COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CPT/Inf (2003) 23

Response of the Spanish Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Spain

from 22 to 26 July 2001

The Spanish Government has requested the publication of the CPT's report on the visit to Spain in July 2001 (see CPT/Inf (2003) 22) and of its response. The response, translated into English by the Spanish authorities, is set out in this document.

The Spanish text of the response can be found on the CPT's website (www.cpt.coe.int).

.

Strasbourg, 13 March 2003

The European Committee for the Prevention of the Torture and Inhuman or Degrading Treatment or Punishments (hereinafter CPT) carried out a visit to Spain between July 22 and 26, 2001, in accordance with the provisions of article 7, paragraph 1, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

As a consequence of this visit the CPT remitted to the Spanish Government the corresponding report in which, after stating the excellent co-operation received by the Delegation of the CPT and presenting the facts verified during the mentioned visit, a series of observations are specified to which the present report intends to give an answer.

Nevertheless, before answering the specific recommendations formulated by the CPT, we consider essential to express the reiterated commitment of the Spanish authorities to respect and make respect the fundamental rights of people detained and deprived of freedom, adopting in any event the opportune measures in order to prevent and prosecute all those behaviours that may imply the exercise of ill treatment or torture.

Access to a lawyer

The CPT considers unsatisfactory the detailed contents of the right of access to a lawyer and understands that, in practice, "the existing provisions on the right to legal assistance do not guarantee that the persons deprived of freedom by the police agencies, from the first moment of their detention, may have access, *de facto* and *de jury*, to a lawyer as the Committee has recommended."

Thus, it invites the Spanish authorities to adopt a specific action to put into practice the recommendation that all freedom deprived persons, from the first moment of their detention, may have full right of access to a lawyer of the kind described in section 19 of the report on the visit of the CPT in 1998, in the understanding that, in the case of people held incommunicado, a lawyer must be appointed on their behalf.

On this point, the Spanish authorities have been reiterating that the current regulations are adapted to the constitutional order. In fact, the specific system of partial and temporary suspension of the right of assistance by a lawyer considered reliable by the detainee is covered by article 55.2 of the Spanish Constitution. This specific system is regulated by the Criminal Law Procedure (hereinafter LECrim), through which the imposition of a lawyer is revealed as one more measure established by the legislator, within his regulatory power, to strengthen the secrecy of the criminal investigations.

This leads the Spanish Government to be convinced that the Spanish legislation as regards legal assistance, such as has been ruled by the Constitutional Court, is adapted to the Constitution, not being considered opportune its modification, keeping in mind, also that the referred restrictive measure doesn't suppose lack of defence for the detainee who has his defence assured through the guarantees contained in said system. We wish to comment the mentioned guarantees as follows:

In the first place, it must be kept in mind that the procedure for the lawyer's appointment by the court implies that the lawyer is able to assist the detainee from the beginning of his deprivation of freedom which is when the police must request from the corresponding Bar Association the appointment of counsel to assume control of the detainee's attention, advice, defence and protection.

And it is not considered exact the appreciation of the CPT that the effective assistance by the lawyer to the detainee starts with the first formal statement to the police. The lawyer is legally authorised for the effective exercise of his function from the same instant in which he accepts the appointment and although article 520.2.c) of the Criminal Law Procedure assigns him the function of attending the interrogatory proceedings and acting in the verification of identity, this requirement in no way establishes a closed list of the lawyer's faculties, and in no way prevents the lawyer to exercise other functions of juridical and personal assistance.

The lawyer may and should appear immediately at the police station and, if he considers that the police has delayed, on no justified grounds, contact with the Bar Association for his appointment, he may and should denounce the delay as an irregularity that affects the detainee's fundamental right of not being deprived of freedom unless it is on the conditions provided by Law -article 17.1 of the Constitution -.

Once arrived at the police station, the lawyer may and should get interested in the personal and legal situation of his defended and, if he considers that he has suffered or runs certain risk of suffering ill treatment, he may and should demand his examination by the Forensic Surgeon and the adoption of measures that preserve his integrity, including the immediate complaint of the detainee's situation before the judicial authority by means of an *habeas corpus* request in order that he is taken to the presence of the judge and that that the irregular conditions of detention come to an end.

The fact that he cannot have a private interview with his defended before the first formal statement -that is to say, without inspection or direct control by the police agents that have him under custody- lacks the relevance attributed to this fact by the CPT, because in any event he may request to be taken openly to the presence of the detainee in order to check if his physical and psychic condition are the proper ones or if there are traces or signs of ill treatment. The lawyer has no legal obstacle to assume and exercise, prior to the formal statement, all the necessary faculties in defence of the dignity and integrity of the detainee, demanding a correct and dignified treatment.

Lastly, if access to the detainee is denied and if suspicion of ill treatment exists, nobody can prevent the immediate denouncement of such a situation and the suspicion that in the official secrecy a deviated police practice is in fact hidden.

Neither may be forgotten that the Spanish procedural system accords by constitutional mandate, -article 17.4 – a specific protection to the detainee allowing a forced conclusion of the governmental detention and his immediate placing under judicial custody if it is considered that outstanding conditions of illegality have taken place in the police behaviour, making use of the prerogatives conferred by the Organic law 6/1984 of May 24, that regulates the *habeas corpus* procedure. Article 1.d) of this Law acknowledges that all those persons "deprived from freedom to whom the rights granted to a detained person by the Constitution and the Procedural Laws are not respected" are illegally detained and may accordingly obtain protection within the framework of these procedures.

Given the fact that the Constitution acknowledges the right to life and physical and moral integrity of persons who may under no circumstances be subject to torture or inhuman or degrading treatment or punishment - article 15 - the founded suspicion of physical or psychic ill treatment justifies under the Law that the lawyer may immediately press – and certainly, without waiting to be called to the formal statement- for the filing of the corresponding judicial procedure of *habeas corpus*, a request that can be made on behalf of the detainee, as his representative, and that he may present directly before the police authority that has him under custody. The above may not prevent, delay or block -at least without incurring in serious criminal and disciplinary responsibility- the processing of this request (article 5) that must arrive at the earliest to the Investigating Judge of the division corresponding to the place in which he is deprived of freedom or, in cases of terrorism, to the Central Investigating Judge (article 2).

Such an effective and overwhelming legal instrument that forces the police to give off the detainee and send him to the judicial Authority constitutes a key piece of the group of faculties that the lawyer may exercise for the defence of the detainee.

As for the specific situation of the held incommunicado the CPT, regarding cases of isolation, refers to the report corresponding to the periodic visit of the year 1991 (Document CPT/Inf(96)9), stating that "the fact that the detainee cannot consult in private with the lawyer designated on his behalf, either before or after making his statement, is very unusual. Under such circumstances it is difficult to speak of the right of access to legal aid, the lawyer being better described officially as an observer."

