

La Ley Orgánica 16/2015 sobre Privilegios e Inmunidades: gestación y contenido. By José Martín y Pérez de Nanclares (dir.), *Cuadernos de la Escuela Diplomática No 55* (Madrid, Ministerio de Asuntos Exteriores y de Cooperación, 2016), 634 págs.

These are good times for the community of internationalists, particularly for Spanish scholars. First of all, because recent Spanish legislation have come to update and develop relevant legal aspects concerning the international relations of the Kingdom of Spain. Thus: Law 2/2014, of 25 March, on the State's External Action and Service (*Ley de Acción y del Servicio Exterior del Estado*, BOE No. 74, of 26 March 2014); Law 25/2014, of 27 November, on Treaties and Other International Agreements (BOE No. 288, of 28 November 2014); and Organic Law 16/2015, of 27 October, on Privileges and Immunity of Foreign States, International Organizations Headquartered or with Offices in Spain, and International Conferences and Meetings Held in Spain (*Ley Orgánica sobre privilegios e inmunidades de los Estados extranjeros, las Organizaciones Internacionales con sede u oficina en España y las Conferencias y Reuniones internacionales celebradas en España*, BOE No. 258, of 28 October 2015). The Law 29/2015, of 30 July, on International Legal Cooperation in Civil Matters (*Ley de Cooperación Jurídica Internacional en materia Civil*, BOE No. 182, of 31 July 2015) also needs to be taken into account. This legislative activity on “international matters” is quite impressive, because it is rather unusual, regardless of their technical accuracy or political opportunity, which has so far produced divergent scholarly reactions.

Indeed, we must also welcome the fact that these Laws have motivated the publication of various outstanding scholarly analysis, mainly *Comentarios a la Ley de tratados y otros acuerdos internacionales* (Comment of the Law on Treaties)¹ and the book which is precisely the object of this review, *La Ley Orgánica 16/2015 sobre Privilegios e Inmunidades: Gestación y Contenido*, directed by J. Martín and Pérez de Nanclares. This Law 16/2015 has also been specifically analysed by J. Ferrer Lloret and J.A. González Vega within the “forum” inaugurated in the new phase (2016-2019) of the *Revista Española de Derecho Internacional*, [68 REDI (2016), pp. 73-97], as well as in an article recently signed by C. Gutiérrez Espada in *Cuadernos de Derecho Transnacional* [8 (2016), pp. 5-33].

The books on Law 25/2014 and Law 16/2015 are both directed by J. Martín y Pérez de Nanclares, either individually or in collaboration with other scholars. Professor of Public International Law at the University of Salamanca and Head of the International Legal Office (*Asesoría Jurídica Internacional*, AJI) of the Spanish Ministry of Foreign Affairs and of Cooperation (MAEC), his credentials are unquestionable. To a large extent, he may be considered as the intellectual father of these Laws. Besides him, a select cast of professors of Private and Public International Law contribute to both books; some of them participating in both, like P. Andrés Sáenz de Santa María, J. Díez-Hochleitner, C. Escobar Hernández, C. Espósito Massicci, A.F. Fernández Tomás, C. Gutiérrez Espada and A. Pastor Palomar.

¹ See a comment in this *Yearbook* at 20 SYbIL (2016) 325-327 [doi: 10.17103/sybil.20.17].

We must acknowledge that the quality of the contributions contained in the book here reviewed is largely backed up by the expertise of their authors, who have particularly dedicated great attention to the study of those aspects of international legal relations. In fact, the aforementioned scholars P. Andrés Sáenz de Santa María, C. Gutiérrez Espada, C. Espósito Massicci and A.F. Fernández Tomás, and other authors such as A. Borrás, A.G. López Martín, J.M. Sánchez Patrón, J. Abrisketa Uriarte and R. Carnerero Castilla, had focused part of their research on the study of immunities in international law. For her part, C. Escobar Hernández, member of the International Law Commission and special rapporteur therein on the subject of “Immunity of State officials from foreign criminal jurisdiction” deserves a special mention; she provides a magnificent synthesis of the work of the Commission on that topic. Amongst the other authors, we find some working in the MAEC (A. Oliva Izquierdo, diplomat and legal adviser at the AJI, and C. Pérez-Desoy Fages, deputy director general of the chancellery), along with a lawyer (B. Djoneva) and a PhD student from the University of Salamanca (D. González Herrera).

