

**SPAIN:
OUT OF THE
SHADOWS – TIME
TO END
INCOMMUNICADO
DETENTION**

**AMNESTY
INTERNATIONAL**



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INTRODUCTION

In Spain, people held in incommunicado detention may be deprived of effective access to a lawyer as well as access to a doctor of their own choice, and are unable to inform their family and friends of their detention. Under Spanish law, incommunicado detention can be imposed before or after the detainee is brought before a judicial authority. Incommunicado detention legislation has been maintained and amplified by successive Spanish governments, despite the calls for over a decade by various UN bodies, the Council of Europe's Committee for the Prevention of Torture (CPT)¹, and human rights organisations, to take measures to remove legislation on incommunicado detention from national law. It is one of the most severe detention regimes in any European Union country.

Successive Spanish governments have taken no action to implement these recommendations and in fact acted in direct opposition to them in 2003 by extending the maximum time limit for incommunicado detention (in police custody and on remand) from five to 13 days. Amnesty International calls on the Spanish authorities to abrogate the existing incommunicado detention legislation and ensure the effective protection of the rights of all persons deprived of their liberty, in a manner that is consistent with international human rights standards.

The Spanish government has justified the use of incommunicado detention on grounds of national security and public safety. However, Amnesty International continues to echo the UN Security Council², the heads of state and government gathered at the UN World Summit in 2005³, the UN General Assembly⁴, the European Court of Human Rights⁵ and the Committee of Ministers of the Council of Europe⁶, in underscoring that the measures states take to protect the lives and security of those within its territory, including from the threat of terrorism, must comply fully with international human rights standards.

In addition to violating important rights of detainees which are essential to ensure a fair trial, - including prompt, effective access to legal representation - the use of incommunicado detention has been strongly criticised by international human rights bodies for facilitating torture and other ill-treatment of detainees.⁷ The UN Commission on Human Rights stated in April 1997 that "prolonged incommunicado detention ... can in itself constitute a form of cruel, inhuman or degrading treatment."⁸

The Human Rights Committee has stated that the practice of prolonged incommunicado detention may violate Article 7 of the International Covenant on Civil and Political Rights which prohibits torture and other ill-treatment, and Article 10 which provides safeguards for people deprived of their liberty.⁹ The Committee has also stated that "[p]rovisions should also be made against incommunicado detention" as a safeguard against torture and ill-

treatment.¹⁰

In 1995 the UN Special Rapporteur on torture called for a total ban on incommunicado detention, stating "Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees be given access to legal counsel within 24 hours of detention."¹¹

In 1997 the UN Committee against Torture (CAT) stated in its concluding observations on Spain that "Notwithstanding the legal guarantees as to the conditions under which it can be imposed, there are cases of prolonged detention incommunicado ... which seems to facilitate the practice of torture. Most of these complaints concern torture inflicted during such periods."¹² The Committee recommended that Spain consider "eliminating instances in which extended detention incommunicado and restrictions of the rights of detainees to be assisted by a defence lawyer of their choice are authorized".¹³ The Human Rights Committee urged Spain in 1996 "to abandon the use of incommunicado detention", expressing its concern that "persons suspected of belonging to or collaborating with armed groups may be detained incommunicado for up to five days, [and] may not have a lawyer of their own choosing".¹⁴ The Committee recommended that the legislation prohibiting incommunicado detainees held on terrorism-related charges from appointing their own lawyer be rescinded. In 2008, the Human Rights Committee repeated its concern yet again, calling for legislative reform to abolish incommunicado detention and ensure all detainees are granted access to a lawyer of their own choice, with whom they should be able to consult in private.¹⁵

In 2002 the CAT repeated its concerns, noting that it was "deeply concerned by the fact that incommunicado detention up to a maximum of [then] five days has been maintained" and that "the Committee considers that the incommunicado regime, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment."¹⁶ In 2003, a few months after these recommendations were made, the Spanish government increased the timeframe of incommunicado detention from five to a possible total of 13 days (in police custody and on remand) for persons held on suspicion of involvement in terrorism-related activities.

