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Basque Country – Spanish state

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## **Comments to the Human Rights Committee Consideration of the 6th Periodic Report of Spain July 2015**

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## **2.- Article 6. Right to life. Enforced disappearances: the dirty war against ETA**

Still there are no news of those disappeared in estrange circumstances and in the context of the "Dirty War against terrorism" in the 80's. The two unsolved cases are: Eduardo Moreno Bergaretxee and Jose Miguel Etxeberria.

In the case of Jose Miguel Etxeberria, *Naparra*, whose disappearance's 35<sup>th</sup> anniversary will be this year, a communication was send to the Working Group of Inforced Disappearances and on July 2014 they sent a letter considering his case an inforced disappearance. Although the family of the disappeared one took regional-institutional attention (they were invited to the Navarra Parliament to explain their case, for the first time ever), the Spanish authorities didn't take any step in the sense of trying to find the body.

## **3.- Article 7. Torture and ill treatment: the incommunicado detention**

Unfortunately we must refer to the report submitted by this Observatory in the year 2009 on the occasion of the 5th periodic report to the Kingdom of Spain, as all issues raised in that report continue to remain in force. On the one hand, while it is true that the number of allegations of torture received at our association has dropped in the last few years, it has been so, not so much as a consequence of a decrease in the use of incommunicado<sup>1</sup> detention, but due to a decline in the number of detentions in general. However, incommunicado detention is still in use, as are the circumstances widely criticized by this Committee and other international bodies: interrogations continue to fail to be recorded, and, in the instances where police stations do have cameras, they only register detainees going in and out of their cells. This going in and out of cells has never been accounted for and no argument to explain them has ever been provided. It is also not a general rule for the detainees to have access to a physician of their choice (this decision is left to the discretion of the examining judge), and detainees are still denied the right to appoint a lawyer of their choice, least of all to confer in private with them.

Thus, if our previous report focused on the measures and infringements still in place, on this occasion this Observatory will provide real examples of cases from the current period 2009-2015. We have incorporated excerpts from testimonies of torture, from questions asked by examining judges, which we consider to be inappropriate, and from actions taken by forensic doctors of the Audiencia Nacional, which did not help to shed light on what happened during the incommunicado detention.

During this period, international reports of great relevance regarding the question of torture have been produced: shortly after CAT and Human Rights Committee's report were published, in 2011 the CPT<sup>2</sup> paid a visit to the Spanish State, and the European Court of Human Rights issued several opinions condemning Spain. Most of the judgements mention the lack of investigation and the great difficulty to probe the torture for the lack of quality of forensic doctors reports. Has to be underlined, that a group of doctors from Argentina, all of them with long work experience and a very well recognizes reputation, have put a complaint against the forensic doctors of the Audiencia Nacional (these are the ones visiting the incommunicado detainees during their arrest) in the World Medical Association. They denounce the lack of professionalism in their duties. At the moment, they are waiting for a decision.

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<sup>1</sup> Table with number of arrests, detention under incommunicado regime, police in charge of the arrests and complaints of torture.

<sup>2</sup> Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31 May to 13 June 2011 CPT/Inf (2013) 6 <http://www.cpt.coe.int/documents/esp/2013-06-inf-eng.pdf>.

In prison, there is a general use of **solitary confinement against Basque prisoners**, specially in the case of women. As they are less female prisoners, to keep them alone in different prisons is easier.

As for isolation, special mention should be made **of women prisoners**. As the number is lower, the isolation is higher in many cases, besides being in very remote prisons from the Basque Country, they are alone. Special mention should be made of the lawyer Arantza Zulueta, whose detention has yet to be resolved by the Working Group for the Arbitrary arrests, who in addition to being imprisoned alone in the prison of Puerto de Santa María, is located in an isolation module, an especially hard place used as punishment and not as a regular place of detention. Arantza Zulueta is suffering this situation since she was arrested more than a year ago, situation that it seems to us particularly alarming. We wish to remember she has not been judged yet, so she is under preventive arrest waiting for the trial, 1000 km far away from the Basque Country under solitary confinement.

(Return distance in kilometers from Bilbao)

- **Idoia Martínez – imprisoned in A Lama, A Coruña: 1.010 km**
- **Iratxe Yañez – imprisoned in Almería, 1.876 km**
- **Eider Perez – imprisoned in Córdoba, 1.580 km**
- **Olga Comes – imprisoned in Mansilla, 640 km**
- **Ainhoa García – imprisoned in Murcia, 1.60 km**
- **Arantza Zulueta – imprisoned in Puerto de Santa María, 1.940 km**
- **Miren Zabaleta – imprisoned in Valladolid, 580 km**

## **5.- Article 10. Dignity of the persons deprived of their liberty:**

### **The dispersal policy of the Basque prisoners**

At this moment, July 2015, there are 329 prisoners in Spanish jails, 10 in prisons in the Basque Country and 4 at home-imprisonment as they are seriously ill. From the 10 people imprisoned in Basque jails, 9 of them are the youth recently arrested (only a week ago) so we are afraid they will probably be moved to further prisons, and the 10<sup>th</sup> is Txus Martin, a prisoner who suffer a very grave illness. You can find more concrete information about him at the “prisoners with grave and chronic illnesses that should be fulfilling their sentence at home arrest”).

As for the numbers it can be assured that the dispersal policy continues being applying to the group of Basque prisoners. This measure that it started being applied in the 80s and that it is also a punishment added to the families, has not been changed nor canceled. Moreover, in recent years, it has changed only for the worse, being the prisoners transferred to prisons further away and having been separated within the prison, thus increasing the isolation.

### **Consequences of Dispersion**

#### **The right to health**

On 5th February, just five days before his release, the Basque political prisoner **Arkaitz Bellón**, with a long history of beatings and aggressions suffered in prison, was found dead in his cell. Along with his life, the Spanish penitentiary policy, of which only objective is to cause suffering, had claimed three lives in the period of one year. His family published a letter that clearly shows what Arkaitz Bellón had to go through during all these years. We include some passages:

*“According to what the medical reports say for the moment, Arkaitz's death has been a sudden death caused by natural causes. We could accept that he died with no indications of having suffered at the moment he died. However, we cannot accept the fact that it was a sudden death. He was killed due to a measured and systematized cruelty he suffered throughout these 13 years he had been behind bars. Being aware of Arkaitz's stay in prison, how can we accept Arkaitz's death as being natural? 13 and a half years ago Arkaitz was arrested and tortured. 3 years passed and after the trial he, along with Txomin and Andoni, was convicted to a long and completely disproportionate sentence in prison. Despite no-one can hardly love freedom as Arkaitz did, he adjusted to his new situation better and quicker than us. It is then when we began to understand the real meaning of the distance and the dispersion: Valdemoro, Ocaña, Herrera de la Mancha, Algeciras, Puerto... He was always further and further. Every year, we undertook journeys of around 100.000 km in order to be able to see him for 40 minutes. We have felt the sensation of uncertainty every single time he was transferred to another prison. For days, we wouldn't even know where he was held. However, we cannot imagine what Arkaitz must have felt like every time we went on the road, scared whether we would be in a car crash or not. We cannot imagine the rage, pain and impotence he had gone through after a guard had beaten him up and left him naked and tied with handcuffs to his bed for a whole day. Arkaitz has taught us that behind bars there are more prisons, considering that he spent most of his stay in prison in solitary confinement, without the protection and company of his comrades. We know what it is to travel a distance of 1000 km to get to visit him, and under the tiniest excuse to have the visit denied and to get back on the road without having seen each other. It is hard, unbearable almost to know that he has had to suffer all this cruelty by himself, all alone. Before us, in the visit, he would always appear to be strong, even if he had been beaten up. He would always make us smile. Arkaitz was simply like that, strong but humble. He didn't want us to worry, he didn't want to harm our hearts. We know that Arkaitz was killed by all of that; Arkaitz is not gone, he was taken away from us. What has happened it is the direct consequence of a ruthless penitentiary policy. It is not “something that can happen to anyone”. More than a simple casualty, it has been a causality.*

The death of a person in prison brings up the issue of the cruelty of the dispersión and the penitentiary policy to the frontline. To the tensions and penalties of life in jail, it is necessary to add the hard consequences of violations of rights. The association [composed by health-care professionals] Jaiki Hadi published in april 2013 a report in which all these consequences were analyzed. We have decided to publish here a part of the report from the one hand, to put into context the denounce of this avoidable and induced death and also, to denounce the situation of the 9 prisoners who suffer serious and incurable diseases and who are still imprisoned:

