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ARTICLE

Reclaiming Political Rights During a Rule of Law Crisis: The Role of the UN Human Rights Committee

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Abstract
How should democratic states approach and respond to secessionist movements using tactics contrary to the constitution to achieve their goals? What is the role of international human rights mechanisms in these processes? This article sheds light on these questions by examining how the UN Human Rights Committee approached and assessed two complaints that came before it in the wake of the Catalan Declaration of Independence in 2017. The aim is to discuss the Committee's examination of the merits in the two cases and the procedural hurdles faced. Specifically, it will analyse the effects of examining the merits in hindsight and the extent to which this perspective may have influenced its views. It will further reflect on the potential costs of acting with procedural flexibility towards the two complaints which, while driven by a sense of urgency, did not meet the threshold for irreparable harm. It is concluded that, while a protective stance towards petitioners is the bedrock of its mandate related to individual complaints, acting with such degree of flexibility risks undermining its procedural effectiveness and the integrity of its individual complaint procedure. It also made it come too close to act as a fourth instance in relation to facts that had already been examined by domestic courts by the time of its assessment. At the same time, it did not challenge Spain's rule of law approach as such.

Keywords Secessionism · Human rights · International covenant on civil and political rights · United Nations · Catalonia

1 Introduction

How should democratic states respond to secessionist movements that use tactics that challenge the constitutional foundations of those states? Can the political rights of leaders of such movements be restricted to curb these acts? What is required to reconcile human rights and the rule of law in these situations? Should the leaders of

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these movements be held accountable if acting contrary to the constitution and, if so, how?

These are daunting questions for democratic states committed to honouring international human rights obligations, including the protection of political rights, while seeking to safeguard the rule of law in these situations. This article centres on the stance of international human rights mechanisms towards these matters. In focus is how the UN Human Rights Committee ('HRC' or 'Committee') approached and assessed two communications that had been submitted by five Catalan leaders charged with rebellion for their role in the events in Catalonia in September and October 2017, culminating in a unilateral declaration of independence.[1] The aim is to analyse the role that the HRC assumed in relation to the Spanish process of responding to these events, its assessment of the merits and procedural challenges posed. With this aim in mind, it will discuss the effects of examining the merits in hindsight and the extent to which it may have influenced its views, including the interpretation of the meaning and scope of political rights during a rule of law crisis. It will further reflect on the potential costs of acting with procedural flexibility in relation to the complaints which, while driven by a sense of urgency, did not meet the threshold for irreparable harm. Even if the aim was to protect the petitioners, such flexibility risks undermining procedural effectiveness and the integrity of its individual complaint procedure.

The article, which will develop these reflections in greater detail, is structured as follows. It will first contextualise the challenge of responding to secessionist movements in light of Spain's approach (II). Next, it will consider the background to the two cases, the allegations made, and how the Committee viewed these allegations (III). Thereafter it will analyse the degree to which it demonstrated a protective stance towards the petitioners despite all the procedural hurdles encountered (IV). Thereafter follows a reflection on the effects of the HRC's approach to the admissibility and merits of the cases. Attention will then be paid to the implications of its approach from the standpoint of procedural effectiveness, the integrity of its individual complaint procedure, and its interpretation of the meaning and scope of political rights in a rule of law crisis (V). The final section concludes (VI).

2 The Challenge of Secessionism. The Catalan Process

Recent scholarship takes a growing interest in the question of how democratic states should approach secessionist movements, generating different views. Often cited in the same breath, despite being so different, are the independentist movements

[1] *Junqueras* et al. *v. Spain*, Communication No. 3297/2019 (HRC views adopted on 30 August 2022) with an individual opinion of Mr. José Santos (partially dissenting), CCPR/C/137/D/3165/2018 (Junqueras case); and *Puigdemont v. Spain*, Communication No. 3165/2018 (HRC views adopted on 15 May 2023), with a joint opinion by Committee members José Santos Pais and Wafaa Bassim (dissenting), CCPR/C137/D/3165/2018 (Puigdemont case). There was a total of four petitioners in the Junqueras case: Oriol Junqueras, Raúl Romeva, Josep Rull and Jordi Turull.

in Catalonia, Quebec, and Scotland.[2] What to do takes on immediate practical significance when such a movement begins to pursue a path toward a non-negotiated separation. Such a development becomes more urgent for states with constitutional frameworks that rule out tactics used by the movements in efforts to achieve their goals. In these situations, the question of how to respond to the political demands of a secessionist movement becomes overshadowed by an urgent need to safeguard and restore the rule of law. While the rule of law is a contested concept,[3] in general terms, it is understood as referring to a principle of governance in which all actors are accountable to laws that are publicly promulgated, equally enforced, and independently and independently adjudicated in a way consistent with human rights. As a multifaceted complex ideal, the rule of law requires states to ensure adherence to the principles of supremacy of law, equality before the law, and accountability to the law. Of equal importance is that states, when implementing this ideal, ensure'fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural transparency'.[4]

The commitment to safeguard all the values and principles connected with the rule of law can be challenging when responding to unconstitutional tactics used by a secessionist movement. One of those challenges is to mete out the meaning of accountability. If it is criminal nature, it may be unclear what crimes have been committed and how they should be sanctioned. These tasks may not be self-evident considering the exceptional nature of the acts in focus. Moreover, even if a unilateral independence declaration is an isolated act issued by an identifiable group of public officials, it often marks the culmination of a series of acts, many of them not unlawful per se, in which a multitude of actors are usually engaged, ranging from political leaders, social organizations and business actors to the police and private citizens. Therefore, a rule of law approach can be difficult to implement due to the practical challenges involved. There is a risk that the investigations and prosecutions become endless and costly if many actors are involved. Additionally, given that the national justice system may need to hold regional political leaders accountable for acts that—though contrary to constitutional law—have been adopted by a democratically elected regional government, there is a risk that the justice system will be perceived as politicized from the standpoint of the secessionist movement and others (whether bystanders or stakeholders) who support its political goals.

[2] See e.g. J Jordana, M Keating, A Marx and J Wouters (eds) (2019) Changing borders in Europe: exploring the dynamics of integration, differentiation and self-determination in the European Union. Routledge; C Closa, C Margiotta and G Martinico (eds) (2019) Between Democracy and Law. The Amorality of Secession. Routledge; W–N Lorne (2023), The Inadequacy of Unilateral Secession Referendums in Modern Democracies. King's Law Journal 34(2): 285–300; F Requejo (2017) Plurinational Democracies, Federalism and Secession. A Political Theory Approach. Revista Catalana Dret Públic 54: 62–80; C Closa (2022) A conflict of sovereignty? Democracy versus rule of law in the case of Catalonian succession. Comparative European Politics 20: 336–364; J L Martí (2021) The Democratic Legitimacy of Secession and the Demos Problem. Politics and Governance 9(4): 465–474.

[3] See e.g. J Waldron (2011) The concept and the rule of law. Georgia Law Review 43(1): 1–62.

[4] Report of the Secretary General. Rule of law and transitional justice in conflict and post-conflict societies (2004), UN doc. S/2004/616, para. 6.

