

**Генеральная Ассамблея**

Distr.: General
2 July 2014
Russian
Original: Spanish

Совет по правам человека

Двадцать седьмая сессия

Пункт 3 повестки дня

**Поощрение и защита всех прав человека,
гражданских, политических, экономических,
социальных и культурных прав,
включая право на развитие**

**Доклад Рабочей группы по насильственным
или недобровольным исчезновениям**

Добавление

Миссия в Испанию* ***Резюме*

По приглашению правительства Испании Рабочая группа по насильственным или недобровольным исчезновениям посетила страну с 23 по 30 сентября 2013 года.

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Эти успехи были достигнуты благодаря инициативам, предложенным или осуществленным родственниками жертв или гражданским обществом и рядом государственных ведомств на национальном уровне или в некоторых автономных сообществах. В соответствии со своими обязательствами, вытекающими из Декларации о защите всех лиц от насильственных исчезновений и норм международного права, государство должно взять на себя ответственность и руководящую роль, для того чтобы сделать эти инициативы частью комплексной, последовательной, постоянной и основанной на взаимодействии и сотрудничестве государственной политики. При осуществлении всех мероприятий в связи с насильственными исчезновениями следует принимать во внимание гендерный фактор.

Сотни родственников пострадавших, с которыми встречались члены Рабочей группы, заявляли о своем глубоком разочаровании в связи с административными препятствиями и трудностями в процессе получения доступа к информации, необходимой для выяснения судьбы и местонахождения своих близких. С учетом того, что с момента совершения большинства насильственных исчезновений прошло очень много времени, а также с учетом преклонного возраста многих свидетелей и родственников пострадавших представляется крайне важным, чтобы государство исходило прежде всего из необходимости установления истины, в частности, в том, что касается судьбы и местонахождения пропавших без вести лиц.

К числу других еще не решенных серьезных проблем относятся: ограниченность сферы действия Закона об исторической памяти; нехватка бюджетных средств для целей его осуществления; сохранение Закона об амнистии в том виде, в каком его толкуют судебные органы; безнаказанность в отношении всех случаев насильственных исчезновений; отсутствие в законодательстве конкретного преступления в форме насильственного исчезновения; отсутствие закона о доступе к информации; затрудненность доступа к архивам; а также отсутствие национального плана по розыску пропавших без вести лиц.

Рабочая группа подтверждает свою солидарность с жертвами насильственных исчезновений и их семьями. Их постоянные страдания служат веским доказательством того, что насильственные исчезновения следует считать длящимися преступлениями и длящимися нарушениями прав человека до тех пор, пока не будет выяснена судьба или местонахождение жертв. Кроме того, Рабочая группа заявляет о своей готовности продолжать конструктивный диалог с испанским государством и оказывать ему содействие в целях полного осуществления Декларации.

Annex

[English and Spanish only]

Report of the Working Group on Enforced or Involuntary Disappearances on the mission to Spain (23 to 30 September 2013)

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I. Introduction

1. The United Nations Working Group on Enforced or Involuntary Disappearances visited Spain from 23 to 30 September 2013. The delegation comprised Ms. Jasminka Dzumhur and Mr. Ariel Dulitzky. The purpose of the visit was to examine the main initiatives and policies of the Spanish State in relation to enforced or involuntary disappearances and to address issues related to justice, truth, reparation and memory for victims of enforced disappearance, all in light of the Declaration on the Protection of All Persons from Enforced Disappearance. The Declaration reflects, codifies and consolidates customary international law, which is legally binding on all States, including the Spanish State.

2. The experts met with various authorities, including: in Madrid, the Secretary of State for Justice; the Secretary of State for Security; the Secretary of State for International Cooperation and Latin America; the Under-Secretary, Office of the Prime Minister; the Under-Secretary of Defence; the Director-General for Multilateral and Global Affairs, and the Director of Human Rights at the Ministry of Foreign Affairs; the Under-Secretary of the Interior and the Executive Secretary of the Human Rights Programme of the Ministry of the Interior and Public Security; the National Director of the Civil Registry and Identity Service; the National Director of the Forensic Medical Service; the Under-Secretary for Justice; the Under-Secretary for Defence; the Director-General of Foreign Policy, Multilateral Global Affairs, and Security; the Director of the Human Rights Office of the Ministry for Foreign Affairs and Cooperation; judges from the National Council of the Judiciary and prosecutors from the Office of the Attorney-General. They also met the President of the Senate and the Congressional Committee on Internal Affairs. In Catalonia the experts met the Government Representative to Catalonia; the Ombudsman and members of the Memorial Democràtic and the Institut Català Internacional per la Pau. In the Basque Country they met the Minister of Public Administration and Justice and spokesperson for the Basque Government; the Director for Victims and Human Rights of the Basque Government; the Human Rights Commission of the Basque Parliament and its Chairperson; the President of the High Court of Justice of the Basque Country and the Senior Prosecutor of the Basque Country; and the Ombudsman. In Andalusia the experts met the Vice-President of the Government (Junta) of Andalusia; the Director-General of Memoria Democrática; the Andalusian Parliament and the deputy Ombudsman.

3. The Working Group wishes to thank the Government of Spain for its invitation to visit the country, for its extensive and positive cooperation before and during the mission, for its candid approach and openness to dialogue and for the information provided during the visit and the additional information provided afterwards. It also wishes to thank the authorities of the three autonomous communities that it visited.

4. The Working Group met hundreds of family members and associations of families of disappeared persons, and other civil society organizations, lawyers, historians, doctors, archaeologists, forensic anthropologists and academics. It also received direct information from witnesses to enforced disappearances. The Working Group is grateful for the copious information and cooperation it has received.

