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International Rehabilitation Council for Torture Victims

Statement in the Case of Iratze Sorzabal Diaz:
Dangers of Ignoring Torture Evidence in European Arrest Warrants

Copenhagen, Denmark – Today, 30 October 2019, the International Rehabilitation Council for Torture Victims (IRCT) reminds the French Judiciary of the serious consequences of executing a European Arrest Warrant (EAW) when there is a real risk the EAW is based on evidence derived from torture. We call upon French courts to refer to the European Court of Justice this pivotal issue of: ***Whether, within the framework of EAWs, courts must deem that an EAW is based on torture when there is such evidence and the evidence is a medico-legal evaluation conducted in compliance with the Istanbul Protocol.***[1]

Comprising of 161 centres in 74 countries, the IRCT is the world's largest membership-based organisation working in the field of torture rehabilitation and a global leader in forensic investigations of alleged torture cases. We also are a key provider of technical expertise to several state authorities and intergovernmental bodies of the European Union (EU) and the United Nations (UN). In the past 34 years, we have assisted hundreds of thousands of torture victims worldwide, which equips us with an expansive knowledge of the global prevalence and practices of torture. It also gives us a profound understanding of the steps needed to effectively investigate and prevent torture. Our expertise is also outlined in our submission to the Court of Appeals on 28 May 2018.[2]

In executing a Spanish EAW against Ms Sorzabal, the French courts have refused to consider compelling evidence that Ms Sorzabal was tortured, including a medico-legal evaluation conducted in compliance with the internationally accepted standards in the Istanbul Protocol and a clear judicial record documenting Spain's serial torture of Basque region individuals and its failure to investigate. Instead, the courts rely on presumptions and the statements of Spanish authorities that there was no torture. We believe ignoring

[1] Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol). 2004. HR/P/PT/8/Rev.1.
[2] https://irct.org/media-and-resources/latest-news/article/962.

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the evidence of torture seriously undermines EU efforts to eradicate it, as well as poisons its administration of justice. It furthermore breaches Ms Sorzabal's fundamental rights. For these reasons, we call upon the French courts to ask the European Court of Justice whether the evidence at hand creates a procedural obligation to promptly, effectively and impartially investigate Ms Sorzabal's allegations that the EAW is based on evidence obtained through torture, if France wishes to execute Spain's EAW.

A. Introduction

Every EAW must contain 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect' from the judicial authorities of an EU Member State. The evidence on which the national arrest warrant is based therefore also constitutes the basis for the EAW.[3] In this case, Spanish authorities based the national arrest warrant of Ms Sorzabal and consequently the EAW on two pieces of evidence – the statements Ms Sorzabal gave in detention and a 'self-critical' statement written by Ms Sorzabal that was subsequently discovered and recounts her confession and experience of torture. There is however compelling evidence in form of a medico-legal evaluation conducted following the Istanbul Protocol by Dr Pierre Duterte, an internationally recognised expert on the investigation of alleged torture, which establishes that the "after-effects presented by Ms Sorzabal Diaz Iratxe corroborate in a particularly convincing manner [her] allegations of ill-treatment." Dr Duterte's expert evidence stands as the most scientifically reliable account of what happened to Ms Sorzabal.

Additionally, the alleged torture of Ms Sorzabal seems to confirm a serial Spanish practice of torture and subsequent ineffective investigation, which has been consistently raised by the EU, the European Court of Human Rights, and also the international community.[4]

[3] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190, art 8.
[4] See for example: Human Rights Committee, 'Concluding observations on the sixth periodic report of Spain' (14 August 2015) CCPR/C/ESP/CO/6; Committee against Torture, 'Concluding observations

Although Spanish authorities opened an investigative procedure following Ms Sorzabal's allegations of torture, the cursory examinations fail to meet Spain's obligation to effectively investigate her claims. Their investigation therefore is not legally sufficient to assure courts that Ms Sorzabal's statements, which underlie the EAW, are not the result of torture. A subsequent re-characterisation of the evidentiary basis of the EAW – that it rests only on the so-called 'self-critical' letter and not Ms Sorzabal's statements from detention, only serves to highlight the bias of Spanish authorities and their willingness to utilise evidence obtained from torture. It cannot be considered to cleanse the EAW of its contamination from torture.

