



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019****Opinion No. 12/2019 concerning Joaquín Forn I Chiariello, Josep Rull I Andreu, Raúl Romeva I Rueda and Dolores Bassa I Coll (Spain)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 21 September 2018 the Working Group transmitted to the Government of Spain a communication concerning Joaquín Forn, Josep Rull, Raúl Romeva and Dolores Bassa. The Government replied to the communication on 21 November 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as 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 or her sentence or despite an amnesty law applicable to him or her) (category D);

(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 States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

4. Mr. Forn became the Minister of the Interior of the government of Catalonia on 14 July 2017. From 1999 to 2017, he was a member of Barcelona City Council and between 2011 and 2015 he was First Deputy Mayor of Barcelona. He oversaw the Office of the Mayor and matters related to interior affairs, security and transportation. He is the president of the public transport operator Transportes Metropolitanos de Barcelona. He was elected as a member of the parliament of Catalonia at the end of 2017.
5. Mr. Rull was the Minister for Territory and Sustainability of the government of Catalonia and councillor with responsibility for those matters in Terrassa City Council between 2003 and 2014. He was also the general coordinator of the political party Convergència Democràtica de Catalunya until 2016.
6. Mr. Romeva was the Minister for Foreign Affairs, Institutional Relations and Transparency, a member of the parliament of Catalonia from 2015 and a Member of the European Parliament between 2004 and 2014.
7. Ms. Bassa was the Minister for Labour and Social and Family Affairs and a member of Torroella de Montgrí Town Council between 2007 and 2015. She has been a member of the parliament of Catalonia since 2015.
8. On 6 September 2017, the parliament of Catalonia voted to hold an independence referendum. On 7 September 2017, the Constitutional Court declared the referendum unconstitutional. On 20 and 21 September 2017, pro-independence demonstrations took place in Barcelona. The referendum was held on 1 October 2017.
9. On 22 September 2017, the Public Prosecution Service filed a lawsuit against the persons considered responsible for the demonstrations. On 16 October 2017, two political leaders who had spearheaded the independence movement were arrested.
10. On 27 October 2017, the parliament of Catalonia voted to approve a unilateral declaration of independence. On the same day, the Government of Spain invoked article 155 of the Constitution, suspended the provincial government and called fresh elections.
11. On 30 October 2017, the Public Prosecution Service filed a complaint of rebellion, sedition and misuse of public funds against members of the provincial government, including Mr. Forn, Mr. Rull and Ms. Bassa.
12. On 31 October 2017, the National High Court in Madrid considered itself competent to hear the complaint and summoned the defendants to appear two days later to make their initial statements.
13. On 2 November 2017, Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa appeared before the High Court. The Court issued detention orders against the four of them, as well as the vice-president of Catalonia and other ministers. The Court reportedly did not specify the individual charges laid against each defendant.
14. On 22 November 2017, the investigative chamber of the National High Court submitted the case file to the Supreme Court for review.
15. On 24 November 2017, the Supreme Court ordered the joinder of the case that had been brought before the National High Court with a Supreme Court investigation begun on 30 October 2017 in relation to other members of the parliament of Catalonia.
16. On 4 December 2017, the Supreme Court granted conditional release and bail to Mr. Rull, Mr. Romeva and Ms. Bassa, and upheld the continued detention of Mr. Forn.
17. On 21 December 2017, new elections were held in Catalonia. Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa were elected as members of parliament. On 5 January 2018, the Appeals Chamber refused to allow Mr. Forn's release.
18. On 24 January 2018, following the denial of his requests to attend the opening of parliament, Mr. Forn resigned his parliamentary seat and undertook to refrain from political activities and to step down from both the parliament and government of Catalonia. He took

these steps with the express purpose of securing his release. It was established before the judge that these actions would remove any risk of renewed criminal activity of the type alleged, thereby eliminating the justification for his detention. Mr. Forn was not released.

19. According to the source, following the local elections, attempts to form a new government in Catalonia were hampered by the judicial proceedings and the detention measures imposed.

20. On 22 March 2018, given her obligation to appear before the Supreme Court the next day, Ms. Bassa returned her election certificate, thereby ceasing to be a member of parliament, and announced her intention not to stand as a candidate in future elections. She asked to return to the school where she had worked before entering politics.

21. On 23 March 2018, Mr. Rull, Mr. Romeva and Ms. Bassa appeared before the Supreme Court. The investigating judge ordered that they should all be detained on the grounds that there was an alleged risk of flight and of repeat offending, despite the fact that they had observed the conditions required for their release. The decision reportedly made reference to events that occurred in 2012, without making an individual link to the defendants.

22. On 9 July 2018, the Appeals Chamber of the Supreme Court upheld the suspension of the members of parliament.

23. On 12 July 2018, a regional high court in Germany considered a European arrest warrant issued for one of the co-defendants and decided to refuse his extradition to Spain. Immediately after this decision, the Supreme Court of Spain withdrew all the European arrest warrants it had issued against six of the co-defendants, who were in Switzerland, Scotland and Belgium, demonstrating that the investigating judge lacked confidence in the charges on which the detention was based.

24. The source claims that the detention resulted from the exercise of rights and freedoms enshrined in articles 19–21 of the Universal Declaration of Human Rights and articles 19, 21, 22 and 25 of the Covenant.

