

**Statement by Jelle Klaas, litigation director and human rights lawyer of the Dutch section of the International Commission of Jurists ([NJCM](#)).**

At the request of [International Trial Watch](#) I was asked to observe the trials of some of the Catalan separatists and protest leaders before the Supreme Court in Madrid. I have observed the trials on 26, 27 and 28 February 2019 (with official translators) and I have read the translated indictment.

My statement focusses on the case against [Jordi Cuixart](#) and is limited to the human rights aspects of his case: on the right to protest, and to the rights to freedom of speech and freedom of assembly in so far as they are linked to the right to protest.

**What is the case about?**

Jordi Cuixart Navarro, president of the [Omnium Cultural](#) (a big Catalan NGO), is accused of the crimes of rebellion, sedition and criminal organization. He is imprisoned (pre-trial detention) since the 16th of October 2017. The accusers in this case are both the public prosecutor and a private prosecutor (which is a legal possibility in Spain). The private prosecutor is the (far right Spanish nationalist) political party [VOX](#).

Cuixart is being tried for infringement of article 472.1, 472.5, 472.7, 473.1, 473.2 and 478 of the Spanish Criminal Code (**crimes of rebellion**). The penalty requested by the public prosecutor for these facts is 17 years in prison, VOX requested 25 years imprisonment.

Cuixart is also tried for infringement of article 544 and 545 of the Spanish Criminal Code (**crimes of sedition**), for which 8 years in prison is requested by the public prosecutor and 15 years (twice) by VOX, and article 57a, 1 and 2 Criminal Code (**crime of criminal organization**), for which VOX requests 12 years imprisonment.

The judge is also requested to declare a disqualification of Cuixart to perform public work/ hold public office for periods between 8 and 20 years for all above mentioned issues.

**Background (based on media and trial material)**

In 2017, a referendum was held on independence in Catalonia, one of the semi-autonomous regions of Spain, after the referendum the Catalanian government and parliament declared independence in October 2017.

The Spanish central government and parliament were opposed to the referendum and the strive for independence. The Spanish Constitutional Court had declared both the referendum and the declaration unconstitutional. The national police had, in the weeks leading to the referendum and the declaration of independence, undertaken searches and seized official and unofficial documents at Catalan government institutes and the houses of Catalan politicians. The police arrested 14 Catalan officials and staff in the weeks preceding to the referendum.

The police tried to close polling stations and seized ballot forms in the run up and during the referendum. The police has used [violence](#) against some of the protestors. Hundreds of protestors were injured. Some of the police officers were [injured](#) as well.

After raids for documents and arrests, during the referendum and its aftermath, there have been (mass) [protests](#) and expressions of [civil disobedience](#). During one of these protests, several unoccupied police cars were [damaged](#). During one of the demonstrations a big crowd [gathered](#) in front of the Catalan ministry of economics. The national government officials and police who were present in the premises have stated they felt threatened and could not leave the premises during the whole day.

Cuixart has called for independence, has supported the referendum and has spoken at demonstrations in his capacity as community organizer. He was no official part of the Catalan government or parliament. He states he is a pacifist and has made several statements and pleas to the public, before and during the protests, not to use any violence and to remain calm. Cuixart says the first protests were grassroots and started instantaneously, his organization then joined and supported them. He also used Twitter and called, inter alia, onto the public to defend and protect the electoral places.

Based on the indictment, the hearing and the media, it can be stated that Cuixart has not used violence himself, he did not attack police officers, nor did he act in any way that called for his prosecution as protestor. He is not being tried for related facts nor is he being tried as a politician (because he was not part of the government).

He is tried for being a protest leader who was responsible for/attributed to rebellion and sedition. According to the state, he knew the referendum was declared unconstitutional and illegal, but he persisted calling on people to vote, protest and protect the voting stations. He knew the police would be there and would have to act.

In the indictment, the public prosecutor says, inter alia:

*'defendants Jordi Sànchez and Jordi Cuixart, before the vote on 1 October was held, being aware of the serious confrontations that could result from citizen mobilisation (not only because of what had taken place on 20 September, but due to the existence of a significant police presence that was under obligation to enforce the court order to prevent the holding of the vote), and in execution of the initially designed plan, took advantage of their leadership roles to promote a collective mobilisation encouraging all Catalans to go to the different polling stations and to prevent the police forces from doing their job. Aside from their constant presence in the media, they resorted to various Twitter messages, in which they instigated citizens to occupy the polling stations before the time scheduled for the intervention of law enforcement officials, and they also requested them to prevent police officers from proceeding with their closure. They also encouraged citizens to vote en masse, despite the ban, and then to protect the counting of votes against actions that could be undertaken by the State Security Forces.'*

Most of the facts in the indictment are not contested. Cuixart merely denied that the government officials were actually blocked in the ministry of economics. Cuixart said, during the interrogation in court, that there was a corridor left in the public during the whole protest, the officials could have left if they had wanted to.

### **The right to protest**

The right to protest is a human right, it is closely linked to the rights of freedom of expression and freedom of assembly.

Article 11 (1) of the ECHR states:

*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*

*No restrictions can be imposed on the exercise of these rights, except those that are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.*

The UN International Covenant on Civil and Political Rights (ICCPR) recognizes the right to assembly in article 21. The UN special rapporteur on that right explains ‘assembly’ as quite a broad concept:

*an assembly is an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sit-ins.*

The freedom of expression is closely linked to the freedom of assembly and protest. It is protected in article 10 of the ECHR and article 19 ICCPR.

The European Court in Strasbourg has stated many times that the rights to freedom of assembly and protest have to be interpreted in the light of the right to freedom of expression. Thoughts, feelings and ideas that offend, shock, or disturb also fall under the scope of the protection.<sup>1</sup>

[Maina Kiai](#), the former UN special rapporteur on the right to protest and freedom of assembly, has a very clear statement about what these rights entail:

*The right to freedom of peaceful assembly is the right to gather publicly or privately and collectively express, promote, pursue and defend common interests.*

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<sup>1</sup> EHRM 7 December 1976, no. 5493/72, par. 49 (Handyside v. VK)

*This right includes the right to participate in peaceful assemblies, meetings, protests, strikes, sit-ins, demonstrations and other temporary gatherings for a specific purpose. States not only have an obligation to protect peaceful assemblies, but should also take measures to facilitate them.*

*Everyone has the right to peaceful assembly. States may not limit this right for certain groups based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status.*

*Under international law, the right to freedom of peaceful assembly is not absolute. Assemblies may be subject to certain restrictions, but such measures must be prescribed by law and “necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” Any restrictions must meet a strict test of necessity and proportionality. Freedom must be the rule and not the exception. Restrictions should never impair the essence of the right. International law only protects assemblies which are peaceful, and the peaceful intentions of those assembling should be presumed.<sup>2</sup>*

A healthy democratic society that is based on the rule of law will facilitate protest(s) to allow its citizens to voice their (dis)content. It is important for a democratic society and its government to know what people care about, to be able to amend its politics accordingly.

Also, or especially, if the goals or opinions of the protestors are not popular and/or a minority position, the government should facilitate peaceful protest and civil disobedience.<sup>3</sup> Because the minority position of the present can become the majority position of the future, and if not: it's better to have dissent openly on the streets than underground and oppressed.

The right to protest is under pressure in Europe. In the last couple of years for instance we saw France [ban protests](#) from environmentalists and trade unions, while in the Netherlands hundreds of people have been [arrested](#) that wanted to protest racism and the 'Zwarte Piet' tradition.

### **The case against Cuixart and the right to protest**

In my expert opinion, the case against Cuixart has four main problems:

#### **1. Protest and peaceful civil disobedience are being viewed as rebellion and sedition**

One of the defining elements in the Spanish Criminal Code leading to rebellion is the use of violence.

In my opinion, the public prosecutors' claim that Cuixart is guilty of rebellion is unfounded. No proof has

<sup>2</sup> <http://freeassembly.net/about/freedoms/>

<sup>3</sup> The ECtHR has stated in *Barankevich/Russia*: 'it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were it so a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.'

been brought forward to argue that Cuixart has used violence, called for violence or in other ways incited violence. On the contrary, there is proof that Cuixart publicly called for peaceful protest and was actively engaged in keeping the protest as peaceful as possible.

By prosecuting Cuixart for sedition based on what he has said, the public prosecutor is interfering with Cuixart's freedom of expression. Based on the ECHR and ECtHR jurisprudence, restrictions to this right can only be tolerated if this restriction is prescribed by law, has a legitimate aim and is necessary in a democratic society. Main part of the last element is a test whether or not the restriction is proportionate.

Based on the facts that are stated in the indictment and that I heard about in the hearings, in my view, a conviction for sedition in the case of Cuixart is not proportionate and is an intolerable interference with his freedom of expression. Two elements that are relevant for that conclusion are that:

- A. Cuixart's statements were not violent or incitements to violence. On the contrary, he publicly called for peaceful protests and for people not to be provoked.
- B. Cuixart is a citizen, not a politician (according to the ECtHR, citizens have a broader freedom of expression than politicians).<sup>4</sup>

## 2. Acts by protestors are attributed to protest leaders

The fact that cars were damaged by some protestors cannot be attributed to the protest leadership. If someone in a protest does something that is (possibly) illegal and the protest leaders can be prosecuted for that, no one would want to be a protest leader anymore. This approach has a serious chilling effect on the organizing of protests, and therefore the freedom of expression and assembly.

A linked issue is that citizens are not sheep that can be summoned (and controlled) in the way the public prosecutor is portraying in the indictment. As a matter of fact a lot of Catalan citizens have strong feelings about independence, the referendum and about the acts of the Spanish government in trying to silence these feelings. People were going to protest and vote anyway, whether Cuixart called for these protests and votes or not.

Cuixart and other protest leaders claim the protests were better controlled and more peaceful because of their intervention and leadership.

## 3. The case seems to ignore people have the right to organize protests and protest on unconstitutional issues

People have a right to protest, organize protests, promote protests, speak at protests and tweet about protests even if the opinion voiced in the protest or the goal of people in the protest is unconstitutional.

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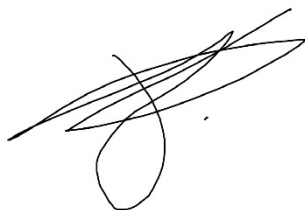
<sup>4</sup> ECtHR 25 November 1997, no. 18954/91, par. 49 (Zana v. Turkey)

Whatever ones thoughts of the opinions and convictions of Cuixart, it is a fact that he believed that the Catalan people should vote in the referendum that was officially organized by the Catalan government. It is his human right to mobilize people for this cause in a peaceful manner and to voice his opinions about it on twitter. The government cannot and should not expect its citizens to keep their opinions to themselves or refrain from making use of their human rights (to assembly, protest and freedom of expression). Even if these citizens could have been aware of serious confrontations that could result from citizen mobilization a government cannot expect its citizens to refrain from using their human rights. Only under strict conditions can the government limit these rights. The government should facilitate the rights to protest and freedom of assembly and speech.

4. Arresting, detaining and prosecuting Cuixart and asking 17 years in prison for, in essence, the fact that he made use of his human rights to protest and freedom of speech is wrong and has a chilling effect on all people who want to speak their minds.

Not only on the Catalan issue, but also on other topics that the state might deem to be unconstitutional. That could also harm the proper functioning of the rule of law based democratic society.

The Dutch section of the ICJ hopes and trusts the judges of the supreme court will base their verdict on the fundamental human rights that are at stake. A prison sentence for Cuixart would be a worrisome outcome from that perspective.



Jelle Klaas, Amsterdam 8 March 2019