B. The Istanbul Protocol evaluation by Dr Duterte, a recognised international expert, establishes a real risk that Ms Sorzabal's statements are the result of torture and that risk can only be dismissed by thorough investigation

1. Evaluations in accordance with the Istanbul Protocol should be considered as compelling evidence of torture

The Istanbul Protocol provides the international standard for how States should execute their obligation to effectively investigate torture under Article 12 of UN Convention against Torture.[5] As we stated in an earlier submission in 2018 to the Court of Appeals, this has also been recognised by the UN, its General Assembly and by the international community. For instance, the European Court of Human Rights refers to the standards provided by the

on the sixth periodic report of Spain' (29 May 2015) CAT/C/ESP/CO/6; Amnesty International, Amnesty International Annual Report 2011 – Spain (13 May 2011) <https://www.refworld.org/docid/4dce153dc.html> accessed 12 October 2019.

[5] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Interim Report of the Special Rapporteur on Torture' (23 September 2014) A/69/387, para 23; Inter-American Court of Human Rights *Vargas-Areco v Paraguay* (2006) C no 155, para 91-94; Inter-American Commission for Human Rights *Ana, Beatriz and Celia Gonzalez Perez v Mexico* (2001) Case 11.565, para 39-41.

Istanbul Protocol as setting the benchmark for assessing the credibility of documentary medical and mental health evidence and expert opinions.[6]

The Istanbul Protocol represents the *lege artis* ("law of the art") of medico-legal investigation into alleged torture. It is thereby acknowledged as the minimum international standard for investigation and ensures an examination's independence, impartiality, thoroughness, the competency of the examiner, reliability of clinical findings, and accuracy of conclusions on the possibility of torture. Accordingly, evaluations conducted following the Istanbul Protocol must be considered as compelling evidence on whether torture has been established and statements have been made as a result of torture. This is especially the case when multiple evaluations are in conflict. Evaluations such as the findings submitted by the medical examiners from the Institute of Legal Medicine of the National Audience in Spain fail to discharge Spain's obligation to conduct an effective investigation as they do not follow the Istanbul Protocol.

The conclusions of the Spanish doctors that there is no need to speak of torture given the lack of physical evidence is fundamentally incorrect. This conclusion violates the basic *lege artis* of medico-legal investigation. Torture methods are often designed to leave no physical marks. As stated in the Istanbul Protocol, "absence of …. physical evidence should not be construed to suggest that torture did not occur, since such acts of violence against persons frequently leave no marks or permanent scars."[7] It is ultimately the sum total of all physical and psychological findings that is determinative of whether torture may have occurred. The absence of strong physical findings does not undermine or suggest that a psychological evaluation and its conclusions are incorrect or invalid. A thorough psychological report produced in accordance with the principles and standards of the Istanbul Protocol, as appears to be the case with Dr. Duterte's report, must be considered

[6] *Salmanoğlu and Polatta v Turkey* App no 15828/03 (ECtHR, 17 March 2009) para 89; *Böke and Kandemir v Turkey* App no 71912/01, 26968/02 and 36397/03 (ECtHR, 10 March 2009) para 48.
[7] Office of the United Nations High Commissioner for Human Rights, The Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1999, New York/Geneva), 32.

as scientifically and medically valuable and as providing legally significant evidence of the existence of torture.

