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June 24, 2008

Members of the United Nations Human Rights Committee
Attn: Nathalie Prouvez, Secretary of the Human Rights Committee
UNOG-OHCHR
CH 1211 Geneva 10
Switzerland

Re: Pre-Sessional Review of Spain

Dear Committee Members,

We write in advance of the Human Rights Committee's ("the Committee") upcoming pre-sessional review of Spain to highlight a few areas of concern we hope will inform your consideration of the Spanish government's ("the government") compliance with the International Covenant on Civil and Political Rights ("the Covenant"). This submission documents Spain's treatment of unaccompanied migrant children and its counter-terrorism measures that are inconsistent with Covenant standards, and proposes issues that committee members may wish to raise with the Spanish government.

Treatment of Unaccompanied Migrant Children

There are approximately 3,000-5,000 unaccompanied migrant children currently in Spain. The majority of these children are from Africa, especially from Morocco and, to a lesser extent, Senegal.¹

¹ Human Rights Watch was unable to obtain accurate figures. Official figures on the total number of unaccompanied migrant children in Spain have proven to be unreliable. Figures are compiled by regional authorities and are not recorded in a uniform manner. Children might also be recorded multiple times in various autonomous communities due to the lack of a functioning centralized registry. The most recent figures available on the website of the Ministry of Labour and Immigration date from 2004. According to that Ministry's Childhood Observatory, 9,117 unaccompanied migrant children were taken into care that year, whereas the figure given by the Ministry of Interior for the same year was 1,873. Ministry of Labour and Social Affairs (Ministerio de Trabajo y Asuntos Sociales), *Childhood in Figures: Number 2 (La Infancia en Cifras: Número 2)*, (Madrid: 2006), <http://www.mtas.es/SGAS/FamiliaInfanc/infancia/AcuerdosConvenios/InfanciaCifras.pdf> (accessed June 20, 2008) p. 182. Ombudsperson (Defensor del Pueblo), *Report on Legal Assistance for Foreigners in Spain (Informe Sobre Asistencia Jurídica a Los Extranjeros en España)* (Madrid: 2005), p. 460. According to UNICEF, Spain reported 5,200 unaccompanied Moroccan children registered in Spanish residential centers at the end of 2007. Human Rights Watch interview with Lenin Guzman, deputy director, UNICEF Morocco, Rabat, May 9, 2008.

Unaccompanied children in Spain face detention upon arrival, abuses in residential centers, and may face expulsion without due process to countries where they are at risk of cruel, inhuman, or degrading treatment. Spain recently signed bilateral agreements with Morocco and Senegal to repatriate unaccompanied children; these agreements do not include basic procedural guarantees to ensure that children are not repatriated to situations of risk.²

This section draws on Human Rights Watch's research in Andalusia (January, February 2008), the Canary Islands (January 2007), and Ceuta and Melilla (July, October, and November 2001), and in Morocco (May and June 2008, and October and November 2001).³

Detention Upon Arrival (Covenant Articles 9 and 10)

Despite assertions to the contrary, Spanish authorities regularly detain unaccompanied migrant children upon arrival.⁴ In the Canary Islands, children told Human Rights Watch that they were taken to police or civil guard stations after they received initial assistance. Police held them there for periods ranging from a few hours to up to two weeks, during which they were brought to a hospital for age assessment.⁵ They were generally separated from adults.⁶ None of the children we

² The readmission agreement with Senegal was signed on December 5, 2006, and with Morocco on March 6, 2007. The agreements contain no provisions for the return of third-country nationals to either Senegal or Morocco. For more information on Spain's readmission agreement with Morocco, see Letter from Human Rights Watch to Prime Minister José Luis Rodríguez Zapatero, January 9, 2007,

<http://hrw.org/pub/2006/SpainMorocco010907.pdf>; and Letter from Human Rights Watch to Prime Minister José Luis Rodríguez Zapatero, April 2, 2007, <http://hrw.org/english/docs/2007/04/02/spain15628.htm>.

³ For a fuller analysis of Spain's treatment of unaccompanied migrant children, see Human Rights Watch, *Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands*, vol.19, no. 4(D), July 2007, <http://hrw.org/reports/2007/spain0707/index.htm>; and Human Rights Watch, *Nowhere to Turn: State Abuses of Unaccompanied Migrant Children by Spain and Morocco*, vol.14, no. 4(D), May 2002, <http://www.hrw.org/reports/2002/spain-morocco/>.

⁴ Police officials told Human Rights Watch that children in need of protection are "never detained" and "receive treatment in full compliance with Spanish legislation." Letter from Juan Enrique Taborda Álvarez, general secretary, Directorate General of Police and Civil Guard, Ministry of Interior, to Human Rights Watch, April 27, 2007.

