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**REPORT**  
**BY ALVARO GIL-ROBLES,**  
**COMMISSIONER FOR HUMAN RIGHTS,**

**ON HIS VISIT TO SPAIN**

**10 – 19 MARCH 2005**

**for the attention of the Committee of Ministers  
and the Parliamentary Assembly**

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## INTRODUCTION

*In conformity with Article 3 (e) of Committee of Ministers Resolution (99) 50, on the Council of Europe Commissioner for Human Rights, I made an official visit to Spain from 10 to 19 March 2005 with a view to preparing a report on the effective respect for human rights were upheld in that country. It was my first official visit of a general nature to Spain, as the previous one, which I made on my own initiative from 5 to 8 February 2001, had been limited to the Basque Country, for the specific purpose of observing the situation generated by the violation of human rights as a consequence of terrorist violence (CommDH(2001)2).*

*During the visit that gave rise to the present report, I travelled to Madrid, Barcelona, Vitoria, Bilbao, Seville and Algeciras. Subsequently, from 5 to 11 May 2005, members of my Office also visited Fuerteventura, Lanzarote, Ceuta and Madrid to supplement the information gathered during the official visit. I should like to express my sincere thanks to the Ministry of Foreign Affairs, the Generalitat de Catalunya, the Basque Government, the Junta of Andalucía, the Government of the Canary Islands and the Government of the Autonomous City of Ceuta for their valuable assistance in the efficient organisation of the visit, during which I was accompanied by the Director of my Office, Manuel Lezertua, and John Dalhuisen and Ignacio Pérez Caldentey, both members of my Office.*

*In Madrid I was granted a hearing by His Majesty the King and I met Interior Minister José Antonio Alonso, Miguel Angel Moratinos, Minister for Foreign Affairs and Co-operation, Justice Minister Juan Fernando López Aguilar, and Consuelo Rumí, Secretary of State for Immigration and Emigration. I also had meetings with Manuel Marín, President of the Congress of Deputies, Francisco Javier Rojo, President of the Senate, Francisco José Hernando, Chair of the General Council of the Judiciary, María Emilia Casas, President of the Constitutional Court, and Enrique Múgica, Ombudsman. In Madrid I visited the Initial Reception and Protection Centre for Adolescents in Hortaleza, the Retention Center for Foreigners, the Moratalaz police station and the Madrid V Prison in Soto del Real.*

*In Barcelona I met Pasqual Maragall, President of the Generalitat, Ernst Benach, Speaker of the Parliament of Catalonia, Josep María Vallés, Minister of Justice, Montserrat Tura, Minister of the Interior, and Rafael Ribó, Ombudsman. In Catalonia I visited a police station of the Mossos d'Esquadra (autonomous authority police), the Retention Centre for Foreigners in La Verneda and the Can Brians Prison.*

*In Vitoria and Bilbao, I met Juan José Ibarretxe, Lehendakari (President) of the Basque Government, Juan María Atutxa, Speaker of the Basque Parliament, Javier Balza, Minister of the Interior, Joseba Azkarraga, Minister of Justice, Employment and Social Security, Gabriel María Inclán, Minister of Health, and Iñigo Lamarca, Ararteko (Ombudsman). In the Basque Country I visited Martutene Prison, near San Sebastian.*

*In Seville, I met Manuel Chaves, President of the Junta de Andalucía, Evangelina Naranjo, Minister of the Interior, María José López González, Minister of Justice and Public Administration, Micaela Navarro, Minister for Equality and Welfare and José Chamizo, Ombudsman. In Seville I visited the Prison Psychiatric Hospital and a care centre for victims of domestic violence. In Algeciras, a Guardia Civil Headquarters, the Retention Center for Foreigners and the Centre for Unaccompanied Foreign Minors of Nuestra Señora del Cobre.*

*In the course of a second visit, the members of my Office met the Directors and Councillors for Social Affairs of the islands of Fuerteventura and Lanzarote and the Ombudsman. They visited the Detention Centre for Foreigners in El Matorral and the Centre for Unaccompanied Foreign Minors in Llanos Pelados in Fuerteventura, as well as the Reception Centre for Foreign Minors in Lanzarote. In Ceuta they met the Government Delegate, the Presidential Advisor and the Director General for Minors. They visited the La Esperanza and Mediterraneo Centres for Unaccompanied Foreign Minors, the Temporary Centre for Immigrants, the Aliens Office and a Guardia Civil headquarters at the El Tarajal border post and part of the borderline. In Madrid they held technical meetings at the Interior and Justice Ministries, the Immigration and Emigration Secretariat and the Constitutional Court.*

*Like the members of my Office in Fuerteventura, Lanzarote and Ceuta, I was able to meet representatives of numerous non-governmental organisations in Madrid, Barcelona, Vitoria and Seville and, although I cannot mention them all individually, I should like to express my thanks for all the help and the valuable information they gave me.*

## **I. GENERAL BACKGROUND**

1. Spain became a member of the Council of Europe on 24 November 1977 and ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) on 4 October 1979. On 1 July 1981, Spain accepted the right of individual complaint to the European Court of Human Rights (ECHR). It has also ratified the Protocol to the Convention and Protocol No. 6, adding new fundamental rights to those protected by the Convention. Spain has signed but not yet ratified Protocols 4, 7 and 13 to the Convention. The process leading to the ratification of Protocol No. 14, which amends the control system of the Convention, is well under way.
2. Other Council of Europe texts signed and ratified by Spain include the European Convention for the Prevention of Torture and other Inhuman or Degrading Treatment or Punishment, the European Social Charter (but not the revised Charter), the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities. On 14 April 2005 Spain signed the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
3. In the 28 years since democracy was restored, Spain has shown firm and deep commitment to the protection of human rights, developing advanced legislation in this field. Today Spain is party to most of the major international treaties and conventions on the protection of human rights, and most of the provisions of those texts have been incorporated into Spanish law. Furthermore, the international treaties and agreements on human rights enjoy special prominence under the terms of Article 10 § 2 of the Spanish Constitution.

4. The fundamental rights and freedoms enshrined in Title I of the Constitution are directly applicable by the courts, and the Constitutional Court watches over human rights, mainly by hearing and judging appeals and questions on constitutionality and “*amparo*” (protection). Under Article 54 of the Constitution it is also the duty of the *Defensor del Pueblo* (Ombudsman) to protect the fundamental rights and freedoms of citizens in their dealings with the public authorities.
5. Generally speaking I must say that I found, both in my interlocutors and in the Spanish society in general, a solid culture of respect for rights. Experience proves, however, that one must remain extremely vigilant in this field for, as we shall see, sectors of risk remain and this makes it essential to strengthen and improve the effectiveness of the supervisory systems.

## II. ILL-TREATMENT

6. The non-governmental organisations I spoke to all agreed that torture and ill-treatment were not systematically practised in Spain, although they expressed concern that complaints were not always systematically and effectively investigated. This is worth noting, as there are documents and reports which appear to indicate that certain legal provisions in criminal law, particularly antiterrorist measures, permit and encourage ill-treatment, particularly where detainees are held incommunicado<sup>1</sup>. It should be noted in this respect that Spain has no specific or exceptional counter-terrorist legislation. Furthermore, terrorism-related crimes are judged exclusively by the ordinary courts; there are no special or exceptional courts for suspected terrorists. The applicable provisions are found mainly in the Criminal Code (CC) as amended by Organic Act 15/2003, of 25 November 2003, and by the Law on Criminal Procedure (LECr) as amended by Organic Act 13/2003 of 24 October 2003. The “*Audiencia Nacional*”, (National Court), responsible for trying terrorist cases, is an ordinary court whose work is not confined to criminal cases but also includes administrative, economic and social matters.
7. In spite of the persistent and violent terrorist attacks Spain has suffered since its transition to democracy nearly 30 years ago, and in spite of the dramatic escalation in the violence of terrorist attacks in general, visible in the attacks of 11 September 2001, the Madrid attacks of 11 March 2004 and the more recent events in London in July 2005, there has been no corresponding toughening of the legislation to curtail, restrict or limit the rights of people detained for terrorist activities. Nor has any exceptional legislation been introduced. As was mentioned earlier, Spain has ratified most of the treaties and conventions that prohibit torture and ill-treatment, including the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS 126) and its two Protocols (ETS 151 and 152), the European Convention on Compensation of Victims of Violent Crimes (ETS 116) and, recently,

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<sup>1</sup> See in particular the *Report by the UN Special Rapporteur on torture in Spain*, 6 February 2004, and *¿Sentando ejemplo? Medidas antierroristas en España*, (Setting an example? Antiterrorist measures in Spain) Human Rights Watch, January 2005.

the Optional Protocol to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. These international standards are faithfully reflected in Article 15 of the Spanish Constitution, which expressly prohibits torture and inhuman or degrading treatment. Also, under Article 174 of the CC, torture is defined as a crime, as is behaviour of a discriminatory nature. Torture is punishable by 1 to 6 years' imprisonment, depending on the gravity of the case. Under Spanish law, however, the statute of limitations does apply to torture,<sup>2</sup> contrary to the recommendations of certain international bodies. Under Section 131 of the CC, the limitation period may be 3, 5 or 10 years, depending on the seriousness of the offence. Accordingly, I believe Spain should consider following the advice of the international bodies concerned and excluding torture from the crimes subject to limitation.

8. As I said earlier, several of the NGOs I spoke with expressed concern at an alleged increase in cases of torture and ill-treatment inflicted by members of the national law enforcement agencies, particularly following the terrorist attacks of September 2001 and March 2004. According to them, fear of reporting such acts, the material difficulty of doing so or obtaining legal assistance, and delays in the investigations all result in many cases of such abuse going unpunished. According to some NGOs, only a small percentage of cases of torture or ill-treatment are reported and even fewer are punished<sup>3</sup>. Naturally I reported this serious and important concern to the Spanish authorities and requested the relevant statistical information. According to data supplied by the Ministry of the Interior, in 2004 15 disciplinary cases were brought against National Police officers for alleged ill-treatment, which is one more than in 2002 and five more than in 2003. It should be noted that none of them concerned detainees held incommunicado. In four of the fifteen cases serious or very serious offences were found to have been committed. Eight cases are still pending sentence or appeal and in three cases the proceedings were dropped. The allegations in these cases ranged from threats to actual torture. Also in 2004, 32 complaints for similar offences were lodged against the Guardia Civil, compared with 59 in 2002 and 27 in 2003. One resulted in a conviction, six in a discharge, two cases have been dropped and 23 are still pending.

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<sup>2</sup> The International Criminal Tribunal for the Former Yugoslavia ("ICTY"), seems to arrive at the conclusion that torture is an international crime for which there should be no time limit. In its judgment in the "*Furundzija*" case, ICTY declared the prohibition of torture to be a peremptory norm or *jus cogens*, leading it to say that "It would seem that other consequences include the fact that torture may not be covered by a statute of limitations". (Case No. IT-95-17/1-T, Judgment of 10 December 1998, § 157). The United Nations Convention against torture does not refer explicitly to limitation but appears to exclude it implicitly. Article 29 of the Rome Statute and Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity clearly state that such crimes cannot be subject to any statute of limitations. The Rome Statute does not only apply to the International Criminal Court (ICC). The ICC's job is, in the last resort, to supplement the work of the national courts, and to this end, states must establish their own jurisdiction to try the same cases as ICC. It follows that this jurisdiction should not be hindered by provisions that do not apply to ICC itself. Governments must ensure that torture, as a crime against humanity or a war crime, is not subject to limitation. (*Amnesty International, public document*, Index AI: ACT 40/024/01 EFAI). The United Nations Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms arrived at a similar conclusion. (See Doc. E/CN.4/2000/62, p. 5)

<sup>3</sup> According to Amnesty International, in 95 out of a total of 450 judgments handed down between 1980 and 2004, torture or ill-treatment was shown to have been committed. See "*España. Acabar con la doble injusticia. Víctimas de tortura y malos tratos sin reparación*" (Spain. Doing away with double injustice. Victims of torture and ill-treatment without compensation), December 2004.

9. In the autonomous regions, 197 complaints were filed against the “*Mossos d’Esquadra*” (Catalonia’s autonomous police force) in the period 2002-2004, while 19 were filed against the Basque “*Ertzaintza*” between 2002 and 2003 and none at all in 2004. This result is largely due to the procedures followed by the *Ertzaintza* since 2002 to avoid cases of ill-treatment and false allegations thereof. They include permanent video surveillance of the premises where detainees are kept, except in the cells, lavatories and showers. Police questioning sessions are not video-recorded, however, against the better judgment of the “*Ararteko*” (Ombudsman in the Basque Country), in order to protect the identity of the police officers fighting terrorism and organised crime. Furthermore, the Basque authorities have adopted other pioneering methods in this field, such as the Protocol concluded between, on the one hand, the Interior, Justice, Employment and Social Security Departments and, on the other, the Health Department, establishing a system of co-operation between the autonomous police, the Basque Health Department and the Basque Forensic Medicine Institute to assist detainees held incommunicado. The Protocol makes detailed arrangements for medical checks to be carried out by the forensic medical examiner on all detainees held incommunicado – in the presence of an officer or clerk of the court – at the start of, during (at least once every 24 hours) and after the period of detention. It also establishes a system for providing the next of kin of detainees held incommunicado with certain information, especially concerning their state of health.
10. Finally, where the local police are concerned, data from various sources indicate that there were 43 complaints in Madrid and 32 in Bilbao in 2004 and 178 in Valencia between 2004 and 2005. All these statistics seem to point to the existence of a number of cases of ill-treatment, apparently more frequent in the autonomous police forces (with the exception of the Basque *Ertzaintza*) and the local police than in the National Police or the Guardia Civil. It is certainly a cause for concern and the authorities should take every appropriate remedial measure.
11. Notwithstanding these figures, certain recent events make it essential to analyse more closely the procedures for dealing with allegations of ill-treatment. On 24 July this year a farmer from *Roquetas* (Almeria) died while on the premises of the local Guardia Civil, a victim of blows received when he violently resisted police attempts to control him in order to transfer him to other police premises. The victim had come to the Guardia Civil only moments earlier, of his own free will, to report an incident involving third parties, allegedly in an extremely agitated state, possibly under the influence of drugs. The autopsy revealed that the cause of death was a broken sternum. The authorities immediately initiated an investigation and the Guardia Civil supplied the judicial authorities with clear evidence of the brutal and disproportionate violence the police had inflicted on the victim, particularly the lieutenant in charge of the Guardia Civil post. The officer and staff involved have been suspended and legal proceedings are in progress. Although what happened was very serious indeed, the government reacted swiftly and openly as soon as the case was brought to its attention. An investigation was immediately ordered and the Minister of the Interior in person reported the full details of the case to the Parliament.
12. However, the initial information emerging from all the investigative measures is rather disturbing. First of all, it appears that this was not the first time that ill-treatment

involving the Guardia Civil in this locality, particularly the lieutenant in charge, had been reported. Yet no serious investigation seems to have been carried out. The court in *Roquetas* to which the cases of ill-treatment were reported surprisingly did no more than apply for information to the very Guardia Civil post where the offences had allegedly been committed and to the very lieutenant accused of committing them. Needless to say, the officers concerned flatly denied the allegations and the legal proceedings were dropped. It subsequently transpired from the investigation carried out by the Guardia Civil to elucidate the death, that the hierarchy had never even been informed of those previous allegations of ill-treatment.

13. Also surprising is the fact that defensive weapons prohibited by the regulations were kept, and apparently used, in the Guardia Civil quarters concerned: an electric truncheon and a rigid, telescopic metal one. The lieutenant violently beat the victim with them, as witnessed by the video recording made by the security cameras at the scene. The authorities acknowledged that the weapons in question were not in conformity with the rules in force and that their use is prohibited, although they had been purchased for the Guardia Civil in a bygone era.
14. Several questions immediately spring to mind. Why were the reports of ill-treatment dealt with by the alleged perpetrators? Is this common practice? Why is there no compulsory and effective procedure in the Guardia Civil for bringing these allegations to the attention of the hierarchy? (We have no clear information as to how the other law enforcement agencies deal with allegations of this type). How, if the allegations made publicly by other people should prove to be true, can it be possible for a judge investigating allegations of ill-treatment simply to ask the alleged perpetrators for information and take their word for it and drop the cases without further investigation? And finally, why were the Guardia Civil in possession of unauthorised weapons as an electric truncheon, officially recognised as dangerous weapons, especially when used on people who may have a heart condition? Have these weapons really been taken out of service, or do other units still have them in their possession?
15. These questions need to be fully elucidated. In the same way as the Ministry of the Interior reacted swiftly and openly in the *Roquetas* case, it is to be hoped that the above questions will be fully clarified. Establishing the truth in cases of alleged ill-treatment clearly calls for a thorough overhaul of the current internal investigation procedures of the law enforcement agencies, with the development of new action protocols which are transparent in terms of the procedure followed and the results obtained, so that cases like this do not happen again. If the firmest possible action is not taken in this respect, suspicions will remain concerning the truthfulness of allegations of torture or ill-treatment, and official denials will be powerless to dispel them.
16. Another figure that caught my attention was the number of people who had died while in detention in police stations, Guardia Civil posts and the like. According to the Co-ordinator for the Prevention of Torture, 48 people died in police custody in 2004. According to the information supplied by the Ministry of the Interior, the number of people who died while in the custody of the National Police or the Guardia Civil in 2004 was 15. The causes of death were suicide, natural causes and fire, with no recorded cases of death by torture or ill-treatment. None of the detainees concerned had



been arrested for terrorist activities. The autonomous police forces registered only two deaths in custody in the period 2002-2004, both on the premises of the *Mossos d'Esquadra*.

17. The arrangements for compensation of torture victims are far from satisfactory. This is an area where there are many shortcomings, even in the legislation, giving rise to much criticism of the authorities. The excessive length of proceedings, the short time limits for the prescription of torture offences mentioned earlier, the difficulties in identifying the people responsible, the small sums awarded in compensation and the lack of proper state aid for victims are all matters that need to be reviewed and improved, and to which corresponding attention should be given when developing solutions to eradicate torture and ill-treatment.
18. It is common knowledge that systematic allegations of torture – regardless of whether there are any facts or evidence to corroborate them – are an obligation incumbent on any ETA activist from the very moment when the arrest takes place, as demonstrated by the documents found in flats occupied by activists of this terrorist organisation and used in judicial proceedings<sup>4</sup>. The aim, as explained in ETA's instructions to its activists in its documents, is none other than to destabilise law-enforcement bodies and, with them, the democratic system and institutions, and to win the support and solidarity of sympathisers with the cause of Basque independence and, beyond them, of radical youth movements and certain sectors of Basque society who are disinclined, for historical reasons, to accept the police version of events. Both the Basque Ombudsman in his recent "Declaration on Torture"<sup>5</sup> and the Basque authorities acknowledged during our meetings in Vitoria that allegations of torture by ETA activists and their families and friends are, in many cases, unfounded and motivated mainly by political designs like undermining the rule of law and the democratic institutions in general. They did not, however, deny that there was reasonable suspicion of ill-treatment and torture in certain cases, deploring the fact that the objective of the complete eradication of practices incompatible with human rights and dignity had not yet been fully achieved in Spain.
19. Personally I am convinced, like the NGOs I spoke to during my visit, that cases of ill-treatment do occur in modern-day democratic Spain, but in isolated instances rather than in any systematic manner. They are the result of deviant behaviour rather than of any deliberate policy or plan on the part of the authorities. States governed by the rule of law have the wherewithal to investigate and severely punish conduct that undermines the physical integrity and the dignity of detainees. Although it must be borne in mind – as stated above – that many false allegations are made for political motives, to destabilise the democratic system, I still believe that reports of torture and ill-treatment are not always investigated as swiftly and efficiently as they should be, as this is the only convincing way to belie such false and ill-intentioned accusations. Although I know the Spanish authorities are committed to finding a solution to this serious and

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<sup>4</sup> A document known as the "ETA handbook on reporting torture". It was found on Commando ARABA/98, detained on 19 March 1998, and used in proceedings before Central Investigative Court No. 1 of the National Court. See the report on allegations of torture in Spain published by the citizens' group "BASTA Ya", which was awarded the European Parliament's "Sakharov prize for freedom of conscience" in December 2000.

