REPORT OF CIVIL SOCIETY ORGANISATIONS TO THE SEVENTH PERIODIC REPORT OF SPAIN TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE

(JULY 2023)

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Sanfermines 78: gogoan
Memoria Libertaria CGT
Plataforma Vasca contra los crímenes del franquismo
Asemblea Republicana Viguesa
Asociación Viguesa pola Memoria Histórica del 36
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[2] Sanfermines 78: gogoan, Libertarian Memory CGT, Basque Platform against the crimes of Franquism, Viguesa Republican Assembly, Viguesa Association for the Historical Memory of 1936;
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Familiares de Marinos Vitimas Base Naval Ferrol
Familiares en Defensa de San Rafael Málaga
Todos los niños robados son también mis niños
Associació Catalana d'Expresos Politics del Franquisme

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1. ARTS. 1 AND 4 CONVENTION: ON THE CRIMINALISATION OF TORTURE IN THE SPANISH CRIMINAL CODE

1.1. ABSENCE OF "INTIMIDATION" AS PART OF THE TELEOLOGICAL ELEMENT IN THE OFFENCE OF TORTURE IN ART. 174 CC

The definition of the crime of torture in Art. 174 Criminal Code does not meet the criteria set out in Art. 1.1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment with regard to the teleological element ("intimidatory torture"),

Argumentation:

1. Since the last concluding observations and the last request for information made by the Committee, the definition of the crime of torture in the Criminal Code has still not been brought into line with the definition of the Convention, which *de facto* means that the Committee's recommendations are still not being complied with.

Article 174 of the Criminal Code still does not include, among the purposes of torture, that of "intimidating or coercing that person or others". The Spanish government points out[3] that this purpose is not included because "crimes against liberty", which include "intimidation or coercion", are included in another Title of the Criminal Code.

2. The government seems to ignore the fact that the answer given confuses a criminal offence in itself (meaning that they refer to the crime of coercion, the classification of which in the Criminal Code has nothing to do with the subject we are dealing with) with a specific volitional element - specifically, a concrete intention - in a criminal offence that protects, in fact, another protected legal right (the right to integrity) . However, the fact that Title VII of the Criminal Code regulates crimes against moral integrity does not in any way preclude the incorporation of an intimidatory teleological element into it, especially when the element does in fact appear in other criminal offences, is found in other Titles and protects other legal assets[4] .

3. The absence of this purpose among the elements of the criminal offence prevents, for example, the prosecution of acts of harassment against the migrant population in an irregular administrative situation that seek, among other purposes, to convey a persecutory message to

[3] Seventh periodic report of Spain due in 2019 under article 19 of the Convention, 13 March 2020, CAT/C/ESP/7: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FESP%2F7&Lang=en para. 5.

[4] Thus, art. 178.2, which regulates sexual aggression (in Title VIII, "Crimes against sexual freedom"), includes those produced "*using violence, intimidation or abuse of a situation of superiority or vulnerability of the victim*"; or, to cite another, in art. 202 (Title X, "Breaking and entering, domicile of legal persons and establishments open to the public"), punishes breaking and entering with "violence or intimidation"; in any case, there are numerous crimes in which the element of intimidation, as a means or as a purpose, appears, beyond "crimes against liberty".

the entire community that fails to comply with the administrative requirements established for regularisation[5] .

Similarly, it prevents the effective investigation of cases where torture is used to intimidate the victim in order to stop them from taking images of police actions[6] .

Recommendations

1. Amend Article 174 of the Criminal Code, bringing it into line with Articles 1 and 4 of the Convention to allow the offence to include the intimidatory purpose in the teleological element.

1.2. SPANISH LAW STILL DOES NOT EXPRESSLY PROVIDE THAT THE ACT OF TORTURE CAN BE COMMITTED BY "*ANOTHER PERSON IN THE EXERCISE OF PUBLIC FUNCTIONS, AT HIS INSTIGATION, OR WITH HIS CONSENT OR ACQUIESCENCE* ".

The definition of the crime of torture in Art. 174 Criminal Code does not meet the criteria set out in Art. 1.1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment with regard to the perpetrator.

Argumentation:

1. Although Art. 1 of the Convention against Torture clearly establishes the perpetrator of the offence, identifying it as "by or at the instigation of or with the consent or acquiescence of a

[5] These facts were documented by Rights International Spain and the UN Decade for People of African Descent Implementation Team in their report on police actions during the state of alarm over the COVID-19 pandemic in 2020, which states that "*From the information gathered from online questionnaires, more than 70% of the people who reported racial profiling (33 out of 47) were subjected to police brutality after being identified*". The report documents numerous cases of police brutality during ethnic profiling raids, in most cases implemented on the assumption that under-reporting among undocumented migrants is common, for fear of the consequences for the complainant (not unfounded fear: El Salto Diario 15.02.2023): "Burjassot police push for the expulsion of a migrant who came to report"": https://www.elsaltodiario.com/racismo/policia-burjassot-propone-expulsion-un-migrante-acudio-denunciar). Rights International Spain and UN Decade for People of African Descent Implementation Team (2020): The Covid-19 health crisis: racism and xenophobia during the state of alarm in Spain. https://rightsinternationalspain.org/wp-content/uploads/2022/03/Racismo-y-Xenofobia-durante-el-estado-de-alarma.pdf. P. 14-16. Regardless of the final number of proceedings that could be initiated for acts such as those denounced, the absence of an "intimidating" purpose in art. 174 PC leads to proceedings being dismissed.

[6] In a case that combines both intimidatory and discriminatory torture, the Nigerian-American Chidi Irondi denounced having been beaten and mistreated in 2020 by police officers who proceeded to arrest him after observing that he was recording a disproportionate police action, subject to administrative sanction by art. 36.23 of the LO 4/2015 of 30 March on the Protection of Public Security. Although Mr. Irondi denounced the facts, pointing out that they waited for him at the door of his house before arresting and assaulting him, and an Istanbul Protocol was provided that accredited the impacts, the case was dismissed by the justice system as it was considered that there was no evidence of criminal behaviour on the part of the agents. This case was denounced by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Working Group of Experts on People of African Descent; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25760, despite the Spanish government's denial of the facts https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=36027.

public official or other person acting in an official capacity", Art. 174 CC still does not foresee that it can be committed by "another person acting in an official capacity".

2. The government points out in its replies[7] that as the Criminal Code includes a broad definition of civil servant in art. 24, this would include "*directors of penitentiary centres, juvenile centres, migrant detention centres or any of their staff*", which are also included in art. 174.2. Furthermore, it adds that the definition of "*instigator*" and "*necessary co-operator*" in art. 28 CC would include cases of "*instigation*" and that the regulation of art. 176 CC would include cases of "*acquiescence*".

3. The truth is that art. 176 CC penalises "*the authority or official who, failing in the duties of their position, allows other persons to carry out the acts foreseen*" in the previous articles, without it being clear from the criminalisation whether only the cases of acquiescence or also those of inducement are included.

4. The truth is that, using the most recent data provided by the Attorney General's Office in 2021, in the 100 cases in which convictions were handed down for "crimes against moral integrity" (subtracting the complaints for gender violence under art. 173.2 CC), none were for "omission of the duty to prevent torture[8] ". The same applies for 2020[9] , with no conviction for art. 176 CC; in 2019, only one conviction for art. 176 CC out of 107 cases convicted[10] ; there is no data published for 2018, and in 2017 there is no conviction for 176 CC out of the 88 cases convicted. All this suggests that either the offence occurs infrequently or there are difficulties in investigating it.

5. Furthermore, the possibility that the perpetrator is another person in the exercise of public functions is not automatically presumed from the answer provided, as it is not clear whether private security personnel accused of assault in juvenile facilities can be considered to be guilty of the criminal offence. In the documented cases in which criminal investigations are instituted, the charges are brought for crimes of injury and not for crimes against moral integrity[11].

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[7] Seventh periodic report of Spain due in 2019. Para. 4.

[8] State Prosecutor's Office: Crime Compendiums - Year 2021 https://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/3003%20Actividad%20del%20Ministerio%20Fiscal/Compendios_2021.xlsm

[9] State Prosecutor's Office: Crime Digests - Year 2020: https://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/3003%20Actividad%20del%20Ministerio%20Fiscal/A%C3%B1o%20anteriores/Compendios_2020.xlsm

[10] State Prosecutor's Office: Crime Digests - Year 2019: https://www.poderjudicial.es/stfls/ESTADISTICA/FICHEROS/3003%20Actividad%20del%20Ministerio%20Fiscal/A%C3%B1o%20anteriores/Compendios_2019.xlsm

[11] This is the case of three private security guards at the first reception centre for unaccompanied minors in Hortaleza, in Madrid, where the aggression is classified by the judge as a "crime of injury" and not against moral integrity, as requested by the Fundación Raíces: Cadena SER (23.01.2017): "A juicio 3 vigilantes de seguridad del centro de menores de Hortaleza": https://cadenaser.com/ser/2017/01/22/sociedad/1485110003_176296.html These events are recurrent in centres such as the one mentioned: El Español (17.01.2019): "Los guardias nos atacan con porras eléctricas": racismo y agresiones en centros de menores": https://www.elespanol.com/espana/politica/20190117/guardias-porras-electricas-racismo-agresiones-centro-menores/368964619_0.html The Raíces Foundation has denounced in its 2020 report: "50 episodes of physical and psychological violence, in which 55 children report having suffered aggressions at the hands of security guards, educators or members of the State Security Forces and Corps, in the context of their stay in resources of the child protection system (centres, residences or foster homes) of the Community of Madrid". On page 79 of the report they detail the difficulties in charging private security guards with crimes against moral integrity. Fundación Raíces:

6. The sheer confusion that these different degrees of participation generate, not in the criminal offences themselves, but in their concrete judicial application, should be enough to prompt clarification on this issue by including the requested wording in the definition. Not only does it not do so, but it chooses instead to maintain the complex framework of assumptions in its description, rather than modify the criminal offence.

Recommendations

1. Amend Article 174 of the Criminal Code, bringing it into line with Article 1 of the Convention, to include "another person in the exercise of public functions, at his instigation, or with his consent or acquiescence" in the active subject of the criminal offence.

2. ART. 2 CONVENTION: LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL MEASURES TO PREVENT ACTS OF TORTURE

2.1. (INTERNAL) INVESTIGATION OF COMPLAINTS OF EXCESSIVE USE OF FORCE BY STATE SECURITY FORCES AND BODIES (SSFB)

2.1.1. Use of highly injurious and/or lethal riot control materials

Argumentation:

1. The use of *rubber bullets* by State Security Forces and Corps and other kinetic energy riot control agents involves the use of highly injurious and potentially lethal material, which is also often used inappropriately and is likely to result in ill-treatment or torture of the persons affected.

It should be noted that, although the improper use of these projectiles involves actions by public officials that could constitute crimes against moral integrity, the mere use of uncontrollable material does not *per se* allow for a "proper" use, so it is understood that these highly injurious and potentially lethal weapons should be banned from the Spanish legal system.

2. The former Special Rapporteur on torture, Nils Melzer, in his July 2017 report (A/72/178) argued that the prohibition of torture and other cruel, inhuman or degrading treatment or punishment is not limited to acts committed against persons deprived of their liberty, but "also

"Violencia institucional en el sistema de protección a la infancia" (July 2020): https://www.fundacionraices.org/wp-content/uploads/2016/03/2020-Informe-Violencia-contra-la-Infancia-en-el-sistema-de-protecci%C3%B3n.pdf Pg. 76 et seq.

covers excessive police violence, for example, at the time of arrest and during the control of public order"[12]. He further recalled that the same Human Rights Council has previously expressed its concern about the use of torture and other cruel, inhuman or degrading treatment against persons exercising their freedoms of peaceful assembly, expression and association (Resolution 25/38 of 2014)[13] . Thus, the former rapporteur insisted that the concept of "intentionality" in international law does not necessarily imply a desire to cause pain or suffering, but the fact that it is "*foreseeable that the use of force would cause such pain or suffering in the natural course of events*". So, "*if you use a kind of weapon that somehow becomes uncontrollable*", he warned, "*you are deliberately or consciously taking the risk that basically that kind of effect will occur*"[14] . In this sense, he recalled the obligation of states to prevent this type of act, which implies legislating, but also training and instructing on how a weapon can or cannot be used as well as on the restrictions on its use, as it could constitute a crime of torture or other cruel, inhuman or degrading treatment.

3. Spain maintains the use of *rubber bullets by the* State Security Forces and Bodies (SSFB) (National Police and Civil Guard), both in the context of peaceful protests for dispersal purposes and in the context of border operations. This is despite the fact that the autonomous parliaments of Catalonia, the Basque Autonomous Community and Navarra, which have their own competences in security matters, agreed to suspend these projectiles between 2014 and 2017 due to their serious impact on the exercise of fundamental rights. Between 2000 and 2020, human rights organisations have counted at least one person killed by the direct impact of a rubber bullet, while eleven others have lost the sight of an eye, in addition to documenting other serious injuries such as broken vertebrae and ribs, and the amputation of the spleen and a testicle[15] . Their use was also documented in 2014 against migrants seeking to swim to Tarajal beach (Ceuta) and in the massacre in Melilla on 24 June 2022.

4. Kinetic energy projectiles are prone to an unstable trajectory, meaning that these weapons are inaccurate when fired or launched from a distance. This means an increased possibility of hitting more vulnerable parts of the body or causing unintended injuries to third parties[16]. In addition, the shape and material of rubber bullets cause them to ricochet on impact, thus increasing the randomness of the direction of the projectiles. Therefore, the use of rubber bullets implies a potentially indiscriminate and highly dangerous use of force. In the context of judicial proceedings, it has been noted that several officers of the Police Intervention Units (UIP) of the National Police have stated that the indications and instructions on the use of this projectile are precisely that they should be fired with a prior ricochet. This statement is corroborated by images of several public order interventions, although on occasions the shot is also fired directly.

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[12] Nils Melzer, *Use of Force outside Detention and Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (United Nations, 20 July 2017), P. 15, para. 34.

[13] Human Rights Council, Resolution 25/38 *The promotion and protection of human rights in the context of peaceful demonstrations* (United Nations, 11 April 2014).

[14] Nils Melzer, *Addressing police brutality as a form of torture* (World Organisation Against Torture, 24 March 2021), accessed March-May 2021, https://www.facebook.com/events/932644077510074/.

[15] Iridia and Novact, *Stop Rubber Bullets (*Barcelona, June 2021), https://iridia.cat/wp-content/uploads/2021/06/Informe-Balas-de-Goma_V2.pdf

[16] International Network of Civil Liberties Organisations (INCLO) and Physicians for Human Rights (PHR). *Covert Lethality* (INCLO, 2017), www.inclo.net/pdf/lealtad-encubierta.pdf

5. In the mark of the legislative process to reform Organic Law 4/2015 on Citizen Security, the prohibition of rubber bullets was one of the central axes of the negotiations between the parliamentary groups. However, the reform was not sufficiently supported and the ban on rubber bullets did not succeed. During the negotiation period, two hundred state and international human rights organisations signed a manifesto in favour of the ban, which was delivered by letter to the Minister of the Interior, Fernando Grande-Marlaska, and which receives no response[17] .

6. The autonomous communities of Catalonia, the Basque Autonomous Community and Navarra have replaced rubber bullets with *foam* bullets. In Catalonia, their use, in force since 2010 by the Mossos d'Esquadra, has caused at least five serious injuries: three loss of an eye, one cranioencephalic traumatism and the amputation of a testicle, equating their impacts to those of rubber bullets. At the same time, in the context of judicial proceedings, senior officers of the Mossos d'Esquadra have declared that they are not precision weapons, manner in which they were presented at the time of their adoption[18] . In the conclusions of the Study Commission on the Police Model, the Catalan Parliament urged the Catalan government to urgently withdraw the SIR-X *foam* projectile, the most harmful of the two currently used by the force (SIR and SIR-X)[19]. However, to date, the Catalan government has not announced any concrete measures to implement this measure.

7. The **traceability mechanisms for less lethal weapons**, especially kinetic energy impact projectiles - such as rubber bullets or *foam* projectiles - are not sufficiently effective, nor do they make it possible to clearly establish which agent used them, where and under what circumstances, preventing proper accountability. On only two occasions has it been possible to identify the perpetrator of the shooting in criminal proceedings; the rest of the cases have gone unpunished. In both cases, the identification was made by human rights organisations, after hours of viewing images of the events and independent experts. In both cases, the police forces responsible (National Police[20] and Mossos d'Esquadra[21]) stated in the respective judicial proceedings that it was not possible to determine who was responsible for the shooting.

8. Bad practices in the **use of police fenders or batons** have been documented on several occasions, as they have been used to hit from the above and to impact vital areas of the body, such as the head, which contravenes international recommendations on the matter. Their unregulated use is also noted. Although most of the protocols are not public, the Mossos

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17 Iridia, "Un total de 200 entidades piden al Gobierno y a los grupos parlamentarios la prohibición de las bales de goma", 28 September 2022, https://iridia.cat/es/un-total-de-200-entidades-piden-al-gobierno-y-a-los-grupos-parlamentarios-la-prohibicion-de-las-bales-de-goma/.

18 Iridia, *Institutional Violence Report 2022* (Barcelona, April 2023). Pp. 42-45, https://iridia.cat/es/Publicaciones/informe-sobre-violencia-institucional-2022/

19 Official Gazette of the Parliament of Catalonia, Report on the Conclusions of the Study Commission on the Police Model, BOPC No. 460, 20 December 2022, https://www.parlament.cat/document/bopc/316366043.pdf#page=98

20 Iridia, "India identifies agent who shot Roger Español on 1-O," 19 June 2019, https://iridia.cat/es/iridia-identifica-al-agente-que-disparo-a-roger-espanol-el-1-o/.

21 Públic, "Identificado el antidisturbio de los Mossos que hirió a un joven de un disparo de foam en 2018", 8 June 2023, https://www.publico.es/public/identificat-l-antiavalot-dels-mossos-ferir-jove-amb-tret-foam-2018.html?utm_medium=Public&utm_source=Twitter#Echobox=1686224574

d'Esquadra, *Instruction 16/2013, of 5 September, on the use of weapons and tools for police use* is publicly available[22]. It establishes that their use is limited to one or two short, dry blows, which must be made parallel to the ground and on muscularly protected parts of the lower trunk of the body. It is important to note, that following the implementation of 360 degree identification (front, back and sides of the helmet) for riot police officers of the Mossos d'Esquadra in Catalonia, there has been a decrease in the use of police batons outwith regulatory and international standards. However, this practice continues to be documented both in Catalonia and in the rest of Spain.

Recommendations:

1. Ensure that all police weapons and tools have a protocol for use that prevents law enforcement officials from using them in a manner contrary to the law and international principles and recommendations to commit acts of torture or other cruel, inhuman or degrading treatment.

2. Prohibit the use of riot control equipment, the use of which is uncontrollable and therefore may constitute a crime of torture or other cruel, inhuman or degrading treatment, as in the case of rubber bullets.

2.1.2. Lack of clear and binding rules and lack of access by civil society to existing regulations on the use of force

Argumentation:

1. No police force provides public access to its protocols, guidelines or internal instructions governing the use of force and police tools and weapons. This lack of transparency, which is generally justified for reasons of public and national security, hinders proper accountability, and prevents public control of the health risks and the exercise of rights of certain weapons. Only in the case of the Mossos d'Esquadra are six guidelines publicly available, although some of them are incomplete.

2. **In the case of local police forces**, it is also up to the municipalities to specifically regulate the use of force and police weapons by means of regulations and orders, in accordance with the state and autonomous community framework. Given that there are 8,131 municipalities in Spain, **the heterogeneity is evident**, with a large number of local police forces that do not even have specific disciplinary regulations or their own regulations on weapons, their incorporation process and their rules of use.

[22] Available at: https://mossos.gencat.cat/web/.content/home/01_els_mossos_desquadra/eines_policials/doc/Instruccio-16_2013-de-5-de-setembre-sobre-us-darmes-i-eines-policials.pdf

3. The **regulations governing the use of rubber bullets by** National Police and Civil Guard officers are neither public nor accessible. Their use is barely covered in the *Circular on the use of riot control equipment*, dated 3 September 2013 and Topic 13 of the *Manual for Updating Police Intervention Units*. The 2013 Circular mentions that rubber bullets may be used under the terms of the protocol on "progressive use of means", referring to a document that the Ombudsman himself has warned does not exist.