The United Nations Special Rapporteur on torture commented in his report on his visit to Spain in 2003 that "torture or ill-treatment is not systematic in Spain", but that "the system of detention as it is practised allows torture or ill-treatment to occur, in particular in regard to persons detained incommunicado in connection with terrorist-related activities".¹⁷ Noting that "incommunicado detention creates conditions that facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture"¹⁸ the Special Rapporteur recommended that the incommunicado regime be abrogated. In his most recent report to the UN Human Rights Council of 18 February 2008 following up on recommendations made on visits, the Special Rapporteur reiterated "his deep concern over the retention of the incommunicado detention regime".¹⁹

In 2008, the UN Special Rapporteur on counter-terrorism visited Spain and examined current legislation and practice. In his subsequent report on the visit he expressed concern at the continued use of incommunicado detention, allegations of ill-treatment of detainees held incommunicado and the failure of the courts to investigate all such allegations.²⁰ The

Special Rapporteur reiterated that a number of human rights bodies had recommended that incommunicado detention be discontinued, and called “for the complete eradication of the institution of incommunicado detention”.²¹ In so doing, he noted that eradicating incommunicado detention would “strengthen the credibility of counter-terrorism measures by law enforcement bodies as a whole and would at the same time further ensure that those falsely accused of ill-treatment are cleared”.²²

Amnesty International is, furthermore, deeply concerned by the propensity of the Spanish authorities to label all allegations of torture or other ill-treatment made by detainees held incommunicado as tactics of an organised criminal strategy to discredit the state. Where such a reaction is made before any investigation into the substance of these allegations has taken place it can only contribute to a climate of impunity for acts of torture and other ill-treatment. It is also contrary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which places Spain under an obligation to ensure a prompt and impartial investigation is conducted wherever there is reasonable ground to believe that an act of torture may have taken place.

CURRENT LEGISLATION

Under the current **Criminal Procedure Act**, at the request of the police²³, an investigating judge²⁴ has the power to order a detainee to be held incommunicado for up to five days in any case and for up to a total of 13 days if the suspect has been detained on suspicion of terrorism-related offences.²⁵ This 13-day period consists of up to five days of incommunicado detention in police custody, which can be extended on orders of the investigating judge by a further five-day period of incommunicado detention on remand in prison (provisional imprisonment). A further three-day period of incommunicado detention may be imposed on a remand prisoner on orders of the judge at any time during the investigation after the original (10-day) incommunicado period has expired.

Under the incommunicado regime the rights of detainees are restricted in various manners²⁶ which are inconsistent with the international human rights standards (relevant treaties and standards include the International Covenant on Civil and Political Rights (ICCPR, Articles 9 and 14); the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Articles 5 and 6); the UN Basic Principles for the Treatment of Prisoners; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the European Prison Rules; the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Standard Minimum Rules for the Treatment of Prisoners). The restrictions include the following:

- Individuals held incommunicado do not have the right to be assisted by a lawyer of their own choice. Legal assistance is provided by a duty lawyer appointed by the Bar Association, on request of the police.
- Individuals held incommunicado do not have the right to consult with a lawyer in private at any time during their detention incommunicado (both in police custody and on remand).
- Individuals held incommunicado do not have the right to communicate, or have communicated, to a family member or other person of their choice the fact and place of their detention. Foreign nationals do not have the right to have such information communicated to their consulate.
- Individuals held incommunicado do not have the right to a medical examination by a doctor of their own choice.²⁷
- Individuals held on suspicion of involvement in terrorism-related offences or organised crime - whether or not they are being held incommunicado – may be held in police custody for up to five days (120 hours) after arrest before being presented to a judicial authority.

Amnesty International notes the “Protocol for the Coordination of Assistance to Persons Detained Incommunicado” and the “Assistance Service for Relatives of Incommunicado Detainees” introduced by the Basque Government (Department of Interior, in consultation with the Department of Justice, Labour and Social Security and Department of Health) in 2003 for the Basque autonomous police force (Ertzaintza). The main features of the protocols include additional and more comprehensive medical exams of detainees, and the facilitation of information to incommunicado detainees’ relatives concerning their whereabouts and physical condition. These protocols represent an improvement on standard Spanish legislation, but do not counteract the most serious concerns regarding such legislation. Although no detainees were held in incommunicado detention by the Ertzaintza in 2007 or 2008,²⁸ Amnesty International noted with deep regret reports that at least one person has been held incommunicado by the Ertzaintza since March 2009.²⁹

In January 2008 it was announced that the Spanish Ministry of Interior was taking measures to install video surveillance cameras to monitor incommunicado detainees throughout the entire period of detention. This proposal was also included in the National Human Rights Plan, made public on 10 December 2008. The move was intended to help prevent possible ill-treatment of detainees, and to deter false allegations of ill-treatment from being made. Amnesty International strongly welcomes this initiative, but remains concerned that it is not fully comprehensive, as it does not include recording in interrogation rooms.

