

THE EXTERNALIZATION OF BORDERS: MIGRATION CONTROL AND THE RIGHT TO ASYLUM

A FRAMEWORK FOR ADVOCACY

CEAR-EUSKADI



The Violation of the Right to Asylum
in Access to Europe

CEA(R) EUSKADI

Comisión de **Ayuda**
al **Refugiado** en Euskadi

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I. INTRODUCTION

1.- CEAR-Euskadi and Its Advocacy Strategy

In 1979, a group of people who were concerned with the plight of individuals who were arriving at our borders seeking protection created the Comisión Española de Ayuda al Refugiado (the Spanish Commission for Refugee Aid, or CEAR). Since then, the organization has not only become a leading figure in the protection and defence of refugees' rights, but has also grown professionally, and in terms of its ideology—broadening the range of groups it protects—and structure.

A small offshoot of this project began in the Basque Country in 1989, with few resources but a great deal of hope. And so the CEAR delegation of the Basque Country was born, with a firm belief in its ability to protect the rights of refugees. The zeal of the volunteers, who contributed their time and knowledge to the cause, as well as the changes in migration and migration policies at the time, led to CEAR-Euskadi being established as a non-governmental organization with its own legal status in 1996. The organization continues to maintain its mandate as a delegation of CEAR, carrying out different programmes in support of refugees and asylum seekers living throughout north-western Spain. Since 1996 we have been two separate entities united by a common aim: to protect and promote the human rights and integral development of refugees, displaced people, stateless people and migrants who need international protection and/or are at risk of social exclusion. The organizations have forged separate yet parallel paths, sharing goals, programmes and resources, taking advantage of synergies and mutually monitoring and acting as guarantors for our mission: achieving, in short, more solid growth.

The Line of Advocacy and Social Participation works to change existing conditions by encouraging critical citizenship and promoting human rights, prioritizing the right to asylum and the right to development.

By working in a network with social organizations, groups and public institutions, we have been able to share and enrich our Education for Development processes.

In particular, the work carried out in this area has focused on three central themes:

- In keeping with the mission of the organization and of the team, we are working to make people aware of, and defending the existence of, forms of persecution that are not explicitly recognized by the 1951 United Nations Convention Relating to the Status of Refugees (hereafter referred to as the Geneva Convention), but which underlie the causes of a person becoming a refugee.

- To raise awareness of gender-related persecution and promote its recognition and defence under the framework of the Geneva Convention.
- Under the framework of international protection, to defend the human rights of people who are displaced due to persecution in the form of the violation of their economic, social, cultural and environmental rights.
- To make people aware of and denounce the fact that the right to asylum is currently in crisis, due to the impossibility of accessing asylum procedures and the systematic violation of the right to international protection of people who reach Spanish territory.

2.- The Never-ending Path: The Violation of the Right to Asylum in Access to Europe

It is within the context of this last line of work that *“The Never-ending Path: The Violation of the Right to Asylum in Access to Europe”* has been set in motion. The aim of the project was to identify work strategies and synergies among human rights actors in order to have an impact on refugees’ access to asylum procedures in Spain.

For this purpose, the organization held a Reflection Meeting in April 2012 in which the following human rights groups and organizations participated:

- AEDIDH- Asociación Española para el Derecho Internacional de los Derechos Humanos
- APDHA- Asociación Pro Derechos Humanos de Andalucía
- Cambalache
- CEAR Canarias
- CEAR-Euskadi
- CIMADE
- European Council of Refugees and Exiles (ECRE)
- Ferrocarril Clandestino
- MIGREUROPE
- Periodismo Humano
- Plataforma por el cierre de los Centros de Internamiento de Extranjeros (CIE)
- Proyecto Esperanza
- SOS Racismo Bizkaia
- Women´s Link Worldwide

Born out of joint debate and reflection, the ‘Document for Advocacy’ that you hold in your hands outlines the mid- to- long-term strategies and challenges pertaining to this subject. These strategies and challenges were analysed and discussed during a **conference** entitled

'La Europa Fortaleza: políticas, consecuencias y mecanismos de protección' (*Fortress Europe: Policies, Consequences and Mechanisms of Protection*), at which plenary talks and thematic workshops looked at the issue of the externalization of borders and the consequences it has on refugees.

This document is divided into two sections. The first section describes the **theoretical framework** of border externalization policies and how they negatively affect refugees by systematically violating the right to asylum. The second section outlines **strategies and challenges**, defined by different social organizations and groups that defend human rights in a process involving joint knowledge and reflection, that will inform CEAR-Euskadi's strategy for advocacy in this area in the future and which we hope will serve as a guide to other organizations as well.



II. A BRIEF THEORETICAL FRAMEWORK

1.- The Externalization of Borders: Migration Control and the Right to Asylum

Article 13 of the Universal Declaration of Human Rights of 1948 establishes the universal right to freedom of movement, and Article 14 declares that *everyone has the right to seek and to enjoy in other countries asylum from persecution.*

Since this first landmark document, the 1951 Convention Relating to the Status of Refugees (hereafter referred to as the Geneva Convention) and the 1967 New York Protocol, along with other international instruments, have confirmed the right of refugees to international protection, and served as the foundation of much national legislation. Spain acceded to the Geneva Convention in 1978.

The Convention defines a refugee as any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to return to it.

In addition, in Article 33.1¹, the Convention lays down the principle of non-refoulement, under which international law prohibits States from expelling or returning refugees to the territory of a country where their lives or freedom are threatened or where they would face torture, inhuman or degrading treatment or other violations of their human rights.

The principle of non-refoulement is the cornerstone of the right to asylum. A nation's failure to comply with this principle leaves refugees with no access to international protection and constitutes a violation of the international treaties that enshrine it.

¹ Article 33.1 (CRSR): Prohibition of expulsion or return ('refoulement'): No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Spain is required to comply with the principle of non-refoulement not only by the Geneva Convention, but also by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed on 10 December 1984 (Art. 3.1²) and the European Convention on Human Rights (Art. 3³).

