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Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff

Mission to Spain*

Summary

The Spanish Civil War and the 40 years of dictatorship that followed left a colossal aftermath in terms of victims of serious human rights and humanitarian law violations, including executions, torture, arbitrary detentions, disappearances, forced labour for prisoners and exile.

The consolidation of democracy constitutes one of the outstanding achievements of the Spanish transition. The avoidance of risk of an institutional breakdown originating with the Armed Forces — one of the greatest challenges of transitions — was achieved through the reform and democratization of those same institutions. These reforms have lessons to offer which may be useful to other countries.

The efforts to cope with the legacies of the Civil War and dictatorship in practically all the spheres of the mandate have been mostly fragmented. The measures adopted have not corresponded to a consistent, comprehensive and overall State policy in favour of truth, justice, reparation and guarantees of non-recurrence.

The most serious shortcomings are to be found in the spheres of truth and justice. No State policy was ever established with respect to truth; there is no official information and no mechanisms for elucidating the truth. The current scheme for the "privatization" of exhumations, which leaves this responsibility to victims and associations, aggravates the

* The summary of this report is distributed in all official languages. The report itself, which appears as an annex to the summary, is distributed only in the language in which it was presented and in English.

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indifference of State institutions and raises difficulties with regard to the methodology, homologation and officialization of truth. The families' need to give their loved ones a proper burial is urgent. In the area of justice, excessive formalism and restrictive interpretations of the Amnesty Act and the principle of legality not only deny access to justice but they also impede any sort of investigation.

As a result of the still apparent shortcomings in institutional response, the theme of the legacy of the Civil War and the dictatorship continues to give rise to differences that are deeper than expected. In view of the strength of the State, the maturity of civil society, and the relevant lessons that have been learned both inside and outside Spain, the Special Rapporteur calls on the State institutions and civil society to focus their discussions on how to deal with outstanding tasks related to the notion of rights, which concerns everyone, regardless of any political consideration.

The Special Rapporteur points out that the strength of democratic institutions lies not in their power to silence or ignore certain matters, especially those related to fundamental rights, but in their ability to manage them effectively, however complex and awkward they may be.

Annex

[Spanish and English only]

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff

Contents

I. Introduction

1. In accordance with resolution 18/7 of the Human Rights Council, and at the invitation of the Government, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, paid an official visit to Spain from 21 January to 3 February 2014.

2. The aim of his visit was to get to know and evaluate the measures adopted by the Spanish authorities regarding the four aspects of his mandate, namely truth, justice, reparation and guarantees of non-recurrence, in relation to the serious violations of human rights and humanitarian law committed during the Civil War and Franco's dictatorship, seeking to achieve a broad perspective regarding the initiatives adopted, to identify good practices and to put forward recommendations on how to approach the outstanding challenges.

3. During his visit, the Special Rapporteur met with representatives of the State and civil society, both at central level and in the Autonomous Communities of Andalusia, Catalonia and Galicia. In Madrid, he met the Minister for Foreign Affairs and Cooperation, José Manuel García-Margallo, as well as the Secretary of the Office of the President, the Secretary of State for Justice, the Secretary of State for Security, the Office of the Under-Secretary for Defence, the Deputy Director-General for International Cooperation of the Ministry of Education and the Deputy Director of State Archives, among other high representatives of the Government. He also met representatives of the General Council of the Judiciary and with the Attorney-General and representatives of the Public Prosecution Service. He held a meeting with the spokespersons of the Justice Commission of the Senate and the National Office of the Ombudsman. In Andalusia, Catalonia and Galicia, the Special Rapporteur met with senior representatives of the Regional Council (Junta) de Andalusia, the Catalan Provincial Government (Generalitat de Cataluña) and the Xunta de Galicia, as well as representatives of the legislative and judicial powers of the Autonomous Communities. He further held meetings with the Ombudsman of Andalusia, the Síndic de Greuges of Catalonia and the Valedor do Pobo Galego.

4. The Special Rapporteur held joint working meetings with representatives of the public institutions that are currently engaged in historical memory work. These included the División de Gracia y Otros Derechos, Memoria Democrática de Andalucía, Memorial Democràtic de Cataluña, the University of Extremadura, the University of Santiago de Compostela, the Department of the Office of the President, Justice and Interior Affairs of the Government of Navarra and the Office of the Secretary General for Peace and Coexistence of the Basque Government. He also held a joint working meeting with the National Ombudsman's Office and the Ombudsmen's Offices of the Autonomous Communities of Andalusia, Castilla y León, Catalonia, Galicia, Valencia, Navarra[1] and the Basque Country. These meetings allowed the Special Rapporteur to gather information and contributed to the dialogue between these institutions.

5. The Special Rapporteur also met with representatives of civil society, including victims, families, associations, academics, physicians, forensic archaeologists and anthropologists, historians, lawyers and the Secretary General of the Episcopal Conference.

6. The Special Rapporteur visited some well-known memorial sites in Madrid (such as the Valle de los Caídos and the Cemetery of Paracuellos, Jarama), Andalusia (Canal de los Presos/Canal del Bajo Guadalquivir, remains of the concentration camp of Los Merinales

[1] As he could not be present, he sent written contributions.

and the mausoleum of the cemetery of Cazalla de la Sierra), Barcelona (Fossar de la Pedrera and Castillo de Montjuic) and Galicia (Isla de San Simón).

7. The Special Rapporteur wishes to thank the Government for its invitation and cooperation throughout the visit. He also wishes to thank the victims and their families for sharing their memories and testimonies. He is lastly grateful to the Office of the High Commissioner of the United Nations for Human Rights for its support.

II. General considerations

8. The implementation of truth, justice, reparation and guarantees of non-recurrence measures in Spain has taken place in a particularly complex context. It involves challenges which are characteristic of post-authoritarian as well as post-conflict transitions, such as broad variations over time and geographical factors in the patterns of violence, during the Civil War (1936–1939) and the dictatorship (1939–1975), a long dictatorship following a conflict, and major developments in the national and international legal contexts since the initial violations occurred.

9. Nevertheless, the prevailing attitudes have tended to mask these complexities and to treat all violations as an amalgam of violent events that occurred as part of a situation of struggle and tension between opposing sides, and they start from a position deliberately publicized by the Franco regime, which for decades prevented any open or direct confrontation with the past. This attempt to suggest symmetries in the behaviour of the different sides, juxtaposed with what must be recognized as undoubtedly, still today, an asymmetrical treatment of the victims, has politicized the debate and has tended to assimilate victims' complaints with political and party affiliations, to the detriment of a concern for rights. The definition of what constitutes a victim is generally detached from the notion of human rights and from the basic notions of beneficiaries and State responsibility.

10. The Special Rapporteur reiterates that matters related to truth, justice, reparation and guarantees of non-recurrence do not fall within the sphere of party politics or individual political programmes, but must be seen as general principles and rights which concern the whole of society. Whence the Special Rapporteur's keenness to receive information, visit sites and establish dialogue with all the victims of human rights violations, regardless of the side they represented or political affiliation, and relating to the perpetrators. Whence also the importance of analysing State policies and measures which are not subject to successive governments. The Special Rapporteur insists on the importance of initiatives by the State and by civil society that cover the claims of *all* human rights and humanitarian law victims, regardless of their political affiliation, or that of the perpetrators.

III. Guarantees of non-recurrence

A. Democratic consolidation and reform of the Armed Forces

11. The consolidation of a robust and stable democracy in itself constitutes a tool with which to guarantee non-recurrence and one of the outstanding achievements of Spain's transition. In fact, Spanish democracy is in no danger of an institutional breakdown originating with the Armed Forces, which are firmly committed to the principles of the Constitution and the law, including all aspects of civil control, and which enjoy a high degree of legitimacy and a reputation for reliability, as reflected in public opinion surveys. The democratization of the armed forces is one of the greatest challenges of transitions and the Spanish example offers valuable lessons that could prove useful to other countries.

12. The fact that the process of military reform, as part of a "seamless" transition, has been so successful is particularly significant, considering the role that the Armed Forces played during the Civil War and the dictatorship.

13. The process of change that led to these results was gradual; it lasted more than a decade and did not pass without some resistance. The attempted military coup of 23 February 1981 was not the only manifestation of that opposition to the changes that were occurring within and outside the army, including some that had started before 1975. Other reactions included: the resignations of high-ranking officers in reaction to the legalization of trade unions and the Communist Party; objections to individual promotions or changes in the criteria applied to promotions; and resistance to changes in the relations between the Ministry of Defence and the Chiefs of Staff. They also included various acts of insurrection, the occupation of government offices and the reluctance on the part of "military senators" to vote in favour of the Constitution.

14. Countries setting out on the task of transforming their armed forces would do well not only to bear in mind the extended duration of these processes, but also the fact that they require systematic efforts of different kinds. Some are part of the structural reforms of State powers, while others focus more on the reform of the armed forces and their professionalization. All those changes were aimed ultimately at transforming the relation between the military and civil powers, with the result that the former ended up under civil control in accordance with the democratic Constitution.[2]

15. There are several factors that help explain the success of these reforms, starting with the great legitimacy of the democratization process. The initial period of the transition enjoyed broad social support, which was reflected in the strong citizen participation in the democratic elections of 1977, and in the high degree of consensus expressed in the public referendum for the 1978 Constitution, all of which encouraged the elected government to undertake structural reforms, including among the military.

16. The success of the reform of the Armed Forces was also to a great extent due — and this is another lesson that politicians in other countries might well pay heed to — to the conduct of the political parties, which maintained a high degree of consensus with respect to the necessary reforms that opened the way for the launch of a State policy in this respect. This meant that the Armed Forces received a coherent message from all the political actors.

17. Further factors that help explain the success of the reforms were the accession of Spain both to the European Economic Community (EEC) and to the North Atlantic Treaty Organization. Apart from the various requirements arising from the need for conformity and modernization, integration exposed the Spanish Armed Forces to other modes of operation in keeping with democratic regimes. Subsequently, the participation in international peace operations helped to consolidate a change of attitude towards the role of the Armed Forces and to strengthen their popular support.

18. From the point of view of the guarantees of non-recurrence, the measures taken to increase the effectiveness of civil control over the Armed Forces played a crucial part, and included the establishment of a Ministry of Defence (1977) with strong attributes, legally defined in the case of the Minister (as civil representative of the President of the Government since 1979) and with a growing civil component among its members. The establishment of such a ministry helped to unify previously isolated chains of command and responsibilities, without which effective control by the civil authorities would have been impossible.

[2] N. Serra, *The Military Transition, Democratic Reform of the Armed Forces* (2010), and F. Agüero, *Militares, Civiles y Democracia* (1995).

19. The reforms also brought with them the transformation of collegiate bodies of the Armed Forces with (de jure and de facto) decision-making powers into mere consultative bodies.

20. Similarly, an effort was made, also gradually, to increase civil control over the intelligence services, to ensure that they were answerable to the civil authorities, and ultimately to the President of the Government, instead of to the requirements of the Armed Forces.

21. The steps taken to make the army more professional and to reduce the military's presence in the civil sector also had the effect of establishing clearer dividing lines between civil and military. These included legal reforms that prevented military personnel from exercising political or trade union activities or from occupying other positions simultaneously. The publication of articles and public views by members of the Armed Forces was also regulated and made to require prior approval (measures which were gradually made more flexible).

22. Other significant measures were those that separated security and defence responsibilities. The new Constitution marked a turning point, placing the activities of the security forces under the civil executive power, with the mission of protecting the free exercise of rights and liberties and guaranteeing public security, thereby laying the foundations for meeting one of the greatest challenges of many transitions.

23. The reform of the Armed Forces also entailed redefining its objectives, previously geared to "national unity" and "internal defence", through successive Directives (especially in 1984, 1986, 1987 and 1990), which placed the emphasis on their contribution to the collective defence of Spain and its allies and to the maintenance of peace between nations.

24. In Spain there were no formal trials to clean up the Armed Forces. In view of the violations committed during the period of the Civil War and the dictatorship, this is a notable shortcoming. Alongside the reform process, however, an effort was made to promote generational renewal and the gradual change of attitudes less in tune with the values of the transition. Examples include the lowering of the retirement age from 70 to 65, reforms in the career and promotion system, and steps to encourage voluntary retirement, opening up opportunities and powerful incentives to bring about the rejuvenation of the top command.

25. At the same time as the numbers of armed forces staff were reduced, especially among the top echelons, and entries to military academies were curtailed, changes were initiated in military training and education, including curricular alterations, as well as renovation, rotation and improvements in the conditions of employment of teachers and a closer integration of military courses with other disciplines and with the regular educational system.