4. The analysis of the **regulations on the use of rubber bullets**, conducted by the specialised organisation *Omega Research Foundation*, concludes that the Spanish threshold for the use of these projectiles is too low, given that international standards have much more precise requirements. The *United Nations Guide on the Use of Less Lethal Weapons in Law Enforcement* (2021) requires that there be an imminent threat of injury for their use to be permissible. In contrast, in Spain, their use is permitted even in situations where there is no risk to persons, but rather damage to private property, and their use is allowed for dispersal purposes. On the other hand, the report notes that the use of the term "approximately" to qualify the permitted distances from which shooting is allowed is unclear. This could make it difficult to hold an officer accountable for acting outside the established parameters. The organisation also finds the omission of a reference to a "point of aim or expected impact" alarming. This is particularly relevant as international standards specify that they should not be used against the head, face or neck and should generally be aimed at the lower abdomen or legs[23] .

5. The **regulations on the use of *foam* bullets** are also not public, although in the Catalan case there has been partial access to the protocol on their use[24] . Once again, it highlights their use for dispersal purposes and not only when there is an imminent threat of severe injury or death, but also to a danger of damage to property. It also allows for the weapon to be targeted at the upper extremities when the person is carrying a projectile object, which effectively authorises its use on the upper trunk of the body. In addition to contradicting international recommendations, the *Omega Research Foundation* found that the Mossos d'Esquadra protocol also contradicts the manufacturer's (B&T AG) own recommendations regarding the use of SIR-X projectiles. This stipulates that the greatest risk of severe injury or death occurs below 30 metres, yet the protocol states that the projectile can be fired between 20 and 50 metres, reducing the minimum firing distance recommended by the manufacturer to ten metres[25] .

Recommendations

1. To regulate the protocols for the use of force by State Security Forces and Corps and a sanctioning regime in the event of non-compliance by means of an Organic Law, in order to enforce the principles of necessity, proportionality and legality regarding the use of force and to send a clear message that abuses will not be tolerated.

[23] Iridia and Novact, *Stop Rubber Bullets* (Barcelona, June 2021), https://iridia.cat/wp-content/uploads/2021/06/Informe-Balas-de-Goma_V2.pdf

[24] Available at: https://mossos.gencat.cat/ca/els_mossos_desquadra/Eines-policials/Llancadora/

[25] Iridia, *Institutional Violence Report 2022* (Barcelona, April 2023). Pp. 42-45, https://iridia.cat/es/Publicaciones/informe-sobre-violencia-institucional-2022/

2. Ensure that all law enforcement protocols for the use of force and the use of weapons and police tools comply with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, as well as the UN Human Rights Guidelines on the Use of Less Lethal Weapons in Law Enforcement.

3. Guarantee public access to the protocols and regulations in force on the use of force and police weapons and tools, in order to comply with the principles of transparency and access to public information.

2.1.3. On existing police oversight mechanisms

Argumentation:

1. The various internal police accountability mechanisms in Spain are not sufficiently independent and effective. Furthermore, their operation is not public, and data on disciplinary proceedings initiated are neither available nor disaggregated by type of offence, precautionary measures applied, and number of sanctions imposed in relation to the types of offences committed. The lack of transparency and publicity of this data makes it difficult for the public to monitor the efficiency and effectiveness of internal police control mechanisms.

2. In the case of the local police, there is also a high degree of discretion applied by municipal bodies (especially the Mayor's Office) and the Chief of Police, which makes it difficult to supervise bodies that have very direct contact with the public.

3. Both the National Police Force and the Guardia Civil have bodies for conducting internal investigations: the Internal Affairs Unit and the Internal Affairs Service, respectively. In both cases, these depend on a police officer belonging to the same corps, which compromises their independence.

4. Of particular concern is the fact that, in most cases, neither colleagues nor superiors provide information for the identification of the perpetrators. In no case of known kinetic energy projectile injuries has the police force identified the perpetrator. Nor are ex officio investigations initiated by commanders.

5. In cases where the court requests specific information from the police department concerned about the operation or action reported, sometimes much less information is provided than requested. On many occasions it is the same unit to which the officer under investigation belongs that responds to the requests, instead of the Internal Affairs Division, while at the same time the person reporting ill-treatment is often criminalized. Cases have also been reported in which these same police forces have prevented the person from lodging a complaint at the police station.

6. As reported by Spain to the CAT as part of the follow-up to its Concluding Observations in 2016, the **Inspectorate of Personnel and Security Services (IPSS)** is considered by the State to be the "first independent body to deal with complaints and allegations of ill-treatment [...] in any

police action". However, as Amnesty International warned at the time, this body has no initiative of its own. It can only undertake inspection actions on possible irregular actions of the State Security Forces and Bodies (SSFB) by express order of the Secretary of State for Security, considering that the see this type of action as extraordinary and incidental. It is the role of the Directorates General of the Police (DGP) and the Civil Guard (DGGC) to notify the IPSS within the first 24 hours of the deaths, serious injuries or suicide attempts of citizens on State Security Forces and Bodies premises or, outside these, on the occasion of a police action. Internal investigations are conducted by the Directorates General themselves, and not by the IPSS, whose role is exclusively to inspect and monitor the investigation. Furthermore, the work of the IPSS is confidential and, according to Amnesty International, its reports, balance sheets and activity reports are not made public[26] .

7. Attached to the IPSS, the recent creation of the **National Office for Human Rights Guarantees (ONGDH)** is noteworthy. However, according to the *Instruction 1/2022* that gave it life, this body is not endowed with greater powers of independent investigation. Its mandate is to register and monitor complaints of alleged violations of fundamental rights during police actions (Art. 8), conducted by members of the DGP and/or the DGGC. This register is unified through the computer application of the Human Rights Plan. However, as far as is known, the application only includes quantitative data and not descriptive data, and the National Police and the Guardia Civil are responsible for the data. Its recent creation has not made it possible to obtain a preliminary assessment of its functioning and results[27] .

8. **Ombudsman's offices have limitations in investigating** cases of misuse of force by police forces. Despite the fact that they are essential administrative oversight bodies, they are given overly broad mandates, making it difficult for them to have the specialised personnel and material resources to conduct a forensic investigation, including an examination of the scene of the crime. Furthermore, the general criterion is to suspend the investigation when judicial proceedings are initiated for the same acts. Its decisions are in the nature of recommendations and are not directly applicable and enforceable.

9. During the recent processing of the reform of the LO 4/2015 of 30 March, on the **Protection of Citizen Security (Ley de Seguridad Ciudadana),** civil society organisations[28] have insistently requested that the political groups, and especially those that make up the government coalition, create an independent mechanism for monitoring the actions of the State Security Forces and Bodies (SSFB) at different moments of its processing, but especially in the phase of the presentation in the Interior Commission. It is understood that the existing mechanisms do not

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[26] Iridia, Novact and RIS, *Transparencia y rendición de cuentas de los cuerpos policiales en el Estado español* (Barcelona, October 2022), https://iridia.cat/wp-content/uploads/2022/10/Transparencia-y-mecanismos-de-control-de-los-cuerpos-policiales-en-el-Estado-espanol-INFORME.pdf.

[27] Ibid.

[28] Iridia (15.03.2022): "Thirteen organisations and collectives call on the parties to seize "the last chance to remove all the harsh measures": https://iridia.cat/es/trece-organizaciones-y-colectivos-reclaman-a-los-partidos-aprovechar-la-ultima-oportunidad-de-quitarnos-todas-las-mordazas/ Amnesty International (03.11.2022): "Spain: seven harsh measures and a cloak of impunity have been restricting and weakening the right to protest for seven years": https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/espana-siete-mordazas-y-un-manto-de-impunidad-llevan-siete-anos-restringiendo-y-debilitando-el-derecho-a-la-protesta/

make it possible to adequately monitor reports of irregular or criminal actions of the State Security Forces and Bodies that affect the right to integrity.

Recommendations

1. Establish an independent mechanism to conduct prompt, impartial and thorough investigations into all allegations of torture and ill-treatment by law enforcement officials, with powers to:

    a. Assess the need for and appropriateness of the incorporation of weapons and tools for police use.
    b. Oversee the development of use of force protocols; as well as the evaluation of police operations and measures taken to avoid the use of force.
    c. To investigate irregular or suspected criminal situations, with the capacity to act ex officio and to access the information necessary for its work to be independent and comprehensive, with binding measures and enforcement mechanisms, as well as sanctioning powers in case of non-cooperation.

2.2. Discriminatory actions by State Security Forces and Bodies by ethnic origin, age and sex of the victim

2.2.1. Excessive use of force by law enforcement officers on racist grounds

Argumentation:

1. In monitoring of international standards applicable to the use of force by law enforcement officials[29] and those relating to the prohibition of racially motivated excessive use of force, this Committee has emphasised that the absolute prohibition contained in Article 2 of the Convention extends to all persons acting, de *jure* or de *facto*, on behalf of the State and has stressed the urgency for States Parties to exercise control over their agents and those acting on their behalf[30] .

In addition, the Committee notes that the protection of minority or marginalised populations at heightened risk of torture is part of the obligation to prevent torture and ill-treatment in application of the principle of non-discrimination[31] . The prevention, investigation and punishment of acts constituting racially motivated excessive use of force by law enforcement officials is a concern of this Committee and other treaty monitoring bodies of the universal system . [32]

[29]UN Basic Principles on the Use of Force and Firearms for Law Enforcement Officials, 7 September 1990.

[30]Committee against Torture, General Comment No. 2, CAT/C/GC/2, paras. 7 and 17.

[31]Committee against Torture, General Comment No. 2, CAT/C/GC/2, paras. 20 and 21.

[32]Committee on the Elimination of Racial Discrimination, General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials, CERD/C/GC/36, para. 30.

2. The Committee has found in the past, that, in Spain, the excessive use of force by agents of the State can amount, at a minimum, to cruel, inhuman or degrading treatment within the meaning of Article 16 of the Convention[33] .

3. In this reporting cycle, this Committee called-upon Spain to provide statistical information regarding*, inter alia,* the measures taken to implement the recommendations on the excessive use of force by law enforcement officials (Articles 1 and 16)[34] . Additionally, the Committee expressly requested Spain to provide annual statistical data from 2015 onwards, disaggregated by punishable or criminal act and by ethnicity, age and sex of the victim on the a) number of complaints filed against police officers in relation to racist and racially discriminatory acts; (b) the number of investigations initiated as a result of such complaints and the authority that initiated them; (c) the number of complaints that were dismissed; (d) the number that resulted in prosecutions or disciplinary measures; (e) the number that led to convictions; and (f) the criminal and disciplinary sanctions applied. Additionally, it should include information on measures taken to prevent assaults, abuses, and excessive use of force on racist grounds by law enforcement officials[35] .

Regrettably, Spain has failed to make the requested information available to the Committee. Instead, the State has only referred to descriptive domestic legislation that does not specifically regulate the legitimate use of force by law enforcement officials, let alone the excessive use of force on racist grounds. In fact, the legitimate use of force by state agents lacks specific and adequate regulation in the Spanish state. Footnote: The Organic Law on Security Forces and Corps contains a general reference to the legitimate use of force by law enforcement officers in Article 5. Unfortunately, the article does not contain any specific guidelines on what means may be used, nor does it include any reference to the use of force against minority populations. This is also not regulated in any lower-ranking legislation.

4. This State silence contrasts with the growing number of cases of racially motivated police violence in the country. SOS Racismo reports having learned of and publicly denounced numerous cases of racially motivated excessive use of police force[36] . The cases of illegitimate use of police force reveal a common pattern of disproportionality and arbitrariness (i.e. law

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[33]Committee against Torture, Communication No. 818/2, Case E.L.G. v. Spain, para. 8.2. Spain, para. 8.2.

[34]Committee against Torture. List of issues prior to the submission of the seventh periodic report of Spain, CAT/C/ESP/QPR/7, paras. 1 and 34.

[35]Committee against Torture. List of issues prior to the submission of the seventh periodic report of Spain, CAT/C/ESP/QPR/7, para. 35.

[36] The last of these cases took place on Saturday 15 April 2023 in the Plaza de Lavapiés (Madrid) where the police arbitrarily stopped a racialised young man and asked him to identify himself. Despite the fact that the young man agreed to identify himself, the police violently attacked him in a disproportionate manner and with a notoriously excessive use of force. Police officers also used violence against at least two other racialised individuals, including a racialised woman holding her two-year-old daughter. "Police brutality: the normalisation of violence, racism and impunity", Es *Racismo*, 19 April 2023. Available at: https://esracismo.com/2023/04/19/brutalidad-policial-la-normalizacion-de-la-violencia-el-racismo-y-la-impunidad/ [accessed: 3 June 2023]. Some recordings of the incidents can be found at: https://tinyurl.com/yc2rtess and https://tinyurl.com/muhwrzvu [accessed: 3 June 2023]. This is not the first time in recent years that incidents of excessive use of police force against racialised people have been recorded in the Lavapiés neighbourhood (Madrid). Already in 2020, a complaint of excessive use of police force against a racialised youth was recorded. Notoriously, in the record of the facts, it is noted that the young man never resisted the police intervention, which was instead answered with a disproportionate and illegitimate use of force by law enforcement officers. "Lavapiés: abusos policiales en la plaza Nelson Mandela", Es *Racismo*, 13 June 2020. Available at: https://esracismo.com/2020/06/13/lavapies-abusos-policiales-en-la-plaza-nelson-mandela/ [accessed: 3 June 2023].

enforcement officers use force in situations that do not require it and/or do not justify the means employed[37]) and extend to situations where officers assault racialised people after hurling racist insults such as "*sudaca de mierda*" and "*moro*"[38] . There are also cases involving racialised minors[39] , racialised pregnant women[40] , as being victims of excessive use of police force. In at least one of the cases documented by the entity, the exercise of police force even caused the death of a racialised person as a result of the intervention[41] .

5. This representative number of cases often fail to find adequate avenues for the investigation and punishment of law enforcement officers who use excessive force, as well as adequate reparation for the victims. It is equally notorious that these acts continue to see victims who are racialised people. Spain continues to fail to adequately address this reality, in addition to the deliberate lack of statistical information that would allow these situations to be made visible and dealt with appropriately.

Recommendations:

1. Request the Government to provide the information requested in the List of Issues;
2. Put in place a specific and independent complaints mechanism to address the use of excessive force by law enforcement officers motivated by racism;
3. Take preventive measures at the institutional level to address the recurrent racist use of excessive police force; and
4. Adopt appropriate legislation to enable international standards on excessive use of force to be implemented in accordance with the principle of non-discrimination.

[37]Es Racismo. "Nueva agresión racista en Sol", Es *Racismo*, 8 February 2021. Available at: https://esracismo.com/2021/02/08/nueva-agresion-racista-en-sol/ [accessed: 3 June 2023].

[38]Euxile, "Los abusos de poder de la policía española" *Eulixe,* 18 February 2021. Available at: https://www.eulixe.com/articulo/reportajes/abusos-poder-policia-espanola/20210218120631022548.html [accessed: 3 June 2023].

[39]Es Racismo. "Canarias: police abuse joins the wave of racism in a centre for minors", Es Racismo, 2 February 2021. Available at: https://esracismo.com/2021/02/02/canarias-el-abuso-policial-se-une-a-la-ola-de-racismo-en-un-centro-de-menores/ [accessed: 3 June 2023].

[40]Es Racismo. "Brutal police assault on pregnant woman in Abrantes", Es Racismo, 20 October 2020. Available: https://esracismo.com/2020/10/20/brutal-agresion-policial-en-abrantes-a-una-mujer-embarazada/

[41]It is Racism. "Issa M., a new victim of police abuse", It is *Racism*, 8 November 2021. Available at: https://esracismo.com/2021/11/08/issa-m-una-nueva-victima-del-abuso-policial/ [accessed: 3 June 2023].

2.2.2. Raids on the basis of ethnic or racial profiling (as cruel, inhuman or degrading treatment) - Articles 2 and 16

Argumentation:

1. In line with international standards on ethnic profiling raids and racial profiling[42] , racially biased checks by police and immigration officers have been the subject of concern and recommendations by this Committee in relation to a number of States parties[43] , including Spain.

2. In this reporting cycle, this Committee requested Spain to provide statistical information on raids based on ethnic or racial profiling and other racist and racially discriminatory acts perpetrated by police officers, as well as on the legislative, administrative and judicial measures adopted to prevent, punish and redress these acts (Articles 2 and 16 of the Convention)[44] . The concern about this violation of the human rights of racialised persons, which is widespread in Spain, is shared by other treaty bodies .[45]

In line with its practice over many years, Spain decided to ignore this issue in its Periodic Report, providing an extremely generic and insufficient response to the Committee's request, in that it merely refers to legal and administrative regulations in force and does not specifically refer to raids based on ethnic or racial profiling. This response shows that the State is not concerned with addressing this human rights violation, which in itself constitutes a violation of its obligations under the Convention, even more so when other human rights bodies have already pointed out that the inclusion of the principle of non-discrimination in a legal text is not sufficient to put an end to identification controls based on ethnic and racial profiling[46] . Similarly, there is no specific prohibition of racial profiling in Spanish law, nor are there sanctions for non-compliance with this prohibition by law enforcement officers.

3. Despite repeated recommendations from international human rights bodies, Spain has failed to address this endemic problem. The practice is even more widespread today than it was a few years ago as a result of the increase in racist speech and acts and has recently become the subject of an application to the European Court of Human Rights[47] .

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[42]For a definition of racial profiling and numerous international standards on the subject, see: Committee on the Elimination of Racial Discrimination. General Recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials, CERD/C/GC/36. A list of international and regional standards can also be found at: Convention against Torture Initiative (CTI). "Key resources. Chapter 4 - Stop and Search procedures and Arrest. 4.1. Stop and search". Available at: https://cti2024.org/resources-for-states/police-resourcekit/key-resources/ [accessed: 1 June 2023].

[43]CAT/C/USA/CO/3-5, para. 26; CAT/C/C/CPV/CO/1, para. 20; CAT/C/ARG/CO/5-6, para. 35; and CAT/C/NLD/CO/7, paras. 44 and 45.

[44]Committee against Torture. List of issues prior to the submission of the seventh periodic report of Spain, CAT/C/ESP/QPR/7, para. 35.

[45]Committee on the Elimination of Racial Discrimination. Concluding observations on the twenty-first to twenty-third periodic reports of Spain, CERD/C/ESP/CO/21-23, paras. 27 and 28; Human Rights Committee. Communication No. 1493/2006, Case Rosalind Williams Lecraft v. Spain, paras. 7.2. Spain, paras. 7.2, 8 and 9.

[46]Committee on the Elimination of Racial Discrimination. Concluding observations on the twenty-first to twenty-third periodic reports of Spain, CERD/C/ESP/CO/21-23, paras. 27 and 28; Human Rights Council. Report of the Working Group of Experts on People of African Descent on its mission to Spain, A/HRC/39/69/Add.2, para. 20.

[47]European Court of Human Rights, *Muhammad v. Spain*, Application No. 34085/17, judgment of 18 October 2022. Noteworthy dissenting votes refer to the Spanish State's failure to adequately investigate identity checks based on

SOS Racismo, together with other associations[48] and the media[49] , has been made aware of and publicly denounced numerous cases of ethnic or racial profiling raids as part of the machinery of institutional racism[50] . Other cases reported since 2017 include ethnic profiling raids on racialised people by the National Police in buses and bus stations[51] ; racist identity checks followed by racist and sexist insults (*"puta negra"*) against human rights defenders in the Lavapiés neighbourhood (Madrid) by the National Police[52] ; increasingly thorough passport checks on racialised people at Spanish airports[53] . These discriminatory police and security actions, as well as many others that go unrecorded and unreported because Spain has not implemented a specific channel to collect them, have in common that they attack the physical and moral integrity of people, who often suffer physical violence. Many others are humiliated in public, forced to undress, searched in their places of work, leisure, in their vehicles or even in front of their children, thus preventing them from freely enjoying public space.

4. In Spain there are plenty of raids based on ethnic and racial profiling, but there is a lack of official statistical data broken down by race and ethnicity collected by the public administrations[54] , which constitutes a breach of the obligations assumed under the Convention and as highlighted by this Committee in its list of previous questions. This lack of data prevents us from knowing the real magnitude of this endemic problem and the differentiated impact of these racist discriminatory acts on grounds of gender, class, migratory status, among others.

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ethnic or racial profiling and the obligation to establish a normative framework preventing identity checks based on ethnic or racial profiling.

