



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



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## REPORT

**by Nils Muižnieks**  
**Commissioner for Human Rights of the Council of Europe**

**Following his visit to Spain**  
**from 3 to 7 June 2013**

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## **Summary**

Commissioner Nils Muižnieks and his delegation visited Spain from 3 to 7 June 2013. In the course of this visit the Commissioner held discussions with state authorities and non-governmental, national and international organisations. The present report draws on the themes of the Commissioner's visit and focuses on the following human rights issues:

### **I. Impact of the economic crisis and fiscal austerity measures on children**

The Commissioner is concerned by the growing child poverty rate in Spain, which reached 30.6% in 2011, and has a potentially devastating long-term impact on children and the country. Children have been disproportionately affected by cuts in social, health and educational budgets and shrinking family benefits have led some children to experience destitution and nutrition problems. The Commissioner urges the authorities to adopt and implement more vigorous and co-ordinated strategies to tackle the root causes of child poverty and to prevent it. In this context, Spain is called on to accede to the revised European Social Charter and to its mechanism of collective complaints. He also underlines the need for a systematic impact assessment of austerity measures on children and other vulnerable social groups, in close co-operation with civil society and National Human Rights Structures such as the national and regional ombudsmen. He is particularly concerned about the detrimental impact of forced evictions on children and their families. The Commissioner is also concerned at the reported growing obstacles that undocumented migrant children face in accessing health care in contravention of the standards contained in the UN Convention on the Rights of the Child by which Spain is bound. The Commissioner is worried about the substantial cuts inflicted on education budgets in the last three years, ranging from 14.4% to 21.4%, and their impact on equality of opportunities and on the principle of inclusive education. The authorities are called upon to make sure that cuts in education budgets, notably in programmes of support for children with specific difficulties, do not affect equal access to quality education for all children. Lastly, the Commissioner calls on the authorities to reconsider their plans to abolish mandatory education for citizenship and human rights in schools, stressing that human rights-related education is key to combating all forms of intolerance and developing generations of active and responsible citizens - indispensable in a democratic society.

### **II. Impact of the economic crisis and fiscal austerity measures on persons with disabilities**

Whilst welcoming substantial improvements in the policy and legal framework that aims to promote and protect the human rights of the 3.8 million persons with disabilities in Spain, the Commissioner is worried about the serious impact that budgetary cuts have had on the living conditions of these persons and their social inclusion. No impact assessment of budgetary cuts on persons with disabilities has yet been carried out. The Commissioner is concerned about shortcomings in the implementation of the 2006 law on personal autonomy and care for dependency, such as the strict categorisation of persons with disabilities according to their levels of diagnosed disability. The Commissioner is also concerned by the fact that the economic crisis and financial restrictions have had a detrimental impact on most programmes and policies aimed at promoting the inclusion of persons with disabilities on an equal footing with others, including measures to improve accessibility to general services as well as employment and training programmes. Given the very high rate of unemployment among persons with disabilities, estimated at over 30%, the authorities are called on to avoid limiting training opportunities and assistance in the field of employment for these persons. The Commissioner is particularly worried about the potential impact of shrinking educational budgets on the inclusion of children with disabilities in mainstream education, taking into account the already high drop-out rate among these children in Spain. The authorities are urged to pay more attention to and accommodate the needs of persons with psycho-social and intellectual disabilities, 10 000 of whom are currently estimated to be homeless, while budgetary cuts threaten the community-based mental health model introduced in Spain in 1986. The Commissioner calls on Spain to promptly complete the process of reform of the legislation on the legal capacity of persons with intellectual and psycho-social disabilities and to ensure their full participation in the country's political and public life, giving full effect to the principles enshrined in the UN Convention on the Rights of Persons with Disabilities and to the Council of Europe standards.

### III. The role of law enforcement authorities in the protection of human rights

Ill-treatment by and impunity of members of law enforcement agencies is a very serious, long-standing human rights issue in Spain, particularly in the context of incommunicado detention by the Guardia Civil. In a number of cases brought before the European Court of Human Rights (hereinafter: the Court) and the UN Committee against Torture (UN CAT), Spain has been found to have violated human rights standards prohibiting torture. The Commissioner considers that incommunicado detention should be abolished. In the meantime, its use should be strictly limited and appropriate guarantees should be in place to avoid further human rights violations. In addition, the authorities need to vigorously combat the discriminatory practice of ethnic profiling that targets and stigmatises migrants in stop-and-search operations, and to adequately sanction all instances of racially-motivated abuse by members of law enforcement forces. The Commissioner is concerned about reported instances of disproportionate use of force, including rubber bullets, by law enforcement officials during anti-austerity demonstrations, whose frequency has increased exponentially during the last two years. He underlines the need for the authorities to heed the national Ombudsman's recommendations and to safeguard the rights to freedom of expression and of peaceful assembly enshrined in Articles 10 and 11 of the European Convention on Human Rights (ECHR), including in the context of "spontaneous", non-notified demonstrations. The Commissioner is concerned that the frequent lack of identification of law enforcement officials, especially during demonstrations, has impeded the prosecution and sanctioning of perpetrators of abuse. The authorities are urged to ameliorate the identification system concerning members of law enforcement, especially anti-riot forces, in order to render them fully accountable for their actions. Additionally, he highlights that it is crucial for prosecutors to effectively investigate, including *ex officio*, and for courts to adequately sanction all instances of ill-treatment committed by law enforcement officials in order to combat and eradicate impunity, especially if this has become institutionalised. The Commissioner urges the Spanish government to end its long-standing practice, based on a law of 1870, of granting pardons to members of law enforcement agencies involved in serious human rights violations, including torture. Lastly, he calls on the authorities to establish an independent and efficient complaints mechanism covering the actions of all law enforcement authorities.

The report contains the Commissioner's conclusions and recommendations addressed to the Spanish authorities and is published on the Commissioner's website along with the authorities' comments.

## Introduction

1. The present report follows a visit to Madrid and Seville, Spain, by the Council of Europe Commissioner for Human Rights (hereinafter “the Commissioner”) from 3 to 7 June 2013.<sup>1</sup> The visit focused on the impact of the economic crisis and fiscal austerity measures on the enjoyment of human rights, paying particular attention to two especially vulnerable social groups: children and persons with disabilities. The Commissioner also looked into issues pertaining to the action of law enforcement authorities, including in the context of the anti-austerity demonstrations which have taken place in the last two years.
2. During his visit the Commissioner held discussions with the Spanish authorities, including the Minister for Health, Social Affairs and Equality, Ms Ana Mato Adrover, the State Secretary of Justice, Mr Fernando Román García, the Undersecretary for Education, Culture and Sport, Mr Fernando Benzo Sainz, the Ambassador for Human Rights, Mr Juan Manuel Cabrera Hernández, the General Director of the National Police, Mr Ignacio Cosidó Gutiérrez, the Guardia Civil Lieutenant General, Mr Pablo Martín Alonso and the Lieutenant General, Mr Claudio Cardiel Ojer, the Delegate for Education of the Andalusian government, Ms María del Mar Moreno Ruiz, and the Delegate for Health and Social Affairs of the Andalusian government, Ms María Jesús Montero Cuadrado. In addition, the Commissioner met with the national Ombudsman, Ms Soledad Becerril Bustamante, and the Ombudsman of Andalusia, Mr José Chamizo de la Rubia. In Madrid, he also held meetings with various representatives of the Ministry of Health, Social Affairs and Equality in charge of childhood and persons with disabilities.
3. The Commissioner also met with a large number of representatives of civil society organisations active in the field of human rights both in Madrid and Seville. He visited a support centre for children operated by “Save the Children” in Madrid (Puente de Vallecas), as well as two civil society-run centres: the educational centre “Angel Rivière” for children with autism and the day care centre “Angel Diez Cuervo” for adults with autism, in Seville.
4. The Commissioner wishes to sincerely thank the Spanish authorities in Strasbourg and in Madrid for their assistance in organising his visit and facilitating its independent and smooth execution. He also extends his thanks to all his interlocutors for their willingness to share with him their knowledge and views.
5. The Commissioner is concerned by the impact on the enjoyment of human rights of the current global financial crisis and subsequent fiscal austerity programmes adopted by various European governments. He shares the serious concern expressed by the Parliamentary Assembly of the Council of Europe<sup>2</sup> that the impact of the financial crisis on the living conditions of citizens in Europe undermines fundamental social rights standards, especially those concerning protection against poverty and social exclusion (Article 30 of the [European Social Charter](#) (revised)). At the same time, the adoption by states, including Spain, of fiscal austerity measures has given rise to social unrest and public protests that have presented states with unprecedented challenges concerning the protection of a number of civil rights, such as the right to freedom of peaceful assembly, and freedom from ill-treatment in the context of the action of law enforcement authorities.
6. Spain has been deeply affected by the consequences of the global economic crisis, which, in the case of this country, has been compounded by the collapse of the construction sector. One of the most serious problems that the Spanish economy and society are confronted with is an extremely high rate of unemployment: in April 2013 it reached 27.1% of the general population and 57.2% among young people.

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<sup>1</sup> During his visit the Commissioner was accompanied by the Deputy to the Director of his Office, Mr Nikolaos Sitaropoulos and his Adviser, Ms Françoise Kempf.

<sup>2</sup> See [Resolution 1651\(2009\)](#) of the Parliamentary Assembly of the Council of Europe (PACE) on consequences of the global financial crisis. See also PACE Committee on Social Affairs, Health and Sustainable Development, [Austerity measures – a danger for democracy and social rights](#), revised draft report, 22 May 2012.

7. The economic crisis and fiscal austerity measures have not affected all regions of Spain evenly. Important discrepancies prevail between the more well-off regions in north-eastern Spain, such as the Basque Country, Navarra and Cantabria, and the regions in south-western Spain, including Extremadura and Andalusia. The highest regional unemployment rate (36.8%) is found in Andalusia. Additionally, social policy, education and health care are competencies devolved to the seventeen autonomous regions among which there have been stark differences in the type and scale of budgetary cuts made over the last few years.
8. The Commissioner chose to visit Seville, Andalusia, in addition to Madrid, in order to gain a better understanding of the impact of the fiscal austerity policies in one of the autonomous regions that has been seriously affected by the consequences of the economic crisis. Therefore, this report focuses on law and practice at the national level and in Andalusia. It consists of three sections concerning the impact of the economic crisis and fiscal austerity measures on children (section I), the impact of the economic crisis and fiscal austerity measures on persons with disabilities (section II), and the role of law enforcement authorities in the protection of human rights (section III). Each section of the report ends with the Commissioner's conclusions and recommendations addressed to the Spanish authorities.

## I. Impact of the economic crisis and fiscal austerity measures on children

### 1. Increase in child poverty

9. The Commissioner is deeply concerned at the growing child poverty rate in Spain, where 30.6% of children were estimated to be at risk of poverty in 2011,<sup>3</sup> an increase of about 10% compared to 2008.<sup>4</sup> Child poverty, probably the most visible effect on children of the economic crisis and fiscal austerity measures, has a potentially devastating, long-term impact, given that it tends to be one of the major root causes of poverty and social exclusion in adulthood.
10. Child poverty rates vary substantially, depending on the autonomous communities concerned. During his visit to Seville, the Commissioner heard with dismay reports about children fainting at school due to lack of proper meals and children wearing the same clothes at school for three consecutive weeks, due to poverty. The region of Andalusia has one of the highest rates of children under 16 at risk of poverty (37.4% in 2011).<sup>5</sup> In 2012, the Ombudsman of Andalusia reported an increase, compared to 2011, of 21.4% in calls to the hotline devoted to complaints concerning children's rights. He explained that this rising number of calls came from an increasing number of families unable to meet their children's needs adequately.
11. The Commissioner noted with particular concern that chronic poverty among children is reportedly on the rise. Children in single-parent families, in young families and in large families, as well as children belonging to vulnerable social groups, such as Roma and migrants, have been particularly affected. Unemployment has had particularly detrimental effects upon minors of possible working age (16-18 years old), resulting in acute poverty among members of this age group, especially as most of the minors concerned do not have a right to unemployment benefits. Characteristically, in 2012 in the region of Catalonia 20% of young people between 16 and 19 were neither working nor studying.<sup>6</sup>
12. Social expenditures per capita in Spain have traditionally been low, including before the crisis. Those who were at high risk of poverty before the beginning of the economic crisis have therefore benefitted from very limited protection against the effects of the crisis. In its 2010 Concluding Observations the UN Committee on the Rights of the Child invited the Spanish authorities to strengthen the system of family benefits and child allowances so as to provide

<sup>3</sup> Eurostat, [Statistics in focus 4/2013](#), where it is stated that children were the age-group at the highest risk of poverty or social exclusion in 2011.

