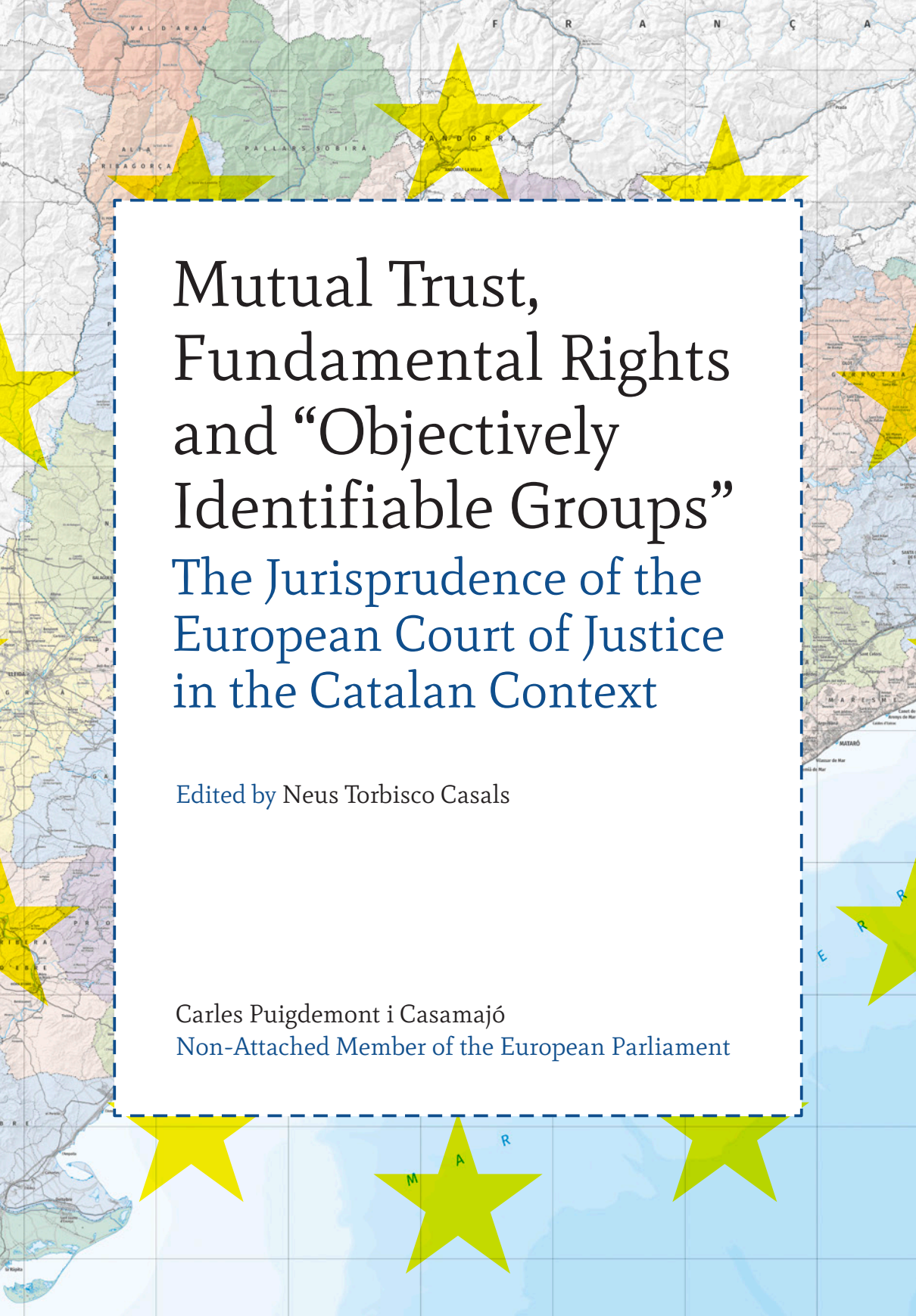

Mutual Trust, Fundamental Rights and "Objectively Identifiable Groups"

The Jurisprudence of the European Court of Justice in the Catalan Context

Edited by Neus Torbisco Casals

Carles Puigdemont i Casamajó
Non-Attached Member of the European Parliament

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This book is dedicated to all those who had to go into exile, suffer persecution and endure human rights violations because of their struggle for the right to self-determination and for preserving the cultural and national identity of all peoples.

This book is a collective project, and it would not have been possible without the help and assistance of many people. We would like to thank especially Victor Santos Mariottini de Oliveira for his diligent and patient editorial assistance throughout the process of its creation, Daniel Mundet Cerdan for his engagement in and energy behind the project from the side of the European Parliament, and Nico Krisch, for his advice in identifying the main themes that are the object of analysis and his crucial engagement in the final stages of editing and revising all the contributions. We would also like to thank all human rights defenders and lawyers who have dedicated countless hours to the defense of the fundamental rights of the Catalan independence movement – as an "objectively identifiable group" – both in Spain and in other European countries. Special thanks are due to Gonzalo Boye, Simon Bekaert, Paul Bekaert, Isabel Elbal, Josep Costa, "Секрет", Wolfgang Schomburg, Sören Schomburg, Christophe Marchand, Michel Hirsch, Sofie Colmant, Creppine Uwashema and Elena Valcuende.

Preface

This volume understand itself as a contribution to the defense of human rights and freedoms in the European Union. Coordinated and edited by Dr. Neus Torbisco Casals, the study represents the results of a project I initiated to explore questions of fundamental rights from the new perspective opened by the judgment of the European Court of Justice in relation to the case of Mr. Lluís Puig, former minister in the Catalan government, and the various European Arrest Warrants against other Catalan politicians, myself included. During this term of the European Parliament I have been able to verify the regression of the rule of law and fundamental rights in different member states of the European Union. The monitoring reports regularly published on the state of the rule of law show that many states around the world, and unfortunately also in the EU, are finding new and increasingly sophisticated and glaring ways of undermining and attacking the political, social and national rights of their citizens in instances of domestic violations of human rights. This regression in the protection of fundamental rights affects above all minorities and dissident groups, thus representing a risk for democracy as a political system that cannot legitimise authoritarianism and majority domination as a solution to historically entrenched cultural and national conflicts, or to criminalize legitimate demands of collective rights such as the right to self-determination.

The study you have in your hands is a contribution to the defence of civil, political and collective rights in the EU based on the most recent jurisprudence of the courts of the European Union. The six chapters of this volume contribute to explaining how current situations of criminalization and violation of individual rights can be reversed, with the basic idea that it is necessary to protect and strengthen the fundamental pillar of the European building that is the creation of a space of freedom, security and justice.

This pillar is the expression of what Robert Schuman, one of the intellectual fathers of the European project, intended when he stated that "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity". The European area of freedom, security and justice is based on trust between states. Trust in the confidence that all Member States of this space have and maintain the same level of commitment and demand towards respect for human rights and the fundamental rights of their citizens. Unfortunately, not all EU Member States have the same standards, and this is currently one of the risks to the European rule of law and democracy that I am particularly concerned about. Especially because I observe the sophistication of the political persecution carried out by some democratic states in such a way that the effect - to stifle dissent and minorities - is achieved with the appearance that the rule of law is being defended, especially through accusations of terrorism or false accusations of ordinary crimes.

With the judgement *Lluís Puig i Gordi and Others* of January 31, 2023, the Grand Chamber of the Court of Justice of the European Union (ECJ) took a significant step towards clarifying the scope and limits of mutual trust between the Member States in the context of the EU's area of freedom, security and justice. These issues, and in particular the balance between the principle of mutual trust and the protection of human rights guaranteed in the Charter of Fundamental Rights, are at the heart of the European Arrest Warrant system, which represents a cornerstone of the EU cooperation on security and criminal matters. It is this ruling that established the concept of an Objectively Identifiable Group of Persons (OIG) and the possibility for national courts to refuse the execution of European Arrest Warrants in cases of human rights deficiencies affecting such OIGs.

With this academic work we want to better understand the antecedents of this turn in the jurisprudence of the ECJ, and we intend to extract its wider implications, especially with regard to the context from which it was born. The volume places the new jurisprudence of the ECJ in the wider context of the development of European law and jurisprudence on the limits of mutual trust between member states in the cooperation in justice matters. It connects this jurisprudence to more general principles of comparative constitutional law, particularly the role of courts in protecting minorities and vulnerable groups in constitutional systems.

The legal analysis of the implications of the concept of "objectively identifiable groups" offers an opportunity for the democratic deepening of the EU. It is an opportunity for reaffirming in an unequivocal and concrete way the commitment of the Member States to the protection of minorities, including minority nations with a distinct history, culture and language such as Catalonia. I am convinced that the OIG study is of great interest and utility for the work of the European Parliament in the defense of fundamental rights, civil rights and freedoms. Europe must be an active agent in the defense of human rights and we now have one more instrument to be able to carry out this task effectively. And it is, after all, one of the Catalan contributions to the improvement of European democracy.

Carles Puigdemont i Casamajó,
Non-Attached Member of the European

Abstracts

1. Neus Torbisco Casals, Introduction: Mutual Trust, Fundamental Rights and the European Court of Justice – the Case *Puig Gordi and Others* in Context

The jurisprudence of the European Court of Justice on the European Arrest Warrant has taken a new turn in 2023 when it had to confront cases concerning members of the Catalan independence movement sought by Spanish courts. In these cases, the tension between the principle of mutual trust between EU member states and the protection of the fundamental rights of individuals came to the fore with particular intensity, and the Court responded through a new articulation of the limits of European Arrest Warrants. While it continued to insist that the automatic execution of EAWs is the norm, it created a new and broader exception that relates to "deficiencies affecting an objectively identifiable group". This volume seeks to better understand the background and meaning of this exception. This introductory chapter outlines briefly the legal and jurisprudential context in which the ECJ found itself in this case. It then sketches the political background of the case in the process towards the 2017 referendum on self-determination in Catalonia and the widening criminalization of the independence movement over the past decade and especially after the referendum. Finally the chapter provides an overview over the contributions of the different chapters and the volume as a whole.

2. Neus Torbisco Casals & Nico Krisch, Mutual Trust, Fundamental Rights and "Objectively Identifiable Groups" in EU Law and Jurisprudence

The meaning and scope of the new approach of the ECJ, focused on "deficiencies affecting objectively identifiable groups", is best understood on the background of the development of its jurisprudence over time and the normative rationales behind it. This chapter thus situates the judgment *Puig Gordi and Others* in the broader context of the development of European law and jurisprudence on the limits of mutual trust among member states in the cooperation on justice affairs. It traces the original design of the EAW and the continued marginalization of rights concerns in the early jurisprudence despite increasing pressures for a different balance. It then inquires into the shift of the system after 2015 in response to a changed environment, both in normative and political terms, with new exceptions and interpretations introduced step by step by in ECJ jurisprudence. The creation of the new exception of "deficiencies affecting an objectively identifiable group" by the ECJ in 2023 is a further step in the evolution towards a more sustainable balance between an interest in effective judicial cooperation and enduring risks for human rights. Similarly to previous shifts, it came about in response to national courts' reluctance to execute EAWs and to international bodies' findings about serious human rights violations. The chapter then analyzes this new category in the light of a deeper inquiry into the notion of "mutual trust" at the heart of European integration, and of a comparative constitutional law approach to the definition of an adequate role of courts in human rights protection without interfering unduly with democratic processes. The protection of social, political and cultural minorities is a central theme in the justification of strong judicial review, and the ECJ's new approach should be understood along those lines as well. This also allows the chapter to delineate the scope of the new jurisprudence and its promise beyond the particular context of the EAW, and of the Catalan case.

3. David Banisar, Freedom of Expression and Assembly Issues in the Conflict over Catalan Independence

Freedom of expression is a core human right essential for democracy. It underpins the right of public participation and political engagement. Its basis is set out in international human rights law, in particular in the International Covenant on Civil and Political Rights and the European Convention of Human Rights. Further, minority and disadvantaged groups are given additional protection under international law to ensure that their voices are heard and protected. While it is not an absolute right, countries can only restrict freedom of expression in limited circumstances. Speech which relates to political topics and issues of public interest is strongly protected and can only be restricted in the strictest of circumstances. This equally applies to discussions around self-determination and political structures of the state, including secession, so long as it does not advocate for violence or promote hatred. Similarly, freedom of assembly, relating to peaceful protests, has also been pronounced as a core human right, interrelated with freedom of expression, and essential for public participation. Like freedom of expression, its basis is clearly set out in international human rights law and cannot be restricted except in strict circumstances. This also includes protection of discussions on issues such as secession. The conflicts arising from the debates over Catalan independence have raised many challenges to freedom of expression and assembly in Spain. This chapter reviews the international standards governing freedom of expression and assembly, the controversies that have arisen in Spain in the context of these conflicts, and the responses of national and international human rights bodies. These responses put the actions of the Spanish Government into the context of the international framework on human rights and indicate that many of the actions in response to debates on independence have not been compliant with their obligations under international human rights law. This then raises issues of whether these are regular enough to be considered as systematic discrimination or as "affecting an objectively identifiable group". The large number of statements and verdicts by international human rights bodies and experts finding violations of standards supports such a conclusion of systematic discrimination.

4. Frédéric Mégret, Surveillance and the Notion of an "Objectively Identifiable Group of Persons" in the European Court of Justice's Case Law on the European Arrest Warrant

European Arrest Warrants issued against Catalan political leaders raise highly topical questions about the limits of "mutual trust" between European democracies. The evolving case of law of the European Court of Justice on this issue suggests that the execution of a warrant may be denied in cases where deficiencies in the soliciting state affect "an objectively identifiable group of person to which the person concerned belongs." This chapter examines how this case law should be assessed where the group concerned is the target of unlawful surveillance. Unlawful surveillance is an endemic and global problem, but the "Catalangate" scandal suggests that it has been particularly a problem in Catalunya as a result notably of the use of the Pegasus spyware. Identifying the nature and legal status of such surveillance can help understand how it shapes the contours of particular "objectively identifiable" groups in the process of monitoring them. Surveillance can be legal, as recognized notably by the European Court of Human Rights, when it satisfies the standards of the Convention, when it is necessary and proportional (typically, in the context of judicial investigations). There is little doubt, however, that surveillance can amount to a human right violation, as has been denounced in the Spanish context by a variety of international observers. This is particularly likely to be the case, as it happens, where it assumes an indiscriminate character because it is targeted at a broad group. Surveillance can, as a result, negatively affect the right to a fair trial and should be a key relevant factor in deciding whether to honor a European Arrest Warrant.

5. Nico Krisch, Political Rights Violations and the Catalan Pro-Independence Movement as an "Objectively Identifiable Group"

This chapter explores the violation of political rights as potential deficiencies affecting objectively identifiable groups. It outlines international jurisprudence clarifying the contours of political rights under the International Covenant on Civil and Political Rights and the European Convention on Human Rights, with a particular focus on the linkage between violations of these rights with the membership of those affected in particular political, social or cultural groups. It then uses this background to inquire in greater detail into the interferences with political rights by the Spanish state against the Catalan pro-independence movement. It analyzes the different instances of restrictions on political rights, which taken together amount to a grave interference that has seriously curtailed the ability of Catalan politicians and civil society actors to exercise their functions. The chapter then scrutinizes possible justifications for such interferences but concludes that, also in the light of the decisions by international and European courts on related issues, no such justification can hold and that we are thus faced with a series of serious political rights violations. As they target a particular political and social group specifically, those violations amount to deficiencies affecting an objectively identifiable group in the understanding of the Court of Justice of the European Union.

6. Alejandro Chehtman, The Right to Truth and the Catalan 'procés'

This chapter examines, first, the origins, legal basis and scope of the right to truth as it applies to Spain under International Human Rights Law, both as an obligation under the European and Universal systems. Although it recognizes IHL as a relevant forerunner, it identifies the direct source of this right in Latin American transitions as a legal instrument to shed light on past human rights violations in contexts of State inaction and general impunity. It further traces its expansion within the Inter-American System and towards its European and African counterparts, to be finally recognized under the Universal system. In short, it shows that this right ultimately entails an obligation by states to conduct impartial, thorough and prompt investigations into human rights violations, and how its fulfilment requires some form of accountability. Notably, this right is internally connected with individual's trust in State authorities' commitment with the rule of law, their reliability, and the importance of non-recurrence of these violations. It is held jointly, or complementarily, by individual victims and collectives who may have been harmed or affected by certain events.

On that basis, the chapter explores whether the responses to certain events fulfil the Spanish obligations under the right to truth. Namely, it examines allegations made by victims and other constituents regarding the Spanish responses to the violence unleashed around the independence referendum, and the independentist movement more broadly, and the terrorist attacks in Barcelona and Cambrils that took place during the Catalan 'proces'. With regards to the former, it documents the sharp contrast between the prosecution of actions by Catalan leaders and Catalan citizens vis-à-vis the prosecution of police officers and other security forces. Nevertheless, it acknowledges that action by victims and civil society have moved authorities to grapple not only with individual acts of violence, but also to consider allegations into systemic aspects of violence, and the potential responsibility of mid-level officials. To this extent, the right to truth has served and helped victims and civil society organizations to push for more appropriate institutional responses. By contrast, there are certain aspects of the allegations of victims concerning the terrorist attacks in Barcelona and Cambrils, that the Spanish authorities have so far refused to squarely confront and investigate, in ways that satisfy the rigorous demands of the right to truth. In the broader context in which these responses have taken place, the treatment of requests by Catalan victims contributes to the claim of them constituting systematic deficiencies affecting an objectively identifiable group.

Contributors

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Chapter 1

Introduction: Mutual Trust, Fundamental Rights and the European Court of Justice – the Case *Puig Gordi and Others* in Context

Neus Torbisco Casals

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I. Introduction

With its judgment in *Lluís Puig Gordi and Others* of 31 January 2023 (hereinafter, *Puig Gordi and others*)[1], the Grand Chamber of the Court of Justice (ECJ) has made a significant step towards clarifying the scope and limits of mutual trust between member states in the context of the EU's area of freedom, security and justice (AFSJ). The judgment was triggered by a reference request for a preliminary ruling from the Spanish Supreme Court (*Tribunal Supremo*) in the criminal proceedings against Mr. Puig Gordi and other prominent Catalan pro-independence leaders, including former president and current Member of the European Parliament, Mr. Carles Puigdemont i Casamajó, who remain in exile in Belgium in the aftermath of the self-determination referendum held in Catalonia on 1 October 2017.

Prior to requesting the preliminary ruling, the Spanish Supreme Court had issued several European Arrest Warrants (hereinafter EAW) and extradition requests against Mr. Puigdemont and other leading members of the Catalan pro-independence movement in exile as part of a broader effort to have them criminally tried in Madrid for sedition and rebellion for their role in the organisation of the 2017 referendum. Yet various European countries - including Germany, Belgium, the United Kingdom and Italy - had refused to execute the EAWs, and Switzerland had treated the extradition requests as related to political offences and not processed them further. The EAWs were unsuccessful for a variety of reasons – from issues of form to problems of double criminality and of immunities in the European Parliament.[2] The German court rejected the EAW against Mr. Puigdemont with respect to the crime of rebellion because, for reasons of fundamental rights protection, German law could not be interpreted to contain a comparable criminal offence for the non-violent acts committed by the accused.[3] Belgian courts relied on a lack of jurisdiction of the Spanish Supreme Court for one of the accused, Mr. Puig Gordi, as they instead found Catalan courts to be the competent authorities, raising questions about the fundamental right to be tried "by a tribunal previously established by law".[4] In this, the Belgian courts relied on earlier findings by the UN Working Group on Arbitrary Detention, which had found the pre-trial detention of other pro-independence leaders to be in violation of international human rights, including freedom of expression and

1 ECJ, Judgment of 31 January 2023, C-158/21, *Puig Gordi and Others*.

2 See Torbisco Casals and Krisch, Chapter 2, this volume.

3 Schleswig-Holsteinisches Oberlandesgericht, Decision of 12 July 2018, 1 Ausl (A) 18/18 (20/18) .

4 Hof van Beroep de Brussel, Decision no. 2021/79, 7 January 2021. As regards the surrender requests concerning the Members of the European Parliament, Carles Puigdemont, Toni Comín and Clara Ponsatí, Belgian courts did not pursue proceedings because of parliamentary immunity.

assembly and also the right to a fair trial and to a competent tribunal.[5] The Working Group, for its part, had taken into account the German decision and of concerns raised even earlier by the UN Special Rapporteur on the right to freedom of opinion and expression who had warned that "the accusation of the offence of rebellion could be considered excessive and therefore incompatible with the obligations of Spain under international human rights law".[6]

With the EAWs frustrated, the Spanish Supreme Court decided to seek help from Luxembourg and request the ECJ to clarify whether it was admissible for a national court to refuse to execute an EAW on the grounds the Belgian courts had used. Given the longstanding emphasis of the ECJ on the need to execute European Arrest Warrants quasi-automatically, except in very narrow circumstances, the Supreme Court hoped for a validation of its approach, and it did indeed find support from the Advocate-General at the ECJ. The Court itself, however, took a different turn. While emphasizing the need for member states to practice mutual trust vis-à-vis one another, it also opened the door to a new, broader exception from the automatic execution of EAWs – an exception focused on "deficiencies affecting an objectively identifiable group". While not saying so explicitly, this was clearly a response to the particular human rights concerns raised in the particular case – concerns relating to members of the Catalan self-determination movement as a whole.

In this volume, we explore further the judgment itself and its implications as well as the background against which it needs to be understood. Our aim is to shed further light on the notion of "deficiencies affecting an objectively identifiable group" by both inquiring into its rationale and into the kinds of deficiencies present in the context of the conflict over Catalan independence over the past decade. In this Introduction, I begin this exploration by situating the judgment in *Puig Gordi and Others* in the evolution of the relation between mutual trust and fundamental rights protection in EU cooperation on issues of security and justice (section II). I then sketch the political background to the case in the political conflict between Catalonia and Spain since 2010, with a particular focus on the 2017 referendum on independence and the repressive response of the Spanish state, especially its judiciary (section III). Finally, section IV presents an overview over the remainder of the volume and the different contributions.

5 UN Working Group on Arbitrary Detention, Opinion No. 6/2019 concerning Jordi Cuixart I Navarro, Jordi Sánchez I Picanyol and Oriol Junqueras I Vies (Spain), 13 June 2019, UN Doc. A/HRC/WGAD/2019/6.

6 Ibid., paras. 115-116.

II. Mutual Trust and Fundamental Rights in the Evolution of the EU Area of Freedom, Security and Justice

The balance between the principle of mutual trust and the protection of fundamental rights has been contentious from the early days of the EU cooperation on justice and security matters. The ECJ had to confront it at various times over the past two decades, especially on questions related to the common European asylum system and the EAW system, which represents a cornerstone of EU cooperation in this area.[7]

Established by the Treaty of Amsterdam in 1999, the AFSJ was perceived as a key step forward in the process of political integration aimed at ensuring the free movement of persons within the Union while offering a high level of protection through judicial and police cooperation and common asylum and immigration policies. At the turn of the century, the mutation of the original European institutions which resulted from the successive revisions of the Treaties had already widened the EU scope of action beyond the original economic realm to include a social dimension. In particular, the progressive strengthening of the powers of European institutions meant that they had an increasing involvement in the allocation and redistribution of social goods - not only police and common security, but control over food safety, tourism and immigration, environmental risks, fighting racism and xenophobia, foreign policy, etc. This social dimension played a key part in advancing the goal of "creating an ever-closer union among the peoples of Europe", as proclaimed in the 1992 Treaty of Maastricht, which replaced the old denomination of "European Economic Community" by "European Union", with a view to asserting its distinctive political identity in the international scene. The supremacy of EU Law, its immediate effect in the jurisdiction of its member states, but also the need to protect fundamental rights and the increasing consolidation of the constitutional positioning of the ECJ - which assumed a broad jurisdiction, also over security and criminal matters - are widely acknowledged as decisive in the European process of supra-national integration.

Allegedly, the EAW is the most important legal instrument developed in the AFSJ - the flagship of the complex institutional and legal framework in the field of EU Justice and Home Affairs (JHA), originally part of the "Third Pillar" in the Treaty of Maastricht (1992). Together with the establishment of legal agencies such as Eurojust (a platform

7 See, in general, Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Bloomsbury Publishing 2020).

for coordination and information exchange among prosecutors) and the creation of the European Public Prosecutor's Office (tasked with investigating, prosecuting, and bringing to justice offenses against the EU's financial interests), it is regarded as the culmination of the triumph of the "Community method" to policing and criminal law issues.[8]

Enhancing judicial cooperation in criminal matters had been on the agenda throughout the 1990s, but it became a particular political priority after 9/11. The EAW was adopted on July 2002 by means of the Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the EU (hereinafter, "Framework Decision"), which entered into force in all member states in 2004.[9] Its main purpose was to facilitate efficient cross-border law enforcement by simplifying the arrest and transfer of criminal suspects (or individuals who have already been sentenced) for the purposes of conducting a criminal prosecution or executing a detention order or a custodial sentence. A simplified surrender procedure replaced the former, complicated extradition proceedings that involved substantial bureaucratic and political burdens. In contrast with the traditional system, an EAW is issued by the judicial authority of one member state and must be dealt with, as a matter of urgency, by the judicial – not the political – authorities of the requested member state. For the core crimes listed in the Framework Decision, it normally commands execution without further scrutiny about the underlying case.

From the start, however, one main concern in relation to the expeditious - almost automatic - form in which the EAW is meant to operate was its potential impact on the fundamental rights of the affected individuals. Initially, this risk was assumed to be mitigated by the general presumption of trust between the then fifteen member states – a presumption which is essential for the effective operation of the system as well as the basis for enhancing cooperation in criminal and security matters. Trust here is generally conceived in normative terms, as a *binding* imperative embedded into the principle of mutual recognition of judicial decisions. This is a demanding conception reaching beyond the judicial sphere and permeating foundational debates about the identity of the EU as a supra-national political entity whose legitimacy and authority derives from its members sharing a democratic ethos and political values, especially respect for human rights and for the rule of law. Hence, in principle, such presumption of trust imposes significant constraints on the degree of scrutiny that judicial authorities can apply when they receive an EAW.

8 Steve Peers, 'EU Criminal Law and Police Cooperation' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 757.

9 European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal L 190, 18/07/2002 P. 0001. For the creation and evolution of the Framework Decision, see also, in greater detail, Torbisco Casals and Krisch, Chapter 2, this volume.

Based on this idea of trust, the EU Framework Decision establishing the EAW sought to create a simplified mechanism of cooperation for surrendering suspected or convicted criminals that relied on the principle of mutual recognition and on "the high degree of confidence which should exist between Member States".[10] The emphasis two decades ago was on removing the obstacles to judicial cooperation in criminal and security matters on a model of supranational integration that was largely concerned with smoothing the process of integration and favouring effectiveness. Although human rights considerations were not totally overlooked, they were certainly of marginal importance in the initial conception of the EAW system. The guiding principle was that EAWs had to be automatically executed, and only under very exceptional circumstances were judicial authorities allowed to verify the grounds for issuing the warrant or investigate the background case further.

However, the initial optimism about automatic forms of cooperation based on mutual trust progressively faded away. On the one hand, the broader allocation of EU powers that led to intensifying cooperation among member states in areas such as criminal law increased the potential for breaches of trust and posed risks for fundamental rights, hence the need for increasing controls. On the other hand, the shift towards a more cautionary approach to trust (namely, less blind and automatically binding, and more rationalised or reflective) is associated with the changing European political landscape over the last decade. More specifically, the emergence of populist authoritarian movements has challenged consolidated views of human rights, democracy, and the rule of law that were at the basis of the process of political integration in Europe. Such backlash increases the risk of systemic failures, or of major domestic deficiencies in fundamental rights guarantees, thus moderating the earlier optimism about automatic forms of judicial cooperation and compliance – an optimism based on an idealised model of supranational integration that presumes solid democratic commitments such as efforts at "taking rights seriously", to paraphrase the title of the book by renowned American legal and political philosopher Ronald Dworkin.[11]

Against this background, the judgment in *Puig Gordi and Others* signifies a relevant shift of perspective, which culminates previous interpretive efforts to strike a better balance between mutual trust and fundamental rights protections. Indeed, as Chapter 2 elucidates, over time pressure built up to allow judicial authorities in member states the application of a higher degree of scrutiny, which was regarded as necessary to tackle patterns of abuse of the system. While the ECJ continued to insist on the importance of mutual recognition between member states, it progressively opened the door to allow exceptions to this principle (and thus to a binding form of trust). Most centrally, by 2016 it had accepted the refusal of an arrest warrant by a domestic judge in cases where "systemic" or "generalized" deficiencies in the protection of fundamental rights

10 ECJ, Judgment of 29 January 2013, C-396/11, *Radu*.

11 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

existed (in the requesting member state) if these deficiencies could directly affect the individual concerned.[12]

However, the Catalan case brought before the ECJ in March 2021, posed a different challenge. Arising from the political conflict around the right to self-determination and the independence referendum, the underlying cases did not relate to systemic or generalized deficiencies affecting the Spanish judicial system as a whole. Instead, the concerns about fundamental rights arising from this conflict were narrowly circumscribed – they affected only a particular, clearly defined group of individuals, namely members of the Catalan political movement in favour of independence. In this respect, various international bodies (including the UN Working Group on Arbitrary Detentions and the UN Human Rights Committee) had found violations of the freedoms of expression and assembly, of political rights and of due process rights affecting members in this specific group.[13]

At first sight, the judicial argumentation in *Puig Gordi and Others* formally upholds the rule of automatic execution and mutual recognition (thus rehearsing the rationale of the EAW regime). Yet the ECJ goes beyond the previously recognised exceptions related to "systemic deficiencies" and, building on a previously practically irrelevant passage in its jurisprudence, creates a new category of exceptions to reciprocal trust relating to "deficiencies affecting an objectively identifiable group of persons to which the person concerned belongs".[14] Hence, executing judicial authorities could also refuse the execution of an EAW if they find that the individual concerned "will run a real risk of infringement of the fundamental right" at issue because of his concrete membership in such "identifiable groups" – an exception that might be seen to echo the passage in the preamble to the Framework Decision that refers to discriminatory prosecutions.[15]

In short: this new legal category, conceptually different and potentially broader than the previously accepted one of "systemic deficiencies", will likely prove crucial to the operation of the EAW system in the future. While there will be few member states with systemic deficiencies concerning a member state as a whole, there are likely to be a greater number of cases with deficiencies related to particular vulnerable or non-dominant groups, be they political, social, ethnic or linguistic. As regards Spain, with its recent history of particularly serious human rights issues related to the Catalan context, the ECJ has opened the door for domestic courts to pay special attention to group-related human rights risks or rule of law deficiencies.

12 ECJ, Judgment of 5 April 2016, Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*

13 See Torbisco Casals and Krisch, Chapter 2, this volume; also Krisch, Chapter 5, this volume.

14 ECJ, *Puig Gordi and Others*, n 1 above.

15 Framework Decision, n 9 above, preamble para. 12.

III. The Political Background: The Catalan Independence Referendum and Spain's Constitutional Crisis

The jurisprudential turn in *Puig Gordi and Others* can only be properly understood on the background of the political conflict between Catalonia and Spain and the struggles over self-determination that peaked in the independence referendum in 2017 and its subsequent criminalization.[16]

On 1 October 2017, Catalonia held a Referendum on Independence, which was declared illegal by the Spanish Constitutional Court and culminated a politically charged complex process of more than a decade – a process with roots in deeply entrenched historical grievances over cultural and economic issues, including language rights, redistributive fairness and identity recognition as part of broader sovereignty claims that date back to pre-constitutional times. Despite its proclaimed illegality, and even in the face of severe countermeasures from Spanish courts and government, Catalonia's regional government led by President Carles Puigdemont decided to move ahead with the vote, supported by a robust majority of representatives in the Catalan Parliament and by the two main civil society associations (*Assemblea Nacional Catalana* and *Òmnium Cultural*). Both NGOs had played a key role in mobilising society and organising massive protests, which shifted political opinion in mainstream Catalan-centred political parties (both conservative and progressive) since July 2010 when the Spanish Constitutional Court issued a judgment that declared fourteen articles of the Catalan Statute of Autonomy – equivalent to a regional constitution – unconstitutional and ordered a restrictive interpretation of twenty-seven others.[17] On 10 July 2010, right after the Spanish Constitutional Court's ruling became public, Òmnium Cultural and other civil society associations organised a massive demonstration to protest the decision. It was attended by over a million people who marched peacefully on the streets of Barcelona under the slogan: "We are a nation. We decide." As reported by international and local press, it was the greatest protest held in Spain since the transition to democracy and had the support of the main unions and political parties represented in the Catalan Parliament.

16 For broader accounts of the background of and events after the independence referendum, see Peter A Kraus and Joan Verges Gifra (eds), *The Catalan Process: Sovereignty, Self-Determination and Democracy in the 21st Century* (Generalitat de Catalunya - Institut d'Estudis de l'Autogovern 2017); Óscar García Agustín, *Catalan Independence and the Crisis of Sovereignty* (Springer Nature 2020).

17 Tribunal Constitucional, Judgment 31/2010 of 28 June 2010.

The constitutionality of the "Catalan Statute" - passed by the Catalan Parliament with the support of a broad majority in 2005, approved by the Spanish Parliament and subsequently ratified by Catalan voters through a referendum in 2006 - had been challenged by the Partido Popular, one of the two major parties in Spain, though with scarce representation in Catalonia. The Constitutional Court ruling was thus widely perceived in Catalonia as a politically motivated interference, an affront to the will of the Catalan people and their legitimate right to self-governance. It triggered massive protests and civil marches during the following years in which social discontent grew in Catalonia as a reaction against what was seen as arrogant central politics in Madrid and the neglect of historical self-government claims, including cultural and linguistic rights, fiscal sovereignty (to correct a systemic situation of economic deficit) and the official recognition of Catalonia as a nation. An association of Municipalities for Independence (AMI) was created in Catalonia, bringing together 780 of about 1000 local municipalities with the goal of defending the right to self-determination. A series of symbolic - non-binding and unofficial - referendums or *consultes populars* ("popular votes") on independence were held in municipalities throughout Catalonia between 2009 and 2011.

Overall, this social process had a deep political impact, channelling the political events that constitute the background of the CJEU judgment in the case of *Puig Gordi and Others*. As a response to the growing social discontent, and a massive demonstration in 2012, Mr. Artur Mas, at the time President of Catalonia, called a snap election for 25 November 2012. Earlier that year, Mr Mas had tried to seek support for a proposed fiscal reform from the Spanish Government in Madrid, but the President of the Spanish Government, Mr Mariano Rajoy, had rejected his initiative and consistently declined to engage in meaningful dialogue aimed at resolving the political crisis in Catalonia. The election resulted in a clear majority for the pro-independence parties, and the newly constituted Parliament of Catalonia resolved that a public consultation on independence would be held during the following legislature. At its first sitting in January 2013, it approved *A Declaration of Sovereignty and of the Right to Decide of the Catalan People*. The declaration stated that "the Catalan people have, for reasons of democratic legitimacy, the nature of a sovereign political and legal subject", and that the people had the right to decide on their own political future.[18] The Declaration was passed with 85 votes in favour, 41 against and 2 abstentions.

However, the Partido Popular – by then the ruling political party in Spain, but with a minority representation in the Catalan Parliament – referred the *Declaration of Sovereignty* to the Constitutional Court. In its judgement of March 2014, the Constitutional Court declared article 1 of the *Declaration of Sovereignty*, which states that 'Catalonia is a nation',

18 Resolució 5/X del Parlament de Catalunya, per la qual s'aprova la Declaració de sobirania i del dret a decidir del poble de Catalunya Tram. 250-00059/10 i 250-00060/10, available at https://www.parlament.cat/document/intrade/7094/.

unconstitutional.[19] The Constitutional Court did accept, however, that there was a 'right to decide' derived from the principle of democratic pluralism. While this right does not entail a unilateral right to hold a self-determination referendum, it does allow initiatives of constitutional reform. The judgment reflected the Constitution's ambiguous and conflicting aims: on the one hand, to preserve Spain as the 'indissoluble unity of the Spanish nation; the common and indivisible homeland of all Spaniards'; on the other, its intention to 'recognise and guarantee the right to autonomy of the nationalities and regions which make it up and [to enable] solidarity among all of them'.[20]

On 19 September of 2014, the Catalan Parliament passed a law regulating public consultations by a broad majority (106 votes out of 135), but later that month the Spanish Government filed an appeal of unconstitutionality against this law. The Constitutional Court met in an extraordinary session held on the same day. It admitted the appeal and suspended the precepts of the Catalan legislation that were challenged.[21] Following the Constitutional Court's ruling and further obstacles to implement the official announcement of a consultation, the President of the Catalan government, Mr. Artur Mas, announced a public "process of citizen participation" through a public consultation supervised by volunteers with merely symbolic effects. Mr Mas had previously tried to negotiate an agreed referendum with the Spanish government, without success.

The consultation ('consulta popular') was held on 9 November 2014. The first question was "Do you want Catalonia to become a state?" In the case of an affirmative answer, the second question was: "Do you want this state to be independent?". The second question was intended to propose a federal reform of the Spanish Constitution, which could offer a political resolution of the conflict. Turnout was just 37%, as the consultation was not perceived as binding in any form, yet more than 80% of those who voted – 1.9 million people – voted in favour of full sovereignty.[22] The Constitutional Court declared the vote unlawful[23], and Mr Mas and some of his ministers faced criminal charges in relation to the non-binding consultation on the grounds that it defied the ruling by Spain's constitutional court and expressed contempt. In March 2017, the High Court of Justice of Catalonia convicted him and two other members of his Government for criminal contempt and a third former minister, who was then a member of the Spanish parliament, was ordered to be removed from his seat. The Court imposed severe fines

19 Tribunal Constitucional, Judgment 42/2014 of 25 March 2014.

20 Article 2 of the Spanish Constitution.

21 Tribunal Constitucional, Order of 29 September 2014, *Recurso de inconstitucionalidad n.º 5829-2014*.

22 See Fernando J. Pérez and Pere Ríos, "1,8 millones de personas votan por la independencia catalana en el 9-N", *El País*, 10 November 2014.

23 Tribunal Constitucional, Judgment 32/2015 of 25 February 2015.

and banned them from holding public office for significant periods of time.[24] Although several Catalan officials were cleared of charges such as misuse of public funds, the Spanish Court of Auditors later initiated proceedings to reclaim the costs of the consultation – approximately 5 million euros – from the convicted officials.[25]

The Spanish Government's new attempt to criminalise the independence movement was a turning point. It marked the hardening of its political strategy that was to involve all organs of State power, including the national legislative, executive and judicial authorities and the monarchy itself. In July 2015, a Catalan pro-independence coalition led by Mr Artur Mas announced that it would seek independence by political means in light of the impossibility of negotiating with Spain if it won a new snap election scheduled for 27 September 2015, which was thus turned into a plebiscite. Catalan nationalist parties included the goal of full independence in their electoral manifestos. The Spanish Parliament next passed a law that gave unprecedented powers to the Constitutional Court to enforce its rulings. This legal reform was intended to counteract a potential pro-independence victory, and to further politicise the role of the Constitutional Court. It was later criticised by the Venice Commission of the Council of Europe on the grounds that it undermined the Constitutional Court's neutrality.[26]

The election resulted in a majority for the pro-independence parties, *Junts pel Sí* (Together for Yes) and CUP (Popular Unity Candidacy). Mr Rajoy's Popular Party – majoritarian in Spain – won only 11 of 135 seats in Catalonia. On 9 November 2015, the new Catalan Parliament passed a resolution declaring the beginning of the *procés* towards independence. In response, the Spanish Government stated that the Government might use any available judicial and political mechanism contained in the constitution and in the law to defend the sovereignty of the Spanish people and of the general interest of Spain.

Following prolonged negotiations to form a government, Mr. Mas stepped down and was replaced as president by Mr Carles Puigdemont. In September 2016, he overcame a confidence vote in the Parliament by announcing that a binding referendum on independence would be held in the second half of 2017. Mr Puigdemont reasserted his willingness to seek an agreement on the referendum with the Spanish Government during a meeting in Madrid in January 2017; yet his proposal was quickly rejected by Mr. Rajoy. In June 2017, the Catalan President announced that the referendum would take place on 1 October and that the question would be: "Do you want Catalonia to become an

24 See Raphael Minder, "Artur Mas, Former Catalan Leader, Is Barred From Holding Office", *The New York Times*, 13 March 2017.

25 See Carlota Guindal, "Artur Mas y tres exconsellers, condenados a pagar 4,9 millones por la consulta del 9-N", *La Vanguardia*, 12 November 2018.

26 European Commission for Democracy through Law (Venice Commission), *Opinion 827/2015 on the Law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court*, 13 March 2017.

independent state in the form of a republic?". The Spanish government's response was that a referendum would be illegal, and that it would be prevented.

In early September 2017, the Catalan Parliament passed legislation formally authorising the referendum and enacting a "Transition Law" to provide a legal framework pending the adoption of a Catalan Constitution in case the majority of citizens voted in favour of independence.[27] The referendum law was explicitly based on article 1 of the International Covenant on Civil and Political Rights (ICCPR), which was claimed to have direct effect in the Spanish legal order by virtue of articles 10 and 96 of the Spanish Constitution. On 12 September, the Constitutional Court suspended the law (for the period during which it considered an appeal from the Spanish government); the law was finally declared invalid by the Constitutional Court after the referendum had taken place.[28]

As it is well known, the Catalan referendum took place despite the suspension order of the Spanish Constitutional Court. In order to suppress the referendum, the Spanish government put into effect a major police operation (Operation Anubis). Its purpose was to investigate and disrupt the organisation of the referendum, and eventually to arrest the responsible Catalan officials, including (in particular) the president. As part of this operation, the Spanish Government ordered the police to seize ballot papers and mobile phones; threatened that severe fines (up to €300,000) would be imposed on people who manned polling stations; closed down websites, and demanded that Google remove a voting location finder from the Android app store. Police were sent from other Spanish regions to suppress the vote and close polling stations. On 20 September 2017, fourteen Catalan government officials were arrested by the Spanish police for being suspected of organising the referendum, and nearly 10 million ballot papers destined for the vote were seized. The detentions prompted spontaneous peaceful gatherings of people around Catalonia. The largest in Barcelona saw around 40,000 people gather in front of the Ministry of the Economy. Claiming that this represented a tumultuous uprising, the Public Prosecutor decided to initiate criminal proceedings for sedition via the *Audiencia Nacional* (a special court in Madrid that has jurisdiction over exceptionally serious crimes, such as terrorism or genocide) against an indeterminate number of demonstrators and the presidents of the Catalan pro-self-determination NGOs *Òmnium Cultural* and *Assemblea Nacional Catalana*. In response, the Catalan government called on citizens to behave peacefully and responsibly and to ignore the "provocations of those who want to stop the vote."

The referendum finally took place on 1 October 2017, despite being suspended by the Constitutional Court and despite the violent operation by Spanish paramilitary police

27 Parliament of Catalonia, Llei no. 20/2017 de transitorietat jurídica i fundacional de la República, 8 September 2017.

28 Tribunal Constitucional, Judgment 124/2017 of 8 November 2017.

forces, which involved approximately 6,000 officers.[29] Private citizens became organised through social networks and occupied schools on the weekend of the referendum where polling stations were located to make it possible to keep them open for the vote. As a result of the force employed by the police, around 900 people were injured, and election organisers were arrested. International reporters disqualified the police raids as a disproportionate police assault; many suggested that the response of the Madrid government was akin to the days of Franco dictatorship and the Mayor of Barcelona called the raids a "democratic scandal". Massive protest and demonstrations took place around Catalonia in the aftermath of the referendum. As tension increased over Catalonia, King Felipe VI made a televised address to the nation on 3 October 2017 where he accused Catalan authorities of disloyalty to the State. He described the push for independence as "unacceptable" since, in his view, it was intended to break up the Constitutional order. The King omitted any reference to the police violence of 1 October, and his speech was received by many citizens in Catalonia with great animosity.

