



Special Rapporteur on the Follow-up of Views
United Nations Human Rights Committee
19th July 2022

We are writing to express our deep concern about the Spanish government's failure to implement the decision in the case of *Garzon v Spain* (Communication no. 2844/2016), and to ask the Committee to do all within its power to engage with the Spanish government to ensure that this important decision is given effect without further delay. As the Government is not cooperating and has not taken concrete actions to implement the decision, we urge the Special Rapporteur on the Follow-up of Views to issue a report on the State's non-compliance.

Background

As is well known, on 25 August 2021, the UN Human Rights Committee (the Committee) issued a decision finding Spain responsible for multiple violations of the rights of our client, the former judge of the Spanish National High Court, Baltasar Garzón. The decision found unanimously that there had been multiple violations of articles 14(1), 14(5) and 15 of the ICCPR. In sum, these amounted to the following:

- First, that criminal proceedings against Baltasar Garzón in both the *Franquismo* and *Gürtel* cases were 'arbitrary'. Emphasizing the fundamental principle of judicial independence, the decision recalled that judges 'should not be subject to criminal or disciplinary action based on the content of their decisions'.
- Second, the Spanish courts lacked the necessary independence and impartiality in their handling of the cases against Judge Garzón. The Committee noted the overlap of judges involved in the investigative and trial stages of both the *Franquismo* (or *historical memory*) and *Gürtel* processes, as well as the role of the investigating magistrate in the *Franquismo* case, who repeatedly assisted the claimant organisations.
- Third, Judge Garzón's fair trial rights were violated by the denial of any right of appeal (noting that the fact the Supreme Court is the trial court of first and only instance for judges provided no guarantee of a fair trial).
- Finally, the prosecution and punishment of Judge Garzón for the crime of '*prevaricación*', which criminalizes 'unjust judgments' under the Spanish Criminal Code, 'was arbitrary and unforeseeable as it was not based on sufficiently explicit, clear and precise provisions that accurately define the prohibited conduct, in violation of Article 15, paragraph 1 of the Covenant'. The conviction of Judge Garzón was not a foreseeable application of the criminal law.

Consequently, the Committee found that Spain must make full and comprehensive reparation for the dismissal and prosecution of Judge Garzón. Including, *inter alia*, the obligations to erase his criminal record, to provide him with an adequate compensation for damages, and to take the necessary measures to guarantee that similar violations are not committed in the future. In their joint concurring opinion, members Gentian Zyberi and Hernán Quezada Cabrera were more specific as to what this reparation must entail, including the restitution of Baltasar Garzón in his

position of Central Judge in the Spanish National High Court. The Spanish government was given 180 days to address the wrongs identified in the decision and to report to the UNHRC about the measures taken.

Non-implementation

The original deadline for the Spanish government's response expired on the 25th February 2022. It was extended until the 25th April 2022 at the Government's request. However, to our knowledge the government has still not responded.

Baltasar Garzón has reached out to the Government directly through a series of letters sent by us on his behalf. He has expressed openness and willingness to discuss constructive ways forward. We have set out clearly our understanding of what appropriate implementation would entail, in accordance with the UNHRC's own guidelines and international standards. We have sent this information directly to the Minister of Justice Pilar Llop Cuenca in two letters sent on the 18th January 2022 and 23rd February 2022 respectively.

We have received no response of substance from the Spanish government whatsoever. The only response was a formalistic objection sent on 26 April 2022, raising a concern as to whether the power of attorney conferred by the applicant covered the implementation stage. The same week we clarified that it did and for the avoidance of any doubt, submitted another power of attorney. There has since been no response or engagement by the Government, thereby aggravating the harm that the author has suffered and continues to suffer as a result of the arbitrary criminal processes that lead to the UNHRC complaint.

It is now almost a year since this decision with no effort by the Government to address the serious concerns underpinning this case, or to offer any form of reparation to the victim of the violations identified by the UNHRC. Similarly, six months have passed since we wrote to the Government, more than twelve years since the suspension of Judge Garzón from the exercise of his judicial functions (14th May 2010) and more than ten since the judgement that unlawfully convicted him (9th February 2012). Therefore, the time for reparation has long since expired.

The Spanish government's non-implementation and its failure to respond to the Committee is extremely serious, as it implies a challenge to the Committee's authority, an enormous detriment to the rights of the individual and to justice itself, which is irreparably undermined by this notorious case.

Implementation required

The Spanish government should be urged to move forward urgently with the full and integral implementation sought by the UNHRC. By its nature, it entails the following measures (as requested of the Spanish government in a fuller letter of January 2022):

-Expungement of criminal record: the decision by the Committee established in its paragraph 7 that 'the State party has the obligation, *inter alia*, to expunge the criminal record of the applicant'. Although the conviction of Baltasar Garzón has been terminated following the completion of his sentence, the obligation to expunge his criminal record, resulting from the violation of Baltasar Garzón's rights set out in the Committee's decision, has not been fulfilled.

-Restitution in the position of Judge: it is a fundamental principle of international law, recognised in the Basic Principles and Guidelines on the Right to a Remedy Reparation adopted by the United Nations, among other instruments, that in light of human rights

violations the responsible state has an obligation of restitution, i.e. ‘to restore the victim to the original situation’ before the violation,¹ as an indispensable part of reparation.²

The Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, adopted in 2016, clearly explain that, whenever possible, States must take restitution measures ‘with a view to restoring rights that have been violated’, citing in particular ‘the victim’s reinstatement in employment that was lost as a result of the violation committed’.³

It should be noted that the Committee has also recognised in other cases and contexts that judges who had been removed from office in violation of their right to be tried by an independent tribunal were entitled to an effective remedy in order to obtain ‘reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts’.⁴ In the present case, Committee members Zyberi and Quezada Cabrera explicitly included in their joint concurring opinion the appropriateness of such a measure as an essential part of the author's effective remedy required by the Committee.

This remedy has also been recognised and applied by other international human rights courts. Thus, the ECtHR held that Ukraine should reinstate Oleksandr Volkov as a Supreme Court judge after concluding that his dismissal had been in violation of his right to be tried by an impartial and independent tribunal.⁵ The IACHR reached the same conclusion in *Apitz Barbera et al. v. Venezuela*, stating that the State had an obligation to reinstate the victims ‘in a position in the Judiciary in which they have the same rank, salary and related social benefits as they had prior to their removal’.⁶

Consequently, an essential part of the full reparation in this case, and a logical consequence of the expungement of the criminal record, is the reinstatement of Baltasar Garzón in the post of Central Judge No. 5 of the National High Court, with the maintenance of seniority and rank, and with all the consequences that this entails for the purposes of public benefits, such as passive rights for retirement purposes. The

¹ 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, UNGA Resolution 60/147, 2005, para. 19: ‘Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property’. See also: Responsibility of States for internationally wrongful acts, UNGA Resolution 56/83, 2002, Article 35.

² Resolution 60/147 para 18; Resolution 56/83 Article 35.

³ Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, 30 November 2016, UN doc CCPR/C/158, para. 6.2: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstcNDCvD%2fXU7dsZDBaDVNmMkVCG3Azi%2bzQxFNvXn4sB5Idu5fnPsNvnnXaSzxzFFMFVdArVF8qXliQ%2fzlzx2107tZ3XrZ6YFLr8gysljzCsAwLhPRnwONc%2bXazQzPRoPqdG6ozew8lCkC3exDI21s%3d>

⁴ Decision on Communication No. 933/2000, 31 July 2003, para. 6.2: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhstcNDCvD%2fXU7dsZDBaDVNmMkVCG3Azi%2bzQxFNvXn4sB5Idu5fnPsNvnnXaSzxzFFMFVdArVF8qXliQ%2fzlzx2107tZ3XrZ6YFLr8gysljzCnDh8ioUpknI%2bbuYmHi8u9%2fU3pT7ZUuCXzsM7%2fkH9%2bO8%3d>

⁵ ECtHR, *Oleksandr Volkov v. Ukraine*, Application No. 21722/11, 27 January 2013, para 208: <https://hudoc.echr.coe.int/eng/?i=001-115871>

⁶ IACHR, *Apitz Barbera and others v. Venezuela*, 5 August 2008, para 246 https://www.corteidh.or.cr/docs/casos/articulos/seriec_182_ing.pdf

Government, as representative of the State, is requested to urge the General Council of the Judiciary (CGPJ) to reinstate the author in this position.

