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Outlawing Judicial Independence: The Prosecution of Judge Baltasar Garzón in Spain[1]

> "A system which is based on the bodies of victims who still await justice to rest in peace is an illegitimate system condemned to suffer eventually the same fate."[2]

Introduction

Judicial independence—upon which rights and the rule of law depend—is under attack globally. Recent attacks on judicial independence signal the refusal by dictators and elected officials alike to be restricted or held accountable by the law or the rule of law. Spain's Judge Baltasar Garzón famous for using the law to investigate and prosecute state officials for criminal violations of internationally protected rights faces criminal charges for opening an investigation into an estimated 114,000 thousand extra-judicial executions and enforced disappearances carried out by Franco's officials during the civil war and dictatorship.

When judges were sacked in Pakistan in 2007, millions of people resoundingly rejected the legitimacy of state officials-whether elected, self-appointed or acting at the behest of foreign advisors- displacing and violating law in the name of security. Led by lawyers and inspired by their own judges they risked their lives and freedom to insist on the restoration of their right, through an independent judiciary, to peaceful legal means of resolving disputes, protecting rights and restricting state power.

Just as Musharaff was threatened by Chief Justice Chaudhry's lawful judicial examination of disappearances and other wrongdoings, so were the powerful around the world threatened by Judge Baltazar Garzón and other investigating judges in Spain who have opened investigations of the officials of many states. The effect, particularly of the 1998 prosecution of Chilean dictator Augusto Pinochet was to inspire human rights advocates around the world to launch proceedings against alleged high ranking perpetrators of crimes against human rights. Within Spain criminal proceedings were launched against officials of Rwanda, Chile, Argentina, the

[1] These are speaking notes for a workshop on "Developing and Ensuring an Independent Judiciary and Legal Profession," at the Fifth Conference of Lawyers in Asia-Pacific, September 18-19, 2010. Prepared by Gail Davidson with research assistance from Diane Tourell and Laura Best.

[2] B. Garzon, *Un Munda sin Miedo,* random House Mondadori 2005, p. 171. Translated and referred to by Peter Burbidge, *Waking the Dead of the Spanish Civil War – Judge Baltasar Garzón and the Spanish Law of Historical Memory,* University of Westminster School of Law, Research Paper No. 10-30.

U.S., Israel[3] and China. It is reasonable to conclude that the prosecution and suspension of Judge Garzón is fuelled by international and domestic pressure from those opposed to the law being enforced against state officials.

There is an urgent need for human rights advocates of the Asia-Pacific and around the world to join in opposing the prosecution of Judge Baltasar Garzón and advocating forcefully for adherence by Spain and other states to international human rights and humanitarian law. These speaking notes and are intended to be a general outline of international laws on state duties to protect judicial independence, to investigate and remedy criminal violations of internationally protected rights and to hold those responsible accountable.

The case of Judge Garzón is extraordinary in part because the law supporting what he did is legion and the purpose of his prosecution is wholly illegal.

Function of independent Judiciary

The rule of law "…requires that there should be laws which lay down what the state may and may not do and by which one can test whether such power which it claims, or any particular exercise of such power is legitimate and a system of courts independent of every other institution of the state, including the legislators and the executive, which interprets and applies those laws."[4] The *Universal Declaration of Human Rights* recognizes the rule of law as essential to peace and justice,

> "Whereas, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,"[5]

An independent, impartial and competent judiciary is the key component of the rule of law and the foundation upon which all rights, including non-derogable rights, depend.[6]

International Standards Protecting Independence of the Judiciary

The right to independent and impartial courts and judges to protect right and determine criminal charges is provided in all key international and regional human rights treaties.
The Human Rights Committee has determined that the right to a **"**competent, independent and impartial tribunal established by law" guaranteed by the *International Covenant on Civil and*

[3] Proceedings against Israel for crimes against Gaza resulted in the Ley Organica 1/2009 of 3 Nov. 2009 which required defendant(s) to be present in Spain or a victim is Spanish or other nexus.
[4] P. Sieghart, *International Human Rights Law,* cited in Lord Elwyn-Jones, "Judicial Independence and Human Rights" in R. Blackburn & J. Taylor, eds., *Human Rights for the 1990s: Legal and Political and Ethical Issues* (London: Mansell, l991) at 44.
[5] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess, Supp. No. 13, UN Doc. A/810 (1948) 71, Preamble.
[6] *Latimer House Principles,* endorsed by Commonwealth Heads of Government at their summit in Abuja, Nigeria, December 2003, Article IV, Independence of the Judiciary. See also the Supreme Court of Canada in *Reference re Provincial Court Judges*, [1997] 3 S.C.R. 3 at para. 131.

Political Rights (ICCPR)[7] is an absolute rights that **"**may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights…"[8]

> "The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception."[9]

The Geneva Conventions, by Article 3 common to all four conventions, ensure that, even in time of conflict, penal sanctions must be determined by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people" and that depriving a person of 'rights of fair and regular trial' is a war crime.[10]

The non-derogability of the right to an independent judiciary during national emergencies has been reiterated on several occasions by the United Nations Special Rapporteur has warned the General Assembly of, "…the repeated violations of the right to a fair trial and other human rights that occur during states of emergency."[11] The Special Rapporteur also observed that, "…judicial oversight is of vital importance both in checking that [the state of emergency] has been lawfully declared and in protecting human rights while it is in force." [12] He concluded that it was imperative that the independence and impartiality of the judiciary and the mandate of the courts to review the legitimacy of emergency measures, to protect rights and to try criminal cases be preserved during states of emergency and recommended an international declaration incorporating such provisions.[13]

Specific state duties to protect judicial independence defined in the Basic Principles on the Independence of the Judiciary (Principles).[14] These requirements are repeated by the Bangalore Principles of Judicial Conduct 2002[15], Recommendation No. R (94)12 of the Committee of Minister of the Council of Europe on the Independence, Efficiency and Role of Judges and the European Charter on the Statute of Judges.

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[7] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, by para. 14(1).

[8] UN Human Rights Committee (HRC) General Comment No. 32, *Article 14, Right to Equality before courts and to fair trial*, 23 August 2007, CCPR/C/GC/32, para. 4, 5, 11 & 19. http://www.unhcr.org/refworld/type,GENERAL,,,478b2b2f2,0.html

[9] UN Human Rights Committee General Comment No. 32, *Article 14, Right to Equality before courts and to fair trial,* 23 August 2007, CCPR/C/GC32, para. 17.

[10] Protocol I, articles 85.4(e) and 5; GC III, article 130; *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (GC IV), article 147; *Rome Statute of the International Criminal Court,* article 8.2.1.iv.