In answer to the above, the Prosecution Service understands that this appreciation doesn't agree with the concept contained in our juridical system, on the function of the lawyer of the held incommunicado. In this sense it is not correct to qualify the legal aid lawyer as a mere “observer", since observer is one who stays in the shadow, at the margin of the procedure, without power of intervention, without commitment for any of the opposing parties and with no responsibility on the performance of the matter. In the Spanish procedural system the lawyer assisting the detainee, incommunicado or not, is a main actor and responsible of the entire maintenance of the system of guarantees, and the Law fully allows him to that effect.

Without prejudice of reiterating the aforesaid on the effective possibilities of participation and control in the period previous to the first statement, his intervention during the detainee's statement to the police includes, without limitation, the following powers he may exercise directly and at once in the course of the statement, which the State authorities cannot deny since they are based and supported by the Constitution:

- To make a complete interrogatory of the detainee, addressing him whatever questions he may wish, not only about the facts attributed by the police, but on the behaviour of the police itself during the detention.

- To verify by himself the physical and psychic conditions of his defended and demand eventually to proceed to the immediate medical examination of the detainee. (article 520.6.a) LECrim).

- To demand that any incident he considers relevant be kept on the record of the police force (article 520.6.c) LECrim, forcing the police to substantiate in an official instrument, as it is the official report, any traces or signs, or any symptom or manifestation of physical or psychic ill treatment that may appear or be suspected at the time of receiving the statement made by the detainee.

- The statement may finish, if the lawyer estimates that his defended has suffered or runs the risk of suffering torture or ill treatment, with an *habeas corpus* petition for its immediate remission to the competent Investigating Judge.

- Lastly, the lawyer may challenge the legitimacy of any statement that may have taken place in his absence and of any prove that directly or indirectly may have been obtained by means of violence, threat or intimidation. On this regard article 11.1 of the Organic Law 6/1985, of July 1, of the Judiciary, provides the following: "the proofs obtained, directly or indirectly, violating the rights or fundamental freedoms will have no effect" ruining all the police work when the authority agents conducted it in an undignified and degrading way with the detainee. The deterrence effect of this legal provision cannot be undervalued, together with other means at long term, as the possibility of demanding the criminal, civil and disciplinary responsibility in which the ill treatment agents and authorities may have incurred.

Notice of the detention

The CPT considers unsatisfactory the legal posture derived from the Spanish regulations respect to the maximum period of time, of five days, during which the right to advise his relatives or a third person of the circumstances of his situation may be refused.

Thus, it invites the Spanish authorities to adopt specific actions to implement the recommendation of reducing to a maximum of 48 hours the period in which detained people are refused by police's agencies the right to have the fact of their detention and the place in which they are being held made known to a relative or other person of their choice.

Regarding this recommendation of the CPT, the Spanish Government has been stating that the restrictions contained in article 527 of the Criminal Justice Law are protected by article 55 of the Spanish Constitution and are admitted both by the Spanish Constitutional Court and by the European Court of Human Rights itself that has maintained that "on reasonable grounds the exercise of rights by the detained person can exceptionally be delayed on condition that they strictly respond to the requirements of the concrete situation".

On the other hand, it must be kept in mind that the detention incommunicado is not applied, as stated by section 13 of the CPT 's report to "certain categories of detainees", but to certain categories of crimes which are those covered by the provision of article 384 bis LECrim: crimes of terrorism and rebellion. Its legal system is extremely restrictive, because it demands in any event judicial authorisation through motivated resolution that must be adopted in the first twenty-four hours of the detention -article 520.bis.2 LECrim- and a permanent and direct control of the detainee's personal situation by the Judge that has agreed to the detention incommunicado or, by delegation of functions, by the Investigating Judge of the judicial territorial boundary where the detainee is deprived of freedom.

In accordance with all the above, the Spanish authorities consider that the continuation of the detention incommunicado, beyond the 48 hours recommended by the CPT, does not determine the non existence of a sensible level of sound guarantees in compliance with a democratic system of justice. As we have tried to state, the detention incommunicado foreseen in the Spanish legislation does not imply the detainee's absolute isolation, neither his abandonment in the hands of the police force, since the detainee has the legal assistance of a lawyer, of a Forensic Surgeon and the supervision of his personal situation by the same Judge that adopts the decision of keeping him incommunicado.

The lawyer is appointed by the corresponding Bar Association with absolute impartiality, the Forensic Surgeon is a professional integrated in a public body independent from any police department, from the Ministry of the Interior and even from the Judge or Court that has knowledge of the cause. The Judge that agrees to the detention incommunicado is assigned to a jurisdictional body, which has been granted the constitutional prerogative of independence. The immediate intervention of these three public agents, objective and impartial, not related organically, functionally, or personally to the acting police force, constitutes more than enough a means of deterrence against any temptation to make use of torture or ill treatment by the agents in charge of the detainee's custody.

Access to a doctor appointed by the detainee

The CPT is insisting on the need that those held incommunicado, apart from the examination by the officially appointed forensic surgeon, should be examined by a doctor of their own choice.

Thus it calls upon the Spanish authorities to take concrete action to guarantee to people held incommunicado the right to be examined by a doctor of their choice, in the understanding that said second medical examination may take place in the presence of a forensic surgeon appointed by the State.

In connection with this recommendation the Spanish Government reiterates that the exceptional cases in which the detained incommunicado is deprived of the right to be examined by a doctor of his choice, are perfectly covered by a regulation based on the Constitution itself and that has been repeatedly declared adapted therein by the Constitutional Court. Such a restriction finds its justification on the protection of the mentioned privileges of articles 10.1 and 104.1 of the Constitution: defence of the social order and safety of the citizens, and in attention to it, the Spanish authorities do not consider convenient the modification of the regulations on this regard.

On the other hand, this recommendation of the CPT aiming that the incommunicado may appoint a physician that may be present together with the forensic surgeon, constitutes a serious distrust on the figure of this one, who is a public officer that, apart from being impartial because of the requirements of his own statute, is a medical professional subject to the highly qualified *ex artis* that outlines and gives its own personality to this profession summarised in the Hippocratic oath.

In any event, the fact that the detainee incommunicado cannot designate a doctor to be present in his examination together with the forensic surgeon cannot be valued as a serious denial of the security of the detainee. On the other hand, accepting the recommendation of the CPT on this point would imply an intermediate situation between communication and isolation difficult to assume. Thus the fact that the detainee may call a doctor of his choice after his confinement has ceased, not before, is perfectly logical. What is not logical is that an unrestricted right of access to a person of the detainee's choice be recognised because it would break temporarily the reservation and confidentiality of the investigation that is the only reason for which the State decides to temporarily restrict the communication right with the outside of a freedom deprived person.

