Brussels, 20 June 2019

To: The President of the European Parliament
Cc: The Chairman of the Committee on Legal Affairs

From: Carles Puigdemont i Casamajó, and Antoni Comín i Oliveres, elected Members of the European Parliament

- Having regard to our previous letter of 14 June 2019;

- Having regard to the results of the elections to the European Parliament of 26 May 2019 officially declared by Spain in accordance with Articles 8 and 12 of the Electoral Act 1976, which were published in the Spanish *Official Gazette* of 14 June 2019, and confirm that we have been officially declared as elected Members of the European Parliament (see documents attached),

- Having regard to the decision of the investigative judge of the Spanish Supreme Court of 14 June 2019 not to withdraw the existing national arrest warrants against us, following our election as new Members of the European Parliament, so that we could be sworn in and take our seats normally (see document attached),

- Having regard to the decisions by the investigative judge of the Spanish Supreme Court to withdraw the European Arrest Warrants issued against us in November 2017 and March 2018, and particularly to the decision of the Court of Schleswig-Holstein which declared that the extradition on charges of rebellion or sedition was inadmissible (see document attached),

- Having regard to the fact that the charges of rebellion, sedition and misuse of public funds brought by the investigative judge of the Spanish Supreme Court against us are the exact same charges, on the exact same facts, brought against Mr. Jordi Cuixart, against Mr. Jordi Sànchez, and against elected Member of the European Parliament Mr. Oriol Junqueras,

- Having regard to Opinion No. 6/2019 of the United Nations Working Group on Arbitrary Detention of 26 April 2019, which confirmed that those charges *"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"* (see document attached),

- Having regard to paragraph 1 of Article 9 of Protocol (No 7) on the Privileges and Immunities of the European Union, which reads as follows: *"During the sessions of the European Parliament, its Members shall enjoy: (a) in the territory of their own State, the immunities accorded to members of their parliament,"*

- Having regard to Article 71(2) of the Spanish Constitution, which provides that *"during their terms of office, Deputies and Senators shall likewise enjoy immunity and may only be*

arrested in the event of delicto flagrante*. They may be neither indicted nor tried without prior authorisation of the respective Houses",*

- Having regard to Article 20(2) of the Rules of Procedure of the Spanish Parliament, which provides that *"rights and privileges are effective since the precise moment in which Members are declared to be elected",*

- Having regard to paragraph 2 of Protocol (No 7) on the Privileges and Immunities of the European Union, which provides that *"immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament",*

- Having regard to the Working Paper of the Directorate-General for Research of the European Parliament *"Parliamentary Immunity in the Member States of the European Union and in the European Parliament"*, which establishes that the immunity conferred in the second paragraph of Article 9 should be regarded as a Union immunity, *"irrespective of the protection accorded by national legislation",*

- Having regard to the Opinion of Advocate-General Jääskinen in *Patriciello* (Case C-163/10), which provided that *"there is a historical link, based on a common principle and identical provisions, between the system of privileges and immunities granted to the Members of the Parliamentary Assembly of the Council of Europe and that granted to the Members of the Parliament,"* and that such link *"justifies harmonising the two texts for the purpose of interpreting the scope of parliamentary immunity in the present case",*

- Having regard to the Olteanu report of the Committee on Rules of Procedure and Immunities of the Parliamentary Assembly of the Council of Europe (Doc. 9718 rev.) which provides that *"the immunities also apply when new Assembly members travel to the Assembly part-session during which their credentials will be ratified",*

- Having regard to the Donnez report of the Committee of Legal Affairs of the European Parliament (A2-0121/86), which indicates that *"quant à la durée dans le temps de l'immunité, outre l'interprétation de la notion de durée de la session mentionnée au paragraphe 3, il est considéré que l'immunité prend effets dès la proclamation de l'élection et cesse à la fin du mandat du député",*

- Having regard to the Decision of the European Parliament on the request for upholding of the immunity and privileges of Francesco Musotto (2002/2201(IMM)), which confirmed that *"in view of its purpose, Articles 9 and 10* [current Articles 8 and 9] *of the Protocol on the privileges and immunities must be interpreted in such a way that these provisions are effective from the time of publication of the results of the elections to the European Parliament",*

- Having regard to Rule 8(1) of the Rules of Procedure of the European Parliament, which provides that *"as a matter of urgency, in circumstances where a Member is arrested or has his or her freedom of movement curtailed in apparent breach of his or her privileges and immunities, the President may, after consulting the Chair and rapporteur of the committee responsible, take an initiative to assert the privileges and immunities of the Member concerned. The President shall notify the committee of that initiative and inform Parliament",*

- Having regard to the judgment of the General Court of 17 January 2013 (Joined Cases T-346/11 and T-347/11), which provides that *"the fact that the privileges and immunities have been provided in the public interest of the European Union justifies the power given to the institutions to waive the immunity where appropriate but does not mean that these privileges and immunities are granted to the European Union exclusively and not also to its officials, to other staff and to Members of the Parliament. Therefore the Protocol confers an individual right on the persons concerned, compliance with which is ensured by the system of remedies established by the Treaty",*

- Having regard to the judgment of the Court of Justice of the European Union of 21 October 2008 (Joined Cases C-200/07 and C-201/07), which provided that *"where the national court is informed of the fact that a Member has made a request to the European Parliament for defence of that immunity (…) it must stay the judicial proceedings and request the European Parliament to issue its opinion as soon as possible."*

A. Whereas the European Parliament's position has been consistent in the sense that, in view of its purpose, Articles 8 and 9 of the Protocol on the privileges and immunities must be interpreted in such a way that these provisions are effective from the time of publication of the results of the elections to the European Parliament;

B. Whereas we were declared officially elected Members of the European Parliament by the competent Spanish authority on 13 June 2019, and such declaration was published in the *Official Gazette* of Spain on 14 June 2019;

C. Whereas immunity would become meaningless if a Member State could imprison elected Members to prevent them from travelling to the place of meeting of the European Parliament to take their seats in Parliament with effect from the opening of the first sitting following the elections;

D. Whereas we enjoy immunity under both the first and the second paragraph of Article 9 of the Protocol as of the publication of the results of the elections to the European Parliament;

E. Whereas the existence of criminal proceedings against us in Spain, and in particular the decision of the investigative judge of the Spanish Supreme Court of 14 June 2019 not to withdraw the national arrest warrant issued against us, amounts to a serious breach of our privileges and immunities as elected Members of the European Parliament, and is intended to prevent us from taking our seats in Parliament as representatives of the citizens of the Union with effect from the opening of the first sitting following the elections on 2 July 2019;

We respectfully request the President to take all necessary measures, as a matter of urgency, pursuant to Rule 8(1) of the Rules of Procedure of the European Parliament, after consulting the Chair of the Committee on Legal Affairs, to assert the privileges and immunities we enjoy as elected Members of the European Parliament, and in particular:

(a) Defend the privileges and immunities of elected Members of Parliament Carles Puigdemont i Casamajó and Antoni Comín i Oliveres;

(b) Declare that the existing national arrest warrants issued by the investigative judge of the Spanish Supreme Court, and the decision not to withdraw them, violate the privileges and immunities granted to elected Members of Parliament Carles Puigdemont i Casamajó and Antoni Comín i Oliveres under paragraphs 1 and 2 of Article 9 of Protocol (No 7) on the Privileges and Immunities of the European Union;

(c) Declare, in particular, that the Union immunity conferred by paragraph 2 of Article 9 of Protocol (No 7) to travel to the place of meeting of the European Parliament protects against any judicial restrictions imposed on free movement which may prevent elected Members of the European Parliament from completing all procedural requirements necessary to take their seats in Parliament in the city of Strasbourg on 2 July 2019, as of the opening of the first sitting of the European Parliament, including the declarations foreseen in Rule 3(2) of the Rules of Procedure;

(d) Forward this decision immediately to the competent authorities of Spain.

Carles Puigdemont i Casamajó
Elected MEP

Antoni Comín i Oliveres
Elected MEP

III. OTRAS DISPOSICIONES

JUNTA ELECTORAL CENTRAL

8953 *Acuerdo de 13 de junio de 2019, de la Junta Electoral Central, por el que se procede a la proclamación de Diputados electos al Parlamento Europeo en las elecciones celebradas el 26 de mayo de 2019.*

La Junta Electoral Central, en su reunión del día 13 de junio de 2019, de conformidad con lo dispuesto en el artículo 224.1 de la Ley Orgánica del Régimen Electoral General, ha procedido, según los datos que figuran en las actas de escrutinio general remitidas por cada una de las Juntas Electorales Provinciales, al recuento de los votos a nivel nacional de las elecciones de Diputados al Parlamento Europeo convocadas por Real Decreto 206/2019, de 1 de abril, y celebradas el 26 de mayo, a la atribución de escaños correspondientes a cada una de las candidaturas y a la proclamación de Diputados electos de los siguientes candidatos:

1. Don Josep Borrell Fontelles (Partido Socialista Obrero Español).
2. Doña Dolors Montserrat Montserrat (Partido Popular).
3. Doña Iratxe García Pérez (Partido Socialista Obrero Español).
4. Don Luis Garicano Gabilondo (Ciudadanos-Partido de la Ciudadanía).
5. Doña Lina Gálvez Muñoz (Partido Socialista Obrero Español).
6. Don Esteban González Pons (Partido Popular).
7. Doña María Eugenia Rodríguez Palop (Unidas Podemos Cambiar Europa).
8. Don Francisco Javier López Fernández (Partido Socialista Obrero Español).
9. Don Antonio Javier López-Istúriz White (Partido Popular).
10. Doña Inmaculada Rodríguez-Piñero Fernández (Partido Socialista Obrero Español).
11. Don Jorge Buxadé Villalba (Vox).
12. Doña M.ª Teresa Pagazaurtundúa Ruiz (Ciudadanos-Partido de la Ciudadanía).
13. Don Oriol Junqueras i Vies (Ahora Repúblicas).
14. Don Iban García del Blanco (Partido Socialista Obrero Español).
15. Don Juan Ignacio Zoido Álvarez (Partido Popular).
16. Doña Sira Abed Rego (Unidas Podemos Cambiar Europa).
17. Doña Eider Gardiazabal Rubial (Partido Socialista Obrero Español).
18. Don Carles Puigdemont Casamajó (Lliures per Europa).
19. Don Nicolás González Casares (Partido Socialista Obrero Español).
20. Doña M.ª Soraya Rodríguez Ramos (Ciudadanos-Partido de la Ciudadanía).
21. Doña Pilar del Castillo Vera (Partido Popular).
22. Doña Cristina Maestre Martín de Almagro (Partido Socialista Obrero Español).
23. Don Francisco Javier Zarzalejos Nieto (Partido Popular).
24. Don Ernest Urtasun Domenech (Unidas Podemos Cambiar Europa).
25. Don César Luena López (Partido Socialista Obrero Español).
26. Doña Mazaly Aguilar (Vox).
27. Don Javier Nart Peñalver (Ciudadanos-Partido de la Ciudadanía).
28. Doña Clara Eugenia Aguilera García (Partido Socialista Obrero Español).
29. Don José Manuel García-Margallo y Marfil (Partido Popular).
30. Doña Izaskun Bilbao Barandica (Coalición por una Europa Solidaria).
31. Don Pernando Barrena Arza (Ahora Repúblicas).
32. Don Ignacio Sánchez Amor (Partido Socialista Obrero Español).
33. Doña Mónica Silvana González González (Partido Socialista Obrero Español).
34. Don Francisco José Ricardo Millán Mon (Partido Popular).
35. Doña Idoia Villanueva Ruiz (Unidas Podemos Cambiar Europa).
36. Don José Ramón Bauza Díaz (Ciudadanos-Partido de la Ciudadanía).
37. Don Juan Fernando López Aguilar (Partido Socialista Obrero Español).

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38. Don Antoni Comín Oliveres (Lliures per Europa).
39. Doña María Rosa Estarás Ferragut (Partido Popular).
40. Doña Adriana Maldonado López (Partido Socialista Obrero Español).
41. Don Hermann Leopold Tertsch del Valle-Lersundi (Vox).
42. Don Jonás Fernández Álvarez (Partido Socialista Obrero Español).
43. Don Jordi Cañas Pérez (Ciudadanos-Partido de la Ciudadanía).
44. Doña Isabel Benjumea Benjumea (Partido Popular).
45. Don Miguel Urbán Crespo (Unidas Podemos Cambiar Europa).
46. Doña Alicia Homs Ginel (Partido Socialista Obrero Español).
47. Doña Diana Riba i Giner (Ahora Repúblicas).
48. Don Pablo Arias Echeverría (Partido Popular).
49. Don Javier Moreno Sánchez (Partido Socialista Obrero Español).
50. Doña Susana Solis Pérez (Ciudadanos-Partido de la Ciudadanía).
51. Doña Isabel García Muñoz (Partido Socialista Obrero Español).
52. Don Leopoldo López Gil (Partido Popular).
53. Don José Manuel Pineda Marín (Unidas Podemos Cambiar Europa).
54. Don Domènec Miguel Ruiz Devesa (Partido Socialista Obrero Español).

El Acuerdo de proclamación de electos es susceptible del recurso contencioso-electoral previsto en los artículos 112 y siguientes de la Ley Orgánica del Régimen Electoral General, ante la Sala de lo Contencioso-Administrativo del Tribunal Supremo, de conformidad con lo dispuesto en el artículo 225 de la LOREG. El recurso deberá presentarse ante la Junta Electoral Central dentro de los tres días siguientes al acto de proclamación de electos.

Finalmente, la Junta ha acordado que la sesión en la que los candidatos electos presten juramento o promesa de acatamiento a la Constitución ante la misma, de conformidad con lo establecido en el artículo 224.2 de la Ley Orgánica del Régimen Electoral General, tenga lugar en el Palacio del Congreso de los Diputados el próximo día 17 de junio, a las 12 horas.

Palacio del Congreso de los Diputados, 13 de junio de 2019.–El Presidente, Segundo Menéndez Pérez.

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III. OTHER PROVISIONS

CENTRAL ELECTORAL COMMISSION

8953

Agreement of 13 June 2019 of the Central Electoral Commission proclaiming the candidates elected to the European Parliament in the elections held on 26 May 2019.

The Central Electoral Commission, in its meeting of 13 June 2019, in accordance with the provisions of Section 224.1 of the Organic Act on the General Electoral System *[LOREG, "Representation of the People Institutional Act"]*, has proceeded, according to the data included in the aggregate count records forwarded by each of the Provincial Electoral Commissions, to the recount of the votes at the national level of the elections of Members of the European Parliament called by Royal Decree 206/2019 of 1 April and held on 26 May, to the assignment of seats corresponding to each one of the candidacies and to the proclamation of the following candidates as elected Members:

The Agreement of proclamation of elected candidates is subject to the lodging of contentious-electoral petitions provided for in Sections 112 and following of the LOREG with the Contentious-Administrative Chamber of the Supreme Court of Justice, pursuant to Section 225 of the LOREG. The petition must be lodged with the Central Electoral Commission within the three days following the proceeding of proclamation of elected candidates. Finally, the Commission has agreed that the session in which the elected candidates will swear or affirm allegiance to the Constitution before it, pursuant to Section 224.2 of the LOREG, shall take place in the Palace of the Congress of Deputies on 17 June at 12:00 hours.

Palace of the Congress of Deputies, 13 June 2019.–

The President, Segundo Menéndez Pérez

III. OTRAS DISPOSICIONES

JUNTA ELECTORAL CENTRAL

8954 *Acuerdo de 13 de junio de 2019, de la Junta Electoral Central, por el que se procede a la publicación de los resultados de las elecciones de Diputados al Parlamento Europeo convocadas por Real Decreto 206/2019, de 1 de abril, y celebradas el 26 de mayo de 2019, con indicación del número de escaños y de votos obtenidos por las candidaturas proclamadas.*

La Junta Electoral Central, en su reunión del día 13 de junio de 2019, de conformidad con lo dispuesto en el artículo 108.6 de la Ley Orgánica del Régimen Electoral General, ha acordado proceder a la publicación de los resultados de las elecciones de Diputados al Parlamento Europeo convocadas por Real Decreto 206/2019, de 1 de abril, y celebradas el 26 de mayo, con indicación del número de escaños y el de votos obtenidos en las diferentes provincias, según los datos que figuran en las Actas de escrutinio general remitidas por cada una de las Juntas Electorales Provinciales, haciendo constar en la columna relativa al número de electores los datos al efecto remitidos por la Oficina del Censo Electoral.

Se adjuntan los cuadros I, II y III comprensivos de los referidos resultados.

Palacio del Congreso de los Diputados, 13 de junio de 2019.–El Presidente, Segundo Menéndez Pérez.

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CUADRO I

Resumen de los resultados de las elecciones de Diputados al Parlamento Europeo convocadas por Real Decreto 206/2019, de 1 de abril, y celebradas el 26 de mayo de 2019, según los datos que figuran en las Actas de escrutinio general remitidas por cada una de las Juntas Electorales Provinciales

Resumen General

	Electores	Votantes	Votos válidos	Votos a candidaturas	Votos en blanco	Votos nulos
Albacete	310.872	207.466	205.365	203.183	2.182	2.101
Alicante/Alacant	1.323.580	775.007	768.625	762.658	5.967	6.382
Almería	513.279	290.644	286.855	284.319	2.536	3.789
Araba/Álava	259.017	162.788	161.535	160.070	1.465	1.253
Asturias	974.557	527.197	522.633	515.193	7.440	4.564
Ávila	137.360	97.733	96.470	95.026	1.444	1.263
Badajoz	555.761	375.798	370.136	365.097	5.039	5.662
Balears (Illes)	819.395	422.150	417.603	412.037	5.566	4.547
Barcelona	4.215.590	2.537.650	2.530.060	2.517.466	12.594	7.590
Bizkaia	950.641	596.033	593.031	588.499	4.532	3.002
Burgos	300.208	192.776	191.053	188.486	2.567	1.723
Cáceres	345.328	237.619	234.056	231.125	2.931	3.563
Cádiz	1.003.340	533.171	525.985	519.253	6.732	7.186
Cantabria	504.002	317.293	313.196	307.207	5.989	4.097
Castellón/Castelló	428.357	278.948	276.126	273.385	2.741	2.822
Ciudad Real	397.523	269.256	265.803	262.564	3.239	3.453
Córdoba	651.351	405.712	399.922	395.516	4.406	5.790
Coruña (A)	1.088.433	595.629	589.586	582.122	7.464	6.043
Cuenca	156.910	117.669	116.241	114.663	1.578	1.428
Gipuzkoa	584.359	369.441	367.253	364.302	2.951	2.188
Girona	534.744	337.190	335.527	333.112	2.415	1.663
Granada	758.494	455.197	448.130	444.134	3.996	7.067
Guadalajara	188.783	127.041	125.941	124.745	1.196	1.100
Huelva	403.364	240.448	236.245	233.003	3.242	4.203
Huesca	174.795	111.431	110.350	108.468	1.882	1.081
Jaén	527.584	352.097	346.730	343.680	3.050	5.367
León	434.239	255.969	253.084	248.942	4.142	2.885
Lleida	316.765	204.402	203.315	201.224	2.091	1.087
Lugo	345.918	189.636	186.774	183.983	2.791	2.862
Madrid	5.104.221	3.245.284	3.231.578	3.213.038	18.540	13.706
Málaga	1.221.611	676.673	668.314	662.110	6.204	8.359
Murcia	1.070.029	650.361	644.833	639.490	5.343	5.528
Navarra	512.878	342.868	340.329	334.426	5.903	2.539
Ourense	362.488	181.196	179.166	177.122	2.044	2.030
Palencia	141.744	96.948	95.936	94.565	1.371	1.012
Palmas (Las)	881.875	452.667	447.627	440.524	7.103	5.040
Pontevedra	906.810	508.066	502.335	496.765	5.570	5.731
Rioja (La)	251.830	162.752	161.184	159.011	2.173	1.568
Salamanca	305.946	188.907	187.084	184.727	2.357	1.823
S/C Tenerife	878.345	452.587	448.980	442.986	5.994	3.607
Segovia	120.931	86.282	85.112	83.811	1.301	1.170
Sevilla	1.546.594	918.585	906.515	897.420	9.095	12.070
Soria	77.466	48.071	47.456	46.326	1.130	615

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	Electores	Votantes	Votos válidos	Votos a candidaturas	Votos en blanco	Votos nulos
Tarragona	578.371	360.716	358.647	355.548	3.099	2.069
Teruel	108.459	73.125	72.081	70.693	1.388	1.044
Toledo	527.323	364.183	359.923	356.323	3.600	4.260
Valencia/València	1.979.848	1.278.237	1.269.699	1.260.248	9.451	8.538
Valladolid	433.445	296.762	294.432	291.277	3.155	2.330
Zamora	169.233	104.591	103.171	101.193	1.978	1.420
Zaragoza	743.168	482.168	479.146	473.844	5.302	3.022
Ceuta	62.495	33.103	32.786	32.535	251	317
Melilla	59.229	32.461	32.102	31.886	216	359
Total estatal	37.248.888	22.619.984	22.426.066	22.209.330	216.736	193.918

CUADRO II

Elecciones al Parlamento Europeo de 26 de mayo de 2019

Relación de votos correspondientes a cada una de las candidaturas que han obtenido escaño y número de éstos

	Total escaños	PARTIDO SOCIALISTA OBRERO ESPAÑOL		PARTIDO POPULAR		CIUDADANOS-PARTIDO DE LA CIUDADANÍA		UNIDAS PODEMOS CAMBIAR EUROPA		VOX	
		PSOE		PP		Cs		Podemos-IU		VOX	
		Votos	Escaños	Votos	Escaños	Votos	Escaños	Votos	Escaños	Votos	Escaños
Albacete		80.912		55.547		28.045		16.897		15.244	
Alicante/Alacant		259.152		189.082		116.508		71.489		55.258	
Almería		101.815		88.000		34.993		19.182		32.173	
Araba/Álava		35.709		20.137		6.028		18.993		3.350	
Asturias		201.642		99.370		70.997		76.949		38.913	
Ávila		28.091		35.212		15.225		6.150		7.627	
Badajoz		175.321		90.905		42.895		24.526		20.617	
Balears (Illes)		122.532		88.432		49.369		43.841		31.983	
Barcelona		606.370		137.052		229.015		243.555		50.487	
Bizkaia		110.281		36.276		15.987		67.625		7.173	
Burgos		66.370		51.931		30.986		17.852		13.235	
Cáceres		102.735		64.539		25.089		16.265		13.507	
Cádiz		198.602		100.635		76.179		74.374		38.899	
Cantabria		117.508		84.760		43.730		26.793		21.381	
Castellón/Castelló		94.580		67.501		35.099		24.530		19.926	
Ciudad Real		112.903		75.166		31.479		18.122		18.250	
Córdoba		159.233		95.355		50.692		51.542		25.976	
Coruña (A)		201.384		169.641		41.164		48.506		16.376	
Cuenca		49.099		36.686		10.723		7.668		7.947	
Gipuzkoa		66.891		15.861		8.449		37.497		3.203	
Girona		49.520		10.619		20.485		15.239		5.361	
Granada		178.676		102.426		59.748		48.334		36.903	
Guadalajara		45.536		30.150		18.495		12.330		13.762	
Huelva		108.416		52.020		26.915		21.852		14.899	
Huesca		42.250		25.145		16.648		10.822		7.450	
Jaén		159.605		82.020		41.046		29.528		21.983	
León		99.425		69.039		33.740		22.522		16.354	
Lleida		28.989		9.813		11.486		7.881		3.081	

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	Total escaños	PARTIDO SOCIALISTA OBRERO ESPAÑOL		PARTIDO POPULAR		CIUDADANOS-PARTIDO DE LA CIUDADANÍA		UNIDAS PODEMOS CAMBIAR EUROPA		VOX	
		PSOE		PP		Cs		Podemos-IU		VOX	
		Votos	Escaños	Votos	Escaños	Votos	Escaños	Votos	Escaños	Votos	Escaños
Lugo		64.907		65.964		9.787		10.930		5.002	
Madrid		1.043.827		715.871		589.877		413.228		319.443	
Málaga		244.922		168.596		92.090		75.960		52.481	
Murcia		206.015		196.899		90.523		51.316		71.704	
Navarra		95.164		63.800		25.233		39.780		14.349	
Ourense		61.777		64.093		12.672		9.543		4.677	
Palencia		34.099		32.033		12.523		7.061		6.463	
Palmas (Las)		145.514		70.739		37.453		47.860		16.018	
Pontevedra		183.178		134.639		33.793		49.512		11.837	
Rioja (La)		60.229		50.124		21.359		13.544		8.417	
Salamanca		60.967		65.117		29.193		12.122		12.430	
S/C Tenerife		141.519		71.194		30.572		45.469		13.665	
Segovia		27.911		26.356		13.370		7.144		6.044	
Sevilla		396.627		160.719		115.167		122.145		65.434	
Soria		18.374		13.775		6.270		3.506		3.095	
Tarragona		71.352		19.268		34.449		21.718		9.357	
Teruel		26.763		18.969		10.848		5.901		4.959	
Toledo		145.842		98.741		42.195		26.347		32.909	
Valencia/València		409.388		266.019		178.319		128.188		92.156	
Valladolid		101.506		81.838		48.676		25.782		25.171	
Zamora		37.521		32.869		13.957		7.102		6.735	
Zaragoza		170.345		99.502		87.070		51.770		39.900	
Ceuta		11.008		8.930		2.527		1.108		6.748	
Melilla		7.487		9.830		2.687		957		3.372	
Total estatal	54	7.369.789	20	4.519.205	12	2.731.825	7	2.258.857	6	1.393.684	3

CUADRO II (Continuación)

	Total escaños	AHORA REPÚBLICAS		LLIURES PER EUROPA		COALICIÓN POR UNA EUROPA SOLIDARIA	
		AHORA REPÚBLICAS		JUNTS		CEUS	
		Votos	Escaños	Votos	Escaños	Votos	Escaños
Albacete		141		121		61	
Alicante/Alacant		2.931		1.721		460	
Almería		194		190		73	
Araba/Álava		28.875		797		40.855	
Asturias		1.902		575		327	
Ávila		81		56		37	
Badajoz		198		222		419	
Balears (Illes)		20.464		10.558		15.993	
Barcelona		513.067		648.836		3.431	
Bizkaia		108.595		2.078		227.127	
Burgos		452		141		597	
Cáceres		146		90		357	
Cádiz		424		497		486	
Cantabria		631		254		777	

