



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

CPT/Inf (2009) 11

**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 14 to 15 January 2007

The Spanish Government has requested the publication of this response. The report of the CPT on its 2007 visit to Spain is set out in document CPT/Inf (2009) 10.

Strasbourg, 2 March 2009

Note: In application of Article 11, paragraph 3, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, certain personal data which is not in the public domain has been deleted from page 8 of the published version of the response.

**ANSWER OF THE SPANISH GOVERNMENT TO THE REPORT ISSUED BY
THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND
INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT),
REGARDING THE VISIT TO SPAIN
CARRIED OUT ON JANUARY 14 AND 15, 2007.**

I. INTRODUCTION

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter the CPT) has sent to the Spanish Government its report corresponding to its visit to Spain on January 14 and 15 2007, to examine the methods of assistance and custody that were being applied to Jose Ignacio De Juana Chaos, an inmate on hunger strike.

Firstly, as regards this visit, the Spanish Government, in its repeated commitment to respect and to enforce the respect of the fundamental rights of persons who are detainees or are deprived of their freedom, or both, by adopting all those suitable measures to prevent and prosecute any behaviour that might imply the exercise of mistreatment or torture, wishes to thank the CPT for its latter visit, and in particular for the excellent cooperation conditions under which it was developed.

Precisely, owing to the importance of this principle of collaboration, and before the CPT had informed it of its specific visit to study this particular case, the Spanish Government provided full answer to the written information requests related to the state of this inmate on hunger strike. Likewise, maintaining the will for collaboration between both parties, this Department has been reporting with due punctuality upon the development of the inmate, once a week, after the visit, as required by the CPT.

Within this working scope, the Spanish Government wishes to take advantage of the present answer to make anew its apologies to the CPT for the problems, fully alien to our will, occurred during or on the occasion of the visit. Thus, it wishes, firstly, to state to the CPT that it has full knowledge of the fact that no member of that Body has ever been involved in organizing visits to the country by which he or she has been chosen. And that such information appeared in communication media that do not, obviously, seem to know what the performing procedures of the CPT are.

On the other hand, as related to the publication, on a newspaper having national daily circulation, of the piece of news summarizing the report which the CPT had sent to the Spanish Government, prior to answer by the latter and prior to its publication in due form having been authorized, the Spanish Government regrets what has happened, even though the aforementioned facts happened – it has to be repeated – in a way alien to its will. It is necessary to indicate that this specific case, owing to the characteristics of the inmate (a man belonging to the terrorist band ETA, and who had been serving sentence for 25 murders), has been followed with high interest by the communication media that have been informing on its evolution, turning it into news almost every day along the hunger strike period, as well as later on. As related to the aforementioned publication, it is deemed necessary to make the following reflections:

- the Spanish Government wishes to show very especially his appreciation to the CPT for its receptiveness and sensitivity to the proffered apologies, and, very particularly, for the fact that it has not unilaterally decided, despite this unpleasant event, to publish its report on its visit of January 2007.

- moreover, the Spanish Government wishes to show its gratefulness to the CPT as, despite these circumstances, it has accepted the Government's arguments in order to allow for writing down the present answer to its report, within a deadline which, thanks to the consideration from the CPT, has come to be the usual three-month one.

But, above all, and already entering the contents of the report of the CPT, consideration has been especially given to the treatment given to this specific case and to the tone kept in the same report, as it has been borne in mind that it actually was a difficult issue owing to the conflicting values thereof – the preservation of life and that of the freedom of a person –, a very positive assessment being able to be deduced from the same report. Therefore, this answer is focused on the recommendations issued by the CPT and gives response, solely and exclusively, to those management aspects related to which observations have been put forward.

Thus, in the present answer, and in order to provide for higher speed to the response being advanced, that part of the report related to the facts that caused the visit and the development thereof are not commented upon, as the Spanish Government fully agrees with the description of the facts, as made by the CPT.

II. HUNGER STRIKE MANAGEMENT

As a general consideration, the Spanish Government wishes to state that it agrees with the criteria expressed by the CPT, so as to analyze the management of this case of hunger strike. In particular, the recognition of the duty to which the State is committed so as to guarantee the life of a person under its custody, having recourse to all possible means to avoid the physical decline of the person. Something that might, in this specific case, have become irreversible and have even led to death.

Likewise, it is pointed out that the criteria complied to by the Directorate-General of Penitentiary Institutions, in order to proceed to the force-feeding of De Juana Chaos, were strictly of a medical nature; and it is pointed out that the doctors requested the corresponding legal authorisation.

