

By George Venturini
From Portside

In 1921 the 'philosophe' José Ortega y Gasset, published one of his most famous works: 'España invertebrada'- Invertebrate Spain. Ortega was a republican, but not a democrat; he had written 'Delenda est monarchia', but remained an elitist. He passionately loved his country, but could not help describing it as "a cloud of dust remaining after a great people have galloped down the highway of history." And ninety years, in the life of a people which sees things 'sub specie aeternitatis', are a very short time.

Last May Mexico's representative on the United Nations Human Rights Council -- the successor to the Commission on Human Rights, during an examination of Spain's human rights record, asked the Spanish representative to investigate cases of enforced disappearances, to punish perpetrators, and to provide redress to the victims. Mexico has a good title for making such a request. After Franco had suffocated in blood the Second Spanish Republic, Mexico offered to receive the largest contingent of refugees. Estimates are inconclusive, but figures are placed between 20,000 and 40,000.

On 21 September the Spanish representative informed the Council that his government was rejecting the call to probe the disappearances of tens of thousands of persons during the period from Franco's 'coup d'état' to the end of the dictatorship in 1975. He said that Spanish judges and courts are bound to act according to legal principles which bind the judiciary. He repeated that the courts were bound by the 1977 amnesty law on all crimes committed during that dictatorship.

Judge Baltasar Garzón of the Spanish 'Audiencia Nacional'-- the National Court has been suspended from the bench on 14 May 2010 under the charge of 'delito de' 'prevaricación', just the day after Spain's admission to the Council. The 'delito' consisted in the Judge having knowingly overstepped his judicial competence by opening

a probe into the disappearances of 114,266 people-- part of the crimes committed by Franco between 17 July 1936 and December 1951, the bloodiest period of Franco's dictatorship.

Judge Garzón initiated the investigation of those disappearances late in 2008. He is now on leave, having obtained a seven-month post as a consultant at the International Criminal Court in The Hague.

Charge and suspension mark an astonishing turn of events, and could signal the end of an illustrious career by a courageous judge. Garzón is no ordinary Chartusian monk of the law, a seat-warmer, or a timorous soul, lucky to have found a kind of 'sine cura' in the judiciary, provided of course that there be no boats rocked in the process.

Garzón entered the judiciary at 23 and joined the 'Audiencia Nacional' at 32. Attached to the 'Juzgado Central de Instrucción No. 5'-- the Fifth Chamber of the Central Criminal Court, his function was that of investigating the cases which were assigned to him, of gathering evidence and evaluating whether a case should be brought to trial. He would not ordinarily try the cases himself.

"

In time Judge Garzón played a key role in indicting suspected Basque terrorists. 'Euskadi Ta Askatasuna'-- Basque Homeland and Freedom, ETA had murdered Carmen Tagle, one of Garzón's prosecuting colleagues in 1989. Garzón took charge of many anti-ETA operations and, more controversially, against ETA's political wing and Basque newspapers. In May 1998 he would disband 'Koordinora Arbetzale Sozialista-KAS', an association of groups seeking independence with violent means, on the grounds that it was for all purposes a strategic arm of ETA. Two months later he closed down the newspaper 'Egin', regarded as the mouthpiece for ETA, a move which raised questions concerning freedom of the press in Spain. In September 2000, in an operation involving 300 policemen, he ordered the arrest of members of 'Ekin', an organisation seen as the successor of KAS. In October 2002 Garzón suspended the operations

of the 'Batasuna' Party for three years, again alleging direct connections with ETA. In February 2003 he ordered the closure of 'Egunkaria', a Basque newspaper.

In 1990 Judge Garzón had personally led police operations against a Colombian-related drug syndicate. The still young judge meant business.

In 1993 Garzón took leave of absence to run for a seat in the Spanish Parliament as an independent in the list of the 'Partido Socialista Obrero Español', the PSOE which returned to govern in 2004. He won a seat, but he might soon have gained the impression that the embattled Socialist Party had taken him on board mainly for window dressing. In 1994 he resigned and returned to his former post.

As investigating magistrate he was in charge of some of Spain's high-profile cases, involving drug trafficking, corruption in high places, and that of the 'Grupos Antiterroristas de Liberación'-- Antiterrorist Liberation Groups, GAL, the shady hit-squad set up by officials within the very government he had left to fight a dirty war against the Basque separatists. Several of Garzón's former political allies ended up in gaol. Garzón charged that Spain's interior ministry financed a campaign waged by mercenaries and radical right-wingers -- the GAL. Police officers were involved and Socialist ministers helped cover it up. This led to trial and convictions of several high positioned civil servants and of the Interior Minister José Barrionuevo.

