

**REPORT RELATING TO THE LIST OF ISSUES DRAWN UP BY THE CAT
PRIOR TO THE SUBMISSION OF THE SEVENTH PERIODIC REPORT OF
SPAIN**

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Introduction

The organisations Giza Eskubideen Behatokia/Basque Human Rights Observatory, Egiari Zor Fundazioa and Konponbidearen eta Giza eskubideen aldeko Sare Herritarra/Citizen Network for Resolution and Human Rights, working in the Basque Country, would like to submit this report to present certain changes, even progress, but maintaining certain areas of concern, especially in two areas:

- Specifically in the field of the rights of victims of torture, in the context of the Basque conflict. Since 2015, there have been no new cases of torture, which shows that it was a practice closely linked to anti-terrorist measures and policies. Indeed, ETA's announcement 12 years ago that it was abandoning violent activity led to a gradual disappearance of the practice of incommunicado detention and, with it, of torture itself in the context of police operations in application of the anti-terrorist law. On the other hand, recent investigations, in the form of official reports by the Basque and Navarre governments, have recognised the existence of at least 5,379 cases of torture in this context. However, years later, these thousands of people have not been institutionally recognised in terms of their rights to truth, recognition, justice and guarantees of non-repetition, and these victims are faced with a whole system that provides impunity and protection for the perpetrators, which results in a lack of attribution/assumption of responsibility. Impunity has its corollary in the pardons granted to public officials directly linked to the practice of torture, as well as their promotion, advancement and reward in their professional careers.
- On the other side of the coin, people who were previously subjected to torture, and as a result of self-incriminating testimonies or those incriminating third parties, are still in prison with severe sentences that are served in full, continue to be subjected to the exceptional anti-terrorist prison system. This group of prisoners see their right to access to freedom arbitrarily limited and their re-socialisation hindered, which in itself constitutes cruel and degrading treatment. However, despite the existence of reports gathering evidence and acknowledging the reality of the reported ill-treatment, the convictions of these people are not reviewed, so that hundreds of people continue to serve prison sentences based on illegal evidence obtained as a result of torture. In effect, the current circumstances of non-existence of violent activity and, therefore, the factual impossibility of criminal recidivism, instead of operating favourably, are responded to with a severe and arbitrary prison policy that denies a horizon of access to freedom and, therefore, of hope of re-socialisation for the prisoner. As we will analyse, nowadays, inappropriate legal interpretations are being produced without legal support, with the sole aim of establishing an arbitrary detention framework. Furthermore, there are contradictory decisions between different administrations, with the Treatment Boards of the Basque prisons dependent on the Basque Government issuing favourable reports on their access to freedom and semi-freedom measures based on the prisoner's own objective conduct, while the Courts and Chambers of the National High Court, a special anti-terrorist court, are holding antagonistic positions in order to unjustly keep them in prison. This clash of interpretations has no prospect of a solution.

In the following lines, we will try to develop these points and also to respond to several of the previous questions raised for this seventh periodic report. It can be seen that many of the concluding observations contained in the CAT/C/ESP/CO/6 report remain unresolved.

Recognition and reparation for victims of torture

Torture victims have suffered for years from a lack of official recognition and second-rate institutional treatment compared to other victims who have suffered similar human rights violations by non-state agents. The years in which successive Spanish delegations denied before the CAT and other UN bodies (mainly the Rapporteur against Torture and the Rapporteur for human rights in the fight against terrorism) the mere existence of torture, considering it a mere strategy of terrorists, following orders or "manuals", to discredit the Security Forces and, by extension, the State itself, are not so long ago.

Today, however, reports carried out at the request of the Basque Government have analysed the testimonies of torture and ill-treatment in the Basque Country in the period 1960-2014 and, by means of a scientific method, also backed by the practice of the Istanbul Protocol, the scale of this practice is coming to light. Thus, reports by the Basque Institute of Criminology already state that 4,311¹ people in the Basque Autonomous Community and another 1,068 in the Autonomous Community of Navarre have been subjected to torture.