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	Total escaños	AHORA REPÚBLICAS		LLIURES PER EUROPA		COALICIÓN POR UNA EUROPA SOLIDARIA	
		AHORA REPÚBLICAS		JUNTS		CEUS	
		Votos	Escaños	Votos	Escaños	Votos	Escaños
Castellón/Castelló		2.801		1.691		255	
Ciudad Real		131		103		74	
Córdoba		232		222		538	
Coruña (A)		76.441		848		2.832	
Cuenca		79		87		27	
Gipuzkoa		109.467		2.198		112.595	
Girona		72.230		150.698		178	
Granada		350		270		412	
Guadalajara		175		83		47	
Huelva		157		103		187	
Huesca		447		472		35	
Jaén		180		109		76	
León		286		200		83	
Lleida		53.670		81.988		151	
Lugo		19.192		239		1.025	
Madrid		5.601		2.801		2.462	
Málaga		554		394		560	
Murcia		487		389		652	
Navarra		54.406		1.336		27.202	
Ourense		16.388		237		819	
Palencia		92		40		36	
Palmas (Las)		1.330		996		68.034	
Pontevedra		60.067		650		1.816	
Rioja (La)		329		170		196	
Salamanca		160		136		70	
S/C Tenerife		1.130		822		118.338	
Segovia		91		52		34	
Sevilla		755		512		629	
Soria		59		32		24	
Tarragona		88.072		99.835		197	
Teruel		175		131		34	
Toledo		238		173		588	
Valencia/València		6.656		3.491		1.300	
Valladolid		309		168		104	
Zamora		80		47		183	
Zaragoza		1.183		530		186	
Ceuta		26		16		98	
Melilla		12		30		13	
Total estatal	54	1.252.139	3	1.018.435	2	633.090	1

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CUADRO III

Elecciones al Parlamento Europeo de 26 de mayo de 2019

Relación de votos correspondientes a cada una de las candidaturas que no han obtenido escaño

	COMPROMÍS PER EUROPA/ COMPROMISO POR EUROPA	PARTIDO ANIMALISTA CONTRA EL MALTRATO ANIMAL	COALICIÓN VERDE-EUROPA CIUDADANA	RECORTES CERO-LOS VERDES-GRUPO VERDE EUROPEO	VOLT EUROPA
	CPE	PACMA	CV-EC	RECORTES CERO-LV-GVE	VOLT
	Votos	Votos	Votos	Votos	Votos
Albacete	216	2.300	503	496	299
Alicante/Alacant	37.248	11.837	2.971	2.934	1.370
Almería	156	3.415	553	331	645
Araba/Álava	151	1.630	671	442	130
Asturias	447	6.060	1.262	1.514	1.291
Ávila	54	765	204	174	148
Badajoz	176	2.648	512	545	425
Balears (Illes)	12.447	6.763	1.817	954	841
Barcelona	2.993	37.809	9.411	5.600	2.234
Bizkaia	442	5.046	1.550	1.013	396
Burgos	187	1.942	758	448	262
Cáceres	91	1.783	372	331	349
Cádiz	621	9.376	1.514	1.977	1.092
Cantabria	292	4.271	958	801	450
Castellón/Castelló	19.665	3.324	761	386	389
Ciudad Real	120	2.426	427	783	368
Córdoba	281	4.327	739	514	529
Coruña (A)	6.490	7.124	1.780	1.741	720
Cuenca	72	889	177	95	129
Gipuzkoa	258	2.647	1.082	623	170
Girona	266	3.854	806	442	227
Granada	377	5.666	1.332	1.225	769
Guadalajara	135	1.779	317	334	187
Huelva	206	3.075	451	427	431
Huesca	1.808	1.087	392	350	182
Jaén	165	3.448	512	468	498
León	183	2.557	656	367	289
Lleida	149	1.560	389	230	119
Lugo	2.135	1.672	512	397	142
Madrid	4.445	50.415	9.573	6.351	6.747
Málaga	646	12.258	1.839	1.290	1.048
Murcia	517	9.115	1.731	1.461	1.344
Navarra	344	3.524	1.955	1.088	407
Ourense	1.567	1.891	581	556	155
Palencia	121	720	209	139	132
Palmas (Las)	34.947	6.875	1.647	1.754	682
Pontevedra	5.183	7.462	1.237	1.307	549
Rioja (La)	126	1.357	673	337	250
Salamanca	118	1.234	509	365	235
S/C Tenerife	3.348	7.977	1.675	1.454	472

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	COMPROMÍS PER EUROPA/ COMPROMISO POR EUROPA	PARTIDO ANIMALISTA CONTRA EL MALTRATO ANIMAL	COALICIÓN VERDE-EUROPA CIUDADANA	RECORTES CERO-LOS VERDES-GRUPO VERDE EUROPEO	VOLT EUROPA
	CPE	PACMA	CV-EC	RECORTES CERO-LV-GVE	VOLT
	Votos	Votos	Votos	Votos	Votos
Segovia	69	754	464	102	133
Sevilla	1.079	13.252	1.925	1.650	1.533
Soria	30	305	112	85	51
Tarragona	448	5.006	929	717	288
Teruel	1.316	538	132	102	85
Toledo	184	3.615	567	515	419
Valencia/València	136.593	19.100	3.675	2.417	1.487
Valladolid	220	2.591	663	489	416
Zamora	55	712	283	381	145
Zaragoza	10.117	5.121	1.314	1.120	693
Ceuta	1.260	313	141	50	54
Melilla	5.927	331	281	330	26
Total estatal	296.491	295.546	65.504	50.002	32.432

CUADRO III-2

	INICIATIVA FEMINISTA	PCPE-PCPC-PCPA	ACTÚA	ANDALUCÍA POR SÍ	POR UN MUNDO MÁS JUSTO
	I.Fem	PCPE-PCPC-PCPA	PACT	AxSÍ	PUM+J
	Votos	Votos	Votos	Votos	Votos
Albacete	232	249	118	22	187
Alicante/Alacant	913	1.037	908	187	305
Almería	329	296	171	280	182
Araba/Álava	483	212	100	30	253
Asturias	630	907	1.888	76	424
Ávila	120	125	215	28	84
Badajoz	482	446	449	58	507
Balears (Illes)	693	407	917	234	313
Barcelona	3.573	3.585	1.291	803	2.049
Bizkaia	690	595	250	70	495
Burgos	493	319	178	39	282
Cáceres	355	405	500	32	140
Cádiz	726	1.036	423	7.625	506
Cantabria	432	650	281	92	305
Castellón/Castelló	328	279	161	73	145
Ciudad Real	333	201	125	52	153
Córdoba	464	960	263	915	355
Coruña (A)	889	828	605	151	381
Cuenca	139	87	56	19	85
Gipuzkoa	396	382	140	67	188
Girona	388	387	100	170	145
Granada	533	820	455	1.308	645
Guadalajara	127	127	116	41	137
Huelva	287	245	180	1.361	216

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	INICIATIVA FEMINISTA	PCPE-PCPC-PCPA	ACTÚA	ANDALUCÍA POR SÍ	POR UN MUNDO MÁS JUSTO
	I.Fem	PCPE-PCPC-PCPA	PACT	AxSÍ	PUM+J
	Votos	Votos	Votos	Votos	Votos
Huesca	227	185	87	20	85
Jaén	370	519	335	996	211
León	284	313	432	30	238
Lleida	234	261	46	70	93
Lugo	258	277	149	64	108
Madrid	4.203	2.831	7.388	781	4.839
Málaga	766	1.040	555	2.059	505
Murcia	754	763	368	148	493
Navarra	911	465	235	112	605
Ourense	247	210	123	42	279
Palencia	122	90	62	18	84
Palmas (Las)	753	663	371	161	624
Pontevedra	650	658	431	118	412
Rioja (La)	256	261	116	23	167
Salamanca	210	143	135	44	184
S/C Tenerife	660	534	299	104	432
Segovia	104	89	113	10	84
Sevilla	906	1.278	2.163	4.914	1.190
Soria	75	69	36	13	44
Tarragona	404	446	147	135	338
Teruel	114	89	60	11	75
Toledo	307	382	359	59	259
Valencia/València	1.391	1.252	911	181	972
Valladolid	294	341	249	33	238
Zamora	121	106	73	27	82
Zaragoza	570	601	364	68	397
Ceuta	16	30	19	13	41
Melilla	34	27	12	8	23
Total estatal	29.276	28.508	25.528	23.995	21.584

CUADRO III-3

	PARTIDO COMUNISTA DE LOS TRABAJADORES DE ESPAÑA	PIRATES DE CATALUNYA - EUROPEAN PIRATES	CENTRISTAS POR EUROPA	FORO DE CIUDADANOS	IZQUIERDA EN POSITIVO
	PCTE	pirates.cat/ep	CXE	FAC	IZQP
	Votos	Votos	Votos	Votos	Votos
Albacete	167	106	539	50	55
Alicante/Alacant	493	428	559	324	380
Almería	168	128	121	73	149
Araba/Álava	178	134	99	16	79
Asturias	1.077	310	188	6.071	749
Ávila	88	65	82	25	48
Badajoz	321	141	398	175	201
Balears (Illes)	330	376	211	173	205
Barcelona	1.971	3.687	1.656	603	1.460

cve: BOE-A-2019-8954
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	PARTIDO COMUNISTA DE LOS TRABAJADORES DE ESPAÑA	PIRATES DE CATALUNYA - EUROPEAN PIRATES	CENTRISTAS POR EUROPA	FORO DE CIUDADANOS	IZQUIERDA EN POSITIVO
	PCTE	pirates.cat/ep	CXE	FAC	IZQP
	Votos	Votos	Votos	Votos	Votos
Bizkaia	358	304	472	118	183
Burgos	289	162	131	115	147
Cáceres	209	138	199	128	103
Cádiz	461	296	374	284	471
Cantabria	501	256	195	134	248
Castellón/Castelló	149	183	314	70	85
Ciudad Real	184	122	193	67	92
Córdoba	542	161	141	135	389
Coruña (A)	531	537	394	229	283
Cuenca	64	45	160	38	45
Gipuzkoa	249	198	615	43	129
Girona	278	502	145	124	135
Granada	424	210	914	163	259
Guadalajara	141	80	60	49	58
Huelva	196	136	298	125	113
Huesca	113	121	51	35	47
Jaén	281	120	123	86	159
León	341	168	102	116	125
Lleida	135	259	58	41	93
Lugo	150	135	38	117	83
Madrid	2.778	2.259	1.930	1.146	1.726
Málaga	562	406	252	273	374
Murcia	461	410	574	316	584
Navarra	370	312	367	227	461
Ourense	148	150	132	133	60
Palencia	86	53	35	37	53
Palmas (Las)	315	271	227	402	255
Pontevedra	502	420	336	176	191
Rioja (La)	179	139	60	32	90
Salamanca	156	126	81	123	96
S/C Tenerife	263	268	176	214	189
Segovia	86	51	387	36	78
Sevilla	749	453	270	330	746
Soria	75	47	31	21	16
Tarragona	284	434	215	102	183
Teruel	51	45	15	10	46
Toledo	233	120	742	130	123
Valencia/València	587	635	379	292	514
Valladolid	269	198	259	104	192
Zamora	95	84	75	82	61
Zaragoza	414	339	128	241	296
Ceuta	14	12	18	10	13
Melilla	14	15	96	11	19
Total estatal	19.080	16.755	15.615	14.175	12.939

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CUADRO III-4

	CONTIGO SOMOS DEMOCRACIA	EXTREMEÑOS PREX CREX	FE DE LAS JONS, ALTERNATIVA ESPAÑOLA, LA FALANGE, DEMOCRACIA NACIONAL	ALTERNATIVA REPUBLICANA	IGUALDAD REAL
	CONTIGO	CEX-CREX-PREX	ADÑ	ALTER	IGRE
	Votos	Votos	Votos	Votos	Votos
Albacete	219	28	105	68	97
Alicante/Alacant	1.800	302	350	241	298
Almería	64	37	198	72	69
Araba/Álava	170	94	24	219	63
Asturias	168	98	254	241	242
Ávila	29	41	78	44	27
Badajoz	127	1.386	149	112	160
Balears (Illes)	527	141	213	392	177
Barcelona	690	978	861	1.189	584
Bizkaia	124	116	159	340	149
Burgos	126	55	118	311	99
Cáceres	312	2.487	86	59	95
Cádiz	236	192	221	365	579
Cantabria	242	95	196	168	154
Castellón/Castelló	62	62	146	89	153
Ciudad Real	78	86	100	56	106
Córdoba	99	53	170	85	144
Coruña (A)	241	148	225	331	244
Cuenca	20	14	56	30	56
Gipuzkoa	192	72	49	308	62
Girona	135	107	104	122	58
Granada	125	82	201	518	157
Guadalajara	94	48	144	55	29
Huelva	65	49	92	59	131
Huesca	28	49	64	104	29
Jaén	104	66	171	78	105
León	125	55	185	189	244
Lleida	37	51	56	63	58
Lugo	63	44	75	190	69
Madrid	859	2.229	3.047	940	1.061
Málaga	376	133	312	534	282
Murcia	502	245	362	149	384
Navarra	332	100	121	248	160
Ourense	72	32	77	93	74
Palencia	30	20	49	23	26
Palmas (Las)	541	173	224	351	347
Pontevedra	179	130	154	226	199
Rioja (La)	30	106	87	72	66
Salamanca	263	84	87	103	46
S/C Tenerife	291	219	179	411	206
Segovia	26	22	52	27	30
Sevilla	470	211	416	301	538
Soria	21	14	32	29	32
Tarragona	107	160	151	328	96

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	CONTIGO SOMOS DEMOCRACIA	EXTREMEÑOS PREX CREX	FE DE LAS JONS, ALTERNATIVA ESPAÑOLA, LA FALANGE, DEMOCRACIA NACIONAL	ALTERNATIVA REPUBLICANA	IGUALDAD REAL
	CONTIGO	CEX-CREX-PREX	ADÑ	ALTER	IGRE
	Votos	Votos	Votos	Votos	Votos
Teruel	21	13	60	30	29
Toledo	159	204	302	113	151
Valencia/València	1.606	328	538	270	556
Valladolid	106	35	211	226	109
Zamora	40	26	55	34	37
Zaragoza	81	164	309	457	133
Ceuta	7	6	7	9	10
Melilla	9	204	17	4	66
Total estatal	12.430	11.894	11.699	11.076	9.076

CUADRO III-5

	MOVIMIENTO CORRIENTE ROJA	PARTIDO HUMANISTA	MOVIMIENTO INDEPENDIENTE EURO LATINO	SOLIDARIDAD Y AUTOGESTIÓN INTERNACIONALISTA
	MCR	PH	MIEL	SAIn
	Votos	Votos	Votos	Votos
Albacete	30	57	40	32
Alicante/Alacant	436	270	342	124
Almería	52	77	69	64
Araba/Álava	23	44	56	25
Asturias	195	190	90	146
Ávila	37	18	31	17
Badajoz	319	115	86	56
Balears (Illes)	218	241	178	97
Barcelona	767	655	848	356
Bizkaia	112	189	83	103
Burgos	119	72	38	232
Cáceres	53	58	55	57
Cádiz	246	258	167	111
Cantabria	207	180	127	138
Castellón/Castelló	40	62	49	27
Ciudad Real	84	74	44	62
Córdoba	190	126	81	63
Coruña (A)	301	281	225	251
Cuenca	14	29	15	13
Gipuzkoa	74	89	56	52
Girona	61	90	71	65
Granada	511	157	68	96
Guadalajara	32	36	22	19
Huelva	89	119	64	39
Huesca	34	41	37	23
Jaén	69	94	46	109
León	127	95	38	34

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	MOVIMIENTO CORRIENTE ROJA	PARTIDO HUMANISTA	MOVIMIENTO INDEPENDIENTE EURO LATINO	SOLIDARIDAD Y AUTOGESTIÓN INTERNACIONALISTA
	MCR	PH	MIEL	SAIn
	Votos	Votos	Votos	Votos
Lleida	37	43	57	26
Lugo	77	78	53	51
Madrid	898	1.426	1.384	672
Málaga	402	306	124	211
Murcia	201	232	200	191
Navarra	63	185	106	458
Ourense	103	83	59	49
Palencia	21	34	15	39
Palmas (Las)	239	298	292	168
Pontevedra	139	227	211	176
Rioja (La)	95	41	56	24
Salamanca	38	63	36	53
S/C Tenerife	360	175	267	104
Segovia	22	35	17	18
Sevilla	435	267	163	193
Soria	12	13	12	16
Tarragona	110	89	114	69
Teruel	29	14	14	14
Toledo	123	89	80	55
Valencia/València	281	263	325	178
Valladolid	122	87	48	223
Zamora	30	36	32	27
Zaragoza	106	126	97	102
Ceuta	11	10	8	2
Melilla	8	10	13	13
Total estatal	8.402	7.947	6.809	5.543

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OFFICIAL STATE GAZETTE

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III. OTHER PROVISIONS

CENTRAL ELECTORAL COMMISSION

8954

Agreement of 13 June 2019, of the Central Electoral Commission proceeding to the publication of the results of the elections of Members of the European Parliament called by Royal Decree 206/2019 of 1 April and held on 26 May 2019, stating the number of seats and votes obtained by the proclaimed candidacies.

The Central Electoral Commission, in its meeting of 13 June 2019, pursuant to Section 108.6 of the Organic Act on the General Electoral System *[LOREG, "Representation of the People Institutional Act"]*, has agreed to proceed to the publication of the results of the elections of Members of the European Parliament called by Royal Decree 206/2019 of 1 April and held on 26 May 2019, stating the number of seats and votes obtained in the various provinces, according to the data included in the aggregate count records forwarded by each of the Provincial Electoral Commissions, stating in the column relating to the number of electors the data forwarded to that effect by the Electoral Register Office.

Tables I, II and III containing the said results are attached.

Palace of the Congress of Deputies, 13 June 2019.–

The President, Segundo Menéndez Pérez

SPECIAL CASE nº 20907/2017

Examining Magistrate: the Very Honourable Mr. Pablo Llarena Conde

Clerk of the Court: the Honourable Ms. María Antonia Cao Barredo

SUPREME COURT OF JUSTICE
Criminal Court

Order nº / ·

Very Honourable Examining Magistrate

Mr. Pablo Llarena Conde

In Madrid, on 15 June 2019.

The Examining Magistrate has been the Very Honourable Mr. Pablo Llarena Conde.

POINTS OF FACT

ONE.- The representations of CARLES PUIGDEMONT i CASAMAJÓ and ANTONI COMÍN i OLIVERES, accused in this case by an Order of 21 March 2018 of alleged crimes of rebellion and misappropriation of public funds and declared in contempt of court by an Order of 9 July 2018, have presented bills dated 11 June 2019, requesting declaration of ineffectiveness of the national search, arrest and confinement warrants hanging over their clients, along with any other precautionary measures which, *inaudita parte*, may have been agreed in the course of this proceeding or of that from which the present proceeding derives, originating from the High Court, Chamber 3, of the National Court, thus guaranteeing their freedom of circulation for the purpose of fulfilling their obligations as elected Members of the European Parliament, confirming the suspension of this proceeding until, as the case may be, the corresponding authorisation of the European Parliament is processed.

TWO.- The private prosecution, the political party Vox, in a bill entered on 14 June 2019, expressed its opposition to the application submitted by Carles Puigdemont.

The Office of the Attorney-General, in bills dated 14 June 2019, also opposed the petitions submitted by Carles Puigdemont and Antoni Comín, on the basis, among other elements, that the privileges and immunities contained in Protocol nº 7 of the Treaty of the Functioning of the European Union (Chapter III, Articles 7 to 9, in regard to the European Parliament) "are applicable once the full

condition of Member of the European Parliament has been attained and when the Parliament is already in session," which is not the case.

POINTS OF LAW

ONE.- The applicants submit respective bills which share the same arguments, based on the idea that they are elected Members of the European Parliament, a condition which, in their opinion, is only pending publication and certification by the Central Electoral Commission, adducing that said proclamation is an act which is no more than a mere automatic mechanism. This conception is the origin of their request: that in being elected Members of the European Parliament, they enjoy the prerogatives of this position pursuant to Protocol nº 7 on the privileges and immunities of the European Union, in relation with Section 20.2 of the Standing Orders of the Congress of Deputies. Such prerogatives include the immunity contained in Article 9 of said Protocol. This signifies, in their view, that the national search, arrest and confinement warrants hanging over both of them must be declared ineffective, along with any other precautionary measures which, *inaudita parte*, may have been agreed in the course of this proceeding or of that from which the present proceeding derives, originating from the High Court, Chamber 3, of the National Court.

TWO.- Section 10 of the Standing Orders of the Congress of Deputies states that *"Members shall not be accountable, even after their mandate has expired, in respect of opinions expressed by them in the performance of their duties".* Section 11 adds that *"During the period of their mandate, the Deputies*

shall also enjoy immunity and may only be detained in cases of flagrante delicto*. They may not be indicted or persecuted without previous leave of the Congress".* Finally, Section 20.2 of the Standing Orders of the Congress of Deputies cited in the bills states that *"The rights and privileges shall be effective from such time as the Members are proclaimed elect".*

On the basis of this last rule, the interested parties call on the immunity deriving from Article 9 of Protocol nº 7 on the privileges and immunities of the European Union, which literally state:

"During the sessions of the European Parliament, its Members shall enjoy:

a) in the territory of their own State, the immunities accorded to members of their parliament;

b) in the territory of any other Member State, immunity from any measure of detention and from legal proceedings.

Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament.

Immunity cannot be claimed when a Member is found in the act of committing an offence and shall not prevent the European Parliament from exercising its right to waive the immunity of one of its Members".

The applicants emphasise that, as Article 9.1.a of the Protocol states that the Members of the

country's Parliament shall enjoy the acknowledged immunities in the national territory, an *"en-bloc"* application must be made of the entire internal system of such prerogatives, including the moment when they are originated: that is to say, not only are they to be acknowledged the prerogatives of Articles 10 and 11, but it is to be understood that the moment of their origin is when they were proclaimed elected, in accordance with the wording of Section 20.2 of the Standing Orders of the Congress. They even state that *"this juridical solution is also that of the Law of the Union, as is understood from the decisions of the European Parliament on this matter. Thus, as the Parliament itself has declared, the Protocol must be interpreted in such a manner that parliamentary immunity takes effect from the moment when the results of the elections to the European Parliament are published,"* and to that effect they expressly cite the Decision of the European Parliament on the demand for protection of parliamentary immunity and privileges of Francesco Musotto.

Their argumentation proves to be erroneous for the reasons which will be set out below and which are based on two mentions of the aforesaid Article 9 of the Protocol which the applicants elude and which must be taken into consideration for the settlement of the question. The invoked rule makes the system of immunities revolve around two cumulative circumstances: one is that *"the European Parliament is in session"*; and the other, that immunity be applied to *"its Members".*

THREE.- For methodological reasons, we will begin with the second element. The immunities of Article 9 apply to Members of the European Parliament, not to elected candidates.

As the Criminal Chamber of this Court has stated in its Order of 14 June 2019, the acquisition

of the condition of Member of the European Parliament occurs following a complex process consisting of two phases: a first stage which is conducted before the Central Electoral Commission and is materialised in the pledge of allegiance to the Constitution and the communication of the list of proclaimed elected candidates; and a second part, in which possession is taken in the seat of the European Parliament and following a written declaration on incompatibilities.

The acquisition of the condition of Member of the European Parliament patently requires the fulfilment of these two types of formalities, firstly before the competent national bodies and later in the European Parliament itself. In all cases, the formalities before the European Parliament, in accordance with Rule 3 and following of the Rules of Procedure of this institution, will not be commenced until the Member States communicate to the Parliament the names of the elected candidates, in order for them to take possession of their seats from the opening of the first sitting held after the elections.

However, it is the internal law which regulates how that first phase has to be completed, which signifies – as the applicants themselves state in their bills – that attention must be paid to the provisions of Section 224 of Organic Act nº 5/1985 of 19 June on the General Electoral System *[“Representation of the People Institutional Act”]*, which proclaims the following:

“1. The Central Electoral Commission shall proceed not later than the twentieth day after the election, to the counting of votes on a national level, to the assignment of seats to each list of candidates and to the proclamation of elected candidates.

2. Within five days from such proclamation, the elected candidates must swear or affirm allegiance to the Constitution before the Central Electoral Commission. On expiry of said term, the Central Electoral Commission is to declare the vacancy of seats assigned to members of the European Parliament having failed to swear or affirm their allegiance to the Constitution, as well as the suspension of any prerogatives to which they may be entitled on account of their mandate, as long as they do not make the aforesaid oath or affirmation.

3. The Central Electoral Commission shall likewise be the competent authority for the conduct of all other general counting operations not contemplated in the preceding section."

The text of the rule leaves no room for doubt regarding the need for the elected candidates, as is the case of the applicants, to swear or affirm allegiance to the Constitution before the Central Electoral Commission.

The Constitutional Court has pronounced on the inescapable nature of this formality in its Ruling 119/1990 of 21 June, citing the STC *[Constitutional Court Ruling]* 101/1983, STC 122/1983 and 8/1985, as follows:

"The obligatory starting point of our reflection clearly has to be the doctrine established in our previous Judgments on the matter (STCs 101/1983, 122/1983 and 8/1985) which, although all passed in regard to cases which are juridically different from the present case (in the first two of the cited Judgments, the appellants had flatly refused to swear or promise in any manner, and in the third, in

which the electors were not Members of Parliament but municipal councillors, they had used formulas radically different from that laid down by Royal Decree 707/1979), eliminate all doubts on the constitutional legitimacy of the obligation to swear or promise allegiance to the Constitution as a requirement for accessing public positions and functions, and even on the sufficiency of the Parliamentary Regulations to impose it.

Moreover, both of the above points are admitted as valid Law by all the parties to the suit, who do not question them within it.

The obligation to swear or promise allegiance to the Constitution as an indispensable requirement for fully attaining the condition of Deputy is not, then, imposed by the Constitution, but, as we have just said, neither is it contrary to it. It has been established by a decision of the legislator (Section 108.6 of Organic Act nº 5/1985) and previously by the Congress of Deputies, in use of the regulatory autonomy which the Constitution itself grants it (Section 72.1), both of them acting within the sphere of liberty for juridical creation which constitutionally corresponds to them.

Differing opinions may be held on the political convenience of imposing these obligations, since, as we have just recalled, this being a legislative or regulatory decision, the position of those who support it is as legitimate from the constitutional point of view as that of those who consider it inadequate or anachronic. This elementary consideration enables us to disregard the extensive considerations of Comparative Law which are contained in both the motion and the pleadings of the Congress of Deputies, since whatever the discernible tendency among Western states in regard to the

obligation to swear or promise allegiance to the Constitution, the fact is that this obligation is imposed in our Positive Law in accordance with the Constitution".

In summary, as long as the applicants fail to carry out the described internal formality, in no event may they commence the second phase of the necessary steps to attain the condition of Member of the European Parliament on which the immunity regime depends pursuant to Article 9 of the Protocol. In the event that this second phase is carried out and they acquire said condition, then as "members" – not as elected persons – they would comply with one of the cases of the corresponding prerogatives.

FOUR.- The second circumstance to which we alluded earlier above is that *"the European Parliament is in session"*. It is not sufficient to be a Member of the European Parliament to enjoy the corresponding prerogatives: in addition, it is necessary for the session to have commenced, thus linking immunity with this time period. By definition, the session is subsequent to the proclamation of the elected persons.

It was in this line that the Court of Justice of the European Union pronounced in its Ruling of 10 July 1986, passed in the case *Wybot/Faure*, in which the Court of Appeal of Paris sought a preliminary ruling on the interpretation of the mention of "session" in Article 9. It is illustrative to reflect on the question raised:

"Must Article 10 of the Protocol on the privileges and immunities of the European Communities

be interpreted, in view of the current wording of the texts and the practice followed by the European Parliament, in the sense that it confers on the Members of the European Parliament a permanent immunity which covers the entire period of their mandate, barring lifting of the immunity by the Parliament itself, or rather does it confer on them an immunity limited to certain time periods of the annual session?"

Well now, in this Judgment, the Court of Justice, as we have said, links immunity to the "session" and specifies how it is to be understood. In this respect, it states that the Parliament must be understood to be "in session" (although not sitting at that moment) until the Parliament itself takes the decision closing the annual or extraordinary sessions, and specifies that the paragraph 2 of said rule – to which the applicants allude (according to which *"Immunity shall likewise apply to Members while they are travelling to and from the place of meeting of the European Parliament")* – signified no obstacle to this interpretation. This provision, the Court declared, maintained its utility in those cases, among others, in which the Parliament may have prematurely closed an annual session.

This interpretation is in accordance with the foundation of immunity itself, which is none other than to preserve the correct functioning of the Institution and in particular the deputies' independence in the exercise of their functions. Parliamentary immunity, according to Rule 5 of the Rules of Procedure of the Parliament, is not a personal privilege of the Member but a guarantee of independence of the Parliament as a whole and of its Members.

FIVE.- Within this framework, the interpretation maintained by the applicants, according to which this immunity is predicated from the moment of proclamation as elected persons, cannot be maintained,

and in particular it is not consistent with the text of Article 9 of the Protocol.

The applicants cite, in support of their interpretation, the Decision of the European Parliament on the motion for protection of the parliamentary immunity and privileges of Francesco Musotto. In this respect, it can be pointed out that the case which gave rise to the motion displays evident differences from the applicants' situation. The first is that the allegedly unlawful actions were committed by the Member of the European Parliament in the interim between his election as such and the attainment of the condition of MEP (see, in this respect, the Report on the motion for protection of the parliamentary immunity and privileges of Francesco Musotto (2002/2201(IMM)), issued by the Committee on Legal Affairs and Internal Market). The second, which is so obvious as to be inescapable, resides in the fact that when the immunity of Francesco Musotto was being discussed he was already a "Member" of the European Parliament and the institution was "in session" and therefore the prerogative of immunity was already in force. Neither of those conditions occurs in the applicants' case, and consequently the scope of an immunity which has not yet been attained cannot be considered.

Finally, in regard to the precedents invoked, the circumstances of which are cited in a generic manner, they derive from decisions passed by organs other than this Supreme Court or do not refer to the election of Members of the European Parliament.

ORDER

THE EXAMINING MAGISTRATE AGREES:

THERE ARE NO GROUNDS FOR DECLARING INEFFECTIVE the national search, arrest and confinement warrants in relation with CARLES PUIGDEMONT i CASAMAJÓ and ANTONI COMIN i OLIVERES.

Thus do I hereby agree, order and sign.

CAUSA ESPECIAL núm.: 20907/2017

Instructor: Excmo. Sr. D. Pablo Llarena Conde

Letrada de la Administración de Justicia: Ilma. Sra. Dña. María Antonia Cao Barredo

TRIBUNAL SUPREMO
Sala de lo Penal

Auto núm. /

Excmo. Sr. Magistrado Instructor

D. Pablo Llarena Conde

En Madrid, a 15 de junio de 2019.

Ha sido Instructor el Excmo. Sr. D. Pablo Llarena Conde.

ANTECEDENTES DE HECHO

PRIMERO.- Las representaciones CARLES PUIGDEMONT i CASAMAJÓ y ANTONI COMÍN i OLIVERES, procesados en esta causa por auto de 21 de marzo de 2018, por presuntos delitos de rebelión y malversación de caudales públicos, y declarados rebeldes por auto de 9 de julio de 2018, han presentado escritos de fecha 11 de junio de 2019, solicitando que se dejen sin efecto las órdenes nacionales de búsqueda, detención e ingreso en prisión que pesan en

contra de sus representados, así como cualesquiera otras medidas cautelares que, *inaudita parte*, se hayan podido acordar en el seno de este procedimiento o de aquel del que éste trae causa, procedente del Juzgado Central de Instrucción número 3 de la Audiencia Nacional garantizando, de esta forma, la libertad de circulación de los mismos a los fines de cumplir con sus obligaciones como diputados electos al Parlamento Europeo, confirmándose la suspensión de este procedimiento hasta que, en su caso, se tramite la correspondiente autorización del Parlamento Europeo.

SEGUNDO.- La acusación popular, partido político Vox, en escrito con entrada el 14 de junio de 2019, mostró su oposición a la solicitud realizada por Carles Puigdemont.

El Ministerio Fiscal, en escritos fechados el 14 de junio de 2019, también se opone a las solicitudes formuladas por Carles Puigdemont y Antoni Comín, en base, entre otros extremos, a que los privilegios e inmunidades contenidos en el Protocolo n.º 7 del Tratado de Funcionamiento de la Unión Europea (capítulo III-arts. 7 a 9, respecto del Parlamento Europeo). "son aplicables una vez adquirida la plena condición de miembro del Parlamento europeo y cuando éste se encuentre ya en período de sesiones", lo que no es el caso.

FUNDAMENTOS DE DERECHO

PRIMERO.- Los solicitantes presentan sendos escritos que comparten los mismos argumentos. Se fundamentan en la idea de que son parlamentarios europeos electos, una condición que, a su entender, solo está pendiente de que se publique y certifique por parte de la Junta Electoral Central, aduciendo que su proclamación es un acto que no deja de ser un mero automatismo. De esta concepción derivan el fundamento de su petición: que al ser parlamentarios europeos electos, gozan de las prerrogativas de tal cargo conforme al Protocolo (n.º 7) sobre los privilegios y las inmunidades de la

Unión Europea, en relación con el art. 20.2 del Reglamento del Congreso de los Diputados. Entre tales prerrogativas se encuentra la inmunidad recogida en el art. 9 del Protocolo citado. Ello supone, a su parecer, que se deban dejar sin efecto las órdenes nacionales de búsqueda, detención e ingreso en prisión que pesan en contra de ambos, así como cualesquiera otras medidas cautelares que, *inaudita parte*, se hayan podido acordar en el seno de este procedimiento o de aquel del que éste trae causa, procedente del Juzgado Central de Instrucción número 3 de la Audiencia Nacional.

SEGUNDO.- El art. 10 Reglamento del Congreso de los Diputados señala que *«Los Diputados gozarán de inviolabilidad, aun después de haber cesado en su mandato, por las opiniones manifestadas en el ejercicio de sus funciones»*. Añade el art. 11 que *«Durante el período de su mandato, los Diputados gozarán asimismo de inmunidad y sólo podrán ser detenidos en caso de flagrante delito. No podrán ser inculpados ni procesados sin la previa autorización del Congreso»*. Por último, el artículo 20.2 del Reglamento del Congreso de los Diputados destacado en los escritos, señala que *«los derechos y prerrogativas serán efectivos desde el momento mismo en que el Diputado sea proclamado electo»*.

Con base en este último precepto, los interesados invocan la inmunidad derivada del art. 9 del Protocolo (n.º 7) sobre los privilegios y las inmunidades de la Unión Europea, que literalmente indica:

«Mientras el Parlamento Europeo esté en período de sesiones, sus miembros gozarán:

a) *en su propio territorio nacional, de las inmunidades reconocidas a los miembros del Parlamento de su país;*

b) *en el territorio de cualquier otro Estado miembro, de inmunidad frente a toda medida de detención y a toda actuación judicial.*

Gozarán igualmente de inmunidad cuando se dirijan al lugar de reunión del Parlamento Europeo o regresen de éste.

No podrá invocarse la inmunidad en caso de flagrante delito ni podrá ésta obstruir el ejercicio por el Parlamento Europeo de su derecho a suspender la inmunidad de uno de sus miembros».

Los solicitantes enfatizan que como el art. 9 del Protocolo, párrafo primero, letra a), señala que en el propio territorio nacional se gozará de las inmunidades reconocidas a los miembros del Parlamento del país, se debe realizar una aplicación en bloque de todo el régimen interno de tales prerrogativas, incluyendo el momento en el que nacen; esto es, no solo que se les reconozcan las prerrogativas de los artículos 10 y 11, sino que se entienda que el momento de su nacimiento es desde que fueron proclamados electos, a tenor de lo dispuesto en el artículo 20.2 del Reglamento del Congreso. Incluso señalan que *«esta solución jurídica es también la del Derecho de la Unión, como se desprende de las decisiones en esta materia del Parlamento Europeo. Así, según ha declarado el propio Parlamento, el Protocolo debe interpretarse de modo que la inmunidad parlamentaria surta efecto a partir del momento en que se publiquen los resultados de las elecciones al Parlamento Europeo»* y, al efecto, señalan expresamente la Decisión del Parlamento Europeo sobre la demanda de amparo de la inmunidad parlamentaria y los privilegios de Francesco Musotto.

Su planteamiento resulta erróneo por las razones que se expondrán a continuación y que se basan en dos menciones del citado art. 9 el Protocolo que los solicitantes eluden y cuya contemplación es esencial para la resolución de la cuestión. El precepto que se invoca hace pivotar el régimen de inmunidades en dos circunstancias cumulativas: una es que *«el Parlamento Europeo esté en período de sesiones»*; y otra, que la inmunidad se reconoce a *«sus miembros»*.

TERCERO.- Por razones metodológicas comenzaremos por el segundo elemento. Las inmunidades del art. 9 se reconocen a los miembros del Parlamento Europeo, no a los electos.

Como ha dicho la Sala de lo Penal de este Tribunal en el auto de 14 de junio de 2019, la adquisición de la condición de miembro del Parlamento Europeo se produce después de un proceso complejo integrado por dos fases. Una primera etapa que se desarrolla ante la Junta Electoral Central, y que se concreta en el acatamiento de la Constitución y la remisión de la lista de los electos proclamados; y una segunda en la que, ya en la sede del Parlamento Europeo y tras la manifestación por escrito sobre las incompatibilidades, se toma posesión.

La adquisición de la condición de miembro del Parlamento europeo exige, de forma patente, la cumplimentación de estos dos tipos de trámites, primero ante los órganos nacionales competentes y después en el propio Parlamento Europeo. En todo caso, los trámites ante el Parlamento Europeo, de conformidad con los artículos 3 y siguientes del Reglamento Interno de esta Institución, no se iniciarán hasta que los Estados miembros notifiquen al Parlamento el nombre de los diputados electos, de forma que puedan tomar posesión de sus escaños desde la apertura de la primera sesión que se celebre después de las elecciones.

Pero es el derecho interno el que regula cómo ha cumplimentarse esa primera fase, lo que supone -como señalan los propios solicitantes en sus escritos- que habrá de estarse a lo dispuesto en el artículo 224 de la Ley Orgánica 5/1985 de 19 de junio del Régimen Electoral General que proclama lo siguiente:

«1. La Junta Electoral Central procederá, no más tarde del vigésimo día posterior a las elecciones, al recuento de los votos a nivel nacional, a la atribución de escaños correspondientes a cada una de las candidaturas y a la proclamación de electos.

2. En el plazo de cinco días desde su proclamación, los candidatos electos deberán jurar o prometer acatamiento a la Constitución ante la Junta Electoral Central. Transcurrido dicho plazo, la Junta Electoral Central declarará vacantes los escaños correspondientes a los Diputados del Parlamento Europeo que no hubieran acatado la Constitución y suspendidas todas las prerrogativas que les pudieran corresponder por razón de su cargo, todo ello hasta que se produzca dicho acatamiento.

3. Asimismo la Junta Electoral Central será la competente para la realización de las restantes operaciones de escrutinio general no previstas en el artículo anterior».

El texto del precepto no deja lugar a dudas sobre la necesidad de que los diputados electos, como es el caso de los solicitantes, juren o prometan acatamiento a la Constitución ante la Junta Electoral Central.

Sobre el carácter insoslayable de este trámite ha declarado el Tribunal Constitucional en la STC 119/1990, de 21 de junio, con cita de las STC 101/1983, STC 122/1983 y 8/1985, lo siguiente:

«Punto de partida obligado de nuestra reflexión ha de ser, claro está, la doctrina establecida en nuestras anteriores Sentencias sobre el tema (SSTC 101/1983, 122/1983 y 8/1985) que aunque producidas todas ellas respecto de supuestos que son, jurídicamente, distintos del actual (en las dos primeras de las Sentencias citadas los recurrentes se habían negado lisa y llanamente a prestar juramento o promesa en forma alguna y en la tercera, cuyos actores no eran parlamentarios, sino concejales, habían empleado fórmulas radicalmente distintas de la establecida por el Real Decreto 707/1979), despejan ya toda duda sobre la licitud constitucional de la exigencia de juramento o promesa de acatamiento a la Constitución como requisito para el acceso a los cargos y funciones públicos, e incluso sobre la suficiencia de los Reglamentos parlamentarios, para imponerla.

Ambos extremos son admitidos ya, por lo demás, como Derecho vigente por todas las partes del litigio, que, dentro de él, no los ponen en cuestión.

La exigencia de juramento o promesa de acatamiento a la Constitución como requisito imprescindible para alcanzar en plenitud la condición de Diputado no viene impuesta, pues, por la Constitución, pero como acabamos de señalar, tampoco es contraria a ella. Ha sido establecida por una decisión del legislador (art. 108, 6.° de la Ley Orgánica 5/1985) y antes que por él, por el Congreso de los Diputados, en uso de la autonomía reglamentaria que la misma Constitución (art. 72.1) le otorga, actuando, el uno y el otro, dentro del ámbito de libertad para la creación jurídica que constitucionalmente les corresponde.

Sobre la conveniencia política de imponer estas obligaciones pueden mantenerse opiniones dispares, pues, como acabamos de recordar, tratándose de una decisión legislativa o reglamentaria, tan legítima es, desde el punto de vista constitucional, la postura de quienes la propugnan como la de quienes la estiman inadecuada o anacrónica. Esta elemental consideración nos permite prescindir de las extensas consideraciones de Derecho comparado que se contienen tanto en la demanda como en las alegaciones del Congreso de los Diputados, pues sea cual fuera la tendencia discernible entre los Estados occidentales en cuanto a la exigencia de juramento o promesa de acatamiento constitucional, el hecho es que esta exigencia está impuesta en nuestro Derecho positivo de conformidad con la Constitución».

En definitiva, mientras los solicitantes no realicen el trámite interno descrito, en ningún caso podrían iniciar la segunda fase de los trámites necesarios para la adquisición de la condición de miembro del Parlamento Europeo del que el artículo 9 del Protocolo hace depender el régimen de inmunidad. Para el caso de que esta segunda fase se desarrollara y adquirieran la misma, entonces ya como «miembros» -no como electos- cumplirían uno de los presupuestos de las prerrogativas correspondientes.

CUARTO.- La segunda circunstancia a la que antes aludíamos es que «*el Parlamento Europeo esté en período de sesiones*». No basta con ser miembro del Parlamento europeo para gozar de las prerrogativas correspondientes. Además, es necesario que se haya iniciado el período de sesiones, vinculándose así la inmunidad con este período temporal. Por definición, el período de sesiones es posterior a la proclamación de los electos.

En esta línea se pronunciaba el Tribunal de Justicia de la Unión Europea en la sentencia de 10 de julio de 1986, dictada en el caso *Wybot/Faure*, en el que la Corte de Apelación de París planteó una cuestión prejudicial sobre cómo debía entenderse la mención del artículo 9 al «período de sesiones». Resulta ilustrativo reflejar cual fue la cuestión prejudicial planteada:

«*¿Debe interpretarse el artículo 10 del Protocolo sobre los privilegios y las inmunidades de las Comunidades Europeas, a la vista de la redacción actual de los textos y de la práctica seguida por el Parlamento Europeo, en el sentido de que confiere a los parlamentarios europeos una inmunidad permanente que abarca todo el período de su mandato, salvo levantamiento de la inmunidad por el propio Parlamento, o bien les confiere una inmunidad limitada a determinados espacios de tiempo del período anual de sesiones?*».

Pues bien, en esta sentencia, el Tribunal de Justicia, como hemos adelantado, vincula la inmunidad al período de sesiones y precisa como debe entenderse el mismo. En este sentido, señala que debe entenderse que el Parlamento está en período de sesiones (aunque no se encuentre reunido en ese momento) hasta que el propio Parlamento adopte la decisión por la que se clausuran los períodos de sesiones anuales o extraordinarios. Y precisa que el párrafo segundo del precepto citado -al que aluden los solicitantes- (según el cual, los parlamentarios «*gozarán igualmente de inmunidad cuando se dirijan al lugar de reunión del Parlamento Europeo o regresen de éste*») no era obstáculo para esta interpretación. Esta previsión, declaraba el Tribunal, conservaba su utilidad en aquellos supuestos, entre otros, en los que el

Parlamento hubiera clausurado anticipadamente un período anual de sesiones.

Esta interpretación resulta conforme con el propio fundamento de la inmunidad, que no es sino preservar el buen funcionamiento de la Institución y particularmente la independencia de los diputados en el ejercicio de sus funciones. La inmunidad parlamentaria, declara el artículo 5 del Reglamento interno del Parlamento, no es un privilegio personal del diputado, sino una garantía de independencia del Parlamento en su conjunto y de sus diputados.

QUINTO.- En este marco, la interpretación que sostienen los solicitantes, según la cual esta inmunidad se predica desde la proclamación como electos, no se puede sostener y particularmente no encaja en el texto del artículo 9 del Protocolo.

Los solicitantes citan, en apoyo de su interpretación, la Decisión del Parlamento Europeo sobre la demanda de amparo de la inmunidad parlamentaria y los privilegios de Francesco Musotto. Al respecto, cabe señalar que el supuesto que dio lugar a la misma guarda evidentes diferencias con la situación de los solicitantes. La primera es que los hechos presuntamente delictivos se cometieron por el parlamentario europeo en el ínterin entre la elección como tal y la adquisición de la condición de miembro del Parlamento (véase, en este sentido, el Informe sobre la demanda de amparo de la inmunidad parlamentaria y los privilegios de Francesco Musotto (2002/2201(IMM)), elaborado por la Comisión de Asuntos Jurídicos y de Mercado Interior). La segunda, que por ser tan obvia no puede ser soslayada, radica en que cuando se discutía sobre la inmunidad de Francesco Musotto, este ya era «miembro» del Parlamento Europeo y el organismo se encontraba en «período de sesiones», por lo que la prerrogativa de inmunidad ya estaba vigente. Ninguna de esas condiciones se da en el caso de los solicitantes, por lo que no cabe plantearse el alcance de una inmunidad que aún no se ha adquirido.

Finalmente, respecto a los precedentes invocados, de los que se citan con carácter genérico las circunstancias de los mismos, traen causa de resoluciones dictadas por órganos distintos de este Alto Tribunal o no se refieren a la elección de parlamentarios europeos.

PARTE DISPOSITIVA

EL INSTRUCTOR ACUERDA:

NO HA LUGAR A DEJAR SIN EFECTO las órdenes nacionales de búsqueda, detención e ingreso en prisión dictadas en relación con CARLES PUIGDEMONT i CASAMAJÓ y ANTONI COMÍN i OLIVERES.

Así por este auto, lo acuerdo, mando y firmo.

Schleswig-Holsteinisches
Higher Regional Court
I. Criminal division/I. Penalty fine division
Office

Schl.-Holst. Oberlandesnericht. Gottorfstraße 2. 24B37 Schleswig

Lawyer
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Kurfürstendamm 194
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Your reference	Our reference	Tel: 04621/861270	Date
62/18	1Ausl(A) 18/18 (20/18)	Fax 04621/861271	12.07.2018

Memo

In the extradition case concerning Carles Puigdemont i Casamajó

The appendix/appendices have been sent

□ For reasons of competence

□ Following consultation

□ For retention

□ To the wrong address

X With the request that you take note

□ For further consideration

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1 Ausl (A) 18/18 (20/18)

Schleswig-Holsteinisches Higher Regional Court

B e s c h l u s s

In the extradition case concerning

Spanish national Carles Puigdemont i Casamajo,

born on 29 December 1962 in Amer (Girona) / Spain,

This followed,

- Advisers: 1. Lawyer Prof. Dr. Wolfgang Schomburg,
2. Lawyer Sören Schomburg,
both at Kurfürstendamm 194, 10707 Berlin -.

After hearing - and to 1.) and 3.) on application - of the attorney general of the state of Schleswig-Holstein, the defendant and his advisers, the I. Criminal Division of the Schleswig-Holsteinischen Higher Regional Court in Schleswig on 12 July 2018 concluded:

1.) The extradition of the defendant from the Federal Republic of Germany to the Kingdom of Spain for prosecution for the allegation of "misappropriation of public funds" (23 March 2018, European Arrest Warrant of the Second Chamber of the Spanish Supreme Court) ("embezzlement") is declared admissible.

2.) The extradition for the further accusation of "rebellion" is declared inadmissible.

3.) No objections are raised to the intention of the Attorney General to authorise the extradition of the defendant.

4.) The extradition warrant of the Senate of 5 April 2018 is maintained. The request to re-enforce this will be rejected. The conditions of the exemption decision in its current version remain in force.

5.) The public treasury has to refund the defendant two thirds of his necessary expenses.

Reasons:

I.

On submission of a European arrest warrant of the Second Chamber of the Spanish Supreme Court in Madrid of 23 March 2018 (Ref.: 20907/2017), the authorities of the Kingdom of Spain request the arrest and extradition of the defendant for the purpose of prosecution.

According to the European arrest warrant, the Spanish authorities accuse the defendant, as the then president of the Catalan regional government, of carrying out and funding a referendum on the future legal status of Catalonia on 1 October 2017, as a result of his behaviour, and of having committed "rebellion", as well as a "misappropriation of public funds" or “corruption”. Because of the details of the allegations, the Senate refers to its decision of 5 April 2018, by which he indeed

ordered the extradition detention against the defendant, but immediately suspended its execution. In compliance with the conditions, the defendant is currently at a place known to the Senate in Germany at large.

The defendant did not agree with the simplified extradition procedure and did not dispense with compliance with the principle of specialty.

The Attorney General considers the extradition of the defendant to be admissible on both counts. With regard to the accusation of "rebellion", the investigation shows that this behaviour is also punishable by German law, namely high treason in accordance with § 81 para. 1 No. 1 StGB, and at least as a serious breach of the peace, according to §§ 125 (1) No. 1, 125 a sentence 1 StGB. With regard to the accusation of "corruption", it is a "catalogued crime" within the meaning of Article 2 (2) of the Framework Decision on the European arrest warrant, so that further investigations of that assessment should be avoided; Incidentally, this behaviour is also punishable under German law as fraud in accordance with § 266 StGB.

The Attorney General of Schleswig-Holstein applied

1. to reject the defendant's objections to the extradition order of 5 April 2018,

2. to declare the extradition of the defendant from the Federal Republic of Germany to Spain to be admissible on the grounds of the European arrest warrant of the Spanish Supreme Court of Madrid of 23 March 2018,

3. to raise no objections to the intention of the granting authority to refuse authorisation obstacles,

4. to resubmit the extradition order of 5 April 2018 and order the execution of the extradition custody.

The defendant applied for,

Declaration that the extradition is inadmissible and

Annulment of the extradition order with associated conditions.

He considers that the events described by the Spanish authorities, which is referred to as "rebellion", is not equivalent to any German criminal offence. The accusation of "corruption" is indeed so designated, but in fact at most meet the charge of fraud and as such does not constitute a "catalogued crime", so that criminal liability under German law should be examined. In any event, that investigation leads to the ambiguity of the allegations, because subsequent contradictory information from the Spanish authorities makes it impossible to determine what precisely the defendant is being charged with. Finally, the defendant suspects that the Spanish state will use criminal proceedings to prosecute him for political reasons.

II.

As in its decision of April 5, 2018, the Senate also now makes a preliminary observation:

The European arrest warrant submitted by the Spanish authorities may, according to the Senate's many years of experience in extradition matters, be described as entirely atypical. The section describing the offence under the form of the European arrest warrant, according to "time of crime, crime scene and the nature of the person's participation" begins a 17-page account of the historical evolution of Catalonia's independence and the participation of various public and political organisations or institutions in this process. The description of the events begins in the spring of 2015, although the defendant allegedly committed the two offences between 6 September 2017 and 1 October 2017.

The resolution of the Supreme Court of Spain of 21 March 2018 on "the indictment and other measures", which is necessary in order to understand the allegations against the persecuted, as referenced in the European arrest warrant, is 70 pages long.

In it, again, the historical development - this time starting from the year 2012 - is described. In addition, this decision not only concerns the defendant, but a total of 25 people are charged with various offences committed at different times and through different actions. Thirteen of them - including the defendant - are said to have been guilty of "rebellion". Another twelve are said to have committed "disobedience". Of these 25 persons, 14 - including the defendant - were alleged to have committed a majority of "embezzlement and misappropriation of public funds".

In addition to these initial documents, the Spanish authorities added further information during the procedure. This was also done at the request of the Senate, after a Spanish document had been translated twice and there had been differences between the German translations. In this regard, from the point of view of the Senate, it should be emphasised that the Attorney General has made a commendable effort to seek the necessary supplement and explanation. The same applies to the willingness of the Spanish judiciary to answer the question.

Against this background, however, it is natural and understandable that all the parties involved in the examination, investigation and evaluation of the submitted material needed significantly more time than has been the case with "ordinary" extradition procedures based on a European arrest warrant in Article 17 (3) of the Framework Decision on the European arrest warrant (RB-EUHb) and in Article 83c (1) IRG, the 60-day period until a decision is made on extradition.

III.

By the European Arrest Warrant of the Supreme Spanish Court of Justice of 23 March 2018, the Spanish authorities have submitted the necessary extradition documents (Section 83a IRG).

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In particular, this European arrest warrant is ineffective because it lacked an underlying national detention order. As already mentioned, the relevant section of the European arrest warrant form is based on the "21 March 2018 charge". These are the opening orders of the Supreme Court of Justice sent by the European Arrest Warrant - and later referred to as such. According to the Supplementary Declarations of the Spanish Supreme Court of 17 May 2018 and of 28 May 2018, this also includes a decision on the continuation of detention concerning the defendant. Thus, within the meaning of Article 8 (1) (c) of the Framework Decision on the European arrest warrant (RB-EUHb), there is "another enforceable judicial decision with the same legal effect" (such as an arrest warrant). The Division has no reason to doubt this statement by the Spanish Supreme Court. There is no doubt that this decision comes from a judicial body responsible for issuing such decisions (see also Hackner in Schomburg / Lagodny / Gleß / Hackner, International Mutual Assistance in Criminal Matters, 5th edition, paragraph 9 to IRG). Incidentally, this legal classification for the Senate is readily plausible and understandable, but the German Code of Criminal Procedure has a parallel rule with § 207 Abs, 4 StPO. According to this provision, in connection with the opening of the main trial, it is also necessary to decide on the order or the continuation of pre-trial detention of a defendant.

The remand order in the form of maintaining the issued arrest warrant, in turn, refers to the national arrest warrant of the Central Investigation Court No. 3 in Madrid of 3 November 2017. This decision is referred to as the "precautionary personal measure" in the opening decision. It is also of no consequence that the individual accusations raised against the defendant at that time were different to what he now finds in the opening decision. It is a well-known phenomenon in the daily work of the division that an initial suspicion at the beginning of investigations may be extended, changed or even mitigated in the course of further inquiries, which must then be taken into account by revising the allegations in the decision on the detention order.

This is what has happened in the current case, as can be seen from the Supplementary Information of the Spanish Supreme Court of 28 May 2018. It should be noted that it was always regarding the same allegation in the sense of a procedural act (§ 264 Abs. 1 StPO), namely the behaviour of the defendant in connection with the referendum of 1, October 2017.

IV.

On this case, after a full and exhaustive examination of the request, the Division confirms its preliminary assessment of the case, as found in the order of 5 April 2018. Specifically, the following applies:

1. Insofar as the Spanish authorities accuse the victim of having participated in a 'rebellion', his extradition is inadmissible.

a) Under § 3 (1) of the IRG, extradition is only permissible if the so-called "mutual punishable offence exists", i.e. if the act was also an illegal act under German law, which fulfilled the facts of a (German) penal law. Even the wording of the law clarifies that it is not sufficient if the alleged act is only in the vicinity of a criminal liability under German law. This must, rather, be given. If this were to be considered differently in the sense of a "less strict" consideration, as has been considered in the public discussion, a more stringent "public policy" control would result, according to § 73 IRG, which the statute on International Legal Assistance in Criminal Matters (IRG) would directly avoid (see justification of the government bill to § 3 IRG-E, BT- Drs., 9/1338, p 36 f.

The requirement of dual criminality is also consistent with the requirements of Art. 2 para. 4, 4 para. 1 RB-EUFib, because and insofar as the alleged offence is not a catalogued crime within the meaning of Art. 2 para. 2 RB-EUFIb and outside the scope of these offences, the Framework Decision allows national law to be linked to the requirement of dual criminality, which in Germany has been dealt with by Article 81 (4) IRG. However, the crime of rebellion belongs to the range of the catalogued crimes as little as the conceivable offence existence of a breach of the peace. The Community law extension of the catalogue to the offences allegedly committed by the defendant, which would be possible under Art. 2 para. 3 RB-EUHb, has not been applied here.

However, in order to enable the necessary investigation, a so-called "appropriate conversion" (§ 3 (1) second version of the IRG) must be carried out (cf. the conversion of the Senate resolution of 5 April 2018, p). This takes into account the fact that the legal system of the applicant Spanish State and the legal system of the requested German State do not fully assess the identical facts in criminal law. This means that the facts underlying the European arrest warrant and the request for extradition should then be assessed on the basis of German criminal law as to whether criminal liability also results from a German criminal law standard which in any event complies with Spanish law.

In this case, the strict standards of, for example, German revision law prove inapplicable to the examination of dual criminality in the case of review of a judgment because they do not do justice to the situation inherent in the extradition law of the clash of different legal systems (BGHSt 27, 168, 173). On the other hand, whether the ability to subsume the facts under "any" criminal law standard is sufficient (see, for example, Lagodny in Schomburg / Lagodny / Gleß / Hackner, International Mutual Legal Assistance in Criminal Matters, 5th ed., Marginal 13 to § 3 IRG), whether a legal congruence of the criminal provisions is to be demanded (Kubiciel in Ambos et al., Legal Aid Law in Criminal Matters, para. 26 to § 3 IRG) or whether a separate proportionality test should be carried out with the perpetrator's legal opinion if necessary, does not need to be decided by the division in this case. Therefore, a submission to the Federal Supreme Court, which is alternatively requested by the Attorney General, in accordance with § 42 (2) IRG or pursuant to § 42 (1) IRG by the Senate, is not required.

For the Senate does not restrict the examination of dual and social criminal liability to the background of the fundamental obligation to extradite (Section 79 (1) IRG, Art. 3, 4 RB-EUHb) and the interpretation of national norms that is generally compatible with Community law. Rather, it extends to the question of whether the reported facts can be punishable by "any" German standard, even if there is no (complete) evaluation congruence between the offences of high treason and, for example, the breach of peace. Review by the Senate on the basis of the facts submitted by the Spanish authorities and the Attorney General, which shows that the persecuted cannot be accused under German law of any offence of high treason or breach of the peace;

b) An offence of high treason must be carried out "by force" according to Art. 472 of the Spanish Penal Code, and it must be carried out in a "violent and public" way, according to the corresponding German penalty provision of § 81 StGB.

It is doubtful whether the defendant pursued the goal of dissolving Catalonia from the Spanish central state in this sense "by force." From the documents submitted, it follows that the defendant legitimizes a secession precisely by democratic means, namely through a referendum. Accordingly, the opening decision of 21 March 2018 (page 57, page numbers here and subsequently quoted after the German translation) admits that it was not about the accusation of the use of force “from the beginning as an instrument for the achievement of independence”. In this context (opening decision, p. 31) it is also mentioned that until the 28th (!) of September 2017 "a tacit pact of non-violence prevailed". The violence carried out by autonomous groups (opening decision, ibid.) in parts of the referendum were not the means by which the defendant wished to reach independence. It is not apparent whether the defendant realised at this point in time that it was futile to achieve the independence of Catalonia by democratic and legal means such as a referendum, leaving a violent overthrow the only option.

In any case, criminal liability for high treason collapses, because the events of 1 October 2017 have not reached the level of violence that would be required to fulfil the unwritten constituent element of the "suitability" of the force for the purpose. This requirement of suitability is not only to be found in the German § 81 StGB, but apparently also in Spanish criminal law, as the statements on the "appropriateness" of the use of force in the opening decision (p. 56) show.

As regards criminal liability for high treason in accordance with § 81 StGB, the Senate already pointed out in its resolution of 5 April 2018 that the concept of violence used in § 105 StGB and § 81 StGB presupposes a qualified level of violence, which in its intended effect is to force the state authority to respond to the demands of the perpetrators (so after BGHSt 32, 165 ff - "Western take-off runway").

The background to this is that, on the one hand, in a democratic state and social order, criminal law must exercise restraint in political disputes for reasons of constitutional law and, on the other hand, in comparison, for protection of individual legal rights, the state and its institutions potential perpetrators stand before addressees that are much more difficult to influence (Laufhütte / Kuschel in Leipzig Commentary StGB, 12th ed., No. 17 to § 81 StGB). Therefore, at an early stage, the case law of the Federal Court of Justice took on the proposed "revolutionary struggle" with victims and causing chaotic conditions as a case of high treason adopted (BGHSt 6, 336, 340), but not about demonstrations, boycott calls or strikes per se, but only if these had led to the paralysis of the entirety of public life (BGHSt 8, 102, 106). The BGH continued this case law in its "Runway West Decision".

It is beyond question that the offence of high treason represents a corporate offence in the sense of § 11 Abs. 1 No. 6 StGB and therefore it cannot depend on the success of a treasonous attack. The Attorney General rightly observes that such a punitive provision would be ineffective, because ultimately it would only have a symbolic character.

On the other hand, the advancement of the threshold for criminal liability associated with a corporate offence risks criminalising the public discourse at an early stage, even if, for example, demonstrations and their undoubted (and political) pressure are protected under constitutional law. Because demonstrations are always an element of pressure. Therefore, when assessing the effect of coercive measures, the responsibilities of the state and its institutions, as well as the appropriateness of the coercive means used to cause the consequences, depend on it; this assessment, in the sense of a potential success, is not only a factual but normative condition of fact (BGHSt 32, 165, 174). The fact that, according to the Attorney General, no definite statement can be made in the present case that the force used was lacking in such aptitude is thus insufficient.

However, even after repeated examination, the Division cannot make a positive assessment that the Spanish institutions could not have withstood the pressure exerted by the events on election day:

As far as the extradition request references tumultuous scenes at a number of polling stations, it is not clear that these scenes were truly representative of actual events. It is true that there are many indications that the individual acts, recognisable on the provided photographic material at the locations shown and other infringing acts described by the investigation report to the detriment of the National Police, each individually led to other criminal offences - in particular assault charges, resistance offences or even breach of the peace. However, the Division does not see beyond the acceptably punishable nature of the individual incidents and the perpetrator recognisable on the video recordings presented, and why the constitutional order of the Spanish state was already seriously threatened by these individual actions.

On election day itself, there were 2,259 polling stations distributed across the country. In 17 of these polling stations, the situation escalated to street fights. On this day, only 58 out of 6,000 national police officers were injured in these conflicts throughout the country.

In addition to these events, neither the European arrest warrant nor the opening decision announces events of the day of an election which might be considered suitable for the purpose of overthrowing. In any case, according to the content of these extradition documents, there were no large-scale street battles, incendiary fires or looting that were directly triggered by the referendum on 1 October 2017. Neither tear gas nor water cannons had to be used. There was no use of firearms.

Nor does it follow that the Supplemental Information of the Spanish Supreme Court of 26 April 2018 found that various riots occurred in Catalonia "on the last days of September and the first days of October of 2017". So, it is about large demonstrations and threats by perpetrators who the National Police detained or, have been. Roads and railways - among other things, with the help of hundreds of tractors or burning barricades - have been blocked nationwide.

These events are in fact not directly or temporally related to the referendum of 1 October 2017 by the Spanish judiciary. Nor are they used to justify the opening decision or the European arrest warrant. They are not used to establish the personal criminal liability of the defendant. To that extent, as stated above, in the opening decision (page 57) it merely states that the defendant and the other initiators did not plan on using force as an instrument for achieving independence right from the beginning, but, despite the warning in the wake of the events of 20 September 2017, the decision was made to carry out the referendum, with acceptance of the risk that violent acts could also occur in connection with the referendum.

Finally, it does not go on to say that the defendant and other Catalan politicians are accused of having urged the Catalan regional police to "ensure" the conduct of the referendum. Insofar as it could be seen as an invitation to block central government police forces,

It is already not apparent that the defendant and others actually instructed the Catalan regional police to attack the Guardia Civil or the National Police; The European arrest warrant and the opening decision of 21 March 2018 also say nothing of such incidents. In this respect, unlike what the Attorney General sees in his application, it will not be possible to establish the allegation that the defendant wanted to enforce violent breaches of the law by employing a superior force of 17,000 regional police officers against 6,000 national policemen. At first, the number of 17,000 police officers in this context probably does not apply. According to the content of the Spanish national arrest warrant of 3 November 2017 (see p. 4), it was the overall strength of the Catalan regional police. As can be seen from the opening statement of 21 March 2018 (there fn. 52, letter e, p. 34), on October 1, 2017, only 7,000 regional policemen were deployed, with the accusation of Spanish justice against the defendant being additionally added. This lies precisely in the fact that he deliberately used fewer (than the usual 12,000 otherwise used in elections) to make checks as ineffective as possible.

Insofar as the regional police acted only passively or uncooperatively, this may have made it more difficult on a case-by-case basis to deploy central forces to demonstrators and visitors to the polling stations and, therefore, to achieve the objective of preventing the holding of the referendum. In that regard, the Senate does not see that the holding of the referendum - even if it had been unconstitutional - inevitably meant a secession from Catalonia, or even a dissolution of Spanish statehood beyond this situation. It may be that, companions of the defendant have seen this as a necessary intermediate step into complete independence. But the defendant himself has only wanted to see the prelude to negotiations.

c) As far as criminal liability for breach of the peace is concerned, the Division very well sees that a series of events on the ground could fulfil this offence. Likewise, it is basically true that even under German law, the (co-) perpetrator and organiser of such acts are not necessarily on the ground.

aa) However, at least according to German law, when assessing the question of whether the organiser of a major event was guilty of breach of the peace, it is necessary to distinguish first whether the actual event, out of or in connection with it, leads to later violent activities, and in turn if it was allowed or prohibited.

The Federal Court has executed this among others in the already mentioned "Runway West" decision (BGHSt 32, 165, 179); "However, those who seriously call for a peaceful demonstration should not be punished as the perpetrators of a breach of the peace, because the event is joined by violent groups, even if he expected them to appear on his call, but the event, for the sake of which its legal objectives were to be pursued in any case, including by eliminating excesses. "This is also the position of the Division. If it were different, many major events which are approved by the legal system and are socially and politically desirable - such as football matches or, in Germany, the G-20 Summit in Hamburg - are unlikely to be organised because riots cannot be ruled out in connection with these events.

As regards the legal qualification of the referendum scheduled for 1 October 2017, the European arrest warrant (page 6) states that Law 19/2017 on the holding of the referendum on 6 September 2017 is the day after i.e. on 7 September 2017, had been "suspended" by a decision of the Constitutional Act. First on the 17 October 2017, i.e. about two and a half weeks after election day, the Constitutional Court ruled that the referendum was "unconstitutional and void".

If the only purpose of the preliminary decision of the Constitutional Court was to declare that the referendum was "pending ineffective" and its result could not therefore be considered valid, the execution of the referendum itself would, though apparently pointless, still be allowed. In this case, the persecuted would be punishable under German law when applying the scale shown without penalty.

For, as set out in (b) above, the Spanish authorities are charging the defendant for no more than the violence inflicted during the riots at the time of the referendum.

If, on the other hand - it seems that the understanding of the Spanish judiciary and, moreover, that it seems to be more obvious – this would mean that the temporary injunction did not just declare the possible election result meaningless, but at the same time contained a ban to carry out the referendum, one would have to assume that the vote on 1 October 2017 was illegal.

bb) For this case, the question of the criminal liability of the persecuted breach of peace would be answered in accordance with the further principles formulated by the Federal Court, inter alia, in the previously mentioned "Runway West Decision".

According to this, criminal liability for breach of the peace also covers the "absentee commander, organiser or spiritual leader" of the violence, in any case, "if and to the extent that violence or threats committed out of the crowd correspond to his will to act and are committed under his perpetration. To be ascribed to him, according to general principles as his own deed "(BGHSt 32, 165, 178 f.). In that regard, "whoever controls from the outside, so for example, he did not go along with the whole battle plan of the violence, but he was also guilty of breaching the peace (see above with reference to the statement of the law). This criminal liability also includes a preparatory and further-executing activity of the "mastermind, commander or spiritual leader" (Krauss in Leipziger Kommentar- StGB, 12th ed., No. 70 to § 125 StGB).

Even on this scale, however, the defendant has not made punishable because of breach of the peace. In the aforementioned case, the Federal Court of Justice was able to establish, for the purpose of internally suspending the defendant who was planning a total blockade of the Frankfurt airport: "The execution of the total blockade was his personal concern. He had pointed out this goal to his followers with conjuring words "(BGHSt 32, 165, 180).

And before that: "The defendant knew that he would not be able to achieve such a lasting blockade of the numerous accesses and exits solely through the passive presence of the expected 5000 to 10,000 participants. Therefore, in order to effectively enforce the blockade into the evening hours, he accepted approvingly that the crowds, following his call, erected barricades, defended them against the eviction forces and police officers who kept the entrances clear, and wanted to actively resist "(op. cit.).

In the present case it was different. The defendant did not possess a will to incite riots. Rather, he has repeatedly emphasised the absolute need for peaceful action. He was not a "spiritual leader" of violence, and according to the Spanish authorities, there was no such thing as a "battle plan for violence" 11, which did not involve blocking the National Police or even bringing about civil warlike conditions, but only to enable as many voters as possible to take part in a referendum, which - as discussed - should only have a preparatory character for further political negotiations, even though this may have been unconstitutional and therefore unlawful. The senate assumes that the central forces wanted to prevent this from their point of view, but from the point of view of the initiator of a referendum, this did not have to mean the inevitability of legal cases in the sense of a breach of the peace, because he could have assumed that the central power present could have sufficed to simply declare the results of such a referendum unlawful and ineffective, or at best carry out de-escalating police operations.

Also, the defendant lacked the possibility of controlling the event, which was necessary for the criminal liability of the "organiser". For a perpetrator's participation, the perpetration that is already required according to general principles is that "the violence or threats committed from the crowd..." are to be ascribed to the offender "according to general principles as his own deed" BGH in the "Western Runway decision BGHSt 32, 165, 178.) This is for the current version of § 125 of the Criminal Code of the perpetrator's commission essentially equivalent participation of objectively supporting and as such subjectively recognisable character of the contribution made because of the advancement of criminal liability as a result of the current version of §§ 125 pp. of the criminal code, effective demarcations at these levels are required if section 125 of the Criminal Code is not intended to constitute a mere danger of harm.

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In the practice of the German jurisprudence, this route was not taken, since published decisions are not apparent, which even the mere abstract support or enabling events from which could develop violent acts, punishable. On the contrary, it is always a question of the relationship in which even a mere participant was responsible for concrete legal action (for example BGH NSts 2009, 28 f; BGHSt 62, 178 ff.j.

Even then, however, there is no criminal liability for the defendant. On the basis of the information provided, he was not the planner, organiser or even only supporter of a foreseeable concrete violence. Precisely because the later events on election day were not planned and organised by him, they took place spontaneously and unpredictably in terms of place, time and procedure. Therefore, the defendant could not control or otherwise influence them.

2. As far as the charge of "corruption" in the form of "misappropriation of public funds" is concerned, extradition is permissible.

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In its resolution of April 5, 2018, the Division pointed this out, and the reason why its examining competence is limited on this point. The Division firmly adheres to this assessment. To avoid repetition, it refers to the aforementioned decision. Merely in summary, it should be pointed out once again that this allegation is a "catalogued crime" within the meaning of Section 81 (4) IRG in conjunction with Article 2 (2) of the Framework Decision on the European arrest warrant. In such a case, the existence of dual criminality is in principle not to be examined. Rather, the examination is limited to the question of whether the assignment of the incident to the appropriate group of offences is plausible and possibly on the further question of whether the described course of events is conclusive (OLG Karlsruhe, NStZ-RR 2007, 376).

In the starting point, the view of the requesting state is decisive for the assignment of a charge of accusation to certain groups of offenders. The defendant acknowledges this, but submits that such a classification is non-binding if it appears "arbitrary or incompatible with the underlying facts". But the division cannot determine such a thing. There is neither a precise definition nor a uniform terminology for classifying a fact, as a catalogued crime (OLG Frankfurt, NStZ-RR 2011, 341). Both corruption and embezzlement are equally characterised by abuse of the powers of a transferred public office. It would contradict the basic idea of the common European area of law, if national concepts and categories were to be used in this context alone. Aware of the inaccuracies and some delineation difficulties, the European states have nevertheless decided to set up this catalogue of crimes, which are at least comparable in their core in the individual countries, so that an explicit examination of dual criminality can be dispensed with.

If one wanted to see this differently, then the division notes only as a precaution that after final examination with regard to the allegations made in this respect, the defendant should have been made punishable by the German scale because of infidelity under § 266 StGB.

The underlying factual description is also conclusive, measured by the limited scope of the audit. The defendant wanted, of course, to settle the costs associated with conducting the referendum from the public budget, as shown by Law 4/2017 and the "Additional Provisions 40". These regulations were declared null and void by a judgment of the Spanish Constitutional Court (ref.: STC 90/2017) of 5 July 2017. Nevertheless, by order of 7 September 2017, the Catalan Government - and with it, first and foremost the perpetrators - authorised the various authorities to "take all necessary measures and contracts to conduct the referendum" (according to the opening decision of 21 March 2018, Of course, this also includes the promise of the assumption of costs by the public budgets.

How and how these would arise was explained in the decision, because details of the measures to be taken by the various authorities were listed. With this order, the defendant overruled the decision of the Constitutional Court. The fact that the preparation and implementation of the referendum would not be possible without this incurred cost, is obvious and incidentally was known to the parties through legal disputes over previous comparable events. These also provided an approximate clue as to what the costs would be in connection with the referendum.

In the course of the procedure, the Spanish authorities have on several occasions submitted further material to prove the breakdown of the costs caused by individual commitments, contracts and expenditure. The information provided was – what is no longer a matter of course in an ongoing investigation – not always constant. However, that does not mean, as the defendant argues, that the argument of the Spanish authorities on this point must (in the meantime) be regarded as wholly incoherent, so that it can no longer serve as the basis for extradition proceedings.

So, it would only be if - as has been decided (OLG Celle NStZ-RR 2009, 313) - "the essential components of the tender, like a mosaic, are tediously elicited from a miscellany of communications." But that's not the case here. For one thing, the clarification of the drafts, which is progressing towards the opening decision of March 21, 2018, corresponds to the aforementioned dynamics of a preliminary investigation that has not yet been completed. On the other hand, the Spanish authorities have apparently supplemented the individual findings of the investigation with regard to the use of public funds, assuming that the division is obliged to review these details as well. That is not so. The only demand that the division had - based on an ambiguous translation of the documents - was the question of whether, under Spanish law, the allegation of infidelity was justified even if commitments were made at the expense of the public budget, but were not yet fulfilled. This question has been answered in the affirmative by the Spanish judiciary.

This seems plausible to the division, for even in German law, the fulfilment of the offence of fraud is sufficient for the occurrence of a risk of harm to the accomplishment of the act. The term of the so-called "damage equivalent asset" has been recognised by the jurisdiction in Germany for decades.

At least one such asset risk is plausibly put forward by the Spanish judiciary, for which the defendant is also attributable from his former position. It would only be different if indications were presented or apparent that public money has not flowed so far and that there are no future obligations, because - as planned from the outset - all expenditures are to be financed or financed by third parties. However, this can also be disregarded taking into account the objections of the defendant. The question of how the costs were caused in detail and on which ministries they were distributed, as well as the question as to whether and to what extent this actually caused financial damage, affects the extent of the suspicion and possibly the extent of the guilt of the defendant. To clarify this, is entirely a matter for the Spanish judiciary. The Division does not have to deal with this. There are no indications that the Division exceptionally has to carry out a suspicious transaction investigation because of special circumstances (§10 (2) IRG).

Other circumstances that could speak against the admissibility of the extradition (§§ 80, 81 No. 1, 83 IRG) are not available and will not be asserted.

V.

There are no objections to the intention announced by the Attorney General to approve the Senate's positive decision on the admissibility of extradition.

Prohibitions of authorisation from the catalogue of § 83 b IRG are not apparent and are not asserted by the defendant.

Nor does the permit need to be suspended because the defendant would face "political" persecution. This is not the case. The Division also expressed this in its resolution of 5 April 2018. Reference is made to the statements there.

The "political" offence of high treason, in other words an offence against the basic political order and the existence of the state itself, is - as stated - not in any way at issue in the context of extradition. The accusation of fraud, is a criminally relevant issue that does not have "political" dimensions.
The idea that the Spanish state, as a member of the community of values and the common legal area of the European Union, could use criminal proceedings to ultimately punish the defendant for political persuasion by means of mere allegations or harsher sanctions deviating from the norm, is upheld by the Division as being outlandish. Therefore, it is unimaginable for the Division that - as the defendant apparently feared - the Spanish judiciary, while ignoring the principle of specialty could prosecute the defendant in an extradition for "rebellion", despite the Division decision. The Division has endeavoured to meet the requirements of German criminal law, as well as those of Community law, in its decision. It has full confidence that the Spanish judiciary will not act differently.

VI.

The Prosecutor General's request to re-enforce the Senate arrest warrant had to be rejected.

With today's Division decision, the situation for the persecuted has not worsened significantly compared to the previous situation. Rather, it is now clear that there will be no extradition because of "rebellion". Thus, the provisional assessment of the Division has been confirmed with regard to the outcome of the extradition procedure. The incentive for the defendant to avoid escaping from further proceedings has not increased.

The defendant has submitted to the extradition procedure so far. He meticulously respected the restrictions imposed on him. He has repeatedly stressed that he will stand trial and adhere to the decision of the German judiciary. The Division takes the defendant, who as a person of political importance probably cannot afford to lose face by fleeing, at his word.

VII.

The decision on costs follows from §§ 77 Abs. 1 IRG, 467 Abs.1, 464 d StPO.

Dr. Probst
Presiding Judge at the
Higher Regional Court

Flohmann Judge at
the Higher
Regional Court

Schiemann Judge
at the Higher
Regional Court

Ausgefertigt:
Schleswig, den 12. Juli 2018

(Willprecht), Judicial employee
as a clerk at the office of the Higher Regional Court

NACIONES UNIDAS
DERECHOS HUMANOS
PROCEDIMIENTOS ESPECIALES
RELATORES ESPECIALES, EXPERTOS INDEPENDIENTES Y GRUPOS DE TRABAJO

TÉLÉCOPIE · FACSIMILE TRANSMISSION

DATE: 27 de mayo de 2019

A/TO: Misión Permanente de España ante la Oficina de las Naciones Unidas y otras organizaciones internacionales en Ginebra

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REF: WGAD/2019/ESP/OPN/1

PAGES: 19 (Y COMPRIS CETTE PAGE/INCLUDING THIS PAGE)

OBJET/SUBJECT: **Comunicación del Grupo de Trabajo sobre la Detención Arbitraria transmitiendo opinión adoptada bajo el párrafo 18 de sus Métodos de Trabajo (A/HRC/36/38)**

Sírvase encontrar adjunta una carta del Presidente-Relator del Grupo de Trabajo sobre la Detención Arbitraria, transmitiendo la Opinión No. 6/2019, referente a España.

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Grupo de Trabajo sobre la Detención Arbitraria

REFERENCIA: WGAD/2019/ESP/OPN/1

27 de mayo de 2019

Señor Embajador,

El Consejo de Derechos Humanos, en su resolución 33/30 adoptada el 30 de septiembre de 2016, titulada "Detención arbitraria", decidió prorrogar por un período de tres años el mandato del Grupo de Trabajo sobre la Detención Arbitraria y le invitó, en el cumplimiento de su mandato, a que siguiese buscando y recogiendo información de los gobiernos y de las organizaciones intergubernamentales y no gubernamentales, así como de las personas interesadas, de sus familias o de sus representantes legales.

Quisiera referirme a la comunicación de fecha 8 de agosto de 2018, dirigida al Gobierno de Su Excelencia, sobre un caso de detención presuntamente arbitraria que habría ocurrido en su país.

A la luz de lo que precede, y conforme al mandato que le ha sido conferido, el Grupo de Trabajo ha examinado el caso mencionado, teniendo en cuenta los elementos puestos a su disposición, y ha adoptado, el 25 de abril de 2018, su Opinión No. 6/2019 (España) (copia adjunta). Esta Opinión será reproducida en la página web del Grupo de Trabajo y mencionada en el informe que el Grupo de Trabajo presentará al Consejo de Derechos Humanos en 2020.

Hago propicia la ocasión para reiterarle, señor Embajador, las seguridades de mi consideración más distinguida.

José Antonio Guevara Bermúdez
Presidente Relator
Grupo de Trabajo sobre la Detención Arbitraria

Su Excelencia, Sr. Cristóbal González-Aller Jurado
Embajador
Representante Permanente
Misión Permanente de España ante la Oficina de las Naciones Unidas
y otras organizaciones internacionales en Ginebra

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Consejo de Derechos Humanos
Grupo de Trabajo sobre la Detención Arbitraria

Opinión núm. 6/2019, relativa a Jordi Cuixart I Navarro, Jordi Sanchez I Picanyol y Oriol Junqueras I Vies (España)

1. El Grupo de Trabajo sobre la Detención Arbitraria fue establecido en virtud de la resolución 1991/42 de la Comisión de Derechos Humanos. En su resolución 1997/50, la Comisión prorrogó y aclaró el mandato del Grupo de Trabajo. Con arreglo a lo dispuesto en la resolución 60/251 de la Asamblea General y en la decisión 1/102 del Consejo de Derechos Humanos, el Consejo asumió el mandato de la Comisión. La última vez que el Consejo prorrogó el mandato del Grupo de Trabajo por tres años fue en su resolución 33/30.

2. De conformidad con sus métodos de trabajo (A/HRC/36/38), el Grupo de Trabajo transmitió el 8 de agosto de 2018 al Gobierno de España una comunicación relativa a los señores Jordi Cuixart I Navarro, Jordi Sanchez I Picanyol y Oriol Junqueras I Vies. Luego de haber solicitado una extensión del plazo de contestación, el Gobierno respondió las alegaciones el 8 de noviembre de 2018. El Estado es parte en el Pacto Internacional de Derechos Civiles y Políticos.

3. El Grupo de Trabajo considera arbitraria la privación de libertad en los casos siguientes:

(a) Cuando es manifiestamente imposible invocar fundamento jurídico alguno que la justifique (como el mantenimiento en reclusión de una persona tras haber cumplido su condena o a pesar de una ley de amnistía que le sea aplicable) (categoría I);

(b) Cuando la privación de libertad resulta del ejercicio de los derechos o libertades garantizados por los artículos 7, 13, 14, 18, 19, 20 y 21 de la Declaración Universal de Derechos Humanos y, respecto de los Estados partes, por los artículos 12, 18, 19, 21, 22, 25, 26 y 27 del Pacto Internacional de Derechos Civiles y Políticos (categoría II);

(c) Cuando la inobservancia, total o parcial, de las normas internacionales relativas al derecho a un juicio imparcial, establecidas en la Declaración Universal de Derechos Humanos y en los instrumentos internacionales pertinentes aceptados por los Estados interesados, es de una gravedad tal que confiere a la privación de libertad carácter arbitrario (categoría III);

(d) Cuando los solicitantes de asilo, inmigrantes o refugiados son objeto de detención administrativa prolongada sin posibilidad de examen o recurso administrativo o judicial (categoría IV);

(e) Cuando la privación de libertad constituye una vulneración del derecho internacional por tratarse de discriminación por motivos de nacimiento, origen nacional, étnico o social, idioma, religión, condición económica, opinión política o de otra índole, género, orientación sexual, discapacidad u otra condición, que lleva o puede llevar a ignorar el principio de igualdad de los seres humanos (categoría V).

Información recibida

Comunicación de la fuente

4. Jordi Cuixart I Navarro, es miembro y Presidente de la asociación Omnium Cultural, que busca proteger la cultura y el lenguaje de Cataluña.

5. Jordi Sánchez I Picanyol, fue Presidente de la Asamblea Nacional Catalana, organización cuyo objetivo es la independencia de Cataluña a través de medios democráticos y pacíficos, organizó dos grandes protestas el 11 de septiembre de 2012 y el 11 de septiembre de 2013. El Sr. Sánchez fue electo miembro del Parlamento de Cataluña para el período a iniciar en 2018. Lideró un movimiento de defensa de la lengua, la cultura y la nación catalana entre 1983 y 1994.

6. Oriol Junqueras I Vies, fue el Vicepresidente del Gobierno de Cataluña y Ministro de Economía y Finanzas. Fue Alcalde de San Vicente dels Horts entre 2011 y 2015 y Miembro del Parlamento Europeo entre 2009 y 2012. En 2011 fue electo Presidente de Esquerra Republicana, en 2012 Miembro del Parlamento de Cataluña, reelecto en diciembre de 2017.

7. Según la información recibida, el 20 y 21 de septiembre de 2017 tuvo lugar una manifestación pública en Barcelona, a favor de un referéndum por la independencia de Cataluña.

8. El 22 de septiembre de 2017, la Fiscalía General presentó denuncia por sedición ante los hechos ocurridos durante la manifestación. El 27 de septiembre la Audiencia Nacional de Madrid se declaró competente para conocer el caso y el 3 de octubre citó a los Sres. Cuixart y Sánchez a declarar, en calidad de investigados, para audiencia del 6 de octubre de 2017.

9. El 16 de octubre de 2017 el Juzgado de Instrucción de la Audiencia Nacional de Madrid, luego de haber tomado sus declaraciones, ordenó la prisión provisional de los Sres. Cuixart y Sánchez, quienes apelaron la decisión. En el auto, el Juez afirmó su competencia y decidió en favor de la detención, sobre la base de la gravedad de la pena.

10. El 6 de noviembre de 2017 fue rechazada la apelación. La fuente destaca que la sentencia del tribunal de apelación no fue unánime. Un juez consideró desproporcionada la detención ante la imprecisión de los alegatos y la vaguedad de su clasificación legal, por contravenir estándares mínimos de certeza jurídica.

11. El 27 de octubre de 2017, el Parlamento Catalán aprobó una declaración unilateral de independencia. Como respuesta, el Gobierno de España, ese mismo día, invocó el artículo 155 de la Constitución y acordó la suspensión de todos los miembros del Parlamento y la disolución de este órgano.

12. El 30 de octubre de 2017, la Fiscalía presentó una denuncia por rebelión, sedición y malversación, contra de los recién removidos miembros del Gobierno de Cataluña, incluyendo el Sr. Junqueras. La fuente alega que la denuncia no especificó los hechos que constituían delitos.

13. Según la información recibida, el 31 de octubre de 2017 la Audiencia Nacional se consideró competente en el caso del Sr. Junqueras y lo citó a comparecer dos días después para declarar. El 2 de noviembre de 2017 el Sr. Junqueras rindió declaración ante el tribunal y quedó detenido por orden del Juzgado Central de Instrucción.

14. La fuente destaca que, en su decisión de imponer la prisión provisional, el Juzgado consideró que el Sr. Junqueras había contado con tiempo y medios para preparar su defensa, a pesar de que su abogado estaba ausente y de que los hechos que se le imputaban no fueron especificados.

15. Los casos de los Sres. Cuixart y Sánchez fueron acumulados con el del Sr. Junqueras, ante el Tribunal Supremo, en virtud del fuero personal de este último, como miembro Gobierno de Cataluña. El 22 de noviembre de 2017, el Juzgado de Instrucción remitió información al Tribunal Supremo. Según la fuente, el Juez describió una organización compleja, que tenía como fin la secesión de Cataluña y la alteración de la forma de organización política del Estado.

16. La fuente indica que los hechos que se remitieron al Tribunal Supremo, lejos de estar limitados a la acusación (referidos al 20 y 21 de septiembre de 2017), se remontaron al 2015. No obstante, no se atribuyó la comisión de hechos específicos y concretos, sino actos que no constituyen agravios o ilícitos.

17. El 24 de noviembre de 2017, el Tribunal Supremo, decidió a favor de la acumulación de las causas y el 4 de diciembre de 2017 confirmó la detención.

18. Como consecuencia de la disolución del Parlamento de Cataluña, el 21 de diciembre de 2017 se celebraron nuevas elecciones, los Sres. Sánchez y Junqueras resultaron electos.

19. El 9 de enero de 2018 el Sr. Junqueras solicitó su traslado a un lugar de detención más cercano a Barcelona y su liberación temporal, para participar en la sesión inaugural del Parlamento, el 17 de enero. El 12 de enero fue negada la solicitud, indicando que existía riesgo de un enfrentamiento ciudadano.

20. La fuente destaca que, el 24 de enero de 2018, otro detenido y coacusado en el juicio, quien había sido electo Miembro del Parlamento, renunció a su cargo y se comprometió a no participar en actividades políticas y a no formar parte del Gobierno de Cataluña. Se alega que ello fue con el propósito de conseguir su liberación.

21. El 5 de marzo de 2018 el Sr. Sánchez aceptó la nominación para ser investido como Presidente del Gobierno de Cataluña. En consecuencia, solicitó ser liberado para acudir a la ceremonia. Tal posibilidad fue negada el 9 de marzo de 2018. El Sr. Sánchez tuvo que renunciar a su nominación.

22. El 21 de marzo de 2018, el Sr. Sánchez solicitó medidas provisionales al Comité de Derechos Humanos, que fueron concedidas el 23 de marzo de 2018. El Comité le pidió al Gobierno que adopte las medidas necesarias para que el Sr. Sánchez pueda ejercer sus derechos políticos. Según la fuente, el Gobierno no cumplió con las medidas.

23. El 21 de marzo de 2018, el Tribunal Supremo emitió auto de procesamiento por rebelión contra los Sres. Cuixart, Sanchez y Junqueras, confirmando su detención.

24. Según la fuente, la defensa de los detenidos ha presentado varios amparos, que han sido denegados o no respondidos. Todas las solicitudes de libertad han sido rechazadas en términos generales, sin individualizar, simplemente estableciendo que los deseos de independencia generan riesgo de re-ofender.

25. Se argumenta que a los detenidos no se les haya podido atribuir la comisión, planificación o instigación de violencia. Se alega que el auto de acusación, del 21 de marzo de 2018, reconoce que la actuación de los imputados consistió en participar en manifestaciones públicas. La violencia de pocos individuos, no relacionados con los acusados, no puede atribuírseles a estos.

26. La fuente aporta una decisión de una Corte Superior de Alemania que, al estudiar una solicitud de extradición del coacusado Ex presidente del Gobierno de Cataluña, no encontró elementos de violencia necesarios en el delito de rebelión. Se indica que el acusado no había planificado o efectivamente usado violencia o fuerza, sino más bien embarcado en el uso de medios democráticos, como el referéndum.

27. La fuente alega que la detención es el resultado del ejercicio de derechos o libertades garantizados en los artículos 18 a 21 de la Declaración Universal y los artículos 19, 21, 22 y 25 del Pacto.

28. La fuente reclama que, en auto del 16 de octubre de 2017, que acordó la detención por el delito de sedición, los únicos hechos en los que el Ministerio Público basó su acusación se relacionan con los eventos del 20 y 21 de septiembre de 2017. No obstante, la orden de detención se refiere a hechos de amplio rango, que ocurrieron antes, durante y después.

29. En relación a la participación de los Sres. Cuixart, Sánchez y Junqueras en los hechos del 20 y 21 de septiembre de 2017, la investigación solo reveló, según la fuente, que estos habían ejercitado libremente de su derecho a protestar. Para la fuente, ello no constituye base legal para una detención, sino que más bien está protegido por los derechos humanos.

30. Según la fuente, las manifestaciones fueron convocadas por muchos individuos y organizaciones, sindicatos, universidades, partidos políticos y asociaciones, sin que estén siendo objeto de un proceso penal o de una detención. Las manifestaciones fueron a favor del derecho de autodeterminación, a través de un referéndum.

31. La fuente indica que el Sr. Cuixart hizo llamados a la calma y la paz en las manifestaciones. Él y el Sr. Sánchez son reconocidos por sus llamados a la no violencia. Ninguna de las protestas organizadas por la asociación Omnium Cultural, en sus 56 años, han sido violentas. De acuerdo con la fuente, la Audiencia Nacional aceptó que Omnium Cultural tenía objetivos legítimos.

32. Se señala que un juez de la Audiencia Nacional consideró que los eventos del 20 y 21 de septiembre de 2017 consistieron en el legítimo ejercicio del derecho a la manifestación pacífica, de acuerdo a la ley: Se llamaba a la movilización de la ciudadanía para protestar ante una situación que se estaba produciendo y que no compartían. La concentración no tenía como intención desacatar e incumplir los mandamientos judiciales, sino ejercer su derecho a la protesta. Se trataba por tanto del ejercicio de un derecho legítimo y dentro de las vías legales, que compartían personalmente y con sus organizaciones.

33. El auto menciona, como parte del proceso criminal, otras acciones que no son punibles y son protegidas por los artículos 21 y 22 del Pacto, tales como la organización de movilizaciones masivas, pacificas, puntuales, ágiles y espectaculares; el llamado a huelga; concentraciones y manifestaciones. Es decir, el ejercicio legítimo de una actividad política, que no justifica la detención.

34. Por otro lado, la fuente argumenta que la detención es una consecuencia del ejercicio de sus derechos a la libertad de opinión y de expresión, que se alega fue criminalizado. La detención fue el resultado de haber expresado pública y pacíficamente el deseo de independencia.

35. La fuente destaca que el llamado a apoyar un referéndum fue despenalizado en España, a través de la Ley Orgánica 2/2015, pues constituye un ejercicio legítimo de la libertad de expresión, bajo los artículos 20 y 21 de la Constitución.

36. Los Sres. Cuixart, Sánchez y Junqueras han expresado su opinión política sobre la situación de Cataluña de forma pacífica y repetitiva. No hay evidencia de que sus acciones fuesen violentas, que hayan incitado a la violencia o que de hecho hayan ocasionado violencia. Los únicos actos de violencia en la acusación es aquella de la policía española, que no puede ser atribuida a los acusados.

37. Se indica que la opinión política de los Sres. Cuixart, Sánchez y Junqueras es la base para su detención, como fue implícitamente establecido en el auto del 5 de enero de 2018. El juez indicó que la detención del Sr. Junqueras no se justifica en su peligrosidad, sino en la probabilidad de que adopte la misma conducta, en relación a sus actividades políticas. Ello se equipara a mantener a alguien detenido por sus opiniones y creencias.

38. Se alega que la detención es resultado del ejercicio del derecho a participar en asuntos políticos. Para la fuente, hay un amplio consenso sobre el derecho de los enjuiciados, y los ciudadanos en general, a votar en el referéndum del 1 de octubre de 2017. La detención tiene como objetivo y consecuencia la restricción del derecho a comunicar ideas, incluyendo el llamado a votar, así como impedir la posibilidad de ser candidato y asumir el mandato, en caso de ser electo.

39. Se señala que, en diferentes decisiones, los jueces concluyeron que el riesgo de actividad criminal está vinculado con las responsabilidades políticas, indicando que el propósito material de la detención es evitar que participen en asuntos públicos.

40. El Sr. Sánchez, como candidato a las elecciones del Parlamento del 21 de diciembre de 2017, no pudo participar en la campaña y votación, a pesar de su rol y subsecuente triunfo. Posteriormente, fue impedido de asumir su cargo parlamentario. La detención tiene como objetivo, y consecuencia, privarlo de su participación política.

41. Según la fuente, el Sr. Junqueras, igualmente privado de su derecho a participar en la campaña y a ser electo. Fue impedido de asumir su cargo parlamentario y de participar en la sesión inaugural del Parlamento.

42. La fuente informa sobre el caso de otro líder catalán, también detenido y enjuiciado, que renunció a su rol político a cambio de la promesa de liberación. Su detención lo habría forzado a renunciar a sus derechos, con la esperanza de alcanzar su libertad.

43. Se argumenta que el objetivo del Gobierno lo demuestran las declaraciones de la entonces Vicepresidenta de España, cuando felicitó al Primer Ministro por tener éxito al decapitar y liquidar a los líderes independentistas. La fuente también llama la atención a las declaraciones del Ministro del Interior, en las que amenazó con enjuiciamiento y detención a otros dos políticos por haber preparado las listas para las elecciones de diciembre de 2017.

44. La fuente alega que la detención de es arbitraria por ser violatoria de los estándares internacionales de los artículos 9, 10 y 11 de la Declaración Universal, 9 y 14 del Pacto, y del Conjunto de principios para la protección de todas las personas sometidas a cualquier forma de detención o prisión.

45. Se alega además la falta de competencia de la Audiencia Nacional, pues esta consideró que la sedición, cuando es cometida con el objetivo de cambiar la organización territorial del Estado, debe ser considerado como una ofensa contra la forma de gobierno y, por lo tanto, la Audiencia Nacional tendría jurisdicción. No obstante, se argumenta que esta sería una errónea interpretación de la legislación, para dar jurisdicción a la Audiencia Nacional bajo el artículo 65.1 de la Ley Orgánica del Poder Judicial.

46. Se argumenta que la ofensa sobre la cual la Audiencia Nacional tiene jurisdicción sólo ha sido utilizada en relación con un ataque contra la forma de gobierno establecida en la Constitución: Monarquía Parlamentaria. No siendo aplicable a una situación de cambio y reorganización en las bases de la estructura regional. Es novedoso e injustificable que se extienda el significado de la ofensa para cubrir los alegatos contra los detenidos.

47. Para la fuente, la Audiencia Nacional sólo tiene competencia sobre ciertas ofensas específicas, lo cual no incluye la sedición. Una sentencia de ese mismo tribunal, del 2 de diciembre de 2008, determinó que la rebelión nunca ha recaído bajo la jurisdicción de la Audiencia Nacional. El tribunal no ha ofrecido motivos para justificar ese cambio de criterio.

48. Se argumenta que la transferencia del caso al Tribunal Supremo no subsana las irregularidades anteriores, porque fue la Audiencia Nacional la que dictó la orden privativa de libertad y porque, a todo evento, el Tribunal Supremo no es más competente. El tribunal con competencia sería el Tribunal Superior de Cataluña, pues el supuesto crimen habría sido cometido en ese territorio.

49. Para la fuente, los hechos descritos demuestran que los tribunales que mantienen detenidos a los Sres. Cuixart, Sánchez y Junqueras no son competentes, independientes e imparciales. Se alega que la declaración de la Vicepresidenta del Gobierno indica claramente la falta de independencia del proceso, no solo por su referencia a la decapitación de los líderes políticos, sino al calificar dicha acción como un logro del Primer Ministro.

50. Para la fuente, la falta de competencia y jurisdicción de los tribunales sobre estos asuntos, así como su falta de independencia e imparcialidad, afectó sus decisiones, incluyendo aquella de detener a los Sres. Cuixart, Sánchez y Junqueras. Como resultado, su privación de libertad constituiría una violación de los artículos 9 y 10 de la Declaración Universal y 9 y 14 del Pacto.

51. En relación a los Sres. Cuixart y Sánchez, el juez ordenó su detención sobre la base de los alegatos de sedición, en conexión con los eventos del 20 y 21 de septiembre de 2017, no obstante, hizo referencia a una sucesión de eventos antes y después, y a lugares en los que los acusados no estaban presentes. La defensa legal del Sr. Cuixart, en audiencia del 11 de enero de 2018, pidió al juez que le informase sobre los hechos concretos y crímenes imputados, pues estos permanecían en duda. Esta solicitud no ha sido respondida.

52. La fuente alega que la sedición requiere de un alzamiento público y tumultuario, lo cual es distinto de una declaración de independencia o de las manifestaciones pro-referéndum. Se indica que la doctrina española ha establecido que es imposible que el legislador hubiese criminalizado la oposición pacífica y colectiva a la ejecución de la ley o de la función pública. Apoyar la autodeterminación no constituye un crimen, sino un derecho, protegido por los artículos 16 y 22 de la Constitución.

53. Según la fuente, los Sres. Cuixart y Sánchez clamaron por una manifestación cívica y pacífica, insistiendo en que cualquier acto violento debía ser evitado. Los daños a vehículos que les atribuyeron, fueron el resultado de acciones de individuos no identificados y que no guardan relación con los detenidos. La Guardia Civil reconoció que otros en la movilización intentaron proteger vehículos del daño.

54. Se destaca que, en una opinión disidente, uno de los jueces de la Audiencia Nacional instó a sus colegas a ser prudentes al establecer los hechos, objetiva y penalmente, y a no desviarse por presunciones, subjetivismo y prejuicios de los hechos. En un análisis de los hechos no es posible identificar un posible delito.

55. Según la fuente, el Sr. Junqueras fue detenido por rebelión, que tampoco puede probarse. Bajo el artículo 472 del Código Penal, la rebelión la cometen quienes se alcen violenta y públicamente para, entre otras cosas, declarar la independencia de una parte del territorio nacional. El delito sólo puede existir si se ha producido en el contexto de un enfrentamiento armado, o al menos violento.

56. Se informa que el anterior fiscal jefe del Tribunal Superior de Cataluña destacó que el comportamiento democrático de más de un millón de ciudadanos, ejercitando su derecho a manifestar pacíficamente, no podía constituir violencia, y menos rebelión.

57. Según la fuente, declarar la independencia de una parte del territorio no encuadra en la definición de rebelión. Para que se constituya ese crimen, se requiere violencia. Se alega que no hubo violencia en ninguna etapa del proceso, excepto la de la Policía Nacional, por la que los detenidos no son responsables.

58. La sedición, por su parte, es una ofensa prevista en el artículo 544 del Código Penal, que requiere un levantamiento violento y colectivo para derogar las leyes. La fuente argumenta que una protesta pacífica no puede constituir sedición. Desde 2005, los actos de convocar o participar en un referéndum han sido despenalizados.

59. Se informa que los Tribunales de Cataluña, durante años, han recibido quejas de sedición relacionadas con actos pro-independencia (por ejemplo, decisiones de 24 de marzo de 2014 y del 8 de enero de 2015). Desde 2014, estos tribunales, que tienen competencia territorial exclusiva sobre dichas denuncias, las han rechazado debido a la ausencia de violencia y la falta de atribución personal de acciones específicas.

60. Para la fuente, el juez consideró que el Sr. Junqueras era responsable de la violencia, pero que él no participó, anticipó y provocó la misma. La orden de detención no particularizó el comportamiento alegado contra el Sr. Junqueras y no pudo establecer si su actuación amerita la privación de libertad.

61. La fuente destaca el estándar según el cual la presunción de inocencia es vulnerada si una declaración oficial sobre un acusado da la impresión de culpabilidad, cuando esta no se haya determinado judicialmente. Dicha vulneración habría sucedido cuando el Primer Ministro describió al movimiento de independencia y sus líderes como rebeldes imprudentes e incluso peligrosos. Además, cuando la Vicepresidenta anunció que el Gobierno había triunfado en la decapitación de sus líderes.

62. Se agrega que, contrario a la presunción de inocencia, la Cámara de Apelaciones de la Audiencia Nacional ha declarado que ciertos hechos son de conocimiento común y no necesitan ser probados. Por ejemplo, indicó que el hecho de que el Sr. Cuixart se haya parado en un vehículo de la Policía Nacional constituye un acto conocido. Sin embargo, ese hecho debe interpretarse en su contexto, pues no hay acuerdo sobre el mismo: el Sr. Cuixart estaba en este vehículo pidiéndole a la multitud detener la manifestación, por lo tanto, ese actuar no puede ser usado en contra de él, sin antes aclarar el contexto.

63. Para la fuente, queda en evidencia que la detención viola la presunción de inocencia, protegida por los artículos 11.1 de la Declaración Universal y 14.2 del Pacto.

64. La fuente, además, destaca la vulneración del derecho a la defensa, que implica que el individuo tenga tiempo y medios para preparar argumentos y pruebas en su favor. Respecto a los Sres. Cuixart y Sánchez, se destaca que fueron citados el 3 de octubre de 2017 para comparecer en una audiencia el 6 de octubre. Al Sr. Junqueras se le concedió incluso menos tiempo, fue citado el 1 de noviembre de 2017, para rendir declaración y luego ser detenido el

2 de noviembre de 2017. A pesar de ello, la orden del 2 de noviembre de 2017 determinó que el acusado se había beneficiado del tiempo necesario para preparar su defensa, sin considerar el hecho de que su abogado no estaba presente.

65. La fuente explica que el tribunal recibió la denuncia del Ministerio Público el 31 de octubre. Al día siguiente, (1 de noviembre, día festivo), el Sr. Junqueras recibió una citación, por lo que él y su abogado debían viajar, sin demora, la distancia entre Barcelona y Madrid (630 km), para comparecer en la audiencia. Se señala que ello no permitió tiempo suficiente a la defensa para consultar, procesar y responder a la acusación de 117 páginas, mucho menos el expediente entero.

66. El abogado del Sr. Junqueras no pudo estar presente, ya que también era defensor de otros miembros del Parlamento, convocados el mismo día ante el Tribunal Supremo, algo que la Audiencia Nacional ignoró. Lejos de aplazar la audiencia, el juez procedió en ausencia del abogado defensor. Todos los acusados plantearon, ese día, su incapacidad para preparar su defensa dentro del tiempo disponible.

67. Finalmente, la fuente alega que, debido a que la detención se debe a la defensa del derecho de los catalanes a la autodeterminación, esta constituye una discriminación basada en la opinión política. Se destaca el vínculo entre las personas encarceladas y la situación política. Los detenidos están públicamente asociados con el movimiento independentista. Además, los hechos en cuestión y su arresto tuvieron lugar en esa región. Esto proporciona una base adicional sobre la cual se afirma que la detención de los Sres. Cuixart, Sanchez y Junqueras es arbitraria y viola sus derechos fundamentales.

68. La fuente concluye solicitando que declare la detención es arbitraria bajo las categorías II, III y V.

Respuesta del Gobierno

69. El 8 de agosto de 2018, el Grupo de Trabajo transmitió las alegaciones de la fuente al Gobierno, solicitándole que, antes del 8 de octubre de 2018, suministrara información detallada sobre las bases jurídicas y fácticas de la detención, así como la compatibilidad de ésta con las obligaciones internacionales de España en materia de derechos humanos. El Gobierno solicitó una prórroga al lapso de contestación, que fue concedida hasta el 8 de noviembre de 2018.

70. En su respuesta, el Gobierno señala que la detención de los Sres. Cuixart, Sánchez y Junqueras ha sido ordenada en una causa penal que se sigue ante el Tribunal Supremo, a la que se acumuló la que inicialmente se seguía ante la Audiencia Nacional. El Juez Instructor adoptó, y la Sala Penal del Tribunal Supremo confirmó, la detención mientras se tramita la causa, en la cual todavía no se ha dictado sentencia.

71. El Gobierno indica que la Constitución Española prevé la posibilidad de adoptar la medida de prisión provisional en su artículo 17, y la Ley de enjuiciamiento criminal atribuye a los jueces la capacidad de imponer la medida cautelar de prisión provisional cuando se verifican las causas previstas en los artículos 503 y 504.

72. El Gobierno indica que, en España rige el Estado de Derecho y el principio de separación de poderes, por lo que en las decisiones adoptadas por el Poder Judicial (en este caso el Tribunal Supremo) no han intervenido el Poder Legislativo ni el Ejecutivo.

73. De acuerdo con el Gobierno, observaciones presentadas basan en las resoluciones contenidas en la causa penal, que son manifestación del poder del Estado (en el presente caso el Judicial), que decidió las detenciones. Por ello, refiere el Estado, no son relevantes los comentarios de los miembros del Poder Ejecutivo o de los partidos políticos, ya que ni uno ni otros han adoptado las medidas de detención, ni existe indicio de que hayan influido en las decisiones del Poder Judicial.

74. El Gobierno precisa que: este no asumió las competencias del Parlamento de Cataluña, acordada su disolución y convocadas elecciones, sus funciones siguieron siendo ejercidas por la Diputación Permanente del Parlamento de Cataluña; se indica el rechazo del Comité de Derechos Humanos de medidas provisionales a favor del Sr. Sánchez en términos del artículo 92 de su Reglamento; refiere que el Tribunal Regional Alemán han considerado que en

España no hay persecución por motivos políticos y que no existen presos de conciencia; y que los amparos presentados han sido admitidos a trámite y están aún en término para su resolución, de acuerdo con criterios del Comité de Derechos Humanos[1] .

75. El Gobierno destaca que la Constitución Española permite su modificación completa al no exigir el principio de "democracia militante" y establece un procedimiento específico para ello, en su artículo 168.

76. Agrega el Gobierno que, en consecuencia, en España son legales los partidos políticos que promueven la separación de Cataluña del resto de España y la Constitución recoge mecanismos que permiten llegar a esa situación, en el marco del Estado de Derecho. Así fue reafirmado por la sentencia del Tribunal Constitucional 42/2014, en la que señala que "el derecho a decidir de los ciudadanos de Cataluña" debe articularse a través de los principios de legitimidad democrática, de diálogo y de legalidad, todo ello en el marco de la Constitución y de los procedimientos de reforma en ella establecidos.

77. De acuerdo con el Gobierno, el movimiento independentista, al no contar con las mayorías requeridas, optó por no respetar el Estado de Derecho y actuar de forma unilateral. Según el Tribunal Constitucional:

> (...) atentado tan grave al Estado de derecho conculca por lo demás, y con pareja intensidad, el principio democrático, habiendo desconocido el Parlamento que el sometimiento de todos a la Constitución es otra forma de sumisión a la voluntad popular, expresada esta vez como un poder constituyente del que es titular el pueblo español, no ninguna fracción del mismo. (...)

78. El Gobierno refiere que tampoco se contaba con las mayorías para modificar el Estatuto de Autonomía de Cataluña, que exige mayorías de dos tercios del Parlamento de Cataluña para aprobar una reforma.

79. Según el Gobierno, el movimiento independentista, aprovechándose del control de la Presidencia, y con el apoyo de las instituciones dirigidas por los Sres. Sánchez y Cuixart, impulsó un referéndum inconstitucional y aprobando leyes inconstitucionales, que llevaban hacia una declaración de independencia, sin contar con la mayoría de votos, y tampoco con la mayoría suficiente de escaños en el Parlamento de Cataluña.

80. De acuerdo con el Gobierno, en el referéndum de aprobación de la Constitución Española de 6 de diciembre de 1978, votaron a favor el 90, 46 % de los electores en Cataluña, siendo el índice de participación del 68% del censo electoral, por lo que votaron a favor del sí a la Constitución el 62% de los catalanes con derecho a voto. En cambio, señala del Gobierno, el movimiento independentista nunca ha tenido la mayoría de votos en Cataluña.

81. El Gobierno señala que desde que España recuperó la democracia plena, en 1977, se ha consolidado como un país de alta calidad democrática, en el que se garantizan los derechos y las libertades de todos sus habitantes, de conformidad con las más prestigiosas instituciones internacionales. Destaca como hecho notorio el reconocimiento internacional de la transición democrática, cuyo punto esencial fue la Constitución de 1978.

82 Según el Gobierno, las actuaciones judiciales del presente caso no pueden entenderse como una reacción a la aspiración política legítima de separación de Cataluña, sino exclusivamente con una medida judicial, por unos hechos concretos, llevados a cabo al margen del Estado de Derecho.

83. A decir del Gobierno, desde el momento en que se adoptaron las decisiones judiciales de detención, y ante solicitud y recurso de las personas afectadas, las resoluciones judiciales han confirmado la detención, manteniendo la misma por riesgo de reiteración delictiva.

84. El Gobierno indica que las detenciones de los Sres. Sánchez y Cuixart se acordaron inicialmente por autos de la Juez Instructora de la Audiencia Nacional, el 16 de octubre, y la del Sr. Junqueras el 2 de noviembre de 2017. Posteriormente fueron confirmadas por la Sala

[1] El Gobierno hace referencia a la Comunicación 1341/2005, Zündel c. Canadá, del Comité de Derechos Humanos.

de lo Penal de la Audiencia Nacional, Sala de lo Penal del Tribunal Supremo y resoluciones del Juez Instructor, dando respuesta a las peticiones de libertad y/o permisos solicitados.

85. En relación a los elementos de hecho, el Gobierno hacer referencia a lo establecido por el Juez Instructor el 21 de marzo de 2018, recogido por la Sala de lo Penal del Tribunal Supremo, por el que se procesa a los Sres. Cuixart, Sanchez y Junqueras por los delitos de rebelión, malversación y desobediencia y por los que acuerda el mantenimiento de la detención, por no haber desaparecido el riesgo de reiteración delictiva, además de la existencia de riesgo de fuga.

86. El Gobierno señala que la resolución del 21 de marzo de 2018 del Juez Instructor recoge los antecedentes fácticos del caso calificándolos, en lo que aquí interesa, como delito de rebelión. El Gobierno precisa que inicialmente se calificaron los hechos como delito de sedición, si bien a medida que avanzaba la instrucción el juez instructor consideró que los hechos indiciariamente se integraban en el tipo de la rebelión.

87. El Gobierno indicia que el Poder Judicial consideró que concurrían los supuesto previstos en el art. 503 Ley de Enjuiciamiento Criminal, para la detención y su mantenimiento, a saber: i) los hechos presentan los caracteres de delito sancionado con penas superiores a 2 años de prisión; ii) motivos bastantes para entender criminalmente responsable a persona determinada; iii) apreciación de la existencia de riesgo de fuga y reiteración delictiva.

88. Según el Gobierno, la prisión preventiva en España es legítima siempre que se fundamente conforme al Estado de Derecho y en el marco del Pacto Internacional de Derechos Civiles y Políticos; en el presente caso, las medidas no se adoptan con objeto de limitar derechos, sino como consecuencia de la actuación de las personas afectadas, que el juez competente valora como posiblemente constitutivas de delitos muy graves, contrarios al Estado de Derecho.

89. En relación con la alegada falta de competencia y jurisdicción de la Audiencia Nacional y del Tribunal Supremo, por considerar que los delitos han sido cometidos en Cataluña, el Gobierno señala que debe considerarse –como lo hizo el Tribunal Supremo– que algunos de los comportamientos que se han desplegado han desbordado el territorio: la agenda intervenida a José María Jové, el Libro Blanco para la independencia de Cataluña y, en relación con el referéndum, la compra de urnas y la impresión de las papeletas para la votación en el extranjero (Francia).

90. El Gobierno remite a lo expuesto respecto de la tipificación que hace el Tribunal Supremo de los hechos imputados a los Sres. Cuixart, Sanchez y Junqueras.

91. En relación a la vulneración de la presunción de inocencia, el Gobierno indica que esta solo puede ser quebrantada por el Poder Judicial, y que no se puede atribuir ésta a las declaraciones de miembros del Poder Ejecutivo.

92. Sobre el alegato de falta de tiempo para la preparación de la defensa, se indica que la suspensión no fue pedida por el Sr. Junqueras al inicio de su declaración, sino que se limitó a presentar por registro general una petición de suspensión, que llegó a la Juez instructora después de celebradas las declaraciones, no antes de éstas.

93. Respecto de los Sres. Cuixart y Sánchez, en el Auto de la Juez Instructora, del 16 de octubre de 2017, en el que se les detiene, no existe ninguna queja ni petición de suspensión vinculada a no haber tenido tiempo de preparar la defensa. En el recurso de apelación resuelto por Auto de la Sala de lo Penal de la Audiencia Nacional, el 6 de noviembre, no se indica como motivo de impugnación la falta de tiempo para la defensa. Así mismo refiere que en las sucesivas peticiones de libertad y recursos de presentados, no han alegado la existencia de límites a su defensa.

94. El Gobierno señala que no existe discriminación en el presente caso y refiere los argumentos de la Sala de lo Penal del Tribunal Supremo, en una resolución del 5 de enero de 2018, donde, al negar una petición de libertad del Sr. Junqueras, se indica que el juicio no busca perseguir la disidencia política.

Información adicional de la fuente

95. La fuente presentó comentarios adicionales sobre las expresiones no violentas de las opiniones políticas de los Sres. Cuixart, Sánchez y Junqueras, así como por haber ejercido sus derechos a la libertad de asociación, reunión y participación en los asuntos públicos de su país, lo que las transforma en arbitrarias. De la misma forma, profundizó con elementos relativos a las violaciones a los derechos al debido proceso legal de los detenidos.

Deliberaciones

96. El Grupo de Trabajo agradece a la fuente y al Estado por el envió de la información correspondiente.

97. El Grupo de Trabajo tiene por mandato investigar los casos de privación de libertad impuesta arbitrariamente que le son sometidos a su conocimiento, para lo cual se remite a las normas internacionales pertinentes establecidas en la Declaración Universal y el Pacto.

98. El Gobierno solicitó, con fundamento en la Regla 33 de los métodos de trabajo, que parte de la presente queja sea remitida al Comité de Derechos Humanos, pues este se encontraría en consideración del caso. Se indica que este estaría examinando elementos relativos a la participación política, a los derechos de asociación y reunión, de libertad de opinión y expresión, y que se trata de los mismos hechos y mismas personas.

99. A ese respecto, el Grupo de Trabajo desea recordar que la Regla 33, incisos a) y d), fracción ii), busca fortalecer la coordinación eficaz de los distintos órganos de derechos humanos, tanto de los procedimientos especiales como los órganos de tratados.

100. En ese contexto, el Grupo de Trabajo recibió información de las partes sobre los hechos y el derecho aplicable, con miras a determinar si se violó el derecho a no ser arbitrariamente privado de la libertad, ello incluye algunos elementos vinculados a los derechos a la participación política, a la asociación y reunión, así como a la libertad de opinión y expresión. El Gobierno no estableció que el reclamo presentado ante el Comité se refieren al derecho a la libertad personal y no ser sujeto de detención arbitraria. A partir de lo anterior, se considera que en el presente caso no se satisface el supuesto previsto en la Regla 33 inciso d) fracción ii), al no ser coincidentes los mismos hechos y los mismos derechos presuntamente violados.

101. Habiendo establecido su posición en torno a esa cuestión procedimental conforme a sus métodos de trabajo y a su práctica,[2] el Grupo de Trabajo reafirma su competencia para conocer del presente caso.

102. El Grupo de Trabajo, ha establecido en su jurisprudencia la manera de proceder en relación con las cuestiones probatorias. Si la fuente ha presentado indicios razonables de una vulneración de la normativa internacional sobre la libertad personal, constitutiva de detención arbitraria, debe entenderse que la carga de la prueba recae en el Gobierno, en caso de que desee refutar las alegaciones[3].

103. El Grupo de Trabajo constató que los Sres. Cuixart, Sánchez y Junqueras son figuras públicas, reconocidas por su trabajo a favor de la independencia de Cataluña, que se han desempeñado en cargos en asociaciones, partidos políticos y en la función pública.

104. De la misma forma, corroboró que los Sres. Cuixart y Sánchez fueron citados el 6 de octubre de 2017 y posteriormente detenidos bajo la figura de prisión preventiva por Juzgado de Instrucción de la Audiencia Nacional. El Sr. Junqueras fue detenido después de rendir declaración por orden del Juzgado de Instrucción, el 2 noviembre de 2017.

Categoría II

105. La fuente alega que la detención de los Sres. Cuixart, Sánchez y Junqueras es el resultado del ejercicio de derechos y libertades garantizados en los artículos 19 a 21 de la Declaración Universal y los artículos 19, 21, 22 y 25 del Pacto.

[2] Opinión No. 89/2018, párr. 64-67
[3] Véase A/HRC/19/57, párr. 68.

106. El Grupo de Trabajo destaca que toda persona tiene derecho a libertad de expresión, lo que comprende el derecho a difundir información e ideas de toda índole, sea oralmente o por cualquier otra forma. Además, el Grupo también reitera que el ejercicio de ese derecho puede estar sujeto a restricciones, expresamente fijadas por la ley y necesarias para asegurar el respeto a los derechos o reputación de los demás, así como la protección de la seguridad nacional, el orden público, la salud o la moral pública.[4]

107. El Grupo de Trabajo coincide con el Comité de Derechos Humanos, en que la libertad de opinión y de expresión son indispensables para el pleno desarrollo de la persona y constituyen la piedra angular de las sociedades libres y democráticas.[5] Ambas libertades constituyen la base para el pleno goce de otros derechos humanos, como por ejemplo para el disfrute de la libertad de reunión y de asociación, y para el ejercicio del derecho a la participación política.[6]

108. La importancia del derecho a la libertad de opinión es tal, que ningún gobierno puede restringir otros derechos humanos por las opiniones -políticas, científicas, históricas, morales o religiosas- expresadas o atribuidas a una persona. No es compatible con la Declaración, ni con el Pacto, calificar como delito la expresión de una opinión, lo que implica que no están permitidos el acoso, la intimidación o estigmatización de una persona, incluida su detención, prisión preventiva, enjuiciamiento o reclusión, en razón de sus opiniones.[7]

109. También es relevante señalar que la libertad de opinión y de expresión comprende la posibilidad de manifestar la forma en que los pueblos pueden determinar libremente su sistema político, su constitución o gobierno, lo que evidencia el vínculo con otros derechos humanos. El Comité de Derechos Humanos ha señalado que "[l]os derechos consagrados en el artículo 25 están relacionados con el derecho de los pueblos a la libre determinación, aunque son distintos de él. De conformidad con el párrafo 1 del artículo 1, los pueblos gozan del derecho a determinar libremente su condición política, y del derecho a elegir la forma de su constitución o gobierno. El artículo 25 trata del derechos de las personas a participar en los procesos de dirección de los asuntos públicos."[8]

110. El Grupo de Trabajo, al mismo tiempo que constató que el referéndum está permitido en España para una amplia gama de temas, incluso el relacionado al presente caso, considera que los llamados a celebrar procesos de participación ciudadana, sean por individuos o a través de organizaciones, son expresiones legítimas del ejercicio de la libertad de opinión y de expresión.

111. El Grupo de Trabajo constató que el 20 y 21 de septiembre de 2017 se celebró una manifestación pública a favor de celebrar un referéndum por la independencia de Cataluña. En ese contexto, se presentaron incidentes o conflictos entre los manifestantes y la policía. También se constató que esos hechos cocretos no han podido ser atribuidos a los Sres. Cuixart, Sánchez y Junqueras.

112. Los Sres. Cuixart, Sánchez y Junqueras fueron acusados por sedición, en relación a la protesta social pacífica del 20 y 21 de septiembre de 2017, en la que participaron además miles de personas. La acusación fue modificada posteriormente con el delito de rebelión.

113. El Grupo de trabajo verificó que el elemento de violencia es esencial para calificación penal de los delitos imputados. En su respuesta, el Gobierno ofreció información sobre el proceso independentista, pero no presentó información sobre acciones concretas de los acusados que puedan haber involucrado violencia y, por lo tanto, constituir delito conforme al derecho aplicable, incluido el derecho internacional.

114. El Grupo de Trabajo constató que las acciones de los Sres. Cuixart, Sánchez y Junqueras, anteriores o posteriores a la celebración de la protesta social del 20 y 21 de septiembre de 2017, no fueron violentas, tampoco incitaron a la violencia, y sus conductas no han dado como resultado hechos u actos de violencia. De lo contrario, consistieron en el

[4] Opinión 58/2017, párr. 42
[5] CCPR/C/GC/34, párr. 2
[6] CCPR/C/GC/34, párr. 4
[7] CCPR/C/GC/34, párr. 9-10
[8] CCPR/C/21/Rev.1/Add.7, párr. 2

ejercicio pacífico de los derechos a la libertad de opinión, expresión, asociación, reunión y participación. Incluso se recibió información sobre el testimonio de un Juez que señaló que los eventos atribuibles a los acusados son expresiones del legítimo ejercicio del derecho a protesta pacífica.[9]

115. En este sentido, el Relator Especial sobre el derecho a la libertad de opinión y expresión, mostró preocupación por estos arrestos, al "estar directamente relacionadas con los llamamientos a la movilización y participación ciudadana realizados en el ámbito del referéndum." También expresó preocupación por que "la imputación de un delito de rebelión pudiera ser desproporcionado y por tanto incompatible con las obligaciones de España en el marco de las normas internacionales de derechos humanos.[10]

116. El Grupo de Trabajo, además, toma nota de la resolución de un tribunal alemán, que al analizar la extradición del Sr. Carles Puigdemont (coacusado), no encontró elementos de violencia en los hechos imputados, necesarios para el delito de rebelión, y confirmó que sus acciones no pueden considerarse un intento de derrocamiento político violento del Gobierno. Indicó que los acusados buscaban la independencia por medios democráticos.[11]

117. El Grupo de Trabajo recibió información convincente, que no refutada por el Gobierno, sobre la situación del Sr. Forn, detenido y acusado en este caso, y que fue persuadido de suprimir su activismo, en favor de la causa independentista, a cambio de ser liberado.

118. Un proceso penal como el del presente caso se vuelve inverosímil si se analiza con el momento político convulso en el que se presenta la acusación y en fechas cercanas a la posible celebración de un referéndum, cuando Sres. Cuixart, Sánchez y Junqueras llevan años de trayectoria política impulsando la independencia de Cataluña. A ello se adicionan las declaraciones de altos funcionarios de Gobierno (que se desarrollarán en el apartado siguiente) que hablan de descabezar a los líderes del movimiento independentista y pretender calificar la conducta de los Sres. Cuixart, Sánchez y Junqueras de violenta ante una protesta social.

119. La inexistencia del elemento de violencia y la ausencia de información convincente sobre hechos atribuibles a los Sres. Cuixart, Sánchez y Junqueras, que los involucren en conductas constitutivas de los delitos imputados, han generado la convicción en el Grupo de Trabajo de que las acusaciones penales en su contra tienen por objeto coaccionarlos por sus opiniones políticas en torno a la independencia de Cataluña e inhibirlos de continuar con esa pretensión en el ámbito político.

120. El Grupo de Trabajo fue convencido de que las acusaciones penales contra los Sres. Cuixart, Sánchez y Junqueras tuvieron por objeto justificar su detención como resultado del ejercicio de derechos a la libertad de opinión, expresión, asociación, reunión y participación política, en contravención de los artículos 18 a 21 de la Declaración Universal y los artículos 19, 21, 22 y 25 del Pacto, por lo que es arbitraria conforme a la categoría II.

Categoría III

121. En vista de los hallazgos bajo la categoría II, el Grupo de Trabajo considera que no existieron bases para la detención preventiva y el juicio. Sin embargo, en vista de que el mismo esta siendo llevado a cabo, y considerando las alegaciones de la fuente, el Grupo de Trabajo procederá a analizar si durante el curso de dicho procedimiento judicial se han respetado elementos fundamentales de un juicio justo, independiente e imparcial.

Presunción de inocencia

122. La Declaración Universal, en su artículo 11.1 y el Pacto en su artículo 14.2, reconocen el derecho de toda persona acusada a que se le presuma su inocencia. Ese derecho impone obligaciones a las instituciones del Estado, de que el acusado sea tratado como inocente hasta que se haya dictado sentencia, más allá de toda duda razonable. Ese derecho obliga a todas

[9] Voto particular del magistrado José Ricardo de Parada Solaesa de fecha 07 de noviembre 2017.
[10] AL ESP 1/2018.
[11] Decision of the Higher Regional Court of Schleswig-Holsteinisches, 12 July 2018.

las autoridades públicas de un país a evitar prejuzgar el resultado de un juicio lo que implica abstenerse de hacer declaraciones públicas que afirmen la culpabilidad del acusado.[12]

123. El Grupo de Trabajo ha determinado que las injerencias públicas que condenan abiertamente a los acusados, antes de la sentencia, vulneran la presunción de inocencia constituyen una injerencia indebida que afecta a la independencia y la imparcialidad del tribunal.[13]

124. En similar sentido, el Tribunal Europeo de Derechos Humanos ha indicado que las declaraciones públicas de altos funcionarios violan el derecho a la presunción de inocencia de las personas cuando éstas son señaladas como responsables de un delito por el cual aún no han sido juzgadas, y con ello pretender convencer al público de su responsabilidad, así como por prejuzgar la valoración de los hechos por la autoridad judicial competente.[14]

125. Ante las alegaciones de la fuente sobre la violación a la presunción de inocencia, el Gobierno indicó que declaraciones efectuadas por el Poder Ejecutivo no eran relevantes, ya que en su opinión no existe ningún indicio de que hayan influido en la toma de decisiones del Poder Judicial.

126. En el presente caso, se recibió información creíble sobre las declaraciones de la Vicepresidenta de España a través de las cuales felicita al Primer Ministro por haber logrado decapitar a los partidos independentistas de Cataluña, mediante los arrestos de sus líderes. A ello se suman declaraciones del Ministro del Interior, en las que se refirió a los líderes del movimiento independentista como imprudentes, peligrosos y rebeldes.

127. Por otro lado, la Cámara de Apelaciones de la Audiencia Nacional indicó que ciertos hechos atribuibles a los acusados son de conocimiento común y no necesitan ser probados. Por ejemplo, para dicho tribunal el hecho de que el Sr. Cuixart, el 20 de septiembre de 2017, se haya parado en un vehículo de la Policía Nacional constituye un acto conocido. Sin embargo, el Grupo de Trabajo recibió información convincente que los Sres. Cuixart y Sanchez, hicieron llamados a disolver la manifestación de manera tranquila en ese momento.

128. Vistos los pronunciamientos de altos funcionarios del Estado que han mostrado a la ciudadanía una anticipada responsabilidad penal de los detenidos, pudiendo llegar a influir sobre la imagen de en los mismos ante los órganos judiciales, el Grupo de Trabajo fue convencido de que se violó el derecho a la presunción de inocencia de los Sres., Cuixart, Sánchez y Junqueras, en contravención a lo dispuesto en los artículos 11.1 de la Declaración Universal y 14.2 del Pacto.

Prisión Preventiva

129. Es una norma establecida de derecho internacional que la detención preventiva debe ser la excepción y no la regla, y que debe ordenarse por el menor tiempo posible. El artículo 9, párrafo 3, del Pacto requiere que una decisión judicial motivada examine los méritos de la prisión preventiva en cada caso. Esta disposición además establece que la "liberación puede estar sujeta a garantías de comparecer a juicio, en cualquier otro lugar. etapa de los procedimientos judiciales y, en caso de surgir, para la ejecución de la sentencia". De ello se deduce que la detención debe ser una excepción en interés de la justicia. Las disposiciones contenidas en el artículo 9, párrafo 3, del Pacto pueden resumirse de la siguiente manera: cualquier detención debe ser excepcional y de corta duración, se debe favorecer la liberación cuando existan medidas que garanticen la presencia del acusado en el juicio y la ejecución de la sentencia; en caso de prolongarse la prisión preventiva, debe incrementar la presunción en favor del juicio en libertad.

130. En el presente caso, los acusados fueron detenidos en octubre y noviembre de 2017 y han permanecido en prisión preventiva durante el juicio, que no ha concluido. La fuente ha

[12] CCPR/C/GC/32, párrafo 30

[13] Opiniones 90/2017 y 76/2018.

[14] Corte Europea de Derechos Humanos, Allenet de Ribemont v. France, § 41; Daktaras v. Lithuania, § 42; Petyo Petkov v. Bulgaria, § 91; Peša v. Croatia, § 149; Gutsanovi v. Bulgaria, §§ 194-198; Konstas v. Greece, §§ 43 and 45; Butkevičius v. Lithuania, § 53; Khuzhin and Others v. Russia, § 96; Ismoilov and Others v. Russia, § 161.

indicado que las negativas de libertad condicionada han sido motivadas en el supuesto peligro de reincidir en el llamado independentista, pues podría causar nuevas manifestaciones populares. El Grupo de Trabajo concluyó que la detención es arbitraria por ser el resultado del ejercicio del derecho a las libertades de opinión, expresión, asociación, reunión y participación. Por otro lado, no se ha podido constatar que los jueces o el Gobierno hayan analizado y concluido, conforme al Pacto, que existan bases legítimas, necesarias y proporcionales para restringir esos derechos humanos, a través de la privación de libertad, desde octubre y noviembre de 2017 y durante el transcurso del juicio. En consecuencia, el Grupo de Trabajo debe concluir que la prisión preventiva ha sido en contravención del artículo 9.3 del Pacto.

Derecho a ser juzgado por un tribunal competente e imparcial

131. Según el artículo 14.1 del Pacto, toda persona tendrá derecho a ser oída públicamente y con las debidas garantías por un tribunal competente, independiente e imparcial, en la substanciación de cualquier acusación de carácter penal en su contra. El Grupo de Trabajo coincide en que los jueces no deben permitir que su fallo se vea influido por sesgos o prejuicios personales, tener ideas preconcebidas en cuanto al asunto bajo su consideración, o comportarse de forma indebida que promueva intereses de las partes.[15]

132. El Grupo de Trabajo no fue convencido de que los actos atribuibles a los Sres. Cuixart, Sánchez y Junqueras hubieran sido violentos. Por el contrario, constató que se llevaron a cabo como ejercicio de la libertad de opinión, expresión, reunión, asociación y participación política, a lo largo de varios años.

133. De la misma forma, el Grupo de Trabajo encontró elementos que permiten suponer que jueces que han tenido conocimiento del asunto han tenido ideas preestablecidas sobre el mismo. Ello se constata, por ejemplo, con los señalamientos derivados del proceso ante la Cámara de Apelaciones de la Audiencia Nacional, en que se hizo referencia a que ciertos hechos son de conocimiento común y no necesitan ser probados.

134. Por otro lado, el Grupo de Trabajo ha considerado que el enjuiciamiento criminal de individuos acusados por delitos cometidos en un determinado territorio, por parte de tribunales ubicados en otra jurisdicción, constituye una violación del derecho a ser juzgado por el juez competente, cuando la legislación nacional le atribuye expresamente la competencia a la jurisdicción de la localidad donde se cometió el supuesto delito.[16]

135. El Grupo de Trabajo, en el presente caso, fue convencido de que la jurisdicción territorial, personal y material que le compete investigar y juzgar posibles actos delictivos eran los tribunales de Cataluña, debido a que los crímenes presuntamente fueron cometidos en territorio de Cataluña, así como por funcionarios de Gobierno y parlamentarios catalanes. Además, el Grupo de Trabajo recibió información convincente de que los tribunales de Cataluña han conocido denuncias relacionadas con el proceso de independencia de España. Por otro lado, el Grupo de Trabajo no fue convencido de que el juez natural para juzgar los presuntos delitos referidos en el presente caso le corresponde a los tribunales que actualmente conocen de ellos.

136. Por las razones anteriores, el Grupo de Trabajo considera que fue inobservado el que derecho a ser juzgados por tribunal competente e imparcial de los Sres. Cuixart, Sánchez y Junqueras, reconocidos en los artículos 10 de la Declaración Universal y 14.1 del Pacto.

Derecho a contar con tiempo y medios adecuados para la defensa

137. El artículo 14.3.b) del Pacto reconoce el derecho de toda persona a "disponer del tiempo y de los medios adecuados para la preparación de su defensa", lo cual constituye una garantía importante para un juicio justo y para el principio de igualdad de armas.[17] Contar con los medios adecuados para la defensa incluye, entre otras, la posibilidad de acceder con

[15] CCPR/C/GC/32, párr. 21
[16] Opinión No. 30/2014.
[17] CCPR/C/GC/32, párr. 32

anticipación a todos los materiales, documentos y otras pruebas que las fiscalías tengan previsto presentar ante el tribunal.[18]

138. El Grupo de Trabajo comparte la apreciación de que cuando los abogados reclaman que el tiempo ofrecido para la preparación de la defensa no es suficientemente razonable puede solicitar un aplazamiento, y las autoridades en principio deben aceptar dichas solicitudes. Es importante señalar que "existe la obligación de aceptar las solicitudes de aplazamiento que sean razonables, en particular cuando se impute al acusado un delito grave y se necesite más tiempo para la preparación de la defensa".[19]

139. En el presente caso, el Grupo de Trabajo fue convencido de que los Sres. Cuixart, Sánchez y Junqueras no contaron con tiempo suficiente para preparar su defensa, al haber existido un tiempo muy breve entre la notificación y la audiencia, teniendo en cuenta el tamaño del expediente y las distancias. Además, se constató que a los acusados no se les concedió más tiempo para preparar su defensa y que ello implicó una afectación al acceso irrestricto a los medios adecuados para su protección legal. Ello implica la inobservancia del derecho reconocido en los artículos 11.1 de la Declaración Universal y 14.3.b) del Pacto.

140. Por lo anterior, el Grupo de Trabajo fue convencido de que la privación de libertad de los señores Cuixart, Sánchez y Junqueras se llevó a cabo en detrimento de garantías fundamentales del debido proceso y un juicio justo, en particular la presunción de inocencia, ser juzgado por tribunal competente e imparcial y a la defensa adecuada, en contravención a lo dispuesto en los artículos 9, 10 y 11 de la Declaración, y 9 y 14 del Pacto, y es de una gravedad tal que confiere a la privación de libertad carácter arbitrario conforme a la categoría III.

Categoría V

141. La fuente alega que la detención de los señores Cuixart, Sánchez y Junqueras fue discriminatoria, pues resulta de su defensa del derecho a la autodeterminación. El Grupo de Trabajo ha considerado arbitraria la privación de libertad cuando esta es destinada a reprimir a miembros de grupos políticos para silenciar su reclamo en favor de la autodeterminación.[20]

142. En este caso, la detención de los señores Cuixart, Sánchez y Junqueras se efectúo a partir de acciones concertadas del aparato nacional de procuración e impartición de justicia, en contra de ciertos dirigentes del movimiento independentista catalán, que a su vez contó con el respaldo político público de altos funcionarios del Gobierno Español, incluso a través de pronunciamientos que apoyaban la decapitación de dicho movimiento. La detención de los señores Cuixart, Sánchez y Junqueras se llevó a cabo en detrimento del principio de igualdad de los seres humanos al haber estado motivada por su opinión política, en detrimento de los dispuesto en los artículos 2 de la Declaración Universal y 3 del Pacto, lo cual hace la detención arbitraria conforme a la categoría V.

143. El Grupo de Trabajo, conforme al párrafo 33.a) de sus métodos de trabajo, remite la información relativa a los derechos a la libertad de opinión y de expresión, así como de reunión y asociación del presente caso, al Relator Especial sobre los derechos a la libertad de reunión y de asociación pacíficas, así como al Relator Especial de libertad de opinión y de expresión.

Decisión

144. En vista de lo anterior, el Grupo de Trabajo emite la siguiente opinión:

> La privación de libertad de los señores Jordi Cuixart, Jordi Sanchez y Oriol Junqueras es arbitraria, por cuanto contraviene los artículos 2, 9 a 11, así como 18 a 21 de la Declaración Universal de Derechos Humanos y los artículos 3, 14, 19, 21, 22 y 25 del Pacto Internacional de Derechos Civiles y Políticos, y se inscribe en las categorías II, III y V.

[18] CCPR/C/GC/32, párr. 33
[19] CCPR/C/GC/32, párr. 32
[20] Opinión No. 11/2017.

145. El Grupo de Trabajo pide al Gobierno de España que adopte las medidas necesarias para remediar la situación de los Sres. Cuixart, Sanchez y Junqueras sin dilación y ponerla en conformidad con las normas internacionales pertinentes, incluidas las dispuestas en la Declaración Universal y el Pacto.

146. El Grupo de Trabajo considera que, teniendo en cuenta todas las circunstancias del caso, el remedio adecuado sería poner a los Sres. Cuixart, Sanchez y Junqueras inmediatamente en libertad y concederles el derecho efectivo a obtener una indemnización y otros tipos de reparación, de conformidad con el derecho internacional.

147. El Grupo de Trabajo insta al Gobierno a que lleve a cabo una investigación exhaustiva e independiente de las circunstancias en torno a la privación arbitraria de libertad de los Sres. Cuixart, Sanchez y Junqueras y adopte las medidas pertinentes contra los responsables de la violación de sus derechos.

148. De conformidad con el párrafo 33.a) de sus métodos de trabajo, el Grupo de Trabajo remite el presente caso Relator Especial sobre el derecho a la libertad de reunión y de asociación, así como al Relator Especial sobre el derecho a la libertad de opinión y de expresión.

149. El Grupo de Trabajo solicita al Gobierno que difunda la presente opinión por todos los medios disponibles y lo más ampliamente posible.

Procedimiento de seguimiento

150. De conformidad con el párrafo 20 de sus métodos de trabajo, el Grupo de Trabajo solicita a la fuente y al Gobierno que le proporcionen información sobre las medidas de seguimiento adoptadas respecto de las recomendaciones formuladas en la presente opinión, en particular:

(a) Si se ha puesto en libertad a los Sres. Cuixart, Sanchez y Junqueras y, de ser así, en qué fecha;

(b) Si se han concedido indemnizaciones u otras reparaciones a los Sres. Cuixart, Sanchez y Junqueras;

(c) Si se ha investigado la violación de los derechos de los Sres. Cuixart, Sanchez y Junqueras y, de ser así, el resultado de la investigación;

(d) Si se han aprobado enmiendas legislativas o se han realizado modificaciones en la práctica para armonizar las leyes y las prácticas de España con sus obligaciones internacionales de conformidad con la presente opinión;

(e) Si se ha adoptado alguna otra medida para aplicar la presente opinión.

151. Se invita al Gobierno a que informe al Grupo de Trabajo de las dificultades que pueda haber encontrado en la aplicación de las recomendaciones formuladas en la presente opinión y a que le indique si necesita asistencia técnica adicional, por ejemplo, mediante una visita del Grupo de Trabajo.

152. El Grupo de Trabajo solicita a la fuente y al Gobierno que proporcionen la información mencionada en un plazo de seis meses a partir de la fecha de transmisión de la presente opinión. No obstante, el Grupo de Trabajo se reserva el derecho de emprender su propio seguimiento de la opinión si se señalan a su atención nuevos motivos de preocupación en relación con el caso. Este procedimiento de seguimiento permitirá al Grupo de Trabajo mantener informado al Consejo de Derechos Humanos acerca de los progresos realizados para aplicar sus recomendaciones, así como, en su caso, de las deficiencias observadas.

153. El Grupo de Trabajo recuerda que el Consejo de Derechos Humanos ha alentado a todos los Estados a que colaboren con el Grupo de Trabajo, y les ha pedido que tengan en cuenta sus opiniones y, de ser necesario, tomen las medidas apropiadas para remediar la

situación de las personas privadas arbitrariamente de libertad, y a que informen al Grupo de Trabajo de las medidas que hayan adoptado.[21]

[Aprobada el 25 de abril 2019]

[21] Véase la resolución 33/30 del Consejo de Derechos Humanos, párr. 3 y 7.

UNITED NATIONS
HUMAN RIGHTS
SPECIAL PROCEDURES

SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS AND WORKING GROUPS

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OBJET/SUBJ: **Communication by the Working Group on Arbitrary Detention giving its opinion as adopted under paragraph 18 of its Working Methods (A/HRC/36/38)**

Please find attached a letter from the Chair-Rapporteur of the Working Group on Arbitrary Detention, giving Opinion No. 6/2019, concerning Spain.

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Working Group on Arbitrary Detention

REFERENCE: WGAD/2019/ESP/OPN/1

27th May 2019

Dear Ambassador,

The Human Rights Council, in resolution 33/30 adopted on 30th September 2016 and entitled "Arbitrary Detention", decided to extend the mandate of the Working Group on Arbitrary Detention for a three-year period and invited it, in compliance with its mandate, to carry on seeking and gathering information from governments and inter-governmental and non-governmental organisations, as well as interested parties, their families and their legal representatives.

I am writing further to the communication of 8th August 2018 addressed to Your Excellency's Government, concerning a case of suspected arbitrary detention that may have occurred in your country.

In the light of the above, and in accordance with the mandate conferred on it, the Working Group has examined the above case, taking into account the material placed at its disposal, and on 25th April 2018 adopted Opinion No. 6/2019 (Spain) (copy attached). This Opinion will be posted on the Working Group's website and mentioned in the report the Working Group submits to the Human Rights Council in 2020.

Yours sincerely,

José Antonio Guevara Bermúdez
Chair-Rapporteur
Working Group on Arbitrary Detention

His Excellency Mr. Cristóbal González-Aller Jurado
Ambassador
Permanent Representative
Permanent Mission of Spain to the United Nations Office
and other international organisations in Geneva

Unedited Advance Version

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27th May 2019

Original: Spanish

Human Rights Council
Working Group on Arbitrary Detention

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

1. The Working Group on Arbitrary Detention was set up by virtue of resolution 1991/42 of the Human Rights Committee. In resolution 1997/50, the Committee extended and clarified the mandate of the Working Group. In accordance with the stipulations of resolution 60/251 of the General Assembly and decision 1/102 of the Human Rights Council, the Council took on the Committee's mandate. The last time the Council extended the mandate of the Working Group for three years was in resolution 33/30.

2. In accordance with its working methods (A/HRC/36/38), on 8th August 2018 the Working Group sent the Spanish Government a communication concerning Jordi Cuixart i Navarro, Jordi Sánchez i Picanyol and Oriol Junqueras i Vies. After having requested an extension to the period in which to reply, the Government responded to the claims on 8th November 2018. Spain is party to the International Covenant on Civil and Political Rights.

3. The Working Group considers the deprivation of liberty to be 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 sentence or despite an amnesty law applicable to them) (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 State parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, which aims towards or can result in ignoring the equality of human rights (Category V).

Information received

Communication by the source

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

5. Jordi Sánchez i Picanyol was President of the Catalan National Assembly, an organisation whose goal is the independence of Catalonia by democratic, peaceful means, organising two large protests on 11th September 2012 and 11th September 2013. Mr. Sánchez was elected as a member of the Catalan Parliament for the period beginning in 2018. He led a movement in 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 between 2011 and 2015 and a Member of the European Parliament between 2009 and 2012. In 2011 he was elected President of Esquerra Republicana, and in 2012 a Member of the Catalan Parliament, to which he was re-elected in 2017.

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

8. On 22nd September 2017, the Spanish Prosecutor-General's office charged him with sedition over the events that occurred during the demonstration. On 27th September the National High Court in Madrid declared itself competent to hear the case and on 3rd October summoned Mr. Cuixart and Mr. Sánchez to appear before the court as suspects on 6th October 2017.

9. On 16th October 2017 the Magistrate's Court of the National High Court in Madrid, after hearing their statements, ordered that Mr. Cuixart and Mr. Sánchez be remanded in custody; they appealed against this decision. In the decision, the Judge stated that he was competent and ruled in favour of the detention, based on the seriousness of the charge.

10. On 6th November 2017 the appeal was rejected. The source pointed out that the appeal court's decision was not unanimous. One judge considered detention to be out of proportion given the lack of precision of the charges and the vagueness of their legal classification, these contravening minimum standards of legal certainty.

11. On 27th October 2017 the Catalan Parliament passed a unilateral declaration of independence. In response, the Spanish Government on the same day invoked article 155 of the Constitution and decreed the suspension of all members of the Catalan Parliament and the dissolution of this body.

12. On 30th October 2017, the Prosecutor's office laid charges for rebellion, sedition and misuse of public funds against the recently-removed members of the Catalan Government, including Mr. Junqueras. The source alleges that the charge did not specify the events that constituted crimes.

13. According to the information received, on 31st October 2017 the National High Court decided it was competent in the case of Mr. Junqueras and summoned him to appear two days later to give evidence. On 2nd November 2017 Mr. Junqueras gave evidence before the court and was detained by order of the Central Magistrate's Court.

14. The source pointed out that in its decision to remand him in custody, the Court considered that Mr. Junqueras had had time and means to prepare his defence, even though his lawyer was not there and the facts of which he was accused had not been specified.

15. The cases of Mr. Cuixart and Mr. Sánchez were put together with that of Mr. Junqueras before the Supreme Court, by virtue of the latter's personal immunity as a member of the Catalan Government. On 22nd November 2017 the Magistrate's Court sent information to the Supreme Court. According to the source, the judge described a complex organisation whose purpose was the secession of Catalonia and the alteration of the form of political organisation of the State.

16. The source indicates that the facts placed before the Supreme Court, far from being limited to the accusation (referring to 20th and 21st September 2017), went back to 2015. However, it was not alleged that specific deeds were committed, but actions constituting torts or illicit acts.

17. On 24th November 2017 the Supreme Court decided to join the cases together and on 4th December 2017 confirmed the detentions.

18. As a consequence of the dissolution of the Catalan Parliament, on 21st December 2017 further elections were held, in which Mr. Sánchez and Mr. Junqueras were elected.

19. On 9th January 2018 Mr. Junqueras requested a transfer to a place of detention closer to Barcelona and temporary release to take part in the opening session of Parliament on 17th January. This application was denied on 12th January, indicating that there was a risk of public disorder.

20. The source pointed out that on 24th January 2018, another detainee and co-defendant in the trial, who had been elected as a Member of Parliament, renounced his seat and undertook not to take part in any political activities and not to form part of the Government of Catalonia. It is claimed that this was in order to achieve his release.

21. On 5th March 2018 Mr. Sánchez accepted the nomination to be invested as President of the Government of Catalonia. Consequently, he asked to be released to attend the ceremony. This was refused on 9th March 2018. Mr. Sánchez had to renounce his nomination.

22. On 21st March 2018, Mr. Sánchez asked the Human Rights Committee for provisional measures, which were granted on 23rd March 2018. The Committee asked the Government to take the necessary measures for Mr. Sánchez to be able to exercise his political rights. According to the source, the Government did not take these measures.

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

24. According to the source, the detainees' defence has lodged several appeals, which have been denied or not answered. All requests for release have been rejected in general terms, without going into individual detail, simply establishing that wishing for independence creates a risk of repeat offending.

25. It is argued that the commission, planning or instigating of violence could not be attributed to the detainees. It is pointed out that the indictment of 21st March 2018 recognises that the actions of the defendants consisted of taking part in public demonstrations. The violence of a few individuals, unconnected with the defendants, cannot be attributed to them.

26. The source supplies a ruling by a High Court in Germany which, after considering an application for extradition of the co-defendant and ex-president of the Government of Catalonia, did not find the elements of violence necessary for the crime of rebellion. It is pointed out that the accused had not planned or actually used violence or force, but instead embarked on the use of democratic means, like the referendum.

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

28. The source claims that, in the writ of 16th October 2017, ordering arrest for the crime of sedition, the only grounds cited by the Prosecutor's Office for its accusation were related to the events of 20th and 21st September 2017. However, the arrest order refers to events over a longer timescale, occurring before, during and afterwards.

29. With regard to the role of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras in the events of 20th and 21st September, the investigation only revealed, according to the source, that they had freely exercised their right to protest. In the view of the source, this does not constitute legal grounds for detention, but is instead 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 are not subject to criminal proceedings or detention. The demonstrations were for the right of self-determination, through a referendum.

31. The source points out that Mr. Cuixart appealed for calm and peace in the demonstrations. He and Mr. Sánchez are recognised for their appeals for non-violence. None of the protests organised by the association Òmnium Cultural in its 56 years have been violent. According to the source, the National High Court accepted that Òmnium Cultural had legitimate aims.

32. It is pointed out that a judge at the National High Court considered that the events of 20th and 21st September 2017 consisted of the legitimate exercise of the right to peaceful demonstration, within the law: the public were called on to mobilise to protest against a situation that had arisen which they did not agree with. The demonstration did not aim to disregard or flout legal orders, but to exercise the right to protest. It was therefore a matter of exercising a legitimate right through legal channels, which they did personally and with their organisations.

33. The writ mentions, as part of the criminal process, other actions that are not punishable and are protected by articles 21 and 22 of the Covenant, such as organising mass, peaceful, occasional, agile and spectacular demonstrations; the call for a strike; rallies and demonstrations, i.e. the legitimate exercise of a political activity, which does not justify detention.

34. Moreover, the source argues that the detention is a consequence of the exercise of their rights to freedom of opinion and expressions, which it is alleged were criminalised. Detention was the result of having publicly, peacefully expressed a desire for independence.

35. The source emphasises that the appeal to support a referendum was decriminalised in Spain by Organic Law 2/2015, as it represents a legitimate exercise in freedom of expression, under articles 20 and 21 of the Constitution.

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

37. It is pointed out that the political opinion of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras is the reason for their detention, as was implicitly established in the writ of 5th January 2018. The judge pointed out that Mr. Junqueras' detention was not grounded on the danger he posed, but on the likelihood that he would behave in the same way in terms of his political activities. This is the same as keeping someone detained for their opinions and beliefs.

38. It is claimed that the detention is the result of his exercise of the right to take part in political affairs. According to the source, there is a broad consensus about the right of the defendants, and of the public in general, to vote in the referendum on 1st October 2017. The aim and consequence of detention was to restrict the right to express ideas, including a call to vote, as well as impeding the possibility of being a candidate and taking up the mandate in the event of being elected.

39. It is pointed out that in different decisions the judges concluded that the risk of criminal activity is linked to political responsibilities, indicating that the material purpose of the detention is to stop detainees taking part in public affairs.

40. Mr. Sánchez, as a candidate in the elections to Parliament on 21st December 2017, could not take part in the campaign and voting, despite his role and his subsequent victory. He was then prevented from taking up his parliamentary position. The objective and consequence of his detention was to deprive him of political participation.

41. According to the source, Mr. Junqueras was also deprived of his right to take part in the campaign and to be elected. He was prevented from taking his parliamentary seat and taking part in the opening session of Parliament.

42. The source reported on the case of another Catalan leader, also detained and placed on trial, who renounced his political role in exchange for the promise of release. His detention had forced him to renounce his rights in the hope of gaining his release.

43. It is argued that the Government's aim is shown in the statements of the then Vice-president of Spain, when she congratulated the Prime Minister for successfully decapitating and liquidating the pro-independence leaders. The source also called attention to the statements of the Minister of the Interior, in which he threatened another two politicians with detention and trial for having prepared the lists for the December 2017 elections.

44. The source alleges that the detention is arbitrary as it violates the international standards in articles 9, 10 and 11 of the Universal Declaration, 9 and 14 of the Covenant and the set of principles for the protection of people subjected to detention or imprisonment of any kind.

45. They further allege the lack of competence of the National High Court, as the latter considered that sedition, when committed with the aim of changing the territorial organisation of the State, must be considered an offence against the form of government, and therefore the National High Court would have jurisdiction. However, it is argued that it would be a misconstrual of legislation to give the National High Court jurisdiction under article 65.1 of the Organic Law on the Judiciary.

46. It is argued that an offence over which the National High Court had jurisdiction has only been used in relation to an attack on the form of government established in the Constitution: Parliamentary Monarchy. It is not applicable to a situation of changing and reorganising the basis of its regional structure. It is novel and unjustifiable to extend the meaning of the offence to include the allegations against the defendants.

47. The source asserts that the National High Court is only competent for certain specific offences, which do not include sedition. A decision by this same court on 2nd December 2008 determined that rebellion has never fallen within the jurisdiction of the National High Court. The court offered no grounds to justify this change of opinion.

48. It is argued that the transfer of the case to the Supreme Court does not remedy the above irregularities, because it was the National High Court that gave the ruling depriving the prisoners of liberty and because in any case the Supreme Court is no more competent. The competent court would be the Catalan High Court, as the supposed crime would have been committed in this region.

49. According to the source, the facts described demonstrate that the courts that are keeping Mr. Cuixart, Mr. Sánchez and Mr. Junqueras in custody are not competent, independent or impartial. It is claimed that the declaration by the Vice-president of the Government of Spain clearly shows the lack of independence of the proceedings, not only because of her reference to decapitating the political leaders, but in describing this action as an achievement of the Prime Minister.

50. According to the source, the courts' lack of competence and jurisdiction in these matters, as well as their lack of independence and impartiality, affected their decisions, including that of detaining Mr. Cuixart, Mr. Sánchez and Mr. Junqueras. As a result, the deprivation of their freedom is in breach of articles 9 and 10 of the Universal Declaration and 9 and 14 of the Covenant.

51. With regard to Mr. Cuixart and Mr. Sánchez, the judge ordered their detention on the basis of the allegations of sedition, in connection with the events of 20th and 21st September 2017; however, he referred to a series of events before and after, and to places where the defendants were not present. Mr. Cuixart's legal defence, in a hearing on 11th January 2018, asked the judge to inform them of the specific deeds and crimes with which he is charged, as these remain in doubt. This request has not been answered.

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

53. According to the source, Mr. Cuixart and Mr. Sánchez called for a civic, peaceful demonstration, insisting that any violent actions should be avoided. The damage to vehicles for which they were blamed was the result of unidentified individuals with no link to the detainees. The Civil Guard recognised that others at the demonstration tried to protect the vehicles from harm.

54. It is highlighted that in a minority opinion one of the judges at the National High Court called on his colleagues to be prudent in establishing the facts in objective and criminal terms, and not to be swayed by presumption, subjectivity and prejudgement of the facts. In an analysis of the facts, it is not possible to identify any possible crime.

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

56. It is reported that the previous head prosecutor of the Catalan High Court stated that the democratic behaviour of over a million citizens, exercising their right to demonstrate peacefully, could not constitute violence, much less rebellion.

57. According to the source, declaring the independence of part of Spanish territory does not fit into the definition of rebellion. For this crime to be committed, violence is required. It is claimed that there was no violence at any stage in the process, except that of the Spanish National Police, for which the detainees are not responsible.

58. Sedition, for its part, is an offence provided for in article 544 of the Criminal Code, which requires a violent collective uprising to repeal laws. The source argues that a peaceful protest cannot constitute sedition. Since 2005 the actions of calling or taking part in a referendum have been decriminalised.

59. It is reported that the Courts of Catalonia have for years heard complaints about sedition over pro-independence actions (for example, decisions of 24th March 2014 and 8th January 2015). Since 2014, these courts, which have sole territorial competence in these claims, have rejected them due to the absence of violence and the lack of personal attribution of specific actions.

60. According to the source, the judge considered that Mr. Junqueras was responsible for the violence, in which he did not take part but anticipated and provoked it. The detention order did not detail the behaviour of which Mr. Junqueras was accused and it was impossible to establish whether his actions merited the deprivation of liberty.

61. The source emphasised that the standard of presumption of innocence is breached if an official statement about a defendant gives the impression of guilt when this has not been determined in court. This breach occurred when the Prime Minister described the independence movement and its leaders as reckless and even dangerous rebels. Likewise when the Vice-president announced that the Government had triumphed in decapitating its leaders.

62. Furthermore, contrary to the presumption of innocence, the Court of Appeal of the National High Court has declared that certain facts are common knowledge and need not be proven. For example, it indicated that the fact that Mr. Cuixart stood on a National Police vehicle is a known action. However, this fact must be interpreted in context, as there is no agreement over this: Mr. Cuixart was on this vehicle asking the crowd to halt the demonstration; this action cannot therefore be used against him without first clarifying the context.

63. For the source, it is obvious that the detention violates the presumption of innocence, protected by articles 11.1 of the Universal Declaration and 14.2 of the Covenant.

64. The source also highlights the infringement of the right to a defence, which involves the individual having time and means to prepare arguments and evidence in his favour. With regard to Mr. Cuixart and Mr. Sánchez, it is pointed out that they were summoned on 3rd October to appear at a hearing on 6th October. Mr, Junqueras was given even less time: he was summoned on 1st November 2017 to make a statement and then detained on

2nd November 2017. Despite this, the order of 2nd November 2017 determined that the accused had had the time necessary to prepare his defence, not taking into account that his lawyer was not present.

65. The source explains that the court received the complaint from the public Prosecutor's office on 31st October. The next day (1st November, a public holiday), Mr. Junqueras received a summons, so he and his lawyer had to travel, without delay, the distance between Barcelona and Madrid (630 km) to appear in court. It is pointed out that this did not give the defence sufficient time to consult, process and respond to the 117-page accusation, much less the entire file.

66. Mr. Junqueras' lawyer could not be present, as he was also defending other members of Parliament, summoned to the Supreme Court on the same day, something the National High Court ignored. Instead of postponing the hearing, the judge went ahead in the absence of the defence lawyer. All the accused pointed out, on that day, their inability to prepare their defence in the time available.