[11] *Civil and political rights, including the questions of independence of the judiciary, administration of justice and impunity*, 6 August 2007, Report of the Special Rapporteur on the Independence of Judges and Lawyers submitted to the UN General Assembly U.N. Doc A/62/207, Summary, p. 1. http://daccessdds.un.org/doc/UNDOC/GEN/N07/451/70/PDF/N0745170.pdf?OpenElement

[12] U.N. Doc A/HRC/4/25, Implementation of General Assembly resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, 18 January 2007 at para. 64. http://daccessdds.un.org/doc/UNDOC/GEN/G07/103/18/PDF/G0710318.pdf?OpenElement

[13] *Ibid,* paras. 69 fllg.

[14] Adopted by the Eighth United National Congress of the Prevention of Crime and the treatment of Offenders in 1985, Preamble and article 1.

[15] Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

Most national constitutions recognize an obligation to ensure an independent judiciary. However in practice, judicial independence is rare and increasingly under threat in states around the world. In some states constitutional guarantees of judicial independence are simply ignored: e.g. China, Colombia, Guatemala, Honduras, Iran, Malaysia, Burma, Sudan, Singapore, Syria and Zimbabwe. Other states invoke emergency to deny universal access to independent and impartial courts: e.g. Syria, Pakistan, and the United States (the latter in relation to capture of non-U.S. citizens). In each of these cases, the absence of independent courts has enabled widespread and egregious violations of internationally protected non-derogable rights by the state, the denial of remedies for victims and impunity for perpetrators. Crimes committed include murder, enforced disappearances, extraordinary rendition, torture and arbitrary and indefinite detention.

In Syria, under emergency measures since 1963 and with courts under tight executive control, the use of torture is so ubiquitous and unrestrained that Syria can offer to torture people captured by other states and rendered to Syria as exemplified by the case of Canadian Maher Arar kidnapped by the U.S. and sent to Syria for torture.

In the United States (U.S.), the September 14, 2001[16] emergency measure was followed by the presidential edict that established an extra-legal regime under which the U.S. captured non-Americans and stripped them of all rights under international and U.S. law.[17]
Under this edict, captives are detained indefinitely, denied protection of the Geneva Conventions and access to "any court of the United States…of any foreign nation or…any international tribunal."[18] The detention and treatment of these captive, still unchecked by an independent court, violates all applicable internationally protected rights, including non-derogable rights to liberty and freedom from torture and *ex post facto* penal sanctions. Captives have suffered irremediable damage including death and permanent injury. The continued existence of Guantánamo Bay threatens to undermine worldwide public confidence in the power of the rule of law.[19] This 'state of emergency' was most recently extended to September 14, 2011 by President Obama, ostensibly necessitated by the **"**continuing and immediate threat of further attacks on the United States." The UN High Commissioner of Human Rights noted with concern the U.S. program of targeted killings of people dubbed suspected terrorists.[20]

In Pakistan, emergency measures were proclaimed specifically to prevent judicial oversight of government actions. Under Emergency Measures declared November 3, 2007, then President Musharaff granted himself the power to amend the Constitution, outlawed judicial independence and arrested judges who refused to sign an oath of allegiance. Judicial safeguards against

[16] Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proc. No. 7463, Sept. 14, 2001, 66 F.R. 48199.
[17] *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism,* Executive Order issued November 13, 2001, http://www.ess.uwe.ac.uk/WCC/execordmilcomm.htm
[18] *Ibid,* Section 7.3 (b)(2) the individual shall not be privileged to seek any remedy or maintain any proceedings, directly or indirectly, or to have any such remedy or proceeding sought on the individuals' behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."
[19] As of 21 May 2009, 240 people remain imprisoned in Guantánamo Bay prison. Of the 779 people imprisoned in Guantánamo Bay prison since 2002, charges have been laid against only 27 people and all these have been charged with *Military Commissions Act 2006* offences.
[20] Navanethem Pillay, UN High Commissioner of Human Rights, Opening Statement, Sept. 13, 2010, "In this context, I am troubled by reports concerning a program by the United States of targeted killings of suspected terrorists in circumstances that challenge international norms set to protect the right to life and the rule of law,"

arbitrary or illegal acts by the state including the violation of non-derogable rights were lost and state official who committed criminal acts and civil wrongs enjoyed impunity.[21]

In Canada Prime Minister Stephen Harper (elected January 2006 with 124 seats out of 308) told Parliament that he would appoint only judges who respected his legislative agenda and changed the appointment procedure to enable this result. Some of Mr. Harper's advisors have called for Canadian courts to be dismantled because their "decrees superceed not only the legislative power of Parliament but the supremacy of God."[22]

The Prosecution of Judge Baltasar Garzón

Background

In September of 2008, Judge Garzón, an investigating judge with Audencia Nacional – the highest level criminal court in Spain – issued a ruling seeking detailed information from church leaders and government authorities about victims of Franco's forces both during the Spanish Civil War (1936-39) and in the early years of the Franco regime (1939-51). October 16/08, Judge Garzón opened Spain's first criminal investigation into Franco-era extra-judicial executions (executions) and enforced disappearances (disappearances) and ordered the opening of 19 mass graves, including one purported to contain the body of the executed poet Federico Garcia Lorca. In a 68-page ruling, Judge Garzón made it clear that he had opened the investigation because he accepted the legitimacy of a petition filed by associations of victims' families requesting his Court to investigate the disappearances and executions of thousands of people. The petition was based on the 'accion popular' in Spanish law which allows private complainants to bring complaints without the consent or support of the prosecutor.
In his ruling, Judge Garzón noted that the count of those executed or disappeared by Franco's forces stood at 114,266, including an estimated 30,000 children of disappeared or executed parents who were either adopted by Falangist sympathizers or raised in orphanages.[23]
Judge Garzón noted that the Franco regime had used all its resources to locate, identify and grant reparations to the victims from the winning side in the civil war, but had not extended the same remedies to the losers, who, he noted, were persecuted, jailed, disappeared and tortured. He concluded, constituted crimes against humanity[24], and in his ruling identified Franco, along with 34 of his former generals and government ministers, as suspected perpetrators of these crimes.

Reacting to his ruling, state prosecutors announced plans to appeal on the basis that EE and ED during by the Franco regime were immune from prosecution under the 1977 *Ley de Amnestia*.

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[21] Provisional Constitution Order No. 1 of 2007, 3 November [2007], s. 2(1) & (3) and Oath of Office (Judges) Order, 2007. See also *Statement by Lawyers Rights Watch Canada to the Seventh Session of the Human Rights Council regarding unlawful emergency measures in Pakistan*, 20 February 2008.

[22] *The Armageddon Factor: The Rise of Christian Nationalism in Canada,* Marci McDonald, Random House Canada 2010, at p. 280.

[23] Garzon relied on the research of Ricard Vinyes as to the number of children taken and 'disappeared.' From Burbidge p. 8.

[24] The term crimes against humanity refers to certain acts committed as part of a widespread or systematic attack directed against any civilian population. Crimes against humanity include murder, deportation, unlawful confinement, enforced disappearance, extermination, enslavement, deportation or forcible transfer of population, torture, rape and sexual slavery, persecution against a group, apartheid, intentionally causing great suffering or serious injury to body or to mental or physical health.