In short, regarding the three control measures to which reference is made in the previous sections, the Spanish Government regrets that the impression of the CPT is that the existing legal structure in Spain fails to provide an effective group of control measures against ill treatment by the police agencies of freedom deprived persons.

This opinion is not shared by the Spanish authorities that, on the contrary, consider that the existing legal structure in our country does provide the detainee with an appropriate level of guarantees, within the present standard of the rest of democratic countries of our milieu.

Thus, the modification of the current legal structure is not considered necessary since it conforms to the Spanish Constitution and to the doctrine of the Spanish Constitutional Court and of the Human Rights European Court.

Judicial Authorities

The report of the CPT, in sections 21 to 24, deals with the implications for the judicial authorities derived from the allegations of torture or ill treatment. The recommendations and contents of the report were taken to the attention of the General Council of the Judiciary (hereinafter CGPJ), requesting its comments on this regard, in answer to which the Permanent Commission of this Council, at its meeting of February 26, approved a communication whose considerations are revealed in the following paragraphs:

In the first place, the General Council of the Judiciary reminds of some observations on the guarantee and protection function of the fundamental rights and public freedoms of the citizen that "par excellence" concern the members of the Judiciary. Thus it derives, in origin, from the specific mandate of article 9 of the Constitution of 1978, attributing to the public authorities to promote the conditions so that the freedom and equality of individuals and of the groups they belong to may be real and effective. This statement is completed with the provision of Article 24 that recognises as fundamental right for all the people "the effective protection of Judges and Courts in the exercise of their legitimate rights and interests, and in no case may they go undefended"

It must also be mentioned the insistence of the Constitution in the idea of guarantee of the basic rights and freedoms, when stating again in Article 53 the binding to such rights and freedoms on all public authorities (and we cannot forget that the Judiciary is one of these authorities, administered in a spread out way by virtue of the individualisation of the jurisdictional authority). Lastly, when defining the observations that shape the Judge's constitutional design, Article 117 covers his independent, immovable, and liable condition and his subjection only to the rule of law.

Only from a permanent interpretation of any kind of judicial complaint subject to the constitutional criteria, the protection of the rights and legitimate interests guaranteed by the Constitution to all persons may be implemented which Judges and Courts have an obligation to provide.

The General Council of the Judiciary doesn't need, therefore, to insist in the correct implementation of such an obligation, since the Fundamental Text itself directly imposes it.

But it is convenient as well, to take into account certain limitations imposed by the Law to the General Council of the Judiciary. In this sense, it cannot dictate, through the exercise of its jurisdiction, general or private instructions on the application of the juridical system to Judges and Courts for specific obstruction as contemplated in Article 12.3 of the Organic Law 6/1985, of July 1, of the Judiciary. As a government body it doesn't participate on the attribute of the jurisdictional authority that lays “exclusively within the competence of Courts and Tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein” (article 117.3 of the Constitution). That is to say, it is not possible to interfere on the judicial application independent of the Law in the resolution of conflicts, the invasion of the denominated jurisdictional field being vetoed.

On the other hand, this does not prevent that, the government within its corresponding functions may carry out a permanent follow-up of the adaptation of such application to the ends determined in the Constitutional Text, mainly, through the guarantee of independence, and, particularly, by means of the exercise of the control function directly attributed by Article 122 of the Constitution as the genuine government jurisdiction.

After the analysis of the judicial aspects highlighted in the CPT’ s report, the General Council of the Judiciary has stated the following regarding the specific sections below:

<u>Judicial investigation of ill treatment complaints formulated by freedom deprived persons</u>

The report of the Committee, which we are commenting, breaks down this section in two aspects:

a) the possibility that detained persons may present a judicial complaint on the treatment received and the action that may be derived from this influence, and,

b) the objective that a competent Court may investigate the matter quickly and thoroughly when the Judge before whom the complaint is lodged, does not investigate it personally,

As for the first one of the above aspects, from the shaping of the Spanish juridical system, the answer may be that mechanisms simpler than lodging a complaint exist to obtain legal action.

The complaint, in the Spanish procedural law, is the juridical formula to exercise criminal action that requires, according to our Criminal Justice Law, the execution of certain formal demands within which the most outstanding is the technical support from Law professionals, since the complaint must be presented with a lawyer and a solicitor signatures (Articles 277 and 783 of the LECrim). On the contrary, other simpler mechanisms can get the same procedural result, with no need of being accompanied of the customary demands that, at least, put up the price and complicate the initiation of the penal process. Specifically we are referring to the denunciation or informal accusation, to the Investigating Judge of some facts of criminal character that any person may carry out, without prejudice of the obligation that concerns any person due to her position (medical doctors, policemen, etc.) to immediately communicate to the judicial authority or the Department of Public Prosecutions the facts that constitute crimes to be prosecuted *ex officio* (Articles 262, 264 and 284 of the LECrim).

That is to say, the vehicle of communication or knowledge to the judicial authority of some facts that may be qualified as injuries or ill treatment crimes, in the Spanish juridical system, finds a range of channels that may be estimated as plentiful.

The report recommends as “the objective", to ensure that the complaint may immediately reach the competent court and that the Court in question may investigate quickly and thoroughly any allegation of ill treatment to freedom deprived persons when the Judge before whom the allegation is made doesn't investigate it personally.

On this aspect we enter into the territory of jurisdiction. According to our Constitution, "the Ordinary Judge predetermined by law" and “a public trial without undue delays” are fundamental rights (Article 24 of the Constitution). Accordingly, if the offended considers that his allegation has been insufficiently investigated (this seems to be the sense of the expression “personally") by the competent Judge that in principle is not other than the Examining Judge, he may have access to another Court.

Thus, no other is the sense of the resources in force of our procedural system, the Constitutional Court having declared on this regard that the fundamental right for effective protection covers itself the possibility that judicial decisions are reviewed by a higher instance when circumstances and hypothesis concur as determined in each case by the Law (STC, Courtroom 1st, of July 24, 2000). Likewise the Court sustained that the mentioned fundamental right does not guarantee the wisdom of the judicial resolutions (Record of proceedings of the Plenary Meeting TC of July 24, 2000).

These statements, which must be joined by the full regulation of the possibility to contest, in the above established cases and hypothesis, the judicial resolutions that are considered harmful for the part affected, must be concluded with the full agreement of our juridical system with the purpose pointed out by the report in question.

