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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by Lawyers Rights Watch Canada, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2012]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Obligation to investigate the prosecution of Judge Baltasar Garzón (Garzón) for opening an investigation of 114, 266 unresolved enforced disappearances and extra-judicial executions (disappearances) by the Franco regime between 1936-1951 (prosecution)

LRWC asks Council to promote universal respect for human rights, ensure implementation of obligations undertaken by states, address gross and systematic violations of human rights and ensure all Council members uphold the highest human rights standards (A/RES/60/251).

LRWC calls for an investigation to determine whether the prosecution was:

- commenced or continued for a purpose contrary to law involving an abuse of Spain's international and/or domestic law obligations; as part of a strategy to promote impunity for, and prevent investigation of, gross and systemic human rights violations committed by the United States (US) and agents of the US Government (USGAs) in pursuit of the Iraq war and US counter-terrorism policies (US crimes); and,
- improperly influenced through interference with Spain's judicial and prosecutorial independence by US government officials (USGOs) assisted by Spanish government officials (SGOs).

Charges against Garzón for 'prevaricación'/malfeasance under article 446 of Spain's Penal Code—by private groups—were approved by the Supreme Court May/26/2009, the appeal dismissed April/2010 and Garzón was suspended May/2010.

It is alleged that by opening the investigation, Garzón violated Spain's Ley de Amnestia of 1977 (AL/77) thereby violating article 446 which prohibits 'knowingly dictating an unjust (i.e. flagrantly unsupported by any reasonable interpretation of the law) sentence or resolution.' Garzón ruled that disappearances, as continuing, and as crimes against humanity, are not subject to amnesties or limitations.

Human rights specialists criticize the prosecution as a scandalous¹ violation of duties to uphold the rule of law, safeguard judicial independence² and eradicate impunity. Criticisms highlight the imperative duty of Spain to exercise criminal jurisdiction over disappearances and that of Garzón's to interpret and apply the law.³ "Judges should not be prosecuted for doing their job."⁴

The applicable domestic and international laws and jurisprudence⁵ impose on Spain an inescapable duty to investigate the disappearances. The Rome Statute, ICCPR, CAT, ECHR, ICPPED, Spain's Constitution and the Vienna Convention on the Law of Treaties compel the investigation and remediation of disappearances and prohibit invoking internal law, (AL/77) "...as justification for..." failure to do so.

¹ "[It is] scandalous for a judge to be put on trial for defending justice, truth and reparations for the victims...of a massive violation of human rights." Amnesty spokesman, "Trials of Judge Garzón Called Scandalous by Rights Groups, January/24/12, IPS.

² UN human rights experts express concern about trial of prominent Spanish judge, February/8/12.

³ "Formal Communication for Consideration and Action Re: Judge Baltasar Garzón," May/20/10, <http://www.lrwc.org/pub1.php>

⁴ UNHCHR spokesperson, February/10/12.

⁵ Ibid, footnote/3.

Garzón was duty bound to determine, as he did, the applicability of AL/77 in light of contemporary legal obligations and did so. There is no evidence of criminal purpose in opening the investigation.

These factors point to the absence of a legitimate purpose and the likelihood of an improper purpose underlying the prosecution.

Factors suggesting the prosecution may have been improperly motivated as part of a strategy to prevent exposure and promote impunity for US crimes are:

- diplomatic cables released by Wikileaks in December/2010,⁶ (cables) reveal US efforts to block and promote impunity for US crimes by various means including preventing adjudication of such cases by Garzón.
- the prosecution advanced US interests by removing Garzón and potentially deterring other judges/prosecutors from approving cases involving US crimes.

The cables reveal behind-the-scenes influence by USGOs and SGOs to:

- promote impunity for, and prevent investigation of, US crimes,
- block criminal cases involving, and discourage use of universal jurisdiction to prosecute, US crimes,
- prevent Garzón from having conduct of such cases.

A recent complaint concluded the cables, “unquestionably demonstrate that senior U.S. officials...actively and surreptitiously met with senior members of the Spanish Government, Administration and prosecutorial authorities...in an attempt to interfere in the judicial process and thereby prejudice the cases [involving US crimes] in favour of the American defendants.”⁷

Two of these cases involved allegations that USGAs had created, authorized and executed gross human rights violations and devised extra-legal means of preventing remedies for victims and accountability for perpetrators.

- The Guantánamo Case: On April/27/09 Garzón initiated a preliminary investigation of the torture and illegal treatment of four former prisoners at Guantánamo Bay prison, by, “...all those who executed and/or designed a systemic torture plan and inhuman and degrading treatment against prisoners under their custody.” The case was formally opened January/27/10;
- The Bush/6 Case: On March/28/09 Garzón opened an investigation of six senior members of the former Bush administration, including former AG Alberto Gonzalez, for violations of international and Spanish law arising from legal memos approving torture and other illegal treatment and creating an extra-legal system to deny prisoners’ rights and protect USGAs from accountability for violations.

