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Rights of the Child in Spain

Report on the implementation of the
Convention on the Rights of the Child
by Spain

Report prepared by the
World Organisation Against Torture (OMCT)
for the Committee on the Rights of Child

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I. Preliminary Observations

Spain submitted its periodic report to the Committee on the Rights of the Child in accordance with the provisions of article 44 Para 1 (b) of the Convention on the Rights of the Child. OMCT appreciates this action and take notes that since its first report (CRC/C/8/Add 6) in 1993, Spain has demonstrated an openness and willingness to adhere to the changes recommended by the Committee concerning the protection of the child¹.

Spain ratified the Convention on the Rights of the Child on November 30, 1990. It also ratified, as recommended by the Committee, the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, which came into force on 1st November 1995.

It also ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on October 10, 1987 and is also party to the European Convention for the Prevention of Torture since 1989.

According to article 96.1² of the Spanish Constitution, articles from ratified international conventions and treaties are automatically incorporated into the domestic legal system. This means that the rights set out in the Convention on the Rights of the Child may be invoked by private individuals directly before Spanish judges and courts of law. Article 39.4³ of the Constitution reinforces this disposition by allowing children to benefit from the rights which the treaties recognise are due to them. OMCT however notes that this disposition is not really accorded in actual practice. The Convention is in fact not yet sufficiently well known and is often interpreted as a simple declaration of intent rather than a legal instrument having full force of law.

OMCT appreciate that several articles of the Constitution are in accordance with the principles of the Convention on the Rights of the Child, for example; the right to life (art. 15), the right to security and freedom (art. 17), the right of the child to participation and to freedom of expression (art. 20).

Articles from the Convention which foresee the child's right not to be tortured, mistreated, physically or psychologically abused or exploited, are covered by art 15 of the Constitution which forbids torture and inhuman and degrading treatment, the right to a fair trial (competent legal guardian, appropriate assistance, presumption of innocence...) is covered by articles 24 and 25.

OMCT welcomes the adoption of national laws with respect to the child of which, amongst others is, the 1996⁴ law concerning the legal protection of the child (here, finally, the child is perceived to be an active participant in the decisions which affect it's well being), the law reforming both the right to judge and the judicial proceedings within the law concerning

¹ Concluding Observations of the Committee on the Rights of the Child : Spain 24/10/94 CRC/C/15/Add.28

² Art. 96.1 Constitución « Los tratados internacionales válidamente celebrados, una vez publicados oficialmente en España, formarán parte del ordenamiento interno. Sus disposiciones sólo podrán ser derogadas, modificadas o suspendidas en la forma prevista en los propios o de acuerdo con las normas generales del Derecho internacional ».

³ Art. 39.4 Constitución « Los niños gozarán de la protección prevista en los acuerdos internacionales que velan por sus derechos ».

⁴ Ley Organica 1/1996 de 15 de enero, de protección jurídica del menor.

minors⁵ and also the law concerning the penal responsibility of minors⁶ (which raises the age of penal majority from 16 to 18 years).

The new law pertaining to the legal protection of the child, also brings important changes concerning inter country adoptions and will thus become a very important means of fighting against irregularities in adoptions, a common occurrence in Spain until this law came into force.

At present, the penal code makes child trafficking an offence whether it be intra or inter-country and punishes both the biological and the adoptive parents as well as the intermediate parties to any pecuniary transactions involving children. The Spanish government has published a very useful description of certain illegal practices used to facilitate adoption procedures. According to this report certain irregularities in the case of inter-country adoption have been discovered in situations where, for example, children coming from the Russian Federation or Central Europe, are placed in orphanages through intermediary organisations, to which the future parents have donated large sums of money in order to take care of the adoption formalities.

In its concluding observations, the Committee on the Rights of the Child highlighted the importance of modifying the language of the law, notably article 154 of the Civil Code⁷ according to the terms of which, the parents « may punish their children within reasonable limits and with moderation » in order for this article to fully comply with article 29 of the Convention. OMCT notes, however, that the language has not been changed and is most concerned that corporal punishment is still considered by many Spaniards to be an effective educational tool.

In Spain, the Constitution concedes a legislative power to the autonomous Communities thereby allowing interaction amongst the different levels of intervention through a well defined framework of the responsibilities and competences of each public administration.

