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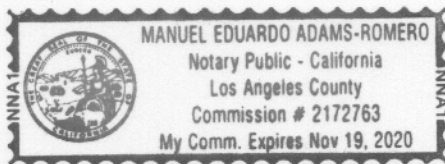
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**Declaration by United Nations Special Rapporteur on Freedom of Opinion  
and Expression David Kaye in the case no. 12.462 Nelson Carvajal Carvajal v.  
Colombia**

9 August 2017

**I. INTRODUCTION**

1. I am David Kaye, the United Nations (“U.N.”) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. I was appointed to this position in August 2014. I am also Clinical Professor of Law and Director of the International Justice Clinic at the University of California (Irvine) School of Law in the United States.
2. U.N. Human Rights Council resolution 7/36, Section 3(a), mandates that the Special Rapporteur “gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence harassment, persecution or intimidation directed at persons seeking to exercise or to promote the exercise of the right to freedom of opinion and expression, including, *as a matter of high priority, against journalists or other professionals in the field of information.*”<sup>1</sup> Section 3(c) mandates that the Special Rapporteur “make recommendations and provide suggestions” concerning these violations of freedom of opinion and expression.<sup>2</sup> Under the mandate, my observations and recommendations are based on an analysis of international human rights law, including relevant jurisprudence, standards, and international practice, as well as relevant regional and national laws, standards, and practices.
3. The Inter-American Commission on Human Rights (“the Commission”) has requested that I prepare this expert declaration (“Declaration”) in the case of **Nelson Carvajal Carvajal vs. Colombia, case no. 12.462**.
4. On June 21, 2002, the Commission received a petition from the Inter American Press Association (“the Petitioner”) against the Republic of Colombia concerning the murder of journalist Nelson Carvajal Carvajal. The Petitioner alleges that, on April 6, 1998, Mr. Carvajal was murdered for reasons related to his work as a journalist. The Petitioner also alleges that Colombia failed to “act with due diligence to investigate, prosecute, and if appropriate, punish the perpetrators of the journalist’s murder”, and, as a result, violated the rights to life, fair trial, freedom of thought and expression, and judicial protection

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<sup>1</sup> Human Rights Council Res. 7/36 at ¶3(a), U.N. Doc. A/HRC/7/36 (Mar. 28, 2008) (emphasis added).

<sup>2</sup> *Id.*, at ¶3(c).

established under Articles 4, 8, 13, and 25 of the Inter-American Convention on Human Rights (“the American Convention”).<sup>3</sup>

5. This is the first time I have submitted an expert declaration in a proceeding before the Inter-American Court of Human Rights (“the Court”). I have not been to Colombia in connection with this case and have not intervened in this case before the submission of this Declaration. I only learned about this case through the documents sent to me by the Commission. However, previous mandate holders and I have issued communications to the government of Colombia concerning other alleged violations of freedom of expression in the country.<sup>4</sup>

## **II. ANALYSIS**

6. In order to provide the Court with assistance in this case, the Commission has requested that I address the principles and standards established under international human rights law concerning State obligations to investigate crimes against journalists and to combat impunity, and the importance and significance of the issues in the present case for the global protection of freedom of opinion and expression.

- a. The issues presented before the Court raise important questions concerning the State’s duty to respect and ensure the right to freedom of opinion of journalists and individuals connected to them.**

7. The International Covenant on Civil and Political Rights (“the Covenant”) – which Colombia ratified in 1969 – obligates each State Party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”<sup>5</sup> The obligations to respect and ensure are well understood to mean that States are expected not only to refrain from interfering with the rights recognized in the Covenant but also to guarantee an environment in which individuals may freely exercise those rights.<sup>6</sup>

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<sup>3</sup> Inter-American Commission on Human Rights, Report No. 21/215, Case 12.462, Merits, Nelson Carvajal Carvajal vs. Colombia (Mar. 25, 2015), at ¶ 2 (“Merits Report”).

<sup>4</sup> See e.g. UA COL 5/2016, available at [https://spdb.ohchr.org/hrdb/33rd/public\\_-\\_UA\\_COL\\_02.05.16\\_\(5.2016\).pdf](https://spdb.ohchr.org/hrdb/33rd/public_-_UA_COL_02.05.16_(5.2016).pdf); AL COL 6/2014, available at

[https://spdb.ohchr.org/hrdb/28th/public\\_-\\_AL\\_Colombia\\_11.08.14\\_\(6.2014\)\\_Pro.pdf](https://spdb.ohchr.org/hrdb/28th/public_-_AL_Colombia_11.08.14_(6.2014)_Pro.pdf).

<sup>5</sup> International Covenant on Civil and Political Rights (ICCPR) art. 2(1), Dec. 16, 1966, 9 U.N.T.S. 171 (“The Covenant”).

<sup>6</sup> See discussion in paras. 15 – 17 below.

8. The Covenant protects the rights to freedom of opinion and expression, much as those rights are protected in the Inter-American human rights system. Article 19(1) establishes that all individuals “shall have the right to hold opinions without interference.”<sup>7</sup> This right closely resembles the right to “freedom of thought” protected under Article 13(2) of the American Convention. The Human Rights Committee (“the Committee”), the treaty-based mechanism charged with interpreting and monitoring compliance with the Covenant, has emphasized that all forms of opinion are protected under Article 19(1), “including opinions of a political, scientific, historic, moral, or religious nature.”<sup>8</sup> Freedom of opinion includes the right to change an opinion whenever and for whatever reason a person chooses,<sup>9</sup> and it also includes opinions that may be considered offensive.<sup>10</sup> The Committee further stresses that the Covenant “permits no exception or restriction” on the right to “hold actual, perceived, or supposed opinions.”<sup>11</sup> Under Article 19(1), an individual cannot be harassed, intimidated, stigmatized, or criminally punished for holding or not holding an opinion.<sup>12</sup>
9. Journalists’ capacity to develop the wide range of opinions protected under Article 19(1) enables them to arrange and present sources and facts in an accessible manner to the public. Physical attacks and other crimes against journalists and those connected to them may, if committed with sufficient frequency and impunity, create such a hostile and dangerous environment that even the freedom to cultivate thought and hold opinions is threatened. The alleged intimidation and harassment of Mr. Carvajal that culminated in his murder<sup>13</sup> – as well as reports of threats to his relatives, witnesses, and investigators<sup>14</sup> – could therefore raise serious concerns about interference with the right to freedom of opinion under Article 19(1). The Court’s discussion of these issues is also likely to advance international legal jurisprudence concerning the scope and nature of the rights to freedom of thought and opinion.

**b. The alleged violations of Mr. Carvajal’s rights not only implicate well-established protections of journalists under international law, but also the public’s right to freedom of expression.**

10. Article 19(2) of the Covenant, which is materially similar to Article 13(1) of the American Convention, protects the right to freedom of expression:

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<sup>7</sup> The Covenant, *supra* note 5, art. 19(1).

<sup>8</sup> U.N. Human Rights Comm., General Comment No. 34, Article 19, Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) (“General Comment 34”).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at ¶ 11.

<sup>11</sup> *Id.*, at ¶ 9.

<sup>12</sup> *Id.*

<sup>13</sup> See e.g. *Merits Report*, *supra* note 3, at ¶¶ 59, 62, 66.

<sup>14</sup> *Id.*, at ¶ 13 – 22.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>15</sup>

11. The State's obligations under Article 19(2) are meant to protect the right of all individuals to seek, receive, and impart information "of all kinds" and participate in public discourse, but it is also a duty to respect and ensure that those who regularly "impart information" on matters of public interest – that is, a free press – enjoy an environment to perform that function. The Human Rights Committee has recognized that a "free, uncensored and unhindered" press is essential to the enjoyment of freedom of opinion and expression and other Covenant rights, and therefore a "cornerstone" of democratic society.<sup>16</sup> Free and open exchange of information and ideas in public spaces, particularly on political issues and public affairs, requires a "free press ... able to comment on public issues and to inform public opinion without censorship or restraint."<sup>17</sup>
12. My own reporting to the U.N. General Assembly has also emphasized the relationship between a free press, public access to information, and government accountability.<sup>18</sup> Journalists – whose profession lies in seeking, receiving, and imparting information – enable individuals the means of seeking information of all kinds, informing their ability to form and hold opinions, encouraging them to engage in their society, and promoting accountability to the public among those in power. Accordingly, there is significant public interest in the capacity of the press to obtain and impart the information that it needs to function properly and perform its "vital public watchdog role."<sup>19</sup>
13. For the sake of completeness, it also bears noting that Article 19(3) of the Covenant recognizes that States may impose restrictions on the freedom of expression under Article 19(2) (but not the freedom of opinion under Article 19(1)) so long as they are provided by law and necessary and proportionate to protect a specified, legitimate public interest. The nature of such restrictions is not at issue in this case: Killing or threats to life are never, under any circumstance, an appropriate response to exercises of the right to freedom of expression, much less legitimate restrictions.<sup>20</sup> Accordingly, I will not evaluate the jurisprudence concerning Article 19(3).

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<sup>15</sup> The Covenant, *supra* note 7, art. 19(2).

<sup>16</sup> General Comment No. 34, *supra* note 8, at ¶ 13 (citing *Marques v. Angola* communication no. 1128/2002).

<sup>17</sup> *Id.*, at ¶ 20.

<sup>18</sup> A/70/361 (2015).

<sup>19</sup> *Id.*, at ¶ 15; citing the European Court of Human Rights, *Goodwin v. United Kingdom*, application No. 17488/90, judgment of 27 March 1996, at ¶ 39.

<sup>20</sup> General Comment No. 34, *supra* note 8, at ¶ 23.

14. Given these considerations, the issues and alleged violations raised by the Petitioner do not merely implicate Mr. Carvajal or journalists per se. Instead, the public's right to be meaningfully informed – and consequently its members' capacity to engage in the public discourse that sustains a democratic society – is also at stake.

**c. Colombia's international obligations to investigate and provide effective remedies for violations of fundamental rights are critical to the disposition of this case.**

15. The State's duty to respect and ensure a free, diverse, and independent press implies a duty to create and maintain "a safe environment for journalists to work independently and without undue interference."<sup>21</sup> Protection against physical attacks also stems from the journalists' "inherent right to life" protected under Article 6(1) of the Covenant, which guarantees that "no one shall be arbitrarily deprived of his [or her] life."<sup>22</sup> In the context of armed conflict, the U.N. Security Council has condemned all attacks against journalists and other media professionals and personnel, and called for all parties to end such attacks and for States in particular to do their part in ending these attacks.<sup>23</sup> The Security Council has also reaffirmed the need to end the "prevailing impunity for violations and abuses" committed against journalists, as well as the responsibility of States to "comply with the relevant obligations under international law to end impunity" and to "take appropriate steps to ensure accountability" for crimes against journalists.<sup>24</sup> These general standards apply with equal force during peacetime, where conflict conditions are absent and do not affect the implementation of the State's obligations to protect the rights of journalists.
16. Under international human rights law, Colombia has a duty to conduct independent and thorough investigations of violations of the rights of journalists, and to ensure that those responsible are brought to justice. As noted above, under Article 2(1) of the Covenant, States undertake to "respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant". The Committee has explained that the positive obligation to "ensure" Covenant rights includes a duty to protect individuals from infringing acts committed by private parties:

"There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or

<sup>21</sup> A/70/361, *supra* note 18 at ¶ 7.

<sup>22</sup> The Covenant, *supra* note 5 at art. 6(1).

<sup>23</sup> S.C. Res. 1738 (Dec. 23, 2006).

<sup>24</sup> S.C. Res. 2222 (May 27, 2015), at ¶¶ 4 – 6.

*to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”<sup>25</sup> (emphasis added)*

17. Under Article 2(3)(a) of the Covenant, States are obliged to ensure that “any person whose rights or freedoms are violated ... have an effective remedy.” Under Article 2(3)(b), claims of rights violations must be “determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.” The Committee emphasizes the need for administrative mechanisms such as law enforcement and the prosecution to “investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”<sup>26</sup> Failure to conduct investigations consistent with these standards “could in and of itself give rise to a separate breach of the Covenant.”<sup>27</sup>

**d. Failure to hold Colombia accountable for any violation of Mr. Carvajal’s rights is likely to exacerbate regional and global impunity for crimes against journalists and media workers.**

18. The State’s duty to conduct appropriate investigations and provide effective remedies for rights violations is a critical bulwark against impunity of any kind. Conversely, the failure to bring perpetrators to justice may “well be an important contributing element in the recurrence of [gross human rights] violations.”<sup>28</sup> The Committee has found this to be particularly true in cases of impunity for violations of the right to life.<sup>29</sup>
19. The Petitioner’s allegations in this case are consistent with the pattern of global impunity for crimes against journalists. Killings of journalists remain persistently high: The Committee to Protect Journalists (“CPJ”) estimates that, in 2016, 77 journalists and 2 media workers were killed;<sup>30</sup> in 2017, 30 journalists and 8 media workers have been killed as of the date of this Declaration.<sup>31</sup> In Colombia, CPJ has recorded the killings of 82 journalists and 1 media worker since the organization started collecting detailed records in 1992.<sup>32</sup>
20. In my own statements before the international community, I have observed that “[a]ttacks on journalists are almost never met with genuine investigation and prosecution,” and that

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<sup>25</sup> General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), at ¶ 8.

<sup>26</sup> *Id.*, at ¶ 15.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, at ¶ 18.

<sup>29</sup> *Id.*

<sup>30</sup> CPJ, available at <https://cpj.org/killed/2016/>.

<sup>31</sup> CPJ, available at <https://cpj.org/killed/2017/>.

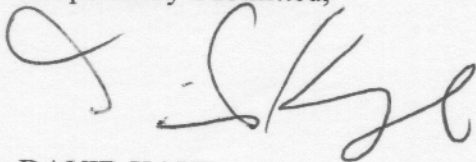
<sup>32</sup> CPJ, available at <https://cpj.org/killed/americas/colombia/>.

even in cases “where there is some form of investigation, victims and survivors must wait years for any sort of reckoning.”<sup>33</sup> I have urged governments to replace this “paradigm of impunity” with “a paradigm of monitoring, investigation, and prosecution,” consistent with their obligations under the Covenant.<sup>34</sup> Given these considerations, I reiterate the importance of holding Colombia accountable to its duty to conduct adequate investigations into allegations of rights violations and provide meaningful redress in the present case.

### **III. CONCLUSION**

21. The Court’s decision in this case has wide-ranging implications for the rights to freedom of opinion and expression exercised by journalists and the public, not only in Colombia but also across the Americas and globally. I respectfully urge the Court to take these considerations into account, as well as to give effect to the principles and standards concerning the protection of journalists established under international human rights law.

Respectfully Submitted,



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<sup>33</sup> Presentation of David Kaye at the World Press Freedom Day International Conference, Riga, Latvia, May 3, 2015, available at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15922&LangID=E>.

<sup>34</sup> *Id.*