2. A real risk that evidence was based on torture can only be dismissed by a thorough investigation

Where judicial authorities have reason to believe that evidence has been acquired as a result of torture or ill-treatment, they are obliged to exclude its consideration unless they can prove by thorough investigation otherwise. The European Court of Human Rights has ruled that an individual only needs to demonstrate a 'real risk' that the evidence in question was obtained by torture or ill-treatment in invoking the exclusionary rule. [8] According to the European Court, it would be 'unfair' to impose any burden of proof beyond such extent.[9]

In this case, it is without question that Ms Sorzabal has established that there is a 'real risk' that her statements are the result of torture. First, her allegations are consistent with information available from multiple international human rights bodies concerning Spain. According to these sources, torture and ill-treatment for the purposes of extracting confessions is widely practised against terrorist suspects in Spain.[10] In prior cases, the European Court has held that the existence of a state pattern of torture, in and of itself, is sufficient to establish a real risk.[11] Secondly, a medical evaluation of Ms Sorzabal indicated, at the time, that her "physical injuries found were consistent with the allegations of torture." Last, Dr Duterte's medico-legal examination must be considered as compelling

[8] *Othman (Abu Qatada) v the United Kingdom* App no 8139/09 (ECtHR, 17 January 2012), para 273; *El Haski v Belgium* App no 649/08 (ECtHR, 25 September 2012), para 88; Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez' (10 April 2014) A/HRC/25/60, para 33.
[9] Ibid.
[10] UN Commission on Human Rights, 'Report of the Special Rapporteur on the question of torture, Theo van Boven: Addendum Visit to Spain' (6 February 2004) E/CN.4/2004/56/Add.2, 9-10; Amnesty International (n2); Compare to *El Haski v Belgium* (n6) para 97.
[11] See for example *El Haski v Belgium* (n6).

evidence that Ms Sorzabal's statements were obtained as the result of torture. According to the jurisprudence of the European Court of Human Rights, French courts are thereby obliged to exclude Ms Sorzabal's statements unless they can demonstrate by thorough investigation that they are in fact not the result of torture.[12]

3. The legal obligation to investigate torture effectively includes conducting an Istanbul Protocol evaluation

The European Court of Human Rights has held that an effective, prompt, and impartial investigation must comply with the Istanbul Protocol.[13] The French court cannot simply rely on the statements of Spanish authorities on the origin of evidence to dismiss its obligation to ensure that, despite the establishment of a real risk that evidence is derived from torture, it is not. This is especially the case where Spain itself has failed to conduct an effective investigation into Ms Sorzabal's allegations. The European Court of Human Rights has found on numerous occasions that Spain violated Article 3 of the European Convention on Human Rights (ECHR) due to its failure to conduct thorough, effective, and impartial investigations into allegations of torture and ill-treatment.[14] Moreover, the low 'real risk' threshold for the burden of proof relies on the fact that, often, the criminal justice system was "complicit in the very practices which it existed to prevent."[15] Allowing France to dismiss the 'real risk' by relying on the statements of Spanish authorities would eviscerate the protection established by the European Court of Human Rights.

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[12] See for example *R.C. v Sweden* App no 41827/07 (ECtHR, 9 June 2010).
[13] *Bati v Turkey* App no 33097/96 and 57834/00 (ECtHR, 3 June 2004), para 133-137; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'CPT standards', CPT/Inf/E (2002) 1-Rev. 2013, chap VII.*Beortegui Martinez v Spain* App no 36286/14 (ECtHR, 31 May 2016), para 47; See also *Beristain Ukar v Spain* App no 40351/05 (ECtHR, 8 March 2011), para 34; *San Argimiro Isasa v Spain* App no 2507/07 (ECtHR, 28 September 2010), para 44-45.
[14] *Beortegui Martinez v Spain* App no 36286/14 (ECtHR, 31 May 2016), para 47; See also *Beristain Ukar v Spain* App no 40351/05 (ECtHR, 8 March 2011), para 34; *San Argimiro Isasa v Spain* App no 2507/07 (ECtHR, 28 September 2010), para 44-45.
[15] *El Haski v Belgium* (n6) para 86.

