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A. Activity of the ECtHR related to Spain in recent years

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2010	689	13 judgments, 6 convictions
2011	899	12 judgments, 9 convictions
2012	905	10 judgments, 8 convictions
2013	1,042	12 judgments, 9 convictions

(2014 memory is not yet completed) [1]

Since the ratification by Spain of the European Convention on Human Rights, in 1979, lawsuits filed against Spain by persons deprived of liberty -either as detainees in police custody, remand prisoners awaiting trial or prisoners serving their final and binding judgment- are:

1. *Arratibel Garciandia v. Spain*, nº 58488713, ECtHR 2015
2. *Extebarria Caballero and Ataun Rojo* v. *Spain*, nº 74016/12 and 3344/13, ECtHR 2013
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11. Raf v. Spain, nº 53652/00 ECtHR 2003
12. *Scott v. Spain*, nº 21335/93 ECtHR 1996-Reports 1996-VI

[1] "Memoria de actividades del Tribunal Europeo de Derechos Humanos en relación a España":http://www.tribunalconstitucional.es/es/tribunal/memorias/Documents/2013_Anexo_IV.pdf

13. *Van der Tang v. Spain*, nº 19382/92 ECtHR 1995-A32

Cases concerning art.3 - inhuman or degrading treatment during *incommunicado* detention

The majority of the ECtHR judgments condemning Spain as regards deprivation of liberty are found in the field of incommunicado police custody, during which acts of ill-treatment have been allegedly perpetrated in breach of Article 3 of the Convention (Prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment").
A brief explanation of incommunicado detention seems appropriate before examining the ECtHR case-law on the issue. Generally, Spanish law allows for criminal suspects to be held in custody by law enforcement agencies for up to 72 hours. This custody may be extended by judicial decision for 48 hours for offences referred to in Article 384 *bis* of the Criminal Procedure Act (i.e. "membership or relationship with armed groups or terrorist or rebellious individuals").

On the basis of articles 509-520 of the Criminal Procedure Act investigative judges may authorise that a person detained under Article 384 *bis* be held incommunicado during these five days. Incommunicado detention is foreseen as an exceptional measure in order to preserve evidence which is crucial for the ongoing investigation. It must be authorized by a judge on the basis of a reasoned decision issued within the first 24 hours of detention, and the personal situation of the detainee must be subject to ongoing, first-hand monitoring by the judge who authorized the incommunicado detention or by the examining judge of the judicial district in which the detainee is being held. The 2003 amendments to the Criminal Procedure Act (contained in Articles 509, 510, 520 *bis* and 527 of the Organic Law 13/2003) include a provision granting the judicial authority the possibility to authorise the incommunicado detention to be extended for an additional period not exceeding five days when the person is placed in prison on remand. Moreover, a further period of incommunicado detention not exceeding three days may be authorised by the relevant judicial authority, if required by the complexity of the investigation.

Summing up, incommunicado detention may be imposed for an initial period of five days of police custody and may also be applied during remand custody in prison for a maximum period of eight days depending on the circumstances and the nature of the criminal offence.[2]

Article 527 of the Criminal Procedure Act is the one establishing the incommunicado detention regime and sets forth the following:

I. Detainees under the incommunicado regime do not have the right to appoint a lawyer of their own choice. Legal counsel is provided by a duty lawyer designated by the Bar Association;
II. Incommunicado detainees do not have the right to meet in private with the duty lawyer appointed to assist them, even after the formal statement to the law enforcement officials has been made;
III. Persons detained under the incommunicado regime do not legally enjoy the right to have the fact and place of their detention notified to a person of their choice (or if a foreign national to inform the Consular Representation of their country);
IV. Persons detained under the incommunicado regime do not have the right to be examined by a doctor of their own choice.

In September 2007, the Secretary of State for Security of the Ministry of the Interior adopted "*Instructions on the behaviour required from security forces in order to safeguard the rights of persons*

[2] *Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT*) from 31 May to 13 June 2011, CPT/Inf (2013) 6, pp. 14-16 http://www.cpt.coe.int/documents/esp/2013-06-inf-eng.pdf

arrested or in police custody"[3]. These Instructions introduced the right of access to an ex officio lawyer within the shortest possible delay (Part III.5), access to medical assistance through a State-appointed forensic doctor (Part III.6) and a ban on any form of physical and/or psychological pressure to obtain a statement. Procedurally, the Instructions recall (Part III.1) that arrested persons should be immediately informed of their rights in a language they can understand. However, and notwithstanding the step forward that has been brought about by the 2007 Instructions, they still do not provide for the right of an incommunicado detained person to consult a lawyer (whether of one's own choice or court-appointed) in private prior to making a statement nor for the right of access to a doctor of one's choice.

ECtHR cases on this issue:
1º) ARRATIBEL GARCIANDÍA v. SPAIN

This is a recent judgment delivered by the ECtHR condemning Spain. Unlike previous cases, in this case, the applicant based his complaint solely on the violation of procedural aspects of Article 3 of the Convention, namely the absence of an effective and thorough investigation by national authorities following the filing of a complaint of torture and other ill-treatment.
As for the facts, on the night of January 18th 2011, the applicant was arrested at his home by officers of the Guardia Civil as part of a judicial investigation into alleged crimes of belonging to the organization EKIN (ally of the terrorist group ETA). During his transfer to Madrid and during his incommunicado detention at the General Directorate of the Guardia Civil in Madrid, he claimed to have been subjected to insults and threats, to sexual harassment, to six or seven sessions of suffocation using a plastic bag covering his head and to have been beaten in the testicles. During the first forensic examination, bruising marks on the applicant's wrists were appreciated and reported as consistent with the use of handcuffs on his way to Madrid. Later, in a second examination, the forensic doctor reported that the applicant claimed to have a headache, pain in his face and neck but refused to reply to the medical examiner on the question of whether he had been mistreated. Following an interrogation session, the applicant signed a statement which he alleged to have been forced to learn by heart in the presence of a court-appointed lawyer and two guardias civiles. He signed his statement with the word "Aztnugal" that is "laguntza" upside down, which means "help" in Basque. In the subsequent forensic examinations, the applicant continued to report that he was not feeling well but refused to be examined. When taken before the Central Investigating Judge of the Audiencia Nacional during his incommunicado detention in Madrid, the applicant informed of the treatment received and was remanded in custody until the 26th July 2012, when he was released on bail. Assisted by a lawyer of his choice, the applicant lodged an appeal before the duty Court in Pamplona claiming to have been subjected to ill-treatment and asked to be heard by the judge and the production of copies of the forensic reports, of the statements he made during his incommunicado detention and of the security camera recordings of the premises where he was held. He also requested the identification of the police officers and the hearing, as witnesses, of the forensic experts and of the court-appointed lawyers present during his testimony. Finally, he asked to be subjected to a physical and psychological examination. The applicant's requests were not received and his application dismissed; so were all his subsequent appeals lodged before other national judicial authorities based mainly on the findings of the forensic reports.

In its reasoning, the ECtHR took well into account that the applicant's requests were not received by the judicial authorities even though the gathering of the additional evidence suggested, particularly the identification and hearing of the police officers, could have contributed to the clarification of the facts. The Court further noticed that the applications were dismissed on the basis of the forensic reports and of

[3] Instrucción 12/2007 (del 14 de septiembre 2007) de la Secretaria de Estado de Seguridad sobre los Comportamientos Exigidos a los Miembros de las Fuerzas y Cuerpos de Seguridad del Estado para Garantizar los Derechos de las Personas Detenidas o bajo Custodia Policial.

a hearing through video conference of the applicant, and reminded that an effective investigation is needed more strongly when, as in the present case, the applicant was during the time when the ill-treatment allegedly took place in a situation of isolation and total absence of communication with the outside world. The ECtHR also referred to recommendations made by the Committee for the Prevention of Torture concerning the guarantees for incommunicado detainees which are still not being implemented by Spanish authorities. In light of the foregoing, the ECtHR concluded that the investigation was not sufficiently thorough and effective and found a violation of Article 3 of the Convention in its procedural aspect.

2º) ETXEBARRIA CABALLERO v. SPAIN and ATAUN ROJO v. SPAIN

In the *Etxebarria Caballero* case, the applicant relying on Article 3 of the Convention, alleged lack of effective investigation by the domestic courts as regards the ill-treatment she claimed to have suffered during her *incommunicado* detention. She also complained about the abuse and ill-treatment inflicted on her while under incommunicado police custody. As to the facts, on the night of March 1st 2011 the applicant was arrested at her home by agents of the Guardia Civil in the framework of a judicial investigation into alleged crimes of belonging to the terrorist organization ETA and participation in various crimes of a terrorist nature. The applicant claimed that she was pulled out of bed by the hair while sleeping with her partner, and handcuffed with a rope, unable to get dressed. Three other people including the applicant's partner were arrested the same day and placed under incommunicado detention. During the applicant's transfer to Madrid and during her detention in the premises of the General Directorate of the Guardia Civil in Madrid, she claimed to have been subjected to threats, shouts, and sessions of suffocation using a plastic bag covering her head, as well as sexual abuse and cold showers. During her incommunicado detention the applicant was recognized in six different occasions by a legal forensic doctor who examined her eyes, her mouth, her head and arms, but neither examined her intimate parts nor her legs, which the applicant did not unveil. The doctor certified the presence of injuries on the applicant's arms attributed to her violent arrest. On 15 March 2011, assisted by two lawyers of her choice, the applicant lodged a complaint with the investigating judge No. 1 of Bilbao, claiming to have been subjected to ill-treatment during her incommunicado detention. She sought copies of her medical reports and recordings of the security cameras where she was kept, and the identification of the police agents, the forensic doctor who examined her and of the court-appointed lawyers present during her testimony. She asked to be subjected to physical and psychological scrutiny by a physician and a gynecologist, and to be heard in person. However, the applicant's requests were not received and all judicial authorities seized dismissed her applications in view of the reports of the forensic experts and of the statements she made during her incommunicado detention.
In the opinion of the Court, the gathering of additional evidence suggested by the applicant, particularly the identification and hearing of the police officers in charge of her during the incommunicado detention, could have contributed to the clarification of the facts in one way or the other. An effective investigation is needed more strongly when, as in the present case, the applicant was during the time when the ill-treatment allegedly took place in a situation of isolation and total absence of communication with the outside world. Indeed, this environment requires a greater effort on the part of domestic authorities to establish the facts denounced. Yet this was not done in the case at hand, since the applicant's requests were not considered. Therefore, and given the lack of a thorough and effective investigation into the arguable claims of the applicant, the ECtHR found that there has been a violation of Article 3 of the Convention in its procedural aspect. It was, however, not possible for the ECtHR to conclude beyond reasonable doubt whether the applicant was subjected to ill- treatment due to the lack of sufficient evidentiary elements resulting in particular from the failure of the investigation conducted.

3º) OTAMENDI EGIGUREN v. SPAIN

On February 20th 2003 Mr. Otamendi was arrested at his home by agents of the Guardia Civil in the framework of a judicial investigation into alleged crimes of belonging to the terrorist organization ETA and was held under incommunicado detention until 23rd of February. Four medical reports were drawn up during the duration of his detention. In them, the applicant claimed to have been subjected to acts of ill-treatment such as threats to cover his head with a plastic bag to suffocate him, he was forced to undress and to exercise as well as to stand up for most of the time, he received intimidating blows in genitals and felt the placing of a metal object in his neck followed by a simulated fire coup. Nevertheless, Mr. Otamendi refused to be examined by the forensic doctor as he considered it unnecessary since he had no marks of blows or other signs of violence. Once released, the applicant lodged a complaint claiming he was subjected to ill-treatment while kept under incommunicado detention and the investigating judge ordered the opening of proceedings. The Directorate of the Civil Guard informed the judge that their register did not show that the applicant had been detained in their premises between 20 and 24 February 2003. Against this background, the applicant requested copies of his statement given before the Central investigating judge of the Audicencia Nacional during his incommunicado detention, the order delivered by the said judge, the video recordings of the statements he made at the Basque television channel ETB the day of his release and requested the Judge to summon the prisoner with whom he shared the cell during his incommunicado detention to appear in Court. Finally, the application was dismissed based on the medical reports drawn up during the incommunicado detention and the statement given by the said doctor at Court. Moreover, it was considered that the applicant's request seeking review of additional evidence would not help to clarify the facts and were thus rejected.
In its reasoning, the ECtHR took into account both the passivity of the Central Investigating Judge of the Audiencia Nacional when the applicant was taken before him during the incommunicado detention and the rejection by the judicial authorities to the applicant's request for furnishing new evidence. Furthermore, the ECHtHR noted that the application was dismissed on the basis of the forensic reports and the doctor's statement at Court without questioning in person Mr. Otamendi. On this point, the ECtHR stressed the importance of adopting the measures recommended by the CPT to improve the quality of the forensic examination of persons subjected to incommunicado detention. In light of the foregoing, the ECtHR concluded that the investigations were not sufficiently thorough and effective and hence appraised a violation of Article 3 in its procedural aspect.

4º) SAN ARGIMIRO ISASA v. SPAIN

On May 14th 2002 the applicant was arrested for alleged terrorist offenses, possession of weapons and explosives and attempted murder. He was led to the General Directorate of the Guardia Civil in Madrid where he was kept under incommunicado detention for five days. He was examined by a forensic doctor who, during the first examination, identified a number of bruises and abrasions all over his arms and legs, as well as in his forehead. The doctor reported that these injuries were recent and attributed them to the detention. The next day the doctor found new minor injuries such as superficial bruising on the face or on the shoulder, but provided no explanation as to their origin. In subsequent examinations the applicant did not answer the question about the treatment received and the forensic doctor confined himself to report the favourable development of the injuries. It was only once the applicant was brought before the central investigating judge of the Audiencia Nacional that he alleged to have been subjected to ill-treatment. The applicant was remanded in custody at the Badajoz Penitentiary and upon arrival he was examined by the prison doctor, who reported that the applicant had a broken rib on the left side. The applicant then filed a complaint claiming to have been subjected to acts such as blows to the head, suffocation sessions by placing a plastic bag around his head, sexual humiliation and harassment and death and rape threats. The application was dismissed on the grounds that the injuries mentioned in the

medical reports were due to the violent and dangerous circumstances in which the arrest took place (the applicant and his companion were armed and had a bomb ready to be used in their vehicle). The applicant appealed against this decision and the Court of higher instance ordered the re-opening of proceedings. It was considered that further investigation was necessary in this case since the applicant had complained of physical and psychological acts of ill-treatment which usually do not leave physical traces. Hence, the investigation could not be reduced to the examination of the medical reports, and it was considered relevant to hear the applicant's statement in person, identify the agents who held their sight during his incommunicado detention and clarify the initial medical report in relation to the broken rib. Notwithstanding these new requests for additional evidence, the application was also dismissed on the grounds that the new medical report pointed out that it was plausible to assume that the broken rib had occurred at the time of the arrest and the applicant was always assisted by a court-appointed lawyer (during the three statements made during his detention) who made no reference to signs of ill-treatment.
The ECtHR noted that the various national courts seized dismissed the applicant's claims solely on the basis of the medical reports drawn up by the forensic doctors. Yet, these reports lacked some of the mandatory information that must be included in forensic reports according to the *Protocol adopted by the Spanish Ministry of Justice on methods to be followed by medical examiners when examining detainees*. Furthermore, the Court took into account the fact that the CPT during her visits to Spain identified two systematic failures as regards the medical examination of detainees held in incommunicado detention: first, the refusal of the Spanish authorities of additional examinations by a forensic doctor of their own choice; secondly, deficiencies in the above mentioned *Protocol*. In the ECtHR's view, the Protocol gaps together with the systematic failures noted by the CPT in this area, constituted sufficient evidence that should have encouraged the domestic courts to conduct further investigations to try to clarify the events. Yet this was not done in the case at hand. In conclusion, given the absence of a thorough and effective investigation into the applicant's claims of ill-treatment, the ECtHR found that there had been a breach of Article 3 of the Convention in its procedural aspect.

5º) BERISTAIN UKAR v. SPAIN

The applicant was arrested on September 5th, 2002 in San Sebastian for alleged involvement in violent street riots. The applicant upon arrival to police dungeons had some injuries, such as erosion in the face, which were collected by the forensic doctor in his report. In his transfer to the General Directorate of the Guardia Civil in Madrid and during the five days he was kept under incommunicado detention he alleged to have been beaten, to have been subjected to attempts of suffocation with a plastic bag over his head, to have been threatened and to have been subjected to sexual harassment. The forensic doctor who examined him on five occasions, however, stated that there were no new injuries (except for the abrasion already reported, which was healing correctly) and reported absence of damage on the genitals or the anal area. After spending five days in incommunicado detention, the applicant was remanded in custody and filed a complaint claiming to have been subjected to the abovementioned acts of ill-treatment. The application was dismissed and Mr. Beristain appealed further, exhausting all legal remedies available to him. He claimed that the forensic reports were inadequate (since they did not fit the pattern established by the *Protocol adopted by the Spanish Ministry of Justice on methods to be followed by medical examiners when examining detainees*) and insisted on the need to continue the investigation, to be heard in person by the judge and to identify and question the officials responsible for his transfer to Madrid and supervision during his incommunicado detention. The applicant's requests were not received and all judicial authorities seized dismissed his applications in view of the reports of the forensic experts (which reported the absence of physical evidence corroborating the alleged ill-treatment) and of the inconsistency in the narrative of the applicant's statements during his incommunicado detention.
In its reasoning, the ECtHR took into account the passivity of the Central Investigating Judge of the Audiencia Nacional when the applicant was taken before him during his incommunicado detention and

stated to have been subjected to ill-treatment. The ECtHR also noted that the judicial investigations confined themselves, in all and for all, to the review of the forensic reports and that the applicant's requests for furnishing new evidence were rejected by all judicial authorities; that is, the applicant was not even heard and the officials responsible for his transfer to Madrid and supervision during police custody were not questioned. Finally, the ECtHR drew attention to the fact that two of the five forensic reports were not included in the case file which led the ECtHR to infer that the national judicial authorities examined only the remaining three reports. The missing reports were finally provided by the Government at the request of the Court without explanation. As regards the forensic reports of persons detained in undisclosed regime, the ECtHR stressed the importance of adopting the measures recommended by the CPT to improve their quality. In light of the foregoing, the ECtHR concluded that the investigations were not sufficiently thorough and effective and hence appraised a violation of Article 3 in its procedural aspect. It was, however, not possible for the ECtHR to conclude beyond reasonable doubt whether the applicant was subjected to ill- treatment due to the lack of sufficient evidentiary elements resulting in particular from the failure of the investigation conducted.

6º) MARTÍNEZ SALA and others v. SPAIN

The case concerned the arrest and detention on 29th June 1992 (shortly before the celebration of the Olympic Games of Barcelona) of 15 suspected sympathizers of a Catalan independence movement allegedly accused of belonging to an armed group. The applicants claim to have been subjected to ill-treatment, both physical and psychological during their arrest and incommunicado detention. In particular, they claimed to have been beaten, threatened, insulted, blindfolded, deprived of sleep, covered their heads with hoods or plastic bags and forced to stand or to exercise during interrogations. The applicants already reported these acts of ill-treatment to the judicial authorities to whom they were brought during their incommunicado detention. In view of the allegations of ill-treatment, further and more detailed forensic examinations were ordered by the investigating judge. Forensic reports reflected some manifestations of signs of violence, such as bruises, abrasions, post-traumatic stress, etc. Nevertheless, given that many of the alleged acts of ill-treatment do not produce recordable damages, the various judicial authorities seized found no evidence of the veracity of the facts complained and dismissed the case.
The ECtHR regretted that with regard to the judicial investigations of the allegations of ill-treatment, the national authorities limited, in all and for all, to the forensic reports and did not identify nor hear the police officers who had transferred the applicants to Madrid and had monitored them during their incommunicado detention. The ECtHR concluded from the evidence before it that it could not determine beyond reasonable doubt, if the alleged ill-treatment had actually been inflicted on the applicants (particularly due to the long period of time that had elapsed since the facts at issue). However, given the absence of a thorough and effective investigation into the allegations of the applicants, the ECtHR found that there had been a violation of Article 3 of the Convention.

