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## Human Rights Council

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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

**Joint written statement\* submitted by the Asian Legal  
Resource Centre, a non-governmental organization in  
general consultative status, Lawyers Rights Watch Canada,  
the International Association of Democratic Lawyers, non-  
governmental organizations in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[14 February 2011]

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\* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

## Judges and the rule of law: the prosecution of Judge Garzón in Spain\*\*

### Recommendations:

Lawyers Rights Watch Canada (LRWC), the Asian Legal Resource Centre (ALRC)<sup>1</sup> and the International Association of Democratic Lawyers call on the Human Rights Council to fulfill its duty to promote and protect the rule of law and fundamental rights and freedoms in Spain and around the world by recommending and monitoring:<sup>2</sup>

1. Guarantees of absolute immunity for judges from criminal and civil proceedings arising from actions taken as part of their judicial function to assess the relevant facts and interpret and apply domestic and international laws.
2. Reinstatement of Judge Garzón to the bench of the Audiencia Nacional pending the outcome of the proceedings taken against him.
3. More effective and timely protection for judges facing threats to their professional and personal security as a result of controversial decisions, compliant with International law involving state actors.

LRWC, ALRC and IADL conclude that the suspension of, and proceedings against Garzón are unsupported by law and are illegitimate based on a review and analysis of:

- International law binding on Spain mandating the resolution of enforced disappearances, (disappearances) extra-judicial executions (executions) and acts of torture constituting crimes against humanity through effective investigations.
- International standards safeguarding judicial independence and the paramount duty of judges to maintain the rule of law and ensure accountability for gross human rights violations.

The prohibition of disappearances, executions and acts of torture, whether committed on a widespread or systematic or an individual basis, are recognized as international crimes by conventional and customary international law. The erga omnes duty to enforce these international crimes requires states to adopt measures necessary to effectively prevent, investigate, prosecute and punish such crimes. Because these duties—arising from international law—are owed to all humankind, they cannot be displaced by domestic laws. Therefore, Spain's Amnesty Law of 1977 (AL/77) and prescription periods cannot be applied to bar investigations of and remedies for such crimes.

LRWC, ALRC and IADL conclude that the prosecution also appears intended to achieve the extra-legal purposes of:

- shielding perpetrators of international crimes from accountability,
- deterring judges from accepting criminal complaints involving state authorities.

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\*\* Asociación Española para el Derecho Humano a la Paz (AEDIDH), el Grupo de Trabajo sobre Justicia Internacional y Derechos Humanos, NGOs without consultative status, also sharing the views expressed in this statement.

<sup>1</sup> Asociación Española para el Derecho Humano a la Paz (AEDIDH) and el Grupo de Trabajo sobre Justicia Internacional y Derechos Humanos endorse this statement.

<sup>2</sup> Footnotes at <http://www.lrwc.org/documents/LRWC.ALRC&IADL.Jt.Stmt.Judges&Rule.of%20Law.HRC.16.pdf>

The prosecution of a judge for investigating international crimes renders nugatory the international framework to fight impunity for the most grave human rights violations, prevents the judicial system from its primary duties, makes a mockery of international law, denies remedies and violates the right of victims and society to know the truth.

## Background

- On October 16, 2008 Judge Garzón of Spain's Audiencia Nacional, in response to a complaint filed by victims' associations, opened an investigation into disappearances, executions, torture and arbitrary detentions (constituting crimes against humanity) committed during the Spanish Civil War and by the Franco regime.
- On October 21, the Public Prosecutor sought to terminate the investigation relying on Spain's 1977 amnesty law (AL/77), statutory limitations and the rule against retroactive criminal laws. On 18 November 2008, Judge Garzón sent the case to the territorial courts where mass graves had been identified for continuation.
- In December 2008, the Criminal Chamber of the National Court allowed the Prosecutor's application, "without prejudice to the competence that could correspond to other judicial bodies."
- On January 26, 2009, a right wing association filed a criminal complaint before the Supreme Court accusing Garzón of "prevaricación" (malfeasance) for instituting the investigation and the complaint was admitted by the Supreme Court in May 2009.
- In February 2010 the Supreme Court rejected an application to stay the proceedings on the grounds that Garzón had "deliberately chosen to ignore or circumvent" AL/77 and the limitations of the Criminal Code.
- On May 11, 2010, the opening of the trial phase was ordered and on May 15, 2010, Garzón was suspended.

## Impotence of amnesty laws to prevent investigation

International courts, regional tribunals and UN committees and special procedures agree that amnesty laws contravene state duties to prevent, prosecute and punish serious human rights violations constituting international crimes and promote impunity and therefore cannot displace the imperative duty of states to investigate and remedy disappearances, executions and torture and other violations.

The Human Rights Committee (Committee) has affirmed that, "...amnesties for serious violations of human rights are incompatible with the [International Covenant on Civil and Political Rights] Covenant." It is noteworthy that Spain has not adopted the Committee's recommendations to repeal the AL/77 and ensure that Franco era human rights crimes were properly investigated and remedied.

The Committee has consistently concluded that amnesty laws:

- (a) are "incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future",
- (b) lead to a form of impunity incompatible with the International Covenant on Civil and Political Rights (ICCPR),
- (c) "...infringe[s] the right to an effective remedy."

The Committee consistently reached these conclusions in cases involving the amnesty laws of Uruguay, Argentina, Peru, Chile, Senegal, Niger, and France and regarding individual communications.

