



International Commission of Jurists

Submission to the Human Rights Committee regarding the consideration of the 5th Periodic Report submitted by Spain

10 October 2008

The International Commission of Jurists (ICJ) provides its views to the Human Rights Committee pursuant to its consideration of the 5th Periodic Report of Spain. In this submission, the ICJ highlights several issues which it considers should be of particular concern to the Committee in its consideration of the report.

The ICJ is concerned that the law and procedure regarding *garde à vue* and *incommunicado* detention, and the limited safeguards the law provides for detainees, fail to protect adequately against torture or cruel, inhuman or degrading treatment (ill-treatment) by police or other state officials, contrary to Article 7 ICCPR. These problems are particularly acute in regard to those held on charges of terrorism or organised crime, who may be detained *incommunicado* for up to 13 days. A further issue of concern is the restriction on defence rights resulting from the *secreto de sumario* investigation procedure. In the course of its hearings, the ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights has heard serious concerns expressed in relation to all of these issues from Spanish lawyers.

In this submission, the ICJ also highlights concerns regarding the credible allegations of Spain's involvement in the United States CIA-run programme of renditions, the reliance of Spanish courts on diplomatic assurances against torture in extradition proceedings, and the alleged unlawful curtailment of the rights to freedom of expression and association.

Police and *incommunicado* detention (Articles 7, 9 and 10 ICCPR)

As a general rule under Spanish law, following arrest, a suspect must be released or brought before a judge within 72 hours.¹ However, a judge can extend this period by 48 hours in terrorism cases, to allow a total of five days police or *garde à vue* detention.² Those suspected of offences in connection with terrorism or organised crime may also be made subject to *incommunicado* detention for a total of up to 13 days, justified, according to the jurisprudence of the Constitutional Court, on the grounds of the seriousness of the crimes, considered implicit in terrorism-related investigations, and the need to protect the integrity of the investigation.³ Under the Spanish Code of Criminal Procedure,⁴ as amended,⁵ a five days period of *incommunicado* police detention can be ordered by a judge. At the end of this period, a judge can issue those suspected of terrorism or organised crime related offences with a further five days of *incommunicado* detention, this time in prison custody, and another three days may be added at any time – either immediately following the ten day period or at a later date, where “the development of investigations or of the trial gives good reasons for this measure”.⁶ During *incommunicado* detention, suspects cannot notify relatives about their detention, receive or send correspondence, meet visitors, or designate their own lawyer. They are instead assigned a lawyer, with whom they are not permitted to consult in private.⁷ *Incommunicado* detainees have the right to be visited and examined by a police medical examiner and, since a 2003 law, by a second forensic medical examiner appointed by a judge.⁸ However, this possibility does not amount to a right to be examined by an independent medical practitioner of one’s own choice.⁹

There is reliable evidence that the system of police detention and the lack of adequate safeguards for detainees, considered further below, have led to numerous incidents of ill-treatment of detainees, which on some occasions may amount to torture. In its report of 2005 following a visit to Spain, the European Committee on the Prevention of Torture

¹ Code of Criminal Procedure (CCP) (*Ley de Enjuiciamiento Criminal*), Law 53/1978, Articles 520(1) and 520bis (1).

² Article 520 bis, CCP. The Constitution makes general provision that preventative detention may last no longer than the time strictly necessary to carry out investigations and that the arrested person must be set free or handed over to the judicial authorities within a maximum period of 72 hours, but it states that this right may be suspended, subject to judicial and parliamentary controls, “in connection with investigations of the activities of armed bands or terrorist groups”, Article 55(2), Constitution.

³ Spanish Constitutional Court, dec. no. 127/2000, FJ 3, STC 196/1987, FJ 7, ATC 155/1999, FJ 4.

⁴ See, footnote no. 1.

⁵ Amended by Organic Law 4/1988 and by Organic Law 13/2003.

⁶ Article 509 (2), CCP. See generally Spain, Fifth periodic report, CCPR/C/ESP/5, 5 February 2008, paras 92-94.

⁷ Article 527, CCP.

⁸ Organic Law 13/2003.

⁹ The Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Spain*. 23/12/2002, CAT/C/CR/29/3, para.14, recommended a joint examination by a forensic physician and a physician chosen by the detainee held *incommunicado*. The European Committee on the Prevention of Torture made a similar recommendation: CPT/Inf (2007)30, *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)*, 10 July 2007.