[48]Rights International Spain. *Survey on police stops based on the use of racial and ethnic profiling*. May 2023. Available at: https://rightsinternationalspain.org/wp-content/uploads/2023/05/Encuesta-sobre-identificaciones-policiales-basadas-en-uso-del-perfilamiento-etnico-y-racial-4.pdf [accessed: 1 June 2023].

[49]Sarah Babiker. "Racial profiling: where security rhetoric collides with human rights", *El Salto Diario,* 10 December 2021. Available at: https://www.elsaltodiario.com/redadas-racistas/perfiles-raciales-alla-donde-el-discurso-de-la-seguridad-colisiona-con-los-derechos-humanos [accessed: 1 June 2023].

[50]In the same vein, European Court of Human Rights, *Lingurar v. Romania*, Application No. 48474/14, para. 80. The last of these cases took place last Saturday 15 April 2023 in the Plaza de Lavapiés (Madrid), where a racialised boy was subjected to an identity check by police officers, without there being any reason for administrative identification, as the officers had observed that this young man and the group he was with had not committed any crime or offence. Regardless of the fact that the young man had identified himself, this ethnic profiling stop then led to arrests and excessive use of force by law enforcement officers against the identified young man and others who were in the square and who accused the officers of acting with racist motives. "Brutalidad policial: la normalización de la violencia, el racismo y la impunidad", Es *Racismo*, 19 April 2023. Available at: https://esracismo.com/2023/04/19/brutalidad-policial-la-normalizacion-de-la-violencia-el-racismo-y-la-impunidad/ [accessed: 1 June 2023].

[51]Youssef Ouled. "Public space (is) not ours, it (does) not belong to us: Racial control in the arrangement of public space (II)", *It is Racism*, 21 March 2019. Available at: https://esracismo.com/2019/03/21/el-espacio-publico-no-es-nuestro-no-nos-pertenece-el-control-racial-en-la-disposicion-del-espacio-publico-ii/ [accessed: 1 June 2023].

[52]This action was also the subject of a complaint to the Working Group of Experts on People of African Descent in 2017: Youssef Ouled. "La Policía Nacional denunciada ante la ONU por agresión racista", *Es Racismo*, 25 September 2017. Available at: https://esracismo.com/2017/09/25/la-policia-nacional-denunciada-ante-la-onu-por-agresion-racista/ [accessed: 1 June 2023].

[53]"Thorough passport control at the airport: only for racialised people", *Es Racismo*, 18 September 2019. Available at: https://esracismo.com/2019/09/18/el-control-minucioso-del-pasaporte-en-el-aeropuerto-solo-para-racializados/ [accessed: 1 June 2023].

[54]Rights International Spain. *Op. cit.,* p. 6; Amnesty International. *Stop Racism, Not People: Racial Profiling and Immigration Control in Spain*. 2011, p. 32.

Recommendations:

1. Request that the Spanish Government provides the information requested in the List of Issues;
2. Put in place a specific and independent complaints mechanism to address raids based on ethnic and racial profiling;
3. Develop a clear official discourse on the prohibition of racial and ethnic profiling raids;
4. Put an end to racial profiling, as it constitutes a discriminatory practice and constitutes cruel, inhuman and degrading treatment under Article 16 of the Convention according to the standards of this Committee.

2.3. Spain has not ratified or adopted the Méndez Principles for Effective Interviewing in the Investigation and Information Gathering Process.

1. The Istanbul Protocol requires States to ensure that law enforcement personnel receive specific training on appropriate internationally accepted methods of interrogation and on effective measures to prevent torture and ill-treatment in this area.

2. Spain has not yet formally endorsed and adopted the Méndez Principles for Effective Interviewing in Investigations and Information Gathering.

Recommendations:

1. Ratify the Juan Méndez Principles and adopt them as mandatory training material in the training process of National Police, Civil Guard, Autonomous Police and Municipal Police.
2. To this end, it is suggested that an international seminar be organised to present the Méndez Principles to trainers and teachers from different security and police forces and to discuss their application. Spain has a number of NGOs accredited to provide such training.

3. ART. 3 CONVENTION: ON EXPULSION, REFOULEMENT OR EXTRADITION WHERE THERE IS A RISK OF TORTURE

3.1. ON THE PRINCIPLE OF NON-REFOULEMENT FROM THE BORDER CITIES OF CEUTA AND MELILLA :

Argument:

1. Border rejection, in application of the First Final Provision Special Regime for Ceuta and Melilla of the LO 4/2015 of 30 March on the Protection of Citizen Security, continues to allow the surrender of foreign citizens intercepted in Spanish territory by Spanish security forces and bodies to the Moroccan authorities without following the legally established procedure, nor compliance with internationally recognised guarantees, and therefore, without allowing them access to the asylum procedure, and without individually assessing the risks of ill-treatment and torture that they may suffer in Morocco. These pushbacks also affect those who try to swim across the border[55] . This is despite the fact that episodes of ill-treatment have also been documented on the other side of the border.

2. In addition to prohibiting collective and summary expulsions and prohibiting the transfer of a person to a jurisdiction where they may be at risk of human rights violations, International law also establishes, as a mandatory procedural requirement, that Spain should analyse this specific risk on a case-by-case basis, giving any person a real opportunity to appeal and challenge the transfer. Spain continues to fail to take measures to ensure that the right to asylum is respected at the borders of Ceuta and Melilla and to review these regulations, which are clearly contrary to international human rights norms and standards[56] .

[55] In the Marhaba report, the Solidary Wheels association includes an interview with the Secretary General of the Unified Association of Civil Guards, who states "This summer 2022 we have had up to 80 rejections of 80 swimmers at the border". Solidary Wheels (2023): "Marhaba, Police violence as a product of systemic violence in Melilla", p. 35. https://www.solidarywheels.org/_files/ugd/0a7d28_7987be3370874c17ab2bdc24870d3f25.pdf

[56] The same report contains multiple testimonies of these refoulements where no procedure is applied (refoulements of minors, asylum seekers...): "*The interviewee tells of having tried to swim across from Morocco and having been arrested by the Guardia Civil. The Guardia Civil returned him to Nador where he was handed over to the Moroccan army, which assaulted him, causing broken bones; they also took a photo of him and warned him that if he did it again he would go to prison. He then spoke about his friend from Agadir called A., who was killed by the Moroccan navy. When he was arrested by the Guardia Civil, they did not put him on the boat but made him swim to the Moroccan side while the agents made fun of the situation*". - Field Diary, 09.11.2020 . Solidary Wheels (2023): Marhaba, *Op. cit.* p. 37.

Recommendations:

1. Adopt the necessary legislative and practical measures to comply with the principle of non-refoulement from the borders of Ceuta and Melilla.

2. Repeal the Tenth Additional Provision of the Aliens Act passed in 2015, which establishes the possibility of rejection at the border for those who cross the borders of Ceuta and Melilla irregularly, as contrary to Article 3 of the Convention, and in line with the Committee's recommendations.

3.1.1. IMPOSSIBILITY OF APPLYING FOR INTERNATIONAL PROTECTION AT SPANISH CONSULATES ABROAD.

Argument:

1. Although art. 38 of Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection establishes the possibility of applying for International Protection in embassies and consulates abroad, the regulation established in this article means that the presentation of applications in diplomatic delegations is now considered a case of exceptional entry permit. Thus, if an applicant goes to a Spanish Embassy or Consulate in a third country and it is demonstrated that he/she is in a dangerous situation, the ambassadors have the discretionary power to authorise his/her transfer to Spain in order to submit a formal application within Spanish territory.

2. Moreover, this mechanism is not legally regulated, so it is de facto not applied. As the organisation Iridia points out in its report on 2021-2022, "*since the approval of the Asylum Law in 2009, human rights organisations have demanded the approval of its legal regulation of embassies as asylum application spaces (art. 38), although this is still not functioning*[57] ". The Ombudsman has confirmed this situation himself when he pointed out "*the impossibility for third-country nationals to apply for international protection in Spanish diplomatic representations in Morocco*"[58] . Subsequently, in October 2022, he urged the Government to

[57] Iridia / Novact: "Vulneración de derechos humanos en la Frontera Sur del Estado español 2021-2022": https://iridia.cat/es/Publicaciones/vulneracion-de-derechos-humanos-en-la-fs-del-estado-espanol-2021-2022/ P. 46.

[58] Ombudsman (14.10.2022): "Request for asylum in Spain without having to use irregular means of entry": https://www.defensordelpueblo.es/resoluciones/solicitud-de-asilo-en-espana-sin-tener-que-utilizar-vias-irregulares-de-entrada/. We highlight the case of the Sudanese asylum seeker Basir, who, after surviving the massacre of 24 June 2022, remaining on the Moroccan side, has requested international protection at the Spanish Embassy in Rabat, according to article 38 of the state asylum law. To date, there has been no response from Spain to Basir's request. Público (08.02.2023): "Basir, two months trapped in Morocco and no response from the government to his request for asylum: "I live in the street and I fear prison": https://www.publico.es/sociedad/basir-meses-atrapado-marruecos-respuesta-gobierno-peticion-asilo-vivo-calle-temo-prision.html/amp

"*adopt the necessary measures to reinforce the material and human resources of the Embassy and consulates in Morocco, in order to ensure that persons in need of international protection can access and process their visas to apply for asylum in Spain, without having to risk their lives or use irregular routes of* entry*"*[59] *".*

3. Given the difficulties in applying for asylum at the border points in the south of the country, this impossibility of applying for international protection at Spanish consulates, as highlighted by the State Attorney General's Office in its Decree of 22 December 2022 when investigating the massacre of 24 June at the Melilla fence[60] , translates into serious obstacles to guaranteeing the principle of non-refoulement of victims of torture, who are not accessing guaranteed and adequate application channels.

4. According to data from the Spanish Ministry of the Interior, all applications received for International Protection at Spanish consulates abroad have been family extensions, which indicates that no initial applications for International Protection have been processed at Spanish consulates abroad[61] .

Recommendations:

1. Adopt the necessary regulatory and practical measures to guarantee access to and effective processing of applications for International Protection in Spanish embassies and consulates abroad, thus guaranteeing the principle of non-refoulement of victims of torture, who do not have alternative measures to process applications for international protection without risking their physical and psychological integrity.

[59] Ombudsman (14.10.2022): "Solicitud de asilo en España sin tener que utilizar vías irregulares de entrada": *Op. cit.*

[60] State Attorney General's Office: "Decreto de la Fiscal de Sala de la Unidad de Extranjería, de 22 de diciembre de 2022", Diligencias Investigación n.º 1/2022: https://elfarodemelilla.es/wp-content/uploads/2022/12/MELILLA-Decreto.pdf, p. 33: "Decreto de la Fiscal de Sala de la Unidad de Extranjería, de 22 de diciembre de 2022", Diligencias Investigación n.º 1/2022: https://elfarodemelilla.es/wp-content/uploads/2022/12/MELILLA-Decreto.pdf, pág. 33: "*A detailed analysis of the situation should be carried out, which is beyond the scope of these proceedings and beyond the competence of this investigating officer, in order to ascertain where the possible flaws lie in a system that does not consider people from countries such as Chad or Sudan, who in most cases are deserving of international protection due to the special circumstances of armed conflict in their countries of origin, put their physical integrity and their lives at risk, undertaking such dangerous conduct as jumping over the Melilla fence, without having had recourse to the legal systems established for this purpose*".

[61] Spanish Ministry of the Interior (2021): Asylum in Figures report https://www.interior.gob.es/opencms/pdf/servicios-al-ciudadano/oficina-de-asilo-y-refugio/datos-e-informacion-estadistica/Asilo_en_cifras_2021.pdf P. 36.

3.1.2. Difficulties or impossibility of applying for International Protection for victims of torture at land or sea border crossings

Argument:

1. Similarly, there are numerous reports detailing difficulties or an outright impossibility to apply for International Protection for victims of torture at land or sea border crossings.

2. With regard to Ceuta and Melilla, the organisation Iridia notes in its report for 2021-2022 that "With regard to *access to asylum, there is great difficulty for people in Morocco to approach the border posts where they can apply for asylum, due to pressure from the authorities. This pressure is mainly located in the areas close to "the border posts, and, therefore, there is no genuine and effective access to asylum at the border, unless you risk your life by swimming or jumping the fence", as the Commissioner for Human Rights of the Council of Europe pointed out during her last visit*[62] ". The organisation also points to reported discretion when applying the asylum procedures by border or territory established in Law 12/2009, of 30 October, regulating the right to asylum and subsidiary protection, as well as bad practices, such as requesting specific documents, which in principle should not be necessary, in order to formalise the application[63] . Along the same lines, other organisations, such as the Community Action Group (GAC) Grupo de Acción Comunitaria in its 2022 report, point out irregularities in the application procedures, such as the fact that "*only 50.9% of the people* [interviewed in that report] had the *possibility of having the advice of a lawyer to prepare the* asylum *interview*" and "*20.8% of the people sign the interview documentation without really knowing what it says on it*[64] ", as it is not translated in the case of Melilla. For its part, Solidary Wheels[65] has documented the difficulties for Moroccan minors and young people when applying for international protection after crossing the border by sea.

2. With regard to the Canary Islands, the Community Action Group provides similar percentages regarding the absence of legal assistance (51.4% of those interviewed) and highlights the "*23.1% who report not having been informed about the international protection procedure by the organisation managing their reception camp*[66] ". For its part, Iridia points out that expulsions of people who have expressed their willingness to apply for asylum in less than 72 hours have been

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[62] Council of Europe, 'Spain should advance social rights, better guarantee freedoms of expression and assembly and improve human rights of refugees, asylum seekers and migrants', 29 November 2022 https://www.coe.int/es/web/commissioner/-/spain-should-advance-social-rights-better-guarantee-freedoms-of-expression-and-assembly-and-improve-human-rights-of-refugees-asylum-seekers-and-migran

[63] Iridia / Novact: "Vulneración de derechos humanos en la Frontera Sur del Estado español 2021-2022": *Op. cit.* Pp. 46-47.

[64] Grupo de Acción Comunitaria (2022): "*El limbo de la frontera Impactos de las condiciones de la acogida en la Frontera Sur española*". http://www.psicosocial.net/investigacion/frontera-sur/ Pág. 38-39.

[65] The Marhaba report reflects twenty-seven interviews conducted between October 2020 and June 2022. All the people interviewed, mostly minors or young Moroccans who have tried to reach Melilla by sea, state that they have not had the opportunity to apply for International Protection in Morocco. They also state that they have not been interviewed by the Spanish Security Forces to assess possible situations of vulnerability or risk in case of refoulement (IP applicants, minors...). Nor has there been any kind of evaluation or assessment of individualised situations or possibility of making IP requests in the returns by sea. This violates the minimum protocol of action established for rejection at the border as defined in STC 172/2020 of 19 November 2020, Solidary Wheels (2023): Marhaba, *Op. cit.*

[66] Community Action Group (2022): *Op.cit*. P. 40-41.

detected at police stations in so-called express deportations; people seeking international protection remain undocumented during the period of time in between going to the police station to renew their asylum applications and when they are summoned to pick up the new documentation; several cases where the presentation of both a passport and city-registration certificate has been required at the appointment for registration or renewal of international protection, in contravention of the Instruction of the Secretary of State for Security and the Undersecretary of the Interior for the formalisation of applications; and obstacles when processing the change of appointment place for people transferred to the peninsula, who must start the procedure from scratch[67] .

3. The fact that among these persons there are many who are injured - as a result of prior intervention by the Moroccan police[68] or subsequent intervention by the Spanish Guardia Civil[69] - or who are potentially deserving of international protection[70], means that the absence of adequate channels for access to applications, together with the expeditious pushback procedure applied by the Spanish authorities[71] , means that the principle of non-refoulement is likely to be violated in many cases. The Special Rapporteur on the human rights of migrants, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment[72] have repeated these concerns in a communication to the Spanish government, when they state that: "*we would like to express our concern about the allegations of pushbacks at the Spanish border of the autonomous city of Melilla with Morocco. We note with concern reports that the Spanish Civil Guard has reportedly returned migrants to Morocco at the border without any individual assessment of their protection needs, in violation of the principle of non-refoulement and*

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[67] Iridia / Novact: "Vulneración de derechos humanos en la Frontera Sur del Estado español 2021-2022": *Op. cit.* P. 90-91

[68] Morocco, Universal Periodic Review, Third Cycle, Human Rights Council, Working Group on the Universal Periodic Review, 27th session 1-12 May 201, 7A/HRC/WG.6/27/MAR/2, para. 96. See also, Concluding observations of the Human Rights Committee on the sixth periodic report of Morocco, 1 December 2016, CCPR/C/MAR/CO/6, paras. 35 and 36.

[69] Público (04.03.2022): "Several videos come to light showing police brutality against migrants at the Melilla fence": https://www.publico.es/actualidad/sale-luz-video-muestra-brutalidad-policial-migrantes-valla-melilla.html

[70] El Diario (25.03.2023): "The Sudanese who were rejected by Spain in the Melilla tragedy: "They should help us, but they beat us": https://www.eldiario.es/desalambre/sudaneses-espana-rechazo-tragedia-melilla-deberian-ayudarnos-pegan_1_10147237.html

[71] In the same line as the rapporteurs, in reference to the massive border rejections following the bloody attempt to enter through the Melilla fence on 24 June 2022, where at least 23 people died and hundreds were injured, organisations such as CEAR point out that: "*Among the people identified are many Sudanese, coming from a country suffering an armed conflict, and who have been prevented from "legally and safely accessing" the office set up in Melilla to be able to apply for asylum*". CEAR (25.04.2022): "CEAR denounces the indiscriminate use of violence in border control": https://www.cear.es/cear-denuncia-el-uso-indiscriminado-de-la-violencia-en-el-control-de-fronteras/

[72] Felipe González Morales, "Mandates of the Special Rapporteur on the human rights of migrants; of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; of the Special Rapporteur on the situation of human rights defenders and of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment". Communication presented at the Palais des Nations in Geneva (Switzerland), 14 April 2021. https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26327 The rapporteurs echo the pronouncements of previous organisations and institutions when they point out that "*we are concerned that the lack of alternatives for a truly safe, orderly and regular migration is forcing migrants to resort to clandestine and dangerous routes, and that this leads them to be possible victims of serious human rights violations*". (p. 5, *op. cit.*).

potentially exposing persons in need of protection and migrant children and adolescents to the risk of violence and cruel, inhuman and degrading treatment in Morocco".

Recommendations:

1. Adopt the necessary legislative and practical measures to guarantee access to and effective processing of applications for International Protection at the land and maritime borders of the autonomous cities of Ceuta and Melilla, in order to properly identify those who allege having been victims of torture. This procedure must guarantee not only the application, but also legal and interpreter assistance, the omission of unjustified obstacles and the adoption of non-refoulement measures while the case is being resolved.

3.1.3. Ill-treatment and excessive use of force by personnel responsible for conducting border refoulement . Cruel, inhuman or degrading treatment, torture sometimes leading to death during refoulement.

Argument:

1. As Amnesty International points out, the lack of investigation and accountability for violations of international law, "pushbacks" and excessive use of force against migrants are recurrent[73] at Spain's southern border.

2. Thus, organisations such as Solidary Wheels document several testimonies of cruel, inhuman or degrading treatment and torture resulting in death by Moroccan and Spanish forces in the attempt to reach Melilla, either in the port of Beni Ensar or on the journey by sea[74] . For their part, Iridia and SiR[a] have documented through the Istanbul Protocol the case of a young Senegalese man who lost the sight of one eye after being hit by a Guardia Civil officer's baton[75] . Cases have also been documented of people who, during pushbacks to Moroccan territory, are forced to swim while being chased and verbally assaulted[76] . All these facts, which cannot be considered isolated cases, are situations of cruel, inhuman or degrading treatment and/or

[73]Amnesty International (04.03.2022): "Amnesty International: New leap with human rights violations in Melilla": https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/amnistia-internacional-nuevo-salto-con-violaciones-de-derechos-humanos-en-melilla/

[74] Solidary Wheels (2023): Marhaba, *Op. cit*. p. 59. They also point out that since February 2022, it has been observed that in the port of Beni Ensar, Moroccan forces have been using dogs as a deterrent and violent weapon with the specific aim of injuring minors and young people who try to swim to Melilla.

[75] Iridia / Novact: "Vulneración de derechos humanos en la Frontera Sur del Estado español 2021-2022": *Op. cit.* p. 48.

[76] Solidary Wheels (2023): Marhaba, *op. cit*. p. 36-37.

torture in *non-custodial settings,* for which the State has repeatedly denied its responsibility in different parliamentary appearances on the matter by the Minister of the Interior[77] .