In November of 2008, a little over a month after opening his investigation, Judge Garzón abruptly shut it down. In a lengthy ruling he passed on responsibility for the opening of the mass graves to regional courts.

In January of 2009, Manos Limpias and Libertad e Identidad, two groups sympathetic to Spain's fascist party filed criminal complaints alleging that by initiating the investigation, Garzón had knowingly made a biased and unfair decision outside the range of possible interpretation of the law and thereby misused his power contrary to *Ley de Amnestia* of 1977 (amnesty law) and s. 446 of the Spanish Penal Code. In March of 2010, the Spanish Supreme Court allowed the application of Falange Española to join with the petition of the two original complainants demanding an investigation of Judge Garzón. The maximum punishment under this section of the Penal Code is 4 years imprisonment a fine and 20 years suspension from public office.

In May of 2009, the investigating judge deemed the petition admissible, ruling that Judge Garzón consciously decided to ignore the will of the Spanish legislature in opening the investigation of Franco-era crimes. Judge Garzón appealed this decision. In September of 2009, the International Commission of Jurists issued a statement expressing concern about the investigation, and brought Judge Garzón's case to the attention of the UN Special Rapporteur on the Independence of Judges and Lawyers.

In March of 2010 a five-judge panel of the Spanish Supreme Court dismissed Judge Garzón's appeal, thereby allowing the investigation against him to continue. On 7 April 2010, the investigating judge indicted Judge Garzón on charges of abusing his powers by opening the investigation in 2008. On May 12, 2010, the Supreme Court allowed the indictment of Judge Garzón to proceed and on May 14, the General Council for the Judiciary voted to suspend him from his duties at the Audencia Nacional. If convicted, Judge Garzón will face a 10 to 20 year suspension from the bench.

On September 7 the Supreme Court rejected Garzon's appeal. His lawyers sought to have judges give evidence on crimes that have no statute of limitation. In his decision to open the investigation, Garzón had made a finding that the disappearances and executions were crimes against humanity and on that basis and others, no limitation applied. The investigating judge (Luciana Varela) who originally accepted the complaint against Garzón had rejected that evidence. The Supreme Court rejected the appeal on the basis that the judges would only be expressing personal opinions! There are still procedural appeals pending and no trial date has been set.

Spain's Amnesty Law

Ley de Amnestia, was passed in 1977 in the transition to democracy, in part to appease those, including the military that posed a threat to the new democracy following 36 years of dictatorship under Franco.[25] The statute gives immunity to "all politically motivated acts, consisting of crimes committed before Dec. 1976." As the statute contains no definition of "actos de intencionalidad politica" a judge would have to decide. At time one parliamentarian,

[25] Peter Burbidge, *Waking the Dead of the Spanish Civil War – Judge Baltasar Garzón and the Spanish Law of Historical Memory,* U. of Westminster School of Law, Research Paper No. 10-30 citing Giles Trimlett, *Ghosts of Spain, Travel Through a Country's Hidden Past,* (2006), Faber & Faber.

observed, "We are transferring to the courts the decision over what will count as political when, as the parliament of the country, this is something we should have decided ourselves."[26]…"

The failure of Spain to remedy "the extensive and wide-ranging human rights abuses committed by the Franco regime in Spain from 1939 to 1975" [27] remained a problem. In response to continuing pressure from victims' families, the Socialist Party-led government passed the *Ley de la Memoria Historica* in December 2007. This act condemns the acts of violence committed during the Franco era and gives victims the right to declaration of reparation and the administrative investigations necessary to locate and indentify the bodies of victims and to remove the remains. However, effective investigations under this act were stalled or blocked by a number of factors: Partido Popular officials at the local level refusing to carry out the law, inadequate funds and lack of expertise.

In January 2009 the UN Human Rights Committee, reviewing Spain's compliance with the International Covenant on Civil and Political Rights, noted this problem. "…the Committee takes note with concern of the reports on the obstacles encountered by families in the judicial and administrative formalities they must undertake to obtain the exhumation of the remains and the identification of the disappeared persons." The Committee went on to point out "that crimes against humanity are not subject to a statute of limitations and… amnesties for serious violations of human rights are incompatible with the Covenant…" The Committee recommended that the 1977 amnesty law be repealed.

> *The State party should: (a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims' bodies, and provide them with compensation where appropriate. .* [28]

International v. Domestic Law

Spain is bound, by domestic and international law to give international law obligations priority. These provisions surely mean that domestic law must be interpreted to accord with current international law duties.

The Vienna *Convention on the Law of Treaties* determines that State parties are bound by their treaty obligations and all treaty obligations must be performed in good faith (the principle of *pact sunt servanda*).[29] Article 27 of the *Vienna Convention* reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." This principle was part of international law long before The *Vienna Convention* came into force.

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[26] *Ibid,* at p. 30 citing Joan Garces in *Auto de fe ante el tribunal suremo* El Pais, May 18, 2010.
[27] The Parliamentary Assembly of the Council of Europe's Recommendation 1736 of 2006, "The Parliamentary Assembly strongly condemns the extensive and wide-ranging human rights abuses committed by the Franco regime in Spain from 1939 to 1975." March 17, 2006. http://www.impunityinspain.com/wp-content/uploads/2010/05/Recommendation_1736_2006.pdf
[28] Concluding Observations on Spain's fifth periodic report as a State party to the International Convention on Civil and Political Rights, CCPR/C/ESP/CO/5, 05 January 2009, at para. 9.
[29] Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1980. U.N.T.S. Vol. 1155, p. 331 [Vienna Convention].

Spain's Constitution, of 29 December 1978, mandates that international treaties validly concluded are part of Spanish law and the terms of such treaties cannot be modified or suspended except in accordance with procedures provided by the treaties or in accordance with the general norms of international law (art. 96(1)). The Constitution also guarantees that provision relating to protected human rights (in this case the right to life) must be interpreted 'in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.

In addition, it is well established that laws must be interpreted within the context of current laws. In the Streletz case [30]the applicants has applied to the ECtHR to have their convictions quashed on the basis that their acts were not offences when committed. All applicants had been officials in the GDR's Socialist Unity Party Central Committee and the National Army and the National Defence Council "81. The Court considers that it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law."

Failure to Protect Judicial Independence

Spain has a positive legal duty to ensure the enjoyment of human rights guaranteed by treaties ratified by Spain and by customary international law which includes a duty to create and protect an independent and impartial judiciary and ensure universal access to that judiciary. This paramount duty arises from many international instruments from the Charter of the United Nations and the *Universal Declaration of Human Rights* to the *International Covenant on Civil and Political Rights* (ICCPR) and the *European Convention on Human Rights* (ECHR).