The question of how democratic states committed to human rights should respond to a secessionist movement using tactics contrary to the constitutional framework was brought into the global spotlight as Spain was reacting to the events that unfolded in Catalonia in September and October 2017. In this case, the leaders of the independentist movement pursued several strategies that challenged the foundations of the Spanish constitution.[5] The strategies included using the legislative competencies of the regional parliament to adopt two laws, the first authorizing the organisation of a binding referendum in Catalonia on the question if it should become an independent republic.[6] The second law provided a detailed regulation of the transition to an independent republic following the referendum.[7] Even if the laws were immediately suspended by the Spanish Constitutional Court,[8] the Catalan government organised the planned referendum on 1 October and issued a unilateral declaration of independence on 27 October. Besides the fact that the two laws were annulled for being contrary to the constitution,[9] the outcome of the referendum failed to meet international standards. Specifically, it did not manifest that degree of widespread support that is usually expected for the outcome of a referendum to have any weight when deciding if a unilateral independence declaration, even when not supported by international or national law, at least had some legitimacy.[10]

The Spanish reaction to the Catalan unilateral declaration of independence was immediate, leading the Spanish central government to invoke article 155 of the Spanish Constitution, which meant dissolving the Catalan Parliament and calling for new regional elections that was set to 21 December 2017.[11] On 30 October 2017, the General Prosecutor formulated criminal charges against all the fourteen members of the Catalan government, including the five Catalan leaders who at a later stage would turn to the HRC with human rights complaints.[12] The initial charges were extremely grave since they referred to rebellion and sedition.[13] According to the Spanish Penal Code, rebellion is a crime against the constitution and is defined

[5] A Remiro Brotons (2017), Independencia como hecho revolucionario, Revista Electrónica de Estudios Internacionales 34:1–12.

[6] Decree 19/2017 of 6 September, on the convening of a referendum on the self-determination of Catalonia, Offical Gazette of the Catalan Government (DOGC), No. 7449A, 7September 2017.

[7] Decree 20/2017, of 8 September, on the legal and foundational transition of the republic, DOGC No. 7451A, of 8 September 2017.

[8] Ruling of the Constitutional Court of 8 September regarding action of unconstitutionality 4335/2017 against the Decree convening the referendum on self-determination of Catalonia, Official Gazette of the State (BOE), 8 September 2017; and ruling of the Constitutional Court of 12 September 2017, in relation to action of unconstitutionality 4386/2017 against Parliament of Catalonia Law 20/2017, BOE, 13 September 2017.

[9] Ruling of the Constitutional Court No. 114/2017 of 17 October, BOE, 24 October 2017); and ruling of the Constitutional Court No. 124/2017 of 8 November, BOE, 16 November 2017.

[10] The Catalan government reported a 90% vote in favour of independence, with a 43% turnout.

[11] Resolution of 27 October 2017, of the Presidency of the Senate, that publishes the Agreement of the Plenary Senate, that approves of the measures requested by the Government, in support of article 155 of the Constitution, BOE No. 260 of 27 October.

[12] Carles Puigdemont, Oriol Junqueras, Raúl Romeva, Josep Rull, and Jordi Turull.

[13] The initial charges also covered the misuse of public funds. For relevant provisions, see arts. 472 (rebellion), 544 (sedition), and 432 (misuse of public funds) of the Spanish Penal Code (SPC).

as a 'violent and public uprising' for different motives, among them to 'declare independent one part of the national territory'.[14] It carries a sentence of up to 25 years imprisonment and absolute disqualification for the same time.[15] Sedition was abolished from the Penal Code in 2022.[16] At the time of the charges, however, sedition was a category of crimes against the public order, which refers to a 'public and tumultuous uprising to impede, by force or legal means, the application of laws or any authority, official corporation or public servant, the legitimate exercise of its functions or its compliance with agreements, or administrative or judicial resolutions', carrying a sentence of up to 15 years' imprisonment and absolute disqualification for the same time.[17]

The charges presented led to the immediate detention of several former members of the Catalan government, among them, Oriol Junqueras, the former Vice-president of the Catalan government, on 2 November 2017,[18] who remained in detention until the Supreme Court delivered its sentence on 14 October 2019.[19] The charges also affected the liberty of Rául Romeva, Josep Rull and Jordi Turull who, together with four other former members of the Catalan government, were initially detained with bail, and then re-detained without bail on 23 March 2018. They then remained in detention until the Supreme Court had delivered its sentence. The charges also affected Carles Puigdemont. Even if he, along with other former members of the Catalan government, had fled to Belgium to escape detention and proceedings, he was subjected to proceedings in Belgium and Germany due to the European Arrest Warrant that had been issued against him by the Spanish courts. Even if he was never extradited, he could not return to Spain for fear of being brought to justice.[20]

3 Reclaiming Political Rights Before the HRC

The two complaints submitted to the HRC by Puigdemont (on 1 March 2018) and Junqueras, Romeva, Rull and Turull (on 18 December 2018) concerned the impact that the rebellion charges came to have on the political rights of the Catalan leaders beyond being detained. The complaints were motivated by court decisions taken at the initial stages of the criminal proceedings which impeded them from exercising certain rights under article 25 ICCPR, namely, the right to be elected at genuine periodic elections, guaranteeing the free expression of the will of the electors, and

[14] Art. 472 SPC.

[15] Art. 473 SPC.

[16] The crime was abolished by the Spanish Organic Law 14/2022 of 22 December. BOE-A-2022–21800.

[17] Former art. 544 SPC. See ibid.

[18] Jordi Cuixart, president of the non-profit cultural organisation Òmnium Cultural (2015–2022) and Jordi Sánchez, president of the Catalan National Assembly (2015–2017), had already been detained.

[19] Ruling of the Second Criminal Law Chamber of the Supreme Court No. 459/2019 of 14 October 2019 in the special case No. 20907–2017. An unofficial translation in English is available here: https://www.poderjudicial.es/sites/cgpj/rwdJSP/utils/IframeReadSpeaker.jsp?idFich=810314fbd7e0f610VgnVCM1000006f48ac0aRCRD. Last accessed on 18 December 2023.

[20] Ruling of the Audiencia Nacional of 3 of November 2017.

the right to take direct part in the conduct of public affairs. In what follows is an account of background, the allegations, and the outcomes in the two cases.

3.1 The Background

The first thing to note is that the Catalan elections on 21 December 2017 led to the re-election of the leaders as representatives of the winning political parties with parliamentary seats. In practice, those who could not be physically present had to vote by proxy.[21] This was also the case with Puigdemont who came to be proposed by the new Catalan parliament to return as a president of that parliament. Since his return to Spain was ruled out, the plan was that he would take part in the investiture session remotely. However, this plan failed when the Constitutional Court imposed provisional measures preventing a candidate for presidency, to be elected, unless he is physically present in the investiture session. It further added that the requirement could not be done by proxy or through online participation.[22] As a result, while seeking to overturn the decision domestically, Puigdemont had to eventually step down to make the formation of a new government possible. It was this fact that triggered his complaint to the HRC, arguing that the Constitutional Court was causing an irreparable damage to his right to be elected.[23]

The situation for those who had been charged with rebellion worsened when the Supreme Court's investigating judge on 9 July 2018 declared that his investigation had been finalized and communicated to the Catalan Parliament that those facing rebellion charges had been automatically suspended from their political functions.[24] The basis for his decision had been article 384 bis of the Spanish Code of Criminal Procedure according to which a person who is indicted and subject to provisional detention for rebellion and 'who is holding a public function or position will be automatically suspended from exercising the same for the duration of the prison situation'. The detained leaders, among them, Junqueras, Romeva, Rull, and Turull, appealed the decision to the Appellate Chamber of the Supreme Court followed by amparo complaints to the Constitutional Court. However, since the latter appeared to be hauling their case,[25] they filed a joint complaint to the HRC.[26] Also Puigdemont

[21] Arts. 23.2 and 79.3 of the Constitution; and art. 95 of the Regulation of Catalan Parliament. For a comment on the constitutionality of this rule, see P García-Escudero Marquéz (2022), Es constitucional el voto por delegación en los parlamentos autonómicos? Comentario a la sentencia del Tribunal Constitucional 65/2022, de 31 de mayo. Recurso de amparo núm. 2388–2018. BOE Núm.159, de 4 de julio 2022). Revista de las Cortes Generales 114: 559–575.

