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URGENT ACTION BY THE EU REQUIRED IN CATALONIA

Human right defenders in the EU must demand urgent action by the European Commission regarding the serious, persistent and systematic violation of the human rights Catalonians. Spain's violation of Article 1 of the UN Charter and Article 1 of the International Covenant on Civil and Political Rights (ICCPR) concerning the self-determination of peoples is aggravated by the arrest of political, social and cultural leaders, their physical abuse, persecution and prosecution by virtue of the criminalization of the exercise of freedom of opinion, expression, peaceful assembly and association, as well as by the instrumentalization of the judicial apparatus for intimidation and repression, the denial the democratic right to participate in the conduct of public affairs, the right to vote in a referendum, and the right to be elected and represent constituents in the European Parliament (articles 7, 9, 10, 14, 19, 21, 22, 25, 26 and 27 ICCPR). Pursuant to articles 10(2) and 96 of the Spanish Constitution, the above international human rights are part of the Spanish legal order.

The break-down in the rule of law also breaches Article 2 of the Treaty of Lisbon, which stipulates that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." Bearing in mind that Spain continues to violate international human rights norms as evidenced in the reports of the Catalonian syndic (ombudsman) and numerous independent international observers including the UN Working Group on Arbitrary Detention¹, the UN Special Rapporteurs on Freedom of Expression², Freedom of Assembly³, on the Independence of Judges and Lawyers⁴, and the Independent Expert on International Order, it is now for the European Council, pursuant to Article 7 of the Treaty of Lisbon to determine not only that "there is a clear risk of a serious breach by a Member State of the values referred to in Article 2", but that the breach has occurred and that it must be immediately remedied. The Council has invoked Article 7 with respect to Poland and Hungary, where the situation is far less serious than in Spain.

In my report to the UN General Assembly (A/69/272) and to the Human Rights Council (A/HRC/37/63) I formulate 23 Principles of International Order, including the right of self-determination of peoples and elucidate the criteria for the exercise of this right. Undoubtedly Catalonians are a "people" and satisfy the criteria laid down in the above reports. Yet, self-determination is not self-executing and requires the solidarity of the international community as evidenced in the cases of Estonia, Latvia, Lithuania, Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and Kosovo. The argument by Spain that self-determination was achieved through decolonization in the 1960s and 70's is disproven by international practice, bearing in mind the progressive development of international law. In particular the 2010 Advisory Opinion of the International Court of Justice in the Case of Kosovo gives priority to the right of self-determination over the principle of territorial integrity. Paragraph 80 holds that territorial integrity concerns the relations among States, and that it cannot be invoked internally to deny the right of self-determination.

¹ Opinions 2019/6 and 2019/12 of 25 and 26 April 2019

² <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22176>

³ <https://www.ohchr.org/en/newsevents/pages/DisplayNews.aspx?NewsID=22197&LangID=E>

⁴ <https://www.catalannews.com/politics/item/un-official-expresses-concern-about-alleged-attacks-on-puigdemont-s-lawyer>

The Spanish Constitution in the light of international human rights law

The pro-sovereignty process in Catalonia faces an adamant and brutal repression by the Spanish State, which emerged from the “transition” following the death of Francisco Franco y Bahamonde. This only partially democratic state is still trying to cope with structural political and legal challenges owing to the refusal to recognize (and accept) the plurality of peoples living in the Spain.

Historically, the rebuff of the right of self-determination of the Catalan people goes back to the devastation of Catalonia by the first Bourbon king of Spain, Philippe d’Anjou, in 1714, following the Treaty of Utrecht of 1713 and the defeat of the autonomous Catalans.

Let us recall that imperial Spain lost all its colonial territories after armed conflicts. Closer to our times, it is worth pointing to the ignominious transfer of Western Sahara to Morocco, a territory for which Spain was the administering power responsible to the UN, as well as its refusal to recognize the results of the referendum of self-determination by the Gibraltar people, that by a vast majority chose to continue being part of the United Kingdom and rejected the “formula” negotiated behind their backs to become a “condominium” of Spain.

