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"Emerging issues of access to justice for vulnerable groups, in particular:
- migrants and asylum seekers;
- children, including children perpetrators of crime"

Report presented by the Minister of Justice of Spain

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Executive summary

The report highlights that access to justice entails the effective enforcement of rights within a reasonable time.

Migrants and asylum-seekers are often in situations of legal and social precariousness and thus particularly vulnerable despite being protected by international human rights instruments, notably the European Convention on Human Rights and the Geneva Convention, irrespective of their origin, nationality or status. A growing number of immigrants have now settled in various European States resulting in an increasing ethnic and cultural heterogeneity. Access to justice of these persons is an essential element to ensure the rule of law and respect for the rights of all, as well as a successful integration.

Difficulties in accessing justice include nationality (residents and naturalised citizens may have a different status than nationals of origin), statelessness and the situation of internally displaced persons. Irregular immigrants face further problems as they have no identity documents so are barred from accessing courts to assert their rights and, because of their illegal status, tend to avoid any contact with the justice system for fear of being detained and deported.

The need for effective access to justice in the case of asylum seekers is often more urgent. While the Geneva Convention must be scrupulously respected, it is a very difficult task to distinguish the cases justified by a well-founded fear of persecution and those which are based on economic or other grounds. These persons, having no identity documents or forged papers, are often arrested at the border and detained until decisions are taken on the granting of refugee status or expulsion.

Access to justice of these vulnerable groups is hindered by financial constraints (legal aid is not always provided free of charge) and practical issues, such as lack of information in a language that the persons concerned can understand. The family dimension, notably family reunification, is of special concern in relation to the access to justice of migrants and asylum seekers, and is particularly worrying where unaccompanied or separated minors are involved.

The second identified group of vulnerable persons is children. Access to justice for children is often barred by obstacles of age and lack of legal capacity resulting in a practical impossibility for them to exercise their rights provided by various international treaties (the European Convention on Human Rights, the United Nations Convention on the Rights of the Child, and the European Convention on the Exercise of Children's Rights). The report highlights ways in which States can facilitate the access to justice of child victims and witnesses of certain criminal offences.

As for child perpetrators of crime, the report outlines a number of Council of Europe efforts to highlight the fact that children are more vulnerable than adults in the criminal justice system and need additional procedural safeguards. They should be seen as children first and as offenders second. The use of detention for juveniles needs to be avoided as far as possible and a wide range of alternatives to custody should be developed and implemented. The new European Rules for Juvenile Offenders, which are currently being drafted, will highlight the particular interests and needs of this vulnerable group. All the rules will be based on the child's best interests, the principle of proportionality and respect for human dignity, and measures of intervention to expose children to the least harm possible while allowing maximum social integration.

I. Introduction

1. At the 27th Conference of European Ministers of Justice it was stated that the attention of the international community had been particularly fixed on the rights of crime victims, as one of the most relevant issues in law enforcement and criminal justice. We also pointed out that "the basic objective of contemporary human society is to face the special needs and interests of crime victims". One need, maybe the first, is access to justice, as far as it is the main means of reparation for the victim of a crime.

2. "Access to justice" is a subject with different profiles. It is indeed quite difficult to measure and assess "access" both from a quantitative and qualitative approach. We must emphasize, at first, that the presence of a large number of complaints may indicate a problem, not an advantage, and it may be preferable to take account of other factors, such as the *ratio* of complaints taken under consideration or the degree of satisfaction expressed by the various agents concerned in the justice system.

3. The second issue we have to keep in mind is "what" justice is accessed: courts of law, administrative instances, complaints and appeals, mediation, reconciliation and/or arbitration?

4. Finally, we must go back to what was in last year's report: that States should notably aim at facilitating the access of victims to justice and indeed ensure that they do not also become victims of procedures and administrative burdens, which practically become a form of re-victimisation.

5. In the present report, however, our purpose is not to present a general overview of issues raised by access to justice but to focus on emerging issues of access to justice for certain vulnerable groups, which have been chosen with regard to the difficulties experienced by their members. The two vulnerable groups chosen for this report (migrants and asylum-seekers, on the one hand, and children, on the other hand) can be presented as critical groups, as far as they are confronted not only with difficulties with regard to access to justice but also with additional difficulties such as, for example, lack of access to information, and lack of the standard means of defence. Very often, an immigrant or a child does not have the required information or education in order to have a proper access to justice in case he needs it. Of course, this does not mean that there is not a particular interest in access to justice by other vulnerable groups, like women (and other) victims of domestic and gender violence (of great significance in Spain's experience and recent legal reform.)

6. As far as immigrants and asylum-seekers are concerned, a global approach suits these per se transnational issues, for which borders often become irrelevant. In that sense, it is fundamental to employ, if not a global, at least a European approach. We would also like to point out that access to justice for migrants and asylum-seekers is a relevant means of integration, which is often forgotten and which should be given as much importance as education or religious issues, in the framework of a successful integration policy.

7. On the other hand, when we speak about access to justice for children, the situation is different because we no longer have the international factor, notwithstanding the specific questions related to immigrant children. This is the reason why the present report would like to point out the Spanish regulation on this issue (see Appendix), in order to compare it with the rules in other European countries.

8. Access to justice and more specifically means of providing adequate access has, for a number of years, been a matter of concern for the member States of the Council of Europe. The core values which the Organisation has been protecting for more than half a century - democracy, the rule of law and human rights - entail the necessity of having efficient and fair functioning of justice systems, enabling individuals to have an effective access to justice and the right in practice to exercise and enforce their legal rights.

9. Access to justice is a basic human right, which not only encompasses the mere access to courts but aims in a more general manner at reaching fair and equitable legal and judicial outcomes, as well as proposing remedies. Obtaining a binding decision which will be effectively enforced is also an essential component of an effective justice system.

10. Migrants and asylum seekers, who are often in conditions of legal and social precariousness and are thus vulnerable, have rights which are protected by international human rights instruments, irrespective of their origin, nationality or status.

11. "Children are vulnerable. They need more protection, not less" as quoted in one of the "seven good reasons for building a Europe for and with children", promoted by the Council of Europe programme for the promotion of children's rights and the protection of children from violence entitled "Building a Europe for and with children"[1]. The Conference will address this specific issue.

12. The purpose of the Conference is to address emerging issues in the access to justice of the above-mentioned vulnerable groups. Nevertheless, the obstacles to access to justice which are usually identified (lengthy and costly procedures, availability of legal representation, limitations in existing remedies, lack of adequate information, formalism and heaviness of legal procedures) will also be mentioned as they are recurrent barriers, impeding effective access to justice for vulnerable groups. Thus, the following themes will be dealt with in the present report:

as regards migrants and asylum seekers:

- a pan-European approach to migration;
- identification, identity and nationality;
- the economic dimension;
- access to information;
- procedural matters;
- the family dimension; and
- the specific case of minors;

as regards children:

- children in judicial proceedings;
- a child-friendly justice system.

[1] This programme is covering in a transversal manner the social, legal, educational and health dimensions relevant to protecting children from various forms of violence.

II. Migrants and asylum seekers

A. Definitions

13. The term “migrant” is used to describe a variety of cases, depending on the context, such as emigrants, returning migrants, immigrants (regular or irregular) or persons of immigrant background.

14. It should be noted that internally displaced persons can also be considered as migrants although there is no transfrontier dimension in their forced move and they remain citizens of their country. Such persons having specific needs due to their displacement, their case will also be addressed in the present report.

15. A refugee is a person who has fled a country having “well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (United Nations Convention relating to the status of refugees – 1951). Any person claiming the status of refugee is an asylum-seeker during the period of legal determination of the claimed status.

16. A stateless person is a person who has no nationality, thus falling outside the State protection and being deprived of benefits associated with nationality.

B. Immigrants as foreigners

17. The framework of the analysis of access to justice for migrants needs to be broader and to be considered in the light of the legal treatment existing for foreigners in our States. Indeed, on the one hand, some rights are equally recognized for nationals and foreigners and then, the legal treatment of foreigners (and then of immigrants) must be the same as for nationals (i.e. right to life, integrity, privacy, freedom, …). On the other hand, several rights are not recognized in our legal orders for foreigners (traditionally the right to vote or to be elected) except when treaties provide otherwise (as in the European Union.)

18. Due process of law is an example of a right which has to be recognized for everyone, independently of citizenship. The interpretation of Article 10 of the Universal Declaration of Human Rights, Article 14.1 of the International Covenant on Civil and Political Rights and Article 6.1 of the European Convention on Human Rights leads to this conclusion. Indeed, in these provisions, due process of law is accorded to any person, independently of his/her nationality.

C. A pan-European approach to immigration

19. Immigration poses an unprecedented challenge for Europe. For the last five centuries, between 1492 and the end of World War Two, Europe has been a continent of emigrants: America, Africa, Asia and Oceania have received millions of European colonists. Since 1945 however the tide has turned: now it is the rest of the world that is sending millions of men, women and children to live and work in Europe, as stated by the European Ministers competent for migration affairs in the conclusions of the Seventh Conference, held in Helsinki on September 16th and 17th, 2002 (MMG-7 (2002) 1).

20. There are differences from country to country, of course, but the general trend is unmistakable: a growing number of immigrants are settled in various European States. In some of these countries, their immigrant population comprises a second or even a third generation, and in many cases they have already acquired the nationality of the host country. The consequence of this phenomenon is a growing ethnic and cultural heterogeneity that is breaking down the standardising tendencies deployed by the various States since the 19th century, the century of nationalism.

21. This new reality generates tensions and new opportunities: Europe's response has to respect human rights, with sustainable solutions that conform to the Rule of Law in order to resolve the tensions and exploit the opportunities. In an increasingly urban, mobile and secularized society, it is up to the legal system to organize the new forms of co-existence among the different countries of Europe. Immigrants' access to justice is, in this context, an essential element to ensure that the rule of law and respect for the rights of all individuals underlie the adaptation of European societies to this facet of globalization.

D. Identification, identity and nationality

22. Issues of nationality, identity and identification of the person have a strong impact on the level of accessibility of persons to justice and the variety of cases where persons are prevented from accessing justice have to be raised.

23. The right of registration at birth is a fundamental principle aiming at ensuring that each individual is conferred a legal identity and is thus recognised as a person before the law.

24. The European Convention on Nationality (ETS 166) which establishes principles and rules relating to the nationality of persons states that everyone has the right to a nationality, that statelessness shall be avoided, that no one shall be arbitrarily deprived of his or her nationality.

25. Accessing justice means that the person who will be considered by the justice system, be it as a victim, witness or offender, has to be identified and his or her identity known. The requirement of identification can in practice and in a number of different situations be an obstacle to accessing justice.

1. Uniformity of nationality and equality of access to justice: persons with an immigrant background

26. As a general rule, the States of Europe have maintained the full equivalence of rights among their nationals: both for those who have enjoyed nationality for many generations and those who have acquired it subsequently, normally through legal residence (first-generation immigrants), or have obtained it through being born on European soil of foreign parents or grandparents.

27. Despite this equality as a general rule, all national legal systems contain certain *de iure* differences between nationals of origin and naturalized citizens. It would be interesting to examine these differences in rights and duties in order to measure to what extent these are translated into a different degree of access to judicial or other systems for the resolution of disputes in the different countries of Europe.

28. Nonetheless, the most important task, albeit a complicated one, would be to determine whether the nationals of the States of Europe encounter, in their day-to-day reality, more or fewer difficulties in accessing justice depending on their different national origin. This task could be approached by analyzing different objective indicators such as the following:

- degree of participation by nationals of immigrant origin in the legal professions, particularly among judges, lawyers (including public prosecutors), as well as in the personnel of penitentiary establishments and the police forces;
- percentage of children or grandchildren of immigrants in Law Schools;
- proportion of complaints before the Courts of Justice in which the parties are nationals of origin or naturalized, and the correlation with the different population groups (litigiousness index);

- proportion of criminal cases or those related to other types of penalties (such as administrative fines) in which the accused is a national of origin or naturalized citizen, and the correlation with the different population groups (punishment index).

29. The compilation and organisation of data of this type would allow us to discover whether the equality of rights and access to justice at the very heart of national citizenship is in fact real or if the growing heterogeneity of citizens in European countries is producing divergence and even discrimination in practice, thus contradicting the uniformity of nationality.

2. Supplementary requirements for legal residents to access justice

30. The legal situation of foreigners residing and working legitimately in Europe, thanks to having the mandatory permits issued by the national authorities, varies greatly in the different Member States of the Council of Europe: all of the countries are on a broad spectrum ranging from those tending towards giving equivalent rights to nationals and immigrants residing in their territory to those whose laws establish numerous differences in their respective rights and obligations.

31. These differences are particularly visible in all matters regarding access to justice. Some critical points might be the following:

- whether foreign residents can lodge complaints or lawsuits on an equal footing with nationals or, on the contrary, they are subjected to different requirements, such as the need for a prior bond, a minimum period of residence in the country, etc.;
- if they have access to the system for appeals against the resolutions adopted by the first instance bodies on the same terms as nationals;
- whether or not immigrants are entitled to free legal aid: in particular, gratuity of the Court Service; legal advice from a solicitor and, where appropriate, defence before the Courts; or economic or other assistance for the submission of evidence or to finance its provision.

3. Stateless persons

32. As a general rule, immigrants residing legally in a country are nationals of a foreign State. However, we must not overlook the case of stateless persons: even though their number is not large, the existence of rules making it possible for them to access justice, despite their lack of a nationality recognized by the State in question, offers an important indicator regarding the degree of accessibility to justice in the different countries of Europe.

4. Internally displaced persons

33. Paragraph 7 of Recommendation (2006)6 of the Committee of Ministers to member states on internally displaced persons states that “Internally displaced persons shall be provided with all documents necessary for the effective exercise of their rights as soon as possible following their displacement and without unreasonable conditions being imposed”.

34. It should be underlined that internally displaced persons, theoretically entitled to as many rights as the other citizens of the country they live in, can be prevented from accessing a wide range of basic rights, such as access to justice, as they sometimes suffer from a limited freedom of movement, absence of legal residence, fear of retaliation if they report abuses.

5. The risk of being identified: access to justice of persons in irregular situations

35. There are two different scenarios: a) that of foreigners living on European soil, in some cases for many years, yet lacking the mandatory residence and work permits; and b) that of immigrants who are discovered while clandestinely crossing the border, whether by air, land or sea. As far as the latter are concerned, it should be pointed out that maritime borders raise additional difficulties that should be taken into account.

36. In either case, immigrants may be in contact with networks or organisations devoted to illegal trafficking of persons. And, in extreme but regrettably not infrequent cases, they are in fact the victims of this inhuman exploitation, as they are subjected to slave labour, poor conditions or sexual exploitation.

37. Each of these hypotheses raises different questions in the matter of access to justice. However, all of them share a common problem: the lack of reliable information about the foreigner's identity.

<u>The identity of immigrants</u>

38. As a general rule, irregular immigrants have no passport (or deny that they have any); nor is it uncommon for them to use false papers. On many occasions, their names and surnames come from very different languages and cultural traditions from those commonly encountered in Europe.

39. These facts hinder the presentation of lawsuits by irregular immigrants as the rules of procedure usually require those bringing actions before the courts to accredit their identity fully, normally by presenting their personal documentation to the court or before a public notary. The non-existence of personal identity documents would therefore act as a barrier for access to justice.

40. The actions of the public authorities, adopting expulsion or internment measures or turning down the applications submitted by immigrants, would paradoxically help to overcome these difficulties. Any administrative or judicial act necessarily identifies the recipient of the decision, thus allowing the institution processing the complaint against the same to identify the person concerned on the terms agreed by the State in whose territory the person is either present or attempting to enter.

41. In any case, the identification of foreigners in an irregular situation is a recurrent problem. It would be of interest to contrast the different means used by the various states in Europe to:

- define the identifying details of individuals: name and surname(s), photograph, fingerprints, recording of biometric data, etc. (cf. the Eurodac system created by CE Regulations 2725/2000);
- registers and other official systems for consigning the identification details of individuals, particularly those which allow accreditation of a person's identity before the courts or other organs for resolving complaints;
- means used by the immigration authorities and border police to establish the identity of foreigners in irregular situations and to verify the identity provided by them;
- international co-operation: methods introduced by European countries to co-operate with the countries of origin of the immigrants.

Irregular residents

42. Access to justice by foreigners in an irregular situation in any European State, over a more or less long period of time, presents two clearly distinct aspects: their participation in lawsuits forming part of the fabric of daily life and, on the other hand, those actions determining the possibility of their permanence in the country.

43. Irregular immigrants generally make scant use of their rights: regardless of whether or not these are recognized under the legislation of the European country of residence, their fear of being detected by the immigration service and their distrust of the public authorities lead them to avoid contact with the machinery of justice. Any conflict is resolved by means of informal arrangements or mediation, or else they are quite simply written off as a bad loss.

44. Nonetheless, the existence of a wide network of legal advice or mediation services, as appropriate, greatly facilitates access to justice by immigrants, both when they are in legitimate situations (as we saw above) and when they lack the mandatory documentation, although in this latter case they remain on the periphery of the judicial system. It would be of interest to confirm the widespread impression that this kind of service deals with its beneficiaries without consideration for their legal resident status and, therefore, they provide advice and reconciliation or mediation services to a high proportion of irregular immigrants.

45. The consulates and embassies that the States of origin have in European countries may have an important role to play in this matter: not only by providing advice or mediating with the national authorities, but also documenting (by means of passports and other papers) their resident nationals.

46. The critical moment for access to justice occurs, however, when the immigrant's stay in the host country is threatened. Expulsion procedures and their judicial review have considerably increased the number of cases brought before the administrative dispute courts of all European countries.

47. In this sphere, particular importance needs to be given to the following aspects:

- the moment at which the irregular immigrants subjected to expulsion proceedings may effectively be assured of the assistance of a lawyer and, if necessary, an interpreter;
- gratuity or otherwise of these services;
- possibility of foreigners without a residence or work permit being arrested by the national authorities; where appropriate, guarantees on arrests, including with respect to their maximum duration (in the light of section 5 of the European Convention on Human Rights and the corresponding national legislation);
- powers of the bodies passing judgement or reviewing these proceedings to adopt interim measures, such as the suspension of an expulsion order, the immediate summons of the detainee before a Judge or other steps;
- powers to visit and inspect the places where foreigners are detained or interned;
- means of communication between the immigrant, his or her lawyer and the national authorities: availability of telephones, fax machines or telematic systems.

48. The critical point consists in specifying whether an expulsion measure affecting an immigrant who has resided in the country for a prolonged period of time, although the necessary permits may be missing at that particular moment, and which has been challenged before the courts can be enforced or not by the competent ministry before the review body comes to a decision on whether or not it is appropriate to suspend the expulsion until a definitive decision is taken.

49. A high number of irregular immigrants exist and ways to normalise their status, through *inter alia* programmes of regularisation, is being addressed in a number of member states.

Immigrants and asylum seekers discovered at the border

50. When border patrols detect foreigners attempting to enter the territory of the State and outwit the border crossings without any kind of documentation, or coming through regular channels but with forged papers, they are arrested and returned to their countries of origin or the country they have just come from. In these cases, the question is categorical: access to justice?

51. The first situation justifying the supervision of this kind of situation by a court or another impartial body capable of meting out justice is the case of asylum-seekers. Scrupulous respect for the Geneva Convention is one of Europe's strongest commitments. Those persons persecuted by their own country tend to have no documentation, thus normally preventing them from obtaining the corresponding visas and even from paying for standard forms of transport. It is not impossible, then, for legitimate seekers of international protection to cross borders in an irregular fashion as the first step to their presentation before the national authorities to lodge a petition for asylum.

52. Together with this fact, it is also the case that it is not uncommon for immigrants leaving home on economic grounds to submit requests for asylum in order to delay, hinder or prevent their repatriation. Distinguishing which ones are persecuted for reasons of race, religion, nationality, political opinions or membership of a particular social group, from those who are merely alleging the existence of such persecution for social or economic reasons, is a very difficult task and liable to involve a wide margin of error. It would seem to be a good idea to offer guarantees that a judicial body will revise claims lodged at the border.

53. In other circumstances, access to justice makes no sense if it is merely to affirm an evidently non-existent right to enter the country. Be that as it may, it may yet be of interest in connection with other aspects, particularly the safeguarding of unrenounceable human rights such as physical integrity or personal freedom (Judgment of the European Court of Human Rights in *Amuur v. France*, dated June 25th, 1996).

54. Having stated the need to ensure access to justice even in these extreme circumstances, we are left with the numerous problems arising from its implementation. In essence, it involves the same problems as access to justice for irregular immigrants, multiplied by the factors of geography and time. Frontiers extend over wide areas; States with mountainous or maritime borders combine the difficulties inherent in these with their mere geographical amplitude.

55. But it is the time factor that decisively constrains access to justice for clandestine immigrants. Their detention, after they have been arrested by the border patrols, must not be prolonged for any longer than is strictly necessary. The ability of States to organize effective justice systems to supervise the monitoring of their borders is a moot question.

56. One of the key elements of the asylum process is ensuring transparency when asylum applications are processed. Informing asylum seekers of their rights is thus crucial in this regard. To that end, border control officials need good quality training on asylum issues, including clear guidelines on the information that should be transmitted to asylum seekers concerning their rights and the way in which applications should be received and dealt with. These training initiatives should be extended, where necessary, to police in service within the country. This training should help make the asylum procedure easier for applicants and ensure that they are given the highest protection to which they are eligible.

57. Information on the rights of asylum seekers and the procedures to apply for asylum should be available in a language that they understand at police stations and at all places where they may apply for asylum. Asylum seekers should also be provided with free translation and interpretation services to enable them to put their case to the authorities in the best conditions.

58. Where migrants or asylum seekers are detained, the Committee for the Prevention of Torture (CPT) has stated that "Immigration detainees should - in the same way as other categories of persons deprived of their liberty - be entitled, as from the outset of their detention, to inform a person of their choice of their situation and to have access to a lawyer and a doctor. Further, they should be expressly informed, without delay and in a language they understand, of all their rights and of the procedure applicable to them. (…) The right of access to a lawyer should apply throughout the detention period and include both the right to speak with the lawyer in private and to have him present during interviews with the authorities concerned. (…) More generally, immigration detainees should be entitled to maintain contact with the outside world during their detention, and in particular to have access to a telephone and to receive visits from relatives and representatives of relevant organisations." (the CPT Standards, paras 30-31).

59. The right of appeal is another aspect of the asylum procedure that the European Commission against Racism and Intolerance (ECRI) – the Council of Europe's independent human rights monitoring body specialised in combating racism and racial discrimination - insistently emphasizes. It is important to examine, in each asylum procedure, whether asylum seekers' ability to lodge an appeal against negative decisions should have a suspensive effect on expulsion orders. Sufficient time, with full access to legal assistance, should be given to them to make a proper case and reports from competent organisations should be taken into account.

60. Appeal mechanisms should be independent of the first instance decision-making body (e.g. a court rather than the Ministry responsible for the body of first-instance) and training and awareness-raising should be provided to officials coming into contact with asylum seekers, including judges. This will ensure that as asylum seekers are able to fully put their case before the authorities by providing them with equal access to all the legal remedies afforded to everyone living in the country, including the right of appeal before an independent court.

6. Abuse or misuse of identity

61. As far as abuse or misuse of identity is concerned, member states shall be urged to take the necessary measures to ensure that travel or identity documents issued are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued.

62. The Recommendation (2005)7 of the Committee of Ministers to member states concerning identity and travel documents and the fight against terrorism deals with the same question and the necessity of rapid and reliable identification of individuals in order to fight terrorism.

63. The general question of abuse of identity or absence of identity entails a large number of interrogations and constitutes a serious challenge for member states. For this reason, the Council of Europe Committee of Experts on Terrorism (CODEXTER) is currently considering the question of "false identity as a challenge to immigration authorities" as part of an ongoing reflection on residence issues which arise in connection with the fight against terrorism.

E. The economic dimension

64. The economic dimension is a key element to take into consideration when addressing the situation of migrants and asylum seekers, often because it is the main or one of the reasons which led them to migrate but also because it prevents them from effectively accessing justice.

65. The economic dimension will also be considered not as the cause of difficulties but rather as an adverse effect of the migration process, which will bring us to the situation of refugees regarding the respect of their right to property.

1. Legal aid, advice and assistance

66. Availability of legal aid, advice and assistance is a key component of access to justice, which should not be impaired by high costs and the Council of Europe has, on the basis of this key principle, adopted many internationally agreed legal texts to ensure that persons have an effective access to justice.

67. The Tampere European Council of 1999 called upon the need to strengthen co-operation between the European Commission and the Council of Europe on matters concerning access to justice and the two Institutions have to this end jointly produced "legal aid information sheets" for each member State of the Council of Europe which provide easy to understand information on the legal aid system in the respective countries.

68. Legal aid, advice and assistance which are a condition for the protection and promotion of human rights (Article 6.3 of the European Convention on Human Rights "if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require") is an accentuated need when speaking of migrants and asylum seekers.

69. The often extremely poor economic situation of migrants and asylum seekers dictates the necessity to make such services available free of charge, to enable this vulnerable group to effectively be informed of their rights and exercise them in practice.

70. The specific situation of refugees is regulated by Article 16 of the Geneva Convention of 1951 which expressly states that refugees "shall have free access to the courts of law" and shall enjoy the same treatment as nationals in matters pertaining to access to the Courts.

71. Furthermore, the Guideline n°5 of the "twenty guidelines on forced return"[2] dealing with the remedy against the removal order expressly states that where the person "does not have sufficient means to pay for necessary legal assistance, he/she be given it free of charge" and the Guideline n°9 on judicial remedy against detention also refers to legal aid as "this remedy shall be readily accessible and effective and legal aid should be provided for in accordance with national legislation".

