



# International Covenant on Civil and Political Rights

Distr.: General  
8 August 2019  
English  
Original: Spanish

## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2657/2015\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Gorka-Joseba Lupiañez Mintegi (represented by counsel, Lorea Bilbao)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Spain
<i>Date of communication:</i>	23 June 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 22 October 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	21 March 2019
<i>Subject matter:</i>	Torture of a member of an armed organization while being held in incommunicado detention
<i>Procedural issues:</i>	Matter examined under another procedure of international settlement
<i>Substantive issues:</i>	Torture; cruel, inhuman or degrading treatment; right to an effective remedy
<i>Articles of the Covenant:</i>	2 (3), 7, 10 (1)
<i>Articles of the Optional Protocol:</i>	5 (2) (a)

1. The author of the communication is Gorka-Joseba Lupiañez Mintegi, a national of Spain born on 19 March 1980 who is a member of the armed organization Euskadi Ta Askatasuna (ETA). He claims that the State party has violated his rights under articles 7 and 10 (1) of the Covenant. In addition, the communication points to a violation of article 2 (3) of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 25 April 1985.

\* Adopted by the Committee at its 125th session (4–29 March 2019).

\*\* The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

\*\*\* An individual opinion by Committee member José Manuel Santos Pais (dissenting) is annexed to the present Views.



**The facts as submitted by the author***The author's detention and torture*

2.1 On 6 December 2007, at around 6.30 p.m., the author was stopped by officers of the Guardia Civil as he was walking in the vicinity of the town of Bériz, Bizkaia Province, in the Basque Country. The officers asked to see his papers. As they went through his belt pouch, the officers noticed that he was carrying a revolver. They pushed him to the ground, pulled down his trousers, handcuffed him and began to kick him. He was later transferred by patrol car to the premises of the Guardia Civil in the La Salve district of Bilbao. Throughout the journey, the officers kept the author with his face pressed against the window and held a weapon to his temple and forbade him to open his eyes.

2.2 Once at the premises of the Guardia Civil in the La Salve district, the author was hooded and interrogated by four people in an effort to get him to “name names”. He was hit, mainly in the testicles, and held at gunpoint. He was later taken to another room where officers told him that he would remain in incomunicado detention.

2.3 Three hours later, the author was taken to the General Directorate of the Guardia Civil in Madrid. Throughout the journey, which lasted approximately four hours, he was hit by one officer while another placed a plastic bag over his head and held it closed with his hands around the author's neck, causing him to suffocate. At one point, the vehicle stopped because one of the officers said that he had been celebrating Constitution Day, was drunk and needed to urinate. The officer also said that no one knew the author was being held, that he could shoot the author and that “all they did was to torture and interrogate people”.

2.4 The author spent five days at the General Directorate of the Guardia Civil in Madrid (from 6 to 11 December) before being brought before the National High Court. During those five days, the author remained naked and blindfolded. He was continuously interrogated – in the absence of a lawyer – by officers of the Guardia Civil, who rotated in groups of four. He was subjected to sleep deprivation, was forced to do thousands of push-ups a day and was suffocated multiple times with a plastic bag over his head, which the officers filled with tobacco smoke. He was also pricked three times at the top of the spine, causing severe pain down the length of his spine. His body was covered by a blanket before he was beaten and his head was submerged in icy water. The author was restrained while officers poured water in his mouth and nose. The officers also drenched his body in icy water. He was penetrated anally with a stick, and death threats were directed at him and his relatives.

2.5 During his five days in police custody at the General Directorate, a forensic doctor visited the author daily.<sup>1</sup> The officers dressed the author and removed the blindfold only for these visits. The author did not tell the doctor about his treatment out of fear of reprisals.

2.6 In addition, over the course of the five days in police custody, the author was forced to make three statements that had been drawn up beforehand by the Guardia Civil. When the author forgot any part of the statement, the person taking the statement would prompt him. The officers told the author that he would receive the assistance of a designated lawyer but would not be able to speak to him. The author does not know whether the lawyer was present during the time that he made the three statements to the Guardia Civil.

2.7 On 11 December 2007, on the last day of his detention at the General Directorate, a person who had not previously been involved in the interrogation sessions repeatedly hit the author in the face, injuring his mouth. The same person tied the author's penis and testicles with a rope and pulled until his penis began to bleed.

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<sup>1</sup> The medical report of 7 December 2007 notes that the author had slight ligature marks and was anxious but did not want to talk about his treatment or eat. The medical report of 8 December 2007 repeats that the author did not want to discuss his treatment or eat. The medical report dated 10 December (relating to an examination carried out on 9 December) notes that the author had a minor scratch on the right side of the abdomen. The second report dated 10 December repeats that the author persisted in refusing to comment on his treatment.

2.8 That same day, the author was brought before the National High Court after the officers administered medication to treat his aphonia and instructed him to repeat to the judge the same statements he had made to the Guardia Civil. Being out of the reach of the Guardia Civil, once he was in the cell at the National High Court the author told the judge and the forensic doctor about the torture to which he had been subjected during the five days of incommunicado police custody at the General Directorate of the Guardia Civil. The forensic doctor recorded the author's statements in her report and noted a 3-mm bruise on the upper portion of the penis, minor sores on the inside of the upper lip and aphonia.

2.9 The author was transferred that same day to Soto del Real prison in Madrid. The admission report did not mention the wounds observed by the forensic doctor a few hours before. The author remained in incommunicado detention until 14 December 2007, in other words, a total of eight days from the time of his arrest (five days in the custody of the Guardia Civil and three days at the prison).

