

# Statement of Defence of Jordi Cuixart

## Executive Summary

**Special Proceedings No. 3/20907/2017**

**Second Chamber**

**Supreme Court**

*Mr. CUIXART, president of the cultural NGO Omnium Cultural is in pre-trial detention since the 16th of October 2017, after the first of October Catalan Referendum on the self-determination. Mr. CUIXART was arrested and detained as a result of his activities in support of the universal right to self-determination and in particular for having claimed it by organizing peaceful demonstrations and assemblies. The opening of legal proceedings against Mr CUIXART and, even more seriously, the deprivation of his freedom as a consequence of his activity in favour of fundamental rights constitute a serious violation of his right to the promotion and defence of fundamental rights.*

*The indictment was made public on 3 November 2018, after more than a year in pre-trial detention. Mr. CUIXART has been accused of rebellion by the Spanish Public Prosecutor, who requests a 17-year prison sentence and a 17-year ban on holding public office. The State Attorney has accused him of sedition, and requests an 8-year prison sentence and 8-year ban on holding public office. Finally, in Spain there is a possibility for citizens and associations, including political parties, to take part in a criminal cases, as a way to promote the general interest. In this case, the third accusation is the far-right party VOX that request 52-year prison sentence for the crimes of rebellion, sedition, and belonging to a criminal organization.*

### **A) Preliminary matter 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 State's reaction to the call for a referendum on the self-determination of Catalonia pushed aside the democratic rule of law in the months of September and October 2017, as denounced by experts from the UN. Under the pretext of defending the unity of Spain, there was a massive violation of fundamental rights. More than 10,000 police officers were sent to Catalonia and companies, private homes, printing presses, newspapers and other premises were searched, including an attempt to conduct a police search at the headquarters of a political party with parliamentary representation despite the absence of a warrant. Voting material was also confiscated, as well as the closure of websites, the banning of public events related to the referendum and the arrests of several people.

Investigating Magistrates Court No. 13, the Public Prosecutor's Office, the State Attorney's Office and the political party VOX adopted and urged the adoption of these measures and others that went beyond what was legally permitted to prevent the holding of the vote. The latter three actors filed the motion that is the subject of these proceedings with the same aim.

#### **2. A TRIAL ON FREEDOM OF EXPRESSION**

The proceedings attempt to build a case against Jordi Cuixart based on acts that fall within the exercise of the right to freedom of expression such as speeches, interviews, websites or WhatsApp groups. This point of view

entails the criminalisation of political discourse to support a criminal conviction and constitutes a violation of the right to freedom of expression found in Article 10.2 European Covenant on Human Rights (ECHR), Article 19 International Covenant on Civil and Political Rights (ICCPR) and Article 20.1.a Spanish Constitution. Furthermore, this violation could have a dissuasive effect on society regarding the use of a right that constitutes one of the essential foundations of democratic society.

### 3. A TRIAL ON THE RIGHT TO PEACEFUL ASSEMBLY

The accusations convert peaceful acts of protest into criminal acts, violating the right of assembly of Art. 11 ECHR, 21 ICCPR and Art. 21 Spanish Constitution. The basis of the motion is Jordi Cuixart's participation and public intervention in and calling for peaceful mobilisations since 2013; including, by way of example, the mass rallies of 11 September, the National Day of Catalonia. These events cannot be criminalised, since the same event cannot be both a crime and an exercise of a fundamental right. This was stated by the UN Special Rapporteur Michel Forst on the status of human rights defenders in his report issued December 2018, in which Jordi Cuixart was cited.

### 4. A TRIAL ON THE RIGHT TO SELF-DETERMINATION

From the indictment it is evident that what is being criminalised is not so much a specific manifestation of the right to self-determination, but rather the self-determination aim itself. Mr. CUIXART is being processed as a result of his activities in support of the universal right to self-determination of the Art. 1 ICCPR and ICESCR.

There is a misconception that the Spanish Constitution prevents the recognition of Catalonia's right to self-determination. The Constitutional Court itself has declared that the Constitution does not address all the problems that may arise in constitutional matters, and that it is up to the public authorities to resolve them through dialogue and cooperation. The indictment uses a judgment of the Constitutional Court that cites the opinion of the Constitutional Court of Canada in relation to Quebec as an argument to deny the unilateral calling of a referendum on self-determination, when in reality that opinion endorsed the holding of a unilateral referendum in Quebec.

### 5. A TRIAL CONCEALING TORTURE

Art. 3 ECHR and Art. 15 of the Spanish Constitution recognise the right to life and physical and moral integrity and consequently prohibits torture and other cruel, inhuman or degrading treatment or punishments. The policing actions of the Civil Guard (paramilitary police) and the National Police during the referendum on 1 October constitutes an act of torture or inhuman or degrading treatment according to the Convention against Torture, ratified by Spain, which deserves a prompt, impartial and effective investigation. This investigation was demanded by numerous international organisations, for example, the Vice-President of the Parliamentary Assembly of the Council of Europe and the Commissioner for Human Rights of the Council of Europe, and international human rights organisations such as Amnesty International, Human Rights Watch and the World Organisation Against Torture (OMCT).

Conducting this investigation is the responsibility of the Public Prosecutor's Office as stipulated by law, but the procedural attitude of the latter is currently not in accordance with the provisions of its bylaws, as denounced by Amnesty International. The accusation regarding the events of 1 October not only lays bare an evident disregard for the citizens that were injured by police action but also contributes to laying the grounds for a trial which, rather than combating forms of torture and inhuman and degrading treatment, leads to impunity and contributes to their cover-up.

## 6. A TRIAL IN A COURT LACKING JURISDICTION

### 6.1 VIOLATION OF THE FUNDAMENTAL RIGHT TO THE ORDINARY COURT

Art. 6 ECHR, Art. 14.1 ICCPR and Art. 24.2 of the Spanish Constitution contain provisions regarding the principle that access to the ordinary court established by law is an essential element for a fair trial. Spanish law provides that when a crime is committed in Catalonia, a Catalan court has the jurisdiction to investigate and judge the case. By maintaining the jurisdiction in the Supreme Court there is a violation of the fundamental right to the ordinary court and the jurisdictional judge.

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

In Article 14.5, the ICCPR states that any person convicted of an offense has the right to have a guilty verdict and conviction reviewed by a court at a higher jurisdiction in accordance with the law. In the proceedings that here concern us, however, the Supreme Court has declared itself to be the sole instance. Its decisions are final and the Constitutional Court will be restricted to examining whether fundamental rights have been respected without entering into considerations of fact or law. This constitutes a violation of his right to a second hearing.

### 6.3 THE RIGHT TO AN IMPARTIAL AND INDEPENDENT COURT

The right to an impartial and independent court is included in Art. 6.1 CEDH and 24.2 Spanish Constitution. The lack of independence of the judges of the Supreme Court and the close links between this court and the political power are the result of a structural problem in Spanish justice. In fact, it was made public that the two main political parties in Spain made an agreement for choosing the president of the criminal courtroom of the Supreme Court Mr Manuel MARCHENA, the one judging this case, as the president of the General Council of Judiciary. The law states that are the members of the General Council of Judiciary that must elect the president, not the political parties. The politization of justice is evident. Moreover, a senator of the Popular party sended a mobile message to group of the conservative party saying that with this agreement "they get control the criminal courtroom of the Supreme Court". Mr Manuel MARCHENA also acted as assistant to the Public prosecutor, appointed by the Government of Mr José M. AZNAR. He was elected to the Supreme Court with the votes of the ten representatives of the Popular party within the General Council of Judiciary

Other example is the case for the President of the Supreme Court, Mr Carlos LESMES. The latter was previously a member of the executive, as Director General of the Ministry of Justice, appointed by former Prime Minister The complaint that gave rise to the present proceedings was signed and led by a public prosecutor who was on José M. AZNAR, representing the right wing of the Popular Party, before being elected as a judge.

leave of absence from Chamber that is to decide on the admission, investigation and prosecution of such proceedings. This fact means that the the magistrates called to appraise the case have, for 14 years, been fellow members of the same Chamber of one of the parties to the proceedings.

In addition, the Spanish Government has made strong statements attributing the current imprisonment and exile of the main independence leaders to the work of the Spanish Government.

## 7. A TRIAL WITHOUT GUARANTEES, VIOLATION OF THE FUNDAMENTAL RIGHT TO A FAIR TRIAL

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

The European Charter for Regional and Minority Languages establishes in its art.9.1.a.I that criminal proceedings must provide that "the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages", a principle that refers to Catalan (which is spoken by 11 million people worldwide), Galician

and Euskera, as stated in the Spanish ratifying document. Jordi Cuixart, the son of a Catalan father and Murcian (Region of Spain) mother, is a person who knows, understands and appreciates both Catalan and Spanish, and has been a staunch defender of linguistic diversity as an element of cultural wealth, particularly in Catalonia, where more than 300 languages are spoken. Even then, he would like to have a proceeding in Catalan and the only way to guarantee the exercise of linguistic rights is while respecting jurisdiction of a Catalan Court.

## 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

We draw attention to the warped and twisted use, for electoral purposes (in May there are local elections in Spain), 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 Spanish 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 has converted 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.

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

There have been numerous procedural violations that make it impossible to consider that we are receiving due process as required by Art. 6 ECHR and 24.2 Spanish Constitution, and such violations have led to a serious situation of defencelessness, mainly regarding three issues:

The conclusion of the summary proceedings: the Court Order of the Chamber that confirms the conclusion of the summary proceedings postpones the examination of the defences' claims regarding the existence of procedural violations that give rise to defencelessness; infringements which violate the right to effective judicial protection and the right to a fair trial. The postponement of these matters to a later time in the proceedings means that, if the reported violations exist, their influence will continue to be felt during the proceedings. This should lead to the suspension of the oral trial due to the invalidity, as a matter of law, of the court order on the summary conclusion issued by the investigating magistrate. We are dealing with an inquisitorial procedure in which guaranteeing the defendant the right to avail himself of the relevant means of evidence has been dispensed with.

The judicial investigation of court 13: the investigator of the proceedings has merely "brought together" supposedly incriminating material produced outside these judicial proceedings, without any possibility of intervention or contradiction by the parties, and delegated the investigation to other courts, mainly Investigating Magistrates Court No. 13 of Barcelona, and to a certain judicial police unit. Since they were not summoned to those proceedings, it has not been possible to identify the documents or procedural acts against which a claim must be filed, and thus the only way to protect fundamental rights is to be granted access to the said proceedings or to eliminate from these proceedings all the material arising from court 13.

The activity of the judicial police: the inquiries of the judicial police have produced reports that are clearly biased towards social and political processes and do not concern the investigation of facts related to any offence. In addition, some of the decisions taken in these Special Proceedings are contradictory and arise from attempts to meet a pre-established schedule, designed to interfere with and shape the political landscape in Catalonia.

## 8. A TRIAL VIOLATING CRIMINAL LEGISLATION

Nobody can be prosecuted or convicted in the absence of a law that classifies the facts that the State wishes to sanction as a crime, as provided in Art. 7 ECHR, Art. 11.2 UDHR and Art. 15 ICCPR. One of the main facts of the indictment, i.e. the calling and holding of a referendum without authorisation, has been a manifestly atypical behaviour since 2005.

But even in the event that it was necessary to accept the application of criminal law to the facts, the framework accepted by the Supreme Court is absolutely lacking in the principle of proportionality, which should govern any State intervention in criminal matters, and may have a clear dissuasive effect on the exercise of freedom of expression and participation in public activity.

## 9. A TRIAL THAT VIOLATES THE PRESUMPTION OF INNOCENCE

The presumption of innocence, recognised in Art. 6.2 ECHR, Art. 14.2 ICCPR, and 24.2 Spanish Constitution, guarantees that no one can be presumed guilty until the accusation has been proven beyond a reasonable doubt. In the present case, in the Spanish legislative chambers, there have been numerous interventions, debates and approvals of motions regarding the possible granting of pardons to the defendants, with the implication being that the State authorities already assume them to be guilty.

## 10. A TRIAL INVOLVING THE ARBITRARY DETENTION OF THE DEFENDANT

Article 5 ECHR establishes the right to freedom and safety of any citizen as a general principle; a right also included in Art. 17 of the Spanish Constitution and in Art. 9 ICCPR. At the time, the ECHR specified that it is not sufficient for provisional detention to be carried out with the aim of maintaining order and preserving peace. It also established the obligation of case-by-case judicial review, without the possibility of only taking into account the severity of the penalties provided as the sole criterion. In this particular case, the State's interference in the said right is not duly justified. In addition, there are indicia, arguments and affected subjects indicating that the provisional detention was adopted to intimidate the political independence movement, clearly with purposes falling outside the criminal process. It is important to highlight the fact that Jordi Cuixart is the father of a 21-month old child, the relationship with whom is limited due to his situation of provisional detention, a circumstance that contradicts the United Nations Convention on the Rights of the Child signed by Spain.

International organisations have positioned themselves in this regard. The OMCT called the detention arbitrary and Amnesty International insists on the disproportionate nature of provisional detention. For its part, the Front Line Defenders organisation considers Mr. CUIXART as a Human Rights Defenders, and says that the criminal procedure to be and act *in reprisal for his work on the protection of civil and political rights*.

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

The document that we submit here describes both the criminal proceedings' effect on fundamental guarantees and the construction of a criminal legislation that focuses on the *secessionist* political aim of the investigated parties and the evident disproportionate nature of the penalties. All of this is particularly severe in the case of Jordi Cuixart, who is legally considered a defender of human rights, according to the declaration of the United Nations General Assembly of 9 December 1998. Cuixart's actions were not criminal. He acted in full awareness of his democratic commitment to the defence of human rights, specially right to peaceful assembly and freedom of expression and the right to self-determination, and, faced with the State's refusal to offer avenues for dialogue, he worked—and will continue to work—to protect those rights.

## **B) Provisional conclusions**

### **A) FACTS**

#### **1) Jordi Cuixart and the organisation Òmnium Cultural (OC)**

Since 2015, Cuixart has chaired OC, an organisation that is financed through its members (receiving less than 1% in public aid). Founded in 1961, OC was persecuted and closed in 1963 by the Franco regime. Every year the organisation awards several prizes for literature and promotes or supports popular culture and social cohesion projects such as *Lluites Compartides*, *Som Escola* or *Casa Nostra Casa Vostra*.

#### **2) Calls 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**

He has also actively participated, since 2009, in the peaceful mobilisation of citizens in defence of the right of the people of Catalonia to decide their political future. On 11 September 2012, the organisation ANC (Catalan National Assembly) called a demonstration under the slogan *Catalunya, un nou Estat d'Europa* (Catalonia, a new European State) that brought together more than 1,500,000 people who demonstrated peacefully in favour of the independence of Catalonia. Since then, these demonstrations have taken place annually, every 11 September (the National Day of Catalonia) and have always been peaceful in nature and with very high attendance figures. In 2014, Òmnium also promoted, in cooperation with other organisations, the citizens' initiative Let Catalans Vote, which was joined by numerous Nobel Peace Prize winners.

#### **3) Events of 20 September 2017**

3.1. Context: On 20 September 2017, more than 30 Catalan mayors were summoned to testify in Provincial Public Prosecutor's Offices for having given public support to the self-determination referendum on 1 October. On previous dates, hundreds of summonses had already taken place and the Civil Guard had searched the headquarters of the company UNIPOST, both of which caused spontaneous and peaceful protests. At around 1 pm on that same date of 20 September, and without having the necessary judicial order, the National Police tried to access the headquarters of the CUP. At the headquarters, members and supporters of the party staged a peaceful sit-in to prevent such access.

3.2. Rally in front of the Catalan Ministry of the Vice-presidency and of the Economy and Finance: At 8:02 am on the morning of 20 September a newspaper issued a tweet with the news of the entry onto the premises and a search of the Ministry (Rambla Catalunya 19-21) by the Civil Guard. The news of the operation (which included 41 entries and searches at private homes and headquarters of companies and the Catalan Government, and a total of 16 arrests) spread quickly. Numerous public figures immediately condemned the police action. Jordi Cuixart posted two tweets calling on people to defend the institutions peacefully.