The first step towards being able to access the protection that asylum offers is to reach a safe country.
Refugees are not reaching Europe. Why not?

In its obsession with policies that tighten security and fight irregular immigration, Europe has externalized its borders through an extensive military and police presence that makes it difficult for the people who need international protection to reach the region and has turned flight from one's country into a new form of violence.

In this atmosphere, Spain has developed a 'system of control' of migration flows that extends its jurisdiction beyond the borders of its territory, acting in international waters and transit countries and establishing agreements with countries of origin in which they agree to control the departure of people from their own coasts.

These increasingly tough migration policies have serious consequences on refugees' and immigrants' ability to exercise and enjoy their human rights and represents a breach of the international agreements and treaties the country has signed.

No matter where they are carried out, border control measures constitute an exercise of state jurisdiction that is not exempt from complying with international treaties, and in fact it must adhere to them. The government of Spain is thus required to comply with the principle of non-refoulement everywhere and every time it exercises its jurisdiction.

² Article 3.1 (CAT): No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

³ Article 3 (ECHR): Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment. Legal opinion recognizes that the wording here 'does not lead to a direct ban on deportation. Nevertheless, European Court of Human Rights case law has consistently prohibited extradition, expulsion or deportation to states where the person concerned faces torture or inhuman or degrading treatment under Art. 3 of the European Convention on Human Rights' (Fischer-Lescano, A. and Löhr, T. 2007).

The main aims of EXTERNALIZING BORDERS⁴

- **To check irregular immigration** by creating a buffer-zone around external borders.
- **To create a security perimeter** in adjoining territories in order to be prepared to react to and defend against irregular immigration, a response to the ever-present uncertainty generated by the 'threats of globalization'.
- **To establish a presence in strategic areas** for geopolitical reasons or to protect economic interests.

These policies have turned Europe into an inaccessible fortress that is indifferent to violations of human rights. Among other factors, the launch of the agency Frontex⁵, agreements with countries of transit, and detention facilities in third countries sustain Fortress Europe's cycle of repression.

But there are cracks in the fortress, through which this repressive system grants access to certain people. Hugging the ground to avoid getting caught in the fences, they reach Europe and join the workforce, and they are workers with characteristics that suit the market well: they are people without rights.

These are mechanisms that do not want immigrants to be expelled: rather, they want them to be under the threat of expulsion. Policies of border externalization and militarization are a response to *capital's passionate desire for a cheap and obedient workforce*, paraphrasing Eduardo Romero's words in one of Cambalache's most recent publications.

In 2011, only 3,414 people gained access to asylum procedures in Spain. The trend over the last ten years has been negative: since 2001, the number of applications has dropped by 65%. The total figures are some of the lowest since Spain's first Asylum Act was passed in 1984.

Comparing this figure with the total number of refugees in the world (43.7 million) and the number of applications for asylum in neighbouring countries in Europe (France's 51,910 and Italy's 34,210), we can reach a conclusion: *Spain has become an efficient 'gendarme' who guards and controls the southern border of Europe.*

The policies implemented by the Interior Ministry in its '*fight against illegal immigration*' are especially effective: the number of immigrants who gained access to Spain's coasts by boat dropped from 39,180 in 2006 to 5,443 in 2011.

In 2011, only a small percentage of the people who reached Spain's coasts, Ceuta and Melilla by boat sought asylum, which indicates the presence of obstacles to accessing asylum pro-

⁴Iker Barbero. Las transformaciones del estado y del derecho ante el control de la inmigración.

⁵The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

cedures and international protection, obstacles which range from a lack of a procedures for identifying profiles which are entitled to international protection to an absence of adequate facilities, limited training of the government employees who work there, difficulties standing in the way of specialized NGOs accessing the places where these people are detained, and a lack of adequate interpreters. At some entry points of potential asylum seekers, such as Fuerteventura, Lanzarote, Tarifa and Algeciras, people are detained in Internment Centres for Aliens (CIEs, *Centros de Internamiento de Extranjeros*) to await expulsion.

The governments and institutions of the European Union, instead of demonstrating absolute respect for the right to asylum and upholding the spirit of Tampere⁶ and the international agreements it encompasses, are 'concerned' with protecting themselves against 'uncontrollable migration flows' and are failing to fulfil their international obligations.

2. What are the concrete mechanisms of border externalization?

2.1. FLIGHT

As a consequence of gender inequality, women flee their home countries under different conditions than men, as they are at risk of suffering physical and sexual abuse by the authorities they meet along their way and the men who flee with them. At the same time, they are leaving behind situations of violence imposed by their families or communities (arranged marriages, female genital mutilation, domestic violence) in their countries of origin. The vulnerability of their situation leads to many of them being captured—either in their countries of origin or while in transit—by human trafficking networks for the purpose of sexual exploitation or forced labour. The violence to which they are subjected continues upon their arrival in their countries of destination.

Lesbian, gay, bisexual, transsexual, and intersex (LGBTI) people are also highly vulnerable and suffer great discrimination both in their countries of origin and in transit. In many societies they are subjected to serious human rights violations because they do not fit the culturally established gender norms. It has become customary for them to be subjected to violence at the hands of state agents or community and family members through a lack of police protection, grave discrimination and denial of access to basic social services, arbitrary arrest, detention or extortion, in addition to social exile from their families, communities or other support systems.

⁶ Meeting in Tampere in 1999, the European Council reaffirmed the importance the Union and Member States attach to absolute respect of the right to seek asylum. It agreed to work towards establishing a common European asylum system based on the full and inclusive application of the 1951 Geneva Convention, thus ensuring that nobody is sent back to a country in which he or she will be persecuted: in other words, the principle of non-refoulement will be observed.

In transit, as well, they suffer continuous abuse, both legal and social, as they are forced to travel through and stay in countries where LGBTI people face persecution. Often, once they arrive in safe countries they conceal their sexual orientation or gender identity in an aim to avoid harm, which makes it difficult to identify them and give them access to asylum procedures or specific assistance.

