

COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE

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REPORT FOLLOWING HER VISIT TO SPAIN
FROM 21 TO 25 NOVEMBER 2022

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SUMMARY

Commissioner Dunja Mijatović and her team visited Spain from 21 to 25 November 2022. The present report focuses on the following issues raised during the visit: social rights, in particular the right to housing and the right to health; freedoms of expression and assembly; and the human rights of refugees, asylum seekers and migrants.

Social rights (in particular the right to housing and right to health)

Spain has made significant efforts to advance the protection of social rights in recent years. However, access to social rights varies substantially throughout the country due to distributed competencies between the central government and regional authorities resulting in different regulations and systems for the delivery of benefits and services in the Autonomous Communities and the cities of Ceuta and Melilla. To address the existing inequality of substantial opportunities in the enjoyment of people's social rights, the Commissioner calls on the authorities to allocate resources transparently and sustainably, and to adopt common standards to ensure, in close co-operation with all competent authorities at central and local levels, that the specific needs of the most vulnerable are met. The Commissioner also invites the authorities to proactively consult and involve civil society organisations at all stages of decision-making.

In the field of the **right to housing**, the Commissioner observes that long-standing issues, such as the low social housing stock owing to years of scarce public investment, high costs for renting or buying a home, and rising levels of homelessness, are prevalent structural issues that must be addressed urgently. The Commissioner emphasises that housing should not be treated as a commodity, only available to some people. She highlights that access to adequate housing is a human right central to the full enjoyment of most other rights. She also observes that forced evictions are a common occurrence in Spain. Therefore, she invites the authorities to extend the temporary suspension of evictions for vulnerable families introduced in response to COVID-19 until a more comprehensive and sustainable solution of alternative housing for all those in need can be found, and to aim this measure at those most disadvantaged. In this regard, she underscores the importance of adopting the housing bill, currently pending in parliament, as soon as possible as it aims to address some of these concerns.

With respect to the **right to health**, the Commissioner observes that more must be done to strengthen universal access to quality public healthcare for all throughout Spain. Regional differences are particularly notable in the provision of primary healthcare and specialised care due to factors such as the predominance of private clinics in some regions, amongst others. As regards primary health care, she finds that the levels of investment remains insufficient and that the employment conditions of health personnel who are, in many places, overwhelmed, exhausted and relying on short-term contracts, are concerning. The Commissioner also draws attention to the high mortality in care homes during the COVID-19 crisis in some Autonomous Communities, which still needs to be effectively investigated and addressed with the close involvement of the families of the victims. In this regard, the Commissioner notes with interest the authorities' initiative to reform the care system for older persons. The latter should be based on an integrated provision of social and health care which ensures that older persons' dignity, autonomy, and independence are respected in full. Welcoming the important steps that Spain is taking to uphold women's and girls' sexual and reproductive health and rights, the Commissioner urges the authorities to ensure that the persistent inequalities in access between regions do not undermine such development. She welcomes the adoption of a new law that will, among others, facilitate access to abortion care, strengthen comprehensive sexuality education in schools, expand access to modern contraception, and regulate different forms of obstetric violence in childbirth, putting women's right to informed consent at its centre.

Freedoms of expression and assembly

The Commissioner noted with concern that the implementation of several provisions of the 2015 Law on Citizens' Safety and the Criminal Code continues to have a serious negative impact on the enjoyment of the freedoms of expression and assembly, in particular for human rights defenders and journalists, creating an overall chilling effect on society. The broad and imprecise wording of the Law on Citizens' Safety gives a wide margin of discretion to law enforcement in interpreting it and imposing sanctions, thus allowing for its disproportionate and arbitrary application. The Commissioner reiterates that the 2015 Law on Citizens' Safety in Parliament should be brought fully in line with European and international human rights standards. She stresses that safeguarding human rights, including freedoms of expression and assembly, is an integral part of the efforts to ensuring citizens' security. As to the Criminal Code, the Commissioner welcomes the recent changes in it, repealing the crime of sedition. She finds, nonetheless, that the Criminal Code needs to be comprehensively amended to strengthen existing safeguards around the rights to freedoms of expression and assembly to facilitate the work of Spanish courts in making decisions in line with Articles 10 and 11 of the European Convention of Human Rights (ECHR). Furthermore, the Commissioner remains concerned about allegations of disproportionate use of force by law enforcement officials, inappropriate use of anti-riot weapons and the lack of clear and visible identification numbers, especially during demonstrations. The Commissioner invites the authorities to strengthen the overall accountability framework for law enforcement officials and to ensure adequate oversight of the use of coercive powers and the imposition of sanctions as well as of allegations of abuse of force.

The human rights of refugees, asylum seekers and migrants

The Commissioner welcomes the measures adopted to guarantee access to protection and reception of people fleeing the war in Ukraine. She observes that steps have also been taken to improve the reception conditions in the Canary Islands and more funding has been allocated to provide for adequate protection and reception of unaccompanied migrant children. However, access to protection varies significantly throughout the country and remains very challenging for many refugees and asylum seekers. Issues include long waiting periods to access the asylum procedure, delays in the identification of special vulnerabilities, as well as obstacles in accessing social rights, including housing and health.

Based on the findings from her discussions in Madrid and in Melilla, the Commissioner observes that the main issues related to access to the Spanish territory for asylum seekers can be found at Spain's borders with Morocco. In particular, the Commissioner stresses that there is no genuine and effective access to asylum at the border between Nador (Morocco) and Melilla. She observed that there seems to be no other way to enter Spain at Melilla border and seek protection with the relevant authorities other than by swimming or jumping the fence, risking one's life. The Commissioner urged the authorities to address the situation comprehensively, to make sure that those in need of protection can access the territory through legal and safe ways. In this respect, the Commissioner addressed the tragic events of the attempted crossings of the fence between Nador and Melilla on 24 June 2022, where at least 23 people died and many were injured, stressing the importance of full and effective accountability of those responsible for any human rights violations. As regards cooperation with Morocco, the Commissioner reiterates that, while all states have the right to control their borders, and to engage in co-operation with other states in doing so, this must be done in full compliance with all applicable international human rights standards. She stresses that Spain, like other Council of Europe member states, should not directly or indirectly contribute to human rights violations through measures taken to implement their migration co-operation with third countries. She also reiterates that the situation at the borders between Morocco and Spain proves once again the urgent need to improve responsibility-sharing and solidarity measures between Council of Europe member states.

INTRODUCTION

1. The Commissioner for Human Rights of the Council of Europe, Dunja Mijatović (the Commissioner) and her team, carried out a visit to Spain from 21 to 25 November 2022. The visit focused on social rights (chapter 1 of this report), freedoms of expression and assembly (chapter 2), and the human rights of refugees, asylum seekers and migrants (chapter 3).
2. During the visit, the Commissioner met in Madrid with the President of the Congress of Deputies, Ana Meritxell Batet Lamaña; the Minister of Justice, Pilar Llop Cuenca; the Minister of Inclusion, Social Security and Migration, Jose Luis Escrivá Belmonte; and the Minister of Foreign Affairs, José Manuel Albares Bueno. She also met with the Secretary of State for Health, Silvia Calzon Fernández; the Secretary of State for Equality and against Gender Violence, Ángela Rodríguez; the Secretary of State for Security, Rafael Pérez; the Secretary of State for the 2030 Agenda, Lilith Verstryngne, and the Secretary of State for the European Union, Pascual Ignacio Navarro Ríos. The Commissioner also met with the National Ombudsman (*Defensor del Pueblo*). She further held meetings with civil society and international organisations.
3. In Melilla, the Commissioner met with the Delegate of the Government, Sabrina Moh; the President of the City, Eduardo de Castro; and high-ranking officials of the Guardia Civil and the National Police. She visited the border perimeter between Melilla and Nador (Morocco), including the Beni Enzar crossing point and Barrio Chino, as well as the Asylum and Refugee Office in Melilla (OAR), the Centre for unaccompanied migrant children La Purísima, where she spoke with unaccompanied migrant children and staff members of the facility, and the Centre for Temporary Stay of Immigrants (CETI).
4. The Commissioner would like to thank the Spanish authorities in Strasbourg, Madrid and Melilla for their assistance in organising her visit. She expresses her gratitude to all her interlocutors in Spain for sharing with her their knowledge, experiences, and insights.¹

1 SOCIAL RIGHTS (IN PARTICULAR RIGHT TO HOUSING AND RIGHT TO HEALTH)

1.1 GENERAL CONTEXT

5. Inequality and poverty are enduring problems throughout Spain, seriously impacting on the enjoyment of social rights by many people living in the country. The 2008 financial crisis and ensuing austerity measures, the COVID-19 pandemic and its economic impact, high levels of inflation and a fragile and precarious labour market have sharply exacerbated the situation throughout the years.² The latest [data](#) from the Spain National Institute of Statistics finds that, in 2021, 27.8% of the population was “at risk of poverty or social exclusion”, amounting to 10,269,000 people. Among this, 54% are single-parent households, facing an increasing cost of living in particular in housing and energy expenses, and 65.2% are non-EU nationals. In 2021, [28.3 % of women](#) were at risk of poverty or social exclusion. Spain also has one of the highest child poverty rates in the EU, with [33.4% of children at risk of poverty](#) or social exclusion at the end of 2021.
6. Access to social rights in Spain varies throughout the country due to the delegation of certain powers between the central government and regional authorities that has led to a highly differentiated landscape in terms of regulations, access to social protection and the delivery of benefits and services in the 17 Autonomous Communities and the cities of Ceuta and Melilla. Lack

¹ This report was finalised on 12 April 2023. All online documents quoted in the report were last accessed on that date.

² See Council of Europe Commissioner for Human Rights, Country Visit [Report](#) on Spain, 2013; Fundación FOESSA y Caritas Española, [Report El coste de la vida y estrategias familiares para abordarlo](#), 2022 and [Evolution of social cohesion and Consequences of COVID-19 in Spain: Conclusions](#), 2022.

of effective coordination between the various competent authorities has created a system of unequal opportunities for people to realise their social rights, depending on the region in which they reside.

7. The Commissioner observes that Spain has made significant efforts to advance the protection of social rights in recent years. In particular, the current government took important steps to address the impact of the COVID-19 crisis. The so-called [social shield](#) (*escudo social*) included the introduction of diverse temporary aid package measures such as a moratorium for mortgage and rent payments, the guarantee of gas, water and electricity supply for vulnerable groups, the suspension of forced evictions for those in vulnerable situations, direct aids and grants, and special micro-loans. These coincided with the expansion of the existing Temporary Redundancy Programs (*Expediente de Regulación Temporal de Empleo*, ERTE) to respond to the sudden loss of income for many and the acceleration of the introduction of the Minimum Vital Income (*Ingreso Mínimo Vital*, IMV). While these constitute important steps in the right direction, the Commissioner was informed that existing weaknesses in the social security system, as well as shortcomings in the design of the new forms of assistance, rendered the total support overall insufficient. Limitations in the scope and eligibility of both existing and new measures mean that many people still struggle to meet their basic needs.

1.1.1 CONCLUSIONS AND RECOMMENDATIONS

8. The Commissioner calls on the Spanish authorities to allocate resources transparently and sustainably, and adopt common standards to ensure, in close co-operation with all competent authorities at central and local levels and in consultation with civil society, that the persisting inequality of real opportunities in the enjoyment of people's social rights is effectively addressed and the specific needs of the most vulnerable are met.
9. The Commissioner invites the authorities to ensure upward harmonisation of social protection and not to impede the efforts of Autonomous Communities to strengthen, by means of their own resources, the protection of social rights within their territories. She recommends that the authorities ensure adequate coordination between the central government and the Autonomous Communities responsible for providing social protection services so as to prevent inequalities.
10. To ensure the full realisation of people's social rights, the Commissioner underscores the importance of taking due account and adequately implement the relevant human rights decisions and recommendations stemming from UN and European human rights monitoring mechanisms. She also stresses the need to ensure that decision-making processes in social policies prioritise broad participation of all relevant stakeholders at local, regional and national level, who should be effectively consulted, including national human rights structures (NHRs) and civil society representatives. In this regard, she recommends developing systematic processes and outreach channels to engage with representatives of specific affected groups, such as older persons and/or their families, women, and marginalised communities, with a view to ensuring that their specific views, concerns, and interests are effectively considered in decisions affecting them and to redressing existing structural inequalities in their access to housing and health care.

1.2 RIGHT TO HOUSING

11. The right to housing is defined as the right to live somewhere in peace, security, and dignity, and includes security of tenure, availability of services, affordability, habitability, accessibility, appropriate location, and cultural adequacy.³ The Commissioner underscores that housing should

³ UN Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant).

not be perceived as a commodity that is only available to some people. Access to adequate housing is a human right central to the full enjoyment of most other rights.