Furthermore, the recording of detainees is not compulsory and is only used when explicitly requested by the judge responsible for the case. Amnesty International was informed by the President of the Criminal Chamber of the National Court that judges only request recording in 50 per cent of cases, making the measure obsolete on many occasions. Other senior judicial representatives interviewed by Amnesty International explained that law enforcement officials considered it a display of personal distrust when judges ordered the measure, consequently making it a sensitive issue for judges to apply. They stated that in order to be effective, video recording must be made compulsory, by law, in all cases. In its 2008 recommendations, the UN Human Rights Committee called on Spain to ensure systematic audiovisual recording of interrogations in all police stations and places of detention.³⁰

The National Human Rights Plan also contained other modifications to the incommunicado regime which would bar minors from being held incommunicado and give detainees the right to a second medical examination by a doctor appointed by the post holder of the (still to be created) National Mechanism for the Prevention of Torture. The National Human Rights Plan also specified the creation of guidelines for doctors examining incommunicado detainees. Although these proposals are an improvement on the current system, none of them rectifies the concerns raised by international expert bodies.

SPECIFIC CONCERNS

LACK OF EFFECTIVE LEGAL ASSISTANCE

International Covenant on Civil and Political Rights, Article 14 (3)(b)

In the determination of any criminal charge against him, everyone shall be entitled to ...

... adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

European Convention on Human Rights, Article 6 (3)(b) and (c)

Everyone charged with a criminal offence has the following minimum rights:

... To have adequate time and facilities for the preparation of his defence;

... To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require

Basic Principles on the Role of Lawyers, Principles 1 and 22

... All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

... Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Individuals being held incommunicado may not be represented by a lawyer of their own choice. A duty lawyer is assigned to the detainee by the Bar Association, on the request of the police, and must attend at the police station within eight hours of being called. Although this lawyer must be present for “formal” police interrogations and when the detainee makes a statement to police, Amnesty International was informed by a representative of a judges’ professional association that in practice incommunicado detainees are also questioned “informally” by police with no lawyer present.³¹ This allegation was reiterated by other legal professionals. One lawyer even told Amnesty International that it was his practice, upon entering the interrogation room, to ask his client if this was the first time he or she was being questioned. Although the results of any interrogation conducted without a lawyer present are not admissible in court, Amnesty International was told that in practice police reports submitted in evidence sometimes refer to information obtained in such informal interviews.³² Furthermore, the opportunity may be used to exert illegitimate pressure – physical or psychological – on the detainee.

Furthermore, in violation of the internationally guaranteed right to counsel, the assigned

lawyer is not permitted to communicate with their client in private at any time during the period of incommunicado detention, both within police custody and on remand.³³ In the case of *Brennan V. UK* (16 October 2001) the European Court found that “an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 § 3 (c). If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness”.³⁴ The court subsequently concluded that “the presence of the police officer within hearing during the applicant’s first consultation with his solicitor infringed his right to an effective exercise of his defence rights and ... there has been, in that respect, a violation of Article 6 § 3 (c) of the Convention taken in conjunction with Article 6 § 1” (relating to right to legal assistance of own choosing and fair trial, respectively).³⁵

The Human Rights Committee has clarified that Article 14(3)(b) of the ICCPR requires states to ensure “that Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.”³⁶

In 1996 the Human Rights Committee, in its Concluding Observations on Spain’s fourth periodic report of its implementation of the ICCPR, emphasized that the provisions allowing for incommunicado detention of up to five days without a lawyer of choice “are not in conformity with articles 9 and 14 of the Covenant” (relating to freedom from arbitrary detention and right to a fair trial, respectively).³⁷ In 1997 the CAT urged the Spanish government to consider abolition of the restrictions on the right of detainees to a lawyer of their own choice.³⁸

The CPT has also expressed concern that detainees held incommunicado could not consult in private with the officially appointed lawyer either before or after making their statements to police. According to the CPT, “the core of the notion of access to legal assistance for persons in police custody is the possibility for a detainee to consult in private with a lawyer, and in particular during the period immediately following his loss of liberty.”³⁹ The CPT has therefore recommended that detainees be granted the right “as from the outset of the period of custody, to consult in private with a lawyer, it being understood that, in the case of a detainee held incommunicado, the lawyer shall be officially appointed on his behalf”.⁴⁰ Where a lawyer is appointed on behalf of a detainee but is unable to consult with their client, as is the case in Spain for incommunicado detainees, the CPT has stated that “Under such circumstances it is difficult to speak of an effective right to legal assistance; the officially appointed lawyer can best be described as an observer”.⁴¹

Some judges of the National Criminal court have expressed support for altering these restrictions to give incommunicado detainees the same rights as ordinary detainees to consult with a lawyer in private after making their statement to police.⁴²

At the end of the police interview, the detainee’s lawyer is allowed to put questions to the detainee and have these recorded as part of the formal statement. However, Amnesty International has been informed by a variety of sources that lawyers are sometimes ordered

by police officers not to speak.⁴³ Lawyers who attempt to intervene, or who ask for the professional identity number of the police officers present to be recorded, report receiving aggressive and intimidating treatment from police officers. This creates a further de facto bar to effective legal assistance and is contrary to Spanish legislation and jurisprudence, which recognises the right of an “active presence of the lawyer” during interrogations.⁴⁴

These limitations on effective access to legal assistance violate Articles 14(3)(d) and (b) of the ICCPR and Article 6(3) (c) and (b) of the ECHR, concerning the right to communicate with a lawyer in confidence and the right to adequate time and facilities for the preparation of a defence.

The importance of effective legal representation for detainees making a statement before police is made all the more significant by the fact that, where a detainee has made a statement in police custody but later chooses to remain silent before the investigating judge or during trial, the police statement may be used as evidence against them. This principle has been upheld even in cases in which the detainee alleged that the police statement had been extracted under torture.⁴⁵

JUDICIAL SUPERVISION

International Covenant on Civil and Political Rights, Article 9 (3)

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

European Convention on Human Rights, Article 5 (3)

Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

For a detainee to be held incommunicado, the law enforcement agency responsible for the individual’s arrest must make a request to the investigating judge for incommunicado measures to be imposed within 24 hours after the arrest. The judge has a further 24 hours to grant or deny this request. There is no obligation for the detainee to be presented before the judge when this decision is made, either initially or if it is extended.

Every order for incommunicado detention must be substantiated in writing (*mediante comunicación motivada*) by the competent judge in each individual case and each time it is extended. However, despite this clear requirement, according to the findings of the CPT, “law enforcement agencies systematically request that persons arrested in relation to terrorist activities be held incommunicado and that the competent judges systematically grant such requests”.⁴⁶ Furthermore, “the reasons given by the judge for ordering incommunicado

detention tend to be brief and of a stereotyped nature, and ... the decision is granted for the maximum period of detention".⁴⁷ Lawyers interviewed by Amnesty International reported that it is common for the "reasoning" of the judge when granting incommunicado measures to be very brief and generic, sometimes simply referring that the measure "has been granted in response to a request from police".⁴⁸ One lawyer said that "'Copy-paste' put an end to detainees' rights".

Under Spanish law, there is no obligation for the judge personally to see a detainee held on terrorism-related charges (whether or not they are held incommunicado) until five days after their arrest. This violates the requirement in Article 9(3) of the ICCPR and Article 5(3) of the ECHR that detainees must be brought "promptly" before a judge. Whilst international standards do not expressly define the meaning of "promptly", the HRC has stated that "any delays should not exceed a few days"⁴⁹. The European Court of Human Rights has ruled that detaining a person for four days and six hours before bringing them before a judge was not prompt access.⁵⁰

Amnesty International notes that Article 520bis of the Spanish criminal procedure act does provide for ongoing judicial supervision of the detainee during incommunicado detention, granting a judge the power to request information at any time during the incommunicado detention period, or seek information personally or by delegation, concerning the detainee's situation. However, this is left to the judge's individual discretion and Amnesty International was informed by the President of the Criminal Chamber of the National Court that in practice judges rarely avail themselves of this power. Although this is not a violation of any legal obligation, it could be considered a professional failing - Judge Fernando Andreu of the National Court has highlighted that the judge is responsible for the detainee and "orders incommunicado measures in order to safeguard the investigation, but must not neglect their responsibility to protect the detainee".⁵¹

LACK OF ACCESS TO DOCTOR OF OWN CHOICE

Standard Minimum Rules for the Treatment of Prisoners, Rules 24 and 91

... The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary...

... An untried prisoner shall be allowed to be visited and treated by his own doctor or dentist if there is reasonable ground for his application and he is able to pay any expenses incurred.

Spanish law permits detainees held incommunicado to see court-appointed forensic doctors every day but does not allow them to be examined by a doctor of their own choice. They may request a medical examination by a second doctor, but s/he will also be state-appointed.

The CPT has repeatedly recommended to the Spanish authorities that, in addition to being examined by a state-appointed forensic doctor, detainees held incommunicado should be

granted the right to be examined by a doctor of their own choice on request (in the presence of the state-appointed doctor).⁵² In its concluding observations on Spain's fourth periodic report of its implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the CAT also recommended that individuals held in incommunicado detention receive a "joint examination by a forensic physician and a physician chosen by the detainee".⁵³ In his most recent report to the Human Rights Council in 2008, following up on the recommendations made on a previous visit to Spain, the Special Rapporteur on torture noted positively that individual judges had, on occasion, allowed incommunicado detainees to be examined by a doctor of their own choice, but that the Spanish authorities had failed to apply this measure in a systematic manner.⁵⁴ The President of the Criminal Chamber of the National Court told Amnesty International that he supports this initiative and is aiming to make it standard practice.

The effective exercise of the right of detainees to medical care and medical examinations while in detention is an important tool in preventing and detecting ill-treatment. Medical reports of examinations during this time are of great importance in successfully prosecuting those responsible when ill-treatment occurs. However, Amnesty International's research on ill-treatment by law enforcement officials in Spain has shown that it is common for police officers to remain present during the medical examination of the detainee, which is likely to intimidate the detainee into remaining silent about any ill-treatment they have suffered. Consequently, forensic medical reports do not always accurately and fully reflect the detainee's physical and mental state at the time of examination. The CPT has repeatedly underscored to the Spanish authorities that "all medical examinations should take place under conditions of confidentiality and in particular be carried out without the presence of law enforcement personnel."⁵⁵

Even when police officers are not present, detainees may be afraid to speak to a state-appointed doctor about any injuries caused by torture or other ill-treatment during incommunicado detention, as they perceive the state-appointed doctor to be part of the same authority structure as the police officers inflicting the ill-treatment.⁵⁶ The vice-president of the UN subcommittee on the prevention of the torture, speaking at a conference on "Medical responsibility in the international fight against torture" commented that "the quality of work of doctors based in Spanish detention centres to detect torture is insufficient" and the procedures for transmitting concerns about possible ill-treatment "do not function adequately and demonstrate grave deficiencies when compared with UN criteria".⁵⁷

Similarly, a study published in November 2008 in the journal *Forensic Science International*, which examined 425 medical reports issued on incommunicado detainees in the Basque Country between 2000 and 2005⁵⁸, concluded that the quality of reporting was "unacceptable" and reflected "insufficient and inadequate medical examinations". The majority of reports lacked formal structure, contained inadequate information on injuries and state of health, and did not include conclusions from the examining doctor on whether injuries were consistent with allegations of ill-treatment. None of the documents followed the recommended standard format of the CPT, and only nine followed the standard format recommended by the Ministry of Interior.

The study notes that "The medical examination is supposed to represent a possibility for the detainee to have a professional assessment of his testimony about ill-treatment and a

safeguard for police officers against false accusations". The failure of the appointed doctors to conduct thorough and effective examinations of the detainees in these cases, paying particular attention to examining, assessing and recording any allegations or evidence of ill-treatment, renders this supposed safeguard useless. The cause of this failure is likely to be a combination of inadequate guidance to doctors on the importance of their role as safeguard and duty to report possible ill-treatment; inadequate training on diagnostic procedures for proper documentation of ill-treatment and a lack of formal protocols or reporting guidelines; the dual loyalty felt towards the detainee/patient and the appointing authority; and a lack of privacy during medical examinations which makes detainees less likely to cooperate fully due to fear of reprisals.