Cases concerning art.5 - right to liberty and security (+art.7 – no punishment without law)

The right to liberty and security is enshrined in Article 5 ECHR, according to which "everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law (…)"

ECtHR cases on this issue:

1º) DEL RÍO PRADA v. Spain

The case of *Del Río Prada* concerned the postponement of the final release of the applicant convicted of terrorist offences, on the basis of a new approach –known as the "Parot doctrine"- adopted by the Supreme Court after she had been sentenced. The Spanish Supreme Court in its judgment no. 197/2006 of 28 February 2006 set a precedent known as the "Parot doctrine". The latter case concerned a terrorist member of ETA (H. Parot) who had been convicted under the Criminal Code of 1973. The plenary Criminal Division of the Supreme Court ruled that the remissions of sentence granted to prisoners were henceforth to be applied to each of the sentences imposed and not to the maximum term of thirty years provided for in Article 70.2 of the Criminal Code of 1973 (this meant that in practice prison benefits would no longer shorten the aforementioned maximum term of thirty years).
In the *Del Rio Prada* case, the ECtHR had to decide whether the continued detention of the applicant beyond the 2nd of July 2008 was sufficiently predictable. The requirement of foreseeability was to be assessed in relation to the "law" (taken as a whole, including the case-law) in effect at the time of her conviction, and also when she was notified of the decision to combine the sentences and fix a maximum prison term. The ECtHR concluded, after analysing the practice of prison and judicial authorities prior to the "Parot doctrine", that the applicant could not have foreseen, reasonably, that the method used for remission of sentence for work done in detention would be altered as a result of the Supreme Court's departure of its previous case-law; neither could she have foreseen that the new legal criteria would apply to her particular case. In light of the foregoing, the ECtHR found a violation of art. 7[4]. In addition, the ECtHR found that the application of the "Parot doctrine" to the applicant effectively delayed the date of her release by almost nine years. She therefore served a longer term of imprisonment than she should have served under the domestic legislation in force at the time of her conviction. This led the ECtHR to conclude that since 3 July 2008 the applicant's detention was not "lawful", in violation of Article 5 § 1 of the Convention. The respondent State was to ensure the applicant was released at the earliest possible date.[5]

2º) MANGOURAS v. SPAIN

This case concerned the sum of three million Euros set for bail of the applicant, the captain of a merchant vessel known as "Prestige" which, after sustaining sudden and severe damage, produced a leak and caused the contents of its tanks (70,000 tons of fuel oil) to spill into the Atlantic Ocean. The applicant, relying on Article 5 § 3 considered the amount set for bail disproportionate and alleged that the authorities had not taken into account his personal situation (profession, income, assets, previous convictions, family circumstances and so forth) in deciding on the amount.
In the ECtHR's view, it follows from the structure of Article 5 in general, and the third paragraph in particular, that bail may only be required as long as reasons justifying detention prevail. If the risk of absconding can be avoided by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account. The authorities must take as much care in fixing appropriate bail as in

[4] Although the arrangements for granting adjustments of sentence as such fall outside the scope of Article 7, the ECtHR considered that the way in which the provisions of the Criminal Code of 1973 were applied in the present case went beyond mere prison policy. Indeed, the ECtHR concluded that the application of the "Parot doctrine" to the applicant did not concern solely the manner of execution of the penalty imposed but, on the contrary, affected its scope since the "Parot doctrine" deprived of any useful effect the remissions of sentence for work done in detention to which the applicant was entitled by law.

[5] The Parot doctrine has not been removed from the domestic legal system, but its applicability is very limited. The elimination of redemptions in 1996 as well as the rewording of article 78 of the 1995 Criminal Act and the adoption of the Organic Law Act 7/2003 compel prisoners to fully serve their sentence to 30 or 40 years imprisonment (which continue to be the statutory maximum for accumulated penalties). Obviously, these amendments cannot be applied retroactively.

deciding whether or not the accused's continued detention is indispensable. Furthermore, the amount set for bail must be duly justified in the decision fixing bail and must take into account the accused's means.
In the instant case the applicant was deprived of his liberty for eighty-three days and was released following the lodging of a bank guarantee of EUR 3,000,000 corresponding to the amount set for bail. The domestic courts based their findings on the serious nature of the offence and the public outcry caused and on certain aspects of the applicant's personal situation, namely his nationality and place of permanent residence and the fact that he had no ties in Spain.
The ECtHR aware of the fact that the amount set for bail was high accepted that it exceeded the applicant's own capacity to pay. However, in fixing the amount the domestic courts sought to take into account, in addition to the applicant's personal situation, the seriousness of the offence of which he was accused (marine pollution on a seldom-seen scale causing huge environmental damage) and also his "professional environment", circumstances which, in the courts' view, lent the case an "exceptional" character. As regards the "professional environment", the ECtHR noted the growing and legitimate concern both in Europe and internationally in relation to environmental offences, as well as the tendency to use criminal law as a means of enforcing the environmental obligations imposed by European and international law. In addition, the ECtHR referred to the practice of the International Tribunal for the Law of the Sea, which also takes into account the seriousness of the alleged offences and the penalties at stake when deciding what constitutes a reasonable bail. Finally, the ECtHR noted that in the instant case, the bail was paid by the company which insured the owner of the ship of which the applicant was Master. The very fact that payment was made by the shipowner's insurer would seem to confirm that the Spanish courts, when they referred to the applicant's "professional environment", were correct in finding – implicitly – that a relationship existed between the applicant and the persons who were to provide the security. In the ECtHR's view, these new realities have to be taken into account in interpreting the requirements of Article 5 § 3.
Therefore, and in view of the fact that domestic courts took sufficient account of the applicant's personal situation, and in particular his status as an employee of the ship's owner, his professional relationship with the persons who were to provide the security, his nationality and place of permanent residence and also his lack of ties in Spain and his age; and in view also of the particular context of the case and the disastrous environmental and economic consequences of the oil spill, the courts were justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant. For all these reasons the ECtHR concluded that the amount of bail was not disproportionate and found no violation of Article 5§3

3º) SCOTT v. SPAIN; VAND DER TANG v. SPAIN and RAF v. SPAIN

The ECtHR ruled in the *Scott* judgment on the legality of the detention on the basis of Article 5§1 while in *Van der Tang* and *Raf* cases the Court ruled on the length of the detention relying on Article 5§3. As will be seen below, in these three judgments the ECHR did not depart from the reasoning followed in its previous jurisprudence, and concluded in two of the three judgments that there had been a violation of Article 5 of the Convention.

The *Scott* case concerned the detention of a British national for an alleged crime of rape. Upon being detained, it was found that the applicant had escaped from a British prison and that an international warrant for his arrest for the murder of his father had been issued against him. The investigating judge, taking into account the seriousness of the offence and the prison sentence it would attract under Spanish law, as well as the existence of an international arrest warrant, ordered the applicant's detention pending trial. The Audiencia Nacional accepted the guarantees given by the United Kingdom authorities and ordered that the applicant should be extradited to stand trial for the murder of his father. This extradition order was only to be executed after the applicant had served any outstanding time of the sentence that

might eventually be imposed on him in Spain for the rape offence. Two years after the applicant had been detained the investigating judge ordered the applicant's provisional release in connection with the rape case. He was, however, kept in detention for another two years under orders made in the extradition proceedings. The applicant complained before the ECtHR that at least between 6 March 1992 and 25 August 1993 he was technically kept in detention pending extradition while, in reality, the justification for his detention was the ongoing investigation into the rape allegations. Once he was released on bail on the rape charge, there was no substantive justification for his continued detention. He should therefore either have been released or extradited immediately. The ECtHR however, taking account of the relevant provisions of the Extradition Treaty between the United Kingdom and the Kingdom of Spain concluded that the national authorities were entitled under that legislation to defer the surrender of a person requested for extradition if a criminal investigation was in progress, they were further entitled to keep the applicant in detention by applying the same principles as those applicable to pre-trial detainees. Against this background, it cannot be said that the applicant's detention during the period concerned was unlawful for the purposes of Article 5§1. However, as regards the duration of applicant's pre-trial detention, the ECtHR consider it excessive given that the case was not particularly complex. Indeed, it was apparent from the case file before it that, after the investigation had been terminated, the evidence against the applicant only included two statements by the complainant, two statements by the accused and four medical certificates. In these circumstances the Court concluded that the duty of "special diligence" enshrined in Article 5§3 has not been observed.

In *Van der Tang* (delivered in 1995) the ECtHR ruled for the first time as regards Spain on Article 5§3. In the case at hand a Dutch citizen working as a truck driver was arrested in 1989 for carrying 1,300kg of hashish in his lorry. Domestic Courts ordered his prosecution as perpetrator of a public-health offence and remanded him in custody. His case was referred to the Audiencia Nacional as it became part of a nation-wide operation to combat a large-scale drug-trafficking organisation (Nécora case). The Central Investigating Judge of the Audicencia Nacional confirmed his detention in remand and ordered to extend it up to the statutory maximum (4 years). The applicant, however, was finally released on bail in July 1992 and the total period of his detention was therefore three years, one month and twenty-seven days.
The excessive length of the applicant's pretrial detention led him to file a complaint before the EctHR. When deciding in the case at hand, the Court took into account the fact that the applicant was well aware as to why he was being kept in detention. Indeed, in rejecting his applications for release, the judicial authorities, put forward two main grounds: the seriousness of the alleged offences and the danger of the applicant's absconding, which persisted throughout the total period of his detention. The ECtHR agreed with theses reasons and further noted on the one hand that the evidence incriminating the applicant was cogent and on the other that the national authorities displayed "special diligence" in the conduct of the proceedings. It is true that, taken on its own, the applicant's case did not appear particularly complex and could have been dealt with more speedily. However, once joined to the Nécora file it became part of a complex process. In light of the foregoing, the Court found that the facts of the present case did not disclose a violation of Article 5§3 of the Convention

Finally, the *Raf* case concerns the excessive length of the pre-trial detention of the Yugoslav national R. Raf pending extradition. The applicant was arrested and criminal proceedings for allegedly belonging to a gang specialized in counterfeiting identity cards were brought against him. Simultaneously, extradition proceedings were initiated pursuant to an international arrest warrant issued by France. The judicial authorities ordered the remand in custody of the applicant. The applicant alleged that his detention pending extradition was excessive. The EctHR, however, rejected the alleged violation of Article 5§3 on the grounds that his detention was always justified by one of the exceptions enshrined in Article 5§1 and that the authorities demonstrated due diligence in the conduct of the applicant's case.

Cases concerning art.6 – right to a fair trial

TENDAM v. SPAIN

The *Tendam* case concerns the refusal by the Spanish authorities to grant the applicant compensation for his pre-trial detention during the criminal proceedings instituted against him for theft, as well as for the loss of and damage to his property seized in connection with the charge of handling stolen goods. In this case the Court held that there had been a violation of Article 6.2 and violation of Article 1 of Protocol nº 1 (protection of property).

The applicant, a German national, was arrested in connection with criminal proceedings relating to the theft of several beehives. Criminal proceedings were also brought against him for receiving stolen goods. He was remanded in custody for 135 days, after which he was provisionally released against the payment of a deposit of 2 404 EUR. Under the proceedings initiated for receiving stolen goods, several searches of his home took place, while the applicant was remanded in custody. During the searches, several properties, including many electronic goods were seized and placed in the premises of the Civil Guard or the investigating judge. Some of them, however, were handed over to the people claiming to be the owners who had denounced their loss beforehand. The Criminal Court No. 3 of Santa Cruz de Tenerife acquitted the applicant of the charges of receiving stolen goods, following the abandonment of the prosecution by the Public Prosecutor at the public hearing. The applicant then requested the return of his seized goods. Some properties were restituted, yet others had either disappeared or were seriously deteriorated. Against this background, the applicant lodged a complaint before the Minister of Justice and Interior claiming compensation for the damages suffered (as a result of the days spent in custody), the losses incurred (by the deposit for his release) and the interests thereof. The applicant also sought compensation for the miscarriage of justice that led to the non-return or loss of value of the items seized in connection with the second criminal proceeding. After the dismissal of his complaint by the administrative bodies, the applicant appealed against the Minister's decision before the judicial courts, which also dismissed his appeals. Both, administrative and judicial authorities based their dismissal on the grounds that the applicant's acquittal could not entail right to compensation, since it was not based on the proven lack of participation in the criminal act but on the lack of evidence. The requirements enshrined in Article 294 LOPJ were therefore not satisfied and hence the applicant was not entitled to compensation on the basis of this provision.

Before the ECtHR, the applicant complained of the refusal by the Spanish authorities to grant him the compensation claimed for his detention on remand and for the disappearance and deterioration of the property seized in the course of the criminal proceedings initiated against him. He relied on Article 6 § 2 of the Convention and Article 1 of Protocol No. 1.

The EctHR concluded that although neither Article 6 § 2 nor any other provision of the Convention gives the acquitted person the right to compensation for lawful detention on remand, the expression of suspicions about the innocence of the accused is no longer acceptable after an acquittal becomes final. Indeed, once the acquittal became final - even if he is acquitted for lack of evidence in accordance with Article 6 § 2 - expressing doubts as regards the acquitted person's guilt, including those derived from the reasons for acquittal, are not compatible with the presumption of innocence. Subsequent court decisions or declarations from public authorities may raise an issue under Article 6 § 2, if they amount to a finding of guilt which ignores deliberately prior acquittal of the accused.

Moreover, the Court noted that under the principle "in dubio pro reo" which is a particular expression of the principle of presumption of innocence, no qualitative difference should exist between an acquittal for lack of evidence and acquittal resulting from a finding of absolute certainty about their innocence. Under Article 6 § 2 of the Convention a judgment of acquittal must be respected by any authority deciding directly or incidentally on the criminal liability of the person concerned. However, in the case at hand, the ECtHR found that the reasoning behind the dismissal of both the Minister of Justice and Interior and the judicial authorities seized, distinguished between an acquittal for lack of evidence and

an acquittal resulting from a finding of non-existence of criminal acts. This distinguishing, casted doubts on the applicant's innocence and ignored the prior acquittal. These factors are sufficient for the Court to conclude that there has been a violation of Article 6 § 2 of the Convention.

JAURRIETA ORTIGALA v. SPAIN

The applicant, Mr. Jaurrieta, while serving his prison sentence was refused ordinary leave from prison by the Prison Board. He applied against this decision before the Central Prison Judge arguing, inter alia, that he had used the leave that he had been granted in the past to stay with his family and that was the purpose of his most recent request for leave. However, the Central Prison Judge upheld the administration's refusal on the grounds that the applicant might breach the conditions of leave (25% risk), he was the subject of further criminal proceedings pending before the courts, and there was no guarantee that the leave, if granted, would be used for a proper purpose. The applicant lodged a reforma appeal against this decision but the Central Prison Judge refused leave once more. The applicant then requested legal aid in order to lodge another appeal against that decision but this time before the Audiencia Nacional. On 18 December 2006 the applicant was served with a Court notification informing him that a decision had been delivered by the Audiencia Nacional on 23 June 2006 upholding the decision to refuse prison leave and that it had been faxed to his Prison on 5 July 2006. The applicant complained before the ECtHR on the basis of Articles 5 § 4, 6 §§ 1 and 2 and 13 of the Convention that his right of access to court had been breached. He argued that he had not been informed that he had been granted legal aid, nor had he been given the name of the legal counsel and legal representative assigned to him. He had had no contact with them and they had not informed him that his appeal before the Audiencia Nacional had been dismissed. Lastly, he contested the merits of the decision to refuse his request for ordinary leave of absence from prison.

For reaching a conclusion on the merits the ECtHR had to first determine whether the applicant's complaint was compatible *ratione materiae* with Article 6 § 1 of the Convention (i.e. whether the civil limb of Article 6 § 1 of the Convention was applicable to a proceeding concerning a request for prison leave). In carrying this assesment, it had to first determine whether the prisoner possessed a "right" within the meaning of that provision. Given that neither the Convention nor the Protocols thereto expressly provide for a right to prison leave, the Court's first task was to determine whether such a right exists in Spanish law. On this regard, the ECtHR noted that Spanish law makes no mention of the categorisation of such leave, i.e.: whether it is a "right" or a "privilege". Yet, the legislation uses the phrase "may be granted" which, in principle, indicates that prison authorities enjoy a certain degree of discretion in deciding whether to grant prison leave. However, this factor is not conclusive, and attention should be paid to the interpretation of that provision by the domestic courts. As regards prison leave, the Spanish Constitutional Court has repeatedly ruled that it does not constitute a subjective or fundamental right. Indeed, even if a prisoner meets the statutory requirements to be granted prison leave, the prison administration can deny it for reasons that are consistent with the constitutional and legal aims of prison leave. In the case at hand, the ECtHR did not find strong reasons to differ from the conclusions reached by the Spanish Constitutional Court. It is true that in Spain, decisions taken by the prison authorities to refuse to grant ordinary prison leave are subjected to judicial review upon a complaint lodged by the prisoner. In the ECtHR's view, however, this fact alone does not transform prison leave into a right for the purposes of Article 6 § 1 of the Convention. Even when the objective conditions required by law are met, the awarding of ordinary prison leave is not automatic. The judicial review of administrative refusals of ordinary prison leave requests should be understood as a guarantee of the proper application by the prison authorities of the prison legislation in order to prevent abuse and unreasonableness. In view of the foregoing considerations, the ECtHR could not recognize the existence of a "right" recognised in Spanish law or in the Convention and declared the application inadmissible.

CONCLUSION:

The 13 judgments afore mentioned represent all the cases in which the ECtHR has ruled in relation to Spain on lawsuits filed by persons deprived of their liberty, be it either detainees in police stations or in remand custody or sentenced prisoners. As it can be seen, the majority of the ECtHR judgments condemning Spain as regards deprivation of liberty are found in the field of incommunicado police custody. That is, complaints from detainees in police stations (in dungeons) on whom it had not yet been rendered a Court order of imprisonment and always in the field of terrorism (since incommunicado detention under Spanish regulations is mainly contemplated for terrorism related offences[6]). In all of these judgments, the applicants claimed to have suffered inhuman and/or degrading treatment during the period when they were under incommunicado detention, and in all of them, the ECtHR condemned Spain for violating Article 3 not in its substantive aspect but in its procedural aspect. Indeed, **according to the ECtHR rulings, Spain systematically incurred in a lack of thorough and effective examination into the allegations of inhuman and/or degrading treatment carried out by the State Security Forces during the incommunicado detention.**

B. Content of material obligations imposed by the ECtHR

Based on existing analyses[7] that have been made in this area and especially on the rigorous analysis undertaken in Workstream 1 of this research project we can conclude that Spain is not among the countries most condemned by the ECtHR, and in particular in relation to the rights of persons deprived of their liberty, as the Court has delivered relatively few rulings. However, since the entry into force of Protocol No. 11, the applications lodged at the Court Registry regarding Spain have significantly increased, yet most of them have been declared inadmissible. The right to a fair trial enshrined in art. 6.1 of the ECHR is the right that has concentrated in recent years most of the judgments in which the Court found Spain in breach of its obligations under the Convention[8]. Yet, infringements of article 6 not related to the rights of persons deprived of their liberty are outside the scope of our research within the present project.