Social organisations that have been working in the field of torture reporting for years report higher figures. Hundreds of victims have been unable or unwilling to participate in the pre-report study, due to death, mistrust of the reporting institution or, in many cases, because they do not want to relive a traumatic episode in their lives, in order to avoid re-traumatisation and re-victimisation. When referring to incommunicado detention, we cannot forget the people who suffered torture without even being taken to a police station (at roadblocks, injuries during demonstrations, episodes of police brutality...), the victims of ill-treatment in prison, as well as the people who suffered extrajudicial execution or forced disappearance by police or parapolice perpetrators. These hundreds of facts would complete the broad map of torture and state violence in our country, based on the broad definition provided by article 1 of the Convention.

Although the reports have a value in the official recognition of these victims and grant them truth, avoiding having to claim the mere existence of torture, this truth does not correspond to, nor has it provoked an official investigation and institutional reparation activity towards them. The publication of these reports, obtained after a thorough investigation, has not generated the slightest reaction from the Spanish government or, above all, from its judicial system. In particular, no prosecutor or magistrate has ever decided to react ex officio to this overwhelming number of cases, to consult the documentation gathered in these studies, and to take the necessary measures to identify and punish the material torturers and all other persons responsible.

¹ The work of collecting data on victims of torture has been carried out in two stages, on the one hand in the provinces of Gipuzkoa, Bizkaia and Araba, and on the other hand, in Navarre.

https://www.ehu.eus/es/-/n_20171218-estudio-tortura

<https://www.navarra.es/es/-/nota-prensa/el-instituto-vasco-de-criminologia-presenta-a-la-consejera-ollo-el-informe-sobre-la-tortura-desde-1979-hasta-la-actualidad>

Indeed, the jurisprudence of the Court of Human Rights has already established a systematic failure to investigate cases of torture under anti-terrorist incommunicado detention and, as a result, a lack of clarification of the facts and those responsible for them. There are already 11 cases in which the European High Court has condemned Spain for failing to investigate allegations of torture, which can be considered as establishing a systematic pattern. Seven of these cases point to Fernando Grande-Marlaska, then examining magistrate of the Audiencia Nacional and current Spanish Interior Minister. This would confirm that the judicial and governmental leadership is contravening its obligations to investigate and prosecute serious human rights violations, obligations contained in international treaties ratified by Spain. This is consistent with the lack of action taken in the face of successive decisions and recommendations of various United Nations bodies (Universal Periodic Reviews, reports of Special Rapporteurs following visits, as well as individual complaints endorsed by the Committee against Torture, Human Rights Committee, etc.) requesting the investigation of allegations of torture.

The lack of judicial investigation contrasts sharply with the estimate of Basque governmental authorities who already put the number of documented cases of torture at 5,379. The inactivity of the judiciary or the public prosecutor's office in taking an interest in such an estimate is impossible to understand. Whether to confront it as fraudulent, or to validate it and reopen the cases, what cannot be assumed is that nobody takes any notice. It is true that, in addition to judicial indifference, a double slab of impunity is operating over these cases: the cases that took place between 1960 and 1977 would be subject to the Amnesty Law that prevents their investigation, legislation that has already been pointed out by different Rapporteurs for the promotion of truth, justice, reparation and guarantees of non-repetition. In this regard, it should be noted that the State party has made no progress in the practical area of "collaborating with the Argentinean justice system and extraditing the persons investigated for the crimes of torture committed during Franco's regime", nor has it initiated "its own criminal proceedings" as the Committee requests in paragraph 14. This is particularly serious because with the recent approval of Law 20/2022, of 19 October, on Democratic Memory, its article 2 establishes a channel for this: "All Spanish State laws, including Law 46/1977, of 15 October, on Amnesty, shall be interpreted and applied in accordance with conventional and customary international law and, in particular, with International Humanitarian Law, according to which war crimes, crimes against humanity, genocide and torture are considered to be imprescriptible and not subject to amnesty". However, this provision, without further normative development and without a channel for its materialisation, has not produced any practical effect in the sense pointed out by the Committee: neither collaboration with the Argentine justice system nor the opening of cases in domestic jurisdiction. It is simply a dead letter.

On the other hand, beyond the 1977 time limit and with reference to crimes not subject to the amnesty law, the statute of limitations is closing the avenues of investigation and judicial reparation to the victims of torture in recent times. These victims, in the aforementioned numerical dimension, are today defenceless due to governmental and judicial negligence. This circumstance violates article 4.2 of the Convention in the sense that Spain has failed to punish these crimes with appropriate penalties which take into account their gravity, as well as article 12 in the sense that the competent authorities have failed to carry out a

prompt and impartial investigation. The demands made by the Committee in its previous report of concluding observations have therefore still not been met.

