



CPT/Inf (2007) 31

**Response of the Spanish Government
to the report of the European Committee
for the Prevention of Torture and Inhuman
or Degrading Treatment or Punishment (CPT)
on its visit to Spain**

from 12 to 19 December 2005

The Spanish Government has requested the publication of this response. The report of the CPT on its December 2005 visit to Spain is set out in document CPT/Inf (2007) 30. The appendices to the response will be published shortly.

Strasbourg, 10 July 2007

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**SPANISH GOVERNMENT RESPONSE TO THE REPORT OF THE EUROPEAN
COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN
OR DEGRADING TREATMENT OR PUNISHMENT (CPT)
IN RELATION TO THE VISIT TO SPAIN
FROM THE 12TH TO THE 19TH OF DECEMBER, 2005**

I. INTRODUCTION

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter CPT) has sent the report corresponding to the periodical visit to Spain between the 12th and the 19th of December last year to the Spanish Government, in compliance with the Article 10 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

In the aforementioned report, the CPT expresses recommendations and suggestions that, taking into account the information collected in the detention places that have been visited, deems necessary to indicate to the Spanish Government to comply with the standards set by the aforesaid Committee.

In this sense, the Spanish Government thanks and takes into consideration the recommendations it has received. Since the beginning of the visits by the different delegations of the Committee, these recommendations have been a guide to introduce improvements in the legal as well as in the practical field, in order to achieve a rigorous compliance of the Convention.

The different recommendations and suggestions expressed by the CPT will find an answer here, through the exposure of general considerations related to the two big areas in which the Committee's report is focused and a particular response to each of the comments indicated in the said document.

II. GENERAL CONSIDERATIONS

The CPT's Delegation focused its studies in two big areas: the access to legal assistance of people since the moment they are deprived of their liberty under the Law Enforcement Agencies and the protection of the rights of foreigners who enter Spanish territory.

The Delegation studied the safeguards applied to persons who were deprived of their liberty because they were involved in an ordinary crime (those crimes that are not related to terrorism) and the effectiveness of the investigations of eventual ill-treatments that could take place during the custody in Law Enforcement Agencies' centres.

On the other hand, due to the information received on the great number of people that tried to enter Spain through Ceuta and Melilla in 2005, the Delegation studied the protection of the rights of those foreign citizens that enter Spanish territory through Melilla.

Thus, the report shows a series of evaluations and recommendations in situations that considers inappropriate on these two matters.

II. 1. Evaluations and recommendations on safeguards applied to persons deprived of their liberty.

After the exposure and analysis of the facts found out during the visit, in relation to the rights of detainees and in the interests of prevention of ill-treatments they could have received, the report recommends that

- the way in which detainees are informed on their rights should be revised, particularly, they should be informed on their right to free legal assistance in a language they can clearly understand.
- The legal framework should be reinforced to explicitly acknowledge the rights of detainees.
- The Draft Law amending the Organic Law 5/2000, dated the 12th of January, regulating the criminal responsibility of minors, should be revised.
- The role of prisons should be revised and it is proposed that all those prisons receiving people in preventive detention should draw up a register on the injuries found in the medical examination of admission.
- Measures should be taken to ensure that the person upon whom a prolongation or renovation of detention is being agreed can always be taken before the judge who is responsible of this decision.
- Measures should be taken to ensure that judges are conscious of their duty to make fast and effective use of the medical examinations in every case when they are notified of the existence of founded evidence of ill-treatments.

Without prejudice to the detailed response to each of these reflections in the Specific Considerations, the general arguments on safeguard of the rights of detainees are expressed as follows:

The CPT indicates expressly that “urges the Spanish authorities to ensure the implementation of an effective system of safeguards, including the fast access to a lawyer since the moment of deprivation of liberty, which works properly according to the recommendations that were previously made by CPT”.

From the recommendation made by the CPT to the Government, it is concluded that this organ asks the Spanish authorities to adopt measures in the legislative as well as in the administrative field, although these measures have not been detailed, in order to create an “*effective system of safeguards*”.

II. 1.1. Legislative measures

The legislative measures have been recommended because the Committee expresses that “the legal framework must be reinforced” literally, in order to ensure what it calls “*the aforementioned rights*” or the “*recommendations previously made*”, needing to be understood as such, as it is understood from the complete content of this report, especially in point 5 (“*Conclusions and recommendations*”):

- A) Information to the detainee on the rights he is granted,
- B) Beyond the simple information on the rights, the real effectiveness of the right to a lawyer’s assistance, and
- C) The access of the detainee to the examining magistrate.

Therefore, in regards to each of these questions, it is necessary to analyze which is the actual “*legal framework*” that wants to be reinforced, in order to study which could be the proceedings to operate the said reinforcement demanded by the Committee, taking the legal framework as a starting point.

A) The information of rights to the detainee.

The starting point in this matter needs to be the Article 520.2 of the Law of Criminal Procedure (hereinafter, LCP), because it provides that “*Every detainee or person imprisoned will be informed in a comprehensible way and immediately... on the rights he is granted and especially on the following: ...a)...b)...c)..., ...f*”. From this point, the rights assisting the detainee must be analyzed to study to what extend our legal system guarantees the information on them.

Contrary to what is normally said in practice, our procedural law does not only deal with the rights of the detainees in the Article 520 of the Law of Criminal Procedure but, apart from it, also deals with them in its six following articles, without prejudice to other provision in connexion with that Law and other related provisions. Moreover, even focusing only in the content of the Article 520, from the rights provided in it, those that are normally presented as rights of detainees are just a part of all those declared in the provision. Specifically, forgetting other rights that the Article 520 also includes, the category or concept of “*rights of detainees*” is normally limited to those rights that must be informed “*especially*” to the detainee, that appear in section 2, letters “a” to “f” (right to silence, not to declare against himself, assistance of a lawyer, communicate his personal situation and custody place, free assistance of an interpreter and examination of a doctor).

On the other hand, beyond these rights that must be informed “*especially*” to every detainee, our procedural law offers a more detailed list with regard to the rights they are entitled to and that means a wider framework of guarantees than the one that, at first sight, could be considered. In this sense, the first section of Article 520 establishes that “*the detention and provisional imprisonment must be made in a way that does not harm the person detained or imprisoned in his person, reputation and patrimony*”, and also that “*The preventive detention can not last longer than the strictly necessary time to carry out investigations in order to clarify the facts*”. In this case, generally, the detainee must be set free and made available to the judicial authority “*in the periods established by this Law and, in every case, in a maximum period of seventy-two hours*” (also Article 520 bis), except of cases of extension that are legally envisaged.

Section 2 of Article 520 establishes the duty to inform the detainee, not only of the entitlement of the rights especially expressed in letters “a” to “f” of this section, but also about the facts he is accused of, the reasons motivating his deprivation of liberty and, as it has been explained, “*of the rights he is entitled to*”. This last part implies that the person must be informed of those other rights he is also entitled to and which are included in Article 520.1 and have been mentioned in this report about the way of detention, as well as those expressed in sections 3 (if the person were a minor), 4, 5 and 6 on the specifications and content of the right to legal assistance, to seek *habeas corpus* (correlatively to the right that in Article 520 bis. 3 is given to the judge to personally or by delegation know about the situation of the detainee), to be separated from other detainees according to the degree of education, age and nature of the crime the detainee has been accused of (Article 521), to have the comfort or occupation compatible to the status of establishment and with security at his own expense (Article 522), to write to competent judges and magistrates (Article 524) and not to be exposed to extraordinary security measures that are not envisaged in the Law (Article 525).

However, in fact, although the LCP designs the theory about a system of information of the detainee’s rights that allows a quite complete guideline on the entitlement the person has, the procedural rule does not regard an entitlement that may be the finishing touch of the system, so that the right could be used as a general guarantee to the effectiveness of the others. That omission is the mere mention of the right to start, in that case, a proceeding of *habeas corpus* pursuant to the Organic Law 6/1984, dated the 24th of May, regulating this institution and that may be included in the legal provisions of the LCP.

On the other hand, the drafting of other articles of the Law regulating this matter should establish in a stricter, more specific and complete way the rights that officers of the authority have to inform about and what is the extension of this information for those who detain or to whom detainees are put available.

B) Real effectiveness of the right to legal assistance.

The CPT considers it as an aspiration that has not yet been achieved by our legal system because, as it is stated in the report (paragraph 50): “*Obviously, the actual legal framework on the right to legal assistance does not guarantee that, in practice, the detainee can make use of the right to access to a lawyer and the right to talk privately to him from the very outset of the person’s deprivation of liberty*”.

In the current system in force regulating the exercise of the right to legal assistance to the detainee, the lawyer’s assistance to persons in custody of the Law Enforcement Agencies of the State is regulated in Article 520 of the LCP (Book II, Title VI, Chapter IV), in which the point 4 establishes that the court appointed lawyer will go to the detention centre as soon as possible and, in every case, in a maximum period of 8 hours, starting in the moment of communication to the correspondent Bar Association.

In point 6. c), it is stated that the lawyer's assistance consists of "*having a private interview with the detainee when the proceedings in which he was involved were finished*". According to this rule, the lawyer's assistance is ensured to every detainee, as well as the almost immediate presence of the lawyers to the centres that communicate the detention. Actually, the time of the arrival of the lawyer is agreed between the detention centre and the Bar Association. It must be taken into account that the private interview with the detainee can not take place until the correspondent proceeding has been filed, never before that, excepting the case that the detainee or person imprisoned is not held incommunicado. In this case, the Article 527, c) suppresses the right to the interview between the lawyer and the detainee or imprisoned. The lawyer will not see the client until the later is taken to the Police to take statement.

It is not denied that, in fact, the current legal system in force allows that the detainee is in custody of the Force detaining him without legal assistance during the first 8 hours from the detention. The LCP establishes this period in its Article 520.4 as a maximum for the appointed lawyer to go to the place in order to assist the person. Although it is understandable that the CPT would like to suppress this period, the facts show that it is a response to the reality in which the available personal and technical resources by the different Bar Associations and administrative detention or custody centres, to which the detainee can be taken to, do not count on the necessary personal or material means to allow the suppression of this period.

More explicitly, this is the reality in big cities in which the daily figures of crimes and detentions is so high that the number of lawyers available in the correspondent Servicio de Asistencia Letrada al Detenido (Service of Legal Assistance to Detainees), organized by the respective association is not enough to assist every police station and detention centre. Generally, a lawyer that is assisting a detainee in a police station receives new notices from the Association before finishing the work, to go to other centres in which detainees require his professional service.

If the existence of a period of eight hours is justified by this explanation in big cities, it has an even bigger justification in the case of assistance in small villages, more or less isolated or far away from the capital city in which the Bar Association has its headquarters. In these cases, the geographical dispersion of the police stations and detention centres to which a lawyer on duty may need to go to in the same day, makes the possibility of an immediate assistance unviable.

With these geographical and administrative structures, some of which are unchangeable due to their nature, the only way to guarantee the immediate legal assistance that CPT wants is the modern notion of tele-assistance, which should be provided through technological proceedings that allow the simultaneous reception and emission of sound and image on real time.

The CPT mentioned in its report the lack of meaning of the right to legal assistance in terms of effectiveness because the detainee can not have a private communication with the lawyer but only at the end of the filing of the proceeding. It has to be indicated that when the detainee has legal assistance via the presence of a lawyer in the custody place, the said presence and consequent assistance in terms of the content of Article 520.6 (information of the rights and professional interview with the lawyer) guarantees that the person will not be defenceless, because some of the rights that the lawyer must ensure to communicate the person are exactly those of non declaration against himself, non confession of his culpability and even refusing to declare in the Police facilities. With all these, the defencelessness of the person can be completely excluded. Once this defencelessness has been excluded, allowing the private interview only after the voluntary taking of evidence of the detainee, in which the person can refuse to answer all the questions he does not want to respond, even with the possibility that the lawyer interrogates the person), does not only mean that the person will not suffer any prejudice, but could even be positive for the avoidance of undesirable interferences in the first investigation steps by some lawyers at the service of crime organizations or other's interest.

C) The access of the detainee to the examining magistrate is not guaranteed in an immediate and efficient way by the LCP but it is guaranteed by the Organic Law regulating the *habeas corpus*.

Despite this, it does belong to the aim of the LCP to endeavour the access to the detainee and it is shown, although only lightly, by our procedural law in its Articles 520 bis.3 and 524.2. Both of them allow the magistrate at any time in the detention to obtain information and know about the situation of the detainee and also to send a writing to “*the superior civil servants of the judicial system*”. However, given that these provisions are not enough to ensure the access of the detainee to a judicial facility, making this possibility more effective and real will require an amendment in the current drafting of the information to every detainee of his right of writ to *habeas corpus*. On the other hand, either making usage of this possibility or not, nothing prevents, although the CPT does not deem it probable, that once the detainee is brought before a court in the periods established by the law, the magistrate can commence the correspondent investigation process by presumptive ill-treatments that the detainee may have suffered. However, despite this, it belongs to the free judicial arbitration from the free evaluation of the possible evidence on which the magistrate counts, his decision of commencement or non commencement of the proceeding or, once it has been commenced, of suspending the process, at least temporarily, because it is believed that there is not enough accredited evidence of the commission of the crime or breach.

II.1.2. Administrative measures

The CPT is also in favour of the adoption of administrative measures, as well as legislative measures, that have the aim of guaranteeing the same information to the detainee in the rights to which he is entitled, the real effectiveness of the right to legal assistance and the access to an examining magistrate.

A) Regarding the information of rights.

While the legal amendment proposed by the CPT is not executed, indicating which must be the content of the information of rights that the authority agents must give to every detainee in detail, the necessary measures will be adopted through the governmental procedure. For this purpose, the best option is to execute this through the Performance Protocols to which the Law Enforcement Agencies of the State are subject to, established by the Ministry of the Interior, about which there is more information in other sections, to set rules for the agents' performance, without prejudice to orders or instructions that the Office of the Public Prosecutor and the judicial organs could instruct to the agents of these Law Enforcement Agencies of the State, as the agents of the Criminal Investigation Police are subordinated to them.

B) Regarding the immediacy of the right to legal assistance to the detainee.

Apart from the legal amendment that will be necessary in this matter to achieve the immediacy and to which it has been made reference, when the said legal amendment would have been made, the administrative performance that could reduce the malfunction denounced by CPT (undesirable delay in the lawyer's assistance to the detainee), involves the Ministry of Justice and the Interior and should be directed, respectively, to achieve the necessary agreement between the Ministry of Justice and the General Council of Spanish Law Profession, together with the Autonomous Communities that have competences in matters of justice administration, to give to the correspondent organs depending on staff (enough legal-aid appointed lawyers) and the necessary technical means (videoconference terminals) to give immediate the service demanded by CPT.

C) Regarding the better access of the detainee to a judicial facility.

The administrative performance that is deemed possible is the one that has already been explained and it consists of the properly explained inclusion, in the aspect of information of rights to the detainee by the officers, of the right to writ to *habeas corpus*, in accordance with the aforementioned Organic Law 6/1984, dated the 24th of May.