26. With regard to justice and the guarantees of non-recurrence, it is worth mentioning the reforms that took place in military justice. The 1978 Constitution marked the first step towards establishing the "principle of jurisdictional unity" and restricting military justice to the strictly military sphere and to the requirements of states of emergency. In 1980, through a series of key reforms of the Military Criminal Code, the possibility of applying military justice to civilians was practically completely removed from the powers of military courts, while judicial guarantees were strengthened, with the addition of defending counsel and the right of appeal before military courts, but also before the Supreme Court, thereby annulling the principle of due obedience and distancing the military command from a system in which the army was at the same time party, judge and prosecutor.

B. Removal of symbols or monuments exalting the military uprising, the Civil War and Franco's dictatorship

27. The Special Rapporteur welcomes the provisions of Act No. 52/2007, which introduces measures to combat the exaltation of the coup d'état, the Civil War and the repression of the Franco dictatorship, including through the removal of symbols and monuments. As confirmed in the 2011 report of the Technical Committee of Experts, the Government reported that the majority of inventoried symbols and monuments had been removed, and that the remaining symbols and monuments either required a lengthy administrative procedure or considerable expense, or were subject to protection rules for their historic or artistic value. Nevertheless, the Special Rapporteur received information recently giving lists of names of streets and buildings, commemorative plaques and emblems, which apparently commemorated the senior posts and officials of the Franco regime in different parts of the country which had been preserved, despite the submission of formal complaints to the authorities and the Offices of the Ombudsman.

28. The Special Rapporteur welcomes the work done in Catalonia, such as the availability of the map of symbols of the Franco era on the Internet and the report of the advisory commission of the Memorial Democràtic. He particularly appreciated the latter's recommendations regarding the need for differentiated approaches.

29. Some objects cannot actually be removed, while others can and must be maintained subject to the necessary contextualization and "reinterpretation", in order that they may lose whatever divisive character they might retain and may contribute instead to public awareness and past remembrance.[3] The Valle de los Caídos provides a good example.

30. The Valle de los Caídos appears very clearly in the opinions expressed by associations as a place which in itself represents an exaltation of Francoism. Act No. 52/2007 only refers in general terms to the rules that will govern the site and the objectives of the managing foundation.

31. The Special Rapporteur welcomes the work and the report of the Committee of Experts for the Future of the Valle de los Caídos (2011), in particular the emphasis it placed on the importance of reinterpreting the site and explaining to all visitors the origin of this monument and its sociopolitical context.

32. As it stands at present, the site does not offer any form of information or sign that explains the predominance of Francoist and fascist symbolism and the exaltation of the "winning" side in the Civil War. Nothing explains the ambiguous character or the belated idea of giving the place a sense of "reconciliation". There is no account of the fact that it was built with the forced labour of thousands of political prisoners under inhuman conditions. Nor does it offer any information about the bodies of the almost 34,000 persons who are buried there, or about the fact that many of the remains were transferred there without the consent and/or the knowledge of their families. There is no explanation of who José Antonio Primo de Rivera was, nor of why he was buried in the centre of the Basilica, or why General Francisco Franco was buried there without having been a Civil War victim.

33. The site can be put to good use and "reinterpreted", with suitable techniques and pedagogy, in favour of the promotion of truth and memory, and given an educational and preventive purpose. It can hardly be construed as a place devoted to peace and reconciliation, so long as silence is maintained about the facts relevant to the context and origin of the site, and especially while the flower-covered tomb of the dictator remains in the centre of the monument.

[3] See A/HRC/25/49.

C. Education

34. Education is a powerful tool for non-recurrence. In particular the teaching of history, if approached as a system of investigation rather than a mechanism for simply preserving data, can train citizens in habits of analysis and critical reasoning.[4]

35. The Special Rapporteur recalls the repression suffered by teachers right from the start of the Civil War, including summary executions of republican teachers and staff cleansing, which affected both public and private education, including religious teaching, from primary school up to university. Various studies have shown how the authorities in Spain during the dictatorship supervised the content of history teaching as a means of guaranteeing political and social consensus, by monopolizing public utterances concerning the country's identity and history. Beyond the use of the curriculum as an instrument of social control, schools became places where control could take on humiliating and stigmatizing forms. The children of parents who had been shot told how, in addition to that loss, at school they were obliged to wear uniforms that identified them as such.

36. Official documents and research on the subject show how study programmes and textbooks gradually slanted the analysis and expanded the explanation of the Civil War and Francoism. From 1938 to the 1950s, although the textbooks largely ignored these subjects, whatever mention they contained of the war tended to justify the coup d'état, laying the blame on the republican side, and to legitimate the dictatorship. After 1953 they incorporated an image of shared responsibilities in a "fratricide struggle" between two rival factions. From 1975 until the reforms of 1990 — although not always consistently — textbooks generally continued to represent the Civil War as a conflict between two Spains and, while some writings raised the issue of the political and economic cost of the dictatorship, the regime's violence against the opposition did not attract much notice. By maintaining the notion that "we were all guilty", the textbooks thus underpinned the policy of "wipe the slate clean and start again" which accompanied the transition.[5]

37. The reforms of the General Organic Act on the Educational System introduced in 1990 and 2006 helped to establish a new form of interpretation, including references to the Franco regime's repression and mentioning certain categories of victims which did not appear earlier. Some textbooks, however, still referred to those data in general terms, perpetuating the idea of symmetrical responsibility.

38. Generally speaking, the present programmes and textbooks have given priority to building a historical viewpoint, to academic analysis, and to argumentation based on recent historical research. While the information at the disposal of the Special Rapporteur did not allow him to analyse their application, he found contradictory indications with regard to the implementation of the programmes and possible inconsistencies between public and private, including religious, educational establishments.

39. The Special Rapporteur also wishes to emphasize the fundamental value of human rights teaching as a tool for strengthening guarantees of non-recurrence. In this respect, he welcomes the provisions of Act No. 8/2013, as well as the efforts made to disseminate them in the country as a whole and in the autonomous communities. The Special Rapporteur insists on the importance of associating the study of the Civil War and Francoism with programmes for human rights training and the promotion of human rights.

[4] A/68/296.

[5] C. Boyd, *The Politics of History and Memory in Democratic Spain* (2008); P. Aguilar, *Políticas de la Memoria y Memorias de la Política* (2008), chap. 2.

D. Civil service training

40. The Special Rapporteur welcomes the fact that the training programmes of the Police and the Guardia Civil include specific modules dedicated to human rights. However, they do not appear to cover any study of the Civil War and the Franco dictatorship, or of the serious human rights violations that occurred in this period and the responsibility of the security forces and the Armed Forces for their perpetration. While some Guardia Civil training modules refer to institutions of the Franco era, they appear to offer outdated interpretations, which are not in line with the current national educational programme.

41. The Judiciary is the branch of the State which has undergone the least structural reforms since the transition (with the exception of military justice, as mentioned earlier). The training of judges and prosecutors represents a key tool for guaranteeing the non-recurrence of violations and changes of attitude within the institution. However, the Special Rapporteur notes with concern that the training programmes of judges in terms of human rights not only omit to mention the responsibilities of the Judiciary, particularly those of special courts, during the Civil War and the Franco dictatorship, but they also omit any specific human rights subjects that go beyond those related to judicial management and the guarantees of due process. It is surprising that they make no reference to the State's obligations with regard to the criminal prosecution of international crimes, such as genocide, crimes against humanity and war crimes.

42. The Special Rapporteur received ambiguous information regarding the Judiciary's commitment to incorporate human rights programmes in the training of judges. According to a number of sources, initial training is considered insufficient and unsuited to providing quality training in human rights.

IV. Truth

A. Institutional mechanisms for elucidating the truth

43. The Special Rapporteur notes that a considerable amount of information is available concerning the violence that occurred in Spain, especially during the Civil War. With few exceptions, the research was done by academics, historians or journalists. This information, however, is extremely widely dispersed, uses a variety of methodologies and requires checking.

44. The "Causa General" (General Cause) and the trials that arose from it, even though they were strongly influenced by a biased interpretation of the facts as seen from the point of view of the "winners" and might have lacked impartiality, represent what was perhaps the only attempt, in the post-war period, to throw light on the acts of violence that occurred in the Civil War, with the aim of building an official account and attributing responsibilities. The Special Rapporteur regrets that these efforts to compile, digitize and publish documents were not systematically applied to other cases and institutions, such as other courts and security forces.

45. The Special Rapporteur notes that there are no official censuses of victims, or data or official estimates of the total number of victims of the Civil War and the dictatorship. Furthermore, several subjects are still under-explored, such as the forced labour of prisoners, bombing deaths, stolen children, the consequences of war and different forms of repression, including that directed at women, and the responsibilities of private companies for their active participation or complicity in the perpetration of human rights violations.

46. The Special Rapporteur notes with concern that there never was any State policy established to seek the truth and that Act No. 52/2007 does not in any way resolve the problem. Even if there were official data, there is no special mechanism for clarifying the facts that could centralize and analyse them. Such mechanisms, in addition to providing information and promoting a knowledge of the facts, do allow their official *recognition*.

47. Several associations are calling for the establishment of a truth commission. The Special Rapporteur urges the authorities to launch serious discussions concerning the establishment of an independent, but official, mechanism or body, whose aim would consist in achieving an exhaustive understanding of the human rights and humanitarian law violations that occurred during the Civil War and the Franco era. He emphasizes that such a mechanism could adopt different working arrangements and formats, including the form of a truth commission.

48. The Special Rapporteur would like to draw attention to valuable initiatives in this search for truth, which, although they do not replace the need for a State policy or official truth mechanisms, could deserve the label of "good practices", for their methodological quality, the quantity and variety of their documentary funds and their accessibility by the public. The project "Nomes e Voces"[6] (Names and Voices), headed by the University of Santiago de Compostela, has made public on the Internet an extensive documentary base on the repression and victims of the Civil War in Galicia, with direct testimonies and catalogued and digitized archives. The Special Rapporteur also welcomes the extensive audiovisual bank, which includes testimonies and educational videos of the Memorial Democràtic de Catalunya.[7] The Special Rapporteur is concerned that there are no similar projects at State level. The lack of any public policy on truth and memory limits the possibilities for coordination and the exchange of experience and knowledge and hampers the maximization of the impact and resources. It also restricts the possibility of extending the historic clarification schemes to eventually cover all victims (and even the testimony of the perpetrators).

49. A compilation of the oral testimonies of victims and direct witnesses is particularly important and urgent in view of the advanced age of the persons involved and the danger that their voices and the invaluable information they might offer may be lost forever.

B. Archives

50. Archives play a central role in the promotion and implementation of the right to truth.[8] The Special Rapporteur welcomes Royal Decree No. 1708/2011 and the creation of the Documentary Centre of Historic Memory of Salamanca, as well as the efforts to further the centralization of selected archives and to allow researchers and private individuals to access them. While practically all the autonomous communities have adopted archive laws, the main documentary sources concerning the Civil War and the Franco regime are located in the national archives.

51. The Special Rapporteur welcomes the provisions of Act No. 52/2007 that guarantee the right of access to documentary collections deposited in the national archives and to obtain any copies required. It is worth noting that the Salamanca Centre has included documentary sources of particular relevance, thus allowing access to documents that had previously been closed to consultation.

[6] http://www.nomesevoces.net.
[7] http://www20.gencat.cat/portal/site/memorialdemocratic.
[8] A/HRC/24/42.

52. Nonetheless, although a considerable quantity of documents is in theory available, in practice access is limited by persisting difficulties and restrictions. Various sources have pointed to disparities in practices and possibilities of access according to the particular archives concerned or the officials in charge, the extensive scattering of information and the lack of technical and staffing resources to ensure the registration of all documents for proper access. They also report that generally speaking free access to archives is not permitted, which restricts the scope of investigations. There are no mechanisms for dealing with complaints or lodging appeals in the event that access is denied. They also report impediments to the localization of some collections, such as the intelligence archive of the Central Documentation Service of the Office of the President of the Government.

53. The Special Rapporteur welcomes the improved access to some funds of military judicial archives, such as the Military Archive of La Coruña and the General Historical Army Archive in Madrid. However, access to the other military justice archives is said to be inconsistent.

54. The Special Rapporteur is concerned that, on the grounds of national security and the Official Secrets Act, historical documents and major military and police archive collections remain classified, with no clear criteria for their release.

55. The Special Rapporteur welcomes improvements made in terms of access to some collections of military judicial archives, such as those deposited by the Fourth Military Territorial Court in the North-Western Intermediate Military Archive, in Ferrol, and those deposited by the First Military Territorial Court in the General and Historical Defence Archive in Madrid. However, access to the other military justice archives is said to be inconsistent.

56. The Special Rapporteur points out that the current legislation and regulations do not resolve the above-mentioned difficulties of access, which could be tackled by means of a State policy and an archive law that would update all the criteria that are applied in terms of privacy and confidentiality, in line with international standards, including the right to truth.

