

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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Promoting human rights by protecting those who defend them

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Formal Communication for Consideration and Action Re: Judge Baltasar Garzón

from

**Lawyers Rights Watch Canada
The European Center for Constitutional and Human Rights
The Asian Legal Resource Centre
Lawyers Without Borders Canada
The Center for Constitutional Rights
The International Federation for Human Rights
(FIDH) and the World Organisation Against Torture (OMCT) within the
framework of their joint programme the Observatory for the Protection of
Human Rights Defenders
The National Lawyers Guild
International Association of Democratic Lawyers**

I. Request for Action

In accordance with the mandates entrusted to you by the United Nations Human Rights Council, Lawyers Rights Watch Canada (LRWC) an NGO in special consultative status with the Economic and Social Council (ECOSOC), the European Center for Constitutional and Human Rights (ECCHR), the Asian Legal Resource Centre (ALRC) an NGO is general consultative status with ECOSOC, Lawyers Without Borders Canada (LWBC), The Center for Constitutional Rights (CCR), The International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT) within the framework of their joint programme the Observatory for the Protection of Human Rights Defenders, The National Lawyers Guild (NLG), and the International Association of Democratic Lawyers (IADL), a non-government organization in special consultative status with ECOSOC, join in requesting you to send a Joint Urgent Appeal to the Government of Spain requesting Spain to:

- a. Ensure that Judge Baltasar Garzón is not punished for exercising his jurisdiction to interpret and apply the law or his decision to apply the law by opening an investigation of over 100,000 enforced disappearances (disappearances) and extra-judicial executions (executions) alleged to have occurred during the civil war and under the Franco dictatorship.
- b. Ensure that the independence of Judge Baltasar Garzón—and others engaged in the investigation of serious human rights violations—is protected from all forms of interference, including criminal proceedings, from state and non-state parties.
- c. Comply with its duty to investigate over 100,000 enforced disappearances (disappearances) and extra-judicial executions (executions) alleged to have occurred during the Franco dictatorship and the civil war.
- d. Ensure that disagreements with Judge Baltasar Garzón’s decision to investigate and his interpretation of Spain’s 1977 Amnesty laws (AL/1977) are determined by judicial review and appeal.
- e. Ensure that disagreements with Judge Baltasar Garzón’s decision to investigate and his interpretation of Spain’s 1977 Amnesty laws (AL/1977) are determined by judicial review and appeal conducted in accordance with Spanish and binding international law.

II. Summary

In 2008 Judge Garzón opened an investigation into an estimated 114,000 disappearances and extrajudicial executions alleged to have been committed during the Spanish Civil War and the Franco dictatorship, by agents of the Franco regime. He then terminated the investigation when his decision to investigate was appealed. Following complaints filed by groups opposed to the investigation, Judge Garzón has now been criminally charged and suspended from his duties as a judge. The charges are based on allegations that by opening the investigation, Judge Garzón wilfully ignored the provisions of an amnesty law: enacted by Spain in 1977 (AL/1977) in the course of the transition to democracy following Franco’s death.

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However it is well established that state sponsored disappearances and executions are amongst the most serious international crimes, defined as continuing until the full particulars of the fate of victims is known, and therefore amnesty laws:

- cannot be interpreted and applied to exculpate former state officials responsible for widespread disappearances and executions by prohibiting civil and/or criminal actions against them; and,
- cannot operate to deprive victims of the right to an investigation to determine the fate of the disappeared and executed;
- cannot override the inalienable societal and individual right to know the truth about disappearances, executions and other gross human rights violations and serious violations of human rights law.

By allowing Judge Garzón to be charged and suspended for carrying out his judicial duty to interpret the law as requiring the investigation of credible complaints of over 100,000 disappearances and executions, Spain is violating its positive legal duties arising from both domestic and international law to protect and enforce rights that are core to the implementation and enforcement of all human rights, namely the:

1. Right to an independent and impartial judiciary guaranteed by, inter alia, the International Covenant on Civil and Political Rights (ICCPR) Article 14 and the European Convention on Human Rights Article (ECHR) art. 6.
2. Right to life guaranteed by, inter alia, ICCPR art. 2 and ECHR art. 2.
3. Right to effective remedies for violations of the right to life guaranteed by, inter alia ICCPR art. 2 and ECHR art. 13.
4. Right to an effective investigation of mass violations of the right to life
5. Inalienable right to know the truth about serious human rights violations.