Verification of the authenticity of the allegation in those cases in which it is difficult to obtain medical evidence on the reality of ill treatment

The report on this point affirms that in certain occasions it may be difficult to obtain medical evidence for many of the types of the frequently alleged ill treatment. According to the level of efficiency with which these practices are applied, some methods as asphyxia or electric shocks do not necessarily leave physical marks. Facing this situation, the report reaches the point of highlighting that "the judges should not consider the absence of marks or conditions compatible with said allegations as a proof of falsehood in themselves".

This statement-recommendation, by itself and formulated with this degree of abstraction, may induce to judgements of a different sign.

The investigating function of the Examining Judge is in fact based on the verification of the criminal notions that initially converge in what has been called in general "*notitia criminis*" (denounce of private persons, police reports, findings, etc.). Along the phase of the instruction, according to the legal shape that to this phase attributes Article 299 of the Criminal Justice Law, the Judge must find out and state for the record the perpetration of the crimes “with all the circumstances that may have an influence on the rating and guilt of the criminals". For this purpose he has a varied range of actions that go from visual inspection (Article 326 and following of the LECrim), reports and experts analysis (the Law in particular refers to the forensic surgeon examination in Articles 344 and following), statements of informers, processed persons and witnesses, etc. That is to say, it may not be affirmed that in a criminal cause for possible ill treatment (we understand physical because the report of the CPT makes reference only to these, leaving outside other equally indictable methods) the absence of “marks" may lead the Judge to the conclusion of the falsehood of the allegation.

And it is so for several reasons. Among them, it should be pointed out that precisely the juridical penal concept difference between ill treatment and injuries resides on the need, for these last ones, of medical assistance followed by medical or surgical treatment, attentions that are not required for the damage to health produced by a conduct that "does not leave injury" which are those that constitute ill treatment.

Thus to affirm that the absence of "marks" leads to describe the accusation as false, would be as much as denying the existence of a criminal figure in our punitive system, which is that of ill treatment.

As for the attitude hold by the Examining Judge at the time of investigating the reality of these ill treatment, he must rely upon the serious and responsible professional exercise that does not disregard an accusation, for instance, by a freedom deprived person, simply by the fact that no physical “record" of the aggression is left. He counts with, as explained, investigating elements distinct from those of simple record of evidences, as the basis for an eventual opening of oral proceedings against those assumed responsible. Therefore, from the General Council of the Judiciary, judgement elements do not exist to think that the Judges, in cases as serious as those in which the elaboration of the report received for study is based, may underestimate these investigating elements.

Independently from it we must always keep in mind that the victim, facing the decision that the corresponding accusation is to be filed or facing the stay of proceedings object of the instruction, has the possibility to lodge an appeal action against such resolution, as appropriate in each case, in accordance with the Criminal Justice Law.

Supervisory Judicial Function of “the way in which detained people are treated by police agencies”, with special reference to those that go through the situation of incommunicado

Section 23 of the CPT report refers to the supervisory function that the Spanish Criminal Justice Law attributes to the judges "to verify the way in which the police agencies treat the people detained under their authority”. It concludes with the invitation to the General Council of the Judiciary “to encourage the judges to adopt a more pro-active position than before regarding the mentioned supervisory function".

In fact, Article 520 bis of the mentioned procedural text -regulating principle of the detention’s length, as well as of the request of incommunicado for persons detained as presumed participants of crimes related to armed bands or terrorist elements- determines that "during the detention, the Judge is able at all times to require information and to know the situation of the detainee, personally or by means of delegation on the Examining Judge of the territory or boundary where the detainee is staying". The exercise of this power acquires special sense in cases of detained persons as presumed participants in terrorism related crimes, and for whom the respective Corps and Forces of the State Security request to be declared incommunicado, since the law extends on these cases the period of detention and, on the other hand, it allows the restriction of the rights that in general are recognised to any other detainee.

Advisable formality of a personal hearing with the judge’s presence to determine the suitability of extending the periods of detention incommunicado

The current regulation on the extension of the period of detention comes from the reform introduced in the Criminal Justice Law by the Basic Law of May 25, 1988, and originates as well from the important Sentence of the Constitutional Court of December 16, 1987, that declared unconstitutional some articles of those that until then were regulating those situations. With this reform, apart from adapting the contents of the Law to the provisions of Article 17 of the Constitution, the harmonisation of this portion of our procedural system with the contents of international texts of human rights is strengthened, as are the International Pact of Civil and Political Rights or the European Agreement for the Protection of Human Rights and Fundamental Freedoms (Rome 1950).

Assuming that the detentions are related to terrorist elements, under the current regulation, the maximum general term of seventy-two hours may be extended by forty-eight hours more without being heard by the Judge before adopting the decision of extending them. However, this does not mean that during such detentions the guarantees provided by the judicial control of those detentions are diminished since in our juridical system sufficient guarantees exist allowing the Judge to verify the legality and the conditions of the detention. On this regard it should be remembered to this effect the mentioned Sentence of the Constitutional Court of December 16, 1987, that even literally affirms that "Nothing prevents the judge (...) to verify the legality and the conditions of the detention, looking after the respect of the detainee's constitutional rights, not only those of Article 24, but also the other constitutional rights concerned in each case. Given the fact that their territorial jurisdiction includes the whole territory of the State, the Judge is allowed to move personally, or, otherwise (...) delegate on the Investigating Judge of the territory or boundary where the detainee is".

All the above implies that the law has tried to be consistent and to allow the effective judicial control of the detention, even though the centralisation of the judicial body prescribes to this one greater diligence in the use of powers and attributions that the Constitution and the Law recognises for the protection of freedoms.

Other actions of the General Council of the Judiciary

The importance that the matter to which refers the report of the CPT has for the General Council of the Judiciary has its translation, essentially, in the constant concern to bring to the spirit of the members of the Judicial career the thought of how important it is to adopt judicial measures that affect the restrictions of the fundamental right to freedom of all persons. The most serious decisions that a judge can adopt are always those related to the deprivation of freedom, and that is why it has been for years a subject that deserves repeated dedication in the formation plans promoted by the government´s agency of the Judiciary.

In this sense, besides the comments to the concrete paragraphs previously exposed, the General Council of the Judiciary wishes to state a series of actions thereof that can be used as an interesting sign when contrasting the potentiality that the remarks made by the CPT might have.

With the result that a brief reference to the actions taken by the Disciplinary Commission of the Judiciary in the last year and to the Plans of Formation, both initial and continuos, for the current year, will be made next.

A) <u>Performances of the Disciplinary Commission</u>

In order to provide concrete statistics on the matter object of the present communication, it has been asked from the Inspection Service of the Council itself the statistics related to the complaints received and processed in relation to the matter that we are concerned with, being able to verify that along the year 2001 no complaint against Judges or Magistrates has been lodged for non-fulfilment of the legally established obligations concerning the problem of incommunicado detention.