The Committee against Torture (CAT) agrees that amnesty laws that preclude investigations and prosecutions are incompatible with State parties obligations and recommended that Spain “should ensure that acts of torture [including]...disappearances, are not offences subject to amnesty”.

The Working Group on Enforced or Involuntary Disappearances (WGEID) has recommended that amnesty laws (even those endorsed by referendum) be annulled to ensure the right to justice and truth. The Special Rapporteur on Torture has said “legal provisions granting exemptions from criminal responsibility for torturers, such as amnesties, indemnity laws etc., should be abrogated.”

The International Committee of the Red Cross (ICRC) has also concluded that amnesties are incompatible with state duties to investigate and prosecute war crimes.

Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone have ruled that amnesties cannot be allowed for crimes against humanity and war crimes as to do so would render the international prohibitions nugatory.

In cases involving the applicability of amnesty law of Brazil, Peru, Chile, Guatemala and El Salvador and other states, the Inter-American Court (IACtHR) and Inter-American Commission of Human Rights have consistently ruled that amnesty laws violate the obligation to investigate and remedy serious human rights violations and are therefore illegal. The European Court of Human Rights (ECtHR) has ruled that amnesties render meaningless the imperative norms that prohibit international crimes and cannot be permitted.

In accordance with these interpretations, domestic courts have also ruled that amnesty laws violate domestic and international law. Spanish courts have consistently affirmed that the amnesties granted in other countries and which have the purpose of exonerating perpetrators of crimes under International law from criminal responsibility are not binding on Spanish courts.

## **Imprescriptibility**

Generally statutes of limitation do not apply to gross violations of human rights constituting crimes under international law.

The principle of imprescriptibility for disappearances, executions and acts of torture derives from the imperative nature of the norms prohibiting such crimes and has been confirmed by all the jurisprudence. The Committee recommended that Spain “guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity” and proclaimed, in the case of Argentina, that gross violations “during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice”.

CAT recommended generally that “action to punish human rights violations not be subject to statutes of limitations” and has recommended the repeal of limitations with respect to torture. In the case of Spain, CAT insisted “the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation”.

The ICRC has concluded that statutes of limitation are not applicable to war crimes.

The ICTY has affirmed that the gravity of the international crimes at issue precludes application of limitations to their resolution.

The IACtHR has held that prescription and other measures intended to prevent investigation and responsibility of those responsible for serious human rights violations such as torture, executions and disappearance, are prohibited.

The ECtHR, the European Commission on Human Rights (EComHR) and the domestic courts of Argentina, Chile, Uruguay and Peru have affirmed that statutory limitations do not apply to the most serious crimes including war crimes and crimes against humanity and thus cannot be interpreted to restrict investigation or remedies.

Additionally, jurisprudence predating the International Convention for the Protection of All Persons from Enforced Disappearance (Convention) agrees that unresolved disappearances are continuing crimes, and consequently any limitation begins only when the prohibited situation has ceased and the fate and whereabouts of the victims is known.

With respect to the issue of retroactivity, widespread disappearances, executions and inhumane acts have been recognized as crimes against humanity since the Hague Convention of 1899, codifying the customary laws of armed conflict. Both the EComHR and the ECtHR have emphasized “the rule that there can be no time-bar...laid down by the Charter of the Nuremberg Tribunal” and therefore retroactivity does not arise. In addition, the ECtHR has noted that the Nuremberg principles just reiterated the definition of war crimes and thus “domestic courts could rely on international law as a basis ... without infringing the principles of *nullum crimen*”.

In Spain, the Audiencia Nacional ruled in *SS Totenkopf-Sturmabteilung*, that the legality principle applicable to international crimes such as crimes against humanity is not domestic, but rather international, and therefore Spain’s Criminal Code applied retroactively to conducts considered criminal under international law.

## **Violation of judicial independence**

The rule of law, recognized as essential to peace and justice, “...requires laws which define limits on state power and a system of courts independent of every other institution of the state to interpret and apply those laws.” An independent, impartial and competent judiciary is the key component of the rule of law and the foundation upon which all rights depend. Fundamental to maintenance of the rule of law is the duty of all states to guarantee, observe and respect the independence of judges to render decisions on all issues of a judicial nature. Judicial investigation of disappearances, executions and torture is mandated by all applicable international instruments. Therefore, a judge must open an investigation when—as in this case—there are reasonable grounds to believe that widespread and systematic disappearances, executions or torture occurred and are unresolved. Judges have a crucial role in ensuring justice through restricting state arbitrariness and interpreting domestic law in accordance with emerging principles of customary international law. Internationally accepted principles mandate that disputes with the correctness of a judge’s decision can only be dealt with by appeal and not by punitive measures directed at the judge personally. Suspension—let alone criminal prosecution, as occurred here—is strictly prohibited.

A law “...used to punish judges whose decisions displease the government in question... infringes the constitutionally protected independence of the judiciary and is thus invalid...” Clearly, “...while exceeding jurisdiction takes an act or decision of a judge out of the realm of correctness, it does not take the activity out of the realm of judging.”

Judges investigating allegations of serious human rights violations constituting international crimes by state agents—including disappearances, executions and torture—are at heightened risk of professional and physical harm from reprisals and therefore require more stringent protections. For this reason International instruments prohibiting

disappearances require states to provide special protection for investigators (including judges), lawyers and witnesses.

The proceeding against Judge Garzón demonstrate the failure by Spain to guarantee, respect and observe judicial independence as required by law and will have a chilling effect on other Spanish judges called upon to remedy serious human rights violations constituting crimes committed in Spain and abroad.

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