

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. []

BETWEEN:

BALTASAR GARZÓN

Applicant

and

SPAIN

Respondent

**EXPERT OPINION ON INTERNATIONAL LEGAL STANDARDS REGARDING
JUDICIAL INDEPENDENCE**

Contents

I. Introduction..... 3

II. Judicial Independence as a Fundamental Principle in International Law and Practice 4

A. THE EUROPEAN CONVENTION ON HUMAN RIGHTS..... 5

B. OTHER REGIONAL HUMAN RIGHTS INSTRUMENTS 6

 1. The American Convention on Human Rights..... 6

 2. The African Charter on Human and Peoples’ Rights 8

C. THE UNIVERSAL HUMAN RIGHTS FRAMEWORK..... 9

 1. International Covenant on Civil and Political Rights..... 9

 2. Convention against Torture..... 11

 3. UN Human Rights Council (and former Commission on Human Rights).....13

 4. The UN Special Rapporteur on the Independence of the Judges and Lawyers13

D. INTERNATIONAL PRINCIPLES AND DECLARATIONS.....14

 1. International Principles.....14

 2. Regional principles in Europe, Asia and Africa15

E. JUDICIAL INDEPENDENCE AND SPAIN’S OBLIGATIONS UNDER INTERNATIONAL LAW..... 16

III. The Protection against Prosecution of Judges for Acts Performed in Exercise of Official Functions 16

A. REGIONAL HUMAN RIGHTS SYSTEMS..... 17

 1. European Court of Human Rights17

 2. Inter-American Court of Human Rights.....18

 3. African Commission on Human and Peoples’ Rights19

B. THE UNIVERSAL HUMAN RIGHTS FRAMEWORK..... 20

 1. International Covenant on Civil and Political Rights..... 20

 2. Convention against Torture..... 22

C. OTHER UNIVERSAL HUMAN RIGHTS MECHANISMS 23

 1. The UN Special Rapporteur on the Independence of Judges and Lawyers 23

D. INTERNATIONAL PRINCIPLES AND DECLARATIONS..... 25

IV. CONCLUDING COMMENTS 28

V. EXPERT WITNESSES 30

I. INTRODUCTION

1. This expert opinion is submitted by the undersigned experts in international law and practice, with particular experience in relation to issues of judicial independence of relevance to the case presently before the European Court of Human Rights (“the Court”). The opinion seeks to facilitate the Court’s consideration of the prosecution of Judge Garzón for the crime of “prevaricación,” by placing it in the context of international standards relating to judicial independence and, more specifically, to the protection of judges from criminal prosecution for their judicial interpretations of the law.

2. The principle of judicial independence is a general principle of law recognised by the international community. The importance of judicial independence has been recognised by many international courts and human rights supervisory mechanisms, as reflected in national constitutions and laws across the Council of Europe and beyond. The obligation to protect judges from liability for their judicial opinions is a necessary corollary of the obligation to respect judicial independence. It is essential to ensure that judges can engage in the proper exercise of their functions, including in legally and politically complex cases, without fearing the initiation of a prosecution by an aggrieved party or the state.

3. Although the protection against liability of judges need not be absolute, in accordance with relevant international principles a high level of protection must be guaranteed. This requires a strict approach to any exceptions to the rule, and rigorous procedural safeguards. States must protect judges from liability in respect of decisions even where it is alleged that they erred in law; allegations of legal errors by judges are common, and they can, if necessary, be corrected by the judicial system through appeal and review rather than through the imposition of disciplinary sanctions or criminal punishment.

4. The potential chilling effect on other judges and the rule of law of prosecuting judges for their judicial decisions is a matter of international concern, as reflected in the international practice cited below. Moreover, in the particular context of crimes against humanity or other grave human rights violations, the practice of international bodies makes clear that safeguards for judicial independence are particularly important. The gravity of the crimes and the history of impunity in respect of them underline the importance of robust and independent judges willing and able to tackle this phenomenon.

5. In light of these principles, the opinion concludes that the prosecution of Judge Garzón in respect of his decision to initiate a criminal investigation into the alleged practice of enforced disappearances during the Spanish Civil War and subsequently during the Junta Period violates Spain's obligations to ensure judicial independence. Even if Judge Garzón had erred in initiating the investigation in question as a matter of law, which is not the subject of this expert opinion, this is a matter that could be addressed in the normal manner through the Spanish legal system. The potential chilling effect of Judge Garzón's prosecution for a purported error of law on others responsible for the investigation of such complex crimes is a matter of particular concern. Any such effect is at odds with obligations in respect of judicial independence, ensuring access to justice of victims and ensuring that those responsible for grave human rights violations do not enjoy impunity.

II. JUDICIAL INDEPENDENCE AS A FUNDAMENTAL PRINCIPLE IN INTERNATIONAL LAW AND PRACTICE

6. Respect for the independence of the judiciary is an obligation imposed by the European Convention of Human Rights, as well as many other universal and regional human rights instruments. This framework of international obligations has been supplemented by a body of international principles developed under the auspices of the United Nations, namely the Basic Principles on the Independence of the Judiciary¹ ("UN Basic Principles"), endorsed by the UN General Assembly in Resolution 40/32, 29 November 1985, and subsequently augmented by the Bangalore Principles of Judicial Conduct.²

7. The latter body of principles expressly recognise that "a competent, independent and impartial judiciary is essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law" and that an independent judiciary is of particular importance to the protection of human rights given that "the implementation of all rights ultimately depends upon the proper administration of justice."³

¹ Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985) ("UN Basic Principles").

² These principles were taken note of by the Commission on Human Rights in Resolution 2003/43, 23 April 2003. In Resolution 2006/23 of 27 July 2006 the Commission on Human Rights observed that the Bangalore Principles "complemented" and "further developed" the UN Basic Principles.

³ See Preamble, Bangalore Principles of Judicial Conduct; see also Vienna Declaration and Programme of Action, World Conference on Human Rights, A/Conf.157/23, 12 July 1993, para. 27.

8. Within the international and regional systems for the protection of human rights, a significant body of jurisprudence has been established which treats judicial independence as an aspect of the treaty obligations of State parties. At both the universal and regional levels, human rights treaties oblige State parties to refrain from taking steps which would compromise the independence of the judiciary. Thus failure to respect the requirements of judicial independence is also incompatible with the obligations incumbent upon States under a number of binding international instruments.

A. *THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

9. The principle of judicial independence is at the heart of the European Convention on Human Rights (“the Convention”).⁴ It is specifically enshrined in Article 6, but it also underpins the protection of all other rights under the Convention. The role of domestic judges in giving effect to Convention rights in their domestic legal orders is well recognised and essential to the protection of human rights in the region.

10. According to Article 6(1) of the Convention “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

11. In successive cases, the Court has emphasised the importance of protecting the independence of the judicial function.⁵ States are obliged to take a range of necessary measures to protect judicial independence. Critical among them are measures related to the appointment and removal of judges. For example in *Campbell and Fell v. United Kingdom* the Court observed:

In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case the Court has had regard to the manner of appointment of its members and the duration of their term of office ... the existence of guarantees against outside pressures

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, entry into force 3 September 1953, 213 *U.N.T.S.* 222.