*“The penitentiary policy applied to this collective has certain components directly affecting on health, until the extent in which they can become clearly pathogenic. Thus, the tense situation to which the members of this collective are subjected to does not help at all in order to preserve the health of these individuals. They are subjected to a way of life, for instance, that causes in many occasions a constant change in the spacial and time*

categories. The constant changes of prison, cell, life regime, conditions of life, the nighttime countings, the continuous searches and personal frisks (humiliating ceremonias such as having to get naked when being frisked -prisoners, as well as relatives-, to form a queue firmly in the counts, etc.). All of that has an obvious influence on these people's health. The monitoring and treatment of ill people subjected to this type of situations is not guaranteed in any way, and the professionals assisting them are simply impotent witnesses. We have registered and diagnosed cases in which this continued forced tension has caused irreversible mental disorders in these people. Yet another penitentiary measure applied to this prisoners collective is the restrictive and discriminating application of the isolation regime or solitary confinement. The Penitentiary Regulation indicates that this regime must be applied only in certain moments, due to various infractions to the regulation. The same thing happens to describe the classification of the penitentiary regime: to the majority of these people, once they have been put in prison, the most severe treatment of the Regulation is applied to them. Furthermore, it is a common measure to separate or isolate the components of this collective in different jails or units. "Superior orders" or "security reasons" are usually the arguments given to justify this type of measures. The professionals working with them in the psychological field perfectly recognise the results of the application of the solitary confinement throughout months and years on people, and we also know that not every person's reaction is the same regarding this type of situations: we know cases of people subjected to long periods in solitary confinement who have ended up having really serious psychological disorders.

The situation of these Basque political prisoners who are seriously ill, far from being better, is getting worse day after day. As Doctor Mati Iturralde confirmed in her article "Illness and jail" published in April's monthly report, the jail is basically a non healthy space. It is not the privacy of freedom what makes the prison cause diseases. There are other factors easily repairable such as the cleanliness, nutrition, overcrowding or the lack of sanitary quality assistance. All these make the stay behind bars a true obstacle race. After 2011, once the peace process had started and the ceasefire by ETA was declared, access to open prison or any other measure of release for prisoners with serious or incurable diseases seems permanently closed. Since then, 14 requests for freedom have been requested and in only two cases, one of them in terminal situation, have granted the release. In addition, the Spanish National Court (Audiencia Nacional) has overturned a state of open prison, imprisoning the sick prisoner again.

### **The following are the main incidents around the right to health recently registered:**

**Ibon Iparragirre:** neighbor from Ondarroa, suffering from HIV in stage C, the most advanced stage of the disease, was in open prison until last March 7 when surprisingly, was arrested by the Basque Autonomous Community's Police (Ertzantza). Iparragirre was imprisoned in Navalcarnero prison, where he remained in the infirmary, and recently, on November 10th, he was transferred to the prison of Alcala Meco. His situation is extremely serious. His illness has caused him a very damaging neurological condition that prevents him from interacting normally with his environment, which has very negative consequences in his day to day. Given his situation, which is extreme, we do not understand the transfer to another prison. This change can not only affect negatively neurologically but also psychologically because it prevents any possible stability. Iparragirre was in the Navalcarnero prison's infirmary. Suddenly, without any improvement on his health, he is transferred to another prison without giving any reason for the change. The transfer, without notice and any justification, has an extremely negative impact not only on Ibon but also in his close environment and in the monitoring the different professionals are doing. That is, adds difficulties to the visits or work carried out by psychologists and doctors. The only change that

would impact positively on the state of Iparragirre would be to return to the previous situation, in which Ibon Iparragirre would recover the complete freedom as his health requires, or at least, to get back to the state of open prison. The jail has only worsened his condition and is not ready to pay attention and deal with a case like his.