<sup>5</sup> Declaration on Torture by the Ombudsman Institution on 21 December 2004.

delicate problem, I must insist that all such cases, without exception, be investigated fully and rigorously and that, where appropriate, the corresponding disciplinary and criminal sanctions be imposed. The procedures introduced by the *Ertzaintza* to do away with any temptation for its members to use violence on detainees has resulted in a completely clean record, with not a single case of torture or ill-treatment reported in 2004 or 2005. Measures like these can serve as models for active prevention policies that demonstrate to the police forces and the general public the authorities' firm determination to eradicate such criminal acts.

### **Incommunicado detention**

20. One of the main criticisms voiced against the Spanish authorities concerns the possibility, under the Law on Criminal Procedure (LECr), of ordering a detainee to be held incommunicado for a period of time which certain international and non-governmental organisations consider excessively long. According to critics, this measure can make it easier for ill-treatment to occur. Under Article 55§2 of the Spanish Constitution, certain rights of prisoners may be restricted in connection with investigations of the activities of armed bands or terrorist groups, i.e. the crimes of terrorism and rebellion referred to in Section 384 bis of the LECr. Subject to prior judicial authorisation, the law provides for the possibility, in connection with these crimes, of extending the maximum duration of custody – normally 72 hours, following which the detainee must be set free or handed over to the judicial authorities (Article 17§2 of the Constitution) – by a further 48 hours. The LECr also empowers the judge to authorise incommunicado detention for these types of crime. Incommunicado detention begins when the judge authorises it and may last for the full duration of police custody, i.e. a maximum of five days.
21. At the end of incommunicado police custody, the judge or court may order incommunicado pre-trial imprisonment for a maximum of five days, plus an additional five days in the case of the crimes covered by Section 384 bis of the LECr, and even for another three days thereafter. Thus, if one adds together the maximum authorised police custody and provisional imprisonment, in certain circumstances detainees may be held incommunicado for up to 18 days. In both custody and pre-trial detention, judicial authorisation is required for detainees to be held incommunicado.
22. During incommunicado detention, detainees have the right to be assisted by a lawyer, although this right is variable if they are accused of rebellion or belonging to armed groups. In this way, an incommunicado detainee will not be assisted by a lawyer of his or her choice, but by a duty lawyer; no news of the detention or the place of detention may be leaked to the detainee's family or other parties, or, in the case of foreign detainees, to their Consulate. The detainee may not see his or her lawyer in private, but

has the right to the lawyer's presence when making any statement. These are certainly serious restrictions, as various international bodies (United Nations Committee against Torture, Council of Europe Committee for the Prevention of Torture) and NGOs have pointed out<sup>6</sup>.

23. Concerning the lawyers officially assigned to incommunicado detainees, it should be noted that it is not the authorities who assign the lawyer, but the Bar Association. In the context of activities of terrorist groups or organised crime, this procedure is designed to ensure the efficiency of the investigation (as confirmed by the Constitutional Court when it found that the restriction provided for in Section 527 a) of the LECr did not violate the essence of the detainee's constitutional right to legal assistance and could therefore not be considered as an "*unreasonable or disproportionate restrictive measure*"<sup>7</sup>). It is important, however, that the detainee should be able to speak to his or her lawyer at least once in private or to freely inform the lawyer of any ill-treatment suffered. The future reform of the LECr, to which I refer below (Chapter IV), may be a good opportunity to review this and other aspects of the current incommunicado arrangements along the lines indicated above.
24. From the time of the arrest, the detainee, even if held incommunicado, has the right to be assisted by a lawyer under the following conditions: it is the police officer's duty, failing which he or she shall be liable to criminal sanctions, to request the presence of the duty lawyer from the Bar; until the lawyer arrives (which must take no longer than 8 hours), the detainee may not be questioned or subjected to any formalities; the detainee must be informed, upon arrest, of his or her right to remain silent and to have a medical examination. The possibilities open to the officially assigned lawyer are therefore: to verify the physical and mental condition of the detainee and, if necessary, order an immediate check-up by the forensic medical examiner; to demand that any detail he or she deems relevant be noted in the police report; to demand that the statement specify whether the detainee has suffered or is in danger of suffering torture or ill-treatment; to challenge the validity of the statement, if it was drawn up in the lawyer's absence, and of any evidence obtained directly or indirectly through the use of violence, threats or intimidation. According to information supplied by the Ministry of the Interior, the number of detainees held incommunicado for crimes of terrorism by the National Police and the Guardia Civil totalled 213 in 2004.
25. Forensic medical examiners are responsible for the medical assistance or supervision of detainees. They form a body of highly-qualified men and women who work for the judicial authorities under the orders of the judges and public prosecutors. All detainees have the right, under Section 520§2, f) LECr, to be examined by a forensic medical examiner. The health of detainees held incommunicado is particularly carefully monitored, with a medical check-up at the time of arrest, then every 24 hours – or more frequently if the detainee so requests – and at the end of the detention. It is important to note that detainees held incommunicado have the right to be examined by a second forensic medical examiner assigned by the judge or court in charge of the case.

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<sup>6</sup> See, for example, the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 13 March 2003 (CPT/Inf (2003)22).

<sup>7</sup> See Constitutional Court judgment 196/1987 of 11 December 1987.

### III. THE PRISON SYSTEM

26. Unlike in the majority of Council of Europe member states, and contrary to the organisation's recommendations, in Spain the prison system is attached not to the Ministry of Justice but to the Ministry of the Interior. The explanation given to me by the Spanish authorities was that the prisons service remained part of the latter when the former Ministry of Justice and the Interior was divided in two in 1996. At all events, as a government representative pointed out, the prisons' attachment to the Ministry of the Interior is merely a matter of administrative organisation. Nevertheless, in Spain the prisons traditionally belonged to the Ministry of Justice, and I cannot hide that I believe that would still have been the best solution.
27. Generally speaking, the problems affecting the Spanish prison system are not very different from those to be found in other Council of Europe member states. Sharp growth in the prison population over the last four years (by more than 30%), lack of investment in the construction of new prisons, a policy of full serving and toughening of sentences (following the reform of the Criminal Code by the Organic Act of 30 June 2003 on full, effective serving of sentences) have led to a worrying deterioration of conditions and overcrowding, which I was able to observe, to a greater or lesser extent, in the four prisons that I visited. The situation is worse in certain Autonomous Communities than others. For example, in the Basque Country, Andalusia and the Canary Islands, the prisons have significant shortcomings and require urgent improvement. Catalonia is something of a special case since, although its problems are similar to those of the other Autonomous Communities (principally overcrowding), it is the only one to which jurisdiction for the prisons has been transferred.
28. In view of this situation, the re-education and social rehabilitation aims of prison sentences, laid down in Article 25§2 of the Spanish Constitution, and the traditional objective of "one prisoner per cell", provided for in Section 19 of the Prisons Act, are, at present, unattainable.
29. The vast majority of the 77 prisons under central government jurisdiction and the 11 in Catalonia are at saturation point. At the time of my visit, the prison population, including in Catalonia, was 60,716, having increased by 33.4% over the last eight years. As a result, Spain ranks second among European Union member states for the number of prisoners per inhabitant (140 per 100,000 inhabitants). Around 77% of prisoners are serving a final sentence, whereas some 22% are in pre-trial detention. The majority have been convicted of offences linked to drug trafficking or consumption. At 61.71%, the proportion of repeat offenders is high. One feature of the situation in the prisons is the sharp rise in the foreign prison population, which currently stands at some 27% of the total. The number of Spanish prisoners has, nonetheless, grown by 18%. Growth in the prison population and the failure to build new prisons or renovate existing ones in order to cope with this growth are a particular cause for concern. The main consequences of this state of affairs are considerable overcrowding (resulting in uprooting of prisoners, who cannot serve their sentences in a prison close to their place of origin or their family's home, which constitutes an additional form of punishment), very difficult working conditions for prison officers, whose number is virtually unchanged unlike that of the prison population, and generally an environment that makes pursuit of a

rehabilitation policy extremely difficult. In addition to this situation, already complex in itself, a policy of dispersion, isolation and direct surveillance of particularly dangerous prisoners is being implemented, which considerably enhances the need for additional space and isolation areas.

30. According to information provided by the prisons service there is an infrastructure plan, which will help to improve the situation through the building of new prisons in Puerto de Santa María (Cadiz), Albocásser (Castellón), Estremera (Madrid) and Morón de la Frontera (Seville) over the period from 2005 to 2008. There are also plans to build three social rehabilitation centres (ie open prisons, where prisoners are only required to stay overnight) in León, Vigo and Alicante.
31. In these circumstances it is necessary to consider introducing alternatives to a closed prison regime. It would also be a good thing to revise the current rules on pre-trial detention, the maximum duration of which - four years - seems excessive (see § 65 below). A particular cause for criticism is the heavy reliance on pre-trial detention as a preventive measure.<sup>8</sup> In this connection, it should be pointed out that Section 520§1 LECr provides that pre-trial detention shall take the form that is least prejudicial to the detainee's interests. The European Court of Human Rights (ECHR) has also held that the need for pre-trial detention must be assessed on a case-by-case basis and the duration of such detention must be closely linked to the right to have one's case heard within a reasonable time. It is accordingly a cause for concern that, in some instances, detainees have still not been brought to trial after four years (the maximum duration laid down by Spanish law).

### **Prison conditions**

32. In Spain, alongside some modern prisons, there are others which are very outdated. During my stay I visited four prisons: Madrid V in Soto del Real, *Can Brians* in Barcelona, *Martutene* in San Sebastián and the Seville Psychiatric Prison Hospital. The first two are relatively recent, and the last two very old. These visits allowed me to observe a number of problems common to all Spanish prisons, which I have already mentioned. Although prisoners undoubtedly enjoy somewhat better living conditions in the more recent prisons, urgent improvements are needed everywhere. For example, I was struck by the small size of the cells (intended to house two prisoners) in a relatively new prison such as Soto del Real (dating from 1995) and the lack of a separation between the lavatory and the rest of the cell. I nonetheless found the common facilities, such as the squash court, the swimming pool and the auditorium, to be of an appropriate standard. This prison is noticeably short of funds for maintenance of its installations and particularly the cells, which are in an obvious state of disrepair. As regards *Martutene* prison, the oldest in the Basque Country (dating from 1941), I have a positive opinion of the direct, almost personalised, relations with prisoners. That naturally does not justify or excuse the fact that some facilities are completely obsolete and inadequate, illustrating the fact that the situation is a difficult one, requiring urgent action, as the competent authorities and the Basque administration acknowledge. All prisons visited

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<sup>8</sup> In a judgment of 26 July 1995 the Constitutional Court ruled that pre-trial detention must comply with the criteria of strict necessity, subsidiarity and temporariness.

had suitable areas for close contact (face to face) with family members. Nor did any prisoner report any ill-treatment to me.

33. Separate mention should be made of psychiatric care conditions in prison. From what I could see, the situation varies greatly, ranging from a modern prison, such as *Can Brians* in Catalonia, where the psychiatric hospitalisation unit has excellent, up-to-date facilities, to other prisons which lack the means to take proper care of prisoners in need of psychiatric treatment. It is essential to develop this kind of care and, as far as possible, to set up a psychiatric unit in each prison, in particular if it is borne in mind that Spain has only two psychiatric prison hospitals, Foncalent in Alicante and Seville, which I visited. With regard to the latter, I can confirm that the medical staff are doing some good work with the patients through a variety of activities (marquetry and bookbinding workshops, drama, gardening and pottery, for example) and that patients' families are involved in the healing process, but also that there are insufficient psychiatrists assigned to these establishments for lack of funds. As to the facilities, I would say that, although they are not inadequate, there is room for improvement.
34. These centres have a limited capacity, and the shortage of medical staff prevents an extension of their activities, making it necessary to house a considerable number of persons in need of suitable psychiatric care in ordinary prisons.
35. Consequently, what is needed is the provision of proper psychiatric care in each prison and a network of specialist establishments for the most difficult cases where the patient cannot remain within the ordinary prison regime. This could be achieved, for example, through agreements with the Autonomous Communities' health authorities.
36. A particular cause for concern is the steadily climbing number of suicides in prison. According to the official figures, 40 deaths by suicide were registered in 2004 – 8 more than in 2002 and 4 more than in 2003. In 2005 there has apparently been an alarming increase. Although it is difficult to establish a causal link between conditions of detention and the number of suicides, the deficiencies in psychiatric care for prisoners, the stringent policy applied (with emphasis on full serving of sentences and a crackdown on granting of prison privileges) and a form of social pressure exerted by other prisoners on those convicted of certain offences could help to explain this worrying state of affairs. In this connection, it is significant that 27.5% of the prisoners who committed suicide in 2004 had served three-quarters of their sentence or had less than 100 days to go to reach that stage. In view of this situation, I attach great importance to the implementation of a programme or plan of action that would help bring down the suicide rate not just through increased vigilance but also by introducing and applying psychological support and assistance measures. It seems clear that the state has a share of responsibility for the death of a prisoner, which it cannot evade. In this respect, the Suicide Prevention Programme, which is currently being revised and updated, could help to reduce the number of cases by means of a prevention policy. At all events the authorities must do more than adopt mere restraint measures and must develop appropriate and effective programmes to reduce what is, by any reckoning, a high suicide rate.

37. The percentage of prisoners with drug addiction problems remains very high although heroine consumption and use of syringes has decreased. I obtained information on the various drug rehabilitation and severance programmes (treatment with methadone, syringe exchange programmes, etc.) being run in prisons in the Basque Country, in particular. The methadone treatment programmes have proved especially effective, and this drug substitute is prescribed and dispensed in all prisons. Drug trafficking nonetheless remains a routine fact of life in many prisons, and it is still fairly easy to obtain narcotics in prison.
38. Prisoner health care is another cause for concern. Many inmates have serious health problems, including infectious or contagious diseases such as HIV, hepatitis B and C, tuberculosis and certain sexually transmitted diseases, and considerable dental problems.
39. There is an Action Plan for Foreign Prisoners (some 27% of the total population), which covers, inter alia, supply of information and legal counselling, issuance of identity papers for those prisoners who have none and educational measures (teaching of Spanish, for example).
40. One always difficult problem is the presence of small children, under the age of three, in prison with their mothers (approximately 210 cases). Although prison is no place for a child to spend the first years of its life, it is also clear that it is precisely at this very young age that children most need their mothers. I believe that in such cases, if family circumstances do not allow for an alternative accepted by the mother and suitable for the child, it is better that the mother and baby/infant should stay together in the short term. Nonetheless, specific, appropriate and decent facilities must then be provided. In this connection, the undertaking obtained from the Directorate General of Prisons to house women prisoners with children under the age of three in a separate area must be viewed in a positive light since it is a step in the right direction.
41. The Spanish authorities are very much aware of the efforts that must be made to improve the situation in the prisons, many of which are today in a terrible state following years without adequate investments and the entry into force of a policy of full serving of sentences, which has filled the prisons to bursting without any reasonable alternatives satisfying the constitutional principle of social rehabilitation. I accordingly consider it necessary to conduct an in-depth study of the consequences of this policy and, in any case, to take urgent measures to allocate the material and human resources needed to cope with the current situation.

#### **The Register of Prisoners requiring Special Surveillance (Ficheros de Internos de Especial Seguimiento - FIES)**

42. One question which has caused a controversy within the prison sector is the existence of the so-called Register of Prisoners requiring Special Surveillance (FIES). This is a data base designed for the monitoring of certain categories of prisoners (terrorists, drug-traffickers, prison officers who have committed offences, etc.). According to Instruction No. 21/1996 of 16 December, the FIES is an administrative data base used to store data on prisoners' status within the judicial and prison systems, but which, according to the

authorities I consulted, in no way predetermines their security classification, affects their treatment rights or entails the imposition of living conditions different from those normally applicable under the regulations. According to the guidelines in force, the creation and maintenance of this data base is justified by the need for access to sufficient appropriate information on certain categories of prisoners, taking account of the offence they have committed, their prison career and their possible links with forms of organised crime. This information allows knowledge of prisoners' contacts and appropriate management of the prison regime and surveillance measures applied to them. The data base distinguishes between groups of prisoners according to the nature of the offences committed, their social repercussions, membership of criminal organisations and the dangers posed, dividing them up into five categories: particularly unstable or violent prisoners and those requiring application of a very strict prison regime (so-called "direct surveillance" prisoners); drug traffickers; members of armed gangs or terrorist organisations; former members of the security forces or prisons service; and, lastly, various groups of prisoners (designated as "special category" prisoners) such as those who have committed common law offences but linked to international crime and perpetrators of particularly violent sexual offences. In 2004, 76 prisoners were registered in the FIES.

43. Some non-governmental organisations contend that the FIES registered prisoners are subject to harsher living conditions, including systematic searches, deprivation of prison privileges, censoring of correspondence and so on. The prison authorities nonetheless informed me that registration in no way affects the prisoner's regime or classification and is merely a system for the administrative control of given categories of prisoners. In this connection, the information stored in the data base is intended solely for units authorised by the Directorate General of Prisons and, in any case, complies with the provisions of the Implementing Act on Personal Data Protection. The fundamental criterion is that the use made of this information should scrupulously respect the rules on protection of personal privacy. At all events, the Spanish Data Protection Agency and the prison supervisory judge (*Juez de Vigilancia Penitenciaria*) – and not just the prisons service authorities – should have access to the information contained in the FIES, its possible impact on the prisoner's treatment should be clarified, and its existence and characteristics should be governed by the Prisons Act and Prison Regulations.

### **The prison system in Catalonia**

44. As already mentioned, Catalonia is the only Autonomous Community to which jurisdiction for prisons has been transferred. However, this has not prevented the authorities from being confronted with difficulties similar to those encountered in the country's other prisons. The high prison population, overcrowding and the decline in prison conditions constitute major obstacles to the implementation of a policy aimed at rehabilitating prisoners. The prison population in Catalonia numbers 8,305 individuals, of whom 2,765 are foreigners.
45. In Catalonia I visited the Autonomous Community's largest and most modern prison, *Can Brians*. The facilities there can be regarded as appropriate and I did not see any overcrowding. As already mentioned, I was favourably impressed by the importance



attached to the prison's Psychiatric Unit, which was well equipped in terms of the material and human resources allocated to it. This is, indeed, an important aspect as some of the other prisons I visited presented serious deficiencies in this connection.