⁵ See, e.g., *Hulki Gunes v. Turkey*, Application no. 28490/95, 19 June 2003, para. 84; *Campbell and Fell v. the United Kingdom*, Application nos 39665/98 and 40086/98, 9 October 2003; *Langborger v. Sweden*, Application no. 11179/84, 22 June 1989; *Van de Hurk v. Netherlands*, Application no. 16034/90, 19 April 1994, para. 45. *Guja v. Moldova*, [GC], Application no. 14277/04, 12 February 2008, paras 85-91; *Piersack v. Belgium*, Application no. 8692/79, 1 October 1982, para. 27. *Sramek v. Austria*, 1982, 8790/79, Application para 42.

... and the question whether the body presents an appearance of independence [...]⁶

12. Consistent with the approach adopted elsewhere, as set out in more detail below, the Court has noted that suspension or removal of a judge from his or her post, or the threat thereof, engages Article 6(1) and may amount to an impermissible “outside pressure” inconsistent with the requirement of independence.⁷

B. OTHER REGIONAL HUMAN RIGHTS INSTRUMENTS

1. The American Convention on Human Rights

13. The principle of judicial independence is likewise enshrined in other regional human rights standards. For example the American Convention on Human Rights in Article 8(1) states that “[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.”⁸

14. The Inter-American Commission of Human Rights (I-ACHR) has established that

The guarantees necessary to ensure the correct and independent operation of the judicial branch include the mechanisms whereby judges are appointed, the stability they enjoy in their appointments, and their proper professional training. In addition, the courts must also be independent of the other branches of government – that is free of all influence, threats, interference, irrespective of their origin.⁹

15. In a report entitled *Democracy and Human Rights*, the I-ACHR expressed its view that “[t]he observance of rights and freedoms in a democracy requires a legal and institutional order in which law prevails over the will of rulers, and in which there is judicial review of the constitutionality and legality of the acts of public power, it presupposes respect for the rule of law.”¹⁰ It concluded further that “[o]ne of the principles that define the rule of law is the

⁶ *Campbell and Fell v. United Kingdom*, 28 June 1984, para. 78, 7 EHRR 165; see also *Langborger v. Sweden*, Application no. 11179/84, 22 June 1989, para. 32.

⁷ *Ibid.* para. 80; and *Zand v. Austria*, 12 October 1978, para. 80, 15 D.R. 70 (1979). *Sramek v. Austria*, para 38.

⁸ American Convention on Human Rights, San José, 22 November 1969, entry into force 19 July 1978.

⁹ I-ACHR, *Report on Terrorism and Human Rights*, 22 October 2002, para. 229; see also IACHR, *Democracy and Human Rights in Venezuela*, 30 December 2009, page 47, para. 185.

¹⁰ This position has been stated by the Inter-American Commission on Human Rights on repeated occasions: I-ACHR, *Second Report on the Situation of Human Rights in Peru*, 2 June 2000, Chapter II, para. 1; *Report on the Situation of Human Rights in Venezuela*, 23 December 2003, para. 150.

separation of powers and the independence of the branches of government as an essential element in democracy.”¹¹

16. In *Reveron Trujillo v. Venezuela*, the Inter-American Court of Human Rights (I-ACtHR) stated that

[T]he principle of judicial independence constitutes one of the basic pillars of the guarantees of the due process, reason for which it shall be respected in all areas of the proceeding and before all the procedural instances in which decisions are made with regard to the person’s rights. The Court has considered that the principle of judicial independence results necessary for the protection of fundamental rights, reason for which its scope shall be guaranteed even in special situations, such as the state of emergency.¹²

17. The I-ACtHR further explained in *Reveron Trujillo* that “judges, unlike other public officials, have reinforced guarantees due to the necessary independence of the Judicial Power, which the Court has understood as ‘essential for the exercise of the judicial function.’” Pointing to its own jurisprudence and that of the European Court of Human Rights, it described that “the following guarantees are derived from the judicial independence: an adequate appointment process, the tenure in the position, and the guarantee against external pressures.”¹³

18. Elaborating on the requirement of independence, in *Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, a case concerning the removal of a number of persons from judicial office in that country on grounds of their purportedly having committed an “inexcusable judicial error”, the I-ACtHR held that the principle of judicial independence “must be guaranteed by the State both in its institutional aspect, that is, regarding the judiciary as a system as well as in connection with ... the specific judge.”¹⁴ The Court further observed:

The purpose of such protection lies in preventing the judicial system in general and its members in particular, from finding themselves subjected to possible undue limitations in the exercise of their functions, by bodies alien

¹¹ I-ACHR, *Democracy and Human Rights in Venezuela*, 30 December 2009, page 46, para. 180.

¹² I-ACtHR, *case María Reverón Trujillo v. Venezuela*, Judgment of 30 June 2009, para. 68, citing *Cf. Habeas Corpus in Emergency Situations (Articles 27(2), 25(1), and 7(6) of the American Convention on Human Rights)*. Advisory Opinion OC-8/87 of 30 January 1987. (Series A No. 8) para. 30, and *Judicial Guarantees in States of Emergency (Articles 27(2), 25, and 8 of the American Convention of Human Rights)*, para. 20.

¹³ *Ibid.* paras. 67, 70.

¹⁴ *Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Merits, Reparations and Costs, 5 August 2008, para. 55, Inter-Am. Ct. H. R. Series C. No. 182.

to the judiciary or even by those judges with review or appellate functions.¹⁵

19. Finding against Venezuela, the I-ACtHR decided that the removal of the judges in question from their position had infringed Article 8(1) of the Convention. Similarly, in *Constitutional Court v. Peru*, the I-ACtHR observed that “one of the principal purposes of the separation of public powers is to guarantee the independence of judges and, to this end, the different political systems have conceived strict procedures for both their appointment and removal.”¹⁶ Endorsing the approach adopted in the UN Basic Principles, the Court further stated that “[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental or other institutions to respect and observe the independence of the judiciary.”¹⁷

2. The African Charter on Human and Peoples’ Rights

20. The African Charter on Human and Peoples’ Rights contains a similar guarantee of “The right to be tried within a reasonable time by an impartial court or tribunal” (Article 7). Article 26 on the other hand requires guarantees on the independence of the judiciary and of the national institutions established for the promotion of the rights enshrined in the Charter. It in part reiterates the general provision of Article 1 as it follows that “State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.” The importance, but also the ‘fragility,’ of judicial independence has been recognised in the African system in several cases before the African Commission on Human and Peoples’ Rights.¹⁸

¹⁵ *Ibid.*

¹⁶ *Constitutional Court v. Peru*, Merits, Reparations and Costs, 31 January 2001, para. 73, Inter-Am. Ct. H. R., Series C. No. 71.

¹⁷ *Ibid.*

¹⁸ *Civil Liberties Organisation v. Nigeria*, Application 129/94; *International PEN, Constitutional Rights Project, Interights and Civil Liberties Organisation (on behalf of Ken Saro-Wiwa Jnr) v Nigeria*, Applications 137/94, 139/94, 154/96 and 161/97.