5. The delegation visited the Valle de los Caídos, the Fossar de la Pedrera in Barcelona and, in Seville, the Murallas de la Macarena and the mass grave at the cemetery. The experts met the Secretary-General of the Spanish Conference of Bishops.

6. Gross violations of human rights were committed in Spain during the Civil War (1936–1939) and the dictatorship (1939–1975). As yet there is no official figure for the number of persons who disappeared, for Spain does not have a central database in this area.

According to the criminal investigation carried out by Criminal Investigation Court No. 5 of the National High Court, the number of victims of enforced disappearance from 17 July 1936 to December 1951 is 114,226. Since this criminal investigation was to all intents and purposes blocked or undermined, that number could not be reliably confirmed by a court enquiry.

7. The order to open an investigation also refers to the systematic abduction of children of Republican detainees (a figure of 30,960 children is mentioned), who were allegedly given to families who supported the Franco regime once their identities had been changed in the Civil Register. In addition, during the Civil War, many Republican parents evacuated their children abroad. When the War was over, the Franco regime decided that all those children should return and, after repatriation, many were sent to Auxilio Social centres, whereupon parental rights were automatically transferred to the State, while their biological families were quite unaware of this situation. Many of these children were adopted without the knowledge or consent of their biological families.

8. The Working Group has received information concerning the alleged “theft” and “kidnapping” of babies and children after the Civil War and even after the restoration of democracy. According to the reports, hundreds of babies were stolen from hospital maternity wards and illegally offered for adoption in exchange for money. According to the information received, in some cases the theft or kidnapping could have taken place with the knowledge or involvement of certain authorities or officials. In order to perpetrate these thefts, the biological parents were given to believe that their children had died shortly after birth. On other occasions the babies were simply snatched under threat and the adoptive parents were told that they had been abandoned. There are apparently around 1,500 complaints with prosecutors but it has not yet been possible to establish how many people were affected by these acts.

9. Information has also been received about isolated cases of disappearance during the 1970s and 1980s, in the context of efforts to combat terrorism. The Working Group acknowledges and emphasizes that, unlike other countries, Spain responded to terrorist violence without systematically resorting to enforced disappearance.

II. Legal framework

10. The Working Group commends Spain for having ratified the vast majority of the international human rights treaties and the Rome Statute of the International Criminal Court. It also notes with satisfaction that the State party has issued a standing invitation to all the Human Rights Council special mandate holders. It particularly welcomes its ratification of the International Convention for the Protection of All Persons from Enforced Disappearance and its recognition of the competence of the Committee on Enforced Disappearances to receive and consider communications under articles 31 and 32 of the Convention. It also congratulates the State on the presentation of its initial report to the Committee.

11. The 1978 Constitution incorporates and protects all fundamental rights in a manner that is broadly and generally consistent with international law. Article 10, paragraph 2, requires rights to be interpreted in a manner consistent with the treaties ratified by Spain. Nevertheless, in many cases of enforced disappearance the Working Group has noted a lack of analysis, or inadequate analysis, of the compatibility of domestic norms and practice with the State’s international obligations.

12. Article 17, paragraph 4, of the Constitution covers the procedure of habeas corpus, which is regulated by Organic Act No. 6/1984. Yet the Constitution itself states that the rights under article 17 can be suspended where a state of emergency or siege is proclaimed

(art. 55). However, it should be pointed out that, according to information provided by the Government, no state of emergency or siege has ever been proclaimed since the promulgation of the Constitution in 1978.

13. The Working Group has analysed the provisions of the Spanish Criminal Code that were cited and described by various authorities — either during the visit or as supplementary information provided later — as regulating enforced disappearance (arts. 163–168 and 530). An analysis of these articles, separately or in conjunction with some or all of them, shows that the Spanish Criminal Code does not contain a separate offence of enforced disappearance, for the offences mentioned contain none of the elements that constitute enforced disappearance. They do not require the involvement of an agent of the State or provide for State support, acquiescence or cooperation in an offence of enforced disappearance committed by a person or group of persons. They only cover the offence of unlawful detention or abduction, whereas the Declaration refers to other possibilities such as arrest, detention or abduction of individuals against their will or being “otherwise deprived of their liberty”. In addition, the wording used in the Criminal Code (“failing to reveal the location of the victim”) is not broad enough to include the third component of enforced disappearance of persons, namely a refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the victim. Lastly, the Criminal Code fails to specify that the consequence of disappearance is to place the person outside the protection of the law. Thus Spanish law is deficient in the area of enforced disappearance.

14. The draft reform of the Criminal Code is a major step forward as it increases the penalties for the offences mentioned above to make them the same as for homicide. It does not, however, include a separate definition of enforced disappearance. The Working Group appreciates the communication received from the Government to the effect that the parliamentary groups might introduce a separate definition of the offence of enforced disappearance and that separate provision for the offence of enforced disappearance is now under consideration.

15. The authorities have informed the Working Group that article 607 bis of the Criminal Code, entitled “Crimes against humanity”, defines crimes against humanity as they are defined in the Rome Statute of the International Criminal Court. This is a welcome addition to the Criminal Code, for it defines enforced disappearance as a crime when it is committed as a part of a widespread attack against a civilian population.

16. Under Spanish law, crimes against humanity, including enforced disappearance, are not subject to the statute of limitations. In addition, under article 132 of the Criminal Code, the term of limitation in respect of a continuing offence begins to run when “the unlawful situation ceases”. Despite this, in considering cases of enforced disappearance during the Civil War, the Supreme Court did not accept that enforced disappearance was a continuing offence and consequently found that the statute of limitations applied to those cases.