We cannot deny that Basque and Navarre institutions are trying to offer administrative reparation to these victims. Indeed, Basque Law 12/2016, of 28 July, on the recognition and reparation of victims of human rights violations in the context of politically motivated violence in the Autonomous Community of the Basque Country between 1978 and 1999 and Navarre Law 16/2019 of 26 March on the Recognition and Reparation of Victims of politically motivated acts provoked by extreme right-wing groups or public officials, are beginning to evaluate testimonies of tortured persons in both territories in order to provide them with administrative recognition.

Although we applaud the path that has been taken, we must make two criticisms of these laws. On the one hand, they establish the status of victim for the people being evaluated, but this has no virtuality whatsoever when it comes to promoting a criminal judicial process. In other words, it establishes victims, but not perpetrators. It recognises the tortured, but does not prosecute torturers. This obstacle was expressly imposed by the Constitutional Court which examined both laws, establishing as a limit that they would not have any criminal implications. Secondly, these laws recognise tortured persons, but do not provide for any reparation measures, unless the torture had effects in terms of disability or serious physical sequelae. Thus, they do not offer any therapeutic reparation measures, medical treatment of physical ailments, psychological-psychotherapeutic rehabilitation of psychic, psychosomatic and psycho-social disorders, they do not grant social aid (aid for access to the labour market, housing, studies...) or they do not have compensation provisions, which do operate for other victims of similar damage. Thus, the concluding observations of the Committee with reference to article 12 of the Convention on due reparation and the right to fair and adequate compensation, including the means for rehabilitation, called for by this Committee in its previous concluding observations (paragraph 15), remain unfulfilled.

Finally, although we note that the incommunicado detention regime has not been applied, it remains in force and there are no plans to abolish it. In this regard, the Committee's request for "updated information on the measures adopted to eliminate the incommunicado detention regime (para. 17 and CAT/C/ESP/CO/6/Add.1, paras. 10 and 11)" should ensure that no progress has been made, and that it remains in force and, therefore, violates the principle of guarantee of non-repetition.

The double victimisation of people torture

In addition to the lack of investigation, in recent times a narrative of legitimisation and glorification of very serious human rights violations attributable to the state is being lavished. We can see that, in the context of what has come to be called the "battle for the narrative", some political and institutional leaders who have had important responsibilities in state terrorism, including torture, are lavishing themselves with statements that not only glorify or legitimise these acts but also humiliate or insult their victims, generating a double victimisation. They have also shown knowledge of the facts and closeness to the decision to

carry them out, if not their proximity to the material perpetrators. Among these cases, we could refer to statements made by the Minister of the Interior between November 1993 and May 1994, Antoni Asunción, who revealed that his predecessor, José Luis Corcuera, who held the post between 1988 and 1993, was responsible for sending at least one letter bomb that killed 22-year-old postman José Antonio Cardosa González in a doorway in Errenteria on 20 September 1989. In the same vein, on 6 November 2022, the former Minister of the Interior José Barrionuevo between 1982 and 1988, when the GAL parapolice groups were active under governmental cover. This is also clear from his recent statements, in which he boasts that he gave orders to kidnap the refugee in Basque territory under French administration Larretxea Goñi and that when they discovered that this police group "got the wrong person", kidnapping the French citizen Segundo Marey, he took it upon himself to release him so as not to "cause more disorder". Lastly, the Minister of the Interior and Justice between 1993-1996, Juan Alberto Belloch, made a statement on 4 December, in which he assumed that he was aware of the human rights activities of the head of the anti-terrorist fight in the Basque Country, General Rodríguez Galindo. In his words, "as an anti-terrorist fighter, Galindo was the best", but torturing Basque detainees "was the only thing he did wrong". Precisely, in one of the very few cases in which justice was able to clarify his responsibilities, Galindo would end up years later sentenced to 75 years in prison for the kidnapping, torture and death of two young refugees.

These statements cannot be seen as isolated, decontextualised statements on the memories of institutional leaders. These statements constitute a pattern of legitimising their actions, of establishing a narrative that the state's gross human rights violations and its total lack of investigation and impunity were justified.

