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增进和保护所有人权——公民权利、政治权利、
经济、社会和文化权利，包括发展权

寻求真相、司法、赔偿和保证不再发生问题特别报告员巴勃罗·德格列夫的报告

对西班牙的访问*

概要

西班牙内战和战后 40 年的独裁，严重侵犯人权和违犯人道主义法，造成了大量受害者，包括处决、酷刑、任意拘留、失踪、强迫囚犯劳动和流放。

民主得到巩固是西班牙过渡时期最突出的成就之一。通过有关机构本身的改革和民主化，避免了源于军队的体制崩溃的风险，这是过渡时期最大的挑战之一。这些改革可为其他国家提供有用的教益。

在任务授权的几乎所有领域，处理内战和独裁的遗留问题的努力大多零敲碎打。所采取的措施与有利于真相、司法、赔偿和保证不再发生问题的一项一致、全面的总体国家政策并不相应。

最严重的缺陷是在真相和正义方面。在真相方面，从未制定任何国家政策；没有任何官方资料和机制以阐明真相。目前关于与遗骸挖掘“私营化”的计划将这一责任留给受害者和各种协会，使国家机构更加冷漠，增加了有关真相在方法

* 本报告概要以所有正式语文分发。报告本身载于概要之后的附件，仅以提交语文和英文分发。

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学、认可和正式化方面的困难。家属迫切需要恰当安葬亲人。在正义方面，过于正式和对《大赦法》以及合法性原则的限制性解释，不仅剥夺了获得正义的手段，而且还妨碍了任何类型的调查。

由于体制对策中仍然十分明显的缺陷，内战和独裁的遗留问题这一专题继续引起意见分歧，其深度超过预期。鉴于国家的强大、民间社会的成熟以及在西班牙国内外所获相关教益，特别报告员呼吁国家机构和民间社会侧重于讨论如何处理尚未完成的与权利理念有关的任务，这一理念涉及每一个人，无论政治考虑如何。

特别报告员指出，民主体制的力量不在于压制某种声音或漠视某些事项的权能，特别是有关基本权利的事项，而在于有效管理这些事项的能力，无论其多么复杂，多么棘手。

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.