III. Truth and memory

17. The families of the disappeared in Spain wish to know the truth about the fate or whereabouts of their loved ones. This is an absolute right under the Declaration and an obligation that the Spanish State should meet in accordance with international law. The Working Group, in its general comment on the right to the truth in relation to enforced disappearance, stated that the right to the truth “means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearance, and the identity of the perpetrator(s)

(A/HRC/16/48, para. 39). Several victims' associations have been formed and there is a dynamic civil society in Spain working for these ends.

18. The Working Group has observed a lack of proper liaison and communication between these victims' groups and the State authorities. Victims' groups, and in particular associations of family members, have not been duly consulted or kept fully informed as measures have been adopted, with the result that those measures have been inadequate and, in many cases, ineffective. In the autonomous communities the Working Group visited, however, communication flows more freely.

19. Spain does not have a State body that deals with all matters relating to enforced disappearance, including the creation and administration of a central database on disappearances. The information available on enforced disappearances during the Civil War and the dictatorship is fragmented and scattered, which makes for confusion over the number of enforced disappearances, among other things. A central database is vital in promoting transparency, accuracy and certainty in respect of disappeared persons. It is necessary to have individual information and statistical data, notably in order to make a clear distinction between the victims of execution and the victims of enforced disappearance. The data should be disaggregated by sex, age and geographical area and give the location of the place where the disappearance occurred. It should also include the date and place of burial and details of any exhumation and identification, and information concerning family members.

20. The Working Group acknowledges the importance of Act No. 52/2007 of 26 December, which "recognizes and enhances rights and introduces measures on behalf of those who suffered persecution or violence during the civil war and the dictatorship". Known as the Historical Memory Act, it attempts to lay the foundations for future policies on the recognition and enhancement of victims' rights, the promotion of reparation and the recovery of memory. It also makes provision for the moral recognition of victims, the award of grants, the banning of symbols commemorating the Franco regime and the creation of a documentation centre. The Working Group received information concerning other legislative measures in respect of victims, such as the Act on Recognition of and Comprehensive Protection for Victims of Terrorism (Act No. 29/2011, of 22 September). According to the information received, this Act grants more rights to victims than the Historical Memory Act, thereby creating different categories of victims.

21. Articles 11 to 14 of the Historical Memory Act, which refer to the finding and identification of disappeared persons, are an attempt to respond to the demands of thousands of family members who wish to know the fate or whereabouts of their loved ones. Yet the measures provided for in the Act require action by the families requesting them and do not create a State obligation to act *ex officio*, and this has created a number of difficulties in the exercise of the rights contained in the Act. Under article 11, the State authorities only have an obligation to cooperate with individuals and to facilitate investigation, search and identification in respect of disappeared persons, which effectively shifts the responsibility for the work from the State to the families. The search for disappeared persons cannot be dependent on the efforts or initiative of family members but should be undertaken as an obligation of the State.

22. The Working Group is aware that the passage of time, the mass nature of the enforced disappearances and the use of mass graves containing hundreds or thousands of people mean that, in many cases, this obligation to guarantee the truth may not result in the identification of every one of the victims individually. Indeed, experts and many of the families acknowledge that, in some places, exhumation is neither possible or desirable. As the Working Group states in its general comment on the right to the truth, "there is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain,

for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person.”

23. The Working Group sees it as positive that the Historical Memory Act establishes an obligation to draw up a protocol for a scientific, multidisciplinary approach to exhumations and to map the mass graves around the country. The Protocol for Exhumation of Victims of the Civil War and the Dictatorship was adopted in September 2011, that is nearly four years after the adoption of the Act, during which time numerous exhumations were carried out. The Protocol is important because it provides for minimum standards to be observed by all scientific teams conducting exhumations.

24. The process of establishing the whereabouts and identity of those who disappeared has had limited success, with the discovery and subsequent exhumation of several mass graves. Some of the factors that account for this limited success are the length of time that has passed since the disappearances began, the fact that there has been little or no involvement by the State, the lack of any clear, detailed and specific procedure for exhumation and identification, and the fact that there is no genetic database of the family members of disappeared persons. There are no national regulations specifically on dealing with the remains after exhumation. The Historical Memory Act fails to regulate the search, exhumation and identification procedure or institutional responsibility for it. This has meant that the families have been obliged to go through numerous judicial and administrative procedures in order to obtain exhumation of the remains of disappeared persons, and their identification, with no clear legal or administrative framework to work in. In particular, there is no national plan for searching for the disappeared, no coordination of the work of exhumation and identification and no updating of the maps of mass graves created under the Historical Memory Act. Establishing an institutional mechanism to take on these tasks ought to improve implementation of the Act and make for better understanding of the nature, causes and impact of enforced disappearances, and promote a culture of responsibility and accountability and respect for the rule of law.

25. The support offered by the various autonomous communities is highly contingent on the governing political party in each place. This results in victims being treated differently depending on where a mass grave is located and it does not make for equal application of the rights recognized in the Declaration or the Historical Memory Act. In some autonomous communities, the local authorities have assumed full responsibility for exhumation — the path chosen by Andalusia in 2003 and that led to the adoption of the Andalusian Protocol for Exhumation of Victims of the Civil War and the Post-war Period, of 2009 — whereas in others, the Government has stayed completely outside the process.

26. Since 2006 the Spanish Government has allocated more than €25 million to the various historical memory associations for their work in the recovery of historical memory, for example locating and exhuming graves, organizing acts of homage and carrying out investigations. The implementation of this aspect of the Historical Memory Act has yielded an abundance of valuable information. The Working Group warmly welcomes this financial investment by the Spanish State in recognizing victims' rights and meeting its international obligations.

27. That said, in the last two budgets no financing was allocated to the Department of Rights of Pardon and Other Rights of the Ministry of Justice, which now has responsibility for applying the provisions of the Historical Memory Act at the national level. The Department was part of the Office for Victims of the Civil War and the Dictatorship in early 2012. The Government has informed the Working Group that the change has not diminished the attention being paid to victims or implementation of the measures

established in the Historical Memory Act. Family members and associations have told the Working Group that, in their view, the cutting of the budget, together with the change of name — which makes no reference to victims — are not solely due to a purely technical restructuring or the economic crisis the country is going through. They note in particular that there is now no department within the Spanish State, even in name, with a sole mandate to attend specifically to victims and answer for their rights, or with a budget to implement the Historical Memory Act.

28. The Historical Memory Act also provides that State administrations should prepare and make available to all interested parties within their territory maps showing the areas where remains are to be found. The Map of Mass Graves is administered by the Ministry of Justice and, according to information received, the Map now shows 2,382 graves throughout the country. However, the Working Group was told that not all the autonomous communities have prepared such maps. Moreover the national map is not updated regularly. At the same time, the Working Group received positive, detailed information on regular updates regarding exhumations and identification of mass graves in the Basque Country and Andalusia. In the Basque Country, for example, the Working Group was given a census that had been taken of exhumations and victims.

29. The obstacles encountered in accessing information and archives are a major problem for victims in their search for the truth. In some cases documents have been deliberately destroyed. The security archives are still difficult or well-nigh impossible to get at. In general there is resistance to declassifying or allowing access to documents. The lack of a comprehensive law regulating access to information and archives means that access to public archives can be regulated or operate differently depending on the geographical region or the institutions involved. This creates situations in which access to information may depend on the goodwill of the official dealing with the request, or their interpretation of the rules.

30. The Working Group notes that there are a number of disputes over death registers and as to the accuracy of the information they contain as regards victims of the Civil War. Some registers have been destroyed, or else access is denied on various grounds, such as protection of personal information. The Working Group was also told that it was difficult to gain access to records belonging to the Catholic Church. Given that many cemeteries are on Church property and information on baptisms and deaths is held in Church records, it is essential, in order to guarantee victims' right to the truth, to open them up and facilitate access for those who are looking for disappeared persons or children believed to have been stolen.

31. The law on protection of personal databases blocks victims' access to information. The authorities apparently use the law to deny access to information relating to disappearance if the information contains a personal detail. Information that is controlled by a State body is a public asset and public access to such information promotes greater transparency and accountability. If public information contains personal details then it should be considered on a case-by-case basis so as to strike a balance between access to information and protection of personal data. The claim of "reasons of State security" for denying requests for information should be used restrictively and only in exceptional circumstances, because this is a matter of investigating enforced disappearances committed in a context of international crimes. What is more, given the time that has passed, it is hardly reasonable to suppose that State security could be jeopardized by access to these records.

32. Moves are now under way to legislate on access to information. The aim is to increase transparency in government activities — with a particular emphasis on battling corruption — rather than to regulate the public's access to information. A wide-ranging law on access to information would help overcome the obstacles described above.

33. The Historical Memory Act also provides that State administrations shall take the necessary steps to remove shields, insignia, plaques and other commemorative objects or references that represent a glorification, whether personal or collective, of the military uprising, the Civil War and the repression by the dictatorship. The Government has informed the Working Group that 86 per cent of the relics listed by the Expert Technical Commission on the removal of symbols of the Franco era have been removed. Family members and associations have informed the Working Group that this provision has not always been observed, for there are no clear and precise regulations establishing what is commemorative and the various bodies' discretion in the matter. These sources say that the political colour of the relevant authority is the decisive factor in removal of such symbols. According to the Government, however, the symbols that have yet to be removed are ones requiring a special administrative procedure or that would incur major financial expenditure because of some particular historic and cultural interest and value.

34. In the area of memory and truth, a small number of autonomous communities have played a major part in extending the scope of the Historical Memory Act. Catalonia adopted a law (Act No. 10/2009) on locating and identifying disappeared persons and the honouring of mass graves. Honouring the graves has taken priority over exhumation. It has also established the "Memorial Democràtic" as the body responsible for policy on civic action on recovery, commemoration and building democratic memory. The Working Group notes with concern the reduction in the budget allocated to the work of the Memorial Democràtic. The Government of the Basque Country has signed a cooperation agreement with the Aranzadi Society for Science, allowing it to carry out a census of the disappeared, exhume numerous graves and identify the victims of enforced disappearance. Whenever a body is identified, the Government of the Basque Country sends a personal letter to the family and a file containing all the information gathered. In Andalusia, the Directorate-General for Democratic Memory is active in many ways, awarding honours and distinctions, making grants to local authorities and other bodies for commemorative monuments, investigations, studies, conferences, exhibitions and publications. In addition, a database of the victims of reprisals by the Franco regime has been created as part of the Todos los nombres (Every name) project.

35. The Working Group received information on the various important initiatives by the Spanish State with regard to the situation of stolen children. It commends the establishment, in the Ministry of Justice, of an information service for those affected by a possible baby theft, the action taken by the Attorney-General's Office, the creation of a DNA bank, the cooperation agreement between the Ministry of Health, Social Services and Equality and the Attorney-General's Office, and the reports by national and independent human rights institutions, inter alia. The Working Group received information regarding the many obstacles that prevent documentation of cases of child theft and the ineffectuality of the investigative measures taken to date. Moreover the national DNA bank does not have enough genetic samples, despite the size of the universe of potential victims and reported cases.

36. The Working Group was able to visit the Valle de los Caídos and received detailed information from a number of State and religious authorities on the site. The State described the various measures being taken to prevent the site deteriorating. It also received information from the families of victims whose bodies now lie in the Valle de los Caídos. More than 33,000 bodies were moved there, thousands of them unidentified. Many remains were taken from frontline cemeteries or from "Republican graves" excavated without families' permission or knowledge. For countless families, it is only in recent years that they learned that their disappeared relatives had been moved to the Valle de los Caídos. The chances of finding and identifying bodies in the Valle de los Caídos are in many cases remote as the area where the bodies lie is apparently prone to serious water damage and has been neglected for years. For many families it is highly problematic that their loved ones

are in a religious site that does not accord with their own beliefs, and not far from the bodies of Francisco Franco and José Antonio Primo de Rivera, the only ones on the site to be acknowledged by their full name. In 2011 a multidisciplinary expert commission was set up to consider the future of the site and it reported in November 2011. Regrettably, the report was not properly circulated and its recommendations have yet to be implemented. The State pointed out, and the Working Group agrees, that action on the Valle de los Caídos requires a broad consensus of all political forces, for which the Government should provide the impetus in the near future.

IV. Right to justice

37. The Declaration requires that the State guarantee to victims of enforced disappearance an effective remedy that includes a thorough and impartial ex officio investigation with a view to identifying those allegedly responsible for the disappearance and imposing the appropriate penalties. However, the combination of a defective legal framework, a judiciary that does not interpret the law in light of international human rights law, prosecutors who have not conducted investigations and the existence of the Amnesty Act and, in particular, the courts' interpretation of the Act, have established a pattern of impunity for enforced disappearances committed during the Civil War and the dictatorship. No effective judicial investigation into any named individual is under way and no one has been convicted for the disappearances during the Civil War and the dictatorship.

38. A number of complaints were brought in the 1990s but they were usually dismissed. In December 2006 a group of victims submitted a collective complaint to the National High Court demanding a judicial investigation into the thousands of enforced disappearances that had allegedly occurred during the Civil War and the dictatorship. Criminal Investigation Court No. 5 of the National High Court, to which the complaint was assigned, described the offences as having been committed in a context of crimes against humanity and referred to a systematic plan of attack to eliminate political opponents starting in 1936 and during the Civil War and the following years. The judge disqualified himself as not competent and referred the proceedings to the relevant territorial courts, which dispersed, undermined and prevented any systematic investigation. Charged with malfeasance in office (*prevaricación*) for having opened and pursued the investigation, the judge in Criminal Investigation Court No. 5 was suspended, tried and ultimately acquitted on 27 February 2012 by Supreme Court judgement. The Supreme Court found that the judge in Criminal Investigation Court No. 5 had committed an error in carrying out the investigations but had acted without the malicious intent required to establish an offence of malfeasance. A month later the Supreme Court ruled in a conflict of jurisdiction, finding that it was the territorial courts, not the National High Court, that were competent to try cases of enforced disappearance during the Civil War.

39. In its rulings on acquittal and competence, the Supreme Court explicitly found that criminal investigation of cases of enforced disappearance during the Civil War was inadmissible since the period of limitation had expired, the alleged perpetrators had died, the continuing nature of disappearance was a fiction that was legally unacceptable and, in any event, the cases were covered by the 1977 Amnesty Act. This set of considerations runs counter to the principles deriving from the international obligations of Spain, including the Declaration.

40. The Working Group is particularly concerned at the effect of the trial of the National High Court judge, the Supreme Court ruling and its decision regarding the competence of the courts. What all this has meant in practice is that any proceedings to clarify and try the thousands of cases of enforced disappearance committed during the Spanish Civil War and the dictatorship are closed, dismissed or blocked, or investigations are kept to a minimum.

Following the Supreme Court rulings, practically no judges launched or pursued, and no prosecutors conducted any investigation into enforced disappearances. It is true that that was already the situation, but the Supreme Court rulings gave the lower courts new arguments for not proceeding with such cases.

41. Enforced disappearance is a continuing offence and an ongoing violation of human rights as long as the fate and whereabouts of the victims remain unclarified (Declaration, art. 17). Enforced disappearance is a single consolidated act, not a combination of isolated, unconnected facts. Even if certain aspects of an enforced disappearance may have been completed years or decades ago, if other aspects of the disappearance persist, and especially if the fate or whereabouts of the victim have not been established, the case should be tried by the criminal courts and the act of enforced disappearance should not be broken down into smaller parts. Thus the period of limitations can only begin once the disappearance has ceased. And even if, for the sake of argument, the statute of limitations was applicable, it could only apply once the judicial investigation had been completed, not before. As the Attorney-General put it, "First the investigation has to be completed and only then can a position be taken on the statute of limitations, for reasons of pure logic" (Circular 2/2012).

42. Moreover, the fact that they are crimes against humanity means that the disappearances committed during the Civil War and the dictatorship are offences that are not subject to the statute of limitations.

43. In October 1977 an Amnesty Act was passed with broad support in the democratic parliament. According to information received by the Working Group, the Spanish authorities and a broad swathe of society see the Amnesty Act as a key component in the peaceful transition from dictatorship to the rule of law, its purpose being to "close wounds and forget the Civil War and political enmity", as the Government said. The Working Group was told that the Spanish Amnesty Act is not an "end of story" law (*ley de punto final*). In this regard, article 18 of the Declaration categorically states that persons who have or are alleged to have committed offences of enforced disappearance shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction. An amnesty law and the interpretation of that law should not permit the State's obligation to investigate, try and punish those responsible for disappearances to lapse completely.

44. In this debate on the judicial response to enforced disappearance, the Constitutional Court has endorsed, explicitly or implicitly, the decisions by other courts to close down investigations, not order exhumations or not recognize the rights of victims' families. The Working Group understands that it should be possible for the Constitutional Court to give an opinion that would bring Spanish judicial practice into line with the country's international obligations.