[22] The Constitutional Court decision 5/2018 of 27 January 2018. BOE-A-2018–2467, adopting provisional measures, and Judgment No. 19/2019 of 12 February 2019. BOE-A-2019–3980, annulling the resolutions of the Catalan Parliament concerning the celebration of the investiture session in the absence of the candidate. The decision was published in BOE on 19 March 2019.

[23] Puigdemont case, supra fn 1, para. 2.8.

[24] Supreme Court decision of 9 July 2018, dictated by the investigating judge of special case No. 20907–2017 of the Second Chamber of the Supreme Court.

[25] The amparo complaint was submitted by Junqueras and Romeva on 19 September and by Rull and Turull on 10 October 2018.

[26] Junqueras case, supra fn 1.

appealed the same decision and filed an amparo complaint without success.[27] He requested interim measures to immediately lift the suspension, which was rejected by the Constitutional Court.[28] This development led him to ask the HRC to expand his initial submission to also his suspension as well.

3.2 The Allegations

Even if the two complaints to the HRC were filed at different times and, at least initially, for different motives, they ended up being remarkably similar in substance. The core allegation set forth by the petitioners in both cases was that the decision to suspend them from their functions as deputies of the Catalan Parliament violated their political rights under article 25 of the International Covenant on Civil and Political Rights (ICCPR or Covenant). In their view, the decision failed to meet the requirements that must be met for restricting these rights as established by the Covenant.

Specifically, the petitioners argued that the decision to remove the leaders from public office had not been prescribed by law since it lacked the necessary foreseeability and objectivity required by article 25.[29] Although there was a formal legal basis for the decision in question, namely art. 384 bis of the Code of Criminal Procedure, it had not been motivated on 'reasonable and objective grounds'. This being so since the crime of rebellion requires that a 'violent and public uprising' had taken place, which was not the case since the demonstrations on 20 and 21 September could not be qualified as such. In support this understanding of the nature of the acts that had preceded the declaration of independence, they relied on the conclusion of a German court that had rejected the enforcement of the Spanish European Arrest Warrant requesting the extradition of Puigdemont to face charges of rebellion.[30] Likewise, they referred to a statement by the UN Special Rapporteur on Freedom of Opinion and Expression in which he expressed his concern that 'charges of rebellion for acts that do not involve violence or incitement to violence may interfere with

[27] Puigdemont filed an amparo complaint on 23 October 2018. The Constitutional Court delivered its decision on 12 March 2019 in which it denied the complaint. See decision No. 16/2019 of 12 March 2019. Available at: https://hj.tribunalconstitucional.es/es/Resolucion/Show/25892 Last accessed on 18 December 2023.

[28] On 28 December 2018, Puigdemont requested the Constitutional Court to adopt provisional measures to lift the suspension. This request was denied by the same court on 15 January 2019.

[29] Junqueras case, para. 3.2–3.5; Puigdemont case, para. 6.7 and annex 6.7–6.11. The complaints include references to HRC, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996. CCPR/C/21/Rev.1/Add.7, paras. 4 and 16; *Paksas v. Lithuania*, Communication No. 2155/2012 (HRC views adopted on 25 March 2014), CCPR/C/110/D/2012. The case concerned an elected Lithuanian President who had been impeached and suffered a life-long disqualification from public office. The HRC viewed the measure to lack the necessary foreseeability and objectivity required by Article 25 ICCPR.

[30] *Oberlandesgericht Schleswig*, 1 Ausl (A) 18/18 (20/18), 5 April 2018, pp. 11, 12 and 15, cited in Junqueras case, p. 4 (fn 10) and Puigdemont case, p. 4 (fn 10).

rights of public protest and dissent'.[31] Accordingly, their acts had been more equivalent to those of political parties that 'promote peacefully ideas that are not perceived favourably by the Government or the majority of the population'.[32]

Moreover, the petitioners alleged that the decision had been arbitrary and did not comply with due process and impartiality guarantees. Concretely, the automatic and collective character of the suspension decision failed to consider their individual circumstances, leading to disproportionate effects. In their view, considering the gravity of the decision, the weight of the justification given must be assessed in each individual case.[33] Moreover, even if the destitution from public functions cannot be excluded entirely, for example, as a sanction of a crime, in cases where the political opposition is brought to justice and loses their right to vote and the right to candidate for office prior to the verdict are always suspicious. Such measures must be justified on exceptional grounds, upholding high standards of procedural integrity and due process guarantees.[34]

Additionally, Puigdemont set forth a separate allegation that restrictions on political rights must be especially solid when directed against the winners of elections, affecting the free expression of the will of the electorate.[35] He further argued that article 384 bis had not been applied correctly in his case since he was not held in pretrial detention.[36] Above all, the decision requiring his physical presence in the investiture session had not been established by law, served no legitimate aim and had disproportionate effects. In support, he argued that several parliamentary systems lack an investiture session and that the CODVID-19 pandemic had meant that such events can be done remotely. In fact, the real objective behind the decision was to prevent him and the other political leaders investigated for rebellion from becoming elected to the regional government.[37]

3.3 The Views

Contrary to the petitioners, Spain maintained throughout the procedure that the decision to remove those who had been charged with rebellion from public office as

[31] UN expert urges Spain not to pursue criminal charges of rebellion against political figures in Catalonia. UN Press Release, 6 April 2018 (https://www.ohchr.org/en/press-releases/2018/04/un-expert-urges-spain-not-pursue-criminal-charges-rebellion-against). Last accessed on 18 December 2023, cited in Junqueras case, para. 3.3 and in Puigdemont case, para. 6.9 (annex I).

[32] *Lee v. Republic of Korea*, Communication No. 1119/2002 (HRC views adopted on 20 July 2005), CCPR/C/84/D/1119/2002, para. 7.2, cited in Junqueras case, para 3.5 and Puigdemont case, para. 6.11 (annex I). But note that the cited case does not concern the rights of members of political parties in public office, but the rights of members of a students' association.

[33] Junqueras case, para. 3.6 and Puigdemont case, para. 6.12 (annex I).

[34] Junqueras case, para. 3.7. and Puigdemont case, para. 6.13 (annex I), citing *Scarano Spisso v. Venezuela*, Communication No. 2481/2014 (HRC views adopted on 17 March 2017), CCPR/C/119/D/2481/2014, para. 7.2 and *Nasheed v Maldives*, Communication No. 2851/2016 (HRC views adopted on 4 April 2018), CCPER/C/122/D/2270/2013 and CCPR/C/122/D/2851/2016, para. 8.6.

[35] Puigdemont case, para. 6.7.

[36] Puigdemont case, para. 6.8 (annex I).

