

EUROPEAN COURT OF HUMAN RIGHTS

Counäl of Europe
Strasbourg, France

APPLICATION

*under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of Court*

IN THE EUROPEAN COURT FOR HUMAN RIGHTS

B E T W E E N:

ANTONIO GUTIERREZ DORADO AND CARMEN DORADO ORTIZ

-and-

Applicants

SPAIN

Respondent

**APPLICATION PURSUANT TO ARTICLE 34 OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS AND RULES 45 AND 47 OF THE
COURT**

I. THE PARTIES

THE APPLICANTS

FIRST APPLICANT:

Surname: **Gutiérrez Dorado**

First name: **Antonio**

Sex: **male**

Nationality: **Spanish**

Occupation: **Hairdresser**

Date and place of birth: **22-03-1952 in Malaga (Spain)**

Permanent address: **San Millán n°3,4° f 29013 Málaga (Spain)**

Tel. No: + **34 952 653685**

SECOND APPLICANT:

Surname: **Dorado Ortiz**

First name: **Carmen**

Sex: **female**

Nationality: **Spanish**

Occupation: **pensioner**

Date and place of birth: **3rd March 1927 in Antequera, Malaga (Spain)**

Permanent address: **C/. Sevilla n° 29 antiguo (No 31 actual), Planta 2, Puerta A, Málaga (Spain)**

Tel. No: + **34 952399393**

Name of representatives:

**Francisco Javier Leon Diaz
Paul Troop**

Occupation of representative:

1 . Advocate

2. Barrister

Address of representative:

Emerika Bluma 1, 71000 Sarajevo, Bosnia and Herzegovina

Tooks Chambers, 8 Warner Yard, London EC1R 5EY, United Kingdom

20. Tel. No: **F. Javier Leon Diaz: +387 61 224891 (Fax. No: +38733283904)**

Tel. No: **Paul Troop: +44 (0) 20 7841 6100**

THE HIGH CONTRACTING PARTY

21. **SPAIN**

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STATEMENT OF THE FACTS

I. CIRCUMSTANCES OF THE CASE:

A. Summary:

The application is brought by the first and second applicants both in their own right and on behalf of their grandfather and father respectively, Mr. D. Luis Dorado Luque ("Mr. Dorado Luque"). Mr. Dorado Luque, a Member of the Spanish Parliament belonging to the socialist party ("PSOE")¹ was forcibly taken away by military forces in July 1936 in circumstances that have not yet been fully established by the Spanish authorities despite the numerous demands and requests of the applicants. As of today, he is still a missing person.

On 17th July 1936, Mr. Dorado Luque travelled from Madrid to the city of "Málaga". He was accompanied by Antonio Acuña Carballar, who was also a Member of Parliament belonging to the socialist party. His wife Josefa Ortiz Lara said goodbye to him at the Atocha train station in Madrid.

On the way to Malaga, the train was stopped at the Acolea train station. In the morning of the 18th July 1936 several military trucks approached. Armed forces belonging to the heavy artillery regiment No 1 entered the wagons upon orders of an Infantry Captain and forcibly took away Mr. Dorado Luque and Mr. Acuña Carballar. It is alleged that a third person was also forcibly taken away who may have been the British Consul in Malaga. The three men were then transferred to the garrison of "San Rafael" in Córdoba.²

¹ See copy of the Spanish Parliament's certificate of 6th March 1992, confirming Mr. Dorado Luque's status as member of Parliament in Annex 2.

² See extract of the autobiographic book of Mr. Rafael Gonzalez de Toro, one of the military man taking part of the operation in Annex 11.

The British Consul was immediately released. The two men were locked in a prison cell where other individuals were already detained: Mr. Córdoba Bautista Garcés Granell a Member of Parliament belonging to the Communist Party, Antonio Bujalance López a Member of Parliament belonging to the Socialist Party and a journalist and ex-Socialist Member of Parliament Mr. Joaquín García-Hidalgo Villanueva.

On 19th July 1936 all men were transferred to the provincial prison of Córdoba where they stayed until the 26th July.³ They were then transferred back to the garrison of "San Rafael" in Córdoba. It appears that they stayed there until at least the 28th July because Mr. Dorado Luque's signature appears as a witness on the death certificate of Joaquín

García-Hidalgo Villanueva who apparently died in the garrison (the death certificate states that the journalist died while in detention of natural causes).⁴

The applicants have no reliable information as to their loved one's fate after 28th July 1936. In early August 1936 a dead body was discovered which had documents with Mr. Dorado Luque's name in the pockets. The autopsy stated that he died "as a result of firearm injuries with serious wounds in the brain and liver". The dead body was registered in the obituary book as Mr. Dorado Luque.⁵ The Applicants suspect that the dead body could have been that of Mr. Dorado Luque and that he was executed around the 30th July 1936 by the military forces and subsequently buried in a pit together with hundreds of other persons in the cemetery of "la Salud" in Cordoba.

On 5th August 1936, the civil registry judge decided that there was insufficient evidence to conclude that the corpse was that of Mr. Dorado Luque and made an entry in the civil registry of Cordoba that the body was that of an "unknown man"⁶

The following years were marked by the establishment of the brutal and repressive Franco regime, which engaged in a systematic campaign of enforced disappearances, "mass killings, torture and the systematic, general and illegal detentions of political opponents". These crimes have never been fully investigated. Thousands of individuals who disappeared during that period are still missing including Mr. Dorado Luque. During the dictatorship the applicant's family suffered exile, persecution and imprisonment, circumstances common to many Spaniards. The applicants state that all their rights were curtailed, including the right to know the whereabouts of their father and grandfather and the right, if he was dead, to bury him in a dignified manner. In addition they were excluded from any public social assistance by obstructionist public officials applying rigid legal provisions.

On 15th October 1977, an Amnesty Law was passed by the newly established Spanish Parliament⁷ which granted immunity from prosecution for past human rights abuses. The Law granted amnesty for atrocities perpetrated during and after the Civil War as part of the push within the newly democratic nation to put the war behind it in the interests of national reconciliation. Article 1.c. of the law establishes that it covers crimes committed up to the 6th October 1977. All crimes with a "political motive" are subject to the amnesty.

10. In 1979 after the death of Franco and shortly after the change of regime took place, the Applicants assisted Mr. Dorado Luque's wife, Josefa Ortiz Lara (their mother and

³ See certificate issued by the prison authorities on 12 September 2007 in Annex 3.

⁴ See copy of the death certificate with Mr. Dorado Luque's signature in Annex 4.

⁵ See copy of the obituary book contained in a certificate of the Cordoba municipality in Annex 5.

⁶ See copy of the civil registry book in Annex 6.

⁷ Ley 46/1977, de 15 de octubre de 1977, de Amnistia. See Annex 7.

grandmother respectively) in the proceedings to obtain official confirmation by the respondent of Mr. Dorado Luque's disappearance⁸, a necessary procedural step before Mrs Josefa Ortiz Lara could obtain her widow's pension in accordance with the

applicable law (the Law on "recognition of pension, medical and pharmaceutical care and social assistance for widows and relatives of those killed as a result of the Civil War").⁹

However, the respondent's authorities dismissed Mrs. Ortiz Lara's request for a widow's pension arguing that she could not be entitled to widow's benefits as there was no evidence of her husband's death in the civil registry books. Indeed, for over 50 years Mr. Dorado Luque's disappearance and/or death remained unrecorded officially even though the authorities had effective knowledge of his disappearance and probable death as recorded in the obituary book of the "la Salud" cemetery in Cordoba.

It took more than 13 years before Mrs Josefa Ortiz Lara was able to obtain from the respondent an official recognition of husband's disappearance. In order to do so, Dorado Luque's family had to initiate a procedure for voluntary declaration of death. Mrs. Josefa Ortiz initiated the procedure in 1981 before the magistrates' court (juzgado de instrucción) number 1 of Málaga. The procedure lasted until 1993. On 10th March 1993 the competent judge, after confirming that Mr. Dorado Luque had disappeared and that his fate and whereabouts were unknown, ordered that his death be recorded in the civil registry books.¹⁰ The ruling of the judge was made pursuant to Article 193 of the Spanish Civil Code which provides that a person can be declared dead when more than 10 years have elapsed since the time of the last known whereabouts of the person or since his disappearance.

After Mr. Dorado Luque was registered as dead in the civil registry books, Mrs. Josefa Ortiz was finally entitled to perceive her widow's pension. Unfortunately she only received it for three years because she died shortly afterwards, in 1996. The alleged reason for the delay in the procedure for the voluntary declaration of death was that the file was lost in the judicial office. It was "found" in 1991. On 1st October 1993 Mrs. Josefa Ortiz filed an appeal seeking to be paid retroactively back to 1981, the date on which she submitted her petition¹¹. The Ministry of Finances dismissed her request on 23rd June 1995 arguing that the lengthy delay to the proceeding was caused by Mrs. Josefa Ortiz's passivity in the search of the file.¹² The first Applicant appealed the decision by lodging an administrative claim for moral and economic damages before the administrative dispute chamber of the State Court. Proceedings are still ongoing as at the date of submitting this application. ¹³

By resolution 1736 of 17 March 2006, the Parliamentary Assembly of the Council of Europe condemned the extensive human rights abuses committed by the Franco regime in

⁸ See application by Mrs. Josefa Ortiz in Annex 8.

⁹ Ley 5/1979 de 18 de septiembre sobre reconocimiento de pensiones, asistencia médico-farmacéutica y asistencia social en favor de las viudas y familiares de los fallecidos como consecuencia de la Guerra Civil

¹⁰ autos 316/1981. See in Annex 9.

¹¹ See copy of Josefa Ortiz's appeal of 1st October 1993 against the decision of the Ministry of Finance in Annex 10.

¹² See copy of the legal assessment of the applicants' lawyers and sentence of the Tribunal for economic and administrative matters of 30 June 1995 in Annex 12.

¹³ Reclamación patrimonial por dolo, daño moral y económico, producido a esta familia ante la jurisdicción contencioso administrativa. N° de autos en procedimiento ordinario 890/2007, Sección Tercera de la Sala de lo Contencioso Administrativo de la Audiencia Nacional.

Spain (1939-75) and called on the Committee of Ministers, *inter alia*, to adopt an official declaration of international condemnation of the Franco regime and to mark 18 July 2006 as the official day of such condemnation and to continue to make available to all historians and researchers all civilian and military archives which may contain documents that can contribute to establishing the truth regarding repression.¹⁴

On 31st October 2008 the UN Human Rights Committee issued a report¹⁵ calling on the Spanish authorities to comply with their international obligations as a State Party to the International Covenant on Civil and Political Rights. The Committee was concerned about long-standing obstacles faced by victims to obtain justice, truth and reparation and called on the Spanish authorities to take measures to repeal the 1977 Amnesty Law and guarantee that crimes under international law will not be barred by statutes of limitations. It also called on the government to appoint an independent commission to establish the historic truth about human rights violations and violations to humanitarian international law committed during the Civil War and Franco's regime, and to ensure the victims' remains are located, exhumed and identified, as well as restored to their relatives.

The respondent Party has not conducted any meaningful investigation into the enforced disappearance resulting from the Spanish civil war and the years after the war. This has had a catastrophic impact on the lives of the surviving family members of the missing persons, a group that includes the applicants in the present case. Because the fate of their loved ones is still not officially known, many are unable to achieve any sense of closure, to recover psychologically, or to move forward with their lives. The respondent Party's failure to take effective action aimed at making the requested information available to the families of the victims of the civil war is particularly egregious.