The *Basic Principles on the Independence of the Judiciary*[31] require Spain to protect both the jurisdiction and the decision making powers of judges from all interference. Article 3 directs,

> "The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."

Whether or not AL/1977 is competent to prevent an investigation of these crimes is indubitably a matter "of a judicial nature" that Judge Garzón has the "exclusive authority" to decide. A revision of Judge Garzón's decision to proceed with an investigation can therefore only be properly accomplished by an appeal of that decision. The *Basic Principles on the Independence of the Judiciary* prohibit (Article 4) prohibits any revision of a judge's decision except by way of judicial review.

> "There shall not be any inappropriate or unwarranted interference with the judicial process, not shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review…"

[30] *Streletz, Kessler and Krenz v. Germany* 34044/96;35532/97;44801/98 [2001] ECHR 230, 22 Marche 2001
[31] Adopted by the Eighth United National Congress of the Prevention of Crime and the treatment of Offenders in 1985, Preamble and article 1.

Suspension of judges is strictly prohibited by the *Basic Principles on the Independence of the Judiciary*,

> "Judges shall be subject to suspension or removal only for reasons of incapacity of behaviour that renders them unfit to discharge their duties. (Article 19)

The charges against and suspension of Judge Garzón constitute, "inappropriate and unwarranted interference" and contrary to the universal interest in the proper and equal application of the law.

Judicial independence requires that judges be free from being punished for judicial decisions that are either unpopular or wrong.

> … it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectful or useful. As observed by a distinguished English judge (in *Taafe v. Downes* (1813) 3d Moore's Privy Council 41), it would establish the weakness of judicial authority in a degrading responsibility.[32]

A law allowing a judge to be punished for an unpopular or controversial decision violates these principles and duties. The Federal Court of Canada struck down a statutory provision that empowered the Attorney General to compel an inquiry into allegations of judicial misconduct on the grounds that the provision created a reasonable apprehension that the Attorney General's power could be, "...used to punish judges whose decisions displease the government in question, and as a result, it infringes the constitutionally protected independence of the judiciary and is thus invalid…"[33] The court also ruled that, "…while exceeding jurisdiction takes an act or decision of a judge out of the realm of correctness, it does not take the activity out of the realm of judging."[34]

Clearly whether or not Judge Garzón exceeded his jurisdiction is a matter for judicial review and not a matter for a complaint of misconduct or criminal wrongdoing.

While judges in all cases must be protected from interference from all parties,[35] judges investigating allegations of serious crimes by state agents—such as at issue here—are at heightened risk of professional and physical harm from reprisals and therefore require more stringent protections. For this reason, both the *Principles on the Effective Prevention and*

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[32] *R.M. v. M.Z.*, Ontario Superior Court of Justice, Divisional Court, April 1, 2009. 249 O.A.C.1. 2009 at para. 26. http://www.canlii.org/en/on/onscdc/doc/2009/2009canlii15147/2009canlii15147.html

[33] *Cosgrove v. Canadian Judicial Council*, 261 D.L.R. (4th) 447 • 40 Admin. L.R. (4th) 1 • 282 F.T.R. 60 http://www.canlii.org/en/ca/fct/doc/2005/2005fc1454/2005fc1454.html

[34] *R.M. v. M.Z.*, Ontario Superior Court of Justice, Divisional Court, April 1, 2009. 249 O.A.C.1. 2009 at para 28 & 29, relying on the Supreme Court of Canada in *Morier and Boiley v. Rivard*, [1985] 2 S.C.R. 716 (S.C.C.) at p.737.

[35] See European Court of Human Rights, Judgment of 16 July 1971, *Ringeisen v. Austria*, para. 95 and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/ll.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 229.

Investigation of Extra-legal, Arbitrary and Summary Executions[36] and the *Declaration on the Protection of all Persons from Enforced Disappearance*[37] mandate special protection for investigators as well as for witnesses.

The *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Article 15 directs,

> "Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation..."

The *Declaration on the Protection of all Persons from Enforced Disappearance*, Article 13 directs,

> "…Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.
> …
> Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished."

The proceeding against Judge Garzón demonstrates a failure by Spain to guarantee, respect and observe judicial independence as required by law.

Duty to Investigate

Spain has a duty to ensure enjoyment of the right to life (and other protected rights) by conducting effective investigations of alleged violations—in this cases, disappearances and executions, arising from both the ICCPR and the ECHR. The *Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions,* the *Declaration on the Protection of all Persons from Enforced Disappearance*[38] and the *International Convention for the Protection of All Persons from Enforced Disappearance* also impose duties on Spain to conduct effective investigations of the crimes at issue. The *Declaration on the Protection of all Persons from Enforced Disappearance* establishes a number of other principles necessary to effectively preventing and punishing enforced disappearances including:

- Art. 18 - amnesty laws are incompetent to protect suspected perpetrators from prosecution;
- Art. 13.1 - victims of disappearances have a right to a prompt, thorough and impartial investigation;
- Art. 13.1 - states must ensure that "no measure" be allowed to impede or curtail such investigations;

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[36] *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions,* Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Article 15. http://www2.ohchr.org/english/law/executions.htm

[37] *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992, Articles 13.3, 13.5 &18.

[38] *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992.

- Art, 13,3 & 13,5 - states must protect those conducting investigations of disappearance—in this case, Judge Garzón—from intimidation and reprisal;
- Art. 13.6 - the investigation shall continue as long as the fate of victims remains unclarified.

The *International Convention on the Protection of all Persons from Enforced Disappearances* (ICPPED), ratified by Spain 24, September 2009, in the Preamble, affirms, "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end." The ICPPED defines the widespread or systematic practice of enforced disappearances—as used by agents of the Franco regime—as crimes against humanity that shall attract the consequences provided by international law. Several provisions require ratifying states to take necessary measures to hold those responsible criminally responsible. One of the required measures is to investigate disappearances—in response to a complaint or when there are reasonable grounds—and to continue the investigation until the fates of victims has been clarified (articles 12.1, 12.2, 24.3, 24.6, 25). Article 18 specifies that victims' families are entitled to full particulars including the circumstances and cause of death, the whereabouts of the remains and the authority who authorized the disappearance. The ICPPED also requires the state to protect investigators—from reprisals. (art. 12.1, 18.2,)

In addition, the duty of Spain to carry out effective investigations of violations is well established by decisions of the European Court of Human Rights (ECtHR), the International Criminal Tribunal for former Yugoslavia (ICTY), the Inter-American Court of Human Rights (IACtHR) and by opinions of the United Nations Human Rights Committee (Committee). These tribunals have concluded that the failure to ensure an effective investigation can itself constitute a violation by the offending states.

