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特定群体和个人：移徙工人

特别报告员加芙列拉·罗德里格斯·皮萨罗夫人
按照人权委员会第2003/46号决议提交的报告¹

增 编

对西班牙的访问

提 要

应西班牙政府向人权委员会所有专门机制所发出的公开邀请，特别报告员于2003年9月15日至27日访问了西班牙。特别报告员访问了马德里、巴塞罗纳、加的斯、塔里法、阿尔赫西拉斯、休达、梅利利亚、大加那利岛拉斯帕尔马斯和富埃特文图拉岛。特别报告员会晤了与移民问题有关的国家当局以及自治政府和地方政府的代表，并会晤了学者、国家各安全部门的代表、联合国难民事务高级专员办事处(难民署)和一些非政府组织以及移民本人。特别报告员访问了外国人关押中心和临时逗留中心。

¹ 本报告的提要将以所有正式语文分发。本报告附件所载的报告将以原文及英文分发。

特别报告员在访问期间评价了西班牙在对付移民问题的新的方面的过程中所遇到的困难。在这方面，特别报告员承认西班牙在使立法和政策适应移民现象的新的层面和性质、遵守在欧洲联盟内部所作的承诺方面作出的努力。具体而言，这意味着朝发展管制欧洲联盟外部边界的制度方面作出努力。

特别报告员注意到，投入资金和技术、采用立法上的改革、以及采取旨在制止非法移民的政策等措施都不足以使这一现象减少。特别报告员注意到，结果是移民通过贩运网所掌握的其他危险得多的手段来企图进入西班牙，有时甚至付出生命的代价。特别报告员也评价了西班牙安全部门和部队为拯救受害的移民的生命、向他们提供援助所做的工作，并了解其中所涉的物质和人力费用。

特别报告员认为，制止非法移民工作所遇到的困难可以归结于许多因素，其中包括原籍国的经济和政治局势困难，而且移民以为西班牙和欧洲是充满机会的天堂。有些人是受了贩运网的骗，不过，还有些人是受其家人和朋友的怂恿而去试试运气的，这些家人和朋友已经在西班牙或在欧洲其他国家合法或非法居住和工作。特别报告员注意到，在西班牙经济的某些部门非常需要移徙工人，如农业部门和家务工作，许多非法移民结果在地下经济遭到剥削。

特别报告员认为，加强管制制度应与解决家庭团聚和让已在西班牙多年的移民融入的工作成正比。

特别报告员感到关切的是，由于难以制止非法移民的来临和将他们驱逐出境，西班牙境内的非法移民不断增加。关于外侨的立法的改变和公文的不不断增加造成了移民局的工作负担过重，这有时导致了手续上的拖延和许多移民的非法身份。

特别报告员注意到，大家对法律所承认的移民应有的保障和权利一无所知，这造成了一些任意决定和可能侵犯人权的情况。特别是在遭到拦截、遣返、驱逐和关押时，由于没有或缺乏法律援助，移民在面对可能的虐待或侵犯权利行为时，常常可能没有能力自卫。

特别报告员注意到，政府与一些非政府组织在移民政策和侨民法的应用问题上存在极大的分歧。非政府组织在确保法律的正确应用和尊重移民的保障和权利方面所做的工作是至关重要的。然而，特别报告员注意到，在某些情况下，民间社会和新闻界往往把非法移民的状况与难民状况相比较。另一方面，政府的某些部门和新闻界也常常指控非政府组织持这种立场。特别报告员认为，这种对立可能不利于适当保护移民

和要求庇护者的权利，并认为适当适用有关法律和法律所规定的保障措施是确保这两种人的权利得到尊重的唯一办法。

特别报告员注意到，由内政部负责的控制移民流的方案和政策与劳工与社会事务部负责的援助、教育和融入方案和政策可能互相矛盾。尽管融入方案似乎应在地方执行，但特别报告员注意到，自治社区和当地政府，尤其是各大城市和加那利岛、休达和梅利利亚的自治社区和当地政府必须付出大部分资源来援助非法移民。同样，它们的融入努力也因非法的身份对移民全面融入所造成的障碍而落空。特别报告员还注意到，在中央、自治和地方三级政府之间在移民问题上缺乏协调。

特别报告员认为，边境管制本身并不能保证体面、有序地管理移民问题。必须在欧洲联盟的框架内，在与原籍国不断对话的基础上处理移民问题。对安全、体面、有序地移民这一问题的重视应该转变成与原籍国进行超越劳务范围的对话。就摩洛哥而言，特别报告员认为，两国政府间的对话必须是平等的对话，是两个享有主权、拥有共同利益的兄弟邻国之间的对话。这种对话的重点应该是防止非法移民，在原籍国取得共同发展；必须作出更大的国际努力来取缔贩卖和贩运人口的犯罪网。

Annex

Report submitted by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants, on her visit to Spain from 15 to 27 September 2003

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Introduction

1. From 15 to 27 September 2003 the Special Rapporteur visited Spain following the open invitation of the Spanish Government to all the thematic mechanisms of the Commission on Human Rights.

2. The Special Rapporteur would like to take the opportunity to express her thanks to the Government of Spain for allowing her to examine with transparency the human rights situation of migrants in Spain and for having facilitated her work by providing all necessary assistance. She would also like to express her gratitude to the persons whom she interviewed and who provided information and material, and to express particular thanks to the migrants for their valuable testimony.²

I. PROGRAMME OF THE VISIT

3. The Special Rapporteur visited the following places : Madrid, Barcelona, Cadiz, Tarifa, Algeciras, Ceuta, Melilla, Las Palmas de Gran Canaria and Fuerteventura.

4. During the first part of her visit, the Special Rapporteur stayed in Madrid. There she was able to meet with various senior officials dealing with the question of migration : the Minister of the Interior ; the Minister for Foreign Affairs ; the Head of the Foreigners and Immigration Office ; the Secretary-General for Social Affairs, the Director-General for Social Action, Minors and the Family, the Director-General for the Organization of Migration, and the Director-General of the Migration and Social Services Institute within the Ministry of Labour and Social Affairs ; the Commissioner-General for Immigration and Documentation ; the Director of the Unit to combat Immigration Networks and Documentary Fraud ; the Director of the Central Unit for Frontiers, Assistance and Documentation of Foreigners ; the Director of the United Nations Information Office in Spain ; the Director-General for Consular Affairs ; the Director-General of the Foreigners and Immigration Office ; the Director of the Asylum and Refugee Office within the Directorate-General for Foreigners and Migration ; and the People's Advocate.