In the previous report, it was summarised that during the year 1999, a total of 53 complaints against Judges or Magistrates on the widest concept of ill treatment that can be considered, including in this statistics the complaints formulated by inmates of penitentiary establishments, were lodged before the General Council of the Judiciary.

In general, they referred to events related to the penitentiary treatment in various respects (from the quality of meals to the treatment by the officers) brought to the Judges of Penitentiary Surveillance from whom, according to the contents of the previously mentioned complaints, they did not obtain a satisfactory answer.

All the complaints were procedure object, consisting in the opportune transfer to the affected Tribunal of Surveillance and realisation, where appropriate, of the pertinent investigations for the confirmation of the veracity of the denounced facts and their possible disciplinary entity. In very specific cases transfer was conferred also to the General Direction of Penitentiary Institutions. The result to all these cases was of file of the records, with the due notification to the accuser and indication of the corresponding proper resources.

B) Organisation of formation activities

It must stand out in this point that, on the part of the General Council of the Judiciary, there have been organised, in a systematic way, courses and formation seminars, not only within the limits of the penitentiary surveillance but also related to the statute of the accused person, in general, referring us on this matter to the annual publications of formative activities, most particularly within the collection “Cuadernos de Derecho Judicial” (“Notebooks of the Judiciary”).

Recommendations to the Public Prosecutor

The report of the CPT deals, mainly in its sections 25 and 26, with the key role to be played by the Public Prosecutor in defence of the rights of the citizens. The recommendations and contents of this report were brought to the Public Prosecutor’ s attention, requesting his comments on this respect, which are summarised next:

In the first place, the General Office of the Judiciary states that the District Attorney ´s position with regard to facts presumably constitutive of torture cannot be but belligerent and active in favour of the rights of the victims and on the interest of society. The prosecution of torture crimes is for the Public Prosecutor a legal duty that is based on Article 105 of the Criminal Procedure ´s Code that forces him to exercise all the reasonable criminal actions, having or not set private prosecutor in the cause.

Statistically, it has been verified in the Public Prosecutor’s report corresponding to the year 2001 that, during the year 2000, 53 criminal proceedings *ex delicto* of torture, 85 *ex delicto* of offence against a person ´s moral integrity committed by a public authority or official and 3 *ex delicto* of offences of omission of the duty to prevent torture were pending. In all these proceedings the Public Prosecutor is party to the suit, impelling the investigation and promoting the exercise of the corresponding legal actions.

On the other hand, the criminal and disciplinary regime applicable to the District attorneys reinforces in an indirect way the mechanisms of legal protection of ill treatment victims, insofar as the District attorney that does not promote the prosecution of the crime, having evidence of its possible commission, can be prosecuted with basis in Article 408 of the Penal Code if, failing in his duty, stops promoting the prosecution of the crime of which he is aware or of the persons responsible of it and disciplinary liability can be demanded from him for non-fulfilment of his professional functions.

In short, the fact that torture and ill treatment by law enforcement officials must be investigated with impartiality and justice is guaranteed through the professionalism and honesty of the members of the Spanish Department of Public Prosecutions and their personal commitment with regard to the duties, which are proper to them.

Notification on the part of the courts to the police agency of all complaints of torture or ill treatment that have been brought before them

The report of the CPT recommends, in paragraph 26, that in all the cases the courts be required to notify to the appropriate police agency all the complaints that have been made before them relating to the way in which a detained person has been treated while she was under arrest and all the subsequent decisions adopted concerning those complaints.

The General Office of the State considers this recommendation appropriate and relevant, to the extent that the prolongation of a criminal prosecution obstructs the conclusion of the disciplinary proceedings that might have been internally instituted for the petition of responsibilities for the fault in which the officer or agent suspicious of ill treat a detainee may have incurred. In this sense, the General Office of the State manifests that it shares the position of the CPT and that it takes note of his recommendation in the understanding that it is convenient that the District attorneys urge the Courts to communicate to the corresponding Police Corps that the criminal proceedings have concluded and the contents of the decision to the effects which may be considered appropriate.

Internal accountability mechanisms

Paragraph 27 and following of the CPT ´s report deal with the disciplinary proceedings against police officers after the criminal proceedings. Regarding the internal accountability mechanisms in the different Spanish Police Corps, it is necessary to point out the following:

The cases of torture and inhuman or degrading treatment or punishment inflicted to the detained persons by National Police officers originate two completely differentiated procedures that are analysed next:

a) criminal proceeding – For the criminal accountability into which the presumed criminal has fallen, within a protection of the general social order, insofar as certain rules that equally affect all the citizens have been contravened and whose jurisdiction corresponds to the criminal courts.

b) disciplinary proceeding – For the administrative accountability into which the presumed criminal has fallen having infringed the ethics of a specific group like it is the ethics of the police group.

In front of the initial evidence of two separated responsibilities as are the criminal and the disciplinary, there will be two different simultaneous proceedings: criminal and administrative, possibility allowed by Article 8.3 of the Organic Law 2/1986 of March 13, of Security Corps and Forces.

The investigations carried out by police officers in functions of judiciary police exclusively, contemplated in Article 126 of the Spanish Constitution, will be part of both proceedings, in order to clarify the facts constituents of crime and the finding and securing of the criminal.

Therefore, there will be initially a documentation generated by police officers carrying out functions of judiciary police, whose addressees are judicial organs, Judges, Courts and Public Prosecution Department, with the purpose of investigating the crime. All this without prejudice that a copy of this documentation be sent to the competent administrative organ for the disciplinary accountability, which will give occasion to a disciplinary file against the author of the facts, whose instruction will correspond to a police officer that has not acted in the functions of judiciary police in this matter, and who has to develop the instruction phase, after which he has authority only to formulate a resolution proposal, never the competence to decide, a function that is reserved to the administrative organ that is empowered to sanction.

Consistent with all that has been exposed, in front of suppositions of torture and ill treatment, in general, the criminal and the disciplinary proceedings, although independent, they go off simultaneously. The police officers are not, like it seems to be deduced from the comment of the CPT, those who have the authority to decide if the matter needs or not to be taken to Court, because if they are officers acting in functions of judiciary police, its performance is directed exclusively to clarify the facts in order to provide directly to the Court all the evidences that might lead not only to find the author but also to make possible his conviction.

On the other hand, being police officers instructors of disciplinary proceedings, a) neither they have this power because, in accordance with all that has been previously stated, in these cases, when the process begins, the Judicial Authority already knows the facts, and b) because, even in those cases in which the disciplinary action is previous to the criminal one, if there are indications of criminal infraction it is not optional that the instructor decides if he takes or not the matter to Court but imperative, since Article 27 of the Disciplinary Régime of the National Police Corps, approved by Royal Decree 884/1989 of July 14, compels him to inform the organ that had ordered the filing suit, who must submit it to the competent Judicial Authority or the Public Prosecution Department.