The ECtHR has determined in many decisions that, Articles 1 and 2(1) of the ECHR[39] compel Spain and other members of the European Union, to ensure effective investigations of violations to the right to life and that failure to do so can, itself, constitute a violation of these articles.[40]

> The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws

[39] Article 1 provides that each State to the ECHR shall secure to everyone within its jurisdiction the rights and freedoms defined in the ECHR and Article 2(1) states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[40] *Hugh Jordan v. the United Kingdom* (Application no. 24746/94) Judgment, Strasbourg, 4 May 2001, para. 105; *Çiçek v. Turkey* (Application no. 25704/94) Judgment, Strasbourg 27 February 2001, para. 148; *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, 105; *McKerr v. the United Kingdom*, (Application no. 28883/95), Judgment, Strasbourg, 4 May 2001, para. 111-115; *Kelly and Others v. the United Kingdom*, (Application no. 30054/96), Judgment, Strasbourg, 4 May 2001, *Shanaghan v. the United Kingdom*, (Application no. 37715/97) Judgment, Strasbourg, 4 May 2001; *Makaratzis v. Greece* [GC], (Application no. 50385/99), Judgment, Strasbourg, 20 December 2004, para. 73-79.

> which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. [41]

The Inter-American Court of Human Rights (IACtHR) has also unequivocally confirmed on many occasions, the duty of states to investigate extra-judicial killings as part of the over-arching duty to ensure the enjoyment of the right to life and other rights.[42] For example, in *Velasquez Rodriguez*[43], a case involving disappearances the IACtHR, ruled,

> 176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.

In the *Myrna Mack Chang*[44]case the IACtHR held that states party to the American Convention on Human Rights have a duty to investigation violations of the "inalienable" right to life arising from their duty to protect that right. With regard to the duty to investigate extra-judicial executions, the IACtHR ruled,

> 156. In cases of extra-legal executions, it is essential for the States to effectively investigate deprivation of the right to life and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity, conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life.
> 157. In this regard, safeguarding the right to life requires conducting an effective official investigation when there are persons who lost their life as a result of the use of force by agents of the State.

The UN Human Rights Committee has confirmed that the ICCPR also imposes these twin duties, namely, the right to a remedy (guaranteed by Article 2) imposes a positive obligation on states to investigate violations of rights protected by the ICCPR, and therefore a state's failure to investigate may in itself constitute a violation of the ICCPR.

> "There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[45]

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[41] *Finucane v. United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003, at para. 67.
[42] The American Convention on Human Rights, Article 1(1). The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. Article 4(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
[43] I/A Court H.R., *Case of Velasquez Rodriguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 172.
[44] I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101.
[45] Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

The *Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions* also require Spain to ensure "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions… to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death."[46] The Economic and Social Council recommended that these principles be respected by states and taken into account within the framework of national laws and practice.[47]

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[48] also impose the obligation to "investigate all cases of 'gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law" (Art. 3(b)).

As a party to the *Rome Statute for the International Criminal Court*, Spain has a legal duty to take effective measures to prevent and punish the widespread disappearances and executions in question, defined as crimes against humanity (article 7.1 (i)).

International law establishes that disappearances are a continuing crime as long as the fate and whereabouts of the victim(s) is unknown. This is articulated in several international and regional instruments.

Statutory Limitation Periods

All international and regional instruments define as disappearances as continuing offences as long as the particulars of the fate and whereabouts of the victim(s) is not known [49] to which no limitation for criminal prosecutions applies. The I*nternational Convention for the Protection of All Persons from Enforced Disappearance,*[50] allows limitation of prosecution for disappearances only after the offence ceases. (Article 8.1 (b)) The *Inter-American Convention on Forced Disappearance of Persons,*[51] Article III states, "This offense [forced disappearance] shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been

[46] United Nations, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* , 24 May 1989, paragraph 9, available at: http://www.unhcr.org/refworld/docid/3ae6b39128.html [accessed May 2010]
[47] Economic and Social Council Resolution E/RES/1989/65 of 24 May 1989.
[48] GA Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, Articles 18 and 22.
[49] See: *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992, Articles 17; Rome Statute, Article 7/1(i); I*nternational Convention for the Protection of All Persons from Enforced Disappearance, Article 1(b)* & The *Inter-American Convention on Forced Disappearance of Persons,* Article III.
[50] Adopted by the General Assembly 20 December 2006 by resolution A/RES/61/177 and shall, in accordance with article 39 enter into force after the 20th ratification. 83 states have signed and 18 ratified as of May, 4, 2010. Cited as Doc. A/61/488. C.N.737.2008.TREATIES-12 of 2 October 2008.
[51] Adopted on June 9, 1994 and entered into force on March 28, 1996.

determined." The *Rome Statute of the International Criminal Court*[52] (Rome Statute) defines widespread disappearances and killings (executions) as international crimes "…not…subject to any statute of limitations" (art. 29) and affirms the duty of every state party[53] to, **"**exercise its criminal jurisdiction over those responsible for international crimes." The *Declaration on the Protection of all Persons from Enforced Disappearance* defines enforced disappearance as "a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified."(Article 17). *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[54] prohibit statutes of limitation from application to such crimes (Art. 6)[55] and require that domestic laws provide at least the same protection for victims as required by international law (para. 2(d).

The duty to prevent and punish through conducting effective investigations is made more urgent by the fact that many states are openly using disappearance and execution as a method of silencing arbitrarily identified opponents. The *Joint Study on Global Practices In Relation to Secret Detention in the Context of Countering Terrorism* equates secret detention and enforced disappearances, "Every instance of secret detention also amounts to a case of enforced disappearance".[56] This exhaustive report by four eminent experts notes the resurgence of the widespread use of secret detention/disappearance by many states around the world (e.g. the United States, China, Russia, Pakistan and Sri Lanka) contrary to the absolute prohibition contained in Article 7 of the *Declaration to Protect all People from Enforced Disappearances.*

> "No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances."

The Right to Truth

The right to truth about serious violations of human rights, such as disappearances and executions is an inalienable and autonomous right, which includes the right to know the

[52] Rome Statute of the International Criminal Court was approved by a vote of 120 to 7 in Rome on 17th July 1998. Countries opposed were: China, Iraq, Israel, Libya, United States, Qatar and Yemen. The Rome Statute entered into force 1 July 2000 and as of May 15, 2010, 139 states of have signed and 111 ratified the Rome Statute.
[53] Spain is a party to the Rome Statute having ratified in October 2000
[54] GA Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005, Articles 18 and 22.
[55] Article 6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.
[56] *Joint Study on Global Practices In Relation to Secret Detention in the Context Of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; The Special Rapporteur On Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and The Working Group on Enforced or Involuntary Disappearances Represented By Its Chair, Jeremy Sarkin,* February 19, 2010, A/HRC/13/42, para. 28. http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.doc

particulars of how, when, where against whom and by whom the violations occurred and the whereabouts of victims.[57]

The study and development of the right to truth was spurred by the widespread use by states of disappearances and executions to extinguish opposition in the 1970s and the subsequent practice of enacting amnesty laws to insulate perpetrators from accountability and prevent remedies. The current increase in state use of these disappearances and executions to annihilate suspected opponents is again accompanied by amnesty and immunity declarations.

