FACTUAL AND LEGAL ASSESSMENT BY INTERNATIONAL AND NATIONAL OBSERVERS OF THE JUDGEMENT CONDEMNING CATALAN AUTHORITIES AND SOCIAL LEADERS (SCJ 459/2019)

On 14 October 2019 the Spanish Supreme Court notified its judgement number 459/2019, condemning members of the Catalan government, the President of the Catalan Parliament and two social leaders with the following crimes and penalties:

- **Crime of sedition together with the crime of embezzlement of public funds** to the following members of the Catalan government:
    - **Oriol Junqueras**, Vice-president and Regional Minister of Economy and Treasury of the Catalan government, to 13 years imprisonment and 13 years general disqualification.
    - **Raül Romeva**, Regional Minister of Foreign Affairs, Institutional Relations and Transparency of the Catalan government, to 12 years imprisonment and 12 years general disqualification.
    - **Jordi Turull**, as Member of the Parliament first and then Regional Minister of the Presidency, to 12 years imprisonment and 12 years general disqualification.
    - **Dolors Bassa**, Regional Minister of Work, Social Affairs and Family, to 12 years imprisonment and 12 years general disqualification.
- **Crime of sedition**:
    - **Carme Forcadell**, President of the Catalan Parliament (and President of the civil society's association Assemblea Nacional Catalana), to 11 years and 6 months imprisonment and 11 years and 6 months general disqualification.
    - **Joaquim Forn**, Regional Interior Minister of the Catalan government, to 10 years and 6 months imprisonment and 10 years and 6 months general disqualification.
    - **Josep Rull**, Regional Minister of Land and Sustainability of the Catalan government, to 10 years and 6 months imprisonment and 10 years and 6 months general disqualification.
    - **Jordi Sànchez**, President of the association Assemblea Nacional Catalana, to 9 years imprisonment and 9 years general disqualification.
    - **Jordi Cuixart**, President of the association Òmnium Cultural, to 9 years imprisonment and 9 years general disqualification.
- **Crime of disobedience**:
    - Members of the Government **Santiago Vila, Meritxell Borràs and Carles Mundó** to a fine of 10 months with a daily fee of 200 euros (60.000 euros each) and special disqualification from holding elective public office during 1 year and 8 months.

The organizations that sign this factual and legal assessment have carried out a monitoring process of the trial before the Spanish Supreme Court with renowned jurists acting as national and international observers during the months of February to June 2019. We have also analysed in depth the legal proceedings and the judgement and we have reached the conclusion that **the proceedings and the judgement violate the following principles and**

rights: principle of legality in criminal law, right to liberty, freedom of expression, freedom of ideology, right to peaceful assembly and the free exercise of representative public office, as well as the right to due process and with all guarantees.

CONCLUSIONS:

I. VIOLATION OF THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW (articles 25.1 SC[1] and 7 ECHR), RIGHT TO LIBERTY (articles 17 SC and 5 ECHR), FREEDOM OF EXPRESSION (articles 20 SC and 10 ECHR) AND FREEDOM OF IDEOLOGY (articles 16 SC and 9 ECHR), RIGHT TO PEACEFUL ASSEMBLY (article 11 ECHR) AND FREE EXERCISE OF REPRESENTATIVE PUBLIC OFFICE (articles 23.2 SC and 3 Additional Protocol ECHR)

1. The penalties that vary from 9 to 13 years imprisonment, for a crime of sedition, violate the principle of legality in criminal law. Violation of this principle takes place when criminal law is enforced unreasonably so that the enforcement is unpredictable for its recipients (amongst others. CCJ[2] 137/1997).

2. Indeed, sedition is not a mitigated modality of an armed and violent rebellion. Sedition is an autonomous crime against public order, which should only be enforced when there is a tumultuous uprising, i.e. when there is an insurrection or violent mutiny (by force or unlawfully) to prevent enforcement of laws or the exercise of public duties. It is the only way to differentiate it with the administrative infraction (article 36.4 LPS[3]). Nevertheless, the judgement disregards the concept of uprising as devised by the Court's own case law, replacing it with the concept "*tumultuous disobedience, collective and together with resistance or force*" (page 396).

