MAY IT PLEASE THE WORKING GROUP

1. As is permitted by the procedure for filing a *communication* before the Working Group on Arbitrary Detention, these pleadings are intended to replace a reply to the questionnaire reproduced in Annex V of "Information sheet no. 26".

2. This document sets out the case for the applicants, each of whom are prominent and respected individuals in the Catalan independence movement, that their ongoing detention by Spain is arbitrary and in violation of their fundamental rights.

1. REMINDER OF THE FACTS AND THE PROCEDURE

The first and second applicants

3. **Mr Jordi CUIXART I NAVARRO** is the president of OMNIUM CULTURAL, an association created in 1961 with the aim of protecting and preserving the Catalan language and culture, which at that time was being persecuted by the Franco dictatorship. It currently has 95,000 members throughout Catalonia.

4. A member of OMNIUM since 1996, Mr Jordi CUIXART I NAVARRO joined its board of directors as treasurer in 2010, before becoming Vice-President, then President in 2015.

5. He is a businessman and founding patron of FemCat entrepreneurs, a private foundation, and also a member of several entities such as cooperative Coop 57.

6. He has been in pre-trial detention for nearly four months at the Madrid V prison.

7. **Mr Jordi SANCHEZ I PICANYOL** is ex-President of the Catalan National Assembly (ANC), and an elected deputy of the Junts per Catalunya party.

8. The ANC is a cross-sectional and unitary organization whose objective is the independence of the Catalan nation through democratic and peaceful means. It has more than 500 territorial assemblies around the country, and fifty sectoral and external assemblies, involving tens of thousands of people who work disinterestedly for collective freedom.

9. The ANC organized the two largest mass mobilizations in the history of the Catalan region, which were also among the largest demonstrations in Europe. The first, on 11 September 2012, involved a demonstration in Barcelona with the slogan "*a new European state*", and the second, on 11 September 2013, involved the formation of a 400km long human chain, "*the Catalan Way towards Independence*".

10. The ANC is the heir to the movement of independence consultations that took place all over Catalonia from 2009 to 2011. On 30 April 2011, the National Conference for the State was held, which marked the start of the process that culminated in the ANC's constitution on 10 March 2012 at the Palau Sant Jordi.

11. Mr Jordi SANCHEZ I PICANYOL is a graduate in political science from the Autonomous University of Barcelona, and was the leader and spokesperson of "*Crida a la Solidaritat*" (Cry for Solidarity) from 1983 until its dissolution in 1993. He directed the Jaume Bofill Foundation until 2010, before becoming the Catalan Ombudsman's assistant. On 16 May 2015, he became President of the ANC in place of Mrs Carme FORCADELL, a position he held until 16 November 2017.

12. He has been in pre-trial detention for nearly four months at the Madrid V prison.

Chronology relating to the first and second applicants

13. On 22 September 2017, the Public Prosecutor lodged a complaint for the offence of sedition, which was alleged to be a consequence of events that occurred in Barcelona on 20 and 21 September 2017, in connection with the demonstrations and gatherings that took place there.

14. On 27 September 2017, the Audiencia Nacional of Madrid considered itself competent to hear that complaint on the basis of article 65.1° of law 6/1985 of judicial power (exhibits n° 1 and n° 5).

15. On 3 October 2017, the investigating judge of the Audiencia Nacional ordered a hearing relating to Messrs CUIXART and SANCHEZ, among others, to take place on 6 October, three days later (exhibit n° 2). A complementary hearing took place on 16 October.

16. On 5 October 2017, those representing Messrs CUIXART and SANCHEZ challenged the jurisdiction of the court, averring that the appropriate judge of the alleged facts was the investigating court of Barcelona, where the events took place.

17. On 11 October 2017, the court dismissed the claim of lack of jurisdiction, arguing inter alia that the complaint of 27 September against Messrs CUIXART and SANCHEZ relates to acts that "*are not an isolated act, but are part of a complex strategy in which they collaborated, in execution of a roadmap established to achieve the independence of Catalonia, and both of them were members of the strategic committee with specific and concrete functions to be performed*" (exhibit no. 3, free translation).

18. The investigating magistrate ordered the detention of Messrs CUIXART and SANCHEZ on 16 October 2017. There were two fundamental legal flaws in this order for detention: the investigating magistrate claimed jurisdiction on the basis of article 65 of the law on judicial power, which could not apply in these cases, as will be explained below; and it based the detention on the gravity of the sentence for the crime of sedition, an offence not capable of being established on the facts relied on by the State here (articles 544 and 545 of the Penal Code) (exhibits no. 4, 5 and 6).

19. On 20 and 21 October 2017, Messrs SANCHEZ and CUIXART, respectively, appealed the committal order concerning them: this appeal was dismissed on 6 November 2017 (exhibit no. 7).

20. The Appeal Chamber judgment was not unanimous and the opinion of the dissenting judge is instructive in identifying the legal flaws in the approach taken by the majority. The dissenting opinion highlights the imprecision of the facts alleged against the applicants, and the vague way in which they have been legally classified, in contravention of the minimum standards of legal certainty required to justify detention. As the applicants pointed out, and as confirmed by the dissenting judge, the facts relied on by the State in fact show the legitimate exercise of the right to demonstrate peacefully. The dissent considers that, for these reasons, detention was disproportionate in this case (exhibit no. 7 bis).

21. On the same day, the appeal relating to lack of jurisdiction which had been lodged on 13 and 16 October 2017, was dismissed (exhibit no. 8). One of the judges, in his dissenting opinion, considered that the court had interpreted the legal norm through which jurisdiction was claimed in a forced and extensive manner to the detriment of the principle of legality, in order to consider itself competent (exhibit no. 8 bis).

22. On 27 October 2017, the Catalan Parliament voted and approved in plenary session the unilateral declaration of independence. In response, the Spanish government invoked article 155 of the Spanish constitution, agreeing among other measures the suspension of all Catalan

Members of Parliament and the dissolution of the Catalan Parliament, with its functions assumed by the government of Spain.

23. Mr SANCHEZ's counsel then lodged a constitutional remedy of amparo on 21 November 2017 against these two judgments, based on the following constitutional violations: infringement of the right predetermined by law to be heard by ordinary judges, infringement of the right to freedom, both related to the right to defence and the right to effective judicial protection. The Constitutional Court has not yet ruled on this application. Its hearing schedule is entirely unpredictable (for example, 24h when it is a claim by the government and more than three years in the case of Mr HOMS, former Deputy of the Catalan Parliament).

24. Mr CUIXART's counsel also filed a remedy of amparo on 21 December 2017.

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The third applicant

25. At the same time, and in order to quell any pro-independence desire at both the associative and political level, on 30 October 2017, the Public Prosecutor filed a complaint against members of the Executive Council of the Govern de la Generalitat (Catalan Government) including against, among others, its President, Mr Carles PUIDGEMONT I CASAMAJO, its Vice-President Mr Oriol JUNQUERAS I VIES, and the Home Secretary Mr Joaquim FORN I CHIARIELLO, for rebellion, sedition and embezzlement, pursuant to Articles 472 (exhibit no.9), 544 and 545 (exhibit no.6) and 473-2 ° of the Spanish Criminal Code (exhibit no.10).

