



THE CASE OF OSWALDO PAYÁ

LEGAL REPORT

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Executive Summary

Oswaldo Payá Sardiñas was a Cuban human rights and democracy advocate. Payá was one of the most important leaders of the Cuban opposition due to his influence founding and leading the Varela Project, a draft bill that—through a massive collection of signatures and in observance of requirements set by the Cuban Constitution—proposed a referendum in which Cubans would decide on legal reforms that would establish the effective respect of their fundamental rights.

On July 22, 2012, Oswaldo Payá was traveling by car from Havana to Santiago de Cuba. Cuban pro-democracy activist Harold Cepero, Spanish youth party leader Ángel Carromero, and Swedish politician and chairman of the Young Christian Democrats Jens Aron Modig, were traveling with him.

According to the Cuban government, at approximately 1:50 p.m., Ángel Carromero lost control of the vehicle and crashed into a tree on the side of Las Tunas-Bayamo highway, near the town of La Gabina, about 22 kilometers from the city of Bayamo, a province of Granma. According to the Cuban government, Payá and Cepero died in the crash, while Carromero and Modig suffered only minor injuries. The government concluded that the crash happened for two reasons: first, the speed at which Carromero was driving; and second, the fact that the brakes were hit abruptly when the vehicle was on a slippery surface.

Based on this version of the facts, on October 15, 2012, the First Criminal Court of the People's Provincial Court of Granma issued a judgment convicting Ángel Carromero of vehicular homicide and sentencing him to four years in prison.

Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there's independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, a totalitarian government or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens, especially for those who openly express their disagreement with the government. To the contrary—as it happens systematically under any type of dictatorship—trials against dissidents are a mere formality aimed at giving the appearance of legality to proceedings where all the parties (prosecution, judge or defense counsel) direct their efforts towards legitimizing the official government version of the events, and not at finding the truth, establishing the facts and punishing those responsible.

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism.

During the investigation, the prosecution ignored the complaints made by the Payá family—based on information they had obtained through friends and members of the Christian Liberation Movement—that government officials had caused the car crash and probably killed both Payá and Cepero. They were never made a part of the investigation proceedings nor were they officially informed of Oswaldo Payá's death. Furthermore, the family wasn't allowed to talk to either of the only two witnesses and survivors of the events, and they were barred from attending Carromero's trial. To date—three years after Payá's death—the Cuban authorities have not communicated the autopsy's results to the family. The only document given to them

by the authorities was a handwritten paper card, issued by Havana's medical examiner's office, stating Payá's cause of death as: "damage to the nervous system." Also, the authorities washed and packed the outfit worn by Payá on the day he passed away before returning it to the family, which prevented them from seeking independent scientific analysis of these items. According to international human rights law, the victims' next of kin must have full access and the ability to act during all stages and instances of the pertinent investigation and trial.

After the events, Carromero was taken to the hospital by individuals who were never identified by the prosecution, neither during the investigation nor the trial. At the hospital, Carromero stated to an officer that a vehicle had rammed and pushed them off the road. Minutes later, officers from the Ministry of the Interior surrounded Carromero while he was still lying on the hospital's stretcher and forced him—through threats and slaps on the face—to change his statement of facts. A few days later, Carromero was taken to a prison in Bayamo where, while being held incommunicado and without access to legal counseling, he was forced to record a self-incriminating video that was swiftly broadcast by state-owned media. According to international human rights law, no one shall be compelled to testify against himself or to confess guilt. This must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused.

Ángel Carromero did not have access to an attorney for several weeks after his arrest, and could not communicate with her without delay or in full confidentiality. The conversations he had with his attorney that should have been confidential were seen and heard by a Cuban government official. According to international human rights law, the right to a defense entails that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer. All persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception, or censorship and in full confidentiality.

Carromero had no other choice but to hire attorneys who were members of the centralized guild controlled by the dictatorial Cuban government. These attorneys are legally compelled to "consciously assume and contribute—within their duties—to defend, preserve and be faithful to the principles comprised in the nation, the Revolution and Socialism," and this should be done "imbued with the righteous, noble and humane ideas of Socialism and inspired by the example set by the Commander in Chief Fidel Castro Ruz." According to international human rights law, the adequate protection of the human rights and fundamental freedoms to which all persons are entitled, requires that all persons have effective access to legal services provided by an independent legal profession. The regulations commanding all attorneys to join a centralized guild, controlled by the dictatorial Cuban government, undermine their independence and cancel the possibility of access to an independent counsel.

During the trial, the prosecution did not allow Carromero's attorneys access to the case file or to the evidence on which the accusation was based. Also, due to Cuba's totalitarian legal system, defense attorneys couldn't present new evidence. These circumstances reduced the presence and participation of Carromero's attorneys to a mere formality, stripped of any effectiveness to simulate the existence of an effective legal counsel. According to international human rights law, it is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients.

The trial against Carromero was not public, as authorities barred the public—including Payá's sons—from attending the hearing. In contrast, authorities did allow members of organizations openly linked to the Communist Party of Cuba into the courtroom. According to international human rights law, the publicity of hearings is an important safeguard in the interest of the individual and of society at large.

In Cuba there is no court of appeals. The only form of appeal that can be submitted against a criminal conviction is an appeal to the People's Supreme Court. In Cuba, however, these appeals are a mere formality, since violations to due process are displayed in the arbitrary acts committed and allowed by the authorities, with no chances of having an independent body reviewing these acts. In the trial against Carromero, this appeal was merely a formality stripped of any effectiveness to simulate the existence of an appeal process before a higher court. According to international human rights law, everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

None of the allegations made for each one of these violations was investigated or clarified by the Cuban authorities. To date, the victims' next of kin don't know the full, complete, and public truth as to what happened to their loved ones. According to international human rights law, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State.

On July 22, 2012, Payá and Cepero died under circumstances that have been actively obscured by the State. Through numerous violations of basic due process rules that are aimed at discovering the truth about the facts in dispute, during the investigation and subsequent trial for the deaths of Payá and Cepero, the Cuban authorities have deliberately prevented the clarification of the events. Information that emerged in the months that followed and that was not at all considered by the Cuban court that convicted Carromero—consisting of witness statements, physical evidence and expert reports—suggest direct government responsibility in the deaths of Payá and Cepero. Specifically, the evidence deliberately ignored by the Cuban State strongly suggests that the events of July 22, 2012 were not an accident—as was quickly claimed by authorities in the state-owned media monopoly and later rubber-stamped by Cuba's totalitarian court system—but instead the result of a car crash directly caused by agents of the State, acting (1) with the intent to kill Oswaldo Payá and the passengers in the vehicle he was riding, (2) with the intent to inflict grievous bodily harm to them, or (3) with reckless or depraved indifference to an unjustifiably high risk to the life of the most prominent Cuban activist in the last twenty-five years and the passengers riding with him in the car.

With these actions, Cuba violated (1) the Payá family's right to act at all stages and in all instances of the investigation and the corresponding trial; (2) Ángel Carromero's right to counsel, including the right to communicate freely and confidentially with counsel; (3) Ángel Carromero's right to an independent counsel; (4) Ángel Carromero's right to effective legal counsel; (5) the prohibition against the use of force to obtain confessions or statements; (6) Ángel Carromero's right to a public trial; (7) Ángel Carromero's right to an effective appeal; and (8) Oswaldo Payá and Harold Cepero's families' right to know the truth.

The authorities of Cuba who performed and allowed violations of due process during the

investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero have violated the international standard of protection for the right to due process of law, binding for Cuba—at the universal level—since December 10, 1948, when it adopted the Universal Declaration of Human Rights; and within the Inter-American legal framework, since May 1948, when it adopted the American Declaration of the Rights and Duties of Man.

In short, Cuba is responsible for the violation of Articles 5, 8, 9, 10, and 11 of the Universal Declaration of Human Rights, and Articles 18, 25, and 26 of the American Declaration of the Rights and Duties of Man which, developed and interpreted by a great number of international instruments, together constitute a comprehensive legally binding system for the promotion and protection of human rights.

A. Background

a. Who was Oswaldo Payá Sardiñas?

Oswaldo Payá Sardiñas¹ was a Cuban human rights and democracy advocate. In 1988, Payá founded the Christian Liberation Movement (in Spanish, *Movimiento Cristiano Liberación*; MCL), a Cuban civil society organization structured as a political movement to promote democratic transition in Cuba. However, like all other organizations not affiliated with the Communist Party of Cuba (in Spanish, *Partido Comunista de Cuba*; PCC), it is not recognized by the Cuban government.² Payá was one of the most important leaders of the Cuban opposition³ due to his influence founding and leading the Varela Project,⁴ a draft bill that—through a massive collection of signatures and in observance of requirements set by the Cuban Constitution⁵—proposed a referendum in which Cubans would decide on legal reforms that would enable the effective respect of their fundamental rights.

In 2002, the European Parliament awarded the Sakharov Prize for Freedom of Thought⁶ to Payá.⁷ During the ceremony, Pat Cox, president of the European Parliament at the time, stated:⁸

Dear Mr. Payá, you represent for many Cubans today what Andrei Sakharov represented in the 1980s for many Soviet citizens—you represent hope. Harassed, pursued, persecuted, prosecuted, condemned and imprisoned from your youth for your opinions, opinions which were openly critical of the government's official policies.... We recognize your endurance in the face of a barrage of obstacles. We recognize your personal courage. Your plan is not a theoretical construction; it has not promised heaven on earth, but reminds people of basic principles, for which so many have fought for so long: respect for human rights and fundamental democratic principles.... The Sakharov Prize for Freedom of Thought for 2002 is awarded to Oswaldo Payá as a tribute to his commitment to freedom of thought, democracy and reconciliation of the Cuban people. We salute Oswaldo Payá's decision to use the pen and not the sword, to use signatures and not bullets, to use peace and not terror as the pathway to democracy in Cuba.

¹ Oswaldo José Payá Sardiñas (Havana, February 29, 1952 – Bayamo, July 22, 2012).

² See Movimiento Cristiano Liberación (in Spanish only), <http://www.oswaldopaya.org/es/movimeinto-cristiano-liberacion/> (last visited Sept. 2, 2014).

³ See Enrique Flor, *Muestras de dolor por muerte de Oswaldo Payá en Miami*, EL NUEVO HERALD, July 24, 2012, available at (in Spanish only) <http://www.elnuevoherald.com/2012/07/23/1257841/muestras-de-dolor-por-muerte-de.html>. See also Yoani Sánchez, *La disidencia cubana se queda huérfana*, EL PAÍS, July 24, 2012, available at (in Spanish only) http://internacional.elpais.com/internacional/2012/07/23/actualidad/1343024525_311717.html

⁴ Between 2001 and 2004, the MCL was able to collect 25 000 signatures for the project. See Editorial, *An unsilenced voice for change*, THE ECONOMIST, Dec. 14, 2005, available at http://www.economist.com/node/5300884?story_id=5300884

⁵ See CONSTITUTION OF THE REPUBLIC OF CUBA 1976 Art. 86 (Spanish original: “La iniciativa de las leyes compete... g) a los ciudadanos. En este caso será requisito indispensable que ejerciten la iniciativa diez mil ciudadanos, por lo menos, que tengan condición de electores.”) (Translation by the author: “The law initiative is the responsibility of... the citizens. In this case, the essential requirement is that the initiative be exercised by at least ten thousand citizens who are eligible voters.”), available at (in Spanish only) <http://pdba.georgetown.edu/Constitutions/Cuba/cuba1976.html>

⁶ European Parliament Sakharov Prize for Freedom of Thought, <http://www.europarl.europa.eu/aboutparliament/en/00f3dd2249/Sakharov-Prize-for-Freedom-of-Thought.html.html> (last visited Sept. 2, 2014).

⁷ See European Parliament's plenary session schedule, Dec. 16–19, 2002, <http://www.europarl.europa.eu/sides/getDoc.do?type=PRESS&reference=NA-20021213-1&format=XML&language=EN#top> (last visited Sept. 2, 2014).

⁸ See award ceremony, Dec. 17, 2002, <http://www.youtube.com/watch?v=TJx47JMd2O8> (last visited Sept. 2, 2014).

In 2006, Payá received an honorary doctoral degree of law from Columbia University in the United States.⁹ Payá was nominated for the Nobel Peace Prize in 2002, 2003, 2008, 2010, and 2011.

b. Lack of independence of the Cuban judicial system

i. Lack of independence of the judiciary

The Cuban Constitution¹⁰ establishes a system of subordination and a lack of independence within the powers of the State, which legally subordinates the entire judicial system and the exercise of any fundamental right to the will of the Communist Party secretary-general.^{11 12}

⁹ See press release from Columbia University, May 17, 2006,

http://www.columbia.edu/cu/news/06/05/sardinas_english.html (last visited Sept. 2, 2014).

¹⁰ The current Cuban Constitution, proclaimed February 24, 1976, has been reformed three times, with the most recent amendment on June 26, 2002.

¹¹ See INTERNATIONAL COMMISSION OF JURISTS, CUBA AND THE RULE OF LAW 152–153 (1962), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/1962/12/Cuba-rule-of-law-report-1962-eng.pdf>. In their 1962 report, “Cuba and the Rule of Law”, the ICJ concluded—based on official and non-official documents, public statements, interviews, and the stories of more than 100 witnesses, before and after the defeat of Fulgencio Batista’s dictatorship—that the Cuban Revolution, led by Fidel Castro, deliberately dismantled the entire justice system on the island. The dismantling was legally based on five reforms to the 1940 Constitution and 16 reforms to what became the “Basic Law” of 1959. The ICJ also documented systematic violations of due process committed by revolutionary courts, including: (1) charges that were general and ambiguous in character, and did not specify any action considered to be criminal in nature; (2) defense lawyers were only informed of the charges against the accused a few minutes before their hearing was due to begin; (3) due notice of the dates on which the cases were to be tried was not given to either the accused or the defense attorney; (4) as defense attorneys were never notified in advance of the hearing dates, they were forced to go to the courts daily to find out which cases were being tried that day; (5) the times that hearings were held were completely arbitrary, with the common practice being to hold them some time after 9:00 p.m., when they were supposed to start at 4:00 p.m. or 5:00 p.m.; (6) changes were made to the charges when the original indictment could not be proved; (7) constant hostility in the form of threats and insults was shown to defense counsel and witnesses, with threats carried out in some cases, and some lawyers who energetically defended their clients were imprisoned and shot as “counter-revolutionary” criminals; (8) interviews with prisoners, if possible at all, always took place in the presence of guards, who were members of the army; (9) defense attorneys were not allowed to see the indictment and consequently did not know the charges against their clients, and—as the latter did not know either, because they had not been officially charged—it was impossible to determine until the act of accusation was actually read out, or until at least a few minutes beforehand; (10) the witnesses for the prosecution were publically encouraged to testify against the accused even on matters that were not within their knowledge; and (11) new types of offence, such as “special conspirator,” were invented during hearings when the accused could not be proved to have committed any of the criminal acts with which he was charged.

See also RICARDO MANUEL ROJAS, *LOS DERECHOS FUNDAMENTALES Y EL ORDEN JURÍDICO E INSTITUCIONAL DE CUBA* (Imprenta Wingord) (2005).

¹² See ARMANDO VALLADARES, *AGAINST ALL HOPE* 22–28 (Alfred A. Knopf 1986) (1985). In 1986, Armando Valladares published his autobiography, “Against All Hope,” in which he describes his arrest, incarceration, summary trial by revolutionary court, and sentencing to 30 years imprisonment for expressing his disagreement with the communist direction of the Cuban Revolution. In the book, Valladares tells the stories of many others who, like him, were charged and convicted by revolutionary tribunals—many of who were sentenced to death by firing squad—without evidence, access to a defense attorney or the case file, in isolation, without knowing the charges they were accused of, and unable to produce or present any evidence in their defense. In cases where the accused was sentenced to death, the sentence would be executed the following morning (many were arbitrarily accused for any reason that could be considered “counterrevolutionary.” The constitutional provisions and laws of the era, in a manner similar to the current, were intentionally vague and imprecise, allowing any action or critical to be labeled a “counterrevolutionary crime”). Valladares revealed that during his trial, “[he] was not allowed to talk privately with the lawyer defending [him], nor did they allow him access to the list of charges.” During the proceedings, “the members of the tribunal were sitting talking among themselves, laughing, and smoking cigars... they all wore military uniforms... At the start of the trial, the president of the tribunal, Mario Taglé, put his feet up on a table, crossed one boot over the other,

Based on the Marxist-Leninist doctrine that demands the installation of a “revolutionary dictatorship of the proletariat,” the Cuban Constitution¹³ establishes a totalitarian legal system based on a single official ideology—determined and interpreted by a single party—whose rulings cannot be discussed or criticized and must be obeyed by all citizens and public officials under threat of criminal prosecution.

The organic part of the Constitution provides that the Communist Party of Cuba is the “superior leading force of the society and the State,” the only party in charge of “organizing and guiding the common efforts aimed at the highest goals of the construction of socialism and advancement toward the communist society.”¹⁴ At the same time, the dogmatic part of the Constitution (Art. 5 et seq.) formally recognizes certain rights and freedoms for Cuban citizens, including the right to “freedom of speech and press.” However, the Constitution cancels these rights, subordinating their exercise to the “objectives of the socialist society,” underlining that the “material conditions” for the exercise of those rights “are provided by the fact that the press, radio, television, cinema, and other organs of the mass media are State or social property and can never be private property. This assures their use at the exclusive service of the working people and in the interests of society” (Art. 53).¹⁵

Finally, to cancel any possibility of legal protection of the rights and freedoms of the Cuban people, the Constitution itself cancels the exercise of any fundamental right or freedom, explicitly binding them to the advancement of a political agenda under one-party rule inspired by Marxist-Leninist doctrine. Specifically, Article 62 of the Constitution provides that “none of the freedoms which are recognized for citizens can be exercised contrary to what is established in the Constitution and the law, or contrary to the existence and objectives of the socialist State, or contrary to the decision of the Cuban people to build socialism and communism. Violations of this principle can be punished by law.”¹⁶

and leaned back in his chair and opened a comic book.”

¹³ Like many other Marxist-Leninist dictatorial regimes that followed the example of the USSR and rose to power after World War II, the Cuban Constitution preserves a formal, liberal structure consisting of two parts: dogmatic and organic. These delineations are inspired by the Constitutions of the American States in the 1780’s and the French Constitution of 1789, which impose limits of content (dogmatic) and form (organic) on the government in power. Despite this historical precedent, the application of Marxist dogma demands the need for a supreme Communist Party as society’s “vanguard;” thus, Marxist-Leninist constitutions abandon the meaning and historical significance of these parts, subordinating both the protection and exercise of fundamental freedoms (dogmatic), as well as the operation and interaction between the branches of government (organic), to the final decision of the Communist Party.

¹⁴ CONSTITUTION OF THE REPUBLIC OF CUBA Art. 5 (*Spanish original*: “[E]s la fuerza dirigente superior de la sociedad y del Estado, que organiza y orienta los esfuerzos comunes hacia los altos fines de la construcción del socialismo y el avance hacia la sociedad comunista”). *available at* (in Spanish only) <http://www.cuba.cu/gobierno/cuba.htm>

¹⁵ *Id.* at Art. 53 (*Spanish original*: “Se reconoce a los ciudadanos libertad de palabra y prensa conforme a los fines de la sociedad socialista. Las condiciones materiales para su ejercicio están dadas por el hecho de que la prensa, la radio, la televisión, el cine y otros medios de difusión masiva son de propiedad estatal o social y no pueden ser objeto, en ningún caso, de propiedad privada, lo que asegura su uso al servicio exclusivo del pueblo trabajador y del interés de la sociedad”). (*Translation by the author*: “Material conditions for the exercise of those rights are provided by the fact that the press, radio, television, cinema, and other mass media are State or social property and can never be private property. This assures their use at the exclusive service of the working people and of the interest of society.”).

¹⁶ *Id.* at Art. 62 (*Spanish original*: “Ninguna de las libertades reconocidas a los ciudadanos puede ser ejercida contra lo establecido en la Constitución y las leyes, ni contra la existencia y fines del Estado socialista, ni contra la decisión del pueblo cubano de construir el socialismo y el comunismo. La infracción de este principio es punible”).

It is important to note that the Cuban Constitution does not recognize the judiciary as an independent organ separate from the executive and the legislative branches of government, nor as the organ responsible for interpreting the Constitution in an objective, independent, and impartial manner, or even for conducting the constitutional review of laws or the acts of the executive.¹⁷ Although Article 122 provides that “[j]udges, in their function of imparting justice, are independent, and owe obedience solely to the law,” the Constitution immediately cancels this guarantee of independence and impartiality by providing that “tribunals constitute a system of State organs... subordinate hierarchically to the National Assembly of the People’s Power and the Council of State,” (whose members are appointed by the communist party)¹⁸ giving the latter the right to give laws a “general and mandatory interpretation,” as well as the power to “issue general instructions to the courts.”¹⁹

The Cuban Constitution also provides that the National Assembly has the power to elect “the president, vice president, and other judges of the People’s Supreme Court,”²⁰ as well as the power to remove them from office.²¹ However, Article 45 of the People’s Courts Law (in Spanish, *Ley de los Tribunales Populares*), Law No. 82²² provides that judges of the People’s Supreme Court will be elected based on a proposal submitted by the president of the State Council. Although neither the Constitution nor Law No. 82 set the procedure for electing the judges of the People’s Supreme Court, the election and appointment of public officials by the legislative branch—based on the proposal presented by the head of the executive—does not imply, in principle, lack of independence in the selection process. However, in order for this procedure to be considered truly independent, a set of basic guarantees must be in place to ensure the independence of the electing body and the selection process itself.

In the case of the judges of the People’s Supreme Court—the highest judicial body in Cuba—the public officials entrusted with the authority to elect them are the members of the National Assembly of the People’s Power. In democratic regimes, the National Assembly—as the State’s legislative power—is usually the place where all the individual interests, both diverse and plural, of the citizens of society are represented. Therefore, its members should be able to

¹⁷ On September 16, 2012, Calixto Ramón Martínez, a journalist for the independent news agency Hablemos Press (a Cuban civil society organization—not recognized by the State—formed by self-taught journalists who work to expose the conditions in Cuba and circumvent the State’s monopoly over media) was arrested at José Martí International Airport in Havana. He had been investigating allegations that medicine provided by the World Health Organization (WHO) to fight the cholera outbreak (which the Cuban government had allegedly tried to downplay since it began in mid-2012) was being kept at the airport instead of being distributed to the Cuban people. Calixto Ramón endured almost seven months of arbitrary imprisonment. He was never officially charged for a crime. See news report from Pen International, *Cuba: Calixto Ramón Martínez Arias released; two other writers remain imprisoned*, Apr. 11, 2013, available at <http://www.pen-international.org/newsitems/cuba-calixto-ramon-martinez-arias-released-two-other-writers-remain-imprisoned/>. See also press release from the Committee to Protect Journalists, *CPJ welcomes release of Cuban journalist*, Apr. 10, 2013, available at <https://cpj.org/2013/04/cpj-welcomes-release-of-cuban-journalist.php#more>; press release from Reporters Without Borders, *Independent reporter released after seven months in detention*, Apr. 10, 2013, available at <http://en.rsf.org/cuba-independent-reporter-released-10-04-2013,44361.html>

¹⁸ *Id.* at Art. 121 (Spanish original: “Los tribunales constituyen un sistema de órganos estatales, [...] subordinado jerárquicamente a la Asamblea Nacional del Poder Popular y al Consejo de Estado.”).

¹⁹ *Id.* at Art. 90 (Spanish original: “[D]ar a las leyes vigentes, en caso necesario, una interpretación general y obligatoria.”).

²⁰ *Id.* at Art. 75 (Spanish original: “[E]legir al Presidente, a los Vicepresidentes y a los demás Jueces del Tribunal Supremo Popular.”).

²¹ *Id.* at Art. 126 (Spanish original: “La facultad de revocación de los jueces corresponde al órgano que los elige.”).

²² See PEOPLE’S COURTS LAW (NO. 82) Art. 45, available at (in Spanish only) <http://www.gacetaoficial.cu/html/itribunales.html>

represent the different interests, concerns, and ways of thinking of the nation's inhabitants. This implies that the members of a legislative body—in this case, the representatives of the national assembly—should have the power to debate, oppose, denounce, and freely discuss ideas and viewpoints different from those of the executive or a majority in parliament.

This plurality of discussions about public policy within a legislative body is prohibited under the Cuban totalitarian legal system. Specifically, the legal imposition of a single political party, the PCC, eliminates any plurality within the national assembly. At the same time, by granting this party absolute control over all State bodies, including the police and the armed forces, it has also built the conditions—since Fidel Castro took power in 1959—to effectively prevent any dissent. Even to discuss how to better “build socialism and communism” puts individuals under the imminent, formal risk of prosecution and imprisonment, and—in practice—physical aggression or even extrajudicial execution.

It should be noted that, although different Cuban civil society groups often call themselves “political parties” (e.g. Arco Progressive Party, Christian Democratic Party, National Liberal Party of Cuba, Social Democratic Party of Cuba), they do not have the legal status to operate as such or to compete for public office within the institutions of the Cuban State. These are civil associations of people whose will to participate in the civic and political life in Cuba is legitimate from the standpoint of a democratic society, but that are considered and treated as illegal—even as enemies of the State—under the totalitarian legal system guaranteed by the Cuban Constitution. Individuals who disagree with or are critical of any of the government's branches, regardless of whether they are organized or not, are not allowed to express their views through the media, which are—as mentioned above—subject to the State's complete control.²³ On the contrary: when the totalitarian State's media refer to dissenting individuals, they do so with the disqualifying and dehumanizing adjectives of “worms,” “wormholes,” and “scum,” or with the criminalizing labels of “antisocial elements,” “mercenaries,” “subversives,” “terrorists,” and “counterrevolutionaries.”²⁴

The constitutional provisions that ban the existence of different groups or opposing parties within the national assembly—in addition to the constitutional obligation to advance a pre-established, single political agenda according to an official ideology, under the threat of being prosecuted and punished for its disobedience—dissolve the possibility of having a meaningful

²³ Reporters Without Borders ranks Cuba in the position 170 out of 180 on its 2014 World Press Freedom Index, next to countries like Equatorial Guinea, Sudan and Iran. See REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX 2014, available at <http://rsf.org/index2014/en-index2014.php>.

Freedom House classifies Cuba as “not free” for both freedom of political rights and freedom of press. On this regard, the report states: “the independent press is considered illegal and their publications ‘enemy propaganda.’ Government agents routinely infiltrate the ranks of independent journalists and report on their activities, often accusing them of being mercenaries working at the behest of foreign powers.” See FREEDOM HOUSE, FREEDOM IN THE WORLD 2014, available at <http://www.freedomhouse.org/report/freedom-world/2014/cuba-0#.VFDw5fR4res>.

The Committee to Protect Journalists classifies Cuba as one of the ten most censored countries on earth. See COMMITTEE TO PROTECT JOURNALISTS, 10 MOST CENSORED COUNTRIES (2012), available at <https://cpj.org/reports/2012/05/10-most-censored-countries.php#9>

²⁴ See, e.g., videos and press releases from different sources exposing this practice, available at (some videos and releases are in Spanish only) <https://www.youtube.com/watch?v=WijpfSpComk>; https://youtu.be/AATbW3uA_08?t=479; <http://www.cubadebate.cu/opinion/2013/11/10/obama-habla-de-cuba-entre-gusanos/>; <http://www.cubadebate.cu/opinion/2014/01/23/la-patria-grande-un-verdadero-dolor-de-cabeza-para-ee-uu/>; http://www.youtube.com/watch?v=IQ5Hp5G_dDo (last visited Sept. 2, 2014).

process of scrutiny derived from an open and rich debate within a pluralistic legislature. This eliminates a fundamental guarantee of independence when electing public officials—in this case, the judges of the highest judicial body in Cuba.