Both cases threatened convictions of USGAs, exposure of further US crimes in US-controlled prisons around the world and charges against senior political and military leaders. Garzón’s conduct of these cases was seen as heightening existing risks. USGOs identified Garzón as:

⁶ <http://www.cablegatesearch.net/search.php>.

⁷ Complaint against the United States of America and the Kingdom of Spain: Interference with the independence of Impartiality of the Judiciary, ECCHR and CCR, January/19/12.

- “[having] an anti-American streak (...evidenced by...scathing editorials...criticizing Guantanamo and aspects of what he calls the "U.S.-led war on terror"),⁸
- “internationally known for his dogged pursuit of "universal jurisdiction" cases.”⁹
- favouring investigating, “criminal responsibility” for the war in Iraq, to include possible charges against former President Aznar, PM Blair, and President Bush...¹⁰
- “an outspoken critic of the Guantanamo detention facility who has publicly stated that former President Bush should be tried for war crimes.”¹¹

The Guantánamo Case: Garzón reportedly planned to request documents revealing, “an official plan of approved torture and abuse of people being held in custody while facing no charges and without the most basic rights of people who have been detained”, and referred to Bagram as part of, “a coordinated system to perpetrate numerous torture crimes against people deprived of their liberty in Guantánamo and other prisons.”¹²

The cables record concern that Garzón “had a field day in the Spanish press criticizing Guantanamo and US CT [counter-terrorism] policies¹³” when terrorism charges against two former Guantanamo prisoners—now victim/witnesses—were dismissed after Spanish courts ruled inadmissible evidence obtained in Guantánamo, citing conditions that were, “impossible to explain, much less justify.”¹⁴

The Guantánamo Case was transferred to another judge following Garzón’s suspension.

The Bush/6 Case: USGOs warned of risks from Garzón, “For two decades, Garzon has generated international headlines with high profile cases...”,¹⁵ and from more charges, “The fact that this complaint [the Bush/6 Case] targets former Administration legal officials may reflect a “stepping-stone” strategy designed to pave the way for complaints against even more senior officials.”¹⁶

USGOs moved quickly to shut the case down, with a key strategy to remove Garzón. Talks were held with the Chief Prosecutor of the National Court (Prosecutor) who first advised that the case was “well-documented,” and Garzón had right of first refusal. He promised keep the case away from Garzón by recommending it go to another judge and by appeal.¹⁷

US diplomatic staff and two US Senators arranged telephone calls and meetings with senior members of Spain’s Ministries of Justice and Foreign Affairs to express concern and warn that the case “would have an enormous impact on the bilateral relationship.” The Prosecutor then said the complaint, “targeted legal advisors...” and “was directed against USG policy.” He promised to “ask [Attorney General] Conde Pumpido to review whether Spain has jurisdiction.”¹⁸

⁸ Cable07MADRID2282 December/20/07

⁹ Cable09MADRID347 April/01/09

¹⁰ Cable07MADRID520 March/21/07

¹¹ Cable09MADRID392 April/17/09

¹² Spanish court opens investigation of Guantánamo torture allegations, Guardian—April/29/09.

¹³ Cable 07MADRID1805 September/18/07

¹⁴ Cable06MADRID2657 October/20//06

¹⁵ Cable09MADRID347 Apri/01//09

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Cable09MADRID392 April/17/09

On April 16th Spain's Attorney General publicly denounced the case. USGOs said this critical announcement, "follows outreach to GOS official to raise USG deep concerns..." and, "puts pressure on crusading judge Garzon...not to proceed with the investigation."¹⁹

The Attorney General called the prosecution "fraudulent", "filed as a political statement to attack past USG policies" He stated, "prosecutors would "undoubtedly" not support a criminal complaint...to investigate six former USG officials...for creating a legal framework that allegedly permitted torture."²⁰

USGOs reported that Garzón "was forced to give up" the case which was, "at the urging of Spanish prosecutors...assigned to another National Court judge who now appears to be trying shelve the case."²¹

The Bush/6 case was transferred (April/23/09) and shelved: a stay of proceedings was issued April/13/11 and the file transferred to the US Department of Justice.

The paramount importance of eradicating impunity for disappearances and other "grave crimes [that] threaten the peace, security and well-being of the world"²² imposes an obligation on Council to exhaustively investigate the appearance of improper purpose outlined in this report.

Unchallenged, the prosecution threatens global peace and justice by rendering nugatory imperative duties to prevent and punish gross violations of human rights.

¹⁹ Ibid

²⁰ Ibid

²¹ Cable09MADRID440 May/05/09

²² Rome Statute Preamble