5. During her visit she also met members of academia, official representatives of the various Autonomous Communities, Autonomous Cities and places she visited, representatives of the various State security forces, representatives of IOM and UNHCR, representatives of various NGOs and the Church, and also a number of migrants.

6. The Special Rapporteur visited, inter alia : La Verneda Foreigners Detention Centre (CIE) and the Casernes de Sant Andreu in Barcelona ; the Isla de Las Palomas reception centre in Tarifa ; the Integrated External Surveillance System Centre (SIVE) and CIE in Algeciras ; the Operations Centre – Frontier Perimeter in Benzú and the Temporary Holding Centre for

² Special thanks to ACSUR-Las Segovias, Franciscans International, Institut de Drets Humans de Catalunya, Andalucía ACOGE, ELIN, Médecins sans Frontiers, PRODEIN and the Spanish Committee for Aid to Refugees (CEAR).

Immigrants (CETI) in Ceuta ; the Beni-Enzar Frontier, Frontier Perimeter, La Purísima Juvenile Centre and CETI in Melilla ; the Barranco Seco CIE in Las Palmas de Gran Canaria ; El Matorral CIE in Fuerteventura ; and other places such as the offices of migrants' organizations and localities where there are large numbers of migrants.

II. STATUS OF THE QUESTION

7. First of all, the Special Rapporteur would like to highlight the peculiar situation of Spain in that, in a period of two decades, it has changed from being a country of origin of migrants to being a country of transit and destination. Despite the increase in the numbers of migrants – as of 30 June 2003, 1,448,671 migrants were living in Spain with a residence permit - they represent only about 3.5% of the total population, according to official sources, a percentage which is lower than that in neighbouring countries.³

8. Most migrants resident in Spain are of European origin (34.98%) , Latin American origin (29.85%) or African origin (27.44%). Of the total number 21.18% are Moroccans. The migrants are mostly concentrated in Catalonia, Madrid and Andalucía. The number of migrant women and minors has increased. There has also been an undetermined increase in the number of illegal migrants.

A. Legal framework

9. In 1985, the first Spanish law on immigration, the Aliens Act, was adopted. In this legislation the phenomenon of migration was largely viewed as a temporary matter and immigrants were regarded as workers whose condition was regulated by the Ministry of Labour. In 1986, the regulations relating to the 1985 Act were promulgated ; these approached immigration as a structural phenomenon and recognized that foreigners had a number of subjective rights. In the year 2000 the Organization Act on rights and freedoms of foreigners in Spain and their social integration (Act No. 4/2000) was adopted. Again in 2000, Act No. 8/2000 amended the above-mentioned Organization Act. Some of the provisions of the regulations relating to this Act have been rescinded by the decision of 20 March 2003 of the Supreme Court, which considered that they exceeded the legal mandate. After the Special Rapporteur's visit, a new Organization Act (Act No. 14/2003) , amending the Aliens Act, was adopted.

10. Recent changes in national legislation have been influenced by the development of migration policy in the European Union, within the framework of the "creation of an area of freedom, security and justice" , in accordance with the idea developed by the Tampere Council of 1999, on the basis of the Amsterdam Treaty. The creation of this area entails measures of access and control, measures for the integration of legal residents and measures to combat illegal immigration.

³ According to a recent study published by the National Institute for Statistics, the number of foreigners listed on municipal registers was 1,984,573, which amounted to 4.7% of the total population.

1. Protection of the human rights of migrants

11. The Aliens Act applies to those persons who are not nationals of Spain or any other European Union. Article 3 of the Act establishes that foreigners shall enjoy the rights and freedoms guaranteed under Title I of the Constitution,⁴ in the terms established by the treaties and the law in accordance with article 13.1 of the Constitution. Article 10.2 of the Constitution states : “The provisions relating to the fundamental rights and freedoms recognized by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international human rights treaties and agreements ratified by Spain”. Spain has ratified all the principal international human rights instruments with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

12. Title I of the Aliens Act establishes rights and freedoms in the same conditions as for Spanish citizens. The rights guaranteed to all foreigners include : the right to education for all children under the age of 18 at all levels and the right to compulsory basic education and preschool education ; the right to medical care for minors and to emergency medical care for all foreigners ; the right to basic social services and benefits ; and the right to effective judicial protection and legal assistance.

13. Foreigners legally resident in Spain also enjoy : freedom of movement within Spanish territory ; public participation in municipal elections, having regard to reciprocity with the country of origin ; rights of assembly and association ; rights to demonstrate and to join trade unions, subject to authorization to stay or reside in Spain ; right to strike when they are authorized to work ; right to non-compulsory education ; right to perform remunerated work on their own account or for others, and access to the social security system ; right of access to social security benefits and services and to actual benefits and services ; right to transfer their earnings and savings ; right to housing assistance ; right to family privacy and family reunification ; and right to free legal assistance in any court.

2. Entry and sojourn of foreigners in Spain

14. In order to enter Spain it is necessary : to comply with a number of requirements, except in the case of asylum-seekers, humanitarian reasons, reasons of public interest or compliance with commitments entered into by Spain ; to do so through the facilities established for this purpose ; to be in possession of a valid identification document and justification of the purpose and conditions of the stay in Spain ; to prove possession of sufficient means or the ability to obtain such means legally ; and, in some cases, to have a visa. It is also necessary not

⁴ Title I defines the fundamental rights and duties and their guarantees, and establishes the dignity of the human person, the inviolable rights inherent in the person, the free development of personality, and respect for the law and the rights of others, which are fundamental to public order and social peace.

to be in any of the prohibited-entry categories. The law provides that in some cases the grounds for refusal of a visa need not be stated, and visas will be granted in accordance with national policy and the policy of the European Union.