⁵ In January 2007 the Prosecutor's Office of the Madrid community claimed that procedures in the Canary Islands for identifying children were flawed, noting that some children had been treated as adults by Canary Islands Police and judiciary. These children had not been reported to the Prosecutor's Office, but were instead treated as adults and received detention and expulsion orders by a judge, in the presence of a lawyer. According to the NGOs SOS Racismo and the Spanish Commission for Refugee Assistance (Comisión Española de Ayuda al Refugiado, CEAR), which referred the cases to the national ombudsperson, such treatment affected persons who physically appeared to be children but who claimed to be older than 18, but also persons who stated that they were underage including one eight-year-old and one ten-year-old who were never given an age assessment by authorities. "Múgica Criticizes Judges' Treatment of Migrant Children as Adults" ("Múgica Critica Que Los Jueces Traten Como Adultos a Los Menores Inmigrantes"), *La Razón* (Madrid), January 31, 2007, <http://medios.mugak.eu/noticias/noticia/87682> (accessed February 2, 2007); Ombudsperson (Defensor del Pueblo), "Update from the Ombudsperson" ("El Defensor al Día"), no. 23, January 2007, http://www.defensordelpueblo.es/index.asp?destino=prensa_revista.asp (accessed May 7, 2007), p. 5; Human Rights Watch email correspondence with children's rights team, CEAR Madrid, April 4 and May 8, 2007.

spoke with had access to a lawyer during this period in custody. Several children reported that they did not receive enough to eat while they were at the police and civil guard stations.⁷

The purpose of their initial detention appears to be the registration of basic data such as their name, nationality, age, identity of parents, place of origin, and how their travel to the Islands had been arranged. The interview to record this information on average lasted for about 10 minutes and in a large number of cases was conducted without an interpreter. A small minority of children said they were brought before a judge, but only jointly with adults.

Although the law provides that a child can be immediately referred to protection services even if there are doubts about his or her age, guardianship in practice is not assumed before the age is determined through an assessment.⁸ As a consequence, children interviewed by Human Rights Watch said they spent up to two weeks at police or civil guard stations with no guardian present either during this period, the initial interview, or during the age examination, and with no means to challenge the detention before a court.

Human Rights Watch urges the Committee to question the Government of Spain about its mechanisms to ensure that security forces do not detain children pending age determination, and that they immediately refer them to appropriate care institutions instead.

Lack of Effective Remedy for Abuses in Residential Centers (Covenant Articles 2(3) and 7)

Spanish authorities typically house unaccompanied children in small scale residential centers, or in some instances, in larger “emergency” centers, that tend to be overcrowded.⁹ While these centers are supposed to be open institutions, children

⁶ A report issued by members of the European Parliament noted that the separation of adults and children was insufficient at the Playa de Los Americas police station. See European Parliament, Greens/European Free Alliance, “The Situation of Migrants in the Canary Islands” (“La Situation des Migrants aux Iles Canaries”), mission conducted by H el ene Flautre from October 16-19, 2006 on the islands of Tenerife and Gran Canaria, http://www.flautre.net/IMG/pdf/Rapport_mission_Canaries.pdf (accessed May 8, 2007), p. 6.

⁷ See also the 2007 annual report of the Spanish Ombudsperson describing the case of several unaccompanied migrant children held in inadequate conditions at a Tenerife police station: Ombudsperson (Defensor del Pueblo), *Annual Report 2007* (Informe anual 2007), June 2008, <http://www.defensordelpueblo.es/index.asp?destino=informes2007.asp> (accessed June 6, 2008) p. 481.

⁸ Circular 2/2006, Various Aspects Relating to the Status of Foreigners in Spain, Attorney General, 2006, p. 82.

⁹ For example, emergency centers in the Canary Islands can hold well over 100 children, whereas capacity for intermediate term centers are limited to 20 children, and for long term residential centers to house to 12 children. The 2007 annual report by the Ombudsperson found that 93 children were housed in the wing of La Esperanza center that is designed for 70 children only. Ombudsperson, *Annual Report 2007*, p. 494. In early 2008, Human Rights Watch was informed that there were as many as 150 children in that wing. Human Rights Watch interview, 2008 (name, exact date and location withheld).

in emergency centers may be kept in almost prison-like conditions because of the center's nature, children's restricted freedom of movement, or because staff lock them in.¹⁰ Human Rights Watch has documented allegations of serious abuses of unaccompanied children in residential centers in the Canary Islands, Ceuta, and Melilla, including abusive disciplinary practices by staff, theft, extortion, and failure to protect children from physical abuse by older or larger children.¹¹

Human Rights Watch's 2007 investigation in the Canary Islands found that the Public Prosecutors, officially in charge of supervising care centers and guardianship, rarely visit residential centers for unaccompanied children and do not have the required resources to carry out their mandate.¹² Additionally, none of the 11 residential centers we visited on five islands had a confidential complaints mechanism, as required by local legislation.¹³ Children at these centers told Human Rights Watch that when outsiders did visit they typically did not speak privately with children and staff knew of the visits in advance and removed some children from the centers.

In 2007 Human Rights Watch documented allegations of high levels of violence and ill-treatment at Arinaga center, especially against younger children, perpetrated by peers as well as staff working at the center. Children at La Esperanza described widespread and very severe beatings of children in Wing One taking place during the last five months of 2006, and the use of what they characterized as "a punishment cell" located on the upper floor, where children were beaten and locked up for periods of up to several days at a time.¹⁴ Children described it as a filthy, windowless and airless cell of a few square meters in which "it was even difficult to breathe." Children locked up in this room had to urinate and defecate on the floor as they were not allowed to go to the toilet. A subsequent investigation by the Spanish

¹⁰ Children in emergency centers in the Canary Islands told Human Rights Watch in January 2007 that staff locked them in and only allowed them to leave in the company of center staff once or twice during the week for a few hours, and on some weekends. The La Esperanza emergency center for unaccompanied children is a former juvenile detention center.

¹¹ See Human Rights Watch, *Unwelcome Responsibilities*, and Human Rights Watch, *Nowhere to Turn*.