1.2.1 REGULATORY FRAMEWORK

12. Article 47 of the Spanish Constitution establishes the right to decent and adequate housing as one of the “guiding principles of social and economic policy”. While it stipulates an obligation to provide conditions and effective norms to allow the right to housing, it does not treat housing as an individual right that can be claimed before courts.⁴ The non-justiciability of social rights, including the right to housing, is considered by civil society actors as one of the biggest obstacles to their protection in Spain.
13. In 2021, Spain signed and ratified the [European Social Charter \(revised\)](#) of 1996, including all three elements of its Article 31, which provides for the protection of the right to housing. Simultaneously, it ratified the Additional Protocol of 1995 providing for a system of collective complaints. Spain is also a party to the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol that came into force in respect of Spain in 2013. The UN Committee on Economic, Social and Cultural Rights (UN ESCR) has to date issued nine views that found Spain to have been in violation of the right to housing, and dozens of precautionary measures preventing evictions on concerns for the possible violations of rights of occupants/tenants. Spain still lacks a clear and binding procedure in national legislation, however, to implement decisions delivered by international and regional human rights mechanisms.⁵ Moreover, the Commissioner understands that in 2020, the Spanish State’s Legal Counsel enacted a [Circular 1/2020](#) on the legal nature of the resolutions issued by UN human rights monitoring bodies, which found such resolutions not to be legally binding.
14. While Spain’s central government has exclusive power over the general planning of economic activities, including rent control regulations concerning credit and mortgages, fiscal policy, and the development of National Housing Action Plans, as well as their coordination, the implementation of these policies is often the task of Autonomous Communities.⁶ The Commissioner notes that some regulatory initiatives taken by Autonomous Communities to address violations of the right to housing, including in the context of forced evictions or rental price controls, were later challenged by the Spanish Constitutional Court for lack of legislative competency. In this respect, the UN ESCR Committee stressed that uniform, national solutions are welcome when they promote the progressive realization of economic, social and cultural rights, but are of concern to the Committee when they hinder such progressive realisation.⁷

1.2.2 UNAVAILABILITY OF AFFORDABLE HOUSING

15. The Commissioner observes that Spain is undergoing a long-standing and structural housing crisis that is of grave proportions, having affected people’s enjoyment of the right to housing as well as many other rights over decades. In particular, the Commissioner notes that the lack of affordable housing has been compounded by successive governments’ decisions to allow private equity firms to buy and raise rents, leading to a spike in the property market that by far outpaces the average increase in purchasing power. The low social housing stock, due to years of scarce public investment, is also concerning. As elsewhere in Europe, the [scarcity of affordable housing](#) is a serious and growing problem that pushes an ever-larger number of people into housing insecurity and homelessness.

⁴ See also UN ESCR Committee, 2018 [Concluding Observations](#) on the sixth periodic report of Spain, paras. 5-7.

⁵ Ibid.

⁶ See Articles 148.1 and 149.1 of the Spanish Constitution.

⁷ See also UN ESCR Committee, 2018 [Concluding Observations](#) on the sixth periodic report of Spain, para 11.

16. The 2018 [Concluding Observations](#) on Spain adopted by the UN ESCR Committee pointed to the negative impacts of the austerity measures on the right to adequate housing, particularly among the most disadvantaged and marginalised individuals and groups. The Committee expressed deep concerns about the insufficient social housing stock; the worsening shortage of affordable housing as a result of excessively high prices, particularly in the private market; and the lack of adequate protection of security of tenure, resulting in a significant number of households without adequate housing and high numbers of homeless persons. In a similar vein, the UN Special Rapporteur on Extreme Poverty, who visited Spain in [2020](#), raised the need for comprehensive and creative measures to ease the housing crisis as one of the key issues for Spain.
17. In 2022, a report commissioned by the European Commission [found](#) that the severe housing deprivation rate had deteriorated (from 1,5% in 2015 to 3,4% in 2020), commonly used as an indication of continuously worsening living conditions among certain groups in the Spanish population, including young people, low-income households and families with children. In 2022, [Amnesty International](#) noted that social housing in Spain comprised only 1,6% of the housing stock. The lack of social rental housing in Spain is also alarming when considering that 76% of low-income households living in the private rental sector spend 40% or more of their disposable income on housing.⁸
18. The lack of affordable housing also results in significant challenges relating to the quality of housing. The Commissioner notes with particular concern the situation in the Cañada Real Galiana shantytown (Madrid), where some sections have suffered power outages since October 2020, affecting the lives of at least 4,500 inhabitants, including some 1,800 children. This case has been the subject of the first [collective complaint](#) with respect to Spain before the European Committee of Social Rights (ECSR). On 19 October 2022, in its admissibility decision, the ECSR decided that it was necessary to indicate immediate measures to the government including adopting all possible measures to avoid serious, irreparable injury to the integrity of persons living in the *Cañada Real* who, without adequate access to electricity, are exposed to risks to life and physical and moral integrity. In particular, the Committee called on the authorities to ensure that all affected persons have access to electricity and heating and to consider the needs of the most vulnerable (including children, persons with disabilities and medical conditions, older persons, migrants, and Roma), as well as to offer appropriate alternative accommodation where needed. The Spanish authorities informed the Commissioner during her visit that the situation was complex, involving various actors, including the Autonomous Community of Madrid and the private energy company, and that discussions across involved Ministries were ongoing to find a comprehensive response to this pressing situation.
19. The urgent need to increase the availability of social and affordable housing is partially addressed by Spain's [2021 Government Plan on Recovery, Transformation and Resilience](#) and the new [National Action Plan on Access to Housing 2022-2025](#). If adequately implemented, these could provide a clear orientation towards the provision of affordable housing and social housing by the Autonomous Communities, as well as on establishing specific assistance to vulnerable persons.
20. At the time of the visit of the Commissioner, the Spanish Parliament was discussing a [bill](#) establishing a legal framework regulating the right to housing at the national level, containing measures that would, *inter alia*, encourage an increase in the availability of affordable and social housing and provide for coordination between the justice system and social services for the prevention of evictions without alternative accommodation. However, civil society organisations, as well as the UN Special Rapporteur on the right to adequate housing and the UN Special Rapporteur on extreme poverty and human rights, in a [Joint Communication](#) of January 2023, considered that protection gaps still remain and that the bill, in its current public version of 18

⁸ See Housing Europe, [The state of housing in Europe](#), 2021.

February 2022, does not fully guarantee the enjoyment of the right to housing and should be amended accordingly.

1.2.3 EVICTIONS AND HOMELESSNESS

21. The lack of adequate measures to address the unavailability of affordable housing in Spain has led to a large number of indebted families and a sharp increase in evictions and homelessness. More than [half a million evictions](#) are reported to have taken place throughout the country since 2013. Despite different measures taken by the government to halt evictions during the COVID-19 pandemic, the Commissioner was informed that [29,406 evictions](#) were carried out in 2020 alone. The latest data on evictions published by the [General Council of the Judiciary](#) show that in 2022, there were 38,267 evictions: 27,533 evictions for non-payment of rent, 8,509 for non-payment of mortgages and 2,225 for other reasons. The government did, however, extend the suspension of evictions for economically vulnerable people introduced in 2020 in response to the COVID-19 pandemic until 30 June 2023.⁹
22. During the visit, it was reported to the Commissioner that homeless people and their needs are often overlooked. The [National Comprehensive Strategy for Homeless Persons 2015-2020](#) records 33,275 people as homeless. According to the [Spanish National Statistics Institute](#), 44% have been in this situation for three years or more. Data collected by [Caritas](#) in 2021 reports 37,207 homeless people. Difficulties in access to housing and homelessness affect in particular persons belonging to vulnerable groups, including undocumented people, as it is the case for some migrants, asylum seekers and refugees (see below Chapter 3).
23. In 2018, the UN ESCR Committee urged Spain to adopt a legal framework that would establish adequate procedures related to evictions, incorporating the principles of reasonableness and proportionality, and due procedural guarantees for the persons concerned. The Commissioner was informed, however, that evictions still often take place without alternative accommodation being provided and without effective remedies being made available to the affected persons. She recalls that under Article 31 of the Revised Social Charter, as interpreted by the ECSR, states parties have the obligation to set up procedural safeguards to limit the risk of eviction and protect the rights of persons threatened by evictions, including with respect to mandatory consultations to find suitable alternative housing, adequate notice periods, prohibitions of evictions being carried out at night or during the winter period, the provision of legal remedies and compensation for legal evictions. In addition, all evictions must be carried out under conditions that respect the dignity of the persons concerned.¹⁰
24. In this context, the Commissioner welcomes that the above-mentioned National Action Plan on Access to Housing 2022-2025 forecasts more funding than previous plans and a special assistance programme for persons subjected to forced evictions, homeless persons, victims of gender-based violence, and other particularly vulnerable persons, and that similar protections are also contained in the bill on housing that is currently pending in Parliament.

1.2.4 CONCLUSIONS AND RECOMMENDATIONS

25. The Commissioner welcomes Spain's ratification in May 2021 of the European Social Charter (revised) of 1996 and its Additional Protocol of 1995, including the acceptance by it of all three elements of the Charter's Article 31 providing for the protection of the right to housing, and the acceptance of the procedure for collective complaints, in a clear sign of genuine commitment to

⁹ Real Decreto-ley 20/2022, de 27 de diciembre, de medidas de respuesta a las consecuencias económicas y sociales de la Guerra de Ucrania y de apoyo a la reconstrucción de la isla de La Palma y a otras situaciones de vulnerabilidad.

¹⁰ See the interpretation of the European Committee of Social Rights of Article 31 of the Revised Social Charter, available in the 2022 [Digest](#) of Decisions and Conclusions of the European Committee of Social Rights.

the effective realisation of social rights, including the right to housing. The Commissioner further welcomes the Spanish authorities' efforts to initiate structural reforms and implement targeted measures to fulfil the right to housing.

26. The Commissioner stresses the importance of adopting, as soon as possible, the housing bill that is currently pending in Parliament, while continuing close consultations with relevant civil society organisations. The Commissioner considers it important to establish a national normative framework that ensures the right to housing as an individual and justiciable human right, accessible for all. Legislation should foresee adequate opportunities for all affected persons to freely and meaningfully participate in the design, implementation, and monitoring of housing policies and decisions, in line with the [UN Guidelines for the Implementation of the Right to adequate housing](#).
27. The Spanish authorities at all levels, including the Autonomous Communities and municipalities, should accompany this process by comprehensively addressing the long-standing structural housing issues, coordinate with each other and take all necessary legal and practical measures to ensure the effective realisation of the right to affordable housing, including the maximum use of all available resources to address the social housing deficit, adequate measures to regulate the private housing market to improve the equal access to affordable housing, and long-term measures to prevent and eradicate homelessness, in particular among children, women, older people, families and other disadvantaged and vulnerable groups.
28. As regards evictions, the Commissioner invites the authorities to consider extending the temporary suspension of evictions for vulnerable families launched in response to COVID-19 until a more comprehensive and sustainable housing solution for all those in need has been found. She urges the authorities to adopt a legislative framework that establishes appropriate requirements and procedures to be followed for conducting evictions, including access to an effective legal remedy, and close coordination between the justice system and all related social services, in accordance with the case law of the European Court of Human Rights (ECtHR), the ECSR and the guidelines provided by the UN ESCR. In this respect, the Commissioner calls on the authorities to ensure the provision of adequate alternative accommodation for vulnerable persons prior to the execution of the eviction and amend the Spanish Civil Procedural Law to this end. In all their measures, the authorities should pay particular attention to the impact of their housing policies on the most vulnerable groups, including people suffering exclusion and poverty.

1.3 RIGHT TO HEALTH

29. The right to health is a fundamental human right. Without it, there is no life in dignity and the ability to exercise other rights is significantly restricted. In the wake of the economic crisis, austerity measures were imposed on health care systems in many member states, with serious negative effects. As became clear during the pandemic, the right to health cannot be protected effectively at an individual level only. It requires effective and inclusive systems that are accessible to everyone and that pay due attention to the essential social determinants of health: education, employment, social protection and living conditions.
30. In 2018, the [Royal Decree 7/2018](#) reintroduced universal access to the public health system in Spain. It was followed by a set of recommendations for its implementation published by the Health Ministry in 2019. The new legal framework improved access for people who were not registered as residents in Spain. However, certain obstacles remain, such as the requirement to prove presence in Spain for more than three months. The Commissioner was informed that the law does not make an exception to such requirements for persons in situations of particular vulnerability. It also excludes older family members who arrive in Spain by way of family reunification.

31. As is the case for the implementation of other social rights, responsibility for matters of public health falls to the Autonomous Communities, which have developed different implementing regulations in this respect, resulting in substantial inequalities. The different ways in which Autonomous Communities have granted access to health for undocumented migrants, for instance, has led to legal uncertainty and confusion throughout the country and has consolidated health exclusions.¹¹ Civil society actors report that the Ministry of Health does not always perform its role of coordinator and regulatory body to ensure greater access, efficiency, and fairness of the health care system.
32. The Commissioner is further concerned by the negative impact on the right to health resulting from an increasing privatisation of the health care system. She observes that regional differences are particularly stark in the provision of primary health care and specialised care, and in the availability of certain diagnostic technologies and treatment options through the public health system. This has led persons who can afford to travel to seek these services from private clinics, which exacerbates the inequality and regional differences in health service provision.
33. The Ministry of Health has acknowledged the need to bridge some of these gaps. In 2022, a [bill](#) aimed at consolidating the equity, universality and cohesion of the National Health System was proposed at the Congress of Deputies. However, civil society actors are concerned that the bill maintains some of the most problematic aspects of the Royal Decree 7/2018, as it does not limit the privatisation of the health care sector and does not ensure universal access to all.
34. The Commissioner's observations in the following sections will focus on some critical points pertaining to primary health care, the impact of the COVID-19 crisis on older people in care homes and women's and girls' access to sexual reproductive health and rights.

