UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/CN.4/2004/G/19
4 March 2004

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS
Sixtieth session
Item 11 (a) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF TORTURE AND DETENTION

Notes verbales dated 20 January 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

The Permanent Mission of Spain to the United Nations Office and other international organizations with headquarters in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights, hereinafter referred to as OHCHR, and, with regard to the latter's note verbale No. 002/2004, concerning the unedited version of the report of the Special Rapporteur on the question of torture concerning Spain (E/CN.4/2004/56/Add.2), wishes to convey the firm belief of the Spanish Government that this provisional version of the report contains so many major factual errors that the conclusions drawn by the Special Rapporteur are seriously undermined, with the result that the report is virtually unacceptable in its entirety, being unfounded and lacking in rigour, substance and method.

The 11-line Summary that precedes the report states that the report "contains a study of the legal and factual aspects regarding allegations of torture or ill-treatment".

Yet as the documentation attached to this note explains in detail, and for the reasons indicated there, the "legal aspects" are inadequately presented in the report of the Special Rapporteur and contain numerous factual errors relating to the existing legal order in Spain.

As regards the "factual aspects", much of what is contained in the report of the Special Rapporteur is information that has not been verified, or has been obtained at second hand or from unidentified sources, information that, moreover, is lacking in even the most basic details that

would allow its credibility to be established. Yet the Special Rapporteur gives these reports credence, and consequently uses them to include in his report serious allegations concerning the situation of human rights in Spain that are false.

Particularly serious factual errors on the part of the Special Rapporteur, among the many noted in the annexed document, are to be found in paragraphs 26, 27, 28 and 57, which show that the Special Rapporteur did not take into account extremely important information provided by the Government. As a result, the Special Rapporteur levels the serious accusation that a "wall of silence" is being maintained by the authorities and society in Spain as they deny the existence of torture or ill-treatment.

On the other hand, the Special Rapporteur has collected alleged statements from sources identified only as "former detainees", whose anonymity the Government believes is completely unjustified. The Special Rapporteur considers these sources to be credible precisely because "a certain pattern had emerged" from their statements. From this Mr. Van Boven goes on to conclude that these statements cannot be considered to be "fabrications". It is outrageous that the Special Rapporteur should have failed to consider that the versions of these "former detainees" might agree precisely because they were acting on the basis of instructions from the organization to which they belonged.

Notwithstanding the foregoing, and as proof of the Spanish Government's determination to continue working with OHCHR and mechanisms for the promotion and protection of human rights, the Permanent Mission of Spain wishes to state the following:

1. In observance of the time limit specified for this purpose by the Office of the United Nations High Commissioner for Human Rights, the Government of Spain is transmitting herewith an annex to this note setting out in detail the most glaring factual errors contained in the report of the Special Rapporteur. Spain hopes that these errors will be immediately corrected so that the edited version of the report may be issued without them.

2. The Government of Spain deeply regrets, and wishes to place on record its strong protest, that it was not given any opportunity to submit objective amendments to the recommendations and conclusions contained in the unedited version of the report of the Special Rapporteur. The position of the Government of Spain is that the many factual errors contained in the body of the report are so serious and of such magnitude that they totally vitiate the report and invalidate its conclusions and recommendations. If these factual errors were to be corrected, as they must be by any Special Rapporteur wishing to submit an impartial and rigorous report, the conclusions and recommendations would of necessity be quite different.

3. In the next few days the Spanish Government will transmit to OHCHR a second document, in addition to the one annexed to this note, containing remarks it feels it must make regarding the substance of the report; these remarks categorically and firmly reflect the Spanish authorities' indignation and rejection of the explicit and implicit tenor of the provisional document submitted by Mr. Van Boven, which are unworthy of a Special Rapporteur holding such an important mandate from the Commission on Human Rights. This second document will, once again, reflect the factual errors which the Special Rapporteur has not felt necessary to correct in the edited version of his report.

The Government of Spain wishes to reiterate to OHCHR its desire to see the document containing its remarks issued concurrently with the edited version of the report of the Special Rapporteur.

Geneva, 20 January 2004

The Permanent Mission of Spain to the United Nations Office and other international organizations with headquarters at Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights (OHCHR) and wishes to draw attention to the edited version of the report of the Special Rapporteur on the question of torture concerning Spain (E/CN.4/2004/56/Add.2), which was transmitted to the Permanent Mission by electronic mail on 28 January 2004.

The Spanish Government feels compelled to convey to this Office, and through it to the Special Rapporteur, its astonishment at and rejection of the fact that the document in question contains statements attributed to the Minister of the Interior of the Kingdom of Spain that he never made.

1. Astonishment to find that the edited version of the report still contains, in paragraph 31 (page 15 of the Spanish version), a false statement attributed to the Minister. And this occurs despite the fact that this error had been rectified in the proposed corrections of the factual errors in the Special Rapporteur's first draft that were submitted by this Mission, corrections which had stressed that the Minister of the Interior had never said that it was he who had ordered the closing of the newspaper *Egunkaria*.

2. Astonishment again upon learning that the Special Rapporteur has refused to change a statement made in the initial version of his report despite the fact that this statement is, it must be repeated, inaccurate.

3. Astonishment upon discovering in paragraph 30 (page 14 of the Spanish text) that the Special Rapporteur himself states that the newspaper *Egunkaria* was closed by a decision of the Audiencia Nacional, which is true and thus in total contradiction with the statement attributed to the Minister of the Interior in the following paragraph.

4. And, finally, astonishment upon seeing that what might at first glance have seemed to be a simple error in the notes of the Special Rapporteur and those who accompanied him, has become, in the edited version of the report, an allegation totally devoid of any basis, which the Special Rapporteur has retained for reasons known only to himself. The Minister never said any such thing, and the Spanish Government is distressed by the Special Rapporteur's stubborn insistence on maintaining the contrary.

In the light of this situation, the Government of Spain categorically rejects the statements of the Special Rapporteur by which he implicitly levels a serious accusation against the Minister of the Interior of the Kingdom of Spain, given that these statements, first of all, are totally untrue and, what is more, attribute to the representative of a democratic Government powers that are strictly illegal under the Spanish legal order.

The Spanish Government would like once again to make a formal protest with regard to this matter, which it will reiterate shortly with the utmost firmness in its additional substantive remarks that it is about to transmit to this Office in order that they might accompany the Special Rapporteur's report when it is issued.

Lastly, the Permanent Mission of Spain requests the Office of the United Nations High Commissioner for Human Rights to arrange for the contents of this note verbale to be included as an annex to the edited version of the report of the Special Rapporteur when it is issued.

Geneva, 2 February 2004

The Permanent Mission of Spain to the United Nations Office and other international organizations with headquarters in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights and, pursuant to its earlier communications regarding the report of the Special Rapporteur on the question of torture concerning Spain, wishes to convey to the Office the final document containing the substantive remarks of the Government of Spain concerning the aforementioned report.

In transmitting this document, the Government of Spain wishes to reiterate formally its understanding that, in accordance with its repeated requests, when the report of the Special Rapporteur is issued, either in print or electronically, it shall be disseminated with the following documents attached contiguously, simultaneously and indivisibly:

1. Note verbale No. 025/2004 dated 20 January 2004 from the Permanent Mission of Spain, together with the document prepared by the Government of Spain concerning the serious factual errors identified in the unedited version of the report of the Special Rapporteur;

2. Note verbale No. 037/2004 dated 2 February 2004 from the Permanent Mission of Spain, which draws attention to the incomprehensible retention of certain especially serious factual errors in the edited version of the Special Rapporteur's report; and

3. The present note verbale, No. 050/2004, dated 11 February 2004, together with the document prepared by the Government of Spain containing its final substantive remarks concerning the report of the Special Rapporteur.

To be more precise, the Permanent Mission of Spain would stress that the need to issue the report contiguously, simultaneously and indivisibly refers not only to the aforementioned notes verbales, but also to the documents attached thereto (i.e. the document on factual errors contained in the report, which was attached to the note verbale of 20 January 2004 [annex I],* and the document containing the remarks of the Government of Spain, which is attached to the present note [annex II]**).

Geneva, 11 February 2004

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** Reproduced as received, in English and Spanish.

ANEXO 1

ERRORES DE HECHO DETECTADOS EN EL INFORME SOBRE ESPAÑA DEL RELATOR ESPECIAL SOBRE LA TORTURA, SR. THEO VAN BOVEN

MANDATO DEL RE: consideraciones relativas a los errores observados en el resumen y en los párrafos 1 a 4 del Informe

Es preciso subrayar, como hace el propio Relator Especial, que su visita se produce a invitación del Gobierno de España en el marco de una invitación abierta del Gobierno español a los mecanismos de protección y promoción de los derechos humanos de las Naciones Unidas, inspirada en el principio de máxima colaboración del Gobierno con las diferentes instancias y organismos internacionales con competencia en este ámbito.

A título de ejemplo, en los últimos seis años, además de las visitas del Comisario de Derechos Humanos del Consejo de Europa, D. Álvaro Gil Robles, y del anterior Alto Comisionado de las Naciones Unidas para los Derechos Humanos, Sr. Vieira de Melho, España ha recibido, en cinco ocasiones, la visita del Comité Europeo para la Prevención de la Tortura y de las Penas y Otros Tratos Inhumanos o Degradantes (CPT), ha presentado sus informes ante el Comité contra la Tortura de Naciones Unidas (CAT) y ha respondido a cuantas peticiones de información le ha solicitado el Relator Especial sobre la Tortura.

El Gobierno español no limitó ni temporalmente ni en su ámbito geográfico la visita del Relator. Tanto la duración como el calendario fueron fijados con total libertad por él, sin que se estableciesen límites que condicionasen su desarrollo. El Gobierno español proporcionó cuanta documentación y apoyo logístico pidió el Relator. Fue él, como señala en su Informe quien decidió no visitar centro de detención alguno, lo cual le privó de un importantísimo elemento de información directa y personal.

Sus comentarios sobre el trato dado a inmigrantes y gitanos no sólo ignoran y contradicen las vertidas en su estudio por la Relatora Especial sobre Derechos Humanos de Migrantes, Dra. Gabriela Rodríguez Pizarro, en su reciente visita a España los días 15 a 26 de septiembre de 2003, sino que además se producen con absoluta imprecisión y sin cita de fuentes que permitieran llevar a cabo la investigación de los hechos denunciados y su esclarecimiento.

A lo largo del Informe el Relator incurre en una sistemática y llamativa omisión de los esfuerzos llevados a cabo por el Estado español para que su lucha de forma eficaz contra el terrorismo se lleve a cabo con el máximo respeto, no sólo del derecho a la vida y a la integridad física, con absoluta prohibición de la tortura y de cualquier trato inhumano o degradante, y, en general, con el máximo respeto a todos los derechos y libertades fundamentales de los ciudadanos.

El Informe parte de un gravísimo error metodológico: el Relator califica su viaje de "*fact-finding mission*", esto es, una misión de investigación de los hechos. Este objetivo de su misión no se ha cumplido, porque en todo su Informe no encontramos "hechos probados" sino “supuestas informaciones", en su mayoría anónimas o recibidas de “grupos / fuentes no

gubernamentales/ ONGs". El Relator coloca al Gobierno en una situación en la que no le es posible rebatir "hechos" sobre los que el Sr. Van Boven no facilita la más mínima información ni precisiones.
El entorno abertzale ha procurado manipular la institución del Relator Especial para utilizarla dentro de su estrategia de propaganda. Esta estrategia está compuesta por unas pautas para la denuncia (Boletín incautado al Comando ARABA de ETA, sobre el que se facilita información más adelante), organizaciones dedicadas a la "recogida de información" sobre las torturas (Torturarem Aurkako Taldea, Behatokia), y una estructura internacional para su difusión, cuyo principal elemento dentro de Naciones Unidas es el presunto etarra Julen Arzuaga, que actúa en este ámbito de manera intermitente, amparado por la acreditación de la ONG "Liga para los Derechos y la Liberación de los Pueblos". Gracias a esta red de propaganda internacional, el mundo abertzale consiguió introducir en el sistema de Naciones Unidas una serie de denuncias que, por el mero hecho de incluirse en el Informe del Relator Especial, adquieren un sello de "respetabilidad" y que, convenientemente manipuladas, permiten perpetuar la idea falsa de que en España la tortura es habitual.

Julen Arzuaga Gumucio está procesado por Auto del Juzgado Central de Instrucción nº 5 de la Audiencia Nacional, en el procedimiento 33/01 por pertenencia a banda armada. La libertad provisional, de la que actualmente disfruta hasta que, en su caso, se dicte sentencia firme, es el resultado de aplicar el sistema de garantías establecido por el ordenamiento jurídico español.

El Relator hizo declaraciones antes de su viaje a España sobre cuestiones clave, como la dispersión de presos etarras y la prisión incomunicada ("facilita la práctica de torturas"), sobre las que luego formula conclusiones tajantes, y casi coincidentes en su Informe, que ponen de manifiesto sus ideas preconcebidas sobre la realidad española. El viaje ha servido para exponer una visión supuestamente contrastada, que no ha sido modificada en modo alguno por la información facilitada por las Autoridades competentes, cuyos argumentos se recogen en el Informe del Relator de modo muy parcial, cuando no tergiversados, y sin concederles verosimilitud.

El Relator reviste así su Informe de un supuesto equilibrio en cuanto a las fuentes que queda desvirtuado por su modo sesgado de recoger la información.

INTERLOCUTORES: consideraciones relativas a los errores observados en los párrafos 5 a 7 del Informe

Hay que añadir a la lista de sus interlocutores los siguientes, que han sido omitidos en los párrafos 5 y 6:

-Director General de la Guardia Civil, Sr. Valdivieso
-Director General de Modernización de la Justicia, Sr. Alberto Dorrego
-Consejero de Justicia del Gobierno de la Comunidad Autónoma Vasca, Sr. Azcárraga

Asimismo, en el párrafo 5 ha de corregirse el cargo que desempeña el Sr. Agustín Núñez, en los siguientes términos: *Director General para Asuntos del Consejo de Seguridad de las Naciones Unidas*.

Representantes de organizaciones no gubernamentales:

Sería conveniente que el Relator aportase la lista completa de sus interlocutores, tanto ONGs como miembros de la profesión legal y judicial, en aras de una absoluta transparencia, que por parte de las autoridades se ha respetado en todo momento. En el párrafo 7, hay ausencias destacadas entre los interlocutores del Relator, tales como el *Foro de Ermua*. El mismo detalle que emplea a la hora de identificar con nombre y cargo a todas las autoridades públicas, debería predicarse igualmente respecto de sus interlocutores no gubernamentales.

MARCO LEGISLATIVO ESPAÑOL

Sobre el análisis que hace el Relator de la penalización de la tortura en el derecho español, conviene hacer una serie de precisiones. La primera es que las modificaciones que se han ido introduciendo en nuestro sistema legal van todas orientadas a un mismo fin: la mayor y mejor protección de los Derechos Humanos, adecuando la legislación a las nuevas realidades sociales españolas, y por supuesto, reforzando la protección de los ciudadanos frente a la tortura y otros tratos inhumanos y degradantes.

PÁRRAFO 11

En relación con el derecho interno español, es indispensable la inclusión de referencias fundamentales, relativas al Estado de Derecho, que a nivel constitucional son :

El art. 1.1 de la Constitución española (CE), que establece que *"España se constituye en un Estado social y democrático de Derecho, que propugna como valores superiores de su ordenamiento jurídico la libertad, la justicia, la igualdad y el pluralismo político".*

El apartado primero del artículo 10 (cuyo apartado segundo sí cita el Relator) es clave para comprender los límites de toda acción del Estado: *"La dignidad de la persona, los derechos inviolables que le son inherentes, el libre desarrollo de la personalidad, el respeto a la ley y a los derechos de los demás son fundamento del orden político y de la paz social "* .

El Relator cita de modo incorrecto el Art. 10.2, que dice textualmente: "las normas relativas a los derechos y libertades fundamentales reconocidas por la Constitución - en el Título I - se interpretarán en conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre la materia ratificados por España".

El Presidente de la Sala de lo Penal del Tribunal Supremo manifestó al Relator que el Tribunal Constitucional ha hecho una lectura muy amplia de este artículo 10 de la CE, incorporando no sólo tratados y acuerdos, sino también la jurisprudencia del Tribunal Europeo de Derechos Humanos (en materia, por ejemplo, de intervención de comunicaciones, registros de domicilios, etc.).

Es llamativo que el Informe omita mencionar al Tribunal Constitucional y sus competencias para conocer de la vulneración de derechos fundamentales a través del recurso de amparo

(arts.161 y 162), para cuya interposición están legitimada toda persona natural o jurídica que invoque un interés legítimo, así como el Defensor del Pueblo y el Ministerio Fiscal.

La referencia constitucional al poder judicial resulta clave para entender su importancia como garante de los derechos humanos, tal y como se recoge en el artículo 53.2 y 117, en el primero de los cuales se establece que:

"Cualquier ciudadano podrá recabar la tutela de las libertades y los derechos reconocidos en el artículo 14 y la sección primera del Capítulo II (derechos especialmente protegidos) ante los tribunales ordinarios por un procedimiento basado en los principios de preferencia y sumariedad y, en su caso, a través del recurso de amparo ante el Tribunal Constitucional".

El Relator también omite referirse al Ministerio Fiscal, cuyas funciones en defensa de la legalidad y derechos de los ciudadanos y actuación conforme al principio de imparcialidad, se sancionan en el artículo 124 de la Constitución.

Es sorprendente la falta de referencia a la entrevista mantenida por el Relator con el Defensor del Pueblo, con la salvedad de su cita nominativa como entrevistado. La Constitución española crea (artículo 54) la figura del Defensor del Pueblo como mecanismo de control y de supervisión de la actuación de la Administración en relación con los derechos y libertades fundamentales, y como garantía de los mismos.

PÁRRAFO 12

Sobre el análisis que hace el Relator de la tipificación del delito de tortura en el derecho español, conviene hacer una serie de precisiones, ya que su Informe contiene en este punto numerosos errores:

El Relator confunde el proyecto de Ley que modificaría el artículo 174 del Código Penal. El Relator hace referencia al proyecto 621/000145, que se refiere a la Ley Orgánica 11/2003 de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros, por la que se modifica, entre otras, la Ley Orgánica 10/1995 de 23 de noviembre del Código Penal, pero que nada tiene que ver con el asunto contenido en el párrafo 12 de su Informe, la tipificación penal del delito de tortura.

La redacción actual del artículo 174 del Código Penal, que tipifica el delito de tortura, se debe a la Ley Orgánica 15/2003 de 25 de noviembre.

Igualmente, es importante señalar que la afirmación del Relator de que el artículo 174 del Código Penal "no contempla que la tortura puede practicarse a instigación de o con el consentimiento de un funcionario público o de otra persona que actúe con capacidad oficial", resulta totalmente infundada: la figura de la instigación está castigada en el artículo 28 del propio Código Penal, que establece que son autores de los delitos tanto los que los cometen materialmente como los que inducen a otros a cometerlos, y aquellos que cooperan en su comisión.

La nueva redacción del artículo 174 del Código Penal incorpora además la comisión de tortura por autoridad pública "por cualquier razón basada en algún tipo de discriminación".

El Código Penal también regula como figuras delictivas autónomas la instigación, la conspiración, proposición y provocación para delinquir (arts. 17 y 18). El artículo 532 regula también como delito la actuación con imprudencia grave, y el artículo 176 castiga expresamente al funcionario que permita o consienta que otro torture.

Es falsa la afirmación del Relator en su Informe de que "ni el Código Penal ni la reforma en curso" consideran que la violación cometida por un funcionario público durante la detención constituya un delito de tortura. Por el contrario, el artículo 177 del Código Penal lo castiga. Y se castigaría al culpable por dos delitos: por la comisión del delito de tortura y, además, por la comisión del delito de violación.

El error fáctico en que incurre aquí el Relator, al recoger de forma errónea e incompleta la legislación española, ofrece al lector de este Informe la impresión de que España cuenta con un marco legal deficiente y caldo de cultivo de impunidad, lo cual es absolutamente falso. La instigación a la tortura, el consentimiento en su práctica y la tortura cometida por medio de la violación sí están tipificadas como delito en el Código Penal español.

Además, la normativa disciplinaria especifica de las Fuerzas y Cuerpos de Seguridad tipifica como infracción muy grave los supuestos de inducción o encubrimiento de todo tipo de infracciones o delitos cometidos por sus miembros, atribuyéndoles en estos casos la correspondiente responsabilidad disciplinaria, además de la que les pudiera recaer en el ámbito procesal-penal.

PÁRRAFO 13

El Relator debería transcribir literalmente en su Informe el artículo 17 de la Constitución, que le fue enviado por las autoridades españolas, y que es fundamental para la comprensión del régimen de la detención:

"1. Toda persona tiene derecho a la libertad y a la seguridad. Nadie puede ser privado de su libertad, sino con la observancia de lo establecido en este artículo y en los casos y en la forma previstos en la ley.

2. La detención preventiva no podrá durar más tiempo del estrictamente necesario para practicar las averiguaciones tendentes al esclarecimiento de los hechos. En todo caso en el plazo máximo de 72 horas el detenido deberá ser puesto en libertad o a disposición de la autoridad judicial.

3. Toda persona detenida debe ser informada de forma inmediata y de modo que le sea comprensible de sus derechos y de las razones de su detención no pudiendo ser obligada a declarar. Se garantiza la asistencia de abogado al detenido en las diligencias policiales y judiciales, en los términos que la ley establezca.

4.La ley regulará un procedimiento de habeas corpus para producir la inmediata puesta a disposición judicial de toda persona detenida ilegalmente. Asimismo por ley se determinará el plazo máximo de duración de la prisión provisional."

PÁRRAFO 14

El Relator cita de modo incorrecto el artículo 520.2 de la Ley de Enjuiciamiento Criminal, al decir que "los motivos de la detención serán comunicados de palabra (*orally*) al detenido"; el artículo citado dice en realidad que ello debe ser hecho "de modo que al detenido le sean comprensibles los hechos y razones de la detención", siguiendo fielmente el artículo 17.3 de la Constitución.

El artículo 520.2c recoge además el "derecho a designar abogado y a solicitar su presencia para que asista a diligencias policiales y judiciales de declaración e intervenga en todo reconocimiento de identidad de que sea objeto". Lo que el Relator dice erróneamente es que según el art. 520.2C "los detenidos deben tener acceso a un abogado de su elección".

Ante nuestro ordenamiento jurídico nadie puede ser detenido sin que se le preste la debida asistencia letrada. El derecho a la asistencia letrada es fundamental ya desde la misma fase de la detención. Tal es así que el artículo 537 del Código Penal castiga a la autoridad que obstruya el derecho a la asistencia a abogado del detenido o preso, favorezca su renuncia o no le informe de sus derechos. (Véase el punto de detención incomunicada).

PÁRRAFO 15

En primer término, resulta errónea la afirmación de que las garantías legales durante el arresto y la detención "cambian en casos de delitos específicos". Ello no es correcto desde un punto de vista técnico-jurídico, puesto que las garantías no cambian sino que se gradúa su ejercicio.

Es preciso que el Relator, en vez de utilizar puntos suspensivos, especifique cuales son los derechos que pueden ser suspendidos en virtud del artículo 55.2 de la Constitución, que son únicamente tres: el 17.2 (duración de la detención), el 18.2 (secreto de comunicaciones) y el 18.3 (inviolabilidad del domicilio). Estos son los únicos derechos que pueden ser suspendidos, y además con numerosos requisitos previos, entre ellos el de la promulgación de una Ley Orgánica.

PÁRRAFO 16

La actual redacción de los artículos que regulan el régimen de incomunicación policial, fue introducida en la Ley de Enjuiciamiento Criminal por Ley Orgánica 4/88 de 25 de mayo y no en 1998, como se dice en el Informe.

El presente párrafo del Informe es erróneo porque el Relator asume como automática la incomunicación de los detenidos por delitos terroristas, desde el instante mismo de la detención y extendida a un período de cinco días desde el inicio.

El régimen general de la duración de la detención es el que recogen tanto los artículos 17.2 de la Constitución como el 520 1. p.2 de la Ley de Enjuiciamiento Criminal) que señalan que “la detención no podrá durar más tiempo del **estrictamente** necesario para la realización de las averiguaciones tendentes al esclarecimiento de los hechos”. Esta es la norma general. Sin perjuicio de lo anterior se establece adicionalmente un límite temporal máximo de 72 horas (art. 17.2 de la Constitución, artículo 520.1 de la Ley de Enjuiciamiento Criminal).