C. *THE UNIVERSAL HUMAN RIGHTS FRAMEWORK*

1. **International Covenant on Civil and Political Rights**

21. Article 14 of the International Covenant on Civil and Political Rights (“the ICCPR”),¹⁹ to which Spain is a State party,²⁰ requires:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

22. Although this provision confers, in particular, a right to a fair hearing, the obligation upon States to ensure the independence of the judiciary arises as a necessary corollary of this right. In General Comment 32²¹ the United Nations Human Rights Committee, the body charged with supervising the implementation of the ICCPR, provided guidance as to the scope of the rights and obligations contained in Article 14 of the Covenant. According to the Committee:

The notion of a “tribunal” in article 14, paragraph 1 designates a body ... [that] ... is independent of the executive and legislative branches of government and enjoys, in specific cases, judicial independence in deciding legal matters in proceedings that are judicial in nature.²²

Elaborating upon this observation, General Comment 31 states that “[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.”²³

23. The Human Rights Committee regularly deals with the requirements of judicial independence in its concluding observations on State reports under the ICCPR. On numerous occasions it has expressed concern at the failure of States to respect the obligation of judicial independence.²⁴ In its response to communications received alleging violations of the ICCPR, the Committee has also found that events including political interference in the

¹⁹ International Covenant on Civil and Political Rights, New York 16 December 1966, entry into force 23 March 1976, 999 *U.N.T.S.* 171.

²⁰ Spain ratified the ICCPR on 27 April 1977.

²¹ General Comment 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 23 August 2007, CCPR/C/GC/32.

²² *Ibid.* para. 18.

²³ *Ibid.* para. 19.

judicial process by State officials have violated the obligation of judicial independence imposed by Article 14.²⁵

24. The Human Rights Committee explains in General Comment 32 that the substance of the requirements of independence under the ICCPR include, *inter alia*, “guarantees relating to [judges’] security of tenure ... the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and the legislature.”²⁶ Significantly, the Human Rights Committee has also made clear in concluding observations on State reports that the imposition of sanctions including disciplinary measures (and *a fortiori* criminal sanctions) upon a judge for purported errors in judicial decision-making represents an interference with the obligation of judicial independence.²⁷

25. The Human Rights Committee recommends that domestic arrangements that interfere with judicial independence be reformed in accordance with relevant international standards, in particular those set out in the UN Basic Principles. Principle 16 of the UN Basic Principles stipulates that “judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.” With regard to the circumstances in which it is permissible to discipline, remove or suspend a judge. Principle 18 states that “judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.” The Principles also lay down standards to be followed where procedures for the suspension or removal of a judge are commenced, stating in Principle 19 that such proceedings shall be “determined in accordance with established standards of judicial conduct.”

26. The Human Rights Committee has, for example, responded to information that Belarus had failed to protect judges from discipline and dismissal related to particular outcomes in the discharge of their judicial functions, by “stress[ing] that the independence of the judiciary and the legal profession is essential for a sound administration of justice and for

²⁴ See e.g. Azerbaijan (2002), para. 14, CCPR A/57/40; Armenia (1999), para. 104, CCPR A/54/40; Argentina (1990), para. 155, CCPR A/45/40; Vietnam (2002), para. 10, CCPR/CO/75/VNM; and Uzbekistan (2001), para. 14, CCPR/CO/71/UZB.

²⁵ See e.g. *González del Río v. Peru*, 28 October 1992, Human Rights Committee Communication No. 263/1987, CCPR/C/46/D/263/1987.

²⁶ *Ibid.*

²⁷ See Human Rights Committee’s Concluding Observations on Vietnam (2002), para. 10, CCPR/CO/75/VNM and Uzbekistan (2001), para. 14, CCPR/CO/71/UZB.

the maintenance of democracy and the rule of law. All appropriate measures, including review of the Constitution and the laws, should be taken in order to ensure that judges and lawyers are independent of any political or other external pressure. The attention of the State party is drawn in this connection to the 1985 Basic Principles on the Independence of the Judiciary.”²⁸

27. Reflecting these requirements, the Human Rights Committee further specifies in General Comment 32 that States “should take specific measures guaranteeing the independence of the judiciary [and] protecting judges from any form of political influence in their decision-making.”²⁹

2. Convention against Torture

28. Like the ICCPR, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention against Torture”)³⁰ also imposes obligations with regard to judicial independence.³¹ The Committee against Torture has described judicial independence as an “essential quality for ensuring the application of the principle of legality.”³² The practice of the Committee makes clear that it is regarded as an important obligation imposed by the Convention against Torture. In its concluding observations on State reports the Committee frequently deals with the principle of judicial independence as a discrete topic, often commenting at some length on the extent to which domestic law and practice meet this obligation.

29. In recent years the Committee has, for example, raised concerns about the compatibility of domestic arrangements with the obligation of judicial independence under the Convention against Torture in respect of several States including Azerbaijan,³³ Cambodia,³⁴ Ethiopia,³⁵ Honduras,³⁶ Kazakhstan,³⁷ Syria³⁸ and Yemen.³⁹ Moreover, where

²⁸ Belarus, ICCPR, A/53/40 vol. I (1998) 26 at paras. 149 and 150.

²⁹ *Ibid.*

³⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York 10 December 1984, entry into force 26 June 1987, 1465 *U.N.T.S.* 85.

³¹ Article 13 of the Convention requires State parties to ensure that an individual who alleges that he has suffered torture “has the right to complain to, and to have his case promptly and impartially examined, by its competent authorities.”

³² Nicaragua (2009), para. 12, CAT/C/NIC/CO/1.

³³ Azerbaijan (2009), para. 9, CAT/C/AZE/CO/3.

³⁴ Cambodia (2010), para. 13, CAT/C/KHM/CO/2.

it has raised concerns with regard to judicial independence, the Committee has now established the practice of recommending that domestic arrangements be reformed in accordance with relevant international standards, in particular those set out in the UN Basic Principles. The Committee's recent observations in respect of Ethiopia, for example, are typical where it observed:

The State Party should take the necessary measures to ensure the full independence and impartiality of the judiciary in the performance of its duties in conformity with international standards, notably the Basic Principles on the Independence of the Judiciary ... In this respect, the State Party should ensure that the judiciary is free from any interference, in particular from the executive branch, in law as well as in practice.⁴⁰

30. Similarly, in its 2010 concluding observations on Syria, the Committee expressed concern as to the independence of the judiciary in that country noting that “judges do not enjoy immunity according to the provisions of Legislative Decree 40, issued on 21 May 1966.”⁴¹ In consequence the Committee recommended that “[t]he State Party should, as a matter of urgency, adopt all necessary measures to protect the independence of its courts and tribunals, as well as the independence and immunity of judges, in accordance with international standards.”⁴² The Committee has specifically requested that States bring domestic arrangements in line with the UN Basic Principles in many other instances.⁴³

31. Furthermore, the Committee has emphasised the particular importance of judicial independence in the investigation and prosecution of grave human rights violations. For example, in its concluding observations on Yemen the Committee noted that it was “particularly concerned” that the lack of independence of the judiciary “may impede the initiation of investigation and prosecution of cases of torture and ill-treatment.”⁴⁴ Similar views were expressed by the Committee with regard to dangers posed by insufficient judicial

³⁵ Ethiopia (2010), para. 22, CAT/C/ETH/CO/1.

