

BALTASAR GARZÓN - *EL JUEZ INDOMABLE*

by George Venturini *

Judge Baltasar Garzón, of the Spanish *Audiencia Nacional*, Fifth Chamber of the Central Criminal Court, was indicted in April 2010 for knowingly and willfully exceeding his competence when investigating crimes committed by the Franco regime which were said to be covered by an amnesty. He had - as charged in March 2010 - twisted the limits of his jurisdiction to by-pass the amnesty law enacted by the Spanish Parliament in 1977, two years after the death of the *Caudillo*, and thus to be able to engineer a case when there was none.

The specific charge against Judge Garzón is: *delito de prevaricación*. Accepting that charge, the Supreme Court declared admissible three criminal accusations against Judge Garzón. *Prevaricación* means in the case the use by a judge of his authority intentionally to subvert the course of justice. This is a very serious criminal offence, punishable by suspension from any judicial activity for up to twenty years. The contested *delito* consists in the Judge having knowingly overstepped his judicial competence by opening a probe into the disappearances of 114,266 people - part of the crimes committed by Franco between 17 July 1936 and 31 December 1951, the bloodiest period of Franco's dictatorship.

Judge Garzón was suspended on 14 May 2010, pending trial. He was given permission to work at the International Criminal Court in The Hague for seven months from May 2010.

It is not known why the judicial authorities did not previously institute any internal inquiry or disciplinary proceedings - for example: following the public debate after the Judge had ordered to open suspected Francoist era mass graves two years earlier, in September 2008 - but instead preferred to rely on criminal accusations, brought by two neo-Francoist organisations: a fictitious trade union called *Manos Limpias* (Clean hands) and another

seedy *Libertad y Identidad* (Liberty and Identity), and the resurrected *Falange*, and declared admissible on 26 May 2009.

The amnesty that Judge Garzón is accused of having ignored had been granted on 15 October 1977 under the mis-guided belief that it would open the way to a much vaunted *transición* - a peaceful transition to democracy. In fact, as things turned out, it has been used to advantage the Francoists, old and new.

A Supreme Court Judge, Luciano Varela, ordered Judge Garzón to stand trial. In a 14-page decision he ruled that Judge Garzón started his inquiry despite being “aware of his lack of jurisdiction.” Considering that Judge Garzón had “deliberately ignored” the amnesty law, Judge Varela refused in early February to dismiss the complaints against Judge Garzón. His counsel, when questioned by the online edition of *El Pais*, said he would appeal Judge Varela’s decision.

The judicial action against Judge Garzón drew an outcry around the world from institutions, community groups, legal experts, human rights organisations, personalities of culture and most political parties. They expressed support to Judge Garzón and described as an absolute disgrace the process opened against him.

More than two hundred organisations defending human rights and jurists all around the world, including former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Ms. Carla del Ponte, signed a petition supporting Judge Garzón. They emphasised that the United Nations Committee on Human Rights requested Spain in 2008 to revoke the post-Franco amnesty law and “to guarantee the imprescriptibility of crimes against humanity.” “Enforced disappearances” which focused Judge Garzón’s investigation are crimes “which cannot be prescribed or amnestied, without violating international law, which is part of the Spanish judicial system.” they stated.

From Brussels, the President of the European Union Council, Herman van Rompuy, raised his voice in solidarity with the Judge.

Spanish trade unions called for a mass-meeting on 13 April 2010 to support Judge Garzón. The meeting had been organised by the Workers' Commissions (CC.OO) and the General Union of Workers (U.G.T.) the most powerful trade unions in the country, and was to be held at the Faculty of Medicine in the *Universidad Complutense de Madrid*. It was intended to protest against the decision by Judge Varela who gave the announcement of the forthcoming trial.

CC.OO and U.G.T. believe indispensable for Spain not to fall into amnesia but defend the cultural and political significance of historical memory. "If we manage to hold a large rally, I believe, with the highest respect, we will have acknowledged that the people's stand is different." anticipated CC.OO leader Ignacio Fernandez Toxo. And he added: "What is happening is incomprehensible; all seems to be a bad dream." But it was not, as he explained, "What is happening in Spain is that the nostalgic persons and executioners become avengers and judges and the victims are turned into perpetrators." Thousands gathered in cities across Spain in support of Judge Garzón, chanting slogans and displaying flags of the pre-war Republican Government assassinated by Franco.

Emilio Silva, the chair of the *Asociación para la Recuperación de la Memoria Histórica* - the Association for the Recovery of Historical Memory, A.R.M.H. which represents victims of Franco regime, said: "This is a sad day for justice. ... If this trial takes place, this will be the first known case of a judge who tries to get the truth, justice and reparation for more than 100, 000 people disappeared and finds himself pursued."

The International Commission of Jurists considered that Judge Garzón short-lived inquiry did not justify disciplinary action, let alone criminal prosecution, adding that the prosecution of judges for carrying out their professional work was "an inappropriate and unwarranted interference with the independence of the judicial process."

Geoffrey Robertson Q.C., the well-known human rights lawyer, declared his support for a judge who has earned a global reputation for his application of international human rights law against the former military regimes which oppressed parts of South America. "It is ironic that one of Spain's few internationally renowned jurists - as well as an incredibly brave investigating judge who has risked his life with the mafia, with Basque group E.T.A. and with al-Qaida - is now having his reputation put at risk." Robertson said. "This is a trial of the integrity of Spain's judges and of the reputation of Spanish jurists who will, if they find for the prosecution, be held in universal contempt by international lawyers." Robertson said that Judge Garzón had been correct in international law in deciding to investigate the crimes committed by Franco and 34 senior Francoist officials. "His ruling that there can be no posthumous impunity for crimes against humanity is important to all descendants of the victims of such crimes worldwide, whether they be from the Armenian genocide or the Nazi holocaust." Robertson said. "As a matter of international criminal law he was undoubtedly right."

"This is something truly scandalous. I think." said Esteban Beltran, Spanish Director for Amnesty International. "This is outrageous. As a matter of principle, Amnesty International does not take a position on the merits of the specific charges made against a person under investigation by a court, but in this case - where Judge Garzón is being brought to justice for investigating past human rights violations - the organisation cannot remain silent." said Widney Brown, Senior Director of Amnesty International. "Whether the investigation by Judge Garzón violated Spanish national law or not is simply irrelevant as the [Amnesty] law itself violates international law. Investigating past human rights violations and setting aside an amnesty law for crimes under international law, such as enforced disappearance, extrajudicial executions and torture, should never be treated as a criminal act."

The United Nations Human Rights Committee and the Committee against Torture had just recently - and once more - warned that Spain should repeal the amnesty law. The Committee members reiterated to Spanish authorities that enforced disappearances and torture are not subject to amnesty and that statutes of limitations do not apply to such crimes.

“The 1977 Amnesty Law barring prosecutions of crimes under international law violates Spain’s obligations under international law and it is a duty of the Judiciary, sooner or later, to state that such a piece of legislation is simply null and void.” said Widney Brown.

Amnesty International urged Spanish authorities instead to concentrate on finding justice for the relatives of the estimated 114, 266 people who disappeared at the hands of the Franco regime. “Instead of a criminal complaint against Judge Garzón for investigating crimes under international law committed in the past, Spain should, irrespective of the date of their commission, bring perpetrators to justice. They should take all measures to disclose the truth about the thousands of enforced disappearances, extrajudicial executions and torture committed during the Franco era and provide full reparations to the victims and their families. ... Any attempt to prosecute a judge for an independent and impartial exercise of his jurisdiction or [for challenging] the legality of an amnesty law is not in accordance with Spain’s obligations under international law and should be reversed.” concluded Widney Brown.

Human Rights Watch said that the European Union member states should express their concern over the prosecution and the potential suspension of Judge Garzón. “[The Judge] sought justice for victims of human rights abuses abroad and now he is being punished for trying to do the same at home.” said Lotte Leicht, E.U. Advocacy Director at Human Rights Watch. “The decision leaves Spain and Europe open to the charge of double standards and undermines the E.U.'s credibility and effectiveness in the fight against impunity for serious crimes.”

Judge Varela's decision was expected to lead to a criminal prosecution of Judge Garzón, and as a result, Spain's *Consejo General del Poder Judicial* - General Council of the Judiciary would consider Garzón's temporary suspension.

Judge Garzón's decision not to apply Spain's amnesty seemed unassailable according to international conventional and customary law, which impose on states a duty to investigate the worst international crimes, including crimes against humanity. The sanctions against Judge Garzón were not only a blow to the families of victims of serious crimes in Spain, Human Rights Watch said. The sanctions also risked undermining the E.U.'s collective credibility and effectiveness in seeking justice for current human rights crimes - be they in Darfur, the Democratic Republic of Congo, or Sri Lanka.

Under international law, governments have an obligation to ensure that victims of human rights abuses have equal and effective access to justice, as well as an effective remedy - including justice, truth, and adequate reparations - after they suffer a violation. The International Covenant on Civil and Political Rights (I.C.C.P.R.), that Spain ratified in 1977 - most importantly, before adopting the amnesty law - specifically states that governments have an obligation "to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy."

In 2008 the U.N. Human Rights Committee, in charge of monitoring compliance with the I.C.C.P.R., called on Spain to repeal the 1977 amnesty law and to ensure that domestic courts do not apply limitation periods to crimes against humanity. In 2009 the Committee against Torture also recommended that Spain "ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty" and asked Spain to "continue to step up its efforts to help the families of victims to find out what happened to the missing persons, to identify them, and to have their remains exhumed, if possible."

The European Court of Human Rights held in 2009 in the case of *Ould Dah v. France*, No.

13113/03, as a general principle, that an amnesty law is generally incompatible with states' duty to investigate acts of torture or barbarity.

Should Judge Garzón be removed from his position over this issue it will serve as a warning to the rest of the Spanish Judiciary from those who seek to prohibit any attempt to come to terms with the past. Ironically, perhaps the Argentinian courts may take the issue further as a case is being examined in that country to investigate what the senior ranks of the Spanish Judiciary seek to hide from view.

The way in which the case against Judge Garzón had been conducted by Judge Varela was nothing but disgraceful. Varela accused Judge Garzón of having knowingly ignored the 1977 amnesty law; he made a whole series of unsubstantiated judgments about Judge Garzon's intentions, and attributed to Judge Garzón judicial resolutions which were not even considered by him. In the process of so doing he committed a far more serious abuse of the judicial process than anything that Judge Garzón could be accused of doing. Judge Varela systematically ignored international law on the issues affecting *los desaparecidos* - the forcibly disappeared, and those who were subjected to other human rights abuses. Spain is a signatory of the major treaties on these issues and Judge Varela was not entitled to ignore these treaties simply because it did not help his case. Additionally, he rejected all requests by Judge Garzón's counsel, Gonzalo Martínez-Fresneda, to take testimony on the issues at the heart of the case. That means rejecting evidence from international experts and a point-blank refusal to consider the arguments of other Spanish judges who share Judge Garzon's positions.

Such behaviour on the part of Judge Varela makes it clear that the case against Judge Garzón is not motivated by questions of law. One should add to this the likely prospect that the court hearing the case will be headed by a judge who is a patron of the ultra Right-wing DENAES - the Foundation for the Defence of the Spanish Nation. As if that were not already enough, the accusing parties are a collection of Right-wing groups, including the *Falange*. Anyone can see that the stage is set for a dangerous judicial farce.

The court's decision could result in a quick-fix suspension of Judge Garzón from the *Audiencia Nacional*, the court which decides the issues on terrorism, crimes against humanity and organised crime.

The crime of illegal detention, without giving information of the detainee's location, and the crime of enforced disappearances, are crimes of continuous nature, which are ongoing until it is known what happened to the victims; that is why these crimes cannot be object of criminal prescription. When these disappearances have been committed in a systematic, massive and generalised manner, as it occurred during the civil war and Franco's dictatorship, they are considered as crimes against humanity and hence cannot be subject of amnesty nor pardon. The criminal law principle of non-retroactivity cannot apply to this type of crimes, since the prohibition of such crimes already existed under international customary law at the time of their commission and, the principle of legality, is governed by national provisions and international human rights law.

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A pioneer and advocate of universal jurisdiction, Judge Garzón had gained worldwide recognition by securing the arrest of former Chilean dictator Augusto Pinochet in London in 1998 for crimes committed in Chile in the 1970s. This ushered in the heyday of international justice. This atypical judge has cornered the armed Basque separatist organisation E.T.A. for more than twenty years.

Judge Garzón, of course, is one of the most high-profile judges in the world and what makes the case bitterly ironic is that he is being prosecuted for trying to apply at home the same principles he so successfully promoted internationally. Many people contested the right of a judge in Spain, which had never come to grips with its own past, to open up wounds in foreign countries. But the Pinochet case inspired victims of abuse throughout Latin America to challenge transitions from dictatorship which allowed the perpetrators of atrocities to go unpunished. These temporary accommodations with the *anciens régimes* did not extinguish the thirst of victims and relatives to find out the truth and to bring their tormentors to justice.

International and national courts ruled that amnesties could not stand in the way of a state's duty to investigate the worst international crimes.

Then in 2008, Garzón set his sights inwards. In the past several years, a growing movement has challenged the *pacto del olvido* - the 'pact of forgetting', which was part of Spain's 'model' transition to democracy, and the children and grandchildren of victims filed complaints regarding the enforced disappearances of more than 100,000 people between 1936 and 1952.

In his long career, Judge Garzón has made many enemies. 'Conservatives' are gunning for him now because he helped unearth alleged massive corruption in the financing of the opposition *Partido Popular*, but many in the Socialist Party have not forgiven him for probing government support for an anti-E.T.A. death squad in the 1980s. If Judge Garzón is convicted it will effectively end his judicial career.

Prosecuting a judge for issuing a controversial decision, even one overruled on appeal (in a split decision), is a dangerous attack on judicial independence. Many undemocratic rulers would love to use criminal sanctions to silence meddlesome judges. The assault on Judge Garzón (there are two other cases against him in the pipeline) comes on the heels of the Spanish government's decision to curtail its law permitting the prosecution of foreign atrocities which had been used to indict Pinochet, convict an Argentine official for 'dirty war' killings, investigate crimes in El Salvador and Guatemala and issue warrants for top Rwandan leaders. But after cases involving powerful countries such as China, the United States and Israel - for alleged crimes in Tibet, Guantánamo and Gaza - created headaches for the Spanish government, both major parties agreed that the law would be limited.

Thanks to Judge Garzón, Spain became a symbol of justice for atrocity victims around the world. Now justice itself may be the victim in Spain.