46. However, based on the information obtained from both the non-governmental organisations I met in Barcelona and the authorities themselves, the overall situation leaves much to be desired, as can be seen from the very difficult situation in the men's prison in Barcelona, which has a capacity of 900 places and houses 2,064 prisoners, and from the incidents at *Quatre Camíns* prison in which a number of prisoners suffered ill-treatment at the hands of prison officers, reflecting a state of considerable tension and unrest. The *Generalitat* provided me with detailed information –both during the visit and afterwards, by means of a letter from the (regional) Minister of Justice – on the main components of its strategic plan for the prison system, notably about the prisons' investment plan<sup>9</sup> for the renovation of Catalonia's prisons and an Infrastructure Master Plan for the 2004-2010 period. Besides, in order to respond to the serious deterioration suffered by Catalonia's prison system, the *Generalitat* (Catalan autonomous government) has foreseen some urgent action.<sup>10</sup> In spite of all this, no significant improvement in the situation is expected before 2010. Two more prisons are currently being built (*Can Brians 2* and a centre for juveniles at *Quatre Camíns*) and, under the above-mentioned Master Plan, work should begin on a third prison in *Lledoners* before the end of the year.
47. At the same time, the lack of a genuine human resources policy in the prisons service and certain trade unions' excessively strong influence among the prison officers (as came to light during the incidents at *Quatre Camíns* prison) complicate the already very difficult situation. I believe that reinforcement of certain components of the present system, such as the prison governors and the prison supervisory judge, can help to improve the situation and ease the current tensions. Lastly, attention must be drawn to the need for Catalonia to have its own prison regulations that would fill the current legislative void and take account of the many problems that afflict the prisons system. In this connection, the background paper drawn up at the request of the Department of Justice could be a good starting point. I take a positive view of the establishment of a Civic Prisons Board and a Social Board, consultative bodies comprising representatives of academic, judicial, political and trade union circles, as fora for dialogue between the Autonomous Community's prisons service and civil society.
48. The incidents at *Quatre Camíns* prison in April 2004, already mentioned above, offer a good illustration of the difficult situation in Catalonia's prisons. Those incidents were preceded by a major disturbance led by a number of prisoners, in which the Deputy Governor and other prison officers were seriously hurt. Subsequently, prison officers inflicted various injuries on 28 prisoners being transferred to other prisons. To be exact, on learning of the attack on their colleagues, a group of prison officers not on duty went to the prison, breaking all the rules, and apparently formed a human corridor through which the transferred prisoners were obliged to pass, thereby being subjected to the ill-

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<sup>9</sup> The strategic guidelines include a programme of investments in prisons, a management plan on human resources, the reorganisation of the CIRE, the preparation of the Prison Regulations and the awareness-raising of public opinion to the functions of the prison system.

<sup>10</sup> Urgent action dealing with human resources, security, treatment programmes and renewal of managing teams.

treatment complained of. The Department of Justice of the *Generalitat* carried out an internal investigation, in which various prison officers were questioned but it proved impossible to identify those physically responsible for the ill-treatment, and then shelved the matter without ordering any sanctions whatsoever. The case was transferred to the public prosecutor's office in order to identify any conduct possibly constituting an offence or a misdemeanour and is currently pending before Investigating Judge No. 3 in Granollers, but the outcome of the judicial proceedings is not yet known. I have to say that the Catalan authorities and institutions have acknowledged both the seriousness of this matter and the use made of unreasonable force. However, in the opinion of the Autonomous Community's Justice Minister, the incidents reported are necessarily linked to the overcrowding, sometimes to saturation point, in Catalonia's prisons, to the lack of an appropriate set of regulations for dealing with crises and to practices prevalent among certain prison officers who are trade union members, making it difficult for the prison management to exercise authority. This situation must not be repeated, and the Catalan prison authorities must take all the measures necessary to prevent a reoccurrence, safeguarding prisoners from physical harm at all times. In this respect, I hope that, with the expected co-operation of the Catalan prison authorities, the judge in Granollers will be able to clarify the facts and determine any criminal liabilities.

49. Regarding the number of suicides in Catalonia's prisons, eight were registered in 2004, and two so far in 2005. There is a suicide prevention programme, which a technical committee is responsible for implementing. As is the case with the prisons elsewhere in Spain, I must stress the need to adopt appropriate measures, in matters not just of restraint but also of prevention.

### **Young offender institutions**

50. Among other human rights related issues, certain non-governmental organisations informed me of their concerns about the situation in the young offender institutions, particularly in Andalusia and the Canary Islands. Since I did not visit any centre of this kind, for lack of time, I am unable to express a direct, properly formed opinion on the problems that may be encountered in this sphere. I nonetheless consider it necessary to place on record the concerns voiced to me.
51. As I said earlier, there are real concerns about conditions in the young offender institutions in Andalusia and suspected cases of ill-treatment.<sup>11</sup> I raised this matter during my meeting with the Autonomous Community's Justice Minister and was informed that the centres were subject to periodical inspections by juvenile court judges and prosecutors to check the conditions prevailing there and no significant complaints had been raised to date.
52. The *Diputado del Común* (the ombudsman for the Autonomous Community of the Canary Islands) recently added his voice to those expressing concern about conditions in the young offender institutions in the Canary Islands and reported a situation of

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<sup>11</sup> See, for example, the report by the Association for Human Rights of Andalusia *¿Qué está pasando en los centros de reforma de menores de Andalucía?* ("What is happening in Andalusia's young offender institutions?"), 24 February 2005.

institutionalised maltreatment necessitating urgent action.<sup>12</sup> He also drew attention to the high proportion of young people who ran away from the centres and the lack of information on their schooling during their stay there. His report also mentioned the overcrowded conditions in the centres and the problems caused by the transfer of their management to what are often private bodies, without conducting the necessary preliminary study of their human and material resources.

#### IV. ADMINISTRATION OF JUSTICE

53. The administration of justice is in the hands of the judiciary, which, in Spain, is completely separate from the executive and the legislative. The judiciary is composed of independent, irremovable and accountable judges and magistrates who are subject to the law alone<sup>13</sup>. The General Council of the Judiciary (Consejo General del Poder Judicial – CGPJ)<sup>14</sup> is the body that governs the judges. Its main functions are the selection, training and career development - appointments, transfers, promotions and discipline - of judges, whose independence it is responsible for protecting<sup>15</sup>. In the exercise of their jurisdictional authority, judges are independent of the courts and of the judiciary's governing body<sup>16</sup>.
54. It should be made clear for the purposes of this report that in Spain it is the judges and courts that are initially responsible for the protection of human rights. Any citizen can call on the judges and courts to protect the fundamental rights recognised in Articles 14 to 29 of the Constitution<sup>17</sup>. Judges and courts are required to disregard regulations or provisions not embodied in a formal Act or norm of equivalent value, if they deem them as contrary to the Constitution. If a judge considers that a provision which has the formal status of a legislative Act, which is applicable to the case being judged and on which the validity of the judgment depends, may be contrary to the Constitution, he/she (or the court) must raise a the matter with the Constitutional Court<sup>18</sup> and wait for its pre-judicial ruling before rendering the judgement on the case. A special procedure of a priority and summary nature is available to citizens who wish to call upon the courts to protect fundamental rights<sup>19</sup>.
55. The operation of the judicial system has been the subject of much legislation since the restoration of democracy, and of several major reforms intended to produce quicker and more effective justice. Powers regarding material means of justice have also been

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<sup>12</sup> See the *Diputado del Común's* annual report for 2004 on the subject of minors.

<sup>13</sup> Article 117 of the Spanish Constitution.

<sup>14</sup> Implementing Act 6/1985 on the Judiciary (Ley Orgánica del Poder Judicial - LOPJ) implements Article 122.1 of the Constitution and regulates, among other matters, the composition and functioning of the CGPJ, the exercise of jurisdictional authority, the professional status of judges and the operation of the courts.

<sup>15</sup> Section 14 of the LOPJ.

<sup>16</sup> Section 12.1 LOPJ.

<sup>17</sup> Article 53.2 of the Constitution. Section 7.1 of Implementing Act 6/1985 spells out this duty of effective protection by the judges and courts, which are bound directly by the provisions on fundamental rights and freedoms recognised by the Second Chapter of Title I of the Constitution (Articles 14 to 38 of the Constitution) as a whole.

<sup>18</sup> Article 163 of the Constitution; Section 6 of the LOPJ; Chapter III of the LOTC.

<sup>19</sup> Act 62/1978 on the legal protection of fundamental rights.

transferred to a number of Autonomous Communities.<sup>20</sup> High Courts of Justice have been set up in all Autonomous Communities.

56. Despite all this, one of the chief problems continuing to affect Spanish justice is excessive delays in decisions by the courts<sup>21</sup>. Over the past few years the European Court of Human Rights has continued issuing judgments condemning Spain for violating the right to trial within a reasonable time, guaranteed by Article 6 of the European Convention on Human Rights<sup>22</sup>.
57. Numerous attempts have been made to streamline the workings of the judicial system: from increasing the number of judges to the creation of single-judge administrative courts<sup>23</sup> and commercial courts,<sup>24</sup> and the reform of certain procedural laws<sup>25</sup>. In addition, the creation of the Court of Appeal of the National Court<sup>26</sup> and the assignment to the civil and criminal chambers of the High Courts of Justice of the Autonomous Communities of jurisdiction to hear appeals against the rulings of provincial courts<sup>27</sup> have undoubtedly helped to improve the situation<sup>28</sup>.
58. Regarding this point, I was glad to hear about the plan for the introduction in the near future of the Judicial Office ("*Oficina Judicial*"), which will replace the Judicial Registry ("*Secretaría Judicial*") in the course of a gradual process starting in 2006 and ending in 2008. The new Judicial Office will modernise and rationalise the staff, material and technological infrastructure surrounding judges, freeing them from the daily administration of the court and allowing them to concentrate exclusively on judicial work, hold trials and deliver judgments. It is anticipated that the introduction of the Judicial Office will be accompanied by a wide-ranging programme for the technological modernisation of the administration of justice, which will lead to the gradual replacement of paper by electronic format. The establishment plan for the Judicial Office will involve the reform of 21 laws and will cost over €100 million just for the area covered by State jurisdiction.
59. Spain has a fairly high level of litigation (4,255 cases per 100,000 inhabitants in 2003)<sup>29</sup>, while the ratio of professional judges remains at quite a low level (9.82 per

<sup>20</sup> Andalusia, Catalonia, Canary Islands, Galicia, Madrid, Navarre, Basque Country and Valencia.

<sup>21</sup> A number of judgments by the European Court of Human Rights (ECHR) have established violations of Article 6 of the Convention on the grounds of undue delay.

<sup>22</sup> Judgments by the ECHR in the case of González Doria, Durán de Quiroga dated 28 October 2003, López Sole and Martín Vargas of the same date and Soto Sánchez dated 25 November 2003. The case against Spain brought by Caldas Ramirez de Arellano, also on the grounds of undue delay, was rejected as inadmissible by the ECHR on 28 January 2003 because domestic remedies had not been exhausted. ECHR Judgments in the cases of Quiles of 27 April 2004 and Alberto Sánchez of 18 November 2004. Other applications on grounds of delay are pending before the ECHR.

<sup>23</sup> Act 29/1998 of 13 July regulating administrative proceedings, Section 8, implementing Sections 90-91 LOPJ.

<sup>24</sup> Through Implementing Act 8/2003 of 9 July on Insolvency Reform, amending the LOPJ.

<sup>25</sup> See the Act on Administrative Proceedings of 13 July; Act 1/2000 on Civil Proceedings of 7 January.

<sup>26</sup> Through Implementing Act 19/2003 of 23 December on reform of the LOPJ, Sections 64.1 and 64A.

<sup>27</sup> Section 73.3 of the LOPJ as amended by Implementing Act 19/2003.

<sup>28</sup> Annual report 2004 by the Ombudsman, pp 128 et seq.

<sup>29</sup> *European Commission for the Efficiency of Justice (CEPEJ), "European Judicial Systems - Facts and Figures"*, page 49. In the volume of litigation per 100,000 inhabitants Spain exceeds both France (3,711) and Germany (3,381).

100,000 inhabitants in 2003)<sup>30</sup>. In order to take remedial action against the insufficiency of professional judges, a Royal Decree providing for the immediate creation of 181 new posts of judges was recently submitted for opinion to the General Council of the Judiciary. In addition, the Ministry of Justice has announced that in 2006 it will create 250 new judicial units and 135 new posts of public prosecutor, which will certainly help to reduce the duration of lawsuits.

60. Mention should be made here of the recent publication of the preliminary draft organic act amending the Organic Act 6/1985 on the Judiciary with regard to the territorial organisation of the administration of justice. This provides for the establishment of "Community Courts" ("Juzgados de Proximidad"), which will be the first tier of judicial organisation in the cities where they are established and will have jurisdiction to try less important and complex civil and criminal cases, thus relieving the courts of first instance of many less important cases that delay or impede the exercise of their functions.
61. As regards criminal matters, reference should be made to the reforms of the Law on Criminal Procedure (LECr) carried out by means of Act 38/2002 of 24 October reforming the shortened procedure and creating special proceedings for the rapid judgment of certain offences.
62. As said above, Spain is a party to the United Nations International Pact on Civil and Political Rights (IPCPR), Article 14.5 of which recognises the right of any person subject to a criminal conviction to have the judgment and penalty imposed submitted to a higher court, in accordance with the law<sup>31</sup>. The United Nations Commission on Human Rights has found on five occasions - two of them in 2004<sup>32</sup> - that Spain has violated the right established in the said Article 14.5 IPCPR, since the possibility, provided for under Spanish law, of entering a special appeal on a point of law against the conviction does not amount to a full reconsideration of the case. Spain is thus persisting in a situation that openly infringes its international human-rights obligations. This situation must cease immediately. Following my visit, I received information about the initiative launched by the Government, and specifically by the Minister of Justice, to bring forward the submission to the Spanish Parliament of a bill on the review of convictions.
63. This initiative should be regarded favourably for two reasons. First of all, because it complies with international human-rights obligations. And here I trust that publication of the new act will ease the way to Spain's accession to Protocol No 7 to the European Convention on Human Rights, which guarantees, *inter alia*, the right, in Council of Europe member States, to have a sentence or conviction reviewed. Secondly, we should be pleased at the positive consequences that the introduction of a full second instance in

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<sup>30</sup> CEPEJ, "European Judicial Systems - Facts and Figures", page 35. The figure indicated is somewhat lower, for example, than that for France (10.37) and much lower than for Germany (23.5).

<sup>31</sup> In addition, Spain is a party to the optional Protocol to the IPCPR and has recognised the competence of the United Nations Commission on Human Rights (UNCHR) to receive individual communications from persons coming under the jurisdiction of the Spanish state and claiming to be victims of a violation of the rights set out in the IPCPR.

<sup>32</sup> 82<sup>nd</sup> session of the UNCHR, 18 October-5 November 2004, decisions CCPR/C/82/D/1073/2002 and CCPR/C/82/D/1101/2002.

criminal matters could have on the reduction of backlogs in the administration of criminal justice. Delay in the adoption of judicial decisions particularly affects the Supreme Court, which, in addition to hearing cassation (on points of law) appeals against rulings by the National Court and the High Courts of Justice, is nowadays still competent to examine cassation appeals directed against criminal rulings issued in first instance by all 50 Provincial Courts of Spain. Many of the latter appeals are not true “cassation” appeals, being only disguised second-instance appeals whose examination impede the normal operation of the Supreme Court and hence the routine and timely exercise of its powers. Providing for the possibility of lodging a criminal second-instance appeals against all convictions could therefore help to reduce the backlog of cases, thus precluding the Supreme Court from having to deal with a large number of “cassation” (on points of law) appeals that are no such thing. Mention should also be made of a draft bill, announced by the Ministry of Justice after my visit, which amends the form, nature and conditions for the lodging of an appeal on points of law in the criminal, civil and administrative-proceedings branches with the aim of limiting its scope and consequently lightening the Supreme Court’s workload.

64. Despite the numerous partial reforms which it has undergone and others that are being adopted, a general consensus exists on the compelling need to draft a new Law on Criminal Procedure to replace the extremely out-of-date act of 1882. The Minister of Justice has personally informed me of his emphatic wish to carry out this highly important reform between 2004 and 2008 during the life of this Parliament and has said that preparations have already started. I trust that, in addition to streamlining criminal proceedings, the new act will deal with several aspects of Spanish criminal procedure incompatible with requirements under European human-rights rules. For example, the European Court of Human Rights has expressed the view<sup>33</sup> that Spanish legislation on wiretapping<sup>34</sup> is contrary to the right to privacy recognised by Article 8 of the European Convention. In the absence of a new legal framework to govern the use of wiretapping, Spain is breaching its international obligations regarding human rights and could again be condemned by the ECHR on the same grounds.
65. It is likewise to be hoped that advantage will be taken of the opportunity presented by the drafting of the new LECr to reduce the maximum duration of pre-trial detention, which, as I have said above (see Chapter III), is excessive from all points of view<sup>35</sup>. The measures to shorten the duration of criminal trials will therefore undoubtedly help in practice to reduce the duration of pre-trial detention as well. It is also certain that constitutional case law has considerably limited the cases in which pre-trial detention has to be imposed or maintained<sup>36</sup>. However, I must stress that keeping someone in detention for a long period of time (up to four years) without a conviction is, in my opinion, difficult to reconcile with the right to liberty guaranteed under international human-rights law and specifically by Article 5§3 of the Convention.

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<sup>33</sup> ECHR Judgment of 18 February 2003 in the Prado Bugallo case.

<sup>34</sup> Section 579 LECr.

<sup>35</sup> Under current rules (Section 504 LECr), the duration of temporary detention may be up to four years (two years possibly renewable by the court for a further two years).

<sup>36</sup> Constitutional Court judgments 40/87 and 71/94.

66. Reform of the LECr should also settle a longstanding question, namely the absence from the Spanish judicial system of grounds for a review of trials in which, according to the European Court of Human Rights, there had been violations of the fundamental guarantees underpinning the right to a fair trial. The rulings issued as the result of such trials are final and continue, through the application of the *res judicata* principle, to have legal force, despite the Strasbourg ruling. This legal vacuum means that the necessary domestic consequences of findings of violations by the ECHR are not fully drawn, thus impeding the full enforcement of those judgements and reducing their impact as a corrective. There is no doubt that the Constitutional Court has reduced<sup>37</sup> the consequences of this gap, as far as the criminal procedure is concerned, by ordering the release of persons imprisoned following conviction at a trial declared by the ECHR to be contrary to the Convention. Even so, it is desirable that this question be settled once and for all by legislation, as the Spanish authorities recognised during my visit.

## V. THE CONSTITUTIONAL COURT

67. The Constitutional Court is a cornerstone of the institutional architecture erected by the 1978 Spanish Constitution. Endowed with extensive powers under Title IX of the Constitution, the Constitutional Court has made a decisive contribution to the removal from the Spanish legal system of rules and practices contrary to constitutional values and incompatible with an advanced democratic society, as proclaimed in the preamble to the Constitution itself. Since its creation in 1981, it has been the responsibility of the Constitutional Court, amongst other things, to ensure that legal norms remains within the limits set out in the Constitution, to assist the judiciary in applying the laws according to the letter and spirit of the Constitution and to promote the proper functioning of the State of autonomous communities organised by Title VIII of the Constitution by resolving disputes concerning jurisdiction between the central authorities and the autonomous authorities.<sup>38</sup>
68. Legal opinion has fully recognised the decisive contribution made by the Constitutional Court to the adaptation and modernisation of criminal proceedings - which are governed by the century-old Act on Criminal Procedure of 14 September 1882 still in

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<sup>37</sup> Constitutional Court judgment 245/1991.