In addition, the Spanish State disregards the pertinent jurisprudence of the Supreme Court of Canada concerning the pro-independence referendums held in Quebec, refuses to accept the jurisprudence of the International Court of Justice (ICJ) concerning the independence of Kosovo, maintains that the referendum in Scotland was a “special case”, with no connection whatsoever to the claim for a referendum in Catalonia. Spain simply refuses to accept the existence and the validity of the right to self-determination, in general, and its application to the to the situation of Catalonia in particular. As a consequence, Spain deals with Catalonia, which stands for 16 per cent of the population and produces 20 per cent of the GDP, as its *de facto* last “colonial territory”.

The position of the Spanish government is that the “problem” does not exist because the Spanish constitution (SC) does not permit that it exists. Specifically, it maintains that 1) the right of self-determination is a “abstract notion” that “has no place” in the Spanish constitution and, in any event, would not be applicable to Catalans, and 2) that the referendum promoted by the Catalan Parliament is contrary to the constitution and cannot be held within the Spanish legal framework.

Yet, the Spanish State is already bound by international instruments that stipulate the right of self-determination. These treaties were already in force in Spain before the adoption of the Spanish constitution of 1978. The ICCPR and the International Covenant on Economic, Social and Cultural Rights have been in force in the Kingdom of Spain since 1977. In common Article 1 of the ICCPR and ICESCR the right of self-determination of peoples is recognized and given special prominence as an enabling right, necessary to enjoy the other human civil, cultural, economic, political and social rights. Article 1, paragraph 1, specifically extends the right to “all peoples” – and does not limit it to colonial peoples. Article 1, paragraph 3, imposes a positive obligation on States parties to actively promote the right of self-determination. Art. 96 of the Spanish constitution establishes that international treaties ratified by Spain are part of the internal legal order. Moreover, art. 10.2 stipulates that provisions relating to the fundamental rights and liberties shall be construed in conformity with international treaties thereon.

As a nation and as a people, Catalonia fulfils all the conditions foreseen by international law and the jurisprudence of international courts to exercise its right of self-determination. Moreover., it can be

argued that Catalonia also meets all the requirements to be considered a “colonial” territory, bearing in mind that Catalonia was conquered, occupied and subjugated under Philippe d’Ajou, and for three centuries has had to endure the disregard for its dignity and national identity, and been subjected to political repression and economic suffocation.

The right to hold a referendum

There is nothing more democratic than a referendum. Holding a referendum is protected under article 19 ICCPR and many international lawyers, including Professor Nicolas Levrat, head of the International Law Department at the University of Geneva, agree that the Catalan people have the right to decide their future⁵.

The answer of the Spanish State has constantly been one of contempt and hostility against the possibility of holding any kind of consultation. The Spanish authorities have explicitly and repeatedly expressed their will to prevent by all means the holding of a referendum, including measures to suspend the autonomy and declaring the state of emergency, alarm and siege (arts. 155 and 116 SC), if required, with the use of the army.

The social alarm generated by this situation has become even more marked during the last months due to the repressive activities of the judicial and police apparatus and the punitive measures promoted by the Spanish State against the Catalan Government, the Parliament, public servants and also private individuals by criminalizing the exercise of the right of self-determinations.

The European Commission decided, at its own initiative, to start proceedings to impose sanctions against Poland and Hungary for violating the democratic rule of separation of powers, but it has turned a blind eye to the far worse perversion and *détournement of powers* by the highest judicial instances in Spain that have become tools for repressive purposes to the detriment of Catalans.

As it has been recognized by the Spanish government itself, the Constitutional Court (CC) plays a central role in this repressive strategy. As it is set out in the Spanish Constitution of 1978, it is for the judges and also the members of the CC to interpret the provisions relating to the primacy of fundamental rights recognized by the Constitution in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain (Section 10.2 SC).