B. General Background Context relevant to the case:

The Spanish Civil War was a major conflict that devastated Spain from 17 July 1936 to 1 April 1939. It began after an attempted *coup d'etat* against the government of the Second Spanish Republic, by a group of Spanish Army generals. The war ended with the victory of the rebel forces, the overthrow of the Republican government, and the founding of a dictatorship led by General Francisco Franco.

As with other civil wars, the Spanish Civil War often pitted family members and trusted neighbours and friends against each other. Apart from the combatants, many civilians were killed for their political or religious views. After the war ended in 1939, Republicans were persecuted by the victorious Nationalists.

A Spanish judge, Baltasar Garzón, has opened a pre-investigation of 114,266 people executed and disappeared during the Spanish Civil War and the Franco years between 17 July 1936 and December 1951.

Paul Preston, a British historian professor at the London School of Economics, specialized in the Spanish Civil War and leading scholar in the matter has produced a

¹⁴ Parliamentary Assembly of the Council of Europe (<http://assembly.coe.int>), "Need for International Condemnation of the Franco Regime: Recommendation 1736" (17 March 2006); (2) Idem, "Need for International Condemnation of the Franco Regime: Report" (November 2005; Doc. 10737).]

¹⁵ See: CCPR/C/ESP/CO/5, 5 January 2009 at paragraph 9.

number of scholarly books and articles on the subject¹⁶. In a lecture given in January 2008 Professor Preston gave a succinct account of what he called "The Crimes of Franco"¹⁷.

The relevant excerpts state as follows:

Apart from those killed on the battlefields, tens of thousands were officially executed, judicially murdered, between the autumn of 1936 and 1945, when the Axis defeat imposed some caution on the Caudillo. However, there were others, perhaps another 50,000, who were killed without even the simulacrum of a trial. Some were thrown alive from cliffs into the sea, or from high bridges into deep rivers. Others were shot against the walls of a cemetery or by a roadside and buried in shallow graves where they fell or were thrown into disused mineshafts. For decades, their families lived in terror, unable to grieve properly, unsure of the fate of their mothers or fathers, their husbands or sons.

In late 2002, building works in one of the patios of the Municipal Cemetery of Toledo unearthed a huge mass grave containing hundreds of bodies of persons who disappeared at the end of September 1936, after the capture of the city by Franco's forces. In addition to the casualties among the Republican militiamen and troops during the attack on Toledo, afterwards there was a sweeping purge of prisoners, wounded and civilian personnel suspected of left-wing leanings. Without mass DNA testing, it is impossible to know the exact numbers of Republicans killed in the days following the siege.

Nevertheless, according to the Cemetery's register between 27 September and 13 October, 727 bodies were buried. There were twenty-one batches of corpses with no details other than the numbers contained in each batch and labelled 'desconocidos' (unknown). There were eight corpses on 27 September and then sixteen batches between 1 and 3 October making up a total of 564 victims, which includes presumably those killed during the fighting on 27 September and the

prisoners and civilians killed over the next six days. The last five batches, one each on 4, 5, 6, 7 and 13 October, saw another 163 bodies.

All over Spain, archaeological activity is producing evidence of the horrors of the Civil War. Equally typical was what happened between July 1936 and December 1937 near the village of Conclud in the province of Teruel. Into Los pozos de Caude, a pit six feet wide and 250 feet deep, were hurled the bodies of 1005 men and women, including adolescent boys and girls. Few of them were political militants. Their crime was simply to be considered critical of the military coup, related to someone who had fled, to have a radio or to have read liberal newspapers before the war. It has taken sixty-eight years for their families to find out the truth. Fear prevented anyone from even going near the pit although occasionally at night bunches of flowers would be left nearby. Once the Socialists were in power, people began openly to leave floral tributes. Then in 1983, a local farmer came forward and said that he had kept a notebook with the numbers of shootings that he heard each night throughout the Spanish Civil War. They came to more than one thousand.

¹⁶ Paul Preston is a British historian and Hispanist, specialized in Spanish history, in particular the Spanish Civil War, which he has studied for more than 30 years. He is currently based at the London School of Economics. Professor Preston is also the Príncipe de Asturias Professor of Contemporary Spanish Studies and Director of the Cañada Blanch Centre for Contemporary Spanish Studies which is based in the European Institute at the London School of Economics.

¹⁷ Paul Preston lecture: The Crimes of Franco; Study day BFI Southbank; January 19, 2008. See at: <http://www.pragda.com/pdfs/Preston-1.pdf>.

The horrors already mentioned reflect the fact that, like the Nazi Volksgemeinschaft and the Soviet gulags, the Franco dictatorship also embarked on a process of national 'reconstruction' through the execution, forced exile, imprisonment, torture and economic and social humiliation of hundreds of thousands of Spaniards defeated in the Civil War of 1936-1939. The persecution of the compatriots deemed to belong to the 'anti-Spain' (leftists or liberals and their extended families all of whom became non-persons without civil rights) affected millions. From the very first days of the war, terror had been a crucial instrument of the military rebels but to this Franco added a determination to annihilate as many Republicans as possible.

As each area of Spain was conquered, there began a process of political and social purge. This was often justified in terms of left-wing atrocities despite the fact that, in many places the military coup had succeeded within days, if not hours, and there had been no such atrocities. Hundreds of thousands who escaped the random killing were kept in conditions of extreme degradation in prisons and concentration camps. Torture accounted for large numbers of suicides in prison and the authorities, feeling cheated by these 'escapes' from their justice, often reacted by executing a relative of the prisoner. Central to the repression was the systematic economic exploitation of both the rural and industrial working classes. Many thousands were forced to work - and die - in inhuman conditions in penal detachments and work battalions. The threat of imprisonment forced millions of workers to accept starvation wages. The social humiliation and exploitation of the defeated was justified in religious terms as the necessary expiation of their sins and also in social- Darwinist terms. Denouncing the defeated as degenerate, their children were taken away and military psychiatrists carried out experiments on women prisoners in search of the red gene. In prisons, massive efforts were made to break not only the bodies of prisoners but also their minds.

After years in which the atrocities of Francoism were silenced in the interests of the consolidation of democracy, it is now possible to put together the overall picture of the Spanish holocaust. Mass graves are one of the most horrendous legacies of the way in which Franco established his power. The true extent of the appalling conditions of the Francoist prison regime is only now beginning to emerge. The daily conditions of starvation and torture and the terror of waiting for the firing squad are things that have long been familiar through the memoirs of survivors.

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C. Criminal Proceedings

The Applicants were one of the first families in Spain to bring a criminal complaint before Spanish Courts. Thus on 22nd May 2006 the second Applicant brought a criminal complaint before the first instance court in Cordoba¹⁸. They complained about abduction and possible murder of Mr. Dorado Luque amounting to war crimes for which there are no statute of limitations. They requested the opening of a full investigation into the facts including ordering the Ministry of Defence to disclose all documents contained in their archives related to the abduction, detention, whereabouts and possible execution of her father and to release all the archived files regarding any intervention by military courts.

Surprisingly, from that moment, successive public prosecutors at all jurisdictional levels have repeatedly attempted to block the proceedings through an array of procedural

¹⁸ Before the magistrate court (Juzgado de Instrucción) number 2 of Córdoba Diligencias Previas

3651/2006. See copy of the complaint in Annex 13.

mechanisms and legal arguments (in particular regarding the application of the statute of limitations and the application of the 1977 amnesty law) calling for the immediate closure of the case. Thus on 27th July 2006 the public prosecutor in Cordoba, arguing that the crimes complained of have long been covered by the 1977 amnesty law, issued a writ requesting the closure of the proceedings.¹⁹

The Court acceded to the public prosecutor's application and on 11th August 2006 ruled against the applicants stating that the facts complaint of amounted to a *hypothetical simple murder*" which was subject to a statute of limitations under article 131 of the Spanish Criminal Code of 20 years.²⁰ The Court reasoned that even if the facts in the complaint amounted to crimes with no statute of limitations under the criminal code in force as at the time the court made its ruling, they could only be so after 2003 when the criminal code was amended and these provisions added. ²¹ Prior to the amendment only the crime of Genocide was not subject to a statute of limitations. The Court also concluded that facts of the case did not amount to Genocide.

The Second Applicant then appealed to the second instance Court in Cordoba on 12th September 2006 disputing the first instance Court's ruling and arguing that the facts of the case should be assessed not as a single act but within the wider context of the brutal repression organized by the Franco regime which were aimed at neutralizing and exterminating political dissention and that on this basis these were crimes with no statute of limitations. The second Applicant argued that these crimes had long been recognised under international law and were already recognized by international customary law as previously stated in recent jurisprudence of the State Court ("Audiencia Nacional")²².

Again the public prosecutor, on 21st September 2006, requested that the complaint be dismissed and the proceedings closed because of the statute of limitations. On 18th October 2006 the appellate court in Córdoba dismissed the appeal and confirmed the ruling of the lower court of 11th August²³. In its ruling the appellate court argued that the current Constitutional regime prevents the prosecution of crimes committed during the civil war and subsequent years as such claims would be contrary to the conciliatory nature of the Spanish Constitutional framework and would only serve at "reviving old wounds or remove the embers of civil confrontation." The appellate court cited its previous jurisprudence in this regard.²⁴

The Second Applicant on 14th December 2006, together with several victims' associations, filed a complaint before the State Court in Madrid (Audiencia Nacional; Juzgado central de Instrucción de Madrid).²⁵ The co-complainants complained that their beloved ones had suffered systematic enforced disappearances as well as possible systematic killings as part of a deliberate and calculated plan to eliminate a sector of the population which had resulted in their families still not knowing their fate and whereabouts. They requested that a full investigation be opened into the facts. In her specific complaint the second applicant requested the State Court to take all necessary steps to investigate these crimes and pointed out that although her mother was forced to sign a declaration of death with regard to her husband, this was solely in order to be entitled to widow benefits and this ought to have no impact on the fact that Mr. Dorado

¹⁹ See letter from the Prosecutor in Annex 14.

²⁰ See decision in Annex 15.

²¹ Ley Organica 15/2003 de 29 de Noviembre de 2003.

²² Audiencia Nacional, Sala de lo Penal, Sección Tercera, Sentencia 16/05 (Rollo 139/1997), de 19 de abril 2005. See appeal in Annex 16.

²³ Decision number 528 (auto No 528). See in Annex 17.

²⁴ The appellate Court referred to a previous decision (auto del 21 de Febrero 2005; Rollo 59/2005).

²⁵ See complaint in Annex 18.

Luque remained missing. She argued that this fact only demonstrated the helplessness and vulnerability of her and her family.

Again the State Prosecutor on 29th January 2008 requested to close the proceedings and argued lack of jurisdiction of the State Court; submitting that the crimes were common crimes subject to statute of limitations and falling within the meaning of the 1977 amnesty law.²⁶ The applicant and the co-complainants challenged the prosecutor's request to close the proceedings in a submission made in March 2008.

Notwithstanding the Public prosecutor's request, on 28th August 2008 the State Court's investigative judge number five, Mr. Baltazar Garzón,²⁷ in a preliminary investigation (*diligencias previas* - no. 399/2006)²⁸, issued an order (auto) against several public and private institutions²⁹ requesting information on individuals disappeared after 17th July 1936 as a result of the civil war and subsequent Franco regime.³⁰

On 16th October 2008 judge Garzón issued a ruling³¹ accepting jurisdiction over the complaints.³² This was the first time since the civil war that a judge decided to investigate these facts. The ruling stated that all the facts complained of were not to be considered in isolation but rather within the wider context of the planned, massive and ruthless repression by the Franco regime which begun on 18th July 1936 against political opponents through unlawful detentions, executions, enforced disappearances and torture carried out in a systematic manner which could amount to crimes against humanity as provided by the Spanish Criminal Code.³³ The ruling stated that seemingly there were 114,266 individuals who disappeared from the 17th July 1936 to December 1951. Judge Garzón further pointed out that the practice of enforced disappearances was used systematically to make it impossible to identify the victims and therefore prevent any judicial action against the perpetrators. This was reinforced by the fact that thousands of Spaniards unlawfully detained, killed or disappeared were never registered in the civil registry.

