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Human Rights Council
Working Group on Arbitrary Detention

Opinion No. 6/2019, concerning Jordi Cuixart i Navarro, Jordi Sànchez i Picanyol and Oriol Junqueras i Vies (Spain)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 8 August 2018, the Working Group transmitted to the Government of Spain a communication concerning Messrs Jordi Cuixart i Navarro, Jordi Sànchez i Picanyol and Oriol Junqueras i Vies. After requesting an extension to the response period, the Government responded to the allegations on 8 November 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards the deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Jordi Cuixart i Navarro is a member and President of the Òmnium Cultural association, which aims to safeguard the culture and language of Catalonia.

5. Jordi Sànchez i Picanyol was the President of the Catalan National Assembly, an organisation whose goal is the independence of Catalonia by democratic and peaceful means, through which he organised two mass protests on 11 September 2012 and 11 September 2013. Mr Sànchez was elected as a member of the Parliament of Catalonia for the period starting in 2018. He led a movement for the defence of the Catalan language, culture and nation between 1983 and 1994.

6. Oriol Junqueras i Vies was the Vice-President of the Government of Catalonia and Minister of Economy and Finance. He was the Mayor of Sant Vicenç dels Horts from 2011 to 2015 and Member of the European Parliament from 2009 to 2012. In 2011 he was elected as President of Esquerra Republicana (Republican Left of Catalonia). He was elected as a Member of the Parliament of Catalonia in 2012 and re-elected in 2017.

7. According to the information received, on 20 and 21 September 2017 a public demonstration took place in Barcelona in favour of a referendum on the independence of Catalonia.

8. On 22 September the Public Prosecutor's Office filed a complaint for sedition related to the events that took place during the demonstration. On 27 September the National Court of Madrid declared itself competent to hear the case and on 3 October summoned Messrs Cuixart and Sànchez to appear before it on 6 October 2017, in order to testify as persons under investigation.

9. On 16 October 2017 the Examining Court of the National Court of Madrid, having heard their testimonies, ordered Messrs Cuixart and Sànchez to be held in detention. They appealed this decision. In the ruling, the judge affirmed his competence and ruled that they must be held in detention on the grounds of the severity of the penalty that might be imposed.

10. On 6 November 2017 the appeal was dismissed. The source notes that the ruling of the appeal court was not unanimous. One judge considered that the detention was disproportionate given the imprecise nature of the allegations and the vagueness of their legal classification, falling short of the minimum standards of legal certainty.

11. On 27 October 2017 the Parliament of Catalonia passed the unilateral declaration of independence. In response, on the same day, the Government of Spain invoked article 155 of the Spanish Constitution and decreed the suspension of all the members of the Parliament of Catalonia and the dissolution of the parliament.

12 On 30 October 2017 the Public Prosecutor's Office filed a complaint for rebellion, sedition and misuse of public funds against the recently removed members of the Government of Catalonia, including Mr Junqueras. The source alleges that the complaint did not specify the acts which constituted crimes.

13. According to the information received, on 31 October 2017 the National Court declared itself competent to hear the case against Mr Junqueras and summoned him to appear before the court two days later in order to testify. On 2 November 2017 Mr Junqueras testified before the court and was detained on the orders of the Central Examining Court.

14. The source notes that, in its decision to hold him in detention, the Court considered that Mr Junqueras had had sufficient time and means to prepare his defence, despite the fact that his lawyer was not present and the acts attributed to him were not specified.

15. The cases of Messrs Cuixart and Sànchez were amalgamated with that of Mr Junqueras before the Supreme Court by virtue of the parliamentary privilege enjoyed by Mr Junqueras as a Member of the Government of Catalonia. On 22 November 2017, the Examining Court referred information to the Supreme Court. According to the source, the judge described a complex organisation whose goal was the secession of Catalonia and the alteration of the form of political organisation of the State.

16. The source notes that, far from being limited to the accusation (concerning 20 and 21 September 2017), the acts that were referred to the Supreme Court dated back to 2015. However, the perpetration of specific and concrete acts was not attributed to the detainees but rather actions that do not constitute wrongs or illegal acts.

17. On 24 November 2017 the Supreme Court ruled in favour of amalgamating the proceedings and on 4 December 2017 it confirmed the detention.

18. As a consequence of the dissolution of the Parliament of Catalonia, new elections were held on 21 December 2017 and Messrs Sànchez and Junqueras were elected.

19. On 9 January 2018 Mr Junqueras asked to be transferred to a detention centre closer to Barcelona and requested his temporary release in order to attend the opening session of the parliament on 17 January. On 12 January his request was refused, on the grounds that a risk existed of civil confrontation.

20. The source notes that on 24 January 2018 another detainee and co-accused in the case, who had been elected as a Member of Parliament, gave up his seat and pledged not to take part in political activities or form part of the Government of Catalonia. It is alleged that he did so in order to secure his release.

21. On 5 March 2018 Mr Sànchez accepted the nomination to be invested as President of the Government of Catalonia. Consequently, he asked to be released in order to attend the investiture session. His request was refused on 9 March 2018. Mr Sànchez had to renounce his nomination.

22. On 21 March 2018 Mr Sànchez addressed the UN Human Rights Committee to request interim measures, which were granted on 23 March 2018. The Committee required Spain to take all necessary measures to ensure that Jordi Sànchez could exercise his political rights. According to the source, the Government did not comply with the measures.

23. On 21 March 2018, the Supreme Court issued an indictment for rebellion against Messrs Cuixart, Sànchez and Junqueras, confirming their detention.

24. According to the source, the legal defence of the detainees has filed several appeals for protection, which have been dismissed or unanswered. All requests for release have been refused on general grounds, without going into the specifics of individual requests but rather simply stating that the desire for independence generates a risk of reoffending.

25. It is argued that it has not been possible to attribute the perpetration, planning or instigation of violence to the detainees. It is alleged that the indictment of 21 March 2018 acknowledges that the action of those under investigation consisted of participating in public demonstrations. The violence of a few individuals, unrelated to the accused, cannot be attributed to them.

