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Safe Reporting of Crime for Victims and Witnesses with Irregular Migration Status in Spain

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Introduction

The protection of crime victims with irregular migration status

According to the European Union (EU) Victims-Directive,¹ victims of crime have the right to be informed, supported and protected, as well as to participate in criminal proceedings. EU Member States retain notable scope for action to transpose these rights into their national legislation, but with the entry into force of this Directive in October 2012, victims' protection entitlements improved significantly within the remit of EU Law.

However, foreign victims with irregular migration status are still in a vulnerable position. Indeed, they are included in the Directive in a particular way. On the one hand, Member States have to take the necessary measures to ensure that the rights set out in the Directive are not conditional on the victim's residence status. According to Art. 1.1, the rights delineated shall apply to all victims in a non-discriminatory manner, including with respect to their residence status. Nevertheless, on the other hand the Directive does not address the conditions of the residence of crime victims in the territory of the Member States. As mentioned in the preamble of the Directive (Recital 10), *'reporting a crime and participating in criminal proceedings do not create any rights regarding the residence status of the victim'*.

Victims of crime with irregular migration status fall under the scope of the EU's Return-Directive.² As with any third-country nationals staying irregularly in their territories, Member States shall issue them with a return decision. As stated in Art. 6.4 of the Return-Directive, *'compassionate, humanitarian or other reasons'* allow Member States to grant at any moment a residence permit or the right to stay to any person with irregular migration status. However, EU law does not directly grant these victims of crime the right to stay if they report the case to the police or the criminal justice system.

The outcome of the existing legal framework can be particularly harmful for these crime victims, who are exposed to retaliation and can fear deportation if they report the crime to the police. But it also impacts upon the whole criminal justice system, which may lose crucial actors for the prosecution of crime.

In the last decade, EU and international law have started to bring in some exceptions to this inconsistent and harmful legal system. According to Directive 2004/81/EC,³ victims of human trafficking have access to a so-called 'reflection period' that allows them to recover and escape from the influence of traffickers. During this period, it is not possible to enforce deportation orders of third-country national victims, and once the reflection period is finished, victims may under certain circumstances access a residence permit. In the same way, Directive 2009/52/EC⁴ requires Member States to facilitate complaints by migrant workers with irregular status, and provides the possibility

¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

² Directive 2008/115/EC of the European Parliament and the Council, of 16 December 2008, on common standards and procedures in Member States for returning illegally-staying third-country nationals.

³ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or have been the subject of an action to facilitate illegal migration, who cooperate with the competent authorities.

⁴ Directive 2009/52/EC of the European Parliament and the European Council, of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

to grant residence permits of limited duration for victims who have suffered particularly exploitative working conditions. The Council of Europe's Convention on preventing and combating violence against women and domestic violence⁵ (known as the Istanbul Convention) compels parties to ensure that victims of the violence covered by the Convention can access complaint mechanisms. Parties must also take necessary measures to encourage the reporting of such violence, to suspend deportation proceedings and to provide, under certain circumstances, access to an autonomous residence permit. However, apart from these exceptions, migrants with irregular status are not protected from deportation proceedings – at least under EU Law – even if they report a crime as a victim or witness.

This systemic legal contradiction affects not only the EU and its Member States, but also the local communities of countries where migration policies are based on the principle of deportation of irregularly-staying foreigners. The need to develop mechanisms to foster '*safe reporting*' of crime – that is, mechanisms encouraging victims to report crimes without the fear of deportation – has been discussed by authorities at different levels of governance in countries beyond the EU. In the United States, for instance, local authorities have led the way in developing different kinds of policies at city level that try to foster '*safe reporting*' of crime. These policies differ in many cases, but consist mainly of so-called '*firewalls*' that are intended to prevent local authorities responsible for criminal law enforcement from taking part in the deportation system designed and conducted by federal authorities.⁶ These policies are based on three main components: '*Don't ask*', '*Don't tell*' and '*Don't enforce*'. According to the first component, local authorities should not ask about the migration status of a person reporting a crime. According to the second, they should not communicate the immigration status of a foreigner to federal authorities. According to the third, they should not enforce federal decisions related to the deportation of an irregular migrant. The legal basis of these policies is closely linked to the U.S constitutional and federal system.⁷ From a political point of view, the idea of safe reporting connects also with the sanctuary cities and sanctuary movement developed in the last decades in the U.S.⁸

Although U.S. cities have often led the debate on safe reporting of crime, the above-mentioned systemic dimension of the problem has enlarged the scope of the debate to other countries, including authorities in the EU, interested in developing policies of safe reporting in the area of freedom, security and justice in which the protection of victims is one of its components.

Purpose and aims of the study

This report presents the main findings of a socio-legal study on the policies governing '*safe reporting*' of crime in Spain. Although '*safe reporting*' is an unknown category in the Spanish literature and migration debate, the geographic situation of Spain and the presence of an important number of irregular migrants fuelled by traditional black economy sectors suggests that the problem of '*(un)safe reporting*' is particularly relevant. In fact, the Spanish Ombudsman suggested in 2004

⁵ Council of Europe's Convention on preventing and combating violence against women and domestic violence, of 11 May 2011.

⁶ KITTRIE, O. F. (2006), '*Federalism, Deportation, and Crime Victims Afraid to Call the Police*', *Iowa Law Review* 91, 1449.

⁷ DELVINO, N. (2019), *Victims of crime with irregular migration status in the United States: Understanding national and local measures enabling 'safe crime reporting' by irregular migrants*, Oxford: COMPAS.

⁸ BAUDER, H. (2017), *Sanctuary Cities: Policies and Practices in International Perspective*, *International Migration*, Vol. 55(2), 2017, 174-187; DE GRAAUW, E. (2014), *Municipal ID Cards for Undocumented Immigrants: Local Bureaucratic Membership in a Federal System*, *Policy & Society*, Vol, 42(3), 309-330; CUISSON VILLAZOR, R.-GULASEKARAM, P. (2018), *The New Sanctuary and Anti-Sanctuary Movements*, *UC Davis Law Review*, Vol. 52, n.1, 549-569.

the Ministry of Interior has suggested very recently (July 2019) the Ministry of Interior to assure that irregular migrants are able to report safely without the risk of being deported or sanctioned.⁹

A second reason also makes the Spanish case interesting. Since 2009, Spanish migration law has contained different regulations protecting (at least in theory) victims of human trafficking and gender-based violence, as well as people who collaborate with public authorities. The clear intention of putting, in most of these cases, the condition of 'victim' ahead of the condition of 'irregular migrant' is an interesting angle from a comparative perspective. Finally, the coexistence of different state, regional and local police forces, and the strong political decentralisation of the country, also draws attention to the Spanish case in relation to the potential of developing local practices facilitating 'safe reporting'.

This report contributes to a broader project carried out by the University of Oxford's Centre on Migration, Policy and Society (COMPAS) assessing legal and policy options for 'safe reporting' of crime for victims and witnesses with irregular status in the United States and four European countries – Belgium, Italy, Spain and the Netherlands – and exploring the legal and political replicability of 'firewall' practices across different countries. Taking into account the framework of this project, the current report has two main aims. Firstly, it tries to provide an overview of the Spanish legislation, policies and practices at national, regional and local level relevant to 'safe reporting' of crime by irregular migrants. The report will pay special attention to the decentralised political organisation of Spain and to migration law provisions. The second aim of the report is to explore the applicability of sanctuary or firewall policies in Spain, although the constitutional, legal and political situation of Spain differs in many aspects from the situation in the U.S.¹⁰

Methods

The report contains the main findings of socio-legal research carried out between January and June 2019, based on two types of data collection. First, the report encompasses desk research on the existing legislation and literature related to the issue of 'safe reporting' in Spain. As mentioned above, the concept of safe reporting has no tradition in the Spanish literature. In fact, desk research has revealed that there is no Spanish literature on the specific topic of crime reporting by migrants with irregular status. The main outcomes of desk research have therefore been migration rules, internal protocols, and reports and data on the implementation of the existing legislation.¹¹

Second, to obtain knowledge about the actual implementation and problems in practice in relation to the possibility of conducting 'safe reporting' in Spain, a limited number of interviews with law enforcement and civil society actors were conducted by the author of this report. Interviewees were selected according to their experience and expertise in relation to crime reporting and irregular migration. Taking into account the existence of different police forces in Spain at national, regional and local levels, as well as the fact that they do not have the same powers in all regions, interviewees were selected in a way that tries to capture the full picture at national level, in the region of

⁹ <https://www.defensordelpueblo.es/noticias/extranjeros-situacion-irregular-victimas-delitos/>

¹⁰ Similar reports are being produced for each country involved in the project.

