



File-number:

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l'Europe – *Council of Europe*
Strasbourg, France

REQUÊTE
APPLICATION

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme,
ainsi que des articles 45 et 47 du règlement de la Cour

*under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of Court*

I. THE PARTIES

THE APPLICANT

Surname: Garzón Real

First names: Baltazar

Sex: M

Nationality: Spanish

Profession: Judge

Date and place of birth:

Permanent address:

Tel. No.:

Fax No.:

Present address:

Name of representatives: Helen Duffy

Occupation of representative: Lawyer

Address of representative: INTERIGHTS
The International Centre
for the Legal Protection
of Human Rights
Lancaster House
33 Islington High Street
London N1 9LH
United Kingdom

Tel No.: +44 (0)20 7278 3230

Fax No.: +44 (0)20 7278 4334

THE HIGH CONTRACTING PARTY

SPAIN

II. INTRODUCTION

1. The Applicant in this case is a Spanish judge of high repute. In December 2006 he opened a criminal investigation into allegations by victims and family members of crimes against humanity committed during the Spanish civil war and the Franco regime that followed it – crimes which had never previously been investigated in Spain. After preliminary investigative steps, in October 2008 he issued a decision assuming jurisdiction over the case. He determined that Spanish laws affording amnesty to crimes committed during the Franco-era and providing for the prescription of crimes after a certain period of time did not apply in this case or to this class of alleged crimes. Judge Garzón justified his decisions by reference to Spanish jurisprudence and a firm corpus of international law, including the jurisprudence of this Court, in relation to the obligation to investigate crimes under international law.

2. Judge Garzón is now being prosecuted in the Spanish criminal justice system for these judicial decisions. Although initially triggered by complaints from political organizations opposed to Judge Garzón's decisions, the decision to prosecute Judge Garzón for 'rendering unjust judgments' has been taken by members of the Spanish Supreme Court.

3. This case concerns the prosecution of a judge for carefully reasoned judgments. The prosecution of judges for their decisions, specifically for their interpretations of the law, rather than appealing and reviewing those decisions where necessary within the normal framework of law, violates the fundamental principle of judicial independence. The principle of judicial independence is reflected across European States, including Spain, and is firmly embedded in international law and practice. It underpins the European Convention on Human Rights ('the Convention'), not only Article 6 which specifically provides for access to an independent and impartial court of law, but all other rights which depend on independent and effective judiciaries for their protection. Subjecting a judge to a criminal prosecution for his judicial decisions has seriously detrimental effects on the reputation and professional development of the judge, and through its 'chilling effect,' on other judges and on the rule of law in any state.

4. In this case the particular interpretations of law for which the judge is being prosecuted relate to the investigation of serious international crimes, and the interpretation of national laws consistently with the State's human rights obligations. Prosecuting a judge for

giving effect to these international obligations is anathema to justice and to the principles and purposes of the Convention, to which the Court is asked to respond.

III. BACKGROUND AND CONTEXT FOR THE PROSECUTION OF JUDGE GARZÓN

A. *THE ROLE OF THE INVESTIGATING JUDGE AND THE ‘AUDIENCIA NACIONAL’*

5. Until his suspension on 14 May 2010, Judge Garzón served as investigating judge in the Juzgado Central de Instrucción No. 5 of the Spanish ‘Audiencia Nacional’, or National High Court of Spain (‘Audiencia Nacional’).

6. Spain is one of the few European States with investigating judges. Criminal cases are usually brought to an investigating judge’s attention by a complaint by victims, the police or the public prosecutor’s office (‘Ministerio Público’). Prosecution can also be initiated through an ‘accion popular’, or public petition whereby Spanish citizens – directly affected or not – can raise allegations of criminal conduct in defence of collective or individual interests. The investigating judge does not choose which cases to pursue. Rather, upon receipt of a criminal complaint, the judge has the responsibility to decide whether there is any basis to proceed with an investigation and, if so, to identify and authorise appropriate investigative and prosecutorial steps. The investigating judge carries out this function subject to judicial review by a panel of judges, in Judge Garzón’s case the ‘Sala de lo Penal’ (Plenary Criminal Chamber) of the Audiencia Nacional.¹

7. The Audiencia Nacional consists of four chambers,² one of which is the Plenary Criminal Chamber. As the central judicial organ responsible for criminal cases in Spain, it addresses cases of national interest, which may be committed in various provinces and which by their nature fall to a central nationwide jurisdiction rather than to local territorial courts. In practice, these have included crimes such as terrorism, organised crime, economic crimes of a certain scale and crimes under international law committed outside Spain.³ This jurisdiction

¹ Ley Orgánica del Poder Judicial (LOPJ) [Organic Law on Judicial Power] 6/1985, 1 July 1985, as amended by Ley Orgánica 111/1999, Title IV, Chapter II, Article 65.7 (Spain).

² LOPJ Title IV, Chapter II, Article 64.

³ ‘The Plenary Criminal Chamber of the Audiencia Nacional is generally responsible for the trial of cases for the following crimes: a. Crimes against the Crown, its Consorte, its Successor, high organs of the Nation and the State, b. counterfeiting ...provided that they are always committed by organizations or criminal groups, c. Fraud in order to alter prices..., d. Drug trafficking..., e. Crimes committed abroad, when in accordance with the Laws or Treaties Spanish courts have jurisdiction to prosecute.’ LOPJ.

is exercised through various ‘Juzgados Centrales de Instrucción’ or central investigative courts of the Audiencia Nacional, one of which was Judge Garzón’s Juzgado Central No. 5.

B. JUDGE GARZÓN’S CAREER

8. Judge Garzón has enjoyed a long and distinguished judicial career. He has served as a Spanish judge for 30 years, 22 of which have been spent in the Audiencia Nacional.⁴ As a judge of the Audiencia Nacional he has handled politically sensitive, difficult and often controversial cases related to a broad spectrum of issues including crimes under international law, corruption and terrorism. Judge Garzón is most known outside Spain for his case work in the field of human rights, including pioneering work on universal jurisdiction in respect of crimes under international law committed in Argentina, Chile, the Western Sahara and more recently at Guantanamo Bay. Other judges of the Audiencia Nacional have since gone on to exercise universal jurisdiction over crimes committed in Guatemala, the Occupied Palestinian Territories, Tibet, China, Rwanda and elsewhere.

9. His work investigating members of the Basque separatist terrorist organization ETA,⁵ despite serious on-going security implications for his own life, including death threats, has been lauded as a significant contribution to the rule of law in Spain.⁶ His commitment to administering justice for terrorist suspects consistently with international human rights law is also well known, as is apparent in the elaboration of what has become an influential protocol (‘the Garzón Protocol’) on the protection of rights of terrorist suspects.⁷

⁴ Cuomo, Kerry Kennedy, ‘Speak Truth to Power: Human Rights Defenders Who Are Changing Our World’, New York: Crown Publishers, 2000, p. 128 in Adan Griego, *Judge Garzón: An Introduction to a Life*, 2001, Stanford.

⁵ See *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, Mission to Spain, A/HRC/10/3/Add.2, 16 December 2008.

⁶ See e.g. ‘ETA planned to assassinate judges...’, *The Telegraph*, 9 June 2009, available at <http://www.telegraph.co.uk/news/worldnews/europe/spain/5486319/Eta-planned-to-assassinate-judges-with-poison-laced-brandy.html>; ‘British neo-Nazis plotted to kill Spanish judge Baltasar Garzón.’ *The Telegraph*, 9 February 2011; ‘A British based neo-Nazi group allegedly plotted to assassinate one of Spain’s leading judges over his attempt to investigate the crimes of Spanish dictator Gen Francisco Franco, it has emerged’. Judge Garzón lives accompanied constantly by bodyguards to this day.

⁷ The ‘Garzón Protocol’ has been recognised by the UN Committee against Torture (CAT): “The Committee takes note of the steps taken to improve the guarantees of individuals held in incommunicado detention, particularly: (a) the so-called Garzón Protocol, which provides for visits by a doctor trusted by the detainee (even though this Protocol has not been applied uniformly);” (CAT/C/ESP/CO/5, Concluding observations of the Committee against Torture, 9 December 2009, para 12) It is now being applied to detainees under several other courts of ‘instrucción’ in the Audiencia Nacional. See decision of 13 December 2006 (‘diligencias previas’ 187/05), issued by the Juzgado Central de Instrucción No. 5 (in the case of detentions of 11 suspects of international terrorism).

10. Judge Garzón's even-handed commitment to justice is manifest also in his handling of investigations into powerful elements in the Spanish political class, in cases from across the political spectrum. In 1988 and 1995 his investigations into terrorist activity uncovered the financing of unlawful 'counter-terrorist' methods from reserved funds from the Ministry of the Interior, leading to the conviction of high ranking members of the police and of the ruling Socialist party, including the former minister of interior, for aiding operations by a paramilitary group known as the 'Grupo Anti-terrorista del Liberacion'. In turn, in August 2008, at the request of the 'Ministerio Público', he began to investigate corruption in the main opposition party, leading to criminal investigations against 60 members of the 'Partido Popular', including some of high rank from within this political party.

11. Judge Garzón is one of the longest serving of the six investigating judges of the Audiencia Nacional, all of whom are known public figures who have had their share of difficult cases. While guarding his privacy in his personal life, Judge Garzón has been called upon to handle cases of particular prominence and at times controversy. Judge Garzón has not investigated *propio motu*, nor has he (or could he have by law) chosen which particular cases should fall within his docket.⁸ But when cases were allocated to him, he has diligently discharged his duty to apply the law. While Judge Garzón has not sought out controversy, nor has he been deterred by it from the proper exercise of his judicial functions.

12. Judge Garzón has been recognised as a leading human rights defender internationally. He has received many prizes and awards for his commitment to justice. He holds 23 honorary doctorates from universities internationally.⁹

13. As of 15 December 2006, Judge Garzón was called upon to investigate crimes, including crimes against humanity, committed during the Spanish civil war and the subsequent military regime of General Franco ('the Franco-era complaint'). As noted below, the crimes alleged in these complaints had never previously been the subject of official investigation or prosecution.

⁸ Article 24 of the Constitution of the Kingdom of Spain provides for the judge according to predetermined law, discussed below.

⁹ See curriculum vitae, Baltasar Garzón Real, Annex 4.

C. BACKGROUND I. THE CRIMES OF THE ‘FRANCO-ERA,’ AMNESTY AND INVESTIGATION

1. Franco-era Crimes and Victims’ Attempts to Secure Investigation

14. The criminal activity with which Judge Garzón is charged consists of judicial decisions to open an investigation into crimes committed during the Spanish civil war and the military regime of General Franco which followed it (‘Franco-era crimes’). The widespread, systematic nature of the crimes committed under the Franco regime is notorious.¹⁰

15. Demands from victims’ families and associations for the investigation of these crimes, exhumation of victims’ remains and accountability are persistent and growing.¹¹

16. This momentum towards justice for the Franco-era crimes is reflected in, among other things, the ‘Ley de Memoria Historica’ (Historical Memory Law), law 52/2007 of 26 December 2007, which recognises that crimes were committed, and establishes a mechanism for ‘compensating those who suffered persecution or violence during the Civil War and the dictatorship.’¹² This law provides some limited reparation to victims, but explicitly notes that it does not preclude the right to access justice before courts and tribunals.¹³

17. There has, thus far, been no official investigation into these crimes. There has still been no prosecution in relation to the crimes of the Franco-era. As one Spanish judge has remarked, the only prosecution connected to the crimes of the Franco-era that has so far been

¹⁰ Information on the crimes and victims’ demands is available at www.elclarin.cl, ‘España. Proceso a los crímenes de la dictadura’ and <http://www.crimesinternacionales-franquismo-casogarzon.es>. In addition to the allegations of systematic killings, torture and disappearances in Judge Garzón’s judgments, Amnesty International reports that over 50,000 children went missing during the Franco regime. A series of histories of summary executions and missing children was recently made available by the newspaper *El Público*. ‘Las historias que los jueces no quieren escuchar’, Pere Rusiñol, Diego Barcala and Ángel Munárriz, *El Público*, 30 May 2010, available at <http://www.publico.es/espana/316586/historias/jueces/quieren/escuchar>. See also Judge Garzón’s citation to ‘El caso de los niños perdidos del franquismo’ of Miguel Angel Rodríguez Arias, Audiencia Nacional, Juzgado Central de Instrucción No. 5, Sumario (Proc. Ordinario) 53/2008 E, Auto de 18 de noviembre 2008, p. 14.

¹¹ Information on these demands is available at www.elclarin.cl, ‘España. Proceso a los crímenes de la dictadura’.

¹² A translation into English of the law can be found at: <http://www.derechos.org/nizkor/espana/doc/lmheng.html>.

¹³ Law 52/2007 of 26 December ‘through which rights are recognized and broadened and measures established for the benefit of those who suffered persecution or violence during the civil war and the dictatorship.’ This law also provides in Article 4.1(2) that ‘This right [to obtain a declaration of reparation and individual recognition] is fully compatible with the other rights and compensating measures recognized in preceding laws as well as the institution of any legal proceedings that may occur before the courts of justice.’ It also provides in its Second Additional Provision that ‘The provisions of this Law are compatible with the exercise of rights and access to the ordinary and extraordinary judicial proceedings established in the laws or international treaties or covenants entered into/ratified by Spain.’

brought is the prosecution of Judge Garzón for initiating proceedings to investigate those crimes.¹⁴

18. Judge Garzón's decision to authorise the Franco-era investigation was one of the first judicial decisions to address these crimes, and the consequences of him doing so, including the criminal case against him, are the subject of this petition and described in detail below. It is worthy of note that the prosecution of Judge Garzón has also had the effect of blocking, or freezing, all other potential investigations.¹⁵ The 'chilling effect' of the prosecution of Judge Garzón on the administration of justice for these serious crimes is already apparent.

19. The lack of access to justice for victims of the Franco-era crimes has been the subject of a separate application to this Court.¹⁶ On April 2010 criminal complaints were also lodged in Argentina.¹⁷

2. Amnesty Laws

20. The failure to investigate or prosecute these crimes has been attributed in part to the existence of a series of amnesty laws passed in Spain during and since the Franco-era. As one of the principal allegations forming the basis of the criminal case against Judge Garzón relates to his decision that these amnesty laws did not apply to the alleged crimes,¹⁸ brief reference to those laws provides relevant context for the consideration of the facts of the case.

21. On 15 October 1977, following the transition to democracy, an Amnesty Law 46/1977 was approved by the Spanish Parliament.¹⁹ The 1977 Amnesty Law provides:

¹⁴ Ramon Saez, 'Los jueces y el aprendizaje de la impunidad. A propósito de los crímenes del franquismo', en la Revista "Mientras tanto", n. 114, Noviembre de 2010.

¹⁵ <http://www.crimenesinternacionales-franquismo-casogarzon.es>. See also http://www.elpais.com/articulo/opinion/Derechos/humanos/independencia/judicial/elpepiopi/20110201elpepiopi_12/Tes and also, <http://www.es.amnesty.org/noticias/noticias/articulo/proceso-al-juez-Garzón-donde-están-los-derechos-de-miles-de-victimas-de-desaparición-forzada/>. See also paras. 47 and 48 below.

¹⁶ *Negrin Fetter v. Spain*, Application 37853/10.

¹⁷ On 14 April 2010 Spanish victims lodged a complaint in respect of crimes against humanity and acts of genocide committed in Spain between 1936 and 1977. An Argentinean judge issued a request ('exhorto') on 14 October 2010 to Spanish authorities 'to inform this court whether in your country there is an investigation into the existence of a systematic, widespread and deliberate plan designed to terrorise those Spaniards who supported representative government via their physical elimination, and of a plan of legalized disappearance of children whose identities were changed.' Giles Tremless, 'Argentinian judge petitions Spain to try civil war crimes of Franco', *The Guardian* (UK), 26 October 2010. To date, the Spanish authorities have not responded.

¹⁸ Other allegations relate to exercise of jurisdiction and the fact that the crimes had prescribed - see Investigative Stage of the case against Judge Garzón, below.

¹⁹ The first amnesty laws were signed by Franco (Decree of 13 September 1936 and Decree 23 September 1939) and intended for those who took part in the insurgency and coup against the republican government. This was

(a) Article 1.1:

The following offences shall be subject to amnesty:

a. All politically motivated acts, whatever the outcome is, defined as crimes and minor offences committed before 15 December 1976;

b. All acts of the same nature committed between 15 December 1976 and 15 June 1977, when in addition to the political motivation there is intent to re-establish the public liberties or demand of autonomy for the peoples of Spain;

c. All acts of identical nature and intentionality as those provided for under the previous paragraph and committed until 6 October 1977, except if they involved serious violence against the life or the integrity of persons.

(b) According to Article 2:

In any case, the following shall be covered by the amnesty:

a. The offenses of rebellion and sedition, as well as the offences and minor offences committed on the occasion, defined in the Code of Military Justice...

e. The offences and minor offences that could have been committed by law enforcement authorities and agents, charged with maintaining public order, when carrying out the investigations and prosecuting the offences included in this law.

f. The offences committed by law enforcement agents and authorities in violation of/against the rights of persons.

followed in 1945 by a general pardon 1 April 1939 (BOE nº 19-21 October 1945) and in 1976 by a Royal Decree-Law (*Real Decreto-Ley*) 10/1976 (BOE nº 186, 4 August 1976), the predecessor of the 1977 Amnesty Law currently in force. See e.g. Sastre Sánchez, R., 'Spain before its recent past: Victimhood and impunity'. See also Garces, J., 'La Ley Española 46/1977, de amnistía, más citada que leída, no tiene por objeto actos de naturaleza genocida y lesa humanidad', in <http://www.crimenesinternacionales-franquismo-casoGarzón.es/p/analisi-juridicos.html>; Chinchón Álvarez, J., 'El viaje a ninguna parte: Memoria, leyes, historia y olvido sobre la Guerra civil y el pasado autoritario en España. Un examen desde el derecho internacional', *Revista IIDH*, Vol. 45, 2007, pages 124-7.

22. The amnesty falls to be applied by relevant judges in the context of particular cases. Article 9 of the 1977 Amnesty Law affirms that ‘the application of the amnesty, in each case, is within the exclusive competence of the judges, tribunals and relevant judicial authorities, who will adopt, in accordance with the procedural laws in force and as a matter of urgency, the pertinent decisions in compliance with this law (...) It shall be applied *ex officio* or at the request of a party, upon prior hearing in any case of the Public Prosecutor’s Office.’²⁰ Spanish courts have accordingly rejected attempts by defendants or the Ministerio Público to have the amnesty law applied at the outset of criminal cases. In the Ruano case for example, the Audiencia Provincial de Madrid found that the issue of the potential application of the amnesty law should be aired only in the context of adversarial proceedings, at the trial stage.²¹ The Supreme Court reached the same conclusion in the *Bultó* case.²²

23. It is a matter of much controversy in the Spanish context whether the 1977 Amnesty Law should be interpreted as applying to serious crimes such as crimes against humanity. Commentators, legislators, and indeed judges, have differed in their approaches to this question.

24. There have been notably few *judicial* interpretations or applications of the 1977 Amnesty Law in the context of criminal proceedings in Spain. The validity of amnesties or their applicability to serious crimes has not been considered by the Constitutional Court. Before the criminal case against Judge Garzón, the Supreme Court had considered the applicability of amnesties only in relation to amnesties by other States, for example when the ‘Full Stop’ and ‘Due Obedience’ laws were invoked by Argentine Scilingo in his defence to charges of crimes against humanity.²³ Other Spanish courts have likewise consistently affirmed that amnesties, pardons or analogous measures granted by third countries with the

²⁰ Article 9: ‘La aplicación de la amnistía, en cada caso, corresponderá con exclusividad a los jueces, Tribunales y autoridades judiciales correspondientes, quienes adoptarán, de acuerdo con las leyes procesales en vigor y con carácter de urgencia, las decisiones pertinentes en cumplimiento de esta Ley, cualquiera que sea el estado de tramitación del proceso y la jurisdicción de que se trate. La decisión se adoptará en el plazo máximo de tres meses, sin perjuicio de los ulteriores recursos, que no tendrán efectos suspensivos. La amnistía se aplicará de oficio o a instancia de parte con audiencia, en todo caso, del Ministerio fiscal. La acción para solicitarla será pública.’

²¹ Judgment of 19 December 1995; Sección II of the Audiencia Provincial de Madrid, Sumario 6/69.

²² The case of a murdered businessman had been closed on account of the 1977 Amnesty Law. It was reopened by the Supreme Court which ordered that it be investigated. The Court noted that the question of amnesty could only arise after investigation and evidence; on this basis the court evaluates the nature of the offence and whether it was truly a ‘political crime’ within the terms of the amnesty judgment of 28 February 1978.

²³ Fundamento de Derecho 6º, Tribunal Supremo decision of 15 November 2004 in the Scilingo (2007) case. <http://www.derechos.org/nizkor/espana/juicioral/doc/stscilingo.html>.

effect of preventing perpetrators of crimes under international law from being punished at home are not binding for Spanish courts.²⁴ Until the Applicant's decision there were however no judicial decisions addressing the scope and effect of the domestic 1977 Amnesty Law in the context of allegations of crimes under international law. By contrast to the developed body of international law on the limits and scope of permissible amnesties,²⁵ Spanish jurisprudence remains scarce on the question of amnesty specifically, although it provides ample acknowledgement of the importance of interpreting Spanish law in light of international law more generally.²⁶

25. A stark difference of view on the correct approach to the interpretation of the amnesty law is apparent in Judge Garzón's case, addressed in detail below. Suffice to note here that in his formal decision of 16 October 2008 Judge Garzón reached one of the first decisions on the amnesty law in Spain when he ordered that preliminary investigative steps to be taken into the Franco-era crimes, reasoning by reference to Spanish jurisprudence and international law that the amnesty was inapplicable to the crimes in question. When deciding to proceed with a criminal case against Judge Garzón, investigating magistrate of the Supreme Court Judge Varela expressed the contrary view that the amnesty law clearly did apply and that Judge Garzón's rejection amounted to inexcusable ignorance and/or deliberate failure to apply the law. Since the investigating magistrate's decisions in this case, his views have been relied upon by several courts as authority for interpreting the amnesty as an absolute bar to investigation of the full range of crimes alleged to have been committed during the regime of General Franco.²⁷ For example the Provincial Court of Madrid of 8 February 2010, rejecting an appeal against the closure of the case on grounds of amnesty and proscription, noted: 'it is relevant to point out that the decision of 3 February 2010 issued by the Magistrate of the Supreme Court Luciano Varela Castro on the acceptance of the complaint filed against the investigative judge of the Central Investigative Court nº 5 of the Audiencia Nacional...clearly

²⁴ See Decision of 25 March 1998 of the Central Investigative Court nº 5 of the Audiencia Nacional; decision of 1 September 2000 (indictment of Miguel Angel Cavallo); decision of 20 September 1998 of the Central Investigative Court nº 6 (Pinochet case). <http://www.derechos.org/nizkor/espana/juicioral/doc/stscilingo.html>.