In light of the referendum result - 92% of voters supported independence, on a turnout of 43% - the Catalan Parliament and Mr. Puigdemont invited the Spanish Government to negotiations aimed at a peaceful resolution of the constitutional crisis, and to accept international mediation. The Spanish Government rejected these calls. As a result, the Catalan Parliament declared independence on 27 October 2017 and was immediately dissolved by the Spanish Government, which imposed direct rule under Article 155 of the Constitution after obtaining the approval of the Senate.[30] The government in Madrid also deposed the Catalan Government in Barcelona (including its president, Mr Puigdemont) and called regional elections for 21 December 2017. On 30 October 2017 the Spanish Attorney General laid charges of rebellion, sedition and misuse of public funds at the *Audiencia Nacional* against Mr Puigdemont and other "secessionist" politicians. A previous complaint had been filed with similar charges before the High Court in Catalonia, the only court with jurisdiction to hear these matters. On the same day, Mr. Puigdemont and five other Catalan ministers went into exile in Belgium.[31]

The criminalization of the independence referendum, and of supporting activism, gathered momentum quickly after 1 October 2017. The charges brought against the two civil society leaders, Mr. Jordi Cuixart and Mr. Jordi Sanchez, following the demonstrations in September led to their detention in mid-October. At the beginning of November, pre-trial detention was also imposed on most of the members of the Catalan regional government that had remained in Spain.

29 See Sam Jones and Stephen Burgen, "Catalan referendum: preliminary results show 90% in favour of independence", *The Guardian*, 2 October 2017.

30 See Raphael Minder and Patrick Kingsley, "Spain Dismisses Catalonia Government After Region Declares Independence", *The New York Times*, 27 October 2017.

31 See *BBC*, "Catalan independence: Carles Puigdemont in Belgium, lawyer says", 31 October 2017, available at https://www.bbc.com/news/world-europe-41811649.

Despite the extreme situation of the pro-independence political leaders (some in prison and some in exile) their pro-independence parties obtained yet another victory in the elections of 21 December. However, their efforts to elect a regional president were thwarted as a result of the criminal proceedings.[32] The Spanish Constitutional Court barred the parliament from electing Mr. Puigdemont – even though he had won the election campaigning from Brussels – on the grounds that he needed to be physically present at the election session – a requirement newly introduced by the court. With Mr. Puigdemont in exile and faced with immediate arrest upon entering Spain, such a presence was illusory. The requirement of physical presence in the Parliament also frustrated an attempt to elect Mr. Jordi Sánchez whose request to be released from pre-trial detention to attend the election session was rejected, even after the UN Human Rights Committee had issued an order for provisional measures in favour of Mr. Sanchez. The next election attempt, too, was thwarted by the decision of the investigating judge to take the third candidate, Mr. Jordi Turull, into pre-trial detention the day before the decisive vote in the Catalan parliament was to be held.

By late March 2018, twenty-six pro-independence leaders had been charged with rebellion and other serious crimes by the Spanish Supreme Court, which had taken over the cases. Nine of them were in pre-trial detention and seven in exile in Belgium, the United Kingdom and Switzerland. For the latter, the investigating judge at the Spanish Supreme Court issued European Arrest Warrants and extradition requests in order to bring them to trial in Madrid. After some initial frustrations – including a withdrawal of the first EAWs – this led to the arrest, on 25 March 2018, of Mr. Puigdemont while traveling through Germany. As mentioned at the outset, however, the German court rejected the arrest warrant for the crime of rebellion, just as Belgian courts did for other prosecuted individuals in 2018 and later again in the case against Mr. Puig Gordi in 2020 and 2021. Scottish courts did not act upon the warrants initially and rejected them later because of immunities in the European Parliament. These cases – which form the immediate background of the ECJ judgment – are examined in greater detail in Chapter 2.[33]

As a result of the rebellion charges, those accused who had been elected to seats in the Catalan parliament and the Spanish Senate were suspended from the exercise of their parliamentary rights and duties. Two of the accused – Mr Puigdemont and Mr Oriol Junqueras – who were elected to the European Parliament in 2019 were not included by Spanish authorities in the list of new members as they had failed (being in prison and exile) to appear in Madrid to swear an oath on the Spanish Constitution.[34] And pre-trial detention continued even in the face of a finding of the UN Working Group on Arbitrary

32 On the following, see Krisch, Chapter 5, this volume.

33 See Torbisco Casals and Krisch, Chapter 2, this volume.

34 See Krisch, Chapter 5, this volume.

Detention – mentioned at the outset – that this detention was arbitrary and unlawful under international human rights law.[35]

The Spanish Supreme Court held the main trial of independence leaders from February to June 2019. In October 2019, twelve defendants – eight ministers of the regional government, the president of the Catalan parliament as well as the two NGO leaders – were convicted for crimes of sedition, the misuse of public funds and disobedience and received sentences of up to thirteen years in prison, for a total of 99 years of incarceration.[36]

It was only in June 2021 and after intense international criticism, including from the Parliamentary Assembly of the Council of Europe[37], that the nine convicted who remained in prison – and had been in prison for over three years – were eventually pardoned (partially and conditionally) by the Spanish prime minister.[38] A reform of the Spanish criminal code in late 2022, which abolished the crime of sedition (while introducing a new crime of aggravated public disturbance), led to the conversion of some of the sentences, though for some of the accused, significant parts of their punishment – especially the disqualification from public office for up to thirteen years – were upheld.[39]

Meanwhile, the criminalization of acts related to the referendum did not cease. The civil society organization, Omnium Cultural, estimates that 1460 people have been subject to prosecutions and trials – some of them still ongoing – and 1200 have faced administrative and accounting procedures against them.[40] Likewise, Spanish authorities used physical and technological surveillance against members of the pro-independence movement – including the Pegasus software against Catalan politicians, civil society activists and lawyers, which resulted in the so-called *Catalangate* scandal in 2022. This surveillance will be discussed in greater depth in Chapter 4.[41]

The criminalization also targeted protests against the trial and the eventual sentence, with some protest groups facing terrorism charges. In November 2023, an investigating judge at the *Audiencia Nacional* opened investigations for suspected terrorism against actors supposedly behind the Tsunami Democratic, the popular movement that had

35 See above and Torbisco Casals and Krisch, Chapter 2, this volume.

36 Tribunal Supremo, Judgment no 459/2019 of 14 October 2019.

37 Parliamentary Assembly of the Council of Europe, Resolution 2381 (2021), 21 June 2021.

38 See Carlos E. Cué, "El Gobierno aprueba los indultos parciales y condicionados a los presos del 'procés' "para abrir un nuevo tiempo de diálogo", *El País*, 22 June 2021.

39 See José María Brunet, "El Supremo mantiene la inhabilitación de Junqueras hasta 2031 pese a la reforma de la malversación", *El País*, 13 February 2023.

40 See Omnium Cultural, *L'Antirepressiva: Map of the Violation of Civil and Political Rights in Catalonia*, available at https://antirepressiva.omnium.cat/en/.

41 See Mégrét, Chapter 4, this volume.

mobilized thousands to protest against the criminal convictions in late 2019, including by blocking certain roads. Those under investigation include Mr. Puigdemont and eleven other political, civil society and business leaders as well as journalists.[42] Many human rights groups, including Amnesty International, were quick to condemn those charges as unjustifiably branding peaceful protest as terrorism.[43] Many have read this – and other – judicial action as an attempt to counter ongoing negotiations about an amnesty law during the autumn of 2023.

The amnesty law, to be enacted into law in early 2024[44], is an attempt to end the criminal persecution of crimes related to the referendum, but hostility to it in the judiciary – expressed publicly by the highest self-governing body of the judiciary[45] – may well thwart the implementation of the amnesty, at least in part.

At the time of writing, various independence leaders remain faced with heavy criminal charges and continue in exile in Belgium and Switzerland, among them Carles Puigdemont and three others whose cases were at the origin of the *Puig Gordi and Others* judgment. European Arrest Warrants and extradition requests may be reactivated against them at any time. This exile – and the political repression it results from – highlights the complexities of European extradition laws and the broader implications of the Catalan independence issue within the European Union.

42 See J.J. Galvez, "La Audiencia Nacional rechaza el recurso de la Fiscalía y avala seguir investigando por terrorismo el 'caso Tsunami'", *El País*, 18 March 2024.

43 See European Civic Forum, Joint letter: *Solidarity for Activists in Catalonia Accused of Terrorism*, 27 February 2024, available at https://civic-forum.eu/publications/open-letter/joint-letter-solidarity-for-activists-in-catalonia-accused-of-terrorism.

44 See, for the version adopted by the lower house of the Spanish Parliament, Congreso de los Diputados, Proposición de Ley Orgánica de amnistía para la normalización institucional, política y social en Cataluña (122/000019), 14 March 2024, available at https://www.congreso.es/public_oficiales/L15/CONG/BOCG/B/BOCG-15-B-32-10.PDF.

45 Consejo General del Poder Judicial, *Declaración institucional del Pleno del CGPJ*, 6 November 2023, available at https://www.poderjudicial.es/cgpj/en/Judiciary/Panorama/Declaracion-institucional-del-Pleno-del-CGPJ--6-noviembre-de-2023-.

IV. The Aim and Structure of the Book

In the following chapters, we interrogate the implications of the new, broader exception to mutual recognition – focused on "deficiencies affecting an objectively identifiable group" – developed by the ECJ in the context of the European Arrest Warrant system. As we explain in Chapter 2, we believe that, on a more general level, the ECJ approach represents a viable middle ground suitable for a plural European Union in which convergence around human rights is envisaged and pursued but cannot be easily guaranteed. In this context, a scrutiny of human rights violations for every individual case might be too burdensome and signal intergovernmentalism rather than regional integration. On the other hand, blind understandings of trust – involving mutual recognition and automatic judicial cooperation – fail to address the serious risks for human rights that can emerge in member states. Alongside the focus on systemic, generalized rule-of-law concerns, the group-oriented approach responds to particularly salient human rights problems – such that are typically not easily remedied in the political process as they tend to affect minorities, political and otherwise. It is in this context that transnational checks and balances are particularly called for.

With this book, we want to understand the background of this turn in the jurisprudence of the ECJ better, and we seek to draw out its broader implications, especially with respect to the context from which it originates – the criminalization of the Catalan pro-independence movement. The volume situates the new jurisprudence in the broader context of the development of European law and jurisprudence on the limits of mutual trust among member states in the cooperation on matters of criminal justice. Moreover, it connects this jurisprudence with more general tenets in comparative constitutional law, especially the role of courts in the protection of minorities and vulnerable groups in constitutional systems.

The volume also focuses on risks for particular types of rights, and spheres of protection, in the Catalan context – taking members of the Catalan pro-self-determination movement as a (political) group. These include concerns about arbitrary detentions and the right to a fair trial; restrictions of the right to political participation; guarantees of human rights in the context of criminal investigations and prosecutions, including concerns about restrictions of the right to privacy and state-authorised digital surveillance; the political use of corruption-related charges; the freedom of assembly and expression, in particular related to the work of civil society organizations. Each of our expert contributors evaluates the practice of Spanish authorities – especially of the judicial system – in light of European and international human rights law.

We use this case-focused analysis to assess to what extent it reflects potential "deficiencies affecting an objectively identifiable group", thereby investigating the possibilities of

taking the interpretation of this concept further to illuminate analogous cases – cases that might become increasingly relevant in the current context of rising autocratic populism and backlash against democracy and human rights. With this, the volume also hopes to identify patterns of potential abuse of the EU system by powerful majorities that illegitimately restrict or suppress the rights of members of vulnerable or politically marginalised groups (for example, stateless nations, cultural, linguistic and ethnic minorities, migrants, or religious groups) with the goal of suppressing political dissent. In the following, I give a brief overview over the different contributions to the book.

Chapter 2, by Neus Torbisco Casals and Nico Krisch, situates the new jurisprudence of the ECJ in the broader context of the development of European law and jurisprudence on the limits of mutual trust among member states in the cooperation on justice affairs. It traces the original design of the EAW and the continued marginalization of rights concerns in the early jurisprudence despite increasing pressures for a different balance. It then inquires into the shift of the system after 2015 in response to a changed environment, both in normative and political terms, with new exceptions and interpretations introduced step by step by in ECJ jurisprudence. The creation of the new exception of "deficiencies affecting an objectively identifiable group" by the ECJ in 2023 is a further step in the evolution towards a more sustainable balance between an interest in effective judicial cooperation and enduring risks for human rights. Similarly to previous shifts, it came about in response to national courts' reluctance to execute EAWs and to international bodies' findings about serious human rights violations. The chapter then analyzes this new category in the light of a deeper inquiry into the notion of "mutual trust" at the heart of European integration, and of a comparative constitutional law approach to the definition of an adequate role of courts in human rights protection without interfering unduly with democratic processes. The protection of social, political and cultural minorities is a central theme in the justification of strong judicial review, and the ECJ's new approach should be understood along those lines as well. This also allows the chapter to delineate the scope of the new jurisprudence and its promise beyond the particular context of the EAW, and of the Catalan case.

Chapter 3, by David Banisar, explores the freedom of expression and assembly in international human rights law, the challenges that have arisen for both in the Catalan case, and the extent to which these challenges affect "an objectively identifiable group". In line with international jurisprudence, Banisar presents the freedom of expression and assembly as core human rights essential for democracy, underpinning the right to public participation and political engagement. While they are not absolute rights, countries can restrict them only in limited circumstances; speech which relates to political topics and issues of public interest is especially strongly protected and can only be restricted in the strictest of circumstances. This equally applies to discussions around self-determination and political structures of the state, including secession, so long as speech or assemblies do not advocate for violence or promote hatred. In this light, the conflicts arising from the debates over Catalan independence have raised many challenges to freedom of expression

and assembly in Spain. This chapter reviews the controversies that have arisen in Spain in the context of these conflicts, and the responses of national and international human rights bodies - responses that indicate that many of the repressive measures of Spanish state institutions have not been compliant with obligations under international human rights law. The large number of statements and verdicts by international human rights bodies and experts finding violations of standards suggests these violations are regular enough to be considered as systematic discrimination and as "affecting an objectively identifiable group".

Chapter 4, by Frédéric Mégret, examines how the case law of the European Court of Justice should be assessed where the group concerned is the target of unlawful surveillance. Unlawful surveillance is an endemic and global problem, but the "Catalangate" scandal suggests that it has been particularly a problem in Catalunya as a result notably of the use of the Pegasus spyware. Identifying the nature and legal status of such surveillance can help understand how it shapes the contours of particular "objectively identifiable" groups in the process of monitoring them. Surveillance can be legal, as recognized notably by the European Court of Human Rights, when it satisfies the standards of the Convention, when it is necessary and proportional (typically, in the context of judicial investigations). There is little doubt, however, that surveillance can amount to a human right violation, as has been denounced in the Spanish context by a variety of international observers. This is particularly likely to be the case, as it happens, where it assumes an indiscriminate character because it is targeted at a broad group. Surveillance can, as a result, negatively affect the right to a fair trial and should be a key relevant factor in deciding whether to honor a European Arrest Warrant. With this analysis, the chapter contributes to a broader understanding of the intersection between targeted surveillance technologies, legal definitions, and the protection of fundamental rights within the European legal landscape.

Chapter 5, by Nico Krisch, explores the violation of political rights as potential deficiencies affecting objectively identifiable groups. It outlines international jurisprudence clarifying the contours of political rights under the International Covenant on Civil and Political Rights and the European Convention on Human Rights, with a particular focus on the linkage between violations of these rights with the membership of those affected in particular political, social or cultural groups. It then uses this background to inquire in greater detail into the interferences with political rights by the Spanish state against the Catalan pro-independence movement. It analyzes the different instances of restrictions on political rights, which taken together amount to a grave interference that has seriously curtailed the ability of Catalan politicians and civil society actors to exercise their functions. The chapter then scrutinizes possible justifications for such interferences but concludes that, also in the light of the decisions by international and European courts on related issues, no such justification can hold and that we are thus faced with a series of serious political rights violations. As they target a particular political and social group specifically, those violations amount to deficiencies affecting an objectively identifiable group in the understanding of the European Court of Justice.

Chapter 6, by Alejandro Chehtman, focuses on the right to truth and its potential violation in the context of the Catalan independence movement. This chapter examines, first, the origins, legal basis and scope of the right to truth under International Human Rights Law, both as an obligation under the European and Universal systems. It traces the expansion of the right to truth from Latin American transitions into the broader Inter-American human rights system and towards its European and African counterparts, to be finally recognized as part of universal human rights as well. The chapter shows that the right to truth ultimately entails an obligation by states to conduct impartial, thorough and prompt investigations into human rights violations. It is held jointly, or complementarily, by individual victims and collectives who may have been harmed or affected by certain events. On that basis, the chapter explores whether the responses to certain events fulfil the Spanish obligations under the right to truth. Namely, it examines allegations made by victims and other constituents regarding the Spanish responses to the violence unleashed around the independence referendum and the terrorist attacks in Barcelona and Cambrils that took place during the Catalan 'proces'. With regards to the former, it documents the sharp contrast between the prosecution of actions by Catalan leaders and Catalan citizens vis-à-vis the prosecution of police officers and other security forces. Nevertheless, it acknowledges that action by victims and civil society have moved authorities to grapple not only with individual acts of violence, but also to consider allegations into systemic aspects of violence and the potential responsibility of mid-level officials. To this extent, the right to truth has served and helped victims and civil society organizations to push for more appropriate institutional responses. By contrast, there are certain aspects of the allegations of victims concerning the terrorist attacks in Barcelona and Cambrils that the Spanish authorities have so far refused to squarely confront and investigate, in ways that satisfy the rigorous demands of the right to truth. In the broader context in which these responses have taken place, the treatment of requests by Catalan victims contributes to the claim of them constituting systematic deficiencies affecting an objectively identifiable group.

Overall, the volume paints a powerful picture of the context out of which the latest step in the ECJ's jurisprudence on the European Arrest Warrant emerged. The group-specific human rights violations analyzed here, in several cases reflected in the findings of international human rights bodies, provide the backdrop against which courts in various EU member states – Germany, Belgium and back then the United Kingdom – refused to execute European Arrest Warrants. Seeking to limit the possibility of challenge by domestic courts while trying to accommodate such concerns, the ECJ found a new formula to balance countervailing interests. This formula focuses on human rights risks for particular, "objectively identifiable" groups – a situation which, unlike other human rights violations, is often unlikely to be remedied by the political process and therefore calls all the more for judicial intervention. Incidentally, this new balance between mutual recognition and human rights protection might be reflective of a broader process towards a judicial constitutionalization of the European Union – a process by which member states courts, jointly with the ECJ, provide powerful checks against particularly salient risks for the rule of law.

Chapter 2

Mutual Trust, Fundamental Rights and "Objectively Identifiable Groups" in European Union Law

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I. Introduction

The tension between mutual trust and fundamental rights runs through the politics of the European Union, but it is most acute for cooperation on police, criminal and security matters, which tend to affect rights with particular intensity. For long, cooperation on these issues was the least developed area of European integration, with a largely intergovernmental approach even after the Maastricht Treaty that had brought it into the ambit of the European Union for the first time. Strengthened in different rounds since, the area now forms a core part of European Union policies, thus allowing for far-reaching integration through centralized rules, but also raising fresh issues about the protection of the individual in the process.[1]

The tension finds its strongest expression in the context of the European Arrest Warrant (EAW), the "flagship" of EU cooperation on criminal matters. Here, European integration relies on mutual trust and convergence among member states, but in practice this principled approach is often confronted with cases in which individuals fear, and sometimes have good reason to fear, a violation of their fundamental rights. The original design of the EAW did not pay much attention to this problem, and it has been through the jurisprudence of the European Court of Justice (ECJ) that articulations of possible responses to achieving a balance between preserving trust and guaranteeing fundamental rights have emerged.

In this chapter, we focus on the most recent step in shaping the relationship between mutual trust and rights protection – that found in the ECJ's *Puig Gordi and Others* judgment of January 2023.[2] In section II, we explore the trajectory that led to the new approach, from the initial conception of the EAW system to the various steps the ECJ took, under significant external pressure, to shift the balance over time. In section III, we trace the origins of the greater opening created by *Puig Gordi and Others*. The new exception to the automatic execution of EAW's established here – focusing on deficiencies for "objectively identifiable groups" – has limited antecedents in earlier jurisprudence, but can be understood as response to a series of refusals and evasions of national courts dealing with arrest warrants against the Catalan independence leaders whose cases lie at the origin of the reference to the Court. Section IV reconstructs different conceptions of mutual trust in the development of the EAW system and EU integration more broadly, showing how a turn to a "rationalised", rather than blind, model of trust is appropriate in a changed normative and political context. Section V situates this shift in the broader

1 See Steve Peers, 'EU Criminal Law and Police Cooperation' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021); Valsamis Mitsilegas, *EU Criminal Law* (2nd edn, Bloomsbury Publishing 2022) ch 1.

2 ECJ, Judgment of 31 January 2023, C-158/21, *Puig Gordi and Others*.

context of the role of courts in dealing with diversity in complex, diverse societies and political systems. It places emphasis on the justifications of judicial review of political decisions and finds that – from a constitutionalist perspective – the focus on group-related deficiencies is a plausible middle ground that responds to particular risks for vulnerable groups from majority decisions. On this background, Section VI explores the scope of the "objectively identifiable groups" at the heart of the jurisprudential shift and, taking further the risk-based argument developed in the previous section, argues that these are best understood as vulnerable societal and political groups. The chapter then outlines which kinds of groups are likely to fall into this category – a broad category if we follow the indications in recent jurisprudence in light of its rationale.

II. Mutual Trust and Fundamental Rights: A Shifting Balance

The shape of the European Arrest Warrant system is best understood in contrast to what came before it. Over decades, cooperation in criminal matters between member states of the European Communities (later, the European Union) had taken place within the structure of traditional extradition in which each country decides, in principle, whether to accede to extradition requests by another. For those countries that had ratified the 1957 Council of Europe Convention on Extradition, discretion was in theory more limited – they had an obligation to extradite in certain circumstances – but the exceptions were wide and in practice, extradition proceedings were still cumbersome and their outcome often uncertain.[3]

The Birth of the European Arrest Warrant

With the inclusion of "justice and home affairs" into the ambit of the European Union by the Maastricht Treaty in 1993, momentum gathered to address the shortcomings of this traditional system. Initial initiatives sought incremental improvements through new agreements reducing the use of exceptions and reservations. As the success of

3 See Steve Peers, *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law* (Oxford University Press 2023) 88–90.

these steps remained limited, a broader reform effort came underway with the Tampere Council in 1999, pushed especially by the Spanish government under José María Aznar, which for long had been discontent with the fact that other member states refused to extradite supposed ETA terrorists (and sometimes even granted them asylum). This led to preparatory work by the EU Commission, but divergences between member states remained substantial. The decisive shift occurred only in the wake of the attacks of 11 September 2001 in the United States, as a result of which European countries wanted to be seen as taking effective measures to combat terrorism. The reform of the extradition system, branded as an anti-terrorism measure, gained significant traction, and the Commission even managed to persuade Belgium – traditionally the most skeptical state, as also expressed in its persistent tensions with Spain on the issue of ETA. As a result, negotiations progressed in an extraordinarily speedy fashion and resulted in the 2002 Framework Decision establishing the EAW.[4]

The main rationale behind this Framework Decision was effectiveness – a smoother system to facilitate the surrender of suspects and criminals and as a result also more effective tools to counter terrorism. It is unsurprising then that the FD's emphasis would be to "implement the principle of mutual recognition…as the 'cornerstone' of judicial cooperation" instead of the previous variegated landscape of extradition agreements.[5] Extradition was turned from a discretionary choice of each country's political institutions into a quasi-automatic surrender under the control of judicial bodies. Double criminality, a core principle of the old system, was abolished for the 32 core crimes targeted by the EAW system, and member states were no longer allowed to refuse the surrender of their own nationals.[6]

On this background it is also unsurprising that human rights concerns took second stage in the Framework Decision. Related considerations appear especially in the preamble, which highlights that the Decision "respects fundamental rights" and that it should not be interpreted as obliging member states to surrender persons in cases in which there are reasons to believe that an arrest warrant has been issued to persecute someone for discriminatory reasons.[7] Moreover, according to its Article 1(3), the Framework Decision "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union." Yet such points do not reappear in the paragraphs dealing with the actual exceptions from the obligation to execute EAWs – exceptions that remain narrow and technical. The emphasis was clearly on creating a smoother mechanism for surrendering suspected or convicted criminals and on reducing obstacles on this path. The guiding principle was

4 See Christian Kaunert, '"Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission' (2007) 29 Journal of European Integration 387.

5 Framework Decision 2002/584/JHA of 13 June 2002, Preamble No. 6. See also Mitsilegas (n 1) 199–202.

6 For an overview of the European Arrest Warrant system, see Peers (n 3) 90–114.

7 Framework Decision, n 5 above, Preamble para. 12.

that an executing judicial authority should not verify the specific grounds of the warrant or investigate the background case further.

Early Jurisprudence

If human rights concerns were thus of marginal importance in the initial conception of the EAW system, the jurisprudence of the European Court of Justice pursued the same direction for more than a decade after its establishment. The Court routinely depicted simplification, greater effectiveness, and the facilitation and acceleration of judicial cooperation as the key aims of a system based on mutual trust, and it emphasized the strict limitations on national authorities with respect to refusals to execute EAWs.[8]

In an early decision of 2007, *Advocaten voor de Wereld*, the Court rejected challenges against the Framework Decision based, among other things, on non-compliance with the principle of legality due to the imprecise wording of the crimes for which suspects were to be surrendered through EAWs.[9] It emphasized the fact that the European Union was based on and bound by the principle of the rule of law and fundamental rights, and that this included the principle of legality of criminal offences. However, the Court found that it was not for the Framework Decision itself to define the relevant offences with sufficient specificity, but instead for the law of the state issuing the EAW. In this understanding of a decentralized system based on mutual recognition, human rights guarantees (and compliance with European and international human rights law standards) was primarily seen as the task of the member state in which criminal proceedings took place.

This approach continued to characterize the Court's jurisprudence over the following years. It was expressed most cogently in two decisions rendered in 2013. In *Radu*, the Court was asked whether the executing judicial authority may refuse to execute an EAW in light of a potential breach of the right to fair trial and defence rights.[10] The underlying case concerned arrest warrants issued by German authorities for a Romanian national prosecuted for acts of robbery. Mr Radu claimed that he had not been notified of the charges and was not in a position to defend himself, and a surrender would thus amount to a violation of his defence rights. In its judgment upon a reference from the Romanian Court of Appeal, the ECJ emphasized, as in previous judgments, that national authorities could refuse the execution of an EAW only in the circumstances expressly mentioned in the Framework Decision. As the alleged violation at issue in the present case was

8 For overviews, see Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust' (2018) 55 Common Market Law Review; Leandro Mancano, 'You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant and Judicial Independence' (2021) 58 Common Market Law Review.

9 ECJ, Judgment of 3 May 2007, C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*.

10 ECJ, Judgment of 29 January 2013, C-396/11, *Radu*.

not among those circumstances, Romanian authorities were obliged to surrender the suspect. The purpose of the Framework Decision, the Court stressed, was to "facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States". A notification of the suspect prior to the issuing of an EAW would "inevitably lead to the failure of the very system of surrender" the Framework Decision sought to establish.

The same rationale prevailed in the second landmark decision of the same year, *Melloni*.[11] Mr Melloni was arrested in Spain after being convicted by an Italian court *in absentia* for bankruptcy fraud. He contested the execution of an Italian arrest warrant against him on the grounds that a surrender would violate his right to a fair trial. The Spanish Constitutional Court, seized in the matter, agreed that a surrender would only be in keeping with fundamental rights under European and Spanish constitutional law if Spanish authorities could make it conditional upon a retrial of the applicant in Italian courts. The ECJ rejected this view, emphasizing once again the exhaustive nature of the grounds for refusing to execute – or make conditional – an EAW set out in the Framework Decision, and that *in absentia* trials could lead to a non-execution only under certain, narrowly defined circumstances. For this present case, this was in its view in keeping with the right to a fair trial under the European Charter of Fundamental Rights and the European Convention of Human Rights, as per the jurisprudence of the European Court of Human Rights. The fact that, under Spanish constitutional law, an unconditional surrender would violate fair trial guarantees was irrelevant for the ECJ because of the primacy of European Union law over national law. More precisely, it held that:

> "allowing a Member State ... to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision."[12]

Even constitutionally guaranteed rights were thus not a sufficient ground for refusing the execution of an EAW. For the Court, the presumption of the uniformity of the standard of fundamental rights protection and the emphasis on mutual trust were pillars of the EAW system that needed to be upheld, even in the face of national constitutional courts seeking to uphold their own guarantees.

11 ECJ, Judgment of 26 February 2013, C-399/11, *Melloni v Ministerio Fiscal*.

12 Ibid., para. 63.

The years 2013 and 2014 mark the high point of mutual trust in the ECJ's jurisprudence not just because of *Radu* and *Melloni* but also – and yet more importantly as a matter of institutional structure – because of the Court's opinion on the EU's accession to the European Convention on Human Rights.[13] Here, mutual trust between member states is elevated to constitutional status – it is

> "of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law."[14]

Having the European Court of Human Rights (ECtHR) potentially question such mutual trust in the name of human rights then becomes problematic, and consequently the accession to the ECHR "is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[15] With such an approach, it is unsurprising that the ECJ did indeed reject that accession as incompatible with the law of the European Union.

Towards Limited Exceptions

The one-sided focus on mutual trust at the expense of fundamental rights protection had provoked criticism right from the beginning of the European Arrest Warrant, but it gathered pace in the following years. The EU Charter on Fundamental Rights gained full legal force with the Treaty of Lisbon in 2009, elevating fundamental rights higher in the architecture of EU law. Member state courts, including constitutional courts, had signalled their discontent and a potential willingness to curtail the application of the EAW system at various reprieves.[16] The European Court of Human Rights, too, had demanded that member states scrutinize the human rights risks in their decisions on surrendering persons (especially in the context of asylum proceedings).[17] More generally, as the EU gained more powers, especially on matters of justice and security cooperation, in the process of forming an "ever closer Union" through different rounds of treaties –

13 ECJ, Opinion 2/13, 18 December 2014.

14 Ibid., para. 191.

15 Ibid., para. 194.

16 See Aida Torres Pérez, 'A Predicament for Domestic Courts: Caught between the European Arrest Warrant and Fundamental Rights' in Bruno De Witte and others (eds), *National Courts and EU Law* (Edward Elgar Publishing 2016).

17 See, e.g., ECtHR [GC], Judgment of 21 January 2011, App. no. 30696/09, *M.S.S. v Belgium and Greece*.

Maastricht, Amsterdam, Lisbon – the salience of rights protection grew and calls for a constitutionalization of the EU became louder.[18]

Already in *Radu*, similar concerns had led the Advocate-General at the Court, Eleanor Sharpston, to embrace a stronger scrutiny of potential rights violations. After a detailed analysis of ECtHR jurisprudence she concluded that, in exceptional circumstances, an alleged risk of a violation of fundamental rights might justify a refusal to execute an EAW. In the context of fair trial guarantees, this threshold was reached if "the infringement in question [is] such as fundamentally to destroy the fairness of the process".[19] This did not sway the Court on that occasion, but it set down a powerful marker for a potential shift in the future.

Moreover, serious problems had emerged in some member states. These concerned, on the one hand, detention conditions, which had also given rise to some of the ECtHR cases and were among the reasons for which the ECJ had limited the principle of mutual trust in the common asylum system of the EU some years earlier.[20] Yet more fundamentally, the rule of law situation in some member states had deteriorated heavily after 2010, especially in Hungary and later in Poland.[21] The presumption of compliance with fundamental rights, which lay at the basis of the legal requirement to realize mutual trust among member states, was thereby increasingly eroded.

Pressure thus built up on the traditional approach of the ECJ from different directions, and it was further exacerbated by a warning shot from the German Constitutional Court in late 2015.[22] The constitutional court had been seized in the case of an Italian arrest warrant which the competent German court decided to execute despite concerns about a conviction *in absentia*. The court used this opportunity to insist that EU law – and the Framework Decision on the EAW – could not trump German constitutional law if it infringed the protection of human dignity, an element of German "constitutional identity" representing a limit to the primacy of the European Union. According to the constitutional court, national authorities had the obligation (and consequently the right) to scrutinize whether the principle of individual guilt was respected with respect to trials *in absentia* in other countries, and that the Framework Decision was to be interpreted in this sense as well.

18 See, e.g., Joseph HH Weiler, *The Constitution of Europe* (Cambridge University Press 1999); Gráinne De Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011).

19 ECJ, Opinion of the Advocate-General of 18 October 2012, C-396/11, para. 97.

20 ECJ, Judgment of 21 December 201, C-411 & 493/10, *N.S. and M.E. and Others v. Secretary of State for the Home Department*.

21 See, e.g., Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545.

22 BVerfG, Order of 15 December 2015, 2 BvR 2735/14. See Frank Meyer, '"From Solange II to Forever I" the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)' (2016) 7 New Journal of European Criminal Law 277.

Eventually, the ECJ corrected its course – albeit cautiously – in the *Aranyosi and Căldăraru* judgment which responded to a reference request from a German court.[23] In both cases, existing evidence – and jurisprudence of the ECtHR – made it likely that the individuals concerned would be subject to detention conditions in Hungary and Romania (respectively) which violated the prohibition on inhuman and degrading treatment. The Court, now no longer willing or able to ignore such concerns, devised a new approach to the interpretation of the Framework Decision, based on the Charter of Fundamental Rights and the ECHR. While the Court continued to insist on the importance of mutual recognition between member states, it opened the door to exceptions to this principle "in exceptional circumstances". According to the ECJ, a refusal to execute an EAW in cases in which a potential violation of the prohibition of torture or inhuman or degrading treatment is alleged requires national courts to conduct a two-step test – first, to identify "systemic or generalised deficiencies" on the basis of "objective, reliable, specific and properly updated" information; and secondly, to ascertain that the particular individual concerned is likely to be exposed to the risk of a violation. *Aranyosi and Căldăraru* did not foresee an outright refusal as the consequence of such an assessment, but rather a postponement until more information was available to rule out the risk.

Prison conditions remained a continuing obstacle in EAW proceedings, and over the coming years the Court continued to affirm the two-step test developed in *Aranyosi and Căldăraru*.[24] In the 2023 judgment in E.D.L., it went yet a step further and suggested a purely individualized assessment in cases in which there is a "real risk of a significant reduction in [a person's] life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health" as a result of a surrender.[25] Such a risk may lead to postponement, but exceptionally also a definitive refusal. Yet whether this more individualized approach will extend beyond the narrow circumstances of E.D.L. remains to be seen. In a more recent case concerning issues related to detention – a risk for the right to respect for private and family life as well as the rights of the child – the Court was more flexible as regards the rights on which a refusal may be based, but it insisted on the two-step assessment of both generalized, systemic deficiencies and risk in the individual case.[26]

However, conditions of detention did not remain the only concern in EAW proceedings. In the years following *Aranyosi and Căldăraru*, concerns about structural human rights violations in some member states continued to grow, especially with a view to rule of law deficiencies in countries experiencing illiberal, autocratic shifts. The deteriorating situation in the Polish judicial system, with growing attacks on the independence of the

23 ECJ, Judgment of 5 April 2016, Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*.

24 See Ermioni Xanthopoulou, 'The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?' (2022) 28 European Law Journal 218, 223–224.

25 ECJ, Judgment of 18 April 2023, C-699/21, *E.D.L.*, para. 55.

26 ECJ, Judgment of 21 December 2023, C-261/22, *GN*.

judiciary, caused the gravest problems in this respect. This led the ECJ, in its 2018 *LM* judgment, to expand the exceptions from mutual recognition another step further.[27] The judgment arose from a reference request by an Irish court concerning the surrender of a suspected criminal to Poland, triggered by the possibility that the person's trial in Polish courts would violate their right to a fair trial on account of the lacking independence of the Polish judiciary. In response, the ECJ broadened the range of its exceptions beyond the prohibition on inhuman and degrading treatment (which had been at the core of the cases on detention conditions) to the right to an independent tribunal which, for the Court, forms part of "the essence of the right to a fair trial".[28] In this regard, the Court continued to uphold its two-step test, requiring both a general and an individualized assessment. First, national courts had to establish a risk for the right to a fair trial being breached in the judicial system of the country concerned as a result of "systemic" or "generalised" deficiencies. Then, in a second step, they had to "assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following [a person's] surrender to the issuing Member State, the requested person will run that risk".[29] This implied an inquiry into problems of judicial independence at the granular level of the particular courts an individual will be subject to. Merely basing a refusal to execute an EAW on the first step – generalized deficiencies – would, in the view of the Court, interfere with the prerogative of the European Council under the Framework Decision to suspend the operation of the EAW with respect to a member state in general.[30]

This line of argument about rule-of-law concerns and other potential violations of fundamental rights continued in the years after *LM*. The Court repeatedly reiterated its insistence on the need to find systemic or generalized deficiencies and to establish their likely impact on the individual concerned, even as challenges to its approach grew in strength. The jurisprudence on prison conditions was often criticized for not focusing sufficiently on individualized risk – including by the ECtHR[31] – whereas for the rule-of-law cases criticism stemmed especially from the fact that it was often difficult to find concrete evidence that structural problems would actually affect a particular person.[32]

Whatever the remaining shortcomings, the shift effectuated by the court from the high point of mutual trust in 2013 to a broadening range of exceptions after 2016 is

27 ECJ, Judgment of 25 July 2018, C-216/18 PPU, *LM*.

28 Ibid., para. 59.

29 Ibid., para. 68.

30 See Framework Decision, n 5 above, preamble no 10.

31 See ECtHR, Judgment of 25 March 2021, App. Nos. 40324/16 and 12623/17, *Bivolaru and Moldovan v. France*. See also Johan Callewaert, 'The European Arrest Warrant under the European Convention on Human Rights: A Matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility', *Zeitschrift für europarechtliche Studien*, vol Special Issue (Nomos 2021).

32 See Mancano (n 8); Xanthopoulou (n 24).

remarkable. Driven by political circumstances and rights-based challenges, the normative requirement for member states to trust each other had given way to a more nuanced jurisprudence balancing effective cooperation with the need to respond to (certain, systemic) threats to individual rights.

III. The Emerging Focus on Group-Related Problems

The ECJ's focus on generalized or systemic deficiencies allowed it to maintain a principle of automatic execution of European Arrest Warrants and avoid individualized assessments in each case by national courts. But this approach – constant since *Aranyosi and Căldăraru* – had difficulties capturing human rights problems which were not merely related to individual cases but concerned broader identifiable groups without constituting generalized deficiencies at the country level.

The Rise of Group-Related Concerns: Towards *Puig Gordi and Others*

The particular problem of group-related rights violations had already been seen by the drafters of the 2002 Framework Decision. Apart from emphasizing that the Decision was not meant to modify fundamental rights obligations, they also included in the preamble a passage highlighting the risk of using criminal proceedings to discriminate against particular groups:

> "Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons."[33]

33 Framework Decision, n 5 above, preamble no. 12.

This passage takes up standard language of non-discrimination clauses in human rights instruments (while limiting the number of criteria for discrimination). It is remarkable that this particular aspect is explicitly emphasized, while other potential rights problems are not especially mentioned.

The discrimination point constitutes an interpretive guidance but it does not reappear in the (mandatory or optional) grounds for non-execution of EAWs listed in the Framework Decision. It is also not taken up in the early jurisprudence of the ECJ – the emphasis on mutual trust and automatic execution trumped rights concerns anyway, but issues of discrimination also did not seem to emerge from the cases before the Court.[34] However, when introducing the "exceptional circumstances" doctrine in *Aranyosi and Căldăraru*, the ECJ mentioned a related aspect, albeit only in passing. When specifying the circumstances that can ground a potential exception from automatic execution, it pointed to "deficiencies, which may be systemic or generalised, or *which may affect certain groups of people*, or which may affect certain places of detention".[35] In the reception of this judgment, commentators and courts emphasized the "systemic or generalized deficiencies", while the group-related aspect has largely gone unnoticed. It was repeated, without further explanation or direct relevance, in later ECJ jurisprudence.[36]

It is only in *Puig Gordi and Others* in 2023 that the group-related aspect gained prominence. Referring to its earlier case-law, the ECJ here recited its usual justification of a two-step test, but modified that test – without further explanation – to include, alongside the "systemic or generalised deficiencies" the category of "*deficiencies affecting the judicial protection of an objectively identifiable group of persons* to which the person concerned belongs".[37] Unlike in previous cases in which the group-related aspect was mentioned, it acquires direct relevance in *Puig Gordi and Others* because of the structure of the underlying cases that led to the reference to the ECJ.[38] These cases were not connected to systemic deficiencies at the country level, and the Spanish Supreme Court thus sought a finding that, absent such generalized deficiences, the execution of an EAW could not

34 Cases of refusals to execute EAWs against supposed members of the Basque ETA by Belgian courts did not lead to references to the ECJ. On these cases, see Michaël Meysman, 'Belgium and the European Arrest Warrant: Is European Criminal Cooperation under Pressure: Refusal of European Arrest Warrant Surrender in the Case Jauregui Espina as Proof of Failing Mutual Trust' (2016) 6 Eur. Crim. L. Rev. 186. See in this respect also ECtHR, Judgment of 9 July 2019, App. No. 8351/17, *Romeo Castaño v. Belgium*.

35 ECJ, *Aranyosi and Căldăraru*, supra note [xx], paras. 89, 104 (emphasis by the authors).

36 ECJ, Judgment of 15 October 2019, C-128/18, *Dorobantu*, paras. 52, 54; ECJ, Judgment of 25 July 2018, C-220/18 PPU, *ML*, paras. 60-61.

37 ECJ, *Puig Gordi and Others*, n 2 above, para. 147.

38 See also Joan Solanes Mullor, 'Be Careful What You Ask for: The European Court of Justice's EAW Jurisprudence Meets the Catalan Secession Crisis and the European Rule of Law Crisis in Puig Gordi and Others, C-158/21, EU:C:2023:57' (2023) 30 Maastricht Journal of European and Comparative Law 201.

be refused. But the cases concerned a particular (political) group, namely Catalans who supported independence, especially leaders and citizens who had actively organised and participated in the referendum on self-determination held in October 2017 in Catalonia. Some of their political leaders remained in exile in different European countries and has claimed violations of procedural and substantive guarantees by Spanish courts on account of their political orientation.[39] The new category of "deficiencies affecting an objectively identifiable group" was thus clearly addressed at the particular rule-of-law problems present in that case.

The novel approach of the Court surprised many, especially because the Advocate General at the ECJ, Richard de la Tour, had supported the position of the Spanish Supreme Court and found that a refusal to execute an EAW could be justified "only in the presence of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State".40 Yet the ECJ chose to go further. As in the earlier developments in the jurisprudence in this area, this shift towards "objectively identifiable groups" followed a series of political and judicial challenges – challenges especially from the courts of other member states, but also from international experts and quasi-judicial bodies of the United Nations.

Criminalization Challenged: The Background of *Puig Gordi and Others*

Those challenges began soon after several of the pro-independence leaders had gone into exile in late October 2017, in the wake of the Catalan independence referendum and after Spanish courts had begun to use the criminal law for addressing the referendum and the political movement more broadly.[41] After opening investigations for a supposed "rebellion" against many pro-independence leaders, the investigating judge at the Spanish Supreme Court issued the first EAWs against the exiles in early November 2017, only to withdraw them a month later, potentially to avoid a rejection – the courts in Belgium, where most of the accused had moved, were notorious for posing obstacles to the execution of EAWs.[42]

When Carles Puigdemont, the deposed President of the Catalan government, travelled to Finland in March 2018, the investigating judge saw an opportunity and renewed the arrest warrants. Mr. Puigdemont's eventual arrest in Germany, on his return from Finland, attracted major media attention over the following months. However, the competent

39 See Torbisco Casals, Introduction, this volume.

40 ECJ, Opinion of the Advocate-General of 14 July 2022, *Puig Gordi and Others*, para. 119.

41 For the political and judicial background, see Chapter 1, this volume.

42 Se Stephen Burgen and Daniel Boffey, "Spanish judge withdraws arrest warrant for Carles Puigdemont", *The Guardian*, 5 December 2017.

German court – the Oberlandesgericht (OLG) Schleswig – rejected the Arrest Warrant for the most part.[43] With respect to the accusation for "rebellion", the OLG found that the acts underlying the accusation were not subject to similar criminal charges in Germany, and without double criminality persons could not be surrendered to other member states for crimes that were not among the core list under the EAW system. The OLG thus decided that the EAW could be executed only insofar as it concerned the misuse of public funds (for the organisation of the referendum), which could be subsumed under the core crime of "corruption". This would have meant that after a surrender, Mr. Puigdemont could not have been prosecuted for rebellion or related charges in Spain. The Spanish investigating judge found this too narrow, openly criticized the German court for its "lack of engagement" and a violation of the rules governing the European Arrest Warrant and withdrew the warrant as a result.[44]

Meanwhile, the revived EAWs against other exilees were unsuccessful in Belgian courts, too, this time for formal reasons. The competent court in Brussels found, as had the public prosecution, that an EAW could only be valid if accompanied by a national arrest warrant, and that no national warrant was in force at the time.[45] The proceedings in Scotland against another former minister in the Catalan government, Mrs Clara Ponsatí, also commenced in late March 2018[46], were continuing when the Spanish investigating judge withdrew all the warrants in July 2018 in response to the ruling in Germany in the case of Catalonia's deposed President.

Frustrations with the European Arrest Warrants continued for the Spanish judiciary also after the third attempt to have the exilees surrendered, which began in November 2019 after the Spanish Supreme Court had convicted nine other Catalan leaders to lengthy prison sentences and disqualification from office for up to 13 years. Three of those targeted by those new warrants – Mr. Puigdemont as well as two of his ex-ministers Toni Comín and Clara Ponsatí – had meanwhile been elected to the European Parliament and once their status as MEPs had been confirmed (in the face of contestation by Spanish authorities), EAW proceedings against them in Belgium and the UK were suspended.[47]

43 Schleswig-Holsteinisches Oberlandesgericht, Decision of 12 July 2018, 1 Ausl (A) 18/18 (20/18). See also Julia König, Paulina Meichelbeck and Miriam Puchta, 'The Curious Case of Carles Puigdemont—The European Arrest Warrant as an Inadequate Means with Regard to Political Offenses' (2021) 22 German Law Journal 256.

44 See Sam Jones and Severin Carrell, "Spanish court drops international warrant for Carles Puigdemont", *The Guardian*, 19 July 2018.

45 AFP, "Catalogne: la Belgique refuse la remise de trois ex-dirigeants indépendantistes", *Le Point*, 16 May 2018.

46 Severin Carrell and Stephen Burgen, "Catalan academic facing extradition from Scotland granted bail", *The Guardian*, 28 March 2018.

47 Gabriela Galindo, "Brussels court annuls arrest warrant against ousted Catalan leader Puigdemont", *The Brussels Times*, 2 January 2020.

With other targeted persons residing in Switzerland and therefore outside the scope of the EAW system, this left primarily Lluís Puig Gordi, former minister of culture in the Catalan *Generalitat*, as a target for surrender. But also, in his respect, Belgian courts rejected the execution of the EAW. The Brussels Court of First Instance and the Court of Appeal – in July 2020 and January 2021, respectively – found that there were serious concerns about violations of the presumption of innocence and that the Spanish Supreme Court, under Spanish law, did not have jurisdiction to try Mr. Puig and that therefore his right to be tried by a tribunal established by law was at risk of being violated. The Spanish Supreme Court had taken on the case – instead of the courts in Catalonia – because some of the co-defendants could, as members of parliament, only be tried by the Supreme Court. Yet no clear legal basis existed for removing defendants who were not in that position from the jurisdiction of the courts which, by law, were competent to hear their case. As a result, the Belgian courts saw serious risks for a fair trial if Mr. Puig were to be surrendered to Spain.[48] It was primarily in response to these decisions that the Spanish Supreme Court requested its reference from the ECJ.

The Belgian decisions were certainly influenced by challenges against the criminalization of the independence movement in other sites. The Belgian courts explicitly cited the findings of the UN Working Group on Arbitrary Detention which in mid-2019 had found the pre-trial detentions of Catalan pro-independence leaders to be "arbitrary" and in violation of different guarantees under the International Covenant on Civil and Political Rights – from freedom of expression and assembly to procedural rights, such as the presumption of innocence, the right to a competent and impartial tribunal, and the rights of the defence.[49] Other international experts, human rights groups and quasi-judicial bodies had likewise been very critical of the decisions of Spanish courts. Following on from this criticism, the UN Special Rapporteur on the right to freedom of expression had, already in early 2018, called upon Spain to refrain from pursuing criminal charges for rebellion.[50] And the UN Human Rights Committee had, in an exceptional step in 2018, indicated provisional measures to safeguard political rights in the Catalan context.[51]

The ECJ was thus confronted with national courts in Belgium and other countries refusing to act on the European Arrest Warrants issued by Spain. And it was also confronted with ever further expressions of international condemnation of the strategy of criminalization of the Catalan pro-independence movement pursued by Spanish authorities. In 2021, after the Belgian decisions, the Parliamentary Assembly of the Council of Europe called

48 Hof van Beroep de Brussel, Decision no. 2021/79, 7 January 2021.

49 UN Docs. A/HRC/WGAD/2019/6, 13 June 2019; A/HRC/WGAD/2019/12 of 10 July 2019.

50 See United Nations, "UN expert urges Spain not to pursue criminal charges of rebellion against political figures in Catalonia", 6 April 2018, available at https://www.ohchr.org/en/press-releases/2018/04/un-expert-urges-spain-not-pursue-criminal-charges-rebellion-against

51 See Nicolas Tomás and Carlota Camps, "UN urges Spain to guarantee Sànchez's political rights", El Nacional, 23 March 2018. See also Krisch, Chapter 5, this volume.

upon Spain to reform its criminal code, consider pardons and drop further prosecutions in order to decriminalize acts related to the referendum.[52] In 2022, the UN Human Rights Committee found that the political rights of a number of Catalan pro-independence leaders had been violated as a result of the criminal prosecution, which led to their suspension from parliamentary office.[53] The ECJ itself had held, in late 2019, that Spanish authorities had to respect the immunity of pro-independence candidates elected to the European Parliament, which had been denied because of a supposed violation of formal requirements.[54] The European Court of Human Rights had found a violation of the European Convention on Human Rights in the gathering of information on judges who had supported a call for a referendum.[55] Moreover, a significant number of cases related to the Catalan independence movement were pending in the ECtHR.

Just as in the cases concerning conditions of detention and judicial independence, the ECJ's move to create a new category of exceptions in *Puig Gordi and Others* – "deficiencies affecting an objectively identifiable group" – did not come out of a vacuum, but instead out of a context densely filled with serious concerns about rights violations and direct challenges from domestic courts. In addition, the Catalan cases also raised with particular vehemence issues traditionally captured by the "political offense exception" to extradition. Abolished by the Framework Decision in the name of mutual trust, it returns to the scene inevitably when there are principled differences between countries in the appreciation of acts of a political nature directed primarily against the state.[56] Even though classical political crimes – treason, rebellion or sedition – are not among the core crimes for which surrender is quasi-automatic in the EAW system, similar issues return when prosecutions of other, listed crimes – such as "corruption" in the cases here – are perceived to have a political element. Between Belgium and Spain, such issues had already come to the fore with respect to Basque cases earlier, but these did not lead to a reference request to the ECJ.[57] When faced directly with the problem in the case of *Puig Gordi and Others*, the ECJ – unlike the Advocate General – found it necessary to find a principled response by broadening, in however a circumscribed way, the grounds on which national courts can refuse the execution of EAWs.

52 Council of Europe, Parliamentary Assembly, Resolution 2381 of 21 June 2021.

53 UN Human Rights Committee, Views of 30 August 2022, Comm. No. 3297/2019, *Junqueras et al v Spain*.

54 ECJ, Judgment of 19 December 2019, C-502/19, *Junqueras Vies*.

55 ECtHR, Judgment of 28 June 2022, App. no. 36584/17, *M.D. and Others v Spain*.

56 See the argument in König, Meichelbeck and Puchta (n 43).

57 See Meysman (n 34).

IV. Transformations of Mutual Trust in the European Union

The balance between the principle of mutual trust and fundamental rights concerns today is entirely different from that a decade ago. While the ECJ keeps emphasizing the principle that member state courts should normally not engage in scrutiny of (and instead "trust") the laws and procedures of other member states when dealing with European Arrest Warrants, it has established two core exceptions: *systemic or generalized deficiencies and deficiencies affecting objectively identifiable groups*, if those deficiencies are likely to result in a violation of the rights of the individual in a particular case. As we have seen in the detention cases, there might also be an exception based only on individual circumstances, but this seems limited to cases of particular gravity, such as threats to the life or physical integrity of the person concerned. To understand the scope of these exceptions – and especially the group-related exception – we need to take a step back and inquire into the normative rationales behind their development.

EU Criminal Law and Policy: the Quest for Legitimacy

The new formula found in the jurisprudence of the Court has typically been interpreted through the lens of the construction of the European Union.[58] As we saw at the outset, the EAW was created with the clear intention to move towards an "ever closer Union" in the area of justice and home affairs, which had remained largely intergovernmental up until the 1990s. The "common values" of the EU, especially fundamental rights, were not the central focus in the post-9/11 climate out of which the EAW grew, and there was in any case a shared understanding that those values were guaranteed by member states and did not need particular consideration in the arrest warrant system. And, indeed the Framework Decision was enacted in the context of a relatively homogeneous Union of fifteen member states, with enlargement and greater diversity among members still in a relatively distant future. The ECJ's developing approach could thus be perceived as a reflection of growing rule-of-law concerns in an enlarged union and a simultaneous stronger emphasis on values and rights since the Treaty of Lisbon in 2007. In this context, the normative expectation of mutual trust in consistent standards throughout the Union became ever more counterfactual. The Court, in this understanding, responded by rebalancing integration and values, but it did so in a cautious way. Instead of turning to full human rights scrutiny – as many activists and scholars, and some member state courts, had called for – it sought to contain the exceptions and allow scrutiny to replace

58 See, e.g., Peers (n 1).

trust and automatic execution only in grave, exceptional situations – and typically situations characterized by structural problems transcending the individual case. If we want to reconstruct this approach from a normative perspective, much hinges on how we understand the notion of trust underlying the edifice of the EAW – and the quest for legitimacy in the European construction more broadly.

Indeed, political integration in Europe has substantially altered the patterns and forms of governance and undermined the hegemony of the state in the social ordering function. Even if their original legitimacy is bounded by their members' consent in (partially) lending their sovereignty, the EU institutions have attained a life of their own, increasingly acting as relatively independent bodies with significant coercive power. As a result of such mutation, these institutions now exercise public authority, and increasingly portray themselves as promoting public interests, and not just a set of aggregated interests of their members and their domestic constituencies. The contractarian model, based exclusively upon state consent, thus appears obsolete both to account for, and legitimize, such transformations and the impact of strong regulatory powers on the rights of European citizens.[59]

In this new context – characterized by the need for constitutionalizing the European Union based on a shared ethos beyond the traditional intergovernamentalist model – the principles of mutual trust and mutual recognition play a crucial role not merely in guaranteeing effective cooperation and compliance, but also in legitimizing European governance in areas that use to be primarily domestic, such as security and criminal matters. This is because the emerging legal regime was built on the presumption that all Member States could be trusted to comply with their obligations to implement EU law correctly and in good faith, including by providing effective protection of the fundamental rights recognised both in domestic constitutions and at EU level, particularly in the Charter of Fundamental Rights of the European Union.

From Moralistic to Rationalised Trust

While mutual recognition and trust were not explicitly mentioned in the original EU Treaties, both have been invoked in secondary legislation and the ECJ has referred to their relevance in guaranteeing cooperation while ensuring respect for fundamental rights.[60] To be sure, a minimum level of trust is implied in any contract or treaty, as each party needs to rely in that the other will adhere to what is consented and cooperate to

59 See Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

60 See Andrea Miglionico and Francesco Maiani, 'One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice' (2020) 57 Common Market Law Review.

comply with ensuing obligations. But in the context of European integration, mutual trust has often been connected to a principled, non-calculative, conception based upon shared interests and values, including democracy, human rights and solidarity, that foster the qualified type of bonds that justify supranational integration as a cooperative enterprise. Cooperation, to be sure, does not emerge naturally. It requires from the agents involved a significant degree of intrinsic commitment (to the goods and values that cooperative schemes are meant to enhance), and of altruism (that is, the willingness to put aside one's opportunistic, immediate or selfish interests and prioritize participation to generate a 'common good'). The benefits of a generalized climate of trust in the context of building cooperative enterprises are apparent. Trust reduces social complexity, and acts as a countervailing force against egotistic predispositions and risk-averted inclinations, facilitating effective collective action and the capacity to share with others on a voluntary basis. Mutual confidence, as a 'non-calculative' general reliance on the goodwill and trustworthiness of others, expresses a positive expectation that somehow defies evidence; that is, we simply behave "as though the future were certain",[61] and count on the assumption that the others will fulfil their roles responsibly, or act according to reasonable social standards respectful of common interests or needs.

Trust thus allows to tackle collective action dilemmas that can impede the achievement of the common good, and is even perceived as critical to build and sustain social capital, in Robert Putnam's terms[62], to the extent that it increases the capacity of civil society to organize and create both formal and informal associations, from political parties to bowling leagues. Furthermore, trusting parties tend to abide willingly by the rules, as they are confident that others will comply, too. This allows saving on constant monitoring to prevent opportunistic behaviour, and thus a democratic society that cultivates strong relations of trust can afford fewer regulations and greater freedoms.[63]

For this reason, trust is portrayed as the 'glue' or the 'lubricant' that binds society – also European societies – together[64] and motivates a positive interaction towards achieving common goals, which underpins any well-functioning democracy.[65] At the supra-national level, it is also assumed that democracy will flourish and function more effectively if a general climate of trust is extended politically, between member states.[66] In a moralistic, non-strategic form of trust, this is based on normative beliefs and commitments rather

61 Niklas Luhmann, *Trust and Power* (Wiley 1979) 10.

62 See, e.g., Robert D Putnam, 'Bowling Alone: America's Declining Social Capital' (1995) 6 Journal of Democracy 65.

63 Patti Tamara Lenard, *Trust, Democracy, and Multicultural Challenges* (Penn State Press 2012).

64 Kenneth J Arrow, *The Limits of Organization* (W W Norton & Company 1974).

65 See David Miller, *On Nationality* (Oxford University Press 1995); Lenard (n 63).

66 On political trust and its implications for cooperation and altruism in globalising democracy, see Neus Torbisco Casals, 'Beyond Altruism? Globalizing Democracy in the Age of Distrust' (2015) 98 The Monist 457.

than in a calculative disposition that economists take as a central manifestation of rationality. Moralistic trust mostly involves a prescriptive statement on how people should behave and relate to one another.[67] In this conception, trust has *intrinsic*, rather than merely instrumental, value: it allows expressing respect for others as human beings, and also the hope that others are equally capable of acting in a respectful way, thus honouring the faith or confidence that we place in them. Therefore, its nature is not mainly linked to a realistic recognition of our 'bounded' rationality and the limits of 'calculativeness'[68], but rather to a conscious decision to trust, in spite of the risks involved, as a way of behaving in accordance with our beliefs and commitments, even if this involves making sacrifices or coping with the potential lack of reciprocity.

Cooperation based on a strong form of trust has always been challenging in contexts such as the European characterized by historical grievances, economic asymmetries and deep cultural divides. But it became yet more challenging as divergences and disparities between member states grew with enlargement of the EU and democracy's decline also affecting other parts of the world – a decline that has also favoured a backlash against human rights.[69] Growing sources of distrust and insecurity have, indeed, made cooperation riskier.

Admittedly, to engage in communal enterprises is always risky, for it requires granting discretion to others to affect our interests, which then leaves us in a position of special vulnerability.[70] However, if distrust grows, the incentives to place ourselves in such an asymmetrical relationship will be drastically reduced and cooperative disposition might only occur within a highly 'rationalized', efficiency-oriented framework, which offers sufficient reassurance about the "rationality" of trusting others, which requires enough guarantees to neutralize (or minimize) the underlying risks. This rationalised conception of trust contrasts with the non-utilitarian, non-calculative understanding described above. Rather than displaying an attitude of confidence, granting trust expresses the outcome of a decision-making process that aims at reassuring that trust is indeed warranted. Knowledge is consequently crucial in this account, which is primarily focused on how to make accurate predictions about the 'trustworthiness' of others, and of the risks of trusting them, based on information about their character, interests, motivations or competence.

But there are obvious hurdles to achieving a high level of certainty beyond the circumscribed scope of special or close relationships that, to a great extent, are inherently

67 Eric M Uslaner, *The Moral Foundations of Trust* (Cambridge University Press 2002) 23.

68 Oliver E Williamson, 'Calculativeness, Trust, and Economic Organization' [1993] Journal of Law and Economics 453.

69 See Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5; Leslie Vinjamuri, 'Human Rights Backlash' in Stephen Hopgood and Jack Snyder (eds), *Human rights futures* (Cambridge University Press Cambridge 2017).

70 Baier, Annette, 'Trust and Antitrust' (1986) 96 Ethics 231.

non-calculative. To begin with, there are numerous factors that 'bound' our rationality and can jeopardize cooperation. Rational agents have a limited cognitive capacity to discern the interests of others, and also to identify optimal outcomes in non-ideal circumstances - that is, when information is incomplete, or difficult to process, and systemic hazards can occur due to deceitful behaviour. Beyond the individual realm, and especially in the absence of previous positive experiences or specific evidence, collective trust involves trusting strangers, which might still be rational if we can assume that acting in favour of our interests will be in their interest, too. Russell Hardin's well-known account of trust as an encapsulated interest[71] is particularly suitable to capture such a strategically oriented dimension of trust that might prevail at the EU level - as we can assume that, for example, automatically executing European Arrest Warrants will benefit all member states. But beyond these utility-maximizing instances of 'trust', the hyper rationalistic notion of trust typical of economic reasoning seems quite inimical to this political project.

In any event, the principle of mutual trust in the EU context was primarily linked not so much to vested interests, but to *shared* interests, understandings or normative commitments and values. If these become diluted, or less shared, predicting compliance and cooperation is harder (especially when cooperation imposes demanding obligations or can lead to sacrificing domestic constitutional principles or values). By definition, mere strategic interactions are not guided by ethical norms or altruistic motivations.

The shifting jurisprudence by the ECJ on the European Arrest Warrant can then be seen as an expression of a development from generalized (blind) trust to this second, more cautious, rationalised notion of trust. In this new shape, it opens the door to stronger scrutiny and controls that promote a balance between a normative, non-calculative, conception of mutual trust and a rationalised model. The broader exceptions from automatic execution, allowing national courts to verify the human rights situation in other member states, represent a shift to a more rationalistic – less moralistic and more cautious – model of trust based on accepting controls to reassert foundational principles and potential abuse.[72]

Indeed, the presumption that all Member States can be trusted to comply with their obligations to implement EU law correctly is substantially connected to the democratic quality of transnational governance. But the EU has expanded to incorporate diverse (heterogeneous and unequal) peoples and societies, and it remains unclear how mutual trust and recognition can be presumed, or taken for granted, in a context marked by strong cultural and political divides. Over time, with the successive enlargement of the

71 Russell Hardin, *Trust and Trustworthiness* (Russell Sage Foundation 2002).

72 See also the account of trust, information and control in Patricia Popelier, Giulia Gentile and Esther van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' (2021) 27 European Law Journal 167.

initial "European Communities", such safeguards had to be strengthened. For instance, the Copenhagen Criteria on democracy, the rule of law and fundamental rights, adopted in 1993 by the European Council[73], specified the kind of shared ethos as conditions of entry to the EU (now reflected in Articles 2 and 49 TEU), which can also be seen as pre-conditions for mutual recognition and trust.

Safeguard mechanisms are important in any contract to incentivize cooperation and prevent serious breaches that could jeopardize the overall agreement. The EU has a variety of such mechanisms – infringement proceedings against Member States for infringing EU law, financial or other penalties for non-compliance with ECJ judgments, and even an institutionalized response when there is a risk of serious breaches of the values underlying the Union under Article 7 of the Treaty on European Union. In the original design of the EAW, it was also through the latter procedure that was supposed to work in dealing with problems with human rights and the rule of law in a particular member state. Given the high threshold for triggering that mechanism, however, it is not practical in circumstances where significant violations of human rights do occur but they fail to reach the threshold of "serious breaches of the values of the European Union".[74]

The ECJ thus had to rely on general principles and interpretive tools to ensure the protection of fundamental rights. The challenge was to define exceptions that would achieve the right balance, thus guaranteeing respect for fundamental rights and, at the same time, avoid impinging on the automaticity and effectiveness of the EAW system. In the case that concerns us here, the ability of domestic courts to scrutinize human rights compliance by other Member States can ultimately enhance the democratic quality of supranational governance. After all, this constitutes the normative basis that justified mutual trust and mutual recognition in the first place. In fact, a blind, merely moralistic presumption of trust might be self-defeating as it can deteriorate the legitimacy of supranational governance in criminal matters in the eyes of the citizens. Instead, a more rationalised model of trust, which assumes that distrust is sometimes justified, can offer a more substantial basis for mutual recognition on the basis of a shared commitment to preserving fundamental rights.

73 See European Commission, "Accession Criteria", available at https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accession-criteria_en.

74 Framework Decision, n 5 above, preamble para. 10.

V. The ECJ as a Constitutional Court: Judicial Review and its Limits

If the jurisprudential shift from the restrictive approach in *Radu* or *Melloni* to the greater openness in *Puig Gordi and Others* redefines the notion of mutual trust in the EU, it also redefines the role of the ECJ in the political and institutional system. We can thus also understand the shift as a reflection of the Court's (still limited) role as a constitutional court of the European Union.[75]

In a constitutional framework, a court – even when tasked with enforcing a constitution, or in the case of the EU, foundational treaties – will normally practice a certain degree of deference to the legislature. Courts vary in their approaches across countries, but many combine such deference with different levels of scrutiny, depending on the problem at hand.[76] The "scrutiny spectrum" has been explored in particular in the United States where the US Supreme Court has developed a jurisprudence centred on three distinct levels of scrutiny – rational basis review, intermediate scrutiny, and strict scrutiny. The latter category comes into play in cases in which constitutional rights are at issue and especially when legislation employs "suspect classifications" that raise concerns about discrimination.[77]

This approach has been understood, and justified, as striking a balance between democratic principles and rights protection. In democratic societies, courts reviewing legislative choices are faced with a counter-majoritarian difficulty in that, by enforcing rights or other constitutional protections, they typically overrule a parliamentary (and thus usually electoral) majority.[78] A full assessment by a court of the rationality and justification of legislative action would then risk unduly encroaching upon democratic processes. The proper role of judicial review is then – in the influential account of John Hart Ely – a limited one that focuses on two aspects primarily: on process and procedures, to ensure that a legislative choice is indeed reflective of democratic processes, and on the representation and protection of minorities that are structurally disadvantaged in

75 On the constitutional role of the ECJ, see, e.g., Alicia Hinarejos, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford University Press 2009) ch 1.

76 For broad comparative approaches, see e.g., Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill 1971); Doreen Lustig and JHH Weiler, 'Judicial Review in the Contemporary World—Retrospective and Prospective' (2018) 16 International Journal of Constitutional Law 315.

77 See Richard H Fallon Jr., *The Nature of Constitutional Rights: The Invention and Logic of Strict Judicial Scrutiny* (Cambridge University Press 2019).

78 See Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986).

those processes.[79] This builds upon a 1938 decision of the US Supreme Court in which Justice Harlan Stone, writing for the Court, suggested that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities", and consequently might call for a "more searching judicial inquiry" than the Court normally applies.[80]

The reference to "discrete and insular minorities" provides a useful frame for understanding the ECJ's turn towards "objectively identifiable groups". The ECJ, when interpreting the Framework Decision, largely operates as a constitutional court – it uses overarching constitutional rules and principles, especially concerning fundamental rights protection, to reinterpret the Framework Decision in a manner that goes well beyond the express exceptions from the principle of automatic execution of EAWs. The initial stance of the Court – its application of the explicit text of the Framework Decision for over a decade – is easily understood as deference to the legislative process, and that deference is still visible in the limited and cautious creation of exceptions to mutual trust. The ECJ does not overrule the fundamental choices behind the Framework Decision entirely, but it intervenes to make sure that broader deficiencies in the rule of law in a country (affecting political and judicial processes as a whole) as well as special problems for particular groups (not normally well-reflected in democratic processes) can be remedied in the EAW system.

The position of the ECJ here, however, has to be seen in the context of the complex architecture of the European Union and its member states. The shift in its jurisprudence not only reflects a scrutiny of legislative process at the level of the EU, but it also allows for national courts' scrutiny of the legal and judicial practices of other member states. Unlike in traditional extradition procedures, which are more focused on questions of double criminality, national courts deciding on European Arrest Warrants now sit in judgment over rule-of-law deficits in other countries. This erects a certain decentralized review mechanism of member state action on the basis of EU fundamental rights – a result that is unavoidable from a human rights perspective, but also one that was seen as undesirable by member states when establishing the EAW system. The European court itself is in principle not authorized to review member state action for human rights compliance, except in areas in which member states implement EU law.[81] Even the European Court of Human Rights, explicitly charged with assessing national action for its compliance with human rights, often employs a "margin of appreciation" to limit its level of scrutiny.[82] In this context, the decentralized rights review in the EAW system thus

79 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

80 US Supreme Court, *United States v. Carolene Products Co.* (1938), 304 U.S. 144 (1938), Majority Opinion (Stone), fn. 4.

81 See Article 51(1) of the Charter of Fundamental Rights of the EU.

82 See Angelika Nussberger, *The European Court of Human Rights* (Oxford University Press 2020).

also creates tensions with the sovereignty of member states, and it is understandable that the ECJ would practice deference not only to EU legislation but also to member states' political and judicial processes.[83] Yet this deference ends when there are indications that the usual political or judicial procedures by which member states ensure human rights compliance do not function as assumed.

The ECJ's approach to rights issues in the EAW context can thus be best understood as a reflection of both the EU's particular architecture of integration – and the resulting shifting notion of mutual trust – and the Court's evolving role as a constitutional court of the European Union. Both aspects counsel a limited, deferential approach – one that respects the principle of mutual trust and democratic decision-making in the EU and member states. Yet they also require that the Court exercise scrutiny when such trust is undermined by challenges not normally corrected in the political process. The formula found by the court for European Arrest Warrants – automatic execution except in situations of generalized, systemic deficiencies or particular group-related problems – is best understood as an attempt to strike the difficult balance between deference and scrutiny.

VI. Unpacking the Concept of "Objectively Identifiable Groups"

The contours of the balance between deference and scrutiny, and the extent of the shift initiated in *Puig Gordi and Others*, become clearer if we can specify the scope of "deficiencies affecting objectively identifiable groups". So far, the ECJ's jurisprudence has given limited indications in this respect. Yet these indications, coupled with the reconstruction of its rationale in the previous section, provide us with some guidance on this new category of exceptions to the principle of mutual trust and automatic execution of EAWs.

As we have seen, the category was first developed in a case with group-related deficiencies related to a particular political group – the Catalan pro-independence movement – which, within Spain, is a minority political group seeking a fundamental change in

83 See Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 European Law Journal 80.

the constitutional structure of the country and is subject to criminal prosecutions as a result. Since then, the new category has only been employed in one other case. That case, *GN* of December 2023, concerned the refusal by an Italian court to execute an arrest warrant issued by Belgian authorities to enforce a judgment rendered *in absentia* against a mother with a small child and pregnant with another.[84] Up until 2021, Italian legislation had contained a clause that prohibited the surrender of pregnant women and mothers of children of less than three years of age, yet this clause was deleted by the Italian parliament to achieve better compliance with the Framework Decision. However, in the case of *GN*, Belgian authorities had not provided concrete information about detention arrangements for the person concerned, and the Italian courts held that without sufficient certainty that Belgium would take adequate measures protecting the right of children not to be deprived of their mother, the surrender of that mother could lead to a breach of the fundamental rights protected by the Italian Constitution and the ECHR. In its reference in the case, the ECJ reiterated its general approach to mutual trust in the arrest warrant system and pointed to the two categories of exceptions developed previously. It also explicated those categories further when it held that an executing authority must ascertain the concrete grounds for a potential violation of rights if it sees a risk

> "on account of either systemic or generalised deficiencies in the conditions of detention of mothers of young children or of the care of those children ..., *or deficiencies in those conditions affecting more specifically an objectively identifiable group of persons, such as children with disabilities*".[85]

The Court distinguishes here between the situation of mothers and children – related to potential "systemic or generalized deficiencies" – and that of narrower groups, such as children with disabilities, which fall into the category of an "objectively identifiable group of persons".

While the line drawn between these categories does not become entirely clear, the latter appears to be reserved for smaller, particularly vulnerable groups. This would correspond with the approach in *Puig Gordi and Others*, where a political minority was concerned. It would also align with the understanding developed in the previous section, which built on the jurisprudence of the US Supreme Court and highlighted the particular role of courts in protecting "discrete and insular minorities" which are typically unable to make their voices heard effectively in the political process.

This provides sufficient ground to begin reasoning towards a clearer understanding of the legal category of "objectively identifiable groups of persons". This category is thus likely to contain a number of subcategories of vulnerable or marginalised groups, not

84 ECJ, Judgment of 21 December 2023, C-261/22, *GN*.

85 Ibid., para. 45 (emphasis added).

only in terms of social subordination or numerical disadvantage, but also in political terms. In general terms, it fits with the rationale famously expressed by Justice Harlan Stone, of the US Supreme Court in the renowned *United States v. Carolene Products Co.* (1938) described above. Minority litigants keep recalling it today to request a special scrutiny ("more searching judicial inquiry", in the original terms) of the disproportionate impact of certain norms or decisions on specific "discrete and insular minorities", which are often insufficiently represented in legislative processes, tend to be systemically oppressed or marginalised, or have limited power to influence legislative or other decision-making procedures and outcomes.

Such a group-conscious conception, which goes beyond individualist forms of discrimination and inequalities to consider the vulnerabilities affecting specific identity groups, is based on an expanded conception of the role of human rights as constraints to powerful majorities and on the instrumental role of judicial review in preventing abuses. In contrast with the individualist (narrower) framework of discrimination, which focuses on the impact on a specific individual without considering his or her identity or role in a given group, advocates of applying a higher standard of scrutiny (when considering, for instance, the execution of a EAW against one or various members of a national minority) typically contest the individualist approach because it generally neglects concerns for structural forms of discrimination and minority rights violations. For the case that concerns us here, a "weaker" model of judicial review based on a principle of (almost blind) mutual trust could de facto protect harmful politics of domination and a paradigm of democracy based on pure majoritarianism. These have clear risks for the rights of minority political opponents – in our case, minority nations that raise claims of self-determination and culture through distinctive political parties or civil society groups.

As a matter of fact, contemporary political disagreements that increasingly confront majorities and minorities regarding the shifting intersections between culture, gender, ethnicity and nationality play a bigger role in strategic litigation in supranational courts of justice. The current backlash against human rights, linked to the emergence of populist forms of democracy, has brought about a renewed public hostility against minorities and, in many European countries, major setbacks on the domestic protection of their rights. In this context, increasingly disempowered and frustrated minorities turn to international courts for protection. Obviously, public courts (in particular, international human rights courts) are not always well placed to engage the multifaceted dimensions of political "struggles for recognition" – in the terms of Canadian political philosopher Charles Taylor.[86] Yet, minority litigants who see their status and rights increasingly threatened by an adverse political climate and have little hope for influence given their structural marginalisation, often seek to restrain the discretionary powers of powerful majorities in perpetuating systems of disadvantage and/or reproducing existing cultural bias or

86 In Amy Gutmann (ed.) Multiculturalism and "the politics of recognition". An Essay by Charles Taylor. NJ, Princeton University Press (1992): 25-73.

a system that discriminates and subordinates them. Through strategic litigation, they seek an affirmation of what they see as collective entitlements, and not merely individual rights or concessions granted out of toleration.

As a result, judges are playing a central role in dealing with cultural clashes and identity claims that confront majority and minority cultures. This raises questions as to whether the judicial sphere provides the best context in which to settle these disputes or, on the contrary, it might exacerbate them yet further. At the outset, there are reasons to think that the essential role of judges and courts in protecting vulnerable minorities, which is usually invoked in objections to the counter-majoritarian critique of judicial review, places public courts in a good position to assess their demands. The judiciary, as Alexander Hamilton famously claimed, might indeed be the "least dangerous" branch "to the political rights of the Constitution," as it has "no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society."[87] In the context of the political backlash described, the international judicial setting can provide a forum for public deliberation and visibility of minorities whose interests and views are typically underrepresented or simply excluded from the domestic political sphere. Hence, the international judicial mobilisation of minorities could give human rights courts the chance to unsettle unfair systems, help inform public understandings, and subvert the narratives and position of privilege of dominant political groups. When rulings (especially those that come from prestigious courts) reflect an effort to hear the voices of women, or of racial, ethnic, gay, religious or national minorities, and to treat their reasons fairly, they have a potential for helping to overcome dominant prejudices against these groups as well as stereotypes of their members and the subordination of their political claims, which is an anti-democratic trend.

Group-Conscious Discrimination and Structural Inequalities

However, this perspective requires a group-conscious understanding of structural forms of discrimination, and to this extent the introduction by the ECJ of the category of "objectively identifiable groups" is crucial to moving towards a more collectivist paradigm of human rights protection. In particular, it involves a shift in perspective, which can take the form of a more rigorous judicial scrutiny, or an inversion of the burden of proof, when there is a reasonable suspicion of political persecution or criminalization of specific groups, as in the Catalan context. Against a suspicion of minority group discrimination and historically subordinated statuses, the principle of mutual trust should take a less prominent role.

87 Alexander Hamilton, *The Judiciary Department, in The Federalist Papers*, 78, 590 (Alexander Hamilton, James Madison, John Jay, eds. 2007) [1788].

In order to spell out this argument, some further remarks to the concept of structural inequality and discrimination might be useful. These notions stand for something other than transitory, fortuitous disadvantages that may be the product of pure bad luck or simply attributable to individual poor choices. As Iris M. Young argues, structural inequality primarily involves "a set of reproduced social processes that reinforce one another to enable or constrain individual actions in many ways". It thus consists "in the relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or easier access to benefits"[88]. The idea of 'social structure' refers to a complex layering of elements (including legal institutions, occupational and property systems, the organisation of family and sexuality, market relations, and division of labor) in which individuals find themselves standing in a given *position*. This position strongly determines their self-perceptions, opportunities and their power to claim their rights.

Structural inequalities tend to be institutionally embedded, deeply rooted in rules, cultural symbols and decision-making processes, so that individual agents acting within this framework (often also members of oppressed groups) contribute to reinforce and perpetuate existing patterns of disadvantage, often *unintentionally*. Thereby, different group statuses are created and reproduced which serve as carriers of subordination, triggering harmful effects that, as Owen Fiss argued in his seminal piece 'Groups and the Equal Protection Clause', are unlikely to be legally actionable as long as the ideal of equality is interpreted as merely embodying an individualist understanding of the anti-discrimination principle.[89] This is so because the highly individualistic structure of that principle often neglects the effect of majority rules in disadvantaging minorities of different sorts. Instead, a group-conscious understanding of discrimination is a better way of approaching the challenge of human rights protection in a political and social world shaped by profound power inequalities. Even if overt discriminations denying political rights to certain groups are proscribed, there are other equally compelling constraints to empowerment and autonomy that might arise from legally adopted rules that perpetuate systemic exclusions and make it impossible for minority groups to exercise their rights.

In sum: the concept of "objectively identifiable groups" as an exception allowed by the ECJ leads to embracing an anti-subordination logic in the assessment of rules or demands when the case at hand might affect individual members in groups that have a history of status subordination (social, political or cultural) or suffer from a systemic under-inclusion, alienation or non-dominating position in the political process in the context of an otherwise well-functioning democratic system. This approach is grounded in a conception of rights and democracy which goes beyond mere majoritarianism and

88 Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000) 2, 15.

89 Owen M Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy & Public Affairs 107.

requires that minority groups are also engaged in the process of governing themselves and that political pluralism is protected.

Of course, even acknowledging the transformational potential of public adjudication in counteracting majority domination, the idealised view of judges as impartial and almost infallible authorities, who can act as a safe haven from majoritarian prejudice, underestimates the institutional constraints and biases that might undermine the required impartiality of adjudicators. Here, it is important to recall that the composition of courts (both domestic and international) is made up of middle- and upper-class professional elites (mostly male) that, in most cases, are also members of the majority culture. There is a risk that the cultural, ethnic, and gender imbalances that are typical of the judicial bench across Western democracies affect impartiality.[90] not because of a conscious prejudice, but simply because judges attend less carefully to the facts of the case, or display a lower level of "perceptual sensitivity"[91] towards the reasoning or arguments invoked by minority claimants. The problem, in other words, is one of adjudicators being less *mindful*, and hence less objective and impartial, in assessing the claims of minority litigants[92].

On the other hand, judges are not legislators, and are required to act as legal agents with a circumscribed function of interpreting and applying legally binding norms. However, human rights norms and fundamental rights are typically expressed through abstract and vague clauses that incorporate contested concepts. In the legitimate scope of judicial discretion, the ECJ and the ECtHR can certainly adopt a broader understanding of non-discrimination using the category of "objectively identifiable groups", which opens the door to a more emphatic concern for the particular experience of minority claimants, who are representatives or members in politically marginalised, disadvantaged or otherwise subordinated and disenfranchised groups.

90 There is an increasing interest in exploring the impact of the lack of diversity in the composition of courts (both domestic and international). *See, e.g.*, Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?* 12 Chicago J. Int'l L. 647 (2012). Neus Torbisco-Casals, "The Legitimacy of International Courts". The Journal of Social Philosophy. Vol 52. Issue 4. 2022

91 *See* Maksymilian Del Mar, *Judging Virtuously: Developing an Emphatic Capacity for Perceptual Sensitivity*, 5. Jurisprudence 5 177 (2014).

92 Neus Torbisco-Casals reflects on this question in "Multiculturalism, Identity Claims and Human Rights: From Politics to Courts". Law & Ethics of Human Rights 2016; 10(2): 367.

An (Open) Typology of Relevant Groups

On the basis of the analysis of existing jurisprudence and our further reconstruction of the rationale behind it, we can render more clearly the potential contours of the category of "Objectively Identifiable Groups" in the EU context. This category should thus be understood to include:

a. Cultural, ethnic and linguistic minorities. Such minorities are present in many EU member states – from the Bretons in France to the Turks in Romania or Roma throughout a variety of countries. In terms of language, there are over 60 regional and minority languages across the European Union. Such minorities are protected in the context of the Council of Europe, especially by the Framework Convention on National Minorities, but also by European Union law itself.[93] Typically far smaller in numbers than mainstream societies and with a distinct identification that sets them apart, minorities of this kind are typically vulnerable to majority domination in the political process and their claims of minority rights vary substantially and involve accommodation policies and collective rights in recognition to their differences with the majority culture.

b. Racial and religious minorities. Such minorities are usually less geographically concentrated but represent minority groups across different member states. This holds in particular for people of other than white-Caucasian complexion, and for non-Christian religions (though in many countries, certain Christian groups are also in the minority). Muslim communities represent an estimated 13 million EU residents, corresponding to around 3.5 per cent of the EU population. Blacks comprise almost 10 million residents. The prevalence of both groups varies heavily across member states, but typically does not surpass 10 per cent of the population. Often identifiable because of physical features or distinctive clothing or symbols, these groups are particularly at risk of discrimination, and they have significantly lower political representation.

c. Social minorities. This is a broad sub-category comprising a variety of social groups which, because of physical or cultural characteristics or identification, are regarded as somewhat distinct from the majority population. Beyond the "children with disability" mentioned by the ECJ in GN, it can include people with physical or mental disabilities more broadly, people with particular sexual orientations and gender identities or also migrants or people with a migration background. In general, any characteristic might constitute a social minority if it is used to mark a group as distinct and leaves it vulnerable to discrimination or domination by the majority.

93 See Rainer Hofmann, Tove H Malloy and Detlev Rein, *The Framework Convention for the Protection of National Minorities: A Commentary* (Brill 2018); A Aslı Bilgin, 'Minority Protection in the European Union: To Protect or Not to Protect?' (2019) 26 International Journal on Minority and Group Rights 92.

d. Peoples or Minority Nations that claim not only minority protections (in the form of a politics of toleration involving negative rights, exemptions or policies against assimilation), but also aspire to be recognise as "distinct" nations or peoples with self-government rights, as it is the case of Catalonia, Scotland and other nations without states. In these cases, claims involve collective rights, such as the right of self-determination (internal or external). These groups are typically organized through political parties and civil society movements – which often face structural obstacles to becoming effective in the political process of many countries and their struggles for special recognition, historical justice and democratic access to statehood is often denied or even criminalised, as in the case of the Catalan self-determination political movement (the focus of *Puig Gordi and Others*).

While these four categories give an indication of certain "discrete and insular" minorities that may fall under the umbrella of "objectively identifiable groups", they should not be seen as fixed or limited. Groups are socially constructed, both through the actions of their members and their political environment. The categories of minorities and peoples, as distinct entities, are also fuzzy, and often interchangeable and group rights can be interpreted and exercised in many ways, also within the boundaries of existing states. Group rights have been the subject of increasing international human rights protection in the last two decades, precisely because failure to protect them have often had negative implications in terms of individual human rights violations, political persecution and the deterioration of democracy.

As we can glance from the *GN* judgment, some groups are not necessarily cohesive or reflect a self-understanding of its members – they may be constituted solely on the basis of common traits, such as a disability. Whenever such a characteristic provokes particular reactions by the majority or the state – through repression, surveillance[94] or other negative consequences – the persons with the characteristic may be seen as an "objectively identifiable group". Deficiencies affecting such a group, especially human rights violations committed against it, can then become a ground for piercing the mutual trust in the European cooperation on criminal matters – and justify a refusal to execute EAW.

Beyond the EU framework one clear example of the relevance of adopting a group-conscious approach to human rights protection as key to democracy concerns indigenous peoples. The progressive recognition of their self-determination claims at the international level (leading to the UN Declaration on the Rights of Indigenous Peoples in 2007, which affirms the right of internal self-determination in the form of collective rights to own and control their lands and territories) has not necessarily translated into local realities but certainly into an increasing political mobilization of these groups. As a result, indigenous persons and rights defenders are facing greater violence and individual human rights violations today, which experts see as a backlash triggered by increasing vindication of collective rights, including self-determination, land rights

94 See Mégrét, Chapter 4, this volume.

and territorial autonomy. These rights are crucial in their broader struggles for cultural survival against settler states and in the current context of environmental crisis, as preserving their eco-systems is seen as an intrinsic part of their cultural and historical identities. This group rationale is reflected in a number of strategic litigation initiatives in regional international human rights courts, but political mobilisation has caused real threats for indigenous rights activists and defenders. According to Front Line Defenders, almost half of the human rights defenders who were killed in 2022 in 26 countries are estimated to be indigenous rights claimants. In addition, several reports submitted to the Human Rights Council by the UN Special Rapporteur on the Rights of Indigenous Peoples have alerted about criminalization becoming a common tool, which contributes to transforming peaceful political demands into open conflicts as they are largely an attempt to silence indigenous peoples voicing their opposition to projects that threaten their livelihoods and cultures. More recently, the current Special Rapporteur, Francisco Cali Tzay (a Mayan Cakchiquel from Guatemala), has also alerted to the widespread impunity for those who commit violence against indigenous rights defenders and to the link between advocating self-determination and being a victim of violence and political persecution. In some instances, indigenous peoples' way of life and cultures have been deemed illegal in order to facilitate evictions from their ancestral lands. This typically occurs as a 'push back" from governments and other stakeholders when native groups oppose large-scale development projects. Indigenous organizations have also been subject to illegal surveillance and confiscations through legal regulations and policies that aim at weakening their mobilization and restrict their social support. In this context, legal individualist approaches to violence, criminal law and discrimination are clearly insufficient to address structural patterns of injustice and vulnerabilities.

VII. Conclusion

Since its inception in 2002, the European Arrest Warrant system has remained largely the same in form, but it has undergone a fundamental transformation in fact. As we have shown in this chapter, the European Court of Justice has – after much hesitation in the early years – rebalanced the principle of mutual trust underlying the EAW with fundamental rights concerns through a variety of steps. It has not abandoned the idea that the automatic execution of arrest warrants should only be refused "in exceptional circumstances", but the scope of these circumstances has been progressively widened over time. If the Court long required systemic and generalized deficiencies, it has now

opened the door to deficiencies affecting particular, objectively identifiable groups, as long as these deficiencies pose a concrete risk for the rights of the individuals concerned.

This transformation did not occur in a vacuum, but is instead the result of sustained pressure – from civil society, political actors and especially courts. National courts that had to implement arrest warrants, constitutional courts seized by applicants against surrender decisions as well as the European Court of Human Rights increasingly challenged the "blind trust" required by the Framework Decision and called upon the ECJ to exercise meaningful review – and especially allow national courts to exercise such review on the grounds of fundamental rights, which had gained greater weight in the EU with the Charter of Fundamental Rights. Gradually, the ECJ established itself as more of a constitutional court, not just a "motor" of European integration but also an independent check on the political bodies of the EU when integration stands in tension with individual rights. Both on issues of asylum and criminal justice cooperation, the Court thus slowly but surely built a system in which – despite stronger integration mandates in EU law – national courts could scrutinize the political and legal practices of other member states.