¹¹ Organic Law 4/2000, of January 11th, on rights and freedoms of foreigners in Spain and their social integration, and Royal Decree 557/2011, of April 20th, which contains the governmental regulation developing the Organic Law. AMNISTÍA INTERNACIONAL, *Más riesgos y menos protección. mujeres inmigrantes en España frente a la violencia de género*, November 2007. DEFENSOR DEL PUEBLO, *La trata de seres humanos en España: víctimas invisibles*, 2012. GROUP OF EXPERTS ON ACTION AGAINST HUMAN TRAFFICKING (GRETA), Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Spain. First and Second Evaluation Round, September 2013 and March 2018.

Catalonia and the city of Barcelona. The lack of studies about 'safe reporting' in Spain might have left some local practices out of the picture. The focus on Catalonia (where the regional police are called 'ordinary' police) and the city of Barcelona (one of the cities most attentive to irregular migrants), and the fact that most interviewees were located in this city, might have led to a territorial bias. To counteract this risk, some interviewees were selected from Madrid, or were asked to describe the situation in the whole country.

In total, 10 interviews took place with interviewees from the local police of Barcelona (interviewee 1), the regional police of Catalonia (interviewee 2), the National Police (interviewees 3 and 4), the prosecutor's office in Barcelona (interviewee 5) and non-state actors: Caritas Diocesana de Barcelona (interviewee 6), Migrastudium (interviewee 7), SOS Racisme (interviewee 8), Arrels (interviewee 9) and Barcelona's Bar Association (interviewee 10). Most of the interviewees work with all kinds of migrants and can give a general overview of the situation, while SOS Racisme and Arrels work in the field of racism and homelessness and shared their experience of more specific communities. The interviews were semi-structured and were conducted face-to-face in all but two cases (interviews 5 and 9), but were not audio-recorded, so as to encourage interviewees to express their opinions freely. Each interview took between half hour and an hour.

Although their points of view were different, all informants agreed on the fact that the topic of 'safe-reporting' was new to them to a great extent, and that in only a few cases had victims of crime been deported as a result of their irregular status. Their answers also showed clearly that institutions have not paid much attention to the issue, despite the fact that the risk of deportation is one of the factors hindering reporting of crime by irregular migrants. It was not possible to include the opinion of migrants themselves (or of additional civil society actors) to confirm this general diagnosis. In any case, the information obtained from these qualitative interviews also confirmed that 'unsafe reporting' damages both the victim and the criminal justice system.

Finally, it is important to mention that a significant component of the information contained in this report derives from the direct professional expertise of the author, who worked as General Director of Migration within the Spanish Government from April 2010 till December 2011. During this period, the Spanish Government passed the Royal Decree 557/2011, which contains the regulation developing Spanish Migration Law. This professional experience has been also taken into account in the report, especially in the sections related to immigration issues.

Structure of the report

The remaining sections of this report will provide the main findings of the research. The report is divided into 6 more sections in order to describe and assess the state of the art of 'safe reporting of crime' in Spain, both from a legal and practical perspective, and to explore to what extent policies and 'firewall' practices fostering 'safe reporting' could be implemented in Spain.

Section 2 describes the constitutional and legal framework regulating immigration, policing and criminal law in Spain in order to provide an understanding of the legal context surrounding 'safe reporting' in Spain and its future development.

Section 3 analyses the interplay of existing police forces in the field of irregular migration. Besides legal rules, this section describes how local, regional and state authorities act when they encounter irregularly staying migrants.

Section 4 analyses the situation of migrants who want to report a crime to the police or act as witnesses. Those cases where no special rules apply and irregular migrants can reasonably be afraid of enforcement and deportation proceedings will receive special attention.

Section 5 describes in detail the specific immigration provisions that can be applicable to people with an irregular migration status who report a crime. Although they do not refer to 'safe reporting', in some cases (human trafficking, gender-based violence, organised crime related to human smuggling and labour and sexual exploitation, and co-operation with law enforcement in general) these regulations can promote 'safe reporting', at least in theory. Although scarce, existing data will help understand how these provisions work in practice.

Section 6 reports recent local policies that have started to appear in Spain (mainly in Barcelona and Madrid, and in the form of municipal cards) and sets out if they could eventually evolve to promote safe reporting in the future.

Finally, Section 7 brings together some conclusions of the Spanish case with reference to the overall aim of the project.

1. Constitutional and legal frameworks for safe reporting of crime by migrants with irregular status

Procedures for reporting of crime by migrants with irregular status involve different institutions, including public authorities which decide on the migration status of the victim; law enforcement authorities, which receive crime reports and take further steps with the acquired information; and prosecutors and judges, who take decisions during criminal proceedings. The powers and organisation of all these institutions may vary significantly among different countries and depend mostly on the constitutional and legal system of each country.

1.1. Spain's territorial organization

In the case of Spain's territorial structure, it is important to note four main features. First, Spain is a strongly decentralised state. Although the 1978 Constitution (*Constitución Española*, CE) does not define Spain as a federal country, it enables the coexistence of seventeen politically autonomous regions (*Comunidades Autónomas*), two autonomous cities (Ceuta and Melilla at the border of Morocco), around eight thousand municipalities with local autonomy, and the central state with its national government and parliament. The Spanish Constitution (and the fundamental rights recognised in its first Title) offers both a foundation and a limit to such variety of territorial entities, who share one single constitutional system.

A second important feature of Spain's territorial organization is that not all regions have exactly the same powers. For the purpose of this report, it is important to point out that only three regions have their own police forces: Catalonia, the Basque Country and Navarra. In the case of Catalonia and the Basque Country these regional police forces are known as 'ordinary police forces' in the sense that within their territories national police forces have only limited powers and a reduced number of officers. In these regions, people normally report crimes to the regional police officers, while in the rest of the country they do so to National Police officers or members of the *Guardia Civil*, (a second police force that operates mainly in rural areas). The local autonomy of municipalities depends on their population. Not all municipalities have local police forces, and the existing ones have limited powers and do not act as judicial police forces.

Thirdly, for the purpose of this report it is also important to take into account the constitutional principles that frame Spain's territorial organisation. Although Spain is not a federal state (at least not formally), the principles of *unity*, *autonomy* and *solidarity*, recognised in Art. 2 of the Constitution, are the cornerstones of the territorial constitution of Spain. As regards the exercise of the powers of all territorial bodies, the constitutional principles of *collaboration*, *mutual loyalty* and *cooperation* are essential. These principles have been recognised by the Spanish Constitutional Court since the early 1980s, with different and not always clear contents. According to the jurisprudence of the Constitutional Court, *collaboration* is a general principle that includes not only to respect the powers exercised by other administrations, but also mutual help (e.g. through sharing of information) so that other administrations can better exercise their powers.¹² *Mutual loyalty* on the other hand is a constitutional principle that includes the idea of not hindering the policies of other administrations,¹³ which is essential for the debate regarding sanctuary policies and local or regional firewalls based on a 'Don't tell' or 'Don't enforce' component. *Cooperation* requires the participation of different administrations in specific bodies or proceedings, and is either a specific

¹² SSTC 18/1982, 4 May and 80/1985, 4 August.

