CORRUPTION IN SPAIN AND THE JUDICIAL 'FRAMING' OF JUDGE BALTASAR GARZÓN REAL (Part two)

by George Venturini *

A Kafkaesque experience before Spanish 'justice'

During half of January and the whole month of February 2012, Judge Garzón sat in his judicial robe next to his lawyer Francisco Javier Baena Bocanegra before the judges of the Second Chamber of the Criminal Division of the Supreme Court, defending himself from the charges brought against him by private individuals and organisations rather than the State. In fact, during investigations and at the trials, public prosecutors had recommended Judge Garzón's acquittal.

What was happening to Judge Garzón had undoubtedly a bad political odour.

The three private prosecutions had been brought by a curious outfit, a fictitious trade union called *Manos Limpias*, Clean Hands, directed by Miguel Bernad Remón, an official of the far-Right party *Fuerza Nueva*, another seedy organisation called *Libertad e Identitad*, Liberty and Identity and the *Falange de la JONS*, which is an acronym for *Juntas de Ofensiva Nacional-Sindicalista*, Phalanx of the Assemblies of the National Syndicalist Offensive - a Neo-Francoist set-up, and by lawyers connected with gaoled persons who had been involved in wide-spread corruption mainly for the advantage of people in the Popular Party, and by other lawyers who were accusing Judge Garzón of corruption.

The specific charge against Judge Garzón is: *delito de prevaricacion* - which means the use by a judge of his authority intentionally to subvert the course of justice, and that in violation of art. 446.3 of the Criminal Code.

This is a very serious criminal offence punishable by suspension from any judicial activity for up to twenty years. It is not clear why the judicial authorities did not previously institute any internal inquiry or disciplinary proceedings, for example, following the public debate which followed the order of Judge Garzón to open suspected Francoist era mass graves two years earlier, in September 2008, but instead preferred to rely on criminal accusations from far Right Francoist organisations in order to indict him in April 2010. Accepting that charge, the Supreme Court declared admissible three criminal accusations against Judge Garzón.

The chronological order of the cases was as follows.

The first case was unanimously accepted by the Criminal Chamber of the Supreme Court on 26 May 2009. The complaint consisted in the Judge having initiated and prolonged an investigation into the disappearance of at least 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, by the hand of deceased persons who had been the beneficiaries of the Amnesty Law of 1977; in addition it was claimed that the matter was not within the competence of the National Court.

The second case was unanimously accepted by the Supreme Court on 28 January 2010. The complaint alleged the commission of the crimes of graft and bribery for money that Judge Garzón was to have received from five banks to finance activities developed during his leave of absence at New York University in 2005 and 2006. The Judge was charged with having dismissed, after his return to the National Court, a complaint against the then president of the *Banco Santander*, Emilio Botín, and other directors of that company which a few months before had made a generous contribution of 302,000 Euros (presently, AU$ 375,000) to organise two series of symposia. Judge Garzón was accused, in exchange, of having dismissed the case. The lawsuit was filed by two lawyers: José Luis Mazón and Antonio Panea.

The third case was unanimously accepted by the Supreme Court on 24 February 2010 and was a complaint of *prevaricación* and illegal interception of communications to authorise the eavesdropping on the conversations that persons suspected in the *Gürtel* case were having with their defence lawyers. On 11 April 2011 Judge Jorge Alberto Barreiro ordered the process opened against Judge Garzón. The case had begun with a complaint lodged by Ignacio Peláez, who represented the businessman José Luis Ulibarri, accused in the *Gürtel* case. Peláez was subsequently joined by two other lawyers: José Antonio Choclán and Gonzalo Rodríguez-Mourullo, who represented Francisco Correa and Pablo Crespo, respectively.

Judge Garzón was charged in the three separate cases in May 2010, and suspended.

At the opening of the first case to be called, which was in fact the third admitted by the Court, Judge Garzón, who, as a senior official of the State had the privileged status of *aforado* - that is of a person who is protected with the equivalent of parliamentary immunity, and can be heard immediately by the Supreme Court, but only as a court of final instance - had asked whether he could be allowed to appeal to another division of the Supreme Court. No-one might have been less surprised than himself when he was told that this was not possible because the legislators had made no such provision. The problem has been raised occasionally in the Spanish Parliament but there was never time for what appeared to be a relatively minor matter. However, the United Nations *International Covenant on Civil and Political Rights* provides that there must always be some possibility of appeal. So, having put down a marker at his trial, Judge Garzón could still play the card of unfair process in the Constitutional Court - which of course is not the same as an appeal - or in the European Court of Human Rights in Strasbourg.

No investigating magistrate had ever been pursued by his fellow judges on three separate charges before. The changed order of the trials was suspicious. In the circumstances, it seems beyond doubt that the prosecution, which is not supported by the State, seemed malicious and perverse.

The timing and processing of the cases by the Supreme Court has created a strong impression of having been coordinated in order to terminate Judge Garzón's career. If so, the objective was achieved, but not without collateral damage to the reputation and legitimacy of the Spanish judicial system, and also of other parties involved. As for Judge Garzón, hardly any word may describe his Kafkaesque experience before Spanish 'justice'.

One could be forgiven for thinking that the main source of Judge Garzón troubles is his having opened in 2008 the first investigation of those responsible for the military *coup* of 17 July 1936, attempted to examine the disappearances of 114,266 people, as well as to indict Franco, 44 former generals and ministers, and 10 members of the *Falange.* He then ordered the exhumation of 19 unmarked mass graves. For this he was accused of perverting the course of justice and breaking the Amnesty Law of 1977.

From the very beginning, the Supreme Court used all means available to stop Garzón. On 17 November 2008 he had agreed to drop his investigation after state prosecutors questioned his jurisdiction. But this did not placate his opponents. The militant Right wing wanted his scalp.

In 2010 the Supreme Court went almost enthusiastically along and declared admissible the case brought by Rightist organisations.

However, with thousands demonstrating in support of Garzón, it soon became clear just why the Spanish Establishment had needed and still needed the *pacto del olvido*, pact of forgetting - meaning by that not only forgetting everything about the Franco's regime, but above all forgetting everything about the malodorous events which go collectively as the case of endemic corruption which has name *Gürtel*.

The Spanish Judicial Establishment clearly calculated that to have conducted an extensive trial against a Spanish judge for investigating mass murder by the Franco's regime in the name of preserving the sanctity of 'constitutional arrangements' would have backfired. They therefore set out to defuse a potentially dangerous situation.

When the time came, the Supreme Court would uphold the view that "the Amnesty Law [of 1977] was enacted with the full consensus of political forces in the constituent period which emerged from the democratic elections in 1977."

The Court would take the view that the law was "the result of a clear and patent claim of the political forces ideologically opposed to Francoism" incorporating "other positions, left and centre and even right", that it was "deemed necessary and indispensable in the operation carried out to dismantle the framework of the Franco regime ... no judge or court, in any way, can call into question the legitimacy of this process." and that "national reconciliation" was achieved in part due to the Amnesty Law which prevented "two Spains facing each other." This was "the will of the Spanish people."

The Amnesty Law had nothing to do with the will of the people. The law was the result of a bad compromise between the Communist and Socialist parties on one hand and the residual forces of *Franquismo* on the other. Most of the judges sitting in judgment of Garzón are dutiful beneficiaries of the latter.

Judge Garzón defenders have consistently argued that all three cases are a form of revenge by the many enemies he has made.

On 14 May 2010 the *Consejo General del Poder Judicial*, General Council of the Judiciary. C.G.P.J. voted unanimously - 18-0 with three abstentions - to suspend Judge Garzón. The C.G.P.J. was bound so to decide once Garzón's final appeal to avoid the trial was rejected two days before. The panel which suspended Garzón was made up of political appointees and deeply divided along Party lines.

At the end of October 2010 the re-election of Judge Juan Saavedra Ruiz to the Supreme Court Criminal 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 despite glaringly contrary decisions of the European Court of Human Rights.

On 17 December 2010 Judge Garzón challenged five of the seven Supreme Court justices who could be appointed to judge him for his activities in respect of the exhumation of Franco victims. He alleged that President Juan Saavedra Ruiz, and Judges Juan Ramón Berdugo, Joaquín Giménez, Francisco Monterde and Adolfo Prego Oliver should have been disqualified 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. These five judges had intervened in the investigation of the case, and the defence claimed that consequently - and according to a strict interpretation of the principle of *nemo iudex in causa sua* - such intervention demonstrated that the five judges had an indirect interest in the outcome of the process.