Judge Garzón was suspended by the *Consejo General del Poder Judicial* - General Council of the Judiciary on 14 May 2010, pending trial. If convicted, he could be barred from his duties for twenty years. Further to besmirch the reputation of Judge Garzón, two more legal complaints were filed against him - one over personal funding allegedly received from a leading Spanish bank for seminars he conducted at New York University, and the other over alleged illegal eavesdropping as part of a corruption investigation. Ironically, when the latter came to a head, several members of the opposition *Partido Popular* were found involved in a network of kickbacks and other illegal payments, including the former party treasurer. Both complaints, as will be seen, were without foundation.

This is not the ordinary procedure in dealing with a judge, and never mind the *etiquette* ! But present Spain - by which one must understand the Spanish Establishment - is not a place given to old-fashioned civility. Accused by Spanish 'conservatives' of harbouring grudges and seeking the media limelight with his pursuit of high-profile cases, but also as a result of his investigations, Judge Garzón attracted wrath, both from sections of the very nostalgic Spanish Judiciary and from the much corrupted Spanish political class - and not only conservative. The Spanish Judiciary is the only non-democratic power in the country with unchanged structures linking it to the dictatorship. It makes for sordid consequences. Mannerism is the substance, manners are something else. The Spanish Establishment is the successor of an oligarchy which inflicted upon the Spanish People the *coup d'état* of July 1936, the brutality of three years of civil war, and between 1939 and 1977 (at least) what may be called the National-Catholic Regime of *Generalísimo* Franco. It is therefore, consequential - in a perverted sense, 'natural' - that an indomitable Judge of modest origin, such as Garzón's, be dealt with that way.

After the suspension, events moved rapidly.

Judge Garzón was given permission to work at the International Criminal Court in The Hague

for seven months from May 2010, and - as usual - he spoke freely about that as well. He, who had targeted the United States because of accusations of torture at its Guantánamo prison camp, expressed optimism that President Barack Obama would reverse “sooner rather than later” a decision by the Bush Administration not to join the International Criminal Court, which was set up eight years before. “The Court can now function, but of course with the United States it would be a lot better.” he said, adding that [President G.W.] Bush’s decision [not to join] had been “one of the worst moments for me.”

Judge Garzón initiated the investigation of disappearances during the Franco regime late in 2008. By then, of course, the Judge “had a reputation” - to put it in ‘polite’ English.

For years Judge Garzón had relentlessly pursued: - State criminals (in the early nineties he had put in the dock government officials involved in a ‘dirty war’ against *Euskadi Ta Askatasuna* terrorists; the result were the convictions for complicity of several high positioned civil servants and even of a minister: José Barrionuevo, the Interior Minister of the González Government in which Garzón had briefly served), - drug importers (in a 1990 well publicised case Garzón disbanded a large importation/distribution organisation), - wrong-doing public officials (in 1999 the former mayor of Marbella - a fashionable sea-side resort on the Mediterranean for the well-off and their ‘play-things’ - was investigated for corruption, sent to trial, and convicted in 2002), and - malefactors of private wealth (Silvio Berlusconi, for instance, of whom he sought, unsuccessfully, extradition in 2001 on the ground of tax fraud and breach of anti-trust laws through a stake in Spanish TV company *Telecinco*). Judge Garzón tried to prosecute shadow war criminals (such as former State Secretary Henry Kissinger over what the United States Government knew about *Operation Condor*). This Operation involved an agreement between six former Latin American dictatorships - Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay - to kidnap and assassinate, leaving no trace, each regime's political opponents. There being no dead bodies, the conspirators could deny everything. The victims were henceforth referred to as *los desaparecidos* - the disappeared. The use of the term ‘enforced disappearances’ in international treaties derives from the ‘dirty wars’ in Latin America during the period.

It was clear to all - to many in high position, in particular - that the still young judge meant business. He was what is often referred to with contempt an 'activist' judge. More 'conservative' judges found Judge Garzón's 'personal' commitment 'distasteful'. 'Consorting with the Police' - as he was accused of by personally leading police operations against the Colombian-related drug syndicate - was the objection emanating from the 'traditionalists' and the *bien-pensant* frequenters of Establishment salons.

The Borbonic *haute bourgeoisie* was prepared to tolerate - but only just - such 'common', unbecoming behaviour. The well-connected grew more concerned when Judge Garzón opened the *Gürtel* case, a corruption case which exploded in 2009 and involved high figures of the *Partido Popular* - Popular Party, the Right-wing opposition and a linear successor of *Franquismo*, especially its regional governments in Madrid and Valencia. The Judge had carefully, diligently, painstakingly examined contracts, backhanders and possibly illegal party funding - and found them very seriously wanting.

The same *señoritos* and their courtesans remained distractedly indifferent when, in 1998, Judge Garzón sought the extradition of 46 former military and civilian officials from Argentina, including former *Junta* members Jorge Rafael Videla and Emilio Massera. After all what was wrong with 'disposing' of some 30,000 'subversives', in whatever way possible, eliminating any trace of their existence by dumping thousands of them from aircraft into the ocean? Had not the National-Catholic 'Crusade' performed a similar, larger 'cleansing', by disposing of the bodies of the 'enemy' in mass graves? Still, the Establishment drew a sigh of relief when Judge Garzón's extradition request was turned down by then President Carlos Menem (1989-1999) - who had pardoned the dictators, and by his successor Fernando de la Rúa (1999-2001). Not until 2003, under President Néstor Kirchner (2003-2007), was a decree prohibiting the extradition of military officials overturned. But at the same time, steps were being taken to put an end to impunity in Argentina, where some 30,000 people fell victim to forced disappearance during the *Junta* regime.

In 2003 Judge Garzón, who for years had been the scourge of E.T.A., indicted Osama bin Laden over the 11 September 2001 attacks in the United States.

Not even this would help the Judge in 2009; he had been stepping on too many toes - Right, Left and Centre. He was making a nuisance of himself - it was whispered, and not only under their breath, by 'colleagues' - as an exhibitionistic super-judge. Many of the old 'colleagues' might not have had the courage to look at themselves in an uncomfortable mirror such as Judge Garzón presented. Impotent envy undoubtedly played its place.

Early in his forties, Judge Garzón had embraced a new interpretation of the law, based on the broad statement of principles of the Universal Declaration of Human Rights (1948), expanded by the treaties of which 'new' Spain had recently become a party: the International Covenant on Civil and Political Rights (1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (1966). The two Covenants entered into force in 1976; Spain ratified them in 1977; they are now parts of what is loosely referred to as the International Bill of Human Rights. It is clear that Judge Garzón passionately believes in them, their force and consequences. For the fraudsters, money launderers, high prelates, gangsters, banksters, *corporados*, and members of the Spanish 'high society' (the few who are aware of those international obligations) they remain just a farrago of words - rhetoricians' exercises, mountebank's tools.

It was under the influence of such study, commitment and drawing of mental horizons that in 1996 Judge Garzón felt ready to test the limits of international human rights law by opening genocide investigations into the Chilean and Argentine dictatorships. He set out to explore the reach of universal jurisdiction by claiming that former Chilean dictator General Augusto Pinochet could be tried in Spain for the crimes he had committed - as he could not be tried in Chile.

The purport of the doctrine of universal jurisdiction is this: to empower national authorities to investigate and prosecute any person suspected of crimes such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances - which are crimes under international law, regardless of where the crime was committed or the nationality of the accused and the victim, and to award reparations to victims and their families. Judge Garzón would become famous for activating such a doctrine extensively.

Under Judge Garzón's interpretation of Spain's law of universal jurisdiction - as received and enacted in 1985, as well as the interpretation by other Spanish judges and legislators at the time - crimes against humanity which occur outside of Spain can be prosecuted in Spain, even if the crimes occurred before Spain's law came into effect in 1985, and even if the victims or perpetrators are not Spanish.

Unfortunately, in 2009 the application of the doctrine was to be circumscribed by the Spanish Parliament, under pressure of extraneous forces, as will be further seen.

In 1998 Judge Garzón issued an international arrest warrant when he learned that General Pinochet was in London for a medical check-up. The Chilean Truth Commission (1990-1991) had strengthened the basis for the warrant, marking an unprecedented use of universal jurisdiction to attempt to try a former dictator for an international crime. At the heart of the indictment were the deaths and disappearances of Argentines, Chileans, Spaniards and others during Pinochet's dictatorship, in particular during Chile's infamous Operation *Condor*. Initially, Judge Garzón sought the indictments because of the murder of Spanish citizens by the Pinochet dictatorship, but later he broadened his jurisdiction on the basis of crimes against humanity regardless of the nationality of the victims. British Police arrested Pinochet in October 1998. Pinochet was held under house arrest for seventeen months in London, pending a decision on his extradition to Spain, until March 2000, when the Home Secretary of the Blair Government decided to release him on the ground that the dictator was deemed unfit to stand trial.

Nevertheless a shivering of apprehension must have gone down the spine of Spanish oligarchs.

Judge Garzón's activity would not have been possible but for continuous contacts with Chilean and Argentine Non Government Organisations in Spain which represented the victims of those dictatorships.

Even before the Pinochet indictment, in 1999 and 2000 Judge Garzón had filed charges against two Argentine naval officers in connexion with the disappearance of Spanish citizens during Argentina's 'dirty war' of 1976-1983: genocide, 30 counts of murder, and 286 of torture. The murder charges against Adolfo Scilingo related to 30 prisoners, Argentine and foreign, thrown out of government jets into the sea. In 2005 Scilingo was prosecuted in Spain for terrorism, torture and attempted genocide - as the aim of the military regime at the time was the destruction of an entire group, its opponents. In 2007 the original sentence of 640 years imprisonment was increased to 1,084 years in a Spanish prison for crimes against humanity. Miguel Cavallo was charged with genocide, terrorism and torture. He was eventually extradited to Argentina on 31 March 2008.

Judge Garzón's indictments of Pinochet and Scilingo were significant beyond the application of international law. Of equal importance was the fact that he pursued Pinochet and Scilingo even though, at the time, both countries had amnesty laws which provided total immunity for crimes committed by the military and the supporters of those dictatorships. In essence, by indicting Pinochet and Scilingo under international law, Judge Garzón took the legal and moral position that international law which prohibited crimes against humanity trumped national amnesty laws. Additionally he argued that amnesty should only apply to situations where a person is convicted or acquitted and then granted a pardon or amnesty.

To say that Judge Garzón's prosecutions and indictments were extremely controversial is an understatement. His decisions were controversial internationally, in Spain, and even in democratic political circles. In Spain and abroad, the legal criticism of Judge Garzón's indictments were due to concern over the enforcement of international law by criminal courts outside of the International Courts established precisely for the purpose of adjudicating international law. The criticism was particularly pointed because the indictments were not limited to crimes against Spanish victims, where there might be grounds for bringing someone to justice under international law in Spain. In the face of this criticism it is important to point out that this is exactly what Spain's law of universal jurisdiction spelled out and allowed for. It was only in 2009 that the Spanish Parliament amended the law of national jurisdiction to limit it to cases which involve Spanish citizens or have a strong nexus to Spain, as will be further seen.

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The political criticism of Judge Garzón's cases was of a different nature. While there was much relief and satisfaction as the Latin American organisers of death and torture were finally being held accountable, there was concern that the overriding of amnesty laws could have the unintended consequence of eliminating a political tool often necessary for difficult transitions to democracy.

It is against this background that one could understand what Judge Garzón has been accused of in Spain and what has led to his suspension from his judicial duties.

On 16 October 2008 Judge Garzón acknowledged jurisdiction and accepted a petition demanding an investigation into the enforced disappearances of Republicans under the Franco Regime. The petition had been submitted by 13 associations of the families of victims, led by the Emilio Silva, of the A.R.M.H.

In his decision Judge Garzón considered that a number of crimes of illegal detention had been committed from the beginning of the war in 1936 to the end of the military repression in 1952, in the context of a systematic plan to eliminate political opponents through murder, torture, exile and forced disappearance. Victims of illegal detentions were of two kinds: those who, after 1936, were *paseados*, taken for a stroll - that is to say, abducted from their houses or taken from detention centres and executed on a side of a road, where many of them are still buried, and those who when they were children were either stolen from their biological mothers or 'recovered' abroad and taken back to Spain with or without their parents' consent.

Judge Garzón must have reasoned that these were crimes of forced disappearance and therefore crimes against humanity. In his decision, the acts committed were crimes at the time because they were against the Laws and Customs of War and Laws of Humanity, as they were committed after the critical date of the 30 January 1933 established after the end of the second world war in Europe in the Allied Control Council Law nº 10 (article 2.5). Therefore, the principles recognised in the Charter and judgment of the International Military Tribunal of Nuremberg should also apply to crimes committed in Spain after the beginning of the civil war in 1936. This would pre-empt the objection of a retroactive application of international law, and therefore the principle of legality - *nullum crimen sine lege* - would be observed.

The concept of crimes against humanity has evolved since 1945. A first definition of this offense was offered by the Tribunal of Nuremberg: "Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on racial or religious when such acts or persecution, whether or not in violation of the law of the country where they were committed, were committed in the wake of any crime within the jurisdiction of the court." The Tribunal said it was competent to "try and punish persons who, acting on behalf of the European countries of the Axis, have committed individually or as members of organisations crimes against humanity." Later on the International Convention on the Suppression and Punishment of the Crime of *Apartheid* called it a crime against humanity.

Another milestone was reached during the wars of Yugoslavia: UN Resolution 827 of 1993 creating the International Criminal Tribunal for the Former Yugoslavia (ICTY - Resolution 827) in The Hague took up the qualification of crimes against humanity provided by the Charter of the Nuremberg Tribunal. The same approach was confirmed on 8 November 1994 during the setting up of the International Criminal Tribunal for Rwanda (ICTR - Resolution 955).

Crimes against humanity are now defined by Art. 7 (1) of the Statute of the International Criminal Court as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

Spain, having signed the Rome Statute on 18 July 1998 and deposited its instrument of ratification on 24 October 2000, is bound by that Statute.

Previously Judge Garzón had sought information from local churches, senior church authorities, and city halls in an attempt to establish a definitive list of victims between 17 July 1936 and December 1951. He put together a list of 114,266 names. Later the list was expanded to 133,708 persons.

Judge Garzón's decision is regarded as the catalyst for the Judge's present tribulations. But, as cyberevents unfolded and as will be seen, there might be other much more sinister causes.