After this general assessment, the following paragraphs focus on the answers to each of the observations and recommendations of the CPT:

1. The CPT, in the 15th paragraph of its report, related to the health supervision of the person beginning a hunger strike, alludes to the distinction among inmates submitted to the special régime of the "File of Inmates for Special Follow-up" (FIES) and the remaining inmates, insofar as the health supervision of an inmate included in the FIES is more intensive throughout the first five days on hunger strike. The CPT pointed out its wish for the Spanish authorities to provide an explanation referring to this matter.

To give an answer to this request, it must be made apparent that it is usual, in non technical sources, to refer to FIES inmates as the set of inmates submitted to exceptional safety and control measures, i.e., the inmates subject to the implementation of the closed system indicated in the Article 10 of the Organic General Penal Law 1/1979, of 26 September.

However, facts are not exactly as mentioned above. FIES is a database created owing to the need of having full information about certain groups of inmates, either due to their being highly dangerous (with reference to the seriousness of their criminal records or to that of their penal curricula), or due to their being in need of special protection.

In order to fulfill the basic safety function, and as a part of the penal justice system, the Directorate-General of Penitentiary Institutions has to contribute, first of all, to the protection of the essential rights recognized by law to every citizen, as well as to public safety. Therefore, it is necessary to proceed to a special follow-up of the inmates belonging to terrorist bands or to organised crime gangs. This special follow-up is equally necessary in the case of those inmates who, because of their fanatical and violent behaviour or positions, might proselytize in order to organise terrorist cells. This special follow-up is necessary, as well, in the case of those inmates having committed offences that raised high social alarm.

Secondly, the Penal Administration has the function of ensuring the life and integrity of all inmates and civil servants, as well as that of ensuring the safety of its Centres in order to achieve appropriate custody, together with an orderly coexistence. So as to achieve these aims, the follow-up of misfit, conflicting or extremely dangerous inmates has to be added to the follow-up of organised groups.

Finally, other groups of inmates require special follow-up to ensure their own personal safety, either because they have belonged to the Law Enforcement Bodies or to the Penal Administration, or have acted as collaborators to the penal justice against criminal organisations.

All these types of inmates may, regardless of their penal classification, be integrated within the FIES file.

Many judiciary rulings have backed the legality of the creation and maintenance of the aforementioned FIES file, in full adjustment to the law codes currently in force.

On the other hand, as it has been pointed out to the Penitentiary Centres in the Instruction 2/2006 of the Directorate-General of Penitentiary Institutions, which lays down a new regulation to the file and to the safety measures thereof, "the implementation of measures implying régime limitations or restriction, or limitation of rights, must not be founded on the inclusion of the inmate within the FIES file. It must be accounted for owing to the need to protect other rights or to preserve the safety, good order of the establishment or the interest of the treatment, the aforesaid need deriving from the personal circumstances of the inmate involved. The former applies even though the process of individualizing the mentioned circumstances can be satisfied by means of the concurrence of features common to those ones pertaining to a collective of inmates, or to an organisation".

In any case, safety measures "will be governed by the principles of necessity and proportionality, and will always be carried out with the respect due to dignity and to the fundamental rights (Article 71.1 I Penitentiary Regulations, approved by the Royal Decree 1907/1996, of 9 February)".

Referring to the way in which the inclusion of an inmate in the FIES file could affect the inmate, should he or she declare him or herself on hunger strike, it is necessary to point out that the health monitoring controls to which the inmate is subject are the same whether he or she were not included within the FIES file: they are daily performed by a doctor and a nurse, and are documentarily registered on the form, which exists to that purpose and which the doctor has to sign. The difference raised by whether the inmate is included in the FIES file lies in the fact that, if he is included in the aforementioned file, the medical reports are communicated to the Directorate-General of Penitentiary Institutions since the first day of the hunger strike, whereas, otherwise, it is proceeded to send these reports from the seventh day, tallied since the beginning of that event.

2. In the 16th paragraph, the CPT recommends the revision of the Action Protocol in cases of hunger strike, after having checked that De Juana Chaos had not undergone any psychiatric examination at any stage of its hunger strike, a fact which makes the CPT show its surprise at the lack of any mention of the psychiatric assessment of the mental health of an inmate on hunger strike. Therefore, the CPT issues its recommendation aimed at the revision of the Protocol, so that it includes a continuous psychiatric assessment of the prisoner on hunger strike, as it considers that such assessment might be of use when determining those cases in which the underlying reasons to the rejection of food could be of psychiatric nature.

As a general rule, the psychiatric assessment of inmates on hunger strike is carried out whenever the doctor in charge of the follow-up deems it to be suitable, either because of the inmate's background or owing to his or her specific situation. In these cases, the assumption is passed as information to the specialist, and the proceeding is documented in the corresponding form.

Nevertheless, as refers to this recommendation, it has to be pointed out that we fully agree with the criterion mentioned by the CPT. Therefore, the revision of the current Action Protocol of the Penitentiary Administration will be undertaken in cases of hunger strike, so as to include the psychiatric assistance and the continuous psychiatric assessment of the inmate undergoing that situation.

In this specific case, it is necessary to mention that the inmate De Juana Chaos, as the CPT itself points out in its report, has shown his resistance to forced feeding, by repeating, on a regular basis, the aforementioned feeding to be against his will. In the same way, and as relates to psychiatric assessment, he was offered that kind of assistance, but he rejected it in a categorical way.

3. According to what is put down in the 17th paragraph, it is the opinion of the CPT that the right management of a hunger strike calls upon an active commitment from the direction of the prison. This applies, for example, whenever it has to be ensured that the communication among the inmate on hunger strike and the corresponding external parties is facilitated, and whenever a sustained dialogue has to be established between the inmate on hunger strike and the people that the inmate wishes to act as his or her representatives.

Regarding the facts hitherto referred, it is necessary to point out that the aforementioned extreme cases have been rigorously complied with in the case of the hunger strike of De Juana Chaos, an inmate that at no moment received a treatment different to that granted to the remaining inmates, the measures and the treatment administered to him being identical to those administered to any other inmate in a similar situation.

In what relates to that, it is deemed necessary to emphasise what is indicated by the CPT in the 21st paragraph, wherein it is expressly indicated that "De Juana was allowed to receive the visits of members of his family during 40 minutes each week, and his lawyers had limitless access to him".

However, regarding the communication between De Juana Chaos and the persons acting as his representatives, it is true that the former had limitless access to his lawyer during the whole period of the hunger strike. Nevertheless, as concerns the access granted to members of his family, the 40 minute weekly limit indicated by the CPT was not established, on the contrary, there were countless occasions in which the inmate was accompanied, not only by his relatives, but also, and above all, by his partner.

4. Referring to the 25th paragraph, the CPT considers that the decision of the Central National Court (the Spanish Audiencia Nacional at Madrid) of 24 November, authorising the Doce de Octubre Hospital to administer force-feeding to De Juana Chaos against his will was caused, above all, by the gradual fall in his potassium blood level. Concerning this, the CPT indicates that in the communication between Madrid VI Prison and the Central National Court, the potassium blood level was erroneously registered, [...]. A laboratory analysis made at the Doce de Octubre Hospital that same day yielded another result [...].

Regarding these results, it is necessary to say that the potassium level in the blood analysis made on blood samples from the inmate who was on hunger strike, the 24 November 2006 was [...], a figure below normal levels. This figure caused the transfer of the inmate to the aforementioned Hospital Centre, in order to provide for a better control. The information that was sent to the Central National Court had on it the figure [...], due to a transcription mistake.

When arriving in the Hospital Centre, a new analysis of the potassium level was made at the Urgency Ward laboratory and, actually, the [...] result does not coincide with the previous one [...], but it is necessary to take into account that the difference it is not of particular relevance: the two results were obtained in different laboratories, and it is thus possible that differences could arise between both results. Furthermore, variations must be considered, in function of the degree of haemolysis of one sample with respect to that of another one, as well as in function of other possible factors.

5. Regarding what is written down in the 26th paragraph of the report of the CPT, in the interests of achieving compliance with what is set out in the 14th paragraph, according to which "the decision-making process should follow a laid down procedure provided with sufficient safeguards, including an independent medical decision-making procedure. Furthermore, a legal resource must be available, and all the aspects for implementing the decision must be duly controlled". Thus, the CPT considers that "the competent legal authority would have, either to set a restriction on the authorisation to administer forced-feeding treatment to a prisoner or to be in position to cancel that authorisation whenever the corresponding legal criteria cease to be fulfilled".

The CPT deduces that the Central National Court practised a rather limited legal inquest, when enquiring the issue of force-feeding the inmate De Juana Chaos.

Likewise, according to what is written down in the 27th paragraph, the CPT considers that detailed control, exerted by or on behalf of the competent legal authorities, should be an essential component of their authorising activity. "The Court involved should ensure the authorisation to proceed to force-feeding an inmate to be implemented in the less harmful way to the physical integrity of the inmate on hunger strike, and that forced-feeding should still be a medical need, in order to which the possibility is mentioned that a forensic doctor, dependent on the legal body, carries out supervisory visits".