72. The necessity for member states to "set up a system to ensure the permanent availability of independent and professional legal advice and representation in the field of asylum and migration at seaports and coastal areas" has already been raised by the Parliamentary Assembly of the Council of Europe in its Recommendation 1645(2004).

73. Special concern in respect of the access to legal advice and representation in the accelerated asylum procedures should be underlined.

[2] adopted on 4 May 2005 by the Committee of Ministers further to their drafting by the Ad hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons – CAHAR

2. Exemption from cautio judicatum solvi

74. The specific case of refugees is dealt with by Article 16 of the Geneva Convention of 1951 which states that refugees shall enjoy exemption from *cautio judicatum solvi*. The problem nevertheless remains for other members of the vulnerable group examined above such as migrants, who may be in an equally precarious economic situation and will have to submit themselves to such cautionary measures and provisions requiring foreigners bringing legal proceedings to give security for costs. Apart from its discriminatory nature, this should be underlined as a clear obstacle to access to justice.

F. Access to information

75. Facilitating access to information for vulnerable groups such as migrants and asylum seekers aims at enhancing their access to justice, as such an access presupposes that individuals are fully informed of their rights and ways to exercise and enforce them.

76. The question of dissemination of the relevant information is undoubtedly linked to the question of the language of the person, as, although information may be available, the fact that it is in a language not understood by the person simply means that it is inaccessible.

77. It is for instance crucial that an asylum seeker be informed of his or her right to an effective remedy against a decision on expulsion and the means to seek such a remedy.

1. Specialised legal and information centres

78. In particular, special importance must be given to the existence of specialized legal information and advice centres, implying multilingual personnel and documentation with experience in the subjects of the greatest interest for immigrants. These centres may be set up directly by the Public Administrations or by private bodies (non-governmental organisations, trade unions or religious groups), with or without public financing. It would be of great interest to compare the different experiences encountered in the various states of Europe.

2. Specific training of persons and professionals involved

79. Raising awareness of the rights of migrants and asylum seekers is a necessity, but so is the exposure of persons and professionals in daily contact with this vulnerable group to relevant information and practices.

80. The police and judiciary could for instance receive training on asylum issues and for instance on refugees' right to *non-refoulement* or on the fact that illegal crossing of the border should not entail penalties.

G. Procedural matters

81. A number of issues related to access to justice concern procedures which are either applied to migrants and asylum seekers, or arise in the judicial procedural context.

82. It should be underlined that the right to a fair trial (Article 6) and the right to an effective remedy (Article 13) guaranteed by the European Convention on Human Rights apply to migrants and asylum seekers, as the rights and freedoms defined in the Convention shall be secured by the member states to "everyone within their jurisdiction" (Article 1 – obligation to respect human rights).

83. The right to an effective remedy entails the right for an asylum seeker whose request for refugee status is rejected to have such a decision reviewed by a judicial authority (or an impartial and independent quasi-judicial or administrative authority), with suspensive effect on the appeal. This international protection concerns civil law issues as well as criminal proceedings.

1. The protection of victims and witnesses

84. The victim or witness must be effectively protected - during and after the criminal proceedings - in order to enable the migrant or asylum seeker to testify without any worries.

85. One of the circumstances that may legally prevent expulsion is the foreigner's collaboration in the fight against organised gangs exploiting human beings. Specifically, section 59 of the LDLE provides that "Foreigners who have crossed the Spanish frontier other than through the channels established for the purpose or who have not complied with their obligation to declare their entry and are therefore irregularly in Spain or are working without authorization, without documentation or with irregular documentation, through having been the victim, injured party or witness of an act of illicit trafficking of human beings, illegal immigration, or illicit trafficking of workers for exploitation in prostitution with abuse of their desperate situation, may be exonerated of their administrative liability and shall not be expelled if they denounce the perpetrators or collaborators in such trafficking to the pertinent authorities, or if they co-operate and collaborate with the police agents dealing with foreign status issues by providing essential information or testimony, as appropriate, in the corresponding trial against these perpetrators."

86. This possibility comprises undoubted difficulties, starting with the logical fear of the illegal foreign resident that the ultimate consequence may be his or her expulsion, which is not at all the practice followed, but rather just the opposite. Secondly, it is necessary to increase the protection for these persons in view of the likelihood of reprisals by organised bands of criminals, as the bringing of charges against organised gangs will normally entail the initiation of judicial proceedings against the members who can be identified or arrested.

87. In such judicial proceedings for exploitation of prostitution, trafficking of workers, etc., the foreigners making the accusations will have to act as witnesses, if not also as victims, which generates a situation of risk for their personal safety, in addition to the fear already mentioned of their own expulsion.

88. In this context it should be noted that in fighting trafficking in human beings, the protection of victims, witnesses and collaborators with the judicial authorities is essential.

2. Multilingual proceedings

89. The European Convention on Human Rights (Article 6.3) sets out that everyone charged with a criminal offence has the right to be informed promptly, in a language which is understandable and in detail, of the nature and reasons for the accusation against him; and the right to have the free assistance of an interpreter if the language used in court is not understandable.

90. It is undeniable that immigrants are in a different, and disadvantageous, situation with respect to nationals when it comes to accessing the courts or other organs of justice, whether for administrative matters or intermediation (mediation and arbitration). The most obvious reasons have to do with linguistic difficulties, insofar as the immigrant is unable to speak the local language or does so only with difficulty and, more generally, their lack of awareness of the laws and judicial systems of the European host country. From this

standpoint, effective access to justice should examine, at least, whether or not the different countries:

- offer the assistance of interpreters to foreigners who do not speak or are not fluent in the official language in which judicial actions are performed, at the various types of hearing and in court;
- ensure the translation of the documentation contained in judicial proceedings as well as administrative or private proceedings for the resolution of conflicts;
- in all these cases, it would be necessary to analyze which languages these interpretation and translation services should be offered in, and to what extent these correspond to those spoken by the different groups of immigrants;
- it is also necessary to ensure the quality of interpretation and translation services and to establish rigorous criteria of selection of the professionals in charge of these essential services;
- it is also essential to be alert to the finance regime for these linguistic services: to what extent should the State ensure their gratuity, perhaps in connection with the different types of proceedings and the economic level of the foreigner coming to seek justice;
- as far as possible, the examination of these aspects should lead to conclusions about whether linguistic differences are in practice a barrier for access to justice by immigrants or if they give rise to situations where the party is unable to provide a proper defence.

3. Consistency and harmonisation of asylum procedures

91. There is an urgent need[3] to develop regional guidelines on asylum procedures and more specifically on accelerated asylum procedures as there is no common definition of such procedures. A series of issues such as the use of the concepts of “safe country of origin” and “safe third country”, the particular care required in the processing of applications classified as "manifestly unfounded" and the right of appeal have to be addressed by member States in order to reach a common approach to asylum procedures.

92. Asylum procedures should provide for minimal legal guarantees concerning *inter alia* the right to legal advice and, if appropriate, to linguistic assistance; the written notification of the reasoned decision to grant or refuse asylum; possibilities of appeal and suspensive effect of the appeal.

93. Asylum procedures should continue to be based on the 1951 Geneva Convention and the European Convention on Human Rights which also implies obligations vis-à-vis persons who are not necessarily refugees in the sense of the 1951 Geneva Convention and reaffirm the generally accepted principle of *non-refoulement* and the prohibition of rejection of asylum-seekers at the border.

94. In this respect, the Steering Committee for Human Rights (CDDH) recognised the relevance of drafting guidelines on the protection of human rights in the context of accelerated asylum procedures. This work falls within the terms of reference received from the Ministers’ Deputies in June 2006, further to Recommendation 1727 (2005) of the Parliamentary Assembly on accelerated asylum procedures in the member States of the Council of Europe.

95. The working group of the CDDH drafting the guidelines will base itself, in particular, on information which it is currently collecting on relevant national practice in this area. It will concentrate on issues related to Articles 2, 3, 5 and 8 of the European Convention on Human Rights, in the light of the relevant case-law of the Court.

[3] The European Union attempted to take steps towards the harmonisation of asylum procedures, through its proposal for a Council Directive.

96. This group started its work in December 2006 and will meet in October and December 2007. The CDDH envisages to request from the Deputies an extension of the terms of reference until 2008.

4. Procedures from abroad

97. A particularly significant case is that of those individuals who attempt to enter a European country legally, either to engage in economic activities or else to be reunited with their relatives, but who are located outside European territory. The steps they have to take to obtain the corresponding visa or, in the case of exemption agreements, the pertinent residence permit, must be conducted at the embassies or consulates that the various States have in the country of origin or nearby.

98. Posing the question of access to justice in this context raises different types of problems:

- the international immunity of States leads potential immigrants to be able to raise lawsuits only before the Courts of their respective State, in their own territory hundreds or thousands of kilometres from the citizen's residence. Some of the Council of Europe Member States have legal rules in place to allow the submission of writs of complaint on migration issues at their diplomatic and consular offices, but the practical application of this possibility, when it exists, is debatable;

- many countries prohibit their Courts from examining the foreign actions of their authorities: to what extent can such a ban prevent the submission to the justice system of a refusal to grant a residence visa? In any case, decisions of this kind are generally taken with considerable margins of discretion and the refusal is not usually reasoned: it does not seem to make much sense to propose the possibility of starting lawsuits doomed to be dismissed.

99. In all of these circumstances, the possibility of accessing justice from abroad in the Courts of European countries, when these allow the petitions to be processed or the residence or family reunification visa has been refused, as appropriate, raises extraordinary difficulties that are added to those experienced by immigrants who are already in the territory of the European country: problems of linguistic communication and translation of documents, lack of familiarity with the national legal system, etc. as indicated above.

100. In this context, special interest must be placed in the potential of new technologies, as it was pointed out, for example, at the conference organised in Germany on the subject of "e-justice" (www.ejustice2007.de). Nonetheless, the decisive factor is to verify whether the European diplomatic delegations have an office or personnel available to enable the processing of the complaints and lawsuits that may be submitted on questions to do with the refusal to issue a visa or delays in their processing.

101. The refusal to provide justice on such a point is just one more reason for the increase in the number of people attempting to cross European borders illegally, in particular by sea.

H. The family dimension

102. The right to family reunification, family unity and family life is being applied to migrants and asylum seekers in a restrictive manner as it generally only applies to members of the nuclear family, the spouse and minor children (excluding other relatives, non biological care-takers and customary guardians).

103. The situation may be quite different when it comes to the reunification of immigrants with their relatives living legally in European territory (please refer to the Judgement of the European Court of Human Rights in *Abdulaziz, Cabales and Balkandali*, dated May 28th, 1985, and Council Directive 2003/86/EC dated September 22nd, 2003, on the right to family reunification, article 18): various European and national laws grant rights to certain members of families, and the occasional breach of these rights needs to be under judicial supervision.

I. The specific case of minors

104. Separated children are "children under 18 years of age who are outside their country of origin and separated from both parents or their legal/customary primary care-givers"[4]. The notion of "unaccompanied minors" is also used, though its meaning varies from one member state to another as the criteria of company is sometimes based on a court decision, or on the contrary on factual grounds.

1. Principles

105. The provisions of the United Nations Convention on the Rights of the Child (1989) should be underlined as they cover the protection needs of those vulnerable children, who are without parents or care-givers and in many cases subject to asylum procedures.

106. Thus, these children requiring special attention have to be treated in respect of the following rights protected by the above mentioned Convention : the principle of the best interests of the child (Article 3), which should be a primary consideration; the principle of non-discrimination, including on grounds of nationality (Article 2); the facilitation of family reunification (Article 10); the right for the child to be consulted on all matters that may affect him or her (Article 12); and the right to special protection for refugee children or children seeking refugee status (Article 22).

107. Members states should seek to ensure that separated children are exempt from accelerated asylum procedures, are not subject to the principle of the "safe third country" and that they are heard, either directly or through their legal guardian, and are questioned in a manner in keeping with their age, maturity and psychological situation.

108. A second situation affects the treatment that must be given to unaccompanied minors. The determination of the foreigner's age, an essential element to determine the application of the specific guarantees and rules regulating these circumstances, may give rise to a dispute justifying access to justice for the person in question. In addition, the set of specific guarantees surrounding the treatment that border police must dispense to minors requires impartial supervision to be effective.

109. In this context, the legal representation of the minors is of particular importance as they lack the ability to act before the courts and steps must be taken to provide them not only with legal advice and a proper defence but also their social welfare. The various countries in Europe have developed different systems, and the comparison of these will provide valuable lessons to improve the handling of the delicate and ever larger problem posed by the presence of unaccompanied minors at frontiers; an extreme example of this can be seen in the Judgment dated October 12th, 2006 by the European Court of Human Rights in the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*.

[4] As defined by the "Separated Children in Europe Programme"

2. Legal Guardianship

110. Unaccompanied and separated children are particularly vulnerable and, although entitled to asylum procedures, are often unable to exercise these rights as no legal guardian has been appointed. This administrative obstacle should be removed so as to ensure that separated children can have a legal guardian and a legal representative appointed as a matter of urgency.