(CPT)¹⁰ found many consistent allegations of ill-treatment in custody by police or the Civil Guard, and the UN Committee against Torture has also criticised ill-treatment of those held on terrorism charges.¹¹ The Special Rapporteur on Torture in 2004,¹² as well as the Special Rapporteur on Human Rights and Counter-terrorism, in 2008,¹³ recommended abolition of system of *incommunicado* detention, as did this Committee in its previous Concluding Observations on Spain.¹⁴

The ICJ considers that *incommunicado* detention, even where judicially supervised as in the Spanish system, cannot adequately protect the safety of detainees. Prolonged *incommunicado* detention can itself amount to torture or cruel, inhuman or degrading treatment¹⁵ and there is good evidence to indicate that the system as applied in Spain facilitates ill-treatment of detainees.

Access to lawyers (Articles 9 and 14 ICCPR)

Risks of arbitrary detention and of torture or ill-treatment during police detention and in particular in *incommunicado* detention are particularly acute in Spain as a result of limitations on rights of access to lawyers, both in law and in practice.

Under Spanish law, persons arrested and held in police custody have a general right to a lawyer of their choice.¹⁶ This right is restricted in respect of terrorism suspects however, who, when held *incommunicado*, do not have the right to nominate a lawyer; rather, they are assigned a lawyer designated from an official list of the Bar Association.¹⁷ The assigned lawyer does not have a right to communicate privately with his client.¹⁸ The Spanish Constitutional Court has upheld the mandatory assignment of a lawyer, as compatible both with the Spanish Constitution and with Spain's international human rights obligations.¹⁹

In practice, delays in access to assigned lawyers considerably undermine the protection they offer. The law provides that the lawyer must reach the detention centre within eight hours from his or her appointment, and makes it an offence for any public authority or official to prevent or obstruct the exercise of the right to a lawyer.²⁰ However, in practice, the assigned lawyer often arrives only when the detainee is scheduled to make a

¹⁰ CPT, *Report to the Spanish Government on its visit to Spain, op cit.*

¹¹ U.N. Committee against Torture, *Conclusions and Recommendation, op cit*, para.10. This recommendation, made in 2002, was in relation to the then five days period of *incommunicado* detention.

¹² Report on Visit to Spain, E/CN.4/2004/56/Add.2, para.66.

¹³ *UN Special Rapporteur on Human Rights and Counter-terrorism Concludes Visit to Spain*, 14 May 2008.

¹⁴ CCPR/C/79/Add.61.

¹⁵ CAT Concluding Observations on the United States, CAT/C.USE.CO/2, 18 May 2006, para.17; HRC General Comment No.20 para.6; report of the Special Rapporteur on Torture on visit to Spain, 2004, *op cit*, para.34.

¹⁶ Article 520 (2), CCP.

¹⁷ Article 527 (a), CCP.

¹⁸ Article 527(c), CCP.

¹⁹ Spanish Constitutional Court, dec. 196/1987, para. 7.

²⁰ Art. 537, Penal Code (See, CAT/C/55/Add.5).

statement to the police,²¹ at which point the lawyer's presence has very little practical protective effect. In its 2005 visit to Spain, the CPT found a consistent pattern of lengthy delays between the request for a lawyer and the lawyer's arrival at the law enforcement establishment. Moreover, when a lawyer did arrive for the formal statement of the detainee, "such access was, in general, limited to the lawyer's passive presence while the detained person's statement was taken and signed."²² It found several cases in which there were credible allegations of ill-treatment, where detainees did not have access to a lawyer for 22 hours or more following arrest.²³

The right of prompt access to a lawyer has been affirmed by this Committee in its General Comment No. 20, and prompt access, at least within 48 hours of arrest or detention, is specified by Principle 7 of the UN Basic Principles on the Role of Lawyers.²⁴ As this committee has recognised, prompt access to a competent lawyer, and the ability to communicate privately and effectively with the lawyer, are indispensable safeguards against coerced statements and torture or other ill-treatment in custody, as well as against arbitrary detention, and therefore to the protection of rights under Articles 7, 9 and 10 of the Covenant.

The ICJ considers that, in order to reliably protect the Covenant rights, the principle of immediate access to a lawyer should be established and implemented in Spanish law. This right should not be undermined or compromised under any circumstances, including in terrorism cases. The law must ensure that the lawyer consults with the detainee in confidence, and in time to give advice prior to any statement being made to the police. Following the initial consultation, access to detainees held in police custody, or in prison custody pending charge, should be regular and substantial, and should respect the confidentiality of lawyer-client meetings and communications.

Judicial review of detention (Article 9 (3) and (4) ICCPR)

Spanish law requires that a person suspected of crimes of terrorism be brought before a judge within 72 hours of arrest.²⁵ If it has been requested within the first 48 hours of arrest, the judge can extend the detention for up to another 48 hours. Judicial authorisation is also required for any imposition of *incommunicado* detention and on any extension of *incommunicado* status for a further five days, and then a further three days.²⁶

²¹ HRW report, *Setting an Example? Counter-terrorism Measures in Spain*, January 2005, Vol. 17, No. 1(D), pp.30-34. CPT report *op cit*, para. 24.

²² CPT report, *op cit*, para.24.

²³ *ibid*, para.23.

²⁴ See also, Human Rights Committee, General Comment 20, Prohibition of torture and cruel treatment or punishment, para.11; *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/CO/78/ISR, paragraph 13; *Concluding Observations of the Human Rights Committee: Switzerland*, UN Doc. CCPR/C/79/Add.70, paragraph 26; Views of 27 July 1993, Communication no. 326/1988, *Case of Henry Kalenga vs. Zambia*, UN Doc. CCPR/C/48/D/326/1988, paragraph 6.3.

²⁵ Article 520, CCP.

²⁶ Article 520 *bis*, CCP.

Therefore, while most of the period of *incommunicado* detention is supervised by the judicial authority, the first 48 or 72 hours – depending on the choice the police makes – are without judicial authorisation.

The ICJ has serious concerns regarding the quality of judicial supervision of detention. The CPT found that the requirement for a detainee to be brought before a judge within 72 hours of arrest was, in practice, not rigorously met: “although judges did issue the decision on a person’s release or continued custody within the required time-limits, they did not always do so having physically seen the person”.²⁷ Where, in case of persons suspected of terrorism offences, a judge is asked to decide whether to extend *garde à vue* for an additional 48 hours, there is no legal requirement for the detainee to appear before the judge in order for the detention to be extended, though the judge may request the detainee’s production.²⁸ In practice, it appears that judges do not always require detainees to appear before them.

Judicial review of *incommunicado* detention is also in practice limited. The Special Rapporteur on Torture’s Report of 2004 noted that he had received “ample information from a variety of sources that in this regard judicial control is more often of a formal and administrative nature than substantive and scrutinizing.”²⁹ He noted that judicial extensions of *incommunicado* detention were normally based solely on a reference to an individual’s suspected links with terrorism, and where such links were alleged, the request was usually granted automatically, without the judge exercising his or her competence to obtain information personally.³⁰

A further problem relates to the right to challenge the lawfulness of one’s detention as guaranteed by Article 9 (4) ICCPR. Under the Spanish system, this right can be exercised by filing a writ of *habeas corpus*.³¹ In most cases, *habeas corpus* petitions are heard by the examining magistrate of the district where the detainee is held; however, in terrorism cases, the application is heard by the Central Instructing Judge of the *Audencia Nacional*, who is also likely to have been the authority that ordered the detention.³² The right to *habeas corpus* is further undermined by the fact that it is not among the rights that police are required to read to an arrested person. Lack of prompt legal advice, and the isolated state of detainees in *incommunicado* detention, further restricts the use of *habeas corpus*. The ICJ emphasises that prompt review by a court is an essential safeguard against ill-treatment and arbitrary detention.³³

²⁷ CPT report *op cit*, para.43.

²⁸ Article 526.3, CCP.

²⁹ Report of the Special Rapporteur on Torture, *op cit*, para.60.

³⁰ *ibid*, para.38.

³¹ Organic law 6/1984 on the Regulation of the Procedure for Habeas Corpus.

³² *Ibid*, Article 2.

³³ *Brogan v UK*, application nos. 11209/84; *Sinan Tanrikulu and others v Turkey* (application nos. 00029918/96, 00029919/96 and 00030169/96, 6 October 2005); *Yasar Bazancir and others v Turkey*, (application nos. 00056002/00 and 0007059/02, 11 October 2005) (6 days detention without judicial supervision breached Article 5.3, despite acute terrorist threat). See also, General Assembly resolution no 34/178, *The right of amparo, habeas corpus or other legal remedies to the same effect*, 106th plenary meeting, 17 December 1979, paragraph 1.

The ICJ is concerned that both the law on judicial review of detention, and its application in practice, are insufficient to safeguard detainees against torture or other ill-treatment or arbitrary detention. The law should be amended to ensure that decisions to extend detention always entail the production of the detainee before the court, and the law and practice should ensure that judicial review of detention is real and substantial.

Criminal Investigations, the right to a defence and *Secreto de Sumario* (Article 14 ICCPR)

Spanish law authorises the use of “*secreto de sumario*” by which, in criminal investigations, an examining magistrate can totally or partially restrict the availability of information on the investigation, including to the defence.³⁴ The procedure aims to protect the integrity of judicial investigations, and the Constitutional Court has held that it constitutes a justifiable limitation on the right to defend oneself, in the interests of preventing interference with or manipulation of the investigation.³⁵ Under Article 302 of the Code of Criminal Procedure, *secreto de sumario* can be imposed for a period of one month, but the Constitutional Court has interpreted this provision as allowing for the renewal of *secreto de sumario* on a monthly basis, provided that it is necessary in the circumstances of the case, until 10 days before the end of the investigation.³⁶

Investigations of terrorist crimes are reportedly regularly extended for two years without the presence of the defence.³⁷ During this time, the accused may remain in pre-trial detention. Under the Code of Criminal Procedure, persons accused of serious offences may be held in pre-trial detention for up to four years, provided that a judge authorises renewal after the first two years of detention.³⁸ Those tried for the 2004 Madrid bombings were kept in prolonged pre-trial detention, during which the secrecy of the investigation appears to have been one of the factors which hampered the defence lawyers in providing effective representation and advice to their clients.³⁹ Renewal of *secreto de sumario* for extended periods inevitably creates difficulties for defence lawyers who do not have access to detailed information regarding the charges against their clients, or the use of means of investigation such as interception of communications. Where the accused is remanded in pre-trial detention, *secreto de sumario* also means that the defence lawyer may know little detail of the factual basis for pre-trial detention, and therefore have great difficulty in challenging it.⁴⁰

³⁴ Article 302, CCP.

³⁵ Constitutional Court, Sentence 176/1988.

³⁶ Constitutional Court, Sentence 176/1988.

³⁷ Sebastia Salellas Magret, Abogado, presentation to the ICJ Eminent Jurist Panel, <http://ejp.icj.org/>

³⁸ Article 504(2) CCP permits a period of 2 year’s pre-trial detention, renewable once on the decision of a judge, for those accused of crimes carrying sentence of more than three years’ imprisonment.

³⁹ Statement of Martin Scheinin, *UN Special Rapporteur on Human Rights and Counter-terrorism concludes visit to Spain*, 14 May 2008; Sebastia Salellas, presentation to Eminent Jurists Panel, *op cit*.

⁴⁰ Organic Law 13/2003 of 24 October 2003, amending article 506 of the CCP.

The ICJ recalls that, according to the Committee's jurisprudence, "the principle of equality of arms implies that the parties to the proceedings must have adequate time and facilities for the preparation of their arguments, which, in turn, requires access to the documents necessary to prepare such arguments".⁴¹ This jurisprudence has been upheld by other international mechanisms, such as the Inter-American Commission on Human Rights.⁴²

The ICJ is concerned that the application of the *secreto de sumario* procedure places unacceptable limits on the right to defend oneself on a criminal charge, to the principle of equality of arms and to the right to have adequate time and facilities for the preparation of defence's argumentations. The application of this legal regime risks violation of the right to fair trial under Article 14 ICCPR.

Non-refoulement and the use of diplomatic assurances against torture (Article 7 ICCPR)

The ICJ is concerned at a recent case in which Spain sought and attained diplomatic assurances against torture and ill-treatment from the Russian Federation in relation to the extradition of a Chechen suspect on charges of terrorism.⁴³ These assurances were accepted by the *Audiencia Nacional*, despite the fact that they contained obvious flaws, including a suggestion that treatment of the suspect could be monitored by the UN Committee Against Torture, which has no such monitoring function. The use of such assurances has been widely criticised as ineffective in protecting against *refoulement* to face a risk of torture.⁴⁴ The European Court of Human Rights has recently held, in *Ismoilov v Russia*⁴⁵, that diplomatic assurances against torture, provided by the government of a country where torture was systematic, did not provide a reliable guarantee against the risk of ill-treatment to satisfy the obligation of *non-refoulement*.⁴⁶

⁴¹ *Paul Perterer vs. Austria*, Communication no. 1015/2001, UN Doc. CCPR/C/81/D/1015/2001, 20 AUGUST 2004, paragraph 10.6. See also, General Comment no. 32, UN Doc. CCPR/C/GC/32, 23 august 2007, paragraph 33; Report of the Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism to the 63rd session of the General Assembly, UN Doc. A/63/223, 6 August 2008, paragraph 36; and, Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraph 238.

⁴² See, footnote no. 41.

⁴³ Statement of Martin Scheinin, *UN Special Rapporteur on Human Rights and Counter-terrorism concludes visit to Spain*, 14 May 2008; Human Rights Watch, Letter to Mariano Fernández Bermejo, Minister of Justice, 8 May 2008.

⁴⁴ UN Special Rapporteur on Torture, Manfred Nowak, August 2005 report to the General Assembly; UN High Commissioner for Human Rights, Louise Arbour, statement to the Council of Europe's Group of Experts on Human Rights and the Fight against Terrorism, 29-31 May 2006; EU Network of Independent Experts on Fundamental Rights, Opinion No. 3-2006, May 2006; European Parliament, February 2007 resolution P6_TA-PROV(2007)0032; Council of Europe's European Commission for Democracy through Law (Venice Commission), Opinion no. 363 / 2005, March 2006; Council of Europe Commissioner for Human Rights, Thomas Hammarberg, Viewpoint: 'The protection against torture must be strengthened', 18 February 2008.

⁴⁵ Application no.2947.06; see further *Saadi v Italy*, Grand Chamber, Application no.37201/06; *Ryabikin v Russia*, Application no. 8320/04.

⁴⁶ Application no. 2947/06, Para.127.

The ICJ emphasises that diplomatic assurances against torture are of their nature ineffective, even where the most sophisticated monitoring mechanisms are in place. They are unenforceable, and provide no means of redress for their breach.⁴⁷

The ICJ is concerned that the Spanish authorities are willing to use diplomatic assurances as a basis for extradition of a Chechen suspect to Russia, despite the widespread practice of torture and other ill treatment in Chechnya and the North Caucasus.

Rendition Flights through Spain (Articles 7, 9, 10, 14 and 16 ICCPR)

There have been credible reports, including from the investigation of Senator Dick Marty, Rapporteur for Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe,⁴⁸ and of the Temporary Committee of the European Parliament (TDIP)⁴⁹ that flights involved in the CIA-run renditions programme landed at Spanish airports, including in Majorca, the Canary Islands and at military bases near Cadiz and Seville, between 2002 and 2006.⁵⁰ Spanish prosecutors continue to investigate the flights and possible crimes on Spanish territory connected with them.⁵¹ It has been confirmed by the Spanish government that renditions flights have landed in Spain, but the government denies that any crimes occurred on Spanish territory.⁵² The US-led renditions programme has involved practices of enforced disappearance and serious and systematic violations by the United States of rights protected in the Covenant, including the right to recognition everywhere as a person before the law, freedom from arbitrary detention, freedom from torture and cruel, inhuman or degrading treatment, and *refoulement* to face a risk of such treatment. Therefore, the use of Spanish airports in the transport of rendered persons engages the positive obligations of Spain to protect against such treatment on its territory, and to investigate whether and how it occurred, and to

⁴⁷ See for ICJ position on the issue: Reject Rather than Regulate (submission by Amnesty International, Human Rights Watch and ICJ to the Council of Europe), <http://www.amnesty.org/en/library/asset/IOR61/025/2005/en/dom-IOR610252005en.html> and http://icj.org/news.php?id_article=3815&lang=en; and Letter to Minister of Justice of Denmark 18 June 2008, http://icj.org/IMG/Joint_NGO_open_letter_re_DAs_without_signatures_1.pdf.

