



SPAIN

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS

63RD SESSION, 12 – 29 MARCH 2018

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1. INTRODUCTION

Amnesty International submits this briefing to the United Nations Committee ('the Committee') in advance of its examination of Spain's sixth periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Covenant) at its 63th session, between 12 – 19 March 2018.

In this briefing Amnesty International provides information on and raises concerns in relation to Spain's implementation of the Covenant, in particular with regard to the enforceability of economic, social and cultural rights in Spain, the right to adequate housing, the right to the highest attainable standard of physical and mental health and the State obligations in the context of business activities in relation to Articles 2, 11, and 12 of the Covenant.

Amnesty International is concerned that since the Committee's last review of Spain in May 2012 the state party has not adopted the necessary legislative measures to ensure that economic, social and cultural rights enjoy the same level of protection as civil and political rights. Furthermore, at a time of economic crisis, when the protection of human rights of individuals in a vulnerable situation is needed the most, the Spanish authorities have adopted retrogressive and discriminatory measures, undermining the right to health and the right to adequate housing.

2. DOMESTIC APPLICATION OF THE COVENANT AND LACK OF EFFECTIVE REMEDIES FOR VICTIMS OF VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ARTICLE 2)

Amnesty International is concerned that the authorities continue to fail to adequately incorporate the Covenant into national law and to provide effective remedies for violations of economic, social and cultural rights. This is contrary to the Committee's previous recommendation requesting Spain to take appropriate measures to ensure that the provisions of the Covenant are fully

justiciable and applicable by domestic courts¹. Under the Spanish Constitution Spain is a social and democratic state, subject to the rule of law², while article 9.2 requires public authorities to ensure that “*conditions for freedom and equality of individuals and groups to which they belong, are real and effective, removing obstacles that prevent or hinder their full enjoyment*”, emphasising that the full exercise of human rights requires not only their formal recognition but also ensuring that they are realized in practice.

The majority of the rights guaranteed under the Covenant however, with the exception of the rights to education and to join a trade union, are granted the status of “guiding principles” under Chapter III of the Constitution and consequently lack the same level of enforceability enjoyed by rights and freedoms contained in Chapter II of the Constitution.³ This is confirmed by the fact that article 53 of the Constitution establishes a system of guarantees through which the fundamental rights contained in Chapter II can be protected, which includes procedures for access to courts and the possibility of appeal to the Constitutional Court for protection.⁴ By contrast, with regard to the “guiding principles” set out under Chapter III, article 53.3 states that they “shall guide legislation, judicial practice and actions by the public authorities (*but they*) *may only be invoked before the ordinary courts in accordance with the legal provisions implementing them*”. Consequently, the “guiding principles” can only be invoked before the courts by reference to the relevant national laws, which implement these provisions. As a result, economic, social and cultural rights do not enjoy the same level of protection as civil and political rights, contrary to the principles of indivisibility, universality and interdependence of human rights⁵ and to the obligation for states parties to the Covenant to provide effective remedies for victims of violations.

This lack of adequate legal protection for economic, social and cultural rights has become more evident during the economic crisis. Spain has adopted unjustified retrogressive measures inconsistent with its obligation to respect, protect and fulfil the right to health and the right to adequate housing (see below) which have had a huge negative impact particularly on discriminated groups, often unable to invoke the necessary legal safeguards to protect their rights.

Spain affirms in its report to the Committee that “*bearing in mind the concerns of the Committee expressed by letter in 2012, none of the decisions adopted in recent years have been able to violate the obligations contracted by Spain through the Covenant*”. However, it recognizes that certain measures can have negative impacts on certain individuals and groups.⁶ Spain also mentions that “*the ICESCR has been invoked on numerous occasions before the national courts both by the parties and by the judges and courts themselves for the legal basis of the defence and protection of such right*”. The judicial decisions referred to in the state report, however, refer solely to the right to education and labour conditions, the only two rights that are granted a stronger degree of protection in the Spanish Constitution.

¹ Concluding observations of the Committee on Economic, Social and Cultural Rights on Spain. E/C.12/ESP/CO/5 May 2012. The UN Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context further called on the Spanish government to “ensure justiciability of the right to adequate housing contained in the Spanish Constitution and relevant international instruments, through accessible complaint mechanisms available to all”, A/HRC/7/16/Add.2 February 2008.

² Spanish Constitution. Article 1.1

³ Chapter II of the Constitution, devoted to rights and freedoms, includes a range of civil and political rights and education and labour rights. The remainder of the rights guaranteed under the Covenant are contained in Chapter III elaborating the so-called “guiding principles” governing economic and social policy.

⁴ They are fully binding on all public authorities, are to be regulated by law, with their essential content respected, and it is possible to lodge appeals on grounds of unconstitutionality (article 53.1); a preferential and summary procedure (*recurso judicial*) is available before the ordinary courts to protect the rights recognized in article 14 and Division 1 of Chapter II (article 53.2); an appeal for protection (*recurso de amparo*) to the Constitutional Court is possible in respect of the rights recognized in articles 14 and 30, and Division 1 of Chapter II (article 53.2).

⁵ Amnistía Internacional, Greenpeace y Oxfam Intermón. Una reforma constitucional para blindar los derechos humanos. Julio 2015, (in Spanish only).

⁶ Sixth periodic report of Spain. E/c.12/ESP/6 31th October 2017. Para. 2 and 3

The Constitutional Court has rarely invoked or relied on the Covenant in its jurisprudence. For example, the Court has been generally reluctant to apply international human rights law when dealing with cases related to the right to housing. In fact, in 2011 the Court declared inadmissible the request of a ruling on constitutionality submitted by the Lower Court No. 2 of Sabadell, which claimed that the provisions of the 2000 Civil Procedural Code that regulate the foreclosure procedure may breach articles 24 (fair trial) and 47 (right to housing) of the Constitution.⁷ While the Constitutional Court dismissed the case, recognizing that during mortgage judicial procedure, the grounds of opposition are very limited, the Court declared that this does not mean that there is a lack of legal defence. The judge of Commercial Court No. 3 of Barcelona requested a preliminary ruling to the European Court of Justice, which eventually found the mortgage enforcement proceedings to be in breach of the EU 93/13 Directive on consumers' rights, although the ruling does not refer to human rights.⁸

Furthermore, since 2013, the Spanish government has appealed before the Constitutional Court against regional laws adopted by the authorities in Andalusia, Navarre, Canary Islands, the Basque Country, Catalonia and Aragón aimed to temporarily take possession of empty homes for social rental purposes with compensation for their owners, and/or sanctions in case they do not comply.⁹ In so doing, the Spanish government argued that temporary dispossession amounted to a disproportionate measure, and that these laws interfered with the national government's competences and breached the principle of equality of conditions for the exercise of economic activities in Spain.¹⁰

In its first decision on these appeals¹¹, the Constitutional Court found that the Andalusian Decree¹² was unconstitutional because it violated the exclusive competence of the state as to the general planning of economic activity (Article 149.1.13 CE). The Court recalled that the government had already adopted regulations on mortgage evictions determining "*in a homogeneous manner for the entire State the sacrifices that are imposed on mortgage creditors to alleviate the situation of their debtors*". These regulations affected the mortgage market, as part of the financial sector, and thereby affected directly and significantly the general economic activity, which is under the exclusive competence of the state. The Court emphasized that although Spain's Autonomous Communities had competences with respect to the right to adequate housing, given that housing is a "significant subsector of the economy", the state can "indicate, if it deems necessary, certain guidelines for the management of this segment of the economy".

In addition, the Court considered that the Autonomous Communities when exercising their powers, in this case with respect to housing, cannot adopt provisions that, even if they have the purpose of protecting people who have lost their homes, have a significant effect on the mortgage market. In this respect the Court emphasised that Autonomous Communities can exercise their powers through all types of regulations but that they must not affect the mortgage market.

In conclusion, the Court held the Andalusian Decree-Law to be unconstitutional because "*it constitutes an obstacle to the effectiveness of the economic policy measure*" and "*breaks the coherent character of the public action of this matter*".

Amnesty International regrets the consideration by the Constitutional Court of the right to adequate housing as a "segment of the economy" and the lack of reference to the state's

⁷ Constitutional Court, Decision 113/2011, of 19 July 2011.

⁸ ECJ, Case C-415/11, Mohamed Aziz v. Catalunya Caixa, Judgment of 14 March 2013.

⁹ Decree-law 6/2013 and Law 4/2013 of Andalusia, Foral Law 24/2013 of Navarre, Law 2/2014 of Canary Islands, Law 3/2015 of the Basque Country, Law 24/2015 of Catalonia, and Decree-law 3/2015 of Aragón. In this regard, the Government has filed unconstitutionality appeals against the laws of Andalusia, Navarre, the Canary Islands, the Basque Country, Catalonia, Aragón, Murcia, Valencian Community and Extremadura, that imposed, among other measures, mediation in case of over-indebtedness, the temporary expropriation of housing empty for social rental purposes with compensation from the owners, and / or penalties in case of non-compliance.

¹⁰ Ministry of Economy and Treasury, Report on the Basque Law draft bill, 20 September 2013, available on <http://www.parlamento>.

