

Setting an Example? Counter-Terrorism Measures in Spain

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Executive Summary

The March 11, 2004 deadly attack in Madrid focused the world's attention and compassion on Spain. In ten virtually simultaneous explosions on four different commuter trains, 191 people lost their lives and over 1,400 people were injured. While the Popular Party government of José María Aznar initially blamed *Euskadi Ta Askatasuna* (ETA), the police investigation quickly pointed to the involvement of Islamic fundamentalists. In a videotape located two days after the attacks, a purported spokesman for al-Qaeda claimed responsibility. However, the extent of coordination between the militants in Spain who perpetrated the attacks and al-Qaeda remains unclear.

Spanish authorities had long considered Spain a recruitment and logistical operations site for al-Qaeda. Soon after the September 11 attacks on the World Trade Center and the Pentagon in the United States, Spanish authorities launched a multi-phased police operation to dismantle an alleged al-Qaeda cell located in Spain; most of those detained had been under police surveillance for several years. That Spain should become a direct target for al-Qaeda shocked a nation already weary from four decades of internal political violence. Since the 1960s, ETA has waged a violent campaign to establish an independent state in what is now the autonomous Basque region in northern Spain and a part of southwestern France. The March 11 bombings – referred to in Spain as 11-M – added an international dimension to Spain's struggle against terrorism.

Spain's strict antiterrorism measures, shaped by years of grappling with ETA violence, have been applied to all those arrested for alleged links to al-Qaeda as well as for alleged participation in the March 11 bombings. Under these measures, spelled out in Spain's Code of Criminal Procedure, detainees suspected of membership in an armed group may be held in incommunicado detention for up to thirteen days and may be held in pre-trial detention for up to four years.¹ During incommunicado detention, detainees are held in isolation and do not have the right to counsel from the outset of detention or to a lawyer of their own choosing. They are assigned a legal aid attorney, who must be present at all interrogations and statements before a judge, but with whom they may not consult in private, either before or after these events. The legal aid attorney is unable to address the detainee directly, either to ask questions or provide legal advice. Under these restrictions, the role of the defense attorney is reduced to that of a silent witness. The law and

¹ The term "armed group" covers terrorist organizations. A November 2003 reform to the Code of Criminal Procedure (LEC) lengthened the incommunicado detention period to a possible total of 13 days. All suspected al-Qaeda members arrested in Spain were detained while the prior code was in force, allowing only five days incommunicado detention. This is discussed in detail in the pages below.

practice of *incomunicado* detention in Spain renders the right of detainees to file a writ of habeas corpus challenging the lawfulness of their detention virtually meaningless.

Although *incomunicado* detainees are technically under judicial supervision, in practice the competent judge does not see the detainee until he or she has spent three, or even five, days in police custody. Detainees are examined regularly by court-appointed forensic doctors, an important safeguard against torture, but not all reports of ill-treatment are duly investigated. There is no access to an examination by a doctor of the detainee's choice. Finally, the right of non-native Spanish speakers to use an interpreter when making a formal statement to the police is not respected in practice.

The right of terrorist suspects to an effective defense, already undermined by the limitations on access to counsel during the *incomunicado* period, is further impaired by the use of secret legal proceedings. Judges may – and often do – impose secrecy, or *secreto de sumario*, on the investigation and judicial proceedings, either in whole or in part. Under *secreto de sumario*, defense attorneys do not have access to critical information regarding the charges against their clients or the evidence against them, including the full grounds for remand to pre-trial detention. This restricted access may be kept in place until the investigative phase of the legal process is almost concluded.

Some terrorism suspects have been subject to conditions in police custody and pre-trial detention that contravene the obligation to respect the inherent dignity of all persons deprived of their liberty. *Incomunicado* detainees have been held in underground cells with no natural light and kept shoeless even during the arraignment hearing in court. In pre-trial detention, terrorism prisoners are frequently held under a high-security regime that severely limits their time outside the cell and contact with other inmates. Finally, the long-standing policy of dispersing terrorism suspects around the country has a detrimental effect on their right to maintain ties with their families.

Human Rights Watch vigorously condemns all acts of terrorism as gross abuses of human rights. The victims of the horrific March 11 bombings, and all victims of terrorism, have the right to see the perpetrators brought to justice, and states have the responsibility to protect their citizens from such acts. Legitimate and effective action against terrorism must, however, be carried out with due respect to fundamental rights.

Citing its long experience with fighting separatist Basque violence, the Spanish government sees itself as a leader in the effort to combine effective counter-terrorism measures with full respect for internationally recognized human rights. Spain is a party to all relevant major human rights instruments, including the International Covenant on

Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Principles, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

This report examines aspects of Spain's antiterrorism regime that give rise to violations of Spain's obligations under international human rights law. It makes concrete recommendations to the government of Spain on ways to bring its counter-terrorism measures into conformity with international standards. While this report addresses the impact of Spain's antiterrorism legislation on the rights of those accused in connection with international terrorism, all of our conclusions and recommendations are applicable to any person arrested and charged under Spain's antiterrorism provisions. Many of our concerns have been raised in the past by international and national human rights bodies with respect to the treatment of suspected members of ETA. Human Rights Watch believes that for Spain to assume a leadership position in the fight against terrorism without undermining respect for human rights standards, critical changes must be made to both the law and practice of its counter terrorism measures.

Recommendations

Human Rights Watch is deeply concerned that current antiterrorism provisions in Spanish criminal law and code of procedure violate fundamental guarantees under international human rights law, and provide inadequate safeguards against ill-treatment in detention and the violations of the right to a fair trial.

To the Government of Spain:

Significantly reform incommunicado detention

In particular, legal and policy reforms should be enacted to ensure that all suspects in police custody have the right to:

- Access to legal assistance from the outset and throughout the period of detention. All detainees should have the right to see a lawyer from the moment in which they are detained, and not only at the formal declaration;
- Confer privately with their lawyer, especially before any official statements are made;
- Notify a person of their choice about the arrest and place of detention after as short a delay as absolutely necessary. The European Committee for the

Prevention of Torture and Inhuman or Degrading Treatment or Punishment has repeatedly stated that a period of a maximum of forty-eight hours would strike a better balance between the requirements of the investigation and the interests of detained persons.

Improve judicial supervision of detainees in police custody

- All detainees should be brought systematically before a judge. Any judge ordering a restricted regime should see the detainee in person when issuing the order and again before ordering an extension of the period in custody.

Ensure the availability and effectiveness of the right to habeas corpus

- All detainees should be notified immediately, in a language they can understand, of the right to habeas corpus and provided basic information about how to exercise this right.
- Judicial authorities and lawyers must interpret the right to habeas corpus in Spanish law as to include an obligation of the examining magistrate to justify fully not only the procedure but also the substantive grounds of the detention.

Guarantee the right to an effective defense

- All legal aid attorneys on the *Audiencia Nacional* (National High Court) duty roster must be made fully aware of their right and obligation to intervene effectively in all official proceedings involving their clients. In particular, the right and obligation to participate actively in the defense of their clients' rights during the police statement and arraignment hearing before the examining magistrate.
- The degree of permissible contact between attorney and client during the police declaration should be clarified. For example, all legal aid attorneys and police officers should receive clear guidelines explicitly stating that the attorney may speak to the detainee and direct questions to the detainee during the statement proceedings. Police officers should be instructed not to obstruct attorneys from directing questions and giving advice to their clients.
- Non-native Spanish speakers should always be provided an interpreter during the police statement.
- The use of secret legal proceedings (*secreto de sumario*) should only be used in the most exceptional cases, and the examining magistrate should provide reasons in writing for the measure. Its use should be particularly circumscribed in cases

where the suspect is being held in pre-trial detention because of the detrimental impact secrecy has on the application for provisional release.

- The Code of Criminal Procedure should be modified to obligate the examining magistrate, where *secreto de sumario* has been imposed, to include all relevant information, such as evidence obtained and witness statements, in the orders remanding suspects into custody.
- The right to be tried within a reasonable time must never be sacrificed, even in the most complex cases. Extensions of the maximum two-year period in pre-trial detention by another two years should be highly exceptional, and defense appeals against the extension should be reviewed with utmost speed. Authorities must exercise special diligence in cases where the suspect is being held in pre-trial detention in order to prevent the use of anticipatory sentencing and uphold the right to the presumption of innocence.

Ensure adequate safeguards for detainees in police custody

- All reports of ill-treatment during police custody should be fully investigated. Judges must act promptly to ascertain the veracity of all allegations of mistreatment that come to their attention, even when the forensic medical examinations do not reveal any physical abuse.
- The National Police and Civil Guard should ensure that all suspects in custody are treated with dignity. Measures designed to protect the physical integrity of suspects and others in the detention facility should be limited to those strictly necessary. In particular, the practice of holding suspects and presenting them in court without shoes should be abolished.
- Independent observers, including accredited nongovernmental and international organizations, should be allowed access to police stations to verify the material and physical conditions of detainees.

Improve conditions in pre-trial detention

- Clarify in the Penitentiary Regulations how much time incommunicado detainees in pre-trial detention are allowed outside their cell each day, and ensure that this minimum is respected.
- Incommunicado prisoners should be entitled, at a minimum, to the same amount of time outside their cell as regular prisoners in solitary confinement (two hours). Where possible, they should be permitted the same amount of time guaranteed to prisoners in the restrictive closed regime (three or four hours).

- Ensure that all prison facilities comply fully with penitentiary regulations regarding time outside the cell and participation in communal activities for inmates held under the high-security closed regime.
- Consider modifying the penitentiary regulations to increase the minimum amount of time inmates in the closed regime may spend outside their cell on a daily basis, as well as their access to programmed, communal activities.
- Cease the practice of dispersing terrorism suspects. Decisions about the location of terrorism suspects should be made according to same criteria and principles used to determine the location of regular prisoners, that is, they should be detained as close to their usual place of residence and their families as possible.

Ensure that the expulsion of foreign terrorism suspects conforms with Spain's non-refoulement obligations

- Reaffirm the absolute nature of the obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or prohibited ill-treatment, in full conformity with international law.

Exercise leadership within the U.N. Committee on Counter Terrorism

- Spain should include in its next periodic report to the CTC details of its efforts to guarantee respect for human rights in the fight against terrorism.

To the Defensor Del Pueblo (Ombuds) Institution:

- Exercise its mandate to investigate conditions of detention for terrorism suspects. On its own initiative, the Ombuds Institution should conduct unannounced visits to police stations to verify the conditions of incommunicado detainees.

To the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment:

- Conduct an ad hoc visit to Spain specifically to monitor the treatment in detention of international terrorism suspects.

Methodology

The research for this report is based on five visits to Madrid between April and September 2004. Interviews were conducted with nongovernmental organizations, community associations, legal aid attorneys assigned to the defense of 11-M suspects, three 11-M suspects on provisional release, defense attorneys for defendants in the case against an alleged al-Qaeda cell, and government officials. The office of Judge Juan del Olmo, the Audiencia Nacional examining magistrate in charge of the 11-M investigation, denied our request for an interview on the grounds that he never discusses ongoing cases. Human Rights Watch conducted an interview with Judge Baltasar Garzón, the examining magistrate in charge of the investigation into an alleged al-Qaeda cell in Spain, on matters of law. Judge Garzón declined to comment on matters relating to ongoing cases.

All of the persons interviewed by Human Rights Watch in connection with the investigation into the March 11 bombings, including legal aid attorneys, suspects, and others close to the investigation, and some of the defense attorneys for those accused of membership or collaboration with al-Qaeda requested that their names be withheld.

Background

During the morning rush hour on March 11, 2004, ten bombs on four different commuter trains in Madrid exploded almost simultaneously. The explosions killed 191 and injured at least 1,400 people, and left a nation shaking with grief and disbelief. While the conservative Popular Party (PP) government of José María Aznar initially blamed *Euskadi Ta Askatasuna* (ETA), the police investigation quickly pointed to the involvement of Islamic fundamentalists with an alleged connection to al-Qaeda. The first five suspects were arrested on March 13, just two days after the attacks. Since then, Spanish authorities have detained at least forty-eight people. As of the end of 2004, eighteen people were in prison awaiting indictment, while forty-one people had been released without charge after questioning or freed on provisional release pending possible indictment.² Provisional release is applied to persons under investigation where the requirements under Spanish law to justify pre-trial detention do not exist. Over half of those arrested are Moroccan immigrants with residency in Spain.

² For up-to-date information on the 11-M arrests (in Spanish), see [online] <http://www.elmundo.es/documentos/2004/03/espana/atentados11m/detenciones.html> (retrieved November 12, 2004).

Several of those suspected of involvement in 11-M had been the subject of prior police surveillance on suspicion of membership in an al-Qaeda cell in Spain. Spanish authorities had been monitoring a group since 1995. Most were of Middle Eastern origin with Spanish citizenship. Authorities suspected them of involvement in activities in support of al-Qaeda including recruitment and financial operations. Since mid-November 2001, when eleven men were arrested, a total of twenty-four people have been detained and accused of membership or collaboration with al-Qaeda; as of mid-November 2004, at least twenty-three were in pre-trial detention.³ None have yet been brought to trial.

Impact of the 11-M attacks on Spain's Counter-terrorism Strategy

On March 14, three days after the bombings, the Spanish electorate unexpectedly gave the Partido Socialista Obrero Español (PSOE) a majority in parliament. The government of Prime Minister José Luís Rodríguez Zapatero does not envision making any changes to Spain's existing antiterrorism measures, though the administration has announced plans for the creation of a National Antiterrorism Center to coordinate intelligence work between the National Police, the Civil Guard and the existing National Intelligence Center, as well as for increasing the number of agents in both agencies dedicated to intelligence-gathering on international terrorism.⁴

Regulation of mosques

The new government has, however, proposed and pursued new policies to respond to concerns about so-called radical Islamic activities in Spain. In May, newly-appointed Minister of the Interior José Antonio Alonso said he would seek tighter control over Spain's mosques and the content of Islamic religious services. In an interview published in *El País*, Spain's leading daily newspaper, Alonso said, "We really need to improve the laws to control Islamic radicals. We need to get a legal situation in which we can control the Imams in small mosques. That is where Islamic fundamentalism which leads to certain actions is disseminated." While larger mosques have traditionally registered voluntarily with the state, authorities estimate that hundreds, if not thousands, of unregistered small mosques exist throughout the country. Alonso added that while "[w]e cannot name the Imam who is going to preside over a religious service...we can require of the Imam or preacher of any religion that it be known who he is and what he is going

³ One of these, Abdula Khayata Kattan, was arrested in Jordan and extradited to Spain in February 2004.

⁴ Europa Press, "Interior Ministry creates a National Antiterrorism Center that unites National Police, Civil Guard, and CNI" ("Ministerio de Interior crea un Centro Nacional Antiterrorista que reúne Policía Nacional, Guardia Civil y C.N.I."), *El Mundo*, May 20, 2004; J.A. Rodríguez and J.M. Romero, "We need to have a law to control the imams of small mosques" ("Es necesaria una ley para poder controlar a los imames de las pequeñas mezquitas"), *El País*, May 2, 2004.

to say in the Mosque or church...We are talking about a phenomenon that can create a breeding ground for terrorism that kills people.”⁵

Leaders of Spain’s Muslim community expressed concern over the proposed measure. Mansur Escudero, the secretary general of the Islamic Commission of Spain, said, “Terrorism is not born in the mosques, it is born out of hate and resentment,” and called the idea of monitoring Friday sermons “surreal.”⁶ As of writing, no concrete steps had been taken to implement Minister Alonso’s recommendations.

Expulsion of foreign terrorism suspects

The government did move quickly to implement another new policy: the expulsion of foreign nationals suspected of links to international terrorism. On May 30, 2004, the press reported that the Spanish government had used a dormant measure in the Law on Foreigners to expel two individuals suspected of terrorist activities.⁷ Article 54(1), in conjunction with Article 57(1), of the Law on Foreigners allows the state to expel foreign nationals who are considered to have participated in acts against national security or acts that might prejudice Spain’s relations with other countries, as well as those implicated in activities against public order defined as very serious under the Organic Law on Protection of Citizen’s Security (*Ley Orgánica sobre Protección de la Seguridad Ciudadana*).⁸ An expedited procedure set out in Article 63 of the Law gives an individual accused of these infractions forty-eight hours to contest the expulsion order. Those expelled under the power are forbidden from returning to Spain for a period of between three and ten years (Article 58(1)). Those detained prior to their expulsion are entitled to free legal assistance from a legal aid attorney, if necessary, and to an interpreter.

Mohamed Berzizoui, an Algerian with Moroccan citizenship, had legal residency in Spain, while Jousef Mahlili, a Moroccan, had a Spanish residency permit that had expired in March 2004, and had been living in Mourenx, France. France requested Spain’s

⁵ J.A. Rodríguez and J.M. Romero, “We need to have a law to control the imams of small mosques” (“Es necesaria una ley para poder controlar a los imames de las pequeñas mezquitas”), *El País*, May 2, 2004.

⁶ Dale Fuchs, “Spain Weighs Muslim Rights and Concerns About Safety,” *The New York Times*, May 23, 2004.

⁷ Organic Law 4/2000 of January 11 on rights and freedoms of foreigners in Spain and their social integration. This clause, though with a slightly different wording, dates back to the 1985 Law on Foreigners, Organic Law 7/1985 of July 1 on rights and freedoms of foreigners in Spain, Article 26 (c). Organic Law 4/2000 replaced the 1985 law. Subsequent amendments to Organic Law 4/2000, contained in Organic Law 8/2000 of December 22 and Organic Law 14/2003 of November 20, did not affect the clause in question.