Finally, it must also be pointed out that, among the implemented means so that, as the CPT states in the 50th paragraph of its report, "*Every police officer should understand that they have the legal duty of guaranteeing that every person deprived of liberty can enjoy the aforementioned rights*", the Ministry of the Interior and Justice make a constant effort to improve the professional training of the staff through the diffusion of the legal grounds that the Spanish Constitution of 1978, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, European Convention on Human Rights, the LCP, the Law on free legal aid, the General Penitentiary Law and its regulations, the Organic Law on *habeas corpus*, the Organic Law on Law Enforcement Agencies of the State, the General Statute of Lawyers, the General Statute of the Office of the Public Prosecutor, the different instruments in relation to extradition and to legal assistance in criminal matters and the Circulars of the Prosecutor's Office of the Supreme Court contain in this aspect.

The said diffusion initiative in the framework of a professional improvement policy would not be innovative because of its implementation by the Ministry of the Interior and its constant development since some years, but, as an example, because of the training of the Law Enforcement Agencies' members in relation to Law in Armed Conflicts in collaboration with other institutions as the Spanish Red Cross.

This legal framework protecting the rights of detainees, supported by internal regulations and by a series of international regulative instruments that have been ratified by Spain and incorporated to our legal system, is especially aware of the definition of a number of principles and rules in the field of ethical professional behaviour, applicable to the police work, in order to avoid arbitrary performances. These are the principles that inspire the general policy of the Ministry of the Interior to guarantee the correct application of the Article 17 of the Spanish Constitution in the citizenship.

All these principles have had a significant influence in the configuration of the Police Statute in force and, particularly, it has inspired the suppositions and criteria regulating the use of force in the framework of basic performance principles, included in the Article 5 of the Organic Law 2/1986, dated the 13th of March, on the Law Enforcement Agencies.

The Law establishes, as the first basic performance principle of the Law Enforcement Agencies: to develop their professional work with absolute respect to the Constitution and the rest of the legal system.

The Law Enforcement Agencies of the State – a group of 130.000 people – execute thousands of legal police performances every year and conduct, in the exercise of their functions to protect the fundamental rights and public freedoms of the citizens, thousands of detentions every year, in the cases and in accordance with the proceedings envisaged by our legal system.

The cases of abuse in police performance are very rare. The general and absolute rule that reigns in the professional performance of our Police Force is the strict respect to the fundamental rights and the dignity and integrity of the detainee.

The content of the CPT's report itself endorses this conclusion, if we look at the rare and concrete cases of alleged ill-treatments to which a specific reference has been made that, on the other hand, will find an explanation in the section of specific considerations.

Likewise, it is noticeable that, during 2005, the number of ill-treatment complaints to detainees increased to sixteen, from which just two, due to their seriousness, were the reason to open a disciplinary file and police and/or judicial enquiries, while the rest of them, due to their lack of fundament, just gave rise to recommendations to the police officers that were responsible in order to improve and correct the public service.

In this sense, the Ministry of the Interior has always applied the principle of “zero tolerance” in cases of possible violation of constitutional rights, facilitating the investigation, the transparency and the cooperation with the rest of the State's authorities, especially the Judicial authorities, when there is a suspicion of any of this kind of behaviours.

In the institutional statements to the citizenship, the Parliament and the members of the Law Enforcement Agencies of the State; the Ministry of the Interior, as well as the Secretary of State for Security highlight and stress this principle as an absolute priority in their performance in the Government.

Moreover, these public and solemn statements of the Ministry of the Interior's leading members have led to concrete measures. In fact, the Government has reinforced the instruments available to the Ministry of the Interior to ensure the appropriate working of the Police services to the Legal System and the Law.

In this sense, it is necessary that the system counts on the appropriate mechanisms to determine if the service to the citizenship is effective and efficient; and if in the execution of certain public policies, including the police's, the legal system has been respected, the performance protocols have been followed and, in short, if the rights of the citizens have been guaranteed whether for the filing of a procedure, the victim of a crime, a presumptive violator of a law who is being investigated or who is detained in any centre or police facility.

The organic instrument available to the Ministry of the Interior is the Inspection of Staff and Security Services, organ in charge of investigation, checking and assessment of the development of the services, centres and units of the Directorate-General of Police and Civil Guard, as well as the performances carried out by members of the respective agencies in the fulfilment of their duties.

This Unit, created by the Royal Decree 1885/1996, dated the 2nd of August, has been purposefully promoted by the Ministry of the Interior.

In spite of the cases of abuse, the bad working of the service or the eventual violation of the rights of the person are currently, as we express, a real exception, there have been concrete instructions to the highest person responsible of the Unit to monitor in a special way this kind of behaviours under the principle of "zero tolerance". The relations between the Inspection and the Organs and Institutions safeguarding the defence of the citizenship's rights and freedoms, as well as the Ombudsman and Non-Governmental Organizations working and participating actively in this kind of policies, have also been strengthened.

Basically, the goal is being rigorous in the application of the legal system and the demand of responsibilities whenever an abuse of these characteristics has occurred.

In order to reach these goals, the following measures have been taken:

1. The means available to the Inspection have been strengthened:
 - Simplifying the structure of intermediate officers to promote the coordination and an effective and efficient development of their work.
 - Increasing the number of civil servants who are responsible for the inspections.
 - Creating a Bureau of Study and Analysis in which the information collected from the inspections will be analysed, studies will be made to improve the performance protocols and the inspection tasks will be designed and planned.

2. A specific Training Plan has been designed for the staff.
3. Inspection tasks are planned to be wider with the aim that not only general inspections can be made, but also the rest of inspections that the current provisions envisage and that, however, were not developed sufficiently in the past.

Finally, via internal circulars of the Secretary of State for Security and the Directorate-Generals of Police and Civil Guard, the awareness of maintaining a strict respect to the rights of the persons during the detention and custody has always been expressed to the officers.

Nevertheless, in order to achieve an effective protection of the detainee's rights and a bigger transparency in the performances of the Law Enforcement Agencies of the State, the Secretary of State for Security has established new precise and up-dated guidelines that allow the safeguard of those rights and, simultaneously, give the officers enough legal guarantees in the cases of detention and the subsequent custody.

These guidelines, which will be soon adopted by the Secretary of State for Security, will bring behavioural and performance rules to the members of the Law Enforcement Agencies of the State to safeguard the rights of the persons who are detained or in custody, in the moment of detention as well as in the moment of identifications or personal register, and will protect the respect to the detainee's rights and will limit the use of minimum measured and essential force, when it is necessary.

II.2. Legal system of protection to foreigners in Spain.

As the CPT expresses in the 58th paragraph of its report, in the interests of the prevention of torture, it examines if the relevant progress in decision-making is accompanied by the appropriate guarantees to ensure that people are not deported to countries in which they could suffer any risk of torture or ill-treatment. In this sense, the European organ expresses its worries about the fact that the proceedings applied to foreigners offer a real opportunity to present their cases, as well as the education on human rights of the officers to whom these cases are given.

In relation to this and even though a the detailed explanation can be found in the section of specific considerations, first of all, it must be pointed out that our legal system, in the context of its purpose of regarding a defence of the migratory flows that take place in an ordered and respectful way with the legal system, has been gradually collecting a growing catalogue of legal-procedural guarantees in favour of those immigrants that come to or are in Spain in an illegal condition.

Thus, in Chapter III of the Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of the Aliens in Spain and their Social Integration, the right to effective protection of the court (Article 20.1), the right to count on the guarantees of the administrative proceedings (Article 20.2), the right to appeal against administrative resolutions affecting them, as well as the right to free legal assistance in the administrative or judicial proceedings that could lead to the denial of entry of the foreigner, his devolution or expulsion from Spanish territory and in all the proceedings related to asylum, are guaranteed. Moreover, the right to the assistance of an interpreter if they do not understand or speak the official language to be used is also envisaged (Article 22).

Likewise, it must be highlighted that the guarantees of foreign citizens during their stay in the Foreigners' Internment Centre by virtue of what is stated in the Articles 62 bis to 62 thereof of the Organic Law 4/2000, dated the 11th of January: foreigners who are internees in these centres are guaranteed a series of relevant rights, such as the assistance of a court appointed lawyer, assistance of an interpreter –free, given the case, - and communication to their relatives or to the consular civil servants of their countries or other persons, among others.

In respects to the protection granted to foreigners, who are non-accompanied minors in Spanish territory, it must be pointed out that, observing the provisions contained in this respect in the **Organic Law 4/2000, dated the 11th of January, as well as the Royal Decree 2393/2004, dated the 30th of December, by which its development regulations are passed**, minors count on an wide range of guarantees that will be described subsequently.

Nevertheless, even taking this wide catalogue of protective guarantees of the rights to foreigners into account, the effectiveness of them can be prejudicial for the dimension of the illegal migratory phenomenon that Spain is facing in the last years.

This is why there exists a noticeable predisposition of the Spanish authorities to constant perfection and improvement, in the regulation of aliens' matters and immigration as well as in the material performance of the Administration applying that legal regulation. In this sense, there is a firm purpose of being constantly aware of the needs that the adaptation to continuous changes of such a variable phenomenon as it is the immigration implies.

Therefore, in relation to the protection of foreign citizens that try to enter our country illegally in the general framework and the situation of the border of Melilla particularly, it must be indicated that the increase in the migratory pressure in such a considerable manner in the last months means, above all, a serious human and social problem for the Government.

However, at the same time, it is a delicate, complex and serious matter for the State - the need of making an effective and real management of the migratory flows – in which the management of interests and policies of Spain and the European Union and the relationships with third countries with a geographic and strategic relevance for Spain and for the rest of members of the European Union come together.

Nevertheless, the difficulties in the management of borders do not prevent us of controlling the borders:

- following the same legal rules for the management of any other border;
- under operative parameters of the Law Enforcement Agencies of the State, protected and guided by our legal system, and
- with absolute respect to the human rights of the citizens that, illegally, try to cross one of our exterior borders.

In order to ensure the respect to a person's rights, his integrity and dignity in Police control of our borders, the Ministry of the Interior has encouraged, and will continue encouraging, the necessary investigations and the immediate adoption of appropriate measures to determine the police officers' responsibilities before any kind of irregular or disproportionate performance in the development of their duties.

In the case of the incidents occurred in Melilla, the fact is that, up to now, there have been no evidences of the existence of irregular performances according to the internal investigations carried on. Now, the legal authorities must determine and call for action to be taken, given the case, to the police officers that intervened who, as well as the rest of the citizens, are protected by the presumption of innocence, fundamental principle of our rule of law.

In relation to the protection of foreign citizens that are involved in the proceedings of entry or repatriation, it must be mentioned that in the cases of denial to enter as well as in the cases of repatriation (in its different categories of return, devolution and expulsion), the lawyer's and interpreter's assistance and the legal control of the resolutions that are filed are completely guaranteed.

In this sense, in the last report of the Spanish Ombudsman in September, 2005, concerning the legal assistance to foreigners in Spain, this Institution collects the following aspects in reference to the conclusions of denial to enter:

"2.2 The legal assistance in the denial to enter is normally offered for free without taking into account the economic possibilities of the foreigner. This praxis is very appropriate..."

"2.5. In the process of denial to enter, an interview is made between the interested person, properly assisted by the lawyer, if he requests it, and the examining magistrate in the majority of the cases. This procedure must be described as suitable given the swiftness of the process and the inquiring nature of the interview."

In this same report, regarding the conclusions in relation to the expulsion process, the lack of regulatory appropriateness for the effective right to legal assistance has not been denounced at any time.

Likewise, in the resolution of the complaints presented by the non-governmental organizations CEAR and SOS RACISMO against the process of devolution to Morocco of 73 Sub-Saharan immigrants caught in Ceuta's and Melilla's borders in October, last year, the Spanish tribunals have declared that there has been absolute lawfulness and correction in the proceedings followed by the Spanish authorities from the point of view of the safeguard of rights of the people affected in relation to the right to legal assistance and the effective protection of the court, as well as to the right to life and physical integrity.

Finally, regarding the training in human rights to the members of the Law Enforcement Agencies of the State, the Training Plans and Educational Programmes of Police and Civil Guard devote an important part of their content to the study of the legal and operative aspects related to human rights and police performance. Without prejudice to it, the Secretary of State for Security is working in collaboration with the leading members of the Training Departments of both agencies to complement the aforementioned training with the didactical material and the experts' assessment brought by Amnesty International.

In this sense, the Department of Police Professional Ethics of the Directorate-General of the Police is already using the Didactical Unit of Amnesty International to modify the training manuals of the basic and executive categories. Contacts have also been maintained in the Civil Guard Academy of Baeza between the teachers and the representatives of the said organization for using it again in the teaching activity next year.

Moreover, the technical viability of incorporating Amnesty International's audiovisual material to the system of professional improvement and updating of both agencies, via their on-line training platforms is being analysed. This will make the information available to a very important number of officers that are already working in Police facilities.

It should also be pointed out that, particularly, the Directorate-General of the Police has been considering the training aspect of its police civil servants as one of the best responses to the defence of human rights. A proof of this could be the wide programme in the general, theoretical and practical framework for the individual and its teaching in the different training centres at every level in the National Police Force (See Annex I on topics and activities related to human rights).

Thus, among the lessons taught in the period 2002-2006 with this aim, the following could be highlighted:

a) Detention, custody and personal register:

- Guideline dated 20th of January, 2003, of the Operative Subdirector-General regarding the custody of the detainees.
- Guideline 19/2005 from the Secretary of State for Security, dated 13th of September, regarding the filing of personal register by the Law Enforcement Agencies.

b) Domestic and gender violence:

- Temporary Regulations dated 18th of November, 2003, from the Directorate-General of the Police regarding the police performance for the application of non-molestation and protection order for victims of domestic violence.
- Resolution dated 1st of July, 2004, from the Secretary of State for Security, through which the publishing of the Performance Protocol of Law Enforcement Agencies of the State and the Coordination with Judicial Organs for the protection of victims of domestic and gender violence was agreed.
- Resolution dated 28th of June, 2005, from the Secretary of State for Security, through which the publishing of the Performance Protocol of Law Enforcement Agencies of the State and the Coordination with Judicial Organs for the protection of victims of domestic and gender violence, updating the general principles and provisions of the Organic Law 1/2004, dated 28th of December, concerning the Measures of Integral Protection against Gender Violence.

c) Foreign Affairs:

- Guideline 3/2005, from the Secretary of State for Security, dated 1st of March, regarding the transfer of minors who are in Internment Centres.
- Guideline 14/2005, from the Secretary of State for Security, regarding the performance in police facilities in relation to foreign women who are victims of domestic or gender violence in an illegal administrative situation.
- Guidelines from the Directorate-General of Interior Police, dated 21st of November, 2005, regarding the information of international protection of immigrants that have arrived to Spain on vessels and other illegal boats recently and are subject to transfer to Internment Centres.

d) Racism, xenophobia and intolerance in football:

- Performance Protocol against Racism, Xenophobia and Intolerance in Football, dated 18th of March, 2005, in which the institutions involved agree to comply with “Measures of Prevention and Protection of Physical and Moral Integrity of Victims of Racist, Xenophobe and Intolerant Actions in the field of sports” and “Measures of Localization and Control of Participants in Racist, Xenophobe, Intolerant and Violent Incidents in Football”.