The paramount duty of states to ensure and allow effective investigations of disappearances and executions has been defined by international instruments and interpreted and confirmed by national and international tribunals.

Disappearances and executions remain in widespread use by states across the economic spectrum as a brutally effective means of neutralizing suspected opponents with absolute impunity. In the struggle between law and realpolitik, Judge Garzón has been a singular advocate for the proper universal enforcement of human rights and therefore one of the world's most effective opponents of impunity. The charges against him have effectively silenced him and will indubitably have a chilling effect on other judges called to make unpopular decisions regarding allegations of serious criminal wrongdoing by former state agents.

LRWC urges the Special Mandate holders to take individual or joint action to remedy this injustice and uphold the rule of law.

III. Facts

In September of 2008, Judge Garzón, an investigating judge with Spain's Audiencia Nacional – the highest level criminal court in Spain – issued a ruling seeking detailed information from church leaders and government authorities about victims of Franco's forces both during the

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Spanish Civil War and in the early years of the Franco regime. In October of that year, Judge Garzón opened Spain's first criminal investigation into Franco-era executions and disappearances and ordered the opening of 19 mass graves, including one purported to contain the body of the executed poet Federico Garcia Lorca. In a 68-page ruling, Judge Garzón made it clear that he had opened the investigation because he accepted the legitimacy of a petition filed by associations of victims' families requesting his Court to investigate the disappearances and executions of thousands of people. In his ruling, Judge Garzón noted that the count of those executed or disappeared by Franco's forces stood at 114,266. Judge Garzón noted that the Franco regime had used all its resources to locate, identify and grant reparations to the victims from the winning side in the civil war, but had not extended the same remedies to the losers, who, he noted, were persecuted, jailed, disappeared and tortured. The disappearances, he concluded, constituted crimes against humanity, and in his ruling identified Franco, along with 34 of his former generals and government ministers, as suspected perpetrators of these crimes.

Reacting to his ruling, State prosecutors indicated that in their view, the executions and disappearances were immune to prosecution under AL/1977, and announced plans to appeal. In November of 2008, a little over a month after opening his investigation, Judge Garzón abruptly shut it down. In a lengthy ruling he passed on responsibility for the opening of the mass graves to regional courts.

In January of 2009, a petition was brought in the Spanish Court by *Manos Limpias* and *Libertad e Identidad* (complainants), two groups opposed to the investigation. The complainants demanded that Judge Garzón be investigated for knowingly overreaching his jurisdiction by commencing an investigation of Franco-era crimes, in violation of AL/1977. In May of 2009, the investigating judge deemed the petition admissible, ruling that Judge Garzón consciously decided to ignore the will of the Spanish legislature in opening the investigation of Franco-era crimes. Judge Garzón appealed this decision. In September of 2009, the International Commission of Jurists issued a statement expressing concern about the investigation, and brought Judge Garzón's case to the attention of the UN Special Rapporteur on the Independence of Judges and Lawyers.

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

IV Law

A/ Failure to Protect Judicial Independence

Spain has a positive legal duty to guarantee an independent and impartial judiciary. This paramount duty arises from many international instruments binding on Spain including, inter

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alia, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). Specific state duties ensure and protect judges' independence are set out in the *Basic Principles on the Independence of the Judiciary*.¹

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

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

Judge Garzón received a complaint requesting an investigation of widespread disappearances and executions carried out during the Spanish civil war and the Franco dictatorship. As the fate and whereabouts of the victims are not known, the crimes complained of are continuing, as opposed to past, offences² to which no limitation for criminal prosecutions applies. The Rome Statute of the International Criminal Court³ (Rome Statute) defines widespread disappearances and killings (executions) as international crimes and affirms the duty of every state to “exercise its criminal jurisdiction over those responsible for international crimes.” Spain is a party to the Rome Statute having ratified in October 2000. Whether or not AL/1977 is competent to prevent an investigation of these crimes is indubitably a matter “of a judicial nature” that Judge Garzón has the “exclusive authority” to decide. A revision of Judge Garzón’s decision to proceed with an investigation can therefore only be properly accomplished by an appeal of that decision. The *Basic Principles on the Independence of the Judiciary* prohibit (Article 4) any revision of a judge’s decision except by way of judicial review.

“There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review...”

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

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

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

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

² See: *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992, Articles 17; Rome Statute, Article 7/1(i); *International Convention for the Protection of All Persons from Enforced Disappearance*, Article 1(b) & *The Inter-American Convention on Forced Disappearance of Persons*, Article III.

³ Rome Statute of the International Criminal Court was approved by a vote of 120 to 7 in Rome on 17th July 1998. Countries opposed were: China, Iraq, Israel, Libya, United States, Qatar and Yemen. The Rome Statute entered into force 1 July 2000 and as of May 15, 2010, 139 states of have signed and 111 ratified the Rome Statute.

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

... it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectful or useful. As observed by a distinguished English judge (in *Taafe v. Downes* (1813) 3d Moore's Privy Council 41), it would establish the weakness of judicial authority in a degrading responsibility.⁴

A law allowing a judge to be punished for an unpopular or controversial decision violates these principles and duties. The Federal Court of Canada struck down a provision that empowered the Attorney General to compel an inquiry into allegations of judicial misconduct on the grounds that the provision created a reasonable apprehension that the Attorney General's power could be,

"...used to punish judges whose decisions displease the government in question, and as a result, it infringes the constitutionally protected independence of the judiciary and is thus invalid..."⁵

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

"...while exceeding jurisdiction takes an act or decision of a judge out of the realm of correctness, it does not take the activity out of the realm of judging."⁶

While judges in all cases must be protected from interference from all parties,⁷ judges investigating allegations of serious crimes by state agents—such as at issue here—are at heightened risk of professional and physical harm from reprisals and therefore require more stringent protections. For this reason, both the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*⁸ and the *Declaration on the Protection of all Persons from Enforced Disappearance*⁹ mandate special protection for investigators and witnesses. With respect to extra-judicial executions Article 15 of the *Principles*

⁴ *R.M. v. M.Z.*, Ontario Superior Court of Justice, Divisional Court, April 1, 2009. 249 O.A.C.1. 2009 at para. 26. <http://www.canlii.org/en/on/onscdc/doc/2009/2009canlii15147/2009canlii15147.html>

⁵ *Cosgrove v. Canadian Judicial Council*, 261 D.L.R. (4th) 447 • 40 Admin. L.R. (4th) 1 • 282 F.T.R. 60 <http://www.canlii.org/en/ca/fct/doc/2005/2005fc1454/2005fc1454.html>

⁶ *R.M. v. M.Z.*, Ontario Superior Court of Justice, Divisional Court, April 1, 2009. 249 O.A.C.1. 2009 at para 28 & 29, relying on the Supreme Court of Canada in *Morier and Boiley v. Rivard*, [1985] 2 S.C.R. 716 (S.C.C.) at p.737.

⁷ See European Court of Human Rights, Judgment of 16 July 1971, *Ringeisen v. Austria*, para. 95 and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 229.

⁸ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, Article 15. <http://www2.ohchr.org/english/law/executions.htm>

⁹ *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992, Articles 13.3, 13.5 & 18.

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on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions directs,

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

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

“...Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

...

Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.”

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

The damage to the rule of law in Spain precipitated by the charges reaches beyond Judge Garzón himself and will have a chilling effect on other Spanish judges called upon to remedy serious human rights crimes committed by former officials of Spain of other states.

B/ Duty to Investigate

As a party to the ICCPR and the ECHR, Spain has a duty to ensure effective investigations of disappearances and executions. This duty arises from Spain’s legal obligation to protect the right to life and to prevent, punish and provide remedies for violations. Other instruments mandating effective investigations of the crimes at issue include, the aforementioned *Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions* and the *Declaration on the Protection of all Persons from Enforced Disappearance*.¹⁰ This latter declaration, approved in 1992 by the United Nations General Assembly, defines enforced disappearance as “a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.”(Article 17). The declaration establishes a number of other principles necessary to effectively preventing and punishing enforced disappearances including:

- that amnesty laws are incompetent to protect suspected perpetrators from prosecution (Article 18);
- The right of victims of disappearances to a prompt, thorough and impartial investigation (Article 13.1);
- the duty of states to ensure that “no measure” be allowed to impede or curtail such investigations (13.1); and,

¹⁰ *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992.