¹² The Prosecutor's Office in Gran Canaria told Human Rights Watch in January 2007 that its oversight of "Arinaga" emergency center on Gran Canaria was limited to communication with center staff; the center director told Human Rights Watch that the prosecutor never inspected the center in the five months following its opening. Human Rights Watch interviews with Maria José Ortega, Las Palmas, January 22, 2007, and with Gabriel Orihuela, director, Arinaga center, January 27, 2007. The Prosecutor's Office in Tenerife told Human Rights Watch in April 2007 that they do not have sufficient staff to carry out frequent inspection of La Esperanza emergency center on Tenerife Island. Human Rights Watch telephone interview with Manuel Campos, Tenerife, April 30, 2007. As of February 2008, this lack of inspection by the Prosecutor's Office in Tenerife remained unchanged. Human Rights Watch interview, 2008 (name, exact date and location withheld).

¹³ Decree 40/2000, of March 15, approval of rules for the organization and functioning of care centers for children within the Canary Islands autonomous community, art. 57.

¹⁴ During Human Rights Watch's 2001 research in Ceuta and Melilla, almost every child we interviewed reported suffering extortion, theft, and physical abuse by larger, older youth in the residential centers for unaccompanied children, and children in the San Antonio residential center in Ceuta reported the existence of a similar "punishment cell" used to discipline children who ran away or committed other infractions. Human Rights Watch, *Nowhere to Turn*.

Ombudsman confirmed detailed reports of abuses against children during that period by staff who have since left that workplace.¹⁵

Children in emergency centers are especially vulnerable to abuse because they have restricted freedom of movement, find themselves in an isolated location, rarely speak Spanish, are unlikely to know the location of the nearest police station or Prosecutor's office, and are not in direct contact with their guardian. Children who manage to approach law enforcement personnel with complaints about abuse can find themselves returned to their centers without any tangible action on their complaints, and at risk of retaliation.

Even when confronted with allegations of abuse in a specific residential center, Spanish authorities have shown little willingness or capacity to investigate the allegations. In February 2007 Human Rights Watch notified the Canary Islands Child Protection Directorate and the Gran Canaria Prosecutor's Office of several children's consistent allegations of abuse at the Arinaga residential center and called for an investigation. The Directorate informed us it was unable to investigate the matter because Human Rights Watch would not provide it with names and details of victims and alleged perpetrators (a decision we made to minimize the risk of retaliation against children). The April 28, 2007 investigation by the Prosecutor's Office of Gran Canaria was seriously flawed: the delegation spent only 90 minutes in the center, at a time when there were 108 children present, conducted interviews without interpreters, and apparently has not interviewed children privately, although one group of children explicitly told the delegation that they did not want to share information out of fear of being reported to staff members by another child.

Human Rights Watch urges the Committee to question the Spanish government about effective mechanisms for monitoring conditions in residential centers for unaccompanied migrant children and should seek the number and type of complaints investigated in 2005, 2006, and 2007 and the outcome of these investigations.

Illegal Repatriations to Situations of Risk, without Effective Remedy (Covenant Articles 2(3), 7 and 13)

Spanish law considers all unaccompanied migrant children to be in need of protection, and thus entitled to state guardianship (*tutela*); by law, children under state guardianship are legal residents.¹⁶ Unaccompanied children can only be repatriated "if conditions are given that children are reunited with their family or if child protection services in the child's country of origin provide adequate care."¹⁷

¹⁵ Ombudsperson, *Annual Report 2007*, p. 493.

¹⁶ Spanish Civil Code, art. 172.1; Organic Law 4/2000, modified by Organic Law 8/2000, art. 35(4).

¹⁷ Royal Decree 2393/2004, art. 92(4).

Spanish authorities nevertheless propose, issue and carry out repatriation orders that do not result in family reunification or placement in a care facility, and that put children at risk of cruel, inhuman or degrading treatment. (see *Illegal Repatriations to Morocco*, below). Children are unable to effectively challenge repatriation decisions because they lack legal status to do so and because no government agency notifies them when a repatriation order is issued or assists them in challenging the order.¹⁸

To the extent they exist at all, official procedures for making repatriation decisions vary widely among autonomous communities and even among provinces within autonomous communities. For example, in February 2008, the central government representative of Málaga province (Andalusia) told Human Rights Watch that a protocol for repatriations had been elaborated at the provincial level, while the administration in Sevilla province (Andalusia) told us that procedures for repatriations were still very much unclear. When we asked government officials in three provinces of Andalusia autonomous community to specify the entity responsible for granting the child his or her right to be heard, as required by article 12 of the Convention on the Rights of the Child and article 9 of Spanish organic law 1/1996, the answers were as varied as the number of government officials we asked. Child protection services said that the hearing has to be conducted by the central government representatives or the public prosecutors; central government representatives gave answers ranging from the public prosecutor, law enforcement bodies, child protection services and themselves; and the public prosecutor in turn intervened in a repatriation decision because the administration had not carried out the hearing. Human Rights Watch viewed one “transcript” of a repatriation “hearing” with a child that was only two sentences, and simply said that the child did not want to return.

