Spanish Yearbook of International Law

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Editorial Office:
Área de Derecho Internacional Público
Facultad de Derecho, Universidad de Alicante
Aptdo. Correos 99
03080–Alicante
España
Tel/Fax: 34–6–590 35 94
E-mail: syil@ua.es

Asociación Española de Profesores de Derecho Internacional
y Relaciones Internacionales
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– *University of Alicante: Dr. M. A. Almeida Nascimento, Dr. V. Carreño Gualde and Dr. J. Ferrer Lloret (Lecturers in Public International Law), C. Antón Guardiola, F. Lozano Contreras, M. Requena Casanova (Associate Lecturers in Public International Law) and F. Pascual Vives (Assistant Lecturer in Public International Law).*

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– *University of Cardenal Herrera-CEU (Elche): A. Aura Larios de Medrano (Assistant Lecturer in Public International Law)*

Contents

Abbreviations

Pol. Ext.	Actividades, textos y documentos de la política exterior española (Ministerio de Asuntos Exteriores, Madrid)
AC	Actualidad Civil
ADI	Anuario de Derecho Internacional
ADMI	Anuario de Derecho Marítimo Internacional
AFDI	Annuarie Français de Droit International
AJIL	American Journal of International Law
AIDI	Annuaire de l'Institut de Droit International
Anuario IHLADI	Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional
Ap.NDL	Apéndice al NDL
AöR	Archiv des Öffentlichen Rechts
Ar. C	Aranzadi Civil
Ar. Rep. J, also RJA	Aranzadi. Repertorio de Jurisprudencia
Ar. Rep. J. CA, also RJCA	Aranzadi. Repertorio de Jurisprudencia. Comunidades Autónomas
ASDI	Annuaire Suisse de Droit International (1994–1990)
ASIL Proc.	American Society of International Law Proceedings
AusYIL	Australian Yearbook of International Law
AVR	Archiv des Völkerrechts
BIMJ	Boletín Informativo del Ministerio de Justicia
BJC	Boletín de Jurisprudencia Constitucional
BOE	Boletín Oficial del Estado
BYIL	British Yearbook of International Law
CDE	Cahiers de Droit Européen
CanYIL	Canadian Yearbook of International Law
CI	La Comunità Internazionale
CML Rev.	Common Market Law Review
ColJTransLaw	Columbia Journal of Transnational Law
Cornell ILJ	Cornell International Law Journal
Cur. DI Vitoria	Cursos de Derecho Internacional de Vitoria
CurrLPr.	Current Legal Problems
Rec. Dalloz	Recueil Dalloz Sirey
DCSI	Diritto Comunitario e degli Scambi Internazionali
De Martens NRG	De Martens Nouveau Recueil Général de Traités
DOCG	Diari Oficial de la Generalitat de Catalunya
DOGV	Diari Oficial de la Generalitat Valenciana
ECBull.	Bulletin of the European Communities
ECR	European Court Reports
ELD	European Law Digest

ETS	European Treaties Series
EA	Europa Archiv
EJIL	European Journal of International Law
Eur.Y	European Yearbook/Annuaire Européen
GYIL	German Yearbook of International Law
Hague Recueil/ R des C/Rec. de C.	Recueil des Cours de l'Académie de Droit International
Harv. ILJ	Harvard International Law Journal
Harv. LR	Harvard Law Review
ICE	Información Comercial Española
ICJ Pleadings	International Court of Justice. Pleadings, Oral Arguments, Documents
ICJ Reports	International Court of Justice. Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
IJRL	International Journal of Refugee Law
ILA Rep.	International Law Association Reports
ILC Yearbook	Yearbook of the International Law Commission
ILM	International Legal Materials
ILQ	International Law Quarterly
ILR	International Law Reports
Int. Conc.	International Conciliation
Int. Lawyer	International Lawyer
Ita.YIL	Italian Yearbook of International Law
JAIL	Japanese Annual of International Law
JDI Clunet	Journal du Droit International
Keesing's	Keesing's Contemporary Archives/Records of World Events
LCEur.	La Ley. Comunidades Europeas
LNTS	League of Nations Treaty Series
NDL	Nuevo Diccionario de Legislación
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
OJEC	Official Journal of the European Communities
ÖZöRVR	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
PCIJ Ser.	Permanent Court of International Justice, Series
PolYIL	Polish Yearbook of International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RBDI	Revue Belge de Droit International
RCDIP	Revue Critique de Droit International Privé
RCEA	Revista de la Corte Española de Arbitraje
RCG	Revista de las Cortes Generales
RCL	Repertorio Cronológico de Legislación
RDA	Revista de Derecho Ambiental

RDCE	Revista de Derecho Comunitario Europeo
RDEur.	Rivista di Diritto Europeo
RDIPP	Rivista di Diritto Internazionale Privato e Processuale
RDP	Revista de Derecho Privado
REDI	Revista Española de Derecho Internacional
REgDI	Revue Egyptienne de Droit International
REL	Revista de Estudios Latinoamericanos (Universidad Simón Bolívar)
Revista IIDH	Revista del Instituto Interamericano de Derechos Humanos
RGD	Revista General del Derecho
RGDIP	Revue Générale de Droit International Public
RHDI	Revue Hellenique de Droit International
RIE	Revista de Instituciones Europeas
Rivista	Rivista di Diritto Internazionale
RJC	Revista Jurídica de Cataluña
RMC	Revue du Marché Commun
RSDIE	Revue Suisse de Droit International et de Droit Européen (desde 1991)
RTC	Repertorio de Jurisprudencia Constitucional (Aranzadi)
RTDE	Revue Trimestrielle de Droit Européen
San Diego LR	San Diego Law Review
Secomex	Semanario de Comercio Exterior
SYIL	Spanish Yearbook of International Law
UN Chron.	United Nations Monthly Chronicle
UNGAOR	UN General Assembly Official Records
UNJur.Y	United Nations Juridical Yearbook
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
Virg. JIL	Virginia Journal of International Law
YaleLJ	Yale Law Journal
Yearbook UN	Yearbook of the United Nations
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ACB	Asociación de Blubs de Baloncesto (Basketball Clubs Association)
AECI	Agencia Española de Cooperación Internacional (Spanish International Cooperation Agency)
AGOSCE	Aids Groups from the OSCE in Chechnya
AI	Amnesty International
AIDCP	Area of the Agreement on the International Dolphin Conservation Programme
AN	Audencia Nacional (National Court)
ANPAQ	National Authority for the prohibition of chemical weapons
AP	Audencia Provincial (Provincial Court)
AAP	Auto de la Audiencia Provincial (Provincial Court Writ)
ADR	Agreement concerning the International Carriage of Dangerous Goods by Road

ATC	Auto del Tribunal Constitucional (Constitutional Court Writ)
ATP	International Transport of Perishable Foodstuffs
ATS	Auto del Tribunal Supremo (Supreme Court Writ)
ATSJ	Auto del Tribunal Superior de Justicia de las Comunidades Autónomas (Superior Court of Justice of the Autonomous Communities Writ)
BC	Brussels Convention
BOVESPA	Bolsa de Valores do Estado de Sao Paulo (Sao Paulo Stock Exchange)
BVRJ	Bolsa de Valores do Rio de Janeiro (Rio de Janeiro Stock Exchange)
CAP	Common Agricultural Policy
CARICOM	Caribbean Community
Cc	Código Civil (Civil Code)
CC	Código de Comercio (Commercial Code)
CCAA	Comunidades Autónomas (Autonomous Regions)
CCAMLR	Convention on the Conservation of Antartic Marine Living Resources
CE	Constitución Española (Spanish Constitution)
CESCE	Compañía española de seguros de credito a la exportación (Spanish export credit insurance company)
CESDP	Common European Security and Defence Policy
CITES	Convention on International Trade of Endangered Species of Wild Fauna and Flora
CIOMC	Inter-ministerial Commission for Negotiation in the WTO
CiU	Convergència i Unió
COARM	Working Group on Conventional Arms
CoCom	Coordinating Committee for Multilateral Export Controls
CODA	Environmental Defence Coordinator Organization
COTIF	Convention on International Transport by Rail
CP	Código Penal (Penal Code)
CPCE	Comisión Permanente del Consejo de Estado (Council of State Permanent Commission)
CSCE	Conference for Securiry and Cooperation in Europe
CSN	Consejo de Seguridad Nuclear
DAC	Development Assistance Comittee
DGCN	Dirección General de Conservación de la Naturaleza
DGRN	Dirección General de los Registros y del Notariado (General Registry and Notary of the Ministry of Justice)
DIP	Derecho Internacional Público (Public International Law)
DIPr	Derecho Internacional Privado (Private International Law)
EAGGF	European Agricultural Guidance and Guarantee Fund
EBIC	European Business Centre
EBRD	European Bank for Reconstruction and Development
EBU	European Broadcasting Union
EC	European Communities
ECHO	European Convention on Human Rights
Eur. Com. HR	European Commission of Human Rights

Eur. Court HR, also	
ECHR	European Court of Human Rights
ECJ	European Communities Court of Justice
ECMMY	European Community Monitoring Mission in the Former Yugoslavia
ECOfiN	Economic and financial Affairs Council
ECOSOC	United Nations Economic and Social Council
EDF	European Development Fund
EEA	European Economic Area
EEC	European Economic Community
EECT	European Economic Community Treaty
EEZ	Exclusive Economic Zone
EFTA	European Free Trade Association
EIB	European Investment Bank
EMU	European Monetary Union
EMWIS	Euro Mediterranean Water Information System
ERDF	European Regional Development Fund
ESDI	European Security and Defence Identity
ESDP	Common European Security and Defense Policy
ESF	European Social Fund
ET	Estatuto de los Trabajadores (Workers' Charter)
ETA	Euskadi Ta Askatasuna
EU	European Union
EUMETNET	Conference of National Meteorological Services in Europe
EUMETSAT	European Organisation for the Exploitation of Meteorological Satellites
EURATOM	European Atomic Energy Community
EUROSTAT	European Communities Statistic Office
EUTELSAT	European Telecommunications Satellite Organisation
FAO	UN Food and Agriculture Organisation
GOVRA	Grupo Operativo de Vigilancia Radiológica (Spanish Nuclear Monitoring Task Force)
HRC	Human Rights Commissioner
IAEO	International Atomic Energy Organisation
ICAO	International Civil Aviation Organisation
ICCAT	International Commission for the Conservation of Atlantic Tuna
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Dayton Agreement Implementation Force
ILC	International Law Commission
ILO	International Labour Organisation
IMDG	International Maritime Code of Dangerous Goods

IMO	International Maritime Organisation
INSS	Instituto Nacional de la Seguridad Social (National Institute on Social Security)
INSTRAW	International Research and Training Institute for the Advancement of Women
INTELSAT	International Telecommunications Satellite Organisation
IOPCF	International Oil Pollution Compensation Fund
IPCC	Intergovernmental Panel on Climate Change
IPTF	International Police Task Force for Bosnia-Herzegovina
IRPF	Personal Income Tax
ISAF	International Security Assistance Force (Afghanistan)
ISM	Instituto Social de la Marina
ITU	International Telecommunication Union
IU	Izquierda Unida
IVAC	Instituto Vasco de Administración Pública
JIMDDU	Interministerial Regulation Board for Foreign Trade in Defence and Dual Use Materiel (Spanish)
JUR	Resoluciones no publicadas en los productos CD/DVD de Aranzadi
KLA	Kosovo Liberation Army
LCAT	Legislación de Cataluña
LECiv.	Ley de Enjuiciamiento Civil (Civil Procedure Law)
LECrim.	Ley de Enjuiciamiento Criminal (Criminal Procedure Law)
LGSS	General Social Security Law
LH	Ley Hipotecaria (Mortgage Law)
LJCA, also LPC	Law on Contentious-Administrative Jurisdiction
LO	Ley Orgánica (Organic Law)
LOCE	Ley Orgánica del Consejo de Estado (Organic Law of the Council of State)
LODE	Ley Orgánica de Educación (Organic Law on Education)
LOPJ	Ley Orgánica del Poder Judicial (Organic Law on Judicial Power)
LOTC	Ley Orgánica del Tribunal Constitucional (Organic Law of the Constitutional Court)
LPL	Ley de Procedimiento Laboral (Labour Procedure Law)
LRC	Ley de Registro Civil (Register Office Law)
LRDA	Ley reguladora del Derecho de Asilo y la condición de Refugiado (Law regulating the right to asylum and refugee status)
LSA	Ley de Sociedades (Company Law)
LTTM	Ley de Tribunales Tutelares de Menores (Juvenile Court Law)
MAE	Ministerio de Asuntos Exteriores
MARPOL	International Convention for the Prevention of Pollution from Ships
MEDWETCOM	Mediterranean Wetlands Committee
MINUGUA	UN Human Rights Verification Mission in Guatemala
MINURSO	UN Mission for the Referendum in Western Sahara
MINUSAL	UN Observation Mission in El Salvador

MO	Ministerial Ordre
MTAS	Ministerio de Trabajo y Asuntos Sociales (Ministry of Labour and Social Affairs)
NAFO	Northwestern Atlantic fisheries Organisation
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NCTS	New Computerised Transit System
NEAFC	Northeast Atlantic fisheries Organisation
NGG	Nuclear Supplies Group
NGOs	Non Governmental Organisations
NGDO	Non Governmental Development Organisations
NMD	National Defence System (US)
OAMI	Oficina de Armonización del Mercado Interior (Office for Harmonization in the Internal Market)
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development
ODA	Official Development Assistance
ODIHR	Office of Democratic Institution and Human Rights
OID	Oficina de Información Diplomática del Ministerio de Asuntos Exteriores, Madrid
OSCE	Organisation for the Security and Cooperation in Europe
OSPAR	Oslo and Paris Convention for the Protection of the Marine Environment of the North-East Atlantic.
PCIJ	Permanent Court of International Justice
PNA	Palestinian National Authority
PSOE	Partido Socialista Obrero Español (Spanish Socialist Party)
RD	Real Decreto (Royal Decree)
RDGRN	Resolución de la DGRN (DGRN Resolution)
RH	Reglamento Hipotecario (Mortgage Rule)
RRC	Reglamento del Registro Civil (Civil Registry Rule)
SA	Sociedad Anonima (Limited Company)
SAD	Sociedad Anonima Deportiva (Sporting Limited Company)
RRM	Reglamento del Registro Mercantil (Mercantile Registry Rule)
SAD	Single Administrative Document
SAN	Sentencia de la Audencia Nacional (National Court Judgment)
SAP	Sentencia de la Audiencia Provincial (Provincial Court Judgment)
SECIB	Secretariat of Ibero-American Cooperation
SJPI	Sentencia del Juzgado de Primera Instancia (first Instance Court Judgment)
SOLAS	International Convention for the Safety of Life at Sea
Ss.	Sentencias (Judgments)
STC	Sentencia del Tribunal Constitucional (Constitutional Court Judgment)
STS	Sentencia del Tribunal Supremo (Supreme Court Judgment)
STSJ	Sentencia del Tribunal Superior de Justicia de las Comunidades Autónomas (Superior Court of Justice of the Autonomous Regions Judgment)

TARIC	Integrated Tariff of the Community
TC	Tribunal Constitucional (Constitutional Court)
TEAC	Tribunal Económico-Administrativo Central (Central Economic-Administrative Court)
TEAR	Madrid Regional Economic Administrative Court
TGSS	Tesorería General de la Seguridad Social (National Treasury of Social Security
TRLPL	Texto Refundido de la Ley de Procedimiento Laboral (Employment Procedure Law)
TS	Tribunal Supremo (Supreme Court)
TSJ	Tribunal Superior de Justicia de las Comunidades Autónomas (Superior Court of Justice of the Autonomous Regions)
UMAD	Deployment Support Medical Unit (Afghanistan)
UN	United Nations
UNAMIR	UN Mission for Rwanda
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	UN Development Programme
UNED	Universidad Nacional de Educación a Distancia (Open University)
UNEP	UN Environment Programme
UNESCO	UN Educational, Scientific and Cultural Organisation
UNHCR	UN High Commissioner for Refugees
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNPROFOR	UN Protection Force (Yugoslavia)
UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
UNSCOM	UN Special Commission (Iraq)
UNTAET	United Nationsl Transitional Administration in East Timor
UPAEP	Postal Union of Americas, Spain and Portugal
VAT	Value Added Tax
WEU	Western European Union
WFP	World Food Programme
WIPO	World Intellectual Property Organisation
WMO	World Meteorological Organisation
WTO	World Trade Organisation
ZEC	Canary Islands Special Zone

Recent Modifications in the Regulation of Spanish Nationality[1]

M. T. Echezarreta Ferrer
Lecturer in Private International Law
University of Malaga

CONTENTS

I. INTRODUCTION

1. This essay deals chiefly with Act 36/2002, of 8 October,[2] amending articles 20 and 22 to 26 of the Civil Code (*Código Civil, Cc*).[3] It examines the successive

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[1] Many of the legal documents quoted from in this essay can be viewed on the following websites: *http://www.boe.es* (*Boletin Oficial del Estado*); *http://www.congreso.es/*(*Congreso de los Diputados*) *http://www.mju.es/*(*Ministerio de Justicia*); *http://www.mir.es/*(*Ministerio de Interior*) *http://www.mir.es/*(Website of the *Administración General del Estado*); *http://www.extranjeria.info/inicio/index.htm* (website of the Zaragoza association of lawyers dealing with issues affecting aliens).

[2] *BOE* n. 242 of 09/10/2002. Entry into force on 9 January 2003.

[3] Since 1998, various protocols have been signed, some modifying treaties on dual nationality: the additional protocol between the Kingdom of Spain and the Republic of Honduras amending the Treaty on Dual Nationality of 15 June 1966, done "ad referendum" at Tegucigalpa on 13 November 1999. *BOE* n. 289 of 03/12/2002; Exchange of Notes of 10 November and 8 December 1993 constituting an Agreement between the Kingdom of Spain and the Republic of Honduras on the amendment of the Agreement on Dual Nationality of 15 June 1966. *BOE* n. 289 of 03/12/2002.

Provisional application of the additional protocol between the Kingdom of Spain and the Dominican Republic amending the Agreement on Dual Nationality of 15 March 1968, done

Spanish Yearbook of International Law, Volume VIII, 2001–2002

proposals for the reform of the regulation of Spanish nationality and focuses on the new features the recent law has introduced, in addition to a personal view of its achievements compared to the previous situation and future implications.

2. This is the sixth reform of legislation on Spanish nationality since the drafting of the original Royal Decree of 24 July 1889.[4] The original wording of 1889 was followed by laws such as those of 15 July 1954,[5] 14/1975 of 2 May,[6] 51/1982 of 13 July,[7] 18/1990 of 17 December,[8] 15/1993 of 23 December[9] and 29/1995 of 2 November[10] and, most recently, Act 36/2002 of 8 October.[11]

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at Santo Domingo on 2 October 2002. *BOE* n. 273 of 14/11/2002; Additional Protocol between the Kingdom of Spain and the Republic of Colombia amending the Agreement on Dual Nationality of 27 June 1979, done "ad referendum" at Bogotá on 14 September 1998. *BOE* n. 264 of 04/11/2002; Additional Protocol between the Kingdom of Spain and the Republic of Bolivia amending the Agreement on Dual Nationality of 12 October 1961, done at Madrid on 18 October 2000. *BOE* n. 46 of 22/02/2002 and 70 of 22/03/2002; Additional Protocol between the Kingdom of Spain and the Republic of Peru amending the Agreement on Dual Nationality of 16 May 1959, done "ad referendum" at Madrid on 8 November 2000. *BOE* n. 282 of 24/11/2001; Additional Protocol between the Kingdom of Spain and the Republic of Paraguay amending the Agreement on Dual Nationality of 25 June 1959, done "ad referendum" at Asunción on 26 June 1999. *BOE* n. 89 of 13/04/2001; Second Additional Protocol to the Agreement on Nationality of 28 July 1961 between Spain and Guatemala, amended by the Protocol of 10 February 1995, done "ad referendum" at Guatemala on 19 November 1999. *BOE* n. 88 of 12/04/2001 and *BOE* n. 119 of 18/05/2001; Provisional Application of the Additional Protocol between the Kingdom of Spain and the Argentine Republic amending the Agreement on Nationality of 14 April 1969, done at Buenos Aires on 6 March 2001. *BOE* n. 88 of 12/04/2001; Protocol amending the Agreement on Dual Nationality between the Republic of Ecuador and the Kingdom of Spain of 4 March 1964, done at Quito on 25 August 1995. *BOE* n. 196 of 16/08/2000; Additional Protocol between the Kingdom of Spain and the Republic of Nicaragua amending the Agreement on Dual Nationality of 25 July 1961, done at Managua on 12 November 1997. *BOE* n. 24 of 28/01/1999; Additional Protocol between the Kingdom of Spain and the Republic of Costa Rica amending the Agreement on Dual Nationality of 8 June 1964, done "ad referendum" in Madrid on 23 October 1997. *BOE* n. 271 of 12/11/1998; Second Additional Protocol to the Agreement on Nationality of 28 July 1961, between Spain and Guatemala, amended by the Protocol dated 10 February 1995, done "ad referendum" at Guatemala on 19 November 1999. *BOE* n. 88 of 12/04/2001 and *BOE* n. 119 of 18/05/2001; Protocol amending article 3 of the Agreement on Nationality between Spain and Guatemala, signed at Guatemala on 10 February 1995. *BOE* n. 158 of 01/07/1996.

4 Gazette of 25 July 1889.

5 *BOE* of 16 July. See Decree of 2 April 1955. *BOE* n. 143 of 23 May 1955.

6 *BOE* n. 107, of 5 May. See Circular *DGRN* of 22 May 1975, *BOE* of 24 May 1975, *Anuario DGRN*, 1975, pp. 343–349.

7 *BOE* n. 181, of 30 July. See *Instrucción de la DGRN* of 16 May 1983 on Spanish nationality (*BOE* n. 120, of 20 May).

8 *BOE* n. 302, of 18 December. See *Instrucción* of 20 March 1991 on nationality (*BOE* n. 73, of 26 March; correction of errors in *BOE* n. 74, of 27 March).

9 *BOE* n. 307, of 24 December.

10 *BOE* n. 264, of 4 November 1995.

11 *BOE* n. 242 of 09/10/2002. Entry into force on 9 January 2003.

3. The aim of the recent amendment was to improve article 42 of the Spanish Constitution, which entrusts the State with the task of safeguarding the economic and social rights of Spanish workers abroad, by adding the duty to gear state policy to encouraging their return. However, facilitating the preservation and transmission of Spanish nationality is undoubtedly, as is explained in the statement of the purpose of the law, a more than effective manner of complying with this duty and this is indeed the main objective of the law in question.

It should be pointed out, owing to its repercussions on the subsequent analysis of the reform, that article 42 *does not draw a distinction* between Spanish emigrants born in Spain and those born elsewhere, nor does it distinguish between emigrants of Spanish origin and those of Spanish descent. These discriminations are however used by the maker of Act 36/2002 to create a different regulatory framework for the transmission of Spanish nationality to children and grandchildren, which tinges the reform with unconstitutionality. In addition to the core issue, it has also been necessary to make the necessary legal retouches to allow for the latest reforms introduced by the law on administrative procedure, the penal code and the law on military service.

4. Indeed, the major challenge of the 21st century is to find an interdisciplinary approach to migratory flows, a complex phenomenon that is conditioning the large-scale social revolution of our time. However, the new law merely aims to alleviate some of the problems emigration posed in past periods by attempting to swell the census rolls of Spanish citizens with people who would be Spaniards had their parents or grandparents not been forced to seek a future elsewhere. The Ministry of Foreign Affairs puts the number of people who will benefit from this measure at around one million twenty-five thousand, of whom some eight hundred and fifty thousand live in Latin America. The rest are mainly based in Europe.

5. Following the announcement of the reform, groups of emigrants, together with their children and grandchildren residing in various parts of the world, joined forces with great organizational success thanks to the Internet, demanding justice with respect to their access to Spanish nationality. However, the fact that the regulatory profile varies according to degree of connection with Spain established in Act 36/2002 – an aspect of the law that has been challenged – has dashed the hopes aroused by the reform at a time of serious economic crisis in some of the countries of residence of the possible beneficiaries. On the other hand, other groups of foreign nationals, victims of the migration phenomenon, have been totally overlooked by the reform, as the opposition's amendments proposing integration measures were rejected. As a result, ten days before the latest reform was due to enter into force, the Socialist Party in Congress presented a new proposal for modifying the regulation of nationality on 19 February.

6. Since the law entered into force, considerable parliamentary activity has been witnessed, culminating in the aforementioned reform proposal. The government has received many oral and written enquiries concerning the number of applications for Spanish nationality from children and grandchildren of Spaniards and on the application of the recent protocols to the agreements on dual nationality. Other questions concern issues relating to aliens, such as the denial of requests for exemption from

visa requirements and, as the case may be, from the requirement of a community residence permit; these applications are filed by citizens of Galician origin who fulfil the requirements for acquisition of Spanish nationality. All this leads us to point out that the debate on nationality, far from ending with the law dealt with in this essay, is currently extremely topical.

II. BACKGROUND TO REFORM ACT 36/2002 ON SPANISH NATIONALITY

7. The background to the recent reform can be traced back to 1996, when a series of reform initiatives began to be presented by the various parliamentary groups but died down in view of the dissolution of the Parliament (*Cortes Generales*) in 2000. The reform was later taken up with a further three bills presented by the Socialist Parliamentary Group on 20 February 2001,[12] by the Popular Parliamentary Group[13] and by the United Left Parliamentary Group[14] on 12 March and 15 October 2001 respectively. The Committee for Justice and Home Affairs finally decided to present a single text on 13 May 2002.[15] Its passage through parliament was very fast: it passed through Congress with a few modifications and the full text was approved by the Senate, which rejected the 54 amendments proposed.

8. Let us first examine the proposals of the opposition groups that were rejected before going on to analyze the measures that were approved in the following paragraph.[16] The proposals can be summed up as follows:

A) Greater emphasis on *ius soli* (having been born in Spain) when attributing Spanish nationality, together with a further link such as having one foreign parent residing in Spain.
B) Reduction of the time period for naturalization: 1. From ten to five years in general. 2. From five to two years for stateless persons and European Union nationals.
C) Abolition of the renunciation of previous foreign nationality upon acquiring Spanish nationality.
D) Abolition of residence requirements for all those who regain Spanish nationality.

Doctrine has also proposed various modifications, some substantial and others merely technical, which would amount to a deep reform of the whole nationality system. These include removing the nationality system from the Civil Code and regulating

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[12] *BOCG, Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 115–1, of 9 March 2001.
[13] *BOCG, Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 122–1, of 16 March 2001.
[14] *BOCG, Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 168–1, of 26 October 2001.
[15] Bill modifying the Civil Code in respect of nationality of 9 May 2002, submitted by the Committee for Justice and Home Affairs (*BOCG*, *Congreso de los Diputados*, VII *Legislatura*, Serie B, n. 241–1, of 16 May 2002).
[16] An in-depth treatment of the background to the reform can be found in A. Álvarez Rodriguez, "Principios inspiradores . . .", quoted from pp. 48 and ff.

it by means of a special law that has often been called for[17] in order to put an end to the patchiness of the latest reforms.

Most of the rejected proposals outline measures to integrate the foreign immigrant population by shortening the minimum periods of residence established for the acquisition of Spanish nationality. I will merely remark – since this is not the purpose of this essay – that the intended integration is not always achieved by obtaining a Spanish nationality document: rather, it should begin much earlier, through the law on aliens. If emphasis is placed on the progressive achievement of the principle of equality while they are aliens, access to nationality will not be necessary and the possible harmful effects with respect to their original nationality will thus be avoided. In short, we will avoid turning them into foreigners in the own country – an unjust situation that was endured by our Spanish ancestors and which we are still attempting to remedy, more than seven decades later.

9. We might point out, as an initial judgement, that there is little new in the new law. It revives in some cases and prolongs in others circumstances already envisaged in previous texts. Indeed, the current reform of article 20[18] was introduced in the interim provision of Act 18/1990 although given the time limits, it is currently not valid.[19] And the current articles 24 and 26 resuscitate the possibility of dual nationality as a result of emigration which was provided for in Act 51/1982 and buried when Act 18/1990 entered into force.[20] In addition, the current article 24.3[21] envisages the reincarnation of the old *Cc* article 26 according to the wording established in the Act of 15 July 1954.[22]

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[17] See A. Lara Aguado's passionate criticism of Act 32/2002 "Nacionalidad e integridad social" (A propósito de la Ley 36/2002, de 8 de octubre), in *La Ley*, n. 5694, of 10 January, pp. 1 and ff.; E. Sagarra Trias "Modificación de la regulación de la nacionalidad española en el Código Civil", *http://www.extranjeria.info/inicio/index.htm*.

[18] "Art. 20.1 The following persons shall be entitled to choose Spanish nationality . . . b) Those whose father or mother is of Spanish origin and was born in Spain".

[19] "Interim provision of Act 18/1990, of 17 December: Persons whose mother or father is of Spanish origin and was born in Spain may apply for Spanish nationality within three years from the entry into force of this Act. In order to exercise this right the person in question must reside legally in Spain at the time the application is submitted. However, he or she may be exempted from this requirement under article 26.1.a) of the Civil Code for the recovery of nationality". The period was extended by Act 29/1995, of 2 November, until 7 January 1997.

[20] See the studies on Act 51/1982 in J. C. Fernández Rozas, *Derecho de la nacionalidad*, Madrid, 1982; J. M. Espinar Vicente, *Derecho internacional privado. La Nacionalidad*, Granada, 1988. A. Álvarez Rodriguez, "Nacionalidad y emigración", Madrid , *La Ley*, 1990; J. Gil Rodriguez, *La nacionalidad española y los cambios legislativos*, Madrid, Colex, 1993. Several authors, *Comentarios a las reformas de nacionalidad y tutela*, Madrid 1986, Tecnos, pp. 17–173.

[21] "Art. 24.3 Persons born and residing abroad who possess Spanish nationality through a Spanish father or mother who were also born abroad, when the laws of their country of residence attribute to them the citizenship of that country, shall lose Spanish nationality if they do not state their wish to keep it to the Registrar within a period of three years from reaching legal age or becoming emancipated."

[22] "Art. 26. Persons born and residing abroad who possess Spanish nationality through a

III. MAIN MODIFICATIONS

10. The improvement that Act 36/2002 is intended to make to the Spanish Constitution involves the following modifications:

A) Relating to the right of option

As for right of option, the circumstances for acquisition of nationality by this means are extended to persons with at least one parent of Spanish origin born in Spain; no time limit [art. 20.1 b)] or age limit (paragraph 3 of art. 20) is established for such persons, nor is the place of birth of the beneficiary taken into account. As we have seen, this circumstance was envisaged in the previous legislation though it expired on 7 January 1997.[23] The novelty mainly lies in the abolishment of the periods of preclusion and the requirement of residing in Spain.

Therefore, in order for the father or mother to be entitled to transmit their Spanish nationality, they must be of Spanish origin and born in Spain. It is not sufficient simply for a parent to be Spanish.

11. Two circumstances discriminate Spaniards for the purpose of transmission of nationality: a) whether or not this is their nationality of origin and b) place of birth.

a) With respect to the first distinction (nationality of origin), it should be pointed out that it was following the first post-constitutional reform brought about by the 1982 Act that it acquired its current nature based on the framework established in article 11 of the Spanish Constitution:

> "1. Spanish nationality is acquired, retained and lost in accordance with the provisions of the law.
> 2. No person *of Spanish origin* may be deprived of his nationality.
> 3. The State may negotiate dual-nationality treaties with Latin American countries or with those which have had or which have special links with Spain. In these countries, Spaniards may become naturalized without losing their *nationality of origin*, even if said countries do not recognize a reciprocal right in their own citizens".

The same Constitution goes on to discriminate Spaniards in art. 60 when it states:

> "Art. 60. 1. The guardian of the King during his minority shall be the person designated in the will of the late King, provided that he is of age and *Spanish by birth.* (. . .)".[24]

Spanish father or mother also born abroad, although the laws of their country of residence attribute them citizenship of that country, shall not lose their Spanish nationality if they expressly state their wish to keep it to the Spanish diplomatic agent or consul, or, failing that, in a duly authenticated document addressed to the Spanish Ministry of Foreign Affairs."

[23] See *supra* note (21).

[24] *Art. 14. Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social*

12. The prevalence of the person of Spanish origin as the holder of rights with respect to nationality vis-à-vis his descendents can be found not only in the new right of option introduced in art. 20.1 b) of Act 36/2002, but also in the acquisition of citizenship through residence provided in art. 22.2. f) and in the loss of art. 25 and recovery of art. 26. These discriminations which, in our opinion, fall outside the constitutional framework established in the Spanish Constitution, reflect a covert mistrust of changes of nationality that springs from a general caution about foreign nationals.[25]

13. The distinction between persons of Spanish origin and Spanish descent raised the issue of possible unconstitutionality – incompatibility with art. 14 of the *CE* – and it was stated that the distinction is limited to the right to nationality, that is, to the specific framework enshrined in art. 11 *CE*. Beyond the right to nationality, any inequality in the entitlement to or exercise of the rights springing from the notion of nationality of origin would amount to a discrimination contrary to article 14 of the Constitution.[26] Various opinions have been expressed about the unconstitutionality of the new provisions introduced by Act 38/2002, of which arts. 20.1.b) and 22.2. f) lay down nationality of origin as a requirement for a right of transmission that is not found in the permitted framework of the *CE*. It has been stated that a difference in treatment could only be justified if a rational, objective and reasonable difference could be found between persons of Spanish origin and persons who acquired Spanish nationality and if the introduction of such a difference were necessary to achieve a higher good than that which is harmed by constraining the rights of naturalized persons – that is, if the means chosen were proportional to the end sought.[27]

14. Furthermore, even the discriminations permitted by art. 11.2 *CE*, such as the penalization of deprival of Spanish nationality when it is not the nationality of origin, as laid down in the repealed art. 25.1 of the *Cc*, have disappeared as this penalization was abolished by *LO* 10/1995, of 23 November, reforming the Penal Code.[28]

15. Finally, continuing with our interpretation of the law according to the Constitution, art. 42 *CE*, which provides the basis for the reform introduced by Act 32/2002 – as is expressly declared in the statement of purpose[29] – does not distinguish between persons of Spanish origin and persons of Spanish descent:

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circumstance. M. Fernández Fernández, "El principio de igualdad y su incidencia en el nuevo Derecho español de la nacionalidad" *REDI*, vol. XXXV, 1983, pp. 432 and ff.

[25] Attention was also drawn to these discriminations in connection with the 1982 law by J. C. Fernández Rozas, "La reforma del Derecho español de la nacionalidad", in *Cursos de Derecho internacional de Vitoria Gasteiz*, 1983, Universidad del País Vasco, Servicio de Publicaciones, 1984, p. 437; E. Pérez Vera, "La Constitución de 1978 y el Derecho internacional privado. Normas en materia de nacionalidad y extranjería", *RDP*, 1982, p. 8 and ff.

[26] J. D. González Campos, "Comentario al art. 17 del Código Civil", in *Comentarios a las reformas . . . cit*., p. 21.

[27] A. Lara Aguado, "Nacionalidad e integración . . ." *op. cit*., p. 5.

[28] *BOE* n. 54, of 2 March 1996.

[29] See subparagraph 2.

"Art. 42. The State shall be especially concerned with safeguarding the economic and social rights of Spanish workers abroad, and shall direct its policy towards securing their return".

Therefore, it is difficult to find a constitutional basis for differentiating between emigrants according to their class of Spanish citizenship or, as we shall see, on the grounds of their place of birth. We assume that cases of Spanish nationals who were born in Spain during the years of mass emigration and who are not of Spanish origin or birth are few and far between; the lawmaker could therefore have omitted the reference to nationality of origin without serious repercussions on the intended aim and would thus have avoided the unconstitutional overtones that sully the reform.

16. a) The requirement of having at least one Spanish parent born in Spain in order for the right of transmission of Spanish nationality to be established has had major social repercussions,[30] as it has excluded thousands of grandchildren of Spanish emigrants whose children were born in exile. The requirement of having at least one parent born in Spain laid down in art. 20.1 b) is clearly designed to discriminate between persons of Spanish origin on the grounds of their place of birth. A paradoxical situation could arise among emigrant families: the offspring of the children born to the emigrant couple in Spain could opt to choose Spanish nationality without having to reside in Spain and without having to go through the procedure for aliens (circumstance provided for in art. 20.1 b); however the brother and sisters born in the country of destination will not enjoy the same right to transmit Spanish nationality to their children, who belong to the category of persons entitled to apply for nationality after one year's residence in Spain, as laid down in art. 22.2. f), which we shall examine.

A different case is that of a woman born in Russia in 1954, who opted to claim Spanish nationality in 1993 on the grounds that her father was of Spanish origin and born in Spain, as established in the third interim provision of Act 18/1990, of 17 December. Her claim was not recognized as she was refused exemption from the requirement of residing in Spain laid down by article 26, then in force. This Russian citizen could have submitted a fresh claim, this time without the need to reside in Spain or request exemption from the residence requirement, following the entry into force of Act 29/1995, of 2 December, until 7 January 1997, the date this right expired. However, she submitted her application on 30 September 1998, and it was again rejected.[31] She could now submit a claim for the third time with full guarantees of success as her circumstances are provided for in art. 20.1 b) of the law now in force.

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[30] On the inappropriateness of drawing a distinction between persons of Spanish origin according to their place of birth see J. M. Espinar Vicente, *La nacionalidad y la extranjería en el sistema jurídico español*, Madrid, 1994, pp. 102–103.

[31] Resolution of the *DGRN* of 27 September 1999. See A. Marin , "La adquisición de la nacionalidad española por opción en la reciente doctrina registral" in *Boletin de Información del Ministerio de Justicia*, n. 1925, 15 September, pp. 28–62.

17. However, such is not the case of the 50,000 direct descendants of the thousands of Civil War exiles who have formed an association to demand they be recognized as Spanish citizens.[32] The *Morados* group, made up of children and grandchildren of Spanish refugees, demanded that the Ombudsman, Enrique Múgica, lodge an appeal with the Constitutional Court against the reform of the current law as it denies Spanish passports to children of Spanish citizens who are descendants of exiles born outside Spain; they likewise called for an "integrated policy" of financial assistance for exiles who are still living and the right to vote for the children and grandchildren of those Spaniards.[33]

The Ombudsman dismissed the group's claim, arguing that the Constitution grants the Legislature the powers to decide who is entitled to Spanish nationality, and that the fact that Congress has passed a reform establishing that only the children of persons of Spanish origin (born in Spain) may acquire Spanish nationality does not contradict the Constitution. However, let us not forget that art. 11 does not extend to the rights of the descendants of Spanish nationals.

The new proposal for a reform submitted by the Socialist party in February 2003 attempts to remedy this inequality regarding the right to pass on Spanish nationality depending on whether a parent or grandparent (persons of Spanish origin) was born in Spain or abroad by eliminating the requirement of having been born in Spain established in art. 20.1 b).

B) Relating to acquisition through residence

As regards acquisition of nationality through residence:

18. Persons not born in Spain having at least one grandparent of Spanish origin (art. 22.2. f) may acquire Spanish nationality by residing in Spain for one year.[34] The previous wording only included persons not born in Spain having at least one parent of Spanish origin. The reform extends to grandchildren – persons having a parent who is of Spanish origin but was not born in Spain, as mentioned in the previous

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[32] *http://www.nodo50.org/despage/Eventos/reconocidos.htm.*

[33] According to the document submitted by *Morados'* coordinator general, the Mexican Alvar Acevedo, to Enrique Múgica's office, the recent reform of the Civil Code in respect of acquisition of nationality is a "major injustice to Spanish people living overseas" and, in particular, to the descendents of the thousands of Republicans who fled to the Americas during the Civil War and postwar. That is, the thousands of grandchildren of those exiles will never possess their ancestors' citizenship, as the vast majority of those 50,000 members of *Morados* are children of Spaniards who were born abroad during the first years of their parents' forced exile. According to *Morados*, the question lies in the fact that, whereas the economic emigrants were able to register their children as Spanish citizens with the consulates in Latin America, the political exiles were denied this right, and their descendants were accordingly forced to adopt the nationality of the host country.

[34] Even if the subject had been born in Spain, his or her circumstances would be classified under subparagraph a) of the same precept with the same right to Spanish nationality through residence.

paragraph, and persons with foreign parents but grandparents of Spanish origin. For the purpose of the law, the term *born* clearly refers to place of birth as opposed to biological descent. It therefore includes adopted persons, who generally have difficulties establishing their place of birth owing to the confidential nature of adoption files.[35]

19. The lawmaker assumes that these subjects have a weaker link with Spanish culture owing to involuntary circumstances such as their father, mother or grandparents of Spanish origin being born outside Spain. In this connection we should bear in mind, first, that the grandparents of these people fled the country and therefore could not choose where their children were born and, second, that the legislation of their countries of destination exerted a certain pressure as regards transmission of nationality and, third, that Spanish legislation of the time encouraged the loss of Spanish nationality for these persons.

Act 36/2002 requires these subjects to reside in Spain for a year; and art. 22.3 establishes that this residence must be legal,[36] continued and take place immediately prior to submission of the application for citizenship. Furthermore, according to the legislation of the Register Office the subject must prove his or her good civic conduct and a sufficient degree of integration in Spanish society (art. 22.4).

20. These subjects' access to Spanish nationality is easier if they are minors and, in addition, if their parents recover Spanish nationality, as they would therefore come under the patria potestas of a Spanish national and enjoy the right of option laid down in art. 20.1 b) *Cc*. This brings us to another discrimination – in this case on the grounds of the subject's age, as a 15-year old minor may exercise a right of option without having to reside in Spain, whereas an 18-year old lacks this right.

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[35] A. Lara Aguado, "Nacionalidad e integración . . .", *op. cit*. p. 7.

[36] See arts. 25 and 27 of *LO* 4 and 8/2000 on the rights and freedoms of aliens and art. 8 of *RD* 864/2001, of 20 July (*BOE* of 21 July and 6 October). Exceptions in art. 49.2 g): In exceptional circumstances the authorities may grant exemption from the requirement of a visa according to paragraph 5 of article 51 of these Regulations, provided the applicant is not acting in bad faith and meets one of the following requirements:. . . . g) Persons of Spanish origin who have lost their Spanish nationality. Regarding access to the labour market, see art. 41 j) of *LO* 4 and 8/2000 establishing that work permits shall not be required of "persons of Spanish origin who have lost their Spanish nationality. See a recent review of this issue by S. Álvarez González, "La concesión de la nacionalidad española por residencia a los estudiantes extranjeros" in *Derecho Registral Internacional. Homenaje a la memoria del profesor Rafael Arroyo Montero*, Madrid, 2003, pp. 363 and ff. The proposed amendments to the draft Organic Law on specific measures on public safety, domestic violence and social integration of aliens attempt to remedy the problems of the children and grandchildren of persons of Spanish origin being classified as aliens by allowing them to enter Spain merely with documents proving their identity and kinship and entitling them to reside permanently in Spain automatically, without having to go through the procedure of periods of temporary residence (*BOCG* of 13 May 2003, n. 136–8).

C) Relating to loss of nationality

21. Loss of nationality due to changed circumstances has also undergone some modifications which, as we have seen, directly influence the volume of cases of dual nationality, which are growing as a result of the mechanisms of "declaration of conservation" of the original Spanish nationality and through the elimination of the need to renounce the foreign nationality in certain cases.

1. *Exception to loss of Spanish nationality through the "declaration of conservation"*

The general rule governing loss of Spanish nationality is laid down in art. 24.1 *ab initio*:

> "Art. 24. 1. Emancipated persons habitually residing abroad who voluntarily acquire another nationality or use exclusively the foreign nationality they had before emancipation shall lose Spanish nationality. This loss shall take place three years from acquisition of the foreign nationality or from emancipation".

22. The exception to this general rule is laid down in the same art. 24, which goes on to establish that the Spanish nationality of origin can be kept if the subject makes an *express declaration* to this effect before the Registrar within three years from the acquisition of the foreign nationality or from emancipation:

a) Emancipated Spanish nationals habitually residing abroad who voluntarily acquire another nationality or use exclusively the foreign nationality they were attributed before emancipation.

From the date of their reaching legal age or becoming emancipated:

b) Spanish nationals born and residing abroad who possess Spanish nationality through a Spanish mother or father, also born abroad, when the laws of the country of residence attribute them the nationality of that country (art. 24.3). According to the second additional provision of the reform law, this cause of loss shall only be applied to those who reach legal age or become emancipated after the present Act enters into force.

If they fail to file a declaration of conservation, they will lose their Spanish nationality once the aforementioned period expires. This precaution aims to prevent the artificial perpetuation of generations of Spaniards having little connection with Spain and no particular interest in keeping their Spanish nationality.

2. *Exception to loss of foreign nationality through non-renunciation*

23. The new law preserves the requirement that subjects who acquire Spanish nationality renounce their foreign nationality, despite the proposals that such a requirement be abolished due to legal ineffectiveness, as it is the foreign law that establishes the causes for loss of the foreign nationality, not the Spanish

Civil Code. Until now, renunciation was symbolic and constituted a commitment made by the individual not to use any other nationality other than Spanish nationality.[37]

However, great importance is attached to this in the 2002 reform with respect to keeping the acquired Spanish nationality. According to art. 25, Spanish citizens who are not of Spanish origin shall lose their Spanish nationality: a) If, during a period of three years, they use exclusively the nationality which they had renounced upon acquiring Spanish nationality.

24. However, there are exceptions to this rule which entail acceptance of dual nationality by the Spanish legislation. Such is the case of:

a) Nationals of Latin American countries, Andorra, the Philippines, Equatorial Guinea or Portugal who acquire Spanish nationality (art. 23.b) in relation to art. 24.1 *in fine*).
b) Aliens who recover lost Spanish nationality (art. 26).[38]

25. In neither of these cases is the subject required to renounce his or her previous nationality, and may therefore have dual nationality. This same rule extends to foreign nationals aiming to recover their Spanish nationality by ancestry that has been lost due to the circumstances described in art. 24 or 25, except that in the second case (art. 25) they must first obtain an authorization, which is granted at the government's discretion (art. 26.2). Therefore, a person who has lost his Spanish nationality through continuing to use the foreign nationality he renounced [art. 25.1 a)] may recover Spanish nationality without having to renounce the foreign nationality provided he or she is granted authorization by the government, and cannot be classified according to the circumstances of loss specified in art. 25.1 a).

26. However, subjects who acquire Spanish nationality by losing the foreign nationality they possessed may recover this lost nationality in the future if the laws of that country so permit, keeping their Spanish nationality if they file the relevant declaration with the Registrar pursuant to art. 24.1 *Cc*. Although we do not believe that this was intended, we understand that this provision may become a means of acquiring

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[37] According to art. 23 *Cc*, which has not been modified: Anyone acquiring Spanish nationality through right of option, letter of naturalization or residence must comply with the following requirements: a) the person aged over fourteen and capable of making a statement must swear or promise loyalty to the King and obedience to the Constitution and laws; b) the same person must renounce his or her previous nationality. Nationals of the countries mentioned in paragraph 1 of article 24 are exempted from this requirement; c) The acquisition must be entered in the Spanish Register Office.

[38] In the case of emigrants or children of emigrants, following the reform of 1995 which abolished the requirement of residing in Spain, such persons need only submit a declaration of recovery and enter the recovery in the Register Office. Other foreign nationals wishing to recover Spanish nationality are required to reside legally in Spain, though they may be exempted from this requirement by the Ministry of Justice owing to personal circumstances. P. Juárez Pérez, "Modificación del artículo 26 del Código Civil por la ley 29/1995, de 2 de noviembre". Note in *REDI*, vol. XLVIII, (1996), 1, pp. 506–509.

dual nationality for immigrants who acquire Spanish nationality and subsequently recover their lost foreign nationality. No doubt the strict application by the *DGRN* of art. 25.1 a) will disallow such an interpretation.

27. Finally, we may come across another case of dual nationality: Spaniards who acquire the nationality of Latin American countries, Andorra, the Philippines, Equatorial Guinea and Portugal. Such cases are exceptions to the general rule of loss of original Spanish nationality. These subjects will only lose their Spanish nationality if they expressly renounce it.[39]

D) Other modifications deriving from Act 36/2002

28. Other modifications introduced by the law include the elimination of the following concepts:

a) The entitlement of persons with asylum to apply for Spanish nationality through residence has disappeared from art. 22.1, as a result of the recognition of such persons as having refugee status in Act 9/1994, of 19 May[40] modifying Act 5/1984, of 26 March, regulating right of asylum and refugee status.
b) Loss of nationality by persons not of Spanish origin through a final judgment has been eliminated from art. 25.1 in consonance with the elimination of that penalty as a result of *LO* 10/1995, of 23 November, passing the new Penal Code.[41]
c) We should also mention the removal from art. 26.2 of the *Cc* of the requirement of government authorization in order for persons who lost their Spanish nationality without completing military service or substitute community to recover it, following the abolishment of this obligation as from 31 December 2001 pursuant to Act 17/1999, of 18 May, on the regulation of armed forces personnel in relation to Royal Decree 247/2001, of 9 March.[42]

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[39] In this connection it is interesting to examine the precautions taken in the recent protocols to dual nationality agreements *infra* note 3.

[40] *BOE* n. 122 and 131 of 23 May and 2 June and *RD* 203/1995, of 10 February, approving the enabling rules (*BOE* n. 52 of 2 March).

[41] *BOE* n. 281, of 24 November.

[42] This modification regarding military service has affected other international treaties to which Spain is a party, such as: Convention on military service with Costa Rica, of 21 March 1930 (adopted by a law of 13 February 1935); Convention on military service with Bolivia, de 28 May 1930 (adopted by a law of 13 February 1935); Convention on military service with Argentina, of 18 October 1948 (ratified by an instrument of 24 February 1984); Convention on military service with France, of 9 April 1969 (ratified by an instrument of 25 August 1969); Convention on military service with Italy, of 10 June 1974 (ratified by an instrument of 4 September 1977); Convention of the Council of Europe on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality, done at Strasbourg on 6 May 1963 (ratified by an instrument of 22 June 1987); Protocol of 24 November 1977 amending the Convention of 6 May 1963 on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality, ratified by an instrument of 17 August 1989.

29. Finally, Act 36/2002 incorporates a first additional provision defining administrative silence in certain nationality cases as follows:

> "A decision on an application for nationality through residence and for exemption from the requirement of legal residence in order to recover Spanish nationality shall be reached within a year at most from the date the application is received by the relevant authority. If no express decision is issued after this period it shall be understood to have been dismissed in accordance with the second additional provision of the Register Office Law".

We will end this brief commentary with a doubt as to the scope of the provision in Act 26/2002 repealing the second interim provision of Act 29/1995, which establishes that:

> "Spanish women who have lost their Spanish nationality through marriage before the entry into force of Act 14/1975, shall be able to recover it pursuant to article 26 of the Civil Code, in the case of emigrants and children of emigrants".

30. It is logical to think that interim provisions are dependent on the laws that give rise to them and that if Act 29/1995 has been repealed we might initially think that the same applies to its interim provision. However, if this is the case, we are dealing with a situation of inequality and injustice deriving from an unconstitutional regulation the redressal of which we do not believe to be opposed to the provisions of Act 36/2002, and such an opposition appears essential for the repealing provision of the aforementioned law to be effective. Therefore, we believe there are legal grounds for ensuring that the second interim provision of Act 29/1995 remains in force, even though its future interpretation will depend on the legal agent – once again, another magnificent opportunity to remedy one of the problems dating from the pre-Constitutional era has been wasted.

III. CONCLUSIONS

In conclusion, while we cannot regard the new law as entirely positive, we must recognize the appropriateness of some of the measures adopted. These measures, while remedying some of the problems of Spanish emigrants, have also created marked discriminatory divisions in many families whose members are not entitled to the same right to pass on Spanish nationality. These discriminations are based on factors of dubious constitutionality such as "Spanish origin" and place of birth.

The cost of legislative reform should be optimized, though in this case many issues have been left unsolved. One of these, which we believe to be particularly interesting, is how the regional authorities deal with the integration of groups of immigrants from the joint perspective of alien law and nationality; this calls for a more unhurried and coherent debate in coordination with the legislation of their countries of origin. Such a study should take into account the legal repercussions that access to Spanish nationality has for groups of immigrants as a measure of integration from the perspective of the laws of their countries of origin. Now that Spain is no longer

a country of emigrants, we cannot allow immigrants to turn up on Spanish soil in the same unfair conditions endured by the Spaniards who were forced to leave/flee Spain and which we are still attempting to alleviate. We do not believe that the integration of foreign nationals should necessarily involve the acquisition of Spanish nationality as is often heard in parliamentary and doctrinal debates. This could cause immigrants to lose many rights, such as their nationality of origin, the right to pass on to their children the nationality that defines their identity and also the loss of the rights inherent in nationality, such as the right to vote. We believe that being forced to work in another country – a situation that stems from necessity rather than choice – should not deprive them of the possibility of remaining bound to their origins and identity with sufficient authority. It follows that integration should involve a scrupulous treatment of the human rights of all people regardless of their nationality, setting up proper channels of intercultural exchange to ensure peaceful coexistence without the need to impose Spanish nationality if this makes the subject a foreigner in his own country – a situation that is even harder, if such a thing is possible, than being a foreigner in his country of destination.

Finally, this new period that has been ushered in by the new bill that has been presented should also help incorporate into that same law questions of provenance relating to nationality which are currently dealt with in diverse legal texts and in the rules of the Registrar, from which some of the incoherencies stemming from the changing rules of the Civil Code are derived.

*Spanish Practice in the Area of Universal Jurisdiction**

Angel Sánchez Legido
Lecturer in Public International Law
University of Castilla-La Mancha

CONTENTS

1. INTRODUCTION: FROM THE *ARGENTINEAN AND CHILEAN HEARINGS* TO THE *GUATEMALA CASE*

The accusations filed by the *Unión Progresista de Fiscales* (union of progressive public prosecutors) against those responsible for the military regimes in Argentina[1] and

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[1] *Accusation filed by the Spanish Union of Progressive Public Prosecutors giving rise to the hearings commencing on 28 March 1996 concerning the Spaniards missing in Argentina.* This accusation was subsequently enlarged on the 9th and 18th of April, 1996. At the trial the popular prosecution was represented by the political group *Izquierda Unida* (the united left), the *Asociación Argentina pro-Derechos Humanos Madrid* (the Argentinean pro human rights association of Madrid) and the *Asociación Libre de Abogados* (free association of

Spanish Yearbook of International Law, Volume VIII, 2001–2002

Chile[2] for their respective and coordinated policies aimed at the elimination of dissidents developed during the course of the dictatorships that afflicted these Latin American countries during the 70s and 80s, set off an exciting Spanish practice of exercise of universal jurisdiction that put Spain at the vanguard of the persecution of the most serious international crimes through the still controversial universality principle. If the objective was to hold the guilty parties accountable for the serious atrocities they committed, the so-called Argentinean and Chilean cases seem to have surpassed, to a certain degree, the very understandably pessimistic initial expectations.[3] It is also true, however, that seven years hence not one of the accused has been sentenced.[4] The arrest and opening of oral proceedings against A. Scilingo,[5] the

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cont.
lawyers). A large dossier of the hearing including numerous court decisions issued together with numerous briefs filed therein are available on the *Equipo Nizkor* Web page: *http://www.derechos.org/nizkor/arg/espana* (last visited on 21.5.03).

2 *Text of the accusation filed in Spain against General Pinochet and others for genocide and other crimes. Filed in Valencia on 1 July 1996.* The accusation was subsequently broadened on 20 September 1996. At the trial the private prosecution was represented by the *Agrupación de Familiares de Detenidos y Desaparecidos de Chile* (union of family members of those arrested and missing in Chile) and approximately ten victims while the popular prosecution was represented by the *Fundación Salvador Allende* (Salvador Allende Foundation), *Izquierda Unida* (the united left), the *Asociación Argentina pro Derechos Humanos-Madrid* (the Argentinean pro human rights association of Madrid) and the *Asociación Libre de Abogados* (free association of lawyers). A large dossier of the hearing is also available on the *Equipo Nizkor* Web page: *http://www.derechos.org/nizkor/chile/juicio* (last visited on 21.5.03).

3 See, for example, among the internationalist Spanish doctrine, the observations of J. A. Tomás Ortiz de la Torre, "Competencia judicial penal internacional de los tribunales españoles para conocer de ciertos delitos cometidos contra españoles en Iberoamérica", *Anuario IHLADI*, vol. 13 (1997), pp. 7 and subsequent; J. A. González Vega, "La Audiencia Nacional contra la impunidad: los 'desaparecidos' españoles y los juicios a los militares argentinos y chilenos", *REDI* , vol. 49 (1997), pp. 285 and subsequent, p. 289; M. Abad Castelos, "La actuación de la Audiencia Nacional española respecto de los crímenes contra la humanidad cometidos en Argentina y en Chile: un paso adelante desandando la impunidad", *Anuario da Facultade de Dereito da Universidade da Coruña* (1998), pp. 33 and subsequent, pp. 58–59; or J. Ferrer Lloret, "Impunity in Cases of Serious Human Rights Violations: Argentina and Chile", *SYIL*, vol. III (1993–1994), pp. 3 and subsequent, pp. 20–29.

4 The main reason is rooted in the fact that the Spanish legal system does not make allowance for trials by default (Arts. 834 and subsequent of the 1881 *Code of Criminal Procedure*) coupled with the fact that the immense majority of the defendants were not to be found in Spanish territory and the Chilean and Argentinean authorities had voiced their opposition to the action taken in Spain. As regards this specific aspect, the important reform of 2002 does not affect the pre-existing regulation.

5 The former military captain Scilingo, allegedly responsible for a number of the atrocities committed in the sinister *Escuela de Mecánica de la Armada (ESMA)* (School of Navy Mechanics) and co-author of the so called "death flights", appeared voluntarily before the Spanish authorities in October of 1997 thus becoming the only defendant with respect to which oral proceedings were initiated.

extradition process initiated in Mexico against R. M. Cavallo[6] and, of particular significance, the arrest and extradition process against A. Pinochet in the United Kingdom[7] are the most significant accomplishments of the legal actions that are still in process today[8] and that seem to be included among the determining factors giving rise to renewed efforts to bring responsible parties in Chile and Argentina to justice.

Although they are probably the most renowned, the so-called Argentinean and Chilean cases are not the only judicial actions taken based on the jurisdictional heading envisioned in Art. 23.4 of the 1985 *LOPJ*.[9] Together with the failed attempts

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[6] Also accused of having taken part in kidnapping, torture and murder committed in the *ESMA*, in February 2001 the Mexican government authorised the extradition of R. M. Cavallo (*Serpico*) to Spain. A challenge was filed before the Mexican judicial authorities with respect to the decision and on 10 June 2003 the Supreme Court of Justice finally authorised the extradition for a hearing in Spain for terrorism and Genocide. See *El País* newspaper of 11.6.03.

[7] As is well known, the arrest in London on 16 October 1998 of the ex-dictator of Chile gave rise to a long and complex extradition process in the United Kingdom that, with Britain's universal jurisdiction and Pinochet's immunity as a backdrop, culminated, on the one hand, with the decision taken by the House of Lords Appeal Committee in March 1999 that authorised extradition for the crimes of torture allegedly committed as of 8 December 1988 (*Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet* – March, 24, 1999, *ILM*, vol. 38–1999, pp. 581 and subsequent) and, on the other hand, with the 1 March 2000 decision taken by the British Secretary of State J. Straw not to process the request for extradition thus permitting Pinochet's return to Chile for humanitarian reasons based on his state of health. The Pinochet case has been the object of an abundant amount of bibliography. From an essentially juridic standpoint and without prejudice to numerous articles published in specialist journals, the work of A. Remiro Brotons, *El caso Pinochet. Los límites de la impunidad*, Madrid, 2000 especially stands out along with some group works such as those edited by D. Woodhouse, *The Pinochet Case. A Legal and Constitutional Analysis*, Oxford-Portland, 2000, and by M. García Arán and D. López Garrido, *Crimen internacional y jurisdicción universal. El caso Pinochet*, Valencia, 2000. See also, J. A. Corriente Córdoba, "El 'caso Pinochet' como episodio en la evolución del Derecho internacional Penal", in A. Blanc Altemir (ed.), *La protección internacional de los Derechos Humanos a los cincuenta años de la Declaración Universal*, Madrid, 2001, pp. 243 and subsequent.

[8] Although a new request filed by the public prosecutor's office for a stay of proceedings is pending over this legal action, prior even to the Supreme Court decision in the Guatemalan case. See *Escrito de la Fiscalía solicitando el archivo de las actuaciones en los casos argentino y chileno* (brief from the public prosecutor requesting a stay of proceedings with regard to legal action in the Argentinean and Chilean cases) of 26 November 2002. Available on the above-mentioned web page of the *Equipo Nizkor*.

[9] In accordance with the literal sense of that precept, "The Spanish jurisdiction shall also be considered competent to deal with acts committed by Spaniards or foreigners outside of national territory that can be classified in accordance with Spanish criminal law such as the following crimes: a) Genocide; b) Terrorism; c) Piracy and the illicit seizure of aircraft; d) Counterfeiting of foreign currency; e) Crimes related to prostitution and the corruption of minors or the declared unfit; f) Illegal trafficking in illegal psychotropic, toxic and narcotic drugs; g) and other crimes that, pursuant to international treaties or conventions, should be persecuted in Spain. The *LOPJ* was published in *BOE*, n. 157 of 2.7.85. Letter e) of

taken against different acting heads of State (*Hassan II*, *T. Obiang Nguema, F. Castro* or *H. Chávez*)[10] or against the former Honduran deputy official *Billy Joya*,[11] the so-called *Guatemalan Case* stands out especially. This is mostly because the Spanish Supreme Court, through a judgement that was taken after seven long months of deliberation and by a very small margin of eight to seven, has come a long way in defining the extent to which the extra-territorial competence of the Spanish courts is to be interpreted.[12]

The Guatemalan Case commenced with the charges filed on 2 December 1999 by the Nobel Peace Prize recipient Rigoberta Menchú[13] against those responsible for the

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Art. 23.4 reproduced above was introduced by Organic Law 11/1999 30 April (*BOE* n. 104, of 1.5.99).

[10] On these cases see section 4.b herein.

[11] In its ruling of 8 September 1998, Central Trial Court 2 denied the opening of proceedings basically because the *LOPJ* was from 1985 and thus the principle of non-retroactivity of the criminal law set out in Arts. 9.3 and 25.1 of the Spanish Constitution prevented the application of universal jurisdiction recognised under said law to crimes that had allegedly taken place in 1982. This ruling is also available on the *Equipo Nizkor* web page: *http://www.derechos.org/nizkor/espana/doc/joya/juri.html* (visited on 20.2.2002). A mere two months later, the plenary of the National Criminal Court rejected that argument in the record of proceedings meaning that the Spanish courts were still considered competent to deal with Argentinean and Chilean cases in light of that Court's understanding that Art. 23.4 of the *LOPJ* has the nature of a procedural and not a punitive regulation and therefore is not affected by the principle of criminal non-retroactivity. *National Court rulings of 4 and 5 November 1998. Rapporteur: the Honourable Carlos Cezón González*, Legal Ground number 3. Rulings are available on the already mentioned *Equipo Nizkor* web page and also with commentary from D. de Pietri, in *REDI*, vol. 51 (1999), pp. 639 and subsequent.

[12] A heated debate had already taken place regarding the universality principle among the Spanish judicature subsequent to the 31 May 2002 pronouncement made by section three of the National Criminal Court in the *Carmelo Soria* case giving rise to the very serious questioning of the scope within which Spanish courts have exercised universal jurisdiction (see "La Audiencia usa el 'caso Otegi' para anular la orden de detención de un ministo de Pinochet", (the National Court uses the 'Otegi case' to nullify the arrest warrant of a Pinochet minister), *El País* newspaper, 1.6.2002) and "El carpetazo al caso Soria abre la vía para archivar las causas de Chile y Argentina" (The shelving of the Soria case paves the way for a stay of proceedings in the Chilean and Argentinean cases) *El País* newspaper, 3.6.2002. That stance was subsequently corrected by the Supreme Court's criminal section itself when it indicated, *obiter dictum* in the *Otegi case*, that "There is no doubt that the prosecution of the actions constituting a crime of terrorism, or those constituting a crime of genocide or torture, are unquestionably subject to the principle of universal jurisdiction, an issue that, as such, is outside of the realm of this case." Supreme Court ruling (Criminal Section), of 14 June 2002, rapporteur P. Andrés Ibañez, R. J. Aranzadi 2002/4744. F. J. 2. See "El Supremo ratifica que no puede perseguir a Otegi por enaltecer a ETA en Francia" (The Supreme Court confirms that Otegi cannot be prosecuted for praising ETA in France) (*El País* newspaper, 15.6.2002).

[13] Subsequent to the opening of preliminary proceedings, charges were also filed by the family members of approximately twelve victims and by the *Confederación Sindical de Comisiones Obreras* (workers' trade union), the *Coordinadora Nacional de Viudas de*

Guatemalan dictatorship that governed that Central American country during the civil war years (1962–1996) and which accused them of perpetrating acts allegedly constituting crimes of genocide, torture, terrorism and kidnapping.[14] Once competence was declared in response to the charges filed and the legal process got under way,[15] the Public Prosecutor's Office filed a remedy of appeal against the ruling of Central Trial Court 1 thus demonstrating the same hostile attitude with respect to the Guatemalan case as it had to the Argentinean and Chilean cases.[16] In its resolution of that appeal, the Plenary of the National Criminal Court upheld the appeal arguing that, in light of the fact that the universal jurisdiction of the Spanish courts is of a subsidiary nature with respect to territoriality criteria, the judicial inactivity or ineffectiveness of the Guatemalan authorities in the persecution of the crimes denounced had not been

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Guatemala (CONAVIGUA) (national coordinating unit for Guatemalan widows), the *Asociación de Familiares de Detenidos-desaparecidos de Guatemala* (FAMDEGUA) (the association of family members of the imprisoned-missing of Guatemala), the *Asociación contra la Tortura* (association against torture), Spain's solidarity committees with Guatemala, the *Asociación Argentina Pro-derechos humanos de Madrid* (Argentinean pro human rights association of Madrid) and the *Asociación Libre de Abogados* (free association of lawyers).

[14] The Commission for Historical Clarification constituted pursuant to the peace agreement between the Guatemalan government and the *Unidad Revolucionaria Nacional Guatemalteca (URGN)* (Guatemalan national revolutionary union) in 1994 registered more than forty thousand victims, 83% of whom were individuals of the Maya ethnic group living in rural areas. The government itself was responsible for more than 90% of the victims either directly or by means of the so called Civil Self-defence Patrols or the death squadrons; *Guatemala. Memoria del silencio. Informe de la Comisión para el Esclarecimiento Histórico* (Guatemala. Silent memorial. Report of the Commission for Historical Clarification), 12 volumes, Guatemala, 1999. Also see the *Guatemala. Nunca Más* also known as the REHMI report, *Proyecto Interdiocesano de Recuperación de la Memoria Histórica* (the inter-diocesan recovery of historical memory project) 4 volumes, Human Rights Office of the Guatemalan Archbishop's Office, Guatemala, 1998. For a brief and excellent exposé of the occurrences that took place in Guatemala during the civil war and their possible classification as crimes against humanity and genocide, see I. Albaladejo Escribano, "Genocidio y crímenes de lesa humanidad en Guatemala" (Genocide and crimes against humanity in Guatemala), in A. Blanc Altemir (ed.), *La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal* (International human rights protection fifty years after the Universal Declaration) Madrid, 2001, pp. 243 and subsequent, pp. 253 and subsequent.

[15] Central Trial Court 1, ruling of 27 March 2000. Court ruling available at the *Equipo Nizkor* web page: *http://www.derechos.org/nizkor/guatemala/doc/autojuz1.html* (visited on 12.2.2003).

[16] Already expressed in what is known as the "Fugairiño Document" ("Note regarding the jurisdiction of Spanish courts"; unsigned note circulated at the meeting of Supreme Court public prosecutors on 10 December 1997 the authorship of which is attributed to the chief prosecutor of the National Court), this attitude has resulted in the systematic challenging of action taken in the Argentinean and Chilean cases. For the last example to date, see the above-mentioned brief filed on 26 November 2002 requesting a stay of proceedings with respect to legal action taken. Both documents are also available on the *Equipo Nizkor* web page.

sufficiently accredited.[17] A Supreme Court appeal was filed against the ruling of the National Court and the Supreme Court's Criminal Section partially upheld the appeal confirming the jurisdiction of the Spanish courts although solely and exclusively for the criminal proceeding for acts denounced against Spanish citizens.[18]

According to the grounds of the ruling itself, the above-mentioned judgement was reached based on the affirmation according to which the proclamation of extraterritorial competence found in Art. 23.4 of the *LOPJ* must be made compatible with the requirements derived from the international system, bearing the principles of international public law in mind.[19] The following pages deal specifically with the most problematic aspects raised by the doctrine of universal jurisdiction applied by Spanish courts from the standpoint of international law.

2. UNIVERSAL JURISDICTION *IN ABSENTIA*?

It has been known for some time now that "among the many problems concerning the limits of the sovereignty of States, few are as difficult or as much disputed as that which concerns the extent of the right of a State to exercise its criminal jurisdiction as it pleases".[20] The spectacular development of International Criminal Law since the end of the cold war has made this an extraordinarily current issue as well. While the singular and ambiguous pronouncement on this subject made by the Hague Court in the almost eighty-year-old *Lotus*[21] case clearly contributed to the inherent difficulty of this issue, its current importance, stemming from the decided will on the part of

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[17] *Auto de la Sala de lo Penal de la Audiencia nacional Española disponiendo el archivo de la querella sobre el caso de Guatemala por Genocidio, de 13 de diciembre de 2000* (Ruling delivered by the Spanish National Criminal Court calling for a stay of proceedings with regard to the Guatemalan case for genocide of 14 December 2000). Also available on the *Equipo Nizkor* web page: *http://www.derechos.org/nizkor/guatemala/doc/autoan.html*.

[18] Supreme Court (Criminal section) number 327/2003 of 25 February 2003, Rapporteur: the honourable Mr. Miguel Colmenero Menéndez de Luarca. Also available at the following web site: *http://www.derechos.org/nizkor/guatemala/doc/gtmsent.html*.

[19] Judgement cited, Legal Ground 8, paragraphs 5 and 9.

[20] A. R. Carnegie, "Jurisdiction over violations of the Law and Customs of War", *BYIL*, vol. 39 (1963), p. 402.

[21] In that case the Permanent Court of International Justice, as a general rule, followed a criteria favourable to the extraterritorial jurisdiction of states: "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable". However, when it came to accepting the international legality of Turkey's intention to indict the French national responsible for the high seas boarding of a ship flying the Turkish flag, the Court based its ruling on the consideration that the boarding took place in Turkish territory and on the wide acceptance by States of the objective territoriality principle. PCIJ, *The Case of the S. S. Lotus*, Judgment n. 9, 1927 September 7th, Publications of the Court, series A, n. 10, pp. 3 and subsequent.

certain States to exercise universal jurisdiction, has led to the problem's return to the International Court of Justice in the case of two recent matters. The Court, evading a response in the first[22] and a judgement still pending in the second,[23] the ambiguities surrounding the universality principle continue to subsist.

From among these ambiguities, arguably the most controversial is the one related to the admissibility of pure or *in absentia* universal jurisdiction. To a large degree this is true because, although there are a relatively large number of instruments used in international practice (both conventional as well as institutional) that recognise States' capacity to bring to justice those responsible for committing certain internationally notorious crimes in the event that they are found within the territory itself, independent of the concurrence of any other connection and even making such legal process compulsory if extradition is not granted,[24] not one of these instruments

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[22] In the case related to the international arrest warrant, the Court went no further than to affirm, pursuant to the request formulated by the parties, that the issuance of an international arrest warrant by a Belgian judge against an acting minister of foreign affairs constituted a violation of the immunities and inviolabilities recognised under international law for such officials. The Court failed however to take a stand on the international legality of universal jurisdiction *in absentia* recognised under Belgian law that was the underlying basis of the Belgian judicial action. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, *ICJ Reports 2002*, pp. 3 and subsequent.

[23] The charges filed on 9 December 2002 by the Republic of Congo (Brazzaville) against France were in response to the action initiated by a French judge against Congo's Home Minister P. Oba and the former's intention to take a statement from the President D. Sassou Nguesso. As this text is being drafted, the Court's pronouncement on the request for provisional measures made by the complainant is imminent. Information can be found on this case (*Certain Criminal Proceedings in France*) at the ICJ web page: *http://www.icj-cij.org*.

[24] The following instruments, among others, can be cited: In the field of *International Humanitarian Law*, the four 1948 Geneva conventions (Art. 49 of I – *BOE* of 23.7.52, Art. 50 of II – *BOE* of 26.8.52, Art. 129 of III – *BOE* of 5.9.52 and 146 of IV – *BOE* of 2.9.52) and Protocol Additional I of 1977 applicable to them (Art. 85 – *BOE* of 26.7.89), the 1989 International Convention against the recruitment, use, financing and training of mercenaries (Art. 9.2 – not ratified by Spain), the Second Protocol Additional of 1999 to the Convention on the protection of cultural goods (Art. 16.1 – ratified by Spain although not yet published in the *BOE*), and the OAU Convention on the elimination of mercenarism in Africa (Art. 8). In the field of *international terrorism*, the 1970 Hague Convention on the illicit seizure of aircraft (Art. 4 – *BOE* of 15.1.73), the 1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation (Art. 5 – *BOE* of 10.1.74), and its Protocol of the same year for the suppression of unlawful acts against the safety of international civil aviation (Art. 1 – *BOE* of 5.2.92–), the 1988 Rome Convention for the suppression of unlawful acts against the safety of maritime navigation (Art. 6.4 – *BOE* of 24.4.92) and its protocol of the same year for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf (Art. 3.4 – *BOE* of 24.4.92), the 1973 New York Convention on the prevention and punishment of crimes against internationally protected persons including diplomatic agents (Art. 3.2 – *BOE* of 7.2.86), the 1994 Convention on the safety of United Nations and associated personnel (Art. 10.4 – *BOE* of 25.5.99), the 1972 Convention on the physical protection of nuclear material (Art. 8.2 – *BOE* of 25.10.91),

expressly and unequivocally recognises that same right when the suspect is not found within state territory.[25] The International Law Commission itself in its draft Code of Crimes Against the Peace and Security of Mankind only considered compulsory universal jurisdiction (and following the *aut iudicare aut dedere* formula) in cases in which the suspect is found within the territory itself.[26]

In this context and simplifying what could be a broader debate, there are two major positions that emerge with respect to this modality of universal jurisdiction.[27] Pursuant to the first, international law would never have recognised in the past nor would it accept today a State's extending its criminal jurisdiction to events that are totally and completely separate from its population, territory or political organisation and thus, in the case of crimes of international concern committed abroad by foreigners and against foreigners, only the physical presence of the suspect within the territory of the State would enable said suspect to be put on trial.[28] In contrast, the second posi-

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the 1979 Convention against the taking of hostages (Art. 5.2 – *BOE* of 7.7.84), the 1997 New York Convention on the suppression of terrorist bombings (Art. 6.4 – *BOE* of 12.6.01), the 1999 New York Convention on the suppression of the financing of terrorism (Art. 7.4 – *BOE* of 23.5.02) and the 1977 European Convention on the suppression of terrorism (Art. 6 – *BOE* of 8.10.80). Also see section II, 5, b, of the *Declaration on measures to eliminate international terrorism* (Res. 49/60, of 17 February 1994), and the *complementary statement* (Res. 51/219). In the field of *International human rights law*, the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 5, – *BOE* of 9.11.87), and the OAS Conventions to prevent and punish torture 1985 (Art. 12) and on the forced disappearance of persons 1994 (Art. 4). Also see Article 14 of the *General Assembly declaration on the protection of all persons from forced disappearance* (Res. 47/133) as well as the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* adopted by ECOSOC in 1989.

[25] The only exception is concerning piracy on the high seas with respect to which both the 1958 Convention on the High Seas done at Geneva (Art. 19 – *BOE* of 27.12.71) as well as the 1982 United Nations Convention on the Law of the Sea (Art. 105 – *BOE* 14.2.97) recognise the right of all States to arrest and put responsible parties on trial.

[26] *ILC report on the work of its 48th session*. General Assembly, Official Documents, fifty-first session. Supplement no. 10 (A/51/10). For a broader analysis of the ILC's work on this subject see B. Graefarth, "Universal Criminal Jurisdiction and an International Criminal Court", *EJIL*, vol. 1 (1990), pp. 67 and subsequent; and A. Sánchez Legido, *Jurisdicción universal penal y Derecho internacional*, Valencia, 2003 (in press).

[27] For a recent analysis of the problems raised by the universality principle, see Henzelin, M., *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, Bruxelles, 2000; Bassiouni, M.CH., "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, vol. 42 (2001), pp. 1 and subsequent; Benavides, L., "The Universal Jurisdiction Principle", *Anuario Mexicano de derecho internacional*, 2001, pp. 20 and subsequent; or J.-M. Simon, "Jurisdicción Universal: la perspectiva del Derecho internacional público", *REEI*, no. 4 (2002).

[28] For other opinions in this sense see, M. Abad Castelos, "La actuación . . .", art. cit., p. 55; M. Cosnard, "Quelques observations sur les décisions de la Chambre des Lords du 25 novembre 1998 et du 24 mars 1999 dans l'affaire Pinochet", *RGDIP*, vol. 103 (1999),

tion tends to singularly and exclusively link the universality principle to the nature of certain crimes and, more specifically, to their character that is especially damaging to the essential interests of the international community, the only factor sufficing in authorising all States to initiate legal proceedings.[29]

a) The replacement of the universality principle by the passive personality principle in the Guatemala case

With respect to these two positions, a division similar to the one among the eight judges of the ICJ that ruled on this topic in the case concerning the international arrest warrant[30] once again emerged in the decision taken by the Spanish Supreme Court on 25 February 2003 in the Guatemala case. The slight majority against pure universal jurisdiction[31] ended up making the existence of victims of Spanish nationality an essential requirement for the application of the title of jurisdiction provided for in Art. 23.4 of the *LOPJ* in those cases in which the suspect is not found in Spanish territory. This decision limits the competence of Spanish courts based on said precept exclusively to acts committed against Spanish citizens.[32] The Supreme

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p. 323 ; J.J. Díez Sánchez, *El Derecho penal internacional. Ambito espacial de la ley penal*, Madrid, 1990, p. 179; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *AFDI,* vol. 55 (1999), pp. 62–63 or, in more detailed form, M. M. Martín Martínez, "Jurisdicción universal y crímenes internacionales", in A. Salinas de Frias (coord.), *Nuevos Retos del Derecho. Integración y desigualdades desde una perspectiva comparada Estados Unidos/Unión Europea*, Universidad de Málaga, 2000, p. 164; and A. Cassese, *International Criminal Law*, Oxford, 2003, pp. 286–295.

[29] Supporters of this view also take into consideration the fact that in most of the international conventions cited above and in conjunction with the state of custody's obligation to try or extradite, a clause is normally introduced stating that "no jurisdiction exercised by a State in accordance with its domestic law shall be excluded". This second view can be linked, for example, to A. Remiro Brotons, *Los límites . . ., op. cit.*, pp. 56 and subsequent; J. Pueyo Losa, "Un nuevo modelo de cooperación internacional en materia penal: entre la justicia universal y la jurisdicción internacional", in S. Alvarez González and J. R. Remacha Tejada (coords.), *Cooperación Jurídica Internacional*, Madrid, 2001, pp. 196 and subsequent; or C. I. Torres García, "Crímenes contra la paz y seguridad de la humanidad, jurisdicción internacional y jurisdicción universal", *Revista Jurídica de Castilla-La Mancha*, n. 34 (2003), pp. 182 and subsequent.

[30] In their separate opinions regarding the above-mentioned judgement of 14 February 2002, the following judges came out against universal jurisdiction *in absentia*: Guillaume (paragraph 12), Ranjeva (paragraph 8), Rezek (paragraph 6) and Bula Bula (paragraph 40) while other judges favoured its admissibility in international law: Van Den Wijngaert (paragraph 56), Higgins, Kooijmans and Buergenthal (paragraph 56).

[31] The majority position is based on the premise asserting that "no State is unilaterally responsible for stabilising order, turning to Criminal Law against all others and throughout the whole world, but what is rather needed is a point of connection that legitimises the extraterritorial scope of its jurisdiction", without the very nature of the crime serving in and of itself as one of those elements of connection, *F.D.* 9, paragraph 1.

[32] The existence of victims of Spanish nationality had been assessed in prior pronouncements

Court, not able to base its pronouncement on the literal sense of Art. 23.4 of the *LOPJ* nor on the parliamentary work giving rise to said Law,[33] based its majority sentence, quite unsystematically, on basically three elements of international practice in its arrival at this conclusion.

First of all, a very brief reference to the domestic practice employed in some neighbouring States that, in fact, is reduced to allusions to German and Belgian cases: on the one hand, the ruling handed down by the German Federal Supreme Court judge of 13 February 1994 in the *Tadic* case in which Art. 6.1 of the German Criminal

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made by Spanish judiciary bodies (Central Trial Court number 6 ruling of 20 September 1998 in the Pinochet case, *F.D.* 3, or the rulings of 4 and 5 November of the plenary of the National Criminal Court on the Argentinean and Chilean cases mentioned above, *F.D.* 9), but this was not always the case (see Central Trial Court number 5 ruling of 25 March 1998 on Argentinean cases, *F.D.* 9, or the ruling of Central Trial Court number 1 of 27 March 2000 in the Guatemala case, *F.D.* 2, in which arguments are made in terms of strict universality) and the Spanish nationality of the victims had never been the decisive criteria in affirming a jurisdiction considered based on the universality principle and not on the passive personality principle – which is not contemplated in the titles of jurisdiction of Art. 23 of the *LOPJ* – nor had its being taken into consideration ever involved a restriction, as regards to competence to hear a case, and to crimes committed against Spaniards.

[33] The definitive version of Art. 23 of the *LOPJ* is the result of amendment 390 tabled by the Socialist Group in the Senate with the aim of avoiding the referral that Article 35 of the draft legislation made to material criminal legislation in determining the jurisdictional scope of the Spanish courts in the criminal law system (F. Benzo Mestre (dir.), *Ley Orgánica del Poder Judicial. Trabajos parlamentarios*, vol. II, pp. 1807–1808). However, no allusion was made either in the justification of the amendment itself or in the corresponding parliamentary debates to possible limits regarding the exercise of a jurisdiction recognised simply with respect to "acts committed by Spaniards or foreign nationals outside of national territory, qualifiable under Spanish criminal law" such as some of the crimes cited in the above-mentioned precept. The conclusion could be reached that, in reality, Art. 23.4 only intended to extend the universal jurisdiction of the Spanish courts in cases in which it is thus foreseen on a compulsory basis in international treaties to which Spain is party. This view would in fact restrict such jurisdiction to cases in which the suspect is present in Spanish territory. Other amendments also tabled in the Senate followed along these same lines: number 47 from Senator Arespacochaga of the People's Parliamentary Group (*idem*, pp. 1659–1661) or number 686 of the Catalonian Parliamentary Group to the Senate (*idem*, pp. 1918–1919) of identical meaning, "this chapter on crimes committed abroad shall be interpreted without prejudice to special criminal laws or international treaties" with no indication of specific criminal categories. However, the fact that among the criminal categories that are mentioned in Art. 23.4 some can be found (genocide, piracy or narcotics trafficking) with respect to which no international treaty specifically calls for the mandatory exercise of universal jurisdiction and, especially the fact that specific mention is made of the latter case in sub-section g) ("any other that, pursuant to international treaties or conventions must be pursued in Spain"), serve as evidence that seems to make a case against the idea that the intention of Spanish lawmakers was to restrict the scope of jurisdiction provided for in this precept exclusively to cases in which there is an obligation by virtue of treaties to which Spain is party.

Code (*StGB*) was interpreted in the sense that the universal jurisdiction provided for therein required the existence of an additional connective link with Germany (legitimising link doctrine), considering the past residence of the suspect in German territory and his arrest therein valid in this respect.[34] It comes as a surprise, however, and as the dissenting judges point out in their individual vote,[35] the absence of references to subsequent developments in German practice, especially the 21 February 2001 judgement delivered by the Supreme Court (*Bundesgerichtshof*) in the *Sokolovic* case[36] and more especially the law with respect to the Code of Crimes against International Law of 26 June 2002 adopted with a view to adapting German criminal law to the ICC Statute. In accordance with a very authorised interpretation, the first article[37] of this law recognises universal jurisdiction such that "a case should be investigated not only when the suspect is found in German territory but also if the suspect's presence is foreseeable. This is reasonably taken to mean that a case will be taken into consideration if a real possibility exists that the person in question will be extradited to Germany upon request".[38]

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[34] A summary of this pronouncement can be found in the ICRC data base on the domestic enforcement of international humanitarian law available at *http://wwwcicr.org/ihl-nat.nsf/WebLAW?OpenView* (visited on 11.3.2003). For a critical analysis of this and other subsequent resolutions in the sense of requiring a legitimising link, see K. Ambos and S. With, "Genocide and War Crimes in the Former Yugoslavia Before German Criminal Courts (1994–2000), in H. Fischer, C. Kreb and S. Lüder (eds.), *International and National Prosecution of Crimes under International Law. Current Developments*, pp. 769 and subsequent; and S. Wirth, *International Criminal Law in Germany. Case Law and Legislation. Presentation to the Conference Combating International Crimes Domestically, Ottawa, 22–23 April 2002*, pp. 2 and subsequent. Available on the Internet at: *http://www.iuscrim.mpg.de/forsch/onlinepub/Ottawa.pdf* (visited on 14.3.2003).

[35] *STS* of 25 February 2003, individual vote, *F.D*. 9, paragraphs 2 and 3.

[36] In that judgement the German Supreme Court for criminal matters held that "The Court inclines, in any case under Article 6 paragraph 9 of the German Criminal Code, not to hold as necessary these additional factual links that would warrant the exercise of jurisdiction . . . Indeed, when, by virtue of an obligation laid down in an international treaty, Germany prosecutes and punishes under German law an offence committed by a foreigner abroad, it is difficult to speak of an infringement of the principle of non-intervention." (judgment of 21 February 2001, 3 *StR* 327/2000). The quotation was taken from A. Cassese, *International . . ., op. cit.*, p. 289.

[37] Pursuant to that first article, the law in question is enforceable for crimes envisioned therein (those of genocide, crimes against humanity and war crimes figuring in the ICC Statute – "even when the crime is committed abroad *and is not related in any way with Germany*" (words in italics added). An English translation of the law is available at the following Internet address: *http://www.iccnow.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates/GermanCodeOfInternation4C1.pdf.* (visited on 13.3.03).

[38] H.P. Kaul, A. Mlitzke and S. Wirth, *International Criminal Law in Germany. The Drafts of the International Crimes Code and the Rome Statute Implementation Act*. Report presented by the German Delegation to the Preparatory Commission for the International Criminal Court during its 9th session held on 18 April 2002. Available on the Internet at: *http://www.iccnow.org/resourcestools/ratimptoolkit/nationalregionaltools/analysis/Comments%20on%20ICCode%20and%20E41.pdf* (visited on 13.3.03).

No less surprising is the reference made to the judgment delivered by the Belgian *Cour de Cassation* on 12 February 2003 in the *Sharon* case alluding only to the aspects contained therein related to the affirmation of the subsistence of immunity in the case of acting state officials and not, paradoxically, to that body's emphatic recognition of absolute universal jurisdiction provided for in Belgian legislation.[39]

The Supreme Court could have been somewhat more selective and meticulous in its assessment of States' domestic practice for it is unquestionable that the immense majority of domestic law links the exercise of universal jurisdiction to the presence of the suspect in national territory.[40] Despite that fact it cannot be ignored that a

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[39] In that judgement, the Belgian Supreme Court ruled inadmissible the suit filed against A. Sharon considering that preference over domestic Belgian law should be given to customary international law as concerns immunity for acting high-ranking officials as had been the interpretation by the ICJ concerning the international arrest warrant. In contrast, it did consider admissible the suit filed against commander A. Yaron being of the opinion that Article 7 of the 1993 Belgian law (amended in 1999) on the prosecution of serious infractions of International Humanitarian Law did not restrict the exercise of universal jurisdiction provided for therein to the presence of the suspect on Belgian soil. Cour de Cassation, Section Francaise, 2e. Chambre, arrêt du 12 fevrier 2003, *Aff. Hijazi S. et crts. C/ Sharon A. et Yaron A.*, n. JC032C1_1. The text of the judgement together with the conclusions of the *procureur général* Du Jardin, are available on the Cour de Cassation's web page: *http://www.cass.be/juris* (visited on 12.3.03).

[40] This is the case of France, for example, where the requirement of the suspect's presence in the territory, called for in the *Code de Procédure Pénal* (art. 689.1) as well as in the laws adapting French legislation to the resolutions by *ad hoc* international criminal courts, was the object, in the Javor case, of a particularly rigid interpretation by the *Cour de Cassation*, linking all judicial action in France based on the universality principle to the existence of clear evidence showing that the suspect is to be found in French territory. See B. Stern, "La compétence universal en France: le cas des crimes commis en ex Yougoslavie et au Rwanda", *GYIL*, vol. 40 (1997), pp. 292 and subsequent; F. Lattanzi, "La competenza delle giurisdizioni di Stati 'terzi' a ricercare e processare i responsabili dei crimini nell'ex Iugoslavia en el Ruanda", *Riv. Dir. Int.*, vol. 78 (1995), pp. 707 and subsequent; or R. Maison, "Les prémiers cas d'application des dispositions pénales des Conventions de Géneve par les jurisdictiones internes", *EJIL*, vol. 6 (1995), pp. 623 and subsequent. Similarly in Holland in the case regarding the former president of Surinam D. D. Bouterse, the Dutch Supreme Court held that, even though Dutch legislation does not require the presence of the suspect in Dutch territory, an individual cannot be tried for acts of torture committed abroad unless "one of the links foreseen in the convention for the establishment of jurisdictional competency is present such as the accused or the victim being of Dutch nationality or should be considered as such or the accused being in Dutch territory at the time of his arrest". For further information see J. K. Kleffner, "Jurisdiction over genocide, crimes against humanity, war crimes, torture and terrorism in the Netherlands", in A. Cassese & M. Delmas-Marty (eds.), *Crimes internationaux et juridictions nationales. Etude comparée*, París, 2002, available on the Internet at: *http://www.jur.uva.nl/aci/jann-kleffner1.pdf* (visited on 3.6.02).

In addition to the cases mentioned, reference to the requirement of presence is a constant in the immense majority of legislations that foresee universal jurisdiction including the 1945 Australian law on war crimes amended in 1988 and 1999 (section 11); the Austrian

majority, no matter how large, is not synonymous with unanimity. Some legal systems foresee the possibility of exercising universal jurisdiction even when the suspect is outside of the boundaries of the country in question. In addition to the case of Belgian law 1993/1999 on the persecution of serious infractions of International Humanitarian Law,[41] mention should also be made of the Israeli Court's admittance of universal jurisdiction in the *Eichmann*[42] and *Demjanjuk*[43] cases or, more recently, New Zealand's law regarding the International Criminal Court[44] and the above-mentioned German law on the Code of Crimes against International Law.

The second type of element on which the Supreme Court majority judgement was based were the Treaties regarding International Criminal Law an analysis of which gives rise to the conclusion that said conventions "contain jurisdictional attribution criteria generally based on the territory or on active or passive personality and such criteria are subsequently supplemented by the commitment of each State to pursue crimes, regardless of where they may have been committed, when the alleged perpetrator is in its territory and does not agree to extradition thus providing for an orderly reaction against impunity and eliminating the possibility of their use as shelter against proceedings. However, it has not been expressly established in any of these treaties that each signatory state may pursue without any limitation and in accordance

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criminal code (article 64); the Danish criminal code (Article 8.6); the French code of criminal procedure (Article 689.1) and the laws adapting French legislation to the Security Council resolutions pursuant to which the *ad hoc* international criminal courts were created (Article 2); the 1974 Nicaraguan criminal code (Article 16); the 1997 Polish criminal code (Articles 110 and 113); the 1995 Portuguese criminal code (Article 5.1); the British and Scottish laws concerning the International Criminal Court requiring not only presence but also residence (sections 68 and 6.2 respectively); the Swedish criminal code (section 2, chapter 2); the Swiss criminal code (Article 6 bis); the Venezuelan criminal code (Article 4.9); and the South African law regarding the International Criminal Court (Article 4.2).

41 Recognition of absolute universal jurisdiction by the cited law was the result of the expressed intention of the Belgian legislator. See A. Andries, E. David, C. Van den Wijngaert and J. Verhaegen, "Commentaire de la loi du 16 juin 1993 rélative a la repression des infractions graves au droit international humanitaire", *Révue de droit pénal et de la criminologie*, 1994, p. 1173; and E. David, "La loi belge sur les crimes de guerre", *RBDI* (1995), pp. 677–678. During the course of questioning by the preliminary issues court of the *Tribunal de Grande Instance* in Brussels with regard to the *Sharon* case (decision delivered on 12 April 2002), the absolute nature of the universal jurisdiction provided for in the above-mentioned law was corroborated by the Cour de Cassation in its above-mentioned judgement of 12 February 2003. See, however, the very recent amendment to that law in note 102 below.

42 The judgements delivered by the Jerusalem District Court and the Israeli Supreme Court regarding the Eichmann case, in *Int. Law Reports*, vol. 36 (1968).

43 A very complete dossier on this matter can be found in the *Equipo Nizkor* web page at: *http://www.nizkor.org/hweb/people/d/demjanjuk-john* (visited on 26.3.2002).

44 *International Crimes and International Criminal Court Act* (2000), section 8. Available in the above-mentioned ICRC data base.

only with its domestic legislation, acts taking place in the territory of another State; not even in the event that that latter state fails to pursue such act".[45]

It is undoubtedly true that none of those treaties expressly and literally provides for universal jurisdiction of an absolute sort but it is equally true that, as corroborated in the judgement delivered with respect to each one of the treaties and as the dissident minority highlights in its individual opinion,[46] almost all of the treaties include a clause pursuant to which no criminal jurisdiction exercised in accordance with national legislation is excluded.[47]

Thirdly and last of all, another two elements of international practice. On the one hand, the already cited judgement of the ICJ of 14 February 2002 on the arrest warrant issue with regard to which, however, the principal judicial body of the United Nations, in its acceptance of the petition filed by the parties, failed to make a declaration regarding the compatibility of universal jurisdiction provided for in Belgian law 1993/1999 with international law, and, on the other hand an International Criminal Court statute from which it does not seem to be able to extract anything shedding light on the extent to which international law admits universal jurisdiction.[48]

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[45] Judgement cited, *F.D.* 9, paragraph 7.

[46] *F.D.* 8, paragraph 6.

[47] Said clause is included in all of the conventions relating to *air safety* (the 1963 Tokyo Convention on offences and certain other acts committed on board aircraft, Article 3.3, *BOE* of 25.12.69; the 1970 Hague Convention, Article 4.3; the 1971 Montreal Convention, Article 5.3, as well as, in remittance to the latter, the 1988 Montreal Protocol, article 1) and *maritime safety* (the 1988 Rome Convention, Article 6.5 and its 1988 Protocol, Article 3.5); as well as to *certain practices and activities related to terrorism* (1973 Convention on internationally protected persons, Article 7; 1979 Convention on the taking of hostages, Article 8; 1979 Vienna Convention on the protection of nuclear material, Article 8.3; 1994 Convention on the protection of United Nations personnel, Art. 10.5; Convention on the persecution of terrorist bombings, Article 6.5; and Convention on the financing of terrorism, Article 7.6), in a number of different conventions adopted on issues of *transnational crime* as of the eighties (1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, Article 4.3, *BOE* of 10.11.90; optional 2000 Protocol to the Convention on the rights of the child with respect to the sale of children, child prostitution and the use of children in pornography, Article 4.4, *BOE* of 31.1.2002; and the 2000 United Nations Convention against trans-national organised crime, Article 15.6 and, in remittance to such Convention, the protocols on trafficking in human beings, trafficking in immigrants, Article 1.2 and illicit trafficking in firearms, Article 1.2 ratified by Spain although yet to be published), and in certain conventions also adopted as of the eighties in the field of *international humanitarian law* and *international human rights law* (1989 Convention regarding *mercenaries*, Article 9.3; 1999 protocol on the protection of *cultural goods*, Article 16.2; or the UN and OAS conventions on *torture*, Articles 5.3 and 12, respectively).

[48] For information see J. Alcaide Fernández, "La complementariedad de la Corte Penal Internacional y de los tribunales nacionales: ¿tiempos de ingeniería jurisdiccional?", in J. A. Carrillo Salcedo (coord.), *La criminalización de la barbarie: La Corte Penal Internacional*, Madrid, 2000, pp. 428–429; D. J. Scheffer, "War Crimes and Crimes Against Humanity", *Pace Int'l L. Rev.*, vol. 11 (1999), pp. 336–337; or our work cited above, *Jurisdicción universal penal y Derecho internacional*, (in press), section 3.1.2.

All things considered, what seems to be clear is that, in harmony with the reticence previously shown by the Spanish Government with regard to the earlier practice of Spanish courts in this area,[49] the new Supreme Court doctrine implies an extraordinary restriction on the universal jurisdiction of Spanish courts. Apart from the cases in which the suspect is found in Spanish territory, it appears that the exercise of universal jurisdiction in the future may only be applicable to cases in which the victims are of Spanish nationality.[50] Thus, as was stated in the individual vote of the dissenting

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[49] On 5 December 2002 the Council of Ministers sent to the General Council of the Judiciary and to the State Council the *Anteproyecto de ley orgánica de cooperación con la Corte Penal Internacional* (Preliminary draft of the organic law on cooperation with the International Criminal Court) (the report of the General Council of the Judiciary dated 24 January 2003 may be consulted in the section entitled *Documentos de interés: estudios e informes* of the official web page of said body: *http://www.poderjudicial.es/CGPJ* – visited on 22 February 2002–) which, together with the draft version of the organic law amending the criminal code (see the official gazette of Parliament: *BOCG, Congreso de los Diputados, VII Legislatura, Serie A: proyectos de ley, n. 145–1, de 5 de mayo de 2003*), seeks to adapt Spanish law to the developments that have taken place over the last several years in the field of International Criminal Law and, in a very special way, to the ICC Statute. Pursuant to its Article 7.2 (that, in accordance with the second additional provision, amends Article 23 of the *LOPJ*) the judicial bodies of Spain and the Public Prosecutor's Office shall abstain from proceeding *ex officio* and also when receiving a charge or accusation when the following three conditions are met: when the alleged perpetrators are not Spanish nationals; when the acts take place in other States; and when the crimes *are objectively the competence* of the Court (italics added). In a strict interpretation, war crimes, genocide and crimes against humanity (crimes that are the objective competence of the Court together with that of aggression pursuant to Article 5 of its Statute) committed abroad could only be tried in Spain when the perpetrators are of Spanish nationality, *translating into a blanket suspension of universal jurisdiction foreseen until now in Article 23.4 of the LOPJ*. Said suspension could be interpreted as a gesture of extreme respect for the International Criminal Court generally preventing that, by virtue of the complementarity principle (Article 17 of the ICC Statute), action by the Spanish courts could hinder the operation of the Court in criminal proceedings involving the mentioned crimes when committed outside of Spain and involving victims that are not of Spanish nationality. Now, considering that the mandate to abstain contained in the preliminary draft only requires that the crimes be included within the objective competence of the Court and not that the Court actually assume such effective competence, the jurisdiction of the Spanish courts would be excluded even if the crimes in question are committed within national territory or by nationals of States that are not party to the Statute and regardless of whether the suspect is found in Spanish territory or not. In this latter case, the precept in question is hardly compatible with the obligation to extradite or try and to not grant asylum or refuge corresponding to the State of custody.

[50] For the Supreme Court, the additional connection based on the Spanish nationality of the victims must be viewed in relation with the specific crime that is taken as the basis to confirm the competence and not with other crimes that could be revealed as the facts related to said crime unfold (*F.D.* 10, paragraph 15). Thus, in the ruling, Spanish jurisdiction is maintained exclusively with respect to the alleged torture committed against Spanish citizens and not with respect to this same crime committed in Guatemala against individuals of other nationalities. That same argument also rules out the competence of the Spanish courts to carry out criminal proceedings for the alleged crime of genocide committed in

minority, the Supreme Court has reinterpreted Article 23.4 of the *LOPJ* such that it would not envision the universality principle if the suspect is not present on Spanish soil but rather the passive personality principle,[51] the only one of the more or less generally accepted titles of jurisdiction to which no allusion was made in said law.

b) Assessment of the new Supreme Court doctrine from the standpoint of international law

An assessment of the effect that the new turn taken by the highest body of Spain's judiciary has had on Spanish practice with regard to universal jurisdiction obviously implies taking part in a debate that is still open and deeply impregnated with ideological connotations and in which personal conceptions of international law are projected. In the end, above and beyond cases of expressed, unquestionable and general recognition of the universality principle whether through conventions with broad-based and representative participation or through United Nations General Assembly resolutions that are adopted by consensus and are the object of systematic reiteration, acceptance of the operability of universal jurisdiction in accordance with general international law with respect to crimes of international concern – especially

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Guatemala in light of the fact that "no connection with a national interest of Spain is perceived with respect to this crime. It is possible to specify said connection in accordance with the nationality of the victims, but the perpetration of a crime of genocide against Spaniards has not been either denounced nor perceived. Neither is it directly linked with other relevant Spanish interests although such interests have been seriously affected by acts that could be qualified as different crimes committed in the same historical context (*F.D.* 10, paragraph 3).

[51] As pointed out by the dissenting judges, in practice the majority judgement replaces the universal jurisdiction criteria set out in Art. 23.4 of the *LOPJ* with passive personality criteria: "Application of the reasonability criteria put forward above could allow a national court to which extraterritorial competence is generally attributable in these cases, as is the case in Spain with the *Audiencia Nacional* (national court), to refuse the abusive exercise of jurisdiction in relation to alleged criminal acts that take place in countries that have no link, in a broad sense, with Spain, with Spanish citizens, with its interests or with its relations. This restriction can be assumed as long as its objective is reasonable, i.e. that of avoiding the effect caused by an excessive number of this sort of proceeding and guaranteeing the effectiveness of jurisdictional intervention given that in cases where there is a complete absence of connective links with the country and with the acts denounced, in the broad sense expressed above, the practical effectiveness of the proceeding could be null" (. . .). "If, however, we interpret the connective link, as is done in the majority sentence, in such a restrictive manner so as to only include cases in which there are victims who are Spanish nationals that, supposing that competence is based on genocide, must also form part of the ethnic group that has suffered that crime, we are eliminating in practice the principle of universal jurisdiction, repealing Art. 23.4 of the *LOPJ*. In practice, the criteria according to which jurisdiction is attributable in these cases would no longer be the nature of the crime as expressly set out in the precept, but rather the victim's nationality" (*F.D.* 11, paragraphs 7 and 8).

non-conventional war crimes, genocide or crimes against humanity[52] – is only possible if logical consequences are related to the developments that contemporary international law has undergone in the area of the individual's international responsibility. Thanks to the evolution in the so called legacy of Nuremberg[53] that has taken place since the end of the cold war, today there can be no possible doubt that certain acts that seriously violate the values and interests that are accepted by the international community as a whole as fundamental and that are within the framework of the types mentioned, are of a criminal character in accordance with an international legal system that, at the same time, views the repression of such acts as a structural and essential demand, so to speak, of international order itself.

Given that this is part of the unquestionable collective heritage of contemporary international law, the traditional absence of operational international criminal courts and the risk of impunity inherent therein should authorise all States, within the framework of a sort of *cosmopolitan functional double-duty*, to assume the tutelage of essential common interests exercising their *ius puniendi* to punish those who, for the perpetration of acts that are the focus of universal reprobation, earn the label of *Hostis humanis generis*, enemies of all humanity.

Acceptance of this reasoning presupposes admitting that the essential values and interests recognised by *positive* contemporary international law, rooted in basic considerations of humanity, cannot be reduced to mere rhetoric in light of the international community's institutional shortcomings. Universal jurisdiction is clearly not a panacea when it comes to preventing and punishing attacks against essential common interests. Moreover, it is not exempt from possible abuse especially in light of the fact that, for the most part, universal jurisdiction is not exercised by all who would like but rather by those who are also able to do so. Despite this fact, it appears essential to admit that, within certain limits and as an indispensable element in combating the traditional impunity with which perpetrators commit such crimes, the principle of universal jurisdiction is reasonable[54] and, collaterally, legally legitimate – at least

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[52] As is well known, the lack of repressive provisions contained in the Hague Convention IV of 1907 on the laws and customs of war on land and in Additional Protocol II to the Geneva Conventions, has meant that a large proportion of war crimes (mostly violations of the laws and customs of war alluded to in Article 3 of the ICTY Statute and violations of Article 3 common to the above-mentioned Geneva conventions) still lack today greater conventional coverage than that offered by the statutes of the international criminal courts only with regard to determining their competence. The same can be said of crimes against humanity in light of the very limited conventional provision for certain acts (torture, forced disappearance) that, under certain conditions, could be described as such. A different case is the problem of genocide, an indisputable crime of international concern in accordance with the 1948 Convention but with respect to which no more national jurisdiction is *expressly* recognised (compulsory jurisdiction, however) than that of the State in which the crime was perpetrated.

[53] For an excellent treatise on the subject in Spanish doctrine see V. Abellán Honrubia, "La responsabilité internationale de l'individu", *R. des C.*, vol. 280 (1999), pp. 137 and subsequent.

[54] As regards extra-territoriality in general – and therefore not only restricted to criminal matters – a defence has been made for some time now as to the need for a reasonability cri-

until which time the will of the majority in favour of the institutional development of international criminal jurisdiction becomes a full reality.

In short, the international responsibility of individuals for the most serious crimes of international concern, on the one hand, and the need to combat impunity in light of the international public order institutional deficit, on the other, are from our point of view and not without limits of course, the elements that, in and of themselves, allow for the justification of the exercise of universal jurisdiction with respect to such crimes as being reasonable and legitimate. This being the basis for the universality principle, it should also be used as the parameter to confirm whether the presence of the suspect in the territory ought to be an inexcusable requisite for the exercise of such principle, even to the point of excluding, in the event that such requisite is not met, the initiation of any investigative act and the activation of the mechanisms of international criminal cooperation (basically in the form of extradition) with a view to achieving the arrest and surrender of the suspect.

The potential for a State to initiate legal proceedings with a view to obtaining the arrest and carrying out the subsequent trial of suspects for crimes of international concern that are not found within their territorial borders – as was the case in the *Argentinean and Chilean cases* and in the *Guatemalan case* – can be based, in conventional terms, on the above-mentioned clause reiterated in numerous conventions on international criminal law pursuant to which "no criminal jurisdiction exercised in accordance with national legislation is excluded". For the Supreme Court in the Guatemalan case, that conventional affirmation does not seem to imply recognition of the universality principle. However, as it has been pointed out, "in light of the object and aim of these treaties, this provision can only be interpreted in the sense of broadening the possibilities foreseen in the Convention and that, possibly due to a lack of consensus, did not materialise. Could the party States establish universal jurisdiction for the repression of these acts in their domestic legal systems? What other interpretation could there be? Those that negotiated these conventions implicitly assumed the legitimacy of actions over and above those provided for in their provisions".[55] If this is true and it is also considered that the clause cited generally supplements and does not replace the other that, for the state of custody, establishes

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teria to add to the generally established jurisdictional links with a view to resolving conflicts of competence. Such reasonability may only be elucidated by contrasting, from the standpoint of the object and purpose of the regulation the extra-territorial enforcement of which is in question, the proximity of the case with the connective links in the enforcing state. For further information see F. A. Mann, "The doctrine of jurisdiction in International Law", *R. des C.*, 1964–I, T. 111, pp. 67 and subsequent; or B. Stern, "Quelques observations sur les règles internationales relatives à l'application extraterritoriale du droit", *AFDI*, vol. 32 (1986), pp. 45 and subsequent.

[55] E. Orihuela Calatayud, "Justicia universal y derechos humanos", in J. Soroeta Liceras (ed.), *Cursos de Derechos Humanos de Donostia-San Sebastián*, vol. III, Zarautz, 2002, pp. 131–132.

the obligation of trying or extraditing, the logical conclusion can be none other than the admissibility of universal jurisdiction *in absentia*.

The above-mentioned clause could be opposable *erga omnes*, and not only between the parties, when the corresponding convention is the object of general and representative participation as is the case with torture, terrorism in the area of air safety or narcotics trafficking.[56] Regardless of this fact, if the argument set out above on the recognition of universal jurisdiction in general international law is accepted, the very basis of the universality principle should justify, at least with respect to the most serious crimes of international concern, the non-compulsory exercise of such principle even in the absence of the suspect in national territory. In accordance with said reasoning, the object and purpose of the universality principle, that which makes its enforcement reasonable and therefore legitimate, is the fight against the extended impunity of the perpetrators of acts the punishment of which, in light of their grave affront to common essential values, is a requirement of international law itself. In this sense, at least in the case of crimes committed from the vantage point of power structures, when the will of the State to punish tends to be especially weak, refusal of universal jurisdiction *in absentia* could be synonymous with impunity.[57] Therefore,

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[56] On the degree of acceptance of the different international criminal law conventions see our work *Jurisdicción universal . . ., op. cit.*, section 2.3.

[57] It is the view of the Spanish Supreme Court that in the absence of other connective links based on the principles of territoriality, active or passive personality or protection of interests, only the presence of the suspect in national territory, in accordance with the principle of supplemental justice or law regarding criminal representation, would authorise a State's exercise of jurisdiction, "thus providing for an orderly reaction against impunity and eliminating the possibility of States being used as a refuge" (*F.D*. 9, paragraph 7, and *F.D*. 10, paragraph 13). Having accepted that the object and purpose of broadening the traditional titles of jurisdiction is to *combat impunity*, it stands to reason that compulsory universal jurisdiction *in presentiam* by means of the *aut iudicare aut dedere* formula (i.e. preventing perpetrators from taking refuge in other States), could be sufficient in achieving said objective when the States with the most direct connective links – especially the place where the act was committed, the nationality of the victims or the direct holder of the *individual* protected interests – tends to also show a will to prosecute. This is usually the case with transnational crime – trafficking in and exploitation of human beings or narcotics trafficking – or international terrorism, areas in which difficulties in effective prosecution are rooted in the transnational and generally organised nature of the crime or the frequent involvement of third States but not in a lack of will to prosecute on the part of the *most directly involved* States. In contrast, as international practice has demonstrated time and time again however, preventing other States from becoming places of refuge is without a doubt an absolutely insufficient measure within the context that could be denominated as *official criminality*. Within this scope that would include the majority of the most serious crimes of international concern – war crimes, crimes against humanity, genocide – and other crimes of international significance not necessarily included among those just listed – torture, forced disappearances, extra-judicial executions – the fact that these crimes are habitually or necessarily committed by the state power structures themselves means that the State that is supposed to take the greatest interest in the suppression of acts that represent a grave affront to not only individual but also common interests, generally lack the will to prosecute and tend to be the place of choice for perpetrators seeking refuge.

even if merely a warning, allowing a pre-trial investigation and the activating of the mechanisms of international criminal cooperation can serve not only as a reminder to the suspect of the consequences that the international legal system attaches to crimes allegedly committed, but also a relief, a relative one of course, as regards the rights that this same legal system affords to the victims.

c) The limits of universal jurisdiction in absentia: *proscription of extra-territorial executive jurisdiction and respect for the competence of the International Criminal Court*

The above does not mean, however, that all forms of universal jurisdiction with the purpose of combating impunity for crimes of international concern – not even the most heinous of them – have a place in contemporary international law. In this sense, despite reiterated violations by a very small number of States that consider legitimate the unilateral exercise of material coercion abroad for the capture and arrest of perpetrators of crime, the prohibition of *extra-territorial executive jurisdiction*, already proclaimed in the *Lotus* case by the Permanent Court of International Justice[58] and reiterated by the Security Council in the *Eichmann case*,[59] is not only supported by wide-ranging international practice[60] but also appears to be a logical and necessary corrective measure to the principle of universality rooted in the notion of sovereignty and its corollaries. Fortunately Spain's practice in matters of the arrest of alleged perpetrators of crimes of international concern, relatively prolific over the last several

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[58] "Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". Judgement cited, pp. 18–19. The same stance was taken more recently by two of the judges that formulated dissenting opinions in the *International Arrest Warrant* case (ODA, paragraph 13 and Van den Wijngaert, pararaph 49), as well as by the ECHR in its very controversial decision for a number of different reasons in the *Bankovic* case. ECHR, Grand Chambre, décision sur la recevabilité de la requête n. 52207/99, *Bankovic et autres contre 17 Etats parties*, 12 December 2001, paragraph 60, HUDOC REF. 00022674.

[59] SC Res. 434, of 13 June 1960. On the already mentioned aspect of the Eichmann case, J. E. S. Fawcett, "The Eichmann Case", *BYBIL*, vol. 38 (1962), pp. 184 and subsequent; L. Green, "Aspects Juridiques du Procès Eichmann", *AFDI,* vol. 9 (1963), pp. 153 and subsequent; or H. Silving, "In Re Eichmann: A Dilemma of Law and Morality", *AJIL*, vol. 55 (1961), pp. 311 and subsequent.

[60] See, for example, Articles 14 of the International Convention against the Taking of Hostages of 1979, 9 of the Rome Convention for the suppression of unlawful acts against the safety of maritime navigation of 1988, 4 of the Inter-American Convention on the Forced Disappearance of Persons of 1994, 18 of the International Convention for the Suppression of Terrorist Bombings of 1997, 22 of the International Convention for the Suppression of the Financing of Terrorism of 1999 or 4 of the United Nations Framework Convention against Trans-national Organised Crime of 15 November 2000.

years regarding narcotics trafficking with the more or less expressed consent of the flag-state,[61] has proven to be fully respectful of the demands of international law.

While this is widely accepted, the principle by which the international illegality of the international seizure of persons should be an obstacle to bringing a suspect to justice once he has been forcibly taken to the territory and is present therein[62] does not enjoy the same degree of acceptance. The illicit nature of such seizures in accordance with international law and its inconsistency with the fundamental right of personal freedom and security recognised in a number of instruments including Article 7 of the International Pact on Civil and Political Rights, should prevent the operability of the maxim *male captus bene detentus*, at least in those States that domestically claim to operate under the ideal of rule of law. Under rule of law, the end can never justify illicit means even if the latter are only implemented abroad.

That, however, is not the only limit that can be put on universal jurisdiction *in absentia*. If, as has been pointed out, that modality of universal jurisdiction is based on the fact that it is an indispensable instrument to combat impunity as regards crimes especially damaging to common interests, the development of international criminal institutions representative of the international community and capable of taking on that mission should advance along the path of, if not yet fully questioning its virtuality, reconsidering its scope and limits. In this sense, if the allowances that needed to be made permitting the creation of the International Criminal Court[63] prevent, at least in the middle or long term, being able to completely dispense with the universality principle, efforts should be made to avoid allowing said principle to stand in the way of the effective operation of the new Court. From this perspective, mindful

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[61] Reports on said practice can be found in the *REDI* publication in the section entitled "*Jurisprudencia española de Derecho Internacional Público*" (Spanish case law in international public law). See for example, the "Grisú" case with a note by C. F. Fernández Beistegui in *REDI*, vol. 48 (1996), pp. 180 and subsequent, or the more spectacular case relative to the capture of the "*Archangelos*" with a note by J. Zavala Salgado, in *REDI*, vol. 49 (1997), pp. 165–169. For a more complete analysis see V. Carreño Gualde, "Suppression of the illicit traffic in narcotic drugs and psychotropic substances on the High Seas: Spanish Case-Law", *SYIL*, vol. IV (1995–1996), pp. 100 and subsequent.

[62] With regard to this see V. Coussirat-Coustère and P.M. Eissemann, "L'enlèvement de personnes privées et le droit international", *RGDIP*, vol. 76 (1972), pp. 348–352 and 356–364; F. A. Mann, "Reflections on the Prosecution of Persons Abducted in Breach of International Law", in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, Dordrecht, 1989, p. 407; or, in Spanish doctrine, commentaries relating to the *Roldán* case by C. Espósito, "El caso Roldán: ¿Detención irregular?", *Meridiano CERI*, n. 3 (1995), pp. 21 and subsequent; and J. González Vega, "*Male captus, bene detentus*: extradición, detención y derechos humanos en el contexto del 'caso Roldán'", *REDI*, vol. 47 (1995), pp. 119 and subsequent.

[63] I take the expression from R. Zafra Espinosa De Los Monteros, "El establecimiento convencional de la Corte Penal Internacional: Grandeza y servidumbres", in J. A. Carrillo Salcedo (Coord.), *La criminalización* . . ., cit., p. 190. Said allowances fundamentally although not exclusively affect limits imposed on its jurisdiction by virtue of Articles 11 and 12 of the Rome Statute.

of the risks that the universality/complementarity combination causes for its effective operation,[64] it is not preposterous to propose an interpretation of the Statute according to which complementarity would only be able to operate with respect to national jurisdictions that have special connective links with the crimes in question.[65] The fact is that an effectively operating Court would make combating impunity by means of the exercise of universal jurisdiction unnecessary and thus such exercise would lose the reasonability that, in other cases and from our point of view, justifies it.

3. THE SUBSIDIARITY OF THE SPANISH COURTS' EXTRA-TERRITORIAL JURISDICTION

Reasons of principle, linked to the mostly territorial projection of sovereignty, but also very practical considerations related to ease in collecting and presenting evidence and for the development of the hearing, put the State in which the crime was committed in a privileged position for the trying of crimes of international concern. It is therefore not surprising that several elements of international practice,[66] recog-

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[64] Highlighted, among others, by F. Lattanzi, "Compétence de la Cour Pénale international et consentement des États", *RGDIP*, vol. 103 (1999), pp. 430–431; J. Alcaide Fernández, "La complementariedad . . .", *art. cit.*, pp. 399 and 433; P. H. Weckel, "La Cour Pénale Internationale. Présentation général", *RGDIP*, vol. 102 (1998), p. 986; A. Rodríguez Carrión, "Aspectos procesales más relevantes presentes en los Estatutos de los Tribunales Penales Internacionales: condiciones para el ejercicio de la jurisdicción, relación con las jurisdicciones nacionales", in J. Quel López, *Creación de una jurisdicción penal internacional*, Madrid, 2000, p. 174; C. Escobar Hernández, "Concurrencia de jurisdicciones y principio de complementariedad", in M. García Arán and D. López Garrido (coords.), *op. cit.*, pp. 258–259; I. Lirola Delgado and M. M. Martín Martínez, *La Corte Penal Internacional. Justicia versus impunidad*, Barcelona, pp. 162 and subsequent; or A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", *EJIL*, vol. 10 (1999), pp. 158 and subsequent.

[65] Thus, the above-mentioned (see note 49) exclusion of jurisdiction provided for in Article 7.2 of the preliminary draft of the law on cooperation with the International Criminal Court should be well received if it were only to be applied *in cases in which that body has effective competence*.

[66] Article 12.2 of the ILC's draft Code of Crimes Against the Peace and Security of Mankind, for example, admitted as an exception to the enforcement of the *non bis in idem* principle, the possibility of a second national trial by the courts of another State when the acts in question had taken place in its territory. The commentary justifying such exception asserts that "the State within the territory of which the crime was committed has a firm interest" and "is more directly affected by the crime than other States". *Report* . . ., p. 89. This special link was also recognised by the same body two years earlier in Article 47.2 of the Draft Statute of an International Criminal Court in the sense of considering the domestic legal system of the place where the crime took place – among others – as regards the amount or duration of punishment imposed. *ILC report on the work carried out during the course of its 46th work session*, comment regarding Article 47 of the Draft Statute of an International Criminal Court, paragraph 2. Principle number 19 of the final report presented by the special rapporteur of the Human Rights Commission, L. Joynet, on the issue of the impunity

nise the special interest that said State has in the prosecution of such crimes and that, on occasion, this gives rise to the acceptance of the priority in the hearing on the part of the so called *iudex loci delicti commissi.*[67]

The conditioned priority placed on the State in which the crime was committed (equivalent to the subsidiary character of universal jurisdiction), is firmly rooted in the practice of Spanish courts regardless of the fact that the enforcement of that rule has not been governed by uniform criteria. Already in the cases involving the *Argentinean and Chilean hearings*, the plenary of the National Criminal Court rejected the interpretation of Article 6 of the Convention on Genocide in the sense of granting exclusive jurisdiction to the judges in the place where the crime was committed, proposing instead an alternative interpretation by virtue of which said precept "imposes subsidiarity status upon actions taken by jurisdictions different from those envisioned in the precept. Thus, the jurisdiction of a State should abstain from exercising jurisdiction regarding acts constituting a crime of genocide that are being tried by the courts of the country in which said acts were perpetrated or by an international court".[68]

In an additional step, in the *Guatemala case*, that same legal body not only proclaimed that the rule inferred from Article 6 of the 1948 Convention constitutes rule

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of the perpetrators of human rights violations – civil and political – affirms that "the territorial competence of the national courts continues to be the general rule." Doc. E/cn.4/Sub.2/1997/20/Rev.1. An idea that had already been expressed by the General Assembly when, in 1973, it proclaimed its "Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity", including the principle that "Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes". Resolution 3074 (XXVIII), of 3 December 1973, section 5.

[67] In the *Bouterse* case the Amsterdam Appeals Court affirmed its competence only after highlighting that, the press news on the development of investigations in Surinam having been confirmed – concerning which there was no trustworthy confirmation – the proceedings should be suspended and, in the event that they conclude with a final judgment, a stay of proceedings should be declared. The 20 November 2000 decision of that court can be found in the *International Committee of Jurists* web page: *http//:www.icj.org/objectives/decision.htm* (visited on 20.12.02). Along these same lines, during the course of a proceeding before the ICJ with respect to the examination of the *International Arrest Warrant* case, the Belgian authorities made an effort to underline the fact that action taken by their judicial bodies against the then Congolese Foreign Minister A. Yerodia Ndombasi, had only been initiated once evidence had been found regarding the Congolese authorities' lack of will to bring him to justice. See, for example, the statements made by the Belgian agent J. Devader and one of the Belgian counsels, D. Bethlehem, during the public hearing of 17 October 2001 (doc. CR 2001/8, p. 22). And also, in the *Eichmann Case*, the Israeli Supreme Court expressly recognised that the State of the territory "is the best place (*forum conveniens*) to hold the trial". Paragraph 12.d, *loc. cit.*, p. 302.

[68] Rulings of 4 and 5 November 1998, already cited, *F.D.* n. 2, *REDI*, vol. 51 (1999), pp. 639 and subsequent.

of a general (and imperative!) nature based on international law,[69] but also proceeded to a clearly disproportionate enforcement of that rule. In its ruling, the National Court considered that this issue should be resolved prior to establishing competence and that, moreover, unless the inactivity or ineffectiveness was due to legislation in force in the State of the territory or due to the passing of a long period of time, the burden of proof lay with the plaintiff.[70]

This way of applying the subsidiarity criteria, however, was questioned by the Supreme Court in its judgement of 22 February 2003 in relation with the same case. In the view of the high court, "the subsidiarity criteria is not satisfactory in the way it was applied by the instance court. The determination of when it is appropriate to intervene in a subsidiary fashion and move forward in the judicial proceedings of specific acts based on the real or apparent inactivity of the territorial State jurisdiction, implies a judgement on the part of the jurisdictional bodies of one State with regard to the capacity to administer justice of those same bodies in another State (. . .) A statement of this sort that can have extraordinary importance in the field of international relations should not be made by state courts. Article 97 of the Spanish Constitution provides for the Government to orchestrate foreign policy and the repercussions that a statement of this nature could have in this area cannot be ignored".[71] Even though the majority judgement is not explicit with regard to the way in which the Spanish courts should go about assessing the priority of the State in which the crime was committed, this does not seem to be a point of discrepancy for the dissenting minority[72] for whom "this criteria is not sufficient to exclude the enforcement of Art. 23.4.a) of the *LOPJ*, calling for the full accreditation of the inactivity or ineffectiveness of the criminal persecution on the part of the territorial jurisdiction as a requirement for the admittance of an extra-territorial suit for genocide (. . .). For a case of this nature to be admitted in a court of law, the same requirements that apply to acts allegedly constituting the crime of Genocide, apply here as well. The provi-

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[69] In its 13 December 2000 ruling the National Court held that the principle of universal persecution found in Article 23.4 of the *LOPJ* should be palliated "with the criteria of jurisdictional attribution of Article 6 of the Convention (. . .) and also with the general principle of subsidiarity that, in our view, forms part of the international 'ius cogens' that has crystallized in Article 6 of the Convention and, more recently, in Article 17 and subsequent of the Statute of the International Criminal Court". *F.D.* 2.

[70] Indeed, having pointed out that "there was no legislative impediment blocking the Guatemalan justice system's persecution of the crime of genocide allegedly committed in the territory of that country" (*F.D.* 3), the 13 December 2000 ruling concluded that "there is no evidence of rejection in the State of the territory (. . .) of the accusation and connected charges filed before Central Trial Court number 1 and we cannot infer judicial inactivity by virtue of the passage of time as was feasible in Chile and Argentina given the number of years that had gone by since the end of the military dictatorships because, as has been pointed out, the material serving as the main nucleus of the case, the initial charge, was first made on 25.02.99 and the claim was filed on 02.12.99 and no Guatemalan court decision was attached rejecting such charge" (*F.D.* 4).

[71] Judgement cited, (*F.D.* 6, paragraphs 5 and 6).

[72] As is recognised in the individual vote. *F.D.* 1.

sion of serious and reasonable evidence that the serious crimes denounced have not, to date, been effectively followed up on by the territorial jurisdiction, for whatever the reason, does not imply any sort of negative judgement on the political, social or material factors that led to said 'de facto' impunity".[73]

This stance taken in Spanish practice, based on recognition of the priority of the judge in the place where the crime was committed, is fully coherent with the foundation upon which, from our point of view and as we have pointed out, the universality principle is based. If the State of the territory has the effective capacity and will to punish the perpetrators of the crime in question, there is no reason to combat impunity where the connective links to the crimes are limited to those provided by the community and essential nature of the interests damaged. However, it could be necessary to make some clarifications as regards such a generic proclamation on the subsidiarity of our courts' extra-territorial jurisdiction. Without prejudice to the fact that recognition of the special status of the State in which the crime was committed should be an incentive for extradition or surrender, the absence of a general obligation as concerns international criminal cooperation imposing such extradition or even legal requirements concerning human rights that could stand in the way of such extradition, cannot be ignored.

In this sense, the priority of the State in which the crime was committed should not serve as a pretext making it possible for Spain to fail to fulfil the obligation – general in our view[74] – that it has to put on trial, if it does not extradite, the perpetrators under its custody of the most serious crimes of international notoriety. In accordance with this interpretation, therefore, the priority of the *iudex loci delicti commissi* could in fact be an obstacle to the exercise of universal jurisdiction *in absentia* – or as the Supreme Court put it, for the implementation of the passive personality principle – but

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[73] Individual opinion, *F.D*. 4.

[74] The wide ranging and representative participation in some of the conventions that provide for universal jurisdiction under the formula *aut iudicare aut dedere* are a reflection of a general consensus as concerns the existence of an extra-territorial obligation to prosecute, in the event of non-surrender, with respect to crimes such as serious infractions of the Geneva Conventions, torture or certain terrorist acts against air safety. Also, recognition of this same obligation by institutions representing the international community, especially resolutions of the General Assembly adopted by consensus and through statements reiterated periodically regarding international terrorism or forced disappearances could also serve as the basis for affirming the existence of an general obligation to prosecute with respect to the State in the territory of which the suspect is found. In this sense, despite frequent failure to fulfil this obligation, that set of pronouncements may mean that, by virtue of general international law, no State can become a land of refuge or a safe haven of passage for the perpetrators of acts that are an affront to the essential interests and values of the international community as a whole. Moreover, especially when it comes to the most serious crimes of international notoriety and independent of conventional coverage or not, the arresting state, as seems to be insinuated in the preamble of the ICC Statute, would very probably be in violation of international law if it failed to put the suspect on trial despite having opted to not extradite or surrender said suspect. For more detailed development of these ideas see my work, *Jurisdicción universal . . ., op. cit.*, section 4.1.

not for its exercise by Spanish judges when the competent authorities decide not to extradite or, in light of juridical problems, cannot extradite, because any other solution would be equivalent to impunity in clear contradiction of the object and purpose of the obligation to extradite or put on trial.

4. EXTRA-TERRITORIAL JURISDICTION AND IMMUNITY OF FOREIGN STATE REPRESENTATIVES

The fact that, given their massive and/or systematic nature, the most serious crimes of international concern tend to be perpetrated from within the very structures of state authority with the participation of the highest ranking state officials, has led to the emergence of the issue of the virtue of traditional immunity and inviolability that international law affords such officials and their functionality as a limit with respect to extra-territorial jurisdiction. As demonstrated by the *ad hoc* criminal courts in the *Milosevic*[75] or *Kambanda*[76] cases, there can be no doubt today that the principle of the international responsibility of the individual for especially serious crimes of international concern prevails over immunity[77] and that such prevalence is fully operational, within the framework of its competences, before international courts. In contrast,

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[75] The indictment against the former Yugoslav President, S. Milosevic, was adopted in May 1999, a year and a half before he was overthrown on 6 October 2000 and while he still figured as the head of the Yugoslav State. ICTY, case IT-02–54, *Prosecutor against Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljus Ojdanic, Vlajko Stojilykovic*, Indictment of 24 May 1999.

[76] Following his confession, the ICTR sentenced *J. Kambanda*, prime minister of the provisional government of Rwanda from 8 April to 17 July 1994, to life imprisonment for his involvement in the genocide of the Tutsi people. ICTR, Chambre I, *Le Procureur c. Jean Kambanda*, affaire ICTR-97–23, jugement du 4 septembre 1998. Subsequent to an appeal, the judgement was confirmed on 19 October 2000.

[77] One of the most firmly rooted rules in international criminal law is that which is derived from the principle of irrelevance of official position. The fact is, while the origin of the idea of the international criminal responsibility of the individual is generally rooted – without prejudice to other more remote precursors – in Article 227 of the Versailles Treaty and in the pretension foreseen therein – and failed in practice – regarding the prosecution of the former German emperor William II of Hohenzollern, the principle of irrelevance of official position was reiterated time and time again in practically all international instruments on the subject, whether in the statutes of all of the international criminal courts created or foreseen to date – from the Statute of the International Military Tribunal of Nuremberg (Art. 7) to the Statute of the International Criminal Court (art. 27.1), from the Statute of the Tokyo Tribunal (Article 6) to the Statutes of the International Criminal Tribunals for the Former Yugoslavia (Article 7) and Rwanda (Article 6) – in all of the ILC projects focusing on the essential principles of international criminal law – from the principles of international law recognised under the Statute and by the judgements of the 1950 Nuremberg Tribunal (principle III) to the draft Code of Crimes Against the Peace and Security of Mankind of 1954 (Art. 3) and 1996 (Art. 7) – or in one of the most significant conventions on this subject – the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Art. 3).

it has not always been so clear – and in some aspects remains unclear – just where to situate the exact point of balance between the two institutions when the responsibility requirement takes place before national courts.[78]

a) Exclusion of functional immunity (ratione materiae) *in the case of former state representatives*

At any rate, in accordance with the most recent international practice, it now appears necessary to make a distinction between state officials that have left office or those that are still in office at the time that the exercise of extra-territorial jurisdiction is sought. With respect to the first supposition, in some recent cases – especially the *Pinochet* case in the United Kingdom[79] and Belgium,[80] but also the *Bouterse*

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[78] For recent treatment of these issues in Spanish doctrine see F. Jiménez García, "Justicia universal e inmunidades estatales: Justicia o impunidad ¿una encruicjada dualista para el Derecho Internacional?", *ADI*, vol. 18 (2002), pp. 63 and subsequent.

[79] In accordance with the majority position defended in the House of Lords second appeals committee as regards this case, although the criminal nature of certain acts does not preclude their consideration as acts carried out in the exercise of official functions (in contrast with the assertion made by the majority of the first appeals committee – Lord Nicholls, *ILM*, vol. 37/1998, p. 1333; Lord Steyn, *ibid.*, p. 1337; and Lord Hoffmann, *ibid.,* p. 1339–, and two of the lord-judges of the second committee – Lord Browne-Wilkinson, *ILM*, vol. 38/1999, pp. 593–594; and Lord Hutton, *ibid.*, pp. 638–639), the institution of the immunity of former state representatives would be incompatible with the notion of crimes against international law and, with respect to such crimes, an exception to the mentioned general rule of immunity *ratione materiae* was made. The grounds for that exception are based on the imperative (and therefore prevalent) nature of the rule that outlaws and orders the prosecution of crimes against international law (Lord Hope of Craighead, *ILM*, vol. 38/1999, pp. 625–626; Lord Phillips of Worth Matravers, *ibidem*, p. 661; and especially, Lord Millet, *ibid.*, p. 651), as well as the existence of an implicit renouncement of immunity inherent in the international criminal type, torture, that foresees the involvement of civil servants or state officials as both a necessary and habitual element (Lord Saville of Newdigate, *Ibid.*, pp. 642–643). For an exhaustive analysis of the different positions taken in British justice in this respect, see A. Remiro Brotons, *El caso . . ., op. cit.*, pp. 109 and subsequent. In light of the different opinions reflected in the Pinochet case, it is no easy task, as was pointed out by S. Villalpando ("L'affaire Pinochet: beaucoup de bruit pour rien? L'apport au droit international de la décision de la Chambre des Lords du 24 mars 1999", *RGDIP*, vol. 103/1999, pp. 416 y 418), to decipher the sense in which the case can be considered as a precedent. The options range from minimalist interpretations that would limit the exclusion of immunity to cases of conventional crimes that, like torture, include the action of official agents as an element of the type, to maximalist positions that, highlighting the prevalence of the values that are safeguarded from crimes against international law, would exclude all possible invocation of immunity by former state representatives suspected of committing these types of crimes regardless of whether such crimes have explicit conventional backing or not. However, despite the fact that there are still many open issues, there is something that, as was pointed out by J. M. Sears ("Confronting the 'Culture of Impunity': Immunity of Heads of State from Nuremberg to ex parte Pinochet", *GYIL*, vol. 42/1999, p. 146), seems clear in the wake of the Pinochet case: the notion of the absolute immunity of former State representatives is unsustainable today.

[80] In his decision of 8 November 1998 regarding the jurisdiction of the Belgian justice system

case[81] and, to a lesser degree, the *Habré* case[82] – one can observe a clear tendency against the operability of functional immunity (*ratione materiae*) in the case of former state officials once they have left office. This may be so because it is understood that by applying the exception of the general rule envisioned in Article 39.2 of the 1961 Vienna Convention on diplomatic relations, crimes of international concern could never fall under the scope of application of said immunity because such crimes could never be considered as acts performed in exercise of official functions – i.e., because the rule of immunity would not be applicable – or it may be because, even if still considered as such kind of acts, prosecution of such crimes is an international requirement that prevails over the general rule thus blocking its operability.

The practice of the Spanish courts as concerns the immunity of former state representatives is clearly aligned with the tendencies outlined above although it is surprising that, in light of the effort made by the Public Prosecutor to block the action taken by Spain's National Court based on the universal jurisdiction title of Article 23.4 of the *LOPJ*, the issue of immunity was not even suggested, at least initially, in the Spanish version of the *Pinochet* case or in the *Guatemala* affair. The fact that, in the first of the two cases, the National Court affirmed its jurisdiction and the fact that in the latter the Supreme Court ended up backing very limited extra-territorial jurisdiction of Spanish courts for the prosecution of torture committed during the Guatemalan dictatorship against Spanish citizens, despite the fact that some of the alleged per-

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to hear the suits filed in that country against ex-dictator Pinochet, Judge Vandermeersch of the Brussels First Instance Court refused to give crimes of international concern any possible consideration as acts carried out in the line of official functions. See the note by 701.

[81] In response to the allegation of the defence of D. D. Bouterse that held that the acts for which he was being tried had been committed at a time during which the accused presided over the military junta that governed Surinam and were therefore covered by his immunity as the former Head of State, the appeals court answered as follows: "The Court of Appeal can leave aside whether that insufficiently reasoned argument on Bouterse's position is correct. After all, the commission of very serious offences – as are concerned here – cannot be considered to be one of the official duties of a head of state". Decision ('beschikking') of 20 November 2000. Available on the International Commission of Jurists' web page: *http://www.icj.org/objectives/decision.htm* (visited on 21.2.02).

[82] The decisions of the Prosecution section of the Dakar Appeals Court of 4 July 2000 and of the *Cour de Cassation* of Senegal of 20 March 2001, refusing to grant jurisdiction to the courts of that country for criminal proceedings against former Chad president, H. Habré were based exclusively on the lack of a domestic provision for universal jurisdiction foreseen in Article 5 of the 1984 Convention against torture and did not take possible immunity *ratione materiae* into consideration at all. On this case see, I. Sansani, "The Pinochet Precedent in Africa: Prosecution of Hissène Habré", *Human Rights Brief*, Center for Human Rights and Humanitarian Law, Washington College of Law, vol. 8 (2001), pp. 32–35, as well as a lengthy dossier on the web page of Human Rights Watch at the following address: *http://www.hrw.org/french/themes/habre-decision.html* (visited on 22.2.02).

petrators identified in the suits are sheltered by *ratione materiae*,[83] are factors that could legitimately be taken as an acceptance, on the part of our courts, of the interpretation according to which such immunity does not cover acts that, under international law, are considered crimes. In this specific aspect, Spanish practice appears to be in line with the most recent trends in this area and is therefore well received.

b) The subsistence of personal immunity (ratione personae) *in the case of acting state representatives*

In contrast, when the case involves high-ranking acting state representatives, the position most defended by the doctrine,[84] supported by certain domestic practice – the *Gadafi* case in France[85] – as well as by Article 98.1 of the Statute of the International

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[83] This is the case of, at least, the former heads of Government, E. Ríos Mont and O. H. Mejías Víctores, and of the former President of the Republic, F. R. Lúcas Garcu.

[84] Among others, see, M. CH. Bassiouni, *Crimes Against Humanity in International Law*, 2nd ed., Haya-Londres-Boston, 1999, p. 508; M. Cosnard, "Les immunités du chef d'Etat", Rapport introductif, SFDI, Colloque de Clermont (juin 2001), *Le chef d'Etat et le droit international*, p. 24; Ch. Dominice, "Quelques observations sur l'immunité de jurisdiction pénale de l'ancien chef d'Etat", *RGDIP*, vol. 103 (1999), p. 301; S. R. Ratner y J. S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, 2nd ed., 2001, pp. 141–142; A. Remiro Brotons, *El caso . . ., op.cit.*, pp. 117 and 121–122; or A. Watts, "The legal position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *R. des C.*, vol. 247 (1994), p. 54. Also, in Article 2 of its Resolution on the immunity of Heads of State and Government adopted by the *IDI* during its 2001 Vancouver session, it affirmed that "(e)n matière pénale, le chef d'Etat bénéficie de l'immunité de juridiction devant le tribunal d'un Etat étranger pour toute infraction qu'il aurait pu commettre quelle qu'en soit la gravité". In the opposite sense, contrary to the subsistence of any sort of immunity in the case of the most serious crimes of international concern see, A. Bianchi, "Immunity versus Human rights: The Pinochet Case", *EJIL*, vol. 10 (1999), pp. 260 and subsequent, as well as the Committee on International Human Rights Law and Practice of the ILA, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, London Conference (2000), p. 14 and conclusion number 4, p. 21.

[85] In its judgement of 13 March 2001, the Court of Cassation repealed the decision of the Paris Appeals Court through with the latter body affirmed that the immunity of acting Heads of State could not be extended to terrorist acts. The repeal was based on the fact that "international customs go against allowing acting Heads of State, in the absence of international provisions stating otherwise that are imposed upon the parties involved, to be the held liable before the criminal jurisdictions of a foreign State (. . .) . In accordance with the current state of international law the crime denounced, regardless of its gravity, does not form part of the exceptions to the principle of jurisdictional immunity covering acting foreign Heads of State and thus, in delivering its judgement, the *chambre d'accusation* has failed to recognise said principle". The text of the judgements delivered by the Cour d'Appel de Paris (arrêt du 20 octobre 2000, n. A 1999 0591) and by the *Cour de Cassation* (arrêt n. 1414 du 13 mars 2001) can be consulted in extract form in *RGDIP*, vol. 105 (2001), pp. 473 and subsequent. The decision of the Cour de Cassation, however, does give rise to some doubts as concerns just what would be considered possible exceptions to the personal immunity of acting State officials. As S. Zappala has pointed out "(a)n *a contrario* interpretation of this passage leads to the conclusion that there are crimes that constitute exceptions to juris-

Criminal Court, has been confirmed by the International Court of Justice in the case relating to the *International Arrest Warrant* (Democratic Republic of Congo versus Belgium), in asserting that said persons "benefit from full immunity from criminal jurisdiction and inviolability abroad".[86]

This latter idea, even before being proclaimed by the International Court, was already relatively well established in the practice of the Spanish courts. In this sense, and along the lines already established by Central Trial Court number 5 in the *Obiang Nguema* and *Hassan II* cases,[87] the confirmation by the plenary of the criminal section of the Spanish National Court of the non-admission of the lawsuit filed against *Fidel Castro* for the crimes of genocide, terrorism and torture, among others, was based on "absolute jurisdictional exemption" derived from the office held and that this loquacious and long-lived dictator continues to hold. In the view of the abovementioned judicial body, "if Spain recognises the sovereignty of the Cuban people and has diplomatic relations with that country, Spanish criminal jurisdiction cannot be attributed to the prosecution of allegedly criminal acts . . . as long as one of the accused is the Honourable Mr. Fidel Castro Ruz who, as concerns Spain, represents the sovereignty of the Cuban people".[88]

As for the rest, the doctrine established by the ICJ in the judgment regarding the international arrest warrant has been followed by both the Supreme Court in the *Guatemala Case*, alluding to the immunity of acting Heads of State and Government as a limit to the exercise of extra-territorial jurisdiction on the part of national courts[89] as well as by Central Trial Court number 4 that has turned to the same doctrine – as well as to the previous doctrine of the National Court itself in the Fidel Castro case – in its non-admission of the suit filed against the Venezuelan President H. Chávez for alleged crimes of terrorism and crimes against humanity committed during the tragic events of 11 April 2002 in Caracas.[90]

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dictional immunity of the Heads of State". "Do Heads of State in office enjoy Immunity from jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation", *EJIL*, vol. 12 (2001), pp. 600 and subsequent. F. Poirat has spoken out in a similar fashion, "Immunauté de juridiction pénale du chef d'Etat étranger en exercice et règle coutumière devant le juge judiciaire", *RGDIP*, vol. 105 (2001), pp. 480–481.

[86] Judgement of 14 February 2000, *cit.*, paragraph 54.

[87] Rulings of 23 December 1998. See "Garzón archiva las acusaciones contra Hassan II y Obiang", *El Mundo*, 24 December 1998.

[88] As is pointed out in another passage of the ruling, it is the condition of acting representatives that is the determining element of the operability of immunity: "It goes without saying that the above solution in no way contradicts a recent resolution delivered by this same Plenary in which the accused was the Senator of the Republic of Chile, General Pinochet, in light of the fact that he was not a foreign Head of State and had already abandoned that office when the appeal filed against the admission of the lawsuit was rejected". National Court Ruling of 4 March 1999; Rapporteur: the Honourable Mr. Jorge Campos Martínez. The most relevant extracts of the ruling may be found, with a note by J. González Vega, in the *Anuario Español de Derecho Internacional Privado*, vol. I (2001), pp. 811–816.

[89] STS cited of 25 February 2003, *F.D.* 8, paragraph 11.

[90] Ruling of 24 March 2003. See: "La Audiencia Nacional remite la querella contra Chávez

Thus,[91] full guarantee of the integrity of the representative functions of such offices seems to constitute an interest meriting special attention in an international society that, given its eminently interdependent nature, needs to conserve the channels through which inter-state relations are conducted. However, as the Court itself recognised in its judgement concerning the *Yerodia Ndombasi* case, the subsistence of personal immunity cannot be synonymous with impunity. In this sense, the essential character of common interests and values, the safeguard of which is at stake, especially points to the need to move forward in the process fortunately under way of institutionalising international criminal justice the jurisdiction of which, as stated in Article 27 of the Rome Statute, cannot be affected by any sort of immunity. But it also points to the need to call for and require, from all members of the international community, greater commitment in the assumption of responsibilities – not the same for all – incumbent upon all in the prevention, and not only the repression, of the most serious crimes of international concern.

5. EXTRA-TERRITORIAL JURISDICTION AND TRANSITION PROCESSES

As has already been pointed out, the fact that the most serious and horrendous crimes against international law can normally only be committed, for practical reasons, from the vantage point of state power structures, coupled with the traditional absence of international criminal courts and the subsistence of a sort of practically absolute *ratione personae* immunity, are factors that oftentimes explain why the prosecution of those responsible is only possible subsequent to the fall of the political regime established and/or maintained by the criminals themselves. When this fall is the result of a popular uprising, a military takeover or any other circumstance against the will of the regime, the demand for responsibilities can take place in the very State in which the crimes were allegedly perpetrated under conditions that, however, are not

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a la Corte Penal Internacional", *El País*, 25 March 2003; and E. Bobourg, "Spain Sends the Case Brought Against Venezuelan President Hugo Chavez to the International Criminal Court*", International Enforcement Law Reporter, June 2003, Victims Compensation*; Vol. 19, No. 6, 1578.

[91] In its judgement of 12 February 2003 mentioned above, the Belgian Supreme Court ended up declaring the non-admissibility of the charges brought against A. Sharon – not so with the charges against the commander A. Yaron – giving preference to common international law over Belgian law; a view shared by the ICJ in the *International Arrest Warrant* case: "Attendu que, sans doute, aux termes de l'article 5.3 de la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, l'immunité attachée à la qualité officielle d'une personne n'empêche pas l'application de ladite loi; Attendu que, toutefois, cette règle de droit interne contreviendrait au principe de droit pénal coutumier international précité si elle était interprétée comme ayant pour objet d'ecarter l'immunité que ce principe consacre; que ladite règle ne peut donc avoir cet objet mais doit être comprise comme excluant seulement que la qualité officielle d'une personne puisse entraîner son irresponsabilité pénale à raison des crimes de droit international enumérés par la loi . . .".

always respectful of the most essential guarantees.[92] Ever since the end of the 80's, however, the replacement of dictatorial regimes with allegedly democratic political systems or the overcoming of situations of civil confrontation, has been the result of national reconciliation processes, implemented more or less by consensus, that have almost always entailed the adoption of amnesties. Although not all amnesty laws adopted are of the same nature, almost all of them do try to prevent the prosecution of crimes committed during the former regime or civil confrontation, under the pretext of not reopening wounds from the past and with a view to achieving reconciliation between social sectors formerly pitted against one another.

With this backdrop, the problem that arises from the perspective of universal jurisdiction has to do with the virtuality that such amnesties could have in preventing the prosecution of crimes pardoned by the courts of other States. In the *Pinochet* case, the stance taken by the E. Frei government was based on the consideration that the exercise of universal jurisdiction by the Spanish authorities, ignoring domestic decisions taken in Chile to make a peaceful transition process possible, could amount to unacceptable interference in the internal affairs of this State. Although the 1978 Amnesty Decree-Law was not mentioned – the dictator's defence strategy before the British courts was that Pinochet should not be prosecuted, but rather that such prosecution should take place in Chile – that is the underlying idea in the letter sent by the then Foreign Affairs Minister of Chile, J. M. Insulza, to the UN Secretary General a few weeks subsequent to the detention of the ex-dictator in London. According to that letter: "In societies undergoing a peaceful transition from an authoritarian regime to a democratic one, there is an inevitable tension between the need to seek justice for all of the human rights violations and the need to achieve national reconciliation. Overcoming this tension is a very delicate task that can only be undertaken by the people of the country in question (. . .) External intervention in this affair, regardless of the intentions of those that have initiated it, does not aid in the achievements of any of these aims but, to the contrary, contributes to the polarization of the society and the deepening, for many years to come, of the differences that still subsist among Chileans".[93]

The invocation of the principle of non-interference in domestic affairs to justify the virtuality of national amnesty measures as an impediment to the exercise of extraterritorial jurisdiction for the repression of the most serious crimes of international concern boils down to using a notion of domestic jurisdiction typical of another historical period and unsustainable in contemporary international law. Without prejudice to the fact that not all transition processes are identical and that not all guarantee the total impunity of those responsible for large-scale atrocities committed under former regimes,[94] a large proportion of the amnesties, as has been recognised by different

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[92] Remember, for example, the tragic end of the Ceaucescus in Romania.

[93] Cit. by A. Remiro Brotons, "La responsabilidad penal individual por crímenes internacionales y el principio de jurisdicción universal", in J. Quel López (coord.), *Creación de una jurisdicción penal internacional*, Madrid, 2000, pp. 225–226.

[94] As S. Wiessner and A.R. Willard remind us, a minimum of 25 countries have used a com-

international human rights organisations,[95] are not only a serious violation of the obligation to investigate, persecute and punish imposed on states under international law but also of the correlative fundamental rights that that same law bestows upon the victims.

In addition to doubts concerning its legality, it is very questionable to attribute generalised effect to a unilateral domestic measure, so that it prevent third States from exercise of a faculty recognized by international law, when this is not the case with the enforcement of an obligation required by it. In this sense, without prejudice to a state that, out of courtesy or for some other reason, imposes limits upon itself regarding its faculty to determine the lawfulness of foreign rules or decisions (as is the case with the Anglo-Saxon doctrine of "act of state")[96] or with respect to the need to acknowledge the effects of such acts in its own territory, neither of the two is in any way an international legal requirement.[97]

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bination of amnesties and truth commissions and reconciliation to make transition processes possible. The results are very diverse, however. Carte blanche amnesty is not the same as a system under which individual pardons are granted in exchange for sincere and complete confessions as seems to have been the case in South Africa. "The responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View", *AJIL*, vol. 93 (1999), pp. 330 and subsequent. In a similar sense, A. Cassese, "Reflections on International Criminal Justice", *Modern Law Review*, vol. 61 (1988), pp. 1 and subsequent; or J. Dugard, "Dealing with Crimes of the Past, is Amnesty Still an Option?", *Leiden Journal of International Law*, vol. 12 (2000), pp. 239 and subsequent.

[95] Ranging from the Human Rights Committee and the Anti-Torture Committee to the Court and the Inter-American Commission on Human Rights. On doctrine regarding guarantee bodies dealing with amnesty and immunity law issues, see N. Roth Arraza and L. Gibson, "The Developing Jurisprudence on Amnesty", *Human Rights Quarterly*, vol. 20 (1998), pp. 864 and subsequent; K. Ambos, *Impunidad y Derecho Penal Internacional*, 2nd ed., Buenos Aires, 1999, pp. 69 and subsequent; or V. Abellán Honrubia, "Impunidad de violaciones de los derechos humanos fundamentales en América Latina: aspectos jurídico internacionales", in A. Mangas Martín (ed.), *La escuela de Salamanca y el Derecho internacional en América. Del pasado al futuro*, Salamanca, 1993, pp. 202 and subsequent. A substantially similar idea is found in Article 18 of the United Nations General Assembly Declaration on forced disappearances, section 60 of the second part of the 1993 Declaration of the Vienna Conference on human rights, principle 18 of the Principles on the effective prevention and investigation of extra-judicial, arbitrary and summary executions adopted by ECOSOC in 1989, or in the judgement of 10 December 1998 delivered by First Instance Court number II of the ICTY in the *Furundzija* case. For a more detailed analysis of this subject see my work *Jurisdicción Universal . . ., op. cit.* (section *4.5.1. La legalidad de las amnistías en Derecho internacional).*

[96] On this topic see, A. Soria Jiménez, "El controvertido significado y alcance de la doctrina del acto de Estado en el Derecho estadounidense", *Revista Jurídica de Castilla-La Mancha,* vol. 20 (1994), pp. 179 and subsequent.

[97] As has been pointed out by B. Stern, "A State is under international duty to respect the limits imposed by international law to the exercise of its own jurisdiction but it is under no international obligation as concerns its attitude with respect to the exercise – in compliance with international law or not – of jurisdiction by other States". "Quelques observations sur les regles internationales relatives à l'application extraterritoriale du droit", *AFDI*, vol. 32 (1986), p. 51. Along these same lines by the same author, "L'extraterritorialité revisitée. Oú il est question des affaires Alvarez-Machain, Pâte de bois et de quelques autres", *AFDI*, vol. 38 (1992), p. 260.

It is not simply the case, however, as has been widely recognised in the doctrine,[98] that amnesty laws lack extra-territorial enforceability in the sense of not being able to prevent the prosecution of the perpetrators by the courts of other States if the latter so choose.[99] It must also be considered that, mindful of the fact that the obligation to suppress crimes against international law is not limited to the State in which the crime was committed but also – at least by virtue of international criminal law conventions – extends to the State in the territory of which the suspect is found – generally under the *aut iudicare aut dedere* formula – it is unlikely that amnesty laws imply the disappearance of such obligations. Admission of this fact would mean acceptance of a unilateral provision of rights or interests that very likely would extend beyond the scope of faculties of the State in which the crime was committed. This is undoubtedly the underlying idea in Article 51 of Geneva Convention I – and precepts corresponding to the other three conventions – when it excludes the possibility of one party exonerating any other party of its responsibilities when it comes to serious infractions. Confirmation of this interpretation means that amnesty laws,

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cont.

[98] See, among others, A. Bianchi, "Immunity . . .", *art. cit.*, p. 275; E. Orihuela Calatayud, "Aplicación del Derecho internacional humanitario por las jurisdicciones nacionales", in F.J. Quel López (ed.), *Creación . . ., op. cit.*, pp. 261–262; A. Remiro Brotons, *El caso., op. cit.*, pp. 73–74; or M. Weller, "On the hazards of foreign travel for dictators and other international criminals", *International Affairs*, vol. 75 (1999), pp. 330 and subsequent. This same opinion is expressed in the report of the Committee on International Human Rights Law and Practice of the ILA, by virtue of which "(e)ven if at least some types of amnesties are not incompatible with international law, it would appear that in any case they lack extra-territorial effect. They do not affect treaty obligations or entitlements under customary international law to bring gross human rights offenders to justice wherever they are . . .", however, "(a) bona fide amnesty could be taken into account by a prosecutor when exercising his or her discretion whether or not to bring a prosecution . . ." (*Final Report . . ., cit.*); and principle number 7 of the *Princeton Principles*, in accordance to which "the exercise of universal jurisdiction with respect to serious crimes under international law shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state". *The Princeton Principles on Universal Jurisdiction*, Princeton, 2001, p. 31 (Available through internet: *http://www.princeton.edu/-lapalunive-jur.pdf* – visited on 5.5.02). Also, the concession of impunity for humanitarian reasons to improve the chances of hostages in the framework of the 1978 Convention does not seem to have any effect on third states. See, M. Abad Castelos, *La toma de rehenes como manifestación del terrorismo y el Derecho internacional*, Madrid., pp. 197–198; and J. Alcaide Fernández, *Las actividades terroristas ante el Derecho internacional contemporáneo*, Madrid, 2000, p. 114.

[99] This was basically the opinion expressed by the Montpellier trial judge who ruled in favour of the prosecution for torture of the Mauritanian official *Ely Ould Dha* arguing, in his 25 May 2001 ruling with respect to the invocation of the 1993 Mauritanian amnesty law, that "regardless of the legitimacy of that amnesty within the framework of a local reconciliation policy, that law is not enforceable except within the territory of the affected State and in third countries does not affect the enforcement of international law. It therefore does not have any effect on public action taken in the enforcement of the law in France". More information on this case in the following web page: *http://www.fidh.org/justice/ely.htm* (visited on 24.2.02).

regardless of whether they comply or not with international law, would in no way affect the faculty or the obligation to exercise universal jurisdiction that, by virtue of international law, corresponds to third States.

For those reasons, the stance taken in this respect in Spanish legal practice when it comes to universal jurisdiction is quite encouraging. In the *Pinochet* case, in response to allegations of litispendency and *res judicata* by the Public Prosecutor in a call for a stay of proceedings based on the existence of a number of resolutions calling for dismissal delivered by Chilean courts in application of the 1978 amnesty Decree-law, the plenary of the criminal court affirmed that "regardless of whether the 1978 Decree-law 2191 can be considered contrary to international *ius cogens* or not, said Decree-law should not be interpreted as a true pardon pursuant to Spanish law applicable in this process but rather should be described as a de-criminalizing rule for reasons of political convenience. Its enforcement does not affect the case of an accused party absolved or pardoned abroad (letter c of section two, Article 23 of the *LOPJ*) but rather, in the case of non-punishable conduct – by virtue of a subsequent de-penalising rule – in the country in which the crime was perpetrated (letter a of the same section two of Article 23 of the same Law), and thus has no bearing on cases concerning the extra-territorial scope of Spanish jurisdiction due to the application of the principles of universal protection and persecution in light of section five of the frequently cited Article 23 of the *LOPJ*. The four cases referred to, not to mention a host of other similar ones, cannot be considered judged or pardoned in Chile and justify the application of the jurisdiction being argued for".[100]

Thus, although the appraisal of the National Court focused, from a strictly internal perspective, on denying that the prosecution of Pinochet is incompatible with the *non bis in idem* principle as formulated in Article 23.2c of the *LOPJ*, it seems to be clear that foreign amnesty laws, when they guarantee the impunity of the perpetrators – if not the above-mentioned subsidiarity rule of the universality principle would come into play – do not constitute an obstacle to the exercise of extra-territorial jurisdiction on the part of Spanish courts.

6. CONCLUSION

Sovereignty and human dignity are values and principles that are equally essential in contemporary international law and serve as the basis for the oftentimes conflicting rules that on occasion are extraordinarily difficult to reconcile.[101] Resorting to

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[100] National Court ruling of 5 November cited above. *F.D.* n. 8, *REDI*, vol. 51 (1999), pp. 642 and subsequent.

[101] This is what P. M. Dupuy called the confrontation between the logic of Lotus and that of Nuremberg. "Editorial. Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes", *RGDIP*, vol. 103 (1999), pp. 292–293. For an overall analysis see J. A. Carrillo Salcedo, *Soberanía de los Estados y derechos humanos en el Derecho internacional contemporáneo*, Madrid, 2001.

decentralised mechanisms to guarantee compliance with international rules that seek to protect essential common interests, including those meant to suppress barbarity, may be justifiable and legitimate, under certain circumstances, so that these fundamental rules are not reduced to worthless print. Having said that, we do not ignore the risks inherent to said mechanisms. In addition to not being accessible to all in the same degree, their unilateral character makes them especially prone to abuse. Thus, the clearly best way to fill this void, up to now occupied by the universality principle, is to delve deeper into the institutionalisation process of international criminal justice represented by the International Criminal Court. The aim is not to replace the State in the task of repressing the most serious crimes of international concern, but rather to get those with the greatest responsibility in this area to effectively assume that responsibility and so that, if this is not the case, the fight against impunity is able to develop with full guarantees from unequivocally representative authorities of the international community. However, until that becomes a reality, universal jurisdiction continues to be vital in the fight against the impunity of the perpetrators of the most serious atrocities.

This seems to have been the understanding of the Spanish courts that, based on the *open texture* of Article 23.4 of the *LOPJ*, put Spanish practice at the vanguard of the spectacular developments that international criminal law has undergone in general, and the universality principle in particular, during the 90's. Those developments, however, politically awkward for daring to put the fight against impunity before other interests – seemingly more important – lately find themselves beating a veritable retreat.[102] There is no doubt that Spanish Supreme Court doctrine in the Guatemala case, anticipating governmental reform projects focusing on the domestic legal framework, bears witness to this fact.

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[102] Evidence of this is the reform tabled, as of 7 May 1993, in what can probably be qualified as the national vanguard instrument on issues of universal jurisdiction, the Belgian law of 1993/1999 on the repression of serious infractions of international humanitarian law. By virtue of an amendment law dated 23 April 2003, the universal jurisdiction provided for in that law continues to be operational "indépendamment du lieu où celles-ci auront été commisses et même si l'auteur présumé ne se trouve pas en Belgique". In that case, however, unless the victim is not Belgian or had not resided in Belgium for at least three years, public action can only be initiated by the general attorney (*procureur général*). Although the latter is obliged to exercise this authority an exception is made, together with other more justified circumstances, when "des circonstances concrètes de l'affaire, il ressort que, dans l'interêt d'une bonne administration de la justice et dans le respect des obligations internationales de la Belgique, cette affaire devrait être portée soit devant les juridictions internationales, soit devant la juridiction du lieu où les faits ont été commis, soit devant la juridiction de l'Etat dont l'auteur est ressortissant ou celle du lieu où il peut être trouvé, et pour autant que cette juridiction est compétente, indépendante, impartiale et équitable". A decision of this nature is susceptible to jurisdictional control. The amendment law, published in *Moniteur Belge*, n. 167 on 7 May 2003 can be consulted at the following internet address: *http://193.191.208.7/mopdf/2003/05/07_2.pdf#Page2* (Visited on 22.5.2003).

Enforcement of the Notion of Due Diligence in the Report of the Human Rights Commissioner of the Council of Europe Regarding his Visit to the Autonomous Basque Community

Fernando Lozano Contreras
Associate Lecturer of Public International Law
University of Alicante

CONTENTS

I. INTRODUCTION: THE FIGURE OF THE HUMAN RIGHTS COMMISSIONER

Within the framework of the specific human rights protection regime set up by the Council of Europe there is a new figure known as the "Human Rights Commissioner" (hereafter *HRC*). The idea of incorporating this institution arose at the Second Summit of Heads of State and Government of the Council of Europe held in Strasbourg on 10–11 October 1997. Definitive creation took place through Resolution (99) 50 approved by the Committee of Ministers on 7 May 1999 at their 104th Session held in Budapest.[1]

The *HRC* may, upon his own initiative, visit those places where it is known that violations of rights and freedoms set out in the European Human Rights Convention (hereafter *EHRC*) are being committed. In this role he carries out a study or inspection of the situation *in situ* and drafts, as necessary, recommendations, opinions or

[1] This Resolution is comprised of a Preamble or Declaration of Intentions followed by 12 articles regulating the principle aims and functions of the *HRC*, see *http://www.coe.int.*

Spanish Yearbook of International Law, Volume VIII, 2001–2002

reports that he submits to the Parliamentary Assembly and to the Committee of Ministers of the Council of Europe. This latter body has the authority to publish any recommendation, opinion or report drafted by the *HRC* and, in so doing, brings the control mechanism to a close.

This new body, of a marked political-diplomatic nature, is under obligation to carry out its functions with total independence and impartiality and is conceived as a non-jurisdictional means[2] of guaranteeing and advancing the human rights and fundamental freedoms set forth in the *EHRC*.

As of February 2003, the *HRC* had made a number of visits.[3] At the beginning of 2001 he travelled to the Autonomous Basque Community (Spain) and drafted the report that is the focus of our study. In the preparation of this study we have used the following means or instruments:

– First of all, the *HRC* report and the specific regulations regime under which the *HRC* operates (*EHRC* and additional Protocols). On this point we took the initiative, in light of the legal framework within which the situation has developed, to analyse the work of the European Court of Human Rights (hereafter *ECHR*), with a view to verifying whether a problem similar to the one described in the Report had arisen in any case law precedent and, if so, to examine the way in which it was resolved.
– Second, and with a view to clarifying some of the legal concepts and categories which we have come across, we have turned our attention to Public International Law especially focusing on the latest reports on the international responsibility of States drafted by the International Law Commission (hereafter *ILC*).
– In third place, with a view to obtaining a balanced view of the situation, we turned our sights to the *Contrainforme* (Counter-report) issued by the Government of the Autonomous Basque Community.

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[2] Article 1 Section 1 of the Resolution asserts that: "The Commissioner shall be a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe"; Article 3 lists its principle functions regarding which it may officially intervene. They include the following of which special mention should be made of the following with respect to this case: ". . . identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member States and assist them, with their agreement, in their efforts to remedy such shortcomings", *ibid*.

[3] Chechnya, Daghestan and Ingoushetia, Georgia, Moldova, Andorra, Norway, Slovak Republic, Finland, Moscow, Turkey, Bulgaria, Greece, Hungary, Kosovo, Romania.

II. COMPLIANCE WITH THE *EHRC* IN THE AUTONOMOUS BASQUE COMMUNITY ACCORDING TO THE *HRC*

In response to numerous complaints[4] received through a number of different channels from residents in the Basque country as well as from citizens from all over Spain, the current *HRC*, Mr. Álvaro Gil Robles, visited Spain's Basque Country on 5–8 February to carry out a study of the human rights situation in that Autonomous Community.

In his Report,[5] sent to the Council of Europe's Committee of Ministers as well as to the Parliamentary Assembly, the Commissioner underlined the ongoing violation of certain rights and freedoms taking place in the Autonomous Basque Community and in the rest of Spanish territory as well.

In his Report the *HRC* highlights, as the principal direct causes of the violation of some fundamental individual rights and of the free exercise of certain civil and political rights,[6] the direct action of the terrorist group *ETA*;[7] and the urban violence

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[4] The term "complaint" used in this context should not be confused with the notion of an "individual or personal complaint" given that, as stated in the Resolution creating this body (Article 1 Section 2) "The Commissioner shall not take up individual complaints.", in light of the fact that this is a body lacking jurisdictional competence. It may have been more correct to use the term "information" (see Article 5 of the Resolution.).

[5] The Report was passed by unanimous decision in the Council of Europe's Committee of Ministers held on 21 March 2001. It was originally published in French and is comprised of the following five sections: I. Introduction; II. General Approach; III. On the practical causes of human rights violations in the Basque Country; IV. Other issues relating to protection of, and respect for, human rights raised by the organisations representing the families of detainees and prisoners accused in connection with acts of terrorism, and by their legal representatives; V. Final Considerations. The report may be viewed in English, French and Spanish at: *http://www.commissioner.coe.int.* There is also a Spanish version in the section entitled "*Temas*" of the El Pais digital newspaper at *http://www.elpais.es*; but we have doubts as to whether this is an official translation since we have found some substantial differences with respect to terminology used in the version that we have worked with (English version). In response to the report, the Basque Government issued a counter-report on 10 April 2001 directed at the Council of Europe expressing its discontent with the partiality and lack of precision in some of the affirmations made by the Commissioner. This counter-report was provided to us by the Basque Government itself (Presidency; Secretariat-General for Foreign Action), official versions in Basque, Spanish, English and French. It is divided into three sections: I. Introduction; II. Refutations by the Basque Government; III. Conclusions.

[6] It is the view of the Commissioner that in this situation a number of rights are violated including: the right to life (Article 2 *EHRC*; Article 15 *CE*), to liberty and security of person (Article 5 *EHRC*; Article 17 *CE*), to thought and conscience (Article 9 *EHRC*; Articles 16 and 20 *CE*), to assembly and association (Article 11 *EHRC*; Articles 21 and 22 *CE*), to freedom of expression and information (Article 10 *EHRC*; Article 20 *CE*), etc. All of these rights are recognised as fundamental by the *EHRC* (Section I) as well as by the Spanish Constitution (Section I, Ch. II) and are also included in the majority of the international instruments to which Spain is party.

[7] *Euskadi Ta Askatasuna*.

perpetrated by groups closely associated with *ETA* (activity that goes by the name *Kale Borroka*).

Second of all, the *HRC* mentions another set of factors that, although they may not be the cause they do at least contribute to the present climate of instability ". . . in a member state (of the European Council) which has a fully democratic system and which has appropriate institutional mechanisms to determine its political life in peace and freedom" (Section I, paragraph 1.).

In this sense the *HRC* refers to a fundamental factor that we are going to deal with here and that constitutes the central theme around which this work revolves: the ever-present passivity manifested by autonomous community political bodies and police corps when it comes to the prevention and suppression of actions perpetrated by violent radical groups.

III. THE ALLEGED LACK OF DUE DILIGENCE ON THE PART OF THE AUTHORITIES IN THE PREVENTION AND SUPPRESSION OF ATTACKS ON HUMAN RIGHTS

As was indicated above, one of the main aspects drawing the attention of the *HRC* (expressed in Section III of his Report) is the alleged passivity or lack of action taken to prevent or suppress the acts of street violence[8] known as *Kale Borroka* characterising not only the conduct of the Autonomous Basque Police force (*Ertzaintza*) but also that of the competent political authorities.[9] The fact is that the *HRC* reaches the conclusion, through diverse testimony furnished,[10] that the violence in the Autonomous

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[8] We should bear in mind the dual nature of the objective element of the due diligence standard: on the one hand it embodies an *ex ante facto* obligation (preventive aspect or facet) consisting of the State's obligation to prevent, within the framework envisioned under international law, certain detrimental conducts and, on the other hand, it includes an *ex post facto* obligation (suppressive aspect or facet) consisting of the obligation to suppress such conducts. Failure to comply with one of these two obligations (or both) could give rise to an international responsibility on the part of the State.

[9] The mission of keeping watch over public law and order in the Basque Country is a competence that, for internal or *ad intra* purposes, has been expressly attributed to the authorities of the Autonomous Basque Community. See Articles 9 and 17 of the Statute on Basque Autonomy (*LO* 3/1979 of 18 December, *BOE* 306, 22.12.1979); Articles 5, 6, 7, 8 and Final Provision 1 of *LO* 2/1986 of 13 March, Regulating State Security Forces and Corps of the Autonomous Community and Local police forces (*BOE* 63, 14.3.1986); and Chapter II (Deontological Code, Articles 29 to 38) of the Law of the Autonomous Basque Community 4/1992 of 7 July on Police Planning (*BOPV* 155, 11.8.1992).

[10] The climate of instability and violence caused by terrorist activity is selective. Actions carried out by these groups tend to be waged against certain sectors of society among which the following, as pointed out by the *HRC*, can be found: elected political officials belonging to non-nationalist groups, judges and prosecutors, State security bodies and forces, military personnel, journalists that do not happen to share radical nationalist ideals, university professors, prison employees . . ., in short, those who publicly or privately ". . . have adopted

Basque Community is perpetrated amidst a climate of almost total impunity; the majority of these criminal acts being neither suppressed nor investigated. He thus concludes Section III of his Report with the following affirmation:

> "In light of what has been said above, it is clear that the Basque government bears some responsibility for the failure to provide sufficient and effective protection of citizens' fundamental rights, but it must not be forgotten either that, in pursuance of Article I of the *ECHR*, the Spanish State is responsible for securing 'to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention', so it is also under an obligation to adopt or strengthen the measures needed to guarantee the fundamental rights of all Basque citizens".

1. *The* Kale Borroka: *definition and legal assessment*

Those acts of urban or street violence, perpetrated by groups of young people (some not yet of legal age) taking place within the territory of the Autonomous Basque Community (and sporadically in the Autonomous Community of Navarre), can be defined as *Kale Borroka*.

These groups of young people, ideologically aligned with the ideas of radical Basque nationalism and organically related to the *ETA* terrorist group through indirect channels or networks, go by different names, *inter alia: Grupos Y, Jarrai* or *Haika*.

Their violence causes an environment of generalised fear among certain sectors of the Basque population[11] and a climate of instability that interferes with the state of social peace throughout the region. The demonstrations in which they participate

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cont.

positions which are favourable to the constitutional order in force, as well as those who have expressed in speech or in writing opinions critical of nationalism or opposed to the terrorist group *ETA* . . .". Although the *HRC* already had the testimony of several people from the sectors under threat, it decided to delve deeper into the affair by calling for the opinion of the competent authorities and of the autonomous Basque police. In this respect, as is also pointed out in the Report, we were surprised to find that although the competent authorities who were interviewed by the *HRC* (regional Minister for Internal Affairs and the *Lehendakari* or President of the Basque Government) ". . . vehemently denied this allegation . . ."; "*ERNE*, the trade union which represents the majority of *Ertzainta* members, remains highly critical of the force's leaders, whom it accuses of failing to order action against *kale borroka* . . .", despite having, in the view of the Police Commissioner, effective means to do so. This last point was harshly criticised in one of the sections under the second point of the counter-report drafted by the Basque Government [Point II (Refutations of the Basque Government); Section a) Fight against *ETA* and street violence], in which it reproaches the *HRC* for his lack of impartiality for not wanting to interview any police official or bother to examine the "objective systems" of orders and instructions of the *Ertzaintza*.

[11] See note 10 and statistical data furnished by the Spanish Home Ministry at *http://www.mir.es/oris.*

generally end with the destruction and burning of public or private property (banking entities; automobile dealerships in France; the private businesses and homes of people belonging to non-nationalist political parties that do not share their radical ideas . . .), or with aggression, threats or coercion directed not only against people that they accuse of being "*españolistas*" or "constitutionalists" (defenders of the Spanish Constitution and of the unity of the Spanish State), but also against their families.

These events, difficult to categorise from the viewpoint of Public International Law, cannot be described as mere sporadic or isolated outbreaks of violence[12] in light of the increasingly less isolated and more organised nature of the actions;[13] nor can they be described strictly in terms of internal violence[14] given that they are not acts in which these groups use or have used arms in the perpetration of the violence.[15]

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[12] International practice offers some examples of this type such as the disturbances that took place in January and February 1998 in Indonesia brought on by the serious economic recession (see *Keesings* 1998, pp. 42007 and 42073); those that took place in Algeria in the Gran Cabilia region during the months of April and May 2001 caused by the protest and uprising of the Berber minority in light of the harsh methods of repression used by the Algerian police at several different demonstrations (*ibid*., 2001, pp. 44130 and 44182); in Nepal in June of that same year in the aftermath of the mysterious assassination of most of the members of the royal family under circumstances that have yet to be made completely clear (*ibid*., 44209–44210) or more recently in Venezuela (*ibid*., 2002, 44667).

[13] According to the report filed by the Prosecutor's office of the National Court on year 2000 events, generously furnished by the State Public Prosecutor's Office, "It is materially impossible to determine the exact number of 'urban terrorist' acts perpetrated in the Basque Country. The figure of 630 terrorist acts during the year 2000 can, however, be extrapolated from information received from the State's Security Forces; a figure far surpassing the approximately 350 street violence attacks registered in 1999. Practically all of them in the year 2000 took place in the Basque Country and very few (less than 20) in Navarre", p. 23. These figures differ from those furnished by the Home Ministry through their Press and Informative Documentation Service. This latter body provided the figure of 581 total acts of street violence registered in the year 2000 in Spanish territory (compared with 390 in the year 1999); the majority (479) perpetrated in the Autonomous Basque Community while the rest (102), took place in the Autonomous Community of Navarre (99) and in other Spanish communities (2). This same trend continued in 2001: a total of 552 acts of street violence were registered; 468 in the Autonomous Basque Community and 84 in the Autonomous Community of Navarre. There was not a significant change in 2002 although the figures do confirm a downward turn: the total number of acts of street violence registered (now referred to as "urban terrorism") reached 448 (410 in the Autonomous Basque Community and 38 in the Autonomous Community of Navarre). According to statistical data by province, the province that has been hit the least over the last four years is Alava while the ones suffering the greatest number of attacks are Vizcaya (1999 and 2000) and Guipúzcoa (2001 and 2002). As concerns the number of arrests, if we compare the last two years (no data is available for earlier years) we can observe a constant albeit timid increase in the number of arrests related to these acts. See *http://www.mir.es/oris.*

[14] Situations that have plagued or continue to plague countries such as Colombia or the Philippines to cite some recent examples.

[15] For a study on the situation of internal violence in Spanish doctrine see, Jiménez Piernas, C., "La calificación y regulación jurídica internacional de las situaciones de violencia interna",

This is a social and political phenomenon somewhere between the two categories mentioned (sporadic outbreaks and internal violence) which we will refer to as "low intensity terrorism". This is a sub-species of terrorism that the central governmental authorities are trying to combat with the same constitutional means used in the fight against *ETA*: criminal law; legislation that is periodically amended in order to provide an appropriate and effective response to these types of actions.[16]

2. *Possible legal consequences in light of EHRC and ECHR case law*

Having established the circumstances underlying this affair, we now propose to analyse the possible legal consequences that the passivity demonstrated by the autonomous Basque authorities with respect to these acts of organised violence could have for Spain in light of the *EHRC* and *ECHR* decisions.

As is already known, Article 1 of the *EHRC*[17] states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".

The *ECHR*, in compliance with its obligation to interpret and enforce attributed to it by the Convention itself, has had the opportunity to express itself on a number of different occasions with respect to the nature and content of this provision. In the *Case of Ireland v. the United Kingdom* (Judgement of 18 January 1978)[18] the Court arrived at a number of conclusions including the following:

> "Article 1 (Art. 1), together with Articles 14, 2 to 13 and 63 (Art. 14, Art. 2, Art. 3, Art. 4, Art. 5, Art. 6, Art. 7, Art. 8, Art. 9, Art. 10, Art. 11, Art. 12, Art. 13, Art. 63), demarcates the scope of the Convention *ratione personae, materiae* and *loci*; it is also one of the many Articles that attests to the binding character of the Convention. Article 1 (Art. 1) is drafted by reference to the provisions contained in Section I and thus comes into operation only when taken in conjunction with them; a violation of Article 1 (Art. 1) follows automatically from, but adds nothing to, a breach of those provisions; hitherto, when the Court has found such a breach, it has never held that Article 1 (Art. 1) has been violated".[19]

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Anuario Hispano-Luso-Americano de Derecho Internacional, vol. 14 (2000), 33–75, pp. 36–51.

[16] *LO* 7/2000 of 22 December (*BOE* 307, 23.12.2000) amends some precepts of the Criminal Code regulating terrorism and other related crimes (Articles 40, 266, 346, 351, 504, 505, 551, 577 to 579), as well as certain norms of the Law regulating the criminal responsibility of minors, *LO* 5/2000 of 12 December (*BOE* 1, 13.1.2000).

[17] See, Wyler, E., *L'illicite et la condition des personnes privées*, París, 1995, pp. 105–119.

[18] See, *Ireland v. United Kingdom Case*, 18.1.1978, at *http://hudoc.echr.coe.int/hudoc*. A Spanish version can also be found in *Tribunal Europeo de Derechos Humanos. 25 años de Jurisprudencia 1959–1983* (*BJC*, Publicaciones de las Cortes Generales), pp. 369–432.

[19] *Ibíd*., paragraph 238. In this same sense see, *Neumeister Case*, 27.6.1968, paragraph 15, and p. 44; *"Belgian Linguistic" Case*, 23.7.1968, pp. 70 *in fine* and 87, paragraph 1;

The Court then adds that "by substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1 (Article 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States";[20] and the most important, "The Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 (Art. 14) and the English text of Article 1 (Art. 1) ('shall secure'), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels".[21]

Three conclusions may be drawn from the Court's opinion regarding Article 1 of the *EHRC*:

a) The first is that Article 1 is a general provision that, along with the other provisions that the Court lists (Articles 14, 2 to 13 and 63), delimits the Convention's scope of application. This precept establishes that an allegation of non-compliance with the *EHRC* may only be filed when the violation is produced within the jurisdiction of the contracting States.[22]
b) The second is that Article 1 does not recognise any right or freedom. It is a provision based on which it is not possible to claim non-compliance *per se* but rather in relation with one or several of the provisions set out in Section I of the Convention[23] (regulations in which rights and freedoms are indeed recognised).
c) The third is that, as is pointed out by the *HRC* himself, Article 1 contains a duty, an obligation; the duty or obligation that all States that are party to the *EHRC* have of guaranteeing, within their jurisdictional scope, respect for and compliance

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Stögmüller Case, 10.11.1969, p. 45; *De Wilde, Ooms and Versyp Case*, 18.6.1971, p. 43, paragraph 80, and p. 47, paragraph 4; *Ringeisen Case*, 16.7.1971, p. 45, paragraph 109 *in fine*, and p. 46, paragraphs. 5–6; *Golder Case*, 21.2.1975, p. 20, paragraph 40 *in fine*, p. 22, paragraph 45 *in fine*, and p. 23, paragraphs 1–2; *Engel and others Case*, 8.6.1976, p. 29, paragraph 69 *in fine*, p. 37, paragraph 89 *in fine*, and p. 45, paragraphs 4, 5 and 11; *Osman v. United Kingdom Case*, 28.10.1998, paragraph 116, at *http://hudoc.echr.coe.int/hudoc*.

[20] See *Ireland v. United Kingdom Case . . ., loc. cit*., paragraph 239.

[21] *Ibid*.

[22] With respect to the question of whether a State that is party to the Convention should answer for acts carried out by its bodies in foreign territory or in an area void of all jurisdiction, see Wyler, E., *L'illicite et la condition . . ., op. cit.*, pp. 105–108.

[23] Article 1 of the *EHRC* and Article 1 of the American Convention on Human Rights have very similar content. In the inter-American system protecting human rights, however, in contrast to the European system, constant individual and expressed references are made to the violation of Article 1 in the guilty verdicts delivered by the Inter-American Court of Human Rights. This fact can be confirmed by simply turning to the latest judgements of the Inter-American Court, see *Cantos Case*, 28.11.2002 and *Cinco Pensionistas Case* (resolution point 3), 28.3.2003, at *http://www.corteidh.or.cr*. See Gros Espiell, H. "La Convention américaine et la Convention européenne des droits de l'homme. Analyse comparative", in *Rec. des C*., t. 218 (1989), 167–411, pp. 231–240.

with the rights and freedoms outlined in Section I; a duty that must be enforced if that which was quoted above is to be complied with "at all levels".[24]

As was stated earlier, one of the most salient factors of the *HRC*'s Report was the passivity or omission manifested by the Basque autonomic authorities when it came to providing effective protection of certain rights and freedoms recognised under Section I of the *EHRC*. These authorities, in the view of the *HRC*, fail to employ the means available to them to *ex ante facto* prevent or *ex pos facto* suppress acts perpetrated by these groups of individuals[25] (persons belonging to or collaborating with the *Kale Borroka*) that periodically wage attacks against those rights and freedoms; official bodies that, in short, do not diligently comply with the obligations that they have undertaken in their internal system by virtue of the Autonomy Statute of the Basque Country.

The main issue arising from this situation is determining whether said omission or passivity, which the autonomic community authorities boast of with respect to certain acts perpetrated by groups of individuals, may be in conflict with the duty to provide a blanket guarantee imposed by the regulation analysed (Article 1) in connection, as is required by the Court, with the provisions that deal with the rights or freedoms that may have been violated;[26] and whether there is a possibility that this attitude, or more precisely this lack of action on the part of the Basque authorities, once having met all of the requirements both in letter and spirit set out by the *EHRC*,[27] could be reason enough to call Spain's international responsibility[28] into question for an infraction of the *EHRC*.

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[24] See *Drozd and Janousek v. France and Spain Case (Merits). Joint Dissenting Opinion of Judges Pettiti, Valticos and Lopes Rocha. Approved by Judges Walsh and Spielman*, 26.6.1992, at *http://hudoc.echr.coe.int/hudoc.*

[25] Article 11 of the draft text of the *ILC* articles on responsibility of the States approved at the first reading covered the case of acts carried out by individuals not acting on behalf of the State (private acts), See *Report of the International Law Commission on the work of its 48th session*, A/51/10, p. 128. In his first report the current rapporteur, J. Crawford, felt that the wording of the precept lacked precision in that it was redundant and meandering and he thus decided to eliminate it and provide it with a new wording by drafting a new article (Article 15 bis), see *First Report on State Responsibility*, A/CN.4/490/Add.5, pp. 31–33; A/CN.4/490/Add. 6, pp. 5 and 7. The Rapporteur's proposal was included in current Article 11 of the draft articles passed at the second reading, "Conduct acknowledge and adopted by a State as its own", see *Report of the International Law Commission on the work of its 53rd session*, A/56/10, p. 118.

[26] See note 5.

[27] See Article 35.1 of the *EHRC.*

[28] The general rules of international law, specifically Article 1 of the *ILC* draft articles on the international responsibility of States for internationally wrongful acts affirm that "Every internationally wrongful act of a State entails the international responsibility of that State"; moreover, Article 2 adds that there is an internationally wrongful act of a State when conduct consisting of an act or omission is attributable to the State and constitutes a breach of an international obligation. See, *Report of the International Law Commission on the work of its 53rd session*, A/56/10, p. 63 and 68.

In order to resolve this issue we turn once again to *ECHR* case law in search of a relevant precedent in which a complaint was filed against a Member State on these same or similar grounds.

The *ECHR* has indeed had the opportunity to rule not on one but rather on several cases that, *mutatis mutandi*, focus on a problem similar to the one arising from this case; controversies in which the complainant claims lack of due protection or, depending on the case, suppression, from the competent authorities as regards violations of certain rights and freedoms contained in Section I of the Convention perpetrated by other individuals (i.e. lack of due diligence on the part of the authorities in the prevention or sanctioning of damaging behaviour.).[29]

The *Osman v. the United Kingdom Case* (28.10.1998)[30] especially stands out. Despite the arguments presented by the complainant focusing on the fact that the United Kingdom failed to comply with its obligation to adequately protect the right to life of Mr. Osman set out in Article 2 of the Convention, the view of the *ECHR* in the end was that the behaviour of the British authorities was not an infringement of the *EHRC*. The Court reiterates that this duty to prevent and suppress attacks against persons is an obligation that does in fact exist and affects all States that are party to the Convention but, in order to prove non-compliance, one must satisfactorily show that the authorities, cognoscente of the risk that (in this case) was encroaching upon the right to life, or cognoscente of the identity of the person or persons who had committed this attack, failed to take the measures that, within their reasonable range of possibilities, should have resulted in the suppression of the risk or the imprisonment of the guilty parties.[31] In this same ruling the Court affirmed that it would have been considered sufficient proof if the complainant had demonstrated that the authorities did not do all that could reasonably be expected of them to preclude that

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[29] See, among others: *Eckle v. Germany Case*, 15.7.1982, paragraph 84; *Colozza v. Italy Case*, 12.2.1985, paragraph 28 *in fine; F.C.B. v. Italy Case*, 28.8.1991, paragraph 33; *T. v. Italy Case*, 12.10.1992, paragraph 29; *Ogur v. Turkey Case*, 20.5.1999, paragraph 88; *Tanrikulu v. Turkey Case*, 8.7.1999, paragraph 101, at *http://hudoc.echr.coe.int/hudoc.*

[30] See *Osman Case . . ., loc. cit*.

[31] *Ibíd*., paragraph 116: "In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right of life in the context of their above mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above) such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2."

immediate and real life threat that they were or should have been cognoscente of.[32]

The *Osman Case* is a clear example of the *ECHR*'s use of an international legal standard:[33] the due diligence.[34] This is a concept that, as far as general international law is concerned, made its debut in the 19th century in the regulatory sector of neutrality law[35] and that subsequently evolved thanks to all of the effort made through international case law in spheres traditionally linked with the international responsibility of States.[36]

This standard of due diligence constitutes a category that, despite the multiple interpretations that have been made regarding its content and limits, continues to lack clear definition. This vagueness was referred to by the European Court itself when it asserted that the issue of whether the authorities ruled or not in compliance with their duty to guarantee the Convention's provisions, is a question that can only be answered by taking a casuistic approach in light of all the circumstances of each particular case.[37]

In the *Osman Case* the *ECHR* held the view that the British authorities had acted diligently despite the fact that Mr. Osman's right to life was violated in the end. As the Court correctly pointed out (and this can counterbalance attempts to provide the standard with content the scope of which goes too far) no international regulation can be interpreted in such a way that it imposes an objective that is impossible for the target State to comply with;[38] *ad impossibile nemo tenetur*.

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[32] *Ibid*.: "For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge."

[33] The term 'standard' is used in the sense of a guideline or common criteria comprised of founded criteria regarding what seems to be normal (from a statistical or descriptive point of view) and acceptable (from a dogmatic point of view) for the international society in the moment at which a certain act must be judged. See Rials, S. "Les standards, notions critiques du droit", in Perelman, Ch., and Vander Elst, R. (Eds), *Les notions à contenu variable en droit*, Brussels, 1984, 39–53; pp 43–44.

[34] The defunct European Human Rights Commission applied this notion to other cases. See *W. v. United Kingdom Case*, 28.2.1983, Decisions and Reports, vol. 32, pp. 190 and subsequent.

[35] The classic precedent that is usually cited in this context is the Alabama arbitration. See Stowell, E. C. and Munro, H. F. (Eds), *International Cases. Arbitrations and Incidents Illustrative of International Law as Practised by Independent States*, Volume II (War and Neutrality), Cambridge, 1916, pp. 336–345.

[36] Especially as concerns the due protection of the person and goods of foreign nationals. An overall vision in this respect can be found in Mazzeschi, R. P., *Due Diligence e Responsabilità Internazionale degli Stati*, Milan, 1989, Cap. III, pp. 193–288 and in Zannas, P. A., *La responsabilité internationale des Etats pour les actes de négligence*, (thesis), Montreux, 1952, pp. 71 and subsequent.

[37] See *Osman Case . . ., loc. cit., ibid*., "This is a question which can only be answered in the light of all the circumstances of any particular case".

[38] *Ibid.,* paragraph 116, "For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices

We are operating within a sector in which the due diligence standard is perfectly enforceable because it is implicitly deduced from a general regulation, basic to the system, that contains a duty or obligation to act and non-compliance with said duty or obligation can give rise to a situation of international responsibility;[39] something that occurs in other specific regimes in which the standard is also used.[40]

Returning to the case at hand (the violence perpetrated by the *Kale Borroka* in the Autonomous Basque Community), it would seem that here, in contrast with the *Osman Case*, the urban violence that the *HRC* refers to in his Report, together with the passivity characterising the autonomic authorities as concerns the suppression of such violence, could in fact lead the *ECHR*, in the event that a complaint were filed, to rule in favour of non-compliance with the due diligence standard as regards the material aspect.[41]

Although in many cases the widespread or unexpected nature of the objectives of the *Kale Borroka* could make it very difficult to prove non-compliance with said stan-

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which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities". In light of this passage one cannot help but to reflect on the circumstances precluding wrongfulness.

[39] In the case we are assuming that, by virtue of Article 1, the standard affects each and every one of the regulations of the *EHRC* that focus on rights or freedoms that may be violated by individuals outside of or not dependent upon the State organisation.

[40] The due diligence standard has been used with greater or lesser success by other regional international judicial authorities. On the European level, the Court of Justice of the European Communities, in its judgement of 9.12.1997, *Comisión c. Francia*, as. C-265/95, Rec. p. I-6990 (case involving the free movement of goods) implicitly offers us an example of a poor use or incorrect application of the standard. See Jiménez Piernas, C., "El Incumplimiento del Derecho Comunitario por los Estados Miembros cuando median actos de particulares: Una aportación al debate sobre la interdependencia entre Derecho Comunitario y Derecho Internacional", *Revista de Derecho Comunitario Europeo*, number. 7 (2000), 15–48, pp. 39–44; on the American side, the use of the standard has been more fortunate; the Inter-American Court of Human Rights in its judgement of 29.7.1988, *Velásquez Rodríguez Case*, Series C, n. 4, paragraph 151, bears witness to that fact.

[41] Jiménez Piernas already elaborated on this dual aspect of the standard when dealing with the topic of due treatment for foreigners. In that respect the following passage is *mutatis mutandi* particularly enlightening: "The double diligence standard in its dual aspect of diligent prevention and suppression of acts perpetrated against foreigners in violation of the domestic or international legal system does, in fact, contain a dual requirement as concerns action taken by the State presumably responsible for such acts. On the one hand, the legal requirement that its internal legal system adequately complies with a standard established by means of comparison with the respective national legal systems, always in relation with international rules, paying specific attention to their treatment of foreigners; and on the other hand, the material requirement obliging the competent authorities to sufficiently abide by and respect their own legal system and to have the means by which to assure compliance. In other words, the rule of law principle by virtue of which, for example, the competent bodies must investigate, pursue and on occasion compensate all punishable acts in accordance with their own legal system": See Jiménez Piernas, C., *La Conducta Arriesgada y la Responsabilidad Internacional del Estado*, Alicante, 1988, pp. 65–66.

dard, this non-compliance is unequivocally attributable internationally to Spain (as a country party to the *EHRC* and as a member of the Council of Europe) and this is so despite the ambiguous use of the term "responsibility" made by the *HRC* himself in his Report. After a biased or partisan reading of the paragraph cited above, this ambiguity could lead to the mistake of trying to attribute international responsibility to the Basque government for this lack of diligence but from our perspective this is inadmissible.

Regardless of whether the specific regulatory regime applying to this case or the general regulatory regime on attribution foreseen in international law is considered, there can be no doubt as to the fact that Spain is the only subject with sufficient capacity to be held internationally responsible for these events.[42] From an international legal standpoint, this affirmation renders useless and sterile all reasoning and arguments used by central government officials that, with a view to exempting Spain from responsibility in relation to these events, waged the argument that in accordance with the distribution of competences based on domestic law, it was the Basque government that should answer to these claims.[43]

As we are well aware, when it comes to attributing an internationally illegal act to a State, the organic structure adopted by said State is normally considered irrelevant in the eyes of international law.[44] At any rate, the legal responsibility of the

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[42] The Preamble and Article 1 of the *EHRC* leave no doubt in this respect. From them it can be clearly deduced that the only subjects with capacity for non-compliance with the provisions of the Convention are the States that are party to such Convention. Moreover, the general regime on international responsibility leaves no possible doubt either. Article 4.1 of the current *ILC* draft articles affirms that: "The conduct of any State organ shall be considered an act of that State . . .whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State." See *Report of the International Law Commission on the work of its 53rd session, loc. cit.*, p. 84.

[43] In a public statement printed in the *El País* newspaper the Home Minister used this argument (flawed from the perspective of international law) in asserting that "It is the Basque government that is responsible for protecting the security of the citizens in the Basque Country and the jurisdiction of the State in these matters is contained in the Basque Statute and in the Constitution . . .": *El País Digital*, 16–3–2001, at *http://www.elpais.es.*

In contrast the Basque Government, in its counter-report of 10 April 2001, affirmed that "In the case of the *ETA* organisation, the prime target is the Spanish state itself. The State, however, has never once been accused of ineffectiveness and of having a degree of responsibility as concerns a lack of sufficient and effective protection of the fundamental rights of the citizens", *loc. cit*., p. 3.

[44] As concerns attribution, international law may occasionally take into consideration some of the situations existing in internal law of each State. That fact, however, does not lessen nor does it condition its complete autonomy when it comes to attributing, on the international plane, this act to the State because in the perspective of international law, the organic organisation of the State remains a mere circumstance, *Cf. PCIJ Case concerning certain German interests in Polish Upper Silesia (Judgment)*, 1926, Series A, n. 7, p. 19. Following this same reasoning, the internationally wrongful nature of a state act can only be derived from the infraction of an international legal obligation by that State. The description of that

Basque government is an issue that should be resolved or settled legally *ad intra* within the framework of the applicable constitutional system.[45]

IV. FINAL CONSIDERATIONS

In summary, the following observations can be made:

It is our understanding that, in accordance with the *HRC*'s Report and in light of the rules regarding this issue provided for under general international law and particular international law, the sort of low intensity terrorism plaguing the Autonomous Basque Community could lead to cases of non-compliance. We could find ourselves faced with, as long as the stumbling block of sufficient proof is overcome, a clear example of non-compliance with the due diligence standard; non-compliance that would affect the human rights regulatory regime in force on the European continent established by the *EHRC*, a scope within which the standard operates thanks especially to the interpretive effort carried out by the *ECHR*.[46]

In accordance with the general rules on attribution that prevail both within the scope of general international law as well as the affected particular international law (the European), we feel that in the hypothetical event that the case reached the judicial level and non-compliance were declared by the *ECHR*, said non-compliance would be attributable solely and exclusively to the State party to the *EHRC* involved in the matter; in this case, Spain. We therefore hold that any type of argument, based on the decentralised structure of the Spanish State, made with the sole purpose or objective of attempting to avoid the possible consequences that would arise from a probable declaration of international responsibility, is legally inadmissible.

We would also like to highlight the already mentioned use made in the Report as well as in *ECHR* case law cited of certain concepts and categories that are elements of general international law. This undoubtedly is one more example of the phenomenon of proximity and interdependence that exists between the regulatory regime of general international law and the specific regimes that tend to operate on a regional level,[47] and of the good service that general international law can

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cont.

act by the legal system itself is of little or no consequence. On this latter point, Article 3 of the current *ILC* draft articles on international responsibility establishes that: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." See *Report of the International Law Commission on the work of its 53rd session, loc. cit.*, p. 43.

[45] See Articles 2, 93 to 97 and 149.1.3 *CE* and note 9 herein.

[46] It is our understanding that the due diligence standard employed by the competent regional international judicial authorities with respect to human rights, is not essentially different from that employed in general international law.

[47] For example, the treatment given to the notion of due diligence in general international case law and by the Inter-American Court of Human Rights and the European Court of

and should provide to such specific regimes through said concepts and categories.[48]

To date we have no knowledge of any individual who has used the protection mechanisms set out under the *EHRC* when turning to the *ECHR* to defend their fundamental rights and freedoms allegedly violated by the low intensity terrorism plaguing the Autonomous Basque Community.[49]

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cont.

Human Rights has been very similar in the essence although not identical as concerns the form. The Inter-American Court of Human Rights has proven through its decisions that it has a more in-depth awareness of the notion than the *ECHR*; solid proof of this being the courage and precision with which it traditionally treats this notion. In contrast the *ECHR*, when it comes to constructing and developing the notion, has by and large taken more reticent, aseptic and less developed stances. The basis for this different sort of treatment is clear. It is our understanding that the Inter-American Court of Human Rights has never feared gazing into the mirror of general international case law, the field in which this notion has undergone the most significant development. The Inter-American Court of Human Rights has made use of and has been instrumental in tailoring its arguments to the content of these decisions and this undoubtedly speaks in its favour. See the *Velásquez Rodríguez Case . . .*, *loc. cit., ibid.*

[48] Something already highlighted with respect to Community law by some Spanish authors. See Díez-Hochleitner, J., "La interdependencia entre el derecho internacional y el derecho de la unión europea", in *Cursos de Derecho internacional de Vitoria-Gasteiz*, 1998, pp. 39–88; Jiménez Piernas, C., *El Incumplimiento del Derecho Comunitario . . ., loc. cit*., pp. 15–21.

[49] Spanish legislation provides for a compensation and indemnity system for damages caused by this sort of crime. This fact, that does not prevent nor does it preclude the opportunity that individual victims have of turning to the *ECHR* in defence of their fundamental rights and freedoms, could, to a certain degree, account for this lack of claims filed on the international level. The victims of terrorist acts or of acts perpetrated by a person or persons forming part of armed gangs or groups or that act with the aim of seriously altering the citizens' sense of peace and security, shall be eligible for compensation from the Spanish State that, on a case by case basis, shall distribute such compensation in the form of civil responsibility. In these cases the Spanish State does not assume any subsidiary responsibility whatsoever but rather subrogates in victims' rights in the exercise of the corresponding civil suits against the perpetrators of the crimes. Both physical as well as psychophysical damages suffered by victims are eligible for compensation. Act 32/1999 of 8 October on Solidarity with the victims of terrorism (*BOE* 242, 9.10.1999) in the wording provided by Additional Provision nine of Act 14/2000 of 29 December (*BOE* 313, 30.12.2000) and by Act 2/2003 12 March (*BOE* 62, 13.3.2003) regulating these aspects.

Spanish Diplomatic and Parliamentary Practice in Public International Law, 2001 and 2002

This Section was prepared by Dr. C. Jiménez Piernas, Professor of Public International Law and International Relations at the University of Alcalá, Dr. M. A. Almeida Nascimento, Dr. V. Carreño Gualde and Dr. J. Ferrer Lloret, Lecturers in Public International Law, and C. Antón Guardiola, Associate Lecturer in Public International Law at the University of Alicante.

Except when otherwise indicated, the texts quoted in this section come from the OID, and more specifically from the OID publication *Pol. Ext.* 2001 and 2002 (*http://www.mae.es*), and from the International Legal Service of the Ministry of Foreign Affairs, whose collaboration we appreciate.

The following is a list of abbreviations related to the documentation of the Spanish Parliament used in the preparation of this Section (*http://www.congreso.es*, and *http://www.senado.es*).

BOCG-Cortes Generales – Boletín Oficial de las Cortes Generales. Cortes Generales. Serie A, Actividades Parlamentarias (Official Journal of the Spanish Parliament. Spanish Parliament. Series A, Parliamentary Activities).

BOCG-Congreso.D – Boletín Oficial de las Cortes Generales. Sección Congreso de los Diputados. Serie D, Actos de control (Official Journal of the Spanish Parliament. Congress of Deputies. Series D, Acts of Control).

BOCG-Senado.I – Boletín Oficial de las Cortes Generales. Sección Senado. Serie I, Boletín General (Official Journal of the Spanish Parliament. Senate. Series I, General Journal).

DSCG-Comisiones Mixtas – Diario de Sesiones de las Cortes Generales, Comisiones Mixtas (Official Record of the Spanish Parliament. Joint Committee Meetings).

DSC-C – Diario de Sesiones del Congreso. Comisiones (Official Record of the Congress of Deputies. Committee Meetings).

DSC-P – Diario de Sesiones del Congreso. Pleno y Diputación Permanente (Official Record of the Congress of Deputies. Plenary Sessions and Standing Committee).

DSS-C – Diario de Sesiones del Senado. Comisiones (Official Record of the Senate. Committee Meetings).

DSS-P – Diario de Sesiones del Senado. Pleno (Official Record of the Senate. Plenary Sessions).

Spanish Yearbook of International Law, Volume VIII, 2001–2002

Index

X. Environment

XI. Legal Aspects of International Cooperation

1. Development Cooperation
   a) *The Master Plan for International Cooperation*
   b) *Defence of human rights, democracy and fundamental freedoms*
   c) *Control of illegal immigration*
2. Assistance to Developing Countries
   a) *Latin America*
   b) *The Mediterranean*
   c) *Sub-Saharan Africa*
   d) *Middle East*
   e) *Asia*
   f) *Oceania*

XII. International Organisations

1. United Nations
2. North Atlantic Treaty Organisation
   a) *Enlargement*
   b) *Relations between the European Union and NATO*
3. Western European Union
   a) Relations between the European Union and the Western European Union

XIII. European Union

1. Enlargement
2. Spanish Presidency
   a) *Fight against terrorism*
   b) *Asylum and immigration*
   c) *Economic and social development*
   d) *Debate on the future of Europe*
   e) *External relations*
3. Area of freedom, security and justice
   a) *Asylum*
4. Economic and Social Development
   a) *Sustainable development*
5. Convention on the Future of Europe

XIV. Responsibility

1. Responsibility of States

XV. Pacific Settlement of Disputes

1. Jurisdictional Modes of Settlement

XVI. Coercion and Use of Force Short of War

1. Unilateral Measures
   a) *Cuba*
2. Collective Measures. Regime of the United Nations
   a) *Iraq*
   b) *Afghanistan*

XVII. War and Neutrality

1. Humanitarian Law
2. Disarmament
3. Exportation of Arms

I. INTERNATIONAL LAW IN GENERAL

1. *Nature, Basis and Purpose*

The XI Ibero-American Summit of Heads of State and Government, held in Lima (Peru), 23–24 November 2001, approved a Final Declaration that included:

> "(. . .)
>
> 2. The shared values and principles that define us represent our community's heritage and coincide with the universal principles embodied in the United Nations' Charter, particularly sovereignty, territorial integrity, refraining from the use or threat of force in international relations, non-intervention, states' legal equality, as well as all peoples' right to freely establish in peace, stability and justice their own political system and institutions, and respect and promotion of human rights. Similarly, we share a firm commitment to democracy.
>
> 3. At the onset of a new century we witness the prevalence and consolidation of democracy in Ibero-America. Consequently, we reaffirm our commitment to strengthen democracy and its institutions, the respect for the rule of law, political plurality, all human rights and fundamental freedoms, as well as the armed forces' subordination to the legally constituted civil authorities, within our countries' constitutional framework.
>
> 4. The stability and transparency of democracy, both its manifestations and functioning, are an imperative.
>
> (. . .)
>
> 5. The premier importance and operation of the rule of law and the respect for democratic principles represent the frame of reference and a shared commitment linking Ibero-American nations. At the same time, political cooperation implies a commitment between nations based on the uncompromised support of sovereignty, territorial integration, self-determination and each country's independence. Within this context, we reject any attempt to alter or interrupt the democratic institutional order chosen with sovereignty by each Ibero-American country and we will make use of consultation mechanisms and carry out specific actions should particularly urgent and relevant cases require it.
>
> (. . .)
>
> 7. We reiterate our unwavering commitment to protect, promote and guarantee the full application of human rights. This requires the prevalence of the rule of law as well as the creation and improvement of the conditions leading to its effective and full implementation. We condemn all human rights violations and demand full compliance with the principles embodied in the Universal Declaration on Human Rights and the pertinent international and regional instruments.
>
> (. . .)
>
> 24. We reiterate our strong rejection of any unilateral and extraterritorial application of a State's national laws or measures that may infringe upon international law and attempt to impose on third countries a state's own internal laws. In this

regard, we call upon the government of the United States to put an end to the application of the Helms-Burton Law, in accordance with the pertinent United Nations General Assembly resolutions.

(. . .)".

One year later, the Final Declaration adopted at the XII Ibero-American Summit of Heads of State and Government held in Bávaro (Dominican Republic), 15–16 November 2002, stated as follows:

"1. The Heads of State and Government of the twenty one Ibero-american countries, committed to the goals of closer links between our peoples, who share similar cultural values and a common aim to strengthen the rule of law and democracy and forge cooperation links with a view to insuring sustainable development and social equity, as well as better and more effective participation in a globalized world, have agreed on the following Declaration:

2. We reaffirm our support to the aims and principles of international law consecrated in the United Nations Charter, the respect for the sovereignty of states and equality before the law, the principle of non-intervention, the non use or threat of force in international relations, respect for territorial integrity, the pacific solution of disputes and the protection and promotion of all human rights. We reiterate our commitment to the promotion, consolidation and preservation of democracy and all peoples' right to choose their political system freely and to the acknowledgement of their cultural identity.

3. In our common aim to strengthen the democratic system, thus insuring democratic governance, we acknowledge the need to promote and continue to support actions aimed at consolidating a democratic culture and the rule of law, based on freedom, peace, tolerance, social and citizens' participation and social justice. At the same time, we underline the importance of those institutions that ensure transparency and efficiency in the actions of governments, political parties, groups and other entities representing civil society, as well as a more active participation by the people in matters relating to public life.

(. . .)

6. We reiterate our strong rejection of the unilateral application of extra-territorial laws or measures, which run counter to international law, the freedom of markets and world trade. Thus, once again, we exhort the government of the United States of America to put an end to the enforcement of the Helms-Burton Law, in accordance with relevant United Nations General Assembly resolutions.

(. . .)

8. We renew our commitment to fight, with a comprehensive outlook, against terrorism in all its forms and manifestations wherever it may manifest itself and whoever participates in it, to deny assistance or refuge to the authors, promoters or participants of terrorist activities. Similarly, we shall fight it by strengthening national legislations to prevent impunity and bolster international cooperation in all areas to prevent, fight against and sanction these type of activities that threaten life, peace, democratic stability and development, in accordance with the United

Nations Charter and fully respecting international law, including human rights and the norms of humanitarian law.

(. . .)".

The Declaration adopted by the Heads of State and Government of the European Union, Latin American and the Caribbean at the II Summit held in Madrid (Spain), 17 May 2002, stated:

"We need to face together the serious challenges and seize the opportunities of the twenty-first century. In a spirit of mutual respect, equality and solidarity, we will strengthen our democratic institutions and nurture the processes of modernisation in our societies taking into account the importance of sustainable development, poverty eradication, cultural diversity, justice and social equity.

Therefore, to develop a solid bi-regional strategic partnership . . . we undertake the following commitments:

In the political field:

1. To strengthen the multilateral system on the basis of the purposes and principles of the United Nations Charter and international law.

2. To reinforce our democratic institutions and the rule of law, we will strengthen judicial systems ensuring equal treatment under the law and promoting and protecting respect for human rights.

3. To welcome the imminent establishment and effective functioning of the International Criminal Court, and to seek universal adherence to the Rome Statute.

4. To combat terrorism in all its forms and manifestations – which threatens our democratic systems, liberties and development, as well as international peace and security – in accordance with the UN Charter and with full respect for international law, including human rights and humanitarian law provisions.

(. . .)".

II. SOURCES OF INTERNATIONAL LAW

1. *Unilateral Acts*

In the presentation made by the Spanish representative, Mr. Pérez Giralda, at the Sixth Committee of the UN General Assembly, at its 56th Session, to comment on the International Law Commission's Report, stated the following with respect to the subject of unilateral acts:

"(. . .)

The Special Rapporteur, Mr. Rodríguez Cedeño, has made a valuable contribution in his fourth report on unilateral acts. Witness to the difficulty of this subject is the recurring discussion in the General Affairs Commission concerning the feasibility of this study and the difficulties that States seem to run into in processing and submitting their practice on this subject to the Commission. We reiterate our interest in this work and the advisability of its concentrating on the

characteristics of certain types of unilateral acts and the legal system applicable to each one of them. It is of maximum interest to clarify an issue that has been debated by the Commission and that affects the very essence of the institution that it seeks to regulate. It is our understanding that the interpretive elements that should be used in the determination of whether an act or omission does indeed constitute a unilateral act in the spirit of the draft belong to the very description of such act. They should be considered as a preliminary issue with respect to the subsequent work of interpreting the terms of an act that has been established as such and that could give rise to doubts as concerns its content and scope. With respect to these latter aspects, we support the transposition, *mutatis mutandis*, made by the Special Rapporteur of the rules of the Vienna Convention on the Law of Treaties placing the emphasis on examination of the intention of the State formulating the unilateral act in question.

(. . .)".

2. *Treaties*

a) Reservations

With regard to the work of the International Law Commission on the subject of reservations to international treaties (Chapter VI of the Report), the Spanish representative, Mr. Pérez Giralda, stated before the Sixth Committee of the UN General Assembly, at its 56th session:

"(. . .)

We agree with the assessment made by the International Law Commission in its consideration of the Rapporteur's proposal, especially regarding the function of the depositary. Indeed, my Delegation is of the opinion that there is no reason for the guidelines being drafted by the Commission to diverge from the articles of the Vienna Convention on the Law of Treaties. The functions of the depositary are, indeed, of great importance, but their content should be especially functional and operational when it comes to reservations and possible objections to the Treaties with the exception, pursuant to Article 77 of that Convention, of those cases in which the Treaty stipulates something different or in which the Contracting States agree to a different system".

3. *Codification and Progressive Development*

Note: See II.1 Unilateral Acts; II.2.a) *Reservations*; XIV.1 Responsibility of States

III. RELATIONS BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

IV. SUBJECTS OF INTERNATIONAL LAW

1. *Self-Determination*

a) East Timor

Assessment of the situation in East Timor led to a question posed in Congress to which the Government responded on 26 January 2001 in the following terms:

> "In Spain's view the situation in East Timor, a little over a year subsequent to the departure of the Indonesian civil and military authorities (concluded on 31 October 1999), merits a positive assessment in light of the complexity that a process of this nature entails.
>
> The task faced by the United Nations when the Transitional Administration in East Timor was established (UNTAET, created by Resolution 1272 of the United Nations Security Council of 25 October 1999) was enormous. UNTAET . . . had to take on a number of challenges: watch over the keeping of law and order, set up an effective administration, create an infrastructure for public and social services, coordinate and deliver humanitarian assistance and set the stage for sustainable development. The stage has progressively been set for the realisation of these objectives. Specific mention should be made of the following advances on the institutional level:
>
> – At the end of October 2000, an exclusively Timorese National Council was set up comprised of 36 members, 13 of whom are women. . . . This is considered the first step towards the creation of a true Timorese Parliament. The ex-head of the East Timor resistance, Xanana Gusmao, was elected President of this new National Council.
> (. . .)
> – And finally, it should be pointed out that East Timor will soon begin a consultation process to draft a new Constitution and elections are scheduled to be held in the summer of 2001 and will subsequently give rise to the creation of the Constituent Assembly.
>
> Currently there are two issues that the UNTAET is working on with regard to West Timor. The pressure being exerted by the International Community (Security Council Resolution 1319 of 8 September 2000) . . . led to a Mission of the United Nations Security Council being sent (from the 13th to the 17th of November 2000) to the area to take stock 'in situ' of the situation in East and West Timor; and the commencement of initiatives, on the part of Indonesia, to curtail militia activity.
> (. . .)
>
> The initial UNTAET mandate runs until 31 January 2001 although the transition process leading to the independence of West Timor is predicted to last between two and three years and the mandate should therefore be extended in the future by the UNSC".
>
> (*BOCG-Congreso.D*, VII Leg., n. 125, p. 277)

b) Palestine

The constitution of a Palestine State was the subject of a question raised in Congress. On 31 October 2002, the Government replied:

"The Government advocates a pacific and negotiated settlement of the conflict in order to achieve just and lasting global peace. Spain, like the European Union, shares the vision put forward by President Bush of two States living side by side in peace and security and that includes an end to occupation and the expedient establishment of a sovereign, viable and pacific Palestine State with democratic institutions.

One of the EU's latest contributions to the Peace Process was the development of a "road map" or calendar for the creation of a Palestine State in the year 2005. This calendar foresees the holding of Palestinian elections at the beginning of 2003 and the Palestinian National Authority (PNA). General elections have, in fact, been organised for 20–1–03.

(. . .)

Spain, in line with the European Union, does not make the replacement of Arafat a condition for the proclamation of a Palestinian State. Also in line with the rest of the Members of the Union, Spain firmly believes that the Palestinian people have both the right and responsibility to elect their leaders by means of democratic and fair elections. The EU has reiterated its position on a number of occasions to the rest of the members of the quartet (USA, Russia and the UN), to the parties involved in the conflict and to the countries in the region. As regards Spain's Presidency of the Union in 2002, the following assessment may be made with regard to the Middle East:

(. . .)

During the course of the semester under the Spanish Presidency, the EU paid particularly close attention to the Middle East conflict with the aim of opening up a political perspective that would make it possible to return to the negotiating table from a global perspective encompassing elements of security, politics and economy viewed as inseparable and interdependent elements of the same process under the conviction that there is no military solution to the conflict. This was expressed in a number of declarations made by the General Affairs Council and in the Barcelona and Seville Declarations.

Moreover, action taken by the Spanish Presidency was aimed at palliating the serious humanitarian crisis that the region is undergoing. The EU participated in the donors' meeting (AHLC) in April in Oslo where it reiterated its commitment to provide economic assistance for the PNA of which it is the biggest donor.

At the same time, Spain pushed for close coordination with other international actors: the US, the Russian Federation, the UN and the most affected Arab countries. One of the major achievements of the Spanish Presidency of the EU was the creation of the "Quartet" comprised of representatives from the UN, the EU, Russia and the US that . . . have been pushing for the search for a solution to reach a just and lasting world peace based on the Resolutions of the United Nations, the principles of the Madrid Conference and the agreements reached by the parties.

Another of the fruits of the push for coordination was the EU's firm backing of the Saudi Peace Plan proposing the establishment of normalised relations between Israel and the Arab countries.

(. . .)".

(*BOCG-Congreso.D*, VII Leg., n. 430, p. 73).

c) Western Sahara

The complex legal conflict affecting the Western Sahara has been the basis for a number of appearances before Congress and the Senate during 2001 and 2002. Specifically, on 28 January 2001, the Government answered a question before the Senate related to the proposal for Saharan autonomy tabled by the UN Secretary General's Personal Envoy, Mr. Baker, affirming that:

"The proposal tabled by the Personal Envoy of the Secretary General of the United Nations, Mr. James Baker, features a regime of autonomy for the Western Sahara territory under Moroccan sovereignty in an attempt to break free of the stalemate that has stood in the path of the implementation of the 1991 United Nations Settlement Plan over the last several years. This stalemate is due to a manifest lack of will on the part of the two sides – Morocco and the Polisario Front – to come to an agreement on the implementation procedure, mainly the list of voters for the self-determination referendum envisioned in the above-mentioned Settlement Plan that would lead to the culmination of the process.

Said proposal has met with the rejection of the Polisario Front and Algeria while it has been accepted (although with reservations) by Morocco.

Throughout this conflict, Spain has always maintained an active position consisting in providing support for the United Nations' efforts and in encouraging the parties to put aside the obstacles that for a number of years have blocked the way to the application of the Settlement Plan that, for the time being, continues to be the only instrument accepted by the parties.

(. . .)

Specifically, during the discussion process that arose at the Security Council following the presentation of this new initiative, the Spanish stance was guided by respect for the consensus reached in the past between Spain's political groups and as expressed in the Green Paper of 22 December 1997; the need to guarantee the presence of MINURSO (United Nations Mission for the Referendum in Western Sahara) in the territory by extending its mandate to 30 November . . ., and maintaining the commitment of the international community with the resolution of this conflict within the framework of the United Nations.

In short, Spain is of the opinion that Mr. Baker's proposal can open up new perspectives for negotiation between the parties in the quest for a mutually acceptable solution for the parties involved within the framework of international legality".

(*BOCG-Senado.I*, VII Leg., n. 350, pp. 4–5).

One month later, on 28 February 2001, the Foreign Affairs Minister, Mr. Piqué i Camps, appeared before the Foreign Affairs Commission of the Congress to respond

to a number of questions on the stance and initiatives taken by the Spanish Government in response to the stalemate in the enforcement of the Settlement Plan and the possible extension of the MINURSO mandate:

"For many years now, Spain has maintained the same position when it comes to the conflict in Western Sahara, that of full support for the United Nations resolutions, full support for the so-called Settlement Plan and full support for the efforts being made by the Secretary-General of the United Nations and for his special envoy, James Baker, to finally resolve this conflict. The Settlement Plan does indeed contain a special element, the celebration of a referendum that is coming up against enormous difficulties.

(. . .)

In light of this context, the Secretary-General of the United Nations and his personal representative have got behind a possible reorientation of the process that Spain, as well as the rest of the governments, has supported to the degree that it can contribute to a solution; that of requesting that the Government of Morocco come up with a proposal for a political solution that could be mutually acceptable to the parties. Today the MINURSO mandate ran out but was extended as requested by Messrs. Baker and Annan. The mandate extension has been approved two times now with a view to giving Morocco time to define its position that, *a priori* and without being privy to its contents, seems to have been rejected by the Polisario Front.

(. . .)

At any rate, Spain is not going to budge even one millimetre from the position taken at any time by the Security Council or by the Secretary-General of the United Nations.

(. . .)".

(*BOCG-Congreso.D*, VII Leg., p. 5023).

Subsequently, on 7 May 2002, the Secretary of State for Foreign Affairs, Mr. Nadal Segala, appeared before the congressional Foreign Affairs Commission to provide information on Western Sahara pointing out the following:

"Our position is based on a stance of active neutrality, . . .

In this sense the Government has repeatedly stated its commitment to the efforts being made by the United Nations in its quest for a solution acceptable to all parties. Specifically, the Spanish position is based on the following points. First, to continue supporting the efforts of the United Nations, of the Secretary-General of the United Nations and of his personal envoy to find a solution to the conflict. Second, to reiterate our willingness to support any solution reached by consensus and that is feasible from those included in the latest report of the Secretary-General of the United Nations, it is believed that only an agreement or consensus will be able to guarantee regional stability. Third, Spain does not recommend the fourth option, withdrawal of MINURSO and recognition of the United Nation's inability to resolve the problem. It is our view that MINURSO continues to carry out essential functions in maintaining the cease fire and its intervention would also be

necessary in the application of any of the three options proposed by Mr. Baker. Fourth, Spain has noted that the only framework to date that has met with the backing of the parties continues to be the Settlement Plan that calls for a referendum. Fifth, Spain considers it necessary to insist on the humanitarian aspects of the conflict independent of the overall political solution. The Polisario Front should be energetically reminded of the need to free the more than 1,300 Moroccan war prisoners that are still being held in Tinduf and the Moroccan authorities should also be encouraged to permit refugees and their families to get together in the Saharan territories.

In short, the Government feels that the situation should not be drawn out over time and that over the last several months we have been witnessing a concerted effort on the part of the international community to free itself of the apparent deadlock in which the conflict finds itself.

(. . .)

The solution to the Sahara conflict lies fundamentally in the Maghreb and the international community can play a positive accompanying role. But if we all agree that the solution should be consensus-based, that solution lies fundamentally within the Maghreb region and should be a solution that respects the dignity of the Saharawi people, that respects their legitimate rights and also bears regional stability in mind. This is the basis on which we should involve ourselves at the initial stages.

(. . .)".

(*DSC-C*, VII Leg., pp. 15676 and 15684).

Finally, on 22 October, the Government answered a question raised by the Senate regarding the steps taken to promote peace in the Western Sahara:

"The Government has repeatedly stated its position with respect to the Western Sahara conflict, which has not changed as of late despite the different positions taken and the different alternatives that have been posed.

Based on the position of active neutrality taken by Spain in this conflict, the Government has stated on a number of occasions its commitment to the efforts being made by the United Nations in the quest for a solution that is acceptable to all sides.

(. . .)

This was the position taken in the past . . . and will be the case as well in the future of the conflict now marked by Resolution 1429 of 30 July.

(. . .)

Resolution 1429 once again underscores, as the Spanish Government has done on all occasions, the large-scale humanitarian problem affecting both the Saharawi refugee population at the Tinduf camps as well as the 1,260 Moroccan prisoners of war being held in such camps, most of them for over twenty years now.

In this sense, the steps taken in June of 2002, while Spain held the Presidency of the European Union, resulted in a memorandum that was sent to Algeria, Morocco and the Polisario Front expressing the Union's concern over these issues and

undoubtedly contributed to the liberation in July by the Polisario Front of 100 Moroccan prisoners".

(*BOCG-Senado.I*, VII Leg., pp. 15–16).

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. *Diplomatic and Consular Protection*

a) Diplomatic Protection

In his appearance before the Sixth Committee of the United Nations General Assembly at its 57th Session, the Spanish representative, Mr. Yáñez-Barnuevo, made the following assessment of the work carried out by the International Law Commission:

"All of you are well aware that diplomatic protection is an institution of considerable importance in international relations and the in-depth examination under way by the ILC is a logical extension of its recently completed work on the responsibility of states for illegal international acts. To this end, the Commission must, first and foremost, base its work on relevant and established international practice without prejudice to meeting new needs or trends to the degree to which this is necessary and does not alter the essential structure and guidelines of the codification project. It is our understanding that this has been the basic concern of the Commission upon examining the reports and proposal made by the Special Rapporteur Mr. John Dugard and we fully share this approach.

For that same reason, we feel that it is appropriate for the ILC to focus basically on the aspects that characterise the exercise of diplomatic protection, i.e. the nationality of the charges and having first exhausted domestic appeal procedures. The ILC should therefore, to the degree possible, avoid other fields – such as the functional or any other sort of protection provided by international organisations or other issues linked with diplomatic protection –, the examination of which could lead the Commission away from its main objective in this field with the result of possibly not being able to bring its work on this subject to a close, as planned, during this five-year period. This of course does not exclude some of these issues being the focus, at a given point in time, of a separate examination that could take advantage of the results that are obtained in the project that is currently under way.

Having examined the first seven articles provisionally approved by the ILC together with their respective commentaries, my delegation will limit its observations to the most salient aspects. First of all, we would like to highlight the importance of coming up with a very accurate definition of the very concept of 'diplomatic protection' in draft article 1 and its commentary. Although we agree in general terms with the content of this draft article, we are afraid that it does not sufficiently differentiate diplomatic protection *per se*, as a notion with specific characteristics in international law, from other concepts that may be related but that should not be confused with it. I am specifically referring to general protection that, in the

form of diplomatic or consular assistance, a State may always lend to its citizens abroad even in those cases – commonplace in international practice – in which not all of the requirements for the exercise of diplomatic protection *per se* are fulfilled. It is our hope that in its second reading the ILC will get back to this issue that we feel is important because it affects the project as a whole, and that it clarifies these concepts in the wording of the articles themselves or at least in the commentary.

We support the approach adopted by the ILC in its configuration of the exercise of diplomatic protection as a right or a faculty – not an obligation, at least in the international arena – of the state of nationality of the natural or corporate person affected by an internationally illegal act perpetrated by another State. This points to the importance of defining as precisely as possible the features characterising the nationality link requirement as a prerequisite for the exercise of diplomatic protection as well as the limited exceptions to that principle that are set out in contemporary international law.

Aspects relating to the nationality of natural persons are covered by draft articles 3 to 7, provisionally approved by the ILC and generally satisfactory for my delegation with a few adjustments. Specifically, in light of the importance in draft articles 3 and 4 of the concept of the acquisition of the nationality of the State filing suit 'in such a way that it does not violate international law', we would have liked to have seen further development of this notion in the commentary. To state it another way, if one abandons – as proposed by the ILC – the effective links criteria, upheld by the International Court of Justice in the *Nottebohm* case, to determine the international effects of nationality, what would it be replaced with? How would opposition based on nationality be argued with respect to third countries? It is the opinion of my delegation that this fundamental point is not at all clear in the text proposed by the ILC.

Along these same lines and sharing the negative formulation given to draft article 6 regarding the exercise of diplomatic protection in cases of double or multiple nationality among the States in question, we believe that the text of the provision itself should provide greater precision regarding the criteria of predominant nationality. To that end, and including elements that are found in the commentary, we would propose the addition of a paragraph 2 stating more or less as follows: 'For the purposes of paragraph 1, the nationality of the State with which the person had the greatest effective links on the dates in question shall be considered as predominant'.

And finally, I would like to express our delegation's support for draft article 7 on the diplomatic protection of stateless persons and refugees provided by the State of legal and habitual residence of the person in question with the cautionary measures contained in said provision. Although this is an example of the progressive development of international law, from our perspective it appears to be perfectly justifiable, it is supported to a certain degree by international practice and is in line with the aims pursued by international regulations on this subject.

I am now going to turn my attention to the issues examined by the ILC at its

last session concerning the second Special Rapporteur's report on diplomatic protection the examination of which was already under way during the past period of the Sixth Committee sessions. I will also address the third report tabled this year. On that occasion, the Spanish delegation was pleased to receive the Special Rapporteur's proposal that made an innovative effort to overcome the traditional disquisition as concerns the procedural or substantive nature of the rule requiring that domestic appeal procedures in the exercise of diplomatic protection first be exhausted. We therefore regret the fact that draft articles 12 and 13 proposed by the Special Rapporteur have not been passed on to the Drafting Committee. We therefore hope that these ideas will be expressed in the form of a commentary to draft article 10, containing the basic formulation of exhausting appeal procedures, and will help to clarify to some degree the doubts surrounding this subject that are not of a purely theoretical or academic nature as is rightly pointed out by the Special Rapporteur.

With respect to the proposed regulation of the exceptions to the rule of exhausting domestic appeal procedures contained in draft article 14 proposed by the Special Rapporteur, my delegation supports the first of such exceptions, focusing on the uselessness of such appeals being formulated with the necessary adjustments, in relation to the third option proposed by the Special Rapporteur that highlights the circumstance in which the existing appeals offer 'no reasonable possibility of obtaining effective remedy'.

As concerns the second exception proposed regarding the renunciation on the part of the accused State of the requirement to exhaust appeal procedures, we share the idea that this renunciation should, in principle, be expressed. The possibility of an implicit renunciation, however, should not be discarded at the outset but this type of renunciation would certainly not be easy to presume or deduce. Basically the same could be said of the own acts (estoppel) doctrine that, in order to produce effects, would have to comprised of unequivocal acts on the part of the State in question.

With regard to the proposed exceptions on grounds of absence of voluntary links or territorial connection between the person affected and the State that is the alleged perpetrator of the internationally illegal act, my delegation is of the opinion that neither practice, nor case law, nor doctrine support beyond doubt the justification for such exceptions and it would therefore be preferable for both issues to be dealt with in the commentary of draft article 14. As concerns the exception to the rule to exhaust domestic appeals based on undue delay, we share the opinion expressed by the ILC and by the Special Rapporteur himself that, while recognising the validity of the exception based on the practice of States, case law and doctrine, its regulation would be better placed, with the necessary adjustments, in the first section of draft article 14. And finally, with respect to the lack of accessibility to appeal, envisioned in the last section of draft article 14, my delegation shares the Commission's decision to reject the proposal on the grounds that it could be added to the case contemplated in the article's first section, i.e. lack of a reasonable effective appeal.

The proposal made by the Special Rapporteur to include a draft article 15 on burden of proof in issues concerning the exhaustion of domestic appeals is certainly interesting to us although we do share the opinion expressed by the ILC regarding its excessively procedural nature and we therefore prefer that it not be included in the draft unless a place were found for it, with the necessary adaptations, in the final part of the draft articles relative to the manner in which diplomatic protection is to be exercised.

With regard to the second part of the third report on diplomatic protection concerning the so-called Calvo clause, my delegation thanks the Special Rapporteur for his exhaustive investigative work. We acknowledge the irrefutable relevance that the Calvo clause, as a manifestation of the doctrine bearing the same name, has had in the practice of the Latin American nations. However, in keeping with the classic concept of diplomatic protection understood as a right or faculty of the State that my delegation has been defending, we cannot conceive of a person renouncing the exercise of a right that basically is not his to renounce given that this privilege lies with the State of his nationality. We therefore share the final position adopted by the ILC in not including draft article 16 proposed by the Special Rapporteur putting, however, appropriate references to this issue in the commentary of the draft articles.

And finally, with respect to the specific issues raised by the ILC to the Governments, and without prejudice to the corresponding written commentaries that may be subsequently forwarded, my delegation is, in principle, of the opinion that the regulations of the 1982 Convention on the Law of the Sea, as regards the exercise of faculties on the part of a ship's flag State, provide sufficient protection for the crew members that are not nationals of the flag State. It therefore does not deem convenient the inclusion of a precept on the exercise of diplomatic protection by the flag State in said cases in the draft articles. The same consideration applies to other similar cases such as those concerning the crew of an aircraft or a spaceship.

As regards the issue of diplomatic protection for companies and their stockholders or partners, my delegation feels that this subject is both important and delicate, merits careful attention and should bear in mind the different hypotheses registered on a practical level. At any rate, we are of the opinion that any approach to this subject should be based on the case law established by the judgement of the International Court of Justice in the *Barcelona Traction* case that reflects current international rule of law in this regard and contains sufficient detail and nuances to cover the most relevant cases. Moreover, in a globalised world in which the ownership of a company's stock can change hands several times in a single day, it is difficult to speak, in practical terms, of a 'shareholders State of nationality' or even of States of nationality given that these could be numerous and continuously changing in many cases".

b) Consular Assistance

On 21 January 2002 the Government replied to a parliamentary question related to the frequency of consular visits to Spanish prison inmates abroad in the period 1996–2000 stating as follows:

> "One thousand two hundred fifty-nine Spanish citizens are serving sentences in foreign prisons in the zones covered by ninety-nine different Spanish Consular Offices; . . .
>
> The frequency with which consular visits are paid to detainees varies substantially from country to country and from Consular Office to Consular Office depending upon the size of the country, the number of official and honorary consular offices in each country, the laws and regulations affecting visits to detainees in the host State – given that this consular function must comply with Article 36.2 of the Vienna Convention on Consular Relations of 24 April 1963 – the distance between the detention centre and the Consular Office, the availability of personnel in each Consular Office, etc.
>
> Based on what has just been said, it is clearly impossible to carry out an investigation that requires the ninety-nine Heads of the Consular Offices in the areas within which there are detention centres with Spanish inmates in 2001 to file a report on the visitation schedule followed during the five previous years with each and every one of the said detainees.
>
> Since this information does not exist, it would be necessary to carry out a long-term investigation . . .
>
> In response to the question of whether monthly correspondence is maintained with the Spanish inmates, I can inform you that only exceptionally is Circular Order 3106 referred to by your Excellencies called upon because the general rule is that each and every detainee must be visited personally, regardless of the penitentiary centre where the sentence is being served, at least once a year".
>
> (*BOCG-Congreso.D*, VII Leg., n. 294, p. 90).

On 25 October 2002, in response to a parliamentary question, the Government provided information on assistance granted by Spain to its nationals abroad, particularly to those in Argentina and Uruguay:

> "The Ministry of Foreign Affairs, via its 158 Consular Offices abroad, helps with situations of grave necessity faced by Spaniards outside of Spain (regardless of whether they are permanent or temporary residents abroad). These expenditures are charged to budget section 493 with 4,098,900 euros for the year 2002. The Ministry, in continuous contact with the consular network, manages available resources giving priority to situations of grave need faced by Spaniards who are elderly, those that are handicapped and unable to work or unprotected minors. Over the past several years consular assistance in Argentina and Uruguay has been reinforced as much as possible while also bearing budget restrictions in mind.
>
> Approximately 10,000 of these grants were issued in fiscal year 2001. The modalities of the aid granted are defined by Ministerial Order AEX/1059/2002 of

25 April on the regulatory bases for consular protection and assistance aid abroad: repatriation, subsistence aid, special individual aid, aid for detained persons, aid for legal assistance and evacuations . . ., but under no circumstances may expenditures be in excess of the approved budget for said budgetary concept. Subsistence aid is one of the most important both in Argentina and Uruguay although, in light of budgetary restrictions, only on some occasions is the amount commensurate with assistance pensions granted through the Ministry of Labour and Social Affairs. In contrast to assistance pensions, subsistence aid – like the rest of the aid granted through Consulates – does not imply any right whatsoever regarding future grants.

Focusing specifically on Argentina, the overall budget earmarked under budget item 493 at the beginning of 2002 for Spain's five consulate generals in Argentina totalled 710,000 euros. Recently, thanks to the favourable development of the euro during the course of the year and due to the fact that the reference currency in Argentina is the US dollar, the budget for those Consulates was increased by 45,000 euros. The 755,00 euros earmarked for consular assistance for Spanish residents in Argentina accounts for 18.42% of said budgetary item. Moreover, at the end of December 2001 and in light of the serious crisis suffered by that country, funds from item 493 that went unused were sent to the Consulate General of Spain in Buenos Aires for an emergency plan allowing for an allotment of 200 dollars to more than 1,200 Spanish families in need.

As concerns Uruguay, approval was given at the beginning of 2002 for the amount of 325,000 euros for the Consulate General in Montevideo and more recently an additional 15,000 euros was added representing a total amount of 340,000 euros, i.e. 8.29% of budget item 493".

(*BOCG-Congreso.D*, VII Leg., n. 246, p. 546).

On 15 March 2001, in response to a parliamentary question, the Government provided information on the situation facing Spanish inmates imprisoned in Morocco and on the enforcement of the Repatriation Agreement for the serving of sentences in Spain:

"1. It can be said that the Agreement on the Transfer of Sentenced Persons between Spain and Morocco of 30 May 1997 has functioned and continues to function in a satisfactory manner because both sides have tirelessly sought flexible solutions permitting maximum speed in the transfer of sentenced persons to their countries of origin; considering each case individually and invoking humanitarian reasons under certain circumstances.

Although the transfer of the detainees should be carried out within the framework of the Agreement, implying the necessary fulfilment of the requirements foreseen in said Agreement such as the duration of the sentence, final judgement and absence of appeal, on a number of occasions, thanks to multiple initiatives taken by the Spanish Embassy as well as the Consulates General, the Moroccan Party has agreed to the transfer of detainees facing serious health problems even in the absence of payment of the fine imposed.

At any rate, the Spanish authorities are going to continue to insist that the responsible Moroccan authorities speed up procedural questions that in some cases create undue delays in the transfer of some detainees for humanitarian reasons.

Proof of the correct functioning of the Agreement is that to date 64 compatriots serving sentences in Morocco have benefited by being transferred to Spanish prisons.

2. Moreover, the objective figures of compatriots transferred to Spain since 1999 thanks to this Agreement are as follows:

Year 1999:	14 transfers.
Year 2000:	12 transfers.
Year 2001:	2 transfers.

(. . .)

4 and 5. The Foreign Affairs Ministry has paid special attention to this problem in the travel recommendations found at the Ministry's web page that is open for consultation by any person who wishes to travel to Morocco or to any other country in the world. With respect to the issue of drugs, the web page specifically states: 'the consumption and possession of drugs, regardless of the amount, is punishable under the law with a prison sentence and fine'. Also in the recommendation for travel to Morocco it recommends that 'in the event of a problem, get immediately in touch with the closest Spanish Consulate or with the closest European Union Consulate' ".

(*BOCG-Congreso.D*, VII Leg., n. 149, pp. 271–272).

On 11 February 2002, in response to a parliamentary question, the Government provided information on Consular assistance furnished by Spain to Spanish nationals being held in Moroccan prisons:

"1. The number of Spaniards detained or imprisoned within the territory of the different consular districts of Morocco is as follows:

Agadir:	1
Casablanca:	3
Larache:	No Spaniard detained.
Nador:	No Spaniard detained.
Rabat:	9
Tangiers:	36
Tetuan:	14

2. As concerns the crimes for which they have been accused or sentenced, 95 percent have been accused or sentenced for drug trafficking while the remaining 5 percent for 'abuse of trust' – criminal category corresponding to fraud –, writing bad checks and murder.

The sentences imposed following judgement vary from between one and ten years imprisonment in the case of narcotic drug trafficking, six months for fraud and twenty years for murder.

3. Spanish prison inmates or detainees are visited by the Spanish Consul as many times as the objective situation requires but at least once a year. At any rate they are visited upon request in writing or by telephone. Specifically the visitation calendar is as follows: In the case of the Consulate General of Tetuan, every fifteen days, the Consulate General of Casablanca pays at least three visits per month, in Agadir every two months, in Rabat every month and a weekly visit is paid by the Spanish Consulate in Tangiers.

4 and 9. Said visits are paid by Spanish Consulate personnel and to date it has not been necessary to resort to any other European Union Consulate for this purpose. Neither has any notice been received from any European Union Consulate requesting that a Spanish Consulate visit a detained compatriot on their behalf.

5. The majority of the Spanish detainees in this country are in permanent telephone contact with their respective Consular Offices that they can call whenever they like. Some of them, however, prefer written correspondence with the Consular Office which answers all letters received.

6. In the Consulates General of Casablanca, Rabat and Tangiers a system of visits by volunteers has been developed. Said volunteers are from service institutions such as the *Hijas de la Caridad* (Daughters of Charity) in the case of Tangiers, clergy from the *San Francisco de Asís* Parish in Rabat or clergy from the area covered by the Consulate General of Casablanca. Visitation systems of this sort have not been set up at the rest of the Consulates General because such visits are paid directly by the personnel from the respective Consulates.

7 and 8. Spanish detainees in Morocco are provided with the economic aid provided for in Circular Order 3106 of the Foreign Affairs Ministry. In cases of health care they are granted special economic aid to defray such costs. Concession of this aid is individually assessed and authorised".

(*BOCG-Congreso.D*, VII Leg., n. 303, pp. 218–219)

2. *Aliens*

On 17 September 2001, in response to a parliamentary question, the Government provided information on security conditions and regulations applied in the transfer to Nigeria of persons from that country illegally entering Spain:

"In the way of background information, one must bear in mind that the enforcement of an expulsion sanction entails the taking of a number of administrative steps with their corresponding guarantees such as communication of the initiation of proceedings to the Consular Office of the respective country or to the Ministry of Foreign Affairs, the court appearance or the possibility of appealing the resolution for expulsion. As of the initial stages of disciplinary measures of expulsion filed against an alien, the authorities of that alien's home country are informed by the Spanish authorities and the former must authorise the entry of their nationals that are expelled to their country.

Accordingly, the Nigerian citizens to which reference was made were interviewed

by their diplomatic authorities in Spain and such authorities issued the corresponding safe-conduct pass needed to follow through with the surrender. Subsequently, in Nigeria, they were brought before the Nigerian immigration authorities in presence of diplomatic personnel from the Spanish Embassy in Nigeria.

As concerns the conditions under which these persons were transferred from Spain to Nigeria, officers of the National Police Force took custody of the persons expelled until arrival at their destination (Police Station officers as well as police from the Intervention Units).

In all of these transfers the proper safety measures are adopted for the aliens being repatriated, for the police officers and for the rest of the passengers when applicable. The location of the passengers and other conditions affecting the aliens are subject to the discretion of the captain of the aircraft who is the competent authority to assess in each case the safety of travel conditions as established, in the case of air transport, in the Chicago Convention of the International Civil Aviation Organisation – ICAO.

While carrying out repatriation measures, not only are Spanish regulations applicable, but also the different international conventions that regulate the air transport of passengers as well as the principle of 'non refoulement' contained in the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Moreover, on 19 June an agreement was initialled between the Government of the Kingdom of Spain and the Government of the Federal Republic of Nigeria on immigration matters. The agreement is therefore pending signature and ratification.

As regards the content of that Agreement, its aim is to improve cooperation between the contracting parties with a view to improving the enforcement of the provisions on the migration of persons and respect and guarantee of their fundamental rights in compliance with applicable legislation in both States, combating illegal immigration, facilitating the repatriation of the nationals of one contracting party illegally residing in the territory of the other party and treating such person with dignity, protecting their human rights.

The articles of this Agreement therefore include provisions covering rights, a readmission procedure providing for and explicitly including the rights and guarantees that must be protected and recognised (such as data protection, not subjecting detainees to undue force, torture or cruel, inhuman or degrading treatment) the means and instruments to follow through with this process, competent authorities to take charge of enforcement and finally, a commitment for mutual technical assistance between the authorities of both countries is established".

(*BOCG-Congreso.D*, VII Leg., n. 231, pp. 507–508).

On 31 July 2002, in response to a parliamentary question, the Government provided information on the granting of refugee status by Spanish authorities:

"1. From the year 1997 to 2001 the total number of asylum seekers in Spain was 37,650 persons. The number of asylum seekers by year is as follows:

1997, 4,975
1998, 6,764
1999, 8,405
2000, 7,926
2001, 9,490

(. . .)
3.

Year	Unfav.	Est. refugee	Hum. reasons	Other protec.
1997	1,431	156	205	
1998	2,067	238	491	193
1999	1,930	294	679	59
2000	2,475	394	273	109
2001	2,103	314	84	168

Upon notification of an unfavourable decision, the asylum seeker is informed that he must leave national territory within 15 days.

4. This data is not easily accessible because there is not always just one single cause for failing to process the request meaning that many refusals to process are due to more than one reason. Data can be provided, however, on the most frequent reasons that a request is not processed.

Most frequent motives for refusal to process:

	Art.5.6a)	Art.5.6b)	Art.5.6c)	Art.5.6d)	Art.5.6e)	Art.5.6f)
1997	1	1,790	47	1,962	148	498
1998	—	2,079	26	1,405	87	283
1999	—	2,555	18	1,566	112	485
2000	—	2,778	8	1,981	186	512
2001	—	4,435	28	2,436	123	223

5. The help of a lawyer is always guaranteed whether that lawyer be privately hired by the asylum seeker, is found through the Spanish Lawyers' Association, via the free legal assistance agreements signed with the Ministry of Justice or, if specifically requested, is a lawyer from one of the NGOs that specialise in work involving asylum seekers and refugees.

As concerns interpreters, the Home Ministry has a hired service providing interpretation for asylum seekers in the following languages: English, French, Arabic, Chinese, Russian, Kurdish, Turkish, Rumanian, Georgian, Farsi, Armenian, Afghan, Urdu, Albanian, Hindi, Somalian, Serbo-Croatian and Portuguese. Moreover, the Asylum and Refugee Office has personnel that speak dialects of Arabic, Georgian and Italian. It can also be confirmed that all asylum seekers that have needed interpreters of languages other than the ones listed above have been provided with such interpreters. This should be recognised as an important achievement on the part of the Central Government given that it is not always easy to find interpreters

given the tremendous linguistic diversity of asylum seekers, many of whom speak only dialects or minority Sub-Sahara African languages.

As concerns medical services, asylum seekers may request health care if so required and this is provided through agreements with the Spanish Red Cross. In the event that hospitalisation is required via medical prescription, this is done through the National Health System.

No complaint has been filed for failing to be provided with legal, health or interpreting services.

6. Extradition procedures are suspended when asylum is requested. As regards persons granted refugee status, this implies the right to reside and work in Spain and therefore expulsion procedures are suspended.

(. . .)

Denial of a request for asylum or refugee status can lead to a residency permit for humanitarian reasons but this person would never be considered an 'immigrant' for registry or statistical purposes. The term 'immigrant' refers exclusively to those persons that from the very beginning apply for a job which at that moment can only be done by signing a contract in the country of origin and with prior approval in the annual contingent".

(*BOCG-Congreso.D*, VII Leg., n. 393, pp. 526–527).

3. *European Convention on Human Rights*

On 26 January 2001, in response to a parliamentary question, the Government provided information on Spain's reasons for failing to ratify Protocol 12:

"One of the issues that was highlighted at the Rome meeting, commemorating the Convention's Fiftieth Anniversary, was the fact that the European Court of Human Rights (ECHR) runs the risk of falling victim to its very success. The influx of appeals to the Court is putting it in danger of collapse. It was also concluded that by simply covering the lack of human and material resources suffered by the Court, it will be able to find a solution over the middle term.

In light of this situation, the adoption in the immediate future of a new legal instrument such as Protocol 12 would spell the definitive paralysis of the ECHR. Its content offers no doubt whatsoever as to its goodness.

However, the probable number of complaints filed for alleged discrimination for such a wide array of reasons (sex, race, colour, language, religion, opinion, social origin, membership in a national minority group, lot, birth or any other situation) will most likely be greater than the number already filed based on the existing provisions of the Convention and its protocols.

All of these worrisome circumstances are being kept very much in mind in the careful consideration that the Spanish Government is giving the possible signing of this Protocol. The basic issue is whether it might be necessary to solve the problems that the ECHR faces today before taking a decision of this nature".

(*BOCG-Congreso.D*, VII Leg., n. 125, pp. 317–318).

VI. STATE ORGANS

1. *Foreign Service*

The functions of the new Ambassador on special mission for migrations and the protection of Spaniards abroad led to a parliamentary question that was answered before Congress by the Minister of Foreign Affairs, Mr. Piqué i Camps on 21 March 2001:

> "(. . .)
> Protection of our compatriots is a priority of our foreign policy that I would like to reiterate here today. It is true that this protection is provided on a permanent basis through our diplomatic missions and consular offices but with this appointment we seek to act in this context with greater social impact and with greater technical specialisation in accordance with the specific circumstances of Spanish emigration to the host countries.
> This special mission will include fact-finding visits that will provide the Government, via the Foreign Affairs Ministry, with studies and proposals aimed at improving the situation being faced by our compatriots abroad and to meet their needs with all sorts of protection measures – legal, economic and social – when circumstances so require.
> In the field of migrations, these functions shall include the participation and collaboration in conventional bilateral and multilateral policy and in community policy on migrations as well as guaranteeing, as needed, the representation of the Foreign Affairs Ministry in the collegiate bodies with an advisory role in these matters.
> Special missions could also be set up for the Foreign Affairs Ministry to the countries of origin of the migratory flows. This is a very important subject; it is a matter of verifying the proper operation of the agreements in force and providing information on the means available to the embassies and consulates to comply with their function of protecting Spaniards residing in countries in which they are accredited.
> Naturally all of this needs to be developed bearing in mind the material and administrative competences that correspond to all Government bodies.
> (. . .)".
> (*DSC-P*, VII Leg., n. 71, pp. 3498–3499).

Subsequently, on 28 May, the Government answered a parliamentary question before Congress regarding commercial services provided by Spanish Embassies in Southeast Asia in the following terms:

> "There is a programme known as the 'European Business Information Centre' (EBIC) governed by Council Regulation 443/92 of 25 February and funded through the PVD/ALA budgetary programme.
> (. . .)
> The EBIC has given rise to some coordination problems among Member States

and the EU Commission. Said Community Programme affects an area that is of the exclusive competence of the Member States. Trade promotion should involve the rigorous enforcement of the principle of collaboration and coordination that entails a series of aspects, especially those regarding information.

This criteria was shared by the majority of the Member States' delegations in the debates held in the PVD/ALA Committee. The Member States, Spain among them, have instructed their diplomatic representations throughout the region to participate in coordination meetings with Commission Delegations from each country trying to avoid the overlapping of activity between the EBICs and the national trade promotion entities to offer the best global public service to the companies.

This coordination work was especially intense in 1998 and 1999. In the end, thanks to impetus provided by Spain and other countries, the 150th PVD/ALA Committee meeting was held on 2 December 1999 and approved a financial proposal that envisioned the participation of representatives from the embassies of members states of the Advisory Committees set up for each EBIC and that will receive and evaluate the annual work plan and trimestral programmes and the annual and trimestral reports on activities carried out.

Spain has a network of commercial services present in nearly all the countries where EBICs are established (Thailand, Malaysia, India, Sri Lanka and Philippines and being set up in Vietnam and Indonesia)".

(*BOCG-Congreso.D*, VII Leg., n. 184, p. 108).

A Senate appearance was also made on 25 July in response to a question about complaints expressed by Spanish prison inmates abroad and follow-up on support efforts and aid payments made by the Embassies and Consulates:

"The Ministry of Foreign Affairs, through its Consular Offices abroad, carefully monitors and is well aware of the situation facing each one of the Spanish detainees abroad. With this aim in mind, the inmates are visited and permanent contact is established with them. A study is made of those that have special needs and efforts are made to satisfy them.

Specifically, special attention is paid to needs related to nourishment, medical care and even clothing. Depending on the situation found in each country or individual case, aid can be provided in the form of pocket money or in kind.

Above all, the aim is to see to it that their basic living conditions are perfectly taken care of".

(*BOCG-Senado.I*, VII Leg., n. 246, p. 66).

The Government also responded before Congress on 28 November 2002 to a question related to the resignation of the Business Attaché of the Spanish Embassy in Baghdad (Iraq), stating as follows:

"On 17 October 2002, the Government became aware that the Spanish Business Attaché in Baghdad had informed the press of his resignation. This was subse-

quently formally confirmed by telegram to the Ministry of Foreign Affairs. This situation, in and of itself, is as unusual as it is incompatible with the most basic rules governing public service given that civil servants do not resign from their posts; Career Diplomat civil servants may request a transfer to Madrid for personal or family reasons.

(. . .)

One can only guess that the unusual action taken by Mr. Valderrama was based on the pressure of his post; the alternative explanation would be more serious still implying a political manipulation of the exercise of his post. It is not up to civil servants to publicly judge the appropriateness of carrying out or failing to carry out Executive policy in affairs entrusted unto them. Control of the Government is exercised by the Legislative branch and, in cases of failure to uphold the law, the Judiciary.

The attitude taken here violates two basic rules that should be borne in mind by all who embark upon a Diplomatic Career: caution in the exercise of their duties and consideration for the effects of their actions on the interests of their country.

(. . .)

It should not be forgotten that Article 7 of Royal Decree 33/1986 of 10 January approving the Disciplinary Regime Regulation applicable to Government Civil Servants considers as a serious offence 'serious lack of consideration for superiors, colleagues and subordinates', as well as 'failing to keep due secrecy with respect to affairs that they are familiar with because of the post they hold when this could be damaging to the Government or is used for self gain'.

As concerns questions related to the Spanish Government's stance on Iraq, Spanish foreign policy respects national interests in accordance with the values proclaimed in our Constitution and the duties arising from international legality, within the coordinating framework arising from the European Union Treaty.

The current Iraqi regime has a history of serious and reiterated human rights violations perpetrated against its own citizens as well as those of neighbouring countries and constitutes a serious threat for peace and stability throughout the world as demonstrated by its systematic failure to comply with international orders and with UN Security Council Resolutions seeking to restore that order.

Spain, in line with its Community partners and with all of the members of the UN Security Council, coincides in denouncing the Iraqi violation of International Law and trusts that diplomatic, political and legal pressure will be successful in re-establishing international order and its respect for the Iraqi regime".

(*BOCG-Congreso.D*, VII Leg., n. 447, pp. 119–120).

Finally, the Secretary of State for Foreign Affairs, Mr. Gil-Casares Satrústegui, appeared before the Senate Foreign Affairs Commission on 4 December 2002 to respond to a question related with the lack of Spanish diplomatic representation in States such as Gambia and Cape Verde in light of the pressure being felt from irregular emigration from West African countries:

". . . Of the States that you specifically refer to, Cape Verde does not constitute a serious emigration problem at this time. . . .

There are currently three thousand Cape Verdians registered and in principle there is no serious problem with illegal immigrants. The situation is different with Gambia that does pose a problem of illegal immigrants but not of the dimensions of other countries like Nigeria where we have a resident embassy and it is one of the highest risk countries or nations such as Senegal or Mali.

The problem is not so much with the embassies there as it is with the embassies here because when it comes to the repatriation of illegal immigrants, the diplomatic representatives of the countries to which the illegal immigrants are going to be returned must acknowledge that they are from their country. This identification can be via the language of one of the country's regions, a physical characteristic that they may have thus making it almost more important their diplomatic presence here than ours there.

