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Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up to and implementation of the Durban Declaration and Programme of Action

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere

Addendum

Mission to Spain: comments by the State on the report of the Special Rapporteur*

* Reproduced as received.

Preliminary comments of the Government of Spain to the report of the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

General observations

1. The Government of Spain would like to thank the Special Rapporteur for his visit to Spain, in the context of the standing invitation extended by Spain to all UN Human Rights special procedures. The Government appreciates the interest showed by the Special Rapporteur, and the fact that he acknowledges the progress achieved in many areas in the fight against racism and xenophobia, and takes careful note of his recommendations, while reserving its right to reply to them more in depth when the final report is formally presented to the Human Rights Council.

2. The Government also appreciates the opportunity provided by the Special Rapporteur to comment on the draft report in order to identify errors of fact or law. While hoping that such comments, which have been provided in a separate document, will be taken into account, the Government of Spain would like to make the following comments of a more general nature, and on the specific recommendations contained in the final part of the report.

3. Although the rest of this document will follow mostly the order of the report, the Government of Spain deems it necessary to clarify at the outset that it firmly condemns any public discourse of a racist or xenophobic nature. No member of the Government has ever made a statement of such a kind. Paragraph 53 casts a shadow of doubt on the Government, for it includes a mention to alleged statements by members of the Government on the abusive use of the public health system by migrants in irregular situation, in the context of a statement by the Mayor of Badalona which is currently being examined by the competent judicial authority. This statement on the part of the Special Rapporteur is extremely serious and it is therefore requested that it be removed for it amounts to an implicit accusation of racism against the Government, which is particularly unfair against the background of its engagement in the fight against any form of discrimination and in favour of equal opportunities for all.

Legal framework

4. The applicable legislation on migration and borders control must be understood and interpreted in the context of the European Union legal norms and policies. The European Common Policy on migration, asylum and fight against irregular immigration as developed since the 1999 Tampere European Council is inspired by the respect of human rights standards and principles enshrined in the EU Fundamental Rights Charter, the 1952 Geneva Convention and, when applicable, the superior interest of the child as required by the 1989 Convention on the Rights of the Child.

5. Some of the statements contained in the Special Rapporteur's report reflect isolated cases and not patterns nor general situations, especially regarding the activities of the State Security Forces and Bodies (SSFB) and in particular the National Police forces, as well as when the Rapporteur bases his statement on an allegedly emerging de facto segregation of migrants neighbourhood in Spain on what he saw in two of the places (Poble Nou in Barcelona and Almeria) during his trip. The Government contends that such grave allegations should be based on sufficient and representative proof, not on what seem to be isolated cases. While accepting that some situations give room for improvement and need

to be addressed, a more in-depth study would be required in order to establish a general trend. Alternative drafting suggestions, when deemed appropriate, have been forwarded to the Special Rapporteur, in the hope that they will be taken into account.

6. The report points out the fact that Spain has not ratified the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families. The Government of Spain would like to recall that no migration receiving State has ratified the aforesaid Convention, and for that matter no Member State of the European Union, for it does not adequately reflect important distinctions, including migrants in a regular situation and migrants in an irregular one. In any case, a common decision by the EU Member States would be required in order to ratify the Convention.

7. Although the report does mention some of the laws applicable in combating racism and racial discrimination, it fails to make a complete account of all relevant legislation, for which appropriate drafting suggestions have been made.

8. The Special Rapporteur regrets that the right to equality before the law is not expressly recognised to non citizens in the Constitution, but fails to acknowledge that a special constitutional provision (art. 13.1) extends to foreigners the public liberties enshrined in Title I of the Constitution, as provided by applicable treaties and the law. A drafting suggestion has been made in this sense.

The institutional framework and public policies to combat racism

9. As is stated in the report, the Government of Spain wishes to stress the importance it attaches to the role played by civil society organizations in the fight against racism and xenophobia, by both financing and making extensive use of data and information gathered by NGO and other relevant actors, as well as by financing the exercise of legal actions against racism and xenophobia by civil society organizations and associations. In this regard, it is worth mentioning the experience acquired since 1994 by the NGO *Movimiento contra la Intolerancia* (Movement against Intolerance), with relevant cases on hate crimes or racial discrimination as shown by jurisprudence such as *Lucrecia Pérez*¹, *Miwa Buene*², the banning of groups for hate and discrimination incitement³, or the *Blood and Honour* case⁴.

