Special Proceedings No. 3/20907/2017
Second Chamber
Supreme Court

TO THE CHAMBER

I, **Mr Luis Fernando Granados Bravo,** Attorney of the Courts and of **Jordi Cuixart i Navarro**, according to the details accredited in the proceedings stated in the margin, appear and, in compliance with the Law, **STATE**:

Making the record available as ordered in the measure of organisation of procedure of 27 November 2018, as a preliminary step, I submit the following

PRELIMINARY MATTERS RELATING TO THE VIOLATION OF FUNDAMENTAL RIGHTS

1. A CASE OF VIOLATION OF FUNDAMENTAL RIGHTS AS A RESULT OF THE OVERPROTECTION OF THE TERRITORIAL UNITY OF SPAIN INITIATED IN SEPTEMBER 2017

The desire to protect Spain's territorial indissolubility at all costs cannot be allowed to lead to a wholesale violation of fundamental rights. According to several observers, this was exactly what happened in the weeks leading up to the 2017 self-determination referendum in Catalonia through the concerted actions of the three branches of Government. It is in that context, which we shall describe in greater detail below, that the present judicial proceedings emerged.

Indeed, in September 2017, within the framework of the pro-independence process that had been initiated by the parliamentary majority of the XI legislature (which resulted from the elections of September 2015), the Parliament of Catalonia passed Law 19/2017, of 6 September, on the self-determination referendum, and Law 20/2017, of 8 September, on the legal and foundational transition of the Republic.

From that moment on, the reaction of the central State institutions pushed aside the democratic rule of law: police action was intensified to prevent the holding of the self-determination referendum, especially by the National Police and the Civil Guard, with more than **10,000 agents** being expressly sent to Catalonia for this purpose and to carry out searches at companies, private homes, printing presses, newspapers and other premises, including an attempt to enter the headquarters of a political party with parliamentary representation, the confiscation of voting material and the closure of websites, among other actions, which also included the prohibition of public acts relating to the referendum and the arrests of several people, senior officials and technicians of the Catalan Government.

The context leading up to and on the date of 1 October itself was documented in the report by the Catalan Ombudsman, the *Síndic de Greuges*, of May 2018 entitled "La vulneración de derechos fundamentales y libertades públicas en ocasión de la reacción penal al 1 de octubre y la aplicación del artículo 155 CE" [The violation of fundamental rights and public liberties as a result of the criminal reaction to 1 October and the application of Article 155 of the Spanish Constitution]. It is provided as document No. 1. Among other conclusions, the Catalan Ombudsman emphatically stated the following:

The reaction of the three branches of Government has been characterised by recourse to exceptional measures such as the application of Article 155 of the Spanish Constitution – interpreted, furthermore, in the broadest sense – and the forced application of criminal law, in addition to openly and blatantly disobeying the Constitutional Court. The measures adopted in this framework ***have significantly affected fundamental rights and constitutional principles, which have suffered from restrictions lacking in legal foresight, legitimate purpose and proportionality****. All of these effects have been examined in this report and it can be concluded that the most noteworthy are those that refer to the rights and principles of personal freedom, political participation, freedom of expression and rights of assembly and demonstration, the principle of criminal legality and effective judicial protection.*[1]

In fact, this situation was already denounced in a joint communiqué at the end of September 2017 by two United Nations experts, Mr David Kaye, UN Special Rapporteur on the protection and promotion of the right to freedom of

1 Translator's Note: translator's own translation of the original in Spanish.

opinion and expression, and Mr Alfred de Zayas, independent expert for the promotion of a democratic and fair world, which is provided as document No. 2**,** in which it was stated that "The measures we are witnessing are worrying because they appear to violate fundamental individual rights, cutting off public information and the possibility of debate".

This concerted action by the three branches of Government was led among others by:

1. Investigating Magistrate's Court No. 13 of Barcelona.
   The High Public Prosecutor's Office of Catalonia
2. The State Attorney's Office
3. The extreme right-wing political party VOX

Investigating Magistrate's Court No. 13 of Barcelona gave leave to a complaint filed by the extreme right-wing political party VOX against the ERC senator Santiago Vidal as a result of the statements made by that political representative in several public speeches. In the summer of 2017, the procedural activity of the case was limited to the investigated parties Santiago Vidal, Carles Viver Pi-Sunyer and Josep Lluís Salvador, as reported at the time by the High Court of Justice of Catalonia through a press release and the decision itself issued on 19 July 2017 which stated that "**it does not aim to achieve either political organisation or the calling of a referendum, and nor is it a general proceeding against those who directly or indirectly had an interest in it,"**[2] documents which are already on file in these proceedings**.**

Despite the clarity of its own judicial decisions, the non-extendable nature of the jurisdiction and the existence of a judicial investigation in the High Court of Justice of Catalonia in this regard, in Preliminary Proceedings 3/2017 (inexplicably, during the month of September 2017) Investigating Magistrate's Court No. 13 agreed to 41 entries and searches and 16 arrests of senior officials of the Catalan Government. The head of the Court, Mr Juan Antonio Ramírez Sunyer, who died in 2018, was described by the president of the Supreme Court, Mr Carlos Lesmes, as having changed "the course of history of our country". It is evident that the actions of Investigating

2 Translator's Note: translator's own translation of the original in Spanish.

Magistrate's Court No. 13 of Barcelona had no legal basis in anything related to the self-determination referendum.

Recently, moreover, some of the defences of Investigating Magistrate's Court No. 13 have even demonstrated possible irregularities in the award of the file to the aforementioned Court in the initial allocation of the complaint.

At that time, **the High Public Prosecutor of Catalonia** issued seven instructions (from that of 2/2017 of 8 September to that of 8/2017 of 27 September) addressed to the police forces as judicial police without any legal basis. Since the investigation had been judicialised in the High Court of Justice of Catalonia, the judicial police depended directly on the investigating magistrate Mercedes Armas, as evidenced by the issuance of several court orders on the matter. Nor did it have the power to direct the governmental police to control public order, given that in no case does it exercise this function. The public prosecutor's appointment of the authority that would exercise this control, Mr Pérez de los Cobos, had no legal basis. The coordination and planning of the police forces corresponds to the legally established and legally organised bodies, and in none of these does the prosecutor's office have pre-eminence or the power to preside or represent. This function corresponds in each case to the Spanish Minister for Home Affairs, the Government delegates, the Catalan Minister for Home Affairs, the Security Board of Catalonia (Junta de Seguretat de Catalunya) and the mayors on the local security boards. Never to the public prosecutor (Law 2/86, Art. 48-50; RD 769/87, Art. 32 and 33, and Catalan Law 4/2003, Art. 4, 6 and 8).

Article 5.2 of the Organic Statute on the Ministry of the Public Prosecutor (Law 50/1981 of 30 December) prohibits the Public Prosecutor's Office from adopting precautionary measures or measures that restrict rights, and therefore it can scarcely claim to enjoy the legal standing required to issue orders to the police, even if it is for the purpose of investigation, and to apply measures such as the seizure of electoral material and other material for the publication, promotion or execution of the self-determination referendum that were ordered through the aforementioned instructions of the Public Prosecutor's Office.

This same Public Prosecutor's Office had, at that time, opened an investigation against 750 Catalan mayors for their participation in the

organisation and preparation of the self-determination referendum, who were gradually summoned to the four provincial public prosecutor's offices in Catalonia. For example, specifically, on 20 September 2017, more than **30 mayors** from several Catalan municipalities were summoned to testify as investigated parties. In all these summonses, a significant number of private citizens accompanied their respective mayors to the courts.

The Public Prosecutor's involvement in the case from a particularly adversarial standpoint as regards the independence movement is patently clear. In fact, the indictment in this proceeding is signed by Ms Consuelo Madrigal, an attorney general of the State appointed by the Government of the Partido Popular (and enjoyed its support) through a resolution of the Council of Ministers on 9 January 2015 and removed on 5 November 2016; and by Mr Javier Zaragoza Aguado, who already signed a circular on 5 November 2015 as chief public prosecutor of the National High Court (Audiencia Nacional) on the pro-independence process in which he gave instructions to all security forces in terms that led to his censure by the Justice Commission of the Parliament of Catalonia by means of Resolution 183/XI.

Attached as documents 3, 4, 5 and 6 are copies of the *Official State Gazette* (BOE) relating to the appointment and dismissal of Ms Madrigal, Mr Zaragoza's circular and censure Resolution No. 183 XI.

Furthermore, the **State Attorney's Office**, in addition to challenging laws and decrees approved by the Catalan institutions that led to the decisions of the Constitutional Court *without grounds* and *inaudita parte* according to Art. 161.2 of the Spanish Constitution, also requested the suspension of the right of assembly in two acts relating to the referendum in Madrid and Vitoria, requesting the relevant measures before Contentious-Administrative Courts No. 3 and 1, respectively, which agreed to the suspension as a precautionary measure. This was denounced in the chapter on Spain in Amnesty International's annual report for 2017/2018 as being unjustified interference in the fundamental rights to freedom of expression and assembly. In the case of Vitoria, when it examined the merits of the case, the Court handed down a judgement rejecting the position of the State Attorney and proclaiming the necessary priority of the fundamental right to assembly. A copy of the judgment is provided as document No. 7**.**

Finally, as for the political party **VOX**, whose initial complaint led to the proceedings of Investigating Magistrate's Court No. 13, it has been examined by the defence at various moments of the procedure, and we have requested its expulsion from the proceedings due to its electoral interests in them, as well as the incompatibility of its ideology with a justice system based on the democratic values of plurality and protection of minorities. However, as far as this section is concerned, VOX as a legal entity was neither harmed nor offended by the facts it has denounced, nor did it have any legally attributed function to protect legality or to prosecute crimes and misdemeanours.

Therefore, and in conclusion, in the weeks following the approval of the laws referred to by the Parliament of Catalonia, four actors without legal jurisdiction for these purposes or outside their competences (Investigating Magistrate's Court No. 13, the Public Prosecutor's Office, the State Attorney's Office and VOX) acted to prevent the holding of the referendum on self-determination, adopting and urging the adoption of measures that drastically affected citizens' fundamental rights, which could not be justified in terms of proportionality or legality, and which laid the foundations for a climate of legal exceptionality that continues today in which the protection of the indissoluble unity of Spain has served as an argument to cast aside citizens' most important civil and political rights.

Three of these actors, the Public Prosecutor's Office, the State Attorney's Office and VOX, share the same aim in these proceedings by exercising the civil motion.

2. A TRIAL ON FREEDOM OF EXPRESSION

The European Convention on Human Rights, in its Art. 10.2, and the Spanish Constitution in its Art. 20.1.a, proclaim the fundamental right to freedom of expression.

The European Court of Human Rights has long recognised that, "Freedom of expression constitutes one of the essential foundations of [a democratic] society" and also that it is "one of the basic conditions for its

progress and for the development of every man" (JECtHR *Handyside v. United Kingdom*, 7 December 1976). According to the Court, "Democracy thrives on freedom of expression" (JECtHR, *Unified Communist Party of Turkey*, application 19392/92 of 30 January 1998, paragraph 58).

This right has been developed in a multitude of decisions, for example, in the recent JECtHR *Stern Taulats and Roura Capellera v. Spain* of 13 March 2018:

30. Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Without prejudice to Article 10(2) of the Convention, it applies not only to "information" or "ideas" which are favourably received or considered harmless or indifferent, but also to those which injure, offend or bother: this is a requirement of pluralism, tolerance and the spirit of openness without which there is no "democratic society" (Handyside v. United Kingdom, 7 December 1976, § 49, Series A No. 24, and Lindon, Otchakovsky-Laurens and July v. France [GS], No. 21279/02 and 36448/02, § 45, ECHR 2007-IV). As enshrined in Article 10 of the Convention, freedom of expression carries with it exceptions which nevertheless require a restrictive interpretation, and the need to restrict it must be convincingly motivated. (…)[3]

These proceedings seek to build the indictment against the president of Òmnium Cultural on the basis of many acts that are considered mere actions of freedom of expression. For example, the indictment of the Public Prosecutor's Office states (p. 67):[4]

These actions, as well as the initiatives of Òmnium Cultural that created the website www.letscatalansvote.org/es, were decisive to achieve the participation of persons of varying degrees of notoriety in the international arena, and to continue the protests in the face of the judicial closure of the websites of the referendum and other judicial proceedings.

It is also stated on page 87 of the indictment that:

The organisations ANC and OC through the website with domain name cridademocracia.cat, and specifically on the URL www.cridademocracia.cat/whatsapp/

3 Translator's Note: translator's own translation of the original in Spanish.
4 Translator's Note: all translations of text taken from the indictment are translator's own.

offered the option of joining a WhatsApp group from which invites were sent to the mobilisation, and the option of being regularly informed through alerts and being called to events in case of need.

At various moments in this indictment reference is made to Jordi Cuixart's interventions in interviews, political events or on social media networks regarding his opinion on how to deal with the self-determination referendum of 1 October and its political consequences.

On page 84, the motion even goes so far as to censure the following facts:

From the arrival of the defendant Jordi Cuixart, on several occasions both of them addressed the crowd to direct its actions. Thus, on the afternoon of 20 September, Jordi Cuixart addressed the assembled citizens and demanded the release of the detainees. Despite claiming that the mobilisation was peaceful, he also appealed to the determination shown in the Civil War (using the expression, "They will not pass!").

The criminality claimed in the indictments for behaviours that merely constitute the expression, promotion and dissemination of political ideas, with the criminalisation of platforms for expression such as websites and a WhatsApp group or speeches at political events or in interviews, is a manifest interference in the fundamental right to freedom of expression according to its conception as a fundamental and protected pillar of political plurality.

The European Convention on Human Rights does not contain an absolute right to freedom of expression, despite its recognition as a fundamental pillar of the system of rights and freedoms. The possibility of interfering in freedom of expression exists, but only under very strict circumstances. Thus, in the aforementioned JECtHR *Stern Taulats and Roura Capellera v. Spain,* the Court had to remind the representation of the State Attorney that:

32. Article 10(2) of the Convention leaves hardly any scope for restrictions on freedom of expression in the sphere of political discourse and debate (in which it acquires the highest importance) or matters of general interest.[5]

5 Translator's Note: translator's own translation of the original in Spanish.

As for the possibility of sanctioning conducts involving the expression of ideas and from a necessary perspective of proportionality, the Court establishes that a prison sentence will only be possible in the event of exceptional circumstances, such as the dissemination of hate speech, apologies of violence or incitement to violence (JECtHR, Grand Chamber, *Cumpana and Mazare v. Romania,* No. 33348/96, 17 December 2004, § 115; JECtHR, *Yalçiner v. Turkey,* No. 6411/00, 21 February 2008, § 44).

These circumstances do not occur in the present case and cannot be inferred from the facts described in the indictments.

In particular, the defence must highlight its strong surprise at the prosecution's stance when it criminalises a political slogan, "They will not pass!" (*No pasarán!*), which was used precisely by those who, in the face of the July 1936 coup d'état, stood firm in defending democracy and the Spanish Republic. An attempt to derive some sort of criminal consequence from the expression of this slogan is not only contrary to the aforementioned right to freedom of expression, but also demonstrates a clear historical ignorance of the significance of this slogan in contemporary universal history given that it was used in the Second World War as an anti-fascist slogan and has continued to be used in modern times, as can be seen on the T-shirts worn by the group Pussy Riot, whose prosecution and conviction was recently censured in the JECtHR *Mariya Alekhina and others v. Russia*, of 17 July 2018.

The acceptance of the indictment by the Supreme Court and the opening of proceedings against Jordi Cuixart for facts arising from the freedom of expression of the defendant in themselves constitute an initial blatant violation of Art. 10 ECHR.

This violation is particularly serious given that an over-restriction through the criminal jurisdiction, as claimed here, could have an obvious chilling effect, as expressly prevented by the ECHR in the *Lingens v. Austria* Judgment of 8 July 1986:

In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in

performing its task as purveyor of information and public watchdog (see, mutatis mutandis, the above-mentioned Barthold judgment, Series A No. 90, p. 26, para. 5).

In conclusion, the stance taken by the complainants criminalising political discourse in order to support a criminal conviction cannot be grounded in any of the powers provided under the Convention and, therefore, entails a violation and a serious attack on the fundamental right to freedom of expression under Art. 10 ECHR and related provisions.

And on this assumption, the Supreme Court cannot accept the holding of the present trial in the terms proposed by the complainants without the risk of prosecuting acts that fall within the right to freedom of expression.

3. A TRIAL ON THE RIGHT TO PEACEFUL ASSEMBLY

Our system of oral criminal trials is subject to the so-called accusatory principle, which places on the prosecution the duty to determine the matter of the proceedings through its indictments. In the present case, the indictments that have been passed to us (and which have not been corrected by the Chamber) contain, in our opinion, accusations that convert into criminal acts mere acts of protest that are fully included in the exercise of the fundamental right to assembly (Art. 21 Spanish Constitution, 21 ICCPR and 11 ECHR).

The European Court of Human Rights, through its case law, has developed the content of the right of assembly of Article 11 ECHR as a particularly central democratic right. Indeed, the right of assembly is a fundamental right in the process of forming public opinion, constituting, together with freedom of expression, a basic right in a democratic society. In addition, it has a distinct purpose, aimed at enabling the formation of free public opinion, hence its association with freedom of expression. The right to peaceful assembly is subject to restriction exclusively in matters of the management of public order and the protection of third-party property. However, not compatible with the protection of this right is to punish citizens for their participation in expressions of the right to assembly provided that they are peaceful and have not been expressly prohibited in the terms developed by the Court.

The term assembly refers to the intentional and temporary presence of at least ten people[6] with the aim of expressing a common point of view. The assembly can take many forms: it can be a static assembly, a sit-in, a picket line, a demonstration, of people, vehicles or bicycles[7], even the occupation of a building[8]. The "temporary" nature of the assembly should not preclude the construction of protest camps, roadblocks[9] or other more permanent[10] constructions. The assembly can take place in public or private[11] spaces. The fact that it has not been authorised or that the conditions imposed by the authorities have not been complied with does not mean that protection of the event can be refused[12].

The protection guaranteed by international law is limited to "peaceful" assemblies. In order to benefit from the protection of this right, the organisers must be willing to hold a peaceful assembly or for it not to have a violent intent that could result in public order problems[13]. The term "peaceful" should not be interpreted in a strict sense. Indeed, "behaviour likely to indispose or offend third parties or even to hinder or prevent the activities of a part of the population"[14] must be admitted.

By way of example, the European Commission of Human Rights ruled that blocking a road by means of a sit-in with the aim of preventing access to military sites cannot be considered as a violent act excluded from the protection of the exercise of the fundamental right[15]. This is also applicable to the case of a blockade of a bridge with vehicles over many hours[16] or people who take part in an unauthorised demonstration refusing to comply with the instructions of the police and trying to force their way across.[17]

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6 Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, Venice, 4 June 2010, CDL-AD (2010) 020, p. 22, § 16.

7 CDL-AD (2010) 020, p. 22, § 17, notes 42 and 23.

8 JECtHR, *Cissé v. France,* No. 51346/99.

9 Inter-American Commission on Human Rights: Report of the Office of the Special Rapporteur on Freedom of Expression (2008), § 70.

10 CDL-AD (2010) 020*,* p. 24, § 18.

11 *Ibid.*

12 JECtHR, *Cissé v. France,* No. 51346/99, § 50.

13 European Commission of Human Rights, *Christians against racism and fascism v. UK,* No. 8440/78, decision, 16 July 1980.

14 CDL-AD (2010) 020, p. 8.

15 European Commission of Human Rights, *G. v. Germany,* No. 13079/87, decision 6 March 1989.

16 JECtHR, *Eva Molnar v. Hungary,* No. 10346/05, 7 October 2008.

17 JECtHR, *Oya Ataman v. Turkey,* No. 74552/01, 5 December 2016, § 40.

With regard to the possible commission of violent acts during an assembly, the European Commission of Human Rights has said that "the possibility of violent counter-demonstrations or those of extremists with violent intentions or of non-members of the organising association who join the demonstration cannot, as such, remove the right. Even if there is a real risk that the demonstration may be disturbed by events beyond the control of the organisers, the demonstration cannot for this reason alone be excluded from the scope of Article 11 ECHR[18]".

