



# International Convention for the Protection of All Persons from Enforced Disappearance

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## Committee on Enforced Disappearances

### Concluding observations on the additional information submitted by Spain under article 29 (4) of the Convention\*

#### A. Introduction

1. The Committee appreciates the additional information provided by Spain under article 29 (4) of the Convention,<sup>1</sup> as requested by the Committee in its 2013 concluding observations.<sup>2</sup> It is also grateful for the additional information submitted in writing in response to the list of questions communicated to the State party in March 2021, and for the open and constructive dialogue held at the Committee's 370th meeting, on 17 September 2021,<sup>3</sup> regarding the measures taken to fulfil the State party's obligations under the Convention in the following areas: (a) harmonization of domestic law and the Convention; (b) investigation of cases of enforced disappearance, search for disappeared persons and reparation for victims; and (c) prevention of enforced disappearance. The Committee also thanks the State party for the additional information provided in writing after the dialogue.

2. At its 376th meeting, held on 22 September 2021, the Committee adopted the concluding observations that follow.

#### B. Positive aspects

3. The Committee acknowledges the steps taken by the State party following the issuance of its previous concluding observations, including: (a) the adoption of Act No. 4/2015 on the status of victims of crime; and (b) the establishment of the State Secretariat for Democratic Memory within the Office of the First Deputy Prime Minister and Ministry of the Presidency, Relations with the Courts and Democratic Memory, by Royal Decree No. 139/2020.

#### C. Effect given to the Committee's recommendations and new developments in the State party

##### 1. General information

4. The Committee is of the view that, despite the various steps taken by the State party since the issuance of the previous concluding observations, the legislation in force, and its implementation, are still not in conformity with the Convention. The Committee urges the State party to give consideration to its recommendations, which were made in a constructive and cooperative spirit, with a view to strengthening the current legislation and ensuring that it, as well as all acts emanating from the State party's authorities, including those currently

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\* Adopted by the Committee at its twenty-first session (13–24 September 2021).

<sup>1</sup> CED/C/ESP/AI/1.

<sup>2</sup> CED/C/ESP/CO/1, para. 40.

<sup>3</sup> CED/C/SR.370.



under consideration, particularly the bill on democratic memory and the bill on babies stolen in Spain, are in conformity with the rights and obligations referred to in the Convention.

## 2. Harmonization of domestic law and the Convention

### Definition of enforced disappearance as a separate offence

5. The Committee welcomes the fact that article 167 (2) of the Criminal Code includes the elements of enforced disappearance set out in article 2 of the Convention.<sup>4</sup> The Committee notes the statement made during the dialogue that the absence of a specific reference to the term “enforced disappearance” in article 167 (2) of the Criminal Code has no practical significance, and that it is the result of the historical development of enforced disappearance as an aggravated form of other crimes against liberty. However, it finds it regrettable that the conduct described is not expressly classified as enforced disappearance. In addition, the Committee welcomes the State party’s explanations of how the penalty for the offence punishable under article 167 (2) of the Criminal Code is calculated and it takes note of the statement made during the dialogue that the offence is an aggravated form of the basic offence of illegal detention and that the penalty is calculated based on the penalty imposed in cases of illegal detention. Nevertheless, the Committee is of the view that enforced disappearance must be assigned specific penalties, as it is a separate offence (arts. 2, 4 and 7).

**6. The Committee invites the State party to revise article 167 (2) of the Criminal Code in order to (a) incorporate the term “enforced disappearance” in the description of the offence; and (b) establish specific penalties applicable to the offence of enforced disappearance, which must be proportionate to the extreme seriousness of this offence.**

### Military jurisdiction

7. The Committee welcomes the State party’s affirmation, in its replies to the list of questions and during the dialogue, that “the ordinary courts are generally always competent to investigate and try the offence established under article 607 bis” of the Criminal Code (crime against humanity).<sup>5</sup> However, the Committee is concerned that, according to the information provided by the State party, the military courts may have jurisdiction to investigate and adjudicate cases of enforced disappearance committed by military personnel that do not qualify as crimes against humanity when certain exceptional requirements are met. The Committee reasserts its position that, as a matter of principle, cases of enforced disappearance should always remain outside military jurisdiction and should fall within the exclusive competence of the ordinary (not military) criminal courts (art. 11).

