

**NATIONS UNIES
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**PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME**

**UNITED NATIONS
OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS**

**SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL**

Mandate of the Special Rapporteur on the independence of judges and lawyers.

REFERENCE: AL G/SO 214 (3-3-16)
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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 17/2.

In this connection, I would like to draw the attention of your Excellency's Government to information I have received regarding Messrs. **Antonio Guerrero Rodriguez, Fernando González Llort, Gerardo Hernández Nordelo, Ramón Labanino Salazar** and **René González Schwerert**. These individuals were arrested in September 1998 in Florida on charges of spying for the Government of Cuba. They were the subject of an Opinion of the Working Group on Arbitrary Detention (19/2005) and two allegation letters sent by the Special Rapporteur on the independence of judges and lawyers on 31 August 2005 and 27 November 2008. The Government of the United States replied on 6 May 2009.

According to the new information received:

Five *habeas corpus* petitions were reportedly filed on behalf of the five defendants. It is alleged that the same judge previously in charge of these cases, Ms. Joan A. Lenart of Florida South District, has been assigned to decide on the *habeas corpus* procedures.

In addition, only part of the evidence available in these cases was allegedly disclosed, potentially affecting the effective right to defence of the defendants, including access to all material which could be exculpatory. I have also been informed that Mr. Gerardo Hernández Nordelo, whose *habeas corpus* procedure is ongoing, was allegedly denied access to legal documents related to his case.

Another defendant, Mr. René González Schwerert, was reportedly released on 7 October 2011, although he is not allowed to return to Cuba being under conditional release and is required to stay three more years on U.S. territory, in the State of Florida. His lawyer reportedly filed a motion to withdraw this condition, which was rejected by the presiding judge. Another urgent motion was recently presented by Mr. Gonzalez's lawyer to request a two-week stay in Cuba for his client to accompany his brother, who is reportedly currently severely ill with cancer. Reportedly, no response to this petition has been so far received.

In light of the aforementioned, while acknowledging the detailed reply provided by your Excellency's Government on 6 May 2009, including the information that all evidence used at the trial was provided to the defence, I remain concerned in particular about the consequences on the principle of equality of arms of the alleged lack of access to all available evidence and documents' file – notably in the case of Mr. Gerardo Hernández. I am also concerned that the *habeas corpus* procedures will be heard by the same judge previously in charge of the cases and on the implications that this may have on an impartial outcome of the decision.

With respect to the *habeas corpus* petitions assigned to the same judge who previously heard the case, I would like to refer your Excellency's Government to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. In particular:

- principle 2: “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”; and
- principle 6 “The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected”.

I would also like to refer in this respect to the 2002 Bangalore Principles of Judicial Conduct, and in particular:

- principle 2.1 “A judge shall perform his or her judicial duties without favour, bias or prejudice”; and
- principle 2.5 “A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially....”.

With respect to the other issue of concern, as already pointed out by my predecessor, I would like to reiterate that international law enshrines the right of the accused and their lawyers to access all the information relevant to the cases they defend, as provided in article 14 (para. 3 (b)) of the International Covenant on Civil and Political Rights, which establishes that “in the determination of any criminal charge against him, everyone shall be entitled to have adequate time and facilities for the preparation of his defence ...”. The Human Rights Committee, in its General Comment 32, has interpreted the words ‘adequate time and facilities’ as including access to documents and other evidence and has also clarified that “this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory”¹. In addition, the Basic Principles on the Role of Lawyers further specify the content of this right, as they provide that the competent authorities must “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 Principles also stipulate that “such access should be provided at the earliest appropriate time”².

It is my responsibility under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. Since I am expected to report on these cases to the Human Rights Council, I would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the summary of the case accurate?
2. Please elaborate on the current situation of the five individuals who are the subject of this letter.
3. Please explain to what extent the assignment of the *habeas corpus* petitions to the same judge who previously decided on the cases is compatible with the principle of impartiality of the judiciary.
4. Could you please elaborate on the reasons why access to the documents’ file of Mr. Gerardo Hernandez has been limited and how this and the non-disclosure of all evidence would be compatible with the principle of equality of arms?

I would appreciate a response within sixty days. I undertake to ensure that your Excellency’s Government’s response to each of these questions is accurately reflected in the reports I will submit to the Human Rights Council for its consideration.

¹ See Human Rights Committee General Comment n° 32, CCPR/C/GC/32, para. 33. See also A/64/181, paras. 40-43.

² Basic Principles on the Role of Lawyers, principle 21.

Please accept, Excellency, the assurances of my highest consideration.

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers