

# *Spain and the War on Iraq*

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The war on Iraq in 2003 had an important impact on Spain, both internationally because of the position taken by our country, and on the domestic political front. Furthermore, the government's clear support of intervention under the Popular Party changed radically after the Socialist Party won the March 2004 elections, going from active involvement in the use of force, unprecedented in our recent history, to total disengagement. A close look at Spanish practice on this issue is, therefore, of special interest.

We have divided this paper into three parts. In the first we deal with Spain's positions in the United Nations; in the second, we examine legislative consideration of the government's stance throughout a number of heated sessions in the Spanish Parliament; in the third, we discuss Spain's constitutional regulatory environment relating to Spain's participation in military conflicts. In each of these sections, the change in the governing party marked a decisive turning point in the direction taken in practice.

## I. SPAIN'S POSITION IN THE UNITED NATIONS: FROM SUPPORT FOR UNILATERAL INTERVENTION TO DEFENCE OF MULTILATERALISM

From the start of its membership on the Security Council as a non-permanent member in January 2003, Spain characterised itself as being keenly receptive to the positions of the United States and the United Kingdom and by its consistent support of the war, as shown in successive interventions by its representatives on the Council. Nonetheless, from 8 October 2002, the Ministry of Foreign Affairs had possession of a report by the Head of its International Legal Advisory Office<sup>1</sup> which, in analysing the principle of the prohibition of the use of force and in particular the right to self-defence and the system of collective security established in the United Nations Charter, underscored "the Security Council's monopoly of authorization of legitimate use of force on behalf of the international community", and offered an in-depth analysis of the Council's position thereon, in particular:

"the established practice . . ., under Article 42 of the Charter and as a last resort when all other measures taken to resolve a crisis of concern to the international community fail, of authorising certain States or organizations to use force to achieve specific goals as set forth by the Council in each situation and in the framework of certain conditions also established by the Council, on a case-by-case basis, depending on the circumstances prevailing in the particular situation at hand."

The Report then went on to discuss in detail the Security Council's position on Iraq, rejecting the theory of authorisation supposedly emanating implicitly from Resolution 678 (1990),<sup>2</sup> stating:

"what for the United States and the United Kingdom is a kind of contractual relationship between the coalition and Iraq that could be resolved at any moment by a castigatory operation if Iraq fails to comply with its obligations, for the Security Council as a whole is an institutionalized regime subject to

<sup>1</sup> The text of the Report was found at <http://www.diariodirecto.com/int/int030317informe.html>.

<sup>2</sup> On the problem of implicit authorizations see, inter alia, C. Denis, "La Résolution 678 (1990) peut-elle légitimer les actions armées menées contre l'Irak postérieurement à l'adoption de la Résolution 687 (1991)", *RBDI*, 1998, pp. 485–537; O. Corten and F. Dubuisson, "L'hypothèse d'une règle émergente fondant une intervention militaire sur une 'autorisation implicite' du Conseil de Sécurité", *RGDIP*, pp. 873–910; J. Lobel and M. Ratner, "Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime", *AJIL*, 1999, pp. 124–154; U. Villani, "La nuova crisi del Golfo e l'uso della forza contro l'Iraq", *RDI*, 1999, pp. 451–462; P. Palchetti, "L'uso della forza contro l'Iraq: la ris. 678 (1990) legittima ancora l'azione militare degli Stati?", *RDI*, 1998, pp. 471–475; U. Villani, *L'ONU e la crisi del Golfo*, Bari, Cacucci Ed., 2005, pp. 136–141.

international supervision, so therefore any resort to the use of force in response to non-compliance by Iraq must be always backed by the Council upon appropriate verification of serious non-compliance, in addition to or followed by issuance of a serious warning to Iraqi authorities.”

A study of Council practice led the Report to conclude that:

“we face a situation with which the Security Council is actively dealing, and it is therefore first and foremost up to the Security Council to adopt any measures as may be necessary at any given time to enforce its mandates and obtain compliance with the will of the international community, and no country can place itself in the position that corresponds to the Council on behalf of the international community as a whole.”