¹¹ Sentence 93/2015, 14th May 2015

¹² Decree-Law 6/2013, 9th April.

obligations with respect to this right, and specifically to the obligation to use the maximum available resources to fulfil the right to housing.¹³

Regarding the right to health, the Constitutional Court has declared constitutional¹⁴ the Royal Decree Law 16/2012, which introduced austerity measures in the public health system, including denying free health care to migrants in an irregular administrative situation¹⁵. In another more recent decision, in November 2017, the Court declared unconstitutional the Basque law¹⁶ which guaranteed universal access to health care for people excluded by Royal Decree Law 16/2012.

The Constitutional Court in its ruling on the Royal Decree Law legitimises cuts to health services under the premise of the existence of a “*situation of urgent and extreme need*” and of “*serious economic difficulty unprecedented since the creation of the National Health System*”. The Court considers it proportionate to limit access to free health care by migrants in an irregular administrative situation with the aim of preserving the public health system as a whole, and affecting a group already in a situation of vulnerability. Consequently, the Court upheld a significant retrogression in the enjoyment of the right to health in Spain without sufficient scrutiny of the justifications put forward by the state.

The Constitutional Court considered that the health reform measures did not constitute a violation of the right to health, on the basis that the latter is a mere “*guiding principle of economic and social policy*”, thereby ignoring that, according to international law standards, any retrogressive austerity measure must be temporary, strictly necessary and proportionate; cannot be discriminatory; must take into account all possible alternatives; and the minimum essential content of the right (in this case health) must be identified and protected.

Amnesty International recommends that Spain:

- Ensure that the Spanish Constitution effectively recognizes and affirms the principle of indivisibility and interdependence of all human rights by giving equal status to all rights and ensuring that all economic, social and cultural rights are guaranteed as fundamental rights in Chapter II of the Constitution.
- Ensure that the judiciary is made aware and receive appropriate training on the content and application of international standards related to the protection of economic, social and cultural rights, including providing effective remedies for victims.

¹³ As noted by the Special Rapporteur on adequate housing, in order to effectively realize the right to adequate housing for everybody, public authorities should fairly balance individual property rights with the social function of property. In particular, they should promote access to secure and well-located housing for the urban poor, inter alia, by conducting audits of vacant housing and building, adopting measures to combat speculation and underutilization of private housing, and regulating the housing finance market and financial institutions. Special Rapporteur on the Right to Housing, Raquel Rolnik (2013): Guiding principles on security of tenure for the urban poor, para. 4. The social function of private property is also enshrined in Article 33 of the Spanish Constitution, and the Constitutional Court has made clear that the social function is an integral part of the right itself, insofar as both individual utility and social function define indivisibly the core content of the right to property (Constitutional Court, Judgment 37/1987, of 26 March 1987, F.J. 2º). Also, The European Parliament has also called on “Member States and their local and regional authorities to implement effective incentive measures, on the basis of forecasts of housing needs, in order to combat the phenomenon of housing remaining unoccupied in the long term, particularly in problem areas, with a view to tackling property speculation and to converting these properties into social housing”. European Parliament, Resolution of 11 June 2013 on social housing in the European Union.

¹⁴ Sentence 139/2016, 21th July.

¹⁵ The expression “migrants in an irregular administrative situation” only refers to “irregular migrants” it does not include people seeking international protection or refugees.

¹⁶ Decree 114/2012, 26th June

3. RIGHT TO ADEQUATE HOUSING (ARTICLE 11)

Since the beginning of the economic crisis in 2008, hundreds of thousands of people have been evicted from their homes after being unable to continue their rental or mortgage payments. Between 2013, when the authorities started to collect statistics, and September 2017, there were 127.302 mortgage evictions and 170.522 rental evictions in Spain.¹⁷ Contrary to the obligation to collect qualitative and quantitative data on the housing needs of the population and the resources available, paying close attention to the impact public policies have on, for example women¹⁸ and those who are most discriminated against¹⁹, statistics on evictions in Spain provide a very limited picture. Publicly available data only shows the territorial distribution of evictions, with no information about the number of people affected by them. Furthermore, the data is not disaggregated by gender, age, nationality or other relevant factors. It is, therefore, impossible to know whether victims of gender-based violence, disabled people, or other groups have been evicted, or whether the number of homeless people has increased as a result. Statistics do not differentiate between homes and other properties, such as parking lots or commercial property. This lack of disaggregated statistical data means that the authorities do not have an accurate assessment of the reality of the impact of mortgage repossessions and rental evictions on the right to adequate housing of different groups. Consequently, they are not in a position to formulate and implement appropriate law and policy responses.

3.1 INSUFFICIENT GUARANTEES TO PROTECT THE RIGHT TO ADEQUATE HOUSING

Rental and mortgage evictions have been carried out without sufficient guarantees being in place for the protection of the rights of people affected, as documented by Amnesty International.²⁰ As noted by the Committee, some evictions may be justified in case of persistent non-payment of rents, but all evictions must comply with international human rights standards.²¹ Furthermore, every interference with the right to private and family life should be reasonable in the particular circumstances.²² The European Court of Human Rights has established that any person at risk of loss of their home should be able to have the proportionality of such a measure assessed by an independent tribunal.²³

Contrary to this requirement Spanish Civil Procedure Law does not require courts to examine the proportionality and reasonableness of the eviction nor to take into consideration the degree of

¹⁷ General Council of the Spanish Judicial Authorities. Statistics available in:

¹⁸ Article 20 of the Law 3/2007, 22th March, on Equality of women and men.

¹⁹ Committee on Economic, Social and Cultural Rights, General Comment N. 16, 2005, para. 39, General Comment No. 20, 2009, para. 41; CEDAW Committee, General Recommendation No. 28, 2010, para. 10 and 28; European Committee of Social Rights, *Feantsa v. France*, Complaint No. 39/2006, 2007, para. 56.

²⁰ Amnesty International “Evicted rights: Right to housing and mortgage evictions in Spain”. June 2015 and “The housing crisis is not over”: Right to housing and impact of rental evictions on women in Spain. May 2017

²¹ CESCR, General Comment No. 7, 1997, para. 11.

²² Human Rights Committee, General Comment No. 16, 1988, para. 4.

²³ ECtHR, *McCann v. UK*, 2008, para. 50; *Paulić v. Croatia*, 2009, para. 43; *Zehentner v. Austria*, 2009, para. 59; *Kay et al v. UK*, 2010, para. 68; *Buckland v. UK*, 2012, para. 65; *Rousk v. Sweden*, 2013, para. 137.

vulnerability of the tenant and the material and procedural inequality between the landlord and the tenant. In particular, the proportionality assessment is necessary to prevent indirect discrimination against women, whose socioeconomic situation is statistically worse than that of men²⁴ and it is also of critical importance when children are involved.²⁵

The lack of justiciability of the right to housing in Spain lies at the root of the ineffective remedies for people experiencing rental evictions. Housing, as explained above, similarly to the majority of other economic, social and cultural rights, is not duly guaranteed in the Constitution and in ordinary legislation.

In the absence of this constitutional protection, procedural law must give courts the means and competence to examine the proportionality of every eviction and to take into consideration the gendered impact of evictions as well as tenants' overall material conditions, and to propose appropriate solutions for those who require protection.

3.2 INEFFECTIVE MEASURES ADOPTED BY THE GOVERNMENT

Amnesty International notes the measures taken by the government in relation to mortgage evictions, such as the suspension of the eviction for especially vulnerable groups, and the promotion of a code of good practices by banks, which includes the possibility of "payment in kind" and restructuring of debt.²⁶ However, these measures taken by the government whilst welcomed, have proved inadequate with respect to their very restrictive scope.

The government has not attempted to introduce similar measures with respect to rental evictions. On the contrary, the government has pursued policy and legal measures to liberalize the housing rental sector and to speed up the judicial eviction procedure, thereby putting tenants' rights at further risk.

Since 2009, Spain has reformed the Urban Rent Law and the Civil Procedure Law five times, resulting in a further weakening of security of tenure.²⁷ These legal changes have substantially weakened the protection of tenants' rights at a time when an increasing number of people became reliant on rental housing. The 2013 reform had the most significant impact on tenants. Previously, the tenant had the right to a lease for up to five years, extendable for three more by mutual agreement. Since 2013, however, the mandatory period has gone down to three years, with an optional extension of only one year.²⁸

Landlords and tenants are free to set the rent and agree on the terms of the annual increase,²⁹ and landlords can break the contract if they need the property for themselves, their parents, children or spouse.³⁰ In case of sale, tenants' rights are now only safeguarded if the lease contract has been recorded in the Land Registry; otherwise, the new landlord is not bound by the old rental contract, and therefore the tenant may be asked to leave.³¹ In case of failure to pay rent, once the landlord goes to court, the tenants will only be able to prevent the eviction by paying their dues if they have not opposed an eviction action successfully once before. The

²⁴ "Good quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women." (CEDAW Committee, General Recommendation No. 33 on women's access to justice, 2015, para. 14.d, UN doc: CEDAW/C/GC/33.