Within the budgetary constraints imposed by the Government's economic policy, currently Spain has a number of embassies in West Africa: in Mauritania that covers Mali; in Senegal that covers Gambia and Cape Verde; in the Ivory Coast, in Ghana, in Nigeria, in Cameroon, in Equatorial Guinea and in Gabon. With this number of diplomatic posts Spain's interests in these countries are sufficiently covered; unfortunately there are not more . . .

There are also honorary consulates in Banjul, in Gambia, in Paria and Mindelo, in Cape Verde . . . Neither of the two cases mentioned is a priority, at least for the time being.

(. . .)".

(*DSS-C*, VII Leg., n. 393, p. 13).

a) Consular Service

Note: See V.1.b) *Consular Assistance*

With respect to Spanish consular services, on 21 November 2001 the Government responded to a number of questions raised in Congress. Reference was made to the steps taken to open a second consular office in Venezuela:

"The Ministry of Foreign Affairs is carrying our the necessary studies to assess the possibility of opening a second consular office in Venezuela in compliance with the Green Paper approved by Congress at its Plenary session on 24 April 2001. In doing so they are bearing in mind the circumstances facing Spanish residents in Venezuela as well as that Department's budgetary status.

It should not be forgotten that the decision to open a consular office is based on the need to fulfil its corresponding duties in the framework of the Vienna Convention on Consular Relations of 24 April 1963. Of the duties incumbent upon a consular office, the most important is the protection of and provision of assistance for Spanish nationals residing abroad. For that reason consular offices are set up in places where a sufficiently large number of Spanish nationals are residing so as to justify the expenditure entailed in opening the office.

(. . .)

In Venezuela the overwhelming majority of the Spanish population (more than 100,000 out of a total of 131,000 Spanish residents in that country) reside in the Federal District and in the States of Miranda and Carabobo, both just outside of the Federal District where the Consulate General is located. The rest of the Spanish nationals are unevenly dispersed throughout the rest of the States.

The Consulate General in Caracas therefore attends to the needs of more than three quarters of the Spanish population residing in that country. So as to be able to carry out its functions, it is one of the best equipped consular offices in the world.

(. . .)

With a view to meeting the needs of this population there is also a broad network of honorary consulates; 19 honorary consulate offices that, in coordination with the Consulate in Caracas, provide effective support to compatriots established within their zones".

(*BOCG-Congreso.D*, VII Leg., n. 268, pp. 338–339).

The Secretary of State for International Cooperation and for Latin America, Mr. Cortés Martín, in his appearance before the Senate Latin American Affairs Commission on 27 February 2002, to provide information on assistance granted by the Spanish Government to Argentina and specifically to Spanish nationals residing in that country, made reference to the Spanish consular service and the activities that it carries out:

". . . The fact that Argentina ranks number one as the country hosting the greatest number of Spanish residents abroad focuses the importance and therefore the attention that the Ministry of Foreign Affairs gives to this subject.

(. . .)

What we did in the consular assistance programme was put a priority on the most needy; i.e. the Spaniards facing a precarious economic situation, especially those requiring medical attention but also those who, given their age, would often times have a very difficult time returning to our country. It is within this context that consular assistance has been provided from that time forward to more than 1,300 families. The total amount is around 250,000 dollars that I reiterate was in the form of immediate and urgent aid to the most needy Spaniards facing difficult circumstances in Argentina.

(. . .)

Moreover, I would like to provide information on the initiatives taken to reinforce the personnel of our consular offices in Argentina. First of all I would like to point out that Spain has a wide-ranging consular network in that country: five consulates general and 54 honorary deputy consulates. In order to meet the needs of the significant increase in Spanish and Argentinean persons that come to our consular offices, eight people have been added to the personnel list at the Consulate General in Buenos Aires . . .

Furthermore, additions have been made to the personnel at the Consulate General in Rosario. Studies are also under way at the Consulate General in Buenos Aires

looking into the need to scale up the current staff in the future. Although there continues to be a lot of work at the Consulate, these measures have alleviated part of this burden and, as a result, a greater degree of agility has been achieved in the performance of duties.

(. . .)".

(*DSS-C*, VII Leg., n. 241, pp. 4–5).

On 14 March 2002, the Government responded to a parliamentary question on the development and forecast concerning Spanish Consulates stating the following:

"In 1995 there were 87 Consulates; in 1996 there were also 87; in 1997 that figure fell to 86; in 1998 it fell again to 85 Consulates, and in 1999, 2000 and 2001 the number remained at 84 for the duration of the three years.

In 1996 there were 1,253 employees; in 1997 that number increased to 1,254; in 1998 that figure was 1,266; in 1999 it fell to 1,255; in 2000 it fell again to 1,234, and in 2001 it rose to 1,261.

Currently the Government plans to open a Consulate in Quito and another in Colombia. As to the creation of new employment at Spanish Consulates, the Government intends to announce visa official posts and all auxiliary personnel posts included in what is known as the *Plan GRECO*".

(*BOCG-Congreso.D*, VII Leg., n. 323, p. 162).

VII. TERRITORY

1. *Territorial Divisions, Delimitation*

Note: See VII.3.a) *Gibraltar*

a) Perejil Island

On 17 July 2002, appearing before the Joint Commission of Foreign Affairs and Defence of the Congress to provide information on the development of events in the aftermath of the occupation by the Kingdom of Morocco of Perejil Island on 11 July 2002 and the Spanish military reaction to take control of the Island on the morning of 17 July 2002, the Minister for Foreign Affairs, Mrs. Palacio Vallelersundi stated:

"First and foremost I want to make it perfectly clear that the objective of the Spanish Government, yesterday as well as today, is to re-establish rule of law and return to the status quo existing prior to 11 July and, based on that, set up a dialogue with Morocco and re-establish bilateral Spanish-Moroccan relations at a level from which they should never have strayed. We have not changed. Both before and after the action taken this morning the Spanish Government has said and defended the same ideal: a return to the status quo and frank and constructive dialogue with Morocco.

. . . The political and security objective is, and I reiterate, to re-establish the status quo existing prior to 11 July that permitted free access to the island which has been the case for the last 40 years subsequent to the evacuation of Spanish troops. This objective means that in the future the Spanish Civil Guard units will be able to continue using the territory of Perejil Island for control and pursuit missions against contraband, drug trafficking and, if need be, illegal immigration as it had been doing up to 11 July. I once again reiterate that the will of the Government is to put an end, as soon as possible and with due guarantee from the Kingdom of Morocco, to the current situation of control of the island by the Armed Forces. Spain has no interest in maintaining a permanent military presence on Perejil Island. Its desire is simply to return, without delay, to the situation prior to 11 July, i.e. prior to the Moroccan military occupation. This must, however, be an authentic status quo.

Allow me to remind you of the historical background to this situation. From 1415 until 1581 Ceuta and its zone of influence, which included Perejil, was Portuguese. As part of the Spanish-Portuguese Treaty of 1668, Spain returned Portuguese possessions to our neighbour with the exception of Ceuta and its surrounding area. From the time that it came under Spanish rule until 1746 the island remained void of effective occupation. In 1867 Spain built a lighthouse and raised the Spanish flag on the islet. The Spanish-French Treaty of 1912 that divided the areas of the Spanish protectorate of Morocco makes no reference to Perejil Island but, subsequent to the conclusion of said protectorate, the island was placed under formal Spanish occupation and was occupied militarily until the beginning of the 60s, i.e. at least five years after the signing of the treaty that put an end to the Spanish protectorate. Spain has been carrying out regular and ongoing inspection visits with a view to controlling contraband and illegal immigration since 1960. Spanish presence on the island has never been the object of official protest from Morocco and on no occasion has there been any record of ongoing Moroccan presence on Perejil Island as the Moroccan authorities have been claiming over the last few days. The fact is that ever since the beginning of the 60s a status quo has been maintained that has implied abstaining from any acts relating to the island and from the establishment of any permanent settlement and of course from any permanently placed symbols of sovereignty. Moreover, in 1975 when Morocco implemented a delimitation of maritime areas that included the island within its domestic waters, Spain responded and filed the corresponding protests.

. . . How have we arrived at this situation for which Spain is not at all responsible. On 11 July, members of the Moroccan Royal Gendarmerie disembarked on Perejil Island and proceeded to set up two tents and raised two flags of the Kingdom of Morocco. From that day until this morning they stayed on the island. On the same day of 11 July the Spanish Government requested, via telephone calls at different levels, clarification from the Moroccan authorities but did not obtain any satisfactory answers. The Spanish Government immediately proceeded to send a verbal note to the Moroccan Embassy in Madrid denouncing the Moroccan action

and calling on the Moroccan Government to adopt the measures necessary to return to the situation as it stood before these events took place.

Spain considers the policy behind these acts perpetrated by Morocco to be unacceptable and has denounced this departure from the status quo in force because it takes the view that this is contrary to the principles that govern relations between neighbouring states and friends. It is in fact inadmissible for Morocco to seek to impose its will by taking initiatives of this sort and this is not in keeping with either the letter or the spirit of the friendship, neighbourly relations and cooperation Treaty signed by the two countries on 4 July 1991. Actions of this nature do not comply with international law or specifically with a fundamental rule of this legal system, considered *ius cogens* under Article 2 of the United Nations Charter calling on States to settle their controversies by pacific means and prohibiting resorting to threat or to the use of force against the territorial integrity or the political independence of any State.

From the very outset, in light of the events unfolding, I initiated numerous diplomatic actions with the Moroccan authorities, pointing out everything explained above and explaining and arguing our view from a legal standpoint. The Moroccan Government, as everyone is aware, instead of responding claimed sovereignty over the island and affirmed that it would not withdraw stating that this action was part of its fight – theoretically – against drug trafficking and illegal immigration. Yesterday the nature of the Moroccan presence on the island changed with the replacement of the royal gendarmes with marine reinforcements who began to set up fixed structures instead of tents. At the same time, the Moroccan Government invited the most important international and domestic press in Rabat to visit the island. These acts represent an escalation of events and were a sign of Morocco's intention to stay and were a clear provocation. In light of the failure met with in the steps taken, the Spanish Government took the decision to call in Defence for consultation – the intervention was a success without any deaths or causalities.

I would like to point out that from the very outset of this crisis provoked by the Moroccan Government, the Spanish Government has had the understanding and has received the spontaneous solidarity of the international community. Based on these facts and subsequent to intense diplomatic efforts, unequivocal statements have been issued by the European Union institutions, i.e. the Council Presidency and the European Commission, as well as by the NATO Secretary-General calling for an immediate Moroccan withdrawal and a return to the former status quo. As can be expected, a number of bilateral contacts have been made through which we have received nothing but support for our argument. These contacts continue to be made today with the European Commission, the European Council, the United States of America and very especially with the Secretary-General of the Arab League with whom I am planning to meet within a few days.

(. . .)".

(*DSC-C*, VII Leg., n. 543, pp. 17348–17349).

With respect to developments in the above-mentioned incident of Perejil Island, Mrs. Palacio Vallelersundi, in an appearance before the Foreign Affairs Commission of the

Congress to report on conversations with the Minister of Foreign Affairs of Morocco and Spanish-Moroccan relations, stated:

> "It was never the Government's intention to impose any forceful solution or to gain any advantage based on the developments of the situation. There was no interest whatsoever in staying on the island any longer than necessary. Therefore, the Government continued, as it had from the very beginning, with diplomatic steps to make the international community understand and of course especially to make Morocco understand our unequivocal will to see the island's former status quo re-established. We stated our intention to commence with the withdrawal of our forces once we are given due guarantee that this status quo shall be respected. Re-establishment of the status quo means a return to the situation that existed prior to the month of July, i.e. the absence of permanent military or government personnel on the island, the absence of symbols of sovereignty and abstention from any related acts. The Spanish Civil Guard units should continue to carry out control and pursuit missions against contraband, drug trafficking and, if need be, illegal immigration just as they had been doing up until 11 July. This was the only acceptable solution for Spain which made a concerted effort to achieve its objectives. Contacts were made in all directions and at all levels to achieve this objective and I would like to make special mention here of the action taken by the crisis cabinet that has been meeting at the Presidential Government level.
>
> From the very beginning the European Union expressed its solidarity with Spain. The European Union backed us from the very outset because Spain is an integral part thereof. I would like to express by gratitude for the support received from the High Representative, Mr. Javier Solana. We would not be where we are today if we had not had the backing of the European Union. An especially relevant role was played by the Secretary of State of the United States, Mr. Colin Powell, who acted as facilitator of the agreement in light of the difficulties that existed in communicating our position to the Moroccans. The Government recognises Mr. Powell's support as fundamental. An agreement was reached on the 20th and the Moroccan authorities expressed their consent through Secretary of State Colin Powell. The State Department of the United States issued a public statement expressing its satisfaction with the understanding reached between Spain and Morocco with respect to the island following the consultations that the United States had with each of the parties. According to this understanding and with respect to the island, the two parties decided to re-establish the situation that existed prior to July 2002. Once the agreement was finalised and after a period of time even shorter than originally envisioned – the agreement called for a twenty-four hour period without any official statements – the Spanish contingent withdrew and left the island. The island had been occupied for barely four days; clear proof, if such proof was actually needed, that what we had said were the Spanish Government's true intentions and that the Government had not confused anyone nor had it intended to do so. The elements of the agreement were contained in identical letters that Secretary of State Powell delivered to the Ministers of Foreign Affairs of Spain and Morocco in very clear terms so as to not give rise to any confusion. First of all the two parties agree to

re-establish and maintain the situation as it existed on the island prior to July 2002. This includes, and is specifically spelled out in the agreement, the withdrawal and the absence of elements and flags or other symbols of sovereignty.

The use of the island as well as its air space and surrounding waters shall be in consonance with the activities carried out prior to the month of July. The two parties will have ministerial level talks, they had ministerial level talks in Rabat on 22 July on the implementation of this agreement; in other words, 'will have' is the plan for the future and 'had' is the reality that came out of the agreement. The two parties shall also decide upon – in the words of the agreement – the future steps to be taken in order to improve bilateral relations. This is all with the understanding that the Government of Spain and the Government of Morocco agree that acts implemented by either of the parties on this subject shall not prejudice their position on the status of the island. It was also reflected in the agreement that any differences shall be resolved exclusively through peaceful means. The agreement reflects the position that Spain has always maintained both with respect to the status quo of the island as well as to the future of our relations with Morocco.

Having concluded this initial part of the agreement, that is to say the withdrawal, I travelled to Rabat as planned to commence talks with my Moroccan colleague on the practical implementation of the agreement. . . . The Minister of Foreign Affairs, Mr. Benaissa, highlighted Morocco's commitment to respect this agreement and, as I am happy to note, this is evident, and also stated his desire to re-establish bilateral relations. . . . It is clear that we find ourselves at a crucial crossroads for the future of our relations with Morocco and we must proceed with serenity, frankness, with a sense of state and also with generosity. Relations with Morocco continue to be one of the most important and delicate issues of our foreign policy. We have made a concerted effort to build a strategic association upon a tight-knit and varied network of interests; this and none other is the spirit of the 1991 friendship, good neighbour and cooperation agreement that covers investment, cultural and educational policy, and financial and technical cooperation. A privileged consultation and political dialogue mechanism has also been set up. Today, the will of the Government is to strengthen the strategic nature of our relations with Morocco. This requires acceptance of this approach by both parties and that this bilateral relation reach higher levels of understanding, consensus and depth that make it a privileged link with the Mediterranean and European environments. In other words, this goes beyond what could be considered purely Spanish-Moroccan relations. For that reason we request and expect from Morocco a clear political will and orientation in our bilateral relations without intermediaries to reformulate the nature of the link as concerns specific aspects of this relation.

I would like to state, on behalf of the Government of Spain, that the Government of Spain welcomes the reforms undertaken by His Majesty King Mohamed VI to modernise the country, to strengthen institutions, to consolidate democracy and to deepen relations with neighbours in the Maghreb. Unequivocally expressed with full conviction and strength is the desire of the Spanish Government to contribute where most useful to the development of these lines of action, of these wide-rang-

ing political lines established by His Majesty King Mohamed VI and his Government. The present situation first of all calls for recuperation of political dialogue, the necessary dose of trust and the implementation, as soon as possible, of the cooperation mechanisms that have been out of operation since last year. All of this must be discussed at the next meeting to be held in September with the Minister of Foreign Affairs, Mr. Benaissa. The return of the respective ambassadors and the discussion of complex issues such as illegal emigration or the fight against drug trafficking, regarding which Spain does not plan to evade any dialogue, any responsibility, should form part of a shared agenda. We maintain our aim of once again putting Spanish-Moroccan relations at the level where they belong. Ladies and Gentlemen – and I am not being rhetorical –, this is what the history and the responsibility that we have to our two peoples demands of us".

(*DSC-C*, VII Leg., n. 544, pp. 17367–17368).

2. *Territorial Jurisdiction*

Note: See VII.3.a) *Gibraltar*

3. *Colonies*

a) Gibraltar

Within the framework of the Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples on its work during 2001 (Fourth Committee of the UN General Assembly), the Representative of Spain reiterated the Government's position in that:

". . . any solution to the question of Gibraltar should be based upon the principle of territorial integrity in accordance with an unequivocal and well-established doctrine of the United Nations. He reaffirmed the commitment of his Government to the Brussels process and the continuation of the Anglo-Spanish talks regarding Gibraltar aimed at the restoration of Spanish sovereignty over the Territory. He stated taht Spain was prepared to take into account all legitimate interests of the territorial population in a definitive negotiated solution to the question of Gibraltar".

(UN Doc. A/56/23 [Part I]).

On 14 March 2001, the Minister of Foreign Affairs, Mr. Piqué i Camps, in an appearance before the Foreign Affairs Commission of the Congress to report on the dispute over Gibraltar stated:

"For a democratic, modern and dynamic Spain that has recuperated its role in the history of Europe and that is playing an increasingly important international role, the continuance of the colony of Gibraltar in our territory, in addition to the territorial dispute, makes for a situation that nowadays is very difficult to continue to harmonise with the maintenance of our national interest and the political logic

of security and economic policy of our common area, both in the European Union and in the Atlantic Alliance. For 289 years now we have endured a British colony in our territory and during the course of this legislative period, the 300th anniversary of the forceful occupation of the Rock will be celebrated. Today we do not want to put Gibraltar back at the centre of a foreign policy characteristic of a politically isolated country. The idea is quite the opposite and should focus on putting it in the terms in which it should be confronted at the beginning of this 21st century; as an anachronism that is becoming difficult to bear and for which it is becoming increasingly urgent to find a formula for solution following the mandates established by the international community for that purpose. Gibraltar is one of the last surviving colonial disputes in the international arena now that Hong Kong, Macao or Boa have disappeared. Furthermore, this colony subsists precisely in one of the most civilised and advanced regions and at a time of growing integration and, more specifically, in a Member State of the European Union such as Spain.

(. . .)".

(*DSC-C*, VII Leg., n. 184, p. 5411).

The Minister also reported on the content and consequences of the agreement reached on 19 April between the Government of Spain and the Government of the United Kingdom:

"On this date the Spanish and British permanent representatives at the European Union signed a series of pragmatic agreements that resolve the technical sort of problems but that fail to touch upon sovereignty issues at all. These agreements focus, first of all, on Gibraltarian authorities, the most important of those reached. The main element of that agreement is the creation of a liaison office with the Gibraltarian authorities that will soon become operable in the British Foreign Affairs Ministry in London and will take responsibility for assuming and channelling communications or decisions originating from or directed to such office. This agreement points to the fact that the Gibraltarian authorities on their own lack competence for external relations and that it is the United Kingdom that plays this role and that is ultimately responsible for the action of said authorities. Thanks to this agreement a series of community directives, mostly in the areas of justice and the internal market, have been unblocked. Second of all, an agreement was reached on the Gibraltarian identification document. The format of this document will be modified to meet Spanish requirements making it valid for travel. The name United Kingdom must appear above Gibraltar on the front and back sides of the document as the issuing office; instead of the term 'Government of Gibraltar', the term 'civil registry office of Gibraltar' must appear thus giving the identification card validity for travel in the European Union under the authority of the Government of the United Kingdom.

These agreements were further complemented by the bilateral agreement on police cooperation that was signed on 29 May of last year by the Spanish and British Home Ministries at the European Union Council of Justice and Home

Ministers approving the partial entry of the United Kingdom in Schengen. This is a local-level trans-border agreement between the National Police and the Civil Guard on the Spanish side and the Royal Gibraltar Police under the auspices of the Governor or the British side. The agreement provides for the designation of liaison officials and permanently open telephone, radio and telex lines. Collaboration could cover all sorts of criminality. These agreements have little affect on the actual gate controls because they deal more with customs and because the United Kingdom excluded itself (and therefore Gibraltar) from the single control-free Schengen area.

(. . .)".

(*DSC-C*, VII Leg., n. 184, p. 5414).

Likewise, in the Report of the Special Political and Decolonisation Committee (Fourth Committee), in reference to the question of Gibraltar, it was stated:

"The General Assembly, recalling its decision 55/427 of 8 December 2000, and recalling at the same time that the statement agreed to by the Governments of Spain and the United Kingdom of Great Britain and Northern Ireland at Brussels on 27 November 1984 stipulates, *inter alia*, the following: 'The establishment of a negotiating process aimed at overcoming all the differences between them over Gibraltar and at promoting cooperation on a mutually beneficial basis on economic, cultural, touristic, aviation, military and environmental matters. Both sides accept that the issues of sovereignty will be discussed in that process. The British Government will fully maintain its commitment to honour the wishes of the people of Gibraltar as set out in the preamble of the 1969 Constitution', takes note of the fact that, as part of this process, the Ministers for Foreign Affairs of Spain and of the United Kingdom of Great Britain and Northern Ireland hold annual meetings alternately in each capital, the most recent of which was held in London on 26 July 2001, and urges both Governments to continue their negotiations with the object of reaching a definitive solution to the problem of Gibraltar in the light of relevant resolutions of the General Assembly and in the spirit of the Charter of the United Nations".

(UN Doc. A/56/557).

On 30 April 2002, in an appearance before the Senate Foreign Affairs Commission, the Minister of Foreign Affairs, Mr. Piqué i Camps, explained the terms of agreement which the Governments of Spain and the United Kingdom may reach with respect to the issue of the sovereignty over Gibraltar:

"I would like, first of all, to underscore the completely novel and encouraging phase of the Spanish-British talks in search of a solution to the dispute. We have been at a standstill for years now but 26 July saw not only the resumption of the ministerial meetings of the Brussels process, interrupted since 1987, but also for the first time we can speak of a true relaunching of the process with expression of a political will – I reiterate, for the first time – on the part of the British Government to negotiate sovereignty issues together with subjects of cooperation.

Both parties thus initiated talks that included the subject of sovereignty in compliance with what had been agreed to no less than fourteen years earlier. July thus marked the beginning of a new phase of the so-called Brussels process instituted via a joint communiqué agreed to in the Belgian capital in November of the year 1984 in application of the joint Lisbon statement of April 1980. All of the democratic governments of Spain since the transition have been, in one way or another, involved in this lengthy process. A process that – as all of your Excellencies are well aware – paves the way to fulfilment of the mandate issued annually for decades now by the United Nations General Assembly to both countries to hold bilateral talks with a view to resolving the dispute while safeguarding the interests of the population.

Both governments base our talks on full respect for the commitment set out in Article 10 of the Treaty of Utrecht and for the rights contained therein that also prohibit any change to the status of Gibraltar without the backing of Spain.

In tandem with solving the issues of sovereignty – as was already mentioned – the aim of the Brussels process is also, in compliance with the joint communiqué of 1984 – I quote –, to foster, in benefit of the two parties, cooperation in the areas of economics, culture, tourism, air transport, the military and the environment.

From my point of view, the current relaunching of the process stems from a series of fundamental premises. The first is that we have already entered the 21st century and the continuance of this conflict has no place within the scope of the European Union especially given that it affects two large countries with a shared friendship, two Member States of the European Union and two NATO allies. Resolution of this problem is not only a responsibility but is also an obligation from which neither the United Kingdom nor Spain can hide any longer.

Both governments have re-embarked on the Brussels process fully aware that refusing to enter into dialogue and search for a negotiated solution to the conflict is no longer, nor would be in the future, easy to justify in the unified Europe to which we belong.

The second premise that is gaining more momentum is the view shared by both governments that the current status quo of Gibraltar is unsustainable in the future. It is not satisfactory to anyone and is the cause of numerous difficulties for everyone, including our partners and allies in the development of the daily activities of the European Union and NATO and of other international organisations.

(. . .)

The third premise is that the lack of a solution to this conflict is a stumbling block to the full development of bilateral relations between Spain and the United Kingdom; relations that have a tremendous potential for the future as can be seen by their development over the last several years with joint initiatives in the European Union, important business and investment projects and growing human relations as well that boast the figure of close to 400,000 British citizens now residing in Spain.

The time has come to apply the very best spirit of bilateral understanding reached in other areas to the solution of this conflict . . .

Thus, on 26 July of last year both Ministries agreed in London to restart the Gibraltar talks and we highlighted our political intention and will to overcome all of our differences regarding Gibraltar and to make a concerted effort to conclude these talks successfully and expediently in benefit of all parties and to jointly and formally transfer the text of our joint communiqué to the Secretaries General of the United Nations and the Atlantic Alliance as well as to the then President of the European Union Council and to the European Commission as the most solid proof of the seriousness of our commitment.

The President of the Government and the British Prime Minister, Mr. Blair, publicly ratified and endorsed the scope of that commitment upon conclusion of the bilateral meeting held in London on 9 November of that same year. A short time later a new ministerial meeting was held in Barcelona on 20 November 2001 at which we confirmed our common objective of continuing the conversations under way in an atmosphere of mutual trust and cooperation and our shared objective of concluding a global agreement that would cover all of the important subjects including those of cooperation and sovereignty by approximately the summer of this year.

We also agreed, as an aim of the upcoming global agreement, to work towards a future in which Gibraltar would benefit from greater self-government and the opportunity to take full advantage of the benefits derived from normalised co-existence with the neighbouring region. The overarching principle – as we affirmed in that communiqué – is to construct a safe, stable and prosperous future for Gibraltar by providing it with a modern and sustainable standing in harmony with our common membership in the European Union and NATO.

A few months later, on 4 February to be exact, my British colleague and I met again in London to take stock of the talks and to ratify our will to persevere in our joint objective. In the joint press communiqué that we then made public, we reiterated our invitation to the Chief Minister of Gibraltar to attend future meetings of the Brussels process offering him a new formula for participation under the principle of two flags, three voices; i.e. to speak with his own differentiated voice but as part of the British delegation. Despite this offer, Mr. Caruana has chosen to continue to remain absent from our meetings, a fact that I regret.

And finally I wanted to mention . . . that the current relaunching of the Brussels process has received the explicit backing of the Heads of State and Government of the European Union. Thus, the European Council at its last meeting in Barcelona in March, also expressed its full backing for the negotiations under way and the reaching of an agreement by the summer, calling on the Commission to seek out a way to support the future agreement. These expressions of support were endorsed by the plenary of the European Parliament just a week later.

In light of these developments in the Spanish-British talks on Gibraltar, I think that I can authoritatively state that the developments during these last nine months of negotiations have been satisfactory . . .

(. . .)

. . . Both governments are fully aware of the responsibility and the risks that

we are taking. The negotiations are continuing forward. Our objective of reaching a global agreement and our timetable have not changed and are public knowledge. We have not concluded yet, however, and therefore we cannot yet reveal the outline of the final agreement.

Furthermore, revealing partial aspects of a negotiation of these characteristics is always risky and not very responsible: risky because the final arrangement of each element of the global agreement cannot and should not be separated from the whole and irresponsible because in a diplomatic negotiation of such proportions and undeniable political sensitivity such as this one, success is only achieved through prudence and discretion.

It is our will to reach a timely agreement between our two governments with firm commitments that we will present – as is logically the case – to our respective parliaments. This agreement shall grant the greatest consideration to the interests of the Gibraltarians, who as people, as Community citizens of a city that was once Spanish and that we hope is ever more friendly and close to us, merit our highest respect.

(. . .)".

(*DSS-C*, VII Leg., n. 271, pp. 9–11).

In an appearance before the Senate Foreign Affairs Commission on 4 December 2002, the Secretary of State for European Affairs, Mr. Miguel y Egea, in response to a question posed by a Member of Parliament regarding the subject of shared sovereignty of Gibraltar, responded that:

"(. . .)

In the middle of last July both governments stated that they had made substantial progress in the negotiation while at the same time recognising that a small number of difficulties subsisted but they affected the so called red lines of the respective positions taken. In light of these circumstances, it was evident that the agreement could not yet be finalised and that negotiating efforts would have to continue until which time formulas were reached that were capable of overcoming the pending difficulties in a way satisfactory to both parties. These pending difficulties are the above mentioned red lines and account for two or at most three points of the final negotiation.

It is common practice in all negotiations, . . . to leave the most difficult issue to the very end and it should therefore come as no surprise to anyone – we were certainly not surprised – that, in light of the complexity of the subjects at stake, precisely due to these last few points of conflict, we have not been able to find a solution to these points within the time frame that we had originally set up. And as is the general norm in any negotiation – and this has been publicly stated by the Spanish side –, the Spanish Government has held from the very beginning that nothing is agreed until all is agreed and finalised. It is not enough to have 97 percent of the negotiation wrapped up if 3 percent is still left undone because nothing is actually agreed to yet.

The Minister of Foreign Affairs has already stated that the completion of an

agreement by the summer was the expression of a reference date the aim of which was to maintain negotiating momentum, serving as a clear indication of the will of the parties to make headway and conclude negotiations as soon as possible but it obviously was not – and I do not believe that Minister Piqué expressed it in those terms –, the setting of a deadline date the passing of which meant the end of all talks. In other words, the idea was not to remedy this subject in the month of July and if not the issue would be considered dead . . . There is a series of basic and essential arguments forming part of Spain's negotiating position that has the backing of Parliament, that the Government defends and that the British Government has been aware of from the very outset. These principles cannot be either ignored nor transgressed.

(. . .)

In a dispute that has lasted nearly three centuries and within the framework of a negotiation process that has made substantial progress, a difference of months is of little importance regardless of the undeniable fact that there is a certain degree of disappointment attached to having set July as a completion date and not meeting with success. For us the most important thing is to continue to strive towards a satisfactory agreement to resolve this conflict in our relationship with the United Kingdom and to overcome an unsustainable situation that is in no one's benefit including the Gibraltarians themselves, that also gives rise to problems among our partners in the principal international organisations and especially within the European Union.

(. . .)

To sum up, the negotiation continues forward and the situation is no worse than it was but is rather the same because we have not made progress since the month of July concerning the pending red lines but we have, however, made significant advances in the debate on these three points given our frequent talks. We therefore continue to work towards our objective of reaching an agreement and resolving these last remaining points within the framework of a joint declaration that we are negotiating with the British Government".

(*DSS-C*, VII Leg., n. 393, pp. 6–7).

With respect to the existing controversy on the sovereignty of the isthmus, Mr. Miguel y Egea stated the following:

"(. . .)

. . . The Gibraltar airport is not open to general traffic because in 1987 when the list of airports to enter in the traffic of the Union was drawn up and the United Kingdom claimed the Gibraltar airport as a Community airport, we raised an objection because that airport is not built on British soil but rather is built on Spanish soil. We subsequently arrived at an agreement in the 1987 accord to recognise this airport within the framework of the Community that was very simple. We did not get into the subject of the Gibraltar conflict, we did not get into who does or does not exercise sovereignty; we simply have an agreement by virtue of which we jointly manage the airport. This was the condition *sine qua non* for us to give the

green light for that airport to be fully recognised in the Union. The British shared this understanding and the Gibraltarians are also well aware of the situation but they do not want to comply with that condition".

(*DSS-C*, VII Leg., n. 393, p. 4).

VIII. SEAS, WATERWAYS, SHIPS

Note: See IV.I.c) *Western Sahara*; X. Environment

1. *Continental Shelf*

On 4 December 2002, the Secretary of State for Foreign Affairs, Mr. Gil-Casares Satrústegui, appearing before the Senate Foreign Affairs Commission to respond to parliamentary questions regarding the Government's stance on possible oil exploration in the continental shelf of Western Sahara stated:

"The Government does not share what it seems that your question was referring to, that a link existed between the stance taken by the United States in April 2002 with the concessions that it had made at the end of July 2001 for oil exploration in the waters of Western Sahara, basically in the north, given to the North American company. A concession has in fact been made by Morocco, as you are aware, to two firms, one French and the other American. The French company is in what is called the off shore of Villacisneros of Dajla and the American company in the off shore of Bojador. The Polisario Front has appealed the decisions taken by Morocco and a legal ruling has been delivered by the Deputy-Secretary of the United Nations that basically states that, in light of the legal status of Sahara as a non self-governing territory, Morocco – although not declaring it the administrating authority because this has not been recognised – may carry out or commission exploratory initiatives but may not actually drill for oil because that would have to be in benefit of the population of the non self-governing territory. Exploration, therefore, is being carried out in accordance with international legality and, once this ruling was delivered, what actually happened, . . . that in July 2000 the special envoy, the Secretary-General, reached the conclusion that the consensus regarding the referendum on Western Sahara had run into difficulties and proposed a political solution that consisted of a proposal for autonomy within the Kingdom of Morocco. At first this was not accepted by the Security Council and successive extensions were made by MINURSO (United Nations Mission for the Referendum in Western Sahara), one of them ending in April 2002. At that time, around the 23rd of April, the United States sent a proposal to the special envoy, the Secretary General, to make an offer of broadened autonomy to see if that could be taken forward. There was a certain tendency to relate that event with the oil exploration concessions and it is the view of the Government that these two events are completely unrelated. In the end the proposal was not accepted and we continue with the successive extensions of the MINURSO until which time, as you are aware, in Resolution

14/29 the reference to autonomy disappears explicitly as such and the Secretary General is called upon to table a new proposal prior to 31 January to subsequently be presented to the parties.

The stance of the Spanish Government regarding the conflict in Western Sahara is very well known. It is our understanding that there is basically an international legality accepted by all parties that was the settlement plan and that we must continue to strive towards a referendum if possible. The fact is, and I always reiterate this, MINURSO is the United Nations Mission for the Referendum in Western Sahara. It is true that there are difficulties, the Secretary General is seeking out solutions and it has been stated that any political solution accepted by Morocco and by the Polisario Front will also be accepted by Spain. Added to this basic position is Spain's petition for MINURSO to continue until a dead end is reached and it becomes necessary to seek solutions for humanitarian problems regarding Moroccan prisoners in Tinduf as well as Saharawi prisoners in Moroccan prisons and the missing on both sides".

(*DSC-C*, VII Leg., n. 393, pp. 12–13).

2. *Fisheries*

In the Government's appearance before the Plenary of the Congress to report on the European Council held on 23 and 24 March 2001 in Stockholm, the President of the Government, Mr. Aznar López, made the following declarations with respect to the negotiations for a fishery agreement between the European Union and Morocco:

"Moreover, Spain supports a European strategy for the Mediterranean, especially for the Maghreb, in which it plays a part and also plans to specifically support it during its Presidency.

As for the European Union and, in consequence, also for Spain, unfortunately a fishery agreement has not been reached with Morocco . . . We would have liked to have seen a positive conclusion to these long negotiations but I would like to recall a few events. The fishery chapter of Spain and Morocco accounts for 8 percent of the total volume of Spanish fishing throughout the world. We are talking about a volume of 30,000 to 40,000 million pesetas out of a total amount of 500,000 million pesetas. It currently affects 326 ships that are receiving assistance and a total of 2,600 workers that, together with the respective shipbuilders, are also receiving assistance. I would like to highlight that 20 years ago Spain had approximately 1,400 ships fishing in Moroccan waters.

The stance taken by the Commission during these months of negotiations has been correct and the attitude of Commissioner Fischler and his way of holding talks and negotiations seem to me to be substantially correct. I think that he did a good job and tried to overcome difficulties which was not possible not because of the stance taken by the European Union or Spain but rather due to the immobility of the positions adopted by the Kingdom of Morocco. The current negotiator was also held back by a point existing in the last agreement of 1995 that affirmed that it would be the last fishery agreement with Morocco and that, under

no circumstances, would it be subject to extension. As a result, this affirmation has restricted Spain's possibilities for negotiation. This means that all of the efforts needed to seek other types of agreements have unfortunately failed to bring positive results. The door must be left open, as the European Union has done, for the possibility of a change in the position adopted by the Kingdom of Morocco that could table a new offer for consideration by the European Union. However, from the standpoint of the European Union and from the standpoint of Spain, not just any price can be paid for any agreement and a poor agreement should not be accepted because it could mean a very high economic and political cost for both European and Spanish interests.

As for arrangements made for shipowners and fishermen, as a result of the conclusions of the Berlin European Council and the conclusions of the Nice European Council that envisioned the possibility of not reaching an agreement before year's end, funds have been provided for the economic assistance of fishermen and shipowners and funds will continue to be provided for this assistance in the terms outlined by the Council of Ministers and in the terms foreseen by the European Union. If in the end it is possible to reach an agreement it will be a satisfaction for all but let us not hold back information in this respect, nor should we try to sow discord in relations between Spain and Morocco that are so important.

(. . .)".

(*DSC-P*, VII Leg., n. 74, pp. 3688–3689).

On 4 April 2001 the Minister of Agriculture, Fishery and Food, in response to the urgent formal request made by the Socialist Parliamentary Group for details of the current situation and the future of the agreement between the European Union and Morocco on the subject of fishery, appeared before the Congress in Plenary to state:

". . . Many fishery agreements have been signed with Morocco, . . . 1983, the Agreement of 1 August, Article 16: At the end of the Agreement's period of application, the two parties shall meet to hold talks with a view to concluding a new fishery agreement. 1988, Article 12 of the agreement: this agreement shall remain in force for a period of four years and at least six months before the termination of that agreement, the contracting parties shall initiate the negotiations necessary for the conclusion of an agreement regulating cooperation in the fishery sector in the future. 1992, Article 15: this agreement shall remain in force for a period of four years and at least six months before the termination of that agreement, the contracting parties shall initiate the negotiations necessary for the possible conclusion of a new agreement. Agreement of 1995, Article 15 simply states: this agreement shall remain in force for four years, nothing more. They signed this agreement knowing that it was the last without a renewal clause and without a mandate of negotiation. And without any mandate of negotiation for a new agreement and without any obligation for a mandate. What situation do we find ourselves in now? With a Government, that of Morocco, that felt no obligation because it signed a commitment with you that this was the last agreement . . .

. . . The European Union had to be convinced to implement the negotiating

mandate. This Government did just that and the mandate was accepted in the month of October before the agreement expired. It could not be done six months before that date because there was no renewal clause nor any sort of obligation but before the agreement expired the Government obtained a negotiation mandate in the month of October 1999 . . .

This was achieved in the month of October and it was not by chance that this was subsequent to the King's visit to Spain and the contacts that the President of the Government had with the King of Morocco. A negotiation process then got under way. The Government met with the Morocco monitoring table and with the sector and the sector sent three messages to the Government: that it wanted an agreement affecting all segments of the fleet, that it wanted an agreement with technical conditions allowing for the viability of fleet activity and it wanted an agreement in which the financial compensation offered Morocco were commensurate with the fishery possibilities . . .

The Government, at all times, maintained permanent dialogue with Commissioner Fischler. Thirteen technical meetings and seven political meetings were held with the participation of the Commissioner and if the Commissioner was negotiating directly it is because the Government has been working with the Commissioner and therefore the Government is grateful to Commissioner Fischler for the special role he has played in the negotiation and for having been present. Never has a commissioner taken part in a fishery negotiation and this Commissioner has been permanently present during seven rounds. This means that the European Commission has supported the Spanish Government. The results remain to be seen but the Commission has been seated at the negotiating table and has been making proposals . . .

The latest proposal tabled is an agreement for a sufficient number of ships with technical conditions that make it impossible for the traditional fleet to fish calling for the compulsory unloading of all catches at Moroccan ports with a 50% increase in levies, with six-month biological prohibitions on cephalopoda, with fishing areas above three miles for the traditional fleet and fifteen miles for the shellfish fleet; in short, an unfeasible agreement. Was this agreement signed? The Government has said that it will not sign an agreement of this nature.

(. . .)

We are negotiating with a sovereign country and a developing country; with a country that has an important fishing fleet and with a country that has taken the political stance that it does not want a fishing agreement and that, throughout the entire negotiation, has made the appearance of negotiating when it really does not want to do so. In response to this there are two possible attitudes: realism or self-delusion.

During the course of the negotiation the European Union has not only implemented financial compensations linked to the fishing agreement but compensations have also been offered to Morocco within the framework of the Meda Programme and the Spanish Government has made parallel bilateral efforts. The problem is not a matter of supporting cooperation. The problem is that there is a

political will not to reach an agreement at this point in time and that is what we have on the table. There is no room here for colonialist attitudes. We can only continue with our dialogue or say: Gentlemen, you are just going to have to negotiate because we have come as far as we are going to go.

The European Union has been flexible in this process and has negotiated and shifted its position; blockage is from the Moroccan side. We are at a time in which we have to confront the situation. The fleet has remained in port since November; the ships are deteriorating; the sailors are demoralised and it is the will of the Government to initiate a process to reactivate economic activity within the fishing sector.

(. . .)".

(*DSC-P*, VII Leg., n. 74, pp. 3719–3721).

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

Note: See VII.3.a) *Gibraltar*

The breakdown of the British nuclear submarine *Tireless* moored at Gibraltar was the object of a question posed to the Government in Congress. The Government responded to this question on 26 January 2001 in the following terms:

"1. The British nuclear propulsion submarine 'HMS Tireless' moored in Gibraltar on 19 May. Twenty-seven hours earlier the Naval Attaché of the British Embassy informed our Ministry of Defence that the vessel at that moment was found approximately 60 miles from the Spanish coastal city of Almería and was heading for Gibraltar being powered by its electric diesel motor and that its principal propulsion had been shut down.

From the very beginning maximum guarantees were called for and were granted by the British as concerns the absence of radiological risks to the population or the environment as a result of the presence of the 'HMS Tireless' in Algeciras Bay.

2. . . . The Spanish Navy then sent a *GOVRA* group to Algeciras Bay prior to the arrival of the submarine to monitor possible radiological variations.

3. . . . The breakdown of the submarine and its mooring at Gibraltar are under the exclusive jurisdiction of the United Kingdom given that it is a British vessel and naval base.

4. The United Kingdom considers the repair of the submarine at Gibraltar to be feasible once having temporarily prepared the base for such operation. We have their assurance that such preparation is temporary and that the additional equipment sent will be removed once the repair work has been completed. The *in situ* repair plan met with the approval of the Nuclear Defence Security Council that is an independent British body comprised of high-level scientists who, subsequent

to a detailed analysis of the situation, determined that the repair work could be carried out in Gibraltar under maximum security conditions.

Although the breakdown is more serious than initially thought, the radiological circumstances have not changed given that the reactor is not affected. The repair work carried out at the Port of Gibraltar thus poses no danger to Spanish citizens residing in the surrounding areas.

5. The situation cannot be resolved at this point by forcing the premature departure of the submarine and a responsible Government cannot take a situation like this lightly but rather must carry out a rigorous analysis of the alternatives and their implications.

(. . .)

The Government's actions have at all times been based on guaranteeing the safety of the Spanish population and the environment of the areas near Gibraltar. If at any time the Government feels that there is or could be a danger it would be the first in demanding the removal of the submarine from our coast.

6. The British authorities have been transparent in keeping the Spanish Government and the Nuclear Safety Council (*CSN*) informed as to the nature of the breakdown.

(. . .)

7. The reactor will only be made operable once a check has been made of the integrity of each one of the ship's systems and the tests have proven to be completely satisfactory, including the hydrostatic tests that permit the monitoring of circuit integrity and therefore the absence of risk. At any rate, power surge trials will be done away from our coastline on the high seas.

8. The Government has at all times respected the independence of the *CSN* without meddling in its scope of jurisdiction.

(. . .)

9. One of the Government's constant concerns has been to keep the public opinion, entities and other groups duly informed in a spirit of rigour and seriousness.

The Action Plan drafted by the *CSN* and the Directorate-General for Civil Protection is public and has been made known to the local mayors as well as to ecological organisations, to the public opinion, to the different collectives in Gibraltar and is available to any private citizen upon request.

The *CSN* furnishes the daily results of the radiological monitoring and draws up a weekly report on repair activities. Both are publicly available.

(. . .)".

(*BOCG-Congreso.D*, VII Leg., n. 125, pp. 422–423).

On 17 April 2001 the Government responded before Congress to a question related with the assessment of the Conference on Climate Change (The Hague) and the stance to be taken on the Sixth Conference on Climate Change stating the following:

"The Hague Conference on Climate Change held in November was not a success. The Conference Chairman had to suspend the Conference that will be taken up again at the end of July of this year. An agreement was not reached although the chasm separating the different negotiating groups was lessened. At the United

Nations Conferences the Spanish Government held the agreed position taken by the European Union Member States. As to emission reductions, the final aim of the Protocol, Spain has committed to Annex B to reduce its emissions by 8% with respect to 1990 levels during the first stage of the commitment (2008–2012). The fact is that our emissions could actually increase by 15% and we would still be in compliance with Kyoto thanks to the Burden Sharing Agreement reached in the European Union; an instrument envisioned under Article 4 of the Protocol allowing the parties included in Annex 1, by means of an agreement, to jointly comply with emissions reduction objectives. This is known as the 'Community Bubble'.

(. . .)

The Spanish Government, as is the case with the rest of the European Union Governments, negotiates with one unified voice at the climate change conferences and positions are adopted at the Council of Ministers of the Environment meetings.

The latest conclusions underscore the EU negotiating positions in the continuance of the COP 6 to be held in Bonn on 16 to 27 July 2001.

The third evaluation report of the Intergovernmental Panel on Climate Change (IPCC) was recalled and it was affirmed that the first commitment stage (2008–2012) is only the first step in the fight against climate change.

The Council of Ministers of the Environment of the EU highlights the need to safeguard the environmental integrity of the Kyoto Protocol; integrity that must translate into a real reduction in greenhouse gas emissions and the existence of a strict compliance and responsibility regime.

The Council expresses its support of the President of the COP 6 reiterating its firm will to dialogue and calls for a constructive attitude from the other negotiating parties in this process.

(. . .)

. . . The Council emphasizes its support of developing countries and makes specific mention of the inclusion of climate change on the agenda of EU development cooperation.

The Council urges the Commission and the Member States to adopt the proper measures to guarantee that the Protocol ratification process allows it to enter into force in 2002.

(. . .)

The Council underlines the importance of the 6th Action Programme, the need to integrate climate change into the different sectors and the relationship that exists between climate change and sustainable development.

(. . .)

The Spanish Government, together with the European Union, has a clear political commitment to achieve the entry into force of the Kyoto Protocol in the year 2002 (Rio + 19) . . .".

(*BOCG-Congreso.D*, VII Leg., n. 164, pp. 482–483).

Subsequently, on 22 March 2002, the Government made reference in Congress to the agreements reached at the Conference on Climate Change held in Marrakech (Morocco) in the following terms:

"The 7th Conference of the Parties to the United Nations Framework Convention on Climate Change was held in Marrakech from 29 October to 9 November 2001. The priority objective reached at this summit (COP 7), was to manage to transfer the political agreement adopted in Bonn in the second part of the 6th Conference of the Parties (COP 6 bis) during the month of July 2001 to legally binding decisions.

(. . .)

The decisions adopted at the COP 7 have translated the political agreements taken at Bonn into legal terms so that the countries that are party to the Framework Convention on Climate Change can commence their respective ratification processes in order that the Kyoto Protocol finally enter into force in the year 2002.

The decisions approved in Marrakech refer to the four chapters of the political Agreement adopted in Bonn, i.e. funding and development; flexibility mechanisms; compliance and sinks. A new one regarding methodologies was added to these.

a) Funding and development . . . the COP 7 focused on approaching the specific needs of the less developed countries.

(. . .)

b) Flexibility mechanisms: once the general application framework of these mechanisms was established at Bonn . . . specific aspects of each one of the mechanisms have been developed. Aspects such as:

- The composition and operation of the JI government body (Supervisory Committee) and of the Executive Board of the CDM.
- The eligibility criteria for gaining access to the mechanisms.
- The conditions to be met for immediate commencement of CDM projects.
- Prohibition of the sale of credits to parties that fail to comply with the commitment period reservation set at 90% of the assigned amount.

The bases have thus been established allowing for commencement of enforcement, at least on an experimental basis, of the above mentioned mechanisms that will not be fully operational until the year 2008.

c) Sinks (LULUCF): in Marrakech absolute priority was put on methodological issues and information requirements that parties should furnish so as to be able to take stock of sink activities.

(. . .)

d) Compliance regime:

(. . .)

In the decisions approved at Marrakech, considerable progress was made in defining issues such as:

- The type of information that the parties should furnish and public access to such information as well as Committee meetings.
- The legitimation of the Parties to file infraction proceedings against another party, admitting such legitimation.
- The provisional execution or suspension of the Committee decision in the

event of a remedy of appeal opting in the end for provisional enforcement of the decision.
– The link between access to the mechanisms and subjection to the compliance system.

(. . .)

Methodologies: Articles 5, 7 and 8. . . these Articles refer to issues that are very important for Protocol enforcement and in the assessment of whether Parties are complying or not.

(. . .)

Subsequent to the Bonn and Marrakech agreements, the first measure adopted by the Spanish Government was the ratification of the Kyoto Protocol in 2002. The legal process for Spanish ratification is already under way with the objective of Parliamentary approval of the ratification instrument during the first semester of 2002.

(. . .)

Over the last several months important initiatives have been taken such as:

– The creation by the Council of Ministers of the Spanish Office for Climate Change under the auspices of the Ministry of the Environment.
– . . . The Council of Ministers has recently approved Royal Decree 1188/2001 of 2 November restructuring the National Climate Council.
– . . . During the month of October the Office formed an inter-departmental working group with the mandate of coming up with a diagnosis of the situation and proposing pertinent action to be taken.
– With a view to approaching the practical aspects of implementing the Kyoto Protocol, . . . the Office is constituting monographic groups in collaboration with the *CEOE* (business association) and the competent ministerial departments".

(*BOCG-Congreso.D*, VII Leg., n. 328, pp. 130–132).

On 10 December 2002 the Secretary General of the Spanish Cooperation Agency, Mr. Rodríguez-Ponga y Salamanca, appeared before the Congressional International Development Cooperation Commission of the Congress to respond to a question regarding the assessment of the results of the Summit on Sustainable Development held in Johannesburg and to report on action to be implemented to promote the objectives established at this Summit:

"The Johannesburg Summit ended with a global agreement, an international agreement taking stock of the three axes of development. Sustainable development is comprised of one part environmental, one part social and one part economic. It is our view that this approach to sustainable development is positive and it must be made clear in a United Nations text that the eradication of poverty is the greatest challenge facing international society. We believe that the United Nations system has been made stronger as a result; that multilateralism has been strengthened.

(. . .)

Many positive things took place. Far-reaching international initiatives were approved on the subjects of water, sanitation and energy backed fundamentally by the European Union and on one occasion by the United States; important political commitments were made on subjects of trade, the link between trade and the environment; the sustainability of consumption and production was discussed as was putting a stop to the degradation of biodiversity.

(. . .)

Globalisation, together with the eradication of poverty, attracted the interest of summit negotiations while issues relating to natural resource management and biodiversity, in the limelight at Rio, were given less relative importance.

(. . .)

The final text also made room, at the request to the European Union, for some agreements at the national level specifically referring to the responsibility of states, the responsibility of each one of the countries in the course of its development process, to fight against poverty by setting up solid and stable democratic institutions, protect human rights, strive for equality between men and women, fight against corruption and foster the implementation of sustainable development strategies that integrate their three dimensions, etc.

On the international level the agreement was taken to deepen the United Nations system reform to assure its coherency and effectiveness, highlighting the future role of ECOSOC and make headway in coordination with international financial institutions and the World Trade Organisation.

(. . .)

During the Spanish Presidency, Spain has played a vital role in the preparation of the Johannesburg Summit by participating in preparatory meetings in New York and Bali as well as in the European Union's Development and Underdevelopment Council and in the Seville European Council. It was also suggested that some initiatives such as those referring to water and sanitation proposed by the European Union could be extended in the future to Latin America; something we consider enormously important.

(. . .)

In relation with the Johannesburg Summit and following the sustainable development approach, the *Azahar* Programme has been implemented for sustainable development in the Mediterranean with the participation of a number of ministries and Autonomous Communities as well. This is a sustainable development programme through which Spain offers the Mediterranean coastal countries, mostly Arab countries from the North of Africa and the Middle East but also including the Balkans, cooperation in the area of natural resources, biodiversity, agriculture and soil conservation, etc. . . .

The *Araucaria* Programme, which has been in operation for a number of years in Latin America, has acquired some nuances as a result of the Johannesburg Summit and the commitments acquired. In a similar fashion, the *Nauta* Programme for the development of fishing in Africa, taking on the sustainable development approach, is in complete harmony with the Johannesburg plans. At the joint com-

mittees being held with these countries, we are by and large basing our discussions on the Johannesburg commitments in light of the fact that we, the signing countries of the joint commission, have participated in Johannesburg and all together, we as donors and the others as beneficiaries, accept these commitments.

(. . .)".

(*DSC-C*, VII Leg., n. 658, pp. 21372–21379).

Finally, the catastrophe caused by the accident of the oil tanker *Prestige* that occurred on 13 November 2002 adjacent to the coast of Galicia led to the appearance of the Minister of Foreign Affairs, Mrs. Palacio Vallelersundi, before the Foreign Affairs Commission of the Congress on 16 December to report on the accident. In her appearance the Minister affirmed:

"(. . .)

I would segment our work during the course of this period in four large areas of action. The first is the coordination of international resources that have been supplied by other States . . . The second concerns the compensation payments that those affected should receive. The third is the impetus given, both in a bilateral and multilateral framework, to initiatives needed to avoid future disasters of the sort caused by the sinking of the *Prestige*; and the fourth is the mobilisation of Community financial resources that can be used to attenuate the effects of this catastrophe.

(. . .)

I will begin by focusing on coordination of international resources. I would like to point out that at the Ministry we have placed maximum priority on the efforts aimed at palliating, to the degree possible and in accordance with means hired from different countries throughout the world, the disastrous ecological consequences of the oil spills before and after the shipwreck. A total of fifteen ships from eight different countries have been operating off the coast of Galicia as a result of this crisis. The countries are France, Holland, Italy, Germany, United Kingdom, Norway, Denmark and Belgium, all specialised in fuel extraction and oil spill monitoring work. To this fleet we must add six aircraft from France, Portugal and United Kingdom plus terrestrial deployment that includes a large number of technicians and experts from practically all of the States of the European Union and from other friendly countries.

(. . .)

As regards the second point that I mentioned on management of the right to compensation, this aspect focuses on the steps taken by the Ministry of Foreign Affairs in relation to the payment of compensation to those who may be eligible due to their being affected by the oil spill.

(. . .)

For the time being we have been able to define the international legal framework within which we can file our claims basically consisting of the following international conventions subscribed to by Spain: the International Convention on Civil Liability for Oil Pollution Damage of 1992 and the International Convention

on the Establishment of an International Fund for Compensation for Oil Pollution Damage also of 1992.

(. . .)

The third area that the Ministry is working in is in relation to initiatives developed with a view to avoiding similar disasters in the future . . . I would like to remind you that Spain is party to the 1982 United Nations Convention on the Law of the Sea, the 1978 Convention for the Prevention of Pollution from Ships and the two 1992 Conventions just referred to . . . From this viewpoint we have taken stock of the need to promote the progressive development of the international law of the sea and with this purpose in mind a group of experts has been formed in the Ministry of Foreign Affairs to study steps that could be taken to fill in possible gaps that may exist in that international legal system as well as to enforce, to the fullest extent of the law, the regulations in force concerning the fight against marine environment and coastal pollution. Moreover, the Government . . . has designed a strategy in which the Ministry of Foreign Affairs has played an active role. I would like to remind you that the initiative was taken by the President of the Government when, on 21 November, he sent a letter to the President of the European Union and to the President of the Commission proposing the urgent adoption of the following measures: the immediate implementation of the marine security agency; the establishment of a European fund to guarantee compensation for damages produced by these types of accidents, the introduction of new regulations as concerns double hulls or similar designs for single hull oil tankers that sail under the flag or dock at a Member State port; new measures to augment the effectiveness of ship inspections; strengthening marine traffic control mechanisms . . ., verification at all Member State ports of the enforcement of controls set up under ship safety regulations and the drafting of proposals within the scope of international maritime law allowing Member States to control and, if necessary, limit ship traffic transporting dangerous cargo within the 200 mile exclusive economic zone. Bearing in mind that nothing can be accomplished in the international arena by solitary action, the Ministry of Foreign Affairs has rallied support from third countries for the application of this set of measures . . .

(. . .)

I would like to draw your attention to the results of this diplomatic strategy the first echelon of which is the European Union and the second being international maritime law. On 26 November at the close of the Spanish-French summit held in Málaga, the Spanish Minister of Development and the French Minister of Infrastructures, Transport and Housing issued a joint declaration that included, on a bilateral level, the same proposals and approaches that I have just referred to and that now have become objectives that are fully assumed and backed by France.

(. . .)

During the course of the Spanish-Italian summit the Italian Government approved an agreement to foster the proposals formulated by Spain. Similar action was taken in Portugal, a country that also raised the possibility of setting up bilateral rapid

alert mechanisms similar to those that we already have in place for our inland waterways.

(. . .)

The European Union is the stage upon which we have been most pleased to find the degree of support given to our proposals. Thanks to this majority backing, decisive headway is being made in the area of maritime security and the fight against oil pollution.

(. . .)

By way of detail, the Council of Ministers of Transport held on the 6th was particularly important.

(. . .)

I would also like to mention and go on record in reporting that the Environmental Council held on the 9th of this month, as well as the General Affairs and External Relations Council of the 9th and 10th, concluded with results favourable to our pretensions.

(. . .)

The fourth area that I referred to relates to the mobilisation of Community financial resources . . . Our main concern has been that of being able to apply, as effectively as possible, the different community instruments available to us both at the European and national levels . . .

At the different ministries we have been working with the clear objective of highlighting for the Copenhagen European Council the actions already taken to deal with the economic, social and environmental consequences stemming from the *Prestige* shipwreck and urging the Council to announce its intention of examining the need to adopt as many additional specific measures as deemed necessary without any other limitation than that imposed by financial perspectives.

(. . .)

I would like to wrap up my presentation by underscoring the importance of the conclusions of the Copenhagen Council as regards the *Prestige* . . . I think that the incorporation of these conclusions is significant; conclusions that are absolutely clear and forthright, without prejudice to the declarations made by the European Council itself, by the Commission but also by the different Member States, particularly France. I reiterate that the specific additional measures are on the table and the European Council has made plans to examine these issues during the month of March based on a Commission report. The Ministry of Foreign Affairs, the entire department, is working and will continue to work along these lines so that the Commission's response is as thorough, expedient and satisfactory as possible.

(. . .)".

(*DSC-C*, VII Leg., n. 652, pp. 21196–21202).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. *Development Cooperation*

a) The Master Plan for International Cooperation

The Secretary of State for International Cooperation and for Latin America, Mr. Cortés Martín, in an appearance on 13 February 2001 before the International Development Cooperation Commission of the Congress to introduce the Master Plan for International Cooperation stated:

> "Spanish cooperation policy undoubtedly forms part of Spain's foreign policy and therefore is subject to its directives. It is based on the principle sustainable, fair and participatory human and social development. The fostering of human rights, democracy, Rule of Law and proper management of public affairs are all an integral and essential part of said policy. The overarching principle of cooperation policy is clearly the fight against poverty. Articles 1, 3 and 7 of the Cooperation Law designate the fight against poverty as the ultimate objective of Spanish cooperation. This priority coincides with the strategies of the European Union, those of the Bretton Woods organisations and those of the international community as a whole set out in the development objectives established on an international level by the Organisation for Economic Cooperation and Development (OECD) that represent another number of indicators the objective of which is poverty reduction; the reduction of the proportion of persons living in conditions of extreme poverty by 50 percent by the year 2015; universal basic education by the year 2015; the eradication of all forms of discrimination, especially due to reasons of sex, in the right to equal access to quality primary and secondary education by the year 2005; reduction in the infant mortality rate by two thirds and maternal mortality by three quarters by the year 2015; a turnaround in the existing trend of degradation of the environment, forests, potable water, climate, soil, biodiversity and ozone layer by the year 2015.
>
> Together with the fight against poverty (and I would venture to say as a *sine qua non* element in the fight against poverty), the defence of the Rule of Law and democratic principles, the promotion and protection of human rights, the promotion of equality between men and women, environmental conservation and the fostering of cultural dialogue are other basic principles of Spanish cooperation. Taken together they all form part of a policy that defends the market economy, free trade, private sector development, the liberalisation of economic activity and a fairer distribution of wealth. These principles that represent so many other general objectives are the bottom line of the solidarity of Spanish society; a solidarity that pursues the values of freedom, democracy and progress for other States just as we want for ourselves. In the same manner that the same principles of diligence, fiscal responsibility and macroeconomic stability that we ourselves practice, we also preach for third countries.
>
> (. . .)

. . . The path towards development is basically comprised of three elements: public and private investment both on the national and international levels, free trade and official development assistance . . .

When this official development assistance is transformed into specific action it should be interpreted in light of the principles on which this policy is built that are found in Article 2 of the law: the responsibility and leading role in the development process should be played by the members of each country; the existence of a basic commitment between each donor and beneficiary; the advancement of social participation both in the beneficiary country as well as in the donor country; cooperation must foster the autonomy of the beneficiary country; the fostering of lasting and sustainable economic growth of countries should go hand in hand with the means with which to foster a redistribution of wealth to favour improvements in standards of living and access to health, educational and cultural services for local populations; respect for commitments made in international organisations.

I will now focus on the geographical priorities of Spanish cooperation. Article 6 of the cooperation law, as Your Honours are well aware, sets out the priority geographical areas for cooperation . . .

The preferential orientation of our cooperation towards the Community of Latin American Nations and towards other Spanish and Portuguese speaking countries is based on the coordination and complementarity criteria preached with regard to the action of the donor community, especially in the European Union programmes. To state this in another way, Spain must focus its resources where the impact of our official development assistance can be most effective and beneficial bearing in mind that our responsibility as a donor country increases in harmony with the importance of our historic and cultural ties with certain areas.

For these reasons, when it comes to geographical distribution, the Master Plan draws a distinction between Spanish cooperation priority countries or programme countries; countries in conflict, in reconstruction or post conflict, with two major axes formed by Colombia and the Balkans; the priority regions named in the cooperation law and the rest of the developing countries, especially the least advanced among them. The aim is to make the principle assistance target countries the beneficiaries of more than 125,119 million pesetas in bilateral assistance alone in the year 2004.

In consonance with the above, the following geographical areas have been formulated: Latin America which is the main target of our cooperation, further aided by the prior existence of a regional cooperation framework, the Bariloche Convention, in the context of the Latin American Conference calling for preferential attention and specific resources . . .

Within Latin America, however, the different levels of development determine the different degrees of priority for Spanish cooperation action. Nations with programme country status in Central America are: El Salvador, Guatemala, Honduras and Nicaragua, which represent the principal nucleus of the regional cooperation strategy for Central America. In the Caribbean: the Dominican Republic. As for South America, the programme countries are Bolivia, Ecuador, Peru and Paraguay. In

addition to this set of countries, special mention must be made of Colombia and Cuba. Colombia will be the focus of a programme especially designed to accompany the conflict settlement process the bases of which are now being set up. As concerns Spanish cooperation policy in Cuba, priority will be placed on facilitating the internal evolution of the country and support for the improvement of living standards for the Cuban people both through bilateral cooperation as well as through cooperation on the European Union level always subject to fully accepted European regulations, promoted by Spain, regarding the democratic clause in cooperation.

Second of all is the Maghreb, Spanish cooperation's area of greatest interest in the Mediterranean and the Arab world given that it is with this area in the north of Africa closest to Spain that we share wide-ranging and intensive political, economic and socio-cultural interests. The stability of this region is vital for both Spain and Europe and a joint development strategy that also addresses the worrisome phenomenon of migration is therefore essential in the area . . .

The Middle East is one of the focal points of greatest potential instability in the Mediterranean in light of the existing regional conflicts and political, economic and social imbalances. In order to establish stability throughout the region it is necessary to actively collaborate in the peace process in which Spain is very much involved. For Spain this means that the Palestinian Territories comprise the only programme country in the region. Consolidation of the peace process will also entail a policy of cooperation with neighbouring countries and especially with Jordan, Lebanon and Egypt . . . Sub-Saharan Africa is the fourth area.

The selection based on two regional divisions is as follows: in Central Africa the programme countries will be Senegal, Cape Verde, Guinea Bissau, Equatorial Guinea and Sao Tome; in southern Africa the programme countries and principal recipients of our assistance are Mozambique, Angola, Namibia and South Africa; the latter being considered a transitional country with the aim of consolidating its democracy and contributing to regional stability.

Asia represent the new challenge for Spanish foreign policy. Cooperation will collaborate in this effort concentrating its programmes on the Philippines, China and Vietnam . . .

In the rest of the countries a series of horizontal training and technical assistance programmes will be implemented with special attention to Southeast Asia in which a microcredit programme has also been set up in Bangladesh.

Central and Eastern Europe. Spanish cooperation has a dual objective in Central and Eastern Europe: on the one hand the maintenance of our commitment with the Balkan peace process and, on the other, support for the transition processes under way in the rest of Europe . . . In the rest of Central and Eastern Europe our action focuses on training and technical assistance programmes paying special attention to reform and modernisation processes. As for the European Union candidate countries, cooperation shall concentrate on supporting their adaptation efforts, especially through the European Union twinning programme.

(. . .)".

(*DSC-C*, VII Leg., n. 147, pp. 4201–4203).

b) Defence of human rights, democracy and fundamental freedoms

On 25 November 2002 the Minister of Foreign Affairs, Mrs. Palacio Vallelersundi, appearing before the International Development Cooperation Commission of the Congress to report on the general lines of action taken by her Ministry in the area of international cooperation, stated:

> "Cooperation policy forms part of Spanish foreign policy and is based on the same principles and values and also defends the same interests. First of all we seek international relations based on Rule of Law and we firmly believe in the universality of principles among which special mention should be made of the defence and advancement of human rights but also the defence and advancement of democracy, Rule of Law, equality between men and women and the market economy. Now, if we intend to be true to this conviction, these principles and fundamental rights that figure in our Constitution must form an integral part of our external action making their universality compatible with respect for and understanding of cultural diversity. Spain, as part of its cooperation policy, wants to see the same principles and values develop in the countries with which we cooperate. To state this in another way, Spain wishes for others the same that we have fought for ourselves, i.e. freedom, respect for human rights, democracy, Rule of Law, separation of Church and State, equality among men and women, a market economy, free trade; everything that defines the flag that we share with our European Union partners. The Government is of the view that claiming the universal applicability of these principles is not only an ethical demand stemming from the radical equality among all men, but is also a requirement for development. Experience teaches us that there is not an example to be found of a developed country – although an example may be found of one with a high per capita income – that fails to respect these principles. In other words, from a selfish point of view if you permit me that term – I have mentioned the ethical and values issues that are fundamental –, there is no better investment than investing in democracy, in the organisation of a society, in strengthening institutions. The Government, in consonance with this concept, considers that the defence of human rights is one of the sectoral priorities established in the Law of cooperation as well as in the Master Plan for Cooperation 2001–2004 approved and given a vote of confidence by this House. There is no doubt that the aim of development assistance is poverty reduction but we are all aware that poverty is not rooted solely in a lack of growth, in low income levels. Fortunately, during the course of the last several years, a new concept of international cooperation has been spreading and has been confirmed in the Monterrey and Johannesburg summits that takes the view that poverty is not fought with the mere transfer of assets, with the mere transfer of capital. To rise out of under-development one needs democracy and respect for human rights as I stated earlier.
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> (. . .)".
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> (*DSC-C,* VII Leg., n. 628, pp. 20548–20549).

On 10 December 2002, in its appearance before the same Commission of the Congress, the Government reported on the stance held by Spain with respect to the importance of human rights in its cooperation relations with third States:

> "The issue of human rights is an absolute priority in Spanish cooperation. This is a point on which we all agree, not only as regards Spanish cooperation but also in all of European Union cooperation that is mostly rooted in respect for and compliance with human rights.
>
> This is also stipulated in our Law of Cooperation, our Master Plan, not only in the annual plan. In other words, human rights form an essential part of development cooperation; they are a political imperative, a moral obligation and are also an effective instrument for the defence of personal dignity and are therefore effective in the eradication of poverty, of injustice and of inequality.
>
> When we speak of human rights we are speaking of political freedoms, of individual freedoms; we are speaking of syndicated freedom, of freedom of education, of freedom of religion, of freedom of opinion, freedom of choice. We are speaking of all of the freedoms that we know and of those that we fortunately enjoy but we are also talking about an independent judiciary, a free market, of the possibility of changing a government with our vote; things that are possible in our countries but that in others are not yet a reality.
>
> We are of the view that these principles are universal values, an opinion supported by the United Nations in its Universal Declaration of Human Rights and also by other declarations made at the United Nations on civil rights, the international pacts on civil and political rights and economic, social and cultural rights.
>
> A large proportion of cooperation development could always be included as human rights. The right to education, everything that we do in education, is a human right; the right to health, the right to a home, in a broad sense, with those international pacts. A large proportion of what we are doing in cooperation, if not all, fits within this general approach of personal dignity and, therefore, respect for human rights.
>
> Specifically, Spanish cooperation is preparing a strategy in the area of Rule of Law and the strengthening of democracy. We have already developed a strategy in the area of the environment, as we are all aware, and we are now proposing this other strategy of Spanish Cooperation in the area of human rights and Rule of Law that entails sending coherent and reiterated messages with respect to the community of beneficiary countries. In Latin America, of course, we are very active in this area. In Latin America we are doing a lot of work in the area of public administration reform and political commitment with respect to human rights. At the May 2002 summit held in Madrid, the European Union-Latin American Summit, specific mention was made of strengthening democratic institutions and Rule of Law, of protecting respect for human rights, of fighting terrorism, of eliminating racial discrimination and intolerance and of promoting equality among men and women as a means of combating poverty and achieving development.
>
> . . . The specific issue of what happens in the case of those countries that do

not comply with respect for human rights was approached. We found that, of the 29 countries that are a priority for Spanish cooperation, four are not free according to the classification done by *Freedom House*. These four are Algeria, China, Equatorial Guinea and Vietnam. Cuba, given special consideration in our Master Plan, would have to be added to this list. It is not a priority country *per se* but it is a country that receives special attention from Spanish Cooperation despite its lack of freedom . . .

If we speak of DAF funds we find that of the ten principle beneficiary countries, only three are not free; the two already mentioned, China and Algeria and the other is Kenya. Discussions have focused within the donor community, and I have attended very thorough debates at European Union meetings, on the degree to which assistance can be tied to strict compliance with human rights. This is a debate in which there are a great many interpretations and I understand that there are disagreements. The conclusion reached by many is that making assistance conditional contributes to doubly punishing the population because they already have a burden to bear with disrespect for human rights and the government that they have to bear without also having an international community holding back any sort of assistance. This would be tantamount to a double punishment for that population group. It is true that cooperation has oftentimes been used as an instrument of change, as a pressure instrument and the results have been meagre. The former government in Spain under the Socialist party wanted to use cooperation as an element of pressure in Equatorial Guinea. What was the result? A large portion of Spanish cooperation was withdrawn and no significant advances were registered in the area of human rights in Equatorial Guinea. In other words, using cooperation as an element of pressure might work in some cases but in many it does not. There is no direct link and therefore assistance cannot be strictly tied to human rights. One can, however, work in support of human rights in many ways and over the long term. This is what we are doing in all of the countries we are working in. In some we are more effective such as in Latin America, for example, while in others the case is different as in China where our capacity for social or cultural penetration is much more reduced but the approach is the same and I believe that it is important to maintain this same approach. In this area we are doing a lot of work in different sectors. I believe that it should be highlighted that in the area of human rights it is important to work in a broad-based fashion in many sectors.

First of all in the consolidation of peace subsequent to war. In this sense Spain, as a country, under this Government and its predecessor, has clearly carried out commendable work in Central America that has been recognised by all of the Central American countries and by the entire international community. Second of all, human rights in the strict sense have been fostered and defended through conferences, meetings and awareness heightening sessions. Third of all, we are working on the modernisation and reform of the public administrations because the training of public officials is vital in all senses if human rights violations are to be avoided: police training, military training, customs and tax officers training, etc.

and also municipal officials. This is an area in which Spanish Cooperation in some countries, especially in Latin America, is particularly important. Fourth of all, through the strengthening of non-governmental organisations in these countries and participation in civil society, an area in which we are also actively participating. In fifth place, we are working in the reform and modernisation of the justice administration which is a challenge for many countries. From Spain we are working on the modernisation of the justice systems in Nicaragua, Honduras and in Bolivia. We believe that it is essential for the justice system to operate properly if corruption and human rights violations are to be avoided.

And finally, we are involved in a variety of other issues including the strengthening of political parties, support for electoral processes, support for indigenous communities, decentralisation processes, support for two trade union programmes being funded by the *AECI* together with the two main Spanish trade unions for trade union strengthening programmes throughout all of Latin America and in other areas such as Palestine, for example. You ask me for my assessment of what we are doing. I think that this is the priority area in which we are operating, in which we are completely committed. We are aware of the limitations that exist due to the political regimes in certain countries but we are working over the long term in benefit of individuals".

(*DSC-C*, VII Leg., n. 658, pp. 21381–21383).

c) Control of illegal immigration

The Secretary General of the Spanish International Cooperation Agency, Mr. Rodríguez-Ponga y Salamanca, in his 15 October 2002 appearance before the International Development Cooperation Commission of the Congress to respond to a question on the consequences that the proposal announced by the President of the Government to restrict cooperation with countries that failed to control illegal immigration was going to have on Spanish development cooperation policy, stated:

"This is an important subject forming part of a wide-ranging reflection that includes input from the President of the Government himself on illegal immigration, the situations it causes and the responsibility of the governments of the countries that these people are coming from. They are in a desperate situation that, unfortunately, only too frequently leads them to their death. There is, therefore, an initial assumption of responsibility that should be assumed by the officials of those countries from which illegal immigrants come . . . Second of all, part of the responsibility is obviously ours and there is now doubt that the Government assumes its responsibility and raises these issues both with respect to immigration as well as to development cooperation. There is an issue yet to be resolved, however, that forms part of the debate confronted with increased frequency by our society and that is legal or illegal immigration and its link to development. It is true that immigration contributes to development. We Spaniards know this very well because our emigration abroad contributed significantly to the development of Spain. This is true not only due to the frequently commented remittances sent by emigrants back to their

home countries but also thanks to the acquisition of new technical training, ways of working, etc.

. . . Morocco. Here I must make a distinction regarding what is considered cooperation with governments and what is cooperation through other channels because if the Government of a country, whether that be Morocco or any other, maintains a certain attitude it could be very difficult to establish cooperation. Let's look at the specific case of Morocco. In the year 2001, for example, the inter-university cooperation programme could not be executed for the simple reason that the Moroccan authorities did not want to call a meeting of the commission specifically set up for that programme. It is very difficult to hold a meeting on a bilateral cooperation programme with a government if that government refuses to even sit down at the table. I am afraid that in 2002 some of the government to government bilateral cooperation programmes with Morocco are going to meet with the same fate making them impossible to execute. The case is different with other types of cooperation that can directly benefit a significant proportion of the Moroccan population. In the specific case of Morocco we have opted to uphold, in 'business as usual' mode, the subsidies for Spanish NGOs working there. What I am saying is that the government to government policy does not necessarily have to affect the *AECI* subsidies granted to Spanish NGOs working in Morocco in benefit of the Moroccan population . . .

Another issue is the existence of difficulties on the government to government level, one of which could be illegal immigration. The result of this could be that some of the bilateral programmes agreed to, set up and budgeted may not be implemented. It is also true that when we hear the President of the Government or other institutions talk about the link between cooperation and immigration, they are not necessarily speaking about development cooperation. There are many other channels of cooperation between governments, of cooperation in the United Nations system, bilateral cooperation, economic cooperation; channels that are not necessarily development cooperation. This means that political signals can be sent to the government in question communicating the need to approach a certain problem, a problem that is ours but that first and foremost is a problem of theirs because, for whatever the reason, there are citizens from that country that have to abandon the country under terrible conditions and, in many cases, only to ultimately lose their lives which makes for a sad state of affairs".

(*DSC-C,* VII Leg., n. 586, p. 19125).

2. *Assistance to Developing Countries*

a) Latin America

On 3 June 2002 the Secretary of State for International Cooperation and Latin America, Mr. Cortés Martín, appearing before the Senate Latin American Affairs Commission to report on the Summit held in Madrid between the European Union, Latin America and the Caribbean, stated:

"First of all, two important results have clearly been achieved on the political front. On the one hand the firm commitment to combat terrorism and narcotics trafficking by strengthening cooperation mechanisms among governments and, on the other hand, the strengthening of bi-regional dialogue through the mediation of international fora, especially the United Nations.

Second of all, the economic and commercial front is where the most significant advances have been made in comparison with the situation as it stood in June of 1999 when the first Summit was held in Rio de Janeiro. On the one hand, the entry into force of the agreement with Mexico that has had a very positive impact on the trade flows between this country and the European Union and, on the other hand – and this is undoubtedly a very relevant issue –, the conclusion of the Association Agreement with Chile . . .

As concerns Mercosur, we have witnessed advances in the negotiations to the point at which the political and cooperation chapters as well as trade facilitation are practically concluded. Moreover, it was agreed to continue trade negotiations with a ministerial level meeting in July which translates into strong support for negotiation despite the adverse circumstances caused by the situation in Argentina.

With respect to Central America and the Andean Community of Nations, a window to the eventual negotiation of association agreements with these regions has been opened. In the meantime, political and cooperation dialogue agreements are being negotiated but cooperation in the area of trade, investment and economic relations has been deepened.

(. . .)

To finish with a review of the different geographical areas in this economic aspect, special mention should be made of the decision taken by the Caribbean countries together with those of Pacific Asia and the Caribbean, of initiating in September negotiations for economic association with the European Union within the Cotonou framework.

(. . .)

And finally, in the third area, that of cooperation, new elements of interest were also featured. First of all the ALIS Programme for the development of the information society . . .

In the area of education that was paid particular attention at the summit, special mention should be made of the new scholarship programme known as ALBAN. This programme was tabled by the External Affairs Commissioner Mr. Patten within the framework of the cultural forum held simultaneously with the summit that brought together foundations and cultural entities from a number of European and American countries. The programme included the funding of 3,900 scholarships for post graduate studies 75 million euros of which would be paid for by the Commission and 38 million euros by the European universities participating in the programme.

In my view this is a milestone that should be underscored because it is going to provide significant impetus to cooperation in the area of education between Europe and American and is going to permit high level training of post-graduate

Latin American students thus providing a boost to development assistance in those countries and helping to overcome a practically exclusive relationship in this area with the United States.

(. . .)

It is also important to mention the support that the summit lent to the 2002–2004 action plan as regards higher education with the aim of improving the quality of instruction and facilitating mobility on the part of students.

The meeting concluded by stating that the II European Union – Latin American and Caribbean Summit was held at a time when the international environment was not the most favourable. On both sides of the Atlantic subsequent to the economic crisis that has spread as a result of the September 11th attacks has led to hard times in several Latin American countries . . . an example being the situation in Venezuela suffering a grave crisis in April, the interruption of the peace process and an electoral climate very much affected by the terrorist violence in Colombia or the deep crisis suffered by Argentina, all added to Europe's concern for enlargement and the elections that will be held over the next few months in several European Union countries.

This general panorama did not paint a very favourable picture for the celebration of the Summit. The Madrid Summit did, however, feature a very high level of participation and produced concrete appreciable results and was assessed very highly by both the participants and, in general terms, by the media and the results obtained.

(. . .)

The scheduling of the next meeting to be held in Mexico in 2004 is a guarantee of the continuance of this process of establishing and consolidating the biregional association.

(. . .)".

(*DSS-C*, VII Leg., n. 295, pp. 3–5).

b) The Mediterranean

On 5 December 2001 the Minister of Foreign Affairs Mr. Piqué i Camps, appearing before the Senate Foreign Affairs Commission to respond to a parliamentary question on measures to be taken to foster better relations and collaboration with Morocco stated:

" . . . Morocco is the number one country in the world when it comes to Spanish cooperation funds, over and above any Latin American country including Peru. It was not in vain that Morocco signed with Spain – in 1997 if my memory serves me correctly – a financial protocol the total of which is the highest of all financial protocols that Spain has ever signed with any other country in the world, including China.

For Morocco, Spain is its number two trading partner. We are currently, together with France, the top investors in the area. Nearly one thousand Spanish firms are operating in Morocco. We have presented very ambitious gas projects off the

Moroccan coast that the Moroccan government has yet to respond to. We have offered a specific development plan for the northern districts that are starting to develop with some specific projects. From a cultural perspective, no other country in the world has as many Cervantes Institute Centres as Morocco; five are currently in operation. There are approximately 12 Spanish-run educational centres providing an education for thousands of Moroccan boys and girls. And I could go on citing many further examples.

There is no other country in the world – outside of the European Union, of course – that has such a close and deep relationship with Spain as Morocco . . .

I am not going to deny that there are problems. We have a problem with illegal immigration that we have laid out on the table, especially in the most crucial moments. We have problems with narcotic drug trafficking. We had a problem with an impasse in reaching a fishing agreement between the European Union and Morocco. I am not going to deny that there are problems".

(*DSS-C*, VI Leg., n. 219, p. 20).

On 4 February 2002 the Government, in reply to a Parliamentary question on humanitarian assistance provisions in light of the precarious situation facing the Saharawi people, reported the following:

"Spanish Government assistance for the Saharawi people, the beneficiaries of which are almost exclusively the Saharawi refugees living in the Tinduf camps (Algeria) are channelled via the Spanish International Cooperation Agency (AECI) carrying out a number of different initiatives:

– Emergency food and humanitarian assistance.
– Subsidies and assistance for study scholarships through Non Governmental Organisations.
– Development (NGDO) awarded within the framework of *AECI* calls for projects.

It is also important to highlight the contributions made to the UNHCR mostly earmarked for its refugee repatriation programme.

In addition to this assistance, over the last several years and specifically since 1995, there has been a significant increase in decentralised cooperation initiatives with Saharawi refugees by the autonomous communities, regional councils and town halls.

(. . .)

Government previsions for the year 2002 are to continue with this assistance at the same level as previous years although with respect to NGDO subsidies, we will have to wait until the presentation of their projects in next year's call for projects".

(*BOCG-Congreso.D*, VII Leg., n. 298, p. 579).

c) Sub-Saharan Africa

On 18 December 2001 the Secretary of State for Foreign Affairs Mr. Nadal Segala, appearing before the Foreign Affairs Commission of the Congress to report on Spain's support for the democratic transition in Equatorial Guinea, stated:

"The Government has been keeping very close watch on the recent developments in Equatorial Guinea and, at the same time, has made a concerted diplomatic effort to promote democracy and human rights in that country that is considered to be of strategic interest for foreign policy in Sub-Saharan Africa. The advancement of democracy and human rights has become, in and of itself, one of the main axes of Spanish cooperation policy in Equatorial Guinea. Despite the fact that the discovery and drilling of rich Guinean oil and gas wells has once again shifted Equatorial Guinea's traditional dependence on the outside world, the Spanish Government's commitment to the advancement of democracy and human rights has only grown. Today Equatorial Guinea is, in fact, the number four producer of oil in Sub-Saharan Africa. Its per capita income has increase five-fold over the last four years from approximately 270 dollars in 1998 to 1,400 dollars in 2001. Thus, Equatorial Guinea is no longer considered a member of the group of least developed countries and now forms part of the middle income countries with a developing economy. Many serious political, economic and social problems do persist, however, and if they are not resolved they could very likely be a stumbling block to the integrated and sustainable development of Equatorial Guinea.

(. . .)

During the course of the last two years the Government maintained a fluid, critical but constructive dialogue with the Government of Equatorial Guinea in the area of democracy and human rights. High level bilateral contacts have been intensified during this period, increasing the number of visits from representatives of both governments. During these meetings the Spanish Government has always shown its willingness to collaborate with the Guinean Government in the new context of the bilateral relationship. Conversations have indicated that there are three fundamental objectives shared by the two governments: the first is to foster Equatorial Guinea's full membership in the international community. The second is to strengthen the institutional framework as the fundamental tool by which to bolster legal security and guarantee respect for human rights making headway in the democratic process. The third is to work so that oil revenues really help with the modernisation of the country and filter down to the citizens improving their level of well being and income. The Spanish Government is willing to lend Equatorial Guinea the necessary assistance to achieve these objectives.

(. . .)".

(*DSC-C*, VII Leg., n. 405, pp. 13196–13197).

d) Middle East

On 10 October 2002 the Government, in response to a parliamentary question on provisions made for increased cooperation in the development of the Palestinian ter-

ritories to palliate the destruction caused during the military occupation of such territories by the Israeli army, reported:

> "The Palestinian Territories are a Middle East priority country in the Master Plan of Spanish Cooperation 2001–2004. Since 1994 cooperation with the Palestinian Territories has been based on the Memorandum of Understanding on Scientific, Technical, Cultural and Educational Cooperation (Tunisia, 29 July 1994). The III Spanish-Palestinian Joint Cooperation Committee was held in Gaza on 5 February 1997. The Monitoring Committee was held in Madrid in July 1999 and preparations for the IV Joint Committee have been under way for more than a year now and will be held as soon as circumstances permit.
>
> In the meantime, funding is still being provided (2001 budget) to projects that are the extension of programmes approved at the III Joint Committee given the satisfactory progress of the execution. However, the grave worsening of the current situation, the humanitarian crisis and the destruction of infrastructures has called for a re-thinking of how to earmark funds budgeted for 2002.
>
> The development over the short and middle term of events in the Palestinian Territories is affecting a number of complex factors: the domestic policy of the Israeli Government, the political stance taken by the Palestinian National Authority, the influence of the Government of the United States, the capacity for action by the European Union, etc. In short, this is an issue of national and international politics that extends beyond the scope of action and even the capacity of the Spanish International Cooperation Agency (*AECI*) and of Non Governmental Development Organisations (NGDOs) that are operating in the region. Moreover, the possibility of implementing cooperation activities in the Palestinian Territories and, more specifically, the reconstruction of destroyed infrastructures and houses is now totally conditioned by the above mentioned factors and by the action of the Government of Israel.
>
> (. . .)".
>
> (*BOCG-Congreso.D*, VII Leg., n. 419, pp. 74–75).

e) Asia

On 15 October 2002 the Secretary General of the Spanish International Cooperation Agency Mr. Rodríguez-Ponga y Salamanca, appearing before the International Development Cooperation Commission of the Congress to report on the activities carried out and envisioned to deal with the humanitarian crisis unfolding in Afghanistan and Pakistan, stated:

> ". . . The situation in Afghanistan and Pakistan was completely unexpected and was therefore not at all envisioned in our budget, in the Spanish cooperation master plan or in the annual plan. It was a completely unexpected situation that we had to react to in an urgent and expedient way. We were able to react and in a manner that was over and above initial previsions because, as I said, this is a geographical area in which Spanish cooperation has not traditionally been present; a region that has no particular historical, linguistic or political ties with Spain.

However, in light of a situation that required significant humanitarian attention, Spain responded. When I say Spain I am not referring only to the *AECI* but also to the NGOs, autonomous communities and individual donations that, through campaigns organised by some NGOs, contributed personally with their money".

(*DSC-C*, VII Leg., n. 586, pp. 19113–19114).

f) Oceania

The Government, in response to a question posed in the Senate regarding the reasons why it proposes to reduce the assistance that the European Union promised to East Timor at the Donors' Summit held in December 2001 in Oslo, as well as the steps taken by the Government at the Barcelona Summit to rectify the decision taken by the European Union to cut assistance in half, stated:

"The European Commission has recently approved its cooperation strategy for East Timor setting out the European Union's financial commitments for the next four years. The cooperation programme shall focus on two priority sectors: health and rural development. In February 2002 the Commission presented a cooperation strategy document on East Timor that significantly reduced funding for the 2002–2004 period. The initial total foreseen in the strategy for the next two-year period was 47 million euros. The annual distribution was 28 million euros for 2002, 7 million euros for 2003, 6 million euros for 2004, 5 million euros for 2005 and 4 million euros for 2006. The Spanish Presidency of the Council of the European Union repeatedly expressed its concern over the drastic reduction of assistance highlighting at a number of different Community meetings the enormous challenges that the new State would be facing. East Timor is one of the world's poorest nations: its income levels are extremely low and its dependence on the donor community is infinitely higher than that of other developing countries in the region. Moreover, it is an emerging State that must undertake an arduous process of reconstruction and faces enormous basic infrastructure needs and is in an extremely fragile economic, social and institutional situation. It therefore requires a very large financial commitment from the international community. And finally the European Commission, mostly at the initiative of Spain and Portugal, increased the volume of assistance by 5 million euros during the course of the period covered by the above mentioned strategy".

(*BOCG-Senado.I*, VII Leg., n. 473, pp. 6–7).

XII. INTERNATIONAL ORGANISATIONS

1. *United Nations*

In response to a parliamentary question on the financial situation of the United Nations, the Government, on 26 January 2002, reported to Congress about Spain's position alongside that of the other members of the European Union:

"(. . .)
The latest figures available (through 30 September) are alarming:

1. 3,094 million dollars in back and unpaid dues (consolidated from the three budgets: ordinary, peacekeeping operations and tribunals).
2. Some specialised agencies like UNRWA (UN Relief Works Agency) or INSTRAW (International Research and Training Institute for the Advancement of Women) suffer from a lack of funding endangering their operation past next 31 December. Urgent voluntary contributions are requested for these.
3. As for Peacekeeping Operations, the needs are on the rise (2,100 million dollars for the current fiscal year, 1,700 of which are earmarked for only four missions). Situations are in a constant state of change in this chapter and it is possible that final figures may be even higher than initial estimates.
4. Sixty-one percent of the unpaid dues, 1,887 million dollars, correspond to the United States. As regards the ordinary budget, that percentage is 81 percent.

To confront the financial crisis facing the Organisation, the EU has proposed a set of measures that, although simple, are important: first of all, the countries in arrears should present a plan by which to comply with their financial duties as soon as possible. Second of all, a new quota sharing system should be devised that reduces or eliminates the current distortions. Moreover, the permanent members of the Security Council should take on their special responsibilities by paying a greater share, especially as regards the Peacekeeping Missions.

Spain, together with the rest of the EU, defends the basic criteria of ability to pay in the determination of each state's quota including special reductions for developing States. At any rate, payment of dues is an elementary obligation of States and they should be paid fully, on time and should not be subject to any conditioning factors".

(*BOCG-Congreso.D*, VII Leg., n. 125, p. 275).

2. *North Atlantic Treaty Organisation*

a) Enlargement

In response to a parliamentary question, the Secretary of State for Foreign Affairs, Mr. Nadal Segala, referred in the Congress, on 23 May 2001, to the stance taken by the Government regarding the enlargement of the Atlantic Alliance:

"The Government's stance with respect to the enlargement of the Atlantic Alliance is based on a dual principle. On the one hand, on our firm commitment to the open door principle, i.e. saying yes to enlargement to the degree that candidate countries comply with established requirements and, on the other hand, the Government's position regarding this enlargement process is also rooted in the principle that this is a process based on the consensus of Alliance Member States and that this consensus process must therefore be supported. The development and

construction of that consensus is the task that we presently have before us. We find ourselves at the commencement of a reflection process. The Prague Summit, forum of debate on these issues, will be held in November of next year and I can tell you that for the time being all options are still open; ranging from denying entry to all candidates to admitting all nine and a number of intermediate positions as well . . .

Spain has taken the view that enlargement should contribute to increased security throughout the continent. I know that this is a very general principle but it is absolutely basic and shared by all.

(. . .)".

(*DSC-C*, VII Leg., n. 234, p. 7040).

b) Relations between the European Union and NATO

The Secretary of State for European Affairs Mr. de Miguel y Egea, in an appearance before the Senate Foreign Affairs Commission on 18 June 2001 to respond to several questions, referred to the stance taken by the Spanish Government regarding the development of a European defence system independent of the North Atlantic Treaty Organisation:

"(. . .)

The efforts being made by the Spanish Government and the rest of the European Union partners participating in the construction of the Common European Security and Defence Policy (ESDP) are not aimed at constructing a European defence independent of the North Atlantic Treaty Organisation. Collective defence shall remain under the auspices of the Alliance and crisis management and in those cases in which NATO as such does not feel committed, action could be taken by the European Union. The decisions adopted at the European Councils of Cologne, Helsinki, Feira and Nice focused on providing the European Union with the necessary resources to fully carry its weight in the international arena and assume its responsibilities as regards crises, adding to the instruments already available to it a decision taking capacity to react within the scope of civil management and military crisis. In response to any given crisis, therefore, the European Union's specialty lies in its ability to mobilise a wide array of both civilian and military resources giving it a global capacity for crisis management and conflict prevention at the service of Common Foreign and Security Policy.

With the development of this autonomous decision taking capacity when NATO decides not to intervene, the European Union shall be made capable of participating in a whole range of Petersburg Missions as defined in Article 17.2 of the European Union Treaty: humanitarian and rescue missions, peacekeeping missions and missions involving combat forces for crisis management and peace restoration initiatives.

Thus, the development of these capacities does not entail the creation of a European army. In the case of States that are members of both the Alliance and the European Union, NATO continues to be the cornerstone of collective defence

and will continue to play a vital role in crisis management. The European Union's military capacities will thus be made fully compatible with and complementary to the commitments made within the NATO framework. The development of a Common European Security and Defence Policy contributes to the vitality of a renewed transatlantic link. Said development translates into true strategic collaboration between NATO and the European Union in crisis management respecting the decision taking autonomy of both organisations.

With a view to assuring the coordination between NATO and the European Union regarding these issues, negotiations are under way between the two organisations regarding the terms and modes of access of the European Union to NATO military resources and capacities so as to avoid unnecessary duplication on the part of one or the other organisation of capacities that are both scarce and expensive.

The European Union will also be provided with modes of access to NATO approach capacities within the framework of the operations run by the EU to assure coherency between the defence approach review mechanisms of the two organisations. These agreements are vital if one expects to be able talk about the operability of the European Union's crisis management capacity.

Spain hopes to conclude this process as quickly as possible and we therefore contribute to the efforts being made in an attempt to dissipate the misgivings that Turkey still harbours towards the European Common Foreign Security and Defence Policy and to prompt the new United States government to give its wholehearted support to the conclusion of said agreements".

(*DSS-C*, VII Leg., n. 151, pp. 16–17).

3. *Western European Union*

a) Relations between the European Union and the Western European Union

In a 15 February 2001 appearance before the European Union Joint Committee to report on the situation of the institutions, operations and personnel of the Western European Union (WEU) in the European Union, the Minister of Foreign Affairs Mr. Piqué i Camps, stated:

> "On 13 November the Ministerial Council of the WEU, under the French Presidency of the Western European Union and the European Union, was held in Marseille to bring an end to the organisation as it had existed up to then. Steps were taken towards what will be, subsequent to a brief transitional phase, an organisation with a new structure that simply maintains what have been referred to as residual functions that will be the minimum level functions allowing the treaty amended in Brussels in 1955 to remain in force . . . Marseille marked the end of a 16-year process of the Western European Union coinciding with the transfer of its headquarters from London to Brussels, reactivating an organisation created 52 years ago and that had found itself in a lethargic state, with a view to making it the embryo of a future European defence organisation.

In light of the balance sheet of the allied intervention in Kosovo, it is clear that the reactivation and operational development efforts made with respect to the organisation in the middle of the 80's and beginning of the 90's failed to provide for the consolidation of the WEU as an effective European defence instrument. It is no less true, however, that the experience accumulated during the course of these last 16 years has been extremely useful for the development of a European common foreign security and defence policy, known as the ESDP within the European Union itself. The acquis that the WEU is going to provide to the Union is therefore very important.

. . . The WEU is transformed because the idea behind its revitalisation became outdated and was overtaken by other events.

(. . .)

During the course of all of these years, collective defence has continued to be firmly anchored in NATO as the principal defence instrument of its members . . . Another determining factor is the participation of 28 countries in the WEU with heterogeneous interests and different statutes.

Instead of developing the WEU's capacities, it was decided to foster them within the Union, incorporating in the European Union those functions of the Western European Union that would allow the Union to assume its responsibilities in what are known as Petersburg Missions.

(. . .)

In July 2000 the WEU functions that were to be transferred to the European Union were defined. What will remain are the so called residual functions as they were named at the Marseille Ministerial Council held in November 2000 by the ten Member States in the so called transition plan that brought to a close certain responsibilities and structures that were incumbent upon the Western European Union. Marseille bore witness to the end of the WEU's responsibilities in the area of crisis management that were conferred by the Treaty of Amsterdam. The residual organisation shall only manage, with minimum possible expenditure, the obligations derived from the Brussels Treaty specifically amending the mutual defence obligation provided for in Article 5, relations with the Parliamentary Assembly of the Western European Union which is found in Article 11 and attend to budgetary obligations, especially the payment of retirement pensions.

In Marseille the minimum structures provided for in the transition scheme were also approved. WEU personnel would be strictly reduced to 29 officials that would keep a secretariat afloat and would attend to the work of the Permanent Council that is represented at the Ambassador level and that will continue to meet with a frequency to be determined by each Presidency based on need.

(. . .)

The Western European Union Command will remain in operation until the new European Union Command is declared operational. The WEU will continue to play a role in the exchange of points of view and also in rapprochement in the area of European security through its Parliamentary Assembly comprised of 28 countries that, as I already mentioned, in one way or another and with differing

status belong to the organisation. The Assembly is the only institution at which the members of the national parliaments of these 28 countries meet on a regular basis.

European cooperation as regards armaments will develop within the scope of the WEU. This is the case of the Western European armaments organisation and the Western European armaments group but these are decisions that will be subject to periodic revisions due to the plans to revamp European armament organisations and fora bearing witness to the changes that, as we all know, are taking place in the European defence industry.

The Marseille Ministerial Council of the Western European Union echoed the same interest shown by the European Union in assuming certain functions of the organisation, an issue that was given the go-ahead. This desire voiced by the European Union was reiterated at the Nice Council where an agreement was reached on the creation of a satellite centre and a security studies institute functioning as an agency and that incorporates the necessary elements of the current WEU structures. This refers to the WEU satellite centre in Torrejón de Ardoz and the Institute for Security Studies that the WEU has in Paris.

Over the next several months the nature and functions of the future agencies should be defined so that the General Affairs Council, made up of the Foreign Affairs Ministers, may adopt joint action. The definitive conversion of the two centres in an agency is foreseen by the end of this year once the current transition period has come to a close".

(*DSCG-Comisiones Mixtas*, VII Leg., n. 77, pp. 579–581).

XIII. EUROPEAN UNION

1. *Enlargement*

Given that we are considerably behind in our relations with the majority of the candidate countries with which we only established diplomatic relations in 1977 due to world events and historic, geographical and social distance, Spain has drawn up an enlargement framework plan known as the "Framework plan for the European Union candidate countries, 2001–2004". The guidelines of this plan were outlined by the Secretary of State for European Affairs, Mr. de Miguel y Egea, before the Foreign Affairs Commission of the Congress on 12 February 2002:

"The enlargement framework plan consists of an introduction and four chapters. The introduction essentially underscores the importance that Spain attributes to enlargement and Your Honours are well aware that this is one of the fundamental points of our Presidency of the Union. Mention is also made of the dimension of this new enlargement, of the status of our bilateral relations with the countries concerned as well as the opportunity that this entire process represents for Spain. In the main body of the framework plan there is a description of the objectives established and the instruments that Spain proposes to apply in this respect. These

two chapters also include an analysis of each one of the different sectors identified that are coordinated by the respective ministerial departments in order to give impetus to our relations with our future partners in an effective and expedient manner. These sectors are: political, security, defence, justice and interior, trade, transport and communication, science and technology, fishery, labour, free movement of the work force, environment, energy, culture, education and language.

. . . The framework plan pursues three main objectives: the first is to support the Government's decided backing for the enlargement of the European Union putting strategic trust in the future of the candidate countries and for our country. The second is to seek to intensify our bilateral relations with the twelve future members of the European Union – I am referring to the ten that are already on the list to complete their negotiations plus Romania and Bulgaria that are candidate countries still immersed in the negotiation process –. We are seeking to foster the greatest possible mutual awareness and to take greater advantage of the future potential of our bilateral relations by making a concerted effort to disseminate the image of the reality of Spain today as a modern and dynamic country that wields international weight, encouraging the mutual benefits of our productive complementarity with the candidate countries and the investment possibilities they offer while at the same time taking full advantage of the interest expressed in Spanish culture and language and spreading as far and wide as possible the scope of our bilateral relations to new sectors such as transport, environment, agriculture, judicial and police cooperation or migration policy. The third goal is that of fostering convergence of opinion with the candidate countries as regards the important issues of the European Union in order to guarantee future agreement and defence of mutual interests. These are, as I mentioned, the three overarching objectives.

The more specific objectives are as follows: first the political objectives. Here we are seeking to create common networks of interest by intensifying the fabric of the political relations between Spain and each one of the enlargement candidate countries. The aim is also to work doubly hard to disseminate in the candidate countries the stance taken by Spain that, from a political standpoint, is one of the most firm when it comes to enlarging European construction and to finish updating and disseminating the image of Spain today in each and every one of the enlargement candidate countries. Another specific objective focuses on defence and security. In this sense it is particularly important to develop the relations that our country has in this areas with the future members of the European Union in consonance with the scheme developed by the Ministry of Defence, especially via the joint Defence Committees. Another specific objective in that of justice and home affairs, an area to which Spain gives particular importance. We are quite aware of the difficulties facing these countries in the area of justice and home affairs and the aim is to develop a common area of freedom, security and justice sharing priorities, regulations and cooperation instruments. There is also the area of trade relations and it was the State Secretariat for Commerce that was the first Government department to take note of the challenge posed by enlargement and draw up a first and second edition of a plan of action.

(. . .)

As concerns the rest of the Community policies, infrastructures, transport, telecommunications, science and technology, agriculture, fisheries, labour, free movement of workers, environment and nuclear energy, there are sections focusing on these specific objectives and on everything relating to socio-cultural, educational and linguistic affairs that are intimately related with the promotion of the Spanish language. In order to achieve these objectives, the framework plan enumerates a series of specific instruments and initiatives. First of all we have the political-institutional instruments. As I have already mentioned, the strengthening of bilateral relations and the establishment of an ongoing dialogue are the cornerstone of the framework plan. Concerted action is vital at all levels of the Government to visibly enhance our presence in the region through a series of actions such as the intensification of bilateral political dialogue via trips and official visits.

(. . .)

Another very important chapter with a view to intensifying this dialogue is the opening of embassies.

(. . .)

The opening of consular sections is also very important . . . The development of the institutional framework is also very important. Here I am referring to the culmination of the conventional bilateral frameworks such as reciprocal protection of investment, avoidance of double taxation, transport and technical and cultural cooperation that are being implemented in all of these countries as well as contacts between our civilian societies especially in university and commercial circles and among non-governmental organisations.

There is also a series of instruments in the area of defence. Based on the principles contained in the bilateral collaboration scheme designed by the Ministry of Defence, specific actions are being developed focusing on the establishment of joint committees with two countries, Cyprus and Malta, adding to others already set up. Another important point is support for the balanced enlargement of NATO throughout the region.

(. . .)

There are also instruments in the field of justice and home affairs. Here the aim is to highlight coordination and training with a view to closing the gap between candidate countries and the Union's judicial policy. Bilateral agreements in the area of justice are being promoted and efforts will be made to implement all appropriate actions to regulate migratory flows and to promote police cooperation with special emphasis on the fight against organised crime . . .

A series of mechanisms in the field of trade relations and tourism are also being implemented. The plan focuses on eliminating technical trade barriers as well as fostering exports and investment via Spanish, Community and world institutions. To this end special attention is being paid to the start-up and development of trade and tourism offices as well as to support for commercial missions. Practically all of the candidate countries with an embassy already have a commercial office as an instrument to promote all of these actions.

As regards the promotion of the Spanish language, one of the fundamental objectives of Spain's cultural linguistic policy is to open Cervantes Institutes in all of the candidate countries . . .

In those places where it has not possible to open a Cervantes Institute, associated virtual classrooms have been set up at the different universities. The last two chapters of the document that you have before you focus on the conclusions and the evaluation and follow-up of the plan respectively, reflecting the apparent obstacles that enlargement, delays in our relations with candidate countries vis-à-vis other Member Countries and relative geographical distance could entail for Spain. They also highlight the important opportunities of enlargement allowing for the establishment of all sorts of links with countries with which we will be sharing a common project very shortly.

(. . .)

The framework plan will be updated each semester with the contributions of our embassies throughout the region, by means of meetings with the inter-ministerial monitoring commission and with an annual session of this Congressional Foreign Affairs Commission of Members of Parliament".

(*DSC-C*, VII Leg., n. 413, pp. 13411–13413).

The President of the Government, Mr. Aznar López, in his 30 October 2002 appearance before the Plenary of Congress to report on the extraordinary Council held in Brussels on 24 and 25 October 2002, specifically referred to the subject of enlargement:

"(. . .)

First of all, the European Council has backed the conclusions and recommendations of the Commission affirming that ten new Member States comply with the political and economic criteria and can assume their obligations as members of the European Union as of the beginning of 2004. The Council also reiterated its commitment to continue in negotiations with those countries that were not able to form part of the first round of accession. It has expressed its support for Bulgaria and Romania for efforts made to fulfil the objective of becoming members of the European Union in 2007 and has also congratulated Turkey for the advances made by this country in complying with the Copenhagen criteria. Allow me to remind Your Honours that this is the same stance that the Spanish Government has defended. We have always taken a favourable view of Turkey's accession to the European Union based on the same political and economic criteria that are applied to the rest of the candidates.

Second of all, it was of vital importance to reach an agreement in Brussels on the financial aspects of enlargement. We needed a final offer to present to the candidates and we also needed a budgetary framework that would allow us to guarantee the normal development of Community policies in an enlarged Europe. In this sense the Council has taken three fundamental decisions. First, we decided that the spending ceilings established for enlargement for the years 2004–2006 at Berlin should be respected. In its previsions Berlin already includes sufficient resources to finance the ten-State enlargement of the European Union. Second, we

have assured that the enlargement negotiations will respect the Community acquis which means that farmers from the new Member States will receive direct payments. Europe will not, therefore, have a first and second division. Third, all of this will be carried out within a framework of budgetary discipline. Total expenditure derived from agricultural payments during the period 2006–2013 will be the same as agreed to in Berlin, growing at an annual rate of one percent.

The financing of agricultural payments to the new Member States will be made without detriment to the direct aid received by the farmers of the current fifteen Member States and a sufficient budget will be maintained for the agriculture of the entire Union until 2013. Furthermore I would like to highlight the importance of another commitment that we reached in Brussels; namely, that any future reform of the CAP, the Common Agricultural Policy, should strictly bear in mind the situation of the most disadvantaged areas that account for more than 75 percent of Spanish agricultural land.

(. . .)".

(*DSC-P*, VII Leg., n. 200, p. 9957).

Two months later the President of the Government referred once again to EU enlargement during his appearance before the Plenary of the Congress and Standing Council to report on the Copenhagen European Council held on 12 and 13 December 2002:

"Copenhagen was the enlargement summit. This process has followed the principles that Spain has always defended. The financial framework of the Berlin agreements was respected, enlargement negotiations were not conditioned by future reform of the common policies, the Community acquis was respected and the timetables have been complied with".

(*DSC-P*, VII Leg., n. 215, p. 10855).

2. *Spanish Presidency*

In his 8 July 2002 appearance the Minister of Foreign Affairs, Mr. Piqué i Camps, presented the objectives of the Spanish Presidency of the European Union to the Joint Committee for the European Union:

"(. . .)

The aim of the Spanish Presidency is to consolidate and provide impetus to the ongoing European project under the slogan *Más Europa* (More Europe) and in so doing will call on the legacy of former presidencies and underscore the firm will to confront the challenge of terrorism. The six priorities that I pointed out at that time were: the fight against terrorism in an area of freedom, security and justice; the introduction of the euro; impetus for the Lisbon process; a more prosperous and dynamic Europe at the service of its citizens; European Union enlargement; external relations and the debate on the future of Europe. These priorities focus on a number of fundamental axes: the fight against terrorism as a joint response of the European Union to a threat affecting us all within a framework of freedom, security and justice; economic and social reforms and sustainable development

with a view to deepening economic modernisation in the European Union; impetus for enlargement negotiations with a view to meeting the itinerary that was established some time ago by the European Council; definition of the bases of the future European Union and finally, greater presence for Europe in the world within the framework of the European Union's external relations.

(. . .)".

(*DSCG-Comisiones Mixtas*, VII Leg., n. 102, pp. 2505–2506).

Subsequently an assessment was made of the results obtained in each one of these areas:

a) Fight against terrorism

"As a result of the abominable attack of 11 September, condemned at the summit of heads of State and Government on the 14th of the same month, the fight against terrorism became the priority of the Spanish Presidency that proposed to deepen and concretise the action Plan against terrorism approved by the European Council barely a week after the attacks. With the decided support of Parliament and the Commission, approval was given for the framework decisions and others throughout the Spanish Presidency on the fight against terrorism and the arrest warrant with the aim of strengthening the instruments of Rule of Law. The result of this is to avoid within Europe the claiming of the category of political crime or claim the existence of suspicious democracies – in inverted commas – as excuses to avoid the arrest and prosecution of terrorists. Moreover, reinforced cooperation among Member States' security forces gave rise to a series of measures on the development of the Europol convention setting up points of contact between Eurojust and Europol to name only some of the activities designed to make it harder for terrorism to benefit from the diversity of those security forces and standardise the prevention of and fight against terrorism. The new forms and dimensions of this phenomenon, especially concerning material or financial support infrastructures made easier by the existence of loopholes that are the result of differences in Member States' legal systems, have also led to measures such as the freezing of assets, shared lists of terrorist elements, organisations and entities and reinforced security or exchange of visa data. There can be no doubt that without the dimension of international cooperation that the fight against terrorism must have, the European Union's efforts could fall short. It is with that reason in mind that during our Presidency we have put our weight behind the conclusion of a global agreement against international terrorism at the United Nations as well as antiterrorist cooperation in the Union's external relations with the candidate countries and with third countries, especially the United States, Canada and Russia".

(*DSCG-Comisiones Mixtas*, VII Leg., n. 102, p. 2506).

b) Asylum and immigration

The President of the Government Mr. Aznar López, in his 24 June 2002 appearance before the Plenary of Congress to report on the European Council held in Seville on

21 and 22 June 2002, gave a summary of the measures tabled in the area of asylum and immigration during the Spanish Presidency:

"The set of measures that the Presidency has tabled concerning immigration and asylum is based on four pillars. The first pillar sets out a series of measures permitting the European Union to fight against illegal immigration. The Council has put a priority on implementing some of the measures contained in the global plan against illegal immigration approved under the Spanish Presidency. It is therefore necessary before year's end to take a close look at the list of third States whose nationals are subject to the visa requirement; to set up a unified visa identification system as soon as possible; to speed up the conclusion of the readmission agreements that are currently being negotiated and to negotiate new agreements; to adopt the elements of a repatriation programme and approve the framework decisions on trade in human beings and illegal trafficking in human beings.

The second pillar is the implementation of the coordinated and integrated management of the Union's external borders. It is of vital importance that all States begin to manage our borders as territorial limits of the Union in a coordinated manner as the best way to guarantee our effectiveness. This is the first step towards a European Union border police patrol.

The European Union's plan for the management of Member States' external borders was recently approved. The purpose of this plan is to better control migratory flows. In order to achieve this objective the Council has decided to create a common body of experts on external borders as soon as possible. This measure will be supplemented with others that should be in force before the end of 2002 such as the implementation of joint external border operations; the creation of Member States' immigration liaison experts or the implementation of pilot projects on border administration. Prior to June of 2003 the Union should also define a common curriculum for the training of border police; determine burden sharing quotas between the Union and Member States for the administration of external borders and adopt a methodology that allows us to assess the risks involved in the control of these borders.

The third pillar is the integration of immigration policy in the Union's relations with third countries. The Union believes that the intensification of economic cooperation, the development of commercial activity, development assistance and conflict prevention are the means by which to reduce the causes of migratory flows. The Union has thus sought the cooperation of third countries at this Council. It is the Union's intention to reinforce the collaboration of all of the immigration countries of origin and transit and to jointly manage border control and readmission. For that reason the Council has decided to include a clause on the everyday management of migratory flows and compulsory readmission in the event of illegal immigration in all agreements signed from now on with any country. Moreover, to give credibility to its support for an approach based upon cooperation with third countries, the Council has declared that the Union is willing to provide technical and financial assistance to those countries to help them combat illegal immigration. As is the case with all of the policies that it develops, the Union will subsequently

assess the effectiveness of the cooperation with third countries to slow down illegal immigration. In the event of a clear lack of cooperation on the part of third countries to halt illegal immigration, the Union will have the prerogative of adopting measures or positions provided for within the framework of external policy and of common security and through the rest of the Union's policies while respecting the commitments adopted by the Union and without prejudice to the objectives of development cooperation.

The fourth and final pillar of the set of measures that the Presidency presented to the Council is that of speeding up the legislative efforts under way on the definition of a common asylum and immigration policy. In Seville we also decided on a timetable of measures in this area. Before December of this year approval will be given to the conditions determining what countries are responsible for processing asylum requests; before June 2003 a regulation will be adopted on the requirements necessary to be granted refugee status as well as the content of said status, the provision providing for family reunification and the status of long-term permanent residents; and before December 2003 common regulations will be adopted on the asylum procedure".

(*DSC-P*, VII Leg., n. 175, pp. 8755–8756).

c) Economic and social development

With respect to the process of economic and social modernisation of the EU, the Minister of Foreign Affairs, Mr. Piqué i Camps, stated:

"(. . .)

The introduction of the euro represents a fundamental milestone that has also coincided in time with the commencement of the Spanish Presidency.

(. . .)

Aside from the introduction of the euro, the process initiated at Lisbon to make the European Union an area of excellence as far as economic and technological development are concerned, was given impetus at the Barcelona European Council on 15–16 March with further details set out at the Seville European Council. Our Presidency has borne witness to aspects of fundamental importance such as the liberalisation and opening of the single energy market; the constitution of a European area of transport and communications with the initiation of the single sky and the launching of the Galileo Programme; the single financial market, full employment and education; boosting of research and technology with the passing for the first time without have to turn to the European Parliament for conciliation of the VI Framework Programme for Research; greater stringency in the enforcement of the transposition of Community law; public hiring within the framework of the internal market as well as recognition for the fiscal system of the Canary Islands or the approval of the broad approaches to economic policy gives but a brief overview of some of the results reached in this chapter during the course of the Spanish Presidency".

(*DSCG-Comisiones Mixtas*, VII Leg., n. 102, pp. 2056–2057).

d) Debate on the future of Europe

The Spanish Presidency had to simultaneously deal with the deepening and enlargement of the EU. The main aspects of that debate are the Convention on the future of Europe and the reform of the Council. As concerns the former, the Minister of Foreign Affairs Mr. Piqué i Camps, in his 8 July 2002 appearance before the Joint Committee for the European Union, affirmed:

> "The Convention on the Future of Europe is a reflection process without historical precedent and is also a new working method based on the one used to draft the European Union's Charter of Fundamental Rights. All of Europe's Community and national institutions are participating in this process and the civil society is involved through the civic forum and the corresponding national debates. In accordance with the mandate of the Laeken European Council, the Spanish Presidency took responsibility for initiating the Convention in collaboration with its President and Vice-Presidents. The aim of the Convention is to offer options and make recommendations with the greatest possible degree of consensus as it looks forward to the Intergovernmental Conference to be held at the beginning of 2004".
>
> (*DSCG-Comisiones Mixtas*, VII Leg., n. 102, p. 2507).

The President of the Government Mr. Aznar López, in his 24 June 2002 appearance before the Plenary of Congress made a specific reference to Council reform:

> "The Presidency has followed three principles in the drafting of its proposals. The first was to foster the coordination of the Council's work. To do this a proposal was made for the reinforcement of the horizontal coordination function of the new General Affairs Council and External Relations Council. The second principle was to simplify Council proceedings. In the future the Councils will last one day and the sectoral councils will be shortened from sixteen to nine days. And thirdly, greater impetus was given to transparency in Council work. From now on when the Council must decide on legislative acts, in accordance with the co-decision procedure, deliberation will be open to the public in accordance with pre-established conditions.
>
> The set of Presidency report proposals involving treaty reform is the one focusing on the Presidency of the European Council. In our view the semester-long system of presidencies has clearly reached its limit. This must be reformed within the perspective of an enlarged European Union".
>
> (*DSC-P*, VII Leg., n. 175, p. 8757).

e) External relations

During this same intervention the President of the Government alluded to the summits between the EU and the United States, Canada and Russia as well as the V Euro-Mediterranean Conference held in Valencia and the II Conference with Latin America and the Caribbean:

"The summit between the European Union and the United States has served to reaffirm the set of shared identity and values existing on both sides of the Atlantic. In addition to reinforcing this identity of values, the summit underscored the unequivocal mutual commitment shared by the European Union and the United States to fight terrorism without distinction wherever it may occur. We agreed to make headway on the progressive convergence of the terrorist lists of the United States and the Union; to negotiate an agreement on judicial cooperation in criminal matters, extradition and mutual assistance and to remain coordinated as concerns the policies of the United States and the European Union from an international perspective paying particular attention to the Middle East. The European Union held a summit with Russia that consolidated a strategic relationship that recognises and backs European support for Russia's efforts in the defence of freedom and democracy. The principle results were the inclusion of the fight against terrorism as a new area of cooperation between the European Union and Russia; the reinforcement of political dialogue and cooperation on issues of security and crisis management; recognition of market economy status for Russia which means European support for future Russian membership in the World Trade Organisation and definition of the bases for a future agreement on the Kaliningrad enclave.

The third bilateral summit held by the European Union under the Spanish Presidency was the summit with Canada. This summit bore witness to the solidness of the Union's transatlantic policy as regards political aspects as well as those aspects focusing on cooperation and research, science and technology, the environment and sustainable development. Two regional summits were also held under the Spanish Presidency that are of particular significance for the Union. To a large extent, Europe's future opportunities lie in these regions. I am referring to the summits that the Union held with the Latin American and Caribbean countries and the V Euro-Mediterranean Ministerial summit. In the middle of May, Madrid played host to the II Summit between the European Union and the Latin American and Caribbean countries where a clear emphasis was put on the true objective of the strategic alliance between Latin America and the European Union. The Madrid Declaration, the assessment report and the common values and positions document especially show a common identity of values and objectives shared by the two continents. This identity covers issues such as the defence of human rights, the fight against drugs, the fight against terrorism and trade.

The Union also wishes to contribute to the regional integration in the area and therefore a commitment was reached to negotiate political and cooperation agreements with Central America and with the Andean Community. The formal minutes and conclusions of the agreement between the European Union and Chile were also signed. As a priority objective of the Union Presidency Spain proposed fostering the Barcelona process. While immersed in a process of European construction and reunification, one must take special stock of the Union's Mediterranean dimension. The Barcelona process is the only forum allowing for direct contact between Israelis and Palestinians and therefore has a direct influence on the development of the conflict in the Middle East. All of the participating states have recog-

nised the appropriateness of holding this conference during which the association agreement between the European Union and Algeria was signed; an action plan aimed to renew impetus to the political, economic and cultural dimension of the Barcelona process was approved; the framework programme for Euro-Mediterranean Justice and Home Affairs was approved that, for the first time, includes cooperation against terrorism; a reinforced European Investment Bank facility was created; approval was given for the action programme for dialogue between cultures and civilisations and the Euro Mediterranean foundation was created for this dialogue".

(*DSC-P*, VII Leg., n. 175, pp. 8754–8755).

3. *Area of Freedom, Security and Justice*

a) Asylum

The Secretary of State for European Affairs, Mr. de Miguel y Egea, in his 30 May 2001 appearance before the Joint Committee for the European Union to respond to a parliamentary question, explained the Government's stance on a possible reform of the right to asylum in the European Union:

"The Community asylum policy is found in current Article 63 of the Treaty on European Union subsequent to the amendment made as a result of the Amsterdam Treaty and it needs to be completed with that which is set out in the Vienna Action Plan and in the Conclusions of the Tampere Summit, both in relation to the subject of the development of an area of security, justice and freedom and therefore the right to asylum as an essential part of that Tampere package.

Neither in the Treaty of Amsterdam nor at Vienna or Tampere has the European Union approached the subject of right to asylum because all of these are based on the 1951 Geneva Convention on Refugee Status as the cornerstone of all Community construction; a situation reiterated by the Heads of State and Government at Tampere proclaiming absolute respect for the right to seek asylum. It should be pointed out that the European Union does not foresee a reform of the right to asylum as such, i.e. the foundation, the basis, the underlying philosophy of the right to asylum that we all agree to and that is contained in the 1951 Geneva Convention. What the European Union is attempting to do is to develop common policies in this area with a view to first of all harmonising the different legislations on the right to asylum that feature some differences and, second of all, to achieving an open and secure European Union fully committed to the obligations stemming from the Geneva Convention on the Status of Refugees and other instruments in the area of human rights; a Union that is in a position to respond in solidarity to humanitarian needs and to guarantee the integration of refugees in our societies while at the same time bearing in mind the need to carry out coherent control – because this has not been discussed with the others – of the external borders to put an end to illegal immigration, to fight against those who take advantage of illegal immigration, organise it and commit international crimes in the process, or against those that use asylum as a cover to justify illegal situations.

(. . .)

Spain's position in the development of these common policies of asylum is to reiterate the validity and applicability of the Geneva Convention on the Status of Refugees that is the basis and foundation of the system of asylum shared by the rest of the Member States".

(*DSCG-Comisiones Mixtas*, VII Leg., n. 42, p. 953).

4. *Economic and Social Development*

a) Sustainable development

Sustainable development is one of the objectives of the founding Treaties that calls for the coherent organisation of economic, social and environmental policies. With regard to this subject the Swedish Presidency tabled a draft report on the integration of the environmental dimension in the sectoral policies and on 16 May 2001 the Commission presented a Communication on an EU strategy for sustainable development.

The Secretary of State for European Affairs, Mr. de Miguel y Egea, spoke out on this point on 5 June 2001 before the Joint Committee for the European Union to report on the Gothenburg European Council held on 15 and 16 June:

"The Spanish position on this issue is naturally one of 'wait and see' at least with respect to some aspects of proposals of the Presidency and the Commission and not with respect to the concept of sustainable development that we wholeheartedly support. In this sense it cannot be denied that among the Commission's proposals there are some subjects that have a very serious impact on Spain. For example, as concerns energy taxes Spain is opposed to the commitment currently in force from 2002 and to indexing. It is our view that the subject is not sufficiently mature nor has it been proven that taxation is a fundamental element in influencing the elimination of CO2. Moreover, the elimination of subsidies for the production and consumption of fossil fuels would affect the Spanish coal sector for which the upkeep of restructuring and reactivation assistance is vital. The aid earmarked for the joint organisation of the agricultural market of tobacco is important as well for a country such as Spain that is the number three producer of tobacco in the Union and this is especially the case for poor regions like Extremadura where tobacco accounts for 25 percent of the final agrarian production.

In short it is our view, as we await the outcome of the debates to be held at the environmental councils, of Ecofin, of social affairs and of general affairs, that the subject of sustainable development is an essential dimension of economic development but it should not replace the Lisbon process but should rather be one more element of such process. It should be remembered that the Lisbon Process has three pillars: employment, progression towards the information society and liberalisation, the opening of markets and the improvement of macroeconomic conditions. It is our view that sustainable development should be added as a fourth pillar to the existing tripod conditioning and affecting all the rest.

(. . .)

The proposal of converting the Spring Councils into sustainable development Councils would be tantamount to denaturalising the strategy and the objectives agreed to at Lisbon in relation with a much broader subject focusing on economic growth, employment, economic reform and innovation. I therefore reiterate that this subject should be added as one more pillar rather than reducing the whole Lisbon process to the subject of sustainable development".

(*DSCG-Comisiones Mixtas*, VII Leg., n. 44, p. 981).

Subsequent to the Gothenburg Council the President of the Government, Mr. Aznar López, presented the agreements reached before the Plenary of Congress on 20 June 2001:

"The strategy that we have just approved rounds out the Union's political commitment with the economic and social modernisation of the Lisbon process.

(. . .)

. . . The strategy points to four priority areas that represent the greatest challenges for sustainable development in Europe: climate change, transport, public health and natural resources. As regards climate change, we reiterated our commitment to the Kyoto Protocol and its ratification. The Protocol is currently the most reasonable solution with which to fight climate change. Moreover, the Commission will prepare a proposal for its ratification before the end of this year. The Union will also work to assure the broadest possible participation of industrialised countries with a view to bringing the Kyoto Protocol into force in 2002.

As regards transport, we made contributions to the sustainable development strategy by including an element that is of special interest to us, namely transport network hubs that will be given priority status at the next review of transeuropean network directives. Developing these elements of interconnection over the middle and long term would undoubtedly lead to a more rational and sustainable use of the transport networks given that an interconnected European network will always be more efficient than fifteen fragmented national networks.

Moreover, the strategy decidedly opts for the sustainable use of natural resources with a view to maintaining biological diversity, conserving ecosystems and preventing desertification. Spain is the most bio-diverse nation in the European Union and unfortunately also suffers from desertification problems. I have been insisting over the past several weeks that the preservation of biodiversity and the problems of soil degradation should be given the necessary notoriety within this strategy and this was accomplished.

In order to improve the political coordination of the Member States it is also necessary for all of them to draft their own national sustainable development strategies. In this sense I am happy to announce to Your Honours that tomorrow the Government will present a draft national sustainable development strategy that we hope will be concluded during the first semester of next year.

(. . .)

Our strategy will be presented at the Environmental Council during our European

Presidency and the Spanish strategy, together with the position of the European Union, will be our contribution to the world summit on sustainable development, the so-called Rio + 10 to be held in Johannesburg in September 2002".