1.3.1 PRIMARY HEALTH CARE

35. As stressed in the Commissioner's [Issue Paper on the right to health](#), primary health care services should be the foundation of universal access to quality health care. The Commissioner reiterates that expanding primary health care ensures that care is delivered in the community and at an early stage, helping to provide affordable, comprehensive and continuous care to all individuals throughout their lives, from prevention and treatment to rehabilitation and palliative care. Clear [evidence](#) exists that budget reductions in primary health care and public health spending adversely affect health outcomes, including life expectancy.
36. The Commissioner notes that austerity-related measures and the COVID-19 pandemic have undermined primary health care in many member states, weakening the foundations of health care systems. This has affected inclusivity and hit the marginalised and vulnerable hardest, with those on lower or fixed incomes, including older persons, children, and persons with disabilities, suffering the most.
37. Investment in primary health care is reportedly insufficient in Spain. According to data collected by [Amnesty International](#), investment in primary health care by some Autonomous Communities represents an average of 14,7% of the total 2022 budget allocated to health.¹² In addition, problems with transparency and accessibility of information on health investment in the Autonomous Communities remain, particularly with respect to primary care.
38. The Commissioner was informed that the Interterritorial Council of the National Health System approved a [Primary and Community Care Action Plan for 2022-2023](#) in December 2021, recognising

¹¹ See Yo Sí Sanidad Universal, *El derecho a la asistencia sanitaria en las comunidades autónomas: Un derecho hecho pedazos, Informe acerca de la trasposición y aplicación del RDL 7/2018 a nivel autonómico entre 2018 y 2022*, November 2022.

¹² See also Amnesty International, [Report](#) España. *La década perdida: mapa de austeridad del gasto sanitario en España del 2009 al 2018 Acciones*, 2020.

that “primary care is a fundamental pillar to achieve the right to health of the population and is key to the welfare state, as well as to ensure comprehensive and equitable care”. The Commissioner regards as positive that in October 2022, the Health Ministry [allocated](#) more than 446 million euros for the deployment of measures within this Action Plan. The allocation of funding to primary care remains a competence of the Autonomous Communities. Civil society actors have expressed concern about the lack of evaluation of the implementation of the Action Plan by the central government.

39. In addition, it is reported that the number of health personnel in public health care facilities remains vastly insufficient. Many staff are overwhelmed and exhausted by the number of patients they see per day, related administrative tasks, and the precarious employment conditions, as the workforce depends mainly on short-term contracts. As a result and due to overall better employment conditions offered by private health services, some health personnel have become disinclined to work in public health services.
40. The Commissioner notes that a few days before her visit to Spain, thousands of public health workers and citizens staged a demonstration in Madrid to demand an increase of funding into primary health care, more primary health care staff and better working conditions. The protest was directed against the adoption by Madrid regional government of measures that demonstrators feared could further dismantle the public health system in favour of private providers. On 21 November 2022, health workers started an indefinite strike.¹³ The Commissioner understands that Madrid is the Spanish region that spends the least amount per capita on primary health care, despite being the region with the highest income per capita. The Madrid [Doctors’ Union](#) claims that for every 2 euros spent on health care in Madrid, one ends up in the private sector.
41. Privatisation of health services in poor areas or small villages has also led to inhabitants, who are not privately ensured, turning to primary health care services for any kind of healthcare service, overwhelming this first-line of assistance. In addition, rural areas, where the population comprises mainly older persons with increasing needs of care, face a growing shortage of doctors.

1.3.2 IMPACT OF COVID-19 ON OLDER PERSONS IN CARE HOMES

42. As stated in the Commissioner’s [Issue Paper on the right to health](#), it should be an absolute priority for Council of Europe member states to promote inclusive and non-discriminatory access to health care for all and make special efforts to ensure that the rights of persons belonging to particular groups with access barriers, including older person, are effectively safeguarded.
43. As elsewhere, the COVID-19 pandemic placed the Spanish national health care system under unprecedented pressure. According to [Amnesty International](#), the authorities failed to put in place adequate measures to guarantee everyone’s right to health during the pandemic, highlighting that older persons, people with chronic illnesses and those with mental health conditions faced the greatest difficulties in accessing care and treatment.
44. During her visit, the Commissioner paid particular attention to the high mortality rate among older persons in care homes in some Autonomous Communities during the COVID-19 crisis. It is estimated that around [35,000 older persons](#) died in care homes throughout the pandemic.¹⁴ Already in May 2020, in her [statement](#) on the impact of COVID-19 on older persons in long-term facilities, the Commissioner referred to incidents in Spain where residents were left in absolute neglect or abandoned despite having been infected. According to a [study](#) conducted in the Autonomous Communities of Catalonia and Madrid in 2020, the measures taken by the authorities to respond to

¹³ The Commissioner was [informed](#) that the strike ended in March 2023.

¹⁴ See also Médicos sin Frontera, [Report](#) *Poco, tarde y mal: El inaceptable desamparo de las personas mayores en las residencias durante la COVID-19 en España*, 2020.

the COVID-19 pandemic and protect the rights of older persons in care homes were inefficient and inadequate. The main concerns related to the lack of protective equipment or PCR test facilities for care homes' staff; the inadequacy of health assistance given to care home residents; and the prolonged isolation of those residents from their families.

45. Transfers to hospitals from these care homes were reportedly refused in a certain number of cases. Between [March and July 2020](#), it was found that 11,389 older persons living in care homes in Madrid alone had died. Among those, 8,338 (73%) were not transferred to a hospital, meaning that seven out of ten deaths in the first wave of COVID-19 occurred within care homes, where in many cases there were no means to provide adequate medical care to residents. The Commissioner understands that the criteria imposed to regulate transfers by some hospitals, at least in Madrid and Catalonia, included age and cognitive impairment, making it extremely difficult for older people in care homes to access prompt and adequate health care.¹⁵ The Commissioner notes that the implemented criteria seem to be at variance with ethical and human rights principles.¹⁶
46. The families of the victims and civil society actors have expressed important concerns about the lack of adequate mechanisms and procedures to reveal the truth about these deaths.¹⁷ In 2020, the Commissioner [noted](#) that prosecutors opened criminal investigations into a number of facilities for older persons in Spain. However, in January 2022, [Amnesty International](#) found that 451 of the 517 investigations had been closed without a minimum effort to clarify what happened. Reportedly, in none of the 127 cases examined in detail were the victims' relatives interviewed, nor were there any visits to residences aimed at on-site inspections. The regional parliaments that set up parliamentary investigative committees also closed the investigations, without clarifying the events.
47. The Commissioner considers that there is a close link between failures in the protection of the right to health for older persons in care homes during the pandemic and the decade of cutbacks in health and social care budgets. Compounded by the high rate of privatisation in care homes, the cutbacks undermined the public health system, leading to diminished access, affordability and quality of health care. Civil society actors also report a lack of coordination between health care and social services and continued shortages of trained personnel in care homes, whose employment conditions are also concerning. According to NGOs, older people are often left defenceless once they enter care homes and are faced with violations of their rights. Contact with the family doctor is often removed, leaving management of the health of the older person to personnel who are neither trained nor equipped to adequately provide the care needed. Insufficient inspections to monitor and evaluate the situation in care homes and the lack of protocols on how to handle cases of staff misbehaviour are also reported.
48. The Commissioner notes that a [new model](#) of care homes has been designed in 2022 by the Government, under the leadership of the Ministry of Social Rights and Agenda 2030 and the Autonomous Communities, to better ensure the dignity of treatment and the rights of residents. The plan proposes various changes, including a limitation in the number of residents, to allow for individualised care; continuing training of caregivers, and gender-inclusive staff programmes. The Autonomous Communities are responsible for the adequate implementation of the new model,

¹⁵ See Amnesty International, [Report](#) *Abandonadas a su suerte: La desprotección y discriminación de las personas mayores en residencias durante la pandemia COVID 19 en España*, December 2020.

¹⁶ As underlined by the Commissioner in her [statement](#) *Lessons to be drawn from the ravages of the COVID-19 pandemic in long-term care facilities* (May 2020), “[a]ny prioritisation procedure that disregards the basic principle of equal worth of all human beings, and is based for instance on assumptions about “social value” or “quality of life”, or criteria such as age, disability status or the fact that the person is in a long-term care facility, are not in line with ethical and human rights principles, as stressed by many international and national ethics bodies.”

¹⁷ See Amnesty International, [Statement](#) *Residencias: Después de 35.000 muertes de personas mayores, las víctimas y familiares solo han recibido opacidad por parte de la Fiscalía y ausencia de justicia en los tribunales*, January 2023.

ensuring that the human rights of residents are respected, and that financial and human resources are adequately allocated.

1.3.3 ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

49. As outlined in the Commissioner's 2017 [Issue Paper on women's sexual and reproductive health and rights in Europe](#), member states' obligations in this respect include ensuring access to safe and legal abortion services; guaranteeing the provision of evidence-based information and comprehensive sexuality education; securing the availability and affordability of modern contraceptive services; and respecting women's rights in childbirth and guaranteeing access to quality maternal health care.
50. The Commissioner welcomes the fact that the government of Spain is committed to the promotion of gender equality, and the eradication of all forms of violence and discrimination against women and girls and LGBTI persons. During the visit, the Commissioner paid particular attention to the important steps taken to uphold sexual and reproductive health and rights. In this respect, she notes that, in April 2022, [Organic Law 4/2022](#) criminalised the harassment or intimidation of women accessing abortion care or of health personnel of healthcare facilities providing abortion services. The Commissioner further welcomes the adoption in February 2023 of a [law](#) amending Organic Law 2/2010 on sexual and reproductive health and voluntary termination of pregnancy (hereinafter "the reform of the 2010 Law"). These amendments were adopted alongside the "[Law](#) for the real and effective equality of trans persons and for the guarantee of the rights of LGBTI persons", which addresses violence and discrimination based on sexual orientation, gender identity, and sex characteristics, and also includes specific measures to promote, *inter alia*, sexual and reproductive health and rights. The Commissioner is pleased to note that the authorities were open to cooperating closely with relevant civil society actors, human rights defenders, activists and health personnel who could effectively contribute to the decision-making process of both pieces of legislation.
51. The Commissioner acknowledges that the new set of legislation adopted following her visit, advance the protection of a variety of aspects related to sexual and reproductive health and rights. The recent reform to the 2010 Law facilitates access to abortion care on request by repealing the 3-day mandatory waiting period and the provision of counselling when acceding to abortion on request. The reform also repeals the requirement of parental/legal guardian consent for girls aged 16 to 17 years-old and women with "judicially modified capacity" (*mujeres con capacidad modificada judicialmente*). In addition, it ensures the availability of both medical and surgical abortion methods in public and private facilities.
52. The Commissioner welcomes the inclusive approach adopted in designing the reform of the 2010 Law. Under the reform, public institutions shall ensure that the measures provided therein are applied without discrimination on the basis of sex, gender, racial or ethnic origin, nationality, religion or belief, health, age, social class, sexual orientation, gender identity, disability, marital status, administrative status of foreigners, or any other personal or social status or circumstance and that the institutional response shall take particular account of multiple and intersectional discrimination.
53. The Commissioner also notes that the reform clarifies that references made to women in relation to reproductive rights are also applicable to trans persons who have the capacity to gestate, including those provisions ensuring menstrual health. In addition, the reform includes the obligation to provide training in sexuality education with a view to recognise sexual diversity. A similar provision is stipulated in the new "Law for the real and effective equality of trans persons and for the guarantee of the rights of LGBTI people", which states that sexuality education shall take into account the specific needs of LGBTI people, avoiding any form of stigmatisation or

discrimination. In addition, this Law ensures access of all women (including lesbian, bisexual and unmarried women) to assisted reproduction techniques.

54. The reform of the 2010 Law also addresses denial of abortion care on the grounds of conscience. It provides that only individual health professionals directly involved in abortion care in public and private facilities can refuse to perform an abortion on grounds of conscience under the condition that they declare it in writing and prior to the intervention. Health facilities are obliged to ensure the presence of healthcare providers who can perform abortion among their staff. An official record of the names of staff objecting to performing abortion care has also been established in each Autonomous Community. The reform of the 2010 Law also ensures that no person who in the previous three years has expressed conscientious objection can be appointed to take part in health committees that review requests for abortion care for medical reasons after the 22nd week of pregnancy.
55. As health care remains a responsibility of the Autonomous Communities, access to and adequacy of abortion care varies depending on the territory in which the woman resides. The Commissioner was informed that, in some Autonomous Communities, abortion care is not available at all in some public hospitals. The 2010 Law specifies that a woman may be referred to a private medical centre in exceptional circumstances when public health services are unable to undertake the procedure in time. The Commissioner notes that this has, however, become the rule in most cases: the majority of abortions in Spain are carried out by subsidised private clinics, free of charge for women, and not all public hospitals provide clear information as to whether abortion services are offered in the facility. In this respect, the Commissioner observes that the reform of the 2010 Law reiterates that access to abortion care shall be a service ensured by the national health system. It establishes the obligation of public health administrations, within their respective competencies, to guarantee the provision of abortion care in public hospitals, according to the criteria of gratuity, accessibility, and proximity, establishing adequate facilities and human resources to guarantee this right equally throughout the territory.
56. The Commissioner was made aware that migrant women, including pregnant migrant women, face a series of barriers to the enjoyment of their sexual and reproductive health and rights due to requirements that stem from Royal Decree-Law 7/2018, of 27 July, on universal access to the National Health System and different implementing regulations by the Autonomous Communities in this respect (see above para. 30 and 31). Those women who do not meet the specific requirements of the Autonomous Community they live in for accessing the National Health System might not, for example, access publicly funded abortion care.
57. During the visit, the Commissioner was informed of large regional disparities in the area of access to modern contraception. Institutional information on contraceptives and how to access them is reportedly deficient. The Commissioner is pleased to note that, with the reform of the 2010 Law, hormonal contraceptives, including long-term contraceptives, and emergency contraception will be financed by the National Health System. Other types of contraception will be provided free of charge in various public centres. The law also expands access to modern contraception, including by encouraging the development of male contraception via public funding, and promoting the idea of “co-responsibility” by men for birth control.
58. For the first time in Spain, a provision on menstrual health care is introduced in legislation, including by introducing a leave from work in certain cases and the free availability of feminine hygiene products in certain settings.
59. The Commissioner was informed that, in some schools, sexuality education remains limited and taught by nurses or teachers without special training for the purpose, focusing on the dangers of sexuality, based on fear and taboos (e.g. addressing only sexually transmissible diseases and contraceptives) instead of the “care” aspect or the cognitive, emotional, physical and social aspects

of sexuality. Before the reform of the 2010 law, Education Councils of each Autonomous Community and the schools themselves could decide whether and to what extent comprehensive sexuality education would be provided to pupils. In a positive move, the reform makes comprehensive sexuality education mandatory in the curriculum of some school levels and requires that it be provided by trained professionals.