In any case, regarding the statement of the CPT about the need to revise the disciplinary proceedings in the light of the result of a criminal proceeding, it must be considered that if the criminal and the disciplinary proceedings have gone off partly simultaneously, the imputation in the administrative order cannot be formalised until the criminal proceeding has concluded, by imperative as well of which is disposed in paragraph 8.3 of the Organic Law 2/1986 already mentioned as in Article 137.2 of Law 30/1992, of November 26, of Judiciary régime of the Public Administrations and the Common Administrative Procedure that point out the primacy of the performance of the Criminal Courts and the binding for the Administration of the declared facts proven by those.

Scope of resolution of the disciplinary proceedings

Regarding the appreciation of the CPT ´s report, in its paragraph 28, about the Units in charge of investigating and solving the disciplinary files, and its concern that these investigations be carried out exclusively within the unit where the officer concerned is in post, it is necessary to report that this appreciation do not correspond with reality for the following reasons:

a) Situation in the National Police Corps

When an officer of the National Police Corps has committed torture or ill treatment to detainees, he can be criminally sentenced as author of a crime or a fault.

The condemnation *ex delicto*, with independence of its importance, would constitute in the disciplinary order a very serious infraction. The criminal sentence for fault, considering the violation that would suppose of the basic principle of performance contained in Article 5.3 of the Organic Law 2/1986, that compels the police officers to safeguard the life and physical integrity of the persons that they would arrest or that were under their custody and to respect their honour and integrity, would be constitutive, in most cases, of a serious infraction.

In both cases, there are disciplinary infractions whose penalising competence corresponds, depending on the sanction to be imposed and on the nature of the infraction, to the General Director of the Police, the Security State Department Secretary or to the Minister of the Interior.

The disciplinary files that are made up in such cases are assigned, in the majority of cases, to Central Instructors appointed to the Disciplinary Régime Unit of the Personnel Division of the Directorate General of the Police, with headquarters in Madrid, whose specific function are the application of the disciplinary system to the personnel of the National Police Corps. They are, therefore, officers with organic and functional dependence different than that of the sanctioned officers.

In the few cases in which a disciplinary file by supposed torture or ill treatment to detainees would be assigned to an instructor appointed to the same unit as the officer supposed author of the facts, neither could be understood that he is ultimately answerable to the same hierarchical superior as the officer against whom a complaint has been lodged, because in these cases, although there is the same organic dependence, the instructor of the file is not answerable to his unit ´s chief officer of the actions performed in the proceeding, but directly to the General Director of the Police, to whom he must send the file once it has been opened because it is the organ that decided to bring the disciplinary proceedings.

On the other hand, it is convenient to precise that the sanctioning authority in general of peripheral organs, in the case of ill treatment, is limited to actions performed in the private life of the police officer (ex. Suppositions of minor domestic violence, small injuries in aggressions), in which case a criminal proceeding is initiated by the unit where the police officer is in post, and is resolved within these limits if no disciplinary liability is appreciated or if it is of minor importance.

If considered serious or very serious, following the directions established in Article 27.4 of the Organic Law 2/1986 it is referred to the General Directorate of the Police for the initiation of the disciplinary file.

Anyway, the unit that concluded a disciplinary action, both for ill treatment and for other minor offences, remits copy to the Disciplinary Régime Unit which starts to revise it and to process the evidence, without prejudice of the appropriate review in process of remedy of appeal against the resolutions pronounced by the organs with authority to sanction below the General Director of the Police.

b) Situation in the Civil Guard

As regards the Civil Guard, it is necessary to point out, in the first place, its concern to guarantee and to protect the human rights, being another evidence of it the Circular number 8, of November 20, 2000, on Protection of the Human Rights.

In this Circular is established the obligation of all the officers to ensure that the actions of their subordinates in the defence and protection of the rights and freedom of the persons comply with the principles, obligations and limits established by the Law, and specially so that the treatment to the detained persons and the conditions during their arrest are respectful with their dignity and rights, complying at all times with the formalities and guarantees provided for it.

At the present time, the mere indication of the existence of presumed ill treatment carried out by law enforcement officers lead to the instruction of a confidential information by an Officer, after getting the order from the command ´s chief (provincial area) or equivalent or superior Unit, giving notice of it to the General Sub-Directorate of Personnel, Disciplinary Régime Service (nation-wide area), so that the knowledge of the information is not limited to the unit in which the concerned Civil Guard performs his duty.

This investigation, as underlines the above mentioned Circular, is also extended to "the clarifying of the acts, the investigation of the performance of the enforcement actions of the service, and also of the immediate officers in that related to the instruction of their subordinates and the surveillance of harmful behaviour or contrary to human rights", which are enough measures to guarantee the investigation of facts with objectivity and impartiality and that the result be properly brought to the knowledge of the superior Authorities for the adoption of the appropriate actions, depending on the seriousness of the facts presented for said reason.

On the other hand, the Organic Law 11/1991, of June 17, of the Civil Guard ´s Disciplinary System, in force, considers as a very serious offence, in Article 9, section 2, "The abuse of its attributions and the practice of inhuman, degrading, discriminatory or humiliating treatment to the persons that would be under their custody, being in that case ordered by the General Director of the Civil Guard Corps the opening of a governmental file, and appointing as instructor an Officer of the Juridical Military Corps, which is always stranger to the unit in which the accused Civil Guard performs his duty.

This instructor will conduct the case giving notice to the Military Legal Attorney and he will formulate the correspondent resolution proposal.

If the facts, finally, lead to the opening of court procedures, there will be the Judges and the correspondent Courts who will judge and deliver an opinion on them, a judgement that is obligatory for the Administration.

Therefore, in any of the possible suppositions the investigation is not limited to the strict unit in which the accused Civil Guard performs his duty. On the contrary, in all the cases is guaranteed the impartiality, objectivity and transparency of the investigations that might be carried out on occasion of the complaints presented by the presumed commission of torture and ill treatment.

The instructor ´s discretionary powers on the disciplinary procedures

a) Situation in the National Police Corps

Regarding paragraphs 29 and 30 of the CPT ´s report on the development of the disciplinary investigations, it is necessary to point out that, in the first place, contrary to what the CPT seems to understand, it is not the disciplinary proceeding instructor ´s ability to decide if the complaint that he investigates implicates or not a criminal behaviour.

In front of the existence of indications of criminal behaviour, he is forced to bring the facts to the knowledge of the body that opened the proceedings, who will bring testimony to the judicial Authority, to whom corresponds to decide if the facts are or not constitutive of crime. If the instructor withdraws from the action of the Law a behaviour that is constituent of a crime, he could incur not only disciplinary but also criminal liability.