**8. Recalling its statement on enforced disappearances and military jurisdiction,<sup>6</sup> the Committee recommends that the State party expressly exclude the investigation and prosecution of cases of enforced disappearance from the competence of the military courts.**

### Definition of victim

9. The Committee welcomes the adoption of the Act on the status of victims of crime<sup>7</sup> and takes note of the State party’s assertion during the dialogue that the definition of the term “direct victim”, as used in article 2 of that Act may be understood as including the definition of “victim” as set out in article 24 (1) of the Convention (art. 24).

**10. The Committee recommends that the State party ensure that the term “victim” as defined in Act No. 4/2015 on the status of victims of crimes is applied, in practice, in line with the definition of the term “victim” in article 24 (1) of the Convention, and that it ensure that any individual who has suffered harm as the direct result of an enforced**

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<sup>4</sup> Organic Act No. 1/2015.

<sup>5</sup> Replies of Spain to the Committee’s list of questions.

<sup>6</sup> A/70/56, annex III.

<sup>7</sup> Act No. 4/2015.

**disappearance, without exception, can effectively enjoy the rights provided for in Act No. 4/2015.**

### **Right to the truth**

11. The Committee highlights the fact that article 5 of Act No. 4/2015 on the status of victims of crimes provides for the right to information and notes that, according to the information provided by the State party, the bill on democratic memory incorporates the right to the truth about the violations that occurred during the Civil War and the Franco dictatorship. However, the Committee notes that the right to the truth is not yet incorporated in domestic law (art. 24).

**12. The Committee again encourages<sup>8</sup> the State party to consider providing, in its legal system, for the right to the truth for all victims of enforced disappearance, in accordance with article 24 (2) of the Convention, irrespective of the date on which the enforced disappearance began.**

### **Bill on democratic memory**

13. The Committee welcomes the approval by the Council of Ministers of the bill on democratic memory, whose adoption will represent a step forward in safeguarding the rights of victims to justice, truth and reparation, including guarantees of non-repetition for enforced disappearances perpetrated in the past. However, it is concerned about reports that certain aspects of the bill, as currently drafted, are not fully compatible with the rights and obligations established under the Convention; for example, compensation is excluded as a form of reparation, and there is no provision for measures to remove legal obstacles to the criminal investigation of enforced disappearances initiated in the past, such as the 1977 Amnesty Act. The Committee takes note of the statement made during the dialogue that the content of the bill will depend on the parliamentary debate and, once adopted, on the regulations governing it and its implementation (arts. 12 and 24).

**14. The Committee recommends that the State party take the steps needed to ensure the prompt adoption of the bill on democratic memory and ensure that its provisions are fully compatible with the rights and obligations established under the Convention. In addition, the Committee, recalling its previous concluding observations,<sup>9</sup> invites the State party to consider setting up a mechanism charged with establishing the truth about past human rights violations.**

### **Crimes relating to the wrongful removal of children**

15. The Committee notes the State party's assertion that the acts described in article 25 (1) of the Convention are punishable under a number of offences set out in the Criminal Code, such as the crimes referred to article 167 (2); false declaration of a birth and the alteration of the paternity, status or condition of a child; child abduction; and the falsification of documents. It also notes the information provided during the dialogue on the Supreme Court's case law in that regard. Nonetheless, the Committee considers that the offences referred to by the State party do not sufficiently cover the acts described in article 25 (1) (a) of the Convention and that they do not provide for penalties that reflect the extreme seriousness of such acts (art. 25).

**16. Recalling its previous concluding observations,<sup>10</sup> the Committee recommends that the State party incorporate as a specific offence in its criminal legislation the acts described in article 25 (1) (a) of the Convention and that it provide for penalties that take into account the extreme seriousness of that offence.**

<sup>8</sup> CED/C/ESP/CO/1, para. 33.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., para. 35.