Por tanto en materia de plazos de detención el régimen ordinario que se establece es que dicho plazo es de 72 horas. La prolongación a 48 horas adicionales, que se prevé en supuestos de delito de terrorismo, es una posibilidad excepcional que debe ser aprobada por el juez y que se regula con absoluta separación de la incomunicación.

La incomunicación también es una medida excepcional, que debe ser acordada por resolución judicial, estrictamente dentro del plazo de detención que prevén la Constitución y la Ley de Enjuiciamiento Criminal.

Según el texto del Informe del Relator, el artículo 520 bis extiende a cinco días el período total durante el cual los detenidos acusados de delito de terrorismo pueden estar incomunicados (48 horas sumadas al máximo de 72 horas, en las que en cualquier otro caso el detenido debería ser liberado o a disposición judicial)”

Por el contrario, el artículo 520 bis 1 estipula que las personas detenidas por delito de terrorismo deben ser puestas a disposición del juez competente en el plazo de 72 horas a contar desde la detención. No obstante lo cual, se puede prorrogar por un período adicional de 48 horas, pero ello exige que se solicite en el plazo de las primeras 48 horas de detención así como que el juez lo autorice en el plazo de las 24 horas siguientes.

Este artículo debe ser interpretado de conformidad con el artículo 17.2 de la Constitución y el artículo 520.1 de la Ley de Enjuiciamiento Criminal en el sentido de que estos plazos son plazos máximos. El artículo 520.1 establece la norma general de que la detención preventiva no podrá durar más del tiempo “estrictamente necesario para la realización de las averiguaciones para esclarecer los hechos. Dentro de los plazos establecidos por esta Ley, y en todo caso en el plazo máximo de 72 horas, el detenido deberá ser puesto en libertad o a disposición del juez. (art. 17.1 de la Constitución española).

En este artículo no se regula la incomunicación. La incomunicación se regula específicamente en el 520 bis 2) de la Ley de Enjuiciamiento Criminal que, sin perjuicio de lo anterior, señala que en cualquier momento se puede solicitar la incomunicación, debiéndose pronunciar el juez al respecto en resolución motivada en el plazo de 24 horas.

PÁRRAFO 17

El Relator comete un grave error de partida que vicia su análisis: la confusión sistemática entre la detención y la prisión provisional.

La prisión provisional es una medida cautelar que se puede acordar una vez iniciado el procedimiento judicial penal, única y exclusivamente por los tres fines tasados que recoge el

artículo 503.3 de la Ley de Enjuiciamiento Criminal (evitar el riesgo de fuga, evitar destrucción u ocultación de pruebas, riesgo de reiteración delictiva). Se trata de una medida que solamente puede ser acordada por el juez cuando no existan otras medidas menos gravosas para el derecho a la libertad. Además, se exige para la adopción de la prisión provisional el que sea objetivamente necesaria (artículo 502 de la Ley de Enjuiciamiento Criminal). Por último, el juez la tiene que adoptar por medio de auto fundado en el que se expresen los motivos por los que considere que la medida es necesaria y proporcionada (artículo 506 de la Ley de Enjuiciamiento Criminal). Contra este auto judicial cabe recurso de apelación que se tiene que tramitar con carácter preferente (artículo 507 de la Ley de Enjuiciamiento Criminal).

La institución anteriormente descrita, o sea la prisión provisional, a la que se refiere el párrafo 17 del Informe del Relator, nada tiene que ver con la detención policial a la que el Relator alude en los párrafos anteriores de su Informe. La legislación española distingue con claridad estas dos figuras sin que quepa confundirlas, como hace el Relator.

Se advierte un grave error en el Informe del Relator porque omite la regulación actualmente vigente de la incomunicación en situación de prisión provisional, que es la Ley Orgánica 15/2003 de 25 de noviembre (remitida al relator por las autoridades españolas). Esta Ley Orgánica, en su Disposición Final Primera modificó, entre otros, el artículo 509 de la Ley de Enjuiciamiento Criminal (al que el Relator se refiere en este párrafo) y el artículo 510, al que añadió un nuevo párrafo 4 ("el preso sometido a incomunicación que así lo solicite tendrá derecho a ser reconocido por un segundo médico forense designado por el juez o tribunal competente para conocer de los hechos"). En consecuencia, el régimen de la incomunicación durante la prisión provisional al que se refiere el Relator en este párrafo de su Informe está regulado en estos dos artículos: 509 y 510.

Además de no citar la Ley Orgánica, el Relator hace referencia a artículos que actualmente están derogados. Su mención a los artículos 506, 507 y 508, ya derogados, es improcedente por un triple motivo: no están en vigor en la actualidad, no hace una trascripción exacta de sus términos, y si lo que se pretende es establecer un marco comparativo con la legislación actual olvida que la nueva legislación pone fin a la discrecionalidad de que investía al juez en la determinación de los plazos de duración máxima de la incomunicación durante la prisión provisional (recuérdese que estamos hablando ahora solamente del régimen de prisión provisional y no del régimen de detención).

Entrando en el comentario que hace el Relator de la legislación actualmente en vigor (la redacción actual del art. 509 de la Ley de Enjuiciamiento Criminal, consecuencia de la Ley Orgánica 15/2003, y no de la Ley Orgánica 13/2003 como cita erróneamente el Relator), el error más grave es que en ningún caso la incomunicación que regula el artículo 509 se refiere a situaciones de detención (artículo 520), sino a situaciones de prisión provisional (artículos 502 y siguientes).

Igualmente es errónea la afirmación del Relator de que la incomunicación "en prisión provisional" pueda durar 13 días consecutivos. El Relator omite decir que el periodo máximo de incomunicación de 5 días puede ser excepcionalmente prorrogado por cinco días adicionales mediante auto judicial que, conforme con el 509.3, debe expresar los motivos por

los que se ha adoptado la medida. La legislación permite que el juez, en un momento ulterior, y excepcionalmente, pueda volver a decretar la incomunicación del sujeto que se encuentra en situación de prisión provisional por un máximo, en este caso, de tres días. Estos últimos tres días no se añaden al período de incomunicación anterior, sino que ha de existir una separación temporal entre ambos. En consecuencia, no es cierta la afirmación de que, tras las últimas reformas legislativas, la incomunicación para los sujetos en situación de prisión provisional pueda durar hasta 13 días consecutivos.

Una vez más, es esencial reiterar que lo que antecede se refiere a los sujetos en situación de prisión provisional. El régimen de la detención es totalmente distinto de aquel, y en ningún caso puede exceder 5 días que no son prorrogables.

Resumiendo los **errores** fácticos que contiene este párrafo del Informe del Relator, son los siguientes:

1. **Absoluta confusión entre detención policial (que por imperativo constitucional no puede exceder en ningún caso de 5 días) y prisión provisional (esta última solo puede darse en el marco de un procedimiento judicial penal).**

2. **Omisión de la legislación que actualmente regula el régimen de la incomunicación para los individuos en situación de prisión provisional, y que es el artículo 509 de la Ley de Enjuiciamiento Criminal, tal como ha sido modificado por la Ley Orgánica 15/2003.**

3. **El Relator cita artículos actualmente derogados sin recoger su contenido literal originario, no pudiendo por tanto valorar la mejora que han supuesto las últimas reformas legislativas.**

4. **Falta de comprensión por parte del Relator de la figura de la incomunicación, ya que no recoge su actual regulación como una figura excepcional (509.1, "el juez de instrucción del tribunal podrá acordar[la] excepcionalmente").**

5. **El Relator convierte en un supuesto normal lo que no deja de ser una situación muy poco frecuente. La incomunicación en situación de prisión provisional solamente dura el tiempo estrictamente necesario para realizar con urgencia diligencias tasadas ("evitar que se sustraigan a la acción de la justicia personas supuestamente implicadas en hechos investigados, que éstas puedan actuar contra bienes jurídicos de la víctima, que se oculten, alteren o destruyan pruebas relacionadas con su comisión, o que se cometan nuevos hechos delictivos"). Es excepcional que el periodo de incomunicación alcance cinco días, y todavía lo es más que dicho período se amplíe por 5 días más.**

6. **El Relator menciona erróneamente en este párrafo el artículo 384 bis de la Ley de Enjuiciamiento Criminal, señalando que el mismo hace referencia al crimen organizado. Ello no es cierto, ya que dicho artículo se refiere a "delito cometido por persona integrada o relacionada con bandas armadas o individuos terroristas o rebeldes".**

7. **El Relator omite mencionar los derechos de los que goza la persona incomunicada en situación de prisión provisional, regulados en el artículo 510 de la Ley de Enjuiciamiento Criminal: (a) derecho a asistir a las diligencias en las que la ley permite intervenir a las personas en esta situación, (b) contar con los efectos que él se proporcione, (c) derecho a realizar y recibir comunicaciones, (d) derecho a ser reconocido por un segundo médico (el derecho a ser reconocido por un segundo médico forense ha sido introducido por la Ley Orgánica 15/2003). Los tres primeros derechos serán disfrutados por el detenido salvo que el juez estime que alguno de ellos desvirtúa el motivo de la incomunicación decidida por el juez.**

8. **Todo lo anterior invalida la conclusión del Relator en el párrafo 60 cuando afirma que en España se ha producido una involución en la materia como consecuencia de las últimas reformas legislativas. La situación es exactamente la contraria.**

PÁRRAFO 18

El Relator en este párrafo de su Informe se refiere al régimen de incomunicación en situación de detención (que se insiste una vez más, no ha de ser confundido con el régimen de incomunicación en situación de prisión provisional, *"pre-trial detention"*). Todo el párrafo está plagado de inexactitudes y errores: **el régimen de incomunicación en situación de detención ha de ser estudiado comparándolo con el régimen general de derechos reconocidos a todo ciudadano detenido.**

El detenido en régimen de incomunicación disfruta de los siguientes derechos (artículo 520 de la Ley de Enjuiciamiento Criminal), de los cuales es informado en el momento mismo de la detención:

1. derecho a guardar silencio, no declarando si no quiere, a no contestar alguna o algunas de las preguntas que se le formulen o a manifestar que sólo declarará ante el juez

2. derecho a no declarar contra sí mismo y a no confesarse culpable

3. derecho a que le defienda un abogado y a solicitar su presencia para que asista a las diligencias policiales y judiciales de declaración e intervenga en todo reconocimiento de identidad de que sea objeto. La actuación del abogado que le defiende se concreta en la posibilidad de solicitar que se informe al detenido de los derechos de que goza, de solicitar que se proceda al reconocimiento médico, así como la de solicitar a la autoridad ante la que se hubiese practicado la diligencia en la que el abogado hubiese intervenido, la declaración o ampliación de los extremos que considere convenientes y la consignación en el acta de cualquier incidencia que hubiere tenido lugar durante la práctica de las diligencias

4. derecho a ser asistido gratuitamente por un intérprete, cuando se trate de extranjero que no comprenda o no hable castellano

5. derecho a ser reconocido por Médico forense o su sustituto legal, y en su defecto por el de la Institución en que se encuentre, o por cualquier otro dependiente del Estado o de otras Administraciones Públicas.

¿Cuáles son los derechos de los que no disfruta?.
El detenido en régimen de incomunicación no tiene los siguientes derechos, que sí tienen los demás detenidos:

(a) procurarse comodidades u ocupaciones compatibles con el objeto de su detención (a las que los detenidos en régimen general tampoco tienen derecho cuando pudiese afectar al secreto de sumario, según el artículo 527 en relación con el 522)

(b) a ser visitado por ministro de su religión, médico, parientes o personas que le puedan dar consejos (a lo que no tienen tampoco derecho los detenidos en régimen general, si ello afecta al secreto y al éxito del sumario, según artículo 527 en relación con el 523)

(c) a correspondencia y comunicación (que en el caso de los detenidos en régimen general debe ser expresamente autorizado por el juez, según artículo 527 en relación con el 524)

(d) a que no se adopte contra él ninguna medida extraordinaria de seguridad (de lo que también están excluidos los detenidos en régimen general en caso de desobediencia, violencia, rebelión o haber intentado fugarse)

(e) a designar abogado de su elección (527a)

(f) a que se ponga en conocimiento del familiar el hecho de la detención y lugar de custodia (artículo 527 b en relación con el 520.2d)

(g) a que el abogado que le defienda se entreviste con él reservadamente una vez terminada la diligencia en la que hubiere intervenido

PÁRRAFO 19

Protocolo 2003 del Gobierno Vasco

El Protocolo que se menciona en este apartado es el resultado de un acuerdo adoptado por los Departamentos de Justicia, Empleo y Seguridad Social, Sanidad e Interior del Gobierno Vasco, y no por el Parlamento como afirma el Relator.

Contrariamente a la afirmación del Relator, no contiene previsión alguna respecto a la grabación audiovisual de los interrogatorios de los detenidos.

La recomendación efectuada por el Relator referente a la grabación en vídeo de los interrogatorios para eliminar las denuncias de tortura ha de calificarse, cuanto menos de ingenua. El Relator parece querer olvidar, o al menos no le presta credibilidad, que ETA ordena a sus miembros y simpatizantes el denunciar torturas y malos tratos en cualquier detención. Grabar las declaraciones de los detenidos no es salvaguardia de ningún tipo: las denuncias de malos tratos y torturas podrían trasladarse a aquellos momentos que no fuesen grabados. Para evitar estas denuncias falsas habría que grabar todo el tiempo en que el detenido se encuentra bajo custodia policial; de hacerse así, la denuncia se podría interponer por atentar contra su intimidad.

EL PAPEL DEL PODER JUDICIAL

PÁRRAFO 20

El Relator omite en este párrafo consideraciones fundamentales para comprender el papel del poder judicial:

En el ordenamiento jurídico español cualquier persona que presencie la perpetración de un delito está obligada a denunciarlo inmediatamente ante la autoridad competente (artículo 259 de la Ley de Enjuiciamiento Criminal). Además, todo aquel que por razón de su cargo, profesión u oficio tuviere conocimiento de un delito está también obligado a denunciarlo inmediatamente. El funcionario o autoridad que faltando a la obligación de su cargo dejase intencionadamente de promover la persecución de los delitos de que tenga noticia incurrirá en un delito de omisión del deber de perseguir delitos, tipificado en el artículo 408 del Código Penal. Naturalmente, toda esta normativa es aplicable a jueces y magistrados, igual que a miembros de las Fuerzas y Cuerpos de Seguridad del Estado.

Las víctimas de la organización terrorista ETA pertenecientes a la Administración de Justicia han sido 17: 8 fallecidas y 9 heridas.

PÁRRAFO 21

A) La Audiencia Nacional como tribunal ordinario.

La Audiencia Nacional es un tribunal ordinario. El Relator se equivoca al afirmar que es un "tribunal especial (*special court*)" porque:

1. La Constitución Española prohíbe la creación de tribunales especiales (artículos 117.6, que prohíbe los tribunales de excepción, y 117.5, que consagra el principio de unidad jurisdiccional)

2. El Tribunal Constitucional, hace ya más de 15 años (sentencia 199/87 de 16 de diciembre), sentenció que "la Constitución prohíbe jueces excepcionales o no ordinarios, pero permite al legislador una determinación de las competencias de acuerdo con los intereses de la justicia (…). Tanto los Juzgados Centrales de Instrucción como la Audiencia Nacional son orgánica y funcionalmente, por su composición y modo de designación, órganos judiciales ordinarios, y así ha sido reconocido por la Comisión Europea de Derechos Humanos en su Informe de 16 de octubre de 1986 sobre el Caso Barberá y otros, en el que afirmó que "la Comisión comprueba que la Audiencia Nacional es un tribunal ordinario compuesto por magistrados nombrados por el Consejo General del Poder Judicial".

3. La **Sentencia del Tribunal Europeo de Derechos Humanos de fecha 06-12-88** relativa al mismo asunto, en su párrafo 53 señaló que dicho tribunal también **considera que la Audiencia Nacional es un tribunal ordinario**. Este tema le fue suficientemente aclarado al Relator por el Presidente de la Audiencia Nacional). **No parece dentro del mandato del Relator Especial sobre la tortura cuestionar la jurisprudencia del Tribunal Europeo de Derechos Humanos**.

La Audiencia Nacional no es un Tribunal de excepción, sino un Tribunal especializado, como los Juzgados de Familia, los Juzgados de Menores, los Juzgados de lo Contencioso-Administrativo o los futuros Juzgados de lo Mercantil.

La Audiencia Nacional es un Tribunal con sede en Madrid y con Jurisdicción en toda España, cuyas competencias no se limitan al ámbito penal, sino también a cuestiones administrativas y sociales. En materia penal su competencia se extiende a una serie de delitos graves, entre ellos los de terrorismo, y a delitos cuyo ámbito territorial es superior al de una Comunidad Autónoma.

El secreto de sumario

En cualquier sistema judicial conocido las investigaciones para la averiguación del delito pueden exigir medidas que impidan que el sospechoso o terceros tengan conocimiento acerca del curso de dichas investigaciones. El secreto de sumario se aplica para estos casos. Su fin es evitar la frustración del propio sumario.

El Relator, al tratar este tema en el párrafo 21 de su Informe, comete un error fáctico grave al referirse indistintamente y mezclar indebidamente dos conceptos distintos: el secreto de sumario (causa secreta) y la prisión provisional. El secreto de sumario, como medida habitual en la instrucción de determinados procedimientos penales, es independiente de que se acuerde o no prisión provisional. Esta última obedece a otras motivaciones ya expuestas al recoger los errores fácticos en el párrafo 17. En cualquier caso, ninguna de estas figuras es de aplicación exclusiva a las causas judiciales por delito de terrorismo. Son figuras de aplicación general a cualquier causa judicial.

El régimen general en el derecho español establece que, hasta que se inicie el juicio oral, las diligencias del sumario son siempre secretas en todo procedimiento penal para quienes no son parte en el proceso (artículo 301 de la Ley de Enjuiciamiento Criminal).

Al margen de lo anterior, el artículo 302 permite que el Juez instructor, mediante un auto, declare el secreto de sumario para todas las partes por un periodo máximo de un mes. El art. 302 es aplicable a cualquier procedimiento penal y no solo a los relacionados con delitos de terrorismo.

Si durante el plazo de 30 días en que se ha declarado el secreto de sumario, el juez decreta la entrada en prisión provisional (conforme al artículo 506.2 de la Ley de Enjuiciamiento Criminal) el auto de ingreso siempre deberá contener el hecho que se imputa y las razones por las que se decreta la prisión provisional. Cuando se alce el secreto de sumario se notifica íntegro el auto al imputado. Esta disposición igualmente se aplica en cualquier procedimiento penal. Por lo tanto, es radicalmente errónea la afirmación del Relator en el párrafo 21, "que la Audiencia Nacional pueda solicitar el secreto de sumario durante 30 días, renovables por la duración total de la prisión provisional que puede durar hasta cuatro años".

De hecho, con sus graves errores al describir el papel del poder judicial, el Relator está poniendo en tela de juicio la regulación del procedimiento penal en España, aplicable a

la persecución de cualquier delito: introduce consideraciones erróneas acerca de la supuesta naturaleza excepcional de la Audiencia Nacional; se equivoca respecto a la actuación de la Audiencia Nacional en delitos de terrorismo, y alega una presunta excepcionalidad en los procedimientos penales en causas por delito de terrorismo, que sólo existe en su imaginación. Es preciso reiterarlo una vez más que en España no existe una legislación anti-terrorista específica, ni existe un tribunal de excepción para los delitos de terrorismo.

Al tratar el Habeas Corpus el Relator vuelve a confundir la prisión provisional con la detención policial.

EL TERRORISMO Y SUS EFECTOS

PÁRRAFO 22

Al utilizar la expresión "detención provisional", el Relator vuelve a confundir la detención y la prisión provisional, con lo que no queda claro a lo que se refiere.

También resulta chocante que afirme que su misión se centró en el "tratamiento" a los detenidos por ser presuntos miembros o colaboradores con grupos terroristas, cuando él mismo decidió no visitar centros de detención.

PÁRRAFO 23

El Relator comete en este párrafo varios errores fácticos graves:

1. El "grupo armado Vasco ETA" no es tal. Se trata de un grupo terrorista, tal y como lo reconocen la comunidad internacional. La Unión Europea (Posición Común 402/2003/PESC del Consejo de 5 de junio de 2003) declaró grupos terroristas a ETA, y a las siguientes organizaciones que forman parte de su entorno: Kas, Kaki, Ekin, Jarrai-Haika-Segi, Gestoras pro Amnistía, Askatasuna, Batasuna (alias HerriBatasuna, alias Euskal Erritarrok). Se le hizo llegar al Relator esta documentación, que fue publicada en el Diario Oficial de la Unión europea el 6 de marzo de 2003.

2. La mención al "Derecho Internacional Humanitario" es improcedente y fuera de lugar. ETA no es parte beligerante en un conflicto armado. ETA es una simple organización criminal que utiliza medios terroristas para alcanzar sus fines. Lo que ETA vulnera son las normas penales y los más elementales derechos humanos.

3. No se puede decir que "a ETA se le imputa el estar implicada en actos criminales", como si su implicación no estuviera suficientemente demostrada, casi siempre mediante reivindicación de la propia banda terrorista. La comisión por miembros de ETA de actos criminales está además ampliamente probada por el gran número de sentencias condenatorias contra los mismos dictadas por jueces en España y en otros países. Las cifras de víctimas causadas por ETA no responden a "estimaciones", sino que se conocen con exactitud: desde 1984 ETA ha asesinado a 831 personas, herido a 2.392, y secuestrado a 77 personas. Esta

información se le habría facilitado directamente al Relator si éste se hubiera interesado por el tema.

A estas víctimas hay que añadir a sus familiares, amigos, y a todos aquellos que diariamente viven bajo la amenaza del terrorismo dentro y fuera del País Vasco, así como aquellos que se han visto forzados a abandonarlo por motivos de seguridad.

En el informe sobre la situación de los derechos humanos en España y País Vasco emitido por el Sr. Gil Robles, Comisario de Derechos Humanos del Consejo de Europa, se hace especial hincapié sobre esta situación al referirse a la tensión a la que están sometidas las personas que desempeñan un cargo electo, las que desempeñan la función judicial o las que, en privado (o incluso en público) han tomado posiciones a favor de orden constitucional en vigor, así como las que hayan podido emitir o escribir opiniones críticas sobre el nacionalismo u opuestas a la banda terrorista ETA y, de forma muy especial, los que pertenecen a Cuerpos y Fuerzas de Seguridad del Estado.

En conclusión, el Relator, a fin de no cometer errores fácticos, debe:

1. **Llamar a ETA por su nombre (grupo terrorista)**
2. **Suprimir la referencia al derecho internacional humanitario**
3. **Remplazar la frase en la que dice "ETA is reported to have been criminally involved" por "ETA has been criminally involved"**
4. **Añadir las cifras precisas sobre víctimas de ETA que figuran *supra***

PÁRRAFO 26

Este párrafo contiene algunos de los más graves errores del Informe, al referirse a un supuesto "patrón" de torturas o malos tratos, surgido de entrevistas que mantuvo con interlocutores cuya identidad no desvela.

El Relator afirma que tanto antes de su visita a España como durante la misma "recibió gran cantidad de información de fuentes no gubernamentales, incluyendo testimonio de antiguos detenidos, en el sentido de que la tortura y los tratos inhumanos, crueles y degradantes continúan ocurriendo en España". El Relator continúa diciendo que "los antiguos detenidos describieron el siguiente tratamiento durante la detención en situación de incomunicación: encapuchamiento, obligación de desnudarse a la fuerza, ejercicios físicos, obligación de permanecer de pie de cara a la pared durante periodos prolongados, privación de sueño, desorientación, utilización de bolsas de plástico con propósitos asfixiantes, humillación sexual, amenaza de violación, amenazas de muerte y ejecuciones simuladas".

El Relator no facilita detalle alguno sobre casos, lugares, fechas, personas afectadas, etc. No deja de ser sorprendente que el Relator, que más adelante en el transcurso de su Informe se refiere a un "patrón de negación de los hechos" por parte de las autoridades, al referirse todas ellas a la táctica de ETA de denunciar torturas y malos tratos, no encuentre ahora sospechoso el que los antiguos detenidos, que pertenecen a una misma organización, cuenten todos la misma o parecida historia, de forma que "emerge un patrón" de malos tratos y torturas.