45. In a few cases, the courts have apparently ordered investigations that made it possible to establish the date and cause of death, recover and exhume victims' remains and identify them and hand them over to their families. Even these cases, however, all ended the same way, with dismissal and closure of proceedings. These isolated positive cases show that it is important and possible for judicial action to guarantee victims' rights, in part at least. The Working Group very much welcomes information received to the effect that a number of investigations have recently been launched, resumed or reopened.

46. When a request is made for an excavation and exhumation of a mass grave or a site where disappeared persons could be buried, judges, prosecutors and police do not visit the site, on the grounds that this is not part of a criminal investigation. This decision amounts to a serious failure on the part of the judicial and prosecuting authorities to investigate ex officio any crime that might have been committed, and particularly enforced disappearance. Indeed, in the majority of cases the complaints are summarily dismissed without judicial

action of any kind. As long as there has been no proper scientific identification of the remains or determination of the dates and causes of death, and no judicial ruling on the existence of a crime, the possible perpetrators and any grounds for extinction of the right of action or of the punishment, courts cannot prejudge those issues without risking a violation of fundamental principles of law. In other cases, courts refer to the Historical Memory Act, claiming that the criminal jurisdiction is not the proper avenue for establishing the truth concerning a disappeared person.

47. As to judicial proceedings in the cases known as “child thefts”, the Working Group draws attention to Attorney-General’s Office Circular 2/2012, setting out standard guidelines for proceedings for abduction of newborn children, which maintains that the offence is continuing in nature and not subject to a statute of limitations. This position is compatible with the provisions of the Declaration. The Attorney-General’s Office has rejected the notion of a systematic plan to steal children. It is important that, where there is sufficient evidence, judicial investigations consider the possibility of links between multiple cases of alleged illegal abduction of children.

48. Organic Act No. 6/1985 of 1 July, on the judiciary, takes a broad view of universal jurisdiction (art. 23). Thanks to this, the Spanish judiciary made very important contributions to the development of universal jurisdiction, by investigating and trying international offences, including enforced disappearance, one example of which was the well-known *Scilingo* case. This action by the Spanish judiciary also played a vital part in strengthening domestic judicial procedures in some of the countries where universal jurisdiction had been asserted, making it possible to reopen or launch proceedings for enforced disappearance. This shows that the Spanish judiciary is quite capable of conducting serious investigations and imposing proper penalties for serious human rights violations, including enforced disappearance.

49. Organic Act No. 1/2009, however, has considerably curtailed the competence of Spanish courts and the application of the principle of universal jurisdiction. This Act has been invoked to dismiss at least two complaints containing claims of enforced disappearance. A new legislative framework, adopted after the visit, restricts the scope of universal jurisdiction even more.

50. In view of the impunity of perpetrators of enforced disappearances during the Civil War and the dictatorship, Spanish victims have asked the courts of Argentina to exercise universal jurisdiction. The Argentine judiciary is now proceeding with one complaint and has sought the cooperation of the Spanish judiciary and State. The State indicated that the Ministry of Justice has accepted all requests for international judicial assistance. Other sources, however, say that the authorities have not always cooperated fully with the Argentine judiciary. In this regard the Working Group emphasizes the importance of judicial cooperation and recalls that, according to article 277 of Organic Act No. 6/1985 of 1 July on the judiciary, “Spanish courts shall provide to foreign judicial authorities such cooperation as they may request in the conduct of their functions, in accordance with international treaties and agreements to which Spain is a party.”

51. According to information received, military courts may have competence to investigate and try cases of enforced disappearance committed by the military, notwithstanding the clear stipulation in article 16, paragraph 2, of the Declaration.

V. Awareness-raising, human rights education and other preventive measures

52. In order to prevent a repetition of enforced disappearances, it is essential to ensure that the public is deeply aware of what happened, properly educate generations to come

about the past and provide society in general and civil servants in particular with adequate training in human rights. In this regard, the Working Group was pleased to hear that training for the Armed Forces covers human rights and international humanitarian law. It was also informed that special subjects relating to the Convention were to be included in 2014. The Working Group emphasizes the importance of including the necessary education and information regarding the relevant provisions of the Declaration in the training given to law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty. Training for judges, prosecutors and lawyers is equally important. The Legal Studies Centre gives courses on human rights and the framework agreement between the General Council of the Judiciary and the Ministry of Justice also provides for human rights training. On the other hand, Act No. 34/2006 on qualification as a court lawyer (*abogado*) or legal representative (*procurador*) contains no provisions on human rights.

53. As a preventive measure, articles 10 to 12 of the Declaration require that deprivation of liberty must be carried out in strict compliance with national and international human rights standards. Yet article 509 and related articles of the Criminal Procedure Act establish a regime of incommunicado detention. Under Spanish law the investigating judge may order a detainee to be held incommunicado for up to 5 days in any case and up to 13 days if they are suspected of belonging to armed gangs or having links with gangs or being involved in terrorist offences. During this time the detainee has no right to a lawyer of their choice or to talk to a lawyer in private, or to inform a member of their family or another person of their choice that they have been detained or where they are being held, or to be examined by a doctor of their choice. The Government informed the Working Group that the Ministry of Justice is currently working on an overhaul of the Criminal Procedure Act, which will apparently make changes to the regime of incommunicado detention. It also indicated that this measure is subject to court supervision and that there is a protocol, adopted by the National High Court, which provides additional safeguards.

54. Detailed information was also received from the State concerning measures relating to the detention and expulsion of undocumented migrants, and the legal safeguards that exist, including Organic Act No. 4/2000 and Act No. 12/2009, to prevent returning a person if they might be at risk of human rights violations. However, domestic law does not make specific reference to enforced disappearance. In addition, the Working Group was concerned at claims it received to the effect that in some cases migrants had been expelled without following the relevant legal mechanisms, which prevented a case-by-case consideration of whether they might be at risk of enforced disappearance, as required by article 8, paragraph 1, of the Declaration.