10. The report contains statements as to the lack of data on acts of racism and racial discrimination. These data have been registered and are being published. Data covering the period 2009-10 are published in the web page of the Council for the Promotion of Equal Treatment and non Discrimination: The year report 2010, pages 39 and 40, identifies 93 such cases in 2009 and 92 cases in 2010⁵; the year report 2011, page 34, gathers a total of 224 cases⁶, and data collected in 2012 according to the Ministry of the Interior and yet to be published show a total figure of 260 cases.

11. These data have been collected, registered and published according to the provisions contained in the Integral Strategy against Racism, Racial Discrimination, Xenophobia and

¹ Audiencia Provincial de Madrid's decision on July 4th, 1994.

² Audiencia Provincial de Madrid's decisión 717/2010 of June 28th.

³ Audiencia Provincial de Madrid's decisión 259/2010 of June 30th.

⁴ Cfr. Strategy against Racism, page 71.

⁵ Available at:

<http://www.igualdadynodiscriminacion.org/recursos/publicaciones/2011/informeAnual2010.htm>

⁶ Available at:

http://www.igualdadynodiscriminacion.org/recursos/publicaciones/2012/informe_2011.htm

other Forms of Intolerance⁷. A number of additional measures have been developed in application of the aforementioned Strategy, such as:

(a) Changes in the Criminal Statistic System, in order to adapt it to international requirements on collection and publication of statistics on racist incidents.

(b) Signature of a Protocol between the Secretary of State of Security and the former Secretary of State (nowadays Secretary General) on Immigration and Emigration with the purpose to promote cooperation between the two entities in the fight against racism, racial discrimination, xenophobia and related forms of intolerance.

(c) Introduction of a new definition of racist or xenophobe incident: “perceived as such by the victim or any other person, including the police agent or any other person, even if the victim does not agree, as well as acts of hatred, violence, discrimination, phobia and rejection against foreigners or people belonging to different groups, on the grounds of their racial, ethnic, national, cultural or religious background”.

12. The Strategy contains not only provisions on the improvement of methods for collection and registration of incidents, number of complaints filed, type of criminal offence, but also on training for competent agents on data collection procedures, as well as on publication of incidents.

13. The Government of Spain regrets that the report does not refer to the training courses it carries out, in particular the 2012 FIRIR, or training program for the identification and registration of racist and xenophobe incidents, addressed to 2.690 members of the Guardia Civil, both National and Autonomous Police (Ertzaintza, Mossos d’Esquadra and Policía Foral in Navarra), as well as local Police.

14. As a result of this training course, a Manual on training of Police and Security forces on identification of racist or xenophobe incidents has been adopted, which provides detailed information on key concepts, international and national standards, police best practices, and recommendations for the elaboration of a protocol on police practice in case of racist or xenophobe incidents⁸. The Manual allows for permanent training in SSFB, provides for legal reference on hate crimes both in the Criminal code and in jurisprudence, explains how to codify facts in the Criminal Statistic System and enables police agents to detect racial or hate motivation in crimes, in order to be able to appropriately direct the investigation, including the so-called polarization indicators – a set of indices which must provide judges and attorneys with reasonable ground to establish charges and, when applicable, penalties. The manual also details the reasons why victims do not file complaints against racist or xenophobe incidents and provides recommendations for the police to obtain information from victims and witnesses as to the grounds of the incident, in particular through the cognitive interview. It also stresses the importance of collaboration with civil society organizations, social services for victims or witnesses, NGOs, migrants or minority ethnic groups’s organizations, religious or cultural leaders active in the fight against racism, xenophobia and other related forms of intolerance. The new Directive 2012/29/UE on minimal norms on rights, support and protection for crimes victims, provides new orientations in the matter.

15. The Government notes with satisfaction the Special Rapporteur’s appreciation for the work of the Spanish Observatory on Racism and Xenophobia, including the research and analysis it conducts on racism and discrimination and its contribution in raising public

⁷ The Strategy is available in English at:

<http://www.oberaxe.es/files/datos/4ef19b2b618db/ESTRATEGIA%20INGLES%20LINEA.2.pdf>

⁸ The manual is available in English at:

<http://www.oberaxe.es/files/datos/50bc5eaaef631/FIRIR%20Handbook%20for%20training.pdf>

awareness on discrimination issues. Apart from the training activities described above, the Observatory has also issued recommendations for both the Media, on its Practical Guide for Media Professionals, and the SSFB, on its Recommendations for training of the Security Forces and Bodies.