²⁵ Expert Opinion on International Law and Comparative Practice, Annex I.

²⁶ Article 10(2) of the Constitution of the Kingdom of Spain reads: 'Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los Tratados y acuerdos internacionales sobre las mismas materias ratificados por España.'

²⁷ Some local courts to whom the cases have been referred have taken further steps (such as opening graves or taking statements from relatives) without explicit reference to the amnesty law: see courts of Benavente (Zamora), Palencia and Villacarrillo (Jaén). Information as of 30 June 2009. See: <http://www.memoriahistorica.org/modules.php?name=News&file=print&sid=948>.

states in the legal reasoning 4, E) para 4 that the criminal proceeding should have never been opened as it refers to an offence that has prescribed and is amnestied.²⁸

26. Differences of view among judges as to the correct interpretation of the law are reflected elsewhere. Within the legislature, the debate has emerged in the context of several draft bills presented to Parliament seeking to repeal the amnesty laws, on the basis that they have often been wrongly understood as applicable to serious crimes. Proponents of one Bill noted that ‘in 1977, the Amnesty Law was adopted in order to be applied to those persons who would be prosecuted and convicted for conduct that was considered criminal by the laws under the Francoist regime, when their objective was to defend democracy and the rights of the peoples and nations of the Spanish State, and the end of the Franco dictatorship.’²⁹ It has been suggested that the predominant interpretation of the 1977 law as comprising a broad-reaching amnesty is at odds with a contextual and purposive interpretation of the 1977 legislation.³⁰ Others note that the preamble to the predecessor to the 1977 Amnesty Law (Royal Decree of 1976) excludes offences which ‘infringed the life or the integrity of persons’ (Article 1)³¹ and was considered not to apply to offences that were ‘appalling, by virtue of their nature, and thus cannot be and should not be consigned to oblivion.’³²

3. Criticism of Spain’s Failure to Investigate Franco-era Crimes by International Bodies

27. The Spanish State’s failure to investigate crimes of the Franco era, and the 1977 Amnesty Law, have been criticised by numerous international human rights bodies. Notably,

²⁸ 1st instance investigating court nº5 of Aranda del Duero, Burgos on 8 February 2010 closed proceedings by reference to prescription and the application of the amnesty law. Rejecting the appeal from this decision, the Provincial Court of Burgos of 24 June 2010 notes likewise that ‘in the event that prescription would not be admitted, the acts would remain unpunishable (“impunes”) by virtue of the amnesty law.’ The Provincial Court refers to a similar decision by the first instance court of Zaragoza of 3 April 2009.

²⁹ Text can be found in <http://www.derechos.org/nizkor/espana/doc/bng4.html>.

³⁰ See Article 3 of the Spanish Civil Code whereby laws shall be interpreted according to their literal sense in relation to the context, historical and legislative background, the social reality of the time/moment in which they have to be applied, paying attention to their spirit and purpose. Según el ‘sentido propio de las palabras, en relación el contexto, los antecedentes históricos y legislativos, la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquellas.’

³¹ See <http://www.boe.es/boe/dias/1976/08/04/pdfs/A15097-15098.pdf>. ‘Se concede amnistía por todos: los delitos y faltas de intencionalidad política y de opinión comprendidos en el Código Penal o en leyes penales especiales no mencionadas en el apartado siguiente, en tanto no hayan puesto en peligro o lesionado la vida o la integridad de las personas o el patrimonio económico de la Nación a través del contrabando monetario, ya se hayan cometido dentro o fuera de España, siempre que la competencia para - su conocimiento corresponda a los Tribunales españoles.’

³² Instruction (*circular*) nº 3/1975 of 13 August 1976 for the application of Decree Law 10/1976, p. 227 cited in Garces, J., ‘La Ley Española 46/1977, de amnistía, más citada que leída, no tiene por objeto actos de naturaleza genocida y lesa humanidad.’

the Human Rights Committee (reporting immediately following Judge Garzón's 16 October decision) stated as follows:

While taking note of the recent decision of the National High Court to consider the question of the disappeared, the Committee is concerned at the continuing applicability of the 1977 amnesty law. It recalls that crimes against humanity are not subject to a statute of limitations and draws the State party's attention to its general comment No. 20 (1992), on article 7, according to which amnesties for serious violations of human rights are incompatible with the Covenant, and its general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant...The State party should: (a) consider repealing the 1977 amnesty law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims' bodies, and provide them with compensation where appropriate.³³

28. Likewise, the Committee Against Torture in 2009 highlighted the differing interpretations of, and problems with, the 1977 Amnesty Law:

*While it takes note of the State party's comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act, the Committee wishes to reiterate that, bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by the principle of legality or the statute of limitation. The Committee has received various interpretations of article 1, paragraph (c), of the Amnesty Act — which stipulates that amnesty shall not apply to acts that “entailed serious harm to the life or inviolability of persons” — to the effect that this article itself would in any case exclude torture from the offences subject to amnesty (Articles 12, 13 and 14); *The State party should ensure that acts of torture, which also include enforced disappearances, are**

*not offences subject to amnesty. In this connection, the Committee encourages the State party 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.*³⁴

29. These decisions reflect and form part of a very developed body of international law on the duty to investigate serious violations of human rights generally, and on the incompatibility with these obligations of amnesty laws that preclude investigation specifically. Relevant international standards are addressed in detail in the Expert Opinion at Annex 2.

30. In conclusion, before Judge Garzón's decisions there had been no prior interpretations of the 1977 Amnesty Law in criminal cases. His view that the amnesty laws did not apply to crimes against humanity was not an isolated view but one that has been shared by other judges and jurists in Spain, and which is reflected in international law and practice. The Expert Opinion annexed to this petition illustrates consensus across international and regional human rights systems, and in a growing body of national jurisprudence, that amnesty laws cannot preclude the investigation of serious crimes. The excerpts from the decisions and reports of international human rights bodies referred to above make this clear in relation to the 1977 Amnesty Law specifically. Through his decisions he was exercising his responsibility as a judge to apply the law as he interpreted it best, and in doing so to give effect to the duty to investigate in international law reflected in the Spanish constitution. As a result of his judicial decisions, Judge Garzón is subject to criminal prosecution for prevaricación, described below.

D. BACKGROUND II. THE LAW AND PRACTICE OF PREVARICACIÓN OR MALFEASANCE IN SPAIN

31. Article 446 of the Spanish Criminal Code ('Código Penal') provides that: 'The judge or magistrate who, knowingly, dictates an unjust sentence or resolution'³⁵ is guilty of the

³³ HRC concluding observations on the Fifth Periodic report of Spain, UN Doc. CCPR/ESP/CO/5, 27 October 2008, para. 9.

³⁴ CAT, Concluding Observations in relation to the fifth periodic report submitted by Spain, CAT/C/ESP/CO/5, 9 December 2009, para. 21 (emphasis added).

³⁵ Article 446 Penal Code: '*El Juez o Magistrado que, a sabiendas, dictare sentencia o resolución injusta será castigado:*

1. ° Con la pena de prisión de uno a cuatro años si se trata de sentencia injusta contra el reo en causa criminal por delito y la sentencia no hubiera llegado a ejecutarse, y con la misma pena en su mitad superior y multa de

crime of prevaricación. Punishment depends on the nature of the sentence or resolution and its effects, but the provision on penalties relevant to the present case provides for a ‘fine equivalent to 12 to 24 months...and a ban on holding public office or employment for a period of 10 to 20 years.’ While Article 447 of the Code also provides for judicial prevaricación for cases not committed ‘knowingly’ – but rather negligently or imprudently or out of inexcusable ignorance of the law – Judge Garzón has not been charged under this Article.

32. The key question in the crime of prevaricación is whether the decision is ‘unjust’, which, as expert witness Professor Manjon-Cabeza explains in Annex 3, has been interpreted according to various theories. The Supreme Court has however emphasised that the correct approach is the ‘objective’ theory,³⁶ which focuses on the key question whether the decision is objectively and manifestly without legal basis. In this respect the Supreme Court has clarified over time that to amount to prevaricación a decision must be: ‘manifestly against the law’;³⁷ patently unlawful;³⁸ unable to be explained by reasonable interpretation³⁹ and/or involve a result that lacks any reasonable explanation.⁴⁰ It has held that the unlawfulness of the decision must be ‘flagrant and glaring’ (‘flagrante y clamorosa’), involving an interpretation which is nonsensical or grotesque (‘esperpéntica’), or where ‘the irrationality of the resolution in question is manifest’, such that it ‘could be appreciated by a layperson.’⁴¹

33. The Supreme Court has further made clear, that if an interpretation is ‘possible’ or ‘objectively sustainable’ it cannot amount to prevaricación. A 2009 judgment decided by Judge Varela – the same judge who as investigating magistrate in the case against Judge Garzón would decide to pursue prosecution for prevaricación – is worthy of note. It states that:

doce a veinticuatro meses si se ha ejecutado. En ambos casos se impondrá, además, la pena de inhabilitación absoluta por tiempo de diez a veinte años.

2. ° *Con la pena de multa de seis a doce meses e inhabilitación especial para empleo o cargo público por tiempo de seis a diez años, si se tratara de una sentencia injusta contra el reo dictada en proceso por falta.*

3. ° *Con la pena de multa de doce a veinticuatro meses e inhabilitación especial para empleo o cargo público por tiempo de diez a veinte años, cuando dictara cualquier otra sentencia o resolución injustas.’*

³⁶ Tribunal Supremo Decision 2/1999, 15 October 1999.

³⁷ Tribunal Supremo, 9 March 1910.

³⁸ Tribunal Supremo, 17 June 1950.

³⁹ Tribunal Supremo, 25 January 1911.

⁴⁰ Tribunal Supremo, 28 June 2004.

⁴¹ Tribunal Supremo Decision 2/1999, 15 October 1999.

[T]he objective element exists when the resolution is not...legally defensible. In other words ... it is the abandonment of the judicial function associated with the rule of law, when the law has been applied ignoring methods and means of interpretation that are acceptable in the rule of law...

[W]here various decisions are objectively sustainable, or where there are doubts regarding the interpretation of the law, the choice between these possible interpretations cannot give rise to a case of 'prevaricación,' as the judge will have stayed within the juridically acceptable.

34. Moreover, in some decisions the Court has suggested that the *effect* of the decisions may be relevant to an assessment of whether prevaricación has been committed: 'the unusual reproach of the criminal law does not arise in light of mere unlawfulness but rather in the face of the consciously distorted application of the law to the detriment of someone.' The Court noted that mere unlawfulness can be challenged by other routes.⁴² Likewise it has referred to prevaricación as 'undermining of the rule of law...a serious departure from the law to the prejudice of one of the parties.'⁴³ The lasting effects of decisions, and whether there were victims of the alleged wrongful decision may, at least according to the jurisprudence above, also be a relevant factor in deciding whether conduct might meet the consistently high threshold for prevaricación.

35. The subjective element requires that the decision is taken in the 'knowledge' that it is against the law and unjust. A good faith interpretation of the law, including the refusal to apply a law on the considered view that it was inapplicable, cannot therefore amount to prevaricación.

36. The prosecution of judges for prevaricación, in Spain as elsewhere, is exceptional. Recent examples highlight a high threshold normally imposed to protect judges from unjustified prosecution. One of the few recent cases, involving an apparently clear case of corruption by a judge who received money in return for judgments, was held not to meet the high threshold of prevaricación.⁴⁴ A decision by a judge to refuse to allow a lesbian couple to adopt, despite their entitlement in law to do so, on the grounds of the application of 'natural

⁴² Tribunal Supremo, 18 June 1992.

⁴³ Tribunal Supremo, Decision 2/1999, 15 October 1999.

⁴⁴ Re 1732/2008, Tribunal Supremo, Decision 308/2009, 11 March 2009.

law,’ is one of the rare cases where allegations of prevaricación have proceeded.⁴⁵ A high threshold is therefore apparent from consistent jurisprudence on prevaricación, though not from the very different standards applied in Judge Garzón’s case, to which we now turn.

IV. FACTS OF THE CASE: CRIMINAL PROCEEDINGS AGAINST JUDGE GARZÓN FOR OPENING THE ‘FRANCO-ERA’ INVESTIGATION

A. *THE INVESTIGATION OF THE FRANCO-ERA CRIMES AND THE EXERCISE OF JURISDICTION BY JUDGE GARZÓN*

37. On 14 December 2006, family members and associations representing victims of the Franco regime filed a petition before the Audiencia Nacional.⁴⁶ The complaint alleged that members of the ‘Junta de Defensa Nacional’, or National Defence Movement, established in 25 July 1936 by dissident generals in support of Franco, had systematically illegally detained, tortured and killed during and after the Spanish civil war.⁴⁷ The victims’ families and associations requested fact-finding missions to ascertain the fate of family members, the exhumation and identification of victims’ remains and criminal investigations.⁴⁸ The application was submitted to the Audiencia Nacional, and allocated automatically to the Juzgado Central de Instrucción No. 5 of the Audiencia Nacional directed by Judge Baltasar Garzón Real.⁴⁹

38. Judge Garzón did not – and in accordance with Spanish law would not have been entitled to – request this particular case. (The right to a judge predetermined by law is guaranteed in Article 24 of the Spanish Constitution).⁵⁰ Nor did he, as a judge to whom a case within his competence had been referred, have discretion, according to Spanish law, to refuse

⁴⁵ A family judge was eventually suspended for ten years for refusing to process the adoption claim of a lesbian couple. See e.g. <http://www.20minutos.es/noticia/953881/0/>. Judge Fernando Ferrín Calamita was condemned by the Superior Tribunal of Murcia in Judgment No. 5/20089 of 23 December 2008. The Supreme Court upheld the decision (increasing the penalty from two to three to 10 years’ suspension from duties) in Judgment no. 1243/2009 of 30 October 2009.

⁴⁶ Several petitions were filed between December 2006 and October 2008 by family members and associations of family members requesting the search, exhumation and identification of the victims’ remains and, among others, the judicial instruction of all proceedings regarding effective remedies to their rights to truth, justice and reparation – i.e. fact-finding missions and criminal investigations.

⁴⁷ See Juzgado Central de Instrucción No. 5 de la Audiencia Nacional, Diligencias Previas Proc. Abreviado 399/2006 V, auto de 16 de octubre 2008, Hechos, RJº primero.

⁴⁸ Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399/2006 V, auto de 16 de octubre 2008, Hechos.

⁴⁹ Complaints are referred to the ‘decanato’ – judge appointed on a rotating system to oversee the distribution of cases – office of the President of the Court and cases are automatically distributed by computer to particular courts, to ensure no manipulation of the court or judge assigned to particular cases.

⁵⁰ Article 24.2 of the Constitution of the Kingdom of Spain guarantees the right to a judge predetermined by law (‘el derecho al juez ordinario predeterminado por ley’).

to investigate such a complaint.⁵¹ His role, as mandated by law, was to consider the case before him and, if it presented indicia of criminal activity that fell within his jurisdiction, to investigate the allegations.

39. On 28 August, 25 September⁵² and 7 October 2008 Judge Garzón ordered that preliminary steps be taken in order to determine the nature and extent of the case.⁵³ These involved basic evidence gathering, through requests to various authorities to provide documents and information concerning victims and alleged perpetrators. Ascertaining the nature of the crimes and those accused of responsibility for them were relevant preliminary steps to determining the question of jurisdiction.⁵⁴

40. On 16 October 2008, Judge Garzón delivered a key decision in the case.⁵⁵ It included the following findings:

- (a) ‘The alleged facts have never been subject to criminal investigation in Spain, as a result of which impunity has been the rule for crimes that in light of legal developments might now be characterised as crimes against humanity’⁵⁶... ‘maximum respect was due to all victims...irrespective of politics, ideology, religion or any other class;’⁵⁷

⁵¹ See e.g. Article 448, Código Penal, which addresses the judicial obligation to administer justice and the punishment for refusing to do so: ‘El juez que se negase a juzgar, sin alegar causa legal, o so pretexto de oscuridad, insuficiencia o silencio de la ley, será castigado con la pena de inhabilitación especial para empleo o cargo público por tiempo de seis meses a cuatro años.’ Also, Article 24.1 of the Constitution of the Kingdom of Spain establishes that all persons have the right to obtain the effective protection of judges and courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence. In this sense, see also Article 7.3 LOPJ stating that the courts and tribunal shall protect rights and legitimate interests, both individual and collective, and in no case causing defencelessness.

⁵² Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. 399/2006V, Auto, 25 September 2008.

⁵³ He requested the courts in Madrid to submit judicial documents in their possession since 1936, asked the prison service to provide relevant information and the Church to provide a list of the disappeared.

⁵⁴ Judge Garzón requested judicial and administrative information from the government agencies and diplomatic missions in order to determine the number and names of those involved in the case. See e.g. Providencia de 25 de Septiembre de 2008 (f. 1493, *ibid*) at Antecedentes del caso, available in hard copy and referenced at <http://www.crimenesinternacionales-franquismo-casoGarzón.es/p/antecedentes-del-caso.html>. In the October 2008 decision Garzón refers to these various decisions as preliminary measures relevant to determining the nature of the alleged crimes and the question of jurisdiction.

⁵⁵ Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399/2006 V, Judgment of 16 October 2008, p. 5, para. 4.

⁵⁶ *Ibid.*, Legal Reasonings, para. 1.

⁵⁷ *Ibid.*, para. 2.

... '[T]hese proceedings are not about a revision of the Spanish civil war...but, more modestly, to determine the question of forced disappearance of persons and other information contained in the complaints;'⁵⁸ ...

While the authorities had 'used all their resources to locate, identify and grant reparations to the victims from the winning side, they did not give the same respect to other victims from the "losing" side who had been persecuted, jailed, disappeared and tortured;'⁵⁹

- (b) The facts alleged relate to 'illegal armed insurrection', 'plans to end the Spanish form of government,' 'systematic executions', 'mass killings', torture and the systematic, general and illegal detentions of political opponents' between 17 July 1936 and 31 December 1951;⁶⁰
- (c) '[T]he atrocious crimes committed after 1936 amount to war crimes, which were already prohibited by national and international law by 17 July 1936;'⁶¹ ...
- (d) [T]he acts, notably 'illegal detention, torture and forced disappearance' fall within the category of crimes against humanity;
- (e) Crimes against humanity were not part of domestic law at the relevant time, and not used as the basis for the criminal investigation, but (in line with earlier Supreme Court doctrine), it could be taken into account that systematic deaths, tortures, detentions and disappearances were conducted in the context of crimes against humanity;⁶²

⁵⁸ *Ibid.*, para. 3.

⁵⁹ *Ibid.*, para. 4.

⁶⁰ Second Legal Reasoning.

⁶¹ Second Legal Reasoning. He cited the 1864 Geneva Convention, the 1888 and 1907 Hague Conventions as well as the domestic law that incorporated these treaties, Articles 28, 29 and 607 *bis* of the Penal Code. Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399/2006 V, Auto de 16 de octubre 2008, p. 7 y 17, capítulo segundo y cuarto.

⁶² Caso Scilingo, Spanish Tribunal Supremo [Spanish Supreme Court], Sala de lo Penal [Criminal Chamber], 1 October 2007 (No. 798/2007) ('Scilingo Case'), available at <http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html>.

- (f) The rules on non-retroactivity, which preclude holding an individual to account for a crime that was not punishable at the time committed, do not apply to preclude jurisdiction for the alleged crimes;⁶³
- (g) ‘A permanent crime of illegal detention without informing the families of the fate of their loved ones,’ amounted to the crime against humanity of forced disappearance. The crimes continue until information concerning the fate of the individual brought to an end the commission of the crime.⁶⁴ ‘Where a victim’s body had not been found, a crime of kidnapping was still being committed and had not lapsed’ and the crimes had not prescribed;⁶⁵
- (h) The non-applicability of amnesty to crimes against humanity was supported by ample international law authorities including the Inter-American Court of Human Rights cases of *Barrios Altos* of Peru, decided on 14 March 2001, and *Masacre de Mapiripán* of Colombia, decided on 5 September 2005.⁶⁶ It is also supported by the Spanish Constitution and jurisprudence of the Spanish Supreme Court which provides for international law to be used in the interpretation, application and punishment of crimes against humanity;
- (i) Jurisdiction was assumed in respect of ‘crimes against the state,’⁶⁷ which under Articles 23.2, 23.4 and 65.1⁶⁸ of the Ley Organica Judicial corresponds to the jurisdiction of the Audiencia Nacional,⁶⁹ carried out in the context of and

⁶³ Eighth Legal Reasoning.

⁶⁴ *Ibid.*, Ninth Legal Reasoning.

⁶⁵ Ninth Legal Reasoning, p. 39. Garzón refers to Article 1 of Protocol I of the European Convention and to European Court of Human Rights, *Streletz, Kessler & Krenz v. Germany*, Application nos 34044/96, 35532/97, 44801/98, 22 March 2001.

⁶⁶ Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399 /2006 V, p. 43, 16 October 2008, 11th Legal Reasoning.

⁶⁷ ‘...the acts committed by the people that took part in the armed insurrection of 18 July 1936, were completely illegal and constituted attacks against the form of government (Crimes against the Constitution, Title Two of the Penal Code of 1932, in force at the time of the insurrection)... Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399/2006 V., Competencia para Tramitacion de la Causa, 16 October 2008, p. 8.