<sup>4</sup> UNICEF, "[La infancia en España 2012-2013](#), El impacto de la crisis en los niños", May 2012, pp. 7-10.

<sup>5</sup> See Observatorio de la Infancia en Andalucía, "Cifras y Datos N° 10: Pobreza y desigualdad", February 2013, pp. 5-6.

<sup>6</sup> See Sindic de Greuges (Ombudsman of Catalonia), "[Informe sobre la pobreza infantil en Cataluña](#) », September 2012, p. 7.

better support to households with children and better protection against poverty.<sup>7</sup> The European Committee of Social Rights also considered in its 2011 Conclusions on Spain that the level of family benefits was not in line with Article 16 of the European Social Charter enshrining the right of the family to social, legal and economic protection.<sup>8</sup> It underlined in particular that the economic protection of families implied that “child allowances must constitute an adequate income supplement”.

13. The Commissioner is concerned that, as part of the packages of fiscal austerity measures, the already low level of direct economic support to families with children has been substantially reduced. In 2011, a subsidy of €2 500 for the birth or adoption of each child, in force throughout the country since 2007, was suppressed and another subsidy of €500 per year to low-income families with children under the age of five was limited to €291. At the same time, direct support provided by regional authorities to families with children has been drastically reduced in many of the autonomous communities. In Catalonia, for instance, the regional budget for support to families with children was reduced by about 75% in 2011.<sup>9</sup> Moreover, conditions of access to subsidies have been toughened and those in need of social support face, according to information provided to the Commissioner, increased administrative hurdles.
14. The Commissioner was informed during his visit to Andalusia that, despite the existence in this region since 2010 of a ‘pact for childhood’, cuts in child benefits and other areas, such as health and education, have also been implemented by the regional and local authorities. They have included the closure of protection centres for minors at risk, the termination of programmes of poverty prevention and programmes of educational support for disadvantaged children.
15. The Commissioner is particularly worried by the consequences of the drastic decrease in the allocation of subsidies for school meals, which have been cut by 30 to 50% in various autonomous communities and have led to malnutrition among a growing number of children of impoverished families. The city of Barcelona, for example, found in 2013 that about 2 800 children were facing nutrition problems and reintroduced about 2 000 suppressed meal subsidies. In June 2013, the national Ombudsman initiated an *ex officio* investigation into the impact of the crisis on the quality of food in families with children with a view to better evaluating the number of children facing nutrition problems and identifying adequate emergency measures. In August 2013, the Ombudsman of Catalonia published a report indicating that about 50 000 children currently face nutrition problems in Catalonia, including acute ones for 750 of them.
16. As regards Andalusia, the Commissioner welcomes the launch in June 2013 of the urgent measures against social exclusion amounting to €120 million. The measures comprise, *inter alia*, food support for children in need (an estimated 47 000 children should benefit from the measure) via school meals, to be available also during the summer holidays. The Commissioner was nonetheless informed that these measures have been elaborated without significant involvement of the regional Ombudsman and NGOs active in child protection.
17. The Commissioner regrets that to date, no impact assessment of the austerity measures on children has been carried out by the authorities. He also shares the concern expressed by many of his interlocutors during his visit that the long-lasting gap in data collection on children seriously hampers a full and accurate assessment of the impact of austerity measures. The Commissioner therefore welcomes the announcement made in April 2013 by the Minister of Health, Social Services and Equality that an impact-assessment on children’s rights of all draft laws and regulations would be carried out.
18. The Commissioner notes with satisfaction that a second [National Plan for Childhood and Adolescence](#) for the period 2012-2015 was adopted in April 2013. He expects that sufficient funding will be available at national and regional levels for its implementation, in view of the importance of such a plan for the development of co-ordinated and comprehensive actions to

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<sup>7</sup> UN Committee on the Rights of the Child (CRC), Concluding Observations on Spain, 3 November 2010, pp. 7-8, available through: <http://tb.ohchr.org>, accessed 18 July 2013.

<sup>8</sup> See European Committee of Social Rights, [Conclusions XIX-4 2011, Spain](#), Articles 7, 8, 16, 17 and 19 of the Charter, January 2012, p. 17.

<sup>9</sup> See UNICEF, [“La infancia en España 2012-2013, El impacto de la crisis en los niños”](#), May 2012, p. 15.

better protect children's rights. However, the plan does not deal with child poverty as such, leaving it for the next National Plan for Social Inclusion for 2013-2016, which is to be elaborated in 2013. The Commissioner also notes with interest that the [National Reform Programme](#) of the government, approved in April 2013, specifies that a comprehensive plan of support to families should be developed in 2014 in order to provide, *inter alia*, additional support to families with children in a difficult socio-economic situation. In Andalusia, the Commissioner was pleased to learn that in 2013 the authorities adopted an action plan against child poverty, whose implementation involves the local authorities, the regional Ombudsman, NGOs and private sector entities.

19. While welcoming these measures taken at national and regional level, the Commissioner regrets the lack, until now, of a relevant comprehensive national action plan to combat child poverty at all levels. He stresses that early intervention and poverty prevention policies tend to be less costly for public expenditure than measures to address poverty and social exclusion taken at a later stage.

## **2. Impact of budgetary restrictions on quality health and social services for children**

### *a. Children's access to quality health and social services*

20. Health and social services in Spain have undergone major budgetary cuts since 2012, which have had a detrimental effect on the availability, accessibility and quality of these services. Until 2012 Spain offered a system of universal and free access to health care. In September 2012, a system of access to health cards based on employment status was introduced in order to reduce the public health budget.<sup>10</sup> The new system covers Spanish and EU citizens. Non-EU citizens, including undocumented migrants (apart from children), no longer have access to free health care, except in cases of emergency. Free access is maintained for pregnant women and children. This reform was strongly criticised, notably by the national Ombudsman who invited the authorities to ensure effective access to health care for those without health cards following the entry into force of the new law. A number of regional governments have also opposed the reform and four of them (Andalusia, Asturias, the Basque Country and Catalonia) have initiated proceedings against the decree before the Constitutional Court, while Andalusia set up a mechanism to maintain free and universal access to health care, on the ground that non-provision of emergency medical services and of treatment of long-lasting illnesses entails particularly high and long-term costs for the authorities.
21. The Commissioner is worried that, despite the fact that migrant children continue to benefit from free health care, NGOs have reported that migrant children whose parents are undocumented have on various occasions been denied access to a health card or to health care. Such practice is incompatible with Article 24 of the UN Convention on the Rights of the Child which enshrines every child's right to the "enjoyment of the highest attainable standard of health". Cases of denial of access to health care have reportedly arisen out of confusion among social services and health professionals, which has been generated by the new law and the various regional responses. Moreover, some migrant parents appear not to be aware that their children continue to have the right to free health care.
22. In general, massive cuts in medical staff, in funding of public health centres and other primary care services, the closing down of emergency services and the need for co-payment of medicines by patients have had a disproportionate impact on children's access to health care. These limitations have reportedly led to less preventive care and reduced attention to health issues that are considered less vital, such as dental care and psycho-social assistance, the demand for which grows in times of crisis. Indeed, children, especially at an early age, are highly sensitive to the quality of the social, health and other services provided to them.
23. Lastly, it appears that budgetary restrictions in primary health and social services have occasionally led to the referral of children from families in a difficult socio-economic situation to child protection services and their alienation from their families, when they should have been provided with the necessary health and social support. The Commissioner underlines that a

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<sup>10</sup> Royal Decree 16/2012 of 20 April 2012.

situation of material deprivation in itself cannot be a sufficient ground for ordering the separation of a child from their natural family and draws attention to a judgment delivered by the Court in June 2013 (*R.M.S. v. Spain*), in which Spain was found to be in violation of Article 8 of the ECHR. In this case, a pre-adoption procedure had been initiated with regard to the applicant mother's child, against the mother's will, following a request made by her to the social services of Motril, Granada, to be provided with "work, food and housing". The Court underlined that instead of separating the child from its impoverished parents, social services should have identified ways of providing material and other support to the family so as to enable them to overcome their difficulties.<sup>11</sup> It concluded that Spain had violated the applicant mother's right to live with her child and to respect for her private and family life. Several interlocutors of the Commissioner indicated during the visit that although such cases occur very rarely, a growing number of families refrain from requesting support from social services for fear of losing custody of their children.

*b. The protection of children's mental health*

24. Poverty and social exclusion have a particular impact on the mental health of children. In a 2011 report on the impact of the economic crisis on mental health in Europe, the World Health Organisation noted that "[t]he effects of extreme poverty on children include deficits in cognitive, emotional and physical development, and the consequences on health and well-being are lifelong."<sup>12</sup> The Commissioner finds it disquieting that, according to a 2012 report on child poverty prepared by the Ombudsman of Catalonia, children belonging to "disadvantaged social groups", were six times more at risk of facing mental health problems.
25. The Commissioner considers it essential that national and regional authorities pay specific attention to the mental health of children as well as of adolescents. Remedies should be identified for the existing gaps that were brought to his attention, notably the lack of co-ordination of health and social services which limits access to existing mental health remedies. The lack of mental health services offered to children in residential care also leads to frequent placements in centres for minors with psycho-social disorders, in respect of which serious concerns have repeatedly been raised by national and international human rights bodies. One of the concerns expressed notably by the UN Committee on the Rights of the Child in 2010 relates to the over-medication of children with psycho-social problems, this often being the only method used in order to tackle the difficulties facing these children.<sup>13</sup>

**3. Impact of evictions on children**

26. Spain has witnessed an unprecedented wave of evictions for non-repayment of mortgage loans, following the bursting of the "property bubble". About 350 000 evictions took place between 2007 and 2011.<sup>14</sup> In 2012 alone 46 408 evictions were ordered by courts.<sup>15</sup>
27. Evictions in Spain are carried out in the context of a legislative framework on mortgages which puts a disproportionate burden on indebted households, despite successive legislative amendments in 2012 and 2013.<sup>16</sup> In March 2013, the Court of Justice of the European Union considered that the Spanish law on evictions for non-repayment of mortgage should be interpreted in line with Directive 93/13/EEC on unfair terms in consumer contracts, which provides for the possibility for courts to stop an eviction procedure in cases where the contract with the bank may be considered to have included abusive clauses.<sup>17</sup> Local and regional authorities have started to take measures, within the remit of their competencies, to limit the number of evictions, freeze them or identify alternatives.

<sup>11</sup> *R.M.S. v. Spain*, judgment of 18 June 2013, paragraphs 84-86.

<sup>12</sup> World Health Organisation, Regional Office for Europe, "[Impact of economic crisis on mental health](#)", 2011, p. 6.

<sup>13</sup> See UN CRC, Concluding Observations on Spain, 2010, *ibid*, p.9.

<sup>14</sup> Centre for Economic and Social Rights, [Factsheet N° 12 on Spain](#), p. 4.

<sup>15</sup> See El País, "[Los jueces efectuaron 46.408 desahucios en 2012, un 13% más que en 2011](#)", 22 March 2013.

<sup>16</sup> Decree 6/2012 of March 2012 and Law 1/2013 of May 2013.

<sup>17</sup> See *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, case N° C-415/11 [judgment](#) of 14 March 2013.