60. In the area of maternal health care, the Commissioner notes that different [national strategies](#) have been developed by the Ministry of Health to ensure women's access to quality care. However, she was informed that these are not always implemented in Spanish hospitals. Civil society actors and some gynaecologists stress that in various phases of women's sexual and reproductive health care, including during pregnancy and delivery at hospital, women are not duly informed about the procedures that will be performed on their bodies, and their autonomy is not respected. The information they receive is often insufficient and inadequate. The Commissioner understands that, in certain hospitals, women's "Birth Plans" (*Plan de Parto*), where women can indicate their preferences, wishes, needs, and expectations during delivery and childbirth to the medical team, are refused or not complied with.
61. In some, mainly private, hospitals, there are concerns relating to the "scheduling" of childbirths by doctors to fit in their agenda. Inductions and other interventions to speed up labour are reportedly used to ensure that births take place when the practitioner is present and able to take charge. This results in the excessive use of synthetic oxytocin, instrumental births and C-sections ([official data](#) for 2020 shows that 34,7% of births in private hospitals and 21,8% in public hospital are performed as C-sections), often without women being duly informed. The Commissioner also notes that certain manoeuvres that are not recommended by the WHO are used in both public and private health care to accelerate childbirth.¹⁸ The lack of precise data from private health entities on practices around childbirth care is also an issue.
62. The Commissioner is concerned by consistent reports of women facing gender stereotypes by health personnel during pregnancy and childbirth, based on the unjustified belief that women are not capable of rational thought or able to make a responsible decision while pregnant. In this respect, the Commissioner notes that the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) recently issued three decisions calling on Spain to compensate women for the physical and psychological health damages suffered during their childbirth, also known as obstetric violence, suffered in 2009 and 2012.¹⁹ The Commissioner was informed that to date, the three women concerned have not been compensated.
63. The reform of the 2010 Law foresees measures to prevent and address different forms of violence against women with respect to sexual and reproductive health, including forced abortion, forced sterilisation, and forced contraception. It also stipulates different measures to protect and guarantee sexual and reproductive rights in the field of gynecology and obstetrics, putting women's right to informed consent at its the centre. The reform, nonetheless, does not refer to certain types of practices as "gynaecological and obstetric violence", despite calls by civil society actors and health practitioners to do so.

¹⁸ Cases are still reported —in both public and private health care — of the use of the Kristeller's manoeuvre, which is not recommended by the [WHO](#), as well as the Hamilton manoeuvre. A higher rate of episiotomies ([27.8%](#) in public hospitals in 2018) than the 10% prescribed by WHO guidelines is also [reported](#).

¹⁹ See the decisions adopted by the UN Committee on the Elimination of Discrimination against Women in [CEDAW/C/75/D/138/2018](#), [CEDAW/C/82/D/149/2019](#) and [CEDAW/C/84/D/154/2020](#).

1.3.4 CONCLUSIONS AND RECOMMENDATIONS

Access to health and primary health care

64. In line with the Commissioner's [Issue Paper on the right to health](#) and its twelve recommendations on how to strengthen the right to health through inclusive and resilient health care systems, the Commissioner recommends that Spain adopt further measures to promote universal health coverage with primary health care as its foundation with a view to delivering high-quality preventive, promotive and curative care to all, throughout people's lives and without exposing them to financial hardship. She also stresses the need to support strong emergency health preparedness and response systems and to strengthen capacities at national and regional levels. In particular, she urges the authorities to allocate further financial investment into primary health care. The Commissioner also recommends the prompt adoption of the 2022 [bill](#) aimed at consolidating the equity, universality and cohesion of the National Health System. It is also important to continue close cooperation with health personnel and civil society actors to ensure that the bill guarantees universal access to health for all.
65. The Commissioner calls on the authorities to respect and protect the labour rights of the health and social care workforce, including by taking immediate measures towards guaranteeing their safety in the workplace and creating adequate working conditions. This include taking all necessary measures to ensure that all members of the health and social care workforce are treated with appropriate levels of dignity and respect, including in terms of their contractual situation, income security and fair compensation to increase diversity across the health and social care workforce and ensure that gender disparities are eliminated.
66. The Commissioner stresses the need to ensure a comprehensive, coherent approach to health and social policy making, including by implementing measures to promote national and regional health commitments to reducing health inequalities throughout the Autonomous Communities.
67. The Commissioner calls on the authorities to ensure that the right to health of persons belonging to particular groups facing legal and practical barriers to access, including women, LGBTI persons, older persons, people arriving in Spain for family reunification and those belonging to marginalised or disadvantaged groups, such as undocumented migrants in their first 90 days in Spain, is effectively safeguarded.

Impact of COVID-19 on older people in care homes

68. The Commissioner urges the authorities to ensure access to accurate, up-to-date information on the human rights situation of older persons in care homes and to strengthen transparency and trust by engaging in open, evidence-based communication and dialogue, including with respect to remaining data gaps and ongoing research. Mechanisms of redress for residents of care homes and the possibility to submit complaints anonymously should also be ensured.
69. With respect to the high mortality of older persons in care homes throughout the COVID-19, the Commissioner calls on the competent authorities to engage with the families of the victims and civil society organisations and ensure that their right to effective justice is safeguarded and that all necessary steps are taken to shed full light on the circumstances of these events and to prevent any such occurrences in the future.
70. The Commissioner considers that the authorities' recent initiative to reform the care system for older persons should be based on an integrated and coordinated provision of social and health care, ensuring that older persons' dignity, autonomy and independence are fully respected. She stresses the need to address the fragmented social protection systems and build consensus between health and other social programmes by engaging in inter-sectoral dialogue with diverse partners. In particular, she recommends taking immediate steps to ensure that health and social care systems

are designed to be people-centred and life-cycle sensitive, offering older persons diverse living options with a view to minimising long-term institutional care. The Commissioner urges the authorities to ensure an increase of trained personnel, the design and implementation of clear protocols that guarantee residents' human rights, the conduct of inspections and evaluation, the anonymity of complaints upon request by the applicant, as well as the participation of families and residents in the management of the care model.

Access to sexual and reproductive health and rights

71. The Commissioner welcomes the adoption of a set of legislations that advance the protection of sexual and reproductive health and rights in Spain and urges the central government to coordinate the prompt implementation of these new measures by the regional and local authorities. It is important that Spain addresses inequalities in access to health between regions.
72. In particular, the Commissioner calls on the authorities to ensure that high-quality sexual and reproductive health care is fully accessible in public health services throughout Spain for all those in need, including with respect to abortion care in line with the World Health Organisation's 2022 abortion care [guideline](#).
73. Concerning contraception and comprehensive sexuality education, the Commissioner welcomes the adoption of new legislation that covers the costs of certain types of contraception, including emergency contraception. The Commissioner emphasises that all young people should be provided with access to free, confidential, and non-discriminatory sexual and reproductive health services, information and education, including on contraception and emergency contraception. As regards the inclusion of sexuality education as mandatory in school curricula, it is important that all those intervening at schools on this topic, including civil society organisations, provide age-appropriate, standardised, evidence-based and scientifically accurate education.
74. The Commissioner stresses the need to eliminate coercive or inappropriate practices in all sectors of health, including in gynaecology and maternal health care. Certain practices imposed on women and girls, without their informed consent, might stem from deep-rooted sexist prejudices and stereotypes and constitute gender-based violence. The authorities should fully acknowledge the existence of these forms of violence and address their various forms and root causes. Training of health personnel and the judiciary on women's sexual and reproductive health and rights, particularly on the various possible forms of violence in gynaecology and maternal health care should be envisaged to prevent the continuation of gender stereotypes in health services and the judiciary. The Commissioner urges the authorities to take due account of the various recommendations and guidelines that exist in the area, as provided by, among others, CEDAW in its 2020 and 2022 Decisions concerning Spain mentioned above, the [UN Special Rapporteur on violence against women](#) (2019), the World Health Organisation in its [2015 Statement](#) and its different guidelines on access to quality maternal care ([antenatal](#), [during pregnancy/intrapartum care](#), [postnatal period](#)). The Parliamentary Assembly of the Council of Europe has also addressed the issue of obstetrical and gynaecological violence in its 2019 [report](#) and related [Resolution 2306\(2019\)](#).

2 FREEDOMS OF EXPRESSION AND PEACEFUL ASSEMBLY

75. Since the financial crisis of 2008, the number of demonstrations against austerity measures substantially increased throughout Spain and took on new forms, including the occupation of public spaces for prolonged periods of time (the so-called *acampadas*), demonstrations to prevent housing evictions, occupation of empty buildings and unused land, and spontaneous demonstrations in front of the residences of politicians. The Commissioner notes that demonstrations have often been met with excessive use of force on the part of the police and the

widespread imposition by the authorities of administrative sanctions, including substantial fines, on organisers and participants. In 2015, as a reaction to this wave of social protests, the Government reformed the 1995 Criminal Code and introduced a new Law on Citizens' Safety.²⁰

76. The Commissioner has received consistent reports that, since then, the implementation of the new legal framework has seriously hindered the exercise of the freedoms of expression and assembly in Spain. According to civil society actors, the law grants a wide margin of discretion to law enforcement, resulting in the arbitrary and excessive use of less lethal weapons such as rubber bullets or the so-called "foam bullets" during peaceful demonstrations. The situation is reportedly exacerbated by the fact that courts frequently interpret events in favour of the police, and the police engage in counter-accusations against demonstrators or journalists who report abuses, rendering accountability mechanisms for law enforcement ineffective. These factors have resulted in the imposition of arbitrary sanctions, the criminalisation of peaceful protesters, journalists, and social movements, and a worrying chilling effect on freedoms of expression and peaceful assembly.
77. The Commissioner's observations in the following subsections will focus on some critical points pertaining to the implementation of the Law on Citizens' Safety and the Criminal Code and their impact on the rights to freedom of expression and freedom of assembly, particularly of journalists and activists. She will also address some of the recent issues related to policing these freedoms in Spain.

2.1 THE RESTRICTIVE NORMATIVE FRAMEWORK AND ITS IMPACT

2.1.1 THE LAW ON CITIZENS' SAFETY

78. Since its adoption in 2015, the Law on Citizens' Safety (hereinafter "the Law") has raised the alarm from different international and European human rights bodies due to the potential negative impact on freedoms of expression and assembly in Spain.²¹ It is commonly dubbed by civil society actors as the "gag law" ("*Ley Mordaza*") in reference to the wide powers it gives to law enforcement in response to social protests and other demonstrations.
79. The Commissioner has closely followed the implementation of this Law and its impact on human rights. In particular, in the context of a review of the Law in 2018, the Commissioner noted in a [letter](#) to the Spanish Parliament that the broad and imprecise wording of the Law as a whole had given a wide margin of discretion to law enforcement forces in interpreting it, thus allowing for potentially disproportionate and arbitrary limitations to the exercise of the rights to freedom of expression and freedom of peaceful assembly as protected under the European Convention on Human Rights (ECHR). The imprecise wording of the Law had also resulted in sanctions being imposed on unclear grounds, as reported by the National Ombudsman and NGOs, including sanctions against journalists filming law enforcement agents, and a large number of sometimes heavy fines imposed on persons taking part in peaceful demonstrations and other public gatherings.
80. In February 2022, in the context of a second attempt to reform the Law, the Commissioner sent a [letter](#) to the Spanish Parliament, reiterating the concerns expressed in 2018 and referring to the findings and recommendations made by the Venice Commission in its [Opinion](#) of March 2021 and the UN Special Rapporteurs in their [Joint Communication](#) of April 2021 on the Law. While she found that several proposed amendments addressed some of the human rights issues raised so far, the text did not seem to include changes to the provisions of Law that had had the most harmful impact

²⁰ Ley Orgánica 4/2015, de 30 de marzo, de Protección de la Seguridad Ciudadana.

²¹ See, among others, the [Statement](#) of several UN Special Rapporteurs, *Two legal reform projects undermine the rights of assembly and expression in Spain*, February 2015.

on the enjoyment of the rights to freedom of expression and freedom of peaceful assembly. She therefore reiterated her call on Parliament to ensure that the review of the Law was used as an opportunity to bring it fully in line with human rights standards.