15. A foreigner in Spain may be in one of the following situations : staying, temporarily residing or permanently residing in the country. The first situation covers persons intending to stay there for less than 90 days, renewable up to a maximum of six months. Temporary residence is residence for over 90 days and less than five years, and may be granted to persons possessing sufficient resources, proposing to engage in an economic activity or possessing administrative authorization to work, or enjoying the right of family reunification. A temporary residence permit may also be granted to foreigners who have already obtained one and been unable to renew it, to foreigners who can prove that they have stayed longer than five years, for humanitarian reasons, in exceptional circumstances or in a situation where the foreigner has settled in Spain. Permanent residence will be granted to a foreigner who has been continuously resident for more than five years, except in cases of special relationship. There is a special regime for students, stateless persons, refugees and minors.

16. In order to work in Spain it is necessary to obtain administrative authorization for this purpose, in addition to authorization of residence or sojourn, except in a number of cases specified by law. Such authorization will be applied for either by the employer or by the foreigner himself, and the requirements will be the same as for nationals, although in the case of work for others, account will be taken of the national employment situation and, in the case of the first authorization, the sector or activity and the geographical area may be limited. In addition to this procedure there is the quota or allocation system, which establishes the number of necessary workers whom it has not been possible to recruit from among Spanish nationals : these quotas are distributed around the various provinces and labour sectors in the light of the national employment situation. In order to participate in this system, the migrant must apply for the job in question from his or her country or origin. In addition, other categories of migration are established, such as those that which do not require a work permit, seasonal workers, trans-frontier workers and transnational services.

3. Return and expulsion

17. In the event of an infringement of the law, the person in question may be expelled from the country. Expulsion is a punitive process which carries with it a ban on entry into the Schengen area for a period of 3 to 10 years. Return is a rapid form of repatriation applicable to immigrants who try to enter Spain illegally. In accordance with the regulations on immigration, attempts at illegal entry are understood to include interception at the frontier or in its immediate vicinity. The purpose of return is to prevent illegal entry : it carries no penalties. If return is ordered, the period of detention and stay on Spanish territory may not exceed 72 hours. Once a decision to return the migrant has been taken, if return cannot be carried out, the migrant is informed of his obligation to leave the territory and he is left at liberty. If he does not leave Spain within the stipulated period, the expulsion procedure is initiated. For 72 hours the migrant will be held in precautionary detention, failing which the examining judge will order full detention. In both cases the Ministry of Foreign Affairs and the embassy or consulate of the migrant's country will be informed.

18. The amendment of the Criminal Code by Organization Act No.11/2003 of 29 September 2003, introducing specific measures relating to public safety, domestic violence and social integration of immigrants, stipulates that a custodial sentence of less than six years imposed on an illegal immigrant shall be replaced by an expulsion order. In the case of a foreigner illegally present in Spain, working in Spain without the necessary permit or engaging in activities prejudicial to public order, the penalty of expulsion may be imposed following completion of the corresponding administrative procedure.

19. A number of NGOs told the Special Rapporteur of their concern that the above-mentioned measure might violate the right of presumption of innocence in that a foreigner accused of an offence would be punished by expulsion and a ban on entry for up to 10 years, even though he might subsequently be acquitted, and about the possible lack of guarantees for foreigners throughout the proceedings.

20. Detention is one of the precautionary measures taken during the expulsion procedure ; it is not of a penal character and may not exceed 40 days. It may be applied for in the following cases : when the foreigner is present in Spain illegally ; when renewal of a permit has not been applied for ; failure to comply with orders issued for reasons of public safety, periodic attendance orders, or orders to stay away from frontiers or specifically mentioned localities ; participation in activities prejudicial to public order, characterized as serious, or in activities prejudicial to the external security of the State or which may prejudice Spain's relations with other countries, or involvement in activities prejudicial to public order, characterized as very serious in Organization Act No. 1/1992 of 21 February 1992, relating to protection of public safety ; inducing, promoting, encouraging or facilitating the clandestine immigration of persons in transit or travelling to Spanish territory when the act does not constitute an offence, or participating in a profit-motivated organization formed for this purpose. In these cases, the priority procedure is initiated, limiting to 48 hours the period during which claims may be lodged ; execution of the procedure is immediate. If immediate execution is not effected within a period of 72 hours, detention is applied for.

21. All decisions affecting foreigners may be appealed. In the case of the decisions referred to in legislation, such as an expulsion order, appeals are lodged via the administrative channel.

4. Competence of the various State bodies in the area of migration

22. The central Government has competence in such areas as planning, coordination and regulation in relation to immigration questions. Social assistance and other planning and execution powers are the responsibility of the Autonomous Communities. Within the Autonomous Communities and Cities, there are government offices or branch offices with competence for immigration matters. The Immigration Policy Council ensures coordination between the State, the Autonomous Communities and the municipalities. The State Secretariat for Foreigners and Immigration, within the Ministry of the Interior, has broad powers to deal with questions relating to immigration. There is also an Inter-Ministerial Commission on Immigration, whose mandate consists in analysing government measures that affect the treatment of foreigners, immigration and asylum.

23. The Forum for the Social Integration of Immigrants is a collegiate consultative body whose aim is to promote the participation and social integration of immigrants in Spanish society.⁵ In addition, the National Police and the Civil Guard come under the aegis of the Ministry of the Interior. The former is concerned with passport control, the registration of foreigners, the investigation of offences and other police duties in urban areas. The Civil Guard undertakes operations to combat trafficking in immigrants, and has responsibility for security at customs posts, airports, highways and ports and for the transport of detainees.

24. The Ministry of Labour and Social Affairs is the institution primarily responsible for policy on the integration of, and assistance and social services for, immigrants. In the Autonomous Communities it manages the immigrant reception centres and is responsible, through its commissions, for the legal protection of defenceless minors. The Migration and Social Services Institute (IMERSO), within the same Ministry, is responsible for activities aimed at the reception and social advancement of the immigrant population.

25. In accordance with article 124.1 of the Constitution, the Office of the Public Prosecutor promotes the working of justice in defence of the rule of law, the rights of citizens and the public interest as safeguarded by the law, supervises the independence of the courts and ensures that the latter meet the interests of society. The juvenile court prosecutors are responsible, inter alia, for monitoring the treatment received by minors taken into care, promoting the examination of cases involving minors and serving as public prosecutors. The Office of the People's Advocate is a supervisory body independent of the activities of all the public authorities.