³⁶ Honduras (2009), para. 10, CAT/C/HND/CO/1.

³⁷ Kazakhstan (2008), para. 27, CAT/C/KAZ/CO/2.

³⁸ Syria (2010), para. 12, CAT/C/SYR/CO/1.

³⁹ Yemen (2010), para. 12, CAT/C/YEM/CO/2/Rev.1.

⁴⁰ Ethiopia (2010), para. 22, CAT/C/ETH/CO/1.

⁴¹ Syria (2010), para. 12, CAT/C/SYR/CO/1.

⁴² *Ibid.*

⁴³ See e.g. Azerbaijan (2009), para. 9, CAT/C/AZE/CO/3; Honduras (2009), para. 10, CAT/C/HND/CO/1 and Yemen (2010), para. 12, CAT/C/YEM/CO/2/Rev.1.

⁴⁴ Yemen (2010), para. 17, CAT/C/YEM/CO/2/Rev.1.

independence for the prosecution and adjudication of grave human rights violations in its concluding observations on Cambodia.⁴⁵

3. UN Human Rights Council (and former Commission on Human Rights)

32. The Human Rights Council (formerly the Commission on Human Rights) has affirmed the principle of judicial independence (and its importance for the protection of fundamental human rights) on many occasions. For instance, in Resolution 15/3, 30 September 2010, the Council stated that “an independent and impartial judiciary ... [is a] prerequisite for the protection of human rights and the application of the rule of law” and that “an independent judiciary ... in full conformity with applicable standards contained in international human rights instruments, is essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy.”⁴⁶ The Council has endorsed the principle of judicial independence and noted the importance of relevant international standards in similar terms on many previous occasions.⁴⁷

4. The UN Special Rapporteur on the Independence of the Judges and Lawyers

33. Owing to the importance of the principle of judicial independence the UN Commission on Human Rights (predecessor of the Human Rights Council) established a Special Rapporteur on the Independence of the Judges. The Special Rapporteur has reaffirmed on numerous occasions that “[t]he independence of the judiciary is a core component of democracy, the rule of law and good governance.”⁴⁸ Since the establishment of the office, Special Rapporteurs have consistently adopted the position that the requirement of judicial independence is an obligation incumbent upon States as a matter of international law, describing it as both an obligation imposed by conventions, including the ICCPR and the Convention against Torture, but also as a “general principle of law recognized by the international community.”⁴⁹ This view has been reaffirmed by different Special Rapporteurs

⁴⁵ Cambodia (2010), para. 13, CAT/C/KHM/CO/2.

⁴⁶ Preamble, Human Rights Council Resolution 15/3, 30 September 2010.

⁴⁷ See e.g. Resolution 12/3, 1 October 2009, A/HRC/RES/12/3; Commission on Human Rights Resolution 2004/33, 19 April 2004, E/CN.4/RES/2004/33; Commission on Human Rights 2003/43, 23 April 2003, E/CN.4/RES/2003/43.

⁴⁸ Report of the Special Rapporteur on the Independence of Judges and Lawyers, 25 March 2010, para. 17, A/HRC/14/26.

⁴⁹ Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, para. 14, A/HRC/11/41.

on several occasions.⁵⁰ Moreover, various Special Rapporteurs have emphasised the particular importance of judicial independence for the investigation, prosecution and, where appropriate, punishment of grave human rights violations.⁵¹

D. INTERNATIONAL PRINCIPLES AND DECLARATIONS

1. International Principles

34. In addition to the obligations set out in international human rights treaties, the principle of judicial independence, and guidance as to its requirements, has been elaborated upon in a number of international declarations. The most significant of these are the UN Basic Principles endorsed by the UN General Assembly in Resolution 40/32, 29 November 1985, and subsequently augmented by the Bangalore Principles of Judicial Conduct.⁵² The UN Basic Principles have been referred to, and drawn upon, by the UN Human Rights Committee,⁵³ the Committee on Torture⁵⁴ and other international human rights courts⁵⁵ on many occasions. The Bangalore Principles supplement the UN Basic Principles (which are primarily directed to States) by providing guidance to judges as to the ethical standards required by the principles of independence and impartiality. The UN Basic Principles affirm the importance of judicial independence for both democracy and the protection of fundamental human rights, and provide protection for judges from criminal liability in respect of the exercise of their judicial functions.

35. The domestic justice system and judicial independence are regarded as “a pillar of the State” and part of the obligations “to ensure the observance of the State’s international legal obligations.”⁵⁶ As observed in the 2003 Vienna Declaration on the Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms, an independent judiciary:

⁵⁰ See e.g. Report of the Special Rapporteur on the Independence of Judges and Lawyers, 6 February 1995, para. 32, E/CN.4/1995/39 and Report of the Special Rapporteur on the Independence of Judges and Lawyers, 31 December 2003, para. 28, E/CN.4/2004/60.

⁵¹ See e.g. Report of the Special Rapporteur on the Independence of Judges and Lawyers, 31 December 2003, para. 30, E/CN.4/2004/60.

⁵² See *supra*, fn. 2.

⁵³ E.g. Concluding Observations on Belarus (1997), para. 14, CCPR/C/79/Add.86.

⁵⁴ E.g. Concluding Observations on Honduras (2009), para. 10, CAT/C/HND/CO/1 and Azerbaijan (2009), para. 9, CAT/C/AZE/CO/3.

⁵⁵ See e.g. *Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, *supra* fn. 14, para. 43; and *Constitutional Court v. Peru*, *supra* fn. 16, para. 73.

[C]an best articulate and activate the normative framework for the protection of human rights. In doing so judges also act as catalysts for law reform and social change, defending the constitution, establishing norms and contributing to the progress towards the full enjoyment of human rights and sustainable human development. Judges also have a crucial role in balancing the requirements of defending society against invidious types of crime - such as terrorism, organized crime and corruption - and preserving fundamental rights and freedoms.⁵⁷

36. Judicial independence is thus considered essential for the compliance of the State with international obligations, the protection of fundamental human rights, and balancing of powers within the State.

2. Regional principles in Europe, Asia and Africa

37. The significance of judicial independence within the human rights framework is also elaborated within regional human rights institutions. Most recently, the Committee of Ministers of the Council of Europe passed Recommendation CM/Rec(2010)12, entitled *Judges: Independence, Efficiency and Responsibilities*. Recalling both Article 6 of the European Convention and the UN Basic Principles, the Recommendation states: “[t]he independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law” and that “judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.”⁵⁸ Similar declarations have been promulgated in Asia and Africa, namely the Beijing Statement of Principles on the Independence of the Judiciary⁵⁹ and the African Union’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.⁶⁰ Finally, the Commonwealth’s Latimer House Principles on the Three Branches of Government also provide guidance on the requirements of judicial independence,

⁵⁶ Vienna Declaration on the Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms, 24 November 2003, Annex to the letter dated 1 December 2003 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General, A/58/618 - S/2003/1145, para. 2.