²⁵ Article 3 of the Convention on the Rights of the Child.

²⁶ See Amnistía Internacional, *Derechos desalojados*, 2015, ch. 2. According to the government, more than 70,000 families had benefited from one or more of these measures by September 2016 (Ministerio de Economía y Hacienda, press release of 21 September 2016).

²⁷ Laws 19/2009, 37/2011, 4/2013, 2/2015 and 42/2015.

²⁸ Articles 4, 9 and 10 of the Urban Rent Law.

²⁹ Articles 17 and 18 of the Urban Rent Law.

³⁰ Article 9.3 of the Urban Rent Law.

³¹ Articles 7.2 and 14 of the Urban Rent Law.

landlord only has to give one month's notice before initiating the lawsuit.³² From 2003 and 2009 the notice period was two months, and from 1994-2003, four months.

3.3 INSUFFICIENT SOCIAL HOUSING

Where people affected by an eviction are unable to provide for themselves, the state must take all appropriate measures, to the maximum of available resources, to ensure that adequate alternative housing is made available.³³

After an eviction, many people cannot escape the trap of insecure housing because public authorities do not provide the necessary housing alternatives. Public authorities are not adopting the necessary measures to ensure that evictions do not result in individuals being rendered homeless, and are not allocating the necessary resources to protect and fulfil the right to housing of those people after eviction.

Although the Committee recommended that Spain “*work in coordination with the autonomous communities to invest more resources in increasing the social housing stock in order to meet demand*”³⁴ in 2012, and reiterated this recommendation in 2017³⁵, national authorities have continued to fail to meet this obligation. They have instead adopted a series of unjustified retrogressive measures in the housing sphere contrary to their international obligations under the Covenant. This is despite the unprecedented numbers of evictions taking place.

Between 2009 and 2017, when measures to meet a growing demand for social housing were particularly necessary, the Spanish public budget for access to housing and support for housing renovation was cut by over 70,4 %³⁶. Consequently, this budget proved to be wholly insufficient to respond to the needs of the increasing number of applicants for social housing.

The national government's spending on “housing and community amenities” was 0.50% of GDP in 2014, less than most Organization for Economic Cooperation and Development (OECD) countries, including the USA (0.54%), Portugal (0.60%), Slovakia (0.61%) or France (1.44%).³⁷

This is against a backdrop of already low public investment in housing, with the country, according to the Ombudsman, only having 276.000 social housing units³⁸ - the lowest percentage in the European Union. Social housing stock in Spain comprises only 2% of all dwellings, compared to 32% in the Netherlands, 20% in Austria, 18% in the UK or 17% in France.³⁹ In Spain, during the economic crisis, the social housing budget experienced the most severe cuts of the Spanish public budget.⁴⁰

The government failed to provide evidence that all feasible alternatives were explored, that groups in a vulnerable situation were prioritized and protected and that all available resources were exhausted prior to making such deep and widespread cuts. As the Committee highlighted, in order to be permissible, spending cuts on housing must be temporary, necessary and proportionate, must not be discriminatory, must mitigate inequalities ensuring that the rights of the most marginalised people are not disproportionately affected, and finally must identify the

³² Second paragraph of Article 22.4 of the Civil Procedure Law.

³³ Committee on Economic, Social and Cultural Rights, General Comment N. 7. The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions

³⁴ CESCR (2012): Concluding Observations: Spain, para. 21.

³⁵ CESCR Communication N° 5/2015, E/C.12/61/D/5/2015. June 2017

³⁶ 2017 Spanish public budget on access to housing and support for housing renovation was just over €474,242 million in 2017, for €1,606 billion in 2009.

³⁷ [OECD](#) Spain is the 18th country on this list.

³⁸ Ombudsman (2013): Report on empty social houses (in Spanish only).

³⁹ Housing Europe, State of Housing in the EU, 2015

⁴⁰ Ministerio de Hacienda y Administraciones Públicas, Estadísticas 2007-2016 Presupuestos Generales del Estado Consolidados 2016, 18 de noviembre de 2015, p. 11.

minimum core content of rights or a social protection floor.⁴¹ The Spanish housing measures adopted during the crisis failed on all these grounds.

Despite the shortage of social housing stock, both regional and municipal public authorities in Madrid sold social housing to investment trusts, thereby further reducing the amount of available supply.

This is despite the fact that the Special Rapporteur on adequate housing had recommended to Spain in 2008 *“to increase the availability of rental housing, through building more affordable rental housing, a more intensive use of vacant buildings, but also through consolidation of a publicly managed stock of rental housing targeted at meeting the demands of the low-income population and guaranteeing security of tenure for tenants”*.⁴²

The decision to sell social housing to the private sector had a major detrimental impact on the ability of tenants to access the already limited supply of affordable public housing stock. Three years after the sale of 4.800 social housing units and other properties in Madrid⁴³, tenants' conditions have significantly worsened. Tenants were misinformed on the sell and its conditions and monthly rents went up, resulting in increasing numbers of tenants being evicted, while others vacated their apartments prior to the judicial eviction.

Furthermore, the authorities did not exhaust all alternative available resources and all alternatives to satisfy the right to housing through a human rights compliant regulation of the property and housing market.

According to the latest official Population and Housing census, in 2011 there were 3,44 million empty homes in Spain⁴⁴. The number of empty homes increased by 10.8% between 2001 and 2011.

As mentioned above, the UN Special Rapporteur on adequate housing recommended Spanish authorities to make a more intensive use of vacant buildings⁴⁵, and many Autonomous Communities adopted laws imposing temporary repossession of empty homes for social rental purposes with compensation to their owners, and/or sanctions in case they do not comply with the law⁴⁶. By contrast, the national government has not only not adopted measures aimed at fulfilling this recommendation but has appealed against all these laws agreed by the Autonomous Communities before the Constitutional Court. In order to meet its obligations under the Covenant, Spain should implement similar measures at the national level to fulfil progressively the right to housing.

3.4 AFFORDABILITY OF THE RIGHT TO HOUSING

In order to comply with international human rights obligations, housing must be affordable. The state must not only ensure that the average cost of housing is proportionate to average income⁴⁷, it must also make sure that housing is affordable for all, including the most disadvantaged households in line with their limited resources.

However, Spain is the country with the worst house-to-income ratio of all OECD states⁴⁸. Spain is also the country where personal expenditure on housing has increased the most within the EU, from 17.4% of total household expenditure in 2005 to 23.0% in 2015.⁴⁹

⁴¹ Letter dated 16 May 2012 addressed by the Chairperson of the CESCR to States parties to the International Covenant on Economic, Social and Cultural Rights.

⁴² Special Rapporteur on the Right to Housing, Miloon Kothari (2008): Report after mission to Spain, para. 101.

⁴³ Amnesty International “Evicted rights: Right to housing and mortgage evictions in Spain”. June 2015.

⁴⁴ Available in: http://www.ine.es/censos2011_datos/cen11_datos_inicio.htm

⁴⁵ Special Rapporteur on the Right to Housing, Miloon Kothari (2008): Report after mission to Spain, para. 101 and 91

⁴⁶ Decree-law 6/2013 and Law 4/2013 of Andalusia, Foral Law 24/2013 of Navarre, Law 2/2014 of Canary Islands, Law 3/2015 of the Basque Country, Law 24/2015 of Catalonia, and Decree-law 3/2015 of Aragon.

⁴⁷ ECSR, Feantsa v. Slovenia, Complaint No. 53/2007, para. 76-77.

⁴⁸ Data available in IMF Global Housing Watch: (last updated on 27 October 2016)

It is true that housing property prices decreased by 35% between 2008 and 2014.⁵⁰ Yet, subsequently, housing prices grew back again by 3.6% in 2015, and by 4,7% in 2016.⁵¹ During the economic crisis, average rental housing prices went down by 31.2% between 2007 and 2014, but came back up by 2.8% in the first quarter of 2015⁵² and in the course of 2017, they increased by 8,9% from last 2017, the sharpest increase ever recorded since 2006.⁵³ However, in some regions recent rises in rental prices have been particularly steep. For example, average rental prices rose by 4.3% in Barcelona over a period of four months between October 2016 and January 2017, and by 3.8% in Madrid in the same period.⁵⁴ On the contrary, salaries have lost 9,2% of their purchasing power⁵⁵.

The value of housing and rental costs are going up again. After years of decline, data from the Bank of Spain shows that, as a result of the combination of rental profit margin and price rises, housing is again a profitable financial asset in Spain, with a higher cumulative return than other alternative types of investment, such as state bonds, stock markets, or estate investment in other European countries.⁵⁶

As detailed above, Spain has not adopted adequate measures to protect people, especially the more vulnerable ones, who cannot afford renting in the private market or owning a property. Nor it has invested more resources in significantly and progressively increasing the social housing stock.