Freedom of peaceful assembly is not an absolute right. Any interference can be justified if it respects the three usual conditions: existence of a legal basis, a public interest that must be protected and respect for the principle of proportionality.

With regard to respect for the principle of proportionality, the State has the burden of proving the proportional and justified nature of the interference (cf. for example JECtHR *Navalny v. Russia*, 15 November 2018, § 144). It is therefore for the State authority to prove that possible interference, for example in the form of a criminal sanction, can be considered to be "necessary in a democratic society". According to the case-law of the Court "the adjective *necessary* cannot be replaced with terms such as *admissible, reasonable* or *opportune*. Necessity always implies **the existence of an imperious social need**".

Thus, the JECtHR *Bukta and others v. Hungary* of 17 July 2007

37. In this connection, the Court notes that there is no evidence to suggest that the applicants represented a danger to public order beyond the level of the minor disturbance which is inevitably caused by an assembly in a public place. The Court reiterates that, "where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance" (see Oya Ataman v. Turkey, no. 74552/01, §§ 41-42, ECHR 2006-XIV).

18 European Commission of Human Rights, *Christians against racism and fascism v. UK,* No. 8440/78, decision, 16 July 1980.

Or the JECtHR *Galstyan v. Armenia* of 15 September 2007

115. …*the freedom to take part in a peaceful assembly is of such importance that a person cannot be subjected to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as this person does not himself commit any reprehensible act on such an occasion (…)*

117. *In the light of the above, the Court concludes that the applicant was sanctioned for the mere fact of being present and proactive at the demonstration in question, rather than for committing anything illegal, violent or obscene in the course of it. In this respect, the Court considers that the very essence of the right to freedom of peaceful assembly would be impaired, if the State was not to prohibit a demonstration but was then to impose sanctions, especially such severe ones, on its participants for the mere fact of attending it, without committing anything reprehensible, as happened in the applicant's case. The Court therefore concludes that the interference with the applicant's right to freedom of peaceful assembly was not "necessary in a democratic society".*

Following the indictment of the Public Prosecutor's Office, page 5 describes a basic pillar of the actions of the accused as being "popular mobilisation as an instrument of pressure", something that is in principle absolutely inherent to a State that considers itself democratic and which lies at the core of the fundamental right to assembly. This mobilising activity is clearly evident at three moments:

1. The mass demonstrations of 11 September 2013, 2014 and 2015, 2016 and 2017, 13 November 2015, 6 February 2017, 11 June 2017 and the call for "permanent mobilisation" (pp. 72-77).

2. The mass demonstrations that took place on 20 September 2017 and on subsequent days consisting of protest rallies against the searches carried out at the premises of the Government of Catalonia or at the homes of those arrested in the police operation ordered by Investigating Magistrate's Court No. 13 of Barcelona (pp. 77 to 91).

3. Demonstrations at polling stations during the referendum of 1 October 2017 (pp. 91-116).

The details of most of these episodes will be provided in greater detail in this statement in the factual section of the first conclusion and throughout the oral trial, however, what we wish to highlight at this time is that the basis of the accusation against Jordi Cuixart Navarro is his participation, public intervention and calling of mass demonstrations of a peaceful nature, which therefore cannot be criminalised or serve as the backdrop for any motion for crimes committed because the same fact cannot be simultaneously both a crime and the exercise of a fundamental right. This was also examined by the UN Special Rapporteur on the situation of human rights defenders, Mr Michel Forst, in his report last December in which he specifically refers to Mr Cuixart as a human rights defender as well as the existence of criminal proceedings following the organisation of protests in Barcelona, document No. 8 (p. 484), and by David Kaye, a UN Rapporteur already cited in this paper, who in a statement on 6 April 2018 noted that "charges of rebellion for acts that do not involve violence or incitement to violence may interfere with rights of public protest and dissent" (document No. 9).

Furthermore, building criminal proceedings for serious crimes on the basis of mass and peaceful acts of civil society to demand certain actions by public powers or in criticism of the actions of others, such as the judiciary, entails not only an attack on the fundamental rights of Mr Jordi Cuixart Navarro in this case, but also erodes the fundamental right to assembly of all citizens through the so-called "chilling effect". This was proclaimed, for example, in the Judgment of the First Section of the National High Court of 7 July 2014:[19]

This is where the effects are noted of the doctrine of the chilling effect, which is a characteristic of judgments on criminal proportionality when fundamental rights are concerned. Because any criminal sanction that did not take into account the fact that the defendants whose acts we had examined were exercising a fundamental right would send a message discouraging citizens from direct democratic participation in common concerns and the exercise of political dissent.

19 Translator's Note: translator's own translation of the original in Spanish.

It is for all these reasons that we understand that the criminalisation, detention and the holding of an oral trial, which is based on the legal view that the exercise of the fundamental right of assembly is a crime, is a clear violation of the validity of this right, since it is impossible to reconcile the exercise of this right with its simultaneous criminality.

For all these reasons, we understand that the massive and peaceful demonstrations held on 11 September 2013, 2014, 2015, 2016 and 2017, 13 November 2015, 6 February 2017, 11 June 2017, 20, 21, 22 September 2017 and 1 October 2017 must be dismissed from the indictments, and therefore from the matter of the proceedings.

4. A TRIAL ON THE RIGHT TO SELF-DETERMINATION

The accusation which is filed against our client Jordi Cuixart Navarro, according to the public prosecutor's indictment, criminalises the defendants' ultimate aim of "declaring the independence of that part of the national territory and obliging the State to accept the separation of that territory" [p. 5]. Without prejudice to subsequent discussion regarding the specific actions of our client, by reading the indictment it can be inferred that what is being criminalised is not so much a specific manifestation of the exercise of the right of self-determination but rather the self-determination aim itself.

In our view, this is a violation of the right to defend self-determination, which itself thrives on three elements:

1. The fundamental right to freedom of thought developed in the previous section and the possibility of expressing any idea, even those that are contrary to the Constitution.

2. The fundamental right to promote the protection and application of human rights and fundamental freedoms at both national and international levels (Art. 1 United Nations General Assembly Declaration on Human Rights Defenders of 8 March 1999) including the right to self-determination.

3. The right to self-determination provided for in international texts (Art. 1 ICCPR) and those applicable in Spain by way of Art. 10.2 of the Constitution.

This third element deserves special attention because we understand that it is the basis and motivation for a large part of the actions of the public powers under the erroneous idea that Article 2 of the Constitution and the indissolubility proclaimed therein prevent the recognition of Catalonia's right to self-determination despite the proclamation of this right in the aforementioned international texts. And, as we have said, no discussion is raised regarding the manner in which that right should be exercised, but rather the proceedings take as their staring point the legal conclusion that this right does not exist in the Spanish legal system. In our opinion, the present legal debate admits conclusions that are diametrically opposed to those pointed out by the public prosecutor and the rest of the complainants in the present proceedings.

First of all, there are some contextual considerations that make it necessary to qualify the indictment of the Public Prosecutor's Office, even regarding its citation of the position of the Constitutional Court on this issue. In the aforementioned Constitutional Court Judgement 42/2014, of March 25, the Constitutional Court stated the following:[20]

The Constitution does not and cannot expressly address all the problems that may arise in constitutional matters, in particular those arising from the willingness of a part of the State to alter its legal status. Such problems cannot be resolved by this Court, whose function is to ensure strict observance of the Constitution. For this reason, the public powers and especially the territorial powers that make up our State of autonomous regions are the ones who are called upon to resolve the problems that unfold in this field through dialogue and cooperation. (...)

For these reasons, it must be concluded that the references to the "right to decide" contained in the challenged Decision, in accordance with a constitutional interpretation that is in conformity with the principles that have just been examined, do not contradict the constitutional statements, and that the former, as a whole, with the

20 Translator's Note: all text taken from Constitutional Court judgements are the translator's own from Spanish originals.

caveats that have been made throughout this Judgment, express a political aspiration that can be defended within the framework of the Constitution.

From a reading of the conclusions of Judgment 42/2014, of 25 March, it is noted that the High Court insists on the importance of political debate in political aspirations and in the recognition, under certain terms, of the so-called "right to decide". Moreover, **Constitutional Court Judgement 42/2014, of 25 March, refers expressly to the 1998 Canadian Supreme Court ruling on the Quebec case and incorporates it**, a reference that the public prosecutor transcribes on page 9 of its indictment:

From this it can be inferred that within the framework of the Constitution, an Autonomous Community cannot unilaterally call a self-determination referendum to decide on its integration within Spain. This conclusion is the same as that made by the Supreme Court of Canada in the pronouncement of 20 August 1998, in which it rejected a parallel between a unilateral secession project by one of its provinces, on the one hand, and both its Constitution and the postulates of international law, on the other.

The incorporation by the Spanish Constitutional Court of the considerations of its Canadian counterpart cannot under any circumstances justify the position articulated by the complainants in the present proceedings, given that the **Canadian Supreme Court endorsed a unilateral referendum.** Let us now take a look at the literal wording:

"A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize. (...) The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.

This quote from the Canadian opinion in the prosecutor's own brief of conclusions poses an insurmountable contradiction in its approaches because

the Spanish Constitutional Court has explicitly accepted the value of that precedent in Constitutional Court Judgment 42/2014.

Constitutional Court Judgement 114/2017, of 17 October, concerning the referendum law approved by the Parliament of Catalonia ignored the references to the right to decide and the considerations of the 2014 ruling (which were specifically invoked by the parties) and focused solely on denying the existence of a right to self-determination as regards Catalonia as a political subject. Thus, the above-mentioned decision states that:

It is true that both the International Covenant on Civil and Political Rights of 19 December 1966 and the Covenant on Economic and Social Rights of the same date, to which Spain is a party, proclaim, and this is recalled in the preamble to Law 19/2017, that "All peoples have the right to self-determination" (Art. 1.1 of both treaties). It is no less true that several unequivocal resolutions of the United Nations, in the scope of which those Covenants were signed, have restricted this right – construed as a claim to unilateral access to independence – to cases of "subjection of peoples to foreign subjugation, domination and exploitation". Apart from these, "any attempt aimed at disrupting, in whole or in part, the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations", as stated in paragraphs 1 and 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by Resolution 1514 (XV) of the General Assembly of the United Nations on 14 December 1960.

It is particularly important to recall this approach for two reasons: 1) because it accepts the validity of the right to self-determination – despite disagreeing with the scope of application, and 2) because at no time in the judgment does it exclude the so-called "right to decide" that it had proclaimed in the aforementioned Constitutional Court Judgment 42/2014, of March 25, in the terms that we have transcribed literally, regarding the position of the Supreme Court of Canada in the case of Quebec. The question of the extent to which the right to self-determination can be applied beyond the context of peoples subject to foreign domination, subjugation or exploitation is currently the subject of a lively and topical debate in international law. The Opinion of the International Court of Justice in the Kosovo case of 26 July 2010 stated:

*The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council. (…)*

The Court has already noted (see para. 79 supra) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question.

The International Court of Justice decided not to rule on this issue since the General Assembly of the United Nations had not made a request for an opinion that included this debate, which simply remained unresolved.

However, the aforementioned opinion of the Supreme Court of Canada incorporated by the Spanish Constitutional Court and the public prosecutor in its indictment, after reviewing all international legislation on the matter and accepting the two classic cases of the right to self-determination (colonies and territories subject to domination), does indeed state that there is a third case:

134. A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent "the whole people

belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135. Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated.

This right to external secession stemming from a previous right to internal self-determination is applicable to political entities which, like Catalonia, have experienced a period of existence as autonomous States that has led to an evident frustration of the establishment of a Statute of Autonomy not endorsed by the population. From this perspective, this consideration would give rise to the emergence of the right to self-determination.

Furthermore, in the case of Catalonia, the entire public law theory regarding the interpretation of the right to self-determination must be viewed in the context of a phenomenon that is unprecedented in our political and historical *milieu*, which is the mass, peaceful and repeated mobilisation of civil society over many years. It is difficult to find a phenomenon comparatively similar to the Catalan pro-independence movement, and therefore the argument of the democratic legitimacy of sustained mobilisation is something that, in a debate on the Catalan path to self-determination, must necessarily be taken into account.

Together with the above conclusions regarding the Spanish and Canadian Constitutional Courts, whether it is called the right to self-determination, the right to decide or given any other label, the spirit of Art. 1 ICCPR leads us to the conviction that there is a right for Catalans to decide their future and that this can be expressed through a referendum on independence.

Neither this substantive position nor the right to defend it can be subject to criminalisation in the light of the law set out above, and for this reason the motion filed in the present proceedings is an attack on basic principles of international law.

5. A TRIAL CONCEALING TORTURE

Article 15 of the Spanish Constitution recognises the right to life and physical and moral integrity and consequently prohibits torture and those acts that may be considered inhuman or degrading treatment. Article 3 of the ECHR contains the same prohibition.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations on 10 December 1984 (with the ratification instrument in Spain being the *Official State Gazette* (BOE) of 9 November 1987) establishes the following concept of torture:

1. For the purposes of this Convention, the term "torture" means any act by which ***severe pain or suffering, whether physical or mental, is intentionally inflicted on a person*** *for such purposes as obtaining from him or a third person information or a confession,* ***punishing him for an act he or a third person has committed*** *or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*

In order to complete the definition and thus the entire content of Article 15 of the Spanish Constitution and 3 ECHR, the definition of inhuman or degrading treatment is developed in Article 16 of the same international convention:

1. Each State Party shall undertake to prevent in any territory under its jurisdiction ***other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official*** *or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.*

In relation to Art. 3 ECHR, regarding violent interventions by the police, we should recall the recent case-law of the ECtHR on violent intervention by the Italian police against demonstrators at the G8 summit in Genoa in 2001. In the judgement, the Court examines the behaviour of police officers who enter a

school occupied by demonstrators and violently attack those present, including those sitting on the floor, by throwing punches, kicks and issuing beatings with batons[21].

It should be noted, in order to avoid possible non-serious but not unexpected objections, that in this case the Italian courts had admitted that "a number of isolated acts of resistance had probably been committed by those inside the Diaz-Pertini School", but despite this it should be emphasised that it declared "absolute lack of proportionality between the police violence and the resistance put up by the persons occupying the premises"[22].

In these circumstances, the Court considered that the police violence against mostly peaceful demonstrators, which had caused a significant number of injuries, not only constituted a violation of Article 3 ECHR, but should even be described as "**torture**" within the meaning of that provision[23].

The police action of the Civil Guard and the Spanish National Police Force during the day of 1 October, as has been described in the previous section, constitutes an evident act of torture or inhuman or degrading treatment according to the international convention that warrants the ***prompt and impartial investigation*** that this treaty demands in its Article 12. An investigation that was demanded in the days after 1 October by important international organisations.

For example, by the vice-president of the Council of Europe, Sir Roger Gale, in statements on 2 October (we provide a press release as document No. 10), and the Commissioner for Human Rights of the Council of Europe, Mr Nils Muisenieks, who specifically sent a letter to the Spanish Minister for Home Affairs on 4 October 2017, which we attach as document No. 11 in which the facts were specifically stated:

Dear Minister, I am writing to you to share my concerns regarding allegations of ***disproportionate use of force by law enforcement authorities*** *in Catalonia on 1 October 2017. I am closely following the developments in Catalonia and have received reports about* ***disproportionate use of force against peaceful demonstrators and persons engaged in passive resistance*** *to police action, on the streets and in and*

21 JECtHR *Cestaro v. Italy*, req. 6884/11, 7 April 2015, § 165.
22 *Idem*, § 180.
23 *Idem*, § 190.

around places where such persons intended to vote. It has also been reported that persons were, in certain cases, subjected ***to disproportionate and/or unnecessary use of force by the police*** *within such places, while being prevented from leaving the premises. In addition, I understand that law enforcement officials have made use of anti-riot weapons, including rubber bullets.*

Having stated his concerns surrounding the facts, he called on the competent authorities to carry out a prompt, independent and effective investigation into police conduct and the disproportionate use of force:

Moreover, I urge you to ensure, in co-operation with other authorities in charge of law enforcement, that ***swift, independent and effective investigations*** *are carried out into all allegations of police misconduct and disproportionate use of force during the events of 1 October 2017 in Catalonia.*

The condemnation of the use of violence by the police forces was supported by the entire parliamentary assembly of the Council of Europe at its meeting on 12 October 2017. As an expression of the condemnation, the Dutch President of the Socialist Party in that Chamber, Mr Tiny Kox, said:

We were shocked when we saw the unexpected brutal violence against citizens exercising a fundamental right.

International human rights organisations with unquestionable prestige and credibility also expressed this same concern through their respective reports and communiqués. Amnesty International in a communiqué from London dated 4 October 2017 (provided as document No. 12) considered that in many cases the Spanish National Police and the Civil Guard had used disproportionate force. Human Rights Watch and the World Organisation Against Torture (OMCT) made similar statements, whose reports are provided as document No. 13-14.

The promotion of this prompt and impartial investigation corresponds by law to the Public Prosecutor's Office. Thus, in its bylaws (Law 50/1981 of 30 December), the Public Prosecutor's Office is responsible for promoting judicial action in defence of legality and citizens' rights (Art. 1), ensuring respect for fundamental rights (Art. 3.3) and prosecuting criminal actions arising from

crimes (Art. 3.4). All according to the principles of impartiality, objectivity and independence (Art. 7).

However, with regard to the nearly **one thousand citizens injured** by the actions of the agents of the Spanish National Police Force and the Civil Guard during the first day of October 2017 in Catalonia, the prosecution dedicates to them a sad paragraph with a vague phrasing and without even identifying or numbering them, an attitude that is radically different to that contained in the same document as regards the treatment of the **agents that caused such injuries** who appear perfectly identified as having been harmed during several pages of the complaint of the present proceedings and are duly singled out. In addition, the prosecution's indictment makes such serious comments about caring for victims as the following

*numerous citizens were also injured, with a figure close to one thousand being put forward that **was manipulated** to exaggerate the police repression, since it **has been proven** that in a **high percentage** of cases the medical attention they received was exclusively as a result of dizziness and anxiety attacks, and not injuries caused by police officers.*

This statement – the same words used by the spokesman of the Partido Popular, Mr Martínez Maíllo, on 2 October 2017 – is not in keeping with the rigour required in criminal proceedings. The data regarding injuries were corroborated by the president of the Physicians' Association of Catalonia and by the Ministry of Health of the Catalan Government in the following days. Although the defence understands that attacks of dizziness and anxiety, as a consequence of police action, must also be addressed in the proceedings, the public data showed that the percentage of cases linked to these conditions was less than 7% of the total.

The attitude expressed in this indictment on the part of the Public Prosecutor's Office – which is consistent, however, with its procedural attitude in the investigation procedures being followed in Catalan courts (for example, the public prosecutor's report provided as document No. 15) – is not compatible with the international commitments regarding the protection of human rights signed by the Spanish State, nor with the requests for prompt and thorough investigations urged by international human rights bodies. This has been

highlighted once again by Amnesty International one year after the events, when it recalled that the prosecutor's office is not fulfilling its commitments to human rights, as evidenced by document No. 16. The building of an accusation such as that contained in the Public Prosecutor's indictment regarding the events that took place on 1 October not only represents a clear disregard for the citizens injured by the police action on that day, which draws a line between first and second degree victims, but also contributes to laying the grounds for a trial which, rather than defending citizens' rights and fighting against forms of torture and inhuman and degrading treatment, leads to impunity for such actions and therefore contributes to their cover-up.