On the other hand, the CPT ´s appreciation related to the instructor ´s discretionary character when investigating a complaint does not seem to correspond to reality either, considering that the disciplinary authority, on the whole, is not a discretionary activity but submitted to rules, being subjected to the observance of the proceeding legally established both in the Organic Law 2/1986 and in the Disciplinary Régime Regulations of the National Police Corps, approved by Royal Decree 884/1989. Therefore, the actions that he will perform will have to conform to the strict respect of the Law in force.

And if one would pretend to extract such a conclusion from the content of Article 25.2 of the above mentioned Regulation, that enables the instructor to refuse *ex officio* the examination of the proposed evidence without an appeal lying against the denial, it would be far from reality because, although it is true that this rule allows to refuse the evidence without appeal, it does it after having established restrictions for it, because it is not in vain that it demands that the denial be reasonable. Therefore, the refusal to examine evidence cannot be arbitrary and whimsical but with reasonable grounds in order to avoid allegations of defencelessness.

As for how to measure the sanction to be proposed, it has been reiterated the jurisprudence criterion that sustains that the type of offence and the concurrent circumstances must be evaluated, highlighting in this respect, among others, the Sentences of the Spanish Constitutional Court of October 3, 1983 and of the Supreme Court, of September 28, 1984, November 24, 1987, and April 26, 1989.

To execute this rating, it has also taken into account the criterions established in Article 13 of the Disciplinary System Regulations of the National Police Corps, that are the following:

- Malice aforethought.
- The disturbance that it caused in the normal operation of the Administration and the police services.
- The damages caused by the behaviour.
- The breaking of the principles of discipline and hierarchy.
- The disciplinary records.

It is also considered the discredit that the behaviour brought to the image of honesty and seriousness that the police must offer to society, particularly the offence to the dignity, honour and rightness in the behaviour that a civil service demands, and the offence to the dignity and prestige of the profession, that harms not only the personal reputation of the accused person but reaches also, by extension, the prestige of the police service and the honour that derives from it for all the professionals of the National Police Corps.

b) Situation in the Civil Guard

Within the Civil Guard, regarding the officer ´s discretionary character in the administration of the complaints against their fellow officers, a brief exam of the disciplinary rules of application to the Civil Guard, together with the case law of the Supreme Court and the Constitutional Court, lead to uphold quite the reverse.

Thereby, and concerning the discretion invoked to bring to the judicial authorities ´s attention the facts that are being investigated, such a discretion is banned by application of that disposed in Article 32.5 of the Organic Law 11/1991, because, in any case, it is an unavoidable obligation of the instructor of the proceedings (administrative and disciplinary) to inform the Military Judicial Attorney, not only of the initiation of the proceeding but also of the facts that caused it, so that it is at the Public Ministry ´s disposal to decide the convenience or not to initiate legal actions.

On the other hand, the instructor ´s activity during the carrying out of the proceeding does not have the discretion already mentioned in the aforesaid report, because it is submitted to the Authority ´s subsequent review, who has to decide who, in definitive, and with the power granted by the disciplinary regulations, controls at all times the instructor ´s investigating performance.

Thereby, the Authority competent to resolve, once received the complete proceedings, will be able to order to carry out the complementary procedural steps which may be considered appropriate, and equally, and if he estimates incomplete the proceedings, he can return it to his instructor, so that he can correct the mistakes that have been committed during the procedure.

Also, the juridical judgement that the instructor carries out does not bind the Authority summoned for resolution and it will be able to order him, in the suppositions of discrepancy, both in the declaration of the proven acts and in the juridical judgement, to bring charges, even in the supposition that the instructor would not consider as constitutive of disciplinary crime the resulting facts, and to bring proposal of procedure with imposition of a sanction, even if this is not the instructor ´s view.

The guarantees tending to ensure that the proceeding is developed subject to the current legislation are reinforced by the fact that the Organic Law 11/1991 demands, in any case, the report of the competent legal adviser, previous to the resolution of the competent authority, resolution that also considers the possibility to send the proceedings to the competent judicial authority if there would be indications of criminal liability.

All the above exposed means that, according to the terms of the report, the discretionary character of the official in charge of the investigation cannot be emphasised.

Effectiveness of the disciplinary proceedings

a) Situation in the National Police Corps

Regarding paragraph 31 of the CPT ´s report on the scarce effectiveness of the disciplinary proceedings, it is necessary to make the following remarks:

In the first place, if we consider the fact that the disciplinary régime ´s object is the exemplarity trough the immediacy of the sanctions, it must be admitted that the need to wait for the resolution of a criminal proceeding that, eventually, goes on for long, to prefer a charge in the disciplinary order, damages the punishment efficiency.

However, this is an imposed consequence, both by Article 8.3 of the Organic Law 2/1986 and by Article 137.2 of the Law 30/1992, previously mentioned. On this regard, it cannot be ignored that the Administration must act fully complying with the Law (Article 103 of the Constitution). In consequence, by constitutional provision, it must be respected what has been established in those precepts.

It cannot be admitted the view that the binding of the facts declared proven by the judicial Authority limits the disciplinary proceeding. That because, on the one hand, more than a limitation, it is a complement to this proceeding, and on the other hand, it is a logical consequence that prevents, considering the primacy given to the criminal Courts, that different bodies of the State may draw different conclusions on the same facts.

The application of the principle *non bis in idem* does not limit the disciplinary proceedings either. To this respect, it cannot be ignored that the Spanish penal code, besides foreseeing criminal figures that protect the general social order and, in consequence, can be carried out by any citizen with independence of its professional activity, has typified certain offences that can only be committed by those holding the condition of public official, trying by this to protect their dignity and demanding from them an ethical performance.

In such suppositions, the penal authority to sanction protects and serves not only the violated social order but the public official ´s prestige and custody of the Administration, that is to say, that the crime that we are dealing with here considers and is based on the condition of public official of the accused person, to the point that if the author of the crime would not have such a condition, that act would not be a crime.

As for the remark of the CPT regarding that the complaints against police officers that are object of judicial procedures rarely lead to disciplinary proceedings, it should be rejected flatly. At the present time all criminal proceedings against police officers lead, as soon as it is known, to the correspondent investigation and disciplinary proceedings.

b) Situation in the Civil Guard

Regarding the consideration of the CPT pointing out that the fact of bringing suit for the above facts jeopardises in great measure the efficiency of the disciplinary proceeding, it is necessary to precise that Article 3 of the Organic Law 11/1991, already mentioned, establishes a confirmation of the principle of *non bis in ídem*, respecting also the preference of the criminal order over the disciplinary.