OMCT appreciates the legal dispositions put in place by the different autonomous Communities concerning the protection of the child. The Community of Madrid for example has created the post of « Defensor del Minor »⁸ who is to work in close contact with children in order to prevent violation of their rights.

OMCT is especially concerned by the difficult situation with which the children of immigrants are often confronted, especially those of Moroccan and Algerian origin in the cities of Ceuta and Melilla. On several occasions, OMCT has publicised the case of children deported by the Spanish police which gave as the official reason for it's action the necessity to reunite families. The circumstances surrounding the deportations, however, have led to doubts concerning the credibility of such reunifications.

⁵ Ley Organica 4/1992 de 5 junio, sobre la reforma de la Ley Reguladora de la competencia y el Procedimiento de los Juzgados de Menores.

⁶ Ley organica 5/2000 de 12 de enero, reguladora de la responsabilidad penal de los menores.

⁷ Art. 154 Código Civil « (...) Los padres podrán en el ejercicio de su potestad recabar el auxilio de la autoridad. Podrán también corregir razonable y moderadamente a los hijos ».

⁸ Ley de Garantías de los Derechos de la Infancia y Adolescencia, Comunidad de Madrid, Ley 5/1996.

II. General Observations

Discrimination

The Convention is applicable to any child who falls within the jurisdiction of a State whether the child be a national of that State or a foreigner⁹. The latter category includes visitors, refugees or any other child who happens to live within the borders of such State, even in a clandestine situation.

OMCT believes that discrimination is one of the causes of torture and approves the fact that the Spanish Constitution provides for the principle of non discrimination in article 14¹⁰ and that this same principle is re-stated in several other laws. This is the case, especially in the law of 1/1996 concerning the legal protection of the child which, in article 3¹¹, provides that each child has the right not to be subject to any discrimination by reason of origin, nationality, race, sex, religion, language or culture, opinion or any other personal, family or social circumstances.

Increasingly, in Spain, we are witness to protest demonstrations against the integration of immigrants or gypsies, organised by the residents of certain districts. These demonstrations can easily degenerate into acts of racist violence which also affect children. In November 2000, for example, in a school in Ceuta, 65% of the parents refused to send their children to school to protest against the schooling of 30 Moroccan children.

Although the Committee, in its final recommendations, did underline the importance of widespread dissemination of the Convention in order to fight against discriminatory practices and attitudes towards vulnerable children, OMCT raises its concern that the situation has not fundamentally improved, especially in the case of children of immigrants and gypsies.

The Committee for the elimination of racial discrimination, in its concluding observations of the 2000 session, expressed its concern that « a noticeably small number of cases brought before the national courts have been judged to be cases of racial discrimination, despite a flagrant general overall increase in violent acts committed by young people, particularly in aggressive behaviour towards foreigners by extremist groups, neo-nazis movements and gangs » (OMCT translation).

In taking note of the positive measures taken by Spain, to ensure that gypsies are not exposed to discrimination, the Committee for the elimination of racial discrimination nevertheless expressed its concern about the high rate of school suspension and absenteeism from primary school on the part of gypsy children as well as the fact that only a very small number of gypsies go on to complete their higher education. Although the Spanish constitution proclaims equality for all citizens living on Spanish soil, reality shows a marginalisation and deterioration of this right with respect to the gypsy people.

⁹ Art. 2 of the Convention on the Rights of the Child.

¹⁰ Art. 14 de la Constitución española « Los españoles son iguales ante la ley, sin que pueda prevalecer discriminación alguna por razón de nacimiento, raza, sexo, religión, opinión o cualquier otra condición o circunstancia personal o social ».

¹¹ Art. 3 de la ley de Protección Jurídica del Menor « los menores gozaran de los derechos que les reconocen la Constitución y los Tratados Internacionales de los que España sea parte, especialmente la Convención y los demás sus derechos garantizados en el ordenamiento jurídico sin discriminación alguna por razón de nacimiento, nacionalidad, raza, sexo, deficiencia o enfermedad, religion, lengua, cultura, opinion ocualquier otra circunstancia personal, familiar o social... ».

OMCT notes with concern, that gypsy children are not completely integrated into Spanish society, and that they are the most affected by the situation of marginalisation in which their community lives. There exists a notable gap between the rate of school attendance by Spanish children compared to that of gypsies, especially at secondary school level. According to gypsy associations, for a total of 180,000 young gypsies in 2000, only 34% attended school. A report by the Council of Europe produced in 1997, criticised the intolerable situation in which gypsy families found themselves. The NGO Médecins du Monde compares the situation of certain regions in Spain, where gypsies live, with certain third world countries (especially in the Valdemingomez ghetto, south of Madrid).