Una de dos, o la coincidencia de "versiones" es considerada "indicio de verosimilitud" de lo relatado o es considerado parte de una "invención" (*fabrication*); pero lo que no es coherente, ni aceptable, es que el Relator lo interprete como lo primero cuando habla con los antiguos detenidos y su entorno, y como lo segundo cuando habla con autoridades y jueces. Además, no facilita información sobre cuándo se produjeron los hechos. No es lo mismo un caso de los últimos 5 ó 6 años que un caso de hace 20, a efectos de dilucidar si en España las torturas y malos tratos tienen una frecuencia superior a la "ocasional".

PARRAFO 27

El Relator no ha tomado en consideración la información que le remitió el Gobierno, a la que hace referencia y que admitió haber recibido.

Además, y por lo que se refiere al párrafo 27, el Gobierno español considera un grave error de hecho que el Relator haya hecho las afirmaciones que vierte en el párrafo 26 sin haber leído la respuesta del Gobierno a la información por él solicitada sobre supuestos casos de tortura ocurridos entre marzo de 2002 y febrero de 2003, cuya relación él mismo facilitó. El Relator no ha leído la información facilitada por España sobre estos casos, puesto que reconoce que no está traducida. Es decir, el párrafo contiene descalificaciones y condenas de la situación en España por parte del Relator, sin haberse ocupado siquiera de conocer la versión de los hechos que, a petición del propio Relator, le facilitó el Gobierno español. Este error vicia no solo el párrafo 26, sino también los párrafos 30 y 31 relativos al cierre del diario Egunkaria.

La información proporcionada por el Gobierno español a solicitud del Relator se refiere a las denuncias por torturas formuladas por cuatro personas detenidas el 8 de marzo de 2002 por el Cuerpo Nacional de Policía y por varios detenidos por la Guardia Civil, en el curso de tres operaciones de lucha contra el terrorismo.

Los cuatro detenidos por el Cuerpo Nacional de Policía, lo fueron en el curso de una operación de policía judicial ordenada por el Juzgado Central de Instrucción nº 5, en Auto de 7-3-03, como consecuencia de las diligencias previas 172/01. La resolución judicial ordenaba en los cuatro casos la detención y registro domiciliario, el cual fue practicado en presencia del secretario judicial.

Durante el tiempo que permanecieron en situación de detención incomunicada, el médico forense les practicó reconocimientos hasta en tres ocasiones. Las denuncias formuladas por los cuatro detenidos, uno de los cuales figura huido de la justicia, se formalizaron dos meses después de la detención, incluso una de ellas siete meses después. Los procedimientos judiciales iniciados por las denuncias están pendientes. Hasta el momento, ningún funcionario ha sido imputado como consecuencia de las mismas.

Las detenciones practicadas por Guardia Civil lo fueron igualmente con ocasión de tres operaciones de policía judicial. La primera de ellas, en relación con el caso Egunkaria, sobre el cual se ofrece abundante información más adelante en esta recopilación de errores de hecho.

La segunda de ellas se dirigió contra el denominado comando "Zelatún". Esta operación fue desarrollada a lo largo de los días 28 y 29 de septiembre de 2002, ordenada en una actuación coordinada desarrollada por los Magistrados de los Juzgados Centrales de Instrucción nº 2 y nº 3 de la Audiencia Nacional. En el momento de la detención, se procedió a la lectura de sus derechos y posterior registro de sus domicilios en presencia judicial. Durante el período de incomunicación fueron reconocidos diariamente por el médico forense. Las denuncias por torturas, presentadas tres meses después de la detención, están siendo conocidas por la autoridad judicial competente, sin que hasta la fecha exista funcionario alguno imputado.

La información referente a estos 5 casos del Comando Zelatún ya había sido solicitada por el Relator, y contestada por el Gobierno español el 31-10-03. La reiteración en la solicitud de informes puede inducir a pensar que existen más casos de denuncias de tortura que los que realmente hay.

La tercera operación se lleva a cabo por Guardia Civil el 8 de octubre de 2002 en el curso de una operación dirigida por el Juzgado Central de Instrucción nº4 de la Audiencia Nacional. Como en los supuestos antes descritos se respetaron los derechos de los detenidos durante el arresto y su posterior detención, y no consta que en las actuaciones judiciales seguidas por la denuncia de torturas presentada tres meses después de la detención, se haya imputado a ningún funcionario.

PÁRRAFO 28

En primer lugar, el Relator comete un error muy grave al declarar que "la opinión predominante entre las Autoridades entrevistadas por el Relator Especial es que TODOS los informes sobre torturas a detenidos en conexión con medidas anti-terroristas son falsos y realizados de forma sistemática como parte de la estrategia de ETA para minar el sistema judicial penal español". Ninguna autoridad española le dijo que "todas" las denuncias fuesen falsas.

Por el contrario, todas las autoridades que se entrevistaron con el Relator reiteraron que toda alegación de tortura es objeto de investigación.

Por lo que antecede, la referencia que el Relator hace a un supuesto "muro de silencio" sobre torturas y malos tratos, es totalmente errónea, como lo demuestra además la invitación que ha recibido del Gobierno español, la información que se le ha suministrado y la plena colaboración que con total transparencia y en todo momento ha obtenido de instituciones, órganos, funcionarios y Autoridades, tal y como él mismo reconoce.

En segundo lugar, también es erróneo afirmar que "el Gobierno dijo que le entregaría el documento encontrado en la desarticulación del Comando ARABA/98", como si no lo hubiese hecho. Consta que la Misión de España en Ginebra le transmitió la documentación a su Oficina, por carta, el 20 de noviembre de 2003, además del documento que le fue entregado en el transcurso de su visita.

PÁRRAFOS 30 y 31

Estos párrafos se refieren al cierre del periódico Egunkaria, único caso concreto citado por el Relator en su Informe para, desde su perspectiva, "ilustrar las tensiones entre las medidas antiterroristas y la obligación de prevenir, prohibir y combatir la tortura". Estos párrafos incurren también en graves errores: **el Relator no toma en consideración las informaciones que él solicitó al Gobierno español y que le fueron remitidas el 17 de noviembre, tergiversa las palabras del Ministro del Interior (y en consecuencia hechos fundamentales del caso), y manifiesta parcialidad a favor de sus "fuentes", impropia de su cargo.**

A continuación se detallan los hechos referentes a este caso:

1. CIERRE DE EGUNKARIA

El cierre de Egunkaria se produjo en ejecución de la decisión adoptada por el Juzgado Central de Instrucción n° 6 de la Audiencia Nacional, como culminación de las investigaciones judiciales practicadas sobre la instrumentalización de este medio por parte de la organización terrorista ETA para fines delictivos.

Es falso que el cierre fuera "decretado" por el Ministerio del Interior, según manifiesta el Relator Especial en su Informe, y es falso que se lo dijese el Ministro del Interior. En cualquier caso, lo manifestado sobre este punto en el párrafo 31 está en completa contradicción con lo expresado en el apartado anterior (30), donde se precisa que la clausura cautelar del periódico la dispuso la autoridad judicial competente.

En concreto, se trataba de una actuación judicial contra conductas delictivas de personas presuntamente vinculadas o integradas en la organización terrorista ETA, a la que apoyaban y ayudaban o con la que colaboraban en actividades de financiación, blanqueo de fondos, evasión de impuestos, etc., que, obviamente nada tienen que ver con las propias de cualquier medio de comunicación.

Conviene precisar, por otra parte, que esta actuación judicial se desarrolla en aplicación de los nuevos principios y criterios incorporados a la normativa interna del Estado español, siguiendo las recomendaciones y acuerdos adoptados en tal sentido en el ámbito internacional en el marco de las Naciones Unidas, para conseguir una mayor eficacia en la prevención y represión de los actos de terrorismo. Se entiende que un aspecto básico para la prevención de la comisión de actos terroristas es el control de los flujos financieros de los que se nutren las organizaciones terroristas.

El Relator debería tener en cuenta la Resolución 1373 del Consejo de Seguridad de Naciones Unidas, adoptada por unanimidad en la sesión celebrada el 28 de septiembre de 2001, que impone a los Estados la obligación de adoptar las medidas necesarias para prevenir y reprimir el delito de terrorismo, su financiación, la congelación de fondos, activos financieros y recursos económicos de las personas que los cometan, o intenten cometer, participen en ellos, faciliten su comisión, etc., de las personas y entidades bajo su control; de las personas que actúen en nombre de estas entidades o bajo sus órdenes; en definitiva, de las personas y entidades concertadas o asociadas de cualquier modo a la consecución de sus fines y objetivos.

2. DENUNCIA DEL MINISTERIO DEL INTERIOR

Respecto al procedimiento judicial iniciado desde el Ministerio del Interior contra Otamendi y otros por falsas alegaciones de tortura (caso Egunkaria), al que también alude el Relator Especial, si no se ha emitido una sentencia, como señala el Relator, es porque la Audiencia Nacional recientemente ha dejado en suspenso este procedimiento hasta que no concluyan las investigaciones por parte del Juzgado de Instrucción de Madrid competente para pronunciarse sobre la denuncia por tortura y malos tratos formulada por Otamendi y otros.

Es la primera y única vez que las Autoridades del Ministerio del Interior han formulado directamente una denuncia ante la Autoridad judicial por la falsedad y gravedad de las acusaciones vertidas por alguno de los detenidos implicados en las actividades a que anteriormente se ha hecho referencia. **Por lo tanto, son falsas las informaciones que recibió el Relator Especial en el sentido de que hay un patrón habitual de contradenuncias por difamación por parte de los poderes públicos, como recoge erróneamente el Relator en el apartado 58 de su Informe**.

3. DOCUMENTO DEL COMANDO ARABA

Otro grave error fáctico del Relator es que no haya tenido en cuenta el documento incautado al comando ARABA, que le fue proporcionado por las autoridades españolas. Ese documento demuestra que las alegaciones de torturas en causas relacionadas con el terrorismo responden en la gran mayoría de los casos a una estrategia sistemática y deliberada por parte de ETA.

El Relator manifiesta que le han llegado informaciones de que durante los traslados los detenidos los mismos son maltratados, y menciona explícitamente que son llevados esposados, encapuchados, con la cabeza entre las rodillas y supuestamente son golpeados. Según los informantes del Relator, una vez en Madrid, los detenidos son incomunicados y se les somete a vejaciones y torturas (desnudez, vejaciones sexuales, etc.).

Todo estos relatos supuestamente coincidentes que hacen los detenidos los encontramos ya en el documento mencionado anteriormente e incautado a la propia organización terrorista. En noviembre de 1996 fue detenido el etarra Luis Aguirre Lete, "Isuntza". Entre los documentos que se le incautaron es especialmente significativo el documento titulado "Sobre las denuncias de torturas", en el que se contienen instrucciones como las que siguen: "Ante una detención, por corta e insignificante que sea, aunque os pongan en libertad sin cargos, ni fianza, ni ninguna otra medida represora, hay que denunciar tortura"; se recomienda "denunciar a cuant@s más txakurras [término despectivo para designar a los policías] podáis, aquí la imaginación no tiene límites y podéis desarrollarla sin miedo, nunca os van a represaliar por una denuncia falsa", y sigue "con la denuncia de torturas, siempre que pasemos por las manos de la txakurrada [policía], se pretenden varias cosas : (...) crear vías para que organismos internacionales se interesen por la falta de libertad de nuestro pueblo, internacionalizar y hacer oír la represión, aunque no se consiga el fin último que se persigue con la denuncia individual (...), desgastar al enemigo militar mediante todo el matxake judicial que se pueda. Está comprobado que las denuncias, aunque no acaben en condena, en ellos cunde la desesperación y además se retroalimenta nuestra campaña."

Resulta una coincidencia sorprendente que dichas denuncias también han comenzado a producirse contra la Policía francesa.

En el momento de la desarticulación del Comando Araba, en marzo de 1998, se encontró una copia textual de este documento, que fue entregado al Relator durante su visita.

Desde 1999 la Guardia Civil ha puesto a disposición judicial a más de 146 terroristas relacionados con ETA, y se han presentado 38 denuncias por torturas, sin que se haya producido una sola condena por hechos producidos desde esa fecha, lo cual evidencia la puesta en práctica por los detenidos de estas "recomendaciones", que también tienen como objetivo desprestigiar el funcionamiento de las instituciones españolas ante el escenario internacional.

4. ACTUACIÓN DE LAS FUERZAS Y CUERPOS DE SEGURIDAD

Con carácter general, la descripción que el Relator hace de la práctica de las Fuerzas y Cuerpos de Seguridad en relación con la lucha antiterrorista, adolece de los mismos, pero todavía más graves, errores de hecho que en el resto de su informe. Sigue basándose exclusivamente en el relato de denunciantes anónimos y no contiene una mínima referencia a las declaraciones y testimonios que le facilitaron los miembros de las Fuerzas y Cuerpos de Seguridad con los que se entrevistó.

5. ENTREVISTA MANTENIDA CON EL MINISTRO DEL INTERIOR

Antes de concluir este apartado, es esencial subrayar los serios errores que contiene el resumen del Relator sobre su entrevista con el Ministro del Interior.

El Relator pone en boca del Ministro del Interior declaraciones que nunca hizo en relación con la libertad de prensa.

En relación con la clausura del periódico Egunkaria, el Ministro del Interior tampoco dijo que este periódico se cerrase por orden gubernativa, sino que le explicó que el cierre de este periódico era el resultado de un proceso judicial seguido por la Audiencia Nacional para la desarticulación del entramado de ETA. Fue este tribunal el que ordenó a la policía judicial el cierre del diario y la detención de sus miembros (director, editores, empresarios y periodistas), por las razones y las consecuencias que anteriormente se han indicado.

DETENCIÓN INCOMUNICADA

La Sentencia del Tribunal Constitucional 196/87 de 11 de diciembre señala que “la medida de incomunicación del detenido, adoptada bajo las condiciones previstas en la ley, sirve en forma mediata a la protección de valores garantizadas por la Constitución española y permite al Estado cumplir con su deber constitucional de proporcionar seguridad a sus ciudadanos, aumentando su confianza en la capacidad funcional de las instituciones estatales. De ello resulta que la limitación temporal del detenido incomunicado en el ejercicio de su derecho de libre designación de abogado que no le impide acceder a ella una vez finalizada la incomunicación, no puede calificarse de medida restrictiva, irrazonable o desproporcionada,

sino de conciliación ponderada del derecho de asistencia letrada - cuya efectividad no se perjudica con los valores constitucionales citados -, pues **la limitación que le impone a ese derecho fundamental se encuentra en relación razonable con el resultado perseguido**, ajustándose a la exigencia de proporcionalidad de las leyes. Esta declaración no contradice en modo alguno los Convenios Internacionales suscritos por España, cuyo valor interpretativo de los derechos fundamentales y libertades públicas se consagra en el art. 10.2 de la Constitución española, pues ya hemos señalado que estos derechos son más restrictivos en materia de asistencia letrada al detenido que en nuestra constitución en cuanto que no incluyen este derecho ente los que se reconocen al detenido en los artículos 5 (Convenio Europeo de Roma) y 9 (Pacto Internacional de Nueva York); el derecho a la libre elección de abogado tan sólo se reconoce en los artículos 6 y 14 de los mismos en relación con el acusado del proceso penal, supuesto no aplicable al detenido o preso en diligencias policiales o judiciales, que es lo que se regula en los artículos 520 y siguientes de la Ley de Enjuiciamiento Criminal".

En consecuencia, el Tribunal Constitucional recoge en esta Sentencia el marco, los objetivos y los límites de la detención en situación de incomunicación.

PÁRRAFO 35

El Relator recoge un resumen de las explicaciones que le facilitó el Secretario de Estado de Justicia, muy cercanas a la realidad jurídica española. Pero dichas explicaciones no han sido tenidas en cuenta por el Relator cuando éste procede, en los párrafos 16 a 18 de su Informe (dedicados exclusivamente a la "detención incomunicada") a valorar el marco jurídico vigente en España, que aparece en dichos párrafos reflejado de forma completamente errónea, citando legislación caduca, confundiendo sistemáticamente detención y prisión provisional, y concluyendo sin base alguna en la realidad que el marco legislativo reformado amplía la detención incomunicada hasta 13 días.

PÁRRAFO 37

El Relator, en este párrafo de su Informe, afirma, poniéndolo en boca de sus fuentes no gubernamentales, que la decisión judicial para autorizar la incomunicación de un detenido es habitualmente un mero trámite, y que se fundamenta simplemente en una referencia a la sospecha de vínculos del detenido con el terrorismo, sin que exista mayor elaboración de pruebas.

Esta afirmación del Relator es gratuita y no está fundada en modo alguno por hechos que así lo avalen. **Nuestra legislación y jurisprudencia son particularmente rigurosas en la exigencia de una motivación y una valoración individualizada por parte del Juez para acordar la incomunicación del detenido o preso**.

PÁRRAFO 38

El Relator desconoce el hecho de que los médicos forenses son profesionales de la Medicina que prestan servicio a la Administración de Justicia de forma permanente y profesional. Son

reclutados mediante un sistema de selección objetivo basado exclusivamente en sus conocimientos profesionales sobre medicina.

Los Médicos forenses son destinados al servicio de uno u otro Juzgado mediante un sistema objetivo que tiene en cuenta la antigüedad profesional. Es decir, ni el Juez, ni las autoridades pueden decidir que sea uno u otro forense quien atienda a un detenido, sino aquel Médico forense a quien corresponda en función de estar previamente destinado al servicio de dicho Juzgado.

En su actuación profesional los Médicos forenses están vinculados exclusivamente a la asistencia médica al detenido conforme a las normas deontológicas de su profesión, sin que puedan recibir instrucciones ni del Juez ni de las autoridades gubernativas.

La insistencia en la designación de abogado y médico particular es una estrategia común de las organizaciones terroristas, pues, mediante la presencia de los mismos, persiguen tanto coaccionar al detenido como poder calibrar el daño que éste puede originar a la organización.

PÁRRAFO 39

El Abogado de oficio en España no es un funcionario de la Administración pública, ni tampoco depende en absoluto de la autoridad judicial. En consecuencia, es errónea la descripción que de él hace el Relator como un "*State appointed lawyer*".

Son abogados de oficio aquellos abogados que voluntariamente se inscriben en este servicio de prestación de asistencia jurídica a las personas carentes de recursos. La organización del servicio de defensa jurídica de oficio corresponde en exclusiva a los Colegios de Abogados, sin que intervengan en ello ni el Ministerio de Justicia ni el de Interior, ni el Consejo General del Poder Judicial.

El servicio se organiza mediante un turno de los Abogados inscritos, de forma que el detenido será asistido por aquel Abogado al que le corresponda de manera aleatoria. Es decir, que en la elección del Abogado concreto que asistirá al detenido incomunicado no interviene en absoluto la autoridad gubernativa ni judicial.

En su actuación profesional el Abogado de oficio tiene el mismo estatuto jurídico que cualquier Abogado libremente elegido por su cliente. No está sujeto a instrucciones jerárquicas, y debe orientar su actuación exclusivamente a la defensa de los intereses del detenido.

La sentencia del Tribunal Constitucional 196/87 de 11 de diciembre señala "**la esencia del derecho del detenido a la asistencia letrada es preciso encontrarla no en la modalidad de la designación del abogado, sino en la efectividad de la defensa**, pues lo que quiere la Constitución española es proteger al detenido con la asistencia técnica de un letrado que le preste su apoyo moral y ayuda profesional en el momento de su detención y esta finalidad se cumple objetivamente con el nombramiento de un abogado de oficio, el cual garantiza la efectividad de la asistencia de manera equivalente al del abogado de libre designación".

El Tribunal Europeo de Derechos Humanos en su sentencia de 13 de mayo de 1980 en el caso Artico reiteraba en los mismos términos que "la libre elección de abogado forma parte del contenido normal del derecho del detenido a la asistencia letrada, pero no de su contenido esencial, pues su privación y consiguiente nombramiento imperativo de abogado de oficio no hace irrecognoscible o impracticable el derecho, ni lo despoja de la necesaria protección".

PÁRRAFO 40

Dados los importantes errores de hecho que contienen los párrafos anteriores del Informe del Relator, su afirmación, en este párrafo de que "recibió información creíble que le conduce a creer que, aunque la tortura y los malos tratos no son sistemáticos en España, el sistema, en la práctica, permite que ocurran casos, especialmente en lo que se refiere a personas en situación de incomunicación por actividades relacionadas con el terrorismo" es totalmente errónea.

Como se ha explicado en los comentarios efectuados sobre los errores de hecho en que incurre el Relator en los párrafos anteriores, y en los que de hecho descalifica cuerpos profesionales independientes (jueces, fiscales abogados de oficio, médicos forenses) el régimen de garantías en España es un régimen moderno, avanzado y perfectamente homologable con los estándares internacionales.

Es rigurosamente falso que se utilice tortura o malos tratos para "obtener declaraciones de los detenidos". Las declaraciones de los detenidos carecen de valor probatorio si no son ratificadas ante el juez que conoce de la causa.

El artículo 11.1 de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, establece que "no surtirán efecto las pruebas obtenidas, directa o indirectamente, violentando los derechos o libertades fundamentales".

INVESTIGACIONES, PROCESOS E INDEMNIZACIONES

PÁRRAFO 43

El Relator comienza este apartado de su Informe con una reflexión totalmente errónea sobre la realidad española, que resume en una expresión (segunda guerra sucia), que es desconocida en España, y que en la nota 11, situada al final de su Informe, dice "había sido dirigida por la administración socialista entre 1983 y 1987" citando a continuación, en la nota 12, las duras condenas impuestas en abril de 2000 a un General y a un ex Gobernador Civil por esos hechos. El Relator debería señalar que la lista de autoridades encausadas fue más amplia, y que todas fueron juzgadas y todas han cumplido o están cumpliendo condena. Esta es una prueba de que el sistema español funciona y reacciona siempre ante este tipo de delitos y a todos los niveles, desde el más bajo al más alto.

Las sentencias contra las diferentes personas involucradas (Ministro del Interior, Secretario de Estado de Seguridad, Delegado del Gobierno del País Vasco, General de División de la Guardia Civil, entre otros), y a las que él se refiere en el punto 12, fueron publicadas y comentadas ampliamente por diversos medios de comunicación, lo que supone uno de los

tantos ejemplos que demuestra la inexistencia del "muro de silencio" del que habla el Relator y el pleno ejercicio de la libertad de prensa en España.

PÁRRAFO 44

En este párrafo el Relator manifiesta un profundo desconocimiento del sistema español. Su afirmación de que "de acuerdo con información recibida, el marco legal (…) no ha tenido éxito en eliminar el recurso a la tortura o a los malos tratos, que supuestamente continúan siendo habituales" en España, y sobre la ineficacia del ordenamiento jurídico para luchar contra los mismos, es totalmente errónea e inadmisible para el Gobierno y la sociedad española.

Estas afirmaciones no se apoyan en fuentes o datos creíbles o verificables y por tanto no merecen figurar en el Informe de un Relator Especial, que hubiera hecho bien en leer detalladamente, y tener en cuenta al redactar su Informe, el manual de ETA sobre denuncias de torturas y la detallada información sobre los individuos procesados a raíz del cierre del diario Egunkaria, que le fueron facilitados por las autoridades españolas.

Por otra parte, este párrafo del informe del Relator menciona expresa y erróneamente que nuestro sistema procesal no permite enjuiciar a los inculpados por delito de tortura porque la duración del proceso judicial es a menudo tan larga, que para el momento en que se inicia un juicio, los acusados no pueden ser juzgados porque su delito ya ha prescrito.

Esta llamativa y falsa aseveración desconoce por completo las características de la prescripción de infracciones penales regulada en nuestra legislación.

De acuerdo con lo previsto en el artículo 131 del Código Penal vigente, los delitos prescriben: *" a los 20 años, cuando la pena máxima señalada al delito sea prisión de 15 o más años; a los 15, cuando la pena máxima señalada por la Ley sea inhabilitación por más de 10 años, o prisión por más de 10 y menos de 15 años; a los 10, cuando la pena máxima señalada por la Ley sea prisión o inhabilitación por más de cinco años y que no exceda de 10; a los cinco, cuando la pena máxima señalada por la Ley sea prisión o inhabilitación por más de tres años y que no exceda de cinco; a los tres años, los restantes delitos menos graves."* Se trata, por tanto de periodos de prescripción suficientemente amplios par evitar el efecto que señala el Relator en su Informe.
Por otra parte, iniciado un procedimiento penal por algún delito, el plazo de prescripción se interrumpe (artículo 132.3 del Código Penal).