The focus on "deficiencies affecting objectively identifiable groups" in the 2023 judgment in *Puig Gordi and Others* is a particularly clear reflection of this new role of the ECJ. The focus on group-related problems, as we have traced in this chapter, had some basis in the Framework Decision and earlier jurisprudence, but had not gained relevance in earlier instances. Yet the Catalan cases with which the Court was confronted brought the issue to the forefront. Without "systemic and generalised deficiencies" affecting the whole country, but with a clear pattern of human rights violations beyond individual cases, the ECJ had to forge a new approach. It did so in a way reminiscent of the US Supreme Court's justification of strict scrutiny for problems related to "discrete and insular minorities", by allowing national courts to refuse the surrender of individuals when arrest warrants against them contain the risk of actualizing deficiencies affecting particular groups. These groups, as we have argued on the basis of the Court's jurisprudence, can be of different kinds: ethnic, linguistic, racial, religious, social or political groups are all candidates here, as long as it can be shown that certain rights problems affect them in a particular way. With this move, the ECJ has not opened to door to human rights scrutiny for every individual case, but it has come closer to a viable balance between European integration and rights protection for particularly vulnerable groups, and it has made yet another step towards constitutionalizing the European Union.

Chapter 3

Freedom of Expression and Assembly Issues in the Conflict over Catalan Independence

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I. Introduction

Freedom of expression is a core human right essential for democracy. It underpins the right of public participation and political engagement. Its basis is set out in international human rights law, in particular in the International Covenant on Civil and Political Rights and the European Convention of Human Rights. Further, minority and disadvantaged groups are given additional protection under international law to ensure that their voices are heard and protected.

While it is not an absolute right, countries can only restrict freedom of expression in limited circumstances. Speech which relates to political topics and issues of public interest is strongly protected and can only be restricted in the strictest of circumstances. This equally applies to discussions around self-determination and political structures of the state, including secession, so long as it does not advocate for violence or promote hatred.

Similarly, freedom of assembly, relating to peaceful protests, has also been pronounced as a core human right, interrelated with freedom of expression, and essential for public participation. Like freedom of expression, its basis is clearly set out in international human rights law and cannot be restricted except in strict circumstances. This also includes protection of discussions on issues such as secession.

The conflicts arising from the debates over Catalan independence have raised many challenges to freedom of expression and assembly in Spain. This chapter reviews the international standards governing freedom of expression and assembly, the controversies that have arisen in Spain in the context of these conflicts, and the responses of national and international human rights bodies. These responses put the actions of the Spanish Government into the context of the international framework on human rights and indicate that many of the actions in response to debates on independence have not been compliant with their obligations under international human rights law.

This then raises issues of whether these are regular enough to be considered as systematic discrimination or as "affecting an objectively identifiable group". The large number of statements and verdicts by international human rights bodies and experts finding violations of standards supports such a conclusion of systematic discrimination.

II. Freedom of Expression – Protections and Limitations

Freedom of expression has been described as the "foundation stone for every free and democratic society"[1], "one of the basic conditions for its progress and for the development of every man"[2], and "indispensable for individual dignity and fulfilment [...] also constitute essential foundations for democracy, rule of law, peace, stability, sustainable inclusive development and participation in public affairs."[3]

The protection of freedom of expression is substantially incorporated into international human rights law in instruments across the globe.[4] Article 19 of the Universal Declaration of Human Rights states: "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[5] Article 19(2) of the International Covenant on Civil and Political Rights states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[6]

Similar protections are also found at the European level. Article 10(1) of the European Convention of Human Rights (ECHR) sets out freedom of expression in the European system:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

1 UN Human Rights Committee, "General Comment 34 - Article 19: Freedoms of opinion and expression" UN Doc CCPR/C/GC/34 (12 September 2011), para 2

2 *Handyside v United Kingdom* (1979) 1 EHRR 737, para 49

3 European Commission, "EU Human Rights Guidelines on Freedom of Expression Online and Offline" (12 May 2014), para 1

4 See Amal Clooney and Lord David Neuberger, "Freedom of Speech in International Law" Oxford University Press (2024)

5 Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III) (UDHR), Art. 19.

6 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19

Article 10 of the ECHR has been interpreted by the European Court of Human Rights (ECtHR) in hundreds of cases.[7] According to the Court, it is "applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[8]

Article 11 of the Charter of Fundamental Rights of the European Union repeats the ECHR language.[9] According to the official Explanations of the Charter "the meaning and scope of this right are the same as those guaranteed by the ECHR. The limitations which may be imposed on it may therefore not exceed those provided for in Article 10(2) of the Convention (...)".[10] The Court of Justice of the European Union has very limited case law on freedom of expression due to limits on its competence on internal member state issues.[11]

1. Limits on Freedom of Expression

Freedom of expression (FoE) is not an absolute right. Both the European and international agreements recognise that it can be restricted in limited circumstances. Article 19(3) of the ICCPR states that FoE can be limited for reasons of protecting the rights of others, national security, public order, public health, or morals.[12] Under the ECHR, Article 10(2) states:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[13]

7 See European Court of Human Rights, "Guide to Article 10 of the Convention – Freedom of expression" (31 August 2022)

8 *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153, para 59

9 Charter of Fundamental Rights of the European Union, OJ C 326 (26 October 2012)

10 European Union, "Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)" OJ C 303/17 (14 December 2007)

11 See e.g. Case C-555/19, *Fussl Modestraße Mayr*, Court of Justice of the EU, 3 February 2021, paras 81-83

12 ICCPR, art 19

13 ECHR art 10(2)

The ECtHR has developed a three-part test which examines if interference with the freedom of expression was "prescribed by law", whether it "pursued one of the legitimate aims" as set out in Article 10(2), and if it was "necessary in a democratic society". A similar test is set out in Article 19(3) of the ICCPR which limits restrictions to those allowed in 19(3), provided in law, and meeting strict tests of necessity and proportionality.[14]

Under international agreements signed by Spain, these important agreements and the decisions of the European Court and the UN Human Rights Committee should be reflected in the interpretation of Article 20 – the guarantee of freedom of expression – of the Spanish Constitution of 1978. This all the more so as Article 10(2) of the Constitution demands that fundamental rights are to be "interpreted in conformity with the Universal Declaration of Human Rights and the treaties and international agreements on the same issue ratified by Spain."

2. Protections for Political Speech

Under international and European law, freedom of expression relating to political speech is subject to strict protections. The ECtHR has ruled that, "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest".[15] In one case originating from Spain, the Court ruled that a criminal punishment for the burning of the King's photo violated Article 10 as the restrictions required "very strong reasons" for restrictions on political speech.[16]

The Court has ruled that the strong level of protection of speech particularly extends to elected officials:

> A person opposed to official ideas and positions must be able to find a place in the political arena. While freedom of expression is important for everybody, it is especially so for an elected representative of the people ... Accordingly, interferences with [his] freedom of expression [...] call for the closest scrutiny on the part of the Court.[17]

14 UN Human Rights Committee, "General Comment 34: Article 19: Freedoms of opinion and expression" (12 September 2011), UN Doc CCPR/C/GC/34, para 22

15 *Wingrove v. the United Kingdom* (1996) 24 EHRR 1, para. 58

16 *Stern Taulats and Roura Capellera v Spain*, App 51168/15 et 51186/15 (ECtHR, 13 March 2018).

17 *Piermont v. France* Apps no 15773/89 and 15774/896 (ECtHR, 27 April 1995) quoting Castells v. Spain (1992) Series A no. 236, p. 22, para 42; Also see *Otegi Mondragon v Spain* App 2034/07 (ECtHR, 6 February 2019), para 50 (relating to Members of Parliament); and *Fragoso Dacosta v. Spain*, App 27926/21 (ECtHR, 8 June 2023) (trade unionists)

As discussed before, the protection of speech also covers discussion of controversial issues, even those that are likely to cause discomfort or shock and challenge commonly held views. In a Turkish case, the Court found that this extended to discussions of separatism:

> In the Court's view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.[18]

However, the speech must be peaceful and must not "spread, incite, promote or justify violence, hatred or intolerance"[19] or create a clear or imminent danger of violence[20] that might have an "impact on "national security" or "public order" by way of encouraging the use of violence or inciting others to armed resistance or rebellion".[21] The restrictions must be limited in scope and purpose.[22] The Court uses a three-part test to determine if the speech in question is a call to violence:

> (i) whether the statements were made against a tense political or social background; (ii) whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance; and (iii) the manner in which the statements were made, and their capacity – direct or indirect – to lead to harmful consequences.[23]

As a principle, the Court has ruled that peaceful and non-violent speech should not result in imprisonment[24] except in "exceptional circumstances" when the speech urges the use of violence or constitutes hate speech.[25]

Similarly, restrictions based on national security and anti-terrorism grounds are also subject to strict scrutiny. The European Court of Human Rights has extensively decided

18 *Socialist Party and Others v Turkey* (1999) 27 EHRR 51, para 47

19 *Stomakhin v Russia*, App 52273/07 (ECtHR, 9 May 2018), para 92

20 *Gül and Others v Turkey*, App 4870/02 (ECtHR, 14 December 2000), para 42

21 *Kılıç and Eren v Turkey* App 43807/07 (ECtHR, 29 November, 2011), paras 28-29

22 *Bidart v. France* App 52363/11 (ECtHR, 2 November 2015), paras 42

23 See e.g. *Rivadulla Duró v Spain* App 27925/21 (ECtHR, 9 November 2023), para 32 (rejecting application of Spanish rapper Pablo Hasel for criminal conviction of critical statements and song on King Emeritus Juan Carlos I, GRAPO and police)

24 *Murat Vural v. Turkey*, App 9540/07 (ECtHR, 21 October 2014), para 66

25 *Erkizia Almandoz v Spain*, App 5869/17 (ECtHR, 22 June 2021), paras 39-40

on Article 10 and anti-terrorism measures.[26] It takes the approach of considering how the speech contributes to a debate of general interest, whether the speech is likely to exacerbate or justify violence, hatred, or intolerance and the severity of the sanction. For the speech to be sanctionable, it must create a "clear and imminent danger" which would "impact on "national security" or "public order" by way of encouraging the use of violence or inciting others to armed resistance or rebellion".[27]

International bodies have also weighed in. The UN Human Rights Committee in General Comment 34 noted:

> Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3.[28]

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism further elaborated on this in his 2016 report to the Human Rights Council.

> it must remain clear that simply holding or peacefully expressing views that are considered 'extreme' under any definition should never be criminalised, unless they are associated with violence or criminal activity. The peaceful pursuance of a political, or any other, agenda – even where that agenda is different from the objectives of the government and considered to be 'extreme'– must be protected. Governments should counter ideas they disagree with, but should not seek to prevent non-violent ideas and opinions from being discussed.[29]

The Special Rapporteurs of the UN, Organisation for Security and Cooperation in Europe, Organisation of American States, and African Union on freedom of expression and media have jointly also set out standards that states should follow when they are engaging in anti-terrorism efforts. In their 2009 joint declaration, they stated that:

> The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.

26 See European Court of Human Rights, "Guide to Article 10 of the Convention – Freedom of expression", 31 August 2022.

27 *Kiliç and Eren v Turkey* App 43807/07 (ECtHR, 29 November 2011), para 29-30.

28 General Comment 34 (2011), para 30.

29 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (22 February 2016) UN Doc A/HRC/31/65, Para 38

> The criminalisation of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism, understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts (for example by directing them). Vague notions such as providing communications support to terrorism or extremism, the 'glorification' or 'promotion' of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement, should not be criminalised.[30]

3. National Minority Rights

One additional aspect of freedom of expression that is relevant for this discussion is the language rights of minorities. Language rights are considered 'expression of individual and collective identity"[31] which are protected as freedom of expression rights as well as under other human rights agreements. Under this aspect, national minorities are recognised as having express protections for freedom of expression. This includes the right to speak in one's own language in public and private, access to media content, engagement with public services, and access to information.[32]

Freedom of peaceful assembly and expression are expressly protected for national minorities under the Council of Europe Framework Convention on National Minorities.[33] The European Charter for Regional or Minority Languages commits states not to restrict broadcasted and written materials in a regional or minority language.[34]

30 UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, "Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation" (December 2008); Also see Joint Declaration on Freedom of Expression and Responses to Conflict Situations, 4 May 2015.

31 CoE Advisory Committee on the Framework Convention for the Protection of National Minorities, "Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities Under the Framework Convention", 24 May 2012.

32 See United Nations Special Rapporteur on minority issues, "Language Rights of Linguistic Minorities: A Practical Guide", March 2017.

33 Framework Convention for the Protection of National Minorities (ETS No. 157), 2008, arts 7, 9

34 European Charter for Regional or Minority Languages (ETS 148), 1992, art 11(2)

III. The Freedom of Peaceful Assembly

The right of peaceful assembly is also considered "one of the foundations" of a democratic society, alongside freedom of expression.[35] The UN Human Rights Committee has said that it, "constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism."[36]

The right is set out in numerous international treaties with slightly different wording. The Universal Declaration of Human Rights states that "[e]veryone has the right to freedom of peaceful assembly and association"[37] while the ICCPR states: "[t]he right of peaceful assembly shall be recognized".[38] The ECHR and the EU Charter state that "[e]veryone has the right to freedom of peaceful assembly". [39] According to the official Explanations of the Charter, the meaning of the Charter provision is the same as the ECHR but its scope is wider since it applies to the European level bodies also.[40] As with freedom of expression, it cannot be constrained below standards set out by the ECtHR.

The scope of assembly covers a wide variety of events. The ECtHR has declined to set explicit parameters on what constitutes an assembly and stated that it should be considered broadly.[41] This can include actions from small spontaneous protests to mass organised events. Other European bodies have also adopted this approach. The OSCE/COE Venice Commission Guidelines define it as "the intentional gathering of a number of individuals in a publicly accessible place for a common expressive purpose. This includes planned and organised assemblies, unplanned and spontaneous assemblies, static and moving assemblies."[42]

In General Comment 37, the UN Human Rights Committee stated that:

> Article 21 of the Covenant protects peaceful assemblies wherever they take place: outdoors, indoors and online; in public and private spaces; or a combination

35 *Kudrevi ius and Others v Lithuania* [GC] App 37553/05 (ECtHR, 26 November 2011), para 91

36 UN Human Rights Committee, "General comment no. 37 (2020) on the right of peaceful assembly (article 21)", (17 September 2021), UN Doc CCPR/C/GC/37, para 1

37 UDHR, art. 20

38 ICCPR, art. 21

39 *Charter of Fundamental Rights of the European Union*, OJ C 326, 26 October 2012

40 European Union, "Explanations relating to the Charter of Fundamental Rights (2007/C 303/02)", OJ C 303/17, 14 December 2007

41 *Navalnyy v Russia* [GC] App 29580/12 (ECtHR, 15 November 2018), para 98

42 OSCE/ODIHR – Venice Commission, "ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly (3rd Ed.)", CDL-AD(2019)017 (8 July 2019), para 18

> thereof. Such assemblies may take many forms, including demonstrations, protests, meetings, processions, rallies, sit-ins, candlelit vigils and flash mobs. They are protected under article 21 whether they are stationary, such as pickets, or mobile, such as processions or marches.[43]

Assemblies can also be protected if virtual. The Human Rights Committee has stated that "article 21 protection also extends to remote participation in, and organization of, assemblies, for example online."[44] The protections also apply in the associated activities including preparations, communications and travel.[45] Internet communications also cannot be hindered to limit a peaceful assembly.

According to the Human Rights Committee, they apply to all persons: "citizens and non-citizens alike. It may be exercised by, for example, foreign nationals, migrants (documented or undocumented), asylum seekers, refugees and stateless persons."[46] The ODIHR-Venice Commission Guidelines note that the protections also apply to organisations who organise them:

> The right to freedom of peaceful assembly can be enjoyed and exercised by individuals and groups (informal or ad hoc), legal entities and corporate bodies, and unregistered or registered associations, including trade unions, political parties and religious groups.[47]

States have a positive obligation to facilitate assemblies. In particular, they are obliged to ensure that limits on assemblies in law and practice do not discriminate against a variety of criteria including "political or other opinion, minority status, and national and social origin".[48] This is reaffirmed by the Council of Europe Framework Convention on National Minorities which requires that all signatories "shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly."[49]

43 UN Human Rights Committee, "General comment no. 37 (2020) on the right of peaceful assembly (article 21)", UN Doc CCPR/C/GC/37 (17 September 2021), para 6

44 Ibid, para 11

45 Ibid, para 33

46 Ibid, para 5

47 OSCE/ODIHR – Venice Commission, "ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly (3rd Ed.)", CDL-AD(2019)017 (8 July 2019), para 43

48 General Comment 37, para 25

49 Framework Convention, art. 7

1. Defining Peaceful Assemblies

As an initial matter, under international law, the protections for freedom of assembly apply only to "peaceful assembly", i.e., that the purpose of the assembly is non-violent. Under the ECHR, the ECtHR has ruled that they do not apply if the organisers have violent intentions, "incite violence or otherwise reject the foundations of a democratic society."[50] The UN Human Rights Committee has said that there is a "presumption in favour of considering assemblies to be peaceful"[51] and while not defining what is peaceful, it has pointed out that "[a] 'peaceful' assembly stands in contradistinction to one characterized by widespread and serious violence."[52] It defines violence as "typically entail[ing] the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property."[53]

The blocking of everyday activities does not automatically end the protections for the assembly. Activities that may violate laws or regulations including entering premises and blockading roads or buildings can be protected, based on the circumstances.[54] The Human Rights Committee has further clarified, stating:

> peaceful assemblies can sometimes be used to pursue contentious ideas or goals. Their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity. These consequences, whether intended or unintended, do not call into question the protection such assemblies enjoy.[55]

The Committee has also stated that "[m]ere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to 'violence'".[56] The ODIHR-Venice Commission Guidelines note that:

> It also includes conduct that temporarily hinders, impedes or obstructs the activities of third parties, for example by temporarily blocking traffic. As such, an assembly can be entirely 'peaceful' even if it is 'unlawful' under domestic law.[57]

50 ECtHR, *Navalnyy*, para 98

51 General Comment 37, para 17

52 Ibid, para 15

53 Ibid

54 For a detailed overview of ECtHR cases, see European Court of Human Rights, "Guide on Article 11 of the European Convention on Human Rights: Freedom of assembly and association" (31 August 2022)

55 General Comment 37, para 7

56 Ibid, para 15

57 ODIHR-Venice Commission Guidelines, para 19

It is also important to note that merely because sporadic violent acts were undertaken by some of the participants of the assembly, it does not in itself make the entire assembly unlawful or make the organisers liable for the participants' actions.[58] Further, the ECtHR has ruled that "[e]ven if there is a real risk that a public demonstration might result in disorder as a result of developments outside the control of the organisers, such a demonstration does not as such fall outside the scope [of protections]".[59] In addition, violence against the assembly, especially by police, does not render it non-peaceful. According to General Comment 37:

> Violence against participants in a peaceful assembly by the authorities, or by agents provocateurs acting on their behalf, does not render the assembly non-peaceful. The same applies to violence by members of the public aimed at the assembly, or by participants in counterdemonstrations.[60]

2. Limits on Freedom of Assembly

As with freedom of expression, the right of assembly can be limited if the restrictions meet the traditional human rights three-part test, requiring that they are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."[61] Restrictions on grounds of public safety can only be justified where the assembly would "create a real and significant risk to the safety of persons (to life or security of person) or a similar risk of serious damage to property."[62] Prohibitions of assemblies should only be considered as a "last resort" and any restrictions should use the "least intrusive measures".[63] A key concept is that any restrictions must be "content neutral".

The ECtHR has found that notification and prior authorisation requirements do not violate the Convention but cannot be disproportionately applied in such a way that they prevent assemblies.[64] However, the right of peaceful assembly applies to unregistered and spontaneous assemblies as well as officially sanctioned ones.

58 *Laguna Guzman v. Spain* App 41462/17 (ECtHR, 6 October 2020), para 34
59 *Taranenko v. Russia* App 19554/05 (ECtHR, 15 May 2014), para 65
60 General Comment 37, para 18
61 ECHR, art 11(2). Nearly the same language is also found in ICCPR, art 21.
62 General Comment 37, para 43
63 General Comment 37, para 37
64 *ECtHR*, *Navalnyy*, para 100

The Human Rights Committee also has stated that sanctions for unlawful conduct that takes place in a peaceful assembly must be "proportionate, non-discriminatory in nature and must not be based on ambiguous or overbroadly defined offences.[65]

3. Relationship of Freedom of Assembly and Freedom of Expression

There is a close relationship between protests and freedom of expression. The UN Human Rights Committee in General Comment 34 on freedom of expression stated that FoE is "integral to the enjoyment of the rights to freedom of assembly and association"[66] while freedom of assembly is "essential for public expression of one's views and opinions" which "entails a possibility of participating in a peaceful assembly with the intent to support or disapprove one or another particular cause."[67] The HR Committee in General Comment 37 reaffirmed the symbiotic relationship in incorporating rules on FoE into any assessment of limits on assembly:

> The rules applicable to freedom of expression should be followed when dealing with any expressive elements of assemblies. Restrictions on peaceful assemblies must thus not be used, explicitly or implicitly, to stifle expression of political opposition to a government, challenges to authority, including calls for democratic changes of government, the constitution or the political system, or the pursuit of self-determination. They should not be used to prohibit insults to the honour and reputation of officials or State organs.[68]

The Organisation for Security and Cooperation in Europe (OSCE) has highlighted the importance of assembly in ensuring that minority and challenging views are allowed to be aired and debated. They describe it as being:

> associated with the right to challenge the dominant views within society, to present alternative ideas and opinions, to promote the interests and views of minority groups and marginalized sections of society, and to provide an opportunity for individuals to express their views and opinions in public, regardless of their power, wealth or status.[69]

65 General Comment 37, para 67
66 Ibid, para 4
67 *Praded v Belarus*, UN Human Rights Committee, Views adopted 10 October 2014, UN Doc CCPR/C/112/D/2029/2011, para 7.4
68 UN Human Rights Committee, "General comment no. 37 (2020) on the right of peaceful assembly (article 21)", CCPR/C/GC/37, 17 September 2021, para 49
69 OSCE, "Handbook on Monitoring Freedom of Peaceful Assembly" (2011), p. 7

The ECtHR has found in numerous cases that protests are expressions of opinion which are protected under Article 10.[70] The Court has also noted the complementary nature of the two rights in a recent case related to Catalonia:

> in the sphere of political debate the guarantees of Articles 10 and 11 are often complementary [...] Notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10, where the aim of the exercise of freedom of assembly is the expression of personal opinions, as well as the need to secure a forum for public debate and the open expression of protest.[71]

In cases where both rights are considered, the Court considers Article 11 as the *lex specialis* but asserts that it "must also be considered in the light of Article 10, where the aim of the exercise of freedom of assembly is the expression of personal opinions."[72]

In the context of the subject of this article, the OSCE has noted that such rights "can also be an important means of calling for change in contexts where more institutional mechanisms for effecting social change are not available." [73] According to the ECtHR, this includes the rights to demand autonomy or secession in the absence of violent intent:

> the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition of its assemblies. Demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security.
>
> Freedom of assembly and the right to express one's views through it are among the paramount values of a democratic society. The essence of democracy is its capacity to resolve problems through open debate. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it.

70 *Steel and Others v the United Kingdom* App 24838/94 (ECtHR, 23 September 1998)

71 *Forcadell i Lluis and others v Spain*, App 75147/17 (ECtHR, 7 May 2019), para 23

72 *Kudrevi ius and Others v Lithuania* [GC], App 37553/05 (ECtHR, 15 October 2015), para 86

73 Handbook on Monitoring Freedom of Peaceful Assembly, para 7

> In a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means.[74]

Further, the use of terrorism laws should not be used to limits peaceful assemblies. According to General Comment 37:

> While acts of terrorism must be criminalized in conformity with international law, the definition of such crimes must not be overbroad or discriminatory and must not be applied so as to curtail or discourage the exercise of the right of peaceful assembly. The mere act of organizing or participating in a peaceful assembly cannot be criminalized under counter-terrorism laws.[75]

Freedom of expression must also be considered in the context of journalists observing protests, whether peaceful or not. Journalists have a right to monitor protests, record, and report on what has happened.[76] This includes ensuring that journalists have unobstructed access to protests regardless of accreditation, that they are afforded protection from violence directed towards them by any party, and have their equipment protected from seizure or damage.[77] The ECtHR has ruled that all attempts to remove journalists from protests is subject to strict scrutiny.[78] It has further found that violence against journalists covering protests violates Article 10.[79]

74 *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* Apps no 29221/95 29225/95, (ECtHR, 20 October 2005), para 97

75 General Comment 37, para 68

76 OSCE/ODIHR – Venice Commission, "ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly (3rd Ed.)", CDL-AD(2019)017 (8 July 2019), para 34; Council of Europe, "Guidelines of the Committee of Ministers of the Council of Europe on Protecting Freedom of Expression and Information in Times of Crisis" CM/Del/Dec(2007)1005/5.3-appendix11 (2007).

77 Miklós Haraszti, "Special Report: Handling of the media during political demonstrations, Observations and Recommendations", OSCE Representative on Freedom of the Media (June 2007)

78 *Pentikäinen v Finland* App 11882/10 (ECtHR, 20 October 2015), para 89

79 *Najafli v Azerbaijan* App 2594/07 (ECtHR, 2 October 2012), para 67

IV. Freedom of Expression Challenges in Spain

The situation relating to freedom of expression in Spain is complex. On the one hand, as a member of the European Union and Council of Europe, it has agreed to adopt standards which give the most far-reaching protections of freedom of expression in the world. It ranks 36th best in the world in the Reporters San Frontiers (RSF) 2023 World Press Freedom Index[80] while the Index on Censorship Index classifies it as "significantly open" in the same range as Canada and France, and above the United States.[81]

However, at the same time, prior and subsequent to the conflict over the independence referendum, there have been many cases raising freedom of expression concerns.[82] The sources of these cases include anti-terrorism measures, insults against the crown, and other provisions of the Criminal Code. These cases set the background to a conflict around independence, many of which involve challenges to state authority and national minority groups, including the Catalan people. The European Centre for Media Freedom has over 300 incidents in their database since 2014.[83] This section will review a selection of the laws and conflicts.

1. Freedom of Expression and Protest under Pressure

One of the most controversial laws is the Organic Law on Citizens' Security, commonly referred to as the "Ley Mordaza", which restricts both speech and assembly rights, adopted by the conservative government in 2015.[84] It makes "disobedience or resistance to the authorities or their agents in the exercise of their duties" as well as occupying public spaces a serious offence. Another provision gives police reports a presumption of truthfulness. Protests can be banned from areas around local elected bodies, even when

80 Reporters San Frontiers, Spain (2023).

81 Index on Censorship, Index Index (2023)

82 See e.g. Letter from COE Human Rights Commissioner to Minister of Justice, Ref: CommHR/DM/sf 015-2021 (11 March 2021); Article 19, "España: Delitos relacionados con la Libertad de expresión en el Código Penal" (March 2020)

83 European Center for Media Freedom, Mapping Media Freedom.
Available at https://www.mappingmediafreedom.org

84 Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadan; See Tori Sparks, "Spain's Gag Law: Watch What You Say", Metropolitan Barcelona (19 April 2021)

they are not in session. Amnesty International reported that, up until 2022, over 250,000 fines and other sanctions were imposed under the law.[85] It also reported that the law had a chilling effect on protests, with many persons concerned about facing severe penalties for attending protests.

One provision that prohibited the "unauthorised" use of images of police officers was partially revised by the Constitutional Court which ruled that authorization was not required. The COE Human Rights Commissioner in 2018[86] and the Venice Commission in 2021 called on Spain to reform the law to better clarify offenses and create a presumption of allowing assemblies, even if not notified in advance.[87] The current government has committed to reforming the law but these efforts have not yet resulted in any changes.

Another long-standing concern has been over anti-terrorism laws being used excessively. Article 578 of the Criminal Code makes it a criminal offence to engage in "public praise or justification of [crimes of terrorism] [...] or of those who have participated in their execution, or the performance of acts that entail discredit, contempt or humiliation of the victims of terrorist crimes or their relatives.". The penalties imposed are higher when "carried out through the dissemination of services or contents accessible to the public through the media, the Internet, or electric communication media or using information technologies."[88] The Council of Europe Commissioner for Human Rights wrote publicly to the Spanish Government in 2021 calling for reform of the Article, noting that:

> some Spanish court decisions have failed to adequately determine whether the glorification of terrorism really entailed the risk of a real, concrete and imminent danger [...] some Spanish courts have also interpreted the notion of intent of the perpetrators in an abstract manner, without taking into account any other element than the wording at stake, and without adequate consideration for the context surrounding the incriminated speech or for its consequences.[89]

The ECtHR in 2021 found that the conviction of a former Basque politician for apology of terrorism for speaking on Basque independence at the tribute of a former colleague violated Article 10 as he did not advocate for violent struggle.[90] However, in 2023, the Court dismissed as inadmissible the application of Spanish rapper Pablo Hasel against

85 Amnesty International, "Derecho a la protesta en España: Siete años, siete mordazas que restringen y debilitan el derecho a la protesta pacífica en España" (November 2022).

86 Dunja Mijatovic, Letter to Juan Carlos Campo, CommHR/DM/sf 015-2021 (11 March 2021)

87 European (Venice) Commission for Democracy Through Law, "Opinion on the Citizens' Security Law", Opinion No. 826/2015 (22 March 2021)

88 Article 578 (2) Spanish Criminal Code.

89 Dunja Mijatovic, Letter to leaders of Spanish Parliament CommHR/DMsf 087-2018 (20 November 2018)

90 *Erkizia Almandoz v Spain* App 5869/17 (ECtHR, 22 June 2021)

his criminal conviction for critical statements and a song relating to various subjects, including the former king and the police.[91]

There has also been some serious criticism around the role of the Constitutional Court and the Audiencia Nacional, a special court with jurisdiction over crimes against the state. In at least one case that reached the European Court of Human Rights, the court found a violation of Article 6 on the right to fair trial for the criminal conviction of a Basque parliamentarian for insulting the king by criticizing his appearance at the opening of a power plant following the raid of a local newspaper and detention of journalists.[92]

In addition to the terrorism provisions, the Spanish Criminal Code contains a number of other provisions which impact on freedom of expression. These provisions have been found to be used in improper ways by authorities to shut down dissent.[93] Article 543 of the Criminal Code makes it an offense to insult "Spain, its Autonomous Communities or the symbols or emblems." In June 2023, the ECtHR ruled that a criminal conviction of a trade union official shouting offensive words during the raising of the national flag during a protest violated Article 10 as it did not create public disorder.[94]

Other provisions, namely Articles 490 and 491, prohibit insults against the crown. The ECtHR ruled in 2018 that the criminal convictions of two persons in Catalonia for burning a picture of the Spanish Royals could not be considered as incitement to hatred and violence as it was a political, rather than personal, critique of the institution of the monarchy, rejecting a decision of the Constitutional Court which had found that it was hate speech, not protected by freedom of expression.[95] The Council of Europe Commissioner for Human Rights in her 2021 letter also reminded the Spanish government of the need to implement protections and noted concerns about the number of artists and activists who had been prosecuted in recent years.[96]

The Court also ruled in 2022 that a decision in military disciplinary proceedings that constituted a reprimand for critical views of the Spanish constitution, expressed in a televised debate, violated Article 10.[97]

91 *Rivadulla Duró v Spain* App 27925/21 (ECtHR, 9 November 2023), para 32

92 *Otegi Mondragon v Spain* App 2034/07 (ECtHR, 15 Sept 2011), For a background article reviewing the case, see Solanes Mullor, Joan. "The Implications of the Otegi Case for the Legitimacy of the Spanish Judiciary: ECtHR 6 February 2019, Case Nos. 4184/15 and 4 Other Applications, Otegi Mondragon and Others v Spain." European Constitutional Law Review 15, no. 3 (2019): 574–88.

93 Organic Act 10/1995, dated 23rd November, on the Criminal Code (translation by Ministry of Justice of Spain)

94 *Fragoso Dacosta v. Spain*, App 27926/21 (ECtHR, 8 June 2023)

95 *Stern Taulats and Roura Capellera v Spain* Apps 51168/15 51186/15 (ECtHR, 13 March 2018).

96 Letter to leaders of Spanish Parliament, CommHR/DMsf 087-2018

97 *Ayuso Torres v Spain* App 74729/17 (ECtHR, 8 November 2022)

These concerns have also been raised in the context of the Universal Periodic Review in the UN Human Rights Council. At the UPR session in March 2020, numerous states including the US, Belgium, Switzerland, Czechia, and Italy, recommended that Spain revise its laws on freedom of expression and association and assembly to reflect international standards.[98] Spain accepted many of the recommendations.[99]

2. Conflicts Relating to the Debate around Independence

This section will consider a few of the freedom of expression conflicts which have arisen in the context of the independence debate set out above with a view to examining if there has been systematic discrimination or deficiencies affecting an objectively identifiable group as per the ECJ jurisprudence.

It is first important to note that issues relating to freedom of expression and independence did not begin with the independence vote. There have been reports of a national police investigation codenamed "Operation Catalonia" starting several years before. Perhaps as part of these, in 2014, a list of judges that signed a public document supporting Catalans' right to decide on independence was secretly compiled by police and leaked to the press. A national newspaper published the files including photos and personal details under the heading of "[t]he conspiracy of the thirty-three separatist judges". The ECtHR ruled that the list had no legal basis and thus violated article 8 of ECHR but because no sanctions were imposed on the judges, it did not find a violation of Article 10.[100] Even in the absences of official sanctions, however, the likelihood of a chilling effect on the views of judges facing investigations should be considered.

Several UN mandates also contacted the government in 2022 after 65 people, mostly Catalan leaders, were found to have been targeted by spyware to have their communications intercepted illegally.[101] The use of spyware is also a violation of freedom of expression, as well as relating to protection of privacy. The use of spyware can chill freedom of

98 UN Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Spain", A/HRC/44/7, 18 March 2020

99 UN Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Spain, Addendum," A/HRC/44/7/Add.1, 18 March 2020

100 *M.D. and others v Spain* App 36584/17 (ECtHR, 28 June 2022)

101 Letter from "Mandatos del Relator Especial sobre cuestiones de las minorías; de la Relatora Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión; y del Relator Especial sobre los derechos a la libertad de reunión pacífica y de Asociación," Ref.: AL ESP 8/2022 (24 October 2022)

expression by dissuading individuals from using their personal communications devices to freely exchange ideas and thoughts with others and freely express their plans.[102]

The conflict was substantially amplified by the decision in 2017 to hold another referendum on independence. According to three UN Special Rapporteurs, the Spanish government undertook a number of actions which seriously impacted rights of freedom of expression, assembly, and public participation. In 2017, the three Rapporteurs wrote to the Spanish government indicating areas of concern and asking for more information. These included the following issues:[103]

- The official website of the referendum as well as numerous others were taken down following an order from the police.104
- The offices of newspaper El Vallenc was searched.
- Televisió de Catalunya (TV3) was ordered by the Superior Court of Justice of Catalonia to not discuss the referendum.
- A public demonstration on the referendum in Madrid was banned.
- The State Attorney General ordered provincial prosecutors to investigate over 700 mayors who publicly supported the referendum and detail those who refused to cooperate.
- Demonstrations against the investigation of the mayors resulted in police violence against protests and observers.[105]

The following section will look at a few of the cases in more detail.

102 See e.g. Teresa Ribeiro, "Communiqué by the OSCE Representative on Freedom of the Media On the Use of Digital Surveillance Technology on Journalists" Communiqué No. 1/2023 (7 September 2023)

103 Letter from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Independent Expert on the Promotion of a Democratic and Equitable International Order and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (22 September 2017)

104 See also Laurens Cerulus, Diego Torres, "Spanish authorities try to shutter Catalan referendum websites", POLITICO (22 September 2017)

105 Letter from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Independent Expert on the Promotion of a Democratic and Equitable International Order and the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association (22 September 2017)

Arrests and Trials of Civil Leaders

Following the referendum on the independence of Catalonia held 1 October 2017 and the declaration of independence later that month, a number of Catalan political and civil society leaders were charged with rebellion, sedition, and misappropriation of funds for their roles in the referendum. This included the organization of demonstrations and the facilitation of parliamentary debates on the referendum. The far-right political party Vox successfully petitioned to also act as public prosecutor in the case. Nine of the accused were taken into pre-trial detention soon after the referendum.

In 2019, twelve of the leaders, including the Vice President of the Catalan government and the President of the Catalan Parliament were found guilty and sentenced to significant prison sentences by the Supreme Court.[106] Many were also disqualified from holding public office. They were found not guilty of rebellion. Nine were jailed until pardoned in 2021.[107]

In a reform of the criminal code in 2022, the crime of sedition was eliminated and replaced with a new crime of aggravated public disturbances.[108] The previous convictions were modified accordingly, though for four of the accused, the disqualification from public office was maintained despite the change in the law.[109] The charges against the three exiled leaders Puigdemont, Comín, and Ponsatí have been amended to reflect the new law which was approved by the Supreme Court in 2023.[110]

As noted in the previous section, political speech is strongly protected under international law. It can only be restricted in cases where it advocates for violence or constitutes hate speech. In this case, there is little indication that the holding of the referendum or the political declaration of independence did either of those, and this view is shared by UN bodies and mandate holders. As detailed by the UN Special Rapporteur for Freedom of Opinion and Expression, David Kaye, in a statement relating to the charges:

> Prosecutions for 'rebellion' that could lead to lengthy jail sentences raise serious risks of deterring wholly legitimate speech, even if it is controversial and discomfiting .... charges of rebellion for acts that do not involve violence or incitement to violence may interfere with rights of public protest and dissent. [...]

106 Diego Torres, "Spain's Supreme Court jails Catalan leaders for up to 13 years", Politico (14 October 2019)

107 "Spain pardons Catalan leaders over independence bid", BBC (22 June 2021)

108 LO 14/2022.

109 "El Supremo deja inhabilitados a los líderes del 'procés' pese a la reforma de la malversación", The Objective (13 February 2023)

110 "El Tribunal Supremo rechaza aplicar el subtipo atenuado de malversación a los procesados en la causa del 'procés' Puigdemont, Comín y Ponsatí", Poder Judicial Espana (15 June 2023)

> International human rights law cautions that, especially in situations involving political dissent, restrictions should only be imposed when they are strictly necessary and proportionate to protect the State's interests.[111]

Further, the ongoing detention of some of the leaders also raised freedom-of-expression concerns. Three UN Special Rapporteurs and the Vice President of the UN Working Group on Arbitrary Detention, wrote in a 2019 letter to the Spanish government highlighting their concerns about the detention of the leader of a prominent non-governmental organisation for rebellion in the absence of evidence of promoting violence:

> concern is expressed about the arrest and prosecution of Mr. Cuixart for the crime of rebellion, for acts that do not appear to involve violence or incitement to violence on the part of Mr. Cuixart, which would imply an interference with his rights to public protest and freedom of expression. In this sense, we recall that international human rights law warns that restrictions on these rights should only be imposed when they are strictly necessary and proportionate.[112]

The UN Working Group on Arbitrary Detention in 2019 found that the detention of six political and civil society leaders violated international standards on fair trials.[113] The Working Group found that the trials were biased due to public statements by senior officials and that the pre-trial detention was arbitrary as it was based on the exercise of the right to freedom of expression and other rights.[114] It found no evidence that there was any violence associated with the protests that was instigated or promoted by the accused. Instead, it stated that it believed that the charges were a direct attempt at limiting the speech of the six leaders. One of the reports of the Working Group stated:

> The absence of the factor of violence and of credible information regarding any acts attributable to Mr. Cuixart, Mr. Sánchez and Mr. Junqueras that would

111 OHCHR, "UN expert urges Spain not to pursue criminal charges of rebellion against political figures in Catalonia" (6 April 2018)

112 UN Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Special Rapporteur on the situation of human rights defenders, AL ESP 5/2018, (January 28, 2019)

113 UN Working Group on Arbitrary Detention, "Opinion No. 6/2019 concerning Jordi Cuixart I Navarro, Jordi Sánchez I Picanyol and Oriol Junqueras I Vies (Spain)", A/HRC/WGAD/2019/6 (13 June 2019); "Opinion No. 12/2019 concerning Joaquín Forn I Chiariello, Josep Rull I Andreu, Raúl Romeva I Rueda and Dolores Bassa I Coll (Spain)", A/HRC/WGAD/2019/12 (10 July 2019)

114 Working Group, para 129

> link them to the sort of conduct that constitutes the offences of which they stand accused have led the Working Group to believe that the purpose of the criminal charges brought against them is to intimidate them because of their political views regarding the independence of Catalonia and to prevent them from pursuing that cause in the political sphere. The Working Group has been persuaded that the criminal charges brought against Mr. Cuixart, Mr. Sánchez and Mr. Junqueras were brought in order to justify the fact that they have been placed in detention for exercising their rights to freedom of opinion, expression, association, assembly and political participation [...]" [115]

The Council of Europe Parliamentary Assembly in 2021 reviewed the prosecution of officials in Catalonia and called on Spain to reform the existing laws on rebellion and sedition and misappropriation of public funds to limit their application in political cases, to drop prosecutions, and extradition requestions and consider pardoning officials.[116]

In July 2022, the UN Human Rights Committee ruled that the suspension of members of the Catalan Parliament charged with rebellion prior to their conviction violated the right to public participation under Article 25 of the ICCPR. It held that "an application of domestic law that allows elected officials to be suspended automatically from their duties for alleged offences involving peaceful public acts, prior to the existence of any conviction, does not allow for an individualized analysis of the proportionality of the measure and thus cannot be considered to meet the requirements of reasonableness and objectivity."[117] It noted that the applicants had called for peaceful demonstrations and noted that under international law relating to freedom of assembly, "there is a presumption in favor of considering the meetings to be peaceful" and that "the isolated acts of violence of some participants should not be attributed to others, the organizers or to the meeting as such."[118]

In sum, there is a convergence of opinions and decisions of international bodies and experts around the finding of a violation of Catalan leaders' rights to expression, assembly and participation as they were promoting peaceful protests and did not advocate for violence.

115 Working Group, paras 119-120

116 Council of Europe Parliamentary Assembly, "Should politicians be prosecuted for statements made in the exercise of their mandate?" *Resolution 2381 (2021)*, para 10.3

117 Human Rights Committee, "Opinion approved by the Committee pursuant to Article 5, paragraph 4, of the Optional Protocol, regarding communication no. 3297/2019", CCPR/C/135/D/3297/2019 (17 August 2023), para 8.8

118 Ibid, para 8.6 (unofficial translation).

Violence against Protesters and Voters

On 1 October 2017, as the public referendum took place in contradiction to the order of the Constitutional Court, police seized materials and attempted to stop people from voting. Hundreds of persons were injured and allegations of police violence were widespread. Amnesty International documented that "National Police (Police Intervention Unit) and agents of the Civil Guard used excessive force against peaceful demonstrators and made inadequate use of riot control material such as rubber bullets or irritating chemicals against people engaged in peaceful resistance."[119]

Following the 2019 Court's conviction of the leaders of the independence vote, protests in Barcelona and nationwide also resulted in clashes and injuries with police using anti-riot munitions and other measures.[120] In these protests, numerous journalists were also injured.[121]

The violence was noted with concern by UN officials including the High Commissioner for Human Rights[122] and a number of Special Procedures.[123] In his 2018 annual report to Member States on human rights concerns, the High Commissioner for Human Right stated:

> In Spain, I was dismayed by the violence which broke out during October's referendum on independence in Catalonia. Given what appeared to be excessive use of force by police, the Government's characterisation of police action on 1 October as "legal, legitimate and necessary" is questionable. I remind the authorities that pre-trial detention should be considered a measure of last resort. I encourage resolution of this situation through political dialogue.[124]

119 Amnesty International, "Actualización de la situación en Cataluña" (1 October 2019)

120 Amnesty international, "SPAIN: Authorities must de-escalate tensions and guarantee the right to public assembly" (18 October 2019)

121 "Press says "enough" after 65 hurt covering Barcelona protests", El Nacional (22 October 2019); "Journalists covering Catalonia demonstrations attacked, harassed by police, protester", CPJ (23 October 2019)

122 "Comment by the UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on the situation in Catalonia, Spain", Office of the High Commissioner for Human Rights (2 October 2017)

123 Office of the High Commissioner for Human Rights, "UN experts urge political dialogue to defuse Catalonia tensions after referendum" (4 October 2017)

124 UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, "High Commissioner's global update of human rights concerns" (7 March 2018).