**José Ramón López de Abetxuko:** the Basque political prisoner went through surgery on Friday 19th in Oviedo, for an artificial pacemaker. Lopez de Abetxuko was admitted last Thursday at the Hospital. On Friday he went to the operating room and on Saturday, the 20th, he was transferred again to prison. From the hospital, the family was told about the income of the Basque prisoner, however, were not authorized to visit him. Once transferred to prison, they could not see him as the authorized vis à vis (face to face visit) was not carried out due to his hospitalization, so, they needed a new authorization. We need to emphasize that Jose Ramon Lopez de Abetxuko was taken to jail without having eateng, that same Saturday, when just 24 hours had passed from the operation.

**Jose Miguel Etxeandia:** prisoner of Larrabetzu Jose Miguel Etxeandia and his psychologist processed the permission to perform the usual therapeutic session three weeks in advance. The session was scheduled for September 22nd, Wednesday, at 09.30am in **Topas prison**, Salamanca. This procedure is repeated every two months but, this time, Etxeandia received a notice from Madrid where it was indicated that the permission for the session was "being processed". An unusual notice that would not ensure the authorization. The Prisons Institution, however, did not report anything to the psychologist although they had someone who would travel to Salamanca. Etxeandia repeatedly asked the prison officials about the authorization without finding another response that "in case of no other response, this is what you get". On Sunday 21st, the eve of the therapy session, Etxeandia told his family during the visit that the authorization was still pending. On day 22nd, and in the absence of express authorization, the psychologist decides to suspend the trip, eventhough she had already begun. So she used the morning of September 22nd, the day that the therapy session should have been held, trying to clarify what happened. She had to speak to 8 different officers in order to get to what had happened. Finally, they reported that the inmate had been informed on 19th, about the authorization for the session. The head of security, also accused the professional of "jeopardizing the procedures of the institution". That same day, ie on 22nd September at 13.00 hours, an official handed Jose Miguel Etxeandia the notification they said having given days earlier. The authorization was dated the 19th.

**Aitzol Gogorza:** the seriously ill political prisoner was admitted to the Hospital de Basurto last November 5th, after suffering severe respiratory failure. Upon his admission, the prisoner of Orereta suffered a pulmonary embolism which causes lung infarct. Aitzol Gogorza's case is particularly worrying because it is one of 10 Basque political prisoners seriously ill. He is diagnosed with an Obsessive-Compulsive Disorder. The judge recently denied the request asking for the application of Article 100.2, despite his really serious situation.

The prisoners have solicited many times to be regrouped in prisons in the Basque Country, to be brought to prisons which are closer to their homes. The Special Rapporteur on the question of torture, Theo van Boven recommended after his mission to Spain in 2003 that "in assigning prisoners from the Basque country to prisons, due consideration should be given to maintaining social relations between the prisoners and their families, in the best interests of the family and the prisoners' own social rehabilitation". The same opinion is shared by several Non-Governmental Organisations and Human Rights Institutions. We can emphasise, among others, the Report of the Human Rights Watch of April 1992, few time after this policy started which mention that "the location of the prisoners in prisons far from their homes must cease. In any

case the transfer to such far places can not be used as a punishment measure". Also the CPT states that "humanitarian considerations, and the objective of social reintegration are enough in order the prisoners to serve their sentence in the regions where their families live and where they have social links".

## **6.- Article 14 and 26. Right to a fair trial and the independence of the judiciary**

The last times we have noticed a development of the use of criminal justice justified as a counter-terrorism necessity, but in fact, extending this definition to areas that have nothing to say with it. We have perceived a judicialization of the political life, with intrusions of the judiciary in the everyday political debate and in the other way round, the politicization of the judiciary, with decisions taken under political pressure or taking into account facts or elements of a political nature rather than a judicial one. The involution in this field is a concern of most of the human rights organization in the Spanish state, as been declared in different statements. One of the most graves attacks is the detention of lawyers defending Basque prisoners. With several police operations, a total of 14 lawyers have been arrested and at the moment are waiting for the trial (two of them are in pre-trial detention: Arantza Zulueta and Jon Enparantza). Several international associations of lawyers have shown their concern for what it is understood of a criminalization of the right of the defence, such European Association of Democratic Lawyers and the International Association of Lawyers ELDH.

## **7.- Article 19, 21, 22 and 25. The violation of Political rights: Freedom of expression and association: the extension of the crime of terrorism to political, social and cultural activities:**

The Committee thus gathered in its 5th periodic review the concern about the guarantee of the freedom of expression:

19. The Committee takes note of reports that the exercise of freedom of expression and association could be unjustifiably hindered by prosecutions before the National High Court for the offences of association and collaboration with terrorist groups (art. 19).