[37] Ibid, para. 11.3 (annex I).

well as the decision not to accept that Puigdemont could be elected remotely did not violate his political rights since, despite the rebellion charges he was able to present himself to elections as deputy in the Catalan Parliament and the European Parliament (EP). He further exercised his right to vote by proxy as deputy of the Catalan Parliament until he renounced from this function to become a member of the EP. He also continued to campaign for the independence of Catalonia.[38] Importantly, the application of article 384 bis was neither automatic nor collective since its application fell upon the Catalan Parliament which individualised the decision to ensure that it did not alter the distribution of seats among the groups in the parliament. This meant that a suspended deputy was replaced by another deputy from the same group.[39] Additionally, it explained that article 384 bis is a very limited provision that does not operate automatically since its application requires a prior judicial decision in a concrete case, which implies individualising and determining if the facts meet the specific conditions established by the provision. Moreover, the decision, which is of a temporary character, was made at an initial stage of proceedings where the investigating judge assesses, in an indicative manner, the existence of the elements of the crime.[40] The decision further complied with universal and regional standards, strengthened civic senses, respect for the rule of law and the maintenance of democratic governance.[41]

Nevertheless, despite Spain's efforts to defend the two court decisions, it failed to persuade the HRC, which concluded that the suspension decision was contrary to the requirements of article 25. The Committee began its reasoning on the law by first recalling that political rights are the essence of a democratic government,[42] and that any restriction of such rights must be prescribed by law, be reasonable and objective, and adhere to fair and equitable procedures.[43] Importantly, it must sufficiently precise both so that those who must observe it are able to foresee its application and adapt their conduct accordingly and so that those who entrusted to apply it are not given illimited or generalised discretion.[44] If the motive for restricting the right to vote or the right to be elected is to sanction a crime, the restriction must be proportionate to that crime.[45] Moreover, a restriction is arbitrary if the verdict

[38] Puigdemont case, para. 10.1.

[39] Puigdemont case, para. 16.11.

[40] Junqueras case, para. 6.1.

[41] Junqueras case, ibid; and Puigdemont case, para. 16.11 (annex I).

[42] Junqueras case, para 8.3 and Puigdemont case, para 16.3 (annex I), citing HRC General Comment 25, para. 1, supra note 28.

[43] Junqueras case, para. 8.3., Puigdemont case, para 16.3 (annex I), citing *Paksas v. Lithuania*, supra note 28, para. 8.3 and UN General Comment 25, supra note 27, paras. 3, 4 and 16.

[44] HRC citing *Maldonado Iporre v. Bolivia*, Communication No. 2629/2015 (HRC views adopted on 2 May 2018), CCPR/C/122/D/2629/2015), para. 11.5; and *Delgado Burgoa v. Bolivia*, Communication No. 2628/2015 (HRC views adopted on 2 May 2018), CCPR/C/122/D/2628/2015. Both cases concern the right to be elected as mayor. See also Siracuse Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. E/CN.4/1985/4, Annex, paras. 15–18, concerning the interpretation of 'prescribed by law'.

[45] HRC citing *Dissanayake v. Sri Lanka,* Communication No. 1373/2005 (HRC views adopted on 4 May 2008, CCPR/C/93/D/1373/2005, para. 8.5.

itself is arbitrary or if it is equivalent to a manifest error, a denial of justice or if the criminal proceedings lacked due process guarantees.[46] A restriction imposed prior to the verdict must be treated with even more care.[47] This is even more so when the law stipulates the automatic pretrial suspension of political rights, *ex lege*, without allowing any margin in its application beyond the verification of the concurrence of the requisites established by the rule.[48] Finally, if a state has a legitimate interest to restrict political rights to protect the rule of law, a parliamentarian can only be removed from office prior to verdict in extraordinary circumstances.[49]

It then proceeded to consider the relevant facts of the case. It noted that the core issue was not if a prior formulation of charges of rebellion is necessary for applying article 384 bis of the Code of Criminal Procedure; instead, the key question was if the crime of rebellion, which required that 'a violent and public uprising' had taken place was, in fact, applicable. This framing led it to consider the role of the Catalan leaders in the demonstrations on 20 and 21 September 2017. In its assessment, it stressed, for example, that Puigdemont had ordered the protesters to act strictly peacefully and that isolated acts of violence by some participants in these demonstrations must not be attributed to others, such as the organisers, or determine the nature of the assembly.[50] It concluded that the demonstrations had been essentially public and pacific, and that Spain had failed to show otherwise. In this light, it viewed the automatic removal of the petitioners from public office for their roles in 'public and pacific events' as failing to meet the requirement of reasonableness and objectivity. The automatism of the decision also wrongfully excluded an individualised analysis of the proportionality of the measure in each case.[51]

By contrast, regarding Puigdemont's separate claim, the Committee found that the requirement of physical presence of a candidate for presidency in the investiture session to be lawful, objective, and reasonable. Importantly, the recurrence of more online or hybrid events since the COVID-19 pandemic does not mean that it is no longer essential to be physically present in certain events or that there is now a right to be exempted from such a requirement. This includes situations in which a person considers that the only way for him to enjoy certain rights is by remaining abroad. This being so since the requirement seeks to protect the political rights of other parliamentarians and, indirectly, the electorate. Even if Puigdemont had escaped justice by going to Belgium, he continued to enjoy several political rights, such as the right to be elected to parliament and, as Spain had pointed out in its written observations, the right to stand for elections to the European Parliament. He could also exercise his right as parliamentarian to vote per delegation until he was suspended from

[46] *Arias Leiva v. Colombia*, Communication No. 2537/2015 (HRC views adopted on 18 December 2018), CCPR/C/123/D/2537/2015, para. 11.6; and *Nasheed v. Maldives*, supra fn 34, para. 8.6.

[47] Junqueras case, para. 8.3, citing HRC General Comment 25, supra note 29, para. 14, according to which the right to vote cannot be restricted during pretrial detention before verdict.

[48] Junqueras case, para. 8.7; and Puigdemont case, para. 11.8 (annex I).

[49] Junqueras case, paras. 8.3 and 8.7; and Puigdemont case, paras. 16.3 and 16.11.

[50] Junqueras case, para. 8.6; and Puigdemont case, para. 16.10, citing HRC General comment No. 37 (2020) on the right of peaceful assembly (article 21), 17 September 2020, CCPR/C/GC/37, para. 18.

[51] Junqueras case, para. 8.7; and Puigdemont case, para 16.12.

public office.[52] In sum, contrary to Puigdemont's claims, article 25 ICCPR did not guarantee a right to be elected president in his absence.

4 The Procedural Hurdles

The HRC's assessment of the merits in the two cases required first overcoming several procedural hurdles. Indeed, Spain objected against proceeding to an assessment of the merits throughout the rounds of written submissions between the parties. This was particularly striking in the Puigdemont case, where Spain invoked abuse of rights, lis pendens, and non-exhaustion of domestic remedies, to get the case dismissed.[53] It even requested that Puigdemont's case be discontinued when he renounced from his function as deputy in the Catalan Parliament to become member of the EP on 7 January 2020 since by then his complaint has lost its purpose.[54] Nevertheless, the HRC maintained a strong protective stance towards the petitioners throughout the procedure, ending up declaring both cases admissible. What follows is a more detailed account of the most important objections, and the disputes surrounding them.

4.1 Concerning Lis Pendens

The two submissions to the HRC were not the only ones filed by the petitioners. In 2018 a total of four complaints had been submitted to the UN in reaction to the rebellion charges. Two complaints had also been sent to the Working Group on Arbitrary Detention (WGAD).[55] Since the four submissions overlapped to a significant extent, Spain objected against the multiplication of complaints, even partly involving the same petitioners (Junqueras and Rull). This led Spain to request the WGAD to transfer the two complaints before it to the HRC which at the time had already received the Puigdemont complaint.[56] Nevertheless, the WGAD responded in the negative by pointing out that even if the complaints were similar, they did not concern the same matter.[57] Later on, Spain sought to have the complaints pending before the HRC dismissed on lis pendens grounds since by then the WGAD had delivered its opinions which had taken a strong stance in favour of the petitioners and their claims that their rights were being violated.[58]

[52] Puigdemont case, para 16.7.