B. Migration policy

26. The Special Rapporteur appreciates that, according to the statement of the grounds for Organization Act No. 8/2000, immigration is regulated on the basis of its conception as a "structural development which has converted Spain into a country of destination of migratory flows and, because of its situation, also into a transit route to other States, whose frontier controls on the routes from Spain have been eliminated or substantially reduced".

27. Various officials informed the Special Rapporteur that migration policy is based on Spain's labour agreements with countries of origin, on a policy comprising frontier control and action to combat trafficking, and on the common European policy. From the common policy derive some of the measures taken, such as the visa requirement for nationals of non-Community countries.

28. The Government Delegate in charge of the Foreigners and Immigration Office stated that migration policy is reflected in activities aimed at strengthening frontier control, carrying out expulsions, improving cooperation with countries of origin and combating the organized networks involved in trafficking in migrants. In addition, the Minister of the Interior reiterated that, on the one hand, this policy is generous vis-à-vis legal migration and respects all the rights of migrants, and, on the other, requires controlled and orderly migration, on the assumption that

⁵ According to information received, following the amendment of the legislation on immigration and of the requirements for participation in the Forum, many NGOs were excluded from it and an alternative forum was established.

excessive generosity would create pockets of marginality and would pave the way for the possibility of the exploitation of immigrants.

29. The Special Rapporteur was informed of efforts to promote the integration of migrants in Spain. The Global Programme for Regulation and Coordination of Foreigners and Immigration (GRECO) is aimed at the “overall design and coordination” and regulation of migration, the integration of resident migrants, and maintenance of the protection system for refugees and displaced persons.

30. The Special Rapporteur is aware of the Government’s efforts to confront the phenomenon of migration in a way that ensures compliance with national and international commitments in the area of human rights and appreciates that the government representatives themselves have admitted the need to improve some aspects of migration management in Spain. Nevertheless, during her visit, she noted a number of problem areas which create difficulties in the implementation of migration policy and have an impact on the human rights of the migrants.

III. PARTICULAR CIRCUMSTANCES AND GENERAL OBSERVATIONS

A. Illegal migrants

31. The Special Rapporteur noted with concern the large number of illegal migrants who, according to some sources, may total as many as 600,000. In addition, she was informed of the main reasons for this illegality : one is clandestine entry, which is being used by the criminal networks and is aggravated by the failure to carry out expulsions ; the other is illegality resulting from delays in procedures.

32. Illegal entry would appear to occur, according to information received, mainly via Barajas international airport in Madrid. The Director-General for Consular Affairs explained that a consul is able to identify persons simply wishing to visit Spain and persons travelling with the intention of remaining there. The Special Rapporteur expressed her concern at possible discretionary action by officials and at a number of cases brought to her attention in which documentation not required by law was demanded and entry was refused arbitrarily, on the basis of circumstantial information and without due deliberation concerning each case.

33. The most recent amendment of the Aliens Act establishes the obligation for carriers to ensure that passengers’ documents are valid and up to date ; failure to do so constitutes an offence carrying heavy penalties. The Special Rapporteur considers that the control function should be carried out by the State authorities and not by private entities, whose aim is commercial and which do not have the necessary expertise to ensure respect for the rights of migrants and asylum-seekers.

34. Crossing the Strait of Gibraltar in pateras, (small boats) is another form of illegal entry less significant in numbers, but more significant in terms of its serious consequences. In Cádiz she was told that deaths in the strait over the past 12 years have, according to the most optimistic estimates, numbered 2,000. Between January and September 2003 there were 162 fatalities. The Special Rapporteur was informed that many of the people arriving in small boats have injuries or wounds caused by the difficulties of the journey. In Andalucía she was informed that the number of fatalities had been reduced through the setting-up of the Integrated External Surveillance

System (SIVE) , which will be extended to the whole of southern Spain by 2005. She visited the SIVE facility, where the Civil Guard described its work of keeping watch on the coasts and rescuing small boats crossing the strait.

35. The Special Rapporteur was informed of the change in the routes taken by illegal immigrants as a result of the system of interception, a change which entails a longer and more dangerous journey. She visited the Islas de las Palomas reception centre in Tarifa, where first aid is given to migrants arriving in boats and details of individual cases are recorded. At the Barranco Seco and El Matorral detention centres, the Special Rapporteur noted the large number of migrants awaiting expulsion. She also interviewed women in various detention centres who were awaiting a response to their asylum application ; some of them had lost relatives in their country of origin or when the small boats were shipwrecked. The Special Rapporteur noted that the mental health of these persons is seriously affected by the uncertainty surrounding their future.

36. The Special Rapporteur finds that the existence of a large number of illegal migrants is due, inter alia, to the fact that deportation orders are not carried out. This often results from the impossibility of documenting the migrants, either because their country does not have a consulate in Spain or because they claim to come from a different country in order not to be sent back. When the expulsion order is not carried out, they are generally placed in detention pending execution of the order ; when the time limit for execution has elapsed, they are released with orders to leave Spain, which they normally do not do. This pattern contributes to the creation of a large number of illegal migrants in the country.

37. The Special Rapporteur noted that the security forces responsible for enforcing the law are not always fully aware of the difference between return and expulsion, or of the various guarantees accompanying these procedures. In practice, it is tacitly understood that return applies only to Moroccans, since Morocco does not accept migrants of other nationalities if it cannot be demonstrated that they passed through its territory. In the case of illegal migrants of other nationalities, the Special Rapporteur noted that even where conditions for implementing return existed, in practice the expulsion procedure was often directly initiated.

38. As a result of the changes in legislation, the People's Advocate detected greater delays in processing permits in immigration offices and pointed out that there is a problem of discrepancy in the application of provisions for regularization because of a lack of harmonization between the special processes and the general regime. The Special Rapporteur noted that there were long queues of people in immigration offices. A case may take eight or nine months on average, and even occasionally up to two years. She was also informed how some lawyers take advantage of the migrants' difficulties by charging for facilitating procedures which are free.

39. In the Ministry of Labour, she was informed that procedures relating to work permits take a long time, especially the first renewal, because numerous checks have to be made. Although the migrant is able to work while permit-related procedures are under way, some migrants stated that employers do not renew their contract if they do not have a valid work permit because they are afraid of the penalties imposed on persons recruiting illegal migrants. In addition, the existence of a contract of employment is a fundamental requirement for renewal of the work permit, without which a residence permit cannot be obtained.