Amnesty International recommends that Spain take measures to:

- Modify the Civil Procedure Law to require judges to assess the proportionality and reasonableness of a rental eviction on a case-by-case basis, bearing in mind the individual circumstances of affected tenants and structural inequality between men and women among other factors.
- Adopt a framework protocol in relation to evictions, including measures to improve the coordination between courts and local authorities to provide adequate housing alternatives for people with limited resources. No one should be rendered homeless as a result of an eviction.
- Enhance the application of the right to housing in the regulation of the property and housing market by submitting to the Spanish Parliament a bill on the right to housing based on international human rights standards.
- Work in coordination with autonomous communities to invest more resources in significantly and progressively increasing the social housing stock in line with concrete benchmarks and indicators and to provide adequate housing benefits.
- Request the National Statistics Institute to compile and monitor disaggregated information (by gender, age, nationality, ethnicity and other relevant factors) on housing conditions and mortgage and rental evictions.

⁴⁹ Eurostat, "A quarter of household expenditure allocated to housing", 29 November 2016 (press release):

⁵⁰ Data from National Statistics Institute, Housing Price Index (March 2016):

⁵¹ Summary indicators of the Bank of Spain: (Consulted on 23 March 2017)

⁵² Fotocasa.es, La vivienda en el primer trimestre de 2015, April 2015:

⁵³ Fotocasa.es, <https://www.fotocasa.es/blog/alquiler/precio-del-alquiler-suben-un-89-en-2017>

⁵⁴ Source: Fotocasa.es

⁵⁵ INE

http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736177027&menu=ultiDatos&idp=1254735976596

⁵⁶ Summary indicators of the Bank of Spain (Consulted on 23 March 2017).

4. RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH (ARTICLE 12)

4.1 AUSTERITY MEASURES

The global economic and financial crisis of 2008 had a harsh impact on people's lives in Spain. Unemployment levels more than tripled;⁵⁷ median incomes fell,⁵⁸ risks of poverty and homelessness worsened,⁵⁹ further contributing to increased levels of socio-economic inequalities. In addition, the economic crisis impacted a range of other sectors— such as public health. This was particularly true for people with long-term care needs. This is being exemplified by several studies which have begun to make the links between unemployment and poor health in Spain.⁶⁰ According to a 2016 article in the *Journal of Urban Health*, inadequate housing conditions and the risk of eviction and homelessness have led to stress, anxiety, and other mental health conditions.⁶¹ This risk of poorer health meant that the government should have ensured that the public health system was well supported and resourced in times of economic crisis. However, based on Amnesty International's research, part of the Spanish government's response to the economic crisis was introducing a range of austerity measures in the public health system (Sistema Nacional de Salud, SNS). This included reductions in public spending

⁵⁷ In 2007, 8.2% of the labour force in Spain was unemployed, only slightly higher than the E.U. average of 7.1%. By 2013, this figure had more than tripled, and stood at 26.1%. See OECD stats: <https://data.oecd.org/unemp/unemployment-rate.htm>

⁵⁸ See, for example, Eurostat, Mean and median income by age and sex - EU-SILC survey, available at: http://ec.europa.eu/eurostat/en/web/products-datasets/-/ILC_DI03

⁵⁹ The population at risk of poverty or social exclusion went from 23.8% in 2008 to 29.2% in 2014. See Eurostat, People at risk of poverty or social exclusion by age and sex - <http://ec.europa.eu/eurostat/web/income-and-living-conditions/data/database>

⁶⁰ For example, see - Rosa M. Urbanos-Garrido et al, "The influence of the economic crisis on the association between unemployment and health: an empirical analysis for Spain" *Eur J Health Econ* (2015) 16:175–184; Xavier Bartoll, Laia Palència, Davide Malmusi, Marc Suhrcke, Carme Borrell, "The evolution of mental health in Spain during the economic crisis" *Eur J Public Health* (2014) 24 (3): 415–418; Margalida Gili Miquel Roca Sanjay Basu Martin McKee David Stuckler "The mental health risks of economic crisis in Spain: evidence from primary care centres, 2006 and 2010" *Eur J Public Health* (2013) 23 (1): 103-108; James A. Lopez Bernal, Antonio Gasparrini, Carlos M. Artundo, Martin McKee, "The effect of the late 2000s financial crisis on suicides in Spain: an interrupted time-series analysis" *Eur J Public Health* (2013) 23 (5): 732-736

⁶¹ See for example, Hugo Vásquez-Vera et al, "Foreclosure and Health in Southern Europe: Results from the Platform for People Affected by Mortgages" *Journal of Urban Health* (2016); J Bolívar Muñoz et al, "The health of adults undergoing an eviction process" *Gac Sanit.* 2016 Jan-Feb; 30(1): 4-10.

on health, on the one hand, and structural changes in the public health system and modifications in the working conditions of health workers to reduce costs, on the other hand. These are described in detail below.

Prior to the implementation of austerity measures, public health expenditure in Spain was gradually increasing: in the period between 2002 and 2009, for example, public health expenditure increased by about 83%.⁶² However, starting 2009, this trend began to reverse. The government began to cut public spending, including expenditure on health. Total public health expenditure and per capita health expenditure (health expenditure per person) have drastically fallen since 2009. Public spending on health in 2013 was 12.6% lower than in 2009. While health expenditure started to increase slightly after 2013, it has not yet reached pre-crisis, 2009 levels. According to Spain's 2017 EU Country Health Profile, in 2015, Spain spent €2,374 per capita on health care, which is lower than the EU average of €2,797.⁶³

The government also introduced structural changes in the SNS through the Royal Decree Law (RDL) 16 of 2012. The Royal Decree Law 16/2012 reduced the categories of people who could access public health care, notably limiting the healthcare migrants in an irregular administrative condition could access. It also introduced user charges where they did not previously exist, in two ways. On the one hand, it created new categories of health care services that would require user contributions. On the other hand, it introduced pharmaceutical co-payments in some instances for groups who could previously access healthcare freely. And finally, it reduced the scope of health products available through the SNS, following which over 400 products were removed from SNS funding.

The government also reduced spending on salaries and remuneration for health workers. One of the ways in which this was accomplished was through changing the working conditions of health workers. Working hours were increased from 35 hours to 37.5 hours per week, with no corresponding increase in pay.⁶⁴ Restrictions were introduced on new hiring, and the replacement of staff in case of vacancies and retirements was limited to 10% of the vacancies.⁶⁵ Freezes on salaries and benefits in this period also effectively amounted to a reduction in wages: estimates suggest that these measures have resulted in an effective salary decrease of between 5% to 9% for health workers in this period, and a drop in purchasing power of up to 30% for some.⁶⁶ The period between 2011 and 2014 has seen a reduction in the numbers of health workers being employed by the SNS. According to official data from the Ministry of Treasury (Ministerio de Hacienda y Funcion Publica) the "Instituciones Sanitarias Sistema Nacional de Salud" lost almost 28,500 workers between 2012 and 2014.⁶⁷ Since then, the number increased, but it has not returned to 2012 levels.⁶⁸

⁶² EGSP Table 1.

⁶³ https://ec.europa.eu/health/sites/health/files/state/docs/chp_es_english.pdf

⁶⁴ Article 4, <http://www.wipo.int/edocs/lexdocs/laws/es/es/es176es.pdf>

⁶⁵ Article 3, <http://www.wipo.int/edocs/lexdocs/laws/es/es/es176es.pdf>

⁶⁶ See for example, <http://www.satse.es/comunicacion/sala-de-prensa/notas-de-prensa/satse-el-gobierno-debe-saldar-ya-la-deuda-que-tiene-con-los-profesionales-de-sanidad>

⁶⁷ In 2012 the total number was 505.185. See Ministerio de Hacienda y Administraciones Publicas, "Boletín estadístico del personal al servicio de las Administraciones Públicas. Registro Central de Personal Enero 2012",

http://www.sefp.minhafp.gob.es/dam/es/web/publicaciones/centro_de_publicaciones_de_la_sgt/Periodicas/parrafo/Boletin_Estadis_Personal/Bol_estad_pers-ener12-INTERNET.pdf. In 2014, the number had dropped to 476 689. See Ministerio de Hacienda y Administraciones Publicas, "Boletín estadístico del personal al servicio de las Administraciones Públicas. Registro Central de Personal Enero 2014", http://www.sefp.minhafp.gob.es/dam/es/web/publicaciones/centro_de_publicaciones_de_la_sgt/Periodicas/parrafo/Boletin_Estadis_Personal/BE_ENE-2014-PROTEGIDO.pdf

⁶⁸ In January 2017, the number was 490.509 (2018 data are not available). See Ministerio de Hacienda y Administraciones Publicas, "Boletín estadístico del personal al servicio de las Administraciones Públicas. Registro Central de Personal Enero 2017", http://www.minhafp.gob.es/AreasTematicas/FuncionPublica/boletin_rcp/B_enero_2017_BIS.PDF

4.1.1 IMPACT OF THE AUSTERITY MEASURES ON ACCESSIBILITY, AFFORDABILITY, AND QUALITY OF HEALTH CARE

Ten years after the on-set of the economic crisis, and more than five years after the Royal Decree Law 16/2012 was enacted, people in Spain continue to feel their impact. These austerity measures have had a hard and retrogressive impact on the right to health in Spain. They have made healthcare less accessible, less affordable, and reduced the quality of care provided by the SNS.

