



CPT/Inf (2007) 30

**Report to the Spanish Government  
on the visit to Spain  
carried out by the European Committee  
for the Prevention of Torture and Inhuman  
or Degrading Treatment or Punishment (CPT)  
from 12 to 19 December 2005**

The Spanish Government has requested the publication of this report and of its response. The Government's response is set out in document CPT/Inf (2007) 31.

Strasbourg, 10 July 2007

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**Copy of the letter transmitting the CPT's report**

Strasbourg, 24 March 2006

Dear Madam,

In pursuance of Article 10, paragraph 1, of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment, I enclose herewith the report to the Government of Spain drawn up by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT) following its visit to Spain from 12 to 19 December 2005. The report was adopted by the CPT at its 59th meeting, held from 6 to 10 March 2006.

The CPT's recommendations and requests for information are set out in **bold** in paragraphs 10, 16, 28, 41, 42, 49 to 57, 63, 65, 67 to 70, and 72 of the report. The Committee requests the Spanish authorities to provide within three months a response giving an account of the action taken to implement its recommendations as well as replies to its requests for information. The CPT would ask, in the event of the response being forwarded in Spanish, that it be accompanied by an English or French translation. It would also be most helpful if the Spanish authorities could provide a copy of the response in a computer-readable form.

I am at your entire disposal if you have any questions concerning either the CPT's report or the future procedure.

Yours faithfully,

Silvia CASALE  
President of the European Committee for the  
prevention of torture and inhuman  
or degrading treatment or punishment

Doña María Victoria SAN JOSÉ VILLACÉ  
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## **I. INTRODUCTION**

### **A. Dates of the visit and composition of the delegation**

1. In pursuance of Article 7 of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment (hereinafter referred to as "the Convention"), a delegation of the CPT carried out a visit to Spain from 12 to 19 December 2005. The visit was one which appeared to the Committee "to be required in the circumstances" (cf. Article 7, paragraph 1, of the Convention).

2. The visit was carried out by the following members of the CPT:

- Silvia CASALE (Head of the delegation)
- Marija DEFINIS GOJANOVIĆ
- Mauro PALMA.

They were supported by Caterina BOLOGNESE of the CPT's Secretariat, and assisted by

- Mark KELLY, Director, Human Rights Consultants, Ireland (expert)
- Beth GELB (interpreter)
- Claude LORD (interpreter)
- Vivian PARRA-IDREOS (interpreter)
- Jorge RAYESS (interpreter).

**B. Establishments visited**

3. The delegation visited the following places:

Establishments under the authority of the Ministry of the Interior

*National Police stations*

- Madrid, Tetuán
- Madrid, San Blas
  
- Almería, Alcalde Muñoz
- Almería, Av. del Mediterráneo
  
- Melilla, Jefatura Superior

*Municipal Police*

- Roquetas de Mar, Depósito municipal de detenidos

*Civil Guard*

- Almería, Comandancia
- Roquetas de Mar
- Roquetas de Mar-Aguadulce
  
- Melilla, Comandancia
- Melilla, Beni Enzar

*Prisons<sup>1</sup>*

- Soto del Real – Madrid V
- Almería – El Acebuche

Establishments under the responsibility of the Ministry of Labour and Social Affairs

- Melilla, Centro de Estancia Temporal de Inmigrantes

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<sup>1</sup> The two prisons were visited for the purpose of conducting interviews with persons who had recently been in the custody of law enforcement agencies. Further, the CPT's delegation examined the process by which information concerning injuries was recorded on admission to prisons and subsequently communicated to the judicial authorities.

**C. Consultations held by the CPT's delegation**

4. The CPT's delegation held meetings with the Minister for the Interior, José Antonio ALONSO SUÁREZ, the Secretary of State for Security, Antonio CAMACHO VIZCAÍNO, the Director-General of the Civil Guard, Carlos GÓMEZ ARRUCHE, the Director-General of Penitentiary Institutions, Mercedes GALLIZO LLAMAS, and other senior officials of the Ministry of the Interior, as well as the Deputy Director-General of the Ministry of Labour and Social Affairs, Miguel Ángel AZNAR NIETO.

The delegation also met with the Audiencia Nacional's President, Carlos DIVAR BLANCO, the President of its Criminal Chamber, Javier GÓMEZ BERMÚDEZ, and its Chief Prosecutor, Eduardo FUNGAIRIÑO BRINGAS. It also met the Ombudsman (Defensor del Pueblo), Enrique MÚGICA HERZOG, and his first deputy, María Luisa CAVA DE LLANO Y CARRIÓ, as well as the Spokesperson of the General Council of the Judiciary, Juan Pablo GONZÁLEZ GONZÁLEZ.

A list of the national authorities and non-governmental organisations met by the delegation is set out in the Appendix to this report.

**D. Cooperation between the CPT and the Spanish authorities and focus of the visit**

5. The CPT's delegation received excellent cooperation during the visit. On the whole, the CPT's delegation was given swift access to persons, places and information, including copies of documentation (police, prison, court records as well as medical files), with the exception of two court files (cf. paragraph 42). In this respect, the CPT wishes to express its appreciation for the efforts of the liaison officer, Antonio CERROLAZA GÓMEZ of the Ministry of the Interior, in facilitating the delegation's work. However, the CPT wishes to put on record that members of its delegation were initially denied access to the Civil Guard premises in Roquetas de Mar (Almería district), with access only being granted through the intervention of the Civil Guard district Commander.

6. The principle of co-operation set out in Article 3 of the Convention also requires that decisive action be taken, including at the highest political level, to improve the situation in the light of the Committee's key recommendations. In this respect, one of the CPT's longstanding key recommendations which has yet to be implemented by the Spanish authorities concerns the right of prompt and effective access to a lawyer from the very outset of deprivation of liberty by law enforcement agencies.

In their response to the CPT's report on the visit in 2003,<sup>2</sup> the Spanish authorities had asserted the adequacy of existing legal provisions, and had enquired: "What is the risk that the arrested person runs during the eight hours before the arrival of a lawyer?". The CPT therefore decided to carry out an ad hoc visit to Spain, focusing on access to a lawyer and the potential effects of delays, in practice, in the right of access to a lawyer, within the wider context of the system of combined safeguards recommended by the CPT to protect persons deprived of liberty from ill-treatment. The delegation concentrated on safeguards in relation to persons deprived of their liberty in connection with "ordinary" criminal offences (i.e. offences other than those related to terrorism). It also considered the effectiveness of investigations into possible ill-treatment arising during custody in law enforcement establishments.

7. In the course of the discussions at the outset of the visit, a welcome development was noted in the Spanish authorities' position regarding access to a lawyer; that is, it is no longer considered unnecessary or unworkable to provide for the right to prompt access to a lawyer for persons detained by law enforcement agencies. Indeed, the authorities agreed to make efforts to ensure that the right of access to a lawyer is enjoyed much earlier in the detention process than is currently the case.

While this is not the first occasion on which such a commitment has been made to the CPT,<sup>3</sup> the delegation was encouraged by the very fruitful dialogue with the Spanish authorities during this visit. The Committee trusts that the time is now ripe for the Spanish authorities to take concrete steps to improve the situation in the light of the CPT's longstanding recommendations, in accordance with the obligations of the authorities under the Convention.