The aforementioned Article 3 establishes, therefore, a safeguard that guarantees that the facts declared proven in sentence could not be nullified later on by an administrative authority.

In this sense, the Fifth Court of the Military of the Supreme Court has stated, among others, in Sentence of June 26, 1993, that the already mentioned article “imposes, on the one hand, the prohibition that the same behaviour would be repeatedly sanctioned by authorities of the same order and through different procedures, because this possibility entails an inadmissible reiteration in the exercise of the *ius puniendi* and, on the other hand, imposes a prohibition of duplicity of administrative and criminal proceedings. The importance of the principle of *non bis in ídem* stands thus delimited so much in the case that the facts are regarded within the limits of a unique juridical order- which implicates its absolute effectiveness-, as much as if its consideration is made from two different orders, in which case it is attenuated when the sanctioned one is related to the Administration through a relationship that grants this one a supremacy of a special kind”.

For his part, The Constitutional Court, in Sentence 234/1991, of December 10, comes to admit that the existence of a relation of special subjection is not enough, by itself, to justify the duality of the sanction (criminal and disciplinary), being necessary, in order that this duality is admissible, that the interest protected by law be different and that the sanction is proportioned to the protection that this interest deserves.

On the other hand, by virtue of the rule of the binding of the Administration to the facts proven by the Judicial Authority, there are suppositions in which the statement of those facts means not only the dismissal in the criminal proceeding but also the impossibility to sanction them.

On the contrary, in many other suppositions, in spite of being the accused one dismissed in the criminal proceedings, if the facts are constituents of disciplinary infraction, the mandatory file is brought and the appropriate sanction is imposed.

In other cases, it also happens that the judicial proceeding concludes with an order of stay of proceedings in which no proven facts are declared, whereupon the imputed behaviour is investigated by the Administration, relapsing sanction whenever the same could be properly certified and proven, since, by virtue of the right of presumption of innocence that assists the summoned one, it is not possible to adopt, in these suppositions, a punishing resolution otherwise.

In general, it is necessary to signify that only do not conclude with disciplinary sanctions the sanctioning proceedings in which there is not enough evidence that allows to weaken the right of presumption of innocence and those in which the declaration of the facts proven, contained in the appropriate judicial resolution, makes impossible not only the criminal sentence but also the administrative sanction.

In all the other cases, these disciplinary proceedings conclude with the imposition of the reasonable sanctions depending on the seriousness and the transcendence of the denounced facts.

It is pointed out, at last, that the disciplinary proceeding, regardless of its date of initiation, must remain unavoidably paralysed until the judicial sentence comes into force.

To this it may be added that the above exposed does not mean that it is not possible to arbitrate measures in the administrative order leading to palliate the negative effect that the delay in the handling of the judicial proceeding, considered its complexity until a sentence comes into force, can cause within the correct functioning of the public services.

Thereby, the disciplinary legislation remains incomplete if it is not necessarily in connection with the regulations that govern the régime of rights and obligations and, in general, the statute of the members of the Civil Guard. The detrimental effect that can lead to the fact that a civil servant, which has been accused of a crime of this nature, can still carry out his duties with absolute normality, and even in the same environment in which the presumed criminal facts have been committed, is diminished by the possibilities that in the statutory order and within the organisational scope of the Administration are contained in the Law of Régime of Personnel of the Civil Guard (Law 42/1999, of November 25).

Indeed, Article 85 of the above mentioned legal text determines that the transition to the suspension from duty of the Civil Guards could be decided as a consequence of the processing, accusation or adoption of some precautionary measure against the accused one in a criminal proceeding or by the filing of a governmental proceeding. Such a suspension leads, obviously, to the impossibility of carrying out the duties characteristic of the accused or processed civil servant.

Equally, the Ministry of the Interior can determine if that suspension leads to the discontinuance in the post to which he is appointed. That implies that, even in the case of reversal of the suspension of the duty, because this sentence is limited in time, the civil servant, as long as the sentence would not come into force, could carry out his duties again but not in the same assignment in which he committed the presumed criminal offence.

Contribution of the internal accountability mechanisms and creation of a division of independent investigation

After the statistics shown in section 32 of the report, the CPT expresses, in the first paragraph of section 33, its conclusion regarding the scarce potential contribution of the internal accountability mechanisms of the National Police and the Civil Guard Corps.

We cannot admit this conclusion because, at the present time, on the part of the Disciplinary Régime Unit of the National Police Corps, all the suppositions of ill treatment and torture to detainees are investigated as soon as they are known and one proceeds, on the one hand, to lodge a complaint before the competent judicial Authority, in the case that this one would not have previous knowledge of the facts and, on the other hand, accounts for the correspondent disciplinary responsibility. Besides, one proceeds to execute the legal sanction regarding the condition of civil servant of the convict, i.e., cessation of duty or public position of the civil servant on a temporary basis, or declaration of the loss of civil servant condition if he was condemned to sentence of absolute or special disqualification for public office or employment.

Concerning the recommendation that the report makes in section 2 of section 33 relative to considering the creation of an independent division of investigation for processing the complaints against police officers, the Ministry of the Interior considers that, in view of the fact that the suppositions of torture or ill treatment to detainees by officers of the National Police Corp are practically non-existent, it is not advisable the creation of a Unit to investigate it differently from the one that already exists, the Disciplinary régime Unit of the Personnel Division, to which corresponds the application of the disciplinary régime of the afro -mentioned group, that has the necessary independence in the investigations that this unit carries out, takes the appropriate procedural steps related to the matter and sends testimony to the Judicial Authority for the pertinent legal effects.

Also, regarding the Civil Guard, it is necessary to inform that Article 16.3 of Royal Decree 1334/1994, of June 20, creates an Area of Internal Affairs, with immediate dependence of the General Director of the Civil Guard, which mission- to survey and to investigate the behaviour of this Force ´s personnel contrary to the professional ethics- was defined by General Order number 57 of September 19, 1994, of that Directive Centre.

With the same mission, and depending of the General Sub-director of Personnel, it is designed like a Service by Order of the Ministry of the Interior of October 29, by which the organic structure of the central services of the General Direction of the Civil Guard is developed.

By these reasons, the Spanish Authorities understand that our legal system fully guarantees the access to the jurisdiction and the obtaining of a resolution legally based, manifestations of the right to the effective judicial protection that, logically, it is not limited to the offended persons but applies also to any other person that, having knowledge of ill treatment carried out in police dependencies, can denounce it before the jurisdictional organs.

Madrid, 17 de junio de 2002
THE GENERAL TECHNICAL SECRETARY
(Spanish Authority in charge of the relationships with the CPT)

Eugenio López Álvarez

H.E. PRESIDENT OF THE EUROPEAN COMMITEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT.