

# Lawyers' Rights Watch Canada

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17 May 2010

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Human Rights Council 14<sup>th</sup> Session  
Item 3. Interactive Dialogue

Written Statement submitted jointly by LRWC, a non-government organization in special consultative status and the Asian Legal Resource Centre, a non-government organization in general consultative status.

## **On behalf of Judge Baltasar Garzon and the Independence of the Judiciary<sup>1</sup>**

### **I. LRWC and ALRC call on the Human Rights Council to call on Spain to:**

1. Comply with its duty to investigate over 100,000 enforced disappearances (disappearances) and extra-judicial executions (executions) alleged to have occurred during the Franco dictatorship and the civil war.
2. Ensure that disagreements with Garzón's decision to investigate and his interpretation of Spain's 1977 Amnesty laws (AL/1977) are determined by judicial review and appeal.
3. Ensure that Garzón is not punished for exercising his jurisdiction to interpret and apply the law or his decision to investigate the disappearances and executions.
4. Ensure that Garzón and others engaged in the investigation of serious human rights violations are protected from reprisals and interference.

### **II. Summary**

The charges pending against Garzón are based on allegations that, in opening an investigation in 2008 into disappearances and executions<sup>2</sup> alleged to have been committed by government agents during the Spanish Civil War and the early years of the Franco regime, he knowingly ignored AL/1977.

Disappearances and executions by states are amongst the most serious international crimes. Amnesty laws cannot be interpreted to deny effective investigations, prevent remedies, extinguish the right to truth, or to allow impunity for perpetrators.

By allowing Garzón to be charged and suspended for carrying out his judicial duty to interpret and apply the law, Spain is violating its duties to protect and enforce rights to:

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<sup>1</sup> The European Center for Constitutional and Human Rights supports this statement.

<sup>2</sup> Estimated at over 114,000.

- independent and impartial judges, International Covenant on Civil and Political Rights (ICCPR) Article 14.
- life, ICCPR Article 2.
- effective remedies for violations of the right to life, ICCPR Article 2.
- effective investigations of right to life violations.
- the truth.

### **III. Facts**

In response to a complaint of continuing disappearances and executions carried out during the Spanish civil war and the Franco dictatorship, Garzón opened an investigation and order the exhumation of mass graves (September/08). After State prosecutors announced plans to appeal on the grounds that AL/1977 provided immunity, Garzón terminated the investigation (November/08) and passed on responsibility to regional courts.

A January/09 petition of Manos Limpias and Libertad e Identidad,<sup>3</sup> which alleged that by opening the investigation, Garzón had knowingly exceeded his jurisdiction thereby violating AL/1977, was deemed admissible and Garzón's appeal to the Spanish Supreme Court was dismissed.<sup>4</sup> On 7 April 2010, Garzón was indicted on charges of abusing his powers by opening the investigation.<sup>5</sup> On May 14 2010, he was suspended by the General Council for the Judiciary. If convicted, Garzón will face a 10 to 20 year suspension.

### **IV Law**

#### **A/ Failure to Protect Judicial Independence**

Spain has a positive legal duty to guarantee an independent judiciary arising from the ICCPR, the European Convention on Human Rights and other instruments. Specific duties are set out in the Basic Principles on the Independence of the Judiciary (Principles).<sup>6</sup>

The Principles require Spain to protect both the jurisdiction and the decision making powers of judges from all interference. Article 3 ensures that,

“The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.”

Whether AL/1977 is competent to prevent an investigation of these crimes is a matter “of a judicial nature” that Garzón had the “exclusive authority” to decide.

Whether Garzón exceeded his jurisdiction is therefore a matter for judicial review rather than a matter for a complaint of misconduct or criminal wrongdoing as “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.”<sup>7</sup>

<sup>3</sup> A third group, Falang, joined in March 2010.

<sup>4</sup> Ruled March 2010.

<sup>5</sup> On May 12, 2010 the Spanish Supreme Court allowed the indictment to proceed.

<sup>6</sup> Adopted by the Eighth United National Congress of the Prevention of Crime and the treatment of Offenders in 1985, Preamble and article 1.

<sup>7</sup> R.M. v. M.Z., Ontario Superior Court of Justice, Divisional Court, April 1, 2009. 249 O.A.C.1. 2009 at para 28 & 29, relying on the Supreme Court of Canada in Morier and Boiley v. Rivard, [1985] 2 S.C.R. 716 (S.C.C.) at pp. 737 ff.