*Criminal proceedings initiated by the author in connection with his torture*

2.10 On 21 December 2007, after visiting his son at the prison, the author's father submitted a complaint to Court of Investigation No. 2 of Bilbao concerning the torture to which the author had been subjected at the General Directorate of the Guardia Civil between 6 and 11 December 2007. However, no response from the Court was received.

2.11 On 17 March 2008, the author's privately engaged lawyers filed another complaint with the Duty Court of Bilbao based on a written statement from the author dated 14 January 2008 in which he reported the acts of torture to which he had been subjected during his detention. In his complaint, the author requested that the following steps be taken: take his deposition as a complainant; include all the medical reports in the file and take witness statements from the doctors who performed the examinations; identify and interview the officers of the Guardia Civil who had been in contact with the author; include his statement before the National High Court in the file; and conduct a physical and psychological evaluation. On 29 March 2008, Court of Investigation No. 2 of Bilbao moved to yield jurisdiction to the courts of Durango (a town in Bizkaia Province). On 15 April 2008, Court of Investigation No. 2 of Durango initiated preliminary proceedings regarding the offence of making threats and requested that the author's complaint, which was written in Basque, be translated. On 29 May 2008, the translation services submitted the translation of the complaint. On 10 June 2008, Court of Investigation No. 2 of Durango rejected the Bilbao court's motion and returned the case to Court of Investigation No. 2 of Bilbao, which agreed to hear it on 20 August 2008.

2.12 On 12 September 2008, Court of Investigation No. 2 of Bilbao received copies of six medical reports.<sup>2</sup> On 25 September, it requested information from the prison authorities regarding the author's whereabouts so that his statement could be taken. On 1 December 2008, the author confirmed the validity of his complaint of 14 January 2008; he did so without the assistance of his lawyer, who had not been notified of the procedures ordered by the Court even though the author was no longer in incommunicado detention.

2.13 On 19 January 2009, Court of Investigation No. 2 of Bilbao granted a stay of proceedings because the report of the medical examination conducted upon the author's admission to the prison reflected only the wounds mentioned by the author, without noting any physical traces likely to substantiate his claims. In the absence of this fundamental information, it was the view of the Court that the author's complaint was uncorroborated.

2.14 On 9 February 2009, the author filed an application for reconsideration with subsidiary appeal with regard to the stay of proceedings, stating that the impugned decision was contrary to the assessment made in the forensic medical report of 11 December 2007, which did note evidence of wounds. The author claimed that the Supreme Court has established that, in regard to certain offences and under certain circumstances, the testimony of the victim holds particular value by virtue of the fact that it is the only possible source of testimony. That meant, he argued, that the investigation must be completed and,

<sup>2</sup> Medical reports dated 7 December (one report), 8 December (one report), 10 December (two reports, one regarding 9 December and the other 10 December) and 11 December (two reports).

to this end, all steps should be taken that could be of help in determining the facts of the case. In the author's view, the refusal of the court to adopt the measures requested in his complaint constitutes a serious violation of the right to a trial in which all safeguards are applied and all relevant evidence is presented.

2.15 On 17 February 2009, the court dismissed the application for reconsideration but admitted the application for appeal. On 20 March 2009, the High Court of Bizkaia admitted the appeal on the grounds that the stay was unjustified because the basic steps needed to reach a reasoned decision had not been taken. In addition, the High Court noted that torture can occur without necessarily leaving any physical trace and that, in the case of some offences, given the context of isolation and incommunicado detention in which they tend to occur, it is impossible to obtain much more than the victim's account, and establishing what truly happened is, therefore, extremely difficult. Accordingly, the High Court ordered the initiation of a thorough investigation.

2.16 On 11 May 2009, Court of Investigation No. 2 of Bilbao ordered that the identities be made known of the forensic doctors who examined the author and the designated lawyer who assisted him when he made his statements at the General Directorate of the Guardia Civil and the National High Court. On 19 May 2009, the author's lawyer requested permission to be present at the hearings. However, on 2 December 2009 and 16 June 2010, the designated lawyer<sup>3</sup> and the forensic doctor who had examined the author at the premises of the Guardia Civil<sup>4</sup> gave statements in the absence of the author's lawyer, who had not been notified. The author's statements before the National High Court on 11 December 2007 were subsequently included in the file. On 22 December 2010, statements were taken from five officers of the Guardia Civil against whom charges had been brought, with the author's lawyer in attendance.<sup>5</sup> On 31 January 2011, a statement from the designated lawyer was taken again, without notifying the author's lawyer.<sup>6</sup> On 18 April 2011, at the request of the judge, a report by a doctor from the Basque Forensic Institute was issued which repeated what had been said in the report of 31 March 2010. These reports indicate that the author's wounds were consistent with his account.<sup>7</sup>

2.17 On 10 June 2011, Court of Investigation No. 2 of Bilbao once again granted a stay of proceedings on the grounds that the investigation had not uncovered any evidence of the commission of the acts alleged in the complaint.

2.18 On 6 July 2011, the author filed another application for reconsideration with subsidiary appeal against the stay of proceedings, claiming that article 173 et seq. of the Criminal Code, article 3 (prohibition of torture and ill-treatment) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and article 15 of the Constitution (right to physical and psychological integrity) had been violated, as had the rights to an effective judicial remedy and to a fair trial. (Reference

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<sup>3</sup> The designated lawyer stated that he saw the author on three nights and that the Guardia Civil informed him that the forensic doctor from the High Court was examining the author daily.

<sup>4</sup> The forensic doctor referred to her medical reports, stating that the wounds she had observed were not consistent with the complainant's account.

<sup>5</sup> The author provided a copy of the statements of the five defendants, who said that the author's hands had been handcuffed in front of him during the car journey to Madrid and that there had been no stop along the way. They denied all of the author's allegations.