OMCT urges the Spanish government to increase its efforts to promote a policy of integration and welcome, by a stricter application of the Gypsy Development Programme, which it launched in 1989, and by giving particular attention to the situation of gypsy children.

III. Definition of the Child

Article 315 of the Civil Code in conformity with article 12 of the Constitution and article 1 of the Convention, considers to be a child every human being below the age of 18 years. Similarly, the Organic Law 1/1996 of 15 January 1996 on the legal protection of minors provides for its application to all minors under 18 years of age living on Spanish soil (art. 1)¹².

Certain ordinary laws of the autonomous Communities (Cataluña, Galicia and Madrid) make a distinction between children (0-12 years) and adolescents (12-18 years).

In the Spanish system, children must be legally represented and protected either by their parents or by their legal guardian but they have also their own private sphere which is limited in the children's own self interest. All acts considered as private or personal must be carried out directly by the child without any voluntary or legal representative.

The personal intervention of the child is also foreseen for all acts which, directly or indirectly, might affect his or her civil status, for example in the case of emancipation. According to the Civil Code, a minor must give his consent to such emancipation which can occur only in specific circumstances such as marriage, the assent of his or her legal guardian, or by legal dispensation at the age of 16 years (articles 317, 320 et 321 of the Civil Code).

The personal capacity to act of a child is variable and flexible according to his or her degree of personal development. For example, at 16 years a non emancipated child is able to carry out all ordinary administrative acts concerning any wealth or property acquired through of his or her own work or skills.

The minimum age for marriage in Spanish law is fixed at 18 years unless a dispensation (« dispensa de edad ») is obtained from a lower court judge after hearing both the parents and the child. Nevertheless in the more traditional - and often more marginalized gypsy communities - the age for marriage can vary between 14-18 years.

¹² Art. 315 Código Civil « La mayor edad empieza a los 18 años cumplidos. Para el cómputo de los años de la mayoría de edad se incluirá completo el día del nacimiento ».

IV. Protection Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

4.1 The Legal Framework in Spain

Article 15¹³ of the Spanish Constitution provides that « everyone has a right to life and to physical and moral integrity and in no case can be subject to either torture or to other inhuman or degrading treatment. The death penalty abolished except for provisions in the Military Penal Code governing time of war » (OMCT translation). Moreover, art 174¹⁴ of the Penal Code gives the following definition of torture : “Any legal authority or any public servant, who by the abuse of his or her position, and with the aim of obtaining a confession or information from any person, or to punish a person for any act which he or she has committed or is suspected of having committed, submits that person to conditions or procedures which by their nature duration or other circumstance, inflict physical or mental suffering, suppression or alteration of judgement or mental faculties or assault on her/his moral integrity, commits an act of torture. The perpetrator of an act of torture will be punished by a period of imprisonment of two to six years if the act is considered to be serious and of one to three years if not considered to be serious. A penalty covering the loss of civil and political rights of up to eight to twelve years will also be incurred. The same penalties will apply to the authorities or the agent of the penitentiary, or centre for juvenile protection or correction, who perpetrate the acts described above, against the inmates” (OMCT translation).

These articles correspond to the obligations specified in articles 37 and 4¹⁵ of the Convention. Nevertheless OMCT is concerned that article 174 of the Penal Code, does not provide for a heavier penalty to be inflicted on the torturer where the victim is a child. Life imprisonment is forbidden by the Penal Code which limits to thirty years of imprisonment, the maximum penalty which can be imposed on adults. For children less than 16 years old, no prison sentence can be longer than two years.

4.2 Street Children and Illegal Expulsions

The cities of Ceuta and Melilla, because of their geographic situation, become for foreigners (mainly of course Moroccans) entry gates into Europe by this indirect Spanish route. OMCT has condemned several times the arrests and irregular expulsions of children of Moroccan origin in both these cities¹⁶. According to information received, children in Ceuta are arrested in the centre of the city and taken into custody in police vans. They are often harassed during

¹³ Art. 15 de la Constitución « Todos tienen derecho a la vida y a la integridad física y moral, sin que, en ningún caso, puedan ser sometidos a tortura ni a penas o tratos inhumanos o degradantes. Queda abolida la pena de muerte, salvo lo que puedan disponer las leyes penales militares para tiempos de guerra ».

¹⁴ Art. 174 Código penal « 1. Comete tortura la autoridad o funcionario público que, abusando de su cargo, y con el fin de obtener una confesión o información de cualquier persona o de castigarla por cualquier hecho que haya cometido o se sospeche que ha cometido, la sometiére a condiciones o procedimientos que por su naturaleza, duración u otras circunstancias, le supongan sufrimientos físicos o mentales, la supresión o disminución de sus facultades de conocimiento, discernimiento o decisión, o que de cualquier otro modo atenten contra su integridad moral. El culpable de tortura será castigado con la pena de prisión de dos a seis años si el atentado fuera grave, y de prisión de uno a tres años si no lo es. Además de las penas señaladas se impondrá, en todo caso, la pena de inhabilitación absoluta de ocho a doce años. 2. En las mismas penas incurrirán, respectivamente, la autoridad o funcionario de instituciones penitenciarias o de centros de protección o corrección de menores que cometiere, respecto de detenidos, internos o presos, los actos a que se refiere el apartado anterior. ».

¹⁵ Art. 4 of the Convention on the Rights of the Child, « States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention ».

¹⁶ OMCT urgent appeal, Child concern, Case ESP 061101.CC.

detention and some of them have been ill treated. Deportations are often carried out without the child having been heard, since they have access neither to the help of an interpreter nor to legal assistance.

The law 4/2000 concerning the rights and freedoms of foreigners in Spain¹⁷ provides that foreign children found without official documents on Spanish territory, will be taken in by the autonomous Communities, which have the obligation to put them under legal guardianship if their families cannot be identified. These children can be departed only in the case of family reunification, or, if the authorities of the country of origin accept to come to their aid and provide legal guardianship. Nevertheless, OMCT has established that deportation of children to Morocco occurs without the least guarantee of family reunification or of assistance from the Moroccan social services.

In Melilla, there was the case of two children both 16 years old, who had been arrested and deported by the national police several times, the last being on 31 October 2001. As soon as they arrived at the border, both children were handed over directly to the Moroccan police without the presence of their families or the social services. They were subsequently subjected to ill treatment by the Moroccan police, and this has been certified by a Spanish doctor¹⁸. According to information received, both of these children had been living in Melilla for 6 years, held residence permits, attended school and were under the legal guardianship of the local authorities in Melilla. It is difficult to believe that their deportation to Morocco was intended to be for family reunification purposes.

In Morocco, emigrants who have been repatriated (refoulés) are subjected to ill treatment, adults and children alike. Consequently any deportation back to Morocco can be considered as contrary to article 37 of the Convention and to article 3 of the European Convention on Human Rights, which forbid torture and other cruel, inhuman or degrading treatment.

In 1998 three officers of the Ceuta local police, made official reports condemning certain irregularities concerning the deportation of children but these reports were simply filed with no real enquiry being opened up. The three whistle blowers were treated as « enemies of the city of Ceuta » and were punished with a period of 6 months suspension from their jobs without pay¹⁹.

OMCT is deeply concerned by the situation described above, especially with respect to the physical and psychological integrity of the street children and recommends to the Spanish government that they be protected in the same way as Spanish children, that is without any discrimination with regard to national origin, race or social status.

4.3 Female Genital Mutilation

The practice of Female Genital Mutilation (FGM) is a problem which exists in Spain today as a result of immigration from sub Saharan countries. Any injury inflicted which impairs the physical or mental well being of a person, is considered an offence under the Spanish Penal

¹⁷ LO 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social, modificada por LO 8/2000.

¹⁸ Appel OMCT, Exactions enfants, Cas ESP 061101.EE.

¹⁹ « Carta al Ministro. Caso tortura en Ceuta », PRODENI España, 30 de Noviembre de 1998.

Code²⁰ and to get around this law, FGM's are performed while the girl children (between the ages of 3 months and 8 years) are being taken on a visit to their respective country of origin. This is often referred to as "the holiday trip". This practice has the most dire consequences for the health of the young girls both at the time of the intervention and for the rest of their lives.

Nevertheless, several paediatricians have noted during the course of their rounds, that some mutilations were so recent, that they must have been carried out on Spanish territory, but they have never been able to assemble sufficient evidence to bring a case against those responsible. The situation is worrisome, especially in those regions of Spain (Cataluna, Madrid, Ceuta and Melilla) where immigration is highest.