26. **Mr Oriol JUNQUERAS I VIES** is the Vice-President of the Catalan Government and the Catalan Minister of Economy and Finance. He was Mayor of Sant Vicenç dels Horts from 2011 to 2015 and Member of the European Parliament from 2009 to 2012. He became president of Esquerra Republicana (ERC) in 2011 and member of the Parliament of Catalonia in 2012. He has a degree in Modern and Contemporary History and a Ph.D. in History of Economic Thinking from the Autonomous University of Barcelona. He is also a writer.

27. He was head of list in the last elections of 21 December 2017 for his Party, Esquerra Republicana, and is an elected deputy.

28. He has been in pre-trial detention since 2 November 2017, at the Madrid VII prison.

Chronology relating to the third applicant

29. From the initiation of the proceedings against the third applicant, the Public Prosecutor indicated that the accused no longer enjoyed immunity as member of the Government of Catalonia, following his loss of office pursuant to the constitutional resolution of 27 October 2017, which implemented Article 155 of the Spanish Constitution (placing Catalonia under direct control and suspending all members of the Catalan government and parliament pending new elections).

30. On 31 October 2017, the Audiencia Nacional considered itself competent to hear the complaint against Mr JUNQUERAS, and summoned him to appear two days later (one working day later, since 1 November is a public holiday).

31. On 2 November 2017, Mr JUNQUERAS was heard and then detained (exhibit no.11). The order for his detention found that he had benefited from the time necessary to prepare his defence, even though his counsel was absent, and even though the facts alleged against him were not specified.

32. On 3 November 2017, Mr JUNQUERAS appealed against his detention.

33. On 15 November 2017, Mr JUNQUERAS filed a new appeal against the detention decision.

34. An application for release was made by Mr JUNQUERAS, among others, on 27 November. They were all refused.

35. On 22 November 2017, the investigating magistrate of the Audiencia Nacional forwarded information to the Supreme Court, so that it could look into all investigations under way.

36. In this communication, and inconsistent with her obligation as investigating magistrate to take account of evidence supporting both the prosecution and the defence, the magistrate of the Audiencia Nacional attributed the commission of the facts to the persons charged, and described in particular the existence of an organisation comprised of members of the Catalan Government and the Presidents of the ANC and OMNIUM associations, with the objective of obtaining independence for Catalonia (exhibit no.12).

37. The facts that she forwarded to the Supreme Court, far from being limited to those contained in the indictment (for Messrs CUIXART and SANCHEZ, the demonstrations of 20 and 21 September 2017, only) went back to 2015, without any specific acts being attributed to any of the applicants and, indeed, with the acts described not amounting to tortious (or otherwise unlawful) acts.

38. On 24 November 2017, the Supreme Court, which had conduct of the investigation against the members of the Catalan Parliament (also initiated on 30 October 2017), ordered joinder of that investigation and the investigations initiated in the Audiencia Nacional (exhibit no.13).

39. On 4 December 2017, the Supreme Court confirmed the detention of the three applicants (and Mr FORN who is not party to this application, for reasons that will be developed in § 45), the only persons still detained as a result of these allegations (exhibit no.14).

40. Further applications to the Supreme Court for release have all been refused.

41. On 21 December 2017, fresh Catalan elections took place (following the Spanish Government's dissolution of the Catalan Parliament on 27 October). Mr JUNQUERAS and Mr SANCHEZ were both elected members of Parliament, despite their detention, and a majority of Parliamentary seats were won by pro-independence candidates. Those results were clearly unsatisfactory to the Spanish government and, on 22 December 2017, the prosecution requested new hearings in these cases.

42. On 5 January 2018, the Appeal Chamber refused to order the applicants' release (exhibit no. 21).

43. On 9 January 2018, Mr JUNQUERAS requested his urgent transfer to a closer place of detention and for exceptional temporary release, in order to be able to participate in the inaugural session of the Catalan Parliament on 17 January 2018.

44. On 12 January 2018, the Supreme Court refused his application, citing the risk of citizen confrontation that would arise with the transfer of a prisoner who attracts such unconditional loyalty (exhibit no. 31).

45. On 24 January 2018, following refusal of his own requests to participate in the inaugural session of Parliament and for release, Mr FORN renounced his Parliamentary seat and undertook not to participate in political activity and to refuse to be member of Parliament or the Catalan government. Those steps were taken for the express purpose of securing his release:

as he explained to the Judge, the risk of any future criminal activity of the sort relied on by Spain to justify his detention would therefore disappear. He is still waiting for a response.

The grounds for detention

46. The criminal allegations made by Spain against the applicants are unsustainable in law and in fact. While it is noted that it is not for the Working Group to assess the merits of a potential prosecution, if, as here, the accusations are manifestly flimsy and the proceedings are beset by jurisdictional and other legal flaws, that must bear on the Working Group's assessment of whether detention consequential on those proceedings is arbitrary. In this case, the Working Group is invited to note that the detention of Messrs CUIXART, SANCHEZ and JUNQUERAS is without any lawful basis.

47. Since the Working Group is competent to assess the conformity of national law with the relevant international standards to which the State has acceded, it is invited to conclude that in light of those obligations, the applicants' detention is arbitrary.

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2 DISCUSSION

48. It is clear from Fact Sheet No. 26 of the Working Group on Arbitrary Detention that, in order to assess situations of arbitrary deprivation of liberty within the meaning of paragraph 15 of resolution 1997/50, the Working Group refers, in performing its mission, to the following five legal categories:

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 him) (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, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the 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, spelled out 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); and

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; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

49. The situation of the applicants clearly corresponds to categories II, III and V, and by application of each of those categories, the applicants' detention is arbitrary.

50. It should be pointed out that Spain ratified the International Covenant on Civil and Political Rights (hereinafter ICCPR) on 27 April 1977 and that the Universal Declaration of Human Rights (hereinafter UDHR) is an integral part of its constitution.

51. Indeed, the Spanish Constitution, in its article 10.2° states that: "*The standards of fundamental rights and freedoms recognised by the Constitution are interpreted in accordance with the Universal Declaration of Human Rights and the relevant international treaties and agreements ratified by Spain*".

2.1 DETENTION RESULTING FROM THE EXERCISE BY THE INTERESTED PARTIES OF THEIR RIGHTS TO FREEDOM OF ASSOCIATION, MEETING, EXPRESSION AND THE RIGHT TO PARTICIPATE IN POLITICAL LIFE (CATEGORY II)

52. In this case, the Working Group is invited to find that the charges against the applicants and their resultant detention arise from their exercise of the following rights protected by the UDHR and the ICCPR:

- The right to freedom of association and assembly (addressed below at 2.1.1);
- The right to freedom of opinion and expression (addressed at 2.1.2);
- The right to participate in political life (addressed at 2.1.3).