⁵⁷ *Ibid.*

⁵⁸ See paras. 4 and 5, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on *Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies.

⁵⁹ Beijing Statement of Principles on the Independence of the Judiciary, Declaration by Chief Justices from the Asia-Pacific Region, 19 August 1995.

⁶⁰ African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, adopted at the 2nd Summit and Meeting of Heads of State of the African Union, held in Maputo, Mozambique, from 4 to 12 July 2003.

emphasising its importance and specifying protections in very similar terms to other international declarations on the matter.⁶¹

E. JUDICIAL INDEPENDENCE AND SPAIN'S OBLIGATIONS UNDER INTERNATIONAL LAW

38. As set out above, respect for the principle of judicial independence is required by international human rights instruments at both the universal and regional levels. Both the ICCPR⁶² and the Convention against Torture⁶³ impose an obligation of judicial independence on State parties. Indeed, even aside from the obligations imposed by these international instruments, it has been suggested, most notably by consecutive UN Special Rapporteurs on the Independence of Judges, that the principle of judicial independence is a general principle of law recognised by the international community.⁶⁴

39. States must adopt multiple measures to give effect to their obligations in respect of judicial independence. In substance the obligation to ensure judicial independence under international law imposes a number of discrete requirements encompassing, *inter alia*, the conditions governing the appointment, promotion, transfer, suspension, removal or discipline of a judge and the duration of a judge's term of office. States must ensure that arrangements safeguard against outside pressures upon the judiciary and the appearance of independence. In view of these requirements there is no doubt that the prosecution of a judge for a decision taken in exercise of his judicial functions engages Spain's international obligations with regard to judicial independence.

40. International standards relevant to the particular context of sanctioning judges are set out below.

III. THE PROTECTION AGAINST PROSECUTION OF JUDGES FOR ACTS PERFORMED IN EXERCISE OF OFFICIAL FUNCTIONS

41. The protection of judges from liability for their judicial decisions exists as an essential corollary of judicial independence. This protection is often expressed as judicial immunity for acts performed in the exercise of official functions. It is essential to ensure that judges can

⁶¹ Latimer House Principles on the Three Branches of Government, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, November 2003.

⁶² Spain ratified the ICCPR on 27 April 1977.

⁶³ Spain ratified the Convention against Torture on 21 October 1987.

engage in the proper exercise of their functions without their independence being compromised through fear of the initiation of a prosecution or civil action by an aggrieved party, including state authorities. In accordance with relevant international principles, prosecuting or imposing sanctions upon a judge in respect of a decision taken in exercise of his or her judicial function is inconsistent with international obligations regarding the independence of the judiciary.

A. REGIONAL HUMAN RIGHTS SYSTEMS

1. European Court of Human Rights

42. The European Court of Human Rights has had opportunity to deal with the question of judicial immunity in cases such as *Ernst and others v. Belgium*,⁶⁵ where the Court ascertained the legitimacy of judicial immunity as a limitation on a litigant's right of access to courts. The Court's observations are instructive:

The fact that states generally grant immunity from jurisdiction to judges is a long-standing practice intended to ensure the proper administration of justice. More particularly, in Belgium, specific rules as regards investigation, prosecution and judgment entailing immunity from jurisdiction are designed on the one hand to prevent reckless, unjustified or vexatious prosecutions against the persons to whom this system is applicable, and on the other hand, to prevent the same persons being treated too severely or too leniently.

43. The Court noted that such a privilege, that is, immunity from jurisdiction, is also afforded to judges in other internal domestic systems and international legal systems for similar reasons. It therefore considers that in the material case, the use of the immunity from jurisdiction applicable to members of the judiciary, as a means of ensuring the proper administration of justice, pursued a legitimate aim.⁶⁶ The former European Commission of Human Rights had also recognised in previous case law that the obligation to protect judicial independence constituted a legitimate reason for limiting suits against judges.⁶⁷

44. The European Court had underlined the link between protection of judges from being subject to legal proceedings and judicial independence, when it stated that it is important "to

⁶⁴ Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, para. 14, A/HRC/11/41.

⁶⁵ *Ernst v. Belgium*, Application no. 33400/96, 15 July 2003.

⁶⁶ *Ibid.* para. 50.

shield members of the judiciary from ill-considered proceedings and to allow them to perform their judicial duties dispassionately and independently.”⁶⁸

2. Inter-American Court of Human Rights

45. For its part, although the I-ACtHR has not addressed the issue of criminal liability of judges directly, in *Apitz-Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*,⁶⁹ the Court found the removal from office of a number of judicial officer holders on grounds of their purportedly having committed an “inexcusable judicial error”, to be in violation of Article 8(1) of the American Convention on Human Rights. Similarly, in *Constitutional Court v. Peru*,⁷⁰ the Court found that the procedure followed in the dismissal of a number of Peruvian Constitutional Court Justices for decisions taken in exercise of their judicial functions had violated Article 8(1) of the Convention.

46. The I-ACtHR, emphasising that “international law has developed guidelines on the valid grounds for the suspension or removal of a judge”.⁷¹ noted the importance of protecting judges from ‘internal’ pressure from higher courts. It noted that judges “cannot be removed on the ground that one of their decisions has been overturned on appeal or review by a higher judicial body.”⁷² This safeguards the independence of judges internally, since they should not feel compelled to avoid dissenting with the reviewing body which, basically, only plays a distinct judicial role that is limited to dealing with the issues raised on appeal by a party who is dissatisfied with the original decision.”⁷³

47. Additionally, the I-ACtHR stated that

⁶⁷ *X v. United Kingdom*, note 166 *supra*, paras. 1-3 (holding that dismissal of suit due to judicial immunity does not violate right to a fair and public hearing); see also *Golder v United Kingdom*, Series A, No. 18, 21 February 1975, (1979-80) (J. Fitzmaurice separate opinion at para. 15).

⁶⁸ *Ernst v. Belgium*, para. 85 (holding that barring suit against judges to ensure their independence met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued). Similarly, in *Weston v. United Kingdom* the Court recognised that the obligation to protect judicial independence constituted a legitimate reason for limiting suits against judges. *X v United Kingdom*, Application no. 8083/77, para. 3 (holding that dismissal of suit due to judicial immunity does not violate right to a fair and public hearing); *Golder v. United Kingdom*, Series A, No. 18 (J. Fitzmaurice separate opinion at para. 15).

⁶⁹ *Supra* fn. 14.

⁷⁰ *Constitutional Court v. Peru*, *supra* fn. 16.

⁷¹ United Nations, Human Rights Council, *General Comment*, No. 32, para 20. See also United Nations, General Assembly, Principle 18 of the UN Basic Principles.

⁷² In this regard, see Principle A, para. 4 (n) 2 of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission’s activity report at 2nd Summit and Meeting of Heads of State of the African Union, held in Maputo, Mozambique, from 4 to 12 July 2003.