Law No. 82 also deprives judges of the guarantee of stability and tenure by stating that the “professional judges and their professional permanent substitutes are elected without being subject to an end of term.”²⁵ This provision allows the judges to be appointed and removed arbitrarily by the authorities. In this regard, it is noteworthy that the Cuban judicial system establishes the existence of two types of judges: the professional and the layman judge.

Depending on the type of court, the law provides that the national or provincial assembly will appoint professional judges. In the case of layman judges—again, depending on the type of court—either the national, provincial, or municipal assembly will appoint them. However, the “committees that select candidates and process applications of laymen judges” for proposal are formed by members of institutions openly associated with the communist party. In this case, the committees are formed by delegates from the Workers’ Central Union of Cuba (in Spanish, *Central de Trabajadores de Cuba*), the Committees for the Defense of the Revolution (in Spanish, *Comités de Defensa de la Revolución*), the Federation of Cuban Women (in Spanish, *Federación de Mujeres Cubanas*), the National Association of Small Farmers (in Spanish, *Asociación Nacional de Agricultores Pequeños*), and the Federation of University Students (in Spanish, *Federación Estudiantil Universitaria*).²⁶

Unlike the Law of the Organization of the Judicial System of 1973 (in Spanish, *Ley de Organización del Sistema Judicial*), which stated that layman judges should have an “active revolutionary involvement,” Law No. 82 does not provide this condition. However, the principle of “active revolutionary involvement” is still in place, since only the supporters of the PCC are appointed as lay judges.²⁷ The Cuban judicial system also allows for judgments handed down by the courts to be revisited and modified, thus violating the basic principle of due process non bis in idem.²⁸

The lack of independence in the Cuban judicial system has been documented, verified, and announced by the Inter-American Commission on Human Rights (hereinafter, IACHR). In its annual reports, the IACHR has stated, “the shortcomings of the Cuban judicial apparatus begin with the Constitution of the Cuban State, which does not provide for separation of powers as to guarantee independence in the administration of justice.”²⁹ The IACHR has consistently held

²⁵ PEOPLE’S COURTS LAW, *supra* note 22 at Art. 52.

²⁶ *Id.* at Art. 49.

²⁷ See INTERNATIONAL COMMISSION OF JURISTS, ATTACKS ON JUSTICE—CUBA 4 (2005), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Cuba-Attacks-on-Justice-2005-Publications-2008.pdf>

²⁸ See LAW NO. 5 OF CRIMINAL PROCEDURE Art. 455(4) & Art. 456(19). The Law of Criminal Procedure authorizes the Minister of Justice, the President of the Supreme Court, and the Attorney General, interchangeably, to promote the review of sentences or acquittals ruled by the courts in criminal matters when the “defendant was wrongly acquitted.” In this sense, the review process can be requested, *inter alia*, when “there are facts or circumstances unknown to the court at the time of sentencing, that... lead to presume the innocence of the convicted or the convict’s involvement in an more serious or less serious offence than that which determined his punishment; or the guilt of the acquitted.”

²⁹ See Annual Report of the Inter-American Commission on Human Rights 2001. OEA/Ser./L/V/II.114 doc. 5 rev. April 16, 2002. Chapter IV. ¶¶ 48—51, available at <http://www.cidh.oas.org/annualrep/2001eng/chap.4a.htm> - CUBA (“It is clear that as regards political trials, the courts continue judging with ideological and political criteria, not by the use of proper judicial procedures. It should also be noted that the lack of judicial independence, bolstered by

that “Cuba lacks the separation of powers necessary to ensure an administration of justice, free of interference from other branches of government”³⁰ and that “Cuban courts do not effectively guarantee the rights of the accused enshrined in the American Declaration,... particularly in cases with a political connotation.”³¹ The IACHR has condemned the widespread existence of “criminal proceedings that do not offer the necessary guarantees of due process, as they are carried out in summary form, without a trustworthy defense counsel, and with juries of dubious independence and impartiality,” as well as the “use of summary trials and the ambiguity and/or broad language of certain criminal-law provisions.”³²

ii. Lack of independence of the prosecution

The Cuban Constitution holds—in a very similar manner to the constitutional provisions that eliminate the independence of the judiciary—multiple provisions that establish a system of subordination that prevent the State’s investigative body from acting in an objective and independent manner. Specifically, the Constitution, as in the case of the courts, creates a direct line of power and subordination between the attorney general and the State Council, eliminating the independence of a body that requires—as an essential element to the domain over criminal prosecutions—the performance of its duties to be independent and free from arbitrary interference.³³

Regarding the attorney general’s appointment, the Constitution and the law provide an identical procedure to the one used to appoint the judges of the supreme court. According to the Constitution and Law No. 83 of the Attorney General,³⁴ the National Assembly of the People’s Power will elect the attorney general based on the candidate presented by the president of the State Council. This process, as with the election of judges of the supreme court,³⁵ lacks the basic guarantees that allow for an independent appointment procedure.

iii. Lack of independence of the attorneys³⁶

All Cuban attorneys must be registered with the National Organization of Collective Law Offices (in Spanish, *Organización Nacional de Bufetes Colectivos*; ONBC) and the National Union of

constitutional provisions that make ideological or political references, violate the principle of equality before the law, since it places members of the Communist Party on a higher level than the rest of Cuban citizens who seek to espouse alternative opinions or take issue with the political system in place.”).

³⁰ See Annual Report of the Inter-American Commission on Human Rights 2005. OEA/Ser.L/V/II.124 doc. 5. February 27, 2006. Chapter IV. ¶ 75, available at <http://www.cidh.org/annualrep/2005eng/chap.4a.htm>

³¹ *Id.*

³² See Annual Report of the Inter-American Commission on Human Rights 2011. OEA/Ser.L/V/II. doc. 69. December 30, 2011. Chapter IV. ¶¶ 216, 226—227, available at <http://www.oas.org/en/iachr/docs/annual/2011/Chap4Cuba.doc>

³³ See CONSTITUTION OF THE REPUBLIC OF CUBA. The Constitution also sets provisions that hinder—in practice, eliminate any possibility for—the Attorney General to act independently and free from interference. In this sense, Article 128 of the Constitution provides that the Attorney General is subordinate to the National Assembly of the People’s Power and the State Council. Likewise, Article 90 provides that the State Council has the authority to “issue instructions to the Office of the Attorney General of the Republic.” This provision, which actually eliminates the Attorney General’s independence and subordinates his/her actions to the commands of the State Council, is reaffirmed in Article 128, which states that the “Attorney General of the Republic receives direct instructions from the State Council.” See also LAW OF THE ATTORNEY GENERAL OF THE REPUBLIC, Art. 2(2).

³⁴ See LAW OF THE ATTORNEY GENERAL OF THE REPUBLIC at Art. 29(1).

³⁵ See the immediately preceding section.

³⁶ Information provided by the Legal Information Center, “CubaLex.”

Cuban Jurists (in Spanish, *Unión Nacional de Juristas de Cuba*; UNJC), as a condition for practicing their profession. The ONBC was established in Cuba in 1973³⁷ and was later reorganized by the State Council in 1984.³⁸ Since then, the only attorneys authorized to practice law in Cuba are those admitted within the ONBC.³⁹

The UNJC is the organization that represents and associates all attorneys in Cuba—and abroad—registered in the lawyers' general index.⁴⁰ While the Cuban legislation provides that the practice of law is free and independent and that attorneys should only abide by the law, the same regulations command lawyers to help fulfill justice by complying and strengthening "socialist legality."⁴¹

Other than in the exceptional circumstances stated in the law, no attorney can practice law without being a member of the ONBC.⁴² Truly independent attorneys are banned from going to court to defend their clients, so they usually provide guidance to their clients without a contract and free of charge⁴³ and without any recognition of procedural legitimacy by any court.⁴⁴

In Cuba, there are no other corporations that attorneys can join to practice law. In fact, the Cuban government denies the creation of new associations in order to "avoid" the existence of organizations with similar purposes.⁴⁵ The organizations already established stand subject to inspections conducted by officials from the department of associations of the Ministry of Justice (hereinafter, MINJUS). The members of any association created without the State's recognition and run without the authorization of MINJUS may be indicted for conspiracy.⁴⁶

³⁷ See LAW OF THE ORGANIZATION OF THE JUDICIAL SYSTEM (Law No.1250), repealed by Law No. 4 of 1977.

³⁸ See LAW ON THE EXERCISE OF THE LEGAL PROFESSION AND THE NATIONAL ORGANIZATION OF COLLECTIVE LAW OFFICES (DECREE NO. 81) [hereinafter LAW OF THE ONBC], June 8, 1994. State Council. Official Gazette of the Republic (12), Extraordinary, 47. Cuba.

³⁹ *Id.* at Art. 43. Currently, the ONBC is governed by the LAW OF THE ONBC, the complimentary legislation (Resolution No. 142/84, RULES OF PROCEDURE ON THE EXERCISE OF THE LEGAL PROFESSION AND THE NATIONAL ORGANIZATION OF COLLECTIVE LAW OFFICES [hereinafter RULES OF PROCEDURE OF THE ONBC]), and the resolutions of its governing bodies.

⁴⁰ *Id.* at 55, special provision. Among the jurists registered in the UNJC are judges, prosecutors, defense lawyers, legal advisors and business consultants, notaries, civil registrars, property registrars, etc.

⁴¹ *Id.* at 48, Art. 4.

⁴² *E.g., (translation by the author)* there are certain exceptions in this provision: (1) lawyers who are occupationally related to civil societies recognized by current law; who represent or lead procedures where a State agency, cooperative, social, or mass organization is a party and where they are employed; or their leaders when it comes to facts relating their duties while in office; (2) attorneys assuming self-representation or representing their spouse or relatives within the fourth degree of consanguinity or second degree of affinity; (3) professionals who teach at law schools, and; (4) jurists exceptionally authorized by the Ministry of Justice—without being a member of the ONBC—to practice law for a set time frame or specific proceeding.

⁴³ Attorneys who want to feel useful within the Cuban totalitarian and arbitrary judicial system find themselves forced to provide guidance free of charge; otherwise, they could be indicted for conducting "illegal economic activities." See PENAL CODE Art. 228.1 (*Translation by the author*: "Whosoever, without the corresponding license or despite the existence of an expressed legal or mandatory prohibition, for profit, dedicates himself to produce, transform, or sell goods, or to render any service, shall be subject to a punishment of deprivation of freedom for a period of from three months to one year, a fine of one hundred to three hundred quotas, or both.").

⁴⁴ No court or agency from the State's administration will allow the involvement of attorneys who fail to show the legal services contract set by the ONBC.

⁴⁵ See Ministry of Justice Res. No. 1/2012, in which the Ministry of Justice denies the constitution of the "Cuban Law Association." available at (in Spanish only) <http://ajudicuba.files.wordpress.com/2012/02/resolucion-1-del-2012-de-direc-asociaciones.pdf>

⁴⁶ See PENAL CODE Art. 208.1 (*Translation by the author*: "Whosoever belongs to an association as an associate or a member not registered in the corresponding registry, shall be subject to a punishment of deprivation of freedom for a

Foreign nationals can only obtain the services of attorneys from “International Law Firm Inc.” (in Spanish, *Bufete Internacional S.A.*),⁴⁷ a corporation subordinate to the Ministry of Justice.⁴⁸ The fees for these services must be paid in Cuban convertible pesos (CUC).⁴⁹

Likewise, the Ministry of Justice regulates,⁵⁰ inspects, oversees, and controls the activity of the ONBC and its members.⁵¹ However, this effort is not aimed at securing the integrity, diligence, independence, and work ethic of attorneys in defending their clients; instead, it deceptively legitimizes the arbitrary decisions made by the Cuban executive. Specifically, the ONBC’s Code of Ethics provides that attorneys, in the exercise of the profession, must “consciously assume and contribute—within their duties—to defend, preserve and be faithful to the principles comprised in the nation, the Revolution and Socialism,” and this should be done “imbued with the righteous, noble and humane ideas of Socialism and inspired by the example set by the Commander in Chief Fidel Castro Ruz.”⁵²

Cuban attorneys face many conflicts of interest preventing them from performing their duties with integrity and independence, as their activities must be legally restrained to Marxist doctrine and must be “inspired” by the supreme leader of the country’s single party, Fidel Castro, who—under the Constitution and the law—ultimately interprets and decides what those doctrines are and how they apply to each case.

Furthermore, attorneys, like all other Cubans, are financially reliant on the State, so that any decision that could challenge the ONBC’s provisions—which is subordinate to the party’s rule—would mean serious complications for their meager source of income, as they could be left unable to practice their profession legally.

Because this totalitarian structure denies the basic guarantees for attorneys to act independently and without fear of reprisal or interference in defending their clients, there is little to nothing that attorneys can do to independently represent a client if the case has any political

period of from one to three months or a fine of up to one hundred quotas. 2. The instigators or directors of an association that is not registered shall be subject to a punishment of deprivation of freedom for a period of from three months to one year or a fine of one hundred to three hundred quotas.”).

⁴⁷ See LAW DECREE NO. 77. January 20, 1984. State Council (January 21, 1984). Official Gazette of the Republic (1), Extraordinary, 5. Cuba. Art. 1–2.

⁴⁸ See Ministry of Employment and Social Security (November 29, 2006) Res. No. 167. June 12, 2006. Official Gazette of the Republic (95), Ordinary, 1727. Cuba. Annex, at 1730.

⁴⁹ See Ministry of Justice (April 20, 2010) Res. No. 53. March 20, 2010. Official Gazette of the Republic (13), Ordinary, 478. Cuba. Second Resolve.

⁵⁰ The law regulates the different legal services provided by attorneys. See also Ministry of Justice (August 28, 2009) Res. No. 165 (August 24, 2009) Official Gazette of the Republic (32), Extraordinary, 191. Cuba. The Ministry of Justice sets the cost for each legal service, as well as the payment of fees and the circumstances in which the fee may be lowered or waived completely. Each procedure has a fee, and a contract must be made for each one. Only the counseling service is free of charge. See also *supra* note 49, at 197, resolution 4. However, due to widespread shortages in Cuba, as well as the current dual currency system, lawyers from the ONBC generally see the need to charge extra fees to survive—putting themselves at risk of incurring a serious misconduct charge, based on the rules of procedure for the exercise of the legal profession. See also RULES OF PROCEDURE OF THE ONBC at Art. 59(3)(c).

⁵¹ See LAW OF THE ONBC, *supra* note 39, at 51, First and Second Special Provision. MINJUS is in charge of authorizing the constitution, separation, amendment, or extinction of ONBC units based on the proposal submitted by its national executive board, which directly informs MINJUS on the development of its activities.

⁵² NATIONAL ORGANIZATION OF COLLECTIVE LAW OFFICES’ CODE OF ETHICS, Feb. 8, 1993, at preamble & Art. 4 available at (in Spanish only) http://www.tsp.cu/codigo_etica_onbc_abogados

connotation or harms the government's interests in any way. In practice, therefore, attorneys refrain from questioning any type of government activity or pleading human rights violations recognized in the Constitution before the courts.

Cuba has an inquisitorial criminal system—as did most Latin American criminal systems until the 90's—that encompasses all the negative aspects of this, coupled with an open subordination of judges and prosecutors to the will of the PCC and its leaders.

According to the law, attorneys can offer circumstantial evidence and testimonies from witnesses to the prosecution⁵³ and to the court,⁵⁴ thus “contributing effectively to finding the factual truth.”⁵⁵ In practice, however, judges arbitrarily restrict the production of evidence (circumstantial, statements by witnesses, etc.) when the defendant is a dissident of the regime.⁵⁶ Defendants and their attorneys—if the latter have yet been appointed—are notified of the formal indictment just a few days before the trial, thus eliminating any chance of producing and offering evidence for a sufficient defense.⁵⁷ Likewise, the law fails to provide a means to appeal and overturn such decisions, leaving defendants defenseless.⁵⁸

According to the law, criminal proceedings are open to the public; this implies that any person might legally witness trial proceedings, with the exception of cases that require protection of the privacy of juvenile victims or that limit the number of people in a courtroom due to the physical limitations of the venue.⁵⁹ However, in practice, this does not happen. Judges restrict public access and set extraordinary measures when the defendants or victims are dissidents of the regime.⁶⁰ It is common practice that officials from the Ministry of the Interior summarily arrest

⁵³ See LAW NO. 5 OF CRIMINAL PROCEDURE Art. 118, 249 & 261.

⁵⁴ *Id.* at Art. 263, 283 & 287.

⁵⁵ *Id.* at Art. 250.

⁵⁶ See ÁNGEL CARROMERO, *MUERTE BAJO SOSPECHA* 142–149 (Anaya Multimedia ed.) (2014). In 2014, Ángel Carromero published the book *Muerte Bajo Sospecha* (Translation by the author: “Death Under Suspicion”), in which he meticulously describes all the facts surrounding the death of Payá and Harold Cepero. (In the book, Carromero stated: [Translation by the author] “They [my attorneys] explained the Cuban legal system to me, or in reality lack of due process guarantees. The defense, as revealed, had no access to the evidence. They also couldn’t offer independent expert reports [circumstantial evidence]; the only authorized experts were the military soldiers appointed by the prosecution.”). See also, ANTONIO DÍAZ SÁNCHEZ, 690 VIVENCIAS DE TERRIBLES PESADILLAS 132, 148–156 (Samhallsgemenskaps forlag) (2006).

⁵⁷ See DÍAZ SÁNCHEZ, *supra* note 56. The book “690 Vivencias de terribles pesadillas” was written by Antonio Díaz Sánchez, a Cuban democracy activist and member of the MCL who, along with Payá, led the coordination of the Varela Project. On March 19, 2003, Díaz Sánchez was arrested during the Cuban “Black Spring,” when the Castro regime imprisoned 75 independent journalists, underground librarians, and democracy activists. This was considered a response to the success of the Varela Project and the rise of independent journalism on the island.

On April 3, 2014, in a process that lacked the most basic due process guarantees, Díaz Sánchez was summarily condemned to 20 years in prison for the crime of “undermining the territorial integrity and sovereignty of the State.” In the book, Díaz Sánchez stated that he was notified of the indictment—requesting 20 years imprisonment—just three days before his trial. Similarly, his attorney did not have access to the indictment until a few hours before the trial, during the night and early morning of the day before.

See also HUMAN RIGHTS WATCH, *NEW CASTRO, SAME CUBA* 58, 62–70 (2009), available at <http://www.hrw.org/reports/2009/11/18/new-castro-same-cuba-0>

⁵⁸ See LAW NO. 5 OF CRIMINAL PROCEDURE Arts. 249 & 287 (Translation by the author: “Art. 249.- It can only be protested before the prosecutor.” “Art. 287.- Rejection may only be protested through a cassation appeal (post-sentence), if the resolution was duly protested.”).

⁵⁹ *Id.* at Art. 305 (Translation by the author: “Criminal proceedings can be held privately for different reasons: state security, morality, public order, and/or respect for the victims or their relatives.”).

⁶⁰ See e.g., HUMAN RIGHTS WATCH, *supra* note 57, at 65–67. See also AMNESTY INTERNATIONAL, *ROUTINE REPRESSION:*

members of civil society not recognized by the State who try to witness the proceedings or wait outside the courthouse.⁶¹

Unlike a democracy—in which the separation of powers is promoted as a guarantee of independence that prevents, among other things, the concentration of power in decision-making—in Cuba, the justice system was intentionally deprived of these guarantees. The constitutional and legal provisions established for the Cuban justice system lack the guarantees needed to secure the independence of the courts, the prosecution, and the defense attorneys of the ONBC.

Therefore, it can be categorically stated that in Cuba there is no independence and separation of powers. Specifically, the Cuban judiciary and justice system are formed by attorneys, prosecutors, and judges whose actions are subordinated and supervised by the PCC, led by Fidel Castro since 1959, and by his brother Raúl Castro, since 2011. This system—whose bodies usually do not even pretend to be independent—is, both formally and in practice, a legal framework used by the PCC as a tool to harass, jail, condemn, and set arbitrary sanctions against any critic of the dictatorial one-party regime.

c. Harassment and systematic repression of dissidents and civil society activists in Cuba

For decades, the Cuban State has restricted and systematically violated the human rights of the individuals within its territory. The systematic nature of these violations is evidenced by the continuous attacks and harassment carried out by the Cuban government against any opposition group or individual critical of the regime.⁶²

POLITICAL SHORT-TERM DETENTIONS AND HARASSMENT IN CUBA 13 (2012), *available at* <http://www.amnesty.org/en/library/asset/AMR25/007/2012/en/647943e7-b4eb-4d39-a5e3-ea061edb651c/amr250072012en.pdf>. See, e.g., videos and press releases from different sources exposing this practice, *available at* (some videos and releases are in Spanish only) <https://www.youtube.com/watch?v=Acj8zygQJ0o#t=96>; <http://conexioncubana.net/noticias/1578-rasta-tendra-un-juicio-a-puertas-cerradas>; <http://www.martinoticias.com/content/article/22834.html>; <http://www.lanacion.com.ar/129748-juicio-a-puertas-cerradas-en-cuba>; <http://www.procubalibre.org/nota.asp?id=13875>; <http://noticias.univision.com/article/249293/2011-01-18/america-latina/cuba/cuba-comienza-juicio-por-muerte>; <http://cubanoticiasdisidentes.blogspot.com/2014/06/fechan-juicio-sonia-garro-ramon.html>; <http://www.jornada.unam.mx/2013/05/31/mundo/029n2mun>

⁶¹ See, e.g., videos and press releases from different sources exposing this practice, *available at* (some videos and releases are in Spanish only) <http://www.martinoticias.com/content/perros-policias-en-calles-de-bayamo-ante-juicio-al-rapero-el-critico/37412.html>;

<http://www.martinoticias.com/content/juicio-contr-10-opositores-orientales-dur%C3%B3-m%C3%A1s-de-doce-horas/37151.html>; http://internacional.elpais.com/internacional/2012/10/05/actualidad/1349427520_704121.html

⁶² See NÉSTOR ALMENDROS, *NOBODY LISTENED* (Cuban Human Rights Film Project) (1987), <https://www.youtube.com/watch?v=9Me-5wryFDQ>. In the documentary, poets, writers, lawyers, ex-members of the PCC, and ex-commanders of the Cuban Revolution military share their experiences as protagonists and witnesses of the abuses and crimes of the judicial system and prisons in Cuba. Jorge Valles (arrested and sentenced to 20 years in prison in 1964); Huber Matos (a commander of the Cuban Revolution, accused of “sedition” and sentenced to 20 years in prison); Raúl Carmenate (detained at 16 years old in March of 1965, liberated 14 years later in 1979); Manuel del Valle; Sergio Bravo (a Protestant pastor who preached on the streets and was detained three times, spending a total of 18 years in prison until September 1979); Alcides Martínez and Miguel Torres Calero (detained and sentenced to 20 years for “conspiring against the powers of the State,” released after 12 years); among others, denounced the threats, beatings, torture, mutilations, summary trials, executions, and murders that they witnessed or endured

For over 30 years, the IACHR has repeatedly condemned the Cuban government for enforcing policies of harassment and persecution against democracy activists, dissidents, civil society groups, and human rights defenders.⁶³

In its 1979 report on Cuba, the IACHR stated that “the legal system in Cuba prevents free expression and any expression of disagreement with the socialist system” and that its “pre-criminal and post-criminal security measures in some cases serve to intimidate and oppress individuals for having expressed their political views. There are people in prison who have never been given the opportunity to defend themselves before an impartial judge, for merely having been considered ‘harmful.’”⁶⁴

Similarly, in its 1983 report on Cuba, the IACHR condemned “the Cuban legislation which establishes limits on the exercise of the recognized rights and freedoms of its citizens. According to this formulation of the laws it is the citizen who must adapt to the purposes set by the State; whereas the concept of democracy envisions exactly the opposite: it is the State that must limit its action in the face of the inherent rights of man.” According to the IACHR, “the subordination of the individual to the State is further entrenched in Cuba by the nonexistence of a separation of governmental powers.”⁶⁵

The IACHR also condemned “the strict control and subjugation of any political and ideological divergence from the dominant ideology of the Government and the Party,” since this “has led to a situation where only those groups identified therewith may express themselves through the means of communication.” The IACHR stated that “there is no freedom of the press in Cuba [that] would allow political dissent, which is fundamental in a democratic system of government,” and that, on the contrary, “the oral, written and televised press is an instrument of the ideological struggle... that follows the dictates of the group in power.”

The IACHR also stated that “there are two characteristics of the Cuban political, economic, social, and cultural system that permit one to interpret how it operates and to evaluate how it promotes and limits the observance of human rights.” The first is the “subordination of Cuban society to the political group in power,” which “is manifested through political practice of the regime and the legal and institutional order upon which that practice is based.” The IACHR considered that the “features of the system are its exclusion of any dissident political views, the use of coercion—direct or indirect—to bring about adherence, and the absence of any effective guarantees which could render the State accountable to the people and protect them in the exercise of their rights. As a consequence, it is a totalitarian political system.”⁶⁶

In its 2003 report, the IACHR described the way that Cuban authorities systematically harass civil society groups and their members. The IACHR condemned the way that—in March 2003—the Cuban authorities “began a week-long crackdown on human rights activists and

during the decades they spent in prison.

⁶³ See, e.g., *supra* notes 17, 23 & 24.