The background to this case - perhaps to the three cases - is that 'conservative' opinion generally asserts that "the dictatorship" is past, and exhuming its less savoury activities is injurious to modern Spanish political interests - as might have been Judge Garzón's extraterritorial attempts to accuse foreign nationals of crimes against humanity. That was a source of embarrassment for Zapatero and his colleagues once abroad.

The politicisation of the Spanish Judiciary would soon be in full display. The Supreme Court president, Judge Juan Saavedra Ruiz, is on record as saying that he is totally against judges like Garzón. "Star judges are opportunists." he said. Another Judge, Adolfo Prego, is the patron of the Right-wing Defence of the Spanish Nation pressure group.

From the beginning, the case against Judge Garzón has been motivated by political and personal vendettas, and the timing of the relevant decisions is no exception. Such haste in a case which had been moving normally through the system for some months has the whiff of malice; the decision to suspend was made even though - it seems - the Attorney General's Office still had questions about the case.

Despite the fact that the decision was widely expected, many in Spain were treating it as marking the end of Garzón's career, regardless of what the verdict in the trial might be. Judge Garzon's lawyer at the time, Gonzalo Martinez-Fresneda, said as much.

Of course, Garzón has been 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 *Gűrtel* case, a corruption case which exploded in 2009 and involved high figures of the Popular Party - a linear successor of *Franquismo* and then the Right-wing opposition - 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. Because of that the third case in order of admission would become the first to be heard.

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, mountebanks' tools.

On 23 December 2010, in an interview with Iñaki Gabilondo of 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 had also been investigated. "I feel totally helpless." he said. "Where is my presumption of innocence ?" he asked disconsolately. 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."

Prominent among such prejudiced judges was Juan Saavedra Ruiz, the President of the Criminal Division of the Supreme Court. Born in 1943, he had joined the judiciary in 1973, in time to pledge allegiance to Franco's regime. He was appointed judge of the Supreme Court in 1999 and in December 2004 he applied for the headship of the Criminal Division. In July 2005 he had become President of the Second Chamber of the Supreme Court, a position to which he was re-elected in October 2010.

On 14 January 2011 the Supreme Court halted the first accepted 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 Identitad* - 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 Organica del Poder Judicial* - Judicial Power Organisation Act. The judges recused by Judge Garzón 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 Organica 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 Luis Navajas explained that the prosecution should guarantee "objective impartiality" of the Court for Judge Garzón.

Considering that 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 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.

Perhaps in this complex series of operations behind the scene, a little item of news might have gone amiss. It was contained in an article, published by *El País* on 19 April 2010, and entitled: *"Garzón: 'Ahora y así, no me puedo ir' "*, with the sub-title: "*Al entorno del juez llegan mensajes de que si abandona la Audiencia Nacional se archivarán los tres procesos contra él y se arreglarán todos sus problemas.*" It freely translates: "Garzon: 'Now and in this way, I am not going anywhere.' Strong hints circulate around the judge that if he were to

leave the National Court the three cases against him would be abandoned and all problems would be 'fixed'."

No such suggestion had been made directly to the Judge, but it had been reported that he could be appointed to a position concerning relations with the whole of Latin America, a position which as yet did not exist but would be set up expressly for him. He confirmed that no one had made such an offer. According to another rumour, he would have been offered a position at the International Criminal Court, where he would be second to Luis Moreno Ocampo, who was said to welcome the possibility. But neither offer had materialised.

Clearly such positions cannot be obtained only because of one's reputation, but require the support of one's government. But during the second Aznar Government, when there was such an opportunity, neither the Government nor the P.S.O.E. would trust Baltasar Garzón because of his independence and refusal to be subjected to power.

As far as the governments were concerned, a support from the minister of the interior would have been necessary and the independence that Garzón had shown in pursuing E.T.A. and the para-government G.A.L. would not warrant any confidence. The verdict was: *Garzón resulta incómodo.* Garzón is an inconvenient person, uncomfortable.

He might have sought an appointment as president of the Criminal Division, maybe of the Court. "A judge with a biography so spectacular, that among other achievements he has been nominated for the Nobel Peace Prize, would not even have considered entering the competition for one of those positions." opined the *El País* article, although "there were those who thought that had he been offered one of them" *se le habría neutralizado* - he would have been "neutralised." If somehow he had been flanked by others, at least two colleagues, "his power, to investigate the thorniest issues from *his* court, would have been over." Of course, one should always consider that a person like Garzón would not have been satisfied with a purely decorative position, continued the article.

A more interesting rumour was circulating: that Prime Minister José Luis Rodríguez Zapatero had instructed the State Prosecutor Cándido Conde-Pumpido, who was a judge seconded from the Second Chamber of the Supreme Court, to settle the matter of the cases against Judge Garzón, and thus to avoid the enormous discredit that proceedings against the judge in

the Supreme Court were causing in international circles. The editorial in *The New York Times* of 8 April 2010, *An injustice in Spain*, which portrayed Judge Garzón as a courageous and controversial judge, and which stated that real crimes are the disappearances and not the investigation pursued by the Judge, as well as other foreign media - such as *Le Monde, The Economist* and *The Guardian* - 'embarrassed' Zapatero and his ministers when travelling in Europe and America.

Of course, it was not something that either Zapatero or Conde-Pumpido would confirm. It is doubtful that it be so, but even if this was true, the Criminal Chamber of the Supreme Court, in its overwhelmingly 'conservative' majority, was now impervious to suggestions of the Government. *"Los magistrados del Supremo* - the article continued - *en su inmensa mayoría, están hartos de Garzón desde hace mucho tiempo. Le consideran vanidoso, mucho peor juez que ellos mismos y la más refulgente supernova en el firmamento de los jueces estrella."* The judges of the Supreme, the vast majority, have been fed up with Garzón for a long time. They consider him conceited, a much worse judge than themselves and more like a shining *supernova* in the sky of the *star judges.* Those judges had reached the top of their profession and had the highest opinion of themselves, though they had gained far less fame, resulting in a much smaller financial profit from courses and conferences in which they participated. They wanted to teach Garzón a lesson and put in his place someone who would be more acceptable.

Judge Garzón had - in their view - repeatedly embarrassed the Supreme Court. Not only that, but now the Supreme Court considered that the judge was responsible for the bad reputation that the Second Chamber was receiving from considering the three cases against him, especially with regard to the crimes of the Franco regime, even if in all three cases the prosecutor had spoken against the complaints. For all that, there was a second type of messages to Garzón and his friends: "Stop immediately the media pressure against the Supreme Court. That does nothing but hurt you." That, of course, assumed that the magistrate had a magic wand with which he could influence newspapers, radio and television and even the whole crowd of advocates and admirers who had emerged because of the three processes, and especially the many associations for the Recovery of Historical Memory which consider grossly unfair that Garzón has to sit in the dock as defendant for trying to investigate the crimes of *Franquismo*.

The fact is that what at first would be no more than a slap on the wrist for Garzón, frowned upon by some sectors of the Government and in the prosecution itself for having slighted the Historical Memory Law and having tried to build a criminal case on what for them may only be an administrative problem, following a return and the strong support of the Right and the fall of the judge who had opened the *Gürtel* case, had led to a whirlwind of ominous conclusion.

It was then a case not of law but simply of blackmail, something like this: "Resign and we will not prosecute you."

The response from an indomitable Judge was not long coming.

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The first case to be heard was that of the wiretapping of conversations between a group of suspects, who were in gaol while the Judge was investigating them for corruption, and their defence lawyers. Judge Garzón, who opened the investigation, was accused of breaching the right of a confidential client-lawyer relationship, necessary for the well-functioning of the judicial system.

Sitting in judgment of Judge Garzón were:

Joaquín Giménez García, President,

with Judges
Andrés Martínez Arrieta
Miguel Colmenero Menéndez de Luarca
Francisco Monterde Ferrer
Juan Ramón Berdugo Gómez de la Torre
Luciano Varela Castro
Manuel Marchena Gómez.

Judge Garzon testified that he ordered the wiretaps, in early 2009, on suspicion that suspects in the case were involved in money laundering in collusion with their lawyers while they were in gaol. He argued that the wiretaps were necessary because the defendants continued

to operate their money-laundering scheme from gaol through their lawyers. This assessment was confirmed by four members of the police's financial crimes division. It was known that the Prosecutor's Office had wanted the case dismissed.

On the face of it, it sounds bad that a judge was 'bugging' conversations between prisoners and their lawyers, but a closer look reveals something rather different. Owing to the structure of the Spanish court system he could not have been involved in the definition of any cases concerning those prisoners so he had a good point when he said that he was not interested in finding out what their defence would be. In fact, it was the lawyers, not the prisoners, in whom he was interested; he believed that they were receiving instructions about money-laundering operations from their clients in gaol. One of the lawyers was subsequently convicted for money-laundering.

Nevertheless, the Supreme Court held in the case 20716/2009 and by judgment 79/2012 (Rapporteur: Judge Miguel Colmenero Menéndez de Luarca) delivered on 9 February, that Judge Garzón's methods, even though it had been supported by the police, state prosecutors and some of his colleagues, "arbitrarily and substantially restricted the right of defence of the suspects ... without any minimally acceptable justification." And again: "The central question to be resolved in this case is related to the fundamental right of defence for the suspect, against the legitimate interest of the State to pursue crimes." the sentence said. "It is not possible to have a just process if the right of defence is essentially eliminated." In a strongly worded 69-page judgment, the seven judges said that Judge Garzón caused "a drastic and unjustified reduction in the defence's strategy" and trampled on the constitutional rights of alleged *Gürtel* corruption network ringleaders Francisco Correa and Pablo Crespo, and other suspects in the conspiracy.

The fact that several of the suspects are members of the Right-wing Popular Party, currently in government, adds fuel to speculation about the chronic politicisation of the Judiciary. Employing the same words as in a preliminary examination by investigating Judge Alberto Jorge Barreiro, the sentence added that Judge Garzon's investigation had the effect of "admitting practices which now are found only in totalitarian regimes where anything is considered valid to obtain the desired information of interest, or assumed to be of interest, to the State, dispensing with the minimum effective guarantees for citizens and thus turning the constitutional and legal provisions on this matter into mere hollow proclamations."

The verdict in the victims of Franco case, which had ended its public hearings only the week before, was awaited with close attention by human rights groups and advocates of democracy across the world. At its heart lay the painful and deeply contentious question of whether Spain's much lauded 'transition to democracy' in the 1970s dealt honestly with a grim legacy, or simply buried it.

Yes, of course, the phone taps were approved by the prosecution and by other judges who succeeded Judge Garzón in the investigation. On a plain logic, the prosecutor and the other judges could be or should be prosecuted for the same crime. This was occurring in a case in which the prosecutor had argued that there were no grounds for a criminal proceeding. Only Garzón would be tried and punished - disbarred for eleven years, and fined 2,500 Euros (AU$ 3,100).

Convicting a jurist over a court ruling is an appalling attack on judicial independence.

Judge Garzón was stung by the Court's affirmation that he had behaved as if working for a totalitarian regime, fishing indiscriminately for evidence and trampling on defendants' rights by wiretapping gaol conversations with defence lawyers. After hearing the guilty verdict, Judge Garzón said: "This sentence, lacking in juridical basis or supporting evidence, eliminates any possibility of investigating corruption and its associated crimes. Instead, it makes room for impunity and, in its fervour to impugn one particular judge, crushes the independence of the entire Spanish judiciary."

He defended his position: "I have always strictly complied with the rules, I have defended the rights of defendants and victims in very adverse situations." he said. And again: "I will take whatever legal measures are necessary to fight this sentence and will take all possible actions to try to minimise the irreparable damage done." ... "Throughout this case my rights have been systematically violated … in order to reach a sentence which was effectively decided on months ago."

Having already been tried in the country's highest court, however, he cannot appeal, or ask for a retrial. He can only appeal to the Constitutional Court or to the European Court of Human Rights.

Judge Garzón's lawyer, Javier Baena Bocanegra, said: "We shall carry on fighting. We have a long road ahead, but I believe both he and I are more than strong enough."

During the preparation for the trial Judge Alberto Jorge Barreiro, in his ruling of 19 October 2010 expressed the view that Judge Garzón had been "quite wrong" in wiretapping and, without giving reasons, but only considering the "mere possibility" that the lawyers were parties in the web of corruption in the outside world, and despite not having any clear suspicion of the lawyers. This action "had ultimately compromised the right of defence" and thus, Judge Garzón "turned the exercise of this fundamental right into a suitable source of self-incrimination of the gaoled accused persons, depriving them of the necessary defence strategy suggested by their lawyers."

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As the background to the second case one should always keep in mind the pretence that the 'constitutional settlement' of 1978 involved a *pacto del olvido.* This was part of a huge compromise: in a nutshell, the Right pretended, as it turned out, to accept democracy, including the Communist Party, and the Left accepted the monarchy, rather than a return to the Republic, and a 'market economy'. Then everyone forgot what had happened and moved on - as the current parlance goes.

Judge Garzon's reputation as human rights defender did not protect him from - and indeed may have contributed to - the wrath of right wing judges, with ties to the old Franco regime. Garzón "challenged the very nerve centres of right wing political power.", said Dr. Juan E. Garcés, the chief lawyer in the Spanish case against General Augusto Pinochet, "by going after corruption among the elite of Spain's right wing party." He re-opened the issue of "impunity granted by the very people who collaborated with or approved of the kidnappings and murders." They are the inheritors of Franco, who had been heavily supported by German and Italian Fascists, and who in turn supported the Nazi after they invaded Poland at the beginning of the second world war, only five months after the conclusion of the Spanish civil war. It is this *milieu* which reminded to W.H. Auden "The unmentionable odour of death [offending the 1 September 1939] night."

There was now a new type of war, played with an obscene chorus of brutal insults which had been raining down on Judge Garzón in the Right-wing media ever since he uncovered the *Gürtel* corruption network and was rising even more confident now that Baltasar Garzón Real had been convicted - a kind of war dance to celebrate his conviction. It became the equivalent of an assault by a pack of wild dogs.

Judge Garzón's struggle to achieve worldwide justice in cases of human rights violations was portrayed by those media more like a permanent violation of human rights in itself - because for them, the corrupt or violent ruler's right to impunity comes before all else. Judge José Castro, who is investigating the *Urdangarín case* had better be ready to face the same dog pack, if he insists on treating the Duke of Palma in line with the principle of equality before the law.

Before all else, in the second case, would come the need to punish the judge who had dared to question the legitimacy of Franco's rising in 1936, a rising which still underpinned the hegemony of the Spanish Right in the economic and social spheres, with a kind of regurgitation in the judicial one. Zapatero had awaken a sleeping tiger with his Historical Memory Law, which, after all, was only intended as a concession to the victims' families - if not as a cosmetic gesture. A report unfavourable to Judge Garzón's strong interpretation of that law, prepared by the Prosecutor Zaragoza - who, it should be said, was a Zapatero man - laid the first stone in the second case against Judge Garzón, who had naively supposed that what had been possible in other countries would be possible in Spain: formal public acknowledgement of the Franco regime's *crimes against humanity*.

As Manuel Fraga Iribarne had said while serving Franco for years and a variety of positions: "Spain is different." The recently departed Fraga went on to triumph in 'democratic' Spain. What took place there is more a shrewd 'reform' of the Franco regime from within. Instead of making a clean break with the dictatorial aspects of the past, and with the crimes which went on until Franco's death, Fraga preached to the Spanish Right that they must act on 'democratic principles', but in the awareness that Franco's rising suppressed a rotten Republic, and that his regime was a golden age. And so they did. Heading a minority government during his first mandate, José María Aznar spoke with some caution but, with the return of the Socialists in 2004, Fraga's line had made headway in the mentality of the Popular Party and its large *entourage*.

A scapegoat was needed - and who better than the man who started judicial proceedings aimed at putting a criminal regime in its proper place in history ? Those who would write that the courts must now give way to the work of historians forget that Nuremberg was crucial to the final rejection of Nazism. But in Spain the heirs of the guilty had already convicted and eliminated the Judge.

That was the infernal purpose of ordering the trials the way it was done, possibly under the grand direction of Juan Saavedra Ruiz.

Judge Garzón's second trial lasted two weeks. Many civil war victims took the stand to defend Judge Garzón's actions.

There was something truly demonic in the acquittal of Judge Garzón in the second case, almost as if the Gran Master of the Inquisition had presided over the works.

The charge against Judge Garzón was that he had abused power by ordering the exhumation of 19 mass graves in Spain in order to assemble a definitive national registry of civil war victims, despite the Law of 1977 which provides amnesty for Franco-era crimes. Judge Garzón testified in the trial, denying that his investigation was politically motivated, stating that he was seeking justice for the victims of the crimes, and rejecting the notion that the 1977 Amnesty Law covered widespread human rights abuses. His remarks were consistent with his previous statements defending the validity of the investigation by insisting that he acted within the bounds of the law and appropriately applied the law at all times.