28. The Commissioner underlines the considerable impact of evictions on the enjoyment by children of their human rights. They generate high levels of stress and seriously disrupt children's lives, especially their education and health. When carried out by law enforcement officials, they are often traumatising for children. They usually result in worse housing conditions, and, in the worst cases, homelessness, since adequate and affordable alternative accommodation is usually not provided. Information brought to the attention of the Commissioner during his visit indicates that evictions have often led to the social exclusion of the evicted persons, including children, given that evicted families sometimes refrain from requesting assistance from social services for fear of being deprived of the custody of their children, as noted above. It is noted that in December 2012 the Court ordered the application of interim measures, under Rule 39 of the Court's Rules, to stop the eviction of a mother and her children from a building she had been illegally occupying since 2009. The applicant alleged that she was offered no alternative accommodation and that the protection of her children's rights would not be ensured in case of an eviction.<sup>18</sup>
29. The Commissioner notes that some steps have recently been taken to mitigate the impact of evictions on children. In late 2012 the Ombudsman of Andalusia initiated an *ex officio* investigation into the impact of housing evictions on children. Also, Law 1/2013 of March 2013 foresees the freezing of eviction proceedings regarding households with children up to three years old. In April 2013, a Madrid court suspended an eviction pending completion of the on-going school year by the children of the family concerned, invoking the children's right to education enshrined in the UN Convention on the Rights of the Child.

#### **4. Impact of austerity measures on children's education**

##### *a. Impact of austerity measures on children's access to quality education*

30. Education budgets in Spain have suffered major cuts in the last few years as part of the austerity measures taken at the national and regional levels. The total education budget was cut by 21.4% between 2011 and 2012<sup>19</sup> and by a further 14.4% in 2013. The Commissioner is informed that cuts have adversely affected all levels of education, from early pre-schooling to universities. He is mainly concerned by the potential impact of this restrictive budgetary policy on the principle of inclusive education and on equality of opportunities that should be available to all children.
31. Budgetary cuts have entailed an end to all central state funding for the programme of development of early pre-schooling. The Commissioner underlines that pre-school is known to be a key factor for reducing the impact of socio-economic and educational disadvantages at a later stage of one's life. Moreover, in various regions substantial cuts have been made in subsidies for school textbooks, meals and transportation. The number of pupils per classes has increased as a result of cuts in the number of teaching posts.
32. Additionally, severe cuts have been made since 2011 in programmes implemented through co-operation between the national and regional authorities which have provided for targeted measures to support children in disadvantaged areas or children coming from disadvantaged groups, such as Roma and migrant children, and to combat school absenteeism. During the Commissioner's visit interlocutors underlined that the elimination of these positive measures is likely to widen the gap between different categories of pupils. In a 2012 report on child poverty in Catalonia, the regional Ombudsman confirmed the negative impact of budgetary restrictions on the implementation of programmes aimed at remedying inequalities and supporting pupils facing difficulties.
33. In 2012 the Ombudsman of Andalusia reported an increase in school absenteeism, linked to the shrinking of resources allocated to schools to tackle this problem. The Commissioner is concerned that budgetary restrictions in education could have a negative impact on the already

<sup>18</sup> Case [A.M.B. and others v. Spain](#), application N°77842/12, 6 December 2012. The applicant alleged violations of Articles 3 and 8 ECHR.

<sup>19</sup> See UNICEF, "[La infancia en España 2012-2013](#)", El impacto de la crisis en los niños", May 2012, p. 19.

very high school drop-out rate in Spain. 24.9% of children were in a situation of early school leaving in 2012,<sup>20</sup> almost double the percentage in other EU member states (12.8% on average in 2012).<sup>21</sup> Moreover, the drop-out rate is substantially higher among certain disadvantaged groups of the population, including Roma and first generation migrants, who may well be disproportionately affected by the termination of some support programmes.

34. Additionally, the Commissioner found it worrying that cuts in educational programmes have resulted in the reduction of public support for extra-curricular activities, which limits poorer children's chances to enjoy their right to leisure and to engage in play, recreational and cultural activities as prescribed by Article 31 of the UN Convention on the Rights of the Child. Furthermore, the elimination of such activities could, according to NGO representatives, have a detrimental, long-term impact on the harmonious coexistence between pupils of different cultural and social groups.

*b. Amendments to civic and human rights education*

35. A draft law on education which was presented in September 2012 put forward changes to the content of education programmes and gave rise to controversy. In February 2013, the Commissioner received a petition against the abolition of education for citizenship, signed by 60 Spanish and European NGOs. Although this issue is not directly connected to austerity measures, the Commissioner found it important to discuss it with the Spanish authorities as he firmly believes that civic and human rights education is key to combating all forms of discrimination and intolerance and for developing generations of active and responsible citizens necessary in a democratic society. He draws the authorities' attention to the Council of Europe standards on human rights education, such as the [Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education](#),<sup>22</sup> which invites member states to "include education for democratic citizenship and human rights education in the curricula for formal education at pre-primary, primary and secondary school level as well as in general and vocational education and training".
36. The above-mentioned bill foresees the abolition of the subjects of Education for Citizenship and Human Rights in primary schools and Civic and Ethical Education in secondary schools, which were introduced in 2006. Additionally, religion would be reintroduced as a full subject, with a possibility to opt-out and take, instead, a course of education in social and civic values. The current Education for Citizenship includes topics such as awareness-raising on children's rights, gender equality, non-discrimination, combating racism, anti-Semitism and homophobia, and human rights and the new information technologies. The authorities have informed the Commissioner that these contents would be mainstreamed across the entire curriculum of schools.
37. The Commissioner is concerned that mainstreaming human rights education across the entire curriculum of schools could lead to its dilution and its effective downgrading by teachers and pupils. He also notes that the proposal to eliminate human rights education has met with substantial criticism from human rights NGOs and teachers' organisations. In April 2013 the Council of State, in its capacity as the government's consultative body, also took a clear stance against the abolition of human rights education. The Commissioner looks forward to receiving more information from the authorities on the envisaged reform of civic and human rights education in schools.

*Conclusions and recommendations*

38. Periods of financial dire straits, such as the one currently affecting Spain and other European states, should not be seen as emergency situations that automatically entail the curtailment of social and economic rights and the deterioration of the situation of vulnerable social groups. On the contrary, such periods of time should be viewed by states as windows of opportunity to overhaul their national human rights protection systems and reorganise their administration in

<sup>20</sup> See Eurostat, table on [early leavers from education and training](#).

<sup>21</sup> Ibid.

<sup>22</sup> Council of Europe Committee of Ministers, [Recommendation CM/Rec\(2010\)7](#) on Education for Democratic Citizenship and Human Rights Education.

order to build or reinforce the efficiency of national social security systems, including social safety nets that should be operational when necessary.

39. The Commissioner draws the attention of the Spanish authorities to the need to ensure that members of social groups that are particularly vulnerable to and affected by fiscal austerity measures, such as children and persons with disabilities, are identified and effectively protected by the state on the basis of impact assessments. To this end, Spain should establish clear criteria for prioritising the social protection of these groups and set up a relevant comprehensive data-collection system in accordance with internationally accepted standards.
40. The Commissioner believes that it would be particularly important to conduct a systematic human rights-based impact assessment of the fiscal austerity measures in Spain, in a transparent and inclusive manner, in close co-operation with civil society and existing National Human Rights Structures, such as the national and regional ombudsmen. In this context, the Commissioner welcomes the fact that the budgets of these institutions in Spain have, until now, not been disproportionately reduced. He urges the authorities to maintain this approach and to refrain from curtailing their capacity to act as mechanisms able to provide effective remedies for or prevent human rights violations.
41. The Commissioner stresses that in times of economic crises states, including Spain, should ensure a social protection minimum for all through a solid legal and institutional framework for social protection in accordance with international and Council of Europe standards, such as those contained in the [European Code of Social Security](#).
42. In this context, the Commissioner encourages in particular the creation and enhancement by states of social safety nets for the most socially vulnerable groups of the population, such as children. Social safety nets should be part of national social protection systems and readily and systematically available in the form of cash transfers, transfers in kind, income support or fee waivers for essential services such as health, education or heating.
43. In addition, the Commissioner encourages the Spanish authorities to accede to the Revised European Social Charter, as well as to the mechanism of collective complaints established under the Charter. He underlines that the European Social Charter can provide useful guidance to all member states on policy-making in times of socio-economic crisis, and thus prevent further social tension and the erosion of social and economic rights.
44. As regards the human rights of children in particular, the Spanish authorities are urged to ensure that adequate funding is allocated to plans to combat child poverty as well as to the implementation of the second National Action Plan for Childhood and Adolescence, which can improve the co-ordination of efforts at all administrative levels.
45. The Commissioner urges the authorities to ensure that alternative, adequate and affordable accommodation is always available and provided in cases of evictions of families with children, irrespective of their age, in accordance with the case law of the European Committee of Social Rights and the guidelines provided by the UN Committee on Economic, Social and Cultural Rights. Genuine consultation with those affected prior to the eviction should also be carried out, in order to evaluate the impact of the eviction on children's lives.
46. The authorities should ensure that no child is excluded from access to health care, irrespective of his or her parents' legal status, including by providing clear guidance to health and social professionals in this regard.
47. The Commissioner also highlights that poverty in itself should never be considered a sufficient ground for separating children from their families, as stressed by the case law of the Court.<sup>23</sup>
48. The Commissioner calls on the authorities to carry out an impact assessment of the budgetary restrictions in the field of education on equal opportunities and inclusion of pupils belonging to vulnerable social groups. Austerity measures should not lead to the elimination of positive action

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<sup>23</sup> See [R.M.S. v. Spain](#), judgment of 18 June 2013. See also *Wallová and Walla v. the Czech Republic*, judgment of 26 October 2006, paragraphs 71-74.

in favour of children with disadvantages, whether in formal or informal education, nor deprive them of their right to quality, inclusive education.

49. Lastly, the Commissioner stresses that human rights education is an essential tool to promote respect for pluralism, the values of democracy and the rule of law. It should form an integral part of education at all levels, as prescribed by the [Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education](#).

## **II. Impact of the economic crisis and fiscal austerity measures on persons with disabilities**

50. The Commissioner is pleased to note that, in the last decade, the Spanish legal framework concerning the human rights of persons with disabilities has considerably improved. [Law 51/2003](#) on equal opportunities, non-discrimination and access of persons with disabilities established the principle of prohibition of discrimination on disability-related grounds, and provided for administrative sanctions and an arbitration system. The anti-discrimination legislation was strengthened in 2007. Moreover, a [Permanent Specialised Office](#) was established in order to deal with discrimination-related complaints as part of the National Council for Disability, a consultative body composed of representatives of various ministries and NGOs.
51. The ratification by Spain in 2007 of the [UN Convention on the Rights of Persons with Disabilities](#) (hereinafter referred to as “CRPD”) and its Optional Protocol on individual complaints led to additional positive legislative developments. The Commissioner welcomes in particular the change in the approach to disability introduced by [Law 26/2011](#), which provides a definition based on the social model of disability in line with the principles of the CRPD. A [long-term strategy for persons with disabilities \(2012-2020\)](#) was adopted as part of the EU Strategy on Disability 2010-2020, and a national strategy for mental health was first implemented in 2006-2008 and then updated for the period 2009-2013.
52. The Commissioner praises the work of the large number of active NGOs representing persons with disabilities throughout the country. They play an essential role in providing services to persons with disabilities and are involved in consultations with the authorities on all aspects of the rights of persons with disabilities, notably through *CERMI* (Committee of Representatives of Persons with Disabilities) which holds the status of an independent body in charge of promoting, protecting and monitoring the implementation of the CRPD, pursuant to Article 33, paragraph 2, CRPD.
53. However, despite this positive framework and the authorities’ declared willingness to improve the level of enjoyment by persons with disabilities of their human rights, since 2011 substantial budgetary cuts in the sector of disability have had a direct and detrimental impact on the situation of many of the approximately 3.8 million persons with disabilities in Spain. The Commissioner was worried to learn that funding for sign language interpretation was abolished in the emergency services of Andalusian hospitals, and substantially reduced in other public services throughout the country, such as courts and schools. This has led to reduced access of persons with hearing disabilities to a range of vital services. Increased co-payment for medication and cuts in public health services have also had a disproportionate impact on persons with disabilities.
54. The Commissioner regrets that no impact assessment of the cuts on the rights of persons with disabilities has so far been carried out. Moreover, he is afraid that the important budgetary restrictions that have been implemented in the last two years, in addition to generating increased poverty among persons with disabilities, could lead to a retrogression in the enjoyment of some of the rights recognised in the last decade, particularly as regards the right to personal autonomy, access to employment and training and the participation of children with disabilities in inclusive education.

### **1. Impact of austerity measures on the personal autonomy of and access to general services by persons with disabilities**

55. The Commissioner acknowledges that the 2006 Law on personal autonomy and situations of dependency (hereinafter referred to as “law on autonomy”) was an important step forward in advancing the rights of persons with disabilities. It introduced a duty for the national and regional authorities to provide the necessary support and care to persons with a certain degree of dependency in order to promote their autonomy and to guarantee a minimum content of rights to all persons concerned. The law covers persons dependent due to disability, but also dependency due to illness or age. It includes provision of professional and non-professional care.
56. The law on autonomy recognises three specific levels of disability and dependency and regional authorities are tasked with diagnosing the level of a person’s dependency in order to determine whether he or she is covered by the law and therefore entitled to a range of services. The Commissioner stresses that the linking of eligibility for services to a specific level of disability is problematic from the point of view of the CRPD. The enjoyment of rights, such as the right to live independently and to be included in the community, protected by the above law as well as by Article 19 of the CRPD, should not depend on a certain level of diagnosed disability.<sup>24</sup> This approach is based on the controversial medical model of disability as opposed to the social model of disability that promotes inclusive ways of living.<sup>25</sup>
57. In this context, the Commissioner notes that after the adoption in December 2011 of a moratorium on the inclusion of new beneficiaries of the law on autonomy, about 280 000 persons, mainly with a “moderate level of disability”, were excluded from the application of the law in 2012 and this exclusion has since been extended until 2015. An earlier decree of 2011 had already modified the system of evaluation of the level of disability, making it more difficult for beneficiaries to be recognised as suffering from a “severe level of disability”. NGO representatives with whom the Commissioner met expressed the view that in fact the lack of support to persons with a moderate level of disability can lead to the worsening of their situation in the long term, and thus to additional costs for the state.
58. Additionally, the system of determination of the level of disability in place raises concerns. The Commissioner notes the criticism made by the national Ombudsman in her 2012 report concerning the long deadlines set by regional administrations for completing the process of determination of the level of disability. This is largely due to inadequate human resources following budgetary restrictions, but also to long and cumbersome administrative procedures.
59. In Andalusia, the Commissioner was informed that, despite the fact that the law on autonomy had been widely applied, all processes of determination of new beneficiaries have been *de facto* frozen since mid-2012 due to the administration’s inability to continue processing eligibility claims. This situation has resulted in a reduced demand for community support services even though in practice there is a dire need for such services. In a resolution of April 2013 based on an *ex officio* investigation into the implementation of the law on autonomy, the Ombudsman of Andalusia concluded that there has been a paralysis of the system and advocated for substantial reforms. In response to this situation, the emergency plan against social exclusion launched by the Andalusian authorities in April 2013 includes the provision of dependency services to a maximum of 15 000 persons who have been left out of the application of the law.
60. The implementation of the law on autonomy requires co-funding from the central and regional authorities. Nonetheless, funding has been curtailed by both of them. In July 2012, the central government adopted a decree which, *inter alia*, reduced the cost to be borne by it in the system of dependency by 13% and increased the level of co-payments by beneficiaries of services

<sup>24</sup> See also Commissioner for Human Rights, [“The right of people with disabilities to live independently and be included in the community”](#), Issue Paper, June 2012, p. 31.

<sup>25</sup> According to the social and human rights based model of disability, which characterises the CRPD, disability is not the automatic result of a physical, sensory, intellectual or psychosocial impairment. It arises from the interaction of these impairments with various barriers in the physical and social environment which hinder the full and effective participation in society on an equal basis with others.

provided under the law. Co-payments to access services have in fact risen considerably in some regions, sometimes reaching 90% of the income of the persons in need. The Commissioner is concerned that persons with disabilities have to invest a substantial share of the social benefits they are entitled to in order to cover the cost of services, which in fact generates a substantial loss of autonomy for them.

61. In general, the Commissioner understands that until now, the dependency component has prevailed over the autonomy component in the implementation of the law. In Andalusia, as in other regions, it appears that the 2006 law, which aimed at granting new rights to persons with disabilities and opening opportunities for enhanced autonomy and independent living by providing a wider range of services, has in fact allowed the authorities to widely grant benefits to primary carers within the family as a means of compensating for the loss of income of families resulting from rising unemployment and gaps in the system of social protection. Moreover, the Ombudsman of Andalusia has underlined that subsidising family members has led many enterprises providing services to dependent persons to bankruptcy, thus limiting further the offer of services instead of expanding it.
62. In order to set aside resources to implement the law on autonomy, some regional governments have also imposed cuts on other programmes for persons with disabilities, thus harming the rights of persons who are not in need of support for autonomy. The Commissioner learned with concern that cuts in the funding for programmes promoting the early detection of some forms of disability as well as rehabilitation programmes are likely to be particularly detrimental and can, as far as rehabilitation is concerned, lead to an ever-growing demand of care for dependency instead of promotion of autonomy.
63. Furthermore, vital support for persons with disabilities is at threat due to delays in the payment of state subsidies to institutions providing a range of services to these persons. Therefore, the Commissioner praises the allocation by the central government, in June 2013, of about €700 million to support a range of NGOs providing social services to the population, including those operating in the area of disability.
64. In their discussions with the Commissioner, NGOs have highlighted as a root cause for the current difficulties the lack of a human rights-based approach in the provision of services to persons with disabilities and, despite a welcome change of approach in the last decade, the fact that existing schemes are still too often conceived as a means of providing assistance rather than making it possible for persons with disabilities to enjoy the full range of their human rights. The Commissioner is concerned that such an approach renders persons with disabilities highly vulnerable to poverty in times of austerity measures and budgetary stringency.
65. As regards access to public facilities, goods and services by persons with disabilities, the Commissioner notes that, although [Law 26/2011](#) reinforced the safeguards introduced by [Law 51/2003](#) in terms of accessibility of public facilities and goods and services available to the public, a generally low level of compliance with accessibility requirements has been reported, including by the CRPD Committee.<sup>26</sup> He is concerned that the economic crisis and the shrinking of public funds have resulted in the halting of many projects of adaptation and reform of public buildings, services and transportation. Representatives of NGOs also expressed the fear that past achievements regarding accessibility could be at risk due to lack of funding. The largest number of complaints received in 2012 by the Permanent Specialised Office related to barriers in accessing goods and services through new technologies, followed by barriers and lack of access to public places or buildings and to means of public transportation.
66. The Commissioner notes with concern that the lack of resources is not the only factor limiting progress towards increased accessibility. The national Ombudsman reported a lack of human rights awareness and willingness of the local authorities to take measures to promote accessibility in practice. In particular, there seems to be a general lack of awareness about the principle of reasonable accommodation defined in Article 2 of the CRPD,<sup>27</sup> which is an essential

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<sup>26</sup> See UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Spain, 19 October 2011, p. 4, available through: <http://tb.ohchr.org>, accessed 18 July 2013.

<sup>27</sup> Under Article 2 of UN CRPD "reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to

element in ensuring full enjoyment of the right to accessibility. It appears that it is not as yet widely understood or accepted that the adoption of specific measures, which are required to allow for treatment on an equal basis with others in the enjoyment of a human right, form part of the right itself and that resources must be allocated to implement this right effectively. The lack of financial resources for the application of the principle of reasonable accommodation, even more so in the current economic and financial context, often results in serious discrimination against persons with disabilities. Representatives of the Permanent Specialised Office have reported to the Commissioner an overall increase in discrimination-related complaints, partly due to the economic crisis.

## **2. Impact of the economic crisis and fiscal austerity measures on the employment of persons with disabilities**

67. States are bound by the CRPD to promote the inclusion of persons with disabilities on an equal footing in all spheres of life. The Commissioner stresses that this principle also applies to the area of employment and draws attention to [Article 15 of the revised European Social Charter](#) which aims to promote the integration of persons with disabilities into the labour market, as long as the disability permits it, rather than keeping them in specific and separate employment schemes.
68. The Commissioner notes that sheltered employment<sup>28</sup> has in general not achieved its original stated aim of integrating persons with disabilities into the mainstream labour market, as acknowledged by the authorities themselves, even though progress was achieved in the last decade. Quotas were introduced in the public and private sectors, Special Employment Centres (sheltered employment) were created and better co-ordination of policies was achieved through the implementation of the [Comprehensive Strategy for the Employment of Persons with disabilities for 2008-2012](#).
69. Nonetheless, rising unemployment in recent years has also affected persons with disabilities. The last data available on the employment of persons with disabilities indicated that in 2011 26.9% of them were unemployed.<sup>29</sup> The current unemployment rate is estimated to be over 30% (against 27.1% for the overall population).<sup>30</sup> Moreover, the economic crisis has resulted in a steep increase in the already high number of persons with disabilities with short-term contracts only.<sup>31</sup> Added to the fact that the salaries paid to persons with disabilities have often been extremely low, the Commissioner is concerned that this trend has increased their vulnerability to poverty and social exclusion.
70. At the same time, central and regional authorities' subsidies for protected employment have drastically decreased and payments due by regional administrations have in many areas been delayed, leading to the non-payment of salaries.
71. Information brought to the attention of the Commissioner during his visit indicates that out- and in- service training opportunities accessible to persons with disabilities, as well as on-the-job support (such as labour mediators), have been shrinking as a result of fiscal austerity measures. This has led to difficulties in access to the mainstream labour market, as well as in maintaining employment and enjoying equal opportunities in the labour market.

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persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

<sup>28</sup> The term "sheltered employment" is used to refer to a wide range of segregated vocational and non-vocational programs for individuals with disabilities, which are designed to assist individuals who for various reasons are viewed as not capable of working in a competitive employment setting in their local community.

<sup>29</sup> See National Statistical Office, "[Notas de Prensa: el empleo de las personas con discapacidad](#)", 2011, 5 December 2012.

<sup>30</sup> See European Foundation Centre, "Assessing the impact of European governments' austerity plans on the rights of persons with disabilities, [Country report: Spain](#)", 25 October 2012, p. 6.

<sup>31</sup> Ibid, pp. 7-9.

### **3. The impact of fiscal austerity measures on access to inclusive education by children with disabilities**

72. The Commissioner welcomes the long-standing policy of the promotion of inclusive education for children with disabilities in Spain, which has resulted in a rate of inclusion in mainstream education of 78% of children with disabilities.<sup>32</sup> [Law 2/2006](#) on education safeguards inclusive education, including the requirement for schools to employ specialised teachers, qualified professionals and to make curricular arrangements and other necessary accommodations to favour the inclusion of pupils with disabilities in mainstream education.
73. However, the Commissioner has noted with concern that persons with disabilities in Spain have substantially lower rates of school completion than the rest of the population: the latest available data indicate that in 2008 11.5% of persons with disabilities had not completed primary education (against 2.1% for the total population) and only 10.5% of persons with disabilities had reached university level education (against 24.1% for the total population).<sup>33</sup>
74. The Commissioner was informed during his discussions with NGO representatives in Spain that cuts in the national and regional budgets for education have impacted on the educational opportunities of children with disabilities and their inclusion in mainstream education, which is a worrying development. He learned that in some schools, all children with disabilities were grouped together in one separate class, and in other instances they were left in mainstream classes but without any personalised support to enable them to be educated on an equal footing with other children. He underlines that the right to inclusive education at all levels is a key human right, enshrined in Article 24 CRPD. The CRPD Committee has deplored the fact that the legislative guarantees are not effectively implemented by school administrations, leading to increased segregation of pupils with disabilities in specialised schools, at times against the will of the parents and without a possibility to appeal decisions concerning the placement in special education classes.
75. It is noted that the law on education provides that, should the necessary additional support not be provided in mainstream education, children with disabilities should be transferred to special education. Therefore, the increasing number of pupils per class due to cuts in educational staff, as well as cuts in budgets for specific assistance to children with special needs, including teaching assistants, interpretation into sign language, accessibility measures, extra-curricular activities, etc. cannot but lead to a growing number of children with disabilities being transferred to special education classes.
76. The Commissioner notes with concern that the lack of financial and human resources is often an argument for school administrations not to provide reasonable accommodation and parents are reportedly often asked to cover the costs of additional support. However, in a 2011 ruling the Supreme Court stated that the lack of material and personal support provided to children with autism in a school in the Valencia region on the ground of lack of resources amounted to a violation of the right to education of the children concerned. The court highlighted that their startling situation of inequality, which required the implementation of specific measures in order to restore equality, was not duly taken into account.<sup>34</sup>

### **4. Human rights of persons with intellectual and psycho-social disabilities**

#### *a. Impact of austerity measures on persons with intellectual and psycho-social disabilities*

77. The Commissioner is concerned that cuts in subsidies for services and care for persons with psycho-social and intellectual disabilities have amplified pre-existing structural gaps in the Spanish mental health care system. He learned that budgetary cuts have been particularly harmful for early identification and rehabilitation programmes, which are considered by Article 25 CRPD as vital “to prevent and minimise further disabilities”. The Commissioner has noted the view expressed by the Ombudsman of Andalusia that the current budgetary cuts *de facto*

<sup>32</sup> Figure provided during the visit of the Commissioner by the Ministry of Education.