⁶⁸ Article 23.2 refers to cases in the national interest, Article 23.4 to universal jurisdiction and Article 65.1 to political acts against the nation (which may arguably include acts of rebellion or terrorism).

⁶⁹ This previous crime was adopted into the current Penal Code in the form of ‘rebellion’ (see Escrito de Defensa 17 June 2010).

connected to crimes against humanity. This covered crimes committed by Franco and his high command during the war and the post-war period;⁷⁰ and

- (j) Victims had the right to reparation, in line with international standards.⁷¹ Given the need to establish the existence of crimes as a preliminary matter, he ordered further investigative steps. He requested information from churches and city halls to compile a definitive list of victims' estimated at around 114,266.⁷² He ordered proof from the Interior Ministry that 35 generals and ministers in the early years of Franco's dictatorship were dead, and requested a list of those in charge of the pro-Francoist Falange movement up until 1951. He also ordered the exhumation of unmarked mass graves and the establishment of coordinating bodies to facilitate the investigation of these crimes.⁷³

41. Judge Garzón thus authorised opening an investigation for serious crimes based on a range of international and national legal authorities.⁷⁴ He ordered that exhumations and other preliminary steps be taken to ascertain facts and the extent of potential criminality, including whether any of the alleged perpetrators were still alive. While his jurisdiction was over 'acts against the state' or 'illegal detentions', as they also amounted to crimes against humanity, he found that they were not subject to prescription and that the 1977 Amnesty Law was not applicable. It is this decision that would soon thereafter form the basis of the criminal prosecution of Judge Garzón addressed below.

42. On 20 October 2008, the Ministerio Público challenged Judge Garzón's 16 October decision before the Criminal Chamber of the Audiencia Nacional.⁷⁵ It argued that the Audiencia Nacional lacked subject-matter jurisdiction ('competencia objetiva'), and that

⁷⁰ Auto 16 October 2008, Third Legal Reasoning.

⁷¹ 14th and 15th Legal Reasoning.

⁷² Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399/2006 V, Auto de 16 de octubre 2008, p. 23.

⁷³ 17th Legal Reasoning. E.g. he established a special group within the judicial police to help the court investigate, executive bodies to oversee and provide information on exhumations in their areas.

⁷⁴ Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399/2006 V, Auto de 16 de octubre 2008, p. 17-22, IV and V. Judge Garzón based his decision on Articles 28, 29 and 607 bis of the Spanish Penal Code, Article 7 of the ICC Statute, Article 6 of the Nuremberg Statute the Sierra Leona Chamber, case of *Kondewa* 25 May 2004, the decision of the Tribunal oral en lo criminal federal n° 5 de la capital federal Argentina en el caso Turco Julián de Agosto 2006, South African Constitutional Court in the case of *Azianian People's Organization* and the Case Adolfo Scilingo of 1 October 2007, Sala Segunda, Tribunal Supremo.

⁷⁵ Challenge by the Ministerio Público, 20 October 2008, Audiencia Nacional, Juzgado Central de Instrucción No. 5, Diligencias Previas Proc. Abreviado 399/2006 V., Apelación 16 October 2008.

jurisdiction fell to local territorial courts to investigate genocide and crimes against humanity. The Ministerio Público also argued that the crimes alleged, which had occurred 60 years ago, had become non-justiciable because of prescription; there was no continuing crime as unlawful detention had notoriously ended with the execution of the victims; the amnesty law, which was democratically introduced applied and the use of forced disappearance to get round the amnesty law violated the principle of retroactivity.⁷⁶ The Ministerio Público objected to Judge Garzón's application of international law.⁷⁷

43. On 7 November 2008, Judge Garzón returned to work after a short period of sick leave. He assessed the evidence before him indicating that the individuals responsible for the 'crimes against the state' over which he had exercised jurisdiction were deceased,⁷⁸ and identifying the location of the alleged mass graves. On 18 November 2008, while the Ministerio Público's challenge was still pending, Judge Garzón ceded jurisdiction in the case to local courts in those territories. He emphasised the continuing right of victims to truth, but deferred to local courts to take forward the determination of the cases.⁷⁹

44. On 2 December 2008, in response to the Ministerio Público's challenge of 20 October 2008, the Plenary Criminal Chamber of the Audiencia Nacional decided, with the dissenting vote of three judges, that the Audiencia Nacional did not have jurisdiction over the Franco-era case.⁸⁰ On the basis that the crimes perpetrated were crimes of 'rebellion' and not 'crimes against the state', the majority of the Plenary Criminal Chamber of the determined that the crimes were outside the jurisdiction of the Audiencia Nacional.⁸¹ It annulled most acts emanating from Judge Garzón's decisions,⁸² but not the preliminary measures authorised by Garzón prior to his 16 October 2008 decision which were held to be preliminary or

⁷⁶ *Ibid.*, at p. 34.

⁷⁷ *Ibid.* at p. 18.

⁷⁸ Article 130.1 of the Penal Code: criminal responsibility/liability extinguishes by death of the accused.

⁷⁹ 'In light of the above and the places where the requests for exhumation were made (Hecho Octavo), the court agrees to defer jurisdiction to the courts corresponding to the localities where the tombs are allegedly situated...', Juzgado Central de Instrucción N° 5, Audiencia Nacional, Madrid, Sumario (Proc.Ordinario) 53/2008 E, 18 November 2008, at 148, available at http://elclarin.cl/images/pdf/spain_20081118.pdf.

⁸⁰ Audiencia Nacional, Sala de lo Penal, Juzgado Central de Instrucción No. 5, Pleno, Diligencias Previas Proc. Abreviado 399/2006 V, Auto, 2 December 2008, p. 7, available at http://elclarin.cl/fpa/pdf/spain_20081202.pdf.

⁸¹ *Ibid.*, at p. 11.

⁸² *Ibid.*, at p. 11; previous judicial acts are declared null and without effect, including the decision of 18 November 2008, but not those considered 'necessary to prove the crime, and those of recognizable urgency' including those that could not wait for a determination regarding jurisdiction.

preventative measures to determine jurisdiction.⁸³ The decision was ‘without prejudice to the competence that could correspond to other judicial bodies.’⁸⁴

45. Three of the seventeen judges of the Plenary Criminal Chamber of the Audiencia Nacional - Judges José Ricardo de Prada Solaesa, Clara Bayarri García and Ramón Sáez Valcárcel - dissented and offered significant separate opinions.⁸⁵ Their dissenting opinions include the following elements:

- (a) The historic significance of the case concerning 1,000,000 disappeared and 30,000 kidnapped children was significant; the tribunal must respond to exceptional circumstances and difficult cases and determine the questions of competence in a way that provide effective protection for the rights of victims under international law;
- (b) The Audiencia Nacional did have jurisdiction over the crime of ‘rebellion’ and over international crimes; supporting but going further than Judge Garzón’s decision, they suggested various bases on which the Audiencia Nacional would be entitled to exercise jurisdiction and to investigate the case;⁸⁶ and
- (c) Under international law, including the jurisprudence of the European Court of Human Rights, States are obliged to investigate the crimes in question as crimes against humanity.⁸⁷

46. As noted above, by the time this decision was issued, Judge Garzón had ceded jurisdiction. As of 18 November 2008 he was no longer involved in the investigation of these crimes.⁸⁸

⁸³ *Ibid.*, at p. 10.

⁸⁴ *Ibid.*, at p. 18.

⁸⁵ Voto Particular, rollo de sala, 34/2008 of 2 December 2008. Judges José Ricardo de Prada Solaesa, Clara Bayarri García and Ramón Sáez Valcárcel dissented on the basis inter alia that Garzón had jurisdiction over the case.

⁸⁶ The magistrates considered that crimes of rebellion are indeed under the mandate of Audiencia Nacional - although it is not explicit in the LOPJ) it is contained in Article 23 of the Law of Criminal Procedure. They also considered that as Judge Garzón’s 18 November 2008 dismissal decision had already rejected jurisdiction the Audiencia Nacional lacked jurisdiction to continue to determine the matter. Two of the three (excluding Judge Javier Martínez Lázaro who filed an independent concurring opinion) found that the investigation may relate to crimes against humanity even though these were only included explicitly in the Spanish Penal Code in 2003.

⁸⁷ *Ibid.*

⁸⁸ As the decision of the Sala Segunda of 2 December had expressly annulled Garzón’s previous decisions including this one, he had to issue another decision, on 26 December, to refer the cases to the local courts.

47. Further demonstrating the complexity of – and controversy surrounding – the question of which court should exercise jurisdiction in respect of the Franco-era crimes, two of the local courts to whom the cases had been sent (Grenada and San Lorenzo del Escorial) subsequently took a different view on the jurisdictional question to that of the majority judgment of the Plenary Criminal Chamber of the Audiencia Nacional. They found, in line with Judge Garzón’s reasoning and that of the dissenting judgments, that the local courts did not have jurisdiction and that jurisdiction over these crimes correctly fell to the Audiencia Nacional. On 28 May 2009 and 2 July 2009 respectively, these courts sent the cases back to Judge Garzón.

48. In accordance with the 2 December 2008 decision of the Plenary Criminal Chamber, Judge Garzón transferred the dispute regarding jurisdiction to the Supreme Court,⁸⁹ in accordance with the applicable procedure where there is a dispute between two equal courts as to which has jurisdiction.⁹⁰ As noted above, at around the same time, in January 2009, allegations of prevaricación were made against Judge Garzón. When the jurisdictional question was referred to the Supreme Court, instead of determining the issue before it, on 26 March 2010 the Supreme Court suspended the action until final pronouncement of the prevaricación case against Judge Garzón, leaving victims with no recourse and no indication of which court they should address to pursue their legal rights.⁹¹ The controversial jurisdictional question on which judges of the Audiencia Nacional and territorial courts had disagreed was therefore made subject to the outcome of criminal proceedings against the Applicant.

49. Judge Garzón’s impugned decisions had had the effect of authorising for a short period of time an investigation with a view to clarifying information and whether there should be prosecutions. He had not prosecuted anyone. There is no suggestion that any individuals’ rights had been negatively affected by his actions. He subsequently renounced

⁸⁹ Tribunal Supremo, Sala Segunda, *Questión de Competencia*, 06/20380/2009 (acumulada 06/20431/2009), pending before the Tribunal Supremo).

⁹⁰ There is no hierarchical relationship between the Audiencia Nacional and these local courts. In each Autonomous Community there is a Higher Court of Justice which is the highest jurisdictional body with the exception of the Supreme Court (Tribunal Supremo). The Constitutional Court is considered to be outside the hierarchy of the judiciary, functioning only as the interpreter of the Spanish Constitution. See Articles 26, 29 and 34 of the LOPJ.

⁹¹ Tribunal Supremo, Audiencia Nacional, Juzgado Central de Instrucción No. 5, *Diligencias Previas Proc. Abreviado 399/2006 V*, Providencia Auto TS, 26 March 2010.

even this limited investigative jurisdiction, deferring to local courts.⁹² The matter was appealed and the appeal court had had the opportunity to address each of the contentious issues in Judge Garzón's decisions. In the months that followed, the exceptional decision was taken to prosecute him for these judicial decisions.

B. THE CRIMINAL CASE AGAINST JUDGE GARZÓN IN RELATION TO THE ABOVE DECISION TO EXERCISE JURISDICTION TO INVESTIGATE

1. The Investigative Stage

50. On 26 January 2009, 'Manos Limpias',⁹³ a political organisation describing itself as 'a civil servant union' and 'right wing', filed before the Criminal Chamber of the Supreme Court of Spain criminal charges for malfeasance (*prevaricación*)⁹⁴ against Judge Garzón alleging the abuse of his judicial authority by opening the inquiry into the Franco-era crimes. The main allegations were that the crimes were subject to prescription, covered by the 1977 Amnesty Law and that the Audiencia Nacional lacked jurisdiction to judge acts of rebellion. In short, the grounds of the complaint were in essence the same issues which had been addressed on appeal by the Plenary Criminal Chamber of the Audiencia Nacional. On 9 March 2009 a similar criminal complaint was submitted against Judge Garzón by *Liberdad e Identidad*, an extreme right wing political organisation,⁹⁵ opposed to immigration and to accountability for those accused of involvement in Franco-era crimes.⁹⁶ A few months later a third complaint in similar grounds was submitted by *Falange de la Jons*, a political movement loyal to General Franco, some of whose members were subject to investigation by Judge Garzón.⁹⁷

⁹² See decision of 26 December 2009, giving effect to the Audiencia Nacional's decision of 2 December.

⁹³ The *Sindicato Colectivo de Funcionarios Públicos Manos Limpias* describes itself as a national and independent trade union founded by Miguel Bernard, former president of the extreme right-wing party *Frente Nacional* (some members of which came from fascist and neo-nazi groups). It states that it represents all formal government workers against matters of political and economic corruption directly related to the Spanish Constitution. It presents itself as known for Unitarian ideals and as 'right wing'. For more information see <http://www.manoslimpias.es/>.

⁹⁴ *Causa Especial 3/20048/2009*, Sala Segunda del Tribunal Supremo, Querrela, 26 January 2009.

⁹⁵ *Causa Especial 3/20048/2009*, Sala Segunda del Tribunal Supremo, Querrela, 26 March 2009. The *Asociación Libertad e Identidad* is a right wing organisation constituted in Malaga in 2009. It claims to represent Spanish citizens against immoral values through publications and judicial interventions. See <http://www.libertadidentidad.com/>.

⁹⁶ See *Causa Especial 3/20048/2009*, Sala Segunda del Tribunal Supremo, Escrito de Defensa, 17 June 2010.

⁹⁷ *Falange de la Jons* derives from a Nazi group known as 'Juntas de Ofensiva Nacional-Sindicalista (JONS)' which fused with 'Falange' at the end of the civil war. The criminal complaint, dated 20 July 2009, was presented on 1 September 2009.

51. As these complaints were against a sitting judge of the Audiencia Nacional, the Supreme Court had jurisdiction. While the rules on triggering criminal complaints are broad reaching, a case cannot proceed against a judge for prevaricación without the Supreme Court. It fell to the Supreme Court to consider whether to admit the complaints, whether there were sufficient indiciae of criminality to investigate the allegations and whether there was sufficient basis to proceed to criminal trial. Jurisdiction over this matter fell to the Second Chamber of the Supreme Court, with responsibility for criminal matters.⁹⁸

52. On 26 May 2009, Manos Limpias' criminal complaint was admitted by the Supreme Court (as were the other complaints at a later stage).⁹⁹ On 30 May 2009, Judge Garzón asked the Supreme Court to exercise its power to dismiss the case. He noted that none of the elements of the crime of prevaricación were present and highlighted the risk to judicial independence. He suggested that while there had been a difference of view on aspects of the law with the Ministerio Público, this had been resolved on appeal.¹⁰⁰ The Ministerio Público supported this argument and also challenged the complaint as inadmissible.¹⁰¹

53. The challenges by Judge Garzón and the Ministerio Público were dismissed by the Second Chamber of the Supreme Court on 15 June 2009. The Court's decision simply relies on the facts that the complaints had observed necessary legal requirements.¹⁰² The Court failed to engage with the arguments that interpretations of the law simply do not give rise to criminal action against the judge, or that they could only be seen as such through an expansive and distorted interpretation of the criminal law of prevaricación.¹⁰³

54. Supreme Court judge Luciano Varela was appointed to the case as investigating judge acting as a delegate to the Second Chamber of the Supreme Court. Differences of views

⁹⁸ The Supreme Court is divided into six chambers. Each chamber is specialised in a different matter. The Second Chamber of 'Sala Segunda' is the one in charge of Criminal Law.

⁹⁹ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Auto Admisión Querella, 26 May 2009, available at http://www.elpais.com/elpaismedia/ultimahora/media/200905/27/espana/20090527elpepunac_1_Pes_PDF.pdf. See also El Tribunal Supremo admite la querella de Manos Limpias contra Garzón por prevaricación, Diario Ya, available at <http://www.diarioya.es/content/el-tribunal-supremo-admite-la-querella-de-manos-limpias-contra-garz%C3%B3n-por-prevaricaci%C3%B3n>.

¹⁰⁰ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Recurso de Reforma, 30 May 2009.

¹⁰¹ Referred to in Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Auto Desestima Recurso Súplica, 15 June 2009.

¹⁰² *Ibid.*

¹⁰³ Article 410 LOPJ. While the decision acknowledges in passing that it is important to avoid the grave risk (including automatic suspensive effect) of a complaint against judges, and that it is possible for the court to

between Judge Garzón and Judge Varela were well known; the latter had for example promoted a strict positivist view of the principle of legality, rejecting international law in interpreting national law in an important Supreme Court decision.¹⁰⁴ Nonetheless, as the judge appointed by law to the case, it was assumed that he would discharge his judicial functions impartially.

55. Judge Garzón and the Ministerio Público formally requested the dismissal of the complaint, setting out in full the reasons why the alleged conduct was not criminal in nature due to the absence of essential elements of the offence of prevaricación.¹⁰⁵ The Ministerio Público submitted that the 16 October 2008 decision could not plausibly be considered ‘legally indefensible or irrational’ (‘jurídicamente indefendible o irracional’) when three magistrates of the Plenary Criminal Chamber of the Audiencia Nacional and some local courts had adopted the same interpretation.¹⁰⁶ He added that, contrary to the complaint made against Judge Garzón, requesting death certificates, however notorious the deaths in question, is not a basis for prevaricación charges either, as there are no ‘notorious’ facts in criminal proceedings where all alleged facts must be proved.¹⁰⁷

56. On 3 February 2010, Judge Varela decided to reject the Ministerio Público’s and Judge Garzón’s request for dismissal. In a key decision, he decided that the criminal case against Judge Garzón should proceed, based on the probable existence of criminal action.¹⁰⁸ Judge Varela found the complaint admissible under Article 446.3 of the Código Penal, on the

consider ‘criminal relevance’ and ‘plausibility’ given the nature of the case, it fails to explain why the conduct alleged might fall within the purview of criminal law.

¹⁰⁴ Varela participated in the Scilingo case, Tribunal Supremo, Sala de lo Penal, Sentencia 798/2007, Recurso 10049/2006 P, 1 October 2007, (re universal jurisdiction) in which his dissenting judgment (‘voto particular discrepante’) was based on the inability of the court to exercise universal jurisdiction because crimes against humanity had only been defined in domestic law in 2003. In 2010 Scilingo filed a writ of nullity (‘incidente de nulidad’) against the decision on the basis of the case against Garzón; Scilingo also filed a malfeasance complaint (prevaricación) against the judges that took part in his case, except Varela. See <http://www.crimenesinternacionales-franquismo-casogarzon.es/2010/05/un-dia-de-verguenza-historica-para-la.html>. For public recognition of the difference of views, see ‘Los Protagonistas’, *Diario de Leon*, 8 April 2010, available at <http://www.diariodeleon.es/noticias/noticia.asp?pkid=519630> referring to long standing differences of view;

¹⁰⁵ This had first been done on 1 October 2009, and was followed up with a new writ requesting the closure of the proceeding and dismissal of complaints submitted by Judge Garzón on 17 December 2009; Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de la Fiscalía, 20 January 2010.

¹⁰⁶ Dissenting Opinions, 2 December 2008 decision; decisions of El Escorial and Granada referred back the case to the JCI nº 5, see above.

¹⁰⁷ He also noted that most of Judge Garzón’s decisions referred by the complainants could not constitute prevaricación as they were purely procedural in nature.

¹⁰⁸ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Sobreseimiento Querrela, 3 February 2010.

grounds that Garzón had ‘deliberately chose[n] to ignore or circumvent’ the law.¹⁰⁹ The decision contained the following rationale for authorising the criminal case against Judge Garzón:

- (a) Judge Garzón’s decisions are ‘objectively contrary to law’;
- (b) Judge Garzón had exercised jurisdiction, and taken a wide-reaching investigate steps, without having jurisdiction established in law;
- (c) It was ‘manifestly unreasonable’ to ignore the fact that the crimes were subject to prescription under law; using ‘forced disappearance’ to circumvent the law that would otherwise apply to ‘illegal detention’ was foreign to any normal interpretation;
- (d) The law of amnesty was democratically approved and should be upheld by courts and the failure of Garzón to do so was ‘inexcusable juridical ignorance’:¹¹⁰ ‘[T]he defendant places himself as an ethical referee of the political decision taken by the democratic forces in 1977, claiming standards and principles of International Law..., only out of an inexcusable ignorance of the law one can equate/compare the amnesty approved by Parliament with unilateral amnesties or ‘auto-amnesties’ to which generally those international instruments refer’;
- (e) ‘International Law does not exclude amnesties. In this sense, the Additional Protocol II to the Geneva Conventions, Article 6 applies to the prosecution and punishment of criminal offences related to the armed conflict...[and] the International Convention for the protection of all persons against enforced disappearances approved on 20 December 2006 by the General Assembly of the UN does not veto possible amnesties for such crimes’;

¹⁰⁹ ‘The examination of the acts has revealed, as probable fact, that the accused judge acted with the intent to elude the legislator’s decision about the regime of locating and exhuming the victims of the horrible crimes of Franco’s regime, ... knowing that these had been subjected to amnesty by the democratic courts of Spain, whose will was consciously ignored or circumvented’, Admissibility Decision, Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, 3 February 2010, at 7, p. 54.

¹¹⁰ *Ibid.* at p. 41.

- (f) The International Covenant on Civil and Political Rights or the European Convention of Human Rights ‘were incorporated into the Spanish legal system (Article 96 of the Constitution) after the occurrence of the acts to which the amnesty law refers...Thus, whatever political opinion one may have on the law, we cannot proclaim its nullity at the time it was adopted’; and
- (g) As regards the subjective element, there is sufficient probability that Judge Garzón was ‘conscious that he lacked competence’ in this case.

57. The decision to proceed to prosecute Judge Garzón was based on the ‘probable existence of a crime.’ While in other circumstances, a probable cause determination may arise from a range of available indicia that a crime was committed, the ‘facts’ in the prevaricación scenario are the existence of a judgment written by a judge. The only controversial question in this case relates to the substance and nature of that judgment, whether it was so twisted and unsustainable as to rise to prevaricación and whether the author knew it to be so. Without hearing evidence as to why his decisions were in fact sustainable interpretations of law, but based instead on his own interpretation of the law, Judge Varela decided to proceed to prosecute of Judge Garzón for irrational, unjust legal decisions.