⁸ Article 23 of the Law on Protection of Citizen’s Security contains a long list of “serious” infractions that may be considered “very serious,” pursuant Article 24, where the risk produced or damage caused so warrants; where the acts amounted to an attack on public health, affected the functioning of public services, collective transportation or the regularity of provisions; or were committed using violence or collective threats. *Ley Orgánica 1/1992, de 21 de febrero, sobre Protección de la Seguridad Ciudadana*.

cooperation in not renewing the permit, and Mahlili was in fact deported from France on May 6, 2004.⁹ Berzizoui was arrested on April 29, 2004, in connection with Judge Garzón's investigation into the May 16, 2003, Casablanca bombings in which forty-four people died, four of whom were Spanish citizens, and released May 6 without charge.¹⁰ He was subsequently expelled from Spain following the expedited appeals procedure in which he was assisted by a legal aid attorney. Both men were deported to Morocco. Unidentified government sources explained that there was insufficient proof to bring the individuals to trial, but that there was "clear evidence" of their relationship to terrorist activities generally and the 11-M bombings in particular. A high-level police official is quoted as saying "There is a before and an after 11-M. What can we do when there isn't criminal proof to bring a person to trial, but all of the evidence indicates that [he or she] was aware of, fomented or supported terrorist activities?"¹¹ According to the press, the General Commissariat for Information, the National Police department in charge of international terrorism, issued a report recommending immediate expulsion.¹²

Government authorities have stated that expulsions will be used in the future. Interior Minister Alonso stressed to Human Rights Watch that this measure is "legal, legitimate and obligatory; we must have the possibility of expelling [individuals] when this proof [of links to international terrorism] exists."¹³ Alonso and his French counterpart, Dominique de Villepin, announced in July 2004 greater cooperation between the two countries in fighting international terrorism, including the creation of a working group to cooperate on the deportation of suspected members of violent Islamic organizations.¹⁴

Interior Minister Alonso told Human Rights Watch that to his knowledge, the two individuals who were expelled were not wanted by authorities in their countries of origin and were therefore not remanded to custody upon return.¹⁵ When asked whether

⁹ J.A. Rodríguez, "Spain helped France to expel a radical imam by revoking his residency" ("España ayudó a Francia a expulsar a un imán radical al revocarle la residencia"), *El País*, June 1, 2004; Isabel Urrutia, "Secrets of religion" ("Secretos de confesión"), *el correo digital*, May 23, 2004.

¹⁰ "A person is detained in Barcelona for alleged connection to the Casablanca bombings" ("Detenida una persona en Barcelona por su presunta relación con los atentados de Casablanca"), Ministry of the Interior, Office for Information and Social Relations [online], <http://www.mir.es/oris/lucha/2004/p042901.htm> (retrieved October 7, 2004).

¹¹ José María Irujo, "The government expels two Islamists as threats to 'national security'" ("El Gobierno expulsa a dos islamistas por amenaza contra 'la seguridad nacional'"), *El País*, May 30, 2004.

¹² *Ibid.*

¹³ Human Rights Watch interview with José Antonio Alonso, minister of the interior, Madrid, July 13, 2004.

¹⁴ Europa Press. "France and Spain will exchange lists of Islamic terrorists" ("Francia y España intercambiarán sus listas sobre terroristas islámicos"), *El Mundo*, July 12, 2004 [online], <http://www.elmundo.es/elmundo/2004/07/12/espana/1089648286.html> (retrieved August 4, 2004).

¹⁵ Human Rights Watch interview with José Antonio Alonso, Madrid, July 13, 2004.

individuals subjected to this expulsion procedure have the right to appeal on the grounds that they may face torture or ill-treatment upon return, the minister of the interior said that he was not aware of any case where this has occurred. In the event, he added, the appeals proceeding would have to determine whether these allegations had any basis in fact, like an asylum claim.¹⁶

International law prohibits the return, deportation, or extradition of a person when there is a credible risk of torture.¹⁷ Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates:

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he will be in danger of being subjected to torture...For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.¹⁸

Furthermore, the U.N. Human Rights Committee (HRC) has interpreted the prohibition of torture in Article 7 of the International Covenant on Civil and Political Rights (ICCPR) to include obligation not to return a person to a place where he or she would be at risk of torture: “In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”¹⁹

The prohibition against torture and ill-treatment, including the prohibition against returning a person to a country where he or she is at risk of torture or ill-treatment is absolute and permits no exceptions; states may not derogate from this obligation. Indeed, the prohibition has risen to the level of *jus cogens* and is a peremptory norm of international law. U.N. Special Rapporteur on Torture Theo van Boven has said that the “expulsion of those suspected of terrorism to other countries must be accompanied by

¹⁶ Ibid.

¹⁷ For an in-depth discussion of the principle of non-refoulement in international law, see Human Rights Watch report “Empty Promises: Diplomatic Assurances No Safeguard Against Torture,” April 2004, Vol. 16 No. 4 (D).

¹⁸ Spain ratified the Convention Against Torture on October 21, 1987.

¹⁹ Human Rights Committee, General Comment No. 20 (1992), U.N. Document HRI/GEN/1/Rev.1 at 30, para. 9. Spain ratified the ICCPR on April 27, 1977.

an effective system to closely monitor their fate upon return, with a view to ensuring that they will be treated with respect for their human dignity.”²⁰

It is Human Rights Watch’s understanding that the Law on Foreigners does not set out specific guarantees for persons subject to expulsion, such as an automatic review of their risk of torture in their country of origin. In view of government statements to the effect that this administrative tool will be used in the future, Human Rights Watch urges Spain to take due precautions to ensure that it does not expose individuals to torture or cruel, inhuman or degrading treatment upon their expulsion to another country .

Impact of 11-M attacks on Moroccans and other Muslims in Spain

Many Spaniards feared a racist backlash against Moroccans as dozens of immigrants from that country have been arrested in connection with the 11-M bombings. Moroccans form the second-largest immigrant group in Spain; nearly 376,000 Moroccans have legal permits to live and work in Spain, and an estimated 200,000 more are undocumented.²¹ The relationship between the immigrant Moroccan community and the Spanish population has been marked by tension, mutual distrust, and occasional violence. On March 16, SOS Racismo, a nongovernmental organization dedicated to fighting all forms of racism, warned of the potential for “an increase in Islamophobia” and issued an appeal to the society as a whole, and public officials and the media in particular, to “actively prevent possible racist reactions and report them should they occur.”²² Local and national government officials called for tolerance, while Prime Minister Zapatero committed himself in his inauguration speech to fighting all forms of xenophobia, recalling that dozens of people from other nations died alongside Spaniards on March 11th.²³ Forty-seven of the 190 people killed in the attacks were foreigners.

In the months following the attacks, an elevated sense of fear led many in the Moroccan community to alter their daily routines and keep as low a profile as possible. Human Rights Watch learned from members of the Moroccan community that women wearing the veil or head scarf and young men, especially those carrying backpacks, reported an

²⁰ Report of the Special Rapporteur on Torture, Theo van Boven, to the United Nations General Assembly, A/58/120, July 3, 2003, para. 15.

²¹ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor. 2004 International Religious Freedom Report: Spain, September 15, 2004 [online], www.state.gov/g/drl/rls/irf/2004/35485.htm (retrieved October 28, 2004).

²² SOS Racismo press release, “For an active struggle against racism and xenophobia (“Por una lucha activa contra el racismo y la xenofobia”), March 16, 2004. On file at Human Rights Watch.

²³ Zapatero inauguration speech, April 15, 2004 [online], <http://www.la-moncloa.es/web/pg04a.htm> (retrieved July 20, 2004).

increase in hostile looks and verbal insults on the street. The Association of Moroccan Workers and Immigrants in Spain (*Asociación de Trabajadores e Inmigrantes Marroquíes en España* – ATIME), a nongovernmental membership organization, urged Moroccans to make certain changes in their daily lives (for example, to avoid speaking Arabic loudly in public and meeting in large groups), to not respond to provocations, and to cooperate with the police. Mustapha El M'Rabet, the president of ATIME, explained:

People don't go out like they did before; they don't meet in large groups. Everyone is conscious of what happened. It is an intelligent way to help to lower the tension...It's difficult to say how long this will last, there's always the fear of the spark that could start a fire...We don't want to play the victim too much...to denounce a situation can create another problem. Maybe further along people will begin to talk.²⁴

Beyond these anecdotal reports of “street hostility,” the much-feared increase in hate crimes against Moroccans or Muslims of any nationality has not materialized. To our knowledge, there have not been any clearly documented cases of racist violence that can be attributed directly to the March 11 bombings.²⁵ According to El M'Rabet, “the reaction has overall been exemplary, that of a society that knows how to distinguish between a few terrorists and a community.”²⁶

Similarly, law enforcement agencies do not appear to have engaged in widespread, indiscriminate police actions in the Moroccan community. In the period immediately following the attacks, there was an increased police presence on the streets in Madrid; El M'Rabet said that ATIME had received a few reports of what he called “excessive professional zeal” on the part of police officers in conducting identity checks of Moroccan men, including one man who said he had been stopped by the police ten times in one day.²⁷ As far as Human Rights Watch is aware, no organization has collected official complaints about this kind of police abuses in the wake of the bombings.

²⁴ Human Rights Watch interview with Mustapha El M'Rabet, president, ATIME, Madrid, June 1, 2004.

²⁵ The press did report a case of vandalism in Balsapintada, a small town in Murcia, on March 18-19, 2004: a group of young men spray-painted the home of a Moroccan family with 11-M in red letters and broke the windows of four cars owned by Moroccan immigrants. Three minors were arrested and confessed. M.M., “Pre-dawn attack on the home of a Magrebí family in Balsapintada” (“Atacan de madrugada la casa de una familia magrebí en Balsapintada”), *La Verdad*, March 20, 2004.

²⁶ Human Rights Watch interview with Mustapha El M'Rabet, Madrid, April 20, 2004.

²⁷ *Ibid.* All Spaniards and legal residents in Spain are required to carry identification, and the National Police are empowered to stop anyone and request these identity papers.

Counter-terrorism Measures in Spain

Spain has a long and painful history of internal political violence. The *Euskadi Ta Askatasuna* (Basque Fatherland and Liberty – ETA) has been waging a violent campaign to establish a separate Basque state since the 1960s. In the last four decades, according to official statistics, ETA has killed 831 people, kidnapped seventy-seven, and injured 2,392.²⁸ In addition, thousands of people, from police officers to politicians to journalists and intellectuals, have lived under the threat of violence by ETA. The separatist group has employed targeted assassinations as well as indiscriminate attacks to further its political goals. The violence has diminished over the last few years. While ETA claimed responsibility for the assassination of twenty-three people in 2000,²⁹ the group killed three people in 2003.³⁰

Basque separatist violence has accompanied Spain's transition to democracy since 1975 after thirty-nine years of dictatorship under General Francisco Franco. Since that time, the Spanish state has adopted a variety of strategies to fight ETA. The criminal justice system has long formed an important part of Spain's approach. Over five hundred people are in prisons around the country for membership or collaboration with ETA. Although Spain has adopted (and later abrogated) specific antiterrorism legislation in the past, terrorist crimes are now included in the regular Criminal Code and special law enforcement and judicial powers to combat terrorism are incorporated into the Criminal Code of Procedure. During one of the worst periods of the conflict, between 1983 and 1987, the Antiterrorist Liberation Groups (GAL) which were death squads financed by secret funds of the Interior Ministry, killed twenty-eight people, a number of whom later turned out to be unconnected to ETA.

In February 2003, a Spanish judge ordered the closing of *Euskaldunon Egunkaria*, a Basque-language daily, and arrested ten employees on charges of affiliation with ETA, while the Spanish Supreme Court permanently banned the Basque political party *Batasuna* in March 2003. Spain's two major political parties, the PSOE and the PP,

²⁸ Commission on Human Rights, "Civil and political rights, including the questions of torture and detention," Notes verbales dated January 20 and 2 and 11 February 2004 from the Permanent Mission of Spain to the United Nations Office at Geneva addressed to the Office of the United Nations High Commissioner for Human Rights," U.N. Doc. E/CN.4/2004/G/19, p. 18.

²⁹ Deutsche Welle, "ETA: A History of Terror," March 12, 2004 [online], www.dw-world.de/english/0,3367,1433_A_1139213,00.html (retrieved August 22, 2004).

³⁰ U.S. Department of State, Bureau of Democracy, Human Rights, and Labor. 2004 Country Human Rights Reports: Spain, February 25, 2004 [online], <http://www.state.gov/g/drl/rls/hrrpt/2003/27865.htm> (retrieved July 20, 2004).

adopted an Antiterrorism Pact in December 2000, a kind of gentleman's agreement to cooperate and coordinate state response to ETA.

Spain's extensive antiterrorism provisions, though developed in response to internal violence, placed that country at the forefront of international antiterrorism efforts in the wake of the September 11 attacks. In response to those attacks, the U.N. Security Council adopted Resolution 1373 on September 28, 2001, mandating all U.N. member states to adopt specific measures to combat terrorism and creating the Counter Terrorism Committee (CTC) to monitor states' compliance. Spain has been an active participant in the work of the CTC. In May 2004, Javier Rupérez, former Spanish ambassador to the United States (2000-2004), was appointed executive director of the Committee. Another Spaniard, Inocencia Arias, was chairperson of the Committee from April 2003 to May 2004.

The new Zapatero government sees itself as a leader in the effort to combine effective antiterrorism efforts with respect for human rights. The director of the Unit for the Coordination of Spain's Participation in the United Nations Security Council of the Ministry of Foreign Affairs, Angel Lossada, emphasized that "Counter terrorism has to be framed in the context of respect for human rights...Spain actively supported the Security Council resolution on human rights and counter terrorism – a step forward in this protection."³¹ Security Council Resolution 1456, adopted in January 2003, requires that "States must ensure that any measure taken to combat terrorism complies with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law."³² In June 2003, Nigel Rodley, a member of the U.N. Human Rights Committee, appeared before the CTC to remind the committee that Resolutions 1373 and 1456 must be taken together to ensure that Resolution 1373 did not become "an instrument for circumventing states' human rights obligations."³³ Lossada also said Spain, as part of its efforts in the international arena, was working for the reform of the CTC "to introduce elements for the protection of human rights."³⁴

³¹ Human Rights Watch interview with Angel Lossada, director, Unit for the Coordination of Spain's Participation in the United Nations Security Council, Ministry of Foreign Affairs, Madrid, July 14, 2004.

³² Security Council Resolution 1456 (2003), January 20, 2003 [online], <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElement> (retrieved March 31, 2004), para. 6.

³³ Security Council Counter Terrorism Committee, Briefing by Sir Nigel Rodley, Vice Chairperson, U.N. Human Rights Committee, "Human Rights and Counter-Terrorism Measures," June 19, 2003 [online], <http://www.unhcr.ch/hurricane/hurricane.nsf/0/EE1AC683F3B6385EC1256E4C00313DF5?opendocument> (retrieved March 25, 2004), para. 3.

³⁴ Human Rights Watch interview with Angel Lossada, Madrid, July 14, 2004.

Attorney General Cándido Conde-Pumpido explained to Human Rights Watch that Spain's "history of twenty-five years of internal terrorism coinciding with democratic development" has resulted in a mature and effective approach to terrorism. He argued that "the counter terrorism fight at the international level is at the same stage as the fight against ETA twenty years ago: illegal detentions [and] torture," problems which no longer exist in Spain due to an antiterrorism approach "based on respect for the rule of law."³⁵

Spanish Legal System

Like most countries in Europe, Spain has a civil law system. In this system, an examining magistrate (*juez instructor*) is in charge of overseeing the investigation of a criminal offense with the help of police officers assigned to him or her for this purpose, while the state prosecutor has the dual role of ensuring that the rights of both defendants and victims are respected. Private prosecuting counsel can be appointed by the victim or victim's family as well. In ordinary criminal cases, police may arrest and hold suspects for a maximum of seventy-two hours before either releasing them on their own authority or under orders from a judge, or bringing them before the examining magistrate.

When a defendant is brought before an examining magistrate, the magistrate can either release the detainee without charge, remand him or her to pre-trial detention (*prisión provisional*) or release him or her on bail subject to a security lodged with the court or other conditions designed to ensure the accused will not abscond (*libertad provisional*). It is the examining magistrate who prepares the committal proceedings (*sumario*), containing the state's case against the accused, and transfers it to the appropriate trial chamber. Offenses punishable by less than six years imprisonment are tried in local criminal court in proceedings presided over by a single professional judge, while those punishable by over six years imprisonment are tried before a panel of three professional judges in higher criminal court. Since 1995, certain crimes—including crimes committed against individuals (e.g. murder), offenses committed by civil servants, embezzlement of funds, and crimes against the environment—have been tried by a jury composed of nine members and one presiding judge.

All terrorism cases are investigated and tried at the *Audiencia Nacional* (National High Court). Created in 1977, the Audiencia Nacional has jurisdiction over "crimes committed by persons belonging to armed groups or related to terrorist or rebel elements when the commission of the crime contributes to its activity, and by those who

³⁵ Human Rights Watch interview with Cándido Conde-Pumpido, attorney general, Madrid, July 12, 2004.

in some way cooperate or collaborate in the acts of these groups or individuals.”³⁶ The Audiencia Nacional has six examining magistrates and an equal number of criminal trial chambers, each presided over by a panel of three professional judges. Crimes under the jurisdiction of the Audiencia Nacional are not subject to trial by jury. Until recently, only two prosecutors assigned to the Court specialized in international terrorism; Attorney General Conde-Pumpido announced in May 2004 his intention to raise this number to six.³⁷ Pursuant a 2003 law, criminal cases decided by the Audiencia Nacional may be appealed to the criminal appeals chamber of the same court. As of December 2004, however, the chamber was not operational.³⁸

Spanish law guarantees the right to legal assistance to all persons accused of crimes. Those who are financially unable to designate private counsel are guaranteed the free assistance of a legal aid attorney. As will be discussed in detail below, virtually all terrorism suspects are held in *incommunicado* detention upon arrest. During this period, they do not have the right to hire a lawyer of their own choosing. Instead, the Legal Aid Department of the local Bar Association assigns a lawyer upon request from the arresting authority. The Legal Aid Department of the Madrid Bar Association maintains duty rosters for different categories of criminal offenses; there is a specialized list for cases under the jurisdiction of the Audiencia Nacional. Every twenty-four hours, two lawyers are on call to respond to requests for legal aid attorneys; if there are more than two arrests in connection with crimes under the Audiencia Nacional’s jurisdiction, the Bar Association proceeds down the duty roster in alphabetical order to designate lawyers. Legal aid service is obligatory for all practicing attorneys, but the lawyers themselves choose which list they wish to serve on. Those wishing to be placed on the

³⁶ Organic Law 4/1988 of 25 May 1988, reforming the Code of Criminal Procedure. The Audiencia Nacional also has jurisdiction over drug trafficking, human trafficking, money counterfeiting, and universal jurisdiction crimes.