26. The source submits a decision by a high court in Germany which, having studied a request for the extradition of the co-accused former President of the Government of Catalonia, did not find the elements of violence necessary in the crime of rebellion. It is noted that the co-accused had not planned or indeed used violence or force but rather he had used democratic means, such as the referendum.

27. The source alleges that the detention is the result of the exercise of the rights or freedoms guaranteed in articles 18 to 21 of the Universal Declaration and articles 19, 21, 22 and 25 of the Covenant.

28. The source claims that in the ruling of 16 October 2017, which ordered the detention of the accused on the charge of sedition, the only acts on which the Public Prosecutor's Office based its accusation are related to the events of 20 and 21 September 2017. Nevertheless, the detention order refers to a wide range of acts, which occurred before, during and after the aforementioned events.

29. In relation to the participation of Messrs Cuixart, Sànchez and Junqueras in the events of 20 and 21 September 2017, the investigation only revealed, according to the source, that they had freely exercised their right to protest. For the source, this does not constitute legal grounds for detention but rather it is protected by human rights.

30. According to the source, the demonstrations were called by many individuals and organisations, trade unions, universities, political parties and associations, which have not been the subject of criminal proceedings or arrest. The demonstrations were in favour of the right to self-determination, by means of a referendum.

31. The source notes that Mr Cuixart made calls for calm and peace during the demonstrations. He and Mr Sànchez are well known for their calls for non-violence. None of the protests organised by the Òmnium Cultural association in its 56 years of history have been violent. According to the source, the National Court accepted that Òmnium Cultural had legitimate objectives.

32. It is pointed out that a judge of the National Court considered that the events of 20 and 21 September 2017 consisted of the legitimate exercise of the right to peaceful protest, in accordance with the law: citizens were called to mobilise in order to protest about a situation that was occurring and with which they did not agree. The demonstration was not aimed at disobeying and breaching judicial orders, but rather at exercising the right to protest. It therefore consisted of people exercising a legitimate right and via legal means, which they shared both personally and with their organisations.

33. The ruling lists, as part of the criminal proceeding, other actions which are not punishable and which are protected by articles 21 and 22 of the Covenant, such as the organisation of one-off, peaceful, dynamic and spectacular mass mobilisations, or calls for strikes, rallies and demonstrations; that is, the legitimate exercise of a political activity, which does not justify detention.

34. Meanwhile, the source argues that the detention is a consequence of the exercise of the right to freedom of opinion and expression, which the source alleges was criminalised. The detention was the result of having publically and peacefully expressed the desire for independence.

35. The source notes that the call to support a referendum was decriminalised in Spain through Organic Law 2/2015, since it constitutes a legitimate exercise of freedom of expression, under articles 20 and 21 of the Spanish Constitution.

36. Messrs Cuixart, Sánchez and Junqueras have peacefully and repeatedly expressed their political opinion on the situation in Catalonia. There is no evidence that their actions were violent, that they have incited violence or that they have caused violence. The only acts of violence in the accusation are those perpetrated by the Spanish police, which cannot be attributed to the accused.

37. It is indicated that the grounds for the detention of Messrs Cuixart, Sànchez and Junqueras is their political opinion, as was implicitly established in the ruling of 5 January 2018. The judge indicated that the detention of Mr Junqueras was not justified on the basis of the danger he posed but rather on the likelihood of him adopting the same behaviour in relation to his political activity. This is tantamount to keeping someone in detention for their opinions and beliefs.

38. It is alleged that the detention was the result of the exercise of the right to participate in political affairs. The source states that there was widespread consensus on the right of the accused, and citizens in general, to vote in the referendum of 1 October 2017. The detention has the goal and consequence of restricting the right to communicate ideas, including the call to vote, as well as to prevent the accused from being candidates and taking up office if elected.

39. It is pointed out that, in various decisions, the judges concluded that the risk of criminal activity was related to political responsibilities, indicating that the actual purpose of the detention is to prevent the accused from participating in public affairs.

40. As a candidate in the elections to the Parliament of Catalonia of 21 December 2017, Mr Sànchez was not able to participate in the campaign and vote, despite his status as a candidate and his subsequent victory. Subsequently, he was prevented from taking up office as a member of parliament. The objective, and consequence, of the detention was to deprive him of his right to political participation.

41. According to the source, Mr Junqueras was also deprived of his right to take part in the campaign and take up office. He was prevented from taking up office as a member of the Parliament of Catalonia and from attending its opening session.

42. The source reports on the case of another Catalan leader, also in pre-trial detention, who renounced his political role in exchange for the promise of his release. His detention had forced him to give up his rights, in the hope of gaining his freedom.

43. It is argued that the objective of the Government is revealed by the remarks of the then Deputy Prime Minister of Spain, when she congratulated the then Prime Minister on successfully beheading and liquidating the pro-independence leadership. The source also highlights the remarks of the Spanish Interior Minister, in which he threatened to have two other politicians detained and prosecuted for having prepared the electoral lists for the elections of December 2017.

44. The source alleges that the detention is arbitrary, since it violates the international standards of articles 9, 10, 11 of the Universal Declaration, 9 and 14 of the Covenant, and of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

45. It is also alleged that the National Court is not competent to hear the case. The National Court considered that when sedition is committed with the goal of changing the territorial organisation of the State, it must be considered an offence against the form of government and, accordingly, falls under the court's jurisdiction. However, the source argues that this constituted an erroneous interpretation of the legislation in order to grant jurisdiction to the National Court under article 65.1 of the Organic Law on the Judiciary.

46. It is argued that the offence over which the National Court holds jurisdiction has only been used in relation to an attack on the form of government established in the Constitution, namely a Parliamentary Monarchy, and is not applicable in a situation of change and reorganisation in the foundations of regional structure. It is unheard of and unjustifiable for the meaning of the offence to be broadened in order to encompass the allegations against the detainees.