The Judgment of the ECtHR *Ataun Rojo v. Spain*, of 7 October 2014, reiterating the position that had already been established in the previous Judgement *Martínez Sala and others v. Spain*, of 4 November 2014, was very clear on this issue:[24]

The ECtHR recalls that when an individual claims to have suffered ill-treatment at the hands of the police or other comparable services of the State, contrary to Article 3, this provision, combined with the general duty imposed on the State by Article 1 of the Convention to "recognise to every person under its jurisdiction the rights and freedoms defined (...) in the Convention" implicitly requires an effective official investigation. This investigation, similar to that resulting from Article 2, must be lead to the identification and punishment of those responsible (see, with regard to Article 2 of the Convention, McCann and Others v. United Kingdom, 27 September 1995, § 161, Series A No. 324, Dikme v. Turkey, No. 20869/92, § 101, ECHR 2000-VIII, and Beristain Ukar, cited above, § 28 and Otamendi, cited above, § 38). ***If this were not the case, notwithstanding its fundamental importance, the general legal prohibition on torture and inhuman or degrading treatment or punishment would be ineffective in practice and it would be possible, in certain cases, for agents of the State, enjoying near impunity, to trample on the rights of those subject to their jurisdiction*** *(Assenov et al. v. Bulgaria, 28 October 1998, § 102, Reports 1998-VIII).*

The way in which the complainants treat the issue of citizens who are victims and injured as a result of police action, and in particular, the actions of such an important body in the protection of victims' rights as the State

24 Translator's Note: translator's own translation of the original in Spanish.

Prosecutor's Office, is in contravention of international commitments regarding the protection of human rights, and specifically of the interpretation that the ECtHR has repeatedly made of the content of the prohibition on torture, inhuman and degrading treatment found in Article 3 of the Rome Convention, an obligation which is omitted in the present trial and which, is in direct contradiction with the opening orders issued by Investigating Magistrate's Court No. 7 of Barcelona, No. 2 of Girona (the second with special reference to the investigation of a crime of **torture**), No. 1 of Lleida, the Fifth Section of the Provincial High Court of Barcelona, etc.

6. A TRIAL BEFORE A COURT THAT LACKS JURISDICTION

6.1 VIOLATION OF THE FUNDAMENTAL RIGHT TO THE ORDINARY COURT

According to Art. 14.1 ICCPR, every citizen has the right to be tried by a "**competent**", independent, impartial tribunal established by law. Cases of a given order must be tried before jurisdictions of the same order. It has thus been established within the scope of this Article that "if, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction" (CCPR/C/GC/32, § 14).

Art. 6 ECHR and Art. 24.2 of the Spanish Constitution also contain provisions in similar terms which declare the principle of the ordinary judge predetermined by law as an essential and indispensable element for a fair trial. In our case, as we have repeatedly shown and as has been shown by all the counsels in these proceedings, the Supreme Court is not the competent court to judge the accusation that has been filed, nor was it competent to investigate the present case as a whole, and much less regarding my client who was never subject to diplomatic immunity.

The Constitutional Court itself, in the light of the invoked fundamental rights, in its Constitutional Court Judgement 193/1996, of 26 November, proscribes *ad hoc* legal or case-law modifications:

Indeed, Constitutional Court Judgement 138/1991 emphasises, as essential elements of the right to the judge predetermined by law, the strict exclusion of the so-called "ad hoc" judge and finds its essence in the fact that the jurisdiction and competence of the court are previously determined by a norm of general force and by the corresponding requirements. The following fragment corresponds to its points of law 1 and 2: "The right to the so-called lawful judge includes, among other points, the exclusion of all forms of 'ad hoc', exceptional or special judges, together with the requirement of predetermination of the court, as well as its jurisdiction and competence; a predetermination that must be established through a norm endowed with general force and issued prior to the event that gave rise to the proceedings, and respecting the reservation of law in the matter (vid. Constitutional Court Judgments 47/1982, 47/1983, 101/1984, 111/1984, 44/1985, 105/1985, 23/1986, 30/1986, 100/1987, 95/1988, 153/1988, 106/1989, among others).

As explained in detail in our brief dated 20 November 2018 filing a jurisdictional plea under Art. 666 of the Criminal Procedure Act, to which we now refer you for an exhaustive discussion of the matter, the present proceedings entail a modification of the case-law criteria for the hearing of this case. According to the list of precedents inventoried in the aforementioned document, the High Court of Justice of Catalonia, in common agreement with the Public Prosecutor's Office, had so far been assuming all the cases against people subject to diplomatic immunity under the Statute of Autonomy of Catalonia even when these facts occurred in the context of some act or plan aimed at "declaring the independence of a part of the national territory".

When the Order of 27 December of this Chamber, reiterating its competence to hear the present case, states that "there has not been any change of approach", we must, as a minimum, emphasise that, compared to the list of court orders issued by the High Court of Justice of Catalonia that support the criterion invoked by the defence, the decision of this Supreme Court does not cite a single precedent or antecedent in which competence has been interpreted in the terms in which it is now exercised. There is therefore no doubt in our minds that there has been a change of approach.

Thus, neither the above-mentioned indicia of the crime of rebellion of Art. 472.5 of the Criminal Code (in relation to which we have documented so many decisions of the High Court of Justice of Catalonia in which it declares

itself competent) nor the alleged existence of acts committed outside the territory of the autonomous community, can justify a change of approach in the case of proceedings that have always been judged, in the event of the existence of persons enjoying diplomatic immunity, before the highest judicial instance of the autonomous community, its High Court of Justice. It is precisely on the basis of these alleged international facts that the Court's decision of last 27 December comes as a surprise. Firstly, because it accepts that they are not included in the indictment (p. 14); secondly, because they focus on facts relating to executive power which, evidently, a civil society leader such as Jordi Cuixart does not exercise; and finally, because the only act that is detailed as regards our client is the creation of the website *letscatalansvote.org* which materialised precisely in the city of Barcelona.

Aware of the exceptional situation in which we find ourselves in legal terms, this Supreme Court concludes its argument with an incomprehensible paragraph on page 31:

The "multiple occasions" on which a High Court of Justice may rule on its own competence to hear certain facts ***do not give rise to*** *a mandatory doctrine that must be complied with by this Chamber.*

With the utmost respect, this paragraph declares a sort of *legal autarchy* of the Supreme Court, as if it were a *law unto itself* within our legal system, that does not at all fit with the consideration of the decisions of our Supreme Court of Justice as a source of law, nor with the overarching vision of the legal system nor, of course, with the respect for fundamental rights found in the *predetermination* of the jurisdiction of the courts precisely to guarantee citizens a fair trial and to shield them from arbitrariness.

It is for this reason that we understand that the decision in the present proceedings to maintain the jurisdiction of this Second Chamber for Jordi Cuixart and in relation to the merits that are the subject of the motion, in contravention of the long-standing approach of our legal system and respect for other fundamental rights that we have discussed in our statement in relation to Art. 666 of the Criminal Procedure Act (right to review by a higher court, appearance of impartiality or language rights), which required declining the jurisdiction, entails a violation of the fundamental right to the ordinary court

and the competent court according to Art. 24.2 of the Spanish Constitution, 6.1 ECHR and 14.1 ICCPR.

6.2. THE RIGHT TO HAVE A SENTENCE OR CONVICTION REVIEWED BY A HIGHER COURT

Any person convicted of an offense has the right to have a guilty verdict and conviction reviewed by a court at a higher instance in accordance with the law (Art. 14.5 ICCPR).

The scope of this provision has been clarified by the Human Rights Committee in its case-law, considering that:

Article 14, paragraph 5, not only guarantees that the judgement will be placed before a higher court, (...) but also that the conviction will undergo a second review[25].

In our proceedings, the Supreme Court declares itself the sole instance. Its decisions are final. They can only be subject to appeal before the Constitutional Court, which will confine itself to examining respect for fundamental rights without entering into an assessment of facts or law. To the extent that this Court insists on claiming to be competent to judge the president of Òmnium Cultural, any decision **to convict him will automatically entail the violation of the right to review by a court in a higher jurisdiction as provided in Art. 14.5 ICCPR.**

We cannot help but be surprised at the way in which the present Court, in the court order resolving the plea on jurisdiction, refers to an alleged "case-law solution" which is in accordance with "the rules offered by Article 2 of Protocol 7 of the European Convention on Human Rights and Fundamental Freedoms". However, it cannot escape the attention of the judges who make up the Chamber that the protection guaranteed by Article 14.5 ICCPR is broader than that stemming from the provisions of the ECHR. It is for this reason that Spain has been condemned for violating the right to review by a higher court in the framework of proceedings similar to the one we are currently discussing.[26]

25 Human Rights Committee, *Gomariz Valera v. Spain,* communication 1095/02, § 7.
26 Human Rights Committee, *Jesús Terrón v. Spain,* communication 1073/2002, § 7.4.

Therefore, the defence would like to expressly invite the Court to indicate how the decision on the plea on jurisdiction respects the international treaties signed by Spain and, in particular, the UN International Covenant on Civil and Political Rights. And to accept that the only way to guarantee the right to review by a higher court in criminal proceedings, as provided in Art. 14.5 ICCPR, is to refer the present case to the courts located in Catalonia, whose decisions are indeed subject to appeal.

6.3. THE RIGHT TO AN IMPARTIAL AND INDEPENDENT COURT

The case-law of the Constitutional Court in this matter is noted, for example, in Judgment 133/2014, of 22 July, which includes in its wording the doctrine that we have also invoked from the ECtHR. Summarising the approach and the superiority and centrality of the fundamental right invoked, the Constitutional Court notes:

As regards the merits of the case raised on the right to judicial impartiality, this Court has stated that it constitutes a fundamental guarantee of the legal system in a State governed by the rule of law which preconditions its very existence, since without an impartial judge there can be no judicial process per se. Therefore, judicial impartiality, in addition to being explicitly recognised in Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), is implicit in the right to a fair trial (Article 24. 2 of the Spanish Constitution), with special significance in the criminal field. Since what is at stake is the trust that the Courts must inspire in a democratic society, the recognition of this right requires that the accused be guaranteed that there are no reasonable misgivings regarding the existence of prejudice or impediment by the court.

The Grand Chamber of the ECtHR recalled in its Judgment *Micallef v. Malta*, of 15 October 2009, with great clarity, the concept and the double subjective/objective assessment of the impartiality of a court (Chapter 93):

Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. (...) must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient

guarantees to exclude any legitimate misgivings in respect of its impartiality (see, inter alia, Fey v. Austria, *24 February 1993, §§ 27, 28 and 30, Series A no. 255-A, and* Wettstein v. Switzerland, *no. 33958/96, § 42, ECHR 2000-XII).*

As regards objective impartiality in the same judgment, the ECtHR established (Chapters 96 and 97):

96. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. (…). What is decisive is whether this fear can be held to be objectively justified (see Wettstein, *cited above, § 44, and* Ferrantelli and Santangelo v. Italy, *7 August 1996, § 58,* Reports *1996-III).*

97. The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings (see court martial cases, for example, Miller and Others v. the United Kingdom, *nos. 45825/99, 45826/99 and 45827/99, 26 October 2004; see also cases regarding the dual role of a judge, for example,* Mežnarić v. Croatia, *no. 71615/01, 15 July 2005, § 36, and* Wettstein, *cited above, § 47, where the lawyer representing the applicant's opponents subsequently judged the applicant in a single set of proceedings and overlapping proceedings respectively) which objectively justify misgivings as to the impartiality of the tribunal, and thus fail to meet the Convention standard under the objective test (see* Kyprianou, *cited above, § 121).*

Chapter 98 of the aforementioned judgment makes it clear what the consequences are of the lack of objective impartiality, even if only its appearance, which is none other than the requirement to withdraw those judges who may be affected by this situation:

"*justice must not only be done, it must also be seen to be done*" *(see* De Cubber, *cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see* Castillo Algar v. Spain, *28 October 1998, § 45,* Reports *1998-VIII).*

As a corollary to the realisation of this fundamental right, of special interest is the content of the individual opinion issued by the judge of the Constitutional Court, Mr Xiol Ríos, to which three other judges adhered, regarding Constitutional Court Judgement 133/2014: "Judicial impartiality must be linked, when it refers to the development of the proceedings, to an attitude

of neutrality by the judge towards the parties and with the will to receive from them in a uncritical way the information that is provided. The attitude required of the Judge has therefore been compared to that of the scientific method. Therefore, what is of interest here is that the determining factor in confirming the loss of judicial impartiality is not that there is prejudice in the judge, which in many cases will be inevitable, but that misgivings are raised regarding his attitude of neutrality, that is, his predisposition and his ability to dispense with any prejudice or preconceived idea when carrying out his work of prosecution in the specific case."

In the case Wettstein v. Switzerland of 21 December 2000, the ECtHR found an infringement of Article 6.1 ECHR in the case of a citizen where the lawyer of the opposing party sat as a part-time judge in related proceedings to which the defendant was a party. This antecedent leads us to the question of whether the fact that the complaint that gave rise to the present proceedings was signed and filed by a prosecutor who was a member on leave of absence from the Chamber that is to decide on the admission, investigation and prosecution of the complaint, is in accordance with the appearance of impartiality and neutrality required by Art. 6.1 ECHR. The answer can only be no.

The signing Public Prosecutor was a member of the Chamber. Said always with the utmost respect and exclusively for the sake of defending the present case, the objective circumstance arises that the prosecutor signing the complaint that led to the proceedings (which in fact includes a modification of the rules on jurisdiction that until then had been applied in similar cases, as we have shown in previous pleadings) served for fourteen years as a member of the Second Chamber of the Supreme Court, the judicial body responsible for its investigation and prosecution. This fact means that the magistrates called to appraise the case have, for years, been fellow members of the same Chamber of one of the parties to the proceedings. Thus, the Attorney General, Mr Manuel Maza, was a member of this Chamber between 2002 (RD 159/2002 of 1 February) and 2016 (RD 545/2016 of 26 November), having coincided in the Chamber with practically all the magistrates that make up the Chamber today. In addition, working in the same court responsible for the trial is of special significance with respect to the magistrates who agreed to the admission of the complaint and the determination of jurisdiction through the order of 31 October 2017. Thus, he worked alongside Mr Manuel Marchena Gómez (9 years), Mr

Andrés Martínez Arrieta (14 years), Mr Julián Sánchez Melgar (14 years), Mr Juan Ramón Berdugo Gómez de la Torre (12 years) and Mr Luciano Varela Castro (9 years).

It is known that the artificial construction of the Supreme Court's jurisdiction responds to an almost personal initiative of the former and late Spanish State Attorney General and the current Chairman of the Spanish General Council of the Judiciary and of the Supreme Court, as already published in the well-informed[27] press on 15 October 2017 (document No. 17):[28]

The State Attorney General is determined to transfer the Puigdemont investigation from Catalonia to Madrid. The idea, shared by the president of the Supreme Court and of the General Council of the Judiciary (CGPJ), Carlos Lesmes, is that the lawsuit against Puigdemont and all the members of the Government is being delayed as a result of the political and social climate of Catalonia. (...) The sources consulted indicate that the majority of the prosecutors in the courtroom, twelve of them present, have advised the State Attorney General against this complaint. As they have argued, the applicable jurisdiction operates where the crime is committed and not where the effects are felt. And Puigdemont has ordered the opening of websites in London and Luxembourg from Catalonia.

Article 219 of the Organic Law on the Judiciary regulates the causes of abstention and/or recusal of judges and magistrates. This is an inventory of cases that oblige the judge *ex lege* to abstain from hearing a case because the existence of the situation described objectively renders him/her to be at risk of bias. It can clearly be understood that having shared a Chamber with one of the parties for 9, 12 or 14 years is a situation comparable to the intimate friendship described Article 219.9 of the Organic Law on the Judiciary because it is evident that the human relationship that exists in this situation could compromise the neutrality of the judge, or at least it is reasonable to think it; for this reason what is recommended is precisely to preserve the appearance of objective impartiality, with the referral of the case to the natural and ordinary courts located in the place where the facts were committed, the Investigating Magistrate's Courts of Barcelona.

27 https://www.ara.cat/es/Los-fiscales-Supremo-desaconsejan-Maza_0_1888011404.html
28 Translator's Note: translator's own translation of the original in Spanish.

Indeed, and precisely in relation to the present special proceedings, the Spanish Government has made strong statements attributing the current imprisonment and exile of the main pro-independence leaders to the work of the Spanish Government. Specifically on 16 December 2017, the former Deputy Prime Minister, Ms Soraya Sáenz de Santamaría, in a press conference in Catalonia said, "Who was it that led to the ERC, Junts per Catalunya and the rest of those seeking independence having no leaders today because they are headless? Mariano Rajoy and the Partido Popular"[29, 30] (document No. 18).

A few days ago, the current Vice-President of the Government also made statements in the Spanish Parliament absolutely contrary to the right to the presumption of innocence of the defendants, stating that "they are in preventive detention for having committed crimes"[31, 32] (document No. 19).

Recently, the "justification" given by the spokesperson of the parliamentary group of the Partido Popular has emerged regarding the proposal for the appointment of the Hon. Magistrate Mr Marchena as Chairman of the General Council of the Judiciary and of the Supreme Court, a position that would allow, in the words of the said spokesperson, controlling the Second Chamber of the Supreme Court and the Chamber of Article 61 from behind the scenes.

It is logical that statements such as these, among many others, should cause confusion in a society that is already very critical of the functioning of the judicial leadership and its appointment. According to data from the European Commission, Spain is at the bottom of judicial independence rankings only ahead of Bulgaria, Croatia and Slovakia[33] (document No. 20). A perception also denounced in the GRECO report and even by the judges who make up the Spanish judiciary through the reports of the ENCJ.

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29 http://www.elmundo.es/cataluna/2017/12/16/5a3549f922601d49358b460e.html

30 Translator's Note: translator's own translation of quote in Spanish.

31 http://www.senado.es/web/actividadparlamentaria/actualidad/video/index.html?s=12_S000040_047_01&ag=1474, minute 4'26".

32 Translator's Note: translator's own translation of quote in Spanish.

33 http://www.elmundo.es/espana/2017/04/10/58ebd6ebca47415f488b460c.html

7. A TRIAL WITHOUT GUARANTEES, VIOLATION OF THE FUNDAMENTAL RIGHT TO DUE PROCESS

Art. 24.2 of the Spanish Constitution establishes the fundamental right to a fair trial, and Art. 6.1 ECHR in a similar sense recognises the right to due process, which is proclaimed in Art. 14.1 ICCPR. The defence understands that in terms of due process, in this case and at this point in time, the following violations of fundamental rights have already taken place.

7.1. VIOLATION OF THE LANGUAGE RIGHTS OF MY CLIENT IN ACCORDANCE WITH THE EUROPEAN CHARTER FOR REGIONAL AND MINORITY LANGUAGES, A SIGNED AND BINDING INTERNATIONAL TREATY

The decision to grant jurisdiction for the judgment of this case to the Provincial High Court of Barcelona (and to the High Court of Justice of Catalonia, in relation to the accused) would guarantee the exercise of language rights and a fair trial, and therefore the distortion of the legal norms on jurisdiction, in addition to the fundamental rights violated, also infringes the language rights recognised by the Spanish State in a way that will no longer be able to be remedied.

The European Charter for Regional and Minority Languages, approved in Strasbourg on 5 November 1992 and which entered into force in Spain by means of the Instrument of 2 February 2001 (*Official State Gazette* (BOE) 15/9/2001), establishes in its Article 9.1.a.I that in the criminal field it must be ensured that "the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages", a provision referring to Catalan, Galician and Basque, according to the provisions of the ratifying

instrument, which provides backing to the declaration of officiality of these languages in Art. 3 of the Spanish Constitution.

This Charter, incorporated directly into the legal system and acting as an interpretative guideline in terms of the rules on the exercise of rights and freedoms (Art. 10.2 of the Spanish Constitution), is complemented by the provisions of Article 231.1 of the Organic Law on the Judiciary, although drafted prior to the Charter, which specifies that the parties, their representatives, lawyers, witnesses and experts, may use the language that is also official in the Autonomous Community. Since the facts took place in the autonomous community of Catalonia and the accused have Catalan political status according to Art. 7.1 of the Statute of Autonomy of Catalonia, there is no legal doubt regarding the right to use Catalan and to **request Catalan as the language of the procedure according to the aforementioned European Charter**.

Therefore, and given that it is in the interest of this party, its lawyers, its defendant and probably of some proposed witnesses and experts, to carry out the oral trial in its entirety in Catalan under the terms laid down in the European Charter, there is no doubt that the most suitable action in terms of a fair trial is for the Court to know the language in which the proceedings are to be conducted, with the Provincial High Court and the High Court of Justice of Catalonia, unlike the Supreme Court, being a suitable judicial body in this sense. In addition, a huge part of the documentary material that already forms part of the present proceedings (written and audiovisual documents) is in Catalan, a language that was neither known to the Board of Appeal nor is it known to the Chamber responsible for the Trial, making it very difficult, if not impossible, for the Court to understand the evidence that is intended to be submitted for its consideration during the Oral Trial.

Our representative, Jordi Cuixart i Navarro, son of a Catalan father and Murcian mother, is a person who knows, understands and appreciates perfectly both the Catalan and Spanish languages (as well as other non-official languages such as English or French) and has been a staunch defender of linguistic plurality as an element of cultural richness that deserves special protection, particularly in Catalonia where more than three hundred languages are currently spoken according to various studies. Jordi Cuixart is also Chairman of the cultural organisation Òmnium Cultural, whose foundational aims include

the promotion and protection of the Catalan language against the minoritisation process that it has undergone and continues to undergo, among other reasons, due to the actions of a public authority that has not introduced linguistic plurality as a fundamental value according to the proclamation of Art. 3.3 of the Spanish Constitution. We cannot overlook that, for example, in the legal system in Catalonia, despite the demographic weight of Catalan, only 8% (2017) of judicial decisions are handed down in this language, even less than the previous year (10% in 2016), according to official data.

It is for this reason that it makes more sense than ever that, in order to exercise the multilingual character of the Spanish State and the aforementioned provisions of the European Charter on language rights, Jordi Cuixart should request the full course of the proceedings be conducted in Catalan, as occurs in other multilingual countries in our region, such as Belgium. And this possibility can only be guaranteed through the attribution of jurisdiction to the courts located in Catalonia, where judicial practice is already oriented in this direction.

In this sense, we must not lose sight of the fact that criminal proceedings are governed by the principle of immediacy, which is connected with the principle of orality, enshrined in Article 120 of the Spanish Constitution, and we stress that orality is a requirement of the Constitution that must be offered and received at the same time, that is, simultaneously and without intermediaries, with a procedural structure based on immediacy, as a consequence of that orality, and which, together with concentration, have come to constitute a guarantee of the authenticity of the evidence. The doctrine of the Constitutional Court in relation to the immediacy of criminal proceedings has been strictly interpreted in the application of this principle as a guarantee of that authenticity, maintaining the need for it to materialise in the form of direct dialogue, without intermediaries, between the judge and the citizen. See, notably, the iconic Constitutional Court Judgment 167/2002, of 18 September. This constitutional doctrine emphasises the unavoidable requirement that the act of judging be an action that is capable of immediately assimilating evidence that depends on sensory perception without any kind of intermediation, being done directly, in order to assess gestures, doubts, nuances, inflections, etc., in the person who is accused and in the witnesses, with the understanding that to subordinate that assimilation to the capacity or professionalism of a third party, such as a translator or interpreter, acting between the citizen and the Judge

(when the latter does not know the language) fully undermines the formal right to immediacy.

It is clear that these assessments must be accompanied by the requirement to know the co-official language in which the citizen in question speaks and expresses himself, without it being possible to offer up the counterargument that the recognition of this right would in practice prevent the judging of those who speak languages not spoken by the judges and magistrates, as is the case with Arabic or French, since, as has been said, the instrument of accession to the aforementioned European Charter establishes that the rights of the three paragraphs of Article 9.1 are recognised (referring to criminal jurisdiction) for languages recognised as co-official in their territories – but unfortunately not with the generic right of every human being to express himself in his own language – and when this does not correspond to the official or co-official language of the place where he resides, he can be assisted by an interpreter.

It is necessary to take into account, also in this matter, the deterrent effect, or *chilling effect*, in relation to the right to use official languages other than Spanish**.** It is logical to presume that adopting a different decision (i.e. that in certain courts Spanish enjoys a preferential position and that Catalan can only be used in exceptional circumstances, such as through translators of documents and interpreters) has the clear effect of discouraging the use of co-official languages other than Spanish, which does not take into account either the content of Article 3.3 of the Spanish Constitution or the literality and purpose of the invoked provisions of the European Charter.

In short, the question of the exercise of the language rights of the defendants, lawyers, witnesses and experts according to the European Charter for Regional and Minority Languages and Article 231 of the Organic Law on the Judiciary itself required interpreting competence over the present proceedings as corresponding to the Catalan courts, whether it be the Provincial High Court for those not enjoying diplomatic immunity or the High Court of Justice of Catalonia for those who do enjoy diplomatic immunity, all without losing sight of the fact that the decisions adopted in this area may compromise the fundamental right to due process (Art. 24.2 of the Spanish Constitution and 6 ECHR) as proclaimed by the Judgment of the Plenum of the Criminal Chamber

of the National High Court of 24 April 2008, which annulled an oral trial precisely for its violation of the right to a fair trial because it did not respect the right to language choice by two Catalan citizens before that court.

This question was expressly raised in these terms in the brief relating to the plea on jurisdiction formulated in this court. However, the Chamber flatly rejected this consideration with a somewhat surprising paragraph:

In any case, making the right to a fair trial dependent (...) on the use of the mother tongue by the professionals assuming the defence would lead to the farcical situation of denying that this right has validity, for example, before the Court of Human Rights.

We say surprising, evidently in legal terms, given that the ECtHR has in principle a different nature to the court we are addressing; for example, it does not have a prosecutorial function such as that unduly attributed, in our opinion, to the Supreme Court in the present case. The Catalan language is also doubly official before the European Court of Human Rights: firstly, because it is the official language of the Spanish State at the same level as Galician, Basque and Castilian (Spanish) and, secondly, because it is the official language of Andorra, a Member State of the Council of Europe, and therefore all the documentation for access to the ECtHR is also in this language. It is paradoxical that it is easier to use Catalan in the ECtHR than before the Spanish Supreme Court, a fact that the transcribed paragraph of the court order of 27 December 2018 highlights as absolutely contrary to current international law.

For all these reasons, and we will not cease to insist on this, given that the Spanish Supreme Court has not assumed the multilingual nature of the Spanish State, the only way to guarantee the language rights of the parties is for the trial to be held in Catalonia, in our case before the ordinary jurisdiction, as they do not hold diplomatic immunity, as we have said many times before. Otherwise, the violation of the European Charter for Regional and Minority Languages and with it the fundamental right of Art. 24 of the Spanish Constitution to due process and a fair trial will be evident.

7.2 THE PRESENCE OF A CHAUVINISTIC AND XENOPHOBIC PARTY SUCH AS VOX FILING A CIVIL MOTION FOR ELECTORAL

PURPOSES UNDERMINES THE ESSENCE OF THIS PROCEDURAL TOOL AND CONTRADICTS INTERNATIONAL COMMITMENTS

In a statement by the defence of 24 October 2018, in the intermediate phase of the present proceedings, we formulated a written petition for the expulsion from the proceedings of the political party VOX, which appears as filer of a civil motion. This petition was dismissed by Court Order of this Chamber dated 6 November 2018, which was, in turn, appealed by the defence, again being dismissed by Court Order of 14 December 2018.

We now refer you to each and every one of our arguments, set forth in that brief and which were not resolved by the Chamber which we are addressing. The defence is perfectly aware of the current regulation of the civil motion in the sense that it allows political parties to file civil criminal lawsuits against members of other political parties. However, at that time, and now, the defence focused its challenge on two elements that have not yet been resolved by the Court we are addressing:

> The warped and twisted use, for electoral purposes, of the procedural tool known as the "civil motion", rather than for purposes of upholding justice or the general interest. Once this has been verified in the proceedings, this usage must be corrected by the rejection of the case (Article 11 of the Organic Law on the Judiciary and 247 of the Civil Procedure Act).
>
> The ideology espoused by this party that is contrary to international treaties on human rights signed by Spain, converting the judicial proceedings into a procedural loudspeaker for such ideas. By allowing VOX to remain as the filer of a civil motion, not only is this discriminatory ideology not prevented, but rather the public authorities are also incurring in a dereliction of their duty to combat such ideologies.

The administration of justice cannot be neutral in the face of this situation, and it is precisely the case-law of the Supreme Court that is responsible, as long as there is no legal regulation, for determining the limits of the tool known as the civil motion and avoiding fraudulent uses thereof. Nor

can discriminatory ideology be understood and accepted within the framework of the administration of justice, and the commitment of the courts to the defence of rights and freedoms must be active. It is impossible to obtain justice in a procedure in which one of the complainants holds the perspective of VOX.

For all these reasons, it is necessary to insist once again on the dismissal of this civil motion and on the invocation of the violation of the fundamental right to due process (Art. 24.2, 6.1 ECHR and 14.1 ICCPR) as long as VOX continues to act as complainant in the present proceedings.

7.3 APPLICATION OF A PROCEDURAL LAW OF EXCEPTION THEREBY LEADING TO A SERIOUS SITUATION OF DEFENCELESSNESS

In this section, we shall examine the procedural violations that prevent us from considering that we are receiving due process as required by Art. 6 ECHR and which, in our opinion, have led to a serious situation of defencelessness. In the present proceedings we have recorded a great many irregularities and procedural deviations that have been committed in application of a law of exception to the present procedure. However, at this procedural moment we shall focus our procedural criticism on three issues:

- The conclusion of the pre-trial investigation
- The judicial investigation of Investigating Magistrate's Court No. 13 of Barcelona
- The investigations of the judicial police

The fundamental rights to effective judicial protection and to a fair trial as provided by Article 24 of the Spanish Constitution and in accordance with Articles 10 of the Universal Declaration of Human Rights, 14 of the International Covenant on Civil and Political Rights, as well as Articles 6 and 7 of the European Convention on Human Rights, prevent judicial arbitrariness, as does Article 9.3 of the Spanish Constitution, which obliges Judges and Magistrates to respect the norms and law in force, since it is undeniable that the principle of legality, also applicable to the organisation of the process, was born politically as a guarantee of citizens' rights and precisely as a means to eliminate judicial arbitrariness.

It should not be forgotten that our law is one of legislative creation and not one of judicial creation, which is clearly reflected in the definition of the function of the Judge in Art. 117.3 of the Spanish Constitution, and therefore under no circumstances can this Chamber validate the procedural violations committed by the Investigating Magistrate, such as declaring the conclusion of the pre-trial investigation while at the same time recognising, on the one hand, that the indictment lacks firmness but denying, on the other, the investigative proceedings proposed by this and other defence parties, and without also having decided on the investigative proceedings requested in due time and form, thus depriving my client of his right to appeal. There is no valid argument on which to base such guarantee being denied to the defendants.

The right to appeal is not accessory, it is substantive, and when provided for in the Law, its violation infringes the right to a fair trial using all relevant means of defence.

The opposite, which occurs very frequently in these Special Proceedings, involves the application of a procedural and material criminal law of exception, a form of what scholars have come to call the Criminal Law of the Enemy, since exceptional criteria are applied with respect to the rights-based doctrine itself applicable to cases in general, with this alternative use of the law, judicial law, the case-law of interests, being contrary to the principle of legality (Art. 7 ECHR), which is the only one recognised in the Constitution of 1978 (Art. 9.3), and obliges Courts and Judges to decide according to the law in force and not according to their particular criteria, however fair and correct they may seem to be, or however serious they consider that questioning the unity of Spain has been.

The right to a fair and equitable trial has as one of its pillars the consideration of the procedure as a guarantee in itself that affects the activity of the parties (equality, hearing and contradiction, right to defence, presumption of innocence), others that affect the judicial activity (judge predetermined by law, right to appeal and to obtain a decision based on law) and also as a guarantee of the trial (such as a fair trial, principle of legality, effective protection and a public trial); this leads to the protection of the constitutional guarantees of the procedural system through the ordinary courts, constitutional appeal and supranational mechanisms.

The conclusion of the pre-trial investigation and the allegations of human rights violations already invoked.

The Chamber we are addressing has revealed a peculiar understanding of what, at least in this case, should be done when faced with a complaint regarding the violation of fundamental rights in the course of the process, in view of the reasoning stated in one of the first actions carried out in this procedure, i.e. its issuance of the Court Order of 25 October 2018 in which it confirmed the conclusion of the pre-trial investigation handed down by the Investigating Magistrate and the Order of Procedure of 30 October denying a supplement to the former requested by the defence (the underlining is ours):

> *Court Order:*
> *The pleadings concerning the alleged infringement of fundamental rights which may have taken place during the investigation phase deserve the same rejection on account of their manifest untimeliness. .../... these pleadings may be asserted again once the trial has begun.*
>
> *Order of Procedure:*
> *… the untimeliness of the investigative proceedings under Art. 627 of the Criminal Procedure Act for the submission of pleadings relating to the violation of fundamental rights.*

Postponing the examination of the defences' denunciations of procedural violations that lead to defencelessness, and therefore violate the effective judicial protection and the right to due process, entails treating them with disdain, without any spirit of review or guarantees and, finally, is a continuation of the destruction of rights and guarantees that has affected these proceedings from the very moment of the admission order. The overall postponement of the questions raised to later moments in order to move the proceedings forwards means that, if the denounced violations exist, they shall continue to exert an effect on the proceedings. Also in this transcendental aspect, in these Special Proceedings, the doctrine of this Court has been disturbed, which has also led to an exceptional application of procedural law.

In any case, we have been led into this procedure to resolve on violations of fundamental rights causing serious defencelessness, which should lead to the upholding of the above points and thus give rise to **the suspension of the oral trial due to the invalidity as a matter of law of the Court Order of the conclusion of the pre-trial investigation** handed down by the Investigating Magistrate on 9 July 2018, for the reasons stated in our statements dated 5 October 2018 and 26 October 2018, to whose content we refer you, **with the consequent reversal of the actions to the moment prior the handing down of the said order.**

The intention is to initiate a trial on the basis of a pre-trial investigation in which **the indictment IS NOT FINAL**, since, by means of a Measure of Organisation of Procedure on 19 July 2018, an appeal for reconsideration was filed against it, which this party has backed, and which has not been resolved six months later, despite having been filed in the month of August, since the possible upholding of the pending appeal would have knock-on effects on the other defendants in the same court order, due to the analogical interpretation of Article 903 of the Criminal Procedure Act that this same Chamber has consistently contested, meaning that the firmness of the prosecution cannot be established with respect to any of the defendants.

The core importance of the indictment on the procedure in ordinary summary proceedings has been demonstrated by this Chamber in these same Special Proceedings recently in its Order dated 27 December, according to which it is *a decision in which the signs of criminality that the investigation has been able to reveal are disclosed and the factual assumptions are felt from which the problems of connectivity can be resolved on an interim basis.*

In addition, as the defence has shown, and as the Chamber decided to postpone the resolution of this procedure, the said Court Order could not be validated because it violates the right to defence due to its establishing that the defences should be instructed of the proceedings and subsequently formulate their statements of defence without having full knowledge of the evidence that exists against them, which violates the doctrine established since Constitutional Court Judgement 66/1989, of 17/4/1989, and must therefore be declared null and void, since the aforementioned decision has dispensed with the essential rules of procedure, thereby causing serious defencelessness for my defendant by

depriving him of the right to a remedy that is part of his fundamental right to effective judicial protection (Art. 24 of the Spanish Constitution, 6 of the European Convention on Human Rights, 14 of the International Covenant on Civil and Political Rights and 10 of the Universal Declaration of Human Rights), otherwise recognised as one of the pillars of the ordinary pre-trial investigation procedure in articles 311, 384, 622 and related provisions of the Criminal Procedure Act.

The defencelessness caused by each of these violations has been appropriately listed in each of the complaints that the defence has had to submit, and it is possible to summarise from all of this that the present Special Proceedings have been established as a true inquisitorial procedure in which, even during the investigation, it is possible to dispense with the defendant's guarantee of the right to use the relevant means of evidence, in which the criterion of denying the proceedings has been generalised on the basis of the Investigating Magistrate's opinion that they lack "capacity to modify the classification and liability for rebellion, sedition, embezzlement or disobedience that is aired here", forgetting and, therefore, infringing the right of the defences to introduce during the investigation phase the demonstration of relevant facts for their own lines of defence, without prejudice to the legal evaluation that could later be granted to them.

In anticipation of the conclusion of the pre-trial investigation the defence requested various investigative measures (document of 15 June 2018) and the dismissal of procedural documents belonging to persons who are not subject to investigation in the present proceedings and whose inclusion the Hon. Investigating Magistrate denied by Court Order of 24 May 2018 (document of 13 June 2018). In fact, recently the Court itself has rejected joining to the present proceedings, by means of an Order of Procedure dated 22 October 2018, a police report that deals with the documentation seized from one of these persons, as it believes, in accordance with the Court Order of 24 May 2018 handed down by the Hon. Investigating Magistrate and the statements made by the defence in the brief of 13 June 2018, that it is not appropriate to join to these proceedings documentation from persons who do not appear as defendants in the present case.

However, having rejected all the petitions made by the defence by means of the aforementioned briefs, he was denied the possibility of appealing under the excuse that an Order of Conclusion of the pre-trial investigation had already been issued, **refusing to grant leave for all of the appeals filed** against the denial of such petitions because, allegedly, the Hon. Investigating Magistrate had lost jurisdiction and could not rule on the appeals. This was subject to a complaint in the processing of Art. 627 of the Criminal Procedure Act, without having obtained a well-founded response from the Chamber under the argument of moving forward in ruling on issues that affect fundamental rights. In its Court Order of 8 November 2018 (on the occasion of the resolution of an appeal against one of the civil motions filed by the complainants), the Chamber itself held that, despite the issuance of the Court Order concluding the case, it is evident that the Hon. Investigating Magistrate did not lose jurisdiction to rule on the appeals filed by any of the parties, which confirms the inadmissibility of not granting leave to the appeals filed by the defence against various decisions and the defencelessness caused for the defendant and the remaining defences.

In addition to the above, before the conclusion of the pre-trial investigation, the defence submitted written petitions requesting investigative proceedings that have not been provided, nor have they even been linked to the proceedings. This fact was denounced in the processing of Art. 627 of the Criminal Procedure Act, without any response being received from the Chamber, and in a document of 29 October 2018 it was requested that the Clerk of Court certify the correct submission of the letter, a request that to date has not received any response.

The investigation by delegation of Investigating Magistrate's Court No. 13 of Barcelona

The purely inquisitorial approach that emerges from such reasoning, validated by this Chamber, has led to the investigation of the procedure being confined to "gathering together" allegedly incriminating material produced outside this judicial procedure, without any possibility of intervention or rebuttal by the parties, with the investigation being delegated to other courts (mostly Investigating Magistrate's Court No. 13 of Barcelona, DP 118/2017) and to a certain judicial police unit also designated by the said Court, in order to

then deny any attempt to produce rebuttal evidence regarding the said material and, even, possibly, invoke the invalidity of all or some of those actions.

Thus, by means of an Order of Procedure of 11/12/17 on page 762 of the case, the Investigating Magistrate requested from the said Court of Barcelona (which secretly led an actual general proceeding against a political and social process taking place in Catalonia) *evidence of any other action carried out in these Preliminary Proceedings and which the Investigating Magistrate believes may be of interest for the special proceedings before this Supreme Court, for the possible crimes of rebellion, sedition, prevarication or misappropriation of public funds, against the members of the Parliamentary Committee and the Government of Catalonia, as well as against the leaders of the Catalan National Association and Òmnium Cultural.* As a result of this decision and others related to it, the majority of the prosecution material in the proceedings comes from Investigating Magistrate's Court No. 13 of Barcelona (DP 118/17), which has been acting as a mother ship.

By denying the joinder of the proceedings (requested by one of the defences and never resolved during the investigation phase) as well as evidence of all the actions of that Court (in the processing of Art. 627 of the Criminal Procedure Act), my client has been deprived of being able to provide rebuttal evidence or elements to support the invalidity of that material, with the reasonings of this Chamber in its Order of 25 October 2018 (our underlining) being in any case illusory for the respect of his procedural guarantees: "In short, the principle of contradiction projects its efficacy with respect to the elements at work in the case, not with respect to those others whose content has no trace of assessment, either by the investigator or by the complainants. <u>There is nothing to prevent, on the other hand, that at the later stage of evidence submission, some of those documents or procedural acts that may have influence on the development of the plenary session may be identified and may be claimed by this Chamber</u>". Not appearing in those proceedings is an absolute impediment to identifying which documents or procedural acts should be claimed, and, therefore, the only way to protect his fundamental rights in this regard **is to agree to request the evidence of all the proceedings in Preliminary Proceedings 118/17 (now pre-trial investigation 5/2018) of the Investigating Magistrate's Court No. 13 of Barcelona) or to dismiss from the proceedings all the documents arising from that Court**. In order to be able to challenge such proof of the prosecution, the full evidence of the prosecution is necessary, since

the grounds of invalidity and procedural irregularities affecting such evidence can only be pleaded and sustained in the light of the full evidence of the proceedings.

The European Court of Human Rights has held that the right to effective judicial protection in criminal proceedings entails that the evidence must be allowed to be rebutted, thereby entailing the possibility for the prosecution and the defence to act with equality of arms and to have the opportunity to hear and comment on the pleadings and evidence presented by the other party (JECtHR, *Rowe and Davis v. United Kingdom*, Application 28901/95, 16 February 2000, paragraph 60). It proclaims that the defendant must have the opportunity to organise its defence in an appropriate and unrestricted manner, as well as the possibility of presenting all relevant arguments before the court, which may influence the outcome of the proceedings (JECtHR, *Moiseyev v. Russia*, Application 62936/00, of 9 October 2008, paragraph 220). It adds that the elements that every person accused of a crime should enjoy include the opportunity to know, for the purpose of preparing their defence, the results of investigations (JECtHR, *C.G.P. v. the Netherlands*, Application 29835/96 of 15 January 1997 and JECtHR, *Foucher v. France,* 18 March 1997, paragraphs 36-38*),* which should be monitored in light of the time and elements offered to a defendant in each particular case and from an overall consideration of the proceedings (JECtHR, *Galstyan v. Armenia*, Application 26986/03, of 15 November 2007, paragraph 84, and JECtHR, *Dolenec v. Croatia*, Application 25282/06 of 26 November 2009, paragraph 208).

The activity of the judicial police

However, in addition to delegating part of the investigation to Investigating Magistrate's Court No. 13 of Barcelona, the rest of the investigations have practically been delegated to the assigned group of the judicial police which, in the same Order of Procedure of 11 December 2017 on page 762, it ordered to take *measures towards clarifying, justifying and informing the investigating magistrate later, the following questions:*

** Whether there are indicia that point to the existence of a possible initial agreement between the political parties Convergencia Democrática de Cataluña*

(CDC), Esquerra Republicana (ERC), and the associations Asamblea Nacional de Cataluña (ANC), Òmnium Cultural and Asociación de Municipios para la Independencia (AMI), that could have been oriented towards sharing a strategy to achieve the independence of the Autonomous Community of Catalonia.

** Whether there are indicia that these organisations may have been carrying out, in a concerted manner, an action aimed at achieving the independence of the Autonomous Community of Catalonia.*

…/…

The same police group is ordered to gather any objective elements that may exist and are indicative of whether CDC, PDeCAT, ERC, ÒMNIUM, ANC and AMI (or any of its main members), promoted, sustained or knew without subsequently altering their plans, of the holding of social mobilisations as an instrument to achieve or facilitate the declaration of independence of Catalonia.

Such inquiries produced the attestations recorded in the case file and constitute, as is to be expected from the entrusting of the task itself, a general pre-emptive approach regarding social and political processes, not an investigation of facts relating to any act classified as a crime, and therefore also violates in this case, by virtue of the right of exception that the Supreme Court has applied in these Special Proceedings, the constitutional and case-law doctrine of proscription of pre-emptive inquiries which, by virtue of the application of the special Criminal Law of the Enemy, had already been exempted earlier in terrorism-related investigations under the alibi that "mere membership of a terrorist organisation, even if no concrete criminal activity has yet been perpetrated, or the mere possibility of collaborating with it, as we now contemplate, makes it possible by itself to set in motion the State's investigative apparatuses, since police functions also refer to the preventive sphere" (Supreme Court Judgements 3/2018, of 16 January, and 1140/2010, of 29 December). The consequence of all this is that **all the actions of the judicial police made as a result of that Order of Procedure of 11 December 2017 must be dismissed from the case**.

And if this were not enough, some of the decisions taken in these Special Proceedings are contradictory and such contradiction appears only to serve to meet a pre-established schedule, designed to interfere with and shape the political landscape in Catalonia. The firmness of the previous words is corroborated point by point in the Second Legal Reasoning of the Court Order

handed down by the Hon. Investigating Magistrate on 22 January 2018, which denied the request of the Public Prosecutor's Office to issue an international arrest warrant against MHP Carles Puigdemont, on criteria of political opportunity such as (underlining added): "He thus seeks to favour the anti-constitutional and illegal strategy that these proceedings are called to put an end to, forcing in addition a context in which he is able to delegate his vote, as if he were in the same situation as those who are arraigned before this Court and have been provisionally deprived of their freedom. In this way, the deprivation of freedom would be instrumented in order to obtain the investiture and the vote that he cannot obtain in parliament."

This schedule includes the unconstitutional application of the suspension provided for in Article 384 bis of the Criminal Procedure Act (see Constitutional Court Judgment 199/1987 of 16 December Point of Law 4), which was finally provided by the Order of 9 July 2018, and led, to avoid delays in the schedule, to the refusal in the Court Order of 24 May 2018 to assume jurisdiction to investigate Mr Josep M. Jové and Mr Josep Lluis Salvadó, both of whom have diplomatic immunity, considering that they had no participation in the rebellion that is subject to these proceedings.

Faced with this decision, the defence requested that the documents that had been seized from the aforementioned gentlemen be excluded from these proceedings, a request that was rejected by Court Order of 9 July 2018 which denied the possibility of appeal to this party, as indicated above.

This Chamber, by means of an Order of Procedure of 22 October 2018, agreed regarding the *seized documentation corresponding to JOSEP LLUIS SALVADÓ I TENESA, and as agreed by the Hon. Investigating Magistrate of the present proceedings in the Court Order of last 24 May, to proceed to return it to the sending Court*.

Therefore, and in strict coherence with what has been agreed by this Chamber, and for the same reason, **the documents related to the body of our brief submitted on 6 June 2018, as well as those documents that reached the proceedings by means of an Order of Procedure dated 8 May 2018 and also reviewed in the body of that brief,** must be **dismissed from these proceedings.**

In light of the foregoing and in order for the defence to have its fundamental right to due process and a fair trial restored, the following are necessary:

- The suspension of the oral trial due to the invalidity of the Court Order on the conclusion of the pre-trial investigation handed down by the Investigating Magistrate on 9 July 2018, for the reasons stated in our briefs dated 5 October 2018 and 26 October 2018, the content of which we refer you to, with the consequent reversal of the actions to the moment prior to its issuance.

- To request the evidence of all actions undertaken in the context of Preliminary Proceedings 118/17 (now Pre-trial Investigation 5/2018) of Investigating Magistrate's No. Court 13 of Barcelona or to dismiss from the proceedings all the documentary *acquis* coming from this Court.

- To dismiss from the proceedings all the actions of the judicial police made as a consequence of that Order of Procedure of 11 December 2017.

- To dismiss from the proceedings the documents listed in the body of our brief submitted on 6 June 2018, as well as those documents that reached the proceedings by means of the Order of Procedure dated 8 May 2018, also listed in the body of that brief.

8. A TRIAL VIOLATING CRIMINAL LEGALITY (ART. 7 ECHR)

As revealed by Cesare Beccaria in the 18th century, the principle of legality of crimes and penalties is solidly anchored in contemporary criminal law under the principle *nullum crimen, nulla poene sine lege.*

At the international level, it is formally recognised in Art. 11.2 UDHR, Art. 15 ICCPR and Art. 7 ECHR. The principle of legality can be divided into three fundamental rights:

Firstly, nobody may be prosecuted or convicted in the absence of a law that classifies as an offence the acts that the State intends to punish. The point of the principle is that the judge should never have the power to create criminality

or penalties: this situation, which was found in the old French law denounced by Voltaire and Beccaria, inevitably led to arbitrariness and illegality. At the same time, if the legislator has been negligent and, for example, has forgotten or omitted to provide for a penalty, the judge cannot step into its place and must issue an acquittal due to a defect in the text.

Secondly, the law provides that the criminality must contain certain precise qualities in order to fulfil its duty of predictability and to avoid arbitrariness on the part of judges. This entails that the law must be sufficiently **accessible and predictable** to preserve legal certainty. This means that each element of the infringement must be clearly identified and defined.

According to the European Court "this condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable" (JECtHR *Kokkinakis v. Greece*, 25 May 1993, para. 52).

For example, the European Commission of Human Rights has long considered that "a court may clarify the requirements of an offence but not alter them substantially to the detriment of the accused. It has recognised that there is no objection to the existing requirements of the offence being clarified and adapted to new circumstances which might reasonably be covered by the original concept of the offence. On the other hand, it is not acceptable that an act which up to then had not been punishable was made a criminal offence by the courts or that the definition of existing offences was extended in such a way as to include facts which had so far not constituted a criminal offence." (European Commission of Human Rights, *Martin Enkelmann v. Switzerland,* No. 10505/83, 4 March 1985, p. 181).

Thirdly, and finally, the law must be in force at the time of prosecution.

The violation of the fundamental right to criminal legality in our case is demonstrated in two ways: 1) conducts that are mere expressions and an exercise of fundamental rights are criminalised and 2) criminal classifications are used that were impossible to foresee by citizens given that we are dealing with legislation applicable to coups d'état (specifically, the crime of rebellion had been applied for the last time in the military coup d'état perpetrated by

Lieutenant Colonel Tejero in 1981), something that has not happened in Catalonia in 2017 despite the insistence of some political actors on the use of that term.

A good expression of this is the decision of the High Court of Schleswig-Holstein of 12 July 2018 issued precisely in relation to the facts of the present case and in relation to the indictment of Mr Carles Puigdemont. In that decision, which is included in a separate proceeding on the personal situation of the person under investigation and in the present case file, the German High Court reviews all the criminal classifications in force in Germany in order to reach the conclusion that no threshold dual criminality exists with its criminal legislation, and therefore it must come to the conclusion that the facts attributed to Mr Puigdemont under the heading of rebellion, which is the only remaining accusation against my client, are not classified as a crime in that country and therefore do not constitute a crime of rebellion or sedition.

Despite not having been able to enter into an assessment of the merits of the petitions due to the inexplicable withdrawal of the all the international arrest warrants last July, this legal perception is confirmed by the precautionary decisions of the courts of Brussels and Edinburgh, which in no case adopted precautionary measures of preventive detention for the investigated parties Messrs Ponsatí, Puig, Comín and Serret.

The same idea is found in the position of a very extensive manifesto signed by professors of criminal law from throughout the entire country of Spain. A copy is provided as document No. 21.

In fact, one of the main facts of the complaint, i.e. the calling and holding of a referendum without authorisation, is a behaviour that has manifestly not been classified as a crime since 2005. Indeed, Organic Law 2/2005, of 22 June, repealed articles 506 bis, 521 bis and 576 bis of the Criminal Code, introduced by Organic Law 20/2003, of 23 December, the first Article of which provided for the disqualification of:[34]

…any authority or public official who, manifestly lacking the competence or powers to do so, calls or authorises the calling (...) of popular consultations by means of a referendum.

34 Translator's Note: all text from the Organic Law cited here is translator's own translation from Spanish.

Due to its clarity, it is necessary to recall the Preamble of the aforementioned Organic Law 2/2005 which justified the decriminalisation of this conduct:

The foregoing articles, which are repealed in this Law, refer to conduct that is not of sufficient magnitude to merit criminal reproach, and even less so if the penalty contemplated is imprisonment. Criminal law is governed by the principles of minimum intervention and proportionality, as pointed out by the Constitutional Court, which has reiterated that a person cannot be deprived of the right to freedom without it being strictly essential. (...) In short, the conducts considered in these criminal classifications do not meet the necessary conditions for their criminality.

All of this necessarily leads us to the conclusion that even if it were necessary to accept the application of criminal law to the facts found in the indictment, an assumption that we have extensively demonstrated we reject, the framework that has been proposed to us by the complainants and that is accepted by the Court in the different decisions that it has already handed down is absolutely lacking in the principle of proportionality that should govern any intervention by the State, and even more so in criminal matters and when it interferes in the exercise of fundamental rights.

The Constitutional Court Judgement of 20 July 1999 [Judge Viver Pi-Sunyer], issued precisely in the appeal for constitutional protection against a conviction handed down by the Supreme Court in special proceedings, is particularly illustrative in this regard:

As stated above, the requirement of special restraint in the repression of activities related to the freedom of expression and communication of political party leaders has been declared by the European Court of Human Rights in numerous judgments, some of which have already been cited in previous points of law. (...) *The application of a provision that contemplates a minimum penalty of six years and one day has a clear chilling effect on the exercise of the freedoms of expression, communication and participation in public activity, even if the sanctioned conduct does not constitute a legitimate exercise of such freedoms. (...) this chilling effect is reinforced in cases such as the present in which the relative indeterminacy of the provision, although it does not pose problems from the perspective of the clarity and precision of criminal law, may create some uncertainty as to whether the expression of ideas, the communication of information or participation in a given public activity is lawful or, on*

the contrary, very severely punished. This uncertainty can naturally inhibit the exercise of such freedoms, which are necessary for the democratic functioning of society and completely essential when such exercise relates to political parties and the moments at which they seek the support of the citizens.

Many fundamental rights are endangered in the present proceedings as a result of the current form of the indictments admitted by the Chamber. The continuation of the proceedings in these terms without any limitation of the punishment entails an evident violation of the fundamental right to criminal legality in the terms described in the preceding sections.

9. A TRIAL THAT VIOLATES THE PRESUMPTION OF INNOCENCE

The right to the presumption of innocence is guaranteed by Art. 6.2 ECHR, 24.2 of the Spanish Constitution and 14.2 of the ICCPR. According to the Human Rights Committee:

According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.[35]

Specifically, regarding the attitude of the **authorities**, the Human Rights Committee insists that "It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused[36]". This position has also been shared by the European Court of Human Rights which has established that "Article 6 para. 2 (art. 6-2) cannot therefore prevent the authorities from informing the public about criminal investigations in progress, but i**t requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected**[37]".

35 Human Rights Committee, general comment, 32, § 30.
36 *Idem.*
37 JECtHR, *Allenet de Ribemont v. France,* App. 15175/89, 10 February 1995, § 38.

Thus "The Court has thus consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence. (...) It also insisted on the importance of respecting the presumption of innocence during press conferences held by State representatives[38, 39]".

Regarding the press, the Human Rights Committee has proclaimed "The media should avoid news coverage undermining the presumption of innocence". For its part, the ECtHR has recognised that "in the terms of the case-law of the bodies of the Convention, a virulent press campaign is in certain cases likely to damage the fairness of the process, influencing public opinion and also the judges called upon to decide on the guilt of an accused[40, 41]".

The Strasbourg case-law also specifies that "known personalities have the right to benefit from a fair trial as guaranteed by Article 6.1 of the Convention, which includes the right to be heard by an impartial court (...). Journalists should remember this when writing articles about ongoing criminal proceedings, as the limits of permissible comment may exclude statements that carry a risk of intentionally or unintentionally reducing a person's chances of receiving a fair trial[42, 43]".

In addition, within the scope of EU law, current Directive 2016/343 of 9 March 2016 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence provides in Article 4 that:

1. Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty.

We provide as documents 21 bis, 21 ter and 21 quater various interventions in the Spanish legislative chambers, including the approval of a

38 JECtHR, *Karaka and Ye ilırmakv. Turkey,* App. 43925/98, 28 June 2005, § 51.
39 Translator's Note: translator's own translation of the original in Spanish.
40 JECtHR, *Craxi v. Italy,* App. 34896/97, 5 December 2002, § 98 and the case-law cited.
41 Translator's Note: translator's own translation of the original in Spanish.
42 *Idem,* § 101.
43 Translator's Note: translator's own translation of the original in Spanish.

motion, relating to the possible granting of pardons to the accused in the present proceedings, taking for granted their guilt on the part of State authorities.

Therefore, in the face of the absolute lack of respect for the presumption of innocence by the authorities in the context of their repeated and unacceptable statements, and in the face of the absence of any measure by these authorities aimed at protecting the presumption of innocence of the accused who are publicly attacked by the media, the present proceedings have become a flagrant violation of articles 6.2 ECHR and 14. 2 ICCPR.

10. A TRIAL INVOLVING THE ARBITRARY DETENTION OF THE DEFENDANT

Article 5 ECHR establishes the right to liberty and security of any citizen as a general principle, as also laid down in Article 17 of the Spanish Constitution and Article 9 ICCPR. The wording itself recognises a number of exceptions to this general principle, including preventive detention in the context of criminal investigations. Article 5(1)(c) ECHR allows for the preventive detention of a citizen when there is reasonable evidence of an offence, when it is deemed necessary to prevent the commission of an offence or when it is deemed necessary to prevent the citizen absconding after the commission of an offence. It is necessary that one of these circumstances should occur in order for the deprivation of liberty to be in accordance with the law of the Convention, a deprivation of liberty that must be controlled by a court according to Art. 5.3 ECHR.

The grounds provided for in Article 5.1 for agreeing to pre-trial detention, including the risk of absconding and the risk of repeated offences, cannot be interpreted in an analogous or broad manner.

Only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty (Ostendorf v. Germany, JECtHR of 7 March 2013)

The ECtHR has specified that it is not sufficient that the grounds for pre-trial detention be carried out with the aim of maintaining order and preserving peace *(Ireland v. United Kingdom*¸ JECtHR of 18 January 1978, § 196). With regard to these exceptions to the general principle of freedom in criminal proceedings, the ECtHR has repeatedly established the obligation of detailed judicial review on a case-by-case basis and without being able to take into account only the severity of the penalties provided for as the sole criterion.

The Court points out that such a danger cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial. (...) When the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by lodging a security. (Letellier v. France, JECtHR of 26 June 1991)

In the same vein, the recent judgement of the Grand Chamber in JECtHR *Buzadji v. Moldova* of 5 July 2016:

122. [...] *the Court considers that the reasons invoked by the domestic courts for ordering and prolonging the applicant's detention were stereotyped and abstract. Their decisions cited the grounds for detention without any attempt to show how they applied concretely to the specific circumstances of the applicant's case. Moreover, the domestic courts cannot be said to have acted consistently. In particular, on some occasions they dismissed as unsubstantiated and implausible the prosecutor's allegations about the danger of the applicant's absconding, interfering with witnesses and tampering with evidence. On other occasions they accepted the same reasons without there being any apparent change in the circumstances and without explanation. The Court considers that where such an important issue as the right to liberty is at stake, it is incumbent on the domestic authorities to* ***convincingly demonstrate that the detention is necessary****.*

And within the framework of the same position, entering into an analysis of elements that are fully applicable to the present case to rule out the risk of absconding, another decision states:

There were, however, other factors that were highly relevant when it came to determining whether a danger of absconding, reoffending or collusion existed: the charges concerned a non-violent offence, the applicant had not attempted to abscond after learning that the theft was under investigation, he did not have a criminal record, he had a wife and a two-month old child and had returned the stolen money and the available jewellery (…) The Court thus considers that, as in the Ilijkov case, the applicable law and the authorities' approach resulted in them failing to consider concrete facts that were relevant to the determination whether there was a danger of the applicant's absconding or committing offences. (Shishkov v. Bulgaria, JECtHR of 9 January 2003)

According to the arguments put forward for the case of Jordi Cuixart, it is evident that the decisions issued by the Supreme Court do not comply with the requirements of the ECtHR's case-law and that, therefore, in the light of European case-law, we are faced with a case of obvious arbitrary detention of the accused in violation of the fundamental right to liberty of Art. 5 ECHR, as the interference of the State in this right is not duly justified.

Article 18 ECHR and the recent case of the ECtHR *Rashad Hasanov v. Azerbaijan* of 7 June 2018

However, beyond this initial analysis of explicit arguments, it will be necessary to assess the possibility that, due to the circumstances present in this case, the decision to hold Jordi Cuixart in pre-trial detention sought purposes other than those expressly set out in the appeals and that therefore the infringement is not only of the right provided for in Article 5 ECHR but also of the right provided for in Article 18 ECHR. Indeed Article 18 ECHR proclaims:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

In cases where pre-trial detention has not been proposed and adopted by the domestic authorities exclusively for the purposes of criminal proceedings, i.e. the prosecution of the offence and the securing of evidence and the appearance of the defendant, such a measure may infringe the right under Article 18 ECHR. In the case of Jordi Cuixart, there is clear evidence for the time

being, as well as arguments and affected subjects, indicating that the decision to provisionally detain him was adopted to intimidate the independence movement, and therefore for purposes *falling outside the scope* of the criminal process and which are neither inherent to nor admitted for the judicial authorities.

The case of *Rashad Hasanov and others v. Azerbaijan,* JECtHR of 7 June 2018, presents us with a case very similar to the present one. In that case, the ECtHR resolves the *de facto* case of the imprisonment of several civil society activists. They are prominent members of the NIDA movement, a non-governmental organisation established by a group of young people in February 2011. According to this manifesto, NIDA seeks freedom, justice, truth and change in Azerbaijan and rejects violence and uses exclusively non-violent methods of struggle. The plaintiffs were part of NIDA's management. In January and May 2013 a significant number of peaceful demonstrations took place in Baku, organised by social networks. The plaintiffs and other members of NIDA participated in organising and directing them. They were arrested on terrorism charges. The ECtHR concluded that there was a joint violation of Article 5 ECHR and Article 18 ECHR since pre-trial detention was adopted to silence and punish the plaintiffs for their political activities.

In summary (paragraphs 122 et seq. of the aforementioned JECtHR), the court assesses:

- The Attorney General's statements openly stating that NIDA's activities, collectively, were illegal actions intended to destabilise the country socially, without any evidence.
- The fact that the detainees were civil society leaders.
- The use of police forces and special courts.
- The existence of reports from international human rights bodies reporting degradation in matters of human rights especially in relation to arrests of civil society activists.

And all of this leads it to the compelling conclusion:

The totality of the above-mentioned facts and circumstances, taken together with the most recent reports and opinions made by various international human rights instances about the crackdown on civil society in the country and the particular cases of

arrest and detention of civil society activists, including the applicants (see paragraphs 79-81 above), indicates that the actual purpose of the impugned measures was to silence and punish the applicants for their active social and political engagement and their activities in NIDA.

The elements assessed by the ECtHR in the Rashad Hasanov case are fully applicable to the present case on the basis of the arguments presented and therefore we can claim the violation of Art. 5 and Art. 18 ECHR in the pre-trial detention of Jordi Cuixart.

The role of the Attorney General's Office in the persecution of the civil independence movement is not only widely-known and evident, but has also been discussed in this brief and from multiple viewpoints throughout the procedure. That Jordi Cuixart is a civil society leader is not only widely known, it is also the position for which he is being prosecuted in these proceedings, where he is described in the public prosecutor's indictment (p. 2), **without indicating his personal details**, only as the *president of Òmnium Cultural.*

The use of special courts is evident in the present proceedings with regard to the aforementioned question of jurisdiction over the National High Court (firstly) and the Supreme Court (later), usurping the trial from the predetermined judge according to the laws of Catalonia, the development of which is on file in the various briefs of the proceedings, in the preliminary decision procedure and also summarised in a pleading in this brief.

Regarding the existence of reports from international organisations, at this time we must review the position of the World Organisation Against Torture based in Geneva, of last 22 November, which described the detention of Jordi Cuixart as **arbitrary** in the terms provided for in human rights legislation (document No. 22); from the Brussels-based organisation Front Line Defenders, which describes the present criminal procedure as an act of reprisal for the activities of Jordi Cuixart according to a communiqué of 28 November where it states it is a "reprisal for his work on the protection of civil and political rights" (document No. 23); and from a new communiqué from Amnesty International on the occasion of the one-year anniversary of his imprisonment on 16 October 2018, which we provide as document No. 24 and which insists on the

disproportionate nature of the pre-trial detention in view of the unfounded nature of the charges on which it is based.

In view of the above, the case of Jordi Cuixart brings together precisely all the elements highlighted by the ECtHR in the Rashad Hasanov judgment against Azerbaijan, and we can state that his pre-trial detention is not only arbitrary and therefore contrary to Art. 5 ECHR but also contrary to Art. 18 ECHR because it is used as retaliation for the exercise of a right and has political objectives that go beyond the individual criminal liability of the person being investigated.

In his case, moreover, it is necessary to add the special circumstances of his son, who is under the age of 21 months, in relation to which the father's pre-trial detention entails a clear limitation of his relationship with him, which frankly contradicts the United Nations Convention on the Rights of the Child signed by Spain.

11. A TRIAL THAT WILL END IN THE STATE BEING DECLARED TO HAVE VIOLATED DEMOCRATIC RIGHTS

When, on 20 July 2007, the Second Chamber of the Supreme Court handed down the ruling on Guantánamo and outlined the Criminal Law of the Enemy, it identified three elements:

1. The concept of author's criminal law does not focus on facts but on character.
2. The generalised decay of procedural guarantees.
3. Disproportionality of penalties.

It is for this reason that when the defence raises the possibility that these proceedings are leading us into the Spanish penal system through the dangerous paths of the Criminal Law of the Enemy, it does not do so as mere "defensive relief" as was described in the order of this Court of 27 December 2018. The extensive brief that we submit to this Court describes and develops in detail the impact of the criminal procedure on fundamental guarantees that have disappeared in the current proceedings, the construction of a criminal law focusing on the *secessionist* political aims of the investigated party and the

evident disproportion of the penalties. And these are precisely the characteristic traits of a criminal law that is proscribed, or should be proscribed, in the words of this Court itself.

For that reason, for the sake of coherence, for legal conviction and for conviction in the defence of human rights we are convinced that, if this long list of serious violations is not rectified, and Jordi Cuixart is convicted, the present procedure will end not in Madrid but rather in an international court of justice with Spain being convicted for the violation of human rights.

All of this is particularly severe in the case of Jordi Cuixart, who is legally considered a defender of human rights for his work as president of Òmnium Cultural, according to the declaration of the United Nations General Assembly of 9 December 1998 issued in protection of human rights defenders. Jordi Cuixart's action was not criminal, of course, but neither was it the result of mere liberality. Jordi Cuixart was aware of his democratic commitment to the defence of human rights and public freedoms, including the right to self-determination, and in the face of the unbending refusal of a State to offer channels for dialogue, he worked tirelessly for the protection of these rights within the framework of the political conflict between Catalonia and the Spanish State. He has worked and will continue to work in this sense whenever necessary.

In parallel to addressing the preliminary matters developed in the previous pages, in accordance with the provisions of Art. 652 and related provisions of the Criminal Procedure Act, I formulate the following

PROVISIONAL CONCLUSIONS

ONE. I deny the description of the facts by the Public Prosecutor's Office, the Private Prosecution and the Civil Motion insofar as it deviates from what is set forth below:

A) Facts

1. Jordi Cuixart and the organisation Òmnium Cultural.

My client Jordi Cuixart i Navarro, a businessman by profession, of legal age and with no criminal record, has held, since 19 December 2015, the position of president of Òmnium Cultural, a non-profit cultural association declared to be of public utility, of which he has been a member since 1996. The organisation is 99% financed with income from membership fees, donations and the provision of services, and less than 1% with public aid from local and provincial administrations for cultural projects; it does not receive subsidies from the Government of Catalonia.

Òmnium Cultural was founded on 11 July 1961 by five Catalan businessmen who, in the midst of Franco's dictatorship and at a moment in history marked by censorship and persecution of Catalan culture, conceived of the organisation as an instrument for the preservation and defence of Catalan culture and language. In 1963 the headquarters of the organisation were searched and closed by the Franco regime, despite this it continued to work on its objectives, teaching Catalan and awarding literary prizes in the Catalan language until it achieved legalisation in 1967. The social purpose of this civil society organisation is the promotion, development and defence of Catalan language and culture in all areas of science, the arts, literature, thought and the media, in all sectors of society and also before public or private institutions, bodies and organisations. Likewise, its social purpose is to promote and defend the full collective recovery of the identity of the Catalan nation.

In implementing its social aims, the organisation Òmnium Cultural (which today has 41 territorial headquarters and more than 133,000 members) has for decades been organising and awarding various literary prizes: the *Nit de Santa Llúcia* (during which the Sant Jordi Novel Prize, the Carles Riba Poetry Prize, the Mercè Rodoreda Story and Narrative Prize and the Muriel Casals Communication Prize are all awarded), the *Premi d'Honor de les Lletres Catalanes*, Òmnium's Prize for the best novel in the Catalan language, the Sambori and Pissiganya Narrative and Children's Poetry Prizes (in which 130 entries are received), and the VOC Audiovisual Awards for content in Catalan. Every year it also organises the *Flama del Canigó*, a project of popular culture and cohesion that takes place in some 400 municipalities, and actively participates book-giving celebration of Sant Jordi (St George's Day), celebrated every 23 April.

The organisation, which has always demanded a broad national consensus and has fought to avoid the fracture of Catalan society, also promotes campaigns of social cohesion and to demand rights such as *Lluites compartides* ("Shared struggles"), which aims to shed light on and vindicate citizens' struggles to achieve social and political rights; *Som Escola* ("We are a School"), a platform that brings together 40 civic, cultural and educational organisations to defend the Catalan school model and the social cohesion it represents; *Justícia pels crims del franquisme* ("Justice for the crimes of Francoism"), an event that is convened annually on 20 November to vindicate the historical memory of the victims of the Franco dictatorship and demand reparations; *Lliures de pobresa, exclusió i desigualtats* ("Free from poverty, exclusion and inequalities"), an initiative for the creation of an economic solidarity fund in the fight against poverty, social exclusion and inequalities developed jointly with the organisations Coop57 and the ECAS (Catalan Social Action Associations), from which support has been given to projects to remodel and adapt social centre premises in low-income neighbourhoods, socio-labour insertion projects, creation of cooperatives, projects of sustainable energy consumption, empowerment of women, immigrants and groups at risk of social exclusion, etc. (documents No. 25 to 28).

Òmnium Cultural also supports campaigns or social initiatives such as *Casa nostra casa vostra* ("Our home, your home"), in support of receiving refugees as well as the Popular Legislative Initiative on Urgent Measures to combat the Housing Emergency and Energy Poverty. It participates in the 1 May trade union calls; it mobilises volunteers for the Food Bank or the counting of homeless people

or to accompany asylum seekers (documents No. 29 to 33). In this sense, the organisation was also one of the coordinators of the demonstration *Els drets no se suspenen* ("You cannot suspend rights") on 29 May 2016, denouncing the Judgments of the Constitutional Court against social laws approved by the Parliament of Catalonia (document No. 34).

In the development of its social purpose, Òmnium Cultural has also carried out various campaigns to support and mobilise citizens, always in a peaceful manner, in favour of the right of the people of Catalonia to decide their political future. Each and every one of its calls, as will be described in the following pages, has been carried out in a legal manner in the legitimate exercise of the rights of association, assembly, demonstration, freedom of expression, ideological freedom and political participation. Both Jordi Cuixart and Òmnium Cultural have always adopted the necessary measures for such mobilisations to take place in a festive and civic atmosphere, and have always exhorted the participants to behave peacefully and to reject any kind of violent attitude.

2. Calls made by the organisation Òmnium Cultural: the peaceful mobilisation of citizens in defence of the right of the people of Catalonia to decide their political future.

The first of the major demonstrations in defence of the right to self-determination in which Òmnium Cultural actively participated was held on 10 July 2010 (document No. 35) under the slogan *Som una Nació. Nosaltres decidim* ("We are a Nation, we decide"). It was called by Òmnium Cultural with the support of various political and civil society organisations as a protest against the ruling of the Constitutional Court of 27 June 2010, which annulled several articles of the Statute of Autonomy of Catalonia approved on 18 June 2006. This Statute had been approved by the Catalan and Spanish Parliaments, and had subsequently been submitted to a referendum and approved by the people of Catalonia. That demonstration, at the head of which walked all the presidents and former presidents of the Government of Catalonia and the Parliament of Catalonia, was attended by 1,100,000 people (according to the Urban Police's data) and was joined by the majority trade unions, more than 1,600 civil society organisation and practically all the parliamentary forces of the Parliament of Catalonia, representing more than 80% of the seats. It was at that time described as the largest demonstration held in Catalonia since 11 September 1977, in which

1,200,000 Catalans took to the streets in Barcelona to demonstrate under the slogan *Llibertat, Amnistia, Estatut d'Autonomia* ("Freedom, Amnesty, Statute of Autonomy") (document No. 36).

At the same time, and during 2009, 2010 and 2011, several Catalan municipalities called and held almost five hundred popular consultations on Catalonia's independence, which were called and held without incident (document No. 37 and 38). Òmnium Cultural, committed to defending the right to decide of the people of Catalonia, supported these initiatives and ceded its headquarters as an electoral venue in the consultation held in Barcelona on 10 April 2011.

The National Day of Catalonia, which is celebrated annually on 11 September, commemorates the defence and fall of the city of Barcelona on that date in 1714 after 14 months of siege during the War of Succession between the Bourbons (supported by the Crown of Castile) and the Austrians (supported mostly by the Crown of Aragon). The victory of the Bourbons brought with it, through the Nueva Planta Decrees, the repeal in 1716 of the institutions of self-government of the Crown of Aragon, which up to that date had been respected by the House of Austria, and therefore 11 September also recalls the subsequent abolition of Catalan institutions and civil rights.

For the celebration of the 2012 National Day of Catalonia, the organisation ANC called a demonstration under the slogan *Catalunya, nou estat d'Europa* ("Catalonia, new State of Europe") that managed to bring together 1,500,000 people who walked several streets of Barcelona, overflowing the official route, in a peaceful demonstration in favour of the independence of Catalonia (document No. 39).

The elections to the Parliament of Catalonia on 25 November 2012 resulted in an absolute majority of seats for the pro-independence political forces. By means of Resolution 5/X of the Parliament of Catalonia of 23 January 2013, it was agreed to initiate the process to make effective the exercise of the right to decide so that the citizens of Catalonia could decide their collective political future in accordance with a series of principles among which we highlight:[44]

44 Translator's Note: translator's own translation of the original in Spanish.

Two. Democratic legitimacy*. The process of exercising the right to decide will be scrupulously democratic and will especially guarantee plurality and respect for all options, through deliberation and dialogue within Catalan society, with the aim that the resulting decision will be the majority expression of the popular will, which will be the fundamental guarantor of the right to decide.*

Three. Transparency. *All the necessary tools will be deployed so that the Catalan people and civil society as a whole have all the information and knowledge necessary for the exercise of the right to decide and to encourage their participation in the process.*

Four. Dialogue. *There will be dialogue and negotiation with the Spanish State, with the European institutions and with the international community as a whole.*

Five. Social cohesion. *The social and territorial cohesion of the country will be guaranteed as well as the will expressed on many occasions by Catalan society to maintain Catalonia as a single people.*

In 2013, Òmnium Cultural organised together with other civil society organisations the *Concert per la Llibertat* ("Concert for Freedom"), which was held at the Camp Nou football stadium in Barcelona on 29 June with the attendance of more than 90,000 people and in which more than 400 artists participated with the aim of claiming, through the universal language of music, the right of the Catalan people and all peoples of the world to be able to decide freely and democratically their future (documents No. 40 and 41).

In 2013, the demonstration to celebrate the National Day on 11 September, organised by the organisation ANC under the slogan *Via catalana per la independència* ("Catalan way to independence") managed to convene more than 2,000,000 people who formed a human chain of 400 kilometres calling for a self-determination referendum. This multitudinous demonstration took place in a peaceful and festive manner, with whole families attending to celebrate the Catalonia's National Day, peacefully demanding the calling of a referendum to decide the political future of Catalonia (document No. 42).

In October 2013, Òmnium Cultural promoted the campaign *Un País Normal (*"A Normal Country"), which sought to broaden social support for the right to decide. In the framework of this campaign, sector-oriented events were held with trade unions and the world of academia and lasted until 2014 (document No. 43). On 8 June 2014, the organisation organised a simultaneous performance of *colles castelleres* (human towers) in eight European cities (document No. 44 and 45),

mobilising more than 70 *colles*, under the slogan *Catalans want to vote – Human towers for democracy*. On 15 July 2014, as part of the aforementioned campaign, it presented the documentary *Un país normal* ("A Normal Country") in which different well-known personalities from the world of communications and politics addressed the debate on the need for Catalonia to be able to vote on its political future.

A referendum was held in Scotland on 18 September 2014 to decide whether it should be an independent country, following an agreement between the Scottish and UK governments. Òmnium Cultural sent a delegation to Scotland that held meetings with experts from universities, political parties and representatives from civil society to learn how the "yes" and "no" debates were conducted, how volunteers were organised, the argument and the role of civil society in the referendum, and so on (document No. 46).

Òmnium Cultural took a public stance in favour of the consultation on Catalonia's independence that was peacefully held on 9 November 2014 under the campaign *Ara és l'hora* ("Now is the time"), collaborating in different actions with the ANC such as the organisation of the Catalan National Day of 11 September 2014, which was held under the slogan *Via Catalana* (Catalan Way) and received a peaceful gathering of more than one million people in the form of a "V" between Avinguda Diagonal and Gran Via de les Corts Catalanes de Barcelona to claim the right to vote in a referendum and the independence of Catalonia. Once again more than 1,000,000 people gathered in a family, festive and peaceful atmosphere to demand a referendum on Catalonia's political future (document No. 47).

In 2014 Òmnium also promoted with other organisations the citizens' initiative *Let Catalans Vote*, managing the website www.letcatalansvote.org, which endorsed a manifesto calling on the Governments of Spain and Catalonia to work together to allow Catalans to vote on their political future and subsequently establish negotiations based on good faith. This website received backing for the manifesto from 25 international personalities such as various Nobel Peace Prize Laureates, human rights activists, personalities from the world of culture and thought, etc. This initiative was relaunched in 2017 with the addition of new backers such as the Nobel Peace Laureates Jodie Williams and Rigoberta Menchú, singer Yoko Ono and activist Angela Davies (document No. 48).

On 9 November 2014, more than 2,000,000 Catalans went to the polls to vote in the popular consultation on the independence of Catalonia that the Government of Catalonia had called with a double question: *Vol que Catalunya esdevingui un Estat? En cas afirmatiu vol que aquest Estat sigui independent?* ("Do you want Catalonia to be a State? If so, do you want this State to be independent?"). The consultation was supported by 920 city councils, 36 regional councils, the Conselh Generau d'Aran and the 4 Catalan provincial councils, all of them approving motions in favour of it (documents No. 49 to 52). A total of 2,344,428 people attended to vote, with the "yes" result to both questions being 1,897,274 votes and the "yes-no" result being 234,848 votes (document No. 53).

On 30 March 2015, the president of Òmnium Cultural, Muriel Casals, signed a letter of intent along with representatives of the civil society organisations ANC and AMI *(Associació de Municipis per la Independencia*) and the political parties CDC and ERC. This document set out the intention to unite the signatory organisations in order to initiate a process of democratic transition towards an independent State within 18 months. This letter of intent, which was based on considering as plebiscites the elections of 27 September 2015, included the drafting of a constitutional text and the subsequent creation of the necessary State structures, negotiation with the Spanish State and with international bodies for the recognition of the new State, maintaining an expectant attitude towards a binding referendum by the Spanish State on the independence of Catalonia and holding a binding referendum on the constitutional text to conclude by proclaiming independence if the result was positive.

The demonstration on the Catalan National Day of 11 September 2015, organised by the ANC with the collaboration of Òmnium Cultural, once again managed to bring to the streets around 1,400,000 people who peacefully demonstrated in favour of the independence of Catalonia over the 5.2 kilometres of its length along the Avinguda Meridiana in Barcelona under the slogan *Via lliure a la República catalana* ("Open road to the Catalan Republic"). During this National Day celebration, Òmnium Cultural invited around thirty international personalities to participate in what was called the *Catalan Weekend* (documents No. 54 and 55).

The Catalan autonomic elections held on 27 September 2015 once again resulted in the pro-independence political forces obtaining an absolute majority in

the Catalan Parliament, an absolute majority that is maintained to this day following new elections called on 21 December 2017 by the Spanish Government following the application of Article 155 of the Spanish Constitution.

The demonstration held on the Catalan National Day of 11 September 2016 was called by the ANC in collaboration with Òmnium Cultural under the slogan *A punt* ("On the brink") and was decentralised by organising demonstrations in five Catalan towns attended by 800,000 people who demanded the holding of a self-determination referendum with the same family-oriented, peaceful and festive attitude as in previous years. Jordi Cuixart took part in this celebration for the first time as president of Òmnium Cultural (document No. 56).

Under the slogan *Per la Democràcia. Defensem les nostres institucions* ("For Democracy. Let's defend our institutions"), several civil society organisations – Òmnium Cultural, ANC and the AMI among them – called, on 13 November 2016, a rally in front of the Montjuïc fountains in Barcelona to protest against the judicialisation of the political conflict after publication of news that the criminal judicial process would continue against former President of the Catalan Government Artur Mas, former Vice-President Joana Ortega and former Education Minister Irene Rigau for having called and held the consultation of 9 November 2014. The rally maintained the same civic and peaceful spirit as all those in which Òmnium Cultural has participated, and it publicly showed its support for the politicians who were prosecuted for holding the consultation (document No. 57).

In December 2016, Òmnium Cultural joined the platform *Pacte Nacional pel Referèndum* ("National Pact for the Referendum"), an initiative that arose at the proposal of the majority of the parliamentary forces of the Parliament of Catalonia through the promotion of the Government of Catalonia, symbolically taking over from the *Pacte Nacional pel Dret a Decidir* ("National Pact for the Right to Decide"). The *Pacte Nacional pel Referèndum* was created on 23 December 2016 and has brought together more than 4,000 civil society organisations (social, cultural, sports, universities, third sector organisations, etc.) and gathered more than 500,000 signatures in order to promote a pact between the Governments of Spain and Catalonia that will allow the holding of an effective and binding referendum so that Catalan citizens can vote on their political future as a nation. Not only do the organisations considered pro-independence form part of the pact, but also

State-level unions such as CCOO and UGT, employers' associations such as PIMEC and CECOT, more than twenty Catalan universities and thousands of civil society organisations. From February 2017, Òmnium Cultural, together with CIEMEN *(Centre Internacional Escarré per a les Minories Ètniques i les Nacions*), carried out the work of the *Pacte*'s technical office, and both are owners and managers of the website www.pactepelreferendum.cat (document No. 58), which has published information on the manifesto of support, the work carried out by the *Pacte* and the document of conclusions drawn up in June 2017.

The work done by the *Pacte* includes sending a letter to the President of the Spanish Government and all Spanish institutions and political parties urging dialogue for an agreed consultation. Signatures for the manifesto were also received from high profile international personalities such as various Nobel Peace Prize winners, civil rights activists and representatives from the world of politics, philosophy and culture.

The manifesto of the *Pacte Nacional pel Referendum*[45], which more than 4,000 organisation have backed and which has collected more than 500,000 signatures, is based on the premise that "Catalans' desire to express their opinion through a referendum is majority and universal; and congruent with the civic, peaceful and democratic determination expressed by the mass mobilisations of organised society in favour of their right to decide" and concludes with the following positions:

We urge the Governments of Catalonia and of the Spanish State to overcome political difficulties and apriorisms, and to finally reach an agreement that establishes the fair and necessary conditions and guarantees for the holding of a referendum recognised by the international community, the result of which must be politically binding and effective.

We recognise the Parliament of Catalonia as the democratic institution where the popular will of the country is expressed. For this reason, we support any initiatives and agreements that may arise to allow this referendum to take place.

We express our conviction that the referendum is an inclusive tool that will allow the free expression of the different positions that the citizens of Catalonia have expressed regarding Catalonia's political relationship with the Spanish State.

45 Translator's Note: all text from the *Pacte* cited here is the translator's own translation from Spanish.

We affirm that democratic culture calls for political solutions to political problems. And we do so by appealing to the fundamental mechanism available to modern societies: the knowledge and validation of the majority will of the people expressed through voting.

This referendum should make everyone feel that they are called to participate. This requires a scrupulously democratic, pluralistic and equal debate among the legitimate options that are currently being expressed in Catalonia.

When the trial date was made public for the consultation of 9 November 2014 against the three politicians mentioned on previous pages (whose statement was scheduled for 6 February 2017), the organisations ANC, Òmnium Cultural, AMI and Associació Catalana de Municipis (ACM) initiated a solidarity campaign under the slogan *El 6F ens jutgen a tots* ("The 6F judges us all"), which was supported by various political parties, the majority unions CCOO and UGT, the *Pacte Nacional pel Referèndum* platform and other civil society organisations. On 6 February 2016, a rally in support of the defendants was called and 40,000 people accompanied them to the headquarters of the High Court of Justice of Catalonia in a peaceful demonstration that left Plaça Sant Jaume in Barcelona and ran through the streets for the most part in silence, interrupted by shows of support from citizens. Upon arriving in the immediate vicinity of the Court, the leaders of the civil society organisations received them and also showed their support for the politicians (documents No. 59 and 60).

On 11 June 2017, a peaceful rally was held in Montjuïc, in the city of Barcelona, in support of the self-determination referendum that the President of the Government of Catalonia had just announced for 1 October 2017. The event, called by the ANC, Òmnium Cultural and the AMI under the slogan *Referèndum és democràcia* ("Referendum is democracy"), brought together more than 30,000 people. In view of the warning to officials issued by the President of the Spanish Government, Mariano Rajoy, indicating that they could be committing a crime if they collaborated with the referendum as well as the commencement in the High Court of Justice of Catalonia of several proceedings against the president of the Parliament of Catalonia and several members of the Government of Catalonia, Jordi Cuixart argued in his public intervention that "you do not have enough prisons to put all the people of Catalonia away"[46] and defended the holding of the referendum, as an exercise of democracy, for the voters of "yes" and for the voters of "no". The event was attended by football coach Josep Guardiola, who read a

46 Translator's Note: translator's own translation of the original in Spanish.

manifesto in which he appealed to the international community to intervene in the political conflict stating that "Catalans today are victims of a State that has set in motion a political persecution unbecoming of a democracy in the Europe of the 21st century"[47] (documents No. 61 and 62).

The 2017 National Day of Catalonia demonstration, organised again by the ANC with the collaboration of Òmnium Cultural, took place under the slogan *Referèndum és democràcia* ("Referendum is democracy"), bringing together nearly 1,000,000 people, according to figures from the Urban Police, who filled the streets of Barcelona forming an enormous cross representing the addition sign, once again all in a family, festive and peaceful atmosphere (document No. 63).

All the aforementioned demonstrations and rallies in which the organisation Òmnium Cultural and Jordi Cuixart took part transpired in a festive, family-oriented, civic and peaceful manner. Since 2012, the ANC had developed a protocol of action that included the presence of a "public order service" (in accordance with the provisions of Art. 4.2 of Organic Law 9/1983, of 15 July, regulating the right of assembly) made up of volunteers who ensured that there were no incidents at the demonstrations, collaborated with the Mossos d'Esquadra and the local police, and held meetings with them and those responsible for medical services, when necessary, in order to provide the rally with the greatest possible security and organisation. In addition, instructions were distributed to the attendees emphasising the need to maintain the peaceful nature of the demonstrations.

In this regard, it should be noted that the Mossos d'Esquadra has a mediation unit, within the larger unit in charge of public order, which aims to resolve conflicts peacefully and persuade, negotiate and mediate with regard to all potentially risky situations that may occur at mass events on public streets, seeking whenever possible to liaison with rally attendees and demonstrators. In accordance with the provisions of Resolution 476/X of the Parliament of Catalonia, of 18 December 2013, approving the conclusions of the report of the Study Commission on Models of Security and Public Order and the Use of Anti-Riot Materials at Mass Events, *the management of security and public order begins before the planning of police units for intervention at mass attendance events. For this reason, fluid communication and coordinated and concerted action on the part of both the different*

47 Translator's Note: translator's own translation of the original in Spanish.

administrations and the public and private actors directly involved are essential. The police model of public security and mass attendance events must be based on the principle of minimum intervention with violent means, in accordance with the legal obligation of proportionality, appropriateness and congruence in police action.

3. Events of 20 September 2017.

3.1. Context

On 20 September 2017, more than 30 mayors from various municipalities in Catalonia who had publicly expressed their support for the self-determination referendum on 1 October (documents No. 64 and 65) were summoned to testify as investigated parties at the Offices of the Provincial Public Prosecutor of Catalonia. Throughout the week, a large number of the 750 mayors investigated by the Public Prosecutor's Office for the same reason had received summonses, and on 19 September a few had already attended to testify and an entry and search had been carried out at the warehouses of the organisation UNIPOST (a provider of private courier and mail services) in the town of Terrassa, at which the Civil Guard had seized the notifications to the members of the electoral boards of the self-determination referendum. Hundreds of residents had accompanied their mayors to the various venues where they were to give statements of support and people spontaneously gathered outside the headquarters of UNIPOST to protest peacefully, without at any time impeding the proceedings, by staging a sit-in in the street that delayed the exit of the vans with the seized material.

At around 1 p.m. on 20 September, a dozen plainclothes policemen from the National Police presented themselves at the headquarters of the political party CUP in Barcelona, requisitioning political and electoral material in favour of the referendum of 1 October which was being loaded into a van, as well as other material from that party which had no connection with the referendum. In the absence of a court order, a police unit with that police force, several of whom were wearing balaclavas, attempted to gain access to the headquarters of the political party, which was refused by the workers and party militants who were on the scene, who demanded that they show them a court order authorising such access. Neither at that time nor at any other time during the afternoon was any court order of the acting authority shown, and for more than 7 hours the headquarters

were surrounded by numerous vans and riot police units, who cut the street at several access points.

Party members, militants and sympathisers took part in a sit-in in front of the headquarters to peacefully prevent the police force from entering the building, with more than 2,000 people concentrating in the vicinity of the headquarters to protest the police action (documents No. 66 and 67). Shortly after 8 p.m., the vans and riot police of the National Police left the venue without having shown at any time any judicial order, firing several shotgun salvoes in the retreat.

During the hours the siege of the CUP lasted, David Fernández, former member of the Parliament of Catalonia and a member of that political formation, tried unsuccessfully, together with other leaders of the formation, to maintain dialogue with those in charge of the National Police operation. Through his mediation he managed to get the Police to remove one of the police vehicles that was remaining among the mass of people and asked the rally attendees to maintain an attitude of peaceful resistance. These facts led to the lodging of a complaint by the political party CUP, the hearing of which fell to Investigating Magistrate's Court No. 9 of Barcelona, where the acting authority issued a report indicating that the headquarters of the party had been under police surveillance since 8 a.m. on the morning of 20 September (document No. 68).

3.2. Rally in front of the Ministry of the Vice-presidency and of the Economy and Finance

At 8:02 a.m. on the morning of 20 September, a newspaper issued a tweet with the news of an entry and search at the Ministry of Economy of the Government of Catalonia located at Rambla Catalunya 19-21 in Barcelona, where the vice-presidency of the Government was also located, accompanying the message with a photograph of the search taken by the photojournalists who arrived at the scene at the same time as the Civil Guard. The news spread quickly and in the next half hour numerous media outlets published it, as well as information on the Civil Guard's operation against the self-determination referendum called for 1 October. Reports indicated that it had involved 41 entries and searches of private homes, companies and headquarters of the Government of Catalonia and the arrest of 16 senior officials, civil servants and workers of that institution, lawyers and representatives and employees of private companies.

Numerous public personalities condemned this police operation from early in the morning, ranging from Catalan and Spanish politicians to trade union representatives and prominent members of civil society, describing it as an "attack on Catalan institutions" and calling on citizens to mobilise (documents No. 69 to 74).

At 8:15 a.m., when the news was already spreading throughout social media networks as well as reaching TV stations, radio stations and digital media outlets, Jordi Sánchez broadcast a tweet in the following sense: *Ha arribat el moment. Resistim pacíficament. Sortim a defensar des de la no-violencia les nostres institucions. Rbla. Catalunya-Gran Via* ("The moment has arrived. We resist peacefully. We take to the streets to defend our institutions from a position of non-violence. Rbla. Catalunya-Gran Via"). At 8:59 a.m., Jordi Cuixart issued the following tweet also calling for a peaceful protest rally in the vicinity of the headquarters of one of the ministries that was searched: *Atenció: Tothom a Rambla Catalunya amb Gran Via. La democràcia es defensa al carrer. Recordeu: serena i pacíficamente alçats. Coratge!* ("Attention: Everyone to Rambla Catalunya with Gran Via. Democracy is defended in the street. Remember: demonstrate serenely and peacefully. Courage!"). At 10:13 a.m., in compliance with the Organic Law regulating the right of assembly, the organisation ANC communicated to the Ministry of Home Affairs of the Government of Catalonia that a rally had been called in front of the headquarters of the Ministry of Economy to protest against the entries and searches. In this communication, the organisation indicated that it was foreseen that the rally would end at 11:59 p.m., that the presence of some 2,000 people was estimated and that, as a security measure, volunteers would be available with vests that identified them as members of the organisation, as was done at all rallies.

This was not the only call for mobilisation, as at the same time other personalities, trade unions and civil society organisations had also called for mobilisation under the slogan of defending Catalan institutions, although Messrs Cuixart and Sánchez decided to assume responsibility for the rally at this point and to organise it so that it would take place in a peaceful and civic atmosphere, as they had already done at the mass demonstrations and rallies called by Òmnium Cultural and ANC in recent years, at which there had not been a single public order incident.

At midday, in a ceremony in Plaça Sant Jaume in Barcelona, various civil society leaders (accompanied by Jordi Cuixart and Jordi Sánchez) demanded the release of the detainees, condemned the judicialisation of the political conflict, called on citizens to defend Catalan institutions, urged the population to participate in the mobilisation called before the Ministry of Economy, and made a firm defence of the people of Catalonia's right to decide. Similar statements were made by Javier Pachecho, representative of CCOO; Camil Ros, representative of UGT; Joan Ignasi Elena, spokesman of the *Pacte Nacional pel Referèndum*; Enric Fosses, rector of Universitat Politècnica de Catalunya-BarcelonaTech; Bel Olid, representative of the *Associació d'escriptors en llengua catalana* (Catalan Language Writers' Association); the representative of the *Federació d'Associacions de Pares i Mares d'Alumnes de Catalunya* (Federation of School Parents' Associations); Joan Lluis Bozzo, representative of the *Associació d'Actors i Directors Professionals de Catalunya* (Catalan Professional Actors' and Directors' Association); Nuria Montanyà, representative of the Scout movement; Gerard Esteve, representative of the *Unió de Federacions Esportives Catalanes* (Union of Catalan Sports Associations) (document No. 75).

Throughout the day my client Jordi Cuixart and Jordi Sánchez, as well as the organisations presided over by them (Òmnium Cultural and ANC), made express appeals to the rally attendees to behave in a civic and peaceful manner and adopted the necessary measures to channel the rally in a peaceful manner. A corridor was organised with volunteers in order to allow entry and exit from the departments of the Ministry; there was dialogue and collaboration with the security forces and bodies; the volunteers of the ANC protected the police vehicles when they had knowledge that there were weapons in their interior; a stage was mounted in the surrounding area with musical performances and calls to keep the peace in order to maintain a festive atmosphere at all times; the rally attendees were requested to isolate any violent attitudes and the rally was called off after an hour.

The purpose of the rally was to protest against the entries and searches being carried out and the judicialisation of a political conflict, not to impede the entries and searches nor to provoke a confrontation with the security forces. Nobody made attempts to assault the Ministry or impede the action of the judicial entourage, with the protest outside the Ministry being held throughout the day in

a defiant – but at the same time peaceful and festive – atmosphere (documents No. 76 to 109). The population's indignation at the coordinated operation against the Catalan institutions was evident. This large-scale operation (which involved the searching of numerous headquarters of the Government of Catalonia and the arrest of its high-ranking officials) also coincided with a summons to declare as investigated parties to thirty of the 750 mayors against whom the Public Prosecutor's Office had just opened proceedings for their public support for the self-determination referendum, with the notification of the suspension of the financial autonomy of Catalonia and with the police encirclement of the headquarters of a political party a few streets away from the venue of the rally.

During the day, Jordi Cuixart issued several tweets invoking the peaceful nature of the rally: 11:30 – *Defensarem la democràcia pacíficament. Fins el final. Res no ens atura davant d'aquest intolerable* ("We will defend democracy peacefully until the end. Nothing will stop us in the face of this intolerable act"); 11:37 – *Mantinguem-nos units i tranquils. Com sempre, perque estem defensant els drets civils i polítics de tots els catalans. De tots* ("Let us remain united and calm. As always, because we are defending the civil and political rights of all Catalans. Of all of them"); 11:42 – *Tothom a Rbla. Catalunya/Gran Via. Serens i organitzats. Aïllem qualsevol actitud violenta. Seguim només indicacions de fonts oficials* ("Everybody to Rbla. Catalunya/Gran Via. Serene and organised. Let us reject any violent attitude. We follow only indications from official sources").

In the interviews Jordi Cuixart carried out in the media during the day, he also insisted that the rally should be serene, civic and peaceful, expressly stating *aïllem a aquests elements que volen pertorbar aquesta mobilització cívica i pacífica* ("let's isolate these elements that want to disturb this civic and peaceful mobilisation") and informing that the rally ended at 12 midnight (documents No. 110 and 111).

In his speeches to the rally attendees he also asked for serenity at all times and addressed them by exhorting that *si detecteu algú que actua d'alguna manera violenta o actua d'alguna manera provocativa, intentant atacar els Cossos de Seguretat, els Mossos d'Esquadra, no ho permeteu, aïlleu-lo, detecteu-lo i desemmasacareu-lo* ("if you detect someone who acts in some violent way or acts in some provocative way, trying to attack the Security Corps, the Mossos d'Esquadra, do not allow it, isolate it, detect it and unmask it") (document No. 112).

In the same sense, Jordi Sánchez's calls during the day were also calls for calm, for a peaceful and non-violent attitude, both in his tweets and in interviews in the media *(volem la pau i estem aquí per defensar les nostres institucions… …ho hem de forma cívica i pacífica* ("we want peace and we are here to defend out institutions... ...we do so civically and peacefully"), and in his speeches to the rally attendees, whom he expressly exhorted: *us demanem sempre actitud no violenta, ens volen provocar, anem a demostrar que anem a defensar les institucions d'aquest país amb democràcia* ("we always ask you for a non-violent attitude, they want to provoke us, we are going to demonstrate that we are going to defend the institutions of this country with democracy").

In the same way, the different political personalities and MPs of the Parliament of Catalonia who joined the rally throughout the day always exhorted people in all their speeches to ensure that the behaviour of rally attendees was peaceful (document No. 113).

Throughout the day, both Jordi Sánchez and members of the ANC responsible for the public order service formed of volunteers entered the Ministry of Economy on several occasions and spoke with Sergeant Laplana of the Mossos d'Esquadra, with the persons responsible for Public Liaison at the Mossos d'Esquadra and with the Lieutenant of the Civil Guard in charge of the search's security team in order to collaborate and facilitate the protest running in an orderly manner. The people in charge of Public Liaison at the Mossos d'Esquadra were present at the Ministry throughout the entire day, as well as numerous Mossos d'Esquadra agents from diverse areas that came to provide support following instructions of their superiors. As a result of these conversations, a cordon of volunteers from the ANC was assembled with reflective vests that kept a corridor open throughout the day through which one could enter and leave the Ministry and was maintained into the night in order to allow the Mossos d'Esquadra to set-up a unit to escort the judicial entourage when the search ended. The detainees did not attend the search at the Ministry as they waived being present at it, and the search was conducted in the presence of witnesses (document No. 114).

Late in the afternoon, public order units of the Mossos d'Esquadra were deployed from Gran Via to make a cordon to the Ministry (which intended to take advantage of the last stretch of the ANC's volunteer corridor) and escort the

judicial entourage out as soon as the search was completed. The deployment of the BRIMO (anti-riot unit of the Mossos d'Esquadra) led to moments of tension with some demonstrators, with Jordi Cuixart and Jordi Sánchez attending to ask for calm from the rally attendees and for them to collaborate with the police force (documents No. 115 and 116). The search was delayed by computer problems, as indicated by members of the Civil Guard, and the cordon of the Mossos d'Esquadra had to be withdrawn pending further indications from the acting Judicial Police. The duration of the search also extended inexplicably throughout the day, as the judicial entourage searched various offices of the Ministry of the Vice-Presidency and of the Economy and Finance, the offices and computers of workers that were not included in the entry and search warrant, which limited the search only to four offices of four specific persons, with the circumstance also arising that one of them did not even have an office in that building and, therefore, was not subject to search (document No. 117).