⁴⁸ Parliamentary Assembly of the Council of Europe, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States*, Doc.10957 12 June 2006 para.103.

⁴⁹ European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners* (2006/2200(INI)) Rapporteur, Giovanni Claudio Fava, A6-0020/2007, para.114.

⁵⁰ El País, 4 February 2008, *La fiscalía busca testigos clave del traslado de presos en los vuelos secretos de la CIA*.

⁵¹ El País, 4 February 2008, *op cit*; <http://jurist.law.pitt.edu/printable.php>, *Spain handing secret rendition intelligence documents to investigating judge*; International Herald Tribune, 14 November 2005, *Spain examines CIA "rendition" flights*.

⁵² <http://jurist.law.pitt.edu>, *Spain says CIA rendition flights may have used Spanish airports*, 15 September 2006; *Spain says US military flights to Guantanamo not illegal*, 2 June 2008, <http://www.neurope.eu/articles/87123.php>.

prosecute any person whose conduct gives rise to individual responsibility for a crime under international law, such as torture or enforced disappearance.

The ICJ welcomes that Spanish prosecutors have initiated investigations into flights landing in Spanish airports apparently connected to the renditions programme.

In light of the serious nature of the human rights violations involved, the ICJ invites the Human Rights Committee to request the Spanish government to indicate what steps it has taken to ensure that no violations of human rights related to renditions take place on Spanish territory, including at military bases on Spanish territory used by other states. The Spanish government should co-operate fully with prosecutors in the investigation of rendition flights, including by providing necessary information and documents.

Freedom of expression and association (Articles 19 and 22 ICCPR)

The ICJ is concerned that a number of prosecutions before the *Audiencia Nacional* for crimes of association or collaboration with terrorist groups, risk unjustifiable interference with freedom of association and expression as protected by the Covenant, particularly in relation to civil society organisations and media active in the Basque country.⁵³ Of particular concern is the prosecution of editors and board members of the Basque language newspaper, *Egunkaria*, which was closed down by the authorities in 2002,⁵⁴ and which remains prohibited from operating, with its assets frozen.⁵⁵ Editors and board members of the paper are charged with membership of an illegal association and collaboration with an armed group. Several of the accused allege that they were tortured in *incommunicado* detention. The *Audiencia Nacional* has ruled that the prosecution should proceed,⁵⁶ despite the recommendation of the prosecutor that it should be dropped for lack of evidence.⁵⁷ It is being pursued as a private prosecution, raising concerns amongst Spanish lawyers of the abuse of that process.⁵⁸

The ICJ is concerned that such prosecutions may criminalise legitimate debate and civil society activity, and have the potential to interfere unjustifiably with rights guaranteed under Articles 19 and 22 ICCPR. The ICJ invites the Human Rights Committee to ask the Spanish government to provide justification to the application of the criminal law against media and civil society organisations in this way, with a view to evaluating the extent to which it meets a permissible necessary and proportionate restriction of the exercise of those rights as provided under article 19 (3) and article 22 (2).

⁵³ Case 18/98; case 33/01; case 44/04.

⁵⁴ Case 44/04.

⁵⁵ Article 19, Press Statement 14 November 2005, *Closure of Basque Newspaper Egunkaria*; Reporters without borders, 3 April 2008, *Justice Minister urged to conclude judicial proceedings that have kept Basque daily closed since 2003*.

⁵⁶ Carlos Jiménez Villarejo, Evidence to the ICJ Eminent Jurists Panel, 3 July 2007 <http://eip.icj.org>.

⁵⁷ Statement of the prosecutor, Miguel Angel Carballo-Cuevo, 4 December 2006, Court Record No.21/05.

⁵⁸ Evidence of Carlos Jiménez Villarejo to ICJ Eminent Jurists Panel, *op cit*.