On the other hand, regarding the guideline section, the publishing of the Guideline of Instrument of Ratification of the optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, made in New York on the 18th of December, 2002, in the General Order of the Directorate-General of Police, n° 1.594, on the 3rd of this month, should be taken into consideration.

III. SPECIFIC CONSIDERATIONS.

In this section, the different considerations and recommendations exposed by the Committee will find a response, analysing the diverse paragraphs of its report.

The CPT wants to stress in its 5th paragraph that, initially, the Delegation members were not allowed to access the premises of the Civil Guard in Roquetas de Mar (Almería). It was only allowed through the intervention of the District Chief Officer of the Civil Guard.

In relation to this incident, it is considered appropriate to clarify that it occurred because the First Officer of the Group of Criminal Investigation Police in Roquetas de Mar receiving them did not know that the people coming to the premise in this municipality were members of the CPT. However, when the Chief-Sergeant of the said group was informed of the presence of the Delegation in the premise by the First Officer, he went immediately to help the Delegation and to show them the premises and the documents they required.

Likewise, it must be pointed out that, due to the waiting of the Delegation to enter the premises of the Civil Guard in Roquetas de Mar, the Chief Lieutenant Colonel of the Headquarters of Almería made his excuses to the Delegation.

A) Introduction.

Paragraphs 9 and 10.

The CPT emphasises its recommendation that “*all the persons obliged to spend the night in a facility of the Law Enforcement Agencies, after the detention, must be given a clean mattress and blankets*” because the CPT observed a constant failure to deliver this material in this kind of facilities.

Regarding this recommendation, already exposed in the last visits (1997, 1998, 2001 and 2003), it is necessary to indicate that in the years 2002 and 2003 orders were instructed to the correspondent Units by the Civil Guard in order to dully arrange the already existing lock-ups and also to give guidelines to continue with the construction of new ones. With the aim of controlling the current situation in these facilities and the level of compliance with the aforementioned orders, in August 2005, the headquarters were required to expose their needs of mattresses and blankets. They had 74 blankets and the same number of mattresses which had been delivered since the 26th of September last year.

Given that this recommendation seems to be motivated by the fact that the Delegation of the said Committee, as it was inspecting the lock-ups of the headquarters in Almería, observed the presence of a mattress that, due to humidity, was a bit worn-out. It must be stressed that it is an exceptional fact because the Directorate-General of the Civil Guard and its dependant Units are constantly aware of the habitability and hygiene of the lock-ups.

B) Ill-treatments

Paragraphs 11 and 16.

In these paragraphs, the Delegation indicates a series of allegations of ill-treatments, including serious cases, with registered injuries at the point of starting preventive prison that were said to be caused by the Police or the Civil Guard, exposing different cases in the following paragraphs as an example.

Regarding Case 1, paragraph 12, the person in question is A (*), whose detention and subsequent bringing before the court was carried out by the Group XIX, dependant of the Narcotics Section, Unit of Drugs and Organized Crime, Provincial Brigade of Criminal Investigation Police in Madrid. The said person participated in certain crimes of drug trafficking, unlawful possession of weapons, crimes against the life and physical integrity of persons or their liberty and criminal act. It should also be mentioned that the said person had been subject to five detention negative attempts. In the first of them, he shot with a weapon several times to police officers failing to shoot at their bodies and rushed at other agents and police contingents with his vehicle, which was also driving in the rest of the attempts, and an officer was injured in one of them.

(*) *In accordance with Article 11, paragraph 3, of the Convention, the identity of the person in question has been canceled.*

In relation to the current case, *the Delegation asserts that the injuries of the medical reports are coherent with the allegations of ill-treatments exposed by the detainee.* In respect to this matter, it must be pointed out that, as a consequence of the successful detention of the person in question, it is true that the person himself suffered injuries because of which had to be taken to the Emergency Service of the Health Care Centre in Collado-Villalba Estación. The correspondent medical report, showing a non serious medical record, includes a series of injuries that, being also true, were a result of active resistance against police officers who participated in the detention, in form of kicks, pushes and pulls that also caused injuries to two officers. The later, who used the minimum force to take the person out of the vehicle and then to detain him, also received medical reports according to which there was an “aggression” due to the injuries and one of them lost his prescription glasses.

The person in Case 2, paragraph 13, is B, detained in the premises of Almería as there was a complaint of ill-treatments in the family environment against him. Regarding this case, *the Delegation also asserts that the injuries caused are coherent with the allegation of ill-treatment.*

The version of this person, who states that the injuries were the result of hits with a truncheon because he asked if he could use the toilet, is quite different to the Police’s version. When the detainee was in the lock-up, he started to kick the bars and to beat his head against the wall. This is the reason why he was asked to stop his behaviour. Instead of obeying, he hit the officer and because of this, he had to be overpowered, using the minimum necessary force and always in a proportionate way in accordance with the situation. The affected officer had to be assisted for his injuries in the Emergency Service of the Hospital Virgen del Mar (Almería). This fact led to the commencement of the corresponding proceedings.

Likewise, it is necessary to mention that the aggressor who was arrested was taken to the Hospital Provincial and refused any medical assistance.

The Case 3, paragraph 14, also *shows a coherence between the injuries of a detainee in the Prison of Madrid V, and an allegation of ill-treatments, consisting of serious beats on the head and shoulders in the street at the time of the detention, as well as beats in the head once he was already handcuffed in the Police station in San Blas.*

He is C, whose detention was carried out as he was stealing in a bar. The said person showed a very violent attitude, with a strong resistance to the detention, as a consequence of which one of the participant officer’s uniform was torn. After overpowering him, using the minimum necessary force, he was taken to the Hospital Gregorio Marañón, which issued the correspondent injury report.

It is significant to point that, when the person was taken to the hospital and during his stay in the Police station in San Blas, he showed a violent and aggressive attitude, without having used force against him.

Concerning Case 4, paragraph 15, the Delegation *makes reference to the case of a person who pleaded because he received strong beats on the head during the detention, as well as in the Police station to which the person was taken, inside a room with the purpose of identification. The Delegation reiterates once again that the injuries of the medical record are coherent to the allegation of ill-treatments.*

In relation to this, in spite of the effort made by the different Units, and due to the shortage of data,

we could not find any detainee in the exposed circumstances.

Paragraph 16.

The CPT expresses a recommendation with reference to the reiteration of the Spanish authorities of the message “zero tolerance” to any kind of ill-treatments. It explains the need of taking steps in the field of professional training of the Law Enforcement Agencies’ members to implement a completely operative system of safeguards against ill-treatments.

Concerning this matter, we must make a reference to what has already been exposed in the General Considerations of this report, but asserting that the Law Enforcement Agencies’ members are absolutely aware of their duty to respect the rights that the Constitution and the rest of the legal system acknowledge to detainees and also know the consequences that the ignorance of these rights can bring. The ignorance can lead to the application of rigorous sanctioning proceedings and even, in cases of ill-treatments, the loss of the job of those persons involved. All this is made without prejudice of informing the Judicial Authorities of the facts to delimitate the correspondent penal responsibilities.

Likewise, the so called “Manual of Criteria for the commencement of proceedings by the Criminal Investigation Police”, elaborated in the framework of the National Commission of Coordination of the Criminal Investigation Police is noticeable. This manual, which has been delivered massively, as it was explained in the report to the visit of the year 2003, includes the Intervention Protocols with detainees in its chapters 8, 9, 10, 11, 12 and 17.

Moreover, in the field of education on human rights, as it has been expressed previously, this education is subject to an especial attention by the Spanish Authorities, focused in the achievement of a respectful performance of the Law Enforcement Agencies’ members in the development of their tasks of detention, custody, interrogatory and treatment of persons deprived of their liberty.

Particularly, the performance of officers that comprise the Law Enforcement Agencies of the State is reigned by the basic performance principles of Article 5 of the Organic Law 2/1986, dated the 13th of March, regarding the Law Enforcement Agencies of the State, that are inspired in the “Declaration on the Police” of the Council of Europe and the “Code of Conduct for Law Enforcement officials of the United Nations General Assembly”.

In relation to this, it is appropriate to show the statistical data corresponding the complaints filed against officers of the Directorate-General of the Police and the filing of proceedings as a result of acts carried out in the development of their work, that are presumed to be tortures, ill-treatments, discriminative actions of any nature or inhuman, degrading or humiliating treatments, during the period from October 2002 to April 2006.

CONCEPT	YEAR				
	2002*	2003	2004	2005	2006**
Num. of cases	1	7	8	12	1
Num. of civil servants affected	1	7	10	15	1
Cases ended with a sanction/ Sentence	1	5	6	5	
Cases closed and filed/ Cases closed with dismissal		1	1	1	
Cases in process or pending judicial resolution		1	1	6	1

* *Since October (inclusive)*

** *Until April (inclusive)*

C) System of safeguards for persons under the custody of the Law Enforcement Agencies.

Paragraph 18 and 19

The CPT puts special emphasis on the information that is given to the detainee by the Law Enforcement Agencies, particularly, the forms that the person receives. It observes that it is not clear that the legal assistance is free and considers that, instead of the word “letrado”, which is more technical, the word “abogado” should be used, as it is a more common term. Likewise, it expresses that the officers of the Law Enforcement Agencies acted less diligently to ensure that the detainees understood their rights effectively. A specific case is mentioned in paragraph 19.

As a response to these considerations on the information to detainees, it must be pointed out that the police performance respects the circumstances envisaged in the Spanish legal system and in the police performance protocols, among them, the aforementioned manual “Manual of Criteria for the starting of proceedings by the Criminal Investigation Police”, adopted by the National Commission of Coordination of the Criminal Investigation Police (See Annex 2).

In the said manual, as its chapter 8 envisages, with reference to the “detention and information of rights”, it is clear that the strict observance of the Spanish legislation in force (Article 520 of the Law of Criminal Procedure), which, by constitutional mandate, complies directly with the Universal Declaration of Human Rights (1949), the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), as well as the United Nations’ regulations, the recommendations of ICPO-INTERPOL and the methodologies and standards of the European Union.

In relation to the usage of terms “asistencia letrada/ asistencia de abogado”, it must be highlighted that, for a long time, every police facility has multilingual forms of information of rights for the detainee available and the term “letrado” is translated into different languages as an equivalent of “abogado”.

Likewise, it should also be reminded that courses on matters like minors, domestic violence and police services with especially vulnerable people are given in a permanent basis and independently of the training that each of the officers has received in his correspondent training academy.

Finally, it is worth saying that this aspect will be subject to specific analysis by the *Code of conduct required to the members of the Law Enforcement Agencies of the State to safeguard the rights of the detainees or in police custody*, which, as it has already been explained, will be soon approved by the Secretary of State for Security.

Paragraph 20 and 21.

Regarding what paragraphs 20 and 21 state, in which there is a reiteration on the *Spanish legislation having to offer the complete right to access a lawyer and the risks of his delay*, we insist on what has already been explained in the section of General Considerations, with reference to the Law in force, the possible alternatives to its amendment and, particularly, the lack of personal and material resources for its implementation.

However, the need of reinforcing the mechanisms guaranteeing the swiftness and efficiency in the granting of legal assistance and the effectiveness of this service by the court appointed lawyers is shared. Moreover, this aspect will be handled specifically in the Guideline of the Secretary of State for Security with a constant reference.

Regarding the second paragraph of 21, it is the common proceeding and, thus, also applicable in the District Police station of Tetuán that, once the detainee has been informed of his rights, the person that requests it or has injuries will be taken to the medical services. In the specific case that is mentioned, the detainee could not be found and, thus, the circumstances are unknown. It is also ignored whether he was taken to the medical services.

Paragraph 22.

The Delegation makes a reference to two particular cases in which the lawyers came immediately when the Civil Guard informed them. According to the CPT, this fact, that seems to be an exception, more than the reality, shows that the Spanish legislation in force can be interpreted in a coherent way with its recommendations.

Concerning the interview between the detainee and the client prior to the statement to the police, it is pointed out, as it has also been expressed in the first General Consideration, that indeed, in accordance with the Article 520 of the Spanish Law of Criminal Procedure in force, this private interview can not take place before procedural steps are taken. It is insisted on the fact that the amendment of this aspect of our legislation will require a considerable increase in material and personal resources. On the other hand, it must be taken into account that, although the detainee can not have a private communication with the lawyer before the procedural steps have been taken, the law ensures the legal assistance through the presence of a lawyer in the custody place. His presence, as well as the rights acknowledged in the aforementioned article 520.6, which are the information of the rights and final interview with the lawyer, guarantees to the detainee not to suffer defencelessness.

Paragraph 23.

This paragraph makes reference to a specific case to note *the existence of long delays between the moment that the detainee requests from the first time the presence of a lawyer and the moment in which the said lawyer arrives*. In this case, the delay was 17 hours. It could not be possible to know how it happened; however, it is worth mentioning the common operation process: once the detainee is in the police station, he will be informed of his rights and the detention will be communicated to the Bar Association, with the possibility of requesting a court appointed or a private lawyer.

In the first case, the Bar Association is be asked to send a lawyer to the police station for the statement taking, depending on the proceedings that must be made and on the demand existing in the Bar Association. In the second case, the said association finds the court appointed lawyer, who contacts the officers involved in the case and will arrive to the police station depending on the proceedings that have to be made and the availability of the lawyer. In any case, nothing prevents the presence of the lawyer in the police facilities when it is believed to be necessary to collect information on the person he represents.

Paragraph 24 and 25.

These paragraphs make reference to the commitment of the Secretary of State for Security to the necessary efforts in order to make sure that the lawyers are present in police stations as soon as possible.

The Secretary of State for Security has contacted the Chairman of the General Council of Spanish Law Profession (comprising all the different professional Bar Associations in our country) to strengthen the coordination mechanisms between Police and Lawyer's Profession in order to guarantee the fast presence of lawyers in police stations. The idea of this initiative is that the General Council of Spanish Law Profession promotes the adoption of measures for a better coordination and faster response to the requests of police officers in Bar associations, with the parallel entry into force of the guidelines included in the future Guideline on conduct required to the members of the Law Enforcement Agencies of the State to safeguard the rights of the detainees.

Finally, the report of the CPT itself recognises that the "Spanish legislation in force can be interpreted – as sometimes happens – in a coherent way in relation to the recommendations of the CPT" on the swiftness of the lawyer's assistance to a detainee. In this sense, we understand that measures of reinforcement for the coordination instruments and the clarifying of the guidelines on police performance, together with the promotion of the Inspection Service, will be enough for the purpose of the CPT, and completely endorsed the Spanish Government, of ill-treatment prevention during the detention in police facilities.

Paragraph 26.

In this paragraph, the Delegation makes reference to the specific case in which it is asserted that a person chose private legal assistance and the Police did not contact the lawyer. The Delegation exposes that, if the access to the lawyer had been faster, the mistake in documentation generating her detention and retention would have been corrected before. It would also have prevented her stay in custody in a police prison, period in which she declared to have suffered ill-treatments.