<sup>6</sup> The designated lawyer claimed that he did not see any wounds on the author when he was brought before the National High Court. In addition, the author had requested that his relatives be informed of his detention, which had been done.

<sup>7</sup> The author provided a copy of both expert forensic reports by Dr. Irene Landa Tabuyo from the Basque Forensic Institute, which indicate that the account is consistent with the evidence. The reports state that suffocation – from which one can recover quite quickly – does not typically leave any external marks on the body; that physically demanding exercise does not leave visible external marks; that threats, humiliation and shouts do not leave external traces; that, regarding the sexual violence recounted by the author, wounds can be clinically insignificant or even absent; and that tying a rope around the penis can cause bruising. Furthermore, the wounds described in the preceding sections constitute temporary superficial trauma and generally, in the absence of complications, rarely leave permanent scars.

was made to the absence of his lawyer during the hearing of witnesses and the contradictions contained in the statements of the accused parties.)<sup>8</sup>

2.19 On 4 October 2011, the court dismissed the application for reconsideration but admitted the appeal. On 22 December 2011, the High Court of Bizkaia dismissed the appeal, noting that the author had not raised any procedural objection regarding the gathering of evidence during the investigation stage and that there was insufficient evidence to continue the investigation.<sup>9</sup>

2.20 On 13 March 2012, the author filed an application for *amparo* before the Constitutional Court for the violation of his rights to physical and psychological integrity and to an effective judicial remedy. On 11 September 2013, the Constitutional Court dismissed the *amparo* application on the grounds that the petition's "particular constitutional significance" had not been demonstrated.

2.21 On 10 March 2014, the author filed an application with the European Court of Human Rights in which he claimed that article 3 (prohibition of torture), article 6 (1) (right to a fair trial) and article 13 (right to an effective remedy) of the European Convention on Human Rights had been violated by the Constitutional Court's failure to consider the merits of his case.

2.22 In a letter dated 18 September 2014, the author was informed that the European Court of Human Rights, sitting in a single-judge formation, had dismissed his application on the grounds that it did not meet admissibility requirements.<sup>10</sup>

### **The complaint**

3.1 The author claims that he has exhausted all available domestic remedies and that the case has not been examined by another procedure of international investigation or settlement, since the European Court of Human Rights did not consider the merits of his application.

3.2 The author claims that the State party violated his rights under articles 7 and 10 (1) of the Covenant inasmuch as he was tortured starting from the moment of his arrest and continuing on during the first five days of his incommunicado detention by the Guardia Civil.

3.3 The author also claims that his right to an effective remedy was violated by the failure to provide notification to his lawyer, which prevented her from attending a number of the proceedings relating to the investigation concerning the acts of torture to which he was subjected;<sup>11</sup> by the absence of a proper analysis in the medical reports (as well as the fact that the medical reports did not meet the minimum standards set out in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)); and by the contradictions contained in the accused parties' statements.

3.4 The author requests that the State party award him adequate compensation for the torture to which he was subjected during the five days that he was held incommunicado in police custody and that the regime of incommunicado detention provided for in the Criminal Procedure Act be declared incompatible with article 10 (1) of the Covenant on the grounds that it constitutes an obstacle to the eradication of torture.

<sup>8</sup> The author points out contradictions in the statements of the officers of the Guardia Civil with regard to the time of his arrest, whether or not he resisted arrest and whether he was handcuffed or his hands were tied with a rope. The author provided a copy of the application for reconsideration with subsidiary appeal.

<sup>9</sup> The author provided a copy of the decision of the High Court of Bizkaia of 22 December 2011.

<sup>10</sup> The author provided a copy of his application and the European Court's decision.

<sup>11</sup> On 1 December 2008, when the author signed his complaint; on 2 December 2009, when the designated lawyer made his statement; on 16 June 2010, when the forensic doctor who examined the author on the premises of the Guardia Civil gave her statement; and on 31 January 2011, when another statement was taken from the designated lawyer.

**State party's observations on admissibility**

4.1 On 21 December 2015, the State party submitted its observations on the admissibility of the communication, requesting the Committee to find the case inadmissible on the grounds that it had already been examined under another international procedure and found to be inadmissible by a judge with the assistance of a rapporteur.

4.2 The State party notes that the European Court of Human Rights did not indicate the actual reason for its finding of inadmissibility, but it contends that a reading of article 35 of the European Convention on Human Rights shows that the Court did indeed consider the merits of the case. The State party rules out the possibility that the case was found inadmissible on the grounds that it was anonymous or essentially the same as another before concluding that it can only have been dismissed pursuant to article 35 (3) (a) of the European Convention, which stipulates that an application is declared inadmissible if it is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application. The State party asserts that the decision of inadmissibility included a consideration of the merits of the case and requests the Committee to contact the European Court for further information in this regard.

**Author's comments on the State party's observations on admissibility**

5.1 On 25 January 2016, the author submitted his comments on the State party's observations on the admissibility of the communication. The author recalls the Committee's jurisprudence<sup>12</sup> according to which a case is not deemed to have been considered by the European Court of Human Rights if it has been found inadmissible for reasons of form. The author further recalls that, in such situations, the Committee has been of the opinion that the limited reasoning contained in the Court's letter does not allow the Committee to assume that the examination included sufficient consideration of the merits and that, consequently, there is no obstacle to its consideration of the communication under article 5 (2) (a) of the Optional Protocol.

5.2 The author argues that, since the European Court found his application inadmissible because it failed to fulfil the admissibility requirements, which refer to matters of form not of merit, his application has not been examined by any other international body and should be found admissible by the Committee.