However, one of the most painful events for the victims of torture has been the promotion of Arturo Espejo Valero to the rank of Lieutenant General of the Guardia Civil as well as to head of the Support Command of the Guardia Civil. These decisions were made by the Ministry of Defence and the Ministry of the Interior respectively. Espejo was linked to the case of torture and death of Mikel Zabala Garate, officially recognised through Basque Law 12/2016 as a victim of a violation of the right to life due to the torture carried out while he was detained in the Intxaurrondo Civil Guard barracks, demonstrating the implausibility of the official version maintained by the Central Government.

When questioned in Congress and the Senate, both Interior Minister Grande-Marlaska and the president of the government, Pedro Sánchez, took refuge in the lack of investigation and criminal determination of the responsibilities of the now Lieutenant General Espejo. Indeed, this refusal to clarify these cases is precisely the origin of the impunity and subsequent promotions, decorations and rewards granted to perpetrators of state violence. We are aware that this humiliates, insults and re-victimises the victims, denying in practice their rights to recognition and reparation. While this Committee urged the Spanish State to combat impunity and to prosecute those guilty of committing torture, it remains an unaddressed issue in the Spanish State.

According to **Article 10** of the Convention, the State must include in the professional training of law enforcement personnel education and full information on the prohibition of torture. The Committee requests information in this regard in paragraph 17. These practices described above operate in exactly the opposite direction, sending the message to public officials that applying torture, in addition to reward and career advancement, is a source of pride. All of this relates to **articles 12 and 13** and in direct response and reference to the Committee's previous concluding observations (paragraph 19) on combating impunity in cases of torture and ill-treatment and the absence of thorough and effective investigations.

Situation of persons in the exceptional anti-terrorist prison system

Progress cannot be denied in this penitentiary matter, mainly by reversing the dispersion and remoteness of this group in prisons throughout Spain, which prevented them from taking root and also unjustly penalised their families. This practice has already been pointed out by the Rapporteurs against Torture and for human rights in the fight against terrorism as cruel and inhuman treatment. Ending this policy by bringing prisoners back to their geographical and social environment is a step in the right direction, which, although not yet completed, may be in the coming months. The concluding observations concerning **article 2 and article 11** (paragraph 22), although steps have been taken in the right direction by putting an end to the generalised application of prison dispersal and isolation of Basque prisoners, it is no less true that there are still issues that do not comply with the Convention and there are still major obstacles in the pathways to freedom that they are encountering, mainly before the anti-terrorist court on which they depend, the Audiencia Nacional.

The criterion for access to a third degree is linked to the conditions of resocialisation of the prisoner. In other words, when a prisoner is ready to lead a normal life in semi-liberty, he or she should be promoted to the third degree. All this is subject to technical reports on the evolution of the prisoner in prison, whether or not there is a risk of recidivism, whether or not he or she will be able to be housed outside, whether or not he or she has a way of supporting or earning a living for himself or herself or with the help of his or her environment, etc. And in this respect, all these prisoners, having served half of their sentence, are suitable to progress to the third degree and reach semi-liberty. This is technically endorsed by the professionals of the penitentiary institutions who attend to them, as they consider that they fit within the parameters set out in the penitentiary legislation and regulations. However, these favourable criteria are blocked by the Audiencia Nacional, a judicial body that is not involved in these processes.

In fact, there are several cases of prisoners who, having been granted 3rd grade prison sentences by the Prison Treatment Boards and therefore, have been released under strict conditions, have been annulled by the National High Court, after being appealed by the public prosecutor's office. These orders are based on interpretations that are contrary to the law, demanding conditions (repentance, express repudiation of their acts, requesting forgiveness from the victims, collaboration and denunciation before the justice system, participation in restorative justice processes...) that the law does not support. In this way, the documents that the prisoners submit in terms of acknowledgement of the damage caused

and which contain clear declarations of responsibility for their acts, recognising the suffering or pain caused to the different victims of this violence, respecting or expressing their regret for this situation and committing themselves to non-repetition, rejecting in the future any use of violent instruments or methods to achieve political or other objectives, are undervalued or scorned. These letters, endorsed by prison technicians in their sincerity, depth and within the framework of the prisoner's own evolution, are legally sufficient for access to penitentiary rights.