[53] For procedural rules see Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP) and the HRC Rules of Procedure.

[54] Puigdemont case, para. 9 (annex I).

[55] WGAD Opinion 6/2019, 13 June 2019, A/HRC/WGAD/2019/6 (Submission by Oriol Junqueras, Jordi Cuixart, Jordi Sánchez); and WGAD Opinion 12/2019, 10 July 2019, A/HRC/WGAD/2019/12 (Submission by Joaquin Forn, Josep Rull, Raúl Romeva and Dolores Bassa).

[56] WGAD Opinion 6/2019, para. 98.

[57] Ibid, para. 100, referring to the interpretation of WGAD Methods of Work, para. 33(d).

[58] UNGWAD Opinion 6/2019, ibid, paras. 119–120.

Indeed, the HRC must ensure that the 'same matter' is not being examined under another procedure of international investigation or settlement'.[59] Regarding Spain, the rule further extends to cases that already have been examined by such a procedure.[60] However, the procedural objection was of no avail since, according to HRC practice, the rule does not cover UN Human Rights Council procedures, special rapporteurs or working groups.[61] Neither was it relevant that Puigdemont had sought relief before European Court of Human Rights,[62] since complaints submitted to regional human rights courts that have been dismissed on procedural grounds fall outside the scope of the rule.[63] Finally, according to HRC practice, 'the same matter' requires the same author, the same facts, and the same substantive rights, which was not the situation.[64] While the HRC's dismissal must be seen as sound, the substantial overlap among multiple cases seemed to nevertheless require some coordination, at least informally, to avoid the appearance of conflicting views within the UN. This might partly why the HRC assessment ended up being framed so narrowly without considering all Puigdemont's initial allegations.

4.2 Concerning the Abuse of the Right of Submission

Indeed, Puigdemont's initial submission to the HRC had entailed a wide range of allegations, including violations of the rights to freedom of expression, assembly, and association.[65] These were based on the contention that he had wrongfully been denied the right to advocate and lead a public movement that sought to bring about constitutional reform.[66] In fact, his initial allegations concerning political rights had been limited to his ability to take up the presidency of the Catalan government.[67] However, as the domestic proceedings progressed, and his political rights were suspended, he wanted his submission to cover this fact, and to add that the suspension had violated his right to an impartial and independent tribunal.[68]

Spain objected to these changes which it saw as an abuse of the right of submission and, specifically, a procedural deviation from the object of the original communication.[69] However, according to the HRC, the petitioner may well add a new fact if

[59] Art. 5.2 (a) of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP).

[60] See Spain's declaration to this effect when acceding to the ICCPR-OP in 1985.

[61] United Nations, Individual Complaint Procedures under the United Nations Human Rights Treaties Fact Sheet no. 7 Rev. 2 (2013), pp. 13-14.

[62] Forcadell I Lluis et al. v Spain, Application No. 75147/17 (ECtHR decision adopted on 7 May 2019).

[63] UN Fact Sheet no. 7, supra note 61, p. 14.

[64] Ibid.

[65] Puigdemont case, para 3 and paras. 3.1–3.3 (annex), referring to political rights (art. 25) freedom of political expression (art. 19), freedom of political association (art. 21), and peaceful protest (art. 22).

[66] Puigdemont case, para. 3 and paras 3.1–3.3 (annex I) as well as para. 15.5.

[67] Ibid, para. 5.6 (annex I).

[68] Ibid, paras. 10.1 and 11.1 (annex I). The right to an independent and impartial tribunal is protected by article 14.2 ICCPR.

[69] Ibid, para. 7.6 (annex I). The right of submission is regulated in art. 3 ICCPR-OP.

it could not be presented in the ideal procedural moment and when he indicates why he did not include it in the original submission or indicates that domestic procedures have been ineffective. Spain has also been given the chance to present additional observations.[70] Furthermore, from the viewpoint of procedural economy, it is more effective to accept the amplification instead of asking for a new separate submission.[71] By contrast, the new claim related to the right to independent and impartial tribunal was rejected. Even if this was due to a failure to substantiate it,[72] the HRC added, even if it was not necessary, that no Spanish state power had, in fact, denied Puigdemont or the independentist parties the possibility to defend a constitutional reform for Catalan independence.[73] Indeed, this passage seemed to entail a significant distancing from the WGAD's opinions that had gone as far as holding that the real purpose of the charges brought against the leaders 'was 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'.[74] Even if the Committee maintained a protective stance towards the petitioners throughout the proceedings, including when Puigdemont wanted to change his allegations, the effect of these revisions was a slimming down of his case compared to the initial allegations.

4.3 Concerning the Non-exhaustion of Domestic Remedies

The most significant procedural objection was the failure of the petitioners to exhaust all available remedies before turning to the HRC.[75] As noted in the dissenting opinions, when the petitioners in the Junqueras case submitted their complaints, amparo applications were still pending, and the year it took for the Constitutional Court to deliver was 'a reasonable time for such judicial consideration'.[76] To this should be added that the criminal proceedings were ongoing, and the judgment delivered on 14 October 2019 must be seen as timely considering the complexity of the case.[77] The problem was even more remarkable in Puigdemont's case since, at the time of filing his complaint, he had not even presented an amparo complaint and he continued to lodge further appeals after turning to the HRC. According to the

[70] Ibid, paras 6.5.-6.6 and para. 14 (annex I), citing *D.C. v. Lithuania*, Communication No. 3327/2019 (HRC views adopted on 22 August 2022), CCPR/C/134/D/3327/2019, para. 8.4; *S.R. v. Lithuania*, Communication No. 3313/2019 (HRC views adopted on 11 August 2022), CCPR/C/132/D/3313/2019), para. 8.8; and *Nuri Jazairi v. Canada*, Communication No. 958/2000 (HRC views adopted on 11 November 2004, CCPR/C/82/D/958/2000, para. 7.2. Note that the petitioners in the cited cases could not add new claims since they had not indicated why they could not have included them in their original submission.

[71] Puigdemont case, para. 15.3.

[72] Ibid, para. 15.4.

[73] Ibid, para. 4.9 (annex I).

[74] WGAD Opinion 6/2019, para. 119; and WGAD Opinion 12/2019, para. 109.

[75] Art. 5.2 ICCPR-OP:'The Committee shall not consider any communication from an individual unless it has ascertained that (b)'The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged'.

[76] Junqueras case. Joint opinion, supra fn 1, para. 5.

[77] Supreme Court, judgment No. 459/2019 of 14 October 2019, supra fn 19.

partially dissenting opinion in his case, 'it was obvious that the initial complaint of the author was premature and should not have been admitted'.[78]

The HRC nevertheless found that the domestic remedies had been exhausted in both cases. This conclusion seemed to deviate from its understanding of the rule as a cardinal principle that means that 'the petitioner must pursue the claim through the national court system until the highest instance'.[79] Its purpose 'to direct possible victims of violations of the provisions of the Covenant to seek, in first place, satisfaction from the competent State party authorities and, at the same time, to enable States parties to examine, on the basis of individual complaints, the implementation, and if necessary, remedy the violations occurring within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring before the Committee is seized of the matter'.[80] However, the remedies available must be 'effective' and 'available' in practice. If not, the requisite can be set aside, which has been done on several occasions.[81] In such cases, the petitioner must provide detailed reasons as to why the remedies are ineffective; 'expressing mere doubts about the availability of domestic remedies is insufficient'.[82] Nonetheless, since the HRC concluded that the remedies had been exhausted in the present cases, the petitioners did not need to motivate anything.[83]

The HRC's stance on this matter was reached based on the understanding that the question if a petitioner has exhausted domestic remedies or not will be assessed, not at the time of submission, but at the time of examination.[84] Several cases were cited in support of the existence of a practice of displacing the relevant moment for determining whether domestic remedies have been exhausted. As noted in *Baroy v Philippines*, if domestic appeals are still pending at that point, the complaint will be dismissed.[85] If, by contrast, the petitioner has made 'all reasonable attempts' to challenge the relevant decision, the domestic remedies rule has been met.[86] Still, it is not clear when exactly the rule is applied. At times, the HRC has held that it is applied in 'contentious cases' involving a risk of irreparable harm, such as in deportation cases where the petitioner faces a risk of being tortured, ill-treated, or killed upon

[78] Puigdemont case. Individual opinion, supra fn 1, para. 5.