Article 4 ensures that, “There shall not be any inappropriate or unwarranted interference with the judicial process.” A revision of Garzón’s decision to proceed with an investigation can only be properly accomplished by an appeal.

The Principles further provide,

“Judges shall be subject to suspension or removal only for reasons of incapacity of behaviour that renders them unfit to discharge their duties” (Article 19).

The charges against and suspension of Garzón are, “inappropriate and unwarranted interference” and contrary to the universal interest in the proper and equal application of the law.

Judicial independence requires that judges be free from punishment for judicial decisions that are either unpopular or wrong.

... it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequences to himself.<sup>8</sup>

AL/1977 cannot be “...used to punish judges whose decisions displease the government in question [without infringing] the constitutionally protected independence of the judiciary and is thus invalid...”<sup>9</sup>

Judges investigating allegations of serious crimes by state agents are at heightened risk from reprisals and require stringent protections, as mandated by the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Investigation Principles)<sup>10</sup> and the Declaration on the Protection of all Persons from Enforced Disappearance (Disappearance Declaration).<sup>11</sup>

Spain has failed to adequately protect judicial independence.

## **B/ Duty to Investigate**

As a party to the ICCPR, Spain has a duty to ensure investigations of disappearances and executions, arising from its duty to prevent and punish violations of the right to life. The Investigation Principles<sup>12</sup> also mandate effective investigations of these crimes. The Disappearance Declaration<sup>13</sup> defines disappearance as “a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared” and establishes: that amnesty laws are incompetent to protect suspected perpetrators from prosecution; the right to a prompt, thorough and impartial investigation; that “no measure” be allowed to impede or curtail investigations; that investigators be protected from reprisals; and that investigations continue until victims’ fates are clarified.

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<sup>8</sup> R.M. v. M.Z., Ontario Superior Court of Justice, Divisional Court, April 1, 2009. 249 O.A.C.1. 2009 at para. 26. <http://www.canlii.org/en/on/onscdc/doc/2009/2009canlii15147/2009canlii15147.html>

<sup>9</sup> Cosgrove v. Canadian Judicial Council, 261 D.L.R. (4th) 447 • 40 Admin. L.R. (4th) 1 • 282 F.T.R. 60 <http://www.canlii.org/en/ca/fct/doc/2005/2005fc1454/2005fc1454.html>

<sup>10</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Article 15. <http://www2.ohchr.org/english/law/executions.htm>

<sup>11</sup> Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992, Articles 13.3, 13.5 & 18. .

<sup>12</sup> Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992.

<sup>13</sup> Supra, note 12.

State duties to investigate and remedy right to life violations are confirmed by judgments of the ECtHR,<sup>14</sup> and the Inter-American Court of Human Rights (IACtHR)<sup>15</sup> and by the Committee.<sup>16</sup>

The Investigation Principles<sup>17</sup> mandate a, “thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions... to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death.”

All other applicable instruments impose duties to investigate and remedy continuing disappearances and executions and forbid statutes of limitations, including the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,<sup>18</sup> the Rome Statute of the International Criminal Court (Rome Statute)<sup>19</sup> and the International Convention for the Protection of All Persons from Enforced Disappearances.<sup>20</sup> The Rome Statute specifically requires Spain to, “exercise its criminal jurisdiction over those responsible for international crimes.”

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<sup>14</sup> See decisions of the European Court of Human Rights in *Hugh Jordan v. the United Kingdom* (Application no. 24746/94) Judgment, Strasbourg, 4 May 2001, para. 105; *Çiçek v. Turkey* (Application no. 25704/94) Judgment, Strasbourg 27 February 2001, para. 148; *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, 105; *McKerr v. the United Kingdom*, (Application no. 28883/95), Judgment, Strasbourg, 4 May 2001, para. 111-115; *Kelly and Others v. the United Kingdom*, (Application no. 30054/96), Judgment, Strasbourg, 4 May 2001, *Shanaghan v. the United Kingdom*, (Application no. 37715/97) Judgment, Strasbourg, 4 May 2001; *Makaratzis v. Greece [GC]*, (Application no. 50385/99), Judgment, Strasbourg, 20 December 2004, para. 73-79 & *Finucane v. United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003, at para. 67.