**State party's observations on the merits**

6.1 On 22 April 2016, the State party submitted its observations on the merits of the communication, in which it notes that the author was arrested for belonging to the terrorist organization ETA and was held by the Guardia Civil – under the oversight of Central Investigative Chamber No. 2 of the National High Court – until he was brought before a judge on 11 December 2007. According to the State party, the author was held incommunicado by order of a judge, who believed the measure to be proportional, necessary and appropriate owing to indications of the author's involvement in terrorism-related offences. The author was subsequently convicted by decision No. 35/2009 of the First Section of the Criminal Chamber of the National High Court.<sup>13</sup>

6.2 Regarding the author's general conditions of detention, the State party submits that he was treated appropriately during his stay at the premises of the Guardia Civil and that the relevant legal procedures were followed when his statements were taken, including with regard to the noting of the start and end times of the interviews, the names of the officers involved and those of the investigator and clerk present at each step of the police investigation, thereby fulfilling the requirements and observing the rules governing the conduct of law enforcement personnel in cases of detention.

6.3 Concerning the alleged ill-treatment, the State party submits that while the author was held in police custody, he was seen on a daily basis by a forensic doctor assigned to the

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<sup>12</sup> The author cites the Committee's Views in the case *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010).

<sup>13</sup> The author was sentenced to almost 12 years' imprisonment for belonging to an armed gang, unlawful possession of weapons and the continuing offence of falsifying an official document.

Investigative Chamber of the National High Court,<sup>14</sup> with the corresponding documentation being included in police file No. G9481912111-07-00021 as submitted to Central Investigative Chamber No. 2 of the National High Court. The State party specifies that the medical examinations did not detect any noteworthy marks (aside from a minor scratch on the right side of the abdomen) and that, prior to being brought before a judge on 11 December 2007, the author did not report any ill-treatment to the forensic doctor.

6.4 The State party acknowledges that, during the examination of 11 December, the forensic doctor observed a 3-mm bruise on the upper portion of the author's penis, as well as minor sores on the inside of his upper lip, but that he bore no marks of having been hit on the head, chest, abdomen or legs. The State party emphasizes that the author's anus and testicles were normal and showed no traces of violence and that there were no signs of suffocation. The State party adds that, according to the medical report prepared at the prison on 13 December, no wounds or noteworthy acute psychological or physical disorders were observed upon the author's arrival and that his overall condition was good and did not require any particular treatment.

6.5 The State party points out that the doctor chosen by the author noted that the minor sores on the inside of the upper lip could have been caused by, inter alia, him accidentally biting his lip or by a toothbrush or the ingestion of hot food and that the 3-mm bruise on his penis could have been caused by a rope being tied around it.

6.6 As for the domestic remedies sought by the author in relation to the alleged ill-treatment, the State party notes that judicial proceedings were initiated with a view to shedding light on the facts of the case and that, in response to the investigative court's first removal of the case from the register, the higher court ordered the continuation of inquiries. A thorough investigation was then conducted. That investigation included the confirmation by the complainant of his original account and the recording of statements from the forensic doctor, the designated lawyer who attended the author during the period of incommunicado detention, the officers of the Guardia Civil involved in the arrest and interrogations during the period of incommunicado detention and the doctor of the author's choice who prepared a report on the basis of the available reports and statements. In reviewing the evidence described above, the State party points to the fact that the designated lawyer did not observe any signs of ill-treatment, which is why, once the collection of all the evidence had been completed, the investigative court removed the case from the register for lack of corroboration of the statement, a decision that was then upheld by the higher court.

6.7 The State party concludes that the author is describing violent practices that are not in the least bit credible given that the signs described by the forensic doctor do not in any way hint at the repeated sessions of ill-treatment to which the applicant claims to have been subjected. In the State party's view, it is a well-known fact that the terrorist group ETA has adopted a strategy whereby members of the group who are detained systematically claim to have been subjected to ill-treatment in police facilities. The State party cites decision No. 1136/2011 of the Criminal Chamber of the Supreme Court of 2 November 2011 to support the existence of a strategy that all ETA activists are obliged to apply, whereby its members systematically claim to have been tortured as a political, military and procedural strategy in the hopes of having certain pieces of evidence disallowed.

6.8 Regarding the conditions of detention, the alleged ill-treatment and the domestic remedies sought by the author, the State party notes that the Committee found that the matter falls within the scope of article 7 of the Covenant, read in conjunction with article 2 (3), rather than article 10 (1), and that for a violation of article 7 to be found, the author's account must be credible and consistent. The State party also notes that, according to the Committee, when a medical report is issued without the author's having been examined by the doctor concerned, it "does not constitute sufficient grounds for refuting the medical reports based on the examination and direct treatment of the author".<sup>15</sup>

<sup>14</sup> On 7 December at 1 p.m., on 8 December at 10.19 a.m., on 9 December at 5.50 p.m. and on 10 December at 8.45 p.m.

<sup>15</sup> *Achabal Puertas v. Spain*, para. 8.4.

6.9 The State party concludes that the alleged events would constitute a violation of article 7, read in conjunction with article 2 (3) of the Covenant. It points out that the events were investigated promptly, thoroughly and impartially (noting that, on that same day, 11 December 2007, the judge immediately ordered that a new forensic report be prepared) and that the author's description of the events is not at all consistent and is more of a catalogue of all the possible acts of torture to which a person in incommunicado detention might be subjected. The State party is of the opinion that the communication is overly detailed (stereotypical) and contradictory inasmuch as it states that the author was hooded or blindfolded most of the time and yet he provides an exhaustive description of the methods and instruments that he claims were used, which would be impossible if he could not see. The State party adds that the private medical report submitted by the author does not rise to the standard required by the Committee for the refutation of forensic medical reports based on an actual examination of the author.<sup>16</sup>

6.10 Taking into account that incommunicado detention is always executed under judicial oversight, that incommunicado detainees are seen by a doctor daily and that the author's complaint is a habitual practice of the members of the terrorist group ETA, the State party argues that there is no indication of any violation of the Covenant.