81. The Commissioner remains concerned about the high number of sanctions imposed by law enforcement on the basis of some articles of the Law. She was informed that at least four articles have had a decisive impact on the exercise of the human rights of participants in peaceful assemblies, human rights defenders and journalists for conduct protected by the rights to freedoms of expression and peaceful assembly in recent years, thus having a chilling effect on overall society. These include Article 36.6, regulating the imposition of sanctions for acts of resistance, disobedience and refusal to identify oneself to law enforcement (referred to by the [Venice Commission](#) as a “catch-all provision” and “all-embracing formula”), Article 37.1 on assemblies for which the notification procedure has not been respected, Article 37.4 regulating disrespect or lack of consideration for law enforcement, and Article 36.23, foreseeing the sanctioning of the use of images or personal or professional data of law enforcement that may endanger the personal or family safety of the agents, or protected facilities.²²
82. The Commissioner stresses that the reform of the Law that was foreseen until March 2023 did not amend the provisions regulating sanctions on grounds such as resistance or disobedience to law enforcement (Article 36.6) and disrespect or lack of consideration for law enforcement (Article 37.4). This is particularly worrying considering that, only in 2021, a total of 52,154 sanctions were imposed based on these two articles, representing more than 80% of the total sanctions imposed that year under the law. Also, she notes an increase in the application of sanctions in relation to Article 37.4 in 2021 (26,254 sanctions) in comparison with previous years. The Law, particularly Article 36.6, has also been used extensively during the COVID-19 pandemic to cover mere acts of non-compliance with lockdown measures, with imposed fines of up to 30,000 euros.²³ The Commissioner notes that the sanctions inflicted on the grounds of these provisions were subsequently annulled by the Spanish Constitutional Court on the grounds of unconstitutionality of the state of emergency to combat COVID-19 declared by the government.
83. As found both in 2018 and 2022, the Commissioner observes that the administrative nature of these sanctions continues to make it difficult to appeal them. In particular, provisions of the Law foreseeing the presumption of truthfulness of the reports of the police, the immediate enforceability of heavy fines and the lack of entitlement to legal aid weaken the position of defendants *vis-à-vis* the authorities. This is compounded by the forfeiture of the right to appeal in exchange of a reduction of penalty that may result in a disincentive to appeal the sanctions, opting instead for proceeding with the payment.²⁴
84. The Commissioner was also informed that journalists have been subjected to administrative harassment in the context of the application of the Law.²⁵ In particular, they have faced large fines under Article 36.23, providing for the sanctioning of the “unauthorised” use of photo and video images of law enforcement at duty or in a private setting that may endanger their safety. High financial penalties were particularly imposed in cases of reporting on police actions. Journalists have

²² Amnesty International [found](#) that authorities had imposed more than 250,300 sanctions stemming from these articles between the adoption of the Law in 2015 and 2021, accounting for 78% of all public security related sanctions.

²³ See the Venice Commission’s [Opinion](#) on the Law on Citizens’ Safety of March 2021; Amnesty International, [Statement](#), *Los casos de abusos por parte de las fuerzas de seguridad durante los estados de alarma evidencian la urgencia de reformar la Ley de Seguridad Ciudadana*, May 2021 and [Report](#) *Violaciones de derechos humanos durante el estado de alarma*, June 2020.

²⁴ Articles 52, 53(1) and 54 of the Law on Citizens’ Safety. See also the Venice Commission’s [Opinion](#) on the Law on Citizens’ Safety of March 2021, paras 74-78.

²⁵ See Amnesty International, [Report](#) *Derecho a la protesta en España: siete años, siete mordazas que restringen y debilitan el derecho a la protesta pacífica en España*, November 2022.

complained that they have been prevented from fully reporting on sensitive issues, such as the arrivals of migrants in Spain. The Commissioner notes that on 19 November 2020, the Spanish Constitutional Court held that the reference to the “unauthorised” use of images implied the need for an authorisation, which is a form of censorship and contrary to the Spanish Constitution. In this line, the Spanish Constitutional Court found that the reference to the word “unauthorised” should be excluded from the Law. The provisions in the Law regulating disobedience and lack of respect towards law enforcement (Article 36.6 and Article 37.4) have also reportedly been used frequently against journalists.

2.1.2 THE CRIMINAL CODE

85. The Commissioner notes that the Criminal Code contains several offences whose application have resulted in violations of freedom of expression. In March 2021, in a [letter](#) to the then Minister of Justice, the Commissioner stressed that in the last few years, a growing number of criminal convictions, including custodial sentences, had been handed down over on artists for controversial lyrics and other performances, and on social media activists for statements considered offensive, including for remarks conceived as humour, on the grounds of several provisions within the Criminal Code. In particular, she noted the lack of clarity of the provision on glorification of terrorism (Article 578) and ensuing diverging interpretations of this provision by Spanish courts, and freedom of expression concerns arising from the provisions criminalising libel of and insults to the Crown (Articles 490 and 491). She also called on the Spanish authorities to restrict the application of provisions on hate speech to cases prohibited under international human rights law and to decriminalise defamation and the offence of “insults to religious feelings” owing to their possible chilling effect on freedom of expression.
86. The Commissioner notes that the Spanish Parliament has begun the process of decriminalising a number of these offences – including “insults to religious feelings,” “attacks on the symbols of the state” and “insults to the Crown”. However, during the visit, the Commissioner was informed by the Spanish authorities that these reforms were delayed due to COVID-19 and other priorities in Parliament.
87. Furthermore, the Commissioner notes that the application of several offences of the Criminal Code, such as the crime of sedition and rebellion, has led to restrictions in the rights to freedom of expression and assembly of Catalan politicians and activists.²⁶ In this respect, she notes that the Parliamentary Assembly of the Council of Europe adopted [Resolution 2381 \(2021\), which](#) stressed, among others, the need to reform the criminal provisions on rebellion and sedition. In this respect, the Commissioner welcomes that the Spanish Parliament [approved](#) several amendments to the Criminal Code in December 2022, including a repeal of the crime of sedition. As a result, in January 2023, when reviewing the various convictions for the crime of sedition in light of the reform, the Supreme Court dropped this charge against politicians and activists, resulting in some of them no longer being banned from holding any public office. For those politicians convicted of other crimes, however, the ban from holding public office remains in place.

2.2 USE OF FORCE BY LAW ENFORCEMENT OFFICERS IN PEACEFUL ASSEMBLIES

88. During his [visit](#) to Spain in 2013, the Commissioner’s predecessor found that excessive use of force by law enforcement officers had been documented in various Spanish cities since 2011 in large-scale anti-austerity demonstrations, including against journalists. He also pointed to the frequent

²⁶ In 2018, the UN Special Rapporteur on the right to freedom of opinion and expression, David Kaye, had [urged](#) Spanish authorities to refrain from pursuing the criminal charge of rebellion against political figures and protesters in Catalonia. See also UN Human Rights Committee, [CCPR/C/135/D/3297/2019](#).

lack of visible identification worn by law enforcement officers, especially during demonstrations, as this had impeded the prosecution and sanctioning of perpetrators of abuse. Accordingly, he urged the authorities to implement a set of recommendations to address these concerns.

89. In 2017, the Commissioner's predecessor [addressed](#) the Spanish authorities following allegations of police misconduct and disproportionate use of force during the events of 1 October 2017 in Catalonia. In 2019, the Commissioner [expressed concern](#) about similar allegations as regards protests in Catalonia, calling for guaranteeing the protection of the rights to freedom of expression and peaceful assembly during demonstrations. In these events, the Commissioner noted that while some attacks had been carried out by demonstrators, several accredited journalists, wearing press visibility jackets, had experienced violent behaviour at the hands of police officers in different cities of Catalonia. Moreover, the Commissioner was also concerned about allegations of disproportionate use of force and inappropriate use of anti-riot weapons by the police on demonstrators, particularly of rubber and "foam bullets". She called on the Spanish authorities to investigate all reported cases of attacks against journalists, whether they were carried out by police officers or demonstrators and to take measures to guarantee the safety of all journalists during demonstrations. During the visit, the Commissioner was informed that no law enforcement officer has yet been prosecuted for the injuries inflicted on a number of journalists following police violence during protests in Catalonia.
90. The Commissioner observes that, in recent years, the level of physical violence from state and non-state actors against journalists covering demonstrations has declined. She notes that demonstrations against measures to combat the Covid-19 pandemic were the backdrop for most of the recorded assaults on journalists, particularly from non-state actors.
91. Nevertheless, civil society actors report the continuing disproportionate use of force by law enforcement during protests in Spain. The Commissioner was informed about the persistence of the problem of lack of clear and visible identification worn on National Police and Civil Guard uniforms while carrying out public order and border control functions, making it difficult to establish responsibility in cases of abuse. Reportedly, their identification number is often displayed in unclear lettering and attached only to the back of the uniform. The Commissioner was informed that the identification system of Mossos d'Esquadra in the Autonomous Community of Catalonia was improved by establishing the 360-degree visibility of identification (in the front, back and on the helmet).
92. Moreover, the Commissioner was informed that kinetic energy weapons, including rubber and "foam bullets", are still commonly employed by law enforcement and there is reported to be little oversight connected to their use. In particular, rubber bullets have reportedly been used by National Police and Civil Guards, including to disperse crowds in peaceful protests, throughout Spain. Civil society actors have [documented](#) that, between 2000 and 2017, the use of rubber bullets has caused the death of at least one person through direct impact, while 11 people have lost their vision in one eye. Rubber bullets were reportedly also used in 2014 against migrants who attempted to swim to the shores of Tarajal beach (Ceuta).
93. The Commissioner was also informed that the Autonomous Communities of Navarra, Basque Country, and Catalonia have replaced the use of rubber bullets with the use of projectile weapons and "foam bullets", which are perceived to be more precise when fired than rubber bullets. However, after examining their use in Catalonia, civil society actors report that it has resulted in

serious injuries in recent years. During judicial investigations into injuries caused by “foam bullets” used by Mossos d'Esquadra, the *jefe de armería* of Mossos d'Esquadra [reported](#) that this type of weapon was not and could not be considered a weapon that guarantees precision.²⁷

94. Furthermore, civil society actors [reported](#) that no law enforcement units in Spain provide for public access to protocols, guidelines for action or internal instructions regulating the use of force, tools and weapons. This lack of transparency, which is generally justified on grounds of public security, hampers adequate accountability and evaluation whether protocols and regulations comply with international standards associated with their use. In this respect, the Commissioner was informed that in Catalonia, the protocol regulating the use of such weapons was recently made partially public, after repeated calls from parliamentarians and human rights actors, including the Catalan Ombudsperson. More generally, it is reported that little comprehensive guidance is provided by the Ministry of the Interior on the use of such weapons.
95. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ([CPT](#)), the criteria for the use of projectile-firing weapons by police officers should, at a minimum, align with those governing the use of firearms and the use of these weapons must be thoroughly regulated and monitored. Moreover, the CPT considered that only specially selected and trained police officers should be allowed to use such weapons and all necessary precautions should be taken when such weapons are used. It also found it essential that all persons against whom these weapons are deployed be subsequently examined by a medical doctor and that there should always be a thorough de-briefing and evaluation of every incident following their use. In 2019, the Commissioner [expressed](#) reservations regarding the use of rubber bullets in the context of policing assemblies.²⁸
96. The Commissioner was informed of the persistence of the problem with impunity for police abuses. Civil society actors [report](#) that although police forces have internal accountability regimes, these do not seem to guarantee the independence and effectiveness of the system. It is reported that the lack of transparency of these regimes makes it impossible to understand to what extent internal control mechanisms are effective and whether, therefore, adequate accountability is being ensured.
97. During the visit, the Spanish authorities informed the Commissioner about the establishment, in February 2022, of a [National Office for guaranteeing human rights](#), the *Oficina Nacional de Garantía de los Derechos Humanos*, within the State Secretariat for Security of the Ministry of the Interior. One of the objectives of the Office is to collect and record data on facts and actions that may reveal alleged human rights violations during a police operation. The Office is tasked among others: to verify and evaluate instructions or other provisions on police operations that may affect the exercise of human rights; to monitor, follow up, and examine cases of death, suicide, attempted suicide or injury to persons that may occur during the police operation; to record all official complaints about human rights abuses during police operations brought to the judiciary, the Prosecutor General, the law enforcement or the National Ombudsman and to follow up on

²⁷ Moreover, the Commissioner was informed that the Catalan government allows the use of one type of foam projectiles for long-distances (known as the SIR-X) for distances between 20 and 50 meters, while the weapon's manufacturer stipulated that firing this type of bullets at a distance of less than 30 meters can cause serious damage. A Study Commission of the Catalan Parliament [requested](#) in 2022 that the Catalan Government urgently withdraw the use of SIR-X projectiles. The study is subject to the vote of the Catalan Parliament's plenary.

²⁸ In particular, in France, in the context of policing assemblies, the Commissioner stressed that head wounds caused by LBD (rubber bullet launchers) fire showed a disproportionate use of force and the unsuitability of this type of weapon in the context of operations aimed at maintaining public order. See the Commissioner's *Memorandum on maintaining public order and freedom of assembly in the context of the “yellow vest” movement in France*, February 2019.

complaints and suggestions notified through the implementation of Royal Decree 951/2005, establishing the general framework to improve the quality of the state's administration. Civil society actors, however, expressed concerns as to the lack of clarity on the type of follow-up and concrete measures that the Office can propose to the Ministry of the Interior to address human rights violations, as well as their scope, nature, and binding force.