In a 2023 letter to the government of Spain, five special UN mandates requested information from Spain on a reported 1,983 people injured in public assemblies from 2017 to 2019 related to the independence question.[125]

Tsunami Democràtic

Tsunami Democràtic was an online, decentralised and "leaderless" group promoting independence through peaceful protest. It appeared shortly before the convictions of the leaders and offered sophisticated phone apps to organise protests against the trial and criminal sentence.[126] The group has largely disappeared.[127]

It is not known who coordinated the group but media accounts and the national prosecutor's office claim that the organisation is connected to several political and civil society leaders. The group organised a number of protests, including at Camp Nou during a key football match and at the Barcelona airport, which resulted in dozens of flights being cancelled and direct confrontation with the police. Many were injured and arrested in connection with the events.

The Audiencia Nacional began to investigate the group for terrorism in 2019 following the airport protest and targeted its internet website[128] as well as the internet code site Github, which hosted the group's app.[129]

The investigating judge at the Audiencia Nacional indicated in November 2023 that he would start formally investigating a series of Catalan political and societal leaders for terrorist crimes around the *Tsunami Democràtic*, even after a decision by the public prosecutor that there was no case for terrorism for the blockade of the airport. In 2024, while the Spanish Parliament was debating an amnesty bill, additional terrorism investigations were opened by the Supreme Court against members of the European and Catalan parliaments whom the Audiencia Nacional could not pursue.

125 Letter from Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association; of the Working Group on Arbitrary Detention; of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; of the Rapporteur Special Rapporteur on the independence of judges and lawyers and of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms in the fight against terrorism, Ref.: AL ESP 11/2022 (8 February 2023)

126 "Catalonia has created a new kind of online activism. Everyone should pay attention", Wired (19 October 2019)

127 Vladyslav Zinichenko and Anna Udovenko, "Democratic Tsunami" as an online stage of the Catalan independence movement", Obraz, 2023. Vol.3 (43). P. 6–17

128 "Spanish judge orders closure of Tsunami Democràtic websites", *El Pais* (18 October 2019)

129 Letters from Guardia Civil to GitHub (October 2019)
https://github.com/github/gov-takedowns/tree/master/Spain/2019

V. Systemic Deficiencies and Objectively Identifiable Groups

Under the decision of the European Court of Justice in *Puig Gordi and Others* (C-158/21), a Member State may refuse to enforce an arrest warrant when there is a violation of fundamental human rights "on account of systemic or generalised deficiencies in that Member State or deficiencies affecting an objectively identifiable group of persons to which the person concerned belongs."[130] They must have "objective, reliable, specific and properly updated information" about the deficiencies. Further, the "authority must verify, specifically and precisely" that there is a risk that such a violation of a fundamental human right will occur. According to the Court, the substantiation of such a risk can, at least in part, rest on findings of UN bodies such as the Working Group on Arbitrary Detention.

As described above in the section on international law relating to freedom of expression, EU protections on freedom of expression follow the decisions of the European Court of Human Rights. Thus, the caselaw of the Court relating to freedom of expression sets the standards for assessment.

In this case, there appears to be a reasonable basis to find that there has been systematic discrimination against those supporting Catalan independence by political, legal, and judicial officials. The reports of several UN Special Rapporteurs, and the Working Group on Arbitrary Detention, as well as respected organisations such as Amnesty International have found numerous violations of international standards on freedom of expression.

In particular, they have repeatedly found a disproportionate response in response to political statements and largely peaceful protests leading to excessive charges for terrorism and sedition against officials and civic leaders. Finally, the media has been prevented in several occasions from reporting on protests. These systematic problems with freedom of expression and assembly are thus best understood as "deficiencies affecting an objectively identifiable group."

This finding could also have important implications beyond arrest warrants into the protection of freedom of expression across the EU. The CJEU is already in the process of considering another Spanish case relating to freedom of expression. A very recent

130 Case C-158/21 *Puig Gordi and Others* OJ C 217 (7 June 2023)

opinion from the Advocate General involving the refusal of French courts to enforce a substantial penalty against a French newspaper and journalist imposed by the Spanish courts for defamation found that the deterrent or chilling effect of enforcing the judgement would violate EU public policy (because of its impact on freedom of expression) and thus justify the refusal.[131]

VI. Conclusion

International human rights law sets a very high standard for the prosecution of persons who are engaged in political speech, even around the contentious issue of secession and changes in the constitutional structure of a state. The standard is particularly high for elected officials. For the restrictions to be justifiable, the speech, in the context of the situation, must threaten public order or national security, advocate for violence or constitute hate speech. These same standards of protection apply to those engaging in peaceful protests.

In the case of the debate over Catalan independence, there seems to be little public evidence which supports the notion that the independence referendum leaders or its supporters were advocating violence or hatred. International bodies including the UN Human Rights Committee, the UN Working Group on Arbitrary Detention, the UN High Commissioner for Human Rights, the Special Rapporteur for Freedom of Opinion and Expression and others have all found that the actions of Spanish authorities violated basic international human rights including freedom of expression, assembly and association, as well as fair trial. National courts in Germany and Belgium also came to the same conclusion. Thus, it is not surprising that the Court of Justice of the European Union responded to those concerns in its 2023 judgment in *Puig Gordi and Others* and opened the door to "deficiencies affecting an objectively identifiable group" as a ground for national courts to refuse executing European Arrest Warrants.

131 Case C633/22, *Real Madrid Club de Fútbol, AE v EE, Société Éditrice du Monde SA*, Opinion of Advocate General Szpunar, 8 February 2024, paras 171, 193

Chapter 4

Surveillance and the Notion of an "Objectively Identifiable Group of Persons" in the European Court of Justice's Case Law on the European Arrest Warrant

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I. Introduction

The intersection of the European Arrest Warrant and surveillance is an intriguing overlap that is revealing of current trends in the protection of international human rights, notably as they impact certain groups and minorities. Both attest in different ways to the fact that even democratic states that one would ordinarily be inclined to defer to for the purposes of extradition may engage in practices that are deeply problematic in terms of rights. This is true of surveillance as a phenomenon which has arguably gone from a niche practice targeting criminal and terror groups to one which, as a result of both the ubiquitous reliance on digital communication technology and the increasing sophistication and availability of cyber tools to monitor it, increasingly involves forms of routinized and massified interception. As a result, even democracies can easily get caught up in the temptations of the surveillance state. In parallel, legal developments have underlined the limits of "mutual trust" among European democracies involved in the European Arrest Warrant (EAW). These have also underscored repeated concerns that democracies may, notwithstanding their commitment to rights, engage in a range of practices that should give pause to an otherwise strong and legitimate drive for criminal cooperation.[1]

In this chapter, I explore one manifestation of this overlap in the form of a recent evolution in the European Court of Justice's (ECJ) case law on the EAW where the execution of such a warrant might lead to the transfer of individuals to a country where deficiencies affect "an objectively identifiable group of persons to which the person concerned belongs."[2] I particularly focus on the status of surveillance as a new ground that might, on its own or alongside others, provide an indication that the rights of members of a group stand to be negatively affected, in ways that should lead a state to decline to execute an EAW. This study emerges in a context of heightened concerns about surveillance globally and an intensification of legal efforts to regulate and hold states accountable for engaging in it, as well as at least second thoughts about the merits of broad strategies of "fluidification" of extradition.[3] It will emphasize the extent to which concerns about surveillance and the proper limits of criminal cooperation are magnified when particular groups are targeted.

1 Rebecca Niblock, *Mutual Recognition, Mutual Trust: Detention Conditions and Deferring an EAW*, 7 New J. Eur. Crim. L. 250 (2016); Febe Inghelbrecht, *Limits to Mutual Trust: Which Role for the European Court of Human Rights?*, https://libstore.ugent.be/fulltxt/RUG01/002/836/121/RUG01-002836121_2020_0001_AC.pdf (last visited Jan 22, 2024).

2 Judgment of the Court, 31 January 2023, para. 102.

3 See, e.g., Nicola Langille & Frédéric Mégret, *Red Notices and Transnational Police Practices*, in International Practices of Criminal Justice 108 (2017).

The first part sets out the broad framework within which the EAW operates, highlighting its ambitions but also increasingly the limits of "blind trust," notably when it comes to particular groups. The second part focuses on the degree to which surveillance has been harnessed to target groups with a discriminatory intent. I then examine in more detail what might be understood as the prima facie negative rights incidence of surveillance in the third part. Finally, in the fourth part, I raise a number of additional difficulties that arise in assessing the legality and legitimacy of surveillance.

II. The Background of European Arrest Warrants in the Catalan Situation

1. The European Arrest Warrant Framework and the Limits of Mutual Trust

The Framework Decision on the European Arrest Warrants of 13 June 2002 is the guiding instrument for EAW.[4] To be clear, European Arrest Warrants should a priori be deferred to, as European Advocates General have repeatedly stressed, based on the importance of mutual trust that underpins the whole system.[5] The competence of the judge issuing a European arrest warrant, in particular, cannot be questioned in any way. The importance of mutual trust between states has been repeatedly emphasized as the central pillar for European arrest warrants to be effective. Moreover, execution of an EAW cannot be refused on grounds other than those included in the Framework Decision.

4 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision.

5 Ester Herlin-Karnell, *From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant*, 38 EUR. L. REV. 79 (2013).

Having said that, the position sometimes described as one of "blind trust"[6] has gradually given room to one that allows for refusals in exceptional and very well documented reasons. The Framework Decision on the EAW itself anticipates, notably, that:

> Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.[7]

Moreover, the EAW does not supersede the prohibition of inhuman or degrading treatment, and an executing judicial authority may refuse surrender notably where a person "would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment," for example, because detention conditions in the issuing Member State infringe Article 4 of the Charter. These are nonetheless quite narrow exceptions to the rule that operate against a background assumption of mutual trust. For example, the standard known as the Aranyosi and Căldăraru test[8] requires an assessment that the general conditions of detention are problematic and that there are "substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State."[9]

However, European law has gradually evolved towards acknowledging the possibility of a refusal to accede to an EAW outside the relatively narrow case of discrimination or inhuman or degrading treatment in places of detention, most notably in relation to the right to a fair trial. The European Commission and the Attorney General have previously said that, in order to refuse a EAW on account of the risk of violating a right, there must be "objective, reliable, specific and properly updated information to demonstrate that there is a real risk of infringement, in the issuing Member State, of the fundamental right to a fair trial." This was principally understood to relate to "systemic, generalised deficiencies in the judicial system of the state requesting an extradition" and proof

6 Ermioni Xanthopoulou, *Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory beyond Blind Trust*, 55 Common Market Law Review (2018); Koen Lenaerts, La Vie Après l'avis: Exploring the Principle of Mutual (yet Not Blind) Trust, 54 Common Market Law Review (2017).

7 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, para. 12.

8 Koen Bovend'Eerdt, 'The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?' (2016) 32 112.

9 Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Judgment of the Court (Grand Chamber) of 5 April 2016, para. 94.

that such deficiencies stand to affect the person in respect of whom an EAW is issued. The Court had been saying so in judgments relating mainly to Poland, where there are objective elements that make it possible to conclude that the rule of law is not functioning adequately.[10] This was evidently quite a high threshold to meet.

In the Lluís Puig Gordi case, involving a former Catalan Minister exiled in Belgium, the Belgium courts had found that for extradition to be judged by the Spanish Supreme Court would violate the rights of the individuals involved because such a tribunal was not predetermined by law, in violation of the European Convention on Human Rights, and therefore had no authority to issue an EAW.[11] This then led the Spanish Supreme Court to turn to the CJEU by way of a preliminary ruling request. The CJEU argued that it was not for the requested state to evaluate whether the courts of the requesting state had authority in and of itself, only whether such lack of authority would cause a serious risk of the fundamental rights of the defendant to be violated. Although the CJEU eventually sided with the Advocate General in emphasizing the overriding importance of cooperation, it also hinted at the possibility that EU Member States could, exceptionally, refuse to execute an EAW to ensure respect for fundamental rights.

However, the Court also moved, in what is widely seen as a subtle evolution of its case law, to find that the deficiencies affecting a system, even as they are "systemic or generalised," could merely "affect[...] an objectively identifiable group of persons to which the person concerned belongs."[12] In other words, rather than pointing to conditions prevailing generally in the requesting country (although evidently such generalized conditions may sometimes prevail), one may concern oneself with conditions affecting only a particular group. The question, then, is under what circumstances one might establish "shortcomings affecting the judicial protection of an objectively identifiable group of persons to which that person belongs," particularly as a result of surveillance.

2. The Case of Surveillance in Catalunya

Surveillance in Catalunya may of course be relevant to assessing deficiencies in a legal system that affect "objectively identifiable groups" and thus act as a hindrance to the execution of an EAW. It is also a human rights concern in its own right. Here, I give a brief overview of the facts of the Catalan situation, highlighting the kind, scope and

10 Court of Justice of the European Union, PRESS RELEASE No 32/22, Refusal to execute a European arrest warrant: the Court of Justice specifies the criteria permitting an executing judicial authority to assess whether there is any risk of breach of the requested person's fundamental right to a fair trial, 22 February 2022.

11 Kamer van Inbeschuldigingstelling (Brussels Court of Appeals) 2021/79.

12 Judgment of the Court, 31 January 2023, para. 102.

intensity of surveillance involved and contextualizing it within the broader effort by Spanish authorities at repression. Although not all allegations are equally grave or all proved conclusively (and indeed some have been heavily criticized in Spain), they add up, taken together, to a systematic pattern of surveillance of Catalan independence leaders, not all of which is covered by the law.

Most notoriously, the so-called Catalangate revealed by the Toronto based Citizen Lab has involved allegations that the Pegasus spyware was used extensively against leaders of the Catalan independence movement.[13] This 2022 revelation suggests that a variety of elected officials but also activists and lawyers have been targeted, as well as, in some cases, their families. At least 65 individuals are alleged to have had their phones hacked between 2017 and 2020, most associated with Catalonia pro-independence parties. This was a bigger number of targets than had been identified by previous Citizen Lab reports. Responsibility was not conclusively assigned, although strong circumstantial evidence has been found to point to the Spanish Government. Some of the surveillance was subsequently justified as judicially mandated, although no evidence to that effect has been provided for many of those involved.

A related development is Operation Catalonia, a covert police operation targeting the Catalan independence process without judicial authorization. The operation focused on pro-independence politicians and included attempts by the Spanish police to obtain banking information in Andorra under threats.[14] It led to the opening of an investigative omission by the Catalan Parliament.[15] Similarly, Democratic Tsunami (Tsunami Democràtic), a civil disobedience group advocating for a self-determination referendum that was behind the occupation of Barcelona Airport in 2019, has been the target of investigation by the Spanish government based on loose terrorism charges,

13 John Scott-Railton et al., *CatalanGate: Extensive Mercenary Spyware Operation against Catalans Using Pegasus and Candiru*, (2022), https://citizenlab.ca/2022/04/catalangate-extensive-mercenary-spyware-operation-against-catalans-using-pegasus-candiru/ (last visited Feb 22, 2024).

14 José Precedo, *El Gobierno de Rajoy investigó al margen de la ley a partidos independentistas durante al menos cinco años*, El Diario, Jan. 15, 2024, https://www.eldiario.es/politica/gobierno-rajoy-investigo-margen-ley-partidos-independentistas-durante-cinco-anos_1_10827474.html (last visited March 10, 2024); José Precedo, *Las notas policiales que recibía Fernández Díaz en su despacho para montar campañas contra el independentismo*, El Diario, Jan. 15, 2024, https://www.eldiario.es/politica/notas-policiales-recibia-fernandez-diaz-despacho-montar-campanas-indendentismo_1_10832806.html (last visited March 10, 2024)

15 Parlament de Catalunya, *Dictamen de la Comissió d'Investigació sobre l'Operació Catalunya*, BOPC 498, Sep. 1, 2017, https://www.parlament.cat/document/bopc/232188.pdf (last visited March 10, 2024) ; *Aprobadas conclusiones de la comisión investigación de "operación Cataluña"*, La Vanguardia, Sep. 9, 2027, https://www.lavanguardia.com/politica/20170907/431110548296/aprobadas-conclusiones-de-la-comision-investigacion-de-operacion-cataluna.html (last visited March 10, 2024).

leading at least one MP to go in exile.[16] Finally, Catalan association Òmnium Cultural has been the object of efforts at infiltration and electronic surveillance.[17]

The use of Pegasus software has been an ongoing cause of concern not just in Spain but globally. In the case of Spain, both the Council of Europe and Amnesty International[18] have expressed concern. A European Parliamentary Committee of Inquiry has also been set up to deal with breaches of EU law flowing from the use of Pegasus and other spyware.[19]

III. Group Surveillance

Understanding the nature of surveillance and where the surveillance of Catalan independence *milieus* fits into that broader paradigm is an important step. Although one might think surveillance is a hallmark of authoritarian and even totalitarian societies, any "democratic exception" to surveillance needs to be relativized. Indeed, one of the characteristics of the contemporary surveillance phenomenon is its tendency to straddle facile divides between the authoritarian and the democratic, the domestic and the international, and the public and the private. It is the extension of surveillance beyond a range of habitual targets – what has been described, notably in the wake of the COVID pandemic, as the "normalization" of surveillance20 – that has alerted civil society to its

16 Claudia Chiappa, *Spain opens terrorism probe into Puigdemont*, Politico, Feb. 29, 2024, https://www.politico.eu/article/spain-open-terrorism-probe-carles-puigdemont-catalonia/ (last visited March 10, 2024); Vicenç Pagès, *Catalan MP Ruben Wagensberg moves to Switzerland over judicial persecution in Tsunami case*, El Nacional, Jan. 31, 2024, https://www.elnacional.cat/en/politics/catalan-mp-ruben-wagensberg-moves-switzerland-persecution-tsunami_1152791_102.html (last visited March 10, 2024).

17 Camille Pagella, L'indépendantisme catalan sous cybersurveillance, Le Temps, Apr. 9, 2022, https://www.letemps.ch/monde/europe/lindependantisme-catalan-cybersurveillance (last visited March 10, 2024).

18 Spain: EU must act to end spyware abuse after prominent Catalans targeted with Pegasus, Amnesty International (2022), https://www.amnesty.org/en/latest/news/2022/04/spain-pegasus-spyware-catalans-targeted/ (last visited Feb 22, 2024).

19 United Nations Office of the High Commissioner, *Spain: UN experts demand investigation into alleged spying programme targeting Catalan leaders*, Feb. 2, 2023, https://www.ohchr.org/en/press-releases/2023/02/spain-un-experts-demand-investigation-alleged-spying-programme-targeting (last visited March 10, 2024); European Parliament, 'Investigation of the use of Pegasus and equivalent surveillance spyware', Recommendation of 15 June 2023, P9_TA(2023)024, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0244_EN.pdf (a recommendation was adopted)

20 Christian Powell Sundquist, *Surveillance Normalization*, 58 Harv. CR-CLL Rev. 117 (2023); Evan Selinger & Hyo Joo (Judy) Rhee, *Normalizing Surveillance*, 22 SATS 49 (2021).

prevalence and omnipresence, even as vulnerable groups have continued in many ways to be the privileged targets of surveillance. This requires a historicization of surveillance patterns highlighting how the surveillance of particular groups is amplified by general patterns of surveillance for all.[21]

1. General v. Group Specific Surveillance

The CJEU case law points to "systematic or generalized deficiencies" that nonetheless "affect an objectively identifiable group."[22] Surveillance can indeed be general in authoritarian societies, but the question is whether it can also be targeted at an "objectively identifiable group" in an otherwise democratic system. This is interesting because from a human rights perspective it may at first seem counter intuitive. In the common understanding, a state is either authoritarian or it is not, and if the former then it will be expected to spread its authoritarianism broadly. Of course, this is not exclusive of being more overbearing when it comes to dissidents or opponents but certainly some states seem committed to surveilling their population *generally*. By contrast, democratic states are often presumed to not engage in at least illegal and generalized forms of interference.

However, the hypothesis that interests us here is that a state may be specifically authoritarian when it comes to a particular group, and that this is in fact the long-standing and more plausible scenario when it comes to otherwise law-abiding and democratic systems. This is not such a farfetched possibility in divided societies. As it happens, group-specific surveillance is endemic in many societies and may even call for intersectional analysis that highlights how certain persons are more likely to be targeted.[23] Even in otherwise and generally authoritarian societies, surveillance may be particularly thorough and systematic when it comes to certain ethnic or national minorities, for example the Uighurs in Xinjiang.[24] The point is that surveillance has a "disparate impact" on particular groups and that in fact the tendency of civil libertarians to frame the issue of surveillance as a general one of privacy "inflicting its harm on everyone" and "encroach[ing] on the public at large," leads to "universalist arguments

21 Mary Anne Franks, *Democratic Surveillance*, 30 Harv. J. L. & Tech. 425 (2016).

22 There is some ambiguity in the judgment. At times, the suggestion seems to be that there must be such deficiencies and that they must affect the group, but at para. 114 the Court speaks of "systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons" which seems to suggest that the deficiencies need only be systemic or generalized when it comes to said group. My emphasis.

23 Sundquist, *supra* note 20 at V.

24 Paul Mozur, *One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority*, The New York Times, Apr. 14, 2019, https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html (last visited Dec 13, 2023).

[that] obscure the topography of power."[25] In practice, it is almost always the case that certain groups (dissidents, minorities, etc.) are the object of more surveillance than others. This makes such surveillance, needless to say, no less problematic.

Indeed, democracies have their own histories of deploying surveillance against groups deemed subversive, even as they would shun from such methods more generally. This may at least point to background "systemic or generalized deficiencies" (for example, in terms of oversight and remedies) even as such deficiencies more significantly "affect" an objectively identifiable group. The historical connection between surveillance practices and discrimination or at least disproportionate policing of certain groups is a strong and old one.[26] In the late 1960s, the FBI notoriously surveilled Black civil rights activists as part of COINTELPRO (Counterintelligence Program) including Martin Luther King. This can easily extend to entire racial or ethnic groups especially in societies dealing with legacies and an ongoing reality of systemic discrimination. Surveillance has particularly characterized the historical experience of African Americans, from informants spoiling slave rebellions to the targeting of "race agitators" starting in the early 20th Century.[27]

Privacy International notes that ""[e]thnic minorities are at greater risk of oversurveillance after protests."[28] Indeed, when it comes to the US, it has been pointed out that "[s]urveillance has been a government tactic to oppress, intimidate, and criminalize entire groups of Americans, and is often done in the name of "national security."[29] In recent years, this has also notably been true of Muslim groups in the New York City area, where the NYPD "infiltrated Muslim student groups, surveilled Muslim owned business, restaurants, and community organizations, going so far as to establish NYPD sponsored youth soccer and cricket teams with the intention of spying on young people who played for the teams."[30] Such tactics have been extended to many US cities. The "colour

25 Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance*, The Century Foundation (Dec. 21, 2017), https://tcf.org/content/report/disparate-impact-surveillance/ (last visited Dec 13, 2023).

26 Dahaba Ali Hussen, *'Dystopian' Surveillance 'Disproportionately Targets Young, Female and Minority Workers'*, The Guardian, Mar. 26, 2023, https://www.theguardian.com/global-development/2023/mar/26/dystopian-surveillance-disproportionately-targets-young-female-minority-workers-ippr-report (last visited Dec 13, 2023).

27 Mass Surveillance and Black Legal History | ACS, (Feb. 18, 2020), https://www.acslaw.org/expertforum/mass-surveillance-and-black-legal-history/ (last visited Dec 13, 2023).

28 Ethnic minorities at greater risk of oversurveillance after protests | Privacy International, http://privacyinternational.org/news-analysis/3926/ethnic-minorities-greater-risk-oversurveillance-after-protests (last visited Feb 22, 2024).

29 October 4 & 2016, *Impact of Government Surveillance on Muslim Americans and Communities of Color / Friends Committee On National Legislation*, Friends Committee on National Legislation, https://www.fcnl.org/updates/2016-10/impact-government-surveillance-muslim-americans-and-communities-color (last visited Dec 13, 2023).

30 *Id*.

of surveillance"[31] encompasses a host of communities including religious minorities and immigrants. Surveillance is reinforced by "predictive policing" whose algorithms constantly reinforce a sense of suspicious groups.

The very fact of dissidence by such groups, moreover, further earmarks them for group specific and renewed surveillance. There is thus a strong connection between minority ethnic status, political activism and surveillance. For example, it has been pointed out that "black people and other people of color have lived for centuries with surveillance practices aimed at maintaining a racial hierarchy."[32] Commenting on the Black Lives Matter Movement, the report notes that:

> [...] participation in a protest leads to unwarranted, continued surveillance for some of the protesters long after the end of a protest, and more importantly [...] such post-protest surveillance activities usually affect black people and other racial minorities the most. [...] In practice this is a form of predictive policing that feeds on over-policing, in this instance individuals from minority and ethnic communities who organise or participate protests.[33]

In other words, there is often a connection between broad group discrimination and the surveillance of the in-group activist community.

The specificity of the surveillance in the case of Catalan independence leaders makes little doubt. This was an extremely targeted operation. It is not alleged that Spain routinely or massively surveils its population. The spyware operation engaged in through Pegasus and Candiru affected around 65 persons, all with close connections to the Catalan independence movement. These included members of the European Parliament and of civil society groups such as the Assemblea Nacional Catalana (ANC) and Òmnium Cultural. The nature of the phishing operations engaged in, notably via SMS, suggested a high degree of voluntarism, preparedness, and purposefulness.

In fact, a group of UN Special rapporteurs who wrote to the Spanish government about Pegasus related surveillance in Spain expressed particular concern that the targeting of this group was directed at and impacted the Catalan people "minority":

31 Alvaro M. Bedoya, *Privacy as Civil Right*, 50 NML Rev. 301 (2020).

32 Malkia Amala Cyril, *Black America's State of Surveillance*, Progressive.org, Mar. 2015, https://progressive.org/%3Fq%3Dnode/188074/ (last visited Dec 13, 2023).

33 Ethnic minorities at greater risk of oversurveillance after protests | Privacy International, *supra* note 28.

> We also express particular concern that the affected individuals mentioned above are all members of the minority Catalan people, and that their attack appears to be related to their peaceful activities on behalf of the Catalan minority. This specific targeting appears to interfere with the right of minority groups to freely affirm and promote their identity, culture and views. Furthermore, this selective targeting appears to be a minority profile, and such practice is prohibited by international and regional human rights norms.[34]

In this context, it is worth noting that the ECtHR in no way requires that an entire population be the target of surveillance to conclude that the right of privacy of particular individuals has been violated. Indeed, it has specifically noted that one of the ways in which potential surveillance can be proved (I return later to why the standard is indeed merely the possibility of surveillance) is if the applicant "belongs to a group of persons targeted by the contested legislation."[35]

2. The Constitution of "Objectively" Identifiable Groups Through Surveillance

Surveillance, then, can certainly apply specifically and particularly to objectively identifiable groups, but what should one make of that notion more generally? It bears underlining that "objectively identifiable groups" is a notion of still recent provenance in the EAW context and one that does not know of any obvious meaning as disclosed by the words themselves. Delineating groups has long been a complex exercise for the purposes of either international human rights law, minority protection or international criminal law. In the case of Catalunya, questions can be asked about whether Catalans in general, Catalan nationalists ("the independence camp") or specifically the persons targeted by spyware would satisfy the requirements of being an objectively identifiable group.

It should be stressed that the standard of an objectively identifiable group need not be a particularly onerous one. In particular, the group could be objectively constituted not on the basis of some inherent "cultural" characteristic as much as its treatment at the hands of the state. For example, human rights NGOs routinely deplore the surveillance of "human rights defenders" including journalists and members of civil society,[36] without

34 Mandatos del Relator Especial sobre cuestiones de las minorías; de la Relatora Especial sobre la promoción y protección del derecho a la libertad de opinión y de expresión; y del Relator Especial sobre los derechos a la libertad de reunión pacífica y de asociación, Ref.: AL ESP 8/2022v 24 de octubre de 2022, p. 5. Author's translation.

35 Roman Zakharov v. Russia, Application no. 47143/06, Judgment, 4 December 2015, para. 171.

36 Demand an end to the targeted surveillance of Human Rights Defenders, Amnesty International, https://www.amnesty.org/en/petition/targeted-surveillance-human-rights-defenders/ (last visited Jan 20, 2024).

it being suggested that these individuals belong to a readily identifiable minority (they are sometimes described as "target communities engaging in protected activities").[37] They exist as an objectively identifiable group, in a sense, merely as a function of having the shared characteristic of being surveilled. The group in the case of Catalunya and surveillance is the individuals who are the target of surveillance, and there is little to add there.

Having said that, it does not seem irrelevant that the group being the target of surveillance is not only defined functionally by that surveillance (in the sense that any random group of "criminals" might be defined as an objectively identifiable group, even if they had no relations between each other and no shared characteristic), but also happens to be a group of persons belonging to a national or ethnic minority and engaged in a range of common political activities. If anything, this reinforces the sense that the group is indeed a group and not simply an interchangeable "category." Minority protection is evidently an old motif in international law and, although arguably less central to what it once was in the inter-war, has become embedded in international human rights law, notably through Article 27 of the International Covenant on Civil and Political Rights and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[38] And minority protection is certainly not alien to the European context with Article 2 of the Lisbon Treaty giving it imprimatur.

Defining minorities or protected groups has always been a challenge for international law and indeed international human rights instruments often seem to depart from assumptions about the existence of such groups to identify the rights of individual members. This has allowed some states to strongly deny that any objectively identifiable groups at least understood as minorities exist on their territory. To be clear, again, the ECJ's case law is not as such related to the need to make a case that Catalan activists for example are a minority in the national or ethnic sense. I merely suggest that making the latter point reinforces the sense that they are an objectively identifiable group defined not only by their treatment at the hands of the state but also by a series of shared characteristics (ethnic, cultural, religious or linguistic) that may then select them, and problematically so, for heightened surveillance.

Over time, the law has clearly evolved in terms of how it defines objectivity when it comes to identifying groups. On the most intuitive level, the classic approach is that minority groups are defined by their having ethnic, religious or linguistic

37 The Geneva Declaration on Targeted Surveillance & Human Rights, Access Now, https://www.accessnow.org/press-release/geneva-declaration-on-targeted-surveillance-and-human-rights/ (last visited Jan 20, 2024).

38 Joshua Castellino, *The Protection of Minorities and Indigenous Peoples in International Law: A Comparative Temporal Analysis*, 17 International Journal on Minority and Group Rights 393 (2010).

characteristics that set them clearly apart from the rest of the population.[39] For example, the Permanent Court of International Justice has found that a minority is a form of "community" and that a community is a "group of persons living in a given country or locality and united by [their] identity of race, religion, language and traditions."[40]

At the same time, the trend has been to simultaneously put emphasis on said groups' social construction, and particularly subjective perceptions. Already the PCIJ had spoken of the defining characteristic of minorities as their being "united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other." In other words, it is at least as much fellow-feeling as inherent characteristics that makes a minority. For our purposes, social construction through self and inter-subjective identification is still susceptible to objective validation (as in, the subjective process exists, objectively) but it is not quite the same thing as objectivity in the sense that a group is found to have inherent and incontrovertible characteristics. It shifts the emphasis not on some intrinsic quality of the group members but on a certain degree of self and other identification.

A parallel development is evident in the related albeit quite different realm of international criminal law. Consider, for example, the case of the Tutsis for the purposes of the Genocide convention before the ICTR.[41] There is much agreement that the Tutsis are not objectively a race or even an ethnic group. Nonetheless, their treatment by colonizers and subsequently by an independent Rwanda has very much been "as if" they were a race or an ethnic group. If nothing else, it is the discrimination which they have suffered that has forged their distinctiveness as a group. Indeed, this is why the post-genocide Rwandan government has sought to prohibit "ethnicisim" as the very ideology of considering that Rwandans are from different ethnicity. In other words, it is ethnic discrimination that creates ethnic groups, not ethnic groups that create ethnicism. What the definition of the Tutsis as a group under the Genocide Convention suggests,

39 2019 annual report to the General Assembly, A/74/160, para. 53.

40 Greco-Bulgarian 'Communities' (1930) PCIJ Ser B No 17, 19.

41 William A. Schabas, *Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunals for Rwanda*, 6 ILSA J. Int'l & Comp. L. 375 (1999); Carola Lingaas, Defining the Protected Groups of Genocide through the Case Law of International Courts (2015), https://www.academia.edu/download/44863281/ICD_Brief_Defining_the_Protected_Groups_of_Genocide.pdf (last visited Jan 22, 2024); Alison Hopkins, *Defining the Protected Groups in the Law of Genocide: Learning from the Experience of the International Criminal Tribunal for Rwanda*, 19 Dalhousie Journal of Legal Studies 2 (2010); Andreas Henriksson, *The Interpretation of the Genocide Convention's Protected Groups Definition* (2004), https://lup.lub.lu.se/student-papers/record/1558257/file/1564593.pdf (last visited Jan 22, 2024).

moreover, is, in addition to shared feelings of fate, a certain commonality of treatment, notably at the hands of the state.

This means that although surveillance may very well flow from the existence of a group of Catalan dissidents that more or less diffusely identify as such, it is also surveillance of that particular group itself that contributes to create the group (a group of "victims" who may in addition share common bonds). Indeed, it has often been the very denial of the separate identity and political agendas of groups (e.g., African Americans, indigenous peoples, etc.) that has led them to a fortiori claim that identity. To be clear, nothing as dramatic hangs on such a determination in the narrow context of an EAW. The question is not whether Catalans (let alone Catalan nationalists or certain Catalan leaders) are a distinct ethnic group or even minority.

What is relevant however is that it is much more how any group is treated that constitutes such a group's objectively ascertainable contours than any characteristic antecedent to such treatment. In other words, what makes an objectively identifiable group is its treatment as such, including as it may shape that group's continued existence in its interaction with the state. Said group may not even consistently self-identify itself as being such a group. In that context, surveillance may not be the only process by which groups are constituted (which may include, for example, more straightforward instances of persecution) but it is arguably an ongoing, more systematic and preliminary act in all persecution. For example, in China, digital surveillance tools do not serve only the purpose of surveilling the Uighurs but of "identifying" them through facial features notably as they travel to big cities in the East of the country.[42] It is relevant that, as has been pointed out in the International Principles on the Application of Human Rights to Communications Surveillance, "[a]ny measure [of surveillance] must not be applied in a manner that discriminates on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[43] Surveillance would have to be analyzed alongside other markers of discrimination such as the relative lack of protection of minority languages in Spain or campaigns of "vilification" of the Catalan minority and persecution of some of its political figures.[44]

42 Mozur, *supra* note 24.

43 Electronic Frontier Foundation, *International Principles on the Application of Human Rights to Communications Surveillance* (2013), https://www.eff.org/files/necessaryandproportionatefinal.pdf (last visited Mar 9, 2024)

44 Report of the Special Rapporteur on minority issues, Visit to Spain, A/HRC/43/47/Add.1, 9 March 2020.

IV. The General, Group and Individual Human Rights Incidence of Surveillance

What then is the more general significance of surveillance for evaluating the kind of treatment that an objectively identifiable group might expect to receive in the judicial system? Surveillance has been the object of heightened scrutiny at least since the revelations of Edward Snowden suggested that the US National Security Agency had been engaged in widespread global monitoring of communications. This has led to a number of responses that go far beyond the case of Catalan separatists in Spain. For example, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism put forward a "Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight."[45] Subsequently, the United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights have adopted a "Joint Declaration on surveillance programs and their impact on freedom of expression."[46] These sources have gradually helped crystallize a clear sense of the unwanted incidence of surveillance measures and the strict regime they have to conform to in order to be legal.

1. Surveillance as a Human Rights Violation

The ill effects of surveillance for human rights are well documented and intuitively understandable. They have been underscored by a range of international instruments including notably United Nations General Assembly Resolution 68/167 on the "Right to Privacy in the Digital Age" (18 December 2013). There has been a strong emphasis on the problematic character of "mass surveillance" which is different but related to the Catalan situation.

45 "Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight," 17 May 2010 (A/HRC/14/46).

46 United Nations Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Joint Declaration on Surveillance Programs and their Impact on Freedom of Expression, 21 June 2013.

Mass surveillance including, for example, through the systematic collection and retention of communication data but also through CCTV, stands to have a deeply corrosive impact on the right to privacy. This is in part because its justification, being extremely general, is therefore also particularly weak, and in part because of the risk of slippage from potentially legitimate targets to illegal ones. As the European Court of Human Rights (ECtHR) put it in the Szabó and Vissy v. Hungary case, the "scope of the measures could include virtually anyone [and] new technologies enable the Government to intercept masses of data easily concerning even persons outside the original range of operation."[47]

By ricochet, the implications on rights are both broader and deeper, entailing potentially violations of basic freedoms such as freedom of speech and opinion. It has a more generally chilling effect. As the UN High Commissioner has suggested, beyond the right to privacy, mass surveillance can impact freedom of opinion and expression, the right to seek, receive and impart information, or the right of freedom of peaceful assembly and association and to family life.[48] There have even been intimations that mass surveillance is per se illegal. As the then Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism put it:

> The States engaging in mass surveillance have so far failed to provide a detailed and evidence-based public justification for its necessity [...]. Viewed from the perspective of article 17 of the Covenant, this comes close to derogating from the right to privacy altogether in relation to digital communications. For all these reasons, mass surveillance of digital content and communications data presents a serious challenge to an established norm of international law. [...] [T] he very existence of mass surveillance programmes constitutes a potentially disproportionate interference with the right to privacy.[49]

It has even been argued that mass surveillance's endemic and systematic character might even amount to a crime against humanity.[50]

Catalunya is not a case of mass surveillance as much as a very targeted type of surveillance. If anything, this makes it even more problematic. Surveillance, when addressed at relatively small groups, has essentially the same effects, all other things being equal, except this time with an added and further damning dimension of

47 Case of Szabó and Vissy v. Hungary (Application no. 37138/14), 12 January 2016, para. 89.

48 A/HRC/27/37, paras. 24-27.

49 UN Doc. No. A/69/397 at para 18.

50 Michael Bohlander, *"The Global Panopticon": Mass Surveillance and Data Privacy Intrusion as a Crime against Humanity?*, in Justice Without Borders 73 (2018).

group-specific persecution. There has been particular emphasis, under international human rights law, for example, on the nefarious effects of surveillance of human rights defenders as a specific form of targeted surveillance.

In the case of Catalan independentists, UN Special Rapporteurs have particularly underlined that the surveillance appears to be:

> [...] an interference with their right to freely hold and express their views, to exchange and disseminate information and ideas, to peacefully assemble and participate in associations, to have a private life and privacy in correspondence, to be equal before the law, and to be equally protected by the law without discrimination.[51]

Among its more notable consequences is a chilling effect leading to "self-censorship" with a resulting "inhibiting effect on the enjoyment of the right to freedom of opinion and expression in Catalonia in general."

One interesting area where the question of group surveillance has surfaced is in relation to asylum law. The question, a relatively hypothetical one at this stage, is whether surveillance and its incident violation of the right to privacy is susceptible of constituting a form of persecution giving access to asylum. As Liane M. Jarvis Cooper has argued, violations of privacy may help identify previous persecution or predict future persecution but may also "qualify as persecution even if it is not accompanied by other harms, threats, acts, or events."[52] This is at least if certain "lack of control harms, chilling effect harms, and manipulation harms, [are] sufficiently severe by themselves to rise to the level of persecution."[53] Although it is too early to know how far this trend will go, clearly systematic violations of the right to privacy tend to be taken with increasing seriousness qua human rights violations and therefore qua persecution.

2. The Legal Regime of Surveillance

Proving that surveillance is illegal is key to any claim that an EAW should not be honored because of deficiencies in the state requiring the EAW. It should be noted that surveillance is not per se illegal and can be justified in a democratic society. As the High Commissioner for Human Rights put it:

51 Mandatos del Relator Especial, supra note 29, p. 5. Author's translation.

52 Liane M. Jarvis Cooper, *Privacy Harms and Persecution*, 31 S. Cal. Interdisc. L.J. 469, 470 (2021).

53 *Id.* at 491.

> since digital communications technologies can be, and have been, used by individuals for criminal objectives (including recruitment for and the financing and commission of terrorist acts), the lawful, targeted surveillance of digital communication may constitute a necessary and effective measure for intelligence and/or law enforcement entities.[54]

By the same token, this basic recognition does not provide a blank cheque for any measure of surveillance. The risk is that very broadly framed concerns will be invoked routinely to justify interference with rights in ways that go far beyond what was considered acceptable only a few years ago. The ECtHR and the Council of Europe have established circumstances that would allow surveillance, essentially along the lines of the regime already embedded in Article 8 (right to respect for private and family life, home and correspondence). The basic principle is that:

> [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The International Principles on the Application of Human Rights to Communications Surveillance, which have been signed by more than 400 civil society groups, are also a good example of a bottom-up soft law initiative to shape the regime of surveillance globally by emphasizing the applicability of "international human rights law." They anticipate that surveillance should be prescribed by law, should pursue a legitimate aim, be "strictly and demonstrably necessary," adequate and proportional.[55] The Human Rights Committee has also highlighted the importance of interference with the right to privacy complying with the principles of legality, proportionality and necessity.[56]

It is worth noting that some cases of alleged surveillance have been dismissed as inadmissible on the basis that they were "manifestly ill-founded" given the existence of adequate and effective guarantees against abuses in the impugned laws.[57] This is also true at the merits stage where, on balance, the European Court has occasionally sided with states. In Breyer v. Germany for example the Court found that amendments to the German Telecommunications Act requiring companies to collect and store the personal

54 A/HRC/27/37, para. 24.

55 International Principles on the Application of Human Rights to Communications Surveillance.

56 Human Rights Committee, Concluding observations on the fourth report of the United States of America under the ICCPR, 26 March 2014.

57 See, e.g.: ECtHR, Weber and Saravia v. Germany, 29 June 2006.

details of all their customers including that of users of pre-paid SIM cards, did not mean that Germany had violated Article 8. The Court particularly deferred to Germany's "margin of appreciation" in exercising its discretion, finding that the measure had been "necessary in a democratic society" and that adequate safeguards were in place.[58]

In other words, the illegality of surveillance is not a foregone conclusion even as the practice rightly attracts human rights concerns. Still, several high-profile complaints about illicit interference have already led to findings that the relevant states had violated their human rights obligations, some of which are discussed below. In the Kennedy case, the Court ended up finding that there were sufficient safeguards in the Act to justify surveillance.[59] Typically, the Court has found, in line with the text of Article 8 and its general approach to limitations to rights, that criminal investigations or national security grounds may justify measures of surveillance but has insisted on a number of minimum safeguards to avoid abuses of power. Nonetheless, several factors can each on its own lead to the conclusion that a violation of the right to privacy has occurred.

First, any limitation to Article 8 must be prescribed by law and the interference that results must be "in accordance with the law." Such law must indicate with sufficient clarity how the discretion of authorities will be exercised. As the Court put it in:

> [...] foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly [...]. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident [...]. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated [...]. The domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.[60]

Moreover:

> [...] since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny by the individuals concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive or to a judge to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion

58 ECtHR, Breyer v. Germany, application no. 50001/12, 30 January 2020.

59 ECtHR, Kennedy v. United Kingdom, application no. 26839/05, 18 May 2010.

60 Association for European Integration and Human Rights and Ekimzhiev, para. 93.

> conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference [...][61]

Some judgments have come to the conclusion that Article 8 was violated merely at this first stage of the analysis. In the Liberty and Others v. the United Kingdom, for example, the Court found that:

> the domestic law at the relevant time [did not indicate] with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications. In particular, it did not, as required by the Court's case-law, set out in a form accessible to the public any indication of the procedure to be followed for selecting for examination, sharing, storing and destroying intercepted material.[62]

In the Ekimdzhiev and Others v. Bulgaria, the Court also found that the law did not meet the "quality-of-law" requirement.[63]

Second, surveillance must be for a legitimate aim, "necessary in a democratic society" and proportional. In the Roman Zakharov v. Russia case, the applicant, the editor-in-chief of a publishing company complained that Russia's system of interception of mobile telephone communications did not comply with the requirements of Article 8 of the convention. The Court unanimously found that the surveillance law was published and accessible, but that it was excessively wide, covering a range of offences, and affecting persons beyond a suspect or an accused. Moreover, the law did not "give any indication of the circumstances under which communications could be intercepted on account of events or activities endangering Russia's national, military, economic or ecological security."

