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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2844/2016*, **, ***

Communication submitted by:	Baltasar Garzón (represented by Helen Duffy)
Alleged victim:	The author
State party:	Spain
Date of communication:	31 January 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 1 November 2016 (not issued in document form)
Date of adoption of Views:	13 July 2021
Subject matter:	Prosecution of a judge for wilful abuse of power
Procedural issues:	Victim status; jurisdiction *ratione temporis*; jurisdiction *ratione materiae*; examination under another procedure of investigation; exhaustion of domestic remedies; substantiation of claims
Substantive issues:	Due process/fair trial; presumption of innocence; right to have one's conviction and sentence reviewed; *nullum crimen sine lege*; unlawful interference; discrimination
Articles of the Covenant:	2 (3), 14 (1–3) and (5), 15, 17, 19 and 26
Articles of the Optional Protocol:	1–3 and 5 (2) (a) and (b)

1.1 The author of the communication is Baltasar Garzón, a national of Spain born in 1955. He claims that the State party has violated his rights under articles 2 (3), 14 (1–3) and (5), 15,

* Adopted by the Committee at its 132nd session (28 June–23 July 2021). The Committee adopted a decision on the admissibility of the communication at its 127th session (CCPR/C/127/D/2844/2016).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Kobauyah Tchamdja Kpatcha, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi. Pursuant to rule 108 of the Committee's rules of procedure, Carlos Gómez Martínez did not participate in the examination of the communication.

*** A joint opinion by Committee members Hernán Quezada Cabrera and Gentian Zyberi (concurring) and individual opinions by Committee members José Manuel Santos Pais (concurring) and Vasilka Sancin (partially concurring, partially dissenting) are annexed to the present Views.

17, 19 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 April 1985. The author is represented by counsel.

1.2 The author served as a judge in the State party for 31 years, including 22 years as a judge for Central Examining Court No. 5 of the National High Court of Spain. In this capacity, he led investigations into two cases of major political significance at the national level: a case involving crimes against humanity committed during the Franco dictatorship ("Franco regime case") and a case involving corruption in the Partido Popular political party ("Gürtel case"). In response to his investigations into these two cases, the individuals and entities that were being investigated filed complaints against the author for wilful abuse of power. The author claims that he suffered persecution and reprisals for his investigations into both cases. He contends that the courts that tried him lacked impartiality, in violation of article 14 (1) of the Covenant; that his right to the presumption of innocence under article 14 (2) of the Covenant was violated because he was suspended as a result of the charges brought against him in the Franco regime case before his guilt had been established; that the Supreme Court denied him the opportunity to present evidence of great relevance in the proceedings against him, in violation of article 14 (3) of the Covenant; and that, in violation of article 14 (5) of the Covenant, he did not have the opportunity to appeal his conviction in the Gürtel case, since it was handed down by the Supreme Court – the only court that was competent to hear the case against him, owing to the office he held. The author claims that he was prosecuted twice on charges of wilful abuse of power, based on an interpretation of that offence that was radically inconsistent with the case law of the Supreme Court, in violation of article 15 of the Covenant. The author also claims that the criminal prosecution against him, his suspension as a judge and his conviction in the Gürtel case violated articles 17, 19 and 26 of the Covenant. Lastly, he argues that he had no effective remedy in respect of the alleged violations described in his communication and thus no effective way to interrupt the proceedings against him, in violation of article 2 (3) of the Covenant.

1.3 On 4 April 2018, the Special Rapporteur on new communications and interim measures decided, on behalf of the Committee, to examine the admissibility of the communication separately from the merits.

1.4 On 31 October 2019, the Committee, acting under rule 101 (1) of its rules of procedure, found the communication to be admissible. The Committee considered that the author had sufficiently substantiated, for the purposes of admissibility, his claims relating to: (a) the arbitrariness of the criminal proceedings for his judicial work in the Franco regime and Gürtel cases; (b) the lack of impartiality of the judges who convicted him in the Gürtel case, who had heard that case and ruled that there were indications of wilful abuse of power; (c) the decision of four judges not to withdraw from the Franco regime case, a decision taken by the same judges who had been challenged; (d) his conviction by the Supreme Court without possibility of appeal; and (e) his having been convicted on the basis of an unpredictable interpretation of the criminal offence of wilful abuse of power in the Gürtel case. The Committee requested the parties to submit information on the merits of the claims under article 14 (1) and (5) and article 15 of the Covenant.[1]

State party's observations on the merits

2.1 In its observations of 31 July 2020, the State party reiterates its argument that the complaint is inadmissible because it has been considered by the European Court of Human Rights.

2.2 On the merits, the State party points out that, in both the Franco regime and Gürtel cases, the author requested the withdrawal of five of the judges on the grounds that they had conducted investigative proceedings, that both requests were accepted by a special chamber

[1] For more information on the facts, the complaint and the parties' observations and comments on the admissibility of the communication, see the Committee's decision on admissibility (CCPR/C/127/D/2844/2016).

of the Supreme Court established to hear such requests and that the judges in question were removed from the cases.[2]

2.3 With regard to the author's claim under article 15 of the Covenant, the State party notes that it was not the interpretation of the offence of wilful abuse of power as defined in article 446 of the Criminal Code that was at issue, but rather the author's use of article 51 (2) of the General Prisons Act to justify his decision to order the interception of communications between defendants and lawyers in the Gürtel case. This provision stipulates that:

> The communications of inmates with their defence counsel or with the lawyer called in specifically in relation to criminal matters and with the attorneys representing them shall be held in appropriate locations; such communications may not be suspended or intercepted except by order of a court authority and in cases of terrorism.

2.4 The State party indicates that, contrary to what was claimed by the author, since 1994, the interpretation of article 51 (2) of the Act has been determined by the Constitutional Court in judgment No. 183/1994 of 20 June.[3] The Court held that the conditions established by article 51 (2) are cumulative, i.e., that interceptions may be justified only in cases of terrorism and by means of a reasoned court order. This interpretation was also followed by the Supreme Court in its judgment of 6 March 1995. Thus, since 1994, there has been a clear and foreseeable interpretation of article 51 (2). The State party maintains that the author knowingly applied this article to a non-terrorism-related case and did so without giving any reasoning for his decision. The State party recalls that the two orders issued by the author on 19 February and 20 March 2020 allowed the recording of all oral communications between the inmates and any lawyer, with the author making no mention of the existence of any indication of criminal conduct on the part of the lawyers in question.