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- the duty of states to ensure that those conducting investigations of disappearance—in this case, Judge Garzón—are protected from intimidation and reprisal (Article 13.3 & 13.5).
- that the investigation shall continue as long as the fate of victims remains unclarified (Article 13.6)

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

Articles 1 and 2(1) of the ECHR¹¹ compel states such as Spain, to ensure effective investigations of violations to the right to life and failure to do so can constitute a violation of these articles.¹²

67. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances.¹³

The duty of states to investigate extra-judicial killings as part of the over-arching duty to ensure the enjoyment of the right to life and other rights¹⁴ has been confirmed by the Inter-American

¹¹ Article 1 provides that each State to the ECHR shall secure to everyone within its jurisdiction the rights and freedoms defined in the ECHR and Article 2(1) states: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

¹² *Hugh Jordan v. the United Kingdom* (Application no. 24746/94) Judgment, Strasbourg, 4 May 2001, para. 105; *Çiçek v. Turkey* (Application no. 25704/94) Judgment, Strasbourg 27 February 2001, para. 148; *Kaya v. Turkey* (158/1996/777/978) Judgment, Strasbourg, 19 February 1998, 105; *McKerr v. the United Kingdom*, (Application no. 28883/95), Judgment, Strasbourg, 4 May 2001, para. 111-115; *Kelly and Others v. the United Kingdom*, (Application no. 30054/96), Judgment, Strasbourg, 4 May 2001, *Shanaghan v. the United Kingdom*, (Application no. 37715/97) Judgment, Strasbourg, 4 May 2001; *Makaratzis v. Greece* [GC], (Application no. 50385/99), Judgment, Strasbourg, 20 December 2004, para. 73-79.

¹³ *Finucane v. United Kingdom* (Application no. 29178/95) Judgment, Strasbourg, 1 July 2003, at para. 67.

¹⁴ The American Convention on Human Rights, Article 1(1). The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. Article 4(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

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Court of Human Rights (IACtHR) on many occasions. For example, in *Velasquez Rodriguez*¹⁵, a case involving disappearances the IACtHR, ruled,

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

In the *Myrna Mack Chang*¹⁶ case the IACtHR held that states party to the American Convention on Human Rights have a duty to investigation violations of the “inalienable” right to life arising from their duty to protect that right. With regard to the duty to investigate extra-judicial executions, the IACtHR ruled,

156. In cases of extra-legal executions, it is essential for the States to effectively investigate deprivation of the right to life and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity, conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life.

157. In this regard, safeguarding the right to life requires conducting an effective official investigation when there are persons who lost their life as a result of the use of force by agents of the State.

The ICCPR also imposes a duty on Spain to ensure effective investigations of extra-judicial killings and forced disappearances. Comments by the Human Rights Committee (Committee) confirm these twin principles that the right to a remedy guaranteed by Article 2 of the ICCPR imposes a positive obligation on states to investigate violations of rights protected by the ICCPR; and, a state’s failure may, in itself constitute a violation of the ICCPR.

“There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”¹⁷

With respect to extra-judicial killings Spain and other states are mandated by the *Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions* to ensure “thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions... to determine the cause, manner and time of

¹⁵ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4, para. 172.

¹⁶ I/A Court H.R., *Case of Myrna Mack-Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101.

¹⁷ Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 8.

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death, the person responsible, and any pattern or practice which may have brought about that death.”¹⁸ The Economic and Social Council recommended that these principles be respected by states and taken into account within the framework of national laws and practice.¹⁹

The duty of states to provide victims of gross human rights violations with ‘[v]erification of the facts and full and public disclosure of the truth’ and an accurate account of the violations that occurred, was confirmed by the United Nations General Assembly in 2005.²⁰

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*²¹ also imposes on states the obligation to “investigate all cases of ‘gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law’” (Art. 3(b)). These principles prohibit statutes of limitation from application to such crimes (Art. 6) and require that domestic laws provide at least the same protection for victims as required by international law (para. 2(d))

As a party to the Rome Statute Spain has a legal duty to take effective measures to prevent and punish the widespread disappearances and executions in question, defined as crimes against humanity (article 7.1 (i)) and “...not...subject to any statute of limitations.” (art. 29)

That disappearances are a continuing crime as long as the fate and whereabouts of the victim(s) is unknown has been affirmed by international and regional instruments. The *International Convention for the Protection of All Persons from Enforced Disappearance*,²² allows limitation of prosecution for disappearances only after the offence ceases. (Article 1(b)) The *Inter-American Convention on Forced Disappearance of Persons*,²³ Article III states, “This offense [forced disappearance] shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.”