40. The Special Rapporteur expresses her concern at the difficulties which illegal migrants encounter in regularizing their situation. For this purpose they have to prove that they have stayed in the country for five years, show that they have settled in the country after three years or have remained for two years illegally after holding a residence permit. In order to prove any of these situations they have to present the appropriate documents.

B. Smuggling and trafficking

41. The situation of migrants is made worse by the fact that many of them have used traffickers in order to cross the strait and, in some cases, virtually the whole of Africa. The Government Delegate in charge of the Foreigners and Immigration Office stated that, in an effort to combat these networks, the Criminal Code had been amended to characterize trafficking and smuggling as serious offences, and imposing heavier penalties, which are further increased in the case of trafficking in minors or exploitation of prostitution. In the Commissioner-General's Office, the Special Rapporteur was informed about the special investigation unit set up to combat networks engaging in trafficking and smuggling, in cooperation with the countries from which migration originates and with the European Union. To this end, the police are cooperating with Interpol and Europol and investigating the offences of aiding and abetting illegal migration, exploitation in the workplace, exploitation of the prostitution of others, networks producing false documents and fraud in documentation processes.

42. The Special Rapporteur believes that an important feature of action to combat the trafficking networks is the cooperation of the victims. Article 59 of the Aliens Act provides for a number of measures which may be taken if the victims of the offence of trafficking in human beings or exploitation of prostitution report the facts to or collaborate with the authorities : non-expulsion from the country, even if the victim is present in Spain illegally ; possibility that the authorities may finance voluntary return to the country of origin or grant the victim a residence permit or work permit. A number of problems have arisen in connection with such collaboration : when the person concerned is unable to produce documentation because the criminal networks have taken away his or her passport or the consulate does not provide new documentation ; or fear of reprisals against relatives in the countries of origin.

43. The various officials spoke of continuing changes in strategy on the part of the transnational organized crime networks. The Government Delegate in the Canary Islands stated that since Spain had become more efficient in the process of repatriating Moroccans, small boats had begun to arrive with a greater percentage of sub-Saharan Africans, and that arrests of boat-owners had resulted in a decrease in the number of owners ; in addition, more migrants had been travelling in a single boat, with the result that the journeys had become more hazardous. In Melilla, the Special Rapporteur was informed that 1,200 cases of fraud are detected every year and that there were problems of corruption within the Moroccan police.

44. The Special Rapporteur suggested to the Minister of the Interior that the first measure that should be taken is to work to ensure that prospective illegal migrants, in their countries of origin, do not put their trust in the criminal networks. According to the Minister, if a deportation policy is not implemented, the migrants will continue to believe what they are told by the "mafias" because they will see that relatives, friends and acquaintances who have left with the help of the mafias have remained in Spain. The Minister stressed the need for a coordinated

policy vis-à-vis the countries of origin from which the trafficking networks operate and referred to a proposal made by the Government of Italy within the European Union to establish quotas for legal migration by citizens of countries which cooperate in dismantling the trafficking networks. During her meeting with the Director-General of the Foreigners and Immigration Office, the Special Rapporteur stressed the need to study in greater depth how these networks operate and to investigate possible ramifications of the networks in Spain and other European Union countries ; throughout her visit she had only heard from the authorities that the criminal networks came from African, Latin American or Asian countries.

C. Detention

45. The Special Rapporteur visited a number of detention centres for foreigners (CIEs). Although the administrative detention of migrants is not of a punitive character, the Special Rapporteur noted that all the centres visited were old prisons which, because of their structure, had serious limitations. She visited the El Matorral centre, where 846 migrants were detained. A number of women whom she interviewed stated that the day of her visit was the first time they had been allowed to go out into the courtyard, since they normally stayed in their rooms. The Special Rapporteur noted that health assistance was provided in all the centres, and was told that that assistance was given in emergency cases and in cases of sickness with very obvious symptoms. She expresses her concern at the fact that no preventive measures are taken in the case of infectious and contagious diseases and that there is no monitoring of possible cases of HIV infection, inter alia.

46. The law ensures that detained immigrants should be given information about administrative and judicial decisions affecting them in a language they understand in all cases in which they are detained for breaches of the Aliens Act. Nevertheless, the Special Rapporteur noted with concern that the detained migrants suffer from a serious lack of information, legal assistance and translation and interpretation services. UNHCR and other organizations expressed concern at the absence of legal assistance or the unsatisfactory nature of assistance, which makes access to asylum difficult.

47. She was also informed that in some communities, although detention must be authorized by the judge, the latter normally confirmed the police proposal without direct contacts with the migrant or visits to the detention centres. According to the same reports, the officially appointed lawyers are often not experts in migration. She was also informed of the lack or limited nature of consular protection.

48. During her visit to La Verneda Centre in Barcelona, the Special Rapporteur interviewed an undocumented Nigerian woman who told her how she had seen her lawyer only once and knew nothing about her situation. The Special Rapporteur came across very similar situations in the Algeciras detention centre. She was informed in Melilla that formerly lawyers would charge for each case, with a tendency to deal with many migrants at the same time, and that now when a migrant's case was taken up, he was assigned a different lawyer from the one who would later handle the case. The immigrants explained that they had no interpreters and that they signed documents in their files without knowing what they were. In the Barranco Seco centre in Las Palmas, a number of migrants said that they were given three minutes a week in which to speak with a lawyer and were unaware of the status of their cases ; and some women who had been

arrested in a singles club were totally unaware of the procedure for regularizing their migration status.

D. Temporary Holding Centres

49. The Special Rapporteur visited the Temporary Holding Centres for Immigrants (CETIs) in Ceuta and Melilla. Although some migrants remain in these centres indefinitely, the aim of the centres is to provide food, lodging, medical assistance, etc. to persons arriving in Spain illegally.

50. In Ceuta, representatives of Médecins sans Frontières (MSF) and the local authorities stated that before the Special Rapporteur's arrival there had been a large number of illegal migrants who could not be accommodated in the CETI and were living in the street. In cooperation with the White Cross, MSF began to provide medical assistance and food for these immigrants, and subsequently set up a camp around the centre. One day before the Special Rapporteur's arrival the camp was dismantled and some immigrants entered the CETI while others were transferred to the CIE. The CETI has a capacity of 448 and at the time of the visit it contained over 600 people. The authorities stated that the CETI's situation was aggravated by the fact that some NGOs allegedly encouraged the immigrants outside the centre to apply for asylum. The Special Rapporteur was informed that, of the 300 applications received, only 30 were approved for further action. Nevertheless, this situation made it difficult to resolve cases speedily. The Special Rapporteur is concerned about the structural problem relating to the fact that non-expelled migrants remain in a legal limbo which prevents them from regularizing their situation and becoming integrated and subjects them to various kinds of pressure.