⁷³ *Apitz Barbera et al*, *supra* fn. 14, para. 84.

[U]nder both domestic and international law there are, on the one hand, the remedies of appeal, cassation, review, removal of cases to a higher court or the like, which are aimed at verifying that a lower court's decisions are correct, and, on the other, there is disciplinary oversight, which is intended to assess the conduct, suitability, and performance of the judge as a public official. Consequently, even if there is a declaration of inexcusable judicial error by a reviewing body, it is still necessary to analyze how serious the conduct is and whether the penalty is proportionate. This sort of review requires an autonomous reason warranting a finding that a disciplinary offense has been committed.⁷⁴

48. In *Apitz Barbera et al* the I-ACtHR emphasised the “irremovability of judges, whether they be temporary or permanent” and the obligation to “ensure that those who were arbitrarily removed from their position as judges be reinstated ... in a position in the Judiciary in which they have the same rank, salary and related social benefits as they had prior to their removal.”⁷⁵ In *Reverón Trujillo* the I-ACtHR reaffirmed this line of jurisprudence.⁷⁶ It also explained the rationale for protecting judges, as “otherwise States could remove judges and therefore intervene in the Judicial Power *without greater* costs or control. Additionally, this could generate a fear in the other judges, who observe that their colleagues are dismissed and then not reinstated even when the dismissal has been arbitrary. Said fear could also affect judicial independence, since it would promote that the judges follow instructions or abstain from contesting both the nominating and punishing entity. Therefore, a remedy that declares the nullity of a dismissal of a judge because it was not lawful must necessarily lead to the reinstatement.”⁷⁷

49. Previously in the *Constitutional Court case*, the I-ACtHR had emphasised the importance of ensuring that judges procedural guarantees when facing removal were respected.⁷⁸

3. African Commission on Human and Peoples' Rights

50. Although the African Commission on Human and Peoples' Rights has not specifically had regard to the question of prosecution of judges, it has recognised the importance of protecting judges from outside pressures as part of the obligations of the state under the African Charter. According to the African Commission, the independence of a court “implies

⁷⁴ I-ACtHR, *Apitz Barbera et al*, *supra* fn. 14, para. 86 (internal citation omitted).

⁷⁵ *Ibid.* para. 246.

⁷⁶ *Ibid.* para. 246.

⁷⁷ *María Reverón Trujillo v. Venezuela*, *supra* fn. 12, para. 83.

⁷⁸ *Constitutional Court v. Peru*, *supra* fn. 16, paras. 74 and 84.

the consideration of the mode of designation of its members, the duration of their mandate, *the existence of protection against external pressures* and the issue of real or perceived independence: as the saying goes “justice must not only be done: it must be seen to be done.”⁷⁹ It has also emphasised the obligation to protect of judges from dismissal, and has found a violation of the state’s obligations in respect of judicial independence when judges can be removed from office.⁸⁰

B. THE UNIVERSAL HUMAN RIGHTS FRAMEWORK

1. International Covenant on Civil and Political Rights

51. The requirements of the obligation of judicial independence under the ICCPR impose restrictions on the circumstances in which it is permissible to take disciplinary measures or to instigate a criminal prosecution of a judge in respect of decisions made in exercise of judicial functions. It is recalled that although Article 14 ICCPR confers, in particular, a right to a fair hearing, the consistent jurisprudence of the Human Rights Committee has made clear that the obligation upon States to ensure the independence of the judiciary arises as a necessary corollary of this right.

52. Dealing specifically with the circumstances in which sanctions may permissibly be imposed on judges under the ICCPR, in General Comment 32, the Human Rights Committee stated:

States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the ... suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.⁸¹

The Comment emphasised the importance of States ensuring that “[j]udges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.”⁸²

⁷⁹ *Civil Liberties Organisation v Nigeria*, Communication No. No. 129/94.

⁸⁰ *Lawyers for Human Rights v. Swaziland*, Communication No. 251/2002.

⁸¹ General Comment 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 23 August 2007, para. 19, CCPR/C/GC/32.

⁸² *Ibid.* para. 20.

53. The Human Rights Committee has further elaborated on the circumstances in which, in its view, it is permissible to impose disciplinary or criminal sanctions upon judges in respect of acts performed in their judicial capacity. The Committee has repeatedly put forward the view that the imposition of disciplinary measures and *a fortiori* criminal sanctions upon a judge for purported errors in judicial decision-making may violate the obligation of judicial independence contained in the ICCPR.

54. The observations of the Committee in its 2001 concluding observations on the Democratic People's Republic of Korea ("the DPRK") are relevant given the scope of the law of "prevaricación" under which Judge Garzón is charged with rendering "unjust judgement".⁸³ The Committee noted with concern "constitutional and legislative provisions that seriously endanger the impartiality and independence of the judiciary,"⁸⁴ observing in this regard that Article 129 of the DPRK's Criminal Code "subjects judges to criminal liability for handing down unjust judgements."⁸⁵ With this provision in mind, the Committee stated:

Given the roles assigned to the judiciary under Articles 2 and 14, paragraph 1, of the Covenant, these legal provisions have an adverse impact on the protection of human rights guaranteed under the Covenant and endanger the independence of the judiciary required by Article 14.1 of the Covenant.⁸⁶

In view of this, the Committee recommended that "[t]he State party should take appropriate measures to ensure and protect the independence and impartiality of the judiciary at all levels."⁸⁷

55. The Committee has expressed similar concerns in its concluding observations even where the sanctions in question are merely disciplinary rather than criminal in character. For example, in concluding observations in respect of Vietnam, the Committee deprecated "the possibility, provided by law, of taking disciplinary measures against judges because of errors

⁸³ Article 446 of the Spanish Criminal Code (Código Penal) provides that: "The judge or magistrate who, knowingly, dictates an unjust sentence or resolution."

⁸⁴ Concluding Observations, Democratic People's Republic of Korea (2001), para. 8, CCPR/CO/72/PRK.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

in judicial decisions,”⁸⁸ and that “these circumstances expose judges to political pressure and jeopardize their independence and impartiality.”⁸⁹

56. The same concerns were again raised, in unmistakably clear terms, by the Committee in its recent concluding observations on Uzbekistan, where it recorded that it was “gravely concerned about the lack of independence of judges contrary to the requirements of article 14, paragraph 1, of the Covenant.”⁹⁰ In particular, the Committee observed:

The possibility, provided by law, of taking disciplinary measures against judges because of ‘incompetent rulings’, exposes them to broad political pressure and endangers their independence and impartiality. The State party should amend the relevant domestic legal provisions, as well as the Constitution, in order to ensure full independence of the judiciary.⁹¹

Thus, the consistent practice of the Human Rights Committee indicates that the imposition of disciplinary measures, and *a fortiori* criminal sanctions, upon judges on grounds of purportedly “incompetent” or erroneous decisions, is generally incompatible with the obligation of judicial independence imposed by Article 8 of the ICCPR.