<sup>15</sup> *Barrios Altos v. Peru*, March 14, 2001, the Inter-American Court of Human Rights. ([http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf))

<sup>16</sup> Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

<sup>17</sup> United Nations, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 24 May 1989, paragraph 9, available at: <http://www.unhcr.org/refworld/docid/3ae6b39128.html> [accessed May 2010]

The Economic and Social Council recommended that these principles be respected by states and taken into account within the framework of national laws and practice

<sup>18</sup> Adopted by General Assembly resolution 60/147 of 16 December 2005, Articles 2(d), 3(b) & 6.

<sup>19</sup> Rome Statute of the International Criminal Court, Article 7.1(i) & 29. The Rome Statute was approved by a vote of 120 to 7 in Rome on 17<sup>th</sup> July 1998. Countries opposed were: China, Iraq, Israel, Libya, United States, Qatar and Yemen. The Rome Statute entered into force 1 July 2000 and as of May 15, 2010, 139 states of have signed and 111 ratified the Rome Statute.

<sup>20</sup> The International Convention for the Protection of All Persons from Enforced Disappearance, Adopted by the General Assembly 20 December 2006 by resolution A/RES/61/177 and shall, in accordance with article 39 enter into force after the 20<sup>th</sup> ratification. 83 states have signed and 18 ratified as of May, 4, 2010. Cited as Doc. A/61/488. C.N.737.2008.TREATIES-12 of 2 October 2008, Article 1(b) & the Inter-American Convention on Forced Disappearance of Persons,<sup>20</sup> Article III.

## C/ The Right to Truth

The right to truth about disappearances and executions is inalienable.

The development of the right to truth<sup>21</sup> was spurred by the widespread use by states of disappearances and executions to quell opposition in the 1970s and subsequent practice of enacting amnesty laws to insulate those responsible from accountability.

The societal necessity and individual right to truth in order to, "...establish incredible events by credible evidence,"<sup>22</sup> has been consistently confirmed by tribunals and articulated in reports and instruments as an inalienable stand-alone right, fundamental to meaningful human rights enforcement and the rule of law.

Principles recommended in 1977 identified "the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violation of human rights, to the perpetration of aberrant crimes"<sup>23</sup> and recommended that amnesty laws have no legal effect on proceedings<sup>24</sup>—such as the investigation approved by Garzón—brought by victims.

The updated Set of Principles to Combat Impunity, adopted in 2005 by the Human Rights Commission, define disappearances and executions as crimes to which an imprescriptable and inalienable right to truth applies.

"Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes."<sup>25</sup>

The Human Rights Commission adopted a resolution that cited, "...exposing the truth regarding violations of human rights and international humanitarian law that constitute crimes" as one of the steps integral to the promoting and implementation of human rights.<sup>26</sup>

States have been called on to,

"ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction."<sup>27</sup>

In 2006, the Office of the High Commissioner of Human Rights concluded,

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<sup>21</sup> The right of families to know the fate of missing relatives was first codified by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 32 & 33.

<sup>22</sup> Nuremberg Tribunal U.S. Chief Prosecutor Robert Jackson, June 7, 1945.

<sup>23</sup> Question of the impunity of perpetrators of human rights violations (civil and political), final report by Louis Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, Annex 1, Principles 3, 4, 17 & 32. <http://www.derechos.org/nizkor/impu/joinet2.html>

<sup>24</sup> Ibid, para. 32. "Amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy. It must have no legal effect on any proceedings brought by victims relating to the right to reparation."

<sup>25</sup> Promotion and Protection of Human Rights, Impunity, Report of the independent expert to update Set of Principles to combat impunity, Diane Orentlicher, Addendum, Update Set of Principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, Preamble paragraph B and Principles 2. E/CN.4/2005/102/Add.1.

<http://www.idp-key-resources.org/documents/2005/d04560/000.pdf>

<sup>26</sup> Adopted without a vote. See chap. XVII, E/CN.4/2005/L.10/Add.17

<sup>27</sup> UN Human Rights Commission, Enforced or involuntary disappearances, Human Rights Resolution 2005/27, April 2005. [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-27.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-27.doc)

“...the right to truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations.”<sup>28</sup>

...

“The right to truth as a stand-alone right is a fundamental right of the individual and therefore should not be subject to limitations. Given its inalienable nature... the right to the truth should be treated as a non-derogable right. Amnesties... must never be used to limit, deny or impair the right to the truth...”

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED),<sup>29</sup> ratified by Spain 24 September 2009, confirms the right, “...to know the truth regarding the circumstances of the disappearance, the progress and results of the investigation and the fate of the disappeared person”<sup>30</sup> and re-states the duty investigate and to protect investigators from ill-treatment.<sup>31</sup>

#### **D/ Amnesty Laws**

Current law clearly indicates that amnesty laws cannot prevent the investigation of continuing disappearances and executions. Jurisprudence rejects this as unjust, incompatible with the rule of law and inconsistent with universal rights. The scope of AL/1977 can only be determined by judicial review and appeal.

Observations of the UN Human Rights Committee (Committee) and decisions of regional tribunals consistently concluded that amnesty laws cannot prevent investigations of serious human rights violations. The Committee has observed that amnesty laws seeking to prevent investigations, punishment and reparations are inconsistent with the ICCPR.

In relation to Spain, the Committee expressed concern “at the continuing applicability of the 1977 amnesty law.” The Committee recalled that crimes against humanity are not subject to a statute of limitations and drew Spain’s attention to General Comment No. 20 (1992), on article 7 of the ICCPR, “according to which amnesties for serious violations of human rights are incompatible with the Covenant...”

Since 1992 the Committee has consistently observed, when considering the legitimacy of amnesty laws in Niger, El Salvador, France, Chile, Croatia, Lebanon, Republic of Congo, Peru and Senegal<sup>32</sup> that,

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<sup>28</sup> Promotion and Protection of Human Rights: Study on the right to truth: Report of the HCHR, 8 February 2006 E/CN.4/2006/91, Summary, page. 2 & para. 60.

<http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>

<sup>29</sup> The International Convention for the Protection of All Persons from Enforced Disappearances opened for signature on 6 February 2007, Doc.A/61/488.C.N.737.2008.TREATIES. The convention comes into force 30 days after the 20th ratification. As of April 7, 2010, 83 states have signed and 18 ratified.

<sup>30</sup> Ibid, Article 24.2 “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. Each State Party shall take appropriate measures in this regard. “

<sup>31</sup> Ibid, Article 12.

<sup>32</sup> Niger: CCPR/C/79/Add. 17, 29 April 1993. El Salvador: CCPR/C/79/Add.34, 18 April 1994.

France: CCPR/C/79/Add. 80, 04 August 1997, at para. 13. Chile: A/54/40, 1999. Republic of Congo: CCPR/C/79/Add.118, 25 April 2000

“... that the Act infringes the right to an effective remedy set forth in article 2 of the [ICCPR], since it prevents the investigation and punishment of all those responsible for human rights violations and the granting of compensation to the victims.”<sup>33</sup>

In 2008 the Committee concluded,

“The State party should ensure that the Law on Amnesty is not applied to the most serious human rights violations or violations that amount to crimes against humanity or war crimes. It should also ensure that human rights violations are thoroughly investigated, those responsible brought to justice and that adequate reparation is made to the victims and their families.”

The ICTY,<sup>34</sup> the ECtHR,<sup>35</sup> the Inter-American Court of Human Rights<sup>36</sup> and the Argentina Supreme Court (Julio Simon/June/05) have rejected or struck down amnesty laws on the same basis.

## V. Conclusion

“Every instance of secret detention also amounts to a case of enforced disappearance” concluded the exhaustive report<sup>37</sup> of four experts while noting increased<sup>38</sup> illegal<sup>39</sup> use occurring entirely outside the law and immune from judicial oversight. With Garzón suspended there is now little or no chance of there being any judicial oversight.

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<sup>33</sup> El Salvador, CCPR/CO/78/SLV, 22 August 2003., at para. 6.

<sup>34</sup> The Prosecutor v. Anto Furundzija [IT-95-17/1-T, 10 December 1998], at para. 155.

<sup>35</sup> Ould Dah v. France, Requeté no. 13113/03, Council of Europe: European Court of Human Rights, 17 March 2009.

<sup>36</sup> Barrios Altos v. Peru, March 14, 2001, the Inter-American Court of Human Rights. ([http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf))

<sup>37</sup> Joint Study on Global Practices In Relation to Secret Detention in the Context Of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; The Special Rapporteur On Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and The Working Group on Enforced or Involuntary Disappearances Represented By Its Chair, Jeremy Sarkin, February 19, 2010, A/HRC/13/42.

<sup>38</sup> Such as the United States, China, Russia, Pakistan and Sri Lanka.

<sup>39</sup> Declaration to Protect all People from Enforced Disappearances, Article 7 “No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.”