Consider also that Judge Garzón had actually taken himself off the investigation for legal reasons well before he was ever indicted.

On 27 February 2012 the Supreme Court, in its 6-1 vote and 63-page judgment 101/2012 in the case 20048/2009 (Rapporteur: Andrés Martínez Arrieta), would condescendingly say that Judge Garzón had misinterpreted Spanish law but had not knowingly and arbitrarily violated the limits of his jurisdiction, as would be required for a conviction. The Court concluded that, though Judge Garzón had overstepped his authority and "exceeded himself in the interpretation of the law" by investigating the Franco-era disappearances, his actions did not constitute an abuse of power. Hence the Court voted 6-1 to dismiss the charges.

Sitting in judgment of Judge Garzón were:

Carlos Granados Pérez, President

with Judges

Andrés Martínez Arrieta
Julián Sánchez Melgar
Perfecto Andrés Ibáñez
José Ramón Soriano Soriano
José Manuel Maza Martín
Miguel Colmenero Menéndez de Luarca

The Supreme Court works - the judgment pointed out - on the assumption that the Spanish legal process cannot be used to hold 'Truth trials'. These 'trials' are intended to investigate crimes in the knowledge that the guilty cannot be punished because their criminal liability had become extinct by death. In Spanish law a criminal process can only be started to investigate crimes committed by an accused who is alive. Therefore, the search for historical truth - though "necessary and legitimate" - is neither the function of the criminal process nor of an investigating judge. Such a search should be conducted by other state institutions. In short, historians have a role as do judges, but they must not be mixed. Hence, disregarding its own responsibility and complicity, the Court drew a separation between history and justice, between judges and historians, pitting historical and forensic truths against one another.

The legal identification of the disappeared is not an issue the Spanish legal system is competent to determine.

The Supreme Court also acknowledged that Judge Garzón attempted "to improve the situation" of civil war victims who "have the right to know the facts and recover their dead" relatives. It almost recognised the legitimacy of the demands by relatives of the victims, who according to the decision have a "right to truth" - what is rather called the "right to know" or the "right to mourn" - about what happened to their loved ones and are justified in seeking effective legal recourse. But the Court did not go that far. Instead it

opted for a weak interpretation of the right to truth, limiting it to the merely academic study of "historical truth" open to interpretation and debate by historians - not judges.

The judges rejected Judge Garzón's firmly held position that international law overrules a national amnesty, and said that victims must accept the domestic legal framework negotiated by Spanish politicians after Franco's departure.

Regarding the facts which led to the opening of the procedure, the Supreme Court stated that neither the interpretation by the defendant of the statute of limitations nor of the Amnesty Law were appropriate.

The judges launched an impassioned defence of the Amnesty Law of 1977. That Law was part of a process of 'transition' from an 'authoritarian state' to the current 'democracy'. This 'transition' - exalted in almost near-mythical words - is considered exemplary and was the result of the embrace between the "two Spains" which previously faced each other in confrontation in the civil war. Therefore it was not a law imposed by the victors of the conflict to enjoy impunity for their actions. It was not a law passed by bearers of power to cover up their own crimes, but a law which was enacted with the agreement of all political forces acting with a clear sense of reconciliation.

For that reason, that is to say, because the 'transition' expressed the will of the Spanish people embodied in a law, no judge or court can in any way call into question the legitimacy of such a process. It is a law which may be repealed exclusively by Parliament.

As far as the likely perpetrators of the facts giving rise to this criminal process are concerned, it was a well-known fact that such likely perpetrators had died; they were historical figures, such as General Franco; or it was logical to think that such deaths had occurred, bearing in mind the time elapsed between the facts and the start of proceedings.

Taking into account, *inter alia*, these arguments, the Supreme Court stated that Judge Garzón's decision to open the abovementioned criminal process was an erroneous interpretation of the law. But one thing is to make an erroneous interpretation of the law and another to consider it a crime of *prevaricación*, judicial misconduct. "This erroneous application of law does not constitute the offence of exceeding authority." the Court said. This

crime does not punish an erroneous interpretation but the interpretation which is objectively contrary to the legal order in the sense that it is not admissible.

Judge Garzón was wrong to investigate Right-wing atrocities from the civil war and to call them crimes against humanity because back then the legal concept did not exist. "It is not possible in our procedural system to open an inquiry without the final goal of imposing a penalty." the Court said.

The Supreme Court noted that there are court decisions and opinions of jurists founded on similar legal basis to the grounds which support Judge Garzón's decision to initiate the process. At the national level, the Court would mention in this regard opinions of the public prosecutor before the Constitutional Court and the *Audiencia Nacional*, the National Criminal Court in two procedures. At the international level, the Court recalled the 17 January 2006 judgment of the European Court of Human Rights in the case *Kolk and Kislyiy* v. *Estonia*, as well as resolutions of the United Nations Committee of Human Rights. [The mentioned case was on balancing the prosecution of crimes against humanity and non-retroactivity of criminal law. There, the European Court of Human Rights held that the punishment of two individuals in 2003 in Estonia for the deportation of civilians to the Soviet Union in 1949, classified as a crime against humanity, was not contrary to the principle of non-retroactivity of criminal law.]

As a result, the Court drew a net line between international and domestic law, opting for a nationalist stance. Judge Garzón's key error - the Court said - was categorising the acts in question 'crimes against humanity' in an obvious attempt to bypass the 1977 Amnesty Law. The Court would hear nothing of it, insisting that domestic laws trump international standards. In reality, crimes against humanity may just be too loaded a term, an ugly marker for political crimes that the Spanish Right still excuses.

Furthermore, the Supreme Court had taken into account the fact that Judge Garzón intended with his action to improve the situation of victims or members of their families whose right to know the facts and recover their dead to honour them is recognised by laws recently passed by Parliament, such as the Law for the Recovery of Historical Memory. .

For all the above 'reasons' the Supreme Court resolved to acquit. This was the joint opinion of 5 of the 7 judges who made up the Chamber. Judge Julián Sánchez Melgar filed a concurring opinion. He agreed that the charges should be dismissed, but on the ground that Judge Garzón lacked the necessary intent to abuse the judicial function.

The sole dissenting judge, Judge José Manuel Maza Martín, waxing indignantly about even having to listen to the relatives of victims, stated that Judge Garzón should have been convicted of wilful violation of the law for instigating a procedure to serve the subjective intentions of the complainants against people already dead and for crimes which had been amnestied or, at least, were clearly prescribed by the statute of limitations. The good intentions of Judge Garzón were irrelevant, the dissenter stated.

The acquittal of Judge Garzón reveals how things are not always what they appear to be - and underlying rationales, better still rationalisations, can be as significant as final decisions. Even though the Court did not find Judge Garzón guilty, its politicised reasoning challenged human rights accountability and vindicates Judge Garzón's broad pursuit of universal jurisdiction.

For all their talk about 'democracy', and obviously the rediscovery of a sense of formal justice, the Court's sentence had been written by judges who agreed to prosecute Judge Garzón in response to a handful of Right-wing extremist groups, neo-Francoist actually, and against the advice of legal experts. It is the same Court which had already barred Garzón from the bench for 11 years, after a widely criticised trial. And it is the same Court which was acting more like the inheritor of Franco's legacy than a guarantor of modern, democratic governance.

The reasoning is strangely reminiscent of authoritarian legalism, an insular and privileged space closed off to social opponents, in a rationalisation which manages to perpetuate a cycle of abuse. Under the guise of an acquittal, that reasoning slammed the door on legal accountability.

The final conclusion to be drawn from the Court's sentence is that it deliberately intended to humiliate a distinguished, and internationally recognised jurist, Judge Garzón for failing the exam. And they counted on there being no reparation.

Humiliation had been well planned, long time before the trial.

On 10 April 2010 Judge Garzón had appealed against the indictment. He then alleged 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 Varela's summary motion to shorten the length of the trial.

There is one further particular of judicial chicanery.

Doubts about the Supreme Court's impartiality had reached a new level on 21 April, when Judge Varela, noting that the plaintiffs' briefs against Judge Garzón included confusion of fact and law and unwarranted references to Judge Garzón's personal life, did not dismiss the charges; instead he returned the briefs to the plaintiffs with suggestions on how to improve their case. Judge Varela's was a stunning departure from judicial discretion - if not propriety. Some legal experts suspected that the Supreme Court, perhaps to avoid further international embarrassment, might have been manoeuvring to bar the *Falange Española* from the trial altogether. The re-born *Falange Española* is the inheritor of the Party which had provided eager gunmen for Franco's death squads. It had joined the complaint but was later barred from the next stage of the case.