2.5 Concerning the author's claim under article 14 (5) of the Covenant that he was convicted by the Supreme Court without the possibility of having his conviction and sentence reviewed, the State party contends that the fact that the Second Chamber of the Supreme Court has jurisdiction to try cases involving the criminal liability of judges is a safeguard for persons enjoying immunity. As stated by the Constitutional Court in judgment No. 166/1993, "the privilege of immunity ... compensates for ... the lack of a second hearing, which, despite being one of the guarantees of due process ..., must be qualified in cases where prosecution is entrusted directly to the Supreme Court". The State party maintains that article 14 (5) of the Covenant does not establish a requirement for two hearings, but for review by a higher tribunal. It points out that article 2 (2) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that there shall be no right of review by a higher tribunal for offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal. The State party points out that having two stages of jurisdiction implies that a higher court or tribunal reviews the decision of a lower one and addresses any miscarriage of justice in the sentencing. However, when an individual is tried at first instance by the court of highest jurisdiction, there cannot be two stages of jurisdiction as there is no higher court, which means that article 14 (5) of the Covenant does not apply. It adds that the impossibility of having two stages of jurisdiction when persons who hold important public offices are tried by the highest court is a reality in many States.

2.6 With regard to the alleged arbitrariness of the criminal proceedings against the author, the State party considers that this claim concerns the assessment of facts and evidence and the application of domestic legislation by the national courts.[4]

[2] The State party notes that, pursuant to article 61 of the Organic Act on the Judiciary, "a chamber composed of the President of the Supreme Court, the Presidents of the Chambers and the most senior and the most junior judge of each chamber shall hear: … motions for the disqualification of … more than two judges of a chamber".

[3] The State party cites Constitutional Court judgments No. 175/1997 of 27 October, No. 58/1998 of 16 March and No. 141/1999 of 22 June.

[4] The State party cites the Committee's decisions in *X and Y v. Netherlands* (CCPR/C/117/D/2729/2016) and *J.P.D. v. France* (CCPR/C/115/D/2621/2015).

2.7 In relation to the Franco regime case, the State party asserts that it is not disputed that the author issued the decisions on the basis of which proceedings were instituted for wilful abuse of power, and that, under Spanish law, it was not possible to open criminal proceedings, as pointed out by the Public Prosecution Service in its report of 29 January 2008. In the report, it was indicated that "the alleged acts are subject to a statute of limitations, since they can be classified only as ordinary crimes under the Criminal Code in force at the time, and criminal law cannot be applied retroactively". Moreover, the report explained that the 1977 Amnesty Act applied to the acts, since they constituted ordinary crimes. In its judgment of 27 February 2012, the Supreme Court noted that, in his order of 16 October 2008, the author, while stopping short of classifying the acts as a crime against humanity, described them as "a continuing offence of illegal detention without providing information on the location of detention 'in the context of crimes against humanity'". According to the Supreme Court, "[the author] sought, by this formal construct, to ensure retroactivity, the non-applicability of a statute of limitations and the prohibition of amnesty". The Supreme Court also pointed out that the rules which constituted international criminal law were not in force at the time of the commission of the acts investigated by the author. The Court also observed that, in his order of 16 October 2008, the author considered that, given the continuing nature of the offence of illegal detention without providing information on the location of detention, the acts were not subject to a statute of limitations under international law, including article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and article 8 of the International Convention for the Protection of All Persons from Enforced Disappearance. However, that criminal offence was not established as an aggravated form of illegal detention at the beginning of the period under judicial investigation. Although it was covered by the 1928 Criminal Code, it disappeared in 1932 and was reintroduced in 1944. Furthermore, the State party submits that it is illogical to argue that a person unlawfully detained in 1936 whose remains have not been found in 2006 may have continued to be detained beyond the maximum period of statute of limitations provided for in the Criminal Code, which is 20 years. The State party points out that the right of victims to an effective remedy is enforceable only for violations suffered after the entry into force of the Covenant for the State party, in accordance with the principle of legality.

2.8 The State party maintains that it cannot be concluded that the initiation of criminal proceedings against the author in the Franco regime case was arbitrary, since the author's actions "ran directly counter to basic requirements of the rule of law". Indeed, in acquitting the author in this case, it was found that his interpretation of the law was erroneous, although his actions did not amount to wilful abuse of power. The State party points out that the two phases of the proceedings against the author in the case – investigation and trial – were kept separate. The motion to disqualify the judges who had dealt with related issues in the investigation phase was accepted, and the sentencing court ultimately acquitted the author, without there being any arbitrariness or denial of justice in the failure to close the case against the author, given that the orders he issued were clearly contrary to the legislation in force and basic principles of law, in particular the principles of statutes of limitation and non-retroactivity. The State party adds that it continues to take steps to protect and provide redress to victims of the Civil War and the dictatorship.[5]

2.9 The State party contends that there are no grounds to suspect bias on the part of the sentencing court in the Gürtel case either. It recalls that the judges indirectly involved in the investigation of the case were disqualified and that the arguments relating to the interpretation of article 51 (2) of the General Prisons Act are also applicable to this case. The State party points out that the author has not denied having issued two decisions allowing the interception of oral communications between prisoners and their lawyers, that these decisions did not

[5] The State party draws attention, in this regard, to a number of ongoing initiatives, including a review of the Historical Memory Act; the establishment of a national register of disappeared persons; the creation of units specializing in the investigation of allegations of serious human rights violations; the development of a protocol for collecting and identifying mortal remains; the granting of public access to State, military and Catholic Church archives regarding all persons who disappeared during the Civil War and Franco's dictatorship; the design of educational programmes on human rights violations committed during that period; and the exhumation of Francisco Franco's remains from the Valley of the Fallen.

mention any indication of criminal conduct by the lawyers and that they applied generally to all lawyers. Consequently, it cannot be concluded that there was arbitrariness or a denial of justice in the criminal proceedings against the author.

Author's comments on the State party's observations on the merits

3.1 In his comments of 12 October 2020, the author claims that his judicial career was cut short after he was subjected to multiple concurrent criminal proceedings. The only basis for these proceedings was the author's interpretation of the law in the exercise of his judicial functions, and the only pieces of evidence to support them were the court decisions issued by the author in the proceedings he was conducting. He notes that the State party has not denied any of the above, and that the use of criminal law to deal with what are considered to be "errors" in the interpretation of the law constitutes an affront to judicial independence.

3.2 The author argues that, as recognized by the Committee itself in its decision on admissibility (para. 8.3), the mere decision to press criminal charges against a judge may amount to arbitrariness according to the standards set by the Covenant. While such arbitrariness must be clear and flagrant, the author contends that the criminal charges against him on the basis of reasonable and reasoned interpretations of the law patently meet this description. Contrary to what the State party maintains, the Committee's actions in the present case are not those of a court of fourth instance, nor do they have any bearing on the assessment of the evidence.

3.3 The author points out the need to prohibit the criminal prosecution of judges for exercising their judicial duties in good faith, and recalls that the possibility of judges being subjected to disciplinary and even criminal sanctions for the content of their decisions has been considered as "incompatible with the requirements of judicial independence". [6] Interpreting the law is part and parcel of the judicial function, even in the most controversial matters that may be interpreted in different ways, as in the Franco regime and Gürtel cases. Differences of opinion, or even miscarriages of justice, cannot lead to the application of criminal law against judges. To correct possible errors of interpretation, there is a whole system of judicial remedies that can allow another court to review the reasoning of the judge *a quo*. The author notes that his rulings were subsequently appealed and reversed during the proceedings relating to the Franco regime case, which should have put an end to the matter.[7] He acknowledges that, in extreme cases of conduct contrary to ethical principles, judges may face disciplinary proceedings. Similarly, the prosecution of a judge may be admissible under the most exceptional circumstances and with strict adherence to fair trial guarantees, including the right to appeal. However, in the present case, the State party has not explained to what extent recourse to criminal proceedings was necessary or justified. As highlighted in an open letter by 80 national and international non-governmental human rights organizations, "the temporal coincidence of these three different trials [Franco regime, Gürtel and Santander[8]], as well as the origin of the complaints, are evidence of judicial harassment aimed against [the author]".[9]

3.4 The author notes that the charge of wilful abuse of power in the Franco regime case was based on a reasonable and reasoned decision containing a harmonious interpretation of crimes against humanity in accordance with Spanish law and international human rights law. Given the intense international criticism of the Spanish Amnesty Act and the State party's failure to investigate and prosecute the crimes committed during the Franco regime, it is implausible for the State party to use an erroneous interpretation of the law applicable to crimes of such gravity to justify the prosecution of the author. He points out that his interpretation has been used and validated by other judges and international law authorities,

[6] The author cites Court of Justice of the European Union (Grand Chamber), *European Commission v. Republic of Poland*, Case C-619/18, Judgment of 24 June 2019.

[7] The author refers to Supreme Court judgment No. 101/2012 of 27 February, by which he was acquitted in the Franco regime case and in which it was stated that his error had been "corrected in judicial proceedings by the Criminal Chamber of the National High Court, sitting in plenary".

[8] For more information on the Santander case against the author, see the Committee's decision on admissibility, paras. 2.31–2.41.

[9] Open letter to the Government and the judiciary of Spain, dated 20 February 2012.

which shows that the matter was, at the very least, debatable. This is evidenced by, in particular, the three dissenting opinions issued by the sentencing court, according to which the author's interpretation was correct. The author submits that the proceedings against him in the Franco regime case should not have been initiated or pursued because there was no prima facie evidence of criminal activity. The initiation of criminal proceedings, regardless of the fact that they ended in acquittal, had a profound impact on his reputation and career, and caused a "chilling effect" on other judges and on victims of the dictatorship. He adds that it is questionable whether progress has been made in terms of historical memory and that, in any event, this is irrelevant to the present case. In view of the foregoing, the author argues that the opening of criminal proceedings for wilful abuse of power was inherently arbitrary.

3.5 The author maintains that another sign of arbitrariness and lack of impartiality in the Franco regime case is that the examining magistrate actively assisted the right-wing extremist organizations that brought the private prosecution in order to ensure that the proceedings could be initiated and pursued,[10] contrary to the view of the Public Prosecution Service. He points out that the Public Prosecution Service interceded on several occasions to argue that the author's position could not be considered legally indefensible or irrational, especially since three judges of the Criminal Chamber of the National High Court, sitting in plenary, and some local courts had followed the same interpretation. He adds that the reversal of the burden of proof placed an excessive onus on him and that the Chamber denied him, without sufficient reasoning, any opportunity to present evidence to prove his innocence. As the Public Prosecution Service noted when requesting the dismissal of the wilful abuse of power case, criminal law was being used to charge someone for being himself.[11]

3.6 With regard to the alleged arbitrariness of the criminal proceedings against him in the Gürtel case, the author argues that he was charged on account of his decision to order, at the request of the police, the interception of telephone communications between the accused persons, who were in pretrial detention, and others, including their lawyers. This measure was ordered for a limited period of time based on evidence that the lawyers were involved in the crimes under investigation, and explicitly provided for the protection of the accused persons' right to a defence. Contrary to what the State party contends, the author submits that neither Spanish law nor Spanish jurisprudence offered a clear solution to the issue of the interception of communications. He adds that, if his decision was erroneous or insufficiently reasoned, the appropriate remedy would, again, have been to review it on appeal, and that there was no justification for the extraordinary, disproportionate and arbitrary decision to initiate a second criminal prosecution against him for wilful abuse of power by a judge, which had resulted in his conviction and disqualification from office for 11 years. The author argues that there were different positions regarding the interception of communications provided for in article 51 (2) of the General Prisons Act and that his position was reasonable. He adds that the interception of communications was supported at all times by the Public Prosecution Service and that the relevant decision was extended by the examining magistrate who took over from the author when the proceedings were referred to him. Consequently, the author's conduct did not meet the requirements for wilful abuse of power of being flagrant and absurd, and manifestly illegal.