25. The source indicates that the indictment against Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa is based on their role in the peaceful demonstrations of late 2017. However, the Supreme Court understands the demonstrations to be just one element of a wider plan.

26. The source points out that the demonstrations were not organized by the detainees alone. A number of trade unions, universities, political parties and professional associations were also involved, but none of their members have been prosecuted, much less deprived of their liberty. The demonstrations were held in support of the exercise of the right to self-determination through a referendum, with no violent intentions.

27. According to the indictment, the actions of the defendants were intended to incite the general public to reject the institutions and powers of the State, with the aim of encouraging and justifying non-compliance with orders issued by the State and mobilizing society to support the aims of independence. In the source's view, their actions amounted to legitimate political activity, which does not justify detention. The indictment includes, as part of the criminal proceedings, other activities that are not punishable offences and that are protected by the Covenant, such as organizing peaceful, one-off, flexible and large-scale mass gatherings and calling for strikes and rallies.

28. The source indicates that, in a decision refusing Mr. Forn's release, the Appeals Chamber found that the organization of future gatherings was largely dependent on him and that he should therefore not be released. The source claims that legitimate demonstrations are being characterized as criminal acts.

29. In Mr. Forn's case, his membership of the associations Omnium and the Catalan National Assembly was highlighted in the arrest warrant as an indication of the offences he had committed, despite the fact that both of those entities are legal and that membership of them falls under the right to freedom of association and expression.

30. The source indicates that the only allegations regarding the criminal responsibility of Mr. Rull and Mr. Romeva relate to their status as members of the government of Catalonia.

Mr. Rull's level of involvement is said to flow from the fact that he has "contributed to the process since 2015" and participated in numerous meetings. Mr. Romeva is mentioned in only six lines of the 70-page decision, in connection with a plan to allow overseas voting via the Internet, which is unrelated to any form of violence.

31. In the source's view, using those factors to justify the detention shows that it is based on the exercise of the rights to freedom of association and assembly and is therefore arbitrary.

32. The source indicates that following the amendment of Organic Act No. 2/2005, the act of calling for a referendum was decriminalized in Spain as it is considered to be a legitimate form of the exercise of freedom of expression.

33. The source states that Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa have expressed their political opinions peacefully. There is no evidence that their actions were violent or that they incited or caused violence. In its parole decision of 4 December 2017, the Supreme Court recognized that there had been no violence.

34. Mr. Forn's belief in independence was explicitly cited in the decision of 2 February 2018 as one of the reasons for refusing his release, together with his alleged determination to commit acts designed to cause political instability.

35. According to the source, the decision of 2 February 2018 states that the defendants continue to aspire to the goal that drove the behaviour under investigation, the goal being that the territory of the autonomous community in which they reside should form the territorial basis of a new republic.

36. The source alleges that Ms. Bassa's detention is based on her political convictions, since she is not even mentioned in the decision of 21 March 2018. According to the Supreme Court, Mr. Romeva's criminal conduct consisted of promoting the creation of State structures and making attempts to boost overseas recognition of the republic of Catalonia. Mr. Rull's criminal conduct consisted of participating in meetings since 2015, signing a pro-independence agreement with civil society and assisting with the holding of the referendum.

37. The source notes that Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa are elected representatives who have served in the parliament or government of Catalonia. Their detention has the aim and effect of limiting their ability to participate in elections and to represent voters, as well as preventing them from contributing to political life and organization.

38. Despite the defendants' political activities being legal, the judges ruled that the risk of criminal conduct was expressly linked to the detainees' public responsibilities. The source indicates that their detention is designed to prevent them from participating in public affairs.

39. Although Mr. Forn was prevented from participating in the election campaign at the end of 2017, he was nevertheless elected as a representative. The detainees have been prevented from carrying out their functions as parliamentarians. Ms. Bassa resigned her seat in parliament and agreed not to stand in future elections. Mr. Forn relinquished his political role, his freedom of opinion and expression and his right to participate in public affairs in an attempt to end his detention.

40. On 26 June 2018, in its decision upholding the charge of rebellion, the Supreme Court invoked article 384 of the Criminal Procedure Act, thereby preventing the detainees from entering parliament even though no final decision had been issued and appeals were still pending. The Court stated that the detainees were rebels, despite there having been no use of violence or weapons and despite the fact that their suspension had not been approved by the parliament of Catalonia, as required by article 25 of its rules of procedure.

41. The source argues that the statements of the then Deputy Prime Minister, in which she congratulated the former Prime Minister for having succeeded in decapitating and wiping out the pro-independence parties, demonstrate the intentions of the Government. The source also draws attention to statements reportedly made by the Minister of the

Interior, in which he threatened to prosecute and detain two other politicians for preparing electoral lists.

42. The source argues that the detention violates the standards of competence, independence and impartiality of the court, the right to be informed of the charges, the presumption of innocence and the provision of adequate time and means to prepare a defence.

43. In the source's view, the competent court is the High Court of Catalonia because the alleged offences were committed in that territory. The source indicates that the National High Court considers that if sedition seeks to change the territorial organization of the State and declare a part of its territory independent, it should be considered an offence against the form of government. The source argues that this is a tactic to hand jurisdiction over the case to the National High Court under article 65 (1) of the Organic Act on the Judiciary.

44. The source argues that the National High Court has considered this offence solely as an attack on the parliamentary monarchy, instead of as a bid to change and reorganize the regional structure. It is wholly unprecedented and unjustified for the scope of the offence to be broadened in order to justify detention.