¹³ SSTC 46/1990, 5 March and 247/2007, 12 December.

content of a competence of the central state or an agreement between different administrations that use cooperation techniques mandated in the Law on the Legal Regime of the Public Sector.¹⁴

Contrary to other countries, it is also worth mentioning that Spanish regional and local authorities also implement national legislation. In the law enforcement sector, for example, there is no strict correlation between regional and local police and regional and local law. Both regional and local police forces are bound by national legislation. It is also important to highlight that, although Spain is a strongly decentralised country, it still lacks a real 'federal culture'. Indeed, many scholars agree that political decentralisation has only succeeded in the last 40 years, and the central state and bureaucracy are still very strong in terms of powers and politics.¹⁵

1.2. Distribution of powers in the field of 'safe reporting'

Reporting of crime by migrants with irregular status is an issue that has implications for migration and criminal justice proceedings. According to Arts. 149.1.2 and 149.1.6 of the Spanish Constitution, both sectors fall exclusively under competences of the central state. Only the Spanish Parliament can regulate these issues, only the Spanish Government can develop legal rules through regulations (royal decrees and ministerial orders), and only officials of the central government can issue residence permits. Located in the capital of each of the Spanish provinces, the Foreigner's Offices (*Oficina de Extranjería*) and the Representation of the Central Government (*Delegación or Subdelegación del Gobierno*) are in charge of migration proceedings.¹⁶ Regional and local authorities have no powers related to the legal status of migrants, although in some cases they can issue reports that may play a role in specific proceedings (e.g. family reunification).

Policing is a task fulfilled by two state police forces: the National Police (*Cuerpo Nacional de Policía*) in urban areas and in relation to some specific issues (for example, migration control) and the *Guardia Civil*, which is in charge of public security in rural areas and some specific issues (for example, guns control). As mentioned before, three regions have their own police forces: Catalonia (*Mossos d'Esquadra*), the Basque Country (*Ertzaintza*) and Navarra (*Policía Foral*). The first two are the so-called 'ordinary' police forces in their territories, and are in charge not only of public security, but also of criminal investigations as judicial police. However, some crimes (human trafficking, favouring illegal migration, etc.) also fall under the competence of national police forces all over the country. Almost 2000 local police forces are operational in Spain.

Based on the competence of the state to grant public security (Art. 149.1.29 CE), a national Law on Security Forces regulates the powers and relations of all these police forces, as well as the common rules related to their status and behaviour.¹⁷ Local police mainly have powers related to administrative policing and traffic control. Regarding public security, the competences of local police are limited mainly to supporting national and regional police forces. Regional police forces in Catalonia and the Basque Country act as 'ordinary' police within their territories and interact with the criminal justice system.

¹⁴ Law 40/2015, October, on the Legal Regim of the Public Sector (Arts. 143-154).

¹⁵ AJA, E. (2004), *Federalismo y hechos diferenciales*, Alianza Editorial, pag. 18.

¹⁶ The representation of the central government (*Delegación del Gobierno* in regions with one single province and *Subdelegación del Gobierno* in each of the provinces in larger regions) has some competences in migration such as issuing deportation orders and some residence permits. Most of the permits, however, are issued by the Foreigner's Office of the province where the foreigner lives.

¹⁷ Organic Law 2/1986, 13 March, of Security Forces.

Migration control, administrative sanctions related to the migratory status of a foreigner and removals are always within the competence of the National Police (*Cuerpo Nacional de Policía*). *Guardia Civil* is competent for border surveillance, but border control and foreigners' documentation is a competence of National Police officers. A specific unit of National Police, the General Commission for Foreigners and Borders (*Comisaría General de Extranjería y Fronteras*), is in charge of migration control. At provincial level law enforcement officers of the Provincial Foreigners Brigades (*Brigadas Provinciales de Extranjería*) carry out this control.

For the purpose of this paper, it is important to underline that local and regional police lack powers in the field of migration. As explained below, if local or regional law enforcement officers encounter a person with irregular migration status, they need to contact (at least in some cases) the units of National Police in charge of migration control. These units will decide, eventually, to open an immigration file that can end with the issue of a deportation order. The same applies to officers of the *Guardia Civil* and the members of the National Police who are not in charge of immigration control.

The above-mentioned national Law on Security Forces (Arts. 45-50) determines the relation between all these police forces. Mutual help and information, as well as concrete cooperation mechanisms at state, regional and local levels, are intended to guarantee that all police forces exercise their powers in an efficient and respectful way.¹⁸ The above-mentioned constitutional principles of cooperation, collaboration and institutional loyalty also limit decisions and behaviours of police forces.

In this constitutional and legal context, it is easy to understand why sanctuary 'Don't Ask', 'Don't Tell' and 'Don't Enforce' measures have not traditionally found fertile soil in Spain in which to be developed. In fact, these policies are alien to the Spanish legal system, both in terms of rules and practices. Nevertheless, Section 3 will analyse in depth the extent to which regional and local polices cooperate in practice with National Police officers when they encounter irregular migrants. Section 7 will examine if there are constitutional obstacles for a future development of these sanctuary measures.

A final remark on the legal framework related to irregular migrants needs to be made in order to contextualize the Spanish case. According to the Spanish law on localities,¹⁹ any person has the right and duty to register in the municipality where he/she lives, irrespective of migration status. This municipal register (*padrón municipal de habitantes*) is very important from a legal and practical perspective for both the foreigner and the municipality. Indeed, being registered is the only requirement to be considered a '*neighbour*' (local resident) from a legal point of view, and gives access not only to municipal services, but also to health care, education and social services. The register is also vital for regularisation proceedings that require proving that the person has been living without interruption in Spain for at least three years. In addition, having an updated register of all neighbours is also relevant for planning and assessing local policies, as well as to determine the distribution of municipal funds.

Although in practice it may be difficult to register vulnerable migrants and homeless people and to store updated information, the fact that most irregular migrants try to register immediately when

¹⁸ At state level a Council of Security Policy gathers the national and regional Ministers. In those regions which have more than one police force, the so-called Security Boards try to coordinate security polices. At local level this is the duty of the Local Security Boards.

¹⁹ Ley 7/1985, de 2 de abril, reguladora de las Bases de Régimen Local (Arts. 15-17).

they arrive in Spain shows that local inclusive policies regarding irregular migrants to some extent exist within the Spanish legal system. An example of this is that local public employees do not have to ask about the migration status of a foreign person who wants to register. In addition, firewalls for the access by police officers of the municipal register do exist based on the fundamental rights guaranteed by the Spanish Constitution. Indeed, the Spanish Constitutional Court has recognized that irregular migrants have some fundamental rights in the same way as nationals (e.g. personal data protection), and that police officers' access to the municipal register needs therefore to comply with data protection requirements and with the proportionality of this access.²⁰

1.3. Legal frameworks relevant to the issue of 'safe reporting of crime'

For the purpose of this report, it is also essential to clarify some legal aspects related to Spanish immigration law and to the relation between administrative authorities in the field of immigration control. Spanish migration legislation is mainly contained in two pieces of legislation: Organic Law 4/2000, of January 11th, on rights, freedoms of foreigners in Spain and their social integration (hereafter, Spanish Migration Law) and Royal Decree 557/2011, of April 20th, which contains the governmental regulation developing the Organic Law (hereafter, Migration Regulation).

According to the Spanish Migration Law, irregular stay is an administrative offense sanctioned with deportation.²¹ As mentioned before, only representatives of the central government at provincial level (*Delegación o Subdelegación del Gobierno*) are entitled to issue deportation orders. Administrative law regulates deportation proceedings and officers of the National Police (*Cuerpo Nacional de Policía*) instruct them. Identification as a migrant with irregular status by this police force in any context (including after suffering or witnessing a crime) may lead therefore to a deportation proceeding if migration law is implemented strictly.