Concerning these recommendations, the Spanish Government reproduces here the answer issued by the General Council of the Judiciary Authority (hereinafter the Council), which is the governing body of the Legal Power in Spain. Within this meaning, it is necessary to state that the Spanish Constitution establishes the principle of division of powers and, concerning Judges and Magistrates, affirms in a categorical way that they are "independent, irremovable from office, responsible and only submitted to the rule of Law". Therefore, as per our constitutional organisation, the Government, as an Executive Power, neither can nor must address to the Legal Power instructions, recommendations or suggestions of any type whatsoever, since this would

represent be an unbearable interference to the independence of the Judges and Magistrates, which is guaranteed by the Constitution (Article 117 of the Spanish Constitution).

The aforementioned independence entails the impossibility of interfering with the exercise of the judiciary function, a prohibition affecting, as a first resort, the Executive Power, i.e., the Government of the Nation. But, furthermore, this independence also applies in the case of the Council established by the Spanish Constitution as "the governing body of the Legal Power". Therefore, this Body itself can neither interfere in the action of the Judges and Magistrates, nor issue any instructions to them.

Owing to this, it is of significance to emphasise that the report issued by the CPT is being answered by Ministry of the Interior which, acting as a party included within the Spanish Government, cannot carry out another action different from that of enacting the strict fulfilment of what is determined by the Judges and the Magistrates. Therefore, as formerly indicated, we later on report on what was stated by the Council.

In their meeting of 25 April, the plenary session of the Council approved the answer to the considerations formulated by the CPT in his report. The aforementioned answer is divided in two parts:

A. In the first part, the conditions having objective nature are analyzed, i.e., the fact that the recommendations of the CPT refer, in short, to the judicial rulings dictated by the First Criminal Chamber (Primera Sala de lo Penal) of the Central National Court, as related to the investigation on the hunger strike of the inmate De Juana Chaos; as well as to the conditions having space and time nature, i.e., the second forced-feeding period that covers the time range between the 11 December 2006 and the 7 January 2007. Likewise, the considerations issued by the CPT are mentioned as related to those elements on which, according to their opinion, the decision to force-feed an inmate on hunger strike must be founded: medical needs, appropriate conditions and due safeguard provisions, including an independent medical decision-making; to which it is necessary to add the availability of legal resource and the appropriate control of all the aspects appertaining to the implementation of the decision.

In its report, the Council notices the positive assessment made by the CPT itself as regards the medical needs, the appropriate conditions and the independence of the medical decisions, in order to analyze and give his answers to the recommendations on the judicial rulings, in the second part of its report.

First of all, it gives its statement on the availability of a legal resource, "this term being liable to be interpreted, in a wide meaning, as equivalent to the legal intervention in order to guarantee the rights and lawful interests of the individual or, in a more exact, correct and strict meaning, as allowed from a legal and technical standpoint, as equivalent to the possibility to appeal the judicial rulings".

As regards the full interpretation, the Council alludes that in the report itself, as issued by the CPT (paragraphs 23 and 24), a reference is made to the Penitentiary Regulation, the Article 210 of which regulates the compulsory assistance in cases of vital emergency. Thus, in this sense, the Council recalls that "a series of rulings were immediately adopted by the competent bodies of the Central National Court:

- On 28th August, 2006, the Criminal Chamber of the Central National Court authorised the hospitalisation of the prisoner on remand.

- On 14th September, the same Chamber authorised the forced administration of therapeutic treatment and forced-feeding of the prisoner on remand.

- On the 20th of the same month, the Chamber authorised using the minimum force essential to achieve such effects, as well as the administration of sedatives to the prisoner on remand.

- During the night of the 24th November, 2006, the investigating magistrate within the Central National Court, while in performing his duties on call, made the decision to administer the treatment against the will of the inmate, a decision which was ratified by the Chamber on the following day ".

As concerns the interpretation of appeal, in the strict legal sense, i.e. the possibility of using ways of impugn before a Court of Law, as appears in the 23rd paragraph the report issued by the CPT, the inmate filed, on the 3 December, an appeal against the Decision of 24 November (and that of 25, by which the Chamber ratifies the decision of the Investigating Magistrate of the Central National Court performing his duties on call). The appeal was dismissed on the following day, i.e. the 4 December, 2006.