3.7 The author claims that the impartiality of the sentencing Chamber was compromised by the overlapping roles of various judges in the three sets of proceedings brought against him. In the oral proceedings in the Franco regime case, which took place five days after the oral proceedings in the Gürtel case, two of the judges of the Second Chamber, L.V. and M.M., had also been prosecuting judges in the Gürtel case,[12] and two others had been investigating judges in the Santander case. The author's motion to disqualify judges L.V. and M.M. was rejected by the Supreme Court. The author argues that the blatant crossover of investigating and prosecuting judges in the three cases, which occurred so close in time and involved the same defendant, calls into question the independence and impartiality of the Chamber, in both the Franco regime and Gürtel cases.

[10] See the Committee's decision on admissibility, para. 2.15.
[11] Ibid., para. 2.13.
[12] Ibid., para. 2.29.

3.8 As for the denial of a second hearing, the author takes issue with the State party's argument that the mere fact of being tried by the Supreme Court gave him greater procedural guarantees, a fact that he claims cannot justify the removal of his right to appeal his conviction.[13] In addition, he states that the remedy of *amparo* before the Constitutional Court can in no case replace a second hearing in criminal proceedings because it does not allow for a review of the sentence and conviction as required by the Covenant or for an evaluation of the facts or a review of sentences handed down by domestic courts.[14] Thus, the Constitutional Court itself has asserted that "it is not a court of second instance, nor is it a supervisory court or a court of cassation".[15] The author points out that, in any event, he filed a writ of *amparo* in relation to the Gürtel case and that it was rejected because it was not considered that his constitutional rights had been affected. He submits that a second hearing is important in cases of wilful abuse of power, given the particular seriousness of the crime and its far-reaching implications for the judiciary and for the rule of law as a whole.

3.9 The author argues that the interpretation of the crime of wilful abuse of power that was followed in prosecuting and punishing him for his judicial decisions in the Gürtel case was an unforeseeable application of the relevant criminal provision and was contrary to the principle of legality enshrined in article 15 of the Covenant. The author asserts that, contrary to what the State party claims, it is a matter not of assessing the way in which article 51 (2) of the General Prisons Act was applied, but of analysing whether the criminal offence of wilful abuse of power under article 446 of the Criminal Code[16] and its interpretation in the proceedings against him complied with the requirements of legality. He points out that, pursuant to article 15 of the Covenant, the punishable conduct must be sufficiently defined as an offence in criminal law, with clarity as to its objective and subjective elements, so that it may be interpreted and applied in a foreseeable manner to his specific case. The author notes that Spanish jurisprudence has required a special degree of unlawfulness of the objective conduct covered by article 446, namely, that it be "flagrant", "manifestly illegal" and "absurd", and that this unlawfulness be appreciable even by a layperson.[17] The author contends that the orders of 19 February and 20 March 2009, through which he requested the interception of communications and for which he was convicted of wilful abuse of power, lack this element of illegality. He states that there were differences of interpretation in Spanish case law regarding the scope of the protection of the confidentiality of communications and the exceptions thereto, and that Organic Act No. 13/2015 of 5 October, amending the Spanish Criminal Procedure Act, confirmed his approach on this issue.[18] Moreover, the European Court of Human Rights has recognized the validity of restrictions on communications between lawyers and defendants, including in non-terrorism-related

[13] The author cites the Committee's general comment No. 32 (2007), para. 47, and its Views in *Jesús Terrón v. Spain* (CCPR/C/82/D/1073/2002), para. 7.4, and in *Capellades v. Spain* (CCPR/C/87/D/1211/2003), para. 7.

[14] The author cites the Committee's Views in *Jesús Terrón v. Spain*, para. 6.5, and *J.J.U.B. v. Spain* (CCPR/C/106/D/1892/2009), para. 7.3.

[15] The author cites Constitutional Court decision No. 114/1995 of 6 July.

[16] The article provides as follows: "A judge or magistrate who knowingly pronounces an unjust sentence or decision shall receive the following punishment: 1. Imprisonment of 1 to 4 years if an unjust sentence has been imposed on the defendant in a criminal case for a serious or lesser offence and the sentence has not been served, or imprisonment of 3 to 4 years and a fine of 12 to 24 months at the daily rate if it has already been served. In either case, the judge or magistrate shall be disbarred for a period of 10 to 20 years; 2. A fine of 6 to 12 months at the daily rate and disqualification from public employment or office for a period of 6 to 10 years, in the case of an unjust sentence imposed on the defendant on trial for a minor offence; 3. A fine of 12 to 24 months at the daily rate and disqualification from public employment or office for a period of 10 to 20 years, if an unjust sentence or decision is pronounced in any other type of case."

[17] The author makes reference to several judgments of Supreme Court.

[18] Article 118 (4) of the Act allows, as an exception to the confidentiality of communications, cases "where there is objective evidence of the lawyer's participation in the criminal act under investigation or of his or her involvement, together with the person under investigation or the accused, in the commission of another criminal offence".

cases, provided that they serve a legitimate and necessary purpose in a democratic society.[19] The author repeats that the Public Prosecution Service supported his decision to intercept the communications and that the judge who replaced him upon his suspension renewed that decision, yet has not been prosecuted for wilful abuse of power, with the State party having failed to justify the difference in treatment. This demonstrates that, at the very least, his reasoning did not meet the standard of flagrant or manifestly illegal conduct required for the offence of wilful abuse of power by a judge. In addition, the subjective element required by the criminal offence of wilful abuse of power, namely, an intent to break the law, was not present, as illustrated by the fact that, in his orders, the author established prerogatives to protect the right to a defence and excluded from the investigation file transcripts relating to the defence strategy. The interception was defined, proportional and justified by the offence under investigation and the type of criminal organization in which those affected were allegedly involved. The author argues that the interpretative leap taken by the Second Chamber of the Supreme Court in convicting him was due to who he was rather than what he had done.

3.10 The author submits that the wording of article 446 of the Criminal Code is in itself ambiguous and unpredictable in its application, in violation of the principle of legality. He recalls that the Basic Principles on the Independence of the Judiciary permit the suspension or removal of judges only for reasons of incapacity or behaviour that renders them unfit to continue discharging their duties[20] and that the Committee itself has considered that judges may not be removed or punished because of errors in judicial decisions or for disagreeing with a particular interpretation of the law.[21] The author repeats that the issue is not the extent to which his interpretation of domestic legislation was correct, but rather the fact that he has been criminally prosecuted for his interpretative work.

3.11 On 20 October 2020, the author attached the report of the Special Rapporteur on the independence of judges and lawyers of 17 July 2020.[22]

State party's additional observations

4. In its observations of 15 January 2021, the State party contends that the report of the Special Rapporteur on the independence of judges and lawyers cited by the author addresses the subject of the disciplinary liability of judges and not criminal liability, and that judicial accountability and the scope of criminal liability are in fact defined in the report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, of 28 April 2014 (A/HRC/26/32). In this report, it is noted that "the requirement of independence and impartiality does not exist for the benefit of the judges and prosecutors themselves, but rather for court users as a part of their inalienable right to a fair trial" (para. 23) and that "while it is important that justice operators be granted some degree of criminal immunity in relation to the exercise of their professional functions in order to protect them from unwarranted prosecution, immunity should never be applied to cases of serious crime, including accusations of corruption. Judicial immunity needs to be limited and serve its purpose of protecting the independence of justice operators; total immunity would only nourish distrust among the public towards the justice system as a whole" (para. 52). The State party submits that the author was convicted not for having issued a decision that was "unjust" in a general sense, but for having intercepted communications between a lawyer and his client in the knowledge that doing so was unconstitutional and unlawful. In this connection, the State party argues that the author faced a criminal penalty for having committed very serious

[19] The author cites European Court of Human Rights, *Foxley v. United Kingdom* (application No. 33274/96), Judgment of 20 June 2000, and *Marcello Viola v. Italy* (application No. 45106/04), Judgment of 5 October 2006.

[20] Principles 18 and 19.

[21] See the Committee's concluding observations on the second periodic report of Viet Nam (CCPR/CO/75/VNM).

[22] Report of the Special Rapporteur on the independence of judges and lawyers, Diego García Sayán (A/75/172).

offences and that his actions violated article 14 (3) (b) of the Covenant, which he invokes in his defence.[23]

Issues and proceedings before the Committee

Consideration of the merits

5.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

5.2 The Committee first notes the author's claims under article 14 (1) of the Covenant that the criminal proceedings against him in the Franco regime and Gürtel cases were arbitrary and that the sentencing courts lacked independence and impartiality.

5.3 With regard to the alleged arbitrariness of the proceedings, the Committee is called upon to determine whether the court that tried the author for wilful abuse of power provided sufficient guarantees to be considered an independent tribunal[24] within the meaning of article 14 (1) of the Covenant. The Committee notes the author's allegation that the sole basis for the decisions to open these proceedings was his interpretation of the law in the exercise of his judicial functions in the Franco regime and Gürtel cases.

5.4 The Committee recalls its general comment No. 32 (2007), according to which States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the Constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[25] It also recalls that judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the Constitution or the law.[26] In the same vein, it is established in the Basic Principles on the Independence of the Judiciary that judges are to be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.[27]

5.5 The Committee considers that the principle of judicial independence, an essential guarantee for the independent exercise of judicial functions, requires that judges and prosecutors be able to interpret and apply the law and assess facts and evidence freely, without being subjected to intimidation, obstruction or interference in the exercise of their functions.[28] Judges should not be subject to criminal or disciplinary sanctions for the content of their decisions, except in cases involving serious crimes, corruption, misconduct or incompetence that render them unfit for office; in such cases, this should be done in accordance with procedures that respect fair trial guarantees. Miscarriages of justice should be corrected by review of the decision by a higher court.[29]

[23] The State party cites the Committee's general comment No. 32, which states that counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.

[24] See Inter-American Court of Human Rights, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment of 5 August 2008 (preliminary objections, merits, reparations and costs), Series C, No. 182, para. 137.

[25] Committee's general comment No. 32, para. 19.

[26] Ibid., para. 20.

[27] Principle 18.

[28] See the report of the Special Rapporteur on the independence of judges and lawyers, according to which "Judicial immunity stems from the principle of judicial independence, and aims at shielding judges from any form of intimidation, hindrance, harassment or improper interference in the performance of their professional functions. Without a certain degree of immunity, prosecution or civil claims could be used as a retaliatory or coercive measure to erode independent and impartial decision-making by diverting the court's time and resources from the execution of regular duties." (A/75/172), para. 44.

[29] See Inter-American Court of Human Rights, *Apitz Barbera et al. v. Venezuela*, judgment, para. 79. The Court notes the argument of the Inter-American Commission on Human Rights that "removal due

5.6 The Committee notes that, in the proceedings in the Franco regime case, the author was tried, suspended from his duties and finally acquitted of wilful abuse of power for having established his competence, as examining magistrate of the National High Court, to investigate alleged cases of enforced disappearance committed during the Civil War and the Franco dictatorship, which the author described as "a continuing offence of illegal detention without providing information on the location of detention in the context of crimes against humanity" and which he considered not to be subject to any statute of limitations in the light of international human rights law. At the same time, the Committee notes the State party's argument that it cannot be concluded that the initiation of criminal proceedings against the author in the Franco regime case was arbitrary since, as the Supreme Court found in its judgment of 27 February 2012, the author's interpretation, while not amounting to wilful abuse of power (see para. 2.8 above), was erroneous. According to the State party, the alleged acts in the Franco regime case were ordinary crimes under the law in force at the time of their commission and were therefore subject to a statute of limitations and to amnesty, pursuant to domestic law. Furthermore, the victims' right to an effective remedy would be enforceable only for violations suffered after the entry into force of the Covenant for the State party.

5.7 Without going into a detailed analysis of the author's interpretation of the law in the Franco regime case, or of the appropriateness of his decisions and of the prevailing national judicial doctrine on the classification of crimes committed during the Civil War and the Franco dictatorship, the Committee observes that it is not disputed that the author adopted reasoned decisions in which he assumed jurisdiction to investigate the allegations, and that he was not alone in taking this position, which was supported by three judges of the Criminal Chamber of the National High Court, sitting in plenary, and some local courts, as noted by the Public Prosecution Service in its opposition to the prosecution of the author for wilful abuse of power (see para. 3.5 above). The Committee considers that, in the light of the foregoing, the author's decisions were at least a plausible legal interpretation,[30] the appropriateness of which was reviewed on appeal, without it being concluded that his decision in the Franco regime case could constitute misconduct or incompetence that might point to an inability to perform his duties within the meaning of the Committee's general comment No. 32.[31] In this regard, Supreme Court judgment No. 101/2012 of 27 February, by which the author was acquitted in the Franco regime case, emphasized that his error "had been corrected in judicial proceedings by the Criminal Chamber of the National High Court, sitting in plenary".

5.8 With regard to the Gürtel case, the Committee notes that the author was convicted of wilful abuse of power for having ordered the interception of oral communications between accused prisoners and their lawyers. However, the Committee takes note of the author's claims that the orders to intercept communications were issued at the request of the police and with the support of the Public Prosecution Service (see para. 3.6 above), on the basis of indications of criminal conduct on the part of the defence lawyers; that the interception was limited in time; that transcripts relating to the defence strategy were excluded (see paras. 2.21 and 2.22 of the decision on admissibility); and that the decision to intercept was extended by the judge who replaced the author upon his removal. The State party has argued that the author's orders applied generally to all lawyers, did not indicate what circumstantial evidence existed and were based on an erroneous interpretation of the relevant legislation in force, namely, article 51 (2) of the General Prisons Act (see paras. 2.4 and 2.9 above). However, this last point has been disputed by the author, who contends that there is a lack of consistency in the jurisprudence on the scope of article 51 (2).[32] In this regard, the Committee notes that the Supreme Court judgment of 9 February 2012, by which the author was convicted in the proceedings in the Gürtel case, examined, at length, the evolution of national case law on that provision and that the examination showed that national case law on the provision had not been consistent, having evolved significantly over the years. Without examining the

to an inexcusable judicial error … is contrary to judicial independence, as it undermines the right of judges to decide freely according to law". See also the report of the Special Rapporteur on the independence of judges and lawyers, (A/75/172), para. 89.

[30] *Apitz Barbera et al. v. Venezuela*, para. 90.

[31] General comment No. 32, paras. 19 and 20.

[32] See para. 3.6 above. See also paras. 2.23 and 2.24 of the decision on admissibility.

appropriateness of the orders issued by the author or the interpretation of article 51 (2) of the General Prisons Act in the Gürtel case, the Committee observes that the references provided by the parties show that the author's interpretation, with which other judges and the Public Prosecution Service concurred, did not constitute serious misconduct or incompetence such as would justify his criminal conviction and removing him permanently from his post, even if, as claimed by the State party, it was erroneous. Rather, it was a possible interpretation of the applicable legal provisions. The Committee notes that the Public Prosecution Service held that article 446 of the Criminal Code could not be applied in the proceedings in either the Franco regime or the Gürtel case, and that, in the latter case, it held that the author's interpretation of article 51 (2) of the General Prisons Act had been correct. The Committee further observes that in the subsequent ruling of the National High Court on 17 May 2018 in the Gürtel case, which was based on article 118 (4) of the new Criminal Procedure Act and in which the Court confirmed the existence of a massive corruption scheme in the Partido Popular and sentenced 29 defendants to prison terms of up to 51 years, it was pointed out that the author had purged the transcripts that potentially violated the right of defence (see para. 6.1 of the decision on admissibility). Moreover, in its ruling of 6 February 2019, the Supreme Court dismissed a complaint of wilful abuse of power that was filed against a judge for intercepting communications, on the grounds that the interception of calls cannot constitute wilful abuse of power (see para. 6.2 of the decision on admissibility).

5.9 As for the alleged partiality of the sentencing courts, the Committee notes that, according to the State party, five of the judges involved in both trials were withdrawn at the author's request and removed from the proceedings. However, the Committee takes note of the author's claims, not refuted by the State party, that two of the judges who convicted him in the Gürtel case had also tried him in the Franco regime case, and that the oral proceedings in the two cases took place within five days of each other (see para. 3.7 above). These proceedings were conducted simultaneously against the same defendant – the author – and resulted in sentences that were handed down 18 days apart. Although the author requested the disqualification of both judges, this request was rejected by the Supreme Court. The Committee also notes that the State party has not contested the author's allegation that one of the judges, L.V., who was the lead examining judge in the Franco regime case, demonstrated his lack of impartiality throughout the proceedings in the case, in particular by repeatedly helping the plaintiffs to modify their pleadings against the author (see para. 3.5 above).

5.10 The Committee recalls that the requirement of impartiality has two aspects. First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.[33] The Committee considers that, on the basis of the information provided by the author, his doubts about the impartiality of the sentencing courts are objectively justified, and that it cannot be concluded, therefore, that the courts appeared to a reasonable observer to be impartial, as was required for his prosecution.[34]

5.11 In the light of all the above information and of the doubts about the possible bias of some of the judges involved, the Committee cannot conclude that the author had access to an independent and impartial tribunal in the proceedings against him in the Franco regime and Gürtel cases, which resulted in his criminal conviction and his being permanently removed from his post. Accordingly, the Committee considers that the author's rights under article 14 (1) of the Covenant have been violated.

5.12 As for the author's claim under article 14 (5) of the Covenant that he was convicted by the Supreme Court in the Gürtel case without possibility of appeal, the Committee recalls that article 14 (5) of the Covenant establishes that everyone convicted of a crime has the right to have his or her conviction and sentence reviewed by a higher tribunal according to law. The Committee recalls that the phrase "according to law" is not intended to mean that the very existence of a right to review should be left to the discretion of States parties. Although

[33] General comment No. 32, para. 21.

[34] See the Committee's Views in *Lagunas Castedo v. Spain* (CCPR/C/94/1122/2002), para. 9.8.

a State party's legislation may provide in certain circumstances for the trial of an individual, because of his or her position, by a higher court than would normally be the case, this circumstance alone cannot impair the defendant's right to have his or her conviction and sentence reviewed,[35] since the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.[36] Bearing in mind that the author was criminally convicted by the Supreme Court without any possibility of review of the conviction and sentence, the Committee concludes that his right under article 14 (5) of the Covenant was violated.

5.13 Lastly, the Committee must determine whether the author's conviction in the Gürtel case on the basis of an allegedly unforeseeable interpretation of the criminal offence of wilful abuse of power constituted a violation of article 15 (1) of the Covenant. The Committee takes note of the author's claim that the application of the offence of wilful abuse of power under article 446 of the Criminal Code to punish his conduct in issuing judicial decisions in the Gürtel case was contrary to the principles of legality and predictability because this offence requires the conduct to be especially unlawful – flagrant or manifestly illegal – and culpable, in the sense that there is an intent to break the law. According to the author, the very description of the criminal offence of wilful abuse of power in article 446 of the Criminal Code is ambiguous and unpredictable.

5.14 The Committee considers that the specific nature of any violation of article 15 (1) of the Covenant requires it to review whether the interpretation and application of the relevant criminal law by the domestic courts in a specific case appear to disclose a violation of the prohibition of retroactive punishment or punishment otherwise not based on law.[37] In this regard, the Committee may examine whether an offence is "sufficiently defined"[38] and therefore complies with the principle of legality, which is the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place.[39] Any offence must be clearly provided for in national law and be foreseeable by the accused.

5.15 The Committee also recalls its jurisprudence according to which it is incumbent upon the courts of States parties to the Covenant to evaluate the facts and evidence in each case, or the application of domestic legislation, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.[40]

5.16 The Committee observes, in this regard, that article 446 of the Criminal Code provides for penalties of up to 4 years' imprisonment for judges who commit wilful abuse of power by issuing an "unjust sentence or decision", but does not define the scope of this expression.[41] The State party has pointed out that the issue in the proceedings against the author in the Gürtel case is not the interpretation of the offence of wilful abuse of power as defined in article 446 of the Criminal Code but the author's interpretation of article 51 (2) of the General Prisons Act, which regulates the interception of communications. However, the Committee notes that, in the judgment handed down by the Supreme Court on 9 February 2012, the author was convicted on the basis of article 446 of the Criminal Code, on the grounds that he had misinterpreted the article regulating the interception of communications. The Committee notes the author's assertion that the offence of wilful abuse of power had been judicially

[35] See the Committee's Views in *Jesús Terrón v. Spain*, para. 7.4, and *Alberto Velásquez Echeverri v. Colombia* (CCPR/C/129/D/2931/2017), para. 9.4. See also general comment No. 32, paras. 45–47.

[36] See general comment No. 32, para. 47. See also the Committee's Views in *Vicencio Scarano Spisso v. Bolivarian Republic of Venezuela* (CCPR/C/119/D/2481/2014), para. 7.11.

[37] *Klaus Dieter Baumgarten v. Germany* (CCPR/C/78/D/960/2000), para. 9.3.

[38] Ibid.

[39] Committee's general comment No. 29 (2001), para. 7.

[40] See, inter alia, the Committee's Views in *Natalia Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3.

[41] The expression "unjust decision" is referred to as being too vague and thus susceptible to undermining the independence of the judiciary in the report of the Special Rapporteur on the independence of judges and lawyers (A/75/172), para. 51, citing the Submission of the human rights monitoring mission in Ukraine (of the Office of the United Nations High Commissioner for Human Rights).

interpreted in a manner that limited it to particularly unlawful and culpable conduct, namely, "flagrant", "manifestly unlawful" and "absurd" conduct whose unlawfulness could be appreciated even by laypersons (see para. 3.9 above; see also paras. 2.12, 2.13, 2.14, 2.23 and 2.24 of the decision on admissibility). The Public Prosecution Service also considered that the author's interpretation of article 51 (2) of the General Prisons Act was correct (see paras. 2.13, 2.14 and 2.26 of the decision on admissibility). Moreover, according to information provided by the author (see para. 2.27 of the decision on admissibility) and not contested by the State party, the judge of the High Court of Justice of Madrid, who replaced the author in the Gürtel investigation, extended and even expanded the interception of the defendants' communications, and there have also been rulings in recent years that annulled orders for wiretapping without there being consequences, let alone criminal charges, for the judges who issued them. Lastly, the Committee notes that article 118 (4) of the new Criminal Procedure Act of 2015 confirms the author's position by allowing, as an exception to the confidentiality of communications, cases "where there is objective evidence of the lawyer's participation in the criminal act under investigation or of his or her involvement, together with the person under investigation or the accused, in the commission of another criminal offence".

5.17 Having considered the author's conduct in the Gürtel case in the light of all this information, the Committee is unable to conclude that his interpretation of domestic law constituted serious misconduct or incompetence such as would justify his criminal conviction and his being permanently removed from his post. Furthermore, the Committee considers that the author's conviction was arbitrary and unforeseeable, as it was not based on sufficiently explicit, clear and precise provisions that define unequivocally the prohibited conduct, in violation of article 15 (1) of the Covenant.

6. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses violations by the State party of article 14 (1) and (5) and article 15 of the Covenant.

7. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose rights have been violated. Accordingly, the State party is obligated to, inter alia, expunge the author's criminal record and to provide him with adequate compensation for the damage suffered. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future.

8. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and the Committee's decision on admissibility and to have them widely disseminated in the official languages of the State party.

Annex I

Joint opinion by Committee members Hernán Quezada Cabrera and Gentian Zyberi (concurring)

[Original: English]

1. While we agree with the Committee concerning the findings of violations by the State party of articles 14 (1) and (5) and 15 of the Covenant, our concurring opinion relates to the remedy part, which the Committee has limited to expunging the author's criminal record, providing adequate compensation and ensuring non-repetition (para. 7).[1]

2. The circumspect remedy indicated by the Committee stands in contrast to its findings that the author's actions did not constitute serious misconduct or incompetence such as to justify his criminal conviction, his removal him from his post and his disbarment from office for 11 years (paras. 5.8, 5.11 and 5.17).

3. In its guidelines on measures of reparation under the Optional Protocol, the Committee has indicated that, while it advises authors to include in their submissions an indication of the types of reparation that they are seeking, and while States parties are then requested to comment specifically on that aspect of the authors' submissions, the information provided by the authors and the States parties in that regard is used by the Committee for reference only; the Committee is not obligated or limited by it.[2] When it comes to different forms of reparations, restitution is usually the preferred form, where and when possible.[3] As the Committee has noted, States parties should provide for measures of restitution with a view to restoring rights that have been violated. Such measures may include, for example, the victim's reinstatement in employment that was lost as a result of the violation committed.[4]

4. In the case at hand, while the remedy indicated by the Committee with respect to the author might implicitly pave the way for restitution in the form of a return to the office, the Committee should have been explicit in emphasizing such full restitution by indicating that the State party is obligated, inter alia, to annul the sanction imposed, expunge the author's criminal record, reinstate the author to the office he held before he was sanctioned and disbarred if he so requests and provide him with adequate compensation for the damage suffered.

[1] Unless otherwise indicated, paragraph numbers in parentheses refer to the text of the Views.

[2] CCPR/C/158, para. 4.

[3] For a definition of what constitutes restitution, see the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex, para. 19).

[4] CCPR/C/158, para. 6.

Annex II

Individual opinion by Committee member José Manuel Santos Pais (concurring)

[Original: English]

1. I fully agree with the Committee's Views. Two of the three proceedings against the author, the Franco regime and Gürtel cases, have clear political connotations. In neither of those cases did the Public Prosecution institute criminal proceedings against the author. Instead, private plaintiffs (organizations of the extreme right in the Franco regime case and a lawyer of one of the defendants in the Gürtel case) pressed charges. Both proceedings were conducted simultaneously and resulted in sentences issued only 18 days apart.

2. In the Franco regime case, the author adopted a reasoned decision assuming jurisdiction. His decision was supported by three judges of the National High Court and some local courts. The author's decision was therefore at least a plausible legal interpretation, as recognized by the Public Prosecution, the appropriateness of which was reviewed on appeal. Ultimately, the Supreme Court judgment of 27 February 2012 acquitted the author of wilful abuse of power.

3. In the Gürtel case, the author's decision to intercept communications was requested by the police and the Public Prosecution and later extended and even expanded by the judge who replaced the author upon his removal. The Public Prosecution considered that the author's interpretation of article 51 (2) of the General Prisons Act was correct; article 118 (4) of the new Criminal Procedure Act (2015) later confirmed the author's interpretation. In the ruling by the National High Court of May 2018, it was also stated that the author had purged transcripts, potentially violating the right to a defence. Finally, the Supreme Court, in its ruling of February 2019, had considered that interception of communication did not constitute wilful abuse of power. Therefore, the author's interpretation was at least plausible. In the light of this and of justified doubts about the possible bias of some judges, the author did not have access to an independent and impartial tribunal in the Franco regime and Gürtel cases.

4. The author was criminally convicted by first- and last-instance courts in the Gürtel case. That said, a conviction by the Supreme Court does not necessarily exclude other possibilities for review, for example by another criminal chamber of the Supreme Court or by the Supreme Court in plenary.

5. The State party has not produced any judgments convicting a judge in a similar context. Article 446 is unclear ("unjust sentence or decision"), insufficiently defined and not respecting the principle of legality. Moreover, the interpretation by the Supreme Court of said provision was unforeseeable and isolated, since there have been rulings in recent years annulling orders for wiretapping without there being consequences, let alone criminal charges, for the judges concerned. Consequently, the author's interpretation of domestic law did not constitute serious misconduct or incompetence that would justify his criminal conviction and disbarment from office. Moreover, his was not an unlawful and culpable conduct, namely, "flagrant", "manifestly unlawful" and "absurd", the unlawfulness or which could be appreciated by even laypersons.

6. The author failed to request specific remedies, rather contesting the proceedings and main assumptions by the sentencing court that led to his conviction. The remedies set out by the Committee in paragraph 7 of the Views are therefore consistent with his claims.

Annex III

Individual opinion by Committee member Vasilka Sancin (partially concurring, partially dissenting)

[Original: English]

1. I fully join the majority in finding that the author's rights under article 14 (1) of the Covenant were violated because the author did not have access to an independent and impartial tribunal in the proceedings against him, which resulted in a criminal conviction and other sanctions (para 5.11).[1] I also joint the majority in finding that the author's right to have his conviction and sentence reviewed under article 14 (5) of the Covenant was violated in the Gürtel case (para. 5.12). However, I cannot join the majority in its finding that the author's conviction and the ensuing consequences demonstrate a violation of article 15 (1) of the Covenant due to a lack of sufficiently explicit, clear and precise provisions that define unequivocally the prohibited conduct in the present case (para. 5.17), as I find the author's submissions and the domestic courts' decisions on the one hand and the majority's Views on the other hand internally inconsistent.

2. In my view, in order to comply with the principle of legality under article 15 (1) of the Covenant, it is not only the wording of a criminal law provision, such as article 446 of the Criminal Code of Spain, that is decisive in establishing whether a criminal offence is sufficiently explicit, clear and precise. Rather, it is the wording of a particular provision and its judicial interpretation that should be assessed for said qualities. The principle of legality mandates that a criminal offence be foreseeable, meaning that a particular provision of a criminal code, read together with its judicial interpretation, must be such as to enable individuals to act accordingly at the relevant time when the offence is alleged to have occurred.

3. This is particularly true in the present case, as the criminal offence concerns the conduct of judges, who can and should be aware of the case law interpreting and further defining the scope of a particular provision. The author himself pointed to decisions of the Supreme Court that had further clarified the content of article 446 – a judicial decision is "unfair" within the meaning of article 446 of the Criminal Code when it is objectively and manifestly devoid of legal grounds, that is, when it manifestly runs counter to the law or is unlawful; cannot be explained reasonably; and/or leads to a situation that lacks any reasonable explanation (para. 2.12 of the decision on admissibility), which was also accepted by the majority (para. 5.16). The criminal offence (which includes the interpretation of the Spanish courts) as such was clear at the relevant time and the individuals concerned (judges) could not have been unaware of its content. Therefore, article 446 of the Criminal Code of Spain, as interpreted by Spanish courts, and its application in the present case, in my view, do not demonstrate a violation of article 15 (1) of the Covenant but, rather, demonstrate arbitrariness in its application in the author's case because the courts lacked impartiality, in respect of which the Committee found a violation of article 14 (1).

[1] Unless otherwise indicated, paragraph numbers in parentheses refer to the text of the Views.