The duty to prevent and punish through conducting effective investigations is made more urgent by the fact that many states are openly using disappearance and execution as a method of silencing arbitrarily identified opponents. The recently released, *Joint Study on Global Practices In Relation to Secret Detention in the Context Of Countering Terrorism*²⁴ equates secret detention

¹⁸ United Nations, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989, paragraph 9, available at:

<http://www.unhcr.org/refworld/docid/3ae6b39128.html> [accessed May 2010]

¹⁹ Economic and Social Council Resolution E/RES/1989/65 of 24 May 1989.

²⁰ GA Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, Articles 18 and 22.

²¹ Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

²² Adopted by the General Assembly 20 December 2006 by resolution A/RES/61/177 and shall, in accordance with article 39 enter into force after the 20th ratification. 83 states have signed and 18 ratified as of May, 4, 2010. Cited as Doc. A/61/488. C.N.737.2008.TREATIES-12 of 2 October 2008.

²³ Adopted on June 9, 1994 and entered into force on March 28, 1996.

²⁴ *Joint Study on Global Practices In Relation to Secret Detention in the Context Of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; The Special Rapporteur On Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; The Working Group on Arbitrary Detention Represented by*

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and enforced disappearances, “Every instance of secret detention also amounts to a case of enforced disappearance”. This exhaustive report by four eminent experts indicates a resurgence of the widespread use of secret detention/disappearance by many states around the world (e.g. the United States, China, Russia, Pakistan and Sri Lanka) contrary to the absolute prohibition contained in Article 7 of the *Declaration to Protect all People from Enforced Disappearances*.

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

C/ The Right to Truth

The right to truth about serious violations of human rights, such as disappearances and executions is an inalienable and autonomous right.²⁵

The study and development of the right to truth was spurred by the widespread use by states of disappearances and executions to extinguish opposition in the 1970s and the subsequent practice of enacting amnesty laws to insulate perpetrators from accountability and prevent remedies.

The societal necessity and individual right to truth in order to, “...establish incredible events by credible evidence”²⁶ has been consistently confirmed by tribunals and articulated in reports and instruments, as an inalienable stand-alone right, fundamental to the rule of law, meaningful human rights enforcement and the eradication of impunity.

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

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

“the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violation of human rights, to the perpetration of aberrant crimes.”²⁷

its Vice-Chair, Shaheen Sardar Ali; and The Working Group on Enforced or Involuntary Disappearances Represented By Its Chair, Jeremy Sarkin, February 19, 2010, A/HRC/13/42.

²⁵ The right of families to know the fate of missing relatives was first codified by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 32 & 33.

²⁶ Nuremberg Tribunal U.S. Chief Prosecutor Robert Jackson, June 7, 1945.

²⁷ *Question of the impunity of perpetrators of human rights violations (civil and political)*, final report by Louis Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, Annex 1, Principles 3, 4 & 17. <http://www.derechos.org/nizkor/impu/joinet2.html>

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He recommended adoption of a set of principles establishing this inalienable right and ensuring that amnesty could not affect any proceedings²⁸—such as the investigation approved by Judge Garzón—brought by victims.

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

“Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.”²⁹

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

“to prepare a study on the right to the truth, including the information on the basis, scope, and content of the right under international law, as well as best practices and recommendations for effective implementation of this right, in particular, legislative, administrative or any other measures that may be adopted in this respect, taking into account the views of States and relevant intergovernmental and non-governmental organizations, for consideration at its sixty-second session.”³⁰

On 21 April 2005 the Human Rights Commission adopted a resolution that cited

“...exposing the truth regarding violations of human rights and international humanitarian law that constitute crimes” as one of the steps integral to the promoting and implementation of human rights.³¹

Notably, during the April 2005 session, the Human Rights Commission also passed a resolution prohibiting states from practicing, permitting or tolerating disappearances and calling on states to, “ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;”³²

²⁸ *Ibid*, para. 32. Amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy. It must have no legal effect on any proceedings brought by victims relating to the right to reparation.”

²⁹ *Promotion and Protection of Human Rights, Impunity, Report of the independent expert to update Set of Principles to combat impunity*, Diane Orentlicher, Addendum, Update Set of Principles for the protection and promotion of human rights through action to combat impunity, 8 February 2005, Preamble paragraph B and Principles 2. E/CN.4/2005/102/Add.1.

<http://www.idp-key-resources.org/documents/2005/d04560/000.pdf>

³⁰ Human Rights Resolution 2005/66: Right to Truth, E/CN.4/RES/2005/66.

³¹ Adopted without a vote. See chap. XVII, E/CN.4/2005/L.10/Add.17])

³² UN Human Rights Commission, *Enforced or involuntary disappearances, Human Rights Resolution 2005/27*, April 2005. http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-27.doc

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In early 2006, the Office of the High Commissioner of Human Rights reported on the right to truth to the 62nd Session of the Human Rights Commission.³³ The report had been circulated to states and to intergovernmental and non-governmental organizations whose feedback was reflected in the report, concluded,

“...the right to truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations.”³⁴

...

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

The *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPPED),³⁵ ratified by Spain 24 September 2009, confirms the right, “...to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”³⁶ The ICPPED also imposes a duty on states to initiate a full investigation where there is evidence of disappearance(s) and to ensure that witnesses, complainants and persons participating in the investigation are protected from ill-treatment.”³⁷

D/ Amnesty Laws

Can Spain’s 1977 amnesty law prevent the investigation of over 100,000 unresolved and continuing disappearances and executions that occurred during a period of civil war and dictatorship? Not surprisingly, the law appears to unequivocally oppose such a result as manifestly unjust, incompatible with the rule of law and inconsistent with the very concept of

³³ *Promotion and Protection of Human Rights: Study on the right to truth: Report of the HCHR*, 8 February 2006 E/CN.4/2006/91. <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>

³⁴ *Ibid*, Summary, p. 2.

³⁵ The *International Convention for the Protection of All Persons from Enforced Disappearances* opened for signature on 6 February 2007, Doc.A/61/488.C.N.737.2008.TREATIES. The convention comes into force 30 days after the 20th ratification. As of April 7, 2010, 83 states have signed and 18 ratified.

³⁶ *Ibid*, Article 24.2 “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard. “

³⁷ *Ibid*, Article 12.

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universal rights. The law also requires such questions regarding the interpretation and application of the law to be determined by judges—as Judge Garzón was required—acting independently and free from interference and fear of punishment...

Observations of the Committee and decisions of regional tribunals consistently determine that amnesty laws are impotent to prevent investigations of and remedies for, serious human rights violations such as disappearances and executions. The Committee has consistently observed that amnesty laws that prevent investigations, punishment and reparations for victims are inconsistent with the ICCPR.

In January of 2009, the Committee issued its Concluding Observations on Spain’s fifth periodic State party report, filed in February of 2008. In its Observations, the Committee welcomed the adoption of the 2007 Historical Memory Act, which, “provides for reparations for victims of the dictatorship” and expressed concern “at the continuing applicability of the 1977 amnesty law.” The Committee recalled that crimes against humanity are not subject to a statute of limitations and drew the State party’s attention to its general comment No. 20 (1992), on article 7 of the ICCPR, “according to which amnesties for serious violations of human rights are incompatible with the Covenant [...]”

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

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

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

In 1993, commenting on Niger, the Committee recommended, “...that investigations should be conducted into the cases of extrajudicial executions...” and “...agents of the State responsible for such human rights violations should be tried and punished. They should in no case enjoy immunity, inter alia, through an amnesty law, and the victims or their relatives should receive compensation.”³⁸

Again in 1994, commenting on El Salvador, the Committee expressed “grave concern” over the adoption of an amnesty law, “...which prevents relevant investigation and punishment of perpetrators of past human rights violations and consequently precludes relevant compensation.”³⁹

In 1997, commenting on France’s report, the Committee observed,

³⁸ CCPR/C/79/Add. 17, 29 April 1993.

³⁹ CCPR/C/79/Add.34, 18 April 1994.

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“...the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights.”⁴⁰

In 1999, regarding Chile, the Committee reiterated that, “... amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future.”⁴¹

In 2000, the Committee, in Concluding Observations concerning the Republic of the Congo, noted that:

“... the political desire for an amnesty for the crimes committed during the periods of civil war may also lead to a form of impunity that would be incompatible with the Covenant. [The Committee] considers that the texts which grant amnesty to persons who have committed serious crimes make it impossible to ensure respect for the obligations undertaken by the Republic of the Congo under the Covenant, especially under article 2, paragraph 3, which requires that any person whose rights or freedoms recognized by the Covenant are violated shall have an effective remedy.”⁴²

In 2003, the Committee, revisiting concerns previously about El Salvador’s amnesty law, observed, “... the Act infringes the right to an effective remedy set forth in article 2 of the Covenant, since it prevents the investigation and punishment of all those responsible for human rights violations and the granting of compensation to the victims.”

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

In 1998, the ICTY,⁴³ dealing with the crimes of torture, quoted with approval the Committee’s statement in General Comment No. 20 that amnesty laws covering serious violations of human rights are incompatible with the ICCPR and went on to rule that if a state sought to introduce amnesty laws providing immunity to perpetrators of torture,

“ Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful;”

The ECtHR decision of March 2009 in *Ould Dah v. France*⁴⁴ case involved France’s use of universal jurisdiction to try for torture a national of Mauritania, notwithstanding a Mauretanian amnesty law providing him with immunity. The ECtHR ruled that to give amnesty laws precedence over the international prohibition against torture would render the aims of the

⁴⁰ CCPR/C/79/Add. 80, 04 August 1997, at para. 13.

⁴¹ A/54/40, 1999.

⁴² CCPR/C/79/Add.118, 25 April 2000.

⁴³ *The Prosecutor v. Anto Furundzija* [IT-95-17/1-T, 10 December 1998], at para. 155.

⁴⁴ *Ould Dah v. France*, Requeté no. 13113/03, Council of Europe: ECtHR, 17 March 2009.

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Convention against Torture meaningless. The court cited with approval the aforementioned ICTY decision and observations by the Committee.

This interpretation echoed the decision of the IACtHR in *Barrios Altos v. Peru* where the court found that Peru's amnesty laws were incompatible with AC HR, specifically with the obligation of states to ensure respect for protected human rights (Art. 1(1)) and to harmonize their laws with international norms of protection (Art. 2) and the right of individuals to judicial protection in Articles 8 & 25.⁴⁵

National tribunals have also concluded that amnesty laws breach domestic and international law. For instance, on June 14, 2005, the Argentina Supreme Court in the Julio Simon case struck down the amnesty laws passed December 24, 1986 and June 5, 1987 granting immunity from prosecution to all members of the military except for top commanders for crimes committed during the Argentina's dirty war period, citing the aforementioned Barrios decision of the IACtHR. The Supreme Court of Chile reached a similar conclusion in the Sandoval case, confirming the non-applicability of the amnesty law to a conviction and sentence for enforced disappearance (Juan Contreras Sepulveda y otros (crimen) casacion fondo y forma, Corte Suprema, 517/2004, Resolucion 22267).

V. Conclusion

The judiciary have the exclusive authority to investigate alleged crimes. Therefore, the initiation of an investigation into presumed crimes cannot be considered as an abuse of power that can render judges susceptible to criminal charges. There are ample proper means available within the Spanish legal system itself to review decisions that might be considered incorrect.

As an investigating Judge of the Spanish National Court, Judge Garzón approved the investigation of widespread disappearances and executions committed during the Spanish civil war and Franco's dictatorship, crimes that are continuing and considered crimes against humanity, under some circumstances. In rendering this decision, Judge Garzón was clearly acting within and in accordance with his judicial duties and powers to interpret and give effect to Spain's overarching international law obligations to investigate such crimes.

Furthermore, Judge Garzón's decision to investigate was appealed by the prosecutor on the grounds that the Tribunal lacked competence and (on 4 December 2008) the Criminal Division of the National Court held that there was no jurisdiction to hear the matter. As a result of this decision, Judge Garzón ceased his investigations. That is, his decision to open the investigation was subjected to the ordinary judicial review process and overturned on appeal. Such a process is an essential part of any functioning legal system predicated on the rule of law. A judge who participates in such a process is merely performing his judicial duties and cannot be subjected to criminal sanctions. To allow criminal proceedings in such a case violates judicial independence and will result in a chilling effect on other judges called upon to decide

⁴⁵ *Barrios Altos v. Peru*, March 14, 2001, the Inter-American Court of Human Rights. (http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf)

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politically sensitive cases.

Moreover, Judge Garzón's decision to open criminal investigations in this matter in accordance with international law regarding state duties to prevent and punish the crimes at issue, to exercise their criminal jurisdiction over such crimes, to ensure remedies for victims and to conduct effective investigations. Article 10.2 of the Spanish Constitution clearly establishes that domestic law must be interpreted in the light of international human rights law obligations. Notwithstanding the November 2009 amendments to Article 23(4) of the Ley Organico Poder Judicial (LOPJ), Spain's obligation to investigate war crimes and crimes against humanity committed under Franco's regime and during the civil war take priority over AL/1977 or other domestic amnesty laws.