58. As evident from the passages cited above, Judge Varela’s decision challenges Judge Garzón’s use of international law in the interpretation of Spanish law, but also the merits of Judge Garzón’s analysis of international law. The decision to prosecute Judge Garzón is on the investigating judge’s previously unsupported view of the law on prevaricación (see Article 7, below) and on a particular, questionable assessment of international law and practice.¹¹¹

59. In light of his decision, and while the appeal against it was pending, Judge Varela and the President of the Chamber Judge Saavedra transferred the matter to the General Counsel on Judicial Power for it to proceed with the suspension of Judge Garzón. [see ‘Judge Garzón’s suspension’, below].

¹¹¹ While the merits of Judge Varela’s assessments of law are not strictly relevant here, it is noted that there are seriously questionable elements. These include erroneous assertions that the Argentinean amnesty laws were not passed by a ‘democratic government’ and a misunderstanding of the relevance of international humanitarian law amnesties, which cover only acts which are lawful under the laws of war (that may not have been under national laws) and do not in any way affect the rule of international human rights law that amnesties cannot preclude the investigation of serious human rights violations. For a fuller discussion of relevant international law on amnesty and prescription see International Expert Opinion Annex 1.

60. In the months that followed the 3 February 2010 decision, both Judge Garzón and the Ministerio Público sought to have the complaint thrown out as an abusive process unsupported in law.¹¹² Judge Garzón also sought repeatedly to be allowed to present evidence in support of his position.¹¹³ Without exception, all applications and all requests to submit evidence were denied, as set out below.

61. On 9 February 2010 Judge Garzón challenged this decision before the Second Chamber of the Supreme Court,¹¹⁴ arguing that the criminal complaints failed to observe minimum grounds for admissibility and that there was no probable basis in the complaints to sustain a criminal charge of prevaricación.

62. Judge Garzón also asked to be allowed to submit evidence to support his arguments that no crime had been committed. Among them was evidence of international experts, including some of those experts whose opinions are found at Annex 1, demonstrating that his approach to the interpretation of the law was reasonable, consistent with (and required by) international law, and the same approach as that adopted by other judges internationally. Although Judge Varela's decision to proceed against Judge Garzón was on the basis that the latter's decisions were 'objectively contrary to law', 'manifestly unreasonable,' 'incomprehensible' and 'beyond any usual interpretation of law,' he resolutely denied Judge Garzón the opportunity to refute this.

63. On 23 February 2010, the Ministerio Público again petitioned for the dismissal of the case, in the most robust terms yet. The Ministerio Público sets out a full array of jurisprudence as to why there can be no basis for alleging prevaricación in this case in light of the well-established interpretation in Spanish law which requires a high threshold whereby it must be 'impossible to reconcile' the interpretation in question with the law, and 'not allow for any doubts or interpretations'. While acknowledging that the Ministerio Público had

¹¹² The Ministerio Público requested dismissal at least nine times: 13 February 2009 (requesting rejection of complaint filed by Manos Limpias, and later opposing the complaint file by Libertad e Identidad), on 8 June 2009 (joining a filing submitted by the defence), 10 November 2009 (requesting rejection of a complaint filed by Falange), 20 January 2010 (joining a petition for dismissal filed by defence), 23 February 2010 (supporting an appeal against a decision rejecting dismissal), 10 April 2010 (supporting/adhering to the request for nullity), 22 April 2010, and 17 May 2010 (escrito de calificación).

¹¹³ The Applicant would request the right to present evidence at least four times. See requests submitted on 9 February 2010, 22 February 2010, 1 March 2010 and on appeal from the 7 April 2010 decision. All of these requests have been denied. The requests and denials continue beyond the investigative phase as noted below (see Decision for the Trial phase of 13 December 2011).

¹¹⁴ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Recurso de Apelación, 9 February 2010.

disagreed with Judge Garzón's interpretation of the law as debatable or forced, it noted that his interpretations were never 'indefensible' or 'objectively unsustainable'. The petition refers pertinently to the three dissenting opinions of the full criminal panel of the Audiencia Nacional referred to above, and to the subsequent differing views of national judges in support of Garzón's views, as evidence that those views could not be said to meet the criteria for prevaricación. It calls for the case to be dismissed.

64. On 23 March 2010, Judge Garzón's appeal was rejected by the Supreme Court's Second Chamber, consisting of Judges Juan Saavedra Ruiz, Adolfo Prego de Oliver y Tolivar, Joaquín Giménez García, Francisco Monterde Ferrer and Juan Ramón Berdugo Gómez de la Torre. The Court does not address the substance of his or the Ministerio Público's arguments but simply states that 'without prejudice to whether or not there was a crime committed, there is no certainty regarding the non-existence of a crime, nor is the prevarication charge arbitrary, illogical or absurd.' Without even answering Judge Garzón's requests to present evidence, the Court rejects the appeal.¹¹⁵

65. The proceedings thus progressed to the next stage and the case against Judge Garzón was transformed by Judge Varela into an 'abbreviated procedure' on 7 April 2010.¹¹⁶

66. In the same decision, Judge Garzón's request to present evidence in his case was rejected, including the evidence of international experts.¹¹⁷ Judge Varela reasoned that it was not necessary to establish the facts with certainty at this stage but only 'probable truth', a standard which had been more than satisfied.¹¹⁸ He also considered that hearing international

¹¹⁵ It cited Article 779 of the Law of Criminal Procedure and noted that '[I]t is enough to analyse, without prejudgment of the existence or non-existence of the crime, that there is no certainty over the non-existence of the crime, nor it is arbitrary, illogical or absurd the possible accusation for prevaricación.' *Recurso de Apelacion N. 20048/2009, Tribunal Supremo, Sala de lo Penal, 23 March 2010, at 10. See also Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de Defensa, 17 June 2010, p.36.*

¹¹⁶ The procedure used for prevaricación ('procedimiento para delitos menos graves') is called 'procedimiento abreviado' (would be 'procedimiento ordinario' or 'sumario' if more serious crimes/offences). After the complaint is admitted, arguments are received from the parties and the presiding judge may or may not accept the plea. Once the investigation is finished, and if the judge decides to carry on with the procedure given enough evidence of the accused's culpability, a 'procedimiento abreviado' (abbreviated procedure) will be started in order to gather more evidence. This leads to the 'juicio oral.' See e.g. *Tribunal Supremo, Sala de lo Penal, Causa Especial n. 20048/2009, 7 April 2010.*

¹¹⁷ Judge Garzón requested the right to submit testimony and documentary evidence but none of these requests were granted by the Court. *Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Recurso de Apelación, 13 May 2010 and 7 September 2010.*

¹¹⁸ Judge Varela noted that the Constitutional Court has affirmed (in decision n° 186/1990) that what is required at that stage is the 'execution of necessary measures to determine the facts, the individuals that participated in them and, in this case, the competent court to try the case... There is no burden of establishing with certainty the factual affirmations at the base of the allegations. It is only responsible for determining the probable truth [...]

experts was incompatible with the exercise of jurisdictional authority by the State,¹¹⁹ without addressing why those experts were considered germane to the present case – not as experts to assist the Court on the law but to prove that Judge Garzón’s decisions could not be considered irrational or without basis in accepted canons of interpretations, notably the consistent interpretation of international and national law. On 10 April 2010, Judge Garzón challenged Judge Varela’s 7 April 2010 decision again without success.¹²⁰

67. At this stage, it fell to the complaining organisations to submit a formal complaint in accordance with the requirements of Spanish criminal procedure. The three political organisations presented their formal complaints (‘escritos de acusación’) to the Second Chamber of the Supreme Court – represented by Judge Varela – on 15 and 19 of April 2010.¹²¹ However, due to defects in the petitions,¹²² under applicable provisions of the criminal procedure code, the writs should have been dismissed.¹²³ Although there was no legal basis to do so, the investigating judge established a new deadline for resubmission and, in the case of the latter plaintiff, provided detailed guidance as to the need to include specific language accusing Judge Garzón of acting ‘knowingly’¹²⁴ and the exclusion of certain pages and paragraphs. After one more failed attempt to meet the requirements and further guidance from the judge that it was required to claim that the decision was rendered ‘a sabiendas’ or knowingly, Manos Limpias and Libertad e Identidad presented a third, rectified petition which followed word for word the case against Judge Garzón as set out in Judge Varela’s 3

The measures requested by the judge’s defence counsel exceed the purpose of the “preliminary measures”.
Procedencia Querella, Tribunal Supremo, Sala de lo Penal, Causa Especial N°: 20048/2009, 7 April 2010, at 5-6.

¹¹⁹ Decision 7 April 2010, *ibid.*: ‘in order to determine if there has been prevaricación or not, the value judgment for evaluating the correctness of the legal decisions issued by the accused corresponds exclusively to the tribunal/court that will judge him. Of course it will do so guided by the arguments put forward/alleged by the parties, but without the mediation/intervention of legal experts and, even less, plebiscites which are incompatible with the exercise of jurisdictional authority of a democratic State...only from an a priori lack of consideration, not only for the trial court but the technical capacity of the parties attorneys, can one understand necessary, or even useful, to turn to the opinion of other legal experts/jurists...’

¹²⁰ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de Acusación, 10 April 2010.

¹²¹ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de Acusación, 15 April 2010 and 19 April 2010.

¹²² In the case of Falange de la Jons this was due to the petition consisting of ‘inappropriate ideological and personal comments’ and in the case of Manos Limpias and Libertad e Identidad to the failure to restrict its accusations to legal claims and for making allegations beyond the scope allowed by Article 650 of the Law of Criminal Procedure. See Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, 20 April 2010, p. 4 and Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, 21 April 2010, p. 2.

¹²³ Articles 781 and 650 of the Law of Criminal Execution, ‘Ley de Enjuiciamiento Criminal’.

¹²⁴ *Ibid.* It required ‘la mera afirmación de que el acusado actuaba a sabiendas.’

February decision. The petition was admitted as the basis for going forward with the criminal case.¹²⁵

68. On 22 April 2010, the Ministerio Público petitioned for the dismissal of the charges ('sobreseimiento') against Judge Garzón on the grounds that the accusation had no procedural legitimacy ('legitimación procesal') and that the acts described in the complaints did not constitute a crime.¹²⁶ This was rejected by Judge Varela on 11 May 2010. The judge reiterated that there was a 'reasonable' basis to proceed and that prevaricación was 'not an absurd or irrational hypothesis'.¹²⁷

69. In Judge Garzón's view the advice offered by the judge investigating the case, Luciano Varela, to parties was illustrative of the lack of his impartiality. On 23 April 2010, Judge Garzón therefore presented a motion requesting the recusal of Judge Varela for his lack of impartiality, based on the nature of the advice given to the complaining organisations on how to remedy fundamental errors to allow for the case to proceed.¹²⁸ According to Judge Garzón, the 'intervention by the instructing judge had no basis in Spanish court procedure.'¹²⁹ (It is noteworthy that, while Judge Garzón is not involved in this action, Judge Varela (and Judge Savaadra, presiding judge of the Criminal Chamber of the Supreme Court) have also now been criminally accused of prevaricación on 12 April 2010 by the association of victims of the Franco regime for his decision against Judge Garzón of 3 February 2010.¹³⁰) On 6 May

¹²⁵ Falange de la JONS did not resubmit within the given time limit and was removed from the case on procedural grounds. Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Providencia, 23 April 2010. Judge Garzón points out in his refusal that Judge Varela's conduct violated Article 238.3 LOPJ and the principle of impartiality and equality of arms. Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de Recusación, 23 April 2010, p. 4. Also, Judge Joaquín Giménez García (part of the case's panel) argues that no amendments should have been allowed to the 'querellas' of Manos Limpias and Falange. See Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Voto Particular, 28 July 2010.

¹²⁶ Causa Especial Nº: 20048/2009, Tribunal Supremo, Sala de lo Penal, Escrito de Nulidad, 22 April 2010, and Causa Especial Nº: 20048/2009, Tribunal Supremo, Sala de lo Penal, Auto 23 April 2010.

¹²⁷ The Ministerio Público argues: '...given the requirements of Article 637(2) (of the Criminal Procedural Code) there are no reasonable indicators of criminality by the accused...the 'acusaciones populares' lack legitimacy to proceed, according to Article 782.2 of the Law of Criminal Execution and the understanding repeated by the decision 1045/2007, of 17 December, and independently, upheld by STS 54/2008, of 08 of April (Atutxa Case)' Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito Fiscalía, 22 April 2010, p. 5. This was rejected by Judge Varela. Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Apertura Juicio Oral, 11 May 2010, 6. Judge Varela also referred back to the decision to deny the appeal of 23 March 2010, affirming that there was reasonable basis to find malfeasance and that it was not an absurd or irrational hypothesis'.

¹²⁸ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Recusación, 23 April 2010.

¹²⁹ 'Garzón recusa a Varela por "parcialidad" en la causa abierta contra él en el Supremo', Agencia EFE, 24 April 2010, available at <http://www.20minutos.es/noticia/687198/0/garzon/varela/recusacion/>.

¹³⁰ Tribunal Supremo, Querrela contra los Magistrados Varela and Saveedra, 12 April 2010. See also 'Querrela contra Luciano Varela por prevaricación', Pere Rusinol, *El Público*, 9 April 2010, available at

2010 a single judge of the Supreme Court dismissed this attempt to recuse Judge Varela ‘in limine’.¹³¹ Judge Garzón’s attempt to have the actions of Judge Varela on the case declared null for lack of impartiality was also unsuccessful.¹³²

70. On 11 May 2010, Judge Varela issued seven resolutions in one day, thereby dismissing the outstanding appeals,¹³³ ordered the opening of the oral procedure and requested Judge Garzón’s presence in court.¹³⁴

2. Trial Phase of the Criminal Case against Judge Garzón

71. On 17 June 2010 Judge Garzón presented to Judge Varela his written defence (‘escrito de defensa’) to charges of prevaricación.¹³⁵ Unusually, he had been obliged to do so despite certain key questions remaining pending before the Chamber.¹³⁶ Judge Garzón’s defence sets out in clear and detailed terms why each of his decisions were justified in law. It also challenged as a violation of basic rights the fact that repeated requests to submit

<http://www.publico.es/espana/305060/querella/luciano/varela/prevaricacion>. See also ‘Dos asociaciones de la memoria histórica se querellan contra los magistrados Varela y Saavedra’, Peres Rios, *El País*, 12 April 2010, available at http://www.elpais.com/articulo/espana/asociaciones/memoria/historica/querellan/magistrados/Varela/Saavedra/elpepuesp/20100412elpepunac_12/Tes.

¹³¹ Tribunal Supremo, Sala de lo Penal, Recurso no. 20048/2009, 6 May 2010, Published on 7 May 2010. See also ‘El Supremo rechaza la recusación de Varela planteada por Garzón’, Julio Lázaro, *El País*, 7 May 2010, available at http://www.elpais.com/articulo/espana/Supremo/rechaza/recusacion/Varela/planteada/Garzon/elpepuesp/20100507elpepunac_3/Tes. In principle, the ‘Ley orgánica del Poder Judicial’ anticipates that the judge will take the necessary preliminary steps and then pass the matter to the plenary chamber for a decision (Article 277.2 LOPJ).

¹³² Two decisions of 28 July 2010, communicated on 24 September, rejected Judge Garzón’s attempt to annul the effects of Judge Varela’s decisions in respect of advancing the case on the basis of his lack of impartiality.

¹³³ This rush of judicial decision-making followed news of Judge Garzón’s invitation to take up a short term appointment at the ICC. The principle outstanding appeal was against the 7 April decision, presented on 10 April 2010.

¹³⁴ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Desestimo Recurso Reforma and Apertura Juicio Oral, 11 May 2010. See also ‘La causa contra Garzón por la investigación del franquismo’, *El País*, 28 April 2010, available at http://www.elpais.com/articulo/espana/causa/Garzon/investigacion/franquismo/elpepuesp/20100421elpepunac_29/Tes.

¹³⁵ These included arguments on the preliminary questions (‘cuestiones previas’) as well as his main arguments (‘el fondo’). Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de Defensa, 17 June 2010. Unusually, he was instructed to submit his defence before the resolution of several interlocutory appeals that were still pending.

¹³⁶ Pending resolutions related to issues such as the right to present evidence (appeal against Judge Varela’s decision of 7 April 2010, not resolved until 26 July 2010 and the alleged nullity of Judge Varela’s decisions on the basis of his lack of impartiality, not resolved by the Chamber until 28 July 10, notified on 24 September 2010).

evidence had either been ignored or refused by the court on the grounds that these were not essential in determining the facts.¹³⁷

72. On 16 September, Judge Juan Saavedra, President of the Second Chamber of the Supreme Court,¹³⁸ indicated that the panel that would try Judge Garzón would be the same panel that had authorised the criminal charges against him. This was confirmed formally by the Supreme Court on 13 December 2010. The panel nominated to hear the criminal case against Judge Garzón now comprises seven judges, including the same five magistrates who have participated in many pre-trial decisions, approving criminal proceedings against Judge Garzón, denying his right to submit evidence and rejecting challenges concerning impartiality.

73. On 16 December 2010, Judge Garzón presented a recusal motion against the five judges previously involved in the proceedings – Judge Juan Saavedra Ruiz, Judge Adolfo Prego de Oliver y Tolivar, Judge Joaquín Giménez García, Judge Francisco Monterde Ferrer and Judge Juan Ramón Berdugo Gómez de la Torre¹³⁹ – which is currently pending. Judge Garzón argued that the magistrates are prohibited by law from taking part in the trial by virtue of their participation in the initial ‘instruction’ phase of the case and for having an indirect interest in its result.¹⁴⁰

74. On 19 January the Ministerio Público took the unprecedented step of supporting this application and calling for the recusal of a chamber of the Supreme Court.¹⁴¹ In accordance with standard procedure, the judges whose recusal was sought were asked for their views,¹⁴²

¹³⁷ See requests on 1 October 2009, 9 February 2010, 22 February 2010, 1 March 2010, 13 May 2010. For more on evidence see Escrito de Defensa *supra*. Evidence included oral testimonies by international human rights law experts, certified translations, as well as additional documentary material.

¹³⁸ The announcement was made on the occasion of Judge Saavedra’s appearance before the Judicial Council to defend his candidature renewal as President of the Second Chamber of the Supreme Court.

¹³⁹ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Recurso de Recusación, 16 December 2010.

¹⁴⁰ ‘In the criminal procedural doctrine, it is unquestionable that the General Principle determines that who takes part in the instruction is prohibited to judge the same subject’ (‘En la dogmática procesal penal, es Principio General incuestionado que quien participa en la instrucción de la causa está inhabilitado para juzgar ese mismo asunto’). Id. at 2. article 219, numbers 10 and 11, of the Organic Law of the Judicial Power. This is supported by the jurisprudence of this Court and throughout human rights law.

¹⁴¹ Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de Concurrencia Recusación, 20 January 2011.

¹⁴² Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Providencia, 25 January 2011.

and one of those judges, Judge Gimenez, accepted the grounds for recusal in a noteworthy decision of 26 January 2011.¹⁴³

75. Judge Gimenez's report set out why the panel was in his view contaminated by its prior involvement in the case, and sheds light on the process by which Judge Garzón came to be prosecuted. He noted the close nature of the 'delegation' relationship between Judge Varela and the Chamber (concluding that it is in reality the Chamber that 'instructs' or takes relevant decisions at the preliminary stage, and the rule precluding the instructing judge from being on the trial court therefore also applies to the Chamber in these circumstances).¹⁴⁴ He noted that the issue of bias must be determined in light of the particular nature of criminal proceedings for *prevaricación*. In this case 'the facts are not in dispute' as (beyond affirming that the name on the judgment was Judge Garzón's and that the signature was authentic) the only the controversial question in the case was the 'criminal relevance' of the allegations against Judge Garzón. As this has been addressed at the pre-trial phase, there are no 'new facts' for the trial court. The Chamber had 'presumed a position' as to culpability; despite its 'efforts' to mark distance between itself and the investigating judge, the determinations at trial would be 'substantially the same' as those at the pre-trial stage. Based on Spanish law and the Convention,¹⁴⁵ Judge Gimenez concludes that there are 'serious and well founded' fears that the tribunal has preconceived ideas about the guilt of Judge Garzón, and notes the heightened significance of this, given that there is no right of appeal from a decision by the Supreme Court.

76. The Supreme Court Criminal Chamber gave leave for the recusal motion to proceed to a plenary body of the Supreme Court on 3 February 2011, where the matter is currently pending.¹⁴⁶

77. The Supreme Court in its 13 December 2010 decision also rejected the majority of the evidence Judge Garzón seeks to submit in his defence.¹⁴⁷ In line with the persistent rejection at the investigative stage of attempts to submit evidence demonstrating that his decisions

¹⁴³ Judge Gimenez, Decision of 26 January 2011, *Recusacion en la Causa 3/20048/2009*.

¹⁴⁴ Articles 73 and 74 of the LOPJ.

¹⁴⁵ He referred to the Gomez de Liano case where the same issue arose – see *Affaire Gomez de Liaño y Botella C. Espagne* (Requête n° 21369/04), Judgment 22 July 2008.

¹⁴⁶ This is a chamber established under Article 61 of the LOPJ.

¹⁴⁷ *Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Auto, 13 December 2010*. He has been permitted to allow statements from victim groups to be included as witness statements See 'El Supremo rechaza a los principales testigos del juicio contra Garzón', Julio M. Lázaro, *El País*, December 2010.

were reasonable and consistent with law, including international law which has its constitutional place in the Spanish legal order, these requests have now been denied even for presentation at trial. As the issues in dispute in Judge Garzón's case relate to his interpretations of the law and whether they can amount to criminal conduct, in his view this evidence is a critical element in an effective defence against allegations that his decisions were unjustifiable, distorted, without support in legal theory or otherwise unjust, as required by the law of prevaricación. Although it is customary for it to be addressed in the same decision as that determining the composition of the panel and the admissibility of evidence, no date has been set for trial.¹⁴⁸

3. Judge Garzón's Suspension as a Result of the Criminal Case

78. On 10 February 2010, *el País* reported that Judge Varela had sent his 3 February 2010 decision confirming charges against Judge Garzón to the Pleno Extraordinario del Consejo General del Poder Judicial (CGPJ), the General Council of the Judicial Power of Spain, requesting Judge Garzón's suspension. The report described how the Council had met to determine Judge Garzón's suspension, although Judge Varela's decision was at that point still subject to appeal, and by law the meeting should not have taken place until the appeals were exhausted.¹⁴⁹ The press report notes that at the meeting the Ministerio Público objected to the decision being made at that premature stage.¹⁵⁰ An argument was advanced by one of the judges that the case could proceed although it was still pending before the Second Chamber as the Second Chamber 'was not just any court' and Judge Varela's intention to proceed with the case was clear. On this basis, the report records that the Council decided not to suspend at that stage, but to proceed to process the suspension to 'gain time' and be ready for it to take effect when the Supreme Court confirmed Judge Varela's decisions.¹⁵¹

79. Judge Garzón learned of the Council's decision when reading the Spanish newspaper *el País* the following day. In response, he submitted a petition to be heard the same day, and

¹⁴⁸ On speculation in the press that the Supreme Court is delaying on this case to see whether other allegations against the Applicant might bear fruit, see 'El Supremo maneja los tiempos para que Garzón pague antes por la Gürtel', Julio M. Lázaro and José Yoldi, *El País*, 31 October 2010, available at http://www.elpais.com/articulo/espana/Supremo/maneja/tiempos/Garzon/pague/Gurtel/elpepunac/20101031elpepinac_5/Tes. See also 'El Supremo maneja los tiempos de Garzón', Ángeles Vázquez, *Público*, 9 January 2011, available at <http://www.publico.es/espana/355261/el-supremo-maneja-los-tiempos-de-garzon>.

¹⁴⁹ Article 383 LOPJ on when suspensión should proceed. See also 'Escrito Garzón instando la nulidad de actuaciones - 13 May 2010' (which refers to the 11 May decision).

¹⁵⁰ 'Falange y un juez algo resentido, a punto de acabar con Garzón', *El País*, 10 February 2010, available at <http://lacomunidad.elpais.com/jordigraug/2010/2/11/falange-y-juez-algo-resentido-punto-acabar-con-garzon>.

was given 10 days to present his defence.¹⁵² When Judge Varela opened the trial phase on 11 May 2011, Judge Garzón again presented a petition, noting that the decision was not final as the challenges remained pending, and arguing against suspension. Judge Garzón received no official response to that request.

80. On 11 May 2010, upon invitation from the Prosecutor of the International Criminal Court ('the ICC'), Judge Garzón requested leave to go to the Hague as an independent expert to the ICC.¹⁵³ On the same day, Judge Varela processed no less than seven resolutions to finalise the pending issues before him and allow for suspension to take effect.¹⁵⁴ As a result, Judge Garzón's suspension took effect before he went on special leave to the ICC. Had he gone on leave without being suspended, it may not have been possible for his suspension to take effect until after his leave.¹⁵⁵

81. On 14 May 2010, the Pleno Extraordinario del Consejo General del Poder Judicial (CGPJ), the General Council of the Judicial Power of Spain, announced its decision to temporarily suspend Judge Garzón from judicial activity without pay until the end of proceedings.¹⁵⁶ When Judge Garzón was suspended pending trial, his salary was also suspended, replaced by a much more basic allowance ('sueldo básico'). While suspension flows inevitably from the criminal action, the manner in which his interim suspension was handled has been challenged and is currently pending appeal.

4. Context of These and Other Allegations

82. Although not the subject of the present complaint, it may be relevant to the Court's understanding of this case to note the wider context of actions adversely affecting Judge

¹⁵¹ *Ibid.*

¹⁵² CP 9-2-2010/103 Comisión Permanente, Consejo General del Poder Judicial, 5 March 2010.

¹⁵³ On 18 May 2010, after the suspension decision, it authorised his release to the ICC as a consultant for seven months during the period of suspension. Acuerdo de Suspensión Cautelar, El Consejo General del Poder Judicial, 18 May 2010.

¹⁵⁴ See <http://www.crimenesinternacionales-franquismo-casogarzon.es/2010/05/mas-alla-del-debido-proceso-tres.html> (see declarations by Judge Garzón's defence lawyer, Gonzalo Martínez Fresneda).

¹⁵⁵ See 'El juez Varela abre el juicio a Garzón', *El País*, Julio M. Lazaro, 13 May 2010, Available at http://www.elpais.com/articulo/espana/juez/Varela/abre/juicio/Garzon/elpepiesp/20100513elpepinac_38/Tes.

¹⁵⁶ Article 383.1 of the LOJP establishes that the CGPJ may suspend a judge – as a precautionary measure – when it has a criminal proceedings against his/her acts as a judge proceed: 'The suspension of judges and magistrates will only take place: 1. When a decision declares reason to proceed with claims against them for crimes committed in the exercise of their functions' ('La suspensión de los jueces y magistrados solo tendrá lugar en los casos siguientes: 1. Cuando se hubiere declarado haber lugar a proceder contra ellos por delitos cometidos en el ejercicio de sus funciones.') Determining whether a case meets the threshold is the discretionary power of the CGPJ. All of this is part of an independent administrative challenge.

Garzón, which he submits are directed to ensuring that he can no longer exercise judicial office in Spain. Shortly after the Franco-era investigation, Judge Garzón completed an investigation pertaining to possible money laundering and corruption involving persons related to the Partido Popular. This investigation has triggered a number of unprecedented attacks on Judge Garzón, including the Franco-era case and a further allegation of prevaricación in relation to an order authorizing the interception of communications between the main suspects in the corruption case and their visitors, including their lawyers, while adopting necessary safeguards to preserve the rights of the defence. This order was endorsed by the Ministerio Público and by the judge that continued the investigation after Judge Garzón.¹⁵⁷ A further investigation relates to a financial contribution by the Santander bank to the University of New York (NYU), where Judge Garzón was guest professor in 2005 and 2006, which were perfectly regular contributions which had taken place in the past, and had no relationship whatsoever with Judge Garzón. It has been publicly alleged that this contribution was made in exchange for rejecting a criminal complaint against the bank in 2007, despite the fact that this decision was made pursuant to a specific request from the Ministerio Público and subsequently confirmed by the Criminal Chamber of the Audiencia Nacional. This complaint against Judge Garzón had, moreover, previously been dismissed by the Supreme Court. No evidence has been produced and despite pressure from Judge Garzón to advance the investigation so his name might promptly be cleared, there is little indication of any meaningful attempt to do this.¹⁵⁸

83. While there is no basis to either allegation, nor has there been the opportunity to refute them, and the publicity they have generated contributes to the slur against his professional and personal reputation to which he has been subjected in recent years.¹⁵⁹ The nature of these allegations of criminality, and the manner in which they have been handled bear close resemblance to the anomalies arising in the present case. These include alterations in the normal criminal procedure, denial of the right to submit (or to have sight of) evidence, signs of bias towards the accusing party and, in all cases, proceeding despite the complete opposition of the Ministerio Público. These elements provide, in Judge Garzón's view,

¹⁵⁷ Diligencias Previas No. 275/08 (known as the "Gürtel Case").

¹⁵⁸ See 'Judge Baltasar Garzón in court on Santander bribe allegations', *The Times*, 16 April 2010, available at <http://www.timesonline.co.uk/tol/news/world/europe/article7099197.ece>.

¹⁵⁹ *El Mundo*, 5 February 2011, where an unnamed judge of the Supreme Court leaks an internal document criticizing Garzón for alleged involvement in torture allegations in Spain at a time he was outside the country as

relevant context to an assessment of motivation behind his prosecution. Despite these ongoing allegations and investigations, the only case for which the Applicant is currently being prosecuted and for which he has been suspended, is the investigation into the Franco-era crimes, which it is the subject of the present application.

V. LEGAL ARGUMENT

A. INTRODUCTION

84. The criminal prosecution of Judge Garzón for prevaricación in his interpretation of the law has violated a range of his rights under the Convention. Notably, this prosecution is not based on a clear, pre-established criminal law framework, but on a broad and unprecedented approach to the law of ‘prevaricación,’ which has no support in Spanish law. The Spanish legal provisions on prevarication, as applied in this case, could not be said to provide clear and foreseeable law, as required by Article 7. The criminal process against Judge Garzón for reasoned judicial interpretations of law is inherently unfair, in violation of the right to a fair criminal process under Article 6. Judge Garzón’s private and professional life has been decimated by being turned from judge to suspected criminal, without due cause, in violation of Article 8. The prosecution of the Applicant for his reasoned judicial opinions in the context of the discharge of his judicial functions also violates Article 10. His rights have been restricted in a manner that suggests improper motive, in violation of Article 18.

85. The Court must interpret the Convention in light of its spirit, object and purpose.¹⁶⁰ This is an unusual case. Directly comparable cases are few, and for good reason: only very exceptionally are judges subject to criminal prosecution in Europe for their judicial decisions and only in the most extraordinary and serious circumstances. The circumstances of Judge Garzón’s case, where a judge is being punished for administering justice, and for interpreting national law consistently with international law, has never arisen before this Court.

86. Expert evidence presented to the Court at Annex 2 demonstrates the universal recognition of the fundamental importance of the principle of the independence of the judiciary. Judicial independence is a general principle of law reflected in the constitutions and

visiting professor in the United States. ‘Va por ahí denunciando lo de Guantánamo ¡y tenía un Guantánamo en su juzgado!’).

¹⁶⁰ *Soering v. the United Kingdom*, Application no. 14038/88. 7 July 1989, § 87): ‘The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.’

laws of European States,¹⁶¹ including Spain, and constitutes an essential pre-requisite to the protection of human rights, the proper administration of justice, and the rule of law.¹⁶² The obligations to take measures to ensure respect for judicial independence are reflected in universal and regional human rights instruments,¹⁶³ including the Convention,¹⁶⁴ and recognised in the jurisprudence of this Court and other human rights bodies.¹⁶⁵

87. The core of judicial independence is the principle that a judge should be free to apply the law and to take decisions on all the issues before him without pressure or influence from any outside authority, agency or individual. This Court has recognised that it is important ‘to shield members of the judiciary from ill-considered proceedings and to allow them to perform their judicial duties dispassionately and independently.’¹⁶⁶ It has underlined the

¹⁶¹ The principle of judicial independence is reflected across European systems, often at constitutional level, such as in Austria (Article 87, The Federal Constitutional Law of the Republic of Austria); Belgium (Article 151, The Constitution of Belgium); Bulgaria (Article 117, The Constitution of the Republic of Bulgaria); Croatia (Article 118, The Constitution of the Republic of Croatia); The Czech Republic (Article 81, The Constitution of the Czech Republic); Denmark (§ 62, The Constitutional Act of Denmark); Finland (Section 3, The Constitution of Finland); France (Article 64, The 1958 Constitution of French Republic); Germany (Article 97, The Basic Law of the Federal Republic of Germany); Hungary (§50 (3), The Constitution of Republic of Hungary); Ireland (Article 35 (2), The Constitution of Ireland); Italy (Title IV, Article 104, The Constitution of Italian Republic); Lithuania (Article 109, The Constitution of the Republic of Lithuania); Macedonia (Article 98, The Constitution of the Republic of Macedonia); Poland (Article 173, The Constitution of the Republic of Poland); Portugal (Article 203, The Constitution of the Portuguese Republic); Romania (Article 124 (3), The Constitution of Romania); Slovakia (Article 141, The Constitution of the Republic of Slovakia); Slovenia (Article 125, The Constitution of the Republic of Slovenia); Turkey (Article 9, The Constitution of the Republic of Turkey).

¹⁶² 1985 General Assembly, ‘Basic Principles on the Independence of the Judiciary’, Resolutions 40/32 and 40/146. The Principles were originally adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Milan, August, 1985, A/CONF.121/22/Rev.1 (1986) at page 53. General Assembly resolution, ‘Human rights in the administration of justice’, A/RES/48/137, 20 December 1993, Bangalore Principles of Judicial Conduct adopted by the Judicial Group on Strengthening Judicial Integrity in 2002.

¹⁶³ Article 10 Universal Declaration of Human Rights, Article 14 International Covenant on Civil and Political Rights, Article 14 Convention Against Torture, Article 8 Inter-American Convention on Human Rights. On customary status, see H.J. Steiner and P. Alston, *International Human Rights in Context : Law, Politics, Morals* (New York: Oxford University Press, 1996), p. 124.)

¹⁶⁴ Article 6 and Article 13 of the European Convention on Human Rights.

¹⁶⁵ A court ‘whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial.’ 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. (‘the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a “tribunal”...This power can also be seen as a component of the “independence” required by Article 6(1).’); *Guja v. Moldova*, [GC], Application no. 14277/04, 12 February 2008, paras 85-91 (‘in a democratic society both the courts and the investigating authorities must remain free from political pressure.’); *Piersack v. Belgium*, Application no. 8692/79, 1 October 1982, para. 27 (judges must be shielded from outside pressures).

¹⁶⁶ *Ernst v. Belgium*, Application no. 33400/96, 15 July 2003, 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 *X v. United Kingdom* the Commission recognised that the obligation to protect judicial independence constituted a legitimate reason for limiting suits against judges. *X v.*

importance of protecting those responsible for the administration of justice from criminal prosecution, or from the threat of prosecution, giving the potential detrimental ‘chilling’ effect of such prosecution.¹⁶⁷

88. Judicial errors can and should be addressed, but through resort to the normal appeal and review mechanisms. One of the most insidious forms of pressure, and the most effective in achieving a ‘chilling effect’ on the willingness and ability of judges to render justice, is susceptibility to criminal prosecution. As set out more fully in the Expert Opinion at Annex 2, the protection of judges from liability for their judicial opinions is essential to respect judicial independence and to protect human rights. It requires stringent supervision by this Court and a heightened level of protection for associated rights.

89. The particular judicial decisions that form the basis of criminal prosecution in this case are decisions enabling the investigation of serious crimes under international law. The international Expert Opinion at Annex 1 makes clear the State’s international obligations in this respect (including the obligation of the judicial arm of the State),¹⁶⁸ to respect the right of victims to the truth, and not to recognise amnesty or statutes of limitation that preclude investigation for serious violations of human rights or for crimes against humanity. Particular concerns regarding the potential chilling effect of the prosecution of Judge Garzón arise in light of the fact that he was prosecuted in response to decisions that sought to give effect to international human rights obligations and the jurisprudence of this Court.

90. The Court is asked to interpret the Convention to give effect to the principles and purposes of the Convention: to protect human rights, including the right of victims to a remedy, and to protect judicial independence and the ability of judges to give effect to the Convention and other international human rights obligations on the domestic level.

B. ARTICLES VIOLATED: 6, 7, 8 10 AND 18

1. Article 7:

91. Article 7 of the Convention reads:

United Kingdom, Application no. 8083/77, (1981) E.H.R.R. 402, 13 March 1989, 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).

¹⁶⁷ See *Kayasu v. Turkey*, Application nos. 64119/00 and 76292/01, 13 November 2008.

¹⁶⁸ See statement by Judge Guzman offering the perspective of a national judge on the judicial obligations in this respect.

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nation.

92. Judge Garzón submits that his prosecution for the crime of prevaricación under Article 446.3 of the Spanish Criminal Code amounts to a violation of the first paragraph of Article 7. The application of the prevaricación law in Judge Garzón's case constitutes a drastic departure from the existing domestic case law and previously established interpretation of the crime of prevaricación. It therefore fails the critical test, set out below, of clarity and foreseeability of criminal law. In addition, while the true vice in this case lies in an entirely unsupported approach to the law of prevaricación, the breadth and ambiguity of the definition of prevaricación in the Spanish Criminal Code renders the law susceptible to abuse, as illustrated by its misuse in the present case, in contravention of the strict requirements of certainty and clarity in the criminal law.¹⁶⁹ An argument that Judge Garzón's impugned conduct – in interpreting Spanish law in line with international law – falls under the crime of prevaricación could only be sustained in line with an approach to that provision as so broad and wide-reaching as to fail the Article 7 test.

93. Particular rigour is required to ensure that clear and unambiguous legislation governs possible legal action against judges, given the potential vulnerability of judges to unfounded allegations of criminality by those opposed to their decisions, and the impact on the judicial role and the administration of justice. A restrictive interpretation of criminal law, to the benefit of the accused, is likewise all the more important where judicial independence is at stake.

¹⁶⁹ For criticism of the provision on prevaricación and calls for the provision to be reconsidered by the International Commission of Jurists, see Summary by the Office of the High Commissioner for Human Rights, 12 February 2010, A/HRC/WG.6/8/ESP/3.

2. Scope of Article 7

94. This Court has emphasised on many occasions that the guarantee enshrined in Article 7 is ‘an essential element of the rule of law’ and ‘occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15...in time of war or other public emergency.’¹⁷⁰ Accordingly, it ‘should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.’¹⁷¹ The present case illustrates precisely the sort of susceptibility to abuse that flows from legal provisions of uncertain scope and reach which Article 7 seeks to protect against.

95. As the Court has made clear, Article 7 enshrines the principle of legality and the principle that the criminal law must not be extensively construed to an accused’s detriment:

*[Article 7] is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law.*¹⁷²

96. These principles have been further elaborated by the European Court in several other cases.¹⁷³ The Court and others have emphasised the obligation to clearly define and ‘strictly construe’ criminal law, stating for example that ‘as a corollary of the principle that only the law can define a crime and prescribe a penalty, the provisions of the criminal law are to be strictly construed...’¹⁷⁴

¹⁷⁰ See, e.g., *S.W. v. the UK*, Application no. 20166/92, 22 November 1995, para. 34.

¹⁷¹ *Ibid.*

¹⁷² See, e.g., *Kokkinakis v. Greece*, Application no 14307/88, 25 May 1993, para. 52.

¹⁷³ *CR v. UK*, A 335-C (1995), para. 34 and *SW v. UK* A-335-B (1995).

¹⁷⁴ *Achour v. France*, Application 67335/01, judgment 10 November 2004, para.37 and 50. See also the Inter-american Court case of *De la Cruz Flores*, Judgment of November 18, 2004. Series C No. 115, paras. 79-82 on the duty of the criminal judge: ‘In this regard, when applying criminal legislation, the judge of the criminal court is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the behaviour of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by law.’ See also Article 22(2) of the ICC Statute under ‘General Principles of Criminal Law’ which states ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.’

97. According to this Court's established case law, to be regarded as 'law' under the Convention, a legal norm must meet the requirement of accessibility and foreseeability.¹⁷⁵ In particular, in *Flinkkilä and others v. Finland*, the Court noted:

*[A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the individual to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.*¹⁷⁶

98. Judge Garzón is aware of the Court's position that Article 7 does not require a criminal law to possess absolute certainty and that 'many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.'¹⁷⁷ This Court has repeatedly stated that 'however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation' and that, accordingly, 'Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.'¹⁷⁸

99. The Court further clarified its role vi-à-vis the interpretative role of domestic courts, and the oversight of this Court's role, in *Streletz, Kessler and Krenz v. Germany*.¹⁷⁹

[...] the Court observes that it is not its task to rule on the applicants' individual criminal responsibility, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether the applicants' acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or international law (emphasis added)

¹⁷⁵ See, e.g., *Liivik v. Estonia*, Application no. 12157/05, 25 June 2009, para. 93.

¹⁷⁶ Application no. 25576/04, 6 April 2010, para. 65.

¹⁷⁷ See note 175 *supra*, para. 94.

¹⁷⁸ *Ibid.*

¹⁷⁹ Application nos. 34044/96, 35532/97 and 44801/98, judgment 22 March 2001, para. 51.

100. The Court has also noted that, in determining whether the law was sufficiently clear and foreseeable it must look not only at the legislation but ‘ascertain whether in the present case the text of the statutory rule read in the light of the accompanying interpretive case-law satisfied this test at the relevant time.’ (Emphasis added)¹⁸⁰

3. Application of the law of ‘Prevaricación’ in the Present case

101. Judge Garzón submits that the Supreme Court’s interpretation of the prevaricación provisions in his case is fundamentally inconsistent with the definition of the offence developed in practice and, therefore, could not be reasonably foreseen.

102. While this Court has pointed out that the role of the judiciary is precisely to dissipate such interpretational doubts as remain,¹⁸¹ the Supreme Court’s application of the relevant criminal law in the criminal proceedings has so far achieved the opposite result by adopting a loose approach to the understanding of the key elements of the crime of prevarication that have been honed in the past case law, thereby blurring the established legal boundaries of the provision. The Supreme Court has extended the reach of the prevaricación provision not by applying it to a qualitatively new circumstance which might not have been foreseen by its drafters, but rather by loosening the strict standards that have been adopted so far to interpret that provision and prevent overreach. This clearly is not what this Court meant by referring to a need to avoid excessive rigidity and to keep pace with changing circumstances.¹⁸²

103. The law on prevaricación is set out briefly at Background Section III above, and in more detail in the Expert Opinion at Annex 3. Article 446 of the Spanish Criminal Code allows for a substantial fine and a mandatory ban on public office for ‘The judge or magistrate who, knowingly, dictates an unjust sentence or resolution.’¹⁸³ An ‘unjust’ decision is not defined in the legislation, but has been so far consistently interpreted by the Supreme Court in successive decisions as one that ‘cannot be explained by reasonable

¹⁸⁰ *Cantoni v. Italy*, Application 17862/91, judgment 15 November 1996, para. 32. See also *Leyla Şahin v. Turkey*, Application no. 44774/98, para. 88, where it is said that ‘the “law” is the provision in force as the competent courts have interpreted it.’