The investigative Judge further noted that the whereabouts and fate of thousands of people that had been detained by the authorities were still unknown. He stated that no investigation had been carried out although the State should have opened an investigation *ex-officio* as the authorities were involved in the disappearances and therefore should have had some control over the information. The ruling stated that these were continuous crimes because no information had been given to the families of the disappeared. In this regard he underlined that the families of the victims had no recourse to domestic judicial remedies until December 1978 and the claimants could not have sought redress. Judge Garzón also pointed out that the distress and anguish suffered by the relatives of the

²⁶ See in Annex 19.

²⁷ Juzgado Central de Instrucción numero 5, sumario 53/2008.

²⁸ The investigative Judge was carrying out "Diligencias Previas" which according to article 13 of the Criminal Procedure Code are a series of actions in the pre-investigation phase mainly aimed at securing evidence that otherwise could be lost.

²⁹ Among the institutions ordered to provide information are: the general state archives; the municipal councils of Granada, Cordoba, Sevilla and Madrid (specifically requesting information about the persons buried in identified mass graves in their municipalities. The judge specifically mention the cemetery of "La Salud" in Cordoba); the Ministry of Culture's center for the historic memory; the Defense Ministry (specially regarding the archives of the military tribunals); the Directorate General of Registries and Notaries; the Spanish Episcopal Conference (specifically regarding the death registries of the churches).

³⁰ See in Annex 20.

³¹ Juzgado Central de Instrucción numero 5, sumario 53/2008. See in Annex 21.

³² See <http://news.bbc.co.uk/2M/europe/7673999.stm>

³³ Article 607 bis of the Criminal Code in force.

victims who still did not know the whereabouts and fate of their beloved ones amounted to the crime of torture as contained in articles 173 and 177 of the Spanish Criminal Code.

Regarding a specific requests made by the second applicant the investigative judge ruled that the ongoing exhumation works in the cemetery of "la Salud" in Cordoba should continue, including the forensic works under judicial supervision by the competent territorial court. He also ordered the municipal archive of Cordoba to disclose all documents related to the cemetery "la Salud", including maps of the cemetery, maps of pits, as well as all files regarding Mr. Dorado Luque's custody from the provincial prison of Cordoba.

On the 20th October 2008, the Public Prosecutor appealed Judge Garzon's ruling again requesting the closure of the proceedings.³⁴ The following day he submitted a second appeal before the President of the State Court's Criminal Division³⁵ requesting to declare null and void judge Garzon's decision assuming jurisdiction in accordance with article 23 of the criminal procedural code. Among several legal arguments the State Prosecutor argued that it could not be a case of enforced disappearances of continuous nature as "it is public and notorious that the victims were executed back then and therefore these facts amount to murder".

On 23rd October 2008 the State Court's investigative judge dismissed the appeal submitted on the 20th October by the State Prosecutor.³⁶

On November 7th 2008 the prosecutor submitted a third appeal requesting the President of the State Court's Criminal Division to suspend all investigative proceedings that could be of irreversible consequences for third parties pursuant to articles 22 and 23 of the Criminal Procedure Code and pending a decision on his previous appeal regarding the lack of jurisdiction of the Court.³⁷ The same day the plenary of the State Court's criminal Division in extraordinary session admitted the State Prosecutors request and ordered all proceedings related to exhumations of mass graves to be suspended until final decision of the appeal regarding the jurisdiction of the Court.³⁸

On 18th November 2008 the State Court's investigative judge issued a decision relinquishing jurisdiction and advising the complainants to pursue their complaints before provincial courts.³⁹ The jurisdiction of the State Court was given by the fact that some of the suspects were State high-level public officials. After receiving evidence that all high level officials suspected of the alleged crimes had died and in accordance with article 130.1 of the criminal code he declared their criminal responsibility extinguished because of death.⁴⁰ Complaints for the same facts alleged against other possible suspects would

³⁴ See in Annex 22.

³⁵ The Audiencia Nacional comprises several divisions with specific jurisdictions (civil, criminal, administrative), each of which is in turn divided into three-judge sections if the number of judges allows. See appeal in Annex 23.

³⁶ See in Annex 24.

³⁷ See in Annex 25.

³⁸ See in Annex 26.

³⁹ See in Annex 27.

⁴⁰ Judge Garzón refers to articles 21, 23, 65 and 88 of the Organic Law on the Judiciary (Ley Orgánica del Poder Judicial).

fall within the jurisdiction of territorial courts. The applicants would thus have to pursue their complaints before the courts in Cordoba.

The investigative Judge in his 152 page decision reiterated his previous legal arguments that these crimes should be prosecuted as the continuing crime of enforced disappearance so long as the perpetrators continue to conceal the fate of the disappeared persons and the facts remain uncertain. He also ruled that because of its continuous nature there could be no application of the statute of limitations and there should be no issue of retroactivity. He further noted that Spain is in breach of its international obligation regarding reparations for the victims. In this regard he pointed out that the lack of official ex officio investigation for many years coupled with the numerous obstacles introduced by the State Prosecutor to the opening of an investigation is in conflict with the European Convention of Human Rights and the Council of Europe resolution 1463 of 3 October 2005 on enforced disappearances. He finally stated that not investigating the facts would amount to a contribution to the effects of these crimes which would be both cruel to the victims and in violation of international standards.

On 2nd of December 2008 the State Court's Criminal Division in plenary session confirmed the State Court's lack of jurisdiction to investigate these crimes.⁴¹

The Proceedings before the Constitutional Court:

38. The second applicant on 17th November 2006 filed an appeal before the Constitutional Court⁴² against the rulings of the lower courts in Cordoba arguing that the decisions of the lower tribunals had disregarded several domestic and international standards and resulted in her not having effective remedies to pursue her complaints in breach of articles 24 and 14 of the Spanish Constitution.⁴³ On 14th April 2008 the Constitutional Court declared the appeal inadmissible *ratione materiae* because the appeal did not entail constitutional matters.⁴⁴

Private initiatives taken by the Applicants:

The family of Luis Dorado Luque initiated several parallel initiatives to the judicial procedures to clarify the disappearance of Luis Dorado Luque.

On 7th July 2006 the Applicants' lawyer sent a petition to the competent Military Tribunal requesting any information regarding the detention and whereabouts of Mr. Dorado Luque. The Military Tribunal responded on 4th July 2006 stating that they had no information about Mr. Dorado Luque in the Historical Archives of the Military Tribunal.⁴⁵

⁴¹ See in Annex 28.

⁴² recurso de amparo n° 10387/2006

⁴³ See in Annex 29.

⁴⁵ See in Annex 30.

⁴⁵ See copies of both documents in Annex 31.

On 8th August 2007 after specific request by the Applicants the Cordoba Municipal Council dismissed a petition to permit the exhumation of the body of Mr. Dorado Luque from a mass grave identified in a pit of the cemetery of "la Salud". The Municipal authorities argued that there were 39 tombstones above the mass grave and they had no authorization to remove them from of the next of kin of the individuals buried there. 46

On 12th September 2007 pursuant to a petition by the Applicants the prison authorities in Cordoba issued a certificate confirming that Mr. Dorado Luque was detained there from the 19th to the 26th July 1936. The certificate stated that the reasons for the detention were "unknown" and that he was released upon orders from the Military Commander of Cordoba and thereafter surrendered to the Military Police ("Guardia Civil") on the 26th July.⁴⁷

On the 3rd October 2008, the first applicant and his family privately hired the services of forensic experts through the company "la Sociedad de Ciencias Aranzadi". In accordance with the recently adopted Historical Memory Law citizens are not prevented from privately researching, locating and exhuming the bodies of their beloved ones disappeared.⁴⁸ In accordance with the Historic Memory Law the first applicant was granted public funds by the Ministry of the Presidency⁴⁹ to assist in the process of searching and recovering the remains of his grandfather.⁵⁰ The public funds cover works related to exploration, identification and exhumation of the remains of Dorado Luque. It is with these funds that he hired the forensic experts. In order to proceed with the forensic works the first applicant also had to obtain a formal municipal authorization since the cemetery is considered a municipal public property.

The forensic experts began their works by trying to locate a mass grave in the cemetery of "La Salud" in Córdoba where allegedly the corpse of Mr. Dorado Luque might be buried according to the 1936 inscription in the cemetery obituary book. The works began with a field study conducted with radar to locate a possible mass grave. Once the location works were finalized, the forensic experts submitted a technical report with their findings to the Municipal Council.⁵¹ The report demonstrated the existence of a pit with hundreds of human remains in addition to around thirty bodies buried at the surface. The next step would have been the start of the excavation works.

Pursuant to the State Court's investigative judge ruling ordering judicial control over the works carried out by the applicants' forensic experts in the cemetery of "la Salud" in Córdoba, the criminal tribunal of Cordoba was responsible for the supervision of the

works.⁵² Although the State Court's investigative Judge issued a specific order to the Court in Cordoba stating that the forensic works regarding the exhumation of Mr. Dorado Luque were authorized, the Municipal Council of Córdoba issued an order to suspend all works. The applicants contested the decision and the Municipal Council responded that it was their understanding that this was required by the judicial procedure and that works should be suspended until requested through specific judicial order by the municipal court. In addition the Municipal Council argued that above the mass grave 39 individuals

46 See copy of the letter in Annex 32.

47 See Annex 3.

48 la llamada Ley de Memoria Histórica 52/2007, así como de normas autonómicas como el Decreto 334/2003 de 2 de diciembre

40 ORDEN PRE 3542/2007

50 See copy of the letter of the Ministry of the President of 21st November 2007 granting the funds in Annex 33.

51 See copy of the technical report in Annex 34.

52 Juzgado de Instrucción no 6 de Córdoba. See specific ruling of the State Court's investigative Judge in Annex 35.

had been buried in tombstones and in order to remove them they would need the agreement of the next of kin. The Municipal Council stated that it can only remove buried bodies *ex-officio* 25 years after burial.

The forensic works have been suspended since that time.

Amnesty International has criticized the Historic Memory Law stating that it is in conflict with the right of families to know the whereabouts (location and identification) of the victims of enforced disappearances and extra-judicial executions. Amnesty International argues that the law goes against the Spanish State's obligations towards the victims as it limits the role of the State in facilitating the efforts of the families of the victims in search of the remains of their beloved ones.⁵³

The UN Human Rights Committee in its Concluding Observations on Spain "while noting with satisfaction the State party's assurance that the Historical Memory Act provides for light to be shed on the fate of the disappeared (...)" showed its concern "(...)" of the reports on the obstacles encountered by families in the judicial and administrative formalities they must undertake to obtain the exhumation of the remains and the identification of the disappeared persons." In this regard the Committee concluded that Spain should "allow families to exhume and identify victims' bodies, and provide them with compensation where appropriate." and "consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship."⁵⁴

The present case, in which the exhumation works have been stalled by the Municipal Council, is a good example of the obstacles encountered by families in the judicial and administrative formalities they must overcome in seeking to implement the provisions of the Historic Memory Law.