The societal necessity and individual right to truth in order to, "…establish incredible events by credible evidence"[58] has been consistently confirmed by tribunals and articulated in reports and instruments, as an inalienable stand-alone right, fundamental to the rule of law, meaningful human rights enforcement and the eradication of impunity.

Although the major international human rights instruments such as the ICCPR, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) and *Convention against Genocide* do not specifically articulate the right to truth for victims of grave human rights violations, all these instruments include the right to effective remedies which includes the companion right to effective investigations of alleged violations and therefore, of necessity, infer the right to know the truth.

In 1997, Louis Joinet, the independent expert appointed by the UN Human Rights Commission to report on impunity, identified

> "the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violation of human rights, to the perpetration of aberrant crimes." [59]

Joinet recommended adoption of a set of principles establishing this inalienable right and ensuring that amnesty could not affect any proceedings[60]—such as the investigation approved by Judge Garzón—brought by victims.

The updated *Set of Principles to Combat Impunity,* adopted in 2005 by the Human Rights Commission, define disappearances and executions as crimes to which an imprescriptable and inalienable right to truth applies.

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[57] The right of families to know the fate of missing relatives was first codified by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 32 & 33.
[58] Nuremburg Tribunal U.S. Chief Prosecutor Robert Jackson, June 7, 1945.
[59] *Question of the impunity of perpetrators of human rights violations (civil and political)*, final report by Louis Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.l, Annex 1, Principles 3, 4 & 17. http://www.derechos.org/nizkor/impu/joinet2.html
[60] *Ibid,* para. 32. Amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy. It must have no legal effect on any proceedings brought by victims relating to the right to reparation."

> "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes."[61]

On 5 April 2005, the Human Rights Commission adopted a resolution directing the Office of the High Commissioner on Human Rights

> "to prepare a study on the right to the truth, including the information on the basis, scope, and content of the right under international law, as well as best practices and recommendations for effective implementation of this right, in particular, legislative, administrative or any other measures that m ay be adopted in this respect, taking into account the views of States and relevant intergovernmental and non-governmental organizations, for consideration at its sixty-second session." [62]

On 21 April 2005 the Human Rights Commission adopted a resolution citing "…exposing the truth regarding violations of human rights and international humanitarian law that constitute crimes" as one of the steps integral to the promoting and implementation of human rights.[63]

Notably, during the April 2005 session, the Human Rights Commission also passed a resolution prohibiting states from practicing, permitting or tolerating disappearances and calling on states to, "ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;"[64]

In early 2006, the Office of the High Commissioner of Human Rights reported on the right to truth to the 62nd Session of the Human Rights Commission.[65] The report which had been circulated to states and to intergovernmental and non-governmental organizations and included their feedback, concluded,

> "…the right to truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations."[66]
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> …

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[61] *Promotion and Protection of Human Rights, Impunity, Report of the independent expert to update Set of Principles to combat impunity,* Diane Orentlicher, Addendum, Update Set of Principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, Preamble paragraph B and Principles 2. E/CN.4/2005/102/Add.1.
http://www.idp-key-resources.org/documents/2005/d04560/000.pdf

[62] Human Rights Resolution 2005/66: Right to Truth, E/CN.4/RES/2005/66.

[63] Adopted without a vote. See chap. XVII, E/CN.4/2005/L.10/Add.17])

[64] UN Human Rights Commission, *Enforced or involuntary disappearances, Human Rights Resolution 2005/27,* April 2005. http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-27.doc

[65] *Promotion and Protection of Human Rights: Study on the right to truth:* Report of the HCHR, 8 February 2006 E/CN.4/2006/91. http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm

[66] *Ibid,* Summary, p. 2.

> "60. The right to truth as a stand-alone right is a fundamental right of the individual and therefore should not be subject to limitations. Given its inalienable nature and its close relationship with other non-derogable rights, such as the right not to be subjected to torture and ill-treatment, the right to the truth should be treated as a non-derogable right. Amnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth. The right to the truth is intimately liked with the States' obligation to fight and eradicate impunity."

The *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPPED),[67] ratified by Spain 24 September 2009, confirms the "right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."[68]

Amnesty Laws as Bar to Investigations of International Crimes

Can Spain's 1977 amnesty law prevent the investigation of over 100,000 unresolved and continuing disappearances and executions that occurred during a period of civil war and dictatorship? Can a law passed in 1977 relieve Spain of international and domestic law duties enacted—without reservations—since the 1977 amnesty law? Not surprisingly, the law appears to unequivocally oppose such a result as manifestly unjust, incompatible with the rule of law and inconsistent with the very concept of universal rights. In any event, the law requires that the interpretation and application of the 1977 amnesty law be determined by judges—as Judge Garzón was required—acting independently and free from interference and fear of punishment.

Observations of the Human Rights Committee and decisions of regional tribunals consistently determine that amnesty laws are impotent to prevent investigations of and remedies for, serious human rights violations such as disappearances and executions.

The Human Rights Committee has consistently observed that amnesty laws that prevent investigations, punishment and reparations for victims are inconsistent with the ICCPR. In January of 2009, the Committee issued its Concluding Observations on Spain's fifth periodic State party report, filed in February of 2008. In its Observations, the Committee welcomed the adoption of the 2007 *Ley de Memoria Historica* but expressed concern 'at the continuing applicability of the 1977 amnesty law.' The Committee reminded Spain that crimes against humanity are not subject to a statute of limitations and drew the State party's attention to its general comment No. 20 (1992), on article 7 of the ICCPR, "according to which amnesties for serious violations of human rights are incompatible with the Covenant […]"

> "…the Committee takes note with concern of the reports on the obstacles encountered by families in the judicial and administrative formalities they must undertake to obtain the exhumation of the remains and the identification of the disappeared persons.

[67] The *International Convention for the Protection of All Persons from Enforced Disappearances* opened for signature on 6 February 2007, Doc.A/61/488.C.N.737.2008.TREATIES. The convention comes into force 30 days after the 20th ratification. As of April 7, 2010, 83 states have signed and 18 ratified.

[68] *Ibid,* Article 24.2 "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard. "

> The State party should: (a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims' bodies, and provide them with compensation where appropriate."

These observations and recommendations to Spain are consistent with statements made by the Committee since 1992 concerning the enactment or proposed enactment of amnesty laws by ten other States parties.