### 3. Investigation of cases of enforced disappearance, search for disappeared persons and reparation for victims

#### Investigation of enforced disappearance

17. The Committee notes with concern the allegations received regarding the lack of progress in investigating enforced disappearances perpetrated in the past. Specifically, the Committee is concerned that complaints have continued to be dismissed based on the ruling of the Supreme Court in 2012 (Judgment No. 101/2012) on the grounds, inter alia, that the alleged acts were covered by the 1977 Amnesty Act or were time-barred. The Committee welcomes the statement made during the dialogue that, in cases of enforced disappearance where it is not known whether the disappeared person has died, the term of limitation does not have to begin to run until the disappearance has ceased, meaning until the location of the person is known, since enforced disappearance is a continuous crime. However, it is concerned at reports that the judicial authorities have reportedly continued to presume the death of disappeared persons based on the period of time that has elapsed since the enforced disappearance (arts. 8, 12 and 24).

18. **The Committee again urges<sup>11</sup> the State party to ensure that the term of limitation effectively commences at the moment when the enforced disappearance ends, that is, until the person's fate or whereabouts are clarified. It also encourages the State party to establish expressly in its legal system that the term of limitation for criminal proceedings in cases of enforced disappearance must commence from the moment when the offence ceases.**

19. **Recalling its previous recommendations,<sup>12</sup> the Committee also urges the State party to:**

(a) **Ensure that all disappearances that could have begun in the past and have not ceased are investigated thoroughly and impartially, regardless of the time that has elapsed and even if there has been no formal complaint;**

(b) **Take the necessary measures to remove any legal impediments to such investigations in domestic law, including the 1977 Amnesty Act;**

(c) **Ensure that perpetrators are prosecuted and punished in accordance with the seriousness of their acts;**

(d) **Ensure that the institutions involved in the investigation of disappearances have adequate financial and technical resources and qualified staff;**

(e) **Ensure that the authorities in charge of the investigation of disappearances and of the search for disappeared persons coordinate their activities systematically;**

(f) **Ensure that all victims of enforced disappearance can exercise their rights to justice, truth and full reparation.**

#### Access to documentation

20. The Committee takes note of the applicable legislation on the preservation of and access to archives and of the agreement signed by the Ministry of the Presidency, Relations with the Courts and Democratic Memory and the Ministry of Culture and Sport, which will allow for the dissemination of and access to documents generated by the repressive bodies of the Franco regime. However, it is concerned about obstacles which, according to allegations received, limit access to archives and documentation that could be relevant to investigations and to the search for persons who were disappeared in the past. In that connection, the Committee welcomes the statement made during the dialogue that the Ministry of Culture and Sport will be addressing issues related to access to archives and that those same issues are covered in the bill on democratic memory (arts. 12 and 24).

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<sup>11</sup> Ibid., para. 12.

<sup>12</sup> Ibid.

21. **The Committee recommends that the State party redouble its efforts to ensure the proper preservation of and timely and effective access to all public and private documentation that could be relevant to the search for persons who were disappeared in the past and to the investigation of their alleged enforced disappearance.**

#### **International legal assistance**

22. The Committee notes the State party's assertion during the dialogue that international legal cooperation is working normally and that all requests for legal cooperation are answered. It is, however, concerned at reports regarding the courts' alleged lack of full cooperation with the National Criminal and Correctional Court No. 1 of Argentina, also a State party to the Convention, which is investigating, inter alia, cases of enforced disappearance that occurred during the Civil War and the Franco dictatorship (arts. 14–15).

23. **The Committee recommends that the State party take the necessary steps to strengthen and guarantee all possible legal assistance when receiving requests from other States parties under articles 14 and 15 of the Convention.**

#### **Search for disappeared persons**

24. The Committee welcomes the information on the measures taken to search for persons subjected to enforced disappearance in the past, including the implementation of a four-year plan (2020–2024) to search for and identify persons who were disappeared during the Civil War and the subsequent political repression, and the drawing up and regular updating of a map of mass graves. It also welcomes the budget allocated in 2021 for activities related to the search for and exhumation and identification of persons who were disappeared as a result of the Civil War and the Franco dictatorship. The Committee is pleased to note the proposed creation of a national DNA bank for victims of the Civil War and the Franco dictatorship in the bill on democratic memory, as well as the information provided on the steps taken towards its creation. The Committee takes note of the information provided during the dialogue on the number of skeletons and mass graves that have been found thus far. However, it is concerned about the explanation that, given the amount of time that has passed, it has not been possible to obtain DNA samples for some 10 per cent of the remains found, owing to their severe deterioration, and that these are in addition to those cases for which it is not possible to obtain genetic data because there are no relatives whose data can be compared to those of the victims – this is true for victims who did not have children or for those whose closest relatives are great-grandchildren (arts. 12 and 24).

25. **The Committee encourages the State party to refer to the guiding principles for the search for disappeared persons<sup>13</sup> when devising and executing comprehensive search strategies and recommends that the State party redouble its efforts to:**

(a) **Promptly search for, locate and release disappeared persons and, in the event of death, identify and return their remains in dignified conditions and with due regard for their customs;**

(b) **Continue to ensure that the search for disappeared persons and, in the event of death, the identification and restitution of their remains, is carried out at the initiative of the State, with the involvement of any interested relatives of the disappeared;**

(c) **Expedite the creation of a national DNA bank for victims of the Civil War and the Franco dictatorship, while ensuring that its development is coordinated with, and that its content may be compared with that of, other genetic databases, and that, in the future, a single DNA bank may be created, as proposed in the bill on babies stolen in Spain;**

(d) **Ensure that the agencies responsible for searching for disappeared persons and identifying their remains in case of death have the financial and technical resources and qualified staff necessary to fulfil their mandates;**

<sup>13</sup> CED/C/7.

- (e) **Ensure that the search continues until the fate of the disappeared person is established.**

#### **Wrongful removal of children**

26. The Committee welcomes the formal submission in March 2020 of bill No. 122/39 on babies stolen in Spain, for consideration by the legislature. However, it finds it regrettable that, according to the information available, the bill has been with the Congressional Justice Committee since July 2020, and no further progress has been made. The Committee takes note of the establishment of an information service to support persons affected by the possible abduction of newborns and the creation of a bank of genetic profiles at the National Institute of Toxicology and Forensic Sciences. However, it notes that neither of these mechanisms have led to the identification of victims of “newborn theft” and that the number of genetic profiles registered is very low in relation to the number of existing complaints. The Committee welcomes the fact that the aforementioned bill provides for the creation of a single DNA bank. At the same time, it is concerned that, according to the information available, most of the investigations into cases of wrongful removal and/or enforced disappearance of children have been closed, because it has proved impossible to gain access to relevant documentation or because the term of limitation has been declared to have expired before investigative measures have been carried out. The Committee notes that, according to the information provided during the dialogue, the terms of limitation applicable in cases of child abduction may vary depending on whether the abduction is treated as a case of enforced disappearance or as an alteration of paternity. It is concerned that, according to the case law referred to, in neither case does the term of limitation commence from the moment when the child’s identity is restored. It is concerned in particular about the decision handed down by the Provincial Court of Madrid,<sup>14</sup> which was endorsed by the Supreme Court and according to which the term of limitation in cases involving “stolen babies” commences from the moment when “the situation of deprivation of liberty ceases, which the Court understood to be [the day on which the] child reaches the age of majority, in accordance with art[icle] 132 (1) of the Criminal Code<sup>15</sup> (arts. 8, 12 and 25).

27. **The Committee urges the State party to intensify its efforts to: (a) search for and identify children who may have been victims of enforced disappearance and/or wrongful removal; (b) uphold their right to an identity; and (c) investigate the alleged perpetrators. It also recommends that the State party:**

(a) **Promptly adopt bill No. 122/39 on babies stolen in Spain, while ensuring its full compatibility with the Convention;**

(b) **Create without delay a national DNA bank that centralizes all the genetic samples of the victims of the cases that have been reported through administrative and judicial channels, and to which samples may be contributed at no cost, voluntarily and without requiring a court order;**

(c) **Ensure, irrespective of the period of time that has elapsed, that the authorities carry out, on their own initiative and without delay, the exhaustive, independent, impartial and effective search for and investigation of all alleged cases of enforced disappearance and wrongful removal of children, with the active involvement of any interested relatives. In this regard, the Committee draws the State party’s attention to principle 8 of the guiding principles for the search for disappeared persons;**

(d) **Ensure that the term of limitation commences from the time when the identity of the victims is restored; and that perpetrators are brought to justice and punished in accordance with the seriousness of their acts;**

(e) **Ensure that victims receive full reparation;**

(f) **Ensure the proper preservation of, and access to, all public and private archives and other documentation that may be relevant to the investigation of cases involving, and to the search for, children who may have been victims of enforced**

<sup>14</sup> Judgment No. 640/2018.

<sup>15</sup> Replies of Spain to the Committee’s list of questions.

**disappearance and/or wrongful removal under the terms of article 25 (1) (a) of the Convention.**

#### **Right to obtain reparation**

28. The Committee notes the information provided by the State party on the rights enshrined in Act No. 4/2015 on the status of victims of crime, including the right of access to assistance and support services and the establishment of assistance units for victims of crimes. It also notes the reparation measures for the victims of the Civil War and of the Franco dictatorship provided for in the bill on democratic memory, which will be introduced during the parliamentary debate and, following the bill's adoption, will be applied as part of the accompanying regulations and implementation. Nevertheless, the Committee notes that Spanish law does not yet provide for a system of full reparation that includes all the measures set out in article 24 (5) of the Convention and that is applicable to all victims of enforced disappearance, irrespective of the date on which the disappearance began (art. 24).

**29. The Committee recommends that the State party take the steps necessary to ensure that its legal system provides for a system of full reparation that includes all the reparation measures set out in article 24 (5) of the Convention and that is applicable to all victims of enforced disappearance, irrespective of the date on which the disappearance began and even if no criminal proceedings have been instituted.**

#### **4. Prevention of enforced disappearance**

##### **Non-refoulement**

30. The Committee welcomes the information provided by the State party on the safeguards established in the domestic legal system and judicial practice to ensure that the return or surrender of a person requested from a State does not result in any infringement of that person's human rights, including the risk of becoming the victim of an enforced disappearance as a result of the direct or indirect actions of a State.<sup>16</sup> Nevertheless, it notes that the same legislation does not expressly prohibit carrying out an expulsion, return (refoulement), surrender or extradition of a person where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. The Committee also notes with concern reports of summary returns of foreign nationals attempting to cross irregularly the borders of the autonomous cities of Ceuta and Melilla – returns which are authorized under the special regime in force for those autonomous cities. The Committee notes the State party's assertion during the dialogue that the legislation on foreign nationals is in line with international human rights standards, as well as with the decision of the European Court of Human Rights in the case of *N.D. and N.T. v. Spain*.<sup>17</sup> However, the Committee is concerned that this practice of summary returns makes it impossible to identify persons who may be at risk of enforced disappearance, since the authorities do not carry out a thorough examination to assess such potential risks (art. 16).

**31. The Committee again invites<sup>18</sup> the State party to consider explicitly incorporating into its domestic legislation a prohibition on carrying out an expulsion, return (refoulement), surrender or extradition when there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance. The Committee also recommends that the State party guarantee the strict observance, in all circumstances, of the principle of non-refoulement enshrined in article 16 of the Convention by ensuring that, before any expulsion, return (refoulement), surrender or extradition, a thorough individual assessment is carried out with a view to determining whether there are substantial grounds for believing that the persons concerned, including persons who attempt to cross irregularly the borders of the autonomous cities of Ceuta and Melilla, may be at risk of enforced disappearance.**

<sup>16</sup> Replies of Spain to the Committee's list of questions.

<sup>17</sup> European Court of Human Rights, *N.D. and N.T. v. Spain*, judgment of 13 February 2020, applications No. 8675/15 and No. 8697/15.

<sup>18</sup> CED/C/ESP/CO/1, para. 22.

### **Fundamental legal safeguards**

32. The Committee takes note of the reform of the solitary confinement regime that took place in 2015<sup>19</sup> and of the fact that the restriction of rights is optional and subject to court order and strict oversight under the new regime.<sup>20</sup> However, the Committee is concerned that, under this regime, the rights of a person to appoint a lawyer of his or her choice, to meet with a lawyer in private and to communicate with all or some of the persons with whom he or she is entitled to communicate, may be restricted for up to five days, a period which may be extended for a further five days in cases of terrorism and organized crime. In that connection, the Committee notes that, according to the information provided during the dialogue, there are plans to amend the Criminal Procedure Act, so that, *inter alia*, communication with one's court-appointed lawyer will no longer be restricted. It also notes with interest that article 520 (2) (e) of the Criminal Procedure Act states that there may be no restriction on the right of relatives of detained persons to be promptly informed of their deprivation of liberty and their current place of detention.<sup>21</sup> Nevertheless, it regrets the lack of clarity as to how the right of relatives or any other person with a legitimate interest, aside from the representative of the Public Prosecution Service and the detainee's lawyer, to obtain information about the deprivation of liberty and place of detention of persons being held *incommunicado* is guaranteed in practice (arts. 17–18).

33. **The Committee recommends that the State party take the steps necessary to ensure that, from the outset and throughout the period of *incommunicado* detention: (a) persons held *incommunicado* enjoy the safeguards provided for in article 17 (2) (d) of the Convention and other relevant international instruments; and (b) any person with a legitimate interest may exercise, in practice, the right enshrined in article 18 of the Convention. Furthermore, and in line with recommendations made by other human rights mechanisms, the Committee encourages the State to avail itself of the opportunity offered by the draft amendment of the Criminal Procedure Act to abolish the existing solitary confinement regime.**

### **D. Fulfilment of the rights and obligations under the Convention, dissemination and follow-up**

34. The Committee wishes to draw attention to the obligations taken on by States when they ratify the Convention and urges the State party to ensure that all the measures it adopts are in full accordance with the Convention and other relevant international instruments.

35. The Committee also emphasizes the particularly cruel effect of enforced disappearance on women and children. Women victims of enforced disappearance are particularly vulnerable to sexual and other forms of gender-based violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisal as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves are disappeared or because they suffer the consequences of the disappearance of members of their families, are especially vulnerable to violations of their human rights. The Committee therefore places particular emphasis on the need for the State party to systematically adopt a gender perspective and take into account the specific needs of women and children as it acts on the recommendations contained in the present concluding observations and the full range of rights and obligations deriving from the Convention.

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<sup>19</sup> Organic Act No. 13/2015.

<sup>20</sup> Article 527, in conjunction with article 509, of the Criminal Procedure Act.

<sup>21</sup> CED/C/ESP/OAI/1, para. 60.



36. The State party is encouraged to disseminate widely the Convention, the additional information submitted under article 29 (4) of the Convention and the present concluding observations in order to raise awareness among governmental authorities, civil society actors and the public at large. The Committee also encourages the State party to promote the participation of civil society in the actions taken to implement the recommendations contained in the present concluding observations.

37. In accordance with article 29 (4) of the Convention, the Committee requests the State party to submit, by 27 September 2024, specific, up-to-date information on action taken in follow-up to the recommendations made in paragraph 14 (bill on democratic memory), paragraph 27 (a) (wrongful removal of children), paragraph 31 (non-refoulement) and paragraph 33 (fundamental legal safeguards) of the present concluding observations. The Committee encourages the State party to promote and facilitate the participation of civil society, in particular organizations of victims of enforced disappearance, in the preparation of this information. The Committee recalls that, under article 29 (4) of the Convention, it may subsequently request the State party to submit additional information on its application of the Convention, including information on the measures adopted to give effect to all the recommendations contained in the present concluding observations.

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