111. The Parliamentary Assembly of the Council of Europe stressed in its Recommendation 1645(2004) that "unaccompanied minors and separated children should be provided with effective legal guardianship as soon as their presence comes to the attention of the authorities of a member state".

3. The age assessment

112. The best interests of the child must be a guiding principle during the initial assessment process to be applied on the arrival of the child and the identification measure of age assessment - which is sometimes necessary due to the uncertainty of the age - should not only take into account the physical appearance of the child but also psycho-social elements.

113. Clear rules on the age assessment should be determined in each member state, bearing in mind that such assessments never give fully reliable scientific results but rather estimations, the benefit of the doubt should be given where the actual age of the child is uncertain. Thus, in these cases, the status of being a minor should be always granted. The results of such assessments should be challengeable and the child or legal guardian should have the possibility to ask for a review by an independent body.

4. Detention

114. The detention of asylum-seeking children is also becoming a serious concern, not only when taking into consideration the *ultima ratio* principle which rules that minors should not be deprived of liberty except as a measure of last resort and for the shortest possible time, but also when considering the actual conditions of their detention. In addition, children should be guaranteed complaints mechanisms concerning their conditions of detention.

115. Children who are in a foreign country, separated from their parents or legal care-givers, exposed to additional precariousness and difficulties are a particularly vulnerable group, within the wider group of children, who are already being considered as a vulnerable category at a general level.

III. Children, including children perpetrators of crime

A. General Overview

116. "Children are not mini-human beings with mini-rights" and being vulnerable, "they need more protection not less" as underlined in the framework of the Council of Europe programme entitled "Building a Europe for and with children".

117. Children deserve the same access to justice but are often confronted in practice with additional barriers as they are not aware of their rights and the assistance that can be provided to them and cannot initiate legal actions without being assisted or authorised by an adult (parent or legal guardian). Children are particularly vulnerable when they are victims of abuse or neglect by their parents or legal guardians.

118. The European Convention on Human Rights protects the rights and freedoms defined in the Convention, which shall be secured by the member states to "everyone within their jurisdiction" (Article 1 – obligation to respect human rights), irrespective of age. Explicit references in the Convention to children's specific rights is exceptional (Article 5(1)d on the conditions of detention of minors) but this does not affect the relevance of the Convention to children, as shown by the many cases brought before the European Court of Human Rights.

119. At the universal level, justice matters involving children should respect the following principles set out by the United Nations Convention on the Rights of the Child of 1989 :

- "the best interests of the child shall be a primary consideration"[5] (Article 3);
- "evolving capacities of the child"[6] (Article 5);
- "participation"[7] (Article 12.2); and
- "non-discrimination"[8] (Article 2).

120. Children being entitled to seize international judicial mechanisms, it will be of interest to assess how children are treated at the international level and examine, for instance, the question of representation, access to legal aid and the weight of the views of children, if they can be expressed.

121. The access to justice for children is often barred by obstacles which result in the practical impossibility for them to exercise their rights, and safeguards and measures aiming at reducing such obstacles should constantly be sought and promoted, to give children their place in the justice system. The issue of access to justice for children also raises the

[5] "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[6] "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

[7] "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[8] "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

issue of negative impact and damages suffered by children while being exposed to the justice system and members States should seek means to reduce such situations.

122. The wider development of a child-friendly justice system appears as a concrete step towards a better accessibility of this vulnerable group to justice and will therefore be examined in the present report.

B. Children in judicial proceedings

1. General principles

123. The European Convention on the exercise of children's rights (ETS 160), which entered into force on 1 July 2000, aims at promoting the children's rights, granting them procedural rights in the framework of family proceedings and facilitating the exercise of these rights.

124. Children involved in judicial proceedings have the right to be informed, thus receiving all information which is relevant to their individual situation. It should be noted that this specific right is not absolute as its exercise has to be considered in the light of the evolving capacities and best interests of the child concerned.

125. Children have the right to be consulted and express their views in the proceedings, seeking counselling when they deem it necessary. They have the right to be represented in proceedings by a special representative, this right being of particular importance in cases of conflict of interest between children and the parents or legal guardians.

126. A wide variety of judicial decisions can concern or affect children such as the placement in care institutions, adoption, contact orders, tutorship or custody. The issue of enforcement of those decisions should also be raised as problems encountered in the enforcement can have serious effects on children.

2. The specific situation of victims and witnesses

127. Children who are involved in judicial proceedings as victims or witnesses require a special protection and assistance throughout the justice process as their age, maturity and specific needs have to be taken into consideration. The physical, psychological and emotional impact of a crime on a victim should be stressed when children are concerned and the seriousness of such an impact on the welfare of children need to be considered.

128. Child victims of crime should not be subject to further victimisation when exercising their rights and particular attention should be paid to the possible consequences of their exposure to an un-adapted justice system. Where appropriate, their right to special protection measures should be effectively exercised.

3. Human trafficking

129. In fighting trafficking in human beings, including trafficking of children, the specific needs of children should be addressed:

- in case of uncertainty about the age of the victim when there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures;

- as regards unaccompanied children:

    a. representation by a legal guardian, organisation or authority shall be provided;
    b. necessary steps shall be taken to establish their identity and nationality;

c. every effort shall be made to locate their family;

- child victims shall be afforded special protection measures.

4. Children perpetrators of crime and in conflict with the law : the juvenile justice system

130. Since the 1960's the Council of Europe has addressed on several occasions the anti-social and criminal behaviour among children and juveniles as well as the ways of dealing with juvenile delinquency while protecting the child's best interest. A number of recommendations adopted by the Committee of Ministers of the Council of Europe provide guidance to member States in this area.

131. The most recent relevant recommendations are the following:

132. Recommendation Rec(2000)20 on the Role of Early Psychosocial Intervention in the Prevention of Criminality. This recommendation sets out a comprehensive strategy for preventing crime and criminal behaviour before a child becomes involved in the criminal justice system. The recommendation's principal rationale is that a new approach to controlling crime and its consequences is required in the face of a number of important developments in advanced industrialised societies that have increased the risk of psycho-social problems affecting children and young people, including anti-social behaviour and crime. The main idea underpinning the recommendation is that the anti-social and violent behaviour among children requires new measures and, in particular, assessment of the risk factors and adapting the early psycho-social intervention programmes accordingly, work with the family and the immediate environment, a re-evaluation of the role of the juvenile justice system as a component of a wider set of measures involving partnerships among relevant agencies, staff training and assessment, etc.

133. Recommendation (2003) 20 on new ways of dealing with juvenile delinquency and the role of juvenile justice. This Recommendation stresses that the juvenile justice system may be efficient in tackling youth crime only as a component of a wider community based strategy that takes account of the wider family, school, neighbourhood and peer group context within which offending occurs.

134. It is universally agreed and endorsed once again by the recommendation that as children are more vulnerable in the face of the power of the State's criminal law than adults they need additional procedural safeguards. They should be seen as children first and only as offenders second.

135. Another important message of the recommendation is the progressive way in which sanctions and measures should be introduced when children grow older as their capacity to understand and participate in criminal procedures, to distinguish right from wrong, to understand the impact their behaviour has on others and to moderate their behaviour increases.

136. The text further recommends to use as much as possible diversion from the criminal justice system as it is more adapted to the fact that the majority of juvenile offenders only ever commit one or two relatively minor offences and it is disproportional and counter-productive to use the criminal justice system in these cases.

137. Furthermore, restorative justice is increasingly becoming a component of juvenile justice strategies. It provides opportunities for offenders to apologise to their victims and make amends for the harm they have done. This fosters respect not only for the legal system, but also for the underlying social values.

138. A very important principle the text endorses is that justice delayed is justice denied. Therefore a swift, adequate and proportionate response by the criminal justice system to juvenile offending is needed. Long periods between committing an offence and receiving a sanction disconnects the two events in a young person's mind and undermines the effectiveness of any disposal. For persistent young offenders, delays increase the risk of offending prior to their court appearance and postpone interventions that might otherwise stop further offending.

139. Juveniles deprived of their liberty experience all the negative aspects of imprisonment. Furthermore, the conditions under which juvenile suspects are held are, in many countries, worse than for offenders serving custodial sentences. They are often locked up for long periods of time, exposed to overcrowding, bullying and intimidation and suffer long periods of boredom without any access to constructive activities. The risk of suicide, self harm and other health problems is also higher and, compared with adults, young defendants lack the resilience of older defendants to deal with the trauma of being imprisoned. Consequently, the use of detention for juveniles should be avoided as far as possible and a wide range of adequate alternatives to custody should be developed and made use of by courts.

140. Parents and legal guardians should be involved and attend the different stages of the criminal proceedings and be offered guidance, assistance and support in order to deal with the offending behaviour of their children.

141. In addition to the above, the Committee for the Prevention of Torture (CPT) has, in "the CPT Standards", laid down guidelines for the treatment of juveniles deprived of their liberty which include material conditions of detention, regime activities, staffing issues, contact with the outside world, discipline, complaints and inspection procedures and medical issues. The CPT states that: "the care of juveniles in custody requires special efforts to reduce the risks of long-term social maladjustment. This calls for a multidisciplinary approach, drawing upon the skills of a range of professionals (including teachers, trainers and psychologists), in order to respond to the individual needs of juveniles within a secure educative and socio-therapeutic environment." (para 28).

142. Recommendation (2003)20 urges that Council of Europe member States adopt separate and distinct European Rules for juvenile offenders as their interests and needs differ from those of adults and they need special interventions and care.

143. In reply to this appeal, the Committee of Ministers entrusted the Council for Penological Cooperation (PC-CP) with the task of drafting such Rules. The work started at the end of 2006 and the new Rules are to be drafted by the end of 2008. The Rules follow, in general terms, the structure and logic of the European Rules for Community Sanctions and Measures (Recommendation n° R(92)16 of the Comm ittee of Ministers) and of the European Prison Rules (Recommendation Rec(2006)2 of the Committee of Ministers) but the standards contained are specifically designed to be adapted to juveniles. The recommendation containing European Rules for Juvenile Offenders subject to community sanctions or measures or deprived of their liberty will start with a list of basic principles, followed by definitions. In Part II will be set out the European standards concerning the implementation of community sanctions and measures designed for juvenile offenders. In Part III will be discussed deprivation of liberty in penitentiary, welfare and mental health institutions. The subsequent parts will deal with staff, with inspection, monitoring and complaints procedures and lastly with evaluation and research.

144. It is intended to base all rules on the principle of the child's best interests, on the principles of proportionality and respect of human rights and human dignity, on the need to limit the use of deprivation of liberty to the strictest minimum possible, while using other measures of intervention which expose children to lesser harm and allow their better social integration. Legal guarantees and judicial control need to be provided in the case of any procedure involving a juvenile offender which may result in taking decisions regarding sanctioning his/her behaviour.

145. One question which still remains open is the necessity to reach a consensus at European level regarding the minimum age of criminal responsibility. It should be stressed that the United Nations Convention on the Rights of the Child (Article 1) states that a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier. As long as the age of majority in Europe is attained at the age of 18 efforts must be made to bring together the diverging practices in the member States as regards the age of criminal responsibility. There is a constant risk that the opening of the frontiers in Europe allows minors committing offences abroad in countries where the criminal responsibility is lower than the average in Europe to be sentenced and held in custody, while elsewhere they would not be held criminally responsible. Children are the future of Europe and taking good care of them will bring closer the future we are striving to build on the Continent.

C. A child-friendly justice system

146. The definition of this concept is not easy as the justice system encompasses a wide range of situations in which children can be involved. The cornerstone of a child-friendly justice system should be the systematic approach – which should prevail in any circumstances involving children – towards the recognition and satisfaction of children's specific needs, thus ensuring that children are considered, valued, respected and included.

147. Such a child-friendly system could in practice be reached through the following measures:

- ensuring direct access of children to legal aid and assistance;
- reducing delays in the proceeding of cases involving children which should be treated as a matter of priority;
- adapting the rules of procedure – without violating the rights of the defence and the principles of a fair trial – in order to develop welfare-based hearings, excluding where necessary the public and media, to ensure the protection of children's privacy;
- reviewing the selection and training of professionals working and caring for children in order to ensure that all persons having contact with a child consider the child's needs and feelings;
- developing a child-friendly environment where children feel comfortable and secure, for instance special court rooms or accommodations;
- establishing national bodies which promote and ensure the exercise of children's rights;
- designing and disseminating guidelines and good-practice manuals.

148. Finally, access to justice of child victims of sexual exploitation and sexual abuse has to be pointed out. Ensuring that investigation and court procedures take due account of the particular vulnerability of children facing such procedures as victims or witnesses is very important. The general principles are that investigations and judicial proceedings (whether they are carried out by a police service or a judicial authority) must always be conducted in a child-friendly manner.