6.11 Regarding incommunicado detention, the State party notes that the Criminal Procedure Act provides for persons to be held in police custody until they are brought before a judge. However, it has been proven that the most dangerous organized crime syndicates and terrorist organizations frequently order members who have recently been arrested to take advantage of any direct contact with other people (relatives or other trusted persons, doctors or lawyers of their choice) while in custody to transmit information and receive orders. Thus, it was in response to the abuse of procedural rights that it made provision for incommunicado detention under articles 509, 510, 520 bis and 527 of the Criminal Procedure Act subject to six main requirements. First, its application requires prior judicial authorization. Second, it can be applied only where there is a risk that the evidence of the commission of unlawful acts might be altered or that further unlawful acts might be committed or abetted. Third, it is applied only to persons arrested on suspicion of offences committed by organized crime syndicates or terrorist or insurgent organizations. Fourth, it is subject to a maximum period of 72 hours, which can be extended for up to 48 additional hours (a total of 5 days). Authorization to extend must be requested of a judge within the first 48 hours and, if granted, must be substantiated by a reasoned decision within the next 24 hours. Fifth, since it is an exception to the general rule, incommunicado detention must be proportional to the "ends sought" in each case. Lastly, the procedural safeguards that apply to persons held incommunicado differ from the ordinary detention regime: a lawyer is appointed by the bar association rather than chosen by the detainee; the designated lawyer cannot interview the detainee in private;<sup>17</sup> and the detainee does not have the right to have a relative or person of his or her choice informed of the arrest and place of detention. In this regard, the State party submits that the detention was incommunicado only with regard to the detainee's relatives or friends, since this type of detention is under constant judicial oversight.

6.12 The State party also notes that there are additional safeguards in place with regard to the medical examination, namely that detainees have the right to be examined by a second forensic doctor, who can, as recognized by the courts, be a doctor they trust, provided that the examination is conducted concurrently with the one performed by the first doctor.

6.13 Lastly, the State party submits that, following this case, the provisions on incommunicado detention were amended by Organic Act No. 13/2015 of 5 October 2015.<sup>18</sup>

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<sup>16</sup> The State party does not substantiate this statement.

<sup>17</sup> The State party specifies that, as underlined by the Council of Europe Commissioner for Human Rights, as a measure to ensure the effectiveness of an investigation, this does not infringe the core of the right to legal counsel, since it is not the authorities who appoint the lawyer but, rather, the bar association, and only lawyers specialized in criminal law who have at least 10 years' professional experience can be named by the bar association as designated lawyers.

<sup>18</sup> The Act transposes Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest



Thus, incommunicado detention cannot be applied to minors under the age of 16 years. It must be authorized by a judicial authority on the basis of a reasoned decision. It can be ordered only under two exceptional circumstances (rather than the previous four: an urgent need to prevent serious consequences that might endanger a person's life, liberty or physical integrity and an urgent need for investigative judges to act immediately to avoid seriously compromising the criminal process). Judicial authorization of incommunicado detention does not automatically lead to the restriction of the detainee's communication rights; rather, the amended version of article 527 establishes that the judge may, exceptionally, deprive a detainee of some of these rights if warranted by the circumstances of the case. Lastly, the possible restrictions of a person's rights are minor in nature, as they simply affect the right to appoint a lawyer of one's choice, the right to communicate with persons with whom a detainee would normally be entitled to speak (with the exception of judicial authorities, the Public Prosecution Service and a forensic doctor), the right to speak with a lawyer in private and the right to have access to documents related to the case (with the exception of those required in order to challenge the legality of the detention).

#### **Author's comments on the State party's observations on the merits**

7.1 On 23 August 2016, the author submitted his comments on the State party's observations on the merits.

7.2 Regarding the State party's argument that the author was treated appropriately during his time in police custody and that all the statements were taken in keeping with legal requirements, the author submits that he was never provided with the records of the statements or the detention log (in which all movements in and out of the cells and all measures and proceedings should be recorded). The author repeats that the interrogations to which he is referring are those that were conducted illegally without a lawyer present, not the interviews referred to by the State party in which statements were taken and for which a designated lawyer was indeed called in.

7.3 In addition, the author points out that the fact that he was charged, detained and later convicted is no excuse for the fact that he was continuously tortured. He recalls that the prohibition of torture is absolute and that, as stipulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture (art. 2 (2)).

7.4 Concerning the procedures related to the complaint of torture, the author reiterates that they were wholly insufficient, incomplete and superficial and that it is therefore uncertain whether the facts of the case were investigated promptly and thoroughly. The author notes that, notwithstanding the enumeration by the State party of the dates and times of the forensic doctor's examinations, none of the reports mentions the start and end times, in violation of the provisions of the Ministerial Order of 16 September 1997.<sup>19</sup> Thus, the medical reports prepared by Dr. Syra Amalia Peña López fail to meet the minimum standards required for incommunicado detention and are utterly insufficient and incomplete, exhibiting a disregard for how difficult it is to prove the commission of acts of torture during incommunicado detention.

7.5 As for the State party's argument that the author did not tell the forensic doctor about any of the ill-treatment and did not wish to be examined before he was brought before a judge, the author reiterates that this was precisely because he was in police facilities and fully aware that, after the medical examination, he would remain there, in the hands of the same officers who were torturing him. The author recalls that, as soon as he was brought before a judge, he recounted what had happened to him.