That made Garzón no friends from 'the Left' of politics.

His prominence as an international figure had begun with his indictment of leaders of the former Argentine military 'junta', on charges of genocide, terrorism and torture during the 1976-1983 dictatorship. The National Court had assigned him this duty.

By 1996 Garzón was ready to test the limits of international human rights law by opening genocide investigations into the Chilean and Argentine dictatorships. He explored the reach of universal jurisdiction by claiming that former Chilean dictator General Augusto Pinochet could be tried in Spain for the

crimes he had committed -as he could not be tried in Chile.

The doctrine of universal jurisdiction empowers national authorities to investigate and prosecute any person suspected of crimes such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and enforced disappearances-which are crimes under international law, regardless of where the crime was committed or the nationality of the accused and the victim, and to award reparations to victims and their families. Garzón had become famous for employing such a doctrine extensively. The application of the doctrine has recently been circumscribed by the Spanish Parliament, as will be seen.

In 1998 Garzón issued an international arrest warrant when he learned that Pinochet was in London for a medical check- up. British police arrested Pinochet in October 1998. Pinochet was held under house arrest in London, pending a decision on his extradition to Spain, until March 2000, when the Home Secretary of the Blair Government decided to release him on the ground that the dictator was deemed unfit to stand trial.

Also in 1998 Garzón sought the extradition of 46 former military and civilian officials from Argentina, including former 'junta' members Jorge Rafael Videla and Emilio Massera. But the extradition request was turned down by then President Carlos Menem (1989-1999) - who had pardoned the dictators, and by his successor Fernando de la Rúa (1999-2001).

Pursuing Pinochet and other butchers and trans-border criminals would win Garzón many points of merit from the Left, but eternal enmity from the Right.

In 2001 Garzón extended his investigation into the anti-competitive activity of corporations controlled by Europe favourite joker, then as presently Prime Minister Silvio Berlusconi, and attempted, unsuccessfully, to have him extradited to Spain on the ground of tax fraud and breach of anti-trust laws through a stake in Spanish TV company 'Telecinco'.

In 2003 Garzón indicted Osama bin Laden over the 11

September 2001 attacks in the United States.

In 1999 and 2000 Garzón had filed charges against two Argentine officers in connexion with the disappearance of Spanish citizens during Argentina's 'dirty war' of 1976-1983. In 2005 Adolfo Scilingo was prosecuted in Spain for terrorism, torture and attempted genocide-as the aim of the military regime at the time was the destruction of an entire group, its opponents. The original sentence of 640 years imprisonment was increased to 1,084 years in 2007. Miguel Cavallo was charged with genocide, terrorism and torture. He was eventually extradited to Argentina on 31 March 2008 where he is currently awaiting trial.

Then Garzón turned to more recent and continuing crimes.

In 2002 Garzón sought to interview former State Secretary Henry Kissinger over what the United States Government knew about 'Operation Condor'. This Operation involved an agreement between six former Latin American dictatorships -- Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay -- to kidnap and assassinate, leaving no trace, each regime's political opponents. There being no dead bodies, the conspirators could deny everything. The victims were henceforth referred to as 'los desaparecidos' -- the disappeared. The use of the term 'enforced disappearances' in international treaties derives from the 'dirty wars' in Latin America during the period.

In March 2009 Garzón investigated the possibility of bringing charges against six former officials of the George Bush Junior's administration for offering justifications for torture. The investigation -- it is said -- had gone pretty perilously close to Vice-President Cheney. On 29 April 2009 Garzón opened an investigation into a 'systematic programme' of torture at Guantánamo Bay, following accusations by four former prisoners. Garzón had said that documents declassified by the US administration and carried by US media "have revealed what was previously a suspicion: the existence of an authorised and systematic programme of torture and mistreatment of persons deprived of their freedom" -- and that flouts international conventions.

This points to the possible existence of concerted actions by the US administration for the execution of a multitude of crimes of torture against persons deprived of their freedom in Guantánamo and other prisons including that of Bagram in Afghanistan.

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

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

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

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

Garzón's troubles stem from the fact that he is no ordinary judge; he is more interested in imparting justice than in blandly administering the law.