For example, the decrease in health workers and resources available to the public health system, on the one hand, and a general increase in demand for health care from the SNS on the other hand, have resulted in longer waiting lists, that are a serious barrier to people's ability to access healthcare at an appropriate time. Waiting times for non-urgent surgical interventions – amongst the most commonly used procedures - had been decreasing prior to the crisis. But between 2010 and 2016, the average waiting time for these procedures has almost doubled.⁶⁹ Equally important is the cumulative impact of these lists on someone trying to access treatment. The problem with the waiting lists manifests itself acutely when people have to wait for successive appointments across a range of services – including diagnostic testing - before they are able to access the comprehensive care they need.

In interviews with Amnesty International, both people who use the SNS and health workers, described the huge change in people's ability to afford health care following the austerity measures. Several health care workers told Amnesty International about how they had seen their patients struggle with the financial burden imposed by the co-payments. In 2015, the direct spending by households on health was 26.3% higher than it was in 2009. Spain's 2017 Country Health Profile stated that 4.4% of the population in Spain reported having stopped taking prescribed medications because these were too expensive.⁷⁰

All health workers Amnesty International interviewed said that despite their best efforts, the changes caused by the austerity measures risked deterioration in the quality of services they were able to provide. In the words of one doctor, "*It is impossible to have unlimited treatments with limited resources. Either we increase our health budget, or we decrease the quality and quantity of treatment we offer*".⁷¹ The increasing demand for health care services combined with the reduction in numbers of health care workers has meant a reduction in the amount of time health workers could spend on each patient.

There is also an urgent need for an impact assessment to understand how the austerity measures have affected particular groups. Amnesty International's research suggests that the austerity measures have affected people who have an increased reliance on the SNS - namely, people with chronic health conditions, older persons, people with disabilities, and people seeking mental health services - in particular ways. For example, as Amnesty International's discussions with patients indicated, many of the over 400 products removed from SNS funding are actually very important to specific groups, including older persons and people with disabilities. "*It is a huge effort to pay for medicines ... I just hope I don't have to take more,*" an older woman told Amnesty International. Older persons are one of the distinct groups affected by the changes in the co-payment structure: pensioners now have to pay based on income status while previously they were completely exempt. Decreased consultation times have a particular impact on the types of care that are potentially resource intensive. Mental health care is one example, where specific changes were noted. As a man receiving mental health care for many years told Amnesty International, "*Earlier I had more time with [my psychologist]. Now it's just 5 minutes. I left the last appointment feeling exactly how I did when I came in*".

Health workers have also been detrimentally impacted by the austerity measures. All health workers interviewed told Amnesty International that their jobs had become harder after the austerity measures were introduced, and that they were seeing more patients and working longer hours than before. In the words of a nurse "*We feel exploited. We are underpaid and we have so*

⁶⁹ In 2010 it was 65 days, and in 2016 it was 115 days. See: <http://inclasns.msssi.es/main.html>

⁷⁰ https://ec.europa.eu/health/sites/health/files/state/docs/chp_es_english.pdf

⁷¹ Amnesty International Interview, Spain, September 2017.

many responsibilities".⁷² One doctor said "*There were days when I had to attend the equivalent of twice the normal, usual patient schedule*". Health workers consistently told Amnesty International that they felt "powerless" and "disillusioned with the system" after the budget cuts and changes to the health system. These feelings health care workers expressed to Amnesty International are consistent with what health care providers have said in other qualitative studies in Valencia,⁷³ and Catalonia.⁷⁴

4.1.2 IMPACT OF THE AUSTERITY MEASURES ON MIGRANTS' RIGHT TO HEALTH

As mentioned earlier, unjustified retrogressive measures have affected the access of migrants who are in irregular administrative situation to many public health services. Royal Decree-Law 16/2012 restricts the right to health of migrants in irregular administrative status, with some exceptions,⁷⁵ by making them pay to receive healthcare, including primary health care. This reform has taken away the healthcare cards from almost seven hundred and fifty thousand persons (748.835 migrants)⁷⁶, removing or seriously limiting their access to the health system and in some situations putting their lives at risk.

The authorities have not conducted or published a human rights impact assessment before adopting the Royal Decree-Law. This is a crucial requirement in order to predict the direct and indirect effects on the right to health, especially on groups in vulnerable situations, and to ensure that the proposed measures did not aggravate the situation further. They have also not facilitated technical studies to assess the fulfilment of their international obligation to make full use of maximum available resources.

Since the entry into force of this reform, Amnesty International has documented cases that reveal the particular impact of this regulation on women, in terms of barriers to information on, and services related to, sexual and reproductive health, the possible failure to identify victims of gender violence and trafficking and a lack of support for victims of sexual violence.⁷⁷

The legal reform has also led to confusion and different procedures and treatment availability in the Autonomous Communities and in hospitals. This is largely due to lack of clarity regarding the applicable rules and protocols, which often vary in medical centres, and to administrative irregularities. These are often based, occasionally, on excuse that, sometimes, have been contrary to the legislation, denying the treatment even to people who had the right to it⁷⁸. This scenario has also resulted in, for example, treatment for pregnant women and emergency services being invoiced⁷⁹. Amnesty International is concerned about a potential deterrent effect these irregularities could have caused in the migrant population – an effect which has not been assessed by the authorities.

The response of the authorities has varied greatly. Most Autonomous Communities have adopted regulations that go beyond the criteria of access to health assistance contained in the Royal

⁷² Amnesty International Interview, Spain, September 2017

⁷³ Francisco Cervero-Liceras et al, "The effects of the financial crisis and austerity measures on the Spanish health care system: A qualitative analysis of health professionals' perceptions in the region of Valencia" Health Policy 119 (2015) 100–10.

⁷⁴ Helena Legido-Quigley et al, "Will austerity cuts dismantle the Spanish healthcare system?" BMJ 2013; p 346.

⁷⁵ The situations in which access to medical care is permitted are as follows: urgent medical care and pregnancy, birth and post-partum. Children will have medical care in all cases, along with people applying for international protection and victims of human trafficking in the period of re-establishment and reflection.

⁷⁶ Government's response to member of the Parliament Jon Inarritu 184/029780. BOCG, Congress of Deputies no. D -387 of 14 January 2014, p.

⁷⁷ Amnesty International (Spanish Section): El laberinto de la exclusión sanitaria. Vulneraciones del derecho a la salud en las Islas Baleares, July 2013 and Sin tarjeta, no hay derecho. Impacto en derechos humanos de la reforma sanitaria en Castilla-La Mancha y en la Comunitat Valenciana, April, 2015. (in Spanish only).

⁷⁸ Ibid.

⁷⁹ Ibid.

Decree-Law; others appealed against the Royal Decree Law before the Constitutional Court; while other still adopted laws enshrining the principle of universality of access to health care.

In contrast, the national government failed to comply with several UN mechanisms recommendations, including from this Committee, which expressed concerns about this legal reform.⁸⁰ The government decided to appeal all these laws before the Constitutional Court.

As mentioned in the first chapter of this report, the Constitutional Court found the Royal Decree Law to be constitutional in 2016⁸¹ while it declared the Basque law⁸² that guaranteed universal access to health care to be unconstitutional, ignoring in both rulings an assessment of compliance with international human rights obligations that apply even in times of economic crisis.

As noted by this Committee, even during periods of austerity the rights of the most at risk of human rights violations, such as undocumented migrants, should be safeguarded and not disproportionately affected.⁸³

Amnesty International recommends that Spain:

- Urgently repeal Article 3, 3 *bis* and 3 *ter* of the Regarding the Royal-Decree Law 16/2012, which limit the categories of people who can access health care under the SNS, and restore access to public healthcare to what it was before Royal-Decree Law 16/2012 came into force; Repeal Article 8, 8 *bis*, 8 *ter*, and 8 *quarter*, and ensure that the Basic common portfolio of healthcare services is what it was before Royal-Decree Law 16/2012 came into force; Repeal Article 85 *ter*, and restore coverage of the 400+ medical products that were removed from the SNS catalogue as a result; and revise the new structure for co-payments introduced by Article 94 *bis*, and to ensure the affordability and the access to health care without discrimination.
- Increase budgetary allocations to the public health sector, with a view to, at a minimum, restoring total public expenditure on health and per capita expenditure on health to what it was before the imposition of austerity measures.
- Conduct a human rights impact assessment to assess how the cuts in public expenditure and implementation of the Royal-Decree Law 16/2012 have impacted the right to health in Spain, and particularly the rights of groups at greater risk, including people with disabilities, people with chronic health conditions, and older persons, and make the results of this assessment public.
- Develop a plan for the long-term monitoring of the population's health, to assess and promptly address any health impacts the economic crisis or austerity measures might have had. Ensure that this monitoring collects disaggregated data and analyses the specific conditions of groups at risk of greater health impact, including people with disabilities, people with chronic health conditions, and older persons.
- Revise the changed working conditions of all health workers, which have impacted the access and quality of health care, to what they were before the austerity measures were imposed.