My client Jordi Cuixart did not enter the interior of the Ministry until after 10:30 p.m., and did so accompanied by Jordi Sanchez and several volunteers of the ANC and MPs of the Parliament of Catalonia with the aim of collaborating with the police forces to enable the exit of the judicial entourage when necessary. The corridor of volunteers that had been present throughout the day was once again made available and it was even proposed that the civil society leaders and the MPs present should accompany the Clerk of Court to the vehicle of the Mossos d'Esquadra that would take her to the City of Justice. Neither Jordi Cuixart nor Jordi Sánchez spoke at any time directly with the Clerk of Court, and were informed by the police forces that she would not exit through the corridor formed.

Around 11 p.m. Jordi Cuixart and Jordi Sánchez indicated to the police forces that they were going to proceed to call off the rally. On the stage that had been set up at the corner of Gran Via and Rambla Catalunya both proceeded to announce to the people that the rally was being disbanded at 12 midnight and indicated to the demonstrators that it was time to head home and that they were summoned to appear again the next day at 12 noon in front of the High Court of Justice of Catalonia, in Passeig de Lluís Companys, to continue protesting against the arrests of high-ranking officials of the Government of Catalonia (document No. 118).

The demonstrators began to leave the rally but there were still many people in front of the Ministry to which the message given from the stage located at the confluence of Gran Via had not yet arrived with clarity and therefore, at around 11:45 p.m., with the aim of ensuring that the message that the rally had been disbanded reached the demonstrators in front of the door of the Ministry, both got on top of one of the vehicles of the Civil Guard parked in front of them and again from there both indicated to the people that they were disbanding the rally by asking them to leave and that the next day they would once again convene at 12 noon. before the High Court of Justice of Catalonia. Faced with the cries of some of the demonstrators of *ni un pas enrere* ("not a single step back"), both leaders insisted on disbanding the rally (documents No. 119 and 120).

During the following hour, Jordi Cuixart and Jordi Sánchez urged the demonstrators at street level to leave the rally and they maintained the corridor of volunteers to allow the exit from the Ministry (documents No. 121 and 122). They continued to enter the building on certain occasions in order to discuss with the police force the progress of the disbanding of the rally and finally, shortly before 1 a.m. on 21 September, they said goodbye to the police force and left the area.

At around 1:30 a.m., the Mossos d'Esquadra alerted the people who were still in attendance at the rally and had ignored the call that they would proceed to charge against them if they did not leave the area, after which a police charge did indeed take place, without injuries, that cleared the area of demonstrators. The members of the Civil Guard verified that the weapons effectively remained in the vehicles parked at the door of the Ministry and a crane service was requested to move the vehicles to police stations since they had flat tyres and several had broken windows. At around 3 a.m., the cranes began to arrive, which finished withdrawing the vehicles at around 7 a.m. on the morning of 21 September.

My client did not cause any damage to the police vehicle when he boarded it to call off the rally, nor did he incite anyone throughout the day to cause damage to the vehicles. From mid-morning people climbed onto police vehicles, the first to do so being various photojournalists with the aim of obtaining images from an elevated position. Throughout the day, the passage of numerous people through the vehicles caused damage to them, damage that was condemned by my client Jordi Cuixart the following day in an interview in the media in which he reiterated that he did not support any kind of violence.

The exit from the building by the Clerk of Court in charge of the entry and search process was organised by an escort unit of the Mossos d'Esquadra, who made use of access to an interior courtyard typical of the Eixample district and which was located in one of the offices on the 2nd floor of the Ministry building (which has 8 floors). This inner courtyard is adjacent to the courtyard of the Coliseum Theatre building, which has a direct access from there to the stage area. The agents waited for the show that was being performed at the time to end and before midnight they escorted the Clerk of Court outside to a Mossos d'Esquadra vehicle that transferred her to the City of Justice. The members of the acting Judicial Police waited inside the Ministry for the Mossos d'Esquadra to clear the main door of demonstrators and the cranes arrived to move the police vehicles, at which point they left the venue escorted by the Mossos d'Esquadra. The members of the Civil Guard's security team responsible for the search had to wait for the cranes to finish moving the vehicles, as they had received orders from their superiors not to leave the building without the vehicles.

3.3. Other searches and rallies

At the same time that the entry and search of the Ministry of Economy was taking place, another 40 addresses, companies and headquarters of the Government of Catalonia were being searched.

Once the search had begun at the Ministry for Foreign Action of the Government of Catalonia located at Via Laietana No. 14 in Barcelona, the workers of the CCOO trade union, whose headquarters are next to the said Ministry, descended to the street and called for a protest against the judicial action by blocking Via Laietana (document No. 123).

Elsewhere in Catalonia, entries and searches took place throughout the day while the population spontaneously gathered in front of the searched venues in order to show their support for the detainees and to protest against the coordinated police operation. At no time did the rallies in the various locations aim to prevent the entry and search procedures, which were carried out in their entirety, and the rally attendees used various protest techniques following the guidelines of non-violent civil resistance such as sit-ins on the ground.

There were rallies and pot and pan protests in different parts of Catalonia and Spain (in Barcelona, for example, those rallying before the Ministry of the Vice-Presidency and of the Economy and Finance shook their keys at 10 p.m.), and in some towns the protest moved in front of the Civil Guard barracks without any incident and while always maintaining an absolutely peaceful atmosphere in the protests (document No. 124).

At 12 midnight on 21 September 2017, the protest called by Jordi Cuixart and Jordi Sánchez to demand the release of the detainees took place in front of the headquarters of the High Court of Justice of Catalonia. A stage was installed on Passeig de Lluís Companys, without affecting the circulation of traffic, at which musical performances and speeches of political and civil society leaders were once again held and the more than 20,000 demonstrators maintained the peaceful attitude requested by the leaders in their speeches (documents No. 125 and 126) without any incident.

On 25 September 2017 agents of the Urban Police of the town of Badalona requisitioned from several citizens posters that they were putting up on the street with the slogan "HOLA EUROPA" (HELLO EUROPE), belonging to the organisation ANC. My client Jordi Cuixart was having dinner in the vicinity and was warned that this material was being seized. He attended the location and spoke with the agents of the Urban Police in a completely peaceful manner while they drew up the seizure report and proceeded to identify the people who were putting up the posters. While they were at the site, the deputy mayor of the town of Badalona appeared, who spoke to the people and held a meeting with some of the agents, taking the decision to return the posters to their owners, indicating that he would assume liability and that Badalona City Council had submitted pleadings against the order of the Public Prosecutor's Office on which the agents claimed to base their actions to seize the posters (documents No. 127 to 133).

4. The platform *Taula per la Democràcia*

As a result of the events that took place in Catalonia in September 2017 and the exceptional crackdown on the exercise of fundamental rights into which the actions of various branches of Government degenerated during that month, on 27 September 2017 the platform *Taula per la Democràcia* was created, which was

joined by some forty civil society organisations, among them Òmnium Cultural, the ANC, the trade unions CCOO and UGT, the employers' association PIMEC, the *Associació Catalana d'Universitats Públiques*, the *Consell Nacional de la Joventut de Catalunya*, the *Confederació d'Associacions Veïnals*, the *Federació d'Assemblees de Pares i Mares-FAPAC*; the *Federació d'Unions Esportives*, the *Unió de Pagesos, FundiPau*, etc. On that date, the various civil society organisations issued a manifesto along the following lines (documents No. 134 to 136):[48]

In Barcelona, on 27 September 2017, the trade unions and organisations from Catalan civil society gathered in the Museum of Catalan History hereby state that:
1. We are united by the need to give a joint response in defence of Catalan institutions, fundamental rights, the right of the Catalan people to decide their political future and democracy.
2. We are concerned by the violation of fundamental rights and democratic freedoms by the Government and State bodies that has taken place in recent days.
3. We call on Catalan society to respond peacefully, firmly and continuously in defence of its institutions and fundamental rights.
4. We believe that political problems must have a political rather than a repressive solution, and we therefore urge the European and international institutions to ensure that this is the case.
5. We stand as a plural and united forum to defend the institutions of Catalonia and the fundamental rights and freedoms of citizens, and we demand the people of Catalonia's right to decide their political future.
6. We pledge to respond in a coordinated and sustained manner to any action that violates fundamental rights, and we do not rule out any peaceful and consensual form of country mobilisation and response.

5. Events of 1 October 2017.

During the weeks leading up to 1 October, my client Jordi Cuixart publicly expressed his support for the referendum on self-determination and criticised the police and the judicial repression against it.

At the end of July 2017, Òmnium Cultural began the campaign *Crida per la Democràcia* ("Call for Democracy") in favour of the referendum with actions such

48 Translator's Note: translator's own translation of the original in Spanish.

as the screening of documentaries, mural painting and graffiti, the distribution of posters and banners with the word "democracy", the creation of a communication channel via WhatsApp, the reactivation of the signing of the *Let Catalans Vote* manifesto, the peaceful mobilisation of citizens, marathons to hang posters in favour of democracy, and so on. It also participated in acts to open and bring the referendum campaign to an end, in exercise of the right to freedom of expression and assembly, without receiving any legal summons in this regard.

By Order of 27 September 2017, the High Court of Justice of Catalonia ordered the State Security Forces and Corps to prevent the use of public premises or buildings until 1 October in preparation for the holding of the referendum and, when it arrived on 1 October, to prevent their opening by closing, where appropriate, any venues that may have opened and to seize all the material related to the referendum. The Order expressly stated, in relation to the agreed measures, that "all measures should be adopted that prevent the attainment of the referendum, without affecting the normal coexistence of citizens".[49]

In the various coordination meetings throughout 28, 29 and 30 September 2017 held by the heads of the police forces of the Mossos d'Esquadra, the National Police and the Civil Guard with the coordinator of the security team for 1 October, Mr Diego Pérez de los Cobos highlighted that on 1 October he expected the presence of more than two million people at the polls with the intention of depositing their vote in a ballot box. It would be attended by people of various ages, entire families including the elderly and children, all in a peaceful citizens' action and, in the event of police action, he stated that he expected that they would engage in passive resistance, and therefore the need to preserve the peaceful coexistence of citizens was insisted on at all the meetings, as well as insisting that the police forces should act according the criteria of appropriateness, congruence and proportionality as established by law (document No. 137).

On 29 September 2017, the Secretary of State for Security of the Spanish Ministry of Home Affairs issued Order No. 4/2017 "laying down rules for compliance with the orders of the High Court of Justice of Catalonia in relation to the suspension of the call for a referendum on 1 October in Catalonia". This Order established the following rules of engagement during the operational phase to be

49 Translator's Note: all text taken from the orders cited in this section are the translator's own translation of the original in Spanish.

carried out from 7:30 a.m. to 9:00 p.m. on 1 October: "4.a. All intervention must be conducted on the general premise of prioritising safety, both of police officers and citizens, over efficiency, and preserving peaceful coexistence. Minimal and proportionate use of force shall be made, avoiding any overuse."

At the various polling stations, many of them public and private schools, either spontaneously, or through the initiative of the ESCOLES OBERTES ("Open Schools") educational community, or through the popular initiative known as CDRs (Referendum Defence Committees), recreational activities were organised at the end of school hours on Friday, 29 September 2017, which lasted throughout the weekend. These activities, at which members of the educational community as well as neighbours, parents of the pupils and the pupils themselves took part, consisted of a varied repertoire of imaginative leisure-festive initiatives: chocolate tasting sessions, basketball and football championships, chess tournaments, story reading, singing and small concerts, theatre performances, craft workshops, zumba classes, *castells* (human towers), autumn festivals, community dinners, etc.

On 30 September, the Mossos d'Esquadra inspected 2,811 polling stations and found that inside them there was no electoral material for the referendum, nor were any preparatory acts being carried out to hold it. They identified the persons at each venue who were responsible for the leisure activities that were taking place at that time and warned them that the premises should be left empty before 6 a.m. on 1 October, issuing a total of 4,469 police notices.

On 1 October 2017, the referendum on the self-determination of Catalonia was held, which had been called by the Government of Catalonia, with the population voting in a peaceful manner throughout the day as was to be expected (document blocks No. 138 and 139 and document No. 140).

Despite the difficulties in voting, the closure of polling stations and the seizure of more than 500 ballot boxes throughout the day by the police forces, according to data provided by the Government of Catalonia at the end of the day (document No. 141), 2,286,217 votes were counted, with a participation of 43.03% of the electoral census. Of the total number of votes cast, 2,044,038 answered in the affirmative to the question raised regarding Catalonia's independence (90.18%), and a total of 177,547 answered in the negative (7.83%); there were 19,719 null and void votes and 44,913 blank votes (1.08%).

As a result of the actions of the Mossos d'Esquadra in the days leading up to the referendum, a total of 239 polling stations did not open their doors on 1 October. Early in the morning of 1 October, the Mossos d'Esquadra avoided the opening of 24 polling venues as voting centres through mediation and dialogue with the people in attendance. Throughout the day, this body of the police force halted the voting activity at 110 other centres by following rules of engagement that were in accordance with the principles of congruence, appropriateness and proportionality, by applying containment and mediation with the aim of maintaining peaceful social coexistence as had been ordered by the High Court of Justice of Catalonia. All of this activity, as well as the peaceful conduct of the citizens themselves, was reflected in 4,983 police notices and reports.

The National Police and Civil Guard units sent by the Central Government to Catalonia, many of whom departed their places of origin to shouts of "go get 'em boys!" (documents No. 142 to 147), intervened from 8:30 a.m. to mid-afternoon on 1 October at 112 polling stations, between the two bodies, without closing any and acting on many occasions with unjustified violence against a peaceful population that only wished to deposit a ballot paper in a ballot box in exercise of the fundamental right to freedom of expression. The police action thus deployed failed to comply with the mandate of the judicial resolution of the High Court of Justice of Catalonia, ethical codes regarding police action and the regulations of the State Security Forces and Corps.

The disproportionate use of force deployed by the National Police and Civil Guard units against a peaceful population that only intended to vote included pushing, kicking, clubbing, hair pulling, punching, ear pulling, pulling of jaws up and down, throwing people from stairs, hitting them with the shields of the riot police units, throwing projectiles, rubber bullets banned in Catalonia by resolution of its Parliament, strikes with the butts of weapons, the use of tear gas, etc. This police action caused injuries of varying degrees to more than 900 people (document No. 148).

The wounds inflicted by the State Security Forces and Corps on the population and even on accredited journalists did not consist of simple fainting spells and anxiety attacks (which were effectively also suffered in the face of the virulent police action) but rather of contusions, hematomas, broken bones,

irritation to the eyes and mucous membranes, erythema, ecchymosis, lacerations to the face and head from blows from batons that required stitches, loss of vision in one eye, etc. A total of 291 people had to be treated by the SEM (Emergency Medical Service) in attendance at the voting centres, and a total of 136 people had to be transferred to hospitals and primary care centres. As evidence of the above, we attach as document block No. 149 a wide range of forensic medical reports issued in the various criminal proceedings launched as consequence of the police action of 1 October[50].

My client Jordi Cuixart made calls to the population throughout the day of 1 October in order to maintain an attitude of peaceful resistance and not respond to the aggressions of the police. In addition, in the previous days he had retweeted messages from the ESCOLES OBERTES initiative which expressly stated that in the event of a police presence, the actions of the people at the voting centres should involve peaceful resistance and they should not respond to provocations of any kind.

As a result of the disproportionate use of force, some agents caused minor injuries that did not require medical treatment. With the exception of the individual and isolated actions of less than a dozen people, the more than 2 million voters behaved in an exemplary, civic and peaceful manner at all times, resorting to methods of peaceful resistance in spite of the violent actions of the State Security Forces and Corps. This peaceful behaviour was confirmed by national and international journalists who reported the reality of what had happened both graphically and through the journalistic articles and editorials in the leading Spanish media (document No. 150).

Likewise, human rights observers and international personalities who came to see how the referendum was taking place issued various reports confirming the peaceful attitude of the Catalan citizens who came to vote on 1 October. Similar comments were made by the *Síndic de Greuges* (Catalan Ombudsman), Liberties and Rights International Spain, Amnesty International,

50 It should be noted that it has not been possible to obtain all the medical reports issued as a result of the police action on 1 October since the defence is not a party to these proceedings and has had to locate them, obtain the authorisation of the injured persons to include the documentation in the present proceedings and request testimony of forensic medical reports in the various courts. On the date on which this letter of provisional conclusions is submitted, the documentation that it has been possible to obtain is included, which is not exhaustive given the difficulties the defence has had in obtaining it. The medical reports are provided with the express request that the personal data of the injured party be kept confidential, and the originals of the documents are designated in the various legal proceedings whose data appear in the reports.

Oxfam Intermón, the World Organisation Against Torture, the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association, Human Rights Watch, the Vice-President of the Parliamentary Assembly of the Council of Europe, the United Nations High Commissioner for Human Rights, the organisation NOVACT, and the Observatory of the Penal System and Human Rights, among others (documents No. 151 to 161). On 4 October 2017, the Commissioner for Human Rights of the Council of Europe sent a letter to the Spanish Minister for Home Affairs in which he highlighted "the disproportionate use of force against peaceful demonstrators and persons engaged in passive resistance to police action, on the streets and in and around places where such persons intended to vote".

In response to the violent police action, on 2 October and over the following days the population held peaceful protest rallies in the squares of the city councils, in front of the police barracks and places where the police forces were housed. The *En Peu de Pau* (On a Peaceful Footing) collective was formed to channel the indignation of the population and help maintain social harmony, by organising workshops and conferences on techniques of peaceful protest and non-violent resistance.

6. Strike of 3 October 2017.

The unions Confederación General del Trabajo (CGT), Coordinadora Obrera Sindica (COS), Intersindical-CSC and Intersindical Alternativa de Catalunya (IAC) called through official and legal channels a strike for 3 October 2017. The strike was completed without incident.

During the day of 3 October, in the framework of what was called *Aturada de país* (Country-wide Strike), the platform *Taula per la Democràcia* called rallies at 11 a.m. in front of the Ramon Llull Secondary School in the City of Barcelona and at 6 p.m. in the University of Barcelona square and in the squares of the City Councils to protest the police violence deployed on 1 October, rallies at which no incidents took place (documents No. 162 to 164).

B) Final Synthesis

As we stated at the end of the preliminary matters section, Jordi Cuixart has worked tirelessly during these years for the defence of human rights and it is, in our opinion, precisely the exercise of these rights and his efforts in defending them that have led to the accusation against him in these proceedings. From the detailed description of the actions carried out by Jordi Cuixart and by the organisation Òmnium Cultural that we have provided above, and based on the legal framework on fundamental rights previously described, it can only be concluded that we are immersed in a serious context of legal exceptionality, as a result of the desire of the State powers to protect at all costs, even by suspending democratic civil and political rights, the territorial unity of Spain.

Jordi Cuixart and Òmnium Cultural's approach is exactly the opposite. They will not give up the exercise and defence of human rights. Their firm commitment, at all costs, is to social cohesion, a broad national consensus and to social, civil and political rights, even if this means placing them above the legal machinations that seek to restrict them, and remaining willing, if necessary, to disobey them peacefully in order to bring about their transformation. For this reason, Jordi Cuixart exercises, has exercised, and will exercise, civil disobedience from a standpoint of non-violence whenever necessary, as a perfectly legitimate instrument in a democratic society, as recalled by Judgment 480/2009 of 22 May of this Supreme Court.

since civil disobedience can be conceived as a legitimate method of dissent from the State, such a form of thought and ideology should be admitted at the heart of a democratic society.

In Catalonia, the broad national consensus which, according to multiple surveys, has the backing of 80% of the population, is currently based on the defence of democratic rights and freedoms, the rejection of repression and the judicialisation of politics, and the defence of a political solution which must necessarily involve the citizens of Catalonia expressing their will by deciding their political future and exercising their right to self-determination. Jordi Cuixart and Òmnium Cultural will always support this.

TWO. The facts described do not constitute any type of crime whatsoever on the part of my client.

THREE. If there is no crime, there can be no perpetrator.

FOUR. It is, therefore, unnecessary to list any circumstances modifying the criminal liability.

FIVE. It is appropriate to freely acquit my client Jordi Cuixart i Navarro.

Signed Clerk Marina Roig Altozano

Signed Clerk Benet Salellas i Vilar

Signed Clerk Alex Solà Paños