Unaccompanied children facing repatriation are represented by their guardianship institution, the regional child protection services. Since child protection services also propose the repatriation of children, this creates a fundamental conflict of interest. Furthermore, in both the Canary Islands and Andalusia autonomous communities the executive has the power to appoint and remove the head of the guardianship institution, who thus becomes subject to influence by political parties in power. In Andalusia, authorities told Human Rights Watch that a child’s best interest is always to be repatriated to his or her family. Human Rights Watch interviewed nine officials responsible for unaccompanied children; not one could explain how a separate best interest evaluation is made, despite clear requirements in Spanish and international law.¹⁹ Instead, child protection services in Cádiz and Sevilla provinces routinely

¹⁸ See also the 2007 annual report of the Spanish Ombudsperson describing rights violations during repatriations of unaccompanied children: Ombudsperson, *Annual Report 2007*, pp. 486-489.

¹⁹ Organic Law 1/1996 of January 15, arts. 2, 11 (2); Convention on the Rights of the Child art. 3(1). Human Rights Watch interviews with Agustín López Sánchez, head of child protection services in Cádiz province, Cádiz, January 29, 2008; Francisco

propose the repatriation of children in an apparently automatic manner, and central government representatives in these provinces, the body that makes the repatriation decision, told Human Rights Watch they never question these proposals.²⁰

Neither provincial nor central government representatives in Andalusia require staff working at centers for unaccompanied children to document information that would be relevant for a repatriation decision.²¹ Instead, child protection institutions request staff to collect information on the child's identity, the contact details of the family, and the child's progress of integration in Spain.

Children under state guardianship do not have the legal capacity to initiate a judicial review of a repatriation decision and the guardianship institution fails to effectively represent the child. Hence, children are deprived of their right to an effective remedy in repatriation decisions that put them at risk of cruel, inhuman or degrading treatment. While Spanish law provides for an additional safeguard by mandating the public prosecutor to ensure that repatriation decisions are in conformity with the law, the prosecutor is not required to meet with the child or instructed to specifically verify that the decision is in the child's best interests, and the prosecutor does not attend the hearing with the child.²² Public prosecutors have challenged repatriation decisions that failed to safeguard children's interests in a few instances, but in many more cases they have not.²³

Caleros Rodríguez, secretary of the subdelegate in Cádiz and Juan Ortuño, chief of cabinet, Cádiz, January 29, 2008; Inmaculada Dugo Benítez, head of child protection services in Seville and Isabel Gragera Murillo, head of office for child welfare, Seville, February 4, 2008; Carmen Belinchón Sánchez, director general of child protection and family affairs in Andalusia, Seville, February 5, 2008; Vigente Vigil-Escalera Pacheco, area director for labour and social affairs, central government representation in Seville, Seville, February 6, 2008; Juan Alcover, area director for labour and social affairs, central government representation in Málaga, Málaga, February 7, 2008; Isidro Ramos Rengife, head of child protection services Málaga, Málaga, February 7, 2008.

²⁰ In Cádiz province, the province's prosecutor told us that child protection services proposed the repatriation of more than 60 children in 2007, and more than 50 in 2006. In Seville province, 46 children were proposed for repatriation from September 2006 to September 2007. From September 2007 to January 2008, 12 proposals for repatriation had been made by the Seville child protection services. The Andalusia minister for social affairs, Michaela Navarro Garzón, stated in front of the Andalusia parliament on October 3, 2007 that child protection services in the past four years proposed in total the repatriation of 988 unaccompanied migrant children. Andalusia Parliament, "Diary of Sessions, No. 390," October 3, 2007, <http://www.parlamentodeandalucia.es/webdinamica/portal-web-parlamento/pdf.do?tipodoc=diario&id=21293> (accessed January 12, 2008), p. 12515.

²¹ Relevant information might include a history of domestic violence, abuse, or trafficking, or the risk of labor exploitation or police abuse upon repatriation.

²² See Attorney General's instruction 6/2004; and Spanish Civil Code, art. 174.

²³ Human Rights Watch has 22 decisions on file in which judges over the past 20 months suspended repatriation decisions or ruled that they were in violation of procedural requirements and/or in violation of children's fundamental rights. In all these repatriation decisions, the offices of the public prosecutors did not intervene; instead, independent lawyers successfully challenged those decisions before court, but in an ad-hoc manner, and not as part of a standard procedure.

In contrast, Spanish law provides adult immigrants with free legal assistance during administrative or judicial expulsion procedures²⁴ and regional Bar Associations are required by law to give free advice to persons seeking legal assistance, to facilitate their requests, and to provide free legal representation.²⁵ In Andalusia, where close to one thousand children face repatriation under recently enacted plans,²⁶ the government has no mechanism to provide children with access to an independent lawyer during repatriation proceedings.²⁷ Instead, children remain represented during this administrative procedure by the institution that proposes their repatriation in a routine manner and as a result without access to an effective remedy.

Illegal Repatriations to Morocco

Spain repatriated at least 81 unaccompanied children to Morocco in 2006, and 11 in 2007; these figures do not appear to include children returned at ports of entry.²⁸ Morocco's pattern of ill-treatment of repatriated children is well-documented, and known to Spanish authorities.²⁹ Nevertheless, Spanish officials frequently assert that such repatriations are legal because children are handed over to Moroccan authorities who take responsibility for them.³⁰ In contrast, Moroccan officials

²⁴ Organic Law 4/2000, modified by Organic Law 8/2000, art. 22(1), and Royal Decree 2393/2004, art. 156(a).

²⁵ Law 1/1996, of January 10, on free legal assistance, art. 22.

²⁶ Andalusia Parliament, "Diary of Sessions, No. 390," p. 12515.