Las denuncias por torturas o tratos inhumanos o degradantes provocan la apertura de un procedimiento penal mediante la incoación de las correspondientes Diligencias Previas por el Juez competente, siendo éste el del lugar donde presumiblemente se cometieron los hechos, y cuya primera diligencia es recabar los informes del Médico Forense, o de los Médicos Forenses que examinaron periódicamente a la supuesta víctima de torturas o malos tratos.

La investigación judicial permite que la autoridad judicial realice una valoración de los hechos, acuerde las diligencias necesarias y dicte la resolución judicial motivada correspondiente. A su vez, la totalidad de la instrucción judicial es inspeccionada por el

Ministerio Fiscal, quien tiene por misión promover la acción de la justicia en defensa de la legalidad, de los derechos de los ciudadanos y del interés público tutelado por la ley, de oficio o a petición de los interesados, así como velar por la independencia de los Tribunales, y procurar ante éstos la satisfacción del interés social.

Además, la resolución judicial motivada que dicta la autoridad judicial es susceptible de ser revisada por un tribunal superior constituido por tres Magistrados, sin perjuicio de la posibilidad de que cualquier posible vulneración de un derecho fundamental sea objeto de estudio y consideración por el Tribunal Constitucional.

PÁRRAFOS 45, 46 Y 47

La relación de sentencias dictadas por el Tribunal Supremo, expedientes disciplinarios abiertos y denuncias formuladas contra miembros del Cuerpo Nacional de Policía y de la Guardia Civil, como consecuencia de actuaciones constitutivas de torturas o malos tratos, que incluye el Relator en su informe, fueron trasladados por el Gobierno español, con el fin de colaborar en la investigación desarrollada por el Relator.

En relación con los datos sobre torturas facilitados al Relator por la Guardia Civil y los que le trasladó el Tribunal Supremo, hay que hacer una serie de precisiones:

- Desde 1997 las sentencias condenatorias por denuncias de detenidos implicados en actuaciones terroristas son siete.

- De las sentencias dictadas por el Tribunal Supremo durante el período 1997-2003 en relación con terrorismo, sólo una se refiere a hechos producidos en los años 90, concretamente en 1992. El resto se refiere a hechos producidos en su práctica totalidad en los años ochenta.

- Según información suministrada por la Sala II del Tribunal Supremo (entregada al Relator Especial con fecha de 23 de octubre de 2003), entre 1997 y 2003, hubo 16 sentencias condenatorias por torturas: 8 de ellas (no 13, como erróneamente se señala en el Informe del Relator) se referían a hechos en los que estaban involucrados miembros del Cuerpo Nacional de Policía; 4 sentencias (y no 6 como erróneamente señala el Informe del Relator) se referían a hechos en los que estaban involucrados agentes de la Guardia Civil; 1 de las sentencias se refería a hechos en los que estaba involucrada Policía local; 1 sentencia se refería a hechos en los que estaban involucrados funcionarios de prisiones; y por último, 2 sentencias por torturas condenaban a particulares. De estas sentencias condenatorias, 7 se refieren a hechos relacionados con operaciones contra presuntos terroristas.

- La información facilitada por la Guardia Civil sobre la inexistencia, desde hace años, de condenas por torturas o malos tratos contra miembros de esa institución, es corroborada por los datos sobre sentencias. A partir de 1999 ninguna actuación de Guardia Civil en la lucha contra el terrorismo ha sido objeto de condena por delito de torturas.

- La última condena del Tribunal Supremo contra miembros de la Guardia Civil destinados en servicios o unidades de lucha contra el terrorismo, se refiere a hechos producidos en 1992. La condena en ese caso, dictada aplicando el Código Penal en ese momento vigente de 1973, fue de cuatro años, dos meses y 1 día de privación de libertad y de seis años y un día de inhabilitación especial.

- La media de sentencias sobre torturas de las que se ha ocupado en los últimos siete años el Tribunal Supremo es de 4 sentencias al año sobre un conjunto de unas 5.000 resoluciones, que se dictan cada año por la Sala II del Tribunal Supremo.

Con posterioridad a la visita del Relator, el 30 de octubre de 2003, la Sala de lo Penal del Tribunal Supremo dictó una sentencia importante. Dicha sentencia, en casación, confirmó la sentencia dictada por la Audiencia Provincial de San Sebastián en junio de 2002, que absolvía a dos Guardias Civiles acusados de torturar a dos miembros de la banda terrorista ETA. Como dato complementario, cabe señalar que los terroristas denunciantes están cumpliendo condena por varios delitos, entre ellos los de asesinato y pertenencia a banda armada. Ambos formularon sus denuncias sobre las supuestas torturas producidas en el momento de la detención un año después de ésta. Cuando fueron detenidos, estaban armados y colocando un lanzagranadas apuntando a viviendas militares del Acuartelamiento del Ejército de Loyola en San Sebastián.

A la vista de los datos, resulta totalmente errónea e intolerable la afirmación del Relator, en el párrafo 44 de su Informe, sobre el papel del proceso judicial en la supuesta “perpetuación de la impunidad”.

Es importante destacar también que el Código Penal vigente ha elevado las penas establecidas en los Códigos anteriores para el delito de torturas:

- **En el Código Penal de 1973 la pena era de prisión menor en sus grados mínimo a medio (de seis meses y un día a cuatro años y dos meses) e inhabilitación especial (de 6 a 12 años), siendo de arresto mayor y suspensión o inhabilitación especial si se produjeren coacciones, amenazas, vejaciones o se sometieran a los interrogados a condiciones o procedimientos intimidatorios.**

- **La reforma del Código Penal en 1995 introdujo la regulación actual, ampliando la pena de prisión de dos a seis años si el hecho fuera grave, y de uno a tres años si no lo fuera, más inhabilitación absoluta de ocho a doce años. Castigándose también, los atentados a la integridad moral, en este caso con penas de prisión de dos a cuanto años si el hecho fuera grave, y de prisión de seis meses a dos años si no lo fuere, en todo caso con una sanción adicional: la inhabilitación especial para empleo o cargo público de dos a cuatro años.**

- **En la última reforma del Código Penal llevada a cabo en 2003, que mantiene la penalidad anteriormente expresada para el delito de tortura, se tipifica una nueva conducta delictiva consistente en ejercer violencia física o psíquica sobre personas que se encuentren sometidas a custodia o guarda en centros públicos o privados,**

imponiéndose en este caso una pena de prisión de 6 meses a 3 años y privación del derecho a la tenencia y porte de armas de 2 a 5 años.

Por otra parte, el Relator Especial comete un gravísimo error al referirse a determinadas acciones disciplinarias de la Guardia Civil en supuestos de abuso de funciones, trato inhumano, degradante o discriminatorio o tortura.

- Dice que no se le ha facilitado información sobre acción disciplinaria por casos de tortura, y que ninguna de las acciones disciplinarias emprendidas por la Guardia Civil ha supuesto privación de libertad.

Toda actuación que pudiera ser constitutiva de delito debe ser denunciada ante los Tribunales, quienes deben conocer de los hechos en primer lugar, vinculando con su declaración de hechos probados a la Administración que ejerce la potestad disciplinaria.

Esa preferencia por la Jurisdicción penal motiva que en los datos remitidos al Relator se indique que durante el período 1999 a 2003 se presentaron y tramitaron 178 denuncias por torturas, de las cuales están pendientes de resolución por los Tribunales 51 casos, 118 fueron absueltos o archivados, y 9 funcionarios han sido condenados por operaciones ajenas a la lucha anti-terrorista.

En el régimen disciplinario de la Guardia Civil, la sanción de arresto está prevista únicamente para las faltas leves y graves.

Los tratos inhumanos, degradantes, discriminatorios o vejatorios, así como las torturas (delito doloso), están tipificados como infracciones muy graves, y para ellas no está prevista, en el ámbito administrativo, sanción de privación de libertad, sino otras como la suspensión de empleo y la separación del servicio, que lleva aparejada la pérdida de la condición de guardia civil (es decir, la expulsión del Cuerpo).

La privación de libertad, si fuera oportuna, corresponde adoptarla a la Autoridad judicial en el ámbito del proceso penal.

PÁRRAFO 48

A fin de evitar errores, los datos que figuran en este párrafo sobre indultos concedidos por el Gobierno han de ser situados en su contexto:

- los indultos fueron concedidos por delitos cometidos antes de 1996, y fueron informados favorablemente por el Ministerio Fiscal y/o por el Tribunal sentenciador. Ningún indulto se extiende a la totalidad de la pena impuesta, ni libera del pago de las indemnizaciones fijadas en la condena. El indulto en ningún caso conlleva la rehabilitación del funcionario público que hubiera perdido tal condición en virtud de la condena.

El Ministerio del Interior no interviene en la tramitación de los indultos, ni hace la solicitud (la realiza el interesado), ni informa sobre los indultos tramitados, ni es necesariamente informado de los indultos concedidos.

El indulto es una gracia, recogida por la Constitución, concedida por razones de equidad, de la que puede ser beneficiario cualquier condenado independientemente del delito o condena, y por lo tanto también los miembros de las Fuerzas y Cuerpos de Seguridad. En la concesión del indulto por delito de torturas, como en todos los indultos, el Gobierno tiene en cuenta las circunstancias singularísimas de cada expediente: circunstancias personales del peticionario (enfermedad), cargas familiares, conducta seguida en el centro penitenciario, no reincidencia, capacidad de reinserción, informes y dictámenes de psicólogos, y muy especialmente los informes preceptivos del Ministerio Fiscal y juez sentenciador. El indulto en ningún caso determina la rehabilitación del funcionario público que hubiera perdido tal condición en virtud de la condena, y que de este modo se ve privado de su modo de vida.

En el caso de los indultos concedidos el 1 de diciembre del año 2000, ninguno de los condenados era reincidente, al menos uno de los informes preceptivos era favorable, la participación de los hechos de alguno de ellos fue circunstancial, y se trataba de indultos por hechos cometidos en los años 80. Ninguno se extendía a la totalidad de la pena impuesta, ni liberaba del pago de las indemnizaciones fijadas en la condena.

PÁRRAFO 49

Comenta el Relator Especial en este apartado la ausencia de legislación efectiva, que, en su opinión, existe en España respecto a las indemnizaciones específicas a las víctimas en los supuestos de comisión del delito de tortura. Este es otro error de hecho.

En el ordenamiento jurídico español se prevé este tipo de indemnizaciones como responsabilidad civil derivada de la penal por todos los delitos o faltas que se puedan cometer. Tal responsabilidad civil alcanza a los conceptos de restitución, reparación del daño e indemnización de perjuicios materiales y morales que se pudieran ocasionar, todo ello según determine con criterios de discrecionalidad la propia Autoridad Judicial en función de las circunstancias concurrentes en cada caso.

Finalmente, ha de recordarse al Relator Especial que una cosa es la sanción penal del hecho delictivo, en la que se tiene en cuenta las circunstancias que él menciona en el Informe, y otra, completamente distinta, la responsabilidad civil derivada del mismo, en el que la indemnización se gradúa necesariamente en función del daño efectivamente sufrido por el perjudicado. Estos principios informan no sólo los procesos por delitos de torturas, sino igualmente los procesos por cualquier otro tipo delictivo.

PÁRRAFO 50

Es erróneo que la dispersión sea aplicada como un castigo adicional que perjudica a las familias. Los presuntos terroristas en espera de juicio son enviados a cárceles en el entorno de Madrid, precisamente para facilitar el pleno ejercicio del derecho a la defensa. Los

condenados son dispersados en la Península (hace tres años que no son enviados ni a Canarias ni a Baleares).

Se trata de una medida legal aplicada a los presos por delitos de terrorismo, no con el fin de agraviar a las familias, sino con el fin de separar al preso del resto de integrantes de la banda terrorista, posibilitando su rehabilitación al margen de consignas y coacciones, y, en definitiva, protegiéndoles de la organización terrorista. No puede olvidarse que ETA mata a sus disidentes, como ocurrió por ejemplo con Dolores González Catarain "Yoyes", asesinada en plena calle en presencia de su hija.

PÁRRAFO 51

El Relator comete un nuevo error al referirse al fenómeno de la tortura por motivos raciales. Muestra una parcialidad inadmisible dado que este tema no formó parte de las conversaciones con sus interlocutores gubernamentales, a excepción de las mantenidas marginalmente con la Defensora Adjunta del Pueblo, cuyos comentarios en ningún caso se ven recogidos en el Informe.

ALGUNAS CONSIDERACIONES SOBRE LAS CONCLUSIONES Y RECOMENDACIONES DEL INFORME DEL RELATOR

AUNQUE LA OFICINA DEL ALTO COMISIONADO PARA LOS DERECHOS HUMANOS HA DADO TRASLADO A NUESTRA MISIÓN EN GINEBRA DE QUE EL RELATOR CONSIDERA DEFINITIVAS LAS CONCLUSIONES Y RECOMENDACIONES QUE FIGURAN EN LA VERSIÓN NO EDITADA DE SU INFORME, LAS AUTORIDADES ESPAÑOLAS ESTIMAN QUE LA CORRECCIÓN DE LOS NUMEROSOS ERRORES DE HECHO QUE FIGURAN EN LOS PÁRRAFOS 1 A 51 DEL INFORME HABRÍA DE CONDUCIR INEXORABLEMENTE A LA ALTERACIÓN DE LAS CONCLUSIONES Y RECOMENDACIONES DEL RELATOR.

POR CONSIGUIENTE, SE INCLUYEN A CONTINUACIÓN UNA SERIE DE OBSERVACIONES SOBRE ERRORES DE HECHO EN LA PARTE DEL INFORME RELATIVA A CONCLUSIONES Y RECOMENDACIONES, ERRORES QUE EN SU MAYOR PARTE SE DERIVAN DE ERRORES FÁCTICOS COMETIDOS POR EL RELATOR EN EL CUERPO DEL INFORME, AL DESCRIBIR LO QUE ÉL CONSIDERA ES LA REALIDAD ESPAÑOLA.

VII) CONCLUSIONES

La técnica de sembrar dudas sin aportar pruebas y la parcialidad de las conclusiones del informe es manifiesta a lo largo del mismo:

PÁRRAFO 52

En este párrafo, da cuenta el Relator de que España ha aceptado cooperar con los mecanismos internacionales y regionales de protección de los Derechos Humanos, en particular los relativos a la prevención y supresión de la tortura y los tratamientos o castigos crueles, inhumanos o

degradantes. Recuerda así mismo que España pertenece al grupo de países que ha trasladado invitaciones permanentes a los procedimientos especiales temáticos de la CDH y, por último, considera "altamente elogiable" la voluntad de España de someterse a procedimientos internacionales de escrutinio. Todas estas observaciones, con las que el gobierno español no puede sino estar de acuerdo, **contradicen la supuesta existencia de un "muro de silencio" y de una política de negación de los hechos en relación con la cuestión de la tortura y los malos tratos por parte de las autoridades españolas.**

PÁRRAFO 54

Además, y en relación con lo apuntado al comentar el párrafo 52, es rigurosamente erróneo afirmar, como hace el Relator en el párrafo 54, que no el debate e interés público en España sobre la cuestión de los estándares y procedimientos en materia de Derechos Humanos. **Por supuesto que sí la hay, como puede comprobar cualquier lector de la prensa española, tanto la de ámbito regional como la de ámbito nacional. El que el grado de debate público no sea suficiente ni en España ni en la mayoría o todos los países del mundo es una apreciación totalmente subjetiva del Relator, que excede del ámbito de su mandato.**

PÁRRAFO 55

Se refiere a su informe como el resultado de una visita de una semana de comprobación de hechos (¿?). Parece que el único hecho cierto que descubre es la existencia del terror y la violencia sobre un sector de la población, -para él esto es "un factor particular que apareció repetidamente durante la visita..."-; pero este factor y su condena enseguida se enturbia con la afirmación de que "muchos países se enfrentan con graves dificultades de naturaleza socio-política..." para disfrutar de los derechos humanos, o con la observación del escaso tiempo de visita, insuficiente para rastrear los factores históricos... que permitan entender la situación de los derechos humanos hoy en España. Queremos decir que el relator no ha constatado simple y llanamente la brutal realidad del terrorismo y de la violencia que el nacionalismo permite sobre más de la mitad de la población del País Vasco, sin añadir "matices" que introduzcan dudas sobre la justificación de su origen.

PÁRRAFO 56

El Relator recoge, con acierto que, las autoridades españolas de alto nivel con las que se entrevistó le manifestaron que todas las medidas para combatir el terrorismo han de permanecer dentro del marco que impone la ley. Sin embargo, acto seguido recuerda que él mismo subrayó que el derecho a no sufrir tortura o tratos crueles, inhumanos y degradantes es inderogable y absoluto, como si las autoridades españolas con las que se entrevistó no tuviesen plena conciencia de ello. **De hecho, sus interlocutores oficiales fueron rotundos al manifestar su máximo apego al estado de derecho, dejando claro que los casos que pudiese haber de tortura y malos tratos eran investigados y sancionados con todo el peso de la ley. En particular, se subrayó reiteradamente al Relator que el Estado lleva a cabo la lucha contra el terrorismo con el más escrupuloso respeto de los Derechos Humanos.**

PÁRRAFO 57

Vale para este párrafo de las conclusiones lo ya manifestado para el párrafo 26. El Relator parece otorgar total credibilidad a sus fuentes no gubernamentales y cuestionar, en cambio, el valor de la información recibida por parte de representantes del Gobierno, el Parlamento y el Poder Judicial. No deja de ser sorprendente y preocupante que algunas de las afirmaciones vertidas en este párrafo por el Relator, coincidan con las que figuran tanto en manuales de ETA como en folletos de propaganda de organizaciones no gubernamentales, tales como *Torturaren Aurkako Taldea*, vinculadas al entorno radical abertzale como con las manifestaciones que de palabra le hizo en el Parlamento de la Comunidad Autónoma del País Vasco la representante de Batasuna, partido político declarado ilegal por el Tribunal Supremo, en sentencia que el Tribunal Constitucional ha estimado plenamente conforme con el Ordenamiento Jurídico español. El Relator debería reflexionar sobre el hecho de que la coincidencia de las versiones procedentes de personas ya sea vinculadas al entorno terrorista ya a sectores nacionalistas radicales, más que a la verosimilitud de dichas versiones a lo que aparenta conducir es a que dichas versiones, de las que emerge, según el Relator, un "cierto patrón de técnicas y métodos de tratamiento de los detenidos", responden a instrucciones procedentes del entramado de ETA. Especialmente revelador es el contenido del documento incautado al comando *Araba* en 1998, al que ya se ha hecho referencia, y del que el Relator posee copia, con traducción al inglés; pese a lo cual no lo ha tenido en cuenta en su informe.

PÁRRAFO 58

Es falso que exista una "política oficial de negar que haya prácticas de tortura o malos tratos". Es rigurosamente falso que exista una política sistemática por parte de las autoridades de contestar a las denuncias por tortura con querellas por denuncia falsa. Como ya se ha señalado, solamente en una ocasión ha presentado el Ministerio del Interior una denuncia por denuncia falsa de tortura. Lo hizo precisamente en el caso *Egunkaria*. Una vez más, el informe contiene datos y conclusiones totalmente carentes de credibilidad.

PÁRRAFO 59

La conclusión del Relator en el sentido de que el control judicial de los detenidos es a menudo formal y administrativa, y no sustantiva, carece de todo fundamento y es claramente injusta hacia los altos magistrados del Tribunal Supremo, de la Audiencia Nacional y del Consejo General del Poder Judicial con lo que mantuvo largas entrevistas, en el transcurso de las cuales le fue expuesto el funcionamiento en la práctica del régimen de detención en situación de incomunicación. Por lo demás, el Relator parece ignorar que el objetivo de dicho régimen no es sancionar al detenido, sino impedir que éste pueda trasladar a integrantes del entramado terrorista, información sobre sus actividades o recibir instrucciones sobre lo que tiene que manifestar a las autoridades, cuando no amenazas procedentes de la propia organización terrorista sobre las graves consecuencias que para el detenido podría tener el que colaborase con las autoridades.

PÁRRAFO 60

Por las razones apuntadas al analizar los párrafos 17, 18 y 33 y siguientes, es totalmente errónea la conclusión del Relator de que las últimas reformas legislativas en España ignoran la opinión internacional en materia de detención en situación de incomunicación.

PÁRRAFO 61

Es inaudito que el Relator equipare en este punto la situación de las víctimas del terrorismo y la situación de las víctimas de tortura y malos tratos. Por supuesto que las víctimas de torturas y malos tratos merecen también toda clase de protección. El problema es que el número de víctimas de torturas y malos tratos es muy reducido (ya que en España no se admiten dichas prácticas, ni en la ley, ni en la realidad), en tanto que el número de víctimas del terrorismo asciende a varios miles (entre muertos, heridos y secuestrados) y esto sin tener en cuenta la existencia de muchos otros miles de personas que viven atemorizadas por el terrorismo y otros miles que, temiendo por su vida o la de sus familias, han tenido que abandonar el País Vasco. Por otra parte, no responde a la realidad referirse, como hace el Relator a la existencia de tensiones entre "las autoridades centrales en Madrid y los partidos o movimientos nacionalistas vascos", ya que podría parecer que nos encontramos únicamente con un supuesto de tensiones entre el gobierno central y los habitantes del País Vasco, cuando la realidad es que un porcentaje muy elevado de los electores en esa Comunidad Autónoma votan a partidos de ámbito nacional y no a partidos regionales.

PÁRRAFO 62

Este párrafo es absolutamente disparatado. Poner en duda que en España haya "espacio público y democrático" para plantear cuestiones relativas a los derechos humanos fundamentales supone un total desconocimiento de la realidad del país, fácilmente corregible con la consulta esporádica de la prensa, la radio o la televisión o con el seguimiento de los debates parlamentarios. Añadir que las organizaciones de defensa de los derechos humanos merecen protección en España roza lo grotesco: en España hay cientos de miles de activistas pertenecientes a multitud de organizaciones que desempeñan sus tareas con la plena protección que les otorga el ordenamiento jurídico vigente y el vivir en un Estado de Derecho. Las únicas organizaciones que no gozan de la protección del Estado son aquellas que han sido declaradas ilegales por los tribunales, por contribuir a las actividades de la banda terrorista ETA.

RECOMENDACIONES

PÁRRAFO 63

Las más altas autoridades han declarado reiteradamente, -es comprensible que el Sr. Relator no lea prensa española, pero eso no lo libra de su obligación a documentarse-, que la lucha contra el terrorismo se realizará en todos los frentes y con todos los medios de los que dispone o puede dotarse un estado de derecho, y siempre dentro de la más escrupulosa legalidad. Esto y no otra cosa están llevando a cabo las Fuerzas y Cuerpos de Seguridad del Estado, no sólo en cumplimiento de los preceptos que consagra la Constitución Española, o de las órdenes e instrucciones que reciben, sino por convicción de la inmensa mayoría sus miembros. En consecuencia, no es necesario reiterar oficial y públicamente que la tortura y los tratos crueles, inhumanos y degradantes están prohibidos con carácter absoluto, ya que dicha reiteración tiene lugar con la frecuencia necesaria en las instrucciones y cursos de formación que se ofrecen a los integrantes de cuerpos y fuerzas de seguridad del Estado.

PÁRRAFO 64

Al contrario que el Relator, las autoridades españolas saben que los casos de torturas o malos tratos se dan con carácter ocasional, por lo que no es necesario redactar un plan global de lucha contra la tortura, como si éste fuese un mal general. Las disposiciones legales y la práctica por parte de los agentes del orden garantizan que no se produzcan torturas ni malos tratos y que, en los casos en que un agente del Estado viola la ley, su conducta sea sancionada adecuadamente.

PÁRRAFO 65

El Gobierno español no considera acertada la recomendación del Relator de suprimir el régimen de incomunicación ya que, al menos en el caso de España, no favorece la tortura. El recurso, bajo control judicial, a la incomunicación de algunos detenidos sigue siendo importante en el aspecto operativo, ya que evita que se puedan destruir pruebas o indicios relevantes, desaparezcan medios empleados en atentados, la huida de cómplices o colaboradores, todo lo cual sucedía en el pasado a causa de la colaboración criminal de abogados próximos al entorno de ETA.

PÁRRAFO 66

La incomunicación, no supone en ningún caso carecer de asistencia letrada, mediante abogado de oficio, ni que el detenido carezca de asistencia médica, -médico forense-, aunque, por las mismas razones a las que obedece la incomunicación, no es conveniente la designación de médico por el detenido en situación de incomunicación.