[79] UN Fact Sheet no. 7, supra fn 63, p. 8; P R Ghandi P R (2001) Some Aspects of the Exhaustion of Domestic Remedies Rule under the Jurisprudence of the Human Rights Committee. German Yearbook of International Law 44: 485–497.

[80] *M K v France*, Communication No. 222/1987 (HRC views of 8 November 1989), CCPR CCPR/C/37/D/222/1987, para. 8.3;.and *J G v The Netherlands*, Communication No. 306/1988 (HRC Views of 15 August 1990), CCPR/C/39/D/306/1988, para. 5.4.

[81] P R Ghandi, supra fn 79, pp. 491–492.

[82] *T K v France*, Communication No. 363/1989 (HRC views of 6 April 1992, CCPR/C/37/D/220/1987, para. 5.4.

[83] Junqueras case, para. 7.5; and Puigdemont case, para. 15.8.

[84] Junqueras case, para. 7.4.; and Puigdemont case, para. 15.7.

[85] *Baroy v Philippines*, Communication No. 1045/2002 (HRC views of 31 October 2003), CCPR/C/79/D/1045/2002, para. 8.3, concerning a minor on death row.

[86] *Lemercier v. France*, Communication No. 1228/2003 (HRC views adopted on 27 March 2006), CCPR/C/86/D/1228/2003, para. 6.4.

return to his or her country of origin.[87] In other cases, it is a practice 'absent exceptional circumstances',[88] and in yet another case, the petitioner had sought to appeal the relevant decision for several years before submitting his communication to the HRC.[89] As for the cases in focus, the Committee justified its decision by referring to procedural economy concerns: in its view, it made no sense to dismiss a case for failure to comply with the rule if the petitioner could just file a new complaint.[90] Furthermore, Spain had not indicated the existence of further remedies,[91] and it had been able to present additional information and allegations related to this issue.[92]

In sum, HRC's reasoning about compliance with the requirement related to domestic remedies in the present cases confirms a pertinent reflection of a former HRC member, namely that 'the practical application of the requirement of domestic remedies is one of the most unpredictable issues in international human rights litigation'.[93] As will be discussed in the next section, there were several effects of taking a positive stance in favour of the petitioners when assessing the procedural hurdles, above all, the domestic remedies rule.

5 The Effects of the HRC's Engagement

The way the HRC engaged in the two cases, above all, its approach to the admissibility and merits of the cases had several implications. Important to acknowledge are the potential costs of acting with procedural flexibility towards the complaints which, though driven by a sense of urgency, did not meet the threshold for irreparable harm. While its protective stance towards the petitioners was understandable, such flexibility risks undermining procedural effectiveness and the integrity of its individual complaint procedures. Equally important to reflect on is the extent to which the passage of time between the registration and the assessment of the two

[87] *Al-Gertani v Bosnia and Herzegovina*, Communication No. 1955/2010 (HRC Vews adopted on 1 November 2013, CCPR/C/109/D/1955/2010), para. 9.3, concerning a deportation decision involving a risk of irreparable harm; and *Bakhtiyari v Australia*, Communication No. 1069/2022 (HRC Views adopted on 29 October 2003), CCPR/C/79/D/1069/2002, para 8.2, also concerning a deportation decision involving a risk of irreparable harm.

[88] *Baroy v Philippines*, supra note 78, para. 8.3; *Lemercier v. France*, supra fn 86, para. 6.4.

[89] *Singh v Francia,* Communication No. No. 1876/2000 (HRC views adopted on 27 September 2011, CCPR/C/102/D/1876/2009), para. 7.3. In this case, the petitioner had obtained the relevant decisión in 2002. In 2006, the Administrative Court rejected the application. In 2007, the Administrate Appeal Court rejected his appeal. In August he lodged a further appeal which was rejected in April 2009. He submitted his communication to the HRC in December 2008.

[90] *Bakhtiyari v Australia*, supra fn 87, para. 8.2.

[91] Puigdemont case, para. 15.8.

[92] Junqueras case, para. 7.4, citing *Lula v Brasil*, Communication No. 2481/2016 (HRC views adopted on 17 March 2022), CCPR/C/134/D/2841/2016, Final proceedings, para. 7.4, also citing procedural economy concerns as overriding the general rule when resubmission is possible.

[93] Scheinin M (2007) Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights. In: Francioni F (ed) Access to Justice as a Human Right. Oxford University Press: 135–152, at 139.

cases had a bearing on its understanding of the meaning and scope of political rights in a rule of law crisis.

5.1 Enhancing Procedural Effectiveness

The UN General Assembly calls on all the UN human rights mechanisms, including the HRC, to achieve greater efficiency, transparency, effectiveness, and harmonisation.[94] The process and outcome in the two cases cast doubt on whether these goals were achieved in the cases in focus.

To be certain, the complaints were submitted in the context of an unprecedented rule of law and constitutional crisis in Spain since the adoption of the Constitution in 1978. Turning to the UN without first seeking to exhaust all domestic remedies was motivated by a sense of urgency and fear of irreparable damage as well as distrust in the domestic court system. Yet, Puigdemont's initial complaint had been motivated by his inability to be re-elected president of the Catalan government. At least in hindsight, it is difficult to appreciate the gravity of this fact as a motive for the HRC to at all register his complaint. In comparison, the suspension decision implied a more drastic restriction of the leaders' rights since they could no longer vote by proxy despite having been democratically elected and without having been convicted. Indeed, this development prompted them to request the Committee to adopt interim measures.[95] However, none of these requests were granted. In the Junqueras case, the request for interim measures led to a series of exchanges between the parties until the HRC concluded that it had lost its purpose.[96] In Puigdemont's case, it was outright rejected.[97]

Even if the HRC views do not reveal the reasons for treating the requests differently or why Puigdemont's request was denied, the contention that the suspension created a risk of irreparable damage seemed exaggerated. For this, there must be a significant and imminent threat of damage that, if it were to materialise, could not be repaired. Even if many rights violations are perceived as irreparable, interim measures are defined as means through which an international human rights mechanism 'is able to prevent irreversible harm to persons who are in a situation of imminent risk, extreme gravity and urgency',[98] thus in principle limited to cases involving the risk of loss of life or personal integrity due to the execution of a death sentence or deportation of a person where he or she would face torture or ill-treatment.[99] Nonetheless, once the complaints had been registered, a critical threshold had been passed. Though the registration of a complaint is separate from its admissibility, it made it possible to calculate the relevant moment for assessing compliance with the rule related to the prior exhaustion of domestic remedies at the time for these

[94] UNGA Resolution 68/268 of 9 April 2014, A/RES/68/268.