Spanish migration law does not protect 'safe reporting' of crime for migrants with irregular status in general terms. As mentioned before, 'safe reporting' is neither recognized nor discussed as such. Indeed, generally there is no political or legal debate on how to promote it and how to build firewalls to encourage irregular migrants to play a more active role in the criminal justice system. There is neither traditions of local nor of regional sanctuary measures trying to protect such migrants from state deportation policies. Although Spain transposed the EU Victims-Directive in 2015,²² little attention has been paid to the protection of irregularly staying migrants who are victims of crime.

Nevertheless, Spanish migration law provides four specific measures that are applicable to irregular migrants and may protect them from deportation. Since 2009, victims of human trafficking (Art. 59bis of the Migration Law) and of gender-based violence (Art. 31 bis of the same Law) are protected from deportation proceedings and are eligible for residence permits under certain circumstances that will be analysed below. The requirements for these situations are not exactly the same, but prioritisation of the condition of victim over the irregular migration status is clearly given in both cases.

²⁰ In the Sentence 17/2013, of January 31st, the Constitutional Court declared that the police access to the register cannot be random and has to be justified and based on specific circumstances.

²¹ The Migration Law originally stated that irregular stay could be punished eventually with a fine. This possibility has been declared to be contrary to the Return Directive by the European Court of Justice in its decision of 23 April 2015 in case C-38/14 - *Zaizoune*. The Spanish Law has not been amended yet, but Spanish courts have changed their jurisprudence and limited fines to exceptional cases.

²² Law 4/2015, of April 27, on the Statute of crime victims has incorporated most of the EU Victims-Directive into national law and is applicable also to foreign victims irrespective their legal status.

A third exception to deportation is also available for victims, witnesses or harmed persons with irregular status who cooperate to fight against organised crime related to human smuggling, labour or sexual exploitation (Art. 59 of the Migration Law). Contrary to the previous cases, that not conditional upon co-operation with the police, in this case the main purpose of this regulation is to foster the reporting of activities of organised-crime.

Co-operation with police, judicial and administrative authorities in other cases not related to organised crime may also lead to other kind of residence permits according to Art. 127 of the Migration Regulation. This possibility is longer standing than the previous ones, and tries to promote co-operation in more cases, but offers a residence status that is less beneficial.

As we shall see below, each of these four mechanisms differs from each other and has concrete requirements. Their main purpose is not always to protect victims, but they are the only regulations applicable to irregular migrants who want to report a crime.

A second aspect that needs to be considered in the context of this report is the interaction between state, regional and local authorities in the field of irregular migration. Local firewalls or sanctuary measures depend largely on existing legal frameworks. In the case of Spain, it is important to point out that the fight against irregular migration is one of the core principles of Spanish migration policy, one that is binding for all public administrations. Article 2bis.2 of the Spanish Migration Law states that all public administrations have to exercise their powers in the field of migration, complying with some general principles. The fight against irregular migration, as well as the social integration of migrants and the commitment to the constitutional and international rights of everyone, are some of these general principles.

The way in which the principle related to the fight against irregular migration works in each administration is not ruled precisely. Nevertheless, some legal provisions have to be taken into account. First, there is no legal obligation to ask foreigners about their legal status,. Lawful status might be a requirement for many services or benefits, but judges have in some cases have declared it illegal to ask for proof of such status when there is no need to do so.²³ In the Spanish context, a general obligation to ask foreigners about their legal migration status would in fact raise important constitutional problems. It would be unreasonable in the case of rights and services provided to all persons irrespective of their migration status, as well as contrary to the principle of proportionality due to its dissuasive impact (chilling effect).²⁴

A general obligation to report the presence of irregularly staying migrants to National Police officers also does not exist in the Spanish legal system. The constitutional principle of collaboration requires legal provisions or bilateral agreements to be implemented. The Spanish Migration Law states a general obligation for all public administrations to share data of people who are taking part in

²³ This was the case, for example, of some municipalities requiring a legal status to register, which was rejected by some judges. For instance, by the Tribunal Superior de Justicia de Andalucía (sentencias 139/2008, % february, and 546/2008, 27 May). Also the Report of the State General Attorney of 20 January 2010 answering to a question posed by a Catalan municipality concluded that this requirement is not in line with the Spanish legal system.

²⁴ This U.S doctrine (Supreme Court, *Wieman v. Updegraff*, 344, US 183, 1952) has been frequently used by the Spanish Constitutional Court to declare that some norms or behaviours are void, because they dissuade others from exercising fundamental rights (SSTC 136/1999, 20 July, FFJJ 20 and 29; 100/2000, 5 of May, FJ 5; 86/2003, 19 of May, FJ 3; 185/2003, 27 of October, FJ 5; 148/2015, Fj 3). The chilling effect doctrine is also used by the European Court of Human Rights (*Bladet Tromso and Stensaas against Norway*, of 20 May 1999, par. 64; *Wille against Lichtenstein*, of 28 October 999, par. 50; *Nikula against Finland*, of 21 March 2002, par. 54; *Heinisch against Germany*, of 21 July 2011, par. 91 and 92; *Gafgaz Mammadov against Azerbaijan*, of 15 October, 2015).

administrative migration proceedings. However, the Constitutional Court has declared that this legal provision does not permit massive and random data sharing, and has required the full compliance of the data protection *legislation*.²⁵ A general legal obligation to disclose the presence of irregular migrants to the Ministry of Interior would also raise constitutional problems. On the one hand is the lack of consent to collect, store and transfer the personal data of migrants to a different administration for the purpose of combating irregular migration. On the other is the impact of such an obligation on migrants, who would refrain from exercising their rights (e.g. registering in a municipality or using social or medical services) for fear of being exposed to deportation proceedings. Again, the 'chilling' effect of such an obligation would raise constitutional concerns.

This is also one of the reasons why current local and regional provisions do not rule any explicit 'Don't ask' or 'Don't tell' obligations. Territorial authorities only ask for the legal status of a foreigner if this is a requirement for the requested service. The main requirements for most local and regional services are a valid passport or ID and being registered as neighbour in a municipality. If a lawful status is required, irregularly staying migrants do not usually apply. If they do, their application is rejected without any kind of report to the National Police.²⁶ This implicit 'Don't tell' rule has recently been criticised by an emerging extreme-right party proposing the deportation of 52,000 irregular migrants who are supposed to have had access to the health system in Andalusia.²⁷ However, this proposal received little attention and was not mentioned in the recent national and regional elections.

²⁵ In the above-mentioned Sentence 17/2013 of January 31st, the Constitutional Court underlined the need to share the data in concrete cases, related to already-existing proceedings.

²⁶ Apart from the above-mentioned general principle for all administrations to combat irregular migration, there is no legal provision that compels local or regional authorities to report the presence of irregular migrants to the National Police. In some cases (e.g. signs of criminal activity or fraud) these cases are reported, but there is no general legal obligation to do so.

²⁷ This party (Vox) criticized the regional government for not sharing with the National Police the data of undocumented migrants who benefit from the public health system in Andalusia (<https://www.ecestaticos.com/file/bf91f78893fe1dbdff27ba5facd5ce91/1546965785-propuesta-vox-andalucia.pdf>)

2. The interplay of existing police forces in the field of irregular migration

For the purpose of this study, special attention has to be paid to the interplay of national, regional and local police forces when they encounter irregular migrants. The latter can happen in many different ways: when a migrant wants to report a crime as a victim or a witness, when he/she is stopped or detained in the context of public security interventions, and so forth. Before analysing the case of crime reporting, it is worth describing how police forces are expected to behave in these situations according to the Spanish legal system.