In fact, D was detained around 10:30 pm on the 7th of July, 2004, by the police officers with identification numbers 65.513 and 62.149, who belong to the police section called "Alfa 200". She was found in the intersection of Gran Capitan Avenue and Conde de Robledo Street, in Cordoba. When the Computing Services of the Directorate-General of the Police, through the operation service 091, were consulted, it was verified that the said woman had an order of detention and enter into prison in force by the First Instance Criminal Court n° 3 in Algeciras (Cádiz) pursuant to a summary criminal proceeding 330/2001, due to a crime against public health. The proceeding was recorded, number 8.299, on the 7th of July, 2004, it was sent to the Examining Magistrates' Court on duty and, on the 7th of July, 2004 it was sent to the First Instance Criminal Court n° 3 in Algeciras (Cádiz).

The common practice is that when a person is arrested due to a judicial claim, and not due to a police claim, in whose case police proceedings must be made (although the detainees are immediately informed of their rights according to the Law of Criminal Procedure), the said person will not do any statement, identification or any other proceeding and thus the presence of a lawyer is not required. In relation with the aforementioned aspect, it must be pointed out that the Article 520 of the said Law of Criminal Procedure, in its section c, establishes "the right to appoint a lawyer and to request his presence to assist the person in the police and judicial proceedings of statement and participate in any identification process the person may be subject to. If the detainee or imprisoned person does not select a lawyer, the legal assistance will be made by court appointment".

On the 31st of August, 2004, the Examining Magistrates' Court n° 3 in Córdoba, judicial authority to which María del Carmen García Fuentes was taken to due to the aforementioned claim, sent the case to the Province Police Station of Córdoba, entering in the General Register on the 3rd of September, 2004. In this register, pursuant to the preliminary proceeding 4604/2004, it was required to start proceedings to clarify the facts that led to the actions generating the said process, attaching a copy of the claim submitted before the court by D.

The correspondent proceedings were made and the result of them was sent to the Examining Magistrates' Court n° 3 in Córdoba, with number 8666, on the 7th of July, 2004.

It is worth highlighting that, the Examining Magistrates' Court n° 3 in Córdoba was consulted on the development of the aforementioned claim, submitted by D against police performance. The response was that it had already been filed and, after the allegation against the court decision to file the case submitted before the Province Superior Court, the later took the same decision as the Examining Magistrates' Court n° 3, confirming the closing of the process.

Even if there had been a fast access to the private lawyer, the mistake in the documentation that led to the detention, that is, the judicial claim, would not have been solved before. Even if the lawyer had arrived to the police station with any document to deny the facts, it could not have been taken into account before the verification with the court lodging the claim, which was closed at night and due to the fact that the request was in force and it had not yet been suppressed by the court, which is the one to certificate the cease of this request. It must also be taken into consideration that the documents brought by the interested parties, although it is not probable, could have been manipulated or forged. Likewise, during a judicial proceeding, through which a number of court orders and rulings can be generated, it is unknown if the one brought by the party could be the last of the process in question or if, on the contrary, any subsequent document could exist suppressing the previous one, in whose case, even being an authentic document, it would lack of validity due to the fact that there existed another discrediting the first.

By observing all the reasons exposed here, it is deduced that it is not the police performance the one which generated a rare and unpleasant situation.

Paragraph 27.

In this paragraph there is a description of the proceeding in force applicable to the selection of a court appointed or a private lawyer, via communication to the Bar Association or to the lawyer selected by the Police or the Civil Guard when a person has been detained, stressing that the *lawyer will be present when the statement is taken but not before.*

A comment on this has to be made: if the legal system in force is not modified and the correspondent administrative measures can not be taken, this process continues to be applicable, taking into account the correspondent increase of personal and material resources.

Paragraph 28.

In this paragraph, it is pointed out that the lawyers earn the same amount of money in their 24-hour service and an extra bonus for each detainee to be assisted in a police station, which means a scarce incentive to arrive as soon as possible.

In relation to the system of duties, the Article 28 of the Regulation of free legal assistance, passed by Royal Decree 996/2003, dated the 25th of July (amended by Royal Decree 1455/2005, dated the 2nd of December), in accordance with the General Statute of the Spanish Law Profession (Articles 45 and 46), passed by the Royal Decree 658/2001, dated the 22nd of June, establishes that the Bar Associations will set a duty system to guarantee the assistance and defence of the detainees in a permanent basis. This duty system, as well as the number of lawyers integrating each of the duty services, is determined by the General Council of the Law Profession with the agreement of the Ministry of Justice. The requirement to the lawyers by the respective associations is strict and they control the time that a lawyer needs to arrive once he has been informed.

The compensation of the lawyers comes from the 24-hour duty service once it is finished and the assistance is considered as a single action. Exceptionally, if the duty service has a superior length (for example, weekly), the retribution will be calculated in an individualized way, without exceeding double of the quantity determined daily to each lawyer for the 24-hour duty service, also daily, without counting the number of assistances carried out. The actions subsequent to the first statement of the detainee or imprisoned person are considered to be included in the retribution corresponding to the process in question, according to a chart established in the Annex II of the Regulation of free legal assistance (Article 38).

Either in the general considerations or in the different paragraphs dealing with this matter (previous private interview with the lawyer), it is recommended to set legal and administrative measures to handle this question and, particularly, the need of the availability of more resources than those currently available, without prejudice to the understanding that the current circumstances do not lead to defencelessness for those under custody of the Law Enforcement Agencies.

Paragraph 30.

The CPT expresses its worry about the presentation of an amendment to the Draft Law for the amendment of the Organic Law 5/2000, dated the 12th of January, specifically in its Article 17, according to which the right to a detainee under legal age to have a private interview with a lawyer before the statement taking would be explicitly rejected.

To this respect, the Secretary of State for Security, which is an administrative unit with competence for the issuing of a report on draft laws affecting the field of its competences, has not proposed any amendment in this sense.

Paragraphs 31, 32, 33 and 34.

There are different general considerations on the role of the judges, highlighting that if the judicial authorities act with swiftness and efficiency in the investigation of the complaints, it will be more probable that the true complaints are founded and those which are not, will turn out to be lacking of fundament. The case law of the European Court of Human Rights, particularly, with reference to Article 3 of the European Convention on Human Rights, is quoted to indicate that “any investigation of eventual ill-treatments must satisfy the criteria of independence, effectiveness, swiftness and transparency”.

Paragraph 35.

Concerning the role of prisons, the CPT recommends that “every prison receiving persons in preventive detention draws up a register in which the injuries detected in the medical examination of admission, together with any other information, as the origin of the said injuries, appear”.

As the report of CPT itself (page 25) states, there is a Guideline dated the 11th of August, 1998, from the Subdirectorate-General of Prison Management, in which the health care services’ have the duty to register, through the correspondent injury report, those injuries observed during the medical examination in the moment of entry into prison.

The health assistance is one of the services that the Prison Administration must offer to the internees in prison, in compliance with the duties established in Articles 3.4 of the Organic Law 1/1979, dated the 26th of September, General Law of Prisons and 4.2 a) of the Prison Regulations, passed by the Royal Decree 190/1996, dated the 9th of February.

These duties comprise, among others, those that the medical services in prisons must accomplish with to do a medical examination of the person in the moment of entry (Article 20 of the Prison Regulations), as well as medical assistance that the person requires during the stay in prison.

When the medical services detect during the examination or consultation any kind of injury in the internee, they must inform of this fact to the Management Office of the centre with the correspondent injury report.

The Management Office of the centre must send the correspondent communication, that is, the medical record, and all the existing information on the facts and circumstances that could be the origin of the injuries as soon as possible and in a detailed way to the court or tribunal that ordered the imprisonment, so that they can have all the information available. All this must be made in accordance with the Guideline of the General Subdirectorate of Prison Management, dated the 11th of August, 1998, to which the Committee's report makes reference.

The intervention of the Prison Administration, after observing that an internee has injuries when he entered, consists of issuing the medical injury report and any other information available to the court or tribunal that ordered the internee's imprisonment. This documentation is sent the next day after the entry into prison or the first working day, together with the receipt notification of the imprisonment order. The judicial authorities do not communicate the prisons eventual subsequent actions in relation to this kind of facts.

Therefore, regarding the recommendation of the CPT, the specific register is believed not to be necessary because the current existing system gives enough guarantees for the detection and follow-up of those injuries that could be caused by ill-treatments during the detention period.

Paragraphs 36, 37, 38, 39, 40 and 41.

Various individual cases are mentioned in relation to specific suppositions of judicial performances. The Delegation knew of these cases due to guided visits in the prison of Almería in December of 2005 and there is no data about the complainant's affiliation or about the reference number of the proceedings. These cases are the following:

1. The detainee entered the prison of Almería on the 9th of October of 2005 due to a crime against the traffic safety, as the person was driving in a condition of drunkenness and disobedience for refusing to do the alcohol test. The person was taken to the police station, an official report is written to start a summary trial. He had injuries and because of this, a medical report was also made by the medical services of the centre and issued the following day to the Examining Magistrates' Court n°4 in Almería which opens the Urgent Proceedings 204/05. Once the complaint was formulated by the Office of the Public Prosecutor for the aforesaid crimes, the accused and his defendant showed their agreement. The sentence of plea of guilty was issued in the court on the 10th of October, 2005 and the person was convicted for the crimes against the traffic safety and disobedience.

When the visit was made, no investigation proceeding had been commenced and the person in charge in the judicial organ had even denied receiving the injury medical report. This case is referred to as number 5.

Regarding this case, it is considered necessary to point that there is not any reference to a violent situation in the official report or in the judicial proceeding. There is also no complaint of ill-treatments that the person could have suffered. The court has not commenced any proceeding because there is no supposition or evidence that would lead to the belief of the existence of police ill-treatments.

2. The detainee entered the prison of Almería on the 4th of September of 2005. In the prison, in the injury medical report was filled in and sent to the examining magistrate n° 5 of Almería. The magistrate in charge of this court told the CPT that he sent the file of the case to the magistrate n° 4 of the same court, who asserted he had not received any injury medical report. The magistrate of this organ recognised that no proceeding had been commenced on the investigation of eventual ill-treatments. A reference of this case can be found in the report as number 6.

3. The detainee stated that he had suffered beats with a truncheon by a police officer in the National Police Station of Almería on the 2nd of September, 2005. As he was taken to the prison of Almería, an injury medical report was made and, together with a written statement denouncing these facts, was sent to the examining magistrates' court n° 5 in Almería on the 3rd of September, 2005. The only proceeding made by this court was the one dated the 9th of November of 2005, in which there was a requirement to the Police to send a report clarifying the circumstances of the arrest. This report was dated the 9th of December and sent to the court on the 14th of December of 2005. By court order, dated the 7th of February of 2006, the temporary stay of proceedings and the filing of proceedings, approved by the prosecutor on the 18th of the same month and year. This case is referred to as number 2.

Concerning this case, it must be commented that it is not questionable that, as the report of the CPT states, the prosecutor can formulate a prosecution against a detainee who is taken to the court on duty for the commission of a crime and in the court, in the procedural framework of urgent proceedings with all procedural guarantees, with the advice of a lawyer, can show his agreement with the said prosecution and punishment petition, without showing or claiming against police performance as the person was arrested in the police station. In case he had done it later, after being made available to the judicial authority and once the sentence was issued according to the summary trial against him, he would have been taken as preventive imprisoned to the prison. It is to understand that these considerations must have been taken into account by the magistrate who knew of the detainee's claim to agree upon the closing of preliminary proceedings and that the prosecutor showed his approval to the filing.

4. The detainee entered the prison of Almería on the 6th of June, 2005, finding a bump on his right hand in the centre's unit of entry. The said detainee said that it was caused by a civil guard officer "in a street fight". The imprisoned person's injury medical report and claim were sent to the examining magistrates' court n° 3 in Almería, on the 6th of June of 2005. No proceeding had commenced at the time of the CPT's visit. The magistrate stated that the injuries were not severe enough to justify any investigation and that the detainee had not issued a complaint of ill-treatment before the magistrate. This case is referenced to as number 7.

5. The detainee entered the prison of Almería on the 5th of July of 2005 with a visible injury in her face. The medical unit of the prison filled in a report which was sent to the examining magistrates' court nº 3 of Almería. The court did not adopt any measure and did not commence any proceeding because, according to the medical report of the prison, the injuries were produced before the police detention and there was no evidence to show that they had a violent origin. The interested person did not issue any complaint against the agent. This case can be found in the report as number 8.

In the CPT's opinion, none of these specific cases exposed in the report accomplish the parameters used by the ECHR to determine the efficiency of the investigation, which, as it is stated in paragraph 45 of the report, are the following:

- On the one hand, being able to determine if the force used by public agents was justified in the circumstances of the case, identification and punishment of the persons involved.
- On the other hand, covering all the appropriate measures in order to collect the necessary evidence to clarify the facts that have been complaint about, among them, witnesses' statement, forensic evidence and, given the case, autopsies.

In all the cases mentioned, the CPT considers that the conditions of swiftness in the judicial response and thoroughness in the investigation have not been accomplished. To this respect, it must be pointed out that, although in some cases a delay in the judicial investigation performance can be observed, all the proceedings were open on the date on which the Delegation visited. Therefore, if the resolution of the file has not been done or the change of preliminary proceedings into summary proceedings has been made, the lack of thoroughness of the judicial proceedings can not be judged. In any case, it is the competence of the interested parties, particularly the Office of the Public Prosecutor's, to seek the preparation of the work of a criminal prosecution in a rigorous and effective way.

Paragraph 42.

The CPT requests the issue of the complete information in relation to the preliminary investigation of cases 1 and 4.

Regarding the case 1, related to the Moroccan citizen A, on the 14th of March, the Spanish Government has sent the information available up to the date, as well as the information given by the Judiciary, specifically the Chief Judge of Collado-Villalba. In this information, there are specifications related to the complaint for ill-treatments issued by the Moroccan citizen, who is currently in a judicial process and, in accordance with the Article 301 of the Law of Criminal Procedure, the proceedings of the preliminary investigation are secret until the oral trial starts. The judicial process is not finished yet, therefore, the complete documentation has not been sent.

On the other hand, concerning the crimes for which A has been prosecuted, the information from the judicial authority was given to the President of the Committee. This information deals with the two pending causes, one of which was decided to stay the proceedings, this is, closed, and the other is waiting for the appointment between the judge of Collado-Villalba and the judge of Madrid.

Likewise, information was also requested on the case of the Spanish citizen E, about whom the complete copy of the preliminary investigation has been sent. Once the information was given, the President of the Committee has expressed her agreement to it.

Paragraph 43, 44, 45, 46 and 47.

The legal regulation of the hearing of detainees before the judicial authority is subject to analysis by the CPT. It considers that this adequate process is one of the most effective to prevent torture and ill-treatments because, in these cases, the judge himself checks the physical and psychological condition of the detainee via personal and direct inspection, promoting the adoption of necessary measures to safeguard the detainee's integrity and to clarify the eventual illegal facts that may have occurred by the police officers.

Thus, in paragraph 43 of the report, it highlights that the legal period for the bringing of the detainees to the governmental authority before the judge is seventy-two hours, although surprisingly, it concludes that, taking into account the information collected from the lawyers, detainees and the judges themselves, this requirement is not thoroughly applied. Moreover, in some occasions, the judges agree upon the detainee's entry into prison without having seen him, giving the impression of a lack of adequateness in the application of the procedural regulations, whose nature of peremptory norm completely prevents that its effectiveness depends on the will of the parties or the judicial arbitration. It is specifically indicated that this deficiency took place in the case number 5, without a higher accuracy on the exposure of the circumstances of this case.

In the Spanish law, by the constitutional mandate coming from the Article 17.2 of the Constitution, the preventive detention is subject to thorough time limits. It can not last more time that the strictly necessary for the clarification of the facts and, in any case, within a maximum period of seventy-two hours; the detainee must be set free or available to the judicial authority.

The principles of the Constitutional Court coming from the interpretation of the said case – STC (Constitutional Court Sentence) 224/1998, dated the 24th of November – states that, due to the essential value of the freedom in the rule of law, the detention of a person must be subject to the criteria of the strict necessity and also to the criteria of the shortest period of time possible – STC 199/1987 – in accordance with the Article 9.3 of the International Covenant on Civil and Political Rights and with the Article 5.3 of the European Convention for the Protection of Human Rights, ratified by Spain. The strictly necessary period of time of a governmental detention must be interpreted in the sense that it can not surpass the limit of seventy-two hours, which is the absolute limit. This does not prevent that those deprivations of liberty which, although not surpassing the said maximum period, surpass the necessary time period to conduct the investigations in order to clarify a crime for which the detainee has been accused, to be qualified as illegal deprivations of liberty, if they are unlawfully extended or maintained. In this case, a restriction of the fundamental right to personal freedom, which is not allowed by the Constitution, can be observed. For these purposes, the “circumstances of the case and, particularly, the aim of the measure of deprivation of liberty, the activity of the authorities involved and the behaviour of the person affected by the measure” must be taken into consideration, as the STC 31/1996 and 86/1996 have established.

The maximum period of seventy-two hours can be exceeded, however, in the exceptional cases mentioned in the Article 55.2 of the Constitution, as a measure of individual cease of the said guarantee to the persons related to armed gangs or terrorist elements and in the terms established by an Organic Law. This limit is currently directed to Article 520 bis of the Law of Criminal Procedure, incorporated to the Organic Law 4/1988, dated the 25th of May.

The legal periods for the extension of the preventive detention beyond the seventy-two-hour period are very strict and its non-compliance would lead to the call for action to be taken against the public officials in question. The extension must be requested during the first forty-eight hours of the detention of the examining magistrate, who must give a resolution in the following twenty-four hours. The judicial authorisation – or its denial – must be reasoned and the detention can not exceed in any case the period of five hours.

The inaccuracy of the CPT's report in paragraph 43 must be pointed out when it states that *the maximum period for the preventive detention in Spain is thirteen days for those crimes related to organized crime, terrorism and drugs*. The report does not indicate the source of such mistaken information, which contributes to the false perception of the judicial reality of our country in the field of judicial treatment to detainees.

It is also worth stressing that, eventual infractions in the constitutional and legal regime of preventive detention, among them its unlawful extension, find an specific judicial tool for the safeguard in *habeas corpus*, declared under the Article 17.4 of the Constitution and developed as a summary judicial proceeding in the Organic Law 6/1984, dated the 24th of May. This allows every person subject to a detention a fast access to a judicial authority to expose allegations against the reasons for detention or its conditions, so that the judge presents a resolution according to the law. The exercise of this special defence tool of the fundamental right to freedom allows an immediate protection to unreasonable extensions in the duration of the administrative detention, because, as the STC 31/1985 reminds, the immediate bringing before a court, which is the aim of *habeas corpus*, is applied in the case that, having conducted a legal detention, the legal period of detention had finished.

An emphasis must be put on the fact that, in no case, the Spanish legal system allows a judge to transform the detention into imprisonment without taking the previous step of hearing, which is regulated according to the Article 505 of the Law of Criminal Procedure with a binding nature, and implying the appearance of the detainee before the judge. The references to the supposed non-compliances with this requirement would mean, given that they were true, a judicial malpractice that could even be prosecutable with disciplinary or criminal procedure.

The detainee's preventive entry into prison also requires a prior request of the Office of the Public Prosecutor or of any of the complainant parties appearing in the process, linking the judicial authority to the accusatory principle and previous request, limiting its arbitrariness, which determines the summon to the hearing that must take place in a maximum period of seventy-two hours since the bringing before the court, where the detainee, assisted by the lawyer of his choice or a court appointed lawyer; the Office of the Public Prosecutor and the rest of the parties will be present. The persons appearing in the hearing can make allegations and propose evidence that can be conducted in the court order or in the said seventy-two-hour period.

These procedural requirements show the validity of the judicial performance, thus, its breach could be used in the core of the process either by the lawyer of the accused person or by the Office of the Public Prosecutor, which should perform with the aim of safeguarding the procedural guarantees via the system of ordinary appeals, envisaged by the Law of Criminal Procedure (Article 766 of the Law of Criminal Procedure in the field of abridged proceedings). The simple fact of the end of the seventy-two-hour period since the bringing before the court of the detainee, without the judge or court making any reference to the personal situation, constitutes a situation of breach of the fundamental right of personal freedom (Art. 17.1 EC), causing the irreparable nullity of judicial invalid acts, in accordance with the principles of the Constitutional Court (STC 82/2003, dated the 5th of May) declaring that the said omission of reference equals to a breach in the legal protection of preventive detention since the seventy-two-hour period. In this case, it must be considered that the person is illegally detained for all legal effects.

The statement of the report, saying that the requirement was not respected in case number 5, does not reveal clearly the source of this data. In any case, if this were true, the appeal against a wrong judicial decision must come from the initiative of the lawyer the person affected or from the Office of the Public Prosecutor.

The CPT's report also shows its disagreement in relation to the working of the distribution system of criminal court procedure in the field of the examining magistrates' court of Almería. In some occasions, complaints or injury medical reports of detainees, which were subject to medical observation in the province prison, were not included in the correspondent criminal process with the swiftness required, but sent to other examining magistrates' courts resulting on a lack of effectiveness in the judicial response.

These observations, in so far they could show proof of a faulty working of the distribution system, would certainly demand an effort to improve the planning and development of the said service.

On the other hand, the Committee makes a concrete reference to the Sentence of the European Court of Human Rights, dated the 2nd of November of 2004, in relation to the case "Martínez Sala", in which the Committee states that Spain was punished for the breach of the Article 3 of the Human Rights Treaty, not because there were actual ill-treatments, but because there was no thorough and effective investigation of the allegations.

In the case Martínez Sala and others against Spain, the claimants, fifteen sympathizers of a Catalan independent movement, alleged before the Court they had suffered physical and psychological torture and inhuman and degrading treatments during their detention in the end of June, 1992, some days before the starting of the Olympics in Barcelona. They also denounced that the investigation conducted by the judicial organ to investigate their complaints was not enough.

In the sentence of the 2nd of November, the Court concluded that there had been a violation of the Article 3 of the Treaty in the procedural aspect due to the denial of the application of the claimants to adduce evidence and, particularly, the police officers' statements who made the interrogation, the incorporation of the court orders of the police officers' statements and reports on the process for crimes of terrorism and belonging to an armed gang against them or their own statements, among others. Thus, the investigation had not been effective enough and the presumed persons guilty for ill-treatments were not found and the facts were not clarified.

Nevertheless, it is worth pointing out that the text of the Sentence includes the intervention of different judicial authorities, which assisted the complaints of ill-treatments issued by the complainants, including the appeal for infringement of fundamental rights and freedoms to the Constitutional Court. The complaints were dismissed as it was considered that there was not enough evidence. This same result was repeated by the Spanish Constitutional Court, which considered that the resolutions conducted by the judicial organs were well founded and, in relation to the adducing of evidence, it was highlighted that, in the Spanish law, the claimant in the criminal field does not have an unlimited right to obtain the administration of evidence he has proposed and judged inappropriate by the Court dealing with the process.

Taking into account the forensic doctor reports, written during the detentions and the reports written by other doctors chosen by the claimants after their release, the European Court concluded that there was not enough evidence to confirm the existence of the ill-treatments that had been alleged, thus no violation of the Article 3 could be considered in its fundamental sense.

Literally, the Sentence says in its point 145 that “the verifications of the medical reports submitted and the behaviour of some of the claimants, sometimes not very cooperative, generate doubts on the credibility of the allegations of ill-treatments conducted before the Court”. It adds in the point 146 that “in conclusion, the Court considers that the evidence elements brought by the claimants do not ground their allegations sufficiently. As consequence, there was no violation of the Article 3 of the Treaty.”

Paragraph 48.

The Committee proposes the following recommendations:

- *A detainee may not receive information of the rights correctly.*
- *It takes time to have access to a lawyer when the police officers take the statement.*
- *There are no guarantees that the person will be physically taken before the judge.*
- *If the prison staff members in charge of admission to prison register the injuries and send them to the judge, there is no guarantee of investigation.*

As consequence of these statements, *the Committee recommends the revision of the legal existing framework and safeguards against ill-treatments of persons deprived of their liberty.* This recommendation has been commented on detail and very thoroughly in the first general consideration of this report.

Paragraph 49.

It is recommended to revise the information of the detainees on their rights, particularly; the right to the free assistance of a lawyer must be expressed in a language they can clearly understand.

As a response to this recommendation, in the report to the visit in 2003, as the Committee recognised, persons detained for a crime, infraction to aliens legislation or other reasons, will be informed of their rights immediately in Spanish. When the detainees are foreigners, this information will be given in English and French. Subsequently, they always receive a very detailed paper in their own language (if it is a common one like German, Rumanian, Arabic, Chinese...) with the rights they are entitled to, among them the right of having a doctor of their choice if they bear the expenses. Afterwards, with the presence of the lawyer or the interpreter, if it is the case, the same rights are read again. All these notifications can be seen in official books and proceedings.

Likewise, the standardised models of Miranda warning in the languages of the most common nationalities in Spain and which are used by the Units of the Criminal investigation Police of the Civil Guard, are also available in the open web page of the Criminal investigation Police in the Web of the Civil Guard (Intranet), to which all its members can access.

Moreover, those languages that, due to the spelling of their alphabets, are difficult to transcript in the computer systems (Chinese, Japanese, Cyrillic languages) can be found in the Technical Unit of the Criminal investigation Police and the printed forms are available to every Unit in these languages. In the rest of the cases, where there are no specifications, the assistance of an interpreter is envisaged.

This aspect is subject to specific handling in the “Guideline on conduct required to the members of the Law Enforcement Agencies of the State to safeguard the rights of the detainees or in police custody” which, as it has already been explained, will be soon passed by the Secretary of State for Security.

Paragraph 50.

The Committee insists on the need of the detainee to have access to a private interview with his lawyer before the statement making. As it has already been pointed out with detail in the first general consideration, the following aspects can be highlighted in relation to this matter:

1. The detainee does not suffer defencelessness.
2. Although there are not yet the necessary personal and material resources to make the private or court appointed lawyer’s assistance effective in all the cases, measures are being taken to reinforce the mechanisms of the necessary cooperation among all the parties involved, as it has thoroughly been expressed in the general considerations.
3. For the time being, it is not envisaged in the applicable legislation (Law of Criminal Procedure), as it has already been expressed in the general part of this report.
4. The possibility of interference in the investigation by the lawyers working for criminal organization or interests of a third party must be considered.

Paragraph 51.

The CPT requests the Spanish authorities to revise the amendment draft of the law on criminal responsibility of minors.

As it has been explained in the comment to paragraph 30, the said amendment has not been executed by the Ministry of the Interior.

Paragraph 52.

The Delegation recommends the draw up of a register of medical reports in the admission of the detainees in the prisons.

As it has already been expressed in the comment to what the Committee exposed in paragraph 35, the implementation of this register is not considered to be necessary because the current system already gives all the necessary guarantees.

Paragraphs 53 to 57: judicial supervision.

The recommendations of the paragraphs 53 to 57 affect directly and exclusively to the judicial organs and the Office of the Public Prosecutor.

Paragraph 53.

The CPT expresses a recommendation consisting of the need to adopt measures to guarantee that the person, on whom an extension or annulment order of the detention is issued, will always be taken before the judge who is responsible of this decision.

This case evokes those suppositions in which the detainee is brought before a judge different to the competent one to the hearing of the case either because the detention was carried out in a different territorial competence or because, in the organization system of duties, the legalization of the situation of administrative detention corresponds to another judge.

Concerning this matter, it must be reminded that the Spanish legislation does not exclude the presence of the detainee before the judge who is definitively competent to hearing of the case, because the sixth section of the Article 505 of the Law of Criminal Procedure provides clearly that, when the detainee is brought before a judge other than the judge or court that must hear the case, and the detainee can not be brought to the later in a seventy-two-hour period, the first will conduct the hearing to make a resolution on his personal situation, without prejudice that, once the competent judge or court to hear the case receives the proceedings, will hear the suspect again, assisted by a lawyer, as soon as possible, to issue a resolution on his personal situation.

The preventive effectiveness of the ill-treatments assigned to the personal presence of the detainee before the judge is even more safeguarded, if that is possible, due to the fact that in these suppositions, the detainee will be brought before the judicial authority twice. Firstly, he will be taken to the examining magistrate of the territorial competence in which he has been detained and, secondly, to the judge or court competent to hear the case. In any case, the examining magistrate of the detention place is obliged to start the adequate proceedings to clarify the eventual ill-treatments or tortures if he observes that the detainee has any possible evidence of being victim of ill-treatments or if he alleges them or issues a complaint in this sense. The inactivity or out of habit of the examining magistrates – and the Office of the Public Prosecutor – if it actually existed, would be attributed to the malpractice, but not to a deficiency in the legal coverage for the practice of the investigating performances in question. This malpractice must be denounced and settled in the core of the process via the correspondent means.

Paragraph 54.

The CPT's report questions the procedural treatment of the so called "contradenuncias" (counter-accusations) issued by some police civil servants for supposed aggressions suffered from detainees who, at the same time, issue a complaint of ill-treatments or torture given in some cases.

In the context of the facts described in the case number 2, without questioning the impartiality of the Spanish judges' and prosecutors' performance, the CPT expresses, however, that there is a certain level of concern for the fact that the injury complaint of a public officer would receive a different treatment than the complaint of ill-treatment. The officer's complaint was resolved in a process characterized by its urgency and swiftness – mentioned in the report as "diligencia urgente con conformidad" (urgent proceeding with consent) -, which concluded in a sentence of conviction as the detainee expressed his compliance with the qualification of facts exposed by the prosecutor. On the other hand, the ill-treatment complaint of the detainee is still on process via ordinary proceedings before the same examining magistrate.

The report expresses some doubts on the validity of a compliance granted by the person accused that was still in custody in the moment of expressing his will. It also shows its disagreement to the possible lack of impartiality of the examining magistrate, who, after giving judgement in relation to the Police complaint, still follows the proceedings for the ill-treatment complaint issued by the person who accused the same police officer. In the Committee's opinion, the said magistrate has already made up his mind on the person guilty of the incident.

The possibility of a loss in the free decision capability of the person in custody in expressing his valid and efficient will of accomplishing with the terms of the complaint issued by the prosecutor does not seem to be accredited in the Spanish judicial performance or in the specific case exposed by the CPT. It must be taken into consideration that the usage of the so called urgent proceedings to have a summary trial, regulated in the Title III of the Book IV of the Law of Criminal Procedure, under the name of "Del procedimiento para el enjuiciamiento rápido de determinados delitos" ("Regarding the process of summary trials for certain crimes), to which apparently the detainee was subject in the aforementioned case, happened in the moment when he was brought to the duty magistrate (Art. 797.1 of the Law of Criminal Procedure) and, as a consequence, he was no more in physical and judicial Police custody. Thus, the risk of suffering any direct or indirect coercion by the officers does not exist.

The validity of the accused person's compliance is not questionable, as he expresses it while he is subject to a judicial cautionary measure of preventive prison, because the said deprivation of liberty, dependant on the judicial authority does not affect in any way the free capacity of decision of the person accused, dully assisted by his lawyer, to design and conduct his defence in the terms he considers to be adequate.

On the other hand, the category of procedural channel used to resolve each of the complaints does not mean an imbalance or a discriminative treatment. The urgent proceeding is normally conducted because the police complaint is documented in a police report which, in accordance with Article 795.1 of the Law of Criminal Procedure, constitutes a formal presupposition of the urgent proceeding, as it states that: "Without prejudice to what has been established for the rest of the special processes, the process regulated in this Title will be applied to the preliminary proceedings and to the judgement of crimes sentenced with a deprivation of liberty that do not exceed five years or any other punishment, being the only one, joint or alternative to other, whose duration does not exceed ten years, without taking into account the quantity, always when the criminal proceeding is carried out pursuant to the police report and that the Criminal Investigation Police has detained a person and has brought him before the duty court or, even without detaining him, has been summoned to come up before the duty court because he has the quality of person denounced in the police report..."

The detainee's complaint, being an individual complaint, follows the process of summary proceedings (Title II of Book IV of Law of Criminal Procedure), and this does not mean there is a lack of guarantees because the summary proceeding and the process for summary trials are special processes that regard a common basic regulation, in accordance with section 4 of Article 795 of the Law of Criminal Procedure, which establishes the supplementary application of the regulations from the first to the second.

Concerning the supposed loss of impartiality – or the external appearance of impartiality – coming from the examining magistrate's sentence against the detainee in the process of the summary proceedings, it must be specified that the judgment of the ill-treatment complaint will not correspond to the same magistrate, although he follows the proceedings. The reason is that, in Spanish law, the process of summary trials corresponds to the duty examining magistrate and he has to issue the judgement in the case of agreement between the complainant and the party accused - Article 801 of the Law of Criminal Procedure, stating that the duty magistrate can issue a sentence if the party accused shows its consent to the indictment in the case of crimes punished with a sentence of up to three years of imprisonment, fine of any quantity or different punishment with a duration no longer that ten years. This does not happen in the summary proceedings, in which, once the process is finished, the case must be sent to other judicial authority (the criminal court judge or, given the case, province criminal court) for hearing and final judgement.

Therefore, in the case number 2 exposed in the CPT's report, the opinion or criterion that the examining magistrate may have had when he approves the consent reached in relation to the police complaint against the detainee, can not affect the judgement of the ill-treatment complaint, as the later must be evaluated by a different judicial authority to the examining court, due to the requirements of summary proceedings.

Paragraph 55.

The report makes reference to the need of adopting the appropriate measures to guarantee that the magistrates are aware of their duty to make fast and effective use of the forensic examinations in any case in which the existence of founded evidence of ill-treatments is notified. In short, it is a reminding of the professional duty for the examining magistrates – and the prosecutors – of investigating the complaints for punishable crimes without external request using all the useful and necessary means to clarify the case.

Without prejudice to the respect, apart from discretion, that must always be acknowledged to examining magistrates in the development of their function regarding the choice of investigation mean selection that they deem adequate to clarify the facts (statement of independence and integrity principle in the development of the judicial function), it must be stressed that, in case of identifying relevant deficiencies or omissions in the compliance of their professional duty, there is always a possibility (in accordance with Title III of Book IV of the Organic Law of the Judiciary) and without the need of an specific reminding, of the call for actions to be taken in the civil, criminal and disciplinary field.

D) Protection of foreign citizens.

After the references made in paragraphs 58 and 59 to the reasons why the Committee is interested in this protection and, particularly, for the circumstances of Melilla, various considerations are exposed in the following paragraphs.

Paragraphs 60 and 61.

The CPT, mentioning the Spanish Aliens legislation, indicates the right that the persons deprived of their liberty should have from the very outset of their custody, of communicating their situation to a person of their choice, as well as the access to a lawyer and a doctor. Likewise, it mentions the right to free legal assistance, in relation to which, the entry denial of foreign citizens must include information on the legal appeal to this decision the right to free legal assistance and the assistance of an interpreter, from the beginning of the controls at the border post.

Concerning this, a reference must be made to the Spanish Constitution of 1978, which establishes in the Article 13 that the foreigners will be granted the public freedoms guaranteed in Title I thereof, in the terms set by the treaties and the law. This acknowledgement of rights is repeated in the Article 3 of the **Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration**. Specifically, in relation to the rights mentioned in the CPT's report, the Article 22 of the aforementioned Organic Law establishes that the foreigners who are in Spain and lack economic resources, according to the criteria set in the regulation of free legal assistance, have the right to it in the administrative or judicial proceedings that could lead to the denial of entry, devolution or expulsion from the Spanish territory and in all the proceedings related to asylum. Moreover, they are granted the right to the assistance of an interpreter if they do not understand or speak the official language to be used.

These rights acknowledged in the law, are developed in the **Royal Decree 2393/2004, dated the 30th of December, by which the Regulations for the enforcement of Organic Law 4/2000, dated 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration are passed. In its Article 13, concerning the denial of entry, it is expressly indicated that the officials responsible** for the control will deny the entry into Spanish territory to those foreigners who do not fulfil the requirements established in this chapter. The aforementioned denial is conducted through a motivated and notified resolution with information about the appeals that can be lodged against it, the period to lodge it and the authority before which the person has to lodge them, as well as the right to legal assistance. In the case when the interested person lacks of economic resources, this assistance will be given by a court appointed lawyer, and, given the case, the assistance of an interpreter is also granted since the moment of starting the control in the border post. Likewise, in the preferential proceedings (Article 130-134 Royal **Decree 2393/2004, dated the 30th of December**), and in the case of return and devolution (Articles 156 and 157 respectively), those rights are guaranteed.

Thus, pursuant to what is established in the aforementioned regulation, in the aliens' proceedings, during all the process, the foreigner is granted the right to free legal assistance, as well as the assistance of an interpreter, in case it were necessary.

Paragraph 62.

The CPT refers to the expulsion summary proceedings. The aliens' legislation enlists the categories of persons to whom these proceedings can be applied, which is open for National Police, confirmed by the Government Delegate and does not require a judicial decision to conduct the expulsion.

It is necessary to point out that the reference made by the CPT to the Article 26.1 of the Spanish legislation on the rights of foreigners, which enlists the categories of persons to whom the summary proceedings of expulsion can be applied, is not correct because the said article is not in force currently. In this sense, the Organic Law 7/1985, dated the 1st of July, concerning the Rights and Freedoms of Aliens in Spain, derogated by the **Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration**, must be observed. **In the later, the administrative sanction of expulsion from the territory is covered in a general way in its Article 57.**

Likewise, the Article 63 of the aforementioned Organic Law regulates the preferential proceeding, which is an administrative proceeding for the issue of expulsion files in certain cases, among them "being irregularly in the Spanish territory, due to the non-granting of an extension of the stay, lack of residence permit or having expired the said permit more than three months ago, and provided that the interested person had not requested its renovation in the period established by law". This preferential process is explained in detail in the Articles 130 to 134 of the Regulation on Aliens Law, granting the instruction to the National Police Force and the resolution or the Government Delegate or Sub delegate. The judicial intervention, when the files are being processed, is limited to the fact that the examining magistrate can request to the competent examining magistrate the entry of the foreigner in question in an internment centre for foreigners. During the time of internment, the foreigner will be available to the examining magistrate.

Paragraph 63.

The CPT makes reference to the bilateral agreement between Spain and Morocco, according to which adult Moroccans are subject to summary proceedings of expulsion just because of their nationality. A series of examples of accelerated returns of Moroccan citizens are mentioned, with the prohibition to come back for a certain number of years, as well as groups of people who were registered in a single section in the register of detainees of the National Police of Almería, without any information whether the person had seen a lawyer or a doctor. Thus, it describes the said return process as a summary procedure.

Moreover, the CPT requests an explanation in relation to the principles of this direct return practice, without application of the proceedings for the return of foreign citizens.

Concerning this matter, it must be mentioned that there is a Bilateral Agreement between the Kingdom of Spain and the Kingdom of Morocco related to the movement of persons, transit and readmission of foreigners who entered illegally, dated the 17th of March 1992, which just comprises the readmission of foreigners coming from third countries and, thus, it is not applicable to Moroccans. This is concluded in its Article 1, which states expressly that: “at formal request of the border authorities of the State who makes the request, the parties’ authorities will readmit in their territory nationals of third countries that would have entered the territory of the later, coming from the State requested”.

Nevertheless, from the statements made by the CPT in relation to this paragraph, the “return” of the “devolution”, in accordance with the regulations in force on this matter, must be highlighted.

As it is observed in the **Royal Decree 2393/2004, dated the 30th of December, by which the Regulation of the Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration**, the return is agreed once the foreigner is present in a qualified border post and he is not allowed to enter the national territory because he does not fulfil the requirements to this effect. In the return resolution, the information to the interested person on his right to legal assistance, free in the case of lacking enough economic resources, the assistance of an interpreter, the information that the denial of entry can lead to return and also, the specific reason why his entry was denied must be included.

The way of execution is immediate and, in any case, within a 72-hour period since the moment of the agreement. If it can not be made in this period, the examining magistrate will determine the foreigner’s place of internment until the return, being in no case a penitentiary centre.

Despite the aforementioned aspect, given the special characteristics of the Autonomous City of Melilla with the neighbour country Morocco, those persons who are not allowed to enter through the border post due to the lack of the necessary documentation, will no be processed with a resolution of return, they will just not be allowed to enter. In the evaluation of this practice, it must be taken into account that approximately 25.000 people enter from Morocco to the city and come back every day and, since the dictatorship, there is an agreement with Morocco declaring that the citizens of the neighbour Province of Nador can enter Melilla and the citizens of Melilla can enter the Province of Nador just having an identity card issued by the authorities for this specific purpose, in order to facilitate the transit and trade of both cities.

“Devolution” is different to return. For the devolution, a file of expulsion is not needed for those foreigners who find themselves in any of the following cases:

- Those who infringe the prohibition to enter Spain, after having been expelled.
- Those who try to enter the country illegally, including those foreigners who are caught in the border or near it.

If the devolution can not be carried out in a 72-hour period, the judicial authority will be requested to take the measure of internment, envisaged for the files of expulsion.

In any of the cases mentioned before, it must be pointed out that the foreigner has the right to legal assistance, free in case the person lacks enough economic resources, as well as the assistance of an interpreter, if the person does not understand or talk the official languages to be used.

In the same way, regarding the prohibition mentioned by the CPT of returning in a certain number of years, it is necessary to clarify that it happens in the case of an agreed devolution as consequence of trying to enter Spain illegally and the said prohibition is established within a maximum period of three years.

Finally, concerning the devolution, it may also be adequate to indicate that, in some cases; the devolution order adopted can not be executed, being this execution filed in stay. This is the case of pregnant women or the case of an asylum application.

The CPT also wishes to receive the correspondent explanation to the direct return of Algerian citizens in relation to the agreement equivalent to the one existing between Spain and Morocco.

Concerning this, it is asserted that the readmission proceedings between Spain and Algeria are executed pursuant to the Protocol between the Government of Spain and the Government of the Republic of Algeria regarding the movement of persons, entered into force on the 18th of February of 2004, and the law in force is strictly respected, like in the case of Morocco.

Paragraph 64.

The CPT makes reference to the non-application of the bilateral agreement between Spain and Morocco related to the direct return of Moroccan citizens without the right to enter for minors who are not accompanied, who are responsibility of the Office of the Prosecutor for Minors, indicating that it should be informed of the arrival of all the non accompanied minors that have a foreigner nationality.

Moreover, the CPT points out that the Moroccan minors must be lodged in especial educational centres in a residence basis. In case of failure when trying to locate the family in Morocco, the minors will stay in Spain and the institutions will take care of them until they are adults and can obtain the residence permit in Spain.

In relation to all those questions, the **Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration** and the **Royal Decree 2393/2004, dated the 30th of December, through which the Regulation of the Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration**, which contain a regulation on them in their articles 35 and 92 respectively must be alluded.

Indeed, the Office of the Public Prosecutor plays an important role in these cases, in relation to which the aforementioned bilateral agreement is not applicable. After the Law Enforcement Agencies of the State inform to the minor protection services of their knowing or localization of an immigrant without identity documents whose minority can not be set with certainty, it will be informed to the Office of the Public Prosecutor to determine the age, with the cooperation of the pertinent health care institutions in order to assist the minor immediately. Once the age has been determined, if the person were minor, the Office of the Public Prosecutor will bring him to the competent minor protection services.

Moreover, it is worth mentioning that during the process through which the General Government Administration resolves on the repatriation of the minor to his country of origin or the country where the relatives are or, by default, on his stay in Spain, the governmental authority will communicate all the proceedings carried out in this process to the Office of the Public Prosecutor.

On the other hand, in relation to what the CPT indicates in the end of paragraph 64, it must be specified that, according to the aforementioned regulation, if a period of nine months finishes from the bringing of the minor before the competent minor protection services and once the repatriation with his family or to the country of origin has been attempted and failed, the minor will be granted the residence permit. This will not hinder the access to those education or training activities or programmes which, according to the competent minor protection service, will be beneficial for him.

Moreover, it must be added that, in the case of minors under the guardianship of the competent minor protection institution that become adults without having obtained the said residence permit and have participated favourably in the training actions and activities programmed by this institution to facilitate the social integration, only this institution can recommend the granting of a temporary residence permit for exceptional circumstances.

Regarding what has been already explained, it is necessary to highlight that in the year 2005, no agreement has been made on the repatriation of a foreign minor, despite the high percentage of Moroccan minors that are in Spanish territory illegally and without forgetting the eventual risk of progressive growth and probable saturation of the Protection Centres, given the permanent illegal entry of minors among the high number of people going through the border posts every day.

In this same sense, and independently of the control exercised by the Office of the Prosecutor for Minors of the Permanent Adscription in Melilla, the fact that the Chief Prosecutor of the Chief State Prosecutor together with the Aliens Coordination Prosecutor and, eventually, the Minors Coordination Prosecutor, at least twice a year, go to inspection not only the situation of the Prosecutor's Office but also the Minors Reformatory Centres "Baluarte de San Pedro".

Finally, it is necessary to highlight that the Protection Centre “La Purísima” has good facilities and the few minors in this centre (every day there are buses taking them to high schools and schools to receive education) show an excellent behaviour, given the motivation to obtain a work or a residence permit.

Paragraph 65.

The CPT expresses the lack of understanding of the legal situation and process in which foreign citizens who talked to the CPT, are involved, including those who were in CETI (Centres of Temporary Stay for Immigrants). In this respect, the CPT considers that those persons deprived of liberty under the Aliens law, should be always granted a document in which the process applicable to them and their rights are explained, which should be available in the most common languages, as well as the possibility to access an interpreter. They are also provided with the basic safeguards mentioned in paragraph 60.

Concerning this, the CPT recommends that measures should be taken to guarantee their granting, in accordance with the aforementioned principles.

First of all, it must be specified that what in the CPT’s report are called CETI (Temporary Immigrant Reception Centres), currently have the name of Centros de Migraciones (Migration Centres), ascribed to the Directorate-General of Integration of Immigrants, the Ministry for Employment and Social Affairs and which develop tasks of information, assistance, reception, social intervention, training and, given the case, derivation for the foreign population.

The content of this paragraph seems to conclude that a reference should have been made to the CIE (Foreigners’ Internment Centres), which are non-penitentiary facilities, depending of the Directorate-General of Police, where the competent examining magistrate can decide upon the internment of a foreigner while the proceeding of his sanction is being issued, without the need of a resolution of expulsion.

Without prejudice to what has been indicated as a response to the content of paragraph 60, in relation to which the basic safeguards are already included in the current Aliens Law in force (see the Article 22 of the Organic Law 4/2000, dated the 11th of January, and its Regulation of development) in reference to the rights and guarantees that a foreigner must have in a Foreigners’ Internment Centre, mentioned by the Committee in the said report, it must be stated that these rights and guarantees and others (health care and social assistance, legal assistance, interpreter, communication with a lawyer, relatives, specialized staff – social workers- etc.) are already included and envisaged in the Spanish legal system, particularly, in the Article 62 bis of the Organic Law 4/2000 which contains the specific right “to be informed about his situation” of a foreigner in section a).

Subsequently, the Article 62 quarter of the Organic Law 4/2000 (“Information and claims”) indicates in section 1 that “the foreigners will receive written information on their rights and duties, questions of general organization, rules of the centre, disciplinary rules and means to make requests or claims. The information will be given in a language they can understand”.

Taking into account what has already been said, it is necessary to point out that the Spanish legal system already covers the safeguards recommended by the CPT in the 65th paragraph of its report.

Paragraph 67.

The CPT wishes to receive an explanation on the “area alrededor de la frontera” (area surrounding the border) in the sense of meaning in the Aliens law, pursuant to the protection of foreign citizens in the said area, established by the regulations of December 2004 regarding the application of the Law of Aliens’ Rights.

In relation to this question, it must be exposed that the concept of “area surrounding the border” does not exist, as such, in the regulations on the foreigners’ rights in Spain. We understand that when the CPT makes a reference to the regulations of December 2004 on the application of the Law of Aliens’ Rights, it refers to the Regulation of the **Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration**. More specifically, when it uses the concept “area surrounding the border”, it refers to the Article 157 of the said Regulation, sections 1 b) and 2, according to which an expulsion file will not be necessary to execute the devolution, pursuant to the order of the Government Sub Delegate or the Government Delegate in the Autonomous Communities with a single province. From those foreigners who try to enter illegally the country, the ones caught in the border or nearby will be considered in this category to these effects. In this case, the Law Enforcement Agencies of the State in charge of the custody of the coasts and borders who have caught foreigners trying to enter Spain illegally will take them as soon as possible to the correspondent police station of the National Police Force to start the identification and, given the case, the devolution.

First of all, as first approach to the question that concerns the CPT, it is worth explaining briefly the cases on which this devolution process must be applied, in order to see how such a process will be unthinkable without understanding that the foreigner, as the regulations state, can be caught “en la frontera o en sus inmediaciones” (at the border or nearby):

- In the cases of attempt to enter national territory through the sea, the interception of the foreigners can take place in the sea, where there is no physical separation limiting the border perimeter; or on land, when it is obvious that the said perimeter has been trespassed but the surveillance authorities have not had the opportunity to stop this attempt to enter until the foreigners have reached land.
- In the case of attempt to enter by land, even in the case of existing a physical separation or obstacle, the impossibility of using coercive means to prevent the foreigners to trespass the border line, leads to the fact that the detention can only be executed when the person is already in national territory.

In any of these cases, the performance of the Law Enforcement Agencies respects the legality and the interpretation of the scope for the devolution process made by the Supreme Court.

Concerning the specific case of Melilla, the Ministry of the Interior has always defended that the area located between both fences is no “res nullus” but a space of sovereignty where the border perimeter is located.

The perimeter limiting the Autonomous City of Melilla and separating it from Morocco is physically comprised by a security area composed by a military post and a double fence, in which the Civil Guard officers carry out a surveillance and control mission with the aim of preventing any breach in our sovereignty space, independently of its origin or nature.

Subsequently, it is an action that tries to prevent the infringement of the Spanish borders’ integrity and, given the case, the force will be used in a proportionate and legal way.

In the specific case of Sub-Saharan immigrants who enter illegally Spain, the first violation of the Organic Law 4/2000, takes place with the infringement of the border and with the attempt to access our territory using the force, violating the border perimeter.

This attempt, contrary to law, is not completed until all the physical obstacles compounding the perimeter are trespassed. Meanwhile, the Civil Guard tries to stop the attacks, reject the entry and prevent, in short, this illegal action to be carried out.

The immigrants themselves are perfectly aware of the border configuration of the City of Melilla, they know that they have to achieve their goal, which is trespassing the perimeter, to enter our country and thus be able to request the benefits that our Aliens law grants. Taking the fact that any sovereign country will custody and defence its borders as a starting point, Spain can not ignore its sovereignty and the borders of the cities of Ceuta and Melilla are not, and can not be, an exception.

Once they are in these cities and the action has been carried out, the immigrants found or caught in the areas near the border are taken to the Melilla police station to identify them and, given the case, to execute the devolution, as the Regulations on Aliens state and accomplishing strictly the proceedings and guarantees granted to them.

Paragraph 68.

The CPT makes reference to the circumstances surrounding the use of force in the cases occurred in the fence between August and October of 2005, and wishes to receive information, in due course, on the results of an investigation that, in its opinion, should be carried out.

Moreover, the CPT wishes to receive updated information on the investigation on various deaths happened in the fence during the said period.

Regarding these matters, it is deemed necessary to expose previously the following considerations:

- In the period of time between August and October of 2005, the border perimeter between Melilla and Morocco suffered a strong migratory pressure by large groups of Sub-Saharan immigrants who attempted to enter Spanish territory illegally in a massive, planned and violent way. In order to trespass the border’s double fence, they used hand-made ladders, ignoring and confronting the Civil Guard officials who tried to prevent their illegal entry.

- All immigrants were male and of full age.
- The cases of massive entry became more frequent, violent and carried out by a larger number of immigrants. Without taking into account the cases of little scope, there were 16 cases characterized by 100 to 650 immigrants acting jointly which means the participation of 4.000 to 5.000 immigrants (obviously some of the immigrants repeated the attempt participating in various cases).
- As a result of the incidents, around 100 immigrants needed medical assistance due to injuries or bruises suffered in the falls from the upper part of the fences or when they run, given the aggressiveness and desperation they showed. In any case, the majority of them (95%) suffered minor injuries, and after being taken to health care centres, they were discharged some minutes later. Those immigrants were evacuated by order or instructions of the Civil Guard.
- Due to the aggressiveness of some immigrants, 29 Civil Guard officers were injured; some of them had severe injuries as in the case of the officer beaten by an immigrant on the head, using a stone.
- No complaints were issued by immigrants, support associations or individuals to any police or judicial authorities, against the Civil Guard performance in the surveillance posts on the border perimeter.

Concerning the information requested by the CPT on the investigation of various deaths, a detailed exposure of the facts related to the deaths of three Sub-Saharan immigrants and the current status of the investigations should be made:

First case

Around 22.20 on the 28th of August of 2005, approximately 300 immigrants of Sub-Saharan origin, attempted to trespass in different waves, the border perimeter located at both sides of the former pass Tres Forcas. Due to the number and resistance showed by the immigrants, the Civil Guard was obliged to use anti-riot material and confiscated around one hundred ladders.

Around 19.10 on the following day, 29th of August, the Civil Guard officers on duty in the border perimeter communicated to their headquarter that a group of around fifty Sub-Saharan citizens who found themselves in Moroccan territory, near the facilities of the Auxiliary Forces of this country, in the surroundings of the former pass of Tres Forcas, were carrying the dead body of a person in a blanket and trying to call the attention of the Civil Guard officers and the Moroccan Auxiliary Forces so that they took charge of the person.

The Auxiliary Force confirmed to the Civil Guard that the immigrants commented that the causes for the decease were related to the massive assault occurred the night before in which, supposedly, according to their comments, the deceased person had participated.

Envisaging this information, the Headquarter of Melilla carried out a wide intern investigation on those facts, basing on four information kinds or resources:

1. Thanks to the details obtained in a meeting between the officials in charge of the Headquarter and the Moroccan Gendarmerie, the Civil Guard knew of the version given by the only witness who related the decease of the Sub-Saharan citizen with the intervention of the Civil Guard: according to this version, the witness and the deceased person had participated in the assault of the border perimeter on the 28th day and, once they trespassed the fence, both were caught by Civil Guard officers.

According to this version, one of the officers had fired the person at point-blank range three times with rubber balls and, after being taken to Moroccan territory, died some time after.

The officers of the Royal Moroccan Gendarmerie “consider that the statement of the immigrant is not reliable because the three short-distance shots would have left considerable injuries and bruises which were not observed”.

Concerning this matter, the Civil Guard’s report also questioned this version asserting there were three shots at point-blank range with rubber balls because “due to the fact that the weapon used in the shooting was not automatic (...), the shooting requires that, for each of the impacts of the rubber ball (...) the weapon is lifted, the ball is put inside and the shot is made; exercise that, carried out three times, prevents the detention of the person being fired after locating him for quite a lot of seconds, therefore, the officer may find that the person starts escaping...”

2. The Headquarter of Melilla also took into account the visioning of the images from the video cameras when the report was done.

From the examination of the aforementioned images, no successive shooting with rubber balls to immigrants and no immigrant returning to Moroccan territory can be seen with important injuries or lesions after failing in the attempt to enter Spain.

3. The conclusions of the report, as a result of the statement of the officers on duty are similar. The report states that, in this sense, none of the officers intervening in the perimeter assault observed any “performance that could be related to the decease or to severe injuries...” to any of the persons in the assault.
4. The headquarter officers also carried out a visual inspection in the surroundings of Vaguada de Linares without finding “blood traces or evidences that could clarify the facts under investigation”.

For all these reasons and taking into account that “there are no proofs on the aetiology of the injuries of the body, and on the date they could have occurred because the legal investigation of the facts corresponds to the Moroccan authorities”, the Civil Guard report’s conclusions indicate that “considering the information available, the relation of the Civil Guard and the decease of the victim can not be deduced in any way”.

Subsequently, we have known that the victim had a bruise in the left lateral part but it could have been caused by an accident or any other reason and not necessarily due to the assault in the surroundings of the border fence.

Without prejudice of the final investigation results of the Moroccan authorities and the conclusions we may receive on this matter, there is no objective proof or other proof of determining nature up to now, linking the unfortunate decease of this Sub-Saharan citizen to the performance of the Civil Guard in this illegal and violent assault of our border on the night of the 28th of August last year. Pursuant to the information given by the Government Delegation of Melilla, the Moroccan judicial authorities were going to start the appropriate procedural measures and we do not know the current status or results of them.

Second case

On the 8th of September, a group of one hundred Sub-Saharan immigrants, coming from Moroccan territory, brought six injured persons to the bordering area of the Aguadu cliffs in order to request medical assistance to the Spanish authorities and gave the injured persons to the Civil Guard.

Concerning these facts, it must be pointed out that the performance of the Civil Guard and the Spanish authorities had a strict humanitarian nature.

The six injured persons given on the 8th day in the bordering area of the Aguadu cliffs were taken by the Civil Guard to health care centres of Melilla, the two persons who were more critical were taken with an ambulance to the city's Hospital Comarcal and the rest of them were taken with an official vehicle to a health care centre.

Unfortunately, one of them died on the 12th of September in the Hospital Comarcal.

The immigrants who brought these six persons to the Spanish authorities informed to the Civil Guard that most of the injuries were caused when they fell as they were escaping to avoid the detention by the Moroccan Law Enforcement Agencies.

Specifically, according to the information available in the Headquarter of Melilla, the person who died suffered "a fall from an approximately 35-metre height in Moroccan territory".

Regarding the immigrant who died, proceeding n° 131/05 was commenced and issued to the examining magistrate n° 1 of Melilla, which led to preliminary proceedings n° 1219/05. Currently, they are pending an expert proof requested by the National Institute of Toxicology of Seville.

Thrid case

On the 15th of September of 2005, two Sub-Saharan immigrants went to the border perimeter to request medical assistance for one of them in an area located between Zoco Had and the border pass of Farhana.

The one with most severe injuries was taken to the perimeter by his partner and died hours later, after being evacuated, in the Hospital Comarcal of Melilla.

According to the information given by the Civil Guard, the decease was due to asphyxia, caused by “oedema of glottis, compatible with a bump or a fall”. According to this same information, there were, however, no “external signs of bump or injuries”.

The partner stated in a detailed report on the facts, written by the Headquarter of Melilla on the 18th of September, that he told the Civil Guard he had not participated in the attempts of trespass of the border or in the assault that took place on the night of the day 15th, or in any other lately. Likewise, he declared that the person deceased, whose name was F, was from Ghana and he knew him for three months. He ignored the causes of his injuries but he was “warned by other immigrants of the fact that there was an injured Sub-Saharan and fearing for him, went to look for him and found him in the surroundings of the bordering town of Farhana, and the person was not able to speak”. That is the reason why “he decided to ask for help to the Civil Guard and, in order to do this, he took him to the nearest border fence, without being able to calculate the distance but asserting that it took him approximately one hour”.

Due to the decease of this immigrant, on the 15th of September of 2005 proceedings were commenced and issued to the examining magistrates’ court n° 2 in Melilla, which led to Preliminary Proceedings 1344/05. The court order of closing the proceedings and the filing was issued on the 19th of April of 2006. It has been appealed by the Office of the Public Prosecutor. The Provincial Criminal Court requested the original court orders on the 7th of July of this year to the court and afterwards agreed upon the commencement of proceedings of complementary nature (identifying a Civil Guard officer that can be seen in the images of the perimeter).

Paragraph 69.

The CPT asserts that the material conditions of the Temporary Immigrant Reception Centre (CETI) in Melilla were inappropriate, taking into account the number of foreign citizens who were in them.

Although the CPT observes the different improvements in comparison with 1997, it indicates the conditions of overcrowding in tents with no heating, under low temperatures, especially in the winter months.