Immunities in international law, in general, have been a recurring topic among Spanish legal scholars specializing in international law, private law and public law. Reference must be made to A. Miaja de la Muela and his special course taught at The Hague Academy of International Law in 1972. In particular, Spanish legal scholars have focused on the practice of foreign courts affecting Spain (for example, the early study of J. Gascon and Marin, published in 1940) and, above all, on the Spanish conventional, legislative and judicial practice.

Spain is not a party to the 1972 Council of Europe Convention (which has nevertheless been examined by A. Ortiz-Arce), but is, on the contrary, a party to other relevant treaties, in particular, those dealing with: (a) diplomatic and consular relations and special missions; (b) privileges and immunities of the United Nations and its specialized agencies; and (c) the EU privileges and immunities, including Exchange of Letters constituting an agreement between Spain and the EU which developed it. Spain has also entered into several headquarters agreements (studied by A. Chueca Sancho) and agreements to regulate the immunities of conferences and international meetings held in Spain (e.g., P. Andrés Sáenz de Santa María dedicated a few lines to the agreement regarding the Madrid Peace Conference of 1991). It should be noted, moreover, that Spain gave its consent in 2011 to the United Nations Convention on Jurisdictional Immunities of States and their Property, 2004, not in force yet. Logically, Spanish scholarship has adequately analysed the drafting process of the 2004 Convention as well as its final text (e.g., C. Espósito Masicci, J. Ferrer Lloret and FJ Carrera Hernández); C. Gutiérrez Espada has dedicated particular attention to the accession of Spain to this Convention and J. Mendieta Grande has addressed the topic from the perspective of Spanish procedural law.

Spanish judicial practice does not seem to converge on a singular position of Spain regarding customary international law on immunities and its trends. Spanish legal scholars have studied with profusion this practice of the Spanish courts: (a) in general (e.g., J. Vega Torres, LI. Sánchez Rodríguez, J. Quel López, along with the abovementioned A. Chueca and A.G. Martín López, and A. Lazari, an Italian scholar based in Spain; (b) with particular emphasis on immunity from execution

(e.g., the aforementioned J. Vega Torres, J. Ferrer Lloret, F.J. Carrera Hernández, as well as M.A. Ruiz Colomé or L. Carballo Piñeiro); (c) in the immunity of Heads of State (much has been written by Spanish scholars on the Pinochet case and later cases of former Heads of State or Government or Heads of State or Government in office, but S. Torrez Bernárdez and, in particular, R. Carnerero Castilla or J. Jorge Urbina have focused on this immunity); (d) on the immunity of diplomatic agents (particularly studied by J. Quel López); or (e) in the admission of the restrictive thesis (A. Chueca and J. Díez-Hochleitner, or A. Soria Jiménez). Many of these studies are built upon the articulation of immunities in terms of the right to effective judicial protection and remedies, particularly the works of J.L. Roca Aymar or F. Gastón Inchausti.

A number of studies or notes deal with relevant judicial decisions of Spanish ordinary courts or the Spanish Constitutional Court: among others, studies and notes of L.I. Sánchez Rodríguez, C. Espósito Massicci —together with F.J. Garcimartín Alférez—, P. Andrés Sáenz de Santa María, C. Gutiérrez Espada or J.M. Sánchez Patrón, as well as J. Sellarés Serra, J.A. González Vega, F. Hernández Cruz, C. Quesada Alcalá, E. Díez Peralta, A. Garrido Muñoz, A.D. Arrufat Cárdua, etc. Other Spanish legal scholars have studied immunities in international law following decisions of the ECJ (e.g., A. Borrás, jointly with JD González Campos, or P. Andrés Sáenz de Santa María) or decisions of the ECHR (A. Sánchez Legido, E. Salamanca Aguado, V. Bou Franch, A. Pastor Palomar or the aforementioned A. Garrido Muñoz), and some of them have dealt with the recent tension between state immunities and human rights, particularly on the occasion of the judgment of the ICJ of 2012 (e.g., M.D. Bollo Arocena, M.A. Cebrián Salvat R. Garciandía Garmendia, or the aforementioned C. Espósito Massicci, A.F. Fernández Tomás, J. Ferrer Lloret and R. Carnerero Castilla) or the practice of the United Nations Security Council (F. Jiménez García).

Without any claim of exhaustiveness, this review of the Spanish scholarly production on immunities should not fail to mention the very special interest of Spain in the immunity of warships or wrecked or sunken state vessels. M.J. Aznar Gómez is, without any doubt, one of the doctrinal references in Spain and abroad regarding this immunity.