2.1.1. Visa requirements and control at embassies

Meeting in Tampere in 1999, the European Council reaffirmed the importance the Union and Member States attach to absolute respect of the right to seek asylum. It agreed to work towards establishing a common European asylum system based on the full and inclusive application of the 1951 Geneva Convention, thus ensuring that nobody is sent back to a country in which he or she will be persecuted: in other words, the principle of non-refoulement will be observed.

The requirement of a visa represents the first obstacle refugees face when they flee their country of origin. People from 134 states and territories, including all of those in Africa (a total of 53), must have a visa in order to gain access to Spain.

This, along with the fact that the new Asylum Act has eliminated the possibility of seeking diplomatic asylum, reduces even further the resources available to people who are seeking access to international protection.

2.1.2. Bilateral agreements with third countries

One of the European Union's priorities within its migration policy has been to forge international cooperation agreements for the repatriation (expulsion to a country of origin) and readmission (expulsion to a third country according to agreements signed by Spain) of migrants in an irregular situation⁷.

Within this context, for over a decade, Spain has been negotiating bilateral agreements with some of the main countries of origin and transit of the people who reach the country, using material, economic and humanitarian support to induce those countries to establish controls on people leaving their own coasts and accept repatriated and readmitted⁸ irregular immigrants.

To this strategy of forcing third countries to share in responsibility and making aid for development conditional on combating irregular immigration, we must add the fact that development cooperation is gradually turning into a business investment at the service of Spanish private interests through the sponsorship of Public-Private Partnerships for Development (PPPD).

⁷ Cotonou Agreement (2000).

⁸ The aim of this type of readmission agreement is not only to repatriate irregular immigrants to their countries of origin, but also to force the signatory countries to admit citizens of third countries when it is presumed that they have transited through their soil in order to reach European territory.

2.2. TRANSIT

2.2.1. Detention centres in third countries: Mauritania's 'little Guantanamo'

In 2003, Spain and Mauritania signed an agreement and developed a protocol for returning to this latter nation people from different sub-Saharan countries such as Mali and Senegal. The agreement lays down both the possibility of returning people who have reached Spain through Mauritania and that of preventing people en route to Spain from leaving Mauritania. After they are returned to Mauritania, Malian nationals are repatriated to different points along the border between the two countries, and nationals of other countries are sent to the town of Rosso, on the Senegalese border.

The Nouadhibou Detention Centre was built in March 2006 within this context, with the express aim of returning to this centre any migrants heading to Spain who were caught in transit. It was built by members of the Spanish army and funded by the Spanish Agency for International Development Cooperation (AECID, la *Agencia Española de Cooperación Internacional para el Desarrollo*).

In 2008, Amnesty International published a report which revealed that every month, up to 300 people were detained at the Nouadhibou Detention Centre, which is not subject to any judicial control. As a result of this report, and at the request of the Spanish Ministry of Foreign Affairs and Cooperation, CEAR travelled to the centre that same year to evaluate the situation.

Mauritania has no law regulating migration. The lack of such legislation is reflected directly in the absence of any formal procedures applied to detainees, the inexistence of administrative solutions and the impossibility of appealing to administrative or judicial authorities. The centre does not provide legal assistance or an interpreter.

Because the centre is not governed by any legislation, there is no limit on the duration of detention. According to information obtained by CEAR⁹, this ranges from 3 to 15 days, until the authorities are able to gather a group of 15 to 20 people to fill a small bus. Detainees are not told when and how they will be transported. Some people said that they have to travel very long distances (over 1,000 kilometres) from where they are dropped off to their village, and that they are not given any sort of resources (transport, food or beverages) to make the journey. Once they have been repatriated, the most common option chosen is that of another attempt.

⁹ Informe de Evaluación del Centro de Detención de Migrantes en Nouadhibou (Mauritania) (Assessment Report of the Migrant Detention Centre in Nouadhibou [Mauritania]), published by the Spanish Commission for Refugee Aid (CEAR) in 2008.

2.2.2. Interception in international and national waters: the militarization of state borders

The actions that have been carried out in order to impede access to Spanish territory include the following:

- Patrols through the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex).
- Joint patrols between Spain and other countries.
- Patrols sponsored by Spain and carried out by third countries.
- The launch of Spain's Integrated System of External Vigilance (SIVE, el *Sistema Integrado de Vigilancia Exterior*).

2.2.3. Private control: Passenger carriers

Because it is difficult to control the entire border perimeter from the home territory, another of the fronts on which the European Union has focused are passenger carriers transporting people from outside the Schengen area¹⁰. Directive 2004/82/EC¹¹ requires carriers to perform identity checks on their passengers and obtain detailed information on their route. The aim of this directive, which is not explicitly stated, is to force companies to check that their passengers have legal documentation. Thus, carriers, most of which are private agents, have taken on an important role in the control of migration flows¹².

Companies that fail to fulfil these obligations face fines ranging from 5,000 to 100,000 euros. The governing authority can also apply other sanctions such as immobilization, seizure and confiscation of the means of transport or temporary suspension or withdrawal of the company's operating licence.

Providing transport to the Spanish border to a person who has filed a timely application for asylum that has been admitted is not considered an infringement of the law under Act 12/2009.

¹⁰ In other words, nationals of any country outside the EU that does not belong to the European Economic Area (which is wider) and does not have an international agreement that implements the legal regulations for the citizens of the States mentioned.

¹¹ Directive 2004/82/EC on the Obligation of Carriers to Communicate Passenger Data, adopted by the European Council in April 2004.

¹² Iker Barbero. Las transformaciones del estado y del derecho ante el control de la inmigración.

2.3. THE BORDER

2.3.1. Systematic mass expulsions

When a person reaches the Spanish border, he or she can be denied entry and expelled without having had the opportunity to express his or her reasons for wanting to enter the country. Mass expulsions¹³ are carried out through procedures that do not take each individual case into account and do not offer enough guarantees that a person will not be returned to the territory of a country in which his or her life or freedom are threatened or where he or she would face torture, inhuman or degrading treatment or other serious human rights violations.