51. In Melilla, the Special Rapporteur interviewed a group of Mali citizens who had been living in the CETI for many months and expressed their frustration at not knowing how their cases would be resolved and their reluctance to participate in the CETI's education activities without knowing whether they would have the possibility of remaining in Spain.

E. Unaccompanied minors

52. The Special Rapporteur observed that there is an indeterminate number of unaccompanied minors, of whom some are accommodated in reception centres while others remain in the streets. Most come from Morocco and are between the ages of 15 and 18, although more and more younger ones are arriving from other places, such as sub-Saharan countries or eastern Europe. According to the 2002 report of the Directorate-General for Immigration, there was a total of 6,329 unaccompanied minors.

53. She was informed that when the State security forces and bodies find an undocumented unaccompanied minor, the public prosecutor places him at the disposal of the competent juvenile protection services of the Autonomous Communities and Cities. After interviewing him and receiving a report from the juvenile protection services, the State authorities decide to send him to the country of origin or residence of his family or to keep him in Spain. The law requires the public prosecutor to order the minor's age to be determined by means of tests in a medical centre on a priority and urgent basis whenever it cannot be conclusively established that an undocumented foreigner is a minor. The public prosecutor's office recommends that, in the case of tests to determine the approximate age of the person concerned, it should be presumed that his

age is the lowest in the age range indicated by the medical services.⁶ In practice, however, this recommendation is apparently not always taken into account. The Special Rapporteur interviewed two immigrants in a detention centre who appeared to be minors.

54. In the Ministry of Labour and Social Affairs she was informed that there had been no case of expulsion of unaccompanied minors. Nevertheless, during her visit to Ceuta and Melilla she received information about a number of cases of expulsion of minors ; in addition, prior to that visit she had already sent an allegation about that question.

55. The Special Rapporteur believes that because of the way in which some family “reunifications” have been carried out, allegedly leaving the minor in the hands of the Moroccan police without the presence of his family or the social services, these reunifications are interpreted as expulsions. Nevertheless, many “reunited” minors return to Spain and some speak of ill-treatment by the Moroccan police. The Special Rapporteur was informed that cooperation efforts are being made with Morocco, including training of police officers and personnel dealing with minors.

56. The Special Rapporteur notes that the negotiations between Morocco and Spain focus on the question of the repatriation of migrants, especially the return of unaccompanied minors. She considers that priority should be given to ensuring that repatriations are carried out with due respect for the rights and best interests of minors. She expresses her concern at Attorney-General’s instruction No. 3/2003, of 23 October 2003, which establishes that public prosecutors must press for the immediate return to their countries of origin of foreign unaccompanied minors over the age of 16 who are present in Spanish territory.

57. Nine months after having been taken into care by the public authorities and on the application of the institution providing care, the minor may be granted a residence permit, retroactive to the time when he was placed at the disposal of the juvenile protection services. There are also provisions for the granting of a work permit to minors who have reached the age of 16. The temporary residence permit expires when the boy or girl attains his or her majority. At that time he or she may apply for a permanent residence permit if they can establish that they have been in the care of a Spanish public entity for a period of at least the three preceding years or be given an extension of their temporary residence permit for humanitarian or other reasons. The relevant legislation authorizes minors who have reached the age of 14 and have been in the care of a Spanish institution to opt for Spanish nationality.

58. The Special Rapporteur visited La Purísima juvenile centre in Melilla, where she met a number of minors who had spent several years there and, on attaining their majority, had left without receiving any documentation. In some cases it may take between 20 and 25 months to obtain documentation. She was also informed that calculation of the nine-month period is interrupted if a “reunited” minor re-enters Spanish territory.

⁶ In order to determine age the services of forensic physicians are used, including, inter alia, bone determination techniques. The results are not 100% reliable.

F. Conditions of employment and integration

59. Spain has established a system of employment quotas aimed at remedying the labour shortage in the short and long terms. The Government recruits foreign workers only from their countries of origin under bilateral agreements.

60. However, this raises a number of problems : migrants who have been working in Spain and whose contract has ended do not have access to these opportunities, and so they stay in Spain in a situation of resultant illegality ; in addition, the Special Rapporteur was informed that in 2002 and 2003 labour needs were not met because of the complexity and slowness of the procedure, the difficulty of foreseeing employment needs one year in advance, the reluctance to recruit workers who do not know one another for jobs requiring mutual trust and, in general, the largely inflexible nature of the system.

61. Official representatives, NGOs and Church representatives pointed out that a paradoxical situation sometimes occurs : in the face of a need for workers and the availability of illegal foreign workers who are not working or are working in the black economy, the law does not permit their regularization. As the Special Rapporteur was able to appreciate, the situation becomes more complicated when employers recruit migrants illegally because, apart from the fact that their rights are infringed, hostility towards these persons is generated by the fact that they have accepted working conditions inconsistent with national standards.

62. The Director-General for Consular Affairs stated that labour agreements have been signed with the countries which are the greatest sources of migration (Ecuador, Colombia, Dominican Republic, Morocco, Romania, Poland and Bulgaria). Nevertheless, there are problems in the implementation of these agreements. The selection procedures take place in the countries of origin through the consulates, which receive the offers, advertise them and process contracts. As recognized by the Director-General and the People's Advocate, the structure of the consular system is not appropriate for the performance of these tasks, its geographical distribution is not geared to current needs and the necessary resources in terms of training and personnel are not available. Efforts have been made to remedy this situation through the creation of the new post of "Chief of Visas" and the appointment of increased staff.

