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HUMAN RIGHTS
SPECIAL PROCEDURES

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DATE: 27th May 2019

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

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

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Working Group on Arbitrary Detention

REFERENCE: WGAD/2019/ESP/OPN/1

27th May 2019

Dear Ambassador,

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

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

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

Yours sincerely,



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

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

Unedited Advance Version

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Original: Spanish

Human Rights Council Working Group on Arbitrary Detention

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

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

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

3. The Working Group considers the deprivation of liberty to be arbitrary in the following cases:

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

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

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

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

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

Information received

Communication by the source

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

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

6. Oriol Junqueras i Vies was the Vice-president of the Government of Catalonia and Minister of Economy and Finance. He was the mayor of Sant Vicenç dels Horts between 2011 and 2015 and a Member of the European Parliament between 2009 and 2012. In 2011 he was elected President of Esquerra Republicana, and in 2012 a Member of the Catalan Parliament, to which he was re-elected in 2017.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29. With regard to the role of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras in the events of 20th and 21st September, the investigation only revealed, according to the source, that they had freely exercised their right to protest. In the view of the source, this does not constitute legal grounds for detention, but is instead protected by human rights.

30. According to the source, the demonstrations were called by many individuals and organisations, trade unions, universities, political parties and associations, which are not subject to criminal proceedings or detention. The demonstrations were for the right of self-determination, through a referendum.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Government's Response

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Additional information from the source

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

Deliberations

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

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

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

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

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

101. Having established its position with regard to this procedural matter in accordance with its working methods and its practices², the Working Group reaffirms its competence to hear this case.

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

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

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

Category II

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

² Opinion No. 89/2018, para. 64-67

³ See A/HRC/19/57, para. 68.

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

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

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

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

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

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

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

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

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

⁴ Opinion 58/2017, para. 42

⁵ CCPR/C/GC/34, para. 2

⁶ CCPR/C/GC/34, para. 4

⁷ CCPR/C/GC/34, para. 9-10

⁸ CCPR/C/21/Rev.1/Add.7, para. 2

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

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

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

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

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

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

120. The Working Group was convinced that the criminal accusations against Mr. Cuixart, Mr. Sánchez and Mr. Junqueras had as their purpose to justify their detention as a result of their exercise of the rights to freedom of opinion, expression, association, assembly and political participation, contravening articles 18 to 21 of the Universal Declaration and articles, 19, 21, 22 and 25 of the Covenant, for which reason the said detention is arbitrary according to category II.

Category III

121. In view of the findings under category II, the Working Group considers that there were no grounds for preventive custody and trial. However, in view of the fact that the trial is going ahead, and taking into account the allegations by the source, the Working Group will proceed to consider whether basic elements of a fair, independent and impartial trial have been followed during the course of the said legal proceedings.

Presumption of innocence

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

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

¹⁰ AL ESP 1/2018.

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

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

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

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

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

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

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

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

Preventive Custody

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

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

¹² CCPR/C/GC/32, paragraph 30

¹³ Opinions 90/2017 and 76/2018.

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

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

Right to be judged by a competent, impartial court

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

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

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

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

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

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

Right to have time adequate time and means for the defence

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

¹⁵ CCPR/C/GC/32, para. 21

¹⁶ Opinion No. 30/2014.

¹⁷ CCPR/C/GC/32, para. 32

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

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

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

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

Category V

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

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

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

Decision

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

The deprivation of liberty of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras is arbitrary in that it contravenes articles 2, 9 to 11 and 18 to 21 of the Universal Declaration of Human Rights and articles 3, 14, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights, falling into categories II, III and IV.

¹⁸ CCPR/C/GC/32, para. 33

¹⁹ CCPR/C/GC/32, para. 32

²⁰ Opinion No. 11/2017.

145. The Working Group asks the Government of Spain to adopt the necessary measures to remedy the situation of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras without delay so that it is in accordance with the pertinent international rules, including those set forth in the Universal Declaration and the Covenant.

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

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

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

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

Follow-up procedure

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

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

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

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

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

(e) Whether any other measure has been taken to apply this opinion.

151. The Government is invited to inform the Working Group of any difficulties it may have encountered in acting on the recommendations set forth in this opinion and to tell it if it needs further technical assistance, for example through a visit by the Working Group.

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

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

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

[Approved on 25th April 2019]

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