At around 12 noon, at an event in Plaça Sant Jaume in Barcelona, several civil society leaders (including those of the trade unions UGT and CCOO) called on citizens to protect the Catalan institutions, with a firm defence of the right of the Catalan people to decide.

Both Cuixart and Sánchez made express calls (in person, in media interviews, and via twitter) to the demonstrators to behave civically and peacefully. A corridor with volunteers was organised to allow entry and exit from the offices of the Ministry. In the afternoon, anti-riot units of the Mossos d'Esquadra were deployed in the area. There were moments of tension during which Cuixart and Sánchez attended in person to request that the demonstrators remain calm and collaborate with the police force. The duration of the search was inexplicably prolonged throughout the day, with the searching of offices and the computers of employees who were not included in the warrant. Shortly after 10:30 pm, Cuixart entered the Ministry for the first time to facilitate the departure of the judicial committee. At around 11:00 pm, Cuixart and Sanchez indicated to the police forces that they were going to proceed to cancel the rally, which they subsequently ordered on two occasions, indicating to the demonstrators that the rally would be dispersed at 12 midnight and that the following day at 12 noon a further rally had been called in front of the High Court of Justice of Catalonia in order to continue protesting against the

arrests. Shortly before 1 am in the morning, Cuixart and Sánchez said goodbye to the police force and left the venue.

#### **4) The platform *Taula per la Democràcia***

As a result of the exceptional repression of the exercise of fundamental rights into which the actions of various State powers degenerated during the month of September 2017, the platform *Taula per la Democràcia* was created, which was joined by civil society organisations such as OC, the ANC, the unions UGT and CCOO, and the employer's association PIMEC.

#### **5) Events of 1 October 2017**

During the weeks leading up to 1 October, 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, OC initiated the *Crida per la Democràcia* campaign in favour of the referendum and with peaceful citizen mobilisations. It 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 Court Order of 27 September 2017, the High Court of Justice of Catalonia ordered the State security forces to prevent until 1 October the use of local or public buildings for the holding of the referendum. In the said Court Order it was expressly stated that the measures to be adopted should be taken "without affecting citizens' normal co-existence".

On 1 October, the referendum called by the Government of Catalonia was held, with the population voting in a peaceful manner throughout the day.

The disproportionate use of force deployed by the National Police and Civil Guard units against a peaceful population that wished to vote caused injuries of varying degree to more than 900 people.

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.

Human rights observers issued various reports verifying the peaceful attitude of citizens who attended in order to vote. In the same sense, among many others, the *Síndic de Greuges* (the Catalan Ombudsman), Amnesty International and various United Nations rapporteurs also issued statements. The Commissioner for Human Rights of the Council of Europe sent a letter to the Spanish Minister for the Interior, highlighting "the disproportionate use of force against peaceful protesters...".

#### **6) Strike of 3 October 2017**

Several unions called a day of strikes for 3 October, through official and legal channels, which proceeded normally. On that date, the platform *Taula per la Democràcia*, within the framework of the so-called *Aturada de país* (Country-wide strike) called rallies to protest against the police violence; rallies at which no incidents took place.

### **B) FINAL SUMMARY**

We are immersed in a serious context of legal exceptionality as a result of the State powers' attempt to protect at all costs, even by suspending democratic civil and political rights, the territorial unity of Spain. Faced with this circumstance, Jordi Cuixart and Òmnium Cultural will never waive the exercise and protection of human rights. Jordi Cuixart has exercised, and will exercise, civil disobedience from a standpoint of non-violence whenever necessary, which is a perfectly legitimate instrument in a democratic society. The broad national consensus deserves to see the rejection of repression and the defence of a political solution that must necessarily involve the exercise of the right to self-determination. Jordi Cuixart and Òmnium Cultural will always support this.

In conclusion,

- The facts described do not constitute any type of crime whatsoever on the part of my client.
- If there is no crime, there can be no perpetrator.

- It is, therefore, unnecessary to list any circumstances modifying the criminal liability.
- It is appropriate to freely acquit Jordi Cuixart i Navarro.