PÁRRAFO 67

El Relator parece desconocer, a pesar de que visitó la Comunidad Autónoma del País Vasco, que la policía autonómica tiene, en muchas ocasiones que operar con el rostro cubierto, para evitar represalias. Recomendaciones para una mayor “transparencia” de los interrogatorios podrían conducir a poner en peligro la vida de los agentes de las fuerzas del orden. Ésta no es una consideración teórica: ETA ha asesinado a cientos de policies.

PÁRRAFO 68

Esta recomendación supone un desconocimiento total a la independencia de los jueces, como responsables de la investigación de infracciones de esta naturaleza. También reitera los prejuicios del Relator al pedir la suspensión de funciones del funcionario público implicado, emprendiendo acción legal inmediata, en todos los casos de quejas y denuncias, ignorando la realidad de una estrategia sistemática de denuncias de malos tratos y torturas, diseñada por ETA, como lo demuestra la documentación intervenida a los terroristas. Todos los casos son investigados; pero la denuncia sistemática de torturas o malos tratos en todos los casos de detenciones no hace sino dificultar el esclarecimiento de los hechos.

PÁRRAFO 69

¿Desconoce el Relator que esto sucede en cualquier sentencia emitida por un tribunal penal que condene por torturas o malos tratos?.

PÁRRAFO 70

La dispersión de presos no tiene un objetivo sancionador ni para los presos ni para sus familias. Precisamente, la dispersión facilita la rehabilitación, al impedir presiones sobre los presos para que no abandonen la organización terrorista.

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RECOMENDACIÓN PÁRRAFO 68 *(obligación de pronta investigación de toda denuncia de torturas o malos tratos; acciones legales contra los autores; independencia de la investigación y principios internacionales en la materia)*

RECOMENDACIÓN 69 *(Indemnizaciones a las víctimas de torturas o malos tratos)*

RECOMENDACIÓN 70 *(dispersión de presos)*

RECOMENDACIÓN 71 *(invitación al Relator Especial sobre el Racismo)*

REMARKS OF THE GOVERNMENT OF SPAIN ON THE REPORT OF THE SPECIAL RAPPORTEUR ON TORTURE

1. SPAIN'S COMMITMENT TO HUMAN RIGHTS

There can be no doubt whatsoever regarding the Spanish Government's strict compliance with its obligations stemming from international instruments against torture and ill treatment. The ratification of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and, at European level, the Convention for the Prevention of Torture and Inhuman or Degrading Treatment, are a true reflection of its will to strengthen the system's domestic guarantees with supranational safeguards.

The **Spanish Government's willingness to undergo examination by the international mechanisms for the promotion and protection of human rights**, both within the sphere of the United Nations as well as the Council of Europe, has not even been questioned by the Special Rapporteur on Torture who, quite to the contrary, considered this attitude to be positive.

To the same extent, both the Government of Spain as well as all the State authorities have expressed their **complete willingness to examine** in great detail any **recommendations** formulated by the Rapporteur, meant to prevent and punish any conduct causing torture or ill treatment to detainees or prisoners, **as long as** such recommendations **respond to a diagnosis based on the reality of Spain** supposedly under analysis.

The improvement of the Spanish legal framework and guarantees to prevent torture and ill treatment bears testimony to the will of both the **Spanish Government and Spanish society** as a whole **to eliminate any breach of fundamental rights** and freedoms.

2. REASONS WHY THE REPORT OF THE SPECIAL RAPPORTEUR IS INVALID

The **Spanish Government regrets** that the **Special Rapporteur**, breaching the terms of his mandate, **has in no way made an objective or well-founded analysis** of the reality under examination, as **the report is full of mistakes** that demonstrate a **total lack of knowledge of both the reality of Spain and the bases and functioning of our legal system**. The erroneous and distorted analysis of the Special Rapporteur on Torture in his Report on Spain **invalidates the contents of its conclusions** and leads to the formulation of clearly inadmissible recommendations, as demonstrated by the detailed analysis of those recommendations made in this document.

We should, in fact, remember that this Report on Spain by the United Nations Human Rights Commission Special Rapporteur on Torture arose as a result of the **special invitation by the Spanish Government to the Special Rapporteur,** Mr. Van Boven, which he accepted on January 13th 2003.

The Special Rapporteur's visit took place between the 6th and 10th of October 2003. The Special Rapporteur established the content of the visit by specifying the interlocutors with whom he wished to speak and the cities he wished to visit. **The Special Rapporteur enjoyed complete freedom to meet with as many representatives of civil society and Non-Governmental Organisations as he deemed fit.**

The Rapporteur approached his visit to Spain as a **'fact-finding mission'**, as described in the press communiqué circulated by the Office of the High Commission of Human Rights on October 3rd 2003. **However**, the Rapporteur **decided neither to visit detention centres** nor to meet with the authorities and professionals who participate in the control of the detainee custody, thereby **eliminating direct contact with** the very **reality** he was meant to be investigating.

The Office of the High Commission for Human Rights sent the Spanish Government a **preliminary version of the Report** on **December 31st 2003** and requested comments on possible factual errors by the Special Rapporteur in his draft report.

On **January 20th**, Spain's Mission in Geneva presented a Note Verbale to the Office of the High Commission for Human Rights, accompanied by the **Spanish Government's plea regarding the factual errors detected in the Report** written by the Rapporteur as a result of his five day visit to Spain.

In the Note Verbale, **the Spanish Government requested that the Report on Spain be published without the numerous errors detected therein**. The Government also expressed its opinion that the Report contained **so many and such significant** factual errors that **the conclusions** reached by the Special Rapporteur **were seriously invalidated**, thus rendering the Report **almost wholly unacceptable** due to its lack of basis, accuracy, grounds and method.

1. It is unacceptable in the first place because of the **incorrect analysis** made by the Special Rapporteur in the 31st December version of his Report of the **'legal framework and guarantees for the protection of detainees** from torture or abuse, especially in the case of people linked to terrorist activities', to which one quarter of the Report is devoted: the technical errors it contains are so great that they prove the Special Rapporteur's lack of understanding of both Spain's legal system and the reality under examination.

The Report is unaware of the most recent reforms of the Criminal Prosecution Act and the Criminal Code regarding torture. It refers to derogated legal texts and describes the National Criminal Court (Audiencia Nacional) as an "Special Court", showing no knowledge of European Court of Human Rights case law.

As a result of the comprehensive document listing the errors sent by the Government of Spain, the **Special Rapporteur rectified** and corrected a **large part of his work on the Legal Framework** and in the definitive version of the Report he did provide a correct interpretation of the constitutional framework and the so-called 'anti-terrorist legislation' (paragraph 30), a common turn of phrase in the terrorist environment which, unfortunately, he continues to use and which refers to nothing other than Article 520 bis of the Criminal Prosecution Act (regulating incommunicado detention), Article 527 (regulating the rights of which the incommunicado detainee is deprived), Article 384 bis and Articles 509 and 510 covering provisional incommunicado imprisonment.

By deleting the former chapter dealing with the Judicial Power (paragraphs 20-21 in the provisional Report of 31th December), the Rapporteur is acknowledging that in Spain there is no such a Special Court for crimes related to terrorism; secondly, in his new exam of the legal framework in place, both the Criminal Code and the Criminal Prosecution Act, the Rapporteur

also acknowledges the improvements brought about by the recent legal amendments and the role of the judge as the main guarantee for the detainee held under a solitary confinement regime ("incommunicado").

However, only a subjective, incomplete and **distorted examination of the incommunicado regime** can explain how the Rapporteur reaches the conclusion that the presence of a lawyer and a forensic physician right from the beginning of incommunicado detention facilitates the practice of torture and that, in his opinion, there is no effective jurisdictional control of the incommunicado status. On the contrary the Rapporteur asserts in the Report that "the system as it is practiced allows torture or ill treatment to occur, in particular in regards to persons detained incommunicado in connection with terrorist related activities".

It is unfortunate that the Rapporteur can reach these conclusions on the basis of a weak and incomplete understanding of the jurisdictional guarantees provided by our legal system and of the functioning of the Spanish trial system, without taking into account the doctrine of the Spanish Constitutional Court and that of the European Court of Human Rights, and, furthermore, without a rigorous approach to the reality and to the specificities of the fight against terrorism.

2. Secondly, the Report is unacceptable because of the definition of the mission to Spain. In the 31st December Report it was a 'fact-finding mission' and was reduced to a mere 'visiting mission' in the definitive version of the Report.

This is proof that **the Rapporteur did not undertake a fact-finding mission** and that some of the assertions made in the Report are wholly questionable to say the least, if not completely false.

3. Thirdly, the Report is not acceptable because the **Special Rapporteur did not include,** in either the preliminary or the definitive Report, **important facts provided by the Government of Spain** at the behest of Mr. Van Boven himself, such as information on the detainees resulting from the closure of the daily newspaper Egunkaria, information regarding the manual of accusations of torture seized from an ETA commando in 1988 and the information regarding alleged accusations of torture conveyed to the Special Rapporteur by his 'sources'. The Special Rapporteur has requested his official interlocutors in Spain for clarification of these accusations which the Spanish Government promptly provided but which he has preferred to ignore.

4. Fourthly, the Report is not acceptable because **the Special Rapporteur has twisted the declarations of the Spanish Minister of the Interior** when he reports their meeting (paragraph 31 of the Report). It is not true that the Minister of the Interior ordered the closure of *Egunkaria* as a simple reading of paragraph 30 of the Report implies. This mistake can only be attributed to negligence or bad faith. In his definitive Report, the Special Rapporteur did not deem it relevant to correct the wording of the paragraphs regarding this case, despite being in possession of documents provided by the Spanish Government. Nor did he contrast the version of his 'sources' with the official documents. The Special Rapporteur did not consider it necessary to correct the assertion made in Conclusion 58 that the Government followed a pattern of counter-accusations for slander against all those who file accusations of torture, when this assertion is wholly false. All of this casts serious doubts on the work of the Special Rapporteur.

The Government of Spain would like to recall **the duty of the Special Rapporteur** on Torture **to respond to 'credible and reliable information'** in fulfilment of his mandate according to Resolution 1985/33 and Resolution 2001/62 of the Human Rights Commission.

Despite this, the Rapporteur uses, almost throughout his report, information from **unidentified sources**. The Government of Spain would like to underline that **in other reports** prepared by United Nations Human Rights mechanisms the **authors have provided the identity of their interlocutors**. This was the case with the report prepared by the **Special Rapporteur on Freedom of Expression**, Mr. Abid Hussain, on his visit to the United Kingdom from October 24th to 29th **1999.** This is just one example of a member state of the European Union that has suffered from the scourge of terrorism for years. That report (E/CN 4/2000/63/Add.3) includes an annex with a list of the full names of all the officials, journalists, academics, NGO members and other interviewees. It includes fourteen government officials, fourteen journalists or members of media related organisations and a further nine individuals, all identified by their full name.

The Government of Spain therefore believes that most of the **information** included by the **Special Rapporteur** in his Report and which constitute the basis of his allegations and Conclusions (paragraphs 26, 40, 41, 44 and 57 of the Report) **is neither credible nor reliable** as it originates from unidentified sources and, moreover**, it lacks** the most elementary **details necessary to check its veracity** (people involved, place of the alleged incidents, date and circumstances…)

The Government of Spain has come to the conclusion that the Rapporteur has only managed to confirm the partial, biased and erroneous view of the situation in Spain he held prior to his visit without even bothering to check his facts once in the country.

3. SPAIN AND THE RULE OF LAW

The Special Rapporteur has chosen to **ignore**, or else has not considered the **information** on the guarantees to prevent torture or ill treatment within the framework of the fight against terrorism provided by all the Spanish officials during their interviews to be credible and reliable enough.

1. **The fight against terrorism in Spain**, as a democracy governed by the rule of law, **takes place within a legal and constitutional framework and with absolute respect of the rights and freedoms of citizens.**
2. The tension referred to by the Rapporteur between the duty to provide security for citizens and the respect of their rights and freedoms does not exist either in the Spanish legal system or in practice.
3. This alleged tension between the defence of peace and security for citizens and the respect of the guarantees and rights of the detainee does not even occur in the regulation governing the incommunicado regime applied to suspected terrorists.
4. The incommunicado regime is only applied to a detainee or prisoner for terrorist offences or organised crime. Its aim is to safeguard the reserve and confidentiality of an investigation. That is the only reason why the State temporarily restricts the right to communicate with the outside world, whilst constantly safeguarding the detainee's right to legal and medical assistance and always under permanent supervision by a judge.

5. **Spain** is a State governed by the Rule of Law and therefore **no breach of human rights is tolerated in the fight against terrorism**.
6. **The courts have punished crimes of torture or ill-treatment** committed by members of the security forces and several officials.
7. The Judiciary, as in independent and impartial body subject only to the rule of law, has all the means and powers to ensure that criminal behaviour be investigated, judged and punished.
8. The rulings and judgements of the courts, including the Supreme Court corroborate this statement.
9. **ETA's strategy is to systematically make torture accusations**, as corroborated by documents captured in operations against ETA commandos.

4. BRIEF APPROACH TO THE "INCOMMUNICADO" REGIME AND LEGAL GUARANTEES

The solitary confinement ("incommunicado detention") regime under police detention applied to people arrested under suspicion of belonging to or collaborating with an armed organisation is one of the concerns expressed by the Special Rapporteur in his Report. In this regard, we must stress that **the detainee is not deprived of any of his fundamental rights**, nor is the situation ever extended beyond the limit established by the Spanish Constitution and the Criminal Prosecution Act. The detainee neither suffers from a lack of judicial supervision that could allow torture or ill-treatment to happen. The only difference imposed by law on these detainees for suspected terrorist activity, under the solitary confinement ("incommunicado") regime decreed by a judge, is that the lawyer is appointed by the Bar Association (" abogado de oficio") and the doctor is a forensic doctor.

The full protection of the rights of detainees or prisoners held incommunicado is analysed later on in this document that contains the Government of Spain's arguments, in the Appendix. This Appendix also dwells on serious omissions in the Rapporteur's report such as those involving the important role of the Prosecution Service and the possibility of exercising a private or public suit. In this same plea we will provide extremely detailed information on **the role of court-appointed lawyers, forensic physicians and judges**. The immediate intervention of those three professionals, independent of the security forces holding the detainee, contrary to the Special Rapporteur's opinion, constitutes a **guarantee for the detainee** and a sufficiently proven **deterrent against any temptation to resort to the use of torture or ill treatment**.

In short, **the Rapporteur offers a totally distorted and blurred view of the solitary confinement ("incommunicado") regime** and attempts to give the impression that the detainee is subjected to the most absolute isolation and abandoned to an uncontrolled police force. This is completely false. The misgivings expressed by the Rapporteur against the professionals who directly supervise the detention are equally incomprehensible and unfounded.

The Special Rapporteur issues a reminder in his report (paragraph 33) that in accordance with the resolution of the Human Rights Commission, '**prolonged incommunicado detention** may facilitate the perpetration of torture and could, in itself, constitute a form of cruel, inhuman or degrading treatment'. The Government of Spain would like to invoke opinion 26/1999 of the Working party on Arbitrary Detentions, approved on 29th November 1999, on the subject of

Mikel Egibar Mitxelena, arrested by legal warrant and detained incommunicado for a total of eight days and committed for trial accused of aiding and abetting an armed organisation.

The aforementioned opinion of the Working party concluded that the custody of Mikel Egibar Mitxelena was not arbitrary. The opinion, through its reasoning invalidates the Rapporteur;s arguments on incommunicado detention and the effectiveness of Spanish legal guarantees.

It should be stated, as an indication of the **duration of incommunicado detention in practice**, that between 2002 and 2003 only one case of incommunicado detention exceeded five days. 75% of cases lasted 72 hours, after which the detainees were sent before the judge and the incommunicado status lifted. In the remaining 25% of cases, incommunicado detention was extended for a further 48 hours (totalling 5 days), after which the detainees went to court and the incommunicado status was lifted.

This document containing the Government of Spain's arguments will provide further information in its appendix on a number of **lawyers** who act in defence of members of the ETA terrorist organisation and **who** either **aid or abet the organisation** or who are actually members.

The many legal proceedings and judgements in cases against ETA commandos and members prove that the organisation exerts strict control over the detainees and prisoners belonging to the group, liasing and communicating with them **through lawyers who work for the organisation.** They are also instruments to guarantee submission to the organisation's discipline and to coerce those prisoners who wish to attempt a return to society. It should not be forgotten that ETA has killed dissidents, such as Dolores González Catarain, 'Yoyes', murdered in the street in full view of her infant daughter.

5. TORTURE AND ILL-TREATMENT: MISREPRESENTATIONS IN THE RAPPORTEUR'S ASSERTIONS

The Government of Spain hereby reiterates, once again, that **every single accusation of torture or ill-treatment is investigated**, and that a legal framework exists, alongside the necessary human and technical resources to enable the speedy probe of all accusations of torture. Therefore the **assertions made by the Rapporteur concerning the passivity and permissiveness of the legal and administrative authorities are completely unacceptable**. The Rapporteur seems to be unaware of the procedures of the Spanish trial system, excluded from his definitive Report. According to the system, both the detainee as well as any other natural or legal person (even if not the victim of the crime) may exercise a legal action, with no prior limit, to exercise a criminal suit as well as standing as acusación or to impeach any pronouncement by the courts that they consider contrary to the law. Thus, Associations Against Torture and Non-Governmental Organisations may join the criminal suit, if they wish.

The Rapporteur seems to forget that for a confession in police custody to be considered as evidence in court several requirements need to be fulfilled. These include that constitutional guarantees must have been respected to obtain it and it should be spontaneous. It must also be legally confirmed. A confession obtained under torture is invalid and could therefore not be used at trial.

Nor should it be forgotten that members of the security forces resorting to torture would have to face serious criminal and disciplinary consequences, including prison and being barred from public office, which would incur loss of civil service status.

The Special Rapporteur describes the attitude of public authorities as “decree of silence” on the subject of torture and extends the application of this decree of silence to the whole of Spanish society when the Special Rapporteur claims to have “observed a reluctance to discuss the occurrence and extent of the practice of torture in Spain, as torture has become highly politically charged” (Paragraph 28). The Special Rapporteur also criticises the Judiciary, referring once again to his “sources”, blaming the former for perpetuating the impunity of those guilty of torture (Paragraph 44).

The Special Rapporteur concludes (Paragraph 58) that denying the existence of cases of torture contributes to a climate of impunity and further concludes (Paragraph 62) that in Spain there is no public or democratic space to deal with the issue of torture.

The **Rapporteur’s** assertions are proof of his **complete ignorance** of the strength of Spanish democracy on a daily basis.

Assertions of this nature invalidate the Report as the Special Rapporteur has acted with an **inexcusable lack of thought, inaccuracies, negligence and unacceptable partiality.**

6. THE STRATEGY OF THE TERRORIST ORGANISATION ETA

The terrorist organisation **ETA**, having **lost the electoral and Parliamentary battle and about to loose on the police front** too, has decided to resort to an **international campaign of systematic accusations of torture and abuse** so that international mechanisms for the protection of human rights and NGOs will pressure the Spanish authorities **to abolish the solitary confinement regime (“incommunicado regime”) under police detention or prison custody**. The regime is very effective and is making it difficult for the armed terrorist organisation ETA to set up and perpetrate terrorist acts.

Despite what the Rapporteur seems to believe, **Spanish society shows no tolerance of any attack against human dignity**. **All citizens reject any excess or unlawful action** by members of the Security Forces. The Spanish Government has declared many times that there is no alternative way to fight ETA, there can be no action outside the law and, therefore, the fight against ETA must always take place within the framework of legality and respect of the fundamental rights protected by our Rule of Law. The members of **ETA** know this; several **documents** were seized from them in November 1996 and one of them was entitled **‘About Accusations of Torture’**. It is very significant because it includes **instructions for its members as follows**:

- ‘If you are arrested, even for a very short time, even if you are released with no charges or bail or any other repressive measure, you must make accusations of torture.’

- ‘We recommend you accuse as many txakurras (dogs=police) as possible. Just **use your imagination** as **you will never be punished for false accusations.’**

- The idea behind accusing the txakurrada (the dogs) whenever you have been in their hands covers several aims:

a) (…) It is a way of **getting international organisations interested in the lack of freedom suffered by our nation** (…)
b) (…) To wear out the military enemy with as much legal pounding as possible. We know that the accusations spread desperation and help our campaign'

ETA's strategy of torture accusations pursues **three clear aims:**

1. To cast doubts among the population about the existence of torture
2. To attack the prestige of Security Forces not just by calling them 'dogs' but also questioning their actions.
3. To spread the idea at international fora that Spain is not under the Rule of Law because it practices torture.

This strategy, practiced by ETA and its support network, is meant to globalise what they present as an historic 'conflict' between the Spanish State and the 'Basque nation', portraying Spain as a State with serious democratic insufficiencies which is using force to prevent the sovereignty of the Basque nation. This is its way of justifying its terrorist activity as a legal procedure to achieve independence. It has orchestrated effective **propaganda campaigns** in which the **resort to false accusations of torture by its members is systematic**.

The abertzale sympathizers have tried to manipulate the institution of the Special Rapporteur in order to incorporate it into its propaganda strategy. This strategy consists of guidelines for accusations, organisations devoted to 'collecting information' about supposed cases of torture (Torturaren Aukako Taldea, Behatokia), and an international structure for its distribution. The latter's main element within United Nations is the suspected member of ETA Julen Arzuaga who acts intermittently in this sphere abetted by the accreditation of the NGO ' League for the Rights and Liberation of Oppressed Nations'. Thanks to this international propaganda network, the abertzales managed to introduce a series of accusations into the United Nations system. They have been lent an air of respectability by their mere inclusion in the Report and if suitably manipulated, could perpetuate the false idea that torture is commonplace in Spain.

Julen Arzuaga Gumucio stands accused of belonging to an armed organisation in Proceedings 33/01 and was committed for trial by the Juzgado Central 5 of the National Criminal Court (Audiencia Nacional). He is currently on pre-trial release until the final judgement of his case is decreed. That is the result of applying the system of guarantees established by the Spanish legal system.

The **authorities**, in compliance with the mandate established in Article 104 of the Constitution and with the functions assigned to them by specific regulations, always act in **scrupulous respect of current legality**. The fact that the Judicial Authority under the supervision of the Prosecution Service usually manages the arrest of people involved in terrorist offences, except in the event of flagrante delicto, is a further guarantee of proper police conduct. Such is the case of **the citizens about whom Mr. Van Boven enquired** during his visit (Paragraph 27). The

Spanish Government provided him with **information** that included the following: **all the arrests took place as a result of a court order; all the house searches were carried out in presence of a court official.** It should be underlined **that the detainees took a minimum of two months to file the accusation of torture. One of them waited seven months to do so.**

Members of the Security Forces are fully aware of the illegality of torture and ill treatment. They are also aware that the slightest deviation in their acts will be investigated, pursued and punished as strictly as possible as demonstrated by the **sixteen convictions for torture** decreed by the Supreme Court between 1997 and 2003. Seven of them refer to torture inflicted on people involved in terrorist activity and related to events that occurred in the eighties, except one which refers to events that took place in 1992.

All of these judgements convicted the police official or officials responsible for the deeds as well as those conducting the police investigations, the examining magistrate and the secretary in the police investigation because they breached their responsibility by permitting other people to commit the crimes. This proves that Spanish Law, by imposing equal sentences on both those who were the material authors of the torture and those who allowed it, considers both behaviours in the same way: the special duty of supervision and hierarchical seniority justify such equal treatment.

It is even more intolerable and, of course, wholly unacceptable that the Rapporteur labels these judgements as a mere formality in view of these objective facts and the more severe punishment for torture offences throughout the different reforms of our Criminal Code.

The approval of new legal measures, their application by judges and prosecutors plus increased police efficacy, whilst constantly respecting legality and basic rights have led to a progressive and significant reduction in the number of terrorist attacks, episodes of street violence as well as the number of dead and injured in those attacks since 1996. The 2003 figures are the best so far and Spanish society is the greatest beneficiary.

Many of the new legal measures incorporated into Spanish domestic law follow the recommendations and agreements adopted within the framework of the United Nations. They resulted in Magistrates Court 6 of the National Criminal Court (Audiencia Nacional) ordering the **cautionary closure** of the ***Egunkaria*** **newspaper** due to the culmination of judicial investigations undertaken regarding the use made of this medium by ETA for criminal purposes. It was an operation against the criminal behaviour of people allegedly linked to or members of the afore-mentioned terrorist organisation that they supported or helped or collaborated with in funding activities, money-laundering, tax evasion, etc. Those activities are not those generally considered fitting for the media. The **measure was directed at defending the basic freedoms and rights of all citizens and not against freedom of expression**.

It is worthwhile stressing that this legal action applied the new principles and criteria incorporated into Spanish domestic law, following the recommendations and resolutions adopted in the international sphere within the United Nations framework (Security Council Resolution 1373, among others), to achieve greater efficacy in the prevention and repression of acts of terrorism. It is known that one of the basic aspects of the prevention of terrorist acts is control over **the financial flows that succour terrorist organisations**.

7. OTHER INTERNATIONAL PRONOUNCEMENTS REGARDING SPAIN

Finally, we should like to refer to the international dimension, of such great interest to the terrorist organisation in question and also mentioned by Mr. Van Boven, albeit in a partial and biased manner:

The Committee Against Torture (CAT) has expressed its satisfaction at Spain's adoption of specific measures such as the incorporation of the relevant provisions of the UN Convention on Torture into the 1995 Spanish Criminal Code, the ratification of the Statute of the International Criminal Court as well as the drafting and distribution of the Handbook of Criteria for Judicial Police Enquiries.

The most recent report presented by the UN Human Rights Commission Special Rapporteur on Torture, dated March 2003, acknowledges the detailed responses provided by the Spanish Government with regards to accusations lodged with him, which is proof of the spirit of co-operation that does exist.

The UN High Commissioner for Human Rights, Mr. **Sergio Vieira de Melho** declared Spain's fight against terrorism to be a transparent one following his visit to the country in February 2003.

The **report prepared by the Human Rights Commissioner of the Council of Europe**, Mr. Gil Robles, following his visit to Spain and the Basque Country in particular in February 2001, is of specific importance. The Commissioner refers to the 'constant violation of human rights in the Basque Country through terrorist action', and to 'the tension suffered by people in an elected post, those involved in the judicial domain, or those who have publicly (or even privately) declared themselves to be in favour of the current constitutional order, as well as those who have issued or written critical opinions of nationalism or of the terrorist organisation ETA and, naturally and specifically, members of the Security Forces'. He makes specific mention of the most recent report on Spain by the Committee for the Prevention of Torture which shows that the 1995 Criminal Prosecution Act 'has reinforced the penalty device for State officials found guilty of acts of torture or abuse ', or for any official public authority judged guilty of 'violating constitutional guarantees'. The report goes on to say that 'the CPT delegation did not receive any accusation of torture by the people interviewed who were either currently or recently detained by Spanish law enforcement officers at any time during their visit'.

The Council of Europe Commissioner for Human Rights concludes his follow-up document (15.1.2004) to his February 2001 visit by referring to the pressure suffered by the Basques because of terrorist actions and declares his solidarity with victims and recalls the need to combat the terrorists criminal acts and the organisations that support them whilst respecting democratic values and the Rule of Law.

8. CONCLUSION

The Spanish Government expected from the Special Rapporteur on Torture, after his visits to Spain, an objective and rigorous Report on the absolute prohibition of torture and ill treatment in in Spain, a prohibition that is upheld both by the legal system and by judicial practice.

Instead, Mr. Van Boven, who was free to meet whoever he deemed fit, has drafted a Report that lacks credibility, given that:

- He has breached his mandate to use "*credible and reliable information*".
- Despite the fact that he did not visit places of detention, he makes comments on the *treatment* of detainees held in incommunicado detention, by resorting to un-verified rumours.
- He has set aside relevant and important documents supplied to him by the Spanish authorities, such as the ETA Manual which orders its members to denounce systematically that they are victims of torture. Furthermore, the Rapporteur collects in the Report alleged patterns and techniques of torture and ill treatment, without providing any facts (identity of the persons concerned, locations, dates….) to verify its authenticity.
- The detailed response provided by the Spanish Government to the individual cases that were brought to its by Mr. Van Boven, has been ignored when drafting the report, and attached as a mere addenda.
- Contrary to other Rapporteurs, Mr. Van Boven has not provided any identification of his non governmental sources, whose information on alleged practices of torture and ill treatment resemble very closely ETA propaganda campaign.
- He refuses to correct the transcription of his interview with the Minister of Interior, and continues to atribute to him the allegation that the newspaper Egunkaria was closed on order of the Government (the falsehood of this statement is proved by Mr. Van Boven in the previous paragraph of his own Report)
- Mr. Van Boven does not seem to realise that the terrorist organization ETA, which has lost the electoral and parliamentary battle, is resorting to an international campaign to tarnish the image of Spain as a country that violates human rights systematically.
- He assumes the existence of a conspiracy of silence on the subject of torture and ill treatment, not only with regards to the public authorities, but extended to Spanish society as a whole, including the mass media. Such allegations are absolutely groundless and false, as can be seen by a brief reading of Spanish newspapers.
- Despite all the facts provided regarding Hight Court sentences, Mr. Van Boven has stuck to his line of questioning the will of Spanish authorities to prevent and punish the violation of human rights in the fight against terrorism.

As a result, the Spanish government, which has always followed a policy of full fledged cooperation with the international mechanisms for the protection of human rights, including the Committee Against Torture, the Committee for the Prevention of Torture of the Council of Europe and the Special Rapporteur for Torture, rejects, in the strongest possible terms, the conclusions and recommendations made by Mr. Van Boven, as they offer a completely distorted picture of the Spanish reality.

APPENDIX

I. REMARKS ON THE VAN BOVEN REPORT ON THE MATTER OF INCOMMUNICADO DETENTION

A. A SIGNIFICANT OMISSION: THE EXERCISE OF CRIMINAL ACTION BY PRIVATE PERSONS AND BY THE PEOPLE AS A GUARANTEE OF TRANSPARENCY IN THE CRIMINAL PROCESS.

The SR’s report fails to analyse the contribution of one defining note of the Spanish criminal system, the lack of monopoly by the official prosecution. This characteristic offers important procedural guarantees which cannot be ignored. The SR’s silence over this issue stands in stark contrast with the time spent by the Spanish authorities, during the meetings held with the SR, informing him of the importance of its existence. It consequently seems advisable to recall that Spain´s procedural system does not grant the public prosecutor a monopoly with regards to the exercise of a criminal action. Spain is the only state in the European Union that allows criminal prosecution to be exercised by the people or by private persons.

As stated in articles 100 and 101 of the Code of Criminal Procedure, the exercise of private prosecution enables the victim of any crime to be a party to the procedure and file an action to have the defendant punished. This means that the victim of any crime of torture or ill-treatment inflicted while in police custody does not depend upon the public prosecutor to mount a prosecution in order to seek reparations for the crime and have the aggressor convicted. Unlike other procedural systems, which limit the presence of a plaintiff in the criminal process to suing for damages, the Spanish system permits a private person to ask for a sentence of his own. And he may do so independently, without any procedural subordination whatsoever to the official prosecution.

In contrast to other European models of criminal action, if in Spain the public prosecutor files to discontinue the public prosecution, this does not automatically terminate the procedure. Criminal action may be conducted through its different phases by the victim of a crime of torture**.** The Spanish system goes to such lengths so as to ensure that the closing of an investigation does not hinge solely on the decision of the State’s representative in the criminal action, but it summons all those persons with an interest in the prosecution of the crime who disagree with the public prosecutor’s decision to drop the prosecution (cfr. Code of Criminal Procedure, articles 782.2.a, 800.1 and 644).

The procedural system is the same for actions brought by the people. This type of prosecution serves as a vehicle for the presence in the criminal action, not only of the victim of the crime, but of *any Spanish citizen* with an interest in the prosecution and conviction of the person responsible. His participation in the criminal action, like the participation of the private parties explained above, is absolutely independent of that of the state prosecutor, establishing his own legal strategy.

The possibility of participation in a criminal action by the aggrieved party or by any interested citizen reflects the historic tradition of the Spanish procedural system, and as such has been contemplated by all successive reforms of the process since the late 19th century. The concept has standing as a historical holdover, but more importantly, private participation in criminal actions has been enshrined in articles 24 and 125 of the current Spanish Constitution.

Case-law handed down by the Spanish Constitutional Court has helped expand the meaning and scope of this very singular procedural instrument. The greater flexibility in the application of the formal requirements necessary for exercising action by the people and by private persons thus established, has favoured non-official presence in criminal action enormously.

With regard to crimes of torture, we must mention the rulings of the Constitutional Court, which, in line with the extensive criterion commented upon above, broke with an interpretation that had become consolidated in the *praxis* of Spanish courts. Indeed, until the Constitutional Court's sentence 34/1994 of 31 January, courts used to understand, on the grounds of a literal interpretation of article 101 of the Code of Criminal Procedure, that action by the people only lay within the reach of individuals ("...all Spanish *citizens* may exercise it..."). As a result of its groundbreaking pronouncement, the Constitutional Court, which safeguards constitutional rights and liberties, expressly proclaimed that legal persons could exercise action by the people.

In order to illustrate that this procedural mechanism, designed to guarantee the transparency of the system, remains effectively in force, the following list of the latest actions for torture exercised in Spanish courts is provided. It includes an indication of the cases where non-official prosecution was present, and what effect it had on the final outcome of the appeal:

1. Convictions for torture by the Supreme Court, upholding an appeal filed by parties to the private prosecution:

Supreme Court Sentence (STS) 701/2001 of 23 April (The court of first instance convicted the defendant of injuries and of ill treatment. The Supreme Court upheld the appeal by the parties to the private prosecution and found the defendant guilty of three counts of torture.)

STS 2051/2002 of 11 December (The court of first instance acquitted the defendants of the crimes of torture and other crimes. The Supreme Court partly upheld the appeal by the parties to the private prosecution and found the defendants guilty of injury instead of torture.)

2. Sentences where the Supreme Court admitted an appeal by the parties to the private prosecution against sentences acquitting the defendants of a crime of torture, but the appeal was dismissed:

STS 53/1999 of 18 January (defendants not convicted of torture, but of injuries)
STS 285/1998 of 2 March (appeal filed by the parties to both the private and the people's prosecution)
STS 1106/1996 of 18 February 1997 (defendants not convicted of torture, but of illegal detention and causing of injuries)

3. Sentences where the Supreme Court confirmed sentences convicting defendants of torture handed down in procedures involving a private prosecution:

STS 1725/2001 of 3 October (the defendants were not convicted of torture, but of an offence against moral integrity: two Civil Guards placed a pistol against the back of the victim's neck and forced him to drop his trousers in the presence of another person and search the ground for a cigarette butt)

STS 772/1998 of 2 June
STS 1117/1998 of 30 September (the sentence was reduced)
STS 873/1998 of 3 July
STS 1050/1997 of 18 July
STS 1154/1995 of 20 December
STS 1202/1995 of 30 November (the sentence was reduced)
STS 683/1995 of 5 June

4. Sentences where the Supreme Court annulled the sentence of the court of first instance convicting the defendant of torture in procedures involving a private prosecution, and decided for acquittal:

STS 1841/2002 of 11 November
STS 379/2001 of 2 April

In accordance with the above, when evaluating the transparency of the Spanish procedural system and its alleged passivity in the investigation and trial of crimes of torture, the following conclusions may be reached:

1. The constitutional principles that guide the actions of the Spanish public prosecutor's office make it impossible for him to take criminal action on the basis of what is politically opportune. The criteria of legality and impartiality, as principles guiding the actions of the public prosecutor (Spanish Constitution, article 124), prevent any criminal case from being dropped and discontinued solely to defend a hypothetical government interest in not prosecuting a crime of torture. Unlike other European procedural systems where the security of the State may constitute sufficient reason to desist from criminal action or to neglect to lodge the proper action (cfr. German Criminal Procedural Ordinance, paragraph 153), the Spanish public prosecutor's office is obliged to lodge all criminal actions stemming from the commission of an illicit deed.

In the hypothetical case that the Spanish public prosecutors office feels the temptation to refrain from lodging a criminal action in a case of torture, it is subject to both political and legal scrutiny. On the one hand, it is subject to political scrutiny given its nature as a State body. On the other hand, its decisions are subject to judicial control, because Spanish procedural law allows the courts to call upon the private prosecution to state its case should the public prosecutor submit an improper request to discontinue the case.

2. Any citizen who is a victim of torture can lodge a complaint and introduce criminal action for the punishment of those responsible independently of the public prosecutor's office. This possibility is not limited to raising a claim for damages, but also allows criminal liability to be demanded. The *quantum* of the punishment demanded can be specified with absolute independence of the public prosecutor's office. A victim of crime who aspires to the just punishment of the accused is not affected by any petition the public prosecution may lodge seeking to have the proceedings discontinued. The victim's petitions for investigation and hearing are just as valid for a successful trial as the petitions emanating from the official prosecution.

3. Any other natural or legal person, even if not a victim of the crime, can introduce a people's action with the same traits of procedural autonomy as in the case of the aforementioned private prosecution. No prior conditions act as obstacles to prevent such criminal action from being exercised.

This enables associations against torture and any non-governmental organisations that wish to join the proceedings to do so, with their own lawyer and independently of the criteria of the official prosecution, without being affected by any requests the public prosecutor's office may lodge to have the procedure dropped.

We ought to specify, lastly, that the rights of the private or people's prosecution include the possibility of challenging any court pronouncement that they consider unlawful. That means it is perfectly feasible for them to lodge any appeal against what they perceive as unjust decisions, without the need to enlist the support of the public prosecutor's office.

B. REJECTION OF THE RECOMMENDATIONS ON INCOMMUNICADO DETENTION AND RIGHTS OF THE DETAINED PERSON

To affirm that terrorism has become one of humankind's greatest concerns is certainly no exaggeration. In recent decades we have seen a profound change of attitude towards the terrorist phenomenon.

Terrorist violence, or at least some of its manifestations, has ceased to be an domestic problem of politically unconsolidated states. It has become a fanatic way of imposing internationally the delirious ideologies, lifestyles or beliefs professed by minority groups in some of the most distant corners of the planet. The immense relevance and impact which terrorism has upon world public opinion should not make us forget, however, that terrorism would never have been possible without the ideological and material support it has secured from local terrorist organisations.

The international community has ceased to consider terrorism a minor problem or a domestic problem of any given country, and has taken up a determined fight against any of its manifestations. Proof of this lies in the numerous conferences, conventions and resolutions aimed at coordinating the efforts of states in the pursuit and punishment of the crimes of terrorism.

In Spain the terms of article 55.2 of the Constitution long ago put forward the idea of the exceptionality of such a singular form of crime. Constitutional legitimacy for the suspension of certain rights, precisely enumerated in the said article, is quite expressive of the determination for there to be a treatment that is dissimilar from the general system applicable to the investigation of other crimes. At the procedural level, the proclamation of the principle of universality in the pursuit of terrorism, made in article 23.4.b of the Organic Act of the Judiciary, reiterates this classification of terrorism as a crime marked by its exceptionality.

Several instruments in the fight against terrorism have been passed in the United Nations, from the Geneva Convention of 16 November 1937 for the Prevention and Punishment of Terrorism to Resolution 1373 (2001) on measures to combat terrorism, approved by the United Nations Security Council at its 4385th meeting, held 28 September 2001. Something similar has

happened in the European Union, where there are instruments such as the Convention on the Suppression of Terrorism of 27 January 1977, and, more recently, the Council Framework Decision of 13 June 2002 on combating terrorism, reached under Title VI of the Treaty on European Union, which identifies terrorist crimes by three defining elements: the social significance of the ends pursued, the gravity of the means used and the existence of an organised structure.

B.1. CONSTITUTIONAL GUARANTEES IN INCOMMUNICADO DETENTION

Terrorist activity is identified with a group organised vertically on the principles of hierarchy and division of functions. Thus, there is a sharp separation between those who design the armed organisation's strategy of violence and those who play the role of mere physical perpetrators of violent acts.

This special *modus operandi,* which terrorist bands share with other Mafia-like forms of organised crime, seriously hinders action by the public authorities, not only because the detention of the physical perpetrator of the crime (who is clearly expendable) has relatively little impact on the future operational ability of the armed organisation, but because of the opacity with which the top echelon of the organisation shrouds itself.

The difficulties inherent in any investigation against terrorism and organised crime are, then, easy to grasp. Legislation attempts to solve these difficulties by modifying the powers of the police and the courts at the outset of the criminal procedure, mainly through keeping the detained or imprisoned person incommunicado. Doing so is intended to ensure the success of the criminal process by avoiding all possible contact between the captured activist and the organisation to which he belongs, so that defensive strategies designed from the outside can be ruled out as the investigation gets underway.

Incommunicado status for a detained or imprisoned person, which is only an option where crimes of terrorism and organised crime are concerned, has been bolstered by Spanish legislation with a goodly number of guarantees, which we shall discuss below:

a) Judgment.

In Spanish law incommunicado detention is always an act of court (Code of Criminal Procedure, articles 509.1 and 3), ordered by a decree in which the competent judge or court must state the grounds on which the measure has been ordered (Code of Criminal Procedure, articles 509.1 and 3, 520 bis 1 and 2).

The police have absolutely no powers of this type, so when they believe a detainee ought to be held incommunicado, they must file a request with a court (Code of Criminal Procedure, article 520 bis 2). The court is independent, cannot be removed and is subject only to the rule of law (Spanish Constitution, article 117.1).

b) Exceptionality.

Holding a detained or imprisoned person incommunicado is an exceptional measure that may only be taken when the judge or court deems that one of the following circumstances is the case (Code of Criminal Procedure, article 509.1):

- to prevent persons who are allegedly implicated in the facts under investigation from eluding justice;
- to prevent the persons allegedly implicated in the facts under investigation from acting against interests of the victim.
- to prevent evidence related to the commission of the crime from being concealed, altered or destroyed;
- to prevent fresh criminal acts from being committed.

It will be the presence of one of these circumstances in the case at hand that will be evaluated—and stated in the judgment—by the court when declaring the detained or imprisoned person incommunicado.

c) Time limit

Article 509.2 of the Code of Criminal Procedure restrictively declares that incommunicado detention shall last the time strictly necessary to carry out urgent proceedings aimed at averting the dangers that justified the measure (referred to above). Yet legislation has not limited itself to this declaration of principles, but has established a maximum for the term during which a detained or imprisoned person may be held incommunicado, which article 509.2 of the Code of Criminal Procedure sets at five days. The normal length of incommunicado detention is no more than 72 hours, as that is the maximum length of detention (Spanish Constitution, article 17.2, and Code of Criminal Procedure, article 520 bis 1), and incommunicado detention may reach the maximum term of five days in exceptional cases, where an extension of the detention for an additional 48 hours period is given in a different grounded judgment in the form of a decree.

Two exceptions are envisaged, however, for the aforementioned maximum term, in the event that pre-trial imprisonment is ordered for crimes committed by persons with links to armed groups or organised crime, by terrorists and by rebels:

1. If the competent judge or court sees a need, he or it may issue a new, clearly reasoned ruling, (Code of Criminal Procedure, article 509.3) extending the incommunicado regime for another term of no more than five days.

2. With the same requirements of form, the judge or court hearing the case may order the imprisoned person returned to incommunicado detention, even after having been allowed to communicate, provided that the subsequent course of the investigation justifies such measures. This second term of incommunicado detention shall in no case be longer than three days.

It is clear, then, that incommunicado detention can only be maintained by the judge for the strictly indispensable time, and that the maximum periods, as such, need not be used up in their entirety. Obviously, once the incommunicado regime has lapsed, the imprisoned person recovers all the rights that were limited by the judgment.

d) Judicial supervision of the enforcement of the measure.

Judicial supervision of the incommunicado regime does not only involve the meeting of the legal requirements for taking the measure; it also extends to the specific circumstances under

which the measure is carried out. Article 520 bis 3 establishes that "during detention, the Judge may at any time demand information and survey the situation of the detained person, personally or by delegating the task to the Examining Judge for the district or precinct where the detained person is located".

e) Right to be examined not by one, but by two forensic doctors.

As established in article 520.1 f) of the Code of Criminal Procedure, all detained or imprisoned persons are entitled to be examined by the forensic doctor or his legal substitute or, if there is none, by the doctor of the institution where the detained or imprisoned person is being held, or by any other doctor working for the State or other public administrations.

Under the terms of article 479 of the Organic Act of the Judiciary, forensic doctors are medical professionals and members of the National Corps of Holders of Advanced Degrees at the service of the Justice Administration. They have been assigned the mission of providing technical assistance to courts and tribunals in matters within their professional discipline, both in the field of forensic pathology and thanatological practices and in professional medical assistance or supervision of detained, injured or ill persons who fall under the jurisdiction of the courts and tribunals, in the cases and fashion stated by the law.

But the most important point for the subject at hand is that, under the aforementioned article 479 of the Organic Act of the Judiciary, forensic doctors "exercise their functions with full independence and under strictly scientific criteria", so their professional criteria can hardly be modulated to suit the hypothetical needs of one of the parties to the criminal action.

Nonetheless, if it is held that examination by a single forensic doctor does not suffice as a guarantee, Final Provision One of Organic Act 15/2003 of 25 November amending Organic Act 10/1995 of 23 November on the Penal Code introduced a new paragraph, number 4, in article 510 of the Code of Criminal Procedure, which reads as follows:

> "4. An imprisoned person being held incommunicado who so requests shall be entitled to be examined by a second forensic doctor appointed by the Judge or Court competent to hear the case".

Consequences of incommunicado detention

Incommunicado detention differs from the general regime as follows:

1. The imprisoned person cannot make or receive any communication whatsoever. Nonetheless, the judge or court may authorise communications that do not frustrate the finality of incommunicado imprisonment and shall, in that case, take the appropriate measures. (Code of Criminal Procedure, article 510.3)

2. His counsel shall be appointed by the Bar association (Criminal Procedure Code, art.527 a).

In Spain, the advocacy is a liberal profession that has no links or organic or functional ties whatsoever with the law enforcement apparatus of the State. In this respect, it behoves us to

recall that article 542.2 of the Organic Act of the Judiciary recognises the absolute independence that lawyers enjoy while practising their profession, affirming emphatically that “in their actions before the Courts and Tribunals, lawyers are free and independent”.

Furthermore, the appointment of a lawyer is not done by the court or the police, but by the corresponding bar association, “a corporation under public law, protected by the Law and recognised by the State, with legal capacity of its own and full capability to achieve its ends” (Royal Decree 658/2001 of 22 June regulating the General Statute of the Advocacy, article 2.1).

In short, incommunicado detention does not strip the detained person of his right to a defence, which a Bar appointed professional continues to provide, but rather deprives him of the counsel of a lawyer of his choice, who is often especially appointed by the very criminal organisation to which the detained person belongs.

3. He will not be entitled to have a relative or person of his choice informed of the fact that he is detained and the place where he is held at any given time. Foreign citizens shall be entitled to have these circumstances notified to the consular office of their country (Code of Criminal Procedure, articles 527 b) and 520.2 d)).

The fight against terrorism cannot stop at the apprehension of the physical perpetrators of attacks, but must reach the leaders of the armed organisation. It is easy to see that if the fact of the detention could be notified to the organisation through the right that article 520.2 d) of the Code of Criminal Procedure recognises on a general basis to all detained and imprisoned persons, many of the expectations that the police might have would be frustrated. This is why a terrorist held incommunicado cannot inform other persons of his detention by the police.

4. Lastly, the detained person cannot confer in private with his lawyer after the proceeding in which he took part.

These are all the restrictions stemming from the incommunicado regime. By abiding by them, Spanish law sees to the effective and entirely normal participation of the incommunicado imprisoned person in the process lodged against him, as shown clearly by article 510.1 of the Code of Criminal Procedure, according to which, “The incommunicado person may attend with all due precautions the proceedings in which this law enables him to participate when his presence cannot thwart the object of holding him incommunicado”.

2. REASONS JUSTIFYING SPAIN’S REJECTION OF THE SR’S REPORT ON THE ISSUE OF INCOMMUNICADO DETENTION

The SR’s report on the matter of incommunicado detention affirms, in biased, unfair terms and from a subjective standpoint, that the system of incommunicado detention, especially pursuant to the reforms effected by Organic Acts 13 and 15/2003, is regressive and that the presence of a lawyer appointed by the bar association and a forensic doctor from the outset of incommunicado detention facilitates the practice of torture, and that there is no effective judicial supervision of the incommunicado regime.

These assertions cannot be taken seriously when held against a meticulous approach to these matters, regarding the special factors in the fight against terrorism and considering international mechanisms and comparative law, and they are flatly rejected by the Spanish State for the following reasons:

A) Lawyer appointed by the bar association

The SR provides the biased affirmation that the presence of such a lawyer facilitates the practice of torture. Notwithstanding the unsoundness of this information, one must bear in mind that frequently the lawyers, doctors and relatives of persons detained for belonging to ETA are some of the most important channels for warning the rest of ETA's members of the detention, setting off ETA's mechanism for the disappearance and concealment of persons and evidence.