²⁷ In Málaga, Human Rights Watch was told that a child who requested a lawyer would be provided with one, but only if the child made a request. Human Rights Watch interview with Isidro Ramos Rengife, Málaga, February 7, 2008. The presence of an independent lawyer should not be made dependent on the explicit expression of will by the child. Whether the child will explicitly request a lawyer depends on the information and explanations provided to the child, the manner and language in which this information is communicated and the extent to which the child is able to understand, in accordance with his or her age and level of maturity. Instead, an independent lawyer should be part of the standard procedure to guarantee the child's right to an effective remedy.

²⁸ Human Rights Watch e-mail correspondence with UNICEF Spain, June 2008. One nongovernmental organization in Tangier told Human Rights Watch that since 2006, every day two to three children are returned from the Spanish port of Algeciras to Tangier the same day they cross. Human Rights Watch interviews with staff of a Moroccan nongovernmental organization working with unaccompanied children, Tangier, May 2008 (name and exact date withheld).

²⁹ UN human rights bodies, Human Rights Watch, the Spanish Ombudsperson's Office, and a number of Spanish nongovernmental organizations have raised the concerns of abuses during repatriations to Morocco with Spanish central and local authorities. See for example, UN Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants, Gabriela Rodríguez Pizarro, Visit to Spain, E/CN.4/2004/76/Add.2, January 14, 2004, paras. 55-56; Letter from Human Rights Watch to Prime Minister José Luis Rodríguez Zapatero, January 9, 2007; Letter from Human Rights Watch to Prime Minister José Luis Rodríguez Zapatero, April 2, 2007; Asociación pro derechos humanos de Andalucía (APDDHA), "Migraciones y Derechos del Menor Extranjero no Acompañado," 2006, <http://www.nominorsindetention.org/download/migracionesyderechos.pdf>; Defensor del Pueblo. *Annual report 2005* <http://www.defensordelpueblo.es/index.asp?destino=informes1.asp>.

³⁰ For example, the head of Málaga's child protection services told Human Rights Watch that he did not need to assess risks to repatriated children because when the Moroccan consulate agreed to issue a child a passport it was effectively taking responsibility for the child and further action on Spain's part would be interference in the affairs of a sovereign state. In Cádiz, Andalusia, the central government delegation asserted that it received written guarantees from the Moroccan consulate that Morocco would assume protection and care of repatriated children, a claim that the Moroccan consulate in Algeciras denied.

repeatedly told Human Rights Watch that Morocco has no procedures or capacity for receiving and caring for repatriated children, lacks the capacity to identify unaccompanied children in Spain or to trace their families, and lacks mechanisms to ensure that repatriated children are returned to families able to receive them.³¹ Officials of the Entraide Nationale, the government body implementing many of Morocco's programs for unaccompanied migrant children, state categorically that they do not accept repatriated children in their centers and do not provide any assistance in tracing children's families or ensuring that children are returned to their families.³²

Under current official procedures, Spain repatriates unaccompanied Moroccan children by handing children over to Moroccan border guards.³³ In practice, this results in children being detained in police lockups with adult criminal suspects and often without food and water, sometimes for days, pending a judicial decision to release the child.³⁴

NGOs and one Moroccan official Human Rights Watch interviewed in May 2008 described cases of Moroccan police busing repatriated children to the outskirts of town and abandoning them there; in other cases children with money bribed police to call a parent to pick them up. NGOs working with unaccompanied children in Tangier told Human Rights Watch that port police routinely beat children caught attempting to cross into Spain, and beat and stole money or property from repatriated children. One former unaccompanied migrant child we spoke with described being held for three days in a Tangier police lockup in late 2007: "There were 70 people with me, about 30 of them children with the youngest about 10 or 11

Human Rights Watch interviews with Isidro Ramos Rengife, Málaga, February 7, 2008; Francisco Caleros Rodríguez, secretary of the subdelegate in Cádiz and Juan Ortuño, chief of cabinet, Cádiz, January 29, 2008; Nadia Kourima, social affairs officer, Consulate of Morocco, Algeciras, January 30, 2008.

³¹ Human Rights Watch interviews with Human Rights Watch interviews with Noufissa Azelali, director of the Ministry of Social Development, Family, and Solidarity's National Institute of Social Action, Tangier, May 5, 2008; Abdeljalil Cherkaoui, executive director for social action, Entraide Nationale, Rabat, May 8, 2008; Dr. Abellah Taleb, regional coordinator of the Entraide Nationale in Tangier-Tetuan, Tangier, May 6, 2008; and Abdelatif Berdai, chef de cabinet, Andane Jazouli, advisor to the minister, and Leila Frohji, director of children's division, Ministry of Social Development, Family, and Solidarity, Rabat, May 9, 2008.

³² Human Rights Watch interviews with Abdeljalil Cherkaoui, Rabat, May 8, 2008, and Dr. Abellah Taleb, Tangier, May 6, 2008.

³³ See article 92.4 of the Royal Decree 2393/2004; and Ministry of Labor and Social Affairs Protocol on unaccompanied foreign children, cited in Observatorio de la Infancia, "Protocolo de Menores Extranjeros no Acompañados," Ministerio de Trabajo y Asuntos Sociales, Madrid, December 2005.