Drawing from this doctrinal background, and joining the small group of States that have an immunities (in international law) law, Spanish Organic Law 16/2015 tries to solve some of the problems caused by the generic remission to “cases of immunity of jurisdiction and from execution established by the rules of Public International Law” of the original Article 21 of Spanish Organic Law 6/1985, of 1st July, of the Judicial Power, or to “subjects or property that enjoy immunity from jurisdiction or execution according to the rules of Public International Law” of Article 36(2)(1) of Spanish Law 1/2000, of 7 January, of Civil Procedure (provision analysed by V. Bou Franch). In its judgment 107/1992, of 1st July, the Spanish Constitutional Court itself had expressed the advisability of a legislative development in this sense, for the sake of legal certainty. And Organic Law 16/2015 has largely undertaken this development —except for certain exclusions—, not being limited to the immunities of foreign States and their property, which is nevertheless its essential core. Indeed, this Organic Law also covers the immunities of the Heads of State and Government and Foreign Ministers, warships and other state vessels and aircrafts, the status of visiting armed forces, and as its

own title suggests the immunities of international organizations with headquarters or office in Spain and international conferences and meetings held in Spain, as well as some of the privileges of States, international organizations and international conferences and meetings, along with procedural issues.

A review of a book on a domestic law regarding immunities and privileges in international law is not the place to evoke the broad normative substance of that law, what it says and what it does not say. Neither of the applicable international law, including the 2004 Convention that inspires the essential core of that domestic regulation. It is not even a proper place to refer to the many interesting reflections contained in the book, among which I should nevertheless highlight some particularly relevant. First of all, the different nuances concerning the limits to immunity, such as the classification of acts or property and the consideration of its nature or purpose, or its attribution or not to the State and the interest they promote, as reference criteria; the balance between immunities and human rights, including effective judicial protection and redress and punishment of serious violations of essential human rights and humanitarian law and other personal injuries, death or damages to property; or the regulatory differences between Organic Law 16/2015 and the 2004 Convention, or other relevant Spanish laws and treaties (among others, Law 14/2014 on Maritime Navigation and the 1982 United Nations Convention on the Law of the Sea, or the Spanish-American Defence Cooperation Agreement and the NATO or UN SOFAs). For example, we may refer to: the concept of commercial transaction or the “specific categories of property”; the “connection” of the property with the State against which the proceeding has been initiated; the definition, meaning and scope of the immunities of warships and other State ships and aircrafts; their applicability or not to acts of the armed forces of a State abroad, with or without the consent of the territorial State, whether they are or not protected by a special status. We may also mention the different foundation of the limits on the immunity of States and international organizations, or the “alternative dispute settlement solution test”.

Secondly, the necessary or redundant character of Title III of the Organic Law 16/2015 (“Immunities of Warships and State Ships and Aircrafts”), taking into account the general clause in Article 4 and Articles 2(i) y 20(1)(b) and (e) of the Law. Thirdly, the difference between an immunity regime and a regime of inhibition of jurisdiction or the renunciation to the exercise of jurisdiction. Fourthly, the character of the Law as a “minimum regulation” or as a “subsidiary rule” when applied to international organizations, and the set of “agreements” contained in Article 35 of the Law. Fifthly, the application of the Law to bodies pertaining to the structure of an international organization and, in general, the consideration of different agencies and entities as “international organizations” to which the Law is applicable, and the necessity to provide coherence to the Spanish legislation and conventional practice.

I will, therefore, limit myself to comment only on a few points concerning the content and structure of the book. Regarding the later, the different contributions are organized upon four sections, which do not follow the systematic order of the Law, but cover the main cases of immunities in international law therein regulated. There is, however, no analysis of the procedural issues, except for very general references provided by J. Martín y Pérez de Nanclares or very specific references