149. The right of children (and their families or legal representatives) to be informed of developments in the investigations and proceedings in which they are involved as victims should be respected. The information should be provided "in a manner adapted" to the age and development of the child. Children should be prevented from being further traumatised through contact, on the premises of the investigation services and in court, with the alleged perpetrator of the offence, unless it is decided that such contact is necessary or useful for ensuring that the proceedings take place satisfactorily.

150. In cases of sexual abuse within the family, in which the holders of parental responsibility, while responsible for defending the child's interests, are involved in some way in the proceedings in which the child is a victim (where there is a "conflict of interest"), specific provisions should be established. In such cases, it should be possible for the child to be represented in judicial proceedings by a special representative appointed by the judicial authorities. This may be the case when, for example, the holders of parental responsibility are the perpetrators or joint perpetrators of the offence, or the nature of their relationship with the perpetrator is such that they cannot be expected to defend the interests of the child victim with impartiality.

151. Measures in order to allow prosecutions to be effectively initiated after the child has reached the age of majority need to be established, although this extension of the limitation period should be restricted to the most serious offences in respect of which there is justification for such an extension. This is an essential element of added value in relation to effective access to justice of child victims. Indeed, it is acknowledged that many child victims of sexual abuse are unable, for various reasons, to report the offences perpetrated against them before reaching the age of majority.

152. As far as access to justice of child victims is concerned, the central issue is the child’s testimony which constitutes a major challenge in the procedures of numerous States. It has became urgently important for States to adopt procedural rules guaranteeing and safeguarding children’s testimony. In order to achieve these objectives, it is important to limit the number of successive interviews with children which force them to relive the events they have suffered, and enable them to be interviewed by the same persons, trained for the purpose, in suitable premises and in a setting that is reassuring, and in the presence of the child's legal representative or, where appropriate, a person of his or her choice.

IV. Conclusions

153. This report underlines a variety of challenges facing the Council of Europe and its member States. Legal solutions for existing obstacles or difficulties in access to justice for the vulnerable groups identified - migrants and asylum seekers, and children including children as perpetrators of crime - should now be envisaged under a more practical pan-European approach.

154. The Council of Europe, which has for decades protected and promoted basic human rights such as access to justice, has a key role to play in this endeavour, through the development of recommendations to its member States which aim at a harmonisation of legal frameworks and practices, collecting and disseminating examples of good practice, monitoring the implementation of the relevant standards and providing assistance to member States.

Migrants and asylum seekers

155. Member States should assess and examine the different measures which could be recommended to :

a) ensure that legal residents and persons with immigrant backgrounds are not confronted with unjustified difficulties when accessing justice;
b) ensure that appropriate and effective remedies are guaranteed;
c) develop and promote free legal assistance and aid for this vulnerable group;
d) raise awareness and train professionals involved in the management and care of migrants and asylum seekers;
e) attain uniformity in asylum procedures and their implementation;
f) ensure that appeals on asylum decisions can be lodged and that appeal mechanisms are independent and impartial;
g) enhance the level and quality of information provided to this vulnerable group;
h) ensure that the specific needs of unaccompanied or separated children are considered and that legal guardianship is appointed as a matter of urgency;
i) provide support to member States in need of technical assistance in issues related to access to justice for migrants and asylum seekers.

Children, including children perpetrators of crime

156. Member States should assess and examine the different measures which could be recommended to :

a) fully empower children in the exercise of their rights;
b) ensure that the basic principles enshrined in the United Nations Convention on the Rights of the Child are applied in matters of justice;
c) grant the required protection to children who are victims and witnesses;
d) enhance children's access to courts both at national and international level;
e) develop child-friendly justice systems in which the best interests of the child is always the primary goal and become Parties to the Convention on the Exercise of Children's Rights;
f) implement child-friendly procedures and measures in all investigations and court proceedings involving children, whether as victims or as alleged perpetrators of crime;
g) adopt a protective approach to child offenders aiming at a successful reintegration into society.

APPENDIX - THE SPANISH EXPERIENCE

SECTION I Emerging issues of access to justice for migrants and asylum seekers

The Formal Legal Regime of Foreigners in Spain in Connection with Access to Justice and Other Rights

As a general principle, we have access to justice propounded on a formal equality of conditions between Spaniards and foreigners, although there may be in either case certain legally defined conditions for exercising this access. Of course, it is necessary to except the citizens of the European Union Member States from the general regime, for the specific reasons that we all know.

Section 13 of the Spanish Constitution provides that foreigners in Spain will enjoy the public freedoms guaranteed under that Part on the terms and conditions stipulated in treaties and legislation. That Part includes section 24.1, which provides that "… all persons are entitled obtain the effective protection of the courts and judges in the exercise of their rights and legitimate interests, without situations of impossibility of defence arising in any case …". It should be noted that, in connection with the right to judicial protection, there is no differentiation between Spaniards and foreigners but rather it is promised without distinctions.

Subsequently it is necessary to resort to the Foreigners in Spain (Rights And Freedoms) and their Social Integration Act (Fundamental Law 4, dated January 11th, 2000), or LDLE in its Spanish acronym. We cannot here deal with the wide scope of that law's contents as it would divert us from the purpose of this report, but it must be pointed out that the LDLE regulates their freedom to assemble and petition, acknowledges the right to education of all foreigners under eighteen years of age on the same conditions as Spaniards, a right that comprises access to basic compulsory education free of charge, the obtention of the corresponding academic qualification and access to the public system for financial assistance and scholarships.

Thus, the problem that arises here is the assessment of a minor's age when there are no reliable documents to indicate how old he or she is. This problem, which is not exclusive to immigrants, is resolved in a technical sense in the report that the Forensic Examiners draw up with regard to the age of the person examined.

Resident foreigners are granted the right to non-compulsory education on the same conditions as Spaniards. Similarly, but for resident foreigners, the right to engage in teaching activities or scientific research is declared. As is logical, the right to work and to Social Security are proclaimed, albeit once more with imposition of the need to be legal residents. Also, always for residents, there is an acknowledgement of their right, on an equal footing with the nationals of European Union Member States, to work as contracted personnel in the service of the Public Administrations, "… in accordance with the constitutional principles of equality, merits and qualifications, as well as publicity. In this respect, they may participate in the public employment offers organised by the Public Administrations."

Always limited to the condition of legal resident, the freedom to join trade unions and to go on strike is also recognized. With the entitlement to health-care there is an extension of the protection, since the condition imposed is not that of residency but registration of the foreigner in Spain on the municipal census of its domicile, which entitles him to health care on the same conditions as Spaniards. This possibility must be referred solely to the local register entries of non-EU foreigners without authorization to reside permanently, that is to say with temporary residence authorization. The legislation provides that foreigners in Spain are entitled to emergency health care in the public sector when affected by serious diseases or accidents,

whatever the cause, and the continued provision of this care until their medical discharge. This is an important point for the medical attention given to undocumented immigrants arriving in Spain with prior conditions or those who have become ill or suffered injury due to the conditions of their journey.

The LDLE continues to extend the right to receive health care on the same conditions as Spaniards to foreigners in Spain under eighteen years of age (without distinction). Pregnant foreigners in Spain, regardless of how they entered Spanish territory, have also the right to receive health care during the pregnancy, delivery and postpartum.

Similarly, rights with regard to housing, Social Security and social services are recognized.

The Right to Judicial Protection

And so we come to the central issue: the right to effective judicial protection. The LDLE devotes a Chapter (Chapter III) to the "legal guarantees" for foreigners. This chapter stipulates that foreigners are entitled to effective judicial protection. It goes on to indicate that the administrative procedures that may be established with respect to foreigners and their situation (let us recall that this includes the issues related to their continued stay and their expulsion) shall in all cases respect the guarantees foreseen in the general legislation on administrative procedure, particularly with regard to the publicity given to rules, the right to reply, granting a hearing to interested parties and the reasoned justification of the resolutions adopted.

Questions regarding the granting or refusal to grant a visa to enter Spain are excluded from this promise since, as set out in the LDLE itself (section 26), the exercise of the power to grant or refuse visas will be subject to the international commitments on these matters and will be aimed at the fulfilment of the goals of the Kingdom of Spain's foreign policy and other Spanish public policies or those of the European Union, such as the immigration policy, economic policy and the policy on the security of citizens. From the subsequent provisions of the same section for certain specific cases (The refusal of a visa must be reasoned when it refers to residence visas on the grounds of family re-grouping or for employment.) it can be inferred that the refusal of a visa in any other case is not subject to the possibility of a challenge by foreigners who have theoretically not entered Spain.

The Act continues regulating foreigners' access to administrative processes, admitting the legitimacy of their own organisations (in administrative procedures organisations legally established in Spain for the defence of immigrants will be entitled to intervene as interested parties) providing that the foreigner involved has expressly entrusted the representation of his or her interests to the said organisation.

The problem of mediation by organisations must be assessed from both sides, as on the one hand they offer immigrants solidarity and aid of undoubted importance, but at the same time attention must be drawn to the fact that all organisations tend to unify their action criteria and may end up imposing their own programmes on individuals. It should also be added that in Spain there is at least one immigrant organisation for every group of nationals.

In administrative dispute hearings (before specific courts) on questions to do with foreign status, the institutions entitled to put in an appearance are those affected by the terms of section 19.1.b) of the Act regulating that jurisdiction.

Administrative appeals against decisions adopted on questions to do with foreign status are of particular importance for the exclusions that apply. In principle, the right to appeal against measures adopted by the administration is acknowledged with regard to foreigners. However, even though these measures may be subject to appeal in accordance with the provisions of statute and the regime for the enforceability of the administrative measures adopted with regard to foreign status is that foreseen as the general one under current legislation, an exception is established for the processing of expulsion orders as "preferential". Therefore, the urgency with

which a decision may be taken to expel an individual is offset by the “preference” in the hearing and deciding on appeals against such decisions.

Assistance of a Solicitor

Evidently, foreigners may hire the services of a solicitor, but the problem of a non-resident immigrant is to be able to make use of free legal assistance. This is what the LDLE attempts to resolve by providing that foreigners in Spain who lack the sufficient economic resources according to the criteria stipulated in the regulations on free legal aid are entitled to receive this service in administrative or judicial procedures that may lead to a refusal to allow them entry, to their repatriation or expulsion from Spanish territory and also in all proceedings in connection with asylum. In addition, they will be entitled to the assistance of an interpreter if they do not understand or speak the official language in use.

The regulations on free legal aid are binding, on the one hand, on the Administration and, on the other hand, Regional Law Associations which organize the service and provide assistance. It is necessary to add that there are various other organisations, particularly Trade Unions, offering legal advice to foreign workers.

In those cases, indicated below, where expulsion proceedings are initiated, immigrant foreigners without residence or work permits can call on the free legal aid provided by the corresponding duty lawyers designated by each Law Association. We will deal later with the conditions for initiating and dealing with the expulsion proceedings.

Illegal Immigrants

This is the term used for anyone on Spanish territory who lacks an official entry or residence permit, either because they have never had one or because their previous temporary permits have lapsed. This is the most problematic situation as the lack of residence in turn constrains the possibility of obtaining a work permit, so there is a necessary concatenation of situations which in turn causes the administrative and criminal justice systems to devote specific rules to the penalization of conduct such as exploitation of clandestine workers.

The lack of a residence permit means that the rights acknowledged are limited to emergency medical care and little more, except in the case of those under 18 years of age. In this state of affairs, we can appreciate the difficulties involved in describing access to justice for foreigners illegally in the territory of a State or who are bereft of any identity documents.

Several problems arise out of this situation:

a) access to legal proceedings to request asylum or residence by a person who may formally be expelled or returned (these are different measures) to their countries of origin. Illegal immigrants logically avoid appearing before any official institution in case this leads to the initiation of the subsequent expulsion proceedings.

b) the need to differentiate between those subjects attempting to enter the State on the grounds of their reasons for leaving their state of origin is another complication that cannot always be clarified with the provisions on the concession of asylum to refugees, which are very restrictive.

c) the massive demand for asylum has given rise to the restriction by the Asylum and Refugee Act (Law 9 dated May 19th, 1994) of the possibility of obtaining asylum exclusively to those who meet the condition of refugee under the Geneva Convention of July 28th, 1951, and the New York Protocol dated January 31st, 1967. This restriction, which represented the elimination of the previous distinction between asylum and refuge, has been justified precisely because of the need to avoid the use of the refugee protection system by immigrants driven by economic

reasons, simply speaking, nothing less than fleeing from starvation and unemployment.

Access to justice has to be split into two aspects: access in order to challenge the orders for their expulsion or return and access to obtain other forms of protection without the implication of a simultaneous risk of expulsion.

The following may be considered as general principles:

- Spanish Courts do not have any regard for the situation of foreigners resorting to them seeking the protection of their persons or rights (whether related with them as individuals, their employment or their religion). The absence of the legal condition of resident cannot limit that protection. A very different matter is when a foreigner is declared to have criminal liability for a crime as it is then possible to order the expulsion from Spanish territory instead of a prison sentence.
- The expulsion and return of foreigners without entry or residence papers may be challenged before the Courts, but not in all cases as there are situations of automatic return without the need for proceedings to impose this penalty (e.g. clandestine attempts to enter Spanish territory).
- It is therefore clear that there is a noticeable difference between the situation of foreigners, specifically those in Spain without a residence permit, whether working or not, and those who are rejected or detained while attempting to enter Spain. Each of these situations, without prejudice to the fact that they do not affect in the slightest the prosecution of any illegal abuse that may have been caused to these people, have different legal consequences.