-Public acknowledgement: full reparation for human rights violations also include satisfaction, which must entail, as recognised by the United Nations General Assembly, 'a public apology including acknowledgement of the facts and acceptance of responsibility'.⁷ The circumstances of the present case, with great media impact both nationally and internationally, and with profound negative consequences for the victim's professional life and public image, require that the Government issue a public apology acknowledging the State's responsibility for the violation of the victim's human rights, in order to guarantee him a full reparation and the restitution of his honour.

-Publication of the Decision in the Official State Gazette (BOE): in its decision, the Committee expressly requests the State to publish the decision, 'as well as the Committee's admissibility decision, and to disseminate them widely'.⁸

-Compensation for damages: the Committee provides for compensation for material and moral damages suffered as a form of reparation.⁹ Compensation for damages is also form of reparation to the victim recognised by international law and the jurisprudence of international human rights courts. Therefore, in order to achieve full reparation for the applicant, the Government is requested to pay compensation for material and moral damages, as well as the corresponding legal costs, as detailed in the letter sent to the Government on 18 January 2022.

-Adoption of measures of non-repetition: the UNHRC decision urges the State to take the necessary measures to ensure that similar violations do not occur in the future. It is imperative for the State to show what steps it has taken to identify and implement the legal, policy and institutional reforms necessary to prevent the repetition of the abuse of the criminal process and the interference with judicial independence that this case represents.

The first measure of non-repetition indicated in the Guidelines on reparation measures is the amendment of laws or regulations that are contrary to the Covenant. The amendment of domestic law to bring it into conformity with the parameters of international human rights law is a reparation measure that has been ordered both by the Committee and by international human rights courts.¹⁰ In the present case, this type of amendment is twofold:

-Firstly, the amendment of the definition of the offence of '*prevaricación*' enshrined in Article 446 of the Criminal Code, which punishes the judge who issues an 'unjust sentence or decision'. It has been sanctioned by the Committee for not constituting a sufficiently explicit, clear and precise provision that accurately defines the prohibited conduct.¹¹

-Secondly, the amendment of the legal framework in order to respect the right to a second criminal instance, taking into account the Committee's determination the denial of the victim's right to appeal violated his fair trial rights under Article

⁷ UNGA Resolution 60/147, 2005 para 22(e). *See also:* UNGA Resolution 56/83, Article 37(2).

⁸ Para 8.

⁹ Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, 30 November 2016, UN doc CCPR/C/158.

¹⁰ *See e.g.:* IACHR, *Apitz Barbera and others v. Venezuela*, para 246.

¹¹ Para 5.17.

14(5) ICCPR.¹² Therefore, in order to comply with the provisions of the Covenant, the State should amend the national Organic Law of the Judiciary (LOPJ) and Law on Criminal Prosecution (LECrIm) to guarantee the right to appeal for all, including those who are subject to trial by the Supreme Court. This has been the consequence of other UNHRC decisions in similar cases with regard to other States.¹³

The present case, concerning a serious violation of judicial independence, calls for deep reflection on the part of the Spanish State. The Government should ensure that Baltasar Garzón receives the full reparation as indicated by the Committee. It should also take active and serious steps to ensure that not only the laws, but also policies practices and institutions within the Spanish legal democratic system, operate so as to protect judicial independence and avoid the manipulation of criminal law for nefarious purposes at the heart of this case.

We urge the Special Rapporteur to press for implementation, and if necessary to condemn the failure of give effect to the ICCPR obligations that have been binding on the state of Spain since ratification in 1977.

We remain at your disposal and that of the Government to finally ensure that these notorious violations are addressed.

Helen Duffy

on behalf of Baltasar Garzón.

¹² Para 5.12.

¹³ See e.g.: Decision on Communication No. 2932/2017, 14 December 2020; Decision on Communication No. 2930/2017, 10 December 2020.