³⁴ See Human Rights Watch, *Nowhere to Turn*; Federación SOS Racismo, "Children Between Borders: Repatriations Without Safeguards and Abuses Against Moroccan Children" ("Menores en Las Fronteras: De los Retornos Efectuados Sin Garantías a Menores Marroquíes y de los Malos Tratos Sufridos"), 2004, http://www.mugak.eu/ef_etp_files/view/Informe_menores_retornados.pdf?revision%5fid=9202&package%5fid=9185 (accessed June 11, 2008); Ombudsperson, *Annual Report 2005 and Debates in Parliament* (Informe anual 2005 y debates en las Cortes Generales) (Madrid: Parliamentary Publications, 2006); UN Commission on Human Rights, Report of the Special Rapporteur on the human rights of migrants, Gabriela Rodríguez Pizarro, Visit to Spain, E/CN.4/2004/76/Add.2, January 14, 2004, paras. 55-56.

years old...The kids are either quiet because they are afraid, or crying for food and water. If they cry the police beat them until they are quiet.”³⁵

Repatriated children are also at risk of prosecution under Morocco’s Immigration and Emigration Law 02/03, which criminalizes “irregular emigration” from Morocco with a fine or imprisonment of up to six months, without regard to the age of the emigrant.³⁶

The risk of ill-treatment upon return is heightened because Spanish authorities do not adequately evaluate whether it is safe to return an unaccompanied child to his country of origin and do not provide children any information on their right to seek asylum or facilitate access to asylum procedures. In 2008 Human Rights Watch interviewed the mother of a Moroccan girl who was under threat of repatriation even though her family had provided Spanish authorities with evidence that she was at risk of physical abuse or murder if she returned to Morocco.³⁷ In other cases we investigated in the Canary Islands and Andalusia, Spanish authorities issued repatriation orders against children even when children’s files contained insufficient information on their background or families.

A Spanish-Moroccan readmission agreement signed March 2007 but not yet implemented lacks explicit safeguards to prevent refoulement, and does not provide for independent monitoring of the repatriation process, although it requires Spanish authorities to automatically communicate the identity of children and their families to Moroccan authorities. In practice Spanish authorities already share information on children in their custody with Moroccan consular officials, a practice that could put asylum-seekers and their families at risk.

Human Rights Watch encourages the Committee to ask the Government of Spain how repatriation procedures for unaccompanied children will be brought in line with Covenant standards to ensure that children subject to repatriation enjoy the right to an effective remedy, to independent legal representation, and will not be subject to cruel, inhuman and degrading treatment if returned.

³⁵ Human Rights Watch interview with former unaccompanied migrant child repatriated from Spain, Tangier, May 5, 2008 (name withheld).

³⁶ Immigration and Emigration Law 02/03, art. 50. Activists working with unaccompanied migrant children and a lawyer in Tangier told Human Rights Watch in May 2008 that in most cases children or their parents are required to sign a document admitting to illegal emigration, and that this document becomes part of the child’s record. In May 2008, Human Rights Watch interviewed two unrelated repatriated children and their parents who described signing documents to obtain the child’s release; in one case the parent, who is illiterate, did not know what she was signing; in the other case the father signed a document acknowledging receiving the child. Human Rights Watch interviews with Hafsa Afailal, al-Khaima Association, Tangier, May 5, 2008; and Najat Chentouf, lawyer, Tangier, May 7, 2008, and two former unaccompanied migrant children and their parents, Tangier, May 2008 (names and exact dates withheld).

³⁷ Human Rights Watch interview with the mother of a Moroccan girl facing repatriation, May 2008 (name and details withheld at the mother’s request).

Human Rights Watch encourages the Committee also to ask the Government of Spain the following questions:

- 1) Provide information on the number of unaccompanied migrant children in Spain in 2005, 2006, and 2007, and the number with pending repatriation orders, in each case disaggregated by autonomous community, age, and country of origin.
- 2) Provide information on the number of unaccompanied migrant children repatriated in 2005, 2006, and 2007, disaggregated by country of origin.
- 3) Provide information on the number of unaccompanied migrant children returned at ports of entry in 2005, 2006, and 2007 and clarify legal procedures for such returns.
- 4) Describe procedures for determining when it is in a child's best interests to be repatriated, including the criteria and sources of information used when deciding that a child can be safely returned to family or a social care institution.
- 5) Describe mechanisms to ensure a) the child's right to be heard prior to making a repatriation decision, b) the child's access to independent legal representation during each stage of the repatriation process, c) the child's access to information on his or her rights, including the right to seek asylum.
- 6) Provide information on the number of unaccompanied migrant children seeking and granted asylum in 2005, 2006, and 2007, disaggregated by country of origin.

Counterterrorism measures and respect for Covenant obligations

Human Rights Watch highlights below issues of concern with respect to counterterrorism measures in Spain that we believe breach Covenant standards. For a fuller analysis, please see Human Rights Watch Letter to the Spanish government regarding the extradition of Murad Ajmedovich Gasayev (available at <http://www.hrw.org/background/2008/spainletter0508/>) and Human Rights Watch report *Setting an Example?: Counter-terrorism measures in Spain* (available at <http://hrw.org/reports/2005/spain0105/>).

Use of diplomatic assurances (Covenant Article 7)

Human Rights Watch is alarmed that the government of Spain is considering the extradition of Murat Ajmedovich Gasayev in reliance on diplomatic assurances against torture and ill-treatment proffered by the Russian authorities.