57. The Special Rapporteur regrets that the recent Act No. 19/2013 on transparency, access to public information and good governance has not provided an opportunity to address the legal gaps in access regulations. He regrets also that recent legislative proposals seeking to deal with this situation have not been followed up.

C. Institutions of historical memory

58. The Government reported that the closure of the Office for Victims of the Civil War and the Dictatorship in 2012 and the transfer of its functions to the Division for the Right to Pardon and Other Rights was due to the fact that the latter had already carried out the same functions under the terms of Act No. 52/2007 and that the number of applications had decreased. Some victims and associations, however, complained that their needs were not being met by State bodies, including the aforementioned Division. It had been left to associations and individuals to make up for the State's inaction, when it came to the location of remains, for instance, or access to documentation and archives, rendering the State services even more obsolete.

59. Several autonomous communities run public agencies dedicated to the recovery of memory, like those instituted by the autonomous governments of Andalusia, Catalonia and the Basque Country, as well as a new one to be created in Navarra.[9] Other programmes are

[9] Autonomous Act No. 33/2013.

headed by public universities, as in Santiago de Compostela and Extremadura. The Special Rapporteur was interested to learn about the very valuable projects launched by these institutions, but was also told that many had suffered major budget cuts and that a number of programmes had been halted owing to political decisions and/or a lack of funding, such as in Aragón, Asturias, Cantabria and the Balearic Islands.

60. The Special Rapporteur would like to draw attention to the potential offered by the Offices of the Ombudsmen, at both national and autonomous community level, for the purpose of defending the rights of victims and their families, in the four aspects of the mandate, but also of putting forward recommendations to the Government and to the legislative and judicial authorities, according to their mandates and the State's international obligations. He urges them to further coordinate actions in this respect.

D. Exhumations

61. The Special Rapporteur welcomes the efforts accomplished on the basis of Act No. 52/2007, which led to the establishment of the Map of Graves, available on the Internet, with records of 2,382 graves across the country, which are believed to contain more than 45,000 remains of persons and in some cases offer data concerning the victims.[10]

62. The Special Rapporteur received many testimonies and complaints from families, sometimes from persons of a very advanced age, who expressed with very deep feeling the wish to be able to offer their loved ones a decent burial place. The Special Rapporteur is concerned that the State has not done more to deal with exhumations and the identification of remains, especially in cases where this is technically and materially feasible.

63. The Special Rapporteur points out that at no stage of his discussions with the authorities did the latter deny the legitimacy of this request. Nevertheless, with few exceptions, most of their responses were limited to references to Act No. 52/2007, the Map of Graves and the budgets allocated to exhumations. Apart from noting that since 2011 the budget for the implementation of the Act, including exhumations, has been cancelled, the Special Rapporteur makes it clear that the above measures in no way represent adequate reparation.

64. Act No. 52/2007 does not establish a State policy in this respect, but leaves families and organizations the responsibility of dealing with exhumation projects themselves. The families of victims and the associations concerned have thus stepped in to replace the State, but without always receiving adequate support. The Special Rapporteur welcomes the work and commitment of victims, families, associations and forensic experts, among others, without whom no progress would have been possible.

65. The Special Rapporteur points out that, while the adoption of technical protocols is a positive factor, the overall cut in subsidies and the State's reluctance to undertake responsibility for exhumations result in major inconveniences in terms of coordination and methodology.

66. The "privatization" of exhumations also has the effect of encouraging the indifference of State bodies, including the courts. The latter tend not to show up when the discovery of a new grave is reported, so that there are no official records of the exhumations. This produces a perverse effect in that it obliges families to choose between their right to inter their loved ones and the possibility that one day they might be able to establish the "official" truth about the circumstances of the loved ones' deaths.

[10] http://mapadefosas.mjusticia.es/exovi_externo/CargarMapaFosas.htm.

V. Justice

A. Impediments to victims' access to justice

67. It is in the field of justice that the greatest shortcomings are apparent in the way the legacies of human rights violations committed during the Civil War and the Franco era are dealt with. The connection between this fact and the absence of reforms in the Judiciary after transition, similar to the reforms carried out in the Armed Forces, is a moot point.[11]

68. Act No. 46/1977 (Amnesty Act) has been put forward by the authorities, referring to decisions of the Supreme Court, as the main obstacle in the way of opening investigations and criminal proceedings with respect to serious human rights and humanitarian law violations. Other arguments, such as the principle of non-retroactivity, the application of the most favourable rule, the time limitation for offences and the principle of legal security, interpreted restrictively, have also been reiterated by the authorities.

69. Act No. 46/1977 was adopted by a democratically elected parliament, essentially in order to extinguish criminal liability and to release from prison persons detained for offences related to acts of political intention, without excluding blood crimes, and offences of rebellion and sedition or conscientious objection. This part of the Act reflects the requirements of all the opposition parties and consensuses which marked the first stage of the transition. The Act also extinguished criminal responsibility for offences committed by public servants and law enforcement officials against the rights of persons (art. 2 (f)). The Special Rapporteur notes that, while the former set of offences raised public reactions even before the end of the dictatorship and lively debates in the legislature, article 2 (f) never gave rise to any equivalent discussion.[12]

70. The Special Rapporteur will not go into the social and political aspects that led to the Amnesty Act. He hopes to contribute to discussion and analysis relating to the compatibility of the Act's provisions, especially article 2 (f), with the State's international obligations in terms of human rights.

71. In this respect, the Special Rapporteur reiterates the recommendations put forward by several human rights mechanisms regarding the incompatibility of the effects of the Amnesty Act with the international obligations taken on by Spain, including article 2, paragraph 3, of the International Covenant on Civil and Political Rights.[13] The Special Rapporteur points out that these commitments were undertaken prior to the adoption of the Amnesty Act. In fact the Act was adopted on 15 October 1977 and the International Covenant on Civil and Political Rights was ratified on 27 April 1977.

72. Apart from international standards that establish the inapplicability of the statute of limitations to crimes against humanity, international law establishes that, in the case of forced disappearances, limitations must apply from the moment the forced disappearance ceases, that is, when the person reappears alive or his or her remains are found. The Special Rapporteur notes with concern that, during his visit, the authorities consistently denied the continuing nature of forced disappearance, alleging that such a principle did not make sense legally.

[11] See, for example, F. Gor, "De la justicia franquista a la constitucional" in *Memoria de la transición*, ed. S. Juliá, J. Pradera and J. Prieto (1996).

[12] See, for example, P. Aguilar, *Políticas de la Memoria* (2008).

[13] CAT/C/ESP/CO/5(2009), CCPR/C/ESP/CO/5(2009), CED/C/ESP/CO/1(2014), A/HRC/27/49/Add.1 (2014).

73. The Special Rapporteur observes excessive formalism in the interpretation of law that inhibits any reflection regarding possible alternatives to guarantee the right of victims to truth and justice. However, in other types of cases, Spain was able to take account of the relevant considerations, without infringing the principle of legality, as in the cases of *Scilingo* and *Pinochet*, where the Spanish courts displayed legal dexterity in favour of the rights of victims. In accordance with the principles of due process, they rejected Chile's Decree-Law on Amnesty and found legal ways of overcoming the problem of the applicability of legal categories compatible with international law and questions of limitation.

74. The Special Rapporteur points out that there would be no impediments in the Spanish legal system to revising or annulling any provisions of Act No. 46/1977 that were incompatible with the State's international obligations. The Constitutional Court would be the ideal venue to discuss and decide on the interpretation of Act No. 46/1977, in the light of international human rights standards and obligations.

75. The Special Rapporteur reiterates his entire willingness to assist the authorities in this process and to facilitate the exchange of experience regarding responses to similar challenges furnished by other regional or national courts, in compliance with international standards and full respect for the principle of legality and procedural guarantees.

B. Lack of investigations as an obstacle to the right to truth

76. On the basis of Act No. 46/1977, in practically all cases brought before Spanish justice for serious crimes committed during the Civil War and the dictatorship, either no investigations are opened, or the cases are shelved without the judges even gaining knowledge of the facts. This not only contravenes international obligations with respect to the right to justice, but also breaches the right to truth.

77. The Special Rapporteur is concerned at the content of the Supreme Court's ruling of 27 February 2012 acquitting the incumbent of Criminal Investigation Court No. 5 for having initiated investigations into forced disappearances which had occurred during the Civil War and the dictatorship, and its decision to transfer the jurisdiction to regional courts. Despite the acquittal in this particular case, this ruling would have confirmed the tendency of judges to shelve any similar cases that come before them.

78. During the visit, the great majority of the authorities, practically unanimously, argued that criminal proceedings were not the right approach to pursue the right to truth; that the aim of criminal proceedings was to impose a penalty on guilty persons and that if it were impossible to identify a suspect or arrive at the presumption of his or her decease, the whole purpose of a judicial investigation would be lost.

79. The Special Rapporteur draws attention to some contradictions inherent in these arguments and the interpretation of Act No. 46/1977.

80. Even in countries that have not repealed amnesty laws, some courts have come up with interpretations both of the laws themselves and of the related principles (such as legality or non-retroactivity) that have not prevented the investigation and prosecution of persons suspected of human rights violations. The reasoning is, for example, that while many amnesties suspend criminal responsibility, the decision requires a court ruling (as stated in Act No. 46/1977, art. 9). That is to say, allowing the benefits of the amnesty requires at least an investigation of the facts, since otherwise there can be no responsibility to either suspend or extinguish.

81. There is nothing in the existing law that would expressly prevent the initiation of investigations. On the contrary, article 6 of Act No. 46/1977 establishes that: "the amnesty

will generally determine the extinction of the criminal responsibility arising from primary or accessory penalties that either have been handed down or may be handed down". The ruling extinguishing criminal responsibility may only be issued once the facts, responsibilities and penalties have been decided, within the context of a judicial investigation. Or at least there is nothing in the text of the law that can invalidate such a conclusion.

82. Secondly, Act No. 46/1977 grants amnesties for a series of offences and article 2, in subparagraphs (e) and (f), refers specifically to offences committed by "public servants or law enforcement officials" and "for the purpose of or on the occasion of the investigation and prosecution of deeds referred to in this Act". The Special Rapporteur emphasizes that amnesty may be applied only after the judicial authorities have first determined whether or not the suspects were public servants or law enforcement officials, and whether the offences were committed in the circumstances described. This cannot be presupposed; it can only be established through investigations, even preliminary, which follow the official nature, rigour and methodology of judicial investigations.

C. Application of universal jurisdiction

83. The Spanish courts have been recognized as pioneers in the application of universal jurisdiction by various human rights mechanisms. Nevertheless, the Special Rapporteur reiterates his concern for the successive reforms of 2009 and 2014 of Organic Act No. 6/1985, which significantly limit the Spanish courts' chances of exercising their jurisdiction over serious international crimes, such a genocide, crimes against humanity and war crimes. The Special Rapporteur is following closely developments related to the closure of some current trials, and the reluctance on the part of some judges to close cases, on the grounds of international standards.

84. The Special Rapporteur is also closely following developments related to the requests submitted by the Argentine justice system for the extradition of two persons suspected of acts of torture committed during the final years of the Franco regime, which might constitute crimes against humanity. He also recalls the State's international obligation to either extradite or judge and that the extradition of the accused can only be denied if the Spanish courts themselves initiate investigations and judge those responsible.

VI. Reparation

A. Definition of victim

85. In transitions, it is essential for the consolidation of democracy and reconciliation to advocate a broad concept of victim, covering all possible aspects of victims, regardless of their political affiliation, or faction, or that of their perpetrators.

86. While Spain has made noteworthy efforts to overcome initial forms of discrimination, pertaining to the Franco regime, in practice many organizations and victims have expressed the view that they still have the impression that they are "second-class victims". This feeling is believed to originate in a series of more ambitious measures seeking recognition and reparation for other categories of victims of serious crimes such as terrorism.

87. In this respect, the Special Rapporteur suggests that advantage should be taken of current discussions around and plans to revise the Preliminary Bill for an Organic Act on the Status of Victim of the Offence to incorporate all categories of victims in the new law,

including those of the Civil War and the dictatorship, while encouraging the participation of victims in the drafting of the Act.

B. Programme of reparations

88. Of the four aspects of the mandate, reparation is the one that has been most developed in Spain. In this respect, most of the action has taken the form of assistance and economic measures.

89. After the end of the Civil War, starting in 1937, the Franco regime launched a system of reparations which established pensions and benefits, among others, for widows and injured survivors belonging to the national side, thereby perpetuating the idea of a society divided into winners and losers. The first provisions establishing pensions for war victims on the republican side were adopted only in 1978, and these were followed in 1980 by pensions for periods spent in prison during the Franco regime (and compensations in 1990), with benefits for exiles. The parliamentary bill of 2002 (161/001512) is one of the first pieces of legislation to promote recognition for those who underwent the repression of the Franco regime, while Act No. 52/2007 advocates the idea of equality between all victims.

90. Act No. 52/2007 extends some of the existing provisions, concerning amounts and delays, and includes reparations for new categories of victims. Some gaps still remain, however, which autonomous community legislation did its best to fill. Many victims and families have complained that the current scheme still excludes whole groups of victims, as well as some categories of persons who had been detained under special conditions, such as in concentration camps or labour camps, and persons detained under the 1933 Anti-Vagrancy and Delinquency Act (Ley sobre vagos y maleantes), which was replaced in 1970 by the Social Dangerousness Act (Ley de peligrosidad social), both of which, it was alleged, had been used to apply a form of social control and repression by the Franco regime. The persons involved were reportedly excluded from measures of reparation, such as the calculation of social security contributions, nor were they considered as "former social prisoners", since Act No. 2/2008 restricted this category to persons detained on account of their sexual orientation.

91. The legislation on restitution and compensation for the confiscation of property belonging to political parties and groups[14] does not contemplate any form of reparation in the case of private persons.

92. The Declarations of compensation and personal recognition, established under Act No. 52/2007, have been portrayed by many official commentators as the greatest gesture of recognition for victims of the Civil War and the dictatorship. The Declarations, however, met with only a lukewarm reception on the part of the victims, many of whom took the view that the document did not constitute adequate redress. If a careful assessment is made of the reasons for these feelings, it could reveal the content of the victims' complaints. The Special Rapporteur emphasizes the essential value of the recognition of the facts and responsibilities and the presentation of an official apology, which extends beyond a mere generic recognition.

93. The Special Rapporteur is particularly concerned at the impact of violations perpetrated against women, whether direct or indirect victims, and the little attention generally given to them in present measures of reparation.

[14] Act No. 43/1998.

C. Annulment of sentences handed down by courts during the Civil War and the Franco regime[15]

94. The Special Rapporteur welcomes the provisions of Act No. 52/2007 that recognize and declare the "radically unjust" nature and illegality of the convictions and sanctions handed down for political or ideological reasons or beliefs by special courts during the Civil War and by all criminal or administrative courts or authorities during the dictatorship. The Act also establishes that the victims of these injustices may request the issue of Declarations of reparation and personal recognition. Despite these measures, victims and their families continue to claim effective reparation for these violations, and for such sentences to be declared null and void. Annulment would represent not only symbolic redress, but it would also terminate the legal effects of the sentences.

95. Some sources suggested that annulment should also apply to sanctions passed under the Anti-Vagrancy and Delinquency Act, which were handed down arbitrarily by courts to punish and condemn persons for their political opinions or affiliations.

96. The first note by the State lawyers, of 3 November 2004, on the possible review-annulment of sentences during the Civil War and the Franco regime, offers an analysis of precedents and comparative law, with reference to the German case. In its conclusions, while it mentions the principles of legal certainty, res judicata and non-retroactivity as a major difficulty, it does not discard the possibilities of the annulment of sentences, and on the contrary sets out alternatives which should be considered in detail.

97. The Special Rapporteur takes note of the only review of a conviction by the Supreme Court in 2007, in the case of the execution of Ricardo Puente Rodríguez, on the grounds of a flagrant formal flaw. The Special Rapporteur regrets that other appeals lodged in similar cases were unsuccessful and that the judicial authorities give precedence to the principle of legal certainty over the rights of the victims, the right to justice and the principles of due process. He regrets that the Government and the Legislature have still not paid sufficient attention to this matter and that concerns of an economic order may have prevailed when the decision was taken.

98. The Special Rapporteur welcomes the legislative proposals calling for the annulment of the sentences that led to the summary executions of well-known political figures (such as Lluis Companys, Manuel Carrasco i Formiguera and Alexandre Bóveda). He insists, however, that it is important to establish measures that benefit all victims without distinction. In this sense he welcomes the provisions of the Community Act No. 33/2013 of Navarra, which requires that the Spanish State annul all judgements passed by military and/or civil courts on political grounds, including all sentences by special courts. The draft Bill on Democratic Memory of Andalusia establishes similar provisions.

99. The Special Rapporteur encourages the State to return as soon as possible to this question and reiterates his readiness to assist within the framework of his mandate. He recalls that comparative studies of other experiences of countries that have faced similar challenges, including in the European context, such as Germany, could prove extremely useful.

[15] See J. Errandonea, *Estudio comparado de la anulación de sentencias injustas en España*, ICTJ (2008) and R. Escudero Alday, *La Declaración de ilegitimidad de los tribunales franquistas: una vía para la nulidad de sus sentencias* (2008).

VII. Conclusions and recommendations

100. **The Special Rapporteur notes a considerable discrepancy between the positions adopted by the majority of State institutions on the one hand and on the other the victims and associations with whom he was in contact. The authorities appear to maintain that, as far as possible, the claims of the victims and associations have mostly been met, but many of the latter feel insufficiently recognized and compensated. This gap is particularly worrying considering that the expectations expressed by many victims cannot, generally speaking, be considered "excessive".**

101. **Initiatives in favour of promoting truth, justice, reparation and guarantees of non-recurrence have to a great extent been pursued by civil society, in particular associations of victims and families, mainly the grandchildren's generation. This is due to the deep-felt commitment on the part of victims, families and associations to keep the voice and claims of victims alive, as well as to the vacuum left by the State in respect of responding to the claims.**

102. **The Special Rapporteur notes that several government representatives, in the course of the meetings he had with them, tended to base discussions on the following proposition: "either we all agree that we are fully reconciled, or the only alternative is the resurgence of underlying hatreds, which would entail too high a risk". In the Special Rapporteur's view, this position does not do justice to the progress achieved with the process of democratization in Spain. He emphasizes that, considering the strength of the institutions and the absence of risk for the stability of the democratic order, it is especially surprising to note that not more has been done for the rights of so many victims. The Special Rapporteur points out that the strength of democratic institutions must be measured not by their ability to ignore certain issues, especially those that refer to fundamental rights, but rather by their ability to manage them effectively, however complex and awkward they may be.**

103. **The Special Rapporteur reiterates his call for trust among citizens, but especially trust in State institutions, as the objective of implementing the measures related to the mandate.[16] Both the institutions and Spanish society are capable of debating and implementing these measures more decisively, which would offer the possibility of increasing and strengthening the trust that exists among citizens and between them and their institutions. Reconciliation devoid of attempts to give full effect to the rights to truth, justice, reparation and guarantees of non-recurrence is invariably only an empty name that is given to a temporary stage in a process which allows the claims to live on.**

104. **The Special Rapporteur lists below his main recommendations and reiterates his full willingness to assist the authorities with implementation. He calls on the Government and the State bodies concerned to:**

(a) Show a firm commitment on the part of the State to fully implement, as a matter of priority, the rights to truth, justice, reparation and guarantees of non-recurrence. The Special Rapporteur insists that the shortage of resources, though they might curtail the State's capacities, cannot justify inaction with respect to such measures;

(b) Rigorously assess the implementation of the Historical Memory Act and its use by victims with a view to adapting models and measures to victim's claims, and

[16] A/HRC/21/46, 2012.

establishing communication channels between the competent authorities, the victims and the associations;

(c) Increase and promote contact and coordination among the various public institutions of historical memory, and allocate the necessary resources for their proper functioning;

(d) Promote actions in this respect and coordination between existing Ombudsmen's offices at national and autonomous community level;

(e) Avoid glaring discrepancies between autonomous community and national levels in related laws, ensuring equal and uniform protection for all victims alike. The Special Rapporteur recognizes the competence of the autonomous communities and the development of legislation and measures that offer greater recognition and protection to victims than at national level;

(f) Support the initiatives of the State and civil society that coordinate and respond to the claims of all the victims of human rights and humanitarian law violations, regardless of their political affiliation or that of the perpetrators.

Truth

(g) Urgently deal with the demands of victims in terms of truth, establish some mechanism to "make truth official" and resolve the excessive fragmentation to which memory-building in Spain has been subject. Restore, if not increase, the resources devoted to this purpose. An official mechanism for clarifying the truth should perform at least the following functions:

- **Systematize existing information;**
- **Resolve the fragmentation and dispersion of information and efforts;**
- **Draw up an orderly plan of investigations;**
- **Establish methodologies and register them;**
- **Access both official and unofficial archives and document funds;**
- **Introduce an official process of validation, formal presentation and dissemination of its conclusions such as to offer official recognition to the victims;**
- **Facilitate the participation of victims and their families in the process and be governed by the notion of rights, regardless of the identity or political affiliation of either victims or perpetrators;**

(h) In consultation with victims and associations, review the current system whereby the State delegates responsibility for exhumations. Allocate the necessary resources and ensure the participation of judicial authorities, among others, in all cases;

(i) Establish a State archive policy that guarantees access to all documentary funds, reviewing the criteria applicable to privacy and confidentiality, in order to bring them into line with applicable international standards, introducing clear regulations, for example through the adoption of an Archive Act.

Guarantees of non-recurrence

(j) Systematize all actions related to symbols and monuments of the Franco era, in accordance with current legislation, seeking differentiated approaches, the contextualization and the "reinterpretation" of symbols and monuments, failing a recommendation in favour of their simple removal;

(k) Implement the recommendations put forward by the Committee of Experts on the Future of the Valle de los Caídos in its 2011 report, in particular with respect to the "reinterpretation" of the site, and research, dissemination, restoration and conservation programmes, including ensuring the dignity of the cemetery and the respectful conservation of the remains of all the persons buried there. Bring greater clarity to the legislation on the legal conditions governing different parts of the site, and on the competencies and responsibilities of the State and the Church. Receive the requests of those who wish to recover the remains of family members buried there without their consent. When it is not materially possible, devise and implement, in consultation with family members, suitable measures of reparation, including symbolic or honorific measures;

(l) Continue consolidating the efforts made in terms of historical and human rights education and establish mechanisms for assessing the implementation of these programmes, with a view to ensuring consistency and effective implementation;

(m) Strengthen the programmes for the human rights training of civil servants, including the Judiciary and security forces, and incorporate subjects related to the Civil War and the Franco era, in line with national study programmes, including the study of the responsibilities incurred by State institutions in the serious human rights and humanitarian law violations that occurred during this period, as a means of promoting education and awareness as well as non-recurrence. Focus this study on the rights of all victims.

Reparation

(n) Extend the recognition and coverage of reparation programmes to include all the categories of victims who have been excluded from existing programmes. Take steps to deal with claims related to the restitution of seized private belongings and documents. Undertake greater efforts to implement non-material and symbolic reparation measures;

(o) Extend existing studies concerning violations to the rights of women and develop measures of reparation and special recognition of the harm they suffered as a consequence of the Civil War and the Franco regime, including sexual violence, assaults, humiliations and discrimination in reprisal for their real or suspected affiliation or that of their families or companions;

(p) Identify suitable mechanisms to give effect to the annulment of sentences handed down in violation of the fundamental principles of law and due process during the Civil War and the Franco regime. Comparative studies of other experiences undergone by countries which have faced similar challenges, including many within the European context, may prove extremely useful.

Justice

(q) Consider alternatives to and annul the effects of the Amnesty Act that impede all investigations and access to justice with respect to the serious human rights violations committed during the Civil War and the Franco regime;

(r) Promote greater awareness of international obligations in terms of access to justice, the right to truth and guarantees of due process and give suitable institutional expression to such obligations;

(s) Ensure that Spanish justice cooperates with judicial proceedings occurring abroad and combat any weakening of the exercise of universal jurisdiction by Spanish courts.

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Informe del Relator Especial sobre la promoción de la verdad, la justicia, la reparación y las garantías de no repetición, Pablo de Greiff

Adición

Misión a España: Comentarios del Estado al informe del Relator Especial*

* El documento se circula tal como fué recibido.

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Observaciones de España al informe del Relator Especial de Naciones Unidas sobre la promoción de la verdad, la justicia, la reparación y las garantías de no repetición, Sr. Pablo de Greiff, sobre su visita a España

I. Introducción

1. El Relator Especial sobre la promoción del a verdad, la justicia, la reparación y las garantías de no repetición, Sr. Pablo de Greiff, visitó España del 21 de enero al 3 de febrero de 2014 para conocer y valorar las medidas adoptadas por las autoridades españolas sobre los cuatro ejes del mandato. El Relator contó durante toda su visita con el apoyo del Gobierno, incluyendo la asistencia logística necesaria cuando así procedía.

2. A continuación se recogen las observaciones de España al informe del Relator que, por las limitaciones de tiempo, no podrán ser leídas en su totalidad durante el diálogo interactivo con el Relator por lo que, a efectos de su constancia, se considera apropiado sean publicados como anejo al informe del Relator Especial a la 27ª Sesión del Consejo de Derechos Humanos.

II. Observaciones de España al informe

3. España agradece al Relator Especial el informe sobre su visita a España y la profesionalidad e independencia, así como el espíritu de diálogo y colaboración con que llevó a cabo tanto la visita a España como la elaboración del informe mismo.

4. Agradecemos los comentarios del Relator sobre la consolidación de la democracia en España y el papel jugado por el proceso de reforma y democratización de las Fuerzas Armadas, que constituyen hoy en día una de las instituciones más valoradas por la ciudadanía. Si el objetivo de toda transición democrática es la consolidación de las instituciones democráticas, creemos que en España no queda duda de que se ha cumplido, y que las garantías de no repetición, uno de los pilares del mandato del Relator, seguramente el más importante para las generaciones futuras, quedan plenamente acreditadas.

5. El Gobierno de España agradece especialmente al Relator que a lo largo de su informe matice con cuidado cada uno de los aspectos de su mandato que examina aplicando al caso español. Como él mismo reconoce, la transición en España fue un fenómeno complejo desde varios puntos de vista, pero particularmente porque reunía elementos de transición de una situación de conflicto a otra de paz, y de una situación dictatorial y autoritaria a otra plenamente democrática.

6. Esa gradación que el Relator aplica en el análisis de su informe no se refleja sin embargo en sus conclusiones y recomendaciones, cuando se refiere por igual a todos los pilares de su mandato sin distinguir aquéllos en los que el éxito es evidente, según su propia acepción, de aquéllos en los que en su opinión quedan cosas por hacer. Así, cuando refiere lo que él denomina “inacción del Estado” a todos los pilares de su mandato, contradice su propio reconocimiento de que, en materia de garantías de no repetición, se ha logrado consolidar la democracia y evitar cualquier riesgo de involución en parte gracias a la reforma de las Fuerzas Armadas como garantes de la democracia y del orden constitucional.

7. Como el propio Relator afirma, no hay recetas mágicas ni fórmulas infalibles para garantizar el éxito de un proceso de transición. La transición española constituye un caso único de reconciliación nacional sin justicia penal, por decisión deliberada y consensuada

por la inmensa mayoría de las fuerzas políticas parlamentarias de evitar la justicia transicional. El equilibrio entre los distintos intereses, paz y democracia, justicia y reconciliación, se encontró en España a costa de renunciar a la justicia penal. Los derechos de las víctimas fueron inicialmente relegados pero desde los inicios de la democracia empezaron a adoptarse medidas de reconocimiento y reparación que culminaron con la adopción de la conocida como Ley de Memoria Histórica en 2007. Esta Ley aglutina una serie de medidas de reparación y reconocimiento, así como otras de carácter simbólico. Creemos que es importante por ello reivindicar el valor de una normativa que refleja la manera como los españoles han querido reconciliarse con su pasado.

8. Precisamente, cuando el Relator menciona en su informe el éxito en la reforma de las Fuerzas Armadas, se refiere al alto grado de legitimidad del proceso de democratización, basado en un amplio apoyo social y en un firme consenso entre los partidos políticos. Ese mismo apoyo social y consenso político fueron los que ampararon la adopción de la Ley de Amnistía en 1977, que como ya se explicó al Relator, no es una ley de punto final otorgada por la dictadura para perdonarse a sí misma, sino una ley adoptada por los partidos parlamentarios democráticamente elegidos y plenamente conscientes de la importancia del paso que estaban dando, en todas sus dimensiones. Agradecemos muy sinceramente al Relator que haya examinado la Ley de Amnistía de 1977 con mayor rigor y profundidad que otros procedimientos especiales y órganos de tratados, que limitan su análisis a recomendar la derogación de la Ley de Amnistía, olvidando su génesis y sus efectos.

9. A este respecto, el Relator distingue en su informe dos aspectos de la Ley de Amnistía: por un lado, la extinción de la responsabilidad penal de los opositores a la dictadura, a la que atribuye un alto grado de consenso entre los partidos políticos; y por otro, la extinción de la responsabilidad penal de los que defendieron la dictadura, que el Relator considera no fue debatido por los partidos políticos. Conviene aclarar en este sentido que dicha afirmación es errónea. De hecho, tanto en los debates parlamentarios que precedieron la adopción de la Ley de Amnistía, como en las declaraciones de los políticos de los partidos de oposición, y en los análisis políticos que se han hecho a posteriori, existen múltiples referencias a esa voluntad de reconciliación y convencimiento de que sólo a través del olvido, la amnesia y el perdón era posible esa reconciliación. Incluso mucho antes de que se adoptase la Ley de Amnistía, tan atrás como en 1960, las actas del VI Congreso del Partido Comunista de España, entonces todavía ilegal, ya recogían la propuesta de la amnistía general, extensiva a todos, en ambos bandos contendientes.

10. Por otro lado el Relator considera que la interpretación que el Poder Judicial ha dado en España a la Ley de Amnistía, combinada con lo que el Relator denomina una interpretación "formalista" del principio de legalidad, impiden la investigación de los hechos acaecidos en España entre 1936 y 1975. Sin embargo, los jueces no hacen sino aplicar los principios de legalidad y de irretroactividad de la ley penal, pilares del Estado de Derecho. Nadie duda de que toda norma penal ha de ser aplicada e interpretada con exquisita observancia del principio de legalidad y sus manifestaciones de lex previa, certa, stricta y scripta. Es por ello que en opinión del Gobierno español, es erróneo calificar peyorativamente de "interpretación formalista" una interpretación que propugna el respeto al estado de Derecho y al principio de legalidad.

11. Reiteramos, por otra parte, que el proceso penal en España no tiene funciones de investigación de los hechos, sino de identificación de los responsables y su castigo. Por ello disentimos del señor Relator cuando señala que los jueces españoles se limitan a archivar las demandas de las víctimas que solicitan noticias sobre el paradero de sus seres queridos. Hemos proporcionado al Relator información sobre decisiones judiciales, como los autos nº 75/2014 y nº 478/2013 de la Audiencia Provincial de Madrid, que coinciden en confirmar que el procedimiento penal no es la vía para dar satisfacción a las pretensiones de los

demandantes (en estos casos, la exhumación de los restos de familiares en el Valle de los Caídos para su sepultura en otro lugar). Pero conviene resaltar que dichos autos no se limitan a archivar la causa e impedir toda investigación, como afirma el Relator, sino que ofrecen la vía contencioso-administrativa como la vía correcta de acuerdo con la concepción procesal española, y que es la prevista en la Ley de Memoria Histórica.

12. Agradecemos al Relator que reconozca en su informe, cuando analiza el pilar de su mandato relativo a la reparación, los esfuerzos desarrollados en España en este ámbito, partiendo de las medidas adoptadas primero durante la dictadura, y después en democracia, referidas ya a las víctimas del bando republicano. Tomamos nota de las observaciones del Relator en cuanto a las categorías de víctimas que considera excluidas de las medidas de reparación con el fin de estudiar su encaje en la legislación vigente. No obstante, me gustaría señalar que el Ministerio de Hacienda y Administraciones Públicas gestiona un programa de reconocimiento de pensiones a las personas que por su orientación sexual sufrieron pena de prisión en aplicación de la legislación aplicable durante el franquismo, y que dichas personas tienen también a su disposición la posibilidad de solicitar la declaración de reparación prevista en el art. 4 de la Ley de Memoria Histórica.

13. Agradecemos las observaciones relativas a la formación de funcionarios públicos en materia de derechos humanos. Como consecuencia de la visita del Relator y de su informe, me complace informarle de que en el proceso de revisión anual de los planes de estudio y formación tanto inicial como continuada de la Carrera Judicial y de los Cuerpos y Fuerzas de Seguridad del Estado, serán tenidas en cuenta las recomendaciones del Relator.

14. Compartimos con el Relator la idea, de que en materia de justicia transicional no existe un modelo único aplicable a toda circunstancia histórica. El modelo español de transición ha sido considerado durante años precisamente eso, un modelo a seguir, y muchas de sus características han servido de inspiración en numerosos procesos de transición post-autoritaria tanto en América Latina como en otros lugares del mundo, y más recientemente, en Túnez.

15. Igualmente, y respecto a la noción de víctima que el Relator maneja en su informe, y cuando se refiere a la "gran distancia entre las posiciones de la mayor parte de las instituciones del Estado por un lado y las víctimas y asociaciones por el otro", parece desconocer que una parte también significativa de las víctimas de la Guerra civil y de la dictadura, aunque silenciosa y no agrupada ni activa, no comparte la apreciación de las asociaciones con las que el Relator parece haber tenido contacto. Esas víctimas consideran que el mayor triunfo de sus pretensiones frente a las violaciones de derechos humanos cometidos en dichos periodos lo constituye precisamente la consolidación de la democracia.

16. Agradecemos al Relator Especial la consideración de buenas prácticas que atribuye al proceso de transformación de las Fuerzas Armadas, así como el resto de sus observaciones, y reiteramos la disposición del Gobierno a seguir dialogando con el Relator con el mismo espíritu de apertura y colaboración sobre los distintos aspectos de su mandato.

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Promotion and protection of all human rights, civil, Political, economical, social and cultural rights, Including the right to development

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff

Addition

Mission to Spain: Remarks of Spain regarding the report of the Special Rapporteur*

* The document is circulated as received.

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Remarks of Spain regarding the Report of the Special Rapporteur of the United Nations about the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr Pablo de Greiff, about his visit to Spain.

I. Introduction

1. The Special Rapporteur about the promotion of truth, justice, reparation and guarantees of non-recurrence, Mr Pablo de Greiff, visited Spain from 21 January to 3 February 2014 in order to know and assess the measures adopted by the Spanish authorities about the four axes of the mandate. The rapporteur had during his visit the government's support, including the necessary logistic assistance as the case might have been.

2. Hereafter, Spain's remarks to the report of the Rapporteur are gathered, as, due to time limitations, they will not be thoroughly read during the interactive dialogue with the Rapporteur. Thus, and for the purpose of the record, they should be published as an annex to the Special Rapporteur to the 27th Session of the General Assembly of the Human Rights.

II. Spain's remarks to the report

3. Spain shows gratitude to the Special Rapporteur for the report of his visit to Spain and the professionality and independence, as well as the spirit of dialogue and collaboration with which he carried out both the visit to Spain and the elaboration of the report.

4. We show gratitude for the Rapporteur's remarks on the consolidation of democracy in Spain and on the role played by the process of reform and democratisation of the Armed Forces, which are nowadays one of the best valued institutions by citizens. If the objective of any democratic transition is the consolidation of democratic institutions, we consider that in Spain it has been undoubtedly fulfilled, and that the guarantee for non-recurrence, one of the pillars of the Rapporteur's mandate, and the most important for future generations, has been fully granted.

5. The Spanish Government shows special gratitude to the Rapporteur for explaining in detail every single aspects of his mandate which he examines when applied to the Spanish case. As he recognises, the Spanish Transition was a complex process from several perspectives, but especially because it moved from a situation of conflict to a situation of peace, and from an authoritarian situation of dictatorship to a situation of full democracy.

6. That gradation that the Rapporteur applies to the analysis of his report is not written on his conclusions and recommendations, when he equally refers to all the pillars of his mandate, not discriminating between the successful ones and those where there is still something to be done. Therefore, when he calls "the State's inaction" to all the pillars of his mandate, he contradicts his own recognition, regarding the guarantees of non-recurrence, of the achievement of democracy and the avoidance of any involution thanks to the reform of the Armed Forces as a guarantee of democracy and constitutional order.

7. According to the same Rapporteur, there are neither magical recipes nor infallible formula to guarantee success in the process of transition. The Spanish Transition is a unique case of national reconciliation without any criminal justice, according to the deliberate and consensus decision of the vast majority of the parliamentary political forces to avoid transitional justice. The balance between the different interests, peace and democracy, justice and reconciliation, was achieved in Spain at the expense of waiving criminal justice.

The rights of the victims were initially set aside, but from the dawning of democracy several measures of recognition and reparation were taken which concluded with the adoption of the so-called Law of Historical Memory in 2007. This law binds together a set of measures of reparation and recognition, as well as other measures of a symbolic character. So, we consider it important to reclaim the value of the regulations that reflect the way in which the Spaniards have wanted to come to terms with their past.

8. As a matter of fact, when the Rapporteur mentions the success of the reform of the Armed Forces, he means the high degree of legitimacy of the democratic process, basing on a broad social support and on a strong consensus among political parties. The same social support and political consensus protected the adoption of the Amnesty Law in 1977, which, as explained to the Rapporteur, is not a full stop law granted by the dictatorship to forgive itself, but a law adopted by the parliamentary parties democratically elected and fully aware of the importance of the step being taken. We honestly thank the Rapporteur for having examined the Amnesty Law of 1977 more rigorously and more deeply than other special procedures and organisations asked, which limit their analysis to a recommendation of the derogation of Amnesty Law, forgetting about its origins and its effects.