On 22 April 2010, in a 14-page judgment, Judge Varela concluded that Judge Garzón had manipulated the course of justice by knowingly violating the 1977 Amnesty Law which shields all sides, including members of the Franco dictatorship, from legal prosecution. In addition, in Judge Varela's view, the 2007 Law for the Recovery of Historical Memory explicitly conferred on the lower courts - and not on Judge Garzón's court - jurisdiction over locating and excavating the mass graves which still dot the Spanish countryside.

Judge Varela charged that Judge Garzón, in order to overcome these restrictions, had tried to create law rather than administer it.

It is interesting to read in the indictment the way in which Judge Varela justified the need to take Judge Garzón to court: "[Judge Garzón's] actions seem to imply that there has been a pact of silence about the actions taken by the previous regime, exposing all the political and judicial systems to the criticism of having been insensitive to the defence of human rights and

defence of the forgotten." Judge Varela intended to prevent Judge Garzón from continuing his trial of the Francoist regime because it would reveal that there has been a *pacto del olvido* and that neither the State nor the courts have put into practice the Law for the Recovery of Historical Memory and have done nothing in defence of the forgotten. In that way, Varela intended to save the honour of the Spanish State and of the courts and to avoid any further embarrassment to the very powerful forces responsible for that silence and for that democratic insensitivity.

On 24 April 2010 Judge Garzón had presented an appeal to the Supreme Court against the judge investigating the case, Luciano Varela for giving advice to the neo-Francoist plaintiffs about the 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 their series of indictments and to meet a deadline, an action that he defined as "atypical, extra-judicial and prejudicial to one of the parties" - *i.e.* 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 out from the case until the Supreme Court would rule on the appeal.

Vendetta would be exerted elsewhere in February 2012.

* * *

The third case was the one in which Judge Garzón was accused of soliciting sponsorship payments, for lectures he gave at New York University while on leave in 2005 and 2006, from banks and other companies four of which were being investigated in his own courtroom or other courtrooms in the National Court.

The allegation was that Judge Garzón, after his return to the National Court, on 27 November 2006, had archived a case against the director of *Banco Santander*, Emilio Botín, in return for payment for some courses sponsored by the bank in New York between 2005 and 2006. The charge previously archived was that the sum of 1.2 million Euros (presently, AU$ 1.5 million), which had been found by a lower court to be in fact 216,000 Euros (presently, AU$

270,000), had been paid to Judge Garzón. As it turned out, it had been paid directly to a university fund.

Judge Garzón's accusers had called for him to face five years' gaol and 30 years' suspension from professional duties.

Five Spanish firms - *Banco Santander*, *Banco Bilbao Vizcaya Argentaria*, *Telefónica*, *Compañía Española de Petróleos, S.A.*, Spanish Petroleum Company, C.E.P.S.A. and *Endesa, S.A.*, *Empresa Nacional de Electricidad, S.A.*, the largest electric utility company in Spain - had given the university a total 1.24 million Euros (presently, AU$ 1,55 million) to sponsor Professor Garzón's lectures.

All companies except for *Endesa* had been the subject of investigations in the National Court.

On 13 February 2012 the Supreme Court, by sentence in the case 20339/2009, announced that it had quashed the bribe-taking case against Judge Garzón. The ground for the quashing was - according to the Court - that a three-year statute of limitations had passed.

The Supreme Court investigating Judge Manuel Marchena Gómez insisted that there was clear evidence of wrongdoing involving the equivalent of some US$ 2.5 million (presently AU$ 2.35 million) but that "opening a hearing is not pertinent", because the complaint was originally laid on the 12 June 2009 and the last payment was made on 17 May 2006, the three-year statute of limitations applicable to cases brought before the Supreme Court had been exceeded by 25 days. It was not clear - and it was only a matter of speculation - why the case, previously archived by a provincial court on 27 November 2006 was not referred back to the lower court where a fifteen-year statute of limitations applies provided there is disclosure of 'further and better evidence'.

The judgment landed just four days after Judge Garzón had been convicted and disbarred for ordering wiretaps in a corruption probe, a decision criticised by his supporters as a political stitch-up.

In fact, there seemed to have been no evidence at all and in addition - as will be seen - there were errors of form in the way the case had been dealt with. The whole investigation

smacked as totally persecutory, indeed political and was an absolute scandal which would have done untold harm to Spain's international reputation.

This is an even murkier case of victimisation of Judge Garzón. It had been pursued in a *shysterish* way.

In the already mentioned 23 December 2010 interview with Iñaki Gabilondo of C.N.N., Judge Garzón had complained that he felt as the victim of a hunt by the Criminal Chamber of the Supreme Court.

Three days after that interview, on 26 December 2010, it became known that the investigation of Judge Garzón's bank accounts, which had been ordered by Supreme Court investigating Judge Marchena to the *Brigada de Delincuencia Economica 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 was the case because Judge Garzón had declared additional income from conferences which income had been corresponded by cheques. In sum, the report was "overtly negative" for what Judge 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. Judge Marchena denied that process on a fanciful, as well as profoundly offensive, 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 as at 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 was quick to deny this. As a career prosecutor, without an appointment as investigating judge, Judge Machena, according to prosecutors, has served under all flags. He could also have joined the office of Conde-Pumpido, but a powerful friend had 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 Popular Party, issuing fairly bizarre, questionable decisions.

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 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 Mutual Penal* - Bilateral Treaty of

Mutual Assistance in Criminal Cases between Spain and the United States. The defence 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 directors of the King Juan Carlos I Centre in New York and in Madrid, and. Ms. Nancy Wilson also at N.Y.U. - were holding information concerning payments made to Judge Garzón and were the persons responsible for the sponsorship of the two courses by the *Banco Santander*. Those were also the persons who could provide information on the sponsorship by the companies *Telefónica*, *B.B.V.A.*, *Endesa* and *C.E.P.S.A.* 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 *B.B.V.A.*, Alfredo Saenz and Carlos Pérez de Bricio, from *C.E.P.S.A.* and Manuel Pizarro, from *Endesa*.

It was only after this new episode of abuse of Judge Garzón that Professor James D. Fernandez, Professor of Spanish Literature and Culture at the New York University and former head of the Center King Juan Carlos I of Spain, C.R.J.C. at the same university, felt bound to explain what happened. He knew very well what had happened, and expressed it in an article in *El País* on 17 February 2012 and in a later interview with the Spanish press on 28 February 2012.

Professor Fernandez wrote that, according to the judgment he had just read, "the Court held that New York University has concealed or deliberately confused information during the investigation." ... And, again, "Judge [Marchena] had cited the fact that, when N.Y.U. was asked a report on the income of Garzón in 2005 and 2006," he had chosen to mis-read the reply.

Fernandez said that he was privy to the correct information, having been director of the Centre from 1995 to 2007. "The reading of the sentence has brought to my mind all the stressful events of recent years, in which, through ignorance, confusion and/or malice, my name, that of my colleagues at the Center and that of the N.Y.U. have been besmirched in the media, with hints of a possible indictment, and, more seriously, in the proceedings of the Supreme Court."

"Seen from far away, I can appreciate now that many misunderstandings arose from the fact that the judge [Marchena] (and its predecessors in the investigation) took the decision not to follow the protocol established in international practice for a Spanish court to obtain information or documents on individuals or institutions based in the United States. For example, when the Supreme Court directed to the address of an academic programme of the N.Y.U. in Madrid a subpoena to testify in the case, the attorneys here in New York advised me to inform the Court that I am a U.S. citizen and resident in New York. I was advised to wait until the Spanish Court direct the request legally, that is, through appropriate judicial channels. So I did. Then the judge [Marchena] ordered a police investigation to find out if I actually lived in Spain or not. But some in Spain misunderstood my abiding by the protocol as a sign of my supposed contempt for the Spanish judicial system or, even worse, as an attempt to conceal information. Nothing is further from the truth. Anyway, I never received a summons channelled through appropriate bilateral channels, and many things were unclear at

the trial. And for lack of information, innocent acts have been attributed to Judge Garzón, wrongly and for ulterior motives.