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warrant proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>19</sup> The author provided a copy of the Ministerial Order of 16 September 1997 on the adoption of the protocol for use by forensic doctors when examining detainees.

7.6 Regarding the State party's argument that there was a lack of physical evidence to support his account, the author notes that no justification was provided for the bruise on his penis, the sores on the inside of his upper lip or his loss of his voice. He recalls the two expert reports, dated 31 March 2010 and 18 April 2011, which were prepared by Dr. Irene Landa Tabuyo, and stresses that they were drawn up at the request of the investigative judge and were, therefore, not "private" reports prepared by a doctor chosen by the applicant, as asserted by the representative of the State party.<sup>20</sup> The author recalls that the reports show that the evidence is compatible with his account. The reports state that suffocation – from which one can recover quite quickly – does not typically leave any external marks on the body; that physically demanding exercise does not leave visible external marks; that threats, humiliation and shouts do not leave external traces; that, regarding the sexual violence recounted by the author, wounds can be clinically insignificant or even absent; and that tying a rope around the penis can cause bruising. As for the fact that, when the author was admitted to the prison, the doctor did not observe any marks on his skin, the author argues that this implies either that external physical marks can disappear quickly or that the prison doctor was not sufficiently diligent in conducting the examination.

7.7 The author denies that the evidence-gathering process was exhaustive, since his representative was not informed of it and was consequently unable to attend the recording of the statements of the forensic doctor, designated lawyer or his own, which consisted of nothing more than the confirmation of the complaint by a judge unrelated to the case. In addition, the author notes that the officers of the Guardia Civil were summoned to testify as suspects and therefore had no obligation to tell the truth. Had they been summoned as witnesses, it would have been possible to obtain more information and to hear the testimony of all those involved, rather than only the five suspects.

7.8 Furthermore, the author emphasizes that the judge of the National High Court, despite having the obligation – once notified of an offence – to obtain testimony and transmit it to the competent court in order for an investigation to be opened, did not do so. The author recalls that it is not known what happened to the analyses ordered by the judge or to the complaint lodged by his father.

7.9 The author contends that, if a physical and psychological examination had been carried out in which the Istanbul Protocol guidelines had been applied, his account could have been proven to be true. In the author's words, "the Spanish courts are reluctant to obtain such proof".

7.10 Regarding the supposed existence of an ETA manual that instructs militants to systematically lodge complaints of torture, the author submits that it is nothing more than a crude lie designed to discredit the innumerable complaints of torture and to cover up a habitual practice during incommunicado detention. The author maintains that, on the contrary, there have been numerous investigations into the torture of Basques held in incommunicado detention and that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has, on numerous occasions, expressed its concern in this regard. The author cites the March 2009 publication by the Basque government entitled *Documentación de la Tortura en detenidos incomunicados en el País Vasco desde el año 2000 al 2008: Abordaje científico* (Documentation of torture against incommunicado detainees in the Basque Country between 2000 and 2008: a scientific approach) (p. 7),<sup>21</sup> according to which the prevalence and scope of the practice of torturing members of the population under study are, at the very least, worrisome and should be considered in themselves as a genuine problem by the competent authorities. The study goes on to state that the evidence does not support the hypothesis that all or most of the complaints are false and are made in accordance with general instructions to that effect and that its findings are consistent with those of international institutions, i.e. that the complaints are not of a stereotypical nature and cannot be considered as mere fabrications.

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<sup>20</sup> The author provided the judge's decision of 1 March 2011 in which he requested the Forensic Medical Clinic to prepare a report explaining the ways in which a 3-mm bruise might appear on the upper portion of the penis and the possible causes of sores on the upper lip.

<sup>21</sup> The author attached a copy of the document to his submission.

The author also refers to the “Proyecto de investigación de la tortura en el País Vasco (1960–2013)” (Project on torture investigations in the Basque Country (1960–2013)), a study on 4,000 cases of torture which the Basque government commissioned from the Basque Criminology Institute. The initial findings of 27 June 2016 were that the Istanbul Protocol was applicable to 200 of those persons, all of whom were deemed to be entirely credible.

7.11 Concerning his incommunicado detention, the author notes that he was held incommunicado in facilities of the Guardia Civil in Madrid for five days (the maximum period allowed by law), but that he later spent an additional three days incommunicado at the prison, for a total of eight days of incommunicado detention. Thus, he asserts, his incommunicado detention was extended, since he was already in prison, in order to erase or hide any sign of torture.

7.12 Lastly, regarding the incommunicado detention regime in the State party, which is applied almost exclusively in terrorism cases, the author recalls that the regime has been repeatedly criticized by various international bodies and contends that, the latest reform notwithstanding, the regime does not protect detainees inasmuch as it significantly restricts their rights and permits a complete lack of transparency that makes it extremely difficult to obtain evidence on what occurs during that form of detention, thereby affording complete impunity. The author reiterates that the regime should be abolished immediately.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the author filed an application regarding the same facts before the European Court of Human Rights (application No. 20764/14) and recalls that, in ratifying the Optional Protocol, Spain introduced a reservation excluding the competence of the Committee in relation to cases that have been or are being examined under another procedure of international investigation or settlement.

8.3 The Committee notes that, by a letter dated 18 September 2014, the author was informed that, in a decision taken in a single-judge formation, his application had been dismissed. The letter stated that, on the basis of the items of evidence in its possession and insofar as it was competent to decide on the complaints submitted to it, the Court had concluded that his application did not meet the admissibility criteria established under articles 34 and 35 of the European Convention on Human Rights.