45. In its ruling of 2 December 2008, the National High Court concluded that rebellion had never fallen under its jurisdiction. The source indicates that 100 professors of criminal law warned that the National High Court lacked competence.¹

46. The source argues that transferring the case to the Supreme Court does not compensate for previous irregularities, because it was the National High Court that issued the detention order and because in any event the Supreme Court does not have jurisdiction over the case either.

47. In the source's view, this shows that in this case the courts are neither competent, independent or impartial. The source alleges that the statement by the Deputy Prime Minister about decapitating the independence parties demonstrates the lack of independence of the judicial process, as it describes the defendants' detention as a political achievement of the Prime Minister.

48. The source indicates that the lack of jurisdiction of the courts, as well as their lack of independence and impartiality, impacted their decisions, including the ordering of detention, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

49. Regarding the accusation of misuse of public funds, the source claims that there are five reports from the Ministry of Finance denying that funds were diverted for the purposes of the referendum of 1 October 2017. The charge of embezzlement cannot therefore be used as grounds for detention.

50. With regard to sedition, the source states that article 544 of the Criminal Code requires there to be a disorderly, violent and collective public uprising intended to disrupt the application of the law; the declaration of independence, the referendum and the demonstrations that preceded them were none of those things. A peaceful protest cannot constitute sedition, nor can calling for or participating in a referendum be interpreted as sedition, since those acts were decriminalized in 2005. Furthermore, the source claims that supporting self-determination in Catalonia is not a crime; it simply constitutes the exercise of the fundamental rights to freedom of thought and of association, which are protected under articles 16 and 22 of the Constitution.

51. The source argues that under article 472 of the Criminal Code, rebellion also requires a violent and public uprising. Peaceful declarations of independence which lack the necessary element of violent confrontation cannot constitute the offence of rebellion. The source claims that, in order to avoid complying with the requirement of violence, the accusations refer to general allegations of intimidation without specifying a particular place or time. For example, the arrest warrant of 2 November 2017 relating to Mr. Forn alleges

¹ "Legalidad penal y proceso independentista", *eldiario.es*, 9 November 2017.

that he committed “many acts” but does not provide specific details about them. In the absence of specific charges relating to acts of violence, the detainees cannot be deprived of their liberty on a charge of rebellion.

52. According to the source, the former Prosecutor of the High Court of Catalonia stated that no violence had been used and that the democratic conduct of more than a million citizens, who exercised their right to demonstrate peacefully, could not retroactively be portrayed as violent in order to serve as an element of rebellion.

53. The source states that in other similar cases, courts in Catalonia have considered complaints of sedition and rebellion in connection with separatist activities.² For example, in connection with the referendum of 9 November 2014, the High Court of Catalonia accepted that the offences could amount to disobedience, misconduct in public office and misuse of public funds. It refused to imprison the defendants and sentenced them for disobedience and misconduct.

54. The source highlights the refusal by a regional high court in Germany to enforce a European arrest warrant issued for one of the co-defendants in the same case. That decision was based on the finding that the element of violence required for the offence of rebellion had not been present and that the acts amounted to the pursuit of a peaceful political objective by democratic means.

55. The source claims that the presumption of innocence is violated if an official statement about a defendant gives the impression that he or she is guilty before a verdict has been reached. Such a violation occurred in the present case when the Prime Minister reportedly described the independence movement and its leaders as reckless and dangerous rebels, and when the Deputy Prime Minister declared that the Government had successfully decapitated the pro-independence parties. In the source’s view, these statements deprived the defendants of the presumption of innocence since the judicial proceedings are still under way and guilt has not yet been established. The statements demonstrate the lack of independence of authorities in this case and amount to violations of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

56. The source stresses that the right to a defence implies the unhindered ability to present evidence that supports the defence and influences the outcome of the trial. The source alleges that the defendants were summoned to testify at a hearing to be held the following day, on 2 November 2017, and were heard and arrested on that date. They did not therefore have time to prepare, and one of the defence lawyers was not even present.

57. On 31 October 2017, the complaint was received from the Public Prosecution Service. On 1 November, which was a public holiday, Mr. Forn’s family received a summons at their home while he was out of the country. The defendant and his lawyer immediately travelled from Barcelona to Madrid, a distance of 630 kilometres, in order to appear at the hearing on 2 November. The source claims that the legal representatives did not therefore have time to consult, analyse and respond to the 117-page complaint and the documents in the case file. The source states that at the hearing, all the defendants raised the fact that they had been unable to prepare their defence in the time available.

58. Lastly, the source alleges that because the detention of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa stems from their defence of the right of the Catalan people to self-determination, it amounts to discrimination based on political opinion and therefore falls under category V.

59. The source emphasizes the link between the detainees and the political situation. The detainees in this case are publicly recognized leaders of the political movement for the independence of Catalonia. Furthermore, the events in question took place in Catalonia. This provides an additional basis for considering the detention of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa to be arbitrary.

² Decisions of 24 March 2014 and 8 January 2015.

Response from the Government

60. The Government notes that the detention of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa is part of a criminal case brought before the Supreme Court that has been joined together with another case that had initially been brought before the National High Court. The investigating judge initially decided to deprive them of their liberty, and the Criminal Chamber of the Supreme Court later upheld and prolonged their detention.