The control of migration flows constantly wins out over the right to international protection.

Terminology of Spain's Aliens Act (Ley de Extranjería):

REFUSAL OF ENTRY: People are denied entry at established border-crossing points, generally ports and airports, if they do not meet the requirements for entry. Refusal of entry is usually accompanied by expulsion: in other words, not only are the individuals prevented from entering the country, but authorities also try to expel them to their country of origin or a transit country, depending on readmission agreements.

RETURNS: Individuals who attempt to enter Spain at areas that are not established border-crossing points are expelled.

EXPULSIONS: Individuals are expelled by virtue of the grounds laid down by Spain's Aliens Act through administrative procedures stemming from an irregular stay in Spain. This is a penalty system that is specifically designed to fight irregular immigration and simultaneously serves to dissuade non-regulated migration.

() Expulsions are carried out through repatriation agreements (in which individuals are returned to their countries of origin) or readmission agreements (in which individuals are sent to third countries). The term 'repatriation' is often used incorrectly: the Government uses 'repatriation' to refer to expulsions to third countries.*

¹³ In principle, mass expulsions are prohibited by international law, but because there is no legal definition establishing the number of people that constitutes a mass expulsion, the only limit that can be drawn from regulations and treaties on human rights and guarantees is that collective expulsions may not be carried out, as authorities are required to issue an individual file for each subject in which the expulsion grounds and resolution are stated.

2.3.2. Internment centres for aliens (CIE)¹⁴

What are CIEs?

CIEs are government-run facilities whose purpose is the precautionary and preventive detention of irregular aliens awaiting expulsion. People can be detained¹⁵ (for a maximum of 60 days) for having committed a simple administrative infraction such as not having documentation. Detention in such centres is always court-ordered.

CIEs are not part of the general penitentiary system. Therefore, they do not depend institutionally on the Interior Ministry's Directorate-General of Penitentiary Institutions, but rather on the Directorate-General of Police. Social organizations, as well as Spain's Ombudsman, have recommended that CIEs cease to be controlled by the National Police. It seems logical that surveillance and security matters be carried out by public employees of the National Police Force, but the living conditions of detainees and the safeguarding of their rights fall well beyond the scope of the police¹⁶.

The situation of women and the LGBTI population

gender-based analysis of the reality of the situation in CIEs reveals and helps us understand the different impact internment has on women and men. According to Women's Link Worldwide's *'Mujeres en los Centros de Internamiento de Extranjeros. Realidades entre rejas'* ('Women in Spanish Detention Centres: From Behind Bars'), women face, among other factors, a serious lack of medical attention, information and legal counsel, cold, hunger and insults, and worse conditions than those of men (less access to yard time, smaller rooms, being forced to clean the centre's facilities). The situation of women who are victims of human trafficking is especially worrying, because 'the procedures laid down by the law are not consistent with the reality of the situation in CIEs'. 'It is impossible to identify victims in a place full of cameras and police officers', circumstances which 'hinder the trusting relationship that is needed'; there is also an alarming 'lack of knowledge regarding human trafficking among police officers'. Therefore, it is very difficult to identify victims of human trafficking among CIE detainees because they are deprived of their freedom and incredibly fearful of being deported to their countries of origin.

¹⁴ The information is based on the Informe Técnico Situación de los centros de internamiento de extranjeros en España, produced by CEAR as part of the European study DEVAS.

¹⁵ We use the word 'detained' here (people in CIEs are not under arrest, but rather are detained, as they have committed an administrative infraction, not a crime), because it is the term recommended by international organizations to refer to people who are deprived of their personal liberty.

¹⁶ Observaciones al documento de trabajo previo al Anteproyecto del Real Decreto por el que se aprobará el Reglamento de Funcionamiento y Régimen Interior de los Centros de Internamiento para Extranjeros. Document produced as part of the campaign QUE EL DERECHO NO SE DETENGA A LA PUERTA DE LOS CIE.

The above-mentioned report states that LGBTI people are also subjected to this sort of abuse and discrimination. Numerous situations involving abuse due to an individual's sexual orientation or sexual identity have been documented: among other abuses, LGBTI detainees have been victims of insults, threats or verbal attacks; and discrimination, in the form of receiving less food, being isolated, not being allowed to use the phone or being denied access to medical attention or to legal counsel.

The situation of refugees in CIEs¹⁷

Of the detainees held in CIEs, approximately 85% are men and 15% are women, although this varies slightly from centre to centre. One in four detainees has one or more reasons to seek asylum. This figure is twenty times higher than the number of people who actually do seek asylum, a very alarming fact which demonstrates the vulnerability of potential candidates.

Contrary to the government's perception that people abuse the asylum system in Spain, in fact the opposite has been documented: people whose human rights have been seriously violated and/or whose life is potentially at risk if they are returned do not become official asylum candidates because they are unfamiliar with the figure of asylum, have not been informed of the possibility of applying for it, or their applications are not even admitted for consideration by the Interior Ministry.

CEAR has verified that detainees encounter many obstacles to gaining access to the asylum procedure. Our research reveals indications, in interviews with employees, that in both Málaga and Valencia staff had been instructed not to inform detainees of their right to asylum unless asked or to discourage them from applying.

2.3.3. Ceuta and Melilla

Ceuta and Melilla have become a sort of large internment centre, since many people cannot leave these cities while their expulsions are being processed. Adding to these difficulties are the closed-border policy implemented with Morocco's collaboration, the dividing fence and the surveillance around the perimeter of the area and the obstacles to accessing information regarding protection procedures. These are two typical cases of the application of strategies aimed at bringing about a decrease in applications for asylum in our country.