(*DSC-P*, VII Leg., n. 93, p. 4529).

5. *Convention on the Future of Europe*

The Secretary of State for European Affairs Mr. de Miguel y Egea, in his 5 December 2001 appearance before the Joint Committee for the European Union to report on the Laeken European Council, referred to the work of what was then the future Convention on the Future of Europe:

"From our point of view the future convention, this new declaration, should respect that of Nice and should leave sufficient room for manoeuvrability for convention members. It does not appear to be useful for the time being to set out a very detailed framework of reflection for the convention before waging a substantial debate that is precisely what is now being implemented. At any rate, I feel that the entire exercise should be governed by the following principles. First of all, preservation of the Community acquis which means not undoing what has already been accomplished but rather consolidating and reinforcing the integration process; second of all, respect for the Community method and balance of the constitutional triangle Council-Commission-Parliament; third of all, development of the Union in those areas in which there is currently a lesser degree of integration, specifically in justice and home affairs and in exterior security and defence policy and lastly, the construction of a Europe that is closer, more transparent and more accessible to European citizens.

At the Laeken European Council the decision will be taken to call a convention as the best way to continue forward with the preparatory process of the 2004 Intergovernmental Conference. Both with regard to its nature and composition the convention will be similar to that organised by the Charter of Fundamental Rights with representatives from the governments of national parliaments, the European Parliament and the Commission and also with the presence of representatives of the candidate countries and, as observers, the Economic and Social Committee and the Committee of the Regions. Work is envisioned to begin in March under the Spanish Presidency and may be ready to present its conclusions by the middle of 2003. This schedule would allow for a pause for reflection before the beginning of the Intergovernmental Conference as such.

(. . .)".

(*DSCG-Comisiones Mixtas*, VII Leg., n. 60, p. 1353).

Once the Spanish Presidency of the EU had drawn to a close the President of the Government Mr. Aznar López, in an appearance before the Plenary of Congress to report on the Brussels European Council meeting held on 24 and 25 October 2002, referred to the progress made at the Convention on the Future of Europe:

"The Convention on the Future of Europe, subsequent to the phase focusing on listening to the aspirations of the citizens on the future of the European Union, is now entering a phase focusing on determining how to express all of the comments and initiatives received in a future constitutional treaty that is simple and comprehensible . . . The Spanish Government can identify with the majority of the initiatives tabled by the chairman of the Convention. These principles imply more effective and efficient involvement on the part of national parliaments in the work of the Union; providing the latter with legal personality; integrating the Charter of Fundamental Rights in the constitutional treaty and defining a series of policies such as the single market or monetary union as essential elements of the European project.

I would also like to draw your attention to the emphasis that Chairman Giscard put on defending the call for a future constitutional treaty that is unequivocal in providing the Union with institutional balance and the need for all institutional efforts to rest on an independent European Commission that acts as the defender of Community interests and guardian of treaties. In the view of Chairman Giscard, the European Commission should operate as a collegiate body with the capacity to table proposals by means of its monopoly over legislative initiative and with competence to enforce and apply certain common policies".

(*DSC-P*, VII Leg., n. 200, p. 9958).

XIV. RESPONSIBILITY

1. *Responsibility of States*

In his appearance before the Sixth Committee of the United Nations General Assembly at its 56th session the Spanish representative, Mr. Aurelio Pérez Giralda, made the following assessment of the work carried out by the International Law Commission:

"Chapter IV of the International Law Commission contains the result of a long and arduous job done both by the Commission as well as by the Governments that have contributed to its successful completion on a subject that is crucial to International Law, the responsibility of States. The Commission had set as the deadline date the five year period ending this year 2001 to complete this work and it has been successful under the expert orchestration of Professor James Crawford. In his four reports the Special Rapporteur has offered solutions for the most serious problems affecting the project approved during the first reading in 1996 as well as an in-depth study of the structure and form of the articles that this year were approved at the second reading.

My delegation has made an effort to keep up with the work of Professor Crawford and the Commission by offering commentaries and suggestions both in writing and through interventions before the General Assembly. Now is not the time to insist on those commentaries given that we now have before us a finished draft, a clear will to conclude the work of the ILC on this subject and a balanced proposal

made by the Commission in recommending, in paragraph 67 of the report, that the General Assembly take note of the articles proposed annexing them to a Resolution and that it consider the possible future adoption of a Convention on this subject. The Spanish delegation has defended the appropriateness of International Law being provided with a binding instrument regarding the responsibility of States although it is aware, especially in light of the debates that took place at the VI Commission last year, of the absence of sufficient consensus for that. The Commission's proposal is realistic because it harbours the expectation that the practice of the States and international jurisdictions allows for evolution towards the regulations and a negotiation among States regarding its content so that further down the road it can be concretised in a legally binding fashion. The regulation approved at the second reading should only be understood as a means to obtaining this provisional solution and can be considered a success as a commitment to choose the least common denominator of the governments' positions. My delegation would like to make pubic its will to contribute to the consensus even though some of the preferences that it has expressed in terms of the progressive development of International Law are not reflected in the final text. I am specifically referring to the absence of an aggravated responsibility regime for the most serious violations of International Law and the absence as well of a conflict resolution system especially with relation to the countermeasures that can only be contemplated in a future Convention".

XV. PACIFIC SETTLEMENT OF DISPUTES

1. *Jurisdictional Modes of Settlement*

The following agreement was approved at the 22 March 2002 Council of Ministers:

"The Council of Ministers has authorised two declarations on the admission of the jurisdiction of the International Tribunal for the Law of the Sea.

The United Nations Convention on the Law of the Sea (UNCLOS) was the fruit of the work of the III Conference of the United Nations on the Law of the Sea with the aim of seeking a peaceful settlement to conflicts arising among signing countries.

To settle controversies arising among States with respect to the application of the Convention this organisation created the International Tribunal for the Law of the Sea as the jurisdictional body to take charge of such issues.

Notwithstanding the above, the Convention established that the States may select, via declaration, one or several of the following courts: the International Tribunal itself, the International Court of Justice (ICJ), a general arbitration court or a specialised arbitration court.

The purpose of this Agreement is to substitute the declaration made by Spain at the time of the ratification of the Convention on the Law of the Sea of 15 January 1997 by virtue of which it selected the International Court of Justice as

the means by which to resolve controversies regarding the interpretation or enforcement of the Convention. In another declaration Spain also accepted the jurisdiction of mentioned Tribunal, the International Tribunal for the Law of the Sea. In other words, it selected both Tribunals as fora competent to judge controversies stemming from enforcement of the Convention.

Moreover, to prevent a situation in which a suit filed against Spain for the delimitation of maritime areas would be automatically heard in one or the other of the two courts without the consent of Spain, it is convenient to make another declaration by virtue of which, in accordance with the Convention itself, controversies on delimitations are excluded.

A declaration of this sort has been made by three neighbouring States with which Spain has signed delimitation conventions: France, Italy and Portugal".

On 30 October 2001, in his appearance before the General Assembly, Spain's representative, Mr. Pérez Giralda, referred to the role that could be played by the International Court of Justice:

"(. . .)

. . . In the context of concern expressed by the President of the Court about the proliferation of international tribunals and the dangers of legal overlap or contradiction that that might entail. It should be recalled that on previous occasions, the President of the Court highlighted the need for a dialogue among jurisdictions in order to try to avoid the potentially harmful effects of the fragmentation of international law. Spain believes that the International Court of Justice is the most appropriate institution to channel such a dialogue, as lon as the international community puts its trust in the Court and endows it with the means of discharging that function. We should also remember that both the current president of the International Court of Justice and his predecessor referred to advisory opinions as representing a possible means of establishing such a dialogue and thereby of ensuring that the International Court of Justice speaks with an authoritative voice.

(. . .)".

(UN Doc. A/56/PV.32).

XVI. COERCION AND USE OF FORCE SHORT OF WAR

1. *Unilateral Measures*

a) Cuba

On 25 February 2002, in response to a Parliamentary question, the Government reported on measures adopted by Spain to defend the interests of Spanish entrepreneurs affected by the United States legislation known as the Helms-Burton Act:

"Spain and the European Union (EU) have repeatedly communicated to the United States (US) authorities that certain provisions of titles III and IV of the Helms-

Burton Act go against international law due to their extraterritorial and retroactive nature, violate the rules of the World Trade Organisation (WTO) and also seriously damage their legitimate interests.

In order to compensate the application of said law to European companies, the EU provided itself with a 'blocking regulation' (Regulation EC 2271/96) that, among other things, prohibited European companies from collaborating with the judicial and administrative authorities of the United States in the enforcement of this Law.

In compliance with this Community Regulation Spain adopted Law 27/98 that establishes the amount of sanctions applicable to private individuals and companies that fail to observe said Regulation. The purpose of this rule is to clearly prevent the possible extraterritorial enforcement of the rule established by a third country and also seeks to fend for the legitimate interests of Spaniards.

Moreover, the Council of the European Union adopted Joint Action 96/668/CFSP of 22 November 1996 in order to ensure that the Member States take the necessary measures to protect those natural and legal persons whose interests are affected by the aforementioned laws and actions based thereon, insofar as those interests are not protected by Regulation EC 2271/96.

At all of the bilateral meetings between Spain and the United States and at the multilateral ones within the framework of EU-US transatlantic relations, efforts have been made to get the United States representatives to see that the Helms-Burton Act goes against international law and the rules of the WTO. In this sense in 1996 the European Union even envisioned the possibility of appealing to the WTO mechanism for the resolution of trade disputes.

On 14 April 1997 and subsequently at the EU-US Transatlantic Summit in London on 18 May 1998, both parties arrived at some agreements in a Memorandum of Understanding that, in last instance, were confirmed at the last EU-US Transatlantic Summit held at Gothenburg on 14 June 2001.

By virtue of these agreements the United States committed to not sanction European companies by enforcing this Law and to amend Title IV introducing the possibility of a presidential waiver that could be applied if necessary. In turn the EU agreed to not call for the formation of a WTO panel against the United States with relation to the Helms-Burton Act as long as the United States adhered to the commitments made in those Memorandums.

The fact is that the United States has not imposed any sanctions related to the enforcement of Helms-Burton. At any rate, the Spanish Government continues to monitor this issue closely given that the continuation of the Memoranda is possible only to the degree that the US Government continues to suspend the enforcement of title III of the Helms-Burton Act as it has been doing via the successive renovation of the waiver and by not enforcing Title IV".

(*BOCG-Senado.I*, VII Leg., n. 310, pp. 62–63).

2. *Collective Measures. Regime of the United Nations*

a) Iraq

On 26 January 2001, in response to a parliamentary question, the Government made the following assessment of the United Nations Humanitarian Programme for Iraq:

"On 14 April 1995 the UN Security Council passed Resolution 986. The purpose of this was to slow down the extremely serious deterioration of the humanitarian situation of the Iraqi people as a result of the sanctions imposed on Iraq after the Kuwait invasion in August 1990.

The humanitarian Programme set up by Resolution 986 and named 'Oil for Food', went into operation on 10 December 1996 with the first sale of Iraqi crude oil controlled by the Sanctions Committee.

The Oil for Food Programme has been helping ever since to palliate the suffering of the Iraqi people and to reduce the negative effects of the sanctions. The situation in the country is significantly better than when the Programme entered into force and has accounted for 15,700 million dollars.

The implementation of the Programme has, however, borne witness to the different internal functional, economic and organisational shortcomings that have had varying degrees of influence – depending on the sector and region of the country –, but clearly having a particularly intense effect on the most vulnerable sectors of the population. A number of reports from different international organisations (UNICEF, FAO, RED CROSS, WHO, UNESCO, MAP and others) show that, despite everything, the situation continues to be dramatic (growing infant mortality rates, widespread malnutrition, notable deterioration of the educational system, alarming decrease in the quality of water for human consumption, progressive destruction of the waste water network, reappearance of formerly eradicated diseases, etc.). The following shortcomings stand out above the rest:

- The slowness of the Sanctions Committee in approving contracts proposed by the Iraqi Government and the keeping of many of them 'in quarantine' during a significantly long period of time.
- Technical difficulties encountered by the Iraqi oil sector in the extraction of the necessary crude to obtain the levels of authorised income at each phase made more complicated still by the complexity of the authorisation process for the purchase of spare parts and drilling equipment.
- The deficient internal organisation as regards the distribution of food, medicines and other essential products and the lack of infrastructure.

During the three and a half years that the humanitarian Programme has been in operation, the Security Council has responded to these shortcomings by approving different resolutions (Res. 1129/97, Res. 1153/98, Res. 1175/98, Res. 1284/99 and Res. 1302/00) that have improved operation and effectiveness.

The humanitarian Programme received a considerable boost in December 1999 with the approval of Resolution 1284 that, in addition to doing away with the

upper limit set on the sales of Iraqi oil, also partially resolved the problem of the contracts 'in quarantine' with the adoption of a series of measures of which special mention should be made of the following: 1) replacing authorisation with a simple notification sent to the Sanctions Committee when the contracts refer to products from the agricultural, food, nutrition, medical and educational sectors and 2) expedient approval by the Sanctions Committee for another series of products – with the exception of those with a dual use –, and of spare parts for use in the petroleum industry.

The contracts 'in quarantine' continue to curtail, however, Iraq's humanitarian Programme. 13.8% of all of the contracts presented to the Sanctions Committee since the commencement of the Programme remain in that situation (at a dollar value of 2,260 million). On a number of different occasions Spain has taken steps to unblock these quarantined contracts.

Phase VIII of the Oil for Food Programme that ended on 5 December has benefited from the new notification practices – introduced into the operation of the Sanctions Committee by virtue of Resolution 1284/99 and extended to the sectors of potable water and sanitation thanks to Resolution 1302/00 –. The UN Secretary-General requested the broadening of the new notification practices to all sectors in the report filed on 8 September. Moreover, the VIII phase introduces improvements in the food sector (1,216 million dollars), with a view to reaching the goal of 2,472 kilocalories per person per day, and in the health sector (498 million dollars) with 63.3% more than in the previous phase. New elements were also introduced in the so-called incorporation phase of the housing sector (757 million dollars) and the injection of 600 million dollars into the general budget for spare parts and oil drilling equipment in compliance with Resolution 1293/00.

At any rate the UN humanitarian Programme, although very important, only envisions improving the lot of the Iraqi population and does not focus on resolving all of their humanitarian needs nor does it look to employing local inhabitants in habitual economic activities.

For this reason the economic recuperation of the country will only be possible through a global solution of the Iraqi issue which would entail the removal of sanctions within the framework of international legality the basis of which is Resolution 1284, the collaboration of Iraq with the UN and this country's compliance with the obligations imposed by Security Council resolutions".

(*BOCG-Congreso.D*, VII Leg., n. 125, pp. 273–274).

On 27 April 2001, in response to a parliamentary question, the Government offered the following assessment of the United States air attack of Iraq:

"It should be pointed out that Moron de la Frontera and Rota are not 'bases located in Spanish territory' that could be interpreted as being American bases in Spain. Both bases are under full Spanish tutelage and the United States Armed Forces have been authorised to use some support facilities by virtue of the current Defence Cooperation Agreement signed between the Kingdom of Spain and the United States of America.

At the conclusion of Operation 'Desert Storm' in March of 1991, Operation 'Desert Calm' commenced and was in turn replaced by 'Southern Watch' to monitor the area south of the Iraqi 33rd parallel.

The Spanish Government has authorised logistical support for this operation in so much as allowing the landing and refuelling of aircraft in transit to the operations zone.

Since 1990 support has also been provided for Operation 'Northern Watch', a continuation of Operation 'Provide Comfort' to support the Kurdish people.

Both operations have the backing of UN Security Council Resolution 688 that demands an end to the Iraqi repression of its own people and especially against the population of Kurdish origin".

(*BOCG-Congreso.D*, VII Leg., n. 169, pp. 164–165).

On 7 June 2001, in response to a parliamentary question, the Government made the following assessment:

"The English-American bombings of 16 February of the outskirts of Baghdad was a unilateral action and neither Spain nor the EU was informed ahead of time.

The Government holds the view that efforts to resolve the Iraqi crisis should be channelled through the United Nations with a view to achieving a global political and diplomatic solution permitting the reintroduction of Iraq into the international community and the lifting of sanctions based on respect for international legality, compliance of Iraq with the obligations imposed by said international community and respect for the territorial integrity and political independence of this country.

The conversations that were held in New York at the end of February between Iraq and the United Nations and that will recommence in the near future, have provided an opportunity to make headway down this path and the opportunity should be taken advantage of.

The Government therefore considers that it is vital to create the necessary conditions allowing for the achievement of a political solution to which the mentioned bombings do not contribute".

(*BOCG-Congreso.D*, VII Leg., n. 192, p. 77).

One year later, on 7 May 2002, in a parliamentary appearance the Government reported on Spain's stance on Iraq:

"The Spanish Government is monitoring with great concern and attention the development of events in the Middle East and is actively participating in the search for a political solution to the region's different conflicts. In this regional, dramatic and difficult context, the Iraq situation is the cause of special concern. Iraq, at a particularly complex juncture in time from an international perspective, is the only country in the region that has failed to condemn the attack of 11 September and it also continues to show disregard for the United Nations' resolutions and refuses to admit inspectors into its territory which has led to the continuance of the sanctions. Spain, holding the Presidency of the European Union and being an active

member thereof, supports the European stance with relation to Iraq as has been reiterated on a number of different occasions by the Government.

First of all, the European Union reiterates that Iraq should fully comply with the applicable Security Council resolutions and especially with United Nations resolutions 687 and 1284. The European Union has also expressed its concern over the humanitarian situation in Iraq and sees the need to palliate the suffering of the Iraqi population and therefore the European Union continues committed to the efforts to review the present provisions of the Oil for Food Programme with a view to improving the effectiveness of the sanctions.

In November 2001 the United Nations Security Council unanimously approved resolution 1382 thus generating expectations for a reorganisation of the sanctions via the introduction of new mechanisms opening the door to an eventual revision of resolution 1284. This resolution, adopted in December 1999, was the outcome of attempts to arrive at a consensus on the United Nations' global treatment of the Iraqi issue and it passed with the abstention of three of the permanent members of the Security Council: Russia, France and China. This resolution calls for changes in the inspection and sanction regimes. The so-called UNSCOM would give way to the newly created UNMOVIC as the inspection mechanism; previsions are made for a series of new controls on Iraqi foreign trade and provisions are introduced the purpose of which is to expedite the awarding of contracts related to basic civilian and humanitarian needs. As a result of resolution 1382, needed efforts are being deployed to improve the legal framework of resolution 1284 and to overcome the deficiencies in the current sanction system.

Furthermore, it is very important to point out that as of the 7th of March of this year the Iraqi Government has initiated talks with the Secretary-General of the United Nations aimed at encouraging Iraq to fully collaborate in the enforcement of international legality. As is our duty, Spain and the European Union support the development of these events and the work that the Secretary-General of the United Nations, Mr. Kofi Annan, is doing to foster international peace and security. In this sense I can say that talks were held during this month of May and the decision was taken to continue such talks throughout the month and before the end of the month further exploratory talks will be held between Iraq and the Secretary-General of the United Nations.

Another relevant point concerning the policy of the European Union is that it continues to be the number one contributor of humanitarian assistance and aid to Iraq. Over the last several months the European Union has continued with its ECHO activities (the Community's humanitarian office) and within this framework a delegation visited the country from 25 January to 6 February to verify the impact of the Agency's action in Iraq, gather information on the situation of the country and begin drafting an action strategy for the future.

Another important issue forming part of the European Union's position is that of preventing any new acquisition of arms of mass destruction on the part of the Iraqi Government because it is convinced that this is a key aspect contributing to regional security and stability. All of the European Union countries share a com-

mon will to collaborate in preventing the proliferation of these types of arms and to prevent their falling into the hands of terrorist groups. As you are aware some of these arms, particularly the chemical and biological ones, are relatively inexpensive and do not require very sophisticated technology and are thus considered to be the arms of choice for terrorist groups. There are, in fact, a number of international institutions that are the focus of efforts against the proliferation and in favour of the control of exports, namely organisations such as the international atomic energy organisation, the organisation for the prohibition of chemical arms, the Convention on biological arms or the missile technology control regime. Within the European Union there is close coordination among all non-proliferation issues and export control among the fifteen Member States.

As for the last point of its policy, the European Union reiterates its support for the independence, territorial integrity and sovereignty of all of the region's countries.

(. . .)

To finish up I would also like to make mention of two specific issues that have been brought up; one referring to the possibility of military attacks on Iraq and the other in relation to the action taken by the United States and the United Kingdom on 16 February 2001. As regards the possibility of a military attack against Iraq I would like to point out the following. First of all the Government of Spain has no knowledge that the Government of the United States or that of any other country has specific plans in that respect. It is in fact important to point out that the Secretary of State himself, Colin Powell, when he was in Madrid on April 10th for the meeting of the Quartet stated his view on this point publicly during the press conference that followed the meeting.

Second of all, I would like to say that the position taken by Spain and the European Union is such that to consider the possibility of military action in Iraq the following circumstances would have to concur: first of all, non-compliance with the resolution of the United Nations on the part of Iraq; second of all, evidence pointing to support for terrorist organisations or the development and storage of arms of mass destruction by the Government of Iraq and third, any action taken would have to be within a framework agreed to at the international level, basically within the framework of the United Nations.

As concerns the action taken by the United States and the United Kingdom in Iraq on 16 February 2001, I am going to refer to the declarations made at that time by the Minister before this very Foreign Affairs Commission on February 28th. At that time the Minister stated, and I quote: It would probably have been better if these operations had not been carried out but to prevent a reoccurrence of such operations what is needed is that the Government of Iraq, the Government of Saddam Hussein, that has been outside of international legality and that is still failing to comply with many points of the United Nations resolutions, comply with those resolutions and with international legality. In short, the treatment and the solution of the Iraqi issue entails the enforcement of and compliance with the international legality found in the different Security Council resolutions. Moreover, and as a logical corollary to the above, any measure adopted by the international com-

munity, including the United States, with regard to this affair, should be done, as I have already pointed out, within that same framework of scrupulous respect for international legality and in this context Spain has always supported a political and diplomatic approach to this issue bearing all its aspects in mind".

(*DSC-C*, VII Leg., n. 486, pp. 15687–15688).

Finally, on 31 October 2002, in response to a parliamentary question, the Government reported on Spain's position in the event of a military intervention in Iraq by the United States:

"Iraq today represents a threat to international peace and security because for more than a decade it has systematically violated international legality. Iraq still has a large proportion of its arms of mass destruction and there are founded indications that it is attempting to increase its military might. In the past Iraq has never thought twice of initiating wars of aggression using said arms both within and outside of its territory. Moreover, Iraq has repeatedly and seriously violated human rights and the protection of minorities.

The Government assigns a positive assessment to the attitude change on the part of the Iraqi government with respect to the readmission of the UN inspectors given the strong political and diplomatic pressure that the international community has applied against the regime of Saddam Hussein. Although encouraging, this change of attitude is not enough and should be backed by concrete action. The Government would be seriously concerned about any lack of willingness on the part of Iraq to accept future Security Council resolutions designed to achieve full compliance with all of the others that have been ignored over the last several years. Therefore, the diplomatic, political and legal pressure exerted by the international community continues to be appropriate and necessary. In this context a new UN resolution would be desirable.

With this, the Government simply places its position within the parameters of action of its European Union partners that can be summarised as follows:

- Respect for international order and rejection of the Iraqi policy of arms of mass destruction.
- Support for UN intervention.
- Maintenance of the international alliance in the fight against terrorism that emerged in the aftermath of the 11 September 2001 attacks.
- Close consensus with the United States.

No State or international forum has yet to decide on any sort of attack against Iraq and it is necessary to forge ahead with the diplomatic efforts, in tandem with political ones, to encourage Iraq to comply with international legality. The Spanish Government cannot base its position on mere hypotheses of possible attacks but rather on facts. The fact is that today Iraq has accepted the inspectors. This is the first step down a path that will not be easy but that must be attempted before contemplating other alternatives".

(*BOCG-Congreso.D*, VII Leg., n. 430, p. 174).

b) Afghanistan

On 5 June 2002, in response to a parliamentary question, the Government reported on the participation of the Spanish contingent in the reconstruction of Afghanistan:

"Spain currently has two contingents deployed in Afghanistan. As part of the anti terrorism Coalition led by the US there is the Deployment Support Medical Unit (UMAD) deployed at the Bagram Air Base. As part of the International Security Assistance Force (ISAF), in support of the Afghan Interim Administration (Resolution 1386 of the UNSC), there is a contingent made up of different units of the land and air armies and is deployed in Kabul.

The UMAD, comprised of 47 members of non-compulsory, support and security personnel, is a medical-surgical facility initially envisioned to provide primary care along with a number of specialities (surgery, orthopaedics, paediatrics, gynaecology, odontology and intensive care) for the Coalition forces at the Bagram base. In light of the Unit's capacities, only days after its deployment it was called upon and authorised to provide medical assistance to the local population setting up a medical office at which, to date, 4,500 people have been treated including men, women and children in addition to approximately 1,000 base personnel patients. The UMAD has also collaborated in an important way with other hospitals in the region both in terms of medical support as well as with medicines, blood and maintenance.

UMAD has set up its operations in tents (6) and containers (2) with electricity provided by autonomous means. Personnel reside nearby in tents (10). All sorts of supplies are received from Spain via three scheduled flights per month and specific support is received from the base (fuel, water, rations, construction machinery, etc.). Personnel is relieved every 45–60 days depending on the availability of means of transport.

The Spanish contingent at ISAF is comprised of three Units (engineers, EDE and EADA) integrated under the operational control of the ISAF and a National Support Element (NSE) for the logistical support of the former adding up to a total of 344 members. This figure includes Officials and Deputy Officials forming part of ISAF's headquarters.

The Company of Engineers forming part of ISAF carries out castrametation and communications work in support of ISAF and is involved in high-impact humanitarian assistance projects regarding needed local infrastructure. To date, in addition to the construction of arsenals, bunkers and all-purpose installations for diverse ISAF contingents, Spanish engineers have reconstructed a number of schools and local police stations and have rehabilitated roads that are vital for the local population.

The Spanish Explosive Deactivation Unit has three highly-qualified and experienced Explosive Deactivation Teams (EDE). Witness to their expertise is their being assigned sensitive reconnaissance and deactivation missions at Government facilities and the Royal Palace. The unfortunate loss of human lives suffered to date by other similar units attached to ISAF (German and Danish) assigned the

same sort of tasks also bears witness to the danger of the missions as well as the professionalism of the Spanish unit.

The 35 members of the Support Squadron to the Aerial Deployment Unit deployed at the Kabul Airport are a highly specialised and critical resource in the control and handling of both cargo and passengers at that terminal that caters to a weekly average of 500 passengers and more than a thousand tons of cargo.

In addition to providing support for the above-mentioned units for which it was designed, the NSE constantly provides specific support to other contingents in the form of specialists, means of transport and collaboration of the nuclear, biological and chemical detection team. The NSE also cooperates with the security and maintenance services of the area known as SAREHOUSE to the east of Kabul where the Spanish contingent is lodged (except the EADA residing at the airport) in old barracks that they rebuilt themselves together with other ISAF contingents.

The contingent is supplied from Spain in a fashion similar to that of the EADA, receiving specific support from ISAF for aspects such as fuel and food. EADA personnel (Air Force) has been relieved and the rest of the contingent (terrestrial army) will be relieved during the second half of May".

(*BOCG-Senado.I*, VII Leg., n. 444, pp. 72–73).

XVII. WAR AND NEUTRALITY

1. *Humanitarian Law*

On 14 March 2002, in response to a parliamentary question, the Government made the following statement regarding the application of the Geneva Convention of 1949 to the Afghan prisoners being held in Guantanamo:

"1. The situation of the detainees in Guantanamo gave rise to consternation on the part of the European Union from the very beginning as was clearly expressed by the declarations of the Spanish Minister of Justice on behalf of the EU Presidency and of the High Representative of the EU and the European Commissioner for External Relations. These concerns have been communicated to United States officials in a confidential manner with a view to clarifying the situation of the detainees and the above-mentioned officials have provided appropriate guarantees that the prisoners are receiving proper treatment. In fact, representatives of the International Committee of the Red Cross (ICRC) have been allowed to visit and have personal private conversations with each one of the detainees.

It should be pointed out that, independent of the legal status of the Guantanamo detainees, from the point of view of international humanitarian law (the Geneva Conventions) these detainees must be treated at all times in a humane manner respecting their fundamental rights. The Spanish Government puts a high priority on the humanitarian treatment of any detainee and respect for their fundamental rights. The Government of the United States has always shown its willingness to guarantee all of the fundamental rights of any prisoner regardless of whether the

Geneva Convention is applied or not. The Spanish Government is convinced that this is how it will be and has no reason to believe otherwise.

2. The British Government has confirmed that the prisoners are being treated in a humane manner. Subsequent to receiving the report drafted *in situ* by the British officials, said Government affirmed in the House of Commons that the detainees waged no complaints and that they are being treated properly and that treatment is in line with international humanitarian regulations. It is therefore unjustified to qualify the treatment given prisoners as inhumane and the photographs of the Guantanamo prisoners so widely disseminated and talked about do not reflect the humane and reasonable treatment that they are receiving.

3. Furthermore, this conviction is backed by the declarations made by the President of the ICRC, Jacob Kellenberger, who said that he did not believe that the United States would attempt to evade its international responsibilities and that the Government of this country agrees with treating detainees as if they were prisoners of war. Mr. Kellenberger goes on to recognise that cooperation with the American authorities is good and that nearly all of the proposals that were made to improve the lot of the detainees were quickly accepted. In practice, said Authorities have shown not only their full collaboration with and support of the ICRC in their examination of the situation of the prisoners in question, but the ICRC has also been able to work in Guantanamo in accordance with the rules that are applied to prisoners of war, therefore being able to provide assistance and speak with them alone, in the absence of any witnesses.

Cooperation with the International Committee of the Red Cross on the ground is, therefore, correct although the issue remains of the divergence from a legal standpoint given that the United States has not given all of the detainees prisoner of war status. In this sense the ICRC has issued a communiqué on the stance taken by the United States with regard to the Guantanamo detainees expressed by President Bush himself on 8 February. This communiqué recognises that there are discrepancies between the ICRC and the United States with respect to the procedure implemented in the determination of which detainees do not have the right to prisoner of war status but went on to mention that both sides continue with their dialogue on this issue.

Moreover, the President of the ICRC, immediately prior to his recent trip to Spain, stated that he noted 'with satisfaction that international humanitarian law is one of the Spanish Presidency's priorities'.

4. In conclusion and based on the above, it does not appear to be reasonable to take any additional measures before the authorities of the United States or the Presidency of the EU – apart from certain Member States – that has been in permanent contact with such authorities on this issue".

(*BOCG-Congreso.D*, VII Leg., n. 323, p. 150).

On 31 October 2002, in response to a parliamentary question, the Spanish Government reported on the situation faced by the Spanish subject Hamed Abderrahaman Ahmed at the Guantanamo military base:

"As soon as word was received of the detention of Mr. Hamed Abderrahaman Ahmed and his subsequent transferral on 11 February to the American naval base in Guantanamo, the Spanish Embassy in Washington contacted the United States' authorities regarding the situation of said Spanish subject and regarding respect for the rules, uses and customs of international humanitarian law in his detention.

Spain was one of the first countries allowed to visit their nationals at said detention centre after France, United Kingdom and Belgium, countries from which there were already citizens being held at the base prior to the arrival of the Spanish subject. Spanish diplomatic officials again visited the detainee in July.

The authorities of the United States have declared that they consider the Guantanamo detainees as 'illegal combatants' captured during the course of an armed conflict because they violate the laws and customs of war (lack of evidence of a basic organisation and responsible commander, operational administration outside of the bounds of the laws regulating armed conflicts, etc.). For those reasons they are of the opinion that said detainees fail to comply with the requirements set out in Article 40 of the 12 August 1949 Geneva Convention for concession of 'prisoner of war' status. They have, however, expressed their intention of treating them in a way commensurate with the Geneva Conventions.

As was discovered by Spanish diplomatic officials, nourishment and hygiene conditions are proper, they receive medical attention, they are free to practice their religion, to communicate by post and receive postal packages, etc. Detention conditions and security measures are, however, strict. At one point the American authorities declared that they were willing to transfer the detainees to their countries of origin if they were processed and consented to subsequent investigation by the United States. To date, however, none of them has been set free except for one case due to psychological instability.

In his conversations with Spanish officials, Mr. Abderrahaman Ahmed considered that the treatment that he is receiving is reasonable and he did not register any complaints. Representatives from the International Committee of the Red Cross present in Guantanamo have also had access to the Spanish detainee on a number of occasions.

The situation of the Guantanamo detainees has also been dealt with within the framework of the dialogue on human rights issues between the European Union and the United States. The EU has always underscored, especially at the Barcelona and Seville European Councils, that respect for human rights and Rule of Law must be the overarching principle of all effective strategies to eradicate terrorism.

The Spanish embassy in Washington remains in close contact with the diplomatic representations of the EU countries with nationals detained at Guantanamo (Belgium, Denmark, France, United Kingdom and Sweden) and is in constant contact with the representatives of the International Committee of the Red Cross to share information and remain informed on this issue".

(*BOCG-Congreso.D*, VII Leg., n. 430, pp. 190–191).

2. *Disarmament*

On 17 April 2001, the Government reported on Spain's stance on the US plan for an antimissile shield in reply to a parliamentary question:

> "The Government recognises and shares the concern regarding the proliferation of missiles and arms of mass destruction, principally due to their destabilising effects in sensitive regions such as Asia and the Middle East. The Government feels that it is necessary to maintain a dialogue with our allies on the existing risk and to seek a solution that bears the whole set of factors in mind giving due importance to strategic balance.
>
> The United States' National Missile Defence System initiative (NMD) gives rise to questions given the consequences that its eventual deployment could have on strategic balance, the proliferation of arms of mass destruction and their vectors, and the complex network of arms control agreements.
>
> The United States (US) has been holding and intensifying regular talks with its European allies on the development of this initiative. Spain believes that a positive step was taken by the US in consulting with Russia and with all of its European allies and is actively participating in this reflection process.
>
> Spain would also be in favour of significant reductions in strategic nuclear arsenals to go hand in hand with any deployment of NMD and would not like to see any negative effects on efforts made in favour of disarmament, non-proliferation and arms control.
>
> For the time being, the United States has yet to define the final configuration of NMD and it is therefore not yet possible to determine its effects on strategic balance, existing initiatives in the area if disarmament or non-proliferation or on the European defence policy.
>
> Once the scope and architecture of the system are defined, an in-depth study of its effects will be needed".
>
> (*BOCG-Congreso.D*, VII Leg., n. 164, p. 292).

3. *Exportation of Arms*

On 9 August 2002, in response to a parliamentary question, the Government reported on the measures implemented by Spain during the Spanish Presidency of the European Union related to the sale of arms:

> "The action taken by the Spanish Government during the course of its Presidency of the European Union with regard to the sale of arms has been carried out mostly within the COARM Working Group of the Common Foreign and Security Policy (CFSP). During the course of the Spanish Presidency the Group met on four occasions (one more than during the previous Presidency). Moreover, led by the Spanish Presidency, the COARM troika held consultation meetings and exchanged information with the EFTA countries within the European Economic Area (Iceland, Liechtenstein and Norway) on 28 February, with Associated Countries in Sofia on

9 April, with the Ukraine on 19 April, with the United States on 30 May and with Russia on 30 May as well.

The Spanish Presidency collaborated actively and chaired an Experts' Seminar on the Control of the Export of Defence Materiel with the Associated Countries in Sofia, Bulgaria on 10 April.

The Spanish Presidency also actively participated in the preparation and development of a Regional Conference that the United States, with Spanish authorisation, organised in Barcelona between the 20th and the 24th of May on the control of exports and borders with all of the EU Member States and with a group of Arab and Mediterranean coastal countries: Saudi Arabia, Algeria, Egypt, United Arab Emirates, Jordan, Morocco, Oman, Qatar, Turkey and Yemen.

During the six months of the Spanish Presidency it also participated actively in two ad hoc meetings involving consultations between the EU and the US on the same subjects on 20 January in Madrid and on 7 June in Brussels.

And finally, the Spanish Presidency of the COARM met on several occasions with a number of NGOs selected due to their interest in these subjects such as Amnesty International (AI), Intermon-Oxfam, the UNESCO chair on the Culture of Peace of the *Universidad Autónomo de Barcelona*, and with Safer World. It was also one of the speakers at the Conference organised by AI and Intermon Oxfam in Madrid on 10 May. As regards the content of this action taken by the Spanish Presidency, Spanish priorities on this subject during the EU presidency have been:

1. As regards the specific measures that could be applied to preventing terrorism within the framework of COARM and other disarmament, non-proliferation and export control fora, a declarative document was drawn up that also outlines some operative recommendations that, once agreed to by Member States and the Commission, was adopted by the European Union Council of 15 April 2002 and figures in the Council Conclusions (7331/02). The most operative measures as regards COARM focus on initiating, together with the Commission, an exercise to examine the possible measures to improve the export control system for defence materiel, dual use materiel and technology and to study the refusal notification system to assure its efficient operation after more than three years in operation (points 6 and 7 of Chapter II).

2. In the area of transparency in the export of arms, the Spanish Presidency encouraged, initiated and was able to finalise the following subjects:

2.1. Greater transparency in the presentation to COARM of national foreign trade data regarding defence materiel.

A new format was agreed to that spells a very important step forward in the degree of transparency of the information that Member States furnish for the COARM Annual Report and to their respective Parliaments. According to this new format, each of the Member States will furnish the statistics on licenses issued and, for those able to provide this information, on the exports actually made during each fiscal period. This shall also include the economic value of the products and a summary list in compliance with the common list of controlled products.

The value amounts attached to the country by country exports will be optional. The number of refusals issued by the Member States as a whole will be provided to each one of the target countries along with a reference to the Code of Conduct criteria applied.

2.2. Standardisation of the EU Member States' certificate of final destination.

A common denominator was reached with identical elements for the certificates of final destination of the 15 Member States. This denominator was widened by getting the Group to request that all Member States adopt the mention of final use/user as a common element in all of the Certificates of Final Destination issued and required for each one of them, in addition to the final destination or addressee.

2.3. The creation of a page on the Network for each EU Member Country containing the most relevant national data on the foreign trade in this type of materiel.

This exercise is practically complete. All of the Union countries possess or are in the process of possessing this type of information on the Network where the public has access to practically the same information as Parliament.

3. In the area of the application of the Code of Conduct, efforts have been made to foster its application to new activities such as mediation in the arms trade, the establishment of factories in third countries or the transportation of arms through the territory of the Union as well as to new products such as the so-called 'civil goods' for use by police or security forces.

3.1. Control of brokerage practices in the foreign trade of defence materiel.

Possibly the greatest success of the Spanish Presidency was achieved in this field. The COARM Group agreed to call on the Presidency to draft a common position paper on this thorny subject. Subsequent to a series of necessary consultations – including legal services provided by the Council – the draft was circulated on 27 June 2002.

The Common Position draft proposes the establishment of a registry of intermediaries in defence materiel transactions and calls for a written license for each transaction. It also proposes the creation of an information sharing mechanism especially to control a possible record of illicit activities on the part of natural or corporate persons working as arms brokers within the territory of the EU. It also proposes the regular and detailed exchange of information on the criteria to be applied to the issuing of brokers' licenses and/or inscription in a special registry of intermediaries.

3.2. Regulate the control of arms production abroad under Union country license.

This exercise has finalised. It was the first subject that was closed under the Spanish Presidency. The European Council will adopt the conclusions of the COARM Groups that call for the strict application of the European Code of Conduct in these cases as well. In practice this means an addition to Criteria 7 of the Code of Conduct that will politically oblige Member States to consider the risks of re-exportation or diversion on the part of third countries producing under license before granting licenses to establish these branch offices.

These COARM conclusions will appear in the 4th Annual Group Report and

will then be adopted by the General Affairs Council (GAC) which means that they will have the same consideration as the Code of Conduct itself.

3.3. Initiate work to achieve the regulation of the transit control of arms through EU countries.

The Spanish Presidency launched the idea in January and was able to bring it to fruition in May. Transit or transfer is much more difficult to regulate than exportation (especially in large ports or airports such as London, Rotterdam, Barcelona, etc.). A notification mechanism of refusals like that which exists for the control of exports would paralyse commerce at many important ports. Moreover, the number of methods currently in use is practically equivalent to the number of Member States. The Presidency therefore decided to approach the problem with a generic text establishing the commitment to be taken on by each Member State to apply the principles and criteria of the European Code of Conduct to the concession of transit licenses but without its complex operational mechanism.

The text was adopted by the Group at the meeting of 29 May 2002 with some modifications that do not alter its substance and will be explicitly included in the upcoming 4th COARM Annual Report that, in turn, will be adopted by the GAC. An expression was also made of the Group's will to include this subject in the first formal revision of the Criteria and the Operational Provisions of the European Code of Conduct.

3.4. Propose to the European Commission to take a serious look at Community Regulations on the export of the so-called 'personal movement restriction devices' (shackles and waist chains).

The Commission announced that during the month of April it would table an initial proposal that would include an extended list of these products – that should be controlled – and a mechanism for their control similar to the one established for dual use materiel. The list would also include products that are used in the application of the death penalty and the control mechanism will be based on Article 133 of the EC Treaty. The Commission was not able to finalise the initial draft proposal although at the last meeting of COARM on 2 July 2002 under the Danish Presidency it presented a full report on the state of the work thus far. It is hoped that a Regulation proposal will be tabled before year's end".

(*BOCG-Congreso.D*, VII Leg., n. 396, pp. 313–315).

Prior to 17 January 2001, the Government reported, in response to a parliamentary question, on the controls applied in Spain to the export of arms:

"The Spanish Government took the lead over the rest of the European Union Member States by subjecting exports of defence and dual use materiel to control via Royal Decree 491/1998 of 27 March approving Foreign Trade Regulation on this type of materiel. Article 6 of that Royal Decree 491/1998 refers to the refusal, suspension and revoking of authorisations. Specifically, export authorisations relating to defence and dual use materiel may be refused, suspended or revoked by the Inter-ministerial Regulation Board for Foreign Trade in Defence and Dual Use Materiel (Spanish initials – *JIMDDU*), when:

a) There are rational indications that defence or dual use materiel may be used in actions that disturb the peace, stability or security on a world or regional scale or that their export/shipment may violate international commitments to which Spain is party.
b) The corresponding operations may have a negative effect on the State's general defence interests or foreign policy.

Consideration of the human rights situation in a country that is the potential recipient of defence or dual use materiel from Spain is full envisioned in the mentioned Article 6 of Royal Decree 491/1998. This is the case in the practical application of that Article.

On 8 June 1998 the European Union adopted its own Code of Conduct for arms export. Eight criteria are set out in this Code of Conduct and should be borne in mind when it comes to authorising arms export operations by European Union Member States. The second criteria of the Code of Conduct makes specific mention of 'respect for human rights in the final recipient country' of an arms export operation.

In the field of arms exports all of the European Union Member States, Spain among them, conform to that second criteria of the 8 June 1998 Code of Conduct. The COARM working group of the European Union is specifically charged with seeing that Member States apply this Code of Conduct.

Based on the above, the Spanish authorities have been paying particularly close attention to requests filed for export licenses for defence and dual use materiel by countries whose human rights situation is not optimal and have been acting in consequence. The objective is, therefore, to prevent Spanish defence and dual use materiel from being used for the purpose of internal repression so as not to contribute to the further deterioration of respect for human rights in countries that are potential recipients of an export operation involving this type of materiel".

(*BOCG-Senado.I*, VII Leg., n. 128, p. 43).

On 25 October 2002, the Government reported, in response to a parliamentary question, on the annual sales volume of all types of police and military materiel from Spain to Turkey during the decade of the 90s:

"The only export of paramilitary and security materiel to Turkey since 1998 was in 1999 and was anti-riot tear gas that was delivered to the Directorate-General of the Police. The export of paramilitary and security materiel is controlled since the entry into force of Royal Decree 491/1998 of 27 March approving the Regulation of Foreign Trade in Defence and Dual Use Materiel.

Export of defence materiel to Turkey from 1990 to 2001:

Year	Value (millions of euros)
1990	0.75
1991	0.73
1992	0.25
1993	0.15

(*cont.*)

Year	Value (millions of euros)
1994	0.45
1995	13.34
1996	29.23
1997	100.21
1998	51.99
1999	30.92
2000	12.49".

(*BOCG-Congreso.D*, VII Leg., n. 426, p. 304).

On 4 December 2002, in an appearance before Parliament, the Government reported on the sale of arms from Spain to Israel and to India and Pakistan:

"The fact is that, in line with a proposal made by the European Parliament, Belgium and Germany decided or announced that they were going to end their policy of arms sales to Israel. I would like to inform you that a formal or public announcement of a suspension of sales is tantamount, practically, to an embargo and it is likely that you have done the same. An arms embargo decision is a measure of such importance that in Europe it is normally taken by the European Council and, within the framework of the United Nations, by the Security Council or we would have to turn to a very specialised OSCE-type body for the go-ahead of an embargo. In the case of an individual country this is an exaggerated step. The European Union code of conduct, that you are very familiar with, does not foresee the application of any specific sort of embargo. What it does is establish a series of guiding and interpretable provisions containing a list of criteria referring to countries and their international obligations, the type of materiel, the country of destiny, the final user or the political situation in a number of countries. The countries of the European Union are obliged to bear this in mind and model their arms sales policies in accordance with this code. There are meetings among all of the countries to study the types of policies being implemented and their consequences.

First of all I am going to focus basically on the subject of Israel. I would like you to know that Spain provides only minimum levels of defence materiel to Israel. In the year 2000 arms exports to Israel accounted for 1.07 percent of the total exports of arms and in 2001 that percentage fell to 0.24. I am not giving this as an excuse but I would like to inform you – and this is outlined in the code of conduct – that there are different types of arms. The export of sport munitions or electronic navigation or air communication components is not the same as the export of lethal arms which is not what is being exported. Moreover, in 1999 in Spain more than 10 percent of the requests for export licenses to Israel were turned down. Trade is at a minimal level and is relatively controlled.

As regards India and Pakistan, during the Presidency of the European Union Spain called a meeting of the Council working group, COARM, on 29 May to take a look at how the code of conduct was being enforced in the different coun-

tries. Control of European exports to these countries began in 1999 given that the code of conduct is from 1998 and in the evaluation that was made in this group we saw that practically all of the states of the European Union were following the same procedures that also coincided with those followed by the United States and Russia. All of the countries agreed that, in the absence of significant increases or decreases of exports from the different countries, a large-scale imbalance in some countries undergoing tensions could be even more dangerous for the situation at hand as was the case in Kashmir and I again would like to reiterate that in the consultations within the European Union and in the troikas with the United States and the Russian Federation it was determined that the policy was basically the same and that it complies with the code of conduct just as it was being applied.

An embargo by the European Union against Israel, whether official or not, – and this issue was approached – would be entirely counter productive. First of all because the most extremist sectors of Israeli society would say that we are aligning ourselves – they who are the region's democracy – with the Palestinians who are going to procure arms on the black market and through neighbouring Arab countries. Second of all because that sort of embargo would never be approved in the United Nations Security Council and would lead to a stand-off with the United States as concerns the Middle East Issue which would not be in anyone's favour. And third of all, the war materiel employed by the Israeli army is not comprised of the small arms that can be bought in Spain but rather by the heavy arms that are sold and will continue to be sold by the United States. Therefore, Europe would put itself on bad terms with the majority of the Israeli political class, would have nothing to gain and would not solve the problem of arms arriving to the zone".

(*DSS-C*, VII Leg., n. 393, pp. 11–12).

Treaties to which Spain is a Party Concerning Matters of Public International Law, 2001 and 2002

This material has been selected, compiled and commented on by a team from the Department of Public International Law of the University of Malaga, which includes Dr. Alejandro J. Rodríguez Carrión, Professor of Public International Law, Elena M. García Rico, Ana Salinas de Frías and M. Isabel Torres Cazorla, Lecturers in Public International Law, and David Márquez Botella, Research Associate in Public International Law.

This survey includes the treaties covered by art. 2.1.a) of the Vienna Convention on the Law of Treaties, published in the *Boletín Oficial del Estado* (Official Journal of the State). Its purpose is to record the legal effects of these instruments, such as ratification or accession, municipal entry into force, provisional application, reservations or declarations, territorial application, termination and abrogation. In a few instances some relevant articles or references will be reproduced in an unofficial translation.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL AND INTERNATIONAL LAW

1. *Nationality*

– Additional Protocol between the Kingdom of Spain and the Argentine Republic amending the Convention on Nationality of 14 April 1969, done at Buenos Aires on 6 March 2001.
Provisional application: 6 March 2001 (*BOE* 88, 12.4.01).
Definitive entry into force: 1 October 2002 (*BOE* 248, 16.10.02).

Spanish Yearbook of International Law, Volume VIII, 2001–2002

– Second Additional Protocol to the Convention on Nationality of 28 July 1958 subscribed to between Spain and Guatemala, amended by the Protocol of 10 February 1995, done *ad referendum* at Guatemala, on 19 November 1999.
Entry into force: 7 February 2001 (*BOE* 88, 12.4.01).

– Additional Protocol between the Kingdom of Spain and the Republic of Paraguay amending the Convention on Dual Nationality of 25 June 1959, done *ad referendum* at Asunción, 26 June 1999.
Entry into force: 1 March 2001 (*BOE* 89, 13.4.01).

– Additional Protocol between the Kingdom of Spain and the Republic of Peru amending the Convention on Dual Nationality of 16 May 1959, done *ad referendum* at Madrid, 26 June 1999.
Entry into force: 1 December 2001 (*BOE* 24.11.10).

– Additional Protocol between the Kingdom of Spain and the Republic of Bolivia amending the Convention on Dual Nationality of 12 October 1961, done *ad referendum* at Madrid, 18 October 2000.
Entry into force: 1 February 2002 (*BOE* 46, 22.2.02 and 70, 22.3.02).

– Additional Protocol between the Kingdom of Spain and the Republic of Colombia amending the Convention on Dual Nationality of 27 June 1979, done *ad referendum* at Bogotá, 14 September 1998.
Entry into force: 1 July 2002 (*BOE* 264, 4.11.02).

– Additional Protocol between the Kingdom of Spain and the Dominican Republic amending the Convention on Dual Nationality of 15 March 1968, done *ad referendum* at Santo Domingo, 2 October 2002.
Provisional application: 2 October 2002 (*BOE* 273, 14.11.02).

– Additional Protocol between the Kingdom of Spain and the Republic of Honduras amending the Treaty on Dual Nationality of 15 June 1969, done *ad referendum* at Tegucigalpa, 13 November 1999.
Entry into force: 1 December 2002 (*BOE* 289, 3.12.02).

– Exchange of Notes on 10 November 1993 constituting an Agreement between the Kingdom of Spain and the Republic of Honduras amending the Treaty on Dual Nationality of 15 June 1966.
Entry into force: 24 November 2002 (*BOE* 289, 3.12.02).

2. *Aliens*

– Agreement between the Kingdom of Spain and the Italian Republic on readmission of illegal aliens, done at Rome, 4 November 1999.
Entry into force: 1 February 2001 (*BOE* 33, 7.2.01 and 146, 19.6.01).

– Exchange of Notes of 8 and 13 June 1999, constituting an Agreement between Spain and Brunei Darussalam on the abolition of visas.
Definitive entry into force: 19 February 2001 (*BOE* 74, 27.3.01).

– Denunciation by Verbal Note of 2 November 2001 of the Exchange of Letters of 26 May 1961, between Spain and Colombia on the abolition of visas.
Entry into force: 2 November 2001 (*BOE* 282, 24.11.01).

– Exchange of Notes of 21 and 27 December 2001, between the Kingdom of Spain and the Republic of Colombia on visas issued free-of-charge.
Provisional Application: 2 January 2002 (*BOE* 73, 26.3.02).
Definitive entry into force: 11 November 2002 (*BOE* 289, 3.12.02).

3. *Human rights*

– European Agreement relating to persons participating in Proceedings of the European Court of Human Rights, done at Strasbourg on 5 March 1996.
Instrument of ratification: 23 December 2000.
Entry into force: 1 March 2001 (*BOE* 47, 23.2.01).
Note: Spain declared the following:

"In accordance with the provisions of Article 4, paragraph 2b, the Kingdom of Spain declares that the provisions of Article 4, paragraph 2 (a) of the Agreement will not apply to its own nationals".

– Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, done at Paris on 12 January 1998.
Instrument of ratification: 7 January 2000.
Entry into force: 1 March 2001 (*BOE* 52, 1.3.01).

– Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women, done at New York on 6 October 1999.
Instrument of ratification: 29 June 2001.
Entry into force: 6 October 2001 (*BOE* 190, 9.8.01).

– European Charter for Regional or Minority Languages, done at Strasbourg on 5 November 1992.
Instrument of ratification: 2 February 2001.
Entry into force: 1 August 2001 (*BOE* 222, 15.9.01 and 281, 23.11.01).
The Spanish ratification was made with the following declaration:

"Spain declares that, for the purposes of the mentioned articles, the languages recognized as official languages in the Statutes of Autonomy of the Autonomous Communities of the Basque Country, Catalonia, Balearic Islands, Galicia, Valencia and Navarra are considered as regional or minority languages.

For the same purposes, Spain also declares that the languages protected by the Statutes of Autonomy in the territories where they are traditionally spoken are also considered as regional or minority languages.

The following provisions of Part III of the Charter will apply to the languages mentioned in the first paragraph:

Article 8:
- paragraph 1 sub-paragraphs a(i), b(i), c(i), d(i), e(iii), f(i), g, h, i.
- paragraph 2.

Article 9:
- paragraph 1, sub-paragraphs a(i), a(ii), a(iii), a(iv), b(i), b(ii), b(iii), c(i), c(ii), c(iii), d.
- paragraph 2, sub-paragraph a.
- paragraph 3.

Article 10:
- paragraph 1, sub-paragraphs a(i), b, c.
- paragraph 2, sub-paragraphs a, b, c, d, e, f, g.
- paragraph 3, sub-paragraphs a, b.
- paragraph 4, sub-paragraphs a, b, c.
- paragraph 5.

Article 11:
- paragraph 1, sub-paragraphs a(i), b(i), c(i), d, e(i), f(ii), g.
- paragraph 2.
- paragraph 3.

Article 12:
- paragraph 1, sub-paragraphs a, b, c, d, e, f, g, h.
- paragraph 2.
- paragraph 3.

Article 13:
- paragraph 1, sub-paragraphs a, b, c, d.
- paragraph 2, sub-paragraphs a, b, c, d, e.

Article 14:
- sub-paragraph a.
- sub-paragraph b.

All the provisions of Part III of the Charter, which can reasonably apply according to the objectives and principles laid down in Article 7, will apply to the languages mentioned in the second paragraph".

- International Covenant of Civil and Political Rights, adopted by the General Assembly on 19 December 1966.

Declaration by the Government of Spain in regard to Article 41, on 24 February 1998:

"The Government of Spain declares that, under the provisions of article 41 of the International Covenant of Civil and Political Rights, it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant" (*BOE* 290, 4.12.01 and 25, 29.1.02).

– Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, signed at New York, 25 May 2000.
Instrument of Ratification: 5 December 2001.
Entry into force: 18 January 2002 (*BOE* 27, 31.1.02).

– Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, done at Strasbourg on 4 November 1993.
Instrument of Ratification: 11 May 1995.
Entry into force: 1 March 2002 (*BOE* 35, 9.2.02).

– Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, done at Strasbourg on 4 November 1993.
Instrument of Ratification: 11 May 1995.
Entry into force: 1 March 2002 (*BOE* 35, 9.2.02 and 142, 14.6.02).

– Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, signed at New York, 25 May 2000.
Instrument of Ratification: 1 March 2002.
Entry into force: 8 April 2002 (*BOE* 92, 17.4.02).
With the following declaration:

"For the purposes of the provisions of article 3 of the Protocol, Spain declares that the minimum age for voluntary recruitment into its armed forces is 18".

VI. ORGANS OF THE STATE

1. *Diplomatic Relations*

– Agreement between the Kingdom of Spain and the Oriental Republic of Uruguay on remunerated employment for dependants of diplomatic, consular, administrative and technical personnel of diplomatic and consular missions, done at Madrid on 7 February 2000.
Entry into force: 21 December 2000 (*BOE* 83, 6.4.01).

– Agreement between the Kingdom of Spain and the Government of Australia on remunerated employment for dependants of diplomatic, consular, administrative and

technical personnel of diplomatic and consular missions, done at Madrid on 6 March 2000.
Entry into force: 27 April 2001 (*BOE* 141, 13.6.01).

– Agreement between the Kingdom of Spain and the Republic of Peru on exemption of visas for diplomatic and service and special passport holders, done at Madrid on 8 November 2000.
Provisional application: 8 December 2000 (*BOE* 309, 26.1.2.00).
Definitive entry into force: 30 June 2001 (*BOE* 161, 6.7.01).

– Agreement between the Kingdom of Spain and the Republic of Ecuador on the free exercise of remunerated employment for dependants of diplomatic, consular, administrative and technical personnel of diplomatic or consular missions, done at Madrid on 7 March 2000.
Entry into force: 23 July 2001 (*BOE* 281, 23.11.01).

– Agreement between the Kingdom of Spain and the Argentine Republic on the free exercise of remunerated employment for dependants of diplomatic, consular, administrative and technical personnel of diplomatic or consular missions, done at Madrid on 9 May 2001.
Entry into force: 21 January 2002 (*BOE* 53, 2.3.02).

– Complementarity and Mutual Diplomatic Support Agreement between the Kingdom of Spain and the Republic of Honduras done *ad referendum* at Tegucigalpa on 15 February 1995
Entry into force: 26 November 2001 (*BOE* 57, 7.3.02).
Note: Spain and Honduras agree to coordinate the action of their Diplomatic Missions abroad with a view to complementing their management in benefit of both countries. To this end they may use the services of the Diplomatic Mission of the other Party in those countries in which one of the two does not have an accredited and resident representation. The Parties shall agree on the scope and procedure of this use as well as the modalities and limits by which it can be extended on the consular level.

In those capitals in which both Contracting Parties have Diplomatic Missions, the two Governments agree to the possibility of requesting diplomatic support from the other Party with respect to the Government before which it is accredited and for national interests that are exclusive to the requesting Party. In this respect it is understood that said support may not be given without a prior and formal request from the interested Party that must be formulated in writing in the form of a note for each case through the respective Embassy in Madrid and Tegucigalpa. The requested Government shall be free to decline such petition for support.

2. *Special Missions*

– Convention on Special Missions and Optional Protocol concerning the Compulsory Settlement of Disputes, done at New York on 8 December 1969.
Instrument of accession: 28 May 2001.
Entry into force: 30 June 2001 (*BOE* 159, 4.7.01 and 233, 28.9.01).

3. *Relations with International Organizations*

– Convention on responsibilities to be assumed between the Kingdom of Spain and the Food and Agriculture Organization with regard to the 24th session of the General Fisheries Commission for the Mediterranean (Alicante, 12 to 16 July 1999) and the 1st extraordinary session (Alicante, 7 to 9 July 1999), done at Rome on 2 July 1999.
Entry into force: 2 March 2001 (*BOE* 153, 27.6.01).

– Exchange of Notes 1 June and 7 July 2001, constituting an Agreement between the Kingdom of Spain and the United Nations for an International Conference organised by the United Nations on the Middle East Peace Process and the Palestinian People to be held in Madrid on 17 to 19 July 2001.
Provisional application: 7 July 2001 (*BOE* 188, 7.8.01).

– Agreement between the Kingdom of Spain and the World Health Organization on facilities and services and the legal status of the Organisation for the 51st session of the Regional Committee for Europe to be held in Madrid (Spain) from 10 to 13 September 2001, done at Geneva on 2 July 2001.
Provisional application: 2 July 2001 (*BOE* 226, 20.9.01).

VII. TERRITORY

1. *Frontiers*

– Framework Convention between the Kingdom of Spain and the Portuguese Republic on improvement of access to the two countries done at Albufeira on 30 November 1998.
Provisional application: 30 April 1999 (*BOE* 128, 29.5.99).
Definitive entry into force: 3 August 2001 (*BOE* 224, 18.9.01).

– Exchange of Notes on 31 July and 20 August between Spain and France on the constitution of a Security Committee and the broadening of the competencies of the Technical Joint Committee of the Spanish-French Agreement of 25 April 1991 on the Somport tunnel.
Entry into force: 20 August 2001 (*BOE* 67, 19.3.02).

2. *Air*

– Open Skies Treaty, done at Helsinki on 24 March 1992.
Instrument of Ratification: 18 November 2002.
Definitive entry into force: 1 January 2002 (*BOE* 46, 22.2.02).
With the following declaration:

In relation to the definition of the term territory found in Article II of the Open Skies Treaty, the Kingdom of Spain reiterates its legal position concerning its controversy with the United Kingdom on the sovereignty of the isthmus of Gibraltar.

VIII. SEAS, WATERWAYS AND SHIPS

1. *Fisheries*

– Amendments to the Schedule to the International Convention for Regulation of Whaling, adopted at the 49th session of the International Whaling Commission, held at Monaco from 20 to 24 October 1997; the 50th Session held at Muscat (Oman) from 16 to 20 May 1998; the 51st Session held at St. George's (Grenada) from 24 to 28 May 1999; and the 52nd Session held at Adelaide (Australia) from 3 to 6 July 2000.
Entry into force: 15 October 2000 (*BOE* 71, 23.3.01 and 83, 6.4.01).

– Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, done at Monaco on 24 November 1996.
Instrument of ratification: 7 January 1999.
Entry into force: 1 June 2001 (*BOE* 150, 23.6.01).

IX. INTERNATIONAL SPACES

1. *Space*

– Exchange of Notes 7 and 28 January 2000, constituting an Agreement between Spain and the United States of America extending the Agreement on scientific and technical cooperation in moon and planetary exploration programs and of manned and unmanned space flights by the establishment in Spain of a space tracking station, signed at Madrid on 29 January 1964.
Provisional application: 29 January 2000 (*BOE* 49, 26.2.00).
Entry into force: 28 February 2001 (*BOE* 82, 5.4.01).

– Exchange of Notes 19 and 22 January 2001, constituting an Agreement between Spain and the United States of America extending the Agreement on scientific and technical cooperation in moon and planetary exploration programs and of manned and unmanned space flights by the establishment in Spain of a space tracking station, signed at Madrid on 29 January 1964.

Provisional application: 29 January 2001 (*BOE* 80, 3.4.01).
Definitive entry into force: 19 December 2001 (*BOE* 19, 22.1.02).

– Agreement on the rescue of astronauts, the return of astronauts, and the return of objects launched into outer space, done at London, Moscow and Washington on 22 April 1968.
Instrument of accession: 23 January 2001.
Entry into force: 26 February 2001 (*BOE* 137, 8.6.01).

– Agreement between the Government of Canada, the Governments of the Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation and the Government of the United States of America on an International Space Station, done at Washington on 29 January 1998.
Instrument of ratification: 15 September 1999.
Provisional application: 29 January 1998 (*BOE* 5, 6.1.00).
Definitive entry into force: 27 March 2001 (*BOE* 270, 10.11.01).

– EUTMESAT Polar System (EPS), as approved in EUM/C/96/Res. V, which was presented for adoption at the 32nd meeting of the EUTMESAT Council on 3–5 December 1996 at Damstadt and adopted at the 42nd Council meeting on 22–24 June 1999.
Entry into force: 24 June 1999 (*BOE* 17, 19.1.02).

– Exchange of Notes 28 January 2002, constituting an Agreement between Spain and the United States of America extending the Agreement on scientific and technical cooperation in moon and planetary exploration programs and of manned and unmanned space flights by the establishment in Spain of a space tracking station, signed at Madrid on 29 January 1964.
Provisional application: 29 January 2002 (*BOE* 66, 18.3.02).

– Declaration made by certain European Governments on the phase of production of the Ariane Launchers done in Paris on 7 June 2001.
Definitive entry into force: 29 May 2002 (*BOE* 236, 2.10.02).

X. ENVIRONMENT

1. *General*

– Regional Implementation Annex for Central and Eastern Europe of the United Nations Convention to Combat Desertification in Countries experiencing serious drought and/or desertification, particularly in Africa (done at Paris on 17 June 1997), done at Bonn on 22 December 2000.
Entry into force: 6 September 2001 (*BOE* 257, 26.10.01).

2. *Seas*

– Annex V and Appendix 3 to the Convention for the Protection of the Marine Environment of the North-East Atlantic, done at Paris on 22 September 1992), adopted at Sintra (Portugal) on 23 July 1998.
Instrument of acceptance: 7 November 1999.
Entry into force: 30 August 2000 (*BOE* 45, 21.2.01).

– Protocols of 27 November 1992, amending the Convention on Civil Liability for Oil Pollution Damage, 1969, and the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

Declaration of 27 September 2000 by Spain, France and Italy, in accordance with the provision of article 3.a).ii of the 1992 Protocol to the Convention on Civil Liability for Oil Pollution Damage, 1969, and article 4.a).ii of the 1992 Protocol to the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971:

In light of the unique configuration of the Mediterranean basin, characterised by the proximity of a number of Mediterranean coastal States, each one of the said States that is a Contracting Party to the Protocol of 1992, amending the international Convention on civil liability for oil pollution damage of 1969 and of the 1992 Protocol amending the international Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971, has the right to claim compensation for damage caused by pollution as defined in the Conventions with the inclusion of lost profits added to the cost of reasonable means of restoration actually taken or to be taken and the cost of the preventive measures and the loss or damage subsequently caused by such measures. Any damage compensation claim may be filed for damage caused by pollution within a limit of 200 marine miles measured from the base lines from which the breadth of territorial seas are measured. Nothing in this declaration made in application to article 3.a).ii) of the Protocol of 1992 amending the international Convention on civil liability for oil pollution damage of 1969 and to article 4.a).ii) of the 1992 Protocol amending the international Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 shall prejudice the present or future controversies nor the legal opinions of either party in this Declaration in relation with the law of the sea and the nature and the scope of the jurisdiction of coastal States and of flag States (*BOE* 150, 23.6.01).

– Agreement between Spain and the International Compensation Fund for Oil Pollution Damages, done at London on 2 June 2000.
Provisional application: 2 June 2000 (*BOE* 174, 21.7.00).
Definitive entry into force: 4 May 2001 (*BOE* 224, 18.9.01).
Note: The Agreement refers to the conflict resolution between the Fund and Spain resulting from the accident of the ship the "Aegean Sea" and the civil liabilities stemming from that incident.

– Amendments of 13 March 2000 to the Annex to the Protocol of 12 July 1978 to the International Convention for the Prevention of Pollution from Ships, 1973, adopted by Resolution MEPC.84(44).
Entry into force: 1 January 2002 (*BOE* 113, 11.5.02).

– Amendments of 5 October 2000 to the Annex to the Protocol of 12 July 1978 to the International Convention for the Prevention of Pollution from Ships, 1973, adopted by Resolution MEPC.89(45).
Entry into force: 1 January 2002 (*BOE* 115, 14.5.02).

– Amendments of 13 March 2000 to the Annex to the Protocol of 12 July 1978 to the International Convention for the Prevention of Pollution from Ships, 1973, adopted by Resolution MEPC.84(44).
Entry into force: 1 January 2002 (*BOE* 113, 11.5.02).

– Amendments of 18 October 2000 to the limits of compensation set out in the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, adopted by Resolution LEG.2(82).
Entry into force: 1 November 2003 (*BOE* 236, 2.10.02 and 271, 12.11.02).

– Amendments of 18 October 2000 to the limitation amounts set out in the Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, adopted by Resolution LEG.1(82).
Entry into force: 1 November 2003 (*BOE* 237, 3.10.02).

– Amendments of 27 April 2001 to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, adopted by Resolution MEPC.95(46).
Entry into force: 1 September 2002 (*BOE* 306, 23.12.02).

3. *Air*

– Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer, of 16 September 1987, adopted on the 11th meeting of the Parties to the Protocol, held at Beijing (China) on 3 December 1999.
Entry into force: 28 July 2000 (*BOE* 16, 18.1.01 and 39, 14.2.01).

– Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, of 16 September 1987, adopted at the 11th meeting of the Parties to the Protocol, held at Beijing (China) on 3 December 1999.
Instrument of acceptance: 7 February 2002.
Entry into force: 25 February 2002 (*BOE* 70, 22.3.02).

4. *Fauna and flora*

– Amendments to Appendices I, II and III to the Convention on International Trade in Endangered Species, done in Washington on 3 March 1973, adopted at the 11th meeting of the Conference of Parties, held at Gigiri (Kenya) on 20 April 2000.

On 12 June 2001, according to Article XVI, paragraph 2 of the Convention, Spain formulated a reservation against the inscription of *Mustela altaica*, *Mustela kathiah* and *Mustela sibirica* in Annex III of the Convention (*BOE* 179, 27.7.01).

– Agreement on the Conservation of African-Eurasian Migratory Waterbirds, done at The Hague on 15 August 1996.
Instrument of ratification: 12 March 1999.
Entry into force: 1 November 1999 (*BOE* 296, 11.12.01).

5. *Nuclear Energy*

– Joint Convention on the safety of spent fuel management and on the safety of radioactive waste management, done at Vienna on 5 September 1997.
Instrument of ratification: 30 April 1997.
Entry into force: 18 June 2001 (*BOE* 97, 23.4.01).

– Annex V to the Protocol on Environmental Protection to the Antarctic Treaty (Protection and Management Areas), done at Bonn on 18 October 1991.
Approval instrument: 5 November 1993.
Entry into force: 24 May 2002 (*BOE* 248, 16.10.02).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. *General treaties*

– General Treaty of Friendship and Cooperation between the Kingdom of Spain and the Republic of Philippines, done at Manila on 30 June 2000.
Entry into force: 30 April 2001 (*BOE* 142, 14.6.01).
Note: The preamble set out the following points as general principles guiding relations between the two nations:

1. Respect for international law. The High Contracting Parties agree to comply in good faith with the obligations assumed under international law, both those stemming from generally recognised principles and regulations of international law as well as those based on treaties or other agreements to which they are party.

2. Sovereign equality. Each of the High Contracting Parties shall respect the sovereign equality and individuality of the other in addition to all of the rights inherent to the sovereignty of the other contained therein especially including the right to legal equality, territorial integrity, political freedom and independence and to non-intervention in the domestic affairs of the other Party. They will also respect the right

of each Party to freely choose and develop their own political, social economic and cultural system.

3. Abstention from resorting to threat or the use of force against the territorial integrity or the political independence of the other Party or to any other means incompatible with the aims and principles of the United Nations. No motive may be invoked to justify the use of such means.

4. Pacific settlement of controversies. In a spirit commensurate with the motives that have led to the conclusion of this General Treaty on Friendship and Cooperation, the High Contracting Parties shall settle any dispute that could arise between them through the exclusive use of pacific means, making a concerted effort to find fair and balanced solutions so as not to endanger international peace and security.

5. Development cooperation. The High Contracting Parties shall make a concerted effort to develop their mutual potential to the maximum with a view to attaining an elevated, effective, balanced and mutually beneficial level of cooperation. In this respect, they shall work to improve the level of their economic and social development and to establish a climate of economic and financial solidarity that may benefit from the positive complementary aspects of their respective economies thus allowing their peoples to reach a higher level of development and prosperity in the economic, scientific, technological, environmental, social, cultural and human domains.

6. Respect for human rights and the fundamental freedoms of persons. The High Contracting Parties shall respect the human rights and fundamental freedoms including freedom of opinion, conscience, religion and creed without discrimination for reasons of race, sex, religion or language. In this respect they shall promote the effective exercise of civil, political, economic, social and cultural rights and freedoms, all of which are rooted in the inherent dignity of human beings and are essential for their free and full development. As a result, both parties reaffirm their commitment to respect the Charter of the United Nations, the Universal Declaration of Human Rights and the international agreements, pacts, conventions and declarations on this subject to which they are bound.

7. Dialogue and coexistence of cultures and civilisations. The High Contracting Parties shall promote all actions intended to stimulate their common cultural values based on their traditional historic and human ties. The principles of tolerance, coexistence and mutual respect shall serve as guidelines allowing them to enrich their common heritage. In this respect the Parties shall make a concerted effort to promote an ever growing and deepening mutual awareness and to develop greater understanding among their citizens and their respective social groups.

The two Parties declare their resolve to maintain and respect these principles in a spirit of mutual trust with a view to improving cooperation or shared interests.

– Protocol to the Convention for cooperation within the framework of the Ibero-American Conference for the constitution of an Ibero-American Cooperation Secretariat (SECIB) and the Statutes of the Ibero-American Cooperation Secretariat (SECIB), done at Havana on 15 November 1999.

Provisional application: 15 November 1999 (*BOE* 11.1.00).
Instrument of ratification: 28 May 2001.
Definitive entry into force: 2 December 2001 (*BOE* 296, 11.12.01).

2. *Military and Defence Cooperation*

– Agreement on Mutual Protection of Classified Information between the Kingdom of Spain and Switzerland, done at Madrid on 22 May 2001.
Provisional application: 22 May 2001 (*BOE* 176, 24.7.01).
Entry into force: 21 January 2002 (*BOE* 66, 18.3.02).

– Agreement between the Kingdom of Spain and the North Atlantic Treaty Organisation represented by the Supreme Headquarters Allied Powers Europe regarding the special conditions applicable to the establishment and use of a General International Military Headquarters on Spanish soil, done at Madrid on 28 February 2000.
Entry into force: 10 July 2001 (*BOE* 183, 1.8.01).

– Framework Agreement between the French Republic, the Federal Republic of Germany, the Italian Republic, the Kingdom of Spain, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland concerning measures to facilitate the restructuring and operation of the European defence industry, done at Farnborough, on 27 July 2000.
Instrument of ratification: 21 June 2001.
Entry into force: 11 August 2001, except Articles 3.2.b), 57, 58.1 and 58.2.b) of the Agreement (*BOE* 190, 9.8.01).

– Agreement between the parties to the North Atlantic Treaty for cooperation regarding atomic information (Paris 18 June 1964) and the Protocol amending the Agreement's Security Annex (Brussels, 2 June 1998) done at Brussels, on 18 December 2000.
Instrument of ratification: 16 November 2001.
Entry into force: 13 December 2001 (*BOE* 298, 13.12.02).

3. *Scientific and Technical Cooperation*

– Scientific, Technical, Cultural and Educational Framework Convention between the Kingdom of Spain and the People's Democratic Republic of Algeria, done *ad referendum* at Algiers on 5 April 1993.
Entry into force: 23 December 2000 (*BOE* 40, 15.2.01 and 129, 30.5.01).

– Scientific, Technical, Cultural and Educational Framework Convention between the Kingdom of Spain and the Lebanese Republic, done *ad referendum* at Madrid on 22 February 1996.
Entry into force: 19 December 2000 (*BOE* 122, 22.5.01).

– Scientific and Technical Agreement between the Kingdom of Spain and the Caribbean Community (CARICOM), done *ad referendum* at Port of Spain on 4 July 1999.
Entry into force: 17 October 2001 (*BOE* 10, 11.1.02).

– Scientific and Technical Agreement between the Kingdom of Spain and the Government of Jamaica, done *ad referendum* at Port of Spain on 4 July 1999.
Entry into force: 26 November 2001 (*BOE* 10, 11.1.02).

– Protocol of Amendment to the General Basic Convention on Scientific and Technical Cooperation between the Kingdom of Spain and the Republic of El Salvador, done at Madrid on 7 November 2000.
Entry into force: 30 March 2001 (*BOE* 43, 19.2.02).

4. *Cultural Cooperation*

– Agreement on Cinematographic Cooperation between the Government of the Kingdom of Spain and the Government of the Federal Republic of Germany, done at Berlin on 11 February 2000.
Entry into force: 18 December 2000 (*BOE* 9, 10.1.01).

– Convention on Cultural and Educational Cooperation between the Kingdom of Spain and the Slovak Republic, done at Bratislava on 11 April 2000.
Entry into force: 22 December 2000 (*BOE* 35, 9.2.01).

– Agreement on Tourism Cooperation between the Kingdom of Spain and the Republic of Namibia, done *ad referendum* at Windhoek on 20 February 1999.
Entry into force: 3 July 2000 (*BOE* 82, 5.4.01).

– Exchange of Notes 30 March and 19 May 1998 modifying article 16 of the Convention on Cultural Cooperation between Spain and Ecuador, of 14 July 1975.
Entry into force: 7 May 2001 (*BOE* 141, 13.6.01).

– Convention on Tourism Cooperation between the Kingdom of Spain and the Republic of Bulgaria, done *ad referendum* at Sofia on 21 July 1998.
Entry into force: 9 July 1999 (*BOE* 190, 9.8.01).

– Exchange of Notes 18 and 20 December 2000, constituting an Agreement between the Kingdom of Spain and the Republic of Panama amending the Convention on Cultural Cooperation between Spain and Panama of 2 May 1979 and abolishing the Convention on Mutual Recognition of Academic Grades and Incorporation Qualifications of 15 March 1926.
Entry into force: 28 September 2001 (*BOE* 256, 25.10.01).

– Agreement on Cinematography Co-Production and Exchange between the Kingdom of Spain and the Kingdom of Morocco, done *ad referendum* at Rabat on 27 April 1998.
Entry into force: 2 October 2001 (*BOE* 271, 10.11.01).

– Annex to the International Agreement for the Establishment of the University for Peace, signed at New York on 5 December 1980, adopted on 20 April 2001.
Entry into force: 20 April 2001 (*BOE* 313, 31.12.01).

– Agreement on Tourism Cooperation between the Kingdom of Spain and the Gabonese Republic, done *ad referendum* at Madrid on 2 March 1995.
Entry into force: 12 December 2001 (*BOE* 4, 4.1.02, and 81, 2.3.02).

– Constituent act for the Association of Ibero-American States for the development of National Libraries in the countries of Ibero-America (ABINIA) done at Lima on 12 October 1999.
Instrument of accession: 8 November 2001.
Entry into force: 14 December 2001 (*BOE* 17, 19.1.02).

– Protocol amending the European Convention on Transfrontier Television, done at Strasbourg on 9 September 1998.
Entry into force: 1 March 2002 (*BOE* 92, 17.4.02 and 158, 3.7.02).

– Agreement between the Kingdom of Spain and the Russian Federation on Cultural Centre Activities done in Madrid on 15 November 2001.
Entry into force: 23 May 2002 (*BOE* 148, 21.6.02).

– Exchange of Notes of 16 January and 6 March modifying Article 2 of the Convention of Cultural Cooperation between the Government of the Spanish State and the Government of the Argentine Republic, done at Buenos Aires on 23 March 1971.
Entry into force: 12 July 2002 (*BOE* 195, 15.8.02).

– UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, done at Rome on 24 June 1995.
Instrument of accession: 9 May 2002.
With the following declarations:

Declaration foreseen in Article 3 (sections 5 and 6) of the Convention:

"No time constraint or limit may be placed on the action of requesting the restitution of a cultural asset forming part of Spain's historical heritage in accordance with Spanish legislation.

Legal Grounds: Articles 28 and 29 of Law 16/1985 of 25 June on Spain's Historical Heritage".

Declaration foreseen in Article 13 (section 3) of the Convention:

"Given that Spain is a Member State of the European Union, it is hereby expressly

stated that in relations with Contracting States that are also members thereof, internal EU regulations shall exclusively apply and therefore the provisions of this Agreement whose scope of application may coincide with that of said regulations shall not apply to said relations."

Declaration set out in Article 16 of the Convention:

"Requests for the restitution or return of cultural assets filed by a State in accordance with Article 8 of the Convention may be made in accordance with the procedure foreseen in Article 16, section b) thereof. The competent authority for this purpose shall be the Ministry of Education, Culture and Sports (Directorate-General for Fine Arts and Cultural Arts)."

Entry into force: 1 November 2002 (*BOE* 248, 16.10.2002).

– Headquarters agreement between the Kingdom of Spain and the High Council of European Schools done on 13 August 2002.
Provisional application: 13 August 2002 (*BOE* 251, 19.10.02).

– Cooperation Convention between the Kingdom of Spain and the United Nations Educational Scientific and Cultural Organisation (UNESCO) on the subject of heritage done in Paris on 18 April 2002.
Entry into force: 13 November 2002 (*BOE* 290, 4.12.02).

5. *Economic Cooperation*

– Agreement for the Promotion and Protection of Investments between the Kingdom of Spain and the Hashemite Kingdom of Jordan, done at Madrid on 20 October 1999.
Entry into force: 13 December 2000 (*BOE* 9, 10.1.01 and 35, 9.2.01).

– Protocol between Spain, the Inter-American Development Bank and of the Agreement between Spain and the IDB for the constitution of the Spanish General Cooperation Fund, done in Santiago on 18 March 2001.
Provisional application: 18 March 2001 (*BOE* 100, 26.4.01 and 138, 9.6.01).

– Agreement for the Promotion and Protection of Investments between the Kingdom of Spain and the Gabonese Republic, done *ad referendum* at Madrid on 2 March 1995.
Entry into force: 12 December 2001 (*BOE* 22, 25.1.02).

– Agreement for the Promotion and Protection of Investments between the Kingdom of Spain and the Republic of Bolivia, done at Madrid on 29 October 2001.
Entry into force: 12 December 2001 (*BOE* 247, 15.10.02).

6. *Tariffs and Trade Cooperation*

– Agreement on the creation of an International Union for the publication of Customs Tariffs done in Brussels on 5 July 1890 and on its amending Protocol done in Brussels on 16 December 1949.
Denunciation: 29 November 2000.
Entry into force: 1 April 2003 (*BOE* 63, 14.3.01).

– Council Act 98/C 24/01 of 18 December 1997 drawing up, on the basis of Article K3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administrations.
Provisional application: 3 May 2002 (*BOE* 199, 20.8.02).
Spain made the following declarations:

Article 26:

"Pursuant to Article 26.4, Spain accepts the competence of the Court of Justice of the European Communities to speak out on a preliminary basis on the interpretation of this Convention under the conditions expressed in letter a) of section 5".

"Spain reserves the right, when an issue is placed before one of its jurisdictional bodies the decisions of which are not susceptible to subsequent domestic jurisdictional appeal, to make it incumbent upon said body to refer the issue to the Court of Justice of the European Communities."

Article 32:

"Pursuant to Article 32, point 4, Spain declares that until it enters into force, this Convention, with the exception of its Article 26, will apply to its relations with the Member States that have made the same declaration. Said declaration shall come into effect ninety days subsequent to its date of deposit."

– Protocol amending the Multilateral Convention on Cooperation and Mutual Assistance between National Customs Administrations and annexes I and VI, done at Cancun, Quintana Roo (Mexico) on 29 October 1999.
Instrument of accession:
Entry into force: 17 October 2002 (*BOE* 240, 7.10.02).
Spain made the following declarations:

1. "The Kingdom of Spain declares that the customs authority referred to in Article 1.1.b) regarding the enforcement of the Convention are, for the Kingdom of Spain, the Customs and Special Tax Department of the State Tax Administration Agency and the Home Ministry in the area of their respective competences."

2. "With respect to Article 3.4 of the Protocol amending the Multilateral Convention on Cooperation and Mutual Assistance between the National Customs Administrations of Latin America, Spain and Portugal, the Kingdom of Spain declares that it accepts annexes I and VI thereof."

7. *Commodities Cooperation*

– Agreement between the Kingdom of Spain and the Italian Republic on the establishment of reciprocal minimum safety reserves of crude oil, intermediate petroleum products and petroleum products, done in Madrid on 10 January 2001.
Entry into force: 10 January 2001 (*BOE* 28, 1.2.01).

– Food Aid Convention. London, 13 April 1999.
Instrument of ratification: 23 December 2000.
Entry into force: 1 July 1999 (*BOE* 41, 16.2.01).

– International Coffee Convention, 2001 (Resolution number 393), done at London on 28 September 2000.
Provisional application: 1 October 2001 (*BOE* 296, 11.12.01).

– Agreement between the Kingdom of Spain and the Republic of Turkey on cooperation and mutual assistance in custom services, done at Madrid on 3 May 2001.
Entry into force: 14 February 2002 (*BOE* 46, 22.2.02 and 73, 26.3.02).

8. *Financial and Tax Cooperation*

– Convention between the Kingdom of Spain and the State of Israel for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and on capital, done at Jerusalem on 30 November 1999.
Entry into force: 20 November 2000 (*BOE* 9, 10.1.01).

– Convention between the Kingdom of Spain and the Kingdom of Norway for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital and Protocol, done at Madrid on 6 October 1999.
Instrument of ratification: 11 December 2000.
Entry into force: 18 December 2000 (*BOE* 9, 10.1.01).

– Convention between the Kingdom of Spain and the Republic of Cuba for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital and Protocol, done at Madrid on 3 February 1999, amended by Exchange of Notes of 9 November and 30 December 1999.
Entry into force: 31 December 2000 (*BOE* 9, 10.1.01 and 122, 22.05.01).

– Convention between the Kingdom of Spain and the Republic of Slovenia for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital, done at Ljubljana 30 December 2001.
Entry into force: 19 March 2002 (*BOE* 154, 28.6.02).

– Convention between the Kingdom of Spain and the Hellenic Republic for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital, done at Madrid on 4 December 2000.
Entry into force: 21 August 2002 (*BOE* 236, 2.10.02).

– Convention between the Kingdom of Spain and the Republic of Iceland for the avoidance of double taxation and the prevention of tax evasion and fraud in relation to taxes on income and capital, done at Madrid on 4 December 2000.
Entry into force: 2 August 2002 (*BOE* 250, 18.10.02).

9. *Radio and Telecommunications Cooperation*

– Amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) and Amendment to the Operating Agreement on the International Maritime Satellite Organization (INMARSAT), adopted at the XII Session of the INMARSAT Assembly, held at London on 24 April 1998.
Entry into force: 31 July 2001 (*BOE* 137, 8.6.01).

– Protocol concerning the Provision of Satellite Facilities in Fixed Satellite Service between the Kingdom of Spain and the Argentine Republic, done in Madrid on 7 March 2001.
Entry into force: 7 March 2001 (*BOE* 174, 21.7.01).

– Final Acts of the World Radio Communications Conference (WRC-95), signed at Geneva on 17 November 1995.
Instrument of ratification: 28 May 2001.
Entry into force: 13 July 2001 (*BOE* 220, 13.9.01 and 11.12.01).

10. *Road Traffic and Transport*

– Exchange of Notes on 7 December and 14 January 2000, constituting an Agreement between the Kingdom of Spain and the Republic of Korea on the mutual recognition and exchange of national driving licences.
Provisional application: 14 January 2000 (*BOE* 22, 26.01.00).
Entry into force: 1 February 2001 (*BOE* 74, 27.3.01).

– Agreement between the Government of the Kingdom of Spain and the Government of the Republic of Moldova concerning international carriage by road, done at Warsaw on 20 May 1999.
Provisional application: 20 May 1999 (*BOE* 151, 25.6.99).
Definitive entry into force: 28 December 1999 (*BOE* 153, 27.6.01).

– Amendments to Annex I, Appendix 4 of the Agreement on the International Transport of Perishable Foodstuffs and on special equipment used for such transport (ATP),

done at Geneva on 1 September 1970, entered into circulation by the Secretary General of the United Nations on 27 July 1999 and 11 February 2000. 9 and 11 February 2000.
Entry into force: 11 February 2001 (the amendment to Annex I, appendix 4, paragraph 1) and on 27 April 2001 (the amendment to the last paragraph of Annex I, Appendix 4) (*BOE* 222, 15.9.01).

– Agreement between the Kingdom of Spain and the Portuguese Republic on the creation of a Joint Committee in the area of road transport and transport infrastructures and protocol done in Salamanca on 26 January 2000.
Entry into force: 27 November 2001 (*BOE* 281, 23.11.01).

– Amendments proposed by Portugal to Annexes A and B of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR), done at Geneva, on 30 September 1957.
Entry into force: 1 July 2001 (*BOE* 70, 22.3.02 and 161, 6.7.02).

– Multilateral Agreement M-80 on the classification of aquatic environment pollutants and regarding their solutions and mixtures that cannot be classified in classes 1 to 8 or in the other sections of class 9 repealing certain provision of annex A of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) Geneva, 30 September 1957 (*BOE* 97, 23.4.02).

– Agreement concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts which can be fitted and/or be used on Wheeled Vehicles, done at Geneva, 25 June 1998.
Instrument of ratification: 12 April 2002.
Entry into force: 22 June 2002 (*BOE* 129, 30.5.02).

– Agreement between the Government of the Kingdom of Spain and the Government of the Russian Federation on international transport by road, done at Moscow on 22 May 2001.
Entry into force: 20 April 2002 (*BOE* 136, 7.6.02).

– Exchange of Notes on 30 April 2002 constituting an Agreement between the Kingdom of Spain and the Republic of Bulgaria on the mutual recognition and exchange of national driving licenses.
Provisional Application: 30 April 2002 (*BOE* 150, 24.6.02).
Definitive entry into force: 27 September 2002 (*BOE* 254, 23.10.02).

– Agreement between the Kingdom of Spain and the Slovak Republic on the international road transport of Passengers and Cargo done at Bratislava on 27 November 2001.
Entry into force: 27 June 2002 (*BOE* 158, 3.7.02).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Argentine Republic on the mutual recognition and exchange of national driving licenses, done at Madrid on 31 July 2002.
Provisional Application: 31 July 2002 (*BOE* 251, 19.10.02).

– Agreement between the Kingdom of Spain and the Republic of Turkey on international transport by road, done at Madrid on 3 March 1998.
Entry into force: 6 August 2002 (*BOE* 295, 10.12.02).

11. *Rail Traffic and Transport*

– Amendments of the Statutes of "Eurofima" European Company for the financing of railway equipment. Admissions of the railways of the Slovak Republic (ZSR) as shareholders of "EUROFIMA" adopted at Zagreb on 15 June 2001 (*BOE* 257, 26.10.01).

– Amendments of the Statutes of "Eurofima" European Company for the financing of railway equipment. Transfer of the Eurofima shares held by Italian State Railways Limited to "Ferrovie dello Stato, S.P.A.", adopted at Basil on 13 December 2001 (*BOE* 89, 13.04.01).

– Amendments of the Statutes of "Eurofima" European Company for the financing of railway equipment. Transfer of the EUROFIMA shares held by Slovak Republic Railways (ZSR) to "Societe Ferroviaire Limited" and amendment of Article 5 of the Statutes, adopted at Brussels on 21 March 2002 (*BOE* 137, 8.6.02).

– Amendments to the Regulation concerning the international carriage of dangerous goods by rail (RID) (Bern, 1 May 1985). Annex to the Convention concerning International Carriage by Rail (COTIF), signed at Bern on 9 May 1980, adopted on 2001.
Entry into force: 1 July 2001 (*BOE* 241, 8.10.02).

– Multilateral Agreement RID 1/2001, on conversion deadlines for the use of certain types of train cars and tankers, partially supplanting the Regulation concerning the international carriage of dangerous goods by rail, signed at Madrid on 7 September 2001 (*BOE* 298, 13.12.02).

12. *Sea Traffic and Transport*

– International Maritime Dangerous Goods Code (Code IMDG), according to Chapter VII of the International Convention for the Safety of Life at Sea, 1974. Amendment 30–00 effective 1 January 2001, adopted at London on 26 May 2000.
Definitive entry into force: 31 December 2001 (*BOE* 173, 20.7.01 and 135, 6.6.02).

– Amendments of 1999 to the International Convention for the Safety of Life at Sea, 1974. Resolution MSC.87 (71) and International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code), Resolution MSC.88(71), adopted on 27 May 1999.
Entry into force: 1 January 2001 (*BOE* 221, 14.9.01 and 257, 26.10.01).

– International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code), adopted by Resolution MEPC.20(22), at London on 5 December 1985 (*BOE* 309, 26.12.01).

– Amendments to the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code), adopted by Resolution MEPC.70(38), on 10 July 1996.
Entry into force: 1 July 1998 (*BOE* 70, 22.3.02).

– Amendments to the 1988 Protocol concerning the International Convention for the Safety of Life at Sea, 1974, adopted by Resolution MSC.92(72), on 26 May 2000.
Entry into force: 1 January 2002 (*BOE*, 86, 10.4.02).

– Amendments to the International Convention for the Safety of Life at Sea, 1974, adopted by Resolution MSC.91(72), on 26 May 2000.
Entry into force: 1 January 2002 (*BOE*, 86, 10.4.02).

– Amendments to the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code), adopted by Resolution MEPC.91(45), on 5 October 2000.
Entry into force: 1 July 2002 (*BOE*, 115, 14.5.02 and 140, 12.6.02).

– 1999 Amendments to the Convention on Facilitation of International Maritime Traffic, 9 April 1965, as amended, adopted by the Facilitation Committee in its 27th session by Resolution FAL.6(27), on 9 September 1999.
Entry into force: 1 January 2001 (*BOE*, 177, 25.7.02).

– Amendments to the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code), adopted by Resolution MEPC.80(43), on 1 July 1999.
Entry into force: 1 July 2002 (*BOE*, 271, 12.11.02).

– Amendments to the Guidelines on the enhanced program of inspections during surveys of bulk carriers and oil tankers, Resolution A 744 (18), adopted on 5 December 2000 by Resolution MSC.105(73).
Entry into force: 1 July 2002 (*BOE*, 299, 14.12.02).

– International Code of Application of Fire Test Procedures (FTP Code), adopted on 5 December 2000 by Resolution MSC.98 (73).
Entry into force: 1 July 2002 (*BOE*, 299, 14.12.02).

– Amendments to the International Convention for the Safety of Life at Sea, 1974, adopted on 18 May 1998 by Resolution MSC. 69 (69).
Entry into force: 1 July 2002 (*BOE*, 299, 14.12.02).

– Amendments to the International Code for the safe Operation of Ships and for Pollution Prevention (ISM Code), adopted on 5 December 2000 by Resolution MSC.104(73).
Entry into force: 1 July 2002 (*BOE*, 300, 16.12.02).

– Amendments to the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code), adopted on 5 December 2000 by Resolution MSC.103(73).
Entry into force: 1 July 2002 (*BOE*, 300, 16.12.02).

– Amendments to the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code), adopted by Resolution MSC.102(73), on 5 December 2000.
Entry into force: 1 July 2002 (*BOE*, 300, 16.12.02).

– Amendments to the International Code of Application of Fire Test Procedures (FTP Code), adopted on 5 December 2000 by Resolution MSC.101(73).
Entry into force: 1 July 2002 (*BOE*, 300, 16.12.02).

– Amendments to the 1988 Protocol to the International Convention for the Safety of Life at Sea, 1974, adopted on 5 December 2000 by Resolution MSC.100(73).
Entry into force: 1 July 2002 (*BOE* 300, 16.12.02).

– Amendments to the International Convention for the Safety of Life at Sea, 1974, adopted on 5 December 2000 by Resolution MSC.99(73).
Entry into force: 1 July 2002 (*BOE*, 302, 18.12.02).

– International Code of Safety for High-Speed Craft (HSC 2000 Code) adopted on 5 December 2000 through Resolution MSC.97(73).
Entry into force: 1 July 2002 (*BOE*, 301, 17.12.02).

13. *Air Traffic and Transport*

– Agreement on Air Transport between the Kingdom of Spain and the Republic of Croatia, done at Madrid on 21 July 1997.
Entry into force: 21 March 2001 (*BOE* 119, 18.5.01).

– Protocol relating to an Amendment to the Convention on International Civil Aviation, done at Madrid on 30 September 1977.
Entry into force: 17 August 1999 (*BOE* 156, 30.6.01).

– Exchange of Notes 15 January 1998 and 14 December 2001 constituting an Agreement between Spain and Uruguay modifying the Agreement on commercial air transport between the Kingdom of Spain and the Oriental Republic of Uruguay, signed at Montevideo on 13 August 1979.
Entry into force: 14 December 2001 (*BOE* 16, 18.1.02).

– Agreement concerning the European Air Group between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic, done at London on 6 July 1998 and Amendment Protocol, done at London, on 16 June 1999.
Instrument of accession: 22 November 2001.
Entry into force for Spain: 3 January 2002 (*BOE* 25, 29.1.02).

– Exchange of Notes 20 May 1993 and 15 January 2002 constituting an Agreement between Spain and Uruguay modifying the Agreement on commercial air transport between the Kingdom of Spain and the Republic of Uruguay, signed at Montevideo on 13 August 1979.
Entry into force: 15 January 2002 (*BOE* 43, 19.2.02).

– Agreement on Air Transport between the Kingdom of Spain and the Republic of Panama, done at Panama, on 7 August 2001.
Entry into force: 10 May 2002 (*BOE* 139, 11.6.02).

14. *Labour, Social Security and Immigration*

– Administrative Agreement for the implementation of the Convention on Social Security between the Kingdom of Spain and the Oriental Republic of Uruguay, done at Madrid on 24 July 2000.
Entry into force: 1 April 2000 (*BOE* 80, 3.4.01 and 146, 19.6.01).

– Administrative Agreement for the implementation of the Convention on Social Security between Spain and the Ukraine, done at Madrid on 17 January 2001.
Entry into force: 17 January 2001 (*BOE* 84, 7.4.01).

– Agreement between the Kingdom of Spain and the United Nations on arrangements for the Second World Assembly on Ageing, done at New York on 25 February 2002.
Provisional application: 25 February 2002 (*BOE* 85, 9.4.02).

– Agreement between the Competent Authorities of Spain and the Netherlands to facilitate the payment of reciprocal credits for sickness and maternity benefits according

to Regulations (EEC) 1408/71 and 574/72, done at Madrid and The Hague on 21 February 2002.
Entry into force: 21 February 2001) (*BOE* 93, 18.4.01).

– Agreement between the Competent Authorities of the United Kingdom of Great Britain and Northern Ireland and the Competent Authority of the Kingdom of Spain concerning the reimbursement of contributions for benefits in kind according to Regulations (EEC) 1408/71 and 574/72, done on 18 June 1999.
Entry into force: 19 June 1999 (*BOE* 93, 18.4.01).

– Agreement between the Competent Authorities of Spain and Belgium concerning the reimbursement of contributions for benefits in kind according to Regulations (EEC) 1408/71 and 574/72, done at Madrid and Brussels on 25 May 1999.
Entry into force: 25 May 1999 (*BOE* 93, 18.4.01).

– Agreement between the Competent Authorities of Spain and Italy concerning the definition of pre-existing reciprocal credits and the establishment of a new procedure for the simplification and acceleration of reimbursements for real expenditures and lump sums done at Madrid and Rome, 13 October and 21 November 1997.
Entry into force: 22 November 1997 (*BOE* 93, 18.4.01 and 138, 9.6.01).

– ILO Convention No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour, done at Geneva on 17 June 1999.
Instrument of ratification: 14 March 2001.
Entry into force: 2 April 2002 (*BOE* 118, 17.5.01).

– Agreement between Spain And Colombia on the regulation and planning of migratory labour flows done in Madrid on 21 May 2001.
Provisional application: 21 May 2001 (*BOE* 159, 4.7.01).
Definitive entry into force: 11 March 2002 (*BOE* 111, 9.5.02)

– Agreement between the Kingdom of Spain and the Republic of Ecuador on the regulation and planning of migratory flows done in Madrid on 29 May 2001.
Provisional application: 28 June 2001 (*BOE* 164, 10.7.01).

– Labour Agreement between the Kingdom of Spain and the Kingdom of Morocco done in Madrid on 25 July 2001.
Provisional application: 24 August 2001 (*BOE* 226, 20.9.01).

– Additional Protocol to the Convention between the Kingdom of Spain and the Kingdom of Morocco modifying the General Convention on Social Security between the Kingdom of Spain and the Kingdom of Morocco of 8 November 1979, done at Rabat on 27 January 1998.
Entry into force: 1 December 2001 (*BOE* 282, 24.11.01).

– Convention on Social Security between the Kingdom of Spain and the Tunisian Republic, done at Tunis on 26 February 2001.
Entry into force: 1 January 2002 (*BOE* 309, 26.12.01 and 32, 6.2.02).

– Agreement between the Kingdom of Spain and the Dominican Republic on the regulation and planning of migratory labour flows done at Madrid on 17 December 2001.
Provisional application: 16 January 2002 (*BOE* 31, 5.2.02 and 70, 22.3.02).

– Complementary Convention to the Convention on Social Security between the Kingdom of Spain and the Republic of Chile on 28 January 1997, done at Valencia on 14 May 2002.
Provisional application: 1 June 2002 (*BOE* 225, 19.9.02).

– Complementary Agreement to the Administrative Spanish-Peruvian Agreement on Social Security of 24 November 1978, done at Valencia on 14 May 2002.
Provisional application: 1 June 2002 (*BOE* 225, 19.9.02).

– Complementary Agreement to the Administrative Agreement for the Implementation of the Social Security Convention between the Kingdom of Spain and the Argentine Republic on 28 May 1966, done at Valencia on 14 May 2002.
Provisional application: 1 June 2002 (*BOE* 225, 19.9.02).

– Agreement between the Kingdom of Spain and the Republic of Poland on the Regulation and Planning of Migratory Flows between the two countries done in Warsaw on 21 May 2002.
Provisional application: 20 June 2002 (*BOE* 226, 20.9.02).

– Agreement between the Kingdom of Spain and Romania on the regulation and planning of migratory labour flows between the two countries done in Madrid on 23 January 2002.
Entry into force: 20 June 2002 (*BOE* 289, 3.12.02).

– Convention on Social Security between the Kingdom of Spain and the Principality of Andorra, done at Andorra on 9 November 2001.
Entry into force: 1 January 2003 (*BOE* 290, 4.12.02).

– Administrative Agreement for the Implementation of the Convention on Social Security between the Kingdom of Spain and the Principality of Andorra, done at Andorra on 9 November 2001.
Entry into force: 1 January 2003 (*BOE* 290, 4.12.02).

– Convention between Spain and Australia on Social Security, done at Madrid, 31 January 2002.
Entry into force: 1 January 2003 (*BOE* 303, 19.12.02).

15. *Health and Relief Cooperation*

– Agreement between the Government of the Kingdom of Spain and the Government of the Russian Federation on cooperation in the area of disaster prevention and mutual assistance in the mitigation of its consequences done *ad referendum* at Madrid on 14 June 2000.
Entry into force: 30 June 2001 (*BOE* 153, 27.6.01 and 183, 1.8.01).

16. *Recognition of Qualifications*

– Exchange of verbal notes between the Kingdom of Spain and the Italian Republic on the admission of Spanish students attending the Spanish high school "Cervantes" of Rome at Italian universities, done at Rome on 26 July 2000 and 23 May 2001.
Entry into force: 23 May 2001 (*BOE* 161, 6.7.01).

17. *Narcotics*

– Treaty between the Kingdom of Spain and the Portuguese Republic for the repression of the illegal trafficking of drugs at sea, done at Lisbon on 2 March 1998.
Entry into force: 21 January 2001 (*BOE* 18, 20.1.01).
Note: In accordance with Treaty Article 4, in the case of a well-founded suspicion of illicit drug trafficking at sea, each Party recognises the right of representation of the other that justifies the intervention of its warships, military aircraft or other ships or aircraft bearing easily visible and identifiable external markings that they are at the service of the State or are duly authorised for such purpose, over the ships of the other State found operating outside of its territorial waters. In the exercise of this right of representation, the official ships or aircraft may pursue, detain and board the ship, examine documents, interrogate individuals found on board and inspect the ship and, if suspicions are confirmed, proceed to seize the drugs, take those allegedly responsible into custody and direct the ship to the closest port or the one most convenient for its immobilisation in the case that it may have to be returned.

– Extension to the Isle of Man of the Agreement on the prevention and repression of the illicit trafficking and illegal use of drugs, via the 21 February 2001 verbal note between the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, done at Madrid on 26 June 1989.
Entry into force: 23 March 2001 (*BOE* 100, 26.4.01).

– Complementary Agreement between the Kingdom of Spain and the Republic of Costa Rica on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances, done *ad referendum* in San Jose de Costa Rica, 24 November 1999.
Entry into force: 31 August 2001 (*BOE* 178, 26.7.01).

– Agreement between the Kingdom of Spain and the Republic of Cuba on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances, done at Havana, 10 November 1998.
Definitive entry into force: 26 January 2001 (*BOE* 183, 1.8.01).

– Agreement between the Kingdom of Spain and the Dominican Republic on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances, done at Santo Domingo, 15 November 2000.
Entry into force: 1 January 2001 (*BOE* 309, 26.12.01).

– Agreement between the Kingdom of Spain and the Republic of Honduras on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances, done *ad referendum* at Tegucigalpa, 13 November 1999.
Entry into force: 25 January 2002 (*BOE* 27, 31.1.02).

– Agreement between the Kingdom of Spain and the Republic of Guatemala on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances, done *ad referendum* at Guatemala, 9 July 1999.
Entry into force: 7 November 2001 (*BOE* 43, 19.2.02 and 81, 4.4.02).

– Agreement between the Kingdom of Spain and the Republic of Uruguay on cooperation in the prevention of the consumption of, and trafficking in narcotic drugs and psychotropic substances done *ad referendum* at Montevideo, 18 March 1998.
Entry into force: 25 January 2002 (*BOE* 73, 26.3.02).

18. *Civil and Criminal Cooperation*

– Convention on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic, done at Donostia (San Sebastian), on 26 May 1989 (*BOE* 58, 8.3.01).
Note: The United Kingdom, via a Letter addressed to the Secretary-General of the European Union Council dated 24 July 2000, communicated that when a decision taken by a Gibraltar Court must be enforced directly by a Court or other authority with the power to do so of another Member State in accordance with the Convention's applicable provisions, the documents comprising said decisions of the Gibraltar Court shall be legalised as being authentic by the United Kingdom Government/ Gibraltar Liaison Unit for EU Affairs of the Foreign and Commonwealth Office ("The Unit") with headquarters in London. This certification will be done in the form of a note.

On 19 October 2000, Spain communicated that it was removing the reservation that it had tabled in August 1998 thus accepting the extension of the 1968 Brussels Convention to Gibraltar in the terms contained in the current agreed regime set out in the document of the above-mentioned Council.

– Second Protocol modifying the Treaty of extradition and judicial assistance in criminal matters between the Kingdom of Spain and the United States of Mexico, done *ad referendum* at Mexico City on 6 December 1999.
Instrument of Ratification: 16 February 2001.
Entry into force: 1 April 2001 (*BOE* 80, 3.4.01).

– Treaty of Extradition between the Kingdom of Spain and the Republic of Paraguay, done at Asuncion on 27 July 1998.
Entry into force: 23 February 2001 (*BOE* 89, 13.4.01 and 118, 18.5.01).

– Convention on judicial assistance in criminal matters between the Kingdom of Spain and the Republic of Paraguay, done *ad referendum*, at Asunción on 26 June 1999.
Instrument of ratification: 16 February 2001.
Entry into force: 1 May 2001 (*BOE* 99, 25.4.01).

– Treaty on the transfer of sentenced persons between the Kingdom of Spain and the Republic of Honduras, done at Tegucigalpa on 13 November 1999.
Instrument of ratification: 9 February 2001.
Entry into force: 30 April 2001 (*BOE* 112, 10.5.01).

– Convention between the Kingdom of Spain and the Russian Federation on the transfer of sentenced persons for the serving of prison sentences, done at Moscow on 16 January 1998.
Instrument of ratification: 11 May 2001.
Entry into force: 21 June 2001 (*BOE* 141, 13.6.01).

– Convention between the Government of the Kingdom of Spain and the Government of the Republic of Bulgaria for cooperation in the fight against delinquency done *ad referendum* at Sofia on 21 July 1998.
Provisional application: 5 February 1999 (*BOE* 65, 17.3.99).
Definitive entry into force: 9 August 1999 (*BOE* 153, 27.6.01).

– Exchange of Notes on 5 May 2000 and 5 February 2001, constituting an Agreement between the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland, for the extension to the Isle of Man of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.
Entry into force: February 2001 (*BOE* 196, 16.8.01).

– Treaty between the Kingdom of Spain and the Republic of El Salvador on judicial competency, recognition and enforcement of sentences in civil and commercial matters done at Madrid on 7 November 2000.
Instrument of ratification: 28 June 2001.
Entry into force: 1 September 2001 (*BOE* 256, 25.10.01).

– Bilateral agreement between the Kingdom of Spain and the Republic of Bolivia on adoption matters, done at Madrid on 29 October 2001.
Provisional application: 29 October 2001 (*BOE* 304, 20.12.01).
Definitive entry into force: 1 August 2002 (*BOE* 177, 25.7.02).

– Convention on the fight against the corruption of foreign public agents in international business transactions, done at Paris on 17 December 1997.
Instrument of ratification: 3 January 2000.
Entry into force: 4 March 2000 (*BOE* 46, 22.2.02).

– Treaty between the Kingdom of Spain and the Republic of Peru on judicial assistance in criminal matters, done *ad referendum* at Madrid, 8 November 2000.
Entry into force: 12 December 2001 (*BOE* 53, 2.3.02).

– Treaty on Extradition between the Kingdom of Spain and the Republic of Honduras, done *ad referendum* at Tegucigalpa, 13 November 1999.
Entry into force: 24 May 2002 (*BOE* 129, 30.5.02).

– Cooperation agreement for the fight against organised crime between the Government of the Kingdom of Spain and the Government of the People's Republic of China, done *ad referendum* at Peking on 25 June 2000.
Entry into force: 6 June 2002 (*BOE* 135, 6.6.02).

XII. INTERNATIONAL ORGANIZATIONS

– Amendment to Article 6 (1) of the Organic Statute of the International Institute for the Unification of Private Law (UNIDROIT), Rome, 15 March 1940, adopted by the General Assembly of UNIDROIT at Rome on 12 December 1989, at its 42nd Session by Resolution 42 (3).
Entry into force: 26 March 1993(*BOE* 2, 2.1.01).

– Amendments to the Constitutive Convention of the International Maritime Organization, adopted by Resolution A.735(18), 4 November 1993.
Instrument of acceptance: 30 November 1994.
Entry into force: 7 November 2000 (*BOE* 35, 9.2.02).

– Convention on headquarters, privileges and immunities between Spain and the Ibero-American Youth Organisation concerning the legal status of the organisation in Spain, done at Madrid on 21 February 2002.
Provisional application: 21 February 2002 (*BOE* 100, 26.4.02).

– Framework cooperation agreement between the Kingdom of Spain and the World Health Organisation done at Madrid on 12 September 2001.
Entry into force: 24 June 2002 (*BOE* 181, 30.7.02).

– Agreement on immunities and prerogatives between the Andean Development Corporation and the Kingdom of Spain done at Madrid on 18 February 2002.
Entry into force: 3 October 2002 (*BOE* 262, 1.11.02).

– Convention on the underwriting of share issues of ordinary capital between the Andean Development Corporation and the Kingdom of Spain done at Madrid on 18 February 2002.
Entry into force: 3 October 2002 (*BOE* 262, 1.11.02).

XIII. EUROPEAN UNION

– Framework Agreement on Trade and Cooperation between the European Communities and their Member States, on the one side, and the Republic of Korea on the other, done at Luxembourg on 28 October 1996.
Entry into force: 1 April 2001 (*BOE* 113, 11.5.01).

– 2000/597/EC, EURATOM: Council Decision of 29 September 2000, on the system of the European Communities own resources.
Provisional application: 1 January 2002 (*BOE* 312, 29.12.01).

– Decision of the Representatives of the Governments of the European Union Member States at a Council meeting on the privileges and immunities granted to the Institute for Security Studies and the European Union Satellite Centre as well as their bodies and personnel, done at Brussels on 15 October 2001.
Provisional application: 1 January 2002 (*BOE* 312, 29.12.01).

– Decision of the Representatives of the Governments of the European Union Member States at a Council meeting on the financial consequences of the expiry of the ECSC Treaty and on the Coal and Steel Research Fund done at Brussels on 27 February 2002.
Provisional application: 24 July 2002 (*BOE* 236, 2.10.02).

XIV. INTERNATIONAL RESPONSIBILITY

1. *Responsibility of Individuals*

– Agreement between the Kingdom of Spain and the United Nations on the enforcement of sentences imposed by the International Criminal Tribunal for the Former Yugoslavia done at The Hague on 28 March 2000.
Entry into force: 16 January 2000 (*BOE* 54, 3.3.01).
Note: Spain's national competent authorities shall be bound for the duration of the sentence and may only examine the enforcement of a sentence imposed by the International Tribunal in cases in which the duration thereof does not exceed the highest maximum sentence foreseen for any crime in accordance with Spanish legislation.

When, pursuant to applicable Spanish national legislation, the sentenced person may benefit from early release from prison, Spain shall duly notify the Secretary. The President of the International Tribunal, subsequent to consultations with the Judges of the International Tribunal, shall determine whether early release from prison may be granted. If the President decides that early release from prison may not be granted, it will no longer be possible to carry out the sentence in Spain.

Confinement conditions shall be governed by Spanish legislation subject to the supervision of the International Tribunal. Those conditions shall be compatible with the minimum Regulations for the treatment of prisoners, the list of Principles for the protection of all persons subject to any form of confinement or prison and the basic principles for the treatment of prisoners and shall be under the supervision of a Peer Commission.

– Resolution 1329 (2000), of 30 November, adopted by the Security Council of the United Nations, amending the Statutes of the International Criminal Courts for the former Yugoslavia and Rwanda [Resolution 827 (1993), of 25 May and Resolution 955 (1994), of 8 November (*BOE* 64, 15.3.01 and 80, 3.4.01)].

– International Convention for the suppression of terrorist bombings, done at New York on 15 December 1997.
Instrument of ratification: 22 April 1999.
Entry into force: 23 May 2001 (*BOE* 140, 12.6.01).

– Act of Rectification of the Secretary-General of the United Nations of 3 May 2002 on the correction of the authentic text in Spanish of the International Convention for the Suppression of Terrorist Bombings, done at New York, 15 December 1997 (*BOE* 137, 8.6.02).

– Resolution 1373 (2001), of 28 September, on international cooperation to combat threats to international peace and security caused by terrorist acts, adopted by the Security Council of the United Nations at its 4385th Session (*BOE* 281, 23.11.01 and 8, 9.1.02).

– Call for the publication of the Council of Ministers Agreement of 30 November 2001 for the enforcement of Resolution number 1267 (1999) and concordant of the United Nations Security Council in compliance with the principles set out in Resolution 1373 (2001) as well as EC Council Regulation number 467/2001 of 6 March 2001.
Entry into force: 3 October 2002 (*BOE* 19, 22.1.02).
Note: One: Prohibit movements of capital and their corresponding operations of encashment, payment or transfer when the issuer, beneficiary or addressee are any of the persons, entities or organisations listed in the annex to EC Regulation number 467/2001 of 6 March 2001 and any other dictates issued in its development in accordance with that contained therein.

Two: Prohibit movements of capital and their corresponding operations of encashment, payment or transfer when the issuer, beneficiary or addressee are any of the persons, entities or organisations listed in the annex to this Agreement that includes the latest consolidated list made public by the Sanctioning Committee created by virtue of Resolution 1267 (1999) of the United Nations Security Council of 26 November 2001 in the terms agreed to under that Resolution and successive ones adopted to the same end.

Three: Instruct the credit and insurance entities, investment service companies, collective investment institutions and their managing entities, pension fund managing entities, secondary market governing entities, foreign currency exchange establishments, electronic money emitting entities and any other persons, entities and institutions enumerated in Article 2 of Law 19/1993 of 19 December on the prevention of money laundering so that the necessary measures may be taken for compliance with this Agreement.

Four: The reference made to persons and entities in the annex shall be understood as also including any other persons, entities and organisations that act on behalf of the aforementioned as well as Spanish establishments and companies controlled by them. Moreover, all of those entities and organisations with respect to which, from the standpoint of the persons that govern or manage them or, due to other circumstances, may be presumed to be a continuation, transformation, merger or succession of any other entity or organisation included in said annex shall be understood as included as well.

– International Convention for the Suppression of the Financing of Terrorism, done at New York, 9 December 1999.
Instrument of ratification: 1 April 2002.
Entry into force: 10 April 2002 (*BOE* 123, 23.5.02 and 141, 13.6.02).
Note: Notification made under article 7 (3): "In accordance with the provisions of article 7, paragraph 3, the Kingdom of Spain gives notification that its courts have international jurisdiction over the offences referred to in paragraphs 1 and 2, pursuant to article 23 of the Organization of Justice Act No. 6/1985 of 1 July 1985".

– Statute of the International Criminal Court, done at Rome on 17 July 1998.
Instrument of ratification: 19 October 2000.

Entry into force: 1 July 2002 (*BOE* 126, 27.5.02 and 180, 29.7.02).
Note: Spanish Declaration under article 103, paragraph 1(b): "Spain declares its willingness to accept at the appropriate time, persons sentenced by the International Criminal Court, provided that the duration of the sentence does not exceed the maximum stipulated for any crime under Spanish law".

2. *Responsibility of States*

– European Convention on the Compensation of Victims of Violent Crimes, done at Strasbourg on 24 November 1983.
Instrument of ratification: 20 October 2001.
Entry into force: 1 February 2002 (*BOE* 312, 29.12.01).

XV. PEACEFUL SETTLEMENT OF DISPUTES

– Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, done at New York, 23 May 1997
Instrument of accession: 23 December 2000.
Entry into force: 1 February 2002.
Entry into force: 30 December 2001 (*BOE* 15, 17.1.02 and 29, 2.2.02).

XVI. COERCION AND USE OF FORCE SHORT OF WAR

XVII. WAR AND NEUTRALITY

– Convention for the reciprocal recognition of proof marks on small arms, done at Brussels on 1 July 1969. Decisions taken by the Permanent International Commission for the proof of small arms at its XXV Plenary Session in June 1998.
Entry into force: 15 November 1999 (*BOE* 190, 9.8.01).

– Convention for the reciprocal recognition of proof marks on small arms and Regulation with annexes I and II, done at Brussels on 1 July 1969. Decision adopted by the Permanent International Commission for the proof of small arms at the XXVI Session, on 1 June 2000.
Entry into force: 15 November 2001 (*BOE* 25, 29.1.02 and 45, 21.2.02).

Treaties to which Spain is a Party Concerning Matters of Private International Law, 2001 and 2002

This section was prepared by Dr. Núria Bouza i Vidal, Professor of Private International Law at the Pompeu Fabra University (Barcelona).

This survey covers the treaties and other international agreements published in the *Boletin Oficial del Estado* (Official Journal of the State) during 2001 and 2002. Its purpose is to record the legal consequences of such agreements and instruments for Spain, such as signature, ratification or accession, entry into force, provisional application, reservations or declarations, territorial application, personal sphere of application, material scope, termination, abrogation and relationship with other treaties or agreements.

I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

Note: See below section IV

III. PROCEDURE AND JUDICIAL ASSISTANCE

– Agreement on Adoption matters between Spain and Bolivia done at Madrid on 29 October 2001 (*BOE* 304, 20.12.01, *BOE* 177, 25.7.02 and *BOE* 195, 15.8.02 (*corrigendum*)).
Provisional applications: from 29 October 2001.
Entry into force: 1 August 2002.
Note: This Agreement is intended to introduce a system of cooperation, channelled through the competent authorities of the two countries, to ensure the prevention and where applicable the total elimination of kidnapping, traffic and sale of children and adolescents in adoption processes.

> *"Article 1. Scope of application*
>
> (. . .)
>
> This Agreement is applicable in the event that a child or adolescent having his/her habitual place of residence in the Republic of Bolivia or in Spain is eligible for full adoption by nationals of either State, subject to the constitutional and legal provisions in force in either country.
>
> (. . .)

Spanish Yearbook of International Law, Volume VIII, 2001–2002

First final provision.

Once Bolivia has ratified the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, there being agreement being the contracting Parties, the principles and precepts of the said Convention shall be observed for the better application of this Agreement".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

– Treaty between Spain and El Salvador on the international jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Madrid on 7 November 2001 (*BOE* 256, 25.10.01).
Ratified by instrument: 28 June 2001.
Entry into force: 1 September 2001.
Note:

"Chapter I. *Scope of application*

Article 1.

"1. This Treaty shall be applicable in civil and commercial matters irrespective of the nature or name of the jurisdictional body concerned

2. This Treaty does not apply to:
Fiscal, customs or administrative matters.
The situation and capacity of natural persons, matrimonial regimes, wills or successions.
Bankruptcies, and meetings and agreements between the debtor and creditors.
Social Security.
Arbitration.

Chapter II. *Jurisdiction*

Article 2. General jurisdiction

"Natural or legal persons domiciled in the territory of one of the Parties shall be subject to the jurisdiction of that Party and may not be prosecuted in the courts of the other Party, irrespective of their nationality unless any of the jurisdictions referred to in the following articles apply:" art. 3: exclusive jurisdiction; art. 4: special jurisdiction and art. 5: Submission.

(. . .)

Chapter III. *Recognition*

(. . .)

Article 10. Recognition

"Judgments delivered in one Contracting State shall be recognized in the other Contracting State without the need of any procedure.

In the event of challenge, any interested Party seeking recognition as a princi-

pal may apply for recognition of the decision by means of the procedure set forth in chapter IV.

If recognition is sought as an incidental issue before a court of one of the Parties, that court shall be competent to deal with it".

Article 11. Causes of denial of recognition

"1. If recognition would be manifestly in breach of the public policy of the requested Party.

2. When judgments are delivered in default of the defendant, if the writ of summons or other equivalent document was not delivered or notified to the defendant in due form and with sufficient time to allow a defence.

3. If the decision is irreconcilable with a decision delivered in litigation between the same parties in the courts of the requested Party.

4. If in delivering judgment the court of the Party of origin, in deciding on an issue regarding the status or capacity of natural persons, marital regimes, wills or successions, ignored a rule of Private International Law of the requested Party, unless the same outcome would have been reached by application of the Private International Law of the requested Party.

5. If the decision is irreconcilable with a decision previously delivered in a State that is not a signatory of the Agreement between the Parties in litigation having the same object and the same cause, when the latter decision qualifies for recognition in the courts of the requested Party.

Similarly, decisions shall not be recognized if they ignore the provisions of article 3.

Decisions shall likewise not be recognized if the court of origin lacked jurisdiction in the terms of this Treaty.

Without prejudice to the provisions of the first paragraph, the jurisdiction of the court of the Party of origin may not be the object of control; public policy as contemplated in article 11 point 1 shall not affect the rules regarding jurisdiction".

Article 12. Bar on review of the facts

The factual basis of the foreign decision may not be the subject of review.

V. INTERNATIONAL COMMERCIAL ARBITRATION

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

VII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN COMMUNITY

– Agreement between Spain and Uruguay on the free exercise of remunerated employment by dependent relatives of diplomatic, consular, administrative and technical per-

sonnel of diplomatic missions and consular offices, done at Madrid on 7 February 2000 (*BOE* 83, 6.4.01).
Entry into force: 21 December 2000.

– Additional Protocol between Spain and Argentina modifying the Convention on Nationality of 14 April 1969, done at Buenos Aires on 6 March 2001 (*BOE* 88, 12.4.01 and *BOE* 248, 16.10.02).
Provisional application: from 6 March 2001.
Entry into force: 1 October 2002.
Note:

> *Article 2.* "Spanish and Argentine nationals who have availed themselves of the terms of the Convention or do so in the future shall be subject to the jurisdiction and the laws of the country granting the new nationality in respect of all acts that may have direct legal consequences there. In all matters not compatible with this provision, such persons shall also be subject to the laws of their nationality of origin".

– Second Additional Protocol to the Convention on Nationality between Spain and Guatemala of 28 July 1961, modified by Protocol of 10 February 1995, done *ad referendum* on 19 November 1999 (*BOE* 88, 12.4.01).
Entry into force: 7 February 2001.
Note:

> *Article 2.* Article 1 of the Convention shall read as follows:
>
> "Persons of Guatemalan or Spanish origin may acquire Guatemalan or Spanish nationality without loss of their original nationality, simply by establishing their place of residence in Spain or in Guatemala, as the case may be, in accordance with the internal laws of either Party, declaring their desire to acquire such nationality before the competent authority and effecting the requisite entries in the registers designated by the laws or government regulations of the country concerned. Within its own territory, each party shall recognize only its own nationality, although persons availing themselves of the benefits of this Convention may be subject to the laws of their country of origin in matters not compatible with the laws of the other Party.
>
> Furthermore, persons referred to in the foregoing paragraph may obtain and renew their passports and identity documents in either one of the Contracting Countries or in both at the same time".
>
> (. . .)
>
> *Article 4.* "This Protocol shall apply to persons of Guatemalan or Spanish origin who acquired Spanish or Guatemalan nationality prior to its entry into force, provided that they expressly state their desire to avail themselves of its terms before the competent authority, which authority must immediately inform the other Party of such a statement".

– Additional Protocol between Spain and Paraguay modifying the Convention on dual Nationality of 25 June 1959, done at Asuncion on 26 June 1999 (*BOE* 89, 13.4.01).
Entry into force: 1 March 2001.
Note: The terms are similar to those of the Additional Protocol with Argentina mentioned above.

– Exchange of Notes between Spain and Italy on Italian Universities admission of Spanish students at the Lyceum Cervantes in Rome, done at Rome on 23 May 2001 (*BOE* 161, 6.7.01).
Entry into force: 23 May 2001.

– Agreement between Spain and Ecuador on the free exercise of remunerated employment by dependant relatives of diplomatic, consular, administrative and technical personnel of diplomatic missions and consular offices, done at Madrid on 7 March 2000 (*BOE* 281, 23.11.01).
Entry into force: 23 July 2001.

– Additional Protocol between Spain and Peru modifying the Convention on Dual Nationality of 16 May 1959, done at Madrid on 8 November 2000 (*BOE* 282, 24.11.01).
Entry into force: 1 December 2001.
Note: Simply introduces the right of beneficiaries of the Convention to obtain and renew passports in either of the two States.

– Denouncement by Colombia of Exchange of Notes on abolition of visas of 26 May 1961, done at Bogotá on 2 November 2001 (*BOE* 282, 24.11.01).
Denouncement effects: from 2 January 2002.

– Additional Protocol signed by Spain and Colombia modifying the Convention on Nationality of 27 June 1979, done *ad referendum* at Santa Fe de Bogotá on 14 September 1998 (*BOE* 264, 4.11.02).
Entry into force: 1 July 2002.
Note:

Article 1. Rights and guarantees

"No person of Spanish origin or Colombian birth shall, by virtue of acquiring the nationality of the other party and residing in the territory of that party, lose the faculty to exercise in the territory of the adoptive State those rights deriving from the exercise of his/her nationality of origin.