Illegal Situations, Illegal Actions on Foreigners and their Consequences

The LDLE regulates the various situations foreigners in Spain might find themselves in. We shall ignore here the situation of foreigners with a residence permit as they do not represent a problem for the purposes of this report. Foreigners without a residence permit, either because they have never had one or because their previous papers have lapsed, are therefore in an irregular situation and are, in principle, guilty of an administrative offence, as this is the consideration given to all situations of presence in Spanish territory without any authorization in force.

But these are offences classified as serious offences, whereas certain other actions by foreigners are deemed very serious (such as actions contrary to public safety) as are other actions that may be taken by third parties where the foreigner is the object/victim of the action.

These actions are of particular importance as they are the most indicative of the abuses suffered by foreign workers. They include:

- the hiring of foreign workers without first having obtained the corresponding work authorization;
- the transportation of foreigners, by air, sea or land, to Spanish territory by those subjects responsible for transport without having verified the validity and duration of their respective passports, travel documents or pertinent identity documents, such as, where appropriate, the corresponding visa that must be held by such foreigners.

Conditions for their Return or Expulsion and Judicial Challenges

Undoubtedly the greatest problems for foreigners are expulsion and return. The difference between these two procedures lies in the distinction between expulsion which is always seen as a penalty imposed whereas return or repatriation implies only a rejection of the entry into or continued presence on Spanish territory of persons who lack the authorization to enter or remain.

Expulsion may be ordered for all foreigners who commit the very serious or serious offences foreseen in the LDLE. The very serious offences are essentially committed by those trafficking with foreign workers, but not the immigrants themselves, except where the offence refers to the performance of acts against State security.

The offences classified as serious, however, directly affect the immigrant involved and have been mentioned above; specifically these include:

- working in Spain without having requested administrative authorization to be self-employed, if temporary residence has been authorized.

- being in Spanish territory irregularly, either through not having obtained an extension of stay, not having any residence authorization or if the said authorization lapsed more than three months previously and providing that the person concerned has not requested its renovation within the term foreseen in the regulations.

- working in Spain without having obtained a work permit or prior administrative authorization to be employed, when the person has no valid residence authorization.

- the participation of the foreigner in the performance of the activities contrary to law and order foreseen as serious offences in the Citizen Safety Act (Fundamental Law 1 dated February 21st, 1992).

Any of the above offences may give rise to the person's expulsion from Spanish territory following the completion of the corresponding administrative proceedings. But what must really be highlighted is that it is not possible for there to be, even in the above situations, any immediate and unappealable expulsion ordered by the Administration. For this reason it can be said that the unauthorized presence of a foreigner in Spanish territory will always constitute an offence, but it will always require the completion of expulsion proceedings.

Expulsion Proceedings

1. The lack of the condition of legal resident: challenges

Expulsion proceedings will be initiated by the administrative authority; it must be remembered that in certain cases, in order to ensure or facilitate the expulsion, the Judge may decide to order the internment of the foreigner in an irregular situation, which may occur when no extension of the stay has been requested, their residence permit is missing or has lapsed for more than 3 months.

The slow pace of bureaucracy does not work to the disadvantage of foreigners and for this reason their situation is irregular and is grounds for their arrest and expulsion unless the foreigner in question had applied for renewal in the three months following the loss of validity of the previous authorization. Residence permits must be considered to have been approved if the Administration does not respond to the application within three months.

If the administration refuses to renew the permit, it is possible:

a) to appeal against this decision by means of a motion for review (section 114.2 of Law 30/92);
b) to request permission to remain in the territory until the appeal is resolved;
c) in due course, it is possible to lodge an administrative dispute appeal against the decision in the motion for review (section 115.3 of Law 30/92) before the corresponding Courts.

2. Arrest and expulsion of non-residents

Foreigners who lack a residence permit may be arrested by the police in order to proceed with their expulsion proceedings by means of either ordinary or preferential proceedings. In the

second case it is possible for an arrest to be ordered but this cannot last for more than 72 hours. This procedure of arrest plus expulsion, deemed "preferential" cannot be considered as the norm. Because of the reservation of imprisonment for those cases where there are grounds to suspect criminal liability, the use of the preferential procedure and warrants for arrest and internment to deal with what is no more than an administrative offence is only an option in exceptional cases, even though expulsion orders are very difficult to execute when the person in question is at liberty.

In these situations foreigners also enjoy a series of rights that will be protected by the Courts:

- they are entitled to make a statement to the police or the judicial authority in connection with the grounds for their expulsion;

- they are entitled to assistance of a solicitor and, if they does not have financial resources, to have a duty lawyer appointed free of charge.

In any case, as with any detainee, foreigners have the rights indicated in section 520 of the Criminal Justice Act, which provides that all persons under arrest or in jail must be immediately informed, in an intelligible manner, of the facts they are accused of and the reasons for their imprisonment, as well as the rights available to them, particularly the following:

- to remain silent and not to make any statement if they so wish, not to answer any or all of the questions asked, or to indicate merely that they will answer only before the Judge;
- not to incriminate themselves or declare themselves guilty;
- to designate a solicitor and request the presence of their solicitor to assist them in the activities of giving a statement before the police or the courts and to be present at any proceedings they may be subjected to for identification purposes. If no solicitor is appointed, one will be designated ex officio;
- to have a relative or such other person as they may choose informed of the fact of their arrest and their location at all times;
- to have the situation they are in notified to the Consular Office of their country;
- to receive free of charge the assistance of an interpreter, when the foreigner in question does not understand or speak the official language;
- to be examined by the Court's Medical Examiner or, if not available, by the Medical Examiner of the Institution where the foreigner is located.

In the praxis of expulsion proceedings, apart from whether or not the issue or renovation of a residence permit has been requested without the Administration having adopted a decision yet or, in particular, if the foreigner is under 18 years of age, the following facts have been seen to constitute significant factors affecting the final outcome, i.e. the decision on whether or not to expel the foreigner:

a) working in Spain, even if without a contract;
b) co-habitation with a Spaniard or with an EU citizen;
c) registration on the municipal census, as indicative of a stable domicile;
d) having had children born in Spain;
e) having been born in Spain, having resided here legally in the preceding years or if these circumstances apply to the foreigner's spouse or partner;
f) forming part of any insertion programme promoted by any non-governmental organisation.

3. Collaboration in the fight against organised gangs

One of the circumstances that may legally prevent expulsion is the foreigner's collaboration in the fight against organised gangs exploiting human beings. Specifically, section 59 of the LDLE provides that "Foreigners who have crossed the Spanish frontier other than through the channels established for the purpose or who have not complied with their obligation to declare their entry

and are therefore irregularly in Spain or are working without authorization, without documentation or with irregular documentation, through having been the victim, injured party or witness of an act of illicit trafficking of human beings, illegal immigration, or illicit trafficking of workers for exploitation in prostitution with abuse of their desperate situation, may be exonerated of their administrative liability and shall not be expelled if they denounce the perpetrators or collaborators in such trafficking to the pertinent authorities, or if they co-operate and collaborate with the police agents dealing with foreign status issues by providing essential information or testimony, as appropriate, in the corresponding trial against these perpetrators.

This possibility encloses undoubted difficulties, starting with the logical fear of the illegal foreign resident that the ultimate consequence may be his or her expulsion, which is not at all the practice followed, but rather just the opposite. Secondly, it is necessary to increase the protection for these persons in view of the likelihood of reprisals by organised bands of criminals, as the bringing of charges against organised gangs will logically normally entail the initiation of judicial proceedings against the members who can be identified or arrested.

In such judicial proceedings for exploitation of prostitution, trafficking of workers, etc., the foreigners making the accusations will have to act as witnesses, if not also as victims, which generates a situation of risk for their personal safety, in addition to the fear already mentioned of their own expulsion. In order to alleviate that dual contingency as far as possible, the Act itself establishes that, when the Office of the Public Prosecutor is aware that foreigners against whom an expulsion order has been issued are appearing in criminal proceedings as a victim, injured party or witness and when it is felt that their presence is essential for the conclusion of the judicial activities, this will be reported to the competent government authority with a view to the consideration of a suspension of the execution of the corresponding expulsion order(s) and, should the order have been executed, similar steps will be taken in order to authorize these persons' return to Spain for such time as may be necessary in order to carry out the legal measures required, without prejudice to the adoption of other measures foreseen in the Witness Protection (Criminal Proceedings) Act (Fundamental Law 19 dated December 23rd, 1994).

But it may also happen that foreigners without a residence permit may anticipate expulsion proceedings and proceed directly to denounce the fact that they have been or are currently the victims of a crime (this has already happened with people who have voluntarily resorted to the Police to denounce that they were exploited in a situation of quasi-slavery, prostitution or other working conditions). In these cases, the praxis followed so far is contrary to the initiation of expulsion proceedings, so in principle it would be enough, initially at least, for the foreigner to lodge the corresponding application for a residence permit or asylum.

4. Expulsion because of the Commission of a Crime

This is, in principle, a question outwit the remit of this report, but it needs to be known: the expulsion of foreigners may also arise in cases where a crime has been committed. This effect may occur in a number of different cases:

A. As an alternative measure instead of imposing imprisonment, whereby the Spanish Criminal Courts order the expulsion of the foreigner instead of enforcing a prison sentence. This may affect a good part of the so-called minor delinquency (in terms of the sentence that can be imposed) and may turn out to be out of proportion when the entity of the crime committed is considered. This possible lack of proportionality may be grounds for the corresponding appeal.

B. When the administrative file for the expulsion proceedings contains a reference to the involvement of the foreigner in an accusation of a crime or offence for which the Law foresees imprisonment for less than six years, providing the expulsion is authorized by the Judge and accepted by the Office of the Public Prosecutor. However, insofar as such an anticipation of expulsion may in part affect the presumption of innocence, the person concerned may oppose such a measure and require the holding of the pertinent trial and so have access to the appeal system.

C. As a consequence of the administrative expulsion insofar as the LDLE itself acknowledges as grounds for expulsion, following the completion of the corresponding proceedings, the fact that the foreigner in question has been sentenced by a court in Spain or elsewhere for criminal behaviour that in this country constitutes a crime punished with more than one year's imprisonment unless the penal record of the person has been cancelled.

5. Expulsion without Expulsion Proceedings

This is a possibility that is only legally contemplated for certain personal situations:

a) for those individuals who have previously been expelled from Spain and contravene the ban on their entry;
b) for those attempting to enter the country illegally.

These are apparently situations without any right of appeal and are solely in the hands of the Administration, but this is not exactly so, as even in these cases it is possible to submit a request for asylum, in which case the return or repatriation of the individual cannot be conducted until a decision is taken, in accordance with the asylum regulations, not to proceed with consideration of the request. On the other hand, no such proceedings are applicable in the case of pregnant women when the measure might represent a risk for the pregnancy or the mother's health.

In these cases, it is normally not possible to enforce the expulsion order automatically and, if the execution of the decision is going to take more than 72 hours, it is possible to order internment on the same terms (but not exactly with the same rights) as when the internment is associated with expulsion proceedings. There is of course no question that their physical security and health are guaranteed, as well as the fact that they will not be subjected to any inhumane or degrading treatment. But it is more difficult to fit the possibility of requesting the assistance of a Solicitor to challenge what is considered as a return and not an expulsion within the legal regime applicable to those who attempt to enter Spain clandestinely.

Thus, it is possible to raise a doubt as to whether in these situations there is still a possibility of accessing the Courts. The initial answer is in the negative as these are persons who do not reside in Spain, legally or otherwise. The small range of the humanitarian assistance provided to them is seen more as being aimed at solidarity and protection than as the recognition of a subjective right held by the person attempting to enter.

After the analysis of all these issues related to access to justice for immigrants and-asylum-seekers, at the European and Spanish levels, the present report will focus its second part on Children, as it is another vulnerable group which needs greater recognition in our societies.

SECTION II Emerging issues of access to justice for children, including children perpetrators of crime

A. Legal Protection of Children as Victims

1. The Spanish Regulatory Framework

The civil protection of minors is contained in several legal texts of state-wide and regional scope, but there can be no doubt that the basic text is the Legal Protection of Minors Act (Fundamental Law 1 dated January 15th, 1996, known as LOPJM in its Spanish acronym). Its underlying tenets date back to the 1978 Spanish Constitution (CE in its Spanish acronym), which contains an obligation for the public authorities to protect families socially, economically and legally. Together with the Constitution, its origins can also be traced back to the international texts signed by the Spanish State, including the United Nations Convention on Children's Rights dated November 20th, 1989, which marked the start of a new political era on this subject.