When Spain's current Asylum Act came into effect, access to the country was restricted for asylum seekers whose applications have been admitted. This prohibition of the right to freedom of movement is not only causing a drastic drop in the number of as-

¹⁷ Data from the report 'Situación de los Centros de Internamiento para Extranjeros en España' ('The Situation of Spain's Internment Centres for Aliens'), produced by CEAR as part of the European study DEVAS.

ylum applications, but has also led potential asylum seekers to refrain from applying, as they interpret the measure as an obstacle to them leaving Ceuta and Melilla.

2.4. REACHING A SAFE COUNTRY

2.4.1. The right to asylum in Spain

If we want to maintain minimum human rights standards in Spain, we cannot ignore our responsibility to protect refugees.

Comparing the number of people who are able to reach Spanish territory and request protection to the number of asylum applications that are approved demonstrates that the right to asylum is currently in crisis and is being systematically violated by the Spanish Government.

As we said at the beginning of this section, in 2011, only 3,414 people were able to gain access to Spanish territory and request international protection. The Interior Ministry granted asylum to 326 people and subsidiary protection to 595 people. 2,383 people were not granted international protection.

The majority of these people, then, were left in a situation of extreme vulnerability and at risk of being returned to a country in which their lives are in danger.

A commitment to ensuring that refugees receive international protection against serious violations of human rights is a legal obligation and a political responsibility for Spain.

Spain has the resources, the ability and the responsibility to ensure that individuals who are in danger have access to international protection under the international treaties to which it subscribes.

2.4.2. Curtailing legal rights (the new Asylum Act)

When Spain's new Asylum Act (*Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*) was passed in 2009, a unique opportunity to move forward in fulfilling our obligation to protect refugees was lost. The act introduces more obstacles to accessing asylum procedures in Spain, obstacles which are in conflict with the Geneva Convention and which will prevent many people who are fleeing serious violations of their human rights from exercising their right to seek international protection.

After three years in effect, the implementing regulations of the act have yet to be made public, which means that there are very important procedural issues regarding the exercise of the right to asylum that have not yet been determined. In any case, the main backward steps introduced by the new Asylum Act in relation to the previous one are below:

- Citizens of the EC are excluded from the right to seek asylum

The new Asylum Act excludes citizens of the EC from the right to seek asylum in Spain and furthermore defines this circumstance as grounds for not admitting an application.

It is the opinion of CEAR, although not that of the Ombudsman, that this exclusion is in conflict with the Geneva Convention of 1951 (Art. 1.A) because it violates its universal character and its prohibition of discrimination (Art. 3) and with Spain's Constitution, which includes the right to asylum in Part I on Fundamental Rights and Freedoms (Art. 13.4, Spanish Constitution).

- People can no longer seek asylum at Spanish embassies

The regulations of the previous Asylum Act established the possibility of seeking asylum at Spanish Diplomatic Missions and Consular Offices in a country different from the asylum seeker's country of origin, in addition to the legal possibility of transporting people who were at risk to Spain for the duration of the asylum proceedings.

The new Asylum Act establishes a procedure that leaves the possibility of asking that an asylum seeker whose physical integrity is in danger be transferred to Spain open to the discretion of the ambassador. This channel still needs to be defined under the regulations that will implement the act, but it is an option that already existed and is not the same as diplomatic asylum.

The removal of the possibility of seeking diplomatic asylum in Spain constitutes a seriously unjust and unjustified measure that turns the institution of asylum into a strictly decorative, ineffective figure that demonstrates Spain's lack of real commitment to refugee protection.

- The *conditional* inclusion of persecution on the basis of gender or sexual orientation

Regarding gender-related persecution of women and the LGBTI population, Spain's Organic Act 3/2007 (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*—shortened to the *Ley de Igualdad*, the Equality Act) included compelling instructions for the Asylum Act that was in effect at the time (Act 5/1984): *'The provisions laid down in Article 3, item 1 will apply to foreign women*

who are fleeing from their countries of origin due to justified fear of suffering persecution on the grounds of gender. It specifically recognized that individuals who are fleeing gender-related persecution have the right to seek the protection offered by asylum¹⁸.

The new Asylum Act, although it includes persecution on the basis of *'gender or sexual orientation'* in its definition of a refugee, does not fully express the instructions of the previous act. The new act makes the possibility of granting asylum to these individuals conditional on the presence of an indefinite legal concept, the *'prevailing conditions in the country of origin'*, failing to recognize gender-related persecution as a cause in and of itself and suggesting that the human rights of women and LGBTI persons are second-rate and somehow unable to stand on their own.

This determinant represents a virtually insurmountable obstacle. Human rights organizations and social organizations in regions of origin have expressed that it is difficult to collect reliable information on human rights violations that are still not universally recognized as such and are hidden by state and non-state structures, and in which investigating what has happened and prosecuting the perpetrators involves risking persecution.

Therefore, the new act represents a step towards formal recognition of gender-related persecution to a certain extent, but clearly, a comprehensive asylum policy that is respectful of refugees' human rights and complies with the 1951 Geneva Convention should not be conditional on the prevailing circumstances in the country of origin.

- The concept of a 'safe third country' as grounds for considering an application inadmissible

The act establishes that an asylum application may be declared inadmissible if the applicant *comes from a safe country as defined by Article 27 of Council Directive 2005/85/EC or, where applicable, by the list drawn up by the European Union (...)*.

The application of this article constitutes a failure to fulfil the requirement laid down in the 1951 Geneva Convention to study each case on an individual basis, and a violation of the principle prohibiting discrimination based on nationality, which is expressed in Article 3 of the Convention.

¹⁸ The Equality Act refers to foreign women, not men, who are also subject to certain types of gender-related persecution. The aim of this act is to eliminate discrimination towards women; therefore, we can consider that it explicitly expresses only those areas in which women are treated unequally from men. So according to this text, gender-related asylum claims can be brought by men.

- A reduction of UNHCR's role at the border

The new law no longer provides that a person whose application has been declared inadmissible at the border can enter Spain if UNHCR issues a positive report upon re-examining his or her application and an administrative appeal has been lodged.