3. It is worth highlighting the seriousness of the events that took place on the morning of 24 June 2022, where at least thirty-seven people died and many more were reportedly injured as a result of the actions of the Spanish and Moroccan security forces in the border area[78] . On that day, the Spanish security forces summarily and contrary to international human rights standards returned at least 470 people. The whereabouts of at least seventy-seven people in Moroccan territory remain unknown[79] . These constitute extraordinarily serious acts of torture resulting in death, on which the organisations that produced this report have provided a specific report, which is found attached to this one.

4. In 2023, deaths have also been documented in local media or alternative sources[80] .

Recommendations:

1. Initiate ex-officio investigations aimed at clarifying the facts reported.
2. Guarantee the principle of non-refoulement of those who have been subjected to these attacks in accordance with Article 3 of the Convention.
3. Facilitate effective and legal access channels that prevent people from being exposed to serious risks to their integrity when crossing borders.

[77] El Mundo (30.11.2022): "Marlaska again denies that immigrants died "on Spanish territory" in the jump to the Melilla fence despite new revelations": https://www.elmundo.es/espana/2022/11/30/63873d91e4d4d83a038b4583.html El Mundo (22.03.2023): "Marlaska reiterates before the European Parliament that there were no deaths on Spanish territory in the tragedy at the Melilla fence": https://www.elmundo.es/espana/2023/03/22/641b1e7dfc6c835a718b45b6.html

[78] Lighthouse Reports (29.11.2022): "Reconstructing the Melilla Massacre": https://www.lighthousereports.com/investigation/reconstructing-the-melilla-massacre/

[79] Amnesty International (13.12.2022): "Spain and Morocco must respond to the victims in Melilla": https://www.es.amnesty.org/en-que-estamos/reportajes/espana-y-marruecos-deben-dar-respuestas-a-las-victimas-de-melilla/

[80] According to a local media report from Nador, on the night of 30 April, a Moroccan boy died while trying to reach Melilla on top of a truck: El Faro de Melilla (02.05.2023): "A young boy dies in Nador while trying to reach Melilla on top of a truck": https://elfarodemelilla.es/muere-un-joven-en-nador-mientras-intentaba-llegar-hasta-melilla-en-lo-alto-de-un-camion/ According to AMDH Nador, on the morning of 15 May, the Melilla authorities refused to rescue a skiff with 13 Moroccan nationals on board. The coast guard forced them to return to the Moroccan coast without rescuing two people who threw themselves into the sea. One of the people on the boat who jumped into the sea was found dead on the coast of the neighbouring country. Twitter AMDH Nador (16.05.2023): https://twitter.com/NadorAmdh/status/1658478570744987649

3.1.4. Denial of access to the right to international protection within Migrant Detention Centres (CIE) and non-compliance with the principle of non-refoulement[81]

Argumentation:

1. There are frequent situations in which inmates who wish to apply for International Protection within the Migrant Detention Centres (CIE) are restricted to do so by police who impede access to the procedure. The application is formalised through the presentation of an application at the administration's registry; however, several occasions have been detected in which this access is denied to the interested parties without any reason whatsoever, preventing the formalisation of the asylum application[82] .

2. In the case of refused applications for International Protection made from the CIE of Aluche (Madrid), Murcia[83] and Valencia[84] , the appeals process which can be lodged to halt the person's expulsion has not been implemented, which itself violates the principle of non-refoulement of persons who have alleged torture. The expulsion is usually notified at the same time as the refusal, without respecting the time limits for lodging the appeal and, in the cases in which it has been possible to lodge the appeal, the stay of the expulsion and release has not been accepted until the final decision has been made.

3. The Spanish legal framework for International Protection recognises the suspensory effect of the application for protection, however, in the CIE of Aluche (Madrid), the main deportation point in Spain, there have been cases of detention of persons who had already expressed their wish to apply for International Protection and who had an appointment to do; expulsions have also been notified during the application procedure, prior to the final decision being received. These deportation practices have occurred in relation to people who had witnessed aggressions or threats, who had suffered them or who were preparing their complaints[85] .

4. Most of the interviews with the Asylum and Refuge Office (OAR) of the Ministry of the Interior, lawyers and police from specialised units are carried out in the same place of deprivation of liberty, at a time when individuals are suffering strong psychological impacts and having to relive

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[81] Article 3, Response to paragraph 9 of the list of issues 81-85. Seventh periodic report of Spain due in 2019 under article 19 of the Convention: *Op.cit.*

[82] Complaint filed on 11/06/2021, Ombudsman File 21015467

[83] Público (03.02.2021): "Rifian activists fight against their deportation in the CIE of Murcia: "In Morocco we are in danger": https://www.publico.es/sociedad/activistas-rifenos-luchan-deportacion-cie-murcia-marruecos-corremos-peligro.html

[84] Levante (15.03.2023): "An asylum seeker ordered to be expelled because of his sexual orientation and not allowed to return to Kosovo": https://www.levante-emv.com/comunitat-valenciana/2023/03/15/ordenan-expulsion-solicitante-asilo-orientacion-84669683.html

[85] Such is the case of a trans woman who was deprived of her liberty in the CIE of Aluche and detained in the same police station where she had made her appointment (CIE control file 2017/2022). She reported having been assaulted at the police station and during the transfer, as well as not having been allowed to present documentation proving her status. In Aluche CIE, the injuries she had sustained on admission were not documented with the corresponding injury report. In the case of another woman who had witnessed an aggression, she was notified of an expulsion order the day after reporting the facts to social organisations and having applied for international protection. She was threatened that the request for protection would be useless.

everything they suffered in the migratory journey and in detention. They are also conducted without providing a copy or written information of what was gathered in the interviews, contrary to the current regulations on International Protection and interviews with possible victims of torture in general and trafficking in particular.

Recommendations:

1. Effectively guarantee respect for the time limits established for the lodging of an appeal and its resolution during expulsion procedures, especially in cases of persons claiming to be victims of torture, in Migrant Detention Centres (CIE).
2. To regulate the obligatory provision of copies of the interviews conducted during deprivation of liberty in CIE for persons requesting International Protection or who are interviewed by special police units (UCRIF), in order to determine whether they are victims of trafficking, in compliance with the Palermo Protocol and the Asylum Law.

3.2. ON THE VIOLATION OF THE PRINCIPLE OF NON-REFOULEMENT OF TRAFFICKED PERSONS

Spain has conducted processes of expulsion, border rejection or extradition of trafficked persons.

Argumentation:

1. The principle of non-refoulement is the cornerstone of the international protection of refugees and asylum seekers[86] and obliges the Spanish authorities not to return or extradite anyone to a country where they may suffer persecution, torture, disappear or be judicially or extrajudicially executed. For its part, the jurisprudence of the Committee against Torture and the European Court of Human Rights establishes that the principle of *non-refoulement* is absolute.

2. However, and despite the fact that different international organisations have noted the importance of extreme diligence on the part of the authorities in the arrival of possible victims of trafficking through migratory flows[87] , situations of expulsion or refoulement have occurred in the case of victims of trafficking, either due to a lack of detection or recognition of their status[88]

[86] This principle is enshrined in Article 33.1 of the 1951 Convention relating to the Status of Refugees, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3 of the European Convention on Human Rights, Article 17.3 of the Spanish Asylum Law.

[87] OSCE: Uniform Guidelines for the Identification and Referral of Victims of Human Trafficking within the Migrant and Refugee Reception Framework in the OSCE Region, 2019; European Commission: Guidelines for the identification of victims of trafficking in human beings; Office of the High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1); Guidelines for the First Level Identification of Victims of Trafficking in Europe, June 2013. See also the report of the Special Rapporteur on trafficking in persons, especially women and children (A/HRC/38/45).

[88] Amnesty International has denounced that "*when the situation of administrative irregularity is combined with the existence of an expulsion order, the fear of any further contact with the authorities increases. Amnesty International is concerned about reports in interviews with NGO workers of police operations against trafficking for sexual exploitation that end with women being detained on the grounds of administrative irregularity, despite the existence of evidence of trafficking or exploitation*" (p. 22). "*In the CATEs, as in the police stations, the police initiate the review and aliens*

, or due to the refusal of the request for protection[89] . Sometimes these have been expedited expulsions, in some cases related to complaints about officials and resulting in avoiding the investigation of the facts. The Committee against Torture has already been made aware of similar situations in previous years (Gladys John case). [90]

3. Moreover, as prosecutors specialised in gender violence point out, "*victims of trafficking do not report it for fear of being expelled*[91] ", which not only makes detection difficult, but also highlights the difficulties of the regularisation system established by Article 59 bis of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration. The law makes the administrative regularisation of the victim's situation conditional on their collaborating with the authorities in identifying the traffickers, after a period of reinstatement and reflection of at least ninety days.

Recommendations

1. Develop and publish official disaggregated statistics on trafficked persons who have been granted international protection in order to effectively assess the principle of non-refoulement.
2. Improve systems for detecting victims of trafficking, especially in areas where there may be outsourced or delegated monitoring functions, ensuring the principle of non-refoulement.
3. Not to return a trafficked person either to his/her country of origin or to third countries, insofar as this could plausibly pose a threat to his/her life, integrity or liberty, as they may be detected or pursued either by the trafficking network that recruited them or by other persons.
4. Eliminate the obligation imposed by art. 59 bis of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, to collaborate with the authorities in the identification of traffickers as a requirement for access to regularization of victims of trafficking in an irregular administrative situation.

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procedures, aimed at initiating an expulsion file. Several people interviewed agreed that the priority for the police is the rapid screening and removal of these people from the centre, as they do not have enough staff to guarantee security" (p. 31). The organisation also denounces that, in application of art. 59 bis of the Law on Foreigners, victims are given the expulsion order at the moment when the 90-day reflection period to denounce the traffickers begins, which does not seem to take into account the difficulties of these women to face the risks derived from this decision: ""They give you the expulsion decree together with the reflection; if you don't denounce, the expulsion order is reactivated"". Maria, trafficking survivor, (p. 38). Amnesty International (2020): "Invisible Chains: Identifying Victims of Trafficking in Spain":https://doc.es.amnesty.org/ms-opac/doc?q=*%3A*&start=0&rows=1&sort=fecha%20desc&fq=norm&fv=*&fo=and&fq=mssearch_fld13&fv=EUR41600020&fo=and

[89] Among the documented cases, the case of two young women of Vietnamese origin deported despite the Ombudsman's suggestion and the fact that both CEAR and APRAMP detected that there were clear indications that they were victims of trafficking, in October 2019, stands out. CEAR: "The refoulement of two young Vietnamese women, a resounding step backwards in the fight against trafficking": https://www.cear.es/la-devolucion-de-las-dos-jovenes-vietnamitas-un-clamoroso-paso-atras-en-la-lucha-contra-la-trata/

[90] Público (19.05.2027): "Spain is denounced before the UN Committee against Torture for expelling a pregnant trafficked woman": https://www.publico.es/sociedad/denuncian-espana-comite-tortura-onu.html

[91] El Mundo (04.11.2018): "Trafficking victims do not report for fear of being expelled": https://www.elmundo.es/comunidad-valenciana/2018/11/04/5bddfb4d268e3e49368b458e.html

4. ARTS. 5-9 CONVENTION: ON THE PROSECUTION OR EXTRADITION OF PERSONS SUSPECTED OF TORTURE

4.1. LAW 46/1977, OF 15 OCTOBER 1977 ON AMNESTY

Law 20/2022 of 19 October on Democratic Memory has not led to the repeal of the 1977 Amnesty Law, which makes it difficult to investigate torture or ill-treatment and, specifically, to prosecute those suspected of having committed torture.

Argumentation:

1. This same Committee to which we address ourselves has already recommended on previous occasions that Spain should ensure that acts of torture are not crimes subject to amnesty[92] . Thus, the validity of Law 46/1977, of 15 October, on Amnesty continues to be one of the most important procedural obstacles to the prosecution of those suspected of having committed torture during the civil war, Franco's dictatorship and during the transition to democracy. It should be reiterated that the pardon granted by the Amnesty Law to "*acts of political intentionality, whatever their result, classified as crimes and misdemeanours committed prior to 15 December 1976"*, expressly excluded its application with respect to "*crimes that have involved some kind of serious violence against the life or integrity of persons*".

2. In April 1977, Spain had ratified the International Covenant on Civil and Political Rights, which states that **"*nothing can prevent the trial or sentencing of a person for acts which, at the time they were committed, were considered criminal under international law, such as enforced disappearance or torture"***. It can therefore be understood that the Amnesty Law was born in open contradiction with the international obligations previously acquired by Spain.

3. Since 2013, **at least five UN mechanisms** (Working Group on Enforced or Involuntary Disappearances[93] , Committee against Torture[94] , Human Rights Committee[95] , Committee on Enforced Disappearances[96] , Special Rapporteur on Truth, Justice and Reparation[97] **) have reminded Spain** that amnesties**,** pardons **and other similar measures that prevent perpetrators**

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[92] Committee against Torture, Concluding Observations, CAT/C/ESP/CO/5 of 19 November 2009, para. 21.
[93] Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/31, 21 December 2009, para. 502.
[94] Committee against Torture, Concluding Observations, CAT/C/ESP/CO/5, *Op. cit.*
[95] Recommending that Spain repeal the Amnesty Law Human Rights Committee, Concluding Observations, Spain, UN document CCPR/C/ESP/CO/5 (2009), 5 January 2009, para. 9.
[96] Europa Press (30.09.2021): "UN lashes out at 1977 Amnesty Law and calls for criminal prosecution of perpetrators of disappearances during Franco's regime": https://www.europapress.es/nacional/noticia-onu-arremete-contra-ley-amnistia-1977-pide-perseguir-penalmente-autores-desapariciones-franquismo-20210930150251.html
[97] Público (18.09-2018): "UN rapporteur urges Spain to "try or extradite" Franco's perpetrators": https://www.publico.es/politica/franquismo-relator-onu-pide-juzgar-extraditar-responsables-franquistas.html

of serious human rights violations from being brought to justice are incompatible with its international obligations.

4. *All laws of the Spanish State, including Law 46/1977, of 15 October, on Amnesty, shall be interpreted and applied in accordance with conventional and customary international law and, in particular, with International Humanitarian Law, according to which war crimes, crimes against humanity, genocide and torture are considered to be imprescriptible and not subject to amnesty*". The fact that there is no express derogation leaves a margin of arbitrariness for judicial interpretation, which has been favourable to the interpretation that crimes of torture and other serious crimes are covered by the amnesty granted by this law.

Recommendations:

1. Repeal Law 46/1977 of 15 October 1977 on Amnesty.
2. Additionally, amend Law 20/2022 on Democratic Memory, of 20 October 2022, to include an express provision that states that no regulatory provision may be interpreted as a rule of impunity, nor have the effect of hindering investigations and access to justice, truth and reparation for serious human rights violations committed during the Civil War and Franco's regime.

4.2. THE LAW 20/2022 ON DEMOCRATIC MEMORY

The Law 20/2022 of 19 October on Democratic Memory still has limitations that hinder victims' access to the investigation and effective prosecution of those responsible.

Argument:

1. In the Law 20/2022 on Democratic Memory of 20 October 2022 there is no mention of the obligation to identify and prosecute the perpetrators of torture and ill-treatment during Franco's regime. The right to justice has been the area where the greatest deficits have been observed on the part of Spain in addressing the human rights violations committed during the Civil War and Franco's regime, something repeatedly affirmed by United Nations human rights mechanisms.

2. Although Art. 29 creates the Court Prosecutor (*Fiscal de Sala*), whose functions include the investigation of crimes during the Civil War and the Dictatorship, Art. 29.2 states that "*Judicial protection shall be guaranteed in proceedings aimed at obtaining a judicial declaration on the reality and circumstances of specific past events relating to the victims referred to in Article 3.1",* but does not specify the right to prosecution and accountability of those responsible for torture and ill-treatment, nor the right to financial redress (compensation).

3. The Law also does not include the obligation to advance the investigation of cases of torture committed during the Spanish Civil War and Franco's regime. There has been a tendency to file

these complaints without minimal investigation actions, based on arguments contrary to international law, such as the time-barring of the acts being denounced, or the impossibility of investigating them in application of the Amnesty Law of 1977 or indeed due to the death of the alleged perpetrators, which demonstrate the serious need to guarantee the support of the Public Prosecutor's Office in criminal proceedings initiated by the victims.

4. The Third Final Provision directs the investigation of these crimes towards the sphere of voluntary jurisdiction which, in the best of cases, can only lead to a resolution in the civil (not criminal) order; that is to say, declarative, but without criminal consequences. This insistence in the Law on declaratory proceedings limits the victims' right of access to binding legal avenues that guarantee the effective prosecution of those responsible.

Recommendations:

1. Guarantee victims' access to criminal proceedings in complaints of torture or ill-treatment during Franco's regime, and not only to voluntary jurisdiction proceedings, in order to guarantee the effective prosecution of those responsible.

2. Ensure that the mandate of the Prosecutor's Office includes advancing in the investigation of cases of torture committed during the Spanish Civil War and Franco's regime.

3. Deprive of effect the provisions of the Amnesty Law that hinder all investigations and access to justice for serious human rights violations committed during the Civil War and Franco's regime.

4. Ensure that the right to compensation for victims of torture under Franco's regime is recognised in law.

5. ART. 10 CONVENTION: ON THE DUTY TO TRAIN LAW ENFORCEMENT PERSONNEL, WHETHER CIVILIAN OR MILITARY, MEDICAL PERSONNEL, PUBLIC OFFICIALS AND OTHERS ON THE PROHIBITION OF TORTURE

5.1. The Spanish Government has not taken steps towards the official recognition of the Istanbul Protocol as a standard of reference in the investigation of torture. In the same vein, it has not taken effective steps towards its implementation.

Argumentation:

1. The European Court of Human Rights has condemned Spain on up to twelve occasions for violations of Articles 3 and 6. Many of these judgments have pointed not only to the lack of political will to investigate allegations of ill-treatment or torture, but also to the lack of or insufficient forensic documentation of these situations.

2. Successive recommendations of the European CPT since its first report in 1991 have insisted on the need to improve the quality of forensic examinations and reports. However, these recommendations have not led to significant improvements.

3. At present, the forensic services of the courts lack specific protocols for the evaluation of torture. There do exist some protocols for documentation of violence in certain instances (e.g., the forensic service of the National Court or the Institute of Legal Medicine of the Basque Country). In 2017, the Scientific-Technical Committee of the Forensic Medical Council published a working guide for forensic medical assistance to persons deprived of their liberty. The guide, however, does not comply with the minimum standards of the Istanbul Protocol, neither with regard to the conditions in which the interview should be conducted nor the different sections that the forensic medical report should contain[98] .

4. Beyond the fact that specific courts may implement limited protocols, the Istanbul Protocol is not recognised as the reference tool in the documentation and investigation of allegations of ill-treatment or torture. This is of enormous importance, because the forensic medical report is only one part of the whole investigative process. The Istanbul Protocol's *Principles for Effective Investigation of Torture and Ill-treatment*[99] set out the minimum set of conditions for a state to be considered as adequately investigating allegations of torture.

[98] https://www.mjusticia.gob.es/es/ElMinisterio/OrganismosMinisterio/Documents/1292430900358-Guia_de_trabajo_para_la_asistencia_medicoforense_a_personas_en_regimen_de_privacion_de_libertad_CM.PDF

[99] Chapter II. Revised version 2022

5. The Istanbul Protocol itself includes in Chapter VIII (Implementation of the Istanbul Protocol) a set of measures that each State must comply with in order to conduct an adequate implementation of the Istanbul Protocol. Despite repeated condemnations of Spain by the ECtHR for its failure to investigate allegations of torture, no steps have been taken towards the effective implementation of the Principles for the Adequate Investigation of Allegations of Torture by States, as specifically and in detail set out in Chapter III of the Istanbul Protocol (updated version 2022).

Recommendations:

1. The State should report on the implementation of the Principles for the Adequate Investigation of Allegations of Torture set out in the Istanbul Protocol (Chapter 3) and inform the Committee of the steps taken or envisaged to ensure compliance.

2. The relevant authorities (Ministry of Justice, Ministry of Interior and Ministry of Health) should ensure the existence of specific protocols for documentation of allegations of ill-treatment or torture by legal (forensic) and non-legal (primary health care and specialised care) clinicians that comply with the requirements of the Istanbul Protocol, in line with the recommendations made by the Mechanism for Prevention of Torture (MNP).