Such is the extent of the denial of permission to leave the prison for a few days, which in ordinary terms is only available after a quarter of the sentence has been served, are denied to prisoners who are about to serve their full sentences. Undoubtedly, these are arbitrary, disproportionate actions, contrary to the law and to the principle of resocialisation and the principle of the re-socialisation of the prisoner.

These judicial decisions are preceded by political and communicative campaigns of very powerful lobbies, from very ideological positions, which deny a new political scenario, which deny the principle of application of the law based on the political context and which slow down processes that derive from a normalised application of ordinary penitentiary legislation.

In addition to the negative human impact on the prisoner who has already begun his or her reintegration process, we would especially like to warn of the frustration that these resolutions provoke in the persons themselves and among their families. And frustrations do not contribute to the consolidation of guarantees of non-repetition.

On the other hand, a new circumstance has had very important implications for the legitimacy of the sentences imposed under this exceptional anti-terrorist legislation. We refer to the case of *Atristain v. Spain*. The European Court of Human Rights (ECHR) has condemned the Spanish state for not allowing Xabier Atristain, then detained incommunicado and therefore under a system in which several of his rights were violated, access to his defence lawyer in 2010. United Nations instruments have taken a stand against this regime for favouring the practice of torture. The Third Chamber of the Strasbourg Court concludes that article 6 of the European Convention on Human Rights was violated with respect to the rights to a fair trial and to legal assistance chosen by the detainee. The judgment states that the prohibition on choosing a lawyer "was such as to undermine the fairness of the subsequent criminal proceedings, insofar as the applicant's initial incriminating statement was admitted in evidence". He was sentenced to 17 years in prison.

Thus, in view of this conviction, the Audiencia Nacional immediately released him pending a review of the sentence by the Supreme Court. However, that court, in an act of contempt for Strasbourg, decided in June to leave the ruling as it was and, in just a few hours, Atristain was imprisoned again.

It is not only the impact that this case has on Atristain himself, but also on the impact it could have on similar cases, in which the application of incommunicado detention violated the basic rights of other persons detained in similar circumstances and who, to this day, are serving sentences based on their self-incriminating statements or the testimony of other

defendants, extracted in such circumstances. In other words, in violation of **article 15** of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which states that "no statement established to have been made as a result of torture may be invoked as evidence in any proceedings". The Committee requests information in this regard, in paragraph 29.

For all of the above reasons, we believe that the international community should facilitate the implementation of an ordinary prison policy that puts an end to this situation. Not privileges, but neither discrimination, based on exceptional anti-terrorist policies that have been common practice for many years.

Specific case of Iñigo Cabacas

The Committee requests information in paragraph 25 regarding the specific case of the death by rubber ball of Iñigo Cabacas. It should be noted that the trial ended with a ruling by the Supreme Court upholding the sentence handed down by the First Section of the Criminal Division of the Provincial Court of Bizkaia. It sentenced a member of the Ertzaintza, head of the operation, to two years' imprisonment and four years' disqualification for the crime of manslaughter due to serious professional negligence. The sentence has no practical effect, as the policeman did not go to prison and as he is already retired, the disqualification does not apply.

However, the sentence, now final, imposes a very forceful account of facts about irregularities in the use of weapons, recording of their use, disproportionate use of force, concealment of evidence and hindering the investigation that "has acted as a scheme of impunity". This ruling was to be developed in the disciplinary sphere, in such a way that the Department would assume internal responsibilities to settle these aspects, now already in the judicial account of the facts. However, the Department of Security indicated that no internal investigation would be opened, because five of the six accused Basque police officers no longer belong to the Corps, due to retirement or permanent disability guaranteed by a doctor due to the "personal cost" they suffered as a result of this case. For all these reasons, the disciplinary code cannot be applied to them. The sixth, a rank-and-file officer, all he did, according to the councillor, was to follow orders to shoot, which is why he could not be internally sanctioned in any case.

There would also be responsibilities of the commanders and other agents who intervened in giving orders for the use of the pellet-launching shotguns, who immediately cleaned the weapons and did not carry out the records of the use of projectiles or who obstructed the course of the investigation in other ways. However, the counsellor did not want to extend to them the responsibilities set out in the sentence.

The family expressed their great sorrow at the false closure of the case, marked by impunity and a complete lack of accountability, both in the judicial and administrative-disciplinary spheres.