In light of the above, the IRCT believes that the French court should ask the European Court of Justice to clarify, in the context of the EAW Council Framework Decision, whether: 1) medico-legal evaluations documenting torture and ill-treatment conducted in accordance with the Istanbul Protocol must be considered as compelling evidence that a 'real risk' exists that evidence was obtained as a result of torture; and, 2) whether, in light of a real risk that evidence is derived from torture, a state authority must either exclude that evidence or conduct a thorough investigation to establish that the evidence is not derived from torture.

C. Executing the EAW in the case of Sorzabal would not comply with international standards of excluding all evidence from torture

As a signatory to the UN Convention Against Torture, France is obliged to ensure that any statement extracted as a result of torture is not invoked as evidence in any proceedings, including administrative, asylum, criminal or extradition proceedings.[16] Where there is compelling evidence that torture was used, it shifts the burden on the relevant authority to duly investigate the matter. As confirmed by the UN Special Rapporteur on Torture, the exclusionary rule is absolute.[17] A state must exclude all evidence that may be derived from torture in order to remove any incentive to undertake torture, safeguard the reliability of evidence, and guarantee the rights of due process and fair trial.[18] Any derogation would

[16] Article 15 as interpreted by the Committee against Torture in its General Comment no. 2: Committee against Torture, 'General Comment No. 2: Implementation of Article 2 by States Parties' (24 January 2008) CAT/C/GC/2, para 6. The principle is also reflected in: UN General Assembly, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (9 December 1975) A/RES/3452(XXX), art 12; UN Human Rights Council Res 13/19 (15 April 2010) A/HRC/Res/13/19, para 7; Human Rights Committee, 'General Comment no. 32' (23 August 2007) CCPR/C/GC/32, para 6 and 41; Committee against Torture *P.E. v France* (2012) Communication no. 193/2001, para 6.3; Committee against Torture *G.K. v Switzerland* (2003) Communication no. 219/2002, para 6.10.
[17] Human Rights Council, Report of the Special Rapporteur on torture (n6) para 22.
[18] Ibid, para 21.

"indirectly legitimize such conduct" and degrades the absolute nature of the prohibition of torture.[19]

1. The exclusionary rule must apply to all evidence arising from torture

It has become an international standard, and perhaps a norm of customary international law, that the exclusionary rule applies not only to statements as a result of torture, but any subsequent evidence derived based on that statement.[20] As explained by the UN Special Rapporteur on Torture, the "exclusionary rule extends not only to confessions and other statements obtained under torture, but also to all other pieces of evidence subsequently obtained through legal means, but which originated in an act of torture."[21] An effective torture prevention framework cannot be sustained without an absolute prohibition on use of derivative torture evidence everywhere. If derivative evidence can be admitted, then officials may still be encouraged to torture. It creates a gap in the torture prevention framework and undermines the absolute prohibition against torture.

Irrespective of the reliability of evidence from torture, it must be excluded. Torture is an anathema to the administration of justice. According to the European Court of Human Rights, the core reason for excluding all evidence derived from torture is to protect the integrity of the judicial system.[22] As stated by the Court, the "trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it."[23]

Moreover, as the European Court has held, "justice must not only be done: it must also be seen to be done …. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are

[19] Ibid, para 30.
[20] Ibid, para 17.
[21] Ibid, para 29.
[22] *Othman (Abu Qatada) v the United Kingdom* (n6) para 264.
[23] Ibid.

concerned, in the accused."[24] In this case, confidence is eroded by the grounded allegations of torture by Ms Sorzabal, by the failure to consider existing and compelling evidence of torture, and by the French courts reliance on presumptions and statements of the Spanish authorities – particularly in light of their systemic practices of torture and refusal to effectively investigate claims. See for example the European Court of Human Rights' multiple judgments against Spain for failing to effectively investigate allegations of torture and ill-treatment.[25]