⁶⁴ Sixth Report on the Situation of Political Prisoners in Cuba—Conclusions, Inter-Am. C.H.R., OEA/Ser.L/V/II.48 doc.7. Dec. 14, 1979, available at <http://www.cidh.org/countryrep/Cuba79eng/conclusions.htm>

⁶⁵ Situation of Human Rights in Cuba Seventh Report—Conclusions, Inter-Am. C.H.R., OEA/Ser.L/V/II.61 Doc.29 rev. 1. Oct. 4, 1983, available at <http://www.cidh.org/countryrep/Cuba83eng/conclusions.htm>

⁶⁶ *Id.*

independent journalists that culminated in the arrest of about 100 activists. They were all taken to the offices of the Department of State Security and subjected to long interrogations and other types of psychological torture.”⁶⁷ The majority of those detained, processed, and sentenced during the crackdown were “Cubans who promoted the Varela Project.” The IACHR stated that “the prominent notables from the peaceful opposition who signed the Varela Project petition, like Gustavo Arcos Bergnes, Elizardo Sánchez, Julio Ruiz Pitaluga, [and] Os[w]aldo Payá” were “arbitrarily arrested.” The IACHR noted that “Cuban authorities confiscated their documents and personal belongings and temporarily prohibited them from leaving the country,” among other things. According to the IACHR, “the Varela Project was followed by repressive acts by the Cuban State against its sponsors and the Cuban citizens who supported it.”⁶⁸

In 2005, the IACHR again condemned the way that “the authorities have stigmatized the work of human rights defenders in order to mislead part of the population about the role of persons who defend and advance human rights.”⁶⁹ The Commission noted that, “under criminal legal provisions that expressly punish the exercise of fundamental freedoms, persons involved in human rights organizations may be liable to criminal penalties, including prison terms of several years.” These “criminal penalties are also imposed under laws whose vagueness and subjectivity afford broad discretion to agents of the state in repressing any dissent against official policy.” Thus, the “offences against the State security recognized in the Cuban Criminal Code, and with which the majority of human rights defenders are charged and later convicted,” include: “enemy propaganda,” “clandestine printing,” “social dangerousness,” “rebellion,” “contempt” (*desacato*), “conspiracy,” “defamation of heroes and martyrs,” “disorderly conduct,” “sedition,” “acts against State security,” among others.⁷⁰

In 2006,⁷¹ the IACHR condemned the “acts of repudiation”⁷² carried out “against political

⁶⁷ Annual Report of the Inter-American Commission on Human Rights 2003, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 of Dec. 29, 2003 at ¶¶ 21, 23–26, available at <http://www.cidh.org/annualrep/2003eng/chap.4a.htm>

⁶⁸ *Id.* (“On February 18, 2003 the Provincial People’s Court of Santiago de Cuba sentenced two members of the Citizen’s Steering Committee of the Varela Project in the Contramaestre area to 18 months in prison. Jesús Mustafá Felipe, 58, and Roberto Montero, 32, were tried for alleged crimes of contempt and resisting arrest. The accusations and charges stemmed from heated clashes with the political police, acts of repudiation against the home of Jesús Mustafá Felipe, as repressive measures to halt the civic effort of these advocates of the Varela Project. Other members of the *Christian Liberation Movement* were arrested on the same day so they could not attend the trial. On February 13, 2003, a member of the Citizens’ Steering Committee of the Varela Project in the city of Santiago de Cuba, Vicente Díaz Espinosa, was threatened with application of Law 88 by agents of the political police, receiving an official citation from State security. Also in January 2003, a report by the *Christian Liberation Movement* confirmed that Agustín Cervantes García, José Alberto Castro Aguilar, and Yunier Santos de la Cruz were being held in Mar Verde Prison in Santiago de Cuba, and Raúmel Vinajera Stivens was in custody in Boniato Prison in the same province. All were arrested without just cause and awaiting trial because they were members of the *Christian Liberation Movement* and advocates of the Varela Project. On January 15, 2003, Cuban Republican Party activist Roberto Oliveros Rodríguez was harassed by agents of the “Rapid Response Brigades” in front of his home in the city of Santiago de Cuba. Demonstrators screamed obscenities at him and warned him to leave the country. The activist was promoting the Varela Project among the people and a campaign urging his neighbors to abstain in the general election of January 19, and authorities wanted to muzzle his activism. That same month Yunier Santos de la Cruz, a member of the *Christian Liberation Movement* and activist on behalf of the signature campaign for the Varela Project, was arrested and taken to Mar Verde Prison in Santiago de Cuba to complete his compulsory military service, which he had decided to quit because of the cruel, inhumane, and degrading treatment at the hands of the police, which he had denounced.”).

⁶⁹ Annual Report Of The Inter-American Commission On Human Rights 2005, OEA/Ser.L/V/II.124. Doc. 7. Feb. 27, 2006 at ¶ 95, available at <http://www.cidh.org/annualrep/2005eng/toc.htm>

⁷⁰ *Id.* ¶ 101. See also LAW NO. 5 OF CRIMINAL PROCEDURE Art. 258 (Translation by the author: “Defendants shall be excluded from the benefit of bail regarding: 1. Crimes against State security.”).

⁷¹ Annual Report of the Inter-American Commission on Human Rights 2006, OEA/Ser.L/V/II.127. Doc. 4 rev. 1. Mar.

dissidents who are not in jail.” These actions consist of “harassment and intimidation carried out by groups of government supporters, among them the Committees to Defend the Revolution and the People’s Rapid Response Outposts against people they consider ‘counterrevolutionaries.’”⁷³ The IACHR noted that “these kinds of repudiation actions against political dissidents, involving persons connected with the Government of Cuba, run counter to the American Declaration, inasmuch as they ignore human dignity and the freedom all persons are entitled to irrespective of their political ideas.”⁷⁴

In 2007, the IACHR stated “that Cuba is the only country in the Hemisphere where it can be categorically said that there is no freedom of expression.”⁷⁵ Such statements are based on the following persistent conditions: a) deprivation of personal freedom as a result of expression of opinions or criticism by journalists and dissidents; b) restrictions to the right of access to information over the Internet; c) indirect restrictions on the practice of journalism applied to the international media and correspondents; and, d) the criminalization of public demonstrations.⁷⁶

The IACHR also condemned the use of “criminal proceedings as a way to punish and restrict the free expression of opinions,” as well as the use of “vague provisions of criminal law as being a ‘pre-criminal danger to society’”⁷⁷ enforced by Cuban judges.⁷⁸ Finally, the IACHR stated that “restrictions on political rights, on freedom of expression and on the dissemination of ideas, the failure to hold elections and the absence of an independent judiciary in Cuba combine to create a permanent panorama of breached basic rights for the Cuban citizenry.”⁷⁹

In 2008, the IACHR deplored “the difficult situation faced by organizations in Cuba to inform the international community about the situation of human rights in Cuba because of potential reprisals, among other reasons.” In this report, the IACHR also announced how difficult it was “to send messages to people living in Cuba because of reports complaining of being harassed by government authorities for receiving communications from this body.”⁸⁰

In its 2009 report, the IACHR held that “Cuba is the country in the Americas with the largest

3, 2007, available at <http://www.cidh.org/annualrep/2006eng/TOC.htm>

⁷² See, e.g., videos from different sources exposing this practice, available at (in Spanish only) http://www.youtube.com/watch?v=x-WYp8U_C7A; <https://www.youtube.com/watch?v=mdZSlgmtPXc>

⁷³ See Annual Report of the Inter-American Commission 2006, at ¶ 71 (“The Committees to Defend the Revolution and the People’s Rapid Response Outposts are made up of a large number of people who collectively guard against counterrevolutionary activities and confront any sign of opposition to the government.”).

⁷⁴ *Id.* ¶ 76.

⁷⁵ Annual Report of the Inter-American Commission on Human Rights 2007, OEA/Ser.L/V/II.130 Doc. 22 rev. 1. Dec. 29, 2007 at ¶ 127, available at <http://www.cidh.org/annualrep/2007eng/TOC.htm>

⁷⁶ *Id.*

⁷⁷ See PENAL CODE Arts. 72, 76(1) & Art. 91 (*Translation by the author*: “Art. 72.- Dangerousness is considered the special inclination which an individual has to commit crimes depicted by his behavior in manifest contradiction to the rules of socialist morality.” “Art. 76(1).- The security measures may be decreed to prevent the commission of offenses or due to their commission. For the former case, they are called pre-criminal security measures; for the latter, post-criminal security measures. 2. The security measures are applied when the individual depicts any of the dangerousness indicators provided for under articles 73 and 74.” “Art. 91.- Whosoever, in the interest of a foreign State, carries out an act with the aim of harming the independence of the Cuban State or the integrity of its territory shall be subject to a punishment of deprivation of freedom for a period of from ten to twenty years or death.”).

⁷⁸ See Annual Report of the Inter-American Commission 2007, at ¶ 129.

⁷⁹ *Id.* ¶ 154.

⁸⁰ Annual Report of the Inter-American Commission on Human Rights 2008, OEA/Ser.L/V/II.134 Doc. 5, rev. 1 Feb. 25, 2009 at ¶ 234, available at <http://www.cidh.org/annualrep/2008eng/TOC.htm>

number of journalists and writers detained for freely express[ing] their thoughts and ideas.”⁸¹

For all of the reasons detailed above, it can be stated categorically that the Cuban State systematically violates the rights and freedoms of its citizens. No citizen is allowed to freely exercise their rights if such exercise is considered by authorities as contrary to “the decision of the Cuban people to build socialism and communism,” an arbitrary standard that entails any expression that could be interpreted by the government as critical or conflicting with its goals. Cubans who dare to oppose this official ideological doctrine, such as democracy activists, are shown on State-owned media and disqualified as “worms,” “mercenaries,” and “counterrevolutionaries.”⁸²

Cuban authorities systematically harass these activists. They are beaten; detained for long or short periods of time without trial and without notification given to their families; subjected to unlawful detention under vague provisions of criminal law such as “pre-criminal security measures” (meaning, before a crime is committed), which, in practice, allows for the police—under the vague and intentionally inaccurate provision of “antisocial conduct”—to arrest and detain activists who have not committed a crime; indicted and summarily convicted by a judiciary with no independence; and often subjected to “acts of repudiation,” or public acts of contempt and humiliation, usually organized by the Committees for the Defense of the Revolution, in which mobs surround the house of a member of the opposition before threatening and beating them. This usually includes blocking the entrance of their homes with trash or waste and defacing the outside of their homes with offensive graffiti, including insults, threats, and praises of the revolution and Fidel Castro.⁸³

It can be concluded categorically, based on the information detailed in the previous sections, that the Cuban State is ruled by a fully authoritarian regime,⁸⁴ a totalitarian government or dictatorship.⁸⁵ Under this regime, there is no guarantee of independence in the administration of

⁸¹ Annual Report of the Inter-American Commission on Human Rights 2009, OEA/Ser.L/V/II. Doc. 51, rev. 1. Dec. 30, 2009 at ¶ 358, available at <http://www.cidh.org/annualrep/2009eng/TOC.htm>. See also Annual Report of the Inter-American Commission on Human Rights 2012, OEA/Ser.L/V/II.147 Doc. 1. Mar. 5, 2013 at ¶ 48, available at <http://www.oas.org/en/iachr/docs/annual/2012/TOC.asp> (“[I]n the course of 2012, information has continued to be received on physical attacks, threats, harassment, and acts of repudiation against human rights defenders, particularly in the context of the repression of expressions of social protest related to the rights of persons deprived of liberty due to their dissidence or political opposition.”).

⁸² See e.g., *supra* note 24.

⁸³ See CLAUDIO FUENTES, GUSANO (Estado de Sats) (2014), available at <https://www.youtube.com/watch?v=pW7i48fSCZ4>. See, e.g., videos from different sources exposing this practice, available at (in Spanish only) <https://www.youtube.com/watch?v=2Job1kdPMEA>; https://www.youtube.com/watch?v=x-WYp8U_C7A & <https://www.youtube.com/watch?v=aXQCum6wYYM>

⁸⁴ See STEVEN LEVITSKY & LUCAN WAY, COMPETITIVE AUTHORITARIANISM HYBRID REGIMES AFTER THE COLD WAR 6–7 (Cambridge University Press) (2010) (“Full authoritarianism is a regime in which no viable channels exist for opposition to contest legally for executive power. This category includes closed regimes in which national-level democratic institutions do not exist and hegemonic regimes in which formal democratic institutions exist on paper but are reduced to façade status in practice. In hegemonic regimes, elections are so marred by repression, candidate restrictions, and/or fraud that there is no uncertainty about their outcome. Much of the opposition is forced underground and leading critics are often imprisoned or exiled.”).

⁸⁵ The term “totalitarian” or “totalitarianism” was coined in the first half of the 20th century. Different authors attribute the coining of the term to different sources. According to the author Richard Pipes (See RICHARD PIPES, RUSSIA UNDER THE BOLSHEVIK REGIME 240–281 [Vintage Books, Random House Inc.] [1995]), the notions of “total” political power and “totalitarianism” were formulated in 1923 by an opponent of Mussolini, Giovanni Amendola (later murdered by the Fascists), who, having observed Mussolini’s systematic subversion of state institutions, concluded that his regime differed fundamentally from conventional dictatorships.

justice or respect for the fundamental rights of citizens, especially for those who openly express their disagreement with the government.

B. Chronology of events

a. Facts according to the Cuban government

On July 22, 2012, Oswaldo Payá was traveling by car from Havana to Santiago de Cuba. Cuban pro-democracy activist Harold Cepero, Spanish youth party leader Ángel Carromero, and Swedish politician and chairman of the Young Christian Democrats Jens Aron Modig were traveling with him. Carromero was driving the vehicle, a Hyundai Accent with the tourism license plate T31402; Modig was riding in the front right seat, while Payá sat in the backseat on the left, next to Cepero.⁸⁶

According to the Cuban government, at approximately 1:50 p.m., Carromero lost control of the vehicle and crashed into a tree on the side of Las Tunas-Bayamo highway, near the town of La Gabina, about 22 kilometers from the city of Bayamo, a province of Granma.⁸⁷ According to the Cuban government, Oswaldo Payá and Harold Cepero died in the event, while Carromero and Modig suffered only minor injuries from the crash.⁸⁸ Carromero and Modig were then taken to the Docente Carlos Manuel de Céspedes Hospital in the city of Bayamo.

According to Stanley Paine (*See* STANLEY PAINE, *FASCISM COMPARISON AND DEFINITION* 73 [UW Press] [1980]), the term was used years later with a positive meaning in the works of Giovanni Gentile, philosopher and proponent of Italian fascism. Gentile used the term “totalitarian” to refer to the structure and goals of the “new State” that would provide the “total representation of the nation and the complete guidance of the nation’s goals.”

Meanwhile, in his 1927 book *The Concept of the Political* (*See* CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* [George Schwab trans., University of Chicago Press 2007] [1932]), Carl Schmitt used the term “total State” (*Totalstaat*) to refer to this political regime.

Lastly, the author Christopher Hitchens (*See* CHRISTOPHER HITCHENS, *GOD IS NOT GREAT* 79 [Twelve Editions] [2007]), stated that “the word ‘totalitarian’ was probably first used by the Marxist dissident Victor Serge (Victor Lvovich Kibalchich), who had become appalled by the harvest of Stalinism in the Soviet Union.” In 1928, Serge was expelled from the Communist Party of the Soviet Union for his criticism of Stalin.

While there is no final consensus on the definition of a totalitarian system, the majority of authors agree on its very basic characteristics: Totalitarian systems are undemocratic political regimes that are characterized by the systematic suppression of the liberties of its citizens. These range from the right to life of the “undesirables” (ideologically defined as such), to freedom of expression, association, assembly, movement, personal appearance, etc. It is the State (the government or political party) that sets the course of the public and private lives of the citizens. There are no restrictions, in law and in practice, on political power; there is no separation between the branches of government or tolerance for diversity. In totalitarian systems, there are no official institutions that citizens can petition and ask to be redressed from the authorities’ repression or from acts committed by third parties, if they have any undesirable political implication for the government. There is a prolific State apparatus based on a single political party that monopolizes all power. The leader of the party—in most cases, the leader of the nation—is revered and, in some cases, worshipped. To remain in power, such regimes systematically repress the population, eradicating any opposing view to official policy, generally making use of the army and secret police services to do so.

⁸⁶ See press release from Cuba’s official newspaper GRANMA, *Note from the Ministry of the Interior*, July 31, 2012 (the official release and also the PDF version of the print edition are no longer available online at granma.com. However, the reproduction of the official release can be found in the following website) *available at* (in Spanish only) http://www.cubadebate.cu/noticias/2012/07/27/nota-oficial-del-ministerio-del-interior/#.U5HuZi_TkoY

⁸⁷ *Id.*

⁸⁸ See press release from Cuba’s official newspaper GRANMA, *Two people died in regrettable road traffic accident in Granma province*, July 23, 2012 (the official release and also the PDF version of the print edition are no longer available online at granma.com. However, the reproduction of the official release can be found in the following website) *available at* (in Spanish only) http://www.cubadebate.cu/noticias/2012/07/22/dos-personas-fallecen-en-lamentable-accidente-de-transito-en-la-provincia-granma/#.U5HuvC_TkoY

According to a note released by the Ministry of the Interior (MININT): “the section of the highway where the accident took place [was] being repaired, the surface of the road [was] unpaved for a stretch of around two kilometers, which made a kind of embankment with plenty of gravel, and was therefore very slippery.”⁸⁹

According to the statement of facts given by José Antonio Duque de Estrada,⁹⁰ an alleged eyewitness of the events quoted on the MININT’s release:

The car went past me at full speed, I am sure it was going over 100 kilometers per hour. It passed a tractor that was also going in the same direction, and after that, I saw a huge cloud of dust rise when it got onto a part of the road that was in bad condition. When I got close, after the dust settled a little, I saw that the car crashed right into the ditch against a tree. From my perspective, the most obvious reason for the accident was the excess of speed. When it fell into the slope, it was not the same as being on the roadway, no brake was going to work, the car could not get any traction, and it skidded and crashed into the tree.

Also, Lázaro Miguel Parra Arjona,⁹¹ another alleged witness of the events, stated that: “the car passed me at great speed; then I saw a large cloud of dust, and when the dust settled, I was able to see the car crashed into the tree that’s in the ditch.” Finally, Wilber Rondón Barrero,⁹² who had also allegedly witnessed the event, stated: “as I got closer I could see that the car was losing control and then crashed into a tree in the ditch.”

A team from the crimes division, composed of Misael Fontes Pérez,⁹³ Inardi Reyes Uriarte,⁹⁴ and Fidel Núñez Guevara,⁹⁵ concluded that the event happened for two reasons: first, the speed at which Carromero was driving; and secondly, the fact that the brakes were hit abruptly when the vehicle was on a slippery surface.

On July 30, 2012, in a video broadcasted by state-owned media in Cuba—the veracity of which was later denied by Carromero once he left the island—Carromero stated the following:⁹⁶

Last time I checked, I was, in fact, traveling at 80 kilometers per hour, but when the accident happened I didn’t look at the odometer; therefore, I can’t really say exactly how fast I was going. I hit the brakes because I saw the hole and the sand. I lost control of the car because we’d entered into a graveled area—I’d lost stability and I wasn’t able to control the direction, I lost control of the car, and I don’t remember anything else.

No vehicle hit us from behind, I was just driving and then I realized there was a pothole and I took the measures any driver [would], which is to lightly push on the brakes. The car lost control and I don’t remember seeing any signs, no signs.

⁸⁹ See *supra* note 86.

⁹⁰ Duque de Estrada is an employee of the Instituto Nacional de Recursos Hidráulicos (INRH) and a resident of the Río Cauto municipality.

⁹¹ Tractor operator for the INRH, resident of the Yara municipality.

⁹² Farmer in the Río Cauto municipality.

⁹³ Breakdowns, Explosions and Fires Officer.

⁹⁴ Head of the Crimes Division of the Granma province.

⁹⁵ Head of Transit Engineering in the Granma province.

⁹⁶ See video at (in Spanish only) http://www.youtube.com/watch?v=yPi_R4B8Eu0.

See also <http://www.youtube.com/watch?v=EB0phUw5RM8>

...

Regarding the news that I've been allowed to read, I ask the international community to please focus on getting me out of here, and not use a traffic accident—which could've happened to anyone—for political purposes.

In the same video broadcasted by state-owned media in Cuba, Modig stated:⁹⁷

I just have a few memories from the actual accident, because I was sleeping during some parts of the trip and it's possible that I was sleeping just before the accident.... Anyway, the first memory that I have from the accident is that we had lost control of the car and we were heading towards a tree at the side of the road, and I don't remember anything else after that moment. The second memory I have is from some kind of ambulance or car, and the third one I have is of finally arriving at the hospital after the accident.

On July 31, 2012, Cuban authorities organized a press conference, in which Modig stated:⁹⁸

For this trip my instructions were to fulfill three goals: the first one was to meet with Mr. Oswaldo Payá to hand over some money [*sic*]; the second goal was to meet with young people from Oswaldo Payá's movement and exchange experiences; and the third goal was to see if Mr. Oswaldo Payá wanted to travel anywhere in the country, and that I should help him and accompany him with the trip.

In a round of questions that followed the press conference, the following exchange occurred:⁹⁹

Alina Perera, Rebel Youth newspaper: I would like to ask you two questions. First, about the accident itself—what happened on July 22? Some have said that a vehicle pushed the car that you and the other travelers were traveling in, off the road—meaning that it was not an accident, but that it was deliberate instead. Is this true? What would you say? The second question is about your goal of supporting Payá on the activities he was going to carry out in Santiago de Cuba. Did you know the details of the itinerary and all the activities Payá was going to carry out in Santiago?

Modig: To the first question. I didn't see anything abnormal; it was an accident. As for the second question, I know that Mr. Payá was supposed to meet with some people there, but I don't know when or how.

Sarah Rainsford, BBC News: I would like you to clarify about the accident itself. There has been a lot of speculation. Was there a third vehicle? Can you tell us anything about what really happened?

Modig: I don't remember there being another car involved in this accident.

Fabiola López, Telesur network: Mr. Payá's widow has told the press that a friend of hers in Stockholm told her that you sent text messages to her after the accident. I would like to know if this is the case, and if you sent text messages to Sweden, what messages did you send?

⁹⁷ *Id.*

⁹⁸ See the video of the press conference, at <http://www.youtube.com/watch?v=erLi5KOJlIk>

⁹⁹ *Id.*

Modig: I sent text messages, but I don't know to how many people after the accident and during my stay at the hospital. But not to Mr. Payá's daughter.

Fabiola López: No, not to his daughter, to a friend.

Modig: To friends in Sweden. No, I don't remember, I was simply telling people I was ok after the accident, I can't remember who specifically.

...

Andrea Rodríguez, AP: Frankly, how can we believe that when you go back to Sweden you won't change your statement? How can we know, for example, that right now you are not being forced by the Cuban authorities to make these comments and apologize? How honest are you being?

Modig: In this case, my apologies are sincere. All the Cubans I've met here in Cuba, everyone, they have all been very kind and treated me well. That's my answer.

Sagrario García, Spanish Television: Do you know when you'll be leaving Cuba?

Modig: I don't know.

b. Criminal trial of Ángel Carromero

On September 17, 2012, the First Criminal Court of the People's Provincial Court of Granma (hereinafter, the Granma court) set a date of October 5, 2012, for the preliminary hearing of the trial against Carromero for the alleged crime of vehicular homicide.¹⁰⁰

On September 26, 2012, during the 67th session of the United Nations General Assembly, Cuba's foreign minister, Bruno Rodríguez, told his Spanish counterpart, José Manuel García-Margallo, that he was confident Carromero's trial would be "relatively quick."¹⁰¹

On October 4, 2012, blogger and democracy activist Yoani Sánchez, her husband Reynaldo Escobar, and Agustín López, an independent journalist, traveled to the city of Bayamo in order to attend Carromero's trial. However, they were arbitrarily detained by authorities before reaching Bayamo, thus preventing them from attending the trial. Sánchez and her husband were released after being detained for 30 hours.¹⁰² According to Rosa María Payá, "during these days, the city of Bayamo was besieged by the police and the state security. They arrested many members of the opposition and dissidents living in that city. They also closed the city's main

¹⁰⁰ See press release from Cuba's official newspaper GRANMA, *Court sets date for the trial against Spanish national Ángel Francisco Carromero Barrios*, Sept. 18, 2012 (the official release and also the PDF version of the print edition are no longer available online at granma.com. However, the reproduction of the official release can be found in the following website) available at (in Spanish only) http://www.cubadebate.cu/noticias/2012/09/17/fija-tribunal-fecha-del-juicio-en-la-causa-seguida-al-ciudadano-espanol-angel-francisco-carromero-barrios/#.U5IYgi_TkoY

¹⁰¹ See news report from website MSN LATINO, *El canciller cubano espera que el juicio a Carromero sea "relativamente rápido,"* Sept. 26, 2012, available at (in Spanish only) <http://noticias.latino.msn.com/eeuu/el-canciller-cubano-espera-que-el-juicio-a-carromero-sea-relativamente-rapido-2>. See also news report from newspaper EL PAÍS, *Cuba pronostica un juicio rápido para el dirigente del PP detenido*, Sept. 26, 2012, available at (in Spanish only) http://politica.elpais.com/politica/2012/09/27/actualidad/1348697589_878152.html

¹⁰² See news report from EL IMPARCIAL, *Detenida la opositora cubana Yoani Sánchez*, Oct. 5, 2012, available at (in Spanish only) <http://www.elimparcial.es/america/detenida-la-opositora-cubana-yoani-sanchez--112185.html>

access points and inspected the vehicles that were trying to get in.”¹⁰³

On October 5, 2012, the Granma court, with Judge Milson Piña Hidalgo presiding, held the oral and public hearing for Carromero’s trial. After a presentation by Judge Hidalgo, the trial began with a statement from Carromero, who was then examined and cross-examined by Dorisbel Rojas, the defense attorney, and by Isabel Bárzaga, the Cuban prosecutor.¹⁰⁴

Carromero ratified the statements he made during the preliminary investigation and confirmed that he had lost control of the vehicle when he hit a pothole in the road.¹⁰⁵

During the concluding stage of the hearing, prosecutor Bárzaga stated that Carromero was responsible for the accident based on the speed at which he was driving and because he failed to note—among other things—the signs indicating that the section of the road in question was undergoing maintenance.¹⁰⁶

Bárzaga pointed out that Carromero’s driving record included 45 traffic tickets in Spain, three of them for speeding. The Cuban prosecutor said: “we are in the presence of a truly reckless person,” stressing that Carromero’s behavior could not be considered as an “isolated” event, but instead a “common” occurrence. On the other hand, Rojas stated that Carromero was not responsible for the accident and that the accident happened due to insufficient signposts and the poor condition of the road.¹⁰⁷

After the hearing, the prosecution requested a seven-year prison sentence for Carromero for the crime of “vehicular homicide.”¹⁰⁸ The court thus ended the hearing and announced it would issue a verdict in another hearing.¹⁰⁹

On October 15, 2012, the court issued a judgment convicting Carromero of vehicular homicide, sentencing him to four years in prison.^{110 111}

¹⁰³ Interview conducted with Rosa María Payá by the Human Rights Foundation on June 18, 2015.

¹⁰⁴ See news report from online newspaper 20 MINUTOS, *Arranca en Cuba el juicio al español Ángel Carromero: “Lo siento profundamente,”* Oct. 5, 2012, available at (in Spanish only) <http://www.20minutos.es/noticia/1608469/0/juicio-cuba/carromero/homicidio-imprudente/>

¹⁰⁵ See news report from newspaper EL PAÍS, *El juicio a Carromero por el accidente que mató a Payá queda visto para sentencia*, Oct. 6, 2012, available at (in Spanish only) http://internacional.elpais.com/internacional/2012/10/05/actualidad/1349422322_541761.html

¹⁰⁶ See news report from EFE NEWS AGENCY, *El juicio contra Carromero en Cuba concluye y queda visto para sentencia*, Oct. 5, 2012, available at (in Spanish only) <http://www.efe.com/efe/noticias/espana/portada/juicio-contracarromero-cuba-concluye-queda-visto-para-sentencia/1/1/1883503>

¹⁰⁷ *Id.*

¹⁰⁸ See news report from online newspaper ABC, *La defensa de Carromero pide absolución con «abundantes alegaciones»*, Oct. 5, 2012, available at (in Spanish only) <http://www.abc.es/20121005/internacional/abci-defensa-carromero-pide-absolucion-201210042116.html>

¹⁰⁹ See press release from Cuba’s official newspaper JUVENTUD REBELDE, *Concluso para sentencia el proceso penal seguido contra el ciudadano español Ángel Francisco Carromero Barrios*, Oct. 6, 2012, available at (in Spanish only) <http://www.juventudrebelde.cu/cuba/2012-10-06/concluso-para-sentencia-el-proceso-penal-seguido-contrael-ciudadano-espanol-angel-francisco-carromero-barrios/>

¹¹⁰ See PENAL CODE Arts. 177 & 9(1) (Translation by the author: “Art. 177.- The driver of a vehicle who, infringing the traffic laws or regulations, provokes the death of an individual shall be subject to a punishment of deprivation of freedom for a period of from one to ten years.” “Art. 9(1).- The offense can be committed intentionally or by negligence 2. The offense shall be intentional when the agent performs the action or omission consciously and willfully and wanted its result, or when, without wanting said result, predicted the possibility of occurrence and

Between December 12 and December 13, 2012, delegates of the Ministry of Justice from both Cuba and Spain met in Havana to discuss Carromero's transfer to Spain. This discussion was a result of a treaty between the Kingdom of Spain and the Republic of Cuba about the enforcement of criminal judgments, which was signed by Cuba and Spain on July 23, 1998.¹¹² In exchange for Carromero's transfer, Spanish representatives guaranteed that his sentence would be completed at a Spanish penitentiary. They also offered to keep the Cuban government informed about the enforcement of the sentence.¹¹³

On December 14, 2012, the Cuban Foreign Ministry confirmed the agreement with Spain for Carromero's transfer.¹¹⁴

c. Facts not considered by the prosecution or collated by the court in the case of Ángel Carromero that suggest the possibility that State agents killed Oswaldo Payá

i. Information available to the public

On July 22, 2012, Yohandry Fontana¹¹⁵—an anonymous writer who often reproduces Cuban government propaganda and whose op-eds generally attack opposition members, frequently calling them “worms,” “mercenaries,” or “CIA agents”—posted on Twitter at 4:15 a.m., saying: “Oswaldo Payá is going on vacation to Varadero. This business of being a dissident in Cuba is a mess. They left Twitter unguarded.”¹¹⁶ On the same day, Félix Rivero Cordoví, an activist and

assumed this risk. 3. The offense shall be committed by negligence when the agent predicted the possibility of occurrence of the socially harmful consequences of its action or omission, but expected, carelessly, to avoid them; or when he did not predict the possibility of occurrence although he could have or should have predicted them. 4. Should, as a consequence of the action or omission, there be a more serious result than the one wanted, decisive for a more severe punishment, this shall be imposed solely if the agent could have or should have predicted said result.”). On November 2, 2013, Carromero sent HRF a copy of the judgment of conviction against him. The judgment, in all relevant aspects, ratified the version of the facts presented by the government just days after the deaths of Payá and Cepero. Conviction judgment number 573/2012, entered by the First Criminal Court of the People's Provincial Court of Granma, is the only court document relevant to his case that Carromero was allowed to see or keep after the trial.

¹¹¹ See news report from online newspaper HAVANA TIMES, *Carromero gets 4 years for dissidents' death*, Oct. 16, 2012, available at <http://www.havanatimes.org/?p=80317>. See also press release from Cuba's official newspaper GRANMA, *Dicta el Tribunal sentencia condenatoria contra el ciudadano español Ángel Francisco Carromero Barrios*, Oct. 16, 2012, (the official release and also the PDF version of the print edition are no longer available online at granma.com. However, the reproduction of the official release can be found in the following website) available at (in Spanish only) http://www.cubadebate.cu/noticias/2012/10/15/dicta-tribunal-sentencia-condenatoria-contra-ciudadano-espanol-angel-francisco-carromero-barrios/#.U5JDCy_TkoY

¹¹² See TREATY BETWEEN THE KINGDOM OF SPAIN AND THE REPUBLIC OF CUBA ON THE ENFORCEMENT OF CRIMINAL JUDGMENTS, available at http://www.boe.es/diario_boe/txt.php?id=BOE-A-1998-25591. The accord allows for convicted criminals to be able to serve their sentences in their country of citizenship.

¹¹³ See news report from online website TELEVISIÓN CAMAGÜEY, Dec. 15, 2012, available at (in Spanish only) http://www.tvcamaguey.icrt.cu/index.php?option=com_content&view=article&id=33200:angel-carromero-terminara-de-cumplir-su-sancion-en-espana&catid=3:Destacado

¹¹⁴ See news report from newspaper EL UNIVERSAL, *Cuba confirma el acuerdo con España para el traslado de Ángel Carromero*, Dec. 14, 2012, available at (in Spanish only) <http://www.eluniversal.com/internacional/121214/cuba-confirma-el-acuerdo-con-espana-para-el-traslado-de-angel-carromer>. See also news report from newspaper EL DÍA, *El Gobierno anuncia el traslado de Carromero a España para cumplir condena*, Dec. 14, 2012, available at (in Spanish only) <http://eldia.es/2012-12-14/nacional/2-Gobierno-anuncia-traslado-Carromero-Espana-cumplir-condena.htm>

¹¹⁵ See <https://twitter.com/Yohandry8787> (last visited Mar. 20, 2015).

¹¹⁶ See screen shot of the tweet at (in Spanish only) <http://www.oswaldopaya.org/es/up/twit-yoha1.png>

member of the Youth Movement for Democracy, stated during a phone call:¹¹⁷

I'm denouncing that Oswaldo Payá Sardiñas died at five in the afternoon of today, here in Bayamo... [in] an accident [in which] he crashed with a squad car on the side of Río Cauto. His fellow also died... plus two foreigners who are seriously [hurt] at the Carlos Manuel de Céspedes hospital, here in Bayamo.

ii. Information obtained by the family

On July 23, 2012, friends and members of the MCL reported to the Payá family the facts and evidence excerpted below that they had obtained from witnesses at the Carlos Manuel de Céspedes hospital on the night of July 22, 2012:¹¹⁸

A bicycle, a tractor, and [the car carrying Payá, Modig, Carramero, and Cepero] were all coming. This is what the witnesses say happened, the ones on the bicycle and the tractor. I spoke to the officer Fulgencio Medina and that is what he told me. He says—and he told all of us that were there, Father Juan, Father Manolito, and all of the officers—he says: “I am going to tell you what happened.” He said that a bicycle, a tractor, and [the car] were coming. One of the witnesses in his statement says—he was reading this to us—“in one moment, Oswaldo’s car was ahead of everyone’s. His car was ahead of the bicycle and the tractor, [and] the red Lada¹¹⁹ went ahead, too, and that’s when the shift happened, from the road to the dirt.” The man on the bicycle says that he “only saw the dust when the car crashed.” That was when the man on the tractor said, “Hey, it looks like something happened....” The Lada seemed to have been driving parallel to them, and at one point it drove ahead.... They started spinning, crashed into the tree, and fell into the ditch.

In that moment, the people in the red Lada were the ones to get out and call for help. This is what the witness on the bicycle recounts. First, they took out the Spaniard, the foreigner, but there was still someone else crying out, probably Harold. So, they tried to take Harold out of the car, but it seemed that his leg was injured and he kept touching his chest, like it was hurting him tremendously. The other person in the car—they didn’t try to take him out because when they touched him, they realized that he was already dead and that there was nothing they could do. So what they tried to do was help, but they took out both of the foreigners first, then they took out a cellphone and called for help; they said, “Send an ambulance here, there has been an accident.” The people in the red Lada had a cellphone. This is what the officer recounts.

...

In that moment, a blue truck came, so the blue truck is the one that rescued them. They put the wounded [into the truck], and the blue truck leaves for the hospital. When they leave [for the hospital], the blue truck and the ambulance cross paths. Immediately, they take [the injured] and put them in the ambulance and they return to the scene.

¹¹⁷ Audio from the phone call *at* (in Spanish only) <https://www.youtube.com/watch?v=r1PyuQgCIIs>. The content of the phone call was edited for clarity.

¹¹⁸ The names of those who provided the information have been omitted to avoid reprisals. The content of the recording was edited for clarity.

¹¹⁹ Lada is a trademark owned by Russian automobile manufacturer AvtoVAZ. The company was established in the late 1960’s (under the Soviet Union) in collaboration with Fiat to produce a simple and long-lasting “people’s car.” Lada cars appeared in Cuba in the mid 1970’s. They became popular in the 80’s, and by the end of the decade represented more than 30% of the cars used in the country. Ladas were used as taxis, police cars, transportation for government officials, etc. See news report and video from BBC NEWS, *Soviet Lada cars are still the most popular in Cuba*, Aug. 18, 2011, available at <http://www.bbc.com/news/world-latin-america-14564585>.

Do you realize? They had left Oswaldo. So they return to the scene, and that's when you [Rosa María Payá] call; and the transit officer is the first to tell you. In reality, they didn't know whose cellphone it was because everything was scrambled, everything was scattered—the backpacks, the cellphones, stuff... they really didn't know, that's what he says. So I asked him, "They told me that she called and that you told her that he had passed away?" And they told me: "his daughter called and the one who answered was the medical investigator that came in the ambulance." It caught my attention that the ambulance had come so quickly, that a medical investigator came in the ambulance. These are significant things—to call an ambulance here in Cuba? There is no 9-1-1 here.... The witnesses say that when the people in the red car approached to help them—according to what the officer says—the Spaniard asked them, "who are you and why did you do this to us?" This is what the officer said. Because this officer is the one who came from Río Cauto... and he told us everything he knew and everything he had.

...

When they, at 8:30 [p.m.], tell me that they are going to take him [Payá] directly to Havana, that's when we see the corpse [of Payá], because we had not been able to see it before. We see that it has not been refrigerated.... They told me, "there are no cooling chambers here...." So the director of the hospital and the coroner were there and they told me, "let's go so that you can see." I check all of the chambers to make sure that there actually aren't any cold chambers. There were other corpses that were outside as well. That is when, for the first time, I saw Oswaldo's corpse. Before that, I had not seen it.... He was the same—when I see him in the bed, he looks the same. I mean he has blood everywhere, his head was to the side and there was blood, his arms were extended. He changed after they did the autopsy.

...

Harold had trauma. The doctor told us, "he is ready to die, he is dying."

...

The people in the clinic were the ones to tell me about the Spaniard. One was accompanying the other, because when we came in, they took us out. They were asking him [the Spaniard] some questions. The officer said that they were going to ask questions that were about the accident, so that's when they started talking to them.

So this woman tells me that he was worried about insurance. The officers, I think, at one moment said that the Spaniard kept contradicting himself; he said that he was driving but then said that he wasn't, that the Swede was the one who was driving. The Spaniard was worried about insurance.... What I understood was that the officer told him [something] like, "you're not going to get out of this one;" "you're not going to have a solution;" "they're not going to pay you the insurance." He told him [Carromero] something like that; that because of how the events unfolded, he couldn't charge the insurance company. So that's when the Spaniard got upset and said that he wasn't going to say anything else until the representatives from the embassy arrived. From then on, they sedated the Spaniard. We couldn't see the Spaniard—at least I didn't see him again—and later he was completely covered with a sheet; when I came back later he was covered from head to toe.

...

I tried to talk to the Swede, but he only spoke English. Father Manolito told him, "I am a priest." He told him in English, with the little English Manolito and I spoke. He gave him a blessing.

When he saw us, he changed his mood; he smiled and realized that we were other people; that we were not the people he had seen there. So I told him I was Oswaldo and Ofelia's friend and that we wanted to know what had happened. He told me something that I didn't understand, I asked him what we could do and he told me a word that I did not understand.... They didn't ask him questions because they [the officers] also did not speak English very well.

On July 23, 2012, Rosa María Payá, Oswaldo Payá's daughter, made a statement to the press, saying: "the information we received from those who were traveling with [my father], is that there was a car trying to push them off the road, ramming against them all the time.... This is why we think that this was not an accident; they wanted to hurt them and ended up killing my father."¹²⁰

On August 1, 2012, Ofelia Acevedo, Payá's widow, issued a public statement, saying:¹²¹

I will not get into details regarding the technical analysis presented by the official version of the event; I am not an expert, although one does not need to be an expert to question their version. I want to clarify that I learned about how the event happened through the television, since I only was given a brief verbal version of this by a police detective, Major Sánchez, when I received my husband's body. I told him that I didn't believe that version and that I needed to talk to the surviving witnesses.

As Oswaldo Payá Sardiñas' wife—and on behalf of my family living inside and outside Cuba—I would like to make a statement explaining why we don't accept the official explanation of the events where my husband, Oswaldo Payá Sardiñas, and Harold Cepero Escalante lost their lives, as they were presented on national television.

First of all, the explanation has been presented by the same Cuban government State security organs that have threatened to kill Oswaldo multiple times throughout his life—and much more cruelly, over the last few years of peaceful struggle of our people's right to have rights. They have discredited, defamed, spied on, and insulted him through media campaigns both inside and outside Cuba. They are the same individuals who have placed microphones in our bed and have hidden them in telephones to hear everything going on in our room. They record all of our telephone conversations, the conversations of relatives, my closest friends, members of our movement, and even my children's cellphones. They are the same individuals who, knowing that Oswaldo's mother had cancer, cowardly went to visit and intimidate her. They are the same individuals who did not allow her sons living outside of Cuba to come and see her before she died, or even after her passing; the same individuals who forbade my oldest son, a 24-year-old student, from visiting his aunt in Spain during his summer vacation last year, and they don't allow any of our family members to leave or enter Cuba.

They are the same security agents who intimidate our neighbors, my husband's co-workers, my brothers and sisters from the Christian community, and even people who we hire to make repairs to our house. They go to the institutions where my sons and daughter study and warn their peers to avoid having any kind of relationship with them. They are the same individuals who break into hospitals and intimidate doctors every time my children have any health problems.

They are the same repressive organs of State security who have attacked my house with mobs brought from other places and who have painted the front of my house with offensive signs, who

¹²⁰ See news report from EL NUEVO HERALD, *Muere el disidente cubano Oswaldo Payá*. July 23, 2012, available at (in Spanish only) <http://www.elnuevoherald.com/2012/07/23/1257301/muere-el-disidente-oswaldo-payá.html>

¹²¹ Ofelia Acevedo and Rosa María Payá's video statements at <http://www.youtube.com/watch?v=6P7tpdIKklU>

have stained my door with red paint simulating blood, who have crowded the walls of the neighborhood with threatening signs and phrases filled with hate—creating terror in our neighborhood. It is they who follow and stalk us in their cars every time we leave the house, who on several occasions have loosened the screws on the wheels of our car while parked, knowing that we were traveling with family and friends; because of this we have nearly been in several accidents.

Last year, on June 2, Oswaldo and I were traveling in our car to my mother's house, driving through El Cerro roadway, having just driven across the intersection with Rancho Boyeros Avenue, when we were hit by an old American car in the right rear wheel of our vehicle, with such a force that it made our car rock. My husband couldn't control the car; we slid on two wheels and turned to the opposite side of the road, we were trapped inside of the car and covered in broken glass from the windshield. Oswaldo hurt his left elbow and I was unharmed.

These are the same individuals who have threatened to kill members of the Christian Liberation Movement and their relatives, and those same individuals who give orders so that we get thrown out of our jobs; they terrorize our lives. They are the same people who have imprisoned Yosvany Melchor, the son of Rosa María Rodríguez, a member of the movement. He is currently serving 12 years in prison for a crime he didn't commit. Their goal is to make people abandon the Christian Liberation Movement.

Secondly, we do not accept the official version of the events because my husband, Oswaldo Payá Sardiñas, was known for his remarkable and limitless sense of responsibility toward all people, particularly those who were associated with him. He would have never allowed the driver of the car to speed. His friends and those who know him know that I speak the truth when I say this. He knew his life was at risk every day in Cuba.

Thirdly, I received the news of the alleged accident from Madrid at 3:18 p.m. on Sunday, July 22. The text message stated the following: "four people were traveling but only three are in the hospital, there is no information regarding the fourth person. Two friends, one of them is unconscious. They were hit and pushed off the road. Do you know who the other two were? We don't know where one of the two is."

Fourthly, I wasn't allowed to meet with the Swedish man and haven't yet been allowed to visit the Spaniard, the two survivors of the event who can tell me what happened.

Fifthly, given these precedents and all the information from all the different sources that has reached us regarding the events of that day, and that my daughter will soon describe to you, my family asks for an independent investigation free from any government intervention, for which we seek the support and solidarity of all our friends as well as international organizations that can give us assistance.

In the same statement, Rosa María Payá stated:¹²²

I do not intend to give another version of what happened; we are not accusing anyone at this time. The facts I am about to describe to you were read by Captain Fulgencio Medina, a criminal investigator, in a room at Carlos Manuel de Céspedes hospital in Bayamo, on the evening of Sunday, July 22. I will not go into details on how these reports were given to us because we don't want to expose those who, in solidarity with our family, have sent us this information.

According to what we were told, Captain Fulgencio Medina—reading the statements made by

¹²² *Id.*

witnesses of the events that took the lives of my father and Harold—said the following to those present in one of the rooms of the hospital. The captain said he would recap the events by reading the witnesses' statements:

The witness on the bike and the witness on the tractor said there was a red Lada traveling alongside the car in question. Suddenly, the latter got ahead of the rest, the bicycle, the tractor and the red Lada.... Then the paved road ended and the car entered a graveled section of the road. The cyclist said that all he saw was the dust when the car went off the road, but that seemed normal to him. The tractor driver mentioned that it seemed as if something had happened.

The officer said another tractor was coming from the opposite side but apparently the road was wide enough and the tractor was far enough away to [avoid] causing any reaction from Ángel. There was no danger of collision between the two.

The passengers in the red Lada came to the rescue, according to the witnesses on the bicycle and on the tractor.

Officer Medina said that the witnesses said that when the individuals from the red Lada came to help the Spaniard, he reacted by saying: "who are you and why are you doing this to us?" First, they took the Spaniard out, and there was another man complaining inside the car, which apparently was Harold, but his leg was seriously injured and he was touching his own chest, as if it hurt a lot. They didn't do anything to help the fourth passenger because they said that they touched him and realized he was dead.

They first pulled out the two foreigners, and then they took out a cellphone that they had with them and said: "send an ambulance over here, there has been an accident." At that time, a blue van arrived and picked up some of the injured and drove them to the hospital. They received a call from [a] girl and said they didn't know who the phone belonged to because everything was a mess. The call was first taken by a traffic agent and then by the medical investigator. Fulgencio Medina said he knew the daughter had called because the medical investigator that she spoke with was in the ambulance.

This was all the information we received from what Captain Fulgencio Medina said to government officials and to the other people present in the hospital room that evening.

It seems very strange to us: 1. That a medical investigator was present in the ambulance; 2. That none of the official versions mention this red Lada or the people traveling in it; 3. If there was no red Lada, who could have called the ambulance? 4. The reaction that, according to the witnesses, Ángel had when he was being assisted; 5. Who determined so prematurely that my father had died and how? 6. That two hours after the incident, my father's body was still on the road.

We have received additional information: we have information that the ambulance was called by a lieutenant colonel, and that an ambulance took Harold to the hospital after making a stop at a children's hospital. We also have information that the doctor who treated Harold—known as "The Kid," the son of Dr. Pérez Profet—expressed disdain for Harold and told the other doctors and nurses that these people were bringing drugs to Santiago and that they were planning to plant bombs there. We don't know if Harold underwent surgery, nor do we know if he even made it to the operating room at all. I am suspicious of the care received by my friend in that hospital.

We have been informed that Ángel arrived at the hospital escorted by an officer who claimed to be an eyewitness of the accident, and that when they arrived, Ángel said twice that the car had

been hit from behind, until he was thwarted by the officer. I wonder if this officer was an eyewitness— what was he doing at the scene at that time? Why didn't he take the injured men in his car? If he called the hospital, how did he know the phone number? Was he one of the men in the red Lada?

I also have doubts regarding the technical condition of the car in which my father and Harold were traveling.

They didn't allow our friends, the people who were representing our family that day, to see my father's body until after 8:00 p.m. They told us that the corpse had a syringe in its groin, a shirt, his jeans, and shoes, and that at the time they saw it, the body still hadn't undergone any form of conservation or refrigeration treatment.

Regarding Harold's condition, a physician told our friends that he was going to die because he was brain dead. It is worth it to note that this information doesn't match the official version regarding Harold's cause of death. It's also very strange because, according to information we received from the words read by Captain Fulgencio Medina, witnesses claimed that they saw Harold while he was still conscious.

Our friends didn't have access to the survivors until after Ángel was sedated, so they were never able to talk to him. They were barely able to communicate with Aron because they don't speak English.

On August 11, 2012, Ofelia Acevedo Payá stated in a newspaper:¹²³

On Tuesday, July 31, at a quarter to nine in the evening, nine days after Oswaldo's death, I received an official summons to stand before the criminal directorate [of] Boyeros' municipality on the following day at 11 in the morning, to "resolve issues related to the civil responsibility derived from the accident." According to what I was told, they wanted to know if my family would claim any compensation for damages caused by the young Spaniard Ángel Carromero, who will probably get indicted for being the one who was driving the vehicle in which both my husband Oswaldo Payá and Harold Cepero Escalante were traveling—in which both perished. As of today, nobody has officially informed me about my husband's death.

My three children and I told the officer who summoned us that we would not claim any compensation because we didn't agree with the official version presented on national television by State security forces. We also did not agree with the burden of responsibility, which, according to the official version, was laid on Ángel. We expressed that we kept demanding a meeting with him, without the physical presence of any member of the State security forces.

...

That big lie [told] by the State security forces, in which they wanted the young Swedish guy to stress the purpose of his visit to Cuba—it's enough to understand that nothing these young men say or have publicly said, while they are being held captive by the repressive control of the State, can be taken into consideration. History has proven this many times when it comes to totalitarian regimes. My family and I ask for an international commission, independent from the Cuban government, to conduct an investigation into the events

We thank all those who have joined us, and those who continue to join our struggle to find the

¹²³ See Ofelia Acevedo, *El amor no pasará*, EL MUNDO, Aug. 11, 2012, available at (in Spanish only) http://elmundo.orbyt.es/2012/08/11/tu_mundo/1344720703.html

truth about what happened. We deeply regret that Ángel Carromero is still imprisoned, and we hope he'll soon be reunited with his family. We haven't seen any verifiable proof, any physical evidence or sign that shows that Ángel behaved recklessly. My husband knew how great his responsibility was to those who were traveling with him.

We want him to be released. Perhaps only once I talk to Ángel will I know what really happened on the afternoon of July 22, when they were approaching the city of Bayamo and a dust cloud hid the moment when all the forces of evil unleashed their power on my husband's head and brutally destroyed the source of his knowledge and word.

On October 3, 2012, the newspaper "La Gaceta" published an interview in which Rosa María Payá stated:¹²⁴

To our family, this trial has no value whatsoever for the simple reason that it's based on the government's version, which is filled with contradictions, and we have other information. With these precedents, we have no reason to believe Ángel is guilty of anything.... There is proof in Europe: according to information that I received, which once again I'll repeat, Carromero and Modig contacted Europe, and the first news we got from their friends in Madrid and Stockholm was that the car was hit and pushed off the road.

...

In the same hospital, [Fulgencio Medina] said that the witnesses had seen another car and that it was at the scene before the crash. This raises several questions: If this car wasn't there, who called the ambulance? Who assisted them first? Why did Ángel ask them "who they were and why they were doing that?".... We learned that something had happened this way. Regis Iglesias, a member of the Christian Liberation Movement exiled in Madrid, told me that a car had been hit, even before he knew that my father was in that car. I don't have any reasons to doubt him.

On October 5, 2012, Rosa María Payá and her brothers—Oswaldo José Payá and Reynaldo Isaías Payá—went to the Granma court to witness the trial against Carromero. However, a police line barred them from entering the courthouse. Rosa María Payá told the media:¹²⁵

They won't let us in. We have been told by someone who claimed to be the court's secretary that we couldn't go inside because we hadn't told them that we were going to attend the trial.... We don't expect anything from this trial. We can't really believe anything from the same people who threatened to kill my father. The only reason why we are here is because we want to see Ángel.... They won't even let us in. I don't know what they are trying to hide. They are violating our rights.

On February 28, 2013, Rosa María Payá revealed text messages to the press that had been sent by Modig to his friends in Sweden on the day of Oswaldo Payá's death. In those messages, Modig had written "Ángel said a car pushed him off the road."¹²⁶

¹²⁴ See news report from the newspaper LA GACETA, *Entrevista a Rosa María Payá*, Oct. 3, 2012, available at (in Spanish only) <http://www.intereconomia.com/noticias-gaceta/internacional/no-esperamos-nada-juicio-carromero-20121003>

¹²⁵ See news report from EL NUEVO HERALD, *Impiden a los hijos de Oswaldo Payá asistir al juicio de Carromero*, Oct. 5, 2012, available at (in Spanish only) <http://www.elnuevoherald.com/2012/10/05/1315742/impiden-a-los-hijos-de-oswaldo.html>

¹²⁶ See news report from MARTÍ NOTICIAS, *Carromero confiesa y muestran los mensajes de texto*, Feb. 28, 2013, available at (in Spanish only) <http://www.martinoticias.com/content/article/19965.html>. See also news report from EL NUEVO HERALD, *Carromero afirmó que un carro los embistió, denuncia la hija de Payá*, Mar. 1, 2013, available at (in Spanish only)

On March 12, 2013, while Rosa María Payá was addressing the United Nations Human Rights Council on the circumstances in which her father died, Luis Amorós Núñez, the Cuban representative, interrupted Payá's speech by banging the table repeatedly. When the president of the council allowed him to speak, Núñez stated:¹²⁷

I apologize for the noise, but it was necessary to interrupt the speech of the mercenary who has dared to come into this room. We want to ask you, Mr. President, if this debate on item 4 is to refer to the general issues that might demonstrate a pattern of human rights violations, or does this also lend to addressing specific issues like the mercenary who is speaking right now?.... We would appreciate it if you could clarify this for us and also enlighten the mercenary giving the speech.

On November 1, 2013, the Human Rights Foundation held the following interview with Rosa María Payá:¹²⁸

Human Rights Foundation: In a democratic society, when a person dies from a car crash or from any other cause, the death generally becomes a matter of public action. The State becomes involved through the prosecutor's office and they investigate the death. The prosecutor's main allies, or the people who somehow represent the prosecutor—besides the State's interest—are the victim's family.

In the case of your father's death in Cuba, how did you participate in this process? Did the prosecutor get in touch with you? Do you believe that the actions taken by the prosecutor were effective to solve your father's cause of death?

Rosa María Payá: In the Cuban criminal system, the family of the victim—and the victims in general—don't participate in the process. They don't have any rights, not even to be a party to the proceedings. In fact, we talked to many lawyers at the ONBC in Havana asking what we could do.

HRF: Did the prosecutor get in touch with you?

RMP: It wasn't that the prosecutor wouldn't call us—it was that the Cuban authorities never told us that my father had died.

We found out because Regis Iglesias called from Madrid and then left a message saying that there were three people in the hospital, that there was one person that was missing, that the car had been rammed and pushed off the road. He asked us, "who were the other people in the car?" Regis Iglesias in Madrid did not know that my father and Harold were in that car, he only knew that Jens Modig and Ángel Carromero were in the car because he knew they were in Cuba and because they had sent text messages, but he didn't know that my father and Harold were in the car.

That's how we found out that something had happened. At that moment we started to call the hospitals in Bayamo, and in one of them, someone told us that there were some people at that hospital, but only three. Hours later, they told us that Oswaldo Payá had passed away. I found

<http://www.elnuevoherald.com/2013/03/01/1419303/carromero-afirma-que-un-carro.html>

¹²⁷ See the statements made by the Cuban representative, Luis Amorós Núñez, before the United Nations Human Rights Council at (in Spanish only) <http://www.youtube.com/watch?v=ztwDHdRslDw>

¹²⁸ Interview conducted with Rosa María Payá by the Human Rights Foundation on November 1, 2013.

out directly because we started calling my father's cellphone and at first no one answered. Finally, when someone answered, I said, "dad?" and a very nervous person responded, "no, no, no."

I started to ask, "where is the owner of the cellphone?" The other person starts to stutter and he tells me something like that he is a traffic officer and that there had been an accident. He didn't answer any of my questions. He passes the phone to someone I believe to have been the medical examiner; now, I don't know if he told me that she was a medical examiner or just a doctor, or if she introduced herself. She started asking me questions like, "is the person a foreigner? How old is he?" I asked if he [Payá] was alive or not, and I started asking, "where is the owner of the cellphone?" and then I asked, "tell me if he is alive or not. Tell me where he is. Tell me where you found this cellphone." She didn't answer me, she just kept asking me questions and she wouldn't answer me until finally she said, "okay, there is one person who is deceased."

After that I don't know if I hung up, if the call was dropped, or if she hung up. That is how we found out that my father had died. The authorities never called my house or even came to my house to tell me about the accident they had invented. That never happened, like it did in Harold's case; an officer went to Harold's house. Of course, only after they had already found out about what had happened, later. But an officer did go to his house.

While the authorities never gave my family an explanation on how the events even happened, they did immediately give a public explanation to the media. A note from the MININT was published in Granma saying that there had been an accident and that two citizens had passed away. They did do it [inform about the deaths] in the media. First, with a note about what had happened, and then with a show where they even used 3D animations to explain the version they had made up about what had happened. But they never directly informed us. In fact, up until today, the authorities still have not told me what happened.

HRF: Have they given you a copy of the autopsy report?

RMP: No. Like I said, in the Cuban criminal system, the victims don't exist.

HRF: What type of involvement have you had in the process related to your father's death?

RMP: When these things happen, the only right—which isn't actually a right—the only explanation that they legally give to the victims is the autopsy report, which they give them in a span of, at most, one month. We have taken all the steps; we even visited the court in Bayamo, the medical examiner's offices in Havana and Bayamo where my father's death and Harold's death were declared. To this day, we have not received the autopsy report or an explanation as to why they have not given us the report. The only interaction we had with the authorities was the first time, when they were giving us my father's body in the medical examiner's office in Havana. The body had traveled from Bayamo to Havana, of course, escorted by security officers [of the State].

HRF: What do you consider to be the reason behind sending the security officers from the State to escort your father's body?

RMP: A reason isn't needed for police to repress citizens who haven't committed a crime. That is a question to ask them. Why were they at my father's funeral?

As soon as they gave us the body, which they did not do until we were at the funeral home—we knew that my father's body was there, but they did not let us see it—an officer spoke to us, supposedly a major from the Bayamo police that had been involved with the case and that had

spoken to the witnesses, etc. He told us that it was an accident and he tried to tell us that they were speeding, that the witnesses said that they were speeding.

He told me that “a witness that was on a bicycle said that your father’s car was going very fast. It had passed him very quickly.” And I asked him, “how does a person on a bicycle know, while on the highway, that the car that just passed by him was speeding?” He just repeated what he had said to me before, and I asked him, “did he have a radar gun?” and he told me something as if I had been making fun of him, and I told him, “no, you are the one making fun of me.”

HRF: This happened at the funeral home?

RMP: No, this happened in the medical examiner’s office; when the body first came to Havana, it was first taken to the medical examiner’s office. That’s where they gave us the little card that said the cause of death was “damage to the nervous system.”¹²⁹ Something that to this day, no doctor has explained to me.

Anyway, that police major tried to give us an explanation that it was an accident and that they were speeding. We told him that we couldn’t believe that and that there was no evidence to lead us to us believe that. The entire time that we were speaking with the police major in that room, which was one meter by a meter and a half, there was a person with a video camera filming our conversation. That doesn’t usually happen.

HRF: Was this the first conversation the State security had with you?

RMP: This was the first encounter, when they were giving us my father’s body, and it was something we could not avoid. And it was being filmed by the State security. After this, about a week later, two people came to my house from Cien y Aldabó—which is the detention center where Ángel Carromero was imprisoned, the corrections center for common crimes, the center of investigations for Havana. Two people came with a subpoena for us, to tell us that we needed to present ourselves a couple of days later at the corrections center for an interview.

When we went, we found ourselves in a room with at least six people, some of whom were not introduced, and all with subpoenas from the corrections center. There they asked us if we wanted to demand compensation from Ángel Carromero’s family for the “accident” that occurred, and they tried to get us to sign a document stating whether we accepted compensation or not and confirming that what happened was an accident for which Ángel Carromero was responsible.

HRF: Was that the only conversation you had with the prosecution?

RMP: Yes. They asked us if we wanted to claim damages. We said that we did not have any reason to believe that it was an accident or that Ángel was responsible. So they wrote up a report stating that we did not want to seek damages for the “accident.” So we didn’t sign that paper and we told them to write that we do not believe it was an accident. The paper we ended up signing said that Ángel was not responsible and that we did not accept it to have been an accident. However, they did not give us a copy of that document.

At that time, they claimed that they did not have anything to do with the criminal investigation, that they were from Havana, that they were not a part of the group of people that had investigated the events in Bayamo, and that their job was just regarding a damages claim. But when we told them that we did not think it was an accident, they gave us some papers on top of

¹²⁹ See pictures of the handwritten card given by Havana’s medical examiner’s office at http://humanrightsfoundation.org/uploads/Oswaldo_Paya_photos.pdf

the table, papers that had the same outline as the ones on national television. They told us, “no, look, what happened was this and this,” and we told them, “no, no, no, you are telling us that you did not participate in the investigation, so we do not have anything to talk to you about.”

After that we were again summoned to pick up my father’s clothes.

HRF: What state were the clothes in? How did they give them to you?

RMP: Washed. Completely washed, folded, and in a bag. As if they had taken them to the cleaners. There they gave us a pair of glasses, some glasses that they didn’t know who they belonged to; and I recognized them, they were Harold’s glasses. We already knew that they had given Harold’s family his belongings. We also knew that they had given them Harold’s cellphones without the memory card, without the “chip [SIM card].” So I asked them in that moment, “where are Harold’s cellphone chips?” and they responded, “it was strange to us too that those phones did not have their [SIM cards].”

iii. Expert report by the Varela Academy of Sciences

On January 23, 2015, the Varela Academy of Sciences concluded a scientific analysis contradicting the official version of the facts presented by the Cuban government.¹³⁰ The report concludes that: (1) there are physical contradictions in the official version about the direction taken by the vehicle during the events; and (2) there are incongruities about the location and material condition of the vehicle after the events. The main conclusions of the report state:¹³¹

Official tampering with the car scene is evident in the... photos analyzed: a) three of them show the final position of the car near a canal, perpendicular to it and with the trunk almost touching it. The front bumper is totally fallen and twisted and described as being four meters away from the road shoulder; b) Yet, another three pictures show the car just above the road shoulder and perpendicular to it. The rear bumper is half fallen; c) Finally two of them show the car at the shoulder and parallel to it. One shows that the front bumper has been removed. The other shows the rear bumper in its normal position.

...

2) In the [pictures], especially in the front view, many reflections of nearby objects can be seen which do not correspond to the rural environment in which the [events] supposedly took place.

There are many physically impossible facts in the [official version]... 1) it is impossible that a skidding and spinning car gently “*moves in a curve towards the right*.” Skidding implies no friction holding the car to the road. Hence there is no centripetal force that can make it turn in a “curve to the right”; 2) the alleged rotation of 155 degrees in the clockwise direction is likewise impossible. [Many] reasons prove this impossibility: a) the [picture] of the skidding marks provided... allowed us to rectify the perspective distortion of the picture only to conclude that the final angle that the car’s longitudinal axis made with the road shoulder was not 155 but only 128 degrees the most.... d) because collision at 155 degrees makes the car rebound after hitting the tree, not in the direction towards the canal, but towards the very road along which it was traveling before. We have proven this point by painstakingly analyzing the dynamics of the collision, based on the center of mass of the car, the point of impact with the tree and the conservation of angular

¹³⁰ On January 23, 2015, the Human Rights Foundation received a copy of the scientific analysis via email.

¹³¹ FRANCISCO MÜLLER, ACADEMIA VARELIANA DE LAS CIENCIAS, ANÁLISIS CIENTÍFICO DEL “ACCIDENTE” EN QUE FALLECIÓ OSWALDO PAYÁ SARDIÑAS EN CUBA, JULIO 22 DE 2012 (forthcoming 2015).

momentum.... e)... when we use a “normal” distance, less than half the road, we discover that the car, going in a strictly straight line against the tree (no curves allowed) would not only hit the tree coming back to the road, but would do so spinning in the clockwise direction, not in the counterclockwise direction....

...

In general the regime’s version is a mixture of some physically possible details amidst many physically impossible ones. The very fact that none of their simulations complied with the description in the judicial text allowed us to find the real law for the collision process. We arrived at a formula that not only predicted the rebounding angle in their simulations but also demonstrated that the 155 angle would make the car go back to the road from which it came.

Thus, all in all... we can [conclude that the facts] 1) did not happen in the place they say it happened nor along the road they say it happened; 2) did not happen after the car spun an angle of 155 degrees in the clockwise direction; 3) did not happen after the car, having lost control, moved in a curve towards the right; 4) did not happen after the car initially traveled along the contrary direction of the road. Consequently, the [facts] did not happen as the regime says [they did]....

iv. Jens Aron Modig’s statements to the media outside Cuba

On October 23, 2012, Jens Modig gave the following interview to *Misceláneas de Cuba*:¹³²

Misceláneas de Cuba: You stated on the Christian Democratic Youth homepage that Ángel Carromero was not driving excessively fast. I have some pictures of the road where the accident occurred. What do these pictures tell you?

Jens Modig: I can’t remember this particular stretch of the road; I was sleeping when the accident happened. We had been traveling for a long time that day. We had set off at around 6:00 a.m., from what I understand. The crash happened at around 2:00 p.m., some time after lunch. As far as I remember though, Ángel was not driving recklessly, as has been claimed. But, these images seem to illustrate a fairly wide gravel road.

MC: Did you lose consciousness immediately after the crash? When and how did you find out that they were dead?

JM: I found out at the hospital, where I was recovering from the accident.

MC: Did the police tell you that they had died?

JM: No, no, no. I found out through friends here in Sweden. No one told me anything at the hospital.

I had my cellphone with me while I was in the hospital. My friends told me: “there are rumors that they have died.” The Cuban authorities never informed me of their deaths, neither then nor after. It’s possible that they could have mentioned it during the interrogations but I’m not sure. The interrogations were several days later.

¹³² See Mileydi Fougstedt, *An Interview with Aron Modig*, MISCELÁNEAS DE CUBA, Oct. 23, 2012, (the original text of the interview has been edited for grammatical consistency) at <http://www.miscelaneasdecuba.net/web/Article/Index/518138fe3a682e0f88c529d6#.UgjoJBaD7Hh>

MC: When was your darkest hour? When did you realize the severity of the situation?

JM: I think there were two moments that were the most difficult. To begin with, I was very confused. According to my calculations, I was unconscious for about 30 minutes, which is a considerable amount of time.

I had headaches for several weeks afterwards. Like I said, I was very confused, but I had a lot of people around me in the hospital who took care of me. I had an IV in my arm. On different occasions, I had to walk up and down [the hospital] since they needed to take X-rays of my neck. They would do other tests, blood tests, but it proved a bit tricky. I just remember that I would immediately fall asleep when I got back into bed.

Later on, two armed guards in green uniforms came into my room and sat down next to my bed. It was in that moment—and also because I had spoken to my friends in Sweden—that I started putting the pieces together. I remembered that we had been driving and in that moment, I realized that two of the passengers had died. It dawned on me that my situation there was not completely legal. I was in a hospital, about 700 kilometers from the nearest Swedish or diplomatic representative. I was in the middle of nowhere, in a part of the world where I did not speak the language, and all of a sudden I had armed police watching me.

So I thought to myself: “I could disappear, they can make it happen if they wanted to.” In that moment, for the first time, I felt totally defenseless. I don’t even remember if I was afraid or not. Reason tells me that I should have been scared, but I don’t remember, maybe because I was still confused. The second hardest moment was when they took me from Bayamo all the way to Havana on a plane. I thought that even though not much had happened in Bayamo, at least the Swedish Ambassador had been there and she had been aware of what was going on. When they took me to Havana, they did not inform the Swedish Embassy or me, for that matter. I did not know where they were taking me or what was going to happen. I ended up locked in a room, without my belongings, with a group of three guards watching me. This was in a house in Havana that was surrounded by high walls.

In that moment I thought: “this can go either way.” At first I was afraid that my life was at risk, but in this moment I wasn’t worried. The embassy had known where I was and that I had survived the accident, but I also thought that things could turn ugly—I could be imprisoned or punished.

MC: Could you have been called to testify against Carromero? Did they call you? Have you thought about it?

JM: Of course, I’ve thought about it a lot. Immediately after the accident, I was in the hospital for less than a day before they took me directly to the police station in Bayamo, where they interrogated me about the accident. At that moment they told me that I would not be prosecuted, I don’t remember the exact words they used, but they told me that I wouldn’t be present at the trial. I didn’t think that was strange at that time because I knew that they could throw me out of Cuba at any moment. That’s what they told me.

They recorded me. They held a long interrogation session where they recorded my answers; they told me they would use them during the trial. They even took me to another room with two women; one was the prosecutor and the other was the defense attorney. They both asked me questions, which I answered, but I have no idea if this was even used during the trial. No idea.

MC: What was on your mind when your plane finally took off from Havana?

JM: I think it was 8 days in total since the day of the incident until the moment I left. The personnel from the Swedish Embassy picked me up at the immigration offices and we ate at the Ambassador's residence before going to the airport. I thought, "while I'm with the diplomatic personnel or in the residence no one can arrest me. But later I'm going to have to go in a car to the airport." I was worried that they would change their minds and lock me up again.

I had to go through customs and passport control, where there could be problems. They could have held me until right before the plane took off. That's why I was so anxious from the moment I checked in until the moment the plane took off. Of course, I asked the Ambassador to stay with me until the plane took off. She did, even after my flight got delayed and left an hour and a half later. However, the entire time I was sitting, waiting for someone to come and arrest me again. It was only once the plane took off that I felt relieved.

On March 5, 2013, Modig gave an interview with Swedish Radio show "Studio Ett,"¹³³ in which he stated:¹³⁴

Studio Ett: You were also traveling in the vehicle that crashed. How did you react to Rosa María Payá's words when she said: "you know what happened, but you have chosen to keep quiet"? Is this true?

Jens Modig: No, it's not like that. I have told the media several times—since this horrible incident happened last summer—that I have no recollection about the accident itself, and that's the truth. I spoke to Rosa María for some hours today and all went well. It has been good to be in touch with her once again, after all that has happened. Analyzing what happened in the summer and afterward, Rosa María feels very frustrated, of course, and so do I. I understand her frustration, and I share it as well, finding no clarity about what happened that day in July.

SE: One thing she said was that you sent an SMS text message after the accident, where you wrote that you were followed and pushed off the road. Did you write that?

JM: Yes, I sent that SMS.

SE: To whom?

JM: To friends here in Sweden, and it said that Ángel said we had been pushed off the road.

SE: The driver?

JM: The driver, the Spanish driver. I don't have any memories of this; however, I have no reason to doubt what Rosa María is saying. The information Rosa María has come from Ángel Carromero, the Spaniard, and from other Cubans.

SE: So, do you think it was an attempt on your lives?

JM: To believe, believe? I don't have a personal recollection of the events, but I also don't have any reason to doubt what they are saying. These are good, honest people. And like I said before, I have no reason to doubt them.

SE: It has been seven months since the accident. What do you take with you?

¹³³ See Studio Ett, <http://sverigesradio.se/sida/default.aspx?programid=1637>

¹³⁴ See news report from MARTÍ NOTICIAS, *El sueco Modig confirma los mensajes de texto*, Mar. 5, 2013, available at (in Spanish only) <http://www.martinoticias.com/content/article/20133.html>. See also *supra* note 132.

JM: A lot, I've thought about this every day for the past seven months. This was a traumatic experience for me. I was able to see, up close, the way a dictatorship like Cuba works. I was imprisoned for about a week, stripped of my belongings, and I had no opportunity to contact my family or Swedish diplomats in Cuba. This was all without being informed or charged with any crime. I didn't receive any information about the process in which I was involved, what I could expect from it, or even how long would it last. I could see the reality in which Cubans live every day.

v. Ángel Carromero's statements to the media outside Cuba

On March 5, 2013, the *Washington Post* published the following interview, in which Ángel Carromero stated:¹³⁵

Washington Post: What happened that day?

Ángel Carromero: Oswaldo Payá asked me to take him to visit some friends, since he didn't have the means to travel around the island. There were four of us in the car: Oswaldo and Harold Cepero in the back, [Jens] Aron Modig [of Sweden] in front, and me driving. They were following us from the beginning. In fact, as we left Havana, a tweet from someone close to the Cuban government announced our departure: "Payá is on the road to Varadero." Oswaldo told me that, unfortunately, this was normal.

But I really became uneasy when we stopped to get gas, because the car following us stopped, waited in full view until we were finished and then continued following us. When we passed provincial borders, the shadowing vehicle would change. Eventually it was an old, red Lada.

And then a third car appeared and began to harass us, getting very close to us. Oswaldo and Harold told me that they were from "la Comunista" because they had a blue license plate, which they said is used by the government. Every so often I looked through the rearview mirror and could see both occupants of the car staring at us aggressively. I started to get scared, but Oswaldo told me not to stop unless they signaled or forced us to do so. I drove carefully, giving them no reason to stop us. The last time I looked at the rearview mirror, I realized that the car had gotten too close—and suddenly I felt a thunderous impact from behind. I lost control of the car, and also lost consciousness—or at least that's what I think, because from that point on, my memories are unclear, perhaps from the medications they gave me later.

When I recovered consciousness, I was being put into a modern van. I don't know how it had gotten there, but neither Oswaldo nor Harold nor Aron were inside. I thought it was strange that I was the only one in the van and I figured that the rest of them didn't need to go to the hospital.

I began to yell at the people driving the van: "who are you? Where are you taking me? What are you doing to us?" Then I lost consciousness again.

WP: What happened after that?

AC: The next time I awakened, I was on a stretcher, being carried into a hospital room. The first person who spoke to me was a uniformed officer from the Ministry of the Interior. I told her a car

¹³⁵ See news report from THE WASHINGTON POST, *Ángel Carromero on the crash that killed Cuba's Oswaldo Payá*, Mar. 5, 2013, available at http://articles.washingtonpost.com/2013-03-05/opinions/37462091_1_harold-cepero-aron-modig-hospital-room

had hit us from behind, causing me to lose control.

She took notes and, at the end, gave me my statement to sign. The hospital, which was civilian, had suddenly been militarized. I was surrounded by uniformed soldiers. A nurse told me they would put in an IV line to take blood and sedate me. I remember that they kept taking blood and changing the line all the time, which really worried me. I still have the marks from this. I passed the next few weeks half-sedated and without knowing exactly what they were putting in me.

WP: Some text messages were sent from the scene, and there have been reports of others, not yet disclosed. Do you know about them?

AC: They took away my mobile phone when they took me out of the car. I was only able to use Aron's mobile phone the time we were together in the hospital. I didn't remember the messages until I arrived in Spain and I read them, asking for help and saying that our car was hit from behind.

WP: How was your statement obtained?

AC: They began to videotape me all the time, and they kept doing so until the last day I was jailed in Cuba.

When they questioned me about what had happened, I repeated what I told the officer who originally took my statement. They got angry. They warned me that I was their enemy, and that I was very young to lose my life. One of them told me that what I had told them had not happened and that I should be careful, that depending on what I said, things could go very well or very badly for me.

Then came a gentleman who identified himself as a government expert and who gave me the official version of what had happened. If I went along with it, nothing would happen to me. At the time I was heavily drugged, and it was hard for me to understand the details of the supposed accident that they were telling me to repeat. They gave me another statement to sign—one that in no way resembled the truth. It mentioned gravel, an embankment, a tree—I did not remember any of these things.

The hit from the back when we left the road didn't need to be hard, because I remember that there was no curb or incline. The pavement was wide, with no traffic. I especially did not agree with the statement that we were traveling at an excessive speed, because Oswaldo was very cautious. The last speed I saw on the speedometer was approximately 70 kilometers per hour [about 45 miles per hour]. The air bags did not even deploy during the crash, nor did the windows shatter, and both I and the front-seat passenger got out unhurt.

WP: A video of you describing the accident was shown to journalists by Cuban authorities. Under what circumstances was it made?

AC: Once I left the hospital, they took me to a jail in Bayamo. It's the worst thing I've ever lived through. I was held incommunicado, never seeing the light of day. We walked among cockroaches until they put me in the infirmary cell, along with another Cuban prisoner.

The conditions were deplorable. A stream of water fell from the roof once a day, the toilet didn't have a tank, and you could use it only when you had a bucket of water that you could throw afterward into the bowl. The cell was full of insects that woke me up when they fell on my body. Although I remember almost nothing specific from those days, images come to me—and I only wish they were nightmares, and not memories.

The video that the authorities made public was recorded under these conditions. As viewers can see, my face and left eye are very swollen and I speak like I am drugged. When an officer gave me a notebook in which the official Cuban government account was laid out, I limited myself to reading statements from that notebook. In fact, you can see me reading Cuban expressions I didn't know, like "transit accident" (in Spain it's "traffic accident"), and you can see me direct my gaze to the right corner, which is where the officer stood who held the notes. I hoped that no one would think that the video was freely recorded, or that what I said there corresponded to what really happened.

WP: Who sent you to Cuba? Why did you travel there?

AC: Nobody sent me to Cuba, and I didn't even tell my boss about my trip. I traveled there during my summer vacation, like so many other supportive people—because I admire the peaceful defenders of liberty and democracy like Oswaldo, who is very well known in Spain.

WP: What do you think about the trial in Bayamo?

AC: The trial in Bayamo was a farce to make me the scapegoat, but I had to accept the verdict without appeal in order to have the minimal possibility to get out of that hell. However, I decided at the last minute to not declare myself guilty, thinking of Alan Gross [an American contractor sentenced to 15 years in prison for bringing communications equipment into Cuba illegally].

As for the Spanish authorities, I can only thank them for managing to repatriate me. I don't want to cause any more problems. I want to get my previous life back. I even understand that, even though I am innocent, I have to continue with my liberty restricted due to the bilateral accord between Cuba and Spain. I only hope that this unjust situation will not last for long.

Despite the accusations to which I am daily subjected by the press and by the defenders of the Castro dictatorship, it's not my intention to go on talking about this traumatic experience. I've received death threats in Spain, and I have had to testify before a notary so that at least the truth would be known if something happened to me.

WP: Why are you speaking out now?

AC: The most important thing for me is that the Payá family has always defended my innocence, when they are the most injured by this tragedy. That's why, when I met Rosa María [Payá's daughter] this week, I could not hide the truth any more. I am not only innocent—I am another victim, who might also be dead now. I know that this decision could result in more brutal media attacks against me from Cuba, but I don't deserve to be considered guilty of involuntary homicide, and, above all, I could not live, being complicit through my silence.

I don't know what they gave me in the intravenous line, but I continue to have large memory lapses. What they didn't manage to make me forget is that Oswaldo is one of the people who most impressed me in my life. He is the true protagonist of this nightmare. He was an exceptional person, and I will never forget him.

On May 8, 2013, during a memorial for Payá held by the People's Party (PP) of Rivas Vaciamadrid, Spain, Carromero reaffirmed his version of the facts regarding Payá's death, saying: "I stand by what the family said."¹³⁶

¹³⁶ See news report from newspaper ABC, Carromero «reafirma» la versión que tiene la familia de Payá sobre la muerte del disidente, May 8, 2013, available at (in Spanish only) <http://www.abc.es/espana/20130508/abci-carromero-reafirma->

On August 5, 2013, during an interview with the Spanish newspaper *El Mundo*, Carromero stated:¹³⁷

Payá was murdered by the Cuban secret services... To say that it was an accident and then blame me for it was the perfect alibi to cover up the death of the only opposition figure that could have led the transition in Cuba.... I am positive that he [Oswaldo Payá] got out alive from the accident. The nurses and a priest assured me that all four of us were taken to the hospital.

Regarding the criminal trial against him, Carromero stated that the Cuban prosecutor “began fabricating evidence and the defense didn’t have access to the car or to any of the witnesses. It was a hoax; the witnesses had their statements written on the palms of their hands.”¹³⁸

On August 7, 2013, during an interview with the TV show “De hoy a mañana,” Carromero stated:¹³⁹

What happened in Cuba was a tragedy. It is the depiction of how dictatorships of any kind work, but in this case, it is a communist dictatorship, which has its advocates in Spain, and is seen as good by some of the people. Well, it is the opposite. This is a dictatorship where there are no rights, where the people are completely oppressed, and where Oswaldo was a beacon for all people who wanted to live in freedom and he was the key for political change in Cuba.

...

Everyone knows that security state officials there—from the politicians who have gone there, to journalists, to anyone who has gone there to help—that dissidents of the Castro regime are constantly followed. They followed Oswaldo around the clock. Two months before this incident, they had crashed into his car while he was driving with his wife.

...

What happened was that we were headed to Santiago and they were following us. Three cars followed us throughout the entire trip. I believe a media outlet published something saying that I had contradicted myself by saying “[different car] colors here, or there,” but that’s not true. There’s no inconsistency here. A red Lada followed us along the entire trip; then, a newer blue car followed us—which is what I’ve said since the beginning, and that was the car that crashed into us.

I want to tell you, that it’s a terrifying experience being the one behind the wheel and realizing you have these people behind you; you don’t know how to react or what to do, you don’t want to give them any reason to pull you over or arrest you. Well... for those who say, “no, they were speeding,” which is part of the official version, I ask them to be reasonable, to please use their common sense. We were not on a highway like the ones you find here in Spain—it wasn’t the M30. Their highways are like the ones from Spain’s countryside in the 20’s. I mean, the roads are

[paya-201305082054.html](http://www.elmundo.es/elmundo/2013/08/04/internacional/1375626545.html)

¹³⁷ See news report from newspaper EL MUNDO, Ángel Carromero rompe su silencio un año después, Aug. 5, 2013, available at (in Spanish only) <http://www.elmundo.es/elmundo/2013/08/04/internacional/1375626545.html>. See also news report from newspaper MIAMI HERALD, Aug. 5, 2013, available at <http://www.miamiherald.com/2013/08/05/3543563/carromero-paya-was-murdered-by.html>

¹³⁸ *Id.*

¹³⁹ See TV clip from the show “De hoy a mañana,” Aug. 7, 2013, at <http://www.youtube.com/watch?v=0ce2iIF Q1XY>

not only “bumpy” but they also have actual holes. These roads are used by wagons that are pulled by horses and other animals; that’s the way it is. So even if someone wanted to speed there, it’s physically impossible because you can’t speed on a road full of holes.

...

As Carlos Payá, Oswaldo’s brother, said, they don’t have just my statement of the event. Throughout this entire time, Oswaldo’s family has gathered [the statements] of other people who were in the hospital that day, who saw what happened there, and who saw how they beat me, who saw how a doctor refused to treat Harold, the other person who died. They witnessed how one of the policemen said that two cars were actually involved. These statements tell a bigger story than what I’ve said. This is not the Carromero case. This case is about how a communist dictatorship makes its number one enemy disappear. Remember that Oswaldo was a Sakharov Prize laureate and was nominated many times for the Nobel Peace Prize. He was a threat to the regime.

...

You see the real Cuba once you get out of Havana, and you can certainly tell that these people have been oppressed under a communist dictatorship for many years.

On August 14, 2013, Carromero gave the following interview to the newspaper *El Nuevo Herald*.¹⁴⁰

Ángel Carromero: A total of three cars followed us. The first one was a patrol car... the other car that followed us was a red Lada, and the third car, which was the one that hit us, was a newer car.... That car was following us and it kept getting closer, and damn it, I mean, I was pretty scared because it was getting closer and closer every time I looked through the rearview mirror. When I saw that it was almost on top of us, that’s when it hit us.... When they put me into the van, I didn’t have to climb any ramp or anything. What’s frightening is that if you compare the pictures that the regime suddenly started to release, you can see that in some pictures it [the car] is on grass, in another picture you see that it’s on a field, and in others it’s seen on sand. In one picture, you can see that it is closer to the ditch, and in another one it is seen a little further away. How is this possible? Did they move the car to take the pictures or what?

...

I was put in a room [at the hospital] and that’s when I asked how they [Oswaldo Payá, Harold Cepero, and Jens Modig] were doing, and the people there told me that they were on their way, that I had been brought there first. I thought, well, if they brought me first, and I’m all right, the other ones must be fine. That’s why I asked. They later spoke to me about four people, then about three, and lastly about only two.

...

When they wanted to change my statement [of the incident], one of the military officers slapped me, and a gentleman came and presented himself as an “expert of the Cuban government.” He

¹⁴⁰ See news report from newspaper EL NUEVO HERALD, *Ángel Carromero, abofeteado en la cárcel cubana*, Aug. 14, 2013, available at (in Spanish only) <http://www.elnuevoherald.com/2013/08/14/1543409/abofeteado-en-la-carcel-cubana.html>. See also news report from newspaper MIAMI HERALD, *Carromero says Cuban officer forced him to change crash story*, Aug. 14, 2013, available at <http://www.miamiherald.com/2013/08/13/3560796/carromero-says-cuban-officer.html>

told me the version of the story where I supposedly crashed into an embankment, that the car had fallen into the embankment, and all this nonsense I had to say, that I, of course, didn't understand. I would say "my God! I mean, how can you say that I fell down into an embankment? If I had fallen down into an embankment this [the car] would've turned upside down, I wouldn't be fine, I would've hurt myself." I didn't understand. But of course, either I said that or I wasn't going to get out of there. Think about it, I was only 26 years old, surrounded by military, without knowing what the hell to do. And of course, they told me: "look kid, you're too young to stay here. Say this and nothing's going to happen to you...." Let's be honest, they didn't beat me up while I was on the stretcher; I mean the only thing they did was slap me.... They did it a couple of times... I mean, it was like, "this didn't happen." Slap, slap.

...

Every time they interrogated me, they asked me about the car. They thought I was from the CIA and that my government had sent me, that I had been sent by my party, or that I was somehow related to the U.S. government. That was their biggest obsession. Regarding the car, every time they questioned me, they were fabricating, you know what I mean? They would keep introducing new elements. "You should have had to pass by this place," and it was because they had already prepared a witness [to corroborate this]. And "you should've seen this sign," and it was because they had already put a sign there. They were creating the facts, because later, during the trial, it became evident how some of the witnesses had notes¹⁴¹ written on their hands. For example, the sign: there was a sign in a certain place around the area of the incident; originally, it was about 100 meters away, but someone grabbed it and moved it to about 150 meters away. They didn't know who had moved it. Well, a lot of stupid things like that.

ENH: They conducted an interrogation, but at the same time they were prompting their version of the facts they wanted you to tell?

AC: No, they weren't prompting. That was the only possible version. Every time I told them "no," they replied, "yes." I mean, at the end of it, I was like, fine, whatever you say. I signed everything they gave me. I mean, without having any contact with the embassy, or the consulate or anything, without having access to an attorney or anyone, just there by myself inside a prison in Bayamo—I would have signed anything, I don't know, anything they gave me.

ENH: Did you ever think about committing suicide?

AC: Yes. The truth is that I'm not proud to have thought about it at all, but I was so desperate, I was... I mean, I thought they were never going to release me, or that they were going to do it themselves. I was isolated; I didn't have any contact with the outside world. I saw myself, I mean... I don't know. The truth is that I don't want to make up any excuses, because I believe in life. I don't believe doing that is the right thing, at all. Besides, I'm Christian. The only thing I can think of is, how bad could I have felt at that point to even think about doing something like that?

On August 26, 2013, Carromero gave the following interview with the Human Rights Foundation:¹⁴²

Human Rights Foundation: Do you remember seeing the car, or Harold Cepero and Oswaldo Payá's bodies after the crash?

Ángel Carromero: The only thing I remember is stepping into the van, on foot, without help,

¹⁴¹ Information or annotations.

¹⁴² Phone interview of Ángel Carromero conducted by the Human Rights Foundation on August 26, 2013.

without stumbling or anything. Just getting in the van.

HRF: You mentioned in an interview that a priest and a nurse told you that Payá and Cepero got out of the accident alive. Could you elaborate on this?

AC: That is correct. When I was taken into the hospital, the first thing I asked, logically, was “where are the others?” They didn’t say anything, but just told me to relax and that they were on their way. At first, the nurse was saying that there were four of us in the car, but then she said there were three and finally only two. And then the Spanish priest called the hospital and they told him that all of us were there, something like that. In fact, this was brought up in the lawsuit submitted by Oswaldo’s family. They asked for this priest to testify, because he had that phone conversation.

HRF: Did you have a chance to speak with Jens Modig when you were in the hospital?

AC: Yes. When they took my statement. When I woke up on a stretcher in the hospital there was a military officer to my left, and she took my statement. So I told her the truth, right? That we were taken out of the car, that I lost control, and that we were hit. So she took my statement and left. Right after that they brought Aron [Modig] in and I told him: “oh my God, Aron, they hit us, they are going to kill us!” and he told me, “yes, probably.” And that’s when we started calling people from his cellphone—since I no longer had my iPhone with me, we only had his—to let people in Spain and Sweden know we were in the hospital.

HRF: At what point did they force you to change your story? Was it at the hospital or in prison?

AC: At the hospital. It all happened there. After they separated Aron and I, they put an IV in me, sedated me, and then took my statement again. There were officers surrounding me by then, and one of them was recording the scene with a Handycam. That’s when they told me, “no, that is not what happened.” One of those officers is the one that slapped me. And then they left. Then this other person showed up, identifying himself as “Cuba’s government expert.” He is the one that told me this bizarre version, which, of course, I didn’t understand... he said I had fallen into an embankment.

I didn’t understand anything; I thought that, well, if he’s telling me I fell into an embankment the car would’ve had to flip over. Well, that is what happened, right?... They told me not to be stupid. So besides slapping me, they told me I could choose whether to stay there for 40 years, or tell their version and nothing would happen to me.

HRF: How could you tell they were military?

AC: They were from the Ministry of the Interior. They were wearing uniforms and on their lapels it said “Ministry of the Interior,” so it was a military uniform.... Some of those surrounding me were dressed as civilians and others wore uniforms.

HRF: That’s when you signed a second statement?

AC: I signed so many papers. I signed the first statement, which is the one the military officer took, the woman. Of course, I signed everything, every time I had to. I was feeling kind of groggy at the end. I don’t even know how many papers I ended up signing. What I do remember is that I tried to make an unintelligible signature on all the papers I didn’t want to sign. I think that’s why they haven’t released any documents yet... My problem was that I was aware of what had happened. I mean, I was aware that they were going to use everything against me. So, the only thing that came to mind—since I thought I wasn’t going to get out of that mess, and just like I did

in the video—was to try to give some signs to those of you abroad who could see—or to whoever saw the papers, or the video—that it was all a hoax. That’s why I made an unintelligible signature on the papers I disagreed with. That I remember.

For example, what I did in the video, when I read the Cuban slang expressions and played with the buttons on my polo shirt. In one scene, you can see my shirt all buttoned up, and in the other one my polo is unbuttoned. So, I kept doing these kinds of things so that nobody would think that I was filming the video on my own free will.

HRF: Was the video shot in Bayamo’s prison?

AC: Yes, in a prison cell. They brought me up to a room and they shot the video there.

HRF: Did they ever identify the people who rescued you, the ones who arrived first at the scene of the accident? Were they witnesses in the trial?

AC: Let’s see, there was a problem understanding the trial and how it was set up. They performed a series of tests that they had practiced, which were very bad. So my family hired a very prominent law firm in Spain, with experts, and they found out that I could plead not guilty, because they didn’t have a case against me even with the Cuban version of the facts. You just have to remember that the first thing the regime said was that I was driving—and please, take note of the preciseness—at 132 kilometers per hour. This was physically impossible, and so was the evidence they made up. So in late August, my lawyers—the only people I was allowed to talk to, and even then we couldn’t speak freely, we had to talk in a room with those one-way mirrors, you know, those that allow people in the other room to see you but you can’t tell if they are there, you know what I’m saying?—they asked me, “what are you going to do? Are you going to plead guilty or not guilty?” Because I realized that I could plead not guilty, even with the official story, I continued pleading not guilty. So they delayed the trial for a month. It wasn’t in early September anymore, but in early October instead. And in that time, they fabricated the whole story.

When they questioned me, I realized, because I had gone to law school, that they were trying to get statements out of me that would corroborate the presence of the witnesses and the road signs they mentioned. They were constantly trying to make me incriminate myself. They were building their case, their farce, by making me sign statements that were consistent with their version.

Just to give you an example—during the trial, one of their made-up witnesses had his statement written on his hand, on the palm of his hand in pen.... I told my lawyer, “will you take a look at that?” She didn’t mention it later, but it was something like that.

HRF: So, the people who actually rescued you never showed up at the trial?

AC: It’s mind-blowing! For example, throughout the trial, neither the person nor the car with the sliding door—my God, that car in Cuba! You don’t see that kind of car in Cuba’s interior—that supposedly took me to the hospital were identified. In the trial they said, “they didn’t know who took me to the hospital.” Does anyone believe that in a militarized hospital nobody is going to know who brought in a foreigner? A foreigner who just had an accident? That is just not believable.

A good soul with a car with a sliding door picked me up, took me to the hospital and disappeared. Nothing more was ever heard from him or her.... Normally, people in Hispanic countries help you and stay with you. I mean, I understand that people from Northern Europe who are “colder” would take you to the hospital and just leave you there, or in a big city where

people don't want to get in trouble or what not. But we Hispanics, come on! If I take someone to the hospital in my car, I would stay there or at least identify myself... [but they] disappeared.

HRF: Did you tell the real story to your Cuban attorney? Did she know?

AC: I couldn't talk to her. As I was telling you before, the room where we met in was bugged and it had a one-way mirror. So, if at any point I mentioned anything of what had really happened, it would have been time to say goodbye. But she was no fool, she knew. It was difficult, but, for example, we had a trick where instead of talking about things, she would write them on a piece of paper. So, she knew exactly what had happened.¹⁴³

...

Take into account that I was alone. I didn't have access to anyone. I was at the mercy of whatever they wanted to do to me. What they had done—in legal terms—was kidnap me. Imagine this situation in the United States; you immediately have access to a lawyer when you get arrested. In Spain we have habeas corpus, where the police are obligated to tell you why you are being detained.

HRF: Something important you mentioned earlier was that you were sedated.

AC: Yes. When they called—for crying out loud, I was fine, but then I had a gash in my head that we don't know where it had come from. It looked like I was hit with a rifle butt, but since we can't show it, it isn't even mentioned. So when they called from Spain, everyone was really worried because they feared we were going to get killed. So when the priest called the hospital, a nurse first picked up the phone and told him I was unharmed, that I was ok, and that I was sitting on a stretcher, because, of course, I felt helpless trying to look around while lying down, which you can't do. So, I was doing everything I could so they would let me sit.

The second time he called, the nurse did not pick up the phone, but a military officer did, and he told him that I was unconscious and sedated. That's when all of the alarms were set off, because what could they have expected from a third call? That I had died, or that something had happened to me? That's when they asked a Cuban priest from Santiago to go to the hospital and see if I was doing okay, which he did. I don't remember any of this because at that point I was already feeling woozy. They let him [in] because he said that I was a devout Catholic, and that he had come to provide spiritual support and what not. They let him see me, and then people from Spain started spreading the news through social media, via Twitter. I think even the government... the party released a statement, in which they confirmed that they knew that I was alive and well. After that, they couldn't play that card anymore.

HRF: What other times did you feel you were sedated?

AC: Well, if you watch the video they made me film, you can see my body language, how I talk, how my gaze seems lost. You can see that I'm not in good condition.... The whole nightmare was in Bayamo. They organized everything while I was in Bayamo. Once they took me to Havana, it

¹⁴³ See CARROMERO, *supra* note 56, at 142–149. (In the book, Carromero referred to this room, stating: [*Translation by the author*] “We were in the room where I would later meet the consul and my attorneys, very similar to the one in Bayamo. There were similar background curtains and a one-way mirror on one of the walls, which no doubt looked into an adjacent room where there were people watching me, unseen.” Carromero confirmed that his conversations in this room were being listened to when, after deciding with his attorney that he was going to plead not guilty, Lieutenant Colonel José Águilas [Chief Instructor of Crimes Against the State] asked him at the end of the meeting, “why did you do that?” while warning him that he “already knew what to expect.”).

stopped.

HRF: Have you tried to get any exams to verify if you still have any of those substances in your body?

AC: Well, we tried. As you know, when someone injects these substances in your body, the traces of them remain in your hair. The problem was that I stayed in Cuba for six months. So, when they did the test, besides the fact that I had lost almost all of my hair from stress—I had little hair to begin with— [in Cuba] they also shaved my head.

The first problem was getting a gram of hair, which we almost couldn't get. Secondly, the conclusion we got—from this very reliable private German laboratory—was that too much time had passed and that we weren't going to find anything. That was the problem. I don't even know if it was on purpose or what, but I spent six months in Cuba. I was there for five and a half months, plus the time I was in Madrid, at Segovia's prison. We didn't have time. I don't know if maybe we would have gotten proof if we would have done it right after arriving at the airport. But we also had the problem of not being able to get one gram of hair. It's hard to believe, but getting one gram of hair isn't easy—hair doesn't weight much.

HRF: They forced you to cut your hair in Cuba?

AC: Yes. I'm not sure why. I don't know if it was to prevent lice or because of hygiene regulations, I don't know. But once I got to Havana they cut my hair, and that was it, they changed my look.

I actually remember the first time they cut my hair. After that, because one can go a little crazy after being locked up for five and a half months, I thought it was normal. But I do remember the first time they cut my hair... it was very humiliating. For a man, this may sound silly, but, like... I don't know. The truth is some things are a little difficult for me to explain because they are emotional feelings. The fact that they cut your hair, it is like they are dehumanizing you. They grab you and you know you are at the mercy of whatever they want to do with you. It's really a psychological thing. I can't really explain it in detail.

HRF: Was this before or after the conviction?

AC: Before. It went like this. They had bought me some clothes for the day of the trial, because they wanted me to wear gray pants, and this thing they called a guayabera [shirt].¹⁴⁴ So, before leaving, a general came—this one was a general—and he yelled at the lieutenant colonel because he said I couldn't be dressed like that, that it wasn't going to look convincing. So he left in a hurry and then brought a white shirt, and they made me wear that one instead of the guayabera.

They recorded me tons of times. Those videos will come out at some point and I'll have to publicly address them when the time comes. Everyone there had cameras and hidden cameras. Of course, I kind of knew how it all worked, since we are used to living in societies where this happens in offices and public places. So, they videotaped me many times, and then they would videotape me again, asking me to say something specific, obviously so they could make their own version of the video.

For example, when my government had already negotiated my return with the Cuban authorities, when the date of my return was pretty much finalized to be around November 14 or

¹⁴⁴ See MERRIAM-WEBSTER (2014). ("Guayabera: a usually short-sleeved lightweight sport shirt designed to be worn untucked.").

15, when they knew that I was going to go back to Spain, that's when they started letting me out of my cell every day. They even gave me a chessboard and got me playing chess with a soldier. But they were so dumb, I noticed that there was a guy recording us from a distance. Or whenever I was let out, another soldier would come up to me, put his hand on my shoulder and say things like "you poor guy," or he would just come up and say hello.

I mean, it was all a complete gimmick. I thought, "can't you see that I know you are doing this because I am going back to Spain? That you are recording this and it's your only defense for what you have done to me for the last few months?" I wouldn't be surprised if tomorrow they release a video where they show me "having a good time."

Come on! I remember that when they were taking me to Havana, when they shot [tons] of videos of me. Of course I never smiled. How could I? I thought they were going to kill me. How was I supposed to be fine? And when they shot the videos, they would tell me, "look, we are going to record you now but you have to smile." I mean, it was all really schizophrenic.

HRF: Was there an independent attorney in Cuba with whom you could speak confidentially?

AC: No, not at all. Damn, I was freaked out—sorry about my language—but I didn't trust the Cuban lawyers. They only have a collective law firm with State-established fees that all attorneys depend on. So, what I first thought was, "how is a Cuban lawyer going to defend me? He's going to panic." If he does his job well, it is not just his career as a lawyer that is over, but his life.... In fact, the manager of the firm at the time went into exile only three weeks after taking up my case and now lives in Spain.¹⁴⁵

Actually, my Spanish lawyer told me—I think he went to Cuba twice to coordinate my defense—that they had to stay hidden while they were there. They had to change their meeting places about 20 times; they felt the pressure. Many times they had to meet in "The Bunker"—that's what they call it. It's an underground hall in the Spanish embassy that can't be bugged because of how it was built.

HRF: When were you given access to an attorney?

AC: I didn't have access to an attorney until a few weeks after I was arrested. Two weeks had passed; how is that possible?

HRF: Were they able to present any evidence during the process?

AC: Look, we even had opinions from experts and physicists from CUJAE,¹⁴⁶ which is a technical university in Cuba, but people were afraid. Anyway, in Cuba's criminal justice system you can't submit opinions from independent experts;¹⁴⁷ they simply do not allow a third party chosen by the defense to review the evidence. They just don't have access to it. My lawyers never saw the car, never had access to anything from the fatal incident; they went in blind. When I found out about all this, I asked myself, "well, why should I even spend money on my defense?" since this

¹⁴⁵ See CARROMERO, *supra* note 56, at 145. (In the book, Carromero stated: [Translation by the author] "In Cuba you know that everything is a part of the government. They absolutely own everything, everybody, and every soul. Therefore, attorneys are not independent professionals but rather part of the regime. They are in what they call 'collective law offices.'").

¹⁴⁶ See official website of University Campus José Antonio Echeverría (CUJAE by its Spanish acronym), <http://cujae.edu.cu/en/who-are-we/welcome>

¹⁴⁷ See LAW NO. 5 OF CRIMINAL PROCEDURE Art. 201 (Translation by the author: "Only the official expert witnesses appointed as such can practice the diligences for an expert's report. If there is none of the needed type, others will be used in accordance with the provisions in this Chapter.").

was indefensible. They couldn't do anything. The basic principle of the defense, which is the principle of contradiction, was being broken—apart from all the other violations that we're now talking about.¹⁴⁸

HRF: Was the legal strategy of your Spanish attorneys to get you out of Cuba as soon as possible?

AC: Of course, that was the idea. We all knew I was going to be convicted. In fact, one of the terms of the agreement was... that the sentence should be under five years so that I could get a third degree [crime]. That's what we got.

Why didn't I appeal? It's very simple. In Cuba, there are no appellate courts.

I don't know how the American court system works, but in Spain, a court of first instance hands down the sentence, then you can submit an appeal before the court of appeals and in that trial, all the evidence and reports are reexamined—it's a review of the first trial. Once you get a verdict on the second trial, then that sentence is almost final. Almost, because you still have the chance to appeal that verdict again. The problem with the court of cassation is that you can only claim due process of law violations; you can't submit any evidence to be reviewed again.

So, what's the problem with Cuba's system? The problem is that there is no court of appeals in Cuba. It's final once you get convicted. The only thing you can do is submit a cassation appeal.¹⁴⁹ But they don't try you again, that's only if one of your rights [of due process] was violated. But of course, they are all violated. And it wasn't realistic—I mean, we were not going to get anything out of it. That's why I didn't do it.

HRF: Is there any way to get the copy of your case file? We understand the case file is not available to the public.

AC: Not even my lawyers [can get it]. My attorneys had to copy the file by hand. They were not even given a copy of the evidence. They had to trace the illustrations they used themselves. Yes, they traced the illustrations. Of course, if my attorneys had been able to get a copy of the file, it would have left Cuba to be analyzed. So, of course, the only thing we have right now are the notes my lawyers were allowed to copy by hand.

In fact, the file was in Bayamo, while I was being held in Havana. My attorneys had to travel to Bayamo and they stayed there for eight to ten hours copying the file... They just put the papers in front of you and say, "here, take a look at them."

HRF: Was there anything peculiar about the judges?

AC: Let me tell you about the trial. There were five judges in the room. The Cuban authorities put the press in another room, and they were recording everything, so they transmitted only what they wanted to show them. In fact, they pulled some footage out from up their sleeves—as if it was CCTV,¹⁵⁰ they used CCTV with videos of Toyotas, from other car accidents, things like that—things that were not in the case file. My lawyer even pointed that out, but it wasn't noted in the sentence. They made a show out of it.

HRF: The judges?

¹⁴⁸ See *supra* note 56.

¹⁴⁹ See *supra* note 147 at Art. 67.

¹⁵⁰ Closed-circuit television (CCTV).

AC: The trial was a show. It was put together with things that were not even there, without any evidence from the file, nothing. They basically just made a media show for their rebuttal. They were constantly looking for ways to defend themselves, so they built [the trial] with these videos to be able to say I was being “fairly” convicted. So, all of this was recorded and they retransmitted pieces of it.

HRF: Finally, what was the publicity of this process?

AC: I don’t know if it was made public or not, in the end. What I do know is that the room was filled with people from the Communist Party, their own people.¹⁵¹ They didn’t let the family in. They stopped them at the door.

Look at what happened to Yoani Sánchez, who went to the trial and was detained and stripped naked. They kept her in a cell for some 24 hours, or something like that. I mean, it’s crazy.

...

How is it possible that the family of the deceased person cannot attend the trial? A year and a month have passed and they haven’t even got an autopsy report. The only thing they got to see was Oswaldo’s body. In the trial, they said it was as if he had been completely crushed. Carlos and Ofelia and those who saw his body always tell me that when they did, the body didn’t have anything. He had bruises but they were in his head; his body was intact.

C. International human rights law

a. Standard of protection for the right to due process of law

i. Independence and impartiality of the courts

According to Article 10 of the Universal Declaration of Human Rights (hereinafter, UDHR): “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”¹⁵²

Article 14 of the International Covenant on Civil and Political Rights (hereafter, ICCPR) provides: “all persons shall be equal before the courts and tribunals. In the determination of any

¹⁵¹ See CARROMERO, *supra* note 56, at 175. (In the book, Carromero stated: [Translation by the author] “When I came into the room, I understood. The trial was public, but only for a ‘selected’ public. They had filled the room with members from the Communist Party or the Youth Communist League.”).

¹⁵² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). While declarations adopted by the United Nation’s General Assembly are not always binding (this term is often used to deliberately state that the parties do not intend to create binding obligations but merely disclose certain aspirations), some instruments called “declarations,” which initially had no binding force, acquired this characteristic as a result of State practice and became customary international law.

See Mary Robinson, United Nations High Commissioner for Human Rights, Statement by the High Commissioner for Human Rights at the European Colloquy Organized by the Council of Europe (Sept. 2, 1998) in COUNCIL OF EUROPE DOC., at 18–21, http://www.coe.int/t/dghl/standardsetting/cddh/Proceedings/InOurHands_en.pdf. (In 1998, Mary Robinson, United Nations High Commissioner for Human Rights at the time, stated in this regard: “Many of the provisions of the Declaration have become part of customary international law, which is binding on all states whether or not they are signatories to one or more multilateral conventions concerning human rights. Thus what started its existence as a solemn but non-binding proclamation of rights and freedoms has, at least in some respects, acquired through state practice the status of universal law.”).

criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁵³

In resolution 2003/39, the former United Nations Commission on Human Rights stated: “any court trying a person charged with a criminal offence should be based on the principles of independence and impartiality.”¹⁵⁴

Similarly, in its resolution 2004/33, the U.N. Commission on Human Rights called upon “all Governments to respect and uphold the independence of judges and lawyers and, to that end, to take effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional duties without harassment or intimidation of any kind.”¹⁵⁵

On this matter, the United Nations Basic Principles on the Independence of the Judiciary state:¹⁵⁶

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

In a joint report on the human rights situation in Nigeria, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Special Rapporteur on the Independence of Judges and Lawyers stated: “the separation of power and executive respect for such separation is a sine qua non for an independent and impartial judiciary to function effectively.”¹⁵⁷

¹⁵³ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Although the Cuban State hasn’t ratified the ICCPR, as a member of the U.N. (on October 15, 1945, Cuba ratified the Charter of the United Nations) it is bound to “promot[e] and encourag[e] respect for human rights” and “fundamental freedoms for all.” In this sense, the rights and freedoms delineated in the ICCPR are inspired by the “principles proclaimed in the Charter of the United Nations,” which bounds States to “promote universal respect for, and observance of, human rights and freedoms,” pursuing the “ideal of free human beings enjoying civil and political freedom” in accordance with the UDHR. See also The Foundation of International Human Rights Law, <http://www.un.org/en/events/humanrightsday/2007/ihr/shtml> (last visited Sept. 9, 2014) (“Over the years, the commitment has been translated into law, whether in the forms of treaties, customary international law, general principles, regional agreements and domestic law, through which human rights are expressed and guaranteed. Indeed, the UDHR has inspired more than 80 international human rights treaties and declarations, a great number of regional human rights conventions, domestic human rights bills, and constitutional provisions, which together constitute a comprehensive legally binding system for the promotion and protection of human rights.... Together with the UDHR, the Covenants comprise the International Bill of Human Rights.”).

¹⁵⁴ U.N. Human Rights Commission Res. 2003/39, U.N. Doc. E/CN.4/RES/2003/39 (Apr. 23, 2003).

¹⁵⁵ U.N. Human Rights Commission Res. 2004/33, U.N. Doc. E/CN.4/RES/2004/33 (Apr. 19, 2004).

¹⁵⁶ Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from Aug. 26—Sept. 6, 1985. See also G.A. Res. 40/32, ¶ 3, U.N. GAOR, 96th plen. mtg., U.N. Doc. A/RES/40/32 (Nov. 29, 1985) & G.A. Res. 40/146, ¶ 2, U.N. GAOR, 116th plen. mtg., U.N. Doc. A/RES/40/146 (Dec. 13, 1985).

¹⁵⁷ See Bacre W. N’diaye, Special Rapporteur on extrajudicial, summary or arbitrary executions, and Param Cumaraswamy, Special Rapporteur on the independence of judges and lawyers, *Situation of human rights in Nigeria*, ¶ 71, U.N. Doc. E/CN.4/1997/62/Add.1 (Mar. 24, 1997).

Similarly, the Special Rapporteur on the Independence of Judges and Lawyers has stated:¹⁵⁸

The Special Rapporteur observes that the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law.

The principle of the separation of powers, [is the] bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a sine qua non for a democratic State.

Regarding this subject, the United Nations Human Rights Committee (hereinafter, HRC) has exhorted the States to establish a clear demarcation between the competence of the executive and judicial bodies.¹⁵⁹ In this sense, the HRC has stated: “the lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy.”¹⁶⁰

In the case of *Arvo O. Karttunen v. Finland*, the HRC stated:¹⁶¹

The impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1 [of the ICCPR]. “Impartiality” of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties.

Regarding this subject, the HRC held that: “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”¹⁶²

Article 18 of the American Declaration of the Rights and Duties of Man (hereinafter, ADRDM) provides: “every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” Furthermore, Article 26 of the ADRDM provides: “every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.”¹⁶³

¹⁵⁸ See Param Kumaraswamy, Special Rapporteur on the independence of judges and lawyers, ¶¶ 32 & 55, U.N. Doc. E/CN.4/1995/39 (Feb. 6, 1995).

¹⁵⁹ See U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee—Romania, ¶ 10, U.N. Doc. CCPR/C/79/Add.111 (July 28, 1999).

¹⁶⁰ See U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee—Slovakia, ¶ 3, U.N. Doc. CCPR/C/79/Add.79 (Aug. 4, 1997).

¹⁶¹ *Arvo O. Karttunen v. Finland*, U.N. Human Rights Committee, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 ¶ 7.2 (1992).

¹⁶² See U.N. Human Rights Committee, General Comment No. 32, ¶ 19, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

¹⁶³ American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82, doc. 6, rev. 1 at 16, available at <http://www.oas.org/en/iachr/mandate/Basics/2.AMERICAN%20DECLARATION.pdf>.

The State of Cuba is party to the first international instruments established in the American Hemisphere to protect human rights. On July 8, 1952, the government of Cuba signed the Organization of American States (OAS) Charter.

In this regard, the IACHR has stated:¹⁶⁴

The rights to a fair hearing are the fundamental concepts of judicial independence and impartiality, which... are broadly considered indispensable to the proper administration of justice and the protection of fundamental human rights. The requirement of independence in turn necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring the correct and independent performance of judicial functions, including tenure and appropriate professional training. The impartiality of a tribunal must be evaluated from both a subjective and objective perspective, to ensure the absence of actual prejudice on the part of a judge or tribunal as well as sufficient assurances to exclude any legitimate doubt in this respect. These requirements in turn require that a judge or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias.¹⁶⁵

On August 18, 1959, the government of Cuba signed the Declaration of Santiago (Final Act of the Fifth Meeting of Consultation of Ministers of Foreign Affairs), in which the creation of the IACHR was decided. On January 31, 1962, the government of Cuba was excluded from participating in the Inter-American system by Resolution VI, adopted at the Eighth Meeting of Consultation of Ministers of Foreign Affairs, held in Punta del Este, Uruguay. On June 3, 2009, during its Thirty-ninth Regular Session held in Honduras, the General Assembly of the OAS set aside Resolution VI adopted at the Eighth Meeting of Consultation of Ministers of Foreign Affairs and established that “the participation of the Republic of Cuba in the OAS will be the result of a process of dialogue initiated at the request of the government of Cuba, and in accordance with the practices, purposes, and principles of the OAS.”

See Annual Report of the Inter-American Commission on Human Rights 2013, ¶¶ 99–101 (Apr. 23, 2013) available at <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/AnnualReport-Chap4-Cuba.pdf>; see also Inter-American Commission on Human Rights, The Situation of Human Rights in Cuba Seventh Report, OEA/Ser.L/V/II.61, doc. 29 rev. 1, ¶¶ 16–46 (Oct. 4, 1983). The Inter-American Commission has maintained that the Cuban State “is juridically answerable to the Inter-American Commission in matters that concern human rights,” since it is “party to the first international instruments established in the American Hemisphere to protect human rights” and because Resolution VI of the Eighth Meeting of Consultation “excluded the Government of Cuba, not the State, from participating in the Inter-American system.”

See *Victims of the Tugboat “13 De Marzo” v. Cuba*, Case 11.436, Inter-Am. C.H.R., Report No. 47/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 77 (1997). As in the case of the UDHR, the ADRDM has become customary international law. On this regard, in the case of “*Victims of the Tugboat ‘13 De Marzo,’*” the IACHR held: “The Inter-American Commission on Human Rights must state, first of all, that the obligation of respecting and protecting human rights is an obligation erga omnes, i.e., one that the Cuban State must assume—like all other member states of the OAS, whether or not they are signatories of the American Convention on Human Rights—toward the Inter-American community as a whole, and toward all individuals subject to its jurisdiction, as direct beneficiaries of the human rights recognized by the American Declaration of the Rights and Duties of Man. Said international instrument, while not binding, embodies general principles and rules of customary international law.”

See *Oscar Vila-Masot v. Venezuela*, Case 11.216, Report No. 87/98, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 21 (1998). In the case of “*Oscar Vila-Masot*,” the IACHR held: “The Commission deems itself competent to enforce all rules relating to the inter-American human rights system, of which the Declaration [of the Rights and Duties of Man] is a part, with the status of a mandatory rule of ius cogens or international customary law.”

¹⁶⁴ See Inter-Am. C.H.R., Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116.Doc.5rev.1corr. ¶ 229, (2002), available at <http://www.cidh.org/terrorism/eng/part.i.htm>

¹⁶⁵ See *Palamara Iribarne v. Chile*, Inter-Am. Ct. H.R., Series C No. 135, Merits, Reparations and Costs, ¶ 145 (Nov. 22, 2005). See also *Herrera Ulloa v. Costa Rica*, Inter-Am. Ct. H.R., Series C No. 107, Preliminary Objections, Merits, Reparations and Costs, ¶ 171 (July 2, 2004). (“The Court considers that the right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, it must be ensured that the judge or court hearing a case does so based on the utmost objectivity. Furthermore, the independence of the Judiciary from the other State powers is essential for the exercise of judicial functions.”).

See also *Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, Inter-Am. Ct. H.R., Series C No. 182, Preliminary Objection, Merits, Reparations and Costs, ¶ 55 (Aug. 5, 2008). (“One of the principal purposes of the separation of public powers is to guarantee the independence of judges. Such autonomous exercise must be guaranteed by the State both in its institutional aspect, that is, regarding the Judiciary as a system, as well as in

ii. Independence and impartiality of the prosecution ¹⁶⁶

The United Nations Guidelines on the Role of Prosecutors¹⁶⁷ provide:¹⁶⁸

States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

In the performance of their duties, prosecutors shall... carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.

Similarly, the Special Rapporteur on the Independence of Judges and lawyers has stated:¹⁶⁹

Prosecutors who are involved in an investigation from the outset should ensure that the rights of defense are fully respected.... Prosecutors should cooperate with the legal profession and public defenders and ensure that the rights to a fair trial and to adequate access to legal defense are safeguarded. States should ensure respect for the principle of equality of arms between prosecutors and lawyers, which requires, inter alia, procedural equality between the prosecution and the defense.

In this regard, the IACHR has stated that¹⁷⁰ “the Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of lifetime appointment and other constitutional guarantees afforded to members of the judicial branch.” The IACHR held that, since “the Office of the Public Prosecutor has a monopoly over criminal

connection with its individual aspect, that is to say, concerning the person of the specific judge. The purpose of such protection lies in preventing the Judicial System in general and its members in particular, from finding themselves subjected to possible undue limitations in the exercise of their functions, by bodies alien to the Judiciary or even by those judges with review or appellate functions.”).

¹⁶⁶ See INTERNATIONAL COMMISSION OF JURISTS, INTERNATIONAL PRINCIPLES ON THE INDEPENDENCE AND ACCOUNTABILITY OF JUDGES, LAWYERS AND PROSECUTORS. PRACTITIONERS GUIDE NO. 1, at 75 n.246 (2007) *available at* <http://www.icj.org/no-1-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors/> (Only the Spanish version of the document has this footnote. *Translation by the author*: “In some countries, criminal prosecution [the investigation and indictment for a crime] lies in institutions that use different names than the ones of ‘prosecutor’ or ‘prosecution.’ Regardless of the name given by each national legal system, a body shall be considered ‘prosecution’ in accordance to the functions performed.”).

¹⁶⁷ *Id.* (“Unlike with judges and lawyers, international law does not contain a provision that guarantees the institutional independence of prosecutors. This is due to the fact that in some systems prosecutors are appointed by the executive branch of power or are under a certain level of dependency of this power, thus resulting in the duty to observe certain orders received from the Government. Whilst an independent prosecutorial authority is preferable to one that belongs to the executive, States always have a duty to provide safeguards so that prosecutors can conduct investigations impartially and objectively.”).

¹⁶⁸ U.N. Guidelines on the Role of Prosecutors, Aug. 27–Sept. 7, 1990, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, U.N. Doc. A/CONF.144/28/Rev. 1 (1990), Guidelines 4, 12 & 13(a).

¹⁶⁹ Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, ¶¶ 45 & 103, U.N. Doc. A/HRC/20/19 (June 7, 2012).

¹⁷⁰ Making reference to a proposal approved during the Second Latin American Colloquium and First Mexican Congress on Procedural Law. 1960.

actions... it must have autonomy and independence from the other branches of government.”¹⁷¹

iii. Right of the victims or their relatives to act at all stages and in all instances of the investigation and the corresponding trial

The Updated Set of principles for the protection and promotion of human rights through action to combat impunity,¹⁷² recognized by the former United Nations Commission on Human Rights, provide:¹⁷³

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as civil parties or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.

In this regard, the Office of the United Nations High Commissioner for Human Rights has stated: “national criminal procedures allow victims and their relatives to participate and intervene in the criminal judicial proceedings.”¹⁷⁴

Similarly, the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provide: “families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation.”¹⁷⁵

The Inter-American Court of Human Rights (hereinafter, IACourtHR) has ruled in different cases:

The guarantees under Article 8(1) of the Convention [due process] do not apply merely to judges and trial courts or judicial proceedings.¹⁷⁶

The victim’s next of kin must have full access and capacity to act at all stages and in all instances of the investigation and the corresponding trial¹⁷⁷.... Whenever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible... and this obligation must be complied with seriously and not as a mere formality.¹⁷⁸

¹⁷¹ Inter-Am. C.H.R., Report on the Situation of Human Rights in Mexico, OEA/Ser.L/V/II.100 doc. 7 Rev. 1. Sept. 24, 1998, ¶¶ 372 & 381.

¹⁷² Updated Set of principles for the protection and promotion of human rights through action to combat impunity, *Report of the independent expert to update the Set of principles to combat impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) U.N. Human Rights Commission, sixty-first session, principle 19.

¹⁷³ See U.N. Human Rights Commission Res. 2005/81, U.N. Doc. E/CN.4/2005/L.10/Add.17, ¶ 21 (Apr. 21, 2005).

¹⁷⁴ High Commissioner for Human Rights, Study on the right to the truth, ¶ 48, delivered to the U.N. Human Rights Commission, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) (“In promoting the right to the truth, States should guarantee broad legal standing in the judicial process to any wronged party and to any person or NGOs having a legitimate interest therein.”).

¹⁷⁵ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989).

¹⁷⁶ See Rosendo-Cantú et al. v. Mexico, Inter-Am. Ct. H.R., Series C No. 216, Preliminary Objection, Merits, Reparations, and Costs, ¶ 159 (Aug. 31, 2010).

¹⁷⁷ See Huilca Tecse v. Peru, Inter-Am. Ct. H.R., Series C No. 121, Merits, Reparations and Costs, ¶ 107 (Mar. 3, 2005).

¹⁷⁸ See Trujillo Oroza v. Bolivia, Inter-Am. Ct. H.R., Series C No. 92, Reparations and Costs, ¶ 100 (Feb. 27, 2002). See

The victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.¹⁷⁹

In the case of *Radilla Pacheco v. Mexico*, the IACourtHR held that:¹⁸⁰

[The civil victim] has the right to participate in the criminal proceedings not only for the effects of the corresponding reparation of the damage but also to exercise their rights to the truth and to justice.... In that sense, the victims of the violations of human rights and their next of kin have the right to have said violations heard and resolved by a competent tribunal, pursuant with the due process of law and the right to a fair trial.

In the case of *García Prieto et al. v. El Salvador*, the IACourtHR ruled: “for the Court, the lack of state response is a determinative element when evaluating whether a breach of Articles 8(1) and 25(1) of the American Convention has occurred, because it is directly related to the principle of effectiveness that should permeate the development of such an investigation.”¹⁸¹

In the case of *Garibaldi v. Brazil*, the IACourtHR ruled that:¹⁸²

The Court considers that the State bodies responsible for an investigation into the violent death of an individual, the purpose of which is to determine the facts, identify those responsible and decide their possible punishment, should perform their task diligently and exhaustively. Given the juridical right to which the investigation relates, there is an obligation to make every effort to ensure that all necessary measures are taken to comply with this objective. The negligent or omissive action of State bodies is not compatible with the obligations arising from the American Convention, especially when an essential human right is involved.

iv. Right to counsel and the right to communicate freely and confidentially with counsel

According to Article 9 of the UDHR: “no one shall be subjected to arbitrary arrest, detention or exile.”

Similarly, Article 14, paragraph 3(b), of the ICCPR provides that in the determination of any criminal charge, everyone shall be entitled:

To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.... To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of

also Myrna Mack Chang v. Guatemala, Inter-Am. Ct. H.R., Series C No. 101, Merits, Reparations and Costs, ¶ 273 (Nov. 25, 2003).

¹⁷⁹ See “Street Children” (Villagrán-Morales et al.) v. Guatemala, Inter-Am. Ct. H.R., Series C No. 77, Reparations and Costs, ¶ 227 (May 26, 2001).

¹⁸⁰ Radilla Pacheco v. Mexico, Inter-Am. Ct. H.R., Series C No. 209, Preliminary Objections, Merits, Reparations, and Costs, ¶ 275 (Nov. 23, 2009).

¹⁸¹ García Prieto et al. v. El Salvador, Inter-Am. Ct. H.R., Series C No. 168, Preliminary Objections, Merits, Reparations, and Costs, ¶ 115 (Nov. 20, 2007).

¹⁸² Garibaldi v. Brazil, Inter-Am. Ct. H.R., Series C No. 203, Preliminary Objections, Merits, Reparations, and Costs, ¶ 130 (Sept. 23, 2009).

justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

In this sense, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides: “a detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.”¹⁸³

In this regard, the U.N. Basic Principles on the Role of Lawyers provide:¹⁸⁴

Governments shall... ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

The U.N. Standard Minimum Rules for the Treatment of Prisoners provide:¹⁸⁵

For the purposes of his defense, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defense and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

In the case of *Victor P. Domukovsky et al. v. Georgia*, the HRC stated: “the right to a defense is inalienable and should be adhered to at every instance and without exception. This entails the right to be tried in one’s presence, to be defended by counsel of one’s own choosing, and not to be forced to accept ex-officio counsel.”¹⁸⁶

Likewise, in the case of *Dimitry L. Gridin v. Russian Federation*, the HRC stated:¹⁸⁷

Denying the author access to legal counsel after he had requested such access and interrogating him during that time constitutes a violation of the author’s rights under article 14, paragraph 3 (b). Furthermore, the Committee considers that the fact that the author was unable to consult with his lawyer in private, allegation which has not been refuted by the State party, also constitutes a violation of article 14, paragraph 3 (b) of the Covenant.

In this regard, Article 25 of the ADRDM provides:

¹⁸³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), principle 17.

¹⁸⁴ U.N. Basic Principles on the Role of Lawyers, Aug. 27–Sept. 7, 1990, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, principles no. 7 & 8.

¹⁸⁵ U.N. Standard Minimum Rules for the Treatment of Prisoners, Aug. 30, 1955, *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Geneva, Switz., ¶ 93. (Approved by the Economic and Social Council by its resolution 663 C [XXIV] of July 31, 1957 and 2076 [LXII] of May 13, 1977).

¹⁸⁶ *Victor P. Domukovsky et al. v. Georgia*, Communication No. 623/1995, U.N. Doc. CCPR/C/62/D/627/1995, ¶ 18.9 (1998).

¹⁸⁷ *Dimitry L. Gridin v. Russian Federation*, Communication No. 770, U.N. Doc. CCPR/C/69/D/770/1997, ¶ 8.5 (2000).

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.... Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

The IACHR has held that the physical presence of an envoy or consul does not have the purpose of defending a detained person or providing sufficient representation, and it cannot replace legal counsel.¹⁸⁸

v. Right to an independent counsel

The U.N. Basic Principles on the Role of Lawyers provide:¹⁸⁹

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.¹⁹⁰

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.¹⁹¹

Regarding the guarantees for the independence within bar associations, the principles mentioned above provide:¹⁹²

Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

In this matter, regarding the establishment of mandatory memberships to bar associations controlled by the State, the HRC has stated:¹⁹³

The Committee also notes with concern the adoption of the Presidential Decree... which gives competence to the Ministry of Justice for licensing lawyers and obliges them, in order to be able to practice, to be members of a centralized Collegium controlled by the Ministry, thus undermining the independence of lawyers.

In this regard: The Committee stresses that the independence of the judiciary and the legal profession is essential for a sound administration of justice and for the maintenance of democracy

¹⁸⁸ See *Loren Laroye Riebe Star et al. v. Mexico*, Case 11.610, Inter-Am. C.H.R., Report No. 49/99, OEA/Ser.L/V/II.102 doc. 6 rev. ¶¶ 75 & 76 (1999).

¹⁸⁹ See *supra* note 184.

¹⁹⁰ *Id.* at “Whereas” number nine.

¹⁹¹ *Id.* at principle 16.

¹⁹² *Id.* at principle 24.

¹⁹³ U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee—Belarus, ¶ 14, U.N. Doc. CCPR/C/79/Add.86 (Nov. 19, 1997).

and the rule of law. The Committee urges... to take all appropriate measures, including review of the Constitution and the laws, in order to ensure that judges and lawyers are independent of any political or other external pressure.

vi. Right to effective legal counsel

In the case of *Dieter Wolf v. Panama*, the HRC stated:¹⁹⁴

The Committee recalls that the concept of a “fair trial” within the meaning of article 14, paragraph I, must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings. These requirements are not respected where, as in the present case, the accused is denied the opportunity to personally attend the proceedings, or where he is unable to properly instruct his legal representative. In particular, the principle of equality of arms is not respected where the accused is not served a properly motivated indictment.

In the case of *Nicholas Henry v. Jamaica*, the HRC stated: “the Committee reiterates its jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defense is an important aspect of the principle of equality of arms.”¹⁹⁵

Similarly, in General Comment No. 13, the HRC stated:¹⁹⁶

Subparagraph 3 (b) [of the ICCPR] provides that the accused must have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing. What is “adequate time” depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter.

The U.N. Basic Principles on the Role of Lawyers provide: “it is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.”¹⁹⁷

In this regard, Article 8, paragraph 2(f) of the American Convention on Human Rights (hereinafter, ACHR) provides: “the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.”

¹⁹⁴ *Dieter Wolf v. Panama*, U.N. Human Rights Committee, Communication No. 289/1988, U.N. Doc. CCPR/C/44/D/289/1988 ¶ 6.6 (1992).

¹⁹⁵ *Nicholas Henry v. Jamaica*, U.N. Human Rights Committee, Communication No. 610/1995, U.N. Doc. CCPR/C/64/D/610/1995 ¶ 7.5 (Oct. 21, 1998).

¹⁹⁶ U.N. Human Rights Committee, General Comment No. 13, ¶ 9, U.N. Doc. A/39/40(SUPP) (Jan. 1, 1984).

¹⁹⁷ See *supra* note 184, principle 21.

In the case of *Castillo Petruzzi et al. v. Peru*, the IACourtHR stated:¹⁹⁸

This particular case illustrates how the work of the defense attorneys was shackled and what little opportunity they had to introduce any evidence for the defense. In effect, the accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as they did not have access to the case file until the day before the ruling of first instance was delivered. The effect was that the presence and participation of the defense attorneys were mere formalities. Hence, it can hardly be argued that the victims had adequate means of defense.

vii. Prohibition against the use of force to obtain confessions or statements

According to Article 5 of the UDHR: “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 14, paragraph 3(g) of the ICCPR states that no one can be “compelled to testify against himself or to confess guilt.”

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides: “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”¹⁹⁹

Similarly, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states: “any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.”²⁰⁰

In the case of *Paul Kelly v. Jamaica*, the HRC stated:²⁰¹

The Committee notes that the wording of article 14, paragraph 3 (g)—i.e., that no one shall “be compelled to testify against himself or to confess guilt”—must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.

In this regard, Article 8, paragraph 3 of the ACHR states that “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.”

¹⁹⁸ *Castillo Petruzzi et al. v. Peru*, Inter-Am. Ct. H.R., Series C No. 52, Merits, Reparations and Costs, ¶ 141 (May 30, 1999).

¹⁹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), Art. 15.

²⁰⁰ Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975), Art. 12.

²⁰¹ *Paul Kelly v. Jamaica*, U.N. Human Rights Committee, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60, ¶ 5.5 (1991).

In the case of *Aguado Montealegre v. Nicaragua*, the IACHR held that self-incriminating statements extracted under duress are utterly invalid.²⁰²

viii. Publicity of the trial

According to Article 11 of the UDHR: “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.”

Similarly, Article 14, paragraph 1 of the ICCPR provides:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

In the case of *G. A. van Meurs v. The Netherlands*, the HRC stated:²⁰³

The Committee observes that courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.

Similarly, in General Comment No. 13, the HRC stated:²⁰⁴

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgment must, with certain strictly defined exceptions, be made public.

In this regard, Article 8, paragraph 5 of the ACHR states: “criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.”

ix. Right to appeal

²⁰² Annual Report of the Inter-American Commission on Human Rights 1989-1990, Case 10.198, Inter-Am. C.H.R., Resolution No. 29/89, OEA/Ser.L/V/II.77 rev.1 doc. 7 (1990).

²⁰³ *G. A. van Meurs v. The Netherlands*, U.N. Human Rights Committee, Communication No. 215/1986, U.N. Doc. CCPR/C/39/D/215/1986 ¶ 6.2 (1990).

²⁰⁴ U.N. Human Rights Committee, General Comment No. 13, ¶ 6, U.N. Doc. A/39/40(SUPP) (Jan. 1, 1984).

According to Article 8 of the UDHR: “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Similarly, Article 14, paragraph 5 of the ICCPR provides: “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

In the case of *Reid v. Jamaica*, the HRC stated:²⁰⁵

The Committee recalls that article 14, paragraph 5, states that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. The Committee considers that, while the modalities of an appeal may differ among the domestic legal systems of States parties, under article 14, paragraph 5, a State party is under an obligation to substantially review the conviction and sentence.

In the case of *Perera v. Australia*, the HRC stated: “the Committee observes that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial.”²⁰⁶

In the case of *Peter Lumley v. Jamaica*, the UNHRC stated:²⁰⁷

While on the basis of article 14, paragraph 5, every convicted person has the right to his conviction and sentence being reviewed by a higher tribunal according to law, a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case.

In the case of *Cesario Gómez Vázquez v. Spain*, the HRC stated:²⁰⁸

As to whether the author has been the victim of a violation of article 14, paragraph 5, of the Covenant because his conviction and sentence were reviewed only by the Supreme Court... the Committee takes note of the State party’s claim that the Covenant does not require a judicial review to be called an appeal. The Committee nevertheless points out that, regardless of the name of the remedy in question, it must meet the requirements for which the Covenant provides.... The Committee concludes that the lack of any possibility of fully reviewing the author’s conviction and sentence... the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met.

²⁰⁵ *Reid v. Jamaica*, U.N. Human Rights Committee, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 ¶ 14.3 (1994).

²⁰⁶ *Perera v. Australia*, U.N. Human Rights Committee, Communication No. 536/1993, U.N. Doc. CCPR/C/53/D/536/1993 ¶ 6.4 (1995).

²⁰⁷ *Peter Lumley v. Jamaica*, U.N. Human Rights Committee, Communication No. 662/1995, U.N. Doc. CCPR/C/65/D/662/1995 ¶ 7.3 (1999).

²⁰⁸ *Cesario Gómez Vázquez v. Spain*, U.N. Human Rights Committee, Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996 ¶ 11.1 (2000).

In the case of *Henry v. Jamaica*, the HRC stated: “the Committee observes that the Covenant does not require States parties to provide for several instances of appeal. However, the words ‘according to law’ in article 14, paragraph 5, are to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.”²⁰⁹

On this subject, Article 8, paragraph 2(h) of the ACHR provides that everyone shall have the right to appeal the judgment before a higher court.

In the case of *Juan Carlos Abella v. Argentina*, the IACHR stated:²¹⁰

The Commission observes that Article 8(2)(h) refers to the minimum characteristics of a remedy that serves as a check to ensure a proper ruling in both substantive and formal terms. From the formal standpoint the right to appeal the judgment to a higher court to which the American Convention refers should, in the first place, apply to every first instance judgment with the purpose of examining the unlawful application, the lack of application, or the erroneous interpretation of rules of law based on the operative part of the judgment. The Commission also considers that to guarantee the full right of defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they have led to an erroneous application or non-application of those rules.

Based on the foregoing, the right provided for in Article 8(2)(h) requires the availability of a remedy that would at least allow for review by a higher court of questions of law and of all the major procedural rulings. Such review is especially relevant with respect to those rulings that may result in defenselessness or cause irreparable damage in the final judgment, including the legality of the evidence. The remedy should also allow the higher court a relatively simple means to examine the validity of the judgment appealed in general, as well as to monitor the respect for fundamental rights of the accused, especially the right of defense and the right to due process.

b. Right to the truth

The first international instrument to codify the right to the truth was the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Article 32 of Protocol I states: “the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.”²¹¹

Likewise, several U.N. resolutions have gradually developed the concept and reach of the right to the truth. Article 13, paragraph 4 of the U.N. Declaration on the Protection of All Persons from Enforced Disappearance states: “the findings of such an investigation shall be made

²⁰⁹ *Henry v. Jamaica*, U.N. Human Rights Committee, Communication No. 230/1987, U.N. Doc. CCPR/C/43/D/230/1987 ¶ 8.4 (1991).

²¹⁰ *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95 doc. 7 rev. ¶¶ 261 & 262 (1997).

²¹¹ Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 7, available at <http://www.icrc.org/ihl/INTRO/470>

available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.”²¹²

Furthermore, 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 provide that redress measures should include: “verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.”²¹³

In 2005, during its last session, the U.N. Commission on Human Rights adopted for the first time a resolution on the right to the truth. In this resolution, the Commission held that it “recognize[d] the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.”²¹⁴ The resolution also pointed out:²¹⁵

The imperative for society as a whole to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families, within the framework of each State’s domestic legal system, to know the truth regarding such violations, including the identity of the perpetrators and the causes, facts and circumstances in which such violations took place.

In 2006, the U.N. High Commissioner for Human Rights stated: “the right to the truth is closely linked to the State’s duty to protect and guarantee human rights and to the State’s obligation to conduct effective investigations into gross human rights violations and serious violations of humanitarian law and to guarantee effective remedies and reparation.”²¹⁶

In 2008, the U.N. Human Rights Council adopted—largely influenced by the U.N. Commission on Human Rights’ previous resolution—its first resolution on the right to the truth:²¹⁷

The importance for the international community to endeavor to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred.

²¹² Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 92nd plen. mtg., U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

²¹³ 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, G.A. Res. 60/147, U.N. GAOR, 64th plen. mtg., U.N. Doc. A/RES/60/147 (Dec. 16, 2005), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

²¹⁴ U.N. Human Rights Commission Res. 2005/66, *Right to the truth*, U.N. Doc. E/CN.4/2005/L.10/Add.17 (Apr. 20, 2005), *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-66.doc

²¹⁵ *Id.*

²¹⁶ High Commissioner for Human Rights, Study on the right to the truth, ¶ 56, delivered to the U.N. Human Rights Commission, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006).

²¹⁷ U.N. Human Rights Council Res. 9/11, *Right to the truth*, U.N. Doc. A/HRC/9/L.12 (Sept. 24, 2008), *available at* http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_11.pdf

In 2000, in the case of *Monsignor Oscar Arnulfo Romero and Galdamez v. El Salvador*, the IACHR held that the right to the truth involves “[knowing] the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them.”²¹⁸

Likewise, the IACHR has stated:²¹⁹

The right to know the truth with respect to the facts that gave rise to the serious human rights violations... and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy with respect to the victims’ relatives and society in general. This obligation arises essentially from the provisions of Articles 1(1), 8(1), 25 and 13 of the American Convention [on Human Rights].