50. This is further exemplified by the ruling of the Directorate General of Registries and Notaries of 29th June 2007.⁵⁵ A non governmental organization ("AERLE") which was carrying out a study on the census of victims of the civil war and post-war period requested on 13th February 2007 access to the registry books to see the registered dead from 1936 to 1950. The civil registry public official dismissed the requests arguing personal data protection issues and the fact that AERLE was not a public institution. AERLE appealed the decision to the Directorate General of Registries and Notaries. The Directorate General transferred the appeal to the public prosecutor who confirmed the first instance decision on the same grounds. The Judge confirming the assessment of the public prosecutor issued a ruling in this regard. The file was then sent back to the Directorate General of Registries and Notaries for final decision. The Directorate General on 29th June 2007, decided to accept the appeal and quash the previous decisions. It argued that the civil registry is a public document and therefore AERLE should be able to consult the books for its research. It took AERLE 4 months of administrative procedures to be able to consult the civil registry books, even though these were apparently "public" documents.

53 See: "España: La obligación de investigar los crímenes del pasado y garantizar los derechos de las víctimas de desaparición forzada durante la Guerra Civil y el franquismo (noviembre 2008); AI document No EUR410008-200809; of 12 November 2008.

54 See: Concluding observations of the Human Rights Committee on Spain CCPR/C/ESP/CO/5, 5 January 2009, at paragraph 9.

55 RESOLUCIÓN 29 de junio de 2007, de la Dirección General de los Registros y del Notariado, en el recurso interpuesto contra Acuerdo dictado por Juez Encargado de Registro Civil, en expediente sobre examen de los libros del Registro. BOE núm. 197 Viernes 17 agosto 2007. See Annex 36.

STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS

The applicants allege that their father and grandfather Mr. Dorado Luque has disappeared after being apprehended by armed forces in Alcolea on 18th July 1936. They invoke Articles 2, 3, 5, 13 and 8 of the Convention.

The Applicants submit that claims on behalf of family members seeking information about the fate and whereabouts of loved ones who have been missing since the armed conflict raise allegations of a continuing violation of the human rights of the family members by the respondent Party. Both Articles 3 and 8 of the European Convention impose a positive obligation on the respondent Party to investigate thoroughly into allegations of arbitrary deprivations of liberty even in cases where it cannot be established that the deprivation of liberty is attributable to the authorities.

The procedural aspects of Article 2 also require investigation. The Applicants submit that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by the authority. Moreover,

"disappearances" are a form of torture as regards the relatives of the "disappeared" person and potentially as regards the "disappeared person."⁵⁶

54. The applicants therefore argue that the persistent effects of the facts alleged in this application amount to a continuous violation of their rights that commenced in July 1936 and continues to the present date, after the entry into force of the Convention.

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

A. Concerning the procedural obligations arising under Article 2

The applicants submit that the authorities have failed to provide a plausible explanation for Mr. Dorado Luque's disappearance in custody. Mr. Dorado Luque has been the victim of an unacknowledged detention under the control of the authorities. This is a life-threatening situation for which the State is responsible. It also seems likely that he is dead in circumstances for which the authorities are liable. The State is obliged to produce the detainee alive or provide a plausible explanation as to how he met his death, the Applicant's submit that the respondent's refusal or failure to provide a substantiated account of what happened to their father and grandfather respectively amounts to a violation of its obligation to protect his right to life.

⁵⁶

See: U.N. Declaration on Enforced Disappearance (Art.1): "Any act of enforced disappearance...constitutes a violation of the rules of international law guaranteeing, inter alia...the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment." The U.N. Human Rights Committee has taken several decisions on individual petitions which indicate that "disappearances" amount to torture. See: *Quinteros v Uruguay*, (107/1981, para.14); also *El-Megreisi v Libya* (Report of the Human Rights Committee, Vol.II, GAOR, 49th Session, Supplement 40 (1994) , Annex IX T, paras 2.1-2.5); *Mojica v. Dominican Republic* (449/1991, para 5.7). See also European Court of Human Rights, *Kurt v. Turkey*, Eur.Ct.Hum.Rts, Case No.15/1997/799/1002, 25 May 1998, para.134; The Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Judgment of July 29, 1988. Series C N° 4, para.187.

It is well established by the Court's jurisprudence that the obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies. Additionally, where failure on the part of the authorities to provide a plausible explanation as to a detainee's fate in the absence of a body together with sufficient circumstantial evidence may be sufficient to conclude to the requisite standard of proof that the detainee can be presumed to have died in custody.⁵⁷

The applicants also recall that the Inter-American Court of Human Rights ruled that circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterised by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim.⁵⁸ In this context, the Applicants submit that the respondent Party has not provided any factual

information. In particular, it has not disclosed the fate of Mr. Dorado Luque, nor has it given any reasons why its authorities would not be able to do so.

In this respect the applicants submit that the State must be held responsible for Mr. Dorado Luque's death itself, either since the circumstances disclose a real likelihood that death has resulted from the unacknowledged detention or since there is sufficient circumstantial evidence to conclude that he is dead.

It is submitted that although the civil registry judge refused to register the body discovered in July 1936 bearing documents belonging to Mr. Dorado Luque in its pockets and that his death was only registered in 1993 after a voluntary declaration by his wife, it is likely that Mr. Dorado Luque was killed in the night of the 29th to 30th of July 1936 and buried in the cemetery of "la Salud" in Cordoba.

This is firstly because, as pointed out by the investigative judge in its ruling of 16th October 2008, it was a general practice not to register people killed or disappeared during the dictatorship as part of the repressive machinery. Second, Mr. Dorado Luque's name was registered in the obituary book of the cemetery "La Salud". Third, the corpse identified as an "unknown man" bearing documents belonging to Mr. Dorado Luque according to the autopsy died "as a result of firearm injuries with serious wounds in the brain and liver" on the same day as Mr. Dorado Luque disappeared. Fourth, the State Prosecutor in his zeal to demonstrate that the crimes complained of were not continuous in nature clearly stated in his appeals of 20th and 21st October 2008 that it was public and notorious that the victims were executed. Finally, the period of time which has elapsed since Mr. Dorado Luque was detained should be a relevant factor to be taken into account. It must be accepted that the more time passes without news of the detained person, the greater the likelihood that he or she has died or been killed.

The Applicants submit that the obligation to protect life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by the authorities⁵⁹.

⁵⁷ see the *Cakoco v. Turkey* judgment of 8 July 1999, to be published in ECHR 1999, § 85; *Ertak v. Turkey* judgment of 9 May 2000, to be published in ECHR 2000, § 131 and *Timurtas v. Turkey* judgment of 13 June 2000, to be published in ECHR 2000, §§ 82-86

⁵⁸ *Velasquez Rodriguez v. Honduras*, judgment of 29 July 1988, para. 131

⁵⁹ see, mutatis mutandis, the *McCann and Others v. the United Kingdom* judgment of 27 September 1995,

Series A no. 324, p. 49, § 161 and the *Kaya v. Turkey* judgment of 19 February 1998, Reports 1998-I, §

In the present case, the Applicants submit that Spain undertook insufficient investigative steps in response to the petitions of the applicant. The second applicant brought several complaints to different courts in Spain for the enforced disappearance and possible murder of her father. Her complaints were rejected on legal grounds by both the prosecutor and the regional courts in Cordoba. No investigation was initiated. Her complaint to the State court was also rejected. Although a number of investigative steps were taken, they were not followed up with any determination. The State Prosecutor has consistently opposed the investigative judge in his investigation despite the later

reminding the first of the State's obligations under international law to investigate these crimes.

In addition the facts were well known to the Spanish authorities as it has been widely reported that thousands of persons still remain unaccounted for since the Spanish civil war. There are many associations of victims of the civil war and the Franco dictatorship in Spain that have repeatedly condemned the lack of action by the State. Several mass graves of victims of that period have been uncovered in the past years in many parts of Spain. In response, the Spanish government adopted "the historic memory law" 2007. This envisages financial assistance and cooperation from the State to private initiatives to tracing missing persons, including the identification of bodies. Nevertheless, no public investigation whatsoever has ever been carried out *ex officio* by the State. The State Court's investigative judge in its ruling of 16th October 2008 clarified that the facts complained of in the case had never been investigated by Spain and consequently there existed impunity as regarding crimes qualifying as crimes against humanity.

The Applicants submit that although the death of Dorado Luque might have taken place before the Convention entered into force in Spain, the Grand Chamber in *Silih v. Slovenia*⁶⁰ noted that a state still has an obligation to carry out an effective investigation or to provide for the possibility of bringing criminal proceedings as may be appropriate to the case⁶¹. This obligation is inherent in Article 2 that requires, *inter alia*, that the right to life be "protected by law". The Grand Chamber further stated that although the failure to comply with such an obligation may have consequences for the right protected under Article 13, the procedural obligation of Article 2 is still a distinct obligation.⁶²

The Grand Chamber concluded that the procedural obligations arising under Article 2 are detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the entry into force of the Convention for a given state. The relevant parts of the court ruling state as follows:

153. The Court recalls that procedural obligations have been implied in varying contexts under the Convention (see, for example, B. v. the United Kingdom, 8 July 1987, § 63, Series A no. 121; M.C. v. Bulgaria, no. 39272/98, §§ 148-153, ECHR 2003-XII; and Cyprus v. Turkey [GC], no. 25781/94, § 147, ECHR 2001-IV) where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory, but practical and effective (ilhan v. Turkey [GC], no. 22277/93, §91, ECHR 2000-VII). In particular, the Court has interpreted Articles 2 and 3 of the Convention, having regard to the fundamental character of these rights, as containing a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb

⁶⁰ Case of *Silih v. Slovenia*, Application no. 71463/01, judgment of 9 April 2009

⁶¹ *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I.

⁶² see *Oneryildiz v. Turkey* [GC], no. 48939/99, § 148, ECHR 2004-XII; and *ilhan v. Turkey* [GC], no. 22277/93, §§ 91-92, ECHR 2000-VII

of these provisions (*McCann and Others*, cited above, §§ 157-64; *Ergi v. Turkey*, 28 July 1998, § 82, Reports 1998-IV; *Mastromatteo v. Italy* [GC], no. 37703/97,

§ 89, ECHR 2002-VIII; and *Assenov and Others v. Bulgaria*, 28 October 1998, §§ 101-06, Reports 1998-VIII).

The Court observes that the procedural obligation has not been considered dependent on whether the State is ultimately found to be responsible for the death. When an intentional taking of life is alleged, the mere fact that the authorities are informed that a death had taken place gives rise ipso facto to an obligation under Article 2 to carry out an effective official investigation (*Yasa v. Turkey*, 2 September 1998, § 100, Reports 1998-VI; *Ergi*, cited above, § 82; and *Suheyla Aydin v. Turkey*, no. 25660/94, § 171, 24 May 2005).

Moreover, while it is normally death in suspicious circumstances that triggers the procedural obligation under Article 2, this obligation binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it (see, *mutatis mutandis*, *Brecknell v. the United Kingdom*, no. 32457/04, §§ 66-72, 27 November 2007, and *Hackett v. the United Kingdom*, (dec.) no. 34698/04, 10 May 2005).