In 1993, commenting on Niger, the Committee recommended, "…that investigations should be conducted into the cases of extrajudicial executions…" and "…agents of the State responsible for such human rights violations should be tried and punished. They should in no case enjoy immunity, inter alia, through an amnesty law, and the victims or their relatives should receive compensation."[69]

In 1994, commenting on El Salvador, the Committee expressed "grave concern" over the adoption of an amnesty law, "…which prevents relevant investigation and punishment of perpetrators of past human rights violations and consequently precludes relevant compensation."[70]

In 1997, commenting on France's report, the Committee observed,
"…the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France [under the ICCPR] to investigate alleged violations of human rights." [71]

In 1999, regarding Chile, the Committee reiterated that, "… amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future."[72]

In 2000, the Committee, in Concluding Observations concerning compliance with the ICCPR by the Republic of the Congo, noted that:

> "… the political desire for an amnesty for the crimes committed during the periods of civil war may also lead to a form of impunity that would be incompatible with the Covenant. [The Committee] considers that the texts which grant amnesty to persons who have committed serious crimes make it impossible to ensure respect for the obligations undertaken by the Republic of the Congo under the Covenant, especially under article 2, paragraph 3, which requires that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy.[73]

[69] CCPR/C/79/Add. 17, 29 April 1993.
[70] CCPR/C/79/Add.34, 18 April 1994.
[71] CCPR/C/79/Add. 80, 04 August 1997, at para. 13.
[72] A/54/40, 1999.
[73] CCPR/C/79/Add.118, 25 April 2000.

In 2003, the Committee, revisiting concerns previously about El Salvador's amnesty law[74], observed,

> "… the Act infringes the right to an effective remedy set forth in article 2 of the Covenant [ICCPR], since it prevents the investigation and punishment of all those responsible for human rights violations and the granting of compensation to the victims."
> …
> "The Committee reiterates the recommendation made in its concluding observations adopted on 8 April 1994, that the State Party should review the effect of the General Amnesty Act and amend it to make it fully compatible with the Covenant. The State Party should respect and guarantee the application of the rights enshrined in the Covenant."[75]

In 2008, the Committee observed in relation to the Former Yugoslav Republic of Macedonia, that amnesty laws, "…are generally incompatible with the duty of States parties to investigate such acts, to guarantee freedom from such acts within their jurisdiction and to ensure that they do not occur in the future." [76]

Regional tribunals have reached the same conclusions. In 1998, the ICTY,[77] dealing with the crimes of torture, quoted with approval the Committee's statement in General Comment No. 20 that amnesty laws covering serious violations of human rights are incompatible with the ICCPR and went on to rule that if a state sought to introduce amnesty laws providing immunity to perpetrators of torture, " Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful;" This is what happened in the Garzon case. As fascist sympathizers, the groups who filed the criminal complaint against Garzón have an obvious interest in preventing investigations.

The Special Court for Sierra Leone in *Prosecutor* v. *Morris Kallon*; *Prosecutor* v. *Brima Bazzy Kamara*,[78] the Applicants before the Special Court of Sierra Leone[79] argued that the amnesty granted under the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ("Lomé Agreement") deprived the Special Court for Sierra Leone of jurisdiction over crimes covered by the amnesty. The Appeals Chamber of the Court rejected this argument, holding a grant of amnesty for serious violations of international law violates a state's duties to the entire world.

> …the amnesty granted by Sierra Leone cannot cover crimes under international law that are the subject of universal jurisdiction. In the first place, it stands to reason that a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation erga omnes… given the existence of a treaty obligation to

[74] CCPR/C/79/Add.34, 18 April 1994.
[75] CCPR/CO/78/SLV, 22 August 2003.
[76] CCPR/C/MKD/CO/2, 17 April 2008.
[77] *The Prosecutor v. Anto Furundzija* [IT-95-17/1-T, 10 December 1998], at para. 155.
[78] *Prosecutor* v. *Morris Kallon*; *Prosecutor* v. *Brima Bazzy Kamara* Case No. SCSL-2004-16-AR72(E), Appeals Chamber for the Special Court for Sierra Leone.
[79] *Prosecutor* v. *Morris Kallon*; *Prosecutor* v. *Brima Bazzy Kamara* Case No. SCSL-2004-16-AR72(E), Appeals Chamber for the Special Court for Sierra Leone.

> prosecute or extradite an offender, the grant of amnesty in respect of [crimes against humanity, breaches of Common Article 3 of the Geneva Conventions and other serious violations of international humanitarian law] is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole.[80] [emphasis added]

Similarly, the ECtHR ruled in the case of *Ould Dah v. France*[81] The ECtHR ruled that to give national amnesty laws precedence over the international prohibition against torture would render the aims of the UNCAT meaningless. The case involved France's use of universal jurisdiction to prosecute for torture a national of Mauritania, notwithstanding a Mauretania amnesty law providing him with immunity. The court cited with approval the aforementioned ICTY Furundzija decision and observations by the Human Rights Committee.

This interpretation echoed am earlier decision of the IACtHR in *Barrios Altos v. Peru* where the court found that Peru's amnesty laws were incompatible with ACHR, specifically with the obligation of states to ensure respect for protected human rights (Art. 1(1)) and to harmonize their laws with international norms of protection (Art. 2) and the right of individuals to judicial protection in Articles 8 & 25.[82]

National tribunals have also concluded that amnesty laws breach domestic and international law. The Argentina Supreme Court in the Julio Simon (June 2005) case struck down the amnesty laws passed December 24, 1986 and June 5, 1987 granting immunity from prosecution to all members of the military except for top commanders for crimes committed during the Argentina's dirty war period, citing the aforementioned Barrios decision of the IACtHR. The Supreme Court of Chile reached a similar conclusion in the Sandoval[83] case, confirming the non-applicability of the amnesty law to a conviction and sentence for enforced disappearance.

The Brazilian Supreme Court in April 2010 reached a contrary decision (7 in favour, 2 against) not to revise the scope of application of the Brazil's 1979 Amnesty Law - 6683/79. [84] The law granted amnesty to persons accused of "political crimes and crimes with a political nexus" committed between September 2nd 1961 and August 15th 1979, except for terrorism, kidnapping, assault and attack. Through a writ of protection of fundamental rights, the Brazilian Bar Association requested the Supreme Court to clarify the scope and constitutionality of the amnesty law. The petitioner argued that crimes such as extrajudicial executions, forced disappearance, rape and torture committed by military agents, should not be considered political crimes or as crimes with a political nexus, and therefore should not be covered by the amnesty.

The Supreme Court upheld the interpretation that the crimes committed by members of the military regime were political acts and therefore covered by the amnesty. The Court further ruled that the law should be interpreted according to the historical context in which it was passed and that it was intended to extend the amnesty to members of the military government. In reply to the argument of the Bar Association that the amnesty law was not the fruit of a consensus, the Court ruled that the amnesty law was instead the result of a political agreement reached between the

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[80] *Ibid* at paras. 71, 73
[81] *Ould Dah v. France*, Requeté no. 13113/03, Council of Europe: ECtHR, 17 March 2009.
[82] *Barrios Altos v. Peru,* March 14, 2001, the Inter-American Court of Human Rights. (http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf)
[83] Juan Contreras Sepulveda y otros (crimen) casacion fondo y forma, Corte Suprema, 517/2004, Resolucion 22267.
[84] Fox News, "Supreme Court rejects change in Brazil's amnesty law to try alleged human-rights abusers" April 30, 2010 - this is not a source I would normally reference - can the actual case be found?

military and the opponents to the regime (including the Bar Association itself) and was a two-sided law that benefited both the civilians as well as the military. The decision also held that it is not within the competence of the Court to "rewrite" the amnesty law, an act of political nature, a function which belongs to the legislative branch.