2.1.1 The right to freedom of association and assembly

53. The right to freedom of association and assembly is proclaimed by Article 20 of the UDHR, which provides that:

> *« Everyone has the right to freedom of peaceful assembly and association. »*

and by Article 21 of the ICCPR, which provides that:

> *« The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. »*

and Article 22 of the ICCPR, which provides that:

> *« 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. »*

54. As contained in the order of 16 October 2017 (exhibit no. 4) detaining Messrs CUIXART and SANCHEZ, the only facts relied on by the Public Prosecutor against them relate to events that took place during a protest against a judicial hearing on 20 and 21 September 2017 in front of the headquarters of the Catalonia Economic Council.

55. Despite this, the detention order systematically refers to other wide-ranging facts, which took place prior to, contemporaneously and subsequent to the facts on which the allegations are based, despite those additional circumstances forming no part of any criminal allegation and therefore not providing any proper basis for detention.

56. With regard to the applicants' specific participation on 20 and 21 September, the investigation only highlighted the free exercise of the right to protest: indeed, the only acts complained of were non-violent acts of demonstration. Those facts do not, therefore, provide a basis for lawful

detention when the applicants' conduct was itself lawful and protected by the right to freedom of assembly and association.

57. The September 2017 demonstrations had not been convened solely by the pro-independence entities now subject to investigation, but also by many other unions, universities, members of other political parties, and professional colleges of various kinds, without these people being prosecuted, let alone detained. The demonstrations were in favour of the right of self-determination of Catalonia through a democratic referendum, and had no violent or unlawful intent.

58. 40,000 people participated in the event, which was a legitimate grassroots demonstration.

59. As for Mr CUIXART, he personally and consistently called for calm and peaceful demonstrations (exhibit no. 22).

60. Indeed, the Working Group is invited to note that Messrs CUIXART and SANCHEZ were known in the media for their calls for non-violence (exhibit no. 15).

61. Moreover, it is instructive to note that all the demonstrations in which the OMNIUM association participated, of which Mr CUIXART is the president, had always been peaceful in its 56 years of history.

62. The appeal chamber of the Audiencia Nacional accepted that OMNIUM CULTURAL has legitimate objectives as a civil society organisation, but found that an association may, through its representatives or leaders, act on the fringes of the law with the excuse of the legality of its association (exhibit no.7). There is no evidence, however, that the applicants did anything unlawful that could justify such a conclusion applying to them.

63. Judge DE PRADA SOLAESA (dissenting) considered that the events of 20 and 21 September consisted of the legitimate exercise of the right to demonstrate peacefully in accordance with the law, a right exercised both by Messrs CUIXART and SANCHEZ personally, and by their associations (exhibit no. 7 bis).

64. More generally, on Mr JUNQUERAS, the jurisdiction order mentioned that (exhibit no. 11, page 8, personal translation):

« the action through the popular movements, was aimed at creating in the citizenship a feeling of rejection towards the Spanish institutions and the powers of the state to propitiate and justify the disobedience of the society towards their orders and allow, when necessary, social mobilization to support the achievement of the independence goals» (underlining added).

65. That is clearly legitimate political activity which cannot justify detaining Mr JUNQUERAS. Indeed, the order even mentions as a criminal process other actions which are clearly not criminal and fall within the protection of Articles 21 and 22 ICCPR:

- the organization of mass mobilizations, peaceful, punctual, agile and, when necessary, spectacular (page 9);
- a call for general strike (page 10);
- different gatherings and demonstrations promoted by the associations ANC and OMNIUM (page 10).

66. The characterisation of legitimate popular political demonstrations as a basis for detaining the applicants has continued throughout these proceedings and, in the most recent decision refusing Mr JUNQUERAS release, the Appeal Chamber stated that the probability of new mobilizations depended a lot on his conduct, and because of that prospect he therefore should

not be released (page 24, exhibit no. 21). But some risk of popular protest cannot justify detention since such protests are protected by Articles 21 and 22 ICCPR and Article 20 UDHR.

67. Even Mr JUNQUERAS' transfer to a closer detention centre and his exceptional temporary release to attend the inaugural parliamentary session on 16 January were refused because of a risk of « *citizen confrontation* » (exhibit no. 31).

68. The reliance on those as purported justification for the applicants' detention indicates clearly that their detention is arbitrary. The Working Group has made such a finding in other cases where detention arises from the legitimate exercise of the right to freedom of assembly and association.

69. For example, as the Working Group stated in a similar case (Opinion 34/2017, Kamel Eddine Tekhar / Algeria):

«§ 37. The Working Group is of the view that Mr. Fekhar is a staunch defender of human rights and that this is the real reason for the judicial harassment to which he has been subjected. By defending the rights of his fellow citizens, including members of the Mozabite minority, he is merely exercising his rights as protected by articles 19 (freedom of opinion and expression), 21 (freedom of assembly) and 22 (freedom of association) of the Covenant. Freedom of assembly does not encompass the commission of criminal acts; however, in the present case, the Government has failed to convince the Working Group that there were reasons to believe that Mr. Fekhar was responsible for the crimes committed during the demonstrations in Ghardaïa in July 2015. »

70. Similarly, all the evidence against the applicants here demonstrates only that they were peacefully demonstrating and engaging in non-violent political activities. Therefore, the applicants have been detained because of their exercise of their fundamental right to freedom of assembly and association, in violation of articles 20 of the UDHR and 21 and 22 of the ICCPR.

2.1.2 <u>The right to freedom of opinion and expression</u>

71. The right to freedom of opinion and expression is protected by article 19 of the UDHR, which stated that:

> *«Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.*»

and by article 19 of the ICCPR:

> *«1. Everyone shall have the right to hold opinions without interference.*
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
> *(a) For respect of the rights or reputations of others;*
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals*».

72. In this case, the applicants right to freedom of expression was criminalised. As a direct result of the applicants' desire for the independence of Catalonia, as expressly reproached in the allegations against them (exhibits no. 7 and 11), and because they have peacefully expressed that desire, and declared it so, they are now incarcerated.

73. That is despite the fact that the call to endorse a referendum ceased to be a crime in Spain following the Organic Law 2/2005, such that those calls constitute a legitimate exercise of the right of freedom of expression, in accordance with Spanish legislation (Articles 20 and 21 of the Spanish constitution) (exhibit no. 20) and international law.

74. The consistent findings of the Working Group have been that detention as a result of the exercise of freedom of opinion and expression is arbitrary. In another situation, similar to this (opinion 16/2017, Bokayev and Ayanov/ Kazakhstan), the Working Group decided that:

« § 49. At the outset, the Working Group notes ***that freedom of opinion and freedom of expression, as expressed in article 19 of the Covenant, are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society****.*

§ 50. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, ***including political opinions****. (…)*

§ 51. In the present case, the Government of Kazakhstan in its response to the submissions made by the source have only cited a number of what it considers to be criminal acts committed by Mr. Bokayev and Mr. Ayanov, without any explanation as to what actions have led to these violations. It is quite clear to the Working Group ***that in fact the basis for the arrest and subsequent detention of Mr. Bokayev and Mr. Ayanov was their exercise of freedom of expression and freedom of assembly****.* ***There is no evidence that any of their actions were violent, that they incited violence or indeed that their actions led to violence by others.*** *Although freedom of expression and freedom of assembly are not absolute rights, the Human Rights Committee states that "when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself****". Moreover, "paragraph 3 [of article 19] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights»* (highlighting added).

75. Further and similarly, in its opinion 36/2017 (Ahmad Suleiman Jami Muhanna Al Alwani / Iraq), the Working Group stated that:

« § 100. Given the ***peaceful nature of the demonstrations*** *and Mr. Al-Alwani's political activism, the Working Group finds that Mr. Al-Alwani's second trial, conviction and death sentence (No. 607/C1/2016 of 10 May 2016) for his speeches at the sit-in square in Ramadi further violated his right to freedom of expression and peaceful assembly. Although the judgment claims that Mr. Al-Alwani had incited violence and terror with his speeches,* ***there is no description let alone evaluation of the details of his speech*** *; it is not even clear when or where he spoke or to whom. A parliamentary committee mandated to investigate the incident reportedly exonerated Mr. Al-Alwani's speech, and the Government has failed to question it in its response. »* (highlighted by us).

76. In a similar case, of an activist in support of the right of his people to self-determination, detained after a demonstration, the Working Group decided that (opinion 11/2017, Salah Eddine Bassir / Morocco):

« §48: *the Working Group considers that Mr. Bassir has been victimized for expressing his political opinion on the situation of Western Sahara, which constitutes a violation of the protection afforded under articles 18, 19 and 26 of the Covenant against discrimination based on a person's political opinion. The Working Group concluded that Mr. Bassir is arbitrarily detained under category II* ».

77. The applicants in our case have repeatedly peacefully expressed their political opinions on the situation of Catalonia. There is no evidence that any of their actions were violent, that they incited violence or indeed that their actions led to violence. As discussed below, the only specified act of violence in the allegations against them is violence perpetrated by the Spanish police; but that cannot be attributed to them or create a lawful basis for their detention.

78. The applicants' political opinion is the basis of their detention. That was implicitly stated on 5 January by the judge refusing to release Mr JUNQUERAS (exhibit no. 21, page 13). The judge admitted that his detention is not justified by his dangerousness, but because of the « probability » that he will pursue the same conduct as before, in relation to his personal and professional political activity. That amounts to the judge keeping him in custody because he is not abandoning his beliefs.

79. In reaction to that, perceiving it to be a means of securing release, Mr FORN renounced his deputy seat in Parliament, and swore to abandon his beliefs (exhibit no. 34).

80. As in the above cited cases, it is as a result of legitimately expressed political opinions that they have been detained, and that detention is therefore arbitrary because it is in violation of the rights protected by articles 19 of the UDHR and 19 of the ICCPR.

2.1.3 <u>The right to participate in political life</u>

81. The right to participate in political life is proclaimed by Article 21 of the UDHR, which states that:

> *«1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.*
>
> *2. Everyone has the right to equal access to public service in his country.*
>
> *3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. »*

and by article 25 of the ICCPR:

> *« Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*
>
> *(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
>
> *(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
>
> *(c) To have access, on general terms of equality, to public service in his country. »*

82. The case law of the European Court of Human Rights (MATHIEU ROHIN AND CLERFAYT v. Belgium, 2 March 1987) is consistent with the ICCPR, namely that the right to free elections includes not only the right to hold free elections but also the right to universal suffrage, the right to vote and to be a candidate (active and passive suffrage).

83. It was a widely held belief, shared by Messrs. CUIXART and SANCHEZ with others who have not been prosecuted or detained, that citizens had the right to vote in the referendum of 1 October 2017. Messrs CUIXART and SANCHEZ called on citizens to exercise that right.

84. Their detention has the aim and effect of restricting their right to communicate their ideas, including their calls to vote and their ability to stand in elections and undertake elected office, even though none of those activities can amount to sedition or rebellion, and none can provide a lawful basis for detention.

85. Despite the lawfulness of their political activities, in the different decisions on the applicants' detention, the judges ruled that the risk of criminal conduct is expressly linked to the public responsibilities to which the applicants aspire (exhibit no. 22), indicating that their detention is materially for the purposes of preventing their participation in public life.

86. Mr SANCHEZ, who was a candidate, could not properly participate in the 21 December elections because of his detention, despite his prominent role and ultimate election for the Junts per Catalunya Party. He has not subsequently been able to take up his seat in the Catalan Parliament. His detention has the aim and the effect of preventing his political participation.

87. Mr JUNQUERAS, also a political representative, a political leader and candidate in the elections, was similarly prevented from taking part in the campaign, to prevent him from being elected and holding office in his country. He was then prevented from taking up his seat and prevented, despite his specific application for temporary release, was prevented from participating in the inaugural session of Parliament.

88. As a direct result and consequence of their detention, therefore, Messrs SANCHEZ and JUNQUERAS were not able to hold the offices and roles to which they were entitled, after being elected by Catalan voters.

89. Worse, Mr FORN preferred to abdicate his political role, in order to be released (exhibit no. 34). His arbitrary detention forced him to cease exercising his right to freedom of opinion and expression and his right to participation in political life, in order to bring his detention to an end.

90. Furthermore, the applicants have suffered obvious reputational damage because of their detention. That has a material and ongoing detrimental impact on their ability to exercise their right to participate fully in political life, including by standing as political candidates.

91. The Working Group is invited to find that the applicants' detention is intended to have this effect, and to discredit them so that they are inhibited in exercising their right to participate in public life.

92. As further proof that the objective sought by the Spanish government and justice system was to prohibit participation in political life, the Working Group's attention is drawn to the statement of the Minister of the Interior that legal consequences could not be ruled out for Mrs. ARTADI and ROVIRA, ERC General Secretary and Campaign Director of Junts per Catalunya respectively, for preparing separatist lists for the elections of 21 December 2017, even though such parties are completely legal (exhibit no. 16). The Minister's statement threatening potential legal consequences for a lawful activity was consistent with and indicative of the Spanish government's concerted interference with the right of Catalan public figures to

participate in political life. Indeed, that being an aim and effect of the Spanish government's conduct is evidenced by the statement of the Vice President of the Spanish Government on 16 December 2017, in which he congratulated the Prime Minister Mariano Rajoy on successfully « decapitating » the leaders of the Catalan independence parties, ERC and Junts per Catalunya (exhibit no. 24 and 25).

93. The situation here is equivalent to that found by the Working Group in its opinion 30/2014 (Daniel Omar Ceballos Morales / Bolivarian Republic of Venezuela, § 50): the detention is arbitrary because « *its aim was to force him (them) to cease exercising his (their) right to freedom of opinion and expression and his (their) right to participation in political life as a mayor belonging to an opposition party ».*

94. The aim of the Spanish government, revealed by the approach they have taken in these cases and fulfilled by the judicial decisions, was and is to eliminate political adversaries by preventing them from exercising their political activities in Parliament at the very least, or causing them to abandon their political activities, as promised by Mr FORN, in an attempt to obtain his freedom.

95. The judge, in his last refusal to release Mr JUNQUERAS (exhibit no. 21, page 24), makes it clear that the detention is based on his political project. Indeed, the decision states that "*the political project remains and the plaintiff has not abandoned it: the way to reach its objective, in the line of what has been followed so far, has neither been abandoned. Its follow-up has already led to the facts which are the subject of this investigation; for all these reasons there remains a risk of reiteration of the same criminal conduct*".

96. It is clear that detention will last until the detainees abnegate their political beliefs and roles.

97. For these reasons, the detention of the three applicants, Messrs CUIXART, SANCHEZ and JUNQUERAS, is arbitrary, in that it results from the exercise by them of their rights, and it prevents the continued exercise of their rights, as protected by Articles 19, 20, 21 of the UDHR and 19, 21, 22, 25 of the ICCPR.

2.2 BREACH OF INTERNATIONAL STANDARDS RELATING TO THE RIGHT TO A FAIR TRIAL (CATEGORY III)

98. For cases falling under the third category, Information Sheet 26 states:

> *"In order to evaluate the arbitrary character or otherwise of cases of deprivation of freedom entering into Category 3, the Working Group considers, in addition to the general principles set out in the* ***Universal Declaration of Human Rights****,* ***several criteria drawn from the Body of Principles for the Protection of All Persons under any form of detention or Imprisonment*** *and, for the States parties to the* ***International Covenant on Civil and Political Rights*** *[ICCPR], the criteria laid down particularly in Articles 9 and 14 thereof ".*

99. In order to establish the arbitrary nature of the detention of Messrs CUIXART, SANCHEZ and JUNQUERAS, the applicants rely on the following provisions:

- **From the Universal Declaration of Human Rights:**

> *« **Article 9** : No one shall be subjected to arbitrary arrest, detention or exile.*

Article 10 *: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

Article 11 *1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed ».

- **From the International Covenant on Civil and Political Rights:**

*«**Article 9**:*

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

[…]

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement.

[…]. »

Article 14*: «1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*
[…]
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
[…]

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

a.) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
b). To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing (…)».

- ***Body of principles for the protection of all persons under any form of detention or imprisonment*** *(Annex II of the information sheet n° 26 WGAD, Resolution 43/173 adopted by the General Assembly)*

*«**Principle 2**: Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.*
[…]
Principle 8*: Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.*
[…]
Principle 20 : *If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.*

Principle 21 :*1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.*
[…]
Principle 36*: 1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. ».*

100. In the case at hand, the Working Group will note the repeated failure to comply with the principles laid down in these texts in the proceedings before the Spanish courts, as detailed below.

101. Thus, the applicants:

- Were prosecuted and detained by a court lacking jurisdiction and not fulfilling the conditions of independence and impartiality (2.2.1);
- The alleged acts did not constitute offences under national law at the date of their commission and the applicants were not promptly or properly informed of the allegations against them (2.2.2);
- The proceedings deprived the applicants of their right to the presumption of innocence (2.2.3);
- The proceedings did not give them the time and facilities to prepare their defence (2.2.4).

2.2.1 **Detention by a court lacking jurisdiction and not fulfilling the conditions of independence and impartiality**

102. The applicants were detained by the Audiencia Nacional, the investigating court in Madrid.

103. Messrs CUIXART and SANCHEZ were detained on 16 October on charges of sedition.

104. The examining judge of the Audiencia Nacional considered that the crime of sedition, when it is committed with the aim of changing the territorial organisation of the State and declaring the independence of a part of its national territory, must be considered to be an offence against the form of Government and therefore the Audiencia Nacional would have jurisdiction (exhibit no. 12). But that requires an entirely novel and impermissible approach to be taken to the law on judicial power which gives the Audiencia Nacional the following jurisdiction pursuant to Article 65 (1) of the Law on judicial power (exhibit no. 5):

"The Criminal Chamber of the National Court [Audiencia Nacional] will investigate:

1. The accusation, unless it corresponds in the first instance to the central criminal courts, of the causes of the following crimes:

a) Crimes against the Crown, his spouse, his successor, the supreme bodies of the nation and the form of government ".

105. But that category of offence, over which the Audiencia Nacional has jurisdiction, has only ever related to an attack on the form of government envisaged by the Spanish constitution (article 1.3 ° of the constitution), i.e. an attack on the organisation of Spain as a parliamentary Monarchy, and not on any re-organisation or change in the political structure on a regional basis. It is entirely novel and, indeed, unjustifiable, to extend the meaning of that offence to cover the allegations against the applicants.

106. Alongside that extension of jurisdiction, the Appeals Chamber also indicated that it need not focus only on the specific facts alleged against the applicants in order to determine whether it had jurisdiction. It should also look, it found, at the general context in which Messrs CUIXART and SANCHEZ were operating (exhibit no. 7): "*It's a complex strategy in which CUIXART and SANCHEZ have been collaborating for a long time*" (personal translation). It also considered that it could look at a wider temporal scope (both historic, and the potential for future actions) rather than limit itself to the question of whether it had jurisdiction over the events alleged against them arising from the 24 hours of demonstrations on 20 and 21 September 2017 (exhibit no. 7).

107. Taking all of that into account, the Audiencia Nacional considered that the applicants' general behaviour, since an indeterminate date, and without details on said behaviour, created a "seditious situation", which had to be stopped by the exercise executive power, in this case by the Council of Ministers voting on 27 October 2017 to apply Article 155 of the Constitution.

108. However, and despite the impermissible extension of jurisdiction attempted by the Appeal court in upholding the finding of jurisdiction, the Audiencia Nacional has no jurisdiction over this matter. On a fair and well-established interpretation of Spanish law, the Audiencia Nacional only has competence over specific offences in the new penal code, which do not include sedition. Moreover, in the former Criminal Code, the Audiencia Nacional had jurisdiction over offences against the form of government, but sedition was an offence under another chapter of offences, so even on the basis of the old law the Audiencia Nacional cannot legitimately claim jurisdiction over these allegations. Finally, the facts as described in the allegation cannot be classified as criminal acts, let alone sedition. Jurisdiction was claimed by the court by a focus only on the assumed motives and objectives of the protagonists and not by reference to the alleged facts (see the dissenting opinion on the jurisdiction appeal, exhibit no. 8 bis).

109. Moreover, in a decision of 2 December 2008, the same court had held that the offence of rebellion had never fallen within the jurisdiction of the Audiencia Nacional, and the court has provided no explanation for why it does not consider that to remain true in relation to this case. A hundred professors of Criminal Law signed a memorandum noting this decision and the incompetence of the Audiencia Nacional to hear this matter (exhibit no. 17).

110. The transfer of the files to the Tribunal Supremo on 4 December 2017 (exhibit no. 14) does not erase the earlier irregularities because it was the Audiencia Nacional that ordered the applicants' detention and, in any event, the Tribunal Supremo is no more competent than the Audiencia Nacional, as the only court with jurisdiction is the Tribunal Supremo of Catalunya, since the supposed crimes were committed in this territory.

111. The circumstances here are analogous to Daniel Omar Ceballos Morales's case (opinion 30/2014 against Venezuela, §35). He was a mayor belonging to an opposition party, who was tried in Caracas, even though, pursuant to the procedural rules, the case should have been heard in a court in San Cristóbal. For that reason, his trial (on charges of civil rebellion and conspiracy) was in violation of the right to be tried by a competent tribunal, and contrary to the procedural rules established in the Code of Criminal Procedure. The same reasoning applies here, and in the same way the applicants' detention is arbitrary.

112. The aforementioned facts also demonstrate that the tribunals which have heard the applicants' cases lack competence on grounds of not fulfilling the conditions of independence and impartiality.

113. The declaration of the government's Vice President gives a clear indication of the lack of independence of the process, not only by her reference to « decapitation », terminology which

is far from impartial or appropriate, but also by attributing that « decapitation » (namely, the applicants' detention) as an achievement of the Prime Minister (exhibits no. 24 25 and 26).

114. Furthermore, the Council of Europe, in its fourth evaluation round dated 3 January 2018, noted that the following recommendation relating to the independence of the Spanish judiciary had still not been implemented : « objective criteria and evaluation for the appointments of the higher ranks of the judiciary, i.e. Presidents of (…) the National Court and Supreme Court judges, in order to ensure that these appointments do not cast any doubt on the independence, impartiality and transparency of this process » (exhibit no. 27, page 7).

115. Thus, the court's lack of jurisdiction over these matters, and lack of independence and impartiality, contaminated their decisions, including the decisions to detain. As a result, the applicants' detention violates articles 9 and 10 of the UDHR, 9 and 14 of the ICCPR and principle 2 of the Body of principles for the protection of all persons under any form of detention or imprisonment.

2.2.2 **The alleged acts did not constitute offences under national law on the date of their commission**

116. The allegations against the applicants are not capable of grounding a lawful detention as the acts described do not amount to offences. Close attention needs to be paid to the facts in these cases to ascertain the extent of the allegations, to attribute specific factual allegations to any of the individual applicants, and to determine whether those allegations are capable of constituting any offence. The need for an analysis of that sort was noted by the magistrate of the appeal chamber of the Audiencia Nacional in his dissenting opinion (exhibit no. 7 bis).

117. As stated above, with regard to Messrs CUIXART and SANCHEZ, the investigating judge detained them only on the basis of an allegation of sedition relating to 20 and 21 September 2017, though he made reference to earlier, concurrent and even subsequent facts (including in places where the applicants were not present).

118. CUIXART's lawyer, during a hearing on 11 January 2018, asked the judge to inform the defence of the concrete facts and crimes attributed to them, since the criminal facts attributed to Mr CUIXART remained unclear. The applicant has still not received an appropriate answer (exhibit no. 35), in violation of Article 14(3)(a) ICCPR.

119. Sedition, as defined in the criminal code (exhibit no. 6) requires public and tumultuous uprising, neither of which characterised the declaration of independence or the demonstrations that preceded it in September 2017. Doctrine stated, even before the start of this procedure, that "*it is impossible that the legislator has also wanted to incriminate the pacific collective opposition to the execution of the law or to the execution of the public function*" (exhibit no. 19, point 4,1). Further, supporting the self-determination of Catalonia does not constitute a crime but is instead a fundamental right, protected by Articles 16 (ideological freedom) and 22 (right of association) of the Spanish Constitution.

120. Messrs CUIXART and SANCHEZ had wished for a peaceful, civic demonstration without violence, insisting that any act of violence should be avoided (exhibits no. 22 and 37). The damage to vehicles of the Guardia Civil (National Police force), which was relied on against them, was the result of the actions of individuals who could not be identified, except one, who had no relation with Messrs CUIXART and SANCHEZ. In fact, the same Guardia Civil recognized that others at the mobilization had tried to protect the vehicles from this damage.

121. In addition, it is important to note that the applicants neither voted for the law which precipitated the referendum of 1 October, nor did they organize the referendum. It is unclear how they can therefore be held responsible for it – albeit that even if they were, there are no particularised allegations in which the facts might constitute the offence of sedition.

122. The Audiencia Nacional ruling on appeal, going beyond the criminal definition of sedition, referred to ongoing criminality (exhibit no. 7) and placed material reliance on the general context, rather than specific acts attributable to the applicants, in order to find that the facts were sufficient to constitute an offence. That is an impermissible approach when considering criminal allegations against individuals.

123. Indeed, in his dissenting opinion, one of the appeal judges of the Audiencia Nacional urged his colleagues to be prudent in order to establish the facts, objectively and criminally, and not to be led astray by presumptions, subjectivism and prejudging the facts (exhibit no. 7 bis). On a proper analysis of those facts, as also stated by Jose Maria Mena, previous chief Prosecutor in the Tribunal Superior of Catalunya for ten years, it is not possible to identify any crime that may have been committed by the applicants (exhibit no. 27).

124. Yet the Audiencia Nacional, ruling on appeal, did not hesitate to indicate (exhibit 8) that: "*The facts that are the subject of the investigation (...) are not isolated facts but part of a strategy planned by the supreme institutional leaders of the Catalan Government and Parliament, in collusion with the leaders of movements and groups of civil society, such as ANC and CULTURAL OMNIUM to severely overthrow the constitutional order, by systematically violating the decisions of the constitutional court* ".

125. That finding was made despite the fact that the allegations against the applicants do not include any alleged violation of decisions of the Constitutional Court, and for good reason, as that would not constitute a crime and would not justify the prosecution or detention of the applicants.

126. Further evidence of the imprecise, unparticularised nature of the allegations against the applicants is given by the joint detention order of Messrs CUIXART and SANCHEZ, when a matter as serious as the deprivation of liberty is a matter that is ordinarily (and properly) considered on an individual basis.

***

127. Mr JUNQUERAS was detained on the basis of the offence of rebellion, which is also not capable of being established on the facts.

128. Indeed, the offence of rebellion, provided for in Article 472 of the Penal Code, is committed by those who, in order, inter alia, to declare the independence of part of the national territory, use a violent and public uprising.

129. Thus, the offence could only be established if the declaration of independence had occurred in the context of an armed or at least violent confrontation. As a result, and although the same purpose was sought, peaceful declarations of independence cannot constitute the crime of rebellion.

130. The requirement of violence is expressly recognised in the text. Thus, and in the case at hand, the declaration of independence, made peacefully and in Parliament, cannot amount to that offence.

131. In order to sidestep that issue, the complaint of the Public Ministry refers to intimidations, but those are not equivalent to violence, and nor are they particularised (by place or time). The allegations against the applicants do not, therefore, constitute rebellion.

132. That position has been corroborated by Jose Maria Mena, previous chief Prosecutor in the Tribunal Superior of Catalunya for ten years (exhibit no. 28), who has stated that there was no violence, and that the democratic behaviour of over a million citizen peacefully exercising their right to demonstrate, could not retroactively become violence, or amount in any context to a rebellion.

133. Javier Perez Royo, professor of constitutional law, affirms that declaring the independence of part of a territory does not fall within the legal definition of rebellion (exhibit no. 29). For that crime to be constituted, violence is required. The was no violence at any stage of the independence process, except when committed by the national police on 1 October, for which the applicants cannot be held responsible. It is impermissible to argue that the applicants should have anticipated the State's reaction and therefore the violence, as the Tribunal stated in its last order of detention concerning Mr JUNQUERAS (exhibit no. 21 page 21).

134. Further, the drafter of the crime of rebellion in 1995, ex-parliamentarian Diego Lopez Garrido, recalls that they included an explicit and key amendment, so that the offence of rebellion had to include violence. In his opinion, the facts here disclose no case for charges of rebellion against the Members of the Catalan government, because of the absence of violence. What would most fit, in his opinion, are crimes of prevarication and disobedience, which are non-imprisonable crimes that do not involve jail but only disqualification (exhibit no. 30).

135. Sedition, for its part, an offence provided for in article 544 of the Penal Code, requires a violent and collective uprising (exhibit no. 9) to derogate the laws. A peaceful protest cannot constitute the crime of sedition. Furthermore, since 2005, the offences of convening or participating in a referendum have been decriminalised (exhibit no. 20).

136. Both crimes, as a hundred professors of Criminal Law have publicly stated, are not and could not be constituted in these proceedings, which lack the element of violence (exhibit no. 38).

137. Indeed, the courts of Catalonia, in other similar investigations, now joined to the present proceedings (exhibit no. 36), rejected complaints of sedition and rebellion when it considered the same facts as the ones presently investigated by the Tribunal Supremo. It accepted only that those facts could amount to disobedience, prevarication and embezzlement, and refused to pronounce any imprisonment.

138. For years, the Courts of Catalunya (e.g. in decisions of 24 March 2014, 8 January 2015) have received complaints of sedition related to the Catalan process for independence. Since 2014, these Courts, which have exclusive territorial competence over such complaints, have rejected the complaints because of the absence of violence in the Catalan independence process and the lack of personal attribution of any identified actions (exhibit no.19, point 8; exhibit no.32, page 4).

139. Mr JUNQUERAS in the detention order of 2 November 2017 merits not even a single line clarifying his personal actions: no violent act is specified. Worse, it is recognized that he did not participate in any violent act nor did he give orders to commit the same (exhibit no. 21, page 13). The judge stated that "*it is true that there is no evidence that the appellant participated personally in specific violent acts, neither does it appear that he gave direct orders in that sense*".

140. The reasoning of the judge is as follows: "*as he incited the citizens to disobey the resolutions of the constitutional court, he has promoted the mobilizations, had to know that the State could not consent to that kind of acts and that it will through the means at its disposal, among them the legitimate use of proportionate and justified force (…). It was foreseeable that violence would take place*". It thus appears that the judge considers Mr JUNQUERAS to be criminally

responsible for violence by the state; but he did not participate in, foresee, or provoke it, and if the state's use of force was lawful it cannot amount to an element of a crime.

141. The same detention order failed to particularise the behaviour alleged against Mr JUNQUERAS, and failed to establish whether his personal behaviour merited custody. The order refers only to "the protagonists" without further details (exhibit no. 11).

142. As in its opinion 47/2013 (Gonzalez / Venezuela), the Working Group is invited to find that:

«§ 32: The extreme ambiguity of the charges brought against a leading member of a political party opposed to the Government allows the Working Group to consider that the detention stemmed from Mr. Rivero's political affiliation. The charges of "involvement in acts of violence" (unspecified), "public incitement to hatred" and "criminal association", with ***no decision on, or explanation of, the material fact of which he is accused, leave the Working Group no option but to conclude*** *that the deprivation of this individual's liberty results from the legitimate exercise of the human rights to freedom of opinion, expression, assembly, association and participation in public affairs, which are guaranteed under articles 19, 20 and 21 of the Universal Declaration of Human Rights and articles 18, 19, 20, 21 and 25 of the International Covenant on Civil and Political Rights.* » *(highlighting added).*

143. The same reasoning applies here and the Working Group is invited to find that the applicants' detention is a violation of article 11.2° of the UDHR and Article 9 ICCPR.

2.2.3 **The proceedings deprived the applicants of their right to the presumption of innocence**

144. The European Court of Human Rights considers that the presumption of innocence is disregarded if an official statement concerning an accused conveys the impression that he is guilty, even though his guilt has not been legally established (ECHR, Allenet de Ribemont v. France, 10 February 1995, No. 15175/89 §§ 35-36, Moullet v. France, 13 September 2007, No. 27521/04).

145. In obvious contravention of that principle, the Spanish Prime Minister described the independence movement and its leaders as "*reckless, even dangerous rebels* " (exhibit no. 15), while the Vice President announced on 16 December 2017 that the Prime Minister has succeeded in « *decapitating* » the leaders of the Catalan independence parties, ERC and Junts per Catalunya (exhibit no. 23 and 24). These pronouncements amount to clear official statements depriving the applicants of the benefit of the presumption of innocence, despite the fact that the judicial processes have not concluded and established guilt. Further, the statements demonstrate the lack of separation of powers in this procedure. They amount to material violations of articles 11.1 UDHR and 14.2 ICCPR.

146. The courts have also taken an impermissible approach to the applicants' presumed innocence. Showing a flagrant disregard for the presumption of innocence, the Appeals Chamber of the Audiencia Nacional has stated (exhibit no. 7) that certain facts are common knowledge and do not need to be proven. For example, it indicated that Mr CUIXART standing on a vehicle of the national police constitutes such a commonly known fact. But that fact needs to be interpreted in its context, which is disputed: Mr CUIXART was on this vehicle to ask the crowd to stop the demonstration, and thus the fact cannot be relied on against him without that context being made clear, or an allegation of an alternative context being proven.

147. These examples serve as evidence that the applicants' detention violates the right to the presumption of innocence protected by articles 11.1° of the UDHR, 14.2° of the ICCPR and principle 36 of the Body of principles for the protection of all persons under any form of

detention or imprisonment. The Working Group is invited to find that their detention is arbitrary for that reason.

2.2.4 **The proceedings did not give the applicants the time and facilities to prepare their defence**

148. The European Court of Human Rights considers that the right to prepare a defence entails an individual having an unrestricted right to present any evidence for that defence that could have an influence of the outcome of the trial (ECHR, Gregacevic v. Croatia, 10 July 2012).

149. Concerning Messrs CUIXART and SANCHEZ, an order was made on 3 October 2017 for a hearing on 6 October: it was ultimately postponed to 16 October, for reasons unrelated to the right to prepare a defence.

150. Mr JUNQUERAS was afforded even less time to prepare his representation and defence prior to his detention. He was heard and then detained on 2 November 2017 (exhibit no. 11), having only been summonsed for that hearing on 1 November 2017. Despite this, the 2 November order found that the defendant had benefited from the time necessary to prepare his defence, notwithstanding that his counsel was absent.

151. The authorities had the audacity to say that this first appearance was intended only to inform him of the proceedings against him, and that he could ask to be re-heard when he wished: it omits to say that this first hearing resulted in his detention.

152. The chronology of events leading to his detention on 2 November was as follows.

153. On 31 October, the court received the complaint from the Public Ministry.

154. On 1 November (a public holiday), he received a summons.

155. The accused and his counsel were required to travel without delay (the distance between Barcelona and Madrid being 630 km) in order to appear at the hearing.

156. That obviously left insufficient time for those representing him to consult, digest, and respond to the 117-page complaint and the documents in the file, or to properly prepare him accordingly.

157. Mr JUNQUERAS' counsel meanwhile, was not able to be present, and the Audiencia Nacional could not fail to be aware of this, since he was also the counsel of members of Parliament, summonsed on the same day before the Supreme Court.