9. In this regard, the Rapporteur points out two different aspects of the Amnesty Law: on the one hand, the extinction of the criminal responsibility of the opponents to the dictatorship, which reached great consensus among political parties; on the other hand, the extinction of the criminal responsibility of the defendants of the dictatorship, which, according to the Rapporteur, was not discussed by political parties. In this sense, it should be made clear that such statement is wrong. Actually, in the parliamentary debates before the Act of Amnesty, in the statements of the opposition-party politicians or even in the political analyses carried out hindsight, there exist many references to the desire of reconciliation and the conviction that only by means of oblivion, amnesia and forgiveness this reconciliation was possible. Even long time before the adoption of the Act of Amnesty, as far as 1960, the minutes to the 6th Congress of the Communist Party of Spain, still illegal at that time, already includes the proposal of a general amnesty, extended to all, in both opposing factions.

10. However, the Rapporteur considers that the interpretation of the Amnesty Law by the judiciary in Spain, along with what he calls a "formalist" interpretation of the principle of legitimacy, block the investigation of the events happening in Spain between 1936 and 1975. Nevertheless, judges are simply applying the principles of legitimacy and non-retroactivity of criminal law, the basis of rule of law. Nobody denies that all criminal laws must be applied and interpreted in absolute accordance with the principle of legitimacy and its manifestations lex praevia, certa, stricta and scripta. That is why, according to the Spanish Government, it is wrong to derogatorily describe as "formalist interpretation" an interpretation which fosters the respect to the rule of law and to the principle of legitimacy.

11. We would like to reassert, on the other hand, that criminal process in Spain has not got an investigative character, but a character of identification of those responsible and their punishment. That is why we disagree with the Rapporteur when pointing that Spanish judges restrict themselves to closing the files of the victims requesting news about the location of their loved ones. We have provided the Rapporteur with information of the court decisions, such as decrees number 75/2014 and number 478/2013 of Madrid Provincial Court, both confirming that the criminal procedure is not the way to satisfy the pretensions of plaintiffs (in these cases, the exhumation of the remains of relatives in Valley of the Fallen to be buried in another place). But it is important to highlight that these decrees are not retricted to close the files and prevent investigations, as the Rapporteur claims, but they offer the contentious-administrative proceeding as a the correct proceeding in accordance with the Spanish procedural conception, and which is also included in the Law of Historical Memory.

12. We show our gratitude to the Rapporteur for acknowledging, when analysing his mandate related to reparation, the Spanish efforts in this respect, on the basis of those measures adopted first during the dictatorship, and then during democracy, regarding the victims of the republican faction. We take account of the Rapporteur's remarks regarding the categories of the victims that he considers excluded from the measures of reparation with the aim of studying their inclusion in the current legislation. Nonetheless, I would like to point out that the Ministry of Finance and Public Administrations manages a programme for the recognition of a contributory pension for those people who, due to their sexual orientation, suffered prison sentence in appliance of the legislation applicable during Francoism. Those people also have at their disposal the possibility of requiring the declaration of reparation included in Article 4 of the Law of Historical Memory.

13. We show our gratitude for the remarks relating the formation of civil servants in relation to human rights. As a consequence of the Rapporteur's visit and his report, I am pleased to inform you that, during the process of annual revision of the school curriculum and of the initial and continuous formation of the judicial career and of the forces and security bodies of the State, the Rapporteur's recommendations will be taken into consideration.

14. We share the Rapporteur's idea that regarding transitional justice there is not an only model applicable to all historical events. The Spanish model of Transition has been considered for years as a role model, and many of its features have inspired a great deal of post-authoritarian transitional processes both in South America and in other places worldwide, and, most recently in Tunisia.

15. Likewise, and regarding the notion of victim that the Rapporteur uses in his report, especially when referring to the *"great distance between the position of most of the State's institutions on one side and the victims and associations on the other"*, he seems to ignore that an equally meaningful part of the victims of the Civil War and of the dictatorship, although quiet and silent, does not share the appreciations of those associations that the Rapporteur seems to have met. These victims consider that the biggest success of their intentions before the violations of human rights committed during these periods is precisely the consolidation of democracy.

16. We show our gratitude to the Special Rapporteur for the consideration of good practices that he attributes to the transformation process of the Armed Forces, as well as the rest of his remarks, and we reiterate the Government's willingness to keep dialoguing with him with the same spirit of openness and collaboration about different aspects of his mandate.

"*the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people*"

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS—PREAMBLE

INTRODUCTION

Millions of people around the world look to the United Nations to resolve problems that affect their daily lives. They expect the United Nations to work towards the improvement of their standard of living and enhance their enjoyment of fundamental rights and freedoms. The challenge of achieving universal respect for all human rights remains as daunting as ever.

The denial of human rights has been at the root of many conflicts. The change in the nature of conflicts—from international to internal—during the past decade has made the link between peace and security, economic and social affairs, democratization, development, good governance and humanitarian issues more obvious. In order to prevent internal conflicts, greater emphasis should be placed on early warning mechanisms in the human rights area as well as on strengthening national institutional capacities to address human rights concerns.

The United Nations human rights mechanisms contribute to the United Nations early warning system. Since its creation in 1945, the United Nations has worked diligently and systematically to promote and protect human rights. It has enabled the international community to organize its response to human rights violations. Since 1979, special mechanisms have been created by the United Nations to examine specific country situations or themes from a human rights perspective. The United Nations Commission on Human Rights has mandated experts to study particular human rights issues. These experts now constitute what are known as the United Nations human rights mechanisms or mandates, or the system of special procedures. Although the mandate-holders have different titles, such as special rapporteur, special representative or independent expert, each is considered as an "expert on mission" within the meaning of the 1946 Convention on Privileges and Immunities of the United Nations. This is why they are all referred to here as "experts".

The United Nations special procedures system has been able to bring the intergovernmental debate on human rights closer to the reality on the ground. During recent years, the United Nations human rights experts have brought to the attention of the international community many issues of concern, such as police brutality, summary executions,

the killing of women in the name of honour, the suffering of street children, the persecution of ethnic minorities in many societies, the role of non-State actors in human rights violations, the link between extreme poverty and respect for human rights, and the impact of human rights violations on civil society.

Questions have recently been asked in various quarters regarding the nature and methods of work of the experts. Such interest is a positive signal and can be attributed to the increasing visibility of the work of the experts. This document provides answers to 17 frequently asked questions about the work of these experts. These questions include some on the work of the Commission on Human Rights and its Sub-Commission. They also address such issues as who the experts are and what they do, how are they selected, their legal status and their term of office.

1. *What is the Commission on Human Rights?*

The Commission on Human Rights (hereafter "The Commission") is a subsidiary body of the Economic and Social Council. The Charter of the United Nations specifies that the Council "shall set up Commissions in the economic and social field and for the promotion of human rights".[1] In its first meeting in 1946, the Economic and Social Council established two functional commissions, one on human rights and the other on the status of women. It was decided that these commissions would be composed of State representatives. The Commission on Human Rights is now composed of 53 States elected by the Economic and Social Council.[2]

[1] Article 68 of the Charter of the United Nations.

[2] The following States are members of the Commission on Human Rights at its fifty-seventh session in March-April 2001: Algeria (until 2003), Argentina (2002), Belgium (2003), Brazil (2002), Burundi (2002), Cameroon (2003), Canada (2003), China (2002), Colombia (2001), Costa Rica (2003), Cuba (2003), Czech Republic (2002), Democratic Republic of the Congo (2003), Djibouti (2003), Ecuador (2002), France (2001), Germany (2002), Guatemala (2003), India (2003), Indonesia (2002), Italy (2002), Japan (2002), Latvia (2001), Liberia (2001), Libyan Arab Jamahiriya (2003), Madagascar (2001), Malaysia (2003), Mauritius (2001), Mexico (2001), Niger (2001), Nigeria (2002), Norway (2001), Pakistan (2001), Peru (2003), Poland (2003), Portugal (2002), Qatar (2001), Republic of Korea (2001), Romania (2001), Russian Federation (2003), Saudi Arabia (2003), Senegal (2003), South Africa (2003), Spain (2002), Swaziland (2002), Syria (2003), Thailand (2003), United Kingdom of Great Britain and Northern Ireland (2003), Uruguay (2003), United States of America (2001), Venezuela (2003), Viet Nam (2003) and Zambia (2002).

Immediately following its creation, the Commission established a subsidiary body that is now known as the Sub-Commission on the Promotion and Protection of Human Rights (hereafter "the Sub-Commission"). The Sub-Commission, which is composed of 26 experts who are elected by the States members of the Commission, has *inter alia* a mandate to undertake studies authorized by the Commission and to make recommendations.

The Commission meets annually for six weeks in Geneva in March-April. The Sub-Commission meets for three weeks in August, also in Geneva. The Office of the High Commissioner for Human Rights acts as secretariat to the Commission and the Sub-Commission.

2. *What does the Commission do?*

Over the years, the work of the Commission has changed substantially. Very early on the Commission focused on elaborating various human rights standards. It drafted the Universal Declaration of Human Rights and the two Covenants, on civil and political rights, and on economic, social and cultural rights. Soon, the main challenge before the Commission came to be how to respond to human rights violations. In 1947, the Economic and Social Council passed a resolution stating that the Commission had "no power to take any action in regard to any complaints concerning human rights".[3]

In 1965, however, the Commission was faced with a number of individual petitions from South Africa and came under considerable pressure to deal with them. This forced it to grapple with the elaboration of procedures to deal with issues connected to racism. A taboo was broken in 1967 when the Commission established an ad hoc working group of experts to investigate the situation of human rights in southern Africa.[4] The demand to act on the situation in southern Africa led to recognition of the need for public debate on specific countries.[5]

[3] The Economic and Social Council resolution 75(V) (1947) and decision of the Commission on Human Rights at its first session, in January 1947.

[4] Resolution 2 (XXIII), document E/259, 1947, para. 22.

[5] In response to a request by the Commission on Human Rights, the Economic and Social Council adopted resolution 1236 (XLII) in 1967, allowing the examination of cases revealing a consistent pattern of human rights violations. In its resolution 1503 (XLVIII), adopted in 1970, the Council established a procedure to deal confidentially with complaints relating to a consistent pattern of gross violations of human rights.

It took until 1975 before the Commission was able to deal with another situation, however. Following the 1973 coup in Chile against President Allende by General Augusto Pinochet, the Commission established in 1975 an ad hoc working group to inquire into the situation of human rights in Chile. In 1979, this working group was replaced by a special rapporteur and two experts to study the fate of the disappeared in Chile. In 1980, the Commission established the Working Group on Disappearances to deal with the question of enforced disappearances throughout the world. Since then, there has been less reluctance to establish expert mechanisms to deal with human rights challenges in various parts of the world. Such mechanisms were progressively applied in a more innovative manner and adapted to an increasing range of violations.

The Commission solicits the help of human rights experts to assist it in the task of examining specific situations. Over the years, the work of these experts has provided a much needed analysis on how human rights principles are applied in reality. It has formed the basis for an informed and substantive debate at the intergovernmental level. It has given a voice to the often silenced victims and offered a basis for dialogue with Governments on the concrete measures to be taken to enhance protection.

The work of the experts is debated during the annual session of the Commission on Human Rights. About one third of the experts also reports to the United Nations General Assembly in New York. Some experts have informally briefed the United Nations Security Council.

3. *What do the mandates currently cover?*

Over the years since they were first created, the United Nations human rights mechanisms have been expanded considerably. As of November 2000, 43 men and women are serving as United Nations experts in the field of human rights. They cover 36 mandates on a wide range of issues relating to civil, cultural, economic, political and social rights. All the mandates, except one, were created by the Commission on Human Rights. The General Assembly created the mandate on children in armed conflict.

Since its action on South Africa in 1967, the Commission has established a long tradition of dealing with specific country situations.

Experts are currently in charge of 14 other country mandates.[6] These country mandates are complemented by the thematic mandates. They cover 22 themes concerning a wide range of civil, political, economic, cultural and social rights. As was stated earlier, the oldest of the existing mandates is that on enforced disappearances, which was established in 1980. Thereafter, the Commission first focused on issues relating to civil and political rights. More recently, attention has been paid to economic, social and cultural rights. In fact, most mandates created since 1995 have been in the area of economic, social and cultural rights.[7]

The mandates are usually entrusted to an individual expert. In some cases, however, because of the nature of the issue under consideration, the Commission establishes a working group of experts. Such working groups are commonly composed of five individuals, one from each of the five United Nations regional groupings: Africa, Asia, Latin America and the Caribbean, Eastern Europe, and the Western group. Two such working groups are currently in operation, one on enforced disappearances and the other on arbitrary detention.

In recent years, several countries have been trying to focus human rights action on issues relating to development. Consequently, the right to development and structural adjustment issues are now receiving additional attention. In each of these cases there is a two-tiered mechanism comprising an independent expert and an intergovernmental working group. These working groups are open to all States, observers and non-governmental organizations.

[6] They are: Afghanistan (in operation since 1984), Iran (1984), Iraq (1991), the former Yugoslavia (1992), Myanmar (1992), Cambodia (1993), Equatorial Guinea (1993), the Palestinian Occupied Territories (1993), Somalia (1993), Sudan (1993), Democratic Republic of the Congo (1994), Burundi (1995), Haiti (1995) and Rwanda (1997).

[7] The thematic mandates that are currently in operation are: enforced disappearances (1980), extrajudicial, summary or arbitrary executions (1982), torture (1985), religious intolerance (1986), mercenaries (1987), sale of children, child prostitution and pornography (1990), arbitrary detention (1991), internally-displaced persons (1992), contemporary forms of racism and xenophobia (1993), freedom of opinion and expression (1993), children in armed conflict (1993), the independence of judges and lawyers (1994), violence against women (1994), toxic waste (1995), extreme poverty (1998), the right to development (1998), the right to education (1998), the rights of migrants (1999), the right to adequate housing (2000), the right to food (2000), human rights defenders (2000) and structural adjustment policies and foreign debt (merged in 2000).

4. *Who are the experts?*

The 43 experts are prominent human rights figures from various walks of life. They include current and former holders of high judicial office, academics, lawyers and economists, former and current members of non-governmental organizations, and former senior staff members of the United Nations. They come from all regions. In more recent years, more effort has been made to select women experts. There are currently 10 women experts.

Although the emphasis of each mandate is different, what all the experts have in common is that they are selected on the basis that they are individuals of high standing who are willing to provide quality services to the United Nations without remuneration. They all enjoy the same legal status and fall within the same structure. Although their action may differ as it is tailored to respond to the specific issue under consideration, they mostly apply the same approach, as will be discussed below.

5. *Why are the experts given different titles?*

As was stated earlier, the Commission bestows varying titles on the experts. These include special rapporteurs, independent experts, representatives of the Secretary-General or representatives of the Commission. These different titles neither reflect a hierarchy, nor are they an indication of the powers entrusted to the expert. They are simply the result of political negotiations. The most important issue is the mandate given to the expert as it is formulated in the resolutions of the Commission on Human Rights. These mandates could focus on reporting on violations, or on analysing a problem, or on assisting in the provision of technical assistance or on a combination of one or more of these features.

6. *Who selects the experts?*

The intergovernmental resolution creating each mandate determines who selects the expert. Special rapporteurs and representatives of the Commission are typically selected by the Chairperson of the Commission. Although there is a tradition that the Chairperson consults with the Bureau of the Commission, the decision is ultimately that of the

Chairperson. The Chairperson is normally a diplomat at the ambassadorial level. The chairmanship of the Commission rotates between the regional groups, which are all represented on its Bureau.

The representatives of the Secretary-General and some independent experts are selected by the United Nations Secretary-General upon the recommendation of the High Commissioner for Human Rights.

The choice of the expert is crucial to the credibility of the mandate. The experts are expected to be individuals of high standing and deep knowledge of human rights. In the selection of experts, it has been determined that consideration should be given to the professional and personal qualities of the individual "expertise and experience in the area of the mandate, integrity, independence and impartiality".[8]

7. *Is there a time limit on experts' term of office?*

The country-specific mandates are reviewed annually by the Commission and the thematic mandates are reviewed every three years. For the mandate to be continued, the Commission must adopt a resolution specifically renewing the mandate and identifying its scope.

Occasionally, there is some pressure from certain States to remove from office experts that they perceive as overcritical of their human rights record. There is no precedent of the Chairperson of the Commission removing any expert. In fact, until 1999, an individual expert could serve indefinitely on a mandate as long as the mandate was in operation.

In April 1999, the Commission decided that experts should serve a maximum term of six years. An extension of three additional years was provided as a transitional measure, for those experts whose six-year term had yet to end. The Commission also decided that there should be a turnover in the experts serving on working groups as well,

[8] See for instance, paragraph 7 of the report of the Inter-sessional Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights (E/CN.4/2000/112).

to "be accomplished in incremental steps over a three-year transition period".[9]

8. *Do the experts receive remuneration for their efforts?*

The human rights experts mandated and appointed by the United Nations do not receive salaries or any other financial reward for carrying out their tasks. They take on their functions out of a commitment to human rights and a conviction that the United Nations work in this field could make a difference.

9. *What is the experts' method of work?*

There is some uniformity in the methods of work for all mandates, although the resolutions establishing the mandates use different language to describe them. Over the years, the experts have developed specific approaches and methodologies to carry out their mandates. In 1999, the sixth annual meeting of the experts approved a manual[10] that spells out in detail the methods of work, *inter alia.*

All experts report to intergovernmental bodies, such as the Commission, or the United Nations General Assembly on their findings, conclusions and recommendations. The mandate of some experts requires them to carry out mainly conceptual studies while others take a more practical approach.

Most experts research and study issues of concern, carry out country visits, receive and consider complaints from victims of human rights violations, and intervene with Governments on their behalf. In some cases, the experts also recommend programmes of technical cooperation.

[9] "A replacement of two members in year one, two in year two and one in year three would provide continuity during the transitional period." (E/CN.4/2000/112, para.20.)

[10] *Manual for Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme*. See E/CN.4/2000/4, dated 18 December 1999.

(a) *Urgent appeals*

Intervening on behalf of victims of human rights violations is an essential element of human rights work. An indication that a violation has reached the attention of the United Nations or a mere inquiry by the United Nations about the circumstances of a case may often be sufficient to halt abuses.

Most experts receive information on specific allegations of human rights violations. In some cases, they send urgent appeals to a Government if a serious human rights violation appears to be imminent. Some experts send around one hundred interventions and appeals per year. They commonly report these communications to the Commission. In doing so, they follow principles of transparency and consistency. They attempt to provide equal opportunities to the sources of information and to the Government concerned. Some cases involve various types of violations relating to the mandates of several experts. In such cases, the experts are encouraged to coordinate their actions.

(b) *Country visits*

It is a priority for experts with country mandates to visit the particular country concerned. Sometimes they are denied access, in which case they travel to other countries, including the neighbouring countries, to interview refugees and other relevant actors. The budget of the United Nations allows the experts to visit a country once or twice a year. Extrabudgetary arrangements are sometimes also made to allow for more frequent visits.

Experts with thematic mandates may decide to carry out visits to countries relevant to those mandates, on the basis of information received. The United Nations budget normally allows for two country visits for each expert. Experts charged with thematic mandates attempt to visit countries in all regions of the world. The requests for visits are either initiated by the experts themselves or by the Commission on Human Rights in specific resolutions.[11]

[11] During the past two years, the thematic experts have reported to the Commission on their missions to at least the following 35 countries in all regions of the world concerning specific issues relating to their mandates: Afghanistan, Albania, Belgium, Cameroon, Chile, Colombia, Cuba, the Czech Republic, East Timor, Fiji, Germany, Guatemala, Haiti, Hungary, Indonesia, Ireland, Kenya, Malaysia, Mexico, the Netherlands, Pakistan, Peru, Romania, South Africa, Sri Lanka, Sudan, the former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, the United Kingdom, the United States of America, Venezuela, Viet Nam and Yemen. Some of these countries received visits from more than one expert.

The experts only carry out official missions. They do not go on mission to any country without the approval of the relevant authorities. The visits are normally organized in coordination with the United Nations team in the country concerned, led by the United Nations Resident Coordinator or the United Nations Information Office.

During these visits, the experts interact with both governmental and non-governmental actors. They require freedom of inquiry, including access to relevant facilities, such as prisons and detention centres, and contacts with representatives of non-governmental organizations. It is standard procedure for the experts to request assurances from the Government that no persons, official or private, who have been in contact with them will be subjected to threats, harassment, punishment or judicial proceedings. Indeed, planned visits have been called off when Governments were not ready to provide the experts with free access to places or to respect the independent nature of the expert's work. Media coverage of the country visits often places the human rights issue at the centre of the public debate.

Sometimes experts are requested by the Commission to carry out joint visits when the human rights problems in a specific situation are multidimensional. Such joint visits have been made in the context of the conflicts in East Timor and in the former Yugoslavia. Sometimes the experts themselves consider it useful to carry out joint missions. This form of coordination amongst the experts is to be welcomed.

(c) *Normative work*

Some experts attempt to develop authoritative norms and standards for their work. The Representative of the Secretary-General on internally displaced persons worked with a team of international legal experts to prepare a compilation and analysis of the legal norms pertaining to internal displacement, on the basis of which he then developed Guiding Principles for the protection of the internally displaced. In April 1998, the Commission took note of these principles and of the decision of the Inter-Agency Standing Committee welcoming the Guiding Principles and encouraging its members to share them with their executive boards. These Principles are designed to provide guidance to the Representative, States, all other authorities, groups and persons, and intergovernmental and non-governmental organizations when addressing the issue of internal displacement.

The Working Group on Arbitrary Detention, which is composed of five experts, has also developed a framework for action. In its Deliberation No. 5 adopted in December 1999, for instance, the Group estab-

lished criteria to govern cases of arbitrary detention of asylum-seekers. The work, which was undertaken in coordination with the Office of the United Nations High Commissioner for Refugees, was welcomed by a number of States and NGOs.

(d) *Follow-up*

The experts hold dialogues with Governments on their findings and recommendations. The dialogue becomes more meaningful when Governments demonstrate the will to approach the concerns raised by an expert in a serious manner. For instance, during the September 1999 visit of the Special Rapporteur on the question of torture to Kenya, the Government assigned a high-ranking police officer to liaise with the Rapporteur. The officer accompanied the Rapporteur during the mission and, on several occasions, ordered immediate corrective action to redress a violation, such as immediate medical attention for certain detainees or the release of one individual who was arbitrarily detained. The Special Rapporteur publicly acknowledged this effective follow-up action.

The effectiveness of the system rests on adequate follow-up of the experts' conclusions and recommendations. The Special Rapporteur on religious intolerance, for instance, developed a matrix containing the recommendations formulated in his report. He routinely transmits these to Governments requesting them to provide him with their comments, as well as to indicate the measures they have taken or intend to take to implement, even progressively, the recommendations. Other experts have started to use similar techniques. The responses they receive from Governments are included in their reports.

(e) *Non-State actors*

The experts do not only address States. Several mandates require their holders to deal with non-State entities. Between 1996 and 2000, the independent expert on the situation of human rights in Somalia reported on the violations committed by warlords and militia leaders in that country. She also addressed the actions taken by the United Nations agencies in the absence of a central government in Somalia. She devoted a major part of her 1998 report to allegations of violations committed by the international troops while in Somalia.

A growing number of mandates now address international institutions. Some of the mandates, particularly those on development and on structural adjustment and foreign debt, aim at considering the impact of

the financial institutions' policies, such as those of the World Bank and the International Monetary Fund, on human rights. Their value is in generating a debate about such issues.

(f) *The role of NGOs*

International, regional and national non-governmental organizations provide invaluable support to the special procedures system. Human rights NGOs have been at the forefront of the advocacy for the creation of specific mandates. They provide essential analysis and information on the human rights situation in many countries and with regard to many thematic issues. Such information is verified by the experts and often transmitted to Governments for their views. The NGOs disseminate the work of the experts to their local constituencies. The significant contribution that NGOs make to enhancing the system is widely recognized by Governments, the experts and the United Nations. The establishment of a mandate on human rights defenders in 2000 constitutes a recognition not only of the indispensable contribution of NGOs, but also of the fact that many human rights defenders are harassed and intimidated for carrying out their human rights work and of their need for protection.

10. *Does the work of experts have impact?*

Through their reports to the Commission, the experts highlight situations of concern. Their reports often provide an invaluable analysis of the human rights situation in a specific country or on a specific theme. Some reports bring to the attention of the international community issues that are not adequately on the international agenda.[12] Many reports name victims and describe the allegations of violations of their human rights. Throughout the year, many experts intervene on behalf of

[12] For instance, the Special Rapporteur on extrajudicial, summary or arbitrary executions has recently placed the issue of the killing of women in the name of honour on the international agenda. In November 2000, the United Nations General Assembly adopted its first resolution condemning this crime, which has for decades been practised with impunity against thousands of women in many parts of the world. On 15 November 2000, *The New York Times* published an editorial on the subject, which was reproduced in the *International Herald Tribune*. It stated "Thousands of times each year, a woman is murdered somewhere in the world by her father or brothers for acts that are seen as besmirching the family's honor, including committing adultery, defying a parental order to marry, being seen in public with a man or becoming a victim of rape—a crime that many people still believe could not happen without the victim's consent. A United Nations special investigator this year named 12 countries where she had received reports of honor killings, in the Middle East, South Asia, Europe, Latin America, and Africa".

victims. While the work of experts is often a major driving force contributing to change, it is difficult to attribute concrete results in the field of human rights to one factor. Much depends on how Governments, the civil society in a particular country and the international community react to the violations and to the findings, conclusions and recommendations of experts.