Persons who are Spanish citizens by origin and Colombians by birth and have obtained the nationality of the other country prior to the entry into force of this Protocol may, in accordance with the provisions of the Convention on Nationality signed on 27 June 1979, recover their civil and political rights through a written representation to the consul or other competent authority designated for that purpose. This situation shall be intimated to the other Party through diplomatic channels.

(. . . .)

Article 3. Relationship with the Convention on Nationality

"Those principles contained in the Convention on Nationality that conflict with the intent of the present Amending Protocol shall be deemed to be repealed; in all other respects, the said Convention shall stand".

– Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, done at Luxembourg on 21 June 1999 (*BOE* 148, 21.6.02).
Deposit of Instrument of Ratification: 19 February 2001.
Entry into force: 1 June 2002.

– Additional Protocol modifying the Convention on Dual Nationality between Spain and Bolivia of 12 October 1961, done *ad referendum* at Madrid on 18 October 2000 (*BOE* 46, 22.2.02 and *BOE* 70, 22.3.02 (*corrigendum*)).
Entry into force: 1 February 2002.
Note:

Article 2. "Spanish and Bolivian nationals having availed themselves of the Convention on Dual Nationality concluded between Spain and Bolivia on 12 October 1961 may at any time register their desire to be dissociated from the terms of that Convention, provided that they do so before the competent judicial authority corresponding to their place of residence. A statement of dissociation does not imply renunciation of the last nationality acquired".

– Agreement between Spain and Argentina on the free exercise of remunerated employment by dependent relatives of diplomatic, consular, administrative and technical personnel of diplomatic missions and consular offices, done at Madrid on 9 May 2001 (*BOE* 53, 2.3.02).
Entry into force: 21 January 2002.

– Exchange of Notes between Spain and Colombia for gratuitous visas, done at Bogotá on 27 December 2001 (*BOE* 73, 26.3.02 and *BOE* 289, 3.12.02).
Provisional application: from 2 January 2002.
Entry into force: 11 November 2002.
Note: The termination of the Exchange of Notes between Spain and Colombia of 26 May 1961 on the suppression of visas does not affect section 4 of the said Exchange of Notes, which provides that visas shall be gratuitous for Spaniards and Colombians respectively entering Colombian and Spanish territory for a stay of over three months or with the intention of establishing their residence there or undertaking professional activities whether remunerated or otherwise.

– Additional Protocol between Spain and the Dominican Republic modifying the Convention on Dual Nationality of 15 March 1968, done at Santo Domingo de Guzmán on 2 October 2002 (*BOE* 273, 14.11.02).
Provisional application: from 2 October 2002.

Note: The terms are similar to those of the Additional Protocol with Argentina mentioned above.

VIII. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

IX. FAMILY LAW

X. SUCCESSION

XI. CONTRACTS

XII. TORTS

XIII. PROPERTY

– UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, done at Rome on 24 June 1995 (*BOE* 248, 16.10.03).
Deposit of Instrument of Adhesion: 21 May 2002.
Entry into force: 1 November 2002.
Note: Spain has formulated the following reservations and declarations:

In accordance with Articles 3 (5) and 6 of the Convention:

"There shall be no limitation on actions for the restitution of a cultural object included in the Spanish Historical Heritage, as provided in Spanish law".

In accordance with Article 13 (3) of the Convention:

"As a Member of the European Union, Spain expressly declares that, in relations with Contracting States that are also Members of the European Union, it will apply the internal rules of the EU and will therefore not apply as between these States the provisions of this Convention the scope of application of which coincides with that of those rules".

In accordance with Article 16 of the Convention:

"Claims for the restitution or requests for the return of cultural objects brought by a State under Article 8 may be submitted to it under the procedure provided in article 16 section b) of the Convention.

The competent authority for these purposes is the Ministry of Education, Culture and Sport (Directorate General of Fine Arts and Cultural Objects)".

XIV. COMPETITION LAW

XV. INVESTMENTS AND FOREIGN EXCHANGE

Note: See Treaties Involving Questions of Public International Law, Section XI.5 Economic Cooperation.

XVI. FOREIGN TRADE LAW

– OECD Convention on Combating Bribery of Foreign Public officials in International Business Transactions, done at Paris on 17 December 1997 (*BOE* 46, 22.2.02).
Deposit of Instrument of Ratification: 4 January 2000.
Entry into Force: 4 March 2000.

XVII. BUSINESS ASSOCIATION/CORPORATION

XVIII. BANKRUPTCY

XIX. TRANSPORT LAW

Note: See also Treaties involving questions of Public International Law, Section XI. 11, 12, 13 and 14.

XX. LABOUR LAW AND SOCIAL SECURITY

– Administrative Agreement of 24 July 2000 for the application of the Social Security Convention between Spain and Uruguay, done at Madrid on 1 December 1997 (*BOE* 80, 3.4.01 and *BOE* 146, 19.6.01 (*corrigendum*)).
Entry into force: from 1 April 2000, the same date that the Convention entered into force.

– Administrative Agreement for the application of the Social Security Convention between Spain and Ukraine of 7 October 1996, done at Madrid on 17 January 2001 (*BOE* 84, 7.4.01).
Entry into force: 17 January 2001.

– ILO Convention No.182 on Worst Forms of Child Labour and immediate action to secure its elimination, done at Geneva on 17 July 1999 (*BOE* 118, 17.5.01).
Ratified by instrument: 14 March 2001.
Entry into force: 2 April 2002.

– Agreement between Spain and Colombia on the regulation and arrangement of labour migration flows, done at Madrid on 21 May 2001 (*BOE* 159, 4.7.01 and *BOE* 112, 10.5.02).
Provisional application: from 21 May 2001.
Entry into force: 11 March 2002.

– Agreement between Spain and Ecuador on the regulation and arrangement of labour migration flows, done at Madrid on 29 May 2001 (*BOE* 164, 10.7.01).
Provisional application: from 28 June 2001.

– Agreement on manual labour between Spain and Morocco, done at Madrid on 25 July 2001 (*BOE* 226, 20.9.01).
Provisional application: from 24 August 2001.

– Complementary Protocol to the Convention between Spain and Morocco modifying the General Social Security Convention of 8 November 1979, done at Rabat on 27 January 1998 (*BOE* 282, 24.11.01).
Entry into force: 1 December 2001.

– Social Security Convention between Spain and Tunisia, done at Tunis on 26 February 2001 (*BOE* 309, 26.12.01 and *BOE* 32, 6.2.02 (*corrigendum*).
Entry into force: 1 January 2002.

– Social Security Convention between Spain and Andorra and Administrative Agreement for its implementation, done at Andorra on 9 September 2001 (*BOE* 290, 4.12.02).
Ratified by Instrument: 19 November 2002.
Entry into force: 1 January 2003.

– Agreement between Spain and the Dominican Republic on the regulation and arrangement of labour migration flows, done at Madrid on 17 December 2001 (*BOE* 31. 5.2.02 and *BOE* 70, 22.3.02).
Provisional Application: from 16 January 2002.

– Social Security Convention between Spain and Australia, done at Madrid on 31 January 2002 (*BOE* 303, 19.12.02).
Entry into force: 1 January 2003.
Note: This Convention revises and replaces the Convention on Social Security between Spain and Australia of 10 February 1990.

– Complementary Agreement to the Social Security Administrative Agreement between Spain and Chile of 28 May 1966, done at Valencia on 14 May 2002 (*BOE* 225, 19.9.02).
Provisional application: from 1 June 2002.
Note: The object of this Complementary Agreement is to avoid a situation where, in the event of voluntary contribution periods coinciding with obligatory contribution periods, the application of article 5 section b) of the Convention on Social Security between Spain and Argentina could prevent this being taken into account to raise the amount of the benefit.

– Complementary Agreement to the Social Security Administrative Agreement between Spain and Peru of 24 November 1978, done at Valencia on 14 May 2002 (*BOE* 225, 19.9.02).
Provisional application: from 1 June 2002.
Note: The purpose of the Agreement is the same as the previous one.

– Agreement between Spain and Poland on the regulation and arrangement of migration flows, done at Warsaw on 21 May 2002 (*BOE* 226, 19.9.02).
Provisional application: from 20 June 2002.

– Agreement between Spain and Romania on the regulation and arrangement of labour migration flows, done at Madrid on 23 January 2002 (*BOE* 289, 3.12.02).
Entry into force: 11 December 2002.

XXI. CRIMINAL LAW

Note: See also section II and Treaties concerning matters of Public International Law 2001 and 2002, section XI.17.

– Treaty between Spain and Portugal to punish illicit maritime traffic of Narcotic Drugs, done at Lisbon on 2 March 1998 (*BOE* 18, 20.1.01).
Entry into force: 21 January 2001.

– Agreement between the United Nations and the Kingdom of Spain on enforcement of sentences of the International Criminal Tribunal for the former Yugoslavia, done at The Hague on 28 March 2000 (*BOE* 54, 3.3.01).
Entry into force: 16 January 2001.
Note:

(. . .)

Article 2. Procedures

1. A request to Spain to enforce a sentence shall be made by the Registrar of the International Tribunal (hereinafter: "the Registrar"), with the approval of the President of the International Tribunal.

2. When making the request, the Registrar shall furnish Spain with the following documents:

a) a certified copy of the judgment;
b) a statement indicating how much of the sentence has already been served, including information on any pre-trial detention;
c) where appropriate, any medical or psychological reports on the convicted person, any recommendation for his or her further treatment in Spain and any other factor relevant to the enforcement of the sentence.

3. The central authority in Spain competent to receive the requests of the Registrar referred to in paragraph 1 of the Article is the Ministry of Justice *(Secretaría*

General Técnica, c/San Bernardo 62, Madrid). The Ministry of Justice shall promptly inform the Registrar of the decision adopted regarding the request, in accordance with Spanish national law.

Article 3. Enforcement

1. In enforcing the sentence pronounced by the International Tribunal, the competent national authorities of Spain shall be bound by the duration of the sentence.

2. Spain will only consider the enforcement of sentences pronounced by the International Tribunal where the duration of the sentence imposed by the International Tribunal does not exceed the highest maximum sentence for any crime under Spanish law.

3. The conditions of imprisonment shall be governed by Spanish law, subject to the supervision of the International Tribunal, as provided for herein.

4. If, pursuant to the applicable Spanish national law, the convicted person is eligible for early release, Spain shall notify the Registrar accordingly.

5. The President of the International Tribunal shall determine, in consultation with the Judges of the International Tribunal, whether any early release is appropriate. The Registrar shall inform Spain of the President's determination. If the President determines that an early release is not appropriate, further enforcement of the sentence in Spain will not be possible, and the Registrar will have to make the appropriate arrangements for the transfer of the convicted person in accordance with Article 10.

6. The conditions of imprisonment shall be compatible with the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, and the Basic Principles for the Treatment of Prisoners.

(. . .)

Article 5. Transfer of the convicted person

The Registrar shall make appropriate arrangements for the transfer of the convicted person from the International Tribunal to the competent authorities of Spain. Prior to his or her transfer, the convicted person will be informed by the Registrar of the contents of this Agreement.

Article 6. Non-bis-in-idem

The convicted person shall not be tried before a court of Spain for acts constituting serious violations of international humanitarian law under the Statute of the International Tribunal, for which he or she has already been tried by the International Tribunal.

Article 7. Information

1. Spain shall immediately notify the Registrar:

   a) two months prior to the completion of the sentence;
   b) if the convicted person has escaped from custody before the sentence has been completed;
   c) if the convicted person has deceased

2. Notwithstanding the previous paragraph, the Registrar and Spain shall consult each other on all matters relating to the enforcement of the sentence upon the request of either party.

Article 8. Pardon and commutation of sentences

1. If, pursuant to the applicable Spanish national law, the convicted person is eligible for pardon or commutation of the sentence, Spain shall notify the Registrar accordingly.

2. The President of the International Tribunal shall determine, in consultation with the Judges of the International Tribunal, whether pardon or commutation of the sentence is appropriate. The Registrar shall inform Spain of the President's determination. If the President determines that a pardon or commutation of the sentence is not appropriate, further enforcement of the sentence in Spain will not be possible, and the Registrar will have to make the appropriate arrangements for the transfer of the convicted person in accordance with Article 10.

Article 9. Termination of enforcement

1. The enforcement of the sentence shall cease:

a) when the sentence has been completed;
b) upon the demise of the convicted;
c) upon the pardon of the convicted;
d) following a decision of the International Tribunal as referred to in paragraph 2.

2. The International Tribunal may at any time decide to request the termination of the enforcement in Spain and transfer the convicted person to another State or to the International Tribunal.

3. The competent authorities of Spain shall terminate the enforcement of the sentence as soon as it is informed by the Registrar of any decision or measure as a result of which the sentence ceases to be enforceable.

Article 10. Impossibility to enforce sentence

If, at any time after the decision has been taken to enforce the sentence, for any legal or practical reasons, further enforcement has become impossible, Spain shall promptly inform the Registrar. The Registrar shall make the appropriate arrangements for the transfer of the convicted person. The competent authorities of Spain shall allow a maximum of ninety days following the notification of the Registrar before taking other measures on the matter.

(. . .)

– Second Protocol modifying the Treaty on extradition and mutual assistance in criminal matters between Spain and Mexico of 21 November 1978, done *ad referendum* at Mexico City on 16 February 2001 (*BOE* 80, 3.4.01).
Ratified by instrument: 16 February 2001.
Entry into force: 1 April 2001.

– Treaty on extradition between Spain and Paraguay, done at Asuncion on 27 July 1998 (*BOE* 89, 13.4.01 y *BOE* 119, 18.5.01 (*corrigendum*)).
Entry into force: 23 February 2001.

– Convention on legal assistance in criminal matters between Spain and Paraguay done *ad referendum* at Asunción on 26 June 1999 (*BOE* 99, 25.4.01).
Ratified by instrument: 16 February 2001.
Entry into force: 1 May 2001.

– Agreement to extend to the Isle of Man the Agreement between Spain and the United Kingdom and Northern Ireland to prevent and punish the illicit traffic and unlawful use of narcotic drugs of 26 June 1989, done at London on 16 April 2001 (*BOE* 100, 26.4.01).
Effects: from 23 March 2001.

– Treaty between Spain and Honduras on transfer of convicted persons, done at Tegucigalpa on 13 November 1990 (*BOE* 112, 10.5.01).
Ratified by instrument: 9 February 2001.
Entry into force: 30 April 2001.

– UN International Convention for the suppression of terrorist bombings, done at New York on 15 December 1997 (*BOE* 140, 12.6.01).
Deposit of Instrument of Ratification: 30 April 1999.
Entry into force: 23 May 2001.
Note: Spain has formulated the following declaration:

> "According to article 23 of Organic Law 6/1985, 1 July, on the Judiciary (*BOE* 157, 2/7/85), terrorism is a universally prosecutable crime in respect of which the Spanish courts possess international jurisdiction under any circumstances; therefore, the provision set forth in article 6 section 2 of the Convention is deemed to be fulfilled and hence there is no need of a special jurisdiction following ratification of the Convention".

– Additional Cooperation Agreement between Spain and Costa Rica to cooperate to prevent consumption of and control Illicit traffic in Narcotic Drugs and Psychotropic substances, done *ad referendum* at San José on 24 November 1999 (*BOE* 178, 26.7.01).
Entry into force: 31 August 2001.

– Agreement between Spain and the United Kingdom and Northern Ireland to extend to the Isle of Man the European Convention on legal assistance in criminal matters of 20 April 1959, done by exchange of notes at Madrid on 5 May 2000 and 5 February 2001 (*BOE* 196, 16.8.01).
Entry into force: 5 February 2001.

– Agreement between Spain and the Dominican Republic to cooperate to prevent consumption of and control Illicit traffic in Narcotic Drugs and Psychotropic substances, done at Santo Domingo de Guzmán on 15 November 2002 (*BOE* 309, 26.12.01).
Entry into force: 1 January 2002.

– European Convention on the Compensation of Victims of Violent Crimes, done at Strasbourg on 24 November 1983 (*BOE* 312, 29.12.01).
Deposit of the instrument of ratification: 31 October 2001.
Entry into force: 1 February 2002.

– Agreement between Spain and Uruguay to cooperate to prevent improper use of and control Illicit traffic in Narcotic Drugs and Psychotropic substances, done at Montevideo on 18 March 1998 (*BOE* 73, 26.3.02).
Entry into force: 25 January 2002.

– Statute of the International Criminal Court, done at Rome on 17 July 1998 (*BOE* 126, 27 May 2002 and *BOE* 180, 29 July 2002 (*corrigendum*)).
Ratified by Instrument: 19 October 2000.
Entry into force: 1 July 2002.
Note: Spain has formulated the following declarations. In accordance with Article 103.1 b):

> "Spain declares that, in due time, it will be willing to receive persons convicted by the International Criminal Court on condition that the sentence does not exceed the highest maximum penalty for any crime under Spanish law".
>
> Having regard to article 87 paragraph 1 of the Statute, the Kingdom of Spain declares that, without prejudice to the competences of the Ministry of Foreign Affairs, the Ministry of Justice will be the competent authority in respect of requests for cooperation made by and to the Court".
>
> Having regard to article 87 paragraph 2 of the Statute, the Kingdom of Spain declares that any requests for cooperation addressed to the Court and any documents in support thereof must be either drafted in Spanish or accompanied by a Spanish translation".

– Agreement between Spain and Guatemala to cooperate to prevent consumption of and control Illicit traffic in Narcotic Drugs and Psychotropic substances, done at Guatemala on 9 July 1999 (*BOE* 43, 19.2.02 and *BOE* 81, 4.4.02 (*corrigendum*)).
Entry into force: 7 November 2001.

– Agreement between Spain and the Republic of Honduras to cooperate to prevent consumption of and control Illicit traffic in Narcotic Drugs and Psychotropic substances, done at Tegucigalpa on 13 November 1999 (*BOE* 31.1.02).
Entry into force: 24 January 2002.

– Treaty on extradition between Spain and Honduras, done *ad referendum* at Tegucigalpa on 13 November 1999 (*BOE* 129, 30.5.02).
Entry into force: 24 May 2002.

– International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999 (*BOE* 123, 23.5.02 and *BOE* 141, 13.6.02 (*corrigendum*).
Deposit of Instrument of Ratification: 9 April 2002.
Entry into force: 9 May 2002.
Note: Spain has formulated the following declaration:

> "In accordance with article 7 paragraph 3, the Kingdom of Spain represents that its courts possess international jurisdiction in respect of cases coming under paragraphs 1 and 2, in pursuance of article 23 of Organic Law 6/1985, 1 July, on the Judiciary (*BOE* 157, 2.7.85 and *BOE* 264, 4.11.85 (*corrigendum*)".
>
> *Art. 23 of the LOPJ*:
> "1. In criminal cases, the Spanish Courts shall have jurisdiction over actions arising from offences committed in Spanish territory or aboard Spanish ships or aircraft, without prejudice to the provisions of international treaties to which Spain is a signatory
> 2. They shall also have jurisdiction in respect of acts defined as offences in Spanish criminal law, including those committed outside Spanish national territory, where the persons incurring criminal liability are Spaniards or aliens having acquired Spanish nationality subsequent to the commission of the offence, and where the following requirements are met:
>
> a) That the act be punishable in the place of enforcement
> b) That the victim or the Public Prosecutor raises an action in the Spanish courts
> c) That the offender have not been acquitted, pardoned or sentenced in another country, or in the latter case have not served the sentence. If he has only served part of the sentence, that part will be taken into account.
>
> 3 (. . .)".

– Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, done at New York on 25 May 2000 (*BOE* 27, 31.1.02).
Deposit of Instrument of Ratification: 18 December 2001.
Entry into force: 18 January 2002.

– Convention on Cooperation to combat organized crime between Spain and the People's Republic of China, done at Beijing on 25 June 2002 (*BOE* 135, 6.6.02).
Entry into force: 6 June 2002.
Note:

Article 1

"The Parties, in accordance with their national laws and International Conventions, agree to cooperate to contain and combat the following criminal activities:

1. Acts of international terrorism
2. Illegal trafficking in arms, munitions, explosives and radioactive materials
3. Illegal trafficking in narcotics, psychotropic substances and chemical precursors
4. Money laundering
5. Contraband
6. Forging of currencies, documents and securities
7. Illegal trafficking in cultural objects and objects of historical value
8. Economic crimes
9. International traffic in human beings
10. Illegal immigration
11. Other kinds of international organized crime

(. . . .)

Article 8

Either of the Parties may refuse, entirely or in part, or may place conditions on, a request for assistance or cooperation if such a request is prejudicial to its national sovereignty or constitutes a threat to its security or public interests.

(. . .)

Article 11

This Convention does not affect compliance with obligations arising out of other International Treaties entered into by the Parties separately.

– Convention on judicial assistance in criminal matters between the Kingdom of Spain and the Republic of Peru, done *ad referendum* at Madrid on 8 November 2000 (*BOE* 53, 2.3.02).
Entry into force: 12 December 2001.

XXII. TAX LAW

– Convention and Protocol between Spain and Norway for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, done at Madrid on 6 October 1999 (*BOE* 9, 10.1.01).
Ratified by instrument: 11 December 2000.
Entry into force: 18 December 2000.

– Convention and Protocol between Spain and Israel for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, done at Jerusalem on 30 November 1999 (*BOE* 9, 10.1.01).
Entry into force: 20 November 2000.

– Convention and Protocol between Spain and Cuba for the avoidance of double taxation and the prevention of tax evasion in relation to tax on income and capital, done at Madrid on 3 February 1996, modified by Exchange of Notes of 9 November and 30 December 1999 (*BOE* 9, 10.1.01 and *BOE* 122, 22.5.01 (*corrigendum*)).
Entry into force: 31 December 2000.

– Convention between the Kingdom of Spain and the Hellenic Republic for the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income and capital, done at Madrid on 4 December 2000 (*BOE* 236, 2.10.02).
Entry into force: 21 August 2002.

– Agreement for cooperation and mutual assistance on customs matters between Spain and Turkey, done at Madrid on 3 May 2001 (*BOE* 46, 22.2.02 and *BOE* 73, 16.3.02 (*corrigendum*)).
Entry into force: 13 February 2002.

– Convention between Spain and Slovenia for the evidence of double taxation and the prevention of tax evasion in relation to taxes on income and capital, done at Ljubljana on 23 May 2001 (*BOE* 154, 28.6.02).
Entry into force: 19 March 2002.

– Convention and Protocol between Spain and Iceland for the evidence of double taxation and the prevention of tax evasion in relation to taxes on income and capital, done at Madrid on 22 January 2001 (*BOE* 250, 18.10.02).
Entry into force: 2 August 2002.

Spanish Municipal Legislation Concerning Matters of Public International Law, 2001 and 2002

This material has been selected, compiled and commented on by a team from the Department of Public International Law of the University of Málaga, which includes Dr. Alejandro J. Rodríguez Carrión, Professor of Public International Law, Elena M. García Rico, Ana Salinas de Frías and M. Isabel Torres Cazorla, Lecturers in Public International Law, and David Márquez Botella, Research Associate.

This survey covers aspects of Spanish municipal legislation related to Public International Law. Only relevant articles will be quoted or mentioned and an unofficial translation or a reference to the *Boletín Oficial del Estado* (Official State Journal) will be given.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

– Resolution of 23 January 2001, passed by the Spanish Technical Secretariat-General for Foreign Affairs, on third States actions regarding multilateral treaties to which Spain is a party (*BOE* 29, 29.2.01).
Note: This Resolution provides for publication, in the public interest, of communications regarding multilateral treaties received by the Spanish Ministry of Foreign Affairs from 31 August 2000 to 31 December 2000.

– Resolution of 11 June 2001, passed by the Spanish Technical Secretariat-General for Foreign Affairs, on third States actions regarding multilateral treaties to which Spain is a party (*BOE* 149, 22.6.01 and 166, 12.7.01).
Note: This Resolution provides for publication, in the public interest, of communications regarding multilateral treaties received by the Spanish Ministry of Foreign Affairs from 1 January 2001 to 30 April 2001.

– Resolution of 27 September 2001, passed by the Spanish Technical Secretariat-General for Foreign Affairs, on third States actions regarding multilateral treaties to which Spain is a party (*BOE* 251, 19.10.01).
Note: This Resolution provides for publication, in the public interest, of communications regarding multilateral treaties received by the Spanish Ministry of Foreign Affairs from 1 May 2001 to 31 August 2001.

– Resolution of 17 January 2002, passed by the Spanish Technical Secretariat-General for Foreign Affairs, on third States actions regarding multilateral treaties to which Spain is a party (*BOE* 28, 1.2.02 and 45, 21.2.02).

Spanish Yearbook of International Law, Volume VIII, 2001–2002

Note: This Resolution provides for publication, in the public interest, of communications regarding multilateral treaties received by the Spanish Ministry of Foreign Affairs from 1 September 2001 to 31 December 2001.

– Resolution of 11 June 2002, passed by the Spanish Technical Secretariat-General for Foreign Affairs, on third States actions regarding multilateral treaties to which Spain is a party (*BOE* 139, 11.6.02).
Note: This Resolution provides for publication, in the public interest, of communications regarding multilateral treaties received by the Spanish Ministry of Foreign Affairs from 1 January 2002 to 30 April 2002.

– Resolution of 4 October 2002, passed by the Spanish Technical Secretariat-General for Foreign Affairs, on third States actions regarding multilateral treaties to which Spain is a party (*BOE* 248, 16.10.02).
Note: This Resolution provides for publication, in the public interest, of communications regarding multilateral treaties received by the Spanish Ministry of Foreign Affairs from 1 May 2001 to 31 August 2001.

III. THE RELATION BETWEEN INTERNATIONAL AND MUNICIPAL LAW

IV. SUBJECTS OF INTERNATIONAL LAW

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. **Nationality**

– Act 36/2002, of 8 October, amending the Civil Code in nationality matters (*BOE* 242, 9.10.02).

2. **European Citizenship**

– Royal Decree 543/2001, of 18 May, on access to public employment in the General State Administration and public bodies belonging thereto for nationals of other States qualifying for the right to free movement of workers (*BOE* 130, 31.5.01 and 237, 3.10.01).
Note: This Royal Decree enacts the principle that nationals of other States should have access to public employment in the same conditions as Spanish nationals, establishing the objective and subjective scope of application of Community norms and it approves the list of Corps and Levels to which nationals of other States cannot accede; these are set forth in the annex, classified in accordance with the ministerial departments or public bodies to which they are affiliated. The Royal Decree likewise

regulates the reservation of certain posts to Spaniards, criteria for access to public employment and the requirements that must be met by nationals of other States, and establishes knowledge of Spanish as a mandatory requirement in any selection process.

3. **Aliens**

– Royal Decree 865/2001, of 20 July, approves the Regulation of recognition of the condition of statelessness (*BOE* 174, 21.7.01 and 276, 17.11.01).

– Royal Decree 142/2001, of 16 January, lays down the procedure for regularization of aliens as provided in the fourth transitional provision of Organic Act 8/2000, of 22 December, amending Organic Act 4/2000, of 11 January, on Rights and Freedoms of Aliens in Spain and their Social Integration (*BOE* 44, 20.2.01).

– Royal Decree 864/2001, of 20 July, lays down the procedure for regularization of aliens as provided in Organic Act 4/2000, of 11 January, on Rights and Freedoms of Aliens in Spain and their Social Integration, amended by Organic Act 8/2000, of 22 December (*BOE* 174, 21.7.01 and 240, 6.10.01).

– Order PRE/1700/2002, of 5 July, creating Immigration Bureaux (*Oficinas de Extranjería*) in Albacete, Ávila, Badajoz, Burgos, Cáceres, Cádiz, Córdoba, Guadalajara, Huelva, Huesca, Jaén, Logroño, Lugo, Málaga, Ourense, Oviedo, Palencia, Pontevedra, Santander, Toledo, Valladolid and Zaragoza (*BOE* 161, 6.7.02), and Order PRE/2277/2002, of 16 September, in La Coruña (*BOE* 224, 18.9.02).

– Act 32/2002, of 5 July, modifying Act 17/1999, of 18 May, on Armed Forces Personnel Regulations, is intended to allow aliens to enter the military profession as soldiers and sailors (*BOE* 161, 6.7.02).
Note: The definition of professional military personnel includes aliens employed by the Armed Forces as soldiers and sailors on a temporary basis. It allows aliens to receive the necessary military training for induction as professional soldiers and sailors on a temporary basis. It contains an additional article, 68 bis, on induction of aliens as professional soldiers and sailors:

> "1. Aliens who are nationals of countries identified in the regulations as among those having special and traditional historical, cultural and linguistic ties with Spain, may join the military profession as soldiers or sailors in the terms provided in the following sections of this Article, always without prejudice to the second paragraph of Article 68 of this Act, provided that, by virtue of the laws of their country of origin or the terms of international conventions, they do not lose their original nationality upon joining the Spanish Armed Forces and there is no bar on their so joining.
>
> 2. The special public-law relationship established by the signing of an undertaking is governed exclusively by this Law and the regulations in implementation hereof. A relationship with the Armed Forces as provider of professional services

shall be established upon signature of a single undertaking, which shall have a duration of three years as from the person's appointment as a pupil of the appropriate military training centre and shall, as of the date of signing, be effective for the purposes of residence and work permit. Notwithstanding the provisions of the foregoing paragraph, persons having acquired Spanish nationality by the end of the contracted period and wishing to continue serving in the Armed Forces as professional soldiers or sailors may renew their contracts subject to the terms of Article 95 of this Law.

3. The requirements for entry of aliens in military training centres, in addition to those set forth in Article 63 section 2 but excluding that of Spanish nationality, shall be as follows: a) that they be legally resident in Spain; b) that they not be disqualified within the territories of countries with which Spain has signed a convention to such effect; c) that they be legally of age under their national laws; and d) that they have no criminal record in Spain or in countries where they have previously resided, in respect of offences considered as such in Spanish law.

4. Regulations shall be issued to determine the number of vacancies open to aliens, indicating specialities, unit or units, and where applicable the percentage of vacancies in such units. Regulations shall also be issued to determine the specific aspects of military training that aliens must complete for induction as time-serving professional soldiers and sailors; in any case, one of the ends of such training shall be to provide appropriate instruction in constitutional principles and values, in institutions and in basic knowledge of the history and culture of Spain.

5. In the event of termination or expiration of their contract, if such persons have not yet acquired Spanish nationality, they shall be subject to the general rules governing the rights and obligations of aliens but not to the provisions of Article 169 of this Law.

6. Persons having applied for Spanish nationality may, if applicable and subject to the regulations, have their contracts extended until such time as such application is resolved".

– Royal Decree 645/2002, of 5 July, modifying Royal Decree 1946/2000, of 1 December, regulating the composition and functioning of the Interministerial Commission on Aliens (*BOE* 160, 5.7.02).
Note: The Interministerial Commission on Aliens is an interministerial collegiate body affiliated to the Ministry of the Interior. Its functions are to analyse, debate and inform any proposals from ministerial departments that have a bearing on aliens, immigration and asylum. This Commission must include the Under-Secretary of the Ministry of the Interior and the Secretary General for Employment.

– Resolution of 12 September 2002 of the Directorate General for regulation of Migrations, establishing rules for the appointment of members to the General Council for Emigration (*BOE* 239, 5.10.02).

– Royal Decree 1244/2002, of 29 November, approving the Regulation on induction of aliens as professional soldiers and sailors (*BOE* 287, 30.11.02).

Note: This implements Act 32/2002, of 5 July, in amendment of Act 17/1999, of 18 May, on Regulation of Armed Forces Personnel, listing the countries whose nationals are acceptable: a) Argentina. b) Bolivia. c) Costa Rica. d) Colombia. e) Cuba. f) Chile. g) Ecuador. h) El Salvador. i) Equatorial Guinea. j) Guatemala. k) Honduras. l) Mexico. m) Nicaragua. n) Panama. ñ) Paraguay. o) Peru. p) Dominican Republic. q) Uruguay. r) Venezuela.

VI. ORGANS OF STATE

1. **Central Organs**

– Law 11/2002, of 6 May, regulating the National Intelligence Centre (*BOE* 109, 7.5.02).
Note: This replaces the National Defence Information Centre with a National Intelligence Centre, which is defined as a special public organization in the terms of the tenth additional provision of Act 6/1997, of 14 April, on the Organization and Functioning of the Central State Administration. Its principal remit will be to furnish the Government with the information and intelligence that it needs in order to prevent and avoid any risk or threat to the independence and integrity of Spain, to national interests and to the stability of the State and its institutions under the Rule of Law. It is affiliated to the Ministry of Defence.

– Royal Decree 463/2002, of 24 May, partially amending Royal Decree 1473/2000, of 4 August, sets out the basic organic structure of the Ministry of Foreign Affairs (*BOE* 125, 25.5.02).
Note: On 26 July 2001, it was agreed in London to relaunch the so-called "Brussels Process", initiated in 1984 to resolve the dispute over Gibraltar. This led to a further meeting of ministers in Barcelona on 20 November last between the Foreign Ministers of Spain and the United Kingdom of Great Britain and Northern Ireland. At that meeting, both Ministers agreed on the summer of 2002 as a target date for a global agreement that will address all the major issues arising from the question of Gibraltar, including cooperation and sovereignty; this agreement is to be implemented and further extended over a period of time that cannot be exactly calculated for the moment but will almost certainly be lengthy. In view of the intrinsic complexity of this dispute and of the circumstances as described, it is essential that the Ministry of Foreign Affairs create a specific unit, with the rank of Subdirectorate General, called the "Office for Gibraltar", affiliated to the Directorate General of External Policy for Europe, with sufficient personnel to deal with an issue of great political importance to Spain – namely the defence of Spain's position in this dispute**.**

– Royal Decree 776/2002, of 26 July, modifies the organic structure of the Ministry of the Presidency (*BOE* 179, 27.7.02).
Note: According to Article 3, the following functions, among others, appertain to the Secretary of State for Communications, subject to the supervision of the Ministry of

the Presidency: the preparation and diffusion of communiqués from the Government and the President of the Government, and the direction of information services of the General State Administration in Spain and abroad.

– Royal Decree 1428/2002, of 27 December, partially amending Royal Decree 1473/2000, of 4 August, sets out the basic organic structure of the Ministry of Foreign Affairs (*BOE* 311, 28.12.02).
Note: The Directorate General responsible for matters of international security and disarmament acquires functions relating to the international combating of terrorism. The Office of the Secretary of State for Foreign Affairs now includes a Directorate General for Security, Disarmament and International Terrorism.

2. **Diplomatic Relations**

– Royal Decree 3450/2000, of 22 December, amends Royal Decree 6/1995, of 13 January, on remuneration of civil servants posted abroad (*BOE* 10, 11.1.01).

– Order of 20 March 2001, made by the Ministry of Finance, establishes limits on excesses and exemptions in respect of diplomatic and consular rules or International Organizations, as referred to in the first final provision of Royal Decree 3485/2000, 29 December (*BOE* 126, 26.5.01).

– Royal Decree 1124/2001, of 19 October, includes unemployment benefit in the protective action provided in Royal Decree 2234/1981, of 20 August, whereby Spanish contract personnel working for the Spanish Administration abroad are included in the general Social Security scheme (*BOE* 260, 30.10.01).

– Royal Decree 1442/2001, of 21 December, creates Tourist Offices at the Spanish Permanent Diplomatic Missions in the People's Republic of China and the Republic of Poland (*BOE* 15, 17.1.02).
Note: Spain needs to expand its network of Tourist Offices in order to address the diversification of markets and the growing presence of Spanish tourist firms abroad.

– Royal Decree 6/2002, of 11 January, creates the Spanish Permanent Diplomatic Mission in the Republic of Cyprus (*BOE* 11, 12.1.02).
Note: According to the Royal Decree, because of its geographical situation in the Eastern Mediterranean, an area of vital interest to Europe, Cyprus is of crucial importance to European and international politics. Therefore, given that Cyprus will soon be a member of the European Union and that its political and economic relations with Spain are excellent, it would be desirable for Spain to open a Permanent Diplomatic Mission there.

– Order DEF/264/2002, of 5 February, creates five Economic-Administrative Sections abroad (*BOE* 39, 14.2.02 and 58, 8.3.02).

Note: With full integration in NATO structures and growing Spanish participation in international defence bodies and programmes, there has been a significant increase in the number of overseas bodies for which funds must be administered, and in the numbers of Defence Ministry personnel allocated to them. Sections have therefore been created in Brussels, Naples Washington, Lisbon and Strasbourg.

– Royal Decree 510/2002, of 10 June, creates the post of Information Attaché at the Spanish Permanent Diplomatic Mission in the People's Republic of China (*BOE* 149, 22.6.02).

– Royal Decree 916/2002, of 6 September, regulates Defence Attachés (*BOE* 215, 9.9.02).

– Royal Decree 1138/2002, of 31 October, regulates the administration of the Ministry of Education, Culture and Sport abroad (*BOE* 262, 1.11.02).

3. **Consular Relations**

– Royal Decree 3425/2000, of 15 December, on Matriculations of Spanish nationals with Consular Offices abroad (*BOE* 3, 3.1.01).

– Orders creating the following Honorary Offices:

Argentina:
– Viedma (Rio Negro Province) and suppressing the Honorary Consular Offices at San Fernando, Balcarce, Santa Cruz, Zapala and San Antonio Oeste (Argentina) (*BOE* 185, 3.8.01).

Austria:
– St. Pölten (*BOE* 237, 3.10.02).

Belgium:
– Liège and supresses the Honorary Viceconsulate at Charleroi (*BOE* 277, 19.11.02).

Brasil:
– Joao Pessoa (*BOE* 31, 5.2.02, 58, 8.3.02, and 128, 29.5.02).

Egypt:
– Suppresses the Honorary Consular Offices at Suez (Egypt) (*BOE* 185, 3.8.01).

Latvia:
– Riga (*BOE* 84, 7.4.01).

Moldova:
– Chisinau (*BOE* 31, 5.2.02 and 127, 28.5.02).

Mongolia:
– Ulan-Bator (*BOE* 181, 30.7.02).

Norway:
– Tromso (*BOE* 113, 11.5.01 and 123, 23.5.01).

Paraguay:
– Encarnacion and Ciudad del Este (Paraguay) and suppresses the Honorary Consular Office at Concepcion (*BOE* 71, 23.3.01).

Philippines:
– Davao and Zamboanga (Republic of Philippines) (*BOE* 302, 18.12.01).

Poland:
– Cracow and Gdansk (Poland) (*BOE* 219, 12.9.01).

Slovak Republic:
– Kosice (Slovak Republic) (*BOE* 31, 5.2.02 and 129, 30.5.02).

USA:
– Durham (North Carolina) (*BOE* 146, 19.6.01).

– Order of 15 October 2001, made by the Ministry of Foreign Affairs, creates a Consular Office at Lagos (Federal Republic of Nigeria) as a General Consulate (*BOE* 261, 31.10.01).

– Order of 8 November 2001, made by the Ministry of Foreign Affairs, suppresses the Spanish General Consulate in Berlin (Federal Republic of Germany) (*BOE* 285, 27.11.01).

– Order of 23 January 2001, made by the Ministry of Foreign Affairs, modifies the jurisdiction of the Spanish General Consulates in Miami and Washington (*BOE* 29, 2,2,01).

– Order of 7 December 2001, made by the Ministry of Foreign Affairs, modifies the jurisdiction of the Honorary Consular Office at Duala (Cameroon) (*BOE* 303, 19.12.01).

– Order AEX/1679/2002, of 14 June, suppresses the Spanish Honorary Viceconsulate at Port-Said (Egypt) (*BOE* 159, 4.7.02).

– Order AEX/2487/2002, of 10 September, creates a Consular Office, with the category of Consulate, at Quito (Republic of Ecuador) (*BOE* 243, 10.10.02).

VII. TERRITORY

1. **Frontiers**

– Order of 5 February 2001, of the Ministry of the Interior, suppresses various border posts in the provinces of Navarra, Huesca, Ourense, Zamora, Cáceres and Badajoz (*BOE* 41, 16.2.01).

Note: Formal suppression of border posts: Vera de Bidasoa, Errazu and Echalar in the province of Navarra; Sallent de Gállego and Bielsa in the province of Huesca; Feces de Abajo and Puentes Barjas in the province of Ourense; Fermoselle, Calabor and Torregamones in the province of Zamora; Piedras Albas in the province of Cáceres; and Villanueva del Fresno in the province of Badajoz.

2. **Air**

– Royal Decree 57/2002, of 18 January, implements the Air Traffic regulations (*BOE* 17, 19.1.02).
Note: Amends the Regulations on Air Traffic adopted by Royal Decree 73/1992, of 31 January, according to Act 48/1960, of 21 June, on Air Traffic.

– Order PRE/1671/2002, of 1 July, partially amends the Order of 18 January 1993 on prohibited and restricted flight zones (*BOE* 159, 4.7.02).
Note: As a consequence of 11 September 2001, changes were made in the structure of airspace as defined in the Order of 18 January 1993 on prohibited and restricted flight zones, in order to augment the protection of certain buildings and zones close to Madrid.

VIII. SEAS, WATERWAYS, SHIPS

1. **Sea**

– Legislative Royal Decree 6/2002, of 4 October, authorizes the Finance Ministry to enter into transactional agreements between the Spanish State, the International Oil Pollution Compensation Fund of 1971 and the parties damaged by the "Aegean Sea" oil spillage, granting an extraordinary credit of 63,625,721.36 euros (*BOE* 239, 5.10.02).

– This was recognized as Act by decision of Congress on 17 October 2002 (*BOE* 257, 26.10.02).
Note: The vessel "Aegean Sea", operating under the Greek flag, ran aground at La Coruña on 3 December 1992, spilling some 80,000 tonnes of oil. The injured parties instituted criminal proceedings as a result of which, Number 2 Criminal Court of A Coruña (on 30 April 1996) and the Provincial High Court of A Coruña (18 June 1997) delivered judgments ordering the Master of the vessel "Aegean Sea" and the Pilot of the port of La Coruña, as directly and jointly responsible for the spillage, to compensate the injured parties. They further declared that the United Kingdom Mutual Steamship Assurance Association and the International Oil Pollution Compensation Fund of 1971 (IOPCF) were liable for the damages caused by the shipwreck, and that their liability was joint and several. Finally, they convicted the owner of the "Aegean Sea" ("Aegean Sea Traders Corporation") and the Spanish State, as subsidiaries in the third-party liability of the ship's master and the port pilot. The judgment

sets specific amounts of compensation for certain complainants, but in most cases it defers the determination of third-party liability in respect of the offence to the enforcement procedure. Also, other injured parties opted to seek compensation through the civil courts upon conclusion of the criminal proceedings. The fact is that at the present moment, ten years after the event, not only have third-party liabilities not been quantified, but it is impossible to predict the outcome of the proceedings. The Royal Decree-Law authorizes the Government, through the Finance Ministry, to take action to compensate claims currently pending in the civil courts or pending enforcement by the criminal courts**.**

2. **Fisheries**

– Act 3/2001 of 26 March, State Sea Fisheries Act (*BOE* 75, 28.3.01 and 174, 21.7.01). *Note:* Fisheries are subject to regulation by four different legal systems: Public International Law, European Community Law, State Law and Autonomous Community Law.

Article 2 of the Act, constrained to some extent by the distribution of competences between the State laws and Autonomous Community laws, makes a distinction between, on the one hand external waters – i.e., maritime waters under Spanish jurisdiction or sovereignty beyond the base lines, as provided in Act 20/1967, of 8 April, on extension of jurisdictional waters to twelve miles for fishery purposes; and in Royal Decree 2510/1977, of 5 August, on jurisdictional waters and straight base lines for the delimitation thereof – and on the other hand internal waters, that is maritime waters under Spanish jurisdiction or sovereignty situated within the base lines.

According to Article 4, the provisions of the Act apply, in external waters as above defined, to:

a) Spanish vessels in the following waters: 1.1 Waters coming under Spanish sovereignty or jurisdiction, including territorial waters, the exclusive economic zone and the Mediterranean fishery protection zone, with the exception of interior waters as regulated by Act 10/1977, of 4 January, on territorial waters; by Act 15/1978, of 20 February, on the exclusive economic zone, and by Royal Decree 1315, of 1 August, establishing a fishery protection zone in the Mediterranean Sea. 2.1 Waters coming under the sovereignty or jurisdiction of the European Union Member States, as provided in the Community regulations. 3.1 Waters coming under the sovereignty or jurisdiction of third countries, without prejudice to the national laws of such countries and the provisions of International Treaties, Agreements or Conventions. 4.1 The High Seas, as currently established in International Law and in the applicable provisions of International Treaties, Agreements or Conventions.
b) Community vessels in waters coming under Spanish sovereignty or jurisdiction, as provided in European Union regulations.
c) Vessels of third countries in waters coming under Spanish sovereignty or jurisdiction, as provided in European Union regulations and in rules applicable under International Treaties, Agreements or Conventions.

Pursuant to Article 5, policy on sea fishing in external waters shall be implemented in the form of:

a) Measures for the conservation of fishery resources, through regulation of fishing tackle, regulation of fishing intensity, seasonal or zonal moratoria, or any other measure deemed appropriate in the light of existing resources;
b) Measures for the protection and regeneration of fishery resources, through the establishment of protected areas and measures to prevent activities that may be harmful to fishery resources;
c) Measures for improved fishery management, as a means of developing the industry through rationalization of fishing activity;
d) Regulation of non-professional fishing inasmuch as it affects resources; e) Establishment of appropriate systems for control and inspection of fishing activities.

– Royal Decree 941/2001, of 3 August, establishes rules for the protection of fishery resources in the Cabrera Archipelago Sea/Land National Park (*BOE* 214, 6.9.01).
Note: When a National Park includes external waters – that is, maritime waters under Spanish jurisdiction or sovereignty lying outside the base lines – the Government will establish rules for the protection of fishery resources as appropriate for these waters alone, subject to the criteria set forth in the Master Plan for the National Parks network. This Royal Decree establishes rules for the protection of fishery resources in the Cabrera Archipelago Sea/Land National Park.

– Royal Decree 1134/2002, of 31 October, on application of sanctions in matters of sea fishing to Spaniards employed in vessels flying flags of convenience (*BOE* 262, 1.11.02).
Note: The relevant part of the Royal Decree is Article 2: Liability for breach of International Law.

1. Failure to comply with obligations in respect of sea fishing, and in particular those established in the 1982 United Nations Convention on the Law of the Sea or the conservation and management measures adopted by regional fishery organizations of which the European Union or Spain is a contracting or cooperating party, by any natural or legal person having Spanish nationality who has a legal tie with a vessel coming under the terms of Act 3/2001 Title V, when the flag State fails to sanction in exercise of its jurisdiction over such breach.

2. The flag State shall be deemed not to have exercised its sanctioning powers if upon the elapse of three months as of authenticated official notification of the breach, it fails to reply or else has not taken the steps necessary to produce such a sanction.

According to Article 3, on classification of countries and territories as flags of convenience: 1. Countries and territories shall be classified as operating flags of convenience if they are considered by regional fishery organizations to be non-cooperative within the areas regulated by them, according to the criteria established by these organizations. 2. Stateless vessels shall in any event be considered to be operating under flags of convenience.

3. **Ships**

– Order FOM/3056/2002, of 29 November, lays down the full procedure for stopovers of vessels in ports of general interest (*BOE* 291, 5.12.02).

– Royal Decree-Law 9/2002, of 13 December, introduces measures for tankers carrying hazardous or pollutant goods (*BOE* 299, 14.12.02).
Note: In response to the serious accident caused by the vessel "Prestige" in Spanish waters close to the coast of Galicia, Article 1 prohibits entry in Spanish ports, terminals or anchorages of single-hull oil-tankers, under whatever flag, carrying heavy fuel oil, tar, asphaltic bitumen or heavy crude oil.

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

1. **Fauna and Flora**

– Royal Decree 942/2001, of 3 August, establishes a programme for the monitoring and verification of tuna caught in the Area of the Agreement on the International Dolphin Conservation Programme (AIDCP) (*BOE* 188, 7.8.01 and 243, 10.10.01).

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

1. **Cultural Cooperation**

– Royal Decree 3424/2000, of 15 December, approving the Statute of the Spanish International Cooperation Agency (*AECI*), brought the Directorate General of Cultural and Scientific Relations under the aegis of the *AECI*; as a result, the planning and management of dissemination of Spanish culture in countries not coming within the scope of the *AECI* is the direct responsibility of the office of the Secretary of State for International Cooperation and Iberoamerica, as amended accordingly in Article 13 section 6 of Royal Decree 1473/2000, of 4 August.

– Royal Decree 813/2001, of 13 July, approves the Regulations of the Spanish Academy in Rome (*BOE* 168, 14.7.01 and 183, 1.8.01).
Note: Since its creation in 1873, the Spanish Academy in Rome has played a fundamental role in the training of several generations of Spanish artists and intellectuals. Today, the Spanish Academy in Rome is still an important instrument of Spanish overseas cultural policy.

– Royal Decree 1137/2002, of 31 October, regulates diplomas in Spanish as a foreign language (*BOE*, 268, 8.11.02).

2. **Economic Cooperation**

– Legislative Royal Decree 1/2001, of 19 January, approves the grant of a guarantee to the Argentine Republic and raises the limit on approval by the Cabinet of transactions chargeable to the Development Assistance Fund (*BOE* 18, 20.1.01).
Approved by the Congress, 8 February 2001 (*BOE* 39, 14.2.01).
Note: In order to help stabilize its international financial position, in cooperation with international financial institutions, the Government was authorized during the 2001 financial year to issue a guarantee of up to one billion US dollars, plus the relevant financial charges, for a period not exceeding five years, to secure the line of financing to be set up by Spain for the Argentine Republic, within the framework of the programme of economic adjustment and financial assistance agreed between the latter and the International Monetary Fund.

– Royal Decree 281/2001, of 19 March, on competences, functions, composition and organization of the Development Cooperation Council (*BOE* 68, 20.3.01).
Note: The Development Cooperation Council was created and regulated by Royal Decree 795/1995, of 19 May, in implementation of the twenty-ninth additional provision of Act 42/1994, of 30 December, on Fiscal, Administrative and Social Measures. According to Article 22 of Act 23/1998, of 7 July, on International Development Cooperation, the Development Cooperation Council is a consultative body for the General State Administration and participates in the definition of international development cooperation policy; it is affiliated to the Ministry of Foreign Affairs through the office of the Secretary of State for International Cooperation and Iberoamerica.

3. **Tariffs and Trade Cooperation**

– Resolution of 28 December 2000, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 5, 5.1.01).

– Resolution of 26 January 2001, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 36, 10.2.01).

– Resolution of 27 February 2001, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 64, 15.3.01).

– Resolution of 25 April 2001, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 107, 4.5.01).

– Resolution of 25 June 2001, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 156, 30.6.01).

– Resolution of 25 September 2001, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 236, 2.10.01).

– Resolution of 29 October 2001, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 275, 16.11.01).

– Resolution of 10 December 2001, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 307, 24.12.01).

– Resolution of 17 January 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 22, 25.1.02).

– Resolution of 22 March 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 82, 5.4.02).

– Resolution of 25 April 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 115, 14.5.02).

– Resolution of 31 May 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 142, 14.6.02).

– Resolution of 25 June 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 155, 29.6.02).

– Resolution of 29 July 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 185, 3.8.02).

– Resolution of 25 September 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 241, 8.10.02).

– Resolution of 25 October 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 266, 6.11.02).

– Resolution of 5 December 2002, passed by the Spanish Customs and Special Taxes Department of the State Agency for Tax Administration, updates the Applicable Integrated Tariff (TARIC) (*BOE* 307, 24.12.02).

4. **Financial and Tax Cooperation**

– Order of 20 March 2001, issued by the Ministry of Finance, clarifies the inclusion of the Tax on Buildings, Installations and Works in section 1 point B) of Article IV of the Agreement on Economic Affairs between the Spanish State and the Holy See, of 3 January 1979 (*BOE* 144, 16.6.01).

5. **Air Traffic and Transport**

– Legislative Royal Decree 14/2001, of 28 September, establishes State-backed reinsurance of risks relating to war and terrorism that may affect air navigation (*BOE* 234, 29.9.01).
Approved by the Congress on 31 October 2001 (*BOE* 269, 9.11.01).
Note: The events of 11 September 2001 in the USA produced a drastic reduction in the capacity of the aviation insurance market, which led to changes of criterion in the coverage offered by reinsurers as the ultimate guarantors of such risks. This produced a sharp retraction of cover tranches, as a result of which airline and infrastructure management companies were unable to cover their potential risks and hence to operate normally. Given this world-wide context, the ECOFIN has opted to authorize the European Union States to provide such coverage temporarily in situations of force majeure.

– Order FOM/3316/2002, of 20 December, replaces annex 1 of Decree 1675/1972, of 26 June, on air navigation assistance tariffs (Eurocontrol) and modifies the late payment interest rate on payment of such tariffs (*BOE* 313, 31.12.02).

6. **Labour, Social Security and Immigration**

– Royal Decree 367/2001, of 4 April, regulates the composition, powers and rules of functioning of the Forum for Social Integration of Immigrants (*BOE* 83, 6.4.01).
Note: By Resolution of 2 December 1994, the Cabinet approved a Plan for Social Integration of Immigrants, which provided for the creation of a Forum for Social Integration of Immigrants. Royal Decree 490/1995, of 7 April, later amended by Royal Decree 2816/1998, of 23 December, established the Forum as a body affiliated to what was then the Ministry of Social Affairs. Organic Act 4/2000, of 11 January, on Rights and Freedoms in Spain and their social integration, as amended by Organic Act 8/2000, of 22 December, regulates the Forum for Social Integration of Immigrants and states the need of implementation as regards its composition, powers, rules of functioning and administrative affiliation. Article 70 of the cited Organic Act defines the Forum as a consultative body to furnish information and advice on matters of

immigrant integration; it is to be a tripartite body containing a balanced mix of representatives of public authorities, immigrants' associations and supporting social organizations, the latter including trade unions and employers' organizations having representation and interest in the immigrant community.

– Royal Decree 344/2001, of 4 April, creates the National Council for Immigration Policy (*BOE* 83, 6.4.01), amended by Royal Decree 143/2002, of 10 of June (*BOE* 143, 15.6.02).
Note: The purpose of the National Council for Immigration Policy is to coordinate actions by public authorities having competences or other means of intervening in immigrant integration policy. It is a collegiate body for coordination and cooperation between the General State Administration, Autonomous Communities and Local Authorities, affiliated to the Ministry of the Interior.

– Royal Decree 345/2001, of 4 April, regulates the Permanent Immigration Observatory (*BOE* 83, 6.4.01).
Note: The Permanent Immigration Observatory is a collegiate body whose task is to gather, analyse and examine the reality of immigration in quantitative and qualitative terms, and to publicize that information. Its ultimate object is to ascertain trends and evolution of immigration and to draw up proposals for the channelling of migratory flows and the integration of alien residents. It is affiliated to the Ministry of the Interior through the Government Delegation for Aliens and Immigration.

7. **Health and Relief Cooperation**

– Royal Decree 775/2002, of 26 July, creates a Spanish Committee for the European Year of Disabled People (*BOE* 206, 28.8.02).

8. **Recognition of Qualifications**

– Order of 20 March 2001, issued by the Ministry of Education, Culture and Sports, regulates the system of recognition of basic and secondary studies undertaken in countries signatory to the "Andrés Bello" Convention as equivalent to Spanish Compulsory Secondary Education and Baccalaureate as established by Organic Act 1/1990, of 3 October, on General Regulation of the Education System (*BOE* 86, 10.4.01).

– Order of 20 March 2001, issued by the Ministry of Education, Culture and Sports, regulates the system of recognition of studies undertaken in Switzerland as equivalent to Spanish Compulsory Secondary Education and Baccalaureate as established by Organic Act 1/1990, of 3 October, on General Regulation of the Education System (*BOE* 86, 10.4.01).

– Order of 20 March 2001, issued by the Ministry of Education, Culture and Sports, regulates the system of recognition of studies undertaken in Germany as equivalent

to Spanish Compulsory Secondary Education and Baccalaureate as established by Organic Act 1/1990, of 3 October, on General Regulation of the Education System (*BOE* 262, 1.11.01).

– Order of 20 March 2001, issued by the Ministry of Education, Culture and Sports, regulates the system of recognition of studies undertaken in Belgium as equivalent to Spanish Compulsory Secondary Education and Baccalaureate as established by Organic Act 1/1990, of 3 October, on General Regulation of the Education System (*BOE* 262, 1.11.01).

– Order of 20 March 2001, issued by the Ministry of Education, Culture and Sports, regulates the system of recognition of studies undertaken in the Netherlands as equivalent to Spanish Compulsory Secondary Education and Baccalaureate as established by Organic Act 1/1990, of 3 October, on General Regulation of the Education System (*BOE* 262, 1.11.01).

– Royal Decree 411/2001, of 20 April, excludes the profession of general nurse with speciality from the annexes in Royal Decree 1665/1991, of 25 October, on recognition of higher education qualifications issued in European Union States and other States that are Parties to the Agreement on the European Economic Area, which require at least three years of training at higher level (*BOE* 96, 21.4.01).

– Order ECD/272/2002, of 11 November, applies the provisions of Royal Decree 86/1987, of 16 January, regulating the conditions for recognition of foreign higher qualifications (*BOE* 40, 15.2.02).

– Order ECD/3305/2002, of 16 December, modifies the Orders of 14 March 1988 and 30 April 1996 for the application of the provisions Royal Decree 104/1988, of 29 January, on recognition and equivalence of foreign non-university qualifications and studies (*BOE* 311, 28.12.02).

XII. INTERNATIONAL ORGANIZATIONS

– Royal Decree 92/2001, of 2 January, regulates the Interministerial Commission to Negotiate in the World Trade Organisation (*CIOMC*) (*BOE* 40, 15.2.01 and 228, 22.9.01).
Note: Royal Decree 295/1995, of 24 February, created the Interministerial Commission to negotiate in the World Trade Organisation (*CIOMC*), whose task is to coordinate the viewpoints of the various Ministries involved in aspects relating to their respective competences and so facilitate the definition of a Spanish position in WTO negotiations.

– Act 1/2001, of 13 March, authorizes the Kingdom of Spain to participate in the eighth increase in the resources of the African Development Fund (*BOE* 64, 15.3.01).

Note: The Spanish contribution amounts to 53,022,242.76 euros, according to Resolution F/BG/99/09, adopted on 30 of June 1999.

– Order PRE/513/2002, of 5 March, authorizes NATO International Military Headquarters in Spain to register their official vehicles and issue registration documents for them, and amends annex XVIII of the General Vehicle Regulations, approved by Royal Decree 2822/1998, of 23 December (*BOE* 59, 9.3.02).

– Royal Decree 1289/2002, of 5 December, creates the Unit for Coordination of Spanish Participation in the United Nations Security Council (*BOE* 292, 6.12.02).
Note: This Decree creates, a specific Unit, only for the duration of Spain's seat on the Security Council, with the necessary human and material resources, whose task, under the direction of the Ministry of Foreign Affairs, is to plan and coordinate all activities necessitated by Spain's presence on the Security Council.

XIII. EUROPEAN UNION

– Royal Decree 779/2001, of 5 July, creates a Council for the debate on the Future of the European Union (*BOE* 167, 13.7.01).
Note: The essential purpose of the Council for the Debate on the Future of the European Union, which reports to the General Secretariat of the Presidency of Government, is to promote, organize and develop, at a national level, debate on the process of reform of the European Union, which will culminate in a Declaration on the Future of the Union, annexed to the Treaty of Nice at an Intergovernmental Conference scheduled for 2004. The Council will operate independently from the Government, but it may at any time require the cooperation of the various organs of the General State Administration and, as necessary, of other public administrations and institutions, as currently provided in law, for the discharge of its functions. These functions are: a) to promote and organize general and sectorial debates at a national level on the future of the European Union; b) to adopt such strategies as will lead to the best possible conduct of debates, and for that purpose to make the appropriate contacts with public institutions, universities and research centres, and private entities; c) to act as a conduit between such institutions and society at large, with a view to identifying states of opinion that can be used as input for the debates; d) to gather the information necessary for the organization of the debates, and to that end to make contacts and hold such meetings as may be necessary with Institutions and Organs of the European Union, with the Congress and the Senate and with the Institutions of the Autonomous Communities; e) to compile reports on the progress and the results of the debate and to bring these to the notice of State institutions and the general public.

– Organic Act 3/2001, of 6 November, authorizes the ratification by Spain of the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, done at Nice on 26 February 2001 (*BOE* 267, 7.11.01).

– Royal Decree 911/2002, of 6 September, partially modifies the structure of the Support Unit for the Organizing Committee of the Spanish Presidency of the European Union (*BOE* 215, 7.9.02).

XIV. RESPONSIBILITY

XV. PEACEFUL SETTLEMENT OF DISPUTES

XVI. COERCION AND THE USE OF FORCE SHORT OF WAR

– Act 8/2002, of 24 April, grants an extraordinary credit of 66,055,348.82 euros for the payment of obligations to the United Nations Organization in respect of peacekeeping operations outstanding from previous years (*BOE* 99, 25.4.02).
Note: United Nations Resolution 55/235, of 22 December 2000, laid down a new scale of assessments for a period of nine years, replacing the previous scale which had been in existence for twenty-seven years. Under this new scale, Spain will contribute in exactly the same proportion as it does to the general UN budget. Thus, according to Resolution 55/5, of 22 December 2000, Spain's obligatory contribution to the general UN budget and the budget for peacekeeping operations will amount to 2.534 per cent of the total in 2001, 2.539 per cent in 2002, and 2.519 per cent in 2003. For the year 2000, Spain's contribution was 2.591 per cent, as stipulated in Resolution 52/215, of 22 December 1997.

XVII. WAR AND NEUTRALITY

– Royal Decree 1315/2001, of 30 November, regulates authorizations for the importation and introduction of chemicals referred to in Lists 1 and 2 of the Convention of 13 January 1993 on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (*BOE* 303, 19.12.01).
Note: Royal Decree 491/1998, of 27 March, approving the regulations on foreign trade in defence and dual use equipment, updated the regulation of exportation/despatch and importation/introduction of defence material and completed and implemented the regulations on exportation/despatch of dual-use products within the framework of the new Community legislation. Because these regulations only provided for control of exportation and importation/introduction of weapons of war, in compliance with the first additional provision of Act 49/999, of 20 December, on measures for the control of chemicals susceptible of diversion for use in the manufacture of chemical weapons, controls had to be introduced for importation and introduction in respect of chemicals included in Lists 1 and 2 of the annex on chemicals of the Convention of 13 January 1993 and not included in the said List of Weapons of War.

– Order DEF/610/2002, of 8 March, creates an International Demining Centre (*BOE* 69, 21.3.02).

Note: This is a specific Centre having sufficient capability to provide basic instruction on self-protection against mines, munitions and home-made devices, and sufficient training to enable any volunteer citizens to undertake demining tasks, within the framework of peace initiatives and humanitarian aid in the service of the international community.

Spanish Municipal Legislation Concerning Matters of Private International Law, 2001 and 2002

This compilation was prepared at the Law School of the *Universitat de les Illes Balears* by Dr. Luis Garau Juaneda, Professor of Private International Law, Dr. Federico F. Garau Sobrino, Lecturer in Private International Law and Silvia Feliu Álvarez de Sotomayor, Assistant Lecturer in Private International Law.

I. SOURCES OF PRIVATE INTERNATIONAL LAW

II. INTERNATIONAL JURISDICTION

– Resolution of 28 December 2000, by the General Technical Secretariat on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters done at Lugano on 16 September 1988 (published in the Official Gazette of the Spanish State on 20 October 1994) (*BOE* 18, 20.1.01).
Note: The Spanish Government communicated its acceptance of the inclusion of Gibraltar in the 1988 Lugano Convention in the terms agreed to with the United Kingdom and expressed in this provision.

– Resolution of 20 February 2001, of the General Technical Secretariat on the agreement relating to the accession of the Kingdom of Spain and the Republic of Portugal to the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters and to the Protocol regarding its interpretation by the Court of Justice with the adaptation introduced by the Convention relative to the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the adaptations introduced by the Convention relative to the accession of the Hellenic Republic done in Donostia (San Sebastian) on 26 May 1989 (published in the *BOE* on 28 January 1991 (*BOE* 58, 8.3.01).
Note: The Spanish Government removed the reservation it had presented in 1998 and accepted the inclusion of Gibraltar in the 1968 Brussels Convention in the terms agreed to with the United Kingdom and expressed in this provision.

III. PROCEDURE AND JUDICIAL ASSISTANCE

– Act 53/2002, of 30 December, on fiscal, administrative and social order measures (*BOE* 313, 31.12.02).
Note: Pursuant to Article 35 the fiscal year fee of the jurisdictional authority in orders involving civil matters and suits under administrative law is created.

Spanish Yearbook of International Law, Volume VIII, 2001–2002

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

Also see above Section II (International Jurisdiction) in this chronicle on Private International Law.

V. INTERNATIONAL COMMERCIAL ARBITRATION

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

VII. NATIONALITY

– Royal Decree 3425/2000, of 15 December, on the inscription of Spanish nationals in the Consular office registries abroad (*BOE* 3, 3.1.01).
Note: Pursuant to Article 2 of this Royal Decree, Spanish nationals who habitually reside abroad and those that transfer their habitual residence outside of Spain must register as residents (see Article 4) or as non residents (see Article 5) at the Consular Office Registry or at the Consular Section of the diplomatic mission corresponding to their place of abode.

VIII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN COMMUNITY

– Error correction of Organic Act 8/2000, of 22 December, on the reform of Organic Act 4/2000, of 11 January, on Rights and Freedoms of aliens in Spain and their Social Integration (*BOE* 47, 23.2.01).
Note: See this same heading in the 1999–2000 edition of this Yearbook.

– Royal Decree 142/2001, of 16 February, setting out the requirements for the standardisation foreseen in transitory provision four of Organic Act 8/2000, of 22 December on the Reform of Organic Act 4/2000, of 11 January, on the rights and freedoms of aliens in Spain and their social integration (*BOE* 44, 20.3.01).
Note: As regards Organic Act 8/2000, see this same heading in the 1999–2000 edition of this Yearbook.

– Order of 20 March 2001, regulating the equivalency scheme of studies carried out in Switzerland with those corresponding to Spanish Compulsory Secondary Education studies and Baccalaureate (pre-university) studies established in accordance with Organic Act 1 /1990, of 3 October, on the General Regulation of the Educational System (*BOE* 86, 10.4.01).

– Order of 20 March 2001, regulating the equivalency scheme of elementary and secondary level studies carried out in the signatory countries of the "Andrés Bello"

Agreement with Spanish Compulsory Secondary Education studies and Baccalaureate (pre-university) studies established under Organic Act 1/1990, of 3 October, on the General Regulation of the Educational System (*BOE* 86, 10.4.01).

– Royal Decree 344/2001, of 4 April, creating the *Consejo Superior de Política de Inmigración* (High Council on Immigration Policy) (*BOE* 83, 6.4.01).
Note: The aim of this body, provided for in Article 68 of Organic Act 4/2000 on the rights and freedoms of aliens in Spain, is to guarantee the proper coordination of public administration initiatives as regards the integration of immigrants.

– Royal Decree 345/2001, of 4 April, regulating the *Observatorio Permanente de la Inmigración* (Standing Immigration Observatory) (*BOE* 83, 6.4.01).
Note: This body is responsible for the collection of data and the analysis and study of the breadth and characteristics of immigration as well as the dissemination of the information obtained with a view to identifying trends and developments and to preparing proposals the aim of which is to channel migratory flows and to integrate foreign residents (Article 1).

– Royal Decree 367/2001, of 4 April, regulating the composition, competencies and operational regime of the *Foro para la Integración Social de los Inmigrantes* (Forum for the Social Integration of Immigrants) (*BOE* 83, 6.4.01).
Note: Pursuant to Article 70 of Organic Act 4/2000 on the rights and freedoms of aliens in Spain, this forum is an advisory, information and consultation body as regards the integration of immigrants. It is comprised of representatives of the public administrations, immigrant associations and social support organisations (interested trade unions and business organisations established in the field of immigration).

– Resolution of 17 April 2001, of the Government Delegation for Alien and Immigration Affairs calling for the publication of the agreement reached by the Council of Ministers of 30 March 2001 approving the Global Programme on the Regulation and Coordination of Alien and Immigration Affairs (*BOE* 101, 27.4.01).

– Royal Decree 411/2001, of 20 April, excluding the profession of specialising generalist nurse from the annexes of Royal Decree 1665/1991, of 25 October, on the recognition of higher education degrees issued in European Union countries and other countries party to the European Economic Area Agreement requiring a minimum of three years of higher education (*BOE* 96, 21.4.01).
Note: As regards Royal Decree 1665/1991, see this same heading in the 1991 edition of this Yearbook.

– Royal Decree 543/2001, of 18 May, on access to public employment with the Central Government and its public organisations of the nationals of other States to which the right to free movement of workers applies (*BOE* 130, 31.5.01; error correction *BOE* 237, 3.10.2001).

– Royal Decree 658/2001, of 22 June, approving Spain's General Statute on the Legal Profession (*BOE* 164, 10.7.01).
Note: Article 13, section 1 letter a) states that to become a member of a Lawyer's Association one of the requirements is to possess Spanish nationality or the nationality of a European Union Member State or a member state of the European Economic Area unless otherwise stipulated in international treaties or agreements or by virtue of legal exemption. Section 2, letter a) of that same Article provides for the possible legal establishment of formulae to be recognised by the rest of the European Union countries guaranteeing standards of preparation for the practice of the profession. Moreover, Article 17, section 1 states that any lawyer who is a member of any Lawyer's Association in Spain may freely render services throughout all national territory, in the rest of the European Union Member States and in other countries in accordance with the regulations in force in this respect. Consequently, lawyers from other countries may practice in Spain in compliance with applicable regulations.

The judgement delivered by Court 3, Section 6 of the Supreme Court on 3 March 2003 declared Article 63, section 1, letter f) of Royal Decree 658/2001 null and void.

– Royal Decree 784/2001, of 6 July, amending the annexes to Royal Decree 1396/1995 of 4 August, amended in turn by Royal Decree 1754/1998, of 31 July, to incorporate into the Spanish legal system European Commission Directive 2000/5/EC, of 25 February 2000, on a second, general recognition system for professional training (*BOE* 171, 18.7.01).
Note: See this same heading in the 1995–1996 and 1998 editions of this Yearbook.

– Royal Decree 864/2001, of 20 July, approving the Regulation on the enforcement of Organic Act 4/2000, of 11 January, on the rights and freedoms of aliens in Spain and their social integration amended by Organic Act 8/2000, of 22 December (*BOE* 174, 21.7.01; error correction *BOE* 240, 6.10.01).
Note: See this same heading in the 1999–2000 edition of this Yearbook.

– Royal Decree 865/2001, of 20 July, approving the Regulation on the recognition of the statute on stateless persons (*BOE* 174, 21.7.01).

– Royal Decree 905/2001, of 27 July, amending Royal Decree 1081/1989, of 28 August, regulating the recognition of certificates, diplomas and other academic degrees in the area of Architecture in the Member States of the European Economic Area as well as the effective exercise of the right to set up a practice and the unhindered rendering of services (*BOE* 189, 8.8.01).

– Royal Decree 936/2001, of 3 August, regulating the permanent practice of law in Spain with a professional diploma issued by another European Union Member State (*BOE*, 186, 4.8.01; error correction *BOE* 220, 13.9.01).
Note: This provision is the transposition into the Spanish legal system of European Parliament and Council Directive 98/5/EC the purpose of which is to facilitate the

permanent practice of law in a Member State different from the one issuing the law degree.

– Order of 25 October 2001, regulating the equivalency regime applicable to studies carried out in the Netherlands with those corresponding to Spanish Compulsory Secondary Education studies and Baccalaureate (pre-university) studies established under Organic Act 1/1990, of 3 October, on the General Regulation of the Educational System (*BOE* 262, 1.11.01).

– Order of 25 October 2001, regulating the equivalency regime applicable to studies carried out in Belgium with those corresponding to Spanish Compulsory Secondary Education studies and Baccalaureate (pre-university) studies established under Organic Act 1/1990, of 3 October, on the General Regulation of the Educational System (*BOE* 262, 1.11.01).

– Order of 25 de October 2001, regulating the equivalency regime applicable to studies carried out in Germany with those corresponding to Spanish Compulsory Secondary Education studies and Baccalaureate (pre-university) studies established under Organic Act 1/1990, of 3 October, on the General Regulation of the Educational System (*BOE* 262, 1.11.01).

– Royal Decree 1316/2001, of 30 November, regulating the reduction of regular air and sea transport fares for residents of the Autonomous Communities of the Canary Islands, the Balearic Islands and the cities of Ceuta and Melilla (*BOE* 300, 15.12.01; error correction *BOE* 28, 1.2.02).
Note: Article 1 establishes that the beneficiaries of said reductions shall be citizens of Spain as well as of any other European Union Member State or of other States party to the European Economic Area Agreement that accredit their status as residents of the Canary Islands, Balearic Islands, Ceuta or Melilla. Pursuant to Article 3, the resident status of the above mentioned citizens who are not Spanish nationals shall be determined by means of their residency card showing the legal domicile giving rise to the right to fare reduction.

– Act 24/2001, of 27 December, on fiscal, administrative and social order measures (*BOE* 313, 31.12.01).
Note: Additional provision eighteen amends Article 10 of the Notary Public Act as regards conditions for access and notary public entrance examinations, requiring Spanish nationality or that of any other European Union country (section 1).

– Resolution of 11 January 2002, of the Deputy Secretariat calling for the publication of the agreement reached by the Council of Ministers on 21 December 2001 determining the contingent of foreign non-Community workers for the year 2002 (*BOE* 11, 12.1.02; error correction *BOE* 58, 8.3.02).

– Order PRE/237/2002, of 8 February, dictating general instructions on the liaison visa number as regards alien affairs (*BOE* 37, 12.2.02).
Note: The liaison visa number (Spanish initials NEV) is a code provided for under Article 9 of the Regulation on the enforcement of Organic Act 4/2000 on the Rights and Freedoms of Aliens in Spain (see this same heading in the 1999–2000 edition of this Yearbook) the purpose of which is to facilitate communication between administrative bodies that take part in the issuing of a visa for stay or residence in Spain.

– Order ECD/272/2002, of 11 February, calling for the enforcement of Royal Decree 86/1987, of 16 January, regulating the conditions applicable to the homologation of degrees of higher education issued abroad (*BOE* 40, 15.2.02).
Note: This provision repeals the Order of 9 February 1987 (*BOE* 13.2.87).

– Act 32/2002, of 5 July, amending Act 17/1999, of 18 May, on the Armed Forces Personnel Regime with the aim of giving aliens access to the status of professional land or sea military personnel (*BOE* 161, 6.7.02).
Note: In this same section, see Royal Decree 1244/2002 approving the Regulation providing access to professional land and sea military status to aliens.

– Royal Decree 645/2002, of 5 July, amending Royal Decree 1946/2000, of 1 December regulating the composition and operation of the Inter-ministerial Commission for Alien Affairs (*BOE* 167, 13.7.02).

– Resolution of 30 August 2002, of the Directorate General for Relations with the Justice Administration calling for the administration of aptitude tests in order to gain access to the practice of law and to carry out the duties of solicitor in Spain by citizens of the European Union and of other states party to the European Economic Area Agreement (*BOE* 220, 13.9.02).
Note: This provision is adopted in application of section eleven of the 30 April 1996 Order (see this same heading in the 1996 edition of this Yearbook) implementing Royal Decree 1665/1991, of 25 October, regulating the general system for the recognition of advanced study degrees issued by Member States of the European Union and of the European Economic Area (see this same heading in the 1991 edition of this Yearbook).

– Royal Decree 1051/2002, of 11 October, approving the Regulation of the *Real y Distinguida Orden Española de Carlos III* (Spanish Royal and Distinguished Order of Charles III) (*BOE* 245, 12.10.02).
Note: For the purpose of this chronicle, mention should be made of Article 9 focusing on the awarding of this insignia to individuals of foreign nationality.

– Royal Decree 1244/2002, of 29 November, approving the Regulation on the access of aliens to the status of professional land and sea military (*BOE* 287, 30.11.02).
Note: This provision is based on Act 32/2002 (see this same section above).

– Royal Decree 1281/2002, of 5 December, approving the General Statute on Spanish Court Solicitors (*BOE* 305, 21.12.02).
Note: Article 8 of the General Statute regulates the general conditions to be met to become a court solicitor. One of these conditions is to "possess Spanish nationality or the nationality of one of the Member States of the European Union or of the States party to the European Economic Area Agreement without prejudice to international treaties or conventions or legal dispensation" (letter A). Another of the conditions is to be the "holder of a licentiate degree in Law or of a foreign degree that, in accordance with current legislation, is homologated with the former as well degrees issued by Member States of the European Union allowing for the practice of solicitor duties in said States and that have been recognised in Spain in compliance with applicable provisions" (letter C).

– Order ECD/3305/2002, of 16 December, amending the Orders of 14 March 1988 and of 30 April 1996, calling for the enforcement of Royal Decree 104/1988 of 29 January, on the homologation and validation of non university degrees issued and studies carried out abroad (*BOE* 311, 28.12.02).

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

– Act 12/2001, of the Autonomous Community of Aragon, of 2 July, on childhood and adolescence in Aragon (*BOE* 189, 8.8.01).
Note: For the purpose of this chronicle, attention should be given to Article 75 on international adoption.

X. FAMILY LAW

– Act 14/2002, of 25 July, on the Advancement, Attention to and the Protection of Childhood in Castilla y Leon (*BOE* 197, 17.8.02).
Note: Articles 109 to 111 deal with international adoption.

– Organic Act 9/2002, of 10 December, amending Organic Act 10/1995, of 23 November on the Criminal Code and the Civil Code on the abduction of minors (*BOE* 296, 11.12.02).
Note: Article 2 calls for the introduction of Article 225 bis in the Criminal Code number three of which foresees the application of a more severe sentence (the upper half of the severity range) when the minor is taken out of the country or when some condition is demanded for his/her safe return. Article 5 calls for the amendment of Article 103 of the Criminal Code introducing measures prohibiting departure from national territory unless judicial authorisation is granted or prohibiting the issuance of a passport to the minor or the withdrawal of such passport in cases in which there is a risk of abduction. Article 6 calls for the introduction of identical measures in Article 158.3 of the Civil Code.

XI. SUCCESSIONS

XII. CONTRACTS

– Order of 21 March 2001, in compliance with the Decision of the Commission of the European Communities of 15 de February 2001 (2001/160/EC), on the enforcement of Council Directive 72/166/EC on the standardisation of Member States' legislations as regards civil responsibility insurance applicable to the circulation of motor vehicles as well as control of the obligation to guarantee this responsibility with respect to the inclusion of Cyprus in the Multilateral Guarantee Agreement (*BOE* 81, 4.4.01).
Note: In conjunction with the extension to Cyprus of compulsory insurance coverage with regard to the civil responsibility of motor vehicles habitually operating in Spain (Article 1), it was established that the Spanish Customs authorities would not monitor the civil responsibility insurance of the vehicles habitually operating in Cyprus (Article 2).

– Royal Decree 1098/2001, of 12 October, approving the general Regulation of the Public Administration Contract Law (*BOE* 257, 26.10.01; error correction *BOE* n. 303, 19.12.01, error correction and errata *BOE* 34, 8.2.02).
Note: In the interest of this Chronicle, mention should be made of Article 74 (discretional publicity in the "Official Journal of the European Union") as well as of Annex I (Registries of European Union Member States and signatories of the Agreement on the European Economic Area).

– Act 23/2001, of 27 December, on the General State Budgets for the year 2002 (*BOE* 313, 31.12.01).
Note: Additional provision eighteen sets the maximum limit of coverage for new export credit insurance contracts excluding the modality of the open export management insurance policy (PAGEX) and policy 100 that can be contracted and distributed by the *Compañía Española de Seguros de Crédito a la Exportación, Sociedad Anónima* (Spanish Export Credit Insurance Company, Public Limited Company, *CESCE*) for fiscal year 2002.

– Act 34/2002, of 11 July, on the information society and electronic trade services (*BOE* 166, 12.7.02).
Note: Title IV regulates electronic contracting.

– Act 52/2002, of 30 December, on the General State Budgets for the year 2003 (*BOE* 313, 31.12.02).
Note: Additional provision seventeen sets the maximum limit of coverage for new export credit insurance contracts excluding the modality of the open export management insurance policy (PAGEX) and policy 100 that can be contracted and distributed by the *Compañía Española de Seguros de Crédito a la Exportación, Sociedad*

Anónima (Spanish Export Credit Insurance Company, Public Limited Company, *CESCE*) for fiscal year 2003.

XIII. TORTS

– Royal Decree, 7/2000 of 12 January, approving the Regulation regarding civil responsibility and motor vehicle driver's insurance (*BOE* 12, 13.1.01).
Note: This provision implements the Law on civil responsibility and motor vehicle driver's insurance (former Law on the use and driving of motor vehicles). In this respect, see the note attached to Act 30/1995 of 8 November on the regulation and supervision of private insurance, heading XVIII of the 1995–1996 edition of this Yearbook.

– Act 44/2002, of 22 November, on Financial System Reform Measures (*BOE* 281, 23.11.02).
Note: Article 32, section three creates a new Title III in the Law on Civil Responsibility and Insurance covering the driving of motor vehicles. This title is the transposition into the Spanish legal system of the extra judicial compensation system for traffic accidents foreseen in Directive 2000/26/EC (Fourth Directive on motor vehicle insurance).

XIV. PROPERTY

– Act 17/2001, of 7 December, on Trademarks (*BOE* 294, 8.12.01).
Note: For the purpose of this Chronicle, mention should be made of Article 3 (persons legally authorised to register brands or commercial names), Articles 79 to 83 (international trademarks), Articles 84 to 86 (Community trademarks) as well as Additional Provision fifteen (cooperation of the Spanish Patent and Trademark Office with international organisations and foreign offices. See the following provision.

– Royal Decree 687/2002, of 12 July, approving the Regulation for the enforcement of Act 17/2001, of 7 December, on Trademarks (*BOE* 167, 13.7.02).
Note: Title VII deals specifically with international and community trademarks. See the former provision.

XV. COMPETITION LAW

– Royal Decree 1443/2001, of 21 December, implementing Act 16/1989, of 17 July on the Defence of Competition as regards the control of economic agglomerations (*BOE* 16, 18.1.02).
Note: Article 9 regulates the action of the Competition Defence Service in cases in which the European Commission makes referral of a case with Community dimensions.

XVI. INVESTMENTS AND FOREIGN EXCHANGE

– Royal Decree 343/2001, of 4 April, on the application of the prior administrative authorisation regime to "*Iberia, Líneas Aéreas de España, Sociedad Anónima*" (*BOE* 82, 5.4.01).
Note: The purpose of this provision is to make the purchase of stocks subject to administrative authorisation thus controlling the entrance of partners among the shareholders.

– Order of 28 May 2001, establishing the procedures applicable to tax returns on foreign investment and liquidation as well as procedures for the filing of annual reports and authorisation files (*BOE* 134, 5.6.01).
Note: This provision implements Royal Decree 664/1999, of 23 April, on foreign investment (see this same heading in the 1999–2000 edition of this Yearbook).

– Resolution of 30 May 2001, of the Directorate General for Trade and Investment granting approval for the forms to be used for foreign investment tax returns when the party under obligation to file the return is the investor or the company holding foreign stock (*BOE* 140, 12.6.01).
Note: This provision, adopted in implementation of Royal Decree 664/1999, of 23 April, on foreign investment (see this same heading in the 1999 – 2000 edition of this Yearbook), was annulled by the Resolution of 21 February 2002, delivered by the Directorate General for Trade and Investment (*BOE* 64, 15.3.02).

– Resolution of 31 May 2001, of the Directorate General for Trade and Investment dictating instructions for the filing, by financial intermediaries, of tax returns for foreign investment in the form of negotiable securities quoted on the Spanish Market and for Spanish investment in the form of negotiable securities quoted on foreign markets (*BOE* 141, 13.6.01).
Note: This provision was also adopted in implementation of Royal Decree 664/1999, of 23 April, on foreign investment (see this same heading in the 1999–2000 edition of this Yearbook).

– Order of 9 July 2001, on the regulation of payment methods applicable to foreign trade debt (*BOE* 170, 17.7.01).

– Circular 2/2001, of 30 July, on the declaration of transactions and foreign asset and liability balance sheets corresponding to negotiable securities (*BOE* 184, 2.8.01; error correction *BOE* 191, 10.8.01).

– Royal Decree 945/2001, of 3 August, on the financial management of certain funds earmarked for the purchase of military material and services abroad and international agreements subscribed to by Spain within the jurisdictional scope of the Ministry of Defence (*BOE* 214, 6.9.01).

– Royal Decree 1098/2001, of 12 October, approving the General Regulation of the Public Administration Contract Law (*BOE* 257, 26.10.01; error correction *BOE* 303, 19.12.01, error correction and errata *BOE* 34, 8.2.02).
Note: For the purpose of this Chronicle, mention should be made of Additional Provision eleven (contracts signed and enforced abroad may be paid for in the currency agreed to by the parties).

– Resolution of 20 February 2002, of the Directorate General of the Treasury and Financial Policy regulating the Creators of the Public Debt Market of the Kingdom of Spain (*BOE* 49, 26.2.02).
Note: The purpose of the Creators of the Public Debt Market is to favour liquidity of the Spanish foreign debt market and to cooperate with the Treasury in the foreign and domestic dissemination of State Debt.

– Order ECO/2652/2002, of 24 October, implementing the obligation to communicate transactions with certain countries to the Executive Service of the Commission on the Prevention of Money Laundering and Monetary Infractions (*BOE* 260, 30.10.02).
Note: This provision is based on Article 7.2 of Royal Decree 925/1995 approving the Regulation of the Law on certain measures for the prevention of money laundering (see this same heading in the 1995 edition of this Yearbook). Article one of this ministerial Order makes all transactions with Egypt, Philippines, Guatemala, Indonesia, Myanmar (former Burma), Nigeria and the Ukraine subject to compulsory communication.

XVII. FOREIGN TRADE LAW

– Order of 1 February 2001, eliminating the dispatch procedures prior to the import and export of goods (*BOE* 35, 9.2.01).

– Royal Decree 167/2001, of 23 February, partially amending Royal Decree 1027/1989, of 28 July, on the registration of vessels and maritime licensing (*BOE* 48, 24.2.01).
Note: This provision is a new draft of Article 63 of Royal Decree 1027/1989 eliminating the obligation to procure a favourable report from the Ministry of Agriculture, Fisheries and Food for the import and export of fishing vessels. The European Commission considered this requirement as a restriction to trade between Community states.

– Resolution of 25 April 2001, of the Customs and Special Taxes Department of the State Agency for Tax Administration compiling the regulations applicable to statistics concerning the trade of goods among European Union Member States for fiscal year 2001 (*BOE* 104, 1.5.01).

– Resolution of 19 June 2001, of the Customs and Special Taxes Department of the State Agency for Tax Administration regulating the implementation of the New Computerised Transit System (NCTS) in Spain and the creation of national guarantee models presented by insurance companies (*BOE* 165, 11.7.01).

– Order of 21 June 2001, amending some of the annexes attached to Royal Decree 2071/1993, of 26 November, on protective measures against the introduction and dissemination in national territory and that of the European Economic Community of organisms damaging to plants or plant products and of export and transit to third countries (*BOE* 155, 29.6.01).

– Resolution of 5 July 2001, of the Customs and Special Taxes Department of the State Agency for Tax Administration compiling the regulations applicable to statistics concerning the trade of goods among European Union Member States for fiscal year 2001 (*BOE* 182, 31.7.01).

– Resolution of 30 July 2001, of the Customs and Special Taxes Department of the State Agency for Tax Administration amending the Resolution of 4 December 2000, containing instructions for the formalisation of the Single Administrative Document (SAD) (*BOE* 188, 7.8.01).
Note: See in this section the Resolution of 31 July 2002, of the Customs and Special Taxes Department of the State Agency for Tax Administration.

– Resolution of 10 December 2001, of the Customs and Special Taxes Department of the State Agency for Tax Administration updating the integrated tariff (TARIC) (*BOE* 307, 24.12.01).

– Circular of 13 December 2001, of the General Secretariat for Foreign Trade regarding the procedure and processing of imports and the entry of goods and their trade regimes (*BOE* 4, 4.1.02).

– Order of 14 December 2001, establishing the statistical thresholds above which it becomes mandatory to include certain additional data in the intrastat declaration and the statistical assimilation thresholds for said declarations in compliance with Articles 23 and 28 of the Council of the European Communities Regulation EEC 3330/1991 (*BOE* 308, 25.12.01).

– Resolution of 19 December 2001, of the Customs and Special Taxes Department of the State Agency for Tax Administration compiling the regulations applicable to statistics concerning the trade of goods among European Union Member States for fiscal year 2002 (*BOE* 311, 28.12.01).
Note: This provision was amended by the Resolution of 21 August 2002, of the Customs and Special Taxes Department of the State Agency for Tax Administration (see in this section).

– Order of 18 December 2001, setting out the instructions for the presentation of the waybill for maritime traffic (*BOE* 4, 4.1.02).
Note: The waybill is the statement made to Customs showing fulfilment of customs monitoring obligations of goods set out in the Community Customs Code.

This provision was implemented by two Resolutions of 28 February 2002 of the Customs and Special Taxes Department of the State Agency for Tax Administration (*BOE* 75, 28.3.02).

– Order of 18 December 2001, modifying the Order of the Ministry of Economy and Finance of 27 July 1995 establishing the form for the summary declaration regarding maritime traffic (*BOE* 4, 4.1.02).

– Order of 27 December 2001, amending annexes I and II of the Order of 24 November 1998 regulating the procedure and processing of imports and pre-import notifications (*BOE* 19, 22.1.02).

– Act 24/2001, of 27 December, on fiscal, administrative and social order measures (*BOE* 313, 31.12.01).
Note: Additional provision twelve prohibits the export or issuance of certain material for paramilitary or security use.

– Order of 28 December 2001, updating the reference codes of the combined nomenclature contained in Act 38/1992, of 28 December, on Special Taxes (*BOE* 5, 5.1.02).

– Order HAC/360/2002, of 19 February, approving form 349 for the summary declaration of intracommunity transactions and setting forth the general conditions and procedures for its telematic presentation and regulating the social collaboration in the telematic presentation of model 347, the annual declaration of transactions with third parties (*BOE* 46, 22.2.02).

– Royal Decree 211/2002, of 22 February, updating certain value amounts contained in Act 36/1994, of 23 December, on the incorporation into Spanish law of Council Directive 93/7/CEE of 15 March concerning the restitution of cultural assets taken illegally from the territory of a European Union Member State (*BOE* 52, 1.3.02).

– Order APA/776/2002, of 8 April, amending certain annexes of Royal Decree 2071/1993 of 26 November, concerning protective measures against the introduction and subsequent dissemination in national territory and that of the European Economic Community of organisms harmful to plants or plant products as well as their export and transit to third countries (*BOE* 88, 12.4.02).

– Order ECO/1101/2002, of 13 May, regulating the telematic filing of certain foreign trade forms (*BOE* 118, 17.5.02).

Note: This provision is in reference to requests for import certificates (Spanish initials *AGRIM*) and export certificates (Spanish initials *AGREX*) for agricultural products and for the Community Import License and the Community Surveillance Document for the import of industrial products.

– Resolution of 31 July 2002, of the Customs and Special Tax Department of the State Tax Administration Agency amending the Resolution of 4 December 2000, setting out instructions for the formalisation of the Single Administrative Document (SAD) (*BOE* 194, 14.8.02).
Note: See above in this same section the Resolution of 30 July 2001, of the Customs and Special Taxes Department of the State Agency for Tax Administration.

– Resolution of 21 August 2002, of the Customs and Special Tax Department of the State Tax Administration Agency amending the Resolution of 19 December 2001, (*BOE* of the 28th) on the preparation and processing of statistics on the trading of goods between Member States of the European Union for fiscal year 2002 (*BOE* 208, 30.8.02).
Note: See the Resolution of 19 December 2001, above in this section.

– Royal Decree 1134/2002 of 31 October, on the issuing of marine fishing sanctions to Spaniards enlisted on ships sailing under a flag of convenience. (*BOE* 262, 1.11.02).
Note: This provision applies to individuals and legal persons of Spanish nationality legally associated with ships from third countries that fail to meet the obligations stemming from conservation and management measures set out in international law and when the flag state fails to exercise its sanctioning authority (see Art. 1).

XVIII. BUSINESS ASSOCIATION/CORPORATIONS

– Act 15/2001, 9 July, on the fostering and promotion of cinema and the audiovisual sector (*BOE* 164, 10.7.01).
Note: In its scope of application Article 1 includes Spanish companies as well as those of European Union State Members and of the European Economic Area established in Spain. Moreover, Article 2 makes reference to the criteria by which the nationality of cinema and audiovisual work is determined.

– Royal Decree 1098/2001, of 12 October, approving the general Regulation of the Public Administration Contract Law (*BOE* 257, 26.10.01; error correction *BOE* 303, 19.12.01, error correction and errata *BOE* 34, 8.2.02).
Note: In the interest of this Chronicle, mention should be made of Articles 9 (capacity to act on the part of non-Spanish companies of European Community Member States); 10 (capacity to act on the part of other foreign companies); and 23 (official translation of the documentation).

– Royal Decree 1123/2001, of 19 October, partially amending the Private Security Regulation approved by Royal Decree 2364/1994, of 9 December (*BOE* 281, 23.11.01).
Note: Additional Provision three states that all references made to nationality and residence in the Private Security Regulation approved by Royal Decree 2364/1994 apply to the nationality of any of the European Union Member States and to that of the States party to the Agreement on the European Economic Area as well as to residency in the territory of said States.

– Organic Act 1/2002, of 22 March, regulating the Right of Association (*BOE* 73, 26.3.02).
Note: Article 9 states that: "Associations constituted in accordance with this Act shall have legal domicile in Spain . . ." (section 1). "Associations that carry out most of their activities in Spanish territory must have legal domicile in Spain" (section 2). "Without prejudice to Community law, in order to be allowed to carry out activities in Spain on a stable and long-term basis, foreign associations must set up a branch office in Spanish territory" (section 3).

– Act 34/2002 of 11 July, on services provided by the information society and electronic commerce (*BOE* 166, 12.7.02).
Note: Articles 2, 3 and 4 refer to service providers subject to this Act regardless of whether they are based in Spain (Art. 2) or not (Arts. 3 and 4).

– Act 50/2002, of 26 December, on Foundations (*BOE* 310, 27.12.02).
Note: Article 6 focusing on the legal domicile of foundations rules that "Foundations that carry out most of their activities in Spanish territory must have legal domicile in Spain" (section 1). It goes on to state that "Foundations that are registered in Spain and carry out their principal activity abroad shall have statutory domicile at the headquarters of their board of trustees within national territory" (section 2). Article 7 regulates foreign foundations.

– Act 53/2002, of 30 December, on fiscal, administrative and social order measures (*BOE* 313, 31.12.02).
Note: Article 100, section 1 amends additional provision fifteen, section four, number 1 of Act 27/1992, on State Merchant Marine Ports and states that shipping companies may request inscription in the special Registry provided that their effective control centre is in the Canary Islands or that they have a permanent establishment or branch office in the Canary Islands in the event that said control centre is located in another part of Spain or abroad. Article 100 amends Article 43 of Act 48/1960, on Air Navigation ruling that the public territorial administrations and private individuals and bodies corporate of a European Union Member State must obtain prior authorisation in order to build or participate in the construction of general interest airports.

XIX. BANKRUPTCY

XX. TRANSPORT LAW

– Royal Decree 101/2002, of 25 January, partially amending Royal Decree 1034/1999 of 18 June on compensation for sea and air transport of goods from or to the Balearic Islands (*BOE* 32, 6.2.02).
Note: These provisions call for a system of public assistance the purpose of which is to lower the cost of the transport of goods from the Balearic Islands to any State of the European Union or the European Economic Area and vice versa.

XXI. LABOUR LAW AND SOCIAL SECURITY

– Resolution of 4 September 2001, of the Directorate-General for Migrations Planning establishing a special deadline in the case of Uruguay for the presentation of the certificate of life and income statement for beneficiaries of assistance pensions (*BOE* 236, 2.10.01).

– Royal Decree 1124/2001, of 19 October, by virtue of which unemployment compensation is incorporated into protective initiatives foreseen in Royal Decree 2234/1981, of 20 August, that includes Spanish personnel hired by the Spanish administration abroad in the General Social Security System (*BOE* 260, 30.10.01).

– Act 16/2001, of 21 November, setting up a special process of consolidation and provision of job posts for statutory personnel in the Social Security's health care institutions of the Health Services branch of the National Health System (*BOE* 280, 22.11.01).
Note: In the interest of this Chronicle, mention should be made of Article 3 setting out the requirements for the beneficiaries of the provision which include: being an individual with Spanish nationality or that of a European Union Member State or of a State of the European Economic Area or with the right to free movement of workers in accordance with the European Community Treaty (section 1, letter a); and not being rendered unfit for professional activity or for access to functions or public services in a Member State nor having been dismissed by disciplinary sanction from any of its public administrations or services during the course of the six preceding years (section 1, letter f).

– Royal Decree 1414/2001, of 14 December, amending Royal Decree 728/1993, of 14 May, establishing old age pensions for Spanish emigrants (*BOE* 311, 28.12.01).

– Royal Decree 53/2002, of 18 January, on Passive Class pension reassessment and supplement for the year 2002 (*BOE* 19, 22.1.02).
Note: Article 9 makes reference to the reassessment of pensions recognised under the auspices of Community regulations on Social Security matters.

– Resolution of 16 May 2002, of the Directorate-General for Migrations Planning establishing a special deadline in the case of Brazil for the presentation of the certificate of life and income statement for beneficiaries of assistance pensions (*BOE* 132, 3.6.02).
Note: This provision refers to old age pensions for Spanish emigrants.

– Resolution of 16 May 2002, of the Directorate-General for Migrations Planning establishing a special deadline in the case of Venezuela for the presentation of the certificate of life and income statement for beneficiaries of assistance pensions (*BOE* 132, 3.6.02).
Note: See the note corresponding to the preceding provision.

– Order TAS/1817/2002, of 8 July, declaring that Spaniards residing in Spain and lending their services at the Headquarters of the Joint Sub-regional Command Southwest of the North Atlantic Treaty Organization are to be included within the scope of application of Royal Decree 2805/1979, of 7 December. (*BOE* 170, 17.7.02).
Note: Royal Decree 2805/1979 includes Spaniards working as civil servants or who are employed by intergovernmental international organisations in the general Social Security system.

XXII. CRIMINAL LAW

XXIII. TAX LAW

– Order of 28 February 2001, approving the form used to request refund of value added tax in the case of an entrepreneur or professional not established in the territory of application of said tax. (*BOE* 74, 27.3.01).
Note: The form approved by this provision should be filed by entrepreneurs or professionals established in EU territory as well as by those established in third countries.

– Order of 26 March 2001, approving forms 565 and 567 in pesetas and euros for the statement-payment of the Special Tax on Certain Means of Transport, form 568 in euros for the refund from the resale or shipment of means of transport outside of the territory and for the physical design and logistics for the filing of form 568 in pesetas and in euros in computer readable format (*BOE* 77, 30.3.01).
Note: Form 568 should be filed when the definitive shipment of the means of transport being resold outside of the territory in which the tax applies has been verified. This must take place within four years of the vehicle's first registration.

– Act of the Autonomous Community of Navarra 8/2001, of 10 April, repealing certain precepts of Act 24/1996, of 30 December, on Corporation Tax (*BOE* 117, 16.5.01).

Note: This provision repeals certain fiscal incentives judged by the European Community to be contrary to Community law.

– Order of 24 May 2001, establishing the limits regarding duties and exemptions for diplomatic or consular regimes and international organisations that are referred to in final provision one of Royal Decree 3485/2000, of 29 December (*BOE* 126, 26.5.01; error correction *BOE* 134, 5.6.01).

– Royal Decree 579/2001, of 1 June, amending the Personal Income Tax Regulation approved by Royal Decree 214/1999, of 5 February, concerning exemptions, wages and earnings from economic activities, obligation to file and withholding and the Regulation on Non-resident Income Tax approved by Royal Decree 326/1999 of 26 February concerning withholding (*BOE* 132, 2.6.01).
Note: Article 1 amends Article 5 (exemption of earnings from work carried out abroad) of the Personal Income Tax Regulation. Article 10 amends Article 14, section 3, letter b), (exceptions regarding the obligation to withhold and make payments on account) of the Regulation on Non-resident Income Tax.

– Order of 5 June 2001, clarifying the inclusion of the Tax on Construction, Installations and Works as regards letter B) of section 1 of Article IV of the Agreement between Spain and the Holy See regarding Economic Affairs of 3 January 1979 (*BOE* 144, 16.6.01).
Note: Said inclusion implies the total and permanent exemption from said tax.

– Royal Decree 995/2001, of 10 September, amending the Corporation Tax Regulation as regards special fiscal regimes (*BOE* 218, 11.9.01).
Note: Article 1 amends Title II ("Application of the special regimes of bodies corporate holders of foreign securities and of mergers, demergers, provisions of assets and securities exchange") of the Corporation Tax Regulation.

– Resolution of 8 October 2001, of the Customs and Special Tax Department of the State Tax Administration Agency setting out the rules for filling out the accompanying documents protecting the movement of products that are the object of special manufacturing taxes, the system for the electronic transmission of circulation documents and the design of certain statements (*BOE* 255, 24.10.01; error correction *BOE* 299, 14.12.01).
Note: See Resolution of 29 November 2002 in this section.

– Act 24/2001, of 27 December, on fiscal, administrative and social order measures (*BOE* 313, 31.12.01).
Note: Article 4 amends Article 24.1 of Act 41/1998 on Income Tax on non-Residents and Tax Rules (see the following provision). Article 11 amends the Second Book (Decision on Imports and Delivery of Goods in the Canary Islands) of Act 20/1991 modifying the fiscal aspects of the Canary Island Fiscal and Economic System.

– Resolution of 29 November 2002, of the Customs and Special Tax Department of the State Tax Administration Agency amending that of 8 October 2001 setting out the rules for filling out the accompanying documents protecting the movement of products that are the object of special manufacturing taxes, the system for the electronic transmission of circulation documents and the design of certain statements (*BOE* 304, 20.12.02).
Note: See the Resolution of 8 October 2001, above in this section.

– Resolution of 5 December 2002, of the Customs and special taxes department of the state agency for tax administration by virtue of which the Integrated Tariff of Application (TARIC) is updated (*BOE* 307, 24.12.02).

Also see above Section XVII (Foreign Trade Law) in this chronicle on Private International Law.

– Act 46/2002, of 18 December, partially reforming Personal Income Tax and amending the Laws on Corporation Tax and non-Resident Income Tax (*BOE* 303, 19.12.02).
Note: Amendments to the Personal Income Tax that are of interest for this chronicle: Article 33 amends Article 67 of the Act regarding Personal Income Tax (Spanish initials *IRPF*) (deduction for double international taxation). Amendments to the Corporation Tax Act: Article 58 amends Article 67 (European groups of economic interest) of the Corporation Tax Act; Article 65 amends Article 121 (inclusion in the tax base of certain positive earnings made by non resident bodies corporate); Article 66 amends Article 129 (bodies corporate that are holders of foreign securities). Amendments to the non-Resident Income Tax are found in Chapter III (Articles 70 to 83).

– Act 49/2002, of 23 December, on the fiscal regime pertaining to non-profit bodies corporate and of fiscal incentives for patronage (*BOE* 307, 24.12.02).
Note: Article 2, letter d) includes among non-profit bodies corporate «the delegations of foreign foundations inscribed in the Registry of Foundations». References are also made to the non-Resident Income Tax in Articles 21, 23, 25, 26 and 27.

XXIV. INTERLOCAL CONFLICT OF LAWS

– Act of the Autonomous Community of the Balearic Islands 18/2001, of 19 December, on Stable Couples (*BOE* 14, 16.1.02).
Note: Article 2, section 2 states that "In order for this Law to apply, at least one of the two members must have regional citizenship in the Balearic Islands and the expressed submission of both members to the system established there under is required.

Spanish Judicial Decisions in Public International Law, 2001 and 2002

The team who selected these cases was directed by Professor Fernando M. Mariño (*Universidad Carlos III*) and includes the following lecturers: A. Alcoceba Gallego, A. Cebada Romero, E. Domínguez Redondo, A. Manero Salvador, D. Oliva Martínez, C. Pérez González, R. Rodríguez Arribas, F. Vacas Fernández and P. Zapatero Miguel.

I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

1. *Enforcement in Spanish law of foreign judicial decisions*

– *STS* 20 November 2001. Civil Division Appeal for judicial review n. 3325/2000

The plaintiff, Mr F.B. was dismissed by Televisión Española, SA on 8 April 1994. Having exhausted all the means provided by the Spanish legal system for appealing against this decision, on 5 January 1998 Mr F.B. filed a suit with the former European Commission of Human Rights against the Kingdom of Spain for violating article 10 of the European Convention on Human Rights. In its judgment of 29 February 2000, the European Court of Human Rights confirmed the existence of a violation of article 10 of the Convention and declared that the Spanish State should pay the plaintiff one million pesetas' compensation for material damages and pain and suffering and 750,000 pesetas in court costs and expenses. On 5 September 2000 Mr F.B. lodged an appeal for a review of the 5 October 1995 decision of the Madrid Superior Court of Justice (TS Madrid) which had declared the dismissal to be fair. The plaintiff specifically asked for his dismissal to be declared null and void and to be immediately reinstated, and paid the wages he ceased to receive as from the date of his dismissal. He also asked for the dismissal to be declared unfair. The TS dismissed his appeal in a judgment dated 20 November 2001.

Reporting judge: Mr. Jesús Gullón Rodríguez

"Legal grounds:

(. . .)

Second: . . . [T]he core issue is to determine, for the purpose of applying article 1796.1 *LECiv*, whether the Eur. Court HR, which found there to be a violation of

Spanish Yearbook of International Law, Volume VIII, 2001–2002

article 10 of the European Convention on Human Rights in the case of the plaintiff, can be interpreted as a 'recovered' decisive document that was withheld due to force majeure or by the action one of the parties.

Many judgments delivered by this Court refer to this precept in relation to the legal concept of recovered document, such as those of 20 May 1986 (*RJ* 1986\2584), 15 April 1987 (*RJ* 1987\2778), 28 March 1988 (*RJ* 1988\2386), 22 January (*RJ* 1990\171), 27 April (*RJ* 1990\3503) and 14 May (*RJ* 1990\4311) 1990 and 22 October (*RJ* 1990\8778) and 12 November (*RJ* 1991\8213) 1991. These maintain that the recovery of documents that are 'decisive' to the resolution of the case applies to documents already existing when the contested decision was delivered, and not to documents that are subsequent to the decision. This interpretation should be followed, not only in view of the restrictive nature of the admission of an appeal for judicial review, but also bearing in mind the clarity of the wording of the legal text. It is not correct to talk of 'recovered' documents and, less still, of 'documents withheld due to force majeure or to the action . . . of one of the parties' in relation to a document that does not yet exist.

In the present appeal, it is obvious that, contrary to the sole ground for appeal, a judgment delivered by the Eur. Court HR or by any other court does not fall within the scope of the aforesaid requirement of the Civil Procedure Law (*LECiv*) as it is not within the legal capabilities of this Court to shun fulfilment of the aforesaid rule as laid down in article 117 *CE* (*RCL* 1978\2836; *Ap.NDL* 2875).

In order for a judgment of the Eur. Court HR to constitute a reason for or means of overturning final decisions, the current legal system would have to be modified, as has occurred in Norway, Luxembourg, Malta and the Swiss canton of Appenzell, to establish for this purpose new legal grounds for judicial review, bearing in mind that article 510 of the new Civil Procedure Law 1/2000, of 7 January (*RCL* 2000\34, 962 and *RCL* 2001\1892), regulates appeals for judicial review and grounds for such appeals in a similar manner to the previous law, according to which the ground claimed in this case would not be admissible either.

Furthermore, it is not appropriate to carry out an extensive interpretation of the grounds for review provided for in the *LECiv*, as the appellant demands, invoking article 7 of the *LOPJ* (*RCL* 1985\1578, 2635; *Ap.NDL* 8375), since, as we shall see, the Eur. Court HR itself, applying article 10 of the Convention, which is similar in scope to article 20 of the *CE*, determines the existence of a violation of this right with specific compensatory effects, thereby granting the protection that the appellant is now requesting through another channel that is legally inadmissible.

Third: Nonetheless, in view of the claims made by the appellant, the following should be added:

1) In principle, as maintained by the case-law of the *TS* (Judgments of the second division, 4 April 1990 [*RJ* 1990\3157] and of the first division, 20 November 1996 [*RJ* 1996\8641]), the decisions of the Eur. Court HR are binding, final and non-enforceable. This Court, given its international nature, merely decides on the international responsibility of the State, there being

no need to determine which national authority is to held responsible for violating the right. Moreover, it cannot be inferred that the Convention has the authority to repeal a regulation, render void an administrative action or overturn a judicial decision it considers contrary to the Convention. The very case-law of the Eur. Court HR has stated on many occasions that its decisions are 'essentially declaratory' (A. 31. Marckx [ECHR 1979\2] and A. 64 Pakelli [ECHR 1983\6]).

2) But furthermore, it so happens that in this case the suit that the dismissed worker filed with the Eur. Court HR not only asked for recognition of the violation of his freedom of expression protected by article 10 of the Convention but also the payment of 279,519,584 pesetas, the estimated total amount of the various types of damages suffered as a result. The Eur. Court HR judgment is thus the culmination of a procedural process, the last of the rulings of a Court, albeit of a special nature, but which fully heard the plaintiff's claim – essentially the same as that which was settled by the national courts, as the significant fact is that the international court applied article 41 of the Convention containing a provision for remedy that endows that court's judgment with a complex nature insofar as is not directly enforceable but not merely declaratory either, as the most authoritative doctrine states.

The precept in question, formerly art. 50 of the Convention, states that 'If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party'. On the basis of this provision, the Eur. Court HR examines at length the circumstances that concurred in the dismissal of the plaintiff, arriving at the conclusion that his claims were indeed based on the right contained in the aforesaid article 10 of the Convention. However, immediately, departing from the premise that it is impossible to make perfect reparation for the consequences of this violation (the only circumstances under which article 41 of the Convention can be applied), the Court goes on to analyze in point 57 of the decision all the circumstances affecting the scope of the requested compensation and reaches the conclusion, taking into account various factors and applying the principle of equity, that the financial compensation for the violation of this right should amount to one million pesetas, plus legal costs, expenses and interest. Therefore, the recognition of the plaintiff's rights deriving from the dismissal he suffered at one point ended definitively with the decision of the Eur. Court HR. From this perspective, the parties to this suit would be bound by the negative effect of the *res judicata*, and this prevents the claims relating to the effects of the infringement of the right to freedom of expression as a determining element of the dismissal of the appellant from being brought again.

Fourth: Therefore, as the public prosecutor requests in his report, the appeal for judicial review must be dismissed, though it is not proper for the appellant to

bear the legal costs owing to his status as a worker who is granted the benefit of free legal aid by law".

2. *Application of international treaties in Spanish law*

– *ATS* 20 February 2001. Civil Division. Declaration of enforceability of a foreign judgment (exequatur) n. 1768/1998

The representative of Mr. Goran U., applied for a declaration of enforceability of a judgment of 28 November 1995, delivered by the Supreme Court of Gibraltar, discharging the contract entered into in August 1990 on the transaction of shares owing to the failure of the purchaser, Mr Anders D., to satisfy the deferred payment.

Reporting judge: Mr. Ignacio Sierra Gil de la Cuesta

"Legal grounds:

First: The first issue that needs to be examined in order to reach a decision on the application for a declaration of enforceability of the judgment delivered by the Supreme Court of Gibraltar on 28 November 1995 is to determine the applicable laws under which the claim should be examined; this is an issue of paramount importance as it conditions not only the presuppositions on which the effectiveness of the foreign decision depends but also the objective powers of the authority that is to deliver judgment on the recognition of the decision.

Second: The application of the Brussels Convention of 27 September 1968 (*LCEur*. 1972\178) on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version following the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, done at Brussels on 29 November 1996; *RCL* 1999\825 and *LCEur*. 1997\134) should be ruled out *ab initio* and outright. . . . The reason for ruling out the application of the convention lies in its spatial scope. Art. 60 of the Convention indeed establishes that it shall apply to the European territory of the contracting States, including Greenland, and to the French overseas departments and territories, and to Mayotte, and empowers the Kingdom of the Netherlands to extend its scope of application to the Netherlands Antilles. When the Kingdom of Denmark, Ireland and the United Kingdom acceded to the Convention through the Luxembourg Convention of 9 October 1978 (*LCEur*. 1978\371) art. 60 was modified; the new wording stated that it shall not apply to any European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible, unless the United Kingdom makes a declaration to the contrary in respect of any such territory. This precept remained unaltered and no such declarations were made until the aforementioned San Sebastian Convention of 1989 whereby the content of art. 60 was withdrawn, thereby annulling the United Kingdom's powers to extend the application of the Convention unilaterally to any European territory for the international relations of which it assumes responsibility. The precept was also stripped of its content following the accession of Austria,

Finland and Sweden, whose Convention of 29 November 1996 was ratified by Spain by means of an instrument dated 23 December 1998.

Under these circumstances the United Kingdom of Great Britain and Northern Ireland formulated a declaration on 30 July 1998 – even before Spain ratified the Convention of accession – extending the application of the Brussels Convention unilaterally to Gibraltar, for whose international relations it assumes responsibility, making use of the powers conferred to it by the wording of art. 60 following the Luxembourg Convention of 1978. This declaration prompted an immediate response from Spain, which, in a declaration formulated on 11 September 1998, expressed its opposition to this attempt at unilaterally extending the Convention without the consent of the other contracting parties. It is therefore in this light that we should examine the application of a supranational regulation to the recognition and enforceability of the decision delivered by the Gibraltar court. Since the article regulating the spatial scope of application of the Convention became stripped of content – and it should be noted that the United Kingdom ratified the Convention of accession stripping it of content – the power accorded by the Luxembourg Convention to extend it to European territory situated outside the United Kingdom for the international relations of which the United Kingdom is responsible was accordingly lost. In view of the foregoing, the attempt to extend the Convention unilaterally evidently comes up against the lack of the necessary consent or acceptance of the other states party and shall not be taken into account as it contradicts the letter of the Convention and the rules of International Law, specifically those pertaining to the Law of Treaties.

Third: Having thus ruled out the application of the Brussels Convention, we must now examine whether the foreign judgment meets the conditions for recognition under the rules of the Civil Procedure Law of 1881 – arts. 951 and following – applicable to the case, in accordance with the second interim provision of Law 1/2000, of 7 January (*RCL* 2000\34 and 962), and, in any event, with the sole abrogative provision, point 1, paragraph 3.

Fourth: Art. 951 of the *LECiv*. 1881 establishes that final judgments passed in foreign countries will have the force established in the respective treaties. In the absence of treaties, this is governed by the system of reciprocity, as the following articles state or, in the absence of either, by a set of conditions established by this very law. The articles regulating this issue are found in Section Two of Title VIII of Book II entitled 'Concerning judgments delivered by foreign courts'.

A foreign element is therefore the basis for a declaration of enforceability of a foreign judgment; this foreign element must stem from the judgment and from the country of provenance, which must enjoy jurisdictional sovereignty over a particular territory in order to settle disputes arising in it between its own nationals, between its nationals and foreign citizens, or between foreign citizens, pursuant to uniform or autonomous rules determining the scope and limits of its jurisdiction. Its jurisdiction is thus linked to the territorial sovereignty of the state, of which it is an expression; in the case of decisions delivered by a Gibraltar Court

it is necessary to go back into history to the law from which the current situation derives. Article X of the Treaty of Utrecht of 13 July 1713, states literally:

'The Catholic King does hereby, for himself, his heirs and successors, yield to the Crown of Great Britain the full and entire propriety of the town and castle of Gibraltar, together with the port, fortifications and forts thereunto belonging; and he gives up the said propriety to be held and enjoyed absolutely with all manner of right for ever, without any exception or impediment whatsoever'.

(. . .)

Fifth: The meaning of the rule has led a significant sector of particularly authorized scientific doctrine to maintain that the cession granted by means of the Treaty was simply territorial, pertaining to domain, and that its attributes therefore lacked sovereignty. This interpretation is backed not only by the article, which refers to Gibraltar being yielded 'without any territorial jurisdiction' and grants the Spanish crown preference should Great Britain grant, sell or by any means alienate the propriety of the town of Gibraltar, but also, in particular, by the historical background to the Treaty, namely the Peace Treaty of 24 October 1648 signed between Ferdinand III and the Empire during the Congress of Münster, the Treaty of Versailles of 9 March 1701 between France and the elector of Bavaria and, especially, the preliminary Hispano-British treaty of peace and amity signed at Madrid on 27 March 1713, in which there is no mention whatsoever of sovereignty.

However, this Court is not unaware of the various interpretations – which are perhaps more concerned with the principles and technique of Public International Law – according to which the transfer of sovereignty is admissible, given the light shed by the Law of Treaties, particularly arts. 31 and 32 of the Vienna Convention of 1969 (*RCL* 1980\1295 and *Ap.NDL* 13520), the preparatory work for the Treaty of Utrecht itself and a few precedents in the judgments of the International Court of Justice, such as that of 12 April 1960 ('Right of passage of Portugal over Indian territory'). Now, several points need to be clarified regarding such a claim. First, to agree to the transfer of sovereignty because under Public International Law it is not possible to conceive of a cession as being limited exclusively to territorial control amounts to converting the Treaty of Utrecht, specifically art. X, into the law that defines the spatial boundaries of the ceded territory, which is limited exclusively to the town and castle of Gibraltar together with its port, fortifications and ports; that is, the Rock of Gibraltar. The cession does not therefore encompass other physical, terrestrial or maritime spaces, just as the waters adjacent to the Rock are excluded. Second, the current territorial possession, which has overstepped these limits, is not properly justified in the acquisitive prescription from which the sovereign right over the territory of the isthmus and adjacent waters is seen to be derived. Were Public International Law to admit that this treaty grants powers to acquire territorial sovereignty and that the necessary period time has expired, the claim of legitimacy comes up against the insuperable stumbling block that the effective exercise of sovereign powers over the territory was not peaceful, as it is well known that Spain fails to agree with the exercise of such powers and expresses this categorically, actively and positively. Third, above Gibraltar's

recognized colonial status hover the effects of the current decolonization process, which in this particular dispute is marked by various resolutions of the United Nations General Assembly – from n. 2070 of 1965, to 2331 of 1966 and 2353 of 1967 and 2429 of 1968 – which defend the principle of territorial integrity in favour of Spain, as the inhabitants of Gibraltar cannot be considered a people with a right to free determination. The very same process and right of decolonization, insofar as it reveals the shift away from the concept of a colonial relationship as one of sovereignty and towards the current notion of an administration under international supervision, delegitimizes British sovereignty over the Gibraltar territories in favour of the state whose territorial claim is identified with the decolonization process; and this also extends to the maritime areas that bathe these territories, given the acceptance of the decolonizing principles at the United Nations Conference on the Law of the Sea in 1982. Fourth, principles pertaining to intertemporal law in International Law, particularly the Law of Treaties, cast a shadow on the validity of the British rights deriving from the Treaty of Utrecht insofar as they allow their rules to be interpreted in the light of contemporary facts; and even the provisions of the Vienna Convention of 1969 cast doubts on this validity, as art. 64 provides for the termination of treaties that clash with a new imperative rule of International Law, and art. 71.2 provides exemption from compliance with the treaty and maintains the rights, duties and legal situations provided that their maintenance does not oppose a new imperative rule of International Law; the cession of sovereignty as a result of use of force and, as such, lacking legitimacy today would only be respected in its effects insofar as it did not violate the principle of territorial integrity that underpins the process and right of decolonization.

Sixth: Given this state of affairs, it is not appropriate to declare the decision of the Gibraltar Courts to be enforceable. There are sufficient arguments to at least cast doubts upon the legitimacy of the territorial sovereignty from which the exercise of jurisdiction by these Courts is derived: for, either the territorial cession carried out in 1714 lacked sovereignty and, therefore, jurisdiction; or if this cession did involve territorial sovereignty, its current legitimacy is questionable in the light of the rules of the Law of Treaties, of the current law on decolonization and the fact that Gibraltar's current status derives from the use of force and its effects and consequences contradict the principles of territorial integrity and free determination which constitute the backbone of this process of decolonization. In any case, this questioned territorial sovereignty should refer exclusively to spaces delimited in the document of concession, and shall never extend to others, whether terrestrial or maritime, in respect of which by no means is it appropriate to recognize sovereign power or jurisdiction of any kind based on prescriptive instruments.

The application of all these considerations to the grounds of the application for a request for exequatur leads to the conclusion that there is no evidence for the existence of the most basic of them all – a judgment delivered by the courts of a foreign country and, as such, foreign courts – in the exercise of jurisdiction deriving from the sovereignty unquestionably exercised over a particular territory (. . .).

The Court rules:

1. We deny the application for a declaration of enforceability of the judgment handed down on 28 November 1995 by the Supreme Court of Gibraltar, made by the *Procuradora* Mrs A.-P. L., representing Mr Goran U.
2. The documentation shall be returned to the petitioner".

– *ATS* 14 June 2002. Criminal Division. Appeal for reversal n. 29/2002

In this judgment the TS dismisses the appeal for reversal lodged by the public prosecutor against the judgment of 23 May 2002 dismissing the action brought against the member of the Basque regional parliament Arnaldo O.M. for possible apology of terrorism. According to press agencies, Mr Arnaldo O.M. had uttered the expression "Gora Euskadi ta askatasuna" during a rally held on French territory.

Reporting judge: Mr. Perfecto Andrés Ibáñez

"Legal grounds:

(. . .)

Second: The scope of decision of the judgment against which the appeal is directed and, therefore, of the current decision, is limited – exclusively – to ascertaining whether, in view of what has just been said, such conduct abroad can be prosecuted in Spain pursuant to art. 23.4 b) *LOPJ* (*RCL* 1985\1578, 2635; *Ap.NDL* 8375) in connection with the Penal Code article that has been quoted.

In this respect there is no doubt that the prosecution of actions that constitute crimes of terrorism and of those that may constitute genocide or torture are necessarily subject to the principle of universal jurisdiction, a question which as such is not applicable to this case. For in the matter in hand it is simply a case of determining how to treat the action brought by the prosecutor in accordance with the legal nature of the conduct in question.

Fourth: . . . This is clear when turning, as is necessary in universally prosecuted actions, to the rules of International Law with the status of national law (art. 96.1 *CE* [*RCL* 1978\2836; *Ap.NDL* 2875]), in order to establish the semantic scope of the syntagm 'terrorist offences'.

In this connection it is necessary, first of all, to quote the European Convention on the Suppression of Terrorism of 27 January 1977 (*RCL* 1980\2212; *RCL* 1992\2262; *Ap.NDL* 13317), which Spain has ratified. Art. 1 states that, for the purpose of extradition between Contracting States, the following offences shall not be regarded as a political offence – and therefore may be classified as terrorist offences: 'c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention; e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence'. And art. 2 allows the same treat-

ment to be given to 'an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person'.

The Spanish Constitution reflects this same criterion by clearly distinguishing, for the purpose of extradition, between political offences and 'terrorist offences' (art. 13.3).

According to the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 (*RCL* 2001\1401), which Spain has also ratified, 'Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: a) With the intent to cause death or serious bodily injury; or; b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss'. According to the same article, anyone who 'attempts' to commit an offence, 'participates as an accomplice' or 'organizes or directs others to commit an offence . . . or in any other way contributes to the commission' of the aforementioned offences shall also be considered to commit an offence (art. 2.1).

Also enlightening is the Council of the European Union's proposal for a framework decision approved on 7 December 2001 (*RCL* 1999\1205 bis and *LCEur*. 1997\3694). The proposal states that each member state shall take measures to ensure that international acts *by their nature and context, which may be seriously damaging to a country or to an international organization shall be deemed to be terrorist offences*: 'a) attacks on a person's life which may cause death; b) attacks on the physical integrity of a person; c) kidnapping or hostage taking . . . e) extensive destruction . . .'.

The EU Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism is also relevant to the decision in hand. According to the position, '"terrorist act" shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of: a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking . . .' (art. 1.3).

And it is well known that art. 15 of the Treaty on European Union states that 'common positions [adopted by the Council] shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions'.

These detailed references to various legal texts are crystal clear and coincide in their precise definition of the expression 'terrorist offences', which, without a doubt, denotes exclusively the practice of those who resort to violence against persons or things in order to provoke alarm or panic, and generally do so in an organized fashion and invoking political aims. It is therefore clear that actions such as the one described in the suit fall outside the scope of application of this category

of rules. Therefore, the interpretative criterion used in the contested judgment is neither arbitrary nor capricious, and not even a question of choice, since it is laid down by provisions that are an integral part of our current legal system, and these guidelines constitute the only valid key to interpretation in this matter.

(. . .)

Eighth: The prosecutor questions whether the 'extolment' or 'justification' of terrorist offences may be classified as opinion. And he bases his argument on the fact that art. 607.2 of the Penal Code, under the heading of 'Crimes of genocide', sanctions conduct consisting of the 'dissemination using any means of ideas or doctrines that deny or justify the offences' listed in the previous paragraph. Therefore, according to him, if the criterion maintained in the judgment appealed against is applied, such apologetic conduct would be impossible to prosecute beyond our borders, even though, in his view, this is not what is agreed in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (*RCL* 1969\248; *NDL* 8726), which mentions incitement to commit genocide in article III.c).

However, the prosecutor's opinion finds no backing either in theory or in International Law or in national law. First, because the offence of incitement is committed by expressing a point of view, making public an opinion. And second, because according to the Convention on the Prevention and Punishment of the Crime of Genocide the apology of genocide does not actually constitute genocide, as is inferred from article II, which only includes under this heading acts such as killings, serious bodily or mental harm, the infliction of destructive conditions, measures designed to prevent births and forcibly transferring children. And also because what this text universally proscribes is (solely) 'direct and public incitement to commit genocide'. According to the first meaning given in the *Diccionario de la Real Academia Española* (Dictionary of the Spanish Royal Academy), the Spanish word used here, 'instigar', is equivalent to 'incitar' (to incite), which is precisely the verb used in art. 18 of the Penal Code to define provocation, something that is empirically and legally different from an apology.