<sup>38</sup> In addition to being governed by the provisions of the Constitution, the functioning of the Constitutional Court is regulated by the Organic Act on the Constitutional Court (LOTC), of 5 October 1979, which implements and supplements the said constitutional provisions. The LOTC has been the subject of numerous amendments introduced through a number of subsequent organic acts which have given it new powers, eg ImpleLO 4/1985 on international treaties and LO 7/1999 on local self-government. In addition, LO 8/1984 amended the procedure for appeals concerning objections on grounds of conscience, LO Act 6/1988 amended the procedure on decisions concerning the inadmissibility of “*amparo*” (protection) appeals and LO 1/2000 introduced new provisions on the examination of questions of unconstitutionality.

force – in order to comply with constitutional requirements, by requiring respect, on the basis of abundant case law, for the guarantees of a fair trial and for the basic rights of persons detained, charged, tried and convicted of a crime<sup>39</sup>.

69. For the purposes of this report, the Constitutional Court's function of protecting fundamental rights and freedoms must be stressed. Title I of the Constitution recognises a wide range of rights and freedoms which all public authorities are obliged to observe. Article 53§2 of the Constitution grants all citizens the right to demand, by means of a so called "*amparo*" (protection) appeal, that the Constitutional Court safeguard the rights and freedoms set out in Articles 14 to 30 of the Constitution.
70. By exercising its various powers - particularly through its case law in connection with the extremely numerous *amparo* appeals lodged from 1981 to the present time - the Constitutional Court has been able to rectify at national level certain situations of failure to uphold human rights on the part of the Spanish public authorities, thus ensuring that the Spanish State does not neglect its international obligations<sup>40</sup>.
71. Despite the legal measures duly adopted (LO 6/1988, already mentioned, which allowed for quicker treatment of inadmissible *amparo* applications), despite higher productivity<sup>41</sup> and measures for internal reorganisation and work rationalisation adopted imaginatively by the Constitutional Court in order to deal with the avalanche of cases brought to its examination, there is absolutely no doubt that the situation of this High Court is near collapse. As the Government has been told repeatedly by the successive Presidents of the Constitutional Court and as I was informed by its current President, Maria Emilia Casas, during our interview, the present ease of lodging *amparo* appeals on grounds of unconstitutionality is leading to an uncontrolled backlog of cases pending, with consequent delays and deterioration in working conditions. For example, at the end of 2004 there were 7,580 *amparo* appeals waiting to be declared admissible, together with the more than 1,000 admissible appeals awaiting judgment in plenary session or in a Chamber<sup>42</sup>. Furthermore, this situation obliges judges to spend

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<sup>39</sup> See, among many other works, Francisco Ramos Méndez, "*El proceso penal, lectura constitucional*", Bosch, 1991.

<sup>40</sup> This internal-filter function may partly explain the comparatively small number of applications and judgments against Spain at the ECHR. In 2004, for example, out of the 40,943 new applications received by the ECHR, only 679 were against Spain. During the same year 2004, the ECHR delivered five judgments against Spain. See *European Court of Human Rights, 2004 annual report* pp 154 et seq. A study of the statistics for previous years confirms the small number of cases brought before the ECHR in respect of Spain.

<sup>41</sup> In 2004 the Constitutional Court issued 7,823 rulings, an increase of 7.8% compared with 2003 and nearly a thousand more than those issued in 2000 (6,998 rulings). The Constitutional Court has to cope with a very high saturation level owing particularly to the steady increase in the number of *amparo* appeals, which account for over 98% of the appeals lodged with it. Thus, compared with the 6,901 appeals lodged in 2000, of which 6,762 were *amparo* appeals, there were 7,951 appeals in 2004, of which 7,814 were of *amparo*. See "*Tribunal Constitucional, Memoria 2004*", pages 208 et seq. The figures are still more eloquent if compared with those for 1990, when 3,019 cases were recorded and 2,225 rulings were issued concerning *amparo* appeals. In 1982, the first complete year of operation of the Constitutional Court, 423 cases were lodged. (See Tribunal Constitucional, "*Estadística 1980-1991*") and 166 rulings were issued on *amparo* appeals.

<sup>42</sup> 505 cases awaiting court judgment and 510 cases awaiting judgment in plenary session.



most of their time rejecting appeals that will not be proceeded with - 95% of the *amparo* appeals - instead of settling the important substantive questions raised in appeals and questions of unconstitutionality, disputes about jurisdiction and by the 5% of admissible *amparo* appeals.

72. In my view, it is therefore essential for the Government to recognise the situation complained of by the Constitutional Court and, after carrying out the appropriate consultations, proceed as rapidly as possible with an Organic Act amending the conditions for filing *amparo* appeals so as to retain their usefulness as a mechanism for protecting fundamental rights without impeding the Constitutional Court in the proper exercise of its important powers<sup>43</sup>. Following my visit, the Minister of Justice announced the presentation to the Council of Ministers of the draft Organic Act on reform of the provisions concerning *amparo* appeals contained in the LOTC, an initiative that can only be welcomed.

## VI. IMMIGRATION AND ASYLUM

73. In Spain, unlike most countries of Western Europe, immigration is a fairly recent phenomenon. In just over two decades, Spain has gone from being a country of emigrants to being a net receiver of immigrants. This has produced many profound changes on both the legislative and social levels. In Spain, as in other European countries, it is becoming difficult to strike the right tension-free balance between orderly regulation of the increasing migration flow, control of illegal immigration and the progressive integration of immigrants into the economic, social and cultural life of the host country. It should not be forgotten that behind illegal immigration there frequently lurks an infamous trade which moves around enormous amounts of money and which must be combated in a co-ordinated way on a Europe-wide and not just national basis. According to the latest statistics, the foreign population in Spain with a residence permit is a little over 2 million, ie 5% of the total population. To this must be added foreigners in an illegal situation, who number between 800,000 and 1 million persons (although there are no official figures), before the process of normalisation. The bulk of the immigrant population is composed of Latin American, European and African citizens.
74. The rules on aliens and immigration are contained essentially in the Organic Act of 11 January 2000 on the rights and freedoms of foreigners in Spain and their social integration and in the Regulation of 11 January 2005. The various reforms have been designed to meet the need to treat immigration as a structural fact that has transformed Spain into a country of destination for migration flows. Another factor has been the necessity to implement Spain's international commitments in this field, among them

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<sup>43</sup> It should be borne in mind that in constitutional justice the policy of increasing the number of bodies or posts adopted in other fields (the ordinary justice system, to give only one example) is not feasible. By its very nature, the Constitutional Court is a single centralised body of a necessarily restricted composition. Its membership (12 judges) may not be altered for legal reasons -being defined in the Constitution (Article 159) - and for practical reasons since this would seriously prejudice its nature, functioning and effectiveness.

the adaptation of domestic legislation to European Union decisions. Here it should be repeated that immigration and asylum problems must be tackled at European and not just national level. It is therefore urgently necessary to establish Europe-wide criteria in this field.

75. The positive aspects of current Spanish regulations include the following: a guaranteed right to legal assistance<sup>44</sup> and free interpretation for persons subject to expulsion proceedings; the possibility of granting a residence permit (although limited to a year) on humanitarian grounds to, amongst others, foreigners who have been victims of racial or xenophobic discrimination or gender violence (in the latter case, there must have been a conviction); immunity from responsibility and expulsion for persons in an illegal situation who have co-operated with the authorities in identifying human-trafficking networks; and the existence of guarantees concerning the repatriation of unaccompanied foreign minors. The last-mentioned case applies only if there is a genuine possibility of the minor being reunited with his family or of proper supervision by the juvenile welfare services of the country of origin. Repatriation will not take place in cases of danger or risk to the minors' well-being or where there is a risk that they or their family will be persecuted. Finally, a residence permit is granted nine months after the minor has been put in the care of the juvenile welfare services.
76. However, the aliens and immigration legislation has been criticised in a number of quarters on the grounds, amongst others, that the rights of assembly, association, demonstration, joining a trade union and striking are limited to foreigners with a residence permit or leave to stay in Spain. There have also been arguments about measures that must be observed by non-EU foreigners without residence permits in connection with the municipal registry, mainly concerning the difficulty of being included on it and the requirement for periodical renewal. Criticism has been particularly bitter about access by the State police to municipal registries as this often causes immigrants to fight shy of registration for fear that irregularities relating to their stay in Spain will come to the notice of the police. However, it is necessary to emphasise the importance of inclusion on the municipal registry, as this is an essential requirement if foreigners are to be able to use the basic social services and health system. Use by the police of information in the municipal registry to penalise an illegal immigrant in practice deprives that person of access to health care and welfare assistance, with resulting harm to the basic living conditions of the immigrant and his family. Finally, the current legislation has been blamed for tightening the economic penalties applicable to companies that carry passengers lacking the necessary documents for entry into Spain with the exception of those filing an admissible asylum application.
77. In spite of criticisms, the imposition of heavy penalties on carriers appears a reasonable measure in cases where there are no potential asylum seekers. I completely agree with the systematic prosecution of people traffickers, subject to the cautions mentioned.
78. Mention must be made of the government project to set up a Council for Equal Treatment and Non-Discrimination following the transposition into Spanish law of

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<sup>44</sup> The Constitutional Court reaffirmed in its judgment of 23 May 2003 the right to legal assistance enjoyed by all foreigners regardless of their administrative situation and on the same conditions as Spaniards.

Community Directive 43/2000, whose purpose is to watch out for situations of possible discrimination against immigrants, particularly in the fields of employment and education. An Observatory on Racism and Xenophobia has also been set up but its staffing and terms of reference have still to be decided.

### **Retention Centres for Foreigners**

79. Entry by a foreigner to a Retention Centre for Foreigners (RCF) has to be ordered by the investigating judge of the place in which the person in question had been detained, at the request of the governmental authority which itself or through its agents had agreed to such detention, within 72 hours of detention occurring. The stay at an RCF may in no case last longer than 40 days, after which the detainee must be released. An RCF is not a detention centre (the regime is therefore not that of a prison) and foreigners sent there accordingly enjoy all rights, which are unaffected by the detention measure. Minors may not enter such centres unless a judge so authorises following a report to this effect by the Attorney General's Department and unless their parents or guardians in the same centre state their desire to remain together and there are wards or rooms that ensure family unity and privacy. I saw no unaccompanied minors at any of the centres visited.
80. During my journey, I visited three FHCs, Moratalaz in Madrid, La Verneda in Barcelona and the one in Algeciras. Members of my Office visited the El Matorral Centre in Fuerteventura. Generally speaking, the physical conditions encountered at the Moratalaz and La Verneda centres left much to be desired and urgently required substantial improvement. Both centres suffered from severe overcrowding. Cells were dark and poorly ventilated and had no washbasins, lavatories or showers of their own. Common areas were small and there were few facilities for any type of exercise. The Moratalaz Centre was replaced at the end of June by a new centre on the premises of the former prison hospital at Carabanchel, which I did not manage to visit but where, according to information given me, conditions are satisfactory. The La Verneda Centre, which suffers from overcrowding very similar to that at Moratalaz and where certain incidents occurred in December 2004 (a number of internees refused to remove their food trays because they were about to be expelled), will be replaced in February 2006 by another centre in the Barcelona Free Zone, which will have more suitable facilities. I was also informed that the Valencia, Murcia, Málaga and Las Palmas centres are to undergo conversion and improvement. Regarding the El Matorral Centre in Fuerteventura, the biggest in Spain with a capacity of 1,080, this has proper modern facilities. It replaced the former airport terminal whose wretched conditions had been repeatedly condemned by NGOs and the Ombudsman. There is no RCF in Lanzarote at the moment though it is planned to open one shortly. Illegal immigrants are transported to the airport hangar, which has been fitted out as a removal hall. There were no foreigners there when members of my Office visited it.
81. During my visit to the RCFs, I could not fail to notice a certain prison-type approach to the way they were organised (the Algeciras Centre is, in fact, situated in a former prison) and the priority given to security over all other considerations. This view obviously does not apply to all centres and the situation at some of them (for example, those in Madrid and Barcelona) will substantially improve following the transfer to

new premises. In any case, it must not be forgotten that detention is a precautionary, preventive and exceptional measure that should in no case be regarded as restricting the foreigner's fundamental rights, apart from the right to walk out.

82. One of the chief problems arising in this area is what happens to foreigners who, after the maximum 40-day period of detention has elapsed without the authorities being able to expel them - because of lack of documents and of co-operation by the consulates in identifying the persons concerned, together with the absence of bilateral agreements with Spain on readmission- have to be released and may not be re-detained on the same grounds. As the Spanish authorities themselves recognised, this leads to large pockets of immigrants without documents illegally present on Spanish territory. Although certain NGOs and the social services of the Autonomous Community concerned usually give them some form of help, such as immediate assistance and care in the network of temporary places in hostels (where they are provided with board, lodging, clothing, health care and advice), these are palliative measures that do not solve the basic problem.
83. This situation is producing serious consequences at humanitarian and social levels and represents a grave problem of concern to the State itself, which cannot remain indifferent to the existence on its territory of a group of foreigners in an illegal situation (in 2004 the number of persons released was 8,716 and in the period of 2005 prior to the visit was around 3,000). The magnitude of the problem may vary but probably increases with the passage of time. This group is composed of immigrants without documents - except for a certificate showing that they were detained for 40 days in an RCF - whose whereabouts and activities once they have been released are officially unknown. The situation of such persons is paradoxical and surprising from a strictly legal viewpoint since it is, in fact, the State itself that is releasing into the national, and possibly European, public space a large number of persons without documents. From the humanitarian viewpoint, the situation is a tragic one. We are dealing with people who cannot make use of the available opportunities of regularising their situation. This means in practice that they cannot obtain a normal job and they therefore become ideal candidates for swelling the ranks of illegal workers who are easy to exploit in the black economy. In addition, it does not seem that the normalisation process that ended on 7 May 2005 will do much to regularise this group's situation since most members of the group lack identity documents or good-conduct certificates. I repeatedly emphasised the importance of this question to the Spanish authorities, suggesting that some formula must be found that would enable these foreigners to be given documents, if only provisional ones. One solution might be to issue a general health card (as in Andalusia, for example) that would not require its holder to be included on the municipal registry, as occurs in the other Autonomous Communities (registration is a formality which many immigrants whose status is irregular shy away from). Furthermore, welfare expenditure must be increased so as to cater properly for such people and ways sought of enabling them to gain a foothold in certain areas of employment, thus making their situation more dignified.
84. Something else that surprised me was the lack of information which detained foreigners had about their situation. Ignorance of the rules on aliens, immigration and asylum is widespread and many foreigners are unaware of their rights and duties. Many of the

internees to whom I spoke mentioned their dismay at not knowing what their situation was and what legal mechanisms were available for regularising it. We must remember that most of these persons have reached Spanish territory after many hardships and I consider that they should be given all necessary information and advice as far as existing legislation allows. On this point, the difficulties of obtaining legal assistance give cause for particular concern, as I was able to see for myself during my visit to the Algeciras Centre. An additional problem is the small number of duty staff from the Bar Associations available to deal with aliens-related matters, together with the absence of special training for lawyers in the field of aliens, immigration and asylum. For example, at Fuerteventura, although the Aliens Team of the Bar Association officially has 32 lawyers, the duty shift responsible for dealing with immigrants and asylum seekers consists of only three lawyers, which is clearly insufficient for providing a proper service to all foreigners reaching the coast of the island. The situation is not particularly serious at the moment after the drastic drop in the number of “*pateras*” (small, extremely fragile wooden boats which, heavily overloaded, transport illegal immigrants especially at night, with a high risk to their lives, from the African coast to the Iberian Peninsula and Spanish islands) but it could worsen. Communication between lawyers and their clients is also difficult because many of the latter express themselves in regional languages and dialects and are ignorant of more widely used languages like English, French or Arabic. Some detainees complained of the limited time spent by lawyers on exploring the details of their cases. This situation could be improved by having more duty staff, proper training of lawyers and individualised non-routine treatment of the various cases.

85. A question which I feel must be clarified is that of the criteria for access to the FHCs by NGOs. Under the existing rules, it is the Ministry of the Interior’s responsibility to provide health assistance and social services at the centres, with such assistance being channelled through other ministries or public and private non-profit entities. Most of the organisations base their access to the internment centres on agreements with the authorities and usually there are no difficulties. However, in the particular case of the El Matorral Centre in Fuerteventura, there appears to be no clear criterion and members of my Office were informed that one organisation had been repeatedly denied access without being told the reasons<sup>45</sup>. This appears to be contrary to the rules governing the operation and rules of procedure of the RCFs whereby “the Administration will in particular facilitate collaboration with institutions and associations offering assistance to foreigners”<sup>46</sup>.

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<sup>45</sup> This was the Spanish Commission on Aid to Refugees (Comisión Española de Ayuda al Refugiado - CEAR).

<sup>46</sup> Ministerial Order of 22 February 1989 on the operating rules and rules of procedure of Foreigners’ Holding Centres.

### **The return and deportation procedure**

86. Although the deportation procedure and the guarantees that should surround it are clearly spelt out in both the Aliens Organic Act and the Aliens Regulation, certain cases of deportation and return have apparently occurred in which not all the legal requirements were strictly observed. I was informed, in particular, about shortcomings regarding legal assistance and the grounds given for deportation decisions. Special attention should be given to this matter. Here I must state that the Aliens Regulation establishes the right of the person concerned to legal assistance (free of charge where the person lacks means) and to the services of an interpreter. He or she is also entitled to be told the reasons for the deportation decision and to be informed about possible remedies. However, I am concerned that the principle of “*non-refoulement*” enshrined in international rules - under which no-one may be deported or returned to a country where his or her life or liberty would be in danger on grounds of race, religion, nationality, membership of a specific social group or political opinions - has not been included in the new Regulation.

### **The normalisation process**

87. Because of the large number of foreigners in an irregular situation and the need to put an end to illegal work, the Government decided to carry out, between 7 February and 7 May 2005, a collective regularisation process - involving the granting of residence and work permits - for foreign workers who had been in Spain for at least six months before the Aliens Regulation came into force, who had a valid contract for at least six months’ employment and who met a number of basic requirements (inclusion on the municipal registry, absence of a criminal record). According to statistics supplied by the Immigration and Emigration Department, 690,679 applications were presented before the offices of the social security and in other governmental offices made available for that purpose. By the end of August 2005, 592,192 applications for regularisation had already been dealt with. Nearly 100,000 were still awaiting a decision because additional documentation was needed from the applicant. According to the information available, employers have already registered 435,990 immigrant workers with the social security authorities, which is equivalent to 95% of the regularisation applications approved to date by the authorities.
88. The number of foreign workers who are members of the social security system is currently 1.6 million, ie 8.7% of the total number of working contributors. This latest large-scale regularisation of the status of immigrants has brought most of the work being done on the black economy to the surface and has ended the unworthy situation of people working illegally under conditions that favour disregard of rights and employment exploitation. It has also strengthened the social security system through new contributions that represent, as a guide, some €90 million a month extra in payments from employers and workers.
89. The normalisation process undoubtedly constitutes a significant effort by the Administration to control and regularise illegal immigration and particularly to put an end to illegal working and the unacceptable situations of exploitation to which it leads.

### **Unaccompanied foreign minors**

90. The question of unaccompanied foreign minors raises a specific, twofold and particularly complex problem - alien status and the fact of not yet being of age - and calls for suitable protection measures on the part of the public authorities. We are dealing here with a situation that affects foreign minors who are not under the effective care of an adult who is legally responsible for them, whether or not they are accompanied by an adult when they reach Spanish territory. According to the information I received, this situation arises mainly in the Autonomous Communities of Madrid and Catalonia, the Valencian Community, the Canary Islands and the Autonomous Cities of Ceuta and Melilla. The majority of foreign minors arriving in Spain are adolescent males (between 15 and 18 years of age) of Moroccan or sub-Saharan origin. In nearly all cases, their aim is not to stay in hostels for minors but to find a job. The legal framework for foreign minors is the Organic Act on the Protection of Minors of 15 January 1996 and the aliens legislation. Under-age asylum seekers are covered by the rules for asylum seekers.
91. This group is subject to special risks as regards their legal and social situation. While the reception system can swing into effective action in the case of immigrant minors who arrive in the company of their families, for unaccompanied minors the difficulties of social and cultural integration and proper personal development are enormous despite the efforts made by public authorities, particularly the authorities of the autonomous communities.
92. Some of the difficulties I was able to observe arise from a lack of co-ordination between the various autonomous authorities, which sometimes follow different and even opposing policies and practices. An example of this is the disparity in applying the rule contained in the Aliens Regulation whereby every unaccompanied foreign minor must be provided with documents within nine months after being placed in the care of the juvenile welfare services. In addition, poor co-operation between the autonomous authority and the central administration - responsibility for these minors is shared, with the autonomous authority being responsible for protection and the central administration for the minors' repatriation and documentation - is liable to impede the search for satisfactory solutions for these minors. Finally, mention should be made of the reluctance of certain representatives of the juvenile welfare services, and of certain public prosecutors and judges, to launch the necessary protection measures.
93. One problem is with identifying minors as such, in other words, determining their age. The normal practice in Spain is to use bone examinations, which have reliability problems that have been highlighted not only by NGOs but also by the United Nations High Commission for Refugees (UNHCR) and the Spanish authorities themselves. The criticisms of such examinations basically concern their inaccuracy, the scarcity of professionals properly trained, and the lack of proper supervision throughout the process. There is also a problem of lack of co-operation by the consular authorities of

the country of origin as regards genuine identification of minors, which leads to documentation that is often photocopied and open to forgery. The logical result is to leave minors without protection and to increase the risk of their ending up as victims of human -trafficking networks.

94. At this point, it is essential to refer to the Attorney General's Instruction of 26 November 2004 on the legal treatment of unaccompanied foreign minors, which replaces a previous Instruction<sup>47</sup> which had received strong and justified criticism because it did not include the protection of unaccompanied minors over 16 years of age who reached Spanish territory<sup>48</sup>. In contrast, the new Instruction, which follows international rules on the subject (Convention on the Rights of the Child and European Charter on Children's Rights), is based on the premise that minors' interests prevail over any other legitimate interest. It states, moreover, that the Attorney General is the person specifically competent to protect minors' rights. The principles to be observed by public prosecutors are: the presumption that any foreigner who has not reached the age of 18 is a minor; if a foreigner without documents is a minor or there is some doubt whether he or she is a minor, he or she must be placed in the care of the juvenile welfare services; finally, repatriation must not constitute an absolute objective and other factors such as the minor's life or physical and psychological well-being must also be taken into account.
95. The agreements which Spain has entered into with other countries concerning the repatriation of unaccompanied minors should be reviewed to bring them into line with the new aliens rules<sup>49</sup>. There must also be a strengthening of measures to facilitate the return to their countries of origin, under decent conditions, of minors who today are sent to Spain by families made desperate by want, in a quest for earnings of any type or of relations who have already emigrated, who go begging on behalf of third parties that get rich by exploiting them, or who enter the labour market early in circumstances of exploitation and precariousness. I must refer here to the information supplied to me by the Andalusian autonomous authorities, on the occasion of my visit to the "*Nuestra Señora del Cobre*" Centre for Unaccompanied Foreign Minors in Algeciras, concerning the initiatives launched in co-ordination with the competent Moroccan authorities, under which training will be offered to minors in order to facilitate their return and subsequent integration in the employment market of their country of origin. Having visited the centre and been impressed by the dedication and expertise of its staff, I can only say that I find this an important and useful initiative. Efforts must also be made to encourage the creation of reception centres, to be constructed with the co-operation of the Spanish Government, in the countries from which most unaccompanied foreign minors come. This would reduce the large number of minors who come to Spain and avoid the saturation of certain centres. The recent decision by the Moroccan Government to construct, with Spanish help, reception centres for minors from that country repatriated by the Spanish authorities is a step forward.

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<sup>47</sup> Instruction by the Attorney General of 23 October 2003.

<sup>48</sup> See "*Derechos de los menores que pretendan entrar sin documentos en España*", report by SOS Racismo, 28 November 2003.

<sup>49</sup> In this connection, the Memorandum signed with Morocco in December 2003 may be regarded as a suitable guideline. This document establishes a commitment to give minors the necessary protection and guidance and to facilitate their rapid identification and documentation.



96. During my visit, I went to two centres for unaccompanied foreign minors, one for initial reception at Moratalaz (Madrid) and the Nuestra Señora de Cobre Centre in Algeciras already mentioned. Members of my Office subsequently visited centres in Fuerteventura, Lanzarote and Ceuta. Conditions at those centres are generally satisfactory, with the exception of the Llanos Pelados Centre in Fuerteventura to which I refer below. I was able to see that the minors there are well looked after and receive the necessary care. Basic necessities (board, lodging and health care) are covered satisfactorily. All minors follow some type of schooling inside or outside the centre and many of them keep in regular touch with their families. Generally speaking, I felt that the juvenile welfare services in the Autonomous Communities which I visited operate reasonably well, although in some of those communities there are insufficient centres to provide a proper reception for all minors who arrive, so that many of them are sent on to better equipped communities, chiefly Madrid.
97. To sum up, we noted that the above Autonomous Community, itself already overburdened because of the capital's attraction, also has to put up with the consequences of the lack of reception centres for unaccompanied minors and with the inadequacy of those in the neighbouring Autonomous Communities, as in the case of Castilla la Mancha, the police authorities of which frequently refer children in this situation to the Madrid centres.

#### **Asylum and refuge**

98. To clear the ground, it is important to point out that the number of asylum applications in Spain is very low (with the exception of Madrid and Ceuta) and that only a small percentage of them are granted. According to UNHCR data, 5,401 asylum applications were submitted in 2004, of which 1,370 were found admissible and only 177 granted. For the period January to May of this year, the figure is 2,185, of which 696 were declared admissible. According to that Agency, this can be explained by, amongst other reasons, the difficulties of obtaining asylum compared with the greater ease of obtaining a residence permit or leave to stay; the fact that Spain is a relatively new destination for asylum seekers in comparison with other countries in its vicinity; and, finally, the usual difficulties accompanying the lodging of an asylum application, such as lack of information and lack of access to legal assistance.
99. Asylum raises two fundamental problems: arrival and reception of the asylum seeker, and legal assistance. While access to the asylum procedure usually presents no problem and the authorities are favourably predisposed, legal assistance causes considerable difficulties, as I was able to see for myself. This situation is widespread at places like Fuerteventura, Lanzarote, Cádiz, Algeciras, Tarifa, Ceuta and Melilla where there are a large number of clandestine immigrant arrivals. When they arrive, these immigrants lack legal advice and qualified legal assistance and, as a result of their illegal entry, are often sent to RCFs after deportation proceedings have been started against them. The chief problems arising during administrative processing of the asylum application are the availability of legal assistance, its poor quality, notification concerning admissibility and the availability of interpreters.

100. The question of stowaways, ie individuals who hide aboard a ship with a view to illegally entering the country of stopover or destination, has aroused the concern of several NGOs, the UNHCR, the Bar Association and the Ombudsman, particularly as regards access to legal assistance. No solution has yet been found to the problem of immediate access to legal assistance for these persons, whether or not they apply for asylum. Access to such assistance is allowed only when the stowaway has clearly stated his or her intention of requesting asylum in Spain. In practice, however, it is very difficult for this to happen because of ignorance of the language and of asylum legislation. In his Recommendation of 28 May 2001, the Ombudsman argued that legal assistance should be provided to stowaways as soon as their existence became known, irrespective of whether they stated their intention of entering Spain or applying for asylum. Nevertheless, the Instruction by the Office of the Government Delegate for Alien Affairs of 9 April 2002, still in force, provides for access to legal assistance only when the stowaway expresses his desire to enter Spanish territory or requests the protection of the state. This places the stowaway in a situation of obvious defencelessness because of his inability, for the reasons already mentioned, to give clear expression to his desire to request asylum, so that the authorities accordingly conclude that no such desire exists. It therefore seems a good idea for the Spanish authorities to consider amending the above Instruction and ensure that stowaways have access to legal assistance in all circumstances. Cases like that of Algeciras Port or the vessel "*Lamda*" in Sagunto Port, in which the concept of border post was not clearly defined, have given rise to situations in which stowaways were defenceless<sup>50</sup>.
101. The transposition of the Community Directive of 29 April 2004 laying down minimum standards on the requirements and status that may be chosen by citizens of third countries and stateless persons will require revision of the current asylum legislation dating from 1984. In principle, inclusion of the Community rules will lead to a strengthening of the level of protection for asylum seekers and refugees.

### **Case of the Canary Islands**

102. The cases of the Canary Islands and Ceuta and Melilla call for special treatment because, together with Andalusia, we are talking about some of the main ports of entry for illegal immigrants. As mentioned above, members of my Office visited the islands of Fuerteventura and Lanzarote as well as Ceuta, where, despite the undeniable efforts of the NGOs, international agencies such as the UNHCR and the authorities, clear cases of violation of the aliens and asylum regulations continue to occur, particularly as regards information to the immigrant, legal assistance and return and deportation proceedings. I am fully aware that, like Andalusia, the Canary Islands and Ceuta have to deal with a migration pressure greatly exceeding that in the rest of Spain. Nevertheless, because of this it is absolutely essential that aliens and asylum/refugee legislation should be applied with scrupulous respect for the foreigner's rights. Here, implementation of the 2005-2007 Immigration Plan for the Canary Islands may be a

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<sup>50</sup> According to the Ombudsman's report for 2004, the provisions of the Instruction on the treatment of foreign stowaways only started to be carried out in Algeciras Port when the vessel moved into the port's dock but not when it remained anchored outside the port. Regarding the case of the ship "*Lamda*", according to Amnesty International, one of the stowaways on that vessel had his asylum application rejected on the grounds that the port of Sagunto was not a border post.

positive factor since its aim is at encouraging joint action between the Canary Islands Autonomous Government and the Ministry of Labour and Social Affairs, whose main objectives are to care for immigrants arriving on the shores of the Canary Islands, combat hidden immigration (by increasing checks on *pateras*) and promote the integration of immigrants and asylum seekers.

103. The massive flow of immigrants to the Canaries Archipelago is largely explained by its proximity to the African coast. The island of Fuerteventura, where the largest number of *patera* arrivals (around 82% of the total in 2004) has traditionally been recorded, is only about 100 km from the Moroccan coast. The vast majority of foreigners reaching the coast of the island are North Africans (chiefly Moroccans and Saharans) and sub-Saharan Africans (mainly from Cameroon, Congo, Gambia, Nigeria, Ivory Coast, Senegal, Ghana and Sierra Leone). There is no need at this stage to dwell on the hardships that must have been undergone by these people, who reach the Spanish coasts after a journey of 20 hours on average in vessels where 20 to 30 people are crowded together and which are unfit to make the crossing safely. In addition, as a consequence of the toughening of penalties and punishments against carriers, most of these vessels sail without a skipper, which adds to the hazards of the voyage<sup>51</sup>.
104. After the starting up of the Integrated System for Patrolling in the Channels and at Sea (known by its Spanish acronym, “*SIVE*”) first on the Andalusian coast and then in Fuerteventura (although it is planned to extend the system shortly to the islands of Gran Canaria and Lanzarote) and Ceuta, traffic by *pateras* and other vessels dropped considerably and it is calculated that 98% of them are detected. In Fuerteventura, for example, the total of 390 vessels in 2003 fell to 239 in 2004. In Lanzarote, 17 vessels were recorded in 2004 compared with 145 in 2003. This has caused a drastic fall in the number of immigrants risking their lives to reach the coasts of the Canary Islands by this route, though attempts are made to gain access by more dangerous and concealed means (which are also harder for *SIVE* to detect).
105. According to NGOs operating in Fuerteventura and Lanzarote, co-operation with the authorities and the Guardia Civil as regards reception of the immigrants, both immediately on arrival and subsequently, is excellent. The commitment and professionalism of the members of the Guardia Civil during the rescue process should be particularly mentioned, although the difference in size between rescue vessels and *pateras* can complicate the operation. Foreigners in an unlawful situation who reach the coasts of Fuerteventura (and also Lanzarote, although, according to the data already referred to, *patera* traffic to this island is currently very limited) are given emergency health treatment and then taken to the police station for identification. There, where appropriate, if they have not made an application for asylum or refuge, return or deportation proceedings are started. After a court order, they are then interned at the El Matorral Centre. Moroccan nationals are returned by aircraft to their country of origin within a short time. For other nationalities (particularly people from sub-Saharan Africa), deportation proceedings are started.

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<sup>51</sup> The Criminal Code lays down penalties for people trafficking of up to 8 years in prison, or 10 years if it takes place for the purposes of sexual exploitation.

106. Information supplied by representatives of the NGOs and Bar Association in Fuerteventura point to serious shortcomings in access to legal assistance and also in the latter's quality. The Bar Association does not possess sufficient lawyers (it currently has only three) to provide an adequate service to all immigrants held in the El Matorral Centre. As I have already said, the centre houses a fairly small number of immigrants at present but there is nothing to say that this number will not increase. In addition, although a judge is allocated exclusively to matters concerning aliens, this does not appear sufficient to cope properly with all cases.
107. I have to say that, although I understand the criticisms levelled by some NGOs at lawyers because they do not try hard enough to help immigrants, I also understand and share the powerlessness and frustration felt by certain lawyers at the inadequacy of the resources available to them for doing their job. Lawyers also lack information about the whereabouts of their clients. As members of the Bar Association said to members of my Office, several cases have occurred in which detainees have been transferred to other RCFs in the peninsula and their lawyer has been informed only afterwards. I must stress once again how important it is that all foreigners in an unlawful situation, whether detained or not, should have unrestricted access to effective legal assistance that will help explain the situation to them and tell them the legal remedies available. It is essential, moreover, that lawyers dealing with aliens, asylum and refuge matters receive special training. Finally, I deplore the fact that certain NGOs which in other localities provide legal assistance over and above that provided by the Bar Association rota do not have access to the Fuerteventura RCF.
108. As regards asylum applications, the number of these is very small, as it is in the rest of the country. On this point too, there is a significant lack of information and of proper legal assistance. It is no secret that immigrants reaching the coasts of the Canary Islands do so in the vast majority of cases after an exhausting journey and in complete ignorance of Spanish asylum rules. They frequently received inaccurate information in their country of origin that has raised false hopes about what awaits them on arriving in Spain. At that initial moment, it is therefore highly important to be able to determine as accurately as possible whether the person concerned is a genuine asylum seeker or not. To do that, every case must receive full and non-routine treatment.
109. As I said earlier, the El Matorral RCF in Fuerteventura is the biggest in Spain, opening at a time (2002) when *patera* traffic was considerable. Facilities are adequate and functional and the centre constitutes a clear improvement over the former airport terminal. Recently arrived persons are accommodated in an initial 70-bunk unit with communal showers, washbasins and lavatories. Conditions in this unit may be regarded as acceptable. Once the court order for internment has been issued, the foreigner is transferred to another unit where he or she will spend the time before the return or deportation order is executed or before transfer to another RCF, usually in the peninsula (the average stay is 33 days, the highest in the country). Regarding conditions in the remaining units, these may be considered acceptable in general, except for the cells where women and people in quarantine are held for medical reasons. These cells measure some 20 square metres and have several bunks, a single lavatory and a shower. Ventilation is poor and natural light weak.

110. The centre has a large yard where detainees can spend their recreation time but they have nowhere to shelter from the sun, which is generally very strong throughout the island. Most foreigners spend their free time in this yard, either sitting or practising sport. As in the other holding centres visited, there are no training or guidance activities.
111. The centre has a medical and health-assistance service. On entry, detainees receive a medical check-up. There are no arrangements for following up the health of detainees, probably because, as was explained to us, foreigners remain only a short time in the centre (not more than 40 days). Meals are provided by outside caterers, who adapt them to the religious requirements of the detainees.
112. On entering the centre, detainees receive an information leaflet in several languages, which provides information on legal assistance and other points of interest. The members of my Office noted serious linguistic errors in the English version of the leaflet that could give rise to misunderstandings. I wish to stress the importance of ensuring that the information supplied to internees is comprehensible and of good quality.
113. The situation of unaccompanied foreign minors shows certain distinctive features in the Canary Islands. Because of the absence of checks on the movements of minors, who are able to move between the islands with a certain ease and freedom, many eventually disappear and even, according to the Ombudsman, wind up in young offender institutions<sup>52</sup>. There is also a great lack of co-ordination between the various relevant authorities in the Archipelago, both autonomous and central (very obvious, for example, in the case of Fuerteventura), when there is any question of adopting measures affecting minors' well-being.
114. In Fuerteventura, in the district of *Llanos Pelados* near the capital Puerto del Rosario, members of my Office visited a centre for foreign minors which, in my opinion, should be closed immediately. The centre consists of a number of prefabricated buildings in very bad condition with worn-out communal lavatories and washing facilities, situated beside a municipal tip and not meeting even minimum health and comfort standards. The Ombudsman himself has called for its urgent closure. Problems of delinquency are very common among the minors, who are frequently taken to police stations in *Puerto del Rosario*, where a form is filled in and the minor subsequently returned to the centre. According to information from the Island's Minister for Social Affairs, a site is available in the *Casillas del Angel* district with proper facilities for accommodating minors. However, the local population appears to be adamantly opposed to transfer of the centre and, in general, to the setting up of hostels for foreign minors in town centres. This is a matter requiring information and education, which is the job of the island and autonomous authorities. The situation in *Llanos Pelados* is incompatible from all points of view with proper protection for foreign minors and I appeal to the

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<sup>52</sup> See section III of this report.

island and autonomous authorities to rectify it with the utmost urgency. The situation is markedly better in Lanzarote and the infrastructure of the centres there is satisfactory. No attitude of rejection of these establishments by the population was noted in Fuerteventura.

### **The cases of Ceuta and Melilla**

115. The Autonomous City of Ceuta constitutes, like Melilla, a special case because of its border with Morocco, the country that is the source of much of the illegal immigration to Spain. Its small size and the heavy migration pressure it has to bear give it certain distinctive characteristics that make it a sort of retaining wall against illegal immigration. It is also one of the areas where cases of unlawful return or expulsion of asylum seekers have been reported on various occasions (and verified in at least one case). Ceuta and Melilla's migration problems have led certain NGOs and the Ombudsman to call for the implementation of an overall plan to deal with the continuous flow of immigrants and provide the resources needed to cope with large-scale arrivals<sup>53</sup>.
116. It is extremely difficult to understand what is happening every day before the barriers of Ceuta or Melilla if one does not also examine the deeper causes of the massive migratory pressure we are witnessing. Nor can one hope to understand the problems faced at these border points if one does not also examine what is happening beyond them, in the neighbouring country where the immigrants arrive and remain before attempting to enter Ceuta or Melilla or to cross the Straights in rickety boats.
117. It is beyond the scope of my mandate to address recommendations to the Moroccan authorities and I will not do so. At the same time, it seems to me to be difficult to ignore the fact that the defence of human rights requires that problems be examined in their entirety. This leads me to insist that neither country should be left to deal with such difficult and delicate problems on their own. There is a responsibility here too for the international community, which must, if these problems are to be resolved, express its solidarity through a cooperation with the countries directly concerned.
118. Immigrants arrive in Ceuta in *pateras* (though increasingly less so now that the *SIVE* system has been set up), by swimming, or crossing the border perimeter (a double metal fence about 11 km long with a separation in the middle constantly patrolled by the Guardia Civil). The immigrants are often people who have travelled many months through the African continent under extremely harsh conditions. Many of them do not survive, dying during the journey before reaching the border with Ceuta or Melilla because of the inhuman conditions suffered, or murdered by bandits or even by the traffickers responsible for their plight. Others come from Asian countries, such as Bangladesh and India, which are going through political, social and economic upheavals. In many cases, these persons have invested all their savings in paying human-trafficking networks. According to testimonies obtained in direct conversation with refugees, individual tariffs for persons coming from Asia vary between €7,000 and

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<sup>53</sup> In his annual report for 2003, the Ombudsman considers that migration pressure on Ceuta is not a temporary phenomenon and that it is therefore necessary to have the resources to deal with cases of large-scale immigrant arrivals and be able to put them into action rapidly and effectively.

€10,000, and for unaccompanied children they may go up to €20,000. According to other repeated evidence, immigrants from Asia (eg Bangladesh) begin their journey at a local airport with an air trip to Dubai and from there to Mali by either air or road. In Mali they often have a long wait before attempting to cross the desert by lorry. It is not rare, as already said above, for some of the travellers to die from heat and dehydration before reaching the Spanish border. From the many stories we heard in different centres it appears that this terrible journey can last up to nine months.

119. At the end of this long and dangerous trip, the immigrants arrive in the vicinity of the Spanish border, exhausted and with a single idea in mind: to cross that border regardless of any danger, even for their physical integrity, that may be entailed. Indeed, since the summer 2005, large groups of persons, pushed by desperation, surge in waves against the metal fence, usually several times during the night, in an attempt to cross it and enter Spanish territory, i.e. the European Union.
120. Several thousands have been successful but many others have failed in their attempt. What shocks, however, is the victims caused by these incidents (more than ten people have died), some of them by gunfire. Besides, several dozens of injured persons – some of them seriously - are to be counted among those to have reached Spanish territory or left behind in Moroccan territory.
121. Subsequently, the Moroccan authorities have removed hundreds of immigrants by bus or truck to other far away parts of their territory, in the middle of the desert, abandoning them to their fate, waterless and foodless, in order to push them to cross the border with Algeria or Mauritania and return to their countries of origin. More recently, the Kingdom of Morocco has decided to deport these persons through an air lift to the countries of origin of the persons deported. Confusion and a lack of transparency have been the main features of this tragedy, in which the lives and physical integrity of thousands of human beings have been at stake. If anything has come to light at all surrounding these operations, it is only because of the presence in the field of a number of humanitarian organisations. And yet, no one seems to be able to say with certainty whether there were additional victims, as these organisations insist, nor, if this is the case, how many.
122. Needless to say that this way of treating the crisis is unacceptable and seriously undermines the fundamental rights of the immigrants subject to such treatment.
123. Moreover, it is difficult to understand the reasons behind the Spanish Government's recent decision to immediately return to Morocco more than 70 persons belonging to a group recently arrived in Ceuta and Melilla after jumping over the fence. Several organisations, including UNHCR, have maintained that that there were asylum seekers among the persons deported. Even if the Ministry of Interior denied this information and the Vice-President of the Government announced that that the deportation had been an urgent and exceptional measure, which will not be repeated, I consider that this incident needs to be fully clarified. I deem it necessary, in this context, to draw the Spanish authorities' attention to the importance of respecting carefully Protocol 4 to the

ECHR<sup>54</sup> and the Guidelines on Forced Return, issued by the Committee of Ministers of the Council of Europe, which prohibit collective expulsion orders and require that each case be examined individually and deportation orders be, also, individually adopted.<sup>55</sup>

124. The assaults on the border fences inevitably lead to confrontations with the security forces during which people are frequently wounded (among both the attackers and the security forces). Recently the Guardia Civil was blamed for having supposedly caused the death of a young 17-year-old Cameroonian as a result of blows he received during one of the late summer assaults on Melilla. Nevertheless, the circumstances of his death remain obscure inasmuch as his body was placed at the foot of the border fence by other migrants 22 hours after the night assault, with those migrants and some NGOs affirming that this was a result of blows received during the assault. The Guardia Civil was also accused, in the first moments, of having killed and wounded by gunfire several persons during one of the recent assaults on the fence but subsequently the Moroccan authorities admitted that the shots had come from their own security forces.
125. In any case, I insist that serious accusations of this nature demand an in-depth investigation and full elucidation of the facts. The Spanish authorities have started an immediate investigation in co-operation with the Moroccan authorities. It is to be hoped that the latter will make available and publish the results of the post-mortems and that the causes of the deaths will be established beyond doubt.
126. Apart from this specific case, concerning which we await the necessary clarification, it is necessary to stress the responsibility of the Moroccan authorities. These authorities are aware of the existence of hundreds of covert migrants living in subhuman conditions in the wooded areas near the border, surviving on refuse or on help from charitable organisations, and who are victims of the human trafficking we have described. It is thus for them to take the necessary steps to stop these persons from risking their physical well-being every night by trying to cross the border illegally. The creation of an appropriate infrastructure for the administering of humanitarian aid seems to me to be urgent. The Kingdom of Morocco should be encouraged and assisted to develop such a humanitarian policy and adopt, if need be, relevant measures to facilitate the return of illegal migrants to their country of origin, while respecting their dignity of human beings and safeguarding their safety.
127. It is important that answers are given to all these questions. All measures must be adopted to avoid the repetition of events similar to those which have just taken place at the Ceuta and Melilla borders. Guaranteeing the physical welfare of foreign persons under the jurisdiction of a State is an imperative for the Governments of all the States concerned. The duty to safeguard such fundamental rights is also applicable in cases of the deportation or forced return of illegal migrants, as laid down by the European Court of Human Rights' case-law<sup>56</sup> and recalled in the Guidelines on Forced Return of the

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<sup>54</sup> Article 4, See Decision of the European Court of HR of 2 February 1999, on Application n° 45917/99, in the case of *Andric* against Sweden

<sup>55</sup> "Forced Return, 20 Guidelines", adopted by the Committee of Ministers on 5 May 2005, Council of Europe Publishing, Strasbourg, September 2005. See, notably, Guideline 3, page 23.

<sup>56</sup> See, for instance, the judgement of 15 November 1996, in the case of *Chahal v. United Kingdom*, A 161.



Committee of Ministers.<sup>57</sup> It is also essential to combat criminal networks trafficking in human beings, together with those aiding and abetting them, as these represent, at least in part, the hidden force behind illegal migration flows. It is also indispensable that the EU, in co-operation with the countries concerned in Africa, puts in place a co-ordinated and efficient policy enabling these persons, currently compelled to emigrate, to remain in their countries of origin with prospects respectful of their and their families' dignity and avoiding, above all, new breaches of their fundamental rights.

128. In Ceuta there are problems similar to those at other points of entry into Spanish territory, such as shortcomings in access to legal assistance affecting both illegal immigrants and asylum seekers, and, according to some NGOs, cases of illegal deportations and returns (see below).
129. As in the Canary Islands and Andalusia, the vast majority of illegal immigrants are of North African and sub-Saharan origin. Moroccan nationals are returned more or less immediately to Morocco via the El Tarajal border post, the only one authorised for this purpose. Spain has signed similar agreements with Nigeria (awaiting ratification), Mauritania, Guinea-Bissau and Algeria. A special problem arises in the case of non-Moroccan nationals who are generally not readmitted by Morocco (unless they are Algerians) and must be returned to third countries.
130. During my visit and that made by members of my Office to this Autonomous City, several cases of deportation without the guarantees stipulated in the alien's legislation were drawn to my attention. One such case, which had major repercussions but which was partly resolved, was the deportation on 28 December 2004 of seven asylum seekers who had been detained by the Guardia Civil in the neighbourhood of the Colegio San Antonio, which shelters foreigners whose status is irregular. Once informed of this occurrence, the Government reacted immediately and all appropriate measures were taken to find the persons concerned. Four of them were eventually traced and readmitted to Spanish territory and the processing of their asylum applications was resumed. In addition, some days before the members of my Office reached Ceuta, the local press reported the alleged deportation by the Guardia Civil of nine illegal immigrants, including two pregnant women, who had swum ashore. According to the same source, the immigrants, all of Congolese nationality except one from Cameroon, were handed over to the Moroccan authorities at the El Tarajal border post. These persons had then been returned by the Moroccan police to Algeria since, as already explained, Morocco does not admit immigrants who are not its own nationals to its territory. The press information was similar to the one given by various NGOs to the members of my Office. However, the central government representative said that appropriate checks had been made but that these had not produced any official evidence of the alleged facts.
131. Though difficult to confirm, I consider that such cases as those alleged to have occurred in December last year, must not be allowed to happen in the future. A thorough investigation must be performed whenever any complaint like this is made. Similarly, all deportations and returns must take place in strict compliance with the legislation in

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<sup>57</sup> "Forced Return, 20 Guidelines", adopted by the Committee of Ministers on 5 May 2005, Council of Europe Publishing, Strasbourg, September 2005. See, notably, Guidelines 2, 16 & 17..

force and with the guarantees laid down by law, in particular the right to legal assistance, which, in cases of priority proceedings, must be provided at state expense at the moment of commencing legal action that may lead to deportation, and regardless of the fact that the foreigner may be in temporary detention. Exercise of this right must logically be guaranteed in all cases but especially in those where the commencement of deportation proceedings is notified through the postal services or even by public notice. Whenever possible, notice should ideally be served on the interested party in person so that he or she may put forward any appropriate arguments within the 48-hour period allowed by law.

132. One of the controversial questions in both Ceuta and Melilla stems from the application of Article 157.1b) of the Aliens Regulation, whereby it is not necessary in single-province Autonomous Communities to initiate deportation proceedings in order to return foreigners who try to enter the country illegally. There is apparently no consistent criterion for applying this rule. Some authorities consider this eventuality to include persons intercepted at or near the border. The strict application of this legal principle could accordingly lead to situations of injustice by violating the “*non-refoulement*” principle already referred to. It is essential, however, that every foreigner in an irregular situation who is detained on Spanish territory - at the border, in the surrounding area, or in the corridor between the two fences of the border perimeter separating Ceuta from Morocco (considered by the authorities to be Spanish territory) - be subject to expulsion proceedings including the necessary guarantees such as access to a lawyer and interpretation prior to their deportation.<sup>58</sup>
133. As at other points of entry to the country, legal assistance to immigrants and asylum seekers represents a serious problem. The Ceuta Bar Association has two duty lawyers for aliens and asylum matters, a wholly inadequate figure given the large number of cases each day (however, this service has been strengthened by the presence of an NGO lawyer at the immigrants’ temporary reception centre). As in Fuerteventura, lawyers complain of lack of information about their clients’ whereabouts once deportation proceedings are under way. They also report that the expulsion decision is frequently communicated to the person concerned once he or she has been transferred to an RCF (usually the one in Algeciras) or sometimes even during the transfer journey. Finally, there are problems of interpretation (particularly in the case of sub-Saharan) highly similar to those already described above for the Canary Islands.
134. As regards asylum and refuge, the Ceuta case poses a special problem because virtually all immigrants arriving there apply for asylum, putting Ceuta second after Madrid in the number of applications. This leads to enormous reception problems and, equally importantly, to a debasement of the concept of asylum, thus damaging the interests of genuine asylum seekers. According to the UNHCR, the reasons for this situation are threefold: the insecurity caused by illegal deportations makes foreigners feel more protected when they request asylum; lack of information about the alternatives to applying for asylum; and applying for asylum opens the way to basic humanitarian assistance.

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<sup>58</sup> “Forced Return, 20 Guidelines”, adopted by the Committee of Ministers on 5 May 2005, Council of Europe Publishing, Strasbourg, September 2005, page 23.

135. I should say that I regard as a very positive step the reduction in the time taken by the Single Aliens Office and the Asylum and Refuge Office to process asylum applications. This has led to a significant decrease in the time taken to issue rulings on cases, currently between one and two months.
136. The principal reception centre for illegal immigrants in Ceuta is the Immigrants' Temporary Reception Centre (known by its Spanish acronym, "*CETI*"), which, like the one in Melilla, comes under the Department of Immigration and Emigration. This is a centre with a capacity for 512 people and proper functional facilities. The regime differs considerably from that of an RCF and is therefore not a holding centre but, as the name indicates, a place of temporary reception where, contrary to the case in an RCF, foreigners can enter and leave freely, subject only to the timetable laid down. All inmates interviewed by members of my Office said they were satisfied with conditions at the *CETI* and the good treatment they were receiving. The *CETI* organises classes in Spanish and in the use of computers, provides programmes for integration and guidance as well as medical and legal assistance. I wish to pay tribute to the legal assistance furnished by the NGO - the Spanish Committee on Aid to Refugees (CEAR) - at the *CETI*, to which a lawyer has been assigned. Because of saturation of the centre, local NGOs fitted out the *Colegio San Antonio*, now closed, as a temporary facility for the reception of immigrants not accepted by the *CETI*. However, conditions at the said *Colegio San Antonio* differed greatly from those at the *CETI* since persons accommodated there had to leave it during the day and did not have access to the programmes and classes provided at the Centre. It should be pointed out that certain NGOs have complained about the lack of funds available to the Ceuta authorities for providing proper care to arriving immigrants, bearing in mind that the centres run by those authorities are largely funded by the State. Against this background, The Minister of Labour and Social Affairs has since informed me that it has signed two further agreements with the Ceuta authorities to shelter and integrate arriving immigrants, the first a specialised centre for separated minors at the cost of 1,700,000 euros and the second, for adults, at a cost of 442.280 euros.

## VII. TRAFFICKING IN HUMAN BEINGS

137. As in other Council of Europe member countries, trafficking in human beings is a primary concern in Spain, which is a transit and destination country for such trafficking. This modern form of slavery has a number of specific features in Spain, where it mainly involves women rather than children or young people. According to statistics provided by the Ministry of the Interior on offences connected with trafficking in human beings, the victims are mainly Chinese, Moroccan, Peruvian, Ukrainian, Romanian, Columbian, Ecuadorian, Brazilian, Pakistani, Russian and Nigerian persons involved in offences of illegal entry, labour exploitation, prostitution, forgery of documents and fraud. In 2005, however, the number of victims in the following fields plummeted: illegal entry (36 cases, as against 466 in 2004), labour exploitation (332, compared with 797 in 2004), prostitution (274 cases compared with 1,717 in 2004), forgeries (38 as against 1,032 in 2004) and fraud (41 compared with 1,872 in 2004). The authorities largely put this down to effective co-ordinated action by the national law enforcement agencies against organised trafficking networks.
138. Spanish legislation comprises a range of provisions for prosecuting trafficking networks and protecting the victims, an aspect which I personally consider absolutely vital for combating this scourge<sup>59</sup>. Furthermore, Spain holds observer status with the International Organisation for Migration (IOM), and actively co-operates with this body in locating victims. This co-operation mainly concerns providing assistance to victims, protecting witnesses and experts (providing legal protection for and ensuring the anonymity of such persons), and communicating information to help to locate missing victims.
139. I am pleased to note that Spanish legislation lays down mechanisms for protecting foreign female victims of trafficking who co-operate with the authorities in combating organised networks. These provisions include granting temporary residence permits (153 such permits were granted in 2004) and work permits for foreigners who, as former victims or witnesses of trafficking in human beings, illegal immigration or prostitution, are unlawfully resident in Spain but are nonetheless prepared to report the perpetrators of these offences and co-operate with the police authorities. Moreover, residence permits can also be issued in exceptional circumstances to foreigners who co-operate with the authorities or for reasons of public interest or national security. Lastly, legislation allows the authorities to waive deportation orders and to permit re-entry to Spain for foreigners to take part in criminal proceedings as victims, injured parties or witnesses where their presence is deemed vital for the purposes of the judicial proceedings.

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<sup>59</sup> The provisions in question are Article 318 bis of the Criminal Code, Sections 1 to 3 of the Implementing Act of 23 December 2004 to protect experts and witnesses in criminal cases, Section 59 of the Implementing Act of 12 January 2000 on the rights and freedoms and social integration of aliens in Spain, and the Law of 11 December 1995 providing for assistance to victims of violent crime and sexual offences.

140. Victims of trafficking must be protected on two fronts, namely that of defending their fundamental rights and that of ensuring the effective prosecution of the traffickers. Accordingly, as in the case of other member states, I would urge the Spanish authorities to sign and ratify as soon as possible the Council of Europe Convention on Action against Trafficking in Human Beings, which provides a solid legal framework for protecting the victims of trafficking and prosecuting the traffickers.

### **VIII. GENDER-BASED VIOLENCE**

141. As in other neighbouring countries, domestic and gender-based violence in Spain poses a serious human rights problem. An estimated two million women suffer gender violence from their spouses or ex-spouses. Between January 1999 and September 2004, 443 women died as a result of gender-based violence. In 2004 the total was 84 deaths, nine of them under-age girls, and by the middle of August 2005 the figure was 36 victims. Furthermore, the NGOs specialising in this field point out that only a small proportion (under 5%) of all cases are reported. This largely explains why this has been one of the most debated issues in Spain over the last few years, and it is in this context that firm action is being increasingly demanded from the public authorities.
142. Domestic violence gradually emerged from the strict family setting to be debated at national level, and the various political parties started addressing the issue. This has led to a series of national action plans (eg the Action Plan against Domestic Violence 1998-2000 and the 2<sup>nd</sup> Integrated Plan against Domestic Violence 2001-2004) and a number of legislative initiatives in the Autonomous Communities (Castilla-La Mancha, Cantabria, Navarre, the Canary Islands and, in the near future, Andalusia) and at national level, notably the Organic Act on Measures for complete protection against domestic violence, which was approved in December 2004. The entry into force of this Law and the consequent amendments to the Criminal Code and the Law on Criminal Procedure constitute milestones in Spain's efforts to combat gender violence. Moreover, a new committee known as the "Observatory on Domestic Violence", which is made up of the Chair and two members of the General Council of the Judiciary and the Ministry of Justice and the Ministry of Labour and Social Affairs, is responsible for taking vigorous action on cases of gender-based violence and stepping up co-operation among the various authorities and institutions.
143. The new legislation gives a broad definition of gender violence, embracing "any act of physical or psychological violence, including infringements of sexual freedom, threats, coercion and arbitrary deprivation of liberty". Furthermore, the aforementioned Law covers acts of violence which reflect discrimination and situations of inequality in which men wield power over women and which are committed by men who are or have been the victims' spouses or persons linked to them by similar relationships, even where they have never lived together.
144. The new provisions adopt an integral approach, ie they deal with preventive, educational, social and also welfare aspects. One extremely positive aspect is the endeavour to raise public awareness by promoting respect for women's dignity and their right to an image free of stereotypes. It is obvious that the first step in countering

gender violence must be to adopt measures to change certain social attitudes. On the judicial front, Spain must take the necessary steps to set up the planned special Courts to deal with violence against women, to be run by investigating judges acting as “gender violence judges” and public prosecutors dealing with violence against women (who will act as chief prosecutors), with the corresponding chambers in all the prosecution services of the Higher Courts of Justice and regional courts.

