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President

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Dear Mr. President of the General Council and Mr. Attorney General:

As President of the American Bar Association (ABA), I write to express the ABA's deep concern over the privately initiated criminal proceedings now underway against Magistrate Baltasar Garzón of Spain's National Court, for alleged prevarication in his judicial rulings concerning the investigation of crimes against humanity allegedly committed in Spain during the period from 1936 to 1951. We believe that international norms on the independence of the judiciary preclude criminal prosecutions of judges for allegedly erroneous judicial rulings. Where nonetheless permitted by law, as in Spain, we believe they should be limited to the most extreme cases and should not proceed with respect to rulings that are subject to legitimate debate, such as Magistrate Garzón's rulings at issue in this case.

The ABA is an independent, voluntary, non-governmental organization of lawyers and judges with nearly 400,000 members worldwide. It regards human rights and the rule of law as cornerstones of a free and just society and is committed to strengthening them in the United States and internationally.

The ABA views the independence of the judiciary as a core element of the rule of law and as an essential safeguard of human rights. The independence of the judiciary is guaranteed by many international law instruments, such as the International Covenant on Civil and Political Rights and the United Nations Basic Principles on the Independence of the Judiciary.

Spain's democracy has been a leader in upholding the independence of the judiciary. For example, even though Spanish governments have not always agreed with Magistrate Garzón's rulings in controversial cases of universal jurisdiction, they have respected his judicial independence.

In the very case which is the subject of this letter, we applaud your publicly reported opposition, Mr. Attorney General, as well as the opposition of the State prosecutors, to the prevarication proceedings against Magistrate Garzón. Your opposition to this prosecution -- even though the State prosecutors opposed Magistrate Garzón's rulings during his investigation of crimes against humanity -- exemplifies where the line should be drawn. Objecting to judicial rulings through ordinary procedures is entirely consistent with judicial independence. But bringing criminal prosecutions against judges who allegedly err in their rulings poses a threat to their independence.

Nonetheless we remain concerned. As you know, on February 3, 2010, the Justice of the Criminal Chamber of the Supreme Court in charge of the prevarication proceedings against Magistrate Garzón declined to dismiss the proceeding, and indicated that he may soon elevate the case to trial.

Although the February 3 decision referred to a number of alleged errors by Magistrate Garzón, the heart of the decision appears to be its view that Magistrate Garzón knowingly made legally indefensible rulings, when he ruled that his jurisdiction to investigate crimes against humanity was not barred by Spain's 1977 amnesty law or by the rule against retroactive application of criminal laws.

In our view, even if these rulings had been legally indefensible (we do not suggest that they were), the proper remedy is not to bring criminal charges against the judge who made them. Prosecuting judges for allegedly erroneous rulings may lead to judicial timidity, especially in close or controversial cases, thereby interfering with the full measure of fearless independence which we rightly expect of our judges.

But even if, contrary to our view, prosecutions for judicial prevarication are ever to be entertained, they should be restricted to the most extreme cases of knowing judicial error. We do not believe Magistrate Garzón's rulings in the crimes against humanity investigation fall into that category.

Numerous sources of international law suggest that amnesties for crimes against humanity are inconsistent with a State's obligations to protect human rights, including the right of access to justice.<sup>1</sup> And Article 15 of the International Covenant on Civil and Political Rights (a treaty to which both Spain and the United States are States Parties) makes clear that crimes against humanity can be prosecuted, so long as the acts in question were recognized at the time they were committed as crimes under international law, even if they were not codified in national law until later.

Whether or not Magistrate Garzón was correct in interpreting the scope and force of these international law concepts and their application in domestic Spanish law – matters on which the ABA expresses no view – it is difficult in light of these principles to view his ruling as legally indefensible, or as warranting criminal prosecution.

The debatable, rather than indefensible, nature of his ruling is reinforced by the eminent experts in international criminal law who he has offered to present in his defense, or who have publicly defended his rulings.

In short, the ABA believes that judges should not be criminally prosecuted for allegedly erroneous rulings. Even where the crime of judicial prevarication is recognized, as in Spain, the ABA believes that it should be restricted to the most extreme cases, and not applied in cases of debatable rulings such as Magistrate Garzón's jurisdictional rulings on crimes against humanity.

The ABA respects the independence of the Spanish Supreme Court. The ABA commends you, Mr. Attorney General, for opposing the criminal proceeding against Magistrate Garzón. If there is a procedurally proper way for you to bring our concerns to the attention of the appropriate judicial authorities, the ABA encourages you to do so. The ABA also respectfully invites the General Council of the Judicial Power to take our concerns into account, to the extent they may be relevant to any disciplinary proceedings against Magistrate Garzón.

I thank you in advance for your consideration.

Sincerely,



Carolyn B. Lamm

cc: U.S. Department of State

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<sup>1</sup> *E.g.*, United Nations Human Rights Committee, General Comment no. 31 (2004), par. 18.