61. The Government notes that article 17 of the Constitution provides for the possibility of imposing provisional detention and that the Criminal Procedure Act gives criminal judges the power to impose it as a precautionary measure on the grounds set forth in articles 503 and 504 of the Act. Spain is subject to the rule of law and the principle of the separation of powers; therefore, neither the legislative branch nor the executive branch have intervened in the decisions of the judicial branch (in this case, the Supreme Court).

62. The observations submitted by the Government are based on the decisions in the criminal case, which are an expression of the position of the State judicial branch that issued the detention decisions. The Government states that comments made by members of the executive branch or members of political parties are therefore irrelevant, since the decision to impose detention was not made by them, nor is there any indication that they have influenced the judiciary.

63. The Government states, in the first instance, that (a) the Venice Commission of the Council of Europe informed the government of Catalonia that the referendum did not comply with international standards; (b) the Government did not assume the powers of the parliament of Catalonia, rather its functions were performed by the Permanent Committee; (c) the investigating judge issued an indictment on 21 March 2018 and, in accordance with the law, summoned Ms. Bassa, Mr. Romeva and Mr. Rull to appear with their defence counsel and the plaintiffs to decide on interim protective measures; and (d) a regional high court in Germany considered it absurd to think that political persecution existed in Spain, while Amnesty International is of the view that there are no prisoners of conscience in Spain.

64. The Government stresses that the Constitution can be amended through a specific procedure. In Spain, political parties that promote the separation of Catalonia are legal, and the Constitution provides for mechanisms that make it possible for that to happen. As the Constitutional Court reaffirmed in judgment No. 42/2014, “the right of the citizens of Catalonia to decide” must be expressed through the principles of democratic legitimacy, dialogue and legality, wholly within the framework of the reform procedures established in the Constitution.

65. In the Government’s view, because the independence movement did not have the majorities required by the Constitution it decided to disregard the rule of law and to act unilaterally. According to the Constitutional Court:

Such a serious offence against the rule of law is an equally grave violation of the principle of democracy. The parliament has ignored the fact that the submission of all citizens to the Constitution is another form of submission to the will of the people, expressed as constituent power held by the Spanish people as a whole and not by any portion thereof.³

66. The Government points out that by controlling the government and parliament of Catalonia and with the support of civil society organizations, the independence movement promoted a referendum and approved unconstitutional laws that led to independence being declared. The movement did this despite not holding the majority of votes or the qualified majority of seats in the parliament of Catalonia required by the Statute of Autonomy.

67. According to the Government, 68 per cent of the electorate in Catalonia participated in the referendum of 6 December 1978 on the Spanish Constitution. Of the votes cast in Catalonia, 90.46 per cent were in support of the Constitution, meaning that 62 per cent of all Catalans were in favour of it. The Government points out that the independence movement, on the other hand, has never enjoyed majority support in Catalonia.

³ STC 117/2017.

68. The Government notes that since the restoration of full democracy in 1977, Spain has established itself as a strongly democratic country where the rights and freedoms of all inhabitants are guaranteed. It highlights the widespread international recognition of the country's democratic transition, the cornerstone of which was the 1978 Constitution.

69. According to the Government, the legal action taken in the case cannot be viewed as a reaction to a legitimate political aspiration, but should be seen rather as a judicial measure imposed in response to specific acts performed outside the rule of law. Since the decisions relating to detention were taken, they have been upheld in several judicial rulings and the continuation of the detention has been confirmed as necessary owing to the risk of reoffending.

70. The Government indicates that the detention was ordered on 2 November 2017 by the investigating judge and was subsequently confirmed by the Criminal Chamber of the National High Court and the Supreme Court in response to repeated requests for release and/or bail. The Government points out that the most complete factual account of the events on which the detention is based is contained in the 21 March 2018 decision of the investigating judge.

71. The factual account contained in the decision of 21 March 2018, submitted by the Government, describes a series of events that occurred as part of the independence movement, from the approval of a political agreement on 19 December 2012 to the events of 1 October 2018 and the subsequent declaration of independence. It describes how the political parties, civil society and the government and parliament of Catalonia took concrete steps, such as the adoption of laws or resolutions, the drafting of the so-called white paper and the issuance of calls for protests and demonstrations, in a bid to advance the goal of independence. It also describes how State bodies such as the Constitutional Court, the Senate and the national Government adopted resolutions or other measures that outlawed or prohibited the actions of the independence movement or were otherwise intended to thwart them. However, according to the factual account, the movement persisted with actions prohibited by the State authorities.

72. The factual account contained in the decision of 21 March 2018 includes information about a meeting on 28 September 2017 between senior leaders of the police force of Catalonia (Mossos d'Esquadra) and the President of the government of Catalonia, the Vice-President Oriol Junqueras and the Minister of the Interior, Mr. Forn. The political leaders were reportedly warned by the security services that an escalation of violence seemed likely owing to the large number of groups that had mobilized. They were advised not to proceed with the referendum on 1 October. According to the decision, the "responsibility of the three members of the government present at that meeting is essentially determined [...] by their decision to promote the referendum on the declaration of independence and to accept or use to their advantage the violence that would inevitably accompany the vote".

73. The Government states that the offences were initially categorized as sedition; however, the investigating judge later considered that they amounted to the criminal offence of rebellion.