<sup>33</sup> See National Statistical Office, “[Panorama de la discapacidad en España](#)”, Boletín informativo del INE 10/2009, p. 7.

<sup>34</sup> Supreme Court, [judgment 3257/2011](#) of 9 May 2011.



threaten the entire community-based mental health model, which was introduced in Spain in 1986 in line with the World Health Organisation's standards.

78. Recent restrictions to the provision of health care, and in social welfare support, including housing, have also been particularly harmful to persons with intellectual and psycho-social disabilities. It is estimated that around 10 000 of them are currently homeless in Spain.<sup>35</sup>
79. Additionally, only a very small percentage of persons with psycho-social and intellectual disabilities (1 to 4%) can benefit from the law on autonomy as the latter does not contain sufficient guidance on how to assess the level of intellectual and psycho-social disability. The Commissioner underlines that the lack of access to support services is especially problematic for persons who have been deinstitutionalised.
80. Persons with intellectual and psycho-social disabilities in Spain have traditionally faced a lack of co-ordinated responses to their needs by the health and social protection system, despite the fact that the law provides a comprehensive framework to deal with intellectual and psycho-social disabilities. The following gaps had been identified by the authorities at the time of elaboration of the first national strategy for mental health for 2006-2008: lack of specialised professionals; lack of resources for rehabilitation and reintegration programmes; lack of specific attention to vulnerable groups (including children, migrants, older persons, etc.); lack of overall co-ordination of social, health and other services; and lack of preventive action. The Ombudsman of Andalusia published a report on mental health in Andalusia in April 2013 in which he reiterated many of these concerns.
81. The Commissioner finds it particularly disquieting that the main response to the problems facing persons with psycho-social problems has often been medication only, especially with regard to minors (see section I), and often without the informed consent of the persons concerned (see below).

*b. The right to legal capacity*

82. The Commissioner is worried by the lack of adequate consideration for the consent of persons with intellectual or psycho-social disabilities in legal capacity-related proceedings, despite some legislative improvements in 2011. The legislation in force, which is based on the principle of substituted (instead of supported) decision-making and guardianship, is not compliant with the requirements of Article 12 CRPD. The extent to which a person with disability can be deprived of his or her legal capacity is determined by a court decision.
83. The Commissioner understands that instances of ill-founded court decisions of deprivation of legal capacity mainly stem from widespread prejudices and lack of adequate information both on intellectual and psycho-social disability and on the rights of persons with such forms of disability. Nonetheless, the lack of community and support services can also explain the difficulty for the administration and courts to acknowledge the views expressed by persons suffering from certain forms of intellectual and psycho-social disabilities as the latter often require specific support to be able to express their consent and views.<sup>36</sup>
84. The Commissioner learned during discussions with persons with disabilities that courts often automatically deprive persons with disabilities placed under guardianship of their right to vote, instead of applying a case-by-case approach. He was informed that, as a consequence, an estimated 80 000 persons with disabilities in Spain cannot vote. In this regard, the Commissioner draws the authorities' attention to the Council of Europe Committee of Ministers [Recommendation CM/Rec\(2011\)14](#) on the participation of persons with disabilities in political and public life, according to which all persons with disabilities have the right to vote and stand for election at all levels on the same basis as other citizens, and should not be deprived of this right by any measure based on their disability, cognitive functioning or perceived capacity.

<sup>35</sup> See [Joint NGO Report](#) submitted to the UN Committee on Economic, Social and Cultural Rights on the occasion of the 5<sup>th</sup> periodic review of Spain, March 2012 (in Spanish), p. 14.

<sup>36</sup> Including the possibility to use methods such as advanced directives, communication support or other options, listed in Commissioner for Human Rights, "[Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities](#)", Issue Paper, 2012, pp. 31-33.

85. Additionally, according to the legislation in force, sterilisation without the full and informed consent of persons whose legal capacity is not recognised can still be performed and third persons can take decisions affecting the medical and other treatment of persons deemed “legally incapacitated”. This practice has been criticised by various international bodies, including the CRPD Committee.
86. The Commissioner is also concerned that persons with intellectual or psycho-social disabilities remain particularly unprotected against involuntary placement in psychiatric hospitals and excessive medication. The legislation in force still allows for institutionalisation of persons on grounds of a diagnosed disorder as an emergency measure, without informed consent and without adequate safeguards prior to the deprivation of their personal liberty.
87. The Commissioner was pleased to learn during his meeting with the State Secretary of Justice, Mr Fernando Román García, that the authorities have completed the preparation of a bill reforming the legal capacity regime in order to ensure the alignment of domestic law and practice with Article 12 CRPD concerning “equal recognition before the law”. The Commissioner notes that such a bill was to be adopted within one year of the adoption of Law 26/2011 and expects that it will promptly be discussed, including with civil society representatives, and adopted.
88. According to information provided to the Commissioner by the authorities, the new bill replaces the current regime of substituted decision-making with supported decision-making. The Commissioner considers such a change of approach as pivotal for enhancing the human rights of persons with intellectual and psycho-social disabilities. The use of guardianship will reportedly be limited to exceptional cases. Reportedly the bill will also introduce new tools for persons with intellectual and psycho-social disabilities to express their will, and will modify the current problematic provisions concerning sterilisation without informed consent and other medical decisions.

#### *Conclusions and recommendations*

89. The Commissioner calls on the Spanish authorities to continue to pursue a human rights-based approach in all policies addressing persons with disabilities, including in the context of austerity measures that affect disability-related budgets. In this regard, he underlines the importance in terms of policy-making and practice to closely consult and actively involve organisations representing persons with disabilities in decision-making processes concerning relevant issues.
90. The Commissioner acknowledges that the enjoyment by persons with disabilities of some of their rights has budgetary implications. This is particularly relevant with regard to the right to live independently and be included in the community, in line with Article 19 CRPD. The Commissioner stresses that budgetary restrictions should not lead to depriving persons with disabilities of the enjoyment of their human rights and to furthering their marginalisation. He reiterates that the full realisation of the economic, social and cultural rights of persons with disabilities can be progressive, pursuant to Article 4, paragraph 2 CRPD, but no unjustified, retrogressive measures should be taken.
91. Therefore, the authorities should strive to ensure that persons in need of support to achieve more autonomy and social inclusion have access to appropriate support. They need to pursue their efforts to remedy the shortcomings of the 2006 Law on autonomy, and to refrain from simply limiting the number of beneficiaries of the law based on the evaluation of the level of disability, which is not in line with the principle of non-discrimination. The Commissioner also believes that the key objective of promoting the autonomy of persons with disabilities and their participation on an equal footing in all societal settings should remain at the centre of the efforts of the authorities, in the spirit of the CRPD.
92. The Commissioner calls on Spain to continue promoting universal accessibility as part of policies to combat discrimination. Additional efforts should be made to raise the awareness of the authorities at all levels, as well as of the private sector, of the concept of reasonable accommodation provided for by Article 2 CRPD.

93. The authorities should ensure that the introduction of co-payments for accessing a range of services, including health care, does not have a disproportionate impact on the income of persons with disabilities and does not result in infringements of their rights as enshrined in the CRPD, such as the right to autonomy and inclusion and the right to enjoy the highest attainable standard of health without discrimination.
94. Despite the context of high unemployment, the Commissioner highlights that persons with disabilities have the right to work, in accordance with Article 27 CRPD, on an equal footing with others. Therefore, programmes permitting the enjoyment by persons with disabilities of this right, by means of specific support and access to adequate training, should not be eliminated without a prior careful assessment of the consequences on the employment and living conditions of these persons.
95. The Commissioner urges the authorities to assess the impact of budgetary restrictions in education on the implementation of the key principle of inclusive education. Inclusive education is a fundamental tool to promote social cohesion and preserve a truly democratic society grounded on the principle of equal opportunities for all.
96. The authorities should therefore ensure that human and financial means remain available for mainstream schools to be able to provide equal access to quality education to children with disabilities and to avoid having to resort, because of budgetary constraints, to separation or placement in special education. The Commissioner stresses that jeopardising inclusive education will have long-term negative consequences for the country, lasting far beyond the current economic and financial crisis. He reminds the authorities that the experience of separation and segregation in other member states of the Council of Europe shows that once segregated systems develop, it is extremely costly and difficult to revert to inclusive education.
97. As regards persons with intellectual and psycho-social disabilities, all efforts should be made by Spain to avoid a lack of resources resulting in the re-institutionalisation of these persons. This would constitute a considerable step backwards, considering the level of advancement of the process of deinstitutionalisation carried out in Spain since the 1980s.
98. Lastly, the Commissioner urges the authorities to complete as a matter of priority the process of reform of the legislation concerning the legal capacity of persons with intellectual and psycho-social disabilities, giving full effect to the principles enshrined in the CRPD. The authorities' attention is drawn in particular to the recommendations made by the Commissioner concerning legislative reforms to be undertaken by member states in order to fully and effectively protect the right to legal capacity as defined in Article 12 CRPD.<sup>37</sup>
99. In this context, the Commissioner stresses the need to end the automatic deprivation of persons with disabilities placed under guardianship of their right to vote and to stand for election. The Commissioner recalls the Council of Europe Committee of Ministers [Recommendation CM/Rec\(2011\)14](#) on the participation of persons with disabilities in political and public life, according to which no one can be deprived of his or her right to vote and stand for election at all levels on the ground of any form of disability.

### III. The role of law enforcement authorities in the protection of human rights

#### 1. Human rights violations in the context of incommunicado detention

100. Reports indicating excessive use of force by law enforcement authorities in the course of anti-austerity demonstrations in 2011 and 2012 brought to light a number of long-standing, serious human rights issues concerning the actions of Spanish law enforcement agencies.<sup>38</sup>

<sup>37</sup> See Council of Europe Commissioner for Human Rights, "[Who gets to decide?](#)", 2012, *ibid*.

<sup>38</sup> The Spanish law enforcement authorities consist of three major forces: the Guardia Civil is the equivalent of a federal military-status police force, under the supervision of the Ministry of the Interior. It operates in rural areas and towns with less than 20 000 inhabitants. It is responsible *inter alia* for security of border areas, customs and ports of entry control, airport security, anti-terrorism, coast guarding, anti-smuggling (including drugs) operations

Additionally, the granting of pardons by the government, including in cases related to serious human rights violations, such as the pardons granted in November 2012 to four police officers who had been convicted of torture, has been of serious concern to the Commissioner.