In the end, when the Spanish Court demanded information from N.Y.U. on the fees received by Garzón in 2005 and 2006, the advice I received from lawyers in New York was that information was not be shared without a proper warrant or without approval from Judge Garzón. Approval came immediately from Judge Garzón, and N.Y.U. sent the required information. But weeks later, I discovered that an employee of the university had made a mistake in collecting the information on Form W-2 (statement of income and withholding taxes) relative to Judge Garzón: the figure for "fees" had mistakenly been added to the figure contiguous "federal taxes withheld [federal taxes withheld]." So, in the first reply, the amount withheld from the salary had been added to money expended for wages. Of course, a correction was sent immediately. Now I see, perplexed and dismayed, in what may be the last word in this case, that the Judge [Marchena] again referred to a laborious correction of an innocent mistake as a further example of bad faith on the part of N.Y.U.

I am afraid that N.Y.U. has now been caught in what seems an intense, personal and political persecution of Judge Garzón."

During the course of the interview with the Spanish press Professor Fernandez clearly stated that the plan of seeking sponsorships for courses to be held by Judge Garzón had been entirely his, and the Judge had nothing to do with negotiations which followed. In the nineties, several Spanish companies and foundations had contributed a total of US$ 8 million to renovate the headquarters of C.R.J.C.

He said that he personally had approached Judge Garzón to deliver lectures and seminars.

The basic engagement of Judge Garzón was made through the Faculty of Law and its *Center on Law and Security* which hired him as a 'Fellow', Visiting Scholar. "When at the C.R.J.C. we learned that one of the best-known public figures and most prestigious in Spain would be on our campus for several months, we decided to offer co-hosting the visit." He was given a " chair founded in 1985, thanks to a donation of two American philanthropists, Carroll and Milton Petrie."

"The idea of seeking the patronage of the *Banco Santander* - said Professor Fernandez - was mine. I counted on the friendship and support of Gonzalo de las Heras, director in New York of *Banco Santander*; we met at the opening of C.R.J.C. on 9 April 1997. Because of the many conversations I had with him for several years, I knew that this type of project complied with what he desired as a possible sponsor: sponsorship with an agenda of particular interest in Spain and Latin America, with participants of international renown, and with high profile events both for the university and the City. I remember the day, 22 March 2005, when at a dinner after a conference ... I spoke for the first time to D. Gonzalo about my idea for symposia, and introduced him to Judge Garzón, who had just arrived in New York."

* * *

More judicial and governmental skulduggery was revealed by WikiLeaks.

On 28 November 2010 WikiLeaks.org and five major newspapers from Spain (*El Pais*), 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 instalment arrived on 30 November 2010.

Among the 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.

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 then Prime Minister 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 Popular Party 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 were less than enthusiastic about their Spanish counterparts and some were described in unflattering terms. In one cable, advice is given on how to win the admiration of the 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 then Spanish Government.

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

The cables show beyond any doubt that Spanish prosecutors and government officials had interfered in several cases on behalf of the United States Administration.

In the case of *The Bush Six*, in which the investigation was re-assigned from Judge Garzón to Judge Eloy Velasco, the latter chose not to pursue it stating that Spain could not investigate the case unless the U.S. explicitly intended not to conduct its own investigation into the matter. *The Bush Six* 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.

A U.S. diplomatic cable leaked by WikiLeaks revealed that Chief Prosecutor Javier Zaragoza had intended to argue that the case should not be assigned to Judge Garzón, and a later cable stated that Garzón was "forced to give up" the investigation. It was explained how Zaragoza had gone about: "Zaragoza said he had challenged Garzón directly and personally on this latest case, asking if he was trying to drum up more speaking fees. Garzón replied he was doing it for the record only and would let it die. Zaragoza opined that Garzón, having gotten his headline, would soon drop the matter. In case he does not, Zaragoza has a strategy to force his hand. Zaragoza's strategy hinges on the older case in which Garzón investigated terrorism complaints against some Guantanamo detainees. In connection with those earlier investigations, Garzón ordered the Spanish police to visit Guantanamo and collect evidence

against the suspected terrorists. Zaragoza reasons that he can use this fact to embarrass Garzón into dropping this latest case by suggesting Garzón in some sense condoned the U.S. approach to detainee issues circa 2004. Garzón took no action in 2004 when the suspects returned to Spain and reported to him their alleged mistreatment. Zaragoza said that if Garzón could not be shamed into dropping the case, then he would formally recommend Garzón do so and appeal if Garzón ignored him."

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 had issued arrest warrants for three American soldiers. In a cable dated 26 January 2007 Ambassador Aguirre said that he met with then 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 at 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.

Prosecutors and top Government officials had interfered in the *Couso* case, in the case of the C.I.A. so-called torture flights, and in the case of torture in Guantánamo. Regarding the gaol on Cuba, the cables show that the American Administration had offered 78,000 Euros (then US$ 85,000, presently, AU$ 98,500) 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 then Attorney General Cándido Conde-Pumpido, and several Prosecutors from the National Court, told the United States that they wanted the cases closed, and the then 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 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 at New York University, as already seen. 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 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. 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 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 Lopéz. 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 rather sordid story of ‘discussions’ between personnel at the Embassy and then 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.

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*.

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 Garzon en el 'caso Guantanamo'* " - Zaragoza has a strategy to twist the arm of Garzón in the Guantánamo case." (!), *El País*, 01 December 2010.

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 later 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 Popular Party, 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 then 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 then 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 had warned against 'anti-American' Judge Garzón. Cable 02 MADRID 002282, dated 21 December 2007, reveals that the Ambassador met with "celebrated 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 continues: "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."

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."

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 *Chargé 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 "steppingstone" 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 *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 have reached 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 had been at large for a long time - 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 detainees' 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, and convicted in July 2010. 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 blowback 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.

On 16 April 2009 the then 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 the 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 have been 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*, then 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 then main force of political opposition, the Right-wing Popular Party, looked the other way.

At a 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 weekly plenary sessions, during which the then Prime Minister would report to the Congress of Deputies, Zapatero and then 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 that 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 WikiLeaks cables revealed 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 was confident of exerting an enormous pressure on the then Spanish Government. American Ambassadors had 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, or a 'Mediterranean banana monarchy' 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 has been suffering seem to be unknown; one can say with a degree of confidence, non-existent. One cannot say the same about Spain, what with the politicisation of the Judiciary - still dominated by Francoists and neo-Francoists - and what at times appears as plain professional incompetence, or sheer malpractice.

Garzón, as the indomitable judge, could be finished. Dr. Baltasar Garzón Real, universally admired outside National-Catholic-Francoist Spain, will not be silenced.

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DEORUM MANIUM IURA SANCTA SUNTO, Let the laws of the gods' hands be sacred, is the epigraph that Ugo Foscolo, the Italian poet, placed at the head of his *carme Dei sepolcri*, on tombs. He wished, in different times and for other reasons, that there be for every human "a stone which may mark out [one's] bones from the infinite number that death sows on land and in the sea" for "as long as the Sun shines upon human sorrows."

This was no doubt the spirit which moved people like Emilio Silva, the leader of *Asociación para la Recuperación de la Memoria Histórica*, the Association for the Recovery of Historical Memory, and the promoter of the movement for the *Ley de Memoria Histórica* or *La Ley por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura,* the Historical Memory Law or - by its longer and more meaningful title - the Act to recognise and extend rights and establishing measures for those who suffered persecution or violence during the Civil War and Dictatorship, which was finally enacted by the Spanish Parliament at the initiative of the Zapatero Government.

This must be recognised as the irrepressible desire for justice, possibly along with law, which has been characterising our time, from the movements against war, to the movement for people's liberation, to the movement for social justice, so powerfully expressed in Spain by *los indignados* of 15 May 2011.

People who barricade themselves in their palaces, secure in their wealth, obsessed with 'law-and-order', oblivious to such demands, deaf to such voices, may find it difficult to understand why a lawyer like Judge Garzón empathised with the sovereign 'sense of injustice' of the families victim of *Franquismo*.

Such 'conservatives' may prefer a stern - could one say: Teutonic ?, vindictive, perhaps ? - interpretation of the law. At best they are the inheritors of *Dura lex, sed lex*, and many of their judges, no doubt, are familiar with Roman Law.

More likely, they take cover behind the literal interpretation of the law - and let Parliament change it, if it deems it necessary.

Until such time, the Amnesty Law of 1977 must be respected - and enforced. The rationalisation may be 'created' for the purpose, and history - that otherwise forbidden territory - just be re-written to justify such rigid interpretation: the Amnesty Law as 'the will of the people'.