Instead, it left the authorities an almost unlimited discretion in determining which events or acts constituted such a threat and whether the threat was serious enough to justify secret surveillance. This created possibilities for abuse. In addition, the possible duration of the measures did not provide sufficient safeguards against arbitrary interference and judicial scrutiny remained too limited. Accordingly, the Court found that the applicant's right to privacy was violated since the authorization procedure under Russian law was "not capable of ensuring that secret surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration."[64]

61 Association for European Integration and Human Rights and Ekimzhiev, para. 94.

62 Case of Liberty and Others v. The United Kingdom, Application no. 58243/00, 1 July 2008.

63 Case of Ekimdzhiev and Others v. Bulgaria, 11 January 2022.

64 Case of Roman Zakharov v. Russia, Application no. 47143/06, 5 December 2015.

Other cases, particularly those dealing with mass surveillance, have emphasized the quasi-unfettered power leading to arbitrary interference in violation of the rule of law,[65] or problems associated with the retention of data and the ongoing risks it creates for privacy.[66]

In the case of Catalunya, the problem is in part that surveillance has occurred outside the law and in part that it is based on a problematic reading of the law. Spain has argued that the surveillance of at least 18 persons was judicially authorized by the Supreme Court of Justice and such cases may attract greater deferral in terms of human rights, although it is worth noting that the judicial warrants have never been made public. But this still leaves many (almost 50) cases of Pegasus-related hacking unaccounted for under a judicial framework. Moreover, it is unclear and likely implausible that such broader hacking was conducted with judicial authorization. The indiscriminatory nature of the surveillance method, namely use of the spyware Pegasus, may in fact suggest an operation that was not closely monitored judicially or conducted strictly for investigative purposes. It points to an intelligence rather than a judicially framed police operation, one possibly "unrestrained" in nature and therefore neither necessary nor proportional.[67]

Moreover, even to the extent that surveillance was carried out within a judicial or at least broad legal framework, it could still be abusive. One of the concerns in the case of Catalunya is that although surveillance may indeed have been judicially ordered, it was based on broad allegations of "sedition" and "rebellion"[68] that are themselves vague and dated, as well as charges for very broadly defined crimes related to "terrorism".[69] The Spanish authorities have repeatedly invoked secrecy and national security to refuse to explain why the surveillance occurred, but it is certainly possible that politicians and activists were targeted less for having committed crimes than as a result of their political activities. It does not help that the Supreme Court has rejected complaints seeking access to the judicial warrants on the basis of which surveillance was supposedly conducted.[70] Ex officio investigations carried out by the Spanish Ombudsman suggest that he was satisfied that the required justification had been provided for surveillance to be authorized but he

65 Case of Haščák v. Slovakia, 23 June 2022.

66 Case of Ekimdzhiev and Others v. Bulgaria, 11 January 2022.

67 John Scott-Railton et al., *Catalangate: Extensive Mercenary Spyware Operation against Catalans Using Pegasus and Candiru*, 2023 24 (2022), https://joan.domenechmilan.com/wp-content/uploads/2022/04/citizenlab.ca-CatalanGate-Extensive-Mercenary-Spyware-Operation-against-Catalans-Using-Pegasus-and-Candiru.pdf (last visited Jan 18, 2024).

68 Judgment no. 459/2019 of 14 October, delivered by the Criminal Chamber of the Supreme Court in Special Proceedings No. 20907/2017.

69 Amnesty International, *Tweet... If You Dare. How Counter-Terrorism Law Restrict Freedom of Expresion in Spain*, (2018).

70 Pieter Omtzigt, *Pegasus and Similar Spyware and Secret State Surveillance*, 41 (2023).

has not disclosed on what basis he came to that conclusion.[71] Notwithstanding the fact that judicial authorization may have been provided in such cases, it could still fail to pass the test of rights, for example because it was not proportional.

3. Alleging Illegal Surveillance and Human Rights

The challenge with proving surveillance is that it is often, by definition, secret, and that applicants may have little more than suspicions about being monitored. This can make it very difficult for them to prove that their rights have been violated, especially in states that require them to prove the exact nature of the interference they were subjected to. In Spain, those complaining about unlawful surveillance such as members of Omnium Cultural, have had a hard time proving infection of their phones, notably as a result of intelligence information being classified. At the same time and normally the Court will not allow challenges to laws in abstracto. This creates a priori a genuine bind for applicants and, potentially, a tricky situation for rights protection. Absent any available evidence that Kennedy specifically had been the target, the ECtHR has nonetheless found that it can examine generally whether there was a "reasonable likelihood" that communications had been intercepted.[72]

According to the Court, this gives the Convention its "effet utile" since otherwise the Convention protections would be "materially weakened" and protections of Article 8 would "to a large extent be reduced to a nullity."[73] As the Court put it in the Klass case:

> The Court therefore accepts that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him. The relevant conditions are to be determined in each case according to the Convention right or rights alleged to have been infringed, the secret character of the measures objected to, and the connection between the applicant and those measures.[74]

This ensures that surveillance measures do not become virtually "unchallengeable" and outside any conceivable domestic or international supervision. Exceptionally, then, a claimant can allege that they are a victim of the mere existence of a regime of surveillance

71 Antonio M. Díaz-Fernández, *Reining in Pegasus: The Oversight of the Spanish Intelligence Service in the Catalangate*, 1 Études françaises de renseignement et de cyber 101 (2023).

72 Kennedy v. United Kingdom, Application no. 26839/04, 18 May 2010.

73 Klass and Others v. Germany, para. 34.

74 Klass and Others v. Germany, para. 34.

or legislation permitting such measures even if they cannot provide conclusive evidence that they individually have been so surveilled. Moreover, according to the UN High Commissioner on Human Rights, the "onus is on the authorities seeking to limit the right to show that the limitation is connected to a legitimate aim."[75] What the Court will take into account is the scope of the legislation and whether the applicant might be affected by it, notably by taking into account whether the applicant that belongs to a group at risk of being subjected to such measures.[76]

Moreover, the court will assess the existence of remedies at the national level. If such remedies are not widely available, then "widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified." A mere menace of surveillance will suffice. By contrast if remedies are available, it will be difficult to invoke a widespread suspicion. Indeed, the regime allowing individuals to claim violations of their privacy rights in abstracto does not extend to modifying the normal rule of exhaustion of local remedies. In Privacy International and Others v. the United Kingdom, the Court found that several NGOs complaining of hacking at the hands of British intelligence services were inadmissible because the Contracting State had not been afforded the opportunity to address or put right the alleged violations.[77] However, the effectiveness of the remedies will also be evaluated when it comes to the merits and, for example, the fact that remedies are only available to persons capable of submitting proof that they were subjected to interception will definitely count against their effectiveness.[78]

4. Surveillance and the Right to a Fair Trial

Surveillance can have a particularly devastating effect more specifically in the judicial context and notably in relation to the right to a fair trial, for example by revealing protected information. This is evidently of relevance in the specific context of honoring EAWs. The main problem with surveillance is that it interferes with the confidentiality of communications between a client and their lawyer. As the ECtHR put it:

> An accused's right to communicate with his legal representative out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. If a lawyer were unable

75 AHRC/27/37, para. 23.

76 Marie Ringler v. Austria, Application no. 2309/10, 12/05/2020, para. 49.

77 Privacy International and Others v. the United Kingdom, 7 July 2020. See also Marie Ringler v. Austria, Application no. 2309/10, 12/05/2020.

78 Case of Roman Zakharov v. Russia, Application no. 47143/06, 5 December 2015, paras. 286-301.

> to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.[79]

This does not mean, of course, that there can never be surveillance of a lawyer, but that it must be within the specific context of judicial investigations of a criminal nature. Evidently, lawyers' "status as attorneys does not exempt them from the responsibilities and duties of all other citizens, nor should it protect them from the scrutiny of law enforcement officers."[80] But there is clear evidence that surveillance has routinely exceeded the boundaries of criminal investigations, if nothing else because of the catch-all nature of much contemporary surveillance and its pervasive nature, for example in the sensitive context of prisons, as well as the vulnerability of all digital conversations.[81]

In fact, the problem today is less with abuses of the existing criminal law framework for surveillance, relatively bounded as this is by procedures, than its full circumvention through ordinary data collection and generalized espionage. This has, if anything, been heightened by national security discourses that emphasize the importance of preventing crime. Leaks or hacks of bulk data have also increased the chance that confidential conversations would be revealed.[82] Certain individuals or groups of individuals have been particularly targeted for surveillance of their conversations with their lawyers, most notoriously Guantanamo detainees.[83] Lawyers have also increasingly been targeted, whether in India[84] or Jordan.[85] It should be a matter of concern that the Pegasus software would have had no way of excluding protected conversations of Catalan activists with lawyers and thus appears to be inherently problematic. It is highly likely that privileged conversations would have been subjected to surveillance.

79 S v Switzerland, Nos 12629/87; 13965/88 (28 November 1991) at para 48.

80 Ronald Goldstock & Steven Chananie, *Criminal Lawyers: The Use of Electronic Surveillance and Search Warrants In the Investigation and Prosecution of Attorneys Suspected of Criminal Wrongdoing*, 136 U. Pa. L. Rev. [1878], 1858 (1987).

81 Jonathan Stribling-Uss, *Legal Cybersecurity in the Digital Age*, (2020).

82 Jordan Smith & Micah Lee, *Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege*, The Intercept (Nov. 11, 2015), https://archive.ph/MHC2m (last visited Dec 14, 2023); Paul H. Beach, *Viewing Privilege through a Prism: Attorney-Client Privilege in Light of Bulk Data Collection Note*, 90 Notre Dame L. Rev. 1663 (2014).

83 Ian Kysel, *Guántanamo Dispatch: New Revelations of Attorney–Client Surveillance*, American Civil Liberties Union (Jun. 14, 2013), https://www.aclu.org/news/national-security/guantanamo-dispatch-new-revelations-attorney-client-surveillance (last visited Dec 14, 2023).

84 Siddhart Varadarajan, *Supreme Court Registrars, Lawyers of Key Clients, Justice Arun Mishra's Old Number on Pegasus Radar*, The Wire, Aug. 2021, https://thewire.in/law/supreme-court-registrars-lawyers-of-key-clients-and-old-number-of-an-sc-judge-on-pegasus-radar (last visited Feb 22, 2024).

85 Journalists and Lawyers Hacked With Pegasus Spyware in Jordan—Probe, Time, Feb. 2024, https://time.com/6590855/jordan-pegasus-spyware-hack/ (last visited Feb 22, 2024).

In fact, the existence of massive and routinized surveillance has created fears that in practice there may remain very little of client-attorney privilege, putting considerable weight on lawyers in terms of their ethical obligations towards their clients.[86] For example, the National Association of Criminal Defense Lawyers, in an amicus brief, complained that "[w]hen every reasonable modern method of communication is apparently subject to routine mass search and seizure by the government, the right to consult with counsel, under the protection of the attorney-client privilege, simply disappears."[87] In effect, lawyers in some countries have had to resort to extreme methods to ensure the confidentiality of their communications such as "turning to technologies like encryption, air-gapped computers isolated from the Internet and disposable 'burner' phones."[88] Not being able to guarantee confidentiality can hamper the work of lawyers and "make [...] it much harder to build trust with their clients, and make [...] clients less willing to speak fully and frankly, complicating efforts to devise an effective legal strategy."[89]

This sensitivity to the dangers of human rights surveillance in the context of the trial has led to particular concern about the regime authorizing such surveillance. The monitoring of lawyer-client communications can be authorized, but only when "strictly necessary" in a democratic society and in exceptional circumstances. In the case of Klass and Others v. Federal Republic of Germany (6 September 1978), the applicants were four lawyers and a judge who challenged the application of the Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications (Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses), in violation of Article 10 of the German Basic Law that guaranteed secrecy as "inviolable."

The law made it possible, in line with the possibility of limitations anticipated by the Basic Law, to impose restrictions in order to protect against "imminent dangers" threatening the "free democratic constitutional order", "the existence or the security of the Federation or of a Land," or "the security of the [allied] armed forces" stationed on the territory of the Republic. In addition, such measures could only be adopted if there were factual indications (tatsächliche Anhaltspunkte) that a person was planning, committing, or had committed certain criminal acts punishable under the Criminal Code, such as offences

86 Sadikov Ruslan, Challenges and Opportunities for Legal Practice and the Legal Profession in the Cyber Age, 1 International Journal of Law and Policy (2023), https://irshadjournals.com/index.php/ijlp/article/view/59 (last visited Dec 14, 2023).

87 Government Surveillance Undermines Attorney-Client Privilege | Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/government-surveillance-undermines-attorney-client-privilege (last visited Feb 22, 2024).

88 Alex Sinha, *How US Government Surveillance Threatens Attorney-Client Privilege*, (Aug. 15, 2014), https://www.jurist.org/commentary/2014/08/alex-sinha-attorney-client-privilege/ (last visited Dec 14, 2023). Also Peter Micek Stribling-Uss Esq , Jonathan, *Why Encryption Is Vital to Attorney-Client Privilege*, Access Now (Jan. 11, 2021), https://www.accessnow.org/encryption-attorney-client-privilege/ (last visited Dec 14, 2023).

89 Sinha, *supra* note 88.

against the peace or security of the State, the democratic order, external security, and the security of the allied armed forces. Moreover, such measures could only be resorted to if the establishment of the facts by another method was without prospect of success or considerably more difficult. Measures were to be immediately discontinued once the required conditions had ceased to exist or the measures themselves were no longer necessary.

The Court found no violation of Article 8 of the Convention in that particular case given the threats that Germany faced, notably of espionage and terrorism by subversive elements, but highlighted that the concern about the confidentiality of client-attorney communications where such circumstances might not prevail remains a heightened one. As Judge Pinto de Albuquerque put it in the Big Brother case:

> Domestic law should provide for a specific regime of protection for privileged professional communications of parliamentarians, medical doctors, lawyers and journalists. Since indiscriminate and suspicionless bulk collection of communications would frustrate the protection of legally protected and confidential information, this can only be effectively guaranteed by means of judicial authorisation of interception of such communications when evidence is put forward that supports a reasonable suspicion of serious offences or conduct damaging to national security committed by these professionals. In addition, any communications of these categories of professionals covered by their professional secrecy, if mistakenly intercepted, should be immediately destroyed.[90]

The current challenge before the European Court of Human Rights of the French intelligence law, moreover, is particularly insistent that the law lacks adequate guarantees to protect the secrecy of lawyer-client conversations.[91] A similar concern is evident in a German Federal Constitutional Court judgment.[92] Such concerns are likely to be magnified if the individuals whose conversations with their lawyers are being intercepted are also members of an identifiable group that is the target of surveillance more generally. Indeed, the Pegasus and Candiru spyware may have targeted, among others, the lawyers representing detained Catalan leaders and UN Special rapporteurs have deplored that fact specifically, noting that if such a practice was confirmed it "would constitute an attack on the independence of lawyers and human rights defenders."[93]

90 Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque, para. 25.

91 Requête n° 49526/15, Association confraternelle de la presse judiciaire v. France, 26 April 2017.

92 Judgment of the German Federal Constitutional Court of 19 May 2020 (1 BvR 2835/17).

93 Mandatos del Relator Especial, supra note 29. Author's translation.

V. Potential Complicating Factors in Assessing the Human Rights Impact of Surveillance

In this final section, I briefly review a few complicating factors in assessing the human rights incidence of surveillance.

1. The Dubious Validity of Group-Based Surveillance

One question that arises is if surveillance of a group can ever be broadly legal. Group surveillance may just be a function of the fact that many individual members of a group are as such the targets of surveillance which, on aggregate, means that one can say that a group is being monitored; but it may also be based on the surveillance of the group as such, with individuals being monitored merely as a result of belonging to the group. The more one departs from an individual surveillance model, the more human rights concerns will be triggered, for example because some form of exploratory "data fishing" is involved, such concerns will rise in proportion to any sense that a group is being surveilled as such, especially in ways that closely espouse particular minority characteristics.

Group surveillance has emerged as a concern based on the idea that "individuals are not stand-alone subjects of surveillance"[94] and that, in practice, individual surveillance is increasingly woven into the surveillance of collectives. In some cases, group surveillance, in its undiscriminating character, is closer to "mass surveillance" about which the ECtHR has expressed most wariness. The Court found in Szabó and Vissy v. Hungary, for example, that the "ordering is taking place entirely within the realm of the executive and without an assessment of strict necessity, [...] and given the absence of any effective remedial measures, let alone judicial ones" that there had been a violation of Article 8.[95] By contrast, in the Kennedy case, it was precisely because British law did not allow for "indiscriminate capturing of vast amounts of communications" that the Court concluded there had been no violation of Article 8. If nothing else, the Court has insisted in the Big Brother case that mass surveillance should be the object of a specific regime including "end-to-end safeguards" from adopting measures of bulk interception, to allowing

94 Kirstie Ball et al., *Regulating Surveillance. The Importance of Principles*, in Routledge Handbook of Surveillance Studies , 377 (2012).

95 Case of Szabó and Vissy v. Hungary (Application no. 37138/14), 12 January 2016, para. 89.

particular interception to occur and ensuring that ex post facto review was available, none of which were found to be satisfactory in that case.[96]

The problem with broad group-based surveillance as surveillance that lies somewhere between mass and individualized surveillance is potentially triple: first, it may in fact be closer to mass than individual surveillance and therefore import all of the problematic characteristics and heightened legal concern of the former; second, it may suggest a discriminatory animus in that presumably only some groups are being monitored in a context where, as we saw, vulnerable groups have often historically been targeted; third, in lumping together what will invariably be a diverse set of individuals, it fails to discriminate between members of such groups as well as increases the risks that persons may be caught unwittingly in the surveillance. The focus on group surveillance, then, suggests the limits of the otherwise influential individual privacy model in a context where it triggers a much broader range of rights violations.[97] Certainly, if all members of a group are suspected of having committed criminal offences (for example, a criminal gang), then they may in some circumstances be the object of intercepts as such. In terms of national security, groups plotting terrorist attacks can be the object of surveillance, but this is much more dubious when groups are not involved in violent threats to the state.

Wariness with group surveillance, moreover, is heightened when it comes to certain categories of persons. In France, for example, a law anticipates members of parliament, magistrates, lawyers or journalists cannot be the target of surveillance measures by intelligence services concerning their electronic communications in the exercise of their functions, except through close monitoring by the plenary version of the *Commission Nationale de Contrôle des Techniques de Renseignement*, tasked, under the jurisdictional control of the Conseil d'Etat, to make sure that such measures are proportional.[98] At the same time, the French Conseil constitutionnel has been satisfied that such a regime does not in and of itself constitute "a manifestly disproportionate attack on the right to respect for private life, the inviolability of the home and the secrecy of correspondence".[99] The law is nonetheless currently being challenged before the European Court of Human Rights on the basis that it lacks adequate sanctions and is not strictly necessary to preserve democratic institutions.

96 See also case of Centrum För Rättvisa v. Sweden (Application no. 35252/08), 25 May 2021.

97 Ball et al., *supra* note 94 at 378.

98 Article L. 821-7.

99 Conseil constitutionnel, décision no 2015-713-DC du 23 juillet 2015. Author's translation.

2. The (Ir)relevance of New Technologies

One emerging complicating factor in calibrating responses to surveillance has been the fact that surveillance is increasingly facilitated by the very technologies that allow digital communications. In the case of so-called "CatalanGate," the use of Pegasus spyware was alleged to be at the heart of covert surveillance. Many of the recent cases before the ECtHR attest to the centrality of such new modes of surveillance that push the boundaries of how surveillance is effected as well as the occasional unease of international courts about some of the challenges that arise. As the ECtHR put it:

> While technological capabilities have greatly increased the volume of communications traversing the global Internet, the threats being faced by Contracting States and their citizens have also proliferated. These include, but are not limited to, global terrorism, drug trafficking, human trafficking and the sexual exploitation of children. Many of these threats come from international networks of hostile actors with access to increasingly sophisticated technology enabling them to communicate undetected. Access to such technology also permits hostile State and non-State actors to disrupt digital infrastructure and even the proper functioning of democratic processes through the use of cyberattacks, a serious threat to national security which by definition exists only in the digital domain and as such can only be detected and investigated there. Consequently, the Court is required to carry out its assessment of Contracting States' bulk interception regimes, a valuable technological capacity to identify new threats in the digital domain, for Convention compliance by reference to the existence of safeguards against arbitrariness and abuse, on the basis of limited information about the manner in which those regimes operate.[100]

This led the Court to insist that "safeguards are therefore pivotal and yet elusive."[101]

In principle, the ECtHR, in one of its first judgments on "modern" digital surveillance found that "it is a natural consequence of the forms taken by present-day terrorism that governments resort to cutting-edge technologies in pre-empting such attacks, including the massive monitoring of communications susceptible to containing indications of impending incidents." There is therefore nothing in principle untoward about states adapting their surveillance practices to the evolution of technologies; to claim otherwise would be to defeat the purpose of (legal) surveillance.

By the same token, the Court found that it must "scrutinise the question as to whether the development of surveillance methods resulting in masses of data collected has been

100 Case of Big Brother Watch and Others v. the United Kingdom, applications nos. 58170/13, 62322/14 and 24960/15, 25 May 2021, para. 323.

101 Ibid, para. 322.

accompanied by a simultaneous development of legal safeguards securing respect for citizens' Convention rights." Indeed, it would:

> defy the purpose of government efforts to keep terrorism at bay, thus restoring citizens' trust in their abilities to maintain public security, if the terrorist threat were paradoxically substituted for by a perceived threat of unfettered executive power intruding into citizens' private spheres by virtue of uncontrolled yet far-reaching surveillance techniques and prerogatives.[102]

The fear that the law is failing to keep up with technological developments is a constant among international bodies. For example, the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights has worried that "legislation on the collection of intelligence and national security information has remained inadequate to advancement in technologies, allowing for an indiscriminate and unprecedented access to information related to the communications between individuals."[103]

One of the concerns here is that governments have increasingly required internet providers for example to store and possibly disclose metadata about their customers' communications. Such metadata can then be exploited both by law-enforcement and intelligence agencies even as "surveillance measures that may be necessary and proportionate for one legitimate aim may not be so for the purposes of another." In other words, one should not readily assume that surveillance that is justified under the limited set of rationales available in the criminal investigation context is also justified for general intelligence work, despite the fact that the lack of "use limitations" on bulk data and its sharing "blurs significantly" the "line between criminal justice and protection of national security."[104]

3. Surveillance by or Significant Mediated by Private Actors

One significant complication in many surveillance cases is that it is not, in fact, clear that the surveillance is the result of activity by the State itself. At least, it may be difficult to prove conclusively that the state was involved absent any finding that state agents were involved or groups acting on behalf of the state or with its acquiescence. It may be that it is instead a foreign state or a corporation that are involved in surveillance,

102 Case of Szabó and Vissy v. Hungary (Application no. 37138/14), 12 January 2016, para. 68.

103 The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights Calls on the United States to Introduce Strong Reforms to the NSA Telephone Metadata Collection Program, R50/15, 14 May 2015.

104 OHCHR, The right to privacy in the digital age, A/HRC/27/37, 30 June 2014, para. 27.

sometimes even on an extra-territorial basis. States may in fact be only too happy to outsource surveillance to private actors to whom it is then difficult to link them. To make matters even more complicated, "[e]ven non-State groups are now reportedly developing sophisticated digital surveillance capabilities", possibly at the risk that "digital surveillance will escape governmental controls."[105] As Mary Ann Franks points out, one of the limitations of the "dominant privacy narrative" is its "narrow focus on the government as the primary threat to privacy and the primary source of surveillance" even as the government's "formidable" powers of surveillance "are now inextricably tied to the private sector."[106] None of this should detract from corporations' own obligations in not engaging in unlawful surveillance or being complicit in human rights violations.[107]

The difficulty of identifying the origin of surveillance may be true in the case of the surveillance of Catalan separatists, despite clues that suggest that the state framing is the most relevant one. The Spanish government admitted that at least insofar as the 18 individuals who were the object of legally sanctioned surveillance, it is the one behind those instances but that leaves a grey area of similarly oriented surveillance that has nonetheless not been attributed. This sort of blurring of the lines between the private and the public has made it harder to attribute responsibility. Notwithstanding, a state may still violate its human rights obligations, including against an "objectively identifiable group," even if it cannot be proven to have directly engaged in said surveillance itself through its agents. Under international human rights law, states have an obligation to protect persons within their jurisdiction from violations that they may suffer at the hands of third parties.[108] Indeed, it has been increasingly asserted that states have obligations to protect from transnational surveillance, notably of diaspora, by their state of origin. A fortiori, then, states have an obligation to stop unlawful surveillance occurring fully within their territory.

At any rate, although the Citizen Lab "Catalangate" report did not conclusively attribute the hacking operation to any particular government, it did suggest strong suspicion bears on the Spanish state which should certainly be aware of such operations when conducted under its auspices. In some surveillance cases, the ECtHR has stressed the importance of supervisory duties. In the Zakharov case, for example, the Court was concerned that the Russian law did not even make it possible for the supervising authorities to discover interception carried out without proper judicial authorization. Control by the judiciary was too superficial, consisting essentially in an initial authorization and then handing over supervision to the executive branch under conditions that were very unclear. There was little that even prosecutors could do given their weak independence, the little

105 A/HRC/27/37, para. 3.

106 Franks, *supra* note 21 at 429.

107 See NSO Group, NSO, Pegasus and Human Rights, Position paper, May 2022 by NSO.

108 Siena Anstis, *Regulating Transnational Dissident Cyber Espionage*, 73 International & Comparative Law Quarterly 259 (2024).

information they had on the specifics of surveillance or the lack of power to destroy illegally intercepted material. Concerns with the rampant privatization of surveillance and the tendency of states to put themselves in situation where they cannot "surveil surveillance" led then UN High Commissioner for Human Rights Michelle Bachelet to call for a "moratorium on the sale and transfer of surveillance technology, [...] an export and control regime [and] to boost legal frameworks securing privacy."[109]

VI. Conclusion

The judgment of the Court of 31 January 2023 still leaves quite a few questions open. It remains very focused on the terms of the request for a preliminary ruling by the Spanish Supreme Court, and in particular the question of whether the Court even has jurisdiction to prosecute and solicit an EAW. Nonetheless, read against the Court's broader jurisprudence in terms of exceptions to "mutual trust" when core human rights issues arise, it does suggest the possibility of a broader ground to deny extradition when the right to a fair trial is at stake as a result of "systematic or generalized deficiencies", specifically when such deficiencies impact an "objectively identifiable group."

In this chapter, I have suggested that surveillance targeted against such a group that may arise from broader "systematic or generalized deficiencies" in the oversight of notably the intelligence service is likely to corrode the right to a fair trial, notably the confidentiality of communications with lawyers. It may also suggest a broader discriminating and even persecutory element which in and of itself may raise doubts about the very possibility of a fair trial, although that would have to be substantiated by specific allegations concerning, for example, the independence and/or impartiality of judges.

In short, patterns of surveillance of certain groups that also happen to be closely associated with certain minorities that further constitute such groups may be an interesting test case for the ECJ's evolving EAW jurisprudence. Given both the ubiquity and nefarious character of surveillance, this raises further potent questions about the possibility of mutual trust in the extradition context, even between otherwise democratic states.

109 Committee on Legal Affairs and Human Rights, Parliamentary assembly Council of Europe - Hearing on the implications of the Pegasus spyware, OHCHR, https://www.ohchr.org/en/statements/2021/09/committee-legal-affairs-and-human-rights-parliamentary-assembly-council-europe (last visited Dec 14, 2023).

Chapter 5

Political Rights Violations and the Catalan Pro-Independence Movement as an "Objectively Identifiable Group"

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I. Introduction

In an age of democratic decline, political rights are under particular threat. In order to stay in power, authoritarian rulers tweak rules about elections, seek to disqualify opposition candidates and often try to influence the media and the press. Challenges to political rights range from subtle measures – rules on the financing of non-governmental organizations, for example – to outright attacks, such as the prohibition of particular parties. Contemporary autocrats typically do not engage in coups or abolish elections, but they shift the conditions for, and operation of, elections in such a way as to ensure that they come out ahead.[1]

Vulnerable groups face special risks when it comes to political rights. Even in nominally democratic countries, they have long faced discriminatory measures. Women were disenfranchised in many countries well into the 20th century. In one of the heartlands of democracy, the United States, Blacks have long faced either formal or factual hurdles for an effective participation in politics and elections. Indigenous groups have often been excluded from political processes, and other ethnic, religious and linguistic minorities have long struggled for effective representation all over the world.

On this background, this chapter inquires into the particular ways in which political rights of "objectively identifiable groups" are threatened. If we are interested in human rights "deficiencies affecting an objectively identifiable group of persons" – the focus of this volume – political rights deserve special attention because they are fundamental for the ability of such groups to make their voices heard in the political process, influence public decision-making, and therefore avoid discrimination in other areas as well. In Section II, the chapter traces the reflection of such deficiencies in international human rights jurisprudence, with a view to clarifying the types of challenges vulnerable groups face.

In Section III, the chapter turns to the particular case of the Catalan independence movement and provides an overview over the different types of interferences with political rights of members of the movement since the independence referendum in 2017. These interferences range from limitations on referenda and the dissolution of the Catalan parliament to factual obstacles for political expression and the disqualification of political leaders. Section IV then analyzes those challenges from the perspective of international and European human rights law with a view to assessing to what extent we can, in this area, speak of human rights deficiencies affecting the Catalan independence movement as an "objectively identifiable group". The picture that emerges here is indeed one of a systematic, and discriminatory, violation of the political rights of many members

1 See Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5; Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545.

(and especially leading members) of the group. As a result, the individual violations should not be seen in isolation but should instead give rise to greater suspicion and a higher level of scrutiny when it comes to restrictions imposed on members of the movement more broadly.

II. Political Rights and Vulnerable Groups in International Jurisprudence

"Political rights", in international human rights law, come in two groups.[2] One concerns political rights in a narrow sense – the right to vote, to stand for election, and to occupy public office. These are connected with basic democratic guarantees – in the words of the Universal Declaration of Human Rights, "the will of the people [as] basis of the authority of government" and "periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". There is some variation in the rights protected under different international instruments – the International Covenant on Civil and Political Rights, for example, guarantees the right to take part in the conduct of public affairs and access to the public service in a broad sense, while the European Convention on Human Rights limits itself to the right to vote and be elected to the legislature. The EU Charter of Fundamental Rights protects the latter rights with a view to municipal elections and elections to the European Parliament, a limited ambit due to the particular nature of the Charter as pertaining primarily to the activities of the European Union itself.

These core rights, however, become meaningful only if other rights, too, are guaranteed – political rights in a broader sense. These include in particular the freedom of opinion and expression, the freedom of assembly and the freedom of association. These are protected by international and regional human rights instruments in similar ways, with some variation in the precise scope of protection and the requirements for limitations. In most contexts, however, such limitations are only admissible if they meet strict requirements of necessity and proportionality, especially when it comes to political speech.[3] In the following, the focus will be on political rights in the narrow sense, but the freedom of expression and assembly will also be taken into view.

2 See, in general, Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Second Edition, Oxford University Press 2019) ch 17.

3 See David Banisar, Chapter 3, this volume.

In the jurisprudence of international human rights courts and quasi-judicial bodies – such as the UN Human Rights Committee – questions of political rights make up a relatively small portion in quantitative terms, but cases in which they are raised are often prominent. This is particularly pronounced in the context of a broader democratic decline – in Europe, the US and other parts of the world – in which violations of political rights become indicators of serious concerns about democratic processes. The United Nations Human Rights Committee's 2022 decision concerning the former (and now again) Brazilian president Lula da Silva is perhaps the best example here: in it, the Committee found Lula's criminal conviction and consequent exclusion from the 2018 presidential elections to have been arbitrary and in violation of his civil and political rights, raising broader questions about the role of prosecutors and the judiciary in the political system of Brazil.[4]

While the jurisprudence on political rights concerns in part problems affecting particular individuals – for example, restrictions of the right to vote due to criminal proceedings or residency requirements[5] – many cases concern problems that arise for particular groups. In the case-law of the European Court of Human Rights, a prominent line of decisions concerns the voting rights of prisoners – an issue that has become especially salient in the wake of the Hirst case in the United Kingdom.[6] Likewise, a number of important judgments concern the loss of voting rights for mentally disabled citizens, especially those placed under guardianship.[7]

The most relevant jurisprudence in our context, however, concerns the political rights of members of particular groups which, through certain social, ethnic, religious or political characteristics, distinguish themselves from – or are distinguished by – the majority society. In this vein, in the European Court of Human Rights, many cases of violations of political rights are connected to membership in such groups, both as regards the right to vote and the right to be elected. The most prominent case in this context is *Seijdic and Finci v Bosnia-Herzegovina* (2009), in which citizens who did not declare their affiliation with one of the three constituent peoples of Bosnia-Herzegovina could not be elected to a parliamentary chamber. The Court saw this as a violation of the right to be elected, and it highlighted that member states' margin of appreciation – usually relatively wide for the right to be elected – was much narrower in cases of particular groups: "where a difference in treatment is based on race, colour

4 UN Human Rights Committee (HR Committee), Views of 17 March 2022, Comm. no. 2841/2016, *Lula da Silva v Brazil*.

5 See, e.g., European Court of Human Rights (ECtHR), Judgment of 1 July 2004, App. No. 36681/97, *Vito Sante Santoro v Italy*; Judgment of 7 May 2013, App. No. 19840/09, *Shindler v United Kingdom*.

6 ECtHR [GC], Judgment of 6 October 2005, App. no. 74025/01, *Hirst v UK* (No 2). See also ECtHR [GC], Judgment of 22 May 2012, App. No. 126/05, *Scoppola v Italy* (No 3).

7 See, e.g., ECtHR, Judgment of 20 May 2010, (Application no. 38832/06), *Alajos Kiss v Hungary*.

or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible".[8]

This enhanced level of scrutiny becomes visible also in cases of special voting regimes for minorities. For example, in *Bakirdzi v Hungary* (2022), the Court found a violation of the right to vote, in conjunction with the right to freedom from discrimination, as a result of a voting regime in Hungary which limited registered minority voters to certain parties and established an excessively high threshold for the obtention of a parliamentary seat by those parties.[9] In contrast, in *Die Friesen v Germany* (2016), a minimum threshold of votes for entering parliament was not seen as discriminatory as it placed minority parties on the same footing as others. In the view of the Court, the European Convention of Human Rights – even if read in conjunction with the Framework Convention on the Protection of National Minorities – does not contain an obligation to enact measures of positive discrimination in favour of minority groups.[10]

Many cases of violations of individual rights are also – though less explicitly – tied to affiliation with a particular (ethnic, religious or linguistic) group. This is visible in the case of *Selahattin Demirtas v Turkey (no 2)*, decided by the Court's Grand Chamber in 2020. The applicant was a member of the Turkish parliament for the pro-Kurdish party, HDK, and was detained for suspected membership in a terrorist organization. The Court found this to be a violation of his right to stand for election, his freedom of expression as well as due process rights. It highlighted the intimate connection between the freedom of expression and political rights in a narrow sense, and reiterated the high threshold that must be met by the state for sanctioning the expression of political representatives:

> "[w]hile the freedom of expression of representatives of the people is not of an absolute nature, it is particularly important to protect statements made by them, in particular if they are members of the opposition. In this connection, the Court accepts, however, that there may be limits, in particular to prevent direct or indirect calls for violence. That said, the Court will always conduct a strict review to verify that freedom of expression remains secured."[11]

8 ECtHR [GC], Judgment of 22 December 2009, App. Nos. 27996/06 and 34836/06 *Sejdić and Finci v. Bosnia-Herzegovina*, para. 44.

9 ECtHR, Judgment of 10 November 2022, App. nos. 49636/14 and 65678/14, *Bakirdzi v Hungary*.

10 ECtHR, Judgment of 28 January 2016, App. no. 65480/10, *Partei Die Friesen v Germany*.

11 ECtHR [GC], Judgment of 22 December 2020, App. no. 14305/17, *Selahattin Demirtas v Turkey (no 2)*, para 384.

The Court also emphasized the need for domestic courts to carefully weigh up the relevant interests and, for the deprivation of liberty of elected representatives, especially consider "whether charges have a political basis".[12]

Similar principles hold for restrictions on, or even prohibitions of, political parties. The European Court of Human Rights typically analyzes these as restrictions on the freedom of association, and only secondarily as restrictions on the right to stand for elections, but it tends to stress the intertwined nature of both. Severe restrictions on a party are only accepted if the party uses or seeks to use unlawful, violent means or if it pursues a programme that is intended to lead to a non-democratic society. In several cases, the Court has found a violation of the Convention where a party's programme was seen by the authorities as undermining the territorial integrity of the State and encouraging separatism for a population group. In the Court's view, there can be no justification for restricting the work of a political group that complies with fundamental democratic principles solely because it has criticised the country's constitutional and legal order and sought a public debate in the political arena.[13] For the Court,

> "It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself."[14]

The jurisprudence of the UN Human Rights Committee is more limited in quantitative terms but follows similar lines in substance. The right to political participation in the UN Covenant on Civil and Political Rights (ICCPR) – which the Committee is called to interpret and monitor – is broader than in the European Convention, in part because it includes a right to take part in public affairs and because the right to vote and stand for election is not limited to the legislature but extends to other offices. The Committee has defined the broad lines of interpretation already in 1996 in its General Comment No. 25.[15]

Many of the cases before the Human Rights Committee concern measures taken against opposition politicians or opposition parties to prevent them from challenging state authorities or incumbent office holders. Because of the geographical scope of its jurisdiction – which covers the 174 states parties to the ICCPR countries and 116 of them for individual communications – the instances before it feature a much wider range of

12 Ibid, para 389.

13 ECtHR [GC], Judgment of 30 January 1998, App. no. 133/1996/752/951, *United Communist Party of Turkey and Other v. Turkey*, para. 57.

14 See ECtHR [GC], Judgment of 25 May 1998, App. no. 20/1997/804/1007, *Socialist Party and Others v. Turkey*, para. 47. See also ECtHR [GC], Judgment of 8 December 1999, App. no. 23885/94, *Freedom and Democracy Party (ÖZDEP) v. Turkey*; Judgment of 20 October 2005, App. no. 59489/00, *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria*.

15 HR Committee, *General Comment No. 25*, CCPR/C/21/Rev.1/Add.7, 27 August 1996.

repressive methods than is the case in the European Court of Human Rights. A good example is the case of Mohamed Nasheed, former president of the Maldives, who had been forced to resign and was prevented from standing again for election as a result of a conviction on terrorism charges in a brief trial without adequate guarantees, which the Committee found to have violated the political rights of the applicant.[16] Other recent cases concern the dissolution of opposition parties in, for example, South Korea and Djibouti, or the imprisonment of dissident politicians in Belarus.[17]

A particularity of the political rights under the Covenant stems from the fact that they are understood to be "related to, but distinct from, the right of peoples to self-determination"[18] – the right to self-determination itself is guaranteed by Article 1 of the Covenant. While self-determination is interpreted as a collective right of "peoples", the political rights under the Covenant are individual rights, and it is only on the basis of such individual rights that complaints can be brought to the Human Rights Committee. Yet the two largely concern the same issues, and their close relation became visible in recent cases related to the Sami in Finland. Here the Committee connected both by holding that the court decisions in question – defining the scope of the Sami community – affected the rights of the applicants, "and of the Sami community to which they belong, to engage in the electoral process regarding the institution intended by the State party to secure the effective internal self-determination, and the right to their own language and culture, of members of the Sami indigenous people."[19] As a matter of principle, the Committee has observed that

> "article 27 of the Covenant [protecting minorities], interpreted in the light of the United Nations Declaration on the Rights of Indigenous Peoples and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development".[20]

With respect to indigenous peoples, the Committee has also further derived political rights of members of particular communities from the minority protections in the Covenant, read together with the more collectively-oriented right to self-determination

16 HR Committee, Views of 4 May 2018, Comm. nos. 2270/2013 and 2851/2016, *Nasheed vs Maldives*.

17 See, e.g., HR Committee, Views of 17 June 2021, Comm. no. 2809/2016, *Lee and others v Korea*; Views of 4 November 2020, Comm. no. 3593/2019, *Farah v Dijbouti*; Views of 26 October 2021, Comm. no. 2619/2015, *Adamovich v Belarus*. Belarus has since withdrawn its acceptance of individual communications.

18 General Comment No. 25, n 14 above, para. 2.

19 HR Committee, Views of 2 November 2018, Comm. no. 2950/2017, *Klemetti Käkkäläjärvi et al. v Finland*, 2018, para 9.11. See also HR Committee, Views of 1 November 2018, Comm. no. 2668/2015, *Sanila-Aikio v Finland*.

20 *Klemetti Käkkäläjärvi et al. v Finland*, ibid., para. 9.8; *Sanila-Aikio v Finland*, ibid., para 6.8.

and the UN Declaration. It has stated in this regard that "it is of vital importance that measures that compromise or interfere with the culturally significant economic activities of an indigenous community are taken with the free, prior and informed consent of the members of the community".[21]

Taken together, and despite the differences in detail, the jurisprudence of the European Court of Human Rights and the UN Human Rights Committee have added much specification to the political rights protected under international human rights law, and they have become increasingly sensitive to the variety of ways – formal and informal – in which these rights can be threatened. They have also shown an increased readiness to exercise stricter scrutiny in cases in which restrictions of political rights appear to be directed in a discriminatory fashion against particular religious, linguistic or ethnic groups. More broadly, these international bodies have paid particular attention to cases involving the political opposition and measures taken to restrict its ability to operate effectively, also in conjunction with interferences with the freedom of expression, assembly or association.

III. Political Rights Restrictions and the Catalan Independence Movement

In the context of the Catalan independence movement, political rights have come under particular pressure as a result of efforts by the Spanish state to thwart an independence referendum. States may not be generally obliged to allow for referenda on questions of public concern, though it might be argued that such an obligation flows from the right to political participation read in conjunction with peoples' right to self-determination when the latter is engaged.[22] However, a host of other aspects of political rights have come to the fore in the Catalan context over the past decade. These do not go as far as the formal prohibition of political parties, but in conjunction, they come close. In late 2017, the vice-president of the Spanish government proclaimed that the government's aim was

21 HR Committee, Views of 21 September 2022, Comm. no. 2552/2015, *Pereira and the other members of the Campo Agua'ẽ indigenous community v. Paraguay*, para. 8.7. See also HR Committee, Views of 27 March 2009, Comm. no. 1457/06, *Poma Poma v Peru*.

22 For an overview of the debate, see Daniel Moeckli and Nils Reimann, 'Independence Referendums in International Law', *Research Handbook on Secession* (Edward Elgar Publishing 2022).

to "decapitate" and "liquidate" the Catalan independence movement,[23] and the many repressive measures the Spanish state has taken have indeed imposed severe restrictions on the ability of individuals, political parties and civil society associations to engage in political activism for the independence of Catalonia.[24]

In the following, I first give an overview over the different restrictions of political rights before turning, in the next section, to an assessment of these rights under international human rights law. For reasons of space, I concentrate on the most relevant events taking place after the independence referendum of 1 October 2017.[25] I do not deal with questions of surveillance, which also affect the exercise of political rights, as they are dealt with in detail elsewhere in this volume.[26]

1. Dissolution of the Catalan Parliament

On 27 October 2017, in response to the Catalan independence declaration, the Spanish government – with approval from the Senate – made use of Article 155 of the Spanish Constitution and dissolved the Catalan parliament. Article 155 stipulates that in cases in which an Autonomous Community "does not fulfil the obligations imposed upon it by the Constitution [...] or acts in a way seriously prejudicing the general interests of Spain", the government can "take the measures necessary to compel the [autonomous community] forcibly to meet said obligations, or in order to protect the above-mentioned general interests."[27] The government interpreted the provision as allowing it to assume the powers of the regional government and to dissolve the parliament; this interpretation was later confirmed by the Spanish Constitutional Court.[28] With this dissolution, the government interfered both with the right to vote and the right to stand for election to the Catalan parliament, given that it rendered the result of the election moot.

23 "Saénz de Santamaría dice que Rajoy ha dejado a ERC y JXCat 'descabezados'", *El Pais*, 16 December 2017.