- Expanded grounds for exclusion

The new act increases the number of reasons for which a person can be denied refugee status through legally imprecise terms such as '*constitute a threat to Spain's security*' and '*constitute a threat to the community*' which clearly go beyond the text of the Convention.

3.- The main demands of the Spanish Commission for Refugee Aid (CEAR)

3.1. Guarantee access to asylum procedures through diplomatic channels:

- Maintain access to diplomatic asylum, as laid out in the previous Asylum Act (Act 5/1984), and preserve the mechanisms that the legislation established for transporting individuals seeking diplomatic asylum to Spain (Art. 16 Royal Decree 40).
- Implement new mechanisms that ensure that refugees in transit enjoy the full protection of the law:
 - a) Establish, in agreement with transit countries, mechanisms for legal assistance and for assistance from the international bodies for detecting cases.
 - b) Set up offices for processing claims in the main ports of Mauritania, Senegal and Gambia, from which joint patrols will normally operate.
 - c) Set up reception centres for individuals seeking diplomatic asylum until they are urgently transferred to Spain or their application is closed.
 - d) Provide material resources for diplomatic offices and legal counsel.
 - e) Involve the International Organization for Migration (IOM) and UNHCR in referral procedures.

3.2 Guarantee the fulfilment of the principle of non-refoulement in operations in international waters and transit countries and ensure compliance with the obligations dictated by international legislation concerning marine search and rescue:

- a. Guarantee that the implementation of pre-border controls does not hinder the exit of individuals who need protection from countries where they may face persecution.
- b. Ensure that border control officials are trained specifically in human rights and the protection of refugees, placing special emphasis on a gender perspective and gender-related persecution. This training should be done in collaboration with UNHCR and the Spanish NGOs that work in this area.
- c. Guarantee that refugees in transit in INTERNATIONAL WATERS enjoy the full protection of the law, fulfilling the principle of non-refoulement.
- d. Ensure that irregular border crossers are given the possibility of expressing their need for protection in order to avoid being returned—whether directly or indirectly—to countries where they are in danger of being persecuted.
- e. Ensure that the actions of the Spanish authorities when controlling migratory flows are subject to monitoring by such legal and institutional bodies as the Ombudsman.
- f. All actions in cooperation with other countries must be conditional on these countries' compliance with the principle of non-refoulement and their respect of human rights.
- g. Set up an independent commission to assess the degree of compliance with human rights and refugee rights in those countries with which Spain cooperates on both returns and resettlement.

3.3. Guarantee access to asylum procedures and the principle of non-refoulement at Spain's border and Internment Centres for Aliens (CIEs):

Since 1994, CEAR has been calling for the elimination of the admissibility stage at the border. But the new Asylum Act, rather than eliminating it, has reinforced it. Furthermore, the new legislation specifies that existing refusals-of-entry, expulsion orders and compulsory-return orders are all grounds for the speedy rejection of any asylum claim. The implementation of these principles would be extremely detrimental to people who are systematically issued expulsion orders at such places as the Canary Islands, Ceuta and Melilla.

- a. Eliminate admissibility procedures at the border or, as a last resort, retain the admissibility stage as defined by the previous Asylum Act (Act 5/1984), applying it only to those cases in which the State responsible for the claim must be determined, and eliminating causes which accelerate the substantive assessment of the application.
- b. Create a form of provisional documentation that accredits the individual's intent to seek asylum in Spain while formal recognition is pending.
- c. Maintain the suspensive effect on exit orders and expulsion procedures for asylum seekers when a legal appeal is lodged at the border and there is a favourable UNHCR report.
- d. Guarantee that the asylum seeker's legal counsel and specialised NGOs have access to facilities closed to the public such as Internment Centres for Aliens and transit zones; ensure complete transparency regarding their operation.
- e. Guarantee that asylum seekers can contact specialised NGOs, specifically by providing them with a leaflet which explains asylum procedures and lists the NGOs' addresses and telephone numbers.

III. MAIN STRATEGIES AND CHALLENGES


In this adverse context, it is especially important that different human rights actors work together in order to ensure that Spain respects the right to seek asylum so that people who are forced to flee their countries of origin can effectively exercise this human right.

This section outlines significant information related to the strategies and challenges defined in the Reflection Meeting organized by CEAR-Euskadi in April 2012.

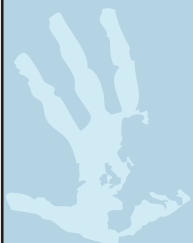
The meeting was attended by the following human rights organizations and groups: SOS Racismo-Bizkaia, APDHA (Asociación Pro Derechos Humanos de Andalucía), CIMADE, Periodismo Humano, Cambalache, Proyecto Esperanza, Plataforma por el cierre de los Centros de Internamiento de Extranjeros (CIE), European Council on Refugees and Exiles (ECRE), MIGREUROPE, Women’s Link Worldwide, Ferrocarril Clandestino, AEDIDH (Asociación Española para el Derecho Internacional de los Derechos Humanos), CEAR-Canarias and CEAR-Euskadi.

It was a great opportunity to lay down concrete, sustainable actions to be implemented in the mid to long term that aim to ensure access to asylum procedures in Spain and combat the externalization of borders.

Origin – Transit – Destination	
1. Advocacy / denouncing injustices	<p>Strategies:</p> <ul style="list-style-type: none"> - To consider the right to asylum a tool for human rights protection. - To pursue allies with an ‘aura of respectability’ (the Ombudsman, the Public Prosecutor’s Office [<i>fiscalía del estado</i>], etc.). - To disseminate exemplary sentences.