2. Convention against Torture

57. The Committee against Torture has adopted an almost identical approach to that of the Human Rights Committee as regards the imposition of disciplinary or criminal sanctions upon judges. It will be recalled that Article 13 of the Convention against Torture requires State parties to ensure that an individual who alleges that he has suffered torture “has the right to complain to, and to have his case promptly and impartially examined, by its competent authorities” and that this has consistently been interpreted by the Committee as imposing an obligation of judicial independence upon State parties.

58. On the specific question of the imposition of sanctions upon judges for alleged errors in decision-making, in its 2010 concluding observations on Syria, the Committee noted with concern the fact that judges “do not enjoy immunity according to the provisions of Legislative Decree 40 ... and they can be transferred by an order which is not subject to any

⁸⁸ Concluding Observations, Vietnam (2002), para. 10, CCPR/CO/75/VNM.

⁸⁹ *Ibid.*

⁹⁰ Concluding Observations, Uzbekistan (2001), para. 14, CCPR/CO/71/UZB.

⁹¹ *Ibid.*

form of review.”⁹² The observations concluded that “the State party should, as a matter of urgency, adopt all necessary measures to protect the independence of its courts and tribunals, as well as the independence and immunity of judges, in accordance with international standards.”⁹³

59. The same approach was adopted by the Committee in concluding observations on the situation in Armenia, where the Committee observed that “[t]he existence of a regime of criminal responsibility for judges who commit errors in their sentences on conviction, since it might weaken the judiciary.”⁹⁴ As a result the Committee recommended that the State party “bring the regime of criminal responsibility for judges into line with the relevant international instruments, including the Basic Principles on the Independence of the Judiciary adopted in 1985 and the Guidelines on the Role of Prosecutors adopted in 1990.”⁹⁵ Similarly, with respect to Uzbekistan, the Committee expressed concern that “a regime of criminal liability applicable to . . . judges ... who wrongly prosecute or convict ... could tend to undermine the judiciary.” The Committee therefore recommended that Uzbekistan “revise the judiciary regulations to bring them into conformity with the relevant international legal instruments, in particular ... the Basic Principles on the Independence of the Judiciary, adopted in 1985.”⁹⁶

60. Thus, the position with regard to the imposition of disciplinary and criminal sanctions upon judges under the Convention against Torture matches that which exists under Article 8 of the ICCPR.

C. OTHER UNIVERSAL HUMAN RIGHTS MECHANISMS

1. The UN Special Rapporteur on the Independence of Judges and Lawyers

61. In 1994, the Commission on Human Rights, noting the attacks on the independence of judges and the link, which exists between the weakening of safeguards for the judiciary and the gravity and frequency of violations of human rights, decided to appoint a Special Rapporteur on the independence of judges and lawyers.⁹⁷ The mandate was last extended in

⁹² Concluding Observations, Syria (2010), para. 12, CAT/C/SYR/CO/1.

⁹³ *Ibid.*

⁹⁴ Concluding Observations, Armenia, (2000), para. 37(c).

⁹⁵ *Ibid.* para. 39(e).

⁹⁶ Uzbekistan, Convention against Torture, A/55/44 (2000) 19 at paras. 80 and 81.

⁹⁷ Commission on Human Rights, Resolution 1994/41, Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, 4 March 1994, adopted without a vote. See E/CN.4/1994/132, chapter X.

2008 by the Human Rights Council for a further period of three years.⁹⁸ In extending the mandate, the Human Rights Council recalled with concern “the increasingly frequent attacks on the independence of the judiciary” and called on the Special Rapporteur to identify specific problems including “attacks on the independence of the judiciary” and make concrete recommendations.

62. In line with the position under both the ICCPR and the Convention against Torture, consecutive UN Special Rapporteurs on the Independence of Judges have consistently adopted the view that judges require a general immunity from prosecution in respect of the exercise of their judicial functions. In a March 2009 report to the Human Rights Council, the Special Rapporteur recommended that “[i]n order to protect judges from unwarranted prosecution, ... it [is] essential that judges also be granted some degree of criminal immunity.”⁹⁹

63. This issue has also repeatedly been raised in the Special Rapporteur’s country reports. The Special Rapporteur’s 2007 country report on the Maldives highlighted the fact that “judges lack protection from unwarranted prosecution because of the lack of legislation on judicial immunity.”¹⁰⁰ In consequence the Special Rapporteur recommended that “specific norms recognising the professional immunity of judges should be adopted.”¹⁰¹ Similarly, in the Special Rapporteur’s report to the Human Rights Council addressing guarantees of judicial independence, the Rapporteur underscored that “judges must not be removed from office because of errors in judicial decisions or because their decision has been overturned on appeal or review by a higher judicial body.”¹⁰² As a result, in the report’s concluding comments, the Rapporteur recommended that “adequate civil and criminal immunity for judges be guaranteed by the Constitution or equivalent, and that detailed procedures for lifting immunity be inscribed in law, reinforcing the independence of the judiciary.”¹⁰³

⁹⁸ Human Rights Council, Resolution 8/6, Mandate of the Special Rapporteur on the independence of judges and lawyers, 18 June 2008.

⁹⁹ Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, para. 66, A/HRC/11/41 (citations omitted).

¹⁰⁰ Mission to Maldives: Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2 May 2007, para. 30, A/HRC/4/25/Add.2.

¹⁰¹ *Ibid.* para. 82.

¹⁰² Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, para. 58.

¹⁰³ *Ibid.* para. 98.

Successive Special Rapporteurs have developed the principle that judges should not be prosecuted for their judicial decisions. The principle of judicial independence does not, by any means, require that judges have unconditional immunity from disciplinary action or criminal prosecution. But, owing to the fact that “the irremovability of judges is one of the main pillars guaranteeing the independence of the judiciary,”¹⁰⁴ as the Special Rapporteur has noted, “only in exceptional circumstances may the principle of irremovability be transgressed.”¹⁰⁵ Moreover, “the law must give detailed guidance on the infractions by judges triggering disciplinary measures, including the gravity of the infraction which determines the kind of disciplinary measure to be applied in the case at hand.”¹⁰⁶ Furthermore, the Special Rapporteur has also affirmed that “disciplinary measures to be adopted must be in proportion to the gravity of the infraction committed [and] judges must not be removed from office because of errors in judicial decisions or because their decision has been overturned on appeal or review by a higher judicial body.”¹⁰⁷

64. The Special Rapporteur has expressed concern about how external pressure on judges – including threats, either from other judges or the prosecutor’s office, as to the potential reaction to their decisions – has led to a chilling effect on the willingness of judges to reach independent judicial decisions: “...cases have been reported that in the past judges have sometimes failed to make independent decisions as they feared to have their judgement overturned after they received “advice” from the prosecutor’s office, the respective appeal court or their own court chairperson.”¹⁰⁸ This applies *a fortiori* to the threat of criminal action.

D. INTERNATIONAL PRINCIPLES AND DECLARATIONS

65. Many of the international declarations, at both the universal and regional levels, which deal with the independence of the judiciary set out standards regarding the circumstances in which judges may be disciplined or may be the subject of civil action or criminal prosecution. In line with the practice of the human rights supervisory bodies, these

¹⁰⁴ *Ibid.* para. 57.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* para. 58.