VI. Human rights institutions

55. The Constitution, like the statutes of the autonomous communities, provides for the establishment of an Ombudsman. Article 54 of the Constitution defines the Ombudsman as a parliamentary high commissioner, appointed by Parliament to defend the rights established in the Constitution. In carrying out this mandate, the Ombudsman is empowered to review the actions of Government and report to Parliament. In addition, the Ombudsman, as the defender of individual rights, may apply for *amparo* on an individual's behalf and is entitled to bring constitutional challenges. Under Organic Act No. 1/2009, the Ombudsman also functions as the national preventive mechanism against torture.

56. The national Ombudsman has a mandate to oppose all human rights violations committed by the State administration, the administration of the government of an autonomous community or a local administration, while the mandate of an ombudsman in an autonomous community covers only human rights violations by the Government of that

autonomous community. Notwithstanding the legislation on this subject, in practice it is not clear how a potential conflict of jurisdiction might be resolved in respect of a human rights violation committed in the autonomous community, where both ombudsmen could intervene.

57. The Working Group notes that, aside from what is stipulated in Act No. 36/1985 and the yearly meetings of the various levels of ombudsmen, there is little coordination between the national Ombudsman and the autonomous community ombudsmen. All are elected by qualified majority in their respective parliaments, based on nominations by the political parties. The election procedure does not give due weight to transparency or provide for consulting with or involving civil society. That could affect the independence of the ombudsman who is elected. The Working Group recalls that the election of an ombudsman at the State or autonomous community level should be carried out in accordance with the Paris Principles.

58. Ombudsman's offices have intervened in cases of child theft. The national Ombudsman and the Ombudsman for the Basque Country have produced major reports on the subject. Some offices have also tried to resolve the communication problems between the administration and victims and their representatives.

VII. National Human Rights Plan of Action

59. Spain adopted a National Human Rights Plan of Action for 2008–2012. It had a chapter on support for victims, including victims of the Civil War and the dictatorship, essentially based on implementation of the Historical Memory Act. The next national plan of action is in the drafting and consulting stage. According to information received, the draft national plan of action measures contains no measures relating to the rights of victims of enforced disappearance.

VIII. Final comments

60. The Working Group appreciates the substantive information provided to it by the various authorities, civil society organizations, and associations of relatives and victims with a view to improving understanding of the issue of enforced disappearance in Spain.

61. Since the return to democracy important, if tentative, steps have been taken to guarantee truth, justice, reparation and memory in the context of the enforced disappearances committed during the Civil War and the dictatorship. The Historical Memory Act, the hundreds of exhumations, the map showing the location of mass graves, the grants awarded to victims, the isolated action taken by some courts in ordering investigation, search and exhumation procedures, the criminal trial launched by Investigating Court No. 5 of the National High Court, the memorials that have been built, the laws and protocols adopted and the institutions created by some autonomous communities such as Catalonia, the Basque Country and Andalusia, represent tangible and valuable progress.

62. This progress has been made thanks to initiatives set in motion or carried out by victims' families or civil society and some State sectors and a number of autonomous communities. In accordance with its obligations under the Declaration and international law, the State should accept its responsibility and take a leadership role in ensuring that these initiatives form part of a comprehensive, consistent, continuous, cooperative and collaborative policy. All activities in relation to enforced disappearance should take account of the gender perspective.

63. At all the sites visited, the Working Group met hundreds of families. Nearly all of them expressed deep frustration at the administrative hurdles and their difficulty in accessing the information they need to clarify the fate and whereabouts of their loved ones. Given the lapse of time since most of the enforced disappearances began and the advanced age of many of the witnesses and family members, it is a matter of urgency that the State make the search for the truth, and in particular the establishment of the fate and whereabouts of the disappeared persons, an immediate priority. There is an absolute obligation to take all necessary, reasonable and effective steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible.

64. Other important challenges remain. The Working Group draws attention to the limited scope of the Historical Memory Act and the lack of any budget for its implementation, the continued applicability of the Amnesty Act as interpreted by the courts, impunity in all the cases of enforced disappearance, the fact that there is no separate offence of enforced disappearance, the lack of any law on access to information, the difficulty in accessing the archives, and the lack of any national plan on the search for disappeared persons, inter alia.

65. The Working Group reiterates its solidarity with victims of enforced disappearance and their families. Their constant suffering is tangible evidence that enforced disappearance is a continuing crime and a permanent violation of human rights until the fate and whereabouts of the victim are clarified.

66. The Working Group would welcome the opportunity to continue its constructive dialogue with the Spanish State and offers its assistance in fully implementing the Declaration.

IX. Recommendations

67. Based on the above considerations, the Working Group recommends that the Spanish State:

General

(a) Act with due urgency and speed in the matter of enforced disappearances, as required by the Declaration and other international obligations. Urgency and speed are of the essence given the advanced age of many of the family members and witnesses who were the last to see persons disappeared during the Civil War and the dictatorship alive;

(b) Implement the recommendations made to Spain by various international human rights bodies, and notably those made by the Committee on Enforced Disappearances and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence;

Legal framework

(c) Ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;

(d) Make enforced disappearance a separate offence consistent with the definition given in the Declaration and punishable by appropriate penalties that take into account its extreme seriousness;

(e) Explicitly stipulate that the separate offence of enforced disappearance is not subject to the statute of limitations or, taking into account the statute of limitations applicable in Spain to continuing offences, ensure through the courts that the term of limitation actually commences at the moment enforced disappearance ceases, that is, when the person is found alive, their remains are found or their identity restored;

