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The Spanish Civil War, Amnesty, and the Trials of Judge Garzón

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Introduction

On February 27, 2012, the Spanish Supreme Court exonerated Judge Baltasar Garzón of committing “*prevaricación*”—imperfectly translated as “knowing abuse of authority”—in a case involving investigation into disappearances during the Spanish Civil War.^[1] Garzón’s exoneration was viewed

by most media outlets as a personal victory for the judge and a victory for the rule of law. In fact, the outcome was much more ambiguous; it defused the domestic and international outcry, but it effectively closed a venue for Civil War era claims. And in a separate and unrelated case, Judge Garzón was removed from the bench for eleven years. The *prevaricación* decision, as summarized below, contradicts recent trends in national and international jurisprudence on amnesty and international crimes. Moreover, less than a month later, the European Court of Human Rights rejected a challenge to Spain’s failure to investigate the fate of the Civil War missing. Together, these decisions probably end legal efforts to achieve some accounting for the crimes of the 1936-1939 Civil War and its repressive aftermath.

Historical Background

Judge Garzón issued the historic arrest warrants against former Chilean dictator Augusto Pinochet, as well as his counterparts in the Argentine military command, alleging that they were responsible for genocide, torture, and terrorism. The arrest warrants touched off extradition proceedings in London and eventually contributed to legal proceedings against Pinochet in Chile. Garzón’s theory, approved at the time by the entire *Audiencia Nacional*,^[2] was that neither a statute of limitations nor an amnesty law could preclude investigation into crimes against humanity. The Supreme Court implicitly approved this theory in an appeal involving former Argentine naval officer Adolfo Scilingo, who was tried and convicted in Spain in 2005 for crimes committed in Argentina during the dictatorship years.

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Trouble came when Judge Garzón tried to apply this same theory to his own country's historical crimes. No one has ever been held accountable for crimes committed during Spain's Civil War; more importantly, up to 150,000 dead still remain unidentified in unmarked graves. Although those who might bear criminal responsibility are dead or dying, family members of some of the missing asked the *Audiencia Nacional* to investigate, hoping to recover the remains of their loved ones so that they could be reburied properly.

Judges of the *Audiencia Nacional* are assigned cases via a lottery system, and Garzón got this case through the lottery. He initially ruled that he had jurisdiction because these were international crimes, thus not subject to either amnesty law or a statute of limitations. He sent off an inquiry to the police as to whether any of the Franco-era officials presumptively involved were still alive. When the police replied that they were all dead, Judge Garzón relinquished his jurisdiction to the local courts to pursue the question of where the bodies had been buried. His initial ruling set off a firestorm in Spain.^[3] Two far-right groups, the Sindicato de Funcionarios Públicos "Manos Limpias" and the Asociación Civil Libertad e Identidad, brought a case against Judge Garzón under Spain's liberal rules, which allow private parties, including organizations, to act as private prosecutors. They alleged that he had deliberately flouted the amnesty law by even hearing the case, thus committing the crime of *prevaricación*. That crime requires that the judge knowingly and abusively act in the face of settled law, not simply commit legal error. The judge assigned to consider the *prevaricación* claim rejected the initial efforts to dismiss it.^[4] The law had never been applied before based simply on disagreement with the legal argumentation in a case, and therefore raised issues of interference with judicial independence. Ultimately, the Supreme Court held the case over for trial.

The Cases

The trial against Judge Garzón began in January 2012. The court denied all of Judge Garzón's pre-trial motions. Meanwhile, during the pre-trial and trial process, thousands of people demonstrated in Madrid in his support. A group of international law experts filed a brief in support of an Interights application on Judge Garzón's behalf before the European Court of Human Rights, alleging interference with the independence of the judiciary. Moreover, Judge Garzón's televised testimony before the court on his reasons for allowing the Civil War victims' case to proceed put the Civil War litigation at the forefront of national debate.

The stakes were high when the Supreme Court, acting as a trial court, issued its decision. The February 27, 2012 decision found that Judge Garzón had made a legal mistake but that he did not deliberately flout the law. Therefore, the charge of *prevaricación* was incorrect. The Court went on to discuss why Judge Garzón's initial rulings regarding the Civil War crimes, even though not criminal, had been incorrect. It first concluded that Judge Garzón could not use Spanish criminal proceedings when the purpose of the investigation was to look into historical truth rather than focusing narrowly on a criminal defendant.