provided by C. Pérez-Desoy Fages and C. Escobar Hernández. The sections in which the book is structured and the contributions included in each of them are: (i) “General issues”, with the contribution of J. Martín and Pérez de Nanclares (“Why an Immunity Law? First reflections on the relevance and content of Organic Law 16/2015, Privileges and Immunities”, pp. 7-40), which deals with the elaboration process, the convenience, the organic and ordinary character and the content of the Law; (ii) “immunities of foreign States in Spain”, which includes the contribution of C. Gutiérrez Espada [“Immunity from State Jurisdiction (Scope and Exceptions)”, pp. 41-58], A. Borrás (“Immunity of States and universal jurisdiction in civil matters”, pp. 59-77), J. Díez-Hochleitner (“Immunity from execution of Foreign State Property in the 2004 Convention and Organic Law 16/2015”, pp. 79-115), A.G. López Martín (“Spanish jurisprudential practice in matters of international immunities”, pp. 117-142), J.M. Sánchez Patrón (“Immunity from execution on property of foreign States: applicable legal principles according to Spanish constitutional case-law”, pp. 143-167), J. Abrisketa Uriarte (“Embassies and consulates abroad: bases of extraterritorial jurisdiction?”, pp. 169-194) and A. Oliva Izquierdo (“Immunity from Jurisdiction and Execution in Spanish Labor Law: Its Relation to Article 7 of the 1961 Vienna Convention”, pp. 195-203); (iii) “Immunities of international organizations”, which includes the contributions of P. Andrés Sáenz de Santa María (“Immunities of international organizations: general and Spanish perspective”, pp. 205-232), the comments of C. Pérez-Desoy (“Comments to the Round Table” The Immunities of International Organizations”, pp. 233-234), the contributions of D. González Herrera (“Brief reflections on the immunities of international organizations”, pp. 235-255), A. Pastor Palomar (“The scope of the concept of ‘international organization’ in the bill: special legal statutes”, or rather “The scope of the concept of ‘international organization’ in Organic Law on privileges and immunities: the special legal statutes”, pp. 257-300) and B. Djoneva (“Short notes of interest in relation to the Law on privileges, immunities and facilities and on financial support granted by Switzerland as host State”, pp. 301-305); and (iv) “Other immunities”, which includes the contributions of C. Escobar Hernández (“Immunities of Heads of State, Heads of Government and Ministers of Foreign Affairs: the work of the International Law Commission”, pp. 307-324), R. Carnerero Castilla (“The immunities of former Heads of State, Heads of Government and Foreign Ministers: the problem of determining official acts performed in the exercise of their duties”, pp. 325-337), C. Espósito Massicci (“Immunities with respect to warships and aircrafts of foreign States”, pp. 339-355) and A.F. Fernández Tomás (“The Spanish position before the immunities of the Armed Forces of other States”, pp. 355-386).

Concerning this structure, it is unfair to demand the circle to be “squared”. But because of its general character, when dealing with immunities of foreign States, Heads of State, diplomatic and consular staff and international organizations, the contribution of A.G. López Martín —which elaborates on an earlier analysis published in *Cuadernos de Derecho Transnacional* in 1999— could well have been located in the section “General issues”. Furthermore, although it addresses a particular issue, that of A. Oliva Izquierdo is also concerned both with the immunity of States —even diplomatic immunities— and those of international organizations. Beyond the structure of the book, it is not easy to find a fitting fit in this book to the interesting contribution of J. Abrisketa Uriarte.

A second observation is that the content of the book really honors its title. It does not deal with Organic Law 16/2015 itself. It does not, for example, contain “Article by Article” comments (such as the *Comentarios a la Ley de tratados y otros acuerdos internacionales*, referred to above). More importantly, not all contributions analyse the Organic Law 16/2015, although they make reference to its “gestation and content”. As J. Martín y Pérez de Nanclares explains in his introductory contribution to the book, the publication of the book originates in a series of papers presented during a specialized seminar held at the Spanish Diplomatic School on March 26, 2015, which helped to finalize the first preliminary draft law to which the AJI had been working on since the end of 2013.

Seemingly, not all the papers presented at the seminar are included in the book. C. Gutiérrez Espada refers to the scheduled intervention of F. Garcimartín Alférez to address the procedural regime of the immunities of foreign states. C. Perez-Desoy Fages also makes reference in his contribution to the participation in the panel discussion of F. Garcimartín and A. Rodrigo Hernández. These papers or contributions to the seminar, however, have not been included in the book. In addition, the brief comments of C. Pérez-Desoy —written with a fairly un-careful phrasing— discuss aspects supposedly mentioned in the intervention of P. Andrés Sáenz de Santa María in the seminar which are not included in her contribution to the book (keys to the negotiation process of headquarters agreements, and in particular the interference of political power). So it is to be supposed that her intervention in the seminar differs in these aspects from her contribution to the book.

Anyway, what I would like to emphasize is that, when this seminar was held, only one first (not definitive) version of the preliminary draft law was available. On the other hand, in the absence of explicit confirmation, it may be inferred from various incidental references that the texts of the contributions of all those who participate in this book were not submitted for publication before 29 January 2016. Although R. Carnerero expressly mentions 20 June 2015 as the date he was due to deliver his pages to the editor, it is the later date that appears in the book, corresponding to the day in which C. Gutiérrez Espada dates his contribution. That is a day after the day in which A. Oliva’s contribution is dated. That means that the contributions were delivered to the publisher once the Organic Law 16/2015 had been published in the *Spanish Official Gazette* (BOE) on 28 October 2015 and entered into force on 17 November 2015. Be that as it may, while some contributions expressly analyse the Law (notably those of J. Martín y Pérez de Nanclares, C. Gutiérrez Espadas, J. Díez-Hochleitner, P. Andrés Sáenz de Santa María, A. Pastor Palomar, C. Espósito Massicci and D. González Herrera), others refer to the preliminary draft law jointly adopted by the Ministry of Foreign Affairs and of Cooperation and by the Ministry of Justice (those of A. Borrás, J.M. Sánchez Patrón or R. Carnerero Castilla). Other authors mention the Law only in passing (A.G. López Martín and A. Oliva Izquierdo), or do not mention at all neither the drafts nor the Law (J. Abrisketa Uriarte and C. Escobar Hernández). Logically, the scholarly analysis referred to the different versions of the preliminary draft law or to the bill submitted by the Council of Ministries (*Consejo de Ministros*) to the Legislative Assembly (*Cortes Generales*) lose partly their value insofar as these drafts were modified later on. They will nevertheless always illustrate the preliminary works. It is true that these

modifications have had a limited scope, but after the seminar virtually all the suggestions contained in the report of the General Council of the Judicial Power (*Consejo General del Poder Judicial*) —mostly to adjust the draft Law to the 2004 Convention— and in the opinion of the Council of State (*Consejo de Estado*), as well as four amendments presented during the parliamentary procedure, were incorporated into the preliminary draft Law, the bill and the Law itself. It is rather incidental that, although A. Pastor Palomar's contribution refers to the Law, honouring the title of his contribution at the beginning of his text, the title of his contribution in the general index of the book refers to the bill. For his part, A.F. Fernández Tomás often alludes to the "future Law" (as does also B. Djoneva), formulates an alternative proposal to the first version of the preliminary draft Law and deals with different versions of the preliminary draft Law.

It is noteworthy that, since most papers aimed at providing a scholarly contribution to the process of Spanish national law-making, many of the authors advanced proposals: either to the wording of some versions of the drafts to Law 16/2015 (in particular A. Borrás, following the resolution adopted by the *Institut du Droit International* in Tallinn in 2015, and A.F. Fernández Tomás), or to the drafting or interpretation of this Law itself (e.g., A. Pastor Palomar's proposal to address a "possible interpretative solution to the Law", and in particular the proposal of the inclusion in the Law of an open-ended list of the international institutions to which the Law is applicable and of a new definition of "entity created by an international organization"). Other proposals refer to the consent given by Spain to, or to the interpretation of, the 2004 Convention: in this sense, the "late" Spanish declarations or reservations proposed by C. Gutiérrez Espada or J. Díez-Hochleitner, as had been proposed by other Spanish legal scholars who had previously analysed the Convention (e.g., J Ferrer Lloret); or the coherent interpretation of Article 19(c) of the Convention and Article 17(2) of the Law that the same J. Díez-Hochleitner considers to be possible; or the statement suggested by A.F. Fernández Tomás on the applicability of the Convention to acts of the armed forces of foreign States.

In short, the book magnificently illustrates the transfer of knowledge from the University to the Society and not only offers to the reader a selection of contributions from the most highly qualified members of the Spanish legal school versed on immunities in international law and other contributions of merit, but it is indeed a careful edition, which incorporates an "index", "summaries" of the main contributions and a useful compilation of annexes that reproduce the texts of the main procedures effected until the approval and publication of the Organic Law 16/2015: the text of the preliminary draft Law in its version sent on 9 April 2015 to the General Council of the Judicial Power and the Attorney General's Office (*Fiscalía General del Estado*) (pp. 455-475) and the reports of the Attorney's Council (*Consejo Fiscal*), of 20 May 2015 (pp. 619-634), and that of the General Council of the Judicial Power, of 28 May 2015 (pp. 531-618); the text of the preliminary draft Law submitted to the Council of State on 22 June 2015 (pp. 433-453) and the Council of State opinion 693/2015 of 23 July (pp. 477-529); the text of the bill sent by the Council of Ministers to the Legislative Assembly (pp. 411-432); and the text of the Law as published in the *Spanish Official Gazette* (pp. 389-410).

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