3. In particular, specifically recommend that:

    a. The Institutes of Forensic Medicine and Forensic Sciences must ensure effective practices for the qualified investigation of torture, including proper training of forensic experts. Given the culture of forensic work in Spain, training should be especially intensive in the psychological evaluation of possible victims.
    b. As is currently regulated in Spain for forensic assessments of gender violence in the Comprehensive Forensic Assessment Units, the forensic protocols for the assessment of torture should contemplate a comprehensive and multidisciplinary approach, through the collaboration of forensic doctors and psychologists following the indications of the Istanbul Protocol (updated version 2022).
    c. In the report, forensic experts should provide an assessment of the level of overall consistency between the findings of the clinical (physical and psychological) assessment and the account of torture.
    d. The ethical principles of forensic examination should be reinforced, including informed consent appropriate to the individual and the situation, privacy of the medical examination and confidentiality of the content of the report.

5.2. The Spanish Government has not taken any steps to train relevant personnel in charge of persons deprived of their liberty in the Istanbul Protocol.

Argumentation:

1. The Istanbul Protocol requires States to ensure that all relevant personnel (State Security Forces and Bodies, prison officials, official forensic experts and other health professionals, prosecutors, lawyers and judges) receive training on effective legal and clinical investigation and documentation of torture and ill-treatment, in accordance with the Istanbul Protocol.

2. Of particular relevance is the training of staff working in detention centres. In this regard, there has been a training process in Catalonia, at the request of the Catalan Ombudsman. All doctors and psychologists in the Catalan penitentiary system (around 150) were trained in the Istanbul Protocol (previous version) in 2018 through a consultancy agreement with external experts. Although the training was not followed up on, the experience was pioneering and an example of good practice which should be commended.

Recommendations:

1. Ensure that the Spanish Penitentiary System and, in general, the personnel working in detention centres (including CIES) agree and undertake a training process similar to the one conducted in Catalonia, to train all health personnel (medical and psychological) in the implementation of the updated version of the Istanbul Protocol. Spain has various NGOs accredited to provide such training.

6. ARTS. 11, 12 AND 13 CONVENTION: LACK OF THOROUGH AND IN-DEPTH INVESTIGATIONS INTO CASES OF EXCESSIVE USE OF FORCE

6.1. ART. 11 CONVENTION: ON CUSTODY OBLIGATIONS AND TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY

6.1.1. Medical assessments in short-stay detention facilities

Argumentation:

1. The Istanbul Protocol establishes that States:

- Should implement a system of mandatory health assessments for all detainees.
- Must guarantee the rights of alleged victims to one or more health professionals of their choice or confidence for a clinical assessment at any time.
- Should ensure that physicians have prompt access (<24 hours) to alleged victims of torture and ill-treatment, to conduct an assessment and document any physical and psychological evidence.

2. In Spain:

- There is a health assessment conducted on admission for persons detained in prisons and migrant detention centres. This is not the case in short-stay detention centres, except in exceptional circumstances. If a citizen is detained, he or she does not have the opportunity to be assessed by a trusted independent clinician.

- If a detainee has allegedly been a victim of torture, the person is taken to the emergency room of a health centre where an untrained person with other duties will conduct a general scope report that usually does not meet the requirements of the Istanbul Protocol.

- In most cases, the State Security Forces and Bodies (SSFB)- especially, in the majority of cases, the National Police and the Autonomous Police - remain inside the medical consultation room and have an intimidating or coercive attitude towards the doctor. The doctor has no clear indications as to how to proceed, due to a lack of knowledge of the Ethical Principles of the Istanbul Protocol[100] and the absence of clear regulations on the matter at the national level.

[100] Vivancos, C., & Rivera Beiras, I. (2020). Medical examination of detainees in Catalonia, Spain, conducted in the presence of police officers. *Torture Journal*, *30*(1), 49-53. https://doi.org/10.7146/torture.v30i1.119257

- In some jurisdictions (e.g., Madrid) the detainee is taken to police clinics or outpatient clinics, where the examination and reports are conducted by doctors attached to the police or dependent on the local authority, in breach of the Istanbul Protocol's principle of independence and absence of conflict of interest.

Recommendations:

1. The State must guarantee the independence of any clinical documentation of ill-treatment after arrest. The police medical service or services under the same police administration should not issue such reports and they should in any case not be admissible as documentary evidence in legal proceedings as they lack the independence criterion established by the Istanbul Protocol.
2. Clear instructions should be issued to the SSFB guarding or transferring detainees on the conditions under which the assessment of detainees should be carried out, guaranteeing the principles of confidentiality and privacy of the medical act and indicating the detainee's right both to be questioned and examined in private and for the report to be given exclusively to the person or their legal representative, in accordance with the Istanbul Protocol (chapters II, IV and VII).
3. The Ministry of Health should issue a technical document and specific instructions to health centres and hospital units on both the conditions of the examination and the duty of privacy and confidentiality of the patient who claims to be a victim of ill-treatment, as well as the requirements of the report to conform to the Istanbul Protocol.

6.1.2. Serving sentences far from the place of residence. Abuse of the figure of transfers between centres.

6.1.2.1. Serving sentences far from the place of residence

Argumentation:

1. Article 12 of the General Penitentiary Organic Law (LOGP) establishes that "*the location of the establishments shall be determined by the prison administration within the designated territorial areas. In any case, an effort shall be made to ensure that each area has a sufficient number of establishments to meet the needs of the penitentiary system and to prevent prisoners from being uprooted*". The European Prison Rules (Rule 17.1) and the United Nations Standard Minimum Rules for the Treatment of Prisoners, the "Nelson Mandela Rules", (Rule 59) are in the same vein. Prison legislation therefore establishes the right of prisoners to serve their sentences in their place of origin or roots, and it is up to the administration to guarantee this right.

2. Non-compliance with this principle amounts in practice to inhuman and degrading treatment, in that:

- It deprives or hinders the right to family life and the maintenance of social relations with the immediate environment.
- It makes it impossible or difficult to progress in prison treatment insofar as the distance from the place where they are settled hinders the granting of permits and progression to the third degree, as they do not have family or social roots.
- It is used as a disguised sanction and/or as a rotation tool in the case of prisoners who are viewed as a "nuisance" to the prison administration.

3. The existence of this practice was already noted by the CPT in its report[101] following the visit to Spain from 14 to 28 September 2020 (paragraph 40) where it states that "*…. However, in the course of the visit, the CPT's delegation came across a considerable number of prisoners who were incarcerated at a great distance from their homes. One category refers to defiant prisoners who are moved from one prison to another throughout the country on a frequent basis".*

4. This is also reiterated in the Government's written reply[102] supplied on 10 February 2020, which states that more than 8,000 persons (15% of the total number of persons deprived of their liberty) are serving sentences outside their place of residence in Spain. To this should be added the 7,600 prisoners whose place of residence is not known to the General Secretariat.

6.1.2.2. Legal defencelessness

1. Furthermore, it should be pointed out that prisoners have little or no protection against such transfers. On the one hand, the usual practice in prisons of not notifying the transfer decision until the day it is to take place prevents communication with the family or with a lawyer to appeal against the decision. Frequently, moreover, the prisoner is not informed of his or her final destination. The prisoner may pass through one or more other intermediate centres where they remain for days "in transit" until they actually reach their final destination, and only then can they communicate this transfer to their family or defence who, until then, have no knowledge of their whereabouts.

2. On the other hand, appeals against such a decision take so long (on average 15.4 months[103]) that a possible decision upholding the decision would have no practical application. The only moderately agile way of appealing against such transfers is to appeal to the Prison Supervision

[101] CPT 2020 Report https://rm.coe.int/1680a47a78

[102] Written answer from the Government dated 10 February 2020 on the place of fulfilment https://drive.google.com/file/d/1OCseb-ZdJx9g9SpR7WivsRYm1sMHCBC0/view?usp=sharing

[103] Data from the General Council of the Judiciary https://www.poderjudicial.es/cgpj/es/Temas/Transparencia/ch.Estimacion-de-los-tiempos-medios-de-duracion-de-los-procedimientos-judiciales.formato1/?idOrg=16&anio=2021&territorio=Espa%C3%B1a&proc=TOTAL%20ASUNTOS

Judge, however in their last meeting in 2022, they removed the criterion declaring themselves competent in this matter.

Recommendations:

1. Prioritise the serving of custodial sentences close to the places of origin, in compliance with national and international regulations in force, avoiding that no prisoner is held in prisons far from his or her place of origin or residence.

2. If it has to be maintained, limit the measure to those who voluntarily request transfer to another prison and/or that the transfer be time-limited, facilitating later reintegration into the prison of origin. Enact regulation that ensures prisoners who report ill-treatment are not transferred to another prison as a form of reprisal during the criminal proceedings, thereby preventing or hindering the reporting or investigation of the facts.

3. In those cases, in which this occurs, guarantee that the transfer decision is communicated sufficiently in advance to avoid powerlessness and to allow family members or lawyers to be informed before the transfer takes place.

4. To regulate the competence of Prison Supervision Judges in this area.

6.1.3. Abusive and punitive use of mechanical restraints in the penitentiary setting

Argumentation:

1. Prison regulations do not list the use of mechanical restraints as an authorised means of constraint[104] . We understand that its use (as has also been indicated by sectors of Spanish penitentiary doctrine and human rights organisations, jurists and doctors) signifies an extensive and/or analogical interpretation in the use of a means not expressly mentioned in legal norms.

2. Mechanical restraints, especially those of a regimental nature, constitute a violation of the constitutional principle of legality and the rule of law. They constitute a source of ill-treatment, a health risk and a source of severe psychological suffering, and their regimental or punitive use constitutes a form of cruel, inhuman or degrading treatment.

[104] The list of means of physical coercion is contained in the Prison Regulations, which in article 72 clearly indicates that "for *the purposes of article 45.1 of the LOGP, provisional solitary confinement, personal physical force, rubber bumpers, aerosols of appropriate action and handcuffs are means of coercion. Their use shall be proportional to the intended purpose, shall never involve a disguised sanction, and shall only be applied when there is no other less burdensome way to achieve the intended purpose and for the time strictly necessary*".

3. In Spanish prisons, although there has been a decrease in recent years, there is still a worryingly high use of this measure[105].

4. This measure, moreover, is not applied for the "minimum necessary" time, as stated in the regulations, which reinforces the idea of the punitive use of the same[106] .

***Recommendations*:**

1. Eliminate the possibility of mechanical restraints, in line with the previous recommendations of the CPT of the Council of Europe , as has been done in the area of juvenile criminal justice.

6.1.3.1. Use of solitary confinement, isolation measures or so-called "special modules". Inhumane conditions of these.

Argumentation:

1. There is a recurrent use of isolation measures[107] , in application of the following situations:
    - Provisional solitary confinement as a means of coercion (Art. 72 of the Prison Rules),
    - Provisional isolation as a sanction (Art 236 and 254),
    - Regimental limitation decided by the Directorate.
    - At the request of the prisoner for personal protection (Art. 75)
    - Classification in closed regime or special departments (art. 91 et seq.)

Except for the punishment of solitary confinement (Articles 42 and 43 of the General Penitentiary Organic Law) and the classification in closed regime and special departments (briefly mentioned in Article 10 of the same law), the other modalities are not provided for in the Law, but in lower regulations, without legal footing.

3. The Nelson Mandela Rules and the CAT's own recommendations, as well as those of successive rapporteurs against torture, indicate that this measure should be imposed exceptionally, as a last resort, and for the shortest possible time, which in any case should not exceed 14 days. However, there are different strategies on the part of prisons to circumvent these recommendations, usually by increasing the hours of the prison yard or by introducing some days between 14-day periods.

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[105] Between January 2021 and September 2022, a total of approximately two thousand mechanical restraints were applied (one thousand restraints/year - 2% of the total number of persons deprived of liberty). Of these, around 60% of restraints were conducted in prisons in Catalonia.

[106] Average duration of 4h 30m, which indicates that there are cases with containment longer than 12h.

[107] https://aen.es/wp-content/uploads/2023/05/Informe-para-la-campan%CC%83a-por-la-abolicio%CC%81n-del-aislamiento-penitenciario.pdf

4. This results in people being held in complete isolation for periods of up to 45 days and serving sentences in closed or special modules for several years.

5. In some cases there are particularly restrictive regimes which regulate that the prisoner should not have any contact - whether significant or not - with human beings (including the officials themselves), on the grounds of alleged dangerousness. Such a regime (known in Catalonia as the Bubble Protocol or *Protocol Bombolla*) constitutes in itself a form of cruel, inhuman or degrading treatment or even torture.

6. Of particular concern is the situation of persons with Severe Mental Disorder (SMD) who remain in conditions of isolation. This practice, despite being prohibited by the Mandela Rules and international law, is systematic. Serious Mental Illness is not considered to be a condition for not being in solitary confinement, except if the person is in an "acute psychotic crisis", whereupon it should be a doctor who, upon examining the person, should terminate the measure of isolation. This ignores the potential for harm and psychological decompensation caused by isolation itself. In this sense, SMD is produced both by the isolation itself and a worsening of people who had this condition prior to their placement in closed units.

7. We find persons deprived of liberty who, due to their precarious state of mental health, are unable to follow internal regulations or behave in ways that are not to be expected in a person without these pathologies. This causes continuous disciplinary proceedings in which the fact that the origin of these behaviours has medical causes is completely ignored, leading them to a vicious cycle of situations of isolation, whereby a regimental approach takes precedence over a clinical approach for persons whose volitional and sometimes cognitive capacities are altered.

6.1.3.1.1.1. On isolation conditions

Argumentation:

1. Within the conditions of isolation, there are particularly worrying elements, especially with regard to the absence of rehabilitation activities. Despite the existence of a regulation that would include an Individual Rehabilitation Plan, in reality "incentive" systems mean that in most cases people do not have access to any type of leisure, educational, therapeutic or work activity. This leads to a situation where in order to access these activities, a "good attitude" must be shown, which is impossible without a minimum of stimulation from the environment and without a supportive therapeutic psychological approach. The CAT already stated in its sixth periodic report on Spain in 2015 that an excessive application of solitary confinement would amount to a form of cruel, inhuman or degrading treatment or punishment and even torture in some cases (17&).

2. Regarding the stay in a special unit, it has been understood by international bodies that cells of 6m2 are not acceptable for prolonged periods of 21 hours or more per day.

3. Given that not all centres have closed or special units, there are constant transfers for this reason[108] (see specific section).

4. There is no reliable data on the number of persons who spend more than 14 days in isolation.

Recommendations:

1. Prohibit solitary confinement as a long-term living regime.
2. Amend the General Penitentiary Organic Law to repeal the current sanction of provisional solitary confinement. Alternatively, restrict it to specific, particularly serious cases that are regulated by law (they are currently defined in a regulation), preventing a single incident from generating more than one solitary confinement sanction, and establishing an appropriate investigation mechanism on each occasion on which this measure is applied.
3. Regulating the prohibition of stays in isolation modules for people with a diagnosis of Serious Mental Disorder (SMD).
4. If solitary confinement is not abolished, set clear time limits and restrictions on its use by regulation (not by internal rules).
5. To develop clinical psychological intervention programmes in all isolation modules, which take into account the special difficulties of these people in living together, with a trauma and culture-sensitive model of care.
6. Prohibit by law any kind of protocol involving forms of isolation without human contact (Protocol Bombolla or similar).

6.1.3.2. Lack of prison health resources and non-integration into the general health system, with lack of independence of health professionals and conflict of interest in dealing with human rights violations in prisons.

Argumentation:

It is 20 years since 28 May 2003, when the Law on Cohesion and Quality of the National Health System (16/2003) came into force, which stipulated that within 18 months the responsibility for prison healthcare would be transferred to the national health service[109] .

[108] https://www.congreso.es/entradap/l14p/e10/e_0101557_n_000.pdf

[109] Specifically, see the sixth additional provision of the aforementioned law on the transfer to the Autonomous Communities of the health services and institutions dependent on the Penitentiary Institutions.

However, this law has yet to be implemented and primary health care in prisons remains the direct responsibility of the Ministry of the Interior and the General Secretariat of Penitentiary Institutions.

2. During these two decades, numerous institutions - both state and international - have denounced the impacts of the failure to comply with this mandate on the health of the population deprived of liberty. In the last two years alone, organisations such as the Spanish Ombudsman, the National Mechanism for the Prevention of Torture or the Committee for the Prevention of Torture of the Council of Europe have continually recommended the immediate transfer of these competences.

3. Among the consequences of this non-compliance, the Ombudsman has complained of

- The high number of health care places that remain vacant - around 80% of the total number of places offered,
- The alarming mental health situation of the prison population due to the "shortage of professionals specialised in psychiatry, the provision of inadequate pharmacological treatment, the indiscriminate application of the disciplinary regime on these persons or their consideration as maladjusted persons with dysfunctional behaviour[110]. This same concern regarding the mental health situation of persons deprived of their liberty has been highlighted by the National Mechanism for the Prevention of Torture in its latest report[111] and by the CPT in its most recent visit to Spain.[112]

4. This general lack of care is compounded by conflicts of interest of healthcare staff within prisons due to their administrative dependence on the Ministry of the Interior, which adds to the difficulty of reporting and investigating possible ill-treatment in prisons.

5. Among mental health patients, particularly serious are those persons with alternative measures for criminal unimputabililty who are serving their sentence in ordinary centres without therapeutic care for their underlying disorder.

6. Finally, numerous transfers have been detected of people who were undergoing medical treatment or pending surgery and/or tests, which has meant the interruption of their treatment and, therefore, a deterioration in their treatment and health.

[110]Spanish Ombudsman, Annual Report 2022, Vol. I, Madrid, pp. 44 and 45. Available at: https://www.defensordelpueblo.es/wp-content/uploads/2023/03/Defensor-del-Pueblo-Informe-anual-2022.pdf.

[111]National Preventive Mechanism for the Prevention of Torture, Annual Report 2021, Madrid, pp. 107 and 108. Available at: https://www.defensordelpueblo.es/wp-content/uploads/2022/05/Informe_2021_MNP.pdf.

[112]Committee for the Prevention of Torture, Report 2021, pp. 65-74. Available at: https://rm.coe.int/1680a47a78

Recommendations:

1. Conduct the immediate transfer of prison healthcare to the National Health Service, as provided for in Law 16/2003 and as has already been done in the autonomous communities of Catalonia and the Basque Autonomous Community.

2. Until this happens, take measures to enable health personnel to comply with their duty to report situations of potential ill-treatment or torture that come to their attention in the course of their work, either anonymously or with protection of sources (see specific section).

3. Act appropriately to transfer psychiatric patients with substitution measures for mental disorder housed in prison to a health facility where they can receive appropriate treatment.

4. Prevent transfer to other centres that cannot guarantee the continuation of treatment or the same health care, prioritising health over safety.

6.1.4. In Migrant Detention Centres (CIE)

Most of the information provided by Spain in relation to the deprivation of liberty of foreigners in CIE consists of the literal transcription of existing regulations, whose mechanisms **exist in a formal manner,** but which **in practice are not implemented in an adequate and effective manner**, generating situations of cruel, inhuman or degrading treatment, which has been considered in independent investigations as Torturing Environments[113] , due to the following facts:

[113] We define a **Torturing Environment** as a space in which conditions are created that, taken together, would meet the legal definition of torture. It is a total of contextual elements, conditions and practices, which diminish or override the victim's will and control over his or her life, and which engage the self (Pérez-Sales P (2017) Psychological Torture. Routledge). The concept has been recognised as an appropriate model for the analysis of detention centres by the Rapporteur against Torture in his report on the subject.

6.1.4.1. Lack of competent and accountable control mechanisms, in as many areas as required, to ensure the investigation of allegations of physical assault, ill-treatment and inhuman and degrading treatment.[114]

Argumentation:

1. By explicitly excluding the penitentiary nature of the internment from its legal nature, the regulations concerning the penitentiary regime are inapplicable. Therefore, in practice, it is the police **who directs and governs the life of the centre, with the sole supervision of the Control Judges from their judicial districts**, located outside the CIE.