The following are some of the cases we can quote where the lawyers of members of the terrorist organization ETA collaborate with the terrorist organisation or form part of the organisation and act as defence counsel to terrorists:

- Lawyer Jone Goirizelaia provides counsel for ETA members, directing the defence of their legal interests, and is an elected member of the Legislative Assembly of the Basque Country for Euskal Herritarrok (EH), a political formation that was declared illegal by the Supreme Court for forming part of ETA. In addition, the 6/3/03 issue of the Official Journal of the European Communities declared the following groups terrorist organisations for forming part of ETA: Kas, Xaki, Ekin, Jarrai, Haika, Segi, Gestoras Pro Amnistia, Askatasuna, Herri Batasuna and Euskal Herritarrok.
- Lawyer Iñaki Esnaola, who directed the defence of ETA members during the 80's, was an elected member of the Congress of Deputies for Herri Batasuna.
- Some lawyers acting as counsels for ETA members are being prosecuted in different proceedings at the National Court (Audiencia Nacional) for their ties to organisations that form part of ETA, as in the case of José María Matanzas Gorostizaga, who is being prosecuted at Central Examining Court Number 5 for belonging to EKIN, the political apparatus of ETA, and who belonged to KAS before that.
- Lawyer Ainhoa Baglietto was also prosecuted at Central Examining Court Number 5 for belonging to Gestoras Pro Amnistia, an organisation that is part of ETA, and so, in turn, was lawyer Luis Barinagarrementería, who is also involved in a criminal procedure in the National Court.
- The most revealing case of the role of ETA lawyers as liaisons and couriers between the leadership of the terrorist organisation and imprisoned members of ETA was that of lawyer José Miguel Gorostiza Vicente. In a conversation held in early 1993 in the visiting room of Alcalá Meco Prison, he informed two imprisoned ETA members of the terrorist organisation's plans to launch attacks against prison officers. Later ETA murdered an officer in the Martutene penitentiary in San Sebastián.
- ETA also murdered the prison psychologist and carried out the lengthiest kidnapping of its history, that of prison officer Ortega Lara, whom the terrorist organisation condemned to death by hunger in a hideout in Mondragón, Guipúzcoa. This death sentence was foiled by the action of the State Security Forces (Civil Guard).
- Lawyer José Miguel Gorostiza was not convicted for these acts because of a purely procedural technicality concerning the validity of the evidence, consisting in the recording of

the conversation, whereas the procedural system that the SR has libelled and slandered so heavily respects scrupulously the guarantees safeguarding the validity of the evidence that can be used to lead to a conviction.

- Other lawyers defending members and collaborators of ETA have been prosecuted in criminal procedures for their participation in the extortion of businesspersons, either in the payment of the so-called "revolutionary tax" or because they acted as intermediaries in the payment of ransoms for kidnappings performed by the terrorist organisation.

Nor does the SR take into account the fact that, as the European Court of Human Rights indicates (Artico Case), the free choice of one's lawyer is one of the elements of the normal content of the detainee's right to legal aid, but it is not the defining note; privation of that choice and the ensuing imperative assignment of a Bar-appointed lawyer does not eliminate that right and does not impinge on the exercise of the right, since the detainee can exercise all the possibilities the law grants to his right of counsel for the defence.

The Constitutional Court (in numerous sentences, inter alia the Sentence of 11/12/1987 that gave rise in 1988 to the present system) has insisted repeatedly on the constitutionality of the inexcusable assignment of a lawyer appointed by the bar association, and requires legal defence to be effective regardless of how it was appointed. Legal aid appointed in this manner is present from the outset in Spain, for the Constitution's aim is for the Bar-appointed lawyer to ensure with his personal presence that the detainee's constitutional rights are respected, that the detainee undergoes no coercion or treatment incompatible with his dignity and liberty, etc. After the incommunicado period, the detainee can freely appoint a lawyer of his choice, and that lawyer will present the detainee's defence in the proper judicial procedure.

The Bar-appointed lawyer has important powers and responsibilities, because he is present during police and court proceedings when statements are taken, and he can request that such points as he considers fit, as well as any incident that may occur during the proceedings, be declared or enlarged upon. He can request that the detainee be informed of his rights, that the forensic medical examination take place, and he can appeal on his client's behalf against the different decrees that govern the detainee's situation up to the time when charges are introduced. This is without prejudice of the right of any detained person, incommunicado or otherwise, to resort to the *habeas corpus* proceedings regulated in article 17.4 of the Spanish Constitution and Organic Act 6/1984 of 24 May regulating the procedure. His officially appointed lawyer may advise him to do so.

Lastly, we must not forget, as the SR does, that statements taken by the police are investigative instruments that have no value as evidence. To be used validly, they must be confirmed before the judge during the process, and they cannot have been secured by means of inhuman treatment or torture, as that would render them invalid.

It is thus evident that the assertions of the SR are not legally sustainable and are entirely unfounded and partial.

B) The forensic doctor

Strangely, the SR also deems that the presence of the forensic doctor facilitates the practice of torture, and again he deliberately ignores important aspects of the forensic doctor's presence during incommunicado detention:

- The statute of the forensic doctor, who, as Spain repeatedly informed the SR, is a medical professional assigned to a court by means of an objective system that factors in professional seniority.
- The reform of autumn 2003 stipulates the right of the incommunicado detainee to ask the judge for a second forensic medical examination.
- The forensic doctor is the doctor appointed by law for all detained persons, incommunicado or otherwise, being held for any offence. The normal system is not altered in any specific way when detention is incommunicado, because forensic medical examination is a right under article 520 of the Code of Criminal Procedure, as worded in Organic Act 14/1983 of 12 December.
- Under the judicial decision to hold a detainee incommunicado, the forensic doctor must visit the detainee at least once a day. This is an additional safeguard the judicial authority (whose formal participation the SR questions greatly) uses in practice for the incommunicado detainee.
- In normal practice in these cases, the forensic doctor goes to the place of detention, examines the physical and mental health of the detainee every day at different times, conducts the examinations in an appropriate place in privacy with the detainee, and gives a written report to the court, which is appended to the case records.

Unfortunately, the SR did not visit detention centres, authorities or professionals who are involved in supervising incommunicado detention, and he draws his opinions from the "non-governmental sources" to which he constantly alludes, clearly scorning to find out the truth with respect to regular practice.

The SR therefore refused to see that the Bar-appointed lawyer and the forensic doctor are safeguards against torture. And comparative law and international mechanisms support this standpoint, as we shall see.

C) Length of incommunicado detention and judicial supervision

Nor does the SR hesitate to state that the mere prolongation of incommunicado status and the ongoing judicial supervision of incommunicado detention right from the start facilitate torture. And he does so contradicting his own assertion that the Spanish system only allows a judge to order incommunicado detention. Again, this consideration does not stand up to contrast with the law or regular practice—which the SR did not check either, probably because it would have forced him to stray from his subjective theses.

It is necessary to know what the judicial authority's legal obligations are with regard to supervising incommunicado persons and what normal practice is:

- The examining judge and public prosecutor on duty are immediately informed of the persons detained by the police, not to mention all the cases where the detention is carried our following a judicial order.

- Within 24 hours of the detention the police may exceptionally submit to the judicial authority a motivated request to have the detainee held incommunicado. The judicial authority examines the request for compliance with the legal requisites set in article 509.1 of the Code of Criminal Procedure (which was introduced by the reforms criticised by the SR, unlike the previous regulation, in which these requirements were not precisely specified by law), to declare or refuse to make the exception the police have requested.

- The judicial authority orders or refuses incommunicado status in a grounded decision in the form of a decree within the first 24 hours of detention. This decree establishes the length of the incommunicado status and its scope, which may encompass all modifications of rights established in articles 527 of the Code of Criminal Procedure (worded by Organic Act 14/1983 of 12 December) or only some of them.

  - The decree is examined by the public prosecutor, who, as guarantor of the principle of legality, ascertains whether it is according to law.
  - From the time the decree is handed down, the judicial authority knows that there is a detainee and he knows the place of detention, and at any time the judicial commission may go there to perform proceedings or examine the physical condition of the detained person.
  - Appeals may be filed against the decree, and the decree may be examined by a tribunal presided by a panel of three magistrates. At all events, civil rights appeals against the decree may be filed with the Constitutional Court.

- Once the detained person decreed incommunicado is taken to court to give a statement under charges, the examining judge again pronounces whether the person is to remain incommunicado or not, the length and scope of the detainee's incommunicado status, and then the examining judge reads out the rights in article 520 of the Code of Criminal Procedure, which the police will have already done at the time of detention, as the police report will show.

- At the conclusion of the judicial proceeding of taking the detained person's statement under charges (which will be attended by the lawyer who has the detained person's confidence if the detainee is no longer incommunicado, or by a Bar-appointed lawyer if otherwise), the court weighs whether to order pre-trial imprisonment or to be set free provisionally (article 505 of the Code of Criminal Procedure).

Where the examining judge issues a grounded decree ordering the pre-trial imprisonment, he will state whether it is to be held incommunicado or not. The decree is open to the same types of appeals as stated above. Where the confinement is incommunicado, it may not last any longer than five days, after which time the incommunicado status must be lifted by legal imperative, as established in article 509.2 of the Code of Criminal Procedure.

- A person being held in pre-trial imprisonment, but not incommunicado, who has already been held under incommunicado status during his confinement, can only be placed under

incommunicado status again in exceptional cases, and for a period of no more than three days. This requires a reasoned judicial decision, and applies when the subsequent course of the investigation or the case offers some merit for that decision, as provided for in article 509.2 of the Code of Criminal Procedure.

In spite of all these judicial checks, the SR has failed to look into what is regular practice and continues to insist that in Spain the system facilitates the practice of torture, and that the incommunicado regime is being prolonged. In that sense, during the 2002-2003 period:

- 75% of incommunicado detentions lasted only 72 hours, after which the detained persons were brought before a judge and incommunicado status was lifted.
- The other 25% were extended another 48 hours, as permitted by law, after which the detained persons were brought before a judge and incommunicado status was lifted.
- Only one was extended for more than five days.

These figures show without any doubt that the Special Rapporteur allegations on the matter have no ground, since the figures illustrate how extraordinarily exceptional a five-day incommunicado detention is and how anecdotal an extension beyond five days is. Above all they enable us to affirm that judges engage in a concrete, exhaustive supervision of incommunicado detention.

Last but not least, with regard to the SR's argument— again based on "non-governmental sources" — that judicial supervision is merely formal and bureaucratic, Constitutional Court case-law has stated that a more precise reasoning of the need for incommunicado detention cannot be constitutionally demanded given the serious and exceptional nature of the offence under investigation. Given the nature of these crimes and the modus operandi of the terrorist organisation, the need for incommunicado detention can be decreed regardless of the personal circumstances of the detainee, due to the high probability that the finality that legitimates such detention will be applicable. Furthermore, as we shall see below, the reform of the pre-trial imprisonment and of the incommunicado regime has resulted in marked improvements in this sense.

D) Reform of provisional confinement to increase the guarantees safeguarding the incommunicado detainee

Unjustifiably, the SR fails to tell the truth when he states that the recent reform of pre-trial imprisonment and incommunicado detention (Organic Acts 13 and 15/2003) is a step in the wrong direction. This can only come as a surprise, because the reform is precisely designed to reinforce and specify the guarantees for a detained or imprisoned person who is held incommunicado, in comparison to the previous regulation introduced in 1988:

D.1) Incommunicado status can only be decreed during police detention for offences of terrorism and organised crime, for it is precisely in these cases where the detention of a member of an organised network may ruin the investigation if the proper measures are not taken to shield information and the secrecy of the investigation.

D.2) The measure may only be taken under judicial authority, in exceptional, justified cases. The reform made the measure exceptional and introduced the need to argue the grounds because of which it was taken.

D.3) Incommunicado detention must have the following objectives, thus imposing upon the judicial authorities the obligation to state clearly the grounds on which it is decided:

- to prevent persons allegedly implicated in the facts under investigation from eluding justice,
- to prevent those same persons from acting against interests of the victim,
- to prevent evidence related with the offence from being concealed, altered or destroyed,
- to prevent fresh criminal acts from being committed.

D.4) The reform has also added the legal mandate that incommunicado detention shall only last the time strictly necessary to carry out urgent proceedings aimed at averting the dangers mentioned above. It can last for a maximum of five days. The usual length is no more than 72 hours, as that is the maximum term of detention (Spanish Constitution, article 17.2, and Code of Criminal Procedure, article 520 bis 1). It may reach the maximum of five days in exceptional cases in which the detention is extended by a different judicial decision which clearly states the reasons for the extension.

- For crimes of terrorism or other crimes committed in concert and in an organised fashion by two or more persons, the period may be extended by another period of no more than five days.
- After the period of incommunicado detention ordered by judge decision which clearly states the grounds for the decision, or extended in another judgment stating the grounds for the extension, the person must necessarily be placed in communication. In the light of the subsequent course of the investigation of the case, the judge may afterwards order the imprisoned person returned to incommunicado status for a maximum period of three days, but only in cases of terrorism and organised crime.

D.5) The incommunicado system is, as the Constitutional Court has indicated, a necessary exceptional measure that must be bolstered by a series of specific fundamental guarantees in order to balance the needs of the fight against terrorism with the rights of the detainee. Thus, the detainee holds the right:

- To be informed of the charges against him, of the reasons for his detention and of his rights.
- To remain silent, to refuse to make a statement, or to declare that he will only make a statement before a judge.
- Not to give evidence against himself and not to confess to being guilty.
- A lawyer appointed by the bar association will be present at the police and court proceedings when statements are taken and may request that such points as he considers fit, as well as any incident occurring during the proceedings, be elucidated or explained in greater detail. He may also request that the detainee be informed of his rights and that the forensic medical examination take place.
- To be assisted by an interpreter free of charge.

- To be examined by the forensic doctor or his legal substitute. The recent reform has expanded this right; the imprisoned person may now ask for a second examination by a forensic doctor appointed by the judge.

E) International documents

The international documents to which the SR refers contain numerous principles and criteria which the Spanish system abides by entirely.

The SR himself refers to one of the principles of the United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly, resolution 43/173 of 9 December 1988), but he neglects to mention others that contradict his assertions and illustrate that Spain abides by UN standards:

- Principle 15 refers expressly to incommunicado detention, its limits and its length, stating "Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days".
- Principle 16, paragraph 4, on notification of the detention to family and consular authorities, states, "Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require".
- Principle 18, paragraph 3, in relationship with confidential access to a lawyer of the detainee's choice, states, "The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or regulations adopted according to law, when it is considered indispensable by a judicial or other authority in order to maintain security and good order".
- In relationship with examination by a doctor of the detainee's choice, Principle 24 states, "A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge", while Principle 25 adds, "A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion".

The Council of Europe has also engaged in much work on this subject, as the SR himself states, although he again forgets to mention the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism of 11 July 2002, which are particularly applicable to the subject at hand, especially guideline number IX, paragraphs 3 and 4, on legal proceedings and the right of defence. The read as follows:

- "3. The imperatives of the fight against terrorism may nevertheless justify certain restrictions to the right of defence, in particular with regard to:

- the arrangements for access to and contacts with counsel;
- the arrangements for access to the case-file;
- the use of anonymous testimony.

- 4. Such restrictions to the right of defence must be strictly proportionate to their purpose, and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance".

The same occurs with the document on the CPT's Standards (Committee for the Prevention of Torture), which, contrary to what the SR says throughout his report, expressly affirms in its conclusions and recommendations, in regard to the right to defence of detained persons, "The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer should be arranged".

We should like to stress that the Spanish State has never been convicted by the European Court of Human Rights for incommunicado detention or extending detention in matters of terrorism, unlike some countries of our area.

C. CONCLUSION

The SR's report is false and biased, it is not based on doctrine from the European Court of Human Rights, it is not backed up by a serious comparative study of law, and it gives an absolutely out-of-focus, distorted view of the problem. Incommunicado detention as provided for in Spanish legislation does not mean the detained person is completely isolated or abandoned in the hands of the police force.

The detained person disposes of the aid of a lawyer and a forensic doctor, and his personal situation is supervised by the same judge who took the decision to hold him incommunicado. The lawyer is appointed by the appropriate bar association according to absolutely objective criteria. The forensic doctor is a professional and a member of a public corps independent of any police department, of the Ministry of the Interior and even of the judge or tribunal hearing the case. The judge who orders the detainee held incommunicado presides over a court vested with the prerogative of independence. The immediate action of these three objective, impartial public agents, none of whom are related organically, functionally or personally with the police force involved, constitute a more than sufficient means of dissuasion from any temptation to resort to torture or ill-treatment that might cross the mind of the agents in charge of holding the detained person in custody.

In comparison to the solid guarantee of these official organisations' qualified, real-time inspection of police action from their position of authority, what could the mere notification of the detention and the place of custody to family or friends add towards preventing ill-treatment? Is this communication so essential when the success of the investigation depends, in the case of well-organised criminal groups subject to strict internal discipline, on stealth and surprise to prevent detained persons from plotting with their companions from the terrorist organisation?

We find ourselves less able to understand why the report exudes mistrust of the forensic doctor. This mistrust is unfair; it throws a certain cloud of suspicion on the actions of a public functionary who, in addition to being impartial due to requirements set by his own statute, is furthermore a medical professional subject to the highly qualified *lex artis* that gives the medical profession its profile and personality and is condensed in the Hippocratic oath. To hold that the fact that the incommunicado detainee cannot name a doctor to be present at his examination together with the forensic doctor is a serious, unsustainable encroachment on the detainee's security, is patently unsustainable.

II. REMARKS ON SOME RECOMMENDATIONS MADE BY THE SPECIAL RAPPORTEUR

RECOMMENDATION 67:

Each interrogation should be initiated with the identification of all persons present. All interrogation sessions should be recorded and preferably video-recorded, and the identity of all persons should be included in the records. In this regard the practice of blindfolding and hooding should be explicitly forbidden.

The concern that all persons intervening in police formalities involving a detainee should be identifiable is perfectly understandable. Indeed it was uppermost in the minds of Spain's lawmakers in 1881, in the drafting of art. 293 of the Code on Criminal Procedure, which is still in force. The article states "the report shall be signed by the author and if a stamp is used this shall appear on all pages together with the author's signature. All persons present, along with experts and witnesses participating in the formalities, shall be invited to add their signatures to the part that refers to them. Should they choose not to sign, the reason shall be recorded".

Modifying the **current legal requirement that those participating in the interrogation of a detainee must be identified**, appears unnecessary since this precaution has been **in force in Spain for well over a century** and covers not just the interrogation but all formalities completed in a police station.

1.- **Recording** the interrogation, **preferably on video**, poses several problems. Indeed, one has the impression that it would produce exactly the opposite effect to that sought. Some of these problems concern the need to ensure the safety of police officers, who -in protecting society- may even find their lives added to the long list of victims of terrorism. Various other reasons militate against the appropriateness of the recommendation. These relate not to the police officer involved in the interrogation but to the individual held in police custody.

The **recommendation made by the SR** does not restrict the filming to a given type of criminal or criminal offence. **The impression given is that all police interrogations should be video-recorded. However, the fact that other rights might be seriously undermined if interrogations were filmed as suggested is overlooked. All detainees have a constitutional right to their image, under art. 18.1 of the Spanish Constitution**. Moreover, filmed pictures of an individual are covered by Spain's data protection legislation (art. 3 of OL 15/1999, 13 December, on the Protection of Personal Data). **To allow the authorities to create and keep**

files containing video-recordings of each and every individual's presence in a police station could become an instrument of power in the hands of the country's security forces and would certainly be opposed, even by those the measure is designed to benefit.

2.- In addition to the legal motives and practicalities in support of justifiable criticism of the recommendation, **there are other reasons that give good cause for doubt as to whether it is legitimate**. Video-recording of every detail of a police interrogation would imply taking a precautionary measure aimed at preventing a crime, in this case torture. The aim of such a measure, the SR report reasons, would be to reduce the current levels of impunity in the case of torture. However, if the philosophy underlying the proposed measure were to be generalised, the very principles underpinning the legitimacy of criminal justice would be compromised, to the extent that a manifestly anachronistic notion of criminal law would result. **If pre-crime surveillance measures are deemed licit in the case of torture, why not extend such an effective system to other categories of crimes that are equally offensive to fundamental legal interests**? For instance, in order to reduce the obstacles encountered in proving domestic violence, would it be appropriate to install sound and picture recording equipment in the homes of husbands suspected of violence in the family? Granted, it could be argued that there is a major difference between a person's home and a police station, the latter not being a private place. Another example might be given: **would the installation of video cameras in the deliberation rooms in courthouses -public buildings par excellence- be admissible as a means of compiling evidence to pre-empt hypothetical cases of prevarication by judges? It is worth bearing in mind also that this purported safeguard could be readily manipulated (possible computer manipulation of images)**.

3.- Lastly, it should be recalled that indiscriminate recording of the authorities and officials involved in conducting penal procedures could pose a serious risk for the safety of said persons. It is worth remembering in this regard that the terrorist group ETA has struck not just against private individuals but also against members of the criminal justice system: police officers, judges, prosecutors and prison officers.

Recorded images -which would be pointless if, at the same time, they were not available to the legal representatives of detainees- could be a priceless source of information for criminal organisations, helping hem identify potential targets.

Moreover, we are aware of no other comparative law norm that imposes the system of recording recommended in the report.

4.- Considerably more effective is Spain's own legislation on legal assistance to detainees which, as indicated, is more comprehensive in terms of guarantees than the provisions set out in leading human rights conventions or the regulatory provisions of countries of a similar legal outlook to Spain.

Everything would appear to indicate that the recommendation proposed has not been given due thought as regards its legitimacy and future consequences.

RECOMMENDATION 68:

Complaints and reports of torture or ill-treatment should promptly and effectively be investigated; legal action should be taken against public officials involved, suspending them from their duties pending the outcome of the investigation and any subsequent legal or disciplinary proceedings. The investigations should be independent of suspected perpetrators and the agency they serve. Investigations should be carried out in accordance with the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended by General Assembly resolution 55/89 (the Istanbul Principles).

1.- Prompt action against officials involved in torture

It is somewhat surprising to find a proposal of this nature, given the framework of our criminal justice system which attaches paramount importance to the principle of obligatory intervention in the event of a crime being committed. **In Spain, action is taken immediately against the alleged perpetrators of torture, for the simple reason that there is no alternative under our criminal law.**

It should be recalled that art. 100 of the Code of Criminal Procedure (CCP) stipulates that "all crimes and criminal offences give rise to criminal prosecution with a view to punishment of the person responsible; additionally, civil action may arise also for restitution or reparation of harm caused, as well as compensation for any losses sustained as a result of the punishable action" (art. 100, CCP). This strongly-worded statement is binding on all public officials competent in this area: they are all obliged to act immediately in the event a public offence comes to their attention in the course of their duties.

In Spain, unlike in other countries, the police, judges and prosecutors are not empowered to decide not to act in respect of a criminal offence. They are bound by law to prosecute all offences that come to their notice in the course of their duties. **This is evident from the following provisions of law**:

a) Role of the judicial police

Art. 282 of the Code of Criminal Procedure states that "the function of the judicial police, and obligation of all its members, is to investigate public offences committed in its territory or jurisdiction; to conduct, within its powers, the enquiries and formalities needed to verify the commission of said offences and discover the perpetrators, and to collect all effects, instruments or evidence of the crime that may be at risk of disappearance and make these available to the judicial authority".

b) Role of the Prosecutor

"Officials of the Prosecutor's Office are obliged, in accordance with the provisions of law, to bring all criminal prosecutions deemed admissible, irrespective of whether a private prosecution has been brought, except in cases where the Penal Code stipulates that only a private prosecution may be exercised. They shall also bring prosecutions for sexual offences that, according to the

Penal Code, must be reported formally by the victims or by the Prosecutor's Office itself if said offences are committed against defenceless persons or persons without legal personality" (art. 105 Code of Criminal Procedure).

c) Role of Investigating Judges

Investigating judges are bound by law to act, by virtue of their office or at the request of a party, in respect of all crimes that come to their notice. They must perform all actions they consider necessary for the preparation of the trial, verifying and recording the commission of the crimes and any circumstances that might have a bearing on the indictment and the culpability of the perpetrators, guaranteeing the latter's safety and ensuring they meet the financial liabilities arising out of said crimes (art. 299 CPP).