Some of Garzón fellow -- judges visibly displayed their disapproval: judges are accustomed to 'discretion'. The Spanish judiciary typically does not look well on magistrates who draw attention to themselves. And that may be an understatement. Some loathe him -- for them he

is but an abuser of the law to aggrandise himself. Others, though timorously, envy him as a courageous and imaginative defender of justice.

"Other judges are critical of him because they would never dare do the things he has done." said Carlos Jimenez Villarejo, formerly Spain's chief anti-corruption prosecutor. José María Mena, a former public prosecutor, sums it up thus: "If he were a tame, lazy judge, he would not have these sorts of problems."

Judge Garzón was anything but lazy. He had to be stopped. The Spanish Right would swear to finish Judge Garzón after he opened the 'Gu"rtel' case, a corruption case which exploded in 2009 and involved high figures of the 'Partido' 'Popular'- Popular Party, the Right-wing opposition and a linear successor of 'Franquismo', especially its regional governments in Madrid and Valencia. The Judge carefully examined contracts, backhanders and possibly illegal party funding.

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

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

On 16 October 2008, in a 68-page judgment, Garzón had acknowledged jurisdiction and accepted a petition demanding an investigation into the enforced disappearances of Republicans under the Franco regime. The petition had been submitted by 13 associations of the families of victims, led by the 'Asociación para la Recuperación de la Memoria Histórica' <http://www.memoriahistorica.org/> -- the Association for the Recovery of Historical Memory, ARMH.

The Judge had ordered the opening of 19 mass graves, including one believed to contain the remains of the poet Federico García Lorca. Previously Garzón had sought information from local churches, senior church authorities, and city halls in an attempt to establish a

definitive list of victims between 17 July 1936 and December 1951. He put together a list of 114,266 names. Later the list was expanded to 133,708 persons.

That decision is regarded as the catalyst for the Judge's present tribulations. But, as already indicated, there might be other causes.

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

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

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

These investigations were huge sources of headache for the Spanish Government, and both major Parties would collude in seeking the limited application of the law, even the domestic reception of it.

One of the loudest voices against Garzón was coming from Manuel Fraga Iribarne. Aged 88, this is one of the relics of the Franco regime. He was for many, crucial years Franco's Ambassador to the Court of St. James and later Minister of Information-read propaganda- and survived to become the ferryman for many Francoists into the 'Partido Popular'-- Popular Party that he founded and which was later to be led by José María Aznar. Fraga still sits as a Spanish senator. He broadly orated that it was an error and absurd that a man could define

himself as competent in a matter where it is debatable that anyone has competence given the amnesty law. And, anyway, "Politically it is a very serious error to revive the problems of the civil war." Of course, he would say that.

A Popular Party spokesperson in the Spanish Congress, Soraya Sáenz de Santamaría, said that there were "many defects in the process" and that Garzón wanted to reopen matters which were resolved in the 'transición'-- the so-called 'transition to democracy' which is said to have taken place in 1977-1978 -- and are not strictly judicial.

The Prosecutors Office spoke also against the action of Garzón, claiming that he was not competent to raise the case, which was to be archived as falling under the 1977 amnesty law.

The fiction behind all this posturing is that a recent, dark period of Spanish history should never be investigated because of an unwritten, dubious political deal, euphemistically known as the 'pacto del olvido' -- a pact of forgetting, which is assumed to have been entered into by the parties emerging from the Francoist era. This and the amnesty of 15 October 1977 should prevent any examination of the crimes of the dictatorship. That pact and that law are the foundation of the 'transition to democracy'. It is not a position which could be sustained in good faith.

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

The Public Prosecutor further contended that the 2007 Law for the Recovery of Historical Memory does not allow judicial enquiries because it already provides appropriate and sufficient measures for the victims. This seems a bad reading of the Law, which says that "[Its provisions are] compatible with taking the legal

action and having access to the ordinary and extraordinary court proceedings established in the laws or the international treaties or covenants ratified by Spain."

Garzón maintained that the illegal detention and disappearance of victims are not subject to the 1977 amnesty law because they can be characterised as crimes against humanity, and as such are subject to universal jurisdiction. In this contention he was supported by Amnesty International and the United Nations Human Rights Commission. Garzón also dismissed any statute of limitations, on the ground that Franco waged a systematic campaign to eliminate opponents and hide their bodies and, since the bodies are still missing, the crimes are ongoing.

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

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

The UN General Assembly in Resolutions 2583 of 1969 and 3074 of 1973 emphasised the importance of "rigorous investigation" of crimes against humanity. It declared that they are under investigation, "wherever and whatever the date that have been committed "and that" persons against whom there is evidence of guilt in the commission of such crimes must be searched, arrested, prosecuted and, if guilty, punished." In his report on the establishment of the Special Court for Sierra Leone, UN Secretary General Kofi Annan emphasised that "the United Nations consistently maintained the position that amnesty cannot be granted in respect of international crimes such as genocide, crimes against humanity or

other serious violations of international humanitarian law."

Similarly, under international law there is explicit recognition that enforced disappearance is a crime of continuing, permanent nature while the whereabouts of a disappeared person are not clarified. Therefore, it would not only be about crimes which have not been prescribed, but also about the Spanish State's duty to investigate the facts and identify the culprits. This principle has been established by the European Court of Human Rights and accepted by Spain's ratification of the International Convention for the Protection of All Persons from Enforced Disappearances, which contains similar principles.

Furthermore, 'the [victims' families'] right to the truth' about their missing relatives was recognised in Resolution 1463 of the Parliamentary Assembly of the Council of Europe 3 October 2005, which also binds Spain, and in the Body of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity issued by the Human Rights Commission of the UN in 1998.

In this sense, criminal investigations of serious human rights violations are considered key to the fulfilment of three objectives: the establishment of the facts, the establishment of individual responsibility, and the reparation of victims. The Inter-American Court of Human Rights also has stated that "the right to know the truth of the relatives of victims of gross violations of human rights is part of the right of access to justice," and that the obligation to investigate is a relief. In similar terms the Special Rapporteurs on the Independence of Judges and Lawyers, have consistently highlighted the "close relationship between the right to justice and the right to truth, because the legal mechanisms play a prominent role in ensuring to clarify the facts."

The Socialist-Government-appointed Attorney General Cándido Conde-Pumpido condemned the investigation. He specifically asked Garzón to shelve his case against the Americans and warned of the risks of turning the Spanish justice system into a "plaything" for politically

motivated prosecutions. Instead of heeding that advice, Garzón opened yet another investigation to seek information on everyone who authorised and carried out the alleged torture of four inmates at Guantánamo Bay.

The Attorney General's intervention followed outbursts by the Popular Party and the Catholic Church criticising Garzón for reopening "wounds from the past."

Garzón effectively rebutted every argument.

Expressing its solidarity with the Judge's position, Human Rights Watch said that the sanctions against Garzón are not only a blow to the families of victims of serious crimes in Spain, but also risk undermining the European Union's collective credibility and effectiveness in seeking justice for current human rights crimes -- be they in Darfur, the Democratic Republic of Congo, or Sri Lanka.

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

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

In 2009 the European Court of Human Rights held that, as

a general principle, an amnesty law is incompatible with states' duty to investigate acts of torture or barbarity.

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

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

On 13 November 2008 Amnesty International called on the Spanish Government to comply with its international obligations regarding past crimes, because blocking such war crimes investigations "could establish impunity mechanisms that are not in compliance with the rules applicable to crimes under international law."

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

Under international law, a government's refusal to

acknowledge the detention of an individual or their whereabouts is an enforced disappearance. In 1992 the UN General Assembly passed the UN Declaration on the Protection of All Persons from Enforced Disappearances. It provides that an enforced disappearance has occurred when government officials or agents arrest, detain or abduct against their will an individual "followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law." According to the Declaration, "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."

In 2006 the prohibition against enforced disappearances was strengthened by the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (Convention against Enforced Disappearance). Under Article 5 of the Convention, "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law." The Convention will not enter into force until it has been ratified by 20 countries. Thus far, 86 countries have signed the Convention and 19, including Spain, have ratified it. In addition, Spain is a Party to the 2002 Rome Statute of the International Criminal Court. Under Article 7(1)(i) of the Statute, which is indicative of customary international law, the 'enforced disappearance of persons' constitutes a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population."

Those criticising Garzón's investigation have claimed that international human rights legislation cannot be invoked as Spain had not ratified it at the time, and in addition, its provisions are not reflective of the state of customary international law during the relevant period. In reply Garzón appealed to the Nuremberg war crimes trials as precedent. The Nuremberg trials began in 1945, 6 years after the end of the Spanish civil war. German officials who had acted under the Nazi Regime -a

regime which had generously supported Franco - were prosecuted for initiating a war of aggression and for the commission of the crimes which resulted: crimes against peace, war crimes, crimes against humanity and genocide. Some people have criticised the Nuremberg trials for applying 'ex post facto' law --created after the fact, by violating the principle 'nullum crimen sine lege'-no crime without a law. However Garzón**maintains that they are a valid precedent: if international law could be used at Nuremberg, the same rules could be applied to events which took place only a few years prior -- he argues.

In a further show of its weakness the Spanish Government- under pressure from the US administration, Israel and China and the Spanish Right, last year introduced legislation to narrow the scope of universal jurisdictionto cases in which the victims of a crime include Spaniards or the perpetrators of which were in Spain.The bill was approved almost unanimously by Parliament. It was said to be aimed at "ending the practice of letting its judges seek war - crime indictments against officials from any foreign country, including the United States."

The view of the Attorney General and the decision of the National Court emboldened the Right.

As a result of a prosecution brought by far-Right organisations for investigating Franco's crimes, judges of the National Court accepted a complaint by a shadowy far-Right pressure group called 'Manos Limpias ' -- Clean Hands, and by another called 'Libertad e Identidad' - Liberty and Identity on the ground that Garzón exceeded his legal powers -- 'prevaricación'-- in 2008 by ignoring the amnesty granted to Franco and his henchmen in 1977 during the 'transition'.

Thereafter, a similar complaint from the 'Falange Española' was admitted by Spain's Supreme Court.

The Supreme Court appointed Judge Luciano Varela Castro to examine the case. "It is like the end of a farce." said Francisco Espinosa, a historian who served on an advisory committee for the investigation. "The same people who participated actively in the failed 'coup' of

23 February 1981 and in the repression under investigation are precisely the ones bringing the complaint, and the Supreme Court, instead of shelving it, gives the green light."

On 3 February 2010 Judge Varela rejected Judge Garzón's petition to dismiss the complaints, claiming that conducting the investigation despite the 1977 amnesty law could amount to a crime under Article 446.3 of the Spanish Criminal Code. "Aware of his lack of jurisdiction and that the crimes reported lacked criminal relevance when the proceedings began, [Garzón] built a contrived argument to justify his control of the proceedings he initiated." wrote Varela in his ruling.

On 25 March the Appeal Chamber of the Supreme Court confirmed the decision to refuse the dismissal of the case. In its decision the Court asserted that the charge "is not arbitrary, illogical or absurd."

On 7 April 2010 Judge Garzón was summoned to appear in court.

Emilio Silva, the president of the Association for the Recovery of Historical Memory -- ARMH, harshly criticised the Supreme Court's announcement that it would try Garzón. Noting that Prime Minister José Luis Rodríguez Zapatero had said that Franco "has already been judged by history," he asked: "What would people in Argentina, where members of the dictatorship have been put on trial, think of that statement?"

"For victims of Franco," a spokesman for the ARMH remarked, "it is a humiliation to see that the judge who tried to find thousands of the disappeared in mass graves could be convicted for it."

"We are truly scandalised." Giulia Tamayo, head of research for Amnesty International in Spain, said. "The UN Commission on Human Rights has repeatedly warned the Spanish government that amnesty laws were not applicable to crimes against humanity, but the Spanish authorities continue to hinder the victims' quest for justice and reparation. Now the only judge who wanted to abide by international law is being made to pay for it. No other country has gone as far as to prosecute a judge that

tried to investigate such crimes." she added.

Garzón's defence had lined up a cast of international legal experts, including Carla del Ponte, former chief prosecutor at the International Criminal Court, and Eugenio Raúl Zaffaroni, the Argentine judge who in 2005 voided the country's amnesty law. But the Supreme Court ruled that it would not admit their testimony. The defence would be appealing against the decision.

On 10 April 2010 Judge Garzón appealed against the indictment. He 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.

On the same day the ARMH announced that it intended to file a criminal complaint against Judge Varela for violating international law in the application of the amnesty law. The Association expressed its "deep indignation" over a trial which had been initiated by "Fascist" Franco's "ideological representatives." The Association also sued Supreme Court Judge Juan Saavedra, president of the chamber which had rejected the appeal lodged by Garzon. Members of the Association said that, if need be, they would pursue a suit against Varela in courts in Argentina and Chile under universal jurisdiction.

The expected reaction soon came: on 14 April Argentine lawyer Carlos Slepoy, who lives and practices in Madrid, and human rights groups filed genocide charges in a federal court in Argentina for the 1936 murders by pro-Franco forces of two Spanish mayors, Elías García Holgado and Severino Rivas, invoking the principle of universal justice.

Among other legal instruments, Slepoy appealed to the UN Convention against Torture, approved in 1984 and in force since 1987, which has been ratified by Argentina, Spain and more than a hundred other countries. The Convention established that, when there is reliable information about cases of torture occurring in one of

the states party, the accused persons can be tried in a court in a different state party.

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

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

The International Commission of Jurists called for the charges against Garzón to be dismissed, saying international law prohibits the prosecution of judges "for controversial or even unjust or incorrect decisions." The Commission said that the attempt to interfere in the judicial process was of "particular concern" since it involved an investigation into crimes against humanity, that Spain had a duty to investigate and prosecute. Amnesties for such crimes are invalidated by European human rights laws, it added.

Several prestigious international lawyers joined Spanish left-wing intellectuals, lawyers, politicians and human rights activists in their defence of Garzón.

The case against Garzón "gives the impression that Spain is trying to hide the existence of crimes against humanity," Argentine Supreme Court Judge Eugenio Raúl Zaffaroni said, while the late Portuguese Nobel literature laureate José Saramago praised Garzón's "courage and honesty."

To everyone's surprise, a member of the Spanish Supreme Court, Judge Luciano Varela, who had been assigned by the Court to look at the complaints against Garzón, saw merit in their request. The irony is that Judge Varela is considered of 'left-wing' sympathies; but he belongs to a generation which believes the post-Franco pledge not to delve into the past must be adhered to. "This artificially built case [against Franco] shows a basic lack of knowledge of the principles of law and of democratically approved laws such as the amnesty law of 1977," he is reported to have said. Long ago Judge Varela made clear his intense dislike for judges like Garzón. "The one thing I find totally repugnant is a judge who likes to play at policeman," he was quoted as saying.

According to Varela, the amnesty law gave permanent immunity to all who had committed violations of human rights under the Franco regime. This judge's orientation increased the likelihood of Garzon's being taken before the Supreme Court -- a five-member court presided over by a judge who swore loyalty to the Franco regime.

Spaniards with a long memory are not amazed by the protagonists who have suddenly reappeared into mainstream debate.

Most of the judges hearing the charges against Garzón are old enough to have sworn loyalty to Franco. Many neo-Francoist judges were appointed during the Aznar period in government.

"The judiciary in Spain has changed since the Pinochet case," explained Juan E. Garcés, who was the leading lawyer in the case against Pinochet. "A lot of rightwing judges were appointed to the Supreme Court by the Partido Popular" government of José María Aznar in the eight years up to 2004." They include some elderly judges who once swore loyalty to Franco's regime, he said.'

The 'Partido Popular' strongly supports the campaign against Garzón. The Party was vocal in its criticism of the Franco case. "It is outlandish," said Manuel Fraga Iribarne, the Party's founding president. Party officials had also lashed out at Garzón for his investigation into the Party's corruption scandal known

as the 'Gürtel' case.

Popular anger spread far beyond Spain, and Party leader Mariano Rajoy called the wave of pro-Garzón demonstrations "anti-democratic".

There is one further particular of judicial chicanery.

Doubts about the Supreme Court's impartiality reached a new level on 21 April, when Judge Varela, noting that the plaintiffs' briefs against Garzón included confusion of fact and law and unwarranted references to 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. 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, Varela concluded that Garzón had manipulated the course of justice by knowingly violating a 1977 amnesty law which shields all sides, including members of the Franco dictatorship, from legal prosecution. In addition, in Varela's view, the 2007 Law for the Recovery of Historical Memory explicitly conferred on the lower courts -and not on Garzón's court- jurisdiction over locating and excavating the mass graves which still dot the Spanish countryside.

Varela charged that Garzón, in order to overcome these restrictions, 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. "[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 pact of silence 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 the courts and to avoid any further embarrassment to the very powerful forces responsible for that silence and for that democratic insensitivity.

Both Amnesty International and Human Rights Watch have called on the Supreme Court to throw out the case.

Human Rights Watch said that if the judge were removed from office, it would damage the Human Rights record of the European Union. The organisation confirmed its opinion in a meeting with the President of the European Council, Herman Van Rompuy.

"Garzón sought justice for victims of human rights abuses abroad and now he is being punished for trying to do the same at home. The decision leaves Spain and Europe open to the charge of double standards." said Lotte Leicht, EU advocacy director at Human Rights Watch.