The Court also attaches weight to the fact that it has consistently examined the question of procedural obligations under Article 2 separately from the question of compliance with the substantive obligation and, where appropriate, has found a separate violation of Article 2 on that account (for example, *Kaya v. Turkey*, 19 February 1998, §§ 74-78 and 86-92, Reports 1998-I; *McKerr v. the United Kingdom*, no. 28883/95, §§ 116-61, ECHR 2001-III; *Scavuzzo-Hager and Others v. Switzerland*, no. 41773/98, §§ 53-69 and 80-86, 7 February 2006; and *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 286-89 and 323-57 ECHR 2007-...). In some cases compliance with the procedural obligation under Article 2 has even been made the subject of a separate vote on admissibility (see, for example, *Slimani v. France*, no. 57671/00, §§ 41-43, 27 July 2004, and *Kanlibas v. Turkey*, (dec.), no. 32444/96, 28 April 2005). What is more, on several occasions a breach of a procedural obligation under Article 2 has been alleged in the absence of any complaint as to the substantive aspect of Article 2 (*Calvelli and Ciglio*, cited above, § 41-57; *Byrzykowski v. Poland*, no. 11562/05, §§ 86 and 94-118, 27 June 2006; and *Brecknell*, cited above, § 53).

Against this background, the Court concludes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent "interference" within the meaning of the *Blečić* judgment (cited above, § 88). In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date."

In this regard, the Applicants' emphasise that it was not possible for them to bring a complaint against the actions of the authorities in the period of Franco's regime. The State Court investigative judge in his ruling of 16th October 2008 confirmed that the families of the victims had no recourse to domestic judicial remedies until December 1978 and the claimants could not seek redress. In addition the 1977 amnesty law barred them from having any prospect of requesting the authorities to open an investigation after 1977. This is demonstrated in the present case by the responses of the prosecutors and courts in Cordoba who systematically dismiss their complaints without even opening an investigation

The Applicants therefore submit that although the killing may have taken place before the entry into force of the Convention, all these procedural steps required by Article 2, which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account, occurred after that date and therefore fall within the Court's temporal jurisdiction.

The Applicants finally note that the State's obligation under Article 2 of the Convention will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice. This requires a prompt examination of the case without unnecessary delays.⁶³ The Respondent not only did not take any proactive steps to comply with their procedural obligations under article 2 but also did not respond effectively to the complaints made by the applicants. Instead, through the State Prosecutor's constant appeals against the actions of the investigative judge, the respondent showed its objections to the opening of any investigation.

The Applicant, for the reasons stated above, therefore submit that the respondent is in breach of article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

The Applicants submit that the disappearance of Dorado Luque caused them a degree of suffering that constitutes inhuman and degrading treatment contrary to Article 3 of the Convention. The Applicants therefore claim to be victims within the meaning of Article 34 of the Convention.

As a result of the complete absence of official information as to Mr. Dorado Luque's fate the Applicants submit that they have suffered anguish that has endured over a prolonged period of time.

The Applicants refer to the Court's previous jurisprudence to the effect that the anguish suffered by family members of disappeared persons can amount to degrading treatment contrary to Article 3 of the Convention.⁶⁴

In *Kurt v Turkey*⁶⁵, the applicant's son disappeared after a raid on her village by the gendarmes looking for members of the PKK. The applicant made repeated requests for

⁶³ see *Calvelli and Ciglio*, cited above, § 53; *Lazarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Byrzykowski v. Poland*, no. 11562/05, § 117.

⁶⁴ *Qakici v. Turkey*, [GC], no. 23657/94, § 98, ECHR 1999-IV, and *Timurta? v. Turkey* no. 23531/94, § 96-98, ECHR 2000-VI.

⁶⁵ Judgment of 25 May 1998, appl. no. 24276/94 at paragraph 37.

information regarding his whereabouts but to no avail. The Court held that there had been a breach of Article 3.

One of the leading cases applying Article 3 of the European Convention to the situation of family members of missing persons is *Cyprus v. Turkey*⁶⁶ In the context of the present case, this case is particularly instructive.

The case of *Cyprus v. Turkey* arose out of Turkish military operations in northern Cyprus in July and August 1974 and Turkey's continued occupation of that area. Nearly 1,500 Greek-Cypriots remain missing twenty years after the cessation of hostilities. These missing persons were last seen alive in Turkish custody, but Turkey has never accounted for their whereabouts or fate. Among numerous complaints at issue in the case, the Court considered alleged violations of the rights of Greek-Cypriot missing persons *and their relatives*. The Court expressly limited its inquiry to ascertaining the extent to which the authorities of the respondent State had clarified the fate or whereabouts of the missing persons.⁶⁷

When the European Court examined whether the relatives of the Greek-Cypriot missing persons were suffering a continuing and aggravated violation of Article 3 of the Convention, it observed:

[T]he authorities of the respondent State have failed to undertake any investigation into the circumstances surrounding the disappearance of the missing persons. In the absence of any information about their fate, the relatives of persons who went missing during the events of July and August 1974 were condemned to live in a prolonged state of acute anxiety which cannot be said to have been erased with the passage of time. The Court does not consider, in the circumstances of this case, that the fact that certain relatives may not have actually witnessed the detention of family members or complained about such to the authorities of the respondent State deprives them of victim status under Article 3. It recalls that the military operation resulted in a considerable loss of life, large-scale arrests and detentions and enforced separation of families. The overall context must still be vivid in the minds of the relatives of persons whose fate has never been accounted for by the authorities. They endure the agony of not knowing whether family

members were killed in the conflict or are still in detention or, if detained, have since died. The fact that a very substantial number of Greek-Cypriots had to seek refuge in the south coupled with the continuing division of Cyprus must be considered to constitute very serious obstacles to their quest for information. The provision of such information is the responsibility of the authorities of the respondent State. This responsibility has not been discharged. For the Court, the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3." (Cyprus v. Turkey at paragraph 157).

Thus, the European Court found that for the period under consideration (after 22 May 1994 as a result of application of the six-month rule), the relatives of the missing persons were victims of a continuing violation of Article 3 of the European Convention (at paragraphs 104, 158).

⁶⁶ Eur. Court HR, judgment of 10 May 2001, Reports of Judgments and Decisions 2001-IV, paragraphs

61⁷⁵⁴⁻¹⁵⁸

⁶⁷ *Cyprus v. Turkey* at paragraph 121.

The Applicants have been living with the fear that Dorado Luque is dead. They have applied to the public prosecutor and requested the authorities to be given his remains. The uncertainty, doubt and apprehension suffered by the applicants over a prolonged and continuing period of time has caused them severe mental distress and anguish.

Similar to the argument regarding Article 2 of the Convention, the applicants also submit that Article 3 of the Convention contains a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb of this provision⁶⁸.

In *Tahsin Acar v. Turkey*⁶⁹, the Court stated that the disappearance of a close relative can constitute a violation of Article 3. This will depend on circumstances such as proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries (at paragraph 34). The Court underlined that:

The essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see Cakici c. Turquie [GC], no. 23657/94, § 98, ECHR 1999-IV; Orhan v. Turkey, no. 25656/94, § 358, 18 June 2002)"

In the present case the Applicants are the daughter (the second Applicant) and the Grandson (first Applicant) of the disappeared man. For more than seventy years they have not had any news of Dorado Luque. During this period the second applicant has applied to various official bodies with enquiries about her father (the second applicant

assisted her at all times), both in writing and in person. Despite her requests, the applicants have never received any plausible explanation or information as to what became of Dorado Luque following his detention by State armed forces. The responses received by the applicants have invariably denied their legal right to pursue any criminal action. No investigation has been opened by the first and second instance courts in Cordoba. The State Court investigative judge initiated a pre-investigation but then discharged himself after several appeals against the opening of the investigation by the State Prosecutor.

The first Applicant, after a long administrative process succeeded in receiving public funds in accordance with the Historic Memory Law to research, locate and exhume the body of his grandfather which was believed to be buried in a mass grave. Although the historic memory law foresees cooperation of governmental bodies in this regard, works were halted by a decision of the Municipal Council. The first Applicant has also been active in writing and publishing several articles about his grandfather's disappearance has

⁶⁸ Case of Silih v. Slovenia, Application no. 71463/01, judgment of 9 April 2009 at paragraph 153.

⁶⁹ judgment of 8 April 2004, appl. no. 26307/95

given several interviews in different media in order to keep his grandfather's memory alive.⁷⁰

The Applicants submit that their submission under the procedural aspect of Article 2 is also of direct relevance here.

The reaction and attitude of the authorities to the Applicants attempts to uncover the fate of their beloved has been only obstructive. No meaningful investigation has been conducted into the disappearance although the Applicants have provided them with a large amount of credible information. The authorities have not provided the applicants with information about the fate of Mr. Dorado Luque, who was last seen in the custody of the authorities. All this is aggravated by the prolonged period of uncertainty for the Applicants.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

The Applicants note from the jurisprudence of the Court that unacknowledged detention is a complete negation of the guarantees contained in article 5. The present circumstances disclose a very grave violation of this article.⁷¹

Mr. Dorado Luque was apprehended by military forces on 18th July 1936. He was allegedly then transferred to the garrison of "San Rafael" in Córdoba together with two other men. Mr. Dorado Luque was locked into a cell where other individuals were

already detained. There is evidence from the prison file that Mr. Dorado Luque was then transferred to the provincial prison of Cordoba where he stayed until the 26th July. According to the certificate issued by the prison authorities on 12 September 2007, Mr. Dorado Luque entered the prison on the 19th July 1936 and was released (upon orders of the military commander of Cordoba) on the 26th July. The certificate also states that there were no reasons given for his detention. There is also convincing evidence that Mr. Dorado Luque was then brought back to the garrison where he stayed at least until the 28th July 1936 as his signature appears in the death certificate of one of the other persons in detention who died in the garrison. The certificate clearly states that he died in the garrison and that Mr. Dorado Luque was in the same cell.

Mr. Dorado Luque has not been seen since. There exists no official trace of his subsequent whereabouts or fate.

The Court's case-law stresses the fundamental importance of the guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It has reiterated in that connection that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention. In order to minimise the risks of arbitrary detention, Article 5 provides a corpus of substantive rights intended to ensure that the act of deprivation of liberty be amenable to

⁷⁰See <http://www.rebelion.org/noticias/2006/3/28909.pdf>.

http://www.soitu.es/soitu/2008/10/03/info/1223041714_746191.html;

<http://www.cgtandalucia.org/spip.php?article347>;

<http://boards4.melodysoft.com/app?ID=forogce&msg=30441&DOC=151>;

http://www.foroporlamemoria.info/noticias/2006/dorado_26032006.htm;

<http://www.diariocordoba.com/noticias/noticia.asp?pkid=430068>;

http://www.kaosenlared.net/noticia.php?id_noticia=25759;

http://www.nodo50.org/pososdecaude/noticias_breves/Cuadernos%20para%20el%20dialogo_P24-27.pdf;

⁷¹ see *gtgek v. Turkey*, no. 25704/94, § 164, 27 February 2001.

independent judicial scrutiny and secures the accountability of the authorities for that measure. The unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5.

Bearing in mind the responsibility of the authorities to account for individuals under their control, Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since (*Kurt, loc. cit.*, pp. 1184-85, §§ 122- 125; *Cakoco, loc. cit.*, § 104).

The applicants submit that the authorities have failed to provide a credible and substantiated explanation of what had happened to Mr. Dorado Luque after the 28th of July 1936 and therefore their responsibility for his subsequent disappearance is engaged.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

91. The applicants submit that information concerning the fate and whereabouts of a family member falls within the ambit of "the right to respect for his private and family life", protected by Article 8 of the Convention. When such information exists and is within the possession or control of the respondent Party who, without justification, refuses to disclose it to the family member then the respondent Party has failed to

discharge its positive obligation to secure the family member's right protected by Article 8.⁷²

The applicants' loved one disappeared during a process of political and social purging by the National Army in July 1936. The Applicants have obtained a certificate from the authorities of the Prison in Cordoba stating that their loved one, who was a member of their immediate family, was detained "without cause" for 8 days in the prison and then released upon orders of the military commander on the 26th July. The Applicants also have evidence that their loved one was still alive on the 28th of July and was detain in the garrison as proved by his signature on the death certificate of one of the former inmates. Other than this, the Applicants have received no information on the fate and whereabouts of their missing loved one.