Therefore, apology of genocide is not included in the Convention and is not internationally punishable, even though it is punishable in Spain, pursuant to art. 607.2 of the Penal Code. This points to the total symmetry between the treatment given by our legislator and by the international legislator to apology of genocide, and the treatment apology of terrorism has received in this courtroom, in this case with respect to its prosecution. And this could not be otherwise, owing to an elementary criterion of legal rationality, on the basis of the coherent and unequivocal legal ground".

IV. SUBJECTS OF INTERNATIONAL LAW

1. *Immunity from enforcement of a foreign state*

– *ATC* 112/2002, 1 July, Application for a declaration of fundamental rights n. 4759/2001

On 27 September 1995 the judge of Social Affairs Court n. 35 in Madrid ruled that Mr Francisco S.O., an employee of the US Embassy in Madrid, had been unfairly dismissed. This judgment was confirmed by a decision of the Social Affairs Division of the Superior Court of Justice of Madrid on 19 May 1997. In view of the employer's failure to comply with the previous ruling, the employee filed a request for its enforcement and a writ issued by the judge of Social Affairs Court n. 35 in Madrid dated 24 July 1998 established the sum of 1,385,936 pesetas principal, 103,945 pesetas legal costs and 138,539 pesetas interest. A subsequent writ issued on 25 September 1998 modified the principal, which was established at 1,465,936 pesetas. Given the failure of the party against which the enforcement action was to be taken to designate any goods liable to attachment, it was agreed by a writ of execution of 28 July 2000 to attach the monies to which the US Government or its Embassy could be entitled as refunded VAT. The party against which the enforcement action was taken lodged an appeal for reversal on the grounds of the non-existence on Spanish territory of goods liable to be attached in order to satisfy the amounts owed, on the understanding that all goods held enjoy the privilege of immunity from enforcement as they relate to activities "iure imperio". The appeal was dismissed by a writ dated 23 November 2000 and a subsequent appeal against refusal of leave to appeal was also dismissed by the social affairs division of the Madrid Superior Court of Justice on 16 May 2001. The resulting application for a declaration of fundamental rights n. 3442/200 claimed that the decision to attach monies relating to refunded VAT infringes the right to effective judicial protection (art. 24.1 CE), specifically the right of non-attachment of the goods of foreign states used for activities "iure imperio". Finally, in a writ of 13 November 2000, the judge ordered that the amount of principal be made available to the enforcer; the other party lodged an appeal for reversal against this decision, which was dismissed by a writ of 13 July 2001 stating once again that the US Embassy not only is entitled to the refund of VAT on activities "iure imperio", but also, pursuant to Royal Decree 669/1986, of 21 March (RCL 1986\ 1096 and 1408), as a result of commercial operations deriving from cooperation and trade agreements, and that although in both cases these operations were "exempt" from VAT, only in the first could they be considered "immune". On 10 September 2001 an appeal for a declaration of fundamental rights was lodged against the decision of Social Affairs Court n. 35 of Madrid, of 13 July (decisions 238/1995,) dismissing the appeal for judicial review lodged against the writ issued by that same judge on 13 November 2000 in proceedings for the enforcement of the judgment on dismissal (n. 38/1998), on the grounds that it violates article 24.1.

"Legal grounds:

First: Before examining the appellant's claim of infringement of rights, it is necessary to clarify several points: first, that the present constitutional proceedings originates from a judgment dated 27 September 1995, issued by the judge of Social Affairs Court n. 35 in Madrid, sentencing the government of the United States of America to pay compensation for unfair dismissal to Mr Francisco S. O., who rendered his services at that government's Embassy in Madrid; second, following the request for enforcement of the aforementioned judgment filed by the unfairly dismissed worker owing to failure to be paid the sums owed, the party

against which the enforcement action was taken and now the appellant failed to designate any goods liable to attachment, claiming that all the goods it possesses on Spanish territory are immune from attachment as they are used for sovereign activities (*iure imperio*) of that State; and third and last, after the judge ordered the attachment of certain goods, the sums of refunded VAT to which the party was entitled, and after the latter was ordered to specify the origin of its deductible VAT in order to be able to determine possible immunity from attachment, it failed to comply with the judge's request by shirking the duty to prove its claim that all the VAT refunded came from immune operations.

Given this state of affairs, in a writ dated 13 July 2001, the judge ratified his decision on attachment and that the party against which the enforcement action was taken should make available the principal, given that, on the one hand the VAT refunded not only originated from sovereign activities but also from commercial activities deriving from cooperation and trade agreements which, although exempt for tax purposes, could not be classified as immune from enforcement; and, on the other hand, the party's claim that all its operations be considered 'sovereign' amounted to evading Spanish jurisdiction in the fulfilment of its duties, which involves an obvious breach of law, a breach of the principle of good faith, and a violation of the right to effective judicial protection from the enforcement of judgments relating to the dismissed worker, and the claimed extension of immunity is unacceptable as it has no grounds in International Law or in the case-law established by the Constitutional Court.

Disagreeing with the aforementioned decision, the party lodged the present application for a declaration of fundamental rights on the understanding that the decision infringes the fundamental right to effective judicial protection (art. 24.1 *CE* [*RCL* 1978\2836 and *Ap.NDL* 2875]) 'insofar that it does not state whether the enforcement measures adopted by a court apply to goods protected by a legal consideration of immunity', claiming, once again, that all its goods are immune from enforcement, as it had previously maintained throughout the court process (systematically appealing against each of the decisions issued in the enforcement process) and to this Court, with which it lodged an application for a declaration of fundamental rights n. 3442/2001 with identical claims and identical grounds. For this reason, in the opinion of the Prosecutor, this appeal is extemporaneous, since the last decision on the contested attachment order was delivered through the writ of 16 May 2001. However, this objection should not be taken into account as through the decision currently contested (writ of 13 July 2001) the court also ruled on the lack of immunity from enforcement of the monies attached when passing judgment on the appeal for reversal; and it is precisely on this judicial consideration that the appeal hinges and to which the appellant imputes the breach of a fundamental right.

Second: The claims presented in accordance with the procedure laid down in art. 50.3 *LOTC* (*RCL* 1979\2383 and *Ap.NDL* 13575) merely confirm the appropriateness of dismissing the application for a declaration of fundamental rights as they manifestly lack any grounds that justify a decision on their substance by this

Court (art. 50.1.c *LOTC*), since the invoked breach of a fundamental right did not occur. Indeed, the plaintiff turned to this Court given the impossibility of appealing by process of law against the Social Affairs Court decision to attach its goods, seeking an interpretation of ordinary legality in accordance with its claims, as is stated clearly in the petition of the appeal, whereby it urges that this court declare the immunity from enforcement of any monies due to the United States Embassy or Government in respect of any refunding of VAT by the Spanish tax office.

And in this connection it is necessary to point out that, as this Court has stated, "art. 21.2 *LOPJ* (*RCL* 1985\1578, 2635 and *Ap.NDL* 8375) and the rules of Public International Law to which this precept refers do not impose a rule of absolute immunity from enforcement on foreign States; rather, they allow the relativity of the said immunity to be established. This conclusion is further backed by the very requirement of effectiveness of the rights laid down in art. 24 *CE* and by the 'reason' for immunity, which is not to grant States indiscriminate protection but rather to safeguard their equality and independence. Therefore, any delimitation of the scope of this immunity should be based on the premise that, in general, when a particular activity or when the allocation of particular goods does not involve the sovereignty of the foreign State, both International Law and, accordingly, national law do not authorize the failure to enforce a judicial decision; consequently, a decision of non-enforcement would amount to infringing art. 24.1 *CE* (see particularly *SSTC* 107/1992, of 1 July [*RTC* 1992\107], *F.* 4; 292/1994, of 27 October [*RTC* 1994\292], *F.* 3; 18/1997, of 10 February [*RTC* 1997\18], *F.* 6; and 176/2001, of 17 September [*RTC* 2001\176], *F.* 3).

When applying the aforementioned doctrine it is clear that the present appeal involves a simple disagreement of the appellant with the judicial decision adopted as it is contrary to the appellant's claim (immunity from enforcement of all its goods), and raises a question before this Court (determination of goods liable to attachment in the enforcement procedure) that only the courts of law are empowered to decide on in the exercise of their duty 'ex' art. 117.3 *CE*, and which can only be reviewed by this Constitutional Court in cases of lack of grounds, manifest arbitrariness, unreasonableness or blatant error (*SSTC* 111/2000, of 5 May [*RTC* 2000\111], *F.* 8; and 161/2000, of 12 June [*RTC* 2000\161], *F.* 4).

However, none of these defects can be imputed to the contested decision (as the Prosecutor maintains) insofar as the court's interpretation of current law cannot be described as ungrounded, unreasonable, arbitrary or erroneous. The judge made the decision to attach sums corresponding to refunded VAT after considering, in a reasoned manner, that such monies originated both from actions *iure imperio* and from private activities (trade operations or cooperation) which, unlike the first kind, do not enjoy the privilege of immunity from enforcement as they are not bound to the sovereignty of a foreign State. This conclusion was not invalidated by the appellant, not even when it received an injunction from the court to prove the specific provenance of the attached monies in order to determine their possible immunity, and it thus maintained a clearly passive attitude with the aim of protecting all its goods from the enforcement order (which had been issued by

the court to ensure it fulfilled its legal duties in respect of an unfairly dismissed worker) and, basically, aimed to secure an extension of its privilege of immunity from enforcement that is neither allowed by International Law nor complies with the constitutional doctrine that this Court has established in this respect. Equally inadmissible is its attempt to justify its inactivity regarding the burden of proof by the fact it is a sovereign state and, accordingly, transfer the burden to the other party, requiring that the dismissed worker prove to the judge the use of the Embassy's goods and assets.

As a result, the contested judgement deserves no reproach from the constitutional point of view insofar as not only was there no breach of the fundamental right as claimed, but, on the contrary, it showed deference for this right, by protecting the worker's right to effective judicial protection by not constraining without cause his possibility of achieving the effective enforcement of the decision that declared his dismissal unfair and recognized his right to receive compensation as established by law (see particularly *SSTC* 107/1992, of 1 July, *F.* 4; 292/1994, of 27 October, *F.* 3; 18/1997, of 10 February, *F.* 6; and 176/2001, of 17 September, *F.* 3).

Therefore, the Court

Rules

That the present application for a declaration of fundamental rights filed by the government of the United States of America be dismissed and the proceedings be shelved.

Madrid, on July the first, two thousand and two".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. *Human Rights and Fundamental Freedoms*

a) The right to appeal a judgment before a higher court in criminal proceedings

– *STS* 25 July 2002, Criminal Division. Appeal for judicial review n. 69/2001

In this decision the Supreme Court partially allows the appeal lodged by Mr Brian Anthony H. and declares null and void a decision issued by the same court on 6 July 1988 dismissing the appeal lodged by Mr Brian Anthony H. This decision of 25 July 2002 orders the proceedings be resumed at the stage of the lodging of the appeal in cassation, in order that the appellant be offered the possibility of lodging such an appeal. The TS considers that in this way the appellant may effectively enjoy his right to appeal a judgment. However, in the opinion of the TS, it is not appropriate to grant authorization for the formalization of the actual appeal for review as there is no new evidence or new facts to prove the innocence of the persons condemned.

Reporting judge: Mr. Carlos Granados Pérez

"Legal grounds:

First: We are currently at the stage of bringing the appeal for judicial review, prior to formalization, for which the express authorization of this division of the Supreme Court is required.

The appeal for judicial review is a special appeal in that, if successful, it amounts to infringement of the principle of respect for the *res judicata* and for the overriding need for certainty in the field of law. Therefore this legal remedy can only be feasible when attempting to remedy situations proven to be unjust and in which there is evidence of the accused's innocence with respect to the facts that constituted the grounds of the condemnatory judgment and provided that it complies with one of the circumstances laid down in article 954 of the Criminal Procedure Law (*LECrim.* 1882, 16).

The appellant wishes for authorization to lodge an appeal for judicial review as he contends that his situation is similar to the 4th case described in article 954, which allows judicial review 'when, subsequent to the judgment, new facts or new evidence become known which prove the innocence of the convicted person'.

In this case the new fact is the opinion issued by the Human Rights Committee of 2 April 1997. It is claimed that this opinion states that the Kingdom of Spain violated various civil rights guaranteed by the Covenant, specifically: violation of the right to freedom in connection with the refusal to grant bail and consequent pre-trial custody; subjection to degrading treatment during custody; undue delays; and violation of the right to appeal the judgment before a higher court.

It is also claimed that, on the basis of the foregoing, Michel and Brian H. 'are entitled to an effective remedy that involves compensation' and 'to an effective and enforceable remedy if a violation is found to have been committed'.

It is pointed out that Brian H. brought an action for State liability for the miscarriage of justice and at the same time lodged an appeal for annulment with the Provincial Court of Valencia, which dismissed the appeal as five years had elapsed since the service of the judgment and it was not a suitable remedy for declaring the judicial error. An application for a declaration of fundamental rights was subsequently filed with the Constitutional Court against the aforementioned decision of the Provincial Court of Valencia. The Constitutional Court, in a decision dated 13 November 2000 (*RTC* 2000\260), dismissed the appeal on the grounds that the appellant had not exhausted all judicial means and pointed out that in order to examine and, if appropriate, redress the possible violations of the appellant's fundamental rights, annulment was not the only means, as he had the option of filing an appeal for review as laid down in the Criminal Procedure Law (arts. 954 and ff.), as the opinion of the Committee may be considered a new fact for the purpose of article 954.4 of the Criminal Procedure Law, or of bringing an action on the grounds of miscarriage of justice as set forth in articles 292 and 293 of the Criminal Procedure Law.

In the background to his appeal, the appellant states that the H. brothers gave notification of their intention to appeal (sic) the decision of the Provincial Court

of Valencia by appointing a lawyer. The Supreme Court rejected the appointment of the aforesaid lawyer as he was not registered in Madrid; the H. brothers therefore presented the grounds of the appeal to the Supreme Court themselves. This court appointed a duty lawyer to defend the interests of the H. brothers. This lawyer informed the court that he considered there were no grounds for the appeal, and the court accordingly appointed a second duty lawyer, who also stated the appeal was ungrounded. The Supreme Court gave them 15 days to find a private lawyer. It is claimed that the H. brothers wrote to the lawyers' association asking to be assigned a lawyer and *procurador* but never received a reply.

It is still claimed that article 876 of the Criminal Procedure Law (with the wording in force at the time, as the first three paragraphs were subsequently repealed by Law 1/1996, of 10 January [*RCL* 1996\89], on Free Legal Aid) established in paragraph two that 'if the appointed lawyer should not consider the appeal appropriate, a second lawyer shall be appointed, and if this second lawyer also fails to find any grounds for appeal, he shall state his refusal and the case information shall pass to the Prosecutor, in order that he establish the grounds for the appeal for the benefit of the person who has filed it or, if considered appropriate, return it accompanied by a letter summarizing the reasons. If the prosecutor takes the first course of action, the appeal shall be conducted in the ordinary manner; if the second course is taken, the court shall notify the appellant in order that, if he deems appropriate, he may appoint a lawyer and lodge the appeal within 15 days, otherwise he shall be deemed to have dropped the appeal.'

It is claimed that these facts are those which gave rise to the issuing of the opinion declaring the following: 'The Committee notes that . . . the appeal was not effectively heard by a court of appeal because they did not have a lawyer to present the grounds for appeal. Therefore, they were denied the right to a review of the conviction and of the punishment, violating paragraph 5 of article 14 of the Covenant'.

The letter of request, specifically the fourth legal ground which examines the reasons for the appeal, adds that the convicts Michael and Brian H. were denied the right to be heard by another court in a criminal case in the proceedings against them. Therefore, once the violation of the aforementioned Covenant has been established, they are entitled to an effective remedy other than an administrative appeal for the miscarriage of justice.

Second: In a decision dated 14 December 2001 (*JUR* 2002\1744), this court examined the effects of the reports of the UN Human Rights Committee on national law and on judicial decisions passed on *res judicata*. This decision states, among other things, the following: '. . . it is evident that art. 2.3.a) of the Covenant does not allow for a private remedy which can affect final judgments. The text is clear: the States Parties to the Covenant must provide for a remedy against decisions which may violate the rights recognized therein. But by no means are they obliged to provide for a remedy based on a decision of the Human Rights Committee. If the States Parties had wished to attribute the opinion of the Committee an effect such as that which the appellant claims, they would have regulated such effects

and their means of enforcement, that is, something other than a remedy'. Therefore, we cannot say that art. 2.3.a) of the Covenant supports the right of this court to declare the contested judgement null and void by means of art. 238 *LOPJ*. This conclusion is further supported by the very wording of the report, paragraph 13 of which establishes that 'the State Party has the obligation to take the necessary measures to ensure that similar violations do not occur in future' and paragraph 14 refers to the Committee's wish to 'receive from the State Party within 90 days information on the measures adopted to apply the report' – in this case this is stated in paragraph 17 – and it is thus clear that the obligation is valid for the state and for the future, and that the application of the findings of the report should be carried out within a broad range of possibilities which the State Party should decide. It is obvious that if the Committee thought that the Spanish Courts should set aside the judgment as a result of their findings, it would neither have merely expressed a desire nor left open the manner of compliance. In short, if the government is not obliged to modify the legislation, it is obvious that the Spanish courts, whose final judgments cannot be reversed through a remedy of the Committee, cannot be obliged to set aside the judgment'. The decision goes on to state that 'nor is it appropriate to resort to an appeal for judicial review, considering the Committee's findings to be a 'new fact' in the sense of art. 954.4 *LECrim.*, as this is not, as we have seen, a fact that is binding for the government or for the courts of the State Party'.

Third: . . . The related doctrine upholds the right of a person convicted of a crime to have his conviction and sentence reviewed by a higher tribunal, as stated in paragraph 5 of article 14 of the International Covenant on Civil and Political Rights, and in order to enforce the right to a judicial review required by the Committee's findings, on which the present appeal is based, and given the special characteristics of this case, it is considered appropriate that this should lead to a partial allowance of the objections stated in the present appeal for review and that the right to a remedy become effective by declaring null and void the decision delivered by this court on 6 July 1988 dismissing the appeal in cassation prepared by Brian Anthony H., and the proceedings be resumed at the stage of lodging the appeal in cassation, thereby granting the opportunity for it to be formalized by the person who expressed his wish to lodge an appeal in cassation, and exercising his right to appeal to a higher court.

With this scope the claims of the *Procurador* Mr C.P., acting on behalf of Mr Brian Anthony H., should thus partially be allowed; on the contrary, it is not appropriate to grant authorization to lodge the actual appeal for judicial review, since there is no new evidence or facts that prove the innocence of the appellant with respect to the facts for which he was tried by the Provincial Court of Valencia".

b) Women's right to equality in the eyes of the law

– *STC* 41/2002, 25 February. Application for a declaration of fundamental rights n. 1203/1997

The appellant had worked for the company Fels Werker, SA, since 2 September 1992, with the professional category of 2nd-level administrative clerk. The relationship between employer and employee began with an indefinite contract; soon after the appellant returned to work after taking maternity leave for the birth of a child, the company proceeded to terminate her employment contract on 6 March 1995, apparently for objective organizational reasons. After the appellant sued the company for unfair dismissal, the company decided to readmit her before the trial came up, though not to her former post but rather to a newly created position. On 7 June 1966 the company attempted to hand her a letter stating that, for objective reasons (her post was to disappear), her employment contract would be terminated. That same letter offered the worker severance pay and compensation for failure to observe the period of notice. The worker refused to take the letter, which was consequently sent to her by registered post with acknowledgement of receipt. At the time of this second dismissal the worker was eight weeks' pregnant, though the company was not aware of this circumstance. The appellant filed a suit asking for the dismissal to be declared null and void, claiming that the company had used the pretext of objective dismissal to disguise a discriminatory dismissal on the grounds of gender, the true reason for which was the fact that she was again pregnant, which she had mentioned to several colleagues and to the financial director. The decision of Social Affairs Court n. 3 of Almería on 25 July 1996 partly allowed her claim and declared the dismissal unfair. An appeal was made to a higher court, and the social affairs division of the Granada Superior Court of Justice issued a judgment on 11 February 1997 dismissing the appeal. The court did not consider the dismissal to be discriminatory and concluded that "if the company was unaware of the pregnancy of the appellant, it is unlikely, if not impossible, that it based its decision to terminate its relationship with the appellant in such circumstances". The appellant filed an application for a declaration of fundamental rights against these decisions, claiming that the principle of non-discrimination for reasons of gender set forth in art. 14 CE (RCL 1978\2836 and Ap.NDL 2875) had been violated.

Reporting judge: Mr Eugeni Gay Montalvo

"Legal grounds

First: The appellant claims that the contested decisions that declared her dismissal unfair violate the principle of equality and non-discrimination on the grounds of sex, as set forth in art. 14 *CE* (*RCL* 1978\2836 and *Ap.NDL* 2875) and the principle of reversal of the burden of proof to which the alleged discrimination gave rise.

In short, it is claimed that the contested judicial decisions, although expressly recognizing the existence of signs of discrimination on the grounds of sex, consider the objective dismissal which the appellant suffered after enjoying maternity leave (and being readmitted only after considerable pressure from the trade unions) insufficient grounds as these signs are offset by the company's lack of knowledge of her pregnancy when it dismissed her for the second time, instead of ascertaining whether the company based its decision to terminate the contract on a real and

non-discriminatory reason, which was the court's duty under national and community law.

(. . .)

Third: Second, it should also be recalled that this court has repeatedly stated that discrimination on grounds of sex includes all types of pejorative treatment that are based not only on the pure and simple fact of the sex of the victim but on the concurrence of reasons or circumstances that are directly and unequivocally related to the sex of the person. Such is the case of pregnancy, an element or differentiating factor which, for obvious reasons, exclusively affects woman (*STC* 173/1994, of 7 June [*RTC* 1994\173], *F.* 2). Decisions of dismissal based on pregnancy, as they exclusively affect women, therefore constitute discrimination on grounds of sex forbidden by art. 14 *CE*.

An examination of the regulations for which art. 10.2 *CE* serves as an interpretative source bears this out. Indeed, art. 5.d) of Convention n. 158 of the ILO (*RCL* 1985\1548 and *Ap.NDL* 3016) states that pregnancy shall not justify the termination of a contract. Furthermore, according to art. 4.1 of Recommendation n. 95, also of the ILO, the period during which it is illegal for the employer to dismiss a woman begins on the day she notifies the employer of her pregnancy by supplying a medical certificate. And the Declaration of 1975 on equal opportunities and treatment for female employees stresses that pregnant women shall be protected against dismissal on the grounds of their condition throughout the pregnancy (art. 8.1).

Although it falls outside this interpretative framework, the analysis of Community Law provides a similar solution. From arts. 1.1, 2, paragraphs 1 and 3, and 5.1 of Directive 76/207/EEC (*LCEur*. 1976\44) one infers that the dismissal of a female worker on the grounds of her pregnancy constitutes direct sexual discrimination (ECJ judgment of 8 November 1990 [ECJ 1991, 74], *Hertz case*), as does refusal to hire a pregnant woman (judgment of the same date relating to the *Dekker case* [ECJ 1991, 73], point 21 of which states that discrimination on the grounds of pregnancy or maternity constitutes direct discrimination and excludes the possibility of justifying the reasonability and proportionality of such as measure), and the termination of the contract cannot even be justified by the fact that a legal prohibition, imposed by the pregnancy, temporarily prevents the pregnant worker from working nights (ECJ judgment of 5 May 1994 [ECJ 1994, 69], *Habermann-Beltermann case*). Later, art. 10.1 of Directive 92/85/EEC (*LCEur*. 1992\3598) prohibited the dismissal of pregnant workers who had notified the employer of their state during the period from the beginning of the pregnancy to the end of maternity leave (the protection is extended to the whole of this period: ECJ judgment of 30 June 1998 [ECJ 1998, 159], *Brown case*). As pointed out in an ECJ judgment of 14 July 1994 (ECJ 1994, 133), *Webb case*, this precept does not provide for any exception to the prohibition on dismissing a pregnant woman during that period, except for exceptional circumstances that are not related to the state of the woman in question.

(. . .)

Fourth: . . . in the case in hand it should be said that the appellant's claims are not convincing as regards the existence of signs of discrimination proving the existence of a general discriminatory environment or, at least, facts that give rise to strong suspicions of discrimination on the grounds of pregnancy.

(. . .)

As the contested judgments stress, if it is claimed that the cause for dismissal was pregnancy, it is necessary to ascertain the existence of such a pregnancy and whether the company against which the suit is brought was aware of this; therefore, since it was found that the company was not aware of the pregnancy, it is difficult to attribute such a violation to the company's decision to terminate the contract and to consider that the company based its decision on such a circumstance.

Furthermore, as regards the alleged breach of the sharing of the burden of proof, it is worth recalling that in order for the alleged reversal to occur, it is not sufficient for the worker to be pregnant and to prove this objective fact but rather, on the basis of this fact, it is necessary to claim concrete circumstances on which to base the existence of a presumable discriminatory treatment. Insofar as it is not sufficient to state a mere claim, but rather to prove evidence, there are no indications of an incorrect appraisal of the burden of proof by the court on the basis of the fact that the company failed to prove the existence of a sufficient real and serious cause for termination proving that the dismissal was not discriminatory. From the found facts it is not possible to deduce the existence of the fact to be proved: the existence of a sign or principle on which to base the presumption of violation of the right of non-discrimination on the grounds of pregnancy as the appellant claims. Therefore, since insufficient evidence of violation of the Constitution has been provided, the court is under no obligation to reverse the burden of proof making it compulsory for the company to prove its lack of intent to violate a fundamental right.

(. . .)".

c) Right to personal freedom and security

– *STC* 169/2001, 16 July. Application for a declaration of fundamental rights n. 3824/1999

This application for a declaration of fundamental rights was filed against the decisions of the Central Magistrates Court n. 5 of the National Court of 19–04–1999 and 31–05–1999 and against a decision of 30–07–1999 of the criminal division (third section) of the National Court confirming the refusal to modify the precautionary measure imposed consisting of release and prohibition on leaving Spain and confiscation of passport. Violation of the fundamental right of freedom and security; offences of terrorism and genocide; "Scilingo Manzorro" case; insufficient power of the law to adopt such a measure restricting the fundamental right and lack of proportionality; granting of protection.

Mr Adolfo Francisco S. M filed application for a declaration of fundamental rights n. 3824/1999 against the decisions of 19 April and 31 May 1999 of the Central

Magistrates Court n. 5 of the National Court and against a decision of 30 July 1999 of the third section of the criminal division of the National Court. The appeal was filed against these first decisions (decisions of 19 April and 31 May 1999 respectively), which denied a request for modification of a precautionary measure (prohibition on leaving Spanish territory and confiscation of passport) and against the second decision (30 July 1999) upholding them. This case dates back to a preventive detention order adopted during the pre-trial hearing of case 19/1997 of the National Court (decision of 10 October 1997) on the grounds of conduct constituting terrorist offences and genocide allegedly committed by Mr Adolfo Francisco S. M during the military regimes of Argentina and Chile. On 9 January 1998, the wife of Mr Adolfo Francisco S. requested his release without bail owing to lack of financial resources. A decision of the same date agreed to his release but with the obligation apud-acta of appearing before the court on a weekly basis, surrendering his passport and being expressly forbidden to leave Spanish territory. The appellant later requested the modification of the precautionary measure preventing him from leaving Spanish territory (letter of 25 March 1999) and Magistrates Court n. 5 of the National Court turned down his request (decision of 19 April 1999) on the basis of the following arguments: (1) The prohibition on leaving Spanish territory is the only way of ensuring that the accused remains at the disposal of Spanish justice, (2) The charge is not broad. It is specific and concrete and refers to the alleged participation in "very serious" crimes (alleged genocide, terrorism, disappearances of persons and torture); (3) the degree of (alleged) responsibility shall be established in the oral proceedings and this cannot be used as grounds for placing the accused outside the scope of Spanish jurisdiction, (4) the fulfilment of criminal orders does not free a person from responsibility and (5) while the possibility of his fleeing is unlikely, his return, if authorized to leave Spanish territory, would be impossible.

Reporting judge: Mr. Julio Diego González Campos

"Legal grounds:

First: The present application for a declaration of fundamental rights was filed against the decisions of 19 April and 31 May 1999 of the Central Magistrates Court n. 5 of the National Court refusing the request for modification of the precautionary measure established in proceedings 17/1997, consisting of release from custody with prohibition on leaving Spanish territory and confiscation of passport, and against a decision of 30 July 1999 of the third section of the Criminal Division of the National Court, which confirmed these decisions. It is claimed that they violated the right of access to the ordinary judge predetermined by law (art. 24.2 *CE* [*RCL* 1978\2836 and *Ap.NDL* 2875]) in relation to the principle of legality, the right to the effective protection of the courts and not to go undefended and the principle of non-retroactivity of unfavourable provisions restricting individual rights (arts. 24.1 and 25.1 *CE*), on the understanding that the Spanish courts lack the jurisdiction to try the offences with which the appellant is charged; and the violation of the right to freedom (art. 17.1 *CE*) in relation to the right to effective protection of the courts and not to go undefended (art. 24.1 *CE*), considering that

the judicial decisions relating to the aforesaid precautionary measure are ungrounded and, therefore, disproportionate.

Another aspect of this appeal is the possible violation of the right to freedom (art. 17.1 *CE*) owing the lack of legal provision for the precautionary measure imposed, a question posed by this court, using the powers conferred for this purpose by art. 84 *LOTC* (*RCL* 1979\2383 and *Ap.NDL* 13575), to the parties to the case in order that they declare what they deem appropriate. But the present appeal does not include the claims added by the appellant in a letter of 18 October 2000 regarding the possible breach of the right to the effective protection of the courts, the right not to go undefended and the right to a trial without undue delay, based on the committal for trial order of 2 November 1999 and the decision of 2 November 1999 modifying the latter. For, as this court declared, it is the letter of application for a declaration of fundamental rights and not the claims that constitutes the object of the declaration that is requested (see particularly *SSTC* 30/1989, of 7 February [*RTC* 1989\30], *F.* 1; 2/1990, of 15 January [*RTC* 1990\2], *F.* 1; 132/1991, of 17 June [*RTC* 1991\132], *F.* 2; 185/1996, of 25 November [*RTC* 1996\185], *F.* 1; 55/2001, of 26 February [*RTC* 2001\55], *F.* 3).

All the parties oppose this except for the Prosecutor, who wishes for the appeal to be allowed, as he considers that the appellant's right to freedom has been violated owing to the lack of provision for and proportionality of the precautionary measure.

Second: As set forth in detail in the case records, the appellant claims a breach of his right to the judge predetermined by law (art. 24.2 *CE*) on the understanding that Spanish courts are not competent to try the offences with which he is charged – terrorism, genocide and torture committed during the period in which Argentina was governed by the military junta. All the parties point out the existence of grounds for disallowing this claim, namely his failure, during the earlier stage, to invoke the allegedly violated right [art. 50.1 a) in relation to art. 44.1 c) *LOTC*], for neither in the request for modification of the precautionary measure nor in the appeals filed against the decisions adopted thereon was a breach of the fundamental right claimed. What is more, the Prosecutor adds that the failure to formally invoke the right is further borne out by the attitude of the appellant who, by voluntarily appearing before the examining judge to give a statement on the facts of case 17/1997, proved his recognition of the Spanish courts' jurisdiction to judge such facts.

Now, we must rule in favour of those who are opposed to allowing these grounds for appeal. From the reading of the records of the case – in particular the letters requesting modification of the precautionary measure, authorization to leave Spanish territory and the appeals against the decisions on this measure – it can be inferred that, indeed, the appellant failed to state a breach of his right of access to the ordinary judge predetermined by law to the court. Therefore, this claim must be dismissed, in accordance with our doctrine on failure to invoke the allegedly violated right at an earlier stage of the proceedings (see particularly *SSTC* 1/1981, of 26 January [*RTC* 1981\1], *F.* 4; 3/1981, of 2 February [*RTC* 1981\3], *F.* 1; 201/2000,

of 24 July [*RTC* 2000\201], *F.* 3, with a full summary of constitutional case-law), which makes it unnecessary for this court to rule on the possible concurrence of other obstacles alleged by the parties and prevents the question from being examined in depth.

Third: Although the second alleged violation centres on the breach of the right to freedom (art. 17.1 *CE*) in relation to the right to the effective protection of the courts and the right not to go undefended (art. 24.1 *CE*), which the appellant bases on the insufficiency of grounds and lack of proportionality of the measure imposed, it shall nonetheless be examined after the question of lack of legal provision for the measure in question, which was stressed by this court to the parties, since the absence of legal provisions for a measure constraining a fundamental right constitutes in its own right a breach of the fundamental right affected (*SSTC* 52/1995, of 23 February [*RTC* 1995\52], F.F. 4 and 5; 49/1999, of 5 April [*RTC* 1999\49], *F.* 5) and is an essential prerequisite of the constitutional legitimacy of the interference of an official authority in fundamental rights (*SSTC* 37/1989, of 15 February [*RTC* 1989\37], *F.* 7; 52/1995, of 23 February, *F.* 4; 207/1996, of 16 February [*RTC* 1996\207], *F.* 4; 49/1999, of 5 April, *F.* 4).

Now, first of all it must be established whether we are dealing with a case of a measure affecting the right to freedom and security protected in art 17.1 *CE* or whether, as one of the parties maintains, the measure affects the freedom of movement recognized in art. 19 *CE* only for Spanish citizens, so that the precautionary measure, having been adopted with respect to the national of another country, cannot constitute a violation of this fundamental right.

Fourth: The arguments that support the opinion that the claim be dismissed are based on two premises that this court cannot share: the absolute exclusion of the nationals of other states from the scope of protection of art. 19 *CE* and the autonomy of the prohibition on leaving Spanish territory and confiscation of passport as a measure constraining the rights of the appellant.

a) First of all, the fact that art. 19 *CE* does not expressly mention foreign nationals does not mean that they automatically and in all cases lack the right to move freely throughout Spanish territory and, specifically, that they lack the right to depart from Spanish territory when they have entered it legally. In *STC* 94/1993, of 22 March (*RTC* 1993\94), *F.* 2, we maintained that 'the lack of a constitutional declaration proclaiming the free movement of persons who do not possess Spanish nationality is not sufficient grounds for considering the problem to be solved . . .'. The literal wording of art. 19 *CE* is insufficient, because that precept is not the only one that should be considered; in addition it is necessary to take into account other precepts that determine the legal status of foreign nationals in Spain, including in particular art. 13 *CE*. Paragraph 1 states that foreign nationals in Spain shall enjoy the public freedoms guaranteed by Title I of the Constitution, albeit in the terms established by treaties and the law . . . And paragraph 2 of this same art. 13 states that only Spaniards shall be entitled to the rights recognized in art. 23 *CE* . . . Therefore, it is obvious that aliens are entitled to the fundamental rights of residence and free movement enshrined in art. 19 of the Constitution' (similar

opinions expressed in *SSTC* 116/1993, of 29 March [*RTC* 1993\116], *F.* 2; 86/1996, of 21 March [*RTC* 1996\86], *F.* 2; 24/2000 of 31 January [*RTC* 2000\24], *F.* 4). So, aliens are entitled to the fundamental rights enshrined in art. 19 provided that they are recognized in treaties or in the law and under the terms of such recognition.

From this point of view, in order for us to conclude that arts. 12 and 13 of the International Covenant on Civil and Political Rights (*RCL* 1977\893 and *Ap.NDL* 3630) recognize the right of free movement of persons who have legally entered the territory of the state, as this Court has declared (*SSTC* 94/1993, of 22 March, *F.* 4; 116/1993, of 29 March, *F.* 2; 24/2000, of 31 January, *F.* 4) the appeal would require us, going beyond the dismissive conclusion reached by some of the parties, to analyze whether the right to free movement is generally recognized in any national law or in any international treaty signed and ratified by Spain. And in this connection, it should be pointed out that art. 20 of Organic Law 7/1985, of 1 July (*RCL* 1985\1591 and *Ap.NDL* 5093), on the rights and freedoms of aliens in Spain, in force when the contested decisions were adopted, provided that 'departures from Spanish territory may be carried out voluntarily, except in cases of prohibition laid down in the present Law'. So, having established the foregoing, the constitutionality of the prohibition on leaving Spanish territory of the appellant, who arrived in Spain legally to give a statement voluntarily in proceedings 17/1997, as a measure constraining his right to free movement, it is also necessary to examine whether it constitutes a constraint provided for in the law and whether it is proportionate and necessary, since we cannot forget that any measure constraining fundamental rights must be grounded in law and be necessary for the achievement of legitimate ends in a democratic society, and its application must be reasoned and reasonable (see particularly *STC* 207/1996, of 16 February, *F.* 4).

b) In the case analyzed, the prohibition on leaving Spanish territory and the consequent confiscation of the passport does not constitute an autonomous measure but one of the guarantees that make up the precautionary measure imposed in lieu of pre-trial custody, that is, pre-trial release. . . . Therefore, the constitutional legitimacy of the contested decisions must be examined from the angle of the right to freedom enshrined in art. 17.1 *CE*, since, irrespective of the content of the agreed guarantee, that is, of the right constrained by the condition that ensures the presence of the defendant at the trial, what defines the scope of constitutional protection is the fact that it is a condition imposed as a guarantee that constitutes the precautionary measure which furthermore was adopted in lieu of pre-trial custody. The fact that the precautionary measure – pre-trial release – by nature restricts freedom and that it replaces pre-trial custody, that is, the possibility that the latter be restored if the measure is not fulfilled, are the characteristics that bear out the influence on the right to freedom of the appellant in this case and define the framework of analysis of the contested decisions.

(. . .)

Fifth: . . . An examination of the breach of the right to freedom, given the possible lack of legal provision the measure restraining this right, requires two

clarifications regarding the object of the examination. First, in the light of the heterogeneousness and multiplicity of the rules quoted by the parties as possible legal provision for the measure, it should be pointed out that in examining this breach this Court must confine itself to analyzing the rules on which the judicial authority bases its intervention, since we cannot forget that we are dealing with a request for a declaration of fundamental rights, the object of which is a specific action by a public power, materialized in certain judicial decisions on the aforementioned precautionary measure, and that the main purpose is its annulment; therefore, the analysis of the breach of the right cannot be carried out by abstracting the content of the aforesaid decisions, as this would require this Court to perform the task, for which it lacks competence, of analyzing all Spanish law as a whole. This is, nonetheless, without prejudice to anything this Court may consider relevant to point out in relation to the provisions quoted by the parties, in order to provide a response to those who have, and have stated this before this Court, a legitimate interest in opposing the present appeal.

The second necessary clarification concerns the definition of the precautionary measure imposed. As we have pointed out when identifying the fundamental right affected, we are not dealing with a measure that has been imposed as an autonomous precautionary measure but one of the conditions that make up pre-trial release. Therefore, the precautionary measure is a pre-trial custody without bail comprising specific precautions, namely the obligation *apud acta* to appear before the Court on a weekly basis and whenever summoned, confiscation of passport and the express prohibition on leaving Spanish territory without authorization. Basically, pre-trial release on the condition of being available to the Court . . .

Sixth: . . . In short, the claimed provisions should be examined from the point of view of the three requirements laid down by our Constitution on legal provision for measures constraining fundamental rights: the existence of a legal provision empowering the judicial authority to impose the measure in the specific case; the legal status this provision should have; and the ability of the Law to guarantee legal certainty.

Seventh: Having made the aforementioned clarification, the analysis of the existence of a specific legal provision for the measure should be based, as pointed out previously, on the content of the rules regulating pre-trial release in the Criminal Procedure Law, that is arts. 528 and following and the corresponding provisions on pre-trial release in lieu of pre-trial custody (art. 504 *LECrim*.), which are those to which the contested judicial decisions refer.

There is no need to cite them, as it is clear from reading them that the Criminal Procedure Law empowers courts to grant pre-trial release as an autonomous measure (arts. 528 and following), and as a measure in lieu of pre-trial custody (art. 504, paragraph 2). It also shows us that, on the one hand, this Law authorizes the judge to impose, at his own discretion and depending on the concurrent circumstances, two types of guarantees, payment of bail (art. 529) and provisional deprivation of the use of the subject's driving licence and confiscation of the related document (art. 529 bis). On the other hand, the court must also impose on the

defendant the obligation to appear before the court *apud acta* whether he has been released with or without bail. In short, these constitute the general rules with status of Law that the judicial constraint of the fundamental right to freedom consisting in pre-trial release under the obligation of remaining at the disposal of the courts requires. But it is obvious that they do not contain a specific legal provision regarding the prohibition on aliens of abandoning Spanish territory and confiscation of passport, which is what the appellant is questioning in the present case.

Eighth: Furthermore, in response to the claims of the parties to this constitutional proceedings, it should be pointed out that neither of the provisions mentioned in their respective letters fulfils the triple legal requirement specified for a measure constraining fundamental rights . . . None of the precepts of the Law on Public Security and the Law on the Rights and Freedoms of Aliens in Spain contains an autonomous legal authorization enabling the courts to grant this measure during the course of a criminal proceedings; rather, it is based on the Criminal Procedure Law.

c) Having established that such an express and specific authorization is not found in the rules regulating pre-trial release in the Criminal Procedure Law, it merely remains to analyze whether the rules on this and the regulation of pre-trial custody constitute sufficient legal provision, on the understanding that these rules, which specifically authorize the adoption of the precautionary measure that most constrains the right to freedom, also entitle the courts to grant precautionary measures that are less restrictive of the right to freedom. Now, the answer to this question cannot be affirmative either.

Indeed, the line of reasoning *ad maiore ad minus* would only lead us to conclude that the precepts concerning pre-trial custody assume the existence of a generic precept providing for interference in the fundamental right, just as we have found the rules on pre-trail release to contain; but, as the Prosecutor states in his claims, this does not allow us to maintain that these provisions as a whole provide the sufficient legal basis that the constitutional requirement of legal certainty and protection of freedom require, as we have pointed out [*SSTC* 36/1991, of 14 February, (*F.* 5), and 151/1997, of 29 September, (*F.* 4)].

Ninth: This court has declared that the constitutional principle of proportionality of measures constraining fundamental rights requires that, in addition to being provided for by law, such a measure must be suitable, necessary and proportional to a constitutionally legitimate end [see particularly *STC* 207/1996, of 16 February, (*F.* 4)]. We should also recall that under normal circumstances a precautionary measure is not imposed on a person awaiting trial, as is deduced from the effective validity in our laws of the fundamental rights to freedom (art. 17.1 *CE*) and the presumption of innocence [art. 24.2 *CE*; see particularly *SSTC* 128/1995, of 26 July, (*F.* 3); 14/2000, of 17 January, (*F.* 3)]. Its special nature and the necessary protection of the right to presumption of innocence as a rule of trial procedure requires that precautionary measures be adopted when there is reasonable evidence of criminality [*STC* 128/1995, of 26 July, (*F.* 3)] and to the extent they are required in order to achieve a constitutionally legitimate aim which, in par-

ticular, as regards pre-trial release, lies in ensuring that the accused is physically available to appear before court, by guaranteeing he will be a party to the suit and, if necessary, depending on the result, guaranteeing his presence at the trial [see particularly *SSTC* 85/1989, of 10 May, (*F.* 2); 56/1997, of 17 March, (*F.* 9); and 14/2000, of 17 January, (*F.* 7)].

The constitutional requirements of the proportionality of measures constraining fundamental rights [see particularly *STC* 207/1996, 16 February, (*F.* 4)] are basically the criteria of suitability, necessity and proportionality. That is, that it should be possible to attain the desired objective through the measure adopted, suitability; that there should not be a less onerous or injurious measure for achieving the proposed objective, necessity; and that sacrificing the right should bring more benefits than disadvantages to general interest in keeping with the seriousness of the interference and the personal circumstances of the person on whom it is imposed, strict proportionality .

Tenth: Specifically, regarding the analysis of the proportionality of the measure, we must point out, first, that the contested decisions, with reference to the statements given by the appellant before the judge, indicate the existence of signs of criminality, and it must therefore be understood that the adoption of the measure was grounded and the appellant cannot be considered to be in the right regarding this point. In this connection, the claim of not being guilty or justification of his conduct is irrelevant to the requirement of the existence of criminality as a legal ground for the precautionary measure and a requirement of its constitutional legitimacy.

Second, the legitimate constitutional aim of the precautionary measure is stated in the contested decisions. Thus, on the one hand, the decision of 19 April 1999 states that 'the prohibition on leaving Spanish territory is the sole means of guaranteeing that the accused remains at the disposal of the Spanish judicial authorities and, if prosecuted, that he can be brought to trial'; on the other, the decision of 31 May 1999 maintains that the 'reasons set forth in the challenged decision are of sufficient weight and substance to indicate that the precautionary measure adopted is the minimum measure that can be taken and the subject's freedom of movement is compatible with his submittal to Spanish justice, which could not otherwise be guaranteed'; and, finally, the decision of 30 July states that 'given the seriousness of the offences described, although an accompanying committal for trial order is needed in future, if appropriate, it should be agreed for the time being, in order to have certain guarantees that the process reaches completion, that the prohibition on abandoning Spain be maintained'.

Now, the fact that the contested judicial decisions state a legitimate end does not signify that the measure adopted is necessary, appropriate and proportional to achieving it. The requirements of proportionality of judicial decisions constraining fundamental rights establish the need that the decisions show evidence of elements allowing this court to assess whether the required evaluation of proportionality has been made. In this case, the decisions state the impossibility of guaranteeing that the appellant be brought up for trial in any other manner, on the basis of the

risk of flight, or the risk of failure to return to Spain should his departure be authorized. However, no reasons are given.

As this court has stated on various occasions in similar circumstances, whereas averting the risk of flight is one of the legitimate aims of pre-trial custody, the courts are required to weigh up the personal circumstances of the subject, particularly if this information is known by the court and used to support the claims of the appellant [see particularly *SSTC* 128/1995, of 26 July, (*F.* 4); 33/1999, of 8 March, (*F.* 7); 14/2000, of 17 January, (*F.* 4)]. In this case, the appellant claimed in all his statements that there was no risk of flight and that he had demonstrated an attitude of collaboration with the judicial authorities by appearing voluntarily before the judge to give statements. However, neither of the contested decisions provides an individual answer to this claim or indicates on what circumstances the court bases its belief that there was a risk of evasion of justice. It is not incumbent on this court to assess this question, for our powers in this respect are limited to conducting an external examination of the contested judicial decisions.

Furthermore, as the Prosecutor claims, the lack of proportionality of the measure also stems from the absence of a time limit thereon. In this connection we should bear in mind the seriousness of the measure taken to ensure the appellant's attendance during the proceedings, for the appellant is an Argentine citizen who resides, works and has his family outside Spain. Therefore, in this case, the measure taken to ensure that the accused attends the proceedings constitutes a particularly burdensome situation for he who suffers it and is not comparable to the damage that could be caused by other types of pre-trial release guaranteed by bail or prohibition on the use of a driving licence or to the damage that this same measure could cause to a person, whether Spanish or foreign, whose life is based in Spain. This makes it all the more necessary for the courts to assess the proportionality of the measure in the light of the time the appellant has been banned from leaving Spanish territory and the foreseeable slowness of a proceedings like the present one, given its obvious complexity and size. For the indefinite nature of the prohibition on leaving the country could in itself constitute sufficient grounds for considering the constraint of the right to be disproportionate and, accordingly, for granting that a violation of the appellant's right to freedom has taken place (*mutatis mutandis STC* 175/1997, of 27 October, *F.* 4).

Eleventh: In connection with the foregoing, we must declare that the appellant's right to freedom has been violated owing both to the insufficiency of the law providing for the agreed measure constraining the fundamental right from the requirements of legal certainty of law, and to the lack of proportionality of the imposed measure, and we must therefore set aside the contested decisions. Nonetheless, as this Constitutional Court has declared [*SSTC* 88/1988, of 9 May, (*F.* 2); 56/1997, of 17 March, (*F.* 12); 98/1998, of 4 May, (*F.* 4); 142/1998, of 29 June, (*F.* 4); 234/1998, of 1 December, (*F.* 3); 33/1999, of 8 March, (*F.* 8); 14/2000, of 17 January, (*F.* 8)], it is the court of law which must decide whether or not to adopt the precautionary measures permitted by the law in accordance with the constitutional requirements of protection of the right to freedom and in accordance

with what this Court has declared in ground 10 regarding the proportionality of the measure and specifically the establishment of a time limit thereon in keeping with the needs of the proceedings and its seriousness.

Decision

Bearing in mind the foregoing, the Constitutional Court, acting on the authority invested in it by the Constitution (*RCL* 1978\2836 and *Ap.NDL* 2875) of the Spanish nation,

Has decided

To partially allow the present application for a declaration of constitutional rights and, accordingly:

1. To dismiss the claim regarding the right to the legally predetermined Judge (art. 24.2 *CE*).
2. To declare that the appellant's right to freedom has been breached (art. 17.1 *CE*)".

d) Right of artistic creation

– *STSJ* Catalonia, 11 July 2001. Contentious-Administrative Division. Jurisdiction for suits under administrative law n. 7/2001

The second division of the Chamber for Contentious Administrative Proceedings of the Superior Court of Justice of Catalonia delivered a judgment on 11 July 2001 allowing the appeal lodged by Paco Dorado SL against the judgment issued on 13 December 1999 by the Court of Contentious Administrative Proceedings n. 12 in Barcelona, which dismissed the appeal lodged against the decision of the Generalitat (regional government) of Barcelona on the grounds that the fundamental right to creation and artistic production had not been violated.

The Catalan TSJ maintains that refusal to authorize the holding of the opera and bullfight on horseback spectacle "Carmen, ópera andaluza de cometas y tambores" violates the aforementioned fundamental right.

Reporting judge: Ms. Celsa Pico Lorenzo

"Legal grounds:

(. . .)

Second: The appellant considers that the decision of the *Generalitat* constitutes censorship and destruction of a fundamental element of an artistic creation of Mr T., whose representation rights are held by the appellant, and art. 20.2 *CE* has thus been violated.

These days it is not frequent for violation of freedom of artistic expression to be invoked, and our post-constitutional legal system, apart from earlier cases involving pornographic literature and magazines (*STS* second chamber or Criminal Division 13 February 1981 [*RJ* 1981\549]), practically lacks any rulings on this subject. Even in the case-law of the European Court of Human Rights (almost all of which refers to sexual morality) we find very few judgments that examine article 10 of the European Convention for the Protection of Human Rights (*RCL*

1979\2421; *Ap.NDL* 3627) on freedom of expression, which includes freedom of artistic expression – specifically freedom to receive and communicate information and ideas – which involves engaging in the public exchange of cultural, political and social information and ideas of all kinds (point 27 of the Eur. Court HR judgment 24 May 1988 [Eur. Court HR 1988\8], case 159/1988, Müller and Others; point 49 Eur. Court HR judgment Karatas 8 July 1999 [Eur. Court HR 1999\98]).

The decisions of the Strasbourg court are almost always based on an examination of whether the measures chosen by the national authorities 'laid down by the law', 'for a legitimate purpose intended to protect sexual morals', the concept of which it recognizes as having changed in recent years (Müller case), are 'necessary in a democratic society', pursuant to article 10 of the European Convention for the Protection of Human Rights. Despite the Court's tendency to consider violations of the aforementioned article 10 to be non-existent (Eur. Court HR judgment 7 December 1976 [Eur. Court HR 1976\6], case 26/1976, 'the little red schoolbook'; Eur. Court HR judgment 24 May 1988, case 159/1988, Müller and Others; Eur. Court HR judgment 20 September 1994 [Eur. Court HR 1994\29], case 474/1994, Otto-Preminger Institute; Eur. Court HR judgment 25 November 1996 [Eur. Court HR 1996\62], case 699/1996, Wingrove) the proliferation of dissenting opinions in the decisions points to the inappropriateness of the measures adopted and the relativity of the concept of obscenity, recalling that similar accusations were once levelled at authors such as Baudelaire or Flaubert (Müller case).

Third: . . . Within the European framework it should thus be concluded, for it is now totally accepted in the field of freedom of artistic creation, that more flexible limits have been developed and established than those laid down in art. 20 of the Spanish Constitution and art. 10 of the European Convention, as mentioned by *STC* 31/1994, of 31 January (*RTC* 1994\31) on the now indisputable possibilities of managing a private television company.

(. . .)

Fifth: Having then dismissed the argument maintained in the judgment presently being examined regarding the lack of legitimisation of the claimant, it is necessary to examine the matter in depth in order to determine whether the aforementioned fundamental right was violated.

We must pass judgment on the failure to authorize the staging in Barcelona's *Plaza Monumental* of the play *Carmen, opera andaluza de cornetas y tambores* by the playwright Salvador, with an audience of some eight thousand and without seating in the square's arena, with the notice that 'during the interval a bullfight will take place with a single bull and bullfighters on horseback'.

Sixth: We see that the decision not to authorize the spectacle is based on Law 3/1988, of 4 March on the protection of animals. Article 4.2.a) of the aforementioned regional law excludes bullfights in places which had bullrings built for the purposes of such spectacles at the time the law entered into force from the prohibition on using animals in spectacles, fights and other activities that may cause them suffering. In keeping with the aforementioned law, paragraph four of art. 210 of the general bylaw on the urban environment, passed by the plenary of Barcelona

city council on 26 March 1999, excludes from the prohibition of public events involving animals duly authorized bullfights held in suitable premises.

At this point there can be no question that the bullfight on horseback to be held during the interval of *Carmen, ópera andaluza de cometas y tambores* was due to take place in accordance with the rules of bullfighting at a site built for that purpose. The plots of similar works by the French authors Bizet and Merimée, with the presence of the bullfighter E., are well known.

Taking our argument further, there can be no doubt that *Carmen, ópera andaluza de cometas y tambores* is a unique artistic creation consisting of a show which is interrupted – by an interval in other spectacles – to perform a bullfight in accordance with current legislation (*RD* 145/1996, of 2 February regarding the aforementioned Law 3/1988, of 4 March). The failure to authorize a spectacle when both parts, the play-musical and the bullfight, conform to current regulations on spectacles therefore constitutes a violation of the aforementioned fundamental right.

(. . .)".

e) Right of meeting

– *STSJ* Catalonia, 18 May 2001, Contentious-Administrative Division. Jurisdiction for suits under administrative law n. 1008/2001

The Second Division of the Chamber for Contentious Administrative Proceedings of the Superior Court of Justice of Catalonia dismisses the appeal lodged by the Asociación Cultural Sun Parade against the decision of 10 May 2001 of the government office in Barcelona which passed on the documentation presented together with the request for permission to exercise the right to demonstrate to Barcelona Council and the city planning authority Port 2000, considering that the latter were the bodies empowered to make such a decision. In this connection, it is considered that the request does not refer to the exercise of such a right but rather to the staging of a leisure and cultural activity.

Reporting judge: Mr. José Manuel Bandrés Sánchez-Cruzat

"Legal grounds:

First: The *Asociación Cultural* Sun Parade, by lodging the present appeal through the special procedure for protection of the fundamental right of meeting regulated in article 122 of Law 29/1998 of 13 July (*RCL* 1998\1741) regulating jurisdiction for suits under administrative law, contests the decision of 10 May 2001 of the Government Subdelegate in Barcelona, issued by delegation of the Government Delegate in Catalonia, ordering that the documentation submitted with the request for permission to exercise the fundamental right of demonstration on 2 June 2001 in the streets of Barcelona be passed to Barcelona Council and to the public planning body Port 2000, considering them to be the authorities empowered to deal with the request.

The claimant's legal counsel asks that the decision be set aside as it violates article 21 of the Constitution (*RCL* 1978\2836 and *Ap.NDL* 2875); the Prosecutor

and Counsel for the State are opposed to this request, and demand that the appeal be dismissed.

(. . .)

Fourth: The right to meet in public places is guaranteed by article 21 of the Constitution as a fundamental right and does not need to be authorized by the administrative authorities.

This fundamental right, political in nature, which is a subjective right exercised collectively and affects the rights and interests of other citizens and the exclusive use of public assets, is not, however, absolute or unlimited, as can be seen in the doctrine of the Constitutional Court.

In order to exercise the fundamental right of demonstration, it is simply necessary to notify in advance the government authority to allow it to assess the lawfulness of exercising this fundamental right and to prevent public disorder, as the Constitutional Court stated in judgment 36/1982, of 16 June (*RTC* 1982\36), since article 21 of the Constitution does not empower the government authority to ban its exercise if there are no reason why it should disturb the public order.

The exercise of the right to demonstrate imposes negative obligations on the public authorities, not to interfere in its exercise, but also positive obligations, to protect in a suitable manner the right to demonstrate in order to satisfy effectively and efficiently the exercise of this right, as can be inferred from the case-law of the European Court of Human Rights (Judgment of 21 June 1988 [Eur. Court HR 1988\17]), a doctrine that applies to our laws by virtue of article 10.2 of the Constitution.

Organic Law 9/1983 of 15 July regulating the right of meeting and amended by Organic Law 9/1999, of 21 April, in accordance with these constitutional postulates, which should be interpreted according to the international treaties signed by Spain on human rights, states that no meeting shall require prior authorization and that the authority shall be notified in advance of meetings held in places of public transit and demonstrations in order to ensure their proper development and, if necessary, ban them if they are deemed to disturb public order and endanger people or property. Any citizen is entitled to this right, which is individual in nature, although it is exercised collectively and, accordingly, by any group or association.

Fifth: From the examination of the administrative proceedings and the documentary evidence provided in the hearing, it can be inferred that the object and purpose of the meeting planned by the *Asociación Cultural* Sun Parade – a cultural demonstration consisting of a parade of floats along *Avenida Paralelo* to *Port Vell* and ending on the city's beaches, intended to promote the values of peace, tolerance and coexistence – does not constitute an expression of the fundamental right of demonstration but rather the holding of a leisure-related festive and public activity.

The holding of the intended meeting does not constitute the exercise of a political right pertaining to the formation of public will and opinion, as the Prosecutor and State Counsel rightly maintain; rather it is a leisure activity and the expres-

sion of the right to culture and the right to leisure laid down in articles XV and XXI of the European Charter for the Safeguarding of Human Rights in the City, adopted at Saint Denis on 18 May 2000, and ratified by the plenary of Barcelona Council on 21 July 2000.

Given the prevalence of artistic, cultural and festive elements over political claims in the planned procession, the meeting should be regarded as a public spectacle, defined as a recreational activity related to public leisure to be held in public thoroughfares, in accordance with article 10 of the Law of the Parliament of Catalonia 10/1990, of 15 June, on Public Spectacles and Establishments and Recreational Activities.

It should be pointed out that the possible interference of the government authority by granting permission for such a cultural demonstration would be contrary to law as it would encroach upon the powers vested in the local authorities, pursuant to article 10 of the aforementioned Law of the Parliament of Catalonia 10/1990, of 15 June, and article 63.2 b) and n) of the Law of the Parliament of Catalonia 8/1987, of 15 April (*RCL* 1987\1275 and *LCAT* 1987\1220), on the local laws of Catalonia and would amount to an exorbitant exercise of the powers of policing public order conferred by article 10 of the Organic Law on the Right of Meeting.

It is therefore not appropriate to consider the contested government decision to be unfounded on the grounds that it assesses inappropriately the involvement of commercial interests in the gathering, or to deduce any type of legal effects stemming from failure to issue the administrative action within a period of 48 hours, as stated in article 10 of the Organic Law regulating the Right of Meeting, as the request of the *Asociación Cultural* Sun Parade does not pertain to the constitutional exercise of the right of demonstration, and no defenceless or violation of the right to legal protection guaranteed in article 24 of the Constitution took place.

It is therefore incumbent on this court to dismiss the appeal, since the contested decision is lawful.

Sixth: The party will not be ordered to pay the costs, as there is no sign of recklessness or unscrupulousness, in accordance with article 139 of the Law regulating Jurisdiction for Suits under Administrative Law.

(. . .)".

f) Right of asylum

– *STC* 53/2002, 27 February. Claim of unconstitutionality n. 2994/1994

Claim of unconstitutionality brought by the Ombudsman, Ms Margarita R. B., against section 8 of the sole article of Law 9/1994, of 19 May, modifying the Law Regulating the Right to Asylum and Refugee Status, namely the wording given to the third indent of paragraph 7 of art. 5: refusal. This section states the following: "While the application or request for re-examination is being processed, the applicant shall remain at the border post, for which suitable premises shall be provided". The appeal claims that the new wording that this paragraph of the sole article of Law 9/1994 gives to article 5 of Law 5/1984 (26 March) regulating the right to asylum and refugee status is unconstitutional. The wording of paragraph 3 of article 5.7 of Law 5/1984

violates (1) article 17.2 of the Spanish Constitution (CE) regarding the duration of preventive detention and also article 53.1 of the Constitution (as it breaches the essential content of the right to freedom) and (3) article 81.1 in relation to article 17.1 of the Constitution (as the challenged precept is not an organic law). In the opinion of the Ombudsman, the most controversial issue is to examine whether the provisions of Law 9/1994 constitute "a new form of deprivation of liberty" in the sense of article 17.1 of the Spanish Constitution: If that measure is considered a form of deprivation of liberty it would be subject to the guarantees laid down in article 53.1 of the Constitution and, specifically, to the application of article 17. In addition, any law regulating forms of deprivation of liberty should adopt the form of an Organic Law (article 81.1 CE).

Reporting judge: Mr. Fernando Garrido Falla

"Legal grounds:

(. . .)

Fifth: We have just recalled that aliens requesting asylum enjoy the right to freedom (art. 17.1 *CE*) vis-à-vis Spain's public authorities. Now, that fundamental right is not absolute and unlimited (*SSTC* 178/1985, of 19 December [*RTC* 1985\178], *F.* 3; 341/1993, of 18 November [*RTC* 1993\341], *F.* 6); the same art. 17.1 *CE* states that nobody may be deprived of his freedom 'except in accordance with the provisions of this article and in the cases and in the manner provided by the law'. We are not dealing strictly speaking with a legally established task as it is not the legislator's job to regulate the right to freedom in general. We are simply dealing with the constitutional provision for laws which – within the limits deriving from the Constitution itself – may establish certain restrictions on the enjoyment or exercise of the right to freedom. It is now incumbent on the Constitutional Court to determine whether one of these restrictions – that of art. 5.7.3 *LRDA* – has exceeded the limits that the Constitution establishes for the Law. Art. 17.1 *CE* refers to two kinds of limits: first, those mentioned expressly in the different paragraphs of art. 17 *CE*; second, other limits shared with the other fundamental rights: the requirement of certainty and proportionality of the limitation. Let us begin with the express limits mentioned in art. 17 *CE*.

Sixth: First, it is clear that it is not possible to counter with art. 5.7.3 *LRDA* the maximum period of seventy-two hours that art. 17.2 *CE* establishes for detention; or, consequently, the requirement that the arrested person be handed over to the judicial authorities within the same maximum period of seventy-two hours. This Court has maintained since *STC* 341/1993, *F.* 6, that the 'arrested person' referred to in art. 17.2 *CE* is, in principle, somebody on whom a precautionary measure of preventive detention of a criminal nature has been imposed; and therefore, the maximum period of seventy-two hours is not applicable when the deprivation of freedom serves a radically different purpose such as the protection of someone who claims to be persecuted, at the same time with the assurance that the entry and stay of aliens in Spain takes place with full respect for the Law. Now, since that same *STC* 341/1993 we have also said that it is inferred from art.

17.2 that any deprivation of freedom other than detention must be limited in time. This criterion was reiterated in *SSTC* 174/1999 (*RTC* 1999\174), *F.* 4 and 179/2000, of 26 June (*RTC* 2000\179), *F.* 2, both of which refer to the expulsion of aliens from the airport transit area. It should be pointed out that that time limit on any deprivation of freedom – other than detention for the prosecution of criminal offences – is not necessarily uniform; rather it must be adapted – naturally without arbitrary concessions to the governing authorities – to the purposes that the deprivation of freedom serves in each case. There is no doubt about the time limits that art. 5.7.3 *LRDA* imposes on the permanence or wait of asylum seekers in 'suitable premises': up to four days and up to two more days if re-examination of a rejected application is requested. Nor are there any doubts about the maximum nature of these time limits and about the consequence (assuming that it is not expressly rejected) that follows from their completion: the right to enter Spain provisionally, beyond the 'suitable premises' of the border post and with no other limit than the possible restrictions on the establishment of residence laid down in art. 4.3 *LRDA*. From the foregoing it can be concluded that the supposed deprivation of freedom established in art. 5.7.3 *LRDA* has clearly defined time limits. We will examine the proportionality of these maximum time limits later on (ground 8).

Seventh: We have seen earlier, quoting our *STC* 341/1993, *F.* 5, that any constraint on freedom must be certain and foreseeable, as otherwise the Law would lose its function as a guarantee of the very fundamental right to which it relates and would subject the exercise of the right to the will of whoever enforces the Law. Now, there is no uncertainty regarding the scope of the supposed restrictions on freedom established in art. 5.7.3 *LRDA*.

Eighth: Restrictions on freedom must also be proportional. That is: suitable, necessary and pondered (among recent judgments, *SSTC* 265/2000, of 13 November [*RTC* 2000\265], *F.* 8; 103/2001, of 23 April [*RTC* 2001\103], *F.* 10). As for the first – the suitability of the restriction to the aim pursued – it is undeniable that confining asylum seekers to 'suitable premises' effectively prevents, by protecting the persecuted person, evasion of the laws regulating the entry, residence and movement of aliens in Spain. Second, as regards the requirement of necessity, it is not clear what other less restrictive measure could achieve the same degree of efficiency in applying the ordinary system for the entry of aliens as having applicants remain or wait in 'suitable premises' at the border; it should be borne in mind in any event that provisional authorization of entry (while the asylum application is processed) is clearly difficult to apply if the application for asylum is denied definitively: owing both to the need to locate the applicant and to the need for physical transfer to the border post.

Furthermore, nor can it be considered in an abstract manner and *a priori* that the maximum periods for remaining in the 'suitable premises' at the border post exceed that which is strictly necessary. The maximum period of four days is clearly related to the minimum time required to process and answer an application for asylum. The same can be said of the maximum period of two days for

re-examination. In this connection it should be borne in mind that art. 5.7.1 establishes that the representative in Spain of the United Nations High Commissioner for Refugees must be informed of the request for asylum within a maximum period of four days, and that the representative may interview the applicant if he or she wishes. The application must be initially accepted or rejected (rejection must be grounded pursuant to art. 54.1 *LPC*) within the same four-day period and the asylum seeker must be notified according to the procedure set out in art. 59 *LPC*. If the alien asks for their application to be reconsidered (they have twenty-four hours to do so) the maximum period for issuing a decision and notifying the applicant is just two days, during which time a meeting must be held with the representative of the United Nations High Commissioner for Refugees, or, at least, the meeting must be prior to the making of the final decision by the Ministry of the Interior (art. 5.7.2 *LRDA*). In view of the laws regulating the processing of applications for asylum, it cannot be considered that the maximum periods during which the freedom of the asylum seeker is restricted are greater than is strictly necessary.

Ninth: Finally, nor can it be said that the regulation of art. 5.7.3 *LRDA* is contrary to the requirement of being pondered, which is also part of the principle of proportionality. Following the methodology referred to in *STC* 103/2001, of 23 April, *F.* 10, the requirement of being pondered involves: first, the identification of a good or interest of constitutional significance which is served by the limitation of another constitutional good; and second, the identification of conditions in which one constitutional interest prevails over another. As for the first, the restriction on freedom laid down in art. 5.7.3 *LRDA* is designed to ensure compliance with the legislation on the entry of aliens into Spain – the significance of which for the other European Union countries was stated in legal ground 3 – without endangering the life or integrity of the person who allegedly suffers persecution, in accordance with International Law on human rights. Compliance with the law – particularly legislation on aliens – is a constitutional good enshrined in arts. 10.1 and 13.1 *CE*: art. 10.1 *CE* refers expressly to 'respect for the Law' as the basis for political order and social peace. Art. 13.1 *CE* expressly states that aliens shall enjoy the public freedoms under the terms laid down by the Law. Therefore, there can be no doubt that respect for legislation on the entry, permanence and residence in Spain of aliens is of relevance to the Constitution.

Tenth: Having identified the existence of a constitutional good to which the restriction laid down in art. 5.7.3 *LRDA* applies, we must also state that respect for the Law (and accordingly the law on aliens) only permits limited, controlled and certain restrictions on a constitutional good (personal freedom) which enjoys a pre-eminent constitutional position as both a fundamental right (art. 17 *CE*) and a higher value of its legal system (art. 1.1 *CE*). This 'rule of conditioned prevalence' among concurrent constitutional goods is also clearly backed by art. 5.1.f) of the European Convention on Human Rights (ECHR), which expressly provides for the prevention of illegal entry into a country's territory as a possible legal cause for restricting personal freedom.

Having established the foregoing, and in view of our reasoning in this judg-

ment, we must conclude that the constraint on the freedom provided for in art. 5.7.3 is pondered.

We must now address a second formal reproach. In the opinion of the Ombudsman, art. 5.7.3 *LRDA* should take the form of organic law, and the contested precept is therefore unconstitutional. As for the definition of organic laws (art. 81.1 *CE*), since *STC* 5/1981, of 13 February (*RTC* 1981\5), this Court has adhered to a strict criterion of interpretation, as regards both the term 'development' and the 'matter' that is an object of reservation. This strict criterion is intended to prevent the legal system becoming stagnated and to preserve the rule of unqualified parliamentary majorities (among others, *SSTC* 173/1998, of 23 July [*RTC* 1998\173], *F.* 7; 129/1999, of 1 July [*RTC* 1999\129], *F.* 2).

(. . .)

Fourteenth: Let us begin by pointing out that the precept currently being challenged modifies the procedure for asylum applications laid down in a non-organic law, Law 5/1984, of 26 March. It is true that this law stems from the express need for regulation stated in art. 13.4 *CE*. But it is equally true that there is no constitutional rule stating that such a law be drawn up and passed as an organic law, nor indeed can this be deduced from art. 13.4 *CE*, which states that the ordinary law shall establish the terms under which citizens from other countries and stateless persons may enjoy the right of asylum in Spain. Having established this, we must now examine whether the new paragraph 7.3 of art. 5 of Law 5/1984 provides for a specific requirement of being passed as an organic law. We must point out in this connection that art. 5.7.3 *LRDA* does not contain any 'direct restrictions' on the fundamental right enshrined in art. 17.1 *CE*, but rather specific restrictions on the manner, time and place in which certain foreign nations seeking asylum in Spain enjoy the freedom laid down in the Constitution. It is important to stress that art. 18 *LRDA* recognizes the right of persons who have been granted asylum to fully enjoy their freedom with no further restrictions than the possible 'precautionary measures' set forth in art. 18.2 *LRDA*, and the same conclusion can be drawn – pursuant to arts. 4.2 and 5.1 *LRDA* – in relation to foreign nationals whose application for asylum is being processed (either expressly confirmed as valid or due to absence of objections). It should then be affirmed that art. 5.7.3 *LRDA* neither develops nor regulates directly and generally foreign nationals' right to freedom, not even the right to freedom of a specific group of foreigners (those who apply for asylum at the border). Art. 5.7.3 *LRDA* imposes – in the framework of a set of regulations basically intended to protect the foreign national, the Law on Asylum – certain time and spatial limits on foreigners in a provisional situation of waiting that is perfectly identified in the Law. This is a restriction on the freedom of movement – with respect to their intention to enter Spain freely – for a maximum of four days (and at most a further two days if, the application having been rejected, expulsion is delayed by a request for reconsideration of the application) which under no circumstances prevents the appellant returning freely to his place of origin or, if necessary, to a third state with different entry requirements. Therefore we must conclude that we are dealing with a provisional and

limited modification of the manner in which certain subjects in very specific circumstances that cannot be generalized enjoy their right to freedom. Art. 5.7.3. *LRDA* does not constitute a frontal development of the right to freedom, nor do the restrictions it establishes amount to an essential limitation of that freedom, which are circumstances that, in accordance with art. 81.1 *CE*, must be dealt with exclusively by organic laws. We must therefore conclude that art. 5.7.3 *LRDA* does not need to be passed according to the procedural requirements of organic laws.

Decision

Bearing in mind the foregoing, the Constitutional Court, acting on the authority invested in it by the Constitution of the Spanish Nation,

Has decided

To dismiss the present claim of unconstitutionality.

Madrid, twenty-seventh of February two thousand and two".

VI. STATE ORGANS

VII. TERRITORY

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANISATIONS

XIII. EUROPEAN COMMUNITIES

1. *Right of non-discrimination*

a) Right to widows/widowers pensions in equal conditions

– *STS* Madrid, 14 May 2001, Social Division. Appeal for reversal n. 5911/2000

The 4th division of the Chamber for Social Affairs of the Madrid Superior Court of Justice dismisses the appeal lodged against a judgment of 27 September 2000 delivered by the Social Affairs Court of Madrid. The issue disputed is the right of the appellant, based on the Treaty of Amsterdam among other legal instruments, to

be paid a widower's pension following the death of his homosexual partner with whom he cohabited. The Court considers that the unequal treatment given to matrimonial unions and cohabiting homosexual couples in law does not constitute discrimination.

Reporting judge: Ms. Concepción Rosario Ureste García

"Legal grounds:

Sole ground: The counsel of the petitioner states only one ground based on art. 190 (this should read 191) c) *TRLPL*, pointing out the violation, owing to an erroneous interpretation, of arts. 14 and 10 *CE*, 174 *LGSS* and the Treaty of Amsterdam, and also quoting judgments of the *TSJ* that do not constitute case-law for the purposes stated in arts. 191 and 194 of the proceedings. The issue under debate has been analyzed and judgments delivered by the Court on previous occasions (Judgment of 26–1–1999, among others), in which the following is stated: the repeatedly quoted art. 174.1 *TRLGSS* establishes as a requirement for the granting of a widower's pension that the applicant be the 'spouse' who has survived the deceased, and therefore (taking up the content of the former art. 160) only recognizes as beneficiaries persons having the status of widow or widower whose spouse has died, and therefore marriage is a *conditio iuris* for entitlement to the benefit in question; this is stated in a judgment of 25–2–1999 delivered by this Chamber for Social Affairs (3rd Division) which dismissed the claim regarding the right to receive a widower's pension and compensation for the death in an accident en route to/from the place of work of his homosexual partner with whom he cohabited, arguing in the legal grounds that the invoked situation similar to marriage lacks legal force for the purposes described in the proceedings and for the purposes of the present appeal, nor can this conclusion be altered by the fact the law forbids marriage between two homosexuals, while art. 32.1 enshrines the supreme rule of the legal system, which limits the right to marry on the basis of full legal equality to men and woman as a standard institution, that is, it defines a civil status, that of being married, and other legal consequences commonly accepted by society, without prejudice to the principle of equality in the eyes of the law that is proclaimed by art. 14 of the Constitution, since it is that same supreme rule which establishes the personal elements that constitute marriage, and the legal impossibility of marrying does not constitute discrimination of any kind because art. 160 (currently 174) only recognizes the right of the surviving spouse to receive a widow's or widower's pension, and the law should be applied in accordance with the principle of legality guaranteed by art. 9.3. *CE*.

The appellant filed an application for a declaration of fundamental rights against the aforementioned decision of the Madrid Superior Court of Justice. The related Constitutional Court decision of 11–7–1994, quoting various decisions of that Court stating that the requirement of marriage in order to qualify for a widow's or widower's pension according to the Social Security system does not conflict with art. 14 *CE*, or with the measures of the public authorities that grant a different and more favourable treatment to family units based on marriage than on other

conventional units, gives an essential reason, namely 'like unions between cohabiting couples, unions between persons of the same biological sex are not legally regulated institutions, nor is there a constitutional right to their establishment; unlike marriages between men and women, which are a constitutional right (art. 32.1) that generates *ope legis* many rights and duties (*STC* 184/1990), and we must thus recognize 'the full constitutionality of the heterosexual principle as a requisite for a marriage union, as laid down in our Civil Code'; and one of the advantages attributed to such a union is the possibility of access to pensions for widowhood.

(. . .)

Furthermore, as for the alleged clash with art. 10 of the Spanish Constitution, a *STC* of 15–11–1990 (184/1990) pointed out that 'free development of the personality is neither prevented nor restricted by the fact that the surviving member of a cohabiting couple is not entitled by law to a widow's or widower's pension . . ., it is obvious that art. 10.1 of the Constitution cannot serve as a basis, considered alone and in isolation, for the right of the surviving member of a cohabiting couple to receive a pension when the other member dies'.

(. . .)

Art. 160 of the *LGSS* and Additional Provision 10.2, of Law 30/1981, of 7 July, are not opposed to arts. 10, 14 and 39 of the Spanish Constitution, and the reasoning that underpins it is 'substantially similar' to international rules and decisions; we may cite in this respect convention n. 102 of the ILO (*RCL* 1988\2049 and *RCL* 1989\771) on Social Security minimal standards, referred to in art. 12.2 of the European Social Charter (*RCL* 1980\1436, 1821 and *Ap.NDL* 3008) and n. 128. In the same way the European Court of Justice, when giving a preliminary ruling on the interpretation of art. 119 of the Treaty establishing the European Economic Community (*LCEur*. 1986\8) and Directive 75/117/EEC (*LCEur*. 1975\39) in a judgment dated 17–2–1998 (*TJCE* 1998\28) – a decision cited in the legal grounds of the present appeal – regarding the case of company rules providing for cheaper transport for the worker's spouse or person of the opposite sex with whom the worker cohabits concludes that this rule does not constitute a discrimination prohibited by those precepts, or a discrimination on the grounds of sex, in that it is fully applicable to workers of either sex (we should not forget that current community law does not apply to discrimination based on sexual orientation (point. 47)) and also leaves the task of adopting measures that may affect such a situation to the legislator, pointing out that although the European Parliament has declared that it condemns any discrimination based on an individual's sexual preferences, rules establishing an equal footing have not yet been adopted, although the Treaty of Amsterdam, signed on 2–10–1997, modifying the Treaty establishing the European Union (*LCEur*. 1986\8), the treaties establishing the European Communities and related acts, has taken a first step by adding to the Treaty an article 6A which, when in force, 'will allow' the Council to adopt, in certain circumstances (unanimous voting on the proposal of the Commission and following consultation with the European Parliament) the measures required to abolish dif-

ferent forms of discrimination, including discrimination on the grounds of sexual orientation.

(. . .)

Ruling

We must dismiss and do dismiss the appeal lodged by Angel Javier S. C., against the decision delivered by the Social Affairs Court n. 16 of Madrid on 27 September 2000, by virtue of a suit brought by the appellant against the National Institute of Social Security and General Treasury of the Social Security regarding his claim for a widower's pension, and, therefore, we must confirm and do confirm the decision in question".

– *STSJ* Catalonia 13 March 2001, Social Division. Appeal for reversal n. 8221/2000

The Social Affairs Division of the Superior Court of Justice of Catalonia delivered a judgment on 13 March 2001 dismissing the appeal for reversal lodged by the Association of Basketball Clubs Saski Baskonia SAD, against a judgment of 14 June 2000 delivered by the Social Affairs Court n. 12 of Barcelona in a suit brought by Senol S. M. against the association for violating the right of non-discrimination on the grounds of nationality.

Reporting judge: Mr. Féliz Azón Vilas

"Legal grounds*:*

(. . .)

Third: As regards the reason for the law applied, in which, as has been stated, an erroneous interpretation is claimed of article 37 of the additional protocol to the Partnership Treaty signed by the European Community and Turkey on 23 November 1970, we should point out that the question consists of determining whether the appellant was discriminated against by the Association of Basketball Clubs on the grounds of his Turkish nationality when he was granted a foreign player's permit as opposed to a Spanish player's permit – which is the type of permit that should have been issued according to the suit the judgment of which, sufficiently grounded, is currently being contested.

The appeal argues that access to competition sport should not be understood to be a condition of employment in the sense that access to a particular post (a national or EU place in a team) it is not a condition of employment and claims that sport has its peculiarities.

In this respect we should recall the arguments used in the *Bosman* judgment delivered by the European Court of Justice, which maintains that the Treaty provisions on the free movement of persons are intended to facilitate the exercise of any kind of professional activity within the EU by nationals of the member states and are opposed to measures (even those of associations and organizations not subject to public law; see the *Walrave* judgment) that could place such nationals in an unfavourable position if they wished to engage in an economic activity in the territory of another State (94).

Point 2) of the aforementioned judgment furthermore establishes that article 48 of the EEC Treaty (*LCEur*. 1986\8) is opposed to the application of regulations adopted by sporting associations according to which, in the competition matches organized by them, football clubs may only pick a limited number of professional players who are nationals of other member states, stating in point 117) that paragraph 2 of article 48 expressly establishes that the free movement of workers would entail the abolishment of all discrimination on the grounds of nationality between workers of member states as regards employment, payment and working conditions, and in point 120) that the fact that there are clauses that do not affect the employment of such players but rather the possibility of their clubs picking them for an official match is (contrary to the law) since insofar that participation in such matches is the essential aim of the activity of a professional player, it is obvious that a rule that limits it also restricts the possibilities of employing the player in question.

Having established that EU sports players cannot be limited by type of contract when rendering their services, we must now attempt to determine whether this reasoning is also applicable to a non-EU citizen of Turkish nationality, assuming that he meets all the requirements imposed by the member state on foreign nationals for reasons of public order or otherwise.

Fourth: To solve the problem appropriately, we must examine the international conventions which the European Union has entered into with Turkey and in this connection it is particularly relevant to cite the additional protocol signed on 23 November 1970 in Brussels annexed to the Agreement establishing the Association between the European Economic Community and Turkey, article 37 of which states that 'As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community'. Likewise, Decision 1/80 of the EC-Turkey Association Council of 19 September 1980 states that 'the Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers'.

In view of the aforementioned regulation, we can only conclude that the appellant, a Turkish citizen, having met all the requirements for working legally in Spain, cannot be subjected to any limitations based on his nationality that cause his situation to differ from that of EU nationals when rendering their services as sports players in Spanish territory, as this would have to be regarded as discrimination on the grounds of nationality, which is precisely what the EU rules are intended to prevent and which, let us not forget, have a direct effect in Spain as a member of the Union.

Since this is the argument maintained by the contested judgment we must confirm it on all grounds and therefore dismiss the appeal lodged by the representative of the *ACB*. In addition, pursuant to article 233 of the Law on Employment

Procedure, the appellant should pay the legal fees of the parties, which the Court establishes at 50,000 pesetas for each.

(. . .)".

2. *State liability for damage resulting from breach of its obligations under Community law*

– *SAN* 7 May 2002, Contentious-Administrative Division. Appeal n. 365/2001

The Ministry of Justice dismissed, due to failure to reply within the time limit, the claim for compensation from the Spanish State for breach of community law, for failure to transpose into national law Parliament and Council Directive 94/47/EC, of 26–10–1994, on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. The AN partially allows the appeal and declares the State liable for damage resulting from failure to comply with Community Law and considers that the appellant is entitled to compensation from the State.

Reporting judge: Mr. Eduardo Menéndez Rexach

"Legal grounds:

First: The present appeal is lodged against the decision to dismiss, through failure to reply, the claim initially filed by the appellant with the Council of Ministers on 18 February 1998 for compensation for damage incurred to individuals resulting from the Spanish state's breach of its obligations under Community law – namely its failure to transpose into national law Parliament and Council Directive 94/47/EC of 26 October 1994 (*LCEur*. 1994\3610), on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; the Council of Ministers passed the claim to the Ministry of Justice, against whose failure to reply expressly the current appeal is directed.

(. . .)

Fifth: The issues to be examined in the present appeal are the extent of the State's liability, the existence of a time limit in relation to certain contracts, the ineffectiveness of another group of contracts in providing compensation on the basis of their signing owing to their failure to meet the requirements of art. 1227 of the Civil Code and the amount of compensation of a final set of contracts since not only the conduct of the government but also that of the contractors contributed to causing the damage. There is in fact no question about the existence of non-contractual liability, since the counsel for the state, following the report issued on 27 July 1999 by the Directorate of the State Legal Department, which features in the record, acknowledges the requirements established by the case-law of the European Court of Justice for determining the liability of the state for damage caused to certain claimants as a result of breach of Community law consisting of a delay in transposing Parliament and Council Directive 94/47/EC; art. 12 of this

rule establishes that States have 30 months from the publication in the Official Journal of the European Communities on 29 October 1994 to adopt the necessary measures to comply with the stipulations therein. By the time this period expired on 29 April 1997 Spain had not complied with any of its obligations. This led the Commission to bring an action with the Court of Justice (case C-311/98) against the Kingdom of Spain for failure to fulfil its obligations, which was removed from the register on 25 May 1999, no doubt on the initiative of the Commission, as the regulatory changes laid down by the Directive had by then been made in national law through the aforementioned Law 42/1998, of 15 December; however, it should be pointed out that in order to bring an action like the present one it is not necessary for the ECJ to declare that the State has failed to fulfil its obligations (Judgment of 8 October 1996 [ECJ 1996, 178], *Dillenkofer and Others*, joined cases C-178/94, C-179/94 and C-188/94 to C-190/94). Nonetheless, although it is not required in order to justify the existence of State liability in this case, since it is recognized in the reply to the claim, it is appropriate to state the principles on which this liability is based as they are useful in settling some of the remaining issues. The general principle of liability of the national authorities for infringement of Community law has been established by the ECJ since the judgment of 19 November 1991 (ECJ 1991, 296), *Francovich and Others*, joined cases C-6/90 and C-9/90; as the ECJ recently declared in a judgment of 4 July 2000 (ECJ 2000, 150), *Haim II*, case C-424/97, '. . . liability for loss and damage caused to individuals as a result of breaches of Community law attributable to a national public authority constitutes a principle, inherent in the system of the Treaty, which gives rise to obligations on the part of the Member States (see Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 38; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* v. *Germany* [1996] ECR I-4845, paragraph 20; and Case C-127/95 *Norbrook Laboratories* v. *MAFF* [1998] ECR I-1531, paragraph 106)'. Having established this general princple, the aforementioned judgment quotes the requirements for liability: '. . . It is clear from the case-law of the Court that three conditions must be satisfied for a Member State to be required to make reparation for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible: the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured parties. Those conditions are to be applied according to each type of situation (*Norbrook Laboratories*, paragraph 107)'. It goes on to state that these conditions '. . . must be satisfied both where the loss or damage for which reparation is sought is the result of a failure to act on the part of the Member State, for example in the event of a failure to implement a Community directive, and where it is the result of the adoption of a legislative or administrative act in breach of Community law, whether

it was adopted by the Member State itself or by a public-law body which is legally independent from the State'. If we compare the facts of the case at hand with the aforementioned conditions for liability, we find, first, that the State failed to implement a Community directive requiring it to adapt its national law to Directive 94/47/EC within the established 30-month period; second, that this directive conferred rights on individuals, like the appellants in this case, which were perfectly identifiable by the provisions of the Directive and could not be enjoyed, such as the right to withdraw *ad nutum* and the possibility of cancellation without defrayal within the established time period (art. 5 of the Directive) and the prohibition of payment of advance payments before the end of the period during which the aforementioned right may be exercised, it being precisely these amounts which were claimed from the government and which the claimants establish as the damages incurred; the causal link is constituted precisely by the fact that the impossibility of exercising such rights is a direct consequence of the State's breach of Community law, since pursuant to national law in force at the time it was lawful for advance payments to be made at the time of signing the contract and there was no possibility of cancellation, which was introduced subsequently in Law 42/1998 as right of withdrawal (art. 10). There is no need to expand on this point as the Administration acknowledges all the conditions we have summed up in relation to the circumstances of this case and the causal link between the State's breach of its obligations and the damage incurred by the claimants, although it disagrees that compensation should be paid to most of them, owing not to the lack of such requirements but to the lapsing of the action since contracts cannot be invoked against the State as there is no reliable record of the date they are entered into, and we must therefore analyze the claims of the defendant, starting with the lapsing of the action in relation with some of the claimants.

Sixth: The procedure through which the claim for state liability must be made in cases such as the present one, and in accordance with EU case-law, having established the state's obligation to provide compensation, must be in such as way as is established by the respective national law on state liability, that is, under the same conditions that '. . . must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it in practice impossible or excessively difficult to obtain reparation' (for example, the aforementioned ECJ judgments *Francovich*, *Norbrook Laboratories* and *Haim II*).

In Spanish law these rules are laid down, first and foremost, in art. 106.2 *CE*, which recognizes the right of individuals to obtain reparation for any damages to their goods and rights caused by the operation of public services; this is developed in Law 30/1992, of 26 November, Title X of which deals with the rules regulating the liability of the public authorities and therefore, according to the aforementioned case-law of the ECJ, this legal framework and lesser regulations that complete it, such as Royal Decree 429/1993, of 26 March (*RCL* 1993\1394, 1765), on the procedure of the public authorities in matters of state liability are applicable to the present case.

(. . .)".

Spanish Judicial Decisions in Private International Law, 2001 and 2002

This section was prepared by Dr. E. Zabala Escudero, Professor of Private International Law at the *Universidad de Zaragoza*, with the collaboration of Dr. J. Pérez Milla and Dr. K. Fach Gómez.

I. SOURCES OF PRIVATE INTERNATIONAL LAW

– *STC*, 14 February 2002. *RTC* 2002/39.

Constitutional principle of non-discrimination by reason of sex and equality of spouses in matrimony. Law applicable to the effects of matrimony. Unconstitutionality of article 9.2 of the *CC* in the previous drafting contained in the articled text approved by Decree 1836/1974 of 31 May.

"Legal Grounds:

(. . .)

Fourth: In light of the foregoing arguments, we must now address the issue of whether art. 9.2 *CC*, in providing that the nationality of the husband at the time of marriage is the nexus determining the law applicable to relations between man and wife and to property relations between the spouses by referral to point 3 of the said article absent or inadequate any marriage settlement, infringes art. 14 *CE* and art. 32 *CE*, . . .

Fifth: . . . In judging infringement of the principle of equality, we have consistently required (a) that the contested regulation entail, either directly or indirectly, differentiated treatment of groups or categories of persons (*STC* 181/2000, 29 June [*RTC* 2000, 181], F. 10), and (b) that the subjective situations as compared be genuinely alike or equivalent – in other words, that the choice of points of comparison be neither arbitrary nor capricious (*SSTC* 148/1986, 25 November [*RTC* 1986, 148], F. 6; 29/1987, 6 March [*RTC* 1987, 29], F. 5 and 1/2001, 15 January [*RTC* 2001, 1], F. 3). And having verified that both conditions are met, we must determine whether or not the difference contained in the regulation is lawful under the Constitution. In these respects, there can be no doubt that in establishing the national law of the husband at the time of marriage as the nexus, residual though it may be, for determining the applicable law, art. 9.2 *CC* entails differentiated treatment of the man and the woman despite the fact that their legal positions in respect of the marriage are the same. The contested article is therefore contrary not only to art. 14 *CE*, but also to art. 32 *CE*, which most specifically declares that men and women have the right to enter into matrimony in terms of absolute legal equality, there being no constitutionally acceptable justification for a rule favouring the man. In light of the Constitution and other Community and

Spanish Yearbook of International Law, Volume VIII, 2001–2002

international documents dealing with equality, the reaction of this Court to any norm or executive act entailing discrimination against women has consistently been in line with the doctrine of the European Court of Human Rights (Decision of 22 February 1994 [ECHR 1994, 9], Burghartz, on determination of the family name) and of the Court of Justice of the European Communities and other Constitutional Courts. Likewise, in a case very similar to the one discussed here, in a decision of 22 February 1983, the German Federal Constitutional Court declared that art. 15 section 1 and 2 first paragraph of the Law Introducing the Federal Civil Code was unconstitutional in that it established the personal law of the husband as the nexus for determining the law applicable to the economic effects of matrimony; it ruled that such preference was contrary to the principle of equality regardless of whether its application was or was not beneficial to the woman – the mere preterition of the wife infringes art. 3.2 of the Constitution – and that the greater certainty in determining the law applicable to the economic effects of matrimony for the given purpose was not sufficient justification under the Constitution to warrant preference for the personal law of the husband.

In a decision of 26 February 1987, the Italian Constitutional Court ruled that preference for the husband's national law in a norm of private international law similar to the one here considered is contrary to the principle of non-discrimination by reason of sex, and contrary specifically to the right of men and women to enjoy full equality before the law when they marry.

As already noted, the contested rule is unconstitutional regardless of whether its application in a specific case is more or less favourable to the woman. That will depend on the rules governing the applicable regime of matrimonial property. However, what the Constitution forbids is the application to the rule of conflict of a nexus that is not formally neutral. Leaving aside the so-called formal neutrality of the rules of conflict, the very use of a nexus awarding preference to the male constitutes an infringement of the right to equality.

In consideration of all the foregoing, the appeal is allowed. It only remains to say that it is not up to this Court but to the judicial authorities, with the means vouchsafed them by law, to determine what the lacuna that annulment of the precept in question might cause in the determination of subsidiary nexus.

(. . .)

It is decided

To accept the instant claim of unconstitutionality, and therefore to declare unconstitutional and repealed by the Constitution, the words "by the national law of the husband at the time of marriage" contained in art. 9.2 of the Civil Code, as set forth in the articled text approved by Decree 1836/1974 of 31 May (*RCL* 1974, 1385 and *NDL* 18760)".

II. INTERNATIONAL JURISDICTION

1. *Family*

– *AAP* Balearic Islands, 6 April 2001. *Web Aranzadi JUR* 2001\180232.

Competence of Spanish courts to hear divorce proceedings brought by a Spanish national resident in Spain.

"Legal Grounds:

(. . .)

In the present case there is no doubt as to the jurisdiction of the Spanish courts as provided in article 22 of the *LOPJ* and the First Additional provision of the Law of 7 July 1981, inasmuch as the plaintiff appears currently to possess Spanish nationality and to be resident in Spain, given which the nationality and residence of the defendant is irrelevant.

The court of instance examines *ex officio* its own territorial jurisdiction and appears to conclude that jurisdiction should lie with a court of Buenos Aires (Argentina). This Court accepts the view sustained by the Counsel for the appellant and by the Public Prosecutor that, in accordance with the general principles set forth in articles 72 to 74 of the *LECiv.*, in divorce proceedings the trial court cannot *ex officio* examine its own lack of jurisdiction. We note that this is the general principle, applicable other than in circumstances where the court is expressly authorised to examine its own jurisdiction; however, the Additional Provisions of Law 30/1981 contain no such reference, merely limiting the possibility of choice of law. Therefore, the question of declination or restraint of jurisdiction may be raised by the other party, or by the Public Prosecutor as the case may be, but never by the court *ex officio*".

– *SAP* Madrid, 5 July 2002. *Web Aranzadi JUR* 2002\227228.

Lack of jurisdiction of Spanish courts in respect of separation. Failure to accredit effective residence of spouses in Spain.

"Legal Grounds:

(. . .)

The evidence submitted in the proceedings must be properly analysed, bearing in mind that the parties are foreigners, in order to determine whether they were in fact domiciled in Madrid as husband and wife. To begin with, the appellant's claim cannot be accepted on the basis of purely formal circumstances and details, namely certification from Madrid City Council of entry in the voters' roll or certification from the Police Department of the spouses' resident's permits, since these do not constitute automatic proof of the effective residence or the real domicile of the litigants as a married couple.

It must be said in this connection that there is no convincing proof that the spouses really occupied the domicile situate at calle . . . no. 1 in Madrid – even allowing that this domicile was used as a professional and banking address – or

that the wife ever lived there; and in fact the wife contradicted herself in the reply to interrogatories, stating that she lived in an apartment at calle . . . in Madrid. In short, there is no evidence of long-term, stable occupation of this domicile as reflected in consumption (water, telephone, electricity, etc.), nor is there any other evidence to support the presumption of real and continuous residence in that domicile.

In fact the wife resides in Paris, at rue . . . number two, as accredited by judicial enquiries undertaken by a Paris court in connection with measures arising from disagreement between the spouses. On 23 January 2001, the court ordered provisional separation. Also, an inventory of goods was carried out by order of the same court dated 10 November 2000; the official report stated that the wife was not initially present in the above-mentioned domicile, that the inventory was made in the presence of a person having a personal relationship with the appellant, whose sole statement to the court officers was that the latter was travelling, and that before the conclusion of the inventory the appellant appeared and was advised of the action there in progress by court order, and that she then stayed in the above-mentioned domicile.

Furthermore, the appellant having made several pleas to the French court, there has been a recent decision, as accredited in court by the appellee, denying those pleas and rejecting the annulment of the decision admitting the absence of conciliation. The court also dismisses the exception of lack of jurisdiction and upholds the competence of the French court to judge the divorce action brought by the appellee. This action was brought on 30 October 2001, and it is surely significant that the present appellant filed for divorce in the Spanish courts in December of the same year.

Having regard to the domicile of the husband, there is no record of his ever having resided at calle . . ., number 1; indeed, there is sufficient evidence to show that he resides at . . ., the place where he carries on his business, his personal life and other related activities, there being documentary proof of his domicile there in the form of utility invoices for the dwelling and a lease. There is nothing to connect the appellee with the above-mentioned Madrid domicile other than business; the address of his bank account, which is in the name of his company is calle . . . number 1. The appellant further contradicts herself by stating in her writ that there was no relationship between the spouses as from 1995, whereas on interrogation she stated that the separation took place in 1998.

The foregoing suffices to conclude that the Spanish courts are to competent to judge the action brought by the appellant, and therefore the appeal is dismissed".

2. *Contracts*

– *STS*, 11 February 2002. *Web Aranzadi JUR* 2002\3107.

Nullity of express submission to German courts in re rental of a property situate in Spain.

"Legal Grounds:

. . . the Spanish translation of clause X of the rental agreement subscribed by the parties, accompanying the German original and the complaint and not brought into question by either party, states literally: *'The parties hereby waive all exceptions in respect of the applicability of International Law and agree that only German Law shall apply. Jurisdiction and place of performance: Munich (Germany)'*. Art. 22,1 of the *LOPJ* provides that Spanish courts and tribunals possess *'exclusive'* competence in respect of real property rights and rentals of properties situate in Spain. . . . It is therefore inexplicable that a party should seek to uphold a clause in an agreement when that clause arbitrarily enters into conflict with a domestic provisions of this rank, which provision is rooted in the Brussels Convention and sets forth the criteria determining judicial competence in civil matters with reference to the nexus between the claim of jurisdiction and, in this case, the territory".

– *SAP* Guipuzcoa. 25 March 2002. *Web Aranzadi JUR* 2002\228306.

Competence of Spanish courts in respect of cheques drawn by a company domiciled in Spain but issued in France and payable through a current account in France. Article 2 Brussels Convention.

"Legal Grounds:

. . . Having regard to the challenge based on lack of jurisdiction, it was claimed that Spanish law was not applicable, since the action arose in connection with a number of cheques drawn by a company domiciled in Spain but issued in France and payable through a current account in France, and hence under Spanish law, the applicable law ought to be French regardless of the domicile of the drawer of the cheques.

The original court declared itself competent in pursuance of article 2 of the Brussels Convention, of which France and Spain are signatories. This Convention, which is the general norm of reference, provides that persons domiciled in the territory of a signatory State are subject to the jurisdiction of that State irrespective of their nationality. This is consistent with the general rule laid down in article 22.2 *LOPJ*, which provides that Spanish courts have jurisdiction when the defendant is domiciled in Spain. Therefore, the Spanish courts are perfectly competent to deal with the present executive proceedings given that the defendants are domiciled in San Sebastian".

– *STSJ* Madrid. 18 July 2001. *AS* 2001\3695.

Incompetence of Spanish courts in respect of dismissal of an Argentine national having rendered services in Argentina for a company domiciled there.

"Legal Grounds:

. . . we accept the facts as proven in the contested decision, to the effect that the plaintiff, an Argentine national, rendered services to a company incorporated and domiciled in Argentina at a work centre in Buenos Aires under a contract of

employment referred to in the fifth proven fact, received payment in US dollars and was dismissed by notarised writ issued at the behest of his employer *Cia. General de Fosforos Sudamericana, SA*. The case does not meet any of the requirements for jurisdiction of the Spanish courts established in article 25 of the *LOPJ*, and therefore the Spanish courts must be declared incompetent in respect of the dismissal challenged by the plaintiff".

– *STSJ* Basque Country. 20 February 2001. *AS* 2001\1277.

Submission of a contract of employment to "*the law applicable in the courts of Bayonne (France)*". Jurisdiction of Spanish courts.

"Legal Grounds:

. . . Art. 3.1 of the Convention on the law applicable to contractual obligations, opened for signature at Rome on 19 June 1980, provides that contracts are to be governed by the law chosen by the parties. This rule applies to the regulation of such contracts but not to lawsuits arising therefrom: art. 1–1 restricts the scope of application to contractual obligations, and art. 1–2–h excludes procedure.

Art. 3.1 does not then contain any rule for determining the country whose courts have jurisdiction in any action arising in connection with a contract, nor is it sufficient reason to deny that it is infringed by the decision rejecting the claim that the Spanish courts could not hear the action brought by Don Marcel.

A second reason for such rejection, equal in weight to the first, is that what Don Marcel and "Pimiento Perfecto, SL" agreed in the contract signed on 1 December 1998 was that the contract be governed by the law applicable in the courts of Bayonne (France), . . . and the terms of that contract strictly speaking confine that stipulation to the obligations arising out of the contract, but not to the issue of what courts are competent to judge disputes between the parties, as the appealed decision rightly sustains. Hence, given that the contract does not expressly stipulate the jurisdiction of the French courts, there can have been no infringement of a rule such as that established in art. 56 *LECiv*.

At all events, this last rule does not apply to cases of submission to the courts of other countries, and indeed, as regards litigation arising out of individual contracts of employment where the obligations under the contract have been performed in a single country, it expressly prohibits choice of another jurisdiction, unless the agreement on such choice is subsequent to the initiation of the dispute or the employee (not the employer) invokes such jurisdiction (art. 17 as it relates to art. 5.1 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters) (. . .).

In short, the Court is absolutely right in upholding the jurisdiction of the Spanish courts in the instant case, given the place where Don Marcel performed his contractual obligations, as provided in art. 25.1 *LOPJ*."

– *STSJ* Madrid. 10 July 2002. AS 2002\3151.

Incompetence of Spanish courts regarding a contract of employment given the existence of a clause of choice of Colombian law.

"Legal Grounds:

. . . Briefly, given the existence of an agreement to be bound by Colombian labour regulations and a specific choice of jurisdiction of the courts of Colombia, articles 57 and 58 of the *LECiv.* (Law 1/2000) as they relate to article 55 thereof supported the exception upheld by the State Legal Service to the effect that jurisdiction lies with the courts of Colombia, such having been the intention and agreement of the contracting parties. The appeal is therefore upheld".

– *SAP* Valencia. 11 May 2001. *Web Aranzadi JUR* 2001\198261.

Incompetence of the Spanish courts in respect of international maritime transport. Clause choosing jurisdiction of a London court.

"Legal Grounds:

. . . The defendant entered a declinatory plea under international law contesting jurisdiction on the grounds that the claim for payment arose from the shipment of containers MSCU 5502625, MSCU 4127319 and MSCU 4043054 from the port of Jakarta (Singapore) to the port of Valencia under a shipping agreement, and that the bills of lading normally issued by Mediterranean Shipping Company S.A. contain a clause 2, Law and Jurisdiction which states: "*Law and Jurisdiction. Any complaints or disputes arising from or in connection with this bill of lading shall be submitted to the High Court of Justice in London. Unless another law be necessarily applicable, English law shall be applicable except in respect of claims relating to cargo shipped to or from the United States* . . .". Since this clause expressly remits to the High Court of Justice of London, the Court of First Instance of Valencia is not competent to judge the matter and must therefore shelve the proceedings and refer the litigants to the competent court.

This Bench has ruled on several occasions on the validity of clauses in bills of lading stipulating arbitration in other countries and on the validity of the choice of foreign jurisdictions in such bills, in addition to the ruling of 6 May 2000. In light of the provisions of art. 17 of the Brussels Convention and the San Sebastian Convention of 26/5/89 (art. 7), although clauses choosing foreign courts are exceptional, these conventions do allow express submission to the courts of third States, and therefore International Law applies here. The bill of lading contains a clause of submission to the London court, in boldface, and there is no evidence to suggest that the plaintiffs/appellees were unaware of it. There was a contractual undertaking by both parties (art. 1255, 1256 *CC*), and the contract left neither party at the mercy of the other. Given this clause, neither party can claim prejudice, wilful dilatoriness or renunciation of rights.

. . . We revoke the original decision and uphold the decision of international jurisdiction, to wit that judgment of the principal issue is the province of the High Court of London".

– *SAP* Badajoz. 23 March 2001. *AC* 2001\2243.

Manner of contesting international jurisdiction at the instance of a party. Express submission to the courts of Argentina in a sporting contract.

"Legal Grounds:

. . . while the challenge of jurisdiction by a party must be made through the proper channel, which according to the Supreme Court is a declinatory plea, although the outcome of that plea, if successful, will be not the referral of the proceedings to the competent foreign court, which is obviously not bound by them, but notice to the parties of which country in the opinion of the Spanish court is competent to judge the matter; therefore, the challenge to competence lodged by the defendant by way of a plea of exception accompanying the writ of defence rather than by way of international declinatory plea, must be deemed improper (. . .) as stated by the court of instance; and moreover, it is possible (or at least arguable) that by proceeding in this manner the defendant tacitly submits to the jurisdiction of the court issuing the original summons, pursuant to art. 58 of the *LECiv.*, albeit this view is not established and is rejected by the most generally accepted doctrine, which considers that the scope of international jurisdiction is determined by the system of competences of this kind and by international Conventions, basically, and it is erroneous in this respect to invoke legal regulations on territorial competence.

. . . having examined the contract between the parties, . . . we find that under clause nine thereof they expressly agree to be bound by the jurisdiction of the ordinary courts of Rosario (Argentina), which choice of foreign jurisdiction may in principle be held to bind the parties in consideration of the principle of free will and of art. 22 of the *LOPJ* (. . .). It therefore follows by reverse logic that the parties may choose the law of another country even if one of them, in this case the defendant, is domiciled in Spain; moreover, the validity and efficacy of such express choice cannot be denied by invocation of art. 21 of the *LOPJ*, nor again by application of the Brussels Convention, since although domiciled in Spain, the defendant's country is not a signatory of this Convention and hence is not covered by its terms given the personal limitations in the clauses relating to jurisdiction. Furthermore, the problem raised as regards the applicable scope of the said Convention is irrelevant given that – as the court of instance has rightly pointed out – the defendant was domiciled in Spain at the time the action was brought against him; in such cases the Supreme Court has repeatedly and unhesitatingly ruled, in connection with the abuse of law (art. 11 of the *LOPJ*), that contractual clauses of choice of law may be ignored, declaring that if the sole purpose of a challenge to jurisdiction is to delay the outcome of the action, such conduct borders on procedural fraud and as such cannot be entertained, for a defendant summoned by the courts of his place of domicile can clearly avail himself of the right of defence and of the forum most favourable to him. In conclusion, therefore, in the specific case here considered, given that the defendant (a football player) was summoned in his place of residence and no reason having been given (or even mentioned) to justify his preference for the courts of Argentina – from which it may be inferred that the whole point of the exception claimed was to delay the proceedings, considering that the bringing of the action in his place of domicile can only be to his advantage – we find that the said exception must be rejected, as did the court *a quo* in the original decision.

– *AAP* Zaragoza. 3 April 2001. *AC* 2001\1067.
Nullity of clause of express choice of English courts. Competence of Spanish courts.

"Legal Grounds:

. . . the contested decision found that the English courts were competent to hear the complaint in consideration of a clause of choice of law agreed by the parties and in pursuance of art. 10.5 *CC*, art. 22.3 of the *LOPJ* and the Brussels Convention, while the plaintiff here appealing sustains that jurisdiction in the case lies with the courts of Zaragoza in pursuance of art. 62 point 1 of the *LECiv.*

According to the Supreme Court, the courts of a foreign State may in principle be expressly chosen as an extension of the jurisdiction designated by international treaties, provided that one of the parties in litigation is domiciled in a Signatory State and the chosen court is in another Signatory State, as in the present case; however, it also adds that the court must be able to apply a given law and that art. 10.5 *CC* requires that there be a connection with the business concerned, which is clearly not the case here.

Therefore, given that neither the object or matter of the contract (trade in bagged pearled urea) nor the parties (purchaser domiciled in Bilbao and seller domiciled in) has any connection whatsoever with English law, that, as repeatedly ruled by the Supreme Court, clauses of choice of foreign law are highly exceptional in nature, and that the defendant domiciled in Zaragoza can have no good reason for defending his rights in the English courts, we find that the clause is null, and in pursuance of art. 22.2 of the *LOPJ* and art. 62.1 of the *LECiv.*, that the courts of Zaragoza are competent to judge the present case".

– *SAP* Valencia. 17 July 2001. *Web Aranzadi JUR* 2002\2820.
Tacit submission to the Spanish courts.

"Legal Grounds:

. . . In the case at issue, the defendant/appellant Cho Yang Shipping Co. Ltd. – and likewise the co-defendant/appellant Vapores Suardíaz Valencia, S.a., which also claimed exception for lack of jurisdiction – entered an appearance in the proceedings and submitted a plea in defence which included, among other things, the exception here at issue, at the same time contesting the basis of the plaintiff's action. For good measure, the defendants accepted the order of 24 October 1994 whereby they were held to have appeared in due time and manner and to have answered the suit, wherefore, in pursuance of article 58, point 2 of the *LECiv.* of 1881, they may be presumed to have tacitly accepted the jurisdiction of the Spanish courts, specifically the courts of Valencia, and it is therefore the duty of this court to set aside the appellate decision whereby the said exception was upheld and the defendants were absolved of the charges brought against them by the plaintiff".

– *SAP* Balearics. 6 March 2001. *Web Aranzadi JUR* 2001\139841.
Tacit submission to the Spanish courts.

"Legal Grounds:

Procedurally, the issue of lack of jurisdiction must be addressed through the established channel for declinatory exceptions . . ., and therefore the defendant's use of lack of jurisdiction as a delaying exception is baseless, given that the writ of defence and the accompanying petition refer to the substance of the matter, and again, at the evidence stage, the defendant, here the appellant, referred to the substance of the case. In short, in his writ of defence the defendant/appellant did not confine himself to raising the appropriate declinatory exception, and this brings the matter within the scope of art. 58.2 of the *LECiv.*, whereunder if after appearing in the proceedings a defendant makes any representation other than to raise a declinatory exception in due form, such representation will be understood as tacit acceptance of jurisdiction".

3. *Lis pendens – related actions*

– *STSJ* Catalonia. 23 July 2001. *AS* 2001\3646.

Dismissal of a person employed in Spain. Jurisdiction of Spanish courts. No *litis pendens* given different objects of actions in Germany and Spain.

"Legal Grounds:

. . . The appeal by the co-defendants claims undue application of article 10 of the Labour Procedure Law in that judgment of the facts referred to in the suit lies with the German court in which the plaintiff has initiated an action.

. . . In thus claiming that jurisdiction lies with the German courts, the employers invoke the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters . . . The defendants take the view that *litis pendens* would bar the Spanish court in favour of the German court.

. . . Our source of law must be article 25.1 of the *LOPJ*, whereunder in social matters, the Spanish courts have jurisdiction where services are rendered in Spain or the contract was made in Spanish territory and the defendant is domiciled in Spanish territory or possesses an agency, branch, regional office or other representation in Spain.

From this standpoint there is no doubt that, the employee's duties having been performed in Spain and the employer having subsidiaries in Spanish territory, the Spanish courts are competent to judge the issue arising from termination of the plaintiff's contract of employment.

. . . The object of the defendants' appeal is, then, to raise a declinatory exception based on the Brussels Convention, given that what we know of the German proceedings indicates that the German court has accepted jurisdiction.

. . . If one were to accept the appellants' argument that these are identical suits, the terms of the Convention would oblige the Spanish courts to waive jurisdiction; however, we have already seen that this is not the case given the difference in approach to either suit – that is, the lack of possible points of comparison

between the object of the action for dismissal here considered and the action brought before the German court. The object of the present action is to secure a ruling of unfair dismissal and joint liability of the defendants in respect of the legally established consequences thereof – that is, either readmission or compensation. There is no reason to believe that German proceedings would produce any other legal outcome".

III. PROCEDURE AND JUDICIAL ASSISTANCE

– *STC* 16 September 2002. *RTC* 2002\162.
Personal notification. Extraprocedural notice of action.

"Legal Grounds:

. . . The application for judicial protection alleges various infringements of the right to effective judicial protection and to defence (art. 24.1 *CE* [*RCL* 1978, 2836 and *ApNDL* 2875]) arising from the cited court decisions, the principal of which lies in defects in the summons issued in respect of small claims case 332/1995 by Court of First Instance No. 2 of Denia. Service having been unsuccessfully attempted in Calpe – the applicant is domiciled in the United Kingdom – the summons was issued directly without any attempt to locate the person, which would not have been difficult given that the domicile was recorded in the Registry of Property. In consequence, proceedings were continued, resulting in a conviction by the Provincial High Court of Alicante in absence of the appellant.

. . . from our examination of the record of proceedings, we find that it was neither unreasonable nor inappropriate for the summons to be served where it was, given the applicant's links with that place and the relationship existing between the applicant and 'Interesmeralda, SL', on whom summons was served at the same address and who subsequently acknowledged service and appeared in the proceedings. We conclude from the same records – and this is the crucial point as regards art. 24.1 *CE* – that Imperial Park Country Club Properties Ltd. had extraprocedural notice of the institution of proceedings in which it and 'Interesmeralda, SL', among others, was co-defendant.

. . . the remitted inquiries have shown that: 1) The applicant Imperial Park Country Club Properties Ltd., domiciled in the United Kingdom, owns properties in Spain, registered with the Registry of Property of Calpe, specifically apartment no. 605 in the "Imperial Park" complex, in which the defendants had acquired certain time-sharing rights under the contract at issue; 2) the forms issued by 'Imperial Park Country Club' tourist complex, which is at least partly owned by Imperial Park Country Club Properties Ltd., give as its address Calle Ponent, no. . . ., Edificio 'Esmeralda', Apartamento . . ., 03710, Calpe, Alicante; 3) The administrator of the 'Imperial Park Country Club' complex is 'Interesmeralda, SL', whose forms give as its address Calle Ponent, no. . . ., Edificio 'Esmeralda', Apartamento . . ., 03710, Calpe, Alicante – that is, the same address as the tourist complex referred to.

In conclusion, an attempt was made to serve the summons at the common domicile of the entity administering the 'Imperial Park' and the complex itself, where the administrator is the owner, among others, of apartment 605, the ultimate object of the contract in litigation.

This being so, given the function discharged by 'Interesmeralda, SL' and the properties owned by Imperial Park Country Club Properties Ltd. in the complex – whose name, incidentally, is the same – it is hard to see the lack of connection between the two companies as alleged.

. . . Finally, we must consider the precise moment at which the applicant claims to have become cognizant of the action – namely, after a date had been set for auction of the attached goods and before the auction took place, and hence in time to pay the sums demanded and prevent forfeiture of the goods. It so happens that at the same point in the proceedings in another action similar to the one prompting the present application for protection, Imperial Park Country Club Properties Ltd. likewise entered an appearance at the executive stage of another adverse decision handed down by Court of First Instance No. 1 of Denia in a declaratory small claims action, no. 284/1996, against which the defendant likewise lodged an application for protection (no. 1061/2000), upon which this Court has yet to rule. Such consistent timing indicates sufficient grasp of the situation to be able to avert prejudicial actions, which does not sit easily with the alleged unawareness of the proceedings.

Taken as a whole, all the foregoing constitutes an adequate basis, given a precise and direct connection according to the rules of human interchange, to presume extraprocedural knowledge of the pending proceedings on the part of the applicant for protection as of the time of service at the Hotel Esmeralda, calle Ponent, no. . . ., in Calpe, despite which the applicant voluntarily refrained from appearing in the proceedings".

– *ATSJ* Community of Valencia, 14 May 2002. *Web Aranzadi JUR* 2002\198874.

Lex fori regit procesum. Language of the defendant and representation in proceedings.

On 29 April of the instant year, this Bench received, by registered mail, a writ from Mr. Michael John H., the heading and the petition in Spanish and the rest in English, requesting the institution of large claim proceedings for civil liability against the Magistrates of the Third Bench of the Provincial High Court of Valencia, Messrs. José Luis P.H., D. Mariano F.M. and D. Francisco H.V.

"Legal Grounds:

. . . all suits brought in Spain, including those brought by Community citizens, are subject to the procedural rules of this country, which rules Mr. H. fails to observe in this second writ despite his having been duly advised thereof.

. . . Hence, given that languages other than that of the addressee are not admissible even for purposes of communication, notification or judicial cooperation between the various member States of the EU except in the case of standardized forms, still less is it admissible for a Community citizen to address a court of

another Member State in a language other than the official language or one of the official languages of the latter, and therefore the writ submitted by Michael John H. is not admissible.

. . . under the provisions of article 399.2, the writ of action must include the appointment of Counsel, attorney and the signature of the Solicitor, which requirements Mr. H. has not met; for this reason also the writ is inadmissible and cannot be accepted as a writ of action in the terms required by our procedural law".

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND DECISIONS

1. *Family*

– *STS*. 14 May 2001. *RJA* 2001\6203.
Probative value in Spain of a Venezuelan decision on extra-marital filiation.

"Legal Grounds:
. . . the real issue raised by this ground is the status of the test of documentation issued abroad as conducted by the court of instance. It also seeks to establish that since the documentation relating to the filiation of the plaintiff refers to a decision by the courts of Venezuela, enforcement ought to have been sought by way of *exequatur*; however, as noted in the original decision, this argument is groundless in that the Venezuelan decision was executed in that country and an order of enforcement of that decision on the basis of the initial claim. We would highlight that the decision here contested has never been the basis for enforcement of a prior decision by the courts of Venezuela; however, if we examine the decision of the court *a quo*, it is plain that in judging the question of whether the plaintiff was or was not an illegitimate child of the decedent of the defendants, the court took due account of the documentary evidence presented in the proceedings, and that, as stated by the Public Prosecutor, in no way entails enforcement of the decision of a foreign court without due performance of the formal requirements of an *exequatur*".

– *ATS*, 6 February 2001. *RJA* 2001\1510.
Denial of *exequatur* of a French divorce decree. Non-compliance with article 15.3 of the 1969 Hispano-French Convention.

"Legal Grounds:
. . . Art. 4.3 of the 1969 Hispano-French Convention, the reference for this *exequatur*, provides that the recognition and enforceability of a foreign judgment, by remittal to art. 11 as regards the conditions for recognition, must be denied where the defendant has not been advised of the initiation of proceedings in due manner and with sufficient time to prepare a defence. According to art. 15.3, the party seeking recognition or requesting enforcement must submit a true copy of

the citation of the party that failed to appear, and any documents necessary to prove that such citation was received in due time.

In formal terms, the applicant has not met the requirements, merely stating the impossibility of furnishing such documents accompanied by a document from the Office of the Prosecutor of the Republic purporting to accredit that statement. However, this document does not serve the purpose intended: Firstly, it does not show that the documents referred to are relevant to the citation of the defendant in the original action here appealed. Secondly, it merely states that the Court does not keep files of documents notified abroad, adding that the document concerned was registered under no. 168C/9 and returned to the bailiff by the Court on 8 August 1993 following formalization by the Spanish authorities. Its terms are therefore far from substantiating the impossibility of accrediting the existence of a case for *exequatur* consisting in service of notice to the defendant of the initiation of proceedings in due manner and in good time. And again such a requirement cannot be said to place the applicant in a position of defencelessness or to violate his right to effective judicial protection, since he does not appear to have exhausted all the means available to him to secure accreditation of the said requirement when he has on the other hand furnished the documents of the rogatory commission issued by the French authority to notify the defendant of the decision handed down in the original proceedings – which notice was in fact successfully served – and when, even if the foreign court or prosecutor's office did not keep files of documents notified abroad, there is no record of the plaintiff having attempted to secure them either from the French authorities in charge of processing rogatory commissions or notifications or referrals abroad, or from the Spanish authorities competent in such matters, if in fact the service of notice was channelled through them as stated. In short, the alleged impossibility is not duly substantiated and sits ill with the fact that the applicant did furnish documentation accrediting service of notice of the foreign decision to the defendant. Therefore, given failure to meet the formal requirement established in art. 15.3 of the Convention and the failure to accredit that the defendant's absence in the proceedings was due entirely to his own will or prompted by his own interest or convenience rather than to his not having received due and timely notice of the action brought against him, following this Bench's established principle, he has failed to overcome the obstacle to *exequatur* consisting in proof of contempt on the part of the defendant, and there is therefore no need to go into the other grounds of opposition raised".

– *ATS*, 3 July 2001. *RJA* 2001\6521.

Applicability of the Convention between Spain and the Union of Soviet Socialist Republics of 26/10/1990 to recognition in Spain of a Russian divorce decree. Incompetence of the Supreme Court to consider the case.

"Legal Grounds:

(. . .)

There being in existence a Convention between the Kingdom of Spain and the Union of Soviet Socialist Republics on judicial assistance in civil matters, signed

at Madrid on 26 October 1990, which came into force on 22 July 1997; the Union of Soviet Socialist Republics having ceased to exist – and having given rise to the appearance of various new States, including the Russian Federation – and the defendant in the *exequatur* being a national of the said Federation, this Bench must rule on the applicability of the of the said Convention to the Russian Federation.

Having examined the Vienna Convention on the Law of Treaties of 23 May 1969, and essentially the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, we conclude that in the event that parts of a State separate to form one or more States, whether or not the predecessor State continues to exist, the predominant principle is the continuity of treaties.

This is the thrust of article 34 of the 1978 Vienna Convention, which establishes that in the event of succession of States as described, any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; the second part of the article introduces an exception to the applicability of such a treaty where the States concerned otherwise agree or it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation. It is concluded that none of the mentioned exceptions apply in the present case, and therefore the Convention between the Kingdom of Spain and the Union of Soviet Socialist Republics on judicial assistance in civil matters, signed at Madrid on 26 October 1990, is applicable.

Under article 21 of that Convention, *'decisions shall be recognized and enforced when they were delivered subsequent to the entry into force of this Convention. Non-enforceable decisions, according to their nature, shall be recognized even if they were delivered prior to the entry into force of this Convention, provided that they were founded upon a rule of competence recognized in the said Convention'*. In light of this provision and of the nature of the conclusions of the decision whose recognition is sought, which do not require enforcement strictly speaking, recognition as requested will be subject to the conditions laid down in the convention, examination of which will be the province of the jurisdictional body indicated in art. 24.3 thereof . . . Absent other forum, territorial jurisdiction lies with the court of the defendant's place of domicile, provided that such domicile is in Spain; in any event, the Court of First Instance corresponding to the Civil Registry where the marriage was registered retains full competence for enforcement as such, absent any other applicable forum".

– *AAP* Balearics, 23 March 2001. *Web Aranzadi JUR* 2001\141077.

Brussels Convention not appropriate for enforcement of a divorce settlement signed in Germany.

"Legal Grounds:

. . . In these proceedings, the counsel for Mrs. H.G. has requested enforcement of a divorce settlement made in Essen (Germany) on 31 October 1978 by

the applicant and her former husband, Hans J. G. (the marriage was terminated by divorce decree of 23 October 1979) . . . Since the request for enforcement of that settlement is based on the provisions of the Brussels Convention, it must be remembered that according to article 54 of the Convention, in the case of applications for *exequatur* in respect of enforceable public documents, its provisions are only applicable to documents formalized after the entry into force of the Convention in the State of origin. In pursuance of this rule, given that the Brussels Convention came into force in Spain on 1 February 1991 and in Germany on December 1994, it follows that the public document whose enforcement is requested by counsel for Mrs. H.G. was formalized before the Convention came into force in Germany. Therefore, the procedure followed by the appellant must be deemed inappropriate – and this ought to have been observed *ex officio* – and the application for enforcement denied. There is no need to examine whether the requirements for such an application are met, since the stated procedural defect precludes such examination and could arguably affect determination of the court competent to consider the *exequatur*".

– *ATS*, 31 July 2002. *Web Aranzadi JUR* 2002\216451.

Grant of *exequatur* in respect of a decree of divorce by mutual consent issued by Argentine courts. Applicability of the general conditions set forth in *LECiv.*/1881. Lack of an agreed judicial forum.

"Legal Grounds:

. . . There being no treaty with the Argentine Republic or any international regulation applicable in respect of recognition and enforcement of decisions, the only possible recourse is to the general provisions set forth in article 954 *LECiv.* – which remain in force pursuant to the third exception in section one of the Sole Repeal Provision of *LECiv.*/2000, 7 January (*RCL* 2000, 34, 962 and *RCL* 2001, 1892) – absent accreditation of negative reciprocity (art. 953 of the Law of 1881 as cited). The finality of the decision under the law of the State of origin is proven. Article 951 – which in this respect does not apply only to conventional law when taken in conjunction with the succeeding provisions – and repeated rulings of this Bench require that for granting of *exequatur* the decision be final irrespective of the rules of recognition. The first requirement in art. 954 (*LECiv.*/1881) is that the divorce action be personal in nature. As to the second requirement in the same article, it has been accredited that the divorce took place by mutual agreement of the spouses. As to the third requirement of the said article, this is fully in compliance with Spanish public policy (in its international dimension), in that article 85 of the Civil Code allows the possibility of divorce whenever and however the marriage took place. As required under art. 954.4, the authenticity of the decree is guaranteed by the accompanying Apostille as stated in the record of proceedings. There is no reason to believe that the parties have invoked the international jurisdiction of the courts of the Argentine Republic as a forum of convenience for fraudulent purposes (articles 6.4 Civil Code and 11.2 *LOPJ*); article 22.2/3 *LOPJ* does not establish exclusive jurisdictions as does article 22.1, but in the present

case there is nothing to favour the jurisdiction of the Spanish courts. To the contrary, the fact that the husband is Argentinian and that the marriage took place in Argentina lends credence to the competence of the courts of origin and hence excludes the possibility of fraudulent intent in respect of the law applying to the substance of the matter, an issue bearing on the previous ground. There is no appreciable contradiction of or material incompatibility with any decision delivered or proceedings pending in Spain. The decision of the Bench is therefore to grant *exequatur* of the decision . . .".

– *AAP* Malaga, 31 January 2001. *AC* 2001/1836.

Decree of maintenance delivered by a Swiss court absent the defendant for reasons beyond his control. Denial of *exequatur* under article 27.2 Lugano Convention.