Additionally, Judge Garzón's apparent success had encouraged other judges: in January 2009 Judge Fernando Andreu said he would investigate seven current or former Israeli officials over a 2002 air attack in Gaza; in May Judge Santiago Pedraz announced that he would charge three U.S. soldiers with crimes against humanity for the April 2003 deaths of a Spanish television cameraman and a Ukrainian journalist. The men were killed when a U.S. tank crew shelled their Baghdad hotel. As at the end of September 2010 Judge Pedraz was still insisting on seeking the arrest of the three G.I.s involved in the killing.

Calls to rein in such meddlesome judges increased as they announced probes involving Israel, the United States and China.

By mid-2009 the Spanish National Criminal Court had received complaints of human rights abuses from as far as Chile, Gaza, Guantánamo Bay, Guatemala, Rwanda and Tibet. Some ten cases from five continents were being investigated by Spanish judges, under the doctrine of universal jurisdiction.

These investigations would become huge sources of headache for the Spanish Government, and government and opposition would collude in seeking to limit the application of the law - even the domestic reception of it.

Judge Garzón's action, in particular, was regarded as controversial: the offences complained of by the petitioners were nearly seventy years old, they had occurred before a solid assertion of the notion of crimes against humanity, any action on them was barred - it was claimed - by the amnesty of 1977. There had been exhumations of mass graves before; now they had been encouraged and found support in Judge Garzón's decision. He himself had ordered the exhumation of 19 unmarked mass graves, one of them believed to contain the remains of the famous poet Federico García Lorca. If nothing else, Judge Garzón was held responsible for inflaming issues which were intended to be settled by the *pacto del olvido* - an unwritten, almost unspoken impossible 'agreement to forget' the past and 'move on'. 'To move on' is an often-heard exhortation by governments and people who prefer not to pay for the consequences of their acts.

Argument flared between the Prosecutor's Office, which stated that Judge Garzón was not competent to raise the case, which was to be archived as falling under the 1977 amnesty law, and Judge Garzón, who tenaciously held his own.

Challenging the investigation, the Prosecutor called for the enforcement of the 1977 amnesty law and of Spain's statute of limitations. He argued that, even if the 1977 law does not cover the crimes, under the Spanish Criminal Code in force when the civil war began, those offences should be considered 'ordinary crimes' and the statute of limitations had in fact expired. Under Spanish law most crimes are deemed to go unpunishable after a 20-year period.

The Prosecutor further contended that the 2007 Law for the Recovery of Historical Memory prevents judicial enquiries in that it already provides appropriate and sufficient measures for the victims. This seems a bad reading of the Law, which says that “[Its provisions are] compatible with taking the legal action and having access to the ordinary and extraordinary court proceedings established in the laws or the international treaties or covenants ratified by Spain.”

Information which recently came to light explains why such position was taken up. It does nothing to reduce the impression of a lack of good faith.

Judge Garzón maintained that the illegal detention and disappearance of victims could not be subject to the 1977 amnesty law because they are as crimes against humanity, and as such are subject to universal jurisdiction, hence not limited by the running of time. He also dismissed any statute of limitations, on the ground that Franco waged a systematic campaign to eliminate opponents and hide their bodies and, since the bodies are still missing, the crimes are ongoing. In this contention he had been recently supported by the United Nations Human Rights Commission, Amnesty International and Human Rights Watch, and in the past by international jurisprudence, Resolutions of the United Nations dating back to the sixties and seventies, of the Assembly of the Council of Europe, decisions of the European Court of Human Rights, and the opinions of specialists in the subject. The matter has been more thoroughly canvassed elsewhere.

It seemed that there was no doubt as to the application of domestic law: international law and obligations assumed by the Spanish State cannot be ignored. The Spanish Constitution of 1978 establishes that provisions relating to fundamental rights shall be interpreted according to the Universal Declaration of Human Rights, international treaties, and conventions ratified by Spain.

In this regard, the international community - and Spain ardently wishes to be part of it - has recognised the applicability of crimes against humanity, the impossibility of these being covered by amnesty laws or other defences of liability, and ‘the right to the truth’ which assists the victims’ families.

On his part, the Socialist-Government-appointed Attorney General Cándido Conde-Pumpido condemned the investigation. In addition, he specifically asked Judge Garzón to shelve his case against American subjects and warned of the risks of turning the Spanish justice system into a “plaything” for politically motivated prosecutions. Instead of heeding that advice, Judge Garzón opened yet another investigation to seek information on everyone who authorised and carried out the torture of four inmates at Guantánamo Bay. What was behind this ‘political’ intervention will come clear further on.

Judge Garzón vigorously rebutted every argument.

The time of the disagreement between the Attorney General and the Chief Prosecutor, Javier Zaragoza, on one hand, and Judge Garzón on the other - chiefly, the last part of 2008, beginning of 2009 - will appear of particular significance on further examination.

On 7 November 2008 the National Court accepted the Prosecutor’s challenge to the investigation. It ruled that Judge Garzón had no authority to launch the investigation because the human rights abuse laws under which he was charging the Franco regime did not exist at the time the acts were committed. It said that because the Court itself only came into existence in 1977, following the end of the dictatorship, it had no remit to deal with charges retrospectively and that the 1977 law provided an amnesty covering “all acts of intentional policy, whatever their outcome, defined as crimes or misdemeanours committed [before the generals’ uprising on 17 July 1936 and up to] to 15 December 1976.”

The Court declared that regional courts were responsible for carrying out further investigations consequent to the excavation of the mass graves, effectively ending any nationally co-ordinated investigation. Some regional courts in time have referred their cases to the Constitutional Court, saying they do not feel qualified to assess them. The National Court ruling means that many investigations will be delayed for years or abandoned completely.

On 17 November 2008 Judge Garzón, while appearing to be ‘dropping’ the case against Franco and his accomplices for the reasons given by the National Court, actually did not do such a thing. Instead of suppressing the contentious matter, he skillfully ‘distributed and multiplied’ the problem: in a 152-page statement, he passed responsibility to regional courts for opening the 19 mass graves. He pointed out the urgent need to find the places where the victims might be - by exhuming the corpses buried in the ditches by the roads or by identifying those who were stolen children - in order to obtain proofs of the crimes committed. The Judge decided that such measures should be taken by the *Juzgados de Instrucción*, the Preliminary Investigation Courts where the graves are located. However, the Preliminary Investigation Courts involved - which are more than 60 - have scarcely taken notice of the duty to investigate. So far, only one has ordered the opening of two graves, while the general tendency has been to close and archive the cases. Several are the arguments which have been relied on to close the cases: that the crimes were not legally defined when the facts happened, that the time prescribed in the statute of limitations had elapsed, or that the acts were covered by the amnesty law of 1977.

As recently as 13 November 2008 Amnesty International had called on the Spanish Government to comply with its international obligations regarding past crimes, because blocking such war crimes investigations “could establish impunity mechanisms that are not in compliance with the rules applicable to crimes under international law.” “Investigations of crimes against humanity committed in other countries have been promoted on many

occasions in Spain so how can the Prosecutor's Office question or oppose complying with the obligation to investigate serious crimes committed during the Civil War and Franco's regime?" asked Esteban Beltrán, Director of Amnesty International, Spain. "Spain cannot appear before the international community as a State which infringes its international obligations."

Under international law, a government's refusal to acknowledge the detention of an individual or their whereabouts is an enforced disappearance. In 2006 the prohibition against enforced disappearances was strengthened by the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (Convention against Enforced Disappearance). Under Article 5 of the Convention, "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." The Convention was ratified in February/April by the Spanish Parliament and entered into force on 23 December 2010. Spain is a Party to the 2002 Rome Statute of the International Criminal Court. Under Article 7(1)(i) of the Statute, which is indicative of customary international law, the 'enforced disappearance of persons' constitutes a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population."

Early in 2009 rumours were circulating that the Spanish Parliament was considering legislation to limit the scope of universal jurisdiction. Until then Art.23.4 of the *Ley Organica del Poder Judicial* - Judicial Power Organisation Act allowed Spanish courts to prosecute people outside of Spain for war crimes, even when no Spanish citizens are involved.

On 19 May 2009 the lower house of Parliament called for a limit on universal jurisdiction law over international crimes, irrespective of where they are committed, to cases in which there are Spanish victims or the alleged perpetrator is on Spanish soil.

Three recent cases involving powerful countries - over crimes in Gaza, Tibet and Guantánamo - had put the law in jeopardy. Foreign Minister Miguel Ángel Moratinos had reportedly told Israeli then-Foreign Minister Tzipi Livni that he would seek to have the law changed, China had publicly protested to Spain, and it was widely believed that the Obama Administration has leaned on the Spanish Government as well.

One can understand the quandary of the Spanish Government, but it would have been a shame if it had capitulated to diplomatic pressure, as Belgium did in 2003 after then-Defence Secretary Donald Rumsfeld threatened to move N.A.T.O. headquarters if Belgium did not repeal its law after a suit against U.S. officials. It would confirm a growing sentiment - fuelled by the dismissal of cases in France and Germany against U.S. officials accused of crimes against detainees, and the International Criminal Court's focus thus far on Africa - that international justice targets only the leaders of weak states while officials of powerful countries have the muscle to prevent accountability.

On 15 October 2009 the Spanish Congress of Deputies gave final approval by a vote of 319-5 with three abstentions to a law - already approved by the lower house in June and then amended in the Senate - limiting the reach of universal jurisdiction.

The new law - to take effect the day after it was published in the Official Gazette - would only apply prospectively, allowing cases being heard under universal jurisdiction to proceed, including investigations of Israeli actions in Gaza in 2002, detainee abuse at Guantánamo Bay and allegations of war crimes and genocide in China, Guatemala, Rwanda and Tibet. There was the rub !

Emboldened by the apparent 'double defeat' of Judge Garzón - in the suspension of the investigation and the passing of legislation restricting universal jurisdiction - the revanchist neo-Francoists made the next move. They launched the prosecution of a judge who had

‘abused his power’ - ‘prevaricated’, as it were. Such move found receptive ears among the judges appointed by Prime Minister José Maria Aznar between 1996 and 2004. There was no need to fear about the attitude of those judges who were old enough to have sworn a loyalty oath to the Franco regime. Precisely, they had asserted “unconditional loyalty to the *Caudillo*, communion with the ideal of the ‘Crusade’ [that is the Francoist *coup*], and adherence to the fundamental principles of the National Movement.” It is exactly what the present king Juan Carlos swore in 1969, at age 31, on being designated as ‘Prince of Spain’ by Franco. Educated by Jesuits, he might have done so with ‘mental reservation.’ Franco was prepared to pay the price to Juan Carlos de Borbón y Battenberg - the great-great-grandson of Queen Victoria in exchange for ‘legitimacy’.

In April 2010 the reaction to Judge Garzón’s indictment had been immediate.

On 10 April 2010 the Judge appealed against the indictment. He claimed that the indictment issued by Judge Varela was politically motivated, compromised judicial independence and sought to impose a specific interpretation of the 1977 amnesty law. He also complained of the short time he had been given to appeal the indictment order, which resulted from Judge Varela’s summary motion to shorten the length of the trial.

On the same day the A.R.M.H. announced that it intended to file a criminal complaint against Judge Varela for violating international law in the application of the amnesty law. The Association expressed its "deep indignation" over a trial which had been initiated by "Fascist" Franco's "ideological representatives." The Association also sued Supreme Court Judge Juan Saavedra, president of the chamber which had rejected the appeal lodged by Judge Garzón. Members of the Association announced that, if need be, they would file a suit against Varela in courts in Argentina and Chile under universal jurisdiction. And so they did, punctually: on 14 April Argentine-born lawyer, Carlos Slepoy, who lives and practices in Madrid, and human rights groups filed genocide charges in a federal court in Argentina for the 1936 murders by Francoists of two Spanish mayors, Elías García Holgado and Severino Rivas, as

well as of Luis García Elgado and of the Argentine Vicente García Holgado. The complaint relied on the application of the principle of universal justice.

Speaking in Buenos Aires, immediately after filing the petition, Mr. Slepoy took pain to explain his personal interest in the case: “I want to respond to some questions as to what makes an Argentine lawyer take an interest in issues of Spain: two things. First, I have lived in Spain for 32 years, I have acquired Spanish citizenship, have raised my two daughters and my son there, I lived happy and painful moments in this country [Argentina], especially because of the extraordinary contribution that was made from Spain to end impunity in Argentina and Chile. Furthermore, and fundamentally, what has happened in Spain is a cause for concern and pain for any citizen of the world. The time will come to feel and definitely a universal consciousness that the enemies of humanity must be prosecuted at any time, anywhere. It is now possible to think of a better world.”

According to the petitioners’ lawyer, the lawsuit is based on the crime of genocide committed by Franco’ and associates and is aimed - amongst other things - at compiling a list of ministers and military leaders from the Franco era who are still alive and who can be prosecuted. “There are still many of them sitting in the Spanish Parliament. The genocide committed from the beginning of the military uprising until the end of the Franco dictatorship, without prejudice to the largest mass crimes, occurred in the first two decades of the regime. Also, in the case of Argentina's dictatorship, which lasted seven years, many human rights violations occurred in the first three years, but this did not prevent judicial inquiry being extended to the entire period of the dictatorship. Both Spanish tribunals and now the Argentine courts which overturned laws were dealing with criminals.”

Mr. Slepoy went on to describe the basis of the petition: “The complaint was filed with the Argentine federal courts which are competent to judge this type of international crimes. We have described the events as genocide because we understand that this is what happened in

Spain, but also - alternatively - as crimes against humanity. Genocide is a crime committed for the purpose of destroying entire human groups within a nation in order to create a society without the existence of them. ... Crimes against humanity, however, are also massive crimes, but indiscriminate; they are widespread or systematic attacks against civilians, but not for the purpose of reorganising the society in which they are committed.”

Mr. Slepoy strenuously defended Judge Garzón. He said: “Judge Garzón had acted in compliance with Spanish law ordering the prosecution of crimes injurious to mankind, even when committed outside Spanish territory. *A fortiori*, the same crimes should be prosecuted when committed in the territory. So it is incomprehensible that he is accused of malfeasance at this time. In any case, Judge Garzón’s decisions were essentially confirmed by both chambers of the Criminal National Court and of the Supreme Court.”

While Judge Garzón confined himself to examine specific crimes against humanity committed between 1936 and 1952, the families of the disappeared wanted to enlarge the case to other murders and disappearances committed between 17 July 1936 and 15 June 1977 when the first democratic elections were held in Spain - a period of forty years. This extension is understandable: there are many officials still alive today, and many of them in positions of political, economic or social prestige in Spanish society.

The Federal Court of Buenos Aires assigned the case to Judge Maria Romilda Servini de Cubria, who is known and highly respected for her independence. She undertook to seek the opinion of an Argentine prosecutor and then to decide whether to take the case. If so, it would be the first time an Argentine federal judge invoked universal jurisdiction for crimes committed outside the country. Judge Servini has presided over major corruption and politically controversial cases in the past twenty years in Argentina.

Among other legal instruments, Mr. Slepoy appealed to the U.N. Convention against Torture, approved in 1984 and in force since 1987, which has been ratified by Argentina, Spain and more than a hundred other countries. The Convention established that, when there is reliable information about cases of torture occurring in one of the states party, the accused persons can be tried in a court in a different state party.

"In Spain, the Franco-era crimes, which were committed on a massive scale in the first few months after the *coup*, were not only never prosecuted, but there is still no will to do so." said one of the Argentine lawyers for the plaintiffs, Beinusz Szmukler, president of the American Association of Jurists Consultative Council. Szmukler said he was confident that the lawsuit filed in the federal court of Judge Servini would succeed. "The principle of universal justice is in our constitution, and allows the courts to try crimes against humanity which were committed abroad." he said. "Furthermore, the Inter-American Commission on Human Rights of the [Organisation of American States] recommended that states in the region apply that principle."

The lawsuit was supported by nearly a dozen organisations, including the A.R.M.H., the Argentine Federation of Galician Associations, the Mothers of the Plaza de Mayo human rights group and the *Central de Trabajadores de Argentina* - a trade union federation.

"It is a shame that in democracy we have to seek Argentine justice, the justice system of another country, to investigate an issue that in our supposedly strong democracy we have not been able to pursue." Santiago Macías, vice-president of the ARMH, said before joining the plaintiffs in Buenos Aires. "The same thing happened in Argentina when Spanish justice was the first to throw down the glove" in investigating human rights crimes committed during Argentina's 1976-1983 dictatorship, Macías said.

To be sure the petition would have been followed with great interest in other South-American countries, as Mr. Slepoy noted during the interview. “Unlike what happened in the opening day of proceedings in Spain in connection with the genocide in Argentina and Chile, ... this lawsuit has received unanimous support from countless people and social and human rights organisations from the moment its presentation was announced. It has aroused high expectations not only in Argentina but in many other Latin American countries where many Spanish exiles reside. Moreover, at the time when proceedings were initiated in Spain on what happened in Argentina and Chile, almost nobody had heard of the principle of universal jurisdiction. Today, after just over a decade and influenced largely by procedures by the Spanish courts in applying this principle, people feel that this is a legitimate and effective way to prosecute international criminals and have confidence that the procedure will be useful now to end impunity for crimes committed during 40 years and went unmentioned for 30 more.”

The claimants before Judge Servini argued that the facts complained of constitute crimes under the Argentine Criminal Code, and - relying mostly on Judge Garzón's decisions from 2008 - that the crimes committed during the civil war and under Franco's regime, from 1936 to 1977, should be considered acts of genocide and/or crimes against humanity, although these two categories are not expressly contemplated by the Argentine Criminal Code.

The validity of the Amnesty Law of 1977 is also questioned by the claimants before the Argentine courts. This law, which precedes the Spanish Constitution of 1978, arguably does not conform either with the constitutional principles of justice and judicial remedy or with the international legal principles which establish the rights of victims to justice, truth and reparation.

The claimants argued that the Argentine courts have jurisdiction on the basis that Art. 118 of the Constitution implicitly contains the principle of universal jurisdiction. Such disposition provides that a special law will determine the place where crimes against the *Jus gentium* committed outside the boundaries of Argentina have to be tried. The claimants sustained

that such special law is the law no. 26200, of implementation of the International Criminal Court Statute (I.C.C. Statute), enacted on 13 December 2006, which confers jurisdiction on the Federal Courts to try crimes within the competence of the I.C.C. (article 5).

Máximo Castex, another lawyer involved in the case, told an interview that by alleging genocide and in some cases crimes against humanity, many other cases involving Argentines whose relatives were killed in Spain will likely be added. He also predicted a flow of Spanish citizens travelling to Argentina seeking to join as plaintiffs.

On 30 April 2010 Federico Delgado, the Argentine Prosecutor, decided that Argentine courts could only hear the case if the country with territorial jurisdiction had not done so; instead, in his opinion, universal jurisdiction could not apply in that there are already investigations of these crimes before the Spanish courts. Prosecutor Delgado explained that while any state may prosecute individuals for crimes against humanity, universal jurisdiction applies only if the state with primary jurisdiction to prosecute a crime fails to do so.

Judge Servini dismissed the claim on 7 May 2010 relying in part on the same arguments. But - as she noted - criminal procedures are not currently being carried out in Spain, which prompted the claimants to appeal the dismissal. On 18 May 2010 Judge Servini notified the claimants that their appeal had been admitted. Spain, and the world, may now look towards Argentina to provide the forum which has been denied in Spain and to advance further in the asserting of universal justice for human rights atrocities.

Judge Servini took up the case and, invoking the principle of universal jurisdiction, she indicated that her court would investigate allegations of genocide, tens of thousands of assassinations and the fate of stolen children - if Spain could not demonstrate it would do so.

In working to undermine Judge Garzón, the Spanish Establishment may have created a foe it cannot best - the international community. As Judge Servini's investigation proceeds, the Spanish Establishment will not be able to sidetrack it like it did with Judge Garzón's. Really, this was to be expected once Spaniards began petitioning the Argentine court.

On 3 September 2010 the Argentine appeals court decided to re-open the investigation into Spain crimes under Franco. Under the universal jurisdiction doctrine the Second Chamber of Argentina's Federal Criminal Appeals planned to send a "diplomatic request" to the Spanish government to ascertain what action the country has taken in the matter. Members of human rights organisations applauded the appeals court's decision to look further into the war crimes as a step toward 'universal justice'. On 14 October 2010 Judge Servini formally petitioned the Spanish Government "to inform this court whether in your country there is an investigation into the existence of a systematic, widespread and deliberate plan designed to terrorise those Spaniards who supported representative government via their physical elimination, and of a plan of legalized disappearance of children whose identities were changed." If it was not possible to investigate and prosecute these crimes in Spain due to the 1977 amnesty law, Judge Servini would be ready to open her own investigation into numerous cases of "torture, assassination, forced disappearances and the stealing of children" which took place in Spain between 1936 and 1975.

Emilio Silva of A.R.H.M. said that Spain is still a long way from addressing its past. "The discussion in Spain is like in Chile and Argentina," he said. "The same arguments all the time: 'We have to look to the future.' I think today there is still a lot of sociological Francoism in Spanish society, and they don't want to look at their crimes. We are crying 'killers' about the terrorist group E.T.A., but in Spain there are a lot of killers, because we had an amnesty law in 1977."

With Judge Garzón under indictment, many Spaniards now felt the Argentine court case is

the last hope for justice.

Argentina had repealed its own amnesty laws and the country had began prosecuting dirty-war suspects. On 21 December 2010 criminal courts in Buenos Aires and in Mar del Plata pronounced sentences to life in prison against 15 military and police officers for crimes they had committed during Videla's military dictatorship (1976-1983). The Buenos Aires Court convicted 8 former police officers, a prison guard, a national police captain and 2 officers for over 100 kidnappings and murders in three detention center, while the Mar del Plata Court convicted a former army officer and 2 ex-marines for kidnapping and torturing nine opposition members at a navy facility. Since 2003, when 1986 and 1987 amnesty laws were struck down by the courts, 131 individuals have been convicted for the crimes committed during the dictatorship. On 22 December 2010 the Cordoba Court sentenced Jorge Rafael Videla, 85, the former Argentine dictator, to life imprisonment for crimes against humanity committed during his 1976–1983 regime when over 10,000 people were 'disappeared' and killed. Videla had been sentenced in 1985 to life in prison; however, he was pardoned five years later by former President Carlos Menem. In 2007 the Supreme Court of Argentine annulled the pardon allowing further prosecution. Following a six-month trial, Videla was found guilty of participating in the murder of 31 political prisoners and sentenced to life imprisonment to be served in a regular prison. 29 other security officials were convicted along with Videla, including former army General Luciano Benjamin Menendez.

Maybe an international investigation is exactly what Spain needs 'to move on', but with justice to the victims of the Spanish civil war. As Judge Garzón's suspension shows, domestic politics can halt a country's self-reflection, but not for long if there is an international investigation. If Judge Garzón's prosecution of Scilingo helped pave the way for Argentina's repeal of its amnesty laws, maybe Judge Servini's work could do the same in Spain.

Thus far the Spanish Government has not responded to Judge Servini's request. If it were to say 'no' then the Judge will proceed.

There is only one possible danger. Because Judge Garzón, in his lengthy decision of 17 November 2008 divested himself of the case, and assigned the task of investigating mass graves and missing people to local courts, the Spanish Government could try to avoid a pertinent answer to Judge Servini's request by saying that investigations are ongoing, and Madrid - not Buenos Aires - has jurisdiction. This fear was expressed by the Spanish Human Rights Association.

Spain's Justice Ministry and several court officials declined to comment on the suit filed in Argentina.

In time Judge Garzón had occasion to turn to more recent and continuing crimes. In 2002 Garzón sought to interview former State Secretary Henry Kissinger over what the United States Government knew about Operation *Condor*. Incidentally, Dr. Kissinger is a very much sought after person: French Judge Roger Le Loire attempted to question him in May 2001 in connection to the disappearance of five French citizens in Chile during the Pinochet regime; in July 2001 Chilean Judge Juan Guzmán obtained the right to question him in connection with an assassination in 1973; in August 2001 Argentine Judge Rodolfo Canicoba sent a rogatory letter in an attempt to hear Kissinger on Operation *Condor*; in September 2001 the family of murdered Chilean General Schneider filed a civil suit in Washington, D.C.; on 11 September 2001, on the anniversary of the Pinochet *coup* Chilean human rights filed a criminal case against Kissinger, Pinochet, the Argentine dictator Videla and the former Paraguayan dictator Stroessner; late in 2001 the Brazilian Government cancelled an invitation for Kissinger to speak in São Paulo because it could not guarantee his immunity from judicial action; in February 2007 a request for the extradition of Kissinger was filed in the Supreme Court of Uruguay on behalf of Bernardo Arnone, a political activist who was kidnapped, tortured and 'disappeared' by the dictatorship as supported by *Condor* and Kissinger. Hardly any case has been successful because of the protection afforded by all United States

presidents and their administrations to Kissinger. Operation *Condor* involved an agreement between six former Latin American dictatorships - Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay - to kidnap and assassinate, leaving no trace, each regime's political opponents. It had the tacit approval and the organisational support of the United States - at least since the early 1960s. There being no dead bodies, the conspirators could deny everything. Due to its clandestine nature, the precise number of deaths directly attributable to Operation *Condor* is highly disputed. It is estimated that a minimum of 60,000 deaths can be attributed to *Condor* - possibly more.

To put it as plainly as possible, *Condor* was a high-level international criminal organisation in a campaign of political repression involving intelligence operations and consequent assassination implemented, and formalised in 1975, by the Right-wing dictatorships of the Southern Cone of South America. However, cooperation between various security services, in the aim of "eliminating Marxist subversion", previously existed before the founding of the organisation on 25 November 1975. The Grand Master, leader and advisor of such a syndicate was none other than Dr. Henry Alfred Kissinger, for the past forty years at different times Secretary of State to Presidents Nixon and Ford, and National Security Adviser to many Presidents - including the present one.

He will be remembered for saying - on 15 September 1970 - amongst other things, about the future of Chile: "I don't see why we need to stand by and watch a country go communist due to the irresponsibility of its people. The issues are much too important for the Chilean voters to be left to decide for themselves." The assassination of President Salvador Allende and of the Chilean democracy followed on 'the first 9/11' - in 1973.

The activities of *Condor* and Kissinger are intimately connected with the mis-fortune of many countries, mainly - but not exclusively - Argentina, Brazil and Chile.

Documents continue to appear and help to complete the record of *Condor*'s activities during its most active period, 1975 to 1978. The record known so far includes assassination plans or attempts - some of them aborted - in the United States, Portugal, France, Italy and Mexico, and the arrest and torture of an undetermined number of foreigners, including Spanish, British, French and U.S. citizens. Those *Condor*'s activities were the heart of Spain's charges against Pinochet, the Letelier case under investigation in Washington, the Brazilian investigation into Goulart's death and a variety of cases involving Uruguayans arrested and killed in Argentina.

On 22 December 1992 a significant amount of information about Operation *Condor* came to light when a Paraguayan judge, José Fernández, visited a police station in the Lambaré suburb of Asunción to look for files on a former political prisoner. Instead he found what became known as the "terror archives", detailing the fates of thousands of Latin Americans secretly kidnapped, tortured and killed by the security services of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay. Some of these countries have since used portions of the archives to prosecute former military officers. The archives counted 50,000 persons murdered, 30,000 "*desaparecidos*" and 400,000 incarcerated.

Condor had many ramifications: Operation *Charly*, Operation *Colombo*, Operation *Independencia*, Operation *Silencio* and even connections with Right-wing French groups and the Italian Fascist organisation of Stefano delle Chiaie, an operative of *Gladio*, which was part of NATO's clandestine force. Nazi war criminal Klaus Barbie was in charge of Operation *Charly*.

There is even a paradoxical connection between *Condor* and the 1972 Olympics in Munich, Germany, during the course of which on 5 September 1972 Palestinian commandos armed with automatic rifles broke into the quarters of the Israeli team at the Olympic Village, killed two members of the team and took nine others hostage. Many hours later, the nine hostages had also been murdered. So was a German policeman. So were five of the Palestinian

terrorists. The 1972 massacre is by far the worst case of violence in Olympic history since the modern games began in 1896.

Judge Servini had been for years well *au courant* with government tolerated, if not sponsored, international criminality: in 1995 she was in charge of collecting in Rome the testimony of Italian terrorist Stefano delle Chiaie and his accomplices in the assassination of General Carlos Prats and his wife. They had been killed by Pinochet's Directory of National Intelligence - D.I.N.A. on 30 September 1974 by a car bombing in Buenos Aires, where they had taken refuge after the Kissinger-promoted *coup* of September 1973.

Judge Servini, investigating the 1974 assassination in Buenos Aires of General Carlos Prats, the Pinochet's rival, had gathered evidence including contemporary memoranda from suspected participants; had obtained the confession of a C.I.A. agent, Michael Townley, who worked for Chile's secret police; and had ordered the arrest of a former Argentine intelligence agent, Juan Ciga Correa, who worked with Townley to kill Prats. Forty-eight documents obtained by Judge Servini, including a memo directly implicating Pinochet in the Letelier murder, were handed over to U.S. investigators. Townley said he participated in the assassination of yet another former Chilean minister, Orlando Letelier, in 1976 in Washington. He confessed as much in his statements before Judge Servini, who was in the United States to pursue her investigations of the Prats murder. The Buenos Aires assassination of the exiled Chilean General and his wife, Sofía Cubert, took place in 1974, when Isabel Peron, a constitutionally elected president, still governed Argentina. The replacement of Prats by Pinochet as commander of the Chilean army paved the way for the overthrow and death of President Allende in September 1973. Two years later, also in Argentina, former Bolivian President Juan Jose Torres was assassinated. He was deposed by the military in August 1971 after governing the country for one year with the support of the political Left.

In the Paraguayan Archives there were official requests to track suspects to and from the U.S. Embassy, the C.I.A., and F.B.I. The C.I.A. provided lists of suspects and other intelligence information to the military states. The F.B.I. also searched for individuals wanted by D.I.N.A. in the United States in 1975.

In June 1999 the State Department released thousands of declassified documents showing for the first time that the C.I.A. and the State and Defence Departments were intimately aware of *Condor*; one Defense Department intelligence report dated 1 October 1976, noted that Latin American military officers bragged about it to their U.S. counterparts. The same report approvingly described *Condor's* "joint counterinsurgency operations" which aimed to "eliminate Marxist terrorist activities"; Argentina, it noted, created a special *Condor* team "structured much like a U.S. Special Forces Team." Material declassified in 2004 states that "The declassified record shows that Secretary Kissinger was briefed on Condor and its 'murder operations' on August 5, 1976, in a 14-page report from [Assistant Secretary of State for Inter-American Affairs Harry] Shlaudeman."

In March 2009 Judge Garzón investigated the possibility of bringing charges against six former officials of the George Bush Junior's Administration for offering justifications for torture. The six former Bush officials are: Alberto Gonzales, former Attorney General; John Yoo, of the Office of Legal Counsel; Douglas Feith, former undersecretary of defense for policy; William Haynes II, former general counsel for the Department of Defense; Jay Bybee, also at Justice Department's Office of Legal Counsel; and David Addington, Vice President Dick Cheney's Chief of Staff. The investigation - it is said - had gone pretty perilously close to Vice-President Cheney.

On 29 April 2009 Judge Garzón opened an investigation into a 'systematic programme' of torture at Guantánamo Bay, following accusations by four former prisoners. Judge Garzón had said that documents declassified by the U.S. Administration and carried by U.S. media "have revealed what was previously a suspicion: the existence of an authorised and

systematic programme of torture and mistreatment of persons deprived of their freedom" - and that flouts international conventions. This points to the possible existence of concerted actions by the U.S. administration for the execution of a multitude of crimes of torture against persons deprived of their freedom in Guantánamo and other prisons including that of Bagram in Afghanistan.

Judge Garzón's inquiry could have been the first formal examination of criminal activity which could have led to a number of U.S. officials being charged with violations of the Geneva Conventions and the Convention Against Torture, both of which have been signed and ratified by the United States.

It seems that in September 2009 Judge Garzón was preparing to the next phase of his investigation.

In using the expression 'crime against humanity' to describe some of the crimes perpetrated by American '*Intelligence*' during the past fifty years, Judge Garzón was taking a highly controversial step. He told the *B.B.C.*: "These days, crimes against humanity are a burning issue, wherever you look in the world - be it Afghanistan, Iraq or Darfur - enough countries to make you realise that this theme never ceases to make the news, just as the fight against this scar, this impunity, never ceases. And if we are referring to the investigations being carried out in Spain in relation to universal justice or eras gone by, then justice needs to follow its course within the parameters of the law. That is what we judges try to do." By 2005 Judge Garzón could confidently believe that the principle of universal jurisdiction was firmly established in Spain. Or so he thought.

In 2003 Judge Garzón also indicted Osama bin Laden over the 11 September 2001 attacks in the United States.

Judge Garzón's troubles stem from the fact that he is no ordinary judge; he is more interested in imparting justice than in blandly administering the law. Some of Judge Garzón fellow-judges visibly displayed their disapproval: judges are accustomed to 'discretion'. The Spanish Judiciary, typically, does not look well on magistrates who draw attention to themselves. And that may be an understatement. Some loathe him - for them he is but an abuser of the law to aggrandise himself. Others, though timorously, envy him as a courageous and imaginative defender of justice. "Other judges are critical of him because they would never dare do the things he has done." said Carlos Jimenez Villarejo, formerly Spain's chief anti-corruption prosecutor. José María Mena, a former public prosecutor, sums it up thus: "If he were a tame, lazy judge, he would not have these sorts of problems."

Judge Garzón was anything but lazy. He had to be stopped. Sections of the Spanish Establishment would swear to finish Judge Garzón after he opened the *Gürtel* case.

By then the Judge had reached the status of 'Super-judge' or, as some of his colleagues begrudged, 'Star-judge' - and for a while he was untouchable. Or so one might have thought.

The pretext was offered by the complications following Garzón's investigation into the Franco regime 'disappearances'.

On 24 April 2010 Judge Garzón presented an appeal to the Supreme Court against the judge investigating the case, Luciano Varela, for giving advice to the neo-Francoist plaintiffs about errors in their documents. Judge Garzón accused the judge of partiality, in having "a direct interest in the proceedings and bias in the action" and having "worked closely with the plaintiffs by offering counsel or legal advice" intended to help the complainants to correct defects in the form of their indictments and to meet a deadline, an action which he defined as "atypical, extra-judicial and prejudicial to one of the parties" - himself, as the accused.

According to Judge Garzón, "intervention by the instructing judge is not protected under any provision of the current legal procedural rules and is clearly unrelated to the substantive rules of Spanish court procedure." Judge Varela accepted the appeal and temporarily stepped down from the case until the Supreme Court would rule on the appeal.

On 11 May 2010 Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court invited the Spanish Judiciary to assign Judge Garzón as a consultant to the I.C.C. for six months. This would have allowed *La Comisión Permanente Extraordinaria del Consejo General del Poder Judicial* - the General Council of the Judicial Power, C.G.P.J. to avoid suspending Judge Garzón during the impending trial. In response, Judge Varela brought forward his conclusion that Judge Garzón should stand trial, and the C.G.P.J. rejected the request of the I.C.C. on the basis that it appeared to be simply a personal request by Moreno-Ocampo, rather than an official I.C.C. invitation. On Friday 14 May 2010 Judge Garzón was duly suspended from judicial activity - with pay - 'as a precaution, pending judgment' as a result of the decision of Judge Varela.

But, later that day, the C.G.P.J. authorised, under several very strict conditions, the assignment of Garzón to the I.C.C.. Since June 2010 Judge Garzón has worked as a consultant to the I.C.C..

After the suspension events moved rapidly.

Early in June 2010 Judge Garzón spoke with the *New York Times* in public about his predicament. It was the first newspaper interview since being charged. Avoiding - naturally - the topic of his trial, Judge Garzón devoted the interview to reaffirming his faith in the principle of universal jurisdiction. He said: "I believe the seeds have been sown, despite the possible contradictions of a country which investigates outside but cannot now investigate

inside. ... The principle of universal jurisdiction has in fact germinated and is a conquest which cannot be lost and will not be lost. ... However, as always happens with international justice, it is about two steps forward, then one step back, then one forward and then two back - so we advance with a lot of difficulties. Why? Because there are a lot of interests at play - judicial as well as political and diplomatic.”

On 1 July 2010, in an interview with *Cadena*, the premier radio network station of the *Sociedad Española de Radiodifusión* – the Spanish Broadcasting Company, Judge Garzón proclaimed: "I have the tranquillity of not having committed any crime."

On 7 September 2010 the Criminal Chamber of the Spanish Supreme Court unanimously confirmed the lower court's order that Judge Garzón abused his power and should face trial later in 2010. The Judges found that the witnesses called by Judge Garzón would proffer merely personal opinions and also determined that the exhumation of 19 mass graves that Judge Garzón had ordered in 2008 was 'inappropriate'. The decision came just days after the Argentine court of Judge Servini had reopened the case against the Francoists for their crimes against humanity.

At the end of October 2010 the re-appointment of Judge Juan Saavedra to the Spanish Supreme Court Penal Division reactivated the three judicial processes against Judge Garzón. The re-appointment of a Right-wing judge may have suggested to the Spanish legal authorities that the complaints had sufficient weight to merit continuing the domestic process.

On 17 December 2010 Judge Garzón challenged five of the seven Supreme Court justices who could be chosen to try him. He alleged that the Presiding Judge Juan Saavedra, the rapporteur Adolfo Prego Oliver, and Judges and Judges Juan Ramon Berdugo, Joaquin Giménez and Francisco Monterde should disqualified themselves from officiating in any way

because they had participated in pre-trial activities and thus may have an interest in the outcome which might affect their impartiality. The five judges had intervened in the investigation of the case, and Judge Garzón's counsel claimed that, consequently and according to a strict interpretation of the principle of *nemo iudex in causa sua* - no-one should be a judge in his own cause, such intervention demonstrated the judges had an indirect interest in the outcome of the process.

The 'Established view' of the case is that 'the dictatorship is past', and exhuming its less savoury activities is injurious to modern Spanish political interests, and the best interest of Spain should be served in 'moving on.'

Certainly, founder members of the *Partido Popular* such as Manuel Fraga Iribarne, who had been deeply compromised with the Franco regime, would wholeheartedly agree. On the other side of the political *spectrum* there may have been a fear that the more aggressively 'Socialist' may wish to use the exhumations to show that the intentions of modern Spanish political leaders may be less than entirely democratic, and that established political entities may seek to influence the course of justice. This happened during the recent past, when the Socialist Government and the *Partido Popular* Opposition colluded in denying the Spanish Senate the necessary majority to approve fresh judges for the Spanish Constitutional Court.

On 23 December 2010, in an interview with Iñaki Gabilondo of the C.N.N., Judge Garzón complained that he felt as the victim of a hunt by the Criminal Chamber of the Supreme Court. With the tranquillity of a person who is already doomed, Judge Garzón said that both his wife and his daughter have also been investigated. "I feel totally helpless." he said. "Where is my presumption of innocence?" he asked.

Judge Garzón spoke openly of each of the investigations being conducted against him in the Supreme Court. When asked by the interviewer how he landed into "the garden" of

A.R.M.H., the Judge responded that he only did what was commanded by the law. "Massive crimes were reported, and a judge, as such, must do as I did. I was legally and ethically bound." He then explained that the fact that he accepted the case could be a source of legal disagreement, but - in no case - of *prevaricación*. "There may be judges who disagree and the matter can be appealed. In the case of Historical Memory, three judges of the Criminal Division of the *Audiencia Nacional* were of the same persuasion as mine," he said, referring to Judges Clara Bayarri, José Ricardo de Prada and Ramón Sáez Valcárcel, who wrote dissenting opinions against the resolution which ended the case.

The same, Judge Garzón said, would be accountable for the same transgression for which he was charged in the case of Santander bank's sponsorship during his tenure as professor at New York University. The Supreme Court investigated whether Judge Garzón had committed a crime in closing the inquiry in the case against the bank's president, Emilio Botín, months after returning from the United States. Judge Garzón had sent the case "to the prosecutor, who recommended the case to be dismissed and, I - the Judge - dismissed it." This was later confirmed by the Criminal Division of the *Audiencia Nacional* and by the Supreme Court, he emphasised. "I did not ask for money, I did not manage money, I received no money," he said, regarding the sponsorship by Santander and other companies. "I did not receive a penny outside my fee as a professor at New York University. I thanked these sponsors because I was the director of the course, but it was New York University which managed funds. I neither played nor knew what was done with them." Nevertheless, he claimed that the Supreme Court saw fit to investigate even the accounts of his wife and daughter, and "I do not know why it is still investigating me."

Judge Garzón also dealt with the *Gürtel* case, on which the Supreme Court has opened a third investigation to establish *prevaricación* in the interception of conversations which passed in gaol between the ringleaders of the plot and their lawyers. "Once in gaol the alleged perpetrators continued to correspond with outsiders, to profit from illicit funds, and to launder money; so, in agreement with the prosecutor and the judge who replaced me in the Superior Court of Justice of Madrid [presently Judge Antonio Pedreira], I intercepted the communications," he said. Then he added: "The right of the defence remained protected and

it cannot be said what Judge Alberto Jorge Barreiro of the Supreme Court, who instructs the third case, said. "How are we to conduct the investigation of serious crimes if they continue being committed by the suspected leaders communicating from the gaol with accomplices on the outside ?." In this case, too, Judge Garzón insisted that his decision could be subject to different legal interpretations, but never of *prevaricación*. "The Supreme Court decided by two votes to one that these interventions should be overturned." "Furthermore, there is not a single *indicium* that the eavesdropping I used undermined the right to defence." But, "Where is my presumption of innocence?" he asked.

Judge Garzón became really upset when the interviewer asked him if he was the subject of a hunt. "I was once asked whether I felt convicted and I said 'yes', although I am not guilty of anything." He recalled that in the Criminal Division of the Supreme Court there are seven judges who have rejected each and every petition he has presented. "This court is going to judge me, but there are a number of elements which indicate prejudice. The impartiality required at the trial has already been discarded. They are gunning for me."

Three days after the interview, 26 December 2010, it became known that the investigation of Judge Garzón's bank accounts, which had been ordered by the Supreme Court's instructor Manuel Marchena to the *Brigada de Delincuencia Económica de la Guardia Civil* - the Economic Crime Squad of the Civil Guard, had produced negative results, but carried the consequence not only of placing in the hands of the two lawyers who represented the claimants against Judge Garzón data on his financial situation but also of airing publicly elements which may lead to new measures and keep the case against Judge Garzón indefinitely open. Judge Garzón had received his honoraria through a Citibank account in New York, a fact which was known to Judge Marchena for having been brought to his attention by Judge Garzón himself. Indeed, in his last decision, Judge Marchena, at the request of Judge Garzón himself, had requested all information on the accounts through an international rogatory letter. The Civil Guard report also found nothing criminal in the tax returns of Judge Garzón. In fact the investigation even showed that Judge Garzón declared more income than resulted from the bank accounts. According to defence sources, that is because Judge Garzón declared additional income from conferences which had been

corresponded by cheques. In sum, the report was "overtly negative" for what Marchena was looking for. In addition, as Judge Garzón himself said during the interview, the investigation had been extended to accounts of his wife without her knowledge, despite the fact that the couple maintains a regime of separate property, and had even reported on the business of their daughter back to February 2010. In his latest decision, Judge Marchena followed the same line pursued by the Criminal Division and rejected the main evidence sought by Judge Garzón, a rogatory letter to New York University to seek all their payroll and question the academic authorities of the University. Marchena denied that process on a fanciful argument: the academic authorities of N.Y.U. would issue such statements as would assist Judge Garzón and only upon 'approval' by the Judge himself.

Not long after the interview, on 14 January 2011, the Supreme Court rejected in full the contention of the defence in the eavesdropping case. But the intended damage - in both cases - had been done.

It appeared on 26 December 2010 that Judge Marchena had taken nearly a year to investigate the economic activities of Judge Garzón, and some would see this slowness as a form of 'persecution' in the process of instructing the case. Nevertheless, Judge Marchena has been quick to deny this. As a career prosecutor, without an appointment as investigating judge, Judge Marchena, according to prosecutors, has served under all flags. He could also have joined the office of Conde-Pumpido, but Enrique López supported his application to become a judge of the Supreme Court. In the Criminal Division he distinguished himself by clearly favouring the interests of the *Partido Popular*, issuing fairly bizarre decisions. The most controversial was his vote to uphold the convictions of five years gaol for police inspectors investigating the case of an attempt to assault the then Defence Minister Jose Bono at a rally for victims of terrorism. The decision was annulled on appeal.

On 31 December 2010 Judge Garzón accessed the Criminal Chamber of the Supreme Court to seek admission of the evidence that Judge Marchena had wronged him by expressing the view in his latest opinion that New York University depended on Judge Garzón's approval to

embark on certain expenditures. Judge Garzón's counsel in this case, Enrique Molina, argued that the expressions of Judge Marchena revealed the "bias" of the instructor, in aiming "to exclude any measures of inquiry proposed by the defence which could serve to prove the falsity of the accusation which had led to the well-known charge against the Judge." In his decision, dated 22 December 2010, Judge Marchena had refused to issue an international rogatory letter to the U.S. for interrogation of the academic authorities of New York University on the possible sponsorship by the *Banco de Santander* of two law courses conducted by Judge Garzón. Judge Marchena rejected the request saying that he had written to the academic authorities "at least seven times", but all this had been in vain. Judge Marchena seemed to suggest that there had been collusion between the University and Judge Garzón. The defence contended that all requests by Judge Marchena had been "outside the legal channels" provided by the *Tratado Bilateral de Asistencia Mutua Penal* - Bilateral Treaty of Mutual Assistance in Criminal Cases between Spain and the United States. It added that "neither the instructor nor the Supreme Criminal Court" had directed any request to the payroll department at N.Y.U. calling for "a copy of all wages" received by Judge Garzón. Therefore, it was "not correct" to claim that such information had been requested "at least seven times." Judge Marchena's decision showed that he failed to contact the *Center on Law and Security* at New York University School of Law, the payor of Judge Garzón, but had contacted instead the King Juan Carlos I Centre or the director of the Centre in Madrid. Judge Marchena had not sent his request to any person at New York University who was in a position to answer.

Judge Garzón also complained that Judge Marchena had not taken any action to request statements from the four academic authorities at N.Y.U., who could provide information on the payments made to the defendant. The defence pointed out that these witnesses, essential in the case, could have been questioned by the Prosecutor General of the United States or persons designated by him, according to the Bilateral Treaty. Such persons - Ms. Karen Greenberg at N.Y.U., the director of the King Juan Carlos I Centre in New York and in Madrid, and Ms. Nancy Wilson also at N.Y.U. - hold information concerning payments made to Judge Garzón and are the persons responsible for the sponsorship of the two course by the Bank of Santander. Those are also the persons who could provide information on the

sponsorship by the companies *Telefónica*, *BBVA*, *Endesa* and *Cepsa* of a series of lectures on the theme of Terrorism and security.

Judge Garzón's submission concluded by producing statements by bankers and entrepreneurs who had declared that Judge Garzón had "never asked for any money for himself or for N.Y.U." or intervened in the negotiations for the sponsorship of the courses, which was the competence of officers at N.Y.U.. These witnesses also stated that the presence of Garzón was not the reason which prompted the sponsors to co-finance courses. Judge Garzón also submitted, amongst others, the testimony of Messrs. Emilio Botín (Chairman of Santander), Francisco González (Chairman of BBVA), Alfredo Saenz and Carlos Pérez de Bricio (Cepsa) and Manuel Pizarro (Endesa).

On 14 January 2011 the Supreme Court halted the case against Judge Garzón until the matter of Judge Garzón's recusation of five judges of the Criminal Division had been resolved. The Court gave three days to the Prosecutor and the complaining parties - the ultra-Right-wing *Manos Limpias* and the similar *Libertad e Identidad* - to declare whether they accepted or rejected the grounds for recusation. The challenge to the impartiality of the five judges had been issued on 17 December 2010 and the Court had delayed one month to issue the order to start the process.

Counsel for Judge Garzón, Gonzalo Martinez-Fresneda, based the challenge on the general principle that anyone who participated in the pre-trial process should be disqualified from hearing the case. This is provided for by art. 219 (11) of the *Ley Orgánica del Poder Judicial* - Judicial Power Organisation Act. The judges recused by Judge Garzón are the President of the Criminal Division, Juan Saavedra, the rapporteur, Adolfo Prego, and Judges Juan Ramon Berdugo, Joaquín Giménez, and Francisco Monterde. According to the defence, these five judges had been involved in investigating the case against Judge Garzón, had declared admissible the first complaint against the Judge, had conducted preliminary investigations before deciding the admissibility of it, had dismissed the appeal against the earlier decision,

and had refused to meet various demands. In addition, they had endorsed the conduct of Judge Varela, who had assisted the complainants in drafting their complaint, they had rejected the evidence brought forward by the defence and they had decided, against the opinion of the Prosecutor, who had asked seven times to dismiss the case. Martinez-Fresneda also submitted that the recused judges had an 'indirect interest' in the case against Judge Garzón and throughout the proceedings had attempted to retain control over the prosecution of the Judge.

On 20 January 2011 the Prosecutor's Office, reporting to the Criminal Division, acceded to the request for disqualification submitted by Judge Garzón against five of the Supreme Court judges designated to decide his case. This was the first time that a prosecutor had supported the disqualification of judges, but he felt obliged to do so under art. 219 (11) of *Ley Orgánica del Poder Judicial* - the Judicial Power Organisation Act. Accepting the first ground submitted by counsel for Judge Garzón, on the general principle that those who participate in the investigation of a case are unfit to prosecute that case, Prosecutor Navajas explained that the prosecution should guarantee "objective impartiality" of the Court for Judge Garzón. Considering that - according the Act - there would be no appeal, it was important to remove any "frightening shadow of suspicion that could tarnish the proper exercise of judicial function." Instead, the Prosecutor rejected the second ground submitted by Judge Garzón's counsel that the recused judges had an "indirect interest" in the litigation, in that they attempted to safeguard their own jurisdiction over the prosecution of Judge Garzón. As a result of the decision by Prosecutor Luis Navajas the Supreme Court was to nominate an instructor with the duty further to study the recusation challenge and, later on, to consider the appropriate procedure before the Special Court as constituted under art. 61 of the Judicial Power Organisation Act.

On 28 November 2010 WikiLeaks.org and five major newspapers from Spain (*El País*), France (*Le Monde*), Germany (*Der Spiegel*), the United Kingdom (*The Guardian*), and the United States (*The New York Times*) began simultaneously to publish the first 220 of 251,287 confidential - some secret - diplomatic cables from American embassies around the

world, dated from 28 December 1966 to 28 February 2010. WikiLeaks was planning to release the entirety of the cables in phases over several months; the first installment arrived on 30 November 2010.

Among the more than 250,000 cables, some 3,651 - 3,620 from the United States Embassy in Madrid and 31 from the U.S. Consulate in Barcelona - deal with Spain, including how U.S. diplomats have viewed the Spanish Government and its ministers since 2004. Of the 3,620 cables from the Embassy, 103 were secret, 898 confidential, and 2,619 sensitive unclassified. The cables give details behind the most aggravating episodes between the United States and its Spanish 'ally'. There is evidence of diplomatic friction between Washington and Madrid over a number of issues, including the withdrawal of Spanish troops from Iraq, Madrid's links with Cuba and Venezuela, and Spain's relations with countries known to support terrorism.

The U.S. Embassy in Madrid had dedicated important resources to try and put the brakes on judicial cases opened by the Spanish National Court against United States soldiers and politicians.

Prosecutors and top Government officials interfered in the José Couso case, of the Spanish TV cameraman who was shot by U.S. forces in Baghdad, in the case of the C.I.A. so-called torture flights which used Spanish airports for stop-overs, and in the case alleging torture in Guantánamo. Regarding the gaol on Cuba, the cables show that the American Administration offered Spain 78,000 Euro to Spain for each prisoner it would accept. On one occasion the U.S. Ambassador to Spain, Eduardo Aguirre, told the Spanish Government that his patience was running out. The cables show he used the visits of U.S. politicians to Spain to try to stop the court cases from proceeding.

The cables disclose that Attorney General Cándido Conde-Pumpido, and several Prosecutors from the National Court, told the United States that they wanted the cases closed, and the Spanish Government also expressed its rejection of a judicial investigation into Guantánamo.

There is evidence too that the United States wanted to keep Judge Garzón away from the Guantánamo case. U.S. reports on the Judge described him as ‘a lover of propaganda’. Strangely, Judge Garzón had come early to the attention of the U.S. Embassy in Madrid. Cable 26 932 reveals a curious episode concerning to the Judge: the U.S. Government’s refusal to assign two secret agents to provide him with escort. The event occurred in 2005 when he went to New York to teach for nine months a course on terrorism. The Spanish Government had assigned him two bodyguards and had asked for two others from United States. But the request was denied under the pretext of an ‘extreme demand’ for such agents.

The three U.S. ambassadors during the period covered by the cables - George L. Argyros, Eduardo Aguirre and the incumbent Alan D. Solomont - sent cables to Washington concerning Prime Minister José Luis Rodríguez Zapatero's Socialist Government, with copies sometimes going to the C.I.A.

Most of the cables complaining about the ongoing judicial investigations in Spain were issued by Ambassador Aguirre, who served from 2005 to 2009, during President George W. Bush's last term in office. The cables illustrate how Aguirre "personally exerted repeated pressures on the Spanish government and judicial authorities" to close those investigations.

Zapatero shows up in 111 cables, which say things like that in 2004 he came to *La Moncloa* - the official residence of the Prime Minister - thanks in large part to the ineffectiveness of the *Partido Popular* in managing the Madrid train bombings of 11 March 2004, and that his claims are those of the Left, “outdated and romantic.” The cables branded him as “a haggard

and romantic left winger” with a “short-sighted policy which makes the common interests electoral calculation.”

Cable 07 MADRID 1021, dated 25 May 2007, from Ambassador Aguirre to Secretary of State Condoleezza Rice states that "Zapatero holds a leftist pacifist foreign policy for the purpose of electioneering in Spanish politics, rather than to meet the basic priorities of foreign policy or broader strategic objectives [of Spain. and] This has resulted in an erratic bilateral zigzags relationship [between the U.S. and Spain]." The Ambassador writes later on that, according to “the Spain strategy you approved two years ago, we have sought to move this government away from visceral and reflexive anti-U.S. policies and sentiments, carving out areas in which Zapatero’s government can offer support for the President’s broad global agenda. We have made clear to the Zapatero government that the price of our willingness to publicly promote good bilateral relations is real contributions on world issues. While we have made some positive headway, the Zapatero government has not hesitated on occasion to pursue an agenda counter to our own when deemed in the Socialist party’s domestic political interest. ... you should note the continued [U.S. Government’s] concern about the court case against the three US servicemen charged with alleged war crimes in the case of the death of Spanish TV cameraman Jose Couso in the Palestine Hotel in Baghdad in 2003. The [Government of Spain] has been helpful behind the scenes in getting the case appealed by the Spanish Prosecutor. ... Aguirre.”

U.S. officials are less than enthusiastic about their Spanish counterparts and some are described in unflattering terms. In one cable, advice is given on how to win the admiration of king, who appears, through 145 cables, to be the only senior Spaniard able to arouse great enthusiasm in the United States, and is seen as an “especially valued” figure as opposed to the “poor impression” created by some members of the Spanish Government.

Despite such an abysmal view of the Spanish Government, U.S. diplomats and politicians assiduously cultivated Foreign Affairs Minister Miguel Ángel Moratinos, and the First Deputy Prime Minister Maria Teresa Fernández de la Vega.

The release on 30 November 2010 of more U.S. diplomatic cables by Wikileaks covered pressure on governments, Spain's Judiciary, and buying foreign assistance with detentions at Guantánamo Bay, with a price of 78,000 Euro = US\$ 85,000, as mentioned, for each former detainee that Spain was to receive. Other countries have been offered financial incentives to empty the camp.

Cable 06 MADRID 1914 highlights the cases of Hamed Abderrahaman Ahmed and Moroccan Lahcen Ikassrien, transferred from Guantánamo Bay to Spanish custody, respectively in February 2004 and July 2005.

Describing conditions at the Cuban detention centre as "impossible to explain, much less justify", Hamed - better known as *the Spanish Taliban* - saw a July 2006 ruling by the country's Supreme Court annul his six-year prison sentence, granting him an immediate release. The ruling cast doubt on the reliability of evidence against Lahcen, who was released on bail. Hamed and his family, at the time, announced their intent to sue the U.S. government over his suffering in Guantánamo Bay.

Later cables illustrate how concerned the Bush Administration was over possible prosecution by Judge Garzón. Citing an op-ed he penned for a Spanish paper in March 2007, and this subsequently being picked up by Socialist Party secretary José Blanco López. Pronouncements by the two, and others, on "criminal responsibility" were met with a diplomatically stern response; cable 07 MADRID 546 states that the Government of Spain

was "cautioned that continued statements on this issue by senior Spanish figures would be viewed negatively."

The cables tell a fairly sordid story of 'discussions' between personnel at the Embassy and Attorney General Cándido Conde-Pumpido, Chief Prosecutor Javier Zaragoza, the Supreme Court Prosecutor Vicente González Mota and other leading members of the Spanish Judiciary, the latter strenuously defending the independence of the judiciary while at the same time undermining the authority of Judge Garzón and giving assurance against his very own independence.