Unauthorised stay is an administrative infraction sanctioned with deportation in most cases. National Police officers are the only ones who can start administrative proceedings related to the irregular status of a foreigner. More specifically, only officers in charge of migration issues (*Brigadas Provinciales de Extranjería*) are entitled to initiate these proceedings, to request pre-removal detention to a judge and to enforce deportations. All other law enforcement officers who encounter irregularly staying migrants are not allowed to start infringement proceedings based on unauthorised stay.

The interplay between local or regional police and National Police officers in charge of migration control is not ruled in legal provisions, but in guides and protocols agreed between the different police forces in the context of existing collaboration mechanisms. These guides and protocols, which are binding for the police forces that have signed them, are not public, but interviews with agents from the local police of Barcelona, the regional police of Catalonia and the National Police²⁸ confirmed their existence and explained their content. According to these guides and protocols, local, regional and state police officers who have no competences in the field of migration control need to report to migration police officers the presence of irregularly staying migrants only in two cases: detention for criminal reasons, and when a person is stopped by police and it is not possible to determine his or her identity. The latter is an exceptional measure than can lead to a situation that is similar to detention, but that, according to internal rules of the National Police, should not be applicable to identified irregular migrants who can prove where they live. Although it is not included in the protocols, a third specific case refers to people who arrive by boat on Spanish coasts or irregular migrants who enter the country and are detected by National Police or Guardia Civil officers. These migrants are detained, although irregular entry is not a crime in Spain, and their presence is reported immediately to National Police officers in charge of migration control. In all other cases (e.g. stops or traffic controls), in which the regular migration status of a foreigner is not clear, the existing protocols do not require communication of their presence to the National Police, even if there is evidence of an unauthorised stay.

The interviewed law enforcement officers²⁹ have confirmed the implementation of these rules in practice. During the fieldwork, it was possible to visit the police station of the Catalan police in the city of Barcelona where all foreign detainees are transferred in order to check their migration status. Transfers are not usual in all places where state and regional police forces are on the ground, but in the case of the city of Barcelona collaboration between police forces has led to the presence of National Police officers in one regional police station in the city to fulfill this task.

²⁸ Interviews 1, 2, 3 and 4.

²⁹ Interviews 1, 2, 3 and 4.

As ruled in the Migration Law (Art. 57), deportation proceedings are initiated by National Police officers when a detainee with irregular status seems to have committed a serious or very serious administrative offence (irregular stay is considered a serious offence). This does not mean, however, that deportation orders are issued in all cases, or that they are enforced. As explained by informant 2 of the Catalan Police, in 2018 around 16,000 persons were detained in the city of Barcelona. 10,000 were third-country nationals, and about 1,500 had irregular status. Most of the initiated infringement proceedings ended up with deportation orders, but only 200 foreigners were actually deported. These figures are not official, but reveal deficiencies in the deportation system, and that the system leaves those who cannot be deported in a vulnerable situation without access to legal residence and work opportunities.³⁰ Nevertheless, in the context of this report it is also important to point out that the described practice (shared facility and efficient management system) shows that efforts to improve co-operation between police forces are being made, particularly in those cases linked to security concerns of law enforcement officers. Indeed, in the case of those detained for criminal reasons, but also in pre-removal detention proceedings (in which there is a special interest in focusing on irregular migrants with a criminal profile),³¹ regional and national police forces endeavour to co-operate more efficiently.

³⁰ According to Spanish migration law, undocumented migrants can legalise their situation in different ways, but the most common is to stay in Spain for a period of three years, and provide proof of social integration and a work contract for one year.

³¹ VALLBÉ, J.J., GONZALEZ BEILFUSS, M., BARAK, K. (2019), 'Across the Sloping Meadow Floor: An empirical analysis of preremoval detention of noncitizens', *Law & Society*, 1-24.

3. Crime reporting to the police by irregularly staying migrants

Irregular migrants who want to report a crime or deliver a statement as a witness do not, as a general rule, have a special status protecting them from immigration enforcement. However, in some specific situations migration rules do provide some protections. In particular, Spanish migration law has special rules for victims of human trafficking and gender-based violence, as well as for foreigners with irregular status who cooperate to fight against organised crime, or cooperate with the police or judicial and administrative authorities. In remaining cases, reporting a crime or delivering a statement to the police is not especially protected.

The interviewees from the Catalan regional police and the National Police³² mentioned that, in order to encourage safe reporting, law enforcement officers do inform migrant communities and the public about the fact that migration authorities are not informed when an irregular migrant reports a crime or gives testimony to the police. This practice is not based on any legal provision or protocol, but on the fact that reporting to National Police officers in charge of migration control is limited to irregular migrants who are detained or cannot be identified. However, the fact that no official public campaigns spread this message among the immigrant population explains the small impact of this policy. One of the interviewed police officers of the Catalan police³³ also explained that officers insist on the same idea in meetings with local residents, school communities, NGOs and foreigners' associations. However, he also acknowledged that this practice usually has little impact.

Another possible means of fostering safe reporting under Spanish Law is anonymous reporting. In fact, it is possible to report crimes online, with telephone calls or with anonymous written communications. Some of the interviewed police officers³⁴ confirmed that these mechanisms are used in practice, and that they always lead to initial inquiries. However, these interviewees also acknowledged that anonymity does not ensure 'safe reporting' of crime in most cases, because Spanish legislation requires identification of the complainant in most crimes to start a judicial proceeding. Other practices, such as reaching out the police through intermediaries, do not seem to happen in Spain.

To sum up, apart from migration rules little has been done in Spain to foster 'safe reporting' of crime by irregular migrants. Information campaigns to counteract the fear of going to a police station after suffering a crime are neither constant nor powerful. Anonymous reporting is not an alternative in those cases where the identity of the victim is needed to open a judicial proceeding. Migration police officers are not trained to understand that these migrant victims need to be protected from deportation proceedings not only because they are victims, but also because it is beneficial for the criminal justice system.³⁵

Nevertheless, interviewees from the civil society sector³⁶ did not describe many cases in which an irregular migrant who reported a crime ended up with a deportation order. As mentioned below, all of them have experienced cases in which existing migration rules were not implemented

³² Interviews 2 and 4.

³³ Interview 2.

³⁴ Interviews 2 and 4

³⁵ Migration doesn't play an important role in the examination proceedings to join Spanish police forces in general, or in the training courses of ordinary police officers. Training deficits have been identified even regarding special migration rules such as the ones that protect human trafficking victims by the Spanish Ombudsman (DEFENSOR DEL PUEBLO, *La trata de seres humanos en España: víctimas invisibles*, 2012, general conclusion 32).

³⁶ Interviews 6, 7, 8 and 9.

correctly. Interviewee 7 denounced cases of accelerated deportation of migrants detained in a pre-removal detention centre who had reported having suffered violence from police officers. According to this testimony, in these cases reporting against the police was not only not protected, but also punished with immediate removal. Informant 6 also described some worrisome situations, such as the detention of a father with irregular status in the police station where his son was processing his ID; or the scheduling of appointments for any reason at the police station with the real purpose of detaining and deporting. However, situations of 'unsafe reporting' of crime that ended up with deportation seem to be seldom and less frequent than in the past, according to all informants.

However, the majority of civil society interviewees³⁷ agreed that irregular migrants are in most cases reluctant to report crime. Apart from implementation problems and the limited opportunities offered by migration rules, some interviewees (interviewees 6 and 7) also mentioned psychological reasons (in the case of violent crimes) as a deterrent for crime reporting. Others (interviewees 6, 7 and 8) referred to cultural reasons related to the criminal justice system in their home countries. One of the interviewees (interviewee 6) flagged the need for a transcultural approach in the way law enforcement officers behave as a desirable training objective of all police officers. However, little has been done so far in this direction.

³⁷ Interviews 6, 7, 9 and 10.