24 For an overview of the events and repressive measures, see Torbisco Casals, Chapter 1, this volume.

25 For an analysis of earlier events, especially around the 2014 consultation, see Jean-Paul Costa and others, 'Judicial Controls in the Context of the 1 October Referendum' (2017) <https://www.parlament.cat/document/intrade/263211>.

26 See Mégret, Chapter 4, this volume.

27 Spanish Constitution, Article 155: "1. Si una Comunidad Autónoma no cumpliere las obligaciones que la Constitución u otras leyes le impongan, o actuare de forma que atente gravemente al interés general de España, el Gobierno, previo requerimiento al Presidente de la Comunidad Autónoma y, en el caso de no ser atendido, con la aprobación por mayoría absoluta del Senado, podrá adoptar las medidas necesarias para obligar a aquélla al cumplimiento forzoso de dichas obligaciones o para la protección del mencionado interés general."

28 Tribunal Constitucional, Judgment of 2 July 2019, STC 89/2019.

2. Obstacles for Candidacies to the Catalan Parliament

In October and November 2017, shortly after the independence referendum and the declaration of independence, various politicians and civil society leaders were charged with the crime of rebellion and taken into pre-trial detention. After new elections to the Catalan parliament had been called for late December 2017, several of the detainees announced their candidacy and sought to campaign for election or re-election. However, their requests to be allowed to leave the prison to take part in election rallies were rejected, and even requests to take part in campaigns via online tools were routinely turned down on the grounds of a purported security risk, especially a risk of a repetition of the alleged crimes. These decisions by prison authorities, were confirmed by the competent courts.[29] They constituted an interference with the right to stand for election.

3. Obstacles for Election to the Presidency of the Catalan Government

After the elections, from which pro-independence parties emerged victorious, the newly constituted Catalan Parliament saw various attempts at electing a President of the regional government, the Generalitat, thwarted by measures of various organs of the Spanish state.

First, upon an application by the Spanish government, the Constitutional Court barred the Catalan Parliament from holding a session to re-elect Mr. Carles Puigdemont, who had been President before being deposed when the Spanish government established direct rule in late October 2017. Like other former members of the Catalan government, he had gone into exile in Brussels, Belgium, as he was subject to rebellion charges and faced immediate detention if he returned to Spain. The Constitutional Court prohibited the parliamentary session at which he was due to be elected, arguing that such an election required the physical presence of the candidate, even though such a requirement was not explicit in either the regional constitution or the rules of procedure of the Parliament.[30]

The election of the next candidate put forward by the parliamentary majority, Mr. Jordi Sànchez, was likewise rendered impossible by Spanish authorities. Mr. Sànchez, former leader of the NGO Assemblea Nacional Catalana, had been detained in October 2017 for

29 E.g., Tribunal Supremo, Order of 15 February 2018, Causa especial no. 20907/2017.

30 Tribunal Constitucional, Order of 27 January 2018, no. 5/2018. See Sam Jones and Stephen Burgen, "Catalan parliament delays vote on leader but backs Puigdemont", *The Guardian*, 30 January 2018.

his role in a pro-independence demonstration and remained in pre-trial detention. His requests to be allowed to leave the prison to attend the parliamentary election session – to comply with the requirement of physical presence established by the Constitutional Court – were rejected by the prison authorities, and the rejection was confirmed by the competent courts.[31] This did not change even after the UN Human Rights Committee had indicated provisional measures demanding that Spain respect the applicant's political rights under the International Covenant on Civil and Political Rights.[32]

A third attempt at electing a president of the Generalitat was thwarted as well. Mr. Jordi Turull, former member of the Catalan government, had been among those detained after the declaration of independence, but had then been released from prison in early December 2017. In mid-March 2018, when it became clear that neither Mr Puigdemont nor Mr Sanchez could be elected, he was put forward as a candidate. In the first round of elections, on 22 March, he narrowly failed to obtain the requisite majority; the second round of elections was scheduled for 24 March. However, the investigating judge in the Spanish Supreme Court ordered him to appear in court on 23 March, at which point Mr. Turull was taken into pre-trial detention.[33] Like in the case of Mr. Sànchez, this made it impossible for him to be physically present at the next parliamentary session, and his election bid thus failed as well.[34]

In all three cases, the measures of Spanish institutions constituted a grave interference with the right of the candidates to take part in the conduct of public affairs, as guaranteed by Article 25(a) of the International Covenant on Civil and Political Rights.

4. Suspension from Parliamentary Office

In March 2018, the investigating judge at the Supreme Court decided to open formal charges for rebellion and other crimes against thirteen accused, partly former members of the Generalitat, partly civil society activists. On this basis, in July 2018, he also ordered the Catalan Parliament to suspend the six accused who were members of the Parliament from the exercise of their office.[35] This suspension from office was foreseen in the Code

31 Tribunal Supremo, Order of 9 March 2018, Causa especial no. 20907/2017. See Sam Jones, "Catalan leader cannot leave jail to attend debate, court rules", *The Guardian*, 9 March 2018.

32 Human Rights Committee, Decision of 23 March 2018, Comm. no. 3160/2018, *Jordi Sànchez v Spain*. The provisional measures are treated as largely irrelevant in the following decision of the investigating judge: Tribunal Supremo, Order of 12 April 2018, Causa especial no. 20907/2017.

33 Supreme Court, Order of 23 March 2018, Causa especial no. 20907/2017.

34 See Sam Jones, "Spanish court remands Catalan presidential candidate in custody", *The Guardian*, 23 March 2018.

35 Supreme Court, Order of 9 July 2018, Causa especial no. 20907/2017.

of Criminal Procedure as an automatic consequence of a rebellion charge in cases in which a formal charge of a crime of rebellion was coupled with the pre-trial detention of the accused.[36] As a result, the accused concerned were barred from exercising their office – an interference with their right to stand for election (which includes the exercise of the office they have been elected to) and the rights of the voters who had elected them.

5. Obstacles to the Exercise of Parliamentary Office in the European Parliament

For the elections to the European Parliament in May 2019, several of the former members of the Generalitat presented their candidacies, among them the former President, Mr. Puigdemont, the former Vice-President, Mr. Junqueras, and two former ministers, Antoni Comín and Clara Ponsatí. They were elected in the popular vote, but the Spanish election administration body, the Junta Electoral, refused to inscribe them in the list of elected candidates as they had not appeared before the Junta to swear allegiance to the Spanish Constitution.[37] Such an appearance was impossible in the case of Mr. Junqueras because of his ongoing pre-trial detention; it was impossible in the cases of Mr. Puigdemont and Mr. Comín – both in exile – as they would have faced detention when traveling to Spain. The European Parliament nevertheless treated them as members from the moment of election, with Mr. Puigdemont and Mr. Comín participating in its work. Mr. Junqueras, however, was refused a permit to leave the prison to attend the parliamentary sessions.[38] In October 2019, the Spanish Supreme Court sentenced Mr. Junqueras to thirteen years in prison and disqualified him from public office for the same duration, thus barring him also from serving in the European Parliament.[39]

As concerns Mr. Puigdemont and Mr. Comín, the investigating judge requested the European Parliament in January 2020 to lift their immunity to allow them to be tried in Spanish courts. In March 2021, the Parliament acceded to the request.[40] The challenge

36 Spanish Code of Criminal Procedure, Article 384bis: "Firme un auto de procesamiento y decretada la prisión provisional por delito cometido por persona integrada o relacionada con bandas armadas o individuos terroristas o rebeldes, el procesado que estuviere ostentando función o cargo público quedará automáticamente suspendido en el ejercicio del mismo mientras dure la situación de prisión."

37 Anabel Diéz and Javier Casqueiro, "La Junta Electoral confirma que Puigdemont, Junqueras y Comín no pueden ser eurodiputados", *El País*, 21 June 2019.

38 Sam Jones, "Spanish court blocks jailed Catalan leader from joining EU parliament", *The Guardian*, 14 June 2019.

39 Tribunal Supremo, Judgment of 14 October 2019, Judgment no. 459/2019.

40 European Parliament, Decision of 9 March 2021, 2020/2024(IMM).

against the Parliament's decision was rejected by the General Court of the European Union in July 2023;[41] the appeal is still pending before the Court of Justice of the EU.

In these different respects, the action of the Spanish Junta Electoral as well as the Supreme Court – and the European Parliament by lifting the immunity – interfered with the right to stand for election, which includes the exercise of parliamentary office once elected. As the European Court of Human Rights has clarified, the guarantee of the right to vote and stand for elections under the European Convention on Human Rights extends to the European Parliament as it exercises legislative functions, as required by Article 3 of Protocol No. 1 to the Convention.[42]

6. Disqualifications from Public Office related to the Referendum

With the criminal sentence in October 2019, the Spanish Supreme Court rendered judgment against twelve Catalan politicians and civil society activists, with prison sentences of up to thirteen years. Eleven of them were disqualified from public office for a duration between one and thirteen years.[43] The sentences were based on the crime of sedition, on the abuse of public funds, and on the crime of disobedience. In all cases, the purported crimes stemmed from the participation of the accused in the campaign for and organization of the independence referendum and the attempt to achieve the independence of Catalonia. The court saw sedition in the joint development and execution of a plan to create public pressure for independence and thereby effect a change in the Spanish constitutional order. It saw disobedience in the fact that the accused public officials continued with their participation in the referendum even though it had been declared illegal by the constitutional court. And it saw an abuse of public funds in the expenses incurred for the organization of the referendum, despite the fact that the funds used for this purpose came – entirely or at least predominantly – from private sources.

These sentences interfered with the rights of the convicted individuals in a variety of ways – from the right to personal liberty to the right to freedom of expression, association and assembly as concerns the acts at the basis of the punishment. Apart from this, the disqualifications also constituted an interference with the political rights of the affected individuals as they made it impossible for them to present themselves as candidate for elections for a substantial period of time.

41 General Court of the European Union, Judgments of 5 July 2023, Cases T-115/20 and T-272/21, *Puigdemont i Casamajó and Others v European Parliament*.

42 ECtHR, Judgment of 18 February 1999, App. no. 24833/94, *Matthews v United Kingdom*, para. 44.

43 Tribunal Supremo, supra note 35.

The disqualifications from public office were not covered by the pardons granted by the Spanish government in 2021 for nine independence leaders. The latter only affected the remaining prison sentences – after more than three years of imprisonment – but not further punitive measures.[44] Likewise, the revision of the Spanish criminal code, which eliminated the crime of sedition (while increasing penalties for other crimes against public order), only affected some of the restrictions on political rights.[45] For four pro-independence leaders, the Spanish Supreme Court reaffirmed the conviction for a supposed abuse of public funds and upheld the disqualification from office for the original duration, rendering some of them ineligible for public office until 2031.[46]

7. Disqualification from Public Office for Actions During Election Campaigns

In December 2019, the then-President of the Generalitat, Quim Torra, was disqualified from public office for disobedience in another context by a judgment of the Superior Court of Justice of Catalonia. He remained in office until September 2020, when the Spanish Supreme Court rejected his appeal.[47] This disqualification – of 18 months – stemmed from the refusal of Mr. Torra to remove from buildings of the Generalitat symbols which supposedly violated the necessary neutrality of the public administration during election campaigns, and which he had therefore been ordered to remove by the central election body of Spain, the Junta Electoral Central, ahead of the legislative elections of April 2019. Among these symbols were Catalan flags with a star as a sign of independence, and large yellow laces and banners calling for the liberation of the Catalan independence leaders as political prisoners. Mr. Torra's view – that these symbols did not violate neutrality as they merely called for the respect of human rights – was rejected by the courts.

This disqualification interfered with Mr. Torra's right to stand for election and to participate in public affairs as well as with his right to freedom of expression.

44 La Moncloa, "Concesión de indultos a condenados en el juicio del procés", 22 June 2021, available at https://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/220621-enlace-indultos.aspx

45 Ley organica 14/2022, 22 December 2022, *Boletín Oficial del Estado* 2022, section I, p. 179570.

46 Tribunal Supremo, Order of 13 February 2023, Order no. 20107/2023.

47 Tribunal Supremo, Judgment of 28 September 2020, Recurso de casación no 203/2020.

8. The Effect of the 2023 Amnesty Law

The amnesty law introduced in the Spanish Congress in November 2023 will, if finally adopted, eliminate the criminal responsibility for the acts mentioned above. Unlike the pardons and the revision of the criminal code, this will not only affect prison sentences or fines but also the disqualification from office. However, the amnesty law will have effects for the future but cannot remedy the severe impact on political rights in the past, nor does it foresee reparations or other forms of remediation for past violations.[48]

IV. The Violation of Political Rights in the Catalan Case: Assessment and Jurisprudence

Taken together, the restrictions imposed by the Spanish state in response to the Catalan independence referendum constitute a massive interference with political rights. They include the dissolution of the regional parliament, the removal of the Catalan Generalitat, the prevention of the election of three candidates to the presidency of the Generalitat, the disqualification of another president of the Generalitat, the disqualification from public office of a large part of the Catalan political leadership for a decade or more as well as serious interference with the ability of Catalan candidates to stand for and exercise office in the European parliament. As we shall see, the core justification – the supposed attack on the constitutional order of Spain – is insufficient to justify those interferences under international human rights law. This is also reflected in a significant number of decisions of international human rights bodies as well as courts in other European countries.

48 At the time of writing, the amnesty law had been passed by the Spanish Congress and was awaiting deliberation in the Senate. See Congreso de los Diputados, "El Pleno aprueba la Ley Orgánica de amnistía para la normalización política, social e institucional en Cataluña y la remite al Senado", 14 March 2024, available at https://www.congreso.es/es/notas-de-prensa?p_p_id=notasprensa&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&_notasprensa_mvcPath=detalle&_notasprensa_notaId=46509

1. The Failure of the Core Justification

According to the UN Human Rights Committee, the exercise of the political rights under the International Covenant on Civil and Political Rights "may not be suspended or excluded except on grounds which are established by laws that are objective and reasonable, and that incorporate fair procedures."[49] The justification for restrictions to the rights under Article 25 – especially the right to take part in public affairs, to vote and stand for elections – must be especially strong when the restrictions target directly the winners of an election and therefore distort the "free expression of the will of the electors" protected by the Covenant. Restrictions must be particularly suspicious when they aim not at a single representative but at the leadership of political groups as such.
The European Convention on Human Rights erects similar requirements for restrictions on the political rights protected by it. The relevant provision in the Convention – Article 3 of Protocol No. 1 – does not mention the possibility of restrictions, but the European Court of Human Rights has recognized that political rights are subject to "implied limitations".[50] In examining compliance with Article 3, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. For the passive aspect – the right to stand for elections – the Court has found that states enjoy a broader margin of appreciation than for the active aspect – the right to vote.[51] However, as already mentioned in section II, the prohibition of discrimination, under Article 14 of the Convention, is equally applicable. Even though the margin of appreciation afforded to States as regards the right to stand for election is usually a broad one, where a difference in treatment is based on race, colour or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.[52]

On the part of Spanish state institutions, and especially the courts, the main justification for the restriction of political rights – as well as the criminalization of pro-independence activism more broadly – has been the challenge to public order emanating from the Catalan independence movement. In early decisions – still in those leading to the suspension from office described above under heading III.4 – the largely peaceful demonstrations and acts of civil disobedience before, during and after the independence referendum were thus qualified as acts of "rebellion". The element of violence, necessary for this qualification, was seen to lie in the pressure exerted on public authorities as a result of public mobilization and also (rather paradoxically) in the violence used by

49 See General Comment 25, n 14 above, para. 15; and Human Rights Committee, Communication no. 2155/2012, *Paksas v Lithuania*, Views of 25 March 2014, para. 8.3.

50 See William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 1023–1026.

51 See ECtHR, Judgment of 30 June 2009, App. nos. 35579/03, 35613/03, 35626/03 et 35634/03, *Etxeberria and Others v. Spain*, para. 50.

52 See supra text at n 7 above.

state authorities to overcome civil disobedience.[53] In later decisions, the Supreme Court dropped this approach and instead proceeded to a conviction on the basis of the crime of sedition, seeing in the mobilization around the referendum a "public and tumultuous uprising". For this, it argued, violence or force as such were not necessary, and action "outside of legal avenues" was sufficient – and such action was found in the (peaceful) resistance by a multitude to the execution by the police of court orders, such as searches of ministries of the Generalitat or the prevention of the referendum, with the aim of hindering the normal functioning of institutions and execution of state laws and decisions.[54]

If the mobilization of the people, through demonstrations and civil disobedience with the aim of creating pressure on the state to effect constitutional change – as relied on by Spanish courts – were sufficient for the grave restriction of political rights, governments would be in a position to entirely hollow out the guarantees of political rights. They could then target all groups that seek fundamental constitutional change, even if they do so through entirely democratic means, in particular political debate and the mobilization of the citizenry. This would run counter to the idea, core to international human rights jurisprudence, that a democracy is characterized by the free exchange of ideas – including those that are contrary to majority opinion and that might appear as problematic, shocking or disturbing to certain parts of the population.[55] In the Catalan case, it would also ignore the fact that the Covenant specifically protects the right to self-determination of peoples which, in its internal component, allows for the expression of a people's view regarding the political system in and through which it is governed.[56] Simply mobilizing citizens for peaceful change – and organizing the political expression of a self-determining people – cannot be grounds for restricting political rights or imposing criminal sanctions.

As a result, restrictive measures have to practice restraint when they risk interfering with the political process. In international human rights jurisprudence, the high threshold to be applied for such measures has been specified in particular with respect to the freedom of assembly and association in the context of restrictions imposed on political parties. The Human Rights Committee has made it clear that "the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favorably received by the government or the majority of the population, is one of the foundations of

53 Tribunal Supremo, n 31 above.

54 Tribunal Supremo, n 35 above, pp. 276-285.

55 See European Court of Human Rights [GC], Judgment of 8 July 1999, App. no. 23556/94, *Ceylan v. Turkey* [GC], para. 32; Inter-American Court of Human Rights, *Perozo et al v Venezuela*, Judgment of 28 January 2009, para. 116.

56 Even if the Committee cannot receive communications solely based on Article 1, it can take the right to self-determination into account when interpreting other provisions of the Covenant; see HRC, *Gillot et al. v. France*, Views of 15/07/2002, no. 932/2000, para. 13.4 and 13.16.

a democratic society", and that "the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient" but that instead a government must "demonstrate that the prohibition of the association [is] in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose."[57] In the same vein, the European Court of Human Rights has found that a scope for restrictions on political parties opens up primarily when "there has been a call for the use of violence, an uprising or any other form of rejection of democratic principles", or an "incitement to violence against an individual or a public official or a sector of the population."[58]

The restriction of political rights in focus in this chapter equals that of constraints on the operation of political parties as it turns on the suspension and disqualification from public office – as well as the creation of practical and legal obstacles to the exercise of office – of a large part of the leadership of the political groups favouring independence.[59] In such a situation, the suspension from office is a comparable threat to the freedom of association as a formal prohibition, and the same strict standards apply here. In the absence of an incitement to actual violence, suspending from office the leadership of key political groups thus violates the right to freedom of association, the right to freedom of expression as well as the political rights to stand for election and exercise public office protected under the International Covenant and the European Convention on Human Rights.

2. Rights Violations in the Catalan Case in International Jurisprudence

The lack of justification for the repressive measures employed by the Spanish state has found increasing reflection in the jurisprudence of international human rights bodies. This jurisprudence follows on from early concerns raised by international human rights NGOs and UN human rights experts, including the UN Special Rapporteur on the

57 Human Rights Committee, Views of 20 July 2005, Comm. no. 1119/02, *Lee v Republic of Korea*, para. 7.2.

58 See ECtHR, Judgment of 2 October 2001, App. nos. 29221/95 and 29225/95, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, para. 90.

59 See, e.g., the equation of a party dissolution and the disbarring of its leaders in ECtHR [GC], Judgment of 13 February 2003, App. nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Refah Partisi and others v. Turkey*, para. 100: "Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases."

right to freedom of opinion and expression who drew attention to the fact that criminal prosecution concerns acts that "were directly related to calls for mobilization and public participation made in the context of the referendum".[60] He also expressed his concern about the fact that

> "charges of rebellion for acts that do not involve violence or incitement to violence may interfere with rights of public protest and dissent. International human rights law cautions that, especially in situations involving political dissent, restrictions should only be imposed when they are strictly necessary and proportionate to protect the State's interests."[61]

The first important international decisions with respect to the Catalan cases were those of the UN Working Group on Arbitrary Detention concerning six political and civil society leaders in pre-trial detention in 2019. The WGAD found those detentions arbitrary and in violation of a number of rights, including the political rights protected under Article 25 of the Covenant. In this context, it held that

> "The absence of the factor of violence and of credible information regarding any acts attributable to [the claimants] that would link them to the sort of conduct that constitutes the offences of which they stand accused have led the Working Group to believe that the purpose of the criminal charges brought against them is to intimidate them because of their political views regarding the independence of Catalonia and to prevent them from pursuing that cause in the political sphere".[62]

In the eyes of the Working Group, the detention was "arbitrary, since it stems from the exercise of the right to freedom of opinion, expression, association, assembly and participation."[63]

This approach mirrored that of the German Oberlandesgericht Schleswig which, in 2018, had to decide on the surrender of exiled Catalan President Carles Puigdemont as a result of a European Arrest Warrant issued by the Spanish Supreme Court. The German court emphasized that "the accused sought to obtain secession precisely by democratic means"

60 UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, AL ESP 1/2018.

61 UN Office of the High Commissioner on Human Rights, "UN expert urges Spain not to pursue criminal charges of rebellion against political figures in Catalonia", 6 April 2018, available at https://www.ohchr.org/en/press-releases/2018/04/un-expert-urges-spain-not-pursue-criminal-charges-rebellion-against.

62 UN Working Group on Arbitrary Detention, Opinion No. 6/2019 concerning Jordi Cuixart I Navarro, Jordi Sánchez I Picanyol and Oriol Junqueras I Vies (Spain), UN Doc. A/HRC/WGAD/2019/6, 13 June 2019, para. 119;

63 Ibid., para. 130.

and that "there was a tacit agreement not to use violence".[64] As a consequence, according to the judgment, the actions with which the applicant was charged would, under German law, not constitute a comparable criminal offense.[65] This was essentially because, in contrast with the approach of the Spanish courts, German law sets a high threshold for considering political mobilization punishable violence, and it does so under the influence of constitutional and human rights guaranteeing freedom of expression and assembly. As the German court pointed out, "in a democratic order, for reasons of constitutional law, the criminal law must practice restraint when faced with political disputes".[66] As a result, the court decided to reject the extradition with respect to the crime of rebellion.

The UN Human Rights Committee adopted a similar approach. As mentioned above, it had already – in an exceptional move in March 2018 – indicated provisional measures to safeguard the political rights of Jordi Sanchez with respect to his election to the presidency of the Generalitat.[67] It went yet further in merits decisions adopted in 2022 and 2023 regarding the suspension from parliamentary office of five pro-independence politicians, including the former president and vice-president of the Generalitat, Carles Puigdemont and Oriol Junqueras.[68] The Committee highlighted that the applicants had called on citizens to remain strictly peaceful and non-violent, that there existed a presumption in favour of peaceful demonstrations and that isolated violent acts of some participants could not be attributed to the organizers or an assembly as such. It also emphasized that the threshold for restrictions imposed prior to final criminal convictions, as in the case of the suspensions, was particularly high. In this light, it concluded that

> "an application of domestic law which leads automatically to the suspension of functions of elected officials, for presumed crimes on the basis of public and peaceful acts, prior to a criminal conviction, [...] cannot be considered to comply with the requirements of reasonableness and objectivity".[69]

As a result, the Committee found that the suspension had violated Article 25 of the ICCPR.

64 Oberlandesgericht Schleswig, Order of 12 July 2018, 1 Ausl (A) 18/18 (20/18), p. 9.

65 Ibid., pp. 9-17.

66 Ibid., p. 10.

67 See n 31 above. The case was later withdrawn and did not reach the merits stage.

68 Human Rights Committee, Views of 30 August 2022, Comm. no. 3297/2019, *Junqueras et al v Spain*; Views of 26 October 2023, Comm. no. 3165/2018, *Puigdemont v Spain*.

69 Ibid. (*Junqueras et al v Spain*), para. 8.8.

Political rights were also reaffirmed by the European Court of Justice which, in a Grand Chamber decision of late 2019, was called upon to decide on the parliamentary immunity – and therefore the parliamentary status – of the former vice-president of the Generalitat, Oriol Junqueras. Mr. Junqueras had remained in pre-trial detention after his election to the European Parliament and, as outlined above, was not permitted by Spanish authorities to assume his parliamentary office by attending parliamentary sessions. The CJEU stressed that the immunity "serves to ensure the effectiveness of the right to stand as a candidate at elections guaranteed in [...] the Charter of Fundamental Rights, which constitutes the expression in the Charter of the principle of direct universal suffrage in a free and secret ballot".[70] To comply with the principle of representative democracy, the Parliament's "composition must reflect faithfully and completely the free expression of choices made by the citizens of the European Union, by direct universal suffrage, as regards the persons by whom they wish to be represented during a given term" and it stressed "that the European Parliament must be protected, in the exercise of its tasks, against hindrances or risks to its proper operation".[71] Consequently, the Court found that Mr. Junqueras enjoyed immunity since his election and that – contrary to the decisions taken by Spanish authorities – this immunity "precludes [...] that a measure of provisional detention may impede the freedom of Members of the European Parliament to travel to the place where the first sitting of the new parliamentary term is to take place".[72] In these proceedings, it was not for the CJEU to decide definitively whether the Spanish authorities had violated the political rights of Mr. Junqueras, but a finding of such a violation is implicit in its decision.[73]

3. Particular Categories

While the argument presented above – and the decisions of international courts and other bodies – evince a serious violation of the political rights of Catalan independence leaders in most of the cases outlined in section III, particular considerations apply for some of those, especially the dissolution of the Catalan Parliament in October 2017 and the disqualification from office of President Torra in December 2019. In both these

70 European Court of Justice, Judgment of 19 December 2019, C-502/19, *Junqueras Vies*, para. 86.

71 Ibid., para. 83.

72 Ibid., para. 90.

73 See the discussion in Cristina Fasone and Nicola Lupo, 'The Court of Justice on the Junqueras Saga: Interpreting the European Parliamentary Immunities in Light of the Democratic Principle' (2020) 57 Common Market L. Rev. 1527. In later decisions on the immunity of Mr. Puigdemont, the General Tribunal of the European Union limited itself to delineating the competences of member states and the European Parliament on questions of immunity. It did not consider the substance of the question whether the withdrawal of immunity violated the rights of the applicant. General Court of the EU, Judgment of 5 July 2023, Case T-272/21, *Puigdemont et al v European Parliament*.

cases, the decisions of Spanish authorities clearly interfered with the political rights of those affected – in the former case, not only the members of the parliament dissolved, but also their voters. This applies even if, in general, a state may not have an obligation to establish regional parliaments or a federal system – where these have been created, and are in addition guaranteed by the constitution, restrictions on their operation constitute interferences with political rights.

In the case of the dissolution of the Catalan Parliament,[74] the question of legality hinges on whether this dissolution had a legal basis and was objectively justified and not arbitrary. In this respect, serious doubts have arisen over the applicability of Article 155 of the Spanish Constitution, though the Spanish Constitutional Court has confirmed the availability of the norm in this case.[75] However, on substance, the dissolution is beset by the same problems as the other measures discussed above. If the individual political rights of independence activists or political leaders could not be curtailed in response to peaceful action in favour of constitutional change, and if political parties cannot be dissolved without an incitement to violence, the same must hold for a collective measure as radical as the dissolution of a parliament. One could imagine that a state could take certain measures against parliamentary decisions violating Spanish laws and the constitution, but a dissolution would be disproportionate.

In the case of the disqualification of Mr. Torra,[76] it is undisputed that, in principle, there might be sanctions for violations of electoral campaign rules which, in grave cases, might lead to a disqualification, even though such consequences require exacting procedural safeguards.[77] However, it is already doubtful that the mere display of certain banners and signs – without taking sides for a particular candidate or party in the elections – can constitute such a grave case. Such a restriction is even less justifiable if, as in the present case, such display represented a vindication of the human rights of some citizens and thus a call for the application of constitutional protections. Even if these were seen as not neutral, a response that removes an elected president of a regional government from office appears as disproportionate.

74 See Section III.1 above.

75 See n 25 above.

76 See Section III.7 above.

77 See also ECtHR, Judgment of 5 December 2019, App. no. 8513/11, *Abil v Azerbaijan*, para. 70.

V. Political Rights Violations as "Deficiencies Affecting an Objectively Identifiable Group"

The interferences with political rights around the Catalan independence referendum are, for the most part, in violation of international human rights law and, as we have seen in the previous section, this fact is increasingly recognized in the emerging international jurisprudence on those issues. Various further cases are pending in the European Court of Human Rights.

In the context of this chapter, we cannot engage with all interferences in full detail. Overall, though, the picture of international condemnation is uniform when it comes to the core justification of repressive measures. And it is telling that the surrender or extradition of Catalan pro-independence politicians has so far been rejected in all cases – either explicitly on substantive grounds, as in the German case, or by reference to more formal criteria, as in Belgian and Scottish courts, or by classifying the cases as "political" and thus not processing them further, as in the case of Switzerland.[78]

The deficiencies in question result in part from executive action – especially the dissolution of the Catalan Parliament in 2017 – but mostly from judicial proceedings. The Spanish judiciary has consistently interpreted criminal and procedural provisions far more widely than in other contexts, and certainly more widely than an interpretation in conformity with international human rights law would suggest. It has also systematically subverted the efforts of other branches to find political solutions to the problem. It has used vaguely-worded crimes such as rebellion and sedition for the criminalization of referenda in clear contrast with the decision of the legislature which, in 2005, had removed the holding of illegal referenda from the list of crimes in the criminal code – precisely with the argument that referenda held by authorities without the competence to do so could be dealt with "in ways other than the criminal law".[79]

Likewise, the judiciary explicitly opposed the pardons granted by the Spanish government in 2021.[80] It undercut the elimination of sedition from the criminal code in

78 See Torbisco Casals and Krisch, Chapter 2, this volume.

79 Ley Orgánica 2/2005, 22 June 2005.

80 RTVE, "El Tribunal Supremo se opone a la concesión de los indultos a los presos del 'procés' y destaca la "falta de arrepentimiento", 26 May 2021, available at https://www.rtve.es/noticias/20210526/tribunal-supremo-se-opone-a-concesion-indultos-a-presos-del-proces/2093763.shtml.

2022 by upholding the extremely long disqualifications of various independence leaders on the basis of a supposed misappropriation of funds for holding the referendum.[81] In an exceptional act of judicial activism, the highest body of judicial self-organization has also condemned proposals for an amnesty for acts related to the referendum – even before any text of these was made public – as violating the rule of law.[82] The deficiencies concerning political rights thus reflect, just like those in other areas, a particular – and particularly conservative[83] – political thrust of a judicial system which has also largely ignored even clear condemnations by international human rights bodies in the Catalan conflict.

Do these violations of political rights then constitute "deficiencies affecting an objectively identifiable group"? The broad picture painted above suggests clearly that they do. The interferences with the political rights of the affected pro-independence politicians and activists (and their voters) cannot be understood outside the context of a concerted campaign of the Spanish state – of both the government and the courts – against a peaceful movement for political ends. The fact that these ends include constitutional change is, as we have seen in the survey of international jurisprudence, irrelevant in this respect – states cannot criminalize the pursuit of such change, including secessionist goals, if the means of this pursuit are democratic and peaceful. The fact that the Spanish state has used an armoury of repressive tools against the group of pro-independence activists – with the stated aim of "decapitating" the movement – is thus an unjustified discrimination. Acts that might otherwise have been qualified as disobedience have come to be treated as rebellion, sedition or as giving rise to abuses of public funds, often with long prison sentences and disqualifications from public office – and they have served to prevent various candidates from being elected to the presidency of the Catalan government. The political rights violations committed in this context thus reflect deficiencies concerning this particular, "objectively identifiable" group.

81 See supra note 42.

82 Consejo General del Poder Judicial, "Declaración institucional del Pleno del CGPJ", 6 November 2023, available at https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/Declaracion-institucional-del-Pleno-del-CGPJ--6-noviembre-de-2023-.

83 Urías, Joaquín, "Spain has a Problem with its Judiciary", *VerfassungsBlog*, 15 January 2020, available at https://verfassungsblog.de/spain-has-a-problem-with-its-judiciary/.

Chapter 6

The Right to Truth and the Catalan 'procés'

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I. Introduction

The Catalan "process" – involving claims of self-determination – has aired structural, unresolved issues at the heart of the Spanish democratic state involving conflicting claims to national self-determination, territorial integrity, past human rights violations and contemporary inequalities.[1] It has led Spain into a constitutional crisis, expressed deep political and cultural divisions and fostered the articulation of a disruptive political project. This chapter explores two discrete episodes that took place in this context. The first one involves the violence unleashed on 1 October 2017, when police and security forces prevented the celebration of a referendum that had been declared unlawful by the Spanish Supreme Court. The second one involves a jihadist attack that took place in Barcelona and Cambrils a few months earlier. It critically assesses the Spanish authorities' efforts in shedding full light on these events in the context of deep divisions and political turmoil. It does so by clarifying the source and scope of the international legal obligations binding upon Spanish authorities and carefully examining whether the relevant threshold for investigations has been met.

In particular, this chapter assesses the rights of victims and the relevant political community to an exhaustive investigation of all the relevant facts surrounding these events under the right to truth under International Human Rights Law (IHRL). It argues that although there is a sharp contrast between the prosecution of actions by Catalan leaders and Catalan citizens vis-à-vis the prosecution of police officers and other security forces for violent acts during the events of 1 October 2017, action by victims and civil society have moved authorities to grapple not only with individual acts of violence, but also to consider allegations into systemic aspects of violence, and the potential responsibility of mid-level officials. In this context, it does not find a sufficiently strong case that Spain has failed to satisfy its international obligations under the right to truth with regards to these events. By contrast, there are relevant aspects of the terrorist attacks in Barcelona and Cambrils, that have remained beyond the remit of public investigations, despite repeated attempts that they be investigated more fully. This fact, in the context of the existing political animosities at play, and particularly in light of allegations of Spanish negligence in adopting reasonable and necessary measures that could have prevented the attacks, and requests by family members of direct victims and by members of the Catalan people of the attacks constitutes a stronger case that the Spanish authorities have not yet fulfilled their whole range of obligations under the right to truth (both individual and collective). All in all, collectively the facts reviewed in this chapter may contribute to support allegations of "systematic or generalized deficiencies" that "affect an objectively

1 See Neus Torbisco Casals, Introduction to this volume.

identifiable group", as articulated by the European Court of Justice in its recent *Puig Gordi and Others* decision.[2]

The chapter is organized as follows. Section 2 explores the origins, crystallization and scope of the right to truth under IHRL. Section 3 assesses potential violations of the right to truth in the response to the violence unleashed by the October 1st (O-1) demonstrations. Section 4, in turn, examines potential violations of the right to truth with regards to the investigation and prosecution of the terrorist attacks in Barcelona and Cambrils. Section 5 briefly concludes.

II. The "Right to Truth" under International Human Rights Law

The conceptual origins of the right to truth under international law have often been traced to the right of families under International Humanitarian Law (IHL) to know the fate of their relatives in armed conflict, as recognized in Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions.[3] Yet this right as a discrete claim against the state under IHRL was arguably the direct result of developments in Latin American responses to atrocity during the transitions to democracy. A critical forerunner of this right in such context was the establishment of truth commissions as a standard response to serious human rights violations. Indeed, although similar institutions had been established in Uganda in 1974, by Idi Amin, and in Bolivia in 1982, by Hernán Siles Suazo, the first operative commission of this type was the Argentine National Commission on the Disappearance of Persons (*Comisión Nacional sobre la Desaparición Forzada de Personas*, or CONADEP).

2 Case C-158/21 ECLI:EU:C:2023:57, specially at para. 114. See, further, Joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198 para. 104.

3 Yasmin Naqvi, "The right to the truth in international law: fact or fiction?", *International Review of the Red Cross*, (2006) Vol. 88(862), 248.

CONADEP was created in December 1983, by the incoming Alfonsín Administration, just after its inauguration.[4] Its influence and legacy have clearly made it a path-setting institution. In only nine months of work, CONADEP was able to identify more than 300 clandestine detention centers and collect evidence of the systematic nature of the repression, including of around 10,000 enforced disappearances.[5] The report outraged the general public against the military and served to challenge the narrative advocated by the military. Indeed, the work of CONADEP was decisive in the subsequent *Juntas* trial. Only two weeks after the CONADEP's final report was issued, a civilian court took the reins of the investigation from the Supreme Council of the Armed Forces, which had stalled it for months.[6] The 700 cases identified and selected by the Office of the Prosecutor to prosecute the members of the *Juntas* had been originally investigated and documented by CONADEP.

The idea of a Commission that would shed light on recent human rights violations soon became the rule in most transitions, both in Latin America and beyond. In 1990 Chile created the first Commission including the word "truth" in its title.[7] The Truth Commission for El Salvador was formally agreed in Mexico City only a few months later as a way out of an armed conflict. Guatemala established its own Commission for Historical Clarification (1997-99) as a response to one of the bloodiest repressions in the region. In 2001, incoming Peruvian president Alejandro Toledo created a Truth and Reconciliation Commission.[8] In short, Priscilla Hayner documented more than 25 truth commissions in the Americas, Europe, Africa and Asia as of 2001, with arguably quite distinct configurations but the general overarching aim of documenting serious human rights violations.[9] Nevertheless, there was not yet talk of a "right" to truth, only a mechanism for transitional justice.

The "right to truth" as a discrete legal claim was coined in Argentina only in the mid-1990s, in the midst of an overarching sense of impunity for the grave violations of human

4 Its forerunners, the 1974 commission created by Idi Amin in Uganda and the 1982 *Comisión Nacional de Investigación de Desaparecidos* created by Bolivian President Hernán Siles Suazo, had both been failed attempts.

5 Notably, though, the report was based on a methodology and knowledge acquired by members of victims' organizations for years, while searching for their loved ones and filing habeas corpus claims before the Argentine judiciary, as well as filling with information the visit of the Inter American Court of Human Rights in 1979. On this story, see Alejandro Chehtman, "The Invention of Transitional Justice", typescript on file with author.

6 Section 10 of Act 23.049 empowered civilian courts to "take over" the investigation and adjudication, in cases of "unjustified delays or negligence in conducting the trial".

7 He however resisted pressures to widen the scope of impunity provisions under Chilean Law.

8 Eduardo González-Cueva, "The Contributions of the Peruvian Truth and Reconciliation Commission to Prosecutions", *Criminal Law Forum* (2004) 15(1-2), 55-66.

9 See Priscilla Hayner, *Unspeakable Truths. Transitional Justice and the Challenge of Truth Commissions* (Routledge 2002)

rights that had been perpetrated by the military dictatorship during the late 1970s. In 1985 the seminal *Juntas* Trial held to account the heads of the first three Juntas, and convicted five of them to prison sentences. This sentence prompted a wave of criminal prosecutions against former military chiefs, and it quickly expanded to lower ranking members of the Argentine military. Amongst economic instability, this triggered organized resistance, first, and revolt later by the Argentine Armed Forces. This broader set of prosecutions were also against Alfonsín's initial plan for limited, or restrained justice, focusing only on leaders and those who perpetrated particularly atrocious acts. Accordingly, his Administration passed Final Stop Act (*Ley de punto final*) in December 1986 first. After its failure to stop the wave of massive prosecution it further passed the Due Obedience Act (*Ley de obediencia debida*) in 1987, thereby putting a halt to criminal investigations of both former military and members of non-state insurrectional groups, except for those in positions of command. Only a few years later, the incoming Menem administration pardoned (1989-1990) everyone who had been convicted (and those who were still being prosecuted), leading to a period of impunity, also known as "*el apagón*" (the "blackout").[10]

Admittedly, as early as 1990 the United Nations Human Rights Committee (HRC) began referring to the "right to know" as a way to end or prevent the occurrence of psychological torture, under Article 7 of the International Covenant on Civil and Political Rights, precisely in a communication against Argentina.[11] But the articulation of the "right to truth" as a discrete claim came, again, from efforts at the domestic level. In a context of widespread impunity in Argentina ("the blackout"), Adolfo Scilingo -an obscure officer in the Argentine Navy- acknowledged the existence of death flights on prime-time TV. His words triggered a political storm. The Head of the Argentine Armed Forces, General Martín Balza, recognized the illegal repression and issued a public apology. Victims' organizations, such as H.I.J.O.S and Mothers of Plaza de Mayo, began resorting to *escraches*[12] against members of the military that had been benefited by the amnesties and pardons.[13] Yet, most notably for our purposes, a small group of human rights

10 These pardons were formalized in decrees 1002-1005 of 1989, and 2741-2746 of 1990. On 13 July 2007, the Argentine Supreme Court declared them null and void on grounds of being incompatible with the Argentine Constitution (see, Argentine Supreme Court, *Mazzeo*, case no M2333XLII).

11 See the explanation by Mr Bertil Wennergren, member of the Human Rights Committee, in his Individual Opinion in the cases: R. A. V. N. et al. (Argentina), communication Nos. 343, 344 and 345/1988, Decision of inadmissibility of 26 March 1990, UN Doc. CCPR/C/38/D/343/1988 (Appendix); S. E. (Argentina), communication No. 275/1988, Decision of inadmissibility of 26 March 1990, UN Doc. CCPR/C/38/D/275/1988 (Appendix).

12 The word "escrache" comes from the slang of Buenos Aires and means to "shed light on what is hidden".

13 This form of protest entailed a demonstration of artistic, public denunciation of individuals responsible for human rights violations. One of the first examples was putting up street signs indicating information about the homes of those responsible for tortures and disappearances. This type of protest was designed by a collective group called *Grupo de Arte Callejero* (Street Art Group).

lawyers around the influential *Centro de Estudios Legales y Sociales* (CELS), some of whose members had participated in CONADEP, filed a request before the Federal Appeals Court in Buenos Aires -the court which had conducted the *Juntas* trial- to launch new investigations, into the fate of victims of enforced disappearance during the dictatorship, even if prosecutions and convictions were ultimately precluded by the Amnesty Laws and Pardons in force.

These presentations invoked international human rights law, which at the time was only beginning to consolidate as the language of truth, accountability and reparations after atrocity in Latin America. They explicitly referred to Report 28/92 of the Inter-American Commission on Human Rights (IACHR) which had recommended "that the Government of Argentina adopt the necessary measures to establish the facts and identify those responsible for human rights violations that occurred during the last military dictatorship."[14] They also cited the duty to investigate enforced disappearance so long as the fate of the disappeared person is unknown, established by the Inter-American Court of Human Rights (IACtHR) in it's very first case *Velázquez Rodríguez v. Honduras*, in 1988. After a few internal meetings, these lawyers decided to articulate these petitions on the basis of what they considered to be a right to "truth" and to "mourning".[15]

By a slim majority the judges, the Federal Appeals Court in Buenos Aires -the same tribunal that had conducted the *Juntas* Trial, albeit with a new composition- initially opened these proceedings and requested the executive and military authorities to send any relevant information pertaining to the list of people who had disappeared through the mechanics narrated by Scilingo.[16] This request thereby led to the establishment of the first "truth trials", an innovative albeit ultimately disappointing, mechanism of transitional justice. These trials later spread through different Argentine courts, organizing hearings mostly for victims, gathering evidence, but without the possibility of issuing indictments or convicting perpetrators.

This innovation spread rapidly. In 1997, Louis Joinet, an independent expert appointed by the UN Commission on Human Rights, acknowledged the existence of an inalienable right to the truth "about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights to the perpetration

14 Federal Chamber of Cassation in Criminal matters (CCCF), Causa ESMA, Res 1/95 (20/03/1995). They also invoked the decision of the the Inter-American Court of Human Rights (IACtHR) in Velásquez Rodríguez v. Honduras, Merits, Judgment (29 July 1988), and *Bamaca Velasquez v. Guatemala*, Judgment (Merits) (Nov. 25, 2000).