2. Evidence arising from torture must be excluded in all proceedings including when executing European Arrest Warrants

The UN Committee against Torture and the European Court of Human Rights "have firmly ruled against the use of evidence tainted by torture …. regardless of whether such evidence may be used in domestic proceedings or in proceedings in a third State."[26] In addition, Article 15 of the UN Convention against Torture prohibits the consideration of evidence that may be the result of torture in "any proceedings".[27] As explained by the UN Special Rapporteur on Torture, 'any proceedings' must be understood as "any formal decision-making by State officials based on any type of information."[28] For instance, the Committee against Torture has confirmed in *G.K. v. Switzerland* that the exclusionary rule is absolute and covers extradition proceedings.[29] As expressed by the UN Special Rapporteur on Torture, "the exclusionary rule applies no matter where in the world the torture was perpetrated …. even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture."[30]

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[24] *De Cubber v Belgium* App no 12005/86 (ECtHR, 26 October 1984), para 26.
[25] *Beortegui Martinez v Spain* (n11); *Beristain Ukar v Spain* (n11); *San Argimiro Isasa v Spain* (n11).
[26] Human Rights Council, Report of the Special Rapporteur on torture (n6) para 28. See for example Committee against Torture *Ktiti v. Morocco* (2011) communication No. 419/2010 and *El Haski v. Belgium* (n6) para 85 - 99.
[27] Human Rights Council, Report of the Special Rapporteur on torture (n6) para 30.
[28] Ibid, para 17 and 30.
[29] *G.K. v Switzerland* (n14) para 6.10.
[30] Human Rights Council, Report of the Special Rapporteur on torture (n6) para 27.

D. These international standards must be an integral part of the EAW procedure

In addition to the ECHR and the EU Charter of Fundamental Rights (CFR), international standards must be followed in the framework of European Union Law.[31] As previously confirmed by the European Court of Justice, these standards form part of the general principles that are not only inspired by the constitutional traditions of the Member States, but also by the international treaties to which Member States are signatories.[32]

As opposed to many other fundamental rights, the right to freedom from torture is an absolute right. Any derogation cannot be excused through limitations by law, nor by any structural principles of the European Union.[33] While we recognise the importance of the general principles of mutual trust and mutual recognition of Member States to the maintenance of the EU and especially the EAW system, in this case, the French courts' wilful ignorance in the face of compelling evidence that torture forms the basis of the evidence underlying Spain's EAW leads to an abhorrent result – ignorance of torture and the violation of our fundamental right to be free from torture. The systematic findings against Spain for violating the prohibition of torture and failing to conduct appropriate investigations also contradict the irrefutable assumption (inherent in the EAW framework decision) that every issuing state of an EAW fulfils the required fundamental rights standards.[34]

In the words of the European Court of Human Rights, the European Convention "is intended to guarantee not rights that are theoretical or illusory but rights that are practical

[31] Consolidated Version of the Treaty on European Union [2012] OJ C 326/13, art 6.
[32] Case C-112/00 *Eugen Schmidberger v Austria* (2003) ECR I-5694, para 77.
[33] See for example article 3 ECHR which does not include a list of justifications or exceptions. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.
[34] There is no fundamental rights clause which would allow for the suspension or refusal of executing an EAW. See Council Framework Decision(n1).

and effective."[35] Within the EAW framework, citizens are dependent on an errorless collaboration between the courts of Member States and the European Court of Justice. It is no secret, however, that national courts are sometimes reluctant to refer cases.[36] Instead of leaving the protection for fundamental rights unclear, the EU should oblige states to conduct meaningful reviews of EAWs, at least when compelling evidence already exists that a citizen was tortured.[37] The European Court of Justice has, in fact, already ruled in similar cases for the suspension and the refusal of EAWs.[38] In this case, the execution of the Spain's EAW against Ms Sorzabal would result in a 'substantial risk' that her fundamental rights will be breached.

Deference to human rights protection is especially critical because the EAW, with its simplified cross-border surrender procedure, is subject to abuse and misuse, where states may arbitrarily accuse persons, including of 'terrorism', and then issue EAWs against them. Spain's misuse of the EAW procedure has already been raised by 4 out of 8 groups of the 2018 European Parliament.[39] Establishing genuine and effective remedies is accordingly necessary to uphold the integrity of the administration of justice in the EU.

Therefore, in the view of the IRCT, neither the statements of Ms Sorzabal nor her subsequent 'self-critical' statement should be admissible in any proceedings, including

[35] See for example *Airey v Ireland* (1979) Series A no 41, para 26; *Artico v Italy* (1980) Series A no 37, para 33.
[36] See for example Frederik Behre 'For the sake of effectiveness: a tightened approach to preliminary reference obligations of the CJEU' (leidenlawblog, 06 November 2018) <https://leidenlawblog.nl/articles/for-the-sake-of-effectiveness-a-tightened-approach-to-preliminary-reference> accessed at 12 October 2019; C-416/17 *Commission v France* (2018) ECLI:EU:C:2018:811.
[37] *R.C. v Sweden* (n10) para 53.
[38] Case C-216/18 PPU *LM* (2018) ECLI:EU:C:2018:586, para 80. See also Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (2016) ECLI:EU:C:2016:198, para 105.
[39] One of the questions asked by the 15 MEPs to the Commission was whether 'such misuse of the EAW can affect the mutual trust that exists between the judicial systems of Member States and undermine its effectiveness'. European Parliament, 'Question for written answer E-000746-18 to the Commission: Misuse of the European Arrest Warrant by Spain' (7 February 2018) <http://www.europarl.europa.eu/doceo/document/E-8-2018-000746_EN.html?redirect> accessed 20.10.2019.

surrender procedures and fulfilment of the EAW, as they are derivatives from Ms Sorzabal's torture. Moreover, the existence of compelling evidence that Ms Sorzabal was tortured contradicts and should negate the presumption of adherence to rights, which underlies the EAW and its mutual trust and recognition system. By ignoring evidence of torture and the real risk that evidence derived from torture underlies Spain's EAW, the French authorities are complicit in Spain's violation of the absolute prohibition against torture as well as its failure to effectively investigate claims afterwards. France thereby contributes to an increased risk of human rights violations by refusing to question the EAW system, which leaves undefined competences for protecting fundamental rights. This contradiction and gap should be remedied by referring the issue to the European Court of Justice.

E. Conclusion & Recommendations

The IRCT calls on the French courts to act as an ambassador of all EU courts to clarify the issue of: *Whether evidence that an EAW is based on torture can be ignored in the execution of an EAW by referring the issue on interpretation of the Council Framework Decision of 13 June 2002 on the EAW to the European Court of Justice.*

The current practice of executing EAWs results in a system which is vulnerable to continuous human rights violations and has, in this case, been abused. The assumption that every issuing state of an EAW fulfils the required fundamental rights standard on which the EAW system is based does not allow for appropriate remedies in cases where this standard is not fulfilled. Not considering evidence on torture in these proceedings not only creates incentive to torture and tolerates violations of EU fundamental rights, but it also corrupts the administration of justice. Ignoring compelling evidence on torture seriously, if not irreparably, damages the integrity of the judicial system especially in cases like this one where Spain has been criticized for manipulating the EAW system and found liable for serial torture and failures to investigate.

The IRCT urges the French courts not to allow this system based upon mutual trust to turn into a system of mutual blindness. The absolute prohibition of torture is so crucial that Member States cannot afford any errors in addressing relevant issues in order to protect the global framework for torture prevention. We urge the French courts to support, not undermine, the fundamental right to be free from torture and to refer these critical issues to the European Court of Justice.

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