³⁷ Julio M. Lázaro, “The National High Court triples the prosecutors dedicated to Islamic terrorism” (“La Audiencia Nacional triplica los fiscales dedicados al terrorismo islamista”), *El País*, May 5, 2004.

³⁸ Organic Law 19/2003 of 23 December modifying Organic Law 6/1985 of 1 July of the Judicial Branch formally created an appeals chamber in response to findings by the U.N. Human Rights Committee that the previous right to appeal, involving limited review by the Supreme Court, was not in keeping with Spain’s obligations under the ICCPR.. In two separate individual complaints lodged against Spain, the Human Rights Committee had ruled that “the inability of the Supreme Court, as the sole body of appeal, to review evidence submitted at first instance was tantamount...to a violation of Article 14, paragraph 5.” *Manuel Sineiro Fernández v. Spain*, Communication No. 1007/2001, U.N. Doc. CCPR/C/78/D/1007/2001 (19 September 2001), para. 7. See also *Cesario Gómez Vásquez v. Spain*, Communication No. 701/1996, U.N. Doc CCPR/C/69/D/701/1996 (11 August 2000). In response to Spain’s fourth periodic report on implementation of the ICCPR, the HRC urged the Spanish government to institute a right of appeal against decisions by the Audiencia Nacional in keeping with the requirements of Article 14, para. 5, of the ICCPR. Concluding observations of the Human Rights Committee: Spain. U.N. Doc CCPR/C/79/Add.61 (3 April 1996), para. 19.

list for Audiencia Nacional cases must have five years experience and have completed specialized courses.³⁹

Counter-terrorism Powers Under Spanish Law

Spain does not have a special antiterrorism law. The Criminal Code (*Código Penal*, CP) defines terrorism offenses. The Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*, LEC) establishes the powers of law enforcement agencies and judicial authorities in investigating crimes of terrorism, while at the same time proscribing the rights of terrorist suspects. These special measures derive from Article 55(2) of the Constitution that allows for the suspension of the rights with respect to length of detention, privacy of the home, and secrecy of communications “as regards specific persons in connection with investigations of the activities of armed bands or terrorist groups.”

Article 571 of the Criminal Code defines terrorists as “those who belonging, acting in the service of or collaborating with armed groups, organizations or groups whose objective is to subvert the constitutional order or seriously alter public peace” commit the attacks described in Article 346 (attacks on buildings or transportation or communications infrastructure with the use of explosive devices) and Article 351 (arson causing risk of injury or death). The article does not criminalize the mere act of belonging to such a group, but rather the commission of criminal acts by members of these groups with the above-mentioned goals.⁴⁰ Articles 572-579 establish the minimum and maximum prison sentences for different crimes when committed by members of the above-defined armed groups or those acting on their behalf. Article 580 allows Spanish courts to consider foreign convictions for activities related to armed groups as equivalent to convictions under Spanish law to enable citing recidivism as an aggravating factor.

The principle features of Spain’s counter-terrorism provisions are the extended period of detention in police custody allowed before the prisoner must be brought before a judge, and the use of incommunicado detention. Whereas the Code of Criminal Procedure (LEC) establishes that all persons arrested must be brought before a competent judge within seventy-two hours of the arrest, those detained on suspicion of membership or collaboration with an armed group (including terrorist organizations) may be held for an

³⁹ Human Rights Watch interview with Marisol Cuevas, head of the Legal Aid Department, Madrid Bar Association, Madrid, July 13, 2004.

⁴⁰ Cándido Conde-Pumpido, attorney general, “The Spanish Counter Terrorism Model” (“Modelo español de la lucha antiterrorista”), Speech given at the Universidad Complutense de Madrid, July 13, 2004. On file with Human Rights Watch.

additional forty-eight hours. This means that terrorism suspects may be under police custody for five days before being seen by a judge.

The LEC also stipulates that the competent judge may order that any detainee be held incommunicado while in police custody (either three or five days), while those accused of membership or collaboration with an armed group (including terrorist organizations) or of having committed a crime in concert with two or more other individuals may also be held incommunicado for an additional five days if remanded into pre-trial detention. Furthermore, incommunicado status may be re-imposed, even after the maximum ten days have expired, for an additional three days. Incommunicado detainees are guaranteed many of the rights accorded all other detainees, with several important limitations.

Persons in incommunicado detention have the right to:

- Be informed immediately in a manner they can understand of the grounds for the arrest and their rights;
- Remain silent until brought before a judge;
- Not incriminate themselves or confess guilt;
- The use, free of charge, of an interpreter, if necessary;
- Have their consulate notified in the case of foreign nationals;
- A medical examination by a state forensic medical officer, and to request a second examination by a different state forensic medical officer.

Unlike all other detained persons, those in incommunicado detention do *not* have the right to:

- Notify relatives or a third person of their choice about the arrest and place of detention;
- Receive and send correspondence or other communications;
- Receive visits from religious ministers, private doctor, relatives, friends or any other person;
- Designate their own lawyer – they must be assisted by a legal aid attorney;
- Consult with their legal aid attorney in private at any time.

The incommunicado regime and its use in antiterrorism cases are discussed in detail in the section entitled The Use of Incommunicado Detention.

Judicial Investigations into International Terrorism

Investigations into the 11-M attacks

The law enforcement response to the March 11 massacre was swift. Audiencia Nacional examining magistrate Juan del Olmo was quickly placed in charge of the investigation into 11-M. Pursuing available clues – in particular an unexploded bomb found in a backpack on one of the trains; an abandoned van containing, among other things, seven detonators; the chips of the cell phones used as detonators; and the testimony of witness – the National Police arrested five suspects on March 13th. By the end of the month, the police had arrested nineteen more. On April 3, 2004, police officers in the special GEO (*Grupo Especial Operaciones*, Special Operations Group) brigade surrounded an apartment in Leganés, a neighborhood of Madrid. After a standoff that lasted several hours, during which shots were fired from inside the apartment, the seven men inside committed suicide by detonating explosives strapped to their bodies. The explosion also killed special operations agent Javier Torrontera and wounded fifteen other agents.

At least seven of those suspected of involvement in the planning and/or execution of 11-M were already, or had earlier been, under police surveillance on suspicion of involvement in terrorism prior to March 11. Jamal Zougam, a 31-year-old Moroccan, one of the first five men to be arrested on March 13 and the only one of the five still in prison, had been monitored in 2001 for suspicious activities. He has been linked to Imad Eddin Barakat Yarkas, the man accused leading an Al-Qaeda cell in Spain, as well as other alleged members of the cell (see discussion below).⁴¹ Serhane Ben Abdelmajid Fakhel, a 36-year-old Tunisian who allegedly coordinated and participated in the bombings, and subsequently died in the Leganés apartment, was apparently under investigation since 1995 for alleged membership in an Al-Qaeda cell in Spain.⁴²

As of the end of 2004, eighteen people were in jail in Spain in connection with 11-M and forty-one people had been arrested and subsequently released after varying amounts of time in police custody and prison. The vast majority of the forty-one are on provisional release. A few were simply questioned and released without charge. Rabei Osman el Sayed, an Egyptian who was arrested in Milan on June 7 was extradited to Spain on

⁴¹ Tim Golden, Desmond Butler, and Don Van Natta, Jr., "As Europe Hunts for Terrorists, the Hunted Press Advantages," *The New York Times*, March 22, 2004.

⁴² J.M.I and J.A.R., "Three months after 11-M – the police and judicial investigation. Seven fugitives, fourteen prisoners, and seven suicides" (« Tres meses después del 11-M – la investigación policial y judicial. Siete fugitivos, 14 presos y siete suicidas »), *El País*, June 11, 2004.

December 7. He is suspected of masterminding the March 11 attacks.⁴³ Of the eighteen in pre-trial detention, nine are Moroccans and five are Spaniards, while the remaining four are Syrian, Lebanese, Algerian and Egyptian, respectively; Moroccans account for twenty-two of those detained and subsequently released, while seven Spaniards fall into this category.⁴⁴ The twelve Spaniards who have been detained are all suspected of involvement in the theft and/or sale of the explosives used in the attacks, or the sale of drugs whose profits were used to finance the attacks.

Investigations into Al-Qaeda pre-dating 11-M

In November 2001, Audiencia Nacional examining magistrate Baltasar Garzón ordered the first arrests in what would become a complex judicial process against alleged members of al-Qaeda both within Spain and abroad. Between November 2001 and July 2002, the National Police carried out a three-phased operation, dubbed Operación Dátil (“Operation Date”), to dismantle an alleged al-Qaeda cell in Spain.⁴⁵ The arrests were the culmination of an investigation underway since 1995, when many of the apprehended suspects had been placed under police surveillance and their telephones wiretapped. In all, twenty-three people have been arrested in Spain as part of the al-Qaeda investigation, while one man was arrested in Jordan and extradited to Spain; until November 2004, fourteen were in pre-trial detention and ten were on provisional release. On November 19, 2004, the trial chamber of the Audiencia Nacional that will hear the trial ordered that nine men on provisional release be returned to pre-trial detention.⁴⁶

⁴³ La Razón Digital, “The Egyptian, intellectual author of 11-M, arrives in Spain to be tried for 191 murders ” (“El egipcio, autor intelectual del 11-M, llega a España para ser juzgado por 191 asesinatos ”), *La Razón Digital*, December 8, 2004 [online], http://www.larazon.es/ediciones/anteriores/2004-12-08/noticias/noti_nac25593.htm (retrieved December 31, 2004).

Four Syrians, three Indians, one Saudi, one Egyptian, one Algerian, one Bosnian, and one Peruvian were detained at various stages of the investigation and subsequently released.

⁴⁵ In Spain, the National Police are responsible for security in urban areas while the Civil Guard has jurisdiction in rural areas and patrols borders and highways. The autonomous regions of Catalonia and the Basque Country have their own police forces.

⁴⁶The men in pre-trial detention are: Driss Chebli, Abdula Khayata Kattan, Imad Eddin Barakat Yarkas, Osama Darra, Sadik Merizak, Hasan Alhusein, Abdelaziz Benyaich, Jasem Mahboule, Luis José Galán González, Najib Chaib Mohamed, Mohamed Needl Acaid, Mohamed Zaher Asade, Said Chedadi, and Mohamed Galeb Kalaje Zouaydi, Bassam Dalati Satut, Ghasoub Al Abrash Ghalyoun, Mohamed Khair El Saqqa, Abdalrahman Alarnaot Abu Aljer, Kamal Hadid Chaar, Taysir Alony Kate, Ahmad Koshagi Kelani, Waheed Koshagi Kelani, and Jamal Hussein Hussein. The latter nine men were returned to pre-trial detention on November 19, 2004. Human Rights Watch was unable at the time of writing to verify the situation of Sid Ahmed Boudjella. Human Rights Watch has adopted the spelling of names as used in the order declaring closed the investigative phase of Committal Proceeding 35/2001-E. Some names are spelled differently in different documents.

The criminal case against presumed al-Qaeda terrorists is composed of two separate formal indictments. On September 17, 2003, Garzón issued a 692-page formal indictment of thirty-five alleged members of al-Qaeda. Of those named in the indictment, fifteen are under international arrest warrants and/or European arrest warrants, including Osama Bin Laden, while two are in custody in other countries.⁴⁷ This indictment was expanded on April 19, 2004, to include five more defendants.⁴⁸ A second, separate indictment was issued on May 20, 2004, against Said Berraj, whose whereabouts are unknown. Thus, a total of forty-one men are under indictment in this single case.⁴⁹ Thirty-three are accused of membership in al-Qaeda, two of collaboration with al-Qaeda, nine are accused of as many homicides as there were fatal victims of the September 11 attacks in the United States, twelve of various financial crimes with the purpose of financing the organization, and two of illegal possession of weapons.⁵⁰

Seven defendants in the al-Qaeda case have been in pre-trial detention since November 18, 2001. That is two years before they were formally indicted and thirty-one months before the investigative phase of the process was declared official closed on June 15, 2004. The other seven had been in prison for periods ranging from four to twenty-eight months.⁵¹ Those on provisional release before the November 2004 court decision to place them back in pre-trial detention had spent periods of time in prison ranging from two to eight months. No date has yet been set for the commencement of the oral trial, though an undisclosed source close to the case told a journalist for the daily newspaper *El País* that it would probably begin in the early to mid 2005.⁵²

On June 9, 2003, Audiencia Nacional Prosecutor Pedro Rubira Nieto issued his recommendations on the accusations to be formally leveled against those detained in the

⁴⁷ Farid Hilali ("Shukri" or "Shakur") is in prison in the U.K, while Ramzi Binhalshib is in U.S. custody. EFE. "Judge Garzón orders the conclusion of investigation of presumed Al-Qaeda cell in Spain" ("El Juez Garzón acuerda la conclusión del sumario sobre la presunta célula española de Al-Qaeda"), *El Mundo*, June 15, 2004 [online], <http://www.elmundo.es/elmundo/2004/06/15/espana/1087296039.html> (retrieved July 20, 2004).

⁴⁸ The indictment was also expanded on April 28, 2004, to correctly identify as Farid Hilali the defendant named in the original September 17, 2003 indictment as Shakur, and to add information about Amer el Azizi, also named in the original September 17, 2003 indictment. Both men's whereabouts are unknown.

⁴⁹ All of this information is contained in the judicial order declaring closed the investigative phase of the process. Committal Proceeding 35/2001-E, Central Court of Instruction No. 5, Audiencia Nacional, June 15, 2004.

⁵⁰ Indictment in Committal Proceeding 35/2001-E, Central Court of Instruction No. 5, September 17, 2003. Of the nine men accused of direct responsibility in the September 11th attacks in the United States, two are in pre-trial detention in Spain (Imad Eddin Barakat Yarkas and Driss Chebli), while one is on provisional liberty (Ghasoub Al Abrash Ghalyoun).

⁵¹ Najib Chaib Mohamed has been in prison since January 22, 2002; Mohamed Galeb Kalaje Zouaydi since April 26, 2002; Driss Chebli and Abdelaziz Benyaich since June 2003; Sadik Merizak and Hasan Alhusein since September 21, 2003; and Abdula Khayata Kattan since February 3, 2004.

⁵² José Yoldi, "Garzón closes the investigation of the Al-Qaeda cell in Spain" ("Garzón concluye la instrucción sobre la célula de Al-Qaeda en España"), *El País*, June 16, 2004.

al-Qaeda process. In his report, Rubira states that he has no intention of prosecuting Kamal Hadid Chaar, Abdalrahman Alarnaot Abu Aljer, Mohamed Khair Alsqqa (sic), and Ghasoub Al-Abras Ghalyoun (sic). All four men were nonetheless accused of membership in the terrorist organization al-Qaeda in Judge Garzón's formal indictment issued three months later. Under Spanish law, the examining magistrate is wholly entrusted with formulating the indictment; the prosecutor may appeal the indictment after it is handed down. In this case, Prosecutor Rubira did not lodge any appeals against the indictment.⁵³ Al Abrash Ghalyoun is also accused of as many terrorist homicides as there were fatal victims of the September 11, 2001 attacks – referred to in Spain as 11-S – in the United States.⁵⁴ Lawyers for two of these defendants told Human Rights Watch that they had no doubts that their clients would be acquitted, since a case is not likely to prosper in the trial chamber if the prosecutor does not accuse.⁵⁵ The lawyer for one of the men said he had spoken with both Prosecutor Rubira and Judge Garzón before accepting the case. The lawyer claims that Rubira told him there wasn't much evidence against his (then) potential client and that he would probably be freed on provisional release after the police concluded its investigation (which turned out to be true). He also claims that Garzón told him that while the man perhaps had had a connection to al-Qaeda in the past, he probably no longer did.⁵⁶

The Use of Incommunicado Detention

International Law and Standards

The most significant, and most criticized, feature of Spain's antiterrorism provisions is the use of incommunicado detention. Incommunicado detention is generally understood as a situation of detention in which an individual is denied access to family members, an attorney, or an independent physician. In some cases, as in Spain, incommunicado detainees do not even have the right to notify anyone about their arrest. While there is no prohibition under international law of incommunicado detention per se, there is significant consensus among United Nations human rights bodies that it can give rise to serious human rights violations and should thus be prohibited. The U.N. Human Rights Committee, charged with monitoring the implementation of the International Covenant

⁵³ In an interview with Human Rights Watch, Judge Garzón declined to comment on matters relating to on-going cases.

⁵⁴ September 17, 2003 indictment, Committal Proceeding 35/2001-E. Al Abrash Ghalyoun is also accused of fraud.

⁵⁵ Human Rights Watch interviews with 11-S criminal defense lawyer, Madrid, June 3, 2004; 11-S criminal defense lawyer, Madrid, June 21, 2004.

⁵⁶ Human Rights Watch interview with 11-S criminal defense lawyer, Madrid, June 21, 2004. In an interview with Human Rights Watch, Judge Garzón declined to comment on matters relating to ongoing cases.

on Civil and Political Rights, issued an authoritative statement on the interpretation of the ICCPR's Article 7 on the prohibition of torture. In General Comment No. 20, adopted in 1992, the Committee recommends that provisions be taken against incommunicado detention.⁵⁷ The U.N. Commission on Human Rights has repeatedly reaffirmed this position, most recently in a 2003 resolution, holding the view that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture."⁵⁸

Despite these general affirmations, many countries continue to practice incommunicado detention, both pursuant to national legal provisions as well as illegally. Its use is usually justified as a necessary measure in the fight against terrorism. The United Kingdom, for example, allows for forty-eight hours incommunicado detention under the Terrorism Act 2000; in June 2003, Australia adopted a Terrorism Act empowering the Australian Security Intelligence Organization to detain and hold suspects incommunicado for up to seven days, a period that can be extended by order of the Attorney General for successive periods of seven days. Countries as varied as Egypt, Serbia and Bolivia all allow incommunicado detention for different periods of time. Countless more countries are cited by human rights organizations for systematically and illegally holding terrorism suspects in incommunicado detention.