The CPT recommends the taking of appropriate measures regarding a larger demand, especially in terms of heating, sanitary facilities and avoidance of overcrowding.

As it was mentioned in reference to paragraph 68, in the year 2005, the migratory pressure suffered in the Autonomous City of Melilla was very high, due to this; the Temporary Immigrant Reception Centre (CETI) of Melilla had an occupancy level of more that 100 per cent during the whole year.

It should be indicated that, in the end of September of 2005, there were massive entries by some numerous and perfectly organized Sub-Saharan groups. As a consequence of this, in the end of September, the Centre had an increase from 800 to 1.700 residents.

Taking into account the aforementioned situation, and regarding the CPT’s recommendation, it is worth noting the ordinary and extraordinary measures taken as consequence of the massive entry during the year 2005.

1. Ordinary measures

- Works were done to build classrooms and kindergartens and to extend the kitchen of the centre. Thanks to these actions, the service of catering and the stay of the children will improve.
- As works of maintenance of facilities and buildings, all the buildings of rooms have been painted and upgraded. The sport area has been fenced in for the security and comfort in the practice of sports and a new area has been set up with sinks for the washing of clothes.

- The following actions have been taken:

Replacement of 100 mattresses with fireproof covers.

Replacement of 80 lockers.

Substitution of all the curtains in the building of rooms.

Purchase of roller blinds for all the rooms.

Repair of 5 water heaters in the bathrooms of residents.

Purchase of 40 cots due to the entry and birth of babies.

- The following services have been offered:

Legal assistance to residents provided by the judicial services of the centre.

Psychological assistance to residents provided by the psychological services of the centre.

Social assistance to residents, as interviews for admission, detection of conflicts and resolution of them, training in social skills, collective talks, etc. provided by four social workers.

Medical assistance to residents given by two doctors and four nurses, and pharmacological assistance.

Educational assistance to resident children provided by teachers of the Ministry of Education and Science and teachers of the centre.

- Moreover, it should be highlighted that the Social Programme of the Centre is carried out by CETI through its own staff and through a Collaboration Agreement with the Spanish Red Cross, which contributes with the following staff:

2 doctors

4 nurses

1 psychologist

3 social workers

2 teachers

1 kindergarten worker

2 translators

1 socio-cultural animation worker

1 administrative assistant

- Apart from this, basic services as catering, cleaning, cloth washing, clothes, wash and hygiene products, etc. have been offered.

2. Extraordinary measures

In the end of September, as consequence of the massive entries, the Centre was not able to assist all the immigrants with dignity. Therefore, it started emergency actions to cover the basic needs of all the immigrants.

- Specifically, the service contracts of catering, cleaning, security, maintenance, etc were extended.
- Enough spaces were facilitated to install 32 tents provided by the Ministry of Defence: 10 given by the General Headquarter of Melilla and 22 given by the General Directorate of Civil Protection.
- 6 showers and 20 toilets were built for the people in the tents.
- The sanitary service was reinforced with a temporary clinic and the hiring of nurses and doctors (Red Cross).
- Moreover, the social performance was empowered by the subscription to different agreements with social organizations: ACCEM, MELILLA ACOGE, which brought social mediators until the end of last year 2005.

Apart from the aforementioned measures, it is worth making reference to the particular situation of CETI in Melilla, which, in the end of 2005, decreased the number of residents considerably from 1.700 to 900 and dismantled the tents that were installed temporarily to receive such a large number of immigrants.

The great difficulty faced by the centre in the year 2005 must be highlighted. The main achievement to indicate was the fact that they offered services in real time to a total number of 1.700 immigrants, taking into account that the centre has a capacity for 480 individuals in the residential category.

Likewise, it should also be considered that, currently, taking the 20th of June of 2006 as a reference, the total occupancy of the CETI of Melilla is 659 people. Therefore, the number of residents of CETI was decreased considerably; this result was possible thanks to the Spanish Administration's important effort. The Secretariat of State for Immigration and Emigration (Ministry for Employment and Social Affairs) and the Ministry of the Interior have implemented a lot of special mechanisms to receive a large number of illegal immigrants that entered massively the city of Melilla. The number of people received by the Directorate-General of Immigrant's Integration and the NGOs is 177 from October of 2005 up to now.

Despite what has been mentioned, at the request of the Ministry for Employment and Social Affairs, the Spanish Government has passed the Royal Decree 1453/2005, dated the 2nd of December, by which subsidies are granted to non-governmental organizations. These subsidies amounted to 2.250.000 euros, orientated to the financing of basic reception performances, sanitary assistance, material distribution and temporary reception and transfer of immigrants in a vulnerable situation who come to Ceuta, Melilla and Canary Islands. With this same aim, the Royal Decree 603/2006, dated the 19th of May, has been passed, amounting to a total sum of 3.000.000 euros.

The Royal Decree 1199/2005, dated the 10th of October, regulates the granting of a direct subsidy to the cities of Ceuta and Melilla for programmes of social integration and maintenance of basic public services related to immigration. The total sum of the subsidy is 3.000.000 euros for both cities.

Paragraph 70.

The CPT points out the large number of repatriations or collective returns, known as voluntary exits, which observed in the CETI files during the second half of the year 2005.

The CPT wishes to receive an explanation on the criterion and categories used in its application, given the concern that they could have been carried out in an arbitrary way.

Concerning the reference made by the CPT on repatriations or collective returns, it is necessary to clarify that in our regulation system, there are no procedural categories in the process of collective repatriation. The administrative proceedings of return, devolution and expulsion are commenced, conducted and resolved in an individualized way and that is the way it has to be. Only the material execution of the said individual proceedings, that is, the physical transfer to the country of destination, is made collectively due to obvious and lawful reasons of means saving and once the transfer has been approved by the reception country.

In relation to this, it is worth reminding two sentences issued in the judicial proceedings of review of 73 devolution proceedings conducted in September of last year, which have declared the strict compliance to the law of the said proceedings and the respect to the rights granted to foreigners in our country by the Spanish authorities that carried them out.

Regarding the “voluntary exits” to which the Committee makes reference, it must be indicated that these are applied to those foreigners who could not be repatriated due to the impossibility of documentation or due to the fact that they were subject to transfer to the Peninsula, although their nationality was known.

In these cases, the conditions of most favourable reception of foreigners in a vulnerable situation is promoted by the NGOs, which in the end take charge of them through their reception centres, giving sanitary and catering assistance, etc.

Paragraph 71.

The CPT makes reference to the way of patrolling in the fenced border, especially by the Civil Guard.

Likewise, it indicates that the procedures to identify people should not be summary proceedings but should be covered by the appropriate safeguards in relation to the deprivation of liberty.

Moreover, concerning minors, the CPT asserts that the existing special safeguards on the expulsion process are not applied strictly and that they do not always receive the appropriate protection when they are caught in the border.

In relation to the performance of Civil Guard patrolling, it is necessary to point out that the members who patrol in the border perimeter or develop any other function, have the category of Agentes de Seguridad (Security officers). In accordance with the legal regulations, they have the right to identify persons, independently of their nationality, in any point or public place in the national territory when it is necessary for security reasons, public order or accomplishment of a mission for the time to accredit their identity without meaning that it is a “deprivation of liberty”.

In the context of the border perimeter surveillance, limited by a double fence, the identifications are not related with admission or denial of entry to Spanish territory if they are unviable, that is, there is no contact between the officer and the immigrant, as they are separated by the fence. Moreover, it must be taken into account that “no one, neither Spanish nor foreigner, can trespass the border fence” and in order to access Spanish territory, everyone needs to go to the border passes facilitated for this purpose.

If an illegal immigrant is intercepted, once the double fence has been trespassed or in its surroundings, independently of the origin, documents, etc. the Civil Guard officers, in accordance with the aforementioned Article 157 of the Royal Decree 2393/2004, by which the Regulations of the Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration is passed, in the sections 1 b) and 2; and with the aim of conducting the identification and, given the case, the devolution, have the duty to take them as soon as possible to the correspondent National Police Force station, where they will be offered the assistance of an interpreter, legal defence, etc. If the person were a minor, he will be taken to the Group of Minors of the Local Police or he will be taken to a Minor Reception Centre, reporting to the Minor Prosecutor in any case.

It is necessary to point out that these identifications and proceedings are brief and, in the majority of the cases, they do not require the transfer of the person who has been caught to the official facilities of the Civil Guard.

Moreover, whenever an illegal immigrant is taken to the National Police Force station, a written report will be drafted and delivered in the police station and the Headquarter of Melilla will have record of it.

Anyway, the taking of immigrants to the National Police Force station, Local Police station or reception centres are rare in relation to the number of immigrants accessing illegally to Melilla from Morocco. The immigrants themselves, for their own interest (knowing that the expulsion or repatriation is difficult and due to their wish to access to the Reception Centres) go quickly, directly and personally to the police station or to a patrol to be taken to the station.

Although the document prior to the transfer is very simple and does not contain many data, the Civil Guard officer can request the services of an official interpreter. However, in most of the cases, it is not necessary because the identification proceedings and the opening of the expulsion file belong to the competence of the National Police Force and they are conducted in their facilities, giving more flexibility and swiftness to the process.

Concerning the treatment to minors, in order to give a response to the CPT's request of information in the end of paragraph 72, in relation to the protection offered to non-accompanied minors by the Spanish authorities, when they attempt to enter Spain through a border post, the Article 35 of the Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration, which regards the residence of minors and is developed by the Article 92 of the Aliens Regulation must be mentioned. Pursuant to these articles and regarding the performances of the Law Enforcement Agencies of the State, in the cases in which they know of, or locate a foreigner without identity documents in Spain whose age can not be stated, they will report the minor protection services so that, given the case, they offer immediate assistance to the minor, according to what is established in the law on legal protection to minors. Moreover, pursuant to these regulations, it is envisaged that if the minor would require immediate attention during the process of determination of his age, the Law Enforcement Agencies of the State will request it to the competent minor protection services.

It must also be added that, as the law in force states, the Law Enforcement Agencies of the State will adopt the necessary technical measures to identify the foreign minors without identity documents in order to know the possible references about them in any public national or foreign institution in charge of their protection. These data can not be used for any other purpose that the one envisaged in this section.

In relation to this, the National Police Force and the Civil Guard respect at any time the Aliens law. In the case of the Civil Guard, as it has already been mentioned, when an illegal foreign minor has been intercepted as the border double fence has been trespassed or in the surroundings of it, in order to identify him, it takes him the Minor Group of the Local Police or takes him to a Minor Reception Centre provisionally, reporting this always to the Office of the Prosecutor for Minors.

Concerning this, as it was stated in the response to the CPT's report of 2003, the specific guarantees established for the treatment and repatriation of foreign non-accompanied minors who are in Spain, envisaged in the Organic Law 4/2000, dated the 11th of January, concerning the Rights and Freedoms of Aliens in Spain and their Social Integration, and in its development regulation, are accomplished homogeneously by the different National Police Force facilities, pursuant to the existence of a Performance Protocol by the General Police Office of Aliens and Documentation, Circular 10/03, dated the 10th of April of 2003, transmitted to every staff member and informing on the steps to follow since the foreign minor in situation of abandonment is found.

Taking into account this and the cases comprised in the law relative to the protection of foreign non-accompanied minors, some of which exposed in relation to what has been commented on the paragraph 64, it is worth enlisting the multiple guarantees granted to this group, from which the following could be summarized:

- When the Law Enforcement Agencies of the State know of or locate a foreigner without identity documents whose age can not be stated for sure, they will report this to the minor protection services, which will offer the attention required.
- The previous fact will be reported to the Office of the Public Prosecutor, which, thanks to the collaboration of the appropriate sanitary institutions, will determine the age.

- During the process to determine the age, if the minor would require immediate attention, the Law Enforcement Agencies of the State can request it to the competent minor protection services.
- The General Administration of the State will only consent the minor's repatriation to his country of origin if the conditions for an effective family regrouping are met or for the appropriate protection by the minor protection services in the country of origin, according to the superior interest of the minor. Moreover, the resolution will be issued after hearing the minor and with a previous report of the minor protection services.
- During this process, the governmental authority will report the Office of the Public Prosecutor on the proceedings that are taking place.
- Once the minor's family has been located, the repatriation will not be executed in case of detecting the existence of risk or danger of the minor's or the family's integrity or prosecution.
- In the case that the repatriation was not possible, after having tried it, once nine months have passed since the minor was put available to the competent minor protection services, he will receive the residence permit.
- In the case that the minor were protected by the competent entity of minor protection when he is of full age without having obtained the said residence permit and has participated appropriately in the educational actions and the activities programmed by this entity, the later can recommend the granting of a temporary residence permit in exceptional circumstances.

Therefore, in accordance with the law in force, the protection of the family and its unity is a priority, seen as a guiding principle of performance in this sense. It devotes the principle of reintegration of the minor with his family or, in case there is no family, with the minor protection services of his country, in so far that there is no risk or damage for him, according to the international parameters on this matter.

Moreover, it is necessary to add that the guarantees exposed are reinforced thanks to the Performance Protocol in relation to foreign unaccompanied minors and to facilitate their repatriation, passed on the 12th of December of 2002 by the Childhood Observatory (associated organ dependent on the Ministry for Employment and Social Affairs, in which the General Administrations of the State, Autonomous Communities and Municipalities and NGOs working in this aspect of the childhood), which has facilitated the coordination in the performance of the institutions with competences in relation with these minors.

Likewise, there is a Memorandum of Understanding with Morocco for their repatriation, although there is an intense work in the Bilateral Spanish-Moroccan Group with the aim of improving this tool in the national and international legislative framework.

Paragraph 72.

The CPT makes reference to the attempt to enter Spain at night by two Moroccan minors, hidden in the bottom part of a lorry. They were taken to the other side of the border by Civil Guard officers as the later considered they had not entered Spanish territory because they did not trespass the doors at Beni Enzar.

In the Delegation's opinion, they were clearly in the "area surrounding the border".

Concerning this incident, which took place in the night of the 16th to the 17th of December, 2005, it is worth mentioning the concept "area surrounding the border" explained before. Pursuant to it, the border limit is not a line and does not have a quantitative dimension in centimetres or metres but is considered as a whole of obstacles or control posts, designed to control and prevent the illegal or clandestine access of the persons who do not accomplish with the requirements.

Taking this into account, as the CTP's expression itself that describes the fact as an "attempt to enter Spain at night", it is considered that the Moroccan minors were not in the "area surrounding the border" at that moment, but at the border. Moreover, the fact of the lorry's register itself shows that the illegal entry did not take place: it would lack sense to make a register if it is considered beforehand that the hidden immigrants had already accessed the Spanish territory to all intents and purposes.

Likewise, it should be pointed out that it was not the Delegation who discovered by itself this case of finding two minors in the bottom part of a lorry, but its members were warned of it by a Civil Guard officer who was in that place. The development of this case shows proof of the lack of irregular or illegal attitudes by the Civil Guard members, as the Delegation could verify directly the treatment and good practice executed with the Moroccan minors.

In relation to the fact that the driver's partner worked as an interpreter has no other justification than the swiftness and the appropriateness of his services. If it were necessary, an interpreter would have been available to the officers some minutes after receiving a communication.