Proper training and guidance for doctors examining detainees is clearly essential for addressing these problems. Implementing the recommendations of the CPT and the CAT with regards to allowing examinations by a detainee's own doctor would also help to address this issue, as well as bring Spain in line with international standards.

LACK OF NOTIFICATION TO FAMILY MEMBERS

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 15 and 16

... communication of the detained or imprisoned person with the outside world, in particular his family or counsel, shall not be denied for more than a matter of days.

... Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

Standard Minimum Rules for the Treatment of Prisoners, Rule 92

An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.

The rights of detainees to communicate with others and to receive visits are fundamental safeguards against torture and other ill-treatment. According to international standards, anyone who is arrested has the right to inform, or have their family or other person of their choice informed, of their detention and location. This notification must happen immediately, or, in exceptional circumstances and when vital for the integrity of the police investigation, with the minimum possible delay. However, under the current Spanish legislation, incommunicado detainees are not able to communicate, or have this information communicated on their behalf, for the duration of the incommunicado period.

Whilst it is permissible in some exceptional circumstances to temporarily delay notice being given to family and/or restrict access to relatives or other persons of the detainee's choice in order to protect evidence and avoid alerting other possible suspects, international standards require that any such restriction must be for the shortest time possible.

The Human Rights Committee has stated that people arrested or detained on criminal charges must be permitted to contact their families "from the moment of apprehension."⁵⁹ Where this is not possible the committee has called for "the mandatory notification of relatives of detainees without delay".⁶⁰ The Special Rapporteur on torture has recommended the immediate notification of relatives and that, "In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours".⁶¹ The CPT stated that the Spanish limit in notification in 1994 – when it was still at five days - was "not justifiable"⁶² and called for this period to be reduced "substantially". It recommended that 48 hours should be the maximum time period during which a detainee should be denied communication with family.⁶³

Under the "Assistance Service for Relatives of Incommunicado Detainees" protocol introduced by the Basque Government in 2003 for the Basque autonomous police force (Ertzaintza), a 24-hour telephone line was established to allow the families of incommunicado detainees to obtain information on the reason for detention, location, and state of health of the detainee, as well as for family members to provide information to the police on the detainee's medical needs. This protocol is a positive step towards ensuring the rights of incommunicado detainees. However, Amnesty International is concerned that the protocol is not always correctly adhered to in practice. Amnesty International was informed by representatives of the Basque Ombudsman's Office (Ararteko) that relatives who have called the telephone line to find out where their family member has been detained have been given inadequate information, for example simply, "In the Basque Country".

CONCLUSIONS AND RECOMMENDATIONS

Amnesty International considers that the incommunicado regime in Spanish law is a violation of Spain's obligations under international human rights law both in theory and practice. No other European Union country maintains a detention regime with such severe restrictions on the rights of detainees. The continuing allegations of torture and other ill-treatment made by detainees who have been held incommunicado demonstrate the grave consequences detention in this regime may have.

Amnesty International calls on parliament to abrogate the existing legislation permitting incommunicado detention and to ensure the effective protection of the rights of all persons deprived of their liberty, in accordance with international human rights standards.

Amnesty International recommends that the Spanish Minister of Justice should:

- End the use of incommunicado detention by immediately abrogating Articles 509, 520bis and 527 of the Criminal Procedure Act, which authorise and govern the use of incommunicado detention; **and subsequently:**
- Ensure all persons deprived of their liberty enjoy the right to consult with a lawyer of their own choice in private, and to have a lawyer present during questioning and the making of statements, from the outset of detention and throughout the period in custody;
- Ensure all detainees enjoy the right to medical examinations by a doctor of their own choice if so requested;
- Ensure all detainees are able to exercise their right to notify a relative or other person of their choice or have the person notified of the fact and place of their detention without delay.

Amnesty International recommends that the Ministry of Interior, and autonomous Counsellors of Interior as appropriate, should:

Ensure video- and audio-recording equipment is in place in all custody areas of police stations and any other places where any detainee may be present, except where this would violate their right to consult with a lawyer or doctor in private, and make the use of such

equipment compulsory in all cases. All interrogations should be video and audio recorded. These recordings must be kept in a secure facility for a reasonable period of time in order to ensure they are available for viewing by investigators if so required.

Amnesty International recommends that the Spanish judicial authorities should:

- Deny requests to authorise incommunicado detention;
- Order the comprehensive use of audiovisual recording measures throughout the detention period;
- Authorise medical examinations by a doctor of the detainee's own choice if so requested;
- Authorise detainees to be assisted by a lawyer of their own choice if so requested;
- Ensure all detainees are presented personally before the judge at the earliest opportunity;
- Ensure judges take full advantage of their powers to supervise the condition of detainees under their responsibility, including by personal visits to places of detention where appropriate.

Amnesty International recommends that the Spanish law enforcement agencies should:

- Ensure law enforcement officers refrain from questioning detainees without a lawyer present;
- Ensure law enforcement officers never attempt to obstruct lawyers from fulfilling their role during questioning of the detainee, including by prohibiting them from speaking;
- Immediately initiate thorough and effective disciplinary investigations wherever there is an allegation of ill-treatment or other grounds to believe ill-treatment may have taken place. Where evidence is uncovered of possible criminal acts, this must be passed immediately to the judicial authorities for further investigation.

Amnesty International recommends that doctors appointed to examine detainees should:

- Insist on conducting all medical exams of detainees out of the hearing and, unless otherwise requested by the doctor in a particular case due to a fear for their own safety, out of the sight of law enforcement officials;

- Ensure medical examinations and reports are in line with the guidelines of the Istanbul Protocol “Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”. Medical reports should include the doctor’s own conclusions on the possible correlation between allegations of ill-treatment and any evidence (or lack) of corresponding injuries.

Endnotes

1 The Committee for the Prevention of Torture (CPT) is comprised of legal, medical, and law enforcement experts drawn from States parties to the European Convention for the Prevention of Torture and Other Inhuman or Degrading Treatment or Punishment. The CPT conducts periodic and ad hoc visits to all places where people are deprived of their liberty in states parties to the Convention. Upon authorisation of the state concerned, the CPT publishes the reports of its visits, which contain its observations and recommendations aimed at eradicating torture and other ill-treatment. It also publishes annual general reports which include thematic and general recommendations aimed at preventing torture and other ill-treatment.

2 See, e.g., UN Security Council resolutions 1450; 1456 at para 6; 1566, Preambular para 6.

3 UN World Summit Declaration 2005, para. 85, adopted by the Heads of State and Government gathered at the UN Headquarters from 14-16 September 2005, UN Doc. A/60/L.1, A/RES/60/1.

4 See e.g., General Assembly resolutions 59/46, 49/60, 51/210.

5 See, e.g., *Aksoy v Turkey*

6 See, e.g., Council of Europe Guidelines on the Protection of Human Rights and the Fight against Terrorism, adopted by the Council of Europe Committee of Ministers on 11 July 2002, H(2002)004. See in particular Guideline II.

7 See, for example, Preliminary Observations of the HRC: Peru, UN Doc. CCPR/C/79/Add.67, paras 17, 25 July 1996.

8 Commission on Human Rights, Resolution 1997/38, para. 20

9 *Albert Womah Mukong v. Cameroon*, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991 at para 9.4; *EI-Megreisi v. Libyan Arab Jamahiriya*, (440/1990), 23 March 1994, UN Doc. CCPR/C/50/D/440/1990, at para 5.4.

10 Human Rights Committee General Comment 20, para.11

11 Report of the Special Rapporteur on torture, UN Doc. E/CN.4/1995/34, para. 926(d)

12 A/53/44 Conclusions and recommendations of the Committee against Torture Spain, 1997, para 131.

13 *Ibid*, para 135.

14 Concluding observations of the Human Rights Committee, SPAIN, UN Doc: CCPR/C/79/Add.61, 3 April 1996, at paras 12 and 18.

15 Draft Concluding observations of the Human Rights Committee, SPAIN, UN Doc: CCPR/C/ESP/CO/5, 27 October 2008, para 14.

16 CAT/C/CR/29/3 23 December 2002 Conclusions and recommendations of the Committee against Torture SPAIN, para 10.

17 E/CN.4/2004/56/Add.2, 6 February 2004 Report of the Special Rapporteur on the question of torture, Addendum, VISIT TO SPAIN, para 41.

18 *Ibid*, para 66.

19 UN Doc: A/HRC/7/3/Add.2, para 561.

20 A/HRC/10/3/Add.2, 16 December 2008 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, paras 22 – 23, 36 - 37.

21 *Ibid*, para 32.