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ The judge or magistrate who, knowingly, dictates an unjust sentence or resolution will be punished: 1.º With one to four years prison sentence if related to unjust sentence against accused of criminal offense when the sentence has not yet been executed, and with the same sanction plus twenty four months fine if it has been executed. In both cases, there will be a sanction of absolute suspension for ten to twenty years. 2.º With six to ten years, if related to unjust sentence against accused of disciplinary offense. 3.º With fine of twelve to twenty

interpretation.’¹⁸⁴ It has held that the injustice must be ‘flagrant and glaring,’ involving an interpretation which is ‘grotesque’ (‘esperpéntica’), ‘manifestly irrational’,¹⁸⁵ and neither ‘sustainable,’ ‘arguable’ nor ‘possible’. Where there is a mere ‘disagreement with a court order,’¹⁸⁶ a party should use regular means of appeal and procedural challenge.¹⁸⁷

104. It is worth recalling at this juncture some of the key aspects of the decisions by virtue of which Judge Garzón stands accused of prevaricación. Judge Garzón is accused of having opened an investigation, interpreting Spanish laws and principles on legality and non-retroactivity, and specifically on amnesty and prescription, as not precluding the investigation of serious crimes.¹⁸⁸ Judge Garzón maintains that his legal actions were in conformity with Spanish and international law, but he understands that it is not for this Court to decide on this issue. However, while there may be other reasonable interpretations of the law, there is no basis on which it could be maintained that his decisions were manifestly unlawful, irrational, grotesque interpretations of the law that cannot be sustained by reasonable interpretation or that they are unarguable. It is indisputable that those actions, including the decision of 16 October 2008, were well-reasoned with reference to Spanish and international law and supported by other judicial opinion, the decisions of the human rights bodies, previous practice and authoritative legal scholarship.

105. Far from ignoring Spanish laws and doctrine, as the case against him suggests, Judge Garzón made careful reference to it. What he also did, which was considered objectionable

four months and special suspension from public office for ten to twenty years, in the case of any other unjust sentence or resolution.

¹⁸⁴ Sentencia del Tribunal Supremo, 25 January 1911; TS, 25 June 1996; Sentencia del Tribunal Supremo, 28 June 2004.

¹⁸⁵ Sentencia del Tribunal Supremo 2/1999, 15 October 1999.

¹⁸⁶ *Ibid.*

¹⁸⁷ ‘[...]es doctrina reiterada de esta Sala que la disconformidad con una resolución judicial, no permite construir, sin más, la base de un procedimiento penal. El desacuerdo, si existe, debe ser combatido a través de los correspondientes recursos, salvo circunstancias especiales de tipificación penal del comportamiento de los magistrados’. Sentencia del TS del Auto de 9 de Octubre de 1995.

¹⁸⁸ Procedencia Querrela, Tribunal Supremo, Sala de lo Penal, Causa Especial Nº: 20048/2009, 7 April 2010, at 8 and 12-1: accused him of ignoring ‘the essential principles of a democratic State, such as legality and irretroactivity of the less favorable criminal law, as well as not objectively knowing the laws democratically approved, as the Law of Amnesty 46/1977’ (*proceso penal cuya artificiosa incoación suponía desconocer principios esenciales del Estado de Derecho, como los de legalidad penal e irretroactividad de la ley penal desfavorable, además de implicar el desconocimiento objetivo de leyes democráticamente aprobadas, como la Ley de amnistía 46/1977.*) Judge Varela’s 3 Feb 2010 decision: ‘...has avoided the application of a law approved by a democratic parliament...the impossibility to demand criminal liability for acts committed in the period determined in the decision, which not only have prescribed, but must be considered as amnestied by virtue of the Law of 15 October 1977 approved/adopted by a democratic Parliament in the middle of the transition process.’

by Judge Varela, was to use international law standards as an interpretative tool in the analysis of Spanish law. In so doing, he concluded that these laws did not preclude investigation for crimes against humanity. Yet this recourse to international law is not unprecedented and has indeed become commonplace in Spanish jurisprudence and practice in recent years, as well as in systems across Europe and beyond. The Spanish Constitution itself in Article 10.2 declares that ‘the laws regulating the fundamental rights and liberties recognised in the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights as well as International Human Rights Treaties and agreements ratified by Spain.’¹⁸⁹ A growing number of Spanish judicial decisions, of the Audiencia Nacional, the Supreme Court and the Constitutional Court, therefore reflect recourse to international law to interpret Spanish law.¹⁹⁰ As one Court has noted, ‘the principles of domestic legality and international legality that are applicable and in force for international crimes coexist...The legality principle applicable to international crimes such as crimes against humanity is not domestic, but rather international.’¹⁹¹

106. Judge Garzón did not rely on international law as a basis for criminal responsibility and he did not exercise his jurisdiction on the basis of crimes against humanity under international law, which were not defined and incorporated into the Spanish Penal Code. More cautiously, he exercised jurisdiction over ‘crimes against the state’ which were clearly criminal at the time in Spain and which the LOPJ specifies as falling within the jurisdiction of his court. In determining that he could however take into account that these crimes were committed ‘in the context of crimes against humanity,’ he was specifically following prior Supreme Court jurisprudence,¹⁹² and ensuring that relevant international obligations of the State in respect of these crimes were respected.

107. Judge Garzón’s task of interpreting the 1977 Amnesty Law and the rules on prescription in light of these crimes was a novelty in Spain. While the decision was not

¹⁸⁹ Article 10(2) Constitution of the Kingdom of Spain. See also Article 96.1 reflecting that the provisions of international treaties that are validly adopted can only be derogated, modified or suspended in the form provided for in the treaties or in accordance with the general principles of International law. Conflict with domestic law does not suffice.

¹⁹⁰ *Scilingo*, 2007, Decision of the Central Investigative Court n° 2 of 17 July 2008 accepting competence to investigate the case of the Nazi concentration camps based on the principle of universal jurisdiction; dissenting vote of Judges Clara Bayarri, Ramón Sáez y De Prada (5 November 2010) to the decision of the Plenary Criminal Chamber of the Audiencia Nacional (closing proceedings in the Tibet case).

¹⁹¹ Decision of the Juzgado Centra de Instrucción (Central Investigative Court) n° 2 of 17 July 2008.

¹⁹² *Scilingo*, 2007. See <http://www.derechos.org/nizkor/espana/doc/competence.html>.

therefore based on prior on-point case law as there was none, it was justified by reference to Spanish decisions on the relationship between international and national law. It was in line with a long body of established international law, with the decisions of human rights bodies and this Court, and with the practice of other judges in other legal systems who have refused to apply their own amnesty or prescription laws to serious crimes (see Expert Opinion at Annex 1). Subsequent developments show the extent of controversy, with some judges agreeing with him on the non-applicability of amnesty and prescription to crimes against humanity and others disagreeing. The dissenting opinion of the three judges of the Audiencia Nacional in relation to the appeal from Judge Garzón's October 2008 decision is worthy of emphasis. A judgment by three senior judges that substantially accords with Judge Garzón's judgment - noting the duty to investigate crimes under international law and explicitly reject prescription of such crimes - highlights the reasonableness of Judge Garzón's position and the arbitrariness of the allegations of criminal prevaricación.

108. Judge Garzón's decision that the principle of legality and non-retroactivity does not preclude prosecution for acts that were crimes under international law at the relevant time is supported directly in Spanish jurisprudence¹⁹³ and is well established in international law, including the jurisprudence of this Court.¹⁹⁴

109. The question of which court had jurisdiction over the Franco era complaint was again novel and controversial. But Judge Garzón's decision that the case fell within the jurisdiction of the Audiencia Nacional is an interpretation shared by several other judges, as illustrated by the minority dissenting opinions of three senior judges of the Criminal Plenary Chamber of the Audiencia Nacional when Judge Garzón's decision on jurisdiction was appealed, and the decisions of several local courts when jurisdiction was transferred to them. This controversial question is pending before the Supreme Court, suspended until the outcome of the criminal case against Judge Garzón.

110. While the preliminary measures he took to establish jurisdiction were criticised by the Supreme Court when deciding to approve the criminal case against him, these had not been challenged by the Ministerio Público and had been upheld by the majority deciding the

¹⁹³ Decision of the Central Investigative Court n° 2 of 17 July 2008, accepting competence to investigate the case of the Nazi concentration camps based on the principle of universal jurisdiction

¹⁹⁴ *Kononov v. Latvia*, Application no. 36376/04, [GC], 17 May 2010.

appeal on jurisdiction as having been legitimate urgent preliminary steps to determine jurisdiction.¹⁹⁵

111. It is therefore clear that his actions reveal none of the flagrant and manifest disregard for the law that the crime of prevaricación, as it was interpreted in the past, requires. At a minimum his position was an arguable approach to sometimes controversial questions of law, as evident from the abundant controversy between judges on the national level both before and after Judge Garzón's decisions.

4. A Strict Approach to Article 7 in the Context of Judicial Independence

112. Judge Garzón further recalls that this Court has noted that 'the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed'.¹⁹⁶ In *Liivik*, the complex economic context of the impugned decisions that led to criminal prosecution for misuse of an official position played a part in the Court's assessment of the quality of the relevant criminal provision under Article 7 (see paras. 97 and 100). It is therefore possible that in certain circumstances the subject matter of a criminal law and nature of public interests it should be balanced against require that a higher standard is applied to the quality of that law in terms of precision and legal certainty.

113. Considering the fundamental importance of the principle of judicial independence reflected in Article 6 of the Convention, Judge Garzón submits that particular care is required on the part of the authorities in delineating the scope of a criminal law that interferes with a judge's ability to make independent decisions. Otherwise, a judge would run the constant risk of facing criminal prosecution for adopting an innovative or novel interpretation of the existing law or simply when having to tackle legal issues that have not been addressed before. This is especially true in cases that involve highly complex and legally and politically controversial issues, such as the case that gave rise to Judge Garzón's prosecution.

114. The universal recognition of the fundamental importance of the principle of judicial independence, as set out in the introduction to the Legal Argument, and developed in Annex 2, supports the need to apply a heightened requirement regarding the quality of criminal law

¹⁹⁵ Decision of Tribunal Supremo, 16 May 2009 and 26 May 2009.

¹⁹⁶ See, e.g., *Cantoni v. France*, Application no. 17862/91, judgment of 15 November 1996, para. 35.

under Article 7 when important public interests are negatively affected by that law. The likely chilling effect on the administration of justice (referred to by the Court in *Kayasu v. Turkey* in the context of Article 10) is also a factor requiring a strict approach to the stringent standards under Article 7.

115. In conclusion, the application of this law to Judge Garzón was not a ‘foreseeable’ application of established law. In light of the terms of the law and/or its interpretation in other cases, it could not have been anticipated that this sort of judicial decision would end in criminal sanction, as the extent of shock and outcry that the prosecution has occasioned perhaps illustrates. On-going controversy in relation to the correct approach to the law on the novel points addressed by Judge Garzón, including successive conflicting decisions, belie the notion that this case concerns the restrictive application of clearly defined criminal law. The application of an entirely novel and extremely expansive approach to the criminal law on prevaricación has violated Judge Garzón’s rights, and rendered other judges vulnerable to similar prosecution.

C. ARTICLE 6(1)

116. Article 6(1) provides:

In the determination...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.

1. The Pursuit of Criminal Proceedings for Judicial Decisions as a Violation of Article 6

117. Judge Garzón submits pursuing criminal charges against him in the circumstances of the present case violates the requirement of fairness under Article 6 of the Convention.

118. Article 6 of the Convention covers violations of specific fair trial guarantees, and it protects the fairness of proceedings as a whole.¹⁹⁷ The fairness requirements of Article 6 apply from the start of criminal proceedings. As the Court routinely notes, Article 6 covers the whole of the criminal proceedings,¹⁹⁸ and is critical at the pre-trial phase.¹⁹⁹ Fundamental

¹⁹⁷ *CG v. United Kingdom*, Application no. 43373/98, 19 December 2001, para. 35.

¹⁹⁸ See, e.g. *Eckle v. Germany*, Application no. 8130/78, 15 July 82, Series A No 51, (1983) 5 EHRR 1, para. 76; *Philips v. United Kingdom*, Application no. 4107/98), 5 September 2001, ECHR 2001-VII, para. 39.

unfairness or a denial of justice can arise at any stage of a legal proceeding and can manifest in many forms.²⁰⁰ Because the protections of Article 6(1) are intended to apply irrespective of the formal designation of proceedings under national law, the Court considers that the protections begin at the moment that ‘the situation of the person concerned has been substantially affected as a result of a suspicion against him.’²⁰¹

119. Article 6(1) was engaged once the Supreme Court judges decided to admit and pursue the criminal complaint filed by Manos Limpias against Judge Garzón. Given the nature of his role, his rights were substantially affected by the criminal allegations from an early stage, even before he was suspended from his duties following confirmation of the charges in May 2010.

120. Judge Garzón submits that allowing criminal proceedings to proceed against a judge – on the basis of that judge’s interpretation of the law which is in line with international law – cannot meet the threshold requirement of fairness. This Court has not had the opportunity to address directly the circumstances in which the initiation of a criminal prosecution would violate the fair trial provisions of Article 6 of the Convention. However, it is submitted that the Court’s practice and the application of basic principles of law indicate that bringing a criminal process can itself be inherently unfounded and unfair, and amount to a violation of Article 6.

121. As one academic commentator put it, the right to a fair trial under Article 6, ‘encompasses both the right to a “fair trial” proper as well as the right of the defendant to be tried only in circumstances in which it would be “fair to try” him or her.’²⁰² This is reflected in the decisions in *Teixeira de Castro v. Portugal* and *Jalloh v. Germany* where the Court found violations of Article 6 in light of considerations of policy that were extrinsic to the determination of guilt.

¹⁹⁹ *Imbrioscia v. Switzerland*, Application no. 13972/88, para. 36; *Salov v. Ukraine*, Application no. 65518/01, paras 64-65; *Salduz v. Turkey*, Application no. 36391/02, para. 50; *Tejedor Garcia v. Spain*, Application no. 25420/94, paras 27-28.

²⁰⁰ *Al-Moayad v. Germany*, Admissibility Decision, Application no. 35865/03, 20 February 2007, para. 101 (regarding arbitrary detention on suspicion of criminal conduct with no opportunity to secure release).

²⁰¹ *Neumeister v. Austria*, 1 E.H.R.R. 91 (1968).

²⁰² A. L.T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford: Oxford University Press, 2008), at 188.

122. The Court has noted that the criminal process may itself constitute punishment, notably in cases concerning extensive criminal proceedings.²⁰³ Consistent with this approach to fair trial rights, national courts recognise that as the criminal trial may itself constitute punishment, there is the duty to protect the individual from the effects of the criminal processes.²⁰⁴ Cases refer to the impact that flows from being a ‘suspect’, the uncertainty that the process involves, whether or not they are ever prosecuted or convicted.²⁰⁵

123. The Court has recognised that States are obligated to take reasonable steps to prevent frivolous, unfounded, illegitimate or vexatious prosecutions. It has highlighted that this obligation is even greater in the context of putative prosecutions of judges in light of obligations to secure and respect judicial independence. For example, in *Ernst v. Belgium*, the Court recognised that national laws protecting judicial immunity pursued a ‘legitimate aim’, namely, ‘to shield members of the judiciary from ill-considered proceedings and to allow them to perform their judicial duties dispassionately and independently’ and held that barring suit against judges on this basis met the requirement for a reasonable relationship of proportionality between the means used and the aim pursued.²⁰⁶ Similarly, in *X v. United Kingdom* the Commission recognised that the obligation to protect judicial independence constituted a legitimate reason for limiting suits against judges.²⁰⁷

124. More generally, human rights law favours a restricted approach to the circumstances in which the criminal law is invoked.²⁰⁸ Given the nature and impact of the criminal law

²⁰³ *Eckle v. Germany*, note 198 *supra* (recognising that the criminal process itself may constitute a form of punishment).

²⁰⁴ See e.g. case of Angel Mattei, 29 Nov 1968 Argentine Supreme Court, fallo 194:40; decisions of German courts and Spanish Supreme Court on how delay constitutes a punishment that must be compensated at the end of trial e.g. BGHST 24, 239; decision of the Spanish Supreme Court n° 71/201, 4 Feb 2011, ponente Maza Martín (see also since December 23 2010 article 21.6 of the Spanish Código penal).

²⁰⁵ The ICC in the Kenya case has criticised the naming of individuals as potential suspects: Situation in the Republic of Kenya, *Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)"* (ICC-01/09), Pre-Trial Chamber II, 11 February 2011, para. 22.

²⁰⁶ *Ernst v. Belgium*, note 166 *supra*, para. 85.

²⁰⁷ *X v. United Kingdom*, note 166 *supra*, para. 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).

²⁰⁸ The IACHR has on several occasions noted the exceptional nature of resort to criminal law, noting that ‘the criminal law is the most restrictive and severe manner of establishing responsibility for illicit conduct,’ *Humberto Palamara Iribarne v. Chile case*, decision on 22 November 2005. Series C No135; see also IACHR, *Ricardo Canese v. Paraguay case*. Decision on 31 August 2004. Series C No. 111.

response, it is often described as the ‘*ultimo ratio*’, where it is justified by the serious nature of the conduct in question, ceding to available alternative responses.²⁰⁹

125. It is acknowledged that this Court has expressed the view that ‘the appropriateness of the institution of a criminal prosecution *usually* falls outside the scope of the Court’s review.’²¹⁰ However, by expressing that this is *usually* the situation, the Court recognises that there are circumstances in which it assesses whether the decisions to bring or allow criminal charges amount to a violation.

126. It is submitted that the confirmation of charges against a judge for his interpretation and application of the law amounts to such a circumstance justifying the Court’s careful scrutiny. By allowing such a prosecution to proceed, the State eviscerates the legitimacy of that judge in the eyes of the public and significantly challenges the ability of that judge to discharge judicial functions, while breaching its obligations regarding the administration of justice and rule of law (see Expert Opinion at Annex 2). In this respect it is recalled that the harm to a protected interest, such as judicial independence in this case, may result from the initiation of criminal process independent of the outcome of trial. The chilling effect on other judges of the prosecution of a judge for his judicial interpretations of law does not depend upon conviction. This Court’s acceptance of a heightened standard or stricter approach to the interpretation of rights where the protection of the administration of justice is at stake has also been referred to in relation to Articles 7 and 8 above.²¹¹

127. Other national and international courts have explicitly recognised that the confirmation stage at the end of the pre-trial phase fulfils an essential protective function.²¹²

²⁰⁹ *Ibid.* See in particular the Concurring Separate Opinion of J Ramirez in *Ulloa v. Costa Rica*, IACHR, 2004, para. 16: “In an authoritarian political milieu, the criminal law solution is used frequently: it is not the last resort; it is one of the first, based on the tendency to “govern with the penal code in the hand,” a proclivity fostered by blatant and concealed authoritarianism and by ignorance, that can think of no better way to address society’s legitimate demand for security. The opposite happens in a “democratic environment”: criminalization of behaviours and the use of sanctions are a last resort, turned to only when all others have been exhausted or have proven to be inadequate to punish the most serious violations of important legal interests. Then, and only then, does a democracy resort to punitive measures: because it is indispensable and unavoidable. Even so, classifying behaviors as criminal offenses must be done carefully and by rigorous standards, and the punishment must always be tailored to the importance of the protected interests, the harm done to them or the peril to which they are exposed, and the culpability of the perpetrator. The lawmaker has a number of useful options available to choose from, as does the judge.”

²¹⁰ *Patsuria v. Georgia*, Application no. 30779/04, 6 November 2007, para. 85 (emphasis added).

²¹¹ See, e.g., *Kayasu v. Turkey*, note 167 *supra*, paras. 107-8.

²¹² See, e.g., S. De Smet, ‘A structural analysis of the role of the Pre-Trial Chamber in the fact-finding process of the ICC’, in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009) 406, at 428.

While this Court has not identified the legal standard that must be applied at the confirmation of charges stage, it has often stated that ‘[t]he manner in which Article 6(1)...is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case.’²¹³ States recognise they are obligated to protect individuals against unsubstantiated accusations, and that courts have an inherent and necessary power to protect judicial process from abuse.²¹⁴ As Lord Devlin held in *Connelly v. DPP*, ‘Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.’²¹⁵ This includes the duty to ensure that in certain circumstances that prosecutions do not proceed. According to Lord Hoffmann in *R v. Looseley*, ‘It is clear from the decisions of the European Court of Human Rights...that the right [under Article 6] is not confined to a fair determination of the question of guilt. It is also a right not to be tried at all in circumstances in which this would amount to an abuse of state power.’²¹⁶

128. One of the principal objects of the confirmation phase, as highlighted by international law scholars, is to fulfil a key control function and provide a judicial process that affords the opportunity for the accused to be spared the main trial and the stigma it carries.²¹⁷

129. In Judge Garzón’s case, it was the Supreme Court’s role to ensure that his prosecution was justified by reference to the very exceptional circumstances in which judges can be prosecuted reflected in Spanish law. The investigative stage should have provided sufficient opportunity for the investigating magistrate, or the panel of the Supreme Court on whose behalf the investigating magistrate acted as delegate, to evaluate the complaints as political initiatives and to stop the prosecution from proceeding.

²¹³ See, e.g., *Adamkiewicz v. Poland*, Application no. 54729/00, 2 March 2010, para. 69; *Zaichenko v. Russia*, Application no. 39660/02, 18 February 2010, paras. 36, 45.

²¹⁴ See, e.g., *Hui Chi-Ming v. R* [1992] 1 AC 34 (protecting against proceedings that are so ‘unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding’.).

²¹⁵ *Connelly v. DPP*, [1964] AC 1254, UKHL. Lord Morris concurred, ‘The power (which is inherent in a court’s jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.’

²¹⁶ *Attorney-General’s Reference (No 3 of 2000)* [2001] UKHL 53, [2001] 1 WLR 2060, para. 45.

²¹⁷ V. Röben, ‘The Procedure of the ICC: Status and Function of the Prosecutor’, (2003) 7 *Max Planck Yearbook of United Nations Law* 513, 532.