American diplomats put heavy pressure on Spanish authorities to drop three investigations targeting the U.S. and its military.

The first investigation concerned the death of Spanish *Telecinco* cameraman José Couso, who was killed by American shells in Baghdad in 2003. Spanish judicial authorities have recently issued arrest warrants for three American soldiers. In a cable dated 26 January 2007 Ambassador Aguirre said that he met with Attorney General Cándido Conde-Pumpido to discuss the political consequences of the *Couso* case. The Attorney General told the Ambassador that the government could not do anything but that the prosecutors "would continue opposing" the arrest warrants. Nevertheless, U.S. officials persisted in trying to stop the proceedings initiated by Judge Santiago Pedraz against the soldiers who used a tank to attack the Hotel Palestine, which was used by many foreign journalists in Baghdad. The attack killed a Spanish television journalist José Couso on 8 April 2003, and his family had lodged a formal complaint.

The second investigation concerned a complaint by an inmate of Spanish nationality of torture by a Guantánamo Bay. "One recent irritant in bilateral relationship is the efforts by

some investigating judges - invoking 'universal jurisdiction' - to indict former U.S. government officials for their [alleged] involvement in torture at GTMO." That is how one 'secret' Embassy cable, dated 26 June 2009, was written before a visit by U.S. Secretary for Homeland Security Janet Napolitano.

The third was an investigation into the use of Spanish bases for C.I.A. 'rendition' flights which used Spanish airports for stopovers, taking al-Qaeda suspects to and from Guantánamo. The Guantánamo case was filed with the National Court on 12 June 2006. In May 2010 the Spanish Prosecutor called for the detention of 13 C.I.A. officers.

The investigations set off alarms in Washington where officials feared that the National Court would apply its 'universal jurisdiction' doctrine when it came to charging defendants in other countries.

The cables indicate a grave concern by the White House that Judge Garzón could investigating possible "perpetrators, instigators, and accomplices", in the crimes of torture committed at Guantánamo, known as *The Bush Six*.

In a cable dated 21 March 2007 Ambassador Aguirre wrote that he told Carles Casajuana, then-national security advisor at the Prime Minister's *La Moncloa* residence, and who is now the Spanish Ambassador to the United Kingdom, that he "was running out of patience with unfair government and P.S.O.E. statements regarding the U.S." The previous day - the fourth anniversary of the Iraq invasion - all parliamentary groups, with the exception of the main opposition *Partido Popular*, agreed on a motion condemning the war. In an *El País* column published on that day, Judge Garzón called for a judicial investigation into the war in Iraq, suggesting that President Bush and former Prime Minister José María Aznar could be put on trial. José Blanco, the then-Socialist Party secretary, echoed these sentiments in a television

interview, saying that "someone has to pay the consequences for that decision and horror." One of Ambassador Aguirre's top advisors sent a 'confidential' missive to Blanco conveying the U.S. Government's disapproval of his comments.

In the spring of 2007, as the Embassy prepared for a visit by then-Secretary of State Condoleezza Rice, diplomats sent a cable suggesting that she bring up the *Couso* case when she met with Foreign Minister Moratinos. But Rice and Aguirre publicly denied that they discussed the case during their meetings with Moratinos and Zapatero.

The secret cables show that in all cases the U.S. Embassy had inside information on the way the investigations were developing, and how diplomats were collaborating with Attorney General Cándido Conde-Pumpido and Prosecutors Javier Zaragoza and Vicente González Mota.

One such episode of 'co-operation' occurred on 14 May 2007 when Chief Procurator Zaragoza told the Embassy's political secretary that he had asked that the investigation be dropped against the three U.S. soldiers who were suspects in Couso's killing. News of the prosecution's request was not available to the press until 19 May, with reports saying that closing of the case had been requested the previous day.

As early as December 2007 the U.S. Ambassador warned against 'anti-American' Judge Garzón. Cable 02 MADRID 002282, dated 21 December 2007, reveals that the Ambassador met with "celebrate and controversial" Judge Garzón on 14 December. According to the cable, Judge Garzón "appreciates the close contact he has with the Embassy and said he considers the U.S. a friend. He also believes we have much to gain from continued collaboration. In his view however, the U.S. is missing opportunities to cultivate relationships with his five colleagues, all fellow investigative magistrates" who "preside over National

Courts 1-6 [and] are (respectively): Santiago Pedraz, Ismael Moreno, Fernando Grande-Marlaska, Fernando Andreau, Baltasar Garzon, and Juan Del Olmo.”

And the cable continued: “Judge Garzon ended the meeting by giving the Ambassador a brief readout of his recent visits to Afghanistan and Iraq. Spanish press has reported that Garzon is working with Spanish public television to put together a documentary for broadcast in January that will focus on the current situation in those two countries. ... Spanish press reports have speculated the Garzon's documentary would be critical of U.S. [counter-terrorism] policy, the Judge did not share specifics on what might be covered in the program.”

The Ambassador commented: “Judge Garzon has been a storied and controversial figure in recent Spanish history, whose ambition and pursuit of the spotlight may be without rival.” ... he has never prosecuted anyone associated with crimes committed during the Franco dictatorship. *He clearly has an anti-American streak (as evidenced by occasional scathing editorials in the Spanish press criticizing Guantanamo and aspects of what he calls the "U.S.-led war on terror"), and we are certainly under no illusions about the individual with whom we are dealing.* [Emphasis in original] There is a very good chance that his documentary next month will indeed be a hatchet job on the U.S. ... This Embassy has a good working relationship with Garzon and his door has always been open to the Ambassador and members of our Country Team. Embassy [Legal Attaché] has tried to foster relationships with all six of the investigative magistrates, with varying degrees of success. Some are responsive to our outreach and attend Embassy-organized conferences and events, others do not. ... Aguirre.”

U.S. officials focused on Chief Prosecutor Zaragoza, who was concerned with *The Bush Six*. William Duncan, a political advisor to the embassy, and a U.S. lawyer went to see the Prosecutor in his office on 1 April 2009. Duncan described the encounter in a cable dated the same day: “He explained that he would decide whether to open a criminal case. The evidence was on the table in his office in four red folders a foot high.” According to the account

Duncan gave the Embassy, the Prosecutor advised the legal representative of the defendants that, if the U.S. government opened its own investigation, then Spain could not continue to claim universal jurisdiction. Duncan concluded: "This is the formula that he would prefer" and called it the "only solution."

The tenor of the conversation may be gathered from the title of the news as it appeared on the leaking of the cable: "*Zaragoza tiene una estrategia para torcer el brazo a Garzón en el 'caso Guantánamo'*" - Zaragoza has a strategy to twist the arm of Garzón in the Guantánamo case" (!), *El País*, 01 December 2010.

Another secret cable underscores the critical importance of Spain as a strategic logistics hub for the U.S. military. The cable details the importance of bases such as Rota, just a short drive from Gibraltar. Its release follows that of an earlier cable in which U.S. officials recorded how Spanish officials had asked that U.S. warships avoid Gibraltar wherever possible in favour of Rota and Spanish ports. "Spanish military cooperation matters," the latest cable said. "The bases of Rota and Moron are strategic hubs, midway between the U.S. and Afghanistan and Iraq. US planes and ships account for around 5,000 flights and 250 port calls a year in Spain. ... The Spanish military is pro-US and pro-NATO. We need to keep this relationship strong." The comments were made in a wider analysis sent by the Embassy to Washington in July 2008 ahead of a visit to Spain by the U.S. Treasury Undersecretary.

Just a month prior to that, another cable recorded the first meeting between Ambassador Aguirre and Carme Chacón, the Spanish Defence Minister. In that meeting, Ms. Chacón found time to raise the "US use of the Spanish bases of Moron and Rota, including ship visits and sensitivities related to Gibraltar," the cable read. It added: "On Gibraltar Chacon was pleased to learn the US-Spanish Permanent Committee would hold an informational meeting on June 17, and yet expressed the Spanish hope US ships would call at Rota whenever possible."

The Guantánamo case was the subject of discussion held on 1 April 2009, and is recorded in cable 04MADRID000347. The cable relates how in March 2009 the Association for the Dignity of Spanish Prisoners - an N.G.O. - had requested the National Court to indict six Bush Administration officials for creating a legal framework which allegedly permitted torture. The N.G.O. was attempting to have the case assigned to Judge Garzón, “internationally known for his dogged pursuit of ‘universal jurisdiction’ cases. Garzon has passed the complaint to the prosecutor's office for them to determine if there is a legitimate case. *Although he seemed displeased to have this dropped in his lap, Chief Prosecutor Javier Zaragoza told us that in all likelihood he would have no option but to open a case.* He said he did not envision indictments or arrest warrants in the near future. *He will also argue against the case being assigned to Garzon.* [Emphasis added] [Ministry of Foreign Affairs] and [Ministry of Justice] contacts have told us they are concerned about the case, but have stressed the independence of the Spanish judiciary. They too have suggested the case will move slowly.”

This is, of course, *The Bush Six* case. They are: Alberto Gonzales, former White House Counsel and then U.S. Attorney General; David Addington, former Vice-president Dick Cheney's Chief of Staff and Legal Adviser; Jay Bybee, former Head of the Justice Department's Office of Legal Counsel; Douglas Feith, former Under-secretary of Defence for policy; William Haynes, former the Pentagon's General Counsel; and John Yoo, former Legal Adviser in the Justice Department's Office of Legal Counsel.

According to Spanish press reports a team of four lawyers worked on the complaint.

The N.G.O. emphasised that Spain had a duty to investigate because five Guantánamo detainees were either Spanish citizens or Spanish residents. However, the N.G.O. did not claim to be representing these individuals. Their names were: Hamed Abderrahman Ahmed - known in the media as *The Spanish Taliban*; Lahcen Ikassrien - a.k.a. Chaj Hasan; Reswad Abdulsam; Jamiel Abdul Latif al Bana - a.k.a. Abu Anas, and Omar Deghayes. As

the cable placed in evidence: “The NGO has attempted to steer this case directly to ... Judge Garzon. ... *Garzon has a reputation for being more interested in publicity than detail in his cases.* [Emphasis added] The NGO's argument for Garzon taking the case is that he investigated some of the individuals named in paragraph four as part of an investigation of al Qaeda cell in Spain. Garzon has passed the NGO's complaint to the prosecutor's office for them to determine if there is a legitimate case.”

How the cable's author could be privy to such 'slackness' on the part of Judge Garzón remains an 'open secret'. His Prosecutor-'colleagues' perhaps ?

The 98-page complaint, meticulously and professionally prepared, documented that the accused *Bush Six* had conspired with criminal intent to construct a legal framework to permit interrogation techniques and detentions in violation of international law.

As the cable noted: “The complaint describes a number of U.S. documents, including: a December 28, 2001, memorandum regarding U.S. courts' jurisdiction over Guantanamo detainees; a February 7, 2002, memorandum saying the detainees were not covered by the Geneva Convention; a March 13, 2002, memorandum on new interrogation techniques; an August 1, 2002, memorandum on the definition of torture; a November 27, 2002, memorandum recommending approval of 15 new interrogation techniques; and a March 14, 2003, memorandum providing a legal justification for new interrogation techniques. The complaint also cites a 2006 U.S. Supreme Court case which it says held the February 2002 memo violated international law and President Obama's recent Executive Order on ensuring lawful interrogations.”

Here is the story of a 'secret memorandum': in January 2002, Albert R. Gonzales, as White House counsel, wrote a secret memorandum declaring portions of the Geneva Conventions,

such as limits on questioning prisoners, “quaint” and “obsolete” after 9/11. Critics said he dismissed international law and laid the legal foundation for abuses. As a senator, Barack Obama opposed Gonzales nomination for attorney general in 2005. Senator ‘Mel’ Martinez by contrast devoted his first Senate floor speech, on 3 February 2005, to defend Gonzales, making history as the first senator to address the chamber in Spanish: ‘*El Juez Gonzales es uno de nosotros.*’ - Judge Gonzales is one of us.” he said.

By the time Martinez was campaigning against charging Gonzales, Spain's Supreme Court had already in 2005 overturned the conviction of a terror suspect the media had dubbed *The Spanish Taliban* on the ground that his Guantánamo interrogations were tainted by conditions the court called “impossible to explain, much less to justify.”

The American Civil Liberties Union unearthed, through the Freedom of Information Act, Gonzales' “quaint” memo as well as Justice Department opinions by Bush lawyers John Yoo - now a Berkeley law professor, and Jay Bybee - now a federal judge in California, which authorised the C.I.A. to use the near drowning technique called ‘waterboarding’, which is widely condemned as torture.

The cable went on: “The complaint asserts Spanish jurisdiction by claiming that the alleged crimes committed at Guantanamo violated the 1949 Geneva Convention and its Additional Protocols of 1977, the 1984 Convention Against Torture or Other Cruel, Unusual or Degrading Treatment or Punishment, and the 1998 Rome Statute. The [Government of Spain] is a signatory to all three instruments. The complaint cites Article 7 of the 1984 Convention Against Torture, which states that if a person accused of torture is not extradited to the nation that is bringing a case against him or her, then the competent authorities in the country where the person is should bring a case against him or her. There is media speculation that one of the NGO's goals may be to encourage the U.S. to begin judicial proceedings on this matter. ... The complaint does not specifically call for arrest warrants. Rather, it ends with a call for the

Spanish courts to take statements from the accused and to request information from the [United States Government] about the various internal documents cited in the complaint.”

On 1 April 2009, [a political officer] and Embassy FSN Legal Adviser “met Chief Prosecutor Javier Zaragoza, who said that *he personally will decide whether to open a criminal case*. [Emphasis added] There is no statutory timeframe for his decision. Zaragoza said the complaint appears well-documented and in all likelihood he will have no option but to open a case (the evidence was on his desk in four red folders a foot tall). *Visibly displeased with this having been dropped in his lap*, Zaragoza said he was in no rush to proceed with the case and *in any event will argue that the case should not be assigned to Garzon*. [Emphasis added] Zaragoza acknowledged that Garzon has the “right of first refusal,” but said he will recommend that Garzon’s colleague, Investigating Judge Ismael Moreno, should be assigned the case. Zaragoza said the case ties in with Moreno’s ongoing investigations into alleged illegal “CIA flights” that have transited Spain carrying detainees to Guantanamo. Zaragoza said that if Garzon disregards his recommendation and takes the case, he will appeal. *Zaragoza added that Garzon’s impartiality was very suspect* [Emphasis added], given his public criticism of Guantanamo and the U.S. war on terror (we note that, among other things, Garzon narrated a documentary in 2008 that was extremely critical of the U.S. involvement in Iraq and Afghanistan and its approach to fighting terrorism) and his August 2008 public statements that former President Bush should be tried for war crimes.