8.4 The Committee recalls its case law relating to article 5 (2) (a) of the Optional Protocol, according to which, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on grounds arising from some degree of consideration of the substance of the case, then the matter should be deemed to have been examined within the meaning of the respective reservations to article 5. However, the Committee also recalls that, even in cases where applications have been declared inadmissible for lack of an appearance of a violation, the limited reasoning outlined in some decisions of this sort do not enable the Committee to assume that the European Court has examined a case on the merits.<sup>22</sup> In the present case, the Committee notes that the decision of the European Court does not state that the appearance of a violation was not observed but, rather, indicates simply that the application fails to meet admissibility requirements, without further explanation. Accordingly, the Committee considers that it is not precluded from examining the present communication under article 5 (2) (a) of the Optional Protocol.

8.5 Furthermore, the Committee notes that the State party did not raise the issue of the exhaustion of domestic remedies; accordingly, the Committee is of the opinion that it is not

<sup>22</sup> See, *inter alia*, the Committee’s Views in *Achabal Puertas v. Spain*, para. 7.3, and *A.G.S. v. Spain* (CCPR/C/115/D/2626/2015), para. 4.2.

precluded by article 5 (2) (b) of the Optional Protocol from considering the present communication.

8.6 The Committee, noting that the author's claims under articles 2 (3), 7 and 10 (1) of the Covenant have been sufficiently substantiated for the purposes of a finding of admissibility, declares them admissible and proceeds to the consideration of the merits.

*Consideration of the merits*

9.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee takes note of the author's claims that he was repeatedly tortured by officers of the Guardia Civil over the course of the five days during which he was held incommunicado in Guardia Civil facilities and during which he was denied the right to assistance from a lawyer of his choosing and the right to communicate with his family. The State party contends that the author was treated appropriately while he was held in police custody and that he was seen daily by a forensic doctor to whom he did not disclose the alleged ill-treatment. The State party points out that the author's statements were recorded as prescribed by law, including their time, length and authorship, and that a thorough investigation was conducted. It further states that, as a result of that investigation, the complaint was set aside for lack of evidence and consistency in the account.

9.3 The Committee recalls its general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, according to which "the text of article 7 allows of no limitation ... no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons".<sup>23</sup> This absolute prohibition also extends to threats of terrorism, which therefore cannot be invoked to justify the use of torture to extract information from suspected terrorists.<sup>24</sup>

9.4 In the present case, the Committee takes note of the author's detailed and consistent description of the events that occurred during his detention in the General Directorate of the Guardia Civil in Madrid, of the acts of torture to which he was subjected and of the State party's failure to produce the detention log. It also takes note of the medical reports, in particular the report of 7 December 2007, which noted that the author had ligature marks on his skin and appeared to be anxious, the report of 11 December 2007 from the forensic doctor assigned to the National High Court, who observed a 3-mm bruise on the upper portion of the penis, minor sores on the inside of his upper lip and aphonia, and of the two expert reports prepared by the Basque Forensic Institute at the request of the investigating judge, which stated that the signs detected during the examination were consistent with the author's account of his ill-treatment. The Committee notes that the State party has not provided any explanation in this regard. The State party argues that the author did not report the ill-treatment until he was brought before a judge. However, the Committee notes that, according to the author, he did not report the ill-treatment during his time in police custody out of fear of reprisal.

9.5 In the light of the foregoing, the Committee is of the view that the treatment to which the author was subjected during the five days in which he was held incommunicado at the General Directorate of the Guardia Civil constitutes a violation of article 7 of the Covenant.

9.6 Having found a violation of article 7 of the Covenant, the Committee does not deem it necessary to consider the claim that the same acts also constituted a violation of article 10 (1) of the Covenant.

9.7 Regarding the author's claim concerning the lack of an effective remedy for securing the investigation and prosecution of the perpetrators of the torture, the Committee notes that the author reported the acts of torture at his first hearing before the National High Court on 11 December 2007 but that no investigation was initiated ex officio at that time.

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<sup>23</sup> Para. 3.

<sup>24</sup> See A/61/259, paras. 44–65.

Furthermore, the complaint of torture lodged by the author's father with the investigative court apparently received no response. In addition, the proceedings that were eventually initiated following the author's subsequent complaint before Court of Investigation No. 2 of Bilbao were stayed on two occasions. Finally, according to the author's statement – which has not been refuted by the State party – his lawyer was not notified of three hearings at which five Guardia Civil officers, the forensic doctors who examined the author and his designated lawyer all gave testimony.

9.8 The Committee recalls its general comments No. 20 and No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, as well as its settled jurisprudence, according to which complaints of ill-treatment must be investigated promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty.<sup>25</sup> According to the Committee, given the difficulty of proving the occurrence of torture and ill-treatment when they do not leave physical marks, as in the author's case, the investigation of such acts should be exhaustive. Furthermore, all physical or psychological harm inflicted on a person in detention – and particularly under an incommunicado regime – gives rise to an important presumption of fact, since the burden of proof must not rest solely on the author.<sup>26</sup> Consequently, and in the light of the circumstances of the present case, the Committee is of the view that the author did not enjoy an effective remedy for securing an investigation into his treatment during his detention from 6 to 11 December 2007 in violation of article 2 (3), read in conjunction with article 7, of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7 and a violation of article 2 (3) of the Covenant, read in conjunction with article 7 of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose Covenant rights have been violated. Therefore, the State party should: (a) conduct an impartial, effective and complete investigation into the facts of this case and prosecute and punish those responsible; and (b) provide adequate compensation. The State party is also under an obligation to prevent similar violations in the future. In this connection, the Committee recalls that the State party should take the necessary measures, including measures of a legislative nature, to put an end to the incommunicado detention regime.<sup>27</sup>

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation is established, the Committee wishes to receive information from the State party, within 180 days, concerning the measures taken to give effect to these Views. The State party is also requested to publish the present Views and ensure that they are widely disseminated.