The ICJ draws the attention of the Committee to the recent decisions issued on 22 September 2008 by the Spanish Supreme Court (*Tribunal Supremo*) concerning the dissolution of two political parties active in the Basque countries for violation of the Organic Law on Political Parties (*Ley Organica no. 6/2002 de 27 de Junio, de Partidos Politicos*). The Special Chamber of the Supreme Court declared illegal the Communist Party of the Basque Countries (*Partido Comunista de las Tierras Vascas – PCTV-EHAK*) for the reason that it could be considered an organization equivalent to the outlawed Batasuna and the expression of the strategy of *Euskadi Ta Askatasuna* (ETA), which involves acts of terrorism.⁵⁹ In a separate decision it also declared illegal the political party Basque Nationalist Action (*Acción Nacionalista Vasca*) for collaborating with Batasuna and giving political support to ETA.⁶⁰ The main consequence of the declaration of illegality is the dissolution of the parties concerned.

The political party Batasuna had been dissolved and declared illegal in accordance with the Organic Law on Political Parties by the decision of the Supreme Court of 27 March 2003 because, *inter alia*, it was determined to have collaborated with and supported the actions of ETA, held to be a “terrorist organization”.⁶¹ Following the decision of the Supreme Court, the European Council of the European Union inserted Batasuna in the list of group and entities recognised as “terrorist organisations”. Indeed, Batasuna has been declared to be part of ETA.⁶² This classification is still in force.⁶³

Under the Organic Law on Political Parties, one of the grounds for the dissolution of a political party is the habitual collaboration “with entities or groups that act in a systematic form in agreement with a violent or terrorist organisation, or that protect or support terrorism or terrorists”.⁶⁴

The main facts the Court took into account as grounds for the dissolution of the two parties include, *inter alia*, the followings:

- The collaboration with or the active participation within the party of members of the party Batasuna;⁶⁵
- Giving disposal of facilities for meetings of members of Batasuna;⁶⁶
- The collaboration with Batasuna in public elections;⁶⁷

⁵⁹ See, decision of the Supreme Court of Spain (*Sentencia del Tribunal Supremo* – hereinafter, *STS*) of 22 September 2008, Acts no. 3/2008 and 4/2008.

⁶⁰ See, *STS* of 22 September 2008, Acts no. 5/2008 and 6/2008.

⁶¹ See, *STS* of 27 March 2003, Acts no. 6/2002 and 7/2002.

⁶² Council Common Position 2003/402/CFSP of 5 June 2003 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/976/CFSP, Annex, 2. “Groups and Entities”, no. 7.

⁶³ Council Common Position 2008/586/CFSP of 15 July 2008 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2007/971/CFSP, Annex, 2. “Groups and Entities”, no. 13.

⁶⁴ Law on Political Parties, article 9(3)(f) (unofficial translation).

⁶⁵ see, *STS* of 22 September 2008, Acts no. 3/2008 and 4/2008, pp. 49, 63, 69; and *STS* of 22 September 2008, Acts no. 5/2008 and 6/2008, pp. 119-120.

⁶⁶ see, *STS* of 22 September 2008, Acts no. 3/2008 and 4/2008, pp. 49, 57.

- The failure of the parties to expressly distance themselves from the positions of Batasuna, the lack of a strong condemnation of terrorism and violence, and the use of a rhetoric similar to that of the dissolved political party on issues such as “political prisoners”.⁶⁸

The Organic Law on Political Parties, as interpreted by the Supreme Court, clearly allows for a political party to be declared illegal for the support of a political party previously made illegal because of its connections with a designated “terrorist organisation”. While this possibility is expressed clearly by article 9.3.g. of the Law, according to the Court’s teleological interpretation, a party could indirectly fall within these grounds for dissolution by supporting a party that carries out a strategy of collaboration, even if only political, with an organisation held as “terrorist”.⁶⁹ The Court has also considered that tacit actions and behaviours that may reflect the underlined meaning of the party’s political discourse may be among the elements which demonstrate support for the organisation previously declared illegal (in this case, Batasuna).⁷⁰

The ICJ recalls that the Human Rights Committee has stated that, regarding the application of the limitation clause of article 22 (2) ICCPR, “the State Party must [...] demonstrate that the prohibition of an association is necessary to avert a real and not only hypothetical danger to national security or democratic order, and that less intrusive measures would be insufficient to achieve the same purposes.”⁷¹ The European Court of Human Rights also held that “[m]easures as severe as [dissolution] may only be applied in the most serious cases”.⁷²