15 Interview with a participant in these meetings on file with author. See, further, Juan Mendez, "An Emerging 'Right to Truth': Latin-American Contributions", in Susanne Karstedt, *Legal institutions and Collective memories* (Bloomsbury 2009), 40

16 CCCF, *Méndez Carreras Horacio, s/Presentación*, Reg. 1/95 (20/03/1995).

of aberrant crimes" as a means to "avoid any recurrence of such acts in the future".[17] He posited that such right was held by the individual victim and her family, but that it was also a broader collective right. He also recognized that states could fulfill their duties by establishing extrajudicial commissions of inquiry as well as by preserving archives relating to human rights violations.[18] These principles were updated in 2005, distinguishing the content of the victims' right, which correlates with the duty of the state to provide detailed information to the victim and her family about the specific circumstances in which the wrong was perpetrated (and the fate of the victim in cases of enforced disappearance), and the duty towards the broader political community to disclose information that led to the widespread or massive human rights violations.[19] Diane Orentlicher, as independent expert, clarified that "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization".[20]

In the Inter-American System of Human Rights (IAS), it was the Inter-American Commission that initially advocated the recognition of the right to truth as a discrete right under the American Convention on Human Rights (ACHR). This initial claim was based on Article 13, which provided a right to information and freedom of expression. But when the Inter-American Court of Human Rights (IACtHR) had the opportunity to address this issue it refused to entertain the existence of such a separate right to truth, which had not been explicitly provided for in the text of the ACHR.[21] This initial reluctance was overturned only a few years later in *Bámaca Velázquez v. Guatemala*. (2000). In this new decision the IACtHR recognized a "right to truth", and subsumed it in the "right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 [Right to a Fair Trial] and 25 [Right to Judicial Protection] of the Convention".[22] In this case, as well as in subsequent jurisprudence, the Court clarified that this right not only is directly linked to the state's duty to investigate, but also to prosecute and punish any serious human

17 Cf. "Question of the impunity of perpetrators of human rights violations (civil and political)", final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1., Annex I, Principle 1.

18 ibid, at para. 18.

19 See, "Report of the independent expert to update the Set of Principles to combat impunity", Diane Orentlicher, Addendum: "Updated set of principles for the protection and promotion of human rights through action to combat impunity", UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

20 ibid, Principle X.

21 IACtHR, *Castillo Páez v Peru* (merits), 3 November 1997, at para. 86, stating that the Commission referred to "a right that does not exist in the American Convention". See, further, Lawrence Bourgorgue-Larsen & Amaya Úbeda de Torres, *The Inter-American Court of Human Rights – Case Law and commentary* (OUP 2011), at paras 27.07-27.08.

22 IACtHR, *Castillo Páez v Peru*, at 201.

rights violations.[23] Indeed, in *Palma Mendoza v Ecuador* (2012), it argued that these rights were "closely related, and usually have reciprocal impact".[24] In 2022, the IACtHR further acknowledged the right to truth as a collective right in a democratic society. In its decision in *Integrantes y Militantes de Unión Patriótica v. Colombia* case this right was considered not only a right of individual victims to know the fate of their loved ones, but the right of a political community to be informed of the serious human rights violations that were perpetrated in its midst.[25] In a short period of time the right to truth crystallized under the Inter-American regional system.

The European system has arguably been more hesitant in recognizing this right. The first step in this direction has been identified with the 2005 recognition by the Parliamentary Assembly of the Council of Europe of the rights of families of disappeared persons to receive information on their relatives, emphasizing the importance of investigating such crimes.[26] The European Court of Human Rights (ECtHR) later acknowledged the right to truth explicitly, at least since its seminal decision in *Association '21 December 1989' v Romania* (2011), which condemned delays and inadequacies in the investigation of deaths during an anti-government demonstration. However, unlike its Inter-American counterpart, it placed its source in the procedural limb of the substantive rights to life (article 2) or freedom of torture (article 3) under the European Convention on Human Rights (ECHR).[27] In particular, the Court deemed that delays in the investigation of relevant crimes or other forms of human rights violations similarly affected the rights of individual victims and the public at large.[28] It further clarified that, in order to be effective, investigations had to be "prompt, complete, impartial and thorough" and "identify and punish those responsible. Finally, it indicated that states were responsible for ensuring that such investigations be conducted by independent persons who were not implicated in the relevant events.[29]

In *El Masri v. Macedonia*, the ECtHR further distinguished between the right of individual victims (the applicant and her family), and the right of the public in general, who had the

23 See, H. Bosdriesz, "Furthering the fight against impunity in Latin America? The contributions of the Inter-American Court of Human Rights to domestic accountability processes" (PhD Dissertation, 2019, on file with author), 66.

24 IACtHR, *Palma Mendoza v Ecuador* (Preliminary objection and merits), 3 September 2012, at para. 85.

25 See, specially, Judge Eduardo Ferrer Mac-Gregor and Ricardo Pérez Manrique's concurring opinion (at para 22).

26 A. M. Panepinto, "*The right to the truth in international law: The significance of Strasbourg's contribution", Legal Studies*, 37(4), (2017) 739-764.

27 See, e.g., James A. Sweeney, "The Elusive Right to Truth in Transitional Human Rights Jurisprudence", ICLQ 67 (2018), 374.

28 Case of *Association '21 December 1989' v Romania*, European Court of Human Rights, Application no. 33810/07, 24 May 2011.

29 ibid, paras 133-145.

right to know what had transpired. In their separate opinion, judges Tulkens, Spielmann, Sicilianos and Keller described this right as a "well-established reality", which was not particularly innovative, nor a "new right". The ECtHR further stressed the importance of the truth for non-recurrence of violations, stating that "an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and *in preventing any appearance of collusion in or tolerance of the unlawful acts."*[30] Finally, it construed the right to truth as essential to maintain "public confidence" in the adherence of authorities "to the rule of law and ... preventing any appearance of collusion in or tolerance of unlawful acts."[31]

The African Commission on Human and Peoples' Rights has now also advocated the right to truth as an aspect of the right to an effective remedy for a violation of the African Convention.[32] South Africa and its influential Truth and Reconciliation Commission arguably played a key role in the recognition of a tacit right to truth.[33] Yet the African Court of Human and People's Rights has not yet issued an opinion on the existence of such a right under the African system.

In any event, by 2009 the right to truth was already "approaching a customary right", as there had been "repeated inferences of this right in relation to other fundamental human rights by human rights bodies and courts".[34] Indeed, in 2010 the UN General Assembly established the international day for the right to truth, and a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has been appointed.[35] This right, it has been acknowledged, establishes an obligation on the part

30 Case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, European Court of Human Rights, Application no. 39630/09, 13 December 2012, para. 192.

31 ibid.

32 See "Principles and guidelines on the right to a fair trial and legal assistance in Africa", DOC/OS(XXX) (May 2003). See further, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/22/52, 17 April 2013.

33 See Patricia Naftali, "Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?" in *Justice pénale internationale / Sexualité et institutions pénales*, Volume XIII (2016).

34 Hayner, *Unspeakable Truths* (n 6), 267. See further, "The Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", UN GA Resolution 60/147, 21 March 2006, A/RES/60/147, at 22. The Office of the UN Commissioner on Human Rights has also published a study on the right to the truth in 2006. OHCHR, *Study on the right to the truth* (8 February 2006), E/CN.4/2006/91.

35 Alice M. Panepinto, "The right to the truth in international law: The significance of Strasbourg's contribution", *Legal Studies* (2017) 37(4), 739-764.

of state authorities to hear the victims and family members,[36] and to protect victims, witnesses and even perpetrators who may fear for their security if they come forward, and help them break the silence if they wish to.[37] Furthermore, there seems to be substantial evidence that such a right not only entails state authorities having a duty towards both victims and, under certain circumstances, the political community at large to investigate human rights violations and determine the specific circumstances in which these rights had been violated. In many contexts, it also requires a substantial process of accountability, often in the form of criminal prosecutions and trials -this right can be violated in cases where investigations are inadequate, incomplete, or unduly delayed. The duty to investigate is essential to ensure public confidence in state authorities' adherence to the rule of law, as well as to ensure non-repetition of said violations. In the next sections I shall examine whether Spain has fulfilled its international obligations with regards to the right to truth under International Human Rights Law.

III. The Prosecution of Police Violence in the Events of 1 October 2017

As indicated, on 1 October 2017 more than two million Catalans went out to vote.[38] Although the Constitutional Court had suspended the referendum, the local authorities in Catalonia considered this decision *ultra vires* and moved on to conduct the consultation. Faced with efforts by police and security forces to prevent this referendum to take place they physically resisted by protecting the ballots. What ensued were significant clashes and numerous acts of violence by police and security officers against demonstrators which rapidly circulated in the media worldwide. According to the Health Advisory Board of the *Generalitat*, 893 people were received in medical centers and hospitals as a result of the police action. At the same time, around 19 officers of the national police and 14 agents of the civil guard were entered for injuries suffered during these events. The day after the events, Amnesty International (Spain) among other organizations claimed that

36 Juan Méndez, "The Right to Truth", in C.C. Joyner (ed), *Reining in Impunity for International Crimes and Serios Violations of Fundamental Human Rights* (Erès Toulouse 1998), 265.

37 Working Group on Enforced and Involuntary Disappearances, General Comment on the right to truth in relation to enforced disappearances (2010), A/HRC/16/48, at 5.

38 France 24, *Cataluña: a dos años del referendo y en vísperas de la sentencia del 'procés'*, 1 October 2019, p. 2.

the Unite of Police Intervention of the National Police (UIP) and agents of the civil guard had used disproportionate force against individuals who were "passively" resisting on the streets and at the entrance of the voting centers.[39]

Justice moved swiftly to address some of the events that took place that day. On October 14th 2019, the Supreme Court of Spain convicted nine Catalan leaders for the crime of sedition, including former vice president Oriol Junqueras, sentencing them to terms between 13 and 9 years of imprisonment.[40] The President of the Spanish government, Pedro Sánchez, said at the time his government would respect the Supreme Court's decision.[41] By 2021, 44 officials had been convicted for their actions in connection to the events of 1 October, and 56 more were still being investigated.[42] On January 2021, Bernat Solé was the first mayor convicted for disobedience by the High Court of Justice of Catalonia (*Tribunal Superior de Justicia de Catalunya* or TSJC) and sentenced to a year barring from public office and a fine.[43] Two more were convicted subsequently -of the 712 mayors who were accused, only 78 were charged, of whom only three have been convicted, two acquitted, and eight are still waiting to be tried at the time of writing.[44] In November 2023, Oleksandr S was convicted and sentenced to 7-years in prison, the highest penalty imposed for acts of violence by private individuals in the context of the

39 Amnesty International, "1-O: Amnistía Internacional denuncia uso excesivo de la fuerza por parte de Policía Nacional y Guardia Civil en Cataluña" (2 October 2017), available at https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/1-oamnistia-internacional-denuncia-uso-excesivo-de-la-fuerza-por-parte-de-policia-nacional-y-guar/. The BBC reported at least 800 victims. See https://www.bbc.com/mundo/noticias-internacional-41453357.

40 *El País*, "Sentencia del 'procés': penas de 9 a 13 años para Junqueras y los otros líderes por sedición y malversación", 14 October 2019, available at https://elpais.com/politica/2019/10/14/actualidad/1571033446_440448.html.

41 *The Guardian*, "Violent clashes over Catalan separatist leaders' prison terms", Oct. 14th 2019, available at https://www.theguardian.com/world/2019/oct/14/catalan-separatist-leaders-given-lengthy-prison-sentences. In November 2023, however, Sanchez sent a bill granting amnesty to all those had been prosecuted for their involvement in pro-Catalan independence actions. *Politico*, "Catalan amnesty law 'in line' with EU values, Spain's justice minister says", 4 December 2023, available at https://www.politico.eu/article/catalan-amnesty-law-definitive-step-to-end-independence-row-spains-justice-minister-felix-bolanos-says/.

42 *Público*, "Unas 3.000 personas encausadas por el 'proces' se quedan fuera del alcance de los indultos", 21 June 2021, available at https://www.publico.es/politica/3000-personas-encausadas-proces-quedan-fuera-alcance-indultos.html.

43 *Ara*, "El TSJC inhabilita a Bernat Solé por facilitar el 1-O cuando era alcalde de Agramunt", 21 Jan. 2021, available at https://es.ara.cat/politica/tsjc-inhabilita-bernat-sole-1-octubre-alcalde-agramunt-conseller-exteriores_1_3106001.html.

44 *El Confidencial*, "A quién beneficia la amnistía: estos son los privilegiados que sacan provecho de la ley", 13 November 2023, avaliable at https://www.elconfidencial.com/espana/cataluna/2023-11-13/quien-se-beneficia-ley-amnistia-privilegios_3766401/.

violence of 1 October.[45] He is one of the "tens" of individuals already convicted for this type of act.[46] Many others have already been acquitted, mostly because of doubts of the relevant courts vis-à-vis the claims by the police agents.[47]

In sharp contrast with these judicial proceedings, little progress was initially made in adequately investigating the violent acts by the police and other security agencies. At least, no investigation took seriously the possibility that these acts had been centrally orchestrated. Against this background, on January 20th 2023, judge Francisco Miralles (of the 7th Magistrate's Court in Barcelona) concluded the investigations into police charges during the events of 1 October and gave way to official criminal charges against 45 police agents. They have to do with incidents in around 20 different schools and public offices, against almost 128 individual victims.[48] In his decision, Miralles concluded that the "facts that will be mentioned below and for which it will be necessary to continue the proceedings under expedited proceedings may constitute not only minor or misdemeanor injury offenses [assault,], but also offenses under articles 174 and 175 of the Criminal Code, notwithstanding their final qualification, which cannot be limited or conditioned by this resolution."[49] These provisions refer to acts of torture and assault as a form of abuse of power by the relevant authorities.

He further emphasized that the same group was in charge of police action in different schools, "in which we must highlight the special disproportionality of the action and

45 See, respectively, *Noticias de Navarra*, "Más de tres años de cárcel para Adrián Sas por agredir a dos mossos", 24 November 2021, available at https://www.noticiasdenavarra.com/politica/2021/11/24/tres-anos-carcel-adrian-sas-2108969.html; *El Triangle*, "Condenado a un año y diez meses de cárcel por agredir a un mosso en la acampada contra la sentencia del 'procés'", 17 November 2021, available at https://www.eltriangle.eu/es/2021/11/17/condenado-a-un-ano-y-diez-meses-de-carcel-por-agredir-a-un-mosso-en-la-acampada-contra-la-sentencia-del-proces/; *La Vanguardia*, "Nueva condena contra un activista independentista", 28 November 2020, available at https://www.lavanguardia.com/politica/20201128/ 49777845941/adrian-sas-condena-audiencia-mossos.html.

46 *elDiario*, "Los jueces condenan a un joven a 7 años de cárcel, la pena más alta por los disturbios del procés", 24 November 2023, available at https://www.eldiario.es/catalunya/jueces-condenan-joven-7-anos-carcel-pena-alta-disturbios-proces_1_10714628.html.

47 *elDiario*, "Los jueces rebajan las altas penas que pide Fiscalía por los disturbios del procés", 13 April 2022, available at https://www.eldiario.es/catalunya/jueces-rebajan-altas-penas-pide-fiscalia-disturbios-proces_1_8892080.html.

48 This includes a list of incidents and number of individual victims: Escuela Ramon Lull de Barcelona (19 personas), Colegio Mediterránea (16), CEIP Ágora (10), Ambulatorio El Guinardo (10), IES Pau Claris (9), Estel (9), IES Joan Fuster (8), IES Pau Romeva (7), Servicios Centrales del Departamento de Enseñanza de la Generalitat (6), Colegio Prosperitat (5), IES Jaume Balmes (4), Escuela Oficial de Idiomas (4), Colegio Infant Jesús (4), Centre Educatiu Projecte (4), Escoles Pies de Sant Antoni (4), CEIP Tibidabo (2), CEIP Els Horts (2), IES Joan Boscà (2), Centre de Formació d'Adults Freire (1), CEIP Aiguamarina (1), CEIP Victor Catalá (1), Colegio Trinitat Vella (1) y CEIP Mas Casanovas (1).

49 Order of Instruction, 20 January 2013, p. 5.

the aggressiveness of the agents", so he believes that the injuries can be imputed to the head of the unit, given the "widespread and violent" behavior of its members.[50] Miralles gave the Prosecutor's Office 40 days to file indictments, accuse the officers or file the case.[51] However, at the time of writing there is no public record of the Prosecutor's Office complying with this deadline.

Accordingly, Miralles's instruction order decided to open investigations against 45 officers for violence in different schools and institutions. It further emphasized how more than five years after the referendum, there was still no police officer convicted for injuring a voter. Yet he decided not to proceed with the investigation of potential crimes of damage to property, in some cases due to lack of concrete evidence while in others he considered that the police acted within its mandate and the relevant legal constraints established under Spanish law. On these grounds, he decided to close the investigation against 20 police agents.[52]

Several of the victims, together with their attorneys, have complained about the role of the Prosecutor's Office, which they claim was entirely functional in protecting the police.[53] In fact, the Prosecutor's Office three years earlier had requested the judge to close this investigation, with the exception of charges against 6 police officers for gross misconduct. Judge Miralles at the time rejected this request. The Audiencia of Barcelona, ordered, at the request of the City Council (*Ayuntamiento*), that the investigation not focus on individual instances of violence, but rather on the response as a global phenomenon. In particular, it established that the investigation should also focus on the "concrete" orders that were given to the police officers on the ground. On 18 September 2019, Miralles summoned eight other chief inspectors of the body (*jefes de núcleo*), who were responsible for the police devices in those centers and asked the Ministry of the Interior for information on the "chain of command" of the operation of that day and of the meetings in which the intervention was planned to prevent the voting.[54]

50 ibid, p. 2.

51 Order of Instruction, 20 January 2013, p. 68. See, further, *RTVE*, "El juez procesa a 45 policías por las cargas del 1-O", 25 January 2023, available at https://www.rtve.es/noticias/20230125/juez-procesa-agentes-policia-nacional-cargas-1-barcelona/2417648.shtml.

52 *El Nacional*, "45 policías españoles serán juzgados por las cargas del 1-O en Barcelona", 25 January 2023, available at https://www.elnacional.cat/es/politica/45-policias-seran-juzgados-por-las-cargas-del-1-o-en-barcelona_958047_102.html.

53 *elDiario*, "Cinco años del referéndum del 1-O, ningún policía condenado por las cargas", Sept. 30th, 2022, available at https://www.eldiario.es/catalunya/cinco-anos-referendum-1-policia-condenado-cargas_1_9577580.html. Indeed, in Barcelona the Office of the Prosecutor requested that the investigation be archived, but the judge and the Audiencia in Girona refused to do so.

54 *El País*, "Investigados ocho jefes operativos de la Policía por el 1-O en Barcelona", 5 September 2023, available at https://elpais.com/ccaa/2019/09/05/catalunya/1567686073_353359.html.

Furthermore, other courts in Catalonia are also investigating the police charges of 1 October 2017. There are more than 20 ongoing investigations against 126 members of the Spanish police and security forces in different courts in Barcelona, Girona, Lleida and Mataró.[55] Around 80 of these agents have already been indicted and some trials are about to start at the time of writing. By contrast, several other cases in Manresa, Amposta and Tarragona have already been closed. So far, the main investigations have not been able to determine that there was a direct order to act violently against those pretending to take part in the illegal referendum, thereby not pursuing investigations towards those politically responsible for the Police. Six years after the events no police agent has been convicted for assault in the demonstrations. By contrast, police investigation into the command level has been limited to the eight chief officers who coordinated the actions in Barcelona, establishing who would act over which school.[56] The delay in finalizing these investigations contrasts with the swift criminal prosecution of not only those involved in the organization of the referendum,[57] but most notably of those private persons convicted for violence against police officials.

In sum, although there have been significant delays and setbacks in the progress of the different investigations, and particularly those involving crimes against demonstrators and participants in the events of 1 October 2017, it is not yet clear that they amount to a violation of the right to truth. For one, insofar as local authorities have made relevant progress in the investigations, individuals involved in violent acts -including mid-level officials in the police forces- have been called to account, and there is at least one investigation into the "global" elements of the violence perpetrated. Therefore, it does not seem that the state response is yet in breach of its obligations to conduct an impartial and thorough investigation that identifies all those responsible for the violent acts by state forces. The role of the civil society, and particularly of the victims and their legal representation, has been and will continue to be critical in making sure these investigations turn out to be meaningful responses in terms of building truth, and providing a sufficient level of accountability. As indicated in the previous Section, it is

55 See, e.g., *RTVE*, "El 'procés' no se agota en el Supremo: el juicio a Trapero y otras causas pendientes del 1-O", 15 October 2019, available at https://www.rtve.es/noticias/20191015/proces-no-se-agota-supremo-juicio-a-trapero-otras-causas-pendientes-del-1/1979602.shtml.

56 *elDiario*, "Cinco años del referéndum del 1-O, ningún policía condenado por las cargas", 30 September 2022, available at https://www.eldiario.es/catalunya/cinco-anos-referendum-1-policia-condenado-cargas_1_9577580.html.

57 The Office of the Public Prosecutor initially announced an investigation of more than 700 mayors for their involvement in the organization of the Referendum. This number was then narrowed down to almost 80, but the majority of those investigations have now been closed. Bernat Solé was the second mayor to be tried and the first to be convicted for disobedience in January 2021. See *Ara*. "Solé, el primer alcalde condenado por el 1-O de los ocho que todavía tienen una causa abierta", 21 January 2021, available at https://es.ara.cat/politica/bernat-sole-primer-alcalde-condenado-abierta-referendum-1-o_1_3106103.html. As of the time of writing there are 6 cases which have reached the trial stage and 6 are still awaiting trial (see, https://antirepressiva.omnium.cat/en/detalls/organitzacio10/).

precisely this type of synergy and collective efforts that developed the right to truth, and gave it teeth as a meaningful element of the transitional justice framework. The work that these organizations, together with some local authorities, are doing in the context of the state responses to 1 October embody this dynamic and are key to pushing the Spanish authorities into fully illuminating and confronting this dark episode.[58]

IV. The Attacks in Barcelona and Cambrils and the Ensuing Investigations

As referred to in the Introduction to this chapter, on 17 and 18 August 2017, two terrorist attacks were perpetrated by a cell of ten individuals. The events were arguably triggered by an explosion that occurred on 17 August 2017 in a house in Alcanar, a small village some 200 km southwest of Barcelona. As a result of this explosion the house collapsed and two people were killed: Youssef Alla and Abdelbaki Es Satty, the leader of the cell. A third person, Mohamed Houli Chemlal, was found seriously injured, and was hospitalized. The investigation over the facts later indicated that they were part of a terrorist cell planning an attack against a sensitive target in Barcelona.[59] The explosion seems to have occurred accidentally, while they were manipulating triacetone triperoxide (TATP, also known as "Mother of Satan"), an extremely unstable explosive. At that time, interrogations of the injured man provided no leads. Investigators later found in the building 120 containers with propane and butane, 500 liters of acetone, bicarbonate and around 240 liters of hydrogen peroxide, all of which would have been stored with a view

58 The passing of an amnesty, depending on its scope, would likely affect these investigations. However, as Section 2 clearly illustrates, criminal investigations are hardly the only mechanism available for protecting and enforcing the right to truth.

59 The only detained member of the cell referred to "monuments and churches, such as *Sagrada Familia*". Jesús García, "El terrorista herido pide 'perdón' y se declara 'arrepentido'", *El País*, 24 August 2017, available at https://elpais.com/ccaa/2017/08/23/catalunya/1503509592_704081.html. In one of the mobile phones used by a member of the cell, Sagrada Familia was one of the locations searched in Google Maps, just as the Stadium of Football Club Barcelona. Manuel Cerdán, "La policía descubrió en un móvil que los yihadistas del 17-A querían poner una furgoneta bomba en el Camp Nou", *Okdiario*, 19 January 2018, available at https://okdiario.com/investigacion/policia-descubrio-movil-yihadistas-del-17-querian-poner-furgoneta-bomba-camp-nou-1713731.

to expand the planned explosions with TATP.[60] The security forces also found detonators, and shrapnel. A car and a motorbike were parked in front of the house.

In trying to identify and locate the owners of these two vehicles, the security forces phoned Younes Abouyaaqoub on the afternoon of 17 August, while he was driving a rented van. The information suggests that at that point he headed towards downtown Barcelona, and when arriving at the densely populated Rambla, he intentionally drove over bystanders, killing 13 people there (including a 7-year-old Australian boy and a 3-year-old boy from Barcelona), and injuring more than 100. He then fled the scene walking, stole a car stabbing and killing its driver, and drove away. The car was later found in *Sant Just Desvern*, to the South of Barcelona. On August 21st –after a four-day search– the local security forces (*Mossos d'Esquadra*) were alerted of the presence of a suspect in Subirats, some 40 km away from Barcelona. When they found him, he ran towards them while using a fake explosive belt and shouting "Allah is the Greatest". He was shot dead.

Meanwhile on 18 August, at 1.14am (around 9 hours after the attack in Barcelona) another car with five members of the cell (Mohamed Hychami, Houssaine Abouyaaqoub, Said Aalla, Moussa Oukabir, and Omar Hychami) drove over a number of bystanders in Cambrils, around 120 km South-West of Barcelona, finally crashing against a vehicle of the *Mossos*. The five people in the car, who were also using fake suicide vests, attacked other bystanders using knives and an axe they had purchased four hours earlier. In this second attack, one person was killed and several others were injured before the five perpetrators were shot dead by the police. In both attacks, 16 people were killed and around 140 were injured. The main group involved at least 10 individuals, including Abdelbaki Es Satty, the head and leader of the cell. Eight members of the cell were dead and two had been detained (Houli Chemlal, injured in the explosion in Alcanar, and Driss Oukabir, detained on 18 August, in Ripoll).

On 27 May, 2021, the Criminal Chamber of the Spanish National Court (*Audiencia Nacional*) convicted Mohamed Houli Chemlal and Driss Oukabir for terrorist activities, and sentenced them to 53 years and 6 months, and 46 years in prison, respectively (on appeal, the sentence was reduced to 43 and 36 years, respectively).[61] Furthermore, they were ordered to pay compensation to victims, and emergency and security bodies who suffered harms as a result of the attacks. Said Ben Iazza was convicted and sentenced to 8 years in prison for collaborating with a terrorist organization, but was released upon receiving the sentence on account of the four years he had spent in pre-trial detention during the investigation and trial. He had provided the van with which the cell bought

60 "Los terroristas compraron 340 litros de material para explosivos con la documentación del detenido en Castellón", *La Vanguardia*, 25 September 2017.

61 Audiencia Nacional, Sala Penal, Sección 3, Madrid, Sentencia 00015/2021, 27 May 2021 (hereinafter, "Judgment"), at 11; Audiencia Nacional, Sala de Apelación, Sentencia 9/2022, 13 July 2022. The sentence was confirmed by Tribunal Supremo, Sentencia 873/2023, 24 November 2023.

the chemical precursors they intended to use to produce the explosives. But none of them were convicted for the 16 murders and hundreds of injured people resulting from the attacks.

A number of issues concerning these events are still the object of significant controversy. First, there are conflicting leads regarding whether the cell was in fact connected to DAESH-ISIL.[62] Some annotations in the notebook used by Es Satty refer to the members of the cells as "soldiers of the Islamic State". Furthermore, on August 17th, the day of the attack in the Ramblas, Amaq News Agency issued a statement claiming responsibility of an attack in Barcelona of soldiers of the Islamic State.[63] Members of the cell conducted repeated trips to different places, namely, Switzerland, Belgium, France and Morocco, including a trip to Paris on the same week of the attacks, which have not been accounted for. And yet, no direct link has been uncovered between the members of the cell and any facilitator or individual belonging to the Islamic State, nor did the messages claiming responsibility for the attack provide detailed information of the perpetrators.[64] By contrast, according to the Trial Chamber, the technical knowledge to produce the explosives was obtained through internet searches.[65] A large number of searches, videos and audios were found in devices belonging to the members of the group. Similarly, the funds necessary to buy the relevant materials, and ultimately conduct the attacks came from the work of the members of the cell, and also from sales of gold acquired through robberies.[66]

Second, there are still some doubts regarding the fate of Abdelbaki Es Satty, the leader of the cell. Es Satty was born in Madchar, Morocco, in 1973. He was 44 years old at the time of the events, and was allegedly responsible for radicalizing the nine other members who were between 17 and 25 years of age (four of them were under 20). He had been linked to different jihadist organizations previously. Although he was investigated for terrorist activities, he had never been detained in connection with them. By contrast, he spent

62 The DAESH flag was drawn in at least one of the pillow covers that are thought would have been used to transport the TATP. A notebook allegedly belonging to Es Satty was found, in which the members of the cell were introduced as "Members of DAESH" in Al-Andalus. Audiencia Nacional, Juzgado Central de Instrucción núm. 4, *Diligencias Previas* 60/2017, Order of 22 August 2017, p. 4.

63 The same group claimed responsibility over the attack in Cambrils shortly afterwards. See, "Referencias a España en la propaganda yihadista", Grupo de Estudios en Seguridad Internacional, Universidad de Granada; y "El Estado Islámico reivindica el atentado en Cambrils", *La Vanguardia*, 19 August 2017.

64 See, e.g., "Heridas sin sanar e interrogantes a un año de los atentados de Cataluña", swissinfo.ch (17 August 2018), available at https://www.swissinfo.ch/spa/heridas-sin-sanar-e-interrogantes-a-un-a%C3%B1o-de-los-atentados-de-catalu%C3%B1a/44321504. For the MO of the Islamic State of claiming ownership of responsibility for attacks performed by radicalised individuals or groups see, e.g., Congressional Research Service, "Terrorism in Europe" (10 February 2021), available at https://sgp.fas.org/crs/terror/IF10561.pdf.

65 Judgment (n 62), at 11.

66 ibid, at 771 and ff.

time in jail for drug trafficking between 2010 and 2014.[67] There, he was closely connected with Rachid Aglif, member of the network responsible for the attacks in Madrid of 11 March 2004.[68] But it is acknowledged that he also met at least once with an official of the Spanish National Center for Intelligence ("*Centro Nacional de Inteligencia*" or CNI). Some have suggested that this visit may have been related to an attempt to recruit him as an informant.[69] But one witness has claimed that, while in Belgium, Es Satty claimed to have been talking on the phone with the Spanish intelligence services.[70]

Although the Spanish authorities have certified, on the basis of an DNA sample, that he was one of the two individuals who died in the explosion of the house in Alcanar, certain representatives of the victims of the attacks have put that finding into question. In connection to this, there are questions concerning whether Es Satty was in fact linked with the Spanish intelligence services (CNI), and if so the precise nature of that relationship. This general line of inquiry was excluded from the criminal investigations pursued in relation to these terrorist attacks. The final decision of the Trial Chamber never mentions the CNI, and it does not allude to any possible links between the Spanish secret services and the Imam of Ripoll, despite the submissions and allegations made by certain parties during the trial.[71] The requests for a special hearing with President Sánchez in Congress was considered inadmissible and the repeated requests to constitute a special commission of inquiry before the Spanish Congress have been blocked.

Third, and finally, there have been a number of claims concerning the responsibility of Spanish authorities for not preventing the attacks. On the one hand, there are allegations about the state's failure to comply with legal duties concerning the control over explosives precursors and reporting of suspicious conducts. Spain is under a number of international obligations concerning the control and surveillance over precursors that can be misused for the illicit manufacture of explosives. One of them is Regulation (EU) No 98/2013. The main aim of this regulation is precisely to "limit their availability to the general public, and to ensure that suspicious transactions … throughout the supply

67 Quiko Alsedo y Pablo Herraiz (2017), "El delito 'no grave' del imam de Ripoll: 120 kilos de droga", *El Mundo*, Aug. 24th 2017.

68 *El País*, "El imán de Ripoll trabó amistad en prisión con un terrorista del 11-M", 20 August 2017, available at https://elpais.com/politica/2017/08/20/actualidad/1503230607_911490.html.

69 *OIET*, "Los atentados de Cataluña un año después. Reconstrucción de los acontecimientos, interrogantes y lecciones por aprender" (2018), 7, available at https://observatorioterrorismo.com/eedyckaz/2020/08/Los-atentados-de-Cataluna-un-ano-despues.pdf.

70 As referred in by the lawyers of victims, available at https://www.youtube.com/watch?v=-1icJmCbjHQ.

71 See, *Audiencia Nacional Sala Penal Sección 3 Madrid, Sentencia 00015/2021* (27 May 2021). See, further, *El Periódico*, "Conenados a Penas de 53, 46 y 8 años de cárcel los acusados por los atentados del 17-A", (available at https://www.elperiodico.com/es/politica/20210527/condenas-acusados-atentados-terroristas-17-a-11768319).

chain, are reported appropriately."[72] Article 4, in particular, establishes that restricted explosives precursors shall not be made freely available to the general public. It further establishes that hydrogen peroxide must be subjected to a registration regime, and that for the purposes of registration, members of the general public shall identify themselves by means of an official identification document. Most relevantly, it requires that suspicious transactions involving hydrogen peroxide (included in Annex I of Regulation 98/2013), sulfuric acid and acetone (included in Annex II) be reported (art. 9(1)). Member States must set up national contact points for these purposes (art. 9(2)). Spain only fulfilled the latter obligation through Resolution 20/2013 of the Secretary of State for Security matters, establishing the Intelligence Centre for Organized Crime (*Centro de Inteligencia contra el Crimen Organizado*) as the national contact point concerning EU Regulation 98/2013.

The failure to implement these directives was instrumental in its failure to identify the cell and prevent the attacks. In effect, on 11 July 2017, a young unidentified person tried to buy 100 liters of hydrogen peroxide. He was asked for the relevant information on the account that it was a dangerous substance, but the transaction was ultimately not performed, given that his ID number was not recognized. The following day (12 July), Youssef Alla went to buy the same amount of hydrogen peroxide, albeit "denying any connection" with the person who had tried the same transaction the day before.[73] The witness further stated that no further documentation was required for acquisitions under 1,000 liters. On 27 July, the same individual bought another 240 liters of hydrogen peroxide, and did not have to fill in the relevant information, given that the sellers used the one they had filled in on the 12th.[74] Acetone was generally bought from different providers, but Mohamed Hychami personally bought 175 liters of acetone in a paint store in Vinaroz. The seller, in the trial, stated that no documentation was required to buy acetone.[75] The sulfuric acid was acquired by a firm (Conforsa) where Mohamed Hychami had worked up until the attacks, and where El Houssaine Abouyaaqoub worked as an intern.[76] Accordingly, there were a number of operations that should have raised an alarm had the Spanish state implemented the relevant controls.

Furthermore, on 25 May 2017 the US intelligence services (the National Counterterrorism Center) notified the Spanish security forces of a bulletin claiming that the Islamic State "was planning to conduct unspecified terrorist attacks during the summer against

72 Regulation (EU) No 98/2013 of the European Parliament and of the Council of 15 January 2013 on the marketing and use of explosives precursors Text with EEA relevance, Available at https://www.eumonitor.eu/9353000/1/j4nvk6yhcbpeywk_j9vvik7m1c3gyxp/vj8bg68ze0zn.

73 Judgment (n 62), p. 812.

74 *Audiencia Nacional, Juzgado Central de Instrucción núm.4, Diligencias Previas 60/2017*, Order of 25 September 2017, 1.

75 Judgment (n 62), p. 816.

76 Judgment (n 62), p. 821.

crowded tourist sites in Barcelona, ... specifically, La Rambla Street".[77] This information was at the time considered of low credibility. Nevertheless, as of June 2015, the level of terrorist alert in Spain remained on 4 out of 5, which entails, "high risk of terrorist attack". [78] Indeed, by 2017 Catalonia had concentrated around 33% of the total number of jihadists detained or killed in Spain since 2013 (76/230).[79]

Finally, specialized journalists as well as think tanks repeatedly claimed that the coordination and exchange of information among different anti-terrorism security services was "widely considered, among those professionals taking part in them, limited or even poor".[80] Among the examples reported in the press, on March 8th 2016 an officer from the *Mossos* answered via email to an inquiry from a police officer in Vilvoorde, Belgium, concerning Es Satty. Es Satty had arrived in Belgium trying to secure a position as an Imam there. The two officers knew each other from a seminar, so the inquiry was not made through the official channels. Although Es Satty had been investigated by the Spanish security forces (*Cuerpo Nacional de Policía and Guardia Civil*) 10 years earlier, that information never reached the Catalan *Mossos*. In fact, it was alleged that local authorities never received information concerning the behaviour of Es Satty while in prison, nor revived information concerning other intelligence investigations that did not lead to formal accusations or prosecutions of the relevant individuals.[81]

In short, despite the lack of serious allegations on direct involvement or complicity in the attacks, a number of claims have been raised in terms of the underperformance by the Spanish authorities of their duties concerning the prevention of this type of

77 Enric Hernàndez (2017), "Los Mossos recibieron la alerta de atentado en Barcelona de la CIA el 25 de mayo", *El Periódico*, 31 August 2017; and Enric Hernàndez (2017), "EEUU confirma que alertó a los Mossos", *El Periódico*, 1 September 2017.

78 Fernando Reinares & Carola García-Calvo, "Actividad yihadista en España, 2013-2017: de la Operación Cesto en Ceuta a los atentados en Cataluña", DT, nº 13/2017 (2017), Real Instituto Elcano, Madrid.

79 Base de Datos Elcano sobre Yihadistas en España (BDEYE).

80 Fernando Reinares & Carloa García-Calvo, "Un análisis de los atentados terroristas en Barcelona y Cambrils", available at https://www.realinstitutoelcano.org/analisis/un-analisis-de-los-atentados-terroristas-en-barcelona-y-cambrils/. See further, *OIET*, "Los atentados de Cataluña un año después. Reconstrucción de los acontecimientos, interrogantes y lecciones por aprender" (2018), 25, "available at https://observatorioterrorismo.com/eedyckaz/2020/08/Los-atentados-de-Cataluna-un-ano-despues.pdf.

81 See, Alissa Rubin *et al*, "Quién era Abdelbaki Essati, el imam que forjó la célula terrorista de Barcelona", *NYT*, 24 August 2017, available at https://www.nytimes.com/es/2017/08/24/espanol/quien-era-abdelbaki-essati-el-imam-que-forjo-la-celula-terrorista-de-barcelona.html.

attack. Perhaps most relevantly, the institutional routes sought by victims and the civil society to shed light on these outstanding issues have remained blocked. The criminal investigation which led to the conviction of three individuals related to the cell avoided any consideration of them. The press reports that this issue was not investigated by the Public Prosecution office, on the grounds that it exceeded the terms of the investigation on the attacks.[82] Miguel Ángel Carballo (from the prosecution office before the *Audiencia Nacional*) stated that there was no reference in proceedings of a relationship between Es Satty and the Spanish National Intelligence Center (CNI). That is, with the exception of the visit one of the agents of the CNI paid him in prison during 2014.[83]

Attempts to resort to other institutional resources in Spain were similarly unfruitful. In July 2019, ERC and PDeCAT requested a hearing with Spanish President Pedro Sánchez in Congress, so that he would explain any links between the Spanish National Intelligence Center (CNI) and Abdelbaki Es Satty. This request was considered inadmissible and no such hearing took place. Furthermore, Junts, ERC, CUP, Bildu and Més Mallorca had filed a request to create a special commission of investigation of the attacks inside the Spanish Congress, also as a response to these statements. Pere Aragonès, President of Catalonia, has also requested that the Spanish State further investigate the attacks. Yet more than four years after being filed, Congress never constituted this special commission.

These obstacles and omissions directly engage the right to truth. As indicated in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, developed upon request of the UN Commission on Human Rights, "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes."[84] This right to truth thus "comprises a positive action from the State to undertake a sustained and systematic effort to investigate and accumulate evidence" for violations of, *inter alia*, the right to life and to bodily integrity under the ECHR.[85] In particular, it has been accepted that the right to truth provides a legal mechanism for

82 *RTVE*, "El excomisario Villarejo insinúa que el CNI estuvo detrás del atentado del 17A en Cataluña", 1 November 2022, Avaliable at https://www.rtve.es/noticias/20220111/villarejo-cni-atentado-del-17a-cataluna/2253381.shtml.

83 *RTVE*, "La Fiscalía descarta la relación entre el imánde Ripoll y el CNI en la investigación de los atentados del 17A", available at https://www.rtve.es/noticias/20180808/fiscalia-descarta-relacion-entre-iman-ripoll-cni-investigacion-atentados-del-17a/1776600.shtml.

84 Commission on Human Rights, E/CN.4/2005/102/Add.1 (2005), Principle 2.

85 Juan Méndez & Francisco J. Bariffi, "The Right to Truth, International Protection" *Max Planck Encyclopedia of Public International Law*, available at https://www.corteidh.or.cr/tablas/r17382.pdf (emphasis added).

actors to press state authorities to "disclose (and not destroy) relevant information"[86] and to disclose the progress of results of investigations.[87] The fact that Spanish authorities have so far refused to squarely confront and investigate allegations that challenge certain aspects of the findings in the only criminal investigation of these events does not fully satisfy these standards. To this extent, it may be argued that the Spanish authorities have fallen short of what international law requires in the fulfillment of the right to truth.

V. Conclusions

This chapter examines, first, the legal basis and scope of the right to truth as it applies to Spain under International Human Rights Law, both as an obligation under the European and Universal systems. It identifies the direct source of this right in Latin American transitions as a legal instrument to shed light on past human rights violations in contexts of State inaction and general impunity. It further traces its expansion within the Inter-American System and towards its European and African counterparts, to be finally recognized under the Universal system. In short, it shows this right ultimately entails an obligation by states to conduct impartial, thorough and prompt investigations into human rights violations, and how its fulfilment requires some form of accountability. This fundamental right is linked to individuals' trust in State authorities' commitment with the rule of law, their reliability, and the importance of non-recurrence of these violations. Finally, this right is held jointly, or complementarily by individual victims and collectives who may have been harmed or affected by certain events.

This framework is used as the point of departure to then examine the Spanish responses to the violence obtained on the events of 1 October 2017 and the terrorist attacks in Barcelona and Cambrils that took place at the time of the Catalan 'proces'. Although the chapter documents the sharp contrast between the prosecution of actions

86 Marloes van Noorloos, "A Critical Reflection on the Right to the Truth About Gross Human Rights Violations", *Human Rights Law Review* (2021), 884, citing, *inter alia*, the "Report of the UN High Commissioner for Human Rights, Best practices for implementation of the Right to the truth", A/HRC/12/19 (2009) and the "Report of the Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence", A/HRC/30/42 (2015).

87 See, IACtHR, *Myrna Mack Chang v Guatemala* (Merits, Reparations and Costs) Series C 101 (25 November 2003), at 275.

by Catalan leaders and Catalan citizens vis-à-vis the prosecution of police officers and other security forces, it acknowledges that action by victims and civil society have moved authorities to grapple not only with individual acts of violence, but also to consider allegations of systemic aspects of violence and the potential responsibility of mid-level officials. To this extent, it did not find a sufficiently strong case that Spain has yet failed to satisfy its international obligations under the right to truth.

By contrast, there are certain aspects of the terrorist attacks in Barcelona and Cambrils, that the Spanish authorities have refused to squarely confront and investigate, in ways that satisfy the rigorous demands of the right to truth. Although there is no unequivocal evidence pointing to a relationship between Abdelbaki Es Satty and the CNI, or about whether failure to comply with its positive duties was linked to the possibility of detecting the plot and preventing the attacks, the recurrent blocking of attempts at looking into these issues affect direct victims and the Catalan people in ways that undermine their right to truth as applicable and binding upon Spain. As indicated in Section 2 above, the right to truth does not belong exclusively to the individuals directly affected but also has a collective dimension, and is thereby a group right internally linked with the group's trust in public authorities. Accordingly, these specific findings, in the context of wider instances of the legal system's differentiated treatment of violence against Catalan protesters and individuals, as documented in Section 3 above, seem to contribute to sustain allegations of systematic or generalized deficiencies in the treatment of an objectively identifiable group, within the recently established conceptual framework of the ECJ.

Mutual Trust, Fundamental Rights and "Objectively Identifiable Groups"

The Jurisprudence of the European Court of Justice in the Catalan Context

Mutual trust among Member States is a core principle of the European Union, but it has long stood in tension with the protection of fundamental rights. The book sheds new light on this relationship, starting from the new approach taken by the European Court of Justice in its judgment in a 2023 case concerning Catalan politicians in exile (*Lluís Puig Gordi and Others*). By allowing national courts to scrutinize whether "deficiencies affecting objectively identifiable groups" exist in other Member States – and allowing them to reject European Arrest Warrants on this ground – the Court has opened up new space for the protection of human rights, and especially the rights of minorities, in the EU. The chapters in this book, written by eminent legal scholars, analyse the concept of "objectively identifiable groups", with a particular view to the Catalan context from which it arose. By clarifying the scope and extent of this important concept, they show how it can provide a fresh opportunity for the democratic deepening of the EU.

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