The purpose of these texts is to offer greater recognition for minors in society and to demand greater protagonism for this role. In its Preamble, the Act states that it represents a "profound reform of the traditional institutions for the protection of minors regulated in the of the Civil Code". The acknowledged sources of this Act are the statutes enacted on May 13th, 1981, October 24th, 1983, and November 11th, 1987.

It is important to highlight a series of "minors' rights" acknowledged in Chapter II of the said Law, most of which coincide with those set out in the text of the constitution and in the International Treaties. The justification for this apparent redundancy can be found in the Act's intention to build a legal framework for the protection of childhood, which goes further than a mere statement of intent and constitutes a true regulatory system.

It is of interest here to list the rights of minors recognized in Spain.

a) Right to honour, personal and family privacy and to their personal image. This also includes the right to the inviolability of the family home and the secrecy of communications and correspondence (section 18 CE). An innovation was inserted in connection with the consent of minors and their legal representatives, as punishment is given for the illegitimate intromission into these rights "even if the consent of the minors or their legal representatives has been given". This is an attempt to protect minors against manipulations originating in their own family circle. Nonetheless, the currency of the validity granted to minors with full autonomy and maturity under section 162 of the CC obliges us to admit exceptions to this provision

b) Right to information. Obligation of the public authorities and the minors' representatives to ensure that they receive information that respects the principles of the constitution and international declarations. This right is couched in excessively generic language, obliging it to be complemented by other legal texts (e.g. please refer to the law dated July 12th, 1994, on television broadcasting activities). However, aggressive advertising campaigns are a source of grave concern and it is difficult to achieve these intentions.

c) Freedom of ideology, conscience and religion. This condenses one of the most problematic aspects may bring parents and their minor children into conflict. Which opinion should prevail? The legal solution is apparently to be found once more in section 162 CC, which allows mature minors to stand up for their autonomy and acts inherent to their rights to a free personality, providing that the conditions of their maturity are sufficient. In any case, in situations of conflict and in the face of decisions implying physical or mental harm, it is always possible to argue the higher principle of the minor's best interests, so that the judge can adopt the appropriate measures to keep the minor from harm or avoid any negative consequences.

d) Right to participate, meet and join associations. Literally, section 7 recognizes the right of association with political parties or trade unions, but it oddly does not expressly contemplate membership of cultural, sports, religious, artistic or voluntary associations. Of course if active participation in an association is likely to be detrimental for the minor, anyone may apply to the Office of the Public Prosecutor to have the necessary protective measures adopted.

e) Right to freedom of expression. Acknowledged under section 8 and of course in section 20 of the CE. The general limit on the exercise of this right is said to be the protection of the minors' interests, and specifically the protection of their image an privacy.

f) Right to be heard. This constitutes a great novelty in this Act: "Minors are entitled to be heard, both in the family setting and in any administrative or judicial proceeding

in which they may be directly involved and that leads to a decision affecting their personal, family or social circle…". Thus, this right is elevated to the maximum category and is deemed equal to the rights inherent to the person. As basic examples of being heard and granting of consent in civil matters, the following cases may be cited: to be heard in matters concerning paterno-filial relations; in situations of foster families; adoption; emancipation; and property issues (executing a testament from the age of 14 years; acquiring possession; accepting donations; ordinary administration of their assets from the age of 16 years, etc.). However, in general terms, the law does not establish any age at which they are entitled to be heard. But looking at the civil regulations in the round, this could be set, in general terms, at the age of 12 years, and below this age whenever the minors in question have sufficient common sense and their presence is deemed necessary.

g) Fostering. Both automatic protection and legal custody are exercised through foster homes or foster families. The first is exercised through special centres for the fostering and protection of minors under the supervision of the centre's director. The second case occurs in a family, with a distinction being drawn between "simple family-based fostering" (transient in nature and intended to procure re-insertion), "permanent family-based fostering" (specific powers of protections are granted due to the age or the circumstances of the minor) and "pre-adoptive family-based fostering" (a period of adaptation while the judge makes the final decision). By definition, it is assumed that this kind of fostering must be as brief as possible as the essential point is for the minor to be integrated into a family, either his or her own or another in which they can participate in all necessary aspects. This purpose is not achieved in the case of immigrant minors due to the difficulties of integrating them in a family. This institution may be considered equivalent to parental authority or traditional custody in some aspects, while in others it is completely separate. For example, foster parents/institutions are attributed certain contents similar to those of parents, but only with respect to personal matters, as the same does not happen with regard to property. Foster care may be terminated for three reasons: the voluntary decision of the foster parents; the request of the parents holding parental authority; by resolution of a Judge. A very different matter is the disappearance of the situation due to the death of the minor or a formal declaration that he or she is deemed deceased, the demise of the foster parent, emancipation, adoption, the voluntary decision of the foster parents (a very controversial point because it does not require the presentation of any cause whatsoever), at the request of the parents or tutor (with a distinction being drawn between consented or disputed foster care), by resolution of a Judge.

h) Adoption. Although already profoundly regulated in the Act dated November 11th, 1987, it now includes international adoption, in view of the great increase in this kind of activity in Spain over recent years. In this sense, the Act introduces the "certificate of suitability" for the parents in the light of an assessment conducted by the institution with the minor in its charge. This was already contained in the Convention and in the Hague Convention for the selection of families opting for adoption. In particular, section 25 refers to the Collaborating Institution for International Adoption. It is also up to this body to issue the "monitoring undertaking". Other functions have to do with mediation: information and advice to the interested parties; participation in the processing of adoption papers vis-à-vis the authorities; advice and support for applicants in and out of Spain. It should be borne in mind that only not-for-profit organisations can be accredited on the corresponding register and these must expressly include in their Articles of Association the goal of protecting minors; they must also have interdisciplinary teams as well as sufficient material resources to perform the functions indicated.

2. Foundation of The Duty of Protection: the Best Interest of the Minor

On the question of the protection of minors, there has been a divergence in the protection system: on the one hand, the typical family-based institutions, to which all minors must be subjected as a general rule, such as parental authority and ordinary wardship; and on the other hand, the assistance or functional protection measures that come into play when the preceding instruments are not adequately exercised or disappear; this group includes administrative custody and legal guardianship ex lege, in addition to fostering as a manifestation of these.

At the heart of this classic problem lies the historical discussion of the capacity of minors: for some, they must be assumed to be incapable of acting, as a general principle, while others adopt entirely the contrary view. The Spanish Civil Code provides no express, definitive response as there are precepts listing acts that minors may perform depending on whether they are 12, 14 or 16 years of age. But in any case, it can be said that there is not one precept in the Civil Code from which it can be inferred that minors have an absolute incapacity to act. Notwithstanding, it is true that being under the age of majority represents an example of a limitation on full capacity, hence the need for the protection of minors. In this way, being under age is a civil status in which protection is implicit but which cannot be identified with a situation of incapacity. The “interest of the minor” will set the pace for the legal intervention by the public authorities. In this respect, we should recall the guidelines set out in Chapter III of Part I of the CE: “On the guiding principles of social and economic policy”, which include families as a sphere for their intervention. More specifically, section 39 CE grants constitutional protection to the family and to minors as well as establishing obligations for parents and, in their absence, to the public authorities: ensuring comprehensive protection; dignity, life, physical and moral well-being, education, etc. and, of course, this precept does not distinguish between domestic and foreign minors.

In fact, the Spanish Constitution does not make any distinction between the rights of minors and those of adults, as both groups are citizens. Therefore, when it comes to exercising their rights, minors need no favours, merely that the public authorities comply with the regulatory mandates of promoting suitable conditions for the real and effective freedom and equality of individuals and the groups they may belong to, and that they eliminate the obstacles hindering or preventing their full enjoyment, thus ensuring that comprehensive protection for minors (sections 9.2; 39.1 and 2 CE).

The best interest of the minor is a principle that has been continuously invoked by legislators and jurisprudence within the realm of family law. It is therefore no novelty, but the difficulty continues to lie in its lack of conceptual determination. In fact, it is a question of taking into account the wishes and sentiments of the minor, depending on their age and capacity for discernment, their physical, educational and emotional needs, and their wardship in the face of situations that do not respect their dignity and, in particular, this concept must be kept in direct relation with the constitutional rights contained in the CE and of course with their rights to education, freedom of thought, conscience, religious liberty, the right to be heard, protection against all forms of abuse, negligent treatment or exploitation, the right not to be separated from their parents, to receive special attention if they are physically or mentally impaired etc.

3. Legal Concept of Helplessness

This term has replaced the former concept of “abandonment” contained in the old section 174 of the Civil Code; the current sub-section 172.2 now states: “The situation of helplessness is deemed to be that which occurs de facto because of failure to comply with, or the impossible or inadequate exercise of, the duties of protection stipulated in the legislation for the guardianship of minors, i.e. when they are deprived of the necessary moral or material assistance”. The LOPJM helped to clarify this legal concept a little more by introducing the competent body to declare these situations and establishing the possibility of a suspension of parental authority, distinguishing in turn between situations of risk and helplessness.

In short, it is a more wide-reaching concept than that of abandonment, so the scope of protection increased. It does not mandatorily require a prior declaration by the courts and it entails automatic wardship by competent public administration. There is no set deadline for it to be determined and it exists as soon as there is an objective de facto situation based on the lack of moral or material assistance, or of both together. On the other hand, the more or less blameworthy behaviour of the person(s) having the minor in their charge or custody is irrelevant, and no regard is had either for the external or a posteriori circumstances provoking the failure to comply with or inadequate exercise of paterno-filial duties.

Therefore, the following are the preconditions for declaration of helplessness: a) the lack of moral or material assistance, pursuant to the contents of section 10 CE: dignity, free development of their personality, always within certain minimal conditions: food, clothing, housing, education, health care, etc.; b) the failure to comply with or the impossible or inadequate exercise of the duties of protection stipulated by the laws on guardianship of minors (personal content of parental authority or wardship, section 154 and 259 respectively of the Civil Code, specified as the rights and duties to look out for the minor; please see also section 172 for the situations of lack of assistance due to force majeure. I emphasize the absence of any deadline or term for declaring situations of helplessness.

The parties involved are: the minor, never an incapacitated adult. The reasons giving rise to a situation of helplessness may originate in many different causes, that can be summed up in three: that they have no parents or tutors; that there is a failure to comply with or inadequate exercise of paterno-filial duties of protection (blame on the part of the parents or other persons responsible); or that it has become impossible for them to exercise those duties (without apportionment of blame).

On the other hand, the arrival of the public Administrations in these matters, traditionally reserved for civil law, entails the need for co-existence and harmonization between the civil and administrative institutions. It is evident that both institutions respond to different principles but they must be in tune with each other to ensure that both are guided by the principle of safeguarding the minor's best interests.

In fact, the assumption of wardship by the public body when the corresponding declaration of helplessness arises has had a very important practical result because it allows immediate action in cases of crisis, removes the minor from the conflict and seeks his or her protection. For a correct intervention, it is necessary for there to be reports advising this course of action as the sole possibility in the minor's best interests. This was the line of action initiated in 1987 and successfully continued since 1996, with the direct intervention of the social services unburdening the courts without impairing the rights of the minors and their families.

4. Protection Measures in Situations of Risk and Helplessness

The first difference that can be highlighted between situations of risk and helplessness is the temporary nature of the fact giving rise to each one. This is in turn derived from the two forms of protection foreseen in each case: administrative custody in the first case and, in the second, ex lege guardianship by the regional government authorities. At the same time, there seems to be a lower level of severity in risk situations, which seems to explain the continued contact with the minor's biological family. This distinction was one of the great novelties introduced by the 1996 Act, as is already expressly reflected in its Preamble, where it states that "innovative is the term to define the distinction, within situations of a lack of social protection for the minor, between situations of risk and helplessness giving rise to a different degree of intervention by the public body. Whereas in risk situations, characterized by the existence of harm for the minor without this attaining sufficient severity to justify his or her separation from the family circle, these interventions are limited to attempts to eliminate the risk factors within the institution of the family, (…) the risk factors in situations of helplessness, where the seriousness of the circumstances makes it advisable to remove the minor from the family, the intervention requires the assumption of the minor's wardship by the public body and the subsequent suspension of parental authority or ordinary guardianship".

It is appropriate to clarify some of the basic similarities and differences between both of these as presented in the Spanish legal system. Wardship is automatic in nature and is imposed ex lege by dint of law. Custody, on the other hand, requires an application by the persons holding power over the minor or else a resolution by a Judge. Another difference lies in the fact that the exercise of wardship and parental authority are incompatible; however, custody is compatible with parental authority or with ordinary wardship. In line with the foregoing, a difference is also made in the origin of the measure. On the one hand, helplessness is the basic requirement for ordering automatic wardship. But in the case of custody, it will be enough for the parents to accredit that it is materially impossible for them to attend to their minor child. Of course, these must be well-grounded reasons and not mere whims or situations of opportunity. Both institutions do coincide in having a certain temporary nature: custody only for as long as necessary, and wardship, which may be provisional when exercised through residential fostering and then become more permanent or even indefinite when a foster family is assigned. On the other hand, both are different in terms of the content or scope of their action. Thus, wardship may extend to the personal and property aspects of the ward, whereas custody only covers personal assistance. Finally, no distinction is made in the Civil Code regarding the grounds for removal in either case: with wardship, there is no specification of who may request it, but in the case of custody the law stipulates that it may be requested by the minor or another interested party (the difference between the two institutions can be seen very well reflected in the Judgement by the Madrid Provincial Appeals Court dated January 21st, 1992).