3. In relation to the particular moment when this uprising or insurrection supposedly took place, the judgement refers to two days with mass gatherings (introducing formerly non-existent concepts of "consecutive uprising" or "multi-uprising" which confuse uprising with peaceful assembly). One of the gatherings was on the 20 September to protest against the arrests of public officials. It has been considered proved that the searches at the Regional Ministry of Economy were carried out despite the mass gathering. Therefore no public duty was prevented on that day. The other gathering was on the 1 October, when crowds of citizens gathered at the polling stations of the referendum. As the Supreme Court mentions on several occasions in its judgement, the Spanish Constitutional Court successively nullified the law and convening decree regarding the Referendum (which were then nullified by the Constitutional Court after the consultation took place), thus removing all their legal effectiveness. The vote was therefore turned into a symbolic act as the legitimate exercise of freedoms of expression and ideology, without any legal consequences for the current legislation. Citizens did not prevent anything from happening that day, as the crime of sedition requires.

[1] Translator's note: Spanish Constitution.
[2] Translator's note: Constitutional Court Judgement
[3] Translator's note: Law on Public Safety

4. The reasoning used in the judgement also entails two consequences. The first is that if two consecutive uprisings took place as stated, it is not understood why the State did not use its own legal instruments provided constitutionally and internationally to partially or fully suspend rights in exceptional situations (for example, declaring the state of siege under article 116 SC or article 4.3 of the International Covenant on Civil and Political Rights) to, in that case, prevent the uprisings from happening. The answer is obvious: because what was taking place was not an uprising but the exercise of the collective right to assembly and protest. The second consequence is that the judgement unconstitutionally recycles and uses the previously abolished crime of calling an illegal referendum. It is obvious that the judgment condemns the defendants because citizens managed to organise a consultation that was used to express the political position of those who voted, despite the suspension and its lack of legal effect.

5. As it has not been possible to prove that there was an uprising or a disruption of public order aimed at preventing the enforcement of laws or the exercise of public duties, the use of the crime of sedition is unreasonable, unpredictable and violates the fundamental right to legality in criminal law. By doing so, there is also a direct violation of the right to liberty of all the convicts – to almost one hundred years imprisonment – for the (unproved) act of committing the crime of sedition.

6. The main basis to justify the conviction for sedition (with a clear confusion in many proven facts and legal reasoning with a hypothetical crime of disobedience, which could only be attributable to authorities), within the sphere of activity of each defendant, is the claim that the convicted individuals protected, promoted, called or organised gatherings to prevent the enforcement of laws or the exercise of public duties. But the judgement does not previously assess whether protests and gatherings, which took place on 20 September and 1 October, were a legitimate exercise of the right to peaceful assembly (which must in any case be broadly interpreted to include the organisation of, and participation in marches, or processions - ECHR's judgement Christians against Racism and Fascism v the United Kingdom), freedom of expression and ideology (the ECHR, in the exercise of such rights, only allows imprisonment in exceptional cases such as apology of violence or dissemination of hate speech, circumstances that have not been proved in relation to any of the convicted individuals). It is not possible to criminally convict someone who is exercising fundamental rights.

7. Consequently, a criminal conviction for sedition is not foreseeable for someone (Cuixart, Sànchez) who, in the free exercise of his or her right to assembly, calls for a protest against certain judicial acts or carries out mediation tasks with police forces (20 September) and encourages citizens to express their opinion through a vote (with suspended effects, 1 October), when participation in (and organisation of) a referendum organised by a non-competent authority was not considered a crime at that moment (since 2005).

8. Moreover, being convicted for encouraging citizens, via tweets or public statements, to participate in mass mobilizations on 1 October is also not foreseeable (members of the Catalan government). It must be taken into account that the Court considered to be proved that in each and every appeal carried out by the now convicted, it was specifically and repeatedly asked that people were to demonstrate peacefully, non-violently and avoiding provocations.

9. All these actions are part of the essential core of the right to peaceful assembly and freedom of expression, from the individual viewpoint – rights protected by different national and international instruments signed by Spain. These instruments protect everyone's right to protest, organise protests, promote them, talk and tweet about them, even if the demands or the aim of the people who attend can be considered unconstitutional (freedom of ideology), as long as the right is peacefully exercised, as happened on 20 September and 1 October 2017 in Catalonia. By criminally convicting the organisation and promotion of mass and peaceful protests with capacity to put pressure on institutions, the right to protest is being criminalised and the rights to peaceful assembly and demonstration are violated. As a consequence this causes a clear chilling effect for the rest of the population, which may be amplified when enforcement measures target a well-known public figure and attract wide media coverage (ECHR's judgement Nemtsov v Russia), as it is the case of Jordi Cuixart and Jordi Sànchez.