Second, it declared that the case could not be brought under the principle of "legality" (the prohibition of *ex post facto* law). Judge Garzón had found that the Civil War era crimes constituted a continuing crime of illegal detention, which, given the circumstances, was at the same time a domestic crime and a crime against humanity under customary international law. This dual nature of acts that are simultaneously national and international crimes has been used widely in Latin American courts to allow prosecution of crimes that were not defined as international crimes in the penal codes of the time. In those cases, the

ex post facto problem does not arise because the domestic crimes of, *inter alia*, murder and kidnapping have long existed. The international aspect thus overcomes the statute of limitations and/or amnesty obstacles. For example, the Argentine Supreme Court and the Peruvian court in the Fujimori case both used this theory.^[5]

The Court found that the crimes committed during the Civil War period and immediately thereafter (the complaint went up to 1952, presumably to try to encompass post-WWII developments) could not constitute crimes against humanity because such crimes had not been defined in either the national penal code or under international law at the time they were committed. Contrary jurisprudence from the European Court of Human Rights involving the former Soviet Union^[6] was distinguished on the basis that the former USSR was a UN member and signatory to the Nuremberg Charter before 1952. Unlike the former Soviet Union, Spain was not a signatory of the Nuremberg Charter and only became a UN member in 1955, and thus Spain had not participated in the Nuremberg-era formation of customary international law. Moreover, because no international law exception could apply, the crimes were subject to the statute of limitations of the national penal law, which had long since expired.

Judge Garzón had affirmed that the crime of illegal detention is a permanent crime in that the ending date of the detention is not known when no body has been recovered, meaning that there is no appropriate starting date for the statute of limitations to run. Furthermore, he argued that in any case, the statute of limitations was tolled during the period of dictatorship, when no judicial remedies were possible, and that there was no statute of limitations on crimes against humanity. All three arguments have been used extensively by Latin American courts, including in the Chilean courts' rulings against Pinochet. However, the Spanish Supreme Court rejected all of them. It found the permanent crime theory a "fiction," held that tolling was irrelevant since more than twenty years passed since the end of the dictatorship, and that while international crimes might not now be subject to a statute of limitations, the principle of legality meant that a statute of limitations could not be retroactively nullified.

With respect to Spain's 1977 Amnesty Law, the Court found that even if the amnesty law would now be considered a violation of international law, that determination is not retroactive. It rejected the jurisprudence of the Inter-American system on amnesty law, finding that it applies its norms retroactively.^[7] The Court then launched into a defense of the amnesty law, finding that it had no right to overturn a law passed by the legislature, that international bodies' criticisms of the law are non-binding, and that the amnesty law represented a consensus of social forces at the time and was an integral part of national reconciliation and transition to democracy. Citing the transitions of Germany and South Africa as paradigmatic, the Court declared that the amnesty law had made possible reparations to the victims.

Importantly, the Court recognized that under current international standards, the crimes committed during the Civil War era would clearly amount to crimes against humanity and that the lack of investigation of such crimes committed against Republican forces—while similar crimes against Franquistas had been investigated and punished—created inequality among victims.

On March 28, 2012, the Penal Chamber of the Supreme Court returned to the demands for investigation of the whereabouts of the detained and disappeared that Judge Garzón had championed. It found that jurisdiction properly lay, as Judge Garzón had already decided,

with the local courts rather than with the *Audiencia Nacional* in Madrid. It also affirmed Spain's duty to comply with the UN 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.[8] However, the Court stated that criminal law was not the appropriate vehicle; rather, laws on exhumations, administrative and civil remedies should be employed.

A day earlier, a related case showed the limits of the Supreme Court's recommendations. Two war survivors, who had previously joined as complainants in the case heard before Judge Garzón, brought a request for the exhumation of their grandfather's presumed remains from the cemetery in Cordoba. Despite Judge Garzón's instruction that the local authorities allow an exhumation, the Cordoba City Council declined to implement his order.

Deprived of a local remedy, the family filed an application with the European Court of Human Rights ("ECHR"), which, on March 27, rejected their application[9] on the basis that too much time had elapsed between the underlying acts and the family's application to the Court. The applicants cited violations of the right to life, continuing mental harm constituting inhumane treatment, and continuing failure to investigate the alleged detention. The ECHR acknowledged that even if the events took place before the acceptance of its jurisdiction, it could consider the state's independent obligation to investigate, which continued until today. However, the ECHR ruled that in this case the requisite "genuine connection between the death and the entry into force of the Convention" was missing since the time-lapse made it impossible to find that "a significant proportion of the procedural steps required [to investigate] have been, or should have been, carried out after the critical date." Moreover, the ECHR concluded that the applicants had acted with a lack of due diligence in bringing their complaint. According to the Court, Spain accepted the right of individual petition in 1981, and it must have become clear to the applicants that no domestic investigation would be forthcoming. Yet the applicants waited for decades to bring the case. The ECHR also rejected the argument that the recent dismissal of the cases that Judge Garzón had championed in the *Audiencia Nacional* were new evidence sufficient to overcome the lack of due diligence. The fact that the petitioners had been trying to get legal action for decades was deemed insufficient. The ECHR's ruling effectively destroys the last hope of the elderly survivors that an international body might insist on action by Spain.