8. Finally, in the light of information received in respect of large numbers of persons attempting to enter Spain at Ceuta and Melilla on the North African coast in 2005, the CPT's delegation also examined the protection of the rights – including the principle of non-refoulement – of foreign nationals entering the territory of Spain at Melilla.

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<sup>2</sup> Cf. page 14 of the Spanish Response to the CPT report on its visit in July-August 2003 (CPT (2005) 8), with reference to paragraphs 18 to 23 of the Report (CPT (2004) 1).

<sup>3</sup> Undertakings were made in 1998 (cf. CPT/Inf (2000) 5, paragraph 21) and 2003 (cf. CPT (2004) 1, paragraphs 6 and 23).

## II. FACTS FOUND DURING THE VISIT AND ACTION PROPOSED

### A. Introduction

9. Much attention has been paid, during previous CPT visits to Spain, to the situation of persons deprived of their liberty in connection with terrorist offences.<sup>4</sup> Such persons, to whom a highly specific legal framework applies, constitute a very small minority of persons deprived of their liberty. On the occasion of this ninth visit to Spain, the Committee decided to examine the efficacy of safeguards against ill-treatment as they apply to the broader spectrum of persons deprived of their liberty, i.e. to those persons detained in connection with “ordinary” criminal offences.

10. Although the CPT’s delegation did not focus its attention specifically on the material conditions of detention in law enforcement establishments, it did note, in several Civil Guard establishments, the continuing failure to provide mattresses to persons held overnight.

**The CPT reiterates its recommendation that persons obliged to stay overnight in custody be provided with a clean mattress and blankets.**

### B. Ill-treatment

11. Concentrating on the situation of persons in the custody of law enforcement agencies on suspicion of “ordinary” criminal offences, the CPT’s delegation collected numerous allegations of ill-treatment, including of a serious nature. The delegation documented injuries recorded on admission to prison on remand, which were either alleged to have been caused by the police or Civil Guard, or for which there was no other plausible explanation as to their origin. The type of alleged ill-treatment documented consisted mainly of kicks, punches and blows with truncheons to various parts of the body. By way of example, reference is made to the following four cases of alleged ill-treatment, resulting in visible injuries. In three of these cases, the injuries were so severe as to require hospital examination and treatment.

#### 12. Case 1

A detained person met by the delegation in Madrid V Prison (Soto del Real) alleged that he had been kicked at the time of his apprehension on 29 June 2005, and that he had subsequently been handcuffed and made to kneel, and punched and hit with a pistol butt by plainclothes police officers from the drugs squad (“Grupo XIX”) of the Provincial Brigade of the Judicial Police (“BPPJ”), before being detained at the National Police station in Tetuán (Madrid).

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<sup>4</sup> Cf. Reports on the CPT’s visits to Spain in April 1991, April and June 1994 (CPT/Inf (96) 9), January 1997 (CPT/Inf (2000) 3), November – December 1998 (CPT/Inf (2000) 5) and July 2001 (CPT/Inf (2003) 22).



The medical file relating to the treatment he received at hospital reported:

- hypoesthesia of the right infraorbital nerve and contusion of the right infraorbital edge;
- a (21-hour old) contusion of the right eye, from which vision is weak;
- haemorrhage inside the ear;
- a haematoma of the right auricle.

The prison medical file (of 2 July 2005) noted pain caused by injuries matching those described in the hospital record, and also documented contusion wounds on both the knees and the left elbow.

These injuries are consistent with the detained person's allegations of ill-treatment. Furthermore, the delegation was able to confirm from police documentation that he had been arrested by the BPPJ Grupo XIX, and held at Tetuán Police Station during the time to which his injuries could be ascribed.

#### 13. Case 2

A person interviewed by the delegation at Almería Prison alleged that, on 2 September 2005, a police officer had beaten him with a truncheon following his request to be allowed to use the lavatory outside his cell at the National Police Station in Almería. An injury report completed on his admission to prison indicated contusions of the left scapular area, right shoulder and right elbow and erosions of the right tibia.

These injuries are consistent with his allegations of ill-treatment. Furthermore, the delegation was able to confirm from police documentation that he had been held at the Almería National Police Station during the period to which his injuries could be ascribed.

#### 14. Case 3

A person detained at Madrid V Prison (Soto del Real) whom the CPT's delegation met, alleged that he had been apprehended one month previously and severely beaten on his head and shoulders with a truncheon by plainclothes police officers in the street. He alleged that, subsequently, at San Blas National Police Station in Madrid he was beaten around the head while handcuffed and on his knees.

Medical, including hospital, records described an incised contusion wound on the right leg, erosion of the facial region, contusion of the cranial region, pain in the joint of the lower jaw, and loss of consciousness for a few seconds or minutes.

These injuries are consistent with his allegations of ill-treatment. Furthermore, an examination of police documentation confirmed that he had been held at the National Police Station in San Blas, Madrid, during the period to which his injuries could be ascribed. Moreover, that documentation also contained photographs showing injuries consistent with his allegations.

15. Case 4

On 12 December 2005, the CPT's delegation interviewed a person detained at Madrid V Prison who alleged that, some fifteen days previously, plainclothes police officers had punched him violently in the chest at the time of his apprehension in the street, and had subsequently punched him in the face in a room used for identification purposes at the National Police Station in Tetuán, Madrid.

The medical file drawn up when he was transferred to hospital reported contusions and erosions on the face, pain in the central chest region after traumatism of the thorax and face against the ground during detention, as well as traumatism of the hands, superficial erosion of the left side of the forehead and a haematoma above the right eye. The injury report enclosed a note, dated 26 November 2005, from the prison admissions unit stating that, on his arrival in the establishment, the prisoner had borne injuries produced during detention.

The injuries described above are consistent with his allegations of ill-treatment. Furthermore, the delegation was able to confirm from police documentation that he had been held at the National Police Station in Tetuán, Madrid, during the period to which his injuries could be ascribed.

16. Given the delegation's findings during this visit, **the CPT recommends that the Spanish authorities reiterate, through formal statements at the highest political level, the clear message that there must be "zero tolerance" of all forms of ill-treatment.** Action must be taken with regard to professional training for law enforcement officials and in order to put in place, without further delay, a fully-functioning system of safeguards against ill-treatment. Such action will be underpinned by a clear message of "zero tolerance" for ill-treatment.

**C. The system of safeguards for persons in the custody of law enforcement agencies**

**1. Introduction**

17. The CPT's standards concerning the full range of fundamental safeguards to be afforded to persons deprived of their liberty by law enforcement agencies have been explained at length in reports on the Committee's eight previous visits to Spain.<sup>5</sup> In the course of this visit, the CPT's delegation reviewed the system of safeguards against ill-treatment of persons deprived of their liberty by law enforcement agencies and, in particular:

- information on one's rights without delay;
- effective access to a lawyer from the very outset of deprivation of liberty; and
- judicial oversight in instances of possible ill-treatment by law enforcement officials.

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<sup>5</sup> Cf. for example, paragraphs 17 to 29 of the Report on the CPT's periodic visit to Spain in 2003 (CPT (2004) 1).

## **2. Information on rights**

18. According to regulations and practice, initial oral information about a detained person's rights is provided at the time of his/her apprehension, with written information provided on arrival at the law enforcement premises. The CPT's delegation found that the form laying out the rights of the detained person was consistently provided to, and signed by, the detainee towards the end of the reception process. The explanatory part of the form described the detainee's right of access to a lawyer and listed the rights to remain silent, to have one's custody notified to a person of one's choice, to the assistance of an interpreter free of charge and of a doctor.

It is noteworthy that the services of an interpreter were described as being free of charge, whereas this was not made clear as regards the services of a lawyer. If detainees who cannot afford to pay for a lawyer are to exercise this right, the form must clearly explain that legal assistance will be provided free of charge.

Below the explanatory section of the form, the detainee could indicate whether he or she wished to exercise a series of rights by ticking the relevant box. However, the terms used could be made more clear; for example, the first box, which the detainee should tick if s/he wished to be assisted by a lawyer, used the term "letrado" rather than "abogado", the latter being the common term for a lawyer and the one used in the explanatory section of the form. Detainees and lawyers complained that "letrado" is a technical term for a lawyer.

19. In practice, law enforcement officials clearly took seriously the need to obtain the detained person's signature on the rights form. However, they were less diligent in ensuring that persons understood and could, in fact, exercise their rights. Indeed, many of the detained persons interviewed by the CPT's delegation had not been adequately informed – or in a language they understood – of their rights during their custody with law enforcement agencies. For example, one person, who had been transferred from civil guard to national police detention in Almería, had not ticked the box requesting her own lawyer, as she had not understood the question (and the term "letrado") on the form. Moreover, because she had been initially detained by the civil guard, the national police took no interest in ensuring that she was correctly informed of her rights and was able to exercise them, while in their custody.

## **3. Access to a lawyer**

20. During the visit, the CPT's delegation sought to address the question as to whether Spanish legislation actually provides detained persons with a fully-fledged right of access to a lawyer, as recommended by the CPT, and what risks might be entailed if such access were delayed in practice. In interviews with both detained persons and members of the law enforcement agencies, the delegation gathered information about when a detained person could have access to a lawyer and whether the person concerned could consult with a lawyer in private.

a. timing of access to a lawyer

21. It should be recalled that, in the CPT's experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons to have rapid access to a lawyer from the very outset of their deprivation of liberty is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.

Case 1 (cf. paragraph 12 above) illustrates how a lawyer can be instrumental in ensuring that access to medical care is provided promptly. Despite the fact that the person in question bore numerous injuries on arrival at the Tetuán national police station, it was only after his lawyer had visited him – and was insistent – that he was transferred (some 24 hours after first being placed in the cells at Tetuán) to a hospital to receive the medical care that he required.

22. By contrast, in Melilla, the CPT's delegation encountered two well-documented cases of lawyers being contacted swiftly (within 20 to 25 minutes) at the request of a detained person, and being present at the Civil Guard Headquarters in less than an hour from the time of being contacted by the Civil Guard.

These two cases show that the current Spanish law can be – and on occasion is – interpreted in a manner consistent with the CPT's recommendations. Regrettably, this would appear to be the exception rather than the rule. Indeed, even in these cases, the lawyer was only present in time to attend the detained person's statement to the police, having had no possibility for prior consultation with his or her client. In the CPT's opinion, this can be too little, too late, for the presence of a lawyer to have the necessary effect insofar as the prevention of ill-treatment is concerned.

23. As was the case during the CPT's previous visits to Spain, the delegation encountered a consistent pattern of lengthy delays between the moment when a detained person first requested a lawyer and the time at which the lawyer actually arrived at the law enforcement establishment. Many persons interviewed by the delegation saw a lawyer for the first time at their court hearing.

The CPT's delegation documented several cases of excessive delays in access to a lawyer, ranging from 17 hours (Case 4) to 22 hours (Case 1), or more (Cases 5, 6 and 8, cf. paragraphs 36, 37 and 41). In all of these cases, ill-treatment was alleged and the allegations were consistent with law enforcement records and were supported by medical findings gathered by the delegation.

24. As had been the case during previous visits<sup>6</sup>, the delegation was informed by both police and civil guard officers, as well as by lawyers, that it was common practice for detained persons to be granted access to a lawyer only at the moment when they made a formal statement while in law enforcement custody. Such access was, in general, limited to the lawyer's passive presence while the detained person's statement was taken and signed.

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<sup>6</sup> Cf. e.g. paragraph 20, CPT (2004) 1.

The CPT welcomes the recognition by the Secretary of State for Security of the existing distinction between law and practice, and his assurance to the delegation<sup>7</sup> that efforts would be made to ensure that lawyers would be present earlier.

25. Although they have no binding legal status, the judicial police practice guidelines issued by the National Police Co-ordination Commission<sup>8</sup> appear to confirm the delegation's findings with regard to both the timing of access to a lawyer and the limited role that a lawyer may play during police custody.

The form in police establishments laying out detained persons' rights<sup>9</sup> explains the right to designate one's own lawyer (or to have one appointed), and to request that the lawyer be present at the statement and participate in any examination of identity that is carried out.

26. The delegation received documentation concerning the particular case of a person detained on 7 July 2004 at Cordoba-West National Police Station which illustrates the potential effects of delay in, or denial of, access to a lawyer. The completed form on her rights as a detainee clearly showed that she had opted to be assisted by her privately appointed lawyer, whose name and telephone number were written on the form. However, the records showed that the lawyer was not contacted by the police. Further, the police reported<sup>10</sup> to the investigating judge that no lawyer had been actively sought<sup>11</sup> because the procedure (placement under arrest at disposal of the court) did not require her statement to be taken.

Had there been prompt access to the private lawyer, a documentation error which had led to her arrest and detention would have been corrected sooner; thus, she would not have spent an extended period in police and prison custody, during which time she was allegedly ill-treated.

27. The delegation was informed that, in practice, if a detained person does not insist on remaining silent and does not have a private lawyer, the police or civil guard telephone the Bar Association for a duty lawyer to be appointed; the latter arranges with the police or civil guard for a time to attend the taking of the statement. Once the Bar Association has notified the lawyer on the duty roster, the lawyer is required to present himself or herself within eight hours. It appears that, in practice, the maximum time limit constitutes the norm for the arrival of a lawyer. Similarly, the delegation was informed that, even when the detained person appoints his or her own lawyer, the police contacts the lawyer with a view to agreeing on a time for the lawyer to be present for the taking of the formal statement.

The process by which the lawyer is contacted to attend at the station is, therefore, based on the assumption that the lawyer will arrive in time for the taking of a statement and not before.

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<sup>7</sup> In talks at the outset of the visit, on 12 December 2005.

<sup>8</sup> Cf. "Criterios para la Practica de las Diligencias por la policia judicial de la Comisión Nacional de Coordinación de la Policía Judicial" (*Carrying out administrative procedures: criteria for Judicial police officers issued by the National Coordinating Committee of the Judicial Police*).

<sup>9</sup> "Procedure for informing the detainee of his rights" ("Diligencia de informacion de derechos al detenido").

<sup>10</sup> On 7 September 2004, to Investigating Judge No. 3 of Cordoba.

<sup>11</sup> In particular, the Bar Association was not notified in order for a duty lawyer to be appointed.

28. Further, the system whereby the Bar Association appoints lawyers working on a duty roster to provide assistance to persons in law enforcement custody is an important factor in ensuring that the safeguard of access to a lawyer is effective in practice. Although there are differences in practice among bar associations in Spain, lawyers are paid a flat rate for being on duty for a 24-hour shift, and a further flat fee for every detained person assisted at the station.<sup>12</sup> Since compensation is based on the quantity of cases handled and there appears to be no compensation for additional time spent at the station, there is little incentive for lawyers to arrive early at the station and consult with their client prior to the procedure of taking a statement, even if this were recognised as permissible.

The Committee would further note that, although this particular issue requires coordination with the Bar Association, responsibility for a functioning legal aid system, capable of ensuring the effective enjoyment of the right of access to a lawyer as recommended by the CPT, lies with the Spanish authorities.

The CPT welcomes the commitment of the Secretary of State for Security to approach the Bar Association in order to ensure that lawyers present themselves earlier at law enforcement establishments. **The Committee would like to be informed of the results of these efforts.**

b. content of access to a lawyer

29. The key Spanish legal provisions concerning law enforcement custody and access to a lawyer<sup>13</sup> set the maximum period of preventive detention at 72 hours,<sup>14</sup> and specify that detained persons shall have the right to designate a lawyer and to request his or her presence in order that s/he attend the police and judicial formalities of the statement and participate in any examination of identity to which he may be subject.<sup>15</sup>

These provisions make no explicit reference to the right to prior, private, consultation with a lawyer and imply that the content of access to a lawyer is more limited than that recommended by the CPT as one of the fundamental safeguards against ill-treatment.<sup>16</sup>

30. The right of access to a lawyer from the very outset of the deprivation of liberty of minors is a fundamental safeguard from which there should be no exception. Regardless of the reason for which minors may be deprived of their liberty, they are inherently more vulnerable than adults. In consequence, particular vigilance is required to ensure that their physical and mental well-being is adequately protected.

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<sup>12</sup> However, the system recently introduced in Madrid provides that, at later stages in the process, the more complex cases may attract extra remuneration based on the number of times there is a legal consultation, number of days taken by the hearing, and /or the number of pages of documents.

<sup>13</sup> They have been discussed in previous CPT reports, and were summarised in Appendix II of the Report on the CPT's first visit to Spain in 1991 (CPT/Inf (96) 9, Part I).

<sup>14</sup> Article 520 (1) of the Code of Criminal Procedure (CCP).

<sup>15</sup> Article 520 (2) CCP.

<sup>16</sup> Cf. paragraph 19 of the report on the CPT's 1998 periodic visit to Spain (CPT/Inf (2000) 5), reproduced in Appendix III of the report on the CPT's 2001 ad hoc visit to Spain (CPT/Inf (2003) 22).

In this context, the CPT is concerned to learn that the Spanish Government has put before Parliament a draft amendment to the Ley Orgánica 5/2000, concerning Article 17, on the rights of minors in detention. Article 17 (2) provides for any statement by the detained minor to be made in the presence of his lawyer and parents or guardian; the proposed amendment would explicitly deny the right of access to a lawyer (in private) until after a formal statement has been taken<sup>17</sup> and would fly in the face of the CPT's repeated recommendations on the right of access to a lawyer.<sup>18</sup>

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31. Whereas access to a lawyer cannot prevent ill-treatment which has already occurred at the point of apprehension, the lawyer can assist in promptly lodging a complaint, to be pursued by the judicial authorities. The role of judges in the prevention of ill-treatment is examined in the following section of this report.

#### **4. The role of judges in the prevention of ill-treatment**

##### **a. preliminary remarks**

32. It is axiomatic that one of the most effective ways of preventing ill-treatment by law enforcement officials lies in the diligent examination by the competent authorities of all such complaints brought before them and, where ill-treatment is found, the imposition of appropriate disciplinary and/or criminal penalties. If the judicial authorities act promptly and effectively to investigate complaints, it will be more likely that true allegations will be substantiated and false complaints revealed as unfounded. Effective and prompt action in all cases brought to the attention of the judicial authorities will tend to have a dissuasive effect on any individual officers minded to ill-treat persons in their custody.

33. The CPT's delegation examined the operation in practice of procedures for judicial oversight aimed at protecting persons detained by law enforcement agencies from possible ill-treatment. In discussions with judges and through the examination of case records, the delegation considered subsequent action taken by the relevant officials to ensure an effective investigation of whether persons displaying injuries on arrival in prison had been ill-treated.

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<sup>17</sup> Article 13 of the draft amendment, as submitted to the Justice Committee of the Parliament on 27 January 2006, provides that Article 17 (2) would contain the following additional paragraph: "The detained juvenile shall have the right to speak in private with his/her lawyer after his/her statement has been taken".

<sup>18</sup> Cf. footnote No. 16 supra.

This examination was conducted from the perspective of the prevention of ill-treatment,<sup>19</sup> and having regard to the relevant evolving jurisprudence of the European Court of Human Rights (hereinafter “the Court”),<sup>20</sup> in particular in relation to the “procedural obligation” associated with Article 3 of the European Convention on Human Rights (ECHR). Any investigation into possible ill-treatment should, therefore, satisfy criteria of independence, effectiveness, promptness and transparency.

One aspect of the Court’s jurisprudence is the notion that the obligation to conduct an effective investigation is one “not of result, but of means”. Thus, in this context, the Court does not scrutinize whether a person has actually been ill-treated or whether a conviction has been secured, but whether *prima facie* evidence of ill-treatment has been effectively investigated. The CPT adopts a similar approach. Indeed, the possibility that injuries were not sustained as a result of ill-treatment does not release the State from its procedural obligation to ensure that the judicial authorities conduct an effective investigation in conformity with ECHR requirements.<sup>21</sup>

34. After a review of the associated role of prisons in triggering judicial action (section b), five individual cases examined by the CPT’s delegation are outlined (section c) and the relevant judicial responses subsequently analysed (section d), with particular reference to the Court’s requirements of an effective investigation.

b. the associated role of prisons

35. The CPT’s delegation examined the recording and transmission of medical and other information concerning injuries on entry to prison, as part of the process of communication of information necessary to enable oversight by the judicial authorities of alleged ill-treatment.

A 1998 Circular<sup>22</sup> of the Department of Prison Administration of the Ministry of the Interior to all prison directors emphasised the need for the judicial authorities to receive information necessary for the better discharge of their oversight role. The Circular clearly sets out responsibilities as to medical screening on admission, and the transmission of any injury reports to prison management, who are in turn instructed to communicate such information in detail, including the circumstances which have contributed to the causing of the injuries, to the appropriate judge or tribunal as a matter of urgency.

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<sup>19</sup> Cf. 14<sup>th</sup> General Report of the CPT, CPT/Inf (2004) 28, paragraph 31.

<sup>20</sup> The Court now finds violations of the ECHR on the sole grounds that a State has failed to establish effective safeguards (cf. *inter alia*, *Averill v. United Kingdom* and *Magee v. United Kingdom*, both of 6 June 2000) and/or accountability mechanisms (*Kelly and Others v United Kingdom*, 4 May 2001).

<sup>21</sup> This very distinction was made in the judgment of *Martinez Sala and others v. Spain* (2 November 2004), in which the Court found Spain in violation of Article 3 not on the basis of the allegations of ill-treatment, but on account of the failure to hold a thorough and effective investigation into those allegations. Cf. paragraph 45 *infra*.

<sup>22</sup> Letter from the Deputy Director General of Prison Administration, Madrid, 11 August 1998.



The CPT notes the positive initiative at Almería Prison (El Acebuche), where a special register for cases of injuries identified by the medical examination on admission has been introduced.<sup>23</sup> Such a register constitutes an important tool for prison management: it establishes that the injuries were not sustained in prison; it allows oversight of the phenomenon of persons arriving with injuries and its implications for prison health care; and it represents a vital link in the chain of evidence related to alleged ill-treatment during law enforcement custody.

c. individual cases examined by the CPT's delegation

36. Case 5

At Almería Prison, the CPT's delegation met a person who alleged ill-treatment at the time of his apprehension. Subsequently, his remand in custody was confirmed by a judge without the judge having physically seen him. An injury report<sup>24</sup> was completed upon his admission to prison on 10 October 2005. This form was sent on 11 October 2005 by the prison to Investigating Judge No. 4 in Almería.

At the time of the visit, no judicial action had been taken by the investigating judge in response to the prison's injury report. Indeed the judge stated that she had not received the report, and speculated that it might have been mistakenly sent to the Criminal Court. The prison provided a copy of the letter of transmission, which did, however, indicate the correct addressee.

37. Case 6

On the admission of another person to Almería Prison on 4 September 2005, an injury report was completed and sent by the prison to Investigating Judge No. 5 in Almería on the same day. In an interview with the CPT's delegation, the person concerned alleged that he had been ill-treated at the time of his apprehension.

According to Investigating Judge No. 5, the case file was passed on to Investigating Judge No. 4, who asserted that she had never received the injury report. Although a medical record formed part of the judicial file, the judge confirmed that there had been no investigation whatsoever concerning how the person in question might have acquired the injuries described in that record.

38. Case 2 (cf. paragraph 13 above)

Annexed to the injury report in this case was a written statement on admission to the prison,<sup>25</sup> dated 3 September 2005, in which the prisoner stated that the injuries were sustained when a police officer had beaten him with a truncheon following a request that he be allowed to use the toilet outside his cell.

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<sup>23</sup> This register is referred to as a "*Registro de lesiones al ingreso*". No such register existed at Madrid V Prison.

<sup>24</sup> A so-called "*parte de asistencia por lesiones*".

<sup>25</sup> A so-called "*acta de comparecencia*".

The above-mentioned documents were sent by the prison to Investigating Judge No. 5 in Almería on 3 September 2005. The file was initially transferred to Investigating Judge No. 6, who took no action and, on 9 November 2005, he sent the file back to Investigating Judge No. 5. On 28 November 2005, Investigating Judge No. 5 resolved to conduct an investigation, and requested that the police provide him with a report on the circumstances of the detention in question. On 14 December 2005, a police report, dated 9 December 2005, had been received by the judge.

39. It is also noteworthy that, very shortly after the incident of alleged ill-treatment in Case 2, the police officer involved brought an action alleging that he had been assaulted by the detained person. An expedited procedure<sup>26</sup> was initiated by Investigating Judge No. 5 to bring criminal charges against this person who, while still in police custody, agreed to the prosecutor's sentencing proposal and was convicted within a matter of days. The same Investigating Judge will now be expected, once he concludes the investigation into the detained person's allegations, to determine whether or not he had been ill-treated.

There can be no doubt that prosecutorial and judicial authorities in Spain are hierarchically and institutionally independent of the police. However, the CPT's delegation noted with concern the different treatment accorded to each of the conflicting allegations made in Case 2. The fact that the prosecutor made a sentencing proposal, in this case, to a person who was still in the custody of the law enforcement official accusing him of assault, is highly questionable. Further, it is unlikely that the investigating judge would be in a position to re-examine the same facts months later in a wholly impartial manner, given that he had already previously concluded that the prisoner was at fault.

#### 40. Case 7

Another person interviewed by the CPT's delegation at Almería Prison alleged that he had been ill-treated at the time of his apprehension by the San José Civil Guard. He was admitted to prison on 6 June 2005, whereupon the admissions unit made a note of a lump on his right hand and of his allegation that a Civil Guard officer had caused it in a struggle. This note, dated 6 June 2005, was annexed to an injury report and both documents were sent by the prison to Investigating Judge No. 3 in Almería on 6 June 2005.

At the time of the visit no action had been taken by the investigating judge in response to the injury report and the note described above. The judge's explanation for her inaction was that the detained person's injuries were not serious enough to warrant further investigation and that, in any case, he had not complained to her about ill-treatment when she saw him prior to his committal to prison on 6 June 2005. Given that he had made precisely such an allegation later the same day, and that it had been recorded in writing by the prison, and submitted to the judge concerned together with medical evidence, this cannot be considered to be a satisfactory response.

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<sup>26</sup> "diligencia urgente con conformidad".

41. Case 8

In a further case, a report of an injury, clearly visible on the face, was completed by the prison medical service on the day the detained person was admitted to Almería Prison on 5 July 2005. This form was sent by the prison to Investigating Judge No. 3 in Almería with a cover note dated 5 July 2005. The detained person in question alleged to the delegation that she had been ill-treated at the time of her apprehension.

No judicial action had been taken by Investigating Judge No. 3 in Almería in response to the injury report. It had apparently been transmitted, in error, to Criminal Court No. 1 and had not been re-directed to the correct destination. When apprised of the case and of the error in transmission, the investigating judge, who should have received the documents, stated that it was impossible for her to take any action until she was officially seized of the matter, either by the formal complaint of the person in question, or by Criminal Court No. 1.

The CPT's delegation subsequently discussed this case with the Dean of judges in Almería, who undertook to issue clear instructions designed to avoid a repetition of such a situation. **The CPT would like to receive confirmation that such instructions have been issued.**

42. To date, the Spanish authorities have furnished some information regarding Cases 1 and 4, but copies of the full judicial files (cf. paragraphs 12 and 15 above), as requested by the CPT's delegation, have still not been received. This information - which is available to the Spanish judicial authorities - is necessary in order for the Committee to be able to carry out its task of examining the judicial action taken in response to *prima facie* evidence of ill-treatment (cf. Article 8 (2) (d) of the Convention). **The CPT requests that this information outstanding be transmitted to the Committee.**

d. analysis of judicial oversight in the protection against ill-treatment

43. According to Spanish law, a person must be brought before a judge within 72 hours (cf. paragraph 29 above). However, information gathered by the CPT's delegation from detainees, lawyers and judges themselves, indicated that this requirement was not rigorously met in practice: although judges did issue the decision on a person's release or continued custody within the required time-limits, they did not always do so having physically seen the person (cf. Case 5).

Further, in the event of incommunicado detention, which under current Spanish law<sup>27</sup> can be applied to any type of offence, the 72-hour period can be extended considerably, and up to a maximum of 13 days in cases of offences of organised crime, terrorism or drugs. During the period of law enforcement custody it is, in theory, possible for the judge to require the person to be presented to him or her. However, there is no obligation on the judge and in practice it reportedly happens rarely.

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<sup>27</sup> CCP Article 520 (1) as amended in November 2003.

In the CPT's view, a detained person should always appear in person before a judge responsible for deciding on his or her continued detention. This is essential if – as should be the case – one of the purposes of the hearing is to monitor the manner in which the person is being treated. From the point of view of making an accurate assessment of the physical and psychological state of a detainee, nothing can replace bringing the person concerned into the direct physical presence of the judge.

44. Under Spanish law, every complaint which may involve the commission of a criminal offence must be examined by a judge. In the CPT's view, whenever criminal suspects brought before prosecutorial or judicial authorities allege ill-treatment, those allegations should be recorded in writing, a forensic medical examination should be immediately ordered, and the necessary steps taken to ensure that the allegations are properly investigated. Such an approach should be followed whether or not the person concerned bears visible external injuries.

Even in the absence of an express allegation of ill-treatment, a forensic medical examination should be requested by the prosecutorial or judicial authorities whenever there are other grounds to believe that a person could have been the victim of ill-treatment. Such a forensic medical examination should be thorough and any finding indicative of ill-treatment should be immediately transmitted to the prosecutorial or judicial authorities for the necessary investigatory steps to be taken. Further, all medical examinations should take place under conditions of confidentiality and in particular be carried out without the presence of law enforcement personnel.

In several of the cases examined (Cases 5, 7, 8), although no allegation was expressly made at the court hearing, injuries were either visible or were at least reported in writing to an investigating judge after medical or administrative screening upon admission to the prison. Under Spanish law, such injury reports must be acted upon by the investigating judge.

45. There are two tests used by the European Court of Human Rights to determine whether an investigation can be said to be “effective”. They are:

- that it must be “capable of leading to a determination of whether the force used was or was not justified under the circumstances and to the identification and, if appropriate, the punishment of those concerned”, and
- that “all reasonable steps” should be taken to secure evidence concerning the incident, including *inter alia* “eyewitness testimony, forensic evidence, and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death”.

An example of the Court's application of these tests is the judgment of *Martinez Sala and others v. Spain* (2 November 2004): the Court found Spain in violation of Article 3 of the ECHR, not on the basis of the allegations of ill-treatment, but on account of the failure to hold a thorough and effective investigation into those allegations. The Court explained that, in dismissing the complaints of severe ill-treatment, the national courts had relied solely on the forensic doctor's report and had not undertaken other reasonable investigative steps, such as taking a statement from the complainants or from the Civil Guard officers responsible for their custody.<sup>28</sup>

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<sup>28</sup> Cf. in particular paragraphs 156 to 160 of the judgment.

46. In the CPT's opinion, none of the cases reviewed by its delegation during the 2005 visit could be described as being effective investigations in accordance with the Court's case law. In the majority of the cases reviewed in Almería, there had been no investigative action whatsoever; the single investigative step taken in Case 2 falls far short of meeting the above-mentioned criteria.

47. In order to comply with Article 3 of the ECHR, an investigation must also be conducted in a prompt and reasonably expeditious manner. Speed is of the essence at the outset of an investigation into alleged ill-treatment, when immediate steps are required to seize any evidence that may support or undermine *prima facie* evidence of ill-treatment (e.g. police batons which may have been used, uniforms that may be bloodstained etc.). Given the speed with which injuries can heal, facilitating rapid access to independent forensic medical expertise is also a vital element of the evidence-gathering process.

The investigation as a whole should also be conducted in a diligent and expeditious manner (i.e. as quickly as is consistent with completing it in a professional way). The CPT is concerned that no judicial response was given to *prima facie* evidence of police ill-treatment which was transmitted to the judicial authorities. In Case 2, over two months after documentation containing *prima facie* evidence of ill-treatment had been sent to the Investigating Judge by the prison, the only investigative step taken by the judge was to request a written report from the alleged perpetrators of that ill-treatment.

## **5. Conclusions and recommendations**

48. The CPT's findings during this latest visit to Spain indicate that a person ill-treated by law enforcement officials at (or after) the time of his or her detention may not be properly informed of his or her rights. It is likely that he or she will then experience a lengthy delay before first seeing a lawyer at the time when his or her formal statement is taken by law enforcement officials. Subsequently, there is no guarantee that such a person will be brought physically into the presence of an investigating judge. If he or she is remanded in custody bearing injuries as a result of ill-treatment, those injuries may be recorded by the prison's admissions or medical staff. However, even if such *prima facie* evidence of ill-treatment is submitted in writing to an investigating judge, an effective investigation would not necessarily follow.

In short, the information gathered by the Committee concerning information on rights (Part C.2), access to a lawyer (Part C.3) and the role of judges (Part C.4), indicate that the safeguards currently in place for persons deprived of their liberty by law enforcement agencies do not adequately protect them from ill-treatment. Consequently, it is imperative that the Spanish authorities review the existing framework and operation of safeguards against ill-treatment for persons deprived of their liberty, from the very outset and up to, and including, the crucial stage of judicial oversight.

As part of that review, action is required to implement the following specific recommendations.

### Information on rights

49. **The CPT recommends that the form on detainees' rights be revised in the light of the remarks in paragraph 18. In particular, the right to legal assistance free of charge should be expressly stated in a language which can be clearly understood.**

### Access to a lawyer

50. The CPT's delegation found that detained persons can – and do – routinely spend some considerable time in police custody before having access to a lawyer and are not able to consult in private with their lawyer until after signing a formal statement made to the police or civil guard.

Clearly, the existing legal framework concerning the right to legal assistance fails to ensure that in practice detained persons are able to exercise the right of access to a lawyer and the right to consult in private with the lawyer, as from the outset of deprivation of liberty. Further, the delegation found clear indications of ill-treatment suffered by detained persons which might have been avoided had this safeguard been provided.

The CPT therefore concludes that the legal framework must be reinforced so as to acknowledge explicitly the above-mentioned rights. Further, all law enforcement officials should understand that they are under a legal obligation to ensure that every person deprived of their liberty is able to exercise the above-mentioned rights. Only in this way will a crucial initial safeguard be established as an effective part of the system of protective mechanisms required for the prevention of ill-treatment.

**The CPT therefore calls upon the Spanish authorities to ensure that an effective system of safeguards, including prompt access to a lawyer from the outset of deprivation of liberty, is in place and fully functioning in accordance with the recommendations previously made by the CPT.**

51. **The CPT calls upon the Spanish authorities to withdraw the draft amendment to the law on the criminal responsibility of minors, in the light of the remarks in paragraph 30.**

### The role of prisons

52. In the light of the remarks made at paragraph 35, **the CPT recommends that all prisons receiving remand prisoners from law enforcement custody introduce a register to record all injuries noted during the medical examination on admission, together with any information as to the origin of such injuries.**

### Judicial oversight

53. In the CPT's opinion, judicial oversight cannot be truly effective in the prevention of ill-treatment if the judge, whose role it is to supervise the exercise of police powers of arrest and detention, does not physically see the person in question. **The Committee recommends that steps be taken to ensure that persons in respect of whom an extension of detention (on remand) is sought are always brought before the judge responsible for deciding this question.**

Further, although persons detained under suspicion of terrorist offences were not the specific focus of the 2005 visit to Spain (cf. paragraph 9 above), the Committee's concerns as to the need for detained persons to be seen by the judge apply equally to persons in police custody subject to incommunicado restrictions.

54. The CPT has serious reservations regarding the possibility for a prosecutor to obtain an agreement to a sentencing proposal (with the effect of proceedings being expedited - *diligencia urgente con conformidad*) from a person who is still in the custody of the law enforcement official accusing him or her of assault (cf. paragraph 39). **The Committee recommends that this be reviewed.**

Moreover, **where a law enforcement official and a detainee in his or her charge make counter-allegations against each other, steps should be taken to ensure that the equitable nature of proceedings is manifest.** In the CPT's view, judicial oversight should not only be independent and impartial, but should also be *seen* to be independent and impartial. **Any use of force in the context of detention should, therefore, be subject to serious scrutiny and should not be treated summarily.**

55. **The CPT recommends that steps be taken to ensure that judges are fully aware of their obligation to make swift and effective use of forensic medical examinations in all cases where *prima facie* evidence of ill-treatment is brought to their attention.**

56. Where information concerning alleged ill-treatment by law enforcement officials is available in prison records and is transmitted to the competent judicial authorities, effective action is not being taken in all cases by judges to investigate and pursue such matters.

**The Committee recommends that the Spanish authorities take all necessary steps – in the light of the CPT's findings in paragraphs 43 to 47 above – to ensure that investigations into possible or alleged ill-treatment are:**

- *effective*, by being both thorough and comprehensive, as elucidated by the case law of the European Court of Human Rights; and
- conducted in a *prompt* and *reasonably expeditious* manner

57. **The Committee recommends that the Spanish authorities take the measures set out in paragraphs 48 to 56 above, as a matter of urgency, in order to ensure that a fully effective system of safeguards for the prevention of ill-treatment in law enforcement custody is in operation.**

## **D. Protection of foreign nationals**

### **1. Introduction**

58. The prohibition of torture and inhuman or degrading treatment or punishment englobes the obligation not to send a person to a country where there are substantial grounds for believing that he or she would run a real risk of being subjected to torture or ill-treatment. In view of the CPT's essentially preventive function, the Committee examines whether the relevant decision-making process is surrounded by suitable guarantees against persons being sent to countries where they run a risk of torture or ill-treatment.<sup>29</sup> In this connection, the CPT considers whether the procedures applied to foreigners offer the persons concerned a real opportunity to present their cases, and whether officials entrusted with handling such cases have been provided with appropriate training and have access to objective and independent information about the human rights situation in other countries.

59. The CPT's delegation examined certain aspects of the treatment of foreign nationals in Melilla, the Spanish autonomous city on the north coast of Africa. Melilla's official points of entry are the coastal port, the airport and three land border crossings along the fenced border with Morocco. During the summer of 2005, an unprecedented number of foreign nationals attempted to enter Melilla from Morocco by scaling the fence; at that time, serious injuries and some deaths among the foreign nationals were reported. The delegation concentrated on issues of interest to the CPT and arising from the particular situation in Melilla, its border location and recent developments. The delegation also analysed aspects of the procedures applied to foreigners, by examining certain activities of the National Police (responsible for the administrative processing of foreign nationals), the Civil Guard (responsible for policing the border) and the Temporary Holding Centre for Immigrants (CETI) in Melilla, which was closed during the night and guarded.

### **2. Entry and expulsion procedures**

60. Persons deprived of their liberty under immigration legislation (whether asylum seekers or not) 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 to a medical doctor.

61. The Spanish law on foreigners provides for the right to free legal aid.<sup>30</sup> If foreign nationals are refused entry, the reasoned decision on such refusal must include information about the right to appeal against the decision, the right to free legal aid, and to assistance of an interpreter, starting from the time at which controls are effected at the border post.<sup>31</sup>

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<sup>29</sup> Cf. Reports on CPT visits to Spain in April 1994 (CPT/Inf (96) 9, Part II, paragraph 95), April 1997 (CPT/Inf (98) 9, paragraph 12) and July-August 2003 (CPT (2004) 1, paragraph 42), in which the CPT already touched upon this issue.

<sup>30</sup> In accordance with the same criteria as those applied to Spanish nationals : Article 16 (1) of the Ley Organica 8/2000 on the Rights of Foreigners.

<sup>31</sup> Cf. Ley Organica 8/2000, Article 26 (2).



62. Apart from regular expulsion procedures, Article 26 (1) of the Spanish Law on the Rights of Foreigners lists the categories of persons to whom expedited expulsion procedures can apply. Such procedures are opened by the National Police, confirmed by the prefect (*Delgado del Gobierno*) and do not require a judicial decision for the expulsion to be implemented.<sup>32</sup>

63. By an unwritten bilateral agreement between Spain and Morocco, Moroccan adults are subject to expedited expulsion procedures by virtue of their nationality alone. The delegation encountered numerous examples of expedited returns of Moroccan nationals from Almería, via Melilla, to Morocco, with a prohibition against return for a number of years. Groups of persons were often listed as a single entry in the Almería national police (Avenida del Mediterraneo) custody register, with no record of persons having been seen by a lawyer, an interpreter or a doctor.

Moreover, when Moroccan nationals are intercepted at the border without the necessary documentation authorising them to enter Spain or if they have been banned from return to Spain, the above-mentioned agreement provides for their direct return to Morocco.

The process of direct return of Moroccan nationals was found to be a summary procedure. It does not include the provision of assistance of either an interpreter or a lawyer.

**The CPT wishes to receive clarification as to the basis for the practice of direct return of Moroccan nationals from Spain to Morocco, without application of the procedures otherwise applying to the return of foreign nationals.**

Similarly, as regards the analogous agreement between Spain and Algeria, the **CPT wishes to receive corresponding clarification in respect of the direct return of Algerian nationals.**

64. The CPT's delegation was informed that Spain's bilateral agreement with Morocco concerning direct return of Moroccan nationals without right of entry does not apply to unaccompanied minors. They are the responsibility of the prosecution's office dealing with minors,<sup>33</sup> which should be informed of the arrival of all unaccompanied minors of foreign nationality. Moroccan minors must be accommodated at special residential education centres.<sup>34</sup> If efforts to re-establish links with their family in Morocco fail, the minors are to remain in Spain in the care of such institutions until they come of age, when they are entitled to reside in Spain.

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<sup>32</sup> In accordance with the Royal Implementing Decree No. 4 of 2000.

<sup>33</sup> In Spanish, the *Fiscal de Menores*.

<sup>34</sup> In Melilla, this is the *Centro Educativo Residencial "Fuerte de la Purísima Concepción"*.

65. The CPT's delegation noted on the part of foreign nationals with whom it spoke, including those at the CETI, a widespread lack of understanding concerning their legal situation and the process which they were undergoing.

Persons deprived of their liberty under immigration legislation should – in addition to being afforded the basic safeguards referred to in paragraph 60 above – be systematically provided with a document explaining the procedure applicable to them and setting out their rights. This document should be available in the languages most commonly spoken by those concerned and, if necessary, recourse should be had to the services of an interpreter.

**The CPT recommends that steps be taken to ensure provision is in conformity with the above precepts.**

### **3. The particular situation in Melilla**

66. During the summer of 2005, many hundreds of foreign nationals attempted to enter Melilla by scaling the double barrier of metal fencing along the border with Morocco which, at the time of the visit, was in the process of being reinforced to a height of 6 metres along its entire length. The Civil Guard is responsible for patrolling the land border<sup>35</sup> and the coast to prevent clandestine entry.