74. The decision of 21 March 2018, submitted by the Government, contains an analysis of the element of violence required for the offence of rebellion under the terms of article 472 of the Criminal Code and the jurisprudence of the Criminal Court. The Government states that the events of 20 September 2017 amounted to an act of violence and revealed a risk of future rallies turning violent. According to the decision, the insistence on holding the referendum on 1 October, in addition to accepting the risk of violence, spurred large numbers of people to meet with force any attempt by the State to prevent it. The decision states that:

The detailed and well thought out nature of the strategy designed to bring about the independence of Catalonia leads to the conclusion that the main perpetrators of the acts must always have known that the process would lead to the instrumental use of force.

75. The Government states that the basis for Mr. Forn's detention stems from the fact that he ordered the continuation of the independence process, called on the population to

mobilize and participate and promoted the design of a Catalan police operation to enable the vote to go ahead and to confront the State police force.

76. According to the decision, Mr. Romeva's detention is based on his participation in activities intended to bring about overseas recognition of a Catalan republic through the Public Diplomacy Council of Catalonia, the fact that he submitted for approval legislation that supported the independence process and his participation in the demonstration on 20 September, where he encouraged the protesters. It states that Mr. Romeva placed "the parliament in the service of the violent outcome of the referendum".

77. The decision states that Ms. Bassa took control of all offices belonging to her Ministry "to ensure that the referendum would go ahead and that its outcome would be successful". She reportedly also gave permission for her department to bear the cost of the vote.

78. Lastly, the decision states that after signing the independence agreement on 30 March 2015, Mr. Rull "participated in numerous meetings to formulate the independence strategy" and that he prevented a ferry carrying State security forces from docking at the port of Palamós.

79. The Government points out that it is on the basis of the above-mentioned legal categorization that the Supreme Court upheld the continued detention. It also states that the decision of 21 March 2018 upholding the provisional detention uses as justification the risk of recidivism and the serious risk of flight. The decision states that:

Given the seriousness of the acts described in the indictment, the use of institutions to carry out those acts, the intention to take the action described in the white paper and the fact that the defendants remained committed to the general ideas for a long period of time before the investiture, their political rights should not be prioritized or given greater protection than the rights that this decision is intended to preserve.

80. The Government reports that the judiciary, in ordering pretrial detention, considered that the requirements of article 503 of the Criminal Procedure Code had been met, namely: (a) the acts amount to an offence punishable by more than 2 years' imprisonment; (b) there are sufficient grounds for holding a particular person criminally responsible; and (c) there is deemed to be a risk of flight and of recidivism.

81. Based on the foregoing, the Government concludes that detention is lawful as long as it has a basis in law. In the present case, the measures have not been taken in order to restrict rights protected by the Covenant, but rather as a consequence of the actions of the individuals concerned, which the judge believes constitute very serious offences.

82. In relation to the claims that the National High Court and the Supreme Court lack competence and jurisdiction because the alleged acts took place in Catalonia, the Government points to the decision of 9 May 2018 in which the Supreme Court considered itself competent in view of the fact that "an offence is committed in all jurisdictions in which any element of it occurs". The Court considered that some of the actions that have been taken as part of the independence movement have extended beyond the territory, for example, canvassing for votes, the purchase of ballot boxes and the printing of ballot papers abroad, thereby attributing jurisdiction to the Supreme Court.

83. With regard to the alleged violation of the presumption of innocence, the Government notes that this principle can be violated only by the judiciary and not as a result of statements made by members of the executive branch.

84. In relation to the allegation of a lack of time and facilities to prepare a defence, the Government states that the detention order for the defendants issued by the investigating judge of the National High Court on 2 November 2017 makes clear that no adjournment was requested at the beginning of the hearing, but that an application was submitted through the general registry after the hearing ended. Therefore, in the Government's view, the persons concerned showed a lack of diligence, in that they should have informed the investigating judge at the beginning of the hearing that they wished to request an adjournment.

85. In connection with the subsequent applications for release and appeals against the denial of the same, the Government points out that during the domestic proceedings the detainees have not alleged that the exercise of their defence has been limited by a lack of time or of information.

86. The Government points out that there is no discrimination in the present case and refers to the statement by the Criminal Chamber of the Supreme Court in its decision of 5 January 2018, in which it denied one of the applications for release:

The promotion of a theory or political preference which favours the independence of part of the national territory is legitimate. The Constitution allows for the defence of any political position, including those that promote the elimination of the Constitution itself and the establishment of a non-democratic regime. A petitioner can defend the relevance of achieving the independence of a part of Spain, or the benefit or desire to do, without committing any offence. The present lawsuit has not therefore been initiated in order to persecute political dissidents or those who support independence. The defendants cannot therefore be described as political prisoners because no one is persecuted for promoting an idea, and the system allows for the promotion of all ideas through multiple channels.

87. The Government concludes by recalling that both a regional high court in Germany and Amnesty International consider that political persecution does not exist in Spain.

Additional comments from the source

88. The source submitted additional comments on the non-violent manner in which Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa expressed their political opinions. In the comments, their detention is described as arbitrary since it resulted from the exercise of their rights to freedom of association, freedom of assembly and participation in the public affairs of their country. The source also supplied further information concerning violations of the detainees' right to due process.

Discussion

89. The Working Group thanks the source and the Government, respectively, for submitting relevant information concerning the detention of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa.