98. As regards law enforcement's external accountability mechanisms, civil society organisations were critical of the Public Prosecutor's role in cases of complaints against police officers.²⁹ Moreover, it is reported that the police hierarchy tends to retain control over information that would be necessary for the accountability mechanisms to assess the responsibility of the law enforcement authority concerned. This is compounded by the difficulty of identifying law enforcement agents during police operations, as mentioned above, and the impossibility of tracing the use of rubber bullets. As a result of the combination of all these factors, investigations into law enforcement abuse remains difficult. Another issue is that the results of these investigations are reportedly not publicly disclosed. In some cases, internal control mechanisms do not take precautionary measures and agents remain on duty when suspected of serious abuse and under investigations in judicial proceedings.
99. The Commissioner welcomes the important and effective work carried by other existing mechanisms, such as the National Ombudsman, who also acts as the National Preventive Mechanism under the Optional Protocol to the United Nations Convention against Torture and regional Ombuds Offices. Ombuds Offices have limitations when it comes to investigating cases of abuse of force.³⁰ In particular, if a case that is opened for investigation by the Ombudsperson is subsequently subjected to judicial review, this results in the immediate suspension of the Ombudsperson's investigation. Moreover, Ombuds Offices' resolutions are recommendations and are, therefore, not legally binding. Also, many of the recommendations issued by these offices in line with international human rights standards, are refused by the administrative authorities, which prevents concrete changes to the system to avoid repetition of the abuse identified.

2.3 CONCLUSIONS AND RECOMMENDATIONS

The Law on Citizens' Safety

100. The Commissioner acknowledges the challenges to policing protests and other public gatherings. However, she underscores that safeguarding human rights, including freedoms of expression and assembly, are an integral part of the efforts to ensuring citizens' security. In this respect, she welcomes the authorities' willingness and efforts in recent years to review the 2015 Law on Citizens' Safety, which has undermined the exercise of the freedoms of expression and assembly in Spain. However, the Commissioner finds it concerning that, at the time of writing the report, the latest attempt to reform the Law did not succeed due to the lack of agreement between political parties to amend some of the provisions whose implementation has proven to be most problematic for the enjoyment of people's human rights in Spain.
101. The Commissioner reiterates the urgency to bring the Law, which has been in place for more than seven years now, fully in line with European and international human rights standards. In particular, the Commissioner notes the imprecise definition of some offences in the Law, and the large number of sanctions, sometimes heavy, that have been imposed, many of these in the context of peaceful demonstrations and gatherings, including against journalists. She encourages the authorities, and in particular Parliament, to include civil society actors and journalists in any review of the Law. It is

²⁹ See Irídia, Novact y RIS, [Report](#) *Transparencia y rendición de cuentas de los cuerpos policiales en el Estado español*, October 2022.

³⁰ *Ibid.* pages 105-108.

important that the Law be amended so as to limit possibilities for arbitrary and disproportionate application, guaranteeing legal certainty and foreseeability, and to reconsider the amounts of fines. The Commissioner calls on the authorities to guarantee the right of the public, media professionals, monitors, and national human rights institutions to record and document law enforcement operations and actions, including to disseminate video records of the policing of assemblies and other encounters between the police and members of the public in full compliance with the applicable privacy rules.

102. The Commissioner notes that several features stemming from the administrative nature of some of the imposed sanctions make it difficult to appeal them. It is essential to ensure that judicial review is accessible and provides reasonable chances of success in the disputes with the administration. To this end, the Commissioner urges the authorities to fully implement the recommendations of the Venice Commission, in its [Opinion](#) on the Law on Citizens' Safety of March 2021, by also taking into consideration the revised Joint Venice Commission - ODIHR [Guidelines](#) on Freedom of Peaceful Assembly, as well as the ECtHR's case-law on Article 10 and 11 of the ECHR and the recommendations provided by the National Ombudsman in this respect.
103. The Commissioner is concerned about the way the Law on Citizens' Safety has been applied against journalists with respect to conduct protected by the right to freedom of expression. Journalists play a crucial role in providing independent coverage of public assemblies as well as information on the authorities' handling of public demonstrations and the containment of possible disorder. They must therefore be given full access to all forms of public assembly and be able to report on them safely and without undue interference. The Commissioner also calls on the relevant authorities to investigate all reported cases of attacks against journalists, whether they were carried out by police officers or demonstrators, and to take measures to guarantee the safety of all journalists during demonstrations.³¹ In this respect, the Commissioner also draws attention to the Council of Europe 2016 [Recommendation](#) on the protection of journalism and safety of journalists and other media actors.

The Criminal Code

104. The Commissioner notes that certain provisions of the Criminal Code have also had an impact on the full enjoyment of freedom of expression and assembly. In this respect, she welcomes the recent amendments brought to the legal framework repealing the crime of sedition. She reiterates her call on the Spanish authorities to comprehensively amend the rest of the Criminal Code to strengthen existing safeguards around the right to freedom of expression and the right of peaceful assembly, in particular when applying legislation combating hate speech and provisions such as those criminalising libel of and insults to the Crown (articles 490 and 491), glorification of terrorism (article 578) and the offence of insults to religious feelings (Articles 524 and 525(1)).
105. The Commissioner welcomes the measures undertaken by the government to restore democratic dialogue in Catalonia. As part of this process, the Commissioner stresses the need to ensure that everyone, including politicians and activists, fully enjoys freedom of expression and peaceful assembly in law and practice.

Use of force by law enforcement officers in peaceful assemblies

106. As regards compliance with international human rights standards by law enforcement, the Commissioner calls on the authorities to ensure that law enforcement officers have the necessary equipment, training, and instructions to effectively police assemblies, as far as possible without recourse to the use of force. In this respect, the Commissioner draws attention to the Venice

³¹ See the Commissioner's [Human Rights Comment](#) (2021), *Journalists covering public assemblies need to be protected*.

Commission and OSCE/ODIHR [Guidelines on freedom of peaceful assembly](#), the [UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#) and the 2019 [UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement](#).

107. In particular, the Commissioner urges the authorities to make a thorough and regular assessment of the dangers posed by the use of non-lethal weapons, such as the use of “foam bullets”, in the context of assemblies, and to review and revise the related protocols, rules, and regulations accordingly. The authorities should ensure the involvement of national human rights institutions, police oversight bodies, civil society representatives, and medical professionals in this assessment.
108. As concerns the use of rubber bullets in the context of assemblies, the Commissioner reiterates that it presents a clear danger for the safety of demonstrators. Because of their imprecise and indiscriminate effect, they should not be used against large numbers of persons, including assemblies. Therefore, the Commissioner urges the authorities to reconsider the use of these weapons in operations aimed at managing public demonstrations.
109. Impunity for excessive use of force by law enforcement should never be tolerated. All allegations of misconduct or ill-treatment in the context of demonstrations and public order operations must be firmly condemned, adequately investigated, and sanctioned by the competent authorities in order to prevent recurrence, strengthen public confidence in the work of the law enforcement authorities and enhance the key role played by law enforcement authorities in safeguarding the rule of law. This implies that law enforcement officers operating in public order are always easily and clearly identifiable. Furthermore, the Commissioner encourages the adoption of measures to raise awareness among prosecutors and judges of their duty to thoroughly prosecute and sanction all allegations of ill-treatment by law enforcement officers, in line with the caselaw of the ECtHR.
110. The Commissioner reiterates the need to strengthen the overall accountability framework for law enforcement officers, including with a view to ensuring adequate oversight of the use of coercive powers and imposed sanctions stemming from the application of the Law on Citizens’ Safety, in line with the recommendations made by her Office in [2013](#) as well as by the Venice Commission in its 2021 Opinion. In this respect, she welcomes the recent establishment of the [National Office for guaranteeing human rights](#), the *Oficina Nacional de Garantía de los Derechos Humanos*, within the State Secretariat for Security of the Ministry of the Interior, to mainstream human rights accountability and monitor the adequate implementation of human rights within law enforcement. The Commissioner looks forward to receiving further information about the work of the Office and its practical functioning, in particular as to the type of follow-up and concrete measures that it can propose to the Ministry of the Interior to address human rights violations.
111. As already stressed by her predecessor in [2013](#), the Commissioner invites the authorities to consider establishing an [independent effective complaints mechanism](#) to promote accountability of law enforcement, either by enlarging the competencies of the National Ombudsman or by setting up a new body. Such mechanisms should have the capacity to deal with individual complaints and to investigate alleged abuses, and their decisions should have binding force.

3 THE HUMAN RIGHTS OF REFUGEES, ASYLUM SEEKERS AND MIGRANTS

112. [UNHCR](#) reports that in 2022, there have been 31,763 arrivals in Spain: 29,895 by sea and 1,868 by land, showing a decrease in arrivals by 26% compared to 2021. The Commissioner notes that, between [January and November 2022](#), 96% of applications for international protection were made once in the Spanish territory, while 3% were lodged at the border. According to the [International](#)

[Organization for Migration](#) (IOM), from 2014 until March 2023, 3,723 missing migrants were recorded on the Western Mediterranean route.

113. The Commissioner notes that Spain, up until February 2023, had granted temporary protection to 165,018 people fleeing the war in Ukraine.³² She welcomes the solidarity demonstrated by the country's authorities and population towards Ukrainian people fleeing the war. She notes that the procedure for the recognition of temporary protection for people affected by the war states that applications shall be processed and resolved within 24 hours and that residence and work permits shall be provided. People coming from Ukraine are entitled to access the Spanish reception system. The Commissioner notes that four reception centres have been set up to assist and host them (*Centros de Recepción, Acogida y Derivación de desplazados ucranianos*).
114. During her visit, the Commissioner focused on several issues pertaining to access to protection, including access to the Spanish territory, the asylum procedure and reception. The Commissioner's interlocutors also raised the alarm concerning continuing cases of summary returns ("pushbacks"), preventing people on the move from gaining access to the asylum procedure in the Autonomous Cities of Ceuta and Melilla.
115. In the present Chapter, the Commissioner addresses selected issues concerning access to the Spanish territory and asylum at the Spanish borders, particularly following her visit to the border between the Autonomous City of Melilla and Nador (Morocco) (3.1) and other concerns related to access to the asylum procedure and reception, including in the Canary Islands (3.2).

3.1 HUMAN RIGHTS SITUATION AT THE BORDERS WITH MOROCCO

3.1.1 ACCESS TO THE TERRITORY AND PUSHBACKS

116. The Commissioner observes that the main issues related to safe and legal access to the Spanish territory for asylum seekers can be found at the borders of the Autonomous Cities of Ceuta and Melilla with Morocco. These concerns are not new and have repeatedly been addressed by the Commissioner and her predecessors throughout the years, as well as other international and European human rights bodies and national actors, such as the National Ombudsman.
117. The Commissioner notes that access to the territory through these borders has gradually worsened since 2015, following the introduction of amendments to the Aliens Act through the adoption of the Law on Citizens' Safety.³³ This change foresaw a special regime for Ceuta and Melilla, stipulating that those non-nationals who are detected trying to irregularly cross border controls at the border of the territorial demarcation of these cities may be refused entry to prevent their illegal entry into Spain. The Law states that in any event, entry shall be refused in a manner that respects international human rights and international protection legislation by which Spain is bound, while applications for international protection shall be formalised in the places provided for that purpose at border crossings and shall be processed in accordance with the rules on international protection.
118. The application of this special regime has continued to raise concerns in relation to pushbacks at the borders of Ceuta and Melilla. On several occasions, the Commissioner and her predecessor have warned that, in practice, these changes to the Alien's Act would have legalised automatic collective expulsions of migrants and asylum seekers arriving in Ceuta and Melilla and that these made it

³² See Ministry of Inclusion, Social Security and Migration, *Ciudadanos ucranianos en España con documentación de residencia*, [Nota de análisis](#), 15 March 2023.

³³ Disposición final primera (1), Régimen especial de Ceuta y Melilla, Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana. See Chapter 2 on Freedoms of Expression and Peaceful Assembly for other concerns related to the implementation of the Law on Citizens' Safety.

impossible to assess the protection needs of migrants.³⁴ Accordingly, both in [2018](#) and [2022](#), on the occasion of reviews to the Law on Citizens' Safety, in her letters to Parliament, the Commissioner noted that the reform did not introduce clear guarantees against *refoulement*, including the right to apply for asylum, or against collective expulsions, nor did it uphold the right to effective remedies, irrespective of the way persons reach Spanish territory. The Commissioner recommended that an obligation be imposed on the authorities to rapidly provide law enforcement officials with clear and mandatory guidance on how to act in compliance with international human rights standards when intercepting migrants at the borders of Ceuta and Melilla.