The contempt for this constitutional requirement by the CC has been one of the main factors triggering the growth of the pro-sovereignty movement in Catalonia. The CC had already illegally transformed itself into a “third legislative chamber” against Catalonia that with its judgment 31/2010 of 28 June 2010 “destroyed” the Statute of Catalonia of 2006. Among other grievances, the CC judgment denied the existence of the historically acquired rights upon which is based the self-government of Catalonia and reinterpreted and amended the preamble of the Statute to make absolutely clear that “there is no other nation but the Spanish nation”. The CC jurisprudence denies the validity of the right of self-determination in the Spanish legal system, as well as Catalonia's status as subject to exercise a “presumed” right to self-determination. At the request of the Spanish executive, the CC has now been “transformed” into a *sui generis* criminal court has now forbidden the Catalan Parliament to even talk about self-determination.

⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3078292

<https://www.unige.ch/gsi/fr/actualites/2017/les-catalans-doivent-ils-pouvoir-voter-sur-leur-independance/>

The highest Spanish judicial instance, the “Supreme Court” has also joined in that repressive frenzy against Catalans and Catalan self-rule and has condemned members of the Catalan government, the speaker of the Catalan Parliament and Catalan social activists to the longest jail sentences foreseen by the criminal code, after finding them guilty of “sedition”, a fictitious crime of “rebellion without violence” of sorts that does not exist anywhere else in Europe. And this, although the United Nations Working Group on Arbitrary Detention had found that the rights of the accused had been violated and had demanded their immediate release.

To the coercion and judicial violence must be added a strategy of economic suffocation and the “dirty war” carried out through the “State sewers” in the so-called “Operation Catalonia”, revealed by the media and officially denounced in the Catalan Parliament and in the Spanish Congress.

We must also remember that at the last elections to the EU Parliament, the President of the Catalan Government, who had to go into exile to avoid repression and the Vice-President, who had been jailed for two years, were elected as members of the Parliament with the votes of over two million European citizens. In spite of this, the Commission and the Parliament have yielded to the pressure of the Spanish State and have refused to confirm their election.

Responsibility of the European Commission

Given the criminal coercive sanctions imposed by the CC and other judicial bodies in the Spanish State and the high probability of the use of force and institutional and physical violence by the Spanish government against the European citizens of Catalonia wishing to exercise their right of self-determination, Will the EU Commission, the EU Parliament continue acting as accomplices of those flagrant violations of human rights of European citizens? Will the TJUE ignore the decisions of UN human right bodies, in violation of art. 2 TUE and of its own jurisprudence, with regard to the primacy of human rights and democratic standards?

If so, which will be the next EU Member State that will decide that it can run the risk of repressing political opponents or human rights defenders without any fear of being sanctioned? Will the EU or any of its Member States ever again dare to speak about the promotion of democratic values and the respect for the right of self-determination in Western Sahara, in Hong-Kong, in Sri Lanka, in Tibet, in Kashmir or in Kurdistan, or anywhere in the world for that matter?

For the reasons above, and given the situation of defencelessness that Catalan civil society finds itself in, I am convinced that the European Commission, must take its head out of the sand and act in accordance with its mandate of overseeing the application of Union law under the control of the Court of Justice of the European Union (CJEU), as it is set out in article 17 of the Treaty on the European Union (TEU), if required through the application of the measures foreseen in article 7 TEU, in order to prevent further violations of human rights and to put an end to the persistent breach of the values referred to in article 2 TEU by the Spanish State against the European citizens of Catalonia. It must do so to prevent a human and economic disaster that could have catastrophic consequences for Catalonia, for Europe, and for democratic values all over the world.

The Catalonian issues are European issues, not just matters of “internal concern” of Spain. The Kosovo precedent is eminently applicable to Catalonia and can no longer be dismissed as being “sui generis”. Double standards and application of international law *à la carte* seriously undermine the credibility of oversight institutions and of the administration of justice. *Quis custodiet ipsos custodes?*

(Juvenalis). Who will watch over the guardians if not the European peoples themselves? Catalonians are European citizens and have a right to demand that the European Commission protect their rights.