"Instead of a criminal complaint against Judge Baltasar Garzón for investigating crimes under international law committed in the past, Spain should, irrespective of the date of their commission, bring perpetrators to justice. ... They should take all measures to disclose the truth about the thousands of enforced disappearances, extrajudicial executions and torture committed during the Francisco Franco era and provide full reparations to the victims and their families. ...Any attempt to prosecute a judge for an independent and impartial exercise of his jurisdiction or to challenge the legality of an amnesty law is not in accordance with Spain's obligations under international law and should be reversed." said Amnesty's senior director Widney Brown.

Amnesty International strongly condemned the

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

The UN Human Rights Committee and the Committee against Torture recently warned that Spain should repeal the amnesty law. They reiterated to the Spanish authorities that enforced disappearances and torture are not subject to amnesty and that statutes of limitations do not apply to such crimes.

Widney Brown, added: "The 1977 Amnesty Law barring prosecutions of crimes under international law violates Spain's obligations under international law and it is a duty of the judiciary, sooner or later, to state that such a piece of legislation is simply null and void."

Amnesty International urged Spanish authorities instead to concentrate on finding justice for the relatives of the estimated 114,266 people who 'disappeared' at the hands of the Franco government.

In a public letter to the Spanish Attorney General, the American Bar Association suggested that "amnesties for crimes against humanity are inconsistent with a State's obligations to protect human rights, including the right of access to justice." and supported Garzón's case against the Francoists. Indeed, even if Garzón did exceed his jurisdiction in opening an investigation on behalf of Franco's victims, the Supreme Court's decision to prosecute him rather than simply strike down his decisions is unsettling and reveals the parlous condition in Spain's judicial system.

The New York Times published a fiercely supportive

editorial, although some on the American Right rub their hands at the threat to universal justice -- which they fear may be used against US officials accused of torture in Iraq.

Garzón appealed the charges, alleging 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.

On 28 April Varela announced that he was considering a request for his recusal from the case.

Just two weeks before the recent United Nations Human Rights Council's meeting the Criminal Chamber of the Spanish Supreme Court in Madrid unanimously upheld the lower court's order that Judge Baltasar Garzón should stand trial. Garzón had been charged on 7 April for his attempt to investigate the war crimes committed between 17 July 1936 and December 1951, the bloodiest period of Franco's dictatorship -- a charge that Garzón has persistently claimed as politically motivated. Judge Garzón will face trial sometime this year before a bench of five judges: Juan Saavedra, president, Juan Ramón Berdugo, Joaquín Jiménez, Francisco Monterde and Adolfo Prego. The judges had found that the witnesses called by Garzón proffered only personal opinions; they also determined that exhumation of 19 mass graves that Garzón authorised on 1 September 2008 was inappropriate. The ruling came just two days after an Argentine court reopened the case against the Franco regime for crimes against humanity.

The politicisation of the Spanish judiciary would soon be in full display. The Supreme Court president, Judge Juan Saavedra, is on record as saying he is totally against judges like Garzón. "Star judges are opportunists," he said. Saavedra is one of the five judges who will now decide Garzón's future. Another Judge, Adolfo Prego, is the patron of the Right-wing Defence of the Spanish Nation pressure group.

On 14 May the CGPJ voted unanimously -- 18-0 with three abstentions -- to suspend Garzón. The CGPJ 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.

No trial date was set.

If convicted, Judge Garzón could face a suspension of up to 20 years.

From the beginning, the case against 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.

Even though 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. Garzon's lawyer, Gonzalo Martinez-Fresneda, said as much.

Two days before the decision, Garzón had asked for a seven-month leave to work as a consultant to the International Criminal Court in The Hague, presumably as a face-saving measure to avoid the humiliation of a suspension. His request was supposed to be discussed on 17 May, but the CGPJ, in response to seven conservatives who comprise a powerful group of its members, called a special meeting of the session for 14 May. A subcommittee of CGPJ met on the evening of the decision-to-suspend to see if Garzón could be allowed to take up that position without resigning from his post in Madrid, but it postponed a decision.

Garzón did not speak publicly after the suspension. But the day before, at a Latin American human rights conference, the clearly crestfallen Judge said: "One does not face complex decisions with optimism but rather with calm, with that calm that comes with knowing I am innocent. ... As a man who respects the law, all that is left for me is to take on tomorrow's decision by exercising my defence."

Thousands gathered in cities across Spain in support of the Judge, chanting slogans and displaying flags of the pre-war Republican Government ousted by Franco. Unfortunately, powerful media branded holding such public meetings and demonstrations as "attacks on democracy."

Human Rights Watch condemned the CGPJ's decision.