Origin – Transit – Destination	
<p>1. Advocacy / denouncing injustices</p> 	<ul style="list-style-type: none"> - To meet with the consulates of the main countries of origin and transit of people who reach Spanish territory in order to call on them NOT TO sign bilateral agreements that require them to control who leaves their coasts and to accept repatriated and readmitted irregular immigrants. - To combat restrictive asylum policies that are being developed under the 'pull effect' argument in order to put an end to it. - To call on Spain to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by the General Assembly resolution 45/158 of 18 December 1990). <p>Topics:</p> <ul style="list-style-type: none"> - New regulations regarding CIEs: Social organizations need to express and make people aware of their opposition to the new regulations and must avoid falling into the trap of the so-called improvements. - The new Asylum Act makes it more difficult for human trafficking to be considered a form of persecution under which a person can be granted asylum (under the previous law, trafficking victims were grouped under the category of 'a particular social group'). Spain's policy is to exclude it from the Geneva Convention, which means that none of the asylum applications brought by victims of trafficking are evaluated. Because it is considered a crime, the victim is required to make a formal complaint and he or she is referred to the Aliens Act for protection. - Resettlement policy: the new Asylum Act sets annual quotas. In the context of the externalization of borders, we must make strengthen this policy, demand that it be fulfilled and call on authorities to increase these annual quotas. - The new asylum agency in Malta. Information on countries of origin will be shared by the different nations of the European Union, but for now we do not know whether this new European agency will make the information it gathers public. It is important that the agency do so, because this would allow organizations to access the information and corroborate and counteract it.

2. Raising awareness / training



Strategies:

- OVEREXPOSURE: A possible tool for combating the invisibility of women in CIEs in particular and detainees in general.
- To define driving ideas in order to reach society.
- To get outside players involved in our activities. To connect with other groups and people working in other areas that may be related to our work against the externalization of borders in order to find shared areas of interest and support each other.
- To create alliances with key journalists and media.
- Human rights discourse: The right to freedom of movement and the right to asylum. How can we combine these two issues?
**Avoid STRATIFICATION of protection (refugees vs. migrants).*
- To take advantage of Periodismo Humano (PH) in order to denounce situations.
- Bring the right to asylum into the mainstream in human rights and migrant rights organizations. In order to succeed in incorporating asylum into the organizations' discourse and work, training in the area is necessary.
- To emphasize the need to keep in mind that people whose bodies have not been recovered in the Strait of Gibraltar are considered missing persons.
- To ensure that it is the refugees who speak to the media, and avoid social organizations speaking on their behalf.
RISK: we could give the mainstream media the sensationalism they are looking for.

2. Raising awareness / training

Challenges:

- To jointly construct an understandable, educational and flexible language in order to better reach civil society, since we are not succeeding in this now.

- To create our own discourse (avoid using 'us and them'). We do not have to think about finding a new way to communicate; rather, we have to re-emphasize our message.

- It is important that we keep in mind that there is a permanent, necessary tension: in order to be able to transform policies, we need to specialize in particular areas, but we also have to coordinate with the struggles and efforts of feminists, unions, etc.


- How do we defend the right to migrate? Not from a utilitarian perspective, but rather from the perspective of the right to freedom of movement. To approach it from a combative and inharmonious (utilitarian) standpoint because this argument can be brought down in a crisis situation. It is important to establish an ethical and political stance with which to approach this issue.

**Pay attention to how society's feelings change depending on the context – indigenous population – migrant.*

- The aim is to make people feel that this is their problem as well, 'it's our problem'. We are all victims of the same system (do not separate the situation of refugees and immigrants from our own, because we are also being oppressed by the system).

- To avoid using and internalizing unacceptable language (e.g. Expulsiones cualificadas).



Origin – Transit – Destination	
<p>3. Research</p> 	<p>Strategies:</p> <ul style="list-style-type: none"> - Arm ourselves with a historical perspective: what has happened to asylum at other critical moments? This can help us plan ahead and propose response strategies. - To detect existing information on countries of origin and transit that is not used (UNHCR), and systematize and share it (achieve a flow of information between the different offices of a single organization and to other organizations). - To expose the incoherency of the Government discouraging Spanish citizens from travelling to certain countries because they are considered unsafe through its Ministry of Foreign Affairs, and then expelling immigrants to these same countries through the Interior Ministry. - To produce a catalogue of externalization 'measures' that Spain and the European Union are implementing in their aim to control migration flows and which are making it harder for people in need of international protection to access asylum procedures. - To produce a resource library: to systematize the existing documents in this area (reports, studies, etc.). <i>*PH offered to create the database.</i> <p>Challenges:</p> <ul style="list-style-type: none"> - To have reliable sources of information in countries of origin that enable us to have first-hand information of what is happening in the country of origin and in transit and also serve as a tool for backing up asylum applications, mainly in relation to gender-related persecution. - To monitor the cases of people who are deported and to have a list of these people in the countries of origin (these states are quite reluctant to comply). - To make progress in identifying victims of trafficking and ensuring their protection through asylum.

3. Research

- TRUTH, JUSTICE AND TOTAL ACCOUNTABILITY. To avoid the crime of forgetting about missing persons. To start building a collective memory (documenting human rights violations) in order to make sure that no victim's story of suffering goes untold.

- To reveal the implications and consequences the policy of externalizing borders has on human trafficking: risk and vulnerabilities.

- To address the impact of gender on migration policies.

- It is essential that we connect discourse on migration policy to economic and social policy. Avoid a discourse of 'us and them', since all the human rights violations that we are suffering follow the same logic.

Topics:

- Lack of information on how deportations are decided (e.g. CIEs: what is the process by which a decision is made overnight to deport a person).

- Spain's agreements with transit and destination countries. Lack of transparency and information about EU alliances and agreements with countries of origin and transit (Detention centres, e.g. Mauritania's Little Guantanamo. What organizations are funding these centres?).

- In the current economic crisis, how will the figure of official development assistance fit into countries' agreements?

- To continuously update our analysis of the context. To have up-to-date information on geopolitical changes and analyze migration policies that are in effect in countries of origin, transit and destination.

- To study Frontex's political responsibilities and identify possible issues that can be brought to the courts. Frontex is made up of States, so it is a good idea to identify the specific responsibilities of Spain and of the EU in concrete cases of human rights violations. This would pave the way for bringing the issue before the Court of Justice, which is the main legal institution of the European Union in charge of ensuring that Community rights are interpreted and applied in the same way in all member states of the European Union.