67. The Regulation of December 2004 on the application of the Law on the Rights of Foreigners, which entered into force in February 2005, includes provision for the protection of foreign nationals in the “area surrounding the border”. **The CPT would like to receive clarification as to what constitutes the “area around the border”, within the meaning of the Law on the Rights of Foreigners.**

68. The CPT understands that the circumstances surrounding the use of force during the events at the fence between August and October 2005 are the subject of an inquiry. **It would like to be informed, in due course, of the results of that inquiry.**

In particular, a number of deaths were widely reported to have occurred at or surrounding the border area during the above-mentioned period. Although Spanish law enforcement or army officers may not have been directly implicated in those deaths, such incidents are a matter of concern to the CPT. **The Committee would like to receive up-to-date information on the investigation into those deaths.**

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<sup>35</sup> Classified as an external land border (“frontera exterior terrestre”).

69. The CPT recognises that the Spanish authorities were faced with a major challenge in the course of 2005 to accommodate the exponential rise in numbers of foreign nationals arriving. At the time of the CPT's visit in December, material conditions at the temporary holding centre for immigrants (CETI) in Melilla were inadequate for the number of foreign nationals present.

The CPT's delegation did note distinct improvements at the centre compared with the situation observed in Melilla in 1997,<sup>36</sup> with further upgrading work under way; staff at the CETI were making efforts to provide a range of services (shelter, hygiene facilities and health care). However, the pressure of overcrowding was undermining those efforts. The situation is understandably difficult, especially when at times large numbers of people arrive at once. Nevertheless, the CPT must express its concern that, at the time of the visit, many persons were accommodated in cramped conditions in unheated tents, with temperatures dropping to low levels, especially at night in the winter months.

The influx appears to have stabilised in October 2005. What was previously an emergency must now be considered as the established state of affairs. Therefore, **the CPT recommends that appropriate measures be taken to meet the greater demands, in particular as regards heating (especially in the tents) and sanitary facilities, and to tackle the problem of severe overcrowding in the CETI.**

70. The CPT's delegation noted in the records of the CETI and of the National Police<sup>37</sup>, covering the second half of 2005, a large number of collective repatriations or removals, known as "voluntary exits",<sup>38</sup> of persons from various sub-Saharan countries. The dates of the most massive departures coincide with the periods in which the CETI's population peaked. Most of the entries do not indicate an NGO into whose care the persons might have been entrusted, the usual practice when persons are transferred to the mainland, and issued with an order to leave the country within a specified time period. The CPT is concerned that "voluntary exits" may be applied arbitrarily and wishes to be assured that they are indeed voluntary.

**The CPT would like to receive clarification as to the criteria for, and modalities of, the application of collective repatriations or removals, or so-called "voluntary exits".**

71. The CPT's delegation also examined the manner in which the policing of the fenced border was carried out, in particular the way in which the Civil Guard exercised their powers to stop people and enquire as to their identity and right of entry. Persons stopped and held – however briefly – by the Civil Guard are deprived of their liberty.

Identification procedures for persons arriving at the border should, by virtue of the constructive deprivation of liberty referred to above, be surrounded by appropriate safeguards. They should not be summary. That is to say that adequate provision should be made to ascertain, through qualified interpretation if required, necessary details such as age and nationality, before any decision is taken to refuse entry. Such precautions are all the more necessary when the persons belong to a particularly vulnerable group, such as minors.

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<sup>36</sup> Cf. Paragraphs 20 to 24 of the Report on the CPT's visit to Spain in April 1997 (CPT/Inf (98) 9).

<sup>37</sup> Foreign nationals who gain entry into Melilla without documents must be processed by the National Police before they are eligible for admission to the Temporary Holding Centre for Immigrants (CETI).

<sup>38</sup> These are known in Spanish as "salidas voluntarias".

In the report on the 2003 visit, the CPT had already commented that it appeared that the particular safeguards in place for minors subject to expulsion procedures were not being rigorously applied.<sup>39</sup> Similarly, particular care must also be taken in respect of minors who are intercepted at border crossings, including Moroccan minors, who are excluded from the direct return provision in the bilateral agreement and to whom special arrangements apply (cf. paragraph 64 above). However, it would appear that Moroccan minors do not always receive adequate protection when they are intercepted at the border:

72. The CPT's delegation observed a night-time attempt by two Moroccan minors to enter Spain at the Beni Enzar border crossing, hidden in the undercarriage of a lorry. Having crossed the Moroccan checkpoint, the two boys were detected by the Spanish Civil Guard. The passenger who had accompanied the lorry driver acted as interpreter and ascertained the boys' ages as 14 and 16 and that they were Moroccan. They were quickly sent back across the border into the custody of the Moroccan police.

The two minors were considered not to have entered Spanish territory, although they were arguably beyond the line of the fence, as they had entered the operative area under the Civil Guard's control, and appeared to the delegation to be clearly "in the area surrounding the border" as referred to in the implementing regulation (cf. paragraph 67). The delegation was informed that they would have been considered to have entered Spain only if they had passed beyond the gates of Beni Enzar. A Civil Guard officer commented that they would not be seriously ill-treated by the Moroccan police, but might merely be subjected to a few "pedagogical slaps" and sent on their way.

Given both the legal provisions relating to all persons in the area surrounding the border and the special arrangements in respect of minors, **the CPT requests clarification from the Spanish authorities of the protection afforded to unaccompanied minors detected trying to enter Spain through a border checkpoint.**

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<sup>39</sup> Cf. CPT (2004) 1, at paragraph 142.

**APPENDIX**

**LIST OF NATIONAL AUTHORITIES AND ORGANISATIONS  
WITH WHICH THE CPT'S DELEGATION HELD CONSULTATIONS**

**A. Ministerial authorities**

**Ministry for the Interior**

José Antonio ALONSO SUÁREZ	Minister for the Interior
Antonio CAMACHO VIZCAÍNO	Secretary of State for Security
Carlos GÓMEZ ARRUCHE	Director-General of the Civil Guard
María Victoria SAN JOSÉ VILLACÉ	Technical General Secretary
Mercedes GALLIZO LLAMAS	Director-General of Penitentiary Institutions
Antonio CERROLAZA GÓMEZ	Deputy Technical General Secretary

**Ministry of Labour and Social Affairs**

Miguel Ángel AZNAR NIETO	Deputy Director-General
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**B. Other national authorities**

Carlos DIVAR BLANCO	President, Audiencia Nacional
Javier GÓMEZ BERMÚDEZ	Criminal Chamber President, Audiencia Nacional
Eduardo FUNGAIRIÑO BRINGAS	Chief Prosecutor, Criminal Chamber Audiencia Nacional
Enrique MÚGICA HERZOG	Ombudsman
María Luisa CAVA DE LLANO Y CARRIÓ	First Deputy Ombudsman
Juan Pablo GONZÁLEZ GONZÁLEZ	Spokesperson, General Council of the Judiciary

**C. Non-governmental organisations**

Andalusian Association for Human Rights (APDHA)

Coordinating Committee for the Prevention of Torture in Spain

Madrid Free Lawyers Association (ALA)

Spanish Commission for Assistance to Refugees (CEAR)