This is **not merely a rhetorical duty incumbent on a public official**. Breaches of this legal obligation are addressed by art. 408 of the Penal Code, which imposes disqualification from public office or employment for a period of between six months and two years in the event that an authority or official fails to carry out the obligations of his position and deliberately fails to pursue the prosecution of crimes that come to their notice or the prosecution of the person(s) responsible".

Lastly, it should be noted that the above obligation to prosecute criminal offences is complemented by the obligation in law to formally report such offences. This is set out in art. 259 of the CPP, which states that "anyone witnessing the commission of a criminal offence is obliged to notify said offence to the nearest investigating judge … or official of the Prosecutor's Office".

It will be clear from the above that Spanish law more than adequately addresses the need for prompt prosecution of criminal offences -including torture- committed in our country. **All Spanish citizens with knowledge of alleged torture are obliged by law to inform the authorities, who in turn are obliged to take immediate criminal proceedings against those responsible**.

2. Disciplinary procedures applicable to officials involved in torture or ill-treatment

In addition to the term of imprisonment applicable to persons convicted of torture under art. 174 of the Penal Code, a disqualification from office for a period of between eight and twelve years is imposed also. The person is deprived of "all his or her public honours, employment and offices, including elected office and is also ineligible for any other public honours, offices or employment or election to public office during said period" (art. 41 Penal Code). Evidently, a measure entailing such serious repercussions cannot be applied preventively, but rather only after a definitive sentence has been handed down.

Regarding judges and magistrates, art. 362 of the Organic Law on the Judiciary provides for temporary suspension from duty during judicial or disciplinary proceedings. This rule applies also to officials of the Prosecutor's Office, in accordance with art. 60 of their Statute (Law 50/81, 30 December).

3.- Investigation by an independent body

Even more incomprehensible is the recommendation that investigation of torture should be entrusted to a body independent of the alleged perpetrator's agency. Spain has a constitutional requirement that jurisdiction for all trials -including for torture- lies with the courts and tribunals established by law, who must judge and enforce their judgments, in accordance with the rules governing powers and procedures set out in law (art. 117.3 of the Constitution).

It is the job of independent and accountable judges and magistrates, who are immovable and are subject solely to the rule of law (art. 117.1 of the Constitution), to try cases of alleged torture in our country. There can surely be no greater independence with respect to someone allegedly involved in the perpetration of such offences.

4.- Investigations in accordance with the provisions of United Nations Resolution 55/89 (Istanbul Principles).

On 4 February 1985, Spain's Plenipotentiary, specifically designated for the purpose, signed in New York the Convention against torture and other cruel, inhuman or degrading treatment or punishment, done in New York on 19 December 1984. Since then, the Spanish authorities have strictly observed the rules of conduct set out in the Convention.

On 9 August 1999, to further the development and application of the Convention against Torture, the UN High Commissioner for Human Rights drew up a 'Manual for effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment', known as the Istanbul Protocol. This is an instrument of unquestionable importance, setting out codes of ethics and conduct which the Spanish authorities share and assume entirely. Having adopted them, Spain considers the rules contained in the Istanbul Protocol to be binding. Thus, the **reminder given in the report is seen as totally unnecessary, since Spain is already fully committed to the principles we are recommended to observe, having endorsed them from the very beginning**.

RECOMMENDATION 69:

Legal provisions should be effectively and expeditiously implemented to ensure that victims of torture or ill treatment obtain redress and adequate reparation, including rehabilitation, compensation, satisfaction and guarantees of non-repetition

1.-A special feature of Spain's criminal justice system is that it allows for the possibility of joint action in the same process: the criminal prosecution arising out of the crime and a related civil action also. This is made clear in the Code of Criminal Procedure, art. 100, which states that "all crimes and criminal offences give rise to criminal prosecution with a view to punishment of the person responsible; additionally, civil action may arise also for restitution or reparation of harm caused, as well as compensation for any losses sustained as a result of the punishable action".

The concern to avoid duplication of procedures -a criminal one to try the alleged offence, and a civil one to determine compensation for harm or injury sustained- has led our system to **impose**

on the Prosecutor an institutional obligation to bring the criminal prosecution alongside a civil one on behalf of the victim (art. 108, Code of Criminal Procedure). Except where the victim waives his or her right to compensation, or reserves the right to initiate civil proceedings at a later date, **the Prosecutor shall include in any sentence requested a pronouncement on civil liability to remedy the injury caused by the crime.**

The appropriateness of the compensation is closely linked to the challenge of proof faced by anyone who takes a civil action to court. For the purpose of deciding the amount of the compensation, proof needs to be furnished with respect to the actual harm sustained. **The complaint formulated in the report by the SR, concerning the application of objective mechanisms for determining the amount of compensation, fails to reflect the reality of our system. The compensation calculation mechanism (scales) relates solely to civil liability arising out of negligent conduct in the use of a motor vehicle.** Said scales were explicitly acknowledged as being constitutional by the Constitutional Court in its Ruling 181/00, 29 June.

These scales, which are regularly updated by legislation, are in principle not applicable to injury and harm caused willfully. A separate matter is whether the quantitative criteria they use might serve as a guideline for court practice, to ensure reparation is based on the principles of equality and legal certainty.

2-. Neither is it true to say that the psychological repercussions and moral damage derived from torture are not compensated because of the difficulties in proving their existence. The SR's conclusion overlooks case law established by the Supreme Court, for whom in certain cases the need for proof may be waived, such as where moral injury or incapacitation of the victim is so evident that no proof is required (Ruling of Supreme Court, 17 January 1992). Such injuries are reparable in accordance with existing criteria for compensation although the Supreme Court has reduced the levels of proof generally called for.

In addition to the above, which relates to the structural principles informing all jurisdictional processes, **victims of torture can also expect to receive the compensation awarded, which is not always the case of those whose legal interests suffer injury.**

Under the Spanish system, the victim can file a claim for compensation not just against the actual perpetrators, as well as any accomplices or accessories to the torture (cf. art. 116.1 and 2 of the Penal Code), but also against **the State, which is civilly liable for injury caused by the unlawful activities of its public officials.** The claim for compensation may even joined to the criminal proceedings initiated to establish whether torture was committed. Under this approach, among the passive parties in criminal proceedings for such crimes, **the Public Administration itself can be brought to trial, as vicariously liable.** This is allowable under art. 121 of the Penal Code, which states that "the State, region, province, island, town council and other public bodies, where appropriate, are vicariously liable for any injury caused by persons found to be criminally liable for willful or culpable criminal actions, where said persons are authorities or agents of or contracted by the authorities or are public officials acting in the course of their duties or activities, provided that the injury is a direct consequence of the functioning of the public services performed".

It should be noted that **the mere fact the State is involved as a party civilly liable for the harmful consequences of torture means that any compensation awarded by a court will in fact be paid.** There is no risk of insolvency that might prevent payment of compensation ordered by a court. **The State budget guarantees the payment of all such sums determined by a court ruling.**

3.- In addition to this unique role of the State Administration as a passive party in criminal proceedings for torture, there are other avenues to guarantee payment.

Under the first of these, public compensation may be claimed on the basis **of art. 106.2 of the Constitution**, which sets out the constitutional **right to compensation for all injuries caused to an individual's possessions or rights as a result of the "abnormal functioning of a public service"**. In such cases, the right to financial redress need not necessarily be associated with a penal procedure. To make a claim **the plaintiff does not need to prove that an offence has been committed** and that a specific police officer has acted criminally. **The State Administration's liability derives from the anomalous functioning of a public service**, in this case, police investigation of a crime. In such instances, the existence of force majeure is the only potential consideration in law that might prevent financial compensation from being effected. A person who has suffered torture merely has to prove he was in a police station and demonstrate objectively the existence of injuries sustained during his stay.

Independently of the above, article 1 of **Law 35/1995 (11 December) on Aid and Assistance to the Victims of Violent or Sexual Crimes** envisages the creation of a system of public aid for direct and indirect victims of willful and violent crimes committed in Spain which result in death, serious bodily injury or serious harm to physical or mental health. This provision is much more than a mere statement of intent. The actual Regulations governing such aid came into force with the enactment of Royal Decree 738/1997, of 23 May. Moreover, to ensure that practice was brought into line with the new measures for victims, Spain's Attorney General issued Circular 2/1998 enlisting the help of Prosecutors to "ensure all officials of the Prosecutor's Office endeavour to make use, for the benefit of victims, of all available institutional resources (…) for counseling and personal guidance of those who have suffered a crime".

In sum, statements such as those made by the SR that call into question the effectiveness of provisions or rulings granting reparation for injury caused by torture are tenable only if the existence of a body of law of undisputed practical application introduced specifically to defend the inalienable rights of crime victims is disregarded.

RECOMMENDATION 70:

In placement of prisoners from the Basque Country in prisons due consideration should be paid to the maintenance of social relations between prisoners and their families in the best interests of the family and the prisoners' own social rehabilitation

The recommendation made in this section of the Report by the SR can only be ascribed to a lack of knowledge of the scope and nature of the problem of the ETA prison population. As contended below, **both the number of ETA prisoners and the strategy used by the terrorist organisation in regard to its prisoners make it totally unfeasible to concentrate such prisoners in prisons close to their families.**

1. A recurring debate: the purported subjective right to serve a sentence in one's place of residence

1.1. **Article 12 of Spain's Law on Penitentiaries (Ley General Penitenciaria**, henceforth LOGP) states that "the location of prisons shall be determined by the Prison Authorities within designated territorial areas. Efforts will be made to ensure that each area has sufficient prison capacity to satisfy its needs and to ensure prisoners do not lose contact with their social environment".

Various attempts have been made -on occasions without technical rigour, at times simplistically and more often than not with spurious motives- to use the above provision to argue in favour of the subjective right of ETA prisoners to be transferred to the Basque Country.

Clearly, **it in no way grants a subjective right to all prisoners to serve their sentence in the prison nearest their home. Though it may be desirable, exceptions may be necessary**, either for reasons of material impracticality as there may be no prison in a given area (an extreme interpretation would lead to the ludicrous situation of having a prison for every town) or no room is available in the prison nearest the inmate's home, or – as is the case here – **for reasons of prison policy, duly justified and inspired by the principles of necessity, proportionality and legality.**

Article 31 of Royal Decree 190/1996, 9 February, under the heading "powers to authorise transfers and movements", states that **"in accordance with article 79 of the LOGP, the Directorate General for Penitentiaries has sole authority to decide**, ordinarily and extraordinarily, as to **the categorisation and placement of prisoners in penitentiaries, without prejudice to the powers of prison judges in matters relating to appeals against categorisation**. The Directorate General will order the appropriate transfers on the basis of specific proposals by the relevant prison Boards ('Juntas de Tratamiento') or, where appropriate, by the prison director or management body, as well as any movement of detainees and prisoners requested by the competent authorities".

Article 79 of the LOGP states that "the management, organisation and inspection of all Institutions regulated by the present Law is the responsibility of the Directorate General for Penitentiaries of the Ministry of Justice, except in the case of Autonomous Communities whose Statutes include implementation of penitentiary legislation and management of their penitentiaries".

1.2. It should be borne in mind that both the LOGP and the Regulations on Penitentiaries fully respect the Spanish Constitution, the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 16 December 1966 and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

In the current circumstances, only a total ignorance of Spain's institutional reality or a sympathy for terrorist groups or their objectives would lead anyone to support the concentration of all prisoners held for crimes of terrorism in their home province. Such a

concentration would mean bringing together in a small number of prisons a sizeable group of terrorists serving sentences for extremely serious crimes and still under the discipline of the terrorist organisation.

1.3. Viewed from the penitentiary perspective, **prisoners convicted of terrorist crimes present the following characteristics**:

a) Membership of stable, hierarchical and disciplined organisational structures, with illegal and clandestine ramifications
b) Pursuit of objectives of a highly serious nature, such as spreading terror in the community, disruption of the system of democratic values, attacks on State institutions and undermining of the legal framework for coexistence
c) The use of violent methods, coercion and threats.

1.4. **The effects of concentrating ETA terrorists in a small number of prisons** have already been seen from past experience and have been emphasised by experts. They may be summarised as follows:

a) Rigid control by ETA of its activists, in order to deter them from taking critical individual stances, which further reduces the already unlikely initial possibility that these prisoners would give up their criminal activities.
b) Communication, visits and –generally- relations with the outside constitute one of the pillars of prison life for inmates linked to terrorist crimes. Penitentiary legislation works on the principle that links should be fostered between prisoners and their families as well as with the community. However, the network of relations with the outside world which ETA facilitates its jailed members often hinders the self-critical process of reflection that helps prisoners dissociate themselves from criminal activity. Apart from normal contact with families and loved ones, experience has shown that ETA prisoners request visits from endless lists of friends who have, on numerous occasions, turned out to be members of the organisation of the terrorist group.
c) Once in prison, **many terrorists do not admit to having committed crimes against others. Rather, they have a deep conviction, fuelled by the terrorist movement, that their actions are totally justified and socially positive in that they** promote certain ideals. The terrorist organisation does not allow its members to take part in prison programmes to facilitate social rehabilitation. Moreover, ETA provides convicted terrorists with considerable social support, treating them as heroes and even organising a tribute to them on their release from prison. Under these circumstances, rehabilitation is virtually impossible.
d) Serious problems in controlling an organised prison population, which uses pressure to impose its way of life in prison.

As indicated in the Statement of Purpose of the Regulations on Penitentiaries, "…the emergence of organised crime (...) generates minority groups of prisoners with great potential to undermine security and order within penitentiaries".

1.5. One of ETA's aims is to cause panic among prison staff. In the pursuit of this aim, they have killed several prison officers, **among them, José Antonio Ortega Lara, who was**

kidnapped and tortured and embodies the human suffering and cruelty inflicted by the terrorist organisation. When ETA murders or kidnaps a prison officer, other officers and their families in Spain are terrorised because they fear logically they might be the next victims.

Even now, despite not being grouped together, these prisoners regularly cause disturbances and threaten prison officers who do not give in to their demands. **They try to impose their own rules in the prisons where they are serving their sentences.**

1.6 One of the aims in avoiding the concentration of ETA prisoners is to **place them beyond the control of the organisation**.

This policy is perfectly compatible with the law and with the individualisation of the serving of sentences.

In line with the philosophy of our Constitution, **imprisonment seeks to rehabilitate the prisoner and ensure his reinsertion in society. A paramount factor in this may well be the proximity of the prisoner to his family environment. However, in certain circumstances proximity may well be an obstacle** to the objective pursued. There are powerful reasons of criminal justice policy to avoid placing together the large numbers of prisoners who still obey orders from ETA. A primary obligation of the State with regard to prisoners is to ensure they do not continue to commit crimes or, as has been said, continue to run from jail the criminal business to which they are party. Prevention of this kind is appropriate in the case of organised crime, where part of the criminal business may be in jail while other parts are not. Similarly, just as it makes little sense to unite all the ringleaders of drug-trafficking in the same prison, so too would it be inadmissible both politically and legally to help terrorist crimes be ordered or planned **from prison, which would become a terrorist headquarters.**

The possible placing of ETA prisoners who are still part of the organisation in jails in the Basque Country (Nanclares in Alava; Martutene in Guipúzcoa; Basauri in Vizcaya) could have devastating consequences in terms of reinsertion as well as from the standpoint of the running of the aforementioned jails

1.7.- The objectives of reinsertion and resocialisation underpin Spain's prison policy, in accordance with art. 25.2 of the Constitution, which states that "custodial sentences and security measures shall be geared to reeducation and reinsertion in society and may not entail hard labour. All prisoners shall enjoy the same fundamental rights under this Chapter except for those rights expressly limited by the court sentence, by the nature of the punishment or by legislation governing penitentiaries". In a similar vein, art. 1 of the LOGP states that "the primary purpose of penitentiaries regulated by the present Law is to bring about the reeducation and reinsertion in society of prisoners sentenced to terms of imprisonment or other penal measures depriving them of their liberty, and to keep and hold in custody detainees, prisoners and convicts".

The fact of the matter is, however, that many convicted terrorists are radically opposed to resocialisation measures. Their decision is heavily influenced by pressure from the terrorist organisation, which endeavours to assert tight control over its members in prison. Terrorist prisoners usually enter jail as active members of ETA, closely bound to the organisation by ties of loyalty and faithfulness and subject to its internal discipline. These close ties produce

immediate benefits (money, visits by relatives, friends and local politicians, lawyers acting for the organisation, the media, etc). In training its members ETA places emphasis on preparing them for possible capture and imprisonment. They are indoctrinated to believe while in prison that they have been taken hostage by the State in order to force ETA into surrendering or lowering its demands in the conflict or war waged by the State against the Basque people. **The prisoner thus remains under ETA's collective instructions regarding jailed members and is prohibited from taking an individual position in any dealings with the Administration**.

1.8.- The taking of steps to avoid the concentration of such prisoners in relation to the overall ETA prison population in no way signifies that they are treated as a group. **Treatment continues to be individual and individualised measures still apply to ETA inmates who eschew the criminal business managed by this murderous organisation**. Spain's Department of Prisons has always adopted **a 'case by case' approach in examining the transfer of ETA prisoners to the Basque Country**, using criteria of scientific individualisation. **Generosity is often shown in deciding which prison the sentence should be served in where a prisoner gives up membership of and allegiance to ETA**.

1.9.- Familiarity with **Spain's legislation regarding the categorisation of sentenced prisoners** is important given that this also determines the jail where the sentence is to be served. Art. 102 of the Regulations on Penitentiaries states that "for individualisation of treatment, and following appropriate observation, each prisoner will be categorised and this will determine the prison with the most suitable regime or, if appropriate, the most suitable unit or section within the prison". Sub-section 5 of the same article states that "in accordance with the provisions of article 10 of the LOGP, prisoners considered extremely dangerous or who manifestly and strongly refuse to adapt to the prison's internal rules will be included in Category One, with consideration given to factors such as:

a) the nature of the crimes committed during the prisoner's criminal record, if evidencing an aggressive, violent and antisocial personality;
b) the perpetration of particularly violent actions against the life and physical integrity of others, sexual freedom, property;
c) **membership of criminal organisations or armed groups, unless the prisoner shows unequivocal signs of withdrawal from the internal discipline of said organisations or groups**.
d) active involvement in uprisings, sit-ins, physical assault, threats or coercion.
e) disciplinary breaches considered highly serious or serious, committed repeatedly over time.
f) the introduction or possession of firearms in prison, or the possession of toxic drugs or psychotropic substances in significant amounts indicating their use for trafficking;

Categorisation of such prisoners takes place quarterly. Until there are clear signs of ties with the terrorist organisation having been broken, one of the factors determining Category One status still exists and this in turn conditions the -legitimate and justified- choice of jail. The choice of prison is determined first and foremost by the prisoner's category, not his place of residence. Additionally, the limited availability of places for the respective categories in each prison must also be taken into account.

1.10.- Transferring a prisoner convicted of terrorism to a jail closer to home has been equated all too lightly with successful reinsertion. One consequence of such a policy would be grouping, **an**

approach already attempted on previous occasions in order to preventing contagion of non-terrorist criminals but which **produced undesirable results from the penitentiary perspective**.

Moreover, the concentration of such prisoners on the basis of their membership of an organisation is difficult to justify in law given the lack of legal provision for such a measure.

1.11.- It should be recalled moreover that in Spain's penitentiary system, **control over prison-related matters is subject to intervention by the Prosecutor's Office** in many instances and also **to supervision by prison judges** (Jueces de Vigilancia Penitenciaria), a specific sub-jurisdiction created by the LOGP in accordance with the constitutional mandate ("for all acts at law, jurisdictional authority shall correspond exclusively to courts and tribunals, who shall judge and enforce their judgments…", art. 117.3 of the Constitution) establishing the powers of the judiciary in the implementation of measures aimed at eliminating possible abuses in this area. The principle of penal legality is established with regard to enforcement, with prison judges empowered in all matters relating not only to the enforcement of the punishment but also the supervision and, in general, resolution of any matters arising out of the serving of a sentence. Spain has, therefore, **a highly judicialised system of enforcement, unlike the so-called administrative decision models prevalent in many countries**.

Art. 76 of the LOGP confers on prison judges "powers to ensure compliance with the sentence handed down, to resolve appeals concerning all modifications to said sentence in accordance with the provisions of laws and regulations, to safeguard the rights of inmates and correct abuses and irregularities that may arise in the enforcement of prison rules". Specifically, **prison judges are given the following powers:**

a) to take all decisions required to enforce custodial sentences, taking over the functions normally corresponding to the sentencing court or tribunal.
b) to rule on proposals for parole for prisoners and revoke parole where appropriate.
c) to approve proposals made by prisons regarding privileges that may involve a reduction in the sentence.
d) to approve periods of solitary confinement in excess of 14 days.
e) to rule on appeals lodged by prisoners against disciplinary action.
f) on the basis of studies conducted by observation and treatment teams, and if necessary the central observation unit, rule on appeals concerning initial categorisation of prisoners and changes (both positive and negative) to status.
g) to rule on the admissibility of petitions or complaints by prisoners regarding their regime or treatment, on grounds of their fundamental rights or their rights and privileges while in prison.
h) to visit prisons as provided for in the Code of Criminal Procedure.
i) to authorise temporary releases for periods exceeding two days, except in the case of Category Three prisoners.
j) To hear applications by the prison governor for the transfer of prisoners to closed penitentiaries.

It can be said therefore that enforcement of sentences entailing deprivation of liberty, including in the case of terrorist prisoners, is subject to a system of strict guarantees, overseen in the final instance by the judiciary, which itself is subject to rigorous rules designed to safeguard its independent and immovable status.

In sum, prison judges have powers of supervision, decision and consultation. They are vested with responsibility for guaranteeing the legality of enforcement of sentences and they protect the rights of prisoners against potential abuses or unlawful actions by the Administration.

As can easily be demonstrated, **terrorist prisoners frequently turn to prison judges with the widest variety of complaints and appeals. These terrorists are afforded legal aid free of charge by the State in such cases.**

2.- A further legal perspective on the need to keep sentenced prisoners at a distance: its importance as a judicial measure to avoid secondary victimisation

Another further argument used to refute the view that ETA prisoners should necessarily be transferred to the Basque Country has to do with the protection of victims and new legislation on measures designed to put effective distance between criminals and the persons to whom they caused harm. This is a means of avoiding secondary victimisation.

2.1.- Under the Organic Law of 9 June 1999, articles 48 and 57 of the current Penal Code empower judges and courts to impose further and effective obligations on persons convicted of certain crimes, among them terrorism.

These provisions authorise courts and judges to impose one or more of the following prohibitions, barring the prisoner from:

a. Approaching the victim or any members of their family or other persons as decided by the judge or court. The sentenced prisoner is banned from approaching said persons wherever they may be and from visiting their home, place of work or any other place frequented by them.
b. Communicating with the victim or members of their family or persons as decided by the judge or court. The sentenced prisoner is banned from making written, verbal or visual contact with said people by any means including by computer.
c. Returning to the scene of the crime or, if different, to the place of residence of the victim or their family. These prohibitions may last for up to 5 years.

These prohibitions afford direct protection to the victims. Separation and distance -not just geographical- will help prevent considerable suffering and problems to victims and help them recover psychologically.

2.2.- The aforementioned articles of the Penal Code may be taken into account when the competent authority decides which prison a person is to be sent or transferred to in order to serve a custodial sentence. Specifically, under art. 102.1 of the 1996 Regulations on Penitentiaries, in taking a decision the relevant Board (‘Junta de Tratamiento’) applies not only the mandatory categorisation criteria but may also take these provisions into consideration.

Articles 48 and 57 confirm that prisoners - much less those convicted of terrorist offences- do not have the right to demand transfer to a jail closer to their families.

2.3.- **From the political standpoint it should be emphasised that the decision to grant privileges to jailed ETA members and to disperse prisoners dates back to the previous government (PSOE) and has been maintained by the current government (PP). In this regard, the degree of consensus among the two major political parties in Spain confers extremely broad democratic legitimacy on these policies**.

2.4.- Lastly, it should be added that the harm caused by ETA terrorism is not limited to the Basque Country but extends to the entire country. Terrorism is not merely a Basque problem, as some have repeatedly and unjustly proclaimed. Victims of terrorist crimes exist the length and breadth of Spain. By way of example, one could cite the creation in 2000 of the Andalusian Association of Victims of Terrorism, which comprises hundreds of family members of ETA victims.

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