- To study European and state legislation and establish critical stances towards them that can serve as a foundation for advocacy.

4. Strategic work with courts



Strategies:

- Asylum on ex post facto grounds as a tool in possible cases of expulsion (when the well-founded fear of being persecuted comes up, for example, when the individual finds out that he or she is going to be expelled to his or her country of origin, where irregular immigration is punishable with imprisonment).

- In view of the lack of access to information and the lack of transparency, keep the Spanish Constitution's Art. 29 in mind: it enshrines the Right to Request Information, which provides that information can be requested when there are no established procedures. The State is required to respond. If we are refused we can turn to the 'Fundamental Rights Procedure' (faster and preferable). This can be of help in bringing a strategic lawsuit.

- Possibility of opening legal proceedings against the EU for violating the European Convention on Human Rights. The EU, as laid down in the Lisbon Treaty, is to become party to the European Convention on Human Rights, through its signature and accession as a separate State. This will mean that the EU will be subject to the Convention and could therefore be brought before the European Court of Human Rights if it were to violate any of the rights laid down in the Convention, just like any other signatory State. This opens up a new channel for opening legal proceedings against the EU, which is the institution that produces most of the legal regulations (Directives, Regulations, etc.) that are later translated into national legislation and that affect many of the areas that concern us: rights of migrants, asylum, trafficking, etc.

- To systematize the relevant case law (e.g. the *Hirsi and Others v. Italy* case) related to the fulfilment of the principle of non-refoulement/national jurisdiction in international waters.


- To disseminate the legal precedents in this area.

- To create a database (exchange legislation and case law, share legal resources) in order to help bring lawsuits.

Challenges:

- To have paid legal teams.

- To investigate and produce a map of the legal system – Identification of responsibilities (Frontex).

<p>5. Intervention / support</p>	<p>Challenges:</p> <ul style="list-style-type: none"> - Maintain presence in CIEs in order to reduce the vulnerability of the detainees. Take the gender perspective into account when intervening, as well as the right to asylum as a tool of protection of human rights (inform people of this right). - Try to relate to and reach the realities of women (in CIEs, on the border, in transit, etc.).
<p>6. Networking</p> 	<p>Challenges:</p> <ul style="list-style-type: none"> - Strengthen the network of contacts in countries of origin and transit; identify social organizations in countries of origin and transit that work to defend human rights and study the possibility of forming alliances and networking with them. <i>* It is IMPORTANT to consider whether these organizations have country agreements in order to determine how to handle this.</i> - 15-M Movement: Take advantage of 15-M meetings in order to reach young people who are itching to take on political issues.

The fact that we were able to identify strategies and challenges as a group through a process of exchanging practices and knowledge among organizations and social groups demonstrates that we brought a great range of experiences to the table and that the process has increased our mutual knowledge. We hope that the notes outlined here serve as a guide and prove useful in informing advocacy strategies for social organizations and groups working in the area and bring us together on our path towards resisting and denouncing these policies.

CEAR-Euskadi is fully committed to implementing these strategies, addressing the challenges over which we have control, and publicly recognizing that any work we carry out in this area has been informed by what we defined together at this meeting of the minds.

We sincerely appreciate the generosity and commitment shown by the organizations and individuals who shared their experiences in fighting for refugees and immigrants, demanding accountability for and raising awareness of their plight, and supporting them as they suffer under the ever-tougher migration policies that are being implemented by Spain within the framework of the European Union in the name of security and against an 'invasion' that does not exist and which have seriously adverse consequences on these individuals' exercise and enjoyment of human rights.

IV. APPENDIX

1. 'FORTALECIMIENTO DE CAPACIDADES DE LA SOCIEDAD CIVIL MARROQUÍ A FAVOR DE LOS DERECHOS – JURÍDICOS, ECONÓMICOS Y SOCIALES – DE LAS PERSONAS SOLICITANTES DE ASILO/REFUGIADOS EN EL CONTEXTO EUROMEDITERRANEO'

The purpose of this project is to contribute to improving the work and advocacy capacity of Moroccan civil society organizations working in the area of human rights of refugees and/or people in need of international protection. It also aims to strengthen the connection between civil society organizations in Spain and those in Morocco and build their capacity to denounce situations in which human rights are being violated.

Main activities to be carried out under the project:

1. Strengthening Moroccan organizations that promote and defend human rights in the area of asylum and political refuge.
2. Training the leaders, management figures and staff of Moroccan civil society organizations in human rights, asylum, political refuge and the national and international legal framework for protection.
3. Building the social and political advocacy capacity of human rights and asylum rights organizations.
4. Creating spheres of cooperation among the participating organizations, the networks to which they belong and other organizations that defend the right to asylum and political refuge in the Euro-Mediterranean region.

Duration: 18 months. From 19 December 2011 to 19 June 2013.

Country: Morocco.

Local partner: The Moroccan Association of Human Rights (AMDH) and others.

Funding: The Spanish Agency for International Development Cooperation (AECID).

Sponsored by: CEAR Euskadi

2. NETWORK FOR THE DEFENCE OF THE HUMAN RIGHTS OF MIGRANTS AND REFUGEES: JUSTICE WITHOUT BORDERS FOR MIGRANTS (JWBM)

Justice Without Borders for Migrants (JWBM) is a bi-regional network (West Africa-Europe) whose mission is to combat human rights violations related to expulsions and refoulement through legal action, advocacy and dissemination of information about such abuses.

In 2011, JWBM carried out a number of advocacy activities directed at the African Commission on Human Rights and Peoples and other regional and international organizations, and also documented and denounced human rights violations related to expulsions and refoulement in order to set in motion the legal actions necessary for the recognition of these individuals' human rights.

More information about partner organizations and the actions and studies that have been carried out can be found at: <http://www.jsf-jwb-migrants.org/>