OMCT applauds the commitment of those associations which come to the help of the girls concerned. It requests that the Spanish government carry out an enquiry to determine if FGM is indeed practised on Spanish territory, and it also encourages the organisation of information campaigns and awareness programmes on this subject.

4.4 Violence Within the Family

In its conclusions from the day's discussions on this subject, on 28 September 2001, the committee for the Rights of the Child recommended to the States Parties, that they introduce or modify, without delay their domestic legislation in order to prohibit all acts of violence within the family or at school, as a form of discipline, in conformity with articles 19, 28 and 37a of the Convention²¹.

In its Concluding Observations on the first periodic report presented by Spain²², the Committee on the Rights of the Child, observed that article 154²³ of the Civil Code, which authorizes parents to « chastise their children reasonably and with moderation », could be interpreted as authorizing acts contrary to article 19 of the Convention on the Rights of the Child²⁴. This article is, today, still in force under Spanish law, and a survey has demonstrated that corporal punishment is still practised and remains socially acceptable in Spain.

²⁰ Código Penal Art. 147 « El que, por cualquier medio o procedimiento, causare a otro una lesión que menoscabe su integridad corporal o su salud física o mental, será castigado como reo del delito de lesiones con la pena de prisión de seis meses a tres años, siempre que la lesión requiera objetivamente para su sanidad, además de una primera asistencia facultativa, tratamiento médico o quirúrgico. La simple vigilancia o seguimiento facultativo del curso de la lesión no se considerará tratamiento médico». Art. 149 «El que causare a otro, por cualquier medio o procedimiento, la pérdida o la inutilidad de un órgano o miembro principal, o de un sentido, la impotencia, la esterilidad, una grave deformidad, una grave enfermedad somática o psíquica, será castigado con la pena de prisión de seis a doce años».

²¹ Committee on the Rights of the Child, 28th session (CRC/C/111) Discussion on «*Violence Against Children, Within the Family and in Schools*», Friday, 28 September 2001: «The Committee urges States parties to enact or repeal, as a matter of urgency, their legislation in order to prohibit all forms of violence, however light, within the family and in schools, including as a form of discipline, as required by the provisions of the Convention and in particular articles 19, 28 and 37a».

²² CRC/C/15/add.28.

²³ Art. 154 Código civil « ... Los padres podrán en el ejercicio de su potestad recabar el auxilio de la autoridad. Podrán también corregir razonable y moderadamente a los hijos ».

²⁴ Art. 19 of the Convention on the Rights of the Child « States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of

OMCT therefore considers the Spanish government to be directly responsible for this practice, since it has still not yet outlawed corporal punishment.

According to a 1997 survey by UNICEF, Save the Children, CEAPA (Confederación española de asociaciones de padres y madres de alumnos) et CONCAPA (Confederación católica nacional de padres de alumnos), 47% of adults esteem that corporal punishment is necessary for the proper education of the child. Following these results, an awareness campaign was organised, but it remains very difficult to change a practice which has such overall acceptability. A new survey conducted in 2001 by the Spanish section of DNI (Defensa del niño internacional, España) showed that the situation had even worsened.

Experts working on the problem of child violence, condemn the fact that this phenomenon is so widespread in Spain, and that public administrations and social services do not pay enough attention when coming to the help of the victims. Each year there are around 147.580²⁵ children who suffer as a result of domestic violence and 90 children die as a result of ill treatment. 81% of offences are committed by the parents and in the case of sexual abuse, 32.5% are also committed by the parents or by someone close to the family. Experts state that the cases reported and known represent only a very limited percentage of the true situation.

OMCT is exceedingly concerned about this situation and asks the Spanish government to proclaim a total ban on corporal punishment and to continue with awareness campaigns on the subject of discipline without the need for corporal punishment.

4.5 Family Court

There exists in Spain in the upper Courts of Justice, a sub-division pertaining to the protection of the family (The Family Court) which affords protection to children who are not in conflict with the law. According to Spanish Law, when a child is a victim of violence, he or she can take a complaint to the Family Court. The Family Court does not exist in all of the autonomous Communities, which makes it difficult to deal with all the cases reported and slows the judicial procedures. A child may have to wait up to five years before his or her case is resolved.

Judges accede to the Family Court by seniority, and are not necessarily specialised in family law and the rights of the child. As a result, there is no consistency in the criterion which are applied and the judgements handed down are often in conflict with each other. One other difficulty which stands in the way of efficient protection of the child in the Family Courts, is the absence of trained child professionals in the technical groups which work in coordination with the judges and lawyers.

OMCT would recommend that the Spanish government take all necessary measures to change this situation, notably by making widely available, professional training programmes on children's rights for those working in the area concerned.

prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement».

²⁵ Calculation taken from a recent study in October 2001 by « Centro de Estudios Jurídico de la Generalitat de Catalunya » estimate that in the Community of Cataluña, 20.825 children suffer from violence.

4.6 Institutional Violence

According to the articles 18 and 21²⁶ of law 1/1996, in line with articles 172 and following of the Civil Code, a child who has been abandoned, must be placed in a child care centre for as short a stay as possible in the interest of the child itself.

Lately these centres, which are responsible for the assistance given to abandoned children without identity papers have been subject to serious criticism on the part of social services, by the press²⁷ and even by members of the public administration. The following situations have been condemned: in some cases children are forced to wear strait jackets, in others they are obliged to take off their clothes in front of an instructor to show that they are not introducing drugs into the centre, yet again they may be placed in solitary confinement for several days on end with no external communication, or they may be expelled arbitrarily from the centre to return, without any help or shelter, back to the streets.

In 1999, the spokesman of the autonomous Community of Melilla, following a visit to one of those centres, took note of and condemned the overpopulation of these centres as well as the poor condition of the establishment. In addition, and above all, he was able to verify for himself the inefficiency of a system which does not fulfil its role of educating and reintegrating the children placed under its temporary care.

One study, concerning the child care centre «La Monontañeta» in the Canary Islands, prepared by the Spanish section of DNI «Defensa del niño internacional» in 1997²⁸ described the situation in this centre which looks after children between the ages of 14-18

²⁶ Art. 18 LO 1/1996 « Cuando la entidad pública competente considere que el menor se encuentra en situación de desamparo, actuará en la forma prevista en el artículo 172 y siguientes del Código Civil, asumiendo la tutela de aquél, adoptando las oportunas medidas de protección y poniéndolo en conocimiento del Ministerio Fiscal ».

Art. 21 «1. Cuando la entidad pública acuerde la acogida residencial de un menor, teniendo en cuenta que es necesario que tenga una experiencia de vida familiar, principalmente en la primera infancia, procurará que el menor permanezca internado durante el menor tiempo posible, salvo que convenga al interés del menor. 2. Todos los servicios, hogares funcionales o centros dirigidos a menores, deberán estar autorizados y acreditados por la entidad pública. La entidad pública regulará de manera diferenciada el régimen de funcionamiento de los servicios especializados y los inscribirá en el registro correspondiente a las entidades y servicios de acuerdo con sus disposiciones, prestando especial atención a la seguridad, sanidad, número y cualificación profesional de su personal, proyecto educativo, participación de los menores en su funcionamiento interno, y demás condiciones que contribuyan a asegurar sus derechos. 3. A los efectos de asegurar la protección de los derechos de los menores, la entidad pública competente en materia de protección de menores deberá realizar la inspección y supervisión de los centros y servicios semestralmente y siempre que así lo exijan las circunstancias. 4. Asimismo, el Ministerio Fiscal deberá ejercer su vigilancia sobre todos los centros que acogen menores ».

Art. 172 Código Civil «La entidad pública a la que, en el respectivo territorio, esté encomendada la protección de los menores, cuando constate que un menor se encuentra en situación de desamparo tiene por ministerio de la Ley la tutela del mismo y deberá adoptar las medidas de protección necesarias para su guarda, poniéndolo en conocimiento del Ministerio Fiscal, y notificando en legal forma a los padres, tutores o guardadores, en un plazo de cuarenta y ocho horas. Siempre que sea posible, en el momento de la notificación se les informará de forma presencial y de modo claro y comprensible de las causas que dieron lugar a la intervención de la Administración y de los efectos de la decisión adoptada. Se considera como situación de desamparo la que se produce de hecho a causa del incumplimiento, o del imposible o inadecuado ejercicio de los deberes de protección establecidos por las leyes para la guarda de los menores, cuando éstos queden privados de la necesaria asistencia moral o material».

²⁷ El Mundo, Domingo 25 de marzo 2001 «Denuncian tratos vejatorios a los internos en los centros de menores».