63. During her visit, the Special Rapporteur expressed her concern at the situation of the agricultural workers in El Ejido, which has still to be resolved, and also at their working conditions and the frequent attacks by xenophobic groups against the workers,

64. Most female legal or illegal immigrants in Spain work in the domestic sector. As the Special Rapporteur was able to appreciate, the situation of these workers is complex. Many work illegally and without social security, and are constantly exposed to exploitation. Those women who are working legally are in a less vulnerable situation, but this does not mean they are immune from possible exploitation, and they are always dependent on the renewal of their contract in order to be able to renew their residence permit. In a number of interviews, the Special Rapporteur was informed that women are discriminated against in terms of wages and conditions of employment according to their nationality ; Moroccan women would appear to be in an especially vulnerable situation.

65. The Special Rapporteur learned how the cases of smuggling and trafficking become more serious when they involve women who are obliged to engage in prostitution : some women accept this work as a means of survival and to earn money to pay off debts in their country of origin, while others, she was told, are exploited and in a virtual state of slavery. These women are deprived of documentation and freedom of movement and are subject to threats against them personally or relatives in their country of origin. She was told this by a number of Romanian women who had been working in a club in Valencia, where their documentation was taken from them and they were not examined by a doctor.

66. The Special Rapporteur interviewed a number of Latin American prostitutes in Madrid ; they expressed concern about their situation as they considered they were discriminated against and ill-treated by the municipal police. They were also concerned about the lack of medical supervision and the possibility of being obliged to work with businessmen as intermediaries. The Special Rapporteur consulted a competent authority about the legal status of sex workers and was told that the practice of prostitution in Spain was “non-legal” ; in other words, it is neither prohibited nor regulated by the law.

67. The Special Rapporteur was informed of the existence of a number of assistance and reception programmes for migrants, including unaccompanied minors, conducted by NGOs in cooperation with the Government under the GRECO plan. However, some organizations mentioned the difficulties they encountered in their integration work owing to the lack of resources and the administrative obstacles impeding the regularization of migrants.

68. Most of the illegal migrants remain in the large cities, such as Barcelona and Madrid, in a legal limbo that does not allow them to regularize their situation or to be deported. Many are in debt to the mafias which organize their journeys in small boats or to relatives who have lent them money, and they end up working in the black economy or in prostitution. When illegal migrants are enrolled on municipal registers, they enjoy certain rights, including medical assistance. The new amendment of the relevant legislation provides for access by the State security forces and bodies to the data on migrants contained in municipal registers, or held by the tax and social security authorities. The adoption of this measure could mean that illegal migrants will not receive basic minimum services because of their fear of being identified. In addition, in order to be included in the register of non-European Community citizens, “the number of a valid passport issued by the authorities of the country of origin” will be required ; at present, any document enabling the person concerned to be identified is accepted.

69. Some representatives of the Autonomous Communities expressed the need for greater cooperation with the central Government. The large number of illegal migrants constitutes a substantial cost for the Autonomous Communities and causes social tension in those regions where the number of migrants causes greatest pressure. In addition, some NGOs expressed regret at the lack of dialogue and cooperation with the government agencies.

70. The Special Rapporteur is very concerned at the discrepancy between the official policy of opposing illegal migration and the tacit recognition of the existence of a “large number of illegals” who are not allowed to regularize their situation except through the system of settlement, after five years during which they are completely unprotected in the face of abuse and exploitation. There is a need to find measures that take into account the Government’s

concern to avert the “appeal effect”. One of the proposals put forward was the possibility of permitting the entry of seasonal agricultural workers, which would not prevent the Government from controlling flows or prevent the immigrants from generating and obtaining social resources.

71. Another important aspect of integration is housing. As the Special Rapporteur was able to appreciate, access to housing is made difficult by high rents, the difficulties of obtaining bank loans, the need to have permanent residence in order to obtain access to State-subsidized housing or abuses by owners : excessive prices, discrimination on grounds of origin, rental of housing lacking minimum standards of inhabitability. In Barcelona the Special Rapporteur visited the Casernes de Sant Andreu, a disused military facility where persons of different nationalities live, and was able to see for herself the difficulties facing migrants.⁷

72. Second-generation or unaccompanied minors have great difficulties with integration, especially because, after having acquired training, some are unable to work owing to their illegal status. In addition, they are confronted with marginalization and stigmatization in educational institutions, validation of their studies may take 6 to 18 months, access to non-compulsory education is difficult and school drop-out is widespread.

73. The Special Rapporteur received information and direct testimony about the considerable delays in the processing of family reunification. Several women migrants from Latin American countries mentioned difficulties such as the requirement to obtain a second renewal of a work permit, which takes a long time in Spain, or the documentation of children, which consulates also take a long time in issuing. They further say that, on occasion, refusal of a visa in the country of origin or a negative report by the governmental or employment authorities is insufficiently justified or that the opinions expressed are arbitrary. In order to benefit from family reunification, the person seeking reunification needs a renewed residence or work permit and must provide evidence of means of subsistence sufficient to meet the needs of his or her family. It was stated that in some communities the law had been interpreted to mean that the applicant for reunification needed to have housing in his or her name.

74. The Special Rapporteur was also informed about the vulnerability of women reunited with their husbands who become victims of domestic violence and fear that their situation may be reported, since the current law requires at least two years of cohabitation in Spain in order to obtain an independent residence permit. She was informed that the new reform of the Aliens Act provides for the possibility that women victims of gender violence who have been reunited with their families in Spain may be given an independent residence permit after the issuing of a protection order. The reform also includes provision for authorization of temporary residence for humanitarian reason or for reasons of cooperation with the justice system.

75. The Special Rapporteur noted that the sensationalist image of migration portrayed in the media does not contribute to a proper understanding of the phenomenon. The tendency to associate migration with crime is very disturbing. Distorted data are very often given about the percentage of arrests of migrants without explaining that most are arrested because of their illegal administrative status and not because they have committed crimes. Some migrants told the Special Rapporteur of the social difficulties they encounter and how, on occasion, they suffer

⁷ See correspondence with Spain in Document E/CN/4/2004/76/Add.1.

xenophobic attacks. Some said that certain areas in some cities had become no-go areas for them because xenophobic attacks were frequent there.

IV. CONCLUSIONS AND RECOMMENDATIONS

76. The Special Rapporteur is aware of the efforts Spain is making to comply with the commitments entered into within the European Union. In practice this has mainly entailed an effort to develop the control system on the external frontiers of the European Union. For Spain this represents a disproportionate obligation, given the constant and growing transit of persons over this southern frontier of Europe.

