On the trial against Judge Baltasar Garzón:
The application of international law to the crimes of the Spanish Civil War and the Franco regime does not constitute criminal malfeasance

In May 2010 Spain caught the attention of the world when the Supreme Court suspended as a result of a criminal malfeasance investigation opened against Judge Baltasar Garzón, the only judge to have challenged the lack of accountability relating to the crimes committed during the Spanish Civil war and the subsequent Franco Regime.

The crime of malfeasance, with which Judge Garzón has been charged, concerns misconduct in the administration of justice and sanctions judges for making unjust judicial decisions. In October 2008 Judge Baltasar Garzón established the jurisdiction of the Audiencia National, applying the principle that crimes against humanity cannot be subject to statutes of limitation or amnesty. He authorized the investigation into the alleged disappearance, torture and execution of 114.266 persons, identified as victims, between 17 July 1936 and December 1951.

Since authorizing the malfeasance investigation against Judge Garzón, the Supreme Court has endeavored to keep the case away from the spotlight of international scrutiny, refusing even to allow the testimony of expert witnesses in international law during the trial.

Hearings in what has been termed the 'historic memory' case against Judge Garzón begin on 24 January 2012. This trial, if successful, could represent the final seal of impunity for those responsible for crimes committed during the Civil War and the Franco regime in Spain. Alternatively, it could finally clear a path for the country to begin a new era of justice for victims of past crimes never before investigated by the Spanish justice system.

The Supreme Court in its decisions so far has maintained the supremacy of national law – including the 1977 Amnesty Law – above the principles of international law. It has also affirmed that judicial actions must remain separate from legislative action and political agreements which, according to the Court, legitimize the 1977 Amnesty Law and make it distinct from others that have been repealed in other parts of the world. The Supreme Court has not recognized the role of the judiciary in taking corrective action where domestic law contradicts the principles and norms of international law. The Supreme Court in this respect has authorised the investigation and prosecution of crimes against humanity committed in foreign countries, but has taken a contradictory position in respect of similar crimes alleged in Spain.

For this reason, national and international human rights organizations have spoken out against the attack on judicial independence in Spain represented by this trial. We have also warned of the nefarious precedent that the prevalent vision in the Supreme Court presents, regarding both access to justice for the victims of the Civil War and the Franco regime and, more generally, for the conduct of national courts around the world. The trial of Judge Garzón for the crime of criminal malfeasance has implications that reach far beyond Spain's borders.

The panel of Supreme Court judges which will hear Judge Garzón's arguments has the opportunity to correct the dangerous course initiated in the pre-trial phase where the investigation for criminal malfeasance was inappropriately authorized. Any criminal offence such as malfeasance by judicial officers needs to be applied cautiously, so as not to undermine the independence of the judiciary or to sanction a judge for following an accepted interpretation of international law.

The panel of the Supreme Court has the option of complying with the provision of Spanish Constitution establishing that international law forms part of Spanish law (Art. 10.2 and 96), rather than persevering with a misguided move to punish a judge for applying international law standards – such as the principle that crimes against humanity cannot be subject to statutes of limitations or amnesty. In other words, the Supreme Court has the possibility of becoming the guarantor of human rights, as judges in other parts of the world have done, or of breaking with international law and standards and so destroying the possibility of access to justice for the victims of serious violations of human rights such as those that took place during the Spanish Civil War and the Franco regime.

Spain itself is obliged to assure conformity with international treaties to which it is a party. The State has a clear obligation to investigate unlawful killings, torture, enforced disappearances and other crimes under international law committed during the Civil War and the Franco regime.

The Council of Europe's Guidelines on eradicating impunity for serious human rights violations establishes a guarantee that is especially important in this context. It states that safeguards should be put in place to ensure that lawyers, prosecutors and judges do not fear reprisals for exercising their functions in these types of cases.

The signatory organizations call on the Supreme Court to act in accordance with the duty to guarantee the constitutional and international laws that define its jurisdictional function with regard to the international obligations taken on by Spain; with regard to the standards of justice warranted in a trial involving a judge of the Spanish magistracy; and with respect to judicial independence concerning, above, all, the rights of victims of crimes under international law.

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