(f) Take the necessary legislative measures to ensure that cases of enforced disappearance can be tried only by the competent ordinary courts, to the exclusion of any other special court, particularly military courts;

(g) Ensure that the judiciary, and particularly the highest courts such as the Constitutional Court and Supreme Court, make consistent use of the Declaration and other international instruments;

(h) Offer more in-service training to judges and prosecutors on the Declaration and other international instruments;

(i) Explicitly include in domestic law the prohibition on expulsion, return or extradition of a person to another State where there are substantial grounds to believe that they would be in danger of enforced disappearance, in accordance with article 8, paragraph 1, of the Declaration, and effectively implement Organic Act No. 4/2000 and Act No. 12/2009;

Truth and memory

(j) Accept its international obligations, take a clear lead in fulfilling them and commit more actively and urgently to establishing the fate or whereabouts of persons disappeared during the Civil War and the dictatorship. All initiatives relating to the search for disappeared persons should be undertaken as an obligation of the State and should form part of a comprehensive, consistent, continuous, cooperative and collaborative policy;

(k) Set up regular consultations with families and associations of families;

(l) Provide greater institutional and financial support to families and associations of families;

(m) Create a State body with full institutional support, and in particular adequate human, technical and financial resources, to deal with all matters relating to enforced disappearance, including the creation and administration of a central database on disappearances;

(n) Update, correct and make available to the public the database created by Criminal Investigation Court No. 5;

(o) Adopt as soon as possible a national plan to search for disappeared persons;

(p) Ensure the coordination of work on exhumation and identification and the regular updating of the maps of mass graves produced under the Historical Memory Act;

(q) Compile, organize and analyse the information generated through the application of the Historical Memory Act, in order to promote better understanding of the nature, causes and impact of enforced disappearances, and make it available to the public;

- (r) Consider setting up an independent expert commission to establish the truth concerning human rights violations during the Civil War and the dictatorship, and enforced disappearances in particular;
- (s) Strengthen efforts to find and identify children who may have been victims of theft, enforced disappearance or identity substitution;
- (t) Ensure that the National DNA bank has genetic samples for all reported cases of children who may have been victims of theft, enforced disappearance or identity substitution, whether reported through administrative or judicial channels;
- (u) Encourage victims' associations to facilitate the collection of samples from family members by the National DNA bank;
- (v) Develop the Protocol for Exhumation of Victims of the Civil War and the Dictatorship, paying attention to the need to strengthen the multidisciplinary approach by bringing in forensic anthropologists, geneticists and archaeologists, and clearly establishing the authorities responsible for each stage;
- (w) Make sufficient funds available to permit effective implementation of the Historical Memory Act;
- (x) Promulgate a law on access to information and a proper legislative framework on archives, so as to guarantee access for the general public;
- (y) Ensure the observance of the provision of the Historical Memory Act regarding the removal of shields, insignia, plaques and other commemorative objects or references that represent a glorification, whether personal or collective, of the military uprising, the Civil War and the repression under the dictatorship;
- (z) Consider and apply the recommendations in the report of the expert commission on the Valle de los Caídos of 29 November 2011, based on a broad political consensus;

Justice

- (aa) Investigate *ex officio*, and try, all disappearances thoroughly and impartially, regardless of the time that has elapsed since they took place;
- (bb) Remove all internal legal obstacles that might impede such judicial investigations of enforced disappearances;
- (cc) Take all necessary legislative and judicial measures to ensure that offences of enforced disappearance are not subject to amnesty, and in particular render null and void the judicial interpretation of the 1977 Amnesty Act;
- (dd) Ensure that those responsible for the administration and pursuit of justice attend exhumations and then analyse the results they yield and take action on that basis;
- (ee) Review the legislative reforms that unduly restrict the exercise of universal jurisdiction over acts of enforced disappearance;
- (ff) Give a narrow interpretation to the legislative amendments on universal jurisdiction in cases of enforced disappearance;
- (gg) Ensure that no administrative, legislative or judicial measure rolls back the current scope of universal jurisdiction over acts of enforced disappearance;
- (hh) Continue providing and strengthening judicial assistance, including by furnishing all the evidence at its disposal, with regard to any criminal proceedings

being conducted in any country for offences of enforced disappearance committed in Spain;

Awareness-raising, human rights education and other preventive measures

(ii) Include where lacking, and supplement, the necessary lessons and information regarding the relevant provisions of the Declaration in the training given to military personnel and police and to medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty;

(jj) Repeal the articles of the Criminal Procedure Act establishing the regime of incommunicado detention and guarantee to all persons deprived of their liberty the rights recognized in the Declaration and other international instruments;

(kk) Ensure strict adherence by the relevant authorities to the applicable procedures for extradition, return and expulsion and, in particular, guarantee evaluation on a case-by-case basis in order to establish whether there are grounds for believing that the person could be subjected to enforced disappearance;

(ll) Adopt the necessary measures to ensure that the procedure of habeas corpus cannot be suspended or restricted under any circumstances, even where a state of emergency or siege has been declared;

Human rights institutions and National Human Rights Plan of Action

(mm) Ensure transparency and consultation with civil society in the procedure for electing the Ombudsman;

(nn) Ensure proper and more effective coordination between the national human rights institutions and those in the autonomous communities;

(oo) Ensure full participation by the various ombudsmen and civil society in the adoption of the National Action Plan;

(pp) Set forth in the National Action Plan specific measures with clear aims in the matter of enforced disappearance.

68. The Working Group invites the Government of Spain, within 90 days from the date of publication of this report, to submit a timetable showing the steps it will take to implement the recommendations of the Working Group, the dates by which each measure will be taken and the dates by which it intends to complete the implementation of the recommendations.