

Open letter to Spanish judiciary authorities in solidarity with Justice Baltasar Garzón

Judges of the Supreme Court, Criminal chamber

General Prosecutor of the State Cándido Conde-Pumpido Tourón

As jurists, lawyers, judges, academics and human rights defenders of different nationalities signing below, we are writing to you in order to express our perplexity regarding the decision on 3 February 2010 of the Investigative Judge of the Second Chamber of the Supreme Court in the special case N^o: 20048/2009. The judge decided to continue the judicial investigation against Justice Baltasar Garzón, allegedly responsible of the offence of judicial prevarication¹.

The criminal complaint was filed against Justice Garzón for trying to fulfill the obligation of the Spanish State to investigate crimes against humanity committed during Franco's dictatorship, in particular enforced disappearances. He is allegedly responsible of disregarding the 1977 Amnesty Law, of violating the principle of non retroactivity of criminal law and the principle of legality and prescription of criminal action.

On 31 October 2008, the United Nations Human Rights Committee has expressed its concerns about the existing obstacles that Spanish victims have been fighting against in order to obtain truth, justice and reparation. The Committee has also called Spanish authorities to take the necessary measures to nullify the 1977 Amnesty Law and to guarantee the imperceptibility of crimes against humanity. Moreover, the Committee has asked the Government to create an independent commission to determine the historic truth about human right violations which took place during the Civil War and Franco's regime, and that will guarantee the localisation, exhumation and identification of the victims' remains, and its restitution to their families.

The so-called law "of Historical Memory" of 2007 has not taken into account the appropriate and sufficient measures in favor of victims. Contrary to what the investigative judge has stated in the decision against Garzón, the above mentioned law allows him to act in favor of the victims, for example by requesting the exhumation of the remains. Indeed the law establishes that it is *"compatible with the exercise of the right to remedy and access to ordinary and extraordinary judicial proceedings, as established in national law or in international treaties and conventions ratified by Spain"*.

Enforced disappearances are among the gravest crimes which cannot be prescribed nor be granted with amnesty without attempting against international law, which is part of the Spanish judicial system.

The crime of illegal detention, without giving information of the detainee's location, or the crime of enforced disappearances, are crimes of continuous nature, that are ongoing until it is known what happened to the victims; that is why these crimes cannot be object of criminal prescription. When these disappearances have been committed in a systematic, massive and generalized manner, as it occurred during the Civil War and Franco's dictatorship, they are considered as crimes against humanity and hence cannot be subject amnesty nor pardon. For this type of crimes, the principle of non-retroactivity in criminal law cannot apply since the prohibition of such crimes already existed under international customary law (*jus*

¹ Article 446 of the Spanish penal code says: "the judge or magistrate who, intentionally, pronounces a ruling or emits a judgment that is not fair will be sanctioned: ... 3. by a fine of twelve to twenty-four months and special disqualification from public employment for a period of between ten and twenty years" .

cogens) at the time of the facts and, the principle of legality, is formed by national provisions and international human rights law.

The investigative judge adds against Justice Garzón: *“Of course, altruist motives, as the laudable wish of palliating the pain of the family of victims of horrendous crimes, do not exonerate, or even attenuate, the possible criminal responsibility of [judge Garzón]”*.

Justice Garzón certainly acts within his obligation towards justice and human rights. Altruism can be part of his personal convictions, but what is at stake here is the obligation of the State of Spain to respect the rights of victims of Franco's dictatorship as well as to fulfill its international obligations as regards human rights.

The investigative judge reproaches Justice Garzón for not having considered the denounced facts as related to political crime and for disregarding the application of the 1977 Amnesty Law. Nevertheless, the same law states in its article 1 that it is not applicable concerning facts that presuppose *“grave violence against the life or personal integrity of several persons”*.

The International Convention for the Protection of All Persons from Enforced Disappearance, ratified by Spain on 24 September 2009, states in its article 13 that *“the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives”*.

In its article 24, the Convention considers as a 'victim' *“the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”* and states that *“each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person”*. Finally it reiterates the obligation of each State Party to take *“all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains”*.

We therefore express to you, dear judges, our perplexity in relation to the use of the offence of judicial prevarication against Justice Baltasar Garzón. Indeed, a judicial officer has always some scope for discretion in the implementation of law. If he does so in order to fulfill the State's human rights obligations, his acts cannot be considered as irrational or contrary to law, otherwise damaging the basic principles of the administration of criminal justice concerning the investigation, prosecution, reparation and prevention of all types of crimes, in particular crimes of international character, as in the present case.

We would also like to express our recognition of Justice Baltasar Garzón's work in favour of victims' rights to truth, justice and reparation, not only in Spain but beyond Spanish borders. He became thereby a very important defender and promoter of international criminal law in the past years, enjoying now a well-earned worldwide recognition.

We hope that you can reverse Francisco Quevedo's maxim *“where there is little justice, it is dangerous to be right”*, and contribute to have in Spain a lot of justice and a lot of reason, allowing the rights of victims and their families to be fully respected. We also call you to support judges like Baltasar Garzón, in their actions that enable Spain to fulfill its obligations under international human rights law, and that contribute to the well being of Spanish people but also of the humanity as a whole.

Respectfully yours.

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