90. The Working Group is mandated to investigate all cases of alleged arbitrary deprivation of liberty that are brought to its attention. In the discharge of its mandate, it refers to the relevant international norms set forth in the Universal Declaration of Human Rights and the Covenant. In its actions, the Working Group adheres to the rules set out in its methods of work and refers to consistent, recognized State practice in the processing of individual communications.

91. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.⁴

92. In the present case, the Working Group notes that Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa are public figures known for their work in support of the independence of Catalonia. In addition, they have held positions in political parties, the civil service and the parliament. The Working Group was persuaded that they have been deprived of their liberty since November 2017 and for most of the duration of the lawsuit.

Category II

93. The Working Group emphasizes that everyone has the right to freedom of expression, which includes the right to impart information and ideas of all kinds, whether orally or in any other form. In addition, the Working Group reiterates that the exercise of

⁴ A/HRC/19/57, para. 68.

this right may be subject to restrictions that are expressly provided for by law and are necessary to ensure respect for the rights or reputation of others, or for the protection of national security or of public order, health or morals.⁵

94. The Working Group shares the view of the Human Rights Committee that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person and constitute the cornerstone of a free and democratic society.⁶ Both freedoms are the basis for the effective exercise of a wide range of human rights, such as freedoms of assembly, association and political participation, as set forth in articles 20 and 21 of the Universal Declaration of Human Rights and articles 21, 22 and 25 of the Covenant.⁷

95. In the view of the Working Group, the importance of freedom of opinion is such that no government may infringe other human rights on the basis of a person's actual or perceived opinions, whether of a political, scientific, historical, moral, religious or any other nature. Consequently, criminalizing the expression of an opinion is incompatible with the Universal Declaration of Human Rights and the Covenant. This implies that harassment, intimidation or stigmatization of a person, including by means of arrest, detention, trial or imprisonment, on the basis of his or her opinions constitute violations of the Covenant.⁸

96. It is also important to note that freedom of opinion and expression includes the opportunity to express the way in which peoples may freely choose their political system, constitution or government, which points to the link with other human rights. The Human Rights Committee has stated that:

The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.⁹

97. The Working Group, noting that referendums are permitted in Spain on a wide range of topics, considers that calls issued by individuals or organizations for the implementation of processes that promote public participation are legitimate forms of the exercise of the rights to freedom of opinion and freedom of expression.

98. The Working Group noted that, on 20 and 21 September 2017, public demonstrations took place in support of a referendum on the independence of Catalonia and that some demonstrators engaged in clashes or confrontations with the police. In this regard, the Working Group did not receive convincing information from the Government that Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa should be held responsible for these incidents.

99. On the basis of information from the parties, the Working Group verified that Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa were in fact among the thousands of people who took part in the September demonstrations, which were coordinated by a number of organizations.

100. The Working Group, on the basis of information provided by both parties, was able to verify that Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa were charged with sedition in connection with the demonstration or social protest held on 20 and 21 September 2017, and that the charge was subsequently changed to rebellion.

⁵ Opinion No. 58/2017, para. 42.

⁶ General comment No. 34 on freedoms of opinion and expression, para. 2.

⁷ *Ibid.*, para. 4.

⁸ *Ibid.*, para. 9.

⁹ General comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, addendum, para. 2.

101. The Government provided information on the independence process in Catalonia and the clashes between demonstrators and the police during the September protests. It did not provide information on any non-peaceful exercise of rights or individual actions on the part of the defendants that could be considered violent and that therefore amounted to offences under applicable law, including international law.

102. The Working Group is aware that violence is an essential component of the legal classification of the offences of sedition and rebellion. In that context, the Working Group was persuaded that the actions of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa, both before and after the demonstrations of 20 and 21 September 2017, were not violent, that the defendants did not seek to incite violence and that their conduct did not result in any violent events or acts. On the contrary, their actions amounted to the peaceful exercise of rights and freedoms protected by the Covenant.

103. Furthermore, on the basis of the information received, the Working Group is not persuaded that other acts attributable to Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa with the aim of organizing a referendum can be considered criminal.

104. In the view of the Working Group, the detention of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa from the outset of the criminal proceedings appears unreasonable when analysed against the backdrop of the tumultuous political context in which the charges were brought, with a group of well-known members of the independence movement arrested just a few days after the referendum was held.¹⁰ In the light of the information received, the Working Group cannot disregard the fact that the defendants are known for their work to promote independence for Catalonia.

105. Furthermore, in this context, the Working Group considers relevant the statements made by senior government officials in which they spoke of decapitating the leadership of the independence movement and described Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa as having engaged in violent conduct in the context of social protests.¹¹

106. In this respect, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression raised concerns regarding the arrests, insofar as they were directly related to calls for mobilization and public participation made in the context of the referendum. He also expressed his concern that the charge of rebellion could be considered disproportionate and therefore incompatible with the obligations of Spain under international human rights law.¹²

107. The Working Group considers it relevant to note that a German court, in its consideration of the extradition of another defendant charged alongside Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa, found that the alleged acts did not involve violence, which is a necessary component of the offence of rebellion. The court therefore established that the actions attributed to the person whose extradition had been requested could not be interpreted as a violent political attempt to overthrow the Government. It stated that the defendants were seeking independence using democratic means.¹³

108. In this context, the Working Group received convincing information, which was not refuted by the Government, that Mr. Forn offered to relinquish his political role in an attempt to be released. In other words, he was driven to give up his freedom of opinion and expression and his right to participate in public life in an attempt to put an end to his detention. Similarly, Ms. Bassa returned her certificate of election in the context of the criminal proceedings against her.