All the evidence produced by the Applicants clearly shows that Mr. Dorado Luque was at all times under the control of public authorities (the respondent's armed forces and prison authorities). From these underlying facts the Applicants submit that the authorities of the respondent Party had within their possession or control information about Mr. Dorado Luque. Despite attempts by the Franco regime to cover up or to destroy information about the civil war and post-war events, there is still some information accessible for the Spanish authorities to draw upon to respond to the requests for information from the Applicants. Professor Paul Preston states in this regard that:

The reconstruction of this repression has been rendered difficult by the one-sided destruction of archival material. This begs the question, if Francoism had so much to be proud of, why were the police, judicial and military archives of the 1940s so ruthlessly purged? In the 1960s and 1970s, the archives of provincial police headquarters, of prisons and of the main Francoist local authority, the Civil Governors, disappeared. Conveys of trucks removed the 'judicial' records of

⁷² See Eur. Court HR, *Gaskin v. United Kingdom*, judgment of 7 July 1989, Series A no. 160; Eur. Court HR, *M.G. v. United Kingdom*, judgment of 24 September 2002.

the repression. As well as the deliberate destruction of archives, there were also 'inadvertent' losses when some town councils sold their archives by the ton as waste paper for recycling. Despite the losses, enough has survived to permit the reconstruction of the 'legal' repression. The efforts of the Association for the Recovery of Historical Memory, both through their archaeological digs but also by encouraging people to come forward and recount their memories, are contributing to the nation-wide reconstruction of the 'unofficial' repression. Finally, it is possible to have a reasonably approximate overview of the human cost of the military coup of 1936. This has been a cumulative process. Since the death of Franco, huge efforts have been made by local historians to recover surviving documentation, more thoroughly in some areas than in others. Minute studies have been produced for many Spanish regions and figures from the thirty-six provinces which have been researched totally or partially show 92,462 deaths. That is to say 92,462 deaths in 36 provinces, 72% of total, which suggests that the real figure is likely to be around 130,000.

The State Court investigative judge through a preliminary investigation demonstrated that much information retained by public institutions is still available. In his ruling of 16th October 2008 he put forward a global figure of 114,266 persons disappeared from 17th July 1936 to December 1951. In his ruling of 28th August he issued orders to several public institutions which ought to have relevant information (see paragraph 28 above).

In his ruling of 18th November 2008 the State Court's investigative judge warned that any delay in the investigation could lead to irreparable damage as there is an urgent need to take appropriate measures to secure all existing sources of evidence and prevent their loss. The judge explained that for instance it is especially important for evidence to be gathered from living individuals as DNA extracted from victims found in mass graves need to be analyzed and matched with their living relatives. Most of these relatives are in advanced age and could die in the near future. This is also applicable for the gathering of testimonies of witnesses who are still alive. An urgent investigation is also required to prevent further loss of private documentation. The judge warned that some the potential witnesses, although their written statements are available, have already died (some recently) and can no longer give oral testimony.

The applicants also note that throughout Spain, thanks to private initiatives, archaeological activity is producing evidence of the horrors of the Civil War.⁷³ As reported by Paul Preston⁷⁴, the Association for the Recovery of Historical Memory⁷⁵ has stated that twenty-six digs are currently ongoing and 109 bodies have so far been recovered. The Association has had 2,500 requests for help to locate the remains of relatives. It is impossible to calculate with certainty the number of bodies lying in shallow graves across Spain but the Association estimates that the requests reflect about 10% of the total. There exist gigantic common graves, in Extremadura where mass killings took place at the concentration camp of Castuera, in Asturias in both Oviedo with 1,600 and Gijon with 2,000, and in various parts of Andalusia. In Catalonia, the regional government has located 54 such graves with 4,000 corpses in Barcelona alone. There are graves in every part of Spain.⁷⁶ It was in recognition of this fact that the Spanish Government drafted the Historic Memory Law which recognizes the need to give support (including through grants) to these private initiatives.

⁷³ See for instance: <http://www.todoslosnombres.org/>.

⁷⁴ Paul Preston lecture: The Crimes of Franco; Study day BFI Southbank; January 19, 2008. See at: <http://www.pragda.com/pdfs/Preston-1.pdf>.

⁷⁵ See: <http://www.memoriahistorica.org/>.

⁷⁶ See: <http://www.geocities.com/priaranza36/ONUweb.html>

Additionally, the Applicants note that the technical report submitted by the forensic experts hired by the first Applicant demonstrated the likely existence of a pit with hundreds of human remains. His grandfather's remains are likely to also be in this mass grave. It appears therefore that this was not an isolated incident but a large operation by the respondent party's armed forces. It involved the execution of hundreds of people, the removal of their bodies, the digging of a large pit and the burial of these hundreds of

bodies. This is a task that could not have been carried out by one individual, or even a handful of individuals. Important measures must have been taken at the time by the National Armed Forces to secure the area, to gather the bodies, to remove and transport them, and to conceal them in the pit. Dozens of people, if not more, from the bottom to the very top of the administrative and / or military hierarchy must have been involved in, or known about this activity.

The Applicants further submit that in any event, the fact that a former regime may have attempted to destroy evidence and information does not relieve the respondent Party of its positive obligations under Article 8 of the European Convention. Rather, it appears that the Spanish authorities have failed to take any action whatsoever to locate, discover, or disclose information sought by the applicants about their missing loved ones. There is no evidence, for example, that the authorities have interviewed any suspects or witnesses, identified any physical evidence still in its possession, or disclosed any information about the locations of the mass graves with a view to making the requested information available to the families of the victims.

Additionally the applicants argue that the right to respect for private life in article 8 includes physical, psychological and moral integrity, which includes mental health. The Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity⁷⁷. The Court in *Bensaid v UK*⁷⁸ stated in this regard that mental health must also be regarded as a crucial part of private life associated with moral integrity and that the preservation of mental stability is an indispensable precondition to the effective enjoyment of the right to respect for private life. It is submitted that the authorities by their current inaction in disclosing information about the fate of the applicants' loved one, have contributed to the mental instability of the Applicants in contravention of Article 8 of the Convention.

⁷⁸ Judgment 6 February 2001 § 47

⁷⁹ Judgment 12 November 2002, § 32

100. Finally the Applicants submit that this inaction by the authorities and the numerous obstacles to the exhumation process of their loved one's remains have prevented them being able to give a proper burial to their loved one. The respondent is therefore withholding from the applicants the possibility for them to pay respect to Mr Dorado Luque. In *Ploski v Poland*¹⁹, the Court recognized that "the refusal to allow the applicant to attend the funerals of his parents constituted an interference with his right to respect for his private and family life." The Applicants submit that by preventing them to complete the exhumation works and recover the remains of Mr Dorado Luque, the

⁷⁷ see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61,

respondent is preventing them from giving a proper funeral to their loved one. This constitutes a violation of their family life under Article 8.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

The applicants complain of a denial of an effective remedy in violation of Article 13 of the Convention.

Article 13 requires effective accountability by the authorities for arguable claims that persons have disappeared in custody. This case discloses that the Respondent's authorities in fact enjoy complete immunity. The Applicants submit that the relevant failings are both systematic and systemic.

The case law of the Court specifies that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms regardless of the form they are secured in the domestic legal order. According to the Court's settled case-law, the effect of Article 13 of the Convention is to require the provision of a remedy at national level allowing the competent domestic authority both to deal with the substance of a relevant Convention complaint and to grant appropriate relief. However, such a remedy is only required in respect of grievances that can be regarded as "arguable" in terms of the Convention.⁷⁸

In addition, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State.⁷⁹

The Applicants also note that according to the Court's settled case-law, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, or where a right with as fundamental an importance as the right to life is at stake, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigation procedure⁸⁰.

Turning to the facts of the case, the Applicants submit Mr. Dorado Luque's was detained by the respondent's armed forces, that the authorities have produced no record of his whereabouts after 28th July 1936 and that he can be presumed to be dead. The Applicants further submit that the impact of Mr. Dorado Luque's disappearance and of their search for him thereafter constitutes inhuman treatment. Finally the Applicants also complain of a violation of Article 8 as no information was provided to them by the authorities and that they have been prevented from giving him a proper burial. The

⁷⁸ see, among many other authorities, *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III, p. 1020, § 64 and *Silver and Others v the United Kingdom* (Judgement 25 March 1983, § 113.

⁷⁹ *Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-VI, § 95, and *Aydin v. Turkey* judgment of 25 September 1997, *Reports* 1997-VI, § 103

⁸⁰ See the above-mentioned *Aksoy*, *Aydin* judgments at § 98 and § 103, respectively. See also *Yasa v.*

Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 114; *Angelova v. Bulgaria*, no. 38361/97, §§ 161-162, ECHR 2002-IV, and *Suheyli Aydin v. Turkey*, no. 25660/94, § 208, 24 May 2005.

complaints under Articles 2, 3 and 8 in these respects are therefore clearly "arguable" for the purposes of Article 13.

The authorities thus had an obligation to carry out an effective investigation into the disappearance of Mr. Dorado Luque. For the reasons set out above in the context of Article 2 and Article 3, an effective criminal investigation was not conducted in accordance with Article 13, the requirements of which are broader than the respondent's obligations under Article 2 and 3 to conduct an effective investigation into the disappearance of a person at the hands of the authorities⁸¹.

The Applicants submit that they have been fighting for their rights before Spanish courts since 1979 when they assisted Josefa Ortiz Lara to obtain official recognition of the death of Mr Dorado Luque and Mrs Josefa Ortiz Lara's widow's pension. They could not have made claims before that because they were justifiably afraid to do so under the previous regime and neither was there an available remedy. The State Court's investigative judge in his ruling of 16th October 2008 confirms this by underlining that the families of the victims had no recourse to domestic judicial remedies until December 1978 and the claimants could not seek redress.

In addition, the Applicants had no remedies regarding criminal complaints after December 1978 because the 1977 Amnesty Law clearly prevented this. It is also important to recognise that it took several years for many Spaniards to begin trusting State institutions after years in which the atrocities of the previous regime were silenced in the purported interests of "the consolidation of democracy".

It took over 14 years of proceedings for Josefa Ortiz Lara to obtain from the respondent an official declaration that Mr Dorado Luque had disappeared. For over 50 years Mr. Dorado Luque's disappearance and/or death remained unrecorded officially and no investigation was carried out. It was only after the family initiated proceedings for a voluntary declaration of death that the competent judge finally confirmed Mr. Dorado Luque's disappearance..⁸²

It was only recently since civil society groups and victims' associations became more active that the international and Spanish media started reporting the issue more widely. The following excerpts of Paul Preston's lecture demonstrate this well:

Media interest in Caudé and other common graves began three years ago [i.e. 2005], when a young Navarrese sociologist, Emilio Silva-Barrera, began to investigate the fate of his grandfather who had disappeared in León in the first months of the war. Overcoming the wall of silence and fear built by the Franco regime, which survived the transition to democracy, Silva discovered the truth. At dawn on 16 October 1936, his grandfather, with twelve other Republicans, was murdered by Falangist gunmen near Priaranza del Bierzo. Their bodies were

buried in a field next to the roadside where they fell. A shopkeeper, Emilio Silva-Faba was the father of six children aged between 3 months and nine years, his offence his membership in the centre left Republican party. His grandson then located the burial place and persuaded a group of archaeologists and forensic medical experts to take part in exploratory digs. DNA tests of the exhumed bones have now identified Emilio Silva-Faba.