Migrants

16. The implicit submission that higher unemployment rates affecting African migrants followed by Latin Americans (para 35, page 8) amounts to discrimination of these groups does not seem to be acceptable in a context where the global unemployment as a whole is as high as 26%, and where the fight against unemployment in all its forms is the first priority of the Government.

17. The Special Rapporteur refers to the Royal Decree Law 16/2012 in terms of “regrettable development”, without taking into consideration the context and the rationale for its adoption.

18. The Government wished to remind that the Court of Accounts stated that the National Health Service was assuming the assistance to individuals already covered by their own national health institutions or by private insurance, which was considerably undermining its finance capacity. On these grounds, the aforesaid Royal Decree Law 16/2012 amended, inter alia, art. 12 of the Organic Law 4/2000, on the rights and liberties of foreigners in Spain, as well as art. 7 of the Royal Decree 240/2007, on entry, free movement and residence in Spain of EU Member States citizens. The purpose of the Royal Decree Law is to guarantee the viability of the national health service, avoiding the so-called “health-tourism”, and at the same time guaranteeing to all foreigners, irrespective of their regular or irregular situation, emergency assistance, as well as medical attention to minors, pregnant women and international protection applicants, while migrants legally residing in Spain are entitled to the same assistance as nationals. This differentiated approach is not based on racial or ethnic grounds, but on the administrative situation of individuals, and therefore does not amount to discrimination in the sense of Directive 2000/43/CE, of June 29th, 2000. The level of health assistance provided by the Spanish law is comparable to that of other EU Member States.

19. It should also be noted that there is a difference between health assistance, described in the previous paragraph, and Public Health measures, which include the programs and protocols for infectious diseases prevention and control. These programs are regulated by the General Law on Public Health 33/2011, and its services are accessible to all foreigners living in Spain, regardless of their administrative situation. This includes, among others, prevention, control and treatment of diseases such as tuberculosis or HIV/AIDS. The available data to this point show positive trends and no ground to expect increases in these diseases.

20. The statements of the Special Rapporteur on his visit to a greenhouse in Almeria are again extracted from isolated facts, and cannot be extrapolated nor generalised. The Government wishes to reiterate its commitment to fight with all available means any form of abuse in working conditions, exploitation of workforce and other illegal practices, in Almeria and elsewhere, and regrets that the report does not take into account any of the information provided by the Government’s Subdelegation in Almeria, the Autonomous Government of Andalusia and the Almeria City Council.

21. Regarding the observations made by the Special Rapporteur on the maximum period of detention for return purposes, the Government would like to point out that such period of 60 days, is one of the shortest among EU Member States, as the Return Directive allows for a maximum of up to 18 months. When the ground for return is the mere irregular

administrative situation, fines are being imposed as an alternative to the return sanction, although this practice is currently under consideration by the European Commission.

22. Regarding the Special Rapporteur's concern that no regulation has been adopted on the functioning of detention centres, the Government reiterates that works in that regard are nearly completed.

23. The Special Rapporteur refers with concern to reported cases of mistreatment, torture and deaths of undocumented migrants. The case on alleged torture of a Moroccan national in May 2012 while in detention at the Madrid Foreigners Detention Centre has thoroughly been examined by both the Working Group on Arbitrary Detention and the Special Rapporteur on Torture, to whom the Government of Spain has provided all relevant information, both on the reasons for detention, as a result of a criminal file for theft, and on the lack of credibility of the torture accusations. The Government wishes to point out that there are factual mistakes in the report, as there is no record of any death at the Barcelona (Zona Franca) CIE on that date. The deaths of undocumented migrants at any CIE are a case of grave concern for the Government and we are compiling a list of the cases reported since 2010 and their judicial status, when applicable, and we will submit the information to the Special Rapporteur at a later stage. The Government would appreciate if a reference to this concern could be included in the report. A drafting suggestion in this sense has been included.

24. Regarding the allegations of mistreatment of undocumented migrants in Ceuta and Melilla, the Government wishes to state its support for the work, often carried out in extreme and sensitive situations, by the SSFB, who are in turn often subject to aggressions, as was the case last April 22, 213 in Melilla, with the result of 6 police agents injured.

Racial profiling

25. Regarding paragraph 51 of the Report and the problem of racial profiling, the Government believes that the reference to the Circular 2 of the General Directorate of Police is inaccurate. The drafting of this paragraph is also ambiguous as it seems to state that the Circular is responsible for an increase in racial profiling.

26. The Circular is stated to be non binding, which is not true. According to Spanish Administrative Law, the General Director of Police has the direct command of the National Police Force, including, among its functions, the development of all working methods, techniques and procedures of the Police. Furthermore, all Director Generals have the function of directing and supervising the correct management of all the units and workers under their responsibility. According to these norms, all Circulars issued by a General Directorate are binding for the persons under its supervision. Therefore the provisions of Circular 2 are binding.

27. Circular 2 provides two major instructions. First of all it forbids all identity checks that are arbitrary, general, abusive and unnecessary. It also forbids all kind of identity checks quota as well as all indiscriminate or general identity checks. The report states that ethnic profiling has persisted after the entry into force of the new Circular, but the Government does not have yet statistical data on the implications of this Circular. Therefore the Government would appreciate a new drafting for paragraph 51 taking into account these considerations, that are, together with the training programs which have already been mentioned, proof of the acknowledgement by the Spanish Government of ethnic profiling as a problem.

Roma Population

28. The Government of Spain appreciates the recognition made by the Special Rapporteur of the great progress made by Spain, favouring the integration of the Roma

population with initiatives such as the National Strategy for the Social Integration of the Roma population 2012-2020, the IRIS initiative in Madrid, Comprehensive Plan for the Roma Population in Cataluña or the program “ACCEDER” (“access”); as well as the key role played by the “State Council of the Roma Population”. However, some specific comments should be made in order to guarantee the accuracy of the information provided in the report:

29. The Special Rapporteur states that some NGOs had reported that the composition of the State Council for the Roma Population was not representative of all the Roma population. The process to select the members of this institution is ruled by the Royal Legislative Decree 891/2005 of 22 July. The 20 representative of Roma organised civil society are elected following an open and public call. The criteria for the selection of candidates are, among others, the effective territorial representation, proper structure and capacity for management, seniority and experience in organs of public participation. As well, at least two members should come from Roma women organisations, and another two from Roma youth NGO. The Rapporteur recommends that each Autonomous Community selects a Roma representative for the State Council to ensure adequate representation. However, in the context of Spanish political and territorial organisation, this is not possible, since the State Council for the Roma population belongs to the central administration which has its own competences in the matter, different from those of the Regional government.

30. The report affirms that discrimination against Roma population in Spain, negative stereotypes, racial prejudice, and hostility against them still prevails, including increase in cases of hate speech on the Internet and social networks. The Government would like to stress that this is still an issue of concern. Thus, since April 2013, Spain has joined the “DOSTA!” campaign of the Council of Europe (Enough! in Roma language www.dosta.org), an awareness raising campaign which aims at bringing non-Roma closer to Roma citizens.

31. The report also refers to racial discrimination in accessing housing and to ghetto-like neighbourhoods with settlements and slums. However, there is no mention to the work done by the Institute for Resettlement and Social Integration (IRIS). This Institution has carried out comprehensive projects in Madrid since 1986, accompanying families during and after the resettlements. The number of slums in Madrid decreased from 783 slum houses in 2010 to 482 in 2011. Regarding forced evictions, it should be clarified that they are always carried out following judicial orders pronounced by a Court and thus, compulsory for the administration

32. The Special Rapporteur also recommends a more effective and appropriate funding, suggesting the Government to give financial support to Roma organisations, including the small and local ones. The Government of Spain would like to stress that this financial support already exists in the framework of the Program for the development of Roma population, administrated by the Ministry of Health, Social Services and Equality. From 1989 until 2008, 3.065.160 euros per year were granted for this purpose by the central Administration. Regional and local Administrations offered subsidies amounting altogether to 3.500.000 euros per year, during the same period of time. The economic crisis has imposed cuts in every budget line in the Spanish Administration, including this one. However, in 2012, 8.317.313 euros were charged against the Income Tax grants for social programs.

33. Finally, regarding the recommendation made by the Special Rapporteur to increase its effort for a better recognition for the Roma culture and identity, including through school curricula, teaching the History of Roma. The Government of Spain would like to outline that, for the first time, the Institute for the Roma Culture created in 2007 has signed an agreement with the University of Alcalá of Madrid to include Roma History in its university curricula.

Other challenges

34. Paragraphs 53 and 54 of the Report, as well as recommendations included in paragraphs 86, 87 and 88, contain references to the emergence of hate speech and xenophobic discourse among politicians which deserve clarification on the side of the Government. The reference to alleged statements by members of the Government on the abusive use of the public health system by migrants in irregular situation have already been dealt with at the beginning of this document (para 3 supra). As already mentioned, the Government of Spain and all its members firmly condemn any public discourse of a racist or xenophobic nature and believe that factual assessments on the functioning of the public health service should not be mixed up with allegedly racist comments of a local authority such as the Mayor of Badalona, which are currently being examined by the competent court in order to determine whether they amount to hate speech.

35. The Government would also like to point out that the Integral Strategy against Racism includes actions on awareness and sensitization, addressed to the society as a whole but also to public institutions, media, and SSFB. These include recommendations to political parties to avoid generalizations and criminalisation of groups on grounds of racial or ethnic origin, religion or belief, avoid the use of pejorative language, and negative stereotyping, use an inclusive political discourse, expressing understanding and respect for the different, and promoting pacific cohabitation and the values of a multicultural society, and publicly condemn acts of discrimination, reject or violence. Several other public entities, such as the Council for the Promotion of Equal Treatment and non Discrimination on racial or ethnic grounds, or the Forum for the Social Integration of Immigrants have issued declarations and statements with the same purpose.

36. As the Special Rapporteur rightly points out, Law 19/2007 was adopted with the aim to eliminate racism and racial discrimination and guarantee equal treatment in sports. It foresees sanctions for serious incidents in this area and guarantees access to sport for all without discrimination.

Recommendations

37. The Government takes good note of the Special Rapporteur's recommendations, the first one of which refers to political leadership. The Government would like to remind that it is in the process of elaborating the II National Human Rights Plan, which will include the fight against any kind of discrimination as one of its main axes. Works are already well underway for the drafting of a baseline study, following the methodology recommended by the UNHCR manual on the elaboration of national human rights plans.

38. Regarding the recommendation contained in paragraph 72 on access to medical care in detention centres, the Government recalls that medical assistance to detainees is provided and that NGOs have free access to detention centres provided that their visits do not interfere with the centre's internal functioning. Centres in Madrid and Barcelona have their own social assistants. All incidents occurred in detention centres are reported to the judicial authority, who can decide on the initiation of a process. Concerning measures taken to avoid sexual abuse in detention centres, the Government recalls that when such cases were reported in the Malaga detention centre, the director of the centre was dismissed and nine policemen were prosecuted - five of them for abuses, and other four for omission of the duty to prevent crime.

39. With regard to the Special Rapporteur's reference to the Asylum legislation and the lack of decree to fully implement such legislation, the Government of Spain wishes to point out that the adoption of such a decree requires the streamlining and integration of a considerable amount of legislation, and at the same time would like to state that in the meantime all rights of asylum seekers are fully guaranteed, in particular the right to be

documented as international protection seeker, the right to free legal assistance and interpretation, the right to communicate the application to the UNHCR, the right to suspend any pending return or extradition procedures, the right to be informed of the file contents in any moment, to health assistance as explained above, and to specific social assistance as provided by the law.

40. The Government does not share the plain assessment that the Interministerial Commission on Asylum and Refuge does not conform to the 1951 Geneva Convention, and wishes to reiterate that its composition, with representatives of all competent ministerial departments as well as the UNHCR, is a guarantee of the high quality and comprehensive functions it carries out.

41. What the Special Rapporteur refers to as administrative hurdles for asylum seekers in Ceuta in Melilla is based on the exceptional situation of these two Autonomous Cities regarding the Schengen regulations, although the Government acknowledges that this interpretation has been challenged in several decisions by the Superior Court of Justice of Andalusia.

42. Asylum applications procedures have not been affected by budgetary cuts, contrary to what recommendations included in paragraph 78 seem to imply. Despite the administrative limitations, the procedures have been improved in both form and contents. The guidelines and good practices of the Asylum Office already take into account a gender perspective, as recommended in paragraph 80, and interviews are carried out, whenever possible, by a person of the same sex as the asylum seeker, particularly in gender violence cases. Prosecution on grounds of gender was explicitly included as a criterion in the Asylum Law 12/2009. Around 20% of asylum granted are based on gender grounds.

43. The Government submits that is already promoting investigations to fight hate speech and on the internet, as suggested in paragraphs 86, 87 and 88. Police units specialised in crime on the internet pay special attention not only to frauds or child pornography but also to the detection and prosecution of incitement to hate, violence and discrimination as provided by art. 510 of the Criminal Code, as well as of genocide justification as provided by art. 607.2 of the Criminal Code, whenever committed by means of the internet or social networks.

44. Finally the Government of Spain wishes to reiterate its full commitment to the fight against racism and discrimination in all its forms as well as its constant support to the work of the Special Rapporteur and the Office of the High Commissioner on this issue.