Furthermore, the IACourtHR has also ruled on the right to the truth. Over the years, the court has upheld that:

The right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.²²⁰

Every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations. This right to the truth has been developed by International Human Rights Law; recognized and exercised in a concrete situation, it constitutes an important means of reparation.²²¹

The right to access to justice goes beyond the processing of domestic proceedings, as it must also ensure, within a reasonable time, the right of the alleged victims or their next of kin for everything necessary to be done to learn the truth about what happened and to punish those who may be responsible.²²²

The investigations and prosecutions conducted on account of the events... warrant the use of all available legal means and must aim to determine the whole truth and to prosecute and eventually capture, try and punish all perpetrators and instigators of the acts.²²³

Whenever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible... and this obligation must be complied with seriously and not as a mere formality.²²⁴

²¹⁸ *Monsignor Oscar Arnulfo Romero y Galdamez v. El Salvador*, Case 11.481, Inter-Am. C.H.R., Report No. 37/00, OEA/Ser.L/V/II.106 doc. 3 rev. ¶ 148 (2000).

²¹⁹ *Ignacio Ellacuría et al v. El Salvador*, Case 10.488, Inter-Am. C.H.R., Report No. 136/99, OEA/Ser.L/V/II.106 doc. 6 rev. ¶ 221 (1999).

²²⁰ *See Barrios Altos v. Peru*, Inter-Am. Ct. H.R., Series C No. 75, Merits, ¶ 48 (Mar. 14, 2001).

²²¹ *See Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H.R., Series C No. 101, Merits, Reparations and Costs, ¶ 274 (Nov. 25, 2003).

²²² *See “Mapiripán Massacre” v. Colombia*, Inter-Am. Ct. H.R., Series C No. 134, Merits, Reparations and Costs, ¶ 216 (Sept. 15, 2005). *See also Serrano Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R., Series C No. 120, Merits, Reparations and Costs, ¶ 66 (Mar. 1, 2005); *19 Merchants v. Colombia*, Inter-Am. Ct. H.R., Series C No. 109, Merits, Reparations and Costs, ¶ 188 (July 5, 2004).

²²³ *See La Cantuta v. Peru*, Inter-Am. Ct. H.R., Series C No. 162, Merits, Reparations and Costs, ¶ 157 (Nov. 29, 2006).

²²⁴ *See supra* note 178.

D. Analysis of the conduct of the Republic of Cuba in relation to international human rights law

a. Violation of the right to due process of law

i. Violation of the rights of the Payá family to participate in the investigation and corresponding trial

According to international human rights law, the victims' next of kin must have full access and the ability to act during all stages and instances of the pertinent investigation and trial. The victims of human rights violations, or their next of kin, must have plenty of chances to be heard and act in the corresponding proceedings, both to clear up the facts and punish the perpetrators, as well as to seek just reparations. Likewise, they shall be informed of any hearings that take place, those they will have access to, as well as all the information related to the investigation.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens, especially for those who openly express their disagreement with the government.²²⁵

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism. As seen above, in the weeks following the events the Payá family publicly announced that they did not accept the official version presented by the Cuban government. First, the family expressed their distrust regarding the official version because, over the last decade, Oswaldo Payá, his family, friends and members of the Christian Liberation Movement have been victims of persecution and systematic harassment from the Cuban government. This climate of repression has been documented in different reports detailing the persecution carried out against people or civil society groups, not recognized by the State, who criticize or oppose the Cuban regime.²²⁶

Furthermore, both Rosa María Payá and Ofelia Acevedo announced having obtained important information which contradicted the official version of the facts presented in state-owned media. The following are among the most important facts that were publicly announced by the Payá family: (1) on July 23, 2012, Rosa María Payá stated that she had obtained information regarding the existence of a second vehicle involved in the events. Payá said that the car in which her father was traveling was rammed off the road;²²⁷ (2) on August 1, 2012, Payá stated that on the evening of July 22, 2012, at Carlos Manuel de Céspedes hospital in Bayamo, Captain Fulgencio Medina read the statements of those who witnessed the events. The witnesses said that there was a red Lada traveling alongside the car transporting Oswaldo Payá. One of the witnesses stated—without being specific about the car's involvement in the events—that the people traveling in the red Lada assisted Ángel Carromero after the events. Likewise, the witness also stated that Carromero reacted to these people by saying “who are you and why are you doing

²²⁵ See this report at 15 & 16, and footnotes 84 & 85.

²²⁶ *Id.* at 11–16, and footnotes 68 & 121.

²²⁷ *Id.* at 23 & 24, and footnote 120.

this to us?”²²⁸ (3) on February 28, 2013, Rosa María Payá made public the text messages that were sent by Jens Modig to his friends in Sweden the day Oswaldo Payá died. In those messages, Modig wrote: “Ángel said a car pushed him off the road.”²²⁹

No policeman or agent from the prosecution went to the house of the Payá family to inform them about what had happened, nor did the family receive any official communication explaining the events or officially notifying them of Oswaldo Payá’s death.²³⁰

The family learned about the events because of phone calls and information provided by friends and relatives. The authorities only gave a spoken description of the facts to the family when Oswaldo Payá’s remains were given to them during a meeting that was being recorded by State agents in Havana’s medical examiner’s office.²³¹

Although Cuban authorities did not officially communicate the facts to the victim’s family, they did publish an official version of the facts to the public at large just days after the events occurred. Amongst the most relevant information presented by the authorities on the state-owned media are: (1) the press releases published on July 23 and 28, 2012, in the official newspaper *Granma*—the only newspaper allowed in Cuba—on which alleged witnesses and officers from the crimes division explained how the events took place;²³² (2) the self-incriminating statements made by Ángel Carromero while he was detained and incommunicado in prison;²³³ and (3) the statements made by Jens Modig while he was still being held by the authorities, in which he said that he did not remember what had happened because he was asleep when the events occurred.²³⁴

The prosecution never informed the family on how the investigation was being carried out. The prosecution never made the family a part of the investigation proceedings, nor did it inform them of the results of any process. The prosecution ignored the complaints made by the Payá family—based on information they had obtained through friends and members of the Christian Liberation Movement—that government officials had caused the car crash and probably killed both Payá and Cepero. Lastly, neither the prosecution nor the courts allowed the family to communicate with Ángel Carromero or Jens Modig.²³⁵

The only time the authorities called on the Payá family was due to a potential damages claim they could file against Ángel Carromero. However, the Payá family, those most affected by the death of Oswaldo, told authorities that they did not accept the official version of the facts, which labeled the events as an “accident,” and repeated that they had important information that countered that version. They also made it clear to the authorities that they believed Ángel Carromero was innocent of the crime for which he was being indicted, requested his release, and rejected any damages claim against Carromero.²³⁶

²²⁸ *Id.* at 25 & 26, and footnote 122.

²²⁹ *Id.* at 28, and footnote 126.

²³⁰ *Id.* at 27 & 30, and footnotes 123 & 128.

²³¹ *Id.* at 22–24 & 31, and footnotes 118 & 120.

²³² *Id.* at 16 & 17, and footnote 89.

²³³ *Id.* at 17 & 18, and footnote 96.

²³⁴ *Id.* at 18 & 19, and footnotes 97 & 99.

²³⁵ *Id.* at 25 & 27, and footnotes 121 & 123.

²³⁶ *Id.* at 27, and footnote 123.

On October 5, 2012, Oswaldo Payá's sons were denied entrance to the Granma court, to which they traveled to witness the trial against Ángel Carromero.²³⁷

To date—three years after Oswaldo Payá's death—the Cuban authorities have not communicated the autopsy's results to the family. The only document given to them by the authorities was a handwritten paper card, issued by Havana's medical examiner's office, stating Oswaldo Payá's cause of death as: "damage to the nervous system." Also, the authorities washed and packed the outfit worn by Oswaldo Payá on the day he died before returning it to the family, which prevented them from seeking independent scientific analysis of these items.²³⁸

The prosecution ignored the grave complaints made by the Payá family and did not allow them to participate in any stage of the process in either the investigation or the trial. They were also not allowed to talk to either of the only two witnesses and survivors of the events, Ángel Carromero and Jens Modig. Their complaints, despite their significance, were not taken into account by the prosecution or the courts to obtain clarification of the events.

Therefore, the State of Cuba is internationally responsible for violating the Payá family's right to act at all stages and in all instances of the investigation and the corresponding trial.

ii. Violations of the right to due process of law in the trial for the deaths of Oswaldo Payá and Harold Cepero

1. Violation of the right to counsel and the right to communicate freely and confidentially with counsel

According to international human rights law, the right to a defense is inalienable and should be adhered to in every instance and without exception. This entails that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer. All persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens.²³⁹

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism. As seen above, Ángel Carromero was jailed in Bayamo and put in isolation for several weeks without having access to legal counseling.²⁴⁰ Several weeks after his arrest, when authorities allowed him to speak to an attorney, Carromero was not able to communicate freely and confidentially with her. In this regard, Carromero

²³⁷ *Id.* at 28, and footnote 125.

²³⁸ *Id.* at 31 & 32, and footnote 129.

²³⁹ *Id.* at 15 & 16, and footnotes 84 & 85.

²⁴⁰ *Id.* at 41 & 46, and footnotes 140 & 142.

stated: “we couldn’t speak freely,” and “I couldn’t talk to her... the room where we met in was bugged and it had a one-way mirror. So, if at any point I mentioned anything of what had really happened, it would have been time to say goodbye.”²⁴¹ Carromero later confirmed that his conversations in this room were being listened to when, after deciding with his attorney that he was going to plead not guilty, Lieutenant Colonel José Águilas (Chief Instructor of Crimes Against the State) asked him at the end of the meeting, “why did you do that?” while warning him that he “already knew what to expect” for having taken that decision.²⁴²

In this case, Ángel Carromero did not have prompt access to an attorney and could not communicate with her without delay and in full confidentiality. On the contrary, the conversations he had with his attorney that should have been confidential were seen and heard by a Cuban government official who, after the meeting ended, threatened Carromero for having decided to plead not guilty to the charges against him.

Therefore, the State of Cuba is internationally responsible for violating Ángel Carromero’s right to counsel, including the right to communicate freely and confidentially with counsel.

2. Violation of the right to an independent counsel

According to international human rights law, the adequate protection of the human rights and fundamental freedoms to which all persons are entitled, requires that all persons have effective access to legal services provided by an independent legal profession. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests. Therefore, the regulations commanding all attorneys to join a centralized guild controlled by the State—in order to be able to practice—undermine their independence.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens.²⁴³

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism. As seen above, all Cuban attorneys must be registered with the National Organization of Collective Law Offices as a condition for practicing their profession. The ONBC is a centralized guild controlled by the dictatorial Cuban government that is subordinate to the orders of the Ministry of Justice, which regulates, inspects, oversees, and controls the activity of the ONBC and its members. However, this effort is not aimed at securing the integrity, diligence, independence, and work ethic of attorneys in defending their clients; instead, it deceptively legitimizes the arbitrary decisions made by the Cuban executive. In this regard, the ONBC’s Code of Ethics provides that attorneys, in the exercise of the profession, must “consciously assume and contribute—within their duties—to defend, preserve and be faithful to the principles comprised in the nation, the Revolution and Socialism,” and this should be done “imbued with the righteous, noble and humane ideas of

²⁴¹ *Id.* at 43, and footnote 142.

²⁴² *Id.* at 44, and footnote 143.

²⁴³ *Id.* at 15 & 16, and footnotes 84 & 85.

Socialism and inspired by the example set by the Commander in Chief Fidel Castro Ruz.”²⁴⁴ In this regard, Carromero stated: “I didn’t trust the Cuban lawyers,”²⁴⁵ because “[Cuban] attorneys are not independent professionals but rather part of the regime.”²⁴⁶

Cuban attorneys face many conflicts of interest preventing them from performing their duties with integrity and independence. Under these circumstances, and acting rationally given Cuba’s totalitarian legal system, attorneys refrain from questioning any type of government activity in order to not be disciplined and/or expelled from the guild, which could mean losing their job with the island’s sole formal employer—the State—and subsequent serious complications with their meager source of income.

In this case, Ángel Carromero had no choice but to hire attorneys who were members of the centralized guild controlled by the dictatorial Cuban government. Carromero’s attorneys, like any other attorney in Cuba, intervened deprived of the basic guarantees that would have enabled them to act independently and without fear of retaliation or improper interference in defense of their client.

Therefore, the State of Cuba is internationally responsible for violating Ángel Carromero’s right to an independent counsel.

3. Violation of the right to effective legal counsel

According to international human rights law, the concept of a fair trial must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Restrictions to the work of defense counsel and its ability to present evidence reduce its presence and participation to a mere formality.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens.²⁴⁷

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism. As seen above, the prosecution did not give Ángel Carromero’s attorneys access to the case file; neither the court nor the prosecution allowed the defense attorneys to have a single copy of the evidence on which the accusation was based. In this regard, Carromero stated: “my attorneys had to copy the file by hand. They were not even given a copy of the evidence. They had to trace the illustrations they used themselves.” Carromero also stated that during the trial, one of the witnesses from the

²⁴⁴ *Id.* at 9, and footnote 52.

²⁴⁵ *Id.* at 46, and footnote 142.

²⁴⁶ *Id.* at 46, and footnote 145.

²⁴⁷ *Id.* at 15 & 16, and footnotes 84 & 85.

prosecution “had his statement written on his hand, on the palm of his hand” with a pen.²⁴⁸

Concerning the limitations his attorneys had to present new evidence in his favor, Carromero stated: “in Cuba’s criminal justice system you can’t submit opinions from independent experts; they simply do not allow a third party chosen by the defense to review the evidence.” Lastly, Carromero stated: “my lawyers never saw the car, never had access to anything from the fatal incident; they went in blind.... They couldn’t do anything.”²⁴⁹

In this case, the prosecution did not allow Ángel Carromero’s attorneys access to the case file or to the evidence on which the accusation was based. Also, due to Cuba’s totalitarian legal system, defense attorneys could not present new evidence. These circumstances reduced the presence and participation of Ángel Carromero’s attorneys to a mere formality, stripped of any effectiveness to simulate the existence of an effective legal counsel. It was a proceeding where all the parties (prosecution, judge or defense counsel) directed their efforts towards legitimizing the official government version of the events, and not at finding the truth, establishing the facts and punishing those responsible.

Therefore, the State of Cuba is internationally responsible for violating Ángel Carromero’s right to effective legal counsel.

4. Violation of the prohibition against the use of force to obtain confessions or statements

According to international human rights law, no one shall be compelled to testify against himself or to confess guilt. This must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens.²⁵⁰

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism. As seen above, officers from the Ministry of the Interior surrounded Ángel Carromero while he was still lying on the hospital’s stretcher and forced him—through threats and slaps in the face—to change his statement of facts. Minutes earlier, Carromero had stated to an officer that they were being followed by a vehicle en route to Santiago de Cuba, which later rammed and pushed them off the road.²⁵¹

A few days later, Carromero was taken to a prison in Bayamo where, while being held incommunicado and without access to legal counseling, he was forced to record a self-

²⁴⁸ *Id.* at 41 & 43, and footnotes 140 & 142.

²⁴⁹ *Id.* at 46 & 47, and footnote 142.

²⁵⁰ *Id.* at 15 & 16, and footnotes 84 & 85.

²⁵¹ *Id.* at 37, 40 & 42, and footnotes 135, 140 & 142.

incriminating video that was swiftly broadcast by state-owned media. In this regard, Carromero stated: “once I left the hospital, they took me to a jail in Bayamo.... I was held incommunicado, never seeing the light of day.... The conditions were deplorable.” Also, Carromero stated that he was sedated the whole time he spent at the hospital in Bayamo—a fact later confirmed by close friends of the Payá family who were in the hospital on the night of July 22—as well as the time spent in Bayamo’s prison.²⁵²

Regarding the video, Carromero stated: “the video that the authorities made public was recorded under these conditions. As viewers can see, my face and left eye are very swollen and I speak like I am drugged. When an officer gave me a notebook in which the official Cuban government account was laid out, I limited myself to reading statements from that notebook.”²⁵³

In this case, Ángel Carromero was compelled to testify against himself. The Cuban authorities exerted physical and psychological pressure on him in order to obtain a confession of guilt of the events that happened on July 22, 2012.

Therefore, the State of Cuba is internationally responsible for violating the prohibition against the use of force to obtain confessions or statements.

5. Violation of the right to a public trial

According to international human rights law, the publicity of hearings is an important safeguard in the interest of the individual and of society at large. Courts must make information on time and the venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens.²⁵⁴

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism. As seen above, judges restrict public access and set extraordinary measures when the defendants or victims are dissidents of the regime. It is important to recall that the Cuban Constitution does not recognize the judiciary as an independent organ separate from the executive and the legislative branches of government, nor as the organ responsible for interpreting the Constitution in an objective, independent, and impartial manner, or even for conducting the constitutional review of laws or the acts of the executive.

In this regard, it is common practice that officials from the Ministry of the Interior summarily

²⁵² *Id.* at 23, 27, 36 & 44, and footnotes 118, 122, 135 & 142.

²⁵³ *Id.* at 37, and footnote 135.

²⁵⁴ *Id.* at 15 & 16, and footnotes 84 & 85.

arrest members of civil society organizations not recognized by the State who try to witness the proceedings or wait outside the courthouse.²⁵⁵

The day prior to Ángel Carromero's trial, Cuban authorities arbitrarily arrested blogger and democracy activist Yoani Sánchez and her husband Reynaldo Escobar, who had traveled to Bayamo in order to attend the trial. Sánchez and her husband were released after being detained for 30 hours.²⁵⁶

The day after, authorities barred Oswaldo Payá's sons from entering the courthouse. According to Rosa María Payá, someone who claimed to be the court's secretary told them they couldn't go inside because they "hadn't told them" that we were going to attend the trial.²⁵⁷ However, Ángel Carromero stated that the authorities did allow supporters of the regime into the courtroom. In this regard, Carromero stated: "when I came into the room, I understood. The trial was public, but only for a 'selected' public. They had filled the room with members from the Communist Party or the Youth Communist League."²⁵⁸

Finally—and consistent with the information provided by international organizations that classify Cuba as one of the ten most censored countries on earth, along with countries like Equatorial Guinea, Sudan and Iran—the authorities put state-owned media and the few international outlets operating in the island in a separate room from which they streamed the hearing along with footage that had nothing to do with the trial.

In this case, the trial against Ángel Carromero was not public. In practice, authorities barred the public—including Oswaldo Payá's sons—from attending the hearing. In contrast, authorities did allow members of organizations openly linked to the Communist Party of Cuba into the courtroom.

Therefore, the State of Cuba is internationally responsible for violating Ángel Carromero's right to a public trial.

6. Violation of the right to an effective appeal

According to international human rights law, everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. The court of appeal shall conduct an evaluation of the evidence presented at the trial and of the conduct of the trial. The remedy should also allow the higher court a relatively simple means to examine the validity of the judgment appealed in general, as well as to monitor the respect for fundamental rights of the accused, especially the right of defense and the right to due process.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of

²⁵⁵ *Id.* at 10 & 11, and footnote 61.

²⁵⁶ *Id.* at 19, and footnote 102.

²⁵⁷ *Id.* at 28, and footnote 125.

²⁵⁸ *Id.* at 47, and footnote 151.

justice or respect for the fundamental rights of citizens.²⁵⁹

The investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero were carried out in this context of full authoritarianism. As seen above, there is no court of appeals in Cuba. The only form of appeal that can be submitted against a criminal conviction is an appeal to the People's Supreme Court.²⁶⁰ In Cuba, however, these appeals are a mere formality, since violations of due process are displayed in the arbitrary acts committed and allowed by the authorities, with no chance of having an independent body review these acts. Among them: the lack of independence of the judiciary; lack of access to an independent counsel and to communicate freely and confidentially with counsel; the lack of access to the case file and the evidence held by the prosecution; the use of force to obtain confessions; and the holding of closed-door trials, all under the totalitarian legal system guaranteed by the Cuban Constitution.

In this case, the appeal to a high court was not an effective remedy to challenge violations of due process, but merely a formality stripped of any effectiveness to simulate the existence of an appeal process before a higher court.

Therefore, the State of Cuba is internationally responsible for violating Ángel Carronero's right to an effective appeal.

b. Violation of Oswaldo Payá and Harold Cepero's families' right to know the truth

According to international human rights law, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities of the competent organs of the State. It involves knowing the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them. This obligation must be complied sincerely and not as a mere formality.

However, as seen in previous sections, Cuba is not a democratic country where the fundamental rights of citizens are respected, or where there is independence and separation of powers. The Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens.²⁶¹

As seen in every section above, Cuban authorities committed numerous violations of due process during the investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero, thus deliberately preventing the clarification of the events that took place on July 22, 2012.

During the investigation, the prosecution ignored the complaints made by the Payá family—based on information they had obtained through friends and members of the Christian Liberation Movement—that government officials had caused the car crash and probably killed both Payá as Cepero. They were never made a part of the investigation proceedings nor were they officially informed of Oswaldo Payá's death. Furthermore, the family wasn't allowed to

²⁵⁹ *Id.* at 15 & 16, and footnotes 84 & 85.

²⁶⁰ *Id.* at 47, and footnote 149.

²⁶¹ *Id.* at 15 & 16, and footnotes 84 & 85.

talk to either of the only two witnesses and survivors of the events, and they were barred from attending Ángel Carromero's trial. To date—three years after Oswaldo Payá's death—the Cuban authorities have not communicated the autopsy's results to the family. The only document given to them by the authorities was a handwritten paper card, issued by Havana's medical examiner's office, stating Oswaldo Payá's cause of death as: "damage to the nervous system." Also, the authorities washed and packed the outfit worn by Oswaldo Payá on the day he passed away before returning it to the family, which prevented them from seeking independent scientific analysis of these items.

After the events, Ángel Carromero was taken to the hospital by individuals who were never identified by the prosecution during the investigation nor the trial. These individuals, who might have witnessed or participated in the events according to the public complaints that had already been made about the existence of a second vehicle involved, were not part of the investigation or subsequent trial. At the hospital, Carromero stated to an officer that a vehicle had rammed and pushed them off the road. Minutes later, officers from the Ministry of the Interior surrounded Ángel Carromero while he was still lying on the hospital's stretcher and forced him—through threats and slaps on the face—to change his statement of facts. A few days later, Carromero was taken to a prison in Bayamo where, while being held incommunicado and without access to legal counseling, he was forced to record a self-incriminating video that was swiftly broadcast by state-owned media.

Ángel Carromero did not have access to an attorney for several weeks after his arrest, and could not communicate with her without delay and in full confidentiality. Carromero had no other choice but to hire attorneys who were members of the centralized guild controlled by the dictatorial Cuban government. These attorneys are legally compelled to "consciously assume and contribute—within their duties—to defend, preserve and be faithful to the principles comprised in the nation, the Revolution and Socialism," and this should be done "imbued with the righteous, noble and humane ideas of Socialism and inspired by the example set by the Commander in Chief Fidel Castro Ruz."

During the trial, the prosecution did not allow Ángel Carromero's attorneys access to the case file or to the evidence on which the accusation was based. Also, due to Cuba's totalitarian legal system, defense attorneys could not present new evidence. These circumstances reduced the presence and participation of Ángel Carromero's attorneys to a mere formality, stripped of any effectiveness to simulate the existence of an effective legal counsel. The trial against Ángel Carromero was not public, as authorities barred the public—including Oswaldo Payá's sons—from attending the hearing. In contrast, authorities did allow members of organizations openly linked to the Communist Party of Cuba into the courtroom.

None of the allegations made for each one of these violations was investigated or clarified by the Cuban authorities. On the contrary, in March 2013, while Rosa María Payá was addressing the United Nations Human Rights Council on the circumstances in which her father died, Luis Amorós Núñez, the Cuban representative, interrupted Payá's speech by banging the table repeatedly. When the president of the council allowed him to speak, Núñez referred to Rosa María as a "mercenary" who had "dared to come" before the council.

Lastly, in January 2015, the Varela Academy of Sciences concluded a scientific analysis disproving the official version of the facts presented by the Cuban government. The report

concluded that: (1) there are physical contradictions in the official version about the direction taken by the vehicle during the events; and (2) there are incongruities about the location and material condition of the vehicle after the events.

In this case, neither the Payá nor the Cepero families have obtained clarification of the events that took place on July 22, 2012. After numerous violations of due process during the investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero, the Cuban authorities have deliberately prevented the clarification of the events. To date, the victims' next of kin do not know the full, complete, and public truth as to what happened to their loved ones.

Therefore, the State of Cuba is internationally responsible for violating Oswaldo Payá and Harold Cepero's families' right to know the truth.

E. Conclusion

It can be categorically stated that in Cuba there is no independence and separation of powers. Specifically, the Cuban judiciary and justice system are formed by attorneys, prosecutors, and judges whose actions are subordinated and supervised by the Communist Party of Cuba.

It can be also stated categorically that the Cuban State systematically violates the rights and freedoms of its citizens. No citizen is allowed to freely exercise their rights if such exercise is considered by authorities as contrary to "the decision of the Cuban people to build socialism and communism," an arbitrary standard that includes any expression that could be interpreted by the government as critical or conflicting with its goals.

It can be concluded categorically that the Cuban State is ruled by a fully authoritarian regime, totalitarian government, or dictatorship. Under this regime, there is no guarantee of independence in the administration of justice or respect for the fundamental rights of citizens, especially for those who openly express their disagreement with the government.

Oswaldo Payá was systematically persecuted and harassed throughout his life as a nonviolent democracy and human rights activist; the Cuban dictatorship also systematically persecuted and harassed his family and friends. The members of the Christian Liberation Movement in Cuba are still harassed by the authorities due to their nonviolent activism in favor of democracy and the recognition of fundamental rights to all Cubans.

On July 22, 2012, Oswaldo Payá and Harold Cepero died under circumstances that have been actively obscured by the State. Through numerous violations of basic due process rules that are aimed at discovering the truth about the facts in dispute, during the investigation and subsequent trial for the deaths of Payá and Cepero, the Cuban authorities have deliberately prevented the clarification of the events. Information that emerged in the months that followed and that was excluded by the Cuban court that convicted Ángel Carromero—consisting of witness statements, physical evidence and expert reports—suggests direct government responsibility in the deaths of Payá and Cepero. Specifically, the evidence deliberately ignored by the Cuban State strongly suggests that the events of July 22, 2012 were not an accident—as was quickly claimed by authorities in the state-owned media monopoly and later rubber-stamped by Cuba's totalitarian court system—but instead the result of a car crash directly

caused by agents of the State, acting (1) with the intent to kill Oswaldo Payá and the passengers in the vehicle he was riding; (2) with the intent to inflict grievous bodily harm to them; or (3) with reckless or depraved indifference to an unjustifiably high risk to the life of the most prominent Cuban activist in the last twenty five years and the passengers riding with him in the car.

With these actions, Cuba violated (1) the Payá family's right to act at all stages and in all instances of the investigation and the corresponding trial; (2) Ángel Carromero's right to counsel, including the right to communicate freely and confidentially with counsel; (3) Ángel Carromero's right to an independent counsel; (4) Ángel Carromero's right to effective legal counsel; (5) the prohibition against the use of force to obtain confessions or statements; (6) Ángel Carromero's right to a public trial; (7) Ángel Carromero's right to an effective appeal; and (8) Oswaldo Payá and Harold Cepero's families' right to know the truth.

The authorities of Cuba who performed and allowed violations of due process during the investigation and subsequent trial for the deaths of Oswaldo Payá and Harold Cepero, have violated the international standard of protection for the right to due process of law, binding for Cuba—at the universal level—since December 10, 1948, when it adopted the Universal Declaration of Human Rights; and within the Inter-American legal framework, since May 1948, when it adopted the American Declaration of the Rights and Duties of Man.

In short, Cuba is responsible for the violation of Articles 5, 8, 9, 10, and 11 of the Universal Declaration of Human Rights, and Articles 18, 25, and 26 of the American Declaration of the Rights and Duties of Man which, developed and interpreted by a great number of international instruments, together constitute a comprehensive legally binding system for the promotion and protection of human rights.