⁸⁴ *Kiliq v. Turkey*, no 22492/93, § 93, ECHR 2000-III.

⁸² In accordance with Article 193 of the Spanish Civil Code a person can be declared death when more than 10 years have elapsed since the last known whereabouts of the person or since he disappeared.

As a result of that 'success', Emilio Silva, together with Santiago Macías Pérez, a local historian from León, founded an organisation, the Association for the Recovery of Historical Memory, to continue the work. Twenty-six digs are currently ongoing and 109 bodies have been recovered. The Association has 2500 requests for help in locating the remains of relatives. It is impossible to calculate with certainty the number of bodies lying in shallow graves across Spain but the Association estimates that the requests reflect about 10% of the total. There exist gigantic common graves, in Extremadura where mass killings took place at the concentration camp of Castuera, in Asturias in both Oviedo with 1600 and Gijón with 2000, and in various parts of Andalusia. In Catalonia alone, the regional government has located 54 such graves with 4000 corpses in Barcelona alone. There are graves in every part of Spain.

As they are excavated, relatives stand nervously, like those awaiting the rescue parties in mining disasters or earthquakes. For those who never knew what happened to their loved ones, even though they know that they were murdered, they still await the definitive confirmation with horror and trepidation. When it comes, as sometimes it does, it permits the shuddering release of pent-up and unacknowledged grief.

It has only been since this point that relatives of the disappeared have started to feel that they can demand from the authorities a proper response to their long grief.

The Applicants filed several criminal complaints before competent Courts (the first and second instance Courts in Cordoba and the State Court) with no avail. During the criminal proceedings public prosecutors at all jurisdictional levels repeatedly attempted to block proceeding through an array of procedural mechanisms and legal arguments. With the final decision of the State Court's investigative judge on 18th November 2008 and subsequent ruling of the State Court's Criminal Division of 2nd of December 2008 the Applicants have been left without an effective remedies because they would have to pursue their complaints before the provincial courts in Cordoba. These courts have already ruled against the Applicants' complaints.

The Applicants' note that at no stage of the criminal proceedings have the Respondent's courts and public prosecutors disputed the facts alleged by the Applicants. The first and second instance Courts in Cordoba dismissed their complaints without even opening an investigation into the substance of the Applicants' complaints. The State Court dismissed the case on procedural issues. Only Judge Garzón opened a pre-investigation and confirmed the facts alleged by the applicants. The arguments of public

prosecutors and the courts in Spain for repeatedly dismissing the Applicants' complains were broadly as follows: 1) because war crimes and crimes against humanity were not contained in the Spanish criminal code at the time, they would not be applied retroactively; 2) that these crimes were subject to statute of limitations that had long passed; and 3) they fell within the meaning of the 1977 Amnesty law. However, Judge Garzón in his rulings instead confirmed that these crimes are not subject to statute of limitations as being war crimes and crimes against humanity, that they are of continuous nature and that the 1977 Amnesty law was inapplicable.

The applicants submit that, as pointed out by Judge Garzón, the legal arguments of the respondent's Courts and public prosecutors substance conflicted with well established international standards. The case law of the Inter-American Court of Human Rights is

particularly relevant. Thus in the case of the "Mapiripán Massacre"⁸³ the Court held that according to its *jurisprudence constante* :

87 Article 13 in pertinent parts.

(...) no domestic legal provision of law can impede compliance by a State with the obligation to investigate and punish those responsible for human rights violations. Specifically, the following are unacceptable: amnesty provisions, rules regarding extinguishment and establishment of exclusions of liability that seek to impede investigation and punishment of those responsible for grave human rights violations -such as those of the instant case, executions and forced disappearances. The Court reiterates that the State's obligation to adequately investigate and to punish those responsible, as appropriate, must be carried out diligently to avoid impunity and repetition of this type of acts. (...) "

According to the United Nations Declaration on the Protection of All Persons from Enforced Disappearances of 18 December 1992⁸⁴ "(...) 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 (...)" (Article 7). The Declaration further provides that complaints about enforced disappearances shall be promptly, thoroughly and impartially investigated by the authorities and, even if there has been no formal complaint "(...) whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation (...)". It further underlines that *no measure shall be taken to curtail or impede the investigation*" and that *an investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified*! Finally the Declaration states that *(...) acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified (...)*".⁸⁵

The International Convention for the Protection of All Persons from Enforced Disappearance signed by Spain on 27 Sep 2007 contains similar provisions. It provides that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law. (Article 5) If not amounting to crime against humanity the term of limitation for criminal proceedings (statute of limitations) shall commence from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature. However States are obliged to guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation (Article 8). The Convention provides that States where there are reasonable grounds for believing that a person has been subjected to enforced disappearance shall undertake an investigation, even if there has been no formal complaint (Article 12). In addition, States shall take the necessary measures to hold criminally responsible any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced

83 Inter-American Court of Human Rights, Case of the "Mapiripán Massacre" v. Colombia; Judgment of September 15, 2005 at paragraph 304.

84 See: U.N. Declaration on the Protection of all Persons from Enforced Disappearance adopted in General Assembly resolution 47/133 of 18 December 1992

85 Article 17

disappearance. It includes the notion of command responsibility and clarifies that superior orders cannot justify the offence of enforced disappearances (Article 6).

The Applicants note that in the case of Spain, the primacy of international law over internal law is provided for in articles 10 and 96 of the Spanish Constitution of 1978. Article 10.2 of the Constitution establishes that the "laws relating to fundamental rights and freedoms which are recognised by the Constitution shall be interpreted pursuant to the Universal Declaration of Human Rights and the International Treaties and Agreements on such matters which have been ratified by Spain". Similarly article 96.1 provides that "Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law."⁸⁶

The Applicants further argue that the effects of such an interpretation are not compatible with the Convention. Each argument will be assessed in turn:

1) *As To The Argument On The Retrospective Application Of Criminal Law:*

The applicants submit that the issue of "retroactivity" of crimes against humanity and war crimes where these have not been criminalized under domestic law has already been dealt with by the court in several cases. Thus in *Kolk and Kislyiy v. Estonia*⁸⁷ the Court stated in this regard that:

"(...)

The Court reiterates that Article 7 § 2 of the Convention expressly provides that this Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal (see Papon v. France (no. 2) (dec.), no. 54210/00, ECHR 2001-XII, and Touvier v. France, no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports 88-B, p. 161).

(.)"

2) *As To The Claim That These Crimes Were Subject To Statutory Limitations:*

121. The Applicants submit that it is now well established under international law that there cannot be statute of limitations for war crimes and crimes against humanity. See the *Kolk and Kislyiy* decision where the Court emphasized that "(...) *no statutory limitation applies to crimes against humanity, irrespective of the date on which they were committed.*(...)".⁸⁸

3) *As To The Applicability Of The 1977 Amnesty Law To These Crimes.*

The Applicants submit that this legal argument raised by the public prosecutors and accepted by the provincial Courts in Cordoba lead to the abandonment of the prosecution

⁸⁶ Spain has ratified the following relevant International treaties as published in the Spanish official gazette ("BOE"): European Convention of Human Rights (entry into force 04 October 1979)⁸⁹; International Covenant on Civil and Political Rights (ratified on 27 April 1977)⁸⁹; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified on 21 October 1987); in addition, Spain signed on 27th September 2007 the International Convention for the Protection of All Persons from Enforced Disappearance.

⁸⁷ *Kolk and Kislyiy vs. Estonia*, applications no. 23052/04 and 24018/04, judgment of 17 January 2006.

⁸⁹12 Ibid.

and consequently of the opening of an investigation as required by article 2, 3, 5 and 13 of the Convention. Indeed the Applicants submit that the application by Spanish courts of a broad and general amnesty law deprived them of the guarantees enunciated in article 2, 3, 5 and 13 of the Convention.

The Applicants recall that the former Commission in previous cases was of the opinion that such amnesty laws are not in themselves in contravention of the Convention unless "it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes".⁸⁹

This argument is fortified because the crimes complained of as confirmed by the State Court's investigative judge amount to crimes against humanity and war crimes through enforced disappearance which are continuous crimes. In this regard as stated above (see paragraphs 15 and 48), the UN Human Rights Committee specifically called on the Spanish authorities to take measures to repeal the 1977 Amnesty Law and guarantee that crimes under international law will not be barred by statutes of limitations.

The Applicants, in this respect, recall the ruling of the Inter-American Court of Human Rights in the case of *Barrios Altos v. Peru* where the Court held that:

41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

Criminal proceedings were therefore not an effective remedy within the meaning of Article 13 of the Convention. The Applicants submit that a civil action could not be a remedy for enforced disappearances involving possible violations of Articles 2 and 3 of the Convention. The Court has already found in a number of cases that a civil action to obtain redress for damage sustained through the alleged illegal acts or unlawful conduct of State agents cannot be regarded as an effective remedy in the context of claims brought under Article 2 of the Convention⁹⁰.

Finally the Applicants' appeal before the Constitutional Court⁹¹ against the rulings of the lower courts in Cordoba was also of no avail as it was dismissed.

The Applicants therefore submit that the respondent violated their right to an effective remedy under article 13 of the Convention.

STATEMENT RELATIVE TO ARTICLE 35 § 1 OF THE CONVENTION

The applicants submit that with the conclusion of the criminal procedure before the State Court on the 2nd December 2008, they have no other effective remedies available to them and therefore domestic remedies have been exhausted. Indeed, with the 18th November 2008 State Court's investigative judge decision inhibiting himself from the

⁸⁹ See Laurence Dujardin and others vs France, Application No 16734/90; decision of 2 September 1991 on the admissibility.

⁹⁰ see *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 119-121. 24 February 2005, and *Estamirov and Others*, cited above, § 77

⁹¹ recurso de amparo n° 10387/2006

case and the subsequent confirmation on 2nd of December 2008 of the State Court's lack of jurisdiction to investigate these crimes by the plenary criminal chamber of the State Court, the Applicants are left without effective remedies.

The only remedies available would be to make a complaint to the provincial courts in Cordoba as suggested by the State Court in its decisions of 18th November and 2nd December 2008. However, this would mean that the applicants would have to pursue their complaints before the courts in Cordoba when these courts have already ruled against the Applicants. Both the lower and higher courts in Cordoba, with their decisions of 11th August 2006 and 18th October 2006 respectively, have ruled against the substance of the applicant's complaints. In addition, public prosecutors in Cordoba have also ruled against the applicants in their decisions of 27th July 2006 and 21st September 2006 respectively. All argued *inter alia* that the 1977 Amnesty law strictly applied and that therefore the prosecution had to be abandoned. The Applicants therefore submit that

another complaint before these Courts would have no prospects of success and need not to be exhausted.

The Applicants also filed an appeal ("recurso de amparo") before the Constitutional Court on 17th November 2006 against the rulings of the lower courts in Cordoba arguing that the decisions of the lower tribunals disregarded several domestic and international standards and resulted in them not having effective remedies to pursue their complaints in breach of articles 24 and 14 of the Spanish Constitution. However, on 14th April 2008 the Constitutional Court declared the appeal inadmissible *ratione materiae* because the appeal did not entail constitutional matters. This remedy is thus no longer accessible to the applicants either.