4. Migration provisions related to 'safe reporting' applicable to irregularly staying third-country nationals

As mentioned above, in specific situations Spanish migration law offers different mechanisms that can be applied to irregular migrants who report a crime. Two of them address directly the case of victims of human trafficking and victims of gender-based violence. A third is applicable to victims, witnesses or harmed persons with irregular status who co-operate with the police to fight against organised crime related to human smuggling, labour or sexual exploitation. A final mechanism concerns everyone who co-operates with police, judicial and administrative authorities in other cases not related to organised crime. These four exceptions to ordinary migration rules differ in their concrete regulation and aims. In fact, their main purpose is not limited to ensuring 'safe reporting'. Furthermore, the legal basis of all these provisions is to foster cooperation with the police, the judiciary and other public institutions during investigation and prosecution procedures that may take a long time. However, as they also protect migrants who want to report crimes to the police, it is important to analyse both their legal requirements and their implementation in practice.

First, it is important to point out that the cases that are not eligible for any of these authorisations remain unprotected. One of the interviewees, for instance, mentioned the specific case of homeless people who suffer from violent attacks or other crimes, who are vulnerable as homeless persons and would never be able to cooperate with the police.³⁸ Although interviewees have not mentioned other groups, the fact that only some cases are covered means that other victims are left unprotected.

4.1. Victims of human trafficking and gender-based violence

The rules that aim to protect victims of human trafficking and victims of gender-based violence are quite similar. Protection of these particular victims is based on a two-fold mechanism: firstly, infringement proceedings and deportations are immediately stopped (or not even started) once undocumented migrants have been identified as victims of these crimes; secondly, these victims become eligible for special residence and work permits that are more advantageous than ordinary authorisations.

Art. 31bis of the Spanish Migration Law and Art. 131-134 of the Migration Regulation govern the cases of *victims of gender-based violence* with an irregular migration status. The protection of the victim starts with the reporting of the crime by the victim or a third party. Immigration infringement proceedings cannot be initiated, and existing proceedings or deportation orders are immediately stopped. In its 2009 version, the Migration Law did not prohibit commencing an infringement proceeding, so that proceedings were started and afterwards suspended. As a reaction to this inconsistency, the Law was amended, and since 2011 there has been no possibility of starting infringement proceedings once the crime has been reported.

According to Spanish law, victims of gender-based violence and their family members can apply for 'protection orders' that allow specialised judges immediately to adopt criminal or civil measures to protect the victim and their children. Once this protection order is issued or a prosecutor confirms evidence of gender-based violence, the victim or their representative can apply at the Foreigner's Office for a residence and work permit that can be extended to any of their children who are below the age of 18 or disabled, and already in Spain. A provisional permit is issued automatically by a

³⁸ Interview 9.

representative of the Spanish Government (*Delegado o Subdelegado del Gobierno*) if a protection order or the above-mentioned report of the prosecutor are in force. This permit allows the victim and their children to live and work in Spain. Once a criminal sentence confirms that the victim suffered from gender-based violence (even if it lacks a statement of condemnation), the representative of the Government should issue a definitive 5-year permit. On the contrary, if gender-based violence is not confirmed, the provisional residence permit is withdrawn. According to available statistics, 11,546 permits were issued in the period 2005-2018.³⁹ However, it is not possible to know how many were provisional or definitive and, more importantly, how many applications were refused. In any case, this figure shows relatively frequent use of this protection mechanism.

Art. 59bis of the Spanish Migration Law and Arts. 140-146 of the Migration Regulation rule the case of *victims of human trafficking*. Protection for these victims starts earlier, namely during process of identifying the foreigner as a victim of human trafficking. There is no need for the victim to have reported the trafficking situation. Once a trained police officer believes there are reasonable grounds for considering that a person is a human trafficking victim, a reflection period is offered, infringement proceedings cannot be initiated, and existing proceedings or deportation orders cannot be enforced. Protection is not conditional on the victim's report but, as explained below, police officers tend to require some kind of cooperation in prosecuting the traffickers if a person is to be identified as human trafficking victim.

Spanish legislation requires a so-called 'responsibility exemption' for the period of previous unauthorised stay. This exemption can be obtained because the victim is cooperating with the police, or due to the personal situation of the victim. The concept of 'personal situation' is open, and no normative criteria define its content. However, it is clear that in the Spanish legal system the protection of victims of human trafficking is not limited (as in several other countries, or in the EU Directive 2004/81/EC) to those who cooperate with the police. Once the exemption is declared by the representative of the central Government (*Delegado o Subdelegado del Gobierno*), victims of human trafficking can apply themselves or through their representatives for a residence and work permit, that can also be extended to any of their children who are below the age of 18 or disabled, and already in Spain. These applications are decided by the Secretary of State of Security or to the Secretary of State of Migration, depending on whether the application is based on cooperation with the investigation or on the personal situation of the victim.

In both cases, a provisional permit is issued by the Foreigners' Office if the representative of the Spanish Government (*Delegado o Subdelegado del Gobierno*) supports the application before sending it to the competent Secretary of State. Definitive permits last for five years and are decided by the Secretary of State of Security (if based on co-operation with the police) or by the Secretary of State of Migration (if based on the personal situation of the victim). However, it is not clear in which cases definitive permits should be issued. As mentioned below, in practice cooperation with the police is usually interpreted in a narrow sense, and an outcome of conviction is required in order to obtain a definitive residence permit. The personal situation of the victim is interpreted in a more open way, linked to whether it is desirable for the victim to stay in Spain in order to recover from the trafficking situation, regardless how the criminal proceeding ends.

Compared to the content of Directive 2004/81/E of 29 April 2004, on the residence permits issued to third-country nationals who are victims of trafficking in human beings, the Spanish legislation is

³⁹ Portal estadístico de violencia de género (<http://estadisticasviolenciagenero.igualdad.mpr.gob.es/>)

quite protective. This is also the case for the rules that apply to victims of gender-based violence, which are based on a broad interpretation of the Istanbul Convention, which doesn't require signatories to issue both provisional and definitive residence permits. As a result, one might reasonably conclude that Spain ensures 'safe reporting' of crime for, at least, victims in these specific situations.

Unfortunately, statistics do not confirm that this is always the case. Access to official data on the implementation of these mechanisms is not easy, and figures lack methodological coherence. However, official data shows clearly that all these provisions are used in fewer cases than expected, and that gender-based violence and human trafficking victims are still under-protected. According to the Group of Experts on Action against Trafficking in Human Beings of the Council of Europe (GRETA), in the period 2013-2016, 877 trafficking victims were identified by national police forces,⁴⁰ while in the period 2012-2017, 293 residence permits were issued to these kind of victims and their children: 78 based on their personal situation and 215 on cooperation with the police.⁴¹ This important gap in the Spanish protection system is due to many factors. For example, EU victims are frequently identified, but don't need a residence permit. Another important factor to be mentioned is the fact that provisional permits based on cooperation are extended until the end of the criminal proceeding, so that definitive permits are lower than expected. However, most interviewees agreed on the fact that the majority of victims 'fall out of' the protection system during criminal proceedings.

According to interviews and some existing reports assessing the Spanish protection system for victims of human trafficking,⁴² it is estimated that victims of human trafficking and gender-based violence still do not report their situation in many cases. Different factors may play an important role. With respect to both crimes, psychological factors may stop victims reporting their situation or limit their willingness to be identified victims. On the other hand, it should not be underestimated that effective protection for these kind of victims requires not only migration benefits, but also reliable protection and assistance mechanisms, as well as trustful collaboration and efficient training of all actors in order to implement all legal provisions in an effective way. Shortcomings in any of these aspects have a negative impact on the functioning of the whole protection system and on victims' confidence that they may report without risk.

Moreover, most of the interviewees from civil society,⁴³ as well as the above-mentioned reports of the Spanish Ombudsman and GRETA,⁴⁴ reveal that migration rules do not seem to be always implemented in a coherent and protective way. Most concerns relate to failures in the identification of human trafficking victims who report their situation, but are not formally identified as victims by the police.