2. The detainee cannot contact the supervisory judges directly, nor does he/she have the means to do so independently[115] **.** Although, as stated in paragraph 162 of the government's replies[116] , the recommendations issued by the judges and the Ombudsman in the capacity of National Mechanism for the Prevention of Torture (MNPT) have been complied with by issuing instruction 2/2018, the mechanism established and the security practice of the centres prevents inmates from having access to paper and pen in an autonomous manner, having to be delivered under the control of the social teams or police personnel in charge of their custody. The written complaint is deposited with the mediation of a social worker or police officer in a mailbox intended for this purpose, which is emptied and sent to the court on duty by the same officers in charge of its custody. There **have been numerous occasions on which it has been denounced that the** police management of the centres have **failed to send the complaints sent to the Control Courts in response to reports of ill-treatment and aggression.**

3. **The functions of CIE control judges have not been specifically developed in the regulations.** This results in **a lack of competences in** important matters such as **investigation, the suspension of expulsion, or release** in situations such as having suffered aggression or ill-treatment during detention or if their life is in real danger in the event of being deported or when the precautionary measure of detention is applied irregularly. **Due to the length of time it takes to open new legal proceedings for the denunciation of assaults or ill-treatment**, the coordination of all existing and new legal agents, the geographical dispersion that often occurs between the detention courts and the judicial districts that are located in the CIE territories**, the deportation of the victim without investigation is unavoidable and justifiable.**

4. After these episodes**, temporary isolation of the victim and the use of threats leading up to the flight is common.** This hinders the investigation of the facts and the contact of the person with his/her lawyers and NGOs. Although this isolation is reported to the court on duty, the

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[114] Responses to paragraphs 20, 157 to 162 of the allegations of the Spanish Government: Seventh periodic report of Spain due in 2019 under Article 19 of the Convention, 13 March 2020, CAT/C/ESP/7 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FESP%2F7&Lang=en

[115] The Protocol for Handling Complaints and Allegations of Abuse is available here: https://www.mundoenmovimiento.org/wp-content/uploads/2022/11/DIP-1906-2021-OFICIO-PROTOCOLO-DENUNCIAS-MALOS-TRATOS-1.pdf

[116] Seventh periodic report of Spain due in 2019 under article 19 of the Convention: *Op.cit.*

mandatory injury report and health assessment are not sent, leaving the person expelled without the option of an expert assessment from outside the centre and without proof of the reported aggression and its consequences. There have been numerous complaints in which, under these circumstances, access to the application for international protection has not been allowed or in which deportation has been conducted without notification[117] .
Likewise, the presence of police personnel has been acknowledged[118] during medical examinations, especially after an episode of aggression (CIE control files 1029/21 and 471/2021).

5. Health professionals are mandated to issue medical reports for those persons who present injuries or who claim to have suffered an assault before and during detention in CIE. However, **the injury reports issued by health personnel do not comply with legal standards and are still not sent directly to the duty courts**, as has been reiterated by the supervisory courts (file 2040/20) and by the Ombudsman (visit to the Madrid CIE on 15/12/20, report MNPT 2020-184). Most of the requests, complaints or claims made have concerned the medical service, and on several occasions, there have also been allegations of mistreatment by an official[119] .

6. Far from what is described in the Criminal Procedure Act, there are constant detentions in CIE of persons from police stations and penitentiary centres who have serious injuries and/or illnesses and who have not been addressed by medical staff in the judicial headquarters. There are some complaints about the admission of inmates in a bad state of health for whom the centre is unable to provide adequate attention[120] . Moreover, the observation room, if any inmate requires specific monitoring, is insufficient and does not have the appropriate means for its proper function[121] .

7. Complaints have also been received concerning the waiting times that sometimes occur in order to be seen by the doctor, to which the response was that they only occur on specific occasions and only when requested by a large number of inmates[122] .

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[117] Situations have been reported, such as that of a citizen of Moroccan origin who was transferred to the airport for deportation despite bleeding from self-inflicted injuries inside the centre when she was about to be deported, with the airport health service assessing that she was not fit to fly (file 21006492). In this case, no medical report was issued by the CIE health service, neither before her transfer to the airport nor after her return to the centre. This person was finally expelled after being administered sedative medication and transferred to the airport bound hand and foot, resulting in disproportionate and degrading treatment (CIE control file 407/2021). The decision rejecting her application for international protection is being appealed in the National Court, without allowing her deportation to be halted. The CIE did not provide her with a copy of the mandatory health report on her state of health, nor of the *fit to travel*, for which reason she was detained on several occasions after her deportation to Morocco.

[118] Madrid Control Judges, police presence during the assistance https://www.mundoenmovimiento.org/wp-content/uploads/2022/11/220512_ACUERDO-CONJUNTO-MAGISTRADOS-CONTROL-CIE-.pdf and negligence in the acquisition and administration of narcotics https://www.mundoenmovimiento.org/wp-content/uploads/2022/11/Acuerdo-CIE.pdf

[119] Unidad de Extranjería, FGE, Memoria 2020, p. 14. Available at: https://www.fiscal.es/-/extranjeria.

[120] *Ibidem*, p. 17.

[121] *Idem.*

[122] *Idem.*

8. Complaints of aggression and ill-treatment without investigation have been numerous and come from all the CIEs in Spain. At least **13 physical assaults** -1 in 2019, 3 in 2020, 3 in 2021, 3 in 2022 and 3 in 2023- have been reported from Aluche CIE to the competent bodies (supervisory courts, criminal investigation courts, the Ombudsman, the National Mechanism for the Prevention of Torture, the Public Prosecutor's Office and the General Council of the Judiciary). In light of the repetition of situations of this type, **the Ombudsman has issued a Recommendation to the Directorate General of Police** to issue an "instruction including a ***protocol for handling complaints and allegations of ill-treatment of persons deprived of their liberty in Migrant Detention Centres"***. The Ombudsman requests that this protocol **include the suspension of the expulsion of persons who may be considered victims of criminal or disciplinary offences while the investigation is underway, as well as the manner of forwarding the appropriate information to the competent authorities**; all of this considering the principle of conducting an effective investigation (Ombudsman's files 21007749 and 21007826). This institution also addressed the State Attorney General's Office (FGE) in this regard, reporting the serious consequences of the failure to adopt measures to suspend the agreed expulsion in cases where there is a complaint of alleged ill-treatment, as this makes it impossible to take a statement and hinders the clarification of the facts being prosecuted (file 17016930 referred to in the Ombudsman's annual report 2020). In response, in October 2022 the police management of the Aluche CIE presented the **Protocol for the processing of complaints and allegations of ill-treatment** to which the social entities have submitted allegations arguing that it does not include the way in which a police officer who is aware of these facts could carry out the complaint of ill-treatment or aggression, and because they understand that the literal application of some points violates the confidentiality of the content of the injury report and truncates the direct communication of the health team with the duty court, which could lead to coercion of the health team providing the assistance and contradict the laws in force on the matter.

Recommendations:

1. Devise regulation regarding the competences of the Control Courts in the investigation of complaints of ill-treatment or torture; to halt the expulsion or release of complainants, and to prosecute non-compliance with the legislation in force by social and health care agents or third parties who are aware of aggressions.

2. Urge the Public Prosecutor's Office to implement the measures proposed by the Ombudsman to ensure the principle of effective investigation (freezing of the expulsion, communication with competent bodies, release, etc.).

3. Regulating by regulation those aspects of the operation of the centre which do not correspond to custodial duties, and which cannot depend on the will of the police officers (access to rights such as international protection, access to pencil paper, medication, health consultation or personal hygiene items, limitation of the right to visits or communication...).

4.	Establish norms and guarantee in practice the existence of effective, transparent and civil society-inclusive mechanisms for the control, monitoring and supervision of Migrant Detention Centres.

6.1.4.2. Non-prudential use of detention

Argumentation:

Although the Government indicates in paragraph 156 of its submissions[123] that detention is a precautionary measure, this is not the case in practice. If it were a precautionary measure, it could only last as long as the main proceedings on which it depends. In the case of expulsion proceedings, this is processed through a preferential procedure and, according to the Regulation of the Aliens Act (Articles 234 to 237) and must be conducted in a maximum of 8 days. The maximum period of 60 days or any other period longer than 8 days is disproportionate and, therefore, constitutes arbitrary detention[124] .

It also fails to comply with the ECtHR criteria on length of detention: only for the duration of the process; with a duration that should not exceed the reasonable period necessary to achieve the objective pursued, and applying the principle of proportionality, with the duration of detention being a relevant factor in the analysis of the same. The average detention time for women was 26 days during 2021 and 2022; and the average for all persons detained in CIEs in the national territory in 2021 was twenty-eight and a half days. However, 10% of the cases resulted in very lengthy detentions and there were six women who were detained for more than 55 days (two were deported and four were released). The average length of stay that inmates spend in the Centre before their expulsion materialises is an estimated average stay of 40 days[125], which does not correspond to the nature and purpose of the precautionary measures.

2. Despite the fact that internment in CIE is an extraordinary measure that cannot be applied in certain situations, Spain has conducted the internment of persons who, according to the law, should never have been interned[126] .

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[123] Seventh periodic report of Spain due in 2019 under article 19 of the Convention: *Op.cit.*

[124] Castilla Juárez, Karlos, *Detention for migratory reasons? Human rights responses for Spain and Mexico,* Tirant lo Blanch, 2018, pp. 244-245.

[125] *Ibidem*, p. 18.

[126] One woman with the status of victim of gender-based violence in Spanish territory with a dependent minor, two victims of trafficking and one victim of smuggling; two women with breastfeeding children and one woman with a child in her care at school; a woman undergoing in vitro fertilisation treatment with embryos already fertilised and awaiting transfer and at least three women victims of different forms of violence who showed signs of post-traumatic stress disorder and mental health problems; five women with EU citizenship (Bulgarian, Hungarian, Italian and Romanian nationals); fourteen women who were applicants for international protection, albeit unofficially, as their applications were accepted during their detention.
All figures are found in: Mundo en Movimiento, Represión y encierro. Análisis interseccional de la violencia en el internamiento de personas extranjeras. (Madrid March 2023) available at https://www.mundoenmovimiento.org/wp-content/uploads/2023/03/Represion_y_encierro-Informe_completo-2023.pdf

Recommendations:

1. Develop regulation ensuring the alternative measures to detention foreseen in Article 61 of the Law on Foreigners, so that they can be applied as a substitute for detention.

2. Establish a limit to the period of detention adapted to the nature and purpose of a preventive measure.

3. Extend the competence recognized to the police directorate of the centre in Article 37 of the CIE Regulation to supervisory judges, so that they can grant release when serious health problems, victims, maternity or other situations are identified in which detention is not appropriate or an alternative measure to detention would be appropriate.

6.1.4.3. Lack of application of a gender perspective in detention (harassment, ill-treatment and threats based on sexual orientation or gender identity, economic activity or care regime.

Argumentation:

1. The State responds exclusively in masculine terms, referring to "prisoners", without providing figures on the number of complaints of aggression and ill-treatment filed over the years. In this way, the fact that women and LGTBIQ+ persons are also deprived of their liberty in these centres, and that they suffer aggression, ill-treatment, inhuman and degrading treatment in relation to their sexual orientation, their gender identity or the economic activity they conduct in order to survive, is rendered invisible.

2. Proceedings have been opened due to the complaint of a group of 6 women who wrote to the control bodies of the CIE of Aluche (Madrid) to report threats of rape and insults directed at one of them for having denounced the aggression of another inmate and another who had been forbidden to share a room with the rest for being a lesbian (CIE Control File 460/2022). The lack of means to prove these kinds of accusations has led to a request to the courts in charge of the control of this centre to enable audio recordings from the security cameras (CIE Control File 505/21).

3. In addition, it was specifically noted that there is a lack of gender-sensitive information on the possibilities that the legislation offers to victims of trafficking, ignoring the fact that trafficking is not an exclusively female crime[127] .

[127] *Idem.*

Recommendations:

1.	Ensure the training and practical application of a mandatory gender perspective for all CIE officers, in order to identify and put an end to the inhuman and/or degrading ill-treatment that can occur during the deprivation of liberty of women and LGTBIQ+ persons. a. Demand the same training for those responsible for the investigation of the alleged facts. b. Data should be collected and published with this perspective in mind.
2.	Guarantee the presence of women in the shifts of the National Police forces providing custody of the women's modules.
3.	Prohibit isolation measures within the modules justified on the basis of the sexual orientation or gender identity of the person deprived of liberty, as well as the official male treatment of trans women held in women's modules.
4.	Train the centre's staff to inform potential beneficiaries of the content of the rights that protect applicants and victims with a gender perspective.

6.1.4.4. The CIE do not meet the necessary conditions for the deprivation of liberty of migrants, nor are the results of the mechanisms that are presumed to exist known, leading to situations of degrading treatment in the context of the existence of Torturing Environments.

From the only publicly available official information[128] , it can be seen that, contrary to what is reported by the Spanish State:

1. There is a progressive deterioration of the Centres due to their use and the constant influx of people[129] .

[128] As of 26 May 2023, neither the 2021 nor the 2022 Report of the State Attorney General's Office is available, so it is not possible to compare the most recent official information. This confirms the lack of transparency.

[129] *Ibidem*, p. 13.

2. People from the Mediterranean coasts who are subject to refoulement procedures and have no criminal record, are held alongside others with a long criminal record, subject to art. 89 of the Penal Code or from penitentiary centres[130] .

3. Despite structural improvements in some CIEs, numerous shortcomings were observed, such as the lack of furniture, shortcomings in the provision of the functions to be conducted in the CIE and their adaptation to the architecture of the building, and the already chronic deficiency in the legal assistance of inmates[131] .

Recommendations:

1. Guarantee the living conditions of the centres, as well as the provision of material, installations and furniture, in order to guarantee dignified living conditions and avoid situations of degrading treatment.

6.1.5. Medical evaluations in places of deprivation of liberty

Lack of adequate medical documentation of allegations of ill-treatment or torture in places of deprivation of liberty

Argumentation:

1. In the prison system, the person does not have access to a clinical injury report by an independent professional. The report is conducted by the prison medical services, which have conflicting obligations with the prison system. The report they produce does not, at present, comply with the principle of independence as set out in the Istanbul Protocol. If the detainee requests an independent clinical examination, the authorisation for the examination and the entry of the doctor may take weeks, when all signs and symptoms have disappeared.

2. At the same time, in the Migrant Detention Centres (CIE), health care is subcontracted to private companies that receive funds directly from the centre itself, and are dependent on the centre's management, which again leads to a situation of conflicting obligations.

[130] *Ibidem*, p. 15.

[131] *Idem.*

Recommendations:

1. The prison health system should be independent from the detaining authorities, to ensure proper coordination of health services and independence of judgement in making a medical/psychological report ("injury report").

2. Along the same lines, make health care in Migrant Detention Centres dependent on the general health system of the area, in order to guarantee the right to equal health care for interned persons.

3. When a detainee within the prison system has allegations of ill-treatment or torture, allow independent medical NGOs to make a clinical assessment of the case in less than 24 hours. The Secretary General of Penitentiary Institutions, under the Ministry of Interior, should issue a circular to all penitentiary centres establishing the right to an independent, prompt (<24h) and effective investigation of allegations of torture by trusted clinical professionals who can make reports in accordance with the Istanbul Protocol. The circular shall set out the channels and procedures for requesting such assessments by independent clinical professionals.

4. Similar provisions should be established for Migrant Detention Centres and other short term detention facilities.

6.2. ARTS. 12 AND 13 CONVENTION: PROMPT AND IMPARTIAL INVESTIGATION OF TORTURE ALLEGATIONS

6.2.1. On the investigation of allegations of torture

Numerous difficulties for effective investigation have been identified in different areas of deprivation of liberty, but also in public places.

Argumentation:

1. Shortcomings in internal police investigations of cases of torture and ill-treatment have an impact on the outcome of judicial investigations. In turn, in this type of cases, the Public Prosecutor's Office has been identified as being prone to inactivity, by not requesting the practice of investigative measures, opposing the practice of such measures or even requesting in advance the closure of the proceedings in this type of cases. Although the specific reasons why the Prosecutor's Office acts in this way are unknown, it should be noted that there is no Prosecutor's

Office Circular providing instructions to prosecutors in these proceedings, as exist for other types of offences[132] .

2. Likewise, there is a tendency for judicial proceedings to be closed in the investigation phase, without exhausting the possibilities of obtaining evidence and making it impossible to hold a trial, despite the existence of solid evidence of criminality. A lack of training of these legal operators in tools for the proof of crimes of torture and ill-treatment, such as the Istanbul Protocol, has been identified[133] .

3. It is not uncommon for police officers to request, in addition, an injury report from themselves, alleging some kind of minor problem, in order to intimidate the citizen for "attacking the authority" and thus stop a possible complaint from the latter[134] .

4. One of the main concerns is to prevent allegations of torture or ill-treatment from being closed on the sole basis of forensic reports stating "*the absence of positive physical findings*", (a) not carrying out a psychological assessment (b) not analysing other elements of consistency or credibility of the allegations in line with those indicated by the Istanbul Protocol (chapter IV). Frequently, court forensic doctors, who not only do not have specialised training in the Istanbul Protocol, but generally lack any kind of specialisation and a frequent deficiency in the evaluation of psychological injuries and psychopathological examinations, do not examine the complainants even when the complainant is a police officer, and limit themselves to transcribing what is provided in any previous care report provided. Thich often means that they do not evaluate physical findings and at the same time do not pay attention to psychological findings. The absence of physical findings in no case rules out the existence of torture as the Istanbul Protocol repeatedly states in chapters II, IV, VI and VII and it is an example of forensic malpractice to consider it as such (IP-Prologue-page 5).

Recommendations

1. Give instructions to the Public Prosecutor's Office to promote the investigation in cases of crimes against moral integrity, torture, sexual freedom, injuries and/or illegal detention committed by public officials, as guarantor of legality, in order to ensure that the corresponding responsibilities are established.

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[132] BOE: "Circular 1/1998, of 24 October, on the intervention of the Public Prosecutor's Office in the prosecution of domestic and family abuse": https://www.boe.es/buscar/doc.php?id=FIS-C-1998-00001 o State Prosecutor's Office: "Circular 6/2011, of 2 November, on criteria for the specialised action unit of the Public Prosecutor's Office in relation to violence against women": https://www.fiscal.es/memorias/estudio2016/CIR/CIR_06_2011.html among others.

[133] El Diario (12.06.2016): "Judges leave a lot to be desired in the investigation and prevention of torture": https://www.eldiario.es/sociedad/espana-espacios-exentos-tortura-producen_128_3957213.html Judges for Democracy has complained on several occasions about the limitations imposed by the General Council of the Judiciary on the training of judges and prosecutors in the investigation of crimes of torture and ill-treatment: El Plural (05.12.2016): "El Consejo General del Poder Judicial no quiere que los jueces se formen contra la tortura": https://www.elplural.com/sociedad/el-consejo-general-del-poder-judicial-no-quiere-que-los-jueces-se-formen-contra-la-tortura_97193102

[134] Only in some cases is it possible to prove this fact, as in the following example. Diario Constitucional (13.03.2023): "Three-year prison sentence for police officer for false accusation of attacking an officer of the authority is confirmed by the Spanish Supreme Court": https://www.diarioconstitucional.cl/2023/03/13/pena-de-tres-anos-de-prision-a-policia-por-denuncia-falsa-de-atentado-a-agente-de-la-autoridad-se-confirma-por-el-tribunal-supremo-de-espana/

2. Ask the Spanish Government to report on the number of complaints made during the last 5 years by the State Security Forces and Bodies against citizens for "resisting authority" (article 556.1 CP) or "attacking authority" (article 550.1 CP) coinciding in time with previous or simultaneous complaints of ill-treatment or torture by the citizen.

6.2.2. Prisons

There is a lack of comprehensive and in-depth investigations into cases of excessive use of force in Spanish prisons.

6.2.2.1. Medical evaluations in places of deprivation of liberty

Lack of adequate medical documentation of allegations of ill-treatment or torture in places of deprivation of liberty

Argumentation:

1. In the prison system, the person does not have access to a clinical injury report by an independent professional. The report is conducted by the prison medical services, which have conflicting obligations with the prison system. The report they produce does not, at present, comply with the principle of independence as set out in the Istanbul Protocol. If the detainee requests an independent clinical examination, the authorisation for the examination and the entry of the doctor may take weeks, when all signs and symptoms have disappeared.

2. At the same time, in the Migrant Detention Centres (CIE), health care is subcontracted to private companies that receive funds directly from the centre itself, and are organically dependent on the centre's management, which again leads to a situation of conflicting obligations.

Recommendations:

1. The prison health system should be independent from the detaining authorities, to ensure proper coordination of health services and independence of judgement in making a medical/psychological report ("injury report").