119. The Commissioner notes that the Spanish authorities justify their approach to entries at the borders of Ceuta and Melilla by referring to the implementation of the ECtHR caselaw, in particular in the case of *N.D. and N.T. v. Spain*.³⁵ In that situation, the ECtHR had found that the prohibition of collective expulsion had not been violated although no individual assessment had been carried out before expelling individuals. The Grand Chamber held that the applicants had placed themselves in an unlawful situation when they deliberately tried to scale the border fence surrounding Melilla, as part of a large group and at an unauthorised location, taking advantage of their large numbers and using force, which created a clearly disruptive situation, difficult to control and endangering public safety. As such, they had chosen not to use legal procedures to enter Spain lawfully, meaning that the lack of an individualised procedure was the consequence of the applicants' own conduct.³⁶ In this regard, concerning the criteria set out in *N.D. and N.T. v. Spain*, the Commissioner had noted that the ECtHR seems to attach particular importance to the applicants' genuine and effective access to means of legal entry, in particular border procedures (alongside the possibility to apply for a visa or other authorisations at a consulate). Such access must go beyond theoretical possibilities and when this exists, but the applicant did not make use of it, the ECtHR will consider whether there were cogent reasons not to do so which were based on objective facts for which the respondent State was responsible.
120. Moreover, the Commissioner notes that, on 19 November 2020, the [Spanish Constitutional Court](#) considered that the Law on Citizens' Safety, including its amendment to the Aliens Act on the special regime of Ceuta and Melilla, was in line with Spanish constitutional doctrine and the ECtHR's case-law, particularly in light of *N.D. and N.T. v Spain*. In doing so, however, the Spanish Constitutional Court stressed the importance of its application to individual entries and the presence of certain safeguards provided for by the law, namely: the existing possibility of a judicial review of a rejection at the border; the need to ensure all the guarantees provided by national and international law when issuing a rejection decision at the border; and that Spanish authorities should pay special attention to particularly vulnerable categories of people, including those who appear to be minors (especially when they are not accompanied by their relatives), pregnant women, or those affected by serious forms of disability, notably caused by old age.
121. As found by the Venice Commission, "both judgments [of the ECtHR and the Spanish Constitutional Court] are "conditional", i. e. based on the assumption that other essential guarantees are in place (effective individual examination of asylum requests in specially allocated "entry points", judicial review of refusals, special attention to vulnerable categories of migrants, etc.)." The Venice Commission added that "These assumptions may be overly optimistic and may prove wrong in the circumstances of individual cases."³⁷

³⁴ See the Commissioner's predecessor [Op-ed Spain cannot legalise what is illegal](#), 2014; [Visit to Spain](#): Spain: Legislation and practice on immigration and asylum must adhere to human rights standards, 2015; [Statement](#), Spain: Commissioner concerned about adoption of amendment to the Aliens Act, 2015; [Letter](#) to the Minister of Interior of Spain, 2016.

³⁵ ECtHR, *N.D. and N.T. v. Spain*, applications 8675/15 and 8697/15, judgment [GC] of 13 February 2020.

³⁶ *Ibid.* para 231. See also the Commissioner's [Recommendation](#), *Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe's borders*, April 2022, pp. 27-29.

³⁷ Venice Commission, in its [Opinion](#) on the Law on Citizens' Safety of March 2021, para 87.

122. The Commissioner finds that appropriate safeguards against *refoulement* are still missing despite repeated requests from the Commissioner and her predecessor, and other human rights bodies, to put these in place. Furthermore, the Spanish Constitutional Court's requirements mentioned above for the rejections to be considered lawful appear not to be respected in practice as shown by the repeated incidents in Melilla and Ceuta.
123. Following her visit to Melilla and discussions with different interlocutors, the Commissioner considers that the assumption that essential guarantees are in place is not supported by the facts on the ground. In particular, she observes that a combination of several elements in Spain's current approach to migration at its borders with Morocco has led to a situation where no genuine and effective access to means of safe and legal entry and asylum exists.
124. The Commissioner was informed by civil society actors that asylum seekers who transit through Morocco may be prevented from leaving Morocco and seeking asylum in Spain as Moroccan authorities apprehend them before arriving to the official land border or at sea. This was also acknowledged by the Spanish prosecutor investigating the incident of migrants climbing the fences in Melilla on 24 June 2022, which led to the death of at least 23 migrants and many injured, with many reported to be missing. The prosecutor noted the difficulty faced by migrants, especially those of sub-Saharan origin, to access the Spanish side of Beni Enzar border post, since this implies first going through the border checks of the Moroccan police who *de facto* keeps these people away from the border.³⁸ Similar findings were mentioned by the Commissioner and her predecessor in 2015 and 2018.³⁹ This leaves certain groups of asylum seekers with no other effective option to enter the borders to seek protection with the relevant authorities other than by swimming or jumping the fence, risking one's life. In this connection, in an exchange between the Commissioner and the State Secretary for Security, it was made clear that most applications made to the Asylum Office of Melilla at the Beni Enzar crossing point are from those who enter the territory by irregular means. In this respect, the Commissioner draws attention to the Spanish prosecutor's findings following the events of 24 June 2022, noting that the promotion of measures that would improve access to means of legal entry, such as the development of the possibility to lodge asylum requests in embassies or consulates, as foreseen in Article 38 of Law 12/2009, or the real provision of access to the Asylum Office at the Beni Enzar border post in Melilla, could lead to a decline in number of attempts in jumping of the fences or persons trying to do so.⁴⁰
125. The Commissioner notes that concerns about Spain's practices of pushbacks, which involve apprehending people, including minors, who have managed to climb the border fences and immediately returning them, remains acute. As also found by the Venice Commission, "there is no official data on summary expulsions, since for the Spanish authorities these "rejections" happen outside of the Spanish territory and do not give rise to any administrative procedures. Given the manner in which those rejections are executed, no individualised treatment of the potential asylum seekers is possible."⁴¹ This is particularly worrying considering that most people who do manage to cross the fence and seek asylum are from countries with high rates of recognition of international protection and that many cases of vulnerability may not be detected in such circumstances. The Commissioner and her predecessor have received consistent information that pushbacks have at times been accompanied by excessive use of force carried out by the Spanish Guardia Civil.⁴² Other

³⁸ Diligencias Investigación n.º 1/2022, Fiscal de Sala Coordinadora de Extranjería, 22 de diciembre de 2022, p. 33.

³⁹ [Third party intervention](#) by the Council of Europe Commissioner for Human Rights: Applications No. 8675/15 and No.8697/15 *N.D. v. Spain and N.T. v. Spain*, 2015, and 2018 [updated version](#).

⁴⁰ Diligencias Investigación n.º 1/2022, Fiscal de Sala Coordinadora de Extranjería, 22 de diciembre de 2022, p. 33.

⁴¹ Venice Commission, in its [Opinion](#) on the Law on Citizens' Safety of March 2021, para 82.

⁴² See [Third party intervention](#) by the Council of Europe Commissioner for Human Rights: Applications No. 8675/15 and No.8697/15 *N.D. v. Spain and N.T. v. Spain*, 2015, and 2018 [updated version](#).

issues related to pushbacks concern migrants attempting to reach the Spanish territory by swimming or using boats include the interception at sea of these migrants by the Spanish authorities, who hand them directly to the Moroccan authorities.

126. The Commissioner expresses her concerns about the possibly hazardous but anticipated and, therefore, avoidable situation that the Spanish authorities' approach to border control creates. The events in Melilla on 24 June 2022 confirm this. According to the [preliminary conclusions](#) of the National Ombudsman, 470 people were returned to Morocco without any legal procedure being observed.⁴³ Allegations of lack of prompt medical assistance and the use of excessive force on the side of Moroccan authorities have also been reported.⁴⁴ In July 2022, in a [letter](#) addressed to the Spanish Minister of the Interior, the Commissioner urged the authorities to conduct an independent, full and effective investigation into the events leading to these deaths.⁴⁵ She notes that, on 22 December 2022, the prosecutor closed the preliminary investigations into the events, stating that no elements were found that would determine the commission of criminal offences and constitute failure to provide assistance during the general operation of 24 June 2022 and the subsequent rejection of migrants at the border by the Spanish authorities.⁴⁶
127. The Commissioner emphasises the absolute obligation of Spain to ensure that any person under its jurisdiction, when expelled, is not subjected to violations of their right to life under Article 2 ECHR, or to torture or inhuman or degrading treatment or punishment under Article 3 ECHR. Even when the Spanish authorities consider that a person should have used legal means of entry by seeking asylum at a border crossing point, the fact that this person has irregularly entered by climbing a fence, thus putting him or herself in that position, can never be a justification for exposing them to such violations. In this context, the Commissioner notes the consistent reports of the use of violence by Moroccan authorities against asylum seekers and migrants at borders, which may amount to situations of serious ill-treatment meeting the threshold of severity under Article 3 ECHR. Concerns about such treatment have been repeatedly raised and widely documented by international and national human rights actors including in the context of the tragic events of 24 June 2022 in Melilla.⁴⁷ Nevertheless, the current practice of immediate returns not only deprives people of an opportunity to apply for asylum, but eliminates any consideration of possible serious human rights violations as a result of such returns, while the treatment that returned persons are often subjected to by the Moroccan authorities is well-documented and is, or should be, known to the Spanish authorities.
128. The above-mentioned issues are not limited to Melilla. The Commissioner was also informed that, in the Autonomous City of Ceuta, border stops on the Moroccan side systematically target people based on ethnicity, leading asylum seekers to use dangerous routes to enter the territory. According to the [UNHCR](#), between 17 and 19 May 2021 more than 8,000 people, including 1,500 children, arrived at the Autonomous City of Ceuta by sea. It is reported that around 6,000 people were immediately rejected. In response to this sudden arrival of migrants in Ceuta, the Commissioner [drew attention](#) to the fact that, especially in such challenging situations, human rights must be protected, including by ensuring dignified treatment, access to asylum, protection of vulnerable people and adequate safeguards in case of expulsion.

⁴³ See also the Spanish Ombudsman's [specific recommendations](#) to the authorities.

⁴⁴ See Amnesty International, [Report](#) *They beat him in the head, to check if he was dead: Crimes under international law committed by Spain and Morocco at the Melilla border*, December 2022. See also the [documentary](#) *Death on the Border*, released by the BBC, in November 2022.

⁴⁵ The same call was made by UN experts to both the [Spanish](#) and [Moroccan](#) Governments on 13 July 2022.

⁴⁶ Diligencias Investigación n.º 1/2022, Fiscal de Sala Coordinadora de Extranjería, 22 de diciembre de 2022.

⁴⁷ For more details, see Amnesty International, [Report](#) *They beat him in the head, to check if he was dead: Crimes under international law committed by Spain and Morocco at the Melilla border*, December 2022 and the UN experts [Communication](#) to Morocco, on 13 July 2022; see also the [documentary](#) *Death on the Border*, released by the BBC, in November 2022.

129. Following this high number of arrivals at Ceuta's borders, the Commissioner notes that, in August 2021, the Ministry of the Interior initiated return procedures for those unaccompanied minors who had arrived in Ceuta. The National [Ombudsman](#) found that the return to Morocco of unaccompanied children was not in line with Spanish legislation and violated the United Nations Convention on the Rights of the Child. The Ombudsman expressed particular concern over the absence of a prior report from the child protection services and the public prosecutor's office. Others have expressed similar concerns including the [Spanish Ministry of Social Affairs and Agenda 2030](#), [UNICEF Spain](#) and numerous [NGOs](#). In this respect, the Commissioner observes that a [local court](#) in Ceuta halted the return to Morocco of nine unaccompanied children who had arrived in May 2021. In February 2022, [another local court](#) ordered the Minister of Interior to facilitate the return to Spain of those children who were illegally sent back to Morocco.

3.1.2 CO-OPERATION WITH MOROCCO

130. In her [letter](#) to the Spanish Minister of the Interior on the 24 June 2022 incident in Melilla, the Commissioner stressed that any investigation should also look at the wider circumstances and policies related to Spain's migration co-operation with Morocco, with a view to preventing future tragedies and ensuring that any policies in place do not violate human rights standards. She stated that co-operation in the area of migration control between Morocco and Spain reportedly led to coordinated actions between the two countries that may expose migrants and asylum seekers to the risk of human rights violations.
131. The Commissioner remains concerned that, to her knowledge, no concrete steps have been taken to ensure that co-operation in the field of migration and border control with Morocco prioritises human rights in compliance with Spain's international obligations, including ensuring genuine and effective access to asylum, the prevention of *refoulement*, the humane treatment of every individual regardless of legal status, and the observance of procedural safeguards in case of expulsion. Full transparency and accountability in relation to border control practices appears also to not have been strengthened.

3.2 ISSUES CONCERNING THE ASYLUM SYSTEM AND RECEPTION

3.2.1 ACCESS TO THE ASYLUM PROCEDURE

132. The Commissioner was informed that asylum seekers are faced with serious obstacles in accessing the asylum procedure throughout Spain. The reasons vary and depend on the Autonomous Communities where the asylum seekers reside. In some cases, long waiting times in obtaining the first appointment to apply for asylum are reported. Civil society actors stated that a year might pass between the online registration of the application and the interview appointment. In the meantime, the asylum seeker would have very limited access to services. In particular, access to health care would be limited to urgent treatment. It is reported that, in some Autonomous Communities, the online application system to register the application does not provide for appointments anymore, leaving the asylum seeker with no proof of their attempt to register.
133. Asylum seekers reportedly receive no adequate information or legal assistance when they try to access the asylum procedure. It is reported that, on a number of occasions, police officers tend to ask for various types of documentation in the context of the asylum procedure that are not required by law, thereby impeding effective and prompt access to asylum. There are also issues concerning the early identification and referral of vulnerable individuals among asylum seekers, which reportedly tend to depend on the training and sensitivity of the person in charge. The Group of Experts on Action against Trafficking In Human Beings of the Council of Europe (GRETA) raised a number of issues relating to the early identification of victims of trafficking, their assistance and

protection, including obstacles in obtaining international protection.⁴⁸ In this respect, the Commissioner notes that, in November 2022, the government has [approved](#) the bill for a new draft Comprehensive Law to combat trafficking and exploitation of human beings, which envisages some measures concerning identification and referral of possible victims of trafficking.

134. In the Canary Islands, in a context of high numbers of arrivals between 2020 and 2021 and health restrictions stemming from the COVID-19 pandemic, civil society actors expressed concerns about obstacles in accessing asylum procedures, namely a lack of information and legal assistance, backlogs, the absence of a vulnerability assessment, arbitrary detention and a lack of adequate protection for the most vulnerable people, such as unaccompanied children and women victims of trafficking. In 2021, the [National Ombudsman](#) reported similar findings, including the insufficient coordination between the various competent bodies of public administrations; the inadequacy of coastal reception infrastructure (CATEs) and a shortage of personnel trained to identify vulnerable persons, which would speed up the immediate transfer to appropriate facilities; the shortage of centres for the humanitarian reception of vulnerable persons; and structural weaknesses in the management and application of procedures applicable to foreign nationals. The Commissioner was informed that the situation in the Canary Islands has recently improved in certain aspects.

3.2.2 RECEPTION

135. The Commissioner observes that the Spanish reception system is separated from the unfolding and outcome of the asylum procedure. The system foresees an 18-month period of accommodation, assistance and financial support, reaching a maximum of 24 months for vulnerable persons.⁴⁹ Only four reception facilities for asylum seekers (known as Refugee Reception Centres, CAR) are directly managed by the State Secretary for Migration of the Ministry of Inclusion, Social Security and Migration (MISSM), which are collective centres. All other reception centres for asylum seekers are run by NGOs, through funds granted by the State Secretary for Migration.
136. During his 2020 [visit](#), the UN Special Rapporteur on extreme poverty noted that access to and discrimination in the allocation of housing constitutes a serious obstacle for refugees and asylum seekers, who often end up in precarious and overcrowded situations. He noted that this limited the enjoyment of their other rights. The Commissioner was also informed that the combination of the lack of available social housing, the insufficient financial support for renting, strict requirements and criteria in rental contracts as well as discrimination exposes many asylum seekers and beneficiaries of protection to extremely vulnerable economic conditions and in some cases leads to destitution. Some of them face homelessness and are accommodated in homeless shelters. Moreover, they must prove at least one year of legal residence in Spain before they can apply for the Minimum Living Wage (MLW). It has been reported that the exclusion of people with undocumented status and those with less than one year of residence from the MLW leads to the social exclusion of some of the most vulnerable groups.
137. As regards reception of migrants in Melilla, the Commissioner notes that, as of 25 November 2022, very few migrants are actually staying in the Migrant Temporary Stay Centre (CETI). She welcomes the decisions of the Spanish Supreme Court of July 2020 confirming that persons who have requested asylum in Ceuta or Melilla have the right to freedom of movement throughout Spain. In September 2020, in a [letter](#) to the Ministers of Home Affairs and for Inclusion, Social Security and Migration, the Commissioner had stressed that transfers to the mainland, of asylum seekers and vulnerable persons in particular, should be extended in order to alleviate the pressure on Melilla's limited reception capacity and provide more human rights compliant options. The Commissioner

⁴⁸ See Group of Experts on Action against Trafficking in Human Beings (GRETA), [Report](#) concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain, 2018.

⁴⁹ AIDA, Country Report on Spain (April 2022): [Reception Conditions](#).

positively notes that the majority of asylum seekers have either been transferred to the mainland or have moved there using their own means.

138. The Commissioner remains, however, concerned about reports from civil society actors that, although there is currently capacity of reception available at the CETI of Melilla, migrants of Moroccan nationality are not allowed to reside in the centre, including families, leaving many of them at risk of homelessness. In this connection, the lack of clear and defined criteria of entry in the CETI reportedly gives the authorities broad discretion in their decisions. The Commissioner was also informed about difficulties for undocumented migrants in accessing health care and social services. Issues as regards the registration in the Civil Registry of undocumented Moroccan minors have also been reported.
139. In the Canary Islands, undignified reception conditions prolonged over time have also been reported particularly between 2020 and 2021 in connection with high numbers of arrivals. In this respect, the Commissioner welcomes the Canary Islands Action Plan ([Plan Canarias](#)) of the Minister of Inclusion, Social Security and Migration, which aims at ensuring comprehensive care services for migrants arriving on the islands. She notes that the implementation of these measures is currently ongoing. According to the National Ombudsman's Office, in [October 2022](#), concerns remained and conditions of reception varied depending on each island, though improvements were noted in comparison to 2020.

3.2.3 MIGRANT CHILDREN

140. As regards migrant children, according to [UNHCR](#), in 2021, some 4,173 children were estimated to have arrived by sea, a 7% increase compared to 2020 (3,890). Of these, 2,856 were unaccompanied minors (68%), 14% fewer than in 2020 (3,340). The Commissioner welcomes the adoption of [Organic Law 8/2021](#), of 4 June, on the comprehensive protection of children and adolescents against violence, strengthening the protection system for children, including asylum applicants. She also notes that an amendment ([Royal Decree 903/2021](#)) modifying the Regulation of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, is aimed at strengthening the rights of unaccompanied children and their integration. She was informed, however, that the decentralisation of the system for the protection of unaccompanied children makes it difficult to pursue a harmonised level of protection across the country.
141. The Commissioner was also informed that concerns remain about the lengthy age assessment procedures and obtaining documentation for these minors, particularly when reaching adulthood. She notes that, for years, the UN [Committee on the Rights of the Child](#) has been demanding Spain to adapt the age assessment procedure to international standards. The Spanish Ombudsman and [NGOs](#) have made the same calls and stressed that the age assessment process should be overseen by judges, not the Prosecutor's Office, and that the best interests of the child should be given primary consideration in all cases, in accordance with international standards on the rights of the child. In this respect, the Commissioner welcomes that, in April 2022, a [review](#) of the age determination procedure was proposed. However, the Commissioner was informed by the Minister of Justice that the proposal is currently stalled pending the Spanish General Council of the Judiciary's submission of its opinion on the proposal.⁵⁰
142. The Commissioner also notes that unaccompanied migrant minors are placed in specific shelters. She welcomes the efforts in providing adequate accommodation and services, including health and education, to those minors sheltered in La Purísima centre, in Melilla, which she visited. She also

⁵⁰ [Press statement](#): *La ministra de Justicia se reúne con la Comisaria de Derechos Humanos del Consejo de Europa*, 24 November 2022.

commends the staff working in the centre for their efforts in assisting these children. She was, however, concerned about the rather poor conditions of the premises and the precarious employment conditions of those assisting the minors in the Centre.

143. In 2021, [UNICEF](#) found that regional and local authorities in the Canary Islands had made great efforts to improve the adequacy of reception conditions for unaccompanied migrant children. However, it stressed the need for contingency planning at the state level, for strengthening the capacities of the institutions involved, including the National Police and the Juvenile Prosecutor's Office, and for transfers to the mainland to avoid the overcrowding of the reception system. According to the National Ombudsman's Office, in [October 2022](#), concerns remained and the conditions of reception for unaccompanied children in the Canary Islands varied depending on each island, though improvements were noted in comparison to 2020, particularly in las Palmas de Gran Canaria.

3.3 CONCLUSIONS AND RECOMMENDATIONS

144. The Commissioner acknowledges that the geographical situation of the Autonomous Cities of Ceuta and Melilla makes them one of the main access routes for migratory flows towards Europe. She understands that Spain is often confronted with complex situations in respect of migrants and asylum seekers' arrivals at these borders and the challenges it faces to address these. She also recognises the efforts made by Spain in this respect, as well as in relation to rescue operations at sea. The Commissioner stresses that the situation at the borders between Morocco and Spain proves once again the urgent need to improve responsibility-sharing and solidarity measures between Council of Europe member states. At the same time, in facing these challenges, it is imperative that Spain protects and safeguards the human rights of refugees, asylum seekers and migrants, and respects its international obligations in the field of international human rights and refugee law.
145. In the view of the Commissioner, to meet these obligations, the current approach to access to the territory and asylum in Ceuta and Melilla must be overhauled. The Commissioner emphasises that pushbacks must stop and that a practice which reconciles border control and human rights must be put in place. She observes that the automatic and general application of the exception to the requirement to carry out an individual assessment in all cases in which people try to enter irregularly is not tenable. This stems from the lack of genuine and effective access to asylum at official entry points, and from the fact that such a practice leaves no space for adequate consideration of the risks to which people are exposed upon return to Morocco, despite well-documented concerns in this regard.
146. In particular, the Commissioner reiterates that the amendments to the Aliens' Act, introduced by the Law on Citizens' Safety, fails to provide clear guarantees against *refoulement* and collective expulsions as well as adequate safeguards or the right of every person to seek asylum, irrespective of the way they reach Spanish territory. She therefore urges the Spanish authorities to provide, without delay, the Spanish border authorities with clear and mandatory guidance on how to act in compliance with international human rights standards when intercepting migrants at the borders of Ceuta and Melilla, including at sea. Such guidance should comprise an explicit prohibition of summary expulsions and of *refoulement*. It should also highlight the procedural guarantees to be respected, including the right to be identified, to have one's international protection needs assessed, to have access to an interpreter, a lawyer and medical assistance, and to judicial review. In this respect, she calls on Spain to take due account of relevant Spanish national legislation and jurisprudence, in particular the Spanish Constitutional Court's decision of 19 November 2020, and the body of recommendations provided by the National Ombudsman in this respect.

147. The Commissioner reiterates that ensuring access to safe and legal routes is a crucial element of a human rights compliant approach to addressing irregular migration and preventing people from undertaking dangerous journeys. The Commissioner finds that if measures to improve access to legal and safe channels to seek asylum, including real access to the Asylum Office at border posts in Ceuta and Melilla, were made effective, migrants' attempts to climb the fences could be reduced, along with the harmful consequences for migrants of such actions. In this respect, she underscores the importance of cooperating with UNHCR and relevant civil society organisations working on the protection of refugees and asylum seekers to ensure a human rights compliant approach in migration management.
148. The Commissioner underlines that the recommendations made in Chapter 2 of this report (paragraphs 106-109), addressing the use of force by law enforcement officials, including the use of non-lethal weapons, in the context of assemblies, should be taken fully into account also in the context of border management. Following consistent reports on the use of excessive force by the Spanish border authorities on some occasions of border control, the Commissioner reiterates that any excessive use of force by law enforcement officials must be fully and effectively investigated and those found responsible must be adequately sanctioned.
149. In view of the severity of the events at the border of Melilla with Nador on 24 June 2022 and previous tragedies, the Commissioner calls on the authorities to examine the wider circumstances and policies related to Spain's migration co-operation with Morocco, including the protocols activated with the Moroccan authorities during border crossing's attempts. Such a review should lead to the suspension of specific co-operation activities that, directly or indirectly, contribute to human rights violations. It should also be used to prevent future tragedies and ensuring that any policies in place do not violate human rights standards.
150. As stressed in her 2022 letter to the Spanish Minister of Interior, the Commissioner reiterates that while all states have the right to control their borders, and to engage in co-operation with other states in doing so, this must be done in full compliance with all applicable international human rights standards. In particular, she highlights the importance of enhancing transparency and accountability in relation to border control practices. This includes making human rights risk assessments before engaging in such activities, which should look, *inter alia*, at the impact co-operation activities may have on the right to life of migrants and asylum seekers, freedom from torture or inhuman or degrading treatment, protection from *refoulement*, and the rights to liberty and private and family life. Risk mitigation strategies should also be implemented, setting out the steps that will be taken to ensure that actual human rights violations do not materialise. These must be complemented by monitoring mechanisms, composed of independent and impartial actors, which continuously assess the impact of any activities implemented on the human rights of those concerned. Furthermore, an effective system of redress should be established for those who, nonetheless, consider that the enjoyment of their rights has been affected by such co-operation activities. Details of the activities foreseen, risk assessments, risk mitigation strategies and the results of monitoring should be made public so that they can be subject to scrutiny. In this respect, the Commissioner urges the authorities to take due account to the recommendations set in her 2019 [Recommendation](#) on saving lives at sea, its 2021 [follow-up report](#), and her 2022 [Recommendation](#) on preventing and ending pushbacks.
151. The Commissioner observes that once within the Spanish territory, asylum seekers face several issues that impede prompt and effective access to the asylum procedure and the protection of vulnerabilities. She calls on the authorities to strengthen the asylum system so as to allow swift access to protection to all persons in need and to guarantee that material and human resources, including adequate numbers of trained police officers, lawyers and interpreters, are available.

152. The Commissioner recommends that the Spanish authorities improve current processes of identifying and assisting vulnerable people in need of special protection. She urges the authorities to pay particular attention to the specific needs of victims of violence and human trafficking, in particular women and children, including unaccompanied children, and to ensure that the protection provided is fully in line with the European Convention on Human Rights and the Council of Europe Convention on Action against Trafficking in Human Beings and related recommendations by GRETA. In this respect, she welcomes the proposal of a bill providing better protection of victims of trafficking.
153. The Commissioner welcomes the efforts made by the Spanish authorities in recent years to enhance the protection and reception of refugees, asylum seeker and migrant children and calls on them to ensure that the specific needs of children, particularly when unaccompanied, are considered at all stages in a manner that gives primary consideration to their best interests. Age assessment procedures should be conducted in line with the Council of Europe Committee of Ministers [Recommendation](#) CM/Rec(2022)22 on human rights principles and guidelines on age assessment in the context of migration, the Parliamentary Assembly's [Resolution](#) 2195 (2017) on Child-friendly age assessment for unaccompanied migrant children and the Council of Europe [Guide](#) on age assessment for children in migration.
154. The Commissioner observes the difficulties in accessing housing and, for some groups of migrants, also health services. She calls on the authorities to continue efforts to improve reception conditions throughout the territory, including in the Canary Islands and the Autonomous Cities of Ceuta and Melilla. She urges the authorities to effectively protect the right to adequate housing and right to health of those migrants, asylum seekers and refugees who are no longer accommodated in reception centres, including by pursuing cooperation with the Autonomous Communities, with a view to addressing the shortcomings in the implementation of relevant instruments, and to avoid homelessness, destitution, and social exclusion.