158. However, far from deferring the hearing, the judge proceeded in his absence, again violating Mr JUNQUERAS' right to prepare his defence and to be properly represented.

159. All the accused raised, on that day, their inability to prepare their defence within the given time.

160. In the case of Daniel Omar Ceballos Morales (opinion 30/2014 / Bolivarian Republic of Venezuela), five days to prepare a defence and present evidence were considered inadequate.

161. In this case, even less time was afforded to the applicants, and there has consequently been a violation of article 14.3 of the ICCPR, since the applicants were not given time and facilities to prepare their defence.

162. In addition, it must be noted that the three applicants are detained with convicted persons, in violation of principle 8 of the Body of the principles for the protection of all persons under any form of detention and imprisonment (exhibit no. 18).

163. All applications to be nearer their families have been refused, in violation of principle 20 of the Body of the principles for the protection of all persons under any form of detention and imprisonment (exhibit no. 31).

164. The Spanish Government took an undue advantage, pushing the applicants to incriminate themselves by abnegating their beliefs, in violation of principle 21.1° of the Body of the principles for the protection of all persons under any form of detention and imprisonment (exhibit no. 34).

165. Each of these violations renders the applicants' detention arbitrary, and the Working Group is invited to find accordingly.

2.3 A DETENTION CONSTITUTING DISCRIMINATION (CATEGORY V)

166. In a similar case, of an activist in support of the right of his people to self-determination, detained after a demonstration, the Working Group decided that (opinion 11/2017, Salah Eddine Bassir / Morocco):

« §53 : *Furthermore, the Working Group notes that widespread abuse is perpetrated against persons who, like Mr. Bassir, campaign for the self determination of the Sahrawi population. This constitutes discrimination in violation of international law, in particular articles 1,2 and 27 of the Covenant. Accordingly, the Working Group considers that Mr. Bassir's detention is also arbitrary under category V*».

167. In this case, since Messrs. CUIXART, SANCHEZ and JUNQUERAS' detention stems from their advocacy of Catalans' right to self-determination, it constitutes discrimination based on political opinion and therefore falls under category V.

168. The Working Group in these matters notes the link between the persons imprisoned and the political situation. The three detainees in this case are publicly associated with the political movement for independence. Moreover, the events in question and their arrest took place in that region. That provides a further basis on which the Working Group is invited to find that the applicants' detention is arbitrary and in violation of their fundamental rights.

In view of all the above, the Working Group on Arbitrary Detention is requested, in the case of Messrs. CUIXART I NAVARRO, SANCHEZ I PICANYOL, and JUNQUERAS I VIES, to find that:

- The applicants' detention and deprivation of liberty results from the exercise of the rights and freedoms guaranteed by articles 19, 20 and 21 of the Universal Declaration of Human Rights, articles 19, 21, 22, 25 of the International Covenant on Civil and Political Rights (category II);

- There has in this case been material non-observance of international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Body of Principles for protection of all persons under any form of detention or imprisonment of such gravity as to give deprivation of liberty an arbitrary character (category III);

- The applicants' deprivation of liberty constitutes a violation of international law for reasons of discrimination based on political opinion (category V);

In consequence, the Working Group on Arbitrary Detention is requested to:

- Order Spain to immediately release Messrs. CUIXART I NAVARRO, SANCHEZ I PICANYOL and JUNQUERAS I VIES and;

- Take all measures to put an end to the numerous violations of the Universal Declaration of Human Rights and to the International Covenant on Civil and Politic Rights found by the Working Group.

Barcelona on 30 January 2018

Mr Jordi CUIXART I NAVARRO **Mr Jordi SANCHEZ I PICANYOL**

Mr Oriol JUNQUERAS I VIES

LIST OF EXHIBITS

1	27/09/17 Auto admicion
2	03/10/17 Auto imputacion
3	11/10/2017 Auto citacion Audiencia Nacional
4	16/10/17 Auto prision
5	Articulo 65-1 Ley del poder judicial
6	Articulos 544 et 545 del codigo pénal (sedicion)
7	06/11/17 Auto apelacion detencion
7 bis	07/11/17 Voto particular del magistrado Jose Ricardo de Prada Solaesa
8	06/11/17 Auto apelacion competencia CUIXART
8 bis	07/11/17 Voto particular del magistrado Jose Ricardo de Prada Solaesa
9	Articulo 472 del codigo pénal (rebelion)
10	Articulo 473-2 del codigo pénal (malversacion)
11	02/11/17 Auto prision govern
12	22/11/17 Informe de la juez Lamela de la Audiencia Nacional al Tribunal Supremo
13	24/11/17 Auto Tribunal Supremo – acumulacion de procedimientos
14	04/12/17 Auto Tribunal Supremo - detencion
15	https://www.washingtonpost.com/world/europe/meet-the-two-jailed-activists-behind-catalonias-independence-movement/2017/10/20/a0a10e4a-b4e0-11e7-9b93-b97043e57a22_story.html?utm_term=.cdbdbb5c28a1
16	https://www.elnacional.cat/es/politica/zoido-consecuencias-artadi-rovira-listas_224535_102.html
17	http://www.eldiario.es/tribunaabierta/Legalidad-penal-proceso-independentista_6_706289383.html
18	http://www.elperiodico.com/es/politica/20171202/asi-vive-junqueras-carcel-6466315
19	« el delito de sedicion » articulo de Marina Roig Altozano, actualidad penal 2017, editorial Tirant lo Blanch, ISBN 9788491692775
20	https://www.boe.es/boe/dias/2005/06/23/pdfs/A21846-21846.pdf
21	05/01/18 Auto apelacion recurso JUNQUERAS
22	Documento 24 defensa CUIXART tweets
23	https://www.ara.cat/es/soberanista-Llarena-mantener-Oriol-Junqueras_0_1935406563.html
24	Declaraciones de Mrs. SANTAMARIA del 16/12/2017
25	http://www.lavanguardia.com/politica/20171216/433683114375/elecciones-cataluna-santamaria-presume-descabezado-erc-junts-per-catalunya.html
26	Denuncia a la fiscalia del Tribunal Supremo del 19 diciembre 2017
27	Fourth evaluation round Spain GRECO Council of Euorpe December 2017
28	http://www.eldiario.es/politica/parece-buscado-peor-casa_0_720578320.html
29	http://www.eldiario.es/zonacritica/puede-acabar-bien_6_726587345.html
30	http://cadenaser.com/ser/2017/10/27/tribunales/1509126971_801763.html
31	12/01/2018 Auto del Tribunal Supremo
32	01/02/2016 Auto del Tribunal Superior de Justicia de Catalunya
33	http://www.elnacional.cat/es/opinion/j-j-queralt-necesidad-supera-legalidad_229230_102.html
34	http://www.lavanguardia.com/politica/20180124/44261387372/forn-tribunal-supremo-libertad-abandona-politica.html
35	09/01/2018 Escrito de CUIXART a la sala segunda del Tribunal Supremo
36	07/01/2018 Escrito de CUIXART a la sala segunda del Tribunal Supremo
37	Copia de tweets de Jordi SANCHEZ del 20/09/2017