⁸⁰ Since the adoption of the reform, several United Nations mechanisms have recommended its review due to the impact on the human rights of migrants: ESCR Committee. Concluding observations. Spain, E/C.12/ESP/CO/5, 17 Mayo de 2012; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. Report of the visit to Spain, A/HRC/23/56/Add.2, 6 June 2013; allegation letter sent to Spain by six UN special mechanisms, Special Rapporteur on extreme poverty and human rights, the European Committee on Social Rights of the Council of Europe, Conclusions XX-2 (2013) (Spain), nine country recommendations in the UPR (A/HRC/29/8 April 2015); Working Group on the issue of discrimination against women in law and in practice (A/HRC/29/40/Add.3 June 2015) and the Committee on the Elimination of Discrimination against Women (CEDAW/C/ESP/CO/7-8, July 2015).

⁸¹ Sentence 139/2016, 21th July.

⁸² Decree 114/2012, 26th June.

⁸³ Letter dated 16 May 2012 addressed by the Chairperson of the ESCR Committee to States parties to the Covenant.

5. SPAIN'S OBLIGATIONS IN THE CONTEXT OF BUSINESS ACTIVITIES

This Committee has recently underlined the duty of States to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.⁸⁴

However, there are no regulations in the Spanish legal system to require companies, in a binding manner, to adopt human rights due diligence measures. Nor does it therefore impose any sanctions in the absence thereof. The latest legal reforms fail to address the many obstacles of a legal, judicial and practical nature limiting or hampering access to justice for the victims. Nor does the legal system recognise the liability of parent companies for the actions of their subsidiaries. On the contrary, Spain has decided to adopt an eminently voluntary approach concerning the observance of human rights by the private sector.

5.1 DUE DILIGENCE REGULATION AND TRANSPARENCY

States should adopt measures such as imposing due diligence requirements on companies to prevent abuses of Covenant rights.⁸⁵ Likewise, they should facilitate access to information relevant for an understanding of corporate actual or potential impacts on human rights through mandatory disclosure laws.⁸⁶

Spain has transposed the European Union Directive as regards disclosure of non-financial information⁸⁷ by means of the Royal-Decree Law 18/2017.⁸⁸ This Directive only applies to "public interest entities"⁸⁹ with more than 500 employees. Under this law, companies are required to provide an annual written report on human rights, environmental and social issues that includes a description of the entity's policies in each of the above areas and the results of those policies. It also must include a description of the principal risks of the entity's business in each area and how it manages those risks. The information provided must cover the entity's own operations as well as, where "relevant and proportionate", its supply chains and business relationships.

⁸⁴ Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. E/C.12/GC/24, 2017. para. 16.

⁸⁵ Ibid para. 16.

⁸⁶ Ibid para. 45.

⁸⁷ Available on: <http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A32014L0095>

⁸⁸ Royal Decree-Law 18/2017 modifies the Commercial Code, the consolidated text of the Spanish Companies Law and Law 22/2015, of 20 July of Accounts Auditing, as regards non financial information and diversity.

⁸⁹ "Public interest entities" are listed companies, credit institutions, insurance undertakings and any other entity designated by Spain as a public interest entity.

However, the law also stipulates that if the entity does not have a policy in any of these areas, it must provide a clear and reasoned explanation for not having one in place.

5.2 WEAKNESSES IN THE CORPORATE ACCOUNTABILITY MECHANISMS IN THE LEGAL SYSTEM

States parties must provide appropriate means of redress to aggrieved individuals or groups whose human rights have been abused by corporations and ensure accountability of these corporations.⁹⁰ Likewise, States must take the appropriate measures to ensure that domestic judicial systems are effective when addressing human rights abuses committed by companies, limiting the legal or other obstacles that there may be.⁹¹

This obligation has an extraterritorial dimension. States parties are required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction.⁹² And they are required to ensure access to redress mechanisms to foreign victims of human rights violations in third countries committed by corporations under the State's jurisdiction.

In the framework of national judicial mechanisms of redress, Spain provides for the criminal and civil liability of companies for some human rights violations. However, there are many obstacles of a legal, judicial and practical nature limiting or hampering accountability and effective access to redress in practice.

5.2.1 LOOPHOLES IN THE CRIMINAL JURISDICTION

The criminal liability of legal persons was first introduced in the Criminal Code in 2010, which was last amended in 2015.⁹³ This legal reform was a major step forward as, from then on, a company can be criminally liable for the commission of a certain number of offences⁹⁴ and the victims can claim the liability of legal persons in judicial criminal proceedings.⁹⁵

⁹⁰ Committee General Comment 24, para 39.

⁹¹ Guiding Principles for Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework. Principle 26.

⁹² General Comment 24 para 26, and also General Comment No. 15: The Right to Water (para 31 and 33), General comment N° 18: The right to work (para 52) and General comment 19: The right to social security (para 54).

⁹³ Organic Law 1/2015, which modifies the Organic Law 10/1995, of the Criminal Code.

⁹⁴ Offences that may be committed by legal persons: unlawful obtaining or trafficking in human organs (art. 156 bis Criminal Code-CC-); trafficking in human beings (art. 177 bis CC); prostitution and corruption of minors (arts. 187 to 189 bis CC); discovery and revelation of secrets (art. 197 CC); swindling (arts. 248 to 251 bis CC); punishable insolvency (arts. 257 to 261 bis CC); computer damage (arts. 264 CC); against intellectual and industrial property (arts. 270 to 277 CC); related to the market and consumers (arts. 278 to 286 bis CC); money laundering (arts. 301 and 302 CC); against the Exchequer and Social Security (arts. 305 to 310 bis CC); against the rights of aliens: illegal trafficking or clandestine immigration of persons (art. 318 bis CC); concerning organisation of the territory and town planning (art. 319 CC); against natural resources and the environment (arts. 325 to 328 CC); of catastrophic risk (arts. 343 and 348 CC); against public health (arts. 368 to 369 bis CC); forgery of credit, debit cards or traveller's cheques (art. 399 bis CP); corruption (arts. 419 to 427 CP); influence peddling (arts. 428 to 430 CP); corruption in international commercial transactions (art. 445 CP); related to the exercise of fundamental public rights and liberties (art. 510 CP) funding terrorism (art. 576 bis CP); and smuggling (Basic Law on the Repression of Smuggling).

⁹⁵ This liability is regulated from two approaches: (i) the direct criminal liability of the company for the commission of a criminal offence of those included in the catalogue of criminal offences that may be committed by legal persons (apart from the natural persons who commit the criminal offence); (ii) or through the civil liability *ex delicto* which already existed prior to the 2010 reform.

Despite this huge step forward, there are major loopholes in the Spanish legislation when claiming the criminal liability of companies.

A) LACK OF SPECIFIC SANCTION FOR THE ABSENCE OF CRIME PREVENTION PLANS

The Criminal Code incorporates a defence from criminal charges based on the existence of business models of organization and management, including suitable monitoring and control measures, to prevent crimes of the same nature as the one that is being investigated.⁹⁶ This reference to the monitoring and control measures can be similar to a due diligence process for the prevention of human rights abuses and may encourage companies to develop a culture of prevention or due diligence.

However, the Criminal Code includes the adoption by companies of plans for monitoring, control and prevention of crimes, as an element that might exonerate or mitigate their criminal liability, in the case of criminal proceedings against them, but the adoption of these plans is not legally binding for companies. As a consequence, here is no criminal or administrative sanction for a failure to adopt the plans, which could serve an important preventive function. Although the inclusion of these plans in the Criminal Code represented an important step towards greater corporate accountability, their implementation is ultimately still a voluntary choice of the company.

B) THE LIMITED CATALOGUE OF CRIMES THAT MAY BE COMMITTED BY LEGAL PERSONS

Legal entities can only be criminally liable for certain criminal offences under the Criminal Code⁹⁷ and, therefore, the criminal liability of companies cannot be demanded in each and every one of the crimes under the Criminal Code, many of which constitute in themselves human rights offences or have serious implications for their realization. In short, not all human rights violations that have been developed as crimes in the Criminal Code can be committed by the legal person, leaving aside from the catalogue of crimes those against the rights of workers, crimes leading to injuries, kidnappings and unlawful detentions, threats, coercion, extortion, crimes against liberty and sexual indemnity, against the freedom of conscience, the subtraction of one's own thing to its social or cultural utility or the usurpations and unlawful entry.

C) JURISDICTIONAL LIMITATIONS UNDER CRIMINAL LAW

The extraterritorial obligation to protect requires States parties take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies

⁹⁶ Criminal Code. Article 31 bis 2. "If the offence is committed by the persons indicated in letter a) of the previous section, the legal person will be exempt from liability if the following conditions are met: 1. the administrative body has adopted and executed effectively, before the commission of the crime, models of organization and management including the suitable monitoring and control measures to prevent crimes of the same nature or to significantly reduce the risk of their commission; 2. The supervision of the operation and compliance of the prevention model implemented has been entrusted to a body of the legal person with autonomous powers of initiative and control or that has the legal responsibility to supervise the effectiveness of the internal controls of the legal person; 3. The individual authors have committed the offence by fraudulently evading the organization and prevention models and 4. There has been no omission or insufficient exercise of its duties of supervision, monitoring and control by the body to which the 2nd condition refers. In cases in which the above circumstances can only be subject to partial accreditation, this circumstance will be assessed for the purpose of mitigating the penalty".