Human Rights Watch opposes the use of diplomatic assurances against torture and ill-treatment in any case where there is an acknowledged risk of such abuse upon return. Diplomatic assurances are inherently unreliable from governments in states where torture and ill-treatment are practiced or where particular groups are routinely targeted for such abuse, as is the case with Chechens suspected of militant activities

in Russia. Our opposition to the use of diplomatic assurances has been echoed by the UN high commissioner for human rights, the special rapporteurs on torture and on counter-terrorism and human rights, and the Council of Europe commissioner for human rights, among other international human rights experts. The European Court of Human Rights has also repeatedly held that diplomatic assurances cannot provide adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to human rights principles.

Murat Gasayev, an ethnic Chechen, is wanted in connection with an attack by an armed group on government buildings in the Republic of Ingushetia in June 2004. Gasayev was detained for three days in August 2004 by the Federal Security Service (FSB) in Ingushetia, and claims that during his interrogation, he was tortured and ill-treated. He was then released without charge. The extradition request from Russia appears to be based on subsequent statements by another detainee, Idris Matiev, who named Gasayev as a participant in the June 2004 actions while under interrogation by the FSB. Matiev later retracted this statement, alleging he was subjected to beatings, torture with electricity and threats against his family.

Murat Gasayev argues he faces a real risk of torture and ill-treatment, as well as the denial of a fair trial due to the potential use of evidence extracted under torture, if extradited to Russia. The widespread torture and ill-treatment, and continuing enforced disappearances, in the Northern Caucasus in the context of counterterrorism or counterinsurgency operations by the Russian security apparatus are well-documented by Russian and international rights organizations.³⁸

We understand that the Audiencia Nacional refused Gasayev's appeal against extradition in large measure as a result of diplomatic assurances from the Russian authorities contained in a set of letters transmitted to the Spanish government in 2007. These assurances included undertakings that Gasayev's conditions of detention would comport with article 3 of the European Convention on Human Rights, he would not be subjected to the death penalty, and he would be eligible for parole after 25 years in prison if convicted to a life sentence.

Moreover, the Russian authorities guaranteed that in conformity with Part II of the UN Convention Against Torture, members of the Committee Against Torture would be permitted to visit Gasayev in detention and to conduct private interviews with him; it is clear from the court documents that this guarantee of monitoring visits by the CAT played a pivotal role in the court's decision to approve Gasayev's extradition. However, it is critical to point out several serious problems with the Russian

³⁸ See for example Memorial, *A Conveyor of Violence: Human Rights Violations During Anti-Terrorist Operations in the Republic of Ingushetia*, Human Rights Center Memorial, <http://www.memo.ru/eng/memhrc/texts/5report9.shtml> (accessed May 6, 2008)

authorities' naming of the committee to conduct post-return monitoring of Gasayev's detention conditions and treatment:

- At the time the assurances were requested and provided, neither the Committee Against Torture, nor the UN Office of the High Commissioner for Human Rights, was seized of the Gasayev case. There apparently was no consultation with the very organs of the UN named as monitors.
- There is no provision in Part II of the Convention Against Torture for the type of ad hoc post-return monitoring of a single individual guaranteed by the Russian government. Article 20 of the Convention Against Torture provides for representatives of the committee to make a visit to a state party, but only in the context of a more general inquiry resulting from information that torture is systematically practiced in that state. Article 20 cannot be read as creating a role for the committee to monitor a sole detainee as a function of a guarantee contained in a bilaterally negotiated set of diplomatic assurances. Such assurances are negotiated outside the formal UN treaty system, do not include any enforcement mechanism, and thus are not legally binding.
- The role of the Committee Against Torture in monitoring the implementation of the Convention Against Torture has never involved the practice of visiting detention centers. There is simply no precedent for this activity, and currently there is no monitoring capacity or funding available for such monitoring. The Russian government clearly did not intend to refer to the Optional Protocol of the Convention Against Torture, which does establish an international monitoring body, since Russia is not a party to the OPCAT.
- The Committee Against Torture has issued recommendations and conclusions, and decisions in individual petition cases, raising serious concerns about the growing reliance on diplomatic assurances against torture and ill-treatment by states parties to the Convention Against Torture (see, e.g., *Agiza v. Sweden*; *Pelit v. Azerbaijan*). The committee has also stated that governments should not rely on diplomatic assurances against torture from states that systematically violate the provisions of the Convention Against Torture. The Human Rights Committee has also pronounced on the issue of diplomatic assurances in the case of *Al-Zery v. Sweden*, having found that assurances from Egypt were insufficient to protect Mr. al-Zery, who was tortured and ill-treated upon return to Cairo despite diplomatic assurances to the contrary.

Post-return monitoring on an ad hoc basis cannot, in and of itself, protect a detainee from abuse. Even if the committee had agreed to conduct visits to Gasayev to monitor his treatment upon return, that initiative could not be considered adequate to ensure his safety. UN High Commissioner for Human Rights Louise Arbour has written that “[b]ased on the long experience of international bodies and experts, it is

unlikely that a post-return monitoring mechanism set-up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, often are reluctant to speak about their suffering, or are not believed if they do.”

In response to a query from Gasayev’s lawyer, the Committee Against Torture confirmed in a letter dated May 23, 2008, that it would not be possible, given the functions of the Committee, for it to conduct post–return monitoring of this kind.

In other respects, the assurances against torture offered by Russia in the Gasayev case merely restate its key obligations under the European Convention on Human Rights. According to our and others’ research, however, Russia has routinely failed to honor its legally-binding treaty commitments and the practice of torture and ill-treatment of persons continues, in particular against Chechens, and also in the context of counter-terrorism or counter-insurgency cases in the Northern Caucasus. There is an unacceptable risk that a breach of these assurances would only be discovered after torture has already occurred.