With regard to the public bodies that are competent to assume these forms of protection, it should be recalled that, pursuant to sub-section 148.1.20 CE, the regions have power to legislate through their respective Legislative Assemblies on assistance or social services in general and in particular on minors. Hence, sub-section 172.1 of the Civil Code provides that “the public body to which the protection of the minor may be entrusted in the respective territory … holds wardship over the same by dint of law and must adopt the necessary protection measures to ensure his or her safekeeping”. As has been said before, the regional authorities have assumed and extensively developed these powers, subject to international treaties.

5. Application of the Spanish “Legal Protection of Minors Act” to Immigrant Minors

Section 1 defines the spatial scope: “the present Act and the instruments developing the same are applicable to those persons in Spanish territory under eighteen years of age, unless they are already of full legal age pursuant to their applicable personal law”. Therefore, this Act will apply to any minor in Spain who so requires it, regardless of their nationality, the foresight contained in the laws regulating paterno-filial relations, custody and other protective institutions. In other words, it applies to any foreigners who are minors in accordance with their national legislation, and in any case if they are under eighteen years of age.

Attention should be drawn to the fact that this 1996 Act, by introducing risk for the minor as a circumstance for its application, together with the classic situation of lack of protection (helplessness), avoids restrictive interpretations on its applicability and contributes to avoiding the blurring of its contents and it can thus be extended to allow application to any minor even if they do not have Spanish nationality, basically through the assumption of protection by the regional authorities and the adoption all those measures foreseen for minors in situations of helplessness or risk. This immediately entails the need for collaboration with the competent bodies of the State from which the minor has originally come.

Notwithstanding this general power, sub-section 6 of section 9 of the said regulations establishes certain distinctions. Thus, the law applicable to protection and other institutions for their custody and safekeeping shall be that corresponding to the minors’ national law; any urgent or interim measures that may need to be adopted shall be those of the law corresponding to their habitual residence; educational measures and those intended to protect all minors abandoned in Spanish territory are governed by Spanish law. In other circumstances, the application of custody rules may be established judicially when the parents are unable to care for the minor and submit a request in this sense and when the public body itself, in the exercise of the protection required of

it under the law, assumes custody because the minor is in a situation of helplessness. This latter case is the most common. This power of assuming custody may be exercised directly by the public body, through some form of residential foster care, or else by means of a foster family.

If administrative wardship is the result of a situation of helplessness affecting the minor, and if the foster care is the continuation of the protection regime invoked, it will also be a measure for the protection of minors in situations of helplessness, as is the case of an immigrant alone in Spain. Therefore, as a result, these immigrants will be subjected to the same legal regime as with autonomous wardship. Hence the difficulty in establishing the autonomy of foster care, as wardship without foster care does not seem to be sustainable as a means of exercising wardship. It must be remembered that, as these are protective measures adopted with respect to minors in situations of helplessness originating through their abandonment by those persons attributed parental authority over them, this regime may be realigned with that for protective and educational measures which, it is worth remembering, are regulated in Spain as legal imperatives.

6. Legal Status of Unaccompanied Immigrant Minors

The term Unaccompanied Minors ("Menores No Acompañados" or MNA in Spanish) appears in the earliest denominations of the phenomenon all over Europe. Although MNA were initially considered to be those minors "alone or without parents or legal tutors", the praxis has caused this definition to be expanded. Thus in Spain, as in other countries, another legal definition arose: that of minors in situations of helplessness. This led to the emergence of the term "foreign minors on Spanish territory in situations of helplessness". In practice, minors shall only be in the charge of the competent administration if they have no relatives or else have relatives (even if they are not their legal tutors) who request this assistance or are unable to look after them. In some cases, the relatives are required to apply for administrative custody, which is easily granted if they wish to have the minors in their own charge.

From the moment a minor enters Spanish territory, a series of steps come into play as part of a procedure in which four phases may be distinguished; a) intervention phase, which lasts from the detection of the minor by Spain's security forces until he or she is placed at the disposal of the competent authorities for the protection of minors; b) investigation phase, including the actions carried out by the competent administration to obtain information about the personal and social or family circumstances of the immigrant minor; c) decision phase, comprising the drafting of a report and proposal by the competent administration for later submission to the governmental authority in charge of deciding on the suitability of the minor remaining in our country or being returned to the country of origin; and d) execution phase, including the different actions intended to implement the resolution adopted on the minor's permanence or return.

In any case, notwithstanding the foregoing, the legal status of foreign unaccompanied minors comprises a series of rights acknowledged at the international, community and national levels. The basic principle is that of preserving their identity, in other words the obligation of the authorities is to guarantee their names, age, nationality, origin, etc. on the other hand, foreign unaccompanied minors, just like their Spanish counterparts, have the same rights contemplated in the LOPJM (Law 1/1996) that we have referred to above. This catalogue does not exhaust all of those in existence, but it does express the two essential ones: the right to dignity and compliance with the supreme principle of the minor's best interests. It is also necessary to mention the Social Security benefits as well as the Foreigners in Spain (Rights and Liberties) Act (Fundamental Law 4 dated January 11th, 2000), as amended by Fundamental Law 8 dated December 22nd, 2000, and Fundamental Law 14 dated November 20th, 2003, which provide a more precise regulation of the rights to education and health care.

B. Regulation for Children Perpetrating Crimes

1. The Criminal Liability (Minors) Act

The Criminal (Fundamental Law 5 dated January 12th, 2000, or LRPM in its Spanish acronym) came into force in Spain in 2001 and is characterized by the following aspects:

a) it incorporates all of the guarantees arising out of the Spanish Constitution in the area of criminal justice for minors;

b) it establishes a combined educational and punitive approach with various measures ranging from a public warning or internment for up to three weekends, probation, fostering by another person or family group, suspension of the right to ride mopeds or motor vehicles, provision of services for the benefit of the community, mandatory treatment at an out-patient clinic or admission to a therapeutic centre, confinement in a centre with open, semi-open or closed regime. Internment may not exceed two years;

c) it creates a flexible framework for the judges of minors (specialist judges from the criminal courts) to be able to determine the measures applicable to those committing criminal offences between the ages of 14 and 18, as well as the power to suspend the enforcement of these measures, always having regard for the greater interest of the minor;

d) it empowers the Office of the Public Prosecutor to order investigation and arraignment with wide powers to resolve not to proceed with trial or to conclude the proceedings, at any moment, if it is felt that maintaining the prosecution is not warranted in the light of the circumstances of the minor and the existence of a factual or possible reconciliation with the victim or an undertaking to provide reparation of the damage caused or to engage in an educational activity;

e) it creates interdisciplinary technical teams, functionally reporting to the Office of the Public Prosecutor, in charge of issuing reports on the psychological, educational, family and social situation of the minor in order to achieve the punitive or educational goal pursued.

The preamble of the Act acknowledges that it is formally a criminal matter but in material terms it deals with penalties and educational measures both within the proceedings and in the applicable sentences, and that it was inspired by the minor's best interest; it includes a differentiation of age groups (14-16 and 17-18) for the purposes of procedural matters and the penalties imposed and flexibility in the adoption and enforcement of such measures as may be appropriate in the light of the circumstances of each specific case; it also give the Regional Governments the power to enforce the measures imposed as well as judicial monitoring of their fulfilment.

2. Legal Age

The act applies to all persons over fourteen and under eighteen years of age who have committed acts specified as crimes or offences in the Spanish Criminal Code or specific penal laws. It also considers the acts committed by minors aged 14 to have no criminal relevance, so their resolution should be sought either through educational measures within the family or, where appropriate, at a public institution for the protection of minors in accordance with the provisions of the Civil Code, and without prejudice to the civil liabilities that may correspond to their parents or guardians for any damage they may have caused.

Logically, all individuals of full legal age fall out with this Act, in other words all those who were eighteen years of age or over when the delinquency in question was committed. Although the law initially foresaw the application of its provisions in 2007 to those less serious matters committed

by young people between the ages of 18 and 21, the recent amendment of the Act by Fundamental Law 8 dated December 4th, 2006, has repealed this intention.

3. Rights Recognized to Minors

The minors to whom this law is applied enjoy all of the rights acknowledged in the Constitution and in the legal system, particularly those contained in the Protection of Minors Act (Fundamental Law 1 dated January 15th, 1996), as well as those in the Convention on Children's Rights from November 20th, 1989, and in all of the norms on the protection of minors contained in the treaties validly ratified by Spain.

This general declaration is made more specific in sub-section 22.1 of the Act which recognizes that minors, apart from their right to be notified of the proceedings as soon as they are begun, have the generic rights for all trials:

- to be informed by the Judge, the Office of the Public Prosecutor, or a police officer of the rights they have;

- to designate a lawyer to defend them, or to have one appointed ex officio, and to have an interview with their lawyer in private, even before making a statement;

- to participate in the investigative measures undertaken in the course of the preliminary proceedings and at the court hearing, as well as to propose and request, respectively, the measures to be carried out;

- to be heard by the Judge or Court before the adoption of any resolution affecting them personally.

- emotional and psychological attention at any stage or degree of the proceedings, with the presence of their parents or such other person as the minor may indicate, if the specialist judge for minors authorizes their presence;

- the use of the services of the technical team assigned to the Minors Court.

At the same time, sub-section 37.1 acknowledges that the Office of the Public Prosecutor, in its dual role of investigating the facts and defending at all times the respect for legality and the rights of the minor, and the minor's lawyer have the power to appear before the Judge, prior to the submission of evidence phase, in order to communicate whatever they see fit regarding breaches of constitutional rights (sections 15 to 29 of the Spanish Constitution) during the stages of the proceedings.

The Act also acknowledges the minors' right to be informed in clear language appropriate for their age regarding any petition or decision that may affect their rights, with the Judge being obliged to hand down, within the five days following the hearing, a resolution setting out the legal and educational reasons for the measure(s) chosen in clear, simple terms, along with the duration, content and purpose of the measure(s).

But, in addition to these, the Act also enshrines other rights that affect any aspect of the life and wellbeing of minors, including:

- the right for the minors' best interests to prevail, without prejudice to the guarantee provided to the victim of the crime to be a party to the proceedings and to be heard at all times;

- the right to be tried by their natural judge;

- the right to a proper defence: from the very moment when minors are detained or proceedings are initiated, they will be entitled to appoint a lawyer to defend them,

or to have one appointed ex officio, and to have an interview with their lawyers in private, even before making any statement;

- the right to privacy, which is ensured by the provision allowing the Judge to order, in the best interests of under-age alleged perpetrators or victims, the sessions to be held in camera and, in all cases, by the ban preventing the media from obtaining or broadcasting images of the minors or information that might lead to their identification;

- the right to a double level of criminal justice, through the establishment of appeals against the decisions adopted by the Judges of Minors, whether for simple appeals or for motions to overturn before the Supreme Court;

- the right to comply with the measure imposed at the closest possible location to the minor's domicile and in as normal a manner as possible.

It should be remembered that the Regional Governments, which are the competent authorities when it comes to enforcement, may enter into agreements with local bodies or with not-for-profit associations for the fulfilment of the measures imposed.

The LRPM expressly regulates the rights of those minors who have been deprived of their freedom, including the right to have the public body in charge of the centre in question ensure protection of their life, physical integrity and wellbeing. All ill treatment whether by word or deed and all degrading acts are absolutely prohibited. Furthermore, they are entitled to receive protection and comprehensive education and training, as well as the full right to exercise their civil, political, social, religious, economic and cultural rights; they are entitled to free health care and to receive compulsory primary education and the corresponding vocational training. They are entitled to individualized treatment and to participate in the centre's activities; to communicate freely with their parents or relatives and to enjoy passes and leaves outside the centre. They are entitled to engage in remunerated work, within the possibilities of the public institution, and to receive the social benefits, in accordance with the legal age limits, as well as to communicate with their lawyers, the Judge of Minors, the Office of the Public Prosecutor and with the inspection services responsible for the centres.

4. Special Provisions for Specific Crimes

There are a number of special provisions in connection with adolescents between 14 and 18 years of age who take part in the commission of terrorism-related crimes, both for the attribution of the power to judge them to the National Court and also with regard to the enforcement of any internment in a closed centre that may be imposed; the duration of this internment increases to ten years in a closed regime followed by a period of probation. Furthermore, measures of greater rigour are established with respect to the crimes of murder, grievous bodily harm, rape or crimes punished in the Spanish Criminal Code by prison sentences in excess of ten years, for which the minimum and maximum periods of internment in a closed regime are increased.