⁴⁰ Regional police forces may also identify trafficking victims, so that the real number is higher.

⁴¹ GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Spain. Second Evaluation Round, March 2018. GRETA(2018)7, pag. 7 (par. 14) and 48 (par. 199).

⁴² DEFENSOR DEL PUEBLO, *La trata de seres humanos en España. Víctimas invisibles*, 2012 (general conclusions 27 and 28). GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Spain. First Evaluation Round, September 2013 GRETA(2013)16 and Second Evaluation Round, March 2018 GRETA(2018)7.

⁴³ Interviews 6, 7, 9 and 10

⁴⁴ DEFENSOR DEL PUEBLO, *La trata de seres humanos en España. Víctimas invisibles*, 2012 (pages 278 and 283). GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Spain. First Evaluation Round, September 2013 GRETA(2013)16, pages 65 and 67 and Second Evaluation Round, March 2018 GRETA(2018)7, pages 66 and 69.

The second report of Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) concerning the implementation in Spain of the Warsaw Convention against trafficking⁴⁵ urged Spanish authorities to improve the timely identification of victims of human trafficking by means of a more proactive approach; and increase the availability of interpreters and cultural mediators.⁴⁶ The first report considered that Spain should ensure that victims can take full advantage of the right to be granted residence permits for their personal situation and for cooperating with the police.⁴⁷

Some interviewees (interviewees 7 and 10) were critical of the fact that law enforcement officers still implement the existing regulation from a cooperation perspective. Although identification does not require the active participation of the victim of human trafficking, police officers seem to request some kind of cooperation. This conditional character of the protection system is also evident, according to interviewees, when it comes to issuing provisional and definitive residence permits. As a result, victims of human trafficking cannot be sure that they will be protected efficiently. This is also the case during criminal proceedings, in which their identity or security and that of their relatives is not sufficiently assured. In any case, the real implementation of the migration regulations does not seem enough to ensure a real 'safe reporting' mechanism for this kind of crime.

4.2. Residence permits based on co-operation with the police and other authorities

As mentioned above, Spanish migration law provides for the possibility of issuing two kinds of residence permits to irregular migrants who report a crime, on the basis of co-operation with certain authorities.

According to Art. 59 of the Spanish Migration Law and Arts. 135-137 of the Migration Regulation, victims, witnesses or harmed persons with irregular migration status who co-operate to fight against organised crime related to human smuggling, labour or sexual exploitation may be protected from deportation and have access to five-year residence and work permits. The regulation is similar to the one applicable to human trafficking victims. These witnesses or harmed persons do not need to be identified, nor can they benefit from a reflection period, but they can avoid deportation, get an exemption for their previous period of unauthorised stay, and be eligible for a five-year residence and work permit, if they report the criminals or co-operate with the competent authorities. Provisional permits are also available, although definitive permits are issued by the Secretary of State of Security in case of co-operation with the police, judges or prosecutors, or by the Secretary of State of Migration in cases of co-operation with other public authorities. It is important to point out, however, that this mechanism requires a 'qualified' co-operation in the sense of delivering 'essential information' to the state authorities or 'testifying against the perpetrators' in judicial proceedings. The competent Secretary of State determines in each case if the co-operation was qualified enough.

Due to the sensitive nature of these kind of permits, it has been impossible to access statistics about the implementation of these provisions. However, the interviewee from the National Police

⁴⁵ Council of Europe Convention on Action against Trafficking in Human Beings *
Warsaw, 16.V.2005.

⁴⁶ GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Spain. Second Evaluation Round, March 2018 GRETA(2018)7, pages 66 and 69.

⁴⁷ GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings in Spain. First Evaluation Round, September 2013 GRETA(2013)16, pages 65 and 67.

informed that these permits have been used recently mainly in the fight against human smuggling and to protect qualified reports against organised crime networks.

Finally, there is a less favourable way to foster co-operation with police, judicial and administrative authorities in cases not related to organised crime. According to Art. 127 of the Migration Regulation, any kind of co-operation with these authorities may give access to a one-year residence permit. Again, this permit is applied for by the migrant and issued by the Secretary of State of Security if the co-operation is with police, prosecutors or judges, and by the Secretary of State of Migration if it is with other kinds of authorities. The fact that the duration of this permit is limited to one year, and that it does not allow the holder to work, shows clearly that this mechanism is intended to encourage co-operation, not only by victims or harmed people, but also by others, and with reference to less severe crimes. The fact that it is not only victims who are eligible, and that the concept of co-operation is completely open, suggest that this mechanism is designed to protect informants, rather than victims. Due to security reasons, little information about the implementation of these permits is available.

5. Emerging local sanctuary policies

As mentioned in the introduction, in Spain there is no tradition of ‘sanctuary’ local measures aimed at protecting irregular migrants from state deportations. Without legal powers in the field of migration, and with local police forces having limited competences, Spanish municipalities have traditionally faced migration without being able to oppose the decisions of national authorities in this field. However, it is important to point out the inclusive approach to migrants adopted by some cities that derives from the legal obligation of all municipalities to register irregular migrants as ‘neighbours’ and, consequently, to grant them access to local services and facilities. As mentioned previously, registration in the *padrón* is both a legal duty and a right for all persons irrespective of their migration status. Spanish judges declared illegal the attempts of some municipalities to require a lawful status in order to register foreigners.

In this legal context, there has been little room for local sanctuary policies. ‘Don’t ask’ policies have not been promoted, since registered irregular migrants are neighbours and benefit from certain constitutional and legal rights. Nor have ‘Don’t tell’ policies been developed, because the obligation to report the presence of irregular migrants to National Police officials affects only detainees and foreigners who can’t be identified, and because data protection laws impede the sharing of data about irregular migrants on a large scale. ‘Don’t enforce’ policies have not even been contemplated, because deportation orders are enforced only by National Police officers and that regional and local police officers do not have access to the database where pending deportation orders appear.

From a political perspective, it is also important to highlight that traditionally the two main Spanish political parties (social democrats and conservatives) have governed the major Spanish cities and have tried to face migration within their competences and without opposing the central government.⁴⁸ However, Spanish cities have designed and implemented strategic plans and inclusive policies giving information and trying to integrate irregular migrants.⁴⁹ Municipalities have fought for more funding and for access to more information about newcomers, as well as for a more active role in some migration proceedings. Some of these claims succeeded, and legal reforms enabled municipalities to report upon the situation of foreign neighbours in proceedings decided by the national administration relating to family reunification, regularisation of irregular migrants, and renewal of residence permits.

After local elections in 2015, this situation shifted in some major cities, which were now governed by new left coalitions closely connected to activist movements that openly criticise Spanish and European migration policies. Cities like Barcelona and Madrid launched different initiatives, inspired to some extent by the sanctuary movement, but these remain mainly symbolic. Initiatives to welcome refugees, to close the detention centre for irregular migrants in the city of Barcelona, or to issue municipal cards for irregular migrants have in some ways changed the traditional debate

⁴⁸ During many years, Spanish municipalities have requested more funding and competences to face the challenges posed by migrants, but the implementation of national legislation was not questioned.

⁴⁹ Some of these practices (mainly by the City Council of Barcelona) have been described in DELVINO, N., SPENCER, S. (2019), *Migrants with Irregular Status in Europe: Guidance for Municipalities* as well as in DELVINO, N. (2017), *European Cities and Migrants with Irregular Status: Municipal initiatives for the inclusion of irregular migrants in the provision of services*.

between local and national authorities in Spain.⁵⁰ Sanctuary elements, such as the idea of local protection versus national prosecution of irregular migration, the debate on the legal basis of sanctuary measures, and the importance of the political and symbolic dimensions of local policies, were all present in the initiatives launched in Barcelona and Madrid. The situation may shift again after the local election of May 26th 2019, at least in Madrid where conservatives have returned to power.