In conclusion, and regarding this aspect, the Council states that, "the competent Court had a decisive participation in safeguarding the right to life of De Juana Chaos, who in one occasion exerted, as well, his right to appeal".

B. Secondly, the Council analyzes the requirement related to the appropriate control of every aspect of the implementation of the decision. A part of the consideration appears in the 26th paragraph of the report issued by the CPT. According to this paragraph, it is assumed that the Central National Court exerted a rather restricted inquiry, and that it should either have set a deadline to the force-feeding of the inmate, or be in the position to call off the authorisation thereof, should the corresponding legal criteria cease to be fulfilled. Moreover, the Council analyzes the recommendation issued by the CPT on the matter of detailed control and, in a specific way, on the matter that the Court should have ensured that the authorisation aimed at force-feeding the inmate be implemented in the less harmful way to his physical integrity, and should have ensured the aforementioned force-feeding remaining a medical need.

The Council considers that the recommendations issued by the CPT assume an assessment being of an abstract kind, and that they are related to the Court having omitted several "ex ante" precautions, i.e. as having been adopted prior to implementing the rulings.

In the present case, the Council indicates in an express way that, "the initial basis must be the premise, according to which all jurisdictional bodies are subject to the principle of legality in performing their procedural activities. Therefore, the aforementioned bodies cannot deserve their activities to bear any reproach when acting in such assumptions as these. In this case, the legal authority acts to guarantee a fundamental right ex Art. 117.4, in an incident occurring while the said authority was fulfilling a precautionary measure adopted within a penal procedure, with no infringement of legal regulations whatsoever, and adjusting its decisions to the scarce ruling and regulatory framework in force, which is presumably integrated by the Court having recourse to analogy and to the general principles of the proceedings. This legislative situation, which the Court

cannot avoid, is emphasized in the report issued by the CPT. The report, after referring to the "Action Protocol: hunger strike ", by which the Spanish penitentiary establishments are governed, and to the Article 210 of the Penitentiary Regulation, considers that the judicial examination and the supervision of inmates in a state of hunger strike might be strengthened, and that a continuous psychiatric assessment should be introduced.

However, there also appear in the report, as we have herein reproduced, a series of appreciations in concreto related to the legal proceedings, owing to which it should be determined whether the Court acted with the wisdom that the case required. This Council considers that the judicial control that was carried out deserves no objection whatsoever but appears, on the other hand, to be in full agreement with prudence criteria, to be adjusted to the guidelines established by the constitutional case law in similar cases (see, as summarizing all of them, the Constitutional Court Ruling – Sentencia del Tribunal Constitucional or STC– 11/1991, of 17 January, which endorses the ruling that requires ‘a medical follow-up of the inmate, in order to be informed about the ongoing of his or her situation, and about the possible risks that might be arising to affect his or her life’).

Precisely, after the situation created by authorising the different measures adopted in view of the best treatment of the inmate, ‘the legal authority, due to its position of impartiality as much as to its need to act with the greater flexibility and the greater capacity of adjusting to whatever might occur, entrusts all the persons involved to provide the Court with necessary information or to submit to it the measures that they consider appropriate. In this case the aforementioned persons involved were those in charge of health care and assistance, the person of the concerned inmate himself, assisted by his lawyers, his relatives, the supporters that visited the inmate, as well as the staff of the department of the Public prosecutor.’

6. Finally, and in accordance with what appears in the 33rd paragraph of the report, the CPT considers the treatment to which De Juana Chaos was submitted as "forced-feeding", since the lack of resistance that he offered to the means employed to restrict his movements must not be judged as being an approval, as he stated with the utmost clarity to be in disagreement with his treatment.

As regards the former precision, it has to be stated that there is a total agreement about the fact that the inmate showed throughout all the proceedings his not wanting to be fed. Thus, it is actually considered that the treatment to which De Juana Chaos was submitted constituted forced-feeding, a food intake integrated by means of therapeutic treatment, which the patient was administered in function of medical needs and in order to preserve his life.

The force-feeding treatment administered to De Juana was carried out with absolute respect and care, within such a delicate field as a hunger strike is. It is necessary to point out that, as arising from the related facts that appear in the report issued by the CPT, it is deduced that, when administering the treatment, every possibility of carrying out the force-feeding (essential to preserve the life of the inmate or the leading to irreversible damage) in the less harmful way were taken advantage of, by using the minimal necessary force as a last resource, and having the minimum recourse to restricting the movements of the patient.

Therefore, the decision on proceeding to the administration of force-feeding was made at the last moment, when such intervention was absolutely essential to preserve the life of the inmate.