Spanish Law

The Code of Criminal Procedure (LEC) sets out restrictions on the rights of persons arrested under suspicion of membership in an armed group, terrorists, or rebels in terms of both the length and the conditions of detention. The rights and guarantees of all persons subject to arrest are detailed in Article 520. Any person arrested has the right to be informed immediately, and in an understandable manner, of his or her rights and the grounds for the arrest (Art. 520(2)). All detainees have the right to choose a lawyer and to request that the lawyer be present during any interrogations and any identification proceedings (Art. 520(2)(c)), as well as the right to notify relatives or another person of their choice about the arrest and the place of detention (Art. 520(2)(d)). Detention in police custody should last "no longer than the time strictly necessary to carry out the investigations aimed at establishing the facts;" the detainee must be released or brought before a judicial authority within seventy-two hours (Art. 520(1)).

In cases involving terrorist suspects, however, the maximum three-day limit in police custody may be extended by forty-eight hours. The extension must be requested within

⁵⁷ U.N. Human Rights Committee, General Comment No. 20, para. 11.

⁵⁸ U.N. Commission on Human Rights, Resolution 2003/32, para. 14.

the first forty-eight hours of detention and authorized by the competent judge within the following twenty-four hours (Art. 520 bis (1)). This judge may authorize that these individuals be held incommunicado in police detention (Art. 520 bis (2)). Terrorism suspects may therefore be held for a total of five days in incommunicado police detention.

Persons being held incommunicado do not have the right to notify a third party about their detention or whereabouts; to receive visits from family members, spiritual advisors, or a doctor of their own choosing; or to communication or correspondence of any kind (Art. 527). Incommunicado detainees do not have the right to designate their own lawyer, but must be assisted by a legal aid attorney. Furthermore, these detainees do not have the right to a private consultation with their lawyer (Art. 527(a) and (c)). Every detainee is guaranteed the right to remain silent until brought before a judge; the right to not incriminate himself or herself or confess to guilt; to have access to a free interpreter if necessary, and, in the case of foreign nationals, to have their consulate informed (Art. 527, with reference to rights set out in Art. 520(2)(a-f)).

All detainees in police custody have the right to an examination by a state forensic doctor.⁵⁹ The November 2003 reform of the LEC granted an additional right to incommunicado detainees to request a second forensic medical examination by a court-appointed forensic medical officer.⁶⁰ This second examination will be performed by a state-appointed medical officer, either from within the same corps of forensic doctors as the first examiner or brought from another tribunal.⁶¹

Once the preliminary police investigations are concluded, and in any event no later than five days after the arrest, the detainee must be brought before a competent judicial authority. At this point, the judge may order the individual released without charge, released on provisional liberty, or commit the individual to provisional prison, or pre-trial detention.

A November 2003 reform of the LEC amended Article 509 to allow the judge to impose an additional five days of incommunicado status in provisional prison on individuals suspected of membership in an armed band or terrorist group, or of having committed a crime in concert with two or more individuals.⁶² This means these individuals may be

⁵⁹ LEC, Article 520 (2) (f).

⁶⁰ LEC, Article 510 (4).

⁶¹ Human Rights Watch interview with Cándido Conde-Pumpido, Madrid, July 12, 2004.

⁶² Organic Law 15/2003 of 25 November 2003, reforming the Code of Criminal Procedure.

held in incommunicado detention for ten consecutive days. The amended article now also states that the competent judge or tribunal “may order that the detainee return to being incommunicado, even after having been placed in communication” when the ongoing investigation so warrants. This final period may last no longer than three days.

Incommunicado Detention Timeline

24 hours: Within 24 hours after the arrest, the arresting agency must request a 48-hour extension of the 72-hour maximum police custody period.

48 hours: Within 48 hours of the arrest, the examining magistrate must approve or deny extension.

72 hours: Within 72 hours of the arrest, the arresting agency must:

- notify the local bar association and request the appointment of legal aid counsel; and
- take the detainee’s statement in the presence of the legal aid attorney (the detainee may refuse to make this statement);

If no extension has been requested, or the request was denied, the detainee must be brought before the examining magistrate.

5 days: Maximum amount of time detainee may be held incommunicado in police custody. By this time, the detainee must have a hearing before the examining magistrate, at which time the magistrate will determine whether to release the detainee without charge, release the detainee on bail or conditions designed to ensure his or her appearance in court at a later date, or remand the detainee into pre-trial detention. If the magistrate lifts incommunicado status before the hearing, the detainee may be assisted by private counsel; otherwise, the legal aid attorney will assist.

The magistrate may impose five more days of incommunicado status in pre-trial detention.

10 days: Total maximum amount of time detainee may be held incommunicado (five days in police custody and five days in pre-trial detention).

Three additional days of incommunicado detention may be imposed on persons in pre-trial detention at any point after the ten days have expired.

Analysis of Concerns

Duration

Current Spanish law allows for a maximum of thirteen days of *incomunicado* detention. The provision in Article 509 of the LEC allowing a judge to order three more days of *incomunicado* status in addition to the stated maximum of five days in pre-trial detention was apparently designed to allow judges to re-impose *incomunicado* status at a *later* stage in the investigation.⁶³ A literal reading of the article 509, however, suggests that the three additional days may be imposed immediately, and Judge Garzón confirmed that this is permissible under current law.

An official government report from February 2004 explained that “these...three days are not added to the prior *incomunicado* period, rather there must exist a temporal separation of the two.”⁶⁴ In practice, some detainees are being held for thirteen days consecutively. At least three of the 11-M detainees were in fact held *incomunicado* for the full five days in police custody and another eight days in pre-trial detention, in other words, thirteen consecutive days.⁶⁵

The Spanish government has consistently ignored or rejected appeals by international human rights authorities to modify or abrogate the *incomunicado* regime. The U.N. Committee against Torture said in 2002 that it was “deeply concerned” over the (then) five-day *incomunicado* detention period in Spain and stated that “regardless of the legal safeguards for its application, [it] facilitates the commission of acts of torture and ill-treatment.”⁶⁶ The U.N. Special Rapporteur on Torture, Theo van Boven, issued a report on Spain in February 2004 in which he stated that “prolonged *incomunicado* detention may facilitate the perpetration of torture and could in itself amount to a form of cruel, inhuman or degrading treatment.”⁶⁷

⁶³ Human Rights Watch interview with Fernando Flores Giménez, Chef de Cabinet of the Secretary of State; Alberto Palomar Almeda, Cabinet of the Secretary of State; and Cesáreo Duro Ventura, advisor to the Secretary of State, Ministry of Justice, Madrid, July 13, 2004.

⁶⁴ Notes verbales from Permanent Mission of Spain to the U.N., p.13 (Human Rights Watch translation).

⁶⁵ Human Rights Watch interviews with three legal aid attorneys, Madrid, June 24, 2004.

⁶⁶ U.N. Committee against Torture, Conclusions and recommendations of the Committee against Torture: Spain. 23/12/2002, CAT/C/CR/29/3, para. 10.

⁶⁷ Civil and Political Rights, Including the Question of Torture and Detention. Report of the Special Rapporteur on the question of torture, Theo van Boven. Addendum: Visit to Spain. E/CN.4/2004/56/Add.2, February 6, 2004, paragraph 34.

Spain strenuously objected to van Boven's report, calling it "unfounded and lacking in rigour, substance and method."⁶⁸ In its official response to the report, Spain stated that during 2002-2003, 75 percent of incommunicado detentions lasted seventy-two hours and 25 percent lasted five days. Only one detainee was held incommunicado beyond five days.⁶⁹ Rejecting wholesale the Special Rapporteur's recommendation to abrogate the incommunicado regime, the Spanish government argued that "[t]he recourse, under judicial control, to incommunication of certain detainees continues to be important from an operational standpoint, since it avoids the destruction of proof or relevant evidence, the disappearance of the means employed in attacks, the flight of accomplices or collaborators, all of which occurred in the past due to the criminal collaboration of lawyers close to the ETA environment."⁷⁰

Insufficient judicial supervision

The European Convention on Human Rights (ECHR) stipulates that all persons arrested "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power" (Art. 5(3)).⁷¹ In decisions related to alleged violations of Article 5(3) of the Convention, the European Court of Human Rights has refrained from establishing a precise time-limit within the meaning of the word "promptly" in the view that the special features of each case must be assessed.⁷² It has however said that "the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5, para. 3, that is to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority."⁷³

In the case of *Brogan and others v. the U.K.*, the four applicants alleged that their rights under Article 5(3) had been violated as a consequence of their arrest under the Prevention of Terrorism (Temporary Provisions) Act of 1984, having been held in police custody without being brought before a judge for periods ranging from four days and

⁶⁸ Notes verbales from Permanent Mission of Spain to the U.N., p.1.

⁶⁹ Notes verbales from Permanent Mission of Spain to the U.N., p.64.

⁷⁰ Notes verbales from Permanent Mission of Spain to the U.N., p.37.

⁷¹ Spain ratified the European Convention on Human Rights on 4 October 1979.

⁷² See for example, *de Jong, Baljet and van den Brink v. The Netherlands* (8805/79) [1984] ECHR 5 (22 May 1984); *Brogan and others v. U.K.* (11209/84) [1989] ECHR 9 (30 May 1989). In the first case, the court ruled that The Netherlands had violated the provisions of Article 5(3) with respect to de Jong, Baljet and van den Brink, who were detained for seven, eleven, and six days, respectively, without being brought before a judge or judicial officer. In the case of *Brogan and others v. U.K.*, the Court found that Article 5(3) had been violated in the case of four individuals held in police custody for periods ranging from four days and eleven hours to six days and sixteen and a half hours without being brought before a judge.

⁷³ *Brogan v. U.K.*, para. 59.

eleven hours to six days and sixteen and a half hours. They were all released without charge. While acknowledging that “the investigation of terrorist offences undoubtedly presents the authorities with special problems,” the Court held:

Even the shortest of the four periods of detention, namely the four days and six hours spent in police custody...falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3. To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word “promptly.” An interpretation to this effect would import into Article 5 para. 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision.⁷⁴

The Court ruled there had been a breach of Article 5(3) in respect of all four applicants.

In current Spanish law and practice, a terrorism suspect may be held *incommunicado* in police custody for five days before being brought before a judge. As established in the LEC, *incommunicado* detention must be the subject of a judicial order, either upon request by the police or Civil Guard, a public prosecutor, or on the instructing judge’s own initiative. When the arresting agency sees fit, it can impose *incommunicado* detention immediately; the judge must ratify this decision within twenty-four hours of the arrest. At any time, the competent judge may request information about the detainee’s conditions or conduct a personal inspection; this is, however, at the discretion of the judge rather than an obligation.⁷⁵ Furthermore, there is no obligation on the judge to personally see the detainee before extending the initial seventy-two hour detention period by another forty-eight hours. Judge Garzón, who reiterated to Human Rights Watch his publicly-expressed opposition to the use of *incommunicado* detention, stressed that detainees have three important guarantees during this period: examinations by forensic doctors every six hours, the right to file a writ of habeas corpus, and the ability to relate any ill-treatment to the legal aid attorney assigned to the case.⁷⁶

⁷⁴ Ibid. paras. 61-62.

⁷⁵ LEC, Article 526 (3): “During the detention, the judge may at any time require information and know, personally or through delegation to the examining magistrate...where the detainee is being held, the situation of the same.”

⁷⁶ Human Rights Watch interview with Judge Baltasar Garzón, examining magistrate of the Audiencia Nacional, Madrid, October 1, 2004.

In practice, in the 11-S and 11-M cases, many of the suspects were held for the full five days without seeing the judge. The first men arrested, in November 2001, for alleged membership in an al-Qaeda cell in Spain were all held for the maximum five days before their hearing with Judge Garzón; it appears that those arrested in connection with this case in successive police operations were arraigned within seventy-two hours. Judge Garzón told Human Rights Watch he extended the incommunicado period in police custody only in the most complicated cases.⁷⁷

As far as Human Rights Watch has been able to ascertain, a significant number of those arrested in connection with 11-M were held for longer than seventy-two hours before seeing Judge Del Olmo; in the fifteen cases for which Human Rights Watch has specific information, all detainees were held for over four days, and many for five days, before the initial hearing in court. One of the accused, Fouad el Morabit Anghar, was detained on three separate occasions: he was arrested for the first time on March 24 and released without charge on March 29; he was rearrested two days later, on March 31, and held for three days until his release on April 2; he was arrested for the third time on April 8 and spent four days in police custody, before Judge Del Olmo remanded him to pre-trial detention on April 12.⁷⁸

The European Committee for the Prevention of Torture (CPT) has stated that five days of incommunicado detention before being a hearing with a judge may not be in conformity with Spain's obligations under international law and has recommended that "persons held incommunicado be systematically brought before the competent judge...prior to the taking of the decision on the issue of extending the detention period beyond 72 hours."⁷⁹

Limitations on the right to counsel

The right of all persons accused of a crime to the assistance of a lawyer is a fundamental procedural guarantee. Article 14 of the ICCPR and Article 6 of the ECHR stipulate that everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing" or to be assigned free legal assistance if necessary. The Human Rights Committee and the European Court of Human Rights

⁷⁷ Ibid.

⁷⁸ See El Mundo's electronic database on the 11-M arrests at www.elmundo.es/documentos/2004/03/espana/atentados11m/detenciones.html (retrieved October 4, 2004).

⁷⁹ Report to the Spanish government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 to 26 July 2001. CPT/inf (2003) 22, para. 24.

have considered these provisions applicable to periods before trial, including the period in police custody.⁸⁰ The U.N. Basic Principles on the Role of Lawyers requires that:

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials...⁸¹

The antiterrorism provisions in Spain's LEC impose serious limitations on the right to counsel during incommunicado detention. First, incommunicado detainees do not have the right to designate their own lawyer but rather must be assisted by a legal aid attorney for the duration of the incommunicado period. Second, these detainees do not have the right to see a lawyer from the outset of detention; the first time they see the legal aid attorney is when they are called to give an official police statement, an event that may occur after three and in some cases five days in custody. Finally, incommunicado detainees do not have the right to confer in private with their lawyers at any time, neither before nor after the statement to the police or the testimony before the judge.

Human Rights Watch acknowledges that the prohibition on appointing one's own lawyer was adopted in response to the concern that Basque separatist detainees were using lawyers themselves connected to ETA to transmit information to the outside world and prejudice the investigation. It may well be, in the words of a high-level advisor in the Ministry of Justice, "a justified precaution given the long history of terrorist groups using lawyers associated [with the same group]."⁸² It is the view of Attorney General Conde-Pumpido that incommunicado status "does not prevent those it affects from enjoying the right to defense, which continues to be offered by a professional of

⁸⁰ The Human Rights Committee held that the provision of the UK's Terrorism Act 2000 allowing suspects to be detained for 48 hours without access to a lawyer was of "suspect compatibility" with Article 9 and 14 of the ICCPR. CCPR/CO/73/UK, para. 13 (2001); the European Court of Human Rights similarly held that Article 6 of the ECHR applies even in the preliminary stages of a police investigation. In the *Imbroscia v. Switzerland* judgement (13972/88) [1993] ECHR 56 (24 November 1993), the Court stated that "Certainly the primary purpose of Article 6 as far as criminal matters are concerned is to ensure a fair trial by a 'tribunal' competent to determine any criminal charge", but it does not follow that the Article (Art. 6) has no application to pre-trial proceedings" and that the requirements of Article 6 (3), including the right to legal assistance, "may...be relevant before a case is sent to trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them." ECHR, Series A, No. 275, para. 36.

⁸¹ Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), Number 8.

⁸² Human Rights Watch interview with Cesáreo Duro Ventura, advisor to the Secretary of State of the Ministry of Justice, Madrid, July 13, 2004.

the Bar Association, but rather [from enjoying] the assistance of a lawyer especially designated, in many cases, by the very criminal association to which he belongs.”⁸³ The Spanish Constitutional Court has stated that the restriction on the right of the incommunicado detainee to choose his own counsel “cannot be called a restrictive, unreasonable or disproportionate measure...because the limitation it imposes on the fundamental right [to legal assistance] is reasonably balanced with the pursued result.”⁸⁴

However, the practice of waiting until the allowable period of incommunicado detention is almost over before requesting the legal aid attorney’s presence for the formal police statement seriously undermines the detainee’s right to counsel and significantly heightens his or her susceptibility to unlawful pressure. While the arresting agency must notify the Bar Association immediately upon detention, it appears to be common for the National Police (or Civil Guard, as the case may be) to delay making an official request for the designation of a legal aid attorney until only hours before the statement is due to be made. The Association of Free Lawyers (*Asociación de Libres Abogados*, ALA), an independent membership organization, alleged in a report to the CPT that in cases of incommunicado detention, the arresting agency only notifies the Bar Association once the time and place has been set for the police statement, which may take place at any time during the three day or, if extended, five day, incommunicado period. The ALA concludes that in practice, lawyers are unable to assist these detainees from the moment of detention, as the government of Spain alleges.⁸⁵

Human Rights Watch gathered testimonies about the experience of nine 11-M suspects. Of these, two were held for five days before the official police statement was taken; five were held for four days; and the remaining two were held for two days. One suspect was held for nearly ninety-six hours before his statement was taken. In almost all cases, the lawyer was notified the same day the statement was to be taken; he or she was only told the detainee’s name, and the time and place of the proceeding.

The three 11-M defendants with whom Human Rights Watch spoke recounted that they had been questioned by police during the incommunicado period without the presence of their lawyer. Defendant X said he was illegally questioned nightly without a lawyer

⁸³ Conde-Pumpido, Cándido. “Modelo español de la lucha antiterrorista.”

⁸⁴ Constitutional Court Sentence 196/87, adopted on December 11, 1987 [online], www.boe.es/g/es/iberlex/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1987-0196 (retrieved September 12, 2004), extract, para. 8.

⁸⁵ Association of Free Lawyers (ALA), [check this title] Report of the Commission Defense of the Defense of the Association of Free Lawyers of Madrid (ALA) in relation to the “Response of the Spanish government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment (C.P.T)” on the visit to Spain undertaken 22 to 26 July, 2001, p.6. Human Rights Watch translation.

present, sometimes two or three times a night, for the four nights he spent in police custody.⁸⁶ Defendants Y and Z both said they were each questioned once by the police during their incommunicado period.⁸⁷ The girlfriend of a fourth defendant told Human Rights Watch that he had been interrogated every day while in police custody.⁸⁸

High-level representatives of the Ministry of Justice assured Human Rights Watch that the arresting agency has the obligation to notify the legal aid attorney and proceed with taking the official statement as quickly as possible. Indeed, according to these representatives, an unjustified delay in taking the statement, and the resulting delay in the detainee's access to a lawyer, would give rise to criminal responsibilities. "It's possible for the police to wait until the end of the seventy-two hours [the maximum period of incommunicado detention where the judge has not ordered an extension of forty-eight hours], but this would be an abuse and could be illegal," according to Cesáreo Duro Ventura, an advisor to the Secretary of State of the Justice Ministry.⁸⁹

The CPT has repeatedly recommended that incommunicado detainees have access to a lawyer from the outset of their detention. A detainee is more apt to tell his or her lawyer in a private setting about torture or ill-treatment that has not left any visible traces. The CPT concluded in its 2001 report on Spain that "existing provisions on the right to legal assistance fail to ensure that persons deprived of their liberty by the law enforcement agencies have, as from the very outset of their custody, the fully-fledged right of access to a lawyer which the Committee has recommended."⁹⁰ None of these provisions has been the subject of reform since that report was written.

Finally, the prohibition of a private conference between lawyer and detainee further undermines the detainee's right to defense at a critical stage. The LEC prohibits all detainees in police custody from speaking with their lawyer in private before the police statement; incommunicado detainees have the added restriction that they may not speak with their counsel in private even after this statement, nor may they confer in private before or after the statement before the judge (in the event incommunicado detention has not been lifted prior to this proceeding).⁹¹ Incommunicado detainees thus cannot discuss their situation openly with their lawyers, nor receive legal advice before crucial official statements that may be used against them in subsequent legal proceedings. The

⁸⁶ Human Rights Watch interview with 11-M defendant X, Madrid, July 13, 2004.

⁸⁷ Human Rights Watch interviews with 11-M defendants Y and Z, Madrid, June 23, 2004.

⁸⁸ Human Rights Watch interview with girlfriend of 11-M defendant, Madrid, June 4, 2004.

⁸⁹ Human Rights Watch interview with Ministry of Justice officials, Madrid, July 13, 2004.

⁹⁰ CPT report on Spain, para.12.

⁹¹ LEC, Articles 520 and 527.

prohibition of a direct, private attorney-client conference deprives the lawyer of any opportunity to collect detailed information relevant to the detainee's case. That lack of information prevents the legal aid attorney from making an effective application for provisional release as long as *incommunicado* status is maintained.

Shortcomings in the right to a medical examination

One of the principal concerns about *incommunicado* detention is that it creates conditions that facilitate the commission of torture or other forms of mistreatment. With this in mind, international human rights bodies have repeatedly stressed the importance of medical exams as a safeguard against such acts. In its General Comment No. 20, the Human Rights Committee recommended that *incommunicado* detainees have the right to be examined by a doctor of their own choice, with the understanding that the examination could take place in the presence of a court-appointed medical officer.⁹²

In its 2001 report on Spain, the CPT expressed its concern about continuing reports of torture of ETA suspects while in police custody and reiterated its recommendation that detainees have the right to a medical examination by a doctor of their own choice:

The CPT has never suggested that the right of access to a doctor of one's own choice should replace a medical examination by a forensic doctor or another doctor employed by the State. However, a second medical examination by a doctor freely chosen by the detained person can provide an additional safeguard against ill-treatment. As matters stand, the current legal provisions and practice concerning access to a doctor by detained persons fail to guarantee that safeguard.⁹³

Under Spanish law, all detainees in police custody have the right to an examination by a forensic doctor. As described above, the November 2003 reform of the LEC added the right of *incommunicado* detainees to request a second forensic examination. This reform, however, falls short of compliance with the CPT and the Human Rights Committee's recommendations, as it still does not allow the detainee to be examined by a doctor of his or her own choice. Attorney General Conde-Pumpido explained to Human Rights Watch that the judge could assign the second forensic medical officer

⁹² U.N. Human Rights Committee, General Comment No. 20, paragraph 67.

⁹³ CPT report on Spain, para. 15.

either from within the same court's corps or request the services of a doctor from another tribunal.⁹⁴

Human Rights Watch did not hear any allegations of torture in connection to the al-Qaeda or 11-M cases. However, we did learn of three 11-M suspects who reported to the judge that they had been mistreated while in police custody. According to his legal aid attorney, defendant Q told Judge del Olmo that he had been made to stand with his arms outstretched for long periods of time and that he had been hit in the stomach. "But the judge saw that he was exaggerating, that he was lying...the forensic doctor's reports didn't include any information [about this]," the lawyer said.⁹⁵ As far as the lawyer is aware, the judge did not make any inquiries about these allegations; the lawyer also dismissed the complaints and therefore did not pursue any action either. The fact that the legal aid attorney, entrusted with the obligation to defend the detainee, did not insist on an investigation into the matter is particularly disturbing.

Similarly, defendant R responded to Judge Del Olmo's question about treatment in police custody by saying that he had been beaten during the first two or three days, "but that he understood that the police were just doing their job." According to his legal aid attorney, Judge del Olmo did not ask any further questions. The lawyer has not been able to see the forensic doctor's reports because they are sealed under the secret legal proceedings.⁹⁶ Defendant V also told the judge that the police had consistently prevented him from sleeping while he was in their custody, either knocking on his cell door at frequent intervals, or coming in to slap him on the back of his head to wake him up.⁹⁷

Human Rights Watch is concerned that while Judge del Olmo has consistently inquired about treatment of all of the 11-M detainees, he does not appear to have responded to the three reports of ill-treatment detailed above.⁹⁸

In its 2001 report, the CPT stated:

⁹⁴ Human Rights Watch interview with Cándido Conde-Pumpido, Madrid, July 12, 2004.

⁹⁵ Human Rights Watch interview with legal aid attorney E, Madrid, June 24, 2004.

⁹⁶ Human Rights Watch interview with legal aid attorney F, Madrid, July 13, 2004.

⁹⁷ Human Rights Watch interview with legal aid attorney H, Madrid, June 25, 2004.

⁹⁸ Human Rights Watch sought an interview with Judge Del Olmo while carrying out this research. Our request for an interview was refused by an official in the Central Court of Instruction No. 6 on the ground that it would be inappropriate for the judge to comment on any ongoing investigations with which he was involved.

...when allegations of such forms of ill-treatment come to their notice, judges should not treat the absence of marks or conditions consistent with those allegations as in itself proving that they are false. In such cases, reaching a sound conclusion as to the veracity of the allegations will also require evaluating the credibility of the person making them; in other words, the persons concerned (as well as any other relevant persons) should be interviewed on this specific matter by the judge, and the opinion of a forensic doctor should be sought.⁹⁹

Limitations on right to an interpreter

International human rights law clearly requires that appropriate measures must be adopted to ensure that an accused person fully understands the charges against him or her as well as all legal proceedings arising from those charges. The U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment (Body of Principles on Detention) states “[a] person who does not adequately understand or speak the language used by the authorities responsible for his arrest...is entitled to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.”¹⁰⁰

The language of the ICCPR and the ECHR refers to the right of all accused individuals to “be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him” (Article 14(3)(a) of the ICCPR and Article 6(3)(a) of the ECHR) and to “have the free assistance of an interpreter if he cannot understand or speak the language used in court” (Article 14(3)(f) of the ICCPR and Article 6(3)(e) of the ECHR). Human Rights Watch believes that these articles, though they refer specifically to proceedings at trial, should be read in conjunction with Principle 14 of the Body of Principles on Detention, and interpreted to include the right to an interpreter for any proceeding that forms part, or may form part, of the legal proceedings against an accused.

All of the foreign nationals accused in connection with the 11-M bombings have had the use of an interpreter during the statement before the judge. However, none were allowed to have an interpreter during the official police statement. In the case of defendant V, an interpreter actually came to the room where the police statement would be taken, but the officers present dismissed him saying his services were not required. His lawyer, who did

⁹⁹ CPT report on Spain, para. 22.

¹⁰⁰ United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. Adopted by General Assembly resolution 43/173 of December 9, 1988, Principle 14.

not insist at the time, told Human Rights Watch, “I recognize now that he didn’t understand everything that well and that it would have been better to use an interpreter. But he was exhausted and just wanted to get it over with.”¹⁰¹

Limitations on Challenging the Lawfulness of the Detention

International Law and Standards

The right to challenge the lawfulness of one’s arrest is a fundamental right enshrined in Article 9(4) of the ICCPR: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Article 5(4) of the ECHR establishes the same rights, as does Principle 32 of the Body of Principles on Detention. The Human Rights Committee has stated that this right is non-derogable even under states of emergency.¹⁰²

According to the jurisprudence of the European Court of Human Rights, the review of the lawfulness of a detention must have bearing on both “the procedural and substantive conditions” of the deprivation of liberty. In other words, a detained person should have “available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements...but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and ensuing detention.”¹⁰³

Spanish Law

In Spain, as in many countries, this right can be exercised by filing a writ of habeas corpus through a simple, expedited procedure that allows the detainee, his or her lawyer, or a third party to demand that the detainee be brought as quickly as reasonably possible before a judge to determine the lawfulness of the detention. Organic Law 6/1984, Regulation of the Procedure for Habeas Corpus, states in the exposition of motives that the law covers not only illegal detentions, but also “detentions which, having been originally legal, are maintained or prolonged illegally or take place under illegal conditions.” Article 1 of the law defines illegally detained persons as: 1) those who were

¹⁰¹ Human Rights Watch interview with legal aid attorney H, Madrid, June 25, 2004.

¹⁰² “In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.” U.N. Human Rights Committee, General Comment No. 29 on states of emergency (Article 4), U.N. Doc CCPR/C/21/Rev.1/Add.11 (2001), para. 16.

¹⁰³ *Brogan and others v. U.K.* (11209/84) [1988] ECHR 24 (29 November 1988), para. 65.

detained by an authority, an agent of the same, a public official or a private individual, without a legal basis, or without compliance with the formalities and requisites established by law; 2) those who are illegally interned in any establishment or place; 3) those who were detained for a period longer than that established by law if, upon completion of the same, they were not released or delivered to the closest judge to the place of detention; and 4) those deprived of their liberty whose rights established in the Constitution and Procedural laws have not been respected.

The detainee, his or her spouse or companion, relatives, and, in the case of minors and incapacitated persons, their legal guardians; the Public Prosecutor; the Defensor del Pueblo; and the competent instructing judge on his own initiative may all file a writ of habeas corpus.¹⁰⁴ The examining magistrate of the district where the detainee is being held is competent to review the petition, except in cases of detention of suspected members of armed groups or terrorists, whose writs of habeas corpus must be reviewed by the Central Instructing Judge, in other words, the same examining magistrate of the Audiencia Nacional who may have ordered the detention in the first place.¹⁰⁵ By contrast, appeals against orders remanding a detainee into pre-trial detention issued by Audiencia Nacional magistrates are reviewed in the first instance by the same examining magistrate but in the second instance by a panel of three judges.

Analysis of Concerns

While the letter of the habeas corpus law in Spain appears to be in conformity with international standards, the interpretation of the law among legal professionals is so narrow as to render it effectively meaningless. In conversations with Human Rights Watch, the attorney general and high-level representatives of the Ministry of Justice argued that habeas corpus was irrelevant in cases of incommunicado detention because this is a situation in which the arrest and period of detention are under judicial supervision and therefore *a priori* legal. The criminal defense lawyers consulted similarly stated that they did not consider filing a writ of habeas corpus on behalf of their clients because the detention had been ordered and supervised by a competent judge. One of the 11-M legal aid attorneys said, “Habeas corpus is hardly ever used in Spain. It’s

¹⁰⁴ Organic Law 6/1984, Article 3.

¹⁰⁵ Organic Law 6/1984, Article 2: “If the arrest is due to the application of the organic law that develops the provisions envisioned in article 55(2) of the Constitution, the procedure should be pursued before the corresponding Central Instruction Judge.” The article makes reference to Organic Law 11/1980 of 1 December; Article 55(2) of the Constitution allows for the suspension of rights with respect to length of detention, home inviolability and privacy of communications in cases involving terrorism. Judge Garzón confirmed this interpretation.

absurd...it only serves to place [the detainee] at the disposal of the judge, and in this case it didn't make sense, all of the time frames were respected."¹⁰⁶

Human Rights Watch is particularly concerned that the Ombuds Institution (*Defensor del Pueblo*), though empowered by law to file writs of habeas corpus, does not see it as a useful or even appropriate tool. María Luisa Cava de Llano, First Adjunct of the Defensor del Pueblo, explained that "it is not common because illegal detentions don't happen. In the last four years, we have not submitted any nor have we been asked to do so." When asked if they ever ex officio go to places of detention to verify the conditions or situation of an incommunicado detainee, she said, "It is not our job to disrupt the work of the National Police; in principal we have no reason to believe that a person in incommunicado detention will be mistreated. Our national police and civil guard enjoy prestige among the public and their work is good until it is proven otherwise. Our assumption is that there will not be problems."¹⁰⁷

Even if there were a broader interpretation of the law and a greater willingness to use this legal tool, there are several practical impediments to incommunicado detainees enjoying the right to habeas corpus. First, they are not informed of this right.¹⁰⁸ The right to challenge the lawfulness of the detention through a writ of habeas corpus is not among the rights that police are obligated to read to detainees at the time of arrest and before the official statement is recorded. It is a fair assumption that many detainees are not aware of this right or of the procedure for exercising it, particularly given that lawyers appear not to regard it as an important right.

Second, the fact that incommunicado detainees do not have the right to notify a person of their choice about the arrest or the place of detention clearly undermines the ability of third parties to file a writ of habeas corpus on their behalf. The CPT, while recognizing that it may be necessary in exceptional cases to deny notification of a third party for brief period of time, has stated that "to deny for up to five days the exercise of [this] right...is not justifiable." The CPT takes the position that "a period of a maximum of 48 hours would strike a better balance between the requirements of investigations and the interests of detained persons."¹⁰⁹

¹⁰⁶ Human Rights Watch interview with legal aid attorney B, Madrid, July 13, 2004.

¹⁰⁷ Human Rights Watch interview with María Luisa Cava de Llano, first adjunct, Defensor del Pueblo, Madrid, July 14, 2004.

¹⁰⁸ Human Rights Watch interview with Rosa Ana Morán Martínez, attorney, Technical Secretariat, Attorney General's Office, Madrid, July 12, 2004.

¹⁰⁹ CPT report on Spain, para. 13-14.

Finally, as detailed above, in most cases the detainee does not see a lawyer until the legally permissible period of incommunicado detention in police custody is almost over. Given that it is the lawyer who is in the best position to counsel the detainee about his various options, including that of filing a writ of habeas corpus, this delay has a direct impact on the detainee's ability to exercise this fundamental right. The European Court of Human Rights has held that "where a detained person has to wait for a period to challenge the lawfulness of his custody, there may be a breach of Article 5(4)." The Court considered that a period of seven days "sits ill with the notion of 'speedily'" under that article.¹¹⁰ The Human Rights Committee concluded that Article 9(4) of the ICCPR had been breached in a case where the applicant had the theoretical right to file a writ of habeas corpus but had been denied access to counsel throughout his detention.¹¹¹

Limitations on the Right to an Effective Defense

International Law and Standards

The right to an effective defense is a cornerstone of the right to a fair trial. The ICCPR (Article 14) and the ECHR (Article 6) stipulate the minimum guarantees necessary to ensure the right to a fair trial to all persons accused of a criminal offense. These include timely and confidential access to counsel, and adequate time and facilities to prepare the defense. Another key element is respect for the principle of "equality of arms" which requires that the prosecution and the defense have equal opportunity to prepare and present their cases, including the obligation on the prosecution to disclose all material information. The European Court of Human Rights has held that "[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention."¹¹²

Spanish Law and Practice

Two aspects of Spanish criminal law applicable to terrorism cases undermine the right to an effective defense. First, access to counsel during the incommunicado period is significantly restricted. As discussed extensively in the section entitled The Use of Incommunicado Detention, incommunicado detainees do not have the right to freely choose counsel but are rather assigned a legal aid attorney until such time as their

¹¹⁰ *Igdeli v. Turkey* (29296/95) [2002] ECHR 507 (20 June 2002), paras. 34-35.

¹¹¹ Human Rights Committee, *A. Berry v. Jamaica*, Communication No. 330/1988, U.N. Doc CCPR/C/50/D/330/1988 (1994), para. 11.1. Berry was detained for two and a half months before he was brought before a judge.

¹¹² *Nikolova v. Bulgaria* (31195/96) [1999] ECHR 16 (25 March 1999), para. 58.

incomunicado status is lifted. Almost five days may pass before a suspect in incomunicado detention first sees a lawyer. Incomunicado detainees do not have the right to confer in private with the legal aid attorney assigned to them, either before or after critical steps in the criminal process such as the official police statement and the hearing before the examining magistrate. In practice, legal aid attorneys have little or no information about the case against their client before they are called upon to assist in these proceedings.

Second, Spanish law permits the use of secret legal proceedings, or *secreto de sumario*, a measure that severely restricts access by defense attorneys to the details of an ongoing criminal investigation under the supervision of the examining magistrate. Article 302 of the LEC allows the examining magistrate to seal all or part of the judicial and police undertakings during the investigative phase. The article states that the measure must be lifted at least ten days before the closing of the investigative phase. Subject to that limitation, the Constitutional Court and Supreme Court case law has established that secrecy may be renewed indefinitely. Under *secreto de sumario*, defense attorneys do not have access to detailed information regarding the charges against their clients. They are not entitled to see any of the evidence or receive any information about the ongoing investigation. In contrast, the prosecutor is entitled to all of this information and to participate in all judicial or police investigations and proceedings. While *secreto de sumario* may be applied in any criminal case, all of the defense attorneys consulted during this research stated that its use in terrorism cases is virtually guaranteed.

Analysis of Concerns

Impact of limitations on the right to counsel during incomunicado detention

The government of Spain has maintained that the prohibition of a private conference between the incomunicado detainee and the legal aid attorney does not imply a significant limitation on the detainee's right to defense. In an official communication to the CPT, the government of Spain stated that the Committee's concerns on this point were irrelevant because "in any event he may request to be taken openly in the presence of the detainee in order to check if his physical and psychic condition [sic] are the proper one or if there are traces or signs of ill treatment."¹¹³ This statement reflects the view, frequently repeated to Human Rights Watch in interviews with government officials,

¹¹³ Response of the Spanish government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment (CPT) on its visit to Spain from 22 to 26 July 2001. Official translation.

that the legal aid attorney during the period of incommunicado detention is an observer or guarantor that fundamental rights – such as the right to not be tortured and the right to be informed of all his or her rights – are not violated. As a high-ranking advisor in the Ministry of Justice explained:

These are very serious crimes [and] very exceptional situations...a private interview only makes sense from the perspective of a strategy of defense whereas [court-appointed lawyers in these cases] are lawyers of guarantee, not defense lawyers. And there is no appreciable prejudice to the guarantees [of the detainee] because all of the defense comes after the arrest, in the beginning it's only necessary that the detainee know his rights.¹¹⁴

Furthermore, Attorney General Conde-Pumpido argued that the inability to speak privately with a lawyer before giving a formal statement to the police did not adversely affect the detainee's right to defense because the statement does not have stand alone evidentiary value in court.¹¹⁵ This safeguard is designed to prevent convictions based on confessions made under potentially coercive conditions. However, while the contents of the police statement may not be used to incriminate the suspect, inconsistencies between the statement and later statements may be used to undermine the suspect's credibility and therefore his defense. An additional concern is that the police statement can be used to collect further evidence against the detainee that would be directly admissible. A private conversation with counsel beforehand would allow the lawyer to advise the detainee against offering self-incriminating evidence. Judge Garzón said the prosecution may not use the police statement against a defendant, but may endeavor to demonstrate that the statement was false.¹¹⁶ Finally, it must be noted that the statement before the judge, which incommunicado detainees also must make without the benefit of prior confidential consultation with a lawyer, does have evidentiary value.¹¹⁷

A 2003 report commissioned by the president of the General Council of Lawyers (*Consejo General de Abogacía* - a nongovernmental association that represents and coordinates all of Spain's local bar associations), Carlos Carnicer Díez, took the view that Article 520(2)(c), which lays out the right of all detainees in police custody to designate a

¹¹⁴ Human Rights Watch interview with Cesáreo Duro Ventura, Madrid, July 13, 2004.

¹¹⁵ Human Rights Watch interview with Cándido Conde-Pumpido, Madrid, July 12, 2004.

¹¹⁶ Human Rights Watch interview with Baltasar Garzón, Madrid, October 1, 2004.

¹¹⁷ Judge Garzón stressed that under Spanish law, even the statement before the examining magistrate is of limited value; "the only proof is the oral trial," in other words, only statements made directly at trial are given significant weight as evidence.

lawyer and request his or her presence at all proceedings, should be interpreted broadly to include the right to a private interview, as this is “the most effective mechanism for the defense of [the detainee’s] personal integrity and the correct exercise of his right to legal assistance.”¹¹⁸ The document notes that while the draft bill to reform the LEC would have allowed for a private interview before the police statement, this modification was dropped in the final reform bill adopted in April 2003. The document clarifies that this right to a private interview should be applicable to all detainees including *incomunicado* detainees.

In a written communication, Carnicer stated the personal view that “persons under police custody should have the right to contact their lawyer and receive his visit in conditions that guarantee confidentiality” and “this right should be effective from the moment of detention and be realized through private interviews.”¹¹⁹

Both the CPT and the Human Rights Committee take the view that the right to counsel must include the right to speak privately with one’s lawyer.¹²⁰ In its 1991 report on Spain, the CPT stated:

[T]he fact that the detainee may not consult in private with the lawyer appointed on his behalf either before or after the making of his statement is most unusual. Under such circumstances it is difficult to speak of an effective right of access to legal assistance; the officially appointed lawyer can best be described as an observer. In the CPT’s view, the requirement that the detainee’s lawyer be officially appointed should make it possible to remove any risk of the legitimate needs of the investigation being prejudiced by an interview in private between the detainee and the lawyer.¹²¹

The existence of this limitation on the right to defense has also perhaps led to the widespread belief among lawyers and the police that the legal aid attorney may not

¹¹⁸ General Council of Lawyers, “Observations on the report presented by the ALA to the General Council of Lawyers on the response of the Spanish government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment.” On file with Human Rights Watch. Human Rights Watch translation.

¹¹⁹ Communication via fax, from Carlos Carnicer Diez to José Luis Galán Martín, dated July 30, 2003. On file with Human Rights Watch. Human Rights Watch translation.

¹²⁰ Report to the Spanish government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 12 April 1991, para. 52; HRC General Comment No. 20, para. 67.

¹²¹ Report to the Spanish government on CPT 1991 visit, para. 51.

directly address the detainee, or intervene in any way or at any time during the statement to the police. All of the legal aid attorneys for 11-M suspects with whom Human Rights Watch spoke held this belief. When asked specifically whether he could intervene to prevent his client from incriminating himself, one lawyer said, “Well, I could stomp on his foot, but no, I couldn’t say anything to stop him.”¹²² Two lawyers told Human Rights Watch that when they did in fact attempt to object to a question during the statement proceedings, the attending police officer told them to be quiet.¹²³

The government of Spain stated in a report to the CPT that:

The lawyer is legally authorised for the effective exercise of his function from the same instant in which he accepts the appointment and although Article 520(2)(c) of the Criminal Law Procedure assigns him the function of attending interrogatory proceedings and acting in the verification of identity, this requirement in no way establishes a closed list of the lawyer’s faculties, and in no way prevents the lawyer to exercise other functions of juridical and personal assistance.¹²⁴

There is a lack of consensus among legal experts as to the limits of the legal aid attorney’s role during the police statement. Marisol Cuevas, the head of the Madrid Bar Association’s Legal Aid Department, assured Human Rights Watch that the legal aid attorney may intervene in the proceeding “without any limitation,” though she did acknowledge that the value of talking directly with the client is limited because others are present.¹²⁵ Andrés Jiménez Rodríguez, head of the division on Defense and Interior, of the Defensor del Pueblo, said that it is not possible to interpret the law in a way that would prohibit the lawyer from participating fully in the proceeding, adding that it would be “illegal” for the police to prevent a lawyer from exercising the defense of his client.¹²⁶ However, Judge Garzón said that while the lawyer may intervene to object to a question or to require that a point be clarified, “theoretically [he or she] may not ask the detainee anything, though in practice this is allowed 100 percent of the time.”¹²⁷

¹²² Human Rights Watch interview with legal aid attorney B, Madrid, July 14, 2003.

¹²³ Human Rights Watch interviews with, legal aid attorney H, Madrid, June 25, 2004; legal aid attorney F, Madrid, July 13, 2004.

¹²⁴ Response of the Spanish government to the 2001 CPT report.

¹²⁵ Human Rights Watch interview with Marisol Cuevas, Madrid, July 13, 2004.

¹²⁶ Human Rights Watch interview with Andrés Jiménez Rodríguez, head, Division on Defense and Interior, Defensor del Pueblo, Madrid, July 14, 2004.

¹²⁷ Human Rights Watch interview with Baltasar Garzón, Madrid, October 1, 2004.

The ability of the legal aid attorney to intervene effectively on behalf of the detainee in the statement to the police is unquestionably undermined by the lack of information provided to counsel. In practice, the lawyer is not informed of the specific charges or evidence against their client, often going into the police statement proceedings armed only with the client's name and the general charge of membership or collaboration with a terrorist group. Many of the 11-M legal aid attorneys with whom Human Rights Watch spoke were not even aware, before arriving at the police station, that their client was a suspect in the 11-M bombings. In its report to the CPT, the ALA concluded, "it is absolutely untrue what the Spanish government says...about the total effectiveness of this legal assistance."¹²⁸ The concerns expressed by the CPT in 1991 remain equally valid today.

Impact of secret legal proceedings

Spanish authorities argue that *secreto de sumario* is a necessary measure to protect the integrity of the judicial investigation that has a limited and temporary impact on the right to an effective defense. The Constitutional Court has ruled that *secreto de sumario* does not violate the constitutional right to defense. In Sentence 176/1988, the Court stated "secrecy of the investigation has the purpose of preventing...interference or manipulation designed to obstruct the investigation...and constitutes a limitation on the right to defense, which does not imply defenselessness, as it does not prevent the party from fully exercising [this right] as soon as secrecy is lifted having satisfied its purpose."¹²⁹ Judge Garzón told Human Rights Watch that *secreto de sumario* merely delays full exercise of the right to an effective defense, which is then fully guaranteed throughout the legal process. He added that defense lawyers are entitled to require that all aspects of the investigation undertaken under *secreto de sumario* be repeated after it has been lifted.¹³⁰

Interviews with defense lawyers and a review of court documents demonstrate, however, that *secreto de sumario* often has a devastating impact on the ability of counsel to secure the release of their clients. All of the lawyers Human Rights Watch met with in the course of this research expressed tremendous frustration over the liberal application of secrecy measures. "*Secreto de sumario* is a disgrace," according to Eduardo García Peña, a criminal

¹²⁸ ALA, Report to the CPT, p.6.

¹²⁹ Constitutional Court Sentence 176/1988, adopted October 4, 1988 [online], www.boe.es/g/es/iberlex/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1988-0176 (retrieved September 13, 2004), extract, para. 4.

¹³⁰ Human Rights Watch interview with Baltasar Garzón, Madrid, October 1, 2004.

defense lawyer.¹³¹ A large portion of the committal proceeding documents in the 11-S case was sealed for two years during the investigative phase of the judicial process. The investigation into the 11-M bombings is almost completely sealed and defense lawyers expect it to remain so for quite some time. As one legal aid attorney for an 11-M suspect told Human Rights Watch, “this is the only documentation I have on my client’s case,” as she pointed to a file of newspaper clippings.¹³² Another legal aid attorney in the 11-M case recounted, with evident exasperation, a meeting with Audiencia Nacional judge Juan del Olmo: “There he was, surrounded by stacks of paper, police reports, all documents I didn’t have and couldn’t see because of the *secreto de sumario*.”¹³³

Where the accused is held in pre-trial detention, the imposition of secrecy has a direct and immediate impact. Article 506 (2) of the LEC was reformed in October 2003 to allow the examining magistrate to omit critical details in the order mandating pre-trial detention for an accused in cases where the proceedings have been declared secret.¹³⁴ The order need only include a “succinct description of the alleged act” and which of the goals of pre-trial detention the judge wishes to achieve.¹³⁵ This means, as one 11-M criminal defense lawyer told Human Rights Watch, that “you can keep someone in prison for secret motives – that’s the worst.”¹³⁶ In other words, the state is not compelled to divulge, even to the detainee or the detainee’s counsel, the grounds that warrant pre-trial detention.

Under Spanish law, pre-trial detention is justified, among other reasons, when there exists sufficient evidence to believe the individual is criminally responsible for the acts of which he or she is accused.¹³⁷ In an ordinary case, all of this evidence must be included in the judicial order mandating pre-trial detention. Where this information is omitted due to secrecy of the proceedings, the criminal defense lawyer may appeal the prison order, but has little concrete information and therefore cannot contest specific details of the

¹³¹ Human Rights Watch interview with Eduardo García Peña, criminal defense lawyer, Madrid, June 25, 2004.

¹³² Human Rights Watch interview with legal aid attorney H, Madrid, June 25, 2004.

¹³³ Human Rights Watch interview with legal aid attorney D, Madrid, June 25, 2004.

¹³⁴ Organic Law 13/2003 of 24 October 2003, First Article modifying Art. 506 of the LEC.

¹³⁵ Article 506(2) of the LEC states that “If the proceedings have been declared secret, the prison order will state the details of the same that, in order to preserve the purpose of secrecy, must be omitted from the notified copy. In no case may the notification omit a succinct description of the alleged act and which of the goals envisioned in article 503 are being pursued. When secret proceedings are lifted, the complete text of the order shall be notified immediately.”

¹³⁶ Human Rights Watch interview with legal aid lawyer C, June 24, 2004.

¹³⁷ LEC, Article 503(1)(2): “Pre-trial detention may only be ordered when the following requisites are met: ... That there appear sufficient grounds to believe criminally responsible for the crime the person against whom prison is to be decreed.”

order. Criminal defense lawyer García Peña explained that under *secreto de sumario*, “whether your client is in jail or not depends solely on the judge and the prosecutor, not on the work of the [defense] lawyer.”¹³⁸ Indeed, one of the 11-M legal aid attorneys whose client has been released told Human Rights Watch, “The judge put [my client] in jail saying there was enough evidence, and three months later he says the opposite. So what happened in that period? I don’t know because of the *secreto de sumario*.”¹³⁹

Criminal defense lawyers for the 11-M accused have on at least two occasions appealed the imposition of secret legal proceedings. Human Rights Watch obtained through a third party a copy of an appeal petition filed by the legal aid attorney for Abderrahim Zbakh, on May 12, 2004, as well as Judge Del Olmo’s denial of the appeal.¹⁴⁰ The principal argument advanced by the Zbakh’s lawyer is that secrecy of the investigation fundamentally undermines the right to defense where there is a simultaneous application of pre-trial detention.

The appeal petition argues that the prerogative of the examining magistrate to omit information from the prison order, as established in the reformed Article 506 (2) of the LEC in October 2003, gives rise to a clear violation of the right to defense:

The right to defense with respect to the personal situation of the accused is not limited but rather emptied and materially excluded...it is evident that if the defense does not have access to the committal proceedings because it has been declared secret, and the prison order does not indicate the motives that make the examining magistrate believe that the accused may be criminally responsible...then it is materially impossible to defend against this cautionary measure.¹⁴¹

The fact that the LEC stipulates that the complete text of the prison order must be made available immediately to the defense as soon as secrecy measures are lifted is cold comfort to defendants sitting in jail. The appeal petition rightly argues that the omission of details from the prison order “prevents the party from fully exercising the right to defense at the time when it is relevant – now...”¹⁴²

¹³⁸ Human Rights Watch interview with Eduardo García Peña, Madrid, June 25, 2004.

¹³⁹ Human Rights Watch interview with legal aid attorney D, Madrid, June 25, 2004.

¹⁴⁰ The criminal defense lawyers for seven other accused became parties to the appeal.

¹⁴¹ Appeal filed May 12, 2004 in Committal Proceeding 20/2004 on behalf of Abderrahim Zbakh, on file with Human Rights Watch.

¹⁴² *Ibid.*

Such a view is consistent with the jurisprudence of the European Court of Human Rights. In the case of *Lamy v. Belgium*, the applicant was remanded into custody by a judge three days after his initial arrest. The applicant's counsel did not have access to the investigation file in the remand proceedings. The Court noted that "[t]he appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case."¹⁴³ The Court ruled that there had been a breach of Article 5(4) of the Convention.

The Case of "R.D."¹

The case of R.D. illustrates the vagaries of a legal process subjected to secrecy. R.D. was arrested on March 17, 2004 and held in incommunicado detention in police custody for five days. At his arraignment on March 23, Judge Del Olmo remanded R.D. to pre-trial detention, where he was held incommunicado for five more days.

The only specific information about R.D. included in the initial order for pre-trial detention is that he is accused of "collaboration or integration in an Islamic terrorist organization," along with another suspect. All of the information provided about evidence is kept general, for example a list of the elements of proof includes: "the statements of the accused themselves, the recognition by a witness of one of the accused in the immediate vicinity of one of the stations that suffered one of the attacks, the interrelation of the whole group of accused, not only on a personal level but also in combination with an element of Islamic radicalism, and the enactment of a series of "purifying" actions that demonstrate the final objective of carrying out an action, whose final fruit was the explosions on the 11th of March 2004 in Madrid... ." Beyond that, the order states that police investigation has established: 1) the origin of the cell phone card used as part of detonator of unexploded bomb; 2) the origin of the cell phone card found in possession of Jamal Zougam, who has been identified by a witness as having placed one of the bombs on a train; 3) the origin of explosives used; and 4) the origin of cell phones used as detonators. The order points to the further goals of the investigation at that stage, and argues that pre-trial detention is indispensable to avoid obstruction of the investigation. None of the details provided are linked to R.D. in any way.

¹⁴³ *Lamy v. Belgium* (19444/83) [1989] ECHR 5 (30 March 1989), para. 29.

R.D.'s legal aid attorney filed an appeal against the pre-trial detention on March 26. The appeal alleges that his client is accused of a crime "solely for knowing or being a relative of [people] under investigation or accused, and for, apparently, professing a fervent religious belief in Islam...The objective data in the case of my client are only that of his blood relationship to others accused in this [case], and other [cases]..."

Judge Del Olmo denied the appeal on April 14. The only additional information about R.D. in the denial is the following: 1) the bag that contained explosives that did not detonate was determined to have originated from a store near the store owned by the accused's brother; 2) the accused's other brother brought water from La Mecca in January 2004 that was allegedly used in purification rites in preparation for the 11-M bombings; and 3) "the police investigation situates the accused in the circle of integration of one of these radical Islamic groups (in which his brothers...and another close family member are members)." The rest of the document concerns itself with establishing that the accused presents a flight risk.

Two weeks later, however, on April 26, Judge Del Olmo ordered that R.D. be provisionally released from prison, with the obligation of presenting himself to the court house every week, provide an address and telephone number where he can be located, and to advise the courthouse of any and all trips outside of Spain and report his return immediately. The reason for the release is that "[a]t the current stage in the investigation, the elements that justified the charge against [R.D.] do not allow for sufficient criminal attribution to maintain the situation of unconditional pre-trial detention...after the declaration of [another] suspect."

A review of these court documents suggests that R.D.'s detention and remand into pre-trial detention was based on circumstantial evidence at best. Under *secreto de sumario*, however, it is impossible to know whether Judge Del Olmo had information relating to R.D. that was omitted from the official court records. R.D. spent nearly six weeks in custody, and he may never know exactly why.

¹ Not his real initials. The information represented here is contained in several official Audiencia Nacional documents, including Judge Del Olmo's order remanding R.D. to pre-trial detention, R.D.'s legal aid attorney's appeal against the order for pre-trial detention, Judge Del Olmo's denial of this appeal, and Judge Del Olmo's order releasing R.D. on provisional liberty. On file with Human Rights Watch.

Prolonged Pre-Trial Detention

International Law and Standards

International human rights law does not specify a maximum allowable period of detention before trial. The ICCPR requires that “anyone arrested or detained on a criminal charge...shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subjected to guarantees to appear for trial.”¹⁴⁴ The ECHR states that “everyone arrested or detained...shall be entitled to trial within a reasonable time or to release pending trial.”¹⁴⁵

The European Court of Human Rights has established in its case law that whether a period of pre-trial detention is unreasonable must be assessed on a case by case basis. In making this assessment, the Court has considered factors such as the seriousness of the offense, the applicable penalties, flight risk, and whether delays are due to the accused or the prosecution. The question of length of pre-trial detention is necessarily linked to the right to a trial within a reasonable period of time. Here again, assessments are made on a case by case basis. The complexity of the case is an important factor, and cases with an international aspect have been accepted as being more difficult and complex, and as such longer delays have been considered reasonable.

The European Court of Human Rights has placed particular emphasis on the obligation of authorities to show “special diligence” when the accused is in pre-trial detention.¹⁴⁶ In *Assenov v. Bulgaria*, in which the applicant had been charged with at least sixteen burglaries and the authorities justified his continued pre-trial detention on the fear that he would re-offend if released, the Court stated:

The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were ‘relevant’ and ‘sufficient’, the Court must also

¹⁴⁴ ICCPR, Article 9(3).

¹⁴⁵ ECHR, Article 5(3).

¹⁴⁶ See, for example: *Punzelt v. Czech Republic* (31315/96) [2000] ECHR 169 (25 April 2000); *P.B. v. France* (38781/97) [2000] ECHR 406 (1 August 2000); *Assenov and others v. Bulgaria* (24760/84) [1998] ECHR 98 (28 October 1998); and *W. v. Switzerland* (14379/88 [1993] ECHR 1 (26 January 1993).

ascertain whether the competent national authorities displayed ‘special diligence’ in the conduct of the proceedings.¹⁴⁷

The European Court of Human Rights found that Assenov’s right to a trial within a reasonable amount of time had been violated because his case took two years to come to trial, during which time “virtually no action was taken in connection with the investigation; no new evidence was collected and Mr. Assenov was questioned only once.”¹⁴⁸

Spanish Law

Under Spanish law, pre-trial detention is considered a measure to be applied only when it is “objectively necessary and...when there are no other less onerous measures to the right to liberty through which the same goals may be reached...”¹⁴⁹ The LEC establishes the conditions under which pre-trial detention may be decreed: the alleged acts must be punishable by a maximum prison sentence of two or more years, or a shorter sentence in the event the accused has a criminal record; and there must be “enough motives” to believe the accused is criminally responsible.¹⁵⁰ When both conditions are met, pre-trial detention may be imposed to “avoid the risk that the accused will commit other criminal acts.”¹⁵¹ Pre-trial detention may also be decreed when it is deemed that the accused presents a flight risk, in order to avoid the “hiding, alteration or destruction of evidence,” and to avoid the accused “taking action against the interests of the victim.”¹⁵²

Persons accused of serious crimes — those which carry a prison sentence of more than three years — may be held in pre-trial detention for up to four years. Article 504 (2) of the LEC stipulates a maximum of two years pre-trial detention in such cases. However, this period may be extended by another two years where the circumstances indicate that it is unlikely that the case can be brought to trial within that period. Fernando Flores Giménez, a high-ranking official in the Ministry of Justice, explained that while in theory

¹⁴⁷ Assenov and others v. Bulgaria (24760/84) [1998] ECHR 98 (28 October 1998), para. 154.

¹⁴⁸ Ibid., paras. 157-158.

¹⁴⁹ LEC, Article 502(2).

¹⁵⁰ LEC, Article 503 (1)(1-2).

¹⁵¹ LEC, Article 503(2). The circumstances of the alleged crime and the seriousness of potential future criminal acts are to be considered in assessing this risk.

¹⁵² LEC, Article 503(1)(3). In order to assess flight risk, the judge must consider as a whole the nature of the alleged crime, the length of the possible prison sentence if convicted, the accused's family, professional and economic situation, as well as the speed of the oral trial. To assess the risk of tampering with evidence, the judge must consider the ability of the accused to access, on his own or through third parties, the sources of proof or to influence co-defendants, witnesses or experts.

two years should be enough to bring a case to trial; complex cases with many accused make the extension necessary.¹⁵³ Detainees must be released at the end of the permissible four-year period. In its 1996 concluding observations on Spain's compliance with the ICCPR, the Human Rights Committee expressed concern that "the duration of pre-trial detention can continue for several years, and that the maximum duration of such detention is determined according to the applicable penalty."¹⁵⁴

Spanish Practice

While prolonged pre-trial detention should be exceptional and imposed only when strictly necessary, in practice it occurs regularly in terrorism cases in Spain. A defense attorney for several 11-S defendants alleged that the two year extension is "practically automatic" in terrorism cases.¹⁵⁵ Another 11-S defense attorney told Human Rights Watch that "the right to no undue delays is not applied in complicated cases; there are too few judges and too many cases."¹⁵⁶

At least twenty-three of the forty-one men indicted in Committal Proceeding 35/2001, the case against alleged members of an al-Qaeda cell in Spain, are in pre-trial detention in Spain. Of these, seven have been held in pre-trial detention since November 18, 2001, (having spent the five preceding days in incommunicado police custody).¹⁵⁷ Another seven have been in prison for periods ranging from two-and-a-half years (beginning in January 22, 2002) to six months (beginning in February 2004).¹⁵⁸ Nine men who had been on provisional release were sent back into pre-trial detention on November 19, 2004.

Judge Garzón, the examining magistrate, concluded the investigative phase of the legal process on June 15, 2004. No date has yet been set for the commencement of the oral trial, though an undisclosed source close to the case told a journalist for the daily newspaper *El País* that it would probably begin in early to mid- 2005.¹⁵⁹

¹⁵³ Human Rights Watch interview with Fernando Flores Giménez, Madrid, July 13, 2004.

¹⁵⁴ Human Rights Committee, Concluding observations of the Human Rights Committee: Spain. U.N. Doc CCPR/C/79/Add. 61 (3 April 1996), para. 12.

¹⁵⁵ Human Rights Watch interview with 11-S criminal defense lawyer, Madrid, June 22, 2004.

¹⁵⁶ Human Rights Watch interview with 11-S criminal defense lawyer, Madrid, June 21, 2004.

¹⁵⁷ These are: Osama Darra, Mohamed Needle Acaid, Imad Eddin Barakat Yarkas, Luis José Galán, González, Said Chedadi, and Mohamed Zaher Asade.

¹⁵⁸ Najib Chaib Mohamed has been in prison since January 22, 2002; Mohamed Galeb Kalaje Zouaydi since April 26, 2002; Driss Chebli and Abdelaziz Benyaich since June 2003; Sadik Merizak and Hasan Alhussein since September 21, 2003; and Abdula Khayata Kattan since February 3, 2004.

¹⁵⁹ José Yoldi, "Garzón closes the investigation of the Al-Qaeda cell in Spain" ("Garzón concluye la instrucción sobre la célula de Al-Qaeda en España"), *El País*, June 16, 2004.

The complexity, breadth, and international dimensions of the legal proceedings against the alleged members of an Al-Qaeda cell in Spain are undeniable. According to the Audiencia Nacional order officially closing the investigative phase of the case, the process is composed of 133 volumes containing the principal accusations and evidence as well as twelve separate documents on a variety of subjects. The September 17, 2003, indictment alone contains hundreds of pages of telephone transcripts reproduced to establish the existence of relationships among the accused and to demonstrate their purported activities in connection with Al-Qaeda.

At the time of the closing of the investigative phase, a significant number of issues were still pending, including reports from the Central Unit for External Information (*Unidad Central de Información Exterior* – UCIE), the police intelligence unit, and numerous defense appeals. Since the opening of the case, Judge Garzón has issued seventeen international inquiries; the Court had yet to receive the responses from Indonesia, Greece, Belgium, Yemen, Syria, Jordan, and Saudi Arabia. The Court had not yet translated the responses from the United Kingdom and Norway. If and when the Court receives reports from those countries that have not yet responded, these will need to be translated and submitted to the UCIE for study.¹⁶⁰ In between mid-June and early October, the Court received only partial responses from Belgium and Germany, while the remaining international inquiries remained outstanding.

The defense appeals still pending included appeals against the September 17, 2003 and April 19, 2004, indictments, as well as appeals against pre-trial detention filed on behalf of eight defendants between January 2004 and June 2004. A panel of three judges in an Audiencia Nacional trial chamber is charged with hearing these appeals.¹⁶¹ By the end of 2004, all of these appeals had been denied.

Analysis of Concerns

Several criminal defense lawyers expressed concern about the use of pre-trial detention as anticipatory sentencing or preventive detention. The defense attorney for Mohamed Needl Acaid, who was arrested on November 12, 2001, and was remanded to prison on November 18, 2001, says her client is serving an “anticipatory sentence.” “He has been in prison for three years accused of three things: a trip to Bosnia, sending money to people in Jordan and Yemen, and using stolen credit cards. But these are all police suppositions, because to date they haven’t obtained any proof of criminal activity,” the lawyer said. No additional information on Needl Acaid has been gathered since 1998,

¹⁶⁰ Order of 15 June 2004, Committal Proceeding 35/2001-E, on file with Human Rights Watch.

¹⁶¹ A separate trial chamber will hear the case when it goes to trial.

when the examining magistrate and the public prosecutor both held that there was insufficient evidence to warrant an arrest, according to the lawyer. She added out that none of those released on provisional liberty have absconded, saying “it makes you think these guys [her client and the other thirteen in pre-trial detention] are being prejudged.” The lawyer has filed for Needl Acaid’s provisional release on at least five occasions; she says she has received the exact same denial of the appeal, with only the date changed, stating simply that “nothing has changed since his detention.”¹⁶² The European Court of Human Rights has specifically stated that the reasons given for continued deprivation of liberty must be fully substantiated and domestic courts may not merely confirm the detention in “an identical, not to say stereotyped, form of words.”¹⁶³

Sebastian Sallelas, the criminal defense lawyer for several defendants in the case, said he was convinced his clients were being held in preventive detention. Preventive detention refers to the imprisonment of people suspected of posing a threat to national security or public order where the goal is to avoid the alleged danger rather than the prosecution of any criminal act. “Social alarm is the concept that justifies preventive detention; there are no criminal arguments, but rather political ones...If you are not brought to trial within a reasonable period of time, it is undue delay because there is no proof,” Sallelas explained.¹⁶⁴ Another 11-S defense attorney said “the only motive is to prevent future acts, there aren’t any others.”¹⁶⁵ With respect to the detentions in connection with the March 11 bombings, one lawyer told Human Rights Watch that “what should be an exceptional measure has in this case been applied as the rule...they have used preventive detention, and that is barbaric. It looks like they just went around arresting everyone in the same circle; they’re letting them go now either because there really isn’t any evidence or in order to fish for more information.”¹⁶⁶

Prolonged detention before trial may have a deleterious impact on the mental health of the detainees. Several 11-S detainees are under psychological treatment and/or taking psychiatric medication, such as tranquilizers. In addition to the considerable length of time these detainees have spent in pre-trial detention, the conditions of confinement under harsh security measures contribute to the deterioration of these detainees’ mental health. These conditions are discussed in the following section.

¹⁶² Human Rights Watch interview with criminal defense lawyer, Madrid, June 3, 2004. This formula is generally used in reference to Article 528(1) of the LEC that states that pre-trial detention may only last as long as the original reasons for detention remain valid.

¹⁶³ *Yagci and Sargin v. Turkey* (16419/90) [1995] ECHR 20 (8 June 1995), para. 52.

¹⁶⁴ Human Rights Watch interview with Sebastián Sallelas, criminal defense lawyer, Madrid, June 22, 2004.

¹⁶⁵ Human Rights Watch interview with criminal defense lawyer, Valencia, June 25, 2004.

¹⁶⁶ Human Rights Watch interview with criminal defense lawyer, Madrid, June 25, 2004.

Conditions of Confinement

International Law and Standards

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Article 10 in the ICCPR thus establishes the overarching principle of respect for the dignity and fundamental human rights of all detained or imprisoned individuals. In its paragraph 2(a), Article 10 also stipulates that “accused persons shall, save in exceptional circumstances, be segregated from convicted prisoners and shall be subject to separate treatment appropriate to their status as unconvicted persons.” The Human Rights Committee has stated that this article expresses a “norm of general international law not subject to derogation.”¹⁶⁷ In its interpretation of the analogous article in the ECHR, the European Court of Human Rights has stipulated that efforts must be made to ensure that “the manner and method of the execution of the measure [detention] do not subject [the prisoner] to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.”¹⁶⁸

The U.N. Body of Principles on Detention and the Standard Minimum Rules for the Treatment of Prisoners (hereafter, Standard Minimum Rules) set out more specific guidelines for the treatment of all persons held in custody. In particular, the Body of Principles on Detention states that the prohibition on “cruel, inhuman or degrading treatment or punishment” should be interpreted “so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.”¹⁶⁹

The Standard Minimum Rules contain basic requirements for the treatment of prisoners awaiting trial (Rules 85-93), including the right to wear their own clothing if suitable and clean, to remunerated work if they so choose, and to procure reading and writing materials and other means of occupation as long as they are compatible with the security and good order of the prison.¹⁷⁰

¹⁶⁷ Human Rights Committee, General Comment No. 29.

¹⁶⁸ *Ocalan v. Turkey*, (46221/99) [2003] ECHR 125 (12 March 2003), paras. 231-232.

¹⁶⁹ U.N. Body of Principles on Detention, Principle 6.

¹⁷⁰ Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No.1) at 11, U.N. Doc E/3084 (1957), amended ESC. Res. 2076, 62 U.N. ESCOR Supp. (No.1) at 35, U.N. Doc E/5988 (1977).

Principle 20 of the Body of Principles on Detention states that “if a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.”¹⁷¹ Furthermore, the Standard Minimum Rules also require that “special attention...be paid to the maintenance and improvement of social relations between a prisoner and his family” and that “consideration...be given to [a prisoner’s] future after release, and he shall be encouraged and assisted to maintain or establish social relations with persons or agencies outside the institution as may promote the best interests of his family and his own social rehabilitation.”¹⁷²

Spanish Law

The General Penitentiary Law and its regulations govern the functioning of the prison system in Spain. The General Penitentiary Law requires respect for the human dignity of all inmates (Art. 3) and states that inmates in pre-trial detention must be held separately from those serving sentences (Art. 16). The Penitentiary Regulations stipulate that “reinsertion and reeducation” are a fundamental objective of the penitentiary system (Art. 2); all inmates have the right to individualized rehabilitation programs, and the destination of an inmate within the prison system should be based on this program “taking into consideration, especially, the possibilities for family ties and its possible repercussions [on the inmate]” (Art. 81.2).

The General Penitentiary Law establishes different prison regimes for different categories of prisoners. Article 10 of the General Penitentiary Law states that a “closed regime” is reserved for prisoners – both pre-trial and convicted inmates – who are considered extremely dangerous or who have a demonstrated inability to adapt to the ordinary, or open, regime.¹⁷³ The Penitentiary Regulations specify that the closed regime is applied only to inmates classified as “first degree” (*primer grado*), a designation based on a variety of factors.¹⁷⁴ All presumed or convicted members of organized crime or armed

¹⁷¹ U.N. Body of Principles, Principle 20.

¹⁷² Standard Minimum Rules, Rules 79 and 80.

¹⁷³ Article 96(2) of the Penitentiary Regulations allows the closed regime to be applied to inmates awaiting trial. Penitentiary Regulations, Royal Decree 190/1996 of 9 February.

¹⁷⁴ Article 102(5) of the Penitentiary Regulations stipulates that the following factors be taken into consideration when determining the classification of an inmate as first degree: a) the nature of the crime(s) committed that might denote an aggressive, antisocial and violent personality; b) the commission of acts against the life or physical integrity of persons, sexual freedom or property carried out with particular violence; c) membership in organized crime or armed bands as long as the inmate does not demonstrate to have extracted himself from the internal discipline of said groups; d) active participation in riots, physical aggression, threats or coercion; e) the repeated commission of serious or very serious disciplinary infractions over time; and the introduction or possession of firearms within the penitentiary center, or of large quantities of drugs with the intent to sell. The grade classification should be reviewed every six months (Art. 105).

groups are classified as first degree until they show “unequivocal signs of having extracted themselves from the internal discipline of said organizations or bands” (Penitentiary Regulations, Art. 102.5). The application of closed regime should be reviewed every three months (Art. 92.3). The General Directorate of Penitentiary Institutions decides whether to transfer an inmate from the ordinary, or open, regime to the closed regime on the basis of a recommendation from a prison committee (Art. 95.1).

The closed regime has two different levels. Under the most restrictive regime, inmates who are classified as extremely dangerous are housed in special departments (Art. 91.3). These inmates should be allowed only three hours outside their individual cell per day (with the possibility of three additional hours for programmed activities. There may be no more than two inmates in the prison yard at the same time (though again, this number may be increased to five for programmed activities); and there are daily cell and body searches (Art. 93).

A slightly less restrictive regime of separate modules or centers is reserved for those who are subject to the closed regime due to “demonstrated inadaptability” (Art. 91.2). Inmates in these modules also have individual cells and should be allowed a minimum of four hours communal life, with the possibility of an additional three hours for programmed activities. At least five inmates should be allowed to participate in collective activities (Art. 94).

Total solitary confinement is only contemplated as a punishment for very serious infractions of prison rules and “evident aggressiveness or violence” (Art. 233). While the normal period is set at six to fourteen days, in cases where the inmate is being punished for more than one infraction that carries the same penalty, he or she may be held for up to 42 days in solitary confinement upon authorization by the Penitentiary Oversight Judge (*Juez de Vigilancia Penitenciaria* - Art. 236). While in solitary confinement, the inmate should have the right to spend two hours alone in the prison yard (Art. 254).

Analysis of Concerns

Treatment in police custody and prison during incommunicado detention

All of the 11-M suspects were taken to the UCIE facilities at the central Canillas police station upon their arrest. They were held in underground cells with no natural light for the duration of their incommunicado detention in police custody. Several of the legal aid attorneys for 11-M

defendants said their clients were exhausted and disoriented when they saw them for the first time. “I saw a very confused, very tired young man,” said one lawyer.¹⁷⁵

While in police custody, which in some cases lasted as long as five days, the detainees were not allowed to bathe or brush their teeth. Most, though not all, were stripped of their clothes and given a white jumpsuit to wear. All, however, had their shoes removed and remained in socks for the entire period, including during the hearing in the courthouse. Defendant V was released after giving his statement to the judge, after five days in police custody, at the end of the working day. His clothes and shoes were not returned to him. “We just sat there on the steps of the Audiencia Nacional, he was wearing that white jumpsuit and his socks, waiting for his family to come from outside Madrid to pick him up. They took two-and-a-half hours to get there.”¹⁷⁶

Defendant X spent five days in police custody and was then sent to pre-trial detention for another five days incommunicado. He remained in the same white jumpsuit for seventeen days until his wife was able to bring him some of his own clothes. He was only given shoes to wear when his legal aid attorney came to visit him for the first time, three days after his incommunicado status was lifted, having spent twelve days in the same pair of socks.¹⁷⁷ Defendants Y and Z both said they remained in the same white jumpsuit for two weeks.¹⁷⁸

An official with the Penitentiary Institutions assured Human Rights Watch that all inmates are allowed to wear their own clothes and shoes, and would be provided these upon entering prison if they did not have any or if what they had were inappropriate or dirty.¹⁷⁹ When asked about the practice of producing detainees in court without shoes, Interior Minister Alonso expressed his surprise, stating that in his experience “the courts would not allow a person to be transferred in those conditions.” He added that “prisons have the obligation to respect the dignity of the person.”¹⁸⁰

The Penitentiary Regulations does not stipulate how many hours per day an incommunicado pre-trial detainee may spend outside his or her cell. A prison official told Human Rights Watch that these detainees have the right to two hours in the prison

¹⁷⁵ Human Rights Watch interview with legal aid attorney H, Madrid, June 25, 2004.

¹⁷⁶ Ibid.

¹⁷⁷ Human Rights Watch interview with defendant X, Madrid, July 13, 2004.

¹⁷⁸ Human Rights Watch interviews with defendants Y and Z, Madrid, June 23, 2004.

¹⁷⁹ Human Rights Watch interview with official, Department for Penitentiary Administration, General Directorate of Penitentiary Institutions, Madrid, July 12, 2004.

¹⁸⁰ Human Rights Watch interview with José Antonio Alonso, Madrid, July 13, 2004.

yard on their own.¹⁸¹ However, the three 11-M detainees with whom Human Rights Watch spoke said they were not allowed out of their cells for the entire *incomunicado* period. Once *incomunicado* status was lifted, they were allowed out in the prison yard, at first on their own, and then with other inmates.¹⁸²

Conditions in pre-trial detention

All but one of the 11-M detainees are being held in the closed regime. Emilio Suárez Trashorras, the first Spaniard apprehended in connection with the theft and sale of the explosives used in the attacks, is in the ordinary regime because he has been deemed a suicide risk. He shares a cell with another inmate and participates in communal activities.¹⁸³ According to an official with the Penitentiary Institutions, Zougam and one other 11-M detainee are classified as extremely dangerous and are being held in the special departments under article 91(3) described above; the rest are in the slightly less restrictive modules or centers under article 91(2).¹⁸⁴ The same official said he did not believe any of the 11-S detainees had ever been placed under the extreme security measures envisioned in the first level of the closed regime.¹⁸⁵

Yet, the defense attorneys for Mohamed Needl Acaid, Osama Darra, Najib Chaib Mohamed, Luís José Galán González, Driss Chebli, Saïd Chedadi, Mohamed Galeb Kalaje Zouaydi and Imad Eddin Barakat Yarkas all said their clients had been placed in conditions resembling solitary confinement after the March 11 bombings. Some said their clients were allowed out of their cells for one hour a day, others for two hours.¹⁸⁶ Human Rights Watch was told these measures were adopted by the General Directorate of Penitentiary Institutions following separate, and purportedly independent, recommendations from the relevant prison committees.¹⁸⁷

At least one of these, Needl Acaid, requested protective measures after he received threats from fellow inmates in the wake of 11-M. The Penitentiary Regulations allows

¹⁸¹ Human Rights Watch interview with official, General Directorate of Penitentiary Institutions, Madrid, July 12, 2004.

¹⁸² Human Rights Watch interview with 11-M defendant X, Madrid, July 13, 2004; 11-M defendant Y, Madrid, June 23, 2004; and 11-M defendant Z, Madrid, June 23, 2004.

¹⁸³ Human Rights Watch interview with official, General Directorate of Penitentiary Institutions, Madrid, July 12, 2004.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Human Rights Watch interviews with, 11-S criminal defense lawyers, Madrid and Valencia.

¹⁸⁷ Human Rights Watch interview with official, General Directorate of Penitentiary Institutions, Madrid, July 12, 2004.

the director of a given prison to adopt restrictive measures to protect the life or physical integrity of an inmate, either on his own initiative or upon request from the inmate (Art. 75.2). Though the details of this restrictive regime appear to be at the discretion of the prison director, an official in the Department for Penitentiary Administration of the General Directorate of Penitentiary Institutions told Human Rights Watch that this would mean, among other measures, only two hours alone in the prison yard per day.¹⁸⁸ According to Needl Acaid's lawyer, however, her client was placed in solitary confinement, with the right to go outside his cell for one hour alone in the prison yard per day, for roughly six weeks.¹⁸⁹

Luis José Galán González, the only Spaniard by birth indicted in the 11-S case, was among the first arrested on November 12, 2001, and has remained in pre-trial detention since November 18, 2001. After having spent virtually his entire term in prison under the ordinary regime, Galán was placed in solitary confinement in mid-April 2004, according to his lawyer.¹⁹⁰ Human Rights Watch was able to view a document from the General Directorate of Penitentiary Institutions (*Dirección General de Instituciones Penitenciarias*) dated April 19, 2004, justifying this measure. It states:

His pre-trial detention having been decreed for presumed acts related to criminal activity carried out at an international level by a terrorist organization, [he] has not made any demonstration of renunciation of the postulates and means used by it, which is evidence of his connection and as such his dangerous personality.

He is allowed to spend two hours alone in the prison yard; the rest of the day he is locked in his individual cell. Galán's lawyer told Human Rights Watch that the claim that these measures have been applied to his client and other 11-S defendants for their own protection in the wake of the March 11 bombings was disingenuous since in Galán's case, it occurred over a month after the attacks. At the time of writing, Galán had been in this restricted regime for six months. His lawyer stated that the real purpose might be to "break the physical resistance of these people."¹⁹¹

¹⁸⁸ Ibid.

¹⁸⁹ Human Rights Watch interview with criminal defense lawyer, Madrid, June 3, 2004.

¹⁹⁰ Human Rights Watch interview with Andrés Jiménez Yera, criminal defense lawyer, Madrid, June 22, 2004.

¹⁹¹ Human Rights Watch telephone interview, Andrés Jiménez Yera, criminal defense lawyer, October 1, 2004.

Human Rights Watch acknowledges that special measures may be necessary in exceptional situations to isolate certain detainees. These measures should, however, be proportionate to the justification and purposes of the restrictions.

The U.N. Committee against Torture has expressed concern over the rigors of the closed regime in Spanish prisons, in particular the limited number of hours outside per day; the exclusion from group, sport, or work activities; and the extreme security measures. “Generally speaking, it would seem that the physical conditions of imprisonment [of these prisoners] are at variance with prison methods aimed at their rehabilitation and could be considered prohibited treatment under Article 16 of the [Torture] Convention.”¹⁹² This article obligates all states parties to “undertake to prevent...other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁹³ In conjunction with article 16, article 11 obligates states parties to “keep under systematic review...arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment” to prevent all forms of cruel, inhuman or degrading treatment or punishment.

Article 10 of the ICCPR requires not only that inmates in pre-trial detention be held separately from convicted prisoners, but also that the former be subject to separate treatment appropriate to their status in order to safeguard the presumption of innocence. All of the 11-M and 11-S detainees appear to be held separately from convicted prisoners. The official from the General Directorate of Penitentiary Institutions did however say that overcrowding sometimes forces the prison system to make exceptions to this rule.¹⁹⁴ The actual treatment of international terrorism pre-trial detainees, however, does not appear to be substantially different from that of convicted prisoners. As described above, the rigors of the closed regime are applied without distinction to detainees and convicted prisoners.

¹⁹² U.N. Committee against Torture, Conclusions and recommendations of the Committee against Torture: Spain, U.N. Doc CAT/C/CR/29/3 23 December 2002), para. 11(d).

¹⁹³ Article 1 of the Torture Convention defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

¹⁹⁴ Human Rights Watch interview with official, General Directorate of Penitentiary Institutions, Madrid, July 12, 2004.

One complaint often expressed by defense attorneys on behalf of 11-M and 11-S detainees was the difficulty their clients faced obtaining reading material in Arabic. While the closed regime imposes certain restrictions on written materials, the source in the General Directorate of Penitentiary Institutions stated that there was no censorship or restrictions on the language of the materials.¹⁹⁵ Nonetheless, several detainees had been denied Arabic-language books, magazines, and newspapers, and at least two had been denied copies of the Koran. A few lawyers reported that their clients were not allowed to speak in Arabic during their weekly five-minute phone calls.¹⁹⁶

Human Rights Watch learned of one particularly disturbing instance of abusive treatment of an 11-S defendant just prior to his release on provisional liberty. Defendant J was remanded into pre-trial detention on September 18, 2003, and remained in pre-trial detention until late April 2004. He was placed under a restrictive closed regime after the March 11 bombings and was allowed outside his cell for just fifteen minutes a day on his own. On April 19, 2004, Judge Garzón ordered his release on provisional liberty, but when his lawyers went to the prison the next day, they were told he was no longer there. For the next five days, J. disappeared. As his lawyers frantically tried to locate him, J. was taken to five different prisons. During this time, he was not allowed to shower or clean himself in any way. He was not told of the order for his release, but rather that he was being transferred to the worst prison in Spain where he would surely be killed by other inmates. With Judge Garzón's diligent help, his lawyers were finally able to locate him in the Puerto de Santa María prison in Cadíz. When one of his lawyers arrived at the prison to secure his client's release, a prison guard told J.: "you're not getting out of here because you're a shitty terrorist" and threatened him that he would have to clean his cell with his tongue before going anywhere. He was eventually released. He and his lawyers have decided to postpone legal action against the prison system until after the trial.¹⁹⁷ On November 19, 2004, defendant J was remanded back in pre-trial detention.

Dispersal of detainees

Since 1989, Spain has implemented a policy of dispersing ETA inmates, both those in pre-trial detention as well as those serving sentences, all over the national territory. The government of Spain argues the policy is necessary to avoid the concentration of large numbers of ETA members, to break the control of the organization over individual members, to prevent the planning and execution of new crimes by ETA members from

¹⁹⁵ *Ibid.*

¹⁹⁶ All inmates are allowed a maximum of five phone calls per week, for five-minutes each. These calls are made within hearing of a prison guard.

¹⁹⁷ Human Rights Watch interview with 11-S criminal defense lawyers, Madrid, June 21, 2004.

within prison, and to protect victims from potential secondary victimization.¹⁹⁸ Human rights organizations and ETA itself have argued that this measure is an additional punishment.¹⁹⁹ In his February 2004 report on Spain, Special Rapporteur on Torture Theo van Boven said dispersal of detainees “apparently has no grounding in law and is applied arbitrarily.”²⁰⁰

The majority of the 11-S defendants in pre-trial detention have also been transferred from prisons near Madrid to different prisons around the country. At least three were transferred in February and early March, while at least five were relocated after the bombings. Human Rights Watch has learned that some ETA inmates were also transferred in March 2004, allegedly in response to the March 11 attacks. María Luisa Cava de Llano, First Adjunct of the Defensor del Pueblo, told Human Rights Watch that her institution had received complaints about the dispersal of ETA prisoners in response to the 11-M bombings, and had requested information from the General Directorate of Penitentiary Institutions. She explained that there would be motive for concern if this “precautionary measure” were applied on a collective, rather than individual, basis.²⁰¹

An official in the Department for Penitentiary Administration of the General Directorate of Penitentiary Institutions said the 11-S detainees were transferred for two reasons. First, because the investigative phase of the trial was over and therefore it was no longer necessary to keep the detainees near the Audiencia Nacional for hearings or interrogations. Second, space was needed in Madrid prisons to accommodate the 11-M detainees. There was no other motive, he said.²⁰²

Most of the 11-S pre-trial detainees are now hundreds of kilometers away from their families. Osama Darra, who has been in pre-trial detention since November 18, 2001, was transferred on March 7, 2004, from the Navalcarnero prison near Madrid to Pontevedra prison in the town of A Lama, in Galicia province. His wife and three

¹⁹⁸ Notes verbales from Permanent Mission of Spain to U.N, Appendix II (Observations on some of the Special Rapporteur's recommendations), Recommendation 70.

¹⁹⁹ ETA has taken extreme and violent measures to protest dispersal of ETA prisoners. On January 17, 1996, ETA kidnapped José Antonio Ortega Lara, a prison official, and held him for 532 days in starkly inhumane conditions. In a statement released after the kidnapping, ETA demanded that the government reverse its dispersal policy, calling it a “strategy of repression.” Ortega was rescued by Civil Guard agents. Amnesty International. Spain: A brief summary of Amnesty International's concerns: January-October 1997, November 1, 1997 [online], <http://web2.amnesty.org/library/index/ENGEUR410071997?open&of=ENG-2U3> (retrieved September 4, 2004).

²⁰⁰ U.N. Special Rapporteur on Torture, 2004 report on Spain, para. 51.

²⁰¹ Human Rights Watch interview with María Luisa Cava de Llano, Madrid, July 14, 2004.

²⁰² Human Rights Watch interview with official, General Directorate of Penitentiary Institutions, Madrid, July 12, 2004.

children live in Madrid and are now unable to visit him on a weekly basis, as they are entitled to, because the trip takes forty-eight hours by public transportation and they have no car.²⁰³ Mohamed Needl Acaid, also in prison since November 18, 2001, was transferred on April 17 from Aranjuez near Madrid to the A Coruña prison in Teixero, Galicia province. The new prison is 600 kilometers away from Madrid. The prison system did not notify either his family or his lawyer of the transfer; his wife found out when she went to visit him that he was no longer there. The long distance and her responsibilities for her four young children mean she is unable to visit him regularly.²⁰⁴ Imad Eddin Barakat Yarkas, who has also been in pre-trial detention for over two-and-a-half years, was transferred from the Real de Soto prison in Madrid to the Mansilla de la Mulas prison in the province of León. His wife, who had her sixth child in December 2003, does not have a car and is unable to visit him.²⁰⁵

The relocations have also made face-to-face visits between the defendants and their defense attorneys almost impossible. One lawyer said he believed his clients had been transferred to obstruct the defense.²⁰⁶ While prison visits between inmates and their lawyers are supposed to take place under conditions that ensure confidentiality, all phone calls placed by inmates, even those to their lawyers, are made within hearing of a prison guard.²⁰⁷ It should be noted that almost all the 11-S defense attorneys with whom Human Rights Watch spoke said they believed their conversations with their clients were monitored. In fact, Article 51(2) of the General Penitentiary Law and Article 48(3) of the Penitentiary Regulations allow for the taping of communications between an inmate and his criminal defense lawyer with judicial authorization. However, an official with the Penitentiary Institutions assured Human Rights Watch that this measure had not been applied to any of the 11-S pre-trial detainees.²⁰⁸ While there may sometimes be legitimate reasons for dispersal, it appears to have been a widespread practice in relation to terrorism suspects, with negative consequences both for family visits and access to lawyers.

²⁰³ Human Rights Watch interview with Sebastián Sallelas, criminal defense lawyer, Madrid, June 22, 2004.

²⁰⁴ Human Rights Watch interview with criminal defense lawyer, Madrid, June 3, 2004. The Penitentiary Regulations stipulate that all inmates have the right to "immediately communicate their entry into a penitentiary center to their family and lawyer, as well as his transfer to another establishment at the moment of entry." (Art. 41(3)).

²⁰⁵ Human Rights Watch interview with Jacobo Teijelo Casanova, criminal defense lawyer, Madrid, June 4, 2004.

²⁰⁶ Human Rights Watch interview with 11-S criminal defense lawyer, Madrid, June 22, 2004.

²⁰⁷ Penitentiary Regulations, Article 47(4).

²⁰⁸ Human Rights Watch interview with official, General Directorate of Penitentiary Institutions, Madrid, July 12, 2004.

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