"Legal Grounds:

. . . The basic and essential arguments of Mr. B. . . . for revocation are that the appealed decision is contrary to law in that the foreign decision was delivered in his absence, which absence was for reasons beyond his control, namely the fact that he was notified almost two months after the trial had taken place . . . This brings into play one of the conditions barring recognition and enforcement set forth in the second subsection of article 27 of the Convention, namely that the foreign decision was delivered while the defendant was in default. The fact that the defendant failed to appear because he was unaware of the existence of the proceedings constitutes an obstacle to recognition of the foreign decision.

This means that one of the circumstances cited in article 27 of the Convention as barring enforcement is given – namely, the provision of point two – since the foreign decision whose recognition and enforcement is sought was delivered while the defendant was in default. The reason for this default was ignorance of the existence of the proceedings, which in the interests of due respect for rights of defence bars recognition of the foreign decision whose enforcement is sought".

2. *Succession*

– *ATS*, 6 November 2001. *RJA* 2001\9521.

Denial of *exequatur* in respect of a Puerto Rican decision containing no element susceptible of enforcement in Spain.

"Legal Grounds:

. . . Application is made for *exequatur* in respect of a decision of the High Court of the Associate Free State of Puerto Rico (Mayagüez Chamber), which application must be examined in light of the conditions required for recognition and enforceability of foreign decisions under arts. 951 *et seq*. of the *LECiv.* of 1881, this being the applicable statute absent any applicable *ad hoc* conventional rule and absent accreditation of negative reciprocity.

It is the object of the *exequatur* that this Bench must examine to determine whether it is allowable or should be denied. The applicants seek recognition of a

foreign decision ordering the Property Registrar concerned to register certain properties in the name of persons possessing rights of inheritance therein, these persons having been declared heirs in a prior decision. This claim is not allowable since *exequatur* is not possible in respect of a foreign decision confined to determining the acts of enforcement necessary to carry out a prior – likewise foreign – decision and to secure effective legal title by allowing registration of the properties comprising the estate in the names of the appointed heirs and issuing an order to that effect to the Property Registrar. This is in fact the sole and specific substance of the decision whose recognition is sought, which contains no other pronouncement susceptible *per se* of producing any kind of effect, be it constitutive, *res judicata*, classificatory, preclusive or of any other nature susceptible of recognition, since such effects relate to judicial decisions issued prior to the act whose recognition is sought in the course of the testamentary proceedings in the courts of the State of origin. The object and purpose of the *exequatur* procedure, which is specifically to render foreign decisions enforceable in Spain, including as regards registration, necessarily excludes concrete acts of enforcement ordered by courts of other countries in respect of other prior decisions, also delivered by these courts, containing an enforceable pronouncement, since otherwise the principle of jurisdictional sovereignty of our courts in the enforcement of judgments, as enshrined in art. 117 of the Spanish Constitution, would be weakened and constrained to some extent by the jurisdictional activity of foreign courts. Be it said, furthermore, that in Spain it is more difficult to secure recognition of enforceability – particularly in the case of registrability, as in the present case – of a judicial decision where, despite the affirmation of the applicant, it is not duly accredited that none of the properties comprising the estate is situated in Spain".

3. *Contracts*

– *AAP* Balearics, 29 May 2001. *Web Aranzadi JUR* 2001\258831.

Lack of jurisdiction of court of first instance in respect of opposition to the enforcement of a foreign judgment.

"Legal Grounds:

. . . Beginning with the issue of functional competence of the Court of First Instance to hear the appeal from a judgment of the same Court of First Instance granting *exequatur* in respect of a foreign decision and hence rendering this enforceable in Spain, it must be said that, as the plaintiff/appellant alleges, and as provided in article 37 of the Brussels Convention, an appeal from the judgment at first instance granting *exequatur* must be brought before the relevant High Court in the form of an incidental action in opposition to enforcement of the foreign judgment, whereupon it is up to the enforcing party to challenge the opposition to the *exequatur* within the term allowed by incidental procedures.

. . . Therefore, although the defendant has withdrawn the irregular appeal lodged with the Court of Instance, it is this Bench's duty to rule on the matter and to uphold the appeal by the plaintiff against the decision sustaining the competence

of the Court of First Instance to admit and consider the appeal as an ordinary appeal, despite the fact that this ruling is without practical effect given the defendant's withdrawal from the appeal against the judgment of 29 March 2000 granting *exequatur*".

– *ATS*, 20 February 2001. *RJA* 2001\3968.

Inapplicability of the regime of recognition and enforcement of the Brussels Convention to a judgment delivered by the Supreme Court of Gibraltar. Decision regarding termination of an agreement for the sale of shares.

"Legal Grounds:

. . . *exequatur* is not allowable in respect of decisions by the courts of Gibraltar. There are sufficient factors at least to tarnish the legitimacy of the claim of territorial sovereignty underpinning the exercise of jurisdiction by these courts: either the cession of territory of 1713 excluded the cession of sovereignty, and hence of jurisdiction, or, if territorial sovereignty was ceded, its current legitimacy is questionable in light of the regulations governing the law of treaties, in light of the current law of decolonization, and in light of the fact that the present status of Gibraltar is founded on the use of force and that the effects and consequences thereof are at odds with the principles of territorial integrity and free determination informing the decolonization process.

(. . .)

Given the requirements of *exequatur*, all these factors lead to the conclusion that the most basic of these requirements is lacking, namely the existence of a judgment delivered by courts in a foreign country – that is, foreign courts – in the exercise of jurisdiction founded upon unquestioned sovereignty over a given territory".

– *AAP* Balearics, 22 March 2001. *RJA* 2001\194928.

Denial of *exequatur* in respect of a German conviction on the ground that the Spanish court did not receive the documents required under art. 46.2 Brussels Convention.

"Legal Grounds:

. . . in the present case, the last paragraph of the judgment for which *exequatur* is sought, contains the following assertions: that the foreign decision was delivered in default, the defendants having been duly summoned but having failed to enter an appearance or to have appointed legal representation, and the action is conclusive; that according to the record of service, the summons was served upon the defendants' attorney on 27 May 1997; that in pursuance of art. 87 paragraph 1 of the German Civil Procedure regulations, the latter was still empowered to receive the summons despite having renounced his attorneyship, since no other attorney had yet been appointed; and that a copy of the decision delivered in default, dated 27 June 1997, was served *ex officio* on the defendant/attorney on 11 August 1997.

Nevertheless, the party applying for *exequatur* has furnished no documents, other than the decision of which enforcement is sought, to accredit compliance with the formal conditions set forth in article 46.2 of the said Brussels Convention; having examined the record of proceedings in detail, this Bench has not found the documents required under the said provision. In the case of a judgment delivered in default, there ought to be the original or an authentic copy of the document accrediting service or notification of the action, or an equivalent document, to the party declared in default, and there being no record of such a document, it must be considered that the provisions of the said article of the Brussels Convention have not been complied with".

– *AAP* Málaga, 19 February 2001. *AC* 2001\1424.

Denial of *exequatur* for lack of accreditation that the entity convicted by the foreign judgment and the entity against which enforcement thereof is sought in Spain are one and the same.

"Legal Grounds:

. . . to seek to identify the words 'Club La Costa Limited' as meaning 'Club La Costa Sociedad Limitada' is not legally tenable . . .; given the difference between the two trade names, there is insufficient proof that the entity convicted in the foreign judgments is the same as the entity against which enforcement is sought in Spain. In light of the jurisprudential doctrine referred to above, the nature of this procedure is not such as to allow declaratory judgments other than or exceeding the bounds of judgments strictly confined to enforcement of a foreign judgment, which purpose is deducible from the argument of the enforcing party here appealed against, which essentially seeks to apply the doctrine of removal of judicial protection to allow enforcement of the judgment delivered in Germany against the goods of a Spanish trading company. The appeal is therefore upheld, since it is not proven that 'Club La Costa Sociedad Limitada', which is not named as a party in the German proceedings, is the same as the entity convicted in the judgments on the same proceedings, in which case article 27.2 of the Brussels Convention applies, which provides that foreign judgments cannot be recognized 'when they have been delivered in default of the defendant, unless the defendant has been served with or notified of the summons or equivalent document in due form and in good time' ".

– *SAP* Madrid, 22 January 2001. Web Colex-Data.

Denial of *exequatur* in respect of a Portuguese judgment on a matter of insurance. Procedure to be followed. Control over jurisdiction court of origin.

"Legal Grounds:

. . . In the proceedings at first instance, the court wrongly followed the procedure provided in the *LECiv.* for enforcement of judgments delivered by foreign courts, when the proper procedure was that provided in the Brussels Convention of reference, in consideration both of its time in force and its seniority over national

laws, making it obligatory to proceed as regulated in Sec. 2 of Title III *et cetera* of the Convention, which lays down a uniform, equal, rapid, simple and autonomous procedure that the courts of Contracting States are obliged to observe, and in this case that procedure bars the admission of any kind of opposition other than an appeal to the Provincial High Court, as authorized in art. 40 of the Convention, against the judgement of the court of first instance which denied the application. These express, specific provisions of the Convention are part of the legal system according to art. 96 of the Spanish Constitution, and they take precedence over ordinary laws in the matters to which they relate.

(. . .)

The rules laid down in arts. 31 *et seq.* constitute a procedure regulated in Sec. 2 Title III of the Convention and differ from that established in respect of Jurisdiction in Title II, in that one of its peculiarities is the absence of the party against which enforcement is sought, which party cannot even make any observations until the submission of its appeal. It is therefore not possible to invoke the forum of its place of domicile or of the place of performance, which in other circumstances is essential in determining jurisdictional competence.

As to the representations of the appealing party regarding failure to comply with the procedural formalities essential to the validity of the judgment to be enforced, the Court is bound by the provisions of arts. 29 and 48 of the Convention on the formal characteristics of the documents submitted and by strict respect for the considerations of fact upon which the court of the State of origin has based its jurisdiction.

Under art. 5.1 of the Convention, in contractual matters persons domiciled in a Contracting State may be sued in another Contracting State if that is where the obligation was or ought to have been performed. This notwithstanding, art. 17 of the Convention allows express submission, in writing or verbal, to a court or the courts of a Contracting State. Such submission is by no means deducible from a situation of default as claimed by the appellant, since default is merely indicative in procedural terms of outright opposition to the action.

In none of the circumstances contemplated in the Convention is the party initiating the action authorized unilaterally to determine the choice of jurisdiction; the proper forum in all cases is that of the defendant or of the locus of performance, unless another forum has been agreed or is implicit in the case concerned.

Art. 52.3 of the Convention provides that in determining a person's domicile, the applicable law shall be the national law of that person. The following article provides that the registered offices of companies and other legal persons shall be considered their domicile, and that their determination by the courts shall be governed by the rules of Private International Law. Under these rules, art. 9.11 *CC* provides that the personal law applying to legal persons is determined by their nationality and is applicable in all matter relating to capacity, incorporation, representation, operation, conversion, dissolution and extinction.

The place of enforcement indicated in the Convention, which is referred to in determining a court's competence to render enforceable judgments delivered in a

Contracting State, as referred to in art. 32 *in fine* as it relates to art. 16.5, is that place in which the judgment will be enforced in accordance with the objective content thereof.

In insurance matters, under art. 34 as it relates to arts. 28 and 11 of the Convention, an application for enforceability of judgments delivered in another Contracting State may be denied without any submission from the party prejudiced thereby if the action was not brought before the courts of the Contracting State in whose territory the defendant, whether insured or beneficiary, is domiciled.

In the present case, the court of origin was apprised, as noted in its judgment, of the fact that the defendant was domiciled in Madrid. In admitting the action against the defendant for trial, it was in breach of article 2 of the Convention and of all the provisions thereof regarding territorial jurisdiction, and therefore, without going into the material grounds, which although not recorded there are more than enough to justify competence, the judgment cannot be admitted as susceptible of enforcement in Spain.

This court therefore rejects the appeal brought by the entity seeking enforcement and upholds in part the appeal brought by the opposing party, thus confirming the original court's denial of enforceability of the foreign judgment".

– *AAP* Valencia, 13 June 2002. *Web Aranzadi JUR* 2002\1371.

Enforcement of an Italian judgment ordering payment of commissions accruing to the plaintiff for agency services rendered to the defendant in Italy. No control over jurisdiction of court of origin.

"Legal Grounds:

. . . Therefore, as the matter at issue does not come under Title II Sections 3 (Jurisdiction in matters of insurance), 4 (Jurisdiction over consumer contracts) and 5 (Exclusive jurisdiction) or article 59 of the Convention, the jurisdiction of the original Italian court does not arise. But even if that jurisdiction were an issue, the appellant's claim would still be inadmissible, since, this being a claim for commissions accrued by the plaintiff for services rendered as agent of the defendants in Italy, it would come under Section 2 on 'Special jurisdiction', article 5 of which provides that *'A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged'*.

(. . .)".

– *ATS*, 11 June 2002. *Web Aranzadi JUR* 2002\7802.

Incompetence of Social Bench of the Supreme Court to grant *exequatur* in respect of a Portuguese judgment. Applicability of Brussels Convention.

"Legal Grounds:

. . . The Brussels Convention is extremely explicit and precise as to the competence of courts to order the enforcement of judgments delivered in States belonging to the European Union, and therefore we are strictly bound by the terms of that Convention as reproduced in Regulation 44/2001, to which reference is made here. . . . There is therefore no alternative to the jurisdiction of the Court of First Instance, and where applicable the Provincial High Court, in respect of enforcement of judgments delivered by other courts in the EU, and for the same reason such jurisdiction is barred to the Social Courts in Spain, given that when these Conventions were signed, the Social Courts had existed in Spain for some time and yet jurisdiction in respect of enforcement of judgments by EU courts lies with the Courts of First Instance and Provincial High Courts, with the possibility of appeal for review of the latter's decisions by the Supreme Court.

From the foregoing it is readily concluded that the application for *exequatur* submitted to this Fourth Bench of the Supreme Court furnishes no legal justification for the assumption of jurisdiction sought thereby. The only Bench of the Supreme Court with competence in matters of *exequatur* is the First Bench in civil matters . . . this application for *exequatur* is denied by reason of lack of jurisdiction of this Fourth Bench of the Supreme Court (Social). Competence in this case lies with the Court of First Instance of Madrid, the place of domicile of the defendant, and it is there that the plaintiff must claim whatever rights he feels are due him".

V. INTERNATIONAL COMMERCIAL ARBITRATION

– *STS*, 23 July 2001. *RJ* 2001\7526.

International commercial arbitration. Law applicable to determine the existence and validity of an arbitration agreement.

"Legal Grounds:

. . . This is indeed a case of genuine international arbitration, agreed by a Spanish entity, . . . and a company from the Republic of Korea, domiciled in Seoul, . . . and art. 18,1 of the agreement signed by the parties contains an undertaking, accepted by both parties, that 'any dispute or claim arising from or in connection with this agreement shall be settled by arbitration in the city of New York, in accordance with the rules and procedures of the American Arbitration Association (AAA)'. This clause is included in the agreement whereby 'Goldstar' granted Kern exclusive distribution and commercialization rights in respect of television sets and other kinds of apparatus in Spanish territory.

. . . Before the issue of the existence and validity of the arbitration agreement is addressed it must first be determined who is to judge it – that is, the applicable law. The question is a complex one in that the applicable law is divided, so that specific laws are applicable depending on certain connection, capacity, effects and so forth. The Spanish system for its part is set forth in article 61 of Law 36/1988, 5 December, on Arbitration, within Title X, 'On the rules of Private

International Law', which provides thus: 'The validity of the arbitral clause and its effects are governed by the law expressly chosen by the parties, provided that it has some connection with the principal legal business, or alternatively, absent such choice, by the law of the place where judgment is to be delivered, and if the latter is not determined, by the law of the place where the arbitral clause was made'. The ground sustains that the appealed decision acknowledges that this is an agreement made in Spain between a Spanish company and a Korean company having a domicile – branch – in Spain; however, the decision *a quo*, in its first legal ground, does not cite this as an accredited fact but as having been alleged by the appellant in the appeal. Furthermore, the Korean company is domiciled in Seoul, Republic of Korea, and there is no record of a branch constituting a domicile as claimed in the ground of appeal, but only of an office in Spain. The contested decision rightly avers that this is a standard agreement or regulation that Goldstar uses throughout the world. Both the 1958 New York Convention and the 1961 European Convention of Geneva enshrined the principle of free will, and it should not be forgotten that the current Spanish law of arbitration was inspired by Recommendation 12/1986 of the Council of Ministers of the Council of Europe.

The decision *a quo* rightly states that the arbitral clause is authorized by art. 22.2, *a sensu contrario*, of the Organic Law of the Judiciary, in that the parties expressly submitted to a non-Spanish body and the defendant in the action giving rise to this appeal for cassation, "Goldstar Company Limited", is not domiciled in Spain; be it said, moreover, that international arbitration is not contrary to the public interest or public policy, nor can it be said to prejudice a third party (art. 6.2 of the Civil Code). There is, then, a clear choice of substantive Law, specifically the rules of the American Arbitration Association and the laws of the State of New York, and furthermore, the lack of a connection with the place of residence of one of the parties and with the performance of the obligations arising out of an agreement does not bar international commercial arbitration as agreed, by a body having no connection with the agreement or with the parties thereto, its sole function being to settle a dispute in the fast-moving world of international trade and so avoid the slow and lengthy deliberations of the jurisdiction of the States of either party".

– *ATS*, 20 March 2001. *RJ* 2001\5520.
Recognition of arbitral award. Proceedings pending in Spain.

"Legal Grounds:

. . . According to the rules of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, to which Spain acceded on 12 May 1977 and which came into force in Spain on 10 August of that year, the Convention is applicable to this case given that the award whose recognition is sought comes under the terms of article I of the Convention and the applicant has submitted the documents cited in article IV, duly translated into Spanish.

(. . .)

. . . as part of this recognition procedure and subject in any case to the dictates of internal public policy, this Bench must inquire whether the existence of pending proceedings in Spain constitutes an obstacle to recognition as here sought . . . This being the case, contrary to the claim of the defendant company, it is evident that at the time the foreign arbitration was moved no proceedings were pending in Spain which might bar recognition of the award. The action instituted in the Spanish courts has no relevance for the purposes of the present proceedings given the circumstances referred to, especially the fact that the company here opposing *exequatur* waited for notification of the initiation of arbitration, then only a few days later brought an action in the Spanish courts. To allow proceedings pending in the forum to affect recognition of the enforceability of a foreign award in respect of arbitration initiated prior to these proceedings – even although the object of these proceedings is to annul the agreement or clause of submission to arbitration, as in the present case – is tantamount to a definitive bar on any foreign award, since it would be sufficient, upon notification of the commencement of foreign arbitration, to institute an action in the Spanish courts and claim pending proceedings to bar recognition of the enforceability of such an award. Therefore, *exequatur* proceedings cannot wait upon other domestic proceedings: to hold otherwise would be to license fraud and to encourage the flouting of freely accepted undertakings. To the contrary, the arbitral award, once its enforceability is recognized, will if appropriate affect the other proceedings, to which end testimony of the present judgment must be remitted to Court of First Instance No. 2 of Vigo".

– *ATS*, 13 November 2001. *RJA* 2002\1513.

Grant of *exequatur* in respect of an arbitral award delivered in the Czech Republic. Applicability of the New York Convention. Dismissal of all the grounds of opposition raised by the party against which *exequatur* is sought.

"Legal Grounds:

. . . The applicable law in the present case is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, by reason of both the matter and the date of the award, whose effects in the case of Spain are universal, since Spain entered no reservations to the provisions of article 1 upon its accession to the Convention, which took place by Instrument dated 12 May 1977. Spain is also signatory to a Convention with the Czechoslovak Socialist Republic on legal assistance, recognition and enforcement of judgments in civil matters, dated 4 May 1987, which would also apply to the point at issue under articles 2, 16–c), 18, 19–e) and 21 thereof. With the disappearance of the Czechoslovak Socialist Republic, the two Conventions are binding on the Czech Republic in accordance with the Vienna Convention on the Law of Treaties of 23 May 1969, and more importantly the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties. As regards the New York Convention, this is further supported by the communiqué issued by the Czech Republic (published in the *BOE*, 14 October 1994) declaring itself the successor of the Czech

and Slovak Federal Republic, effective as of 1 January 1993; and as regards the Bilateral Convention, by the exchange of letters of 21 March 1994 and 2 February 1995 (*BOE*, 15 June 1995). Of the Conventions above cited, we prefer the New York Convention, for although the Bilateral Convention is of a later date, in cases like the present one, the multilateral convention is preferred on the principle of maximum efficacy and favour of *exequatur*, as this Bench has noted in other cases where it has ruled in favour of these criteria.

. . . the appeal cannot be entertained, first and foremost because the New York Convention takes precedence over the Bilateral Convention as explained in the previous ground. Thus, in light of the referral in art. III of the multilateral convention to 'the rules of procedure of the territory where the award is relied upon' for recognition and enforcement of arbitral awards, it necessarily follows that under the provisions of art. 57 of Law 36/1988 on Arbitration, art. 955 of the *LECiv.* of 1881 and art. 56.4 of the *LOPJ*, jurisdiction in respect of the present application lies with this Bench, and the issue must be resolved in accordance with the procedures provided in Section Two, Title VIII, Book II of the Law of 1881, as it relates to art. 2 and the Sole Repeal provision, 1–3, of *LECiv.* 1/2000, 7 January. Moreover, the conclusion would be the same if we were to apply the article of the Bilateral Convention invoked by the defendant. A simple reading of the article as it relates to art. 18 of the same Convention reveals a glaring inconsistency in its terms which makes it difficult to determine the body to which application for recognition and enforcement can be made: the initial reference to the 'competent requested tribunal or judicial authority' does not sit well with the rest of the sentence, to wit 'that delivered the judgment as the Authority of first instance'. Whatever the deficiencies of the drafting or the translation, the only possible interpretation of this provision, as it necessarily relates to arts. 3 and 18, is that application for the recognition and enforcement of the award may be made either to the court that issued the decision in first instance for remittal to the court of the other competent party, or else to the court in the receiving State that has jurisdiction in these matters according to the rules of competence in that State. The view that the first sentence of art. 24 of the Bilateral Convention is disjunctive is further supported by the translation made by a sworn translator/interpreter of art. 24.1 of the Czech version of the Convention, which reads: 'application for recognition or enforcement of the decision may be made directly to the requisite court or to the judicial authority that judged the matter at first instance; in this case the application shall be remitted to the judicial authority of the other signatory of the Convention, as provided in article 3 of the Convention'. We would note here that in any case, had the applicant exercised the option of applying through the court of origin rather than the court of the requested State, the authority of the State of origin would simply have referred the case to the central Spanish authority; in accordance with the internal rules already cited, the latter would have remitted it to this Bench, which would institute proceedings in accordance with arts. 951 *et seq*. of the *LECiv.* of 1881, as has in fact been the case.

. . . The ground of appeal as formulated – which comes under the provisions

of art. V, 1–c) of the New York Convention – cannot be entertained for two reasons: firstly, the text of the award itself indicates that it was instigated at the request of the applicant for arbitration; and secondly, the ground for opposition to *exequatur*, as provided in art. V, 1–c) of the New York Convention, entails absence of any connection between the arbitral clause and the arbitral award in that the award addresses issues unconnected with the arbitral clause or aspects outwith its material scope. The position of the party opposing recognition is quite different: the claim does not concern breach of the agreed bounds in the arbitral award but the specific demands of the plaintiff in the arbitration proceedings. The issue is therefore whether the arbitral award is *ultra petita* in respect of the terms framing the dispute rather than whether the bounds of the arbitral clause as agreed by the parties were overstepped. A literal reading of the clause gives a generous scope, which certainly does not exclude a claim for late payment interest on the unpaid price. Whether or not such payment is appropriate is a separate issue, quite beyond the duty of this Bench to decide on *exequatur*, given that this procedure is purely one of recognition and as such cannot examine the facts of the matter.

. . . The position of the party opposing *exequatur* allows this Bench to examine the issue of compliance with the formal requirements of art. IV, 1–b) of the NYC as it relates to art. II, 2 thereof, and likewise the question whether the arbitral award is valid and effective under the material law indicated by art. V, 1–a), in respect of which the burden of proof of applicability lies with the party against which recognition is sought.

Firstly, as regards the precise scope of the conditions laid down in Art. IV as it relates to art. II of the Convention, given the absence of an arbitral clause signed by the parties, this Bench has not only adopted a systematic and integrative approach, including reference to other conventional norms where appropriate, such as the European Convention on International Commercial Arbitration (Geneva 21, 1961), but it has paid particular attention to the purpose of the clause. In our view, the object is to ascertain whether it was the intention of both parties to include in their business agreement a clause, constituting an undertaking or conveying the general intention to submit to arbitration any disputes arising from the performance of a certain legal business relationship between them; which common intent is reflected in the communications maintained and the actions taken by either party in the business relationship, but necessarily in the understanding that such intent is not fulfilled when one of the parties ignores or does not act upon an offer coming directly or indirectly under a binding clause.

. . . The arbitral clause, specifically clause 14, is reproduced on the back of the two confirmations submitted with the application for *exequatur*. This clause refers in turn to the front of the same confirmations, which set forth the terms of submission and specify both the competent body and the applicable law. The first of these confirmations, dated 7 May 1993, is signed by the defendant company, but the second, dated 11 June 1993, is not.

With respect to the requirements of the *exequatur* at issue here, the source of doubt is therefore this second document. Taken as a whole, from the documents

submitted to the proceedings, which testify to an exchange of communications between the parties – in some case through intermediaries – with regard to the making and performance of the successive agreements on the supply of goods, it may reasonably be inferred that their intent was to submit any disputes arising in connection with the supply of goods to arbitration. It is important to note that, as stated by the opposing party, the various supplies of goods took place within the framework of a broader agreement, whereunder the latter was granted the exclusive right to commercialize, in the market of Taiwan, the products that the applicant had undertaken to distribute. It was within the framework of this agreement that successive contracts were made in which the opponent placed orders for goods with the applicant. The documentation submitted is sufficient evidence that the successive supplies were all subject to the same general conditions, whose terms included a clause on choice of law and submission to arbitration. This arbitral clause, as noted, appeared in stipulation 14 of the general conditions of contracting, with reference to the 1980 Incoterms rules, which were set forth on the back of the order confirmations sent by the applicant to the opponent through an intermediary, and this fact was noted, in red lettering, in the lower part of the front of the order confirmation, above the space designated for the signature of the contracting parties. This was also included in the general contracting conditions displayed on the back of the various invoices issued upon each delivery of goods, which invoices the applicant duly delivered to the opponent and which the latter did not refuse. Therefore, as required by art. IV, 1–b) of the general norm, it is established with reasonable certainty that the parties agreed to submit disputes arising from their business relationship to arbitration, and that that agreement – for which there was no particular formality as provided in art. II, 2 of the Convention – was valid and binding upon the parties in the various supplies of goods giving rise to the dispute. The party against which *exequatur* is requested simply claims that it did not accept order number 7005/1993/7686 – the one whose confirmation is not signed by the opponent – and hence did not accept either the contract or the arbitral clause; however, there is no documentary evidence of such refusal. Indeed, the documentation submitted suggests otherwise – that it consented to the contract, and therewith the arbitral clause, and that it subsequently sought to extricate itself from it in light of what it claims was a clear breach by the applicant of its undertakings in respect of their agreement on exclusive commercialization or distribution.

. . . On the foregoing basis we may now address the validity and force of the arbitration agreement in light of the ground for denial of *exequatur* provided in art. V, 1–a) of the NYC. The arguments put forward by the company opposing *exequatur* seek to negate the validity of the arbitration agreement by appeal to art. 4.2 of Law 98/1963, 4 December, on international arbitration and trade and enforcement of awards in the Republic of Czechoslovakia, subsequently replaced by Law 216/1994, currently in force. Along with a copy of the said Law 98/1963 and a sworn translation thereof, the opponent of *exequatur* has submitted an opinion by two legal experts from the State of origin, also duly certified, on these points.

Czech law is clearly applicable as regards verification of the validity and force of the arbitration agreement for the purposes of *exequatur* of a foreign judgment, this being the law chosen by the parties and also the law applicable in the case of subsidiary connections as provided in art. V, 1–a) of the NYC. However, this article is not applicable as sustained by the party opposing *exequatur*. Where, as in the present case, the arbitral clause is part of a set of general conditions regulating the principal agreement to which the arbitral clause applies, that clause is deemed valid if the other party accepts, by a means other than in writing, a written proposal to formalise the principal agreement. To be accepted as an express acceptance, such acceptance need not be rendered in writing or subject to any other formality, and it need not make specific reference to the arbitral clause; it is sufficient that it make reference to the agreement as a whole.

But above all, art. II of the NYC contains a provision referring to the material form of the arbitral agreement which excludes it from the provisions of art. V, 1–a). This article is predicated on the existence of a written agreement in one of the forms stipulated in art. II, which agreement will be recognized in Contracting States if it complies with certain formal requirements. Hence, the award delivered in respect of such an arbitration agreement must also be recognized if it complies with the said formal requirement, which is the case here as noted above.

Finally, the defendant alleges lack of due citation in the arbitral proceedings and lack of notification of the award therefrom. In respect of the ground for opposition to *exequatur* contemplated in art. V, 1.b) of the Convention and the cause of denial provided in section two, point b), the plea in opposition must be dismissed. In relation to both points, the applicant submitted a certificate from the Court of Arbitration confirming due summons of the defendant in accordance with Czech law, the Regulations of the Court of Arbitration, and notification of the award".

– *ATS*, 9 October 2001. *RJA* 2001\9419.

Competence to order precautionary measures in process of *exequatur* of an arbitral award lies with the courts of the place where the foreign award for which *exequatur* is requested has to be enforced.

"Legal Grounds:

. . . Exception three in point 1 of the Sole Repeal Provision of *LECiv.* 1/2000, 7 January, maintains in force articles 951 *et seq*. of *LECiv.*/1881 (*LEG* 1881, 1) pending the entry into force of the forthcoming Law on International Judicial Cooperation, which will be the internal norm regulating procedure for recognition and enforceability of foreign judgments and other decisions, as stated in art. 523 of the new Law of Procedure. Obviously, the continuance of this aspect of the 19th-century procedural law does not mean that it remains entirely in force in respect of applications for *exequatur* that come under the autonomous regulations contained therein. To the contrary, the maintenance of such precepts necessitates adaptation of the procedural steps there established to the regulatory provisions of the new Law, which came into force on 8 January 2001. The adoption of

precautionary measures in *exequatur* proceedings initiated subsequent to the entry into force of *LECiv.* 1/2000 and coming under the autonomous regime of *LECiv.*/1881, will therefore be subject to the provisions of articles 721 *et seq*. of the new procedural law, which will likewise be applicable to measures requested after its entry into force in proceedings initiated before then, as provided in the Seventh Transitional Provision of *LECiv.* 1/2000. In this respect the need to establish linkages between the two sets of rules – those of *LECiv.*/1881 and those of *LECiv.*/2000 – is even more evident if possible, since as regards the system of recognition of foreign decisions, the new Law looks to the future when the Law on International Judicial Cooperation comes into force, for this will undoubtedly subscribe to the current conceptions of the subject prevailing in the integrated legal and judicial space that constitutes one of the fundamental pillars of the European Union and to achieving which the efforts of the various national and Community public powers and institutions are directed; these are modern conceptions enshrined in the Community Regulations Nos. 1347/2000 and 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Articles 723 and 724 of *LECiv.* 1/2000 contemplate the rules of objective and territorial competence for the adoption of precautionary measures. Generally, competence therefor lies with the court judging the matter at first instance, or, if proceedings have not been initiated, the court having jurisdiction in respect of the principal action. For its part, article 724 determines jurisdiction in cases where arbitration or the formal judicial award from arbitration is pending, and where the proceedings are held before a foreign court, subject in this last case to the terms of International Treaties. In all such cases jurisdiction to decide on precautionary measures will lie with the court of the place where the foreign award or judgment has to be enforced, or failing that, of the place where such measures would take effect. *Exequatur* proceedings do not readily fit into any of the cases contemplated by either set of rules. On the one hand we have rules assigning jurisdiction according to the different procedural instances and stages, including extraordinary appeals, which cannot be readily applied to a procedure such as that regulated in arts. 951 *et seq*. of the *LECiv.*, in respect of which it has been repeatedly stressed that it is special, merely for purposes of recognition and not entirely contentious, and that despite being declaratory or declaratory and constituent, it stands mid-way between procedures of that nature and enforcement procedures strictly speaking. In the structure of the *LECiv.* of 1881, the *exequatur* procedure, with that configuration, has only one instance, namely this Court – with ever more numerous exceptions introduced by International Conventions – for reasons only understandable from a historical perspective and based in the final analysis on arguments having to do with the exercise of the sovereign power of the State as incarnate in the highest judicial body in the Nation. In fact not even in the most modern forms of *exequatur* procedure, instituted through recent international instruments on the subject and through Community regulations, can one talk strictly speaking of procedural instances, in the exact sense of the successive stages in a procedure whereby the matter can be examined, with full jurisdiction, again successively and where applic-

able by different courts. Nor is application for precautionary measures in the *exequatur* procedure the same as application made while foreign arbitral or judicial proceedings are pending or after a decision has issued therein but no motion has been made to secure its recognition or enforceability, given that, as has also been repeatedly ruled, the formality of recognition is independent of the proceedings giving rise to the decision whose recognition is sought.

It therefore falls to us to fill a gap in the regulations by arriving at an interpretation of the rules by way of an analogical, teleological and even goal-oriented approach, without losing sight of the setting in which they reside and the reality with which they are intended to deal; an interpretation that will moreover be as efficacious as possible not only in protecting the credit as precautionary measures are intended to do, but also in guaranteeing the effectiveness of the judicial protection that is sought. Having weighed the different possibilities, it is this Court's opinion that the surest approach to achieve these ends is to attribute competence to adopt precautionary measures in *exequatur* proceedings under the rules of the *LECiv.* of 1881 to the judicial bodies of the place where the foreign decision would be enforced or, failing that, the place where the requested measures would take effect. There are obvious drawbacks in the dissociation of competence to decide on *exequatur* and precautionary measures, particularly in terms of the law being seen to be good – and this applies to the decision on recognition – and bearing in mind that the same problems arise in a decision on precautionary measures when proceedings are pending abroad; however, these must take second place to the considerations favouring the proposed solution, which is better adapted to the special nature and the specific purpose of the recognition procedure, and for several other reasons: firstly, it is also better adapted to the nature and essence of the functions attributed to this Court, and to the nature of the Court itself, which in the present scheme of jurisdiction is not intended to be a court of ordinary appeal; secondly, it anticipates the forthcoming legal situation and the procedural system that will in future govern *exequatur*; thirdly, it attributes jurisdiction to the body that will ultimately rule on the enforcement of the foreign decision (*cf.* art. 958 *LECiv.* 1881), thus promoting greater efficacy and economy of procedure; fourthly, it ensures that the applicant has means of appeal from whatever decision is delivered on the measures requested (arts. 735 and 736 *LECiv.* 1/2000), thus favouring more effective judicial protection, and particularly the right of access to the legally established system of appeals, and hence more suitable in terms of constitutional guarantees; fifthly, it obviates the possibility of adopting a solution different from that which would be appropriate where foreign proceedings are pending or where a decision has issued therein but no motion has been made to secure its recognition in Spain, cases clearly similar to the application for precautionary measures in *exequatur* proceedings; and sixthly, it is the logical solution by analogy with other rules, such as art. 50 of Law 36/1988 on Arbitration, which regulates appeal for annulment – a procedure sharing aspects of its object and purpose with a recognition procedure – establishing that a party so wishing may apply to the Court of First Instance having jurisdiction in respect of enforcement to order

precautionary measures such as will ensure that the award is effective, notwithstanding that competence in respect of the appeal lies with the Provincial High Court".

– *STS* 29 November 2002. *RJ* 2002\10403.
Non-effect of international arbitration clause.

"Legal Grounds:

. . . What must be examined is the scope of the clause of submission to international arbitration, which states: 'Arbitration: Arbitration, as applicable, or general average, as applicable, shall take place in London under English Law'. This is plainly a generic clause in which the only matter clearly identified as being subject to international arbitration is the general average – which is not the concern here – but it fails to state which of the possible differences arising between the parties would be settled by arbitration, as required under article II–1 of the New York Convention on Recognition and Enforcement of Arbitral Awards of 10 June 1958, to which Spain acceded on 29 April 1977. For the national court to recognize it, the arbitral clause must not be null or inapplicable and must at all events be effective; that is not the case here, since the clause is clearly unsatisfactory and is too imprecise and vague to meet the basic requirements for it to be admissible and applicable.

. . . The scope of the arbitral clause here at issue is not such as to accredit a formal and express commitment to arbitration, including a clear choice of law, since this is not mentioned in the clause, whereas article 61 of the Law of Arbitration (*RCL* 1998, 2430 and *RCL* 1989, 1783) refers to the law expressly designated by the parties, which law must be connected in some way with the principal legal business or with the dispute in a given order of priority. However, the clause is too imprecise in this respect to be applicable".

VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

1. *Proof of foreign law*

– *STC* 2 July 2001. *RTC* 2001\155.
Work performed abroad. Spanish personnel in the service of the Commercial Office of the Spanish Ministry of Trade and Tourism in Beijing. Proof of applicable foreign law.

"Legal Grounds:

. . . the crux of the matter is whether in the present case the judgment delivered by the Social Division of the High Court of Justice of Madrid on 9 May 1997 has infringed the plaintiffs' right to effective judicial protection (art. 24.1 *CE*) by revoking the original decision on the grounds of "lack of proof of the 'content and validity' of the foreign law applicable". On this point, the first step must be

to determine whether, as the Public Prosecutor avers, the appealed decision is guilty of "undue omission" in failing to address the sole claim of the appellants, namely their right to receive payment of certain sums of money.

Fourth: . . . it should be remembered that in the original decision, having stated that according to art. 10.6 of the Civil Code the law applicable to the case was Chinese labour law, and that according to art. 12.6 *CC* the burden of proof of the said law lay with the plaintiffs, the court concluded . . . that, there being insufficient proof of the foreign law, Spanish labour law must be applied. And in application of the latter [specifically art. 4.2.f) *ET* (*RCL* 1995, 997)], bearing in mind that the existence of the pay differentials claimed had been accepted, upheld the employees' case and recognized their entitlement to the amounts claimed but not the interest also claimed for late payment. Upon appeal against this decision raised by the State Attorney, the Social Division of the High Court of Justice of Madrid concurred with the court of instance as to the applicability of Chinese law to the case at issue, and as to the burden of proof falling upon the plaintiff (arts. 10.6 and 12.6 *CC*); however, it then concluded, without any detailed explanation, by revoking the original decision by reason of absence of proof of the content and validity of the foreign law by the means established therefor in Spanish law.

Regarding the foregoing, there are reservations: firstly, whether art. 10.6 *CC* was or was not applicable given that the Convention on the law applicable to contractual obligations (Rome, 19 June 1980) has been in force in Spanish law since 1 September 1993 . . ., and whether art. 6 of the Rome Convention should be applicable. Secondly, according to paragraph two of art. 12.6 *CC* – which was in force at the time and has since been replaced by art. 281 of the Civil Procedure Law 1/2000, 7 January (*RCL* 2000, 34 and 962) – the burden of proof of the content and validity of a foreign law lies with the person invoking that law, while in the original proceedings it was the State Attorney, in opposition, who claimed that Chinese law was the applicable law. The foregoing notwithstanding, however, the constitutional issue concerning us here is whether, in light of art. 24.1 of the Spanish Constitution, the grounds stated in the decision delivered on appeal are sufficient, given that the appellate court confined itself to upholding the applicability of Chinese law and the burden of proof thereof lying with the plaintiffs, without any argument, citation of sources or other justification in support of the decision to revoke the original judgment (which in light of the circumstances applied Spanish labour law in default, citing the Supreme Court's own doctrine).

Fifth: . . . the fact is that the appellate court failed to apprise the plaintiffs of the *ratio decidendi* of its decision – that is, the reasons for which the original judgment was set aside and their right to the claimed pay differentials denied – thus denying not only recognition of the right upheld by the court *a quo* but also the very recognition by the defendant of existence of the debt owing to the plaintiffs, all of which, as regards the application of the law in force, is contrary to the doctrine laid down in this connection by the Supreme Court whereby in the absence of proof of the foreign law invoked in the proceedings, Spanish law must apply, as repeatedly confirmed by the jurisprudence. Be it said that this doctrine is more

faithful to the intent of art. 24.1 *CE* than the appellate decision to dismiss the appeal, given that in connection with overseas transactions Spanish law is perfectly equipped to provide the protection vouchsafed by the cited article of the Constitution. Therefore, insofar as the decision here challenged diverges from that jurisprudence and from the foregoing consideration, it is not unreasonable to demand more explicit justification for the change of approach and the denial of a universally recognized right; in other words, since no grounds are adduced for the given interpretation, it follows that the appellate decision was merely arbitrary.

We therefore find that the fundamental right of the plaintiffs to effective judicial protection and to the means of defence (art. 24.1 *CE*) has been infringed, and we consequently uphold the present appeal for protection".

– *STS*, 22 May 2001. *RJA* 2001/6477.

Contract of employment between a non-national and the Spanish Consulate in Los Angeles (USA) for services in the USA. Applicable law. Consequences and evaluation of the burden of proof of foreign law.

"Legal Grounds:

. . . The plaintiff, a Guatemalan national domiciled in the city of Los Angeles (California, USA), there being no record of her ever having resided or been in Spain, entered into a contract of employment with the Spanish Consulate General in Los Angeles on 15 July 1987, whereunder she worked as a cleaner for the Consulate.

On 14 August 1997 the Spanish Consul General in Los Angeles informed the plaintiff by letter that her employment with the said Consulate General was terminated as of that date. . . . The second of the working hypotheses referred to analyses the consequences of lack of proof of foreign law where that is the applicable law according to the relevant rules of conflict. This second hypothesis clearly holds water only if we obviate the conclusion of the first legal ground of the present judgment regarding the absence of contradiction between the decisions compared, and likewise the position sustained in the fourth legal argument as it relates to the first of the hypotheses considered. Even so, under this new or alternative analysis the appeal here considered must still be dismissed, for the following reasons.

First: Art. 12.6 *CC* – which is applicable in the case at issue despite having been repealed by the new Law of Civil Procedure (*RCL* 2000, 34 and 962) – provides that 'courts and authorities shall, *ex officio*, apply the rules of conflict of Spanish law' and adds that 'the person invoking foreign law must furnish proof of its content and validity by the means provided in Spanish law'; at the same time it provides that for the application of foreign law 'the court may further avail itself of whatever means of ascertainment it deems necessary and may issue appropriate orders to that effect'. The article contains no specific provision for the event that the person having the burden of proving the applicable foreign law fails to do so. In principle, a number of solutions are possible, particularly the following two. The first is to dismiss the suit because the person having the burden of prov-

ing the law supporting his claim has not done so and must therefore bear the consequences of failure to prove the law supporting that claim. The second solution is to apply the national law. This Bench is not unaware of the fact that a recent decision of 16/3/1999 opted for the second solution, citing repeated doctrine of the First bench of this Court to the effect that when Spanish courts are unable to apply a foreign law with absolute certainty, they should then judge according to Spanish law. However, given the specialized nature of the labour law system, this Bench adopted a different position as long ago as 19/2/1990 in a case where a foreign law was applicable under the Spanish rule of conflict and the plaintiff – as in the present case – merely cited certain Spanish rules but neither invoked nor accredited the applicable foreign law. The decision argued that 'failure to so invoke and prove cannot, as the appellant claims in the seventh ground, determine the application of Spanish law, since this would leave us in the absurd position of sanctioning the deliberate omission of proof of the foreign law and the application of Spanish law whenever the latter was felt to be more beneficial'.

Second: This is the proper solution in the present case; the plaintiff having based his claim on Spanish law and that law having been found not applicable, the claim must be dismissed as lacking in grounds. This conclusion cannot be evaded by indirect application of Spanish law as a consequence of failure to prove the foreign law. This is so firstly because, as noted, the party made no effort to prove the foreign law, seeking simply to have that law excluded in favour of Spanish law, and on that basis the claim must be dismissed. Secondly, the rules governing the burden of proof do not operate in the same way as rules whose application is mandatory. The issue here is not that lack of proof of a fact prejudices the party basing its position on that fact, but that there is a rule or set of rules applicable to the case by virtue of a mandatory rule. In other words, Spanish law cannot be deemed applicable if the party seeking such application does not prove the foreign law. To the contrary, if the applicable law is the foreign law, then the party invoking it must prove that law in support of its claim. This is not made sufficiently clear in art. 12.6.2 *CC*, which provides that it is up to 'the person invoking the foreign law' to prove it; however, the proper meaning of the provision is that a person basing his claim on the mandatory applicability of the foreign law is obliged to prove that law. A third foundation for this conclusion is that, as the scientific doctrine points out, the rule set forth in art. 12. 6 paragraph 1 of the Civil Code is mandatory and clearly provides that the Spanish courts must apply *ex officio* the rules of conflict of Spanish law. If, then, the Spanish rule of conflict determines that the foreign law is applicable, this conclusion, being mandatory, cannot be altered in light of the degree of effort made by the parties in the suit to prove the law invoked; such would be tantamount to allowing discretion in a matter where no discretion is allowable and would further encourage strategies such as the institution of actions based on a law known to be inapplicable in the expectation that if the plaintiff refrains from furnishing proof and the defendant fails to do so, the courts will apply a law that is more conducive to the plaintiff's interests. That is clearly the intent in the present case, where the party obliged to prove

the applicable law in support of its claim has not only failed to do so but has sought throughout to throw doubt on the proof offered by the opposing party. Furthermore, the claim on Spanish law in the absence of proof of the foreign law is inimical to judicial safety in that the question of which law is applicable law depends on the proof presented in the proceedings. Finally, this argument contravenes the logic of the rules of conflict in that – obviously depending on the outcome of the proof – as in the present case, the applicable law has nothing to do with the criteria cited in the rules of conflict for establishing the rule that actually applies.

For the rest, this conclusion cannot be considered as contravening the right to effective judicial protection, given that in the course of the proceedings the party has had the opportunity to prove the applicable law, and any difficulties that such proof may entail do not in any case warrant denial of the law applicable under the rules of conflict. This conclusion is not opposed but rather confirmed by a recent ruling of the Constitutional Court (*RTC* 2000, 10), in that any violation of the right to effective judicial protection therein derives not from failure to apply Spanish law but from not having permitted the party to prove the foreign law".

– *STC*, 11 February 2002. *RTC* 33/2002.

Lack of proof of foreign law. Burden of proof on the invoking party. Dismissal of action. Violation of the right to effective judicial protection

"Legal Grounds:

(. . .)

Sixth: Insofar as the aforementioned doctrine applies to the case here at issue, we find that the right to effective judicial protection (art. 24.1 *CE*) has been violated as regards the right to a judicial ruling on the merits of the case, inasmuch as the Social Court and the High Court raised an unfounded objection, thereby unreasonably barring a decision on the facts of the matter. That is, absent proof of the foreign law (which both courts deemed applicable to the case), they declined to pronounce on the suit brought by the plaintiff (the terms of dismissal), moreover declining to do so by subsidiary application of the *lex fori*, in this case Spanish labour law. The said objection (absence of proof of foreign law) was in fact groundless given that the burden of proof of the content and validity of English law lay with the defendant who had invoked it and not the with the plaintiff under art. 12.6 of the Civil Code as it then was (since replaced by art. 281 of the Civil Procedure Law 1/2000, 7 January [*RCL* 2000, 34 and 962 and *RCL* 2001, 1892]).

Despite this, the plaintiff was required to submit proof but was not at any time given the opportunity to do so through the appropriate procedural channels; moreover, the failure to prove the content and validity of the English law caused the denial of the claim (in the case of the original court) and the dismissal of the appeal (in the case of the High Court). It is therefore clear that the plaintiff was unreasonably denied a judgement on the facts underlying his case (as in the case of *STC* 10/2000, 31 January, F. 2).

It therefore remains only to conclude that the two decisions here challenged violated the appellant's right to effective judicial protection (art. 24.1 *CE*)".

2. *Public policy*

– *SAP* Granada, 23 April 2001. *See* Section X.5. Maintenance.

– *SJPI* Navarra, Pamplona, 26 October 2001. *See* Section X.1. Filiation.

– *RDGRN*, 14 May 2001. *RJA* 2002\1728.

Denial of registration of marriage celebrated abroad. Polygamy: International public policy. Intent inimical to the Spanish concept of matrimony and to the dignity of women as enshrined in the Constitution.

. . . In the present case, at the time of contracting matrimony in 1972, the applicant was already married; the bride was aware of this fact and consented to be married. While it is true that polygamy is allowed in Morocco and that the husband was a Moroccan national at the time of the marriage, the registration of a polygamous marriage is not allowable in that it would be contrary to personal dignity as established in the Constitution, it would be contrary to the Spanish concept of marriage and would be contrary to public policy (art. 12–3 CC).

"Legal Grounds:

. . . When a person acquires Spanish nationality, any previous marriage contracted abroad and still in force must in principle be registered with the Spanish Civil Registry (*cf.* art. 66, 1, *RRC*). It is a requirement for registration, besides the appropriate certificate or a voucher (*cf.* arts. 256 and 257 *RRC*), that the marriage be valid for the purposes of Spanish law.

. . . The polygamous marriage whose registration is sought took place in 1972, it being also accredited by certificate issued by the Moroccan authority and by admission of the applicant in his writ of appeal that the Moroccan party had previously contracted a marriage which must be presumed to be valid and current. Although the second marriage may be valid under Moroccan law and in that connection the personal status of the parties should in principle apply, it is clear that while the foreign law is generally applicable under our rules of conflict, it must be barred in this case by reason of an exception in respect of international public policy (*cf.* art. 12–3 *CC*), which cannot allow registration of a polygamous marriage that would be contrary to the Spanish concept of matrimony and to the constitutional dignity of women.

. . . We do not intend here to go into the issues of various kinds that this may raise for the Spanish legal system. What is clear is the inadmissibility of an entry of marriage in the Spanish Registry where it is stated that one of the parties was already married at the time of the wedding. It must be borne in mind that one of the details required by law in the registration of a marriage is the marital status of each of the parties at the time of marrying (*cf.* arts. 35 *LRC* and 12, and 258 *RRC*)".

– *STSJ* Galicia, 2 April 2002. *AS* 2002/899.

Flexibility of effects of public policy. Award of widow's pension to two spouses. Condition of spouse in case of polygamous marriage. Division of pension.

"Legal Grounds:

(. . .)

The object of the plaintiffs' appeal is . . . that, as wives of the deceased, each one be awarded the full widow's pension rather than that the pension be divided between the two as ordained in the original judgment. As noted earlier, the deceased had married the plaintiffs in accordance with the law of his country, Senegal, thus having two wives, a situation permitted by the system of polygamy legally existing in that country. Such a situation is prohibited by our legal system, under which polygamy is considered an offence . . . The fact is that the deceased's matrimonial ties with the plaintiffs were legally constituted under the laws of their country, in accordance with the personal laws of the parties and the laws of the place where the marriages were entered into. Art. 49.2 of the Civil Code sets forth the basic rules of the system for recognition of foreign marriages, in conjunction with art. 50. However, there is no express provision regarding marriage between foreigners and under foreign authorities outside Spanish territory; this lacuna must therefore be covered by analogy to the provisions of art. 49.2 of the Civil Code (or of art. 50 of the same Code), so that such a marriage may be recognized for the purposes of Spanish law if it was in accordance with the laws of the place where it was contracted. In this way it is allowable to recognize marriages between foreigners in a foreign State that are valid according to the personal law of the foreign parties. Within the meaning of arts. 49 and 50 of the Civil Code, it is allowable to recognize marriages contracted in accordance with foreign laws if they were in compliance with the laws of the place where they were contracted – that is, to recognize them if they were formalized in accordance with the foreign law in force at the time. That said, although bigamy is prohibited in this country and is contrary to public policy (art. 12.3 of the Civil Code provides that under no circumstances can a foreign law be applicable 'when it is contrary to public policy') and despite the incompatibility of the foreign marriage system with our own system – which incompatibility is of course sustained – it is allowable to recognize the legal effects of the marriage contract entered into by the deceased with the plaintiffs under the foreign system as they relate to the present context of Social Security benefits in this country; in other words, it should be recognized that the plaintiffs are entitled to a pension as a consequence of their marriage to the deceased under their national law – a fact recognized in the original judgment and not challenged by the National Institute of Social Security in its appeal. This is consistent with the fact that the concept of public policy, while comprising norms of internal law that are mandatory irrespective of whatever foreign elements are involved and in any case imply that the foreign law is manifestly contrary to fundamental national legal principles, does admit of qualification or flexibility; as the Supreme Court observed in a decision of 22/11/1977 (*RJ* 1977, 4284), the public policy exception is not an absolutely immutable rule but admits of 'inflexions'. Nonetheless,

the plaintiffs' claim for recognition of the full pension for each one cannot be entertained. The marriages contracted by the deceased in his country of origin are legally binding for the purposes of recognition, as noted; however, they cannot justify the award of a full widow's pension separately for each of the survivors. Public policy, specifically as regards our Social Security system, also applies in this respect (as a limiting or delimiting factor).

(. . .)".

3. *Renvoi*

– *STS*, 23 September 2002. *RJ* 2002/8029.

Succession of a British national domiciled in Spain. Inheritance of immovable property situated in Spain. Will in favour of the spouse. Applicability of Spanish law. Acceptance of *renvoi*. Unity of succession.

"Legal Grounds:

. . . in respect of the properties situate in Spain, the application of Spanish law, to which English law, as the personal law of the deceased, refers back, does not violate the principles of singularity and universality of succession as enshrined in art. 9.1 *CC*. The decision here challenged accepts as proven that the sole goods of the deceased are the immovable properties situate in Spain as provided in the will, and therefore there can be no question of fragmentation in the regulation of the estate. In the event of such fragmentation the general rule (not specific to succession *mortis causa*) in art. 12.2 *CC* would cause rejection of *renvoi* to English law as being contrary to these principles. This Court takes the same view, as set forth in parts of a decision of 15 November 1996, rejecting *renvoi* from the deceased's national law to the law of Spain in respect of properties situate in Spain, and likewise in a decision of 21 March 1999. Therefore, if, as in the present case, the deceased's estate is comprised solely of immovable properties situate in Spain, there can be no objection to *renvoi* from English law, Spanish law being the only law applicable to the universal succession of the deceased".

– *SAP*, Malaga 13 March 2002. AC 2002/1287.

Succession of British national. Will made before Danish consul under English law. Unity of Succession. Interpretation regarding *renvoi*. Claim of *legitima*. Testamentary freedom in English law.

"Legal Grounds:

. . . a Declaratory Judgment on Small Claims was sought in respect of the third of the estate of which the plaintiff considered himself to have been deprived through an erroneous interpretation of the law applicable to the succession of the deceased.

. . . In the view of this Court, the aforementioned art. 12.2 *CC* cannot be simply and literally interpreted in isolation from the rules of succession set forth in art. 9.8 *CC*, which provide that the right of inheritance is personal regardless of where the goods are situated, and that the testator has the right to make his will

subject to the terms of his national law. In fact the Supreme Court, in the decision of 15 November referred to above (*RJ* 1996, 8212) has addressed the semantic scope of the wording 'without taking into account' which appears in art. 12.2 *CC* in connection with the non-allowability of *renvoi*, taking the view, however, that the law 'to be taken into account' is 'not necessarily the law of Spain'. This jurisprudential interpretation, in conjunction with another Supreme Court ruling of 21 May 1999 (*RJ* 1999, 4580), offers a means of interpreting the institution of *renvoi* in a way that is neither mechanical nor automatic, whereby the Courts are authorized to interpret issues according to a procedure which, in the understanding of this Court, operates as follows: 1) judgment of legal relevance, identifying a conflict in the rules of succession of different countries; 2) subsumptive judgment, on whether the case at issue is covered by domestic law, *vid*. art. 12.2 *CC*; 3) evaluative judgment on how the provisions of domestic law correlate with the national law of the deceased, *vid*. art. 9.8 *CC*; and 4) identification of the rule of interpretation on which the case hinges.

. . . Steps 1 and 2 lay down the legal grounds adduced by the plaintiff, while step 3 represents the legal grounds of the opponent, on which basis the court concerned weighs the directly proven or deducible consequences of the will of the deceased.

. . . In this connection, before proceeding to step 4 the Court must needs address the following issues: a) The deceased, a British national resident in Spain, made a will which was notarized by the Danish Consul in Malaga, despite the fact that it could have been notarized by any Spanish commissioner for oaths without this affecting the force or terms of his will, which circumstance supports a reasonable presumption of intention to evade any kind of intervention by a Spanish judicial authority; b) clauses 2 and 3, which in themselves clearly convey his intent, are reinforced in clause 6 by specific reference to English law in all matters relating to interpretation of the will, and which, in exercise of his right to testamentary freedom makes only the minimum legal provision for certain relatives or the surviving spouse lacking any means (Administration of States Act 1925, Inheritance Act 1983 and Provision for Family and Dependants Act 1975); c) given the intended outcome, namely the absence of any provision in favour of his children – that is, the plaintiff Marianne E. G. and one of the co-defendants Niels V. W. – were the will to be judged under Spanish law, this would evidently give rise to situations that the testator had not intended or had deliberately sought to prevent. In such an event foreign nationals would be unjustly subject to rules of disinheritance applying under Spanish law that would not apply under their own law, given that, there being no rule of mandatory succession there, they are not mentioned or included in the will. Consequently, counter to the purpose of *renvoi*, which is to regulate inter-State differences in legal outcomes, one person, in this case Marianne E. G., might claim to have been unduly disinherited under a law other than her own (Spanish law) but could not so claim under her own (English) law, and another, in this case Niels V. W., while unable to claim pretermission or discrimination under his own (English) law, might be forced to decline or even renounce a right

of inheritance which, being neither to his advantage or his detriment, he has not challenged.

. . . Having disposed of the last and the two preceding steps, we come to step 4, and here our interpretation of the rules dictates that *renvoi* cannot be recommended".

4. *Preliminary question*

– *SAP*, Granada. 23 April 2001. *See* Section X.5. Maintenance.

VII. NATIONALITY

– *SAN* (Contentious-Administrative Division), 12 June 2001. *Web Aranzadi JUR*, 2001\294445.

Application for naturalization of Moroccan citizen by reason of residence. Marriage to a Spanish national. Degree of integration in Spanish society. Polygamy. Denial.

"Legal Grounds:

. . . Under art. 21.2. of the Civil Code, Spanish nationality may be granted on the basis of length of residence, subject to the conditions set forth in art. 22, the second paragraph of which provides that one year's residence is sufficient for a subject who has been legally married to a Spanish national for one year and is not legally or *de facto* separated, with the proviso that such period of residence have been legal and continuous up to the time of application; . . .

Art. 22.4 of the Civil Code establishes that persons wishing to obtain Spanish nationality must furnish evidence of good civic conduct and adequate integration in Spanish society, in a process governed by the regulations of the Civil Registry.

. . . In the present case, the grounds for denial were firstly that the wife lost her Spanish nationality because the marriage took place before 1975 and the Spanish law then in force so provided; and secondly that there was no proof of integration in Spanish society given that she contracted a second marriage under Moroccan law and according to the Muslim rite on 28 January 1991.

The first argument cannot be entertained, since the administrative record shows that the wife of Telaitmas Mohamed Ahmed is a Spaniard and is the daughter of a parent who acquired Spanish nationality in 1953 under the Decree of 18 May 1951; her nationality is given as Spanish in her marriage certificate, and moreover, she was issued with a Spanish Identity Card, valid for 10 years, on 3 November 1987. In light of this the wife cannot be assumed, as in the administrative decision, to have lost her Spanish nationality by reason of the marriage of 22 November de 1970, registered with the Central Civil Registry Office on 26 November de 1990 in application of art. 23.3 of the Civil Code in force at the time. This rule was amended upon the entry into force of Law 14/75, whereunder such marriage does not cause the loss of nationality, particularly where this is gainsaid by much later events, such as the issue of a Spanish Identity Card.

As to the evidence of adequate integration in Spanish society, the appellant himself admitted in his appearance before the Registrar that he lives with two wives, with both of whom there is issue, in complete harmony, but in the complaint this fact is not deemed significant for the purposes of demonstrating integration in Spanish society. Such a view cannot be entertained, firstly because it is highly doubtful that polygamy is not a significant differentiating factor in a society which, although open and tolerant of different practices and customs, only recognizes monogamous marriage; and secondly, because Spanish law so provides. It would therefore be inconsistent to acknowledge the legality of a different family arrangement constituted in accordance with laws or customs differing from Spanish laws or customs in so important an aspect as social organization while declaring obedience to the Spanish Constitution and Spanish law, which forbid a person to marry while already married to someone else (art. 46.2. *CC*). Therefore, the appellant having admitted this fact, as recorded in the challenged judgment in evidence of failure to meet the cited requirement, the judgment must stand inasmuch as it is a reasonable interpretation of the rule on which the judgment is based".

VIII. ALIENS, REFUGEES AND EUROPEAN COMMUNITY CITIZENS

– *STC*, 29 January 2001, *RTC* 2001/13.

Principle of non-discrimination by reason of race. Control of foreigners. Racial appearance as basis for presumption of foreignness. Dissenting vote. Fundamental rights. Community Law and free movement of persons.

Eighth: . . . Police requests for identification in order to ascertain compliance with the laws on aliens are authorized by art. 72.1 of Royal Decree 1119/1986, 26 May (*RCL* 1986, 1899 and 2401), . . ., whereby aliens are obliged to carry with them the passport or other document by virtue of which they entered Spain, and their resident's permit if applicable, and to show these when so required by the authorities or their agents, although they may confirm their identity by other means if they are not carrying the said documents. Likewise, art. 11 of Organic Law 1/1992, 21 February (*RCL* 1992, 421), on the protection of citizen security provides that 'aliens in Spanish territory are obliged to hold available documentation attesting to their identity and to their legal presence in Spain, in accordance with the regulations currently in force', and that they may be required to identify themselves in pursuance of art. 20.1 of that law. The issue therefore lies in whether the exercise of this power, which is lawful as long as it adheres to the purpose for which it was vouchsafed, was covertly motivated by racial discrimination. In this connection it must be acknowledged that in police controls for that purpose, persons having certain physical or ethnic characteristics may reasonably be assumed not to be of Spanish origin.

We would add that given the place and the time of such requirements, when they can normally be expected to carry identification, such controls are not illogical and, for the reason just stated, are less burdensome to the person required to

identify him/herself. Given the range of possible circumstances of this kind (travel centres, paying accommodation, areas with high affluence of immigrants, etc.), assessment is largely on a case-by-case basis. We should add again that, however lawful such operations may be and even if identification is required strictly for the purposes set forth in the regulations, the power to require identification must be exercised in due proportion, respectfully and courteously – in short, in a manner that impinges as little as possible on the sphere of the individual. Where this condition is not met, the exercise of this power not only violates the law but suggests that what might in principle seem to be a reasonable selection of persons for identification in the exercise of police functions may in fact have been deliberately chosen in order to cause special or additional harm to persons belonging to a given racial or ethnic group – that is, that beneath the cloak of the performance of proper legal functions, there may be a racist or xenophobic motive in the very decision to exercise these functions or in the manner in which they are exercised in the given circumstances.

Ninth: In the present case, we cannot entertain the claim that the requirement of identification to Mrs. W.L. was patently discriminatory. . .

. . . That said, it appears from the facts as related in the challenged administrative decision – which were not rebutted in the trial prior to this appeal for protection – that for the police the person's race simply indicated a greater probability that that person was not Spanish. There is nothing in the account of the intervention to suggest that the National Police, in acting, were motivated by racial prejudice or a particular animadversion towards a given ethnic group, as is adduced in the complaint.

(. . .)

. . . Discrimination could be presumed had the action been based on a criterion (in this case, racial) totally irrelevant as regards the individual treatment of persons to whom the regulations apply, in this case foreign citizens. As noted, foreign citizens are obliged to show documentary evidence that they are in Spain legally, and in any case all citizens are obliged to produce identification, as provided in art. 20.1 of Organic Law 1/1992, 21 February, on protection of citizen security as it relates to art. 9 of the same law and to art. 12 of Decree No. 196/1976, 6 February (*RCL* 1976, 291 and *ApNDL* 3964), regulating the National Identity Card, as implemented by Royal Decree 1245/1985, 17 July (*RCL* 1985, 1849 and *ApNDL* 3969)".

Dissenting Vote.

Entered by Judge Julio Diego González Campos in respect of the Decision of the Second Bench of 29 January 2001 on appeal for judicial protection 490/1997.

"(. . .)

Third: There is no doubt that the plural reality, here very briefly described, raises contradictions as regards the goals of legislative policy in this matter. And in this light, there are certain question that we ought to have posed: e.g., Is universal monitoring of foreigners constitutional? Is non-discriminatory control of foreigners admissible in light of the given diversity of situations? How can such control be maintained without prejudice to personal dignity (art. 10.1 *CE*)?

Fourth: As regards the first point, we should note that, from Organic Law 7/1985, 1 July (*RCL* 1985, 1591 and *ApNDL* 5093) to Law 4/2000, 11 January (*RCL* 2000, 72 and 209), changes in the Spanish law on aliens have increasingly stressed the goal of 'controlling aliens', as in other European Community States.

For this reason I feel that the Decision from which I dissent ought to have considered this objective in light of the 'social and democratic state of law' propounded in art. 1.1 *CE*. It would then have highlighted a significant fact – namely, that such control is a hangover from the times of the 'police state', and an 'aliens police' with sweeping powers – that does not in principle sit well with the values of a social and democratic state of law. The decision of the Court, to which I dissent, ought therefore have been to exclude, or at least restrict and subject to strict conditions, general control of foreigners anywhere in the national territory.

I would further add that if they are to be justified by recourse to other relevant constitutional rights, such as citizen security or protection of the national labour market, measures for general control of aliens must in my opinion be subject to the principle of proportionality if their purposes are not to be distorted, and in particular to ensure that such measures, even if conducive to that end, are in fact proportionate. The Decision from which I dissent fails to do, despite the fact that to understand the need for such a sense of proportion it is sufficient to note that the consequences, as seen from these standpoints, are not at all desirable. In the first case, it is conducive not only to more intensive control, but also to a negative social image of foreigners which can, as it has done in several European countries, encourage xenophobic reactions. At the same time, in terms of the labour market it can, paradoxically, encourage lack of police control and tolerance as regards the working and living conditions of immigrants in parts of the national territory where there is demand for foreign labour. Therefore, while it will not do to seek equality in illegality, it is unfortunate to allude, as does the Decision from which I dissent, to the location of 126 illegal foreigners in Valladolid in 1992 when there are many thousands completely uncontrolled in other parts of the country.

Fifth: In connection with the last two issues, it should be remembered that the general control of foreigners has been tightened in Spain since 1994, following accession to the Convention on application (*RCL* 1994, 1000) of the Schengen Agreement of 14 June 1985 (*RCL* 1991, 1911), although such control, exercised in a general way as regards persons and in any part of the national territory, cannot be said to have been imposed by Community law.

In effect, one of the basic objectives of the European Union according to the Treaty of Amsterdam of 2 October 1997 (*RCL* 1999, 1205, 2084 and *LCEur* 1997, 3620) is to 'to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured . . .'. True, it further adds: '. . . in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime' (art. 2). However, that does not mean that these measures are intended to restrict freedom of movement, but that their purpose is a different one – namely, to control access by nationals of third States to the Community area. This is borne out

by the new Title IV of the constituent Treaty of the European Community (*RCL* 1999, 1205ter and *LCEur* 1997, 3695) as reformed by the Amsterdam Treaty above cited, art. 62 whereof clearly distinguishes between, on the one hand, 'the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders' (section 1), and on the other hand 'measures on the crossing of the external borders of the Member States', which place a number of conditions on the access of foreigners to the European Community area (section 2).

I believe that this point bears upon the Decision from which I dissent, in that the control of aliens has been displaced from its proper sphere – that is, at authorized points of entry on the borders of the Member States – to the interior of the country, far from these borders, and it is therefore doubtful that this measure is in proportion with its stated object. This doubt is reinforced if we consider the above-cited objective of Community Law – that is, the free movement of persons – which does not sit well with a generalized system of control imposed anywhere in Spanish territory.

Sixth: Finally, in my opinion the introduction of a criterion based on the fact that a person belongs to a given racial group violates art. 14 of the Spanish Constitution in that it constitutes discrimination which the said article expressly prohibits, be it direct or indirect; and that would appear to be criteria followed by the Decision from which I dissent in admitting indirect discrimination where the control of aliens is concerned. I find it hard to accept – and this is the fundamental reason for my dissent from the Decision – that 'certain physical or ethnic characteristics may reasonably be assumed to indicate that they are not of Spanish origin', as stated in Ground 7.

The majority opinion of the Court leads to the assumption that the general concept of control of aliens and its implementation anywhere in the national territory may be additionally based on a personal trait – that is, race – which is expressly prohibited by art. 14 of the Spanish Constitution. This notion is reiterated further on in a warning (largely rhetorical in my opinion) against excesses in the implementation of the measure, to the effect that there must be a 'reasonable selection of persons for identification in the exercise of police functions', which must not be abused in order to inflict 'special or additional harm to persons belonging to a given racial or ethnic group'.

Here again, such measures ought to have been weighed against the general clause of art. 10.1 of the Spanish Constitution, particularly as it relates to 'the dignity of persons' as the supreme value in all our legal system. Unfortunately, this was not done in the Decision from which I dissent: suffice it to point out firstly that the harm referred to in the Decision does not ensue only in cases of direct discrimination like those cited but may also be expected to ensue if it is accepted, in accordance with the majority view, that racial traits constitute a proper criterion for 'reasonable selection' of persons for screening as aliens. Moreover, to accept such a criterion is to ignore another important social consideration for the application of aliens regulations – namely that like many other European States,

Spain is now a 'multiracial society' that includes a not inconsiderable number of persons of other races. And the category of other races includes both legally resident aliens and Spanish nationals.

This fact alone should suffice to bar race as a criterion of selection in the control of aliens, as foreseeably prejudicial to the dignity of persons; suffice it to say that, as regards aliens of the first group, if they may be subject to repeated controls by reason of their race, this will not only affect an element of their identity which ought to be respected for the sake of their dignity as persons, but it will also run counter to the goal of integrating aliens in Spanish society. And as regards the second group, it may lead to a no less serious consequence in the form of discrimination between nationals by reason of race – likewise offensive to personal dignity – as I believe has occurred in the present case".

IX. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

X. FAMILY

1. *Filiation*

– *SJPI* Navarra, Pamplona, 26 October 2001. *AC* 2001\2126.

Law of filiation. Child of French nationality. *Favor filii*. Public policy. Applicability of Spanish Law.

"Legal Grounds:

. . . We should note first, however, that the applicant cites the Spanish nationality of Maria Soledad D. as determining the applicable personal law in pursuance of article 9.4 of the Civil Code; in this respect it must be said that there ought in principle to be no doubt as to the Spanish nationality of the applicant given that even had she not possessed such nationality by birth, her mother being French, she would certainly have acquired it by marriage, it having been established that she married a Spanish citizen in 1969; this brings into operation article 21 under the Law of 1954 (*RCL* 1954, 1084; *NDL* 5658, 22144), whereby any foreigner marrying a Spanish citizen automatically acquires Spanish nationality; this would be open to question only if the applicant had undertaken acts from which it transpired that she possessed Spanish nationality, there being several rulings by the *DGRN* indicating that nationality is not lost if the person concerned can show that he or she has undertaken acts entailing the use thereof. In the present case we consider that such is not proven; indeed, quite the contrary, given that the plaintiff possesses and is in use of French rather than Spanish nationality, as witness the power of attorney in the record of proceedings. However, in a similar case, a ruling of 22 March 2000 (*RJ* 2000, 2485) interpreting article 9 of the Civil Code found that 'article 9 of the Civil Code in fact states that both the nature and the sub-

stance of filiation (meaning filiation by marriage or by other means) are to be governed by the personal law of the child, which according to paragraph one is determined by nationality, and in this case both mother and daughter possess French nationality, it being understood in principle that the daughter's birth was registered with the municipal registry of the twentieth district of Paris. From a literal standpoint, the French Civil Code, as the national law of the child (art. 12.1 of the Civil Code) would appear to be applicable in establishment of the filiation here at issue. However, the circumstances of the action demand a proper practical interpretation of the precept, which it must be remembered cannot ignore the interests of the child; these interests are assumed to be an essential and basic part of the rule, and therefore that rule must necessarily be applied in *favor filii*. Under the material law of the forum, in certain cases the national law may be applied at the expense of the foreign law. Such is the case here, since the daughter's French nationality is neither final nor necessarily exclusive but is a first or provisional nationality, given that under article 17.1.a), the child of a Spanish father or mother is Spanish. To adhere solely to the nationality at the time the action was brought and ignore the rule cited above would lead into a labyrinth with no hope of a satisfactory legal outcome. The basic requirement for recognition of Spanish nationality is the declaration that the child is the biological daughter of a Spanish citizen; in other words, this judicial decision predates and determines the issue, so that nationality is both an effect and a consequence given compliance with the requirement, which is first and foremost that she be the daughter of a Spanish citizen. The consequence of the foregoing argument is that article 9.4 applies where the person possesses the attributed nationality to the exclusion of any other. In the present case, the nationality is not definitive nor does it inevitably lead to automatic application of the foreign law regardless of the father's nationality, which does not conform to our own law and would be a barrier to the filiation here sought. The material Spanish law in this case therefore has an immediate and imperative bearing on the public policy of the forum as regards the duty of the Spanish courts to provide proper protection for a minor and safeguard her rights. And so we have decided, in order to furnish the legal protection asked of us and not to leave the minor in a position of absolute defencelessness. Although in the present case the person claiming paternity is not a minor, the circumstances are the same, and we therefore consider that regardless of the plaintiff's nationality, which in principle must be assumed to be French, the fact that she claims the paternity of a Spanish citizen is sufficient cause to render Spanish law applicable".

2. *Adoption*

– *SAP* Asturias, 30 March 2001, *AC* 2001\2236.

Simple adoption by Spaniards of a Guatemalan child in Guatemala. Conversion to full adoption. Requirement of adoption *ex novo* before a Spanish court. Consent of the biological mother to conversion. Fulfilment of requirements.

"Legal grounds:

(. . .)

According to art. 9.5 *CC*, 'an adoption abroad by a Spanish adoptive parent shall not be recognized in Spain if the effects of such adoption are not the same as provided in Spanish law'. This applies to the present case, as will be shown hereafter, and hence Spanish Law cannot ever recognize as fully effective an adoption constituted in Guatemala . . ., which incidentally is not a signatory of the Hague Convention on the protection of children and cooperation in respect of intercountry adoption (The Hague 29/5/1993) . . . arts. 26 and 27 of which regulate the effects of conversion of an adoption. As regards adoptions made in States not signatories of the Hague Convention, art. 9.5 of the Civil Code will apply; furthermore, art. 9.4 addresses problems regarding the 'nature and substance' of 'completed' intercountry adoptions while point 5 lists the requirements for 'proposed' intercountry adoptions. In general, Spanish Law is applicable to intercountry adoptions finalized in Spain or its consular territory, unless the adoptee resides outside Spain or does not acquire Spanish nationality upon adoption, in which case the adoptee's national law will apply as regards requirements of capacity and consent.

(. . .)

It should be remembered that adoption in Spain has three essential effects or characteristics: it is irrevocable, all legal ties between the adoptee and his/her biological family are sundered, and the adoptee becomes for all purposes a member of the adoptive family. . . . under Guatemalan law, adoption only affects the adoptive parent and the adoptee: the former is not the legal heir of the latter; the adoptee and his/her biological family retain their mutual rights of inheritance; and if the adoptive parent dies while the adoptee is a minor, the latter returns to the authority of his/her natural parents. It must be concluded that the process of adoption of a Guatemalan minor by Spanish parents bears no relation to adoption as defined by the Spanish Civil Code and cannot be considered registrable . . . at grave risk to the legal enforceability of an adoption so registered. The adoption in Guatemala confers parental authority upon the Spanish parents. This adoption cannot be recognized as such in Spain, but its effects as defined by Guatemalan law can be recognized (art. 9.4 *CC*), and in this case, under Guatemalan Law, the possessors of parental authority are Spanish citizens.

(. . .)

Simple adoptions formalized by foreign authorities cannot be registered. In such cases, for the reasons above noted, the *DGRN* has ruled that such adoptions can be recognized on the basis of new consents in a voluntary application for adoption *ex novo*, in which case the competent court will be bound only by the *lex fori* – that is, Spanish law since the adoptee resides in Spain.

(. . .)

Under art. 22.3 of the *LOPJ* . . . Spanish courts are competent to examine cases of adoption where the adoptive parents and the adoptee are Spanish and both parties habitually reside in Spanish territory.

Given that the situation of the minor is similar to a fostering arrangement, . . . there is no reason why the adoptive parents should not file anew for adoption under voluntary jurisdiction . . . As noted, the record in this case shows that they have presented a certificate of suitability and the requisite social reports from Guatemala.

Art. 25 of the *LOPJ* introduced a new element in connection with international adoptions, consisting in the issue of a certificate of suitability and, when so requested by the country, a commitment to follow up; the public authority thus has a key role in the reception and processing of international adoption applications in that it guarantees that the process commences with an examination and assessment of the applicants. The certificate of suitability with which procedures for adoption began in the child's country of origin can be found in folio 14 of the records of these proceedings. The fact that the adoption was constituted before the competent Guatemalan authorities as required by the *lex loci* is not disputed.

The report of the Office of the Solicitor General approved the adoption application by the appellants and ordered the issue of a public document enabling the child to be adopted by the appellants, who from that moment acquired legal guardianship of the child. On folio 34 is the declaration of the biological mother consenting to have the simple adoption converted to a full adoption in Spain without the need of a further consent in the conversion dossier; and in the relevant public document she accepted the adoption on the understanding that it is final and irrevocable, and likewise that her rights of consanguinity, legal guardianship and inheritance are entirely terminated by the adoption, such rights being transferred to the adoptive parents, whom she expressly authorizes to readopt her child in Spain without the need of a further consent in the adoption dossier, and she definitively delivered her child into the guardianship of the adoptive parents . . .

(. . .)

Notwithstanding the foregoing, despite the fact that the situation is comparable to that of fostering or adoption, with regard to the adoption it is proposed to carry out in Spain, this Court finds itself faced with the following difficulties:

a) If under art. 600 of the cited Law, which was in force at the time of initiation of voluntary jurisdiction procedures, the biological mother was legally capacitated to give her consent in accordance with the laws of her country in the manner in which she so did, given the lack of accreditation of the currency and substance of the Guatemalan law, the Decisions of the *DGRN* may be open to suspicion of having infringed its own internal public policy, considering the practical effects of adoption in that country; at all events, more than six months elapsed between the last consent of the biological mother recorded in the Guatemalan record and the initiation of adoption procedures before a Spanish judge as this relates to the provision of art. 1830 of the former *LECiv.*, so that in any case the consent would have to be renewed to conform to the Spanish legislation on the matter.
b) The opinion of the 12-year-old adoptee has not been heard, although there is no allegation that he lacks sufficient powers of judgement as provided in art.

177.3 *LECiv*. Any doubt as to whether or not the child has sufficient powers of judgement must be resolved by a hearing as provided in art. 9 *LPJM*, and no reason has been given to justify the authority's failure to act.

c) Strictly speaking, the opinion of the public authority has been dispensed with; nonetheless, art. 177 section 4 of the Civil Code requires that the opinion of the public authority be heard in order to assess the suitability of the adopter (in this case to confirm it) when the adoptee has been legally fostered by the former for more than one year. In other words, while the procedure may be initiated by the adopter or adopters, the intention is that the public authority, which acted at an earlier stage, should now give an opinion on the developments prior to the adoption.

Consequently, the Magistrate *a quo* must remedy the omissions referred to and then, on an ethical basis and in the interests of the child, freely decide on the adoption whose constitution is at issue. The appealed decision is therefore annulled for reasons of public policy as explained above".

3. *Legal kidnapping*

– *STC*, 20 May 2002. *RTC* 120/2002.

International kidnapping of minors. Hague Convention of 1980. Restitution of a child taken to Spain by her mother. Nature of the transfer. Effective legal guardianship.

"Legal Grounds:

First: Given the terms in which the original suit was filed, the object of this appeal for judicial protection is to determine whether or not the Decision (*AC* 1998, 2474) of the High Court, namely that there was no reason to examine the issue of substance raised in the appeal lodged by the present plaintiff against the Judgment of the Court ruling that it was unlawful for her to bring her child to Spain and the child should therefore be returned to Poland under the custody of her father on the grounds that the appeal was void since the appealed decision had already been executed, violated her right to effective legal protection as vouchsafed by art. 24.1 *CE* (*RCL* 1978, 2836 and *ApNDL* 2875).

(. . .)

Third: In the present case, the High Court decided not to address the substance of the issue raised in the proceedings and therefore did not rule on the challenge presented in the appeal from the judgment at first instance, taking the view that the appeal was void since the appealed decision had already been executed.

(. . .)

Fourth: None of these grounds are acceptable to this Court from the standpoint of the right to a judgment based in Law on the substance of the challenge brought, which is part of the fundamental right to effective judicial protection as recognized in art. 24.1 *CE*.

Be it said that the purpose of the Hague Convention of 25 October 1980 is 'to

secure the prompt return of children wrongfully removed to or retained in any Contracting State' [art. 1.a)], and for that purpose it provides a procedure, with a six-week time limit (art. 11), aimed simply at the return of unlawfully removed children without the decision adopted in this procedure affecting the merits of any custody issue (art. 19). This is, then, a summary or provisional emergency procedure, since the decision does not prejudge issues of custody, which must be resolved in different proceedings by whatever Court is competent in each case.

The Spanish legislator, aware of the end pursued by the said Convention and of the urgency of the procedure that it introduces for its implementation (see art. 1902 *LECiv.*, which provides that implementation of the procedure 'shall be preferential and must be completed within six weeks as from the date on which the request for return of the child was lodged with the Court'), has nevertheless determined that the decision be a two-tier one, meaning that the court's decision may be appealed without stay of execution, but that such appeal must be 'resolved within a maximum of twenty days' (art. 1908 *LECiv.*).

This special treatment of the second instance, whereby appeal is allowed against the decision of the Court originally judging a case of international abduction of children but lodging of the appeal does not produce a stay of execution, leads us to suppose that one of the possible consequences of the procedural regulation contemplated by the legislator is the hypothesis that the appealed decision may be enforced at the same time as the Court *ad quem* considers the appeal; nonetheless, the legislator does not view such an eventuality as grounds for the appeal court to refrain from ruling on the substance of the issue put to it. The High Court ought therefore to have addressed the substance of the issue raised by the applicant for judicial protection, there being no reason in law to excuse the court *ad quem* from that obligation, . . .

Fifth: Again, we cannot entertain the contention in the appealed decision that since the original decision had already been executed, the grounds of the decision on appeal were of no legal import. As the Public Prosecutor noted when deciding a case under the Hague Convention of 25 October 1980, the court must make two pronouncements: it must rule on the lawfulness or unlawfulness of the removal of the child to Spain from her country of origin; and it must order – that is, having determined that the removal of the child to Spain was unlawful, under art. 3 of the said Convention – the immediate return of the child to her country of origin, provided that none of the circumstances excusing the obligation of return, as regulated in art. 3 of the Convention, arise. Viewed in these terms, despite that fact that the child had been returned to its country of origin, the issue of whether or not the appellant had unlawfully removed the child from Poland to Spain is not irrelevant, especially given that throughout the proceedings the appellant maintained that the child had always been in the care and the company of her maternal grandparents. A ruling on this issue, regardless of its efficacy in Spanish procedure once the child had been returned as a consequence of the appealed decision, could be of considerable value to the applicant for judicial protection since, as argued in the complaint, a decision favourable to the appellant could be invoked

in the Polish courts judging the marital suit between the parents, to support or reinforce her rights as regards custody of the common child.

(. . .)

Seventh: It transpires from the foregoing that by failing to rule on the substance of the issue raised in the appeal when there was no legal cause not to do so, the appealed decision infringes the appellant's right to judicial protection, and therefore such protection must be granted".

4. *Marriage*

a) *Celebration and register*

– *RDGRN*, 14 May 2001. *RJA* 2002/1728 (Public policy). *RDGRN*, 23 January 2002. *JUR* 2002/120565.

Marriage of convenience. Absence of consent to matrimony. Celebration abroad. Denial of registration.

"Legal Grounds:

(. . .)

Second: Marriages of convenience are undoubtedly void in Spanish law as due to the absence of true consent to matrimony (*cf.* arts. 45 and 73.1 *CC*). To prevent as far as possible the occurrence of such marriages and their registration in the Civil Registry, this Department issued an Instruction dated 9 January 1995 intended to prevent foreigners from obtaining entry to Spain or regularizing their presence here by means of simulated marriages with Spanish citizens.

Third: The cited Instruction seeks to prevent fraudulent marriages being held in Spanish territory, stressing the importance, in the procedures prior to celebration of the marriage, of a confidential personal interview with each of the parties separately (*cf.* art. 246 *RRC*) as a means of identifying any obstacle or impediment to the marriage (*cf.* arts. 56, 1, *CC* and 245 and 247 *RRC*), including the absence of consent to matrimony. Likewise, similar measures must be adopted when it comes to registering, either in the Consular Registry or the Central Registry, a marriage already concluded in the foreign form permitted by the *lex loci*. The Registrar must ascertain whether the legal requirements for celebration of the marriage – without exception – have been complied with (*cf.* art. 65 *CC*) and this check, if the marriage is vouched for by a 'certificate issued by an authority or functionary of the country in which it is held' (art. 256.31 *RRC*), requires that the Registrar be persuaded, by verification of that certificate and 'of the appropriate supplementary declarations', that there is no doubt as to 'the reality of the marriage and its legality under Spanish law'. Such is the provision in article 256 of the Regulations, following the same criterion as laid down in article 23, II, of the Law and article 85 of its Regulations for the admission of other entries lacking full documentation on the strength of a certificate from a foreign Registry.

Fourth: Such an extension of the measures intended to prevent registration of simulated marriages, including those celebrated abroad, has been an object of this

Department's doctrine since the Decision of 30 May 1995, as a result of which registration is to be denied where a number of objective facts are given, as verified by the declarations of the parties and by other evidence, from which it can reasonably be deduced in accordance with the rules of human conduct (*cf.* art. 1.253 *CC*) that the marriage is void by reason of simulation.

Fifth: In this specific case, the issue is the registration of a marriage celebrated in the Dominican Republic on 13 December 1999, between a Dominican and a Spaniard, in connection with which the following objective facts have been established: the bride did not know the address of the groom or the names of his children; the groom was unable to state the correct age of the bride and did not know her address, telephone number, income, date of birth or the names and ages of her children.

Sixth: It is reasonable and in no way arbitrary to deduce from these verified facts that the marriage is void by reason of simulation.

(. . .)".

b) *Matrimonial property*

– *SAP* Barcelona, 3 July 2001. *Web Aranzadi JUR* 2001/287086.

Law applicable to family economic regime. Marriage between a Spaniard possessing Catalan *vecindad civil* [regional citizenship] and a stateless person, celebrated in Catalonia where both reside. Non loss of Spanish nationality or of citizenship under previous legislation through marriage to a person having no nationality. Application of Catalan legislation.

"Legal Grounds:

. . . Given, then, that when they married, the plaintiff possessed Spanish nationality and Catalan *vecindad civil* and Alejandro D. G. was a stateless person, the crux of the issue is to determine under what economic regime the marriage between them was constituted.

. . . we must first note that as regards nationality, the Law of 15 July 1954, which amended articles 17 to 27 of the Civil Code and was in force at the time the marriage took place, stated in its Preamble that 'The principle of family unity holds in both the system of acquisition and loss of nationality . . . However, the excessive strictness of the Civil Code, which tended to facilitate statelessness, has been moderated; the law now provides that a Spanish spouse will only lose her nationality of origin where the laws of the country of which her husband is a national require that she acquire her husband's nationality', in which case article 23 provides that she will lose her Spanish nationality '3. Any Spanish woman marrying a foreigner does acquire the nationality of her husband.

Therefore, given that in the present case the husband was stateless, the plaintiff did not lose her nationality since the husband had no specific nationality. Moreover, she continued to possess Spanish nationality, and for the same reasons she maintained her Catalan citizenship; for although according to article 14 of the Civil Code the wife had the same condition as the husband, since the husband had

no nationality, there was no condition for her to adopt – not even that of the Spanish common law, for which the husband would have to be Spanish national. In this respect the only provision of the Civil Code was in article 8, whereby 'Criminal, police and public security laws are binding upon all persons living on Spanish territory'. The laws here examined, which determine family economic regime, are not among those cited, and therefore it does not follow that a stateless person residing in Spain before acquiring Spanish nationality is bound by, or his personal status for the present purposes is, that of Spanish common law.

Turning to the Supreme Court decision of 14 December 1967 as invoked by the plaintiff, this does not say what the plaintiff claims that is says. That decision establishes first of all that the third provision of article 15 of the Civil Code 'is predicated upon the assumption of a legal status – that of being a Spanish national – which in legal terms accords common or foral civil status depending on a number of circumstances, but absent the former status, the latter cannot of themselves produce the same effect.' In other words, common or foral citizenship is not acquired by anyone simply residing in a place but only by Spanish nationals, from which it follows that on marrying, the plaintiff's husband acquired neither Catalan nor common civil citizenship.

Secondly, the ruling establishes that 'When a foreigner acquires Spanish citizenship and thereby the same personal status as Spanish nationals, it is understood that he is subject to that civil law known as common law because it is applicable in its entirety to most Spaniards and in part to all Spaniards (preliminary title, title IV, Special laws, Mortgage Law, etc.); however, having once acquired Spanish nationality, he may, under art. 15, acquire foral status'. In short, foral status can be acquired only after acquiring Spanish nationality, and the common Spanish law is applicable at the time of acquiring Spanish citizenship.

This conclusion diverges from that presented by the appellant, who claims that non-Spaniards residing in foral territory are personally subject to the common law, which does not necessarily follow from the decision discussed.

Having regard to the point raised that the stateless person may decide his own matrimonial economic regime, we would note that under the Spanish legislation applying to the present case, both in the common civil law and in the Catalan law, which is relevant here, those engaging in matrimony were entitled to decide the economic conditions of their association, as provided in article 1315 of the Civil Code and article 7 of the Special Compilation of Civil Law of Catalonia, both of which provide that the family economic regime shall be as stipulated or agreed in their marriage articles – and this Court does not deny that the stateless person may also have that right.

However, in this particular case the spouses did not make use of that entitlement; they drew up no marriage articles and hence, since the marriage had to be subject to some regime, recourse must be had to the regime that the law establishes by default.

Absent marriage agreements or articles, that regime is separation of estates, as provided at that time in article 7 of the Catalan Compilation, and in that case

article 12 of the Civil Code, after stating what provisions were mandatory in 'all provinces of the Kingdom' – which did not include those at issue here – established that 'For the rest, those provinces and territories in which foral law subsists shall retain these intact for the time being, and their present legal regime, whether written or customary, shall be in no way altered by publication of this Code, which shall have the status of supplementary law where the special laws of such provinces or territories do not provide.'

Hence, if the common law is supplementary in this matter, with the scope provided in the article referred to, we must conclude that in the present case the applicable law was the Compilation then in force in Catalonia, and as this expressly regulated the marital economic regime differently from the common law, there is no need of recourse to the latter.

On this question it is likewise necessary to consider that, setting aside the fact that marriage was celebrated in Catalonia where both resided, the wife possessed Catalan citizenship, which she did not forfeit upon marrying, given that she did not assume that of her husband or exchange it for the common citizenship; and for this reason, under the provisions of article 12, as it relates to article 15, of the Civil Code, the applicable law was the foral law since the latter of the two articles establishes in what circumstances 'family rights and duties, rights and duties relating to the status, condition and legal capacity of persons, and those of testate or intestate succession as stipulated in this Code are applicable'. The circumstances enumerated do not include the present one, which, given the breadth and scope of those included, must therefore be deemed to be expressly excluded.

The argument against this, that the husband by reason of being stateless did not acquire his wife's Catalan citizenship upon marrying, cannot be entertained; the issue here is not whether the husband assumed the wife's citizenship, but strictly to determine the economic regime applicable to the marriage. As noted above, some economic regime had to be applicable, and the appropriate regime under Spanish law is the foral law, given that there is no applicable foreign law since the husband is stateless, and the rules applicable to the wife were those of the foral law of Catalonia, which is where the marriage took place. There is therefore no common nexus or other reason to apply the common law, as this was not applicable either to the husband or the wife.

The Supreme Court took a similar view in a sentence of 30 June 1962 determining the economic regime applicable to a marriage celebrated in Bilbao between an Italian, who retained his Italian nationality for twenty years before acquiring Spanish nationality, and a Spaniard born in Burgos.

In that case, where the husband did possess a nationality, the Supreme Court ruled that absent marriage articles and evidence as to the existence, content and scope of Italian law on the economic regime of married couples, which the appellant claimed should be separation of estates, the applicable system was common property. Applying the same logic to the case at hand, we consider that the applicable regime is separation of estates, this being the appropriate system under the supplementing law.

Be it said that the fact that the husband acquired Spanish nationality the following year, at which time he would be a subject of the common law, does not affect the issue here in that a Supreme Court decision of 20 March 2000 ruled, among other things, that 'marital conditions are not altered by acquisition of civil citizenship".

c) *Divorce*

– *SAP* Palma de Mallorca, 25 October 2001. *Web Aranzadi JUR* 2002/39779.

Law applicable to separation and divorce. Spouses possessing British nationality. Applicable law. Absence of allegation and proof of foreign law. Denial.

"Legal Grounds:

(. . .)

Article 9.2 of the Civil Code provides that 'the effects of marriage shall be governed by the common personal law of the spouses at the time of marrying'; then, after establishing the law applicable absent a common personal law, it provides that 'separation and divorce shall be governed by the law determined in article 107'. Article 107 provides that 'separation and divorce shall be governed by the common national law of the spouses at the time suit is brought; absent a common nationality, they shall be governed by the law of the spouses' habitual place of residence; and if the spouses have their habitual places of residence in different states, they shall be governed by the law of Spain, provided that the Spanish courts are competent'

(. . .)

. . . For the material foreign law to be applicable, it must therefore be invoked and proved by the party seeking recognition of the legal consequences of that law. . . . Such has been the ruling of this Court regarding the invocation of foreign law where, as in the present case, the foreign law is insufficiently proven; according to a decision of 23 October 1992 and others, the report compiled at the behest of the appellants and referring specifically to the litigation at issue is not sufficient to accredit the foreign regulation unless it literally transcribes the provisions referred to, and it does not, as required, accredit the currency of the applicable foreign law' (decision of 4 May 1995).

In light of the foregoing, it being established that the spouses at litigation in the present case possess British nationality and did so at the time of bringing suit, there can be no doubt that this action for separation must be settled by application of the material Law, that is the law of the United Kingdom, which was not invoked by the parties at the appropriate point in the proceedings, nor was its substance and validity accredited in the course of litigation through the means of proof accepted in Spanish law as provided in article 12.6 of the Civil Code (in force at the time this action was initiated and subsequently repealed by Law 1/2000, article 281.2 of which contains a provision similar to the cited article of the Civil Code). Moreover, the applicable British regulation could not be verified *ex officio* by the court *a quo*, despite the fact that the latter, in exercise of its powers under

article 12.6 of the Civil Code *in fine*, reserving its judgment pending the production of more particular evidence, issued an order dated 9 November 2000 whereby information was requested from the General Technical Secretariat of the Ministry of Justice regarding the issues, itemized in 25 detailed sections, which petition was fruitless. Given the circumstances, the court of first instance was absolutely right to dismiss the complaint.

In challenging that decision the appellant invoked the jurisprudential doctrine whereby in certain cases the issue has been resolved in accordance with the rules of substantive Law of our own legal system when the exact nature or the true scope of interpretation of the foreign statutes that ought in principle to apply are not accredited. This Court takes the view that that line of jurisprudence – which has indeed been adopted in certain cases submitted to the Supreme Court, although there is no record of its having been considered for the resolution of any marital proceedings – cannot be applied to the decision on the issue considered here, since the parties took the wrong line from the outset of the proceedings by invoking Spanish legal provisions in their initial writs, taking it for granted that Spanish law would be applicable, whereas in this case all the issues at debate, and not simply odd aspects, are subject to British law; moreover, this action does not concern matters of property law in which the parties may freely dispose, but rather the matter concerns issues regulated by mandatory norms regarding which public policy is paramount – as article 9.1 of the Civil Code clearly establishes, 'the personal law attaching to natural persons is determined by their nationality. That law shall determine capacity and civil status, family rights and duties, and succession by reason of death'; then again, articles 9.2 and 107 of the Civil Code provide that separation and divorce shall be governed preferentially by the common national law of the spouses at the time of bringing the action, and the litigants may not elude these imperative norms through incorrect allegations and omission of proofs, since otherwise the applicable substantive law would be subject to the caprice of the litigants. In any event, we should also note that were this action to be tried under Spanish law, such decision might well be unenforceable in the United Kingdom, precisely because the material law of that State, of which both spouses are nationals and where the marriage from which separation is sought was celebrated, was not duly applied".

– *SAP* Barcelona 18 June 2002. *AC* 2002/2176.

Marital separation. Foreign law that does not admit separation. Application of Spanish law. Equivalence of institutions.

"Legal Grounds:

(. . .)

This Court has in the past pronounced, in a similar marital case between foreign subjects having their habitual residence in Spain, that in pursuance of article 769.1 of the *LECiv.* (*RCL* 2000, 34, 962 and *RCL* 2001, 1892) as it relates to article 22.3 *LOPJ* (*RCL* 1985, 1578 and 2635), the Spanish courts are competent where both litigants are resident in Spain at the time of applying for a separation. . . .

The question at issue was not strictly speaking that of the judicial forum but whether habitual residence meant that special law was applicable for substantive purposes when the resident spouses retained their common foreign nationality, the ruling being that the *lex civilis fori* of the place of domicile was applicable rather than the national common law. In this connection, it is fair to say that in their *praxis*, the Spanish courts have consistently striven through jurisprudential doctrine to apply Spanish constitutional principles to marital crises among foreign subjects who are resident in Spain, where they have built their family life and where they may be said to have laid down family, economic and working roots over the years even if they preserve the cultural customs of their country of origin; . . .

What was originally a nuanced jurisprudential tendency became official policy with the promulgation of Organic Law 4/2000, 11 January (*RCL* 2000, 72 and 209) and Organic Law 8/2000, 22 December (*RCL* 2000, 2963 and *RCL* 2001, 488) on Rights and Freedoms of Foreigners in Spain, whereunder foreigners come within the scope of Title I of the Constitution (*RCL* 1978, 2836) in the terms set forth in International Treaties, in the cited Laws and in the Laws regulating the exercise of each one; moreover, they provide in a general way that foreigners may exercise the rights attributed to them by this Law in conditions of equality with Spaniards. The solutions that the Law envisages for the domicile of a married couple (in both procedural and substantive terms, as interpreted to be the meaning of article 107 *CC* [*LEG* 1889, 27]), can be found in decisions of the Supreme Court relating to recognition of *exequatur* (Orders of 27 October 1998 [*RJ* 1998, 9009] and 11 January 2000 [*RJ* 2000, 359]). From all this it may be inferred that while the laws of the Kingdom of Morocco do not specifically contemplate the situation of legal separation as defined in articles 53, 54, 56, 57 and 58 regarding Divorce, it does contemplate the wife's right to maintenance if the husband has sufficient assets; in the event of the husband's unwarranted absence, she retains this right for one year, and even if she is repudiated, the wife is entitled to a sum in consolation, proportionate to the husband's means. This regulation comes within the meaning of maintenance as set forth in the New York Convention of 20 June 1956 (*RCL* 1966, 2107 and *RCL* 1971, 2055) and the Hague Convention of 2 October 1973 (*RCL* 1987, 1891, 2492) (both recognized by Spain, in 1986 and 1987), which regulate international norms regarding maintenance in connection with family relationships, parentage, marriage or affinity irrespective of any condition of reciprocity, even with respect to the law of a non-contracting State, so that obligations of maintenance are to be governed by the internal law of the place of residence of the debtor of maintenance. This was enshrined, by virtue of reforms in Law 11/1990, 15 October (*RCL* 1990, 2139) and Law 1/1996, 15 January (*RCL* 1996, 145), in article 9.7 of the Civil Code (*LEG* 1889, 27), which provides that the Law of the habitual place of residence of the person claiming maintenance shall apply where maintenance cannot be claimed under the Common National Law.

This being established, it must be said that the Moroccan legislation having been duly submitted in the proceedings as required by article 12.6 *CC*, it has been accredited that the defendant, Abdelhalaik A., came to reside in Spain with his

wife Ayadi R. in 1988, . . . leaving the wife without sufficient financial means and without having paid the Property Tax on the family dwelling or the electricity bill. This is accredited by the defendant's own declaration.

There is, then, a clear case for application of the principle of equivalence of institutions that holds in private international law, or the principle of equivalence of outcomes referred to in an Order of the Supreme Court of 11 January 2000 (*RJ* 2000, 359), followed by the decision of this Section 12 of 13 February 2002 (roll 742/2001 [*JUR* 2002, 135624]), and for assimilation of the present case to 82.1 *CC* (*LEG* 1889, 27), allowing the separation as petitioned".

5. *Maintenance*

– *SAP* Granada 23 April 2001. *AC* 2001\1620.

Claim for maintenance by wife and children of Iraqi nationality. Hague Convention of 1973. Condition of spouse. Repudiation. Public policy.

"Legal Grounds:

(. . .)

It must first be noted that the central norm in Spanish private international law as regards determining the law applicable to maintenance in international cases is the Hague Convention of 2 October 1973 . . . on the law applicable to maintenance obligations, which has been in force in Spain since 1 October 1986. Neither the original decision nor the parties at litigation take into account the fact that by virtue of incorporation of the Convention into Spanish law, article 9.7 of the Civil Code has been replaced in obedience to the *erga omnes* scope of the Convention, article 4 of which establishes that for the purpose of applying the appropriate regulations, the principal nexus is the habitual residence of the maintenance creditor. The actors in the suit for provisional maintenance – the wife and children – are Iraqis having their habitual residence in Granada. They expressly invoke the internal law, that is, articles 142 *et seq*. of the *CC*, albeit under article 9.7 of the *CC*, when the appropriate norm is the Hague Convention on the law applicable to maintenance obligations. As article 1 states, this Convention applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate.

Since the fact of being married constitutes a civil status, under article 9.1 of the *CC*, the actors' personal law ought to apply – in this case the law of Iraq; similarly, under article 50 of the *CC*, Iraqi law is likewise applicable in respect of the form of marriage where both spouses possessed the same nationality at least at the time they married. The point of these remarks is that the claim for maintenance brought by Ms. Muna S. is based on her condition as wife of the defendant, for which purpose she has submitted the requisite official marriage certificate, duly translated, which expressly states that the marriage was conducted according to Moslem rites. The defendant, for his part, denies the existence at present of any marital tie, claiming that this was dissolved in 1981. The defendant has failed to corroborate this at any point in the present proceedings. Nonetheless, we

would note that according to one sector of private international law doctrine, a unilateral repudiation is contrary to Spanish international public policy if, with due consideration of the specific circumstances, it violates the principle of equality between spouses, giving rise to a situation in which there is lack of legal protection (see Carrascosa González in *Jurisprudencia civil comentada*, t. I, p. 617). Another author has similarly pointed out that repudiation as a means of dissolution of marriage violates basic principles of the laws of the forum, such as the prohibition of any kind of discrimination by reason of sex and respect for human dignity. The requirement of protection of the cultural identity of minorities in a country does not prevent societies from laying down certain minimum mandatory standards (Palao Moreno, *Actualidad Civil*, no. 15, April 2001, p. 566). Besides the strictly personal consequences that repudiation may have, there are other consequences that deserve protection on general legal principles (see *STS* 10 March 1998 [*RJ* 1998, 1272]), especially those concerning assistance and financial aid".

6. *Non-marital unions*

– *SAP* Navarra 12 June 2002. *Web Aranzadi*, *JUR* 2002/201896.

Law applicable to the condition of stable or *de facto* couple. Rules for solution of conflicts of law; competence of the State. Application by analogy of article 9.2 of the Civil Code.

"Legal Grounds:

. . . In dealing with this appeal, we must first address a prior issue, namely the petition received by this Court for a ruling by the Constitutional Court on the constitutionality of art. 2.3 of *LF* (Foral Law) 6/2000 of 3 July.

(. . .)

This action presumably seeks a declaratory judgment on the condition of 'stable or *de facto* couple', based, as noted by the court *a quo* (*F.D.* 1), on Foral Law 6/2000. The reference to this Law means that what is sought is a ruling to the effect that in institutional terms the parties constituted a 'stable Navarran couple' and are hence subject to the provisions of Navarran law. Assuming that *LF* 6/2000 is applicable, article 2.3 thereof must likewise be applicable according to the letter of that Law.

It therefore follows that the crux of the present appeal is the validity of art. 2.3 of *LF* 6/2000.

Having said this, there is clearly some doubt as to the constitutionality of article 2.3 of Law 6/2000 in that a) this is evidently a provision intended to resolve a conflict of territorial laws – that is, to determine whether one of a number of conflicting specific legal systems is applicable (in this case, Navarran law and the common civil law applying to either member of the 'stable couple' by reason of their regional citizenship [*vecindad civil*]; b) under the Constitution, the establishment of rules for the 'resolution of territorial conflicts of laws' is the exclusive province of the State (art. 149.1.8 *CE*). The 'rules for resolution of conflicts of laws' are the competence of the State 'in any case', which constitutes an excep-

tion to the general rule whereby those Autonomous Communities that possessed a prior foral civil law can legislate on their 'conservation, amendment and implementation'. The reservation of exclusive competence to the State applies to both 'private international law' and 'inter-regional law'. . .

Nevertheless, despite the fact that a question of constitutionality could or should be raised on the basis of such considerations, this Court, while cognizant of the fact that an appeal has been lodged with the Constitutional Court alleging unconstitutionality of the cited Law in its entirety, deems it proper in the present case, even at the risk of anticipating, to remit to art. 5.3 *LOPJ*, which provides that issues of unconstitutionality are only allowable 'when a statute cannot be interpreted as conforming to the constitutional system'. Under this provision, the issue can be sidestepped by interpreting art. 2.3 as a material norm of Navarran law that would be operative 'after' the appropriate State-wide rule of conflict has been applied. To determine which law code is applicable to the case, one must remit to the rules of conflict in the Civil Code, the State legislator being the only authority competent to regulate such matters (art. 149.8 *CE*). Viewed in this way, the applicable rule of conflict, by obvious analogy, is art. 9.2 *CC*, as the only rule of conflict in the Code that fits the situation of a 'stable couple', which the legislator moreover considers analogous to marriage (art. 1 *LF* 6/2000 'affective relationship analogous' to that of marriage).

In the present case, under article 9.2 *CC*, the law applicable to a stable union is that of the 'habitual common residence', which was Agreda (Soria). Hence, this stable couple cannot be governed by the law of Navarra but must be governed by what is known as the common or general civil law.

Had the 'habitual common residence' of the couple been in Navarra, under article 9.2 *CC* the applicable law would be that of Navarra, specifically article 2.3 of *LF* 6/2000.

In this case, there are two possible situations as regards 'common habitual residence' in the foral territory:

a) one or both of the cohabitants may possess Navarran regional citizenship, in which case they would legally and institutionally constitute a 'Navarran stable couple' and hence come under the provisions of *LF* 6/2000.
b) neither possesses Navarran regional citizenship, in which case for the purposes of *LF* 6/2000 they cannot be considered a 'stable couple'.

Therefore, in consideration of the foregoing, the former relationship between Miguel Julián C. M. and Teresa S. M. cannot be considered a 'stable couple' for the purposes of *LF* 6/2000".

– *SAP* Gerona 2 October 2002. *AC* 2002/1493.

Break-up of a *de facto* couple. Determination of the law applicable to their estates upon separation. Applicability by analogy of the rules of conflict relating to marriage and the dissolution thereof. Applicability of Catalan civil law absent invocation and proof of applicable foreign law.

"Legal Grounds:

(. . .)

. . . the patrimonial relations at issue between two persons who have constituted a *de facto* couple for a number of years, at least by analogy with points 1 and 2 of article 9 of the Civil Code given the lack of any specific regulation of *de facto* couples, must be governed by their personal law. This, again by analogy, is the thrust of article 107 of the Civil Code.

Therefore, given that the litigants are Swiss nationals and as non-Spaniards do not possess Catalan regional citizenship, the matter ought to be resolved in accordance with Swiss law. This would exclude what we might call immediate or direct applicability of Catalan law, which both litigants presumably consider applicable since they invoked it both in the complaint and in the answer thereto.

So far, then, the reasoning and the arguments put forward in the appealed decision may be considered correct.

. . . However, this Court dissents from the solution adopted by the original court on the basis of the premises described. The latter argued that the litigants having failed to accredit the substance of their personal law in this matter, the action could not be admitted for trial and therefore it dismissed the complaint.

. . . In other words, in the present case Swiss law was not even invoked as applicable. The writ of opposition to the appeal here considered states, without offering proof, that there is no regulation of *de facto* couples in Swiss law. Be that as it may, this Court has received no allegation and has no cognizance of what Swiss law may provide in this respect. There is therefore no accreditation of the existence, the substance or the currency of such law. Here, *de facto* couples, although not expressly regulated in the common Spanish civil law, are certainly not prohibited, and therefore cohabitation of this kind cannot be said to be contrary to Spanish public policy.

Indeed, the personal and patrimonial situation of couples upon breaking up has given rise to a great deal of jurisprudence. And furthermore, there has been regulation of *de facto* couples in Catalonia since 1998. Given that the litigants are resident here, then, the issue must be resolved by what we might call indirect application of the laws of Catalonia".

XI. SUCCESSION

– *SAP* Alicante 28 December 2001. *Web Aranzadi*, *JUR* 2002/69600.

Will made in Spain. Joint will previously made in Berlin according to German law. Proof of foreign law.

"Legal Grounds:

The original plaintiff seeks to base the present appeal on the fact, unchallenged by the opposing party in this suit and further officially documented, that in accordance with the private law then in force in their country, Mr. T. and his first wife, their marriage being officially confirmed, made a joint 'Berlin' will on 18 September

1973; this will, which was allegedly never impugned, barred him from making any subsequent testamentary provision even after the decease of his first wife, under the relevant provisions of German law.

In support of her allegations and petitions in this case, the appellant invokes certain articles (1.944, 2.267, 2.269, 2.271, 2.280, 2.281 and 2.283 of the *BGB* [German Civil Code]). These, duly translated into Spanish, were submitted along with the writ of complaint and certified as being currently in force by a certificate from the Embassy of the German Federal Republic. These regulations are, then, part of German law, which this Court – like the court of first instance – is bound to consider and, if appropriate, apply in pursuance of article 9 of the Spanish Civil Code, sections 1 and 8.

To that end – that is, the application of such foreign norms – it seems appropriate to start from the jurisprudential guidelines contained in decisions of the Supreme Court, among other authorities . . .

In this case it is true that the original plaintiff, now the appellant, as noted, filed with her appeal evidence of the German law invoked in favour and as the basis of her case, which she maintained was applicable and enforceable for the settlement of this litigation; however, the evidence furnished was in fact scant, providing only a literal transcript of the two articles of the *BGB* mentioned above but omitting transcripts of others alluded or remitted to – arts. 2270, 2278, 2279 or 2296 – which are doubtless concordant, complementary or related to the first two and might have served to establish the scope and provide an understanding of their terms through systematic interpretation; and more importantly, she furnished no discussion or opinion by German legal experts, the documents submitted with the complaint, besides being brief and succinct, giving an inadequate account of the qualifications in German law of the signatories of the document. Had such an opinion been furnished, it might have been sufficient to determine the doctrinal and jurisprudential guidelines necessary to establish the true scope of the provisions contained in the cited article, the consequences, effects or scope of a joint 'Berlin' will, particularly after the death of one of the testators, and to determine whether, as the trial court wondered, the will would, as appears logical, affect only the conjugal estate – that is, the goods of the spouses at the time of death of one of them – or, as does not appear reasonable – would extend to any goods or assets that the surviving spouse might acquire subsequently throughout his or her lifetime. Thus, the first marriage having been dissolved by the death of one of the spouses, for example and particularly in the event of a further marriage by the survivor, the latter's capacity to make a new will would be absolutely confined, limited or even annulled, and he or she would be unable to appoint the later spouse or new children or descendants of the second marriage as heirs.

It is the lack of proof and, to the say the least, serious deficiencies in accreditation of the foreign law invoked by the plaintiff in her action, particularly having regard to the scope and meaning of the articles of German law specifically referred to by the plaintiff – and that lack of proof must be laid at the door of the plaintiff, since, as already noted, the burden of proof as a matter of fact rested

with her – that prompted the original court, and now also this appellate Court, on the basis of the relevant jurisprudential doctrine as cited, to resort to Spanish law in order to apply the foreign norms, interpret them properly and particularly to compensate for the stated omissions of proof, for the purpose of resolving the questions at issue in this case. Thus, in support of the view that the father of the plaintiff and husband of the defendant, his first marriage being extinguished and his second and subsequent marriage to the defendant being current, could make a nuncupative will in accordance with Spanish law, freely disposing of his future goods and assets while respecting the legitimate portion of his daughters by this first marriage, it seems proper, possible and pertinent to cite and invoke arts. 668 and 737 of the Spanish Civil Code and the principles informing them, art. 668 enshrining the principle of the testator's freedom to dispose of his goods for purposes of inheritance or legacy, and art. 737 providing in a general way that all testamentary provisions are essentially revocable even if the testator 'in the will expresses his wish or resolve not to revoke them'.

Furthermore, the efficacy, as claimed by the plaintiff, of the decree of succession apparently issued in her favour by the Municipal Court of Tierganten (Berlin) cannot be upheld inasmuch as a) as noted above, that decision took no account of the will made by Mr. T. In Spain in 1981, and the Berlin court was unaware of it, and b) there is no record of what were or what ought to have been the circumstances taken into account by the said court in accordance with the German material and procedural rules, in issuing a decree of succession contradictory to, and at all events ignoring the wishes of the deceased to dispose of his goods *mortis causa* as validly stated and manifested in the manner required for that purpose by Spanish law.

Finally, we must say that even were we to admit the full efficacy of the joint will made by Mr. T. in 1973 and invoked for her sole benefit by the plaintiff, that will would not warrant – or at least there is serious doubt that it would warrant – the intent of this suit to annul the deed of succession dated 18/09/1997 whereunder, as this Court understands it, the only right vouchsafed to her by that writ was to inherit the goods described and identified in section a) subsections aa), ab) and ac) thereof upon the decease of the testator in that first will, which goods are evidently not the same as listed in the above-mentioned deed of succession signed by the defendant, specifically registered property number 7.933, located in Spain and acquired by the deceased Mr. T. after the dissolution of his first marriage upon the death of his spouse Gerda-Else-R. T. née Orkanov, to whom Mr. T. succeeded as holder of title by inheritance, as recorded in the deed here impugned. We would further note that in the joint will referred to, the testators included no clause to the effect that upon the decease of the surviving spouse their daughters should be entitled to inherit any goods that the latter may in turn have inherited from his spouse".

XII. CONTRACTS

– *SAP* Badajoz, 23 March 2001. *AC* 2001\2243.

Atypical contract. Inadmissibility of *derogatio fori*. Applicable law absent proof of foreign law.

"Legal Grounds:

. . . the plaintiff, a company, brought an action for petty debt against the defendant, a professional footballer, in respect of compensation for unilateral and unfair termination of a contract between the two, dated 8 March 1996 (doc. no. 2), whereby the former was granted full, exclusive and irrevocable power, for a term of two years, to make representations and negotiate contracts in the name and on behalf of the defendant in connection with his activity as a footballer. In view of breach of contract by the latter, the said company sought enforcement of the penalty clause set forth in clause eight of the said contract, alleging that the said provision specifies a fine or sanction equivalent to 20% of all contracts or other business entered into by the footballer during the lifetime of the contract.

(. . .)

. . . no judge or court may try any matter in which he or it is not jurisdictionally competent. Such judge or court must therefore determine whether such jurisdiction exists, including jurisdiction *ex officio*. This is an issue of public policy in which the free will of the parties has no part, for as the appellant rightly states, no court may try an issue for which it lacks international judicial competence. As the Supreme Court ruled in a decision of 10 November 1993, 'jurisdiction has limits beyond which a court may not try a case; it is therefore a *prius* for the action of a court that there be law sufficient to allow – or in some cases, oblige – the court to act *ex officio* if it has such jurisdiction'. Any challenge by a party to the competence of the court of instance must be made through the proper channels, which according to Supreme Court doctrine is by way of declinatory exception, although the outcome of such an exception, if admissible, is not remittal to the actions of the competent foreign court, which would obviously not be bound by it, but advice to the parties as to which country, in the view of the Spanish court, ought to judge the matter. Therefore, the defendant's allegation of incompetence by way of exception accompanying his plea in defence rather than by an international declinatory exception cannot be entertained; moreover, such an exception was absent from the *petitum* in his original writ, as noted by the court of instance. And again, the fact of his having proceeded in this manner may possibly (at least arguably) be deduced as tacit submission to the jurisdiction of the court of instance that summoned him as provided in art. 58 of the *LECiv*. This occurred in a similar case in a decision of the Territorial High Court of Barcelona of 24 March 1987 and a decision of the Supreme Court of 12 January 1989, although the criterion is not settled and is rejected by the majority doctrine, which considers that the scope of international judicial competence is defined by a specific international system (*LOPJ* and international conventions) and it is wrong in this connection to remit to legal provisions on territorial competence.

Furthermore, leaving aside the provisions of art. 58 referred to above and examining the contract binding the parties (arbitrary, unilateral and unfair termination of which is alleged as the basis of the plaintiff's action for debt), we see that under clause nine of the contract the parties expressly agree to be bound by the jurisdiction of the ordinary courts of Rosario (Argentina). Such an agreement to submit to a foreign court can in principle be accepted as binding on the parties in deference to the principle of free will and pursuant to art. 22 of the *LOPJ*, paragraph 2 of which establishes that Spanish tribunals and courts have jurisdiction in a general way 'when the parties have tacitly or explicitly agreed to submit to the Spanish tribunals or courts'. Therefore, *mutatis mutandis*, submission by the parties to the courts of another country is in principle admissible even although one of the parties, to wit the defendant, is domiciled in Spain as in the present case; art. 21 of the *LOPJ* as cited does not negate the validity and efficacy of such express submission, and the same is true of the Brussels Convention although the defendant resides in Spain, since the defendant is not a party to that Convention and hence cannot be bound by the personal limits in the clauses attributing jurisdiction. Furthermore, the problem of the scope of application raised by the said Convention is immaterial in light of a circumstance that cannot be ignored and was rightly stressed by the original court, namely that the defendant's place of domicile at the time the action was brought against him was Spain; in such a circumstance the Supreme Court has repeatedly and unhesitatingly ruled that jurisdiction clauses in a contract can be legitimately ignored, basing its argument on the notion of abuse of law (art. 11 of the *LOPJ*), sustaining that if the sole object of a challenge of competence is to delay resolution of the action, such conduct merits no protection, bordering as it is on procedural fraud; in short, a defendant summoned by the courts of his country of domicile enjoys the full right of defence and access to the jurisdiction most favourable for him. And therefore, turning to the case at issue, the footballer having been sued in his place of residence and there being no record of any reason to justify his preference for the courts of Argentina (none having been submitted), it may reasonably be inferred that his sole interest in claiming the said exception was to delay the proceedings, and given that the fact of the plaintiff bringing the action in his place of domicile is actually favourable to him, this court deems it proper to deny the exception claimed, as did the court *a quo* in the original decision.

Having settled the foregoing, we must now examine the law that is applicable to the case at issue, given that appellant has objected to the law applied (Spanish law) by the original court, since the resolution of this issue may indubitably affect the outcome of the action and cannot therefore be dismissed *a priori* as immaterial. In this respect it must be said that the jurisprudence, in interpreting art. 12.6 of the *CC*, is practically unanimous in sustaining that the application of foreign law, where admissible, is a matter of fact and as such must be alleged and proven by the invoking party, to which end the said party must not only accredit the exact nature of the law in force in the foreign country, with certification legalized by the Consulate and an explanation of its substance by two jurists of that nationality, but must also accredit its scope and the manner of its interpretation by the

courts there, in such a way that the Spanish courts are left in no reasonable doubt as to its applicability. Therefore, when the Spanish courts are unable to determine with absolute certainty that the foreign law is applicable, they are bound to judge and decide in accordance with domestic law. The view of the jurisprudence is that it is no business of the Spanish courts to interpret foreign precepts (in this connection see *STS* 28–10–1968; 7–9–1990; 16–7–1991; 31–12–1994 among others); hence, absent accreditation in the present case of the meaning or interpretation given by the courts of Argentina to the rules applicable there to actions of this kind, the proper course is to proceed in accordance with Spanish law, as the original court rightly did".

– *SAP* Madrid, 4 April 2001. *Web Aranzadi JUR* 2001\187069.
Insurance contract. Applicable law.

"Legal Grounds:

. . . The plaintiff brought an action for debt based on an insurance policy subscribed with the defendant covering damage to a leisure yacht. On 8 August 1996 the craft suffered an engine breakdown the repair of which cost 2,198,318 pesetas. The plaintiff submitted a claim for this amount to the insurer, but the monies were not paid.

The insurer opposed the suit claiming an exception of lack of legitimate title to act, as according to the insurer, the person who subscribed the policy was M.C. Herrero and not the plaintiff, a legal person. Secondly, the insurer sustains that English law is applicable since the defendant is domiciled there. On the facts of the matter, it sustains that the damage to the engine was caused by failure to change the oil and not by external factors as alleged by the plaintiff.

As to whether English law ought to be applied, the relevant provision is art. 109 of Law 30/1995, 8 November, on Regulation and Supervision of Private Insurance, which states: 'Insurance contracts shall be governed by the general norms of Private International Law with regard to contractual obligations where arts. 107 and 108 do not provide.' In turn, art. 107 establishes . . .

In other words, art. 109 remits to art. 107, and art. 107 establishes that Spanish law shall apply to damage insurance when the risk is located on Spanish territory (the yacht in point is registered at Barcelona) and the policyholder is domiciled in Spain: the charter company has its registered offices in Madrid, and hence these rules would appear to apply. However, under paragraph 2, in the case of major risks the parties may freely choose the applicable law, and seagoing craft like the one concerned here are listed among the major risks. In other words, the applicable law would be that stipulated by the parties. The parties made no such stipulation in the insurance contract. It therefore appears that we must revert to the aforementioned norm and apply Spanish law, Spain being the country where the risk is located and the country of domicile of the policyholder.

Then again, the provisions of art. 10.5 of the Civil Code do not apply as supplementary law since the parties have not made any express choice of law, they do not have a common national law or country of residence and we do not know

where the contract was formalized; the place of signing does not appear on the policy and, just as the premium is paid through an insurance agent, the policy may well have been signed in the same way.

We therefore conclude, on the foregoing grounds, that the applicable law must be Spanish law".

– *STS* of 28 September 2001. *RJ* 2001\8718.

Exclusive trade mark licensing agreement. Repercussions of free movement of goods.

"Legal Grounds:

. . . As regards the facts, we would note the following:

A) The agreement on which the appellant bases its claim was formalized on 25 April 1978, several years prior to the accession of Spain and Portugal to the European Communities, and was entered in the Spanish Registry of Industrial Property on 28 February 1991, that is several years after the said accession.

B) The agreement, called a 'licensing agreement' is subscribed by the companies Bacardi & Company Limited, domiciled at Vaduz (Liechtenstein) and having offices in the Bahamas Islands (hereinafter Bacardi), Bacardi International Limited, having an office in Hamilton, Bermuda (hereinafter International), and Bacardí y Compañía, Sociedad Anónima, España, domiciled at Madrid (hereinafter Bacardí España).

C) The recitals of the agreement state: a) that Bacardi is the owner of the manufacturer's 'Bacardi' trade marks registered in most of the world to distinguish rum and other products (hereinafter 'Bacardi products') made in accordance with its own exclusive inventions, formulas, secrets and manufacturing processes; b) that 'although Bacardi has granted International an exclusive license to manufacture and sell Bacardi products in various parts of the world, including Spain, International wishes to give up the said rights in Spain and its territories to Bacardi. Bacardi in turn wishes to grant to Bacardí España the rights specified in this agreement'.

D) In the clauses of the agreement, Bacardi authorizes Bacardí España to manufacture several varieties of Bacardi rum and anisette in Spain, to sell these Spanish-made products both in Spain and 'in all countries where and as it shall agree with International' and to use the name 'Bacardi' in such products and in its trade name; Bacardí España undertakes to cooperate with Bacardi in any litigation that the latter may decide to initiate in defence of its brands, while the former may not initiate any proceedings on its own without the prior consent of the latter, and to submit advertising of Bacardi products to the judgment of Bacardi; Bacardí España undertakes to pay Bacardi '200 US dollars per year' 'for all the rights assigned in this agreement'; Bacardi declares that by virtue of International's renunciation of its rights in Spain and territories, it guarantees to Bacardí España the rights, privileges and licences mentioned; and it is provided that the agreement is to be terminated, among other causes,

in the event that 'Bacardi International's interest in Bacardí España should become a minority interest for whatever reason'.

E) On the same date the three companies referred to subscribed a 'Framework Agreement on Performance and Services and Technical Assistance', stating that the sole parties were Bacardi and Bacardí España, in which allusion was made to the simultaneous trade mark licensing agreement and which specified that the assignment to the latter was exclusive for 'Spain and its territories'; the stated object was to ensure that Bacardi products manufactured by Bacardí España should always maintain the same excellent level of quality as all Bacardi products; the annual amount payable to Bacardi for analysis and quality control of the products was limited to 20,000 US dollars; and again it stipulated termination of the agreement in the event that Bacardi International's interest in Bacardí España should become a minority interest.

F) Bacardi & Company Limited ratified the exclusive licence in favour of Bacardí España for 'all Spanish territory' in a document signed at Nassau (Bahamas Islands) on 28 March 1991.

G) The company Bacardí & Company Limited had been incorporated in Vaduz (Liechtenstein) in 1969 and retained its registered offices there until 12 May 1992, when it decided to move them to Tortola (British Virgin Islands) 'without liquidating the company, to reorganize', but on 19 June the following year it once more established itself in Vaduz, again without liquidating the company.