⁹⁷ See footnote 12.

available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.⁹⁸

States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain.⁹⁹

The most significant obstacles or limitations of the regulation of criminal liability of the legal person in Spain include the difficulties in determining the liability of the entity that exercises control of the business group, due to the differentiated legal personality of each of the legal entities comprising it when they carry out their activity abroad.

In the Spanish legal system there is the possibility of establishing branches and subsidiaries of the parent company or entity that controls the business group. The key difference between subsidiary and branch is that, in the second case, it is the main company itself that exercises its activity through the branch, not forming a separate entity. The previous difference is important insofar as, while the branch shares the legal personality of the parent company, the subsidiary forms a person independent of the main company.

In 2014, the reform of the Organic Law of the Judiciary (*Ley Orgánica del Poder Judicial, LOPJ*)¹⁰⁰, limited the scope of the jurisdiction of the Spanish criminal bodies to investigate crimes committed outside the national territory. Before the first reform in 2009, this law recognized the principle of absolute universal jurisdiction. However, after this reform and that of 2014, access to the Spanish criminal justice by foreign victims without roots in our country and the possibility of bringing criminal proceedings against foreigners who are not rooted in our country or are not in national territory have been significantly restricted.

Under Article 23 of the Organic Law of the Judiciary (LOPJ), most crimes committed by foreigners or Spaniards can only be prosecuted by Spanish courts if the victim is Spanish or is legally resident in Spain. Regarding legal persons, the law only explicitly provides bringing criminal proceedings against them in crimes against sexual freedom and indemnity committed against under-age victims (although the Criminal Code does not include this offence in the catalogue of crimes that companies may commit), trafficking in human beings, in crimes of corruption between individuals or in international economic transactions and in the crime of terrorism. In all of them, except for corruption, there is a requirement for the victims to be Spanish or reside in Spain and it is expressly established that companies must have their headquarters or registered office in Spain.

This regulation prevents access to the criminal justice system by foreign victims without roots in Spain, for crimes committed by Spanish persons in third countries. In addition, the actions of the subsidiaries of Spanish companies abroad are also exempt from liability, since the registered office would not be in Spain because the company has its own legal personality in the country in which it is established, regardless of the effective control that the parent company has on the subsidiary.

In relation to the above, the State Attorney General's Office, in its Circular 1/2016¹⁰¹ warns that in order to consider that companies commit the typical action, it is not necessary *"to establish a direct link with the company, including self-employed, subcontracted workers and employees of subsidiary companies, provided that they are integrated in the perimeter of their social domain"*. This could provide an avenue for victims to bring legal proceedings against a Spanish company for crimes committed by employees of a subcontracting or subsidiary company abroad. However, the Circulars of the Office of the Prosecutor are not binding and changes in the substantive law would be needed to make the scope of liability as defined by the Circular binding and certain in law. In addition, the potential for liability of Spanish companies should not be

⁹⁸ General comment 24 para. 30.

⁹⁹ General comment 24 para. 16.

¹⁰⁰ Organic Law 6/1985 of the Judiciary. Available on: <https://www.boe.es/buscar/act.php?id=BOE-A-1985-12666>

¹⁰¹ Circular on the criminal liability of legal persons according to the reform of the criminal code carried out by Organic Law 1/2015 (conclusion 8).

limited to crimes committed by employees of subsidiaries, but by the subsidiaries themselves, through the acts or omissions of their directors and legal representatives.

Finally, the LOPJ establishes the requirement of the prior filing of a complaint by the victim or by the Public Prosecutor's Office. This limits actions brought in the name of the people (people's action) by associations that defend the general interests of victims.

Spain should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain. Regarding access to remedy, and to ensure redress to victims and effective accountability, Spain should adopt the relevant legal reforms, including the reform of the LOPJ, to ensure that criminal liability for human rights violations is extended to include the acts and omissions of the entities under the effective control of a Spanish company, even if they do not have their registered office in Spain, and that foreign victims who do not reside in Spain can bring criminal claims in Spain against the Spanish parent or controlling company.

5.2.2 LOOPHOLES IN THE CIVIL JURISDICTION

The standing of the victim and the Law on Criminal Procedure empower the victim of a crime to bring a civil action -derived from the punishable act- in the criminal process or reserve its exercise for the corresponding civil process. However, not every crime generates civil liability nor all unlawful acts are criminal offences.¹⁰²

A) LACK OF HUMAN RIGHTS DUE DILIGENCE REQUIREMENTS IN LAW

The legal system does not include any regulations requiring companies to adopt and conduct human rights due diligence measures in relations to their own activities and its business relationship with another entity, such as the adoption of a human rights policy, in which the company undertakes to respect all human rights, in accordance with international standards; the establishment of a human rights due diligence framework; an impact assessment analysis from a human rights perspective and the adoption of an Action Plan on how the risks identified will be addressed and managed and human rights harm will be prevented.

On the contrary, as highlighted above, it is the companies that voluntarily decide whether or not to introduce human rights risk prevention mechanisms.

B) LACK OF SPECIFIC LIABILITY DUE TO THE ABSENCE OF A DUE DILIGENCE PLAN

Article 1903 of the Civil Code provides for the possibility that companies may be civilly liable for acts or omissions committed by their workers negligently in the performance of their duties. Just like with the Criminal Code, the possibility arises that companies do not assume liability for the acts of their workers if the company has acted with the due diligence of the *pater familias* to prevent the damage.¹⁰³

¹⁰² The Civil Code includes the distinction between a civil wrongful act and a criminal offence (articles 1092 and 1093) establishing that civil obligations arising from offences will be governed by the provisions of the Criminal Code, so that those arising from acts or omissions involving negligence or negligence not punishable by law shall be subject to the provisions of the Civil Code relating to non-contractual civil liability regulated in articles 1902 et seq. In summary, there is no substantial difference between non-contractual civil liability and civil liability for acts constituting a crime.

¹⁰³ Article 1903 establishes that the obligation imposed by the previous article shall apply, not only for its own acts or omissions, but also for those of those people who must be answered for (...) It also applies to owners or directors of an establishment or company with respect to the damages caused by their dependents in the service of the sectors in which they are employed, or in the performance of their duties (...) The liability that

For legal coherence, just like the Criminal Code establishes what requirements a crime prevention plan must fulfil, the concept of due diligence should be developed in the legislation based on the standards set by the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

C) JURISDICTIONAL LIMITATIONS UNDER CIVIL LAW

The problem of extraterritorial jurisdiction also arises under civil law in so far as the LOPJ limits the capacity of victims when the damage occurs outside of Spain.

Specifically, article 22.1 *ter* of the LOPJ (general forum) establishes that the civil courts will be competent when the defendant has his/her domicile in Spain, understanding that a legal person has its domicile in Spain when its registered office, centre of administration or central administration or its main activity centre is located there. For its part, Article 22 *quinquies* of the LOPJ recognizes (specific forum) that if the defendant didn't have a domicile in Spain, Spanish courts will be competent in matters of non-contractual obligations only when the harmful event has occurred in Spanish territory.

Civil actions can therefore be brought against companies domiciled in Spain, even if the harm occurred abroad. However, because of the separate legal personality that exists between Spanish parent companies and their foreign subsidiaries, it is very challenging for victims to make an arguable case against a Spanish parent company for abuses that were directly committed by subsidiaries. Legal reforms are necessary to make clear that Spanish parent companies have a responsibility to ensure that the companies they control both domestically and abroad do not commit human rights abuses. The law should also establish the liability of the corporate group, or its parent company, when harm occurs as a consequence of a lack of adequate due diligence measures of controlling entities.

5.2.3 LOOPHOLES IN THE ADMINISTRATIVE JURISDICTION

States parties should also consider the use of administrative sanctions to discourage conduct by business entities that leads, or may lead, to violations of the rights under the Covenant. For instance, in their public procurement regimes, States could deny the awarding of public contracts to companies that have not provided information on the social or environmental impacts of their activities or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate any negative impacts on the rights under the Covenant.¹⁰⁴

Recently in 2017, Spain adopted the new Public Sector Contracts Law transposing Directive 2014/24 on public procurement and Directive 2014/23 on the award of concession contracts. This regulation prohibits the public administration from contracting with legal entities when they or their administrators or representatives (since not all crimes can be committed by legal persons under the current Criminal Code) have been convicted in an enforceable sentence relative to certain crimes¹⁰⁵.

this article deals with shall cease when the persons mentioned therein prove that they used all the diligence of a good parent to prevent damage. The article that gives rise to the concept of "culpa in vigilando" is important to determine the liability of companies in cases of a human rights violation, as laid down by the Supreme Court when it stated that the breach of the duty of care blameworthy on the part of the employer in the selection of dependents or in the control of the activity developed by them generates their responsibility in the damage that has occurred. See Supreme Court, First Chamber, Civil, Judgment of March 30, 2007, rec. 4169/1999 -EDJ 2007/19748-, See also Supreme Court, First Chamber, Civil, Judgment of March 30, 2007, rec. 4169/1999 -EDJ 2007/19748/.

¹⁰⁴ General comment 24 para. 50

¹⁰⁵ Terrorist offences, constitution or integration of a criminal organization or group, illicit association, illegal funding of political parties, trafficking in human beings, business corruption, influence peddling, bribery, fraud, crimes against the Exchequer and Security Social, crimes against the rights of workers, prevarication, embezzlement, negotiations prohibited to officials, money laundering, crimes related to the planning of the

The new law also provides for the prohibition of contracting companies sanctioned for a number of breaches of a professional, tax or administrative nature such as, for example, a very serious infringement in environmental matters in accordance with the provisions of current legislation, or when the obligation of having an equality plan in accordance with the provisions of article 45 of the Basic Law 3/2007 for the equality of women and men, among others, is not complied with. In some cases, the prohibition does not apply if the company adopts technical, organizational and personnel measures suitable to avoid the commission of administrative infringements of the same nature. This mechanism is not applicable when the unlawfulness of contracting derives from one of the cases provided for by an enforceable judgment under criminal law, which can be very positive for the promotion of the adoption of crime prevention programmes in accordance with the criminal requirements provided for in article 31 *bis* of the Criminal Code, reinforcing its preventive relevance.

Although the progress of the enactment of this regulation is noteworthy, the law does not consider an obstacle to public procurement that a company has failed or is failing to comply with its responsibility to respect human rights. Neither is this made a selection criterion nor a condition for contracting. It is necessary that public administrations contracting with private companies, giving permits or awarding grants or other benefits or special regimes, or assuming public activities or services should be subject to criteria/conditions and terms of performance that ensure respect for human rights.

The case study below gives an example of a recent case in which, in Amnesty International's view, the policies and practices of a Spanish-based corporate group have had very grave repercussions for the human rights of people outside Spain.

FERROVIAL AND ITS TREASURE ISLAND: NAURU

The Government of Australia's offshore refugee processing system on Nauru and Manus Island (Papua New Guinea) has inflicted harm. Amnesty International's research into conditions on Manus Island in 2013 and 2014 found that the combined effect of detention conditions amounted to cruel, inhuman and degrading treatment or punishment, and that some detention conditions violated the international prohibition on torture and other ill-treatment.

Similarly, the organization's research on Nauru in 2016 found that the Government of Australia's treatment of refugees and asylum-seekers on the island is a deliberate and systematic regime of neglect and cruelty, and amounts to torture under international law.

The leading private contractor was Broadspectrum, an Australian-based company which runs the refugee processing centres on Nauru as well as Manus Island under a three-and-a-half year contract valued at AUD\$2.5 billion (US\$1.9 billion). The described system could not function without Broadspectrum's involvement.

Broadspectrum has been a subsidiary of Ferrovial—a Spanish company highly internationalised—since April 2016. Ferrovial acquired Broadspectrum in full knowledge of these human rights abuses and the level of profit that Broadspectrum was making on the back of this immense suffering. The company was well aware of the conditions faced on Nauru by refugees and people seeking asylum and, in some cases, its employees and sub-contractors were directly responsible for neglect and abuse.

Broadspectrum and its parent company Ferrovial have contributed to human rights abuses. The contract came to an end in October 2017 and Ferrovial has not accepted any responsibility for their human rights abuses.

territory and town planning, the protection of historical heritage and the environment, or the penalty of disqualification special for the exercise of profession, trade, industry or commerce.

5.3 THE NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS: A MISSED OPPORTUNITY

In 2017, Spain approved its National Action Plan on Business and Human Rights¹⁰⁶, three years after it started developing it.

On a positive note, the Plan mentions several times the concept of due diligence linking it to the foreseeable adjustment of companies to the United Nations Guiding Principles on Business and Human Rights in Spain and in third countries. According to the Plan, this aspect involves identifying impacts on human rights derived from their activity, preventing them and, in case of causing them, being accountable for and mitigating them. The Plan also provides that the Monitoring Committee will develop and submit to the government the adoption of a system of incentives for companies implementing appropriate human rights policies, aligned with the OECD Guidelines for Multinational Enterprises and certifying their implementation globally.

This is an acknowledgment by the State of the responsibility of Spanish companies to adopt effective measures to prevent human rights abuses both in their domestic activities and abroad. However, the Plan approved fails to meet the minimum requirements to realize prevention of the potential human rights abuses committed by companies both domestically and abroad.

The Plan is a missed opportunity because it fails to address the aforementioned detailed loopholes in the legal system. The Plan fails to impose any changes in the legislation, contemplate any specific policies or steps by the public administration urging companies to adopt due diligence measures or include effective measures to improve victims redress. On the contrary, the Plan addresses corporate due diligence from a voluntary approach, an approach focused on the promotion of self-regulatory codes, incentives and dissemination of information on best practice for companies that voluntarily undergo external evaluation processes that will be of a confidential nature.

The Plan has not included specific commitments making progress in the removal of the obstacles, both in legal terms and in the practice of access to justice for the victims of human rights violations by companies. Although it includes the possibility of considering and making recommendations for the extension of non-judicial mechanisms, it does not include this commitment regarding judicial mechanisms, essential for the effective redress of victims. For the latter, all that is foreseen is a *“report on the legal mechanisms through which the civil liability of companies which by means of their acts caused damage is legally enforceable”* –without providing a mechanism of participation for civil society- and a reference to the recent reform of the criminal liability of legal persons in the Criminal Code. However, there is no specific commitment in the Plan that the government will adopt the relevant reforms, which is something that it contemplates to do in relation to the extrajudicial mechanisms.

Nor is there any mention to one of the key obstacles for access to victims redress, which is the unequal access to information by the victims, essential information to exercise their human rights and the production of the evidence, (information about the damage caused and the extent of said damage) which companies often fail to offer. This is why it is essential that the plan addresses the companies' obligation to disclose key information related to the company's structures and its analysis of impacts and risk mitigation assessments.

In addition, the Plan is a missed opportunity for the State to adopt specific measures to ensure the conditionality of the Government's support to business projects to the strict adherence to human rights by companies, the State's oversight of projects having received public support, the denial of the government's support to economic projects breaching human rights and the demand of respect to those rights through a detailed and public process when the public administrations contract the services of companies.

¹⁰⁶ National Action Plan on Business and Human Rights, approved in July 2017. Available on <http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/DerechosHumanos/Documents/170714%20PAN%20Empresas%20y%20Derechos%20Humanos.pdf>

Regarding extraterritorial obligations, Spain has recognised, in the Plan, the significance of extending corporate responsibility of respect for human rights beyond borders. However, the Plan fails to make any references to the expectation that Spanish companies respect human rights both in their domestic operations and abroad. The Plan also ignores any specific measures intended to ensure that respect.

Amnesty International recommends that the state party:

- Adopt a law requiring business entities over which they exercise control, power or authority to exercise human rights due diligence in order to identify, prevent and mitigate risks to human rights and prevent human rights abuses, as well as to account for how risks and impacts are addressed. The law should clearly articulate that due diligence extend to the activities of subsidiaries, suppliers, subcontractors, franchisees, and other business relations wherever these may be located. The Law on Corporations, approved by the Royal Decree Law 1/2010, and Commercial Code, should be reformed consistently with that new legislation.
- Adopt the necessary legal reforms, mainly the Criminal and Civil Code to place Spanish companies under an express legal duty of care towards individuals and communities whose human rights may be or are affected by the activities of companies they have an ability to control, wherever these may be located.
- Adopt the necessary legal reform of the Royal Decree Law 18/2017 on non-financial information that ensures that companies are required to generate and disclose information that relates to the impact of their global operations on human rights, the environment, public health and other matters of public interest. The law also should require parent or controlling companies to ensure the generation and publication of this information in relation to the activities of their subsidiaries. This is particularly important in the context of multinational corporations.
- Adopt the necessary legal reforms -including in the Criminal Code, Civil Code, and the Organic Law on the Judicial Power- to ensure the right to effective remedy and reparation for victims of corporate abuses of human rights. These reforms should remove substantive, procedural and practical barriers to for foreign victims to bring claims, including by establishing parent company or group liability regimes and facilitating access to relevant information.

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SPAIN

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

63RD SESSION, 12 – 29 MARCH 2018

Amnesty International submits this briefing to the United Nations Committee ('the Committee') in advance of its examination of Spain's sixth periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Covenant) at its 63th session, between 12 – 19 March 2018.

In this briefing Amnesty International provides information on and raises concerns in relation to Spain's implementation of the Covenant, in particular with regard to the enforceability of economic, social and cultural rights in Spain, the right to adequate housing, the right to the highest attainable standard of physical and mental health and the State obligations in the context of business activities in relation to Articles 2, 11, and 12 of the Covenant.

Amnesty International is concerned that since the Committee's last review of Spain in May 2012 the state party has not adopted the necessary legislative measures to ensure that economic, social and cultural rights enjoy the same level of protection as civil and political rights. Furthermore, at a time of economic crisis, when the protection of human rights of individuals in a vulnerable situation is needed the most, the Spanish authorities have adopted retrogressive and discriminatory measures, undermining the right to health and the right to adequate housing.