47. The source states that the National Court is only competent to judge specific offences, which do not include sedition. A sentence of 2 December 2008 by the same court ruled that rebellion had never fallen under the jurisdiction of the National Court. The court has not given any reasons for this change of criterion.

48. It is argued that the transfer of the case the Supreme Court does not remedy the aforementioned irregularities, since the National Court ordered the detention of the accused and because, in any event, the Supreme Court is no more competent. The competent court would be the High Court of Justice of Catalonia, since the alleged crime would have been committed in that territory.

49. The source claims that the facts described above demonstrate that the courts by which Messrs Cuixart, Sànchez and Junqueras are being kept detained are not competent, independent or impartial. It is alleged that the remarks of the Deputy Prime Minister of Spain clearly highlight the lack of independence of the proceedings, not only because she referred to the beheading of political leaders but also because she described the action as an achievement of the Prime Minister.

50. The source alleges that the lack of competence and jurisdiction of the courts over these matters, as well as their lack of independence and impartiality, affected their decisions, including the decision to detain Messrs Cuixart, Sànchez and Junqueras. As a result, the deprivation of their liberty constitutes a violation of articles 9 and 10 of the Universal Declaration and of articles 9 and 14 of the Covenant.

51. In relation to Messrs Cuixart and Sànchez, the judge ordered their detention on the grounds of the allegations of sedition, in relation to the events of 20 and 21 September 2017. However, he referred to a succession of prior and subsequent events, and to places in which the accused were not present. In a hearing of 11 January 2018, Mr Cuixart's legal defence asked the judge to inform it of the specific acts and crimes attributed to him, since they remained unclear. This request has not been answered.

52. The source alleges that sedition requires a public and tumultuous uprising, which is different from a declaration of independence or from the pro-referendum protests. It is noted that Spanish doctrine has established that it is impossible for the legislator to have criminalised the peaceful and collective opposition to the execution of the law or of public service. Supporting self-determination does not constitute a crime but rather a right protected by articles 16 and 22 of the Spanish Constitution.

53. According to the source, Messrs Cuixart and Sànchez called for a civic and peaceful demonstration, insisting that all violent acts must be avoided. The damage to vehicles that was attributed to them was the result of actions by non-identified individuals who are unrelated to the accused. The Civil Guard acknowledged that other participants in the mobilisation attempted to protect the cars.

54. It is pointed out that, in a dissident opinion, one of the judges of the National Court urged his colleagues to be prudent, in objective and criminal terms, when establishing the facts and not to stray into presumptions, subjectivism and prejudices in relation to the facts. In an analysis of the facts it is not possible to identify a possible crime.

55. According to the source, Mr Junqueras was detained for rebellion, which cannot be proved either. Under article 472 of the Spanish Criminal Code, rebellion is committed by those who rise up violently and publicly in order to, among other things, declare the independence of part of the national territory. The crime can only exist if it has occurred in the context of an armed, or at least violent, confrontation.

56. It is pointed out that the previous Chief Prosecutor of the High Court of Justice of Catalonia stated that the democratic behaviour of more than one million citizens, exercising their right to demonstrate politically, could not constitute violence, much less rebellion.

57. According to the source, declaring the independence of part of the territory does not fit the definition of rebellion. In order for such a declaration to be considered rebellion, violence is required. It is alleged that no violence occurred at any stage of the process, except for that perpetrated by the Spanish National Police, for which the detainees are not responsible.

58. Meanwhile, sedition, an offence provided for in article 544 of the Criminal Code, requires a violent and collective uprising in order to repeal the laws. The source argues that a peaceful protest cannot constitute sedition. The acts of calling for or taking part in a referendum have been decriminalised since 2005.

59. It is pointed out that the courts of Catalonia have over the years received complaints for sedition related to pro-independence acts (for example, the decisions of 24 March 2014 and of 8 January 2015). Since 2014, these courts, which have the exclusive territorial jurisdiction over the said complaints, have dismissed them due to the lack of violence and the lack of personal attribution of specific actions.

60. The source alleges that the judge considered Mr Junqueras to be responsible for violence, but Mr Junqueras did not foresee, provoke or participate in it. The detention order did not specify the behaviour attributed to Mr Junqueras and could not establish whether his actions merited the deprivation of liberty.

61. The source highlights the standard according to which the right to the presumption of innocence is violated if an official statement related to an accused person gives the impression of guilt when this has not been legally determined. It is alleged that the said violation occurred when the Spanish Prime Minister described the independence movement and its leaders as imprudent and even dangerous rebels, and when the Deputy Prime Minister announced that the Government had succeeded in beheading its leaders.

62. It is added that, in breach of the right to the presumption of innocence, the Appeals Chamber of the National Court has stated that certain facts are common knowledge and do not need to be proved. For example, it stated that the fact that Mr Cuixart had stood on a vehicle of the National Police constituted a known fact. However, this fact must be interpreted in context, since disagreement exists on the matter: Mr Cuixart stood on the vehicle asking the crowd to stop the demonstration. Therefore, this action cannot be used against him without first clarifying the context.

63. The source claims that it is evident that the detention violates the right to the presumption of innocence, protected by article 11.1 of the Universal Declaration and 14.2 of the Covenant.

64. The source also highlights the violation of the right to a defence, according to which the individual must have the time and means to prepare arguments and evidence in their favour.

In respect of Messrs Cuixart and Sànchez, it is noted that they were summoned on 3 October 2017 to appear at a hearing on 6 October. Mr Junqueras was granted even less time; he was summoned on 1 November 2017 to testify on 2 November, on which day he was also detained. Despite this, the detention order of 2 November 2017 stated that the accused had enjoyed the time necessary to prepare his defence, without considering the fact that his lawyer was not present.

65. The source explains that the court received the complaint from the Public Prosecutor's Office on 31 October. The following day (1 November, a public holiday), Mr Junqueras received a summons, as a result of which he and his lawyer had to travel without delay from Barcelona to Madrid (630 km) in order to appear before the court. It is noted that this did not give the defence sufficient time to study, process and respond to the 117-page accusation document, much less the entire file.

66. Mr Junqueras' lawyer was unable to be present, since he was also defending other members of the Parliament of Catalonia, summoned to appear on the same day before the Spanish Supreme Court, a circumstance which the National Court ignored. Far from postponing the hearing, the judge proceeded in the absence of the defence lawyer. All the accused protested, on that day, that they had been unable to prepare their defence within the available time.

67. Finally, the source alleges that, given that the detention is due to the defence of the Catalan people's right to self-determination, it constitutes discrimination on the grounds of political opinion. The connection between the detainees and the political situation is highlighted. The detainees are publicly associated with the independence movement. Furthermore, the acts in question and their arrest took place in that region. This provides additional grounds on which it is affirmed that the detention of Messrs Cuixart, Sánchez and Junqueras is arbitrary and violates their fundamental rights.

68. The source concludes by requesting that the detention be declared arbitrary under categories II, III and V.

Response from the Government

69. On 8 August 2018, the Working Group transmitted the allegations from the source to the Government, requesting the Government to provide detailed information by 8 October 2018 on the legal and factual grounds of the detention, as well as its compatibility with Spain's obligations under international human rights law. When the response deadline arrived, the Government requested an extension, which was granted until 8 November 2018.

70. In its response, the Government stated that the detention of Messrs Cuixart, Sànchez and Junqueras had been ordered within criminal proceedings taking place before the Supreme Court, to which the proceedings that initially took place before the National Court were added. The examining judge ordered, and the Criminal Chamber of the Supreme Court confirmed, the detention of the accused during the criminal proceedings, on which a judgement has not yet been made.

71. The Government indicates that the Spanish Constitution, in article 17, provides for the possibility of adopting the measure of pre-trial detention, and that the Criminal Procedure Law grants judges the capacity to impose the precautionary measure of pre-trial detention when the causes set forth in articles 503 and 504 are verified.

72. The Government notes that Spain is governed by the rule of law and the principle of separation of powers. As such, neither the legislative nor the executive branches have intervened in the decisions adopted by the judicial branch (in this case the Supreme Court).

73. According to the Government, the observations submitted are based on the rulings contained in the criminal proceedings, which are the manifestation of the branch of the State (in this case the Judiciary) which ordered the detention. Therefore, in respect of the State, the comments made by members of the executive branch or of political parties are irrelevant, since they have not adopted the precautionary measure of detention and there is no indication that they have influenced the decisions of the judiciary.

74. The Government indicates that it did not assume the competencies of the Parliament of Catalonia once its dissolution and the calling of new elections were decreed, but rather its functions continued to be exercised by the Permanent Committee of the Parliament of Catalonia; that the Human

Rights Committee did not request any interim measures in favour of Mr Sànchez by virtue of article 92 of its regulations; that the German regional court has considered that no persecution on political grounds exists in Spain and that there are no prisoners of conscience; and that the appeals for protection submitted by the accused have been admitted for processing and that the deadline for ruling on them has not passed, in accordance with the criteria of the Human Rights Committee[1].

75. The Government points out that the Spanish Constitution allows for its own entire modification since it does apply the principle of "militant democracy" and establishes a specific procedure in article 168 for the said modification.

76. The Government adds that in Spain, the political parties that advocate for the separation of Catalonia from the rest of Spain are consequently legal and that the Constitution includes mechanisms that enable this situation to come about, within the bounds of the rule of law. This was reaffirmed in sentence 42/2014 of the Constitutional Court, which stated that "the right to decide of the citizens of Catalonia" must be channelled through the principles of democratic legitimacy, dialogue and legality, all within the framework of the Constitution and of the procedures for reform established therein.

77. The Government argues that the independence movement, not having the required majority, opted not to respect the rule of law and decided to act on a unilateral basis. The Constitutional Court ruled the following

> (…) Such a serious attack on the rule of law violates, with similar intensity, the democratic principle, the Parliament having disregarded that the subordination of one and all to the Constitution is another form of submission to the will of the people, expressed in this instance as a constituent power of which the entire Spanish people, and not a single fraction of it, is the holder. (…)

78. The Government alleges that the movement did not have a sufficient majority to modify the Statute of Autonomy of Catalonia, which requires a two-thirds majority of the Parliament of Catalonia in order to pass a reform.

79. According to the Government, the independence movement took advantage of its control of the Presidency and, with the support of the institutions led by Messrs Sànchez and Cuixart, promoted an unconstitutional referendum and passed unconstitutional laws leading to a declaration of independence without having a majority of votes and without having a sufficient majority of seats in the Parliament of Catalonia.

80. The Government points out that in the referendum of 6 December 1978 to approve the Spanish Constitution, 90.46% of the eligible voters in Catalonia voted in favour, the turnout being 68% of the electoral census. This means that 62% of Catalans with a right to vote voted in favour of the Constitution. The Government states that, by contrast, the independence movement has never had the majority of votes in Catalonia.

81. The Government argues that since full democracy was reinstated in Spain in 1977, it has established itself as a country of high democratic quality in which the rights and freedoms of all its citizens are guaranteed, in accordance with the standards of the most prestigious international institutions. It highlights as a well-known fact the international recognition of its democratic transition, of which the 1978 Constitution is the fulcrum.

82. The Government claims that the judicial actions of the present case cannot be understood as a reaction to the legitimate political aspiration for the separation of Catalonia but rather exclusively as a judicial measure in response to specific acts committed outside the framework of the rule of law.

83. According to the Government, from the moment in which the judicial decisions of detention were adopted, and in response to the requests and appeals of the affected persons, the judicial rulings have confirmed the detention, upholding the measure on the grounds of the risk of reoffending.

84. The Government indicates that the detention of Messrs Sànchez and Cuixart was initially ordered in the ruling of the Examining Judge of the National Court, on 16 October, while that of Mr

[1] The Government refers to Communication No. 1341/2005 Zündel v. Canada, of the Human Rights Committee.

Junqueras was ordered on 2 November 2017. The detention order was subsequently confirmed by the Criminal Chamber of the National Court, the Criminal Chamber of the Supreme Court and in rulings of Examining Judge, in response to the requests for release and/or the requested permits.

85. Regarding the factual elements, the Government refers to what is established by the Investigating Judge on 21 March 2018, included in the Criminal Division of the Supreme Court, through which Messrs Cuixart, Sanchez and Junqueras are being prosecuted, for crimes of rebellion, embezzlement and disobedience, and through which it is agreed to remand them in custody, as the risk of reoffending still exists, along with the risk of absconding.

86. The Government indicates that the court decision of 21 March 2018 of the Investigating Judge includes the factual background of the case, qualifying them, in what interests here, as a crime of rebellion. The Government states that the facts were initially described as a crime of sedition, although as the investigation progressed, the investigating judge considered that they were indistinct from the offence of rebellion.

87. The Government indicated that the Judiciary considered that the suppositions indicated in art. 503 Civil Procedure Act concurred for detention and remand, specifically: i) the facts were an offence punishable by penalty of over 2 years in prison; ii) sufficient reason to believe a specific person to be criminally responsible; iii) assessment of the risk of absconding and reoffending.

88. According to the Government, preventive detention in Spain is legal, provided that it is justified in accordance with the Rule of Law, and in the framework of the International Covenant on Civil and Political Rights; and in this case, the measures are not taken to limit rights, but as a result of the action of the people affected, which the competent judge assesses as possibly constituting very serious crimes, contrary to the Rule of Law.

89. In relation to the alleged lack of competence and jurisdiction of the National Court and the Supreme Court, considering that the crimes have been committed in Catalonia, the Government indicates that it must be considered – as the Supreme Court did – that some of the behaviours deployed have gone beyond the territory: the diary seized from José María Jové, the White Paper for the independence of Catalonia and, in relation to the referendum, the purchase of ballot boxes and the printing of ballots papers on foreign soil (France).

90. The Government refers to the classification made by the Supreme Court of the charges against Messrs Cuixart, Sanchez and Junqueras.

91. Regarding the non-observance of the presumption of innocence, the Government states that this can only be violated by the Judiciary, and cannot be attributed to statements by members of the Judiciary.

92. On the allegation of a lack of time for the preparation of the defence, it is indicated that the suspension was not filed by Mr. Junqueras at the start of his statement, but was limited to the general registry filing a suit for suspension, which reached the investigating Judge only after the statements had been made, not before.

93. Regarding Messrs Cuixart and Sánchez, in the writ of the Investigating Judge, of 16 October 2017, when they were detained, there is no complaint or suspension request linked to not having had time to prepare the defence. In the appeal resolved by the Writ of the Criminal Division of the National Court on 6 November, the lack of time for the defence is not indicated as a reason for objection. It also indicates that in successive requests for release and appeals filed, they have not alleged the existence of limitations to their defence.

94. The Government states that there is no discrimination in this case, and refers to arguments of the Criminal Division of the Supreme Court, in a resolution dated 5 January 2018, in which on rejecting the request for the release of Mr. Junqueras, it is indicated that the trial does not seek to persecute political dissent.

Additional information of the source

95. The source presented additional comments on the non-violent expression of the political opinions of Messrs Cuixart, Sánchez and Junqueras, and to have exercised their rights of freedom of association, assembly and participation in public affairs of their country, which makes them arbitrary.

Similarly, it went into depth with elements regarding the violation of rights to the due legal proceedings of the detainees.

Deliberations

96. The Working Group thanks the source and the State for sending the corresponding information.

97. The Working Group is mandated to investigate cases of deprivation of liberty imposed arbitrarily, which are submitted to its knowledge. Hence, it refers to the corresponding international standards established in the Universal Declaration and the Covenant.

98. Based on Rule 33 of the work methods, the Government asked that part of this complaint be referred to the Human Rights Committee, as this would be considering the case. It is indicated that it will be examining elements regarding political participation, rights of association and assembly, freedom of opinion and speech, and that the same facts and people are dealt with.

99. In this respect, the Working Group would remind that Rule 33, subparagraph a) and d), section ii), seeks to strengthen the effective coordination of different bodies of human rights, both of special procedures and treaty bodies.

100. In this context, the Working Group received information from the parties on the facts and the applicable law, with a view to determining whether the right was breached on not being arbitrarily deprived of freedom. This includes some elements linked to rights of political participation, association and assembly, along with the freedom of opinion and speech. The Government did not establish that the claim presented to the Committee referred to the right to personal freedom and not to be subject to arbitrary detention. Based on the above, it is considered that this case does not meet the supposition given in Rule 33, subparagraph 3) section ii), as the same facts and the same allegedly violated rights do not coincide.

101. Having established its position regarding this procedural issue, in according to its work methods and practice[2], the working Group reaffirms its competence to know the case.

102. The Working Group has established in its jurisprudence, the way to proceed regarding evidentiary issues. If the source has presented prima facie evidence of a breach of international regulations on personal freedom, leading to arbitrary arrest, it should be understood that the burden of proof falls on the Government, if it wishes to reject the allegations[3].

103. The Working Group confirmed that Messrs Cuixart, Sánchez and Junqueras are public figures, recognized for their work in favour of Catalan independence, that they have held positions in associations, political parties and in the civil service.

104. Similarly, it confirmed Messrs Cuixart and Sanchez were summoned on 6 October 2017 and later remanded in custody by the Investigating Court of the National Court. Mr. Junqueras was detained after making a statement by order of the Investigating Court on 2 November 2017.

Category II

105. The source alleges that the detention of Messrs Cuixart, Sánchez and Junqueras is the result of the exercise of rights and freedoms guaranteed in articles 19 to 21 of the Universal Declaration and articles 19, 21, 22 and 25 of the Covenant.

106. The Working Group underlines that everyone has the right to freedom of speech, which includes the right to disseminate information and ideas of any type, either orally or in any other way. The Group also reiterates that exercising this right may be subject to restrictions, explicitly set out in law, and necessary to ensure the respect of rights or the reputation of others, along with the protection of national security, public order, health and public morals[4].

[2] Opinion No. 892018, par. 64-67
[3] See A/HRC/19/57, par. 68
[4] Opinion 58/2017, par. 42

107. The Working Group coincides with the Human Rights Committee, in that freedom of opinion and speech are essential to full personal growth and form the cornerstone of free and democratic societies.[5] Both freedoms form the basis to fully enjoy other human rights, such as the freedom of assembly and association, and to exercise the right to political participation.[6]

108. The importance of the right to freedom of opinion is such, that no government may restrict other human rights for –political, scientific, historic, moral or religious – opinions, expressed by or attributed to a person. To classify the expression of an opinion as an offence, it is not compatible with the Declaration, or with the Covenant. This means that harassment, intimidation or stigmatization, including arrest, pre-trial, prosecution or imprisonment, on the grounds of his/her opinions.[7]

109. It is also significant to point out that freedom of opinion and speech covers the possibility of expressing the way in which people can freely determine their political system, their constitution or government. This demonstrates the link with other human rights. The Human Rights Committee has pointed out that "[1] the rights set forth in article 25 are related to the right of people to free determination, although they are different. Pursuant to paragraph 1 of article 1, the people have the right to freely determine their political status, and the right to choose the form of their constitution or government. Article 25 deals with the rights of people to participate in management processes of public issues.[8]

110. At the same time, the Working Group which confirmed that the referendum is permitted in Spain, for a wide range of issues, including that related to this case, considers that the calls for holding public participation processes, either individually or through organizations, are legitimate expressions of the right to freedom of opinion and speech.

111. The Working Group confirmed that on the 20 and 21 September, 2017, a public demonstration was held, in favour of holding a referendum on the independence of Catalonia. In this context, incidents or conflicts occurred among the demonstrators and police. It was also confirmed that these specific events could not be attributed to Messrs Cuixart, Sánchez and Junqueras.

112. Messrs Cuixart, Sánchez and Junqueras were accused of sedition, in relation to the peaceful social protest on 20 and 21 September 2017, in which thousands of people also participated. The accusation was later modified to the crime of rebellion.

113. The Working Group verified that the element of violence is essential for the criminal classification of the charges. In its response, the Government offered information on the independence process, but did not present information on specific actions of the accused that may have involved violence and, therefore, constitute an offence in accordance with applicable law, including international law.

114. The Working Group confirmed that the actions of Messrs Cuixart, Sànchez and Junqueras, prior or subsequent to the celebration of the social protest of 20 and 21 September 2017, were not violent, nor did they incite violence, and their behaviour did not result in events or acts of violence. On the contrary, they consisted of the peaceful exercise of rights to freedom of opinion, speech, association, assembly and participation. Information was even received on the testimony of a Judge, who states that the events attributable to the accused are expressions of the legitimate right to peaceful protest. [9]

115. In this sense, the Special Rapporteur on the right to freedom of opinion and speech, expressed concern about these arrests, "their being directly related to the calls for mobilization and citizen participation made within the scope of the referendum." He also expressed concern that "the charge of rebellion could be disproportionate and therefore incompatible with Spain's obligations within the framework of international human rights standards.[10]

116. The Working Group also took note of the decision of a German court, which, on analyzing the extradition of Mr Carles Puigdemont (co-accused), found no elements of violence in the facts alleged, necessary for the crime of rebellion, and confirmed that his actions cannot be considered an attempt at

[5] CCPR/C/GC/34, par. 2
[6] CCPR/C/GC/34, par. 4
[7] CCPR/C/GC/34, par. 9-10
[8] CCPR/C/21/Rev.1/Add.7, par.2
[9] Individual opinion of the magistrate José Ricardo de Parada Solaesa on 07 November 2017.
[10] AL ESP 1/2018

the violent political overthrow of the Government. He indicated that the accused sought independence through democratic means.[11]

117. The Working Group received compelling information, which was not refuted by the Government, on the situation of Mr Forn, arrested and charged in this case, and who was persuaded to suppress his activism, in favour of the pro-independence cause, in exchange for his release.

118. Criminal proceedings like this case are implausible if they are analyzed with the turbulent political time in which the prosecution was presented, and on dates near the possible celebration of a referendum, when the political careers of Messrs Cuixart, Sánchez and Junqueras have for years been driving for the independence of Catalonia. Added to this are the statements made by senior Government officials (given in the following paragraph), which speak of eliminating the leaders of the independence movement, and to classify the conduct of Messrs Cuixart, Sánchez and Junqueras as violent, in view of social protest.

119. The non-existence of violence and the lack of convincing information on facts attributable to Messrs Cuixart, Sánchez and Junqueras, which implicate them in conducts leading to the charges, has generated the conviction in the Working Group that the charges against them are intended to coerce them for their political opinions on the independence of Catalonia and to inhibit them from continuing with that aspiration in the political sphere.

120. The Working Group was convinced that the criminal charges against Messrs Cuixart, Sànchez and Junqueras were aimed at justifying their detention as a result of the exercise of their rights to freedom of opinion, expression, association, assembly and political participation, in contravention of articles 18 to 21 of the Universal Declaration and articles 19, 21, 22 and 25 of the Covenant, so it is arbitrary according to category II.

Category III

121. In view of the findings under category II, the Working Group considers that there were no grounds for preventive detention and trial. However, as this is now underway, and considering the allegations of the source, the Working Group will proceed to analyze whether, during the course of said judicial process, the fundamental elements of a fair, independent trial have been respected and impartial.

Presumption of innocence

122. In article 11.1 of the Universal Declaration and article 14.2 of the Covenant, it is recognized the right of anyone accused to be presumed innocent. This right imposes obligations on State institutions, that the accused should be treated as innocent until sentencing, beyond reasonable doubt. This right obliges public authorities of a country to avoid prejudgement of the result of a trial, which involves refraining from making public statements, which affirm the guilt of the accused.[12]

123. The Working Group has determined that public interference that openly condemns the accused, before the sentence, violates the presumption of innocence and constitutes undue interference that affects the independence and impartiality of the court.[13]

124. Similarly, the European Court of Human Rights has indicated that public statements by high-ranking officials violate the right to presumption of innocence of persons when identifying them as being responsible for a crime for which they have not yet been tried, and this is intended to convince the public of their guilt, as well as prejudging the assessment of the facts by the competent judicial authority.[14]

125. In face of the allegations of the source on the breach of presumption of innocence, the Government indicated that statements made by the Judiciary were not relevant, as it believes that there is no indication that they have had any impact on the decision-making of the Judiciary.

[11] Decision of the Higher Regional Court of Schleswig-Holsteinisches, 12 July 2018
[12] CCPR/C/GC/32, par. 30
[13] Opinions 90/2017 and 76/2018
[14] European Court of Human Rights, Allenet de Ribermont v. France, ₴ 41; Daktaras v. Lithuania, ₴ 42; Petyoo Petkov v. Bulgaria ₴ 91; Pesa v. Croatia ₴ 149: Gutsanovi v. Bulgaria, ₴₴ 194-198; Konsas v. Greece, ₴₴ 43 and 45; Butkevicius v. Lithuania ₴ 53; Khuzhin and Others v. Russia, ₴ 96; Ismoilov and Others v. Russia, ₴ 161.

126. In this case, credible information was received on statements made by the Vice-President of Spain, through which she congratulates the Prime Minister for having eliminated independent parties from Catalonia, by arresting their leaders. Added to this are the statements made by the Minister for Internal Affairs, who referred to the leaders of the independence movement as reckless, dangerous and rebellious.

127. On the other hand, the Appeals Chamber of the National court indicated that certain facts attributable to the accused, are of common knowledge and do not need to be proved. For example, according to this court, the fact that Mr. Cuixart stood on vehicle of the National Police on 20 September 2017, is a known act. However, the Working Group received convincing information that Messrs Cuixart and Sánchez called to dissolve the demonstration in a calm way at that time.

128. In view of the declarations of senior offices of the State, which have shown to the public an anticipated criminal responsibility of the detainees, which could influence their image to the judicial bodies, the Working Group was convinced that the right to the presumption of innocence of Messrs Cuixart, Sànchez and Junqueras was violated, in contravention of the provisions of articles 11.1 of the Universal Declaration and 14.2 of the Covenant.

Preventive detention

129. It is an established norm in international law that preventive detention should be an exception and not a rule, and should be ordered in the shortest time possible. Article 9, paragraph 3 of the Covenant requires that a reasoned judicial decision examines the merits of preventive prison in each case. This provision also establishes that "release may be subject to guarantees of appearing before a court, in any other place, stage of court proceedings, and if applicable, the execution of the sentence". It is hence deduced that detention should be an exception in the interests of justice. The provisions of article 9, paragraph 3 of the Covenant, can be summarized as follows: any detention should be exceptional and for a short duration. Release should be facilitated when there are measures to guarantee the presence of the accused at the trial and the execution of the sentence. If preventive prison is extended, presumption should be increased in favour of release on bail.

130. In this case, the accused were arrested in October and November 2017, and have remained in preventive prison during the trial, which is not yet over. The source has indicated that the refusal for conditional release has been caused by the supposed risk of reoffending in the call for independence, which could cause further public demonstrations. The Working Group concluded that the detention is arbitrary, as it is the result of exercising the right to freedom of opinion, speech, association, assembly and participation. On the other hand, it has not been determined whether the judges or the Government have analyzed and concluded, pursuant to the Covenant, that there are legitimate, necessary and proportional basis to restrict these human rights, through the deprivation of liberty since October and November 2017, and during the trial. Consequently, the Working Group should conclude that preventive prison has been in contravention to article 9.3 of the Covenant.

Right to be tried by a competent and impartial tribunal

131. According to article 14.1 of the Covenant, every person shall have the right to be heard publicly and with due guarantees by a competent, independent and impartial tribunal, in the substantiation of any accusation of a criminal nature against him. The Working Group agrees that judges should not allow their judgement to be influenced by personal bias or prejudice, or have preconceived ideas about the matter under their consideration, or behave in an improper way that promotes the interests of the parties.[15]

132. The Working Group was not convinced that the acts attributable to Messrs Cuixart, Sánchez and Junqueras were violent. On the contrary, it confirmed that they had been carried out as an exercise of freedom of opinion, speech, assembly, association and political participation over a number of years.

133. Similarly, the Working Group found elements that enabled it to assume that judges with knowledge of the matter, had preset ideas about it. This is confirmed, for example, by the accusations arising from the process to the Appeals Chamber of the National Court, which refers to certain facts that are of common knowledge and do not need to be proved.

134. On the other hand, the Working Group considered the criminal prosecution of individuals accused of crimes committed in a given territory, by courts located in another jurisdiction, constitutes a

[15] CCPR/C/GC/32, par. 21

violation of the right to be tried by the competent judge, when the national legislation expressly attributes jurisdiction to the jurisdiction of the locality where the alleged crime was committed.[16]

135. In this case, the Working Group was convinced that territorial, personal and material jurisdiction, responsible for investigating and judging possible criminal acts, corresponded to the tribunals of Catalonia, because the alleged crimes were committed in the territory of Catalonia, along with Government officials and Catalan parliamentarians. The Working Group also received convincing information that the tribunals of Catalonia were aware of complaints regarding the independence process of Spain. However the Working Group was not convinced that the right judge to try the alleged crimes referred to in this case, corresponded to the courts that currently know them.

136. For the above reasons, the Working Group considers that right of Messrs Cuixart, Sánchez and Junqueras to be judged by a competent and impartial court was unobserved, as acknowledged in article 10 of the Universal Declaration and article 14.1 of the Covenant.