2. Along the same lines, make health care in Migrant Detention Centres dependent on the general health system of the area, in order to guarantee the right to equal health care for the people interned.
3. Allow, when a detainee within the prison system has allegations of ill-treatment or torture, independent medical NGOs to make a clinical assessment of the case in less than 24 hours. The Secretary General of Penitentiary Institutions, under the Ministry of Interior, should issue a circular to all penitentiary centres establishing the right to

	an independent, prompt (<24h) and effective investigation of allegations of torture by trusted clinical professionals who can make reports in accordance with the Istanbul Protocol. The circular shall set out the channels and procedures for requesting such assessments by independent clinical professionals.
4.	Similar provisions should be established for Migrant Detention Centres and other short term detention facilities.

6.2.2.2.2. Inadequate investigation mechanisms

Argumentation:

1. Torture or cruel, inhuman and/or degrading treatment and punishment in prisons continues to be a daily documented reality. The implementation of measures and mechanisms to avoid such practices is an absolute priority in order to prevent and eradicate them.

2. The mechanisms for safeguarding the fundamental rights of persons deprived of their liberty, such as the Subdirectorate General of Penitentiary Analysis and Inspection, the Penitentiary Supervision Court and the Public Prosecutor's Office, are not serving this purpose.

6.2.2.2.2.1. Inadequacy of the Prison Inspectorate

Argumentation:

1. The Inspectorate, either due to the overload of attributions, the remoteness of the penitentiary centres whose supervision is entrusted to them, the organic dependence on the General Secretariat of Penitentiary Institutions, or for other reasons, has not fulfilled its purpose of preventing, detecting and sanctioning these practices[135] . There is a formal, but not real, protection of the fundamental rights of persons deprived of their liberty.

Moreover, the importance of the Prison Inspectorate in the role of impartial and independent control of prison practices and visits to closed units and special departments has already been recommended unsuccessfully by other international bodies (CPT 2020).

[135] To prove the current ineffectiveness, see how only after receiving credible communications from the CPT (Response of the Spanish State to Recommendation 35 to Observations of the CPT Spain 2020) of physical ill-treatment in Castellón II, Madrid VII and Seville II, an inspection visit was carried out which also revealed the existence of indications of such conduct, without it having been possible to detect them until then. How is it possible that a visit lasting only two weeks could detect irregularities in several centres and the regularly functioning inspection system was previously unable to detect them?

6.2.2.2.2.2. Role of the Duty Courts

Argumentation:

1. The Penitentiary Centre regularly informs the Prison Supervision Court of certain measures that severely restrict fundamental rights, such as the use of coercive means. However, there is no communication from the Penitentiary Centres or from the Penitentiary Inspectorate to the Duty Courts, which are responsible for investigating criminal proceedings.

2. The Guardia and Instruction Courts, for their part, have been rejecting some complaints on considering that they fall within the competence of the Penitentiary Surveillance Court. In other cases, the mistrust generated by the fact that the complainant or the witnesses are inmates in penitentiary centres usually leads the judge to automatically file the case, after receiving the prison report, which systematically denies the veracity of the facts.

3. As the Constitutional Court has recently established, it is necessary, as the Constitutional Court has recently established, that before the complaint is filed, all possible means of evidence must be used to conduct the investigation, such as statements by the complainants, the accused and witnesses.

4. Similarly, a consolidated jurisprudential doctrine of giving greater credibility to the complainant's statement when the events have taken place in concealed spaces should be extended to this area and should at least serve to allow the opening of a trial in which all the evidence is assessed.

Recommendations

1. Modify the organisation of the Penitentiary Inspectorate, so that it:

   - It does not depend organically on the Sub-Directorate of Penitentiary Institutions itself.
   - It has adequate human and material resources to fulfil its function and is located close to prisons.
   - The recommendation on the importance of the Prison Inspectorate in the role of impartial and independent control of prison practices and the visit of closed modules and special departments is reiterated.

2. Guarantee real compliance with the obligation of prison visits and prisoner care by the Prison Supervision Court.

3. Regulate by law the mandatory and immediate legal aid for the victim of abuse in any judicial claim, so that it is assigned judicially from the first moment.

4. Regulate through norms the jurisprudential requirements (Constitutional Court) of effective investigation in cases of ill-treatment or torture, in order to ensure their obligatory compliance by judicial bodies, which ignore the repeated warnings of the Constitutional Court and international bodies, as well as the Principles for the Effective Investigation of Allegations of Torture detailed in the Istanbul Protocol (updated version 2022).

6.2.2.2.3. Existence and insufficient and inadequate use of video-recording systems for the investigation of allegations of ill-treatment or torture in prisons.

Argumentation:

1. International bodies have repeatedly stated that one of the most useful tools available is the recording of images in prisons by means of video-surveillance systems. In this regard, the CPT made a specific recommendation on this matter in its report following its visit to Spain from 14 to 28 September 2020[136] (paragraph 54).

2. In the same vein, the NPMPT in its 2021 Annual Report[137] (paragraph 122) notes the importance of video surveillance as an indispensable element in the prevention of ill-treatment.

3. The General Secretariat of Penitentiary Institutions (SGIP) has issued an instruction regulating the processing of personal data obtained through the recording of images and sound by the video-surveillance systems existing in the different penitentiary establishments[138] .

4. While it is considered good practice, it is interesting to note some shortcomings of this Instruction:

- **Image retention and deletion times**: The general rule (section 4.7) is 30 days (1 month) for the deletion of images. Although this period is in line with the minimum recommendation made by the CPT in its 2020 report ("*...they should be kept securely for a period of at least one month - and preferably longer"),* it falls far short of the period set by the Spanish MNPT, which, aware of the Spanish context, recommends that the

[136] CPT 2020 Report https://rm.coe.int/1680a47a78

[137] Annual Report 2021 MNPT https://www.defensordelpueblo.es/informe-mnp/mecanismo-nacional-prevencion-informe-anual-2021/

[138] SGIP Instruction 4/2022 of 28 July https://derechopenitenciario.com/wp-content/uploads/2022/08/i-4-2022_videovigilancia11.pdf

general retention period should be at least 3 to 6 months. This extension allows for compatibility between preservation periods and court deadlines[139] .

- **Storage guarantee**: Section 4.6 of the instruction states that the retention time shall be 1 month "*provided that the system permits*". In other words, there is no guarantee that it can be retained in all cases.

- **Access to the images by the person deprived of liberty**: The MNPT report also includes as a recommendation "*to enable a procedure... so that persons deprived of liberty during the disciplinary proceedings can access and provide as evidence the images and sounds captured by the video-surveillance systems, after viewing them during the investigation phase with the investigating person, or before the Disciplinary Commission itself*", but this recommendation has not been taken into account.

Recommendations:

1. Amend SGIP Instruction 4/2022 so that:

   - Recordings are kept for a period of 6 months.
   - There is a guarantee that the images will be preserved, that all video surveillance cameras will work properly and that they cannot be tampered with or altered.

2. **Allow persons deprived of their liberty access to images in disciplinary proceedings** where ill-treatment is alleged.

3. **To guarantee, as a matter of policy, the extraction and official transmission** to the General Secretariat by the penitentiary centre of the recordings of all situations in which there are complaints from a person deprived of liberty, in order to achieve the dual objective of allowing an inspection and auditing function and preventing their erasure or destruction.

4. **Map of video cameras**. Ensure that the General Secretariat of Penitentiary Institutions publishes a "map" of the video-surveillance cameras in each penitentiary centre it manages, so that both prisoners and judges can be aware of the existence of recordings of reported incidents.

[139] The need to extend the conservation periods becomes evident if we bring them into line with the judicial deadlines, as it is possible that the images have been erased before any judicial ruling. In this sense, we cite the Order of the JVP of Villena of 16 February 2021. Order of the JVP of Villena of 16 February 2021 https://derechopenitenciario.com/wp-content/uploads/2023/05/4.-Auto-JVP-Villena-16-02-2021.pdf

6.2.3. On legislative reforms (or lack thereof) that hinder investigations

There are a number of legislative measures that hinder the investigation of allegations of ill-treatment and torture. In particular, the following should be noted:

6.2.3.1. Lack of proper identification of the officials involved:

The legislation on police stops in Spain is insufficient to guarantee the effective identification of police officers, which hampers judicial investigations, as it is often not possible to determine the perpetrator.

Argumentation:

1.. The identification of officers of the State Security Forces and Corps (which includes the National Police Corps, Municipal Police and Civil Guard) is regulated by Royal Decree 1484/1987, of 4 December, Nature, Legal Regime, Dependency, Scales, Categories, Staff Relations and Administration, Uniform, Badges and Weapons (art. 18 and 19.2) and Instruction 13/2007 on the use of personal identification numbers on the uniforms of the State Security Forces and Corps (art. 18 and 19.2) and Instruction 13/2007 on the use of personal identification numbers on the uniforms of the State Security Forces and Corps (art. 18.1 and 19.2). 18 and 19.2) and Instruction 13/2007 on the use of the personal identification number on the uniforms of the State Security Forces and Corps (arts. 1 and 2). These establish the obligation to wear the Professional Identification Card (TIP) on the chest in a legible format at a distance of 1.2 metres. The fact is that the size of the TIP often prevents its legibility at this distance, which has led to further recommendations from the Ombudsman, which have not been heeded[140] .

2. The identification of the Police Intervention Units (UIP), riot police, is regulated by the Resolution of the Directorate General of the Police, of 4 April 2013, which establishes the identification number on the uniform accessory garments of the Police Intervention Units, requires them to wear the Police Operational Number on the back of the uniform, in addition to the TIP on the chest.

3. Officers frequently fail to comply with this obligation, which prevents people who suffer police aggressions from being able to identify them individually. On numerous occasions they do not wear the TIP, or they cover it up or damage it; the UIP often cover up the NOP with trauma-resistant vests, and lately they have claimed that they wear bulletproof vests which allows them to avoid the regulation of the NOP, which only directly refers to “trauma-resistant vests[141]”. This

[140] Ombudsman : "Visibility of the Police Intervention Unit identification number": https://www.defensordelpueblo.es/resoluciones/identificacion-de-las-unidades-de-intervencion-policial/

[141] Ombudsman: "Identification of the National Police on all accessory garments of the uniform": https://www.defensordelpueblo.es/resoluciones/identificacion-de-la-policia-nacional-en-todas-las-prendas-accesorias-de-uniformidad/

often leads to the dismissal of criminal proceedings and has instigated further recommendation for changes to regulation from the Ombudsman, which have not been heeded.

4. The only existing sanction for non-compliance with the duty to be properly identified is a serious disciplinary offence under art. 8. k) of Organic Law 4/2010, of 20 May, on the Disciplinary Regime of the National Police Force. This is a disciplinary offence, which provides for a suspension from duty of between five days and three months.

5. Despite numerous complaints filed by civil society on this issue, no police officer has been sanctioned in the last 7 years for not being properly identified[142] .

6. The NOP regulation is not accessible to the public.

Recommendations:

1. Regulating the obligation for police officers to carry identification visible around the perimeter, or from 360 degrees (on the chest, back, sides and helmet), as is the case for the Mossos d'Esquadra and Ertzaintza. The police identification must have a non-confusing typography and a size suitable for visibility at a distance of 1.2 metres.

2. Establish an effective sanctioning regime with accessible legal channels for civil society to denounce non-compliance with the obligation to wear proper identification. To this end, the obligation and the sanctioning regime should be included in Organic Law and not in Instructions or laws on uniformity.

3. Regulate the obligation to carry the NOP also on bullet-proof waistcoats.

4. Regulate the publication of orders and instructions regulating the identification of State Security Forces and Corps officers.

[142] El Salto (16.12.2022): "No police officer has been sanctioned in the last seven years for not wearing his ID number": https://www.elsaltodiario.com/impunidad-policial/ningun-policia-sancionado-ultimos-siete-anos-no-llevar-visible-identificacion#:~:text=Impunidad%20policial-,Ning%C3%BAn%20polic%20polic%20C3%ADa%20ha%20sido%20sancionado%20en%20los%20%C3%BAltimos%20siete%20a%C3%B1os,casos%20de%20mala%20praxis%20policial. Público: (4.02.2020): "Interior has not sanctioned any officer for not carrying his ID number": https://www.publico.es/politica/interior-no-sancionado-agente-no-portar-numero-identificacion.html

6.2.3.2. On the regulation of the possibility of taking images of State Security Forces and Bodies (SSFB) officers

Article 36.23 of the LO 4/2015, of 30 March, on the Protection of Public Security is used by civil servants to prevent the taking of images of State Security Forces and Corps.

Argumentation:

1. Article 36.23 of LO 4/2015, of 30 March, on the Protection of Public Security, punishes the "*unauthorised use of images or personal or professional data of authorities or members of the Security Forces and Corps that may endanger the personal or family security of the agents, of the protected facilities or jeopardise the success of an operation, with respect for the fundamental right to information".*

2. Despite the fact that the article sanctions the dissemination of images, and not the taking of them, those taking the images are often sanctioned at the time of taking them and prior to any dissemination having taken place. This has had the effect of discouraging the public from taking images of police officers in perceived abusive situations[143] , and has led to police officers threatening or imposing a sanction on those taking images, or by using other offences such as disobedience (art. 36.6) or disrespect (art. 37.4) to sanction those taking images[144] .

3. The real impossibility of taking images of police officers due to the arbitrary application of sanctions by art. 36.23, 36.6 or 37.4 LO 4/2015, indicates a generalised censorship or self-censorship, which prevents the taking of and subsequent use of images of abusive or criminal police actions in judicial proceedings, ultimately contributing to their impunity. In this sense, several rapporteurs have called-out the Spanish government and pointed out the dissuasive effect of this measure when considering the documentation of rights violations on the southern border[145] .

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[143] There is a widespread public belief that photographing is punishable, which has led to the media having to clarify this issue: Público (07.02.2019): "Taking photos of police officers will no longer be punishable": https://cadenaser.com/ser/2019/02/07/politica/1549525208_914161.html

[144] El Diario(13.06.2022): "Pulitzer Prize winner Javier Bauluz, fined by the gag law while photographing the arrival of migrants in the Canary Islands": https://www.eldiario.es/desalambre/premio-pulitzer-javier-bauluz-multado-ley-mordaza-fotografiaba-llegada-migrantes-canarias_1_9079814.html The Objective (26.01.2022): "Los mossos multan con 601 euros a una periodista por hacer una foto de un control policial": https://theobjective.com/espana/2022-01-26/mossos-multan-601-euros-periodista-foto/

[145] *"We are concerned about the possible infringement of the right to freedom of expression through the Law on the Protection of Public Security, including the right of journalists and the public to information. The provision of information to the public and the publication of images and recordings of police actions are not only essential to the right to information but are also legitimate in the context of democratic control of public institutions. In particular, their absence could impede the documentation of possible abuses of excessive use of force by law enforcement officials".* Felipe González Morales, "Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment". Communication presented at the Palais des Nations, Geneva, Switzerland, 14 April 2021. https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26327 P. 5.

Recommendations:

1. Delete art. 36.23 of LO 4/2015, of 30 March, on the Protection of Public Security, which punishes the dissemination of images of officers of State Security Forces and Corps.

6.2.3.3. On the conversion of prison officers into law enforcement officers[146]

The Proposed Law amending Article 80 of Organic Law 1/1979 of 26 September, General Penitentiary Law, in order to recognise, for legal purposes, the status of agents of authority for prison officers (Organic), converts prison officers into agents of authority.

Arguments:

1. The approval of the Proposition of Law modifying article 80 of Organic Law 1/1979, of 26 September, General Penitentiary Law[147] converts prison officers into agents of authority.

2. This measure adds new difficulties to the already existing ones for persons deprived of their liberty to report assaults by prison officials, since, as 26 civil society organisations point out in a communiqué[148] , it "*will act as a deterrent to file complaints and initiate proceedings in the event of a possible counter-complaint by officials*".

3. The social organisations also understand that this measure "increases the margin of arbitrariness in sanctioning proceedings, including those that seriously affect fundamental rights, such as isolation in cells".

Recommendations:

1. To repeal the Proposed Law amending Article 80 of Organic Law 1/1979, of 26 September, General Penitentiary Law, in order to recognise, for legal purposes, the status of agents of authority for prison officers (Organic).

[146] Proposed Law amending Article 80 of Organic Law 1/1979, of 26 September, General Penitentiary Law, to recognise, for legal purposes, the status of agents of authority for prison officers (Organic). https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-105-1.PDF

[147] https://www.congreso.es/public_oficiales/L14/CONG/BOCG/B/BOCG-14-B-105-1.PDF

[148] Iridia (30.11.2021): "26 organisations ask the Congress of Deputies to backtrack and not to approve that prison officers be considered agents of the authority" https://iridia.cat/es/26-organizaciones-solicitamos-al-congreso-de-los-diputados-que-den-marcha-atras-y-no-se-apruebe-que-los-funcionarios-de-prisiones-sean-considerados-agentes-de-la-autoridad/

6.2.4. On the criminalisation of public denunciation of torture and ill-treatment

Argumentation:

1. Spain has not embraced the international trend of decriminalising defamation. The Penal Code provides for the offences of libel and slander, which when committed through publicity, such as press releases, press conferences or messages on social networks, can lead to prison sentences. In the event that these offences affect public officials in the exercise of their functions, it ceases to be a private offence and becomes a semi-public offence and the Public Prosecutor's Office can intervene in the judicial proceedings. This body of law has led police unions or prison officers' unions to use criminal law to retaliate[149] for public denunciation of their malpractice.

2. At the European level, the Directive on whistleblowers[150] does not cover the denunciation of torture and ill-treatment. Law 2/2023 of 20 February[151] , which transposes it, does not have the provisions to cover the denunciation of crimes of torture and ill-treatment.

3. For its part, jurisprudence has admitted certain areas in which freedom of expression and information should have a wider margin, due to the social function it fulfils, for example in trade union action or consumer rights. However, this wider space is not being recognised for discursive action in defence of human rights and public denunciation of torture and ill-treatment. The Courts are not understanding that the prevention of torture and ill-treatment needs to be publicly communicated, both in order to support victims' complaints and to denounce these practices when victims are not in a position to make reports, due to their vulnerability or their lack of access to evidence.

4. The anti-SLAPP Directive (*strategic lawsuits against public participation*), which is currently being processed, provides for the courts to neutralise abusive litigation aimed at retaliating against and censuring, among others, human rights defenders. Professionals working for the rights of persons deprived of their liberty should be able to benefit from this protection.

Recommendations:

1. Recognition by the Courts that a wide space of freedom of expression and information must be provided for public denunciation of torture and ill-treatment.
2. Recognition by the Courts that persons working in the defence of human rights, including those of persons deprived of their liberty, have the status of human rights defenders and their social function should be protected.
3. The neutralisation by the courts of abusive legal actions aimed at censuring the public denunciation of cases of torture and ill-treatment by human rights defenders.

[149] https://www.eldiario.es/catalunya/archivada-querella-sindicatos-prisiones-profesor-ub-decir-carceles-hay-torturas_1_6125271.html

[150] https://www.boe.es/doue/2019/305/L00017-00056.pdf

[151] www.boe.es/buscar/act.php?id=BOE-A-2023-4513

6.2.5. Encouraging collaboration with civil society on torture prevention actions

Argumentation:

1. The Istanbul Protocol states that States can and should encourage and support collaboration with civil society in their efforts to prevent torture. At the same time, members of civil society should not rely solely on State initiatives to undertake independent preventive and rehabilitative action.

Recommendations:

1.	Provide specific lines of cooperation with national anti-torture organisations by opening specific lines of funding and establishing memoranda of understanding to allow, inter alia, independent monitoring of detention centres by NGOs, training of staff in detention centres and documentation of alleged cases, as well as sustaining rehabilitation programmes.

7. ART. 14 CONVENTION: ON FAIR AND ADEQUATE COMPENSATION TO ALL VICTIMS OF TORTURE AND ILL-TREATMENT

7. 1. Absence of an action protocol for compliance with the rulings of the various committees for the protection of human rights of the United Nations system .

Argumentation:

1. Law 25/2014, of 27 November, on Treaties and other International Agreements does not provide, in its art. 30 ("Enforcement") for binding compliance with the resolutions of the United Nations Committees for the Protection of Human Rights.

2. The Spanish Government has just approved the 2nd Human Rights Plan and it does not include the commitment, adopted in the 1st Human Rights Plan, to adopt an "*Action Protocol to comply with the Opinions and Recommendations of the different Committees for the protection of Human Rights of the United Nations system*".