22 *Ibid*, para 63.

23 In this paper, the term "police" is used to refer to all public police forces in Spain including those at the national, autonomous regional and local level, and the Civil Guard.

24 Spain operates an "inquisitorial" criminal justice system, in which an investigating judge (juez de instrucción) is responsible for conducting the initial investigations

into criminal offences. The task of the investigating judge is to gather all the evidence necessary to prosecute an offence and to ensure the rights of suspects are protected throughout the investigation. If the investigating judge deems that there is a valid case to answer, he or she passes the case and all evidence collected on to a trial court to be heard.

25 Criminal Procedure Act, article 509.2.

26 Criminal Procedure Act, article 527.

27 Incommunicado detainees may, however, request a medical examination by a second state-appointed doctor (Article 510 CPP).

28 Confirmed with autonomous Counsellor of Interior, as of 19 September 2008.

29 Manex Castro, arrested by Ertzaintza officers on 1 March 2009 in the Basque Country.

30 Draft Concluding observations of the Human Rights Committee, SPAIN, UN Doc: CCPR/C/ESP/CO/5, 27 October 2008, para 14.

31 Interview with Amnesty International, 15 June 2008.

32 Interview with Amnesty International, 16 July 2008.

33 Under Spanish legislation, no detainee (including those not held incommunicado) has access to a lawyer in private before making their statement to the police. Amnesty International believes that this legislation must be reviewed urgently.

34 Brennan v. the United Kingdom (00039846/98), 16 October 2001, Para 58.

35 Para 63, *ibid.*

36 Human Rights Committee General Comment 32, on Article 14 of the ICCPR, 23 August 2007, UN Doc: CCPR/C/GC/32.

37 CCPR/C/79/Add.61, para 12.

38 A/53/44 Conclusions and recommendations of the Committee against Torture Spain, 1997, para 135.

39 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 1 to 12 April 1991 (hereinafter CPT Report 1991) para 50.

40 *Ibid.*, para 52.

41 *Ibid.*, para 51.

42 Interview with Amnesty International, 16 October 2008.

43 Interview with Amnesty International, 9 July 2008.

44 Constitutional Court Sentence 199/2003 of 10 November 2003.

45 See for example Supreme Court Appeal Sentence 927/2006, 4 October 2006.

46 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 10 to 22 April 1994 (hereinafter CPT Report 1994) para 62.

47 *Ibid.*

48 Interview with Amnesty International, 11 July 2008.

49 Human Rights Committee General Comment No. 8, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), para. 2.

50 Brogan et al. v. United Kingdom, 29 November 1988, 145b Ser.A 33 at 62.

51 El Pais newspaper, 3 February 2008, "Cámaras que paran torturas".

52 See CPT reports 1991 para 57, Report of Visit of the CPT to Spain from 22 November to 4 December 1998 para.26, Report of Visit of the CPT to Spain from 22 to 26 July 2001 para 9, and Report of Visit of the CPT to Spain from 22 July to 1 August 2003 para 25.

53 CAT/C/CR/29/3 23 December 2002 Conclusions and recommendations of the Committee against Torture SPAIN, para 14(b).

54 UN Doc: A/HRC/7/3/Add.2, paras 561 and 614.

55 See for example Report of Visit of the CPT to Spain from 12 to 19 December 2005, para 44 and Report of Visit of the CPT to Spain from from 22 July to 1 August 2003, para 24.

56 See Amnesty International's report Spain: Adding insult to injury: The effective impunity of police officers in cases of torture and other ill-treatment (AI Index EUR 41/006/007).

57 Europa Press, 18 April 2008, "El subcomité de la ONU para la prevención de la tortura dice que la prevención en las cárceles españolas es insuficiente".

58 B. Morentin, et al., A follow-up investigation on the quality of medical documents from examinations of Basque incommunicado detainees, Forensic Sci. Int. (2008), doi: 10.1016/j.forsciint.2008.10.002.

59 Human Rights Committee concluding observations on Democratic People's Republic of Korea 2001, UN Doc CCPR/CO/72/PRK, para 18.

60 Human Rights Committee concluding observations on India 1997, UN Doc CCPR/C/79/Add.81, para 23.

61 Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment 2001, UN Doc A/56/156, para 39(f).

62 CPT Report 1994, para 60.

63 Ibid.

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