Right to have sufficient time and means for the defence

137. Article 14.3.b) of the Covenant acknowledges the right of everyone to "have sufficient time and means to prepare their defence", which is an important guarantee for a fair trial and for the principle of equality of arms".[17] Having sufficient means for the defence includes, among other things, the possibility of having advance access to all material, documents and other evidence that the public prosecutor plans to present at court.[18]

138. The Working Group shares the assessment that when lawyers claim that the time provided to prepare the defence is not sufficient, they can reasonably ask for a deferral, and in principle, the authorities should accept these requests. It is important to underline that "there is an obligation to accept requests for reasonable deferrals, particularly when the accused is charged with a serious offence, and more time is needed to prepare the defence".[19]

139. In this case, the Working Group was convinced that Messrs Cuixart, Sànchez and Junqueras did not have enough time to prepare their defence, since there had been a very short time between notification and hearing, taking into account the size of the file and distances to travel. In addition, it was found that the defendants were not granted more time to prepare their defence and that this had an effect on the unrestricted access to the adequate means necessary for their legal protection. This implies the non-observance of the right recognized in articles 11.1 of the Universal Declaration and 14.3.b) of the Covenant.

140. As a result of the above, the Working Group was convinced that the imprisonment of Cuixart, Sànchez and Junqueras was carried out to the detriment of the fundamental guarantees of due process and a fair trial, in particular the presumption of innocence, to be tried by a competent and impartial tribunal and have the appropriate defence, in contravention of the provisions of articles 9, 10 and 11 of the Declaration, and 9 and 14 of the Covenant, and is of such gravity as to mean that the detention was arbitrary according to category III.

Category V

141. The source alleges that the detention of Messrs Cuixart, Sánchez and Junqueras was discriminatory, as it was the result of their defence of the right to self-determination. The Working Group considered the deprivation of freedom to be arbitrary, when it is targeted at repressing members of political groups in order to silence them in their claim for self-deterimnation.[20]

142. In this case, the detention of Messrs Cuixart, Sánchez and Junqueras was made based on concerted actions of the national judicial apparatus of the administration and prosecution of justice, against certain leaders of the Catalan independence movement, who had the public political support of senior officials of the Spanish Government, even through declarations, which backed the elimination of this movement. The imprisonment of Cuixart, Sànchez and Junqueras was carried out to the detriment of the principle of equality of human beings, as it was owing to their political opinion, to the detriment of the

[16] CCPR/C/GC/32, par. 21
[17] CCPR/C/GC/32, par. 32
[18] CCPR/C/GC/32, par. 33
[19] CCPR/C/GC/32, par. 32
[20] Opinion No. 11/2017

provisions of article 2 of the Universal Declaration and article 3 of the Covenant, meaning that the detention was arbitrary according to category V.

143. According to paragraph 33.a) of the working methods, the Working Group forwards the information regarding rights of freedom of opinion and speech, assembly and association of this case, to the Special Rapporteur, on the rights of freedom of peaceful assembly and association, and to the Special Rapporteur on the freedom of opinion and speech.

Decision

144. In view of the above, the Working Group expresses the following opinion:

> The detention of Messrs Jordi Cuixart, Jordi Sànchez and Oriol Junqueras is arbitrary, inasmuch as it contravenes Articles 2, 9 to 11, as well as 18 to 21 of the Universal Declaration of Human Rights and Articles 3, 14, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights, and is registered in categories II, III and V.

145. The Working Group requests that the Government of Spain take the necessary measures to remedy the situation of Messrs Cuixart, Sànchez and Junqueras without delay in compliance with the relevant international standards, including those set out in the Universal Declaration and the Covenant.

146. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to immediately release Messrs Cuixart, Sànchez and Junqueras and grant them the effective right to obtain compensation and other types of reparation, in compliance with international law.

147. The Working Group urges the Government to carry out a thorough and independent investigation into the circumstances surrounding the arbitrary detention of Messrs Cuixart, Sànchez and Junqueras and to take appropriate measures against those responsible for the violation of their rights.

148. In accordance with paragraph 33.a) of its working methods, the Working Group remits this case to the Special Rapporteur referring to the right to freedom of assembly and association, and to the Special Rapporteur on the right to freedom of opinion and speech.

149. The Working Group asks the Government to disseminate this opinion through all available means and as widely as possible.

Follow-up procedure

150. In accordance with paragraph 20 of its working methods, the Working Group requests the source and the Government to provide information on the follow-up measures adopted with respect to the recommendations made in this opinion, in particular:

(a) If Messrs Cuixart, Sànchez and Junqueras have been released and, if so, on what date;
(b) If compensation or other reparations have been awarded to Messrs Cuixart, Sànchez and Junqueras;
(c) If the violation of the rights of Messrs Cuixart, Sànchez and Junqueras has been investigated and, if so, the result of the investigation;
(d) If legislative amendments have been approved or modifications have been made in practice to harmonize Spanish laws and practices with their international obligations in accordance with this opinion;
(e) If any other action has been taken to apply this opinion.

151. The Government is invited to inform the Working Group of any difficulties it may have encountered in the implementation of the recommendations formulated in the present opinion and to indicate whether it needs additional technical assistance, for example through a visit from the Working Group.

152. The Working Group requests the source and the Government to provide the above-mentioned information within a period of six months from the date of transmission of this opinion. However, the Working Group reserves the right to undertake its own follow-up of the opinion if new matters of concern in relation to the case are brought to its attention. This follow-up procedure will allow the Working Group to keep the Human Rights Council informed of the progress made in applying its recommendations, as

well as, where appropriate, the deficiencies observed.

153. The Working Group would remind that the Human Rights Council has encouraged all States to collaborate with the Working Group, and has asked them to take their views into account and, if necessary, take appropriate measures to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the measures they have adopted.[21]

[Approved on 25 April 2019]

[21] See resolution 33/30 of the Human Rights Council, par. 3 and 7