H) The plaintiff and appellant Bacardí España has 'occasionally' imported Bacardi Rum from Brazil (folio 394 of the record).

I) The same plaintiff has never claimed that genuine Bacardi Rum could not be commercialized in the territories of other Member States of what was then the European Economic Community, although it has claimed that product from Mexico could not be commercialized in 'most' EEC countries given the capacity of the bottles, which contain just under a litre.

. . . As regards EC Law, the main relevant provisions of the Treaty of Rome, as it was at the time of the facts at issue, are: articles 9 and 19 insofar as they establish the principle of free movement of goods between Member States and consider products from third countries to be in free circulation if the import formalities have been complied with and any customs duties or charges have been levied; article 30, which prohibits quantitative restrictions on imports and all measures having equivalent effect; article 36, which authorises quantitative restrictions on imports justified, among others, on grounds of the protection of industrial and commercial property, with the proviso that 'Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'; article 85, which prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which, among others, consist in sharing

markets or sources of supply; article 86, in as much as it declares incompatible with the Common Market any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it (the last two provisions could be applicable if, as the appellant appears to claim on occasion, it has no relation of dependency with Bacardi and Bacardí International); article 110, on establishing a customs union with the progressive abolition of restrictions on international trade and the lowering of customs barriers; and article 222 in as much as it provides that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

For its part, art. 7 of the First Council Directive 1989/104/EEC, of 21 December 1988, refers to the expiration of the right conferred by the trade mark and provides that this right does not entitle the holder to prohibit use of the trade mark for products commercialized thereunder in the Community by or with the consent of the holder.

As to free circulation, EEC Council Regulation no. 3842/1986 of 1 December 1986, whose primary aim was to prevent the release for commercialization of counterfeit or 'pirate' goods, as was that of the Regulation that replaced it (no. 3295/1994), provided in art. 1.3 that such a prohibition would not apply to 'goods which bear a trade mark with the consent of the owner of that trade mark but which are entered for free circulation without the owner's consent. Nor shall it apply to goods entered for free circulation which bear a trade mark under conditions other than those agreed with the owner of that trade mark'.

. . . That said, in light of the EC Law and the jurisprudence of the Court of Justice cited, we may say at this point that the third to sixth grounds of the appeal fail in that they proffer an interpretation of the of the Spanish regulations on competition and trade marks that is contrary to the said Law and which therefore also diverges from the criterion adopted by this Bench in a decision of 15 May 1985, in which, although admittedly in application of the former Statute of Industrial Property rather than the regulations cited heretofore, it declared as follows: 'Firstly: If, as the appellants acknowledge, 'the point at issue is the possibility of movement of goods lawfully branded in the country of origin even where the trade mark in the country of destination belongs to a different person', the statutory regulations on the matter clearly do not specifically prohibit an activity such as that whose prevention is sought, and article ten of the statute cannot be invoked as sustained in the appeal, since that provision, which is couched in very general terms, simply states that protection will be available, 'in such manner and conditions as shall be determined', to patents, trade marks, models and drawings of all classes, trade names, establishment signs and motion pictures, where registration has been granted.

Second: The right to exclusive use which the trade mark affords its holder by distinguishing the product concerned from similar products on the market (article one of the Statute) bears no relationship to the situation arising in connection with the resale, in the geographical area covered by the licence, of products legitimately distinguished by the trade mark and acquired by means of proper commercial activity, albeit through channels other than those controlled by the assignee.

Third: Article thirty-one of the Statute, the only regulation of which violation is alleged, simply provides, in concordance with article thirty-two, that the transfer of items of industrial property is not prejudicial to third parties until such time as such transfer is accredited by entry of a duly certified document in the registry (decision of sixth of October nineteen seventy-two and others cited therein), a description which evidently does not fit a situation like the one at issue here and raised in the appeal; moreover, the categories of registrable items in which industrial property rights may be constituted do not include agreements for 'licensing and sublicensing of use' of a trade mark (articles two and three of the Statute and article two of the Paris Convention of twentieth January nineteen eighty-three, and subsequent revisions up to fourteenth July nineteen sixty-seven), which means that such transactions, while binding where they are interconnected, can in no way constrain imports of the product manufactured by the original owner of the trade mark for sale on the domestic market, as is the case, *mutatis mutandis*, with introduction patents . . .'.

. . . What is really important for the resolution of this appeal is, in short, that the plaintiff and appellant sought to prevent the importation to Spain of legitimate and genuine Bacardi Rum, identified as such with details of the place of manufacture and bottling, despite the plaintiff's own acknowledgment that Bacardi Rum was indeed commercialized in Europe, albeit denying that such commercialization, in the very restricted sense of retail, was in fact rum manufactured and bottled in Mexico, and albeit likewise denying that it (not the owner of the brand) had consented to commercialization of rum of such origin in the European Communities (folios 223 and 224).

Given that the appellant at one point admitted that it had itself 'occasionally' imported Bacardi Rum from Brazil (response to one of the reconventional demands, folio 394), and that the agreements on which the appellant bases its claim themselves accredit the undeniable links between the holder of the registered trade mark 'in most of the world' (Bacardi & Company Limited), the exclusive licensee of the trade mark for the manufacture and sale of Bacardi products 'in various parts of the world' (Bacardi International Limited) and the Spanish licensee for the manufacture of Bacardi products in Spain and their sale in Spain and 'in all countries where such sale is agreed with International' (Bacardí y Compañía, Sociedad Anónima España), to the extent that the other two parties exercise real control over the plaintiff, loss of which control through changes in the shareholdings is identified in the agreements as a cause of termination thereof, it is hardly reasonable to minimise the scope of the Community regulations on free circulation of goods by claiming, as the plaintiff does, that they are merely administrative, while treating the Community regulations on homogeneity of bottle sizes as essential, since in fact Spanish Royal Decree 1472/1989, 1 December, always subject to strictures not to confuse the consumer, at that time permitted the importation and commercialization in Spain of bottles slightly smaller than a litre; and we would additionally point, firstly, to the narrow definition of commercialization sustained in the appeal, as referring solely to the sale of rum to end consumers, and secondly, to the fact that the importations challenged were not in any case prejudicial

to the interests of the Spanish State, as confirmed by the actions undertaken in respect of precautionary measures.

On the other hand, it is plain that the effect of prohibition of the importations on the basis of the said agreements was to isolate or compartmentalize the market in 'Spain and its territories', a significant part of the Community area, obviously with no benefit to consumers given that, as the appellant admits, the imported Bacardi Rum was genuine and fully authorized by the owner of the brand, that it did not differ in quality from the rum made by the appellant and that it could nonetheless be sold at a lower price.

In short, had the appellant not been a subsidiary of the parent company and had the proceedings not consequently centred on agreements between independent companies to divide up the Community market, the matter would probably have had to be examined from the standpoint of arts. 85 and 86 of the Treaty.

(. . .)

In light of all the foregoing, each of the grounds of appeal may readily be dismissed for the following reasons:

A) As regards the third ground, alleging infringement of arts. 2, 5 and 12 of the Unfair Competition Law, even granting, in line with a large part of the doctrine, that under art. 5 types of conduct not coming exactly within the meanings of arts. 7 to 17 may be considered to be prohibited, in no circumstances can conduct such as the subject of the complaint be considered 'objectively contrary to the requirements of good faith', given the new conception of the Law on unfair competition, which 'has ceased to be conceived as a body of regulations primarily intended to settle conflicts between competitors and has become an instrument to regulate and control conduct in the market place', and as such the new Law 'is a vehicle not only for the private interests of entrepreneurs in conflict, but also for the collective interests of consumers' (Preamble Law 3/1991); and again, it suffices to link the second paragraph of art. 12 with the first paragraph thereof to deduce that the parallel importations at issue do not come within their meaning, since the Bacardi Rum imported from other Member States was absolutely genuine or legitimate, having been manufactured and commercialized under the control of the owner of the trade mark.

B) As to the fourth ground, alleging infringement of arts. 30 and 36 of the Treaty of Rome, the appellant attributes to the 'Hague II decision' a scope that it does not possess and further treats its position as exclusive licensee for Spain as equivalent to that of the brand owner, at some points going so far as to present itself almost as the exclusive licensee for the entire Community space.

C) As to the fifth ground, alleging infringement of art. 32 of the Trade Mark Law, the appeal appears in some way to claim that the principle of trade mark exhaustion is limited to Spain; here, the appellant again identifies itself with the owner and licensor of the trade mark and further appeals to section 2 of the said article, which is most surprising given that the defending importers

have in no way modified or altered the characteristics of the product, which throughout the appeal the appellant has admitted to be genuine, manufactured by the licensor and marketed with the latter's consent.

D) As to the sixth ground, alleging infringement of art. 31.2 c) of the Trade Mark Law, the appellant again identifies itself with the licensor and appears to suggest that the importation of Bacardi Rum to any place in the European Community would require its consent as exclusive licensee for Spain, thus ignoring the interdependency of sections 1 and 2 of the said article, which is clearly set forth in the general condition with which the cited section commences".

– *SAP* Madrid, 15 January 2002. *Web Aranzadi JUR* 2002\105765.
Consumers and users. Abusive clause in an air transport contract.

"Legal Grounds:

. . . incidents occurring in a flight of the defendant, Swissair S. A., from Madrid to Prague on 8/10/1999 . . . the appellees' holiday plans were upset in that they were forced to spend the first day of their vacation in an undesired location (Zurich) and to delay their arrival at their chosen destination.

. . . As regards the nullity of general clause 9 of the passenger transport contract between the parties, as printed on the ticket here at issue, we would note that while it may be true that failure to guarantee timetables may be justified on grounds of safety or air traffic control for which other agents of air traffic are responsible, it cannot be deduced, as the said general condition provides, that the timetable is not guaranteed in any event or that it is subject to indiscriminate alterations without prior notice to the passengers or that connections are not guaranteed, with no justification of the cause. Such conditions, unwarranted or insufficiently justified to the consumer of air transport depending on the case and on proof in or out of court, would be absolutely contrary to the guarantees established in this respect for consumers or passengers in the sections exemplifying abusive contractual clauses set forth in Additional Provision 1, stipulations 2, 3, 4 and 15 of the General Law for the Protection of Consumers and Users, the applicable regulations in respect of limitations on the liability of the air carrier being the international regime as set forth in arts. 22 and 25 of the Warsaw Convention cited above. Therefore, without prejudice to further analysis of the said limitation, also cited by the airline as defendant and principal appellant, the above-mentioned clause must be deemed abusive in the terms just stated, in consequence whereof, pursuant to the provisions of arts. 10 and 10-bis of the General Law applicable to the case, and also the international regulations governing private air transport, the said clause, whereby the defendant is free to fulfil the contract of air transport or not at its own discretion without good reason, must be held to be null and excised from the contract, as provided in the correlative art. 1256 of the Civil Code, the contract itself remaining otherwise in force subject to the legitimate will of the contracting parties. In conclusion, while the appealed decision is amended in respect of the invalidity of the clause as claimed by the plaintiffs in the original proceedings,

the consequent terms of compensation set forth thereafter in consideration of the appeal by the defendant must stand".

XIII. TORTS

– *SJ1* I Oviedo, 6 February 2001. *Web Aranzadi JUR* 2001\142765.
Hague Convention of 4 May 1971. Proof of foreign law.

"Legal Grounds:

. . . on 23 April 2000, he was driving his Suzuki 600 motorcycle along a road in Portugal in a line of traffic; he had just overtaken one vehicle, and when he attempted in turn to overtake the van driven by the defendant, the latter pulled out suddenly into the left-hand lane with the same intention, leaving him no alternative but to swerve to the left. As a result, he ran off the road and suffered a fall, causing serious damage to the motorcycle and a comminuted fracture to his right knee-cap, for which he was treated at the site of the accident, and again months later at the Central Hospital in Asturias for removal of the implanted osteosynthetic material, having developed intolerance thereto, leaving long-term effects of diminished flexibility of the knee, atrophy of the quadriceps and slight disfiguration.

. . . Having established that the Spanish courts are competent to examine the case, the next step is to determine what law they are to apply, to which end we must return to international law, specifically the Hague Convention of 4 May 1971, ratified by Spain on 4 September 1987 and published in the *BOE* of 4 November of the same year.

The basic provision is article 3, whereby any conflict is to be judged by the internal law of the State where the accident occurred; however, there is an exception to this general principle, namely that if all the vehicles involved in the accident are registered in another State (as in the present case, both being registered in Spain), the applicable law is the internal law of the State of registration.

The relevant internal law in this case is therefore article 12 of the Civil Code, according to which the applicable rule of conflict must in all cases be as determined by Spanish law; the pertinent provision in such cases is article 10, section 9 of the *CC*, which stipulates that non-contractual obligations are to be governed by the law of the place where these obligations arose. In the case to hand, the basis of the action is a traffic accident in Portugal, and therefore under the cited provision, the applicable substantive law is Portuguese law. Moreover, the substance and validity of that law would have had to have been accredited, by any of the means of proof allowed by Spanish law, by the person obliged to do so, given that in this case the principle of *iura novit curia* does not apply. The foregoing is not affected by the final point in section six of the said article 12, which allows that in application thereof the court may use whatever means of verification that it sees fit, since this presupposes that the party alleged and proved foreign law, and the purpose of such verification is to determine whether such allegation is correct . . .

In examining the consequences of this omission, it must be remembered that the invocation of foreign law is properly treated . . . as a fact requiring proof, and not, as formerly, contrary to the law . . . In conclusion, given the facts of the case, we dismiss the appeal, not because the insurer's appeal was formally defective but because it failed to prove a fact that was essential to its success and could not therefore be accepted by the court".

– *SAP* Badajoz, 19 July 2001. *ARP* 2001\798.
Traffic accident. Law applicable in determining liability.

"Legal Grounds:

. . . Lastly, the appeal is based on the fifth ground, which states: 'Finally, the decision infringes the Hague Convention of 1971, ratified by Spain on 4 September 1987 (*RCL* 1987, 2379, 2661). According to article 3 of the said Convention, the applicable law is the internal law of the State in whose territory the accident occurred. However, article 4 establishes (among others) the following exceptions: a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability 'towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred' Article 8 provides that the applicable law will determine, in particular:

1. The basis and extent of liability;
4. The kinds and extent of the damages;
5. The question whether a right to damages may be assigned or inherited.

Therefore, although we concur with the decision in that the proper forum for judgment of the matter is the locus of the accident, the applicable law as regards third-party liability is that of Luxemburg. Moreover, both Law 30/1995 and the Insurance Contracts Law (applied by the judge in establishing civil liabilities) expressly deny applicability to the case in question, in the following terms: art. 4 of the Law on Use and Circulation of Motor Vehicles, as amended by Law 30/1995, states: 'Compulsory insurance as provided in this Law shall guarantee coverage of third-party liability in respect of terrestrial motor vehicles habitually kept in Spain'. Art 4 of Law 30/1995 denies the applicability of the same Law to the case in question. This ground, subject to the qualifications set forth hereafter, must be admitted:

5.1. In dealing with the issue raised by the present appellant regarding the plea of non-applicability of Spanish law on third-party liability, the appealed decision stated as follows: . . . And as to the non-applicability of Spanish law in the present case, suffice it to point out that articles 8 and 12.3 of the *CC* enshrine the notion of public policy as being based upon the territoriality of the laws affecting such policy. Therefore, the civil obligations 'arising from offences or misdemeanours committed by Spaniards or foreigners on Spanish territory, shall be governed by the provisions of the Criminal Code'; hence, any third-party liability in connection with an offence or misdemeanour must be ruled by the *lex loci delicti commissi*, and this without exception given that the Criminal Jurisdiction attracts the

civil action, a principle that must be applied in the present case. However, the original court took no account of, and there is no record of the appellant having invoked, the Hague Convention on the Law Applicable to Road Traffic Accidents concluded on 4 May 1971 at the Hague, Kingdom of the Netherlands, as ratified by Spain by Instrument of 4 September 1987.

. . . It being established, then, that the Convention determines solely and exclusively the law applicable to extra-contractual third-party liability arising out of road traffic accidents, we must now consider whether the case at issue here comes under any of the exceptions contemplated in article 4 of the said Convention, to wit: Subject to Article 5, the following exceptions are made to the provision of Article 3 (article 3: The applicable law is the internal law of the State where the accident occurred).

a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability 'towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred . . .'. In the present case, there is obviously only one vehicle involved, namely the Suzuki Vitara convertible, Luxemburg registration CL- . . .; the victim Lilianne M. A., user in the capacity of passenger and sister of the driver, was domiciled in Luxemburg, L- . . . -Bettembourg, . . ., Rue Vieille; hence, all the conditions therefor being met, the law applicable by the trial court is that of the State of Luxemburg and not that of Spain".

– *SAP* Alicante, 20 September 2002. *Web Aranzadi JUR* 2002\273185.

Extra-contractual liability. Compensation in accordance with the prices in the plaintiff's country of domicile.

"Legal Grounds:

. . . in reviewing the evidence presented in the proceedings, it is noted that in the view of the judicial appraiser, the damage whose repair is reflected in the invoice submitted as document 5 of the action arose out of an accident similar to the one here at issue and that the prices set forth in the said document are the normal prices for this type of repair and for the jobs done in the country of origin (Belgium). On this basis, the judicial appraiser not having recommended the exclusion of items from the list given by the plaintiff, in obedience to the principle of *restitutio in integrum* which must inform the quantification of compensatory obligations and by virtue of which consideration must be given to the real damage sustained in order to seek to restore the situation of the injured party's assets to what it was before the event that caused the damage, this court deems it proper to uphold in its entirety the complaint demanding compensation for the real financial expense that the repair of the damaged vehicle has entailed to the owner as accredited by the invoice submitted with the complaint and the conclusions of the appraisal; we differ from the court *a quo* where the latter describes compensation in accordance with the prices in the plaintiff's country of origin as undue enrichment, in that the

owner of a foreign vehicle is entitled to have it repaired in his own country and to be reimbursed for the cost of that repair even if it is greater than it would have been in Spain, considering that the injured party must be compensated for all the damages sustained and all of these must be included in the compensation provided by art. 1902 *CC*; nor can the foreigner be obliged to have the vehicle repaired in Spain given the inconvenience and added expense that would be attendant upon staying longer here or in dispensing with the vehicle while it is being repaired and having to return from his own country to collect it, with all the inconvenience that this would entail in terms of lost days of work, travel expenses and, if necessary, lodging".

XIV. PROPERTY

XV. COMPETITION LAW

XVI. INVESTMENTS AND FOREIGN EXCHANGE

– *STSJ* Madrid. 30 January 2002. *RJ CA* 2001\1045.
Investment in a foreign company absent prior verification procedure.

"Legal Grounds:

. . . The appellant has been sanctioned for having subscribed – on 24 September 1997 – a capital increase of the Luxemburg company 'G. Investiments, SA', for a declared amount of 7,500,000 pesetas and with a holding of 99.66%, without having first applied for administrative verification as required by art. 5.2 of Royal Decree 672/1992.

. . . at the time of the investment – September of 1997 – the regulations in force required such prior verification, which requirement in the view of this Bench and Section does not constitute a restriction on the principle of free movement of capital, given that absence of such prior verification was not a bar in the case of investment in Community countries.

. . . the removal of the verification requirement since the entry into force of Royal Decree 664/1999 vacates the imputed violation; so-called blank provisions like the one here at issue are considered sanctioning regulations – as the jurisprudence of the Second Bench of the Supreme Court has consistently recognized in respect of extra-penal provisions in what are known as blank criminal laws – and the applicable principle is that of retroactivity of the most favourable sanctioning regulation".

XVII. FOREIGN TRADE LAW

XVIII. BUSINESS ASSOCIATION/CORPORATIONS

XIX. BANKRUPTCY

XX. TRANSPORT LAW

– *SAP* Madrid, 16 July 2001. *Web Aranzadi JUR* 2001\252241.
Air transport contract. Warsaw Convention. Compensation for moral prejudice.

"Legal Grounds:

. . . Both the company Iberia Líneas Aéreas de España, S.A. and Mr. Emilio J. R. P. challenge the original decision on the same point, namely the compensation to be paid to the plaintiff as a consequence of late delivery of the passenger's baggage by the defendant airline, although obviously each party takes a different position; whereas the original court awarded the sum of 20,000 pesetas on this point, the appellant Iberia sustains that no payment should be required, and the other party sustains that he ought to be paid the full amount claimed in this respect, namely 100,000 pesetas. As to the allegations of the airline company, Iberia as appellant sustains that there is no liability in respect of compensation for moral prejudice since neither the Warsaw Convention nor the Hague Protocol make provision for such compensation, and that as a special norm, it is preferentially applicable to the Civil Code; however, it must be borne in mind that merely because the Warsaw Convention does not name this concept, it cannot be assumed that the concept is excluded – the Warsaw Convention makes no provision for compensation in respect of the need to acquire new clothes as a result of the misplacement and late delivery of baggage, and yet the appellant accepts the original decision and does not question that compensation, which is set at the sum of 68,314 pesetas. It is therefore our view that the absence of express provision in the Warsaw Convention does not exclude the possibility of applying the general norms of the Civil Code and compensation where one party has prejudiced another through failure to fulfil its own obligations as freely assumed in the contract of transportation. The appeal by the party referred to must therefore be dismissed".

– *SAP* Madrid, 4 April 2001. *Web Aranzadi JUR* 2001\187014.
International maritime transport. Interpretation of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Delay in the delivery of goods. Failure to claim default.

"Legal Grounds:

. . . Briefly, the plaintiff sued the cited company, an enterprise engaged in maritime transport of goods between Spain and Guinea, for five million pesetas in respect of damages occasioned to the plaintiff by delay in the delivery of goods

that the plaintiff had sent to Bata for resale there. . . . The defendant opposed this claim, essentially on the grounds that the freight contract was governed by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924), as ratified by Spain and included in the amending Protocol of 23 February 1968 by Instrument of 16 November 1981 and published in the *BOE* of 11 February 1984. A reading of the relevant clauses of the said convention shows that they refer not to the late arrival of goods but only to the loss or destruction thereof and establish rates of compensation on a lump sum basis unless the value of the goods has been declared. The claim in the present case of compensation for delay in delivery of the goods is tantamount to claiming that the defendant failed to fulfil his obligation. Default as delay imputable to the debtor does not imply total or absolute non-fulfilment unless it is so defined by the parties or is a consequence of fulfilment of the obligation. In the present case, the shipper advised the plaintiff of the approximate date of arrival of the ships at Bata in the form of a schedule, in maritime terms, estimating arrival between the 1st and the 5th of December 1997; it has also been accredited that the shipping company notified the plaintiff by facsimile that the vessel would be unable to reach its destination on the planned dates because it had had a breakdown and had put into Las Palmas for repairs. This communication was sent to the plaintiff's office, and if the latter failed to receive it because he was in Bata at the time, this cannot be blamed on the shipper, considering that if the plaintiff was in Bata, the agents at his office could presumably have informed him of the vessel's delay. In any event, pursuant to art. 1.100 he could have accused the shipper of default as from that date, but this he failed to do, and therefore he cannot claim compensation for delay in the vessel's arrival given that the parties do note state in the charter documents or the bills of lading that the date of arrival of the goods was an essential element of the obligation, nor could such be inferred from their nature".

– *STS*, 16 June 2001. *RJ* 2001\4341.

Territorial application of the Geneva Convention of 16 May 1956 on the Contract for the International Carriage of Goods by Road.

"Legal Grounds:

. . . It is proven in the proceedings that, as a consequence of an offer by Lep Internacional, SA to Fagor Arrasate, SCL, both parties entered into a contract for transportation of machine tools sold by Fagor Arrasate, SCL to North American Stainless (NAS), from the port of Bilbao to the city of Ghent (United States), the offer by Lep Internacional, SA giving 14 February 1994 as the approximate date of departure. The goods were loaded aboard ship on 28 February 1994, the conventional goods arriving at the port of Philadelphia on 14 March 1994 and those in containers at the port of Norfolk on 19 March 1994; all the agreed goods arrived at Ghent on 31 March 1994. Container TOLU 456063 was not delivered at the NAS headquarters in Ghent until 07.30 hours on 8 April 1994. The goods were carried from Norfolk to Ghent by road.

Because container TOLU 456063 was delivered later than 7 April 1994, North American Stainless, in accordance with the agreement with Fagor Arrasate, SCL, paid a premium of 10% of the purchase price on the said container rather than 15%, which they would have paid had the container arrived on 7 April 1994.

. . . Under art. 1 of the Convention of 19 May 1956, to which Spain acceded by Instrument dated 12 September 1973 and published in the *BOE* of 7 May 1974, carriage of goods by road is subject to the Convention, irrespective of the place of domicile and nationality of the contracting parties and with the exceptions set forth in paragraph four, whenever the following requirements are met: that the contract be for good consideration, that carriage be effected by automobiles, articulated vehicles, trailers or semi-trailers, and finally that the ports of origin or uplift of the goods and the place of destination are located in two different countries, at least one of which must be a signatory of the convention.

The transportation giving rise to this case was a combination of sea and land shipment. Land shipment was by road from the port of Norfolk, where the goods were transferred to a road vehicle, to the destination at Ghent, all the road transport therefore being undertaken in the same country. The requirement of applicability of art. 1 of the Geneva Convention whereby 'the points of origin or uplift of the goods and the place of destination be located in two different countries' is not applicable to contracts like the one at issue here in which the terrestrial part of the transportation takes place in a single country, although the goods have been brought from another country by other than terrestrial transport – in this case by sea. In such cases of transport by different means, where it is not accredited that the maritime carrier has contracted the onward terrestrial carriage in its own name, each stage of such transport must – as the decision *a quo* provides – be subject to the regulations applying to the mode or segment of transport in which the event giving rise to the complaint occurred. The fact that the starting and end points of the transport of the goods were in different countries does not mean that the whole is subject to the regulations of the Geneva Convention when the road transport took place entirely within one country".

– *SAP* Castellón, 22 March 2001. *Web Aranzadi JUR* 2001\185860.

Contract for international carriage of goods by road. Interpretation of the CMR Convention: sub-contracting of transport and value of goods.

"Legal Grounds:

. . . The source of the action was the performance of a contract for international carriage of goods by road. A Dutch company J. B. Van den Brick, engaged in the importation and sale of fruit, contracted Betrex España, S.A., a company domiciled in Gandía (Valencia), to carry oranges from the facilities of Cooperativa Agrícola El Pényó in Vallada (Valencia) to the facilities of Impex Fruit-Grubbenvorst GV in Grubbenvorst (Netherlands), as set forth in a CMR international freight charter issued on 4 March 1998 (doc. 1). The carrier Betrex España, S.A. subcontracted the said carriage to David España, S.L., which company in turn subcontracted it to Transcolibrí, S.L.; the latter subcontracted it to Distribuciones

Ambort Aremany, S.L., which last carrier actually transported the goods in refrigerated truck, registration number AL 2716 R, as recorded in the waybill.

. . . J. B. Van den Brink invoiced Betrex España, S.A. for the damage to the shipment to Impex Grubbenvorst for a total of 12,405 Florins (doc. 6 bis). Betrex España, S.A. had insured the shipment with Victoria Meridional, Cía Anónima de Seguros y Reaseguros, S.A., and the latter, through Oscar Schrunk España, Correduría de Seguros, S.A., paid the compensation due (1,013,839 pesetas) to Betrex España, S.A. (doc. 7). As subrogee in all the rights of David España. S.A. in connection with the said contract of carriage by virtue of the insurance contract signed with Betrex España, S.A. (doc. 5), the insurer Oscar Schrunk España demanded payment of the compensation from Transcolibrí, S.L., the firm to which Betrex España, S.A. had contracted the carriage.

Transcolibrí, S.L. refused payment and Victoria Meridional, Cía Anónima de Seguros y Reaseguros, S.A. sued . . .

. . . In fact, the present case is an action for recovery brought by a contracted carrier (through the insurer) against one of the subcontracted carriers, but not against the carrier in whose hands the damage occurred – that is, not against the firm which actually carried the goods. Such recovery action is not expressly regulated in the CMR Convention, but it comes within the meaning of arts 37 *et seq* CMR (Sánchez Gamborino), whose substantive regime – this being a case of international carriage by road – is governed by the CMR Convention itself. In effect, as the cited author states, although there is a legal vacuum in the CMR Convention as regards regulation of the legal relationship between carriage contractors and carriage subcontractors, that relationship is legally the same as the relationship between the consigner and the carriage contractor (art. 3 CMR) and is subject to the same rules although different persons are involved. In this connection art. 17.1 states that 'The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery . . .'. Hence, the liability of Transcolibrí, S.L. upon execution of the contract of carriage lies in blameworthy supervision or choice, given that it undertook to carry the goods either itself or through a third party, and the carrier is not only he who actually does the carrying but all persons who undertake and guarantee the outcome thereof, as confirmed by the jurisprudence (*STS* 14/7/1987) and the doctrine (Gomez Calero/Sánchez Gamborino).

. . . The evidence presented confirmed the reality of the damage and the fault of the carrier. This is clear from the expert report compiled by Harmsen De Groot, the basis of the carrier's liability, and the report was in no way detracted from by the appellant carrier, on whom the burden of proof falls as provided by art. 18.1 as it relates to art. 17.2. Moreover, in controlled-temperature transport, in order to be excused of liability, the carrier must also demonstrate that he has taken all the necessary steps as regards choice of vehicle, maintenance, functioning of temperature control devices and compliance with any specific instructions given him (art. 18.4). In the present case it has not been demonstrated – as the appellant alleges – that the spoilage of the oranges occurred through the fault of the user or

holder of title in failing to chill them properly prior to transportation, or that there were no instructions. Indeed, although not entered in the waybill, the truck driver has acknowledged that he was given instructions regarding the temperature at which the goods should be kept in transit (folio 180). Furthermore, the carrier entered no reservations on the waybill, it has not been demonstrated that the truck's refrigeration system was in perfect working order, nor has a contrasting expert opinion been sought to demonstrate that if the truck's refrigeration system was working perfectly the high temperatures attained could only have been due to inadequate chilling of the oranges prior to transportation.

. . . Finally, the appellant invokes art. 23.1 CMR, which provides that 'When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage'. This provision is applicable where, as in the present case, the consigner has not declared the value of the goods (not shown on the waybill), and therefore if there is damage to the goods, the carrier only has to pay the user their actual value in their place of origin or at the place and time at which they were accepted for carriage.

The report issued by Harmsen De Groot also establishes that the extent of spoilage of the oranges at the time of inspection was 13 3% (folio 19), although it was to be expected that the rot would spread rapidly because of the high temperature, affecting 50% of the value of the goods. The valuation of the damage must therefore be set at 50% of the value of the oranges, but basing the calculation, pursuant to art. 23 CMR, on the value of the goods carried at source, that is at the place and time they were accepted for carriage, and on the nature of the goods (Navelina oranges). As it does not appear in the record of proceedings, this value will have to be determined upon execution of the decision and in no case may it exceed the amount claimed by the appellant insurer. Consequently, since the amount of the principal is unadjusted, the appellant carrier cannot be ordered to pay interest on arrears. As the well-known aphorism states: *iniliquidis non fit mora*".

– *SAP* La Coruña, 16 November 2002. *AC* 2002\300.

Convention on the Contract for the International Carriage of Goods by Road (CMR). Submission to arbitration.

"Legal Grounds:

. . . Irrespective of whether an intermediary or agency relationship existed, the fact is that the goods were transported by a road vehicle from the point of origin in Italy to the destination in Spain, and the operation therefore constituted international carriage as governed by art. 1 of the Convention of 19/5/96 on the Contract for the International Carriage of Goods by Road (CMR), section 1 of which specifies or adds the words: 'irrespective of the place of residence and the nationality of the parties' (provided that at least one of the parties is domiciled in the country

of destination or acceptance of the goods and that the country be a signatory State). Consequently, submission to arbitration must be under the Convention or by agreement (art. 33 of the Convention), which was not the case in the contract at issue".

– *SAP* Murcia. 14 September 2002.*Web Aranzadi JUR* 2003\7562.

Existence of a contract for the international carriage of goods by road. *Lex Mercatoria*.

"Legal Grounds:

. . . The original action claiming 46,000 pesetas for carriage costs in a transport service having failed, the plaintiff appealed against the court's decision on the ground that it failed to acknowledge that where there is a waybill, there must logically be a contact of carriage, meanwhile ignoring the fact that the appellant has no claim on a contract that he has neither formalized nor signed, being quite unconnected with the conditions under which the parties agreed sale of the goods.

. . . leaving aside for the moment the fact that in the waybill submitted by the appellant the box for carriage costs has not been completed although it is obligatory to do so, and the fact that a mercantile sale cannot cause any obligation upon a third party, the fact is that the goods were delivered to a firm and a location other than those stated by the consignor, and in view of the defects noted in the waybill, the clause 'ex factory' or 'ex work' constitutes *prima facie* evidence that the carriage was not arranged by the defending company.

The lack of reference in the waybill to the expenses payable by the consignor does not appear to be the fault of the defendant, given that, as stated in the CMR charter, 'bold-outlined boxes are to be completed by the carrier' and the omission cannot be taken as acceptance of these expenses, but rather the contrary.

Finally, from the documentation submitted it transpires that the purchaser, the firm 'The Traditional Slipper', arranged the carriage with a different firm, the British carrier 'Transmec Group', which subcontracted the carriage on part of the route to the appellant, so that the obligation is unconnected with the defendant".

XXI. LABOUR LAW AND SOCIAL SECURITY

– *TSJ* Madrid, 26 June 2001. *AS* 2001\2944.

Contract of employment. Determination of closest ties.

"Legal Grounds:

. . . First: The plaintiff's original contract of employment began on 1 January 1968 with a Spanish company; as from 1 November 1975, the Spanish company was acquired by Alfa Laval, S.A., which was subrogated to the said contract of employment.

Second: The firm Alfa Laval, S.A. is part of the Alfa Laval group of companies, which in turn belongs to a larger group called Tetra Laval Group, whose Presidency and General Management are domiciled in Sweden, the said group

having branches in numerous countries in the form of subsidiaries duly incorporated as companies in accordance with the relevant national laws in each case, while the group as such has no independent legal personality.

Third: The plaintiff, then, as set forth in his writ of complaint and in his writs of exception in the appeals here considered, has always had the same labour relationship with the cited group of companies, in the material form of various contracts of employment with the subsidiary companies; he has always been registered with Social Security through the Spanish branch, Alfa Laval, Sociedad Anonima, he has always been domiciled in Spain and has served on successive occasions with the Spanish subsidiary, the Greek subsidiary, the Spanish subsidiary again, then the Italian and the British subsidiaries.

Fourth: The plaintiff reported directly to the President of the Alfa Laval Group, Mr. S. H.

Fifth: In his last period of office as Executive President of Alfa Laval and President of the Alfa Laval Flow commercial area, he serviced all the group companies. including the Spanish company; his registration as an employee of the British company was purely instrumental, as declared in his proven statement in the first legal ground of the decision here challenged.

. . . As stated in point one above, the plaintiff clearly served a group of companies consisting of a set of subsidiaries located in various European countries, and while the last contract articulating the relationship existing between the parties was indeed signed in the United Kingdom, this does not alter the fact that the services were rendered to all the companies in the group; consequently, in order to determine what Law is applicable to the ties linking the employee with the countries of domicile of the firms for which he has worked, and specifically – as provided in the article of the Treaty of Rome referred to by the appellants – it is necessary to determine with which country the contract of employment had the closest ties. The answer is undoubtedly Spain, this being the country where the labour relationship at issue was initiated and where the employee has always maintained his residence. He has received expenses for weekly journeys to his home in Spain and maintenance in the place where he was serving at any time, which was not always the United Kingdom as acknowledged by the appellants. He has travelled repeatedly to other countries, and finally, he has been continuously registered with Social Security here, which clearly demonstrates the intention of the parties to establish a labour relationship in Spain, regardless of the subsidiaries with which the employee may have had to work on instructions from his employer. We should stress that the plaintiff's services were lent not only to the British subsidiary but to all the group companies, including the Spanish subsidiary. Therefore, given that the Alfa Laval Group has no independent legal personality, the most consistent contractual ties have been maintained through the Spanish company. The details that the appellants sought to include in the roll of proven facts are irrelevant in that such ties are not affected by improvements in Social Security in the United Kingdom or by the fact that the currency of payment was Sterling, and certainly not by the fact that he enjoyed the official public holidays of that

country when there, that he was provided with lodging and a vehicle while in the United Kingdom, as was natural, or that he paid part of his taxes there, given that the same circumstances would undoubtedly have arisen had he stayed in any other country, which circumstances do not define a particular tie thereto but are the natural consequences of a temporary posting with a given subsidiary of the group for which he worked. Spanish law is therefore clearly applicable and the cited ground is dismissed".

– *STSJ* Basque Country, 13 February 2001. *AS* 2001\4333.
Ministry of Foreign Affairs. Unemployment benefit for personnel serving abroad.

Matters of Fact:

. . . The sole instance of the current proceedings was initiated by an action and completed by a decision, regarding which the proven facts are as follows:

'I. The plaintiff, Mr. José Ramón A., has been working for the Ministry of Foreign Affairs since 1 April 1977, first as Official of the Spanish Embassy in Warsaw, then as Chancellor at the Consulate General in Munich and lastly as Chancellor in Belgrade until 31/8/1999. He has been continuously employed in the said posts under contract of employment, at a gross monthly salary of 914,864 pesetas.

II. On 31 August 1999, the Ministry of Foreign Affairs terminated his contract of employment on the grounds of 'failure to adapt to the new post'.

III. On 24/11/1999 he applied for unemployment benefit. This was denied him by decision of 3/1/2000 on the basis of an order of 8 June 1982 in implementation of Royal Decree 2234/1981, 20 August, art. 5 of which denies protection of the right to unemployment benefit to Spanish contract personnel employed by the Spanish Administration abroad.

"Legal Grounds:

. . . The first sustains that the original decision is in violation of arts. 19 to 24 of ILO (International Labour Organisation) Convention 102; according to the appellant, since this provision was ratified by Spain in 1952 and came into force in 1955, as from that year it 'clearly determines that the State has an obligation to protect all employees in the event of unemployment or loss of employment and income', and internal Spanish regulations implementing the Convention cannot set aside its provisions, since the Convention is paramount.

Validly formalized and ratified international treaties that comply with all the other requirements in each case are part and parcel of Spanish law (arts. 96.2 and 5.1 *CC*); however, this does not mean that subjective rights under their provisions are automatically recognized, since this depends on their efficacy in each case. In fact the efficacy of international norms varies; some (e.g., Community Regulations) are automatically recognized and others are not. ILO Conventions fall into the latter category since they are rules for harmonization of legislation between the different ratifying countries, so that States are obliged only to adapt their internal regulations to the provisions of the Treaty.

Spain ratified ILO Convention 102 on 17/5/1988, but only in respect of parts II to IV (regulating unemployment) and VI, which came into force as part of Spanish law as from 20/6/1989. Article 19 of the Convention specifies that each Member for which this part of the Convention is in force must secure to the persons protected the provision of unemployment benefit 'in accordance with the following Articles of this Part' (referring to the regulatory part of the Convention), and in this Part – arts. 19 to 24 – article 21 provides that the Member States may establish criteria for protection against unemployment with reference to one of two categories: salaried employees (in which case it is determined that there should be at least 50% protection) or resident persons. Art. 205 *LGSS* shows that the internal regulations on unemployment in force in Spain follow the first of the two criterion; under the rules, unemployment protection would potentially be available to over 50% of the salaried population, since it covers employees in industry, services and agriculture, workers contracted under administrative law and functionaries in the service of the public administrations. The internal Spanish regulations on unemployment, then, observe the guidelines laid down therefor in ILO Convention 102. Nevertheless, even were this not so, the appellant would be unable to base his claim directly on this Convention, it being a mere harmonizing norm as already noted.

. . . The appellant sustains that the regulation on which the original court based its dismissal of the action, *RD* 2234/1981, of 20 August, 'is discriminatory inasmuch as the present appellant or others might be situated in countries where there is no coverage of unemployment or of any other kind'.

Arts. 41 and 42 of the Spanish Constitution are part of the regulation of the 'Guiding principles of social and economic policy' (Title I Chapter III of the Constitution), and hence 'They may only be invoked before the ordinary jurisdiction in accordance with the laws implementing them' (art. 53.3 *CE*). The implementing legislation in the present case is the General Social Security Law and *RD* 2234/1981 (to which the applicant makes no objection from the standpoint of the possibility of an act *ultra vires*), and therefore it is to the provisions of the latter that we must have recourse.

Art. 2 of the said Royal Decree, which includes contract personnel at the service of the Spanish administration abroad in the general regime, provides that 'Protection, affiliation and contribution as regards the personnel referred to in this Royal Decree who are affiliated to the Spanish Social Security shall be as provided in the General Regime of the Social Security, with the sole exception of unemployment benefit'. This provision is reiterated in a Ministerial Order of 8/6/1982, issued in implementation of the said Royal Decree. These legal provisions were analysed in Supreme Court decisions of 12/12/1996 and 7/2/1997. . . .

In short, the Supreme Court's opinion is based on the fact that the scope of application of the Social Security regulations in force at the time the General Social Security Law of 1974 was approved did not extend to Spaniards serving abroad, and that under article 7, sections 1 and 3 of that Law, the inclusion of such workers was contingent on the enactment of special regulations for that purpose, in this

case *RD* 2234/1981; the difference that it established in the regulation of protection vis-à-vis other workers included in the system was deemed justified by the economic interests of the system and the protection afforded through regulations extraneous to the internal organisation of the Spanish Social Security. That, then, is the interpretation that this High Court is bound to follow, in pursuance of art. 123 *CE*, inasmuch as the regulation of Social Security subsequent to the said Royal Decree 2234/1981 has not altered the regulation set forth there.

We should add that were we to accept the appellant's argument to the effect that his case ought to be treated differently from the subjects of the aforementioned Supreme Court decisions in that he had no access to unemployment protection in the foreign countries where he served, he would be bound at the very least to comply with the requirement set forth in arts. 208.5 *LGSS* and 11 of *RD* 625/1985 regarding workers returning to Spain upon severance of their contracts of employment abroad, namely to accredit through the 'Spanish Institute of Emigration' that he has no right to unemployment benefit in the country where he has ceased to work. The appellant has not accredited this and hence offers no good reason to justify our diverging from the criterion upheld by the Supreme Court in the cited jurisprudence".

– *STSJ* Galicia, 14 July 2001. *AS* 2001\1950.
Social Security. Territorial scope of application.

"Legal Grounds:

. . . In the section on 'Legal Grounds:, the appellant cites art. 191.c *LPL* as negating the applicability of arts. 1.4 *ET*, 124 *LGSS*, and 94, 95 and 96 *LASS*.

First: The facts are: (a) the worker was contracted in Spain by *Corporación Ibérica*, SA, acting on behalf of its principal, FTF Offshore Bahamas Corporation, domiciled at Nassau, to work on Drillmar-1, a platform under the flag of the Bahamas and situated outside Spanish jurisdictional waters; (b) the contract of employment provided for medical/health care at the expense of the Company and insurance of up to $US 100,000 in the event of accidental death or permanent disability; (c) the appellant suffered an industrial accident – inguinal hernia – on 8 September 1995 and was on sick leave until 27 December 1995, the object of the present action being a claim for Temporary Disability benefit at a rate of 10,000 pesetas per diem.

Second: The Court rightly denied the competence of the Spanish courts even although the employment abroad by a foreign company was consequent upon a contract or the offer of a contract received in Spain (art. 25 *LOPJ*). Our competence to judge is one thing, but whether such competence compels us to apply our regulations on matters of Social Security is quite another. As in a previous decision – *TSJ* Galicia 18 December 2000 *R*. 2917/1997 – we would point out that according to Supreme Court decisions of 19 February 1990 and 9 May 1988, the basic principle underlying our Social Security system is that of territoriality. By reverse interpretation, art. 1.4 *ET* excludes from its scope of application contracts entered into by Spaniards with foreign enterprises that entail service abroad, and

in any case the situation comes under art. 10.6 *CC*, whereby 'the obligations deriving from a contract of employment, absent express choice of law by the parties and without prejudice to the provisions of article 8 section 1 – mandatory applicability of criminal, police and public safety laws – shall be governed by the law of the place where the services are rendered', which in the case of ships must be the law of their flag or place of registration (art. 10.2 *CC*), and in the present case that is clearly the United Kingdom of Great Britain. This provision is consistent, for the purposes of internal Spanish law, with art. 1.5 *ET*.

According to the cited jurisprudence, the same principle of territoriality also applies in matters of Social Security. Art. 7.1 *LGSS*/1994 (in force at the time the contract was signed) provides that 'Spaniards residing in Spain [. . .] shall be included in the Social Security system [. . .] provided that [. . .] they undertake their activity in the national territory'. From this regulation – referred to by art. 2 of Decree 2864/1974, 30 August – it is equally clear that the protection of Spanish workers employed abroad is in principle a matter for the Social Security of the country concerned, given that the matter under discussion – Social Security – is an imperative not subject to the will of the parties and that agreements in breach of the legal norms are void and without effect (art. 1255 *CC*).

Third: Therefore, Spanish workers employed abroad – that is, emigrants and not persons on temporary assignment abroad – in non-Community countries are generally excluded from the Spanish Social Security and may only be included when there is specific provision to that effect; this norm is justified by consideration of the economic limitations of the system and the fact that in most cases protection is afforded by the Social Security of the country in which the person works, as guaranteed by Community regulations or other international instruments (*STS* 7 February 1997 and 12 December 1996). What the foregoing amounts to is that the appellant cannot allege breach of any Spanish regulation on the coverage of Temporary Disability considering that in the circumstances in which the services were rendered – abroad and to a foreign company – such coverage is not possible in the Spanish system, which leaves protection to international conventions (*LGSS*, First Additional Provision) or would at best admit coverage by Special Convention (*RD* 996/1986, 25 April and *OM* 14 January 2000), which regulations were introduced in compliance with art. 42 *CE*, and art. 14 *CE* (*STC* 77/1995, 2 May) and cannot be invoked against this limitation on protection".

– *STSJ* La Rioja, 30 January 2001. *AS* 2001\1090.

Retirement pension. Recognition of missionary work abroad for purposes of contribution

"Legal Grounds:

. . . The first of the problems raised in the original decision is to determine whether the religious activities undertaken by the defendant and now appellant outside the national territory count, given that, as argued by the court *a quo* – and in the appeal by the Management Entity – 'under the provisions of art. 7 of the Merged Text of 1994, to qualify for inclusion in the Social Security system, the

person must have undertaken his work, whether self-employed or in the employment of others, in Spanish territory'.

The defendant, 'as certified by the religious congregation of the Slaves of Mary, lived in Spain until 7 July 1966, on which date she went to Bolivia as a missionary and left there on 21 November 1970 without ceasing her activity'.

This part of the grounds is also upheld, it being the view of this Court that:

A) As noted in the previous ground, the tenth Additional Provision of Law 13/1996, 30 December, (*MFAOS*), as implemented by *RD* 487/1998, refers to computation of 'the time during which priests, monks, nuns and secularised religious personnel exercised their ministry or religion within the 'Social Security System', regardless of which of the various existing regimes specifically applied'. And again, the preamble to *RD* 487/1998 states that 'implementation of the tenth additional provision of Law 13/1996 does not end with the situation cited in this *RD*, but . . . the latter is a first step, to be completed at a later date by a second Royal Decree which will allow the computation of all periods of ministerial or religious work in the terms set forth in the last point of the cited additional provision'. Therefore, the intention of the legislator as regards the recognition of periods of priestly or religious activity by priests, monks, nuns or secularised personnel of the Catholic Church for purposes of contribution is to include such persons in the Social Security system – which it does – regardless of the specific regime applying to them, and to count all periods of priestly or religious activity, although the regulation remains to be completed at a later date.

Absent such regulation, the Social Security system is based upon the principle of territoriality; however, art. 7 *LGSS*, where the principle is enshrined, contemplates exceptions, allowing that 'the Government may institute means of protection for Spaniards not resident in Spain' (art. 7.4); this the government has done in several instances, including *RD* 728/1993, 14 May, which introduces old-age pensions for Spanish emigrants.

At the same time, *RD* 84/1996, 26 January, approving the General Regulations on registration of companies and affiliation, registration, deregistration and modification of data with the Social Security, is applicable to 'the registration of companies, to the opening of contribution accounts and to the affiliation, registration, deregistration and modification of data of persons covered by the Social Security, as regards contribution'. This is therefore applicable to priests, monks, nuns or secularised personnel of the Catholic Church, in that according to the sole additional provision of *RD* 487/1998, 'cases where this *RD* does not provide shall be regulated by the common provisions governing the relevant Social Security regimes to which the pensions correspond', and also in that *RD* 84/1996, para 2 art. 1 specifically excludes certain Social Security regimes – civilian State functionaries, the Armed Forces and functionaries serving in the Administration of Justice – which do not include self-employed workers or the general regime.

The relevant statute then being *RD* 84/1996, art. 36.1.5 lists a number of situations in which registration is allowed, including transfer by the employer to a place outside the national territory. There can therefore be no objection to the

territorial and temporal applicability of the precept to the present case, which is further recommended by considerations of material justice.

B) Here again, absent the proposed regulation, where there is doubt as to the applicable legislation, this must be resolved in the manner most favourable to the beneficiary, in obedience to the principle *in dubio pro operario o beneficiario* applicable to the sphere of Labour Law and Social Security, in accordance with the terms of the jurisprudence cited in the previous ground.

. . . Given admission of the foregoing ground, the defendant must clearly be credited with both the period of contribution prior to 1 January 1962 and that of work in Bolivia. In conclusion, the decision by the Provincial Office of the *INSS* of La Rioja of 8 October 1998 granting a retirement pension to the defendant is lawful and therefore there can be no demand for repayment of monies unduly received".

– *STSJ* Madrid. 31 May 2002.*Web Aranzadi JUR* 2002\209486.

Contract of employment. Workers in the service of the Spanish administration contracted in Spain for service abroad. Scope of application of the Unified Collective Agreement for Contract Personnel of the State Administration.

"Legal Grounds:

. . . if the contracting as such . . . took place at the headquarters of the Spanish Ministry of Defence – undoubtedly situated on Spanish territory and of Spanish nationality both as a Department and as an employer – and involved a Spanish citizen, then clearly, under article 1.4 of the Workers' Statute (*ET*) of 24 March 1995 and likewise of the previous Statute of 10 March 1980 – the labour relationship between the parties must be governed in its entirety by Spanish labour law, which for the purposes of this case particularly includes the said Unified Collective Agreement. Article 1.4.1 of this Agreement excludes persons 'contracted abroad', but article 1.1 provides for the inclusion of persons – as in the present case – who are Spanish nationals contracted in Spain by a Spanish Administration. This sets aside article 10.6 of the Civil Code of 24 July 1889, as drafted in the Decree of 31 May 1974, given that the said article 1.4 of the Statute constitutes a special regulation which overrides the general provision contained in the said article 10.6 of the Civil Code.

The foregoing – and this Section of the Court has also had occasion so to rule more recently without in any way contradicting itself . . . – means that the said Unified Collective Agreement is not applicable by reverse interpretation in cases where: a) the Spanish national was contracted abroad – with the obvious proviso that the contract contains no clause of express choice of Spanish law, in which case the said Unified Collective Agreement would be applicable; b) the Spanish national was contracted, in Spain or abroad, with express choice of a foreign law; or c) the Spanish national was contracted, in Spain or abroad, with or without express choice of Spanish law; but in pursuance of article 1.4.6 of the Unified Collective Agreement, Spanish conventional norms are specifically excluded.

In the present case, the facts remaining unaltered, we find that the contract was concluded in Madrid; however, according to the invitation for applications, contracting was subject to the local law – that is, the law of the United States where the plaintiff worked – and under article 1.4.6 of the Unified Agreement, it is not applicable to personnel expressly subject to the foreign law, as is the case here.

Also, for determination of the applicable law, the Rome Convention acknowledges the free will of the parties, so that the applicability of any provision is contingent on the parties not having expressly agreed on that point. Article 1.4 of the Workers' Statute is only applicable absent express choice of another law".

XXII. CRIMINAL LAW

– *SJP* Madrid, 29 January 2001. *RJA* 2001\10.

Industrial property offence. Domain names. Legitimacy of a branch of a foreign company.

"Proven Facts: That. . . ., in his majority and having no criminal record, engages in the commercialization of financial market services in connection with the creation of tax-free companies, investment companies, re-invoicing of imports, bank accounts, etc. These services are offered by Amerinvest Spain, as associates of the Chase-Manhattan Group, by way of electronic mail or a web page clearly associated with the said group, or again directly claiming, in collaboration with other enterprises, membership of that group. The activity is advertised not only on the Internet but also in announcements placed in financial newspapers and gazettes, giving the impression that the entity offering these products is backed by Chase-Manhattan Corporation and thus causing confusion and leading to error of consumers, there being no relationship of any kind between the said corporation and the accused or any of the enterprises that he manages. Chase-Manhattan Bank, Chase-Manhattan Corporation and Chase-Manhattan are the owners of various trade marks registered in Spain in classes 16, 36, 35, 38, 39 and 41 of the international nomenclator".

"Legal Grounds:

First: . . . Art. 274 para 1) *CP* (Criminal Code) provides for the sanctioning of persons who, knowing of the existence of a Registered Trade Mark, infringe the exclusive rights of the owner of that Trade Mark for industrial or commercial purposes.

. . . The documentation submitted by the plaintiff demonstrates that Chase Manhattan Corporation is the holder of title in the trade marks Chase Manhattan Bank, Chase Manhattan, Chemical, Chase and Chase Investment Bank and can therefore legitimately bring the criminal action. Such legitimacy is questioned by the defendant's defence in the first point of its writ of provisional conclusions but it does not raise it as a prior issue or even mention it in the course of its statement. The basis for the claim of lack of legitimacy is that the plaintiff, *Chase Manhattan Bank Sucursal en España*, is not the holder of title in the above-named

trade marks, the holder of title being Chase Manhattan Corporation, a foreign financial holding company.

The ground posited by the defence must be dismissed, given that regardless of the nationality of the company, which under Spanish law is determined by incorporation and domicile as provided in art. 28 of the *CC* and in art. 5 of the *LSA*, its operations and jurisdiction are governed by the laws of the country where it is incorporated (as in the case of capacity) and by Spanish law as regards creation of an establishment. However, in all cases a branch is an extension of the principal, as defined in the Regulations of the Mercantile Registry (art. 295), being a secondary establishment having the status of permanent representative with some autonomy of management, through which the company undertakes all or some of its activities. Thus, the Spanish branch does hold title in the registered trade mark and can legitimately bring the action. Its legitimacy is further guaranteed under article 6 bis of the Paris Union Convention.

On behalf of Amerinvest, a company apparently incorporated in and under the laws of the State of Delaware (as documented in the writ of defence) and having no establishment in Spain, the defendant has been offering financial products of all kinds, ranging from high-income, risk-free investments to the incorporation of offshore companies, development of business strategies and international tax structures. Such offers are announced in financial newspapers or gazettes, associating Amerinvest with the Chase Manhattan Group (folios 7 to 10 of the proceedings). The weekly magazine *Interviú* (16 to 22 November 1998) contains an extensive publicity article in which Amerinvest brazenly advertises ways of opening secret bank accounts, setting up tax-free companies in Europe and the USA or in tax havens in a context of tax evasion, linked to persons of public importance who have engaged in capital flight; moreover, the article associates Amerinvest with the Chase Manhattan Group, stating that it belongs to the same financial/business family without claiming membership of the group. Such claimed associations are repeated elsewhere, for example in the newspaper *Expansión* on 17/11/1998, 18/11/1998, 24/11/1998 and 16/12/1998.

Alongside the above-mentioned advertising channels, the defendant uses other, more modern media, placing publicity associated with Chase Manhattan on the Internet. The web page http://www.chase-manhattan-group.com (folio 83) begins with a message of welcome to the Chase Manhattan group and there lists, among others, the company Amerinvest with links to Chase Manhattan Corporation, Chase Bank, Chase Manhattan Mortgage Corporation and others (folio 84). Among the pages in the domain http://www.chase-manhattan-group.com, we would cite http://www.chase-manhattan-group.com/amerinvest% 20sp/entertosp.htm, referred to in folios 108 *et seq*. of the proceedings, accessed by way of a Spanish flag (enter here) as cited in folio 83, from which – again associated with the Chase group in the welcome to the page or the same group's copyrighted sign – access is provided to the offers listed in the page; users clicking on 'tax-free companies' access the page taxfreesp.htm (folios 110 to 113); users clicking on 'off-shore companies' are led to the file offshoresp.htm (folio 114), in which the user can select

from a list of countries to obtain information about their tax benefits and other advantages. The page entertosp.htm affords access to 'secret bank accounts' at banksecretsp.htm – in construction – (folio 117) and 'addresses' at addressesp.htm, all of which are in Spanish and target potential Spanish-speaking customers.

The use of the name Chase Manhattan in the electronic mail address, in an Internet domain or in any other conventional advertising medium infringes the rights of the holder of title in the registered trade mark Chase Manhattan.

The defendant objects in defence that he is not a legal representative of Amerinvest; that this company is duly incorporated in and under the laws of the State of Delaware; that Chase Manhattan-Group Corporation is a company duly incorporated under the laws of the State of Delaware and that the Chase-Manhattan-Group domain is registered in the Network Solutions Inc. registry with the Name Servers NS1.DNS-HOST.COM (209.235.102.13) and NS2.DNS-HOST.COM (209.235.102.12), as accredited by the documents accompanying the writ of defence (folios 385 to 393 of the proceedings).

As to the first of the issues raised, given that Amerinvest has no branch in Spanish territory, is not registered with the Mercantile Registry and hence has appointed no administrators, renders no annual accounts, etc. – in other words, complies with none of the obligations of a company under the laws of the country where it carries out its registered activities – the defendant evidently cannot legally represent the said company, for the simple reason that it does not exist in Spanish territory.

The defendant states that his relationship with the company (presumably the company incorporated in the State of Delaware) was simply that of Commercial Agent; however, there is no sign of the normal status of an agent on commission as regards representation and action on behalf of the principal, rendering of accounts or any other such evidence. From the abundant documents on record – both those submitted and those seized in the search – it is plain that the defendant represents Amerinvest; witness the visiting card bearing the words . . ., Amerinvest Spain. The accounts, which were also seized, contain no entry relating to payment of an agent's commission. The defendant was unable to name any other commercial agent acting on behalf of Amerinvest when required to do so by writ of 21 October 1998 (folio 153).

Aside from the non-existence of Amerinvest Spain as argued above, for which he would be solely culpable under art. 28 *CP*, criminal charges can also be brought against the defendant under art. 31 *CP*, insofar as it can be established that the defendant at least acted voluntarily on behalf of Amerinvest.

The conflict between the name of the Internet domain and the registered trade mark must be resolved in favour of the latter; the trade mark is the principal distinguishing sign of the enterprise in its commercial dealings and an essential element of consumer protection, hence the principle of protection of the trade mark, as a type of industrial property, of the accredited holder of title against anyone using another that is liable to confuse the consumer. The solution is analogous to that of a conflict between a registered trade mark and a trade name, which are

deemed identical where the same words are used but in a different order, gender or number, or when words are used with the addition or deletion of generic or accessory terms, articles, adverbs, conjunctions and so forth, the reason being that trade marks, and distinguishing signs in general, are essential to transparency in the marketplace in that they permit identification of the company providing a product or service.

Given the function of such distinguishing signs as both identifying and differentiating an enterprise, its products or services or its establishments, the competitive effort made by the owner of such signs neither can nor should be usurped by a third party. The owner of the trade mark enjoys the exclusive right to use it, and this right is violated when third parties use it to identify themselves with the former's establishment, good name, reputation, etc.

Whether the conflict between the Internet domain and the registered trade mark is a matter of criminal law is a separate issue. This will depend on whether the dominion name conflicting with the trade mark has been used for commercial purposes with criminal intent.

To resolve this issue, we must first determine what regulations are applicable in respect of registration of the domain name.

Registration of a domain name is contingent on good faith in the applicant, as stated in the Uniform Domain Name Dispute Resolution Policy (UDRP) adopted by the ICANN (Internet Corporation for Assigned Names and Numbers), which specifies that '. . . by asking us to maintain or renew a domain name registration, you hereby represent and warrant to us that (a) the statements that you made in your Registration Agreement are complete and accurate; (b) to your knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party; (c) you are not registering the domain name for an unlawful purpose; and (d) you will not knowingly use the domain name in violation of any applicable laws or regulations. It is your responsibility to determine whether your domain name registration infringes or violates someone else's rights'.

The domain www.chase-manhattan-group.com was registered on 28 April 1998 in the name of Chase Manhattan Group Corporation, with Network Solutions Inc., an entity accredited by the ICANN and hence bound by the Uniform Domain Name Dispute Resolution Policy (UDRP). Under the UDRP there are arbitration services provided by entities recognized by the ICANN, which settle disputes over domain names that infringe an industrial property right; thus, in case no. D2000–0388 (http://arbiter.wipo.int/domains/decisions/html/d2000–0388.html) the WIPO Arbitration and Mediation Center examined the registration of the domain www.chasemanhattancorp.com and found in favour of Chase Manhattan Corporation; the factual background stated, among other things, that [the complainant] 'is a holding corporation whose subsidiaries are engaged in financial services. Chase National Bank . . . was founded in 1877. On March 31, 1955, the acquisition of Chase National Bank was effected by The Bank of the Manhattan Company and the resulting corporation was known as The Chase Manhattan Bank. In 1969, The Chase Manhattan Bank formed a one-bank holding company *viz*. the Complainant.

In the same year the shares of the Complainant corporation were listed on the New York Stock Exchange. On March 31, 1996, the Complainant merged with the Chemical Banking Corporation and the Complainant became what was then the largest bank holding company in the USA. Since 1877, the Complainant, its predecessors and subsidiaries, have used the words 'Chase' and subsequently 'Chase Manhattan' as part of their trade name. . . . The Complainant is owner of the . . . trade mark . . .'.

In light of the foregoing, there can be no doubt as to the bad faith of the defendant in bringing the action, since regardless of who owns the Internet domain, the name is an internationally-recognized trade mark, a fact of which the defendant must have been cognizant for the reasons stated. The latter cannot be recognized as holder of title in the domain, given that, among other things, he has no known relationship with the Chase Manhattan Group Corporation. What can be recognized is that he took advantage of it, undoubtedly in full awareness of who was the legitimate owner, to advertise financial services of all kinds in conventional media, including in the publicity the electronic mail address and the web page denominated Amerinvest@Chase-Manhattan-Group.com and http://www.Chase-Manhattan-Group.com, and for inquiries in Spanish AmerinvestSp@Chase-Manhattan-Group.com; this indicates an intent to attract customers in Spain and other countries, in violation of trade mark law in that he used a denomination corresponding to a trade mark duly registered by someone else since 1967 and internationally known, with intent to take advantage of the other's reputation for the purpose of attracting customers, who, trusting in the back-up of a major bank, might be persuaded to enter with the defendant into financial transactions which they would otherwise not agree to. . . .

Despite the demand by the owner of the trade mark and the injunction issued by the court that he cease to use an identical or confusingly similar name – issued on 21/10/1998 (folio 153) – the defendant did not cease such use. This was confirmed by the entry and search of the office located at c/ Francisco Giralde no. . . . and c/ Núñez de Balboa no. . . ., authorized by court order of 2/7/1999 (folios 277 to 284), which turned up orders for insertion of advertisements in the *Boletín de Bolsa, Economía y Finanzas* to appear on 26/2/1999 (that is subsequent to the injunction) in which financial products of the kind noted above were again offered as in association with the Chase Manhattan Group. Such association was also evident in the visiting cards likewise found in the search, and in the fact that he still had the web page associated with the lawful owner of the trade mark, with the aggravating circumstance that the resemblance was now not merely phonetic. On the web page http://www.chase-manhattan-group.com/bank/chaseoffice.html there is an image of the Chase Manhattan bank – as substantiated by a notarized statement submitted to the proceedings in response to the inquiry made on 11/1/2001 – which furthermore is the only 'active' link on that page and gives access to the official web page of the plaintiff (http://www.chase.com). The other link on the said page, a photograph referring to the CMG Group, has no content and simply returns the user to the main page. It should be noted that the page

http://www.chase-manhattan-group.com/bank/chaseoffice.html is not active in the English version but is active in the Spanish version.

The association of the activity with the Chase Manhattan trade mark, including the link to its official web page, is confusing to the consumer in that anyone engaging such services will undoubtedly be led to believe that they are guaranteed by a bank of acknowledged prestige".

XXIII. TAX LAW

– *STSJ* Basque Country, 26 February 2001. *JT* 2001\1702.

Personal Income Tax. Hispano-French Convention of 27 July 1973. Accreditation of the condition of cross-border worker.

"Legal Grounds:

. . . This administrative appeal has been brought against a decision of the Foral Economic-Administrative Tribunal of Gipuzkoa of 11 December dismissing claim no. 1177/1995, submitted in objection to a Personal Income Tax withholding effected in August 1995 by the appellant's employer.

The appellant's object in this action is the annulment of the said withholding, dated 31 August 1995, and subsequent withholdings effected by 'Euskal Kulturgintza, SA' during the years 1995 and 1996, and repayment of the monies withheld. The basis of the appellant's claim is that in respect of the said tax year the Foral Tax Office ought to have taken into account that the appellant was a cross-border worker and that under article 15.4 of the Hispano-French Convention of 27 June 1973 (*BOE*, 7 May 1975) on avoidance of double taxation, he should pay tax only in his State of residence and hence should be repaid the monies withheld.

. . . As regards the principal ground of the appeal, this Court considers that the plaintiff's claim is justified.

As we ruled in decision 118/1999 (proceedings 2843/1996), 'In effect, as the State Central Office for Taxation has pointed out . . ., given the disappearance of border documentary formalities as specific and required evidence that the plaintiff is a cross-border worker, there can be no objection to the use of other general means of proof if they are sufficiently reliable. This is indubitably true of the set of documents appended to the administrative record . . . and referred to by the appellant, which bear witness to the fact that his place of residence was in the bordering French Department of *Pyrenées Atlantiques* and was demonstrably such as early as 1992 and 1993. Although the document specifically required under the bilateral Convention no longer exists, the circumstances that prompted the Convention of 1973 remain. Given that Member States of the European Community are free to regulate direct taxation, the Spanish and French States are fully entitled to demand personal taxes based on different criteria, hence giving rise to double taxation. For the same reason, the disappearance of the requirement of authorization for intra-Community emigration, which persisted until free movement of workers was introduced by Regulation 2194/91/EEC of 25 June, does not negate the underlying principles of the Convention, and therefore the definitions regarding cross-

border workers as set forth in the EEC Regulation of 1971 still apply. Therefore again, and finally, the Foral institutions of Gipuzkoa recognized a need to create a Registry of workers in such a situation, as enshrined in the provision referred to above. The added circumstance that the appellant is registered with the said Registry of Cross-Border Workers, as accredited by a certificate from the Direct Tax Management Service of the Revenue Department of Gipuzkoa . . ., would tend to confirm the applicability of the provisions of the Convention to the present case having regard to past tax years, inasmuch as the appellant's place of residence is not challenged as a fact but purely as a matter of documentary formalities, which obstacle, as we have seen, is readily overcome by consideration of other evidence supporting the actual facts'.

The foregoing is essentially applicable to the case here at issue, in that not only has the appellant been finally registered in the registry replacing that of the Convention, instituted by Foral Decree 90/1996 of 10 December (*LPV* 1998, 75) (*BOG* no. 241, 16 December) although not in existence in the 1995 tax year, of interest here (as certified on folio 24 of the plaintiff's evidence), but reliable documentary proof has been offered that in 1995 the appellant was taxed by the other State party to the Convention – especially folio 57 and documents contained in folios 26 to 38 of the record – thus constituting a case in which double taxation is not allowed".

– *STS* 18 September 2002. *RJ* 2002\8347.

Double taxation convention with Brazil. Tax base applicable to profits of an overseas branch of a Spanish company.

"Legal Grounds:

. . . In its Balance Sheets and Profit and Loss Accounts, the Sao Paolo (Brazil) branch of the *Banco Central Hispanoamericano*, SA (*BCH*) applied the rules of 'Monetary Correction' laid down in the Brazilian Corporations Act 6404/1976, which require that the historical vale of stable elements of the firm's assets – that is, fixed assets and liquid assets (capital and reserves) – be adjusted in accordance with a set of indices.

. . . art. 7.1 of the Convention provides: 'The profits of an enterprise in a Contracting State may be taxed in that State only unless the enterprise effects transactions in the other State by way of a permanent establishment there. In the latter case, the profits of the enterprise may be taxed in the other State, but only to the extent that such profits can be attributed to the permanent establishment'. The meaning of the provision is clear: having established the principle that a company's profits are to be taxed in the country of which it is a national, it makes an exception in the case of profits earned by a Spanish company's permanent establishment in Brazil (or vice versa), which 'may' be taxed in Brazil to the extent that they are imputable to that permanent establishment.

Section 2 of the same article 7 provides, as noted earlier, that 'When an enterprise from a Contracting State carries on (its activity) in the other Contracting State through a permanent establishment situated there, the profits attributed to it

in either Contracting State shall be the same as if it were a distinct and separate enterprise, carrying on the same or similar activities in the same or similar conditions and dealt with the enterprise of which it is a permanent establishment on an independent footing', which means that the branch opened by *Banco Central Hispanoamericano*, SA as a permanent establishment in Sao Paolo (Brazil) must be considered for tax purposes as if it were a different company, quite separate from the parent firm, whose profits must be imputed to it quite independently; and, if it is considered as a Brazilian enterprise, these must be determined in accordance with the laws of Brazil.

The foregoing does not imply that the Spanish Revenue Department must apply Brazilian law on monetary correction (as the appellant appears to suggest) but that the profit imputable to that branch of the bank for the purposes of the Spanish Company Tax must be as determined in Brazil in accordance with Brazilian laws. The amount so calculated must constitute the tax base both in Spain and Brazil, but in the former case (Spain), under art. 23 of the Convention, to avoid double taxation the amount paid in the equivalent tax in the latter (Brazil) must be deducted from the resulting quota.

Therefore, it is not lawful for the Spanish Revenue Department to determine the tax base of the said branch unilaterally and according to its own rules; the tax base must be determined according to the Brazilian rules, and the result must likewise be accepted as the tax base in Spain.

In conclusion, the net profit or tax base of the Sao Paulo (Brazil) branch of the *Banco Central Hispanoamericano*, SA for the purposes of Spanish Company Tax must be the same as is determined in accordance with the laws of the other country and must be accepted by the tax authority. The Spanish Revenue Department may not make further imputations or adjustments to that tax base, on which Spanish Company Tax must be paid net of the equivalent tax paid in Brazil".

XXIV. INTERLOCAL CONFLICT OF LAWS

– *SAP* Vizcaya, 15 June 2001. *AC* 2001\1587.

Consequences of a will made according to the Civil Law of the Basque Country by a person not possessing regional citizenship. Applicability of the Civil Code. Non-nullity.

"Legal Grounds:

. . . the object of the appeal is to determine specifically: 1) the legal consequences ensuing from the fact that Mr. . . . made a will dated 12 July 1989 in accordance with the Law of 30 July 1959 on Compilation of the Foral Civil Law of Vizcaya and Alava, when at the time of making the will he did not in fact hold regional citizenship of Vizcaya . . .

. . . With regard to the first issue, according to the plaintiff the fact that the will was made in accordance with regional civil law even although at that time the testator did not possess regional citizenship and hence the applicable law was not that regional law but the common law, specifically the Civil Code (*CC*), does not

render the will totally void but only annuls the appointment of heirs in so far as it prejudices the disinherited, which under article 851 *CC* would mean that the defendant is entitled only to the part due her of the first third portion. For her part, the defendant argues that the will is totally void and without effect, having been made by fraud in law, and that the applicable doctrine is that established by Supreme Court decision of 5 April 1994.

We neither share the view of the defendant and appellee nor feel bound by the doctrine set forth in the cited decision – which as a single decision does not constitute jurisprudence and which besides deals with a case not exactly the same as the present one – in that in the former the testators made the will after having gained civil citizenship of Vizcaya and so registered with the Civil Registry, whereas in the latter this was not so.

In the present case the purport of the will was to appoint the plaintiff sole and universal heir to all the testator's goods, rights and shares, to the exclusion of all other descendants, and hence the defendant, the testator having declared that he possessed civil citizenship of Vizcaya and was thus subject to the provisions of the Compilation of Civil Law of Vizcaya, in force at that time.

The key issue in the case, above all from the defendant's point of view, is the consideration that Mr. Domingo R. made a will in accordance with foral law, constituting fraud in law, plainly with the intention of disinheriting her, which he could not have done without just cause had the will been made in accordance with the common law, which was the duly applicable law.

That said, however, absolute nullity (article 6.3 *CC*) is not the same as fraud in law (article 6.4 *CC*). Fraud in law does not necessarily entail the nullity of a legal act but simply causes the due application of the regulation the fraud was intended to evade, and the existence of such fraud may cause total nullity or some other effect. It is neither an imperative nor still less a categorical consequence of fraud in law that a false claim of civil citizenship, whether in error or with malicious intent, must inevitably cause the absolute nullity of the will.

In our view, given that the testator claimed civil citizenship that he did not possess at the time of making the will, especially considering that this constitutes fraud in law, and given that the object is due application of the regulation that the testator sought to evade, we are bound to inquire what the applicable regulations are in accordance with the negated civil citizenship, which of these are essential or dispensable, which are imperative or prohibitive and what is the effect of the latter in the event of contravention, given that such effect may not be nullity in law.

The law states that where there are forced heirs the testator may only dispose of his goods in the manner and subject to the limits established in articles 806 *et seq*. *CC* . . ., that the *legitime* is that portion of the estate reserved by law to certain heirs – hence the term 'forced heirs' – (article 806 *CC*), and that the testator may not deprive his heirs of the *legitime* other than in cases specifically defined by the law (article 813 *CC*, as it relates to articles 848 *et seq*. regulating disinheritance). It follows from this that the *legitime* system is imperative in the sense

that it cannot be set aside by voluntary decision of the testator. Nevertheless, if the *legitime* system is imperative in that it cannot be set aside, this does not mean that infractions of the system necessarily cause total nullity of the provisions of the will. The legal attribution of civil citizenship as such is binding and cannot be ignored, but testamentary provisions conflicting therewith are not automatically void; rather, as a safeguard to the system of legal attribution, there are compensatory legal mechanisms whereby the provisions of the will can be adjusted to the rules of inheritance appropriate to the testator's actual civil citizenship.

The will at issue contains an unjustified clause which *de facto* constitutes unwarranted disinheritance not authorised by the Civil Code (articles 813 and 848 *et seq*. *CC*). However, unwarranted disinheritance does not cause nullity of the will but, as provided in article 851 *CC*, annulment of the appointment of heirs in so far as this prejudices the disinherited; and this is precisely the effect that the testator sought to evade by claiming the foral law.

Therefore, the only question arising from article 851 *CC* is how to determine the extent of the rights of the disinherited heir, that is whether these entitle her to her portion of the whole *legitime*, to the basic third and the undisposed part of the second third, or whether she is only entitled to her portion of the first third of the *legitime*. . . .".

– *SAP* Navarra, 16 November 2001. *AC* 2001\2388.

Determination of the law applicable to an advertising contract. Applicability *ex officio* of the rules of inter-regional law.

"Legal Grounds:

This action was brought in connection with an advertising contract concluded between the parties, . . .

. . . The default is a matter of record, but the extent to which this prejudiced the plaintiff is quite another matter. Nevertheless, the extent of that prejudice does not affect the fact that there has been default. . . .

There is a subsidiary claim that Law 518 of the New Fuero is not applicable because the contract was not made in Navarra. This issue was addressed and debated in depth in the original proceedings, as witness the fact that the sentence here challenged clearly expresses the view that the amount of the compensation is excessive, but that no other solution is possible under the provisions of the said Law. This is therefore not a 'new issue' as claimed by the appellee . . . and moreover, it is an issue to be judged *ex officio* by the Court (art. 12.6 *CC* as it relates to art. 16.1 *CC*; this was further affirmed by decision of the High Court of Navarra of 8 March 2000 [*RJ* 2000, 6112] in an *ex officio* ruling on a question of inter-regional law, which was in fact cited by the appellee although in connection with a different matter).

To determine whether the contract was subject to foral law, art. 16.1 of the Civil Code directs us to the criteria set forth in Chapter IV of the Preliminary Title of that Code. Specifically, art. 10.5 provides that 'Contractual obligations shall be

subject to the law specifically cited by the parties, provided that this has some connection with the business concerned; failing that, the common national law of the parties; failing that, the law of their common place of residence; and in the final resort, the law of the place where the contract was formalized'. Clearly, there is no submission to the foral law of Navarra, submission to the courts of Pamplona being purely procedural rather than an acceptance of the applicable substantive law. There is no law in common, as the two parties possess different civil citizenships. Again, the habitual places of residence – Vitoria and Pamplona – are different; and finally, the contract was not formalized in Navarra. Crucial in this respect is the statement by Mr. L., a member of *Aspe's* advertising department until October 1999, who stated that the contract was signed by the plaintiff in Pamplona, and as he had no power of attorney from 'Aspe', it was later signed by the defendant in Vitoria (response to question five and to cross-question five, at folio 303). The appellee cited this response to claim that the contract was formalized in Navarra, but in fact it signifies the opposite: it was signed in Pamplona and in Vitoria, or, if it is assumed that the agreement comes into force with the consent of the last party to sign, then in Vitoria. But by no means in Navarra. For it is also clear that although the negotiation was undertaken by a member of *Aspe's* sales department, he lacked real power of consent, and therefore the contract became valid only when signed by *Aspe* in Vitoria. It is also irrelevant whether the contract was printed at the plaintiff's offices in Pamplona or whether the negotiations took place in Pamplona (the latter point being unsubstantiated), since the 'place of formalization' obviously means the place where the contract was validated by the consent of both parties – and the final consent, that of the second party who signed in acceptance of the will of the first party, was not given in Navarra.

The appellee's argument is based on a decision of the High Court of Navarra of 8 March 2000. However, this simply rules that if a contract containing a penalty clause is formalized in Navarra, it comes under Law Ley 518 of the New Fuero, and that is not the issue here. The question is whether or not the contract was in fact formalized in the Region of Navarra. The cited decision ruled that the foral law was applicable because the contract concerned a property situate in Tudela (Navarra), and because the penalty clause was added to the verbal agreement in Tudela; the cited decision does not therefore assist the appellee's argument but deals with a separate issue.

In light of the foregoing, we cannot accept the view taken by the court at first instance. The applicable law is not Law 518 of the New Fuero but the common law enshrined in the Civil Code, which in this respect provides that the courts may in equity modify the penalty when the principal obligation has been partially fulfilled by the debtor (art. 1154 *CC*)".

– *SAP* Navarra, 1 October 2001. *AC* 2002\582.

Succession. Law applicable to validity of will. Determination of regional citizenship.

"Legal Grounds:

The issue in this case is whether the mother of both litigants, Ms. Bienvenida G., possessed regional citizenship of Navarra entitling her to make a will in accordance with the special rules of the foral law of Navarra. If she was so entitled, the nuncupative will made in 1993 before the Notary of Bera de Bidasoa would be valid; otherwise, this will would be void, and the valid will would be that made before the Notary of Vitigudino in 1983. The crux of the matter, then, is whether the testatrix lived for ten consecutive years in Navarra; given that she made no attempt to acquire such regional citizenship by application to the Civil Registry after two years' residence, her acquisition of such citizenship would have been subject, by default, to art. 14.5.2 *CC*. . . .

The only relevant issue in the case is therefore to determine whether it is substantiated that she lived for ten consecutive years in Navarra and to assess the various items of evidence submitted in the proceedings. Other considerations raised in the appeal, essentially in grounds One and Two, as to whether the testatrix believed that she possessed regional citizenship of Navarra or her personal intention and desire was to dispose of her estate in accordance with Navarrese custom, are irrelevant. In order to make a will 'according to the custom of Navarre', the testator must possess regional citizenship of Navarre, acquired by one of the means set forth in art. 14.5 *CC*; the desire, the conviction or the will of the testator to feel Navarrese or to make a will as such is not sufficient.

The evidence in the record of proceedings as to the place of residence of the litigants' mother since 1975 is profuse and at times contradictory. . . . In this respect, the jurisprudence has it that registration in the voting list may be indicative but is not in itself proof of actual residence . . .

What is really important is that all those indications of the mother's residence in Bera, which as noted are not entirely convincing, are contradicted by a number of indications to the contrary. In short, we cannot consider proven the claim that the mother lived in the Region of Navarra long enough to qualify for Navarrese regional citizenship, that is for ten consecutive years".

– *SAP* Lérida, 17 December 2001. *JUR* 2002/47611.

Law applicable to the rights of the surviving spouse. Law governing the effects of marriage.

"Legal Grounds:

The original decision dismissed the action brought by the plaintiffs to be declared heirs *ab intestato* of their late son Fernando, concluding that under Art. 9.8 of the *CC* as it relates to art. 9.2 of the same statute, and likewise under art. 333 of the *Codi de Successions*, the Catalan law is applicable and hence the declaration of succession in favour of the defendant, wife of the deceased, is correct.

In support of their appeal, the appellants repeat that their son possessed Aragonese regional citizenship from the time of his birth, that this status was unaffected by his marriage and that it has not been substantiated that he lived for ten years in

the city of Lleida or that he expressed a desire to acquire regional citizenship of Catalonia, . . .

. . . In light of the foregoing, the Court, having re-examined the evidence submitted by each party and assessed it as a whole, is in accord with the conclusions of the court *a quo* as regards the Catalan regional citizenship of Fernando Fernández Pisa at the time of his death, the abundant documentary evidence accompanying the writ of response being sufficient to establish continuous residence in the city of Lleida for more than ten years . . .

. . . The appellants challenge the original court's interpretation in respect of art. 9.8 of the *CC*. This article provides that succession *mortis causa* is to be governed by the national law of the deceased at the time of death, further providing that the rights vouchsafed by law to the surviving spouse are to be governed by the law regulating the effects of matrimony, always without prejudice to the portions legally reserved to descendants. According to art. 9.2 *CC*, the effects of matrimony are to be governed by the common personal law of the spouses at the time the marriage took place; failing a common law, by the personal law or law of the common place of residence immediately following the marriage; and failing such residence, by the law of the place where the marriage was celebrated. In the present case, the effects of the matrimony between the plaintiffs' son and the defendant are governed by the law of Catalonia, this being applicable as the personal law of both spouses in consideration of their regional citizenship (art. 16.1 *CC*); moreover, even supposing that Aragonese regional citizenship were accepted as valid (which it is not, as noted), the same regulations would still apply to the marriage, given that absent a common personal law and the spouses not having expressly chosen one as set forth in the said provision, the applicable criterion is the habitual place of common residence immediately following the marriage, and it has not been disputed that after marrying in the city of Lleida, the spouses were habitually resident there until their deaths. Therefore, the rights of succession pertaining to the surviving spouse must be governed by the law of Catalonia, in which respect this Court is in full accord with the arguments set forth in the original decision, which are entirely consistent with the provisions cited above; we cannot accept the interpretation put forward by the appellants to the effect that the expression 'the rights vouchsafed by law . . .' refers to the law of the deceased's regional citizenship – that is, the law governing succession – which they allege is the law of Aragon. Were this interpretation to be entertained, the referral to the law regulating the effects of matrimony would be unnecessary and void of meaning, since the personal law of the deceased, whatever it was, would apply unless both laws vouchsafed the same rights of succession. But the object of the provision is precisely to deal with any clashes between two sets of regulations, to which end it stipulates the law governing the effects of matrimony, without prejudice to the portions legally reserved to descendants; in this respect it expressly provides that such portions are to be determined by the law governing the succession, but the same is not true of the rights of succession of the widowed spouse. Furthermore, it having been established that the deceased acquired Catalan regional citizenship, his succession

is subject to the civil law of Catalonia and hence the applicable statute is the *Codi de successions per causa de mort en el dret civil de Catalunya*, Law 40/1991 of 30 December, arts. 323 and 333 of which provide that in the event of succession *ab intestato*, the deceased having no children or descendants, the surviving spouse must succeed. The appeal is therefore dismissed and the decision here contested is confirmed in its entirety".

– *SAP* Balearic Islands, 10 September 2002. *JUR* 2002/272157.

Law applicable to determination of the regime of matrimonial property. Marriage contracted before the entry into force of the Constitution. Applicability of the national law of the husband.

"Legal Grounds:

. . . In opposition to the appeal and in defence of the terms of the original decision, the defendant and appellee alleges that article 14 of the Civil Code prior to the reform of 17/3/73, which provided that 'the wife shall have the same condition as her husband', and likewise article 9.2 of the Civil Code after the said reform, which takes as binding 'the national law of the husband at the time of marrying', are incompatible with the Constitution of 1978, and specifically with articles 14 and 32.1 thereof, concluding therefore that the original decision correctly cited section three of the repeal provision in the Constitution, whereby the foregoing regulations were without effect, and that the applicable criterion was therefore the habitual residence of the spouses at the time of marrying – a neutral criterion concordant with article 107 of the Civil Code and with article 9.2 thereof as established by Law 11/90, 15 October.

This Court cannot entertain such an interpretation, as set forth in the original decision and defended by the defendant and appellee in that while as from the approval of the Spanish Constitution of 1978, by virtue of the third repeal provision it could be concluded – as recently confirmed by Constitutional Court decision of 14/2/2002 (*RTC* 2002, 39) declaring unconstitutional article 9.2 of the Civil Code as contained in the Articles approved by Decree no. 1836/1974, 31 May, in the point that specifies as applicable 'the national law of the husband at the time of marriage' – that such imposition of the law of the husband at the time of marriage, although a residual nexus for determination of the law applicable to their personal and patrimonial relations, entails differential treatment of men and women despite the fact that their positions as regards the marriage are equal, and conflicts with articles 14 and 32 of the Spanish Constitution, the first of which guarantees equality without discrimination by reason of sex and the second the right of men and women to enter into matrimony in full equality before the law. Nonetheless, however right the implied reproach of former provisions may be, it is still true, as argued in the decision of Bench 1 of the Supreme Court of 6/10/86 (*RJ* 1986, 5327), that in the case of matrimony contracted prior to the Constitution, the principle of judicial protection is better served by upholding the inviolability of marital financial arrangements made before the present Constitution came into force, given that marriage articles are legal contracts immediately enforceable upon mat-

rimony and are drawn up in accordance with the law in force at the time of marriage. Thus, as is stressed in the best doctrine following in the steps of European systems, this conclusion is consonant with the general legal principles of unity and immutability, which apply mainly in terms of acquired rights, except where the spouses have drawn up marriage articles. This was not the case in the proceedings analysed by the Supreme Court or in the case here at issue, in both of which the marriage took place long before the promulgation of the Constitution.

Briefly, then, article 14 of the Constitution, which establishes the equality of Spaniards of either sex before the law and forbids any discrimination by reason of birth, race, sex, religion, opinion or any other personal or social condition or circumstance, raises the problem of whether or not, given the direct applicability of the principle of non-discrimination by reason of sex, the personal law of the male spouse ought to prevail in determining the regime of matrimonial property of the spouses in the event referred to in points 2 and 3 of article 9, which is extensible to inter-local law under the first rule of article 13. In answer to this problem, the original decision proposed as an alternative criterion for determining the regime of matrimonial property of the spouses where they possess different regional citizenships, that the personal law of the husband be substituted by a different nexus such as the habitual place of residence of the spouses at the time of marrying, citing as authority article 107 paragraph 1 of Law 30/1981, 7 July (*RCL* 1981, 1700; *ApNDL* 2355). The court of instance explained that this would constitute an objective nexus common to both spouses, fully compatible with the new principle of equality of treatment in their interpersonal relations, which in the absence of marriage articles would be applicable in cases where the spouses possessed different regional citizenships. In such a situation, under this approach the lack of a common regional citizenship would prompt the applicability of this other nexus by analogy with article 4 point 1, and also arguably with article 3 point 1 of the Civil Code, which nexus would be made possible by the third repeal provision of the Constitution.

Nevertheless, this Court takes the view that the doctrine referred to is not applicable to the case here at issue and therefore upholds the present appeal. The new constitutional principle of equality of the sexes cannot be held to cause review of a regime of matrimonial property constituted specifically on 15/1/66, the date on which the spouses were married in the church of San Miguel in the town of Felanitx without making a marriage settlement, and therefore the regime of matrimonial property must stand as it was under the law that was then in force and remained applicable until the personal separation of the spouses in July 1997, before which time they made no marriage settlement to modify the conditions holding under the law in force at the time of the marriage, that is, prior to the Constitution.

It must be said in this respect that with the regard to the present case, the conclusion set forth in the foregoing paragraph is supported by the prohibition of retroactivity as set forth in article 9 of the Constitution. The original decision is clearly retroactive in that the application thereto of the new regulations would affect the legality of situations existing prior to their enactment. The regime of

matrimonial property comes into being with the act of marriage and continues in effect thereafter; it cannot be modified by a statute which, although enshrined in the Constitution, was not promulgated until more than ten years after the marriage in question.

In effect, although the jurisprudence holds that preferential treatment of the man over the woman is both discriminatory and unconstitutional, a doctrine consolidated by rulings of the Constitutional Court, this is to be understood as referring to situations arising after the promulgation of the Constitution, which means that the repeal is not fully retroactive and situations of matrimonial property constituted long before the Constitution cannot be reviewed in the light of the regulations in force today. Indeed, were we to allow full retroactivity as the appealed judgment in essence propounds, innumerable presently stable family situations would have to be reviewed, to the detriment of the principle of legal security, likewise enshrined in article 9 of the Constitution. The first concern must therefore be to preserve legal security, especially in a case like the present one in which the nexus judged discriminatory by the Constitution of 1978 was supplementary in default of a specific expression of will by either spouse and could moreover have been changed at any time by means of a marriage settlement, which according to the record neither spouse ever proposed.

This Court therefore upholds the appeal to the effect that, given the regional citizenship of the husband at the time of marriage, the regime applicable to the spouses is that of community of acquisitions.

. . . It is therefore concluded that the spouses were subject to the legal regime of community of acquisitions provided by the Civil Code in article 1316 as it relates to article 9 sections 2 and 3 in the version in force at the time of marriage, and to article 16".

Spanish Literature in the Field of Private and Public International Law and Related Matters, 2001 and 2002

This survey, prepared and compiled by B. Arp and Dr. E. Crespo Navarro (Assistant Lecturers in Public International Law), and M. Guzmán Peces and J. I. Paredes Pérez, (Associated Lecturers in Private International Law), under the direction of Dr. I. García Rodríguez (Lecturer in Private international Law) at the University of Alcalá, Madrid, is designed to provide information for international lawyers and law students on matters concerning Public International Law, International Relations, Private International Law and Community Law published in Spain or by Spanish authors.

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VILLÁN DURÁN, C., *Curso de Derecho internacional de los derechos humanos*, (A Course on International Human-Rights Law), Trotta, Madrid 2002, 1028 p.

As Prof. Carrillo Salcedo points out in his foreword, this book reflects very well its author's dual career in teaching and the civil service, as he draws from his experience as a former lecturer and researcher at the universities of Oviedo and Leon and from his work as an international civil servant at the office of the United Nations High Commissioner for Human Rights, where he continues to hold a post.

The *Course*, which begins with an extensive General Introduction, focuses on studying the regulatory and institutional aspects of universal International Human-Rights Law, from the viewpoint of the various mechanisms that have been established for promoting and protecting human rights. It examines all the bodies

responsible for promoting and protecting these rights, both political and technical, and their working methods, results and possible means of future development. This is done with the twofold aim of describing the system and discovering the keys to its possible improvement.

In view of the complexity of the universal system for the promotion and protection of human rights, the *Course* has been divided into four parts. The first describes the keys to the formation, basic legal system, institutions and sources of International Human-Rights Law (Lessons 1 to 4). The second part concentrates on the activities of the United Nations regarding the promotion of human rights, studying the mechanisms for the codification and progressive development of international rules on human rights, technical cooperation and dissemination activities (Lessons 5 to 7). The third part deals with the conventional protection mechanisms (Lessons 8 to 10). And the fourth and final part, which is more extensive than the previous sections, explores the mechanisms for the extraconventional protection of human rights (Lessons 11 to 16).

The book furthermore includes a full doctrinal bibliography at the end of each chapter and a series of *Charts* and *Annexes* which greatly facilitate the consultation of resources and texts of immediate practical use.

VVAA, *Código de Derecho Internacional*, (A Code on International Law), La Ley-Actualidad, Madrid 2002, 986 p.

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MARIÑO MENÉNDEZ, F. (Ed.), *El derecho internacional en los albores del siglo XXI: homenaje al profesor Juan M. Castro-Rial Canosa*, (International Law at the Dawn of the 21st Century: A Tribute to Professor Juan M. Castro-Rial Canosa), Trotta, Madrid 2002, 736 p.

3. Monographs and Collective Works

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ABRIL STOFFELS, R., *La asistencia humanitaria en los conflictos armados*, (Humanitarian Assistance in Armed Conflict), Tirant lo Blanch, Valencia 2001, 470 p.

AGUSO ZAMORA, M. J., *El Tribunal Constitucional y el Convenio Europeo de Derechos Humanos*, (The Constitutional Court and the European Convention on Human Rights), Univ. de Córdoba, Córdoba 2001, 207 p.

ALDECOA LUZÁRRAGA, F. and KEATING, M. (Ed.), *Paradiplomacia: las relaciones internacionales de las regiones*, (Paradiplomacy: The International Relations of Regions), Marcial Pons, Madrid 2001, 238 p.

ALZINA DE AGUILAR, J. P., *Embajadores de España en Londres: una guía de retratos de la Embajada de España*, (Spanish Ambassadors in London: A Portrait Guide to the Embassy of Spain), Ministerio de Asuntos Exteriores, Madrid 2001, 400 p.

ARCOS RAMÍREZ, F., *¿Guerras en defensa de los derechos humanos?: problemas de legitimidad en las intervenciones humanitarias*, (Wars in Defence of Human Rights? Problems of Legitimacy in Humanitarian Interventions), Dykinson/Univ. Carlos III, Madrid 2002, 117 p.

AUBARELL SOLDUGA, G. (Ed.), *Las políticas mediterráneas: nuevos escenarios de cooperación*, (Mediterranean Policies: New Scenes of Cooperation), Icaria, Barcelona 2001, 351 p.

BAEZA BETANCORT, F., *Una aproximación jurídica al contencioso de Gibraltar: la cláusula* Rebus Sic Stantibus *y el derecho de libre determinación de los pueblos*, (A Legal Introduction to the Gibraltar Dispute: The *Rebus Sic Stantibus* Clause and the Right of Peoples to Self-Determination), Real Sociedad Económica de Amigos del País, Las Palmas de Gran Canaria 2001, 196 p.

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BERMEJO GARCÍA, R., BLANC ALTEMIR, A. and REMIRO BROTÓNS, A. (Comps.), *Problemas actuales de derecho internacional humanitario: asistencia, ayuda humanitaria y derecho humanitario bélico (V Jornadas de Derecho Internacional Humanitario) Valencia, 29–3–XII–99*, (Current Problems of International Humanitarian Law: Assistance, Humanitarian Aid and Humanitarian Law of War), Univ. de Valencia, Valencia 2001, 222 p.

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This monograph springs from the General Course taught by Prof. Oriol Casanovas in the 2nd *Cursos Euromediterráneos Bancaja de Derecho Internacional* (Bancaja Euro-Mediterranean Courses in International Law) and published in Spanish in *CEBDI*, vol. II (1998), pp. 35–267. It was subsequently revised, updated and translated into English.

The book is divided into three parts. The first describes in four chapters (fundaments, custom, treaties and various problems) the main features of the regulatory structure of Public International Law. The second part, in three chapters, shows the development of the international community from the perspective of its players (states, international organizations, self-determination, human person). The third part, also consisting of three chapters, refers to the functions of Public International Law (state powers, international responsibility and the peaceful settlement of disputes), ending with a brief set of conclusions. The last pages of the book provide a select bibliography which strikes a balance between Spanish-language doctrine and doctrine published in other languages. Finally, mention should be made of the case-law index, which is ideally suited to the author's aim and includes many references to cases heard by regional and ad hoc courts.

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El derecho internacional humanitario a la luz del estatuto y de la jurisprudencia del tribunal penal para la antigua Yugoslavia, (International Humanitarian Law in the light of the Statute and Case-Law of the International Criminal Tribunal for the Former Yugoslavia), Comares, Granada 2001, 216 p.

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FANJUL, G. (Comp.), La realidad de la ayuda 2001–2002: una evaluación independiente de la ayuda al desarrollo española e internacional, (The Reality of Aid in 2001–2002: An Independent Evaluation of Spanish and International Development Assistance), Fundación Intermón, Barcelona 2001, 149 p.

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FERRER LLORET, J., *La aplicación del principio de autodeterminación de los pueblos: Sahara Occidental y Timor Oriental*, (Application of the Principle of Self-Determination of Peoples: Western Sahara and East Timor), Univ. de Alicante, Alicante 2002, 253 p.

The validity of the principle of self-determination as a structural principle of the international system at the beginning of the 21st century poses no doubts as to its application to colonial situations. However, developments in the Western Sahara and East Timor issues also highlight the huge difficulties witnessed by the application of this principle in the last quarter of the 20th century. Using inductive methodology based on the study of international practice, Jaume Ferrer Lloret's monograph conducts a legal analysis of the application of this principle in the two former Portuguese and Spanish colonies, East Timor and the Western Sahara, respectively. These territories were unable to exercise the principle of self-determination in the past owing to their armed occupation by neighbouring states, Indonesia and Morocco, respectively, at the end of 1975.

The comparative analysis carried out by the author shows that both cases are fairly similar, though there are also obvious differences, as he points out in considerable detail in the four chapters into which the monograph is divided. Indeed, the principle of self-determination of peoples has now effectively been applied in the case

of East Timor, specifically after the holding of the referendum of self-determination on 30 August 1999, the subsequent withdrawal of Indonesian troops in October that year, the deployment of the UN Transitional Administration in East Timor (UNTAET), and, finally, the solemn proclamation of the independence of the Democratic Republic of East Timor on 20 May 2002. It joined the UN as a new member State (191) on 27 September 2002.

To date Morocco, for its part, has refused to hold a referendum of self-determination in the Western Sahara, despite the UN Peace Plan which the organization, with scant resources and very little political will on the part of the Security Council, has been attempting to implement since 1991. In an endeavour to break the current deadlock on the Peace Plan, the UN Secretary-General's personal envoy recently proposed that the Western Sahara be granted some measure of autonomy following the return of the Saharan refugees currently in Algeria, and that the referendum be held after five years. Nor has this proposal so far met with the approval of the parties to the dispute, Morocco and the Polisario Front.

As the author concludes after pointing out the long period of breach of international law in the cases of East Timor (for 24 years) and the Western Sahara (since 1975), in both cases the violation by Morocco and Indonesia of the prohibition on the use of force, with the consent of the major Western powers, does not endanger the traditional principles of preservation of sovereign equality and non-intervention, though it does prevent the exercise of the principle of free determination of peoples and respect for human rights. The stance of the Western powers brings to mind the fundamental features of classical international law as a liberal, decentralized and oligocratic system.

It is true that in the case of East Timor the principle of self-determination of peoples has finally been applied thanks to internal changes in Indonesia and the consensus reached between the major powers through the United Nations; the achievement of this consensus was greatly helped by the active diplomacy carried out by the former colonial power, Portugal. Therefore, as the author suggests, we may expect that, depending on possible internal changes in Morocco's political system, the same consensus will be achieved through the United Nations enabling the principle of self-determination to be applied in the case of the Western Sahara by means of a referendum, held, with the proper guarantees, under the international supervision of the UN.

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The seriousness of the crisis that has rocked the world since the fundamentalist attack on New York and Washington and the counterterrorist response of the US and its allies, which began with the actions in Afghanistan, have sharpened public interest in understanding the international system, its conflictive points and its most immediate background.

The book entitled *From Empires to Globalization* recently published by Pedro Lozano Bartolozzi, a lecturer at the University of Navarra, is a response to this concern. It is divided into two different parts. The first analyses the International Network of Relations as a communication system, examining the various doctrinal positions, structure and dynamics of the players, factors and means of international life and its legal and informative framework. The second part, which is divided in turn into three sections, describes the course of the main events that have progressively woven the web of international relations from the Second World War to the end of the 20th century. This complex, detailed study is structured into three stages: the Cold War, co-existence, and the current period that has emerged in the wake of the fall of the USSR, the Communist systems in Eastern Europe and the changes in the peripheral areas. Each chapter includes its own bibliographical section and several maps. The study addresses international relations as a whole, from both a theoretic and a practical point of view, includes worldwide events and fills a noticeable gap in Spanish bibliography in the field of international studies.

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AGUILAR GRIEDER, H., *La extensión de la cláusula arbitral a los componentes de un grupo de sociedades en el arbitraje comercial internacional*, (Extending the Arbitration Clause to the Components of a Group of Companies in International Commercial Arbitration), Univ. de Santiago de Compostela, Santiago de Compostela 2001, 433 p.

There is no better description and assessment of the task performed in this book by Dr. Hilda Aguilar Grieder than the words used by Dr. Santiago Álvarez González in the Foreword (p. 19), when he points out that the author "shows us the rugged landscape that arbitral and judicial practice has shaped in the past thirty years as regards the phenomenon of the extension of the arbitration clause" and that this "interesting landscape is dealt with from top to toe, with progressively refined legal arguments". Indeed, this exhaustive, rigorous and thorough study by Dra. Aguilar pays tribute to a whole saga of professionals from the field of private international law teaching and research (her grandfather, Professor Mariano Aguilar Navarro and her father, Dr. Mariano Aguilar Benítez de Lugo, Professor of the University of Seville), and an area of Spanish doctrine that has benefited from the teachings – in this case indirectly – of Professor Julio D. González Campos. This comes across in both the structure and the thoughtful content of this book, which was written under the expert guidance of Dr. Santiago Álvarez, who trained at the so-called "School of Oviedo" under the aegis of Dr. José Carlos Fernández Rozas. Having now introduced Dra. Grieder, it behoves us to do justice to the thorough research she has carried out, without which all the rest would be superfluous.

In addition to the usual Introduction and Conclusions, the book is structured into four chapters. The first Chapter sets out the problems and various analytical perspectives from which the subject of the study can be approached. It explores the basic elements – groups of companies and the arbitration clause – separately,

whereas they are dealt with jointly in the rest of the book. It addresses both legal and economic aspects and examines the compatibility of the principle of strict interpretation of the arbitration clause with the obstacles that arise when extending it within a group of companies to companies that did not sign the contract in which this clause is included. Once the reader has a clear picture of the problems that can arise from extending the arbitration clause, the second Chapter systematically analyses the doctrinal requirements for solving these problems. But since doctrine provides insufficient answers, Dra. Aguilar draws from the most representative judicial decisions that support the idea of "economic unity of the group". In the following two chapters the reader appreciates even more the exhaustive nature of the author's research. In the third Chapter she breaks down the clauses and stipulations used in the doctrine of groups of companies, namely: the stipulation in favour of a third party; the criterion of representation; the prohibition of *venire contra factum proprium*; and the doctrine of the lifting of the veil. In the fourth Chapter she goes on to explore the conflictual solution to the extension of the arbitration clause to corporate groups. Although our opinions differ in some aspects from the author's interpretation of the arbitration of the ICSID, this book fills a gap in Spanish legal literature and complements many other studies written by foreign authors in recent years, as it is of great practical use. (I.G.R.)

ALONSO PÉREZ, F., *Régimen jurídico del extranjero en España. Comentarios, jurisprudencia, legislación y formularios*, (The Legal System governing Aliens in Spain. Observations, Case-Law, Legislation and Forms), Dykinson, Madrid 2002, 840 p.

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BLANCO-MORALES LIMONES, P. and CARBONELL PUIG, J., *La actividad aseguradora en el espacio económico europeo: aspectos teóricos y prácticos*, (Insurance Activity in the European Economic Area: Theoretical and Practical Aspects), Colex, Madrid 2002, 224 p.

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CALVO CARAVACA, A. L. and CARRASCOSA GONZÁLEZ, J., *Conflicto de Leyes y conflicto de jurisdicción en Internet*, (Conflict of Laws and Conflict of Jurisdiction in the Internet), Colex, Madrid 2001, 172 p.

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CANO BAZAGA, E., *Adopción internacional y nacionalidad española*, (International Adoption and Spanish Nationality), Mergablum, Sevilla 2001, 110 p.

CARRASCOSA GONZÁLEZ, J. *Globalización y Derecho internacional privado*, (Globalization and Private International Law), Liberlibro.com, Albacete 2002, 316 p.

CARRASCOSA GONZÁLEZ, J. and SÁNCHEZ JIMÉNEZ, M. A., *Sistema español de Derecho de nacionalidad y extranjería*, (Spanish Legal System on Nationality and Aliens), DM-Editor, Murcia 2002, 215 p.

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DÍEZ VERGARA, M., *Manual práctico de comercio internacional*, (A Practical Handbook of International Commerce), 5th ed., Deusto, Bilbao 2001, 388 p.

ESPINAR VICENTE, J. M., *Comentarios a la nueva Ley de Extranjería*, (Observations on the New Law on Aliens), Univ. de Alcalá de Henares, Madrid 2001, 92 p.

As the author himself points out when commenting on the reform of the Spanish law on aliens, the "gestation" of Law 4/2000 has been truly "pathological" (p. 3). Therefore, it seems to us that publishing a book of observations on a "new" law whose reform was already being considered and negotiated is a brave and risky endeavour on the part of Dr. Espinar Vicente, professor of private international law at the University of Alcalá (Madrid), similar to that of a bullfighter in the ring. And bearing in mind the delay in publishing a Yearbook of this kind (which

furthermore has to be translated into English), by the time the reader gets to read this review, it will have undergone various amendments – as indeed is the case.

This book is short, consisting of only two chapters, but concise. The first chapter examines the rights and freedoms of aliens in Spain, distinguishing between political and social/labour rights, and the right to education and care. The last section of this chapter is particularly interesting as it analyses certain new features of the Law on Aliens with respect to Organic Law 1/1992 on protection and public safety, the General Tax Law and some aspects relating to monetary transfers. The second Chapter deals with the administrative aspects of the new law: regulation of the conditions for entering Spanish territory; requirements for the temporary or permanent establishment of aliens in Spain; and the situation of Spanish employers and foreign nationals seeking employment in Spain. One of the most notable and interesting aspects of Dr. Espinar Vicente's book is that each sector that is examined includes a chart with two columns containing the text of the article of the Organic Law on Aliens of 1992 and the new 2000 Organic Law on Aliens and Social Integration. This prevents confusion and provides the reader with a perfectly clear picture of each change and whether or not it is in keeping with the legislative policy goals set by the government in this field. In the case of the major topics (family reunification, education, membership of trade unions and strikes), the chart is extended to include the 1985 Law on Aliens, giving a fairly clear idea of how policy on aliens has developed in Spain over the past fifteen years.

Perhaps the author should have waited until the rules giving effect to the law were passed in order to provide a fuller commentary, though this would undoubtedly have spoiled the freshness of his observations. Furthermore, this and other studies published on the law may have assisted the lawmaker in the task of modification. All in all, this book is very well written, like all those published by Dr. Espinar Vicente, and is eminently practical and highly useful for anyone wishing to learn about Spanish legislation in this area. (I.G.R.)

ESPINOSA CALABUIG, R., *La publicidad transfronteriza*, (Cross-Border Advertising), Tirant lo Blanch, Valencia 2001, 240 p.

ESPLUGUES MOTA, C., *El divorcio internacional (Jurisdicción, ley aplicable, reconocimiento y ejecución de sentencias extranjeras*), (International Divorce (Jurisdiction, Applicable Law, Recognition and Enforcement of Foreign Judgments)), Tirant lo Blanch, Valencia 2002, 429 p.

ESPLUGUES MOTA, C. and LORENZO SEGRELLES, M. de, *El nuevo régimen jurídico de la inmigración en España (análisis de la LO 8/2000, de 22 de diciembre, de reforma de la LO 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España)*, (The New Legal Framework for Immigration in Spain (Analysis of LO 8/2000 of 22 December reforming LO 4/2000 of 11 January, on Rights and Freedoms of Aliens in Spain), Tirant lo Blanch, Valencia 2001, 486 p.

ESPLUGUES MOTA, C., PALAO MORENO, G. and LORENZO SEGRELLES, M. de, *Nacionalidad y extranjería*, (Nationality and Aliens), Tirant lo Blanch, Valencia 2001, 224 p.

ESTEBAN DE LA ROSA, G. and MOLINA NAVARRETE, C., *La movilidad transnacional de trabajadores: reglas y prácticas*, (The Transnational Mobility of Workers: Rules and Practices), Comares, Granada 2002, 264 p.

FÁBREGA RUIZ, C. F., *Protección jurídica del menor inmigrante*, (Legal Protection of Immigrant Minors), Colex, Madrid 2001, 176 p.

FACH GÓMEZ, K., *La contaminación transfronteriza en Derecho internacional privado*, (Cross-Border Pollution in Private International Law), Bosch, Barcelona 2002, 504 p.

FERNÁNDEZ ROZAS, J. C., *Sistema del comercio internacional*, (System of International Commerce), Civitas, Madrid 2001, 384 p.

GARCÍA GUTIÉRREZ, L., *La compensación de créditos en el comercio internacional*, (Credit Compensation in International Commerce), Eurolex, Madrid 2002, 276 p.

GARCÍA RODRÍGUEZ, I., (Ed.), *Las minorías en una sociedad democrática y pluricultural*, (Minorities in a Democratic and Multicultural Society), Univ. Alcalá de Henares 2001, 358 p.

The aim of this collection of papers edited by me and springing from the II International Courses of the Autonomous City of Melilla, published under the same title as the work in question, is to analyse minorities from an interdisciplinary approach (philosophical, social and legal). The papers included in the book examine aspects of internal, regional, European and international law. The book's structure is a faithful reflection of the five round tables held in that city. The first module, "Minorities and Rule of Law", was analyzed by professors V. Zapatero (University of Alcalá), J. De Lucas (University of Valencia), F. Mariño (Universidad Carlos III) and E. Ruiz (University of Deusto), who referred to the international protection of minorities, the deficit of multicultural democratic legitimacy and the rule of law. In the second module Paz Andrés Sáenz de Santamaria (University of Oviedo) moderated the theme "The protection of minorities in Europe" with the participation of R. Calduch (Universidad Complutense), J. Ferrer (University of Alicante) and J. González (University of Oviedo), who focused on the situation of minorities in Europe and how they are protected by community law, with particular reference to the gypsy (Romany) minority. The third module addressed "The protection on minorities in Spain", with the participation of L. I. Sánchez Rodríguez (Universidad Complutense), C. Jiménez Piernas (University of Alcalá), the course director, J. Borrego (counsel for the Spanish state at the European Court

of Human Rights) and J. M. de Palacio, representing the Spanish ombudsman. The issues discussed in this module concerned the existence of possible national minorities in Spain – such as the Berber population in Ceuta and Melilla – and the protection of such minorities by the state attorneys and office of the ombudsman. The fourth theme, moderated by J. Martínez Gijón, who represented the Director General for Religious Affairs, was "Religious minorities in Spain", with the participation of J. Giménez y Martínez de Carvajal (Universidad Complutense and advisor to the Spanish Episcopal Conference), J. P. Bastian (Université Marc Bloch de Strasbourg – France) and Abdelkader Mohamed Alí (former member of the European Parliament). The participants in this round table analyzed the situation of religious minorities in Spain, with particular reference to Hebrews, Muslims and evangelists, and their position towards the Catholic faith. The course was brought to a close with a debate on "Minorities and private international law" in which Avi Nantel (Israeli lawyer), M. Aguilar Benítez de Lugo (University of Seville), E. García García (Chief judge of the autonomous city of Melilla) and I. García Rodríguez (University of Alcalá) took part. The aspects discussed were integration and respect for the rights of minorities in general and, in particular, the role of public policy in remedying some cultural differences which are contrary to the principles and values that were upheld by the forum and basically coincide with the rules of human rights.

GARCIMARTÍN ALFÉREZ, F. J., *Derechos de sociedades y conflicto de leyes: una aproximación contractual*, (Rights of Societies and Conflict of Laws: A Contractual Approach), Edersa, Madrid 2002, 327 p.

GIL MINGUILLÓN, S., *La litispendencia arbitral internacional: extensión de la eficacia del convenio*, (Lis Pendens in International Arbitration: Extension of the Effectiveness of the Convention), Univ. de La Rioja, Logroño 2001, 176 p.

GONZÁLEZ MARTÍN, N., and RODRÍGUEZ BENOT, A., (Coords.), *Estudios sobre adopción internacional,* (Studies on International Adoption), Univ. Nacional Autónoma de México, México 2001, 389 p.

GRÀCIA I CASAMITJANA, J., *Dret internacional privat: materials pràctics*, (Private International Law: Practical Resources), Univ. Autónoma de Barcelona, Barcelona 2001, 146 p.

GUARDIOLA SACARRERA, E., *La compraventa internacional. Importaciones y exportaciones*, (International Sales. Imports and Exports), 2nd ed., Bosch, Barcelona 2001, 430 p.

HEREDIA CERVANTES, I., *Proceso internacional y pluralidad de partes*, (International Suits and Plurality of Parties), Comares, Granada 2002, 395 p.

HERNÁNDEZ RODRÍGUEZ, A., *Los contratos de edición en el Derecho internacional privado*, (Publishing Contracts in Private International Law), Comares, Granada 2002, 206 p.

HORNERO MÉNDEZ, C. and RODRÍGUEZ BENOT, A., (Coords), *El nuevo derecho de extranjería*, (The New Law on Aliens), Comares, Granada 2001, 497 p.

HUERTAS GONZÁLEZ, R. (et al.), *Comentarios a la Ley de extranjería*, (Observations on the Law on Aliens), Lex Nova, Valladolid 2002, 388 p.

IGLESIA MONJE, M. I. de la, *El principio de conformidad del contrato de compraventa internacional de mercaderías*, (The Principle of Conformity in Contracts for the International Sale of Goods), Centro de Estudios Registrales, Madrid 2002, 464 p.

JIMÉNEZ BLANCO, P., *El contrato internacional a favor de tercero*, (International Contracts in Favour of Third Parties), Univ. de Santiago de Compostela, Santiago de Compostela 2002, 322 p.

JUÁREZ PÉREZ, P., *Orden social y litigios internacionales: competencia judicial*, (Social Order and International Disputes: Jurisdiction), Comares, Granada 2002, 246 p.

We should celebrate the publication of this book on jurisdiction in social order as hitherto, since the Organic Law on the Judiciary was passed in 1985, only sectorial and partial studies had been conducted. Dra. Juárez Pérez, who studied and trained in legal research under the guidance of Professor E. Pérez Vera while still with the UNED, displays in this book a considerable amount of the methodological and scientific knowledge acquired at that university. As a result the book's research, although directed by her new colleagues at the Universidad Carlos III, nonetheless appears to be a product of the school of the UNED. We should add that the reason for pointing this out is to clarify that we fully agree with the author of the foreword when she states Dra. Juárez Pérez's book "displays the same soundness as the previous one" (p. XVII), but disagree with her observation that the "credit" for conducting this research is due to the research team of the Universidad Carlos III. It is sufficient to note the structure and content of the footnotes and the clear wording and approach to the subject to notice the difference between Dra. Juárez's study and the research produced by the Universidad Carlos III.

This is a piece of honest and rigorous research written in a style that is easy to read and understand. Furthermore, it is not only conducted from the perspective of Spanish law but takes into account the much broader legal framework that the processes of economic integration, such as that of the European Community, provide for relations in labour and social-security matters. Although the purpose of this research is to gain a post as university lecturer, it is nonetheless a useful source

for other law professionals such as judges, prosecutors, barristers and solicitors. In this regard the author takes a pedagogic approach in Chapter one and sets out very clearly the scope of action of Spanish social jurisdiction in foreign legal transactions. This chapter lays the groundwork for the following three chapters. Chapter II analyses the entry into force of R. 44/2001 and its significance, both in general and in regard to the complexity of employment contracts. But this research would not be complete without the list included in Chapter III of the international treaties on international jurisdiction to which Spain is a party and the definition of their scopes of application in relation to national and community law. To complete the circle, Dra. Juárez Pérez performs a thorough analysis of the various situations arising from individual labour relationships, the posting abroad of workers and industrial relations. Although only briefly, she also analyses social security relations, a subject shunned by most scholars of private international law. Finally, we should point out that throughout the book the author asks many questions and attempts to answer them progressively, bearing in mind that she is dealing with a highly sensitive subject that involves many interests that are difficult to reconcile. (I.G.R.).

LARA AGUADO, A., *La contratación transfronteriza de valores negociables en la Unión Europea*, (The Cross-Border Purchase of Negotiable Securities in the European Union), Comares, Granada 2002, 296 p.

LÓPEZ-CARCELLER MARTÍNEZ, P., *La reivindicación de los bienes culturales muebles ilegalmente exportados*, (Reclaiming Illegally Exported Movable Cultural Assets), Tirant lo Blanch, Valencia 2001, 128 p.

MARCHAL ESCALONA, N., *Garantías procesales y notificación internacional*, (Procedural Guarantees and International Document Service), Comares, Granada 2001, 424 p.

El nuevo régimen de la notificación en el espacio judicial europeo, (The New System of Document Service in the European Legal Area), Comares, Granada 2002, 248 p.

MARTÍNEZ SANZ, F., *La responsabilidad del porteador en el transporte internacional de mercancías por carretera. CMR*., (The Responsibility of the Carrier in the International Carriage of Goods by Road. CMR), Comares, Granada, 2002 656 p.

MIGUEL ASENSIO, P. A. de, *Derecho privado de internet*, (Private Law on the Internet), 2nd ed., Civitas, Madrid 2001, 584 p.

Derecho privado de internet, (Private Law on the Internet), 3rd ed., Civitas, Madrid 2002, 648 p.

MIQUEL CALATAYUD, J. A., *Documento extranjero ante el registro de propiedad*, (Foreign Documents vis-à-vis the Land Register), Centro de Estudios Registrales, Madrid 2002, 256 p.

MILÁNS DEL BOSCH PORTOLES, I. and MADRAZOS RIVAS, E., *La universidad como agente de cooperación al desarrollo*, (The University as a Development Cooperation Agent), Dykinson, Madrid 2002, 344 p.

MORÁN GARCÍA, M. E., *Derecho de los mercados financieros internacionales*, (Law of International Financial Markets), Tirant lo Blanch, Valencia 2002, 519 p.

MOYA ESCUDERO, M., (Dir.), *Comentario Sistemático a la Ley de Extranjería*, (Systematic Commentary on the Law on Aliens), Comares, Granada 2001, 1040 p.

OLIVA BLÁZQUEZ, F., *Compraventa internacional de mercaderías (ámbito de aplicación del Convenio de Viena de 1980)*, (The International Sale of Goods (Scope of Application of the Vienna Convention of 1980)), Tirant lo Blanch, Valencia 2002, 552 p.

OREJUDO PRIETO DE LOS MOZOS, P., *La celebración y el reconocimiento de la validez del matrimonio en Derecho internacional privado español*, (The Conclusion and Recognition of the Validity of Marriage in Spanish Private International Law), Aranzadi, Navarra 2002, 364 p.

OTEROS FERNÁNDEZ, M., *Determinación de la competencia judicial internacional y territorial: sumisión tácita y declinatoria*, (Determining International and Territorial Jurisdiction: Tacit Submission and Refusal), Univ. De Córdoba, Córdoba 2002, 304 p.

PARRA RODRÍGUEZ, C., *El nuevo Derecho internacional de los contratos*, (The New International Law on Contracts), Bosch, Barcelona 2001, 504 p.

PÉREZ MARTÍN, E., *Los extranjeros y el Derecho en la antigua Grecia*, (Aliens and Law in Ancient Greece), Univ. Rey Juan Carlos/Dykinson, Madrid 2001, 340 p.

Although the content of this book by Dra. Pérez Martín (Universidad Rey Juan Carlos – Madrid) has not changed much since the first version was submitted as a doctoral research paper – on that occasion I was a member of the examining panel together with such prestigious professors of private international law as Dr. Julio D. González Campos (Universidad Autónoma), José C. Fernández Rozas (Universidad Complutense) and P. Abarca Junco (UNED) – it is worth pointing out the importance of its considerations of private international law from a historical perspective. It is by no means unusual for a scholar to explore the subject

of aliens nowadays, but to do so from the perspective of classical Greece indicates a certain enthusiasm about history that is only possible under the guidance of Professor Espinar Vicente. During the defence of the thesis we made a few objections and criticisms which are not worth pointing out here, as this is not the time and place. We will merely state what is required of a publication such as the SYIL – to provide knowledge to those in other countries of both the works that are published and the authors responsible for them. The reader will find an ambitious work based on two pillars which introduce the points of departure and perspective of private international law. The first part studies the different models of organization of social groups in classical Greece, with reference to Aristotle, Epicure and Fustel de Coulanges. It explains how religion, culture and law influenced the composition of the Greek "polis". Chapter II goes on to point out the heterogeneity within Greek homogeneity and attempts to define the characteristics of private international law among the Greek "poleis", in which the concept of sovereignty differs from the current notion. The author makes an interesting point about international relations in the last section of this chapter. Having laid this necessary groundwork, she discusses the position of aliens in the Spartan and Athenian models and the existence of various statuses that posed a considerable number of problems. In this final chapter, Dra. Pérez Martín explores the problems raised by issues from which the existence of a private international law may be deduced: marriage, successions and contracts.

We should nonetheless point out that this is not a history book or a book about the Greek origins of private international law; rather, it is a historical analysis of the consequences of globalization in a world beset with constant manifestations of regionalism and nationalism. And there is an underlying current – that is highly topical – that points to the advisability of adopting multilateral as opposed to bilateral and unilateral solutions. We should remember we are dealing with a period in which the dominant power was very strongly felt vis-à-vis the smaller communities. And this observation is particularly important with respect to the position of the alien in an international society lacking in cultural, social, economic or legal balance. In such a situation, failure to belong to a particular community did not amount to an absence of rights; rather, it led to the marginalization of the individual, which was only overcome if the person managed to become integrated into the local culture, society, economy and law. This is therefore a complex and difficult subject with highly complicated materials of dubious legal rigour but which cannot be dispensed with as there are simply no others. Therefore, we believe that this book is worth reading since, although it does not solve current problems, is helps us reflect on and reconsider certain aspects of the law on aliens – and of private international law too – in order to realize that these old problems not only call for new solutions. (I.G.R.).

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REQUEJO ISIDRO, M., *La cesión de créditos en el comercio internacional*, (The Granting of Loans in International Commerce), Universidad de Santiago de Compostela, Santiago de Compostela 2002, 281 p.

RODRÍGUEZ BENOT, A., (Dir.), *La multiculturalidad: especial referencia al Islam*, (Multiculturality: Special Reference to Islam), Consejo General del Poder Judicial, Madrid 2002, 467 p.

RODRÍGUEZ GAYÁN, E., *Salvamento marítimo internacional*, (International Maritime Salvage), Tirant lo Blanch, Valencia 2002, 260 p.

RODRÍGUEZ PINEAU, E., *Régimen económico internacional. Aspectos internacionales*, (International Economic System. International Aspects), Comares, Granada 2002, 304 p.

RODRÍGUEZ VÁZQUEZ, M. A., *Denegación de la eficacia de sentencias europeas por indefensión del demandado*, (Denial of the Enforceability of European Judgments owing to Defendant's Lack of a Proper Defence), Bosch, Barcelona 2001, 220 p.

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SALINAS MOLINA, F., (Dir.), *Derecho Internacional Privado. Trabajadores extranjeros. Aspectos sindicales, laborales y de seguridad social*, (Private International Law. Foreign Workers. Trade-Union, Labour and Social-Security Aspects), Consejo General del Poder Judicial, Madrid 2001, 582 p.

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VEGA VEGA, J. A., *El contrato de permuta financiera (SWAP)*, (Swap Agreements), Aranzadi, Pamplona 2002, 320 p.

VIÑAS I FERRÉ, R., *Dret internacional privat del Principat D'Andorra*, (Private International Law of the Principality of Andorra), Vol. I, Marcial Pons, Madrid/Barcelona 2002, 288 p.

ZAMORA CABOT, F. J., *Las vías de solución de los conflictos de extraterritorialidad. Un estudio a partir del Derecho antitrust de los Estados Unidos*, (Ways of Settling Conflicts on Extraterritoriality. A Study Based on United States Antitrust Law), Eurolex, Madrid 2001, 192 p.

4. Articles, and Notes

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AGUILAR BENÍTEZ DE LUGO, M. and CAMPUZANO DÍAZ, B., "El certificado de idoneidad para las adopciones internacionales desde la perspectiva del derecho internacional privado español", (The Certificate of Suitability for International Adoptions from the Perspective of Spanish Private International Law), GONZÁLEZ MARTÍN, N., and RODRÍGUEZ BENOT, A., (Coords.), *Estudios sobre adopción internacion*al, Univ. de México 2001, 205–249.

AGUILAR GRIEDER, H., "Arbitraje, grupos de Estados y extensión de los efectos de la cláusula arbitral", (Arbitration, Groups of States and Extension of the Effects of the Arbitration Clause), *Revista de la Corte Española de Arbitraje*, vol. XVI (2000/2001), 57–82.

ÁLVAREZ GONZÁLEZ, S., "Igualdad, competencia y deslealtad en el sistema español de Derecho interregional (y en el de Derecho Internacional Privado)", (Equality, Competition and Disloyalty in the Spanish System of Interregional Law (and in that of Private International Law), *REDI*, vol. LIII (2001) n. 1 and 2, 49–74.

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"El alcance de la reforma de la Ley de Enjuiciamiento Civil en el Derecho Internacional Privado: Presentación General", (The Scope of the Reform of the Law of Civil Procedure in Private International Law: A General Introduction), *Anuario Español de Derecho Internacional Privado*, t. 1 (2001), 145–153.

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EUROPEAN COMMUNITY LAW

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Table of Cases

Spanish Yearbook of International Law, Volume VIII, 2001–2002

Index[1]

[1] This Index was compiled by M.A. Almeida Nascimento, C. Antón Guardiola, V. Carreño Gualde, J. Ferrer Lloret, F. Lozano Contreras, F. Pascual Vives and M. Requena Casanova (sections of Public International Law); B. Arp, A. Aura Larios de Medrano and E. Crespo Navarro (sections of Private International Law).

Spanish Yearbook of International Law, Volume VIII, 2001–2002