<sup>25</sup> See, for example, *Abromchik v. Belarus* (CCPR/C/122/D/2228/2012), para. 10.4, and *Benítez Gamarra v. Paraguay* (CCPR/C/104/D/1829/2008), para. 7.5.

<sup>26</sup> See *Achabal Puertas v. Spain*, para. 8.6; European Court of Human Rights, application No. 40351/05, *Beristain Ukar v. Spain*, judgment of 8 March 2011, para. 39.

<sup>27</sup> CCPR/C/ESP/CO/6, para. 17; CCPR/C/ESP/CO/5, para. 14 and *Achabal Puertas v. Spain*, para. 10.

## Annex

[Original: English]

### **Individual opinion of José Manuel Santos Pais (dissenting)**

1. If we are to rely exclusively on the facts submitted by the author, we may conclude that the author's rights under article 7 of the Covenant were violated. However, there are enough elements in the file to cast legitimate doubts as to the author's overall credibility.

2. The author was stopped by officers of the Guardia Civil on 6 December 2007 in the Basque Country, carrying a revolver (para 2.1), and arrested for belonging to the terrorist organization ETA. He was detained by the Guardia Civil – subject to the oversight of Central Investigative Chamber No. 2 of the National High Court – until he was brought before a judge on 11 December 2007. As an assessed proportional, necessary and appropriate measure, the judge ordered the author held incommunicado owing to evidence of his participation in terrorism-related offences. He was later sentenced to 12 years' imprisonment by decision No. 35/2009 of the Criminal Chamber of the National High Court (para. 6.1).

3. According to the author, during the five days he spent at the General Directorate of the Guardia Civil in Madrid before being brought before the National High Court, he was subjected to sleep deprivation, forced to perform thousands of push-ups daily, suffocated multiple times with a plastic bag over his head, jabbed three times at the top of his spine, drenched in icy water over his head and body and penetrated anally with a stick (para. 2.4).

4. However, the forensic doctor who visited him daily only refers to slight ligature marks and to a minor scratch on the right side of the abdomen, and notes that the author was anxious but did not want to talk about his treatment (para. 2.5 and footnote 1).

5. On 11 December 2007, the last day of his incommunicado detention, the author states that he was repeatedly hit in the face, causing wounds to his mouth, and his penis and testicles were tied with a rope and pulled until his penis began to bleed (para. 2.7). The forensic doctor, who recorded the author's complaint of five days of ill-treatment before the National High Court, noted a bruise on the upper portion of the penis, although of just 3 mm, minor sores on the inside of the upper lip and loss of voice (para. 2.8).

6. However, the State party claims the author bore no marks of having been hit on the head, chest, abdomen or legs, his anus and testicles were normal and showed no traces of violence and there were no signs of suffocation. According to the medical report drawn up at the prison on 13 December, no wounds or noteworthy acute psychological or physical disorders were observed upon arrival and the author's overall condition was good (para. 6.4).

7. Furthermore, the doctor who examined him noted that the minor sores inside the upper lip could have been caused by, inter alia, an accidental bite, a toothbrush or ingestion of hot food; the 3-mm bruise on the penis could have been caused by a rope being tied around the penis (para. 6.5), but allows also for other causes to be considered.

8. The admission report in Soto del Real prison in Madrid did not mention wounds found by the forensic doctor a few hours before but reflects only wounds mentioned by the author, without noting any physical traces likely to substantiate his claims. No wounds were observed at that time (paras. 2.9, 2.13 and 6.4).

9. The High Court, which noted that torture would not necessarily leave a physical trace and that in some offences it is only possible to rely on the victim's account, ordered the launching of a thorough investigation (para. 2.15). However, this reasoning entails for States parties a *probatio diabolica*, where it may be almost impossible for States to eliminate all possible hypotheses of alleged violations.

10. On April 2011, at judicial request, a report by a forensic doctor from the Basque Forensic Institute was issued, indicating that the author's wounds were consistent with his account, constituted temporary superficial trauma and, in the absence of complications,

rarely would leave permanent scars (para. 2.16). However, although such wounds may be consistent with the author's account, they are also consistent with other plausible causes. This is particularly true since the forensic doctor who examined the author at the premises of the Guardia Civil confirmed before Court of Investigation No. 2 that the wounds she had observed did not match the author's account (para. 2.16). Therefore, we have conflicting medical reports.

11. On December 2011, the High Court of Bizkaia dismissed the author's appeal, noting that he had not raised any procedural objection regarding the gathering of evidence during the investigation stage and that there was insufficient evidence to continue the investigation (para. 2.19).

12. As for domestic remedies sought in relation to the alleged ill-treatment, in response to the investigative court's having archived the case the higher court ordered a continuation of the inquiries, which led to a thorough investigation. On the basis of the evidence gathered, the designated lawyer did not observe any signs of ill-treatment, which is why, once the exhaustive collection of evidence had been completed, the investigative court archived the case for lack of consistency in the statement, a decision upheld by the higher court (para. 6.6).

13. The incommunicado detention in the present case was executed under judicial oversight and the author was examined by a doctor daily (paras. 6.10–6.12).

14. The contradictory forensic medical reports do not seem to hint at repeated sessions of ill-treatment to which the author claims to have been subjected, and lead me to conclude that the author failed to sufficiently substantiate his claims of a violation by Spain of article 7 of the Covenant.

15. Furthermore, I am of the view that Spanish judicial authorities investigated thoroughly and on different occasions the author's claims and found them to be unfounded for lack of corroboration of his statement. I therefore also conclude that there was no violation of article 2 (3) read in conjunction with article 7 of the Covenant.

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