10. The conviction is not foreseeable either for someone who, protected by parliamentary privilege (Forcadell), accepted for consideration parliamentary proposals and resolutions without overseeing their content (according to well-established case law from the Spanish Constitutional Court) in order to protect the parliamentary institution of a government from judges and the free exercise of public office of members of parliament.

II. VIOLATION OF THE RIGHT TO DUE PROCESS AND WITH ALL GUARANTEES

1. The violation of the rights to a judge established by law (articles 24.2 SC and 6.1 ECHR) and to a review of the conviction (article 57.2 of the Organic Law 6/2006, 19 July, reforming Catalonia's Statute of Autonomy and articles 24 SC, 6 ECHR and 14 International Covenant on Civil and Political Rights).

The Spanish Supreme Court was not the Court established by law to hear this case. Under current legislation (article 57.2 Catalonia's Statute of Autonomy) acts carried out in Catalan territory in relation to those granted immunity must be heard before the High Court of Justice of Catalonia.

In addition, the problem of violating the right to a judge established by law is worsened when people without immunity receive the same procedural treatment as those who have immunity. In such cases, they cannot exercise their right to a review of the conviction for potential appeals as the only available remedy, this is the protection before the Constitutional Court, is not an ordinary remedy nor a second instance. This remedy will not be able to prevent the judgement of the Spanish Supreme Court to become final as the Supreme Court's judgment is issued as only instance. This is a severe violation of article 13 ECHR "right to an effective remedy", in relation to recognized rights, and article 2 of the Additional Protocol number 7.

2. Violation of the right to an impartial judge (articles 24 SC and 6.1 ECHR)

The judgement uses several pages to question, and in the end dismiss, the defences' claims regarding the lack of impartiality of the Tribunal, particularly regarding the President of the Court. However, those arguments are not convincing and it is still possible to appreciate, as

our numerous international observers who were in Court point out, that a violation of the right to an impartial judge, both subjectively and objectively, has inclined the Court towards a guilty verdict.

3. Right to submit evidence (article 24.2 SC and articles 6.1 and 3 ECHR)

Despite the arguments in the judgement regarding the possibility or not to show several videos, it is clear that during the trial the President introduced what he called a "methodology guideline", pointing out that video documents would not be shown during the cross-examination of witnesses. The submission of that evidence and the challenging of it were essential for the defence, as the reasoning regarding the scope of violence and the guilty verdict show. From this point of view, this has caused an effective material lack of protection to the convicted.

4. Equal treatment to all parties (article 24.2 SC and articles 6.1 and 3 ECHR). The Court showed a clear inequality of treatment to the parties' witnesses (worse for those proposed by the defendants) despite the fact that under article 6.3 d) ECHR everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Moreover, several testimonies of witness proposed by the defendants were clearly interrupted and hindered by the President of the Court. The principle of "equality of arms" was violated in such a way that has lead to a guilty verdict.

5. Violation of the right to liberty through the arbitrary detention of the defendants (articles 17 SC and 5 ECHR).

Such an important topic is dealt with in the judgement by only one page (page 161). The claim of the violation of the right to freedom for maintaining pre-trial detention of two years for the defendants is silenced in the judgement. This is understood for this particularly striking omission: absolutely nothing is said in connection with the declaration of "arbitrary" detentions described by the United Nations Working Group on Arbitrary Detention. This is omitted despite the fact that it was specifically claimed by one of the defences during the last session of the trial, when they asked for the enforcement of two resolutions of the UN Working Group, from May and July 2019. Those resolutions urged the State to free the defendants whose cases had been examined. This omission is particularly serious taking into account the fact that it affects one of the most important rights of the defendants, the right to liberty.

Due to all these reasons, international and national observers condemn the violation of human rights (civil and political rights listed and recognized by Treaties and Conventions dully signed by the Kingdom of Spain, which in turn are part of the national legal system under articles 10, 96 and other concordant articles of the Spanish Constitution), the violation of criminal and procedural principles mentioned, as well as the criminal law principles of fragmentation, proportionality and last resort, by the analysed criminal proceedings and its judgement.

The great violation of the abovementioned rights and principles caused by the judgement and the reasoning within it make it impossible to analyse this judgement from a strictly legal point of view. Any earnest attempt at interpreting the judgement based on technical and legal concepts, such as sedition, uprising, violence or fundamental right becomes unsuccessful. The reason is surely because it is a clearly ideological resolution aimed at replacing the political solution that is needed in the conflict in Catalonia.