

OPINION No. 26/1999 (SPAIN)

Communication addressed to the Government on 21 June 1999

Concerning Mikel Egibar Mitxelena

The State is a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.
2. The Working Group expresses its appreciation to the Government for having provided the information requested promptly and in full.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
 - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. The Working Group welcomes the cooperation of the Government, which promptly acceded to its request.
5. According to the complaint and information subsequently provided by his lawyer, Mikel Egibar Mitxelena was detained on 10 March 1999, at his home, in the presence of his wife and son, and remained in police custody, with judicial authorization, through 15 March, when he was transferred to the competent court for inquiry proceedings and trial. The petition states that the detention was arbitrary on five grounds, notwithstanding the fact that, “as the Government of Spain has noted, the detention of Mr. Mikel Egibar was conducted according to the Spanish legislation in force”. The grounds cited were the following:
 - (a) Detention in police custody for five days, and in judicial custody for a further three days, without the assistance of a lawyer freely chosen by the detainee;

- (b) Extension of police custody by order of a competent judge, without justification;
- (c) Prolonged incommunicado detention, for a total of eight days;
- (d) Ill-treatment of the detainee while in police custody, consisting of prolonged interrogations, physical ill-treatment in the form of repeated blows to the head, genitals and back and sleep deprivation;
- (e) Proceedings were largely conducted in secret.

6. In a detailed reply, the Government acknowledges the facts contained in paragraphs (a), (b), (c) and (e) of the preceding paragraph, but denies the allegation of torture. It nevertheless maintains that the entire proceedings were conducted in accordance with the Spanish legislation in force.

7. The Group considers that its opinion should be based on the following facts:

(a) The Guardia Civil of Spain detained Mikel Egibar on 10 March 1999 at his home. To that end it had sought a warrant of arrest from Central Examining Court No. 3, which issued the warrant empowering the police to enter and search Mr. Egibar's home, pursuant to charges brought by the Public Prosecutor's Office;

(b) On the day after it detained Mikel Egibar the Guardia Civil sought confirmation from the court of the incommunicado detention in which the prisoner was being held, which was granted the same day;

(c) Before the expiry of the time limit for police custody, which under Spanish legislation is 72 hours for terrorist offences, on 12 March the Guardia Civil sought a 48-hour extension of the time limit for bringing the detainee before the court, which was also granted;

(d) The judicial decisions of 11 and 12 March providing for incommunicado detention and extension of the arrest period, ordered the judge of Examining Court No. 3 to take protective measures on behalf of the detainee, and regular medical examinations were conducted on 11, 12, 13, 14 and 15 March;

(e) On expiry of the extension of the detention period, on 15 March Mikel Egibar was placed at the disposal of the judge of Examining Court No. 5, Judge Baltasar Garzón, who proceeded to interrogate him; however, as the detainee refused to testify because of the absence of a freely-chosen defence counsel, his incommunicado detention period was extended to 18 March;

(f) During interrogations at police headquarters, and during his first appearances before the examining magistrate, Mikel Egibar received the assistance of lawyers assigned by the Bar Association;

(g) Mr. Egibar is being prosecuted for the offence of assistance to an armed group of a terrorist character.

8. It should be added that a remedy of habeas corpus lodged by Mr. Mikel Egibar's wife against both the detention, its extension and the incommunicado detention was declared inadmissible by the judge of Examining Court No. 3 and that a request for review lodged in respect of the secrecy of the preliminary investigation was dismissed by the judge of Examining Court No. 5 of the High Court.

9. Article 9, paragraph 3 of the International Covenant on Civil and Political Rights contains an obligation to ensure that a person is brought before a judge or other officer authorized by law to exercise judicial power "promptly" ("sin demora" in Spanish, "sans délai" in French). A 72-hour time limit is, in the Group's opinion, within the bounds of what can be considered to be "prompt". A 48-hour extension, in a case involving extremely serious offences and a difficult and complex investigation, under judicial control and with ongoing medical supervision to avoid torture - thus guaranteeing the protection of the accused - cannot be regarded as a violation of the right set forth in the above-mentioned provision concerned.

10. Incommunicado detention, when justified by insuperable problems in the investigation of the offence concerned, especially when crimes as serious as terrorism are involved, cannot in itself be regarded as contrary to the Covenant. Furthermore, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment authorizes incommunicado detention for a few days in exceptional cases (Principles 15, 16 and 18, paragraph 3), such as "exceptional needs of the investigation", or "exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order". The Group considers charges of terrorism and conspiracy to represent an exceptional circumstance which, according to Spanish legislation, authorizes incommunicado detention for a brief period. It should be added that the judge of Examining Court No. 3 of the National High Court took measures for the physical and psychological protection of the person under arrest, to the point where he received a medical examination daily.

11. The same may be said of the right to choose a legal counsel, to be assisted by counsel during the trial and to meet with counsel, as set forth in the above-mentioned Body of Principles, adopted by the General Assembly, by consensus, in 1998. As Mikel Egibar did not ask to be interrogated in the presence of a lawyer of his own choosing and had accepted the presence of a court-appointed lawyer, his rights were not violated, especially since, as soon as the incommunicado detention was ordered, he was able to designate a lawyer whom he has kept throughout the rest of the proceedings.

12. Secrecy of inquiry proceedings in the early stages of the investigation is a measure authorized not only by Spanish law, but by nearly all bodies of legislation, as a measure designed to avoid the results of the trial being affected. It does not infringe the rights of the defence, which at the trial stage will have access to all procedural documents and will be able to challenge any irrelevant or illegally obtained evidence. Thus it cannot be considered that any right essential to the defence of the accused has been violated.

13. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mikel Egibar Mitxelena is not arbitrary.

Adopted on 29 November 1999