3. The jurisprudential line of the Supreme Court[152] has established the absence of legal value of the opinions of the Committees, which cannot be considered as a title for patrimonial liability of the legislating State. Only the STS 2747/2018 of 17 July, in the case of Ángela González Carreño, upheld the patrimonial liability for abnormal functioning of the Administration of Justice[153] . However, in STS 401/2020, of 12 February, the Supreme Court again pointed out that the rulings of the United Nations Committees are not assimilable to the rulings of the European Court of Human Rights, and in subsequent decisions it has not ruled on the possibility of obtaining pecuniary claims derived from the rulings of the Committees.

Recommendations:

1. Establish a regulatory protocol for compliance with the rulings and recommendations of the various committees for the protection of human rights of the United Nations system, which would make these resolutions binding. This protocol should provide for the possibility of directly obtaining financial claims arising from the rulings of the Committees.

[152] STS of 6 February 2015. Contentious-Administrative Chamber, Section 4, no. 507 (Rec. 120/2013).

[153] Following the presentation of Opinion 47/2012 of 16 July 2012 of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW).

7.2. Inadequacy of the Victims' Statute as a tool for redress for victims of torture and ill-treatment

Argumentation:

1. Law 4/2015, of 27 April, on the Statute of the Victims of Crime does not contemplate the reparation of victims of torture and ill-treatment : there is no reference to the right to reparation as a central sphere of State responsibility; it does not establish the obligatory nature of the ex officio procedural impulse in this type of crimes, thus contemplating the special vulnerability of this type of victims, and it does not establish guarantees to ensure the non-repetition of violence, compensation, satisfaction and rehabilitation.

The Spanish government points out[154] that the Criminal Procedure Act provides for civil action, derived from the commission of a crime, for reparation of the damage and compensation for the harm caused by it and that, insofar as the subsidiary responsibility for the damage caused criminally by public officials falls on the Administration to which they are attached, the compensation of victims is guaranteed in any case. However, it does not respond to the demands made in the previous section regarding the adoption of specific measures to protect the right to reparation of torture victims. In particular, civil liability does not cover all the aspects mentioned in CAT General Comment No. 3, in that it does not cover "*the provision of funds to cover future medical or rehabilitation services needed by the victim to ensure the fullest possible rehabilitation; or the loss of opportunities such as employment and education*[155] ".

2. Compensation for victims of torture and ill-treatment, in the case of judgments in court proceedings, is established on the basis of a scale established for victims of traffic accidents and not on the basis of a specific scale that considers the specific impacts that these aggressions generate. Thus, for the cataloguing of the different psychological impacts of torture victims, organisations specialised in making expert reports usually resort to the DSM-V[156] or the ICD-11[157] ,

3. Victims of torture and ill-treatment lack specific public support to ensure their reparation and rehabilitation. There is no specific support for rehabilitation in specialised centres, no support measures for cross-cultural care, no specific measures of care by individual or community/family oriented social services, and no measures to ensure the training of victims, in breach of the provisions of CAT General Comment No. 3, which states that "*each State Party should adopt a*

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[154] Seventh periodic report of Spain due in 2019 under article 19 of the Convention, 13 March 2020, CAT/C/ESP/7: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FESP%2F7&Lang=en paras. 209 and 210.

[155] Committee against Torture: "General comment No. 3", 13 December 2012, CAT/C/GC/3: https://www.ohchr.org/en/documents/general-comments-and-recommendations/catcgc3-general-comment-no-3-2012-implementation Para. 10.

[156] American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders: https://www.psychiatry.org/psychiatrists/practice/dsm

[157] WHA: International Statistical Classification of Diseases and Related Health Problems: https://icd.who.int/es

long-term integrated approach and ensure that specialised services for victims of torture or ill-treatment are available, appropriate and easily accessible"[158] .

4. There are no specific rehabilitation programmes or specialised public services for victims of torture and ill-treatment. The Spanish government points out[159] that this provision is covered by Law 35/1995, of 11 December 1995, which targets aid and assistance to victims of violent crimes and crimes against sexual freedom. It does not however recognise any specific provision for victims of torture or ill-treatment committed by public officials rather than by individuals. Article 4 of the Law, cited by the government, does not consider the physical or psychological harm caused by those acting on behalf of the State.

5. There are no Offices for the Attention of Victims of Torture and Ill-treatment. As the government points out[160] , the Victims' Attention Offices (Oficinas de Atención a la Victima) address victims of "*violent crimes and crimes against sexual freedom and, in particular, gender violence and domestic violence*", however it refers to crimes perpetrated by private individuals and not specifically to those conducted by public officials. This makes it difficult for victims to access individualised attention "*assessment and evaluation of the therapeutic and other needs of persons*[161] *".*

Recommendations:

1. Amend Law 4/2015, of 27 April, on the Statute of the Victims of Crime to specifically contemplate reparation for victims of torture and ill-treatment and establish the obligation to initiate ex officio proceedings in these crimes.
2. Establish a specific compensation scale for victims of torture and ill-treatment, which considers the specific physical and psychological damage resulting from this type of aggression.
3. Establish by law, and include budget for, specific public aid for victims of torture and ill-treatment, guaranteeing a mechanism of sustainability and economic independence for comprehensive and adapted rehabilitation.
4. Create the Office for the Care of Victims of Torture and Ill-treatment.

[158] Committee against Torture: "General comment No. 3", *Op. cit*. para. 13. The Commentary further notes that "*Such services should include: a procedure for the assessment and evaluation of the therapeutic and other needs of individuals, based, inter alia, on the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol); and may include a wide range of interdisciplinary measures, such as medical, physical and psychological rehabilitation services; social and reintegration services; community and family-oriented assistance and services; vocational training; education; etc. A holistic approach to rehabilitation that also considers the strength and resilience of the victim is of utmost importance*".

[159] Seventh periodic report of Spain due in 2019... Para. 216.

[160] Seventh periodic report of Spain due in 2019... Para. 214.

[161] Committee against Torture: "General comment No. 3", *Op. cit*. para. 13.

7. 3. On the non-implementation of the right to rehabilitation of torture victims

1. Article 14 of the Convention states that states must ensure that their legislation guarantees the victim of an act of torture redress and the right to fair and adequate compensation, including the means for as full rehabilitation as possible. CAT General Comment #3 gives precise indications as to how this should take place.

2. Specifically, it states that in order to comply with article 14, States parties must enact legislation that expressly provides victims of torture with an effective remedy and recognises their right to obtain appropriate redress, including compensation and as full rehabilitation as possible. Spain lacks such a legislative framework.

3. Where the State is held responsible for violations of the law, the legislation provides for the possibility of making a claim for damages (Patrimonial Claim). In the judgments produced in Spain of convictions for torture so far, there have been no claims in which the State has been declared responsible and an amount of financial reparation has been fixed for the victims. In this regard, there is no scale that could be used as a reference[162] . Although some compensation has been awarded to persons deprived of liberty in pre-trial detention who have later turned out to be innocent, it has been awarded as a result of a *malfunctioning of justice.* Equally, the amounts have been low and have not been paid, or there have been disproportionate delays in the payment of compensation.

4. General Comment #3 states that the aim should be the fullest possible rehabilitation of those who have suffered harm as a result of a breach of the Convention and that this should be comprehensive and include medical and psychological care, as well as legal and social services. The Commentary establishes that care may be provided by public or civil society rehabilitation services, giving the victim the freedom to choose the arrangement that best responds to his or her situation and considering, as the Commentary indicates, the importance of creating safe and trauma-sensitive spaces. There is currently a lack of specialised public services in Spain. Although there are some victim care centres in civil society, they lack support, funding or recognition by the authorities, and must be sustained in a precarious way, with other activities or through co-payment by the victims themselves.

5. These benefits, the commentary states, should apply equally to nationals and to persons with asylum or refugee status.

6. Guarantees of non-repetition are an essential part of reparation measures. At present, the State Attorney General's Office lacks a diagnosis of the structural causes of the continued existence of cases of ill-treatment or torture by the State Security Forces and Bodies that would lead to the implementation of non-repetition measures.

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[162] The right to prompt, fair and adequate compensation for torture or ill-treatment referred to in article 14 has multiple dimensions and the compensation awarded to a victim must be sufficient to compensate for the pecuniary and non-pecuniary damage to which a financial value can be attached and which results from torture or ill-treatment. This may include reimbursement of medical expenses and funds for medical or rehabilitation services needed by the victim in the future to achieve the fullest possible rehabilitation; pecuniary and non-pecuniary damages resulting from the physical or mental harm caused; loss of earnings and loss of earnings due to disability caused by torture or ill-treatment; and loss of opportunities, employment or education.

Recommendations:

1. Request the state to provide specific information and data on the right to rehabilitation of torture victims, in line with point forty-six of General Comment #3 on States' obligations to report on the effective implementation of the Commentary.

2. Develop a comprehensive rehabilitation plan for victims of ill-treatment or torture that complies with the indications of General Comment #3.

3. Develop a normative framework to ensure that the victim obtains appropriate reparation, including compensation and the fullest possible rehabilitation. In particular, it is particularly relevant, for the implementation of the right to compensation, the elaboration of specific indications and scales that consider the peculiarities of the damage inflicted by torture that go beyond the eventual physical or psychological sequelae of a purely clinical nature.

4. The state shall report on the measures taken for the effective implementation of the Guarantees of Non-Repetition.

7. 3. ON THE INCOMPATIBILITY WITH INTERNATIONAL LAW OF THE STATUTE OF LIMITATIONS FOR CRIMES OF TORTURE

Argumentation:

Although both conventional and customary international law uphold the imprescriptibly of war crimes and crimes against humanity[163] , as ratified by the jurisprudence of the European Court of Human Rights[164] , the Spanish Criminal Code does not meet the standards of statute of limitations required for crimes of torture.

2. Crimes against moral integrity in the Spanish Penal Code, specifically the crimes of art. 174 CP, are subject to the statute of limitations established in art. 131 CP, which sets it at 15 years in relation to the maximum penalty established at[165] . This is due to the fact that these crimes are not considered crimes against humanity in these cases.

3. Law 20/2022, of 19 October, on Democratic Memory[166] has established in its art. 3 that "*All Spanish State laws (...) shall be interpreted and applied in accordance with (...) International*

[163] Preamble of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968, Art. 29 of the Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006.

[164] ECHR Kononov v. Latvia, Grand Chamber, 17 May 2010; Mocanu and Others v. Romania, Grand Chamber, 17 September 2014.

[165] Article 131. *1. The statute of limitations for offences shall expire: At fifteen, when the maximum penalty indicated by law is disqualification for more than ten years, or imprisonment for more than ten and less than fifteen years.*

[166] https://www.boe.es/buscar/act.php?id=BOE-A-2022-17099

Humanitarian Law, according to which war crimes, crimes against humanity, genocide and torture are not considered applicable and are not subject to amnesty". However, this provision has not led to the modification of the statute of limitations of Article 174 of the Criminal Code, as it is understood that it does not form part of this category of crimes.

4. The Committee against Torture itself has on previous occasions addressed[167] to the Spanish government to urge it "*to ensure that acts of torture are not subject to any statute of limitations*", but this recommendation has not been heeded, according to the government's response, which maintains the distinction[168] , maintaining a distinction between the statute of limitations of art. 174 CP and that established[169] for those of art. 607 bis CP.

5. This has led to the repeated rejection of complaints from victims of torture during Franco's regime and has been one of the recurrent arguments put forward for not considering them[170] . The United Nations Rapporteur for the promotion of truth, justice, reparation and guarantees of non-repetition has pointed out the imprescriptibly of these crimes[171] , in line with what is established in General Comment no. 3 of the Committee against Torture, which has pointed out that "given *that torture has permanent effects, it should not be subject to prescription, as this would deprive victims of the reparation, compensation and rehabilitation to which they are entitled*[172] ".

Recommendations:

1. Make the necessary legislative amendments to ensure that any crime of torture is not subject to any statute of limitations.

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[167] CAT/C/ESP/CO/5, para. 22.

[168] Seventh periodic report of Spain due in 2019... Paras. 9 and 10.

[169] Article 131.3. *Crimes against humanity and genocide and crimes against persons and property protected in the event of armed conflict, except those punishable under Article 614, shall not be subject to any statute of limitations.*

[170] Amnesty International has documented several cases: "Examples of cases documented by Amnesty International: (i) case of enforced disappearance of a member of the Provincial Council of Soria in the year 1936, whose file was confirmed by Auto 148/17 of 31 July, of Section No. 1 of the Provincial Court of Soria; (ii) case of enforced disappearance of six teachers in Cobertelada, Soria, whose file was confirmed by Auto 103/17, of 29 May 2017, of Section No. 1 of the Provincial Court of Soria; iii) case of enforced disappearance and extrajudicial execution of 10 people in Barcones, filed twice, the last and final one confirmed by Order of the Provincial Court of Soria of 14 January 2016, and iv) case of extrajudicial execution and/or enforced disappearance of 12 people in Paterna, Valencia, whose investigation was closed by Order of the Court of First Instance and Instruction No. 2 of Paterna, of 7 June 2017. The organisation has also learned of complaints of torture allegedly committed during the Franco regime, which the Spanish authorities have refused to investigate on the grounds that the statute of limitations has expired: (i) complaint of alleged torture committed in 1974 in Madrid, in the context of a police detention, Order of the 30th Section of the Provincial Court of Madrid, of 1 October 2018; (ii) complaint of alleged torture committed in 1971 in Valencia, in the context of a police detention, Order of the 5th Section of the Provincial Court of Valencia, of 21 March 2019; iv) six complaints of alleged torture committed between 1971 and 1975 in Valencia, in the context of police custody; Order of the 4th Section of the Provincial Court of Valencia, 21 May 2020. Amnesty International: "Report to the United Nations Committee on Enforced Disappearances, Supplementary Information 20th Session, 12-23 April 2021". Footnote six. https://www.amnesty.org/es/wp-content/uploads/sites/4/2021/05/EUR4136892021SPANISH.pdf

[171] Diario de Mallorca (09.03.2023): "The UN rapporteur in Mallorca: "The crimes of Francoism do not prescribe": https://www.diariodemallorca.es/mallorca/2023/03/09/relator-onu-mallorca-crimenes-franquismo-84398867.html

[172] Committee against Torture: "General comment No. 3", 13 December 2012, CAT/C/GC/3, https://www.ohchr.org/en/documents/general-comments-and-recommendations/catcgc3-general-comment-no-3-2012-implementation Para. 40.

2. Make the necessary regulatory adjustments to provide reparation for the victims of Franco's regime, including through criminal proceedings.

7.4. The Law of Democratic Memory does not allow victims of Francoism access to financial reparation.

Argumentation:

1. Article 6.1 of Law 20/2022 of 19 October on Democratic Memory establishes that the right to reparation explicitly excludes compensation, stating that "*without giving rise to any economic or professional effect, reparation or compensation".* Instead, reparation is structured through "*measures of restitution, rehabilitation and satisfaction*".

2. The law also denies any kind of patrimonial responsibility of the state, which especially affects persons whose property was seized, or who underwent forced labour, as well as those who were wrongfully convicted.

Recommendations:

1. Make the necessary regulatory adjustments for a right to reparation for the victims of Franco's regime also through financial compensation, both in cases of torture and in other cases.

7.5. Right to international protection, reparation and rehabilitation measures for victims of torture in transit

7.5.1. The Spanish Government only recognises torture in the country of origin as a ground for granting international protection. It excludes torture in third countries or in countries during migratory transit as a basis for granting international protection.

Argumentation:

1. As a signatory to the Convention against Torture, Spain has an obligation to provide assistance and care to all victims, regardless of whether the torture took place on Spanish soil or not.

2. Numerous studies have shown[173] that a considerable proportion of migrants arriving in Spain have suffered extreme forms of torture, especially those who have passed through the routes crossing Libya, Sudan or Mali. These are people who have suffered extreme forms of traumatisation, with abductions, enslavement and brutal forms of physical or psychological torture. However, the forensic documentation of these events and their clinical impact through the elaboration of Istanbul Protocols is not currently considered a relevant element for the granting of international protection by the Asylum and Refuge Office (OAR) of the Ministry of the Interior.

3. The physical and psychological suffering caused by torture does not disappear on its own over time. For many victims, the suffering worsens if it is not addressed through professional support. Therefore, many victims in non-perpetrator host countries need comprehensive rehabilitation services to alleviate their suffering and help them to rebuild their lives.

4. On this basis, in line with General Comment 3 (paras. 15, 27 and 40) of the Convention against Torture, all States signatories to the Convention have an obligation to protect and provide redress and rehabilitation to all victims of torture present in their territory.

5. General Comment #4 states, under heading twenty-two, that States Parties must recognise that victims of torture or other cruel, inhuman or degrading treatment or punishment suffer physical and psychological damage that may require specialised rehabilitation services and access to such services on a long-term basis. Once a victim's state of health and need for treatment has been medically certified, he or she should not be deported to a State that does not have or does not ensure adequate medical services for rehabilitation. This is because the suffering that victims would face if they were sent to a place that does not have these means of rehabilitation amounts to ill-treatment or torture and therefore triggers the *non-refoulement* clause.

6. Recognising this fact, the European Court of Justice established, along the same lines, that additional protection should be granted to those victims of torture who will not be able to have physical or psychological rehabilitation in the event of their expulsion[174] .

7. Reparation seeks to provide victims with some degree of compensation, satisfaction and restoration for the harm suffered. And, in this regard:

a. Provide protection and humanitarian shelter, with a space where rehabilitation and reparation are possible.
b. It acknowledges and validates the victim's experience and suffering and seeks to restore their dignity and respect.
c. Receive support, resources and assistance, so that victims of torture in transit can rebuild their lives and overcome the traumatic effects of what they have experienced.
d. Measures to restore lost rights and opportunities for victims, which may include temporary protected access to health services, education, housing or employment, among others, until they are eligible for regularisation processes and citizenship rights.

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[173] Grupo de Acción Comunitaria (2022): "*El limbo de la frontera Impactos de las condiciones de la acogida en la Frontera Sur española*". http://www.psicosocial.net/investigacion/frontera-sur/ Págs. 22 y 35.
[174] https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/cp180053en.pdf

Recommendations:

1. Recognise, in accordance with CAT General Comment 3, the right of victims of torture in third countries to protection, assistance and rehabilitation in the country where they are, irrespective of whether the acts of torture occurred in the country of origin or the country of arrival.

2. Consequently, request Spain to consider torture in transit, properly documented through the Istanbul Protocol, as a reason for granting humanitarian protection status.

7.5.2. Spain fails to recognise and redress the suffering of the relatives of the victims of enforced disappearance .

Argumentation:

1. In recent years, it is estimated that several thousand migrants have disappeared while crossing the Mediterranean, while trying to reach the coast of Spain and in Spanish jurisdictional waters.

2. The international legal system and various specialised bodies, including the International Red Cross, have indicated that these are cases of enforced disappearance.

3. The Working Group on Enforced Disappearances has indicated, and this has been endorsed by the Human Rights Council, that migrants whose whereabouts are unknown at some point in their migratory transit should be considered victims of enforced disappearance[175] .

4. The severe suffering of the relatives[176] of persons who have suffered enforced disappearance, and the lack of any possibility to mourn their relatives, has been repeatedly recognised by multilateral bodies and the United Nations system as a form of torture[177] . In this case, the relatives of migrants who suffer enforced disappearance are left in a situation of complete defencelessness as they are not recognised as interlocutors by the State. There are no policies for the identification of corpses when they are located, for informing relatives in the country of origin or for activating protocols for the repatriation of corpses. On the contrary, in the majority of cases the remains are buried in mass graves, when they occur at the border, or in the sea itself, when this is the case.

[175] WGEF (2017) Enforced Dissapearances in the Context of Migration. A/HRC/36/39/Add.2 https://www.ohchr.org/en/enforced-disappearances-context-migration-report

[176] Bourguignon, M., Dermitzel, A., & Katz, M. (2021). Grief among relatives of disappeared persons in the context of state violence: an impossible process? *Torture Journal*, *31*(2), 14-33. https://doi.org/10.7146/torture.v31i2.127344

[177] Perez-Sales, P., Duhaime, B., & Méndez, J. (2021). Current debates, developments and challenges regarding torture, enforced disappearances and human rights. *Torture Journal*, *31*(2), 3-13. https://doi.org/10.7146/torture.v31i2.128890

Recommendations:

1. Regulate the recognition of the direct families of migrants who have died or disappeared at borders as victims of torture, so that they have the right to receive information and to have all possible steps taken to locate their remains, the eventual repatriation of their remains and psychosocial care and support for the processes of trauma and mourning.

2. Develop specific reparation and rehabilitation policies for the families of persons missing in transit in areas under Spanish jurisdiction.