145. This range of new legislative mechanisms has been supplemented by new administrative bodies such as the Special Government Department on Violence against Women and the National Observatory of Violence against Women, both of which come under the Ministry of Labour and Social Affairs. Moreover, new units specialising in preventing gender-based violence are in operation in the national law enforcement agencies, with a current total staffing of 1,102. Experience has shown that in cases of gender violence it is essential for the law enforcement agencies to become involved early on in order to provide the victim with immediate protection. An agreed set of procedures for the staff of these agencies and co-ordination with the relevant judicial bodies are essential for appropriate victim protection. Lastly, on the social front, we should point out that the National Employment Strategy includes a specific action programme for victims of gender violence who are registered jobseekers.
146. Another extremely important development here was the implementation of the “Protection Order for Victims of Domestic Violence” in July 2003, prior to the entry into force of the aforementioned legislation. This Order constituted a judicial resolution laying down the requisite criminal procedural measures to protect victims, together with the sanctions laid down for the offence in question (exclusion and detention orders and imprisonment), provisional civil measures (use of the marital home, custody of children and maintenance). The Order concurrently activates national, Autonomous Community and local social protection mechanisms. In order to facilitate the requisite inter-institutional co-ordination for implementing the Order, a Committee was set up to monitor the implementation of the Protection Order. A number of non-governmental organisations informed me of their concern about the possible lack of protection for victims between the time of reporting the offence and the time of serving the Protection Order on the perpetrator, a period which ranges between 24 and 48 hours and during which the victim may have no protection. I must stress the need for judges to decide on the application for a Protection Order as quickly as possible, and, once it has been issued, for the Order to be served immediately on the parties and communicated to the competent government departments.
147. The Ministry of Justice also keeps a Central Register for the Protection of Victims of Domestic Violence. According to statistics published by this Ministry, since August 2003 some 100,000 individuals (almost 95% of whom are men) have been registered. The Register contains only cases that have been dealt with by the courts, which have already issued over 55,000 protection orders in cases of domestic violence. The data is removed from the register where the individual in question has been found innocent by the courts or where no further action is taken.

148. One of the main criticisms levelled at the new Law by NGOs has been that it comprises no provisions on the right of asylum and refuge for female victims of gender violence. Nor does asylum legislation specifically mention persecution by gender violence as a ground for securing refugee status, which means that the decision in such cases is left completely to the authorities' discretion. So I can only welcome the Spanish Government's decision on 31 May 2005 to grant refugee status to a female victim of gender violence. Drawing on this decision, it would be useful for the Spanish authorities to conduct a thorough case-by-case study of all asylum applications that have been submitted on the primary grounds of gender violence and the need to protect the victims of such violence.
149. In this connection, the new Aliens Regulation should establish clearer, more detailed mechanisms for protecting foreign women who are illegally resident in the territory and have suffered gender violence. Article 46§3 states that victims of domestic violence can secure a temporary residence permit under certain circumstances (ie where a judicial protection order has been issued for the victim and a final judgment has been delivered). Nevertheless, there have been cases of foreign victims of gender violence turning up at police stations to report the offence, and, having done so, being subjected to the procedure for illegal residence in the country. This is why such persons often decide not to report the violence perpetrated against them, out of fear that their mere presence on police premises will lead to an administrative deportation procedure. The failure to report the offence prevents these persons from securing a criminal prosecution and the statutory victim protection facilities. The Ombudsman submitted a recommendation to the Directorate General of Police to the effect that the police should refrain from instituting administrative procedures against illegally resident aliens who report offences in police stations. The Directorate General replied that it could not accept the recommendation because it implied interfering with the exercise of its powers and responsibilities.
150. Nonetheless, in August this year, the Ministry of Interior issued instructions reconciling the obligation on its civil servants to initiate proceedings in respect of foreigners they know to be in an irregular situation with the contrary imperative to protect victims of crime. Thus, in addition to the protective measures foreseen in various pieces of legislation, the non-expulsion of irregular immigrants is guaranteed where a protection order has been issued in their favour, which in turn opens up the possibility of obtaining a residence permit in the event of the perpetrator's conviction.
151. During my visit I personally witnessed the implementation of specific measures against domestic violence by the Autonomous Communities. I was particularly interested in the information I received on the Andalusian Government's Action Plan on Violence against Women, which had been drawn up by the Andalusian Women's Institute, a subordinate body of the Andalusian Ministry of Equality and Social Welfare. It should not be forgotten that Andalusia has one of the highest rates of domestic violence nationwide (in 2004 there were 12,421 reports by female victims of violence at the hands of their spouses or ex-spouses). I was greatly impressed by the active participation of all public authorities in this Autonomous Community in combating gender violence, which is now considered as a full-blown "national problem". One of

the main highlights of the Action Plan has been the launch of a Job Training Scheme (under the “*Cualifica*” programme). This training programme, which is backed by some 128 enterprises, is designed to facilitate the occupational integration of women participating in the programme by providing them with the requisite training. A number of my colleagues interviewed beneficiaries of this programme in Seville. They noted the advantages for those concerned, not only from the strictly occupational and social angle but also in personal terms, as the Scheme substantially boosts the victims’ self-esteem.

152. Notwithstanding the progress achieved by the new legislation, which was unanimously adopted by the Chamber of Deputies, a number of judges have challenged the constitutionality of the provisions before the Constitutional Court, arguing that the Law in question was liable to undermine the equality principle set out in Article 14 of the Constitution. This means that we must await the outcome of the question until the Constitutional Court delivers its ruling.

## **IX. SUPPORT AND ASSISTANCE FOR THE VICTIMS OF TERRORISM**

153. Spain has suffered from terrorism for decades and it is very difficult to give a dispassionate account of a phenomenon that has caused more than 1,000 deaths over the past 37 years. For decades, broken families, victims left with permanent disabilities or severe psychological problems, and an atmosphere of fear have been the daily lot of thousands of Spaniards. Since the tragic events in Madrid on 11 March 2004 Spain has had to deal with not only ETA (Basque acronym for “Basque Country and Freedom”) but also international terrorism. Nevertheless, as previously noted, this has not led the Spanish authorities to adopt any special anti-terrorist measures other than those already set out in the Criminal Code and in the LECr, or suspend any human rights and freedoms. During my visit, I had the opportunity, in both Madrid and Vitoria, to meet the representatives of organisations and associations concerned with protecting and helping the victims of terrorism. Their accounts of immense suffering and their capacity for dialogue made a great impression on me.
154. For many years now, Spain has been a pioneer in offering help and assistance to the victims of terrorism and I cannot but urge other member states to follow its example. The authorities, both in central government and in the Autonomous Communities, have developed a wide range of legislative measures to provide support and assistance in different areas, including the financial sphere. The starting point is the acceptance, by both the public authorities and society, of the existence of a moral debt towards the victims, which must be reflected in recognition of their suffering and in a duty of solidarity towards them.
155. Compensation and support for the victims of terrorism, which is mainly channelled through the Ministry of the Interior, cover both physical injuries and material damage to varying extents. The Law on Solidarity with the Victims of Terrorism of 8 October 1999 also established a system of compensation, which supplements normal arrangements and recognises that compensation should be paid in respect of physical and psychological damage resulting from terrorist offences. As far as the Autonomous



Communities are concerned, it is worth mentioning the Programme of Aid for the Victims of Terrorism, launched by the Basque Government, which provides extensive cover for victims' needs and the provision of support.

156. One of the most outstanding initiatives for co-ordinating and improving co-operation arrangements and victim aid was the establishment in December 2004 of the post of High Commissioner for Support to the Victims of Terrorism, whose main task is to co-ordinate the activities of all government departments, thus avoiding the duplication and overlapping of responsibilities. The first Commissioner, Gregorio Peces Barba, is an eminent legal expert, strongly committed to defending human rights, who has held important posts such as President of the Chamber of Deputies and Vice-Chancellor of Carlos III University in Madrid, as well as having been a member of the Constitutional Committee of the Chamber of Deputies.
157. One of the aspects of the problem which the associations and organisations representing the victims of the terrorist attacks in Madrid on 11 March 2004 highlighted is the use and exploitation of the consequences of terrorist violence by the media. It seems fair and reasonable to insist that they refrain from repeated use of certain images, which only serve to revive the pain and suffering in the minds of those concerned. A certain moderation and restraint are required on the part of both the media and society in general.
158. Victims' associations have stressed,<sup>60</sup> on the other hand, that victims wishing to be present during the trial of the persons accused of having committed terrorist crimes find themselves in a difficult situation. The absence of specific measures of attention for the benefit of victims compels them to enter and leave the premises of *Audiencia Nacional* – the competent court to deal with cases of terrorism – at the same time as the members of the families and friends of the accused terrorists and makes it unavoidable for the former to stand, before, during and after the trial the latter's insults, threats and shouts. I believe that a proper safeguard of the victims' dignity would require the adoption of specific measures enabling them to participate in full serenity and confidence in the trial of those having caused their suffering.
159. The people I met also stressed the need for the authorities to establish some sort of procedure to avoid lengthy procedures with the administrative agencies dealing with the situation of victims of terrorism. In more specific terms, the associations representing the victims of 11 March 2004 referred to the problems facing injured persons and the difficulties encountered by those affected by terrorist attacks in returning to employment. Although I am aware of the exceptional efforts which the authorities, and in particular the High Commissioner, have already made, and are continuing to make, to ensure that the victims of terrorism receive adequate care and attention, everything possible must still be done to put into practice the duty of solidarity to which I have previously referred. I found particularly interesting the proposal launched by some victims' associations to set up a single office – possibly within the Under-Directorate for the attention to the citizens and assistance to the victims of terrorism in the Ministry

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<sup>60</sup>Statement by Mr Portero de la Torre, Chairman of the Association « Victims of Terrorism » during a hearing with the Sub-Committee on Victims of Terrorism of the Committee on Justice and Home Affairs, *Diario de sesiones del Congreso de los Diputados, Comisiones, VII Legislatura, año 2003, número 859, página 27164.*

of Interior – in charge of managing all victims’ requests for assistance. The setting up of a single administrative unit where victims could go to process their requests for different types of assistance would, no doubt, induce a more individual treatment of persons who have suffered terrorist violence in their bodies and souls, alleviating these persons of the burden, particularly heavy in their case, of having to claim in front of several agencies and authorities the concession of different types of assistance.

160. I gave special attention to the issue of victims of terrorism during my visit to the Basque Country in February 2001. In the following section I report on developments in the situation in that Autonomous Community, subsequent to my March 2003 follow-up report<sup>61</sup>.

## **X. THE HUMAN RIGHTS SITUATION IN THE BASQUE COUNTRY.**

161. There are at least two reasons for including a separate chapter on the human rights situation in the Basque Country. The first and most important reason is the continuation, for more than 40 years, of a form of terrorism linked to extremist nationalism which has caused over 1,000 deaths, almost 7,000 injured, massive damage and destruction and great suffering among the Spanish people. Terrorism affects Spanish society as a whole and has a particular impact on political and social relations in the Basque country itself.
162. Secondly, I believe it is useful to continue updating the analysis I made of the situation in the Basque Country in my report of 9 March 2001 [CommDH (2001) 2], in which I addressed the problem of the continuing violations of human rights in this Autonomous Community as a result of terrorist action. Two years later, in March 2003, I published a report [BCommDH (2003) 15] in which I examined developments in the situation and the measures taken to apply the recommendations made in 2001.
163. I would like to emphasise a point which I already made in my 2001 report, namely that the action taken by ETA is a direct interference with the most fundamental of human rights (Section III, § 1, page 4). In other words, terrorism is, in itself, a direct violation of the most fundamental of human rights, the right to life, and also the right to physical and moral integrity. I also pointed out in the same report (Section III, § 4, page 6) that many human rights violations were not only the result of direct action by ETA, but that the so-called “*kale borroka*” (street violence), carried out by radical pro-independence groups affiliated to ETA, had become a new form of human rights violation in the Basque Country. The report called on the Basque and Spanish Governments to take the necessary steps to counter terrorist action and street violence effectively and to safeguard the fundamental human rights of all Basque citizens.
164. In the aforementioned March 2003 follow-up report, I noted with satisfaction that there had been a significant reduction in the number of incidents of street violence and an equally significant increase in the number of arrests made in respect of these incidents, and pointed out that the measures taken by the relevant authorities –both at central level<sup>62</sup> and at the level of the Basque autonomous authorities and more specifically the

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<sup>61</sup> BCommDH(2003)15

<sup>62</sup> According to victims associations, the new legislation on civil liability for damages caused by actions of “*kale borroka*” contributed, together with other measures, to reduce the extension of this phenomenon

Department of the Interior of the Basque Government, which supplied me with detailed and precise statistics – had succeeded in putting an end to street violence and to the impunity which had accompanied such violence up to that point. Despite this good news, I noted with regret, in my report, the large number of offences committed by ETA during the period 2001-2003 and the threats that this terrorist organisation had made against numerous citizens in the Basque Country, who continued to need police protection.

165. Since 2003, the trend towards a reduction in the number of incidents of street violence has continued and become more marked. The Basque Department of the Interior provided me with extremely detailed information which clearly pointed to this conclusion. In 2001, the year in which my first report on this subject was published, 536 attacks of this type were made on the Basque population whereas in 2004 the number had fallen to 140. This is, of course, a cause for satisfaction. Nevertheless, it is vital to remain extremely vigilant since, as already stated above, there has been a worrying reappearance of street violence in the smaller and larger towns of the Basque country since my visit – particularly during summer 2005.
166. Indeed, the recent attempts by pro-independence groups linked to ETA to revive the “*kale-borroka*” movements are a cause for concern. In August 2005 alone, the police counted some thirty attacks of this type in a period of five days, coinciding with two bomb attacks by ETA. The banned political party “*Batasuna*” is in fact continuing to operate under various covers, to organise demonstrations and exert pressure on various democratically elected municipal councillors in the Basque Country to abandon their posts and responsibilities (more than 100 councillors have already yielded to the clear threats made to them). All State and Basque authorities responsible for the security forces therefore need to take action to prevent and punish this type of criminal and anti-democratic behaviour.
167. On the other hand, it is also worth noting that the number of terrorist attacks by ETA has fallen steadily since I drew up the aforementioned reports. This trend is explained by more effective policing, international co-operation and the growing political and social isolation of the terrorist organisation and its affiliated groups. Although it has not been possible to completely eradicate Basque nationalist terrorism, as would have been desirable, there is no doubt that its ability to strike at Spanish society has been reduced to an all-time low. For example, compared to the 47 terrorist attacks by ETA<sup>63</sup> and the 15 deaths caused in the whole of Spain in 2001, in 2003 there were only 2 attacks and 3 deaths. In 2004 the number of attacks rose to 7 in the Basque Autonomous Community and 26 in the rest of Spain, whereas, for the first time since the establishment of a democratic regime in Spain, ETA did not cause any deaths in 2004. Nor have any deaths been noted, to date, in 2005.
168. I have already referred, in the previous section, to the very wide range of measures taken by Spain to care for and assist the victims of terrorism. Brief reference should also be made to the measures taken by the Basque Government in this field, which are a useful addition to those taken by central government. For example, Decree 214/2002,

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<sup>63</sup> According to the data provided by the Basque Department of the Interior, this figure can be broken down as follows: 24 attacks in the Basque Autonomous Community and 23 in the rest of Spain.

dated 24 September, merged various existing victim-support programmes. This decree proposes a series of measures in various fields such as health – in particular psychological and educational-psychological care – education, employment, housing and material assistance. The Victim-Support Department, set up by Decree 369/2001, is answerable to the Basque Minister of the Interior and is mainly responsible for providing support to the victims of terrorism. In 2004 this Department dealt with 125 victim-aid cases<sup>64</sup>.

169. As I already pointed out in my 2001 report, relations between associations for the protection of the victims of terrorism and the Basque Government have long been tense and difficult, the former accusing the latter of a tolerant attitude towards terrorists and of indifference, abandonment and purely rhetorical solidarity with those who have most directly suffered the consequences of terrorist attacks<sup>65</sup>.
170. In its search for a solution to this situation, the Basque Parliament agreed, in June 2002, to set up a committee to examine the situation and needs of the victims of terrorism, which came into being on 3 July 2002. All the political groups represented in parliament, with the exception of “*Euskal Herritarrok*”<sup>66</sup>, took part in this committee, and it also invited a wide range of representatives of institutions at all levels – the judiciary, universities, employers’ organisations and trade unions, the mass media, the Church and non-governmental organisation, in particular victim-support associations. After this committee had completed the first stage of its work, the Basque Parliament, at its plenary session on 25 June 2003, unanimously approved a motion concerning the measures that could be taken to alleviate the situation of the victims of terrorism, in which it is proposed that various authorities should adopt a wide range of extra measures to provide moral, financial, educational, administrative and judicial support to the victims of terrorism.
171. Although I am aware of the serious disagreements which continue to be an obstacle to a fluent dialogue between the victims associations and the Basque autonomous authorities, it is necessary to acknowledge the efforts made by the Basque Parliament to establish an open dialogue with the representatives of all political and social groups – especially the representatives of victims associations – to promote the adoption of more ambitious measures in support of the victims of terrorism. I have no indication, however, that the measures proposed by the Basque Parliament have been implemented, something I deem essential if one wants to the expression of solidarity with the victims be viewed as something more than simple rhetoric.

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<sup>64</sup> According to the data provided by the Basque Government this figure can be broken down as follows: 68 cases concerning material damage – housing, vehicles, business premises and other items (personal effects, clothes...) – and 57 for physical damage.

<sup>65</sup> For example, AVT and COVITE were invited to appear before the Human Rights Committee of the Basque Parliament on 26 November 2002 to discuss the situation and needs of the victims of terrorism (Official Gazette of the Basque Parliament, 7<sup>th</sup> parliamentary year, No. 190, page 24877 et seq). On 29 October 2002, when the Minister of Justice, Employment and Social Security appeared before the same Committee, he himself recognised that he had to accept the criticism that the victims had not only suffered pain and trauma but that they had also felt forgotten, abandoned and neglected. (Ibid, page 24875).

<sup>66</sup> Pro-independence electoral coalition, closely linked to ETA.

172. In my 2003 follow-up report, I referred to the enactment of Organic Act 6/2002 on political parties, providing for the possibility of banning parties and electoral coalitions which promote, encourage or justify violence. Pursuant to this law, the Supreme Court ordered the disbandment of the parties associated with ETA activities which had stood in the previous local and national elections under various names. In decision No. 48/2003, dated 12 March, the Constitutional Court rejected the appeal against this legislation, which had been lodged by the Basque Government on grounds of unconstitutionality and found that its principles complied with the Constitution<sup>67</sup>.
173. The Constitutional Court also dismissed the appeals lodged by “*Batasuna*” (Unity) and “*Herri Batasuna*” (Unity of the People)<sup>68</sup> and by “*Herritarren Zerrenda*” (Citizens’ list)<sup>69</sup>, against the decisions rejecting their candidatures for the municipal elections and the European Parliamentary elections in 2004. Nevertheless, in decision 85/2003, dated 8 May, the Constitutional Court upheld parts of the appeal lodged by various voters’ associations from different parts of the Basque Country on the grounds that, in their case, the requirements set out in Article 23 of the Spanish Constitution, recognising the right to political participation, had not been met. However, the same decision rejected the appeals lodged by numerous other electoral platforms whose candidatures for the same local elections had not been accepted either. *Batasuna*, *Herri Batasuna*<sup>70</sup> and various affiliated electoral platforms<sup>71</sup>, have lodged applications in respect of this matter with the European Court of Human Rights. At the time of drafting, the decision on these appeals was still pending.
174. I consider it necessary, before concluding this Chapter on the Basque country, to make a reference to a problem explained to me during the visit, namely the situation of a group of non-permanent (“*interinos*”)<sup>72</sup> teachers of the Basque public education system. These teachers had received notifications from the Department of Education to the effect that they were to be removed from their posts on the grounds that they had not succeeded in passing the exams demonstrating they had the “linguistic profile” required for the posts they were holding. In other words, because their knowledge of the Basque language was lower than the level required for their posts. This group complains of “linguistic discrimination” and has raised this complaint before several national and international instances. After my visit, I met in Strasbourg with representatives of this group and they provided me with a large amount of documents concerning this problem.

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<sup>67</sup> The Basque Government’s subsequent application to the European Court of Human Rights was declared inadmissible, in a decision dated 3 February 2004, on the grounds that it was not entitled to bring an application.

<sup>68</sup> Judgments of the Constitutional Court 5/2004 and 6/2004.

<sup>69</sup> Judgment of the Constitutional Court 99/2004 of 27 May.

<sup>70</sup> Applications Nos. 25817/04 and 25803/04.

<sup>71</sup> Applications Nos. 35579/03, 35613/03, 35626/03, 35634/03 and 43518/04.

<sup>72</sup> In spite of their denomination as “non-permanent” (“*interinos*”), these 157 teachers enjoyed in practice a high degree of stability in the performance of their functions as they had been occupying their same posts for periods lasting between 15 and 25 years.

175. These teachers allege, among other complaints,<sup>73</sup> that the requirement to know the Basque language did not apply at the time they joined the public education system and was introduced only after the jurisdiction over educational matters was transferred to the Basque Autonomous Community, in disregard of the transfer conditions applicable to teaching staff.<sup>74</sup> I agree, for my part, with the “*Ararteko*” and the National Ombudsman’s opinions that the measures imposed, for insufficient knowledge of the Basque language, on these senior teachers entail excessively detrimental consequences for them. Without prejudice to importance of the citizens’ right to use the official language of their choice, I consider, that initiatives aimed at facilitating the exercise of this right should not put the employment of so small a group of persons in peril, who represent less than 1% of all the teachers employed by the Basque autonomous administration. I consider it preferable to avoid impositions in this field where flexibility and prudence are much needed to avoid social tensions for linguistic reasons and to promote a consensual practice of bi-lingual education in the Basque Autonomous Community.

## XI. THE SITUATION OF ROMA

176. The Roma (traditionally known as “Gypsies” in Spain) make up a sizeable part of the Spanish population, accounting for approximately 1.5%. According to data supplied by the Ministry of Labour and Social Affairs, the Gypsy community comprises between 600,000 and 650,000 persons<sup>75</sup> (although the most recent estimates from Gypsy non-governmental organisations put them at 700,000), the vast majority of whom are sedentary, concentrated primarily in the Autonomous Communities of Andalusia, Valencia and Murcia and in the main metropolitan areas of the country. It should be noted that the Spanish Constitution does not formally recognise or define the concept of ethnic minority. It recognises and protects all the people of Spain, along with their cultures, traditions, languages and institutions. However, as in other Council of Europe member states, the Gypsy community suffers to a degree from rejection<sup>76</sup> and social and economic exclusion. Nonetheless, in recent years many Gypsies have integrated into society and have reached satisfactory living standards, similar to those of the rest of the population.

177. The main difficulties facing the Gypsy community fall primarily into three main categories: (i) housing, (ii) employment, and (iii) image within society and

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<sup>73</sup> They also complain that the Department of Education requires a knowledge of the Basque language to those who teach in Spanish, that they had not been given the opportunity to benefit from the Basque language learning programmes for teachers until 2000., that they are at pains to learn this language because of their age and because they live in areas where it is hardly spoken, that the Decree on “linguistic profiles”, was adopted against the wishes of the largest trade unions and with the only support of the nationalist ones...

<sup>74</sup> These conditions were enshrined in Act 2/1993 of the Basque Parliament on teaching staff outside university education, which granted stable employment to non-permanent staff in possession of the relevant academic diplomas and seniority.

<sup>75</sup> There are no official statistics on the Gypsy population since data on membership of an ethnic or religious group, or data based on other economic or social circumstances are protected under the Constitution. Consequently, they are not included in the official figures relating to population, employment, education, social welfare, etc.

<sup>76</sup> According to the Advisory Committee of the Framework Convention for the Protection of National Minorities of 27 November 2003, there are still instances of rejection of and hostility towards the Gypsies by the population in general, communication media and certain authorities.

discrimination. As far as housing is concerned, and although precise figures are not available, it is estimated that some 10-12% of the community live in shanty towns or encampments. There is also a sizeable proportion living in poor standard housing, with no access to basic services (drinking water, light, etc.). In addition to or as a consequence of this, there is a serious problem of overcrowding which gives rise to considerable social tension.

178. Access to employment is another major problem not only because of the difficult labour market situation in Spain but also because many Gypsies have had little vocational training. Furthermore, as in other countries, they suffer from discrimination when applying for jobs.
179. It must also be acknowledged that within Spanish society certain prejudices and stereotypes vis-à-vis the Gypsies persist, which are at odds with the actual day-to-day life of the majority of the Gypsy community. There is still a lack of awareness of the cultural wealth and traditions of that community. This needs to be turned to account and explained in order to convey a more positive image of this group of citizens who are entitled to the same rights and obligations as all Spaniards. A separate issue is the associated problems brought about by the arrival in recent years of groups of Gypsies from a number of countries in Eastern Europe who are, clearly, the cause of certain serious problems of fairly aggressive begging, including in some cases, examples of criminal behaviour which cannot and should not be tolerated.
180. Finally, there are the school-related problems encountered by Gypsy children. Although Spain does not have any schools which are specifically for Gypsies (which would encourage widespread discrimination), certain state-run schools are being attended by large numbers of children from this community. In general, there is a high rate of absenteeism, slow development and drop-out, as there are many children who do not go beyond primary education<sup>77</sup>. Moreover, no references to Gypsy history and culture are included in school curricula or textbooks. In this respect, I regard as a very positive move the recent signature of a collaboration agreement between a Gypsy organisation and the Ministry of Education and Science, to implement measures to improve access and integration for the Gypsy community in the educational field.
181. During my visit to Andalusia, I was able to see for myself some of the difficulties affecting the Gypsy population. Almost half of all Spanish Gypsies, around 300,000 people, live in this Autonomous Community. As in other parts of the country, in recent decades there has been a tangible improvement in the living conditions of this group, brought about primarily by access to social protection, health care, education and housing. Nonetheless, major problems such as those referred to above remain.

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<sup>77</sup> According to figures provided by the Fundación Secretariado General Gitano, the national Gypsy foundation, more than 70% of Gypsies over the age of 16, females in particular, have not completed their primary education. As a result, very few Gypsy students are in secondary education or vocational training.

182. In Andalusia, I visited the community of the “Three thousand dwellings” in the “*Poligono Sur*” in the southern part of Seville. This is an area with a large Gypsy population. It is in varying levels of decline, exacerbated in particular in some parts by common problems (basically drugs, alcoholism, crime, marginalisation, unemployment and a high rate of social unrest). Despite the significant difficulties, the authorities of the Autonomous Community have exerted considerable efforts (such as the Seville Municipality’s Integral Plan) to address the shortcomings identified. At a meeting I had with representatives of the Gypsy community, they asked for greater involvement by the authorities in the Plan, and requested that it should not be limited solely to security aspects. They voiced their concern and unease at the attitude of the police who, they claimed, focused on the more repressive aspects. I was told that there were other areas near Seville where Gypsies were in the majority and where living conditions were much worse than in “*Poligono Sur*” (for example, “*El Vacie*”, largely made up of shacks). Lastly, I was asked to transmit their request for the abolition of the Royal Edict issued by the Catholic Kings in 1499.<sup>78</sup> This request, I was informed, had already been submitted to the Spanish authorities. Although, following the entry into force of the Constitution which establishes equality between all Spaniards, this problem can be regarded as having been solved by the law as it now stands, a symbolic gesture along the lines of this request would be welcomed by the Gypsy community in Spain.
183. Representatives of Gypsy organisations drew my attention to the standstill in the Gypsy development programme initiated by the Ministry of Labour and Social Affairs, the only national programme directed exclusively at the Gypsy community. For some of the Gypsy organisations the programme remains merely a means of assistance and not one promoting the Gypsy community in all its aspects. The Ministry has insisted that even if this programme, which is jointly financed by central government, the autonomous communities and municipalities, has only received limited additional funding over the last few years, it has nonetheless resulted in significant improvements for the Gypsy community – for example through the 61% rise in employment of Gypsies assisted by the programme. In any event, it is essential for Gypsy organisations to be actively involved in any governmental strategy focusing on the development and improvement of the living conditions of this community. In this regard, I consider the plan to set up a National Gypsy Council and its future involvement in drafting a new national development plan to be a very positive move.

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<sup>78</sup> Under this edict, Gypsies (referred to as “Egyptians”) must have “recognised trades” and not “wander about through the Kingdom”, failing which they made themselves liable to severe penalties such as flogging, banishment or life imprisonment.



## RECOMMENDATIONS

184. The Commissioner, in accordance with Article 3 b, c and e, and Article 8 of Committee of Ministers Resolution (99) 50 makes the following recommendations to the Spanish authorities:

### Ill-treatment

1. Investigate rapidly and thoroughly all allegations of torture or ill-treatment, and deaths of detainees in police stations, premises of the Guardia Civil and other police authorities, applying where necessary the appropriate disciplinary and criminal sanctions. Establish appropriate procedures guaranteeing that allegations of ill treatment in a given detention centre, police station or Guardia Civil unit, will not be investigated exclusively or responded to directly by the officers allegedly involved but by specialist investigation services unconnected with the reported facts and under the supervision of a higher authority
2. Extend the prescription period for the crime of torture; consider removing the prescription of such offences altogether.
3. Remove from police stations and barracks any remaining instruments of defence prohibited by the regulations, which may cause dangerous physical harm.
4. Identify and eliminate the causes of the higher incidence of cases of ill-treatment by the police units of the local authorities and Autonomous Communities compared to national security forces. It may be useful, in this context, to introduce the control procedures similar to those used by the *Ertzaintza* more widely.
5. Create the necessary mechanisms for compensating victims of torture and ill-treatment, where necessary through legislative reforms.
6. Review the current regime of incommunicado detention so as to allow the detainee to meet his or her counsel in private, at least once.

### The prison system

7. Revise, in the context of the reform of the Code of Criminal Procedure, the legal provisions on pre-trial detention, bringing them into line with the criteria set forth by the European Court of Human Rights.
8. Progressively reduce overcrowding in prisons by building new establishments, refurbishing those already in existence and extending the use of alternative sentences to imprisonment which would assist those convicted with their reintegration into society.
9. Carry out a thorough review of the provision of psychiatric care in the detention estate, equipping prisons with psychiatric care units able to treat detainees suffering from mental disorders and setting up a network of specialist establishments for the most serious cases, acting where appropriate in conjunction with the health authorities of the Autonomous Communities.

10. Revise and update the Suicide Prevention Programme.
11. Strengthen and expand drug rehabilitation and severance programmes, in particular the use of methadone treatment where medically advisable. Implement stricter measures to control drug trafficking in prisons.
12. Improve health care in prisons, particularly with regard to infectious and contagious diseases.
13. Take all necessary measures to ensure that detention facilities holding mothers and small children are specially adapted to the children's development.
14. Provide the necessary guarantees to ensure that the information contained in the files on prisoners requiring special observation ("FIES") is used exclusively by the authorised units, with due regard for the provisions of the Act on Personal Data Protection and without its application resulting in disciplinary measures not provided for in prison legislation and regulations. Ensure access to this information by officials of the Spanish Data Protection Agency and the judges responsible for the supervision of prisons. Regulate the use of these files through their inclusion in the legislation covering the prison service.
15. In Catalonia, the necessary measures must be taken to reduce overcrowding in certain prisons and avoid a repetition of cases of ill-treatment such as those in *Quatre Camins*. With regard to these serious incidents, it is essential to identify those responsible and, where appropriate, ascertain the criminal liability of officers involved in the physical attacks suffered by prisoners during their transfer as a result of the violent and aggressive behaviour directed towards officers and officials in the centre. Such conduct cannot be allowed to go unpunished.

### **The situation in young offender institutions**

16. Take the necessary steps to prevent cases of abuse and ill-treatment in young offender institutions. Juvenile court judges and prosecutors should make regular visits to these centres and verify that the accommodation and treatment conditions are appropriate.

### **The administration of justice**

17. Make the necessary legislative and budgetary reforms to reduce the excessive length of proceedings, increasing the number of judicial organs, setting up at the earliest opportunity the 'Judicial Offices', introducing community courts to deal with minor cases and amending the arrangements for and scope of appeals to the Supreme Court.
18. Introduce a second instance for criminal proceedings, offering the possibility of appeal against all convictions delivered at first instance as provided for in the International Covenant of Civil and Political Rights and consider the ratification of Protocol No. 7 to the European Convention on Human Rights.

19. Ensure that the future Code of Criminal Procedure simplifies proceedings, reduces delays, and regulates telephone tapping in compliance with the requirements of the European Convention on Human Rights. Introduce the possibility of reviewing convictions handed down as a result of judicial proceedings which the European Court of Human Rights has declared to be contrary to the Convention.

### **Constitutional Court**

20. Heed, as a matter of urgency, the complaints emanating from the Constitutional Court, by reforming the conditions for and scope of "*amparo*" (protection) appeals so as to reduce their number and thereby enable the said Court to devote itself to considering the substantive questions referred to it.

### **Immigration and asylum**

21. Adopt and promote the necessary measures at national and European level to combat the trafficking in human beings for the purposes of illegal immigration.
22. Facilitate the registration of foreigners and adopt measures to preclude use of the information contained in the municipal registry to penalise illegal immigrants.
23. Complete the reforms of the Retention Centres for Foreigners in order to improve the living conditions. Speed up the anticipated transfer of the "*La Verneda*" centre in Barcelona to the new facilities in the "Free Zone" of the city.
24. Ensure that the foreigners held in the centres have access at all times to all the necessary information about their situation. All centres should provide new arrivals with a sheet setting out their rights and duties, explained both clearly and fully. This information should be provided in various languages, and at the very least in English, French and Arabic. The information in foreign languages must be correct and be devoid of errors which could give rise to misunderstandings.
25. Facilitate, at all times, access to a lawyer and to an interpreter free of charge for foreign persons held in retention centres.
26. Bar associations should allocate the necessary resources to provide specific training in alien, immigration and asylum legislation for those acting as court-appointed lawyers dealing with foreigners in an unlawful situation or seeking asylum.
27. Set out clear rules concerning access by non-governmental organisations to Retention Centres for Foreigners.
28. Adopt the necessary measures to ensure that deportations and returns take place in strict compliance with the law, particularly the right to legal aid and an interpreter, with an indication of the grounds for the decision and the appeals that can be made. All cases of unlawful deportations or returns must be thoroughly investigated and the appropriate administrative and criminal sanctions imposed.

29. Avoid the collective return of foreigners, by ensuring the individual examination of each case and guaranteeing the right to appeal expulsions and access to asylum proceedings.
30. Adopt the necessary measures to ensure the respect for the life and safety of immigrants during collective assaults on the metal fences of Ceuta and Melilla. Ensure the human treatment of these persons, where possible in concertation with the Moroccan authorities and with those of other countries concerned by these migration flows, guaranteeing the exercise of their right to asylum and conducting, if necessary, the return to the country of origin with full respect for their physical integrity and dignity as human beings.
31. Actively promote a common immigration policy within the European Union with a view to better responding to the large-scale immigration flows disproportionately affecting member States in the Mediterranean area (Spain, Italy, Malta) and organising the co-operation with, and assistance to, the third countries where this immigration originates.
32. Examine the possibility of providing foreigners who, for various reasons, cannot be deported with certain necessary documentation, for example the general health card, without requiring the person's inclusion on the municipal registry. In addition, welfare expenditure on the provision of care for these individuals must be maintained and increased and ways to provide them with occupations in certain areas examined in order to improve their situation.
33. Ensure the appropriate reception and care for unaccompanied foreign minors.
34. Ensure that the current legislation requiring minors to be given appropriate documentation without exception within nine months of being handed over to the juvenile welfare services is respected.
35. Identify alternatives to the determination of age through bone examinations, in view of the unreliability of such methods.
36. Close, immediately, the "*Llanos Pelados*" unaccompanied foreign minors centre in Fuerteventura, transferring those held there to facilities offering acceptable reception and care provision conditions. Provide the Department of Social Affairs of the Island's Council with the necessary resources to carry out this transfer and to provide appropriate care to all unaccompanied foreign minors arriving or located on the island.
37. Fully respect the legal requirements concerning the asylum application procedure, so as to preclude cases of unlawful deportation or return.
38. Provide the Aliens Offices with the necessary human and material resources to process rapidly and efficiently all asylum applications submitted.
39. Ensure that all asylum seekers have unrestricted access to the application procedure and that they effectively enjoy the right to the assistance of a lawyer and an interpreter.

40. With regard to stowaways, consideration should be given to reviewing the instruction issued by the office of the government delegate for alien affairs dated 9 April 2002 and ensure that such individuals have access to a lawyer whatever the circumstances.

### **Trafficking in human beings**

41. Strengthen the legal provisions pertaining to the prosecution of human-trafficking networks.
42. Improve the mechanisms protecting female victims of trafficking in order to guarantee their fundamental rights and facilitate the prosecution of traffickers.

### **Gender-based violence**

43. Give consideration to approving and implementing provisions of a general nature concerning asylum for female victims of gender-based violence. Until they adopt a decision on this issue, the Spanish authorities should show a degree of flexibility in this area.
44. Establish clearer mechanisms to protect illegally-resident foreign women who are victims of gender-based violence, avoiding as far as possible the initiation of proceedings to deport the individuals in question who turn up at a police station to report cases of domestic violence.
45. Where an application is made for a protection order for the victims of domestic violence, adopt all the necessary measures to ensure that the court deals with the matter as swiftly as possible and once the order has been issued ensure that it is notified immediately to the parties and the competent public authorities.

### **Support and assistance to the victims of terrorism**

46. Strengthen the mechanisms for assisting victims of terrorism.
47. Improve the co-ordination between the different administrations managing assistance schemes for victims of terrorism and, to the extent possible, establish a single office to administer all the assistance victims are entitled to.
48. Create the necessary mechanisms to ensure that assistance is rapidly afforded to victims without prolonged formalities.
49. Provide victims of terrorism with adequate care and attention on the occasion of trials against the persons accused of terrorist crimes, informing the former adequately and making sure, to the extent possible, that they enjoy the calm and respect they deserve as victims during judicial proceedings.

**Basque Country**

50. Continue and strengthen the measures taken by the Basque and national security forces against the resurgence of "*kale-borroka*", acts of street violence and intimidation against holders of elective offices at national, autonomous community and local level, and any other type of terrorist pressure exerted on individuals.
51. Attach priority to the protection of and solidarity with victims of terrorism, persevering with the dialogue initiated with associations of victims of terrorism in search of appropriate responses to their actual needs, putting into practice promptly whatever methods seem necessary to improve their material situation and alleviate as far as possible their distress.
52. Reconsider the situation of the group of "non-permanent" teachers who have been unable to meet the criteria of the linguistic profile attached to the posts they have been holding for many years, avoiding measures which are detrimental against them for this reason.

**The situation of the Gypsies**

53. Adopt the necessary measures to facilitate access by the Gypsy community to housing (eradicating the shanty-town settlements), employment and education.
54. Give fresh impetus to the Gypsy Development Programme, actively including Gypsy organisations in this or any other government strategy seeking to develop and improve their living conditions.