For the purpose of this report, it is worth including a brief reference to the two municipal cards launched in both cities. Although none of these documents is related directly to ‘safe reporting’, they show the interest of local authorities in pursuing measures that support residents with irregular status. The so-called ‘Neighbourhood Document’ (*Documento de Vecindad*) issued by the City Council of Barcelona in January 2018⁵¹ has a clear objective: to influence judges’ decisions on deportation orders and pre-removal detention. According to Spanish law, deportation orders can be enforced without the need for a judicial authorisation, but an appeal to administrative judges can be lodged in order to revoke or suspend them. In the case of pre-removal detention, a judicial authorisation is needed in order to proceed with enforcement. In this legal context, the aim of the municipal ‘Neighbourhood Document’ is to certify that its holder (always an irregular migrant that has been living in Barcelona for at least six months) is registered and integrated in the city. Showing this Document should demonstrate – at least in the intentions of the promoters of the initiative – that its holder should not be detained, or should not even be sanctioned with deportation, but rather with a fine. From a legal perspective, it is unlikely that this purpose can be achieved.⁵² However, the fact that almost 900 Documents were issued in the first year of the initiative (2018) shows that it has had an important political impact. Nevertheless, taking into account its main purpose, and that the ‘Neighbourhood Document’ is not an ID, but a municipal report on the actual situation of an irregular migrant, it doesn’t seem likely that it could evolve to a measure related to safe reporting.

The ‘Neighbourhood Card’ (*Tarjeta de Vecindad*) issued by the City Council of Madrid as a pilot project in one of its districts since July 2018 has a different purpose.⁵³ It tries to promote registration in the city of Madrid of people who have difficulty registering but who attend social or education programmes at certain organizations operating in the city. The aim of the ‘Neighbourhood Card’ is to facilitate access of these people to local services and programmes that may increase in the future. After a first pilot in one district, the City Council decided to extend it to the whole city. However, following the recent elections of May 2019, the practice will probably come to an end. With 300 documents issued by the end of April 2019, Madrid’s ‘Neighbourhood Card’ is an interesting example of a municipal document that is not an ID, but a tool to promote a specific aim, here active

⁵⁰ GARCÉS MASCAREÑAS, B., GRACIA MORENO, M. (2019), ‘The Multilevel Governance of Refugee Reception policies in Spain’, CEASEVAL, Research on The Common European Asylum System, Nr. 18.

⁵¹ Government Commission Decree of 30 November 2017, governing the procedure for issuing the Neighbourhood Document. This regulation was amended in May 2018 in two concrete respects. A strategic policy document of the City Council that includes references to the Neighbourhood Document (Government Measure promoting access to regular status and preventing lapsed irregularity) was approved some months before.

⁵² GONZALEZ BEILFUSS, M. (2019), The Neighbourhood Document of the City Of Barcelona: real or symbolic sanctuary?, *Revista Catalana de Dret Públic*, 58.

⁵³ Contrary to the case of Barcelona, Madrid’s municipal card lacks a legal regulation and has not been analyzed by any scholar. The information provided in this paper is the provisional result of different interviews with municipal employees of Madrid’s City Council carried out in April and May 2019 by the author of this paper.

registration. However, as in the case of Barcelona’s document, it is not likely that this initiative could have included firewalls for safe reporting.

Conclusion

'Safe reporting' of crime for irregular migrants has received little attention in Spain until now. Although the presence of irregularly staying foreigners has always been deemed an important issue, and is likely to increase in salience in the near future, there has been little debate on how to foster 'safe reporting' in general. A very recent recommendation of the Spanish Ombudsman to the Ministry of Interior to assure that irregular migrants report crimes to the police without fear of being deported may bring attention to the topic. But the Spanish protection system is based on migration rules that only cover victims of human trafficking or gender-based violence and specific cases of cooperation with the police.

Municipals cards launched recently in the cities of Barcelona and Madrid are intended to address different problems and cannot evolve into mechanisms to promote 'safe reporting'. The Spanish constitutional and legal framework does not favour the development of these initiatives at local and regional levels. First of all, it has to be highlighted that an inclusive approach towards irregular migrants is already present in the Spanish legal system, in the sense that all neighbours need to be registered in the municipality in which they live irrespective of their lawful status. Registration gives immediate access to local and regional services. Firewalls to the access by migration police of this municipal register have been granted both by the existing legislation and the Spanish Constitutional Court, due to the fact that irregular migrants are also holders of fundamental rights such as personal data protection.

Although fighting irregular migration is a general principle of the Spanish migration policy that is binding for all administrations, there is no concrete obligation to ask for the lawful status of all foreigners and to report to National Police officers in charge of immigration control the presence of those who are found to be of irregular status. According to existing protocols and guides between different police forces, unauthorised migrants need be reported to National Police officers in charge of migration control only in cases of detention or lack of identification. None of the four existing regional polices has ever questioned this requirement. Enforcement of deportation orders is also an exclusive competence of National Police officers, and no collaboration of regional or local law enforcement officers is needed, because foreign detainees are always under control of the National Police. 'Don't Ask', 'Don't Tell' and 'Don't Enforce' provisions at local or regional level do not seem to be easily transferable to Spain, because these kinds of practices would raise constitutional problems due to their tension with the principle of mutual loyalty that limits the exercise of power of all administrations.

Obligations to ask about the lawful status of all foreigners and to report to the National Police the presence of those who are in an irregular condition would also raise constitutional problems. A general obligation to ask about the immigration status of all migrants would be unreasonable and have a 'chilling' effect. The obligation to report the presence of all irregular migrants would have also have a clear chilling effect, as well as negative consequences from a data protection perspective.

Nevertheless, the fact that in Spain victims of crime with irregular migration status do not dare to report for fear of deportation is a problem. Migration provisions do protect victims of gender-based violence and human trafficking, as well as victims, witnesses and harmed persons who cooperate to fight organised crime in cases of human smuggling, labour and sexual exploitation. This is done in a rather privileged way compared to other crimes. However, the implementation of these provisions

is far from being as favourable as imagined. Cooperation with the police is in practice the key element in most of them, and protection is made conditional upon it.

Anonymous reporting is an already-existing alternative way to detect crime suffered by irregular migrants, but it has limited scope, because an identified complainant is necessary in order for most judicial proceedings to commence. In addition, public campaigns trying to promote 'safe reporting' of crime by informing communities that victims or witnesses with irregular status will not be reported to National Police officers have had limited impact.

Although both law enforcement officers and representatives of civil society seem to be aware of the problems of 'unsafe reporting' both for the migrants themselves and for the whole criminal justice system, proactive policies and measures are required, mainly at national level, to promote 'safe reporting' of crime.

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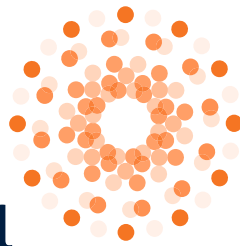
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Interview list

Interviewee	Institution	Date
1	Local Police of Barcelona (Head of a Police Station)	15.01.2019
2	Regional Police of Catalonia (Superintendent)	04.03.2019
3	National Police (Officer of the Migration General Commission)	14.03.2019
4	National Police (Officer of the Foreigner's Brigade of Barcelona)	22.03.2019
5	Prosecutor (Delegate of Migration issues in Barcelona)	18.03.2019
6	Caritas Diocesana de Barcelona (Legal advisor)	03.05.2019
7	Migrastudium (Legal advisor)	07.05.2019
8	SOS Racisme (Member)	03.06.2019
9	Arrels (Member)	06.06.2019
10	Barcelona's Bar Association	07.06.2019



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The Global Exchange on Migration and Diversity is an ambitious initiative at the Centre on Migration, Policy and Society (COMPAS) opening up opportunities for knowledge exchange and longer term collaboration between those working in the migration field.