67. Finally, the source alleges that because the detention is for defending the Catalans' right to self-determination, it represents discrimination on the basis of political opinion. The link between the people imprisoned and the political situation is highlighted. The detainees are publicly associated with the pro-independence movement. Also, the facts in question and their arrest took place in this region. This provides further grounds for stating that the detention of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras is arbitrary and infringes their fundamental rights.

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

The Government's Response

69. On 8th August 2018, the Working Group sent the source's allegations to the Government, asking it to supply detailed information about the legal and factual grounds for the detention by 8th October 2018, as well as the compatibility of the said detention with Spain's international obligations in the field of human rights. The Government asked for an extension to the period for replying, and this was granted until 8th November 2018.

70. In its response, the Government stated that the detention of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras was ordered as part of a criminal procedure which is still in progress before the Supreme Court, to which the one initiated before the National High Court was added. The examining judge ordered, and the Criminal Court of the Supreme Court confirmed, the detention while the proceedings, in which a decision has not yet been handed down, continue.

71. The Government points out that the Spanish Constitution provides for the possibility of ordering the option of prison on remand in article 17, and the Criminal Procedure Act empowers judges to impose the precautionary measure of detention on remand where the grounds stipulated in articles 503 and 504 exist.

72. The Government points out that the State of Law and the principle of separation of powers rule in Spain, so neither the Legislative nor the Executive branch have intervened in the decisions taken by the Judiciary (in this case the Supreme Court).

73. According to the Government, the observations submitted are based on decisions contained in the criminal proceedings, which are a manifestation of the power of the state (in this case the Judiciary), which ordered the detentions. Therefore, says the State, the comments of members of the Executive branch or of political parties are not relevant, as neither one nor the other ordered the detention, nor is there any evidence that they influenced the decisions of the judiciary.

74. The Government states that it did not assume the powers of the Catalan Parliament; following its dissolution and the calling of elections, its functions continued to be performed by the standing committee of the Catalan Parliament; it points out that the Human Rights Committee rejected provisional measures in favour of Mr. Sánchez on the terms of article 92 of its Regulations; it recalls that the German Regional Court considered that in

Spain there is no persecution for political reasons and there are no prisoners of conscience; and that the appeals lodged were admitted for consideration and are still pending resolution, in accordance with the criteria of the Human Rights Committee.

75. The Government emphases that the Spanish Constitution can be modified in its entirety as the principle of "militant democracy" is not required, and lays down a specific procedure to do this in article 168.

76. The Government adds that consequently in Spain political parties calling for the separation of Catalonia from the rest of Spain are legal, and the Constitution includes mechanisms that make this possible within the framework of the State of Law. This was reaffirmed in Constitutional Court decision 42/2014, which stated that "Catalan citizens' right to decide" must be expressed through the principles of democratic legitimacy, dialogue and legality, all within the framework of the Constitution and the procedures for reform set forth within it.

77. According to the Government, the independence movement, as it did not have the required majorities, opted not to abide by the State of Law and to act unilaterally. According to the Constitutional Court:

> (...) such a serious attack on the State of Law also infringes, just as strongly, the democratic principle, the Parliament not having recognised that the submission of all to the Constitution is another form of submission to the popular will, expressed in this case as a constituent power held by the Spanish people, not by any part thereof. (...)

78. The Government states that nor did the majorities exist to change the Catalan Statute of Autonomy, which requires majorities of two thirds of the Catalan Parliament to pass any reform.

79. According to the Government, the independence movement, taking advantage of its control of the Presidency, and with the support of the institutions led by Mr. Sánchez and Mr. Cuixart, organised an unconstitutional referendum and passed unconstitutional laws, leading to a declaration of independence, without having the majority of votes and without a sufficient majority of seats in the Catalan Parliament.

80. According to the Government, in the referendum to approve the Spanish Constitution of 6th December 1978, 90.46 % of voters in Catalonia voted in favour, with a participation rate of 68 % of the electoral roll, which means 62 % of the Catalans entitled to vote did so in favour of the Constitution. On the other hand, the Government points out, the independence movement has never had the majority of votes in Catalonia.

81. The Government points out that since Spain returned to full democracy in 1977, it has consolidated its position as a country of high quality democracy, where the rights and freedoms of all its inhabitants are guaranteed, in accordance with the most prestigious international institutions. It emphasises as a well-known fact international recognition of the democratic transition, the keystone of which was the 1978 Constitution.

82 According to the Government, the judicial measures in this case cannot be seen as a reaction to the legitimate political aspiration of Catalan separation, but exclusively as a judicial measure in connection with specific deeds committed outside the State of Law.

83. According to the Government, from the time the judicial decisions on detention were taken, faced with applications and appeals by the people affected, judicial decisions have confirmed the detention, maintaining it due to the risk of repeat offending.

84. The Government points out that the detentions of Mr. Sánchez and Mr. Cuixart were initially ordered by decision of the examining judge of the National High Court on 16th October and that of Mr. Junqueras on 2nd November 2017. They were subsequently confirmed by the Criminal Court

1 The Government refers to Human Rights Committee Communication 1341/2005, Zündel vs. Canada.

of the National High Court, the Criminal Court of the Supreme Court and the decisions of the examining Judge in response to the applications for release and/or temporary release lodged.

85. With regard to the factual background, the Government refers to the decision of the examining Judge on 21st March 2018, upheld by that of the Criminal Court of the Supreme Court, to indict Mr. Cuixart, Mr. Sánchez and Mr. Junqueras for the crimes of rebellion, misuse of funds and disobedience, for which reason it was decided to keep them in custody, as the risk of repeat offending had not disappeared, as well as there being a risk of flight.

86. The Government points out that the decision of 21st March 2018 by the examining Judge includes the tactical background to the case, describing it for the present purposes as the crime of rebellion. The Government explains that the facts were initially described as the crime of sedition, though as the examining judge's investigation progressed he considered that the evidence indicated that the facts came into the category of rebellion.

87. The Government points out that the Judiciary considered that the circumstances stipulated in art. 503 of the Criminal Procedure Act existed to justify detention and its maintenance, namely: i) the deeds have the features of crimes punishable with terms of over 2 years in prison; ii) sufficient reasons to consider a particular person to be criminally liable; iii) risks of flight and repeat offending are considered to exist.

88. According to the Government, preventive custody in Spain is legitimate whenever it is based on the State of Law and within the framework of the International Covenant on Civil and Political Rights; in this case, the measures are taken not to limit rights, but as a consequence of the actions of the people in question, which the competent judge considers might constitute very serious crimes, contrary to the State of law.

89. Regarding the alleged lack of competence and jurisdiction of the national High Court and the Supreme Court on the grounds that the crimes were committed in Catalonia, the Government points out that it must be considered - as the Supreme Court did - that some of the behaviours went beyond the region: the diary confiscated from José María Bové, the White Book on Catalan independence and, in relation to the referendum, the purchase of ballot boxes and printing voting slips abroad (in France).

90. The Government refers to the above regarding the way the Supreme Court classifies the actions of which Mr. Cuixart, Mr. Sánchez and Mr. Junqueras are accused.

91. Regarding the flouting of the presumption of innocence, the Government points out that this can only be done by the Judiciary, and cannot be applied to statements by members of the Executive branch.

92. Regarding the allegation of lack of time to prepare the defence, it is pointed out that no suspension was requested by Mr. Junqueras at the beginning of his statement, but he simply lodged a request for suspension through the general registry, and this reached the examining Judge after hearing the statements, not before them.

93. With regard to Mr. Cuixart and Mr. Sánchez, in the order by the examining judge of 16th October 2017 under which they were detained, there was no complaint or request for suspension on the grounds of not having had time to prepare their defence. In the appeal lodged with the Criminal Court of the National High Court on 6th November, the lack of time to prepare a defence is not given as cause for objection. It also states that in the successive applications for release and appeals lodged, the existence of limitations on the defence was not mentioned.

94. The Government states that there is no discrimination in this case and refers to the arguments of the Criminal Court of the Supreme Court, in a resolution of 5th January 2018 in which, while rejecting an application for the release of Mr. Junqueras, it is stated that the trial does not seek to persecute political dissidence.

Additional information from the source

95. The source submitted additional comments on the non-violent expression of the political opinions of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras, and that their detention was for having exercised their rights of freedom of association, assembly and participation in their country's public affairs, making them arbitrary. Likewise, the source provided further material concerning infringements of the detainees' rights to due process.

Deliberations

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

97. The mandate of the Working Group is to investigate the cases of arbitrary deprivation of liberty submitted to it for consideration, to which end it refers to the relevant international regulations set forth in the Universal Declaration and the Covenant.

98. The Government requested, on the basis of Rule 33 in the working methods, that part of this complaint be passed on to the Human Rights Committee, as the latter is considering the case. It is pointed out that the Committee is examining aspects concerning political participation, the rights of association and assembly, of freedom of opinion and expression, and these involve the same facts and the same people.

99. In this respect, the Working Group wishes to recall that Rule 33, points a) and d), fraction ii), seeks to strengthen effective coordination between the different human rights bodies, both in special procedures and as treaty bodies.

100. In this context, the Working Group received information from the parties concerning the facts and applicable law, with a view to determining whether there was an infringement of the right not to be arbitrarily deprived of liberty, including some information linked to the rights of political participation, association and assembly, as well as freedom of opinion and expression. The Government did not establish that the claim lodged with the Committee concerns personal freedom and not being subject to arbitrary detention. On the basis of the above, it is considered that in this case the circumstance provided for in Rule 33 point d) fraction ii) does not arise, as the facts and the rights supposedly infringed are not the same.

101. Having established its position with regard to this procedural matter in accordance with its working methods and its practices[2], the Working Group reaffirms its competence to hear this case.

102. The Working Group has established in its jurisprudence the way in which it proceeds with regard to matters of evidence. If the source has submitted reasonable indications of an infringement of international regulations on personal freedom which constitute arbitrary detention, it must be understood that the burden of proof falls on the Government if it wishes to refute the allegations.[3]

103. The Working Group understands that Mr. Cuixart, Mr. Sánchez and Mr. Junqueras are public figures, recognised for their work in favour of independence for Catalonia, who have taken up positions in associations, political parties and in public service.

104. It further understands that Mr. Cuixart and Mr. Sánchez were summoned on 6th October 2017 and subsequently detained in preventive custody by order of the Examining Court of the National High Court. Mr. Junqueras was detained after making a statement by order of the Examining Court on 2nd November 2017.

Category II

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

[2] Opinion No. 89/2018, para. 64-67
[3] See A/HRC/19/57, para. 68.

106. The Working Group emphasises that everybody has the right to freedom of expression, which includes the right to disseminate information and ideas of all kinds, verbally or in any other way. Furthermore, the Group also reiterates that the exercise of this right may be subject to restrictions explicitly laid down by law and necessary to ensure respect for the rights or reputation of others, as well as protecting national security, public order, health or public morals.[4]

107. The Working Group agrees with the Human Rights Committee that freedom of opinion and expression are indispensable to the full development of people and represent the cornerstone of free, democratic societies.[5]

108. The right to freedom of opinion is so important that no government may restrict other human rights because of the opinions - political, scientific, historical, moral or religious - expressed by or attributed to a person. It is not compatible with the Declaration or with the Covenant to describe the expression of an opinion as a crime, which means harassment, intimidation or stigmatisation of a person, including their detention, preventive custody, trial or imprisonment for reason of their opinions are not permitted.[7]

109. It is also relevant to point out that freedom of opinion and expression includes the possibility of talking about the way in which peoples can freely determine their political system, their constitution or government, making clear the link with other human rights. The Human Rights Committee has stated that "(t)he rights enshrined in article 25 are related to peoples' right to free determination, although they are different to it. According to paragraph 1 of article 1, people have the right to freely determine their political condition, and the right to choose the form of their constitution or government. Article 25 deals with people's rights to take part in the processes of running public affairs."[8]

110. The Working Group, while noting that referendums are permitted in Spain for a wide range of subjects, including that related to this case, considers that calls to hold public participation processes, whether issued by individuals or through organisations, are legitimate expressions of the exercise of freedom of opinion and expression.

111. The Working Group noted that on 20th and 21st September 2017 a public demonstration was held in favour of organising a referendum on the independence of Catalonia. In that context, there were incidents or conflicts between demonstrators and police. It was also noted that these specific facts could not be attributed to Mr. Cuixart, Mr. Sánchez and Mr. Junqueras.

112. Mr. Cuixart, Mr. Sánchez and Mr. Junqueras were accused of sedition in relation to the peaceful social protest of 20th and 21st September 2017, in which thousands of other people also took part. The accusation was later changed to the crime of rebellion.

113. The Working Group ascertained that the element of violence is essential to the criminal categorisation of the crimes in question. In its response, the Government offered information about the pro-independence process, but did not supply information about specific actions by the accused that might have involved violence and therefore constitute a crime according to applicable law, including international law.

114. The Working Group noted that the actions of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras, before and after the holding of the social protest on 20th and 21st September 2017, were not violent, nor did they incite violence, and their behaviour did not result in violent deeds or actions. On the contrary, they insisted on the

[4] Opinion 58/2017, para. 42
[5] CCPR/C/GC/34, para. 2
[6] CCPR/C/GC/34, para. 4
[7] CCPR/C/GC/34, para. 9-10
[8] CCPR/C/21/Rev.1/Add.7, para. 2

peaceful exercise of the rights of freedom of opinion, expression, association, assembly and participation. Information was even received about the testimony of a judge who stated that the events attributable to the defendants are expressions of the legitimate exercise of the right to peaceful protest.[9]

115. In this respect, the Special Rapporteur on the right of freedom of opinion and expression expressed concern about these arrests, as "they are directly related to calls to public mobilisation and participation made in the context of the referendum." He also expressed concern that "indictment for a crime of rebellion could be disproportionate and therefore incompatible with Spain's obligations within the framework of international human rights regulations."[10]

116. The Working Group also took note of the decision by a German court, which after considering the extradition of Mr. Carles Puigdemont (co-defendant) did not find elements of violence in the facts at issue, which are necessary for the crime of rebellion, and confirmed that his actions could not be considered an attempt to violently overthrow the Government. It indicated that the accused sought independence by democratic means.[11]

117. The Working Group received plausible evidence, which was not refuted by the Government, concerning the position of Mr. Forn, detained and accused in this case, who was persuaded to renounce his activism in favour of the pro-independence cause in exchange for his release.

118. Criminal proceedings like those in this case become implausible if they are considered in the convulsed political context in which the charges are laid and around the time of a possible referendum, when Mr. Cuixart, Mr. Sánchez and Mr. Junqueras have spent years of their political careers backing independence for Catalonia. Added to this are the declarations of senior officers of the Government (detailed in the following section) who talk about decapitating the leaders of the pro-independence movement and attempting to label the behaviour of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras as violent in a context of social protest.

119. The non-existence of the element of violence and the absence of convincing information about actions attributable to Mr. Cuixart, Mr. Sánchez and Mr. Junqueras that involve them in behaviour constituting the crimes they are charged with have led to a conviction among the Working Group that the criminal accusations against them aim to coerce them with regard to their political opinions about Catalan independence and stop them pursuing this aim in the political arena.

120. The Working Group was convinced that the criminal accusations against Mr. Cuixart, Mr. Sánchez and Mr. Junqueras had as their purpose to justify their detention as a result of their exercise of the rights to freedom of opinion, expression, association, assembly and political participation, contravening articles 18 to 21 of the Universal Declaration and articles, 19, 21, 22 and 25 of the Covenant, for which reason the said detention 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 custody and trial. However, in view of the fact that the trial is going ahead, and taking into account the allegations by the source, the Working Group will proceed to consider whether basic elements of a fair, independent and impartial trial have been followed during the course of the said legal proceedings.

Presumption of innocence

122. Article 11.1 of the Universal Declaration and article 14.2 of the Covenant recognise the right of the presumption of innocence for all defendants. This right imposes obligations on State institutions for the accused to be treated as innocent until found guilty beyond all reasonable doubt. This right obliges all

[9] Dissenting opinion by the magistrate José Ricardo de Parada Solaesa of 7th November 2017. I0 AL ESP 1/2018.

[10] AL ESP 1/2018.

[11] Decision of the Higher Regional Court of Schleswig-Holstein, 12th July 2018.

the public authorities in a country to avoid prejudging the result of a trial, which means not making public statements affirming the guilt of the accused.[12]

123. The Working Group has determined that the public interference openly condemning the accused before any verdict has been given violate the presumption of innocence and constitute undue interference which affects the independence and impartiality of the court.[13]

124. Likewise, the European Court of Human Rights has indicated that public statements by senior government officers violate people's presumption of innocence when they are pointed to as responsible for a crime for which they have not yet been tried, so attempting to convince the public of their responsibility, as well as prejudging the assessment of the facts by the competent judicial authority.[14]

125. In response to the source's allegations of violation of the presumption of innocence, the Government indicated that statements made by the Executive branch were not relevant, as in its opinion there is no evidence that they have influenced the decisions of the Judiciary.

126. In this case, credible information was received concerning the statements by the Vice-president of Spain in which she congratulated the Prime Minister for having managed to decapitate the Catalan pro-independence parties by arresting their leaders. These are alongside statements by the Minister of the Interior, in which he referred to the leaders of the pro-independence movement as reckless, dangerous rebels.

127. Furthermore, the Appeal Court of the National High Court indicated that certain actions attributable to the accused are common knowledge and do not need to be proven. For example, for the said court the fact that Mr. Cuixart climbed onto a National Police vehicle on 20th November is well-known. However, the Working Group received convincing information that Mr. Cuixart and Mr. Sánchez were calling for the demonstration to be dissolved at that moment.

128. In view of the statements by senior officers of the State expressing to the public a premature criminal liability on the part of the detainees, possibly influencing their image before the courts, the Working Group was convinced that the right to the presumption of innocence of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras was violated, in contravention of the stipulations of articles 11.1 of the Universal Declaration and 14.2 of the Covenant.

Preventive Custody

129. It is an established standard of international law that preventive custody must be the exception and not the rule, and must be ordered for the shortest time possible. Article 9 paragraph 3 of the Covenant requires that a justified court decision examine the merits of preventive custody in each case. This provision also establishes that, "release may be subject to guarantees to appear at the trial, in any other place, stage in court proceedings and, if appropriate, for execution of the sentence." From this it can be understood that detention must be an exception in the interests of justice. The provisions contained in article 9 paragraph 3 of the Covenant can be summed up as follows: any detention must be exceptional and of short duration, release must be favoured where there are measures to guarantee the appearance of the accused at the trial and execution of the sentence; in the event that preventive custody is prolonged, the presumption in favour of release must increase.

130. In this case, the accused were detained in October and November 2017 and have remained in preventive custody during the trial, which is not over. The source

[12] CCPR/C/GC/32, paragraph 30

[13] Opinions 90/2017 and 76/2018.

[14] European Court of Human Rights, Allenet de Ribemont v. France, § 41; Daktaras v. Lithuania, § 42; Petyo Petkov v. Bulgaria, § 91; Pela v. Croatia, § 149; Gutsanovi v. Bulgaria, §§ 194-198; Konstas v. Greece, §§ 43 and 45; Butkevicius v. Lithuania, § 53; Khuzhin and Others v. Russia, § 96; Ismoilov and Others v. Russia, § 16L

indicated that the refusal of release on bail was motivated by the supposed risk of again calling for independence, as this could lead to further popular demonstrations. The Working Group concluded that the detention was arbitrary because it was the result of exercising the right of freedom of opinion, expression, association, assembly and participation. Moreover, there is no indication that the judges or the Government assessed and concluded, in accordance with the Covenant, that there are legitimate grounds to restrict these human rights through the deprivation of liberty since October and November 2017 and during the course of the trial. Consequently, the Working Group must conclude that preventive custody has been in contravention of article 9.3 or the Covenant.

Right to be judged by a competent, impartial court

131. According to article 14.1 of the Covenant, everybody is entitled to be heard publicly and with due guarantees by a competent, independent and impartial court in the trial of any accusation of a criminal nature against them. The Working Group agrees that judges must not allow their decision to be influenced by personal bias or prejudice, have preconceived ideas about the matter under consideration or behave improperly to further the interests of either side.[15]

132. The Working Group was not convinced that the actions attributed to Mr. Cuixart, Mr. Sánchez and Mr. Junqueras were violent. On the contrary, it noted that they were taken in exercise of freedom of opinion, expression, assembly, association and political participation, over several years.

133. Likewise, the Working Group found evidence to suppose that the judges that have heard the case had preconceived ideas about it. This is shown, for example, in the statements about the proceedings before the Appeal Court of the National High Court, in which reference was made to certain facts being common knowledge and not needing to be proven.

134. On the other hand, the Working Group considered that a criminal trial of individuals accused of crimes committed in a particular region by courts located in another jurisdiction constitutes a violation of their right to be tried by the competent judge, where national legislation explicitly attributes the competence to the jurisdiction in the locality where the supposed crime was committed.[16]

135. In this case, the Working Group was convinced that the regional, personal and material jurisdiction competent to investigate and try possible criminal acts was the courts of Catalonia, as the crimes were presumed to have been committed on the territory of Catalonia by officers of the Government and Catalan members of parliament. Furthermore, the Working Group received convincing information that the Catalan courts have heard charges related to the process of independence from Spain. Moreover, the Working Group was not convinced that the natural judge to try the alleged crimes referred to in this case is in the courts currently hearing them.

136. For the above reasons, the Working Group considers that Mr. Cuixart, Mr. Sánchez and Mr. Junqueras' right to be tried by a competent, impartial court as recognised by articles 10 of the Universal Declaration and 14.1 of the Covenant was not observed.

Right to have time adequate time and means for the defence

137. Article 14.3b) of the Covenant recognises everybody's right to "have adequate time and means to prepare their defence," which represents an important guarantee of a fair trial and the principle of equality of arms.[17] Having adequate means for defence includes, among other things, the possibility of prior access to

[15] CCPR/C/GC/32, para. 21
[16] Opinion No. 30/2014.
[27] CCPR/C/GC/32, para. 32

all the materials, documents and other evidence the prosecutors intend to submit before the court.[18]

138. The Working Group shares the opinion that when lawyers claim that the time offered to prepare a defence is not sufficiently reasonable they may apply for a postponement, and the authorities must in principle accept such applications. It is important to point out that "there is an obligation to accept reasonable applications for postponement, in particular when the defendant is accused of a serious crime and needs more time to prepare their defence."[19]

139. In this case, the Working Group was convinced that Mr. Cuixart, Mr. Sánchez and Mr. Junqueras did not have sufficient time to prepare their defence, as a very short time elapsed between the summons and the hearing, taking into account the length of the indictment and the distances involved. Furthermore, it was noted that the accused were not given more time to prepare their defence and this affected unimpeded access to the adequate means to prepare their legal defence. This constitutes non-observance of the right recognised in articles 11.1 of the Universal Declaration and 14.3.b) of the Covenant.

140. For the above reasons, the Working Group was convinced that Mr. Cuixart, Mr. Sánchez and Mr. Junqueras were deprived of liberty at the expense of fundamental guarantees of due process and a fair trial, in particular the presumption of innocence, of being tried by a competent, impartial court and of an adequate defence, contravening the stipulations of article 9, 10 and 11 of the Declaration and 9 and 14 of the Covenant, and this so seriously that it makes the deprivation of liberty arbitrary according to category III.

Category V

141. The source alleges that the detention of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras was discriminatory, as it is the result of their defence of self-determination. The Working Group considers the deprivation of liberty to be arbitrary where it is for the purpose of repressing members of political groups to silence their demands for self-determination.[20]

142. In this case, Mr. Cuixart, Mr. Sánchez and Mr. Junqueras were detained on the basis of actions arranged between the national prosecution and justice system against certain leaders of the Catalan independence movement, in turn with the public political backing of senior officers of the Spanish Government, including through pronouncements supporting the decapitation of this movement. Mr. Cuixart, Mr. Sánchez and Mr. Junqueras were detained in contravention of the principle of equality for human beings as it was motivated by their political opinion, in contravention of the stipulations of articles 2 of the Universal Declaration and 3 of the Covenant, making their detention arbitrary under category V.

143. The Working Group, in accordance with paragraph 33.a) of its working methods, passes on the information concerning the rights of freedom of opinion and expression, as well as those of assembly and association in this case, to the Special Rapporteur on the rights of freedom of assembly and peaceful association, and to the Special Rapporteur on freedom of opinion and expression.

Decision

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

The deprivation of liberty of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras is arbitrary in that it contravenes articles 2, 9 to 11 and 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, falling into categories II, III and IV.

[18] CCPR/C/GC/32, para. 33
[19] CCPR/C/GC/32, para. 32
[20] Opinion No. 11/2017.

145. The Working Group asks the Government of Spain to adopt the necessary measures to remedy the situation of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras without delay so that it is in accordance with the pertinent international rules, including those set forth 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 release Mr. Cuixart, Mr. Sánchez and Mr. Junqueras immediately and grant them the effective right to receive compensation and other types of reparation, in accordance with international law.

147. The Working Group calls on the Government to conduct an exhaustive, independent investigation into the circumstances surrounding the arbitrary deprivation of liberty of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras and take the pertinent measures against those responsible for the violation of their rights.

148. In accordance with paragraph 33.a) of its working methods, the Working Group passes this case to the Special Rapporteur on the rights of freedom of assembly and peaceful association, and to the Special Rapporteur on freedom of opinion and expression.

149. The Working Group asks the Government to disseminate this opinion by all possible means, as broadly as possible.

Follow-up procedure

150. In accordance with paragraph 20 of its working methods, the Working Group asks the source and the Government to provide it with information about the follow-up measures taken with regard to the recommendations set forth in this opinion, in particular:

(a) Whether Mr. Cuixart, Mr. Sánchez and Mr. Junqueras have been released, and if so, on what date;

(b) Whether compensation or other reparations have been granted to Mr. Cuixart, Mr. Sánchez and Mr. Junqueras;

(c) Whether the violation of the rights of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras has been investigated, and, if so, the result of the investigation;

(d) Whether legislative amendments have been passed or changes made in practice to harmonise the laws and practices of Spain with its international obligations in accordance with this opinion;

(e) Whether any other measure 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 acting on the recommendations set forth in this opinion and to tell it if it needs further technical assistance, for example through a visit by the Working Group.

152. The Working Group asks the source and the Government to provide it with the aforesaid information within six months of the date on which this opinion is issued. Nevertheless, the Working Group reserves the right to undertake its own follow-up on the opinion if further causes for concern regarding the case are brought to its attention. This follow-up procedure will enable the Working Group to keep the Human Rights Council informed about the progress made to implement its recommendations, as well as, if appropriate, any deficiencies observed.

153. The Working Group recalls that the Human Rights Council has encouraged all states to cooperate with the Working Group, and asked them to take its opinions into account, and if necessary to take appropriate steps to remedy the

situation of people arbitrarily deprived of liberty, and to inform the Working Group of the measures they have taken.[21]

[Approved on 25th April 2019]

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