101. The Commissioner regrets that human rights violations –in particular, ill-treatment- in the context of incommunicado detention by the Guardia Civil continue to occur, despite long-standing recommendations by several international human rights institutions. The largest group of applications related to the work of the law enforcement forces lodged with the Court and the UN CAT relates to ill-treatment suffered by persons while in incommunicado detention by the Guardia Civil.
102. Since 1991 the Committee for the Prevention of Torture (CPT) has been calling attention to the problem of ill-treatment by the Guardia Civil of persons suspected of certain category of offences, i.e. “membership or relationship with armed groups or terrorist or rebellious individuals”. It has called upon the Spanish authorities to abolish incommunicado detention stressing that by its very nature, it is likely to generate abuse and human rights violations. In its report on Spain published in May 2013,<sup>39</sup> the CPT regretted that in practice the guarantees against human rights violations in incommunicado detention had not been substantially strengthened since its previous visit and recommendations in 2007. It deplored in particular the impossibility for detainees to meet in private with a lawyer, although since 2007 they have the right to access an *ex officio* appointed lawyer. Additional guarantees, such as the possibility to meet with a medical doctor of one’s choice, the detainee’s right to notify their family of their detention, or the 24-hour video and audio recording of the incommunicado detention, are not yet systematically implemented. The CPT has also criticised the lack of proper judicial oversight of persons held in incommunicado detention<sup>40</sup> and the fact that detainees are mostly unable to identify the alleged authors of abuse as they are routinely blindfolded during interrogations. The national Ombudsman, in her 2012 report, has also considered illegal and unjustifiable the fact that police officers had interrogated alleged perpetrators, and in some cases addressed their lawyers with their faces hooded so as not to be identified. Additionally, the CPT highlighted that although the incommunicado detention of minors is no longer in use since 2007, the relevant legislation still needs to be amended so as to fully ban this practice.
103. The Commissioner is concerned that allegations of serious ill-treatment in detention, although often documented by forensic doctors, have in many cases not led to the opening of effective investigations.<sup>41</sup> When complaints of ill-treatment have been investigated, the investigations have often not been sufficiently effective (see below sub-section III.3).
104. In four cases the Court has found that Spain had violated Article 3 of the ECHR due to a lack of effective investigations into allegations of ill-treatment committed in the context of incommunicado detention. A first judgment delivered in 2004 ([Martinez Sala and others v. Spain](#)) concerned the arrest in Barcelona and Madrid of 15 persons suspected of membership of an armed group and their subsequent alleged ill-treatment while in detention by members of the Guardia Civil. The Court found that the investigation into the allegations of ill-treatment had not been effective. It highlighted in particular the refusal by the competent investigative authorities to examine diligently all the evidentiary elements at their disposal.<sup>42</sup>

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and security in prisons. The National Police (*Policia Nacional*) is a civil force, in charge of policing in urban areas of more than 20 000 persons. The local police is recruited, funded and controlled by the municipalities. It deals with local authority enforcement matters and minor offences. The Basque country, Catalonia and Navarra have their own regional police forces (respectively the *Ertzainza*, the *Mossos d’Esquadra* and the *Policia Foral de Navarra*) with competences similar to those of the National Police.

<sup>39</sup> See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment, [Report to the Spanish Government on the visit to Spain](#) carried out by the CPT from 31 May to 13 June 2011, 30 April 2013, CPT/INF(2013)6.

<sup>40</sup> CPT, 2013, CPT/INF(2013)6, *ibid*.

<sup>41</sup> CPT, 2013, CPT/INF(2013)6, *ibid*, paragraphs 14-16.

<sup>42</sup> [Martinez Sala and others v. Spain](#), judgment of 2 November 2004.

105. In three more recent judgments against Spain the Court again concluded that there had been violations of Article 3 of the ECHR in the context of incommunicado detention.<sup>43</sup> The Court's judgments point to a number of gaps in the current system, such as the lack of diligent and independent forensic examination of incommunicado detainees that lead to ineffective investigations into allegations of ill-treatment committed by law enforcement officers. The execution by Spain of these judgments is currently supervised by the Council of Europe Committee of Ministers.
106. The UN CAT has also found in two cases that Spain violated the Convention against Torture due to inadequate investigations into allegations of torture in incommunicado detention, inflicted by members of the Guardia Civil in Madrid (in the case of *Encarnacion Blanco Abad*)<sup>44</sup> and by the Basque national police in the Basque Country (in the case of *Oskartz Gallastegi Sodupe*).<sup>45</sup> The UN CAT found violations by Spain of, *inter alia*, Article 12 of the Convention against Torture according to which states must carry out a prompt and impartial investigation whenever there is reasonable ground to believe that torture has been committed. Lastly, in May 2013, the UN Human Rights Committee also found, in *María Cruz Achabal Puertas*, that Spain had violated the International Covenant on Civil and Political Rights due to lack of an effective investigation into the allegations of torture and other forms of ill-treatment made by the applicant, while detained incommunicado by the Guardia Civil in Madrid.<sup>46</sup>
107. Considering the number and seriousness of human rights violations that have been reported in the context of incommunicado detention, the Commissioner is concerned about the lack of clarity of certain parts of the draft law that was presented by the government in 2013 and aimed at amending the Code of Criminal Procedure, also affecting incommunicado detention. The Commissioner understands that the new text could be interpreted as extending the grounds for ordering incommunicado detention, since the reference to an offence connected to terrorism, as defined in Article 384 of the Code of Criminal Procedure in force, is eliminated in the new draft code. Additionally, the duration of police custody foreseen in the draft code needs to be clarified since a continuous police detention of five days (without judicial review), as stated currently in Article 175 of the draft code, raises issues of compatibility with the Spanish Constitution.<sup>47</sup> The Commissioner looks forward to receiving more information from the authorities on the legislative amendments that are envisaged.

## **2. Ill-treatment and discrimination of migrants by law enforcement authorities**

108. The Commissioner is concerned about increasingly frequent reports of ill-treatment or discriminatory treatment of migrants by law enforcement officials. In 2011 the CPT, among others, reported allegations of ill-treatment suffered by migrants detained in detention centres for foreigners (CIES) as well as at airports during deportation procedures.
109. Moreover, the Commissioner notes with concern that members of the Guardia Civil have at times been reported to have ill-treated migrants during operations at sea. In one such case considered by the UN CAT in 2011 (*Fatou Sonko*),<sup>48</sup> Spain was found in violation of Article 16 CAT for not having prevented acts of cruel, inhuman and degrading treatment and of Article 12 CAT for lack of a prompt and impartial investigation into the applicant's allegations.

<sup>43</sup> *San Argimiro Isasan*, judgment of 28 September 2010 ; *Beristain Ukar*, judgment of 8 March 2011; *Otamendi Egiguren*, judgment of 16 October 2012.

<sup>44</sup> UN CAT, *Encarnacion Blanco Abad v. Spain*, Communication N°59/1996, Views adopted on 14 May 1998, available through: <http://tb.ohchr.org>, accessed 18 July 2013.

<sup>45</sup> UN CAT, *Oskartz Gallastegi Sodupe v. Spain*, Communication N°453/2011, Decision adopted on 23 May 2012, available through: <http://tb.ohchr.org>, accessed 18 July 2013.

<sup>46</sup> UN Human Rights Committee, Communication 1945/2010, *María Cruz Achabal Puertas v. Spain*, Views of 23 May 2013, available through: <http://tb.ohchr.org>, accessed 18 July 2013 (only in Spanish).

<sup>47</sup> Article 17 of the Spanish Constitution limits the duration of police custody to a maximum of 72 hours. An additional 48 hours can be ordered by a judge in the case of incommunicado detention.

<sup>48</sup> *Fatou Sonko v. Spain*, application N° 368/2008, decision of 25 November 2011, available through: <http://tb.ohchr.org>, accessed 18 July 2013. The case concerned the death of a Senegalese migrant during an attempt to reach Ceuta by sea. The applicant, the deceased migrant's sister, alleged that members of the Guardia Civil had punctured the migrant's boat and ordered him to jump into the sea, leading to his subsequent death.

110. The frequent practice of ethnic profiling by the police has also been widely criticised by various international bodies.<sup>49</sup> The United Nations Human Rights Committee found this practice to be in violation of the International Covenant on Civil and Political Rights in 2009 in the case of [Rosalind Williams](#).<sup>50</sup> In the case of [B. S.](#) in 2012,<sup>51</sup> the Court found that Spain failed to carry out an effective investigation into allegations of racist abuse by the police.<sup>52</sup> The applicant, a Nigerian female sex worker legally residing in Spain, raised two main issues before the Court: lack of investigation into her allegations of ill-treatment by national police officers; and her targeting during identity checks on grounds of her ethnic origin. The Court found a violation of Article 14 of the ECHR in conjunction with Article 3 of the ECHR due to lack of investigation into the possible racist motivations of the ill-treatment suffered by the applicant. It also found a violation of Article 3 of the ECHR for lack of an effective investigation into the allegations of ill-treatment by members of the national police.
111. The Commissioner welcomes the withdrawal of a 2010 internal regulation encouraging police raids against migrants and ethnic profiling. A new circular issued in May 2012 states that identity checks must be carried out in a “selective” and “respectful” way and detentions following police checks should be avoided. However, it is noted that in May 2013, the national Ombudsman, after having received a large number of complaints about ethnic profiling, issued new recommendations to the law enforcement authorities regarding rules that should be applied in policing. She invited the police to put in place a system of recording the ethnic origin of persons subjected to identity controls, on the basis of confidentiality and consent, with a view to obtaining data on potential discrimination in stop-and search operations. She also recommended training of the police in the areas of respect for diversity and of the operation of identity checks in a manner respectful of the principles of equality and non-discrimination. Lastly, she recommended the setting-up of a complaints mechanism for persons who claim to have been subjected to discriminatory identity controls. The Commissioner considers that such a mechanism could form part of a wider complaints mechanism concerning the actions of law enforcement authorities (see below, sub-section III.4).

### **3. Human rights protection in the context of policing public demonstrations**

#### *a. Excessive use of force by the police in public demonstrations in 2011 and 2012*

112. Since 2011, the number of demonstrations against austerity measures has substantially increased throughout Spain. In 2012, the national police reported a total of about 6 000 demonstrations, an increase of more than 50% compared to 2011. Demonstrations have also taken new forms, including the “occupation” of public spaces for prolonged periods of time (the so-called “*acampadas*”), demonstrations to prevent housing evictions, occupation of empty buildings and unused land and spontaneous demonstrations in front of the residences of politicians (known as “*escraches*”).
113. The Commissioner was informed that in the context of these demonstrations, law enforcement officials have in some instances engaged in the disproportionate use of force leading to allegations of human rights violations. It is clear that policing demonstrations is an increasingly challenging task for law enforcement authorities, considering the large number and sometimes spontaneous nature of demonstrations over the last two years, as well as the tense social context. It is nonetheless of key importance to ensure that the freedoms of expression and of peaceful assembly are fully respected and protected, in accordance with Articles 10 and 11 of the ECHR.

<sup>49</sup> See ECRI, [Fourth report on Spain](#), adopted on 7 December 2010; Advisory Committee on the Framework Convention for the Protection of National Minorities, [3rd Opinion on Spain](#), adopted on 22 March 2012; UN CERD, Concluding Observations on Spain, 8 April 2011, paragraph 10, available through: <http://tb.ohchr.org>, accessed 18 July 2013.

<sup>50</sup> UN Human Rights Committee, Communication 1493/2006, [Views](#) adopted on 27 July 2009, available through: <http://tb.ohchr.org>, accessed 18 July 2013.

<sup>51</sup> [B. S. v. Spain](#), judgment of 24 July 2012.

<sup>52</sup> The execution by Spain of this judgment is currently supervised by the Council of Europe Committee of Ministers.