As regards deprivation of liberty in the framework of this report, rulings against Spain are found, as explained earlier, in the context of the lack of an effective investigation of ill-treatment during incommunicado detention of persons accused of crimes for which in Spain a specific tribunal ("Audiencia Nacional") has jurisdiction (terrorism, crimes against the State,

[6] Although the incommunicado detention initially arose in connection with terrorism related crimes (art. 520 bis Criminal Procedural Code), its use has spread to other crimes pursuant to the provisions of Article 509 Criminal Procedural Code. In this sense, the incommunicado detention has also been adopted in cases of bribery, misappropriation of funds, forgery, fraud and alteration of public tenders (Judgment of the Audiencia Provincial at Las Palmas 212/2010 of 28 April) or offenses against public health (Judgment of the Constitutional Court 219/2009, of December 21). Detención Incomunicada en España, Universidad de Valencia: http://congresos.adeituv.es/imgdb//archivo_dpo15509.pdf

[7] "El tiempo de los derechos", nº 31. La jurisprudencia del Tribunal Europeo de Derechos Humanos relativa a torturas. Septiembre 2013. www.idhc.org; SARMIENTO, MIERES, PRESNO: *Las sentencias del Tribunal Europeo de Derechos Humanos*, 1ª ed., Aranzadi, Pamplona, 2007; Informe de Amnistía Internacional *"España: salir de las sombras. Es hora de poner fin a la detención en régimen de incomunicación"*, 2009 (EUR 41/001/2009); GARBERÍ LLOBREGAT y MORENILLA ALLARD: *"Convenio europeo de Derechos Humanos y jurisprudencia del Tribunal Europeo relativa a España, Textos, Protocolos, Nuevo Reglamento del Tribunal, Normas complementarias y Formulario de Demanda"*, Bosch, Barcelona, 1999; "List of General Measures adopted in order to prevent new violations", http://www.coe.int/T/E/Human_Rights/execution/02_Documents/MGindex.asp y CELDRÁN KHUL: *España y el Tribunal Europeo de Derechos Humanos*, Ministerio de Asuntos Exteriores, Escuela Diplomática, 2004 entre otros.

[8] CELDRÁN KHUL: *España y el Tribunal Europeo de Derechos Humanos*, Ministerio de Asuntos Exteriores, Escuela Diplomática, 2004. Pág. 4.

etc.). *Martinez Sala and Others v Spain* was the judgment that triggered the ECtHR case-law condemning Spain for breaches of article 3 in its procedural aspect.[9] This judgment pointed out a reality already highlighted by several international organizations. Indeed, there are numerous reports prior to that ECtHR judgment which made recommendations to Spain in this area, notably the reports of the United Nations Committee Against Torture (UNCAT)[10], and the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment or Treatment (CPT),[11] which will be discussed in more detail later.

ECtHR judgments on incommunicado detention point out the following obligations for Spain as regards incommunicado detention:

a) The need to carry effective and thorough investigations leading to the identification and prosecution of those responsible for the acts of ill-treatment. This may require:
    a. The identification and hearing of the police officers in charge of the detainees held incommunicado;
    b. The identification and hearing of the forensic medical experts who examined the detainees during their incommunicado detention;
    c. The identification and hearing of the court-appointed lawyer present during statement taking.
b) The authorization for the applicant to supply evidence which could help clarify the facts, for example:
    a. copies of the forensic reports and of the statements made during incommunicado detention;
    b. security camera recordings of the premises where detainees were held and statements taken;
    c. New physical and psychological examinations.
c) The need to hear the applicant
d) The need to improve the quality of the forensic examination of persons subjected to incommunicado detention
e) Following the recommendation of the CPT, expressly mentioned in its case-law, the ECtHR encourages amendments to the legal regime of incommunicado detention so as to ensure rights such as:
    a. Being assisted by a lawyer of their own choice;
    b. Being examined by a forensic doctor from the public health system of their own choice, in addition to the State-appointed forensic doctor;
    c. Notifying a family member or person of one's choice of the fact of the arrest and the place of the detention;
    d. meeting in private with the duty lawyer appointed to assist them.

The obligations hereby listed relate to arrested persons held incommunicado. As regards prison matters related to remand prisoners or convicted prisoners, the ECtHR has not yet ruled on

[9] RUILOBA ALVARIÑO, J.: "La sentencia del TEDH en el asunto Martínez Sala y otros c. España, de 2 de noviembre de 2004. Crónica de una muerte anunciada", Revista Española de derecho internacional, 2005, Vol. 57, Nº 1, págs. 209-220.

[10] Where it was stated that "prolonged incommunicado detention may facilitate the practice of torture and could in itself amount to a form of cruel treatment, inhuman or degrading" Report of the Special Rapporteur on the question of torture, Theo van Boven, visit to Spain from 5th to 10th October 2003 (E/CN.4/2004/56/Add.2). The same opinion shares the UN Special Rapporteur on Human Rights in the Fight Against Terrorism, Martin Scheinin, who after his visit in 2008 stressed the need to end the regime of incommunicado detention altogether (A/HRC/10/3/Add.2)

[11] Where it was stated that "the regime of solitary confinement, regardless of the legal safeguards for its application, facilitates the commission of acts of torture and ill-treatment" Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman Treatment from 22nd to 26th July 2001 (CPT/Inf/(2003)).

claims related to prison issues strictly speaking (i.e.: to those aroused in connection with the enforcement of a prison sentence). We can therefore conclude that **no decisions of the ECtHR have had a direct impact for Spain as regards actual obligations in penitentiary issues** (although the recommendations made in connection to the effectiveness and thoroughness of the investigations into the claims of alleged ill-treatment during incommunicado detention could be extrapolated and applied to the investigations which domestic authorities carry out in prisons when either remanded or sentenced prisoners report acts of ill-treatment).

Given that the ECtHR has not yet ruled on prison issues strictly speaking, it is not surprising that in the practice of domestic Prison Courts (which are very specific and far removed from the ordinary criminal courts) **ECtHR case law is not quoted**[12]. The General Secretariat for Prisons, through the Centre for Prison's Monitoring and the Ministry of Home Affairs, publishes each year a detailed study of the most important judgments on Prison related issues which have legal significance concerning Spain. Even in official publications like the one hereby mentioned (which goes back more than 25 years) the ECtHR jurisprudence is hardly ever cited.[13]
The point is that many of the prisoners do not know how to reach the ECtHR, lack the sufficient economic means for pleading before it and in Spain the possibility of requesting legal aid free of costs is not contemplated as regards the ECtHR. In fact, in none of the Bar Associations of Spain, there is a specific shift of duty-lawyers for the ECtHR. Prisoners belonging to the terrorist organization ETA have had lawyers of their choice who have pleaded all the way through until the ECtHR. When questioned about the reasons for not pleading before the ECtHR, prisoners arguments were: "Once I serve my sentence I do not want to be involved with Courts, the farther the better"; "That's just for the rich, for ETA prisoners who have very expensive lawyers", "I am afraid that if they review my conviction I may come off worse than before", "I do not trust any judge, better to go unnoticed, serve the sentence and be over with all of this", "I'm tired of courts, and it takes them so long to deliver a decision...","I do not want to suffer the consequences of getting there", " I did not know I had only six months to file the appeal" (sic)[14]. In light of the foregoing, it can be concluded that within Spanish prisons the European Court of Human Rights remains a fairly unknown, abstract and distant figure.

[12] See in this respect the case law on Prison related issues gathered each year in a text published by the Ministry of Interior in collaboration with the Technical Secretariat: "*Jurisprudencia penitenciaria*". It is available in the following link: http://www.institucionpenitenciaria.es/web/portal/documentos/publicaciones.html

[13] In order to visualize the little impact that has the ECtHR jurisprudence on Prison related issues in Spain's domestic law, we will hereby comment the three judgments that have been cited within the Official Compilation known as "*Jurisprudencia penitenciaria*":

- *Del Río Prada v. Spain,* nº 42750/09 ECtHR 2013, concerning the accumulation of penalties and the maximum term of imprisonment. Spain was found to have breached its art. 7 and art. 5 obligations on the basis of the illegality of the Parot doctrine. (See *Jurisprudencia penitenciaria* 2013. Secretaría General de Instituciones Penitenciarias. Ministerio del Interior. Pág. 18-)
- *Mangouras v. Spain,* nº 12050/04 ECtHR 2010, as regards bail during detention on remand. Although the ECtHR concluded that Spain had not breached its art. 5 obligations, still this judgment has a spill over effect on the area of prison law. (See *Jurisprudencia penitenciaria* 2010. Secretaría General de Instituciones Penitenciarias. Ministerio del Interior. Pág. 295-)
- *Kudla v. Poland,* nº 30210/96 ECtHR 2000 concerning adequate psychiatric treatment during detention on remand and the unreasonableness of the length of detention. (See *Jurisprudencia penitenciaria* 2010. Secretaría General de Instituciones Penitenciarias. Ministerio del Interior. Pág. 324-). However, the defendant State in this judgment is Poland)

[14] These responses were obtained through a form that was distributed between 1,000 prisoners. See in this respect the report from CABRERA CABRERA, RÍOS MARTÍN y SEGOVIA BERNABÉ: "Andar 1 km en línea recta. La cárcel que vive el preso del siglo XXI". Universidad Pontificia Comillas. 2010.

C. Pilot or quasi-pilot judgments

In the case of *del Río Prada v. Spain* the ECtHR applied Article 46 but limited itself to request Spain to ensure that the applicant was released at the earliest possible date. Spain released the applicant two days after the decision had been rendered.[15] Even though the Court did not expressly request the release of other inmates who were in the same situation as the applicant, other prisoners affected by the Parot doctrine have also been released by the Spanish authorities. There is however, a kind of informative opaqueness as regards the exact number of released inmates and no official data is available. According to newspapers, during 2014 other 72 prisoners affected by the Parot doctrine were released and by mid 2015 at least 7 more prisoners too.[16]

[15] http://politica.elpais.com/politica/2013/10/22/actualidad/1382423724_548038.html
[16] http://vozpopuli.com/actualidad/64337-el-fin-de-la-doctrina-parot-sigue-excarcelando-etarras-siete-en-lo-que-va-de-ano

II. NATIONAL LEGAL SYSTEM FOR PRISONERS' RIGHTS PROTECTION

Preliminary information on the Spanish Prison System:
In Spain there are two prison administrations. The Central Government administration that has jurisdiction over the entire Spanish territory, except Catalonia; and the Catalan administration (Government of Catalonia) that has jurisdiction for prisons administration in that territory.
It should be noted that the Spanish Prisons System depends nowadays of the Ministry of Home Affairs. Before 1992 it depended of the Ministry of Justice and, for two years (1994-1996), it depended from the Ministry of Justice and Home Affairs that split after that period into two different Ministries. At that time (1996), it was decided that Prisons Administration would move to the Ministry of Home Affairs, gaining then an important new competence.

Statistics

DISTRIBUTION OF THE PRISON POPULATION BY SEX (As of November 2015)[17]

	Central Adm	%	Catalonia	%	Totals	%
Men	49,753	92.16	8.339	93.29	58.092	92.32
Women	4.233	7.84	600	6.71	4.833	7.68
Total	53.986	100	9,294	100	62,925	100

PRISON POPULATION BY PROCEDURAL SITUATION (As of November 2015)[18]

	Central Adm.	Catalonia	Totals
Preventive	6.791	1.206	7.997
Convicted	45.974	7.686	53,660
Security Measures	524	47	571

PRISONS OF THE GENERAL ADMINISTRATION OF SPANISH GOVERNMENT (As of April 2015)[19]

Prisons	**68**
Centres for social integration	**32**
Units for mothers	**3 (Seville, Madrid, Mallorca)**
Psychiatric prisons	**2 (Alicante, Seville)**
Management Services of penalties and alternative measures	**56**
TOTAL	**161**

The **prisons** are the places where inmates are deprived of their liberty, either as convicted prisoners or prisoners on remand.
The **Centres for Social Integration** are prisons for the fulfilment of imprisonment of third degree-open regime and the monitoring of conditional release.

[17] http://www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html
[18] http://www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html
[19] http://www.institucionpenitenciaria.es/web/portal/centrosPenitenciarios

Units for mothers can be external[20] (pioneer in Spain, as far as the Ministry of Home Affairs is concerned) or held in prisons in special modules. In Spain, inmate mothers can keep their children with them until they are three years old –Art. 38 GPOA-

The **Management Services of penalties and alternative measures** are administrative units that are entrusted with the implementation of these penalties and alternative measures. They are structurally and functionally dependent on prisons or Centres for Social Integration.

2015 amendments to the Criminal Code affecting the enforcement of prison sentence

On July 1st, 2015 a reform of the Spanish Criminal Code[21] came into force. This reform undertakes a comprehensive review and update of the Criminal Code and some of the amendments address and affect the execution of the prison sentence.
The amendments affecting the execution of the prison sentence can be categorised as follows:

1. The introduction of the possibility of being sentenced to "**reviewable life imprisonment**" (prisión permanente revisable)
2. The suspension of the prison sentence and granting of conditional / early release pursuant to Articles 90 , 91 and 92 of the Criminal Code
3. Being directly ranked as third degree prisoner pursuant to Article 36.3 of the Criminal Code
4. The replacement of the execution of the prison sentence by the expulsion from the country as regards foreign persons pursuant to Article 89 of the Criminal Code

As regards the new penalty of "reviewable life imprisonment", it must be noted that given the huge overturn that an undetermined (yet not uncertain) prison sentence entails as regards the actual pattern of sentence execution, further legal provisions are needed for its clarification and implementation. **However, as of November 2015, no additional regulations have been issued**.

A. List of legal remedies

1. Sources of domestic law used in prison litigation[22]

1.1. Domestic sources related to prisoners

- Spanish Constitution (Constitución Española), 6 December 1978, especially its Article 25 which states reeducation and social reinsertion of prisoners as the main purpose of imprisonment.

- General Prison Organic Act (GPOA, Ley Orgánica General Penitenciaria) 1/1979, 26 September 1979. Rule establishing prison system guidelines. Its most important characteristics are: the principle of legality in the enforcement of penalties, the introduction of the open regime and of with Judge for prisons' supervision, and the conception of the penalty as a measure of prevention and which aim is the reeducation and the social reinsertion of prisoners.

[20] Physical prison structures with complete autonomy that enable a specific regime of cohabitation between mothers and their children up to three years:
www.institucionpenitenciaria.es/unidadesdemadres
[21] Organic Law 1/2015 of 30 March
[22] http://www.institucionpenitenciaria.es/web/portal/administracionPenitenciaria/normativa.html

- Prison Regulations (PR, Reglamento Penitenciario) (RD 190/1996, 9 February 1996). It develops the principles of the GPOA in harmony with the punitive model established in the Criminal Code.

- Royal Decree 840/2011 (Real Decreto), 17 June 2011, that establishes the conditions for the enforcement of penalties consisting in working for the benefit of the community, as well as permanent localization penalty in prison. Certain security measures are also established, as well as conditions for the suspension of the enforcement of prison penalties or their substitution by other penalties.

1.2. Domestic sources related to access to a duty-lawyer and free legal aid

All matters relating to access to a duty-lawyer and free legal aid are regulated in the following legal texts:

a) The rules on duty-lawyers adopted by Bar Associations. Each Bar Association in Spain has its own rules. The ICAM (Madrid's Bar Association) passed its rules on duty-lawyers in October 24th 2013. In Spain there are 83 Bar Associations (i.e. one province may have several Bar Associations; for example: in Madrid there is a Bar Association in Madrid city and another one in Alcala de Henares). It is a common practice that, when a new Board of Governors of a Bar Association is elected, amendments are introduced to the rules on duty-lawyers. Besides Bar Associations, in Spain there is also the General Council of Spanish Lawyers but it does not issue norms neither minimum standards to be followed as regards duty-lawyers.

b) Law 1/1996 of January 10 on free Legal Aid, and Royal Decree 1455/05 amending Regulations on Free Legal Aid

c) The Official Decrees approved by each Autonomous Community (Comunidad Autónoma, there are 17 in total) regulating the fees for duty-lawyers. In the Autonomous Community of Madrid the Decree actually in force is: Decree 86/03 of 19 June 2003
It is important to note that not every Bar Association in Spain has a shift of duty-lawyers for prison issues (Madrid's Bar Association does). In those prisons located in a province where there is no shift of duty-lawyers for prison issues, inmates are assigned a duty-lawyer for general criminal issues (sometimes they may lack specific knowledge on prison law).
For a lawyer to access the duty roster for prison issues (i.e.: for a lawyer to be able to practice as a duty-lawyer on prison issues) he/she requires:

- 5 years of professional experience.
- To have previously practiced as a duty-lawyer on criminal issues (which in turn, requires 3 years of professional experience and a Master in Legal Access)
- Successful completion of a 35 hours training course in prison legislation.

Duty-lawyers for prison issues handle all legal matters related to prison legislation which have to be lodged either before the Courts for Prison Supervision, Provincial Courts, Central Courts for Prison Supervision, Criminal Division of the Supreme Court, or Criminal Chamber of the Audiencia Nacional. Once a duty-lawyer is assigned the defence of a particular prisoner, he/she will assume the legal defence in each and every complaint filed before the Judge for Prison Supervision, whenever the intervention of a lawyer is mandatory (i.e.: as regards the lodging of appeals, each of which costs in Madrid). The in-court legal assistance offered by the duty-lawyer lasts for a period of two years since the date of the appointment, and it may be renewed for equal periods if so agreed by the lawyer and the prisoner.

Duty-lawyers and free legal aid are two different things. If a prisoner is granted free legal aid (which depends on the legal aid committee in each Autonomous Community) the duty-lawyer is free of cost for the prisoner and it is the Autonomous Community the one that pays the Bars Association for the legal

assistance provided. If a prisoner is not granted free legal aid, he/she will have to pay the fees of the duty-lawyer. However, almost all prisoners (95%) are granted free legal aid, since they earn hardly any money, either because they do not have a job or, if they do, they earn very little.

Prisoners who are granted free legal aid, are also exempted of bearing the costs of proceedings. The costs of litigating prison related complaints are always allocated ex-officio, that is, prisoners are always levied even if they do not win the appeal. To apply for legal aid the prisoner must fill in an application form for legal aid authorizing the Autonomous Community to consult their tax data. They usually reply within two months, either granting or denying the requested free legal aid; yet, as already stated, prisoners are nearly always granted free legal aid.

In many Bar Associations (Pamplona, Seville, Orense, Madrid, Barcelona, etc.), besides duty-lawyers for prison issues, it is also available the so-called: Service for Legal Advice on Prison (Servicio de Orientación Jurídica Penitenciaria). This service is free of charge for prisoners and consists on the provision of legal advice from lawyers experts in Prison Law. These lawyers hold interviews with inmates in prison every week and answer their questions and doubts. They also help prisoners fill in their requests for a duty-lawyer. However, they do not file applications before judicial authorities; they solely clarify doubts. Still, it is a highly-requested service which, regrettably, is not available in every province in Spain.
The Bar Association of Vizcaya was pioneer in the creation of a SOJP in 1986 through the agreement signed by the Bar Association and the General Secretariat for Prisons. The initiative emerged from lawyers with a special sensitivity and interest in serving society. The following Bar Associations which took the witness were Álava and Madrid, in 1989. Later, during the 1990s other SOJP were established in various Bar Associations. Each SOJP has organized its service according to their needs and possibilities: macro-prisons and smaller prisons do not have the same needs, the various Bar Associations throughout Spain function differently, and the Service also varies depending on whether it is funded by the Bar Association or it is just a group of voluntary lawyers.
At present the following major Bar Associations offering this service are: Pamplona, Guipúzcoa, Toledo, Ciudad Real, Salamanca, Valladolid, Palencia, Burgos, Córdoba, Zaragoza, Seville, Murcia, Alicante, Valencia y Castellón. Since 2013 in Catalonia the SOJP is the same service for all prisons located in that territory. The SOJP is based on a unitary design that adapts to each prison centre according to its size, the main difference being the number of hours assigned to each centre. The Catalan SOJP was created by an agreement signed between the Department of Justice of the Regional Government of Catalonia and the different Bar Association of that Autonomous Community. The service is centralized by a single coordinator and is provided by 32 lawyers of the different Bar Associations that correspond to the demarcation where the Prison is located.
At present, Extremadura does not have a SOJP. Since 2011 neither does Baleares Islands (Some lawyers who were part of the former SOJP continue, without any kind of financial coverage, to advise and assist prisoners, besides working in the Commission on Human Rights of their Bar Association) nor does the Canary Islands; and within Galicia it is only available in Ourense.[23]

2. Competent authorities
Note: In the Spanish system prisoner's requests or complaints are normally filed firstly inside the prison, before going to the judiciary. In order to analyse this first step (prison's complaints and requests), it is important to understand the structure of a Spanish prison and the functions of the different authorities involved in it.

[23] *See*: http://www.derechopenitenciario.com/SOAJP/otros-ind.asp

2.1. Administrative Authorities (civil servants) inside the prison[24]

1) **Director ("Director")** -art. 208 RP-**:** He rules the prison, except on matters dealt with by the disciplinary commission. He can decide, for example, the separation of prisoners in the prison.

2) **Deputy Directors** ("Subdirectores") -art. 280 RP-: They are in charge of certain working areas and can be classified into:

-Deputy Director on Regime ("Subdirector de Régimen"): He is the second person in charge of the prison and is in charge of the office of regime where are located all the prison records of each inmate.

-Deputy Director for Treatment ("Subdirector de Tratamiento"): He is in charge for the technical teams and he is responsible for performing the studies and observations for each prisoner as well as to define individual treatment for them.

-**Deputy Director for Security** ("Subdirector de Seguridad"): Responsible for security measures in prison.

-**Deputy Director for Healthcare** ("Subdirector medico"): He is in charge of medical services.

-**Deputy Director for Human Resources** ("Subdirector de personal"): He is in charge of human resources (there is not necessarily one in every prison)

-**Deputy Director for Economic Management** ("Administrador"): He is in charge of the financial management of the prison.

3) **Security officers** ("Funcionarios de seguridad") -art. 283 RP-: Their main task is to perform the internal supervision of the prison. They wear uniforms. There is a hierarchy and, according to their position, they assume different responsibilities. We can distinguish between:

– Head of module ("Jefe de módulo"): Is the Security Officer in charge of the internal supervision of a module

– Head of Centre ("Jefe de centro"): Is responsible for the office of the Chief of Services. Controls the movement of prisoners within the prison, as well as the reports, prisoner counts, seizures, confiscations and body searches

– Head of Services ("Jefe de servicios") – art. 238 RP-: Is responsible for the smooth running of the prison, and can take provisional measures, such as to suspend a communication for the sake of security and orderly functioning of the detention facility

4) **Technical staff:** arts. 281 et seq. RP

- **Lawyer** ("Jurista"): Responsible for handling the criminal and penitentiary situation of every prisoner. He is legally bound to inform the inmate on all legal issues. It is also the legal adviser of the prison and the one who studies all the complaints and appeals in order to defend the prison before the Judge for Prison's Supervision[25].

- **Psychologist, pedagogy expert, psychiatrist, sociologist** ("Psicólogo, Pedagogo, Psiquiatra, Sociólogo"): They are members of the treatment team. They are responsible for making reports on each prisoner.

- **Educator** ("Educador"): Collaborates in the elaboration of reports on each prisoner. He is also in charge of programming sports and recreational activities. He should be responsible for only a certain

[24] All of them are civil servants. The Director and Deputy Directors are appointed directly, but from the available pool of civil servants. Only the Director of the General Secretariat for Prisons is appointed directly without him/her having to be a civil servant

[25] This is as far as the text of the Law says. The reality however, is that no inmate seeks for the lawyer's advice as regards their legal situation, since he/she is de facto devoted to the Prison's legal affairs. In fact, many of the errors present in the spreadsheets for calculating and clearing prison sentences are spotted by the prisoner's lawyer or the inmates themselves.

number of prisoners since they have to know them well to do their job properly, but usually there is one per module or department. He is the person who has more personal contact with the inmates.

- **Social Worker** ("Trabajador Social"): He is in charge of managing the information regarding the social and family situation of the inmates and he must help them to solve social problems or assist them in their relations with the Welfare Administration.

- **Teacher** ("Maestro"): In prison there is a school, also called teaching unit, and it is lead by teachers. They can be members of the Prisons staff but they are often teachers coming from the Ministry of Education and Science. They are in charge of educational courses and of the library.

- **Medical staff** ("Equipo médico"): -209.1 RP-**:** physician, nurses and nursing assistants.

- "**Demandadero"**-art. 304 RP-**:** The "demandadero", or messenger, is hired by the prison itself and is in charge of buying items that prisoners cannot find inside the prison.

5) Bodies-art. 265 RP**:**

-Board of Directors ("Consejo de Dirección") -arts. 270 y 271 RP-: It is the governing body of the prison, and among other things, it approves internal rules, sets on visiting days, etc. It meets once a month at least and is composed of: Director, Deputy Director for Regime Security, Deputy Director for Healthcare, Deputy Director for Human Resources, and the **Deputy Director for Economic Management**.

-**Treatment Board** ("Junta de Tratamiento") -arts. 272 a 275 RP-: Responsible, among others, for the study of each inmate situation, their classification, treatment needs and planning activities. The Treatment Board Technical Teams carry out studies under the direct supervision of the Deputy Director for Treatment. They meet at least once a week. The Teams are constituted by the following members: Director, Deputy Director for Treatment, Deputy Director for Healthcare, Psychologist, Psychiatrist, Pedagogy, Teacher and a Head of Service.

-**Disciplinary Committee** ("Comisión Disciplinaria") -arts. 276 y 277 RP-: Exercises disciplinary and sanctioning powers. Meets at least 4 times a month and consists of the Director, deputy Director on regime, Deputy director for security, a lawyer, a Head of Services, and an officer.

-Economic-Administrative Board ("Junta Económico-Administrativa") – arts. 278 y 279 RP-: It is responsible for the economic management and the management of prison's staff. It is composed of: the Director, Deputy Director for Economic Management, Deputy Director for Healthcare, Deputy Director for Human Resources and the Coordinator for Job Training or Social Work (the latter is a non-permanent member and is not always convened by the Director)

2.2. Other Public Authorities, outside the prison

Note: the functions of some of these authorities will be analyzed in the third part of the Report. We only mention them here in order to have the full picture of all the different actors involved.

General Secretariat for Prisons ("Secretaría General de Instituciones Penitenciarias")[26]: It belongs to the Ministry of Home Affairs. Its main objective is the monitoring and management of all the activities aimed at providing the public service in regard to implementing penal sentences and measures. For this purpose, it envisages the suitable planning and organisation of Prison Institutions, territorial coordination with the different peripheral services (prisons), the promotion of institutional collaboration projects designed to enhance achievement of the institution´s purposes, and actions that promote and implement alternative measures.

Centre of Direction ("Centro Directivo")**:** It has an absolute control over the decisions taken by Prisons' Directors as regards the *Files for the Special Monitoring of Inmates* (FIES, Ficheros de Internos de Especial Seguimiento). It is a political body related to the General Secretariat for Prisons.

26 http://www.institucionpenitenciaria.es/web/portal/idioma/en/administracionPenitenciaria/index.html

Ombudsman ("Defensor del Pueblo")**:** Receives complains from inmates. Not dependent on the General Secretariat for Prisons. It is not a state official, but a person appointed by the elected government.

2.3. Judiciary Authorities

1. **Judge for Prisons' Supervision ("Juez de Vigilancia Penitenciaria", JVP)**: In each province and within the criminal jurisdictional system, there is at least one court for prison supervision, which has jurisdictional functions under the General Penitentiary Law on enforcement of custodial judgments and security measures. It is in charge of the judiciary review of the disciplinary powers of prison authorities, and of the protection of the rights and benefits of the inmates in prisons, as well as other tasks established by the law. These judges may visit the prisons to interview inmates who so request and/or interview them through video conference. However, interviews with prisoners are not in any case mandatory and there are judges who never make use of this possibility. It is always a judge sitting alone.
2. **Central Judge for Prisons' Supervision ("Juez Central de Vigilancia Penitenciaria", JCVP):** Performs the same functions as the judge for Prisons' Supervision but for inmates convicted by the "Audiencia Nacional" (Court having jurisdiction *ratione materiae* for some specific crimes). It is located in Madrid. It is always a judge sitting alone.
3. **Prison sections of the Provincial Court in each province ("Audiencia Provincial"):** Decides on appeals against decisions of Judges for Prisons' Supervision. Cases are tried by a three-member bench.
4. **2nd Chamber of the "Audiencia Nacional"**: Decides on appeals against decisions of the Central Judge for Prisons' Supervision. It is located in Madrid. Cases are tried by a three-member bench.
5. **2nd Chamber of the Supreme Court**: Decides on appeals filed against those decisions of the Judge for Prisons' Supervision that deny rank progression and/or conditional release. The Supreme Court is also in charge of making a consistent and uniform interpretation on penitentiary rules in certain cases. Cases are tried by a three-member bench.
6. **Constitutional Court**: Decides on claims based on the violation of Fundamental Rights. It is the last domestic court step before going to the ECtHR in case of violations of fundamental rights.

All these judiciary authorities are **impartial bodies.** Article 117.1 of the Spanish Constitution states that: "Justice emanates from the people and is administered on behalf of the King by Judges and Magistrates of the Judiciary who shall be independent, irremovable, and liable and subject only to the rule of law." It then establishes some guarantees of their independence in art. 117.2: "Judges and Magistrates may only be dismissed, suspended, transferred or retired on the grounds, and subject to the guarantees provided by law."

2. Remedies available for prisoners' rights protection

Note: In Spain, the specific remedies available for prisoners are **preventive**. There is no specific compensatory remedy for prisoners. There is, however, the possibility to claim the State's pecuniary responsibility for the (bad) functioning of the Judicial Administration ("*reclamación de responsabilidad patrimonial por el funcionamiento de la Administración de Justicia*"). This is a general (i.e. not just exclusively for prisoners) remedy consecrated in Article 121 of the Spanish Constitution. It is an administrative procedure initiated by the applicant through the filing of a written request directly before the Ministry of Justice.[27] The procedural steps are regulated by the general rules governing the liability of the State (Articles 139 *et seq* of the Law on the Legal Regime of Public Administrations and Common Administrative Procedure, and the Royal Decree 429/93 of 26th March). The decision adopted

[27] http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/tramites-gestiones-personales/reclamacion-responsabilidad

by the Ministry of Justice brings to an end the administrative stage of the proceedings, yet against such decision an appeal ("recurso de reposición") can be lodge or proceedings can be directly initiated before the litigious-administrative court (recurso contencioso-administrativo)
The Organic Law on the Judiciary (Articles 292-296) establishes three legal grounds for claiming compensation: (NOTE: In all these three scenarios, there ought to be a causal (direct, immediate and exclusive) relationship between the actions of the judiciary and the damage claimed. The right to claim compensation shall lapse one year)

1. The existence of a judicial error owing to the adoption of judicial decisions not consistent with the law, either for the misapplication of the legal rule, for the wrong assessment of the facts, or the omission of essential evidence. Prior to the filing of a request claiming compensation before the Ministry of Justice, it is necessary to obtain a court decision expressly acknowledging the existence of a judicial error.
2. Irregularities in the administration of justice: for example, undue delays in judicial proceedings, loss or damage of assets under the custody of judicial bodies, etc.
3. Undue remand custody: a person who has been unduly remanded in custody is entitled to compensation for the harm caused to him due to his unnecessary stay in prison if he meets the requirements set out in Article 294 of the Organic Law on the Judiciary. Under this provision, the State is liable for the harms caused by detention on remand if detainees have been acquitted on the grounds that the alleged offence did not exist. This provision was interpreted by the Spanish Supreme Court as meaning that the State was liable if detainees managed to prove either that the alleged crime did not exist or that they had not committed it. The State was not deemed liable, by contrast, when detainees had been acquitted by virtue of the principle of the presumption of innocence but there was actually no certainty about their innocence.[28] These requirements limit the right to compensation and do not seem to be in line with the ECtHR jurisprudence, which already condemned Spain for these reasons in *Tendam v. Spain*
   The amount of compensation depends on the time remanded in custody and on the personal and family consequences this deprivation of liberty entailed.

3.1. General approach to prisoners' remedies

Inmates/prisoners can file requests and complaints (dealing or not with human rights) to:
1º) The Prison Director. Complaints and requests are firstly filed before the Prison Director. However, when the complaint refers to human rights violations committed by Prison officers, inmates usually don't address the Prison Director because they fear retaliation or covered sanctions like the transfer to another unit, another prison, delays with their mail, the prohibition of some communications, visits, etc.
2º) The Judge for Prison Supervision. It is the most frequently used and trusted remedy. JVP receive around 18 new complaints every day and don't have enough means to work on them properly. They receive complaints on fundamental issues as well as complaints on superficial questions. They need however to study all of them and usually don't have time enough to do in-depth analysis and to give good motivations. JVP suggest that it would be useful to have a sort of filter in order to only analyse serious complaints.
3º) The Prosecutor (specialized on Prison supervision): According to the Organic Statutes of the Public Prosecution Services (Act 50/1981 of 30th December) and to the 5th additional provision of the Organic Law of the Judiciary there is a specialized Prosecutor on penitentiary supervision and inmates can submit complaints to the Prosecutor. However, they usually don't trust this institution that rarely reports positively on inmates situations and usually follows the prison's report.
4º) The Ombudsman. Inmates also use this possibility. However, the complaint cannot be anonymous which sometimes makes it difficult to convince inmates to claim on ill-treatment.

[28] See, for example, judgments of the Spanish Supreme Court of 28 September 1999 (rec. 4712/1995) and 27 January 2003 (rec. 7928/1998).

There is no piece of legislation formally preventing prisoners from filing requests and complaints before the Judge for Prison's Supervision, the Prosecutor and the Ombudsman at the same time and as regards the same complaint and/or request.

3.1.1. Internal complaints and requests within the prison

Although it is not ruled clearly in any piece of legislation, a procedure has been *de facto* developed which involves filing a first request (petition) inside the prison before moving to the judiciary. As it will be analysed later in this report, the lack of concrete procedural rules concerning complaints and requests inside the prison is a source of uncertainty and arbitrariness. In practice, rules used within the General Administration are the ones used in prisons too.

Prisoners file firstly any request or complaint inside the prison before going to the judiciary. If the prisoner's request is denied or in the absence of an answer the inmate can lodge a complaint directly before the Judge for Prison Supervision. One of the main problems of the procedure inside the prison is that, due to the absence of specific rules, there is no clear limit of time for the prison to give an answer to the prisoner.

In practice, inmates, as regards ill-treatment related issues, usually prefer to go directly to the judge because they fear retaliation or covered sanctions like the transfer to another unit, another prison, delays with their mail, the prohibition of some communications, visits, etc. The problem is that, due to the lack of clear regulation on this possibility, some Judges for Prison Supervision consider that those prisoners need in any case to previously file a complaint within prison before going to the judiciary, whereas some other judges accept direct complaints, without the need for previously going through the prison's complaints procedure.

As far as internal requests and complaints within prisons are concerned, it should be noted the importance of having a register of all the requests and complaints that are filed. A difference needs to be done, on this issue, between prisons under the responsibility of the Spanish Government and prisons under the responsibility of the Government of Catalonia. In the Spanish prisons system, although there isn't a real external centralized register of requests and complaints (at the level of the General Secretariat for Prisons, for example, which would be desirable as regards statistics and external monitoring)[29] inmates always receive a receipt of their requests and complaints filed inside the prison. Prisons in Catalonia, however, lack an internal complaints system and there is no adequate acknowledgment of receipt as regards requests. For example, at La Modelo Prison in Barcelona, inmates may make written requests to the director on a form or orally. Further, the director and deputies regularly visit the different Galleries and receive requests from inmates. There is however no register of the requests made and prisoners are not provided with a receipt (mainly due to the fact that orally requests are accepted); neither is there a specific internal complaints system in place and requests and complaints are mixed together.[30]

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[29] statistics on the types of complaints made should be kept as an indicator to management of areas of discontent within prisons *Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT*) from19 to 22 June 2012 CPT/Inf(2013) 8, pp. 18-19

[30] The CPT has reported on this dysfunction and considers that complaints should as far as possible be resolved within the prison itself. This requires putting in place a proper internal complaints system; for example, prisoners ought to be able to make written complaints at any moment and place them in a locked complaints box located in each accommodation unit (forms should be freely available); all written complaints should be registered centrally within the prison before being allocated to a particular service for investigation or follow up. In all cases, the investigation should be carried out expeditiously (with any delays justified) and prisoners should be informed within clearly defined time periods of the action taken to address their concern or of the reasons for considering the complaint not justified. Information on the right to appeal should also be provided. In addition, statistics on the types of complaints made should be kept as an indicator to management of areas of discontent within the prison. Introducing such a system in La Modelo Prison and in other Catalan prisons would be beneficial for inmates and prison staff as well as for the management. *Report to the Spanish Government on the*

3.1.2. General distinctions for filing requests between prisoners on remand and convicted prisoners (ranked or not ranked yet)

Both convicted prisoners (irrespective of whether they have been ranked or not) and prisoners on remand may lodge complaints and requests. Yet there are specific procedures depending on the subject area and the category into which prisoners can be classified. We will first very briefly comment these peculiarities, and then elaborate at length on the common procedure for filing complaints and requests

- Prisoners on remand

As regards prisoners on remand, they can lodge requests for **temporary release / leaves** exclusively for the following two reasons: birth of a child, and death of an immediate family member to the Prison Director.
If the Director denies the request for a special permit, the prisoner on remand may appeal such administrative decision through an action of complaint ("recurso de queja") before the **Judge who ordered their prison sentence** (indeed, as regards leaves prisoners on remand seize the jurisdiction of this judge and NOT of the Judge for Prison Supervision. For other matters such as complaints, requests or sanctions related to their life in prison inmates on remand turn to the Judge for Prison Supervision). Such appeal can be filed directly by the prisoner without the need for a lawyer's signature and is free of charges. In case this action of complaint is rejected, prisoners can still appeal: firstly before the same judicial authority within three days by lodging an action for reform ("recurso de reforma") and, if this second appeal is also rejected, they can then within 5 days turn to the higher instance. At this point, they need a lawyer to formalize the lodging of the remedy of appeal ("recurso de apelación"); prisoners can apply for a duty-lawyer and free legal aid, in which case they will not have to bear the running costs of the proceedings. There is no specified period of time within which the judicial authority has to render a decision. In practice it takes them 3 to 4 months on average.

Therefore, the main handicap prisoners on remand face when requesting special permits is that until the final decision rendered by the highest trial Court (that is, until a final decision concluding the judicial proceedings is rendered) the extraordinary reason behind the request for special permit may have expired.

Given that prisoners on remand are not ranked in any of the categories envisaged by the Spanish penitentiary system, they cannot access jobs offered inside prisons nor request ordinary permissions. They can, however, participate in the activities that are organised within the prison. The filing of any other request and complaint that may arise as regards their stay in prison follow the same common procedure for filing requests and complaints, which we detail below

- Convicted prisoners who have not yet been ranked

Prisoners over which a prison sentence has been handed down but who are not yet ranked in any of the categories envisaged by the Spanish penitentiary system (either because they were not in custody while trial was pending, or because although being in custody they are still under the observation period by the Treatment Board) may, according to Articles 80 et seq of the Criminal Code:

1. Request suspension of the enforcement of the sentence, if imprisonment or the sum of all the penalties imposed by the judgment does not exceed two years in prison. Two additional requirements must be met: It must be the first time they commit a crime (and thus have no criminal record) and they must satisfy their civil liability derived from the

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visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from19 to 22 June 2012 CPT/Inf(2013) 8, pp. 18-19.

offence (unless the declaration of insolvency is recorded in the criminal case). The application must be lodged by a lawyer before the Criminal Execution Judge. If the application is refused, the decision can be appealed the immediate superior organ in the judicial hierarchy.

2. Request suspension of the enforcement of the sentence in case of drug addicts, if the penalty does not exceed 5 years of imprisonment and provided it has been established in the judgment that addiction was a triggering element of the offence and the person enters into a detoxification program. The application must be lodged by a lawyer before the Criminal Execution Judge
3. Request to replace the execution of the penalty for the expulsion of foreign nationals from the country, if the penalty does not exceed six years in prison. The application must be lodged by a lawyer (though the applicant is heard at all events) before the court that rendered the judgment.
4. Request to be ranked initially as a third category prisoner. This application is lodged before the Prison Director of the facility where the applicant will serve its penalty. The conditions to be met are: imposition of a less severe penalty, satisfaction of civil liability, employment contract and be the first conviction.
5. Request the suspension of the enforcement of the sentence in case the convicted suffers incurable diseases. The application must be lodged by a lawyer before the Criminal Execution Judge, the illness must be properly proven through an official medical report and must lead to the applicant's death in a short time

All these procedures can last about 6 months if the decision is appealed up to the highest judicial body. The cost of litigating depends on whether the offender is a beneficiary of free legal aid (see *supra*), in which case he will not have to bear any financial cost, or whether he has a lawyer of his own choice.

As regards temporary release / leaves, convicted prisoners who have not yet been ranked also seize the jurisdiction of the judge who ordered their prison sentence. They too can only apply for extraordinary leaves grounded on the birth of a child or the death of an immediate family member exclusively. They first address the Prison Director, if the application for leave is rejected the prisoner who has not yet been ranked may appeal such administrative decision through an action of complaint ("recurso de queja") before the judge who ordered his/her prison sentence. In case this action of complaint is rejected, he/she can still appeal: firstly before the same judicial authority within three days by lodging an action for reform ("recurso de reforma") and, if this second appeal is also rejected, within 5 days before the higher instance.

As regards disciplinary sanctions they are the same for ranked and not ranked prisoners and the Judge for Prison Supervision is the competent authority for controlling the lawfulness of such measures for both, ranked and not ranked prisoners

- Convicted prisoners who have already been ranked

Persons convicted and ranked within one of the three categories envisaged by the Spanish penitentiary system (see *infra*) may:
1) appeal against the maintenance or regression of such category,
2) apply for permits (temporary leave),
3) apply for parole,
4) make requests and
5) file complaints.

The procedure for applying for **permits**, for appealing against the **maintenance or regression of ranking** and for applying for **parole** is similar to the procedure fo**r filing requests and complaints** (detailed *infra*). However, in practice, it is worth noting that complaints referring to ill-treatment are scarcely filed. The reason is that inmates fear the consequences that they may have to bear by filing them; they also fear the consequences if the JVP

finally upholds their complaint. Therefore, very few prisoners dare to file them, usually only those already serving long sentences and those ranked first category, since their situation cannot worsen(i.e. those who installed in the sociological term "learned helplessness" / “indefensión aprendida” consider that their prison situation cannot deteriorate and are thus indifferent to the consequences that may arise from their constant complaints

In Spain, the Prison Administration adheres to the wording of Prison Regulations (GPOA and PR) almost to the letter. That is why in most cases, prisoners do not expect any benefit by the prison administration (permits, progressions of category and parole), aware that firstly they will have to plead before the Courts and only after the judge has upheld their claim, the Prison Administration will finally grant them their request. The legal instruments most commonly used for the defence of inmates’ rights are the GPOA itself and the PR and the criteria agreed upon by the Judges for Prison’s Supervision (JVP), although they are not mandatory. In Spain, the 5th Section of the Provincial Court of Madrid has established many criteria that have inspired many other judicial bodies for prison execution and that has had much recognition at the national level by practitioners and the doctrine.[31]

The process must always be initiated by the prisoner itself. Requests and complaints are filed before the Prison Director, whereas application for permits are submitted before the Treatment Board, and application for parole and appeals against the maintenance or regression of category are lodged before the General Secretariat for Prisons (via the Prison Director). If the prisoners’ requests, complaints, applications and appeals are rejected by the Prison administration, the prisoner may resort to the judiciary and firstly to the Judge for Prison’s Supervision (JVP) and if the remedy is also rejected at this first instance he may appeal to the immediately superior organ.

3.2. Judiciary remedies: General complaint and request mechanism

(THE SAME PROCEDURE IS FOLLOWED FOR THE FILING OF ANY REQUEST AND COMPLAINT, INCLUDING COMPLAINTS FOR HUMAN RIGHTS VIOLATIONS)

Judges for Prison Supervision (JVP) decide through indictments/acts (“autos”) on different issues:

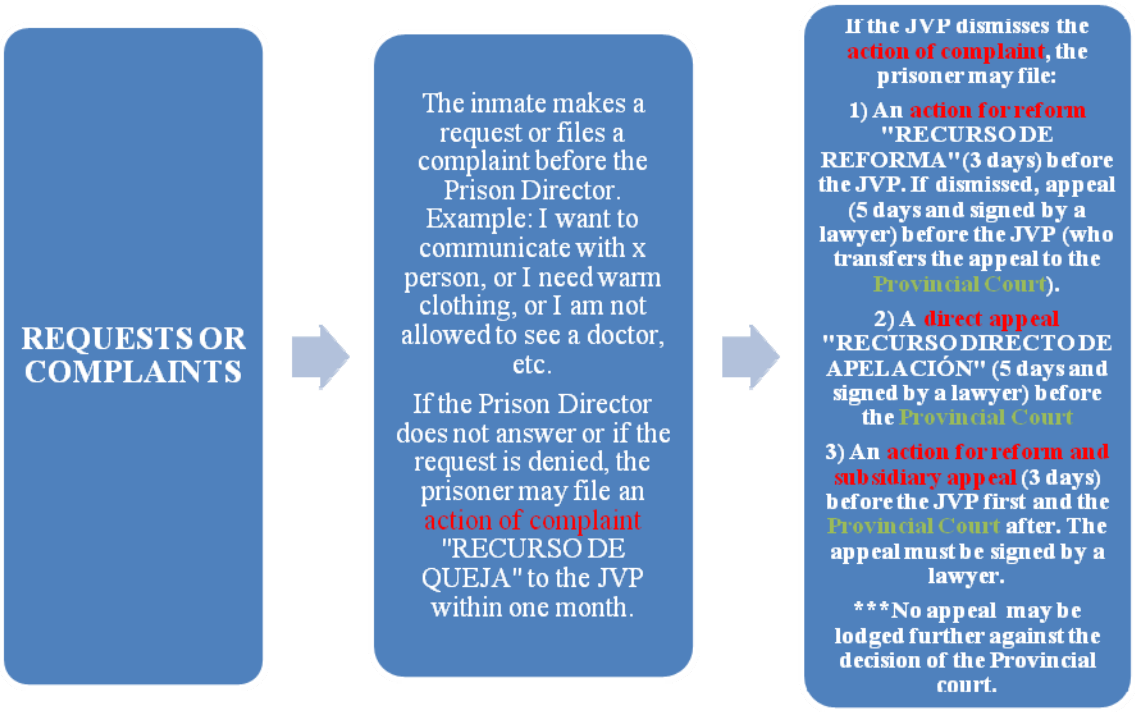
1º) Complaints/requests from prisoners and/or their lawyers. Complaints can deal with human rights related issues (the way cell inspections are done, determination of the prison, disciplinary regime, way of conducting searches on inmates, authorization of radiological explorations, absence of health care, transfer conditions, access to prisons’ reports, application of coercive measures, isolation, etc.) or not (complaints on the prohibition of holding cards games, video games or e-books, complaints for not providing fat free milk or dessert in the dinner, etc).

2º) Acts and decisions from the Prison administration. The Prison’s administration has the duty to transmit to the Judge some of its decisions, having then a judicial control of prisons’ administrative actions (see judgment of the Spanish Constitutional Court nº 175/1997). In particular, the judge controls:

a. Detainees transfer to a closed regime. Art. 76.2 LOGP
b. Detainees’ limitations on their regime. Art. 75 RP
c. Use of coercive means. Art. 45.2 LOGP
d. Communications interception. Art. 51.5 LOGP
e. Application of the following measures: art. 20.3 RP (staying more than 5 days in arrivals units), art. 34 (transfer), art. 44 RP (suspension of oral communications), art. 95.3 RP (transfer to a closed regime).

[31] For example: Traditionally, Judges for Prison’s Supervision denied permissions or progression of category whenever prisoners had other pending criminal proceedings (even if they met the requirements of art. 154 of the Prison Rules). The 5th Section of the Provincial Court of Madrid clarified that, according to the correct interpretation of the presumption of innocence, rights or benefits could not be denied only on that basis, without an appropriate assessment of all the prisoner’s circumstances in a judgment with all due guarantees.

FILING REQUESTS OR COMPLAINTS



As shown in the above scheme, within prisons, requests and complaints are filed through a specific application form ("instancia") which has attached to it a tracing paper, where a copy of the written text remains. Inmates fill in this form of their own handwriting and hand it in to the Head of Module or to the Educator, who submits it to the Director. There is no specified period of time within which the Director has to reach a decision. However, if within three months from the date of the receipt of the request, the Director has not taken any action, the prisoner may file an "action of complaint" ("recurso de queja" to the JVP in charge of supervising the facility where the inmate serves his sentence against the **implied** rejection of the request or complaint ("recurso de queja por silencio administrativo"). The prisoner may also file an action of complaint before the JVP if the Prison Director **explicitly** refuses the request or dismisses the complaint. In both cases, implicit or explicit rejection of the request/complaint by the Prison Director, the inmate has one month (30 calendar days) for lodging the action of complaint.

These actions to the JVP can be filed directly by the prisoner of their own handwriting without the need for a lawyer's signature and is free of charges. Usually prisoners lodge this document and submit them "on open" to the prison postal service so that they arrive sooner. There is no sample-form to be used as a template, but rather all kinds of writings are accepted.

When the JVP receives the action of complaint raised by the prisoner against the denial of his request or complaint, he opens a file and initiates proceedings. The Judge asks the Prison for reports and forwards all to the Public Prosecutor. The judge either rejects or upholds the action of complaint and must justify the decision. If rejected, the prisoner has 3 options:

1. Within three days, the prisoner may bring an action for reform "RECURSO DE REFORMA". Once this appeal is received in court, the same procedure as with the action of complaint is followed: the documents are forwarded to the Public Prosecutor so that he may take into consideration the prisoner's allegations. The prosecutor issues a report and refers back to the Judge for Prisons' Supervision, who settles on the issue by an indictment. If the Judge dismisses

the application once again, the prisoner has 5 days to file an appeal RECURSO DE APELACIÓN. At this point, prisoners send a written request for a lawyer (since a lawyer's signature formalizing appeals RECURSOS DE APELACIÓN is mandatory). From that moment on, the designated lawyer also has 5 days to file the appeal

2. Within 5 days, the prisoner may lodge a direct appeal "RECURSO DIRECTO DE APELACIÓN" straight before the Provincial Court. This direct appeal must be formalized by a lawyer (a barrister "PROCURADOR" is however not needed). If the prisoner has not fulfilled this requirement, the court itself asks the bar association to appoint a duty-lawyer, who will then have a five-days period to formalize the appeal.

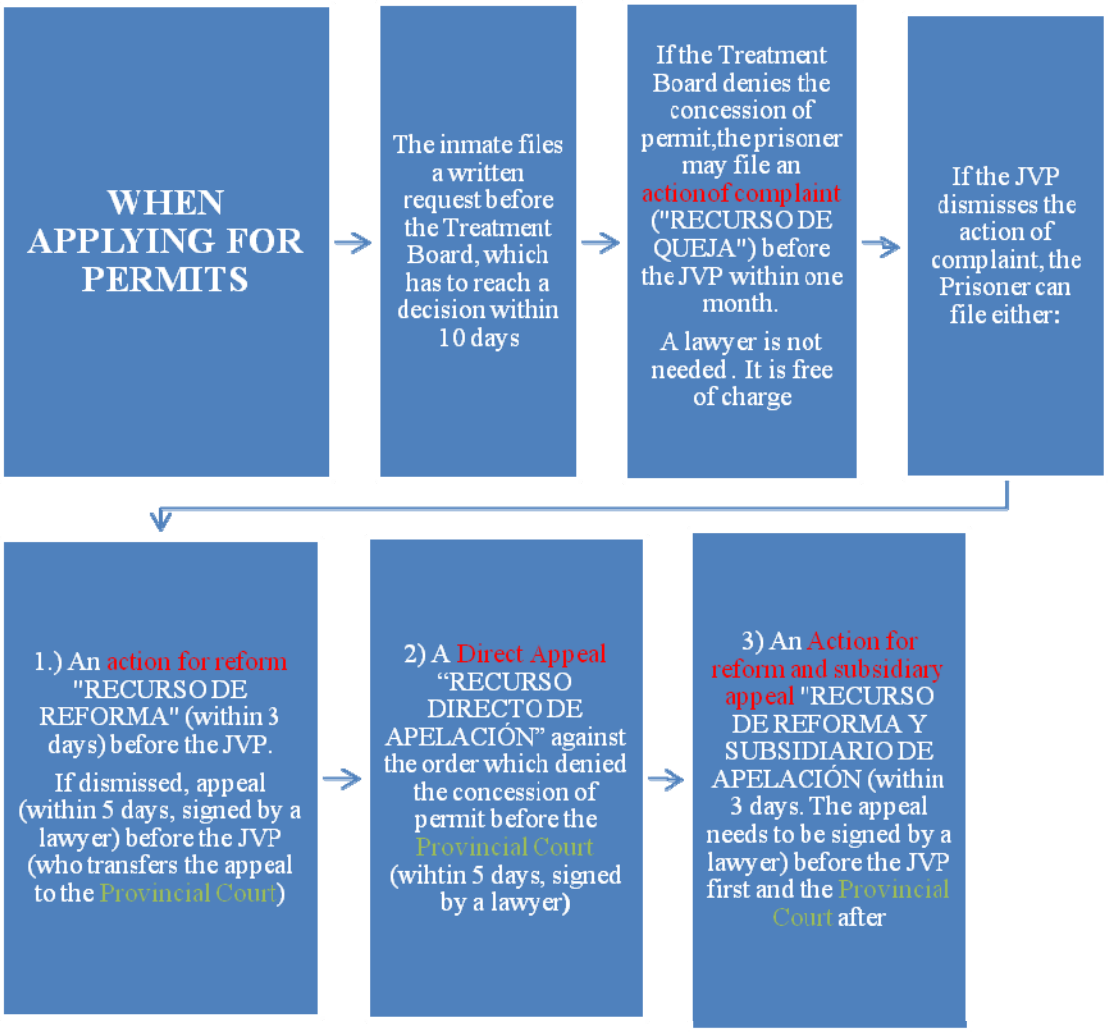
3. Within 3 days, the prisoner may bring an action for reform and subsidiary appeal "RECURSO DE REFORMA Y SUBSIDIARIO DE APELACIÓN". The action for reform needs not be signed by a lawyer and usually prisoners submit this document on their own handwriting. However, prisoners must at this point already indicate whether they would like to be assigned a duty-lawyer in case the action for reform is dismissed and the subsidiary appeal is then lodged. The way of proceeding is always the same: the judge receives the action for reform, requests reports to prison, and refers the case to the Public Prosecutor who in turn issues a report. Based mainly on the Prosecutor's report, the Judge by indictment either rejects or upholds the action for reform. If rejected, an appeal "RECURSO DE APELACIÓN" signed by a lawyer is brought before the Provincial Court.

Once all the lawyer's allegations are handed to the Province Court, the date for the final deliberation and rendering of decision is specified. Against the decision issued by the Provincial Court, no appeal may be lodged further. The procedure that follows since the first inmate's request until the Provincial Court renders its final decision and notifies it to the Prison may last, on average, from 6 to 8 months. It is free of charge since the costs of prosecution are waived officially and the majority of prisoners are often granted legal aid (though they may also opt for a private attorney).

3.3. Judiciary remedies: Specific complaint and request procedures

3.3.1. Application for permits (temporary leave)

APPLICATION FOR PERMITS

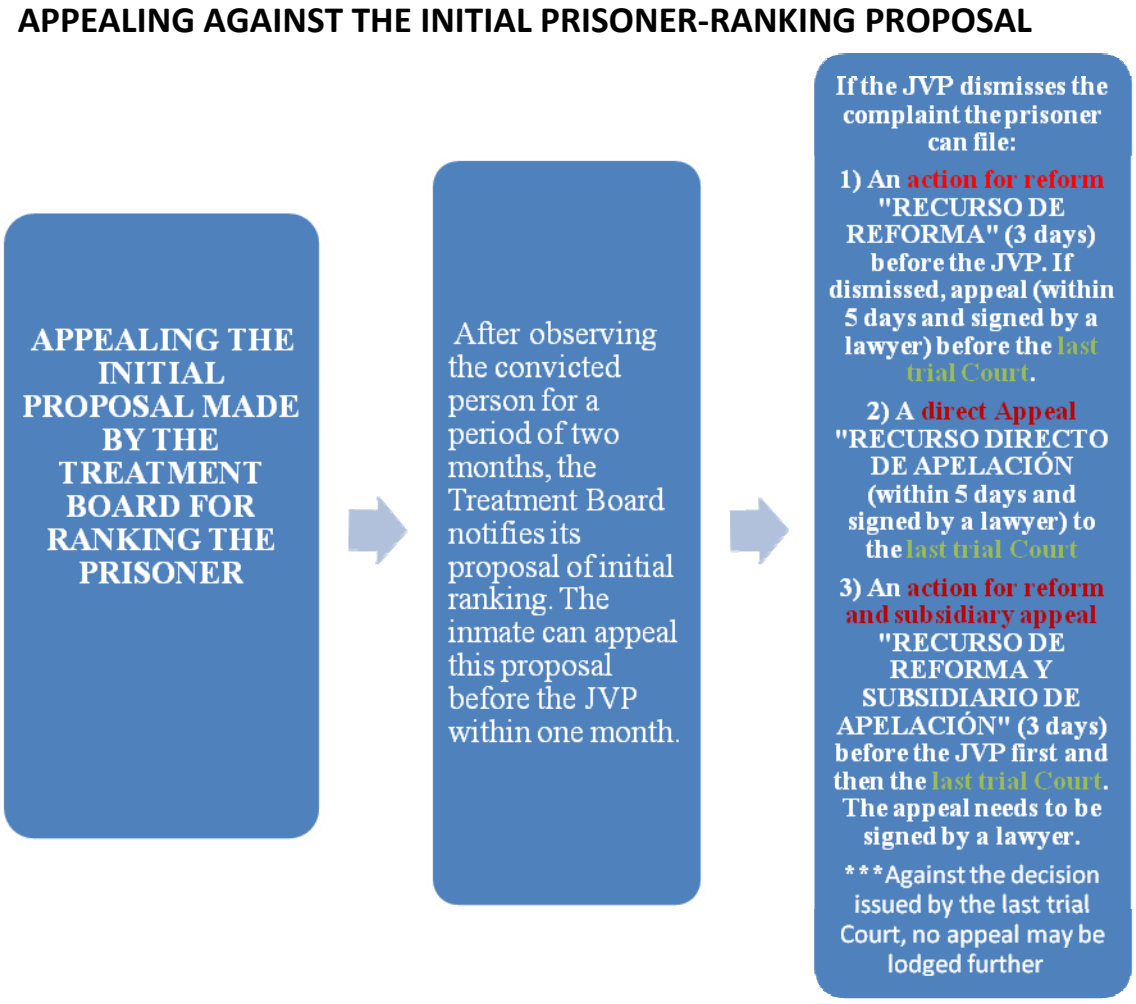


As shown in the above scheme, permits are considered a prison benefit. Permits are regulated in art 154 of the Prison Rules. The requisites that must be met to be granted a permit are: a) have served ¼ of their sentence, b) be ranked as a second category prisoner, and c) good behaviour. The Treatment Board evaluates the granting of permits. If the Board denies its concession, the prisoner may file a complaint ("recurso de queja" "action of complaint") on their own behalf, without the assistance of a lawyer, before the Judge for Prison's Supervision.

When the Judge for Prison's Supervision receives the action of complaint raised by the prisoner against the denial of permit, he asks the Prison for reports and forwards all to the Public Prosecutor, who usually reports systematically in the negative about granting the permit. The reports of the Public Prosecutor are often stereotyped writings that show none or little knowledge of the prisoner they are reporting on. Prosecutors tend to cling to the reports of the Board of Treatment, which issues two: one reporting on the individualized treatment program pursued by the prisoner and known as PIT; and another report known as risk variables tables. Based on these two entry-forms, which are filled in by ticking boxes, the Prosecutor forms his opinion on the issue and forwards it to the Judge for Prison's Supervision who then decides.

The judge through an indictment either rejects or upholds the action of complaint and must reason the decision.
When appealing, defence lawyers frequently plead the lack of a sufficiently reasoned decision, the abuse of Standard Forms, the errors identified in Prison reports, and often provide many documents to attest good behaviour (for example: diplomas, record of praiseworthy acts, participation in workshops, certificate attesting the prisoner's participation in a program to support inmates with an increased risk of suicide, certificate proving that their family are enrolled in the municipal register, guarantees and endorsement from either institutions or family members that host them during previous Prison's leave, employment contract if any, letters of recommendation, etc.). Lawyers can also request medical reports, reports on drug addiction, etc.

3.3.2. Appealing against the initial prisoner-ranking proposal



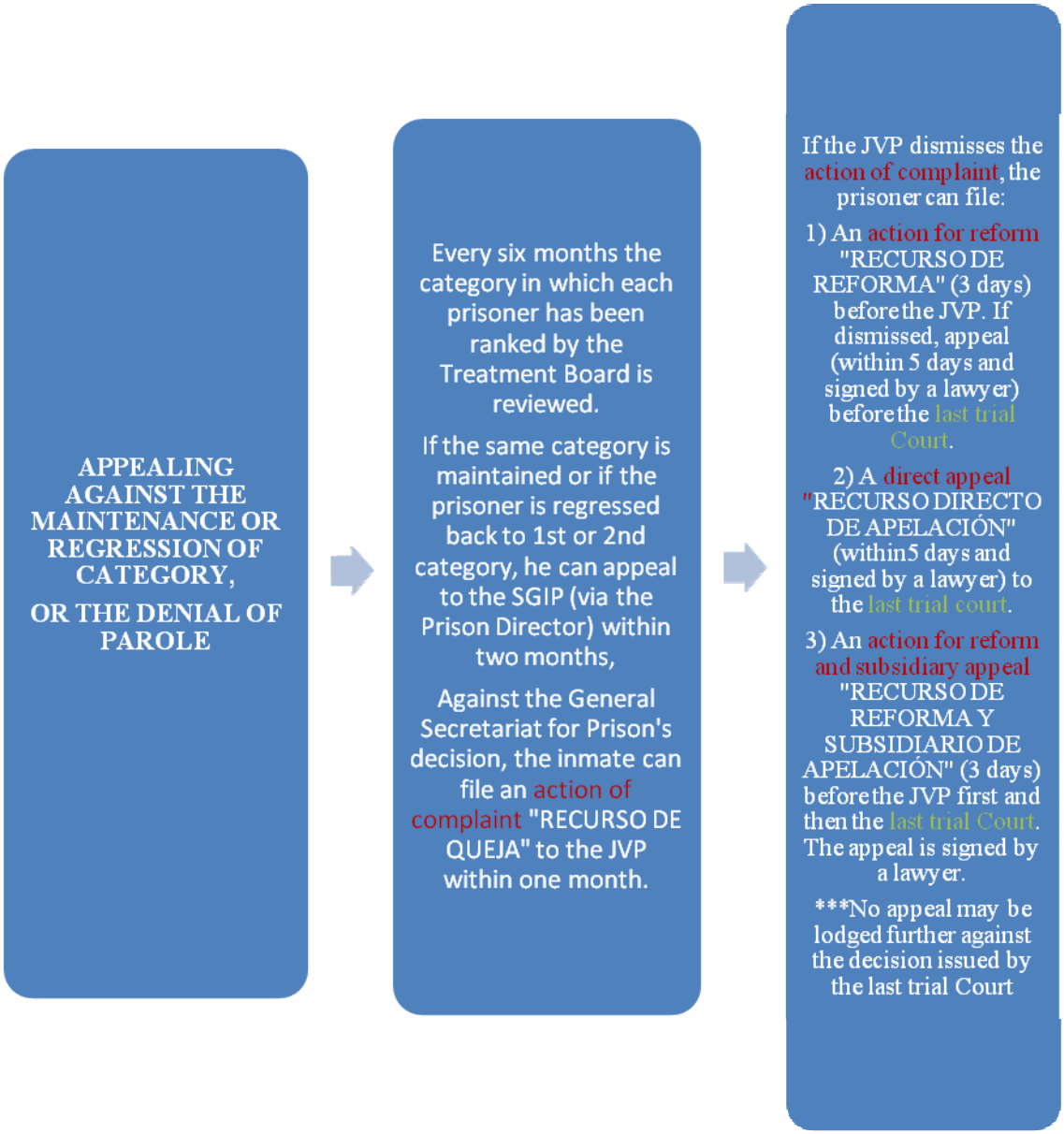
The procedure is similar to the one pursued for permits. If pleaded until the last judicial instance, it may last up to 8 months. It is free of charge if the prisoner has been granted free legal aid.

3.3.3. Appealing against the maintenance or regression of prisoner category or appealing the denial of parole

In Spain, each person is assigned a regular prison situation or a treatment category as they are named by the GPOA. The first category ("primer grado") corresponds to a closed or maximum security regime. The second category ("segundo grado") is the ordinary regime, and it is also applied to detainees, remand prisoners, convicts who have not been assigned a particular category because they have not yet received the testimony of the judgment and inmates already in jail to whom simultaneously a Tribunal has decreed preventive detention. The third category ("tercer grado") corresponds to an open regime or home detention curfew. Each category has a particular regime (set of house rules) regulating life in prison (schedules for daily walks in the prison courtyard, searches, activities, exit permits, recounts, etc.) which will enable the realization of a given prison treatment. This assignment process is called level classification. In sum, there are three categories (1st, 2nd, and 3rd), although the doctrine considers parole or conditional liberty as the fourth category.
In the detention facilities where second category prisoners serve their prison terms there are mandatory activities (personal hygiene, cleanliness and tidiness of cells) as well as time rules that must be respected by all. Before 8.00 inmates may shower and the first count of inmates takes place. At 8.30 they have breakfast and later, until 13.30 the activities take place in each person detachment or in case of not having anything to do, prisoners are in the yard. At 13.30 it is time for the distribution of food and from 14.30 onwards prisoners return to their cells and there is a second recount. They stay locked until 16.30, when prisoners go out into the yard or other activities are performed. At 19.30 they go to the dining room for dinner and then until 21.00 they are allowed to go out to the yard again, coming back to the cell at that hour. At 21.30 another count is performed and the light is turned off at 00.00.
Prisoners considered potentially dangerous and capable of destabilizing discipline, security and good order within the prison or considered not suitable to fit the ordinary scheme of life in prison serve their prison terms in first category prisons or modules. Their detention regime is characterized by the following features: Absolute separation from the rest of the prison population, individual cells in any case, limitation of activities, greater control and surveillance, specific intervention program carried out by specialized and stable technical teams, 3 hours in the yard (shared with maximum 1 yard mate) + 3 hours of daily scheduled activities (shared with maximum 5 fellow inmates), daily search of the cell and personal search, including full body search if it is suspected that the prisoner is in possession of dangerous items, food is served by passing trays, showers during yard time, and regular medical visits. Inmates ranked first grade (as well as those who are isolated), spend 21 hours in a cell continuously and 3 hours out into the yard with another inmate of the same module[32].
As regards the third category modules or social integration centres, they shelter prisoners who are serving their prison terms in a semi-detention regime since they spend the day outside prison, usually working, and return to prison only at nights.
Parole or conditional liberty is the final stage in the execution of a sentence. It is like the "fourth degree". It allows prisoners to be released before the end of their prison sentence upon the condition not to re-offend and upon the condition to comply with the rules of conduct imposed by the Judge for Prison's Supervision. During this time the person is under the supervision of the Prison's Social Service (external), under the General Directorate of Territorial Coordination and Open Environment ("Dirección General de Coordinación territorial y medio abierto"). For an individual to enjoy parole he/she must be classified as a third category prisoner, must have at least served three-quarters of the sentence, and must have a record of good conduct and an individually established favourable prospect of social

[32] *Mirando el abismo. El régimen cerrado,* Cabrera Cabrera, Ríos Martin, Pontificial University Comillas. Saint Mary Foundation. 2005. Madrid. This study analyses the situation of these prisoners. In Spain, there are currently (as of November 2015) 1.040 prisoners classified in first grade of treatment, 961 men, and 79 women.
http://www.institucionpenitenciaria.es/web/portal/administracionPenitenciaria/estadisticas.html

reintegration. The abovementioned circumstances shall not be deemed fulfilled if the offender has not satisfied civil liability.



The procedure may also last up to 6-8 months if pleaded until the last judicial instance. It is free of charge if the prisoner has been granted free-legal aid, whose counsel is only mandatory for filing the last appeal before the last trial Court.

B. Map of complaints covered by national legal remedies

List of thematic areas in the field of prisoners' rights protection covered by legal remedies:

1. Prison facilities

Prison Directors are, in principle, obliged to admit prisoners who **voluntarily apply** (provided with the so-called "imprisonment warrant", a document issued by the Criminal Execution Judge) for serving their prison sentence in that particular prison. If the prison is full, Directors must however admit the prisoner and then request the prisoner's transfer to another centre. The flow of prisoners is regulated by

the General Secretariat for Prisons; hence, Directors can just suggest and, eventually prevent, transfers yet the ultimate decision is taken by the General Secretariat for Prisons. In this sense, Prison Directors are vested a limited power.
If prisoners need to be transferred, according to the Spanish legislation governing Prison issues,[33] prisoners should be allocated, to the greatest extent possible, to prisons situated in the proximity of the city or province of homestead, especially as regards those who have no criminal record and those who are not troublesome. However, some courts do not consider family proximity the only criterion, but take also into account art. 72 GPOA which states that when determining the most appropriate prison for allocating a particular convict, regard should be had of his/her personal, procedural and penitentiary circumstances. Therefore, many inmates (slightly less than half of the prisoners) are serving sentences in prisons outside the provinces of family residence[34]. This is because the criteria which predominates in the distribution of prisoners is namely security and internal order of prison[35]. This situation is continuously a concern in the reports of the Spanish Ombudsman[36]. Indeed, a great number of complaints voiced by prisoners refer to serving their prison terms in detention facilities located far from their families, apparently without other reasonable arguments than the mere lack of space.

As for the **cell** (except for the so called first category regime or for the isolation sanction or the programme for auto protection--art. 75 GPOA) hardly ever hosts just one inmate, the general rule being that of sharing a cell with at least two people (sometimes even three or four other inmates), and there is no choice on whom to share the cell with. Indeed, inmates share cells with other prisoners designated by the Prison Administration with a mandatory character, and without any choice to contest that decision. This leads to many problems of cohabitation within the prison. In Catalonia there are currently prisons in which six inmates are sharing the same cell (for example in the jail called La Modelo)[37].

[33] See for example:
-Article 25 of the Spanish Constitution establishes that the enforcement of custodial sentences should be aimed at the rehabilitation and social reintegration of prisoners. This mandate requires that persons sentenced to imprisonment are not removed from society, but must continue to be an active part of the social community. For the observance of this consideration, the rehabilitate-oriented constitutional provision maintains a dual requirement. On the one hand, encouraging the active contact of inmate-society, which requires from the Prison Administration the beginning of a process of social integration of the prisoner through the maintenance / enhancement of those social ties (family, friends, social community) he/she had before admission to prison. On the other hand, the constitutional provision requires the avoidance of social dislocation capable of hindering the process of social integration and personal recovery. To achieve this goal, the criteria guiding the General Secretariat of Penitentiary Institutions on the allocation of prisoners should aim at preventing that the enforcement of sentences triggers family uprooting motivated by the geographical distance between prison and their home address.

-Articles 12.1 GPOA states: 'the policy behind geographical redistribution of prisoners must seek to prevent the breakdown of social ties, while trying to match the territorial areas, insofar as possible, with the map of the State of Autonomies ".

-Article 9 PR provides that the aim of treatment in prison is to "endow the prisoner with the intention and the ability to live respecting criminal law ... to make him/her assume an attitude of self-respect, and to be individually, as well as socially responsible towards his family". Compliance with these objectives clearly calls for the allocation of inmates in prisons situated in proximity to their families' residence.

[34] "*Mirando el abismo: el régimen cerrado*", Cabrera Cabrera, Ríos Martín, Pontificial University of Comillas, Saint Mary Foundation, Madrid, 2005.

[35]This is particularly true as regards prisoners convicted for terrorism and prisoners ranked as first category. As regards prisoners belonging to ETA organization, the Spanish government follows a policy of dispersion and it is therefore actually a general established procedure to out them in prisons far from their places of residence. In respect of prisoners ranked as first category, they serve their prison sentence in one of the facilities which are specifically adapted to this kind of treatment

[36] See: Defensor del Pueblo. Informe Anual para las Cortes Generales 2013, pp. 132 et seq. https://www.defensordelpueblo.es/es/Documentacion/Publicaciones/anual/Documentos/Informe_2013.pdf

[37] Ibídem

2. Living arrangements

Temporary leaves from prison or permits ("permisos") entail the temporary release of the imprisoned person. Regular or ordinary permits: are those granted periodically to prepare for life in freedom. Their concession is optional and a report by the Treatment Board is required. They are subjected to conditions and are limited in duration. The special permits are those granted on humanitarian grounds of severe and exceptional circumstances. Their concession is mandatory ("shall be granted"), duration is unlimited and prisoner must respect the security measures that the prison administration and the supervising judge may consider appropriate.

Ordinary permit is granted for six days, up to a maximum of thirty-six per year, as regards second category prisoners ("segundo grado"). Third category prisoners ("tercer grado") can enjoy up to forty-eight days a year, plus weekend-permissions. For an individual to be granted an ordinary permit he/she must have served a quarter of the entire sentence (except for those who have been directly classified as third category prisoners), must not have misconduct and must be a second category prisoner.

The Prisons Act regards various types of **communications** when in prison: oral, written, telephone and special.

Prisoners have two communications of at least twenty minutes per week. However, if circumstances allow for it, they can accumulate the time of the two into one weekly visit (art. 42.3 PR). As for those classified as third category prisoners, they may communicate every time they want when their working hours allows it. Those inmates serving their prison sentences in facilities located far from their home address, may upon request to the prison warden accumulate in one day all oral communications, and/or even add and attach to the latter other special communications (i.e. family "vis a vis") to which they are also entitled.

Letters can be sent from prison to prison, but will be mailed through the prison administration and can be monitored.

Phone calls are authorized generally to all prisoners with up to five phone calls a week, each lasting five minutes, but may not be accumulated from one week to another, neither the number of calls nor their duration. Phone calls are conducted in the presence of an official.

There is the possibility of communicating "vis a vis" (face to face), without glass or bars. There are three types of "vis a vis" communications: intimate, family and cohabitation.

a) intimate, shall be granted at least once a month (so that both, sentenced and detained persons can have sexual relations).

b) At least once a month prisoners are also entitled to a one to three hours communication with family and friends.

c) At least once every three months communications of cohabitation can be granted to prisoners who do not enjoy permissions so as to allow them to communicate with their spouse or spousal equivalent and their children aged fewer than ten for a maximum of six hours

3. Disciplinary measures

The disciplinary regime refers to the prohibited conduct in prison and the penalties provided for. It applies to both convicted and remand prisoners except those who are admitted to psychiatric facilities. Infractions are classified as very serious, serious and minor.

Body searches are aimed at discovering if the prisoner is hiding in his / her body or his / her clothes prohibited substances or dangerous objects. There are certain minimum requirements that must be met for carrying out body searches and there must always be a clear justification for them. The cell is to be considered the usual place of residence of the prisoner, and is entitled to all the protection afforded to the domicile of non-incarcerated. Therefore, a cell search should be done with the same guarantees as

standard home inspections (i.e. judicial authorization, attested by the judicial secretary –in this case the prison administrator- and two witnesses).

The coercive means which are legally provided for are the provisional solitary confinement, personal physical force, rubber fenders, appropriate aerosols or sprays and handcuffs. These coercive means are normally securely stored at the head of service headquarters and are controlled through a record book containing several annotations, such as: the date when they were used, kind of coercive means applied, concise factual report, other measures taken. The use of fire arms by prison officers in the performance of their duties is prohibited. The use of the afore-mentioned coercive means is directed exclusively to the restoration of order. They must be strictly proportional to the intended purpose, and never be used as a disguised sanction. Their implementation will last the time strictly necessary, and they will be used when there is no other less burdensome way to achieve the intended purpose. They cannot be applied to pregnant or nursing women up to six months after termination of pregnancy, or those accompanied by children. They are not to be applied either to prisoners convalescent from serious illness, except when their acts could result in an imminent danger to their safety or that of others.

4. Health care

Inmates are entitled to ensure that the Prison Administration cares for their life, integrity and health. Furthermore, all prisoners without exception are guaranteed health care equivalent to that provided to the entire population[38]. The medical assistance has a comprehensive character aimed at both prevention and healing and rehabilitation.

Regarding the health care offered in prisons the following consideration must be noted:

- Lack of adequate resources for providing optimum healthcare in prison infirmaries to sick prisoners with certain diseases. Only primary care is provided. The present medical staff is often insufficient (only 1 doctor for 1,200 inmates).
- The monitoring of certain diseases, especially AIDS, requires a continuous update on pharmacological advances with combined therapy, preventive measures and specific individualized monitoring, impossible to ensure in the prison environment as currently structured.
- Access to public hospital network is reserved for the most severe cases and always following post-event diagnosis. As a result several cases of late diagnoses (pneumonia, toxoplasmosis, encephalopathy) occur.
- Motivated by the lack of hospital beds, the seriously ill people are continuously transported between their cells and the hospital prison without the possibility of prolonged hospital stays that dignify their situation. Prisons' Infirmaries are not prepared to function as hospital modules. Overcrowding and coexistence of different diseases (even in some Psychiatric prisons) worsens the stay since it adds distress to the disease itself.
- Prisoners suffering from mental illness who are in prison are not placed in special mental health centres. In Spanish prisons there is a very high number of people with mental health disorders that should be treated by specifically trained personal, but Spain has only two Psychiatrist Prisons, one in Sevilla and one in Alicante, with very few vacancies, so there is a clear overbooking and it´s clearly not enough for all existing cases.
- Another issue related to health care deals with the right to the provision of complementary medical benefits (drugs, but also other basic means like glasses, hearing aids, …) Art. 139 of 1981 RP included them for inmates not having economic resources but the 1996 RP does not refer to them. However, these

[38] In this sense the Judges for Prison supervision urge the relevant authorities to seek to overcome the dysfunctions that exist as regards the provision of health care to inmates, since this disparity violates the right to equal access to a constitutional right, such as the right to health, whose scope should be the same for sentenced and not sentenced people.

resources can be understood as included among the right to "basic complementary benefits". Dentist care is the same as provided by the Social Security to any citizen.
- The number of suicides (25-30 per year) is also of special concern. There is a programme for the prevention of suicides in order to identify potential cases and have a specific supervision on them.

5. Available statistics

In Spain, there are 50 Judges for Prison´s Supervision (JVP) and one Central Judge for Prison´s Supervision (attached to the Audiencia Nacional). They deal with 34.000 cases per year which means that each Judge has around 640 cases per year. Most of the cases are on permits (35%), penitentiary ranking (30%), parole (25%) and complaints (10%)[39]. Complaints related to human rights violations would enter this last category. More concrete data are confidential and it is not possible to access them.

C. Assessing the effectiveness of the remedies

As stated earlier (see *supra*, Section I of this report), complaints at the ECtHR about ill-treatment in Spanish prisons are currently scarce. The main reasons for such a low level of complaints are:

- on the one hand, a bigger control inside the prisons, thanks to the video cameras and guarantees offered by the prison system;
- on the other hand, prisoners' fear of retaliation, or inmates lack of trust in the system (they often consider that the judiciary trusts more the prison than inmates).
- in addition, inmates don't know how to access the ECtHR and usually prefer to end their conviction without accessing again the judiciary (see end of section 1 above).

All remedies exposed above need to be revised critically, in particular, in the light of the interviews undertaken in the framework of this project but also in the light of many reports done by independent sources (Ombudsman, CPT, etc., see *infra*).
Indeed, after having interviewed several prisons' practitioners –lawyers specialising in prisons law, Prison Supervision Prosecutors, Judges for Prison Supervision (JVP), magistrates who resolve appeals against orders made by the JVP, NGOs, prison officers and the Mechanism for the Prevention of Torture depending from the Ombudsman's office- as well as some prisoners, we have reached some conclusions regarding the positive and negative aspects of the Spanish penitentiary system. However, few of them concern the Spanish remedies system.

1. Good practices of the domestic system

As for the positive aspects or strengths, we can highlight the following ones:

1) The General Prison Organic Act (GPOA) is a good law and the penitentiary legal system is acceptable.
2) Spain has modern and well equipped infrastructures (except a few old prisons that are in very bad conditions). All respondents agreed that Spanish prisons are ranked among the best in Europe.
3) The prison system is a system of guarantees in the sense that there is a lot of judicial control.
4) Human rights violations related to abuses or ill-treatment inside the prison are not generalised, but they are an exception. Complaints about ill-treatment in prison are almost non-existent today. The main factors are the greater control that exists inside the prison through the cameras and the prison system itself, which is considered to offer many guarantees.
5) However, it should be noted that it is very difficult to control if these ill-treatments exist and to what extent because prisoners do not dare to report them. It is due to several reasons:

[39] Data obtained from the CENDOJ: www.cgpj.es/datosactividadjudicial

- They are afraid of reprisals.
- They do not trust the system: they know that security officials and the prison physician enjoy a presumption of truthfulness, and do not expect judges to conduct a thorough research about their complaints
- They do not know how the ECtHR works and how to get to the Court.
- They prefer to serve their sentence as soon as possible and forget about everything related to the legal world and life in prisons.

6) In some cases, penitentiary treatment programs, which are pioneer in Europe are being implemented -Good practices-, but they are not held in prison, and they are not generalised. These programs are namely carried out by the Judge for Prison´s Supervision number 1 of Madrid, as a requirement (compulsory program) for accessing to parole. These treatments consist of:

a) Those prisoners convicted of crimes against public health who do not have drug addiction receive special treatment in the last phase of their prison sentence. This treatment is not offered by the prison administration, but it is carried out by the SAJIAD (legal service for advice and assistance to drug addicts), which is an advisory service for judges and drug addicts located in Madrid next to the Courts.
b) Those prisoners convicted of violent crimes receive as well a special treatment led by the abovementioned service (SAJIAD).
c) Those prisoners convicted of serious imprudence resulting in death by motor vehicle receive special treatment, led by SAMUR in Madrid (Municipal service of relief and rescue assistance)

It should be noted that the CPT has also pointed out some positive aspects:
- Relations with the outside world:
"The CPT's delegation found that the favourable situation of promoting contact with the outside world, observed during previous visits, persisted. Prisoners were entitled to two 20-minute visits per week, with a maximum of four visitors; prison management may authorise that these two weekly visits, which take place in closed visiting booths, be accumulated. In addition, prisoners may receive two monthly open visits, lasting between one and three hours each, one of them being an intimate (so-called vis-à-vis) visit, the other from close relations. Further association visits, lasting a maximum of six hours, from the spouse or partner and children of up to ten years of age may also be authorised.
In addition, prisoners are entitled to receive and send letters and to make telephone calls. According to the information received by the delegation in the establishments visited, inmates were allowed to make five telephone calls every week, each call lasting some eight minutes."[40]
- Disciplinary procedures:
"The prisoners are able to benefit, in practice, from the formal safeguards surrounding the disciplinary procedure (notably, the requirement that proceedings be served on prisoners in writing; the possibility to be assisted by a third party, including a lawyer; the possibility to present evidence and the requirement that a decision declaring evidence inadmissible be motivated; the possibility to appeal)"[41]

2. Dysfunctions of the domestic system

As far as dysfunctions are concerned (weaknesses of the Spanish penitentiary system or areas to be improved) that could infringe on certain fundamental rights aspects, it should be noted that

2.1. On remedies

1) As it has already been mentioned earlier, it is worth noting that, in Spain, there is no penitentiary procedural law. There was a project in 1997 and in 2005 but they were finally not adopted.

[40] CPT/Inf (2013) 6, p. 42.
[41] CPT/Inf (2013) 6, p. 40.

Therefore, in practice, Judges for Prison Supervision (JVP) have currently a very important role and establish *ad hoc* criteria. For example, as far as time-limits are concerned, a mixture between the administrative and the criminal procedure is being used. The main problem is that these criteria are not mandatory and their real enforcement depends on each individual judge. In practice, we have noticed that there are big differences from one judge to another and inmates actually know that and are aware that their requests and complaints will have a different result depending on the JVP in charge of their case. **In view of this lack of uniformity and predictability it can be said that, to a certain degree, the Spanish penitentiary procedural system suffers from legal uncertainty**

2) In particular, a dysfunction that has been pointed out is the absence of a clear direct access to the judiciary as regards complaints of ill-treatment (prisoners first complain before the JVP who then forwards the claims on ill-treatment to criminal judges for investigation). Although some JVP have accepted direct complaints from inmates (that is without them having previously filed their complaints within prison), most of them consider it is mandatory, in application of general administrative law provisions, to previously file any petition within prison and thus consider it as a necessary pre-requisite to be satisfied before appealing to the judiciary. It could thus be said that t**he external system of legal remedies for prisoners as regards ill-treatment lacks to a certain extent clearness and confidentiality and it is not direct**

3) As far as internal complaints and requests are concerned, **there isn't a real external (at the level of the General Secretariat for Prisons) centralized register of requests and complaints (**which would be desirable as regards statistics and external monitoring). As for prisons in **Catalonia, they lack an internal complaints system** and there is **no adequate acknowledgment of receipt as regards requests.**

4) As far as judicial remedies are concerned, **the lack of specific compensatory remedies needs to be pointed out.** In addition to the claim for compensation for damaged caused by judicial error for irregularities in the administration of justice (regulated in Article 121 of the Constitution and Article 292 of the Organic Law on the Judiciary) a person who has been subject to pre-trial detention is entitled to compensation for the harm caused to him due to his unnecessary stay in prison if he meets the requirements set out in Article 294 (1) of the Organic Law on the Judiciary. Under this provision, the State is liable for the harms caused by detention on remand if detainees have been acquitted on the grounds that the alleged offence did not exist. This provision was interpreted by the Spanish Supreme Court as meaning that the State was liable if detainees managed to prove either that the alleged crime did not exist or that they had not committed it. The State was not deemed liable, by contrast, when detainees had been acquitted by virtue of the principle of the presumption of innocence but there was actually no certainty about their innocence.[42] **These requirements limit the right to compensation and do not seem to be in line with the ECtHR jurisprudence, see Tendam v. Spain which has been already discussed in the first section of the present report**

5) On fair trial conditions, we could point out the fact that a **lawyer is only mandatory when appealing a JVP decision**. Sometimes it is too late in order to have a proper defence and in particular appropriate means of proof (forensic reports…). The inmate/prisoner appears exceptionally before the JVP.

6) Evidences indicating the possibility of ill-treatment during the *incommunicado* detention continue not to be thoroughly pursued by the Spanish judicial authorities and some of the recommendations made by international bodies as regards legal safeguards continue to be disregarded, particularly: the right of access to a doctor of one's own choice and the right to meet privately with the court-appointed lawyer.

[42] See, for example, judgments of the Spanish Supreme Court of 28 September 1999 (rec. 4712/1995) and 27 January 2003 (rec. 7928/1998).

Recommendations made in connection to the effectiveness and thoroughness of the investigations into the claims of alleged ill-treatment during incommunicado detention could be extrapolated and applied to the investigations which domestic authorities (be it the judiciary or the Prison Administration) carry out in prisons when either remanded or sentenced prisoners report acts of ill-treatment. Indeed, there is room for improvement in this regard: firstly there is need for an increased receptiveness of the photographic documentation of injuries sustained in prison; secondly, the report of the testimony received should be more detailed and reasoned (i.e. more in line with the so-called Istanbul Protocol); finally, a copy of the report should always be delivered to the inmate concerned).

2.2. On other issues

1) Cells

In Spain (except for the so called first category regime or for the isolation sanction or the programme for autoprotection- article 75GPOA), cells are not individual and the general rule is to share a cell. Prisons establish with whom the prisoners have to share the cells and this is compulsory, the inmates not being able to choose their mate. This situation creates many problems of cohabitation in prison and infringes the right to privacy. Furthermore, European Prison Rules (articles 18.5.6 and 7) are disregarded insofar as they establish that:

18.5 Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation.

18.6 Accommodation shall only be shared if it is suitable for this purpose and shall be occupied by prisoners suitable to associate with each other.

18.7 As far as possible, prisoners shall be given a choice before being required to share sleeping accommodation.

2) Regarding to the specific treatment for prisoners.

One of the main problems and the most important challenge of the Spanish system is related to the treatment in prison in connection with the crime for which the person has been convicted. Despite some isolated examples which have been signalled above, there is a deficiency in this regard. More attention should be paid to the treatment in prison and more professionals are needed, but even with the number of professionals we have at the moment, we could do it much better. The lack of specific treatment has been highlighted by all respondents unanimously.

3) Regarding EU foreigners convicted in Spain

They are usually serving sentences in prisons located far from international airports, so the family visits become especially difficult at three levels:
a) economic, since they must invest much money in journeys (from their country of origin to the Spanish nearest airport, and from there to the prison and return), in accommodation to spend the night and in meals;
b) temporary, since they must spend several days in visiting their relative in prison and
c) the language, which makes it difficult to understand how to get to places, how to upload funds into the prisoner's account, what kind of things can be delivered through packages to their loved ones and finally, how to make an appointment for the family or intimate vis a vis. To mitigate these effects, foreign prisoners serving sentences in Spain, should be placed in prisons very well connected with their relatives home address (saving several transports and overnights). The criterion of proximity to the family home should be determinant. The non enforcement of this criterion goes against the individualized treatment and undermines the principle of equality. However, it has to be pointed out that many foreigner prisoners prefer to serve their sentence in Spain rather than in his home country, renouncing to the prisoners transfer agreements. This happens with Italy, Romania, etc. This is not the

case, on the contrary, with Holland, citizens of Netherlands Antilles asking to move to Holland in all cases.

4) Regarding mentally ill inmates

As a general rule, in Spain they remain in common prisons instead of being transferred to special mental health centres, thereby infringing the provisions of Rule 12.1. and 2 and 47.1 and 2. They should be treated by specific staff, but in Spain there are only two psychiatric prisons, one in Seville and one in Alicante with very few seats. Therefore, there is a clear neglect about this issue. The scientific community unanimously considers that the prison environment is not suitable for people with such conditions. According to the study made by a team of doctors in 2007 for the European Union, at least 25% of inmates in Spanish prisons have mental illness, as the Ministry of Health detailed in the "Global Action Strategy on Mental Health". As evidenced by the data analysed in this study, each year more than 40 specialized psychiatric consultations are recorded per 100 prisoners. In one year, a doctor who comes to a Spanish prison has to attend more than 420 cases on average. Prison Administration does not know exactly how many mentally ill people are in jails, where they are located, or how many of them were found unimpeachable. Deputy Director General of Coordination of Health in Prisons has recognized this fact: "The data we have are estimates from the epidemiological studies we have available". This lack is only a link in the chain of errors and gaps, driven by the lack of political will, which condemns to oblivion prisoners with mental health problems. This practice violates the right to health and integrity of the person.

5) Regarding living conditions of prisoners classified in first category

The classification of the inmates in the first category and the non limitation in this classification breaches the European Prison Rule 25.2, when it establishes that: "This regime shall allow all prisoners to spend as many hours a day outside their cells as are necessary for an adequate level of human and social interaction".

In Spain, prisoners who are in isolation modules ranked as first category (closed prison regime) spend 21 hours continuously inside the cells. They can only go out to the yard three hours a day. They can only do that with another inmate from the same module. Therefore, they go out in pairs, and if odd, one leaves alone. Living conditions in isolation are very harsh and have repercussion on the prisoners, at a physical and psychological level[43].

6) Regarding the transfer of prisoners

Transfers of prisoners are done in vehicles which are known as "Kanguros" (kangaroos). Although these vehicles comply reviews, the inmates are handcuffed and they don't have seat belts in order to prevent suicides or other dangerous actions. This way of acting implies a serious danger for prisoners in case of accident or collision. The conditions of these transfers involve degrading treatment. Furthermore, European Prison Rule 32.2 is violated as it establishes that: "The transport of prisoners in conveyances with inadequate ventilation or light, or which would subject them in any way to unnecessary physical hardship or indignity, shall be prohibited.

7) Regarding arbitrariness

Discretion or arbitrariness are systematically used in the penitentiary Spanish system. Depending on the judge to whom the case is assigned (JVP), depending on the prison officials and on the prison itself, the enforcement of the sentence will be more or less hard. Therefore, there is a luck factor in the execution of the sentence. Discretion is mainly applied in the case of FIES inmates, "Ficheros internos de especial

[43] Regarding the situation of this category of prisoners, there is a qualitative study entitled: "Mirando al abismo: el regimen cerrado" (Looking at the abyss. The closed prison regime), written in 2002 by Julian Rios Martin and Pedro Cabrera Cabrera, from Madrid University Pontificia de Comillas.

seguimiento" (Internal File for special tracking). There are 5 types of FIES (armed gangs, direct control, forces and state security, organized crime) and being classified in this way allows the prison to restrict their rights without having to explain (eg. deny access to newspapers for days, deliver the mail very late, more registration cell and personal searches, etc.).

8) Regarding Restorative justice and mediation

In Spain, restorative justice and mediation are only incorporated in a few prisons. It is done through voluntary programs and external staff of non-profit associations. The first experience on prison mediation took place in the prison of VALDEMORO MADRID III in 2003. The purpose was to solve conflicts between incompatible or penalized inmates and it was conducted by the Association of Mediation and conflict pacification of Madrid (www.mediacionypacificacion.es). The program, which was made altruistically, had very positive results and was extended to other prisons in the country. The problem with such programs is that they can only be carried out if authorized by the General Secretariat of Penitentiary Institutions, which depends on the Ministry of Home affairs. As they are not binding, these programs are only carried out in a few prisons, despite the benefits they bring. As an example of this, we have to note the so called "Encuentros restaurativos" (restorative meetings) between prisoners of the terrorist organization ETA and its victims. 14 meetings were performed with a highly satisfactory result both for victims and former terrorists. Nevertheless with the change of government in 2012 these meetings were banned, without giving any explanation. Nowadays, they continue to be held but neither inside the prison, nor with the consent of the administration. The meetings are kept when inmates finish their sentence and are released and they have to be requested specifically by the former prisoners. Acting like this, Spain is infringing the content of Rule 56.2 ("Whenever possible, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners"), since the General Secretariat of Penitentiary Institutions does not provide the introduction and spread of these resources, even though they do not have any cost for the administration, since the mediation is carried out by NGO´s and non-profit associations.

9) Regarding the execution of the sentence

In Spain, three courts are involved at the stage of sentence implementation. On the one hand we have the Criminal Execution Judge (to whom the suspension of the prison sentence is requested), and on the other hand we have the Judge for Prison Supervision (also involved at the stage of sentence implementation, notably, conditional release) and the last trial judge (regarding the classification of inmates in categories or degrees (first, second…), the maintenance and regression in these categories, and the expulsions of non-EU citizens. As a result there is a lot of bureaucracy and delays, since all the files and a lot of paperwork must be sent back and forth. Many scholars are of the opinion that ideally one single judicial authority should encompass all of these questions. This is another great reform to be done in Spain: to create a specific judge for sentence implementation.

10) Regarding the rule of proximity to the family home in the case of convicted for terrorism

In Spain, this rule is never fulfilled. Due to the policy of dispersal of prisoners serving sentences for terrorist offenses, they are always in prisons located far from their family homes. Also prisoners who are classified into first category (different to terrorism) are often far from their families. In this way, the European Prison Rules 17.1 and 17.3, developed in Part II (Internal Policies), are disregarded insofar as they establish that:

17.1 Prisoners shall be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation.

17.3 As far as possible, prisoners shall be consulted about their initial allocation and any subsequent transfer from one prison to another.

This expression "as far as possible" allows the Administration to act at will and not to consult with prisoners their initial allocation and subsequent transfers.

11) Regarding the access to prisoners or lawyers to the ECtHR

Spanish prisoners serving sentences do not reach the ECtHR due to several reasons: lack of information or ignorance of prisoners and lawyers, lack of resources and unwillingness of prisoners: they do not want to fight anymore against the system and they prefer to finish their sentence as soon as possible and forget everything related to lawsuits and courts.

All respondents have agreed that it would be very useful to know the work of the ECtHR in prison matters, because it could serve as an example. In Spain there is little knowledge of EctHR and its jurisprudence does not have any significance at prison level. This is a serious gap in the Spanish legal system which should be definitely changed. We need to devote more public resources to the training of lawyers and judges in the field of the EctHR.

12) Prison labour

Prison labour is mainly regulated by Royal Decree 782/01, of 6th July 2001. According to this Decree prisoners who work are covered by the general Social Security regime and their salaries are, theoretically, referenced to national minimum wage levels (Salario Mínimo Interprofesional). The reality, however, is that their rights are not on the same footing as those enjoyed by non-incarcerated workers. Several infringements have been spotted:

1. Wages are much lower (the average wage of 'working prisoners' in Spain is about 222 € per month)[44]
2. There is no freedom of association. 'Working prisoners' cannot join Trade Unions
3. Opacity as regards the criteria for selecting candidates to jobs offered in prison
4. Non-observation of the standard criteria for estimating the overtime hours worked

13) ETA inmates

In Spain, there is a specific concern regarding ETA terrorist inmates. Prisoners serving sentence for ETA terrorism related crimes in Spain are the subject of a specifically targeted penitentiary policy, which differs from that applied to the other prisoners. The most recent aspects of this policy are the politics of *dispersion* (i.e. scattering and distancing ETA prisoners), *confinement* (their initial systematic classification into so-called first grade treatment) and the requirement of three additional conditions in order to progress into third grade (open) treatment or to obtain parole: an *irreversible security period* – Article 36,2 Criminal Code CrC – *full completion of the sentence* – Article 78 CrC – and *abandonment and collaboration* – Article 72,6 Organic General Penitentiary Act OGPA. According to the law, these conditions are applied only for crimes of terrorism or crimes committed in the framework of criminal organisations.

The application of a specific penitentiary regime depending on the crime of terrorism rather than on the personal features of each prisoner, and sometimes even disregarding the differences in the seriousness of the offences amounts to a general policy for a specific collective directly running against the need to consider penitentiary application in an individualised way.

III. SOFT LAW AND NATIONAL HUMAN RIGHTS AND NON-JURISDICTIONAL AUTHORITIES

In Spain, the National Human Rights Authority is the **Ombudsman,** which is thus the main independent non-jurisdictional authority. The Ombudsman is the Parliament's High Commissioner entrusted with the

[44] http://www.apdha.org/media/guia-trabajo-en-prision-2015.pdf

defence of the citizen's fundamental rights and civil liberties through the monitoring of the Administration's activity. The Ombudsman is elected by the Congress of Deputies and the Senate by a three-fifths majority. Its mandate lasts five years and does not seek or receive orders from any authority. It discharges its functions with neutrality, independence and impartiality; and enjoys full immunity and inviolability in the performance of its duties.

As a result of the amendment of the Ley Orgánica–Act 3/1981, of 6 April, regulating the Ombudsman, by the Ley Orgánica 1/2009, of 3 November and the entrance into force of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* the Spanish Ombudsman acts as the so-called **National Mechanism for the Prevention of Torture** (hereafter NMPT). The aforementioned amendment allowed the creation of an Advisory Council, acting as a body for technical and legal cooperation to facilitate the functioning of the aforesaid Mechanism. As a result of this amendment, the Ombudsman adopts the same preventive approach followed by the Subcommittee for the Prevention of Torture of the United Nations. Therefore, the Ombudsman regularly visits detention centres without prior communication, draws and disseminates the annual report, and addresses recommendations to the competent authorities. It also makes proposals and remarks as regards the legislation in force, maintain direct contact with the Subcommittee for the Prevention of Torture of the United Nations, and finally it promotes dissemination and aware-raising activities relating to the mission of the MNPT. In 2010, the MNPT duly carried out visits and in mid-2011 released its first annual report, available on its website. The most recent report as MNPT was delivered in 2014.

In addition to ex officio interventions, the Ombudsman can also act at the request of any citizen. Such request is free of charge. Prisoners address him by letter sent from the prisons where they are serving sentences. In 2014 the Ombudsman received 471 complaints from inmates, and initiated 114 ex-officio actions. Within its functions as MNPT and as regards prisons[45], the Ombudsman initiated 45 inquiry proceedings into alleged claims of ill-treatment, although in some cases, poor description without reference to specific facts have limited the furtherance of investigations.
The main concerns reported by the Ombudsman as regards prisons and inmate living conditions (both, in its capacity as Ombudsman and as MNPT) are as follows:

As regards cells: Even though Article 19 of the Prison Regulations enshrines the principle of accommodation in an individual cell, (although, if necessary, and temporarily, it provides for the possibility of placing more than one inmate per cell), still, however, in many prisons the practice of accommodating two long-term prisoners per cell subsists; the extreme case being the so called "collective cells" where three or more inmates are placed, for example in the prisons of San Sebastian, Melilla and Ibiza. Nevertheless, this practice of "collective cells" has been found to be falling into disuse, and it is seen as a last measure of resort in times of sporadic overcrowding. Even though, the overall prisoner population has decreased[46], the current situation of economic crisis has resulted in the postponement of the finalization or opening of prisons. This will slow down the solution in the near future to the problem of co-habitation of cells. The Ombudsman will therefore continue with its close monitoring.

As regards medical treatment: A number of inmates who had been prescribed medical treatment by specialists from the public health services were not correctly receiving such treatment since the prison administration was not willing to bear its costs. They believed that the Autonomous Community was responsible for those expenses, which were to be considered as medication prescribed at a public

[45] https://www.defensordelpueblo.es/es/Mnp/InformesAnuales/informeAnual_MNP_2014.pdf, p. 143
[46] In 2014 the total population has decreased from 66,779 to 65,194 inmates (-2.37%).
From January 2012 to December 2014 the accumulated decreased exceeded 7% of the total prison population. Therefore, the downward trend seems consolidated after many years of sustained increase of the prison population.

hospital. In light of the Autonomous Communities' refusal to bear the costs, the Prison Administration, acting through the State's Legal Service, initiated judicial proceedings against those Autonomous Communities. Meanwhile, prisoners were still not receiving the prescribed treatment.

Location of public telephones inside prisons: Around 19% of prisons whose management is attributed to the central government lack facilities to ensure the adequate confidentiality of telephone communications. Phones are located within the offices of Security officers and hence the right of inmates to make calls (enshrined in Article 47 of the Prison Rules) is constrained. Telephone communication comprises two moments: the dialing moment and the conversation as such. The presence of the Security Officer should be limited to the dialing moment, to verifying that the dialed number corresponds to the authorized telephone, and to the moment when the conversation ends. Once the communication is established, the Security officer should leave, so that the conversation cannot be heard. However, in those cases where the phones are located within the offices of Security Officers, it is very difficult to combine the duty of the officer to remain in their jobs, with the right of the inmate to communicate by telephone without the conversation being heard.

Management of ill-treatment allegations:[47]
Almost all prisons visited in 2014 lacked an adequate and unified system for **receiving and recording complaints** submitted by prisoners for **acts of ill-treatment**. The recording of complaints in each prison, would not only improve transparency, but would also be a means for external supervisors to easily gather this information during their visits. Therefore, the Ombudsman readily recommends that in all prisons a system for receiving and recording complaints filed by inmates (both before the Prison Director and the judicial authorities) concerning mistreatment should be established, notwithstanding the fact that complaints are further referred to the Prison Inspectorate for the pursuance of an effective investigation. This system should be the same for all prisons throughout Spain.
In addition, the Ombudsman noted that the **access to evidence by inmates** when they report mistreatment by Prison Officers is still inadequate and needs to be improved. Indeed, the delivery to inmates who request the injury report drawn up by the prison medical staff continues to be an issue of concern for the Ombudsman, as well as the lack of receptiveness by the Prison Administration as regards the photographic documentation of injuries sustained in prison. Further, the Ombudsman believed it necessary to remind that it is not up to the Prison Administration to decide in which cases allegations of mistreatment must or must not be notified to the judicial authorities. Rather, the criterion is that in all cases in which an injury report is drawn up in prison, the Judge for Prison Supervision must be informed within the shortest delay possible so that, if deemed necessary, the appropriate proceedings may be pursued. Indeed, as established by Article 262 of the Criminal Procedure Act whenever medical services treat an inmate who discloses injuries (whether injuries are due to the application of coercive means or internal fights or self-harm, or whether they were already present at the time of his imprisonment or transfer from another prison), the medical staff must systematically draw up a report and submit it to the competent judicial authority.
In light of all these deficiencies, the Ombudsman recommended the issuance of internal regulations, whose purpose is to establish a flexible procedure and a standardized test of complaints of ill-treatment. The emphasis should be placed on the **conduct of interviews** and on the subsequent preparation of a **detailed and reasoned report** of the testimony received. The report should include allegations of

[47] Since 2011, the NPM has been assisted by external technical experts specialising in legal and forensic medicine, psychiatry and psychology. Their work has enriched the reports of the NPM by providing an analysis, based on their knowledge and professional experience, of the conditions of detention and of any possible bad practices or risk of ill-treatment that may arise. This collaboration has allowed an exhaustive review of the medical records of those deprived of their liberty, as well as any injury reports that the medical records may contain.
https://www.defensordelpueblo.es/en/Mnp/InformesAnuales/EstudioLesiones_EN.pdf

inmates on how the injuries occurred, a detailed description of the injuries appreciated[48], documented with photographs taken, and an assessment of whether the alleged origin according to the account given by the inmate is consistent with the characteristics of the injuries. Moreover, the report should make reference to the psychological state of the inmate and include the exact time and place in which the medical examination took place and the medical expert in charge of it should be correctly identified. This information will facilitate the eventual judicial investigation, as it provides an in-court independent forensic expert with detailed information to assess the etiology of the injury and to conclude on its probable origin. A copy of the report should always be delivered to the inmate concerned.
Finally, the availability of adequate surveillance systems and the existence of general rules for all prisons on the taking, management and extraction of recordings thereof, are an essential element to complement investigations both of an administrative and judicial character as regards allegations of ill-treatment. It is for this reason that the Ombudsman urges the Prison Administration to enlarge the existing surveillance systems in prisons to allow the continuing monitoring of all facilities where inmates are, except inside the bathrooms and the cells.

IV. OTHER SOURCES

A. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

The CPT has carried out frequent visits to Spain, the first one of which took place in 1991. The Committee's last report was drawn up following its visit from 14 to 18 July 2014; however, given that it refers exclusively to detention centres for foreigners (Centros de Internamiento de Extranjeros) and to the treatment of foreign nationals (both in Melilla and during forced return procedures in Madrid International airport) it falls out of the scope of the present report.
The CPT's most recent reports relevant to our research topic are, on the one hand, a report drawn up following the CPT's visit to Spain from 19 to 22 June 2012, which examined the conditions of detention of persons held in the Barcelona prison for men ("La Modelo")[49]; and on the other, a report drawn up following the CPT's visit from 31 May to 13 June 2011 much more exhaustive, in that it examined conditions of detention, both during police custody and within prisons throughout the entire national territory.
In the latter report, drawn up following its 2011 visit to prisons throughout the entire national territory, particular attention is devoted to the incommunicado detention regime[50] (a recurrent concern in all the CPT's report since its very first visit back in 1991). The Committee continues to gather credible and consistent allegations of ill-treatment inflicted on detainees held under this regime and expresses its concern that elements indicating the possibility of ill-treatment during the incommunicado detention

[48] The following should be adequately described for each injury: the type of injury, its shape and colouring, its dimensions, its exact location and approximate date on which they may have occurred. Complementary examinations (gynaecological examination, trauma examination, dermatological, etc.) should also be included whenever they are considered medically appropriate according to the criteria of accepted best practice.
[49] It is to be recalled that in Spain there are two prison administrations. The Central Government administration that has jurisdiction over the entire Spanish territory, except Catalonia; and the Catalan Administration (Generalitat of Catalonia) that has jurisdiction for prisons administration in that territory
[50] Ordinary custody did not rise that many issues as regards safeguards against ill-treatment and conditions of detention. Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 31 May to 13 June 2011, CPT/Inf (2013) 6, pp. 25-28

continue not to be thoroughly pursued by the Spanish judicial authorities[51]. Even though, by the time of their 2011 visit, three of the six investigative judges of the Audiencia Nacional were systematically applying a series of measures which provide for specific safeguards for persons held under incommunicado detention[52], such measures are not binding and their application cannot be imposed on an investigative judge. To its surprise, the CPT noted that during the first five months of 2011 all the incommunicado detentions were authorised by a judge who does not apply any of these safeguards.
In view of the fact that some of the deficiencies highlighted in the CPT's visit of 2007 in relation to incommunicado detention were still not addressed, the Committee reiterated some of its previous recommendations. Firstly, it called the Spanish authorities to carry out a thorough and independent investigation into the methods used by members of the Guardia Civil when holding and questioning persons arrested under the incommunicado regime. Secondly, it reiterated the necessity to comply with the following legal safeguards for persons held in incommunicado detention: the right for a detained person to be brought physically before the competent judge prior to the taking of the decision on the extension of the period of detention beyond 72 hours; the right to meet and talk in private with a lawyer; the right of access to a doctor of one's own choice[53]; the right to have a third person informed about one's detention at the earliest possible moment; the adoption of a code of conduct on questioning; and the full video and audio recording of such interrogation.
Besides incommunicado detention, the CPT also paid particular attention in its 2011 visit to several penitentiary centres throughout Spain to the units or modules for inmates presenting special difficulties in adapting to prison life or subject to disciplinary measures. In those units or modules for "conflictual" prisoners, a number of allegations of ill-treatment by staff were received[54]. Moreover, as regards the conditions of detention in these modules, the CPT reported that the regime, as well as the overall atmosphere, was particularly impoverished. Inmates in these units did not appear to have the same opportunities of access to activities (whether work, education or recreation) as prisoners in other modules and little support is provided to assist them to re-integrate into an ordinary regime module. In

[51] From the information gathered by the CPT's delegation, it would appear that whenever allegations of ill-treatment are raised by persons held under incommunicado detention, they are systematically considered as unreliable and to be part of a defence strategy to undermine the declaration drawn up towards the end of the incommunicado regime. CPT/Inf (2013) 6, p. 18

[52] These safeguards consist of: the notification to the family regarding the fact of detention and the detained person's whereabouts; the possibility of being visited by a doctor of one's choice together with the forensic doctor appointed by the investigative judge; 24-hour video surveillance and recording of the detention areas

[53] On this point, the Spanish Government noted that Ley Orgánica15/2003, of 25 November, as amended by Ley Orgánica10/1995, of 23 November, approving the Criminal Code, includes a new Article 510.10 that allows detainees in incommunicado detention to request a second medical examination by a court-appointed professional. In this sense, it is the judicial authority who decides, for each concrete case, if detainees need to be examined by two or more doctors. The Spanish Government further noted that the *Human Rights Plan of the Spanish Government* adopted on 12 December 2008 by Council of Ministers includes, among other measures, the possibility to carry out actions in order to ensure that detainees placed in incommunicado detention are examined both by a prison doctor and a doctor from the Public Health System freely appointed not by detainees themselves but by the National Mechanism to Prevent Torture (Ombudsman). Moreover, the abovementioned Plan includes the adoption, through Decree of the Ministry of Justice, of a Protocol that shall contain the minimum medical exams for detainees, as well as standardised reports to be filled in, in order to coordinate the assistance given to incommunicado detainees. The aim is to include this programme –which is currently being elaborated –into the management protocols of the Institutes of Forensic Medicine. Once elaborated, the objective is to implement it within the Audiencia Nacional, with a view at offering the same form, with the same content to all Forensic Institutes. 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 31 May to 13 June 2011 CPT/Inf (2013) 7, pp. 33-34
However, by the end of 2014 the National Mechanism to Prevent Torture had not yet been given the opportunity to appoint a second doctor, who is part of the public health system, to conduct an independent examination of the detainees during the time they are held incommunicado p.12 §39

[54] Particularly worrying were the allegations of ill-treatment in Puerto III Prison which allegedly took place in rooms adjacent to the medical consultation area on the ground floor of the respective module - the only area not covered by CCTV. *See* CPT/Inf(2013) 6, p. 31

fact, placement in this "conflictual" modules was perceived by inmates and by several prison officers as a punitive measure, many thought that it served as an additional informal classification, from which it was difficult to progress.
In its 2011 visit, the CPT also considered particularly worrying the resort to a mean of restraint known as fixation (prisoners being fixated by their wrists and ankles to a bed with cloth straps, either face down or face up). Concerns were raised as to the frequency and duration of this method. In its previous report following a visit to Spain in 2007 the CPT had already expressed its concern and made a series of recommendations, which at the time of the 2011 the CPT found not to have been fully implemented. The CPT reiterated the recommendations then made, urging the Spanish authorities to put in place stricter rules governing fixation so that such method be used only as a last resort to prevent the risk of harm to the individual or others and only when all other reasonable options would fail to satisfactorily contain those risks; it should never be used as a punishment or to compensate for a shortage of trained staff; it should only be used within a medical setting
Psychiatric care also raised concern, in that it was limited in all prisons visited (i.e.: visits took place only once or twice a month by an external psychiatrist). However, as regards the health-care services in the prisons visited the CPT noted they were, on the whole, of a good standard. Health-care staffing levels were generally acceptable and prisoners could access a range of specialised services either within the prison or at a local hospital. In addition, medical facilities in these establishments were considered to be suitably equipped[55].
Finally, in the report following the CPT's 2011 visit, reference is also made to prison overcrowding. At the time of the CPT's visit, the number of persons imprisoned in Spain (excluding Catalonia) stood at 62,300, for an official capacity of 55,421 (with an occupancy level of 112 percent). This represents an improvement as compared to the situation observed in 2007 (when the prison occupancy level stood at 143 percent), despite an increase in the prison population of 9% during the intervening period. Spanish authorities informed that they intended to tackle prison overcrowding through the creation of an additional 18,000 places (9,000 double occupancy cells) within the next few years, with a focus on the continued construction of large prisons. The CPT reminded in this regard that emphasis should be given to the promotion of alternative sanctions.
Prison overcrowding, however, is much more of an issue as regards La Modelo Prison in Barcelona (the largest remand prison in Catalonia) where the high levels of overcrowding have had deleterious effects on the conditions of detention for prisoners.[56] Given that the distribution of prisoners across the establishment is not even, there are galleries with very high occupancy rates of four, five and even six inmates per cell each measuring 10 m²; that is, in some galleries the effective living space is of 1.5m². As reported by the CPT, in those cells with a higher occupancy rate the conditions were very unsatisfactory. Cells tended to be dirty, stuffy and had limited access to natural light (one of the two sets of bunk beds was placed in front of the window) and many of them were infested with cockroaches. Further, the state of hygiene in these cells often left much to be desired. Complaints were also received about a lack of heating in winter months. All prisoners, however, are able to spend a large part of the day outside their cells. Even those inmates who do not participate in any organised activities or work can be out of their cells for more than ten and a half hours every day, during which they can have access to the outdoor yards for six hours.
Although the Catalan authorities have undertaken an extensive programme of prison building in order to create the necessary capacity, the current economic crisis has put a brake on any additional prison-related expenditure. This has resulted in delays to the opening of the new prisons of Figueres and Tarragona due to the lack of budgetary resources for staffing need. In light of the foregoing, the CPT noted that it is surely unfeasible in the foreseeable future to fulfil the Catalan authorities' stated wish to

[55] CPT/Inf(2013) 6, p. 39
[56] La Modelo Prison has been consistently operating above its official capacity for more than 20 years. *Report to the Spanish Government on the visit to Spain carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment* (CPT) from 19 to 22 June 2012, CPT/Inf(2013) 8, p. 8

close down La Modelo Prison. Realistically, the establishment is likely to continue to function as the main remand prison in Catalonia at least for some years to come.[57] According to the CPT, in order to ensure that it is able to offer decent living conditions the number of prisoners needs to be considerably reduced. A strategy should be put in place to progressively reduce the inmate population to its official capacity. This will require finding some 700 places in other prison establishments in Catalonia in which to place inmates who would otherwise be allocated to La Modelo, an objective that should be attainable given the additional capacity potentially available within the prison system.

B. United Nations Committee against Torture

Spain submitted its sixth periodic report, covering the period since 2009, to the United Nations Committee against Torture (hereafter UNCAT) on December 2013. The examination of the Spanish report and the adoption of UNCAT's concluding observations took place in May 2015. Only two of these concluding observations refer to persons deprived of their liberty and are relevant for our research. One of these observations has to do with incommunicado detention. In response to UNCAT's request for information, Spain reported on the reduction of the recourse to incommunicado detention and on the proposed reform of the Criminal Procedure Act with a view to implementing measures of the 2008 Spanish Government Human Rights Plan[58]. Despite appreciating these advancements, UNCAT nevertheless concluded that it continued to be deeply concerned with the maintenance of a regime that allows for the possibility of being held incommunicado up to 13 days without a series of fundamental rights and guarantees universally applied to persons deprived of their liberty. Therefore, and as it had already done in previous reports, UNCAT encouraged the Spanish authorities to review incommunicado detention with a view to its abolition, and ensure that all persons deprived of their liberty have access to the following fundamental rights of detainees: (a) To consult a lawyer of their choice; (b) To be examined by a doctor of their choice; (c) To have a family member or person of their choice notified of their arrest and current place of detention; (d) To meet privately with a lawyer (a right which is currently restricted even in the case of a court-appointed lawyer). The State party should also implement and strengthen the measures provided for in Measure 97 of the Human Rights Plan; in this respect, it is especially important that the video surveillance system covers all police stations nationwide and is installed in cells and interrogation rooms and is not limited to public areas.
The second concluding observation related to prisons deprived of their liberty concerned the recourse to the sanction of solitary confinement. Spain noted that according to the General Organic Law on Prisons (Article 76.2) and the Prison Regulations (Article 236), the maximum sanction for a very serious offence cannot exceed 14 days of solitary confinement, or 42 days when it concerns several serious offences that have taken place at the same time. In the latter instance, the approval of the Judge for Prison Supervision is required whenever a prison proposes solitary confinement for a period greater than 14 days. The judge must also state whether the sanctions should be applied consecutively or at reasonable intervals. Furthermore, Spain reported that solitary confinement is applied only after the commission of three serious disciplinary infractions.

[57] During 2015 demolition of part of "La Modelo" prison has been undertaken. By 2017 complete demolition and final closure is expected to be achieved. By that same date the opening of a new centre located in the outskirts of Barcelona (in an area known as la Zona Franca) is also expected. This new centre will host preventive prisoners and prisoners ranked third degree. However, the reality is that by the end of 2015 construction work of this new prison had not yet begun and the demolition works of La Modelo were highly criticised by prison officers who considered it over-hasty http://www.lavanguardia.com/local/barcelona/20150327/54429291300/primer-derribo-prision-model-barcelona-fecha.html

[58] Committee against Torture, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure: Spain (CAT/C/ESP/6) 5th May 2015, p. 8

Notwithstanding the above, UNCAT expressed its concern that prisoners could be detained in solitary confinement for up to 42 days and reminded that excessive application of solitary confinement constitutes cruel, inhuman or degrading punishment, including torture in some cases (art. 11). In light of the recommendations made by the Special Rapporteur on torture and other inhuman or degrading treatment or punishment (A / 66/268, para. 88), the Committee urged Spain to prohibit solitary confinement exceeding 15 days. In addition, the State party should ensure that it is used only as a last resort, for the shortest possible period, under strict supervision and judicial control.