[95] Rule 94.1 of the HRC Rules of Procedure.

[96] Junqueras case, paras. 1.2–1.3.

[97] Puigdemont para 1.2.

[98] J Cardona Llorens (2019) The Legal Value of the Views and Interim Measures Adopted by United Nations Treaty Bodies, Spanish Yearbook of International Law: 146–165 at 153.

[99] Naldi, G J (2004) Interim Measures in the UN Human Rights Committee. The International & Comparative Law Quarterly 53(4): 445-454, at 447.

assessments, in 2022 and 2023 respectively. The HRC also referred to the registrations as motives for declaring the complaints admissible, deeming it relevant that the UN special rapporteur for new communications had thought that the petitioners' arguments that the domestic remedies were ineffective for avoiding irreparable damage were sufficiently substantiated to register their complaints.[100] Nevertheless, as in other cases, the HRC failed to provide a detailed legal reasoning on this point.[101]

The early registration of the two complaints, which in all fairness had been made prematurely, had unfortunate consequences on the HRC's procedural effectiveness. This was especially so in Puigdemont's case, which led to multiple rounds of written exchanges between the parties with several revisions of his initial complaint as the domestic proceedings were developing. The result was a 23,000-word-long view of his case that far exceeded the 10,700-word limit imposed by the UN General Assembly.[102] From this perspective, his case raises procedural economy concerns. This is a paradox since, as we have seen, these same concerns lay the basis for declaring his complaint admissible instead of asking him to re-submit a fresh and more concisely drafted complaint or to join the Junqueras submission. More generally, the resources allocated to his complaint seems to reinforce an unfair distribution of resources among human rights complaints from different parts of the world.[103] The resources dedicated to the Puigdemont case should be appreciated in the context of an ever-increasing workload and rising backlog haunting the HRC by causing delays, including in the present cases.[104]

5.2 Protecting the Integrity of the Individual Complaint Procedure

The HRC's protective stance was further manifested by the degree to which the HRC sought to adapt its procedure to attend to their complaints with the risk of affecting its unique but limited mandate. The HRC is the most prominent UN treaty-body organ with broad competence to receive individual complaints related to any rights under the ICCPR.[105] However, its procedure has not been designed to respond, promptly, to complaints which, while urgent, do not meet the threshold of irreparable harm required for granting interim measures. In fact, turning to the WGAD, despite it being a very small body of experts, proved to be more useful for the petitioners as they obtained, within 60 days, an opinion on their situation. Indeed, the two opinions brought global attention to their situation and declared that

[100] Junqueras case, para. 7.5; and Puigdemont case, para. 15.8.

[101] MM Hakki (2002) The silver anniversary of the Human Rights Committee: anything to celebrate? International Journal of Human Rights 6(3): 85–102 at 97.

[102] UNGA Resolution 68/268 of 9 April 2014, A/RES/68/268, para. 15.

[103] V Shikhelman (2018) Access to Justice in the United Nations Human Rights Committee, 39 Michigan Journal of International Law: 453–542, at 460, pointing out that most of the complaints come from states belonging to the Western Europe and Others group.

[104] I Jélic and L Mührel (2022) The Human Rights Committee – Challenges and Prospects for Enhanced Effectiveness and Integration, Journal of Human Rights Practice: 17–43, at 19.

[105] As of 10 November 2023, the OP has 117 states parties, among them Spain, which ratified the ICCPR in 1977 and the OP in 1985. The OP entered into force on 23 March 1976.

their detention violated several rights.[106] The WGAD thus took a strong stand in their favour when the domestic proceedings were developing. By contrast, the HRC procedure usually takes several years from start to finish, also in the current cases.[107] Unlike the WGAD, the HRC is constrained by strict procedural rules. These manifold constraints usually make it unsuited to respond, in a timely fashion, to events that are unfolding and might require international attention and engagement. Allowing procedural flexibility in some cases creates a risk of transforming the complaint mechanism into a monitoring mechanism in an evolving situation. While this function may be welcome for potential victims of human rights in an ongoing crisis, it risks undermining the main purpose of its individual communications procedure, which is to assess if the state concerned has violated rights guaranteed by the ICCPR and failed to remedy the situation. The HRC is not an appeal court.

Its procedure is also limited in another way. As the HRC has stressed on several occasions, including in the cases in focus, 'it is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case'. However, this hands-off stance is not absolute if 'it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality'.[108] Even so, in the cases in focus,[109] though affirming that it does not see itself as 'called to assess the internal adequacy of the interpretation realised by the domestic courts of the internal law or the assessment that they have realised related to the law and facts',[110] as indicated in Sect. 3.3 of this text, it ended up examining if the initial charges of rebellion had been well-founded considering the relevant facts, above all, if the attempt to bring about secession had involved any violent uprising.

Even if the Committee threaded carefully in developing this delicate point, its reasoning seems fraught with difficulties. As the dissenters opined, 'however subtle the reasoning used [by the committee] may be, it still confronts the interpretation under domestic law of the crimes of rebellion and sedition and the applicability of article 384 bis'. Furthermore, the 'domestic courts had settled such interpretation reasonably and in a timely manner' and it 'should therefore not act as a fourth instance to dispute their analysis'.[111] Indeed, the UN treaty-based committees, such as the HRC, 'are competent to consider possible violations of the rights guaranteed by the treaties

[106] WGAD Opinion 6/2019, para. 144; and WGAD Opinion 12/2019, para. 133.

[107] Junqueras case (18.12.2018—30.08.2022); and Puigdemont case (01.03.2018—14.03.2023).

[108] General Comment 32. Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 23 August 2007, para. 26; *Riedl-Riedenstein* et al. *v Germany*, Communication No. 1188/2003 (HRC views adopted on 5 November 2004), CCPR/C/82/D/1188/2003), para. 7.3; *Schedko v Belarus*, Communication No. 886/1999 (HRC views adopted on 3 April 2003), CCPR/C/77/D/886/1999), para. 9.3; *Röder* et al. *v Germany*, Communication No. 1138/2002 (HRC views adopted on 24 March 2004), CCPR/C/80/D/1138/2002, para. 8.6; and *F B L v Costa Rica*, Communication 1612/2007 (HRC views adopted on 28 October 2013, CCPR/C/109/D/1612/2007, para. 4.2.

[109] Junqueras case, para. 8.5; and Puigdemont case, para. 16.9, citing the sources, ibid.

[110] Ibid.

[111] Junqueras case, joint opinion (dissenting), para. 3; and Puigdemont case, individual opinion (partially dissenting) para. 2.

concerned, but not to act as an appellate instance with respect to national courts and tribunals'.[112] This means they are not competent to determine matters related to the administrative, civil or criminal liability of individuals, to review the innocence or guilt of an individual or 'to review the facts and evidence in a case already decided by the national courts'.[113] In the present cases, the relevant facts had already been under scrutiny not only by the investigating judge of the Supreme Court (9 July 2018) but more importantly by the Supreme Court in its 483 pages-long judgment on 14 October 2019. The latter had reasoned that while the legal meaning of violence in principle may extend to psychological violence, including in such serious offenses as the crime of torture, it acknowledged that this meaning was too far apart from what 'violent uprising' means. Indeed, the Supreme Court discarded the crime of rebellion and in its place applied the crime of sedition. However, even if the HRC views on the applicability of rebellion was confirmed by the Supreme Court, it was not a fact that was fully known at the time of the suspension decision. This raises the question about the extent to which the Committee relied on facts not known when the suspension was imposed.