As stated above in paragraph 126, a civil action alone could not amount to a remedy for the illegal acts or unlawful conduct of State agents regarding enforced disappearances involving possible violations of article 2 and 3 of the Convention.

The Applicants therefore submit that they have no further means in Spain to resort to any kind of new or more effective procedure in order to find their loved ones' remains and obtain the information for which they have awaited in vain for so long. The applicants have put their trust in their country's judicial system and its ability to accord them with full respect of their basic rights. Demonstrably, they have been repeatedly disappointed.

The applicants further submit that the European Court has jurisdiction over this case for the following reasons:

1. Jurisdiction "*ratione temporis*":

The Applicants accept that the Court is not competent to examine applications alleging violations which are based on facts that occurred before the date of ratification of the Convention in a given State. However, the Applicants submit that the alleged violations contained in this application are of a continuing nature and thus have subsisted, and continue to subsist, since the date of ratification by Spain of the Convention on 4 October 1979. Indeed, the Applicants submit that the ongoing failure of the respondent State to clarify the facts surrounding the disappearances constitutes a continuing violation of the Convention.

A. With regard to the alleged violations of Article 2 of the Convention:

The Applicants accept that where killings of persons occur before the date of ratification the Court has no competence *ratione temporis* to examine those deaths. However as argued in the section above relating to Article 2, the Applicants submit that, following the Grand Chamber recent jurisprudence in the *Silih* case, the alleged interference with Article 2 in its procedural aspect falls within the Court's temporal jurisdiction. The Court is therefore competent to examine this part of the application.

The Grand Chamber in *Silih* clearly stated that the procedural obligation to carry out an effective investigation under Article 2 is a detachable obligation arising out of Article 2 capable of binding the State even when the relevant death took place before the critical date. (para. 159).

Similarly, the Grand Chamber in its *Cyprus v. Turkey* judgment (cited above), found that the evidence bore out the claim that many persons then missing had been detained either by Turkish or Turkish Cypriot forces during the conduct of military operations, in a situation which could be described as life-threatening and that the missing persons had disappeared against that background. It held that the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of the Greek-Cypriot missing persons who disappeared in such life-threatening circumstances (see paragraphs 133-136) disclosed a continuing violation.

In *Varnava and others v. Turkey*⁹² the Court argued that:

(...) the phenomenon of disappearances, which, although linked to a specific point of time when the missing person was last seen and the surrounding circumstances, may be distinguished from conventional cases of use of lethal force or unlawful killings which are dealt with under Article 2. In the latter cases, the fate of the victim is known; the former are characterised by an ongoing situation of uncertainty and, not infrequently, callous inaction, obfuscation and concealment (see, amongst many examples, Kurt v. Turkey, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, §§ 127-128, Timurtas v. Turkey, no. 23531/94, §§ 84,97, ECHR 2000-VI § 84, 97, Akdeniz and Others v. Turkey, no. 23954/94, § 93, 31 May 2001, Tas v. Turkey, no. 24396/94, §§ 80, 90, 14 November 2000; Imakeyeva v. Russia, §§ 150 165, 9 November 2006, Baysayeva v. Russia, §§ 119,127 April 2007).(...)"

The Court recalled that "(...) even assuming therefore that an interpretation of a Convention provision cannot be retrospective in its application, this argument does not prevent an obligation of a continuing nature from being recognised as existing after that date(...)" concluded that "(...) to the extent therefore that the facts of these cases disclose a continuing obligation under Article 2, it has competence *ratione temporis*..."

With Regard To The Alleged Violations Of Article 3 Of The Convention:

The Applicants submit that with regards to Article 3, the continuous nature of the violation is twofold: it applies to the procedural limb of the provisions as well as to the continued and prolonged anguish and mental stress that the disappearance of loved ones has on them which is exacerbated by the authorities' reactions and attitudes to the situation. The arguments have been laid out in the above section concerning Article 3.

⁹² At Paragraph 112.

With Regard To The Alleged Violations Of Article 8 Of The Convention:

The violation of Article 8 of the ECHR also continues today. As argued in the above section on Article 8, the Spanish authorities have failed to take any action whatsoever to locate, discover, or disclose information sought by the applicants about their missing loved one. In addition the Applicants, due to both the inactions and actions of the Respondent, are prevented from mourning the death of their loved one and from conducting a proper burial. This still continues today.

D. With Regard To The Alleged Violations Of Article 5 Of The Convention:

The Applicants submit that, in accordance with previous jurisprudence of the Court⁹³, the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of Mr. Dorado Luque since the 28th of July 1936, the date on which there is convincing evidence that he was under the full control of the authorities and which proves that their responsibility was engaged for his subsequent disappearance, amounts to a continuing violation of Article 5 of the Convention.

2. The Six Months Rule:

The applicant is aware of the fact that "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken", as article 35 of the ECHR states.

Nonetheless, a different starting date for the time limit applies in the case of continuing violations, ie cases where the violation is not (only) constituted by an act performed or a decision taken at a given moment, but (also) by its consequences, which continue and thus repeat the violation day by day. This is the situation in the present case where the Applicants submit that the failure of the respondent State to clarify the facts surrounding the disappearances constitute a continuing violation of the Convention continuing to subsist after the date of ratification by Spain of the Convention on 4 October 1979. The Applicants therefore submit that as long as that situation persists, the six-month rule is not applicable.⁹⁴

STATEMENT OF THE OBJECT OF THE APPLICATION

The Applicants seek:

A declaration that their rights under articles 2, 3, 5, 8 and 13 of the Convention have been violated.

⁹³ See: *Cyprus v. Turkey [GC], no. 25781/94, §150; and Varava and Others v Turkey, Judgement 10 January 2008, §§ 145*

⁹⁴ See *Malama v Greece (Judgement 1 March 2001, § 35.*

The applicants also seek damages arising out of the violation of their rights, including pecuniary damages for just satisfaction and all costs incurred in bringing this Application.

Thirdly, the applicants seek that the Court, should it find a violation of their rights, order the respondent, in addition to the payment of compensation, to promptly carry out a full and effective investigation into the whereabouts and fate of their loved one, to disclose all information in its power and to punish those responsible should they still be alive.

STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

150. The Applicant has not submitted the above complaints to any other procedure of international investigation or settlement.

LIST OF DOCUMENTS

The Applicant encloses the following documents:

Annex 1: Relevant Domestic Law and Practice (unofficial translation)

Annex 2: Copy of the Spanish Parliament's certificate of 6th March 1992, confirming Mr. Dorado Luque's status as Member of Parliament.

Annex 3: Certificate issued by the prison authorities on 12 September 2007.

Annex 4: Copy of the death certificate of Joaquín García-Hidalgo Villanueva with Mr. Dorado Luque's signature.

Annex 5: Copy of the obituary book contained in a certificate of the Cordoba municipality.

Annex 6: Copy of the civil registry book

Annex 7: The 1977 amnesty law (Ley 46/1977, de 15 de octubre de 1977, de Amnistía)

Annex 8: Copy of the application by Mrs. Josefa Ortiz Lara in the proceedings to obtain official confirmation by the respondent of Mr. Dorado Luque's disappearance

Annex 9: Ruling of the magistrates' court (juzgado de instrucción) number 1 of Málaga of 10th March 1993 confirming Mr. Dorado Luque's disappearance and ordering that his death be recorded in the civil registry books. (Autos 316/1981)

Annex 10: Copy of Josefa Ortiz's appeal of 1st October 1993 against the decision of the Ministry of Finance.

Annex 11: Extract of the autobiographic book of Mr. Rafael Gonzalez de Toro, a military commander who took part of the detention of Mr. Dorado Luque.

Annex 12: Copy of the legal assessment of the applicants' lawyers and sentence of the Tribunal for economic and administrative matters of 30 June 1995.

Annex 13: Criminal complaint by the second Applicant of 22nd May 2006 before the first instance court in Cordoba (Juzgado de Instrucción) number 2 of Córdoba Diligencias Previas 3651/2006.

Annex 14: Writ from the public prosecutor in Córdoba of 27th July 2006, requesting the closure of the proceedings.

Annex 15: Ruling of the first instance court in Cordoba of 11th August 2006.

Annex 16: Appeal by the second Applicant against the first instance court decision of 12th September 2006 before the second instance Court in Cordoba.

Annex 17: Decision of the appellate court in Córdoba of 18th October 2006 dismissing the appeal and confirming the ruling of the lower court of 11th August (Decision number 528).th

Annex 18: Complaint by the Second Applicant of 14th December 2006 before the State Court in Madrid (Audiencia Nacional; Juzgado central de Instrucción de Madrid).

Annex 19: Writ by the State Prosecutor of 29th January 2008 requesting the closure of the proceedings.

Annex 20: Decision of Judge Garzón ordering (auto) several public and private institutions to provide information on individuals disappeared after 17th July 1936 as a result of the civil war and subsequent Franco regime.

Annex 21: Decision of 16th October 2008 by judge Garzón accepting jurisdiction over the complaints.

Annex 22: Appeal by the Public Prosecutor of 20th October 2008 against judge Garzón's ruling and requesting the closure of the proceedings.

Annex 23: Appeal by the Public Prosecutor of 21st October 2008 before the President of the State Court's Criminal Division requesting to declare null and void judge Garzón's decision assuming jurisdiction.

Annex 24: Decision of judge Garzón of 23rd October 2008 dismissing the appeal submitted on the 20th October by the State Prosecutor.

Annex 25: Appeal by the Public Prosecutor of 7th November 2008 before the President of the State Court's Criminal Division requesting to suspend all investigative proceedings pending a decision on his previous appeal regarding the lack of jurisdiction of the Court.

Annex 26: Decision of 7th November 2008 by the State Court's criminal Division in extraordinary session admitting the State Prosecutors request and ordering all proceedings related to exhumations of mass graves to be suspended until final decision of the appeal regarding the jurisdiction of the Court.

Annex 27: Decision of judge Garzón of 18th November 2008 relinquishing jurisdiction and advising the complainants to pursue their complaints before provincial courts.

Annex 28: Decision of 2nd of December 2008 by which the State Court's Criminal Division in plenary session confirmed the State Court's lack of jurisdiction to investigate these crimes.

Annex 29: Second Applicant's appeal of 17th November 2006 before the Constitutional Court (recurso de amparo n° 10387/2006).

Annex 30: Constitutional Court's decision of 14th April 2008 declaring the appeal inadmissible *ratione materiae*.

Annex 31: Applicants' request of 7th July 2006 to the competent Military Tribunal requesting any information regarding the detention and whereabouts of Mr. Dorado Luque and the Military Tribunal's response on 4th July 2006.

Annex 32: Letter from the Cordoba Municipal Council of 8th August 2007 dismissing the Applicants' petition to permit the exhumation of the body of Mr. Dorado Luque from a mass grave identified in a pit of the cemetery of "la Salud".

Annex 33: Copy of the letter of the Ministry of the President of 21st November 2008 granting the funds to assist in the process of searching and recovering the remains of Mr. Dorado Luque.

Annex 34: Technical report of the forensic experts submitted to the Cordoba Municipal Council.

Annex 35: Ruling of the State Court's investigative Judge to the competent court in Cordoba (Juzgado de Instrucción no 6 de Córdoba).

Annex 36: Ruling of the Directorate General of Registries and Notaries of 29th June 2007.

Annex 37: Letter of Authority for Mr. Leon Diaz and Mr. Paul Troop.

DECLARATION AND SIGNATURE

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

*Place: Sarajevo (Bosnia and Herzegovina)
Paul Troop*

Date: 8 June 2009

F. Javier Leon Diaz

Signature of the applicant or of the representative