114. Two series of major public demonstrations have led to allegations of excessive use of force by the national and Catalan police forces: the “occupation” of the central square of Madrid in May and June 2011 by the “*indignados*”; and the occupation of the main square of Barcelona, in May 2011.
115. The Commissioner is concerned about reports by participants in the large demonstrations that took place in Madrid in May and June 2011 indicating numerous instances of beatings and other forms of ill-treatment of those arrested by the National Police during the demonstrations, and also during transfers to and in the police station. He found it particularly disquieting to learn that peaceful demonstrators and even passers-by have at times been seriously ill-treated by members of the police. Journalists have also alleged that they have been beaten up by members of the police during demonstrations in Madrid and Barcelona.
116. On 27 May 2011, the Catalan police violently evacuated Barcelona’s main square which had been “occupied” since mid-May, resulting in 121 persons being injured. Further clashes between demonstrators and the police occurred on 15 June 2011 when demonstrators tried to prevent MPs from accessing the regional parliament. In July 2011 the Ombudsman of Catalonia published a report on these events, based on an *ex officio* investigation. He concluded that the brutal evacuation of the square had amounted to a violation of the freedom of peaceful assembly, even though in these cases the demonstrations had not been previously authorised by the authorities. He recommended a more proactive and flexible attitude of the authorities when faced with spontaneous demonstrations. He also deplored the lack of adequate planning and co-ordination of the police action and lack of mediation work with the demonstrators, indiscriminate and disproportionate use of force and illegal behaviour of police officers whose identification plates were usually not visible during the operations of 27 May and 15 June.
117. On 25 September 2012, excessive use of force was again reported on the fringes of a large demonstration in Madrid as National Police officers followed alleged perpetrators of disturbances into Madrid’s main train station and reportedly mistreated various persons present in the station. According to information received by the Commissioner during his visit to Spain, 25 of the 37 persons arrested after the demonstrations of 25 September 2012 filed complaints for ill-treatment by national police officers while in detention. The Ministry of the Interior ordered an internal investigation which was completed in January 2013. It concluded that the anti-riot units of the National Police had reacted adequately and made proportionate use of force. The national Ombudsman also opened an investigation to ascertain whether the use of force was proportionate.
118. Furthermore, the extensive use of rubber bullets has been reported during various demonstrations. The Commissioner notes with concern that the use of such weapons presents a clear danger as evidenced by the death of a person hit by a rubber bullet in Bilbao in April 2012. He shares the concerns expressed by the CPT as to the lack of clear rules regarding the use of new projectile weapons reported during the events of May 2011 in Barcelona. In that context, the CPT stressed that the criteria for the use of projectile-firing weapons by police officers should at least correspond to those governing the use of firearms, and that the use of such weapons must be thoroughly regulated and monitored. It also recommended that the officers using them be adequately trained.<sup>53</sup>
119. The Commissioner welcomes the adoption in May 2013 of a Code of Ethics of the National Police containing recommendations on the use of force, which reiterate the following principles, also enshrined in Organic law 2/1986 on the law enforcement forces: opportunity; consistency of the actions undertaken; proportionality in the use of force; and the use of force only as a last resort, with warnings and with the purpose of minimising damages. Nonetheless, he shares the view of the national Ombudsman, expressed in a recommendation of March 2013, that the authorities should also elaborate guidelines concerning the proportionate use of force by the anti-riot units in the context of demonstrations, including clear rules on the use of anti-riot weapons. He recalls that under the 1990 UN [Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#) the development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimise the risk of endangering uninvolved

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<sup>53</sup> See CPT, 2013, CPT/INF(2013)6, *ibid*, paragraph 107.

persons, and the use of such weapons should be carefully controlled. The Commissioner also wishes to draw the attention of the Spanish authorities to the July 2013 judgment of the Court in [Abdullah Yaşa v. Turkey](#), where the Court stated that the dangerous nature of the material used (in that case, gas canisters launched by rifles) justified the application *mutatis mutandis* of the Court's case-law on the use of potentially lethal force and concluded that the use of such material should therefore be strictly regulated in national law, within the framework of a system of adequate and effective safeguards against arbitrary use, abuse and avoidable accidents.<sup>54</sup>

*b. Lack of identification of law enforcement officials*

120. While a large number of complaints for ill-treatment by members of police forces have been made known following demonstrations throughout the country, the Commissioner is concerned that in many cases investigations have been closed on the ground that the relevant police officers could not be identified. During his visit, he was informed about and concerned by the fact that the identification numbers of Guardia Civil and National Police officers cannot be read at a distance of more than one metre and contain seven digits, which make them very difficult to memorise. Additionally, he was informed that occasionally police officers do not wear their identification numbers or have them hidden or turned upside down, to avoid identification. This issue was raised several times in 2012 and 2013 by the national Ombudsman. The Commissioner is concerned that this practice makes it extremely difficult for victims to have their cases investigated and leads to impunity for members of law enforcement authorities.
121. The Commissioner notes with concern that the failure of the authorities to identify the perpetrators of ill-treatment is a main reason for dismissing complaints against law enforcement officials and for the closure of investigations into complaints concerning the excessive use of force.<sup>55</sup> In 2009 the Court delivered a judgment in the case of [Iribarren Pinillos v. Spain](#) concerning allegations of ill-treatment by police anti-riot forces and the use of tear gas grenades during riots that took place in Pamplona in 1991, and the subsequent lack of effective investigation. Following a complaint by the applicant against the law enforcement forces, the *Audiencia Nacional* of Navarra recognised the responsibility of the state for the applicant's serious injuries but closed the case due to the impossibility of identifying the perpetrator and the lack of clarity of the circumstances surrounding the riots. The Court found Spain in violation of Article 3 of the ECHR for lack of effective investigation into the circumstances that led to the applicant's serious injuries and for lack of adequate weighing of the state responsibility in the events of 1991, awarding no compensation to the applicant. The Court also found a violation of Article 6 of the ECHR since the proceedings initiated by the applicant were excessively lengthy: they started in 1991 and ended in 2003.<sup>56</sup>
122. In view of the above, the Commissioner welcomes the decision taken by the Ministry of the Interior in April 2013 to change the size and mode of display of the identification numbers of members of the National Police, rendering them easier for the public to read and memorise. He also learned with interest that the measure could soon be extended to the anti-riot units of the Guardia Civil. However, he was informed that the numbers will be placed at the back of the bullet-proof jackets of the officers operating in anti-riot units. The Commissioner believes that alternative options should be identified, such as placing the number on the helmets of officers, so that they can easily be read in the context of demonstrations.

*c. The authorities' responsibility to safeguard the freedoms of expression and of peaceful assembly*

123. The Commissioner received complaints about the increasing use of administrative sanctions against participants in demonstrations. In the province of Madrid, 1 117 administrative inquiries against demonstrators were initiated by the Government Delegation (*Delegación de Gobierno*) of Madrid in 2012 and 230 between January and April 2013. According to information provided to the Commissioner, demonstrators have been faced with fines ranging from €300 (participants) to €1 500 (organisers), in cases of demonstrations that have not been notified to

<sup>54</sup> [Abdullah Yaşa v. Turkey](#), judgment of 16 July 2013, paragraph 43.

<sup>55</sup> [San Argimiro Isasan](#), paragraphs 41-42.

<sup>56</sup> [Iribarren Pinillos v. Spain](#), judgment of 8 January 2009.



the authorities, or have been notified after the deadline of ten days prescribed by Law 1/1992 on the protection of citizens' security, which requires advance notification of any demonstration gathering more than 20 persons.

124. In this context, the authorities' attention is drawn to the Guidelines on Freedom of Peaceful Assembly of the OSCE and the Venice Commission which specify that, in principle, it is unnecessary under international human rights law to require advance notification of a public assembly and that "where legislation requires advance notification, the law should explicitly provide for an exception from the requirement where giving advance notice is impracticable", particularly in cases of spontaneous assemblies.
125. The practice of non-notified, "spontaneous" demonstrations, organised through social media, notably in front of politicians' residences, has developed in Spain since March 2013 and led to the imposition of administrative sanctions. A demonstration in April 2013 in front of the house of the Deputy Prime Minister resulted in the imposition of fines on 18 persons for the organisation of and participation in a non-notified demonstration.
126. In May 2013, a Madrid court dismissed a complaint of threats and harassment filed against these 18 persons. The court concluded that there was no threat to public order and no violation of the rights to privacy, freedom and security of the family of the Deputy Prime Minister justifying a limitation to freedom of expression and peaceful assembly. Referring to the case law of the European Court of Human Rights, the court underlined that restrictions to freedom of expression are to be construed even more carefully when related to a public personality holding a political position. A decision rendered on 30 July 2013 by another court in Madrid made it clear that imposing a fine on a participant in a non-notified but peaceful demonstration amounted to a violation of the right to peaceful assembly on the ground that "the decision to dissolve the demonstration and fine participants was not aimed at safeguarding public order, which was not threatened, but at impeding or restricting the fundamental right to peaceful assembly (...)". The court added that a decision to restrict freedom of assembly on the ground of lack of prior notification must be necessary and proportionate, as well as clearly reasoned by the authorities.<sup>57</sup>
127. The Commissioner stresses that the imposition of sanctions, including administrative ones, on participants in spontaneous or unauthorised demonstrations, can amount to an infringement of their right to freedom of expression and peaceful assembly. It is recalled that the Court has noted that a notification requirement "should not represent a hidden obstacle to the freedom of peaceful assembly as it is protected by the Convention", and that "it goes without saying that any demonstration in a public place may cause a certain level of disruption to ordinary life and encounter hostility."<sup>58</sup>
128. The Commissioner notes that this view of the Court was also referred to by the national Ombudsman, in a 2012 recommendation to the authorities of the Balearic Islands, in which she warned against possible infringements of the freedom of peaceful assembly. The above recommendation concerned the dissolution by the police in Palma de Mallorca, in May 2012, of a peaceful demonstration which lasted beyond the time that was originally notified to the authorities. The Ombudsman observed that the regional authorities could dissolve a demonstration only in cases of disruption of public order entailing a material risk for persons and goods.
129. The Commissioner notes with satisfaction that the Spanish authorities made known to him that they do not intend to pursue further the idea put forward in late 2012 to introduce additional restrictions on the footage, processing and dissemination of images, sounds or data on members of law enforcement in the exercise of their duty when such images, sounds or data can put their lives or the operation they are involved in at threat. Such a measure would have a serious, chilling effect on the right to freedom of expression in the country.

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<sup>57</sup> See Juzgado de lo contencioso-administrativo N° 12 de Madrid, sentencia N°274/2013, 30 de julio 2013. Unofficial translation.

<sup>58</sup> [Oya Ataman v. Turkey](#), judgment of 5 December 2006, paragraph 38.

130. However, the Commissioner remains concerned about a bill that aims to amend the Criminal Code, reportedly in reaction to the demonstrations of 2011-2012. This bill includes in particular the criminalisation of the dissemination by any means of messages or orders inciting disturbance of public order or supporting “the decision of disturbing public order”. The latter draft provision seems to relate to the convocation of demonstrations through social media. It entails the risk of limiting freedom of expression and peaceful assembly, depending on the interpretation given to the notion of disturbance of public order as well as on the determination of the intention of those who allegedly incite disturbance of public order. The vague nature of this provision might in fact lead to sanctioning declarations and opinions expressed prior to public disturbances, which would be incompatible with international standards on freedom of expression and the case law of the European Court of Human Rights. The Commissioner would like to receive additional information from the authorities on this draft provision.

#### **4. The need to combat impunity of members of law enforcement authorities**

##### *a. Effective investigations in cases concerning human rights violations by law enforcement officials*

131. Public confidence in law enforcement authorities is closely related to the latter’s attitude and behaviour towards the public, in particular their respect for the human dignity and fundamental rights and freedoms of the individual as enshrined in the ECHR.<sup>59</sup> The Commissioner strongly believes that it is essential for the authorities to ensure that all instances of abuse of trust or ill-treatment by law enforcement officials are firmly condemned, adequately investigated and sanctioned by the competent authorities, in order to prevent recurrence and enhance the key role played by law enforcement authorities in safeguarding the rule of law.
132. The Commissioner notes with deep concern that charges relating to allegations of ill-treatment inflicted by law enforcement officials are frequently dismissed by judges, as shown in the case-law of the Court (see previous sub-sections). Reportedly only a few investigations into allegations of torture and other forms of ill-treatment have resulted in convictions. Amnesty International reported that between November 2007 and October 2009, out of 11 investigations into allegations of torture and other forms of ill-treatment, only two have resulted in convictions.
133. In this context, the Commissioner also notes that the definition of torture contained in Spanish law (Article 174 of the Criminal Code) is not fully aligned with Article 1 of the UN CAT, given that it does not mention that torture can be committed by any “other person acting in an official capacity”, in addition to “an authority or public official”. The definition also needs to be expanded so as to include in the possible purposes of torture the intimidation or coercion of the person subjected to torture or of a third person.
134. Obstacles to effective investigations and dissuasive sanctioning include the above-mentioned inadequate identification system of members of law enforcement agencies, lack of prompt access to a lawyer (in incommunicado detention), gaps in the system of oversight of detainees by forensic doctors and resulting gaps and inaccuracies in medical records (also related to incommunicado detention) and the overall failure by investigating judges to effectively and promptly investigate allegations of ill-treatment. Moreover, investigating judges appear to rarely undertake *ex officio* investigations into publicised cases of alleged ill-treatment, although Article 12 of the UN CAT requires the prompt initiation of investigations even in the absence of a formal complaint. It also appears that they tend not to examine evidence that could substantiate allegations of ill-treatment, including video recordings of interrogations.