**The State party should ensure that any restriction on freedom of expression and association is necessary, proportional and justified, in accordance with article 19, paragraph 3, and article 22 of the Covenant.**

We should point out however that the same is not guaranteed. As regards to the freedom of expression, we should emphasize, for example, the admission of the complaint against the leader of the political party Sortu, that after the operative that ended with 12 lawyers arrested, he disagreed with such arrests. The instructor trial judge, Eloy Velasco, used the names of chess moves to different arrests of lawyers and organizations of relatives of prisoners. Thus, the one held in 8<sup>th</sup> of January 2014 it is called "Check" (in which they were arrested three lawyers) and the last one, on 12<sup>th</sup> of January of 2015, that led to the arrest of 16 people, 12 of them lawyers "Mate". The politician used the same expression to show his disagreement using the expression "the Basque Country will Check-mate the guardia civil" during a public statement on behalf of the political formation and in the exercise of his role of political representative. He then received a complaint that has finally been admissible. The Court now considers that the statements of "extreme seriousness" are "objective and clearly abusive" and therefore are subsumed in the type of article 504.2 of the Criminal Code. However, he believes that they do "not integrate" the crime

of Article 543 of the Criminal Code of "insulting Spain", as it was intended by the far-right association Dignity and Justice, promoter of the complaint.

### **No application of international law**

While there are numerous convictions against Spain by the **European Court of Human Rights**<sup>3</sup> in **Strasbourg** for the violation of art.3, the State party has not adopted any measure to investigate the allegations of the torture, which remain closed without carrying out the relevant measures. On the other hand, there has been much controversy over the way that the **2008 European rules on accumulation of convictions** should be interpreted. This had been requested by several Basque prisoners who had spent several years in prison in the French state, but the High Court makes a restrictive interpretation and, in our opinion, against the inspiring spirit of the law, denying that this accumulation has any effect in these cases. Given the option of submitting a preliminary question and refer the matter to the Court of Luxembourg for Them to issue their opinion on what is the meaning of the European Standard, the National Court has refused to make such inquiry. **Working Group on Arbitrary Detention**: as we mentioned at the beginning of this report, the WG took in account the case of Jose Miguel Etxeberria, Naparra. The Spanish Government didn't take any measures or put in contact with the family in order to find out what happened and to find the body.

**Committee Against Torture**: Case Orkatz Gallastegi: In that case, the Committee established that there was a violation of art. 12<sup>4</sup>. In that concrete case, his declaration during the incommunicado detention was the prove for sentence him to 26 years in prison. That case was the first one in which the Spanish High Court changed his way of interpreting the value of the incrimination probe: until that moment, only a self-incrimination declaration at the police station was not enough. Now, in 2015, the Spanish High Court changed its way again and have published a statement in which they affirm a self-incrimination during the detention is not enough for sentence a defendant. We ask the Spanish courts to follow the indications of the CAT and take some measures on investigating his torture complaint and to review his case according to the new of interpretation of the Spanish High Court. **Human Rights Committee**: Case Maria Atxabal. No measures have been taken in this case neither by the Spanish authorities after the communication by the Committee.

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<sup>3</sup> *Han Seven have been seven occasions that Spain has been convicted for the violation of Article 3: six of those occasions referred to incommunicado arrests of Basque citizens:*

Demand n° 2004/65: Martínez Sala and others v España  
Demand n° 2507/07, September 28, 2010: Affaire San Argimiro Isasa v Espagne  
Demand n° 40351/05, March 8, 2011: claim Beristain Ukar v España  
Demand n° 47303/08, October 16, 2012 afaire Otamendi Egiguren v España  
Demand n° 744016/12, October 7, 2014, Etxeberria Caballero v España  
Demand n° 3344/13, October 7, 2014, Ataun Rojo v España  
Demand n° 58488/13, May 5, 2015, Arratibel Garciandía v España

<sup>4</sup> **Article 12** Every State Party shall ensure that, wherever there is a reasonable ground to believe that under its jurisdiction an act of torture has been committed, the competent authorities will proceed to a prompt and impartial investigation