Nothing of course could be farther from the truth. Judge Garzón realised that, acted consequently, and paid for it. A kind of modern Antigone, Judge Garzón determined *that* Law to be unjust, immoral and against the laws of the gods, as if expounding upon the superiority of 'divine law' to that made by man. The end of the tragedy is different: Antigone died, Garzón will live.

Long before he was suspended, even long before his trials began, there were demonstrations of solidarity for his taking jurisdiction over the complaint of families victim of National-Catholic Spain. The demonstrations continued throughout the trials and led to thousands of people, common people, gathering at *Puerta del Sol* in Madrid and in other places in the country for rallies in support of Judge Garzón and to denounce the Supreme Court's decisions.

One of the signs read: "España al revés: CORRUPTOS Y FASCISTAS HACEN UZGAR AL JUEZ", Spain back to front, corrupt and fascist people going to judge the Judge.

Judge Garzón's lawyer, Francisco Baena Bocanegra, said that his client was "devastated" but was studying whether an appeal could be filed with the European Court of Human Rights in Strasbourg, or even Spain's Constitutional Court. Under the current law, Judge Garzón

cannot legally appeal the Supreme Court's decision disbarring him. That is The Law. But what of Spain's obligations under the *International Covenant on Civil and Political Rights,* and of course under the many international treaties which contain similar obligations ? And what of Spain's frequent condemnation in various global forums for not allowing the top court convictions of politicians and judges to be appealed ? What about it ?

Judge Garzón's suspension was met with muted response by politicians. The Socialist spokesman for judicial affairs in Congress, Julio Villarrubia, said that his party "was very concerned" about the conviction and sentence handed down to a judge with a long, distinguished career, while Justice Minister Alberto Ruiz-Gallardón, of the Popular Party, said that the government "respected" the Court's ruling. "In this decision, as in other rulings handed down by the courts, the government won't try to make any type of political evaluation." he said.

Caution may just be the response of the two major political parties. There is little desire "to reopen wounds." "Forgetting" may be just around the corner.

It is significant that in a 2008 survey, almost 45 per cent of Spaniards opposed an independent commission investigating civil war crimes; only 39 per cent supported it. The split was 42 per cent to 40 per cent when it came to investigating Franco-era crimes. The same survey, though, also showed a 50 per cent support for identifying buried remains, with 27 per cent against.

"The vast majority of Spaniards accept that an amnesty was just the price to pay for democracy." said José Álvarez Junco, a writer and professor of history at the *Universidad Complutense de Madrid*, one of Spain's most respected historians. "Garzón did not accomplish much, other than media upheaval. Things are still where he left them."

Few victims and victimisers from that decades-ago period are still alive. While most agree that the identities of those still buried will eventually be discovered, it seems increasingly unlikely that anyone will be prosecuted.

Judge Garzón's verdict, while a setback to those who want to pursue the Franco-era crimes, is just part of the process, said Emilio Silva, whose father's remains were the first to be

positively identified by DNA testing. "Justice doesn't come easy." he said. "We will exhaust all instances to get the truth and [Judge Garzón second trial and acquittal] was one of them."

There is, of course, a more pessimistic view of things: the sentencing of Judge Garzón, even that of acquittal, leaves the Historical Memory Law, under which he was acting, a dead letter.

There were many reactions from outside Spain.

On 8 February 2012 an editorial in *The New York Times* called the trials "a disturbing echo of the Franco era's totalitarian thinking." The editorial concluded: "[Judge Garzón's] powerful enemies now see a chance to end his career. Judge Garzón is undeniably flamboyant and at times overreaches, but prosecuting him for digging into Franco-era crimes is an offense against justice and history."

On the same day Ms. Gabriela Knaul, the U.N. Special Rapporteur on the Independence of Judges and Lawyers joined the U.N. Working Group on Enforced or Involuntary Disappearances in a statement. It said it was "regrettable that Judge Garzón could be punished for opening an investigation which is in line with Spain's obligations to investigate human rights violations in accordance with international law principles." Ms. Knaul noted in the statement that "supposed errors in judicial decisions should not be a reason for the removal of a judge and, even less, for a criminal proceeding to be launched." adding that "autonomy in the interpretation of the law is a fundamental element in the role of a judge and for progress in human rights."

The Working Group was set up in 1980 to help families determine the fate or whereabouts of disappeared relatives and is presently comprised of Jeremy Sarkin, Chairman-Rapporteur, Olivier de Frouville, Vice-Chairman, and Ariel Dulitzky, Jasminka Dzumhur, and Osman El-Hajjé, members. The Working Group, for its part, underlined that enforced disappearance is a continuing offence and human rights violation as long as the fate or whereabouts of the victim remain unclarified. "Reconciliation between the State and the victims of enforced disappearances cannot happen without the clarification of each individual case, and an amnesty law should not allow an end to a State's obligation to investigate, prosecute and punish those responsible for disappearances."

Professor Philippe Sands, who teaches international law at University College in London, expressed concern over the process. “This is very troubling; targeting an independent judge or prosecutor through the criminal justice system anywhere raises very serious concerns.” he said. “To sanction a possible breach of ethics or misconduct is up to the professional organisations. To bring down the criminal justice system on an investigative judge for an alleged fault is to use a sledgehammer to crack a nut. It’s almost unique in Europe.”

On 10 February the U.N. Office of the High Commissioner for Human Rights expressed its concern over the trial of Judge Garzón. The Office spokesperson, Rupert Colville, indicated that judges should not be criminally charged for investigations performed within the scope of their judicial duties. Colville stated that “judges should not be subject to criminal prosecution for doing their job. ... Spain is obliged under international law to investigate past serious human rights violations, including those committed during the Franco regime, and to prosecute and punish those responsible.”

Reed Brody of Human Rights Watch had early said that “This is a trial that should never have been held, but which at least served to show that Garzón acted in accordance with international law, which imposes on states a duty to investigate the worst international crimes.” and, while the trial was proceeding: “The Supreme Court should put an end to this sorry episode for Spanish justice by acquitting Judge Garzón of all the charges against him.” Brody added. “Investigating state killings and ‘disappearances’ should never be considered a crime.”

The process “to neutralise” Judge Garzón moved quickly: on 20 February 2012 the Standing Committee of the *Consejo General del Poder Judicial*, the General Council of the Judiciary, C.G.P.J., the governing body of judges, agreed to enforce the 11-year disqualification of Judge Garzón. The following 23 February the full governing body of the Council would confirm the removal of Judge Garzón.

On the same 20 February 2012 more than 80 human rights Non Government Organisations expressed “their deep concern regarding the criminalisation of Judge Baltasar Garzón,” and “the serious violation of the independence of the judiciary brought about by three criminal proceedings implemented against him.”

The organisations signed an open letter to the Government and the Judiciary of Spain in which, having noted "that in similar cases, other judges were never subject to judicial or even criminal proceedings, and are normally treated with internal procedures.", they remarked that "[t]he Prosecutor had requested the acquittal of Garzón. The Supreme Court rejected the proofs requested by the defence counsel and also denied the recusal of magistrates that would not provide independence and impartiality during the trial."

Further on, they considered "that the temporal coincidence of these three different trials, as well as the origin of the complaints, is evidence of judicial harassment aimed against Judge Garzón."

The signatories indicated that they shared the concern of a group of United Nations experts, led by the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, and the five independent experts of the U.N. Working Group on Enforced or Involuntary Disappearances.

Two days later, some Irish, English, American and South African prominent jurists from the legal profession and academia took out space in newspapers to publish an open letter in which they pointed out that "there are serious grounds for believing that Judge Garzón has been the victim of, at the very least, a miscarriage of justice."

Such illustrious persons were joined by Sir Geoffrey Bindman Q.C., one of Britain's most distinguished civil rights lawyers, who has been involved with human rights in Latin America at least since 1974, when he travelled to Chile to be an observer at trials of former members of Chile's Popular Unity government by the Pinochet regime. The trials were never held, but Bindman met some of the prisoners. He also represented Dr. Sheila Cassidy and the 'disappeared' prisoner William Beausire, both of them British victims of Pinochet's secret police. In 1998 Bindman was honoured by representing Amnesty International in the House of Lords, following the arrest of Pinochet in London and the subsequent action to set aside Pinochet's claim to diplomatic immunity.

The learned barrister quoted with approval the view of Reed Brody of Human Rights Watch, one of the observers at the first trial - that of the wiretappings. Brody had commented: "It looks like Garzón's enemies got what they wanted... the criminal prosecution of a judge for

his judicial actions undermines the independence of the judiciary. The accumulation of charges against him raises the appearance that they have been brought in revenge for his handling of cases involving vested interests."

On 27 February 2012 the International Commission of Jurists, the Center for Constitutional Rights, the European Center for Constitutional and Human Rights, Lawyers Rights Watch Canada, the Observatory for the Protection of Human Rights Defenders, a joint programme of the International Federation for Human Rights and the World Organisation Against Torture, the *Asociación pro Derechos Humanos de España*, the *Asociación Española para el Derecho Internacional de los Derechos Humanos*, the Due Process of Law Foundation, and Rights International Spain issued a statement. The organisations included Spanish and international observers who had attended Judge Garzón's trial and followed the proceedings held during the previous weeks with significant concern. In a previous statement they had warned the international community and Spanish society of the danger that the process posed to both judicial independence and access to justice for victims of crimes committed during the civil war and the Franco regime.

They were welcoming the Supreme Court's decision finally to acquit Judge Garzón of the *prevaricación* charges against him in the 'Historic memory' trial. However, at the same time, the organisations strongly reaffirmed that "grave damage had been done to both Judge Garzón and judicial independence more broadly. Judge Garzón should never have been prosecuted for complying with the clear obligation under international law to investigate grave violations of human rights." … "Moreover, the critical question that motivated the prosecution of Judge Garzón has not been adequately answered: Who has the legal authority to investigate crimes committed during the Spanish Civil War and the Franco regime ?" ... "We remind the Supreme Court of its obligation to rule on this issue of legal authority or competency raised before it. Determination of this pressing issue was inexplicably subordinated to the malfeasance prosecution against Judge Garzón and as a result has unjustifiably remained pending for over two years."

The organisations called on the Supreme Court to consider and determine, in accordance with its constitutional mandate and principles of international law, what courts have the authority to investigate and provide effective remedy for the 114,266 enforced disappearances and extra-judicial killings committed during the civil war and Franco regime which followed.

They also called on the Court to confirm the applicability of national and international law to the investigation and redress of these and other serious crimes against international law.

The organisations felt bound to join the Office of the High Commissioner for Human Rights and the U.N. Human Rights Committee, and to call on Spain to repeal its 1977 Amnesty Law as it violates the international law obligations Spain has assumed since that year and the Spanish Constitution itself: arts. 1.1, 9, 10.2, 95 and 96.

At the same time, Amnesty International called the acquittal good news but demanded Spain set aside the Amnesty Law and investigate war-time and post-war atrocities. Its head of international justice, Marek Marczynski said: "It is a scandal that Spain has not yet tackled its dark past." ... "News about Judge Garzón is a step forward. However, what we want to see next is a full investigation into the catalogue of abuses that took place during the civil war and Franco' regime. There must not be impunity for these most horrible crimes in Spain."

Reed Brody of Human Rights Watch observed that the Supreme Court "has spared itself further embarrassment by dropping these ill-advised charges" and re-iterated that Spain should repeal its 1977 Amnesty Law.

"But the damage has already been done with the previous conviction of Garzón. Garzón will not be able to return as a judge, but he is not the real loser." Brody said. "The real losers are the reputation of the Spanish judiciary and those ... who knew they could count on at least one independent judge to apply human rights laws without fear of the political consequences." Human Rights Watch also called for Spain to "assist the families of Franco's victims in their long quest for truth and justice."

Alberto Ruiz-Gallardón, the Justice Minister of the Popular Party Government, contended, however, that the Court's ruling showed that in Spain, "there is a strong and independent judiciary." "None of the criticism against the Supreme Court, in my view unjustified, has made it lose its prestige in the eyes of Spanish citizens." Ruiz-Gallardón said.

Quite the contrary ! The three cases have exposed sharp divisions in Spanish society. Many Right-wingers regard Judge Garzón as a publicity-seeking troublemaker who has tried to reopen old wounds from the 1936-39 civil war which was won by Franco.

Others have immediate concerns: avoiding the stench of corruption which has enveloped the Popular Party. On the day Judge Garzón was convicted in the wiretapping case, the Popular Party's Esperanza Aguirre, President of the Madrid Region, and one of the major 'lifters' in the Popular Party, rejected statements that it was a sad day for democracy and said that people who broke the law should be punished. "Garzón has been charged in three serious cases by unanimous agreement of 15 Supreme Court judges, so I think it is a very happy day for democracy, not a sad one." she said. Madam Aguirre has a deep, personal interest in *Dura lex, sed lex* - no matter how unjust, and only if applied to Judge Garzón, of course.

After initiating his legal action, Judge Garzón passed jurisdiction down to regional courts to help victims' families search for their loved ones. Those cases remain in legal limbo due to uncertainty about which courts, if any, have the right to look into Franco-era crimes. The 27 February judgment of acquittal did nothing to clarify that key point.

"Dozens of courts in Spain received cases, some have initiated proceedings, others have done nothing and some have returned them to the High Court considering it to have jurisdiction." said Emilio Silva. "The Supreme Court should with the greatest urgency ... state which court is competent so that the mass graves can be investigated." he added.

One of many victims whose whereabouts remain unknown is Federico García Lorca, Spain's most famous 20th-century poet.

The International Commission of Jurists said that Judge Garzón's acquittal was a "bitter victory", since the holding of the trial amounted to an attack on judicial independence. "Spain has to decide whether or not, at this point in history, it is ready to face its past and to allow victims, family members and Spanish society as a whole to know the truth about the human rights violations ... and to obtain proper redress for those wrongs." said the I.C.J.'s Belisario dos Santos Junior, who had observed the trial. He warned of a real risk in Spain or elsewhere that fear could drive judges to "uncontroversial interpretations of the law" to avoid going through an ordeal such as Judge Garzón's.

The I.C.J. President, Pedro Nikken, said: "The acquittal of Judge Garzón by the Supreme Court of Spain is a bitter victory for all those who fight for the promotion of truth, memory and an effective remedy and reparation for grave violations of human rights everywhere in

the world." Nikken, who had observed the trial, added: "A violation of the independence of a judge is an attack against the independence of the judiciary as such." and "The very opening of the trial *per se* was a very serious mistake."

By mid-March 2012 the Foreign Minister José Manuel García Margallos sent a secret communication to all Spanish ambassadors around the world instructing them on how to deal with inquiries and concerns about the recent conviction and dis-barring of Judge Garzón. Sent during the previous two weeks, the two-page instruction told diplomats to remind foreign governments which express concerns that Spain is a country of law and order and that Judge Garzón's conviction was approved by the entire Supreme Court bench.

García Margallos' order is part of a broader strategy to improve Spain's image abroad. However, outside Spain, Judge Garzón conviction will look closer to an incoherent setting of accounts and the crib will clearly be much-thumbed while trying to convince critics that the verdict was reached entirely on judicial and not political grounds.

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Baltasar Garzón Real spoke clearly about his future, while visiting friends and colleagues in Santo Domingo de Guzmán, the capital of the Dominican Republic on 21 February 2012.

He vowed to continue "fighting for justice and against organised crime and corruption."

"While I have strength I will fight for everything that I consider a must for modern society, such as more justice, more safety, security, more protection for victims, more commitment to fight for human rights." he said in an interview with the newspaper *Listin Diario*.

"That has been my life in justice and that will continue to be my action in justice from another point of view not strictly jurisdictional." said Garzón. And of course, he explained, "with equal energy and with the insistence that I think is necessary to give more protection to citizens, that is what I will continue to do."

He confirmed that commitment in Buenos Aires on 1 March 2012. Garzón is seen as civic hero by many in Argentina, where thousands fled to escape the Franco regime.

"... I can say that I am going to continue to fighting for what I think is indispensable, fighting in this case and in the protection of human rights. I don't know how I'm going to do it but I'm going to do it as long as I am alive." Garzón said speaking to a large gathering of activists and Spanish immigrants.

"I don't know what's happening in Europe, but despite the acquittal I'm going to maintain the charges in the European Human Rights Court because it's necessary, I think, to get a response for the thousands, the hundreds of thousands of victims. ... What I do want is a response as to whether a judge can be expelled from his jurisdiction for interpreting the law and in view of facts which can definitely be considered as crimes against humanity which could otherwise be forgotten forever." he added.

As a new generation was taking its place in the fight, the words heard at *Puerta del Sol* in May 2011 and coming from tens of thousands of determined protesters resonate: *"¡De norte a sur, de este a oeste, la lucha sigue, cueste lo que cueste!"* From north to south, from east to west, the struggle goes on, whatever the cost.

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