The continuous examination of a particular situation, however, signals to victims that their plight is not forgotten by the international community and provides them with the opportunity to voice their grievances. The perpetrators of human rights violations know that they are being watched. The authorities concerned know that the assessment of their human rights record will have an impact on political, developmental and humanitarian considerations. This sometimes brings improved accountability and therefore change for the better.

The experts' reports often serve as an important early warning. For instance, before the genocide in Rwanda took place, the Special Rapporteur on extrajudicial, summary or arbitrary executions visited the country and reported on the serious ethnic violence that was occurring. The international community did not provide an adequate response to this significant early warning.

There are many examples of concrete results being achieved by the experts. During their country visits, many of them succeed in obtaining relief for victims. In January 1992, for example, the Special Rapporteur on the situation of human rights in Afghanistan succeeded in obtaining a presidential decision from then President Najibullah to commute the death sentences of some 114 persons into 20-year prison terms.

11. *What is the relationship between the experts and the various United Nations bodies?*

The experts are asked to fulfil specific tasks that are outlined in specific United Nations resolutions. They are expected to remain within their mandate and carry out their duties with full independence from any governmental or non-governmental influence. This independence is highly prized by victims, Governments and NGOs.[13] It is a sine qua

[13] See for instance, paragraph 10 of the report of the Inter-sessional Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights (E/CN.4/2000/112).

non for the successful fulfilment of the mandates. As was stated on behalf of the United Nations Secretary-General before the International Court of Justice, "in the absence of complete independence, human rights mandate holders and special rapporteurs would hesitate to speak out against and report violations of international human rights standards".[14]

This independence does not, however, militate against coordination and dialogue with other actors, particularly within the United Nations system. Dialogue is very much encouraged by United Nations resolutions, as well as tradition. In resolutions establishing mandates the Secretary-General is typically requested to provide support for the work of the experts. This is mainly viewed as political support as well as financial support from the regular budget of the United Nations and the assistance provided by the Office of the United Nations High Commissioner for Human Rights (OHCHR). The various United Nations agencies are also requested to provide support for the work of the experts.

The work of the experts is facilitated by OHCHR and, while they are on mission, by the senior United Nations official in the country. Many experts also hold regular consultations with the United Nations Secretariat in New York and with the various specialized agencies. Without the support of the United Nations country teams, the work of the United Nations human rights experts would suffer seriously. For instance, on 4 March 1998 OHCHR concluded a Memorandum of Understanding with the United Nations Development Programme (UNDP), according to which UNDP and OHCHR shall cooperate closely "with a view to implementing aspects of mandates of country and thematic special procedures and working groups". The cooperation between UNDP and OHCHR endeavours to enhance the effectiveness and efficiency of human rights fact-finding missions. Local UNDP offices extend both substantive and logistical support before and during missions. UNDP also makes available relevant UNDP reports and evaluation papers regarding countries to be visited.

[14] Paragraph 55 of "Written statement submitted to the International Court of Justice on behalf of the Secretary-General of the United Nations" in the *Advisory Opinion on Difference Relating to the Immunity From Legal Process of a Special Rapporteur of the United Nations Commission on Human Rights.*

12. *What is the experts' legal status?*

The experts carrying out United Nations human rights mandates are legally classified as "experts on mission" in the meaning of the 1946 Convention on Privileges and Immunities of the United Nations. While they are working on their mandates, the experts enjoy functional privileges and immunities that are specified *inter alia* in article VI, section 22 of the Convention. These include:

> "*a*) Immunity from personal arrest and detention and from seizure of their personal baggage;
>
> *b*) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity is to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
>
> *c*) Inviolability for all papers and documents;
>
> *d*) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
>
> *e*) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
>
> *f*) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys."

The privileges and immunities of the Commission's experts recently became the subject of a binding advisory opinion by the International Court of Justice (ICJ). On 29 April 1999, ICJ gave its opinion in the case of Dato' Param Cumaraswamy, the Special Rapporteur on the independence of judges and lawyers. Dato' Cumaraswamy has been the subject of several defamation suits in Malaysia for damages amounting to US$ 112,000.

ICJ held that article VI, section 22, of the Convention on Privileges and Immunities of the United Nations was "applicable" in the case of Mr. Cumaraswamy[15] and stated that he was "entitled to immunity from legal process of every kind" for the words spoken by him during an interview published in the November 1995 issue of *International Commercial Litigation*. The Court also stated that Mr. Cumaraswamy

[15] *Advisory Opinion on Difference Relating to the Immunity From Legal Process of a Special Rapporteur of the United Nations Commission on Human Rights*, issued on 29 April 1999.

should be "held financially harmless for any costs imposed upon him by the Malaysian courts, in particular taxed costs". The Court found that the Government of Malaysia was under "the obligation to communicate the advisory opinion to the Malaysian courts, in order that Malaysia's international obligations be given effect and Mr. Cumaraswamy's immunity be respected".[16]

13. *Is there any oversight on the work of the experts?*

Human rights experts deal with issues that have a political dimension. It is thus hardly surprising that the objectivity and the quality of the work of some experts are sometimes questioned.

The Commission on Human Rights exercises oversight over the work of the experts while keeping in mind that the experts are irremovable, independent and are immune from legal process. It examines their reports and passes resolutions either welcoming or criticizing the work of the expert, or simply takes note of their action. During 1999-2000, the Commission undertook a general review of the work of the experts. As a result, it adopted a number of resolutions in April 2000 aimed at enhancing the effectiveness of the work of the experts. The adopted measures included the establishment of the above-mentioned time limit for mandate holders and reaffirmation that the independence of the experts constitutes a main criterion for their selection.

Moreover, the United Nations General Assembly is also currently debating a draft code of conduct that will apply to all experts on mission, including the United Nations human rights experts.[17] The experts' main concern with respect to the draft code is that it does not adequately take into account that they are unpaid independent actors, rather than paid consultants who receive instructions. Their function requires them to act in accordance with the mandate entrusted to them, their conscience, and on the basis of facts and human rights law.

The experts also exercise a degree of self-regulation. Since 1993, they meet annually to deliberate amongst themselves on issues relating to their mandates. During these meetings, they consider matters of

[16] See the report of the Inter-sessional Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights (E/CN.4/2000/112).

[17] *Proposed Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials and Experts on Mission* (A/54/695).

common interest, such as their methods of work. They also have discussions with the High Commissioner for Human Rights, the Bureau of the Commission on Human Rights, the Chairpersons of the United Nations human rights treaty bodies established under the six core United Nations human rights treaties[18] and NGOs. The meetings provide a forum for airing problems in an effort to find solutions.

14. *What resources are available to experts?*

As the experts are professionals with full-time jobs who render their services to the United Nations on a part-time basis, the quality of their output depends to a large extent on the quality of support they receive from OHCHR and the amount of time staff invest in this work. Currently, the Office can provide a staff member to assist each mandate for an equivalent of approximately three full-time months a year only.

Most States are conscious of the need not to overload the system. However, human rights situations sometimes dictate the creation of new mandates. The increase in the number of mandates, without a corresponding increase in resources to support them, places additional burdens on OHCHR.

In 1999, the High Commissioner requested two experts to prepare the study, with the assistance of two staff members, on the pressing needs of the experts and how they might be addressed. The study recommended five measures to strengthen the system: measures to enhance the effectiveness of urgent appeals; the development of a more effective response to emergencies; the improvement of follow-up methods; increasing support through the allocation of additional staff and the development of a database.[19] For these measures to be implemented, an increase in the resources currently available to OHCHR is needed.

[18] These are: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the International Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child.

[19] See *Capacity-building to strengthen the special procedures system of the United Nations human rights programme*, Thomas Hammarberg and Mona Rishmawi, 30 June 1999.

15. *Is there an overlap between the work of the experts and the functions of the United Nations High Commissioner for Human Rights?*

On 20 December 1993, the General Assembly created the post of United Nations High Commissioner for Human Rights. Unlike the experts, the High Commissioner is a high-level official of the United Nations appointed by the Secretary-General and approved by the General Assembly. The High Commissioner heads the Office of the High Commissioner for Human Rights, which supports the work of the experts. The current High Commissioner for Human Rights is Mary Robinson, the former President of Ireland. She took office in September 1997. José Ayala-Lasso, who was High Commissioner from April 1994 until March 1997, preceded her.

There is much interaction between the High Commissioner and the experts. While the mandates of the experts are specific, focusing on a country or a theme, the High Commissioner's mandate however, is broad and includes the promotion and protection of all human rights, civil, cultural, economic, political, and social in all parts of the world. As such, there is a possibility for overlap between the mandates of the High Commissioner and the special procedures mechanisms. This overlap is avoided through coordination.

16. *What is the Sub-Commission and how does it function?*

The Sub-Commission is a think-tank created by the Commission to assist it by undertaking in-depth thinking into particular phenomena. Amongst the main tasks of the Sub-Commission in the past was the preparation of draft standards and norms for the Commission's consideration. A number of those were eventually adopted by the United Nations General Assembly.

The Sub-Commission is composed of 26 independent experts. They meet annually for three weeks in August in Geneva to deliberate on human rights issues. State and NGO representatives also make statements before the Sub-Commission, whose meetings are generally open

to the public. The Sub-Commission recommends to the Commission topics that require further consideration.[20]

The Sub-Commission studies are aimed at enhancing the understanding of a topic and recommending to the Commission how to address it. Some of these studies may lead to a standard-setting exercise. Others may lead to the establishment of new mechanisms.

17. *Does the work of the Sub-Commission's experts differ from the work of the Commission's experts?*

Like the experts of the Commission, the experts of the Sub-Commission are "experts on mission" within the meaning of the 1946 Convention on Privileges and Immunities of the United Nations. This was affirmed by the International Court of Justice in an advisory opinion rendered on 15 December 1989 in a case known as the *Mazilu* case.

The Sub-Commission experts mainly conduct studies. They do not usually take up individual cases and do not send urgent appeals to Governments. They do not carry out fact-finding missions. The work of experts is publicly and extensively debated during the three-week session of the Sub-Commission. Every topic is usually studied by one or more special rapporteurs of the Sub-Commission for at least three years. The expert entrusted with the study normally submits a working paper, a preliminary report, a progress report and a final report.

[20] The Sub-Commission is currently studying a wide range of issues. These are studies by special rapporteurs on the rights of non-citizens; the concept and practice of affirmative action; globalization and its impact on the full enjoyment of human rights; the elimination of traditional practices affecting the health of women and girls; indigenous peoples and their relationship to land; and terrorism and human rights; as well as the preparation of working papers on discrimination based on work and descent; measures provided in the various international human rights instruments for the promotion and consolidation of democracy; the consequences of the working methods and activities of transnational corporations (TNCs) as well as the responsibility of States and TNCs with regard to violations of all human rights; procedures for the implementation of standards on the human rights conduct of companies; the administration of justice through military tribunals and exceptional jurisdiction; domestic implementation in practice of the obligation to provide effective remedies; discrimination in the criminal justice system; and the privatization of prisons. In addition, the Sub-Commission requested the Commission in 2000 to approve four new studies. These are: the human rights problems and protections of the Roma; the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water; human rights and human responsibilities; and reservations to human rights treaties.

The experts of the Sub-Commission are often academics, lawyers, judges or, in some cases, representatives of their Governments. They are expected to conduct their work on the Sub-Commission, however, independently of any governmental or non-governmental influence.

As independent experts, the experts are not subject to the oversight of the United Nations Secretariat. While they are assisted by OHCHR, the experts carry out their research independently of the Secretariat. Owing to the limited Secretariat resources available, as mentioned above, the experts often rely on their own resources to support their research.

CONCLUSION

The United Nations human rights experts play a vital role in working towards the universal achievement of freedom from fear and want. They are not paid. Their reward is the satisfaction of working towards the realization of human rights, as "the highest aspiration of the common people" as the Universal Declaration of Human Rights proclaimed.

The system remains seriously under-resourced and has yet to achieve its full potential, however. Efforts are continuing to be made to strengthen the system to enable it to achieve the goal of universal respect for all human rights. With the cooperation of various actors, in particular Governments, United Nations bodies, and the non-governmental sector, its effectiveness could be considerably enhanced.

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Inquiries should be addressed to:

Office of the United Nations High Commissioner for Human Rights
United Nations Office at Geneva
8-14, avenue de la Paix
1211 Geneva 10, Switzerland

New York Office:
Office of the United Nations High Commissioner for Human Rights
United Nations
New York, NY 10017
United States of America

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