²⁸ DNI (Defensa del Niño Internacional) España Informe «Programa participando se aprende a participar, conoce tus derechos», Las Palmas y Arucas, 1997.

years. According to this report, the atmosphere which predominates in the centre is not conducive to the participation of the children in any activities. A state of tension exists between instructors and children, corporal punishment is commonly applied to resolve conflicts and the children gradually become more aggressive and pessimistic about their future.

In concluding, DNI asserts that the children in this care centre do not feel that they are protected by the instructors. On the contrary they fear them and can only envisage a future in which two types of activity are possible: theft or the sale of drugs. Confronted with their difficulties, they either react violently or simply give up hope.

OMCT therefore encourages the Spanish government to take all necessary measures to improve the situation in the child care centres, and to ensure that the children are treated humanely, with the respect and dignity due to a human being and in a manner which takes into account the specific needs of persons of their age in conformity with the Convention on the Rights of the Child.

V. Protection Against All Forms of Violence

Article 19 of the Convention on the Rights of the Child demands that « The States Parties take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence injury or abuse, while in the care of parent(s) legal guardian(s) or any other person who has responsibility for the care of the child ».

In October 2000, the Department of Justice of the Community of Cataluña, presented a report on violence against children in which it estimated there were 20.825 physically abused children in the territory of the Community. The report further specified that the phenomenon was similarly widespread throughout all of Spain thereby underlining the seriousness of the situation.

5.1 Sexual Violence

Spanish legislation protects minors against sexual abuse. The Penal Code of 1995 provides for sentences of up to 15 years of imprisonment where a victim of sexual abuse is less than 18 years of age. The age of sexual consent has been raised to 13 years. Any sexual relations with a child less than 13 years²⁹ old, is therefore considered to be without consent and falls under the category of sexual abuse. Whereas the age of sexual consent has been raised, OMCT considers that it still remains too low.

²⁹ Art. 180 Código penal. «... Las anteriores conductas serán castigadas con las penas de prisión de cuatro a diez años para las agresiones del artículo 178, y de doce a quince años para las del artículo 179, cuando concurra alguna de las siguientes circunstancias: (...)

3ª Cuando la víctima sea especialmente vulnerable, por razón de su edad, enfermedad o situación, y, en todo caso, cuando sea menor de trece años.

4ª Cuando, para la ejecución del delito, el responsable se haya prevalido de una relación de superioridad o parentesco, por ser ascendiente, descendiente o hermano, por naturaleza o adopción, o afines, con la víctima.
2. Si concurrieren dos o más de las anteriores circunstancias, las penas previstas en este artículo se impondrán en su mitad superior ».

The Penal Code, does not condemn sexual relations between a child aged more than 13 years and a minor under 18 years in cases where there is no violence, no exploitation, demonstration of superiority, intimidation, abuse or incitement to prostitution (money, gifts, promises etc.). The consent of a child less than 15 years of age to sexual relations with an adult, is considered to be invalid.

According to the Special Rapporteur of the United Nations on violence against women, the age below which a victim is considered to be minor, should be set at 18 years in order that children be protected from abuses³⁰. However, the Special Rapporteur admits that, given the increase in sexual activity among teenagers in some countries, this may cause some difficulties.

According to a report presented in 1996 by Professor Lopez of the University of Salamanca, 22,7% of girls and 15,2% of boys are victims of sexual abuse before reaching the age of 17 years. These abuses range from forms of aggression without physical contact such as exhibitionism, up to the most intimate sexual acts. Of these victims 69% are under 13 years old, 30% of rapes reported in Madrid were even committed against children of 6-7 years old.

Unfortunately, there is a strong reticence on the part of a victim of sexual abuse to make an official accusation and lodge a complaint. The accusation procedure obliges the young victim of sexual abuse to explain the facts over and over again and to be interrogated by several people thus leading to a situation which often dissuades the child from lodging an official complaint.

Spain is very much behind with regard to legislation aimed at combating child pornography, a situation which contributes to an increase in this phenomenon. Whereas the Swedish Presidency of the European Union, in the first half of 2001, asked Member State to promote legislative reforms which would state that possession of child pornography material be considered a crime, so far Spain, has taken no action in this respect. Since 1997, PRODENI (Asociación pro derechos del niño y de la niña) has denounced the diffusion of child pornography over the internet and has requested, without any concrete results, stricter legislation on this subject.