"This is a sad day for the cause of human rights. Garzón was instrumental in delivering justice for victims of atrocities abroad and now he is being punished for trying to do the same at home." Reed Brody, the rights group's legal counsel, said in a statement. "Garzón's decision not to apply Spain's amnesty, for which he is being prosecuted, is supported by international law, which imposes on states a duty to investigate the worst international crimes, including crimes against humanity. Thanks to Garzón, Spain became a symbol of justice for atrocity victims around the world. Now justice itself has become the victim in Spain."

Lotte Leicht, also from Human Rights Watch, said that "Garzón has made efforts to ensure justice for victims of human rights violations outside Spain, and now he is being punished for trying to do the same in his own country."

There were also some courageous voices within the judiciary: for instance, Dolores Delgado, a prosecutor at the 'Audiencia Nacional' declared unequivocally that the trial of Garzón is aimed at squelching the application of universal jurisdiction in Spain.

Whether the charge against Garzón will hold up remains to be seen.

Anger has spread far beyond Spain.

As noted, Spain's so-called historical memory groups have already imitated Garzón's prosecution of Pinochet by lodging a case asking for Francoist atrocities to be investigated by an Argentine court, on the basis that international law permits other countries to prosecute crimes against humanity if Spain refuses so to do. Carlos Slepoy, a Madrid-based Argentine lawyer, went to Buenos Aires to present the petition. "There are still

people alive who were involved in the extreme repression of the first decade of Francoism, but crimes were still being committed up to 1977." he explained. "If we manage to find people who were involved, we will demand their detention, extradition and trial --whatever country they are now in."

The Argentine court may accept and deal with the case, in full application of the doctrine of universal jurisdiction that Spain has recently restricted. Much will depend on the Spanish Government's reply to Judge María Servini's request in date 14 October 2010, that the Madrid Government "inform [her court] whether in [Spain] there is an investigation into the existence of a systematic, widespread and deliberate plan designed to terrorise the Spaniards who supported representative government by their physical elimination, and of a plan of legalised disappearance of children [of Republican families] whose identities were changed."

Much also will depend on whether Spain's Supreme Court decides to condemn Judge Garzón. "What is on trial here is a lot more than Garzón's future," said Juan E. Garcés. "This is a battle for the history and the soul of Spain itself."

If at the trial Garzón will be found guilty, his judicial career will come to a sudden end and the world will lose one of its champions of international criminal law and universal jurisdiction. Thanks to Garzón Spain became a symbol of justice for atrocity victims around the world. Now justice itself may be the victim in Spain.

In the words of Emilio Silva, the president of the Association for the Recovery of Historical Memory: "The irony is that Garzón is the only person now being pursued through the courts because of 'Franquismo' crimes."

In 1939, when Madrid fell to Franco, Ortega y Gasset took off for Argentina, and exile. But he was no Pau Casals, the famous Catalan cellist refugee -who swore never to return-- and never did. He died in exile two years short of the death of the 'gentle general', as the butcher of the Second Republic was known, and reverently

referred to, throughout most of the Anglophone world.

Ortega y Gasset had written that "'el encanallamento', the debasement, of the average [Spaniard] makes Spain a nation which has lived for centuries with a dirty conscience."

In 1948 Ortega accepted an invitation from the regime, which wanted to appear 'more democratic' -- and returned. There was to be no reprisal. But the price was that he should keep his mouth shut. Ortega paid the price for seven long years, his lips sealed in an unbreakable silence.

If Judge Garzón will be found guilty, Spain will have another reason to live with a dirty conscience.

What is certain is that, just like Pau Casals, Judge Garzón will not compromise. The Spanish ruling class should prepare itself for a man who will not be silenced.

*Dr. Evan Jones of Sydney, Australia read a first version and made very much appreciated comments.

Dr. Venturino Giorgio Venturini, formerly an 'avvocato' at the Court of Appeal of Bologna, taught, administered, and advised on, law in four continents, 'retiring' in 1993 from Monash University. Author of eight books and about 100 articles and essays for learned periodicals and conferences, his latest work THE LAST GREAT CAUSE -- 'Volunteers from Australia' 'and Emilia-Romagna in defence of the Spanish Republic, 1936-1939' is in course of publication by the Search Foundation in Sydney. Since his 'retirement' Dr. Venturini has been Senior Associate in the School of Political and Social Inquiry at Monash; he is also an Adjunct Professor at the Institute for Social Research at Swinburne University, Melbourne.
george.venturini@arts.monash.edu.au