5.3 Upholding Political Rights in Hindsight

The HRC's protective stance was manifested most firmly in the Committee's conclusions that Spain had violated the leaders' political rights. While some reported it as a victory for the leaders,[114] the views were in fact limited to a very specific decision, namely the leaders' removal from public office for around fifteen months during an ongoing criminal proceeding,[115] a modest outcome compared with what had been alleged initially in the Puigdemont case. Moreover, the operational part only states that Spain should provide the victims with effective remedies and that this requires providing integral reparation to them. However, the HRC deemed that its views, which should be published and disseminated, constituted sufficient reparation for the violations. It also added that Spain should adopt measures deemed necessary to avoid similar violations in the future while leaving it unclear what those measures could be.[116] In practice, this means that the Spanish Supreme Court's rather unconventional view that the HRC recommendations are legally binding for Spanish public authorities, has little significance since compliance with the recommendations does not require any domestic judicial action.[117]

[112] J Cardona Llorens (2019) The Legal Value of the Views and Interim Measures Adopted by United Nations Treaty Bodies, fn 98, at 151.

[113] Ibid.

[114] E.g. Spain violated Catalan ex-leader's rights, UN body rules, Politico (18 May 2023 (https://www.politico.eu/article/spain-violated-catalan-ex-leaders-rights-un-body-rules/). Last accessed on 18 December 2018.

[115] The suspension lasted from 09.07.2018 to 14.10.2019.

[116] Puigdemont case, para. 18 and Junqueras case, para. 10.

[117] For a comment on this unconventional view, see C Escobar (2019), Sobre la problemática determinación de los efectos jurídicos internos de los dictámenes adoptados por Comités de derechos humanos: algunas reflexiones a la luz de la sts 1263/2018, de 17 de julio 2019, Revista Española de Derecho Internacional LXXI: 241–250.

The passage of time between the initial submissions and the publication of the HRC views influenced both their contents and their significance. Its views were much humbler when compared with the mentioned WGAD opinions. From this perspective, it makes a difference if an international human rights mechanism assesses a human rights complaint arising during a crisis, i.e. a situation marked by 'great disagreement, confusion, or suffering' or whether it does so in the aftermath of such a crisis.[118] As noted in by the dissenters to the HRC views, '[t]he political situation in Spain at the time of the facts…was extremely delicate, with the State at the verge of disruption', adding that though there were significant risks to national security and democratic order, the petitioners persisted in their efforts to secure Catalonian independence.[119] At the time, there was great uncertainty about what would happen and how to respond to the events that were unfolding and what was required to safeguard or restore the rule of law.

From this perspective, assessing the two complaints in hindsight, after several years after the events has several advantages. Notably, the HRC's views are a reminder that even a crisis of this magnitude does not provide a valid excuse for violating political or other rights under the ICCPR of those who act contrary to the constitution when holding them accountable. That said, in the aftermath of a crisis, there is a risk of hindsight bias, i.e. that the events that took place were more predictable than they actually were at the time.[120] By the time the HRC assessed the merits, the petitioners in the Junqueras case had been convicted for sedition, the reform of the Spanish Code to abolish the crime of sedition had been accomplished, the cases had been appealed and the verdicts had been reduced disobedience, and misuse of public funds. When Puigdemont' case was assessed, the jailed Catalan leaders had been pardoned even if the disqualification from public office remains in force. The extent to which the HRC views were influenced by these developments is unclear. Nevertheless, in principle its examination of the suspension decision should be assessed based on the facts known at the time it was made. The effect of the HRC's views retrospectively seems to be that the rebellion charges should have been ruled out from the outset and that the Catalan leaders should have remained as deputies throughout the proceedings thus legitimising a continued campaign for Catalan independence.

Generally, the HRC has achieved prominent 'international reputation that imparts great moral authority' which is the result, among other things, of its composition of 18 experts.[121] Even if its views are not legally binding under international law, formally speaking, its pronouncements have 'persuasive quasi-legal authority' and are

[118] Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/crisis

[119] Junqueras case, joint opinion (dissenting), para. 3; and Puigdemont case, individual opinion (partially dissenting) para. 2.

[120] M E Giroux et al (2016) Hindsight Bias and the Law, Zeitschrift für Psychologie 224(3):190–203.

[121] M Nowak (2005) U.N. Covenant on Civil and Political Rights: CCPR Commentary N P Engel, 2nd ed, pp. 894–95.

of legal value.[122] This value extends to its interpretations of the meaning and scope of the rights guaranteed under the ICCPR, which is 'relevant not only for individual cases but also more broadly for the implementation of the Covenant in the State Parties'.[123] In this light, it is important that the HRC insisted that any restriction of political rights must meet the requirements of legality, reasonableness, objectiveness, and due process guarantees, even during a rule of law crisis provoked by the use of tactics contrary to the constitution and culminating in a unilateral declaration of independence. It is furthermore a reminder that the rule of law entails not only a commitment to universal accountability but also to principles that guide and constrain the implementation of this goal, including 'fairness in the application of the law'.[124] Nonetheless, of equal importance is the fact that the HRC did not challenge Spain's rule of law-based approach as such, including that the Catalan leaders were held accountable for their acts. In fact, by focusing mainly on the suspension decision, it even sought to refrain from openly challenging the reasonableness of the initial charges of rebellion even if, as was pointed out in the previous subsection, it is doubtful if its limited assessment of this point remained fully consonant with its limited mandate by coming so close to acting as a fourth instance.

6 Concluding Reflections

In conclusion, the HRC's views that the Catalan leaders' political rights had been violated, considering the collective and automatic nature of the suspension decision prior to verdict seemed reasonable, at least to some extent. After all, even if the suspension had been imposed to prevent them from continuing acting contrary to the constitution, it was imposed against a collective of democratically elected leaders without individual differentiation. At the same time, its assessment of the facts suffered from hindsight bias since it seemed to consider, at least implicitly, facts that were not fully known at the time of the suspension decision. Moreover, the HRC came too close to act as a fourth instance when assessing whether the initial charges of rebellion were sound. Once it had opened the 'pandora's box' of relevant domestic facts in such a highly complex and politically charged case, it should have at least acknowledged the motives behind the charges: to hold the leaders accountable for having acted contrary to the constitution.

From the standpoint of a sound international administration of justice, the HRC views were delivered at a price. The Committee's protective stance towards the petitioners, even if constituting the bedrock of its mandate related to individual communications, led it to declare the complaints admissible despite all the procedural

[122] D McGoldrick (1994) The Human Rights Committee. Clarendon Press, pp. 151–152; and J Rehman (2003) International Human Rights Law. Harlow Longman, p. 91, describes the HRC Views as having 'moral and political' force.

[123] C Escobar (2019) fn 117, at 249; and A Seibert-Fohr (2017) The Human Rights Committee. In: G Oberleitner (ed) International Human Rights Institutions, Tribunals, and Courts. Springer: 117–141 at 131.

[124] Rule of law and transitional justice in conflict and post-conflict, supra fn 4, para. 6.

hurdles faced. Its approach to these hurdles seemed unfortunate as it undermined its procedural effectiveness and could risk blurring its unique but limited mandate. Importantly, its stance on the domestic remedies rule could have an unfortunate impact in terms of further relaxing the interpretation of this rule. This rule is nonetheless important in serving not only the goal of protecting the national interests of the states concerned; the rule is also a gatekeeper to protect the HRC from becoming ever more flooded with complex complaints filed in the context of ongoing domestic proceedings. It is debatable if it was worth it, considering the views' minor relevance in guiding the still ongoing process.

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