¹⁰⁸ Mission to Russia A/HRC/11/41/Add. 2. See also Kazakhstan (E/CN.4/2005/60/Add.2).

principles and standards also suggest that judges ought to enjoy protection against criminal liability for decisions made in their judicial capacity.

66. The Council of Europe, in Recommendation CM/Rec(2010)12 entitled *Judges: Independence, Efficiency and Responsibilities* lays down more detailed standards regarding the limits of judicial criminal liability. Para. 66 of the Council of Europe standards states, in very clear terms, that “the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.” Moreover, according to para. 70, “judges should not be personally accountable where their decision is overruled or modified on appeal.” It is notable that the Council of Europe standards also draw a distinction between acts performed in a judicial capacity and other acts of a judge stating, in para. 70 that “when not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen,” illustrating that judicial immunity is functional in character.

67. The Council of Europe, concerned with strengthening the judiciary in its member States, established the Consultative Council of European Judges (“CCJE”) as an advisory body on issues related to the independence, impartiality and competence of judges. The CCJE earlier laid out the principles and procedures governing criminal, civil and disciplinary liability of judges within Council of Europe member States.¹⁰⁹ It noted that whereas “the trust conferred by society upon judges is such that there should be some means of holding judges responsible” there was a need for caution in light of the need to maintain judicial independence and freedom from undue pressure.¹¹⁰ It distinguished between immunity from judicial acts and other crimes: “[j]udges who in the conduct of their office commit what would in any circumstances be regarded as crimes (*e.g.* accept bribes) cannot claim immunity from ordinary criminal process.” Although the report acknowledged that the practice of States did not uniformly exclude liability for failings in the exercise of their functions, “the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still

¹⁰⁹ Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality, 19 November 2002, CCJE (2002) Opinion no. 3, paras. 51-54.

¹¹⁰ *Ibid.* para. 51.

less imprisonment, the presence of which may, however sub-consciously, affect his judgment.”

68. Moreover, the CCJE observed that the “vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has become common in some European States. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.”¹¹¹

69. The CCJE adopted in November 2010 a Magna Carta of Judges (Fundamental Principles) summarising and codifying the main conclusions of the Opinions that it had already adopted. The Magna Carta notes that “Judges shall be criminally liable in ordinary law for offences committed outside their judicial office.”¹¹²

70. The African Union’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopts the same approach to limitations on judicial criminal liability as that set out in the Council of Europe’s standards. Principle 4(n) of the AU Principles states:

Judicial officers shall not be: (i) liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions [or] (ii) removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body;

71. Furthermore, Principle 4(p) further states that “judicial officials may only be removed or suspended from office for gross misconduct.” In the Asian context, the same principle is set out in the Beijing Statement of Principles on the Independence of the Judiciary, Principle 22 of which states that “[j]udges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge.” Similarly, Principle 4(d) of the Commonwealth (Latimer House) Principles on the Three Branches of Government states that “judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.”

¹¹¹*Ibid.* para. 54.

72. Thus, across these bodies of principles, all specify restrictions on the circumstances in which it is permissible to hold a judge either criminally or civilly liable for acts performed in the exercise of his or her judicial functions. In line with the practice developed by human rights supervisory mechanisms on the question, a judge may only be prosecuted for acts performed in his judicial function in cases of exceptional gravity involving, for example, circumstances of malice or gross negligence on the part of the judge.

IV. CONCLUDING COMMENTS

73. The importance of judicial independence has been affirmed by many international courts and human rights supervisory mechanisms. As demonstrated by the jurisprudence established by both the Human Rights Committee and the Committee against Torture and as reaffirmed by the Special Rapporteur on the Independence of Judges and the corpus of international principles on the matter, the protection of judges against criminal liability for their judicial acts is a necessary corollary of judicial independence, which exists to ensure that judges can engage in the proper exercise of their functions without fearing the initiation of a prosecution or civil action by an aggrieved party, including the state. Although the limitations on criminal liability attaching to the exercise of judicial functions may not be absolute, under relevant international obligations, judges must be granted protection from criminal liability in respect of alleged errors in law, which should, if necessary, be corrected in the normal manner by the national judicial system rather than through the imposition of disciplinary sanctions or criminal punishment upon a judge. Prosecuting or imposing criminal sanctions upon a judge in respect of a decision taken in exercise of his or her judicial function is, unless justified by the exceptional gravity of the error and its consequences and in accordance with a clearly defined procedure, inconsistent with international obligations and standards regarding the independence of the judiciary.

74. From the jurisprudence of international courts and human rights supervisory mechanisms, several key observations can be made:

- (i) The principle of judicial independence is necessary in a democratic state for the protection of fundamental rights.

¹¹² Magna Carta of Judges (Fundamental Principles), Consultative Council of European Judges, 19 November 2010, CCJE (2010) 3 Final.

- (ii) The removal of a judge from the judge's position infringes upon the independence of the judiciary except in limited circumstances, which do not include the dismissal of judges for decisions taken in exercise of their judicial functions.
- (iii) Judges cannot be removed on the sole ground that his or her decision has been overturned on appeal or review by a higher judicial body, or indeed that one of their decisions are contrary to law or jurisprudence.
- (iv) The guarantee of tenure shall operate so as to allow the reinstatement to the condition of judge to whoever has been arbitrarily deprived of it.

In light of these principles, the prosecution of Judge Garzón in respect of his decision to initiate a criminal investigation into the alleged practice of enforced disappearances during the Spanish Civil War and subsequently during the Junta Period appears inconsistent with international requirements regarding the principle of judicial independence. The prohibition on prosecuting judges is inherent in judicial independence. Any exceptions must be clearly defined, extremely limited and rigorously applied with attendant safeguards. They cannot encompass criminal sanctions for basic errors of law, which can be resolved on appeal. Still less can they allow for sanctions for expressing arguable views on the correct interpretation of the law. It is inherent in the judge's independence that he be allowed to interpret the law as he considers best in the particular case.

V. EXPERT WITNESSES

Professor Carlos Ayala
Judge Azhar Cachalia
Param Cumaraswamy
Leandro Despouy
Professor Manfred Nowak
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Professor Carlos Ayala

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Judge Azhar Cachalia

Judge of Supreme Court of Appeal of South Africa since 2006; Judge of Transvaal High Court since 2001; Board member of Open Society Foundation for South Africa since 2000; served as Judge of the South African High Court from 2001 to 2005; co-founded the United Democratic Front (a coalition of anti-apartheid organizations in South Africa) in 1983; worked with numerous community organisations throughout his life.

Professor Manfred Nowak

Professor of International Law and Human Rights at Vienna University and Director of the Ludwig Botzmann Institute of Human Rights in Vienna; from 2004 to 2010 served as UN Special Rapporteur on Torture; from 1993 to 2006 served as UN expert with different assignments in relation to enforced disappearances; from 1996 to 2003 served as one of the international judges in the Human Rights Chamber for Bosnia and Herzegovina in Sarajevo established by the Dayton Peace Agreement.

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