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

We conclude that Judge Garzón has neither engaged in professional misconduct nor acted with criminal intent. Rather, he has acted fearlessly to give appropriate priority to Spain's obligations to investigate serious crimes under international law. With Judge Garzón suspended there is now little or no chance of there being any judicial oversight.

The rising number of States again using widespread disappearances and executions to remove arbitrarily targeted people from the protection of domestic and international law necessitates a clear and forceful response from the Special Rapporteurs and Working Groups addressed. Current state-sponsored disappearances and executions, chronicled in the *Joint Study on Global Practices In Relation to Secret Detention*,⁴⁶ are occurring entirely outside the law, immune from judicial oversight. Spain's election to the United Nations Human Rights Council requires also increases the urgent need for the Special Rapporteurs and Working Groups to take action in support of both the body of laws prohibiting disappearances and execution and its advocate, Judge Baltasar Garzón.

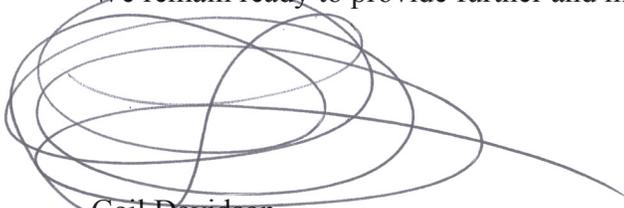
All of which is respectfully submitted.

Thank you for giving this important matter your timely and careful consideration and for your response to our call for action.

⁴⁶ *Supra*, note 24.

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We remain ready to provide further and more detailed submissions.



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Lawyers Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law internationally by: protecting advocacy rights; campaigning for jurists in danger because of their human rights advocacy; engaging in research and education; and, working in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations. www.lrwc.org

The European Center for Constitutional and Human Rights (ECCHR) is an independent, non-profit, legal organization that enforces human rights by holding state and non-state actors responsible for egregious abuses through innovative and strategic litigation. ECCHR focuses on cases that have the greatest likelihood of creating legal precedents in order to advance human rights around the world. <http://www.ecchr.eu/>

The Asian Legal Resource Centre (ALRC) is a Hong Kong-based regional NGO with UN ECOSOC General Consultative status. The ALRC promotes the respect for human rights through the strengthening of institutions of the rule of law, notably the police, prosecution and judiciary. It seeks to strengthen and encourage positive action on legal and human rights issues at the local and national levels, through advocacy, research and publications. <http://www.alrc.net/>

Lawyers without Borders Canada (LWBC) is the Canadian branch of the “Avocats sans frontières” world movement. It is a NGO whose mission is to contribute to the defense of the rights of the most vulnerable individuals or groups in the developing world or in countries in crisis by reinforcing access to justice and legal representation. www.asfcanada.ca

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization committed dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. For more than 40 years, CCR has engaged in litigation and advocacy related to the respect and enjoyment of international human rights in U.S. and international courts and tribunals, and through regional and international human rights mechanisms. For more information on CCR, see www.ccrjustice.org.

The International Federation of Human Rights (Fédération internationale des ligues des droits de l'Homme) (FIDH) is a non-governmental federation for human rights organizations. FIDH's core mandate is to promote respect for all the rights set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Its priority areas include protecting human rights defenders and fighting impunity. For more information on FIDH, see www.fidh.org.

The National Lawyers Guild (NLG), founded in 1937, is the oldest and largest public interest/human rights bar organization in the United States. It is a member of the International Association of Democratic lawyers, headquartered in New York with chapters throughout the United States.

International Association of Democratic Lawyers (IADL) is a non governmental organization of lawyers and jurists from all parts of the world which was founded in 1946 by lawyers who were committed to promoting the goals and rights contained in the Charter of the United Nations. One of our aims is to defend and promote human and peoples' rights in particular through the strictest adherence to the rule of law and the independence of the judiciary and the legal profession. IADL has affiliates and members in over 90 countries and has special consultative status at ECOSOC, UNESCO and UNICEF.

The World Organisation Against Torture (OMCT) created in 1986, is today the main coalition of international non-governmental organisations (NGO) fighting against torture, summary executions, enforced disappearances and all other cruel, inhuman or degrading treatment. With 282 affiliated organisations in its SOS-Torture Network and many tens of thousands correspondents in every country, OMCT is the most important network of non-governmental organisations working for the protection and the promotion of human rights in the world.