77. The Special Rapporteur noted that in practice the investment in resources and technology, the introduction of legislative changes and the implementation of policies aimed at curbing illegal immigration have not been sufficient to bring about a decrease in the phenomenon. She observed how migrants end up trying to enter Spain by other far more dangerous means in the hands of the networks, in many cases paying for it with their lives. She was also able to appreciate the work of the State security forces and bodies in saving lives and providing emergency assistance to migrants.

78. The Special Rapporteur considers that the difficulties involved in curbing illegal immigration are due to many factors, including the difficult economic and political situation of the countries of origin and the view that the migrants have of Spain and Europe as a paradise of opportunities. Some migrants are deceived by the trafficking networks, but others are encouraged to try their luck by relatives and friends already living and working legally or illegally in Spain or elsewhere in Europe. The Special Rapporteur noted that there is a considerable need for migrant workers in some sectors of the Spanish economy, such as the agricultural sector and domestic labour, and that many illegal migrants end up being exploited in the black economy.

79. The Special Rapporteur considers that the strengthening of control systems should be proportionate to solutions comprising family reunification and integration of migrants who have already been in Spain for several years.

80. The Special Rapporteur is concerned about the presence of a growing number of illegal migrants in Spain due to the difficulty of curbing the influx of such migrants and carrying out expulsions. As a result of the various changes in the legislation on immigration and the steady increase in the number of cases, immigration offices have been overwhelmed, with subsequent delays in procedures and ensuing illegality for many migrants.

81. The Special Rapporteur noted a lack of knowledge of the guarantees and rights which the law accords and recognizes for migrants. This situation may result in cases of arbitrary decisions and possible violations of human rights. Particularly in the contexts of interception, return, expulsion and detention, migrants run the risk of defencelessness in the face of possible abuses and violations owing to the absence or insufficiency of legal assistance.

82. The Special Rapporteur noted that there is considerable tension between the Government and some NGOs, not only with regard to immigration policies, which the NGOs often criticize, but also over the enforcement of the Aliens Act. She considers that the work NGOs are doing to assist and protect the rights of migrants is of fundamental importance. She nevertheless noted that in some cases, in a number of NGOs and in the press, there is a tendency to equate the situation of illegal migrants with that of refugees. In addition, in some sectors of the Government and the press, there is a tendency to accuse NGOs of adopting this position. The Special Rapporteur considers that this confrontation may be prejudicial to the protection of the rights of migrants and asylum-seekers, and believes that the proper enforcement of the law is the only way of ensuring respect for the rights of both groups.

83. The Special Rapporteur notes a risk of discrepancy between the migration control programmes and policies under the responsibility of the Ministry of the Interior, and the assistance, education and integration programmes and policies which are the responsibility of the Ministry of Labour and Social Affairs. While it appears logical and appropriate for integration programmes to be implemented at the local level, the Special Rapporteur observes that the Autonomous Communities and local governments, especially in the large cities, the Canary Islands, Ceuta and Melilla, have to devote most of their resources to assistance to illegal migrants. Their integration efforts are being frustrated by the obstacles which illegal status places in the way of the full integration of the migrant and the migrant's enjoyment of his rights. The Special Rapporteur also noted limited coordination in the area of social action between the three levels of government – central, Autonomous Community and local.

84. The Special Rapporteur considers that frontier control per se does not ensure the orderly management of migration in decent conditions. Within the framework of the European Union, the question of migration should be the subject of an ongoing dialogue with the countries of origin. The focus on safe, orderly migration in decent conditions should be reflected in a dialogue with the countries of origin which goes beyond labour matters. In the case of Morocco, the Special Rapporteur considers it essential that the dialogue between the two Governments should be a dialogue of equals, of sister, neighbouring, sovereign countries with common interests. The focus of this dialogue should be the prevention of illegal migration and co-development in the countries of origin ; greater international cooperation efforts are needed to dismantle the criminal networks engaging in the trafficking and smuggling of migrants.

85. The Special Rapporteur recommends to the Government that it should constantly consider the importance of the support it receives from the NGOs and the Church and that they should not be accused of facilitating the entry of undocumented migrants into the country.

86. The Special Rapporteur recommends that, in the medium and short terms, measures to ensure the more effective protection of the human rights of immigrants in Spain should be strengthened. These measures should include :

a) Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ;

b) Amendment of relevant legislation to ensure that the human rights of migrants and asylum-seekers are not jeopardized ;

c) Training of officials responsible for enforcing legislation on migration to ensure its just and homogeneous implementation throughout the national territory ;

d) Measures to ensure that migrants enjoy in practice the rights to legal assistance and to an interpreter in all administrative procedures relating to their migration status. The Special Rapporteur encourages NGOs and the People's Advocate to continue their excellent work of assisting migrants and supervising implementation of the guarantees provided for by law ;

e) A greater effort to ensure coordination between the various levels of government in migration matters through reactivation of the existing agencies ;

f) The active and prominent participation of NGOs in forums for dialogue with the government at the national, Autonomous Community and local levels on migration matters ;

g) Information and awareness campaigns on the situation of migrants and their contribution to the economy, culture and development of Spain. The Special Rapporteur invites the Government and the press to avoid statements and remarks which tend to foster fear of foreigners and may lead to incidents of racism and xenophobia ;

h) Increase in resources and acceleration of procedures necessary to ensure the rapid and effective processing of migration cases ;

i) Increase in resources and necessary structural adaptations to ensure that Spanish consulates abroad provide effective services and speed up procedures relating to family reunification ;

j) The system of employment quotas should be made more flexible, especially in certain sectors such as domestic work, so as to permit specific offers to individuals in some cases in order to meet the needs of the labour market and to avert the exploitation of migrants in the black economy ;

k) Measures to ensure the full and effective implementation of legislation relating to unaccompanied minors in relation to reunification and documentation ;

l) Active policies to encourage rental of subsidized housing for migrants, offering guarantees to owners, and initiating awareness campaigns against racism and xenophobia ;

m) Ensuring appropriate protection for victims of trafficking in human beings and their families, so as to enable them to cooperate with the justice system and receive compensation for violations suffered ;

n) A greater UNHCR presence in the temporary holding centres (CETIs) and detention centres (CIEs) so as to effectively safeguard the right to asylum.