...

Zaragoza noted that Spain would not be able to claim jurisdiction in the case if the [United States Government] opened its own investigation, which he much preferred as the best way forward and described as “the only way out” for the USG. “He cited the complaint against Israeli officials [previously] mentioned [in the cable] and said he would request the investigating judge close that case once he had formal notice that the Israelis had opened their own investigation. On March 31 and April 1, the Acting DCM (?) discussed the case separately with [Foreign Minister] Moratinos’ Chief of Staff Agustin Santos, and [Ministry of Justice] Director General for International Judicial Cooperation Aurora Mejia. *Santos said the case was worrisome. He noted that the Spanish judiciary was independent*, but he opined that

these universal jurisdiction cases often sputtered out after the initial burst of publicity. He also noted that they tended to move very slowly through the system. *Mejia also stressed that the judiciary was independent*, and added that the MOJ had no official information regarding the case and knew nothing about it beyond what the media had reported. *She said privately that the reaction to the complaint in the MOJ was "horror."* [Emphasis added] A/DCM stressed to both that this was a very serious matter for the USG and asked that the Embassy be kept informed of any developments.”

Some days later, U.S. Republican Senator Judd Gregg and the Embassy's Chargée D'Affaires "raised the issue" with another official at the Ministry of Foreign Affairs. The next day, Zaragoza informed the U.S. Embassy that the complaint might not be legally sound. He noted he would ask Attorney General Cándido Conde-Pumpido to review whether Spain had jurisdiction.

The cable 1 April 2009 went on: “Given Spain's reputation for liberally invoking universal jurisdiction, this may not be the last such case brought here (nor is it the first -- in 2007, a different Spanish NGO brought a complaint against former [Secretary of Defence] Rumsfeld for crimes against humanity based on the Iraq war and Abu Ghraib. *Zaragoza told us that case was quietly dismissed although he could not recall the grounds*). Emphasis added] *The fact that this complaint targets former Administration legal officials may reflect a "stepping-stone" strategy designed to pave the way for complaints against even more senior officials.* [Emphasis in original] Both the media and [the Embassy's] FSN Legal Advisor suspect the complaint was prepared with the assistance of lawyers outside Spain, perhaps in the U.S., and perhaps in collaboration with NGO's such as Human Rights Watch or Reprieve. It appears to have been drafted by someone who understands the U.S. legal system far better than the average Spanish lawyer. For all the publicity universal jurisdiction cases excite (Garzon's attempt to extradite Pinochet from the UK comes to mind), we only know of one case ever tried here (involving a former member of Argentina's military junta). *Based on what Zaragoza told us, we suspect the case will eventually be referred to the National Court for investigation, although that step may not come for some time.* [Emphasis added] Once it

reaches the National Court, these cases seem to move slowly, periodically generating publicity as new evidence is taken (as with Moreno's investigation into so-called Guantanamo flights). Whether this case will end up with Garzon, Moreno, or some other judge, we cannot say. *Garzon, despite his penchant for publicity* [Emphasis added] and criticism of certain aspects of U.S. policy, has worked well with the U.S. on more routine criminal matters (although we think a direct approach to him on this case could well be counter-productive). Moreno, while his reputation as a judge stands higher among legal insiders, has been cooler in his dealings us. *We suspect the Spanish Government, whatever its disagreements with the policies of the Bush Administration, will find this case inconvenient.* [Emphasis added] Despite the pro forma public comment of First Vice President Fernandez de la Vega that the GOS would respect whatever decision the courts make in this matter, the timing could not be worse for President Zapatero as he tries to improve ties with the U.S. and get the Spanish public focused on the future of the relationship rather than the past. That said - the cable concluded - *we do not know if the government would be willing to take the risky step of trying behind the scenes to influence the prosecutor's recommendation on this case* [Emphasis added] or what their reaction to such a request would be. [Chargé D'Affaires Arnold A.] Chacon.”

Barely three months into President Obama's Administration, the United States, with a view to assisting in the case of *The Bush Six*, turned to a Florida senator to deliver a simple message to Spain: ‘Do not indict former President George W. Bush's legal brain trust for torture in the treatment of Guantánamo detainees’, Senator ‘Mel’ Martinez - a former trial lawyer - warned on one of his frequent trips to Madrid. ‘Doing so would chill U.S.-Spanish relations.’ Given his credentials as a ‘Bush insider’, Martinez had greater access than most senators in Madrid. He would invariably ask, a former official of the Bush Administration said, “Is there a message you would like me to deliver?” If he agreed with the message, he would convey it - in visits which at one point took him to the *Zarzuela* to greet king Juan Carlos.

On 15 April 2009 Senator Martinez went, in company with the Chargé D’Affaires Chacon, to meet then-Acting Foreign Minister Ángel Lossada. The Americans, according to the 15 April

cable, “underscored that the prosecutions would not be understood or accepted in the U.S. and would have an enormous impact on the bilateral relationship” between Spain and the United States. Here was a former head of the G.O.P. and a representative of a new Democratic Administration - headed by a President who had decried the Bush-Cheney Administration's use of torture - jointly applying pressure on Spain to kill the investigation of the former Bush officials.

Rather than An act of acquiescence, Lossada offered the former U.S. Republican Party and Secretary of Housing and Urban Development in the Bush Administration a lesson in Spain's separation of powers. "The independence of the judiciary and the legal process must be respected." Lossada replied on 15 April 2009. Then for emphasis - as cable 09 MADRID 392 confirmed - “Lossada reiterated to Martinez that the executive branch of government could not close any judicial investigation and urged that this case not affect the overall relationship."

The case is still open, on the desk of a Spanish judge, awaiting a reply from the Obama Administration on whether it will pursue a probe of its own. But the episode became part of a secret, concerted American effort to stop Judge Garzón from investigating a torture complaint against former *The Bush Six*.

The cause for alarm at the U.S. Embassy was what a U.S. diplomat called a "well documented" 12-inch-tall dossier compiled by a Spanish human rights group. In the name of five Guantánamo prisoners with ties to Spain, it accused the Bush legal insiders of laying the foundation for abuse of detainees in the months following the 11 September 2001 attacks.

Of particular concern was that an irrepressible Judge Garzón might reach probatory conclusions under Spanish law, which gives judges extraordinary investigative powers.

Judge Garzón, already famous for issuing arrest warrants for Pinochet and Osama bin Laden, had been cast by Ambassador Aguirre as a publicity seeker with an ``anti-American streak" in 'confidential' cable 02 MADRID 002282.

If those efforts are any guide - and judging by the result Britain never turned Pinochet to Spanish justice and bin Laden is still at large - a Spanish prosecution of *The Bush Six* seems unlikely. But just the indictments would undermine American diplomatic credibility on human rights and, quite likely, confine *The Bush Six* to the United States, for fear of arrest overseas.

Civil rights attorney Michael Ratner, president of the Center for Constitutional Rights based in New York, who has long championed Guantánamo detainee rights, called the cables - taken together - "quite dramatic." "The U.S. prides itself on our own independent judiciary," Ratner said. "But here you have the hypocrisy of the U.S. Government trying to influence an independent judicial system to bend its laws and own rules. ... And it is the Obama Administration doing it to protect Bush people," he added.

International prosecutions are not unprecedented. The Israelis tried with success in the *Eichmann* case: captured in May 1960 in Buenos Aires, tried and convicted in 1961, executed in May 1962. President Bush Senior sent U.S. troops to invade Panama in 1989 to capture Manuel Noriega, saw him tried, convicted on eight counts of drug trafficking, racketeering, and money laundering, incarcerated, and then extradited to France, where he was tried again, convicted in July 2010, and is now in gaol. In January 2009 a Miami judge inflicted on 'Chuckie' Taylor, a U.S. citizen, a 97-year sentence for torturing hundreds of Liberians as commander of his president-father's security unit from 1999-2003.

But by the time Spain's Association for the Dignity of Prisoners filed the torture complaint that U.S. diplomatic circles found so troubling, the Obama Administration was resisting calls to set up a Truth Commission or assign a special prosecutor to examine the legal framework which organised Guantánamo and permitted "enhanced interrogation techniques" which included waterboarding 'high-value' detainees.

"Generally speaking, I am more interested in looking forward than I am in looking backwards." Obama said on 9 February 2009.

After Judge Garzón's suspension, the investigation of *The Bush Six* was assigned to Judge Eloy Velasco. Judge Velasco has thrice asked the Obama Administration to declare whether it envisions a similar investigation at home, which would supersede his efforts.

"They have never answered. From the record of this case they have ignored that it even existed." said Ms. Katherine Gallagher, a staff attorney at the New York Center for Constitutional Rights, who is assisting Spanish lawyers seeking Guantánamo prosecutions. Michael Ratner, the Center president, opines that, news of the meddling may cause blow-back to the U.S. political effort. "Now that it has been brought out that there were efforts to compromise the Spanish judiciary they are going to have to show their independence." he said.

Lossada emphasised that the independence of the Spanish Judiciary had to be respected, but he added that the government would send a message to the Attorney General that it did not favour prosecuting this case.

The next day, 16 April 2009, Attorney General Conde-Pumpido publicly declared that he would not support the criminal complaint, calling it "fraudulent" and "has been filed as a political statement to attack past [U.S. Government] policies." If the Bush officials had acted criminally, he said, then a case should be filed in the United States. On 17 April, the Prosecutors of the National Court filed a request that complaint be discontinued. In the 17 April cable, officials at the U.S. Embassy in Madrid congratulated themselves for their successful involvement in the case, noting that "Conde-Pumpido's public announcement follows outreach to [Government of Spain] officials to raise [the U.S. Government] deep concerns on the implications of this case."

Still, this did not end the matter. It would still be up to Judge Garzón to decide whether to pursue the case against *The Bush Six*. In June - coincidentally or not - the Spanish Parliament enacted legislation narrowing the application of 'universal jurisdiction.' In September 2009, Judge Garzón decided to pursue the case.

The case eventually came to be overseen by another judge who early in 2010 asked the parties behind the complaint to explain why the investigation should continue. Several human rights groups filed a brief urging this judge to keep the case alive, citing the Obama Administration's failure to prosecute *The Bush Six*. Since then, there has been no action. The Obama Administration essentially got what it wanted. The case of *The Bush Six* disappeared.

At mid-April 2009, asked whether the Obama Administration would cooperate with any request from the Spanish Judiciary for information and documents related to *The Bush Six*, Press Secretary Robert Gibbs dodged the question by saying: "I do not want to get involved in hypotheticals." What he did not disclose was that the Obama Administration, working with Republicans, was actively pressing Spain to drop the investigation.

Soon the highest echelons of the Spanish Judiciary might have to explain to Parliament their repeated refusals to bring U.S. soldiers to trial for the 2003 killing of José Couso in Baghdad. The cables recently disclosed reveal continuing contacts with U.S. authorities aimed at preventing a trial.

The pressure on the Attorney General's Office, the Government and the Congress of Deputies - the lower house - to take action comes from different sectors, including Couso's family, while the main force of political opposition, the Right-wing *Partido Popular*, looks the other way.

At a recent press conference, Couso's family expressed indignation that both the Attorney General's Office and the Government, "rather than defend national sovereignty and investigate what happened, act in the service of a foreign power and then hide the truth." The family members said they are planning further legal actions.

At recent weekly plenary sessions, during which the Prime Minister reports to the Congress of Deputies - the lower house, Zapatero and Foreign Minister Trinidad Jiménez did not answer reporters' questions: they simply smiled. But interest has not ceased in Spain since *El País* began publishing the content of the cables which refer to the Couso case. According to those cables, the Spanish 'Socialist' Government supported everything the U.S. Embassy in Madrid did to prevent the case against the soldiers from moving forward. In one of the cables, sent in May 2007 to then-Secretary of State Condoleezza Rice, U.S. Ambassador Aguirre, assured her that the Spanish Government had "helped in the wings" so that the judge's decisions would face appeal and end the investigation. In another cable the Ambassador sent to the State Department on 14 May 2007, he stated: "While we are careful to show our respect for the tragic death of Couso and for the Spanish judicial system, behind the scenes we have fought tooth and nail to make the charges disappear."

At about the same time, María Teresa Fernández de la Vega, who was the First Deputy Prime Minister until she left Parliament altogether in October 2010, held a meeting with the

Ambassador. She told him that Attorney General Conde-Pumpido had remarked on the excellent cooperation from the embassy and U.S. authorities in helping to conclude the case.

This "excellent cooperation" was referred to on 30 November 2010 by the Attorney General's Office in a statement which underscores that its actions are based on strictly legal criteria, with no external interference. In the statement there was no mention of the *Couso* case.

Yet the cables recently come to light reveal the pressure that the Obama Administration exerted on the Spanish Government in 2009 in several areas, including, the derailment of the criminal investigation into the role played by *The Bush Six* in establishing the policies which governed the interrogation - and torture - of prisoners seized in the 'war on terror.'

Even the Obama Administration's view of Spanish politics' personalities offers some interesting reading.

One can only draw from the cables that the United States Embassy in Madrid is confident of exerting an enormous pressure on the Spanish Government. American Ambassadors have a view of the 'Socialist' Government which projects a mixture of *hauteur*, concern, condescension, but - rarely - display of approval. The tone of the cables is often paternalistic and Spaniards could be forgiven for thinking that - on the evidence of those cables - Americans see their country as akin to an unreliable Latin American place, which needs 'firm guidance'.

The impact of the cables in Latin America has been as strong as in Spain - if not stronger. In Argentina, for instance, the courts do not seem to have doubt as to prosecuting crimes against humanity. Cases such as those under which Judge Garzón is suffering are unknown; one can say with a degree of confidence, non-existent. Optimistically, all that bodes well for Spain. There, given the politicisation of the Judiciary - still dominated by Francoists and neo-Francoists - and, consequently, by what at times appears as plain professional incompetence

in some cases, it is really anyone's guess whether Judge Garzón will survive his trial. Rightists oppose his views and actions, and his impartiality and fame - as well the perceived love of the spotlight - have created his share of enemies on the Left. The international legal community admires him greatly, but it may not be sufficient.

Even if he is finally removed from the Spanish bench, Baltasar Garzón's legal career is far from over.

He will not easily be silenced.

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