##### *b. Imposition of effective sanctions on perpetrators of serious human rights violations*

135. The Commissioner stresses that penalties imposed on law enforcement officials for serious human rights violations should be dissuasive in order to prevent recurrence and eradicate impunity. In this respect, a number of examples of relevant practice in Spain have given rise to the Commissioner’s grave concern, especially those concerning pardons in cases of torture and

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<sup>59</sup> See Council of Europe Committee of Ministers [Recommendation Rec \(2001\) 10](#) on the European Code of Police Ethics.

other forms of ill-treatment, based on a law of 1870 which confers on the government discretionary power to grant pardons.

136. In 2005, the Council of Ministers granted a partial pardon in the case of four local police officers in Galicia who had been convicted of illegal detention and ill-treatment of a resident of Senegalese origin in March 1997. The four police officers were suspended from duty for a period ranging from eight to ten years, and sentenced to prison terms ranging from three to four years. As a result of the pardon, the four police officers were reinstated in their duties in January 2006 and never served their prison sentences. The pardon was confirmed by the Supreme Court in January 2008, when it rejected an appeal submitted against the granting of the pardon.
137. Another, more recent case of pardon triggered widespread national and international criticism. It concerns the ill-treatment, in 2006, of a Romanian national who was allegedly beaten up on the street and again ill-treated and threatened during his transfer to the police station, by plainclothes police officers of the Catalan police. He was released the following day as the police officers had mistaken him for a violent criminal. Five police officers were consequently convicted in 2006 for the victim's ill-treatment and illegal detention (the three main perpetrators were sentenced to six years and seven months imprisonment). The five officers were suspended from duty pending appeal to the Supreme Court, which confirmed the sentence in 2009 but reduced the maximum prison term to four years and six months for three of the perpetrators.
138. In February 2012, the government decided to grant a partial pardon to four of the five officers, reducing their prison term to two years, which in practice meant exempting them from serving the sentence previously imposed by courts. In May 2012, the Barcelona *audiencia*<sup>60</sup> overturned the decision of pardon taken by the government, ordering the immediate imprisonment of the four convicts due to the grave nature of the offences and the need to prevent their recurrence. Nonetheless, in November 2012, the government granted the four police officers a pardon for the second time and converted their prison sentences into a fine of €7 200. Two hundred judges have expressed their disagreement in an open letter to the government. In December 2012 [the Commissioner also expressed deep concern](#) about this decision of the Spanish government, noting that such measures foster impunity and undermine the rule of law.
139. The Commissioner believes that the Spanish government's practice of granting pardons to perpetrators of serious human rights violations has a most detrimental impact on the efforts to prevent and eliminate torture and other forms of ill-treatment. It sends the entirely unacceptable signal that abuse committed by law enforcement officers may be tolerated and may remain unpunished. Moreover, he draws attention to the Court's judgment in the case of [Abdulsamet Yaman v. Turkey](#) where the Court stated that "where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The Court also underlines the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted..."<sup>61</sup>
140. A number of examples originating in the case law of Spanish courts also indicate a general judicial trend of imposition of non-dissuasive penalties in similar cases. In November 2011, the Spanish Supreme Court overturned the conviction of four members of the Guardia Civil by a court in the Basque Country for torture committed against two alleged members of ETA. In December 2010 four of the fifteen defendants had been sentenced to between two and four and a half years' imprisonment. However, the Supreme Court acquitted them on the ground that the lower court's decision was not based on sufficiently solid evidence.

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<sup>60</sup> The *Audiencia* is a special court responsible for all offences of terrorism, as well as a few other serious offences with an international component, such as money laundering, extraditions and genocide. The national court is based in Madrid, and regional branches exist in all autonomous communities.

<sup>61</sup> [Abdulsamet Yaman v. Turkey](#), judgment of 2 November 2004, paragraph 55.

*c. Independent complaints mechanism concerning the actions of law enforcement authorities*

141. The Commissioner believes that the most effective way of combating impunity among members of law enforcement forces is to establish an effective and independent complaints mechanism. He is aware that internal investigation mechanisms exist within the Spanish Ministry of the Interior in order to tackle cases of abuse committed by members of the Guardia Civil and of the National Police. However, he stresses that such mechanisms, although necessary to impose disciplinary sanctions, are not sufficient to ensure adequate sanctioning of all instances of abuse by law enforcement officials and effective redress for victims of abuse.
142. The Commissioner notes that, in addition to bringing their cases to courts, victims of ill-treatment can lodge complaints with the national and some of the regional Ombudsmen. Moreover, in 2007 a Police Ethics Committee was established in Catalonia tasked with examining complaints concerning the conduct of police officials, which represented a welcome step forward in tackling police abuse. The Commissioner regrets that this committee no longer functions due to the resignation of most of its members in 2011, following the rejection by the regional authorities of the code of ethics that it had prepared. Regrettably the Ethics Committee was transformed into a mere advisory body on police ethics in January 2012.
143. As regards the national Ombudsman, in 2012 she received 51 complaints of abuse by law enforcement officials. In this context, it is noted that the Ombudsman hosts a National Preventive Mechanism against Torture. However, the Ombudsman can only make recommendations to the administration and cannot impose sanctions. Should this institution act as an independent complaints mechanism regarding law enforcement actions the Commissioner is of the opinion that its mandate should be amended and the human and financial means at its disposal enhanced. The Commissioner is aware that the idea of having a special ombudsman for each of the police forces has also been proposed as an alternative. It is for the Spanish authorities to determine which option best fits the Spanish legal system and tradition, bearing in mind that any complaints mechanism should be in line with the principles noted in the Commissioner's [Opinion concerning Independent and Effective Determination of Complaints against the Police of 2009](#). The Commissioner also recalls that the Council of Europe has long-standing experience in providing support to countries establishing complaints mechanisms upon which Spain can usefully draw.

*Conclusions and recommendations*

144. The Commissioner draws the authorities' attention to the Council of Europe Committee of Ministers [Guidelines on eradicating impunity for serious human rights violations](#) (2011) and to the [section on "Combating impunity" of the CPT's 14<sup>th</sup> general report](#) and stresses the need for all states to elaborate policies and practice to prevent and combat any institutional culture within or outside of law enforcement authorities which promotes impunity. Measures in this context should include a policy, adhered to by all law enforcement authorities, of zero-tolerance towards serious human rights violations, the introduction of anti-corruption policies and the establishment or reinforcement of appropriate training and control mechanisms, in line with the Council of Europe [Committee of Ministers' Recommendation on the European Code of Police Ethics](#). The authorities are urged to undertake measures to raise awareness among judges and prosecutors of their duty to thoroughly investigate all allegations of ill-treatment by law enforcement officials, in line with the caselaw of the European Court of Human Rights.
145. In this context, the Spanish authorities at all levels are urged to firmly and publicly condemn all instances of ill-treatment and abuse committed by law enforcement officials, in police custody and during operations, including demonstrations. This is crucial to combating impunity and strengthening public confidence in the work of the law enforcement authorities.
146. The Commissioner urges the authorities to abolish the practice of incommunicado detention which is likely to generate more human rights violations. He also calls on the authorities to apply the recommendations issued by the CPT, notably as regards the possibility for detainees to be visited by a medical doctor of their choice, to have the fact of detention and their whereabouts notified to their families and to have 24-hour video surveillance and recording of their detention areas. The relevant primary legislation should also be amended to expressly prohibit

incommunicado detention of minors. The Commissioner also stresses the need to put an end to the practice by law enforcement officials of hiding their identity during interrogations as this practice prevents allegations of ill-treatment from being adequately investigated and breeds impunity.

147. The authorities should vigorously combat discriminatory behaviour by members of the law enforcement forces and ensure that any racially-motivated misconduct is effectively investigated and adequately punished. The Commissioner recalls that the case-law of the European Court of Human Rights clearly indicates that the national authorities are under an obligation to carry out an investigation on the possible racist motives behind the conduct of law enforcement officials when there are indications of the existence of such motives.<sup>62</sup> Measures should also be adopted in order to address the practice of ethnic profiling in identity controls, as recommended by the national Ombudsman. The Commissioner encourages the Spanish authorities to draw inspiration from ECRI [General Policy Recommendation N°11](#) on combating racism and racial discrimination in policing, which provides extensive guidance on tackling ethnic profiling through targeted legal, policy and training measures. In line with the same Recommendation, the Spanish authorities should ensure that continuous, systematic training is provided to members of law enforcement agencies concerning respect for diversity and for the principles of equality and non-discrimination.
148. The Commissioner urges the Spanish authorities to adopt, as a matter of priority, clear and binding regulations on the proportionate use of force by law enforcement agents in the context of demonstrations,<sup>63</sup> including on the use of projectile-firing weapons, in line with the CPT recommendations,<sup>63</sup> the case-law of the Court and the national Ombudsman's recommendations. Continuous training should be provided to law enforcement officers on the use of these weapons with full respect for the principles of opportunity, proportionality, restraint and minimum damage contained in the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
149. The Commissioner stresses that it is essential to ensure that all law enforcement officials are easily identifiable so as to facilitate the prosecution and sanctioning of perpetrators of abuse. The new identification number format adopted by the National Police is a step forward, which should be extended to other forces. The Commissioner calls on the authorities to consider ways of ensuring that the identification numbers of members of anti-riot units are also placed on the front of their uniform, possibly on their helmets and/or other parts of their gear, so as to ensure that they are visible in all circumstances.
150. The authorities are urged to ensure that the activities of law enforcement agencies in the context of demonstrations do not infringe on the rights to freedom of expression and freedom of peaceful assembly which are enshrined in Articles 10 and 11 of the European Convention on Human Rights. He stresses in particular that no administrative sanctions should be imposed on participants in peaceful demonstrations, including those that have not been notified to the authorities, as the notification requirement should in no circumstances constitute an obstacle to the effective enjoyment of the rights to freedom of expression and of peaceful assembly. The authorities are also urged to abstain from the adoption of any legislative measure that could lead to undue limitations to the enjoyment of these rights.
151. The Commissioner calls on the Spanish government to end the long-standing practice of granting pardons to members of law enforcement authorities who commit serious human rights violations such as torture. This is a practice that sabotages efforts to combat torture and ill-treatment and corrodes the fundamental principles related to the rule of law. In this context, the authorities are also urged to reinforce and systematise prosecutors and judges' on-going training concerning the need to take resolute action to uphold the prohibition of torture and other forms of ill-treatment. Such offences should always be prosecuted, including *ex officio*, and punished by appropriate penalties which take into account their grave nature.
152. The Commissioner wishes to recall that, for an investigation into possible ill-treatment to be effective, it should comply with the five following principles: (a) *independence*: there should be

<sup>62</sup> [Nachova and Others v. Bulgaria](#), judgment of 6 July 2005.

<sup>63</sup> See CPT, 2013, CPT/INF(2013)6, *ibid*, paragraph 107.

no institutional or hierarchical connections between the investigators and the official complained against and there should be practical independence; (b) *adequacy*: the investigation should be capable of gathering evidence to determine whether the police behaviour complained of was unlawful and to identify and punish those responsible; (c) *promptness*: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law; (d) *public scrutiny*: procedures and decision-making should be open and transparent in order to ensure accountability; and (e) *victim involvement*: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.<sup>64</sup>

153. Lastly, the Commissioner invites the authorities to consider establishing an independent complaints mechanism covering all law enforcement officials, either by enlarging the competencies of the national Ombudsman or by setting up a new body. The Council of Europe can provide useful examples from other member states and guidance in this domain.

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<sup>64</sup> See [Opinion](#) of the Council of Europe Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, 12 March 2009, also available in [Spanish](#).