Furthermore, the government of Russia has failed to abide by diplomatic assurances it has offered in the past. In 2003, Russian authorities denied a delegation of the European Court of Human Rights access to five extradited Chechens. Georgia had extradited the men in October 2002 despite a request from the Court that it suspend any transfer until it had had an opportunity to review the cases. The Russian authorities had subsequently offered diplomatic assurances, including guarantees of unhindered access for the Chechens to appropriate medical treatment, to legal advice, and to the European Court itself. In its April 2005 ruling, the Court found that Russia had violated the European Convention (article 38) by “obstructing the Court’s fact-finding visit and denying it access to the applicants,” having thereby “unacceptably hindered the establishment of part of the facts in this case.”³⁹ The Shamayev court also ruled that the extradition to Russia of one of the men remaining in Georgia would violate article 3, despite the assurances of humane treatment from Moscow.

We also draw the Committee’s attention to the European Court of Human Rights decision of August 10, 2006, in the case of *Olaechea Cahuas v. Spain* (Application No. 24668/03). The Audiencia Nacional approved the extradition of Adolfo Héctor Olaechea Cahuas, a suspected member of the Shining Path (*Sendero Luminoso*) organization, in part in reliance on diplomatic assurances from Peru that he would

³⁹ European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, Application No. 36378/02, October 12, 2005, <http://cmiskp.echr.coe.int////tkp197/viewhbkkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=10174%sessionId=7463075%skin=hudoc-en%attachment=true> (accessed May 5, 2008).

not be tortured or ill-treated. The European Court issued an order for interim measures to stay the extradition until the court had the opportunity to review the applicant's file. The Spanish authorities ignored this injunction and executed the extradition, which the European Court determined to be in violation of article 34 of the ECHR involving the effective exercise of the right of individual application. This case is of interest with respect to reliance upon diplomatic assurances and Spain's *nonrefoulement* obligation, and also to Spain's commitments under the First Optional Protocol to the ICCPR.

We urge the Committee to ask the Spanish government about this and other cases involving the use of diplomatic assurances to transfer individuals to countries where they face a risk of torture or prohibited ill-treatment. Further, the Spanish government should be called upon to clarify its position on the use of diplomatic assurances generally, with a view to ensuring that the absolute prohibition against torture and ill-treatment under article 7 of the Covenant is always guaranteed.

Incommunicado detention (Covenant Articles 7 and 14)

Human Rights Watch remains deeply concerned about the use of incommunicado detention in Spain. Our conclusions are based on research conducted in 2004, but we regret that the laws and procedures have remained unchanged over the past four years. The Code of Criminal Procedure permits terrorism suspects to be held incommunicado for up to thirteen (13) consecutive days. Though incommunicado detention is not prohibited per se by international human rights law, there is significant consensus among United Nations human rights bodies, including the Committee, that it can give rise to serious human rights violations and should thus be prohibited.

Terrorism suspects may be held for five (5) days in incommunicado police detention. During this time, these detainees 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. Incommunicado detainees do not have the right to designate a lawyer, but must be assisted instead by a legal aid attorney. Furthermore, these detainees do not have the right to a private consultation with their lawyer.

Once the preliminary police investigations are concluded, and in any event no later than five days after the arrest, a detainee must be brought before a competent judicial authority. The judge may order the individual released without charge, released on provisional liberty, or remand the individual into pre-trial detention. At this point, the judge may impose an additional five (5) days of incommunicado status in pre-trial detention, and an additional three (3) days at any time, either immediately or at a later stage. This means the judge is at liberty to impose a total of

eight (8) consecutive days of incommunicado detention in pre-trial detention, or alternatively, to impose five (5) days and then three (3) days at a later date.

Incommunicado detainees are held in isolation and have severely curtailed access to counsel at a critical stage in the legal proceedings against them. These detainees only see a lawyer for the first time when they are called to give an official police statement, an event that may occur after three or even five days in custody. Furthermore, they 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 to the judge. The prohibition of a direct, private attorney-client conference deprives the lawyer of any opportunity to collect detailed information relevant to the detainee's case, preventing the lawyer from challenging the lawfulness of the detention and from making an effective application for provisional release as long as incommunicado status is maintained.

The Spanish government has thus far ignored or rejected appeals by international human rights authorities to modify or abrogate the incommunicado regime. In 1996, the Committee recommended that Spain abandon the regime. The Committee against Torture and the special rapporteurs on torture and on counterterrorism and human rights have expressed concern about this issue, as have the Council of Europe Commissioner for Human Rights and the European Committee for the Prevention of Torture.

Human Rights Watch encourages the Committee to ask the Spanish government about the compatibility of incommunicado detention with its Covenant obligations. In particular, it should ask the government what justifications exist for delaying access to a lawyer and for denying incommunicado detainees the right to confer in private with their lawyers. The government should explain whether and when it plans to modify the incommunicado detention regime so that it complies in full with its Covenant obligations.

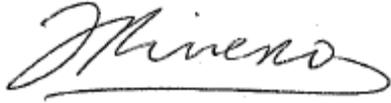
We hope you will find these comments useful and would welcome an opportunity to discuss them further with you. Thank you for your attention to our concerns, and with best wishes for a productive session.



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