109. The absence of violence and the lack of persuasive information regarding any specific, individual acts attributable to Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa that would link them to prohibited conduct have led the Working Group to find that the purpose of the criminal charges brought against them and the ensuing lawsuit is to intimidate them

¹⁰ Opinion No. 6/2019, para. 118.

¹¹ See paras. 41, 47 and 55 above.

¹² AL ESP 1/2018.

¹³ Decision of the Regional High Court of Schleswig-Holstein, 12 July 2018.

because of their political views and expression regarding the independence of Catalonia and to prevent them from pursuing that cause by political means.

110. In the light of the foregoing, the Working Group has been persuaded that the detention of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa resulted from the exercise of their rights to freedom of thought, opinion, expression, association, assembly and political opinion, in violation of articles 18–21 of the Universal Declaration of Human Rights and articles 19, 21, 22 and 25 of the Covenant. Their detention is therefore arbitrary under category II.

Category III

111. In the light of the findings in relation to category II, under which it was concluded that the detention resulted from the exercise of human rights, the Working Group considers the pretrial detention and prosecution of the defendants to be disproportionate and unjustified. Nevertheless, since a trial is taking place, with long prison sentences being requested, and in view of the claims made by the source, the Working Group will analyse whether, during the course of the judicial proceedings, the fundamental elements of a fair, independent and impartial trial have been respected.

Presumption of innocence

112. Article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant recognize the right of all persons charged with a criminal offence to be presumed innocent. This right imposes a number of obligations on all State institutions to treat persons accused of a criminal offence as innocent until they have been found guilty beyond any reasonable doubt. In the view of the Working Group, as well as that of the Human Rights Committee, this right carries an obligation for all public authorities, including the executive branch, to avoid prejudging the outcome of a trial, which means refraining from making public statements affirming the guilt of the accused.¹⁴

113. The Working Group has determined that statements publicly condemning the accused person before a sentence has been passed violate the presumption of innocence and constitute undue interference that undermines the independence and impartiality of the court.¹⁵

114. The European Court of Human Rights has stated that the public statements of high-ranking officials violate the right to presumption of innocence if such statements declare persons guilty of an offence for which they have not yet been tried, thereby leading the public to believe them guilty and prejudging the assessment of the facts by the competent judicial authority.¹⁶

115. In the present case, the Working Group was satisfied that the Deputy Prime Minister of Spain made statements congratulating the Prime Minister for successfully decapitating the Catalan pro-independence parties by arresting their leaders. The Working Group also received credible information regarding statements made by the Minister of the Interior, in which he referred to the leaders of the independence movement as reckless and dangerous rebels.

116. In the light of the statements made by high-ranking government officials prematurely attributing guilt to the independence leaders, which could influence how they are viewed by the courts, the Working Group has been persuaded that the right of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa to be presumed innocent has been violated, in breach

¹⁴ General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30. See also Human Rights Committee, CCPR/C/112/D/1773/2008, para. 9.8.

¹⁵ Opinions No. 90/2017, No. 76/2018 and No. 89/2018.

¹⁶ European Court of Human Rights, *Allenet de Ribemont v. France*, para. 41; *Daktaras v. Lithuania*, para. 42; *Petyo Petkov v. Bulgaria*, para. 91; *Peša v. Croatia*, para. 149; *Gutsanovi v. Bulgaria*, paras. 194–198; *Konstas v. Greece*, paras. 43 and 45; *Butkevicius v. Lithuania*, para. 53; *Khuzhin and Others v. Russia*, para. 96; *Ismoilov and Others v. Russia*, para. 161.

of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

Pretrial detention

117. It is an established norm of international law that pretrial detention should be the exception, rather than the rule, and should be ordered for the shortest possible time. Article 9 (3) of the Covenant requires that the justification for pretrial detention should be analysed in a reasoned judicial decision in every case. This provision also establishes that “release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement”. It follows that detention should be an exceptional measure used in the interests of justice. The provisions of article 9 (3) of the Covenant can be summarized as follows: any detention should be exceptional and short-term, and the accused person should be released if there are measures in place to guarantee that he or she will appear for trial and for execution of the judgment. If the period of pretrial detention is extended, there should be an increased likelihood of granting bail.

118. In the present case, the defendants were arrested in November 2017, released in December 2017 and detained again from March 2018 onward. They have thus been held in pretrial detention for most of the trial, which has not yet ended. The source has indicated that conditional release has been denied on the basis of the alleged risk that they might repeat their call for independence, since this could lead to new public demonstrations. The Working Group concluded that the detention is arbitrary, since it stems from the exercise of the right to freedom of opinion, expression, association, assembly and participation. Furthermore, it has not been established that either the judiciary or the Government carried out an analysis and determined, as required by the Covenant, that there are legitimate, necessary and proportional grounds for restricting these human rights through deprivation of liberty during the trial. Consequently, the Working Group can only conclude that this continued application of pretrial detention violates article 9 (3) of the Covenant.

Right to be tried by a competent, independent and impartial tribunal

119. According to article 14 (1) of the Covenant, everyone shall be entitled to a fair hearing by a competent, independent and impartial tribunal in the determination of any criminal charge against them. The Working Group considers that the requirement of impartiality demands that judges must not allow their judgment to be influenced by personal bias or prejudices, nor harbour preconceptions about the particular case before them, nor act in ways that promote the interests of the parties. The tribunal must also appear to a reasonable observer to be impartial.¹⁷

120. The Working Group has found that the criminal prosecution of individuals accused of offences committed in a particular territory by courts located in another jurisdiction constitutes a violation of the right to a hearing before a competent court if national legislation expressly attributes competency to the jurisdiction that corresponds to the place in which the offence is alleged to have been committed.¹⁸

121. In the present case, the Working Group was convinced that the territorial, personal and material jurisdiction to investigate and adjudicate on possible criminal acts fell to the Catalan courts, since the offences were allegedly committed in Catalan territory by officials of the Catalan government and parliament. In addition, the Working Group received credible information according to which the Catalan courts have heard complaints relating to the movement in favour of independence from Spain. Moreover, the Working Group was not convinced that the natural judge of the alleged offences in the present case is the courts that are currently hearing them.

¹⁷ General comment No. 32, para. 21.

¹⁸ Opinion No. 30/2014.

122. Like the Human Rights Committee, the Working Group considers that:

States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws [...]. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.¹⁹

123. The Working Group considers that the statement by the Deputy Prime Minister recognizing the Prime Minister's political achievement of decapitating the independence movement by detaining its leaders, together with the fact that the pretrial detention of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa was ordered by the judiciary in contravention of Covenant rights, gives rise to a situation that affects the perception of the lack of impartiality of the court for any reasonable observer.

124. For the reasons given above, the Working Group considers that the right of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa to a hearing by a competent and impartial tribunal, as recognized in article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant, was disregarded.

Right to adequate time and facilities for the preparation of a defence

125. Article 14 (3) (b) of the Covenant recognizes the right of every person to have adequate time and facilities for the preparation of a defence, which is an important guarantee of a fair trial and the principle of equality of arms.²⁰ Adequate facilities for a defence include, inter alia, early access to all materials, documents and other evidence that the prosecution plans to offer in court.²¹

126. The Working Group shares the view that if the lawyers consider that the time offered for the preparation of a defence is not sufficiently reasonable, they may request the adjournment of the trial, and the authorities are, in principle, obliged to grant such a request. It is important to note that "there is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed".²²

127. In addition, as the Human Rights Committee has also pointed out, having adequate facilities to prepare a defence includes access to all materials, documents and other evidence that the prosecution plans to present to the court.²³

128. In the present case, the Working Group has been persuaded that Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa did not have adequate time to prepare their defence, in view of the very short period of time between their being summoned to appear in court and the hearing itself, and given the size of the case file. In addition, it found that the defendants were not allowed additional time to prepare their defence and that this limited their access to the facilities necessary for their legal protection. The foregoing amounts to a violation of the right recognized in article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant.

129. In the light of the foregoing, the Working Group is convinced that the deprivation of liberty of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa undermined the fundamental safeguards of due process and a fair trial, in particular the rights to presumption of innocence, to a hearing by a competent tribunal and to an adequate defence, in violation of the provisions of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, and gives the deprivation of liberty an arbitrary character under category III.

¹⁹ General comment No. 32, para. 19.

²⁰ Ibid., para. 32.

²¹ Ibid., para. 33.

²² Ibid., para. 32.

²³ Ibid., para. 33.

Category V

130. The Working Group has found that deprivation of liberty is arbitrary when it is intended to punish members of political groups as a means of silencing their calls for self-determination.²⁴

131. In the present case, the Working Group has found that the detention of Mr. Forn, Mr. Rull, Mr. Romeva, Ms. Bassa and other leaders of the independence movement²⁵ was carried out as a result of a concerted effort made by the national apparatus for the enforcement and administration of justice against certain leaders of the Catalan independence movement, and that those efforts enjoyed the public political backing of high-ranking officials within the Spanish Government, including expressions of support for decapitating the movement. The detention undermined the principle of the equality of human beings because it was motivated by their political opinions as leaders, in violation of the provisions of article 2 of the Universal Declaration of Human Rights and article 3 of the Covenant, and is therefore arbitrary under category V.

132. The Working Group, in accordance with paragraph 33 (a) of its methods of work, has decided to refer information relating to the rights of freedom of opinion, expression, assembly and association received in the context of the present case to the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

Disposition

133. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Joaquín Forn, Josep Rull, Raúl Romeva and Dolores Bassa, being in contravention of articles 2, 9–11 and 18–21 of the Universal Declaration of Human Rights and articles 2, 14, 19, 21, 22, 25 and 26 of the Covenant, is arbitrary and falls within categories II, III and V.

134. The Working Group requests the Government of Spain to take the steps necessary to remedy the situation of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa without delay and to bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

135. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

136. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa and to take appropriate measures against those responsible for the violation of their rights.

137. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

138. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

²⁴ Opinion No. 11/2017.

²⁵ Opinion No. 6/2019.

Follow-up procedure

139. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa;

(c) Whether an investigation has been conducted into the violations of the rights of Mr. Forn, Mr. Rull, Mr. Romeva and Ms. Bassa and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Spain with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

140. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

141. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

142. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²⁶

[Adopted on 26 April 2019]

²⁶ Human Rights Council resolution 33/30, paras. 3 and 7.