130. But rather than fulfilling this protective obligation, the Supreme Court confirms the charges on the basis that there is ‘no certainty regarding the non-existence of a crime, nor is the prevarication charge arbitrary, illogical or absurd.’²¹⁸ It does not affirm whether (and therefore why) there is sufficient indication of criminality, ‘sufficient evidence of the applicant’s guilt’, ‘substantial grounds to believe’ the defendant’s guilt,²¹⁹ or ‘*prima facie* grounds for the suspicion against the defendant’²²⁰ for example, as would be typical at the confirmation stage. Instead, in the instant case it appears to have shifted the burden onto the Applicant to show why the case should not proceed. Relying on a lack of ‘certainty regarding the non-commission of the crime’, it confirms the criminal charges and authorises the case to proceed. Such a low standard of review would presumably allow even inadequate and ill-founded (but not on their face absurd) charges to proceed, and provides no protection to judges from unfounded attacks on their exercise of independent judicial functions. At the same time, while apparently shifting the onus to the applicant to show why Judge Varela’s decision was ‘illogical or absurd’, the Supreme Court denied Judge Garzón any opportunity to present evidence that might be capable of achieving that end, or more pertinently explaining why there had, in fact, been no crime committed.

131. Judicial supervision, strikingly lacking from these proceedings, is particularly critical in the circumstances of the present case for several reasons. First, independence of the judiciary requires that the prosecution of judges is prohibited, except in exceptional circumstances. Prosecution for prevaricación for a contested interpretation of the law is not a prosecution that could fall within the exceptional circumstances in which judges are legitimately prosecuted (see Expert Opinion at Annex 3.) Second, a rigorous approach to supervision was required by the unusual origin of the criminal procedure that triggered prosecution in this case. The Spanish system, which allows any citizen, whether directly affected or not by alleged conduct, to bring criminal complaints against a judge in respect of judgments rendered.²²¹ It is currently controversial – and subject to proposals for reform –

²¹⁸ Recurso de Apelacion N. 20048/2009, Tribunal Supremo, Sala de lo Penal, 23 March 2010, at 10.

²¹⁹ See, e.g., *The Prosecutor v. Omar Hassan Ahmad al Bashir*, ICC-02/05-01/09-OA, Judgment on the appeal of the Prosecutor against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, 3 February 2010, para. 30, available at <http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf>.

²²⁰ *Bok v. The Netherlands*, Application no. 45482/06, 18 January 2011, para. 45 (‘[t]he domestic courts were satisfied that there was prima facie evidence upon which the State was entitled to bring the criminal proceedings against the applicant’).

²²¹ This contrasts to an ‘acción privada’ allowing private affected or interested parties to complain. For rules relevant to ‘acusaciones populares’ see Article 125 of the Constitution of the Kingdom of Spain, Articles 20.3

that this system permits prosecution on the sole basis of such a complaint, without requiring the support of the Ministerio Público, and even where as in the present case the Ministerio Público has filed numerous motions seeking dismissal of the case as contrary to the interests of justice. The concern regarding the susceptibility of judges to illegitimate – and indeed politically-motivated – prosecution requires a thorough scrutiny of the lawfulness and appropriateness of proceeding with a prosecution.

132. By pursuing the criminal case against Judge Garzón without basis in law or fact, and despite the serious implications for his rights and for judicial independence more broadly, the State violated Judge Garzón's right to be free from an inherently unfair, illegitimate and abusive criminal prosecution in violation of Article 6.

2. The Spanish Supreme Court's Refusal to Admit Evidence That Would Show the Legitimacy of Judge Garzón's Decision Contributed to the Violation of his Right under Article 6(1) to be Safe from Unfounded or Illegitimate Criminal Proceedings

133. Judge Garzón complains that his inability to present evidence at any stage in his process to date has contributed to the violation of his rights under Article 6. Repeated requests to present evidence as to why no crime had been committed, which should have prevented the prosecution which he contends has resulted in a series of violations of his rights, were consistently denied, without adequate explanation. It is inherent in the State's obligation to prevent frivolous or unfounded prosecutions that reasonable opportunity be afforded to the victim to demonstrate that there was in fact no criminal conduct sufficient to trigger any investigation. When conduct consists only of a judicial decision argued to be manifestly without basis in law, to deny the judge the opportunity to explain why in fact it was a reasoned opinion, well founded in law, defies explanation. The result is a criminal process triggered by political interests opposed to Judge Garzón's decisions and their effects, which should have been truncated at the preliminary stage but which has instead gone on to violate a series of his Convention rights, including Article 6.

and 23.2.b LOPJ, and Article 101 and following of the Criminal Procedure Code. In accordance with the law, these accusers: (i) cannot claim damages because it does not have the status of victim or even affected by the offence (Article 108 Ley de Enjuiciamiento Criminal (14/09/1882), 18/2006 (BOE n° 134, 6 June 2006)); (ii) cannot file criminal complaints in cases of Article 23.2 LOPJ, that is, crimes committed abroad, where the law reserves criminal action exclusively for the Ministerio Fiscal and victims (Article 20.3 and 23.2.b LOPJ); and (iii) do not have access to 'free lawyers' schemes ('justicia gratuita') and must pay a caution (Article 280.1 of the Criminal Procedure Code).

134. The denial of evidence continues to trial phase,²²² in violation of the obligation to allow evidence to be presented by both prosecution and defence.²²³ As it is not timely to address issues regarding the fairness of the trial itself in current brief, this issue is not addressed at this stage.

135. The Applicant does not address other specific fair trial rights which have been violated by the approach to criminal procedure in this case as the criminal trial is pending. He reserves the right to submit arguments as to specific violations of his fair trial rights to the Court in amplification of the present application should this prove necessary.

3. The Question of the Impartiality of the Trial Court under Article 6(1)

136. As set out in the statement of facts, pre-trial decisions were taken not only by investigating magistrate Judge Varela, but also by a panel of five judges of the Second Chamber of the Supreme Court on whose behalf Judge Varela acted as a ‘delegate’.²²⁴ On 13 December 2010 these five judges²²⁵ were appointed to the trial bench that will hear Judge Garzón’s trial. As made clear by one of the judges of the Chamber, Judge Gimenez, in the decision in which accepted the grounds for recusal, the involvement of the Chamber in the case to date makes it impossible for it to meet the pre-requisites for an impartial tribunal under the Convention.²²⁶ The five judges have pre-judged substantive issues in the case, through their role in pre-trial determinations confirming the charges of prevaricación based on judicial decisions alone, in circumstances where (as Judge Gimenez has noted) ‘there is no new questions for trial. They have also exercised a close relationship with investigating Judge Varela. There is therefore a serious appearance of bias that would cause a reasonable observer to fear a lack of impartiality.

137. However, Judge Garzón recognises that this question of recusal of these judges is pending before the Supreme Court. He therefore does not claim a violation at this time but

²²² *Bader and Kanbor v. Sweden*, Application no. 13284/04, 8 November 2005, para. 47.

²²³ *Ibid.*

²²⁴ Article 57 of the LOPJ. See various acknowledgements by Judge Varela and the Chamber of this relationship, set out in Judge Gimenez Decision on Recusal, 26 January 2011, above.

²²⁵ The judges are D. Juan Saavedra Ruiz D. Adolfo Prego Oliver y Tolivar D. Joaquín Giménez García D. Francisco Ferrer Monterde D. Juan Ramon Berdugo Gómez de la Torre.

²²⁶ See e.g. *Gomez de Liano v. Spain*, Application 21369/04, 22 July 2008, concerning a judge of the Audiencia Nacional prosecuted for prevaricación, where Spain was found in violation for subjecting the Applicant to trial by a panel that had been substantially involved at earlier stages in the proceedings.

reserves the right to return to this matter once all remedies have been exhausted at the domestic level.

4. Suspension without Pay

138. The presumption of innocence is one of the most basic human rights protections, reflected in Article 6, and in customary international law. While Judge Garzón appreciates that in certain exceptional circumstances suspension from judicial duties may be an inevitable consequence of legitimate criminal prosecutions, he submits that suspension without pay – prior to the determination of guilt – offends the principle of the presumption of innocence. Unlike a fine imposed upon conviction, automatic suspension without pay cannot be justified in light of the terms of Article 6(2).²²⁷

D. ARTICLE 8

139. Article 8 of the Convention reads:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

1. Prosecution and Suspension Without Pay as an ‘Interference’ with the Exercise of an Article 8 Right

140. Judge Garzón submits that the criminal proceedings initiated against him as a result of his professional activities as a judge constitute an interference with his private life in breach of Article 8 of the Convention.

²²⁷ Withholding pay is a criminal sanction according to the *Engels* criteria applied by the Court. *See, mutadis mutandis, Ezeh and Connors v. United Kingdom*, [GC], Applications nos. 39665/98 and 40086/98, 9 October 2003. In *Janosevic v. Sweden*, the Court acknowledged that an issue relating to the presumption of innocence may arise from imposing sanctions or penalties before conviction, although on the facts of that case no violation was found. *Janosevic v. Sweden*, Application no. 34619/97, 23 July 2002.

141. The application of the prevaricación provisions amounts to ‘an interference’ in the meaning of Article 8. It is well established in the jurisprudence of this Court that the Convention’s notion of private life is ‘not restricted to an “inner circle” in which an individual may live his own personal life as he chooses’ and that ‘it includes activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing themselves as well as their relationships with the outside world’.²²⁸ In particular, the Court held in the past that ‘an interference affecting an individual’s ability to engage in professional activities and creating serious difficulties for him in terms of earning his living’ fell within the scope of Article 8.²²⁹ This was found to be the case even where a contested measure did not prevent an individual from pursuing certain types of professional activity.²³⁰

142. Judge Garzón is being criminally prosecuted, accused of abusing his office by intentionally rendering unjust judgments. The impact of subjecting a judge to a criminal process for an offence that implies gross professional misconduct, particularly when as in Judge Garzón’s case the process is a matter of public renown, is profound. It has to be questioned to what extent a judge can realistically expect ever to resume judicial office. Being prosecuted would significantly limit Judge Garzón’s ability to pursue his judicial career or other occupation that would be commensurable with his professional interests and professional and education background.²³¹

143. The penalties for this offence, if eventually convicted, reflect the seriousness of the offence. Article 446 of the Spanish Criminal Code provides for a sentence of a significant fine and a mandatory ban on occupying any judicial or public office for a period of ten to twenty years, which considering Judge Garzón’s age would amount to a lifetime ban on occupying judicial or public office in Spain.

144. In addition to – and as a direct consequence of – the criminal proceedings, Judge Garzón is suspended from judicial duties. During this period, he does not receive his salary but a reduced allowance, and is unable to take other work in Spain.

²²⁸ *Taliadorou and Stylianou v. Cyprus*, Application nos. 39627/05 and 39631/05, judgment of 16 October 2008, para. 53.

²²⁹ *Ibid.*; see also *Sidabras and Dziautas v. Lithuania*, Application nos. 55480/00 and 859330/00, judgment of 27 July 2004, para. 48.

²³⁰ *Sidabras*, para. 48.

²³¹ See, *mutatis mutandi*, *Sidabras*, para. 49.

145. Judge Garzón is a career judge. He is passionate about and committed to his judicial work. While he is fortunate enough, due to the extent of international recognition of his work to date, to have other international offers of employment (and is currently on a short term contract for a modest consultancy with the Prosecutor's Office of the International Criminal Court in the Hague), what he has always wanted was to resume his judicial career without undue interference. Despite the support he has received from many in Spain and beyond it is undeniable that the impact of this unfounded prosecution on his professional life has been devastating.

146. The impact on Judge Garzón's personal honour and professional reputation of being accused of abusing his office and engaging in criminal activity, particularly when his responsibility was to enforce criminal law, attains 'a certain level of gravity' required to cause 'prejudice to personal enjoyment of the right to respect for private life'.²³² In the past, the Court found an interference with the rights guaranteed in Article 8 where the applicant's reputation suffered specifically in the context of their professional activities.²³³

147. Judge Garzón is aware of the Court's position that 'Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence'.²³⁴ However, as argued above there is no basis to consider the conduct of which Judge Garzón is accused – his judicial decisions on points of law – to amount to criminal conduct. He has moreover argued that the application of the *prevaricación* law to him in respect of his decisions was an entirely unforeseeable consequence of judicial decision making on difficult questions of law (see below as well as Article 7 above).

2. The Interference is not 'in Accordance with Law'

148. Para. 2 of Article 8 permits only such an interference with a person's right to respect for their private life as is 'in accordance with the law'. As has been noted by this Court, the term 'law' used in Article 7 refers to 'the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and

²³² See *A v. Norway*, Application no. 28070/06, 9 April 2009, para. 64.

²³³ See *Taliadorou*, para. 56; see also *Sidabras*, para. 49, in which the applicant 'suffered constant embarrassment as a result of their past [professional] activities'.

²³⁴ See e.g., *Sidabras*, para. 49.

which implies qualitative requirements, notably those of accessibility and foreseeability'.²³⁵ Judge Garzón has argued above that the prevaricación provision of the Spanish Criminal Code cannot be regarded as law for purposes of Article 7. Consequently, the same arguments apply in the context of Article 8. Judge Garzón therefore submits that the contested interference in his private life is in breach of the Convention as it is not established by law.

3. The Interference is not 'Necessary' Pursuant to a Legitimate Aim, or Proportionate

149. Judge Garzón additionally submits that, even if the interference were considered to be provided for in law, it cannot be justified as 'necessary in a democratic society' or proportionate to any legitimate aim. While the Court does not have to examine this argument if it accepts that the prevaricación provision, as applied in this case, does not meet the requirements applied to the 'law,' Judge Garzón submits that the interference was also unnecessary and disproportionate.

150. First, the action pursues no 'legitimate aim' under the Convention, but is antithetical to the Convention's purposes. As noted above, and as the Expert Opinion on judicial independence at Annex 2 makes clear, prosecuting a judge for controversial or 'minority interpretations', or indeed – if it had been the case – for getting it wrong is at odds with international standards on judicial independence. As another opinion on International Standards at Annex 1 makes clear, prosecuting a judge for investigating serious crimes and refusing to applying amnesty laws or statutes of limitation to such serious crimes is at odds with the aim of ending impunity for serious crimes and giving effect to international human rights obligations on the domestic level. The prosecution of Judge Garzón did not pursue a legitimate Convention aim.

151. Moreover and in any event, criminal prosecution in this case cannot be seen as a necessary or proportionate interference with Judge Garzón's rights. In *Kayasu v. Turkey*,²³⁶ the Court considered whether the imposition of disciplinary and criminal sanctions against a public prosecutor for filing an indictment could be justified by a 'pressing social need' capable of justifying a restriction of his freedom of expression.²³⁷ In particular, the Court noted that 'the imposition of a criminal sanction on an official belonging to the national legal

²³⁵ *Kononov v. Latvia*, Application no. 36376/04, 17 May 2010, para. 185.

²³⁶ *Kayasu v. Turkey*, note 167 *supra*, paras. 107-8.

²³⁷ *Ibid.*, para. 104.

service would inevitably, by its very nature, *have a chilling effect, not only on the official concerned but on the profession as a whole*. For the public to have confidence in the administration of justice they must have confidence in the ability of judges and prosecutors to uphold effectively the principles of the rule of law. It follows that any chilling effect is an important factor to be considered in striking the appropriate balance between the right of a member of the legal service to freedom of expression and any other legitimate competing interest in the context of the proper administration of justice.²³⁸ The chilling effect of the prosecution of Judge Garzón is therefore an important factor that the Court is urged to take into account in finding the interference with his professional life a violation of Article 8.

152. In addition, the Applicant submits that suspension ‘without pay’ is not a proportionate interference with Judge Garzón’s Article 8 rights. There is no justification for withholding pay from a judge who has been suspended on account of pending criminal proceedings, in which his innocence must be presumed. While the heart of the violation of Judge Garzón’s rights lies in the unfounded criminal prosecution, from which the suspension automatically flows, the Applicant submits that withholding pay increases the impact of the interference and further contributes to a finding that the interference was an unnecessary and disproportionate interference with his Article 8 rights.

153. Finally, the Court is reminded that where less onerous alternatives exist that would minimise the restriction of rights while meeting any legitimate aim, these must be followed. This reflects the principle that the use of criminal law in general has been recognised as necessary and appropriate only in exceptional circumstances, as ‘*ultimo ratio*.’²³⁹ In Judge Garzón’s case, there were less onerous alternatives in place to address the allegations that his judicial decisions were not legally sustainable. These were exhausted in the form of the appeal process. The criminal case against Judge Garzón relates to judicial decisions, which are not alleged to have victimised anyone, which had no lasting effects and which were overturned on appeal. It is suggested that criminal investigation and prosecution in these circumstances is disproportionate.

²³⁸ *Ibid.*, para. 106. Emphasis added. See also *Worwa v. Poland*, Application no. 26624/95, 27 November 2003 on the ‘fair balance that should be maintained between the rights of the individual, in particular the right to respect for private life, and the concern to ensure the proper administration of justice’ (para 82).

²³⁹ See e.g. J Ramirez in *Ulloa v. Costa Rica*, discussed under Article 6.

154. If there were any suggestion that Judge Garzón had failed in his judicial responsibilities, he could also have been subject to disciplinary proceedings, but there was no basis for such proceedings.²⁴⁰ It is noteworthy in this respect that when the political organisations ‘Falange Española de las JONS’ and ‘Manos Limpias’ originally sought to challenge Judge Garzón’s decision on the investigation of Franco-era crimes, they did so by seeking disciplinary measures. On 12 November 2008 and again on 20 January 2009, they presented complaints concerning Judge Garzón’s 2008 decision to the Disciplinary Judicial Council. The Council rejected the application categorically, noting that there are proper avenues for addressing judicial decisions which were alleged to have been wrong, notably appeal and review, and this was not the subject matter of disciplinary proceedings.²⁴¹ It was when attempts to use the less onerous disciplinary route were unsuccessful the organisations turned to the criminal complaint for prevaricación and surprisingly found the support of the state in the form of Judge Varela and the Second Chamber of the Supreme Court. This only serves to underscore the lack of legitimacy in proceeding with a criminal complaint against Judge Garzón.

E. ARTICLE 10: FREEDOM OF EXPRESSION

155. Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

²⁴⁰ It is acknowledged that disciplinary proceedings can also fall foul of the obligation to protect judicial independence and it is not suggested that they clearly would not have been appropriate in the circumstances of this case.

²⁴¹ See Causa Especial 3/20048/2009, Sala Segunda del Tribunal Supremo, Escrito de Defensa, 17 June 2010.

preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

156. Freedom of expression as guaranteed by Article 10 of the Convention is generally regarded as ‘one of the essential foundations of a democratic society and one of the basic conditions for its progress.’²⁴² The pivotal importance attached to this right stems from its constitutional underpinning as a pre-requisite of democratic societies. The ‘constitutional’ importance of the freedom of expression also accounts for the strict limitations imposed by the Court to any interference with this right.²⁴³

157. The Court has established that the principles embodied in Article 10 apply to civil servants²⁴⁴ including members of the judiciary.²⁴⁵ Indeed, it has been observed that ‘[according to the [Court’s] case law, among all public officials, judges enjoy the highest protection of their authority, and the limit of acceptable criticism of them is the narrowest.’²⁴⁶ For instance, the Court has frequently held that, in order to maintain public confidence in the judiciary (‘the guarantor of justice’),²⁴⁷ judges should be protected from unjustified, destructive and essentially unfounded attacks,²⁴⁸ as well as from disciplinary penalties amounting to an unjustified interference with the exercise of the right protected by Article 10 of the Convention.²⁴⁹

158. In *Kayasu v. Turkey*,²⁵⁰ a case with notable parallels to the case at hand, disciplinary and criminal sanctions were imposed on a public prosecutor for filing an indictment accusing high level officials of serious criminal conduct. The Court found that criminal sanctions

²⁴² *Vogt v. Germany*, Application no. 17851/91, 26 September 1995 [GC].

²⁴³ D. Judge Harris, M. O’Boyle, E.P. Bates, C. M. Buckley, *Law of the European Convention on Human Rights*, 2nd edition, (Oxford, Oxford University Press, 2009), at 443. See, *inter alia*, *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, 1 EHRR 737, p. 23, para. 49 (‘[...] every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued’).

²⁴⁴ *Vogt*, para 53. See also, *inter alia*, *Fuentes Bobo v. Spain*, Application no. 39293/98, 29 February 2000, para. 38; *Guja v. Moldova*, note 165 *supra*, para. 52.

²⁴⁵ *Wille v. Liechtenstein* [GC], Application no. 28396/95), ECHR 1999-VII, para. 41; *Kudeshkina v. Russia*, Application no. 29492/05), 26 February 2009, para. 85, *Harabin v. Slovakia*, Application no. 62584/00, 29 June 2004, CEDH 2004-VI.

²⁴⁶ D. Judge Harris, M. O’Boyle, E.P. Bates, C. M. Buckley, *op. cit.*, at 488.

²⁴⁷ *Kudeshkina*, note 245 *supra*, para. 86.

²⁴⁸ See, e.g., *Kudeshkina*, *ibid.*; *Skalka v. Poland*, Application no.. 35640/97, 27 March 2003, para. 40; *Perna v. Italy*, Application no. 48898/99, 6 May 2003 [GC], (2004) 39 EHRR 563, ECHR 2003-V.

²⁴⁹ See *Kudeshkina*, *infra*.

²⁵¹ See existence of interference with freedom of expression of a public prosecutor in relation to filing an indictment in *Kayasu v. Turkey*, note 167 *supra*.

against a prosecutor in respect of indictments issued amounted to a violation of Article 10.²⁵¹ It is submitted that the Court's rationale in protecting official statements by a public prosecutor through his indictments, or statements by the defence in court,²⁵² must apply *a fortiori* to decisions rendered by a judge, and that a restriction of Judge Garzón's Article 10 rights arises in the present case.

159. Judge Garzón is well aware that the exercise of judicial office is a responsibility rather than a right. However in exercising his responsibility to apply the law, it is critical that he and other judges are free to interpret the law in accordance with their judgment, and to express this through decisions without fear of criminal sanction. It is submitted that Judge Garzón was protected from arbitrary interference with the freedom to express his judicial opinions on the law under Article 10.

1. Interference with the Article 10 Right

160. The criminal prosecution of Judge Garzón and his temporary suspension from his judicial duties have had significant negative effects on the Applicant, as set out above. Penalizing him for statements he has made in the course of his judicial functions, he has been subjected to an unjustifiable criminal process, and suspended from judicial office, without pay since May 2010.

2. The Interference was not 'Necessary in a Democratic Society'

161. The prevaricación charges, aimed apparently at preventing possible further investigations into the Franco-era crimes, or prosecuting him for judicial interpretations that were not shared by the majority of legal opinion in Spain, did not pursue a legitimate aim as required by Article 10 of the Convention. The criminal investigation and the pending threat of a criminal sanction against Judge Garzón inevitably have a 'chilling effect' not only on Judge Garzón himself but on the whole community of investigating judges (see *Kayasu*). It will have a deterrent effect on possible future investigations into the crimes of the Franco-era but also other crimes where similarly controversial legal issues are involved. Far from pursuing a legitimate aim, the prosecution of judges for their interpretations of law is antithetical to Convention aims, judicial independence and the rule of law.

²⁵¹ See existence of interference with freedom of expression of a public prosecutor in relation to filing an indictment in *Kayasu v. Turkey*, note 167 *supra*.

162. The prevaricación charges and suspension without pay are, moreover, a disproportionate measure, and therefore not ‘necessary,’ in view of several factors.

163. Firstly, the impact on judicial independence and the chilling effect on the profession has been referred to previously as an important factor relevant to evaluating proportionality. In *Kayasu* the Court stated that ‘[f]or the public to have confidence in the administration of justice they must have confidence in the ability of judges and prosecutors to uphold effectively the principles of the rule of law. It followed that any chilling effect was an important factor to be considered in striking the appropriate balance between the right of a member of the legal service to freedom of expression and any other legitimate competing interest in the context of the proper administration of justice.’

164. The nature and severity of the criminal sanctions involved have been acknowledged as relevant to proportionality.²⁵³ Judge Garzón maintains that criminal sanction is an inappropriate response to allegations of having erred in law. The attack on his career and reputation that criminal proceedings constitute bear no proportion to the nature of the allegations against him, which essentially relate to the merits or otherwise of his interpretations of law. The lack of fairness in the prevaricación procedure (including the lack of opportunity to present evidence in Judge Garzón’s defence to such charges being brought) are also factors relevant to assessing proportionality.²⁵⁴

165. Moreover, as argued above in relation to Article 8, the suspension without pay cannot be justified as a proportionate or necessary measure.

166. In conclusion, the prosecution and temporary suspension of Judge Garzón constitutes an unjustified and disproportionate interference with his right to impart, through his judicial decisions, his judicial opinions on the correct interpretation of the law, an essential aspect of the discharge of his responsibilities as a judge.

F. ARTICLE 18: LIMITATION ON USE OF RESTRICTIONS ON RIGHTS

167. Article 18 provides:

²⁵² On statements by defence lawyers made during criminal trials see *Steur v. the Netherlands*, Application no. 39657/98, 28 October 2003, and in *Nikula v. Finland*, Application no. 31611/96, ECHR 2002-II.

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

168. The existence of an improper motive for a restriction on any of the rights and freedoms guaranteed by the Convention will result in a breach of the right or freedom concerned read together with Article 18.

169. Such a finding is rare, not least because of the difficulty in demonstrating that the motive for an interference is improper, i.e., not one involving a mistaken or good faith view that the action concerned is permissible under the Convention. Nevertheless Article 18 is not a dead letter. The Court approaches its applicability by reviewing whether the particular measures taken by the authorities are justifiable or show that improper motives have played a part in events.

170. The Court found such an improper motive to exist in *Gusinskiy v. Russia*, Application no. 70276/01, 19 May 2004, which concerned the use of a detention power for commercial objectives linked to the interests of the State. Finding that the prosecution had been in part for illegitimate motives, it found that:

The applicant's liberty was restricted "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence". However, when considering the allegation under Article 18 of the Convention the Court must ascertain whether the detention was also, and hence contrary to Article 18, applied for any other purpose than that provided for in Article 5 § 1 (c). (para. 74.)²⁵⁵

171. Similarly, the misuse of criminal proceedings leading to detention with a view to stopping proceedings under the Convention was held to be a violation of Article 18 in *Cebotari v. Moldova*, no. 35615/06, 13 November 2007 in which it was stated:

²⁵³ See *Ceylan v. Turkey* [GC], Application no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, Application no. 41205/98, § 69, ECHR 2001-I; *Skalka v. Poland*, Application no. 43425/98, §§ 41-42, 27 May 2003; and *Lešník v. Slovakia*, Application no. 35640/97, §§ 63-64, ECHR 2003-IV

²⁵⁴ See *Kudeshkina* para. 83.

²⁵⁵ The Court found that "Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons. ... There has accordingly been a violation of Article 18 of the Convention taken in conjunction with Article 5. (paras. 77-78.)

The Court recalls that the restriction on the right to liberty under Article 5 § 1(c) must be justified by the purpose of that provision. In the instant case, the Government have failed to satisfy the Court that there was a reasonable suspicion that the applicant had committed an offence, with the result that there was no justification for his arrest and detention. Indeed, having regard to its conclusion in paragraph 141 of the Oferta Plus judgment (cited above) the Court can only conclude that the real aim of the criminal proceedings and of the Applicant's arrest and detention was to put pressure on him with a view to hindering Oferta Plus from pursuing its application before the Court. It therefore finds that the restriction on the Applicant's right to liberty was applied for a purpose other than the one prescribed in Article 5 § 1(c). On that account there has been a breach of Article 18 of the Convention taken in conjunction with Article 5 § 1. (para. 53.)

172. The key element of the Court's reasoning in interpreting Article 18 is therefore whether the authorities abused their power because they applied restrictions permitted by the Convention for a purpose other than that for which the restriction was intended, to put pressure on an individual or bring about another desired result. As each of the cases cited above shows, several motives may be in play in any situation, including some that were justifiable. Article 18 is breached where it is established that, in addition to such justifiable reasons, or instead of them, the authorities are influenced by impermissible reasons.

173. The case against Judge Garzón was triggered by two right wing organisations who oppose accountability for persons associated with the former regime of General Franco. It clearly had a political motivation at its inception. At issue in the present case, however, is only whether the decision to authorise and proceed with the criminal prosecution of Judge Garzón in light of these complaints was influenced by improper motives on the part of at least some of the relevant state agents involved in these decisions.

174. The Applicant has been subjected to a criminal investigation and prosecution for judicial decisions adopted in line with the State's international legal obligations. He has at all times acted with due regard for the law and his professional requirements in the discharge of his functions as an investigative judge. Prosecuting a judge to punish him for his interpretation of the law, to silence him, or directly and indirectly to influence other judges in their approach to difficult legal and political issues, are improper motives under the

Convention. Various *indiciae* from the unusual facts of the present case lead, inevitably, to an inference of improper motives at play in Judge Garzón's prosecution.

175. Peculiarities in the treatment of Judge Garzón's case by the Supreme Court, as compared to other cases, inevitably give rise to questions as to motive. First, as recorded above, the approach to the law of prevaricación in this case represents a drastic departure from the approach adopted in any other case. The normally restrictive interpretation of the crime, to ensure that prosecution of judges is an exceptional measure confined to the most serious cases, contrasts with a novel and broad reaching approach in the prosecution of Judge Garzón. Judge Varela's own decision on prevaricación of February 2009, noting the consistently stringent standards that preclude prosecuting judges where there are 'doubts' as to the interpretation of the law or where their interpretations are 'sustainable' or 'defensible,' contrasts starkly with his handling of the present case. The prosecution of Judge Garzón for prevaricación on the basis of his decisions alone, contrasts with the failure to investigate or prosecute other judges for comparable decisions on jurisdiction, prescription, crimes against humanity. Nor is there, quite rightly, any suggestion that such prosecution would be appropriate.

176. The persistent refusal by Judge Varela and the judges of the Second Chamber of the Supreme Court to hear Judge Garzón's arguments as to why, in his view, there was no crime to be investigated, in response to no less than six requests to submit evidence, is difficult to understand.²⁵⁶ While prosecution for prevaricación could only be justified, in Judge Varela's own language, for 'unsustainable' or 'indefensible' decisions, Judge Garzón has been denied all opportunity to explain why the decisions were indeed sustainable and entirely defensible according to accepted canons of interpretation and sources of law. This refusal to allow him to submit evidence continues to the trial stage where he has been denied the opportunity to prepare and present evidence he considers critical to his defence.²⁵⁷

²⁵⁶ See the requests for evidence made on 10 Feb 2010, which received no response and was reiterated on 22 Feb and 1 March. On 7 April Judge Varela issued a decision saying that the investigation phase was concluded and that he rejected the evidence on the basis that it was unnecessary. Judge Garzón challenged/appealed and Judge Varela again refused to receive the evidence on 11 May. This was appealed (apelación) and the Sala Segunda del Tribunal Supremo decided he could not present the evidence on 26 July 2010.

²⁵⁷ See decision of the Tribunal Supremo of 13 December 2010, in which the chamber rejected in part his request to submit evidence, excluding all evidence on why the interpretation was reasonable and in line with international law and practice.

177. An exceptional approach to criminal procedure is also apparent from the specific advice provided to the political organisations that triggered the case on how to change the terms of their complaint to enable the case to proceed. This is consistent with the resolute determination to proceed against Judge Garzón and the existence of a motive that goes beyond the normal even handed application of criminal law.

178. Although the full extent of the ‘chilling effect’ of the criminal case against Garzón remains uncertain, the effect of the prosecution on the investigation of cases related to the Franco-era crimes is already apparent, and may also be relevant to the existence of an improper motive under Article 18. The criminal proceedings against Judge Garzón are being used to determine questions of law that have not been resolved to date in Spain, with the effect of halting access to justice for family members of victims. This can be seen, firstly, from the Supreme Court’s reaction when it was called on to determine the on-going dispute as to which court – Judge Garzón’s Audiencia Nacional or the local courts – have jurisdiction over the crimes. Instead of determining the question of jurisdiction directed to it as the ultimate judicial authority of the land, the Supreme Court suspended determination of the matter pending the resolution of the criminal case against Judge Garzón. Thus the criminal case against Judge Garzón is being used to determine controversial questions beyond the criminal sphere, notably jurisdiction over the Franco-era crimes. Similarly, the decisions of the investigating judge Varela to proceed against Judge Garzón, and specifically his views on the applicability of the amnesty to crimes against humanity, have (without legal basis) been relied upon as authoritative interpretations of the law of amnesty. As a result of the criminal case against Judge Garzón, one view of the law is dominating, not because of resort to the normal appeal and review processes but as a result of the chilling effect of criminal action against Judge Garzón. It is submitted that these were not unforeseeable or incidental effects of criminal proceedings against Judge Garzón.

179. Other indicators of the determination from some within the Supreme Court to remove Judge Garzón from office may be discerned from beyond the case itself. Negative public comments have been made concerning Judge Garzón, including by the President of the Second Chamber now responsible for his prosecution.²⁵⁸ Other criminal allegations, much

²⁵⁸ E.g. in an interview with Judge Saavedra, in the Spanish daily *El País* dating back to 20 December 1999, he said he was ‘totally opposed’ to the ‘star judge’ model of Judge Garzón. Excerpt available at

publicised but unsubstantiated, fuel a broader attack that Judge Garzón has been subject to in the press since he began investigating the Franco-era crimes and the corruption in the Partido Popular.²⁵⁹ While Judge Garzón recognises that the Court cannot consider these initiatives at this time, he notes that the context in which the case before the Court is unfolding may be relevant to questions regarding motive.

180. The extraordinary circumstances in which Judge Garzón was subjected to prosecution, coupled to the manner and context of that prosecution, raise fundamental questions as to why criminal proceedings were ever commenced. While unnecessary to speculate about the full range of motives that might underpin this case, it is submitted that the natural inference is that the criminal process is being used to punish Judge Garzón for his interpretation of the law, to preclude him from exercising judicial office and to deter future judges from acting in a similar way. The facts taken together are sufficient to indicate impermissible motives giving rise to a violation of Article 18 in connection with Articles 6, 7 and 8 of the Convention.

VI. ADMISSIBILITY

A. VICTIM STATUS

181. The Applicant in this case is a judge of high repute, who has been a victim of violations of his rights under Articles 6, 7, 8 and 10, in conjunction with Article 18, as set out above, as a result of which he has suffered significant disadvantage.

182. For two years he has been subject to an illegitimate and unlawful criminal prosecution. The case has had an impact on his reputation, professional standing and his ability to exercise his career as a professional judge in Spain. The criminal charges automatically prompted suspension without pay, which has also caused financial disadvantage. Calls for his resignation before the case is determined and allegations of bringing the profession into disrepute are reflections of the leverage and impact criminal actions against him. The profound impact on his professional and personal life stems from the arbitrary approach to the law of prevaricación and the unjustifiable act of subjecting a judge

http://www.elpais.com/articulo/espana/jueces/punto/final/elpepiesp/20100418elpepinac_5/Tes. See also comment by De Rosa of the Consejo Judicial del Poder Judicial.

²⁵⁹ The full scope of this attack is not addressed in this brief, which focuses on the direct responsibility of state agents. For examples, see e.g. Popular ‘Pressure on Garzón to step down from his role as judge’ Siglo XXI, 25/2/2010.

to criminal prosecution for his interpretations of the law; it is not limited to and will not be undone by the outcome of the pending criminal trial.

183. It is well established that the existence of a law may itself impact on rights, even without its full implementation. In the present case, the law (or a warped interpretation of it) has been implemented, with the effect of Judge Garzón having been charged, subjected to prosecution and suspended without pay. It is acknowledged that *further* steps by the trial court may lead to Judge Garzón being a victim of further violations, notably of his fair trial rights, which are not addressed in detail at this stage. But as set out in the body of this brief, violations have already arisen under 6, 7, 8 and 10 of the Convention, and significant disadvantage has ensued, from the decisions to authorise and take forward the prosecution of a judge for his judicial decisions to interpret the law in line with the State's international obligations.

B. DOMESTIC REMEDIES

184. Judge Garzón has exhausted all available domestic remedies in respect of the violations alleged in this brief, in accordance with Article 35 of the Convention.

185. The well established rule on the exhaustion of domestic remedies serves to ensure that the State should have the first opportunity to remedy violations of human rights on its territory. The rule requires that victims exhaust all measures that are reasonably available, effective and 'capable' of remedying directly the wrong in question before having recourse to this Court.²⁶⁰ At the same time, the Court has noted that 'the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights...that it must be applied with some degree of flexibility and without excessive formalism.'²⁶¹ It has further recognised that the rule of exhaustion 'is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case.'²⁶² In the application of the rule, the importance of having regard to the circumstances

²⁶⁰ E.g. *Civet v. France*, Application no. 29340/95, 28 September 1999, para. 43, *Khashiyev and Akayeva v. Russia*, Application nos. 57942/00 and 57945/00, 24 February 2005.

²⁶¹ *Cardot v. France*, Application no. 11069/84, 19 March 1991, p. 18, para. 34.

²⁶² *Akdivar and others v. Turkey*, Application no. 21893/93, 16 September 1996, (1997) 23 EHRR 143, para. 69. The Court went on: 'This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.' See also Isayeva,

of the particular case including ‘realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant’ has been Court has repeatedly stressed by the Court.²⁶³

186. At the heart of the particular case before the Court is the fact that, in the circumstances of Judge Garzón’s case, the violations of rights stem from the criminal prosecution itself. It is his case that the use of criminal law to punish judges for their interpretations of the law, in line with international law, is *per se* illegitimate and antithetical to Convention aims. The approach to domestic remedies is therefore closely linked to the arguments on the merits of the case. If the Court wishes to consider the issues of admissibility and merits together, Judge Garzón has no objection to this approach.

187. Judge Garzón emphasises that the violations of his rights do not depend on the outcome of the criminal process, which cannot provide an effective remedy against the violations that arise from being subject to a process that itself is a violation of human rights. Nor will the ‘chilling effect’ on other judges be averted by the determination of guilt or innocence upon evaluation of the facts of a particular case after a long, public criminal process. Judge Garzón should never have been prosecuted, and the only appropriate remedy was one which would have enabled such prosecution to be prevented or stopped in a timely way. As the Inter-American Commission on Human Rights affirmed in *Tristan Donoso v. Venezuela*, where the bringing an unjustified criminal prosecution is itself a violation of rights, there is no need to await the outcome of the trial before approaching the Court, as the trial is not the effective remedy against an unfounded prosecution having been pursued in the first place.²⁶⁴ The remedies that must be exhausted are those that might be capable of preventing – or bringing to a timely end – a violative criminal process.

188. In Judge Garzón’s case, the applicable domestic procedure provided for an investigating magistrate to determine whether the criminal complaint should be admitted, investigated and whether it should proceed to trial, and for a chamber of the Supreme Court

Yusupova and Bazayeva v. Russia, Hudoc (2005), 41 EHHR 847; *Van Oosterwijck v. Belgium*, Application no. 7654/76, 6 November 1980, p. 18, para. 35.

²⁶³ *Foka v. Turkey*, Application no. 28940/95, 9 November 2006, 11 (emphasis added). *Akdivar*, *ibid.*, para. 69; see *Menteş and Others v. Turkey*, 28 November 1997, Reports 1997-VIII, p. 2707, § 58.

²⁶⁴ The Commission refers to the Applicants arguments that it is “illogical and legally anomalous to require that a person exhaust the domestic remedies within a proceeding to which that person objects *ab initio* and entirely” and concludes that the criminal trial is not an adequate remedy. Para. 20 REPORT N° 71/02. See Decision on Admissibility, Petition 12.360, Santander Tristán Donoso, Panama, 24 October 2002.

to supervise this role and ultimately to take the relevant decisions – to proceed where this was justified and to dismiss where it was not. The manner in which this stage of the process unfolded – Judge Varela’s determination to proceed without hearing evidence by Judge Garzón, direction provided to the complaining organisations and the decision to take this prosecution forward despite the lack of a legal basis for so doing, the refusal of the panel to exercise meaningful supervision of that decision – has been fully explored in the statement of facts above.

189. For present purposes what is critical to note is that Judge Garzón exhausted each and every possible opportunity available to him to prevent and to stop the prosecution from going forward. He immediately challenged the criminal complaints lodged in January 2009, and requested dismissal again on numerous subsequent occasions as set out on the statement of facts. He challenged the decision by Judge Varela to allow the case to proceed, and the decision of the Supreme Court Chamber to uphold this decision. He also sought to challenge the lack of impartiality in Judge Varela’s handling of the matter on several occasions. He sought to present evidence at each stage as to why there was no basis to this prosecution, and was denied the right to do so, which he in turn challenged and appealed. His challenges and appeals were supported and complemented by those of the Ministerio Público. All of his challenges and appeals were rejected.

190. The Spanish State has had ample opportunity to ‘put matters right through their own legal system’, which as the Court has noted, for example in *Akdivar and others v. Turkey*, is the rationale underpinning the rule of domestic remedies.²⁶⁵ There are no other avenues available to Judge Garzón to prevent this prosecution and the violations of his rights entailed therein. There is no recourse to the constitutional court to prevent a prosecution, and any remedy before that Court – which is discretionary – arises only following trial (and in respect of specific fundamental fair trial rights not raised in this complaint at this time).

191. On 28 July 2010, the decision was reached by the Supreme Court to deny the last of the appeals which could have effectively led to the dismissal of the criminal case against Judge Garzón. This decision was communicated to Judge Garzón on 24 September 2010.

²⁶⁵*Akdivar and others v. Turkey*, note 262 *supra*. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system.

With this decision, there was no further opportunity to halt this process and prevent him being subjected to criminal prosecution in violation of his rights under the Convention.

192. It is acknowledged that some aspects of the violations arising from his criminal prosecution continue to unfold. The fullness of the Article 6 violations will not be clear until the criminal process is completed, and the lack of due process in respect of the suspension process is subject to a pending challenge at the domestic level. No claim is made in respect of these violations, where avenues remain to seek a remedy on the domestic level. However the heart of Judge Garzón's case, as presented herein, relates to violations arising from subjecting a judge to criminal process for reasonable (even if not majoritarian) interpretation of the law. There is no outstanding 'effective remedy' that falls to be exhausted in this respect.

C. TIME LIMITS

193. As noted above, the last domestic remedy was exhausted and the time limits for admissibility purposes began to run, with the delivery of the Supreme Court's decision of 28 July 2010, communicated to the Applicant's counsel on 24 September 2010.

VII. STATEMENT OF THE OBJECT OF THE APPLICATION

194. Judge Garzón asks the Court to find that subjecting him to criminal prosecution, for reasoned judicial decisions leading to the opening of an investigation into serious crimes, is a violation of his rights under Article 6, 7, 8 and 10 in conjunction with Article 18, and to award him just satisfaction under Article 41 (including pecuniary and non-pecuniary damages, plus legal costs and expenses).

VIII. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS.

195. Judge Garzón has not sought redress in any other international proceedings.

196. DECLARATION AND SIGNATURE

I hereby declare that, to the best of my knowledge and belief, the information given in the present application form, presented on my behalf on 24 March 2011, is correct.

Signature

Place

Date

ANNEXES

1. Expert Opinion on International Standards Relating to the Duty to Investigate, and the Impermissibility of Amnesty or Prescription, in Relation to Crimes Against Humanity: submitted by: Professor James Crawford; J. Louis Joinet; Professor Juan Mendez; Professor Pedro Nikken; Professor Naomi Roht-Arriaza; Judge Eugenio Raúl Zaffaroni; and Expert Statement from the Perspective of the National Judge by J. Juan Guzmán.
2. Expert Opinion on International Legal Standards regarding Judicial Independence by Professor Carlos Ayala; Judge Azhar Cachalia; Former Special Rapporteurs on the Independence of Judges and Lawyers, Param Cumaraswamy and Leandro Despouy, Professor Manfred Novak; Judge Stefan Treschel.
3. Expert Opinion on Spanish law of Prevaricación, Professor Araceli Manjón-Cabeza Olmeda (in original language, along with preliminary translation enclosed)
4. Curriculum Vitae, Baltasar Garzón Real
5. Relevant Legal Provisions of Domestic Law (in original language)
6. Relevant Domestic Decisions (in original language)
7. Power of Attorney signed by the Applicant, Baltasar Garzón Real, and Representative, Helen Duffy, INTERIGHTS.