Although the Brazilian amnesty law prevents prosecution for crimes committed during the military regime, it does not preclude the possibility for the victims to seek the truth and ask for remedies. However, access to documents is currently obstructed by two laws preventing the disclosure of information on the basis of national security reasons. The constitutionality of these laws is being challenged before the Supreme Court. On May 2009, draft legislation granting access to documents containing information about human rights violations committed by public agents was submitted by the government to the Congress.

With regards to civil remedies, victims of the military dictatorship can seek reparations through administrative and/or judicial means. The Brazilian government established two special commissions (the Amnesty Commission and the Special Commission on Those Who Died and Disappeared for Political Reasons) to recognize and document the situation of victims of the military rule and to grant them or their families material reparations. Judicial decisions have also granted indemnities for moral damages suffered by victims of the regime.

The Supreme Court decision does not close the debate on the Brazilian Amnesty Law. The validity of the law is also being contested before the Inter-American Court of Human Rights, whose jurisprudence has repeatedly stated that amnesty laws cannot prevent the prosecution and sanction of those who are responsible for serious human rights violations such as torture, extrajudicial executions or enforced disappearances. In the case, *Julia Gomes Lund et al. v. Brazil* (also known as the "Guerrilha do Araguaia" case), Brazil is accused of having arbitrarily detained, tortured and forcedly disappeared 70 people with the intent to exterminate the Araguaia guerilla. These crimes, committed during the military rule, could not be brought to trial because of Brazilian Amnesty Law.

This decision is contrary to the Vienna Convention on the Law of Treaties and to contemporary jurisprudence that domestic laws must be interpreted as consistent with international law obligations.

The Supreme Court of Honduras has issued two important rulings, first finding that amnesty could not be granted before the judiciary had adequately investigated the case, and subsequently ruling that the Constitution does not permit amnesty decrees that include common crimes committed by members of the military, as these could not be considered to be related to political crimes. (Honduran Supreme Court, Amparo en Revisión, Caso 58-96, Jan. 18, 1996 and Sentence of the Honduran Supreme Court, June 27, 2000, petition for declaration of unconstitutionality no. 20-99)[85]

A number of secondary sources cite the decision of the Spanish Sala de lo Penal de la Audiencia in the *Pinochet case* as a relevant case standing for the impermissibility of amnesties.[86]

[85] Margaret Popkin, "Latin America: The Court and the Culture of Impunity" (Crimes of War Project: December 2003)
[86] See, for example, Cassese, *supra* note 58; I was unable to find copies of these decisions.

Non-Retroactivity

With respect to the issue of retroactivity widespread disappearances and executions have been considered crimes against humanity since the Hague Convention of 1899. Also Spanish courts had convicted (April 19,2005) Argentina's Adolfo Scilingo for crimes against humanity which included summary executions during the dirty war period on the basis that, although these crimes were not part of Spain's penal code, they were, when carried out on a widespread scale, international crimes.

Conclusion

The duty of Spain and other states to conduct effective investigations of violations of international human rights and humanitarian law considered crimes as a necessary step to eradicating impunity is imposed by international legal instruments—e.g. the Rome Statute, ICCPR, UNCAT, ECHR, ICPPED—and confirmed by a wealth of jurisprudence from within Spain and international tribunals—e. g. the ICTY, ECtHR, IACtHR, the UN Human Rights Committee.

As an investigating judge of the Spanish National Court, Judge Garzón approved the investigation of widespread disappearances and executions committed during the Spanish civil war and Franco's dictatorship, crimes that are continuing and considered crimes against humanity. In rendering this decision, Judge Garzón was clearly acting within and in accordance with his judicial duties and powers to interpret and give effect to Spain's overarching international law obligations to investigate such crimes. In view of the preponderance of authorities binding on Spain mandating an effective investigation, any other decision would have been wrong and unsupported by law. We conclude that Judge Garzón has neither engaged in professional misconduct nor acted with criminal intent. Rather, he has acted fearlessly to give appropriate priority to Spain's obligations to investigate serious crimes under international law.

With Judge Garzón suspended there is now little or no chance of there being any judicial oversight.

The rising number of States again using widespread disappearances and executions to remove arbitrarily targeted people from the protection of domestic and international law necessitates a clear and forceful response from lawyers and human rights defenders around the world. Escalating state-sponsored disappearances and executions are occurring entirely outside the law, immune from judicial oversight. The prosecution and removal of Judge Baltasar Garzón from office signals an intention to neuter the capacity of courts to enforce international human rights and humanitarian law by authorizing and conducting investigations or prosecutions of state or former state agents. As military force overtakes the rule of law around the world, the collapse of these laws and standards threatens our survival.

Necessary supports to judicial independence—reasonably operating democracy, a free press, an active civil society and some effective and accessible mechanisms of accountability—are under attack or non-existent.

Lawyers and other human rights defenders around the world continue—for the most part—to work side by side rather than collaboratively on issues of critical global importance.

In Pakistan lawyers and civil society were successful. On March 16, 2009, two years after the Chief Justice Chaudhry was first sacked, his reinstatement was announced by Prime MinisterYousaf Raza Gilani. Then on July 31, 2009, the Pakistan Supreme Court, composed of a 14-member bench headed by Chief Justice Iftikhar Muhammad Chaudhry, unanimously declared the November 3, 2007 Proclamation of Emergency "unconstitutional, *ultra-vires* of the Constitution and consequently being illegal and of no legal e[ffect]"[87] The Court went on to declare all appointments of judges who had sworn the loyalty oath, "…unconstitutional, void *ab initio* and of no legal effect."[88]

Human rights and legal organizations must take a page from the Pakistan Lawyers Movement and join together to oppose the prosecution of Judge Garzón as a violation of the independence of the judiciary, a de facto rejection of the rights to an effective remedy and access to justice for victims of human rights violations amounting to crimes under International law. The prosecution seeks to criminalize legal actions to discover the truth of criminal acts by state officials and agents and to thereby expose them to the possibility of criminal liability.

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"A large responsibility for the denigration of the victims of these crimes rests with those who are indifferent ("los indiferentes") since it is their attitude which makes all aggressions possible. Without their silence and passivity the massacres which we have seen over the course of history, and which still continue, would not have taken place."[89]

[87] *Sindh High Court Bar Association through its Secretary and Nadeem Ahmed Advocate v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others* July 31, 2009, PSC at para. 21.
[88] *Ibid*. at para. 22 (iii).
[89] *Supra,* footnote 2, at page 4.