In particular, concerning the similarity of political discourse of a political party with that of a “terrorist organisation”, the European Court of Human Rights recalled that “si on estime que la seule défense des principes susmentionnés se résume, de la part d’une formation politique, en un soutien aux actes de terrorisme, on diminuerait la possibilité de traiter les questions y relatives dans le cadre d’un débat démocratique, et on permettrait aux mouvements armés de monopoliser la défense de ces principes, ce qui serait fortement en contradiction avec l’esprit de l’article 11 et avec les principes démocratiques sur lesquels il se fonde”.⁷³

In particular the European Court of Human Rights clarified that “un parti politique peut mener campagne en faveur d’un changement de la législation ou des structures légales ou constitutionnelles de l’Etat à deux conditions: 1) les moyens utilisés à cet effet doivent être a

⁶⁷ see, STS of 22 September 2008, Acts no. 3/2008 and 4/2008, p. 76; and STS of 22 September 2008, Acts no. 5/2008 and 6/2008, pp. 95-97, 101-104.

⁶⁸ see, STS of 22 September 2008, Acts no. 3/2008 and 4/2008, pp. 70, 72, 76, 79; and STS of 22 September 2008, Acts no. 5/2008 and 6/2008, pp. 104-106, 107, 109-110, 112-114, 117-118.

⁶⁹ see, STS of 22 September 2008, Acts no. 3/2008 and 4/2008, p. 92.

⁷⁰ see STS of 22 September 2008, Acts no. 3/2008 and 4/2008, p. 72.

⁷¹ *Aleksander Belyarsky et al. vs. Belarus*, Communication no. 1296/2004, 7 August 2007, UN doc. CCPR/C/90/D/1296/2004, paragraph 7.3.

⁷² Case of Socialist Party and others vs. Turkey, Case no. 20/1997/804/1007, 25 May 1998, paragraph 51.

⁷³ *Affaire Partie de la Démocratie et de l’Évolution et autres c. Turquie*, Application nos. 39210/98 and 39974/98, 26 April 2005, paragraph 25; and, *Affaire Demokratik Kitle Partisi et Elçi c. Turquie*, Application no. 51290/99, 3 May 2007, paragraph 32.

tous points de vue légaux et démocratiques; 2) le changement propose doit lui-même être compatible avec les principes démocratiques fondamentaux.”⁷⁴

The ICJ is concerned that the development of this jurisprudence by the Supreme Court of Spain and the wide margin given by the Organic Law on Political Parties for the dissolution of political parties may lead to further instance of designations as unlawful associations with weak or tenuous connections with the main outlawed organisation. The ICJ recalls that the conditions for limitation of the right to freedom of association must strictly respect the criteria of necessity and proportionality. Consequently, while the illegalisation of an association directly linked with the outlawed organisation seems to respond to these criteria, the dissolution of political parties for links, not with the alleged “terrorist organisation”, but with another organisation already declared illegal risks not meeting these requirements. In particular, in order to satisfy the requirement of proportionality, measures alternative to the dissolution should be considered, such as for example the dismissal of elements connected with the previously illegalised party.

In addition, there is a risk that an organisation declared illegal may be inappropriately inserted in the list of terrorist organisations of the European Council of the European Union with the potential consequence of bringing into the sphere of application of the dissolution’s provision of the Organic Law on Political Parties entities that had links with parties such as ANV and PCTV in this example.

Finally, the requirement that an organisation expressly distance itself from the political discourse of an illegal party, as suggested by the Supreme Court, especially given that “tacit actions and behaviours” are elements to be taken into account, may breach the right to freedom of expression and constitute an impermissible restriction to the right to freedom of assembly. This consideration is supported by the jurisprudence of the European Court of Human Rights, which rejects the identification of political parties and terrorist organisations through the mere similarity of their political discourse.

⁷⁴ *Affaire Partie de la Démocratie et de l’Évolution et autres c. Turquie*, Application nos. 39210/98 and 39974/98, 26 April 2005, paragraph 22; and, *Affaire Demokratik Kitle Partisi et Elçi c. Turquie*, Application no. 51290/99, 3 May 2007, paragraph 29.