Conclusion

Although Judge Garzón was acquitted in this case, his legal troubles continued. During the same time period, two other complaints for claimed judicial improprieties against him went to trial. A few days before the judgment of February 27, he was convicted of *prevaricación* in another case of alleged judicial impropriety, involving wiretapping of jailed defendants in a corruption scandal. The defendants, according to the Spanish media, were close to the now-ruling Popular Party and had allegedly been stealing millions in public funds.[10] Judge Garzón was barred from the judiciary for eleven years, effectively ending his judicial career.

Judge Garzón filed an appeal of his sanction to the Spanish Constitutional Court on May 9, 2012. He argued that there was no wiretapping law in place for him to violate, that he properly exercised his discretion, and that the efforts to remove him from the bench were arbitrary, vindictive, and undermined the independence of the judiciary.[11] The 15,000-strong European Association of Judges for Democracy and Freedom has asked the Spanish Justice Minister to pardon him.[12]

About the Author:

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Endnotes:

[1] For the full text of these decisions in Spanish, see *Documentación sobre la causa contra Garzón* [Documentation on the Case Against Garzón], *Justicia Internacional y Franquismo: El Caso Contra Garzón* (updated to Mar. 29, 2012), available at <http://casogarzon.blogspot.com.es/p/documentacion-sobre-la-causa-contra.html>.

[2] The Spanish *Audiencia Nacional* is a high court of national jurisdiction that is loosely analogous to a U.S. federal court.

[3] For a chronicle of the investigation and reaction to it in Spain, see *Un Juez Ante La Justicia* [A Judge Before the Court], *El País* (Spec. Issue) (Spain), available at <http://www.elpais.com/especial/caso-garzon/> [hereinafter *A Judge Before the Court*].

[4] See, e.g., Auto TS Desestima Recurso Contra Querrela [Rejection of Complaint Against Appeal] J.T.S., June 15, 2009 (Spain); Auto TS No Sobreseimiento Querellas [No Dismissal of Complaints] J.T.S., Feb. 3, 2010 (Spain); Auto TS Denegatoria Recurso Apelación [Denial of Appeal], J.T.S., Mar. 23, 2010 (Spain). See also Garzón's effort to get Judge Varela disqualified due to bias. Escrito de Recusación [Brief of Disqualification], J.T.S., Apr. 23, 2010 (Spain); Auto TS Inadmitiendo Recusación Varela [Denial of Admission to Disqualification of Varela], J.T.S., May 7, 2010 (Spain). All decisions are available at <http://casogarzon.blogspot.com.es/p/documentacion-sobre-la-causa-contra.html>.

[5] See, e.g., Motion Submitted by the Private Accusation in Representation of the Government of Chile (Enrique Lautaro Arancibia Clavel), Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice] 24/8/2004, "Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, Causa no. 259/ Recurso de hecho" (Arg.); Cases Barrios Altos, La Cantuta, and SIE Basements (Alberto Fujimori) — Expediente A.V. 19-2001, Sala Penal Especial, Corte Superior de Justicia de Lima [Special Criminal Court, Superior Court of Lima], (Apr. 7, 2009) (Peru). For more on the concept and on these decisions, see Due Process of Law Foundation, *Digest of Latin American Jurisprudence on International Crimes* (2010).

[6] *Kolk & Kislyiy v. Estonia*, App. Nos. 23052/04, 24018/04 (Eur. Ct. H.R. 2006).

[7] In fact, the Inter-American jurisprudence does no such thing: it is the continuing existence of obstacles to investigation and prosecution—including amnesties and statutes of limitation—into the present that negates the victims' right to a remedy and a day in court, thus violating the American Convention on Human Rights. See Organization of American States, *American Convention on Human Rights*, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[8] G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 15, 2005).

[9] *Dorado v. Spain*, App. No. 30141/09 (Eur. Ct. H.R. 2012).

[10] See *A Judge Before the Court*, *supra* note 3.

[11] *Garzón alega ante el Constitucional que el Supremo vulneró su independencia* [Garzón Argues Before the Constitutional Tribunal that the Supreme Court Violated Judicial Independence], *El País* (May 9, 2012) (Spain), available at http://politica.elpais.com/politica/2012/05/09/actualidad/1336555969_029706.html.

[12] *Jueces y fiscales europeos piden perdón para Garzón* [European Judges and Prosecutors Apologize to Garzón], *Reuters* (May 17, 2012) (Spain), available at <http://es.noticias.yahoo.com/jueces-y-fiscales-europeos-piden-el-indulto-para-190633800.html>.