Moreover, OMCT noted with consternation that in a sentence handed down on 12 January 1998 the Spanish Supreme Court agreed to impunity for a person who pays a child in return for sexual favours if it is the child her/himself who asks for money and sets the price. This decision is most alarming because it condones the development of child prostitution. According to the figures published by the Ministry of Social Affairs, each year over 5000 children prostitute themselves, mainly in the suburbs of the large cities such as Madrid, Barcelona, Valencia and in the Canary and Balearic Islands. These are the children who are most vulnerable, living on the fringes of society, who are drawn into the networks of prostitution and paedophilia.

OMCT therefore encourages the Spanish government :

- to organize campaigns for protection against sexual abuse, prostitution and child pornography,
- to guarantee that children who are victims of sexual abuse, gain immediate and easy access to legal and social assistance,

³⁰ UN Doc. E/CN.4/1997/47, para 37.

- to take adequate legislative measures aimed at a more efficient repression of persons profiting from child prostitution.

5.2 Violence in School

A report on violence in schools by CONCAPA (Confederación católica nacional de padres de alumnos)³¹, stated that 40% of children were subject to aggression at least once in school, 80% were subject to insults and 35% admitted to having aggressively attacked another child. The report's conclusions demonstrate that this kind of violence is on the increase in Spain, and that it concerns into all social classes without distinction, rooted in family background where there is a lack of affection, corporal punishment and parental discord.

This form of violence starts during the very early years of school and is on the increase in certain regions (for example in the autonomous Community of Madrid). It is a factor in absenteeism from school and therefore affects the overall development of its victims.

OMCT welcomes the efforts undertaken by the Spanish government through the new law on educational counselling, to facilitate the integration of foreign children in order « to learn how to live together in harmony », but also encourages the government to focus its attention on the prevention of violence with training programmes for teachers, instructors and other personnel working in schools, and also by assigning to the children greater participation and responsibility.

VI. Children in Conflict With the Law

In the new Penal Code which came into force in 1995, Spain showed itself to be particularly attentive to the cause of children. Amongst the most important changes, OMCT would like to highlight the raising of the age of penal majority from 16 to 18 years.

In the explanatory statements of the new law 5/2000³², the penal responsibility of the child is presented as having an educational character, taking precedence over all other legal considerations. In this sense, the law gives the possibility to the prosecuting magistrate not to take legal action and also to abandon the pursuit of legal procedures in cases where the child has reached an agreement with the victim, or has taken a commitment with the victim's agreement, to make good the damage caused. Deprivation of liberty is therefore to be considered as an exceptional measure, to be taken only in the most serious cases and for as short a time as possible.

The coming into force of the new law, however, has not been backed up with a sufficient increase in the necessary human and financial resources, thereby creating logistical problems (lack of arrangements to take care of children between 16-18 years of age newly released from prison), and human resources problems (shortage of lawyers and judges for juvenile courts, with a view to ensuring an adequate follow-up of children released from prison).

³¹ CONCAPA *Informa* n. 52 Mayo-Junio 2001.

³² LO 5/2000 Reguladora de la Responsabilidad Penal del Menor.

A new law on terrorism, law 7/2000³³, which came into force at the same time as law 5/2000, is in contradiction with the latter as well as with the principles governing the Convention on the Rights of the Child, since it provides for a major increase in the length of prison term for children accused of terrorism³⁴.

Article 2 of the new law 7/2000 provides for a prison term of four years, and in exceptional cases up to five, for children of 16 years, if repeated crimes have been committed, and in the case of children between 16-18 years, for a term of eight years with prolongation up to ten years in the most serious cases³⁵.

OMCT is especially concerned by this article which allows for prolongation of detention, in contradiction to the principle of social reintegration, which is the basis of article 37b of the Convention on the Rights of the Child and of the juvenile justice system.

6.1 The Age of Penal Responsibility

The age of penal responsibility coincides with the age of civil majority, 18 years. Article 1 of the law 5/2000 relative to the penal responsibility of the child³⁶ provides for the application of the same law to all children over 14 years and under 18 years of age. The Spanish penal system provides that there is absolutely no responsibility on the part of a child under 14 years old.

³³ Ley Orgánica 7/2000, de 22 de diciembre 2000, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, y de la Ley Orgánica 5/2000, de 12 de enero, reguladora de la Responsabilidad Penal de los Menores, en relación con los delitos de terrorismo.

