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SPECIFIC GROUPS AND INDIVIDUALS: MIGRANT WORKERS

**Written statement* submitted by the Federation of Associations for the Defence and
Promotion of Human Rights,
a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[11 February 2005]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

LEGAL ASSISTANCE TO STOWAWAYS IN SPAIN: AN AGGRAVATING DEFICIENCY

The existing alienage law in Spain only authorizes the entry in the Spanish territory of those stowaways that seek asylum and whose demand has not been accepted for processing. With a clear intention of making a restrictive interpretation of stowaways' legal assistance right, the Government's Delegation on Alienage and Immigration has passed many preliminary findings in the past years, the last one of which – dated 9th of April 2002- on the Treatment of Foreign Stowaways.

This preliminary finding deprives of any content the right to legal assistance as it conditions the exercise of the same to the fact that the stowaway declares expressly that his intention is to enter the Spanish territory or to demand international protection in Spain (asylum and refugee status) when he is interviewed by National Police Forces' officers. Therefore, it violates the normative hierarchy principle as it restricts a right foreseen in the constitution.

It seems that some might forget that a formal recognition of the rights is not enough, instead, as is declared in article 9.2 of the Spanish Constitution: "it is up to the public powers to promote the conditions for the liberty and equality of each person and of the groups they integrate to be real and effective and to remove the obstacles that impede or hinder their full enjoyment...".

In spite of the change of Government in Spain in 2004, the situation has not improved and not even the aforementioned preliminary finding is met.

According to the literal interpretation of the aforementioned preliminary finding, which is still being carried out, legal assistance will only be granted to a stowaway when he declares his intention of entering the Spanish territory or demands the Spanish State's international protection. But, as it is clearly shown, this condition is superfluous when one is dealing with persons capable of enduring ten, twenty or more days hidden in a vessel, on many occasions without being able to ingest any food or water, with a clear threat on their lives, an all this because they try to flee their country due to persecution or economic reasons.

Furthermore, if the stowaways do not clearly state their intention of applying for asylum, on many occasions this right is ignored, even though they can explain they are fleeing because a family member has been killed or because there is an armed conflict; it is almost necessary for them to pronounce the word "asylum". Because the intention of the civil servants that carry out the interview is not to find out the motives for them to have travelled as stowaways, but instead to finish as soon as possible, not giving the interviewees the opportunity of expressing their true will.

In fact, if we analyse the content of the first interview form that police members carry out, we find out that they ask for their personal details, if they have any document to prove their identity, about their health, the treatment they receive and if they have been given any food. Finally, they ask textually "if they want to declare anything else" and that is the moment the interviewee has to realize that it is his opportunity of explaining the motives that have driven him to take the decision of travelling as a stowaway and what are his intentions, whether entering and asking for protection to

the Spanish State, keep on travelling to a third country, or returning to his country of origin.

On many occasions they make captious questions on whether they like to work and they normally answer in a positive way, because, even though a person is seeking protection, it does not mean that he does not want or can work. But civil servants consider this answer as a proof that they do not want to seek asylum and thus justify them not having legal assistance. Paradoxically, in this way, the preliminary finding of 9th of April 2002 is also not met, as it recognises the right to legal assistance when a stowaway declares that his intention is to enter the Spanish State and, if he has said that he wants to work, that is because he wants to enter Spain.

A return proceeding has to be initiated on those persons whose entry has been denied, in which legal assistance is also perceptive. Well, this is not complied with on all occasions as the stowaways are returned without any proceedings, without any legal assistance, in violation of their effective judicial protection rights and the right to appeal against administrative actions, expressly recognised in articles 24 of the Constitution, and 20 and 21 of the Spanish Alienage Law.

The Government, when applying this preliminary findings, without ever going through a return proceeding, considers that it respects the stowaways' legal assistance right and in response to any accusation it pleads that the interviewee has not declared its will to enter Spain or to seek asylum. But its actions do not offer any guarantee respecting the right of these people and it is opaque, because if the opposite was the case he would have no inconvenience in the fact that the lawyer be present in the first interview with the aim of finding out with all guarantees the true intentions of the interviewees. The lawyer's presence is only allowed when the stowaway has expressly declared its will to seek asylum and the persons that have been present in the interview as witnesses (vessel's captain, shipping company's lawyers) demand that one be called.

Nevertheless, those social organizations that work in a specialized field oriented to these persons insist, from a practical point of view, on the systematic violation of the right to legal assistance, the disparity between official numbers for some ports and others in the Spanish territory, as well as the repetition of cases throughout the whole of 2004 in which stowaways' presence was found out and no care could be provided.

The case of the Westeria merchant vessel

Even more serious and troubling is the case of the Westeria merchant vessel, as it shows the existence of criminal practices, facing a situation of a total lack of protection and impunity.

On last 29th of May 2004, it was made known that four stowaways that travelled on board the Westeria merchant vessel, moored in the port of Ribeira in La Coruña, and which had sailed out of Dakar (Senegal) on the 19th of May, had been abandoned in deep waters off the coast of Mauritania or Morocco on the orders of the ship's captain, when making for the Canary Islands. After declaring before the judge, five members of the

crew were detained: the captain, the chief engineer and the first mate, Korean nationals, as well as the chief officer and the cook, of Chinese origin.

The non governmental organization, the Spanish Refugee Aid Commission, decided to appear in court as civil party in the case and on the 1st of July filed a complaint for presumed crimes of homicide, negation of succour, disappearance of persons, torture and, if enough elements could be accredited, piracy against the ship's captain and those who according to the investigations are found legally responsible.

It was demanded that the captain and the first mate be detained, that the ship be retained, a sketch drawing of the raft in which the Senegalese stowaways were abandoned and information on the vessel in order to make a reconstruction of the facts. But by that time the vessel had already been authorized to sail out of the port of Ribeira on route to Panama, and the judge had decided to shelve the case, returning the passports to the 5 charged persons, to relieve them of the weekly attendance measure and to allow that all of them return to their country of origin (South Korea and China) without leaving behind any information on their addresses.

From the 1st of July last, the complaint was filed before the head Judge in charge of the case, who had to take a resolution on its admission and imposition of bail. Twenty seven days had to pass before the judge notified CEAR that if it wanted to appear before the court in this case it had to previously deposit the exorbitant amount of 2.000 euros bail. On the next day, the amount was deposited, hoping that at last the investigations would start with the trial of the evidence demanded in the complaint.

On the 3rd of September, nevertheless, a written notification was sent to the Court in Ribeira notifying that the judge did not accede to the trial of any of the demanded evidence, that it kept the case closed and that an appeal could be started against the shelving order. This meant that by the time an investigation would be started, at least 8 months would go by, with which the localization of the crew and the evidence would be almost impossible.