However, the well-founded opinions contained in this Report were not taken into account by Spain’s representatives on the Security Council; on the contrary, Spain aligned itself with the position of the United States from the start, accepting its assessment of the situation and its interpretation of prior Security Council resolutions as permitting intervention. At the 5 February 2003 session at which Secretary of State C. Powell exhibited the alleged evidence of Iraq’s possession of weapons of mass destruction and its links to terrorism, the then-Spanish Minister of Foreign Affairs, Ms. Palacio took the floor, and stated:

“The Secretary of State has put before us compelling data pointing to the existence of weapons of mass destruction and to the consequences of their possible use. Those data also confirm that Iraq is deceiving the international community and that it is not cooperating. Legally speaking, and in the context of the United Nations and of Resolution 1441 (2002) in particular, that information leads to the legal conclusion that there has been a flagrant violation of the obligations established in Resolution 1441 (2002)”.<sup>3</sup>

This explains the Minister’s negative assessment of the reports submitted by H. Blixy M. ElBaradei at the 14 February 2003 session, where she stated:

“Like hundreds of millions of citizens the world over, I have been following the words of the inspectors, of Mr. Blix and of Mr. ElBaradei with great care and attention and with an eagerness to hear just one sentence – an affirmation of active, immediate and complete cooperation by Saddam Hussein’s regime. The inspectors have not been able to make that affirmation”.<sup>4</sup>

Spain’s support of intervention even led it to co-sponsor with the United States and the United Kingdom the two draft resolutions seeking to establish a legal basis for the action. As is well known, both drafts resorted to the fallacious theory of

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<sup>3</sup> Security Council, 4701st meeting, 5 February 2003, Doc. S/PV 4701, p. 28.

<sup>4</sup> Security Council, 4707th meeting, 14 February 2003, Doc. S/PV 4707, p. 16.

linked resolutions, looking to the Council to find non-compliance with Resolution 1441 (2002) in order to revitalize the use of force authorisation contained in Resolution 678 (1990), and considering it unnecessary for the Council to have to expressly approve any new authorisation. The draft submitted on 24 February 2003, after citing the major Council Resolutions on Iraq starting with Resolution 661 (1990) and referring to the most pertinent provisions of Resolution 1441, noted that "Iraq has submitted a declaration pursuant to its Resolution 1441 (2002) containing false statements and omissions and has failed to comply with, and cooperate fully in the implementation of that resolution" and in the preamble limited itself to proclaiming that "Iraq has failed to take the final opportunity afforded it in Resolution 1441 (2002)". The second draft, submitted on 7 March, added a deadline of 17 March upon recognition of non-compliance, during which the Council could reach the conclusion that Iraq had changed its attitude, leaving it implicit that if this were not the case the authorisation to act would automatically come into force.<sup>5</sup>

Having failed to get approval for a new Resolution as featured above, it is worthy of note that in the dramatic Security Council session of 19 March 2003, held just hours before the commencement of military action, it was the representative of Spain who took on the job of demonstrating the existence of a legal basis to permit intervention, on which neither the representative of the United States nor of the United Kingdom took a stand. The Spanish Representative, Mr. Arias, stated:

"Spain understands, and it has demonstrated that since it became a member of the Council, that a new resolution, even if it were politically desirable, would not be legally necessary.

Indeed, the legitimate recourse to the use of force to disarm Iraq of its weapons of mass destruction is based on the logical linking of Resolutions 660 (1990), 678 (1990), 687 (1991) and 1441 (2002), adopted pursuant to Chapter VII of the Charter.

Resolution 660 (1990) considered the Iraqi invasion of Kuwait a breach of the peace and international security. Therefore, at that time, Iraq not only constituted a threat to peace and international security, but was also in breach of the peace and international security.

Iraq did not comply with that demand of the Council, which requested, in its second Resolution, that Member States use all means necessary to make Iraq

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<sup>5</sup> The operative part of the draft Resolution had the Council stating that it would "Find that Iraq has failed to take the final opportunity offered by Resolution 1441 (2002), unless, on or before March 17, 2003, the Council reaches the conclusion that Iraq has shown full, unconditional, immediate and active cooperation in conformance with its obligations to disarm under Resolution 1441 (2002) and relevant prior resolutions, and has surrendered all weapons, weapons support and distribution systems and structures prohibited by Resolution 687 (1991) and all relevant Resolutions thereafter, and all information relating to their prior destruction."

comply with resolution 660 (1990). An international coalition, under mandate, intervened militarily and restored international legality.

Resolution 687 (1991) declared a cease-fire, subordinating it to compliance with a number of conditions. The majority of them demanded the disarmament of weapon of mass destruction. They also referred to humanitarian matters, terrorism and the payment of war reparations. With the exception of the last issue, the remaining conditions were not met.

Iraq has provided cover to terrorists and has recently boasted of training suicide teams. Saddam Hussein's regime has not returned all those who disappeared or were taken prisoner. It continues to fail to provide information, in a clear, complete and authentic manner, on the whereabouts of its weapons and its programmes for weapons of mass destruction. Let us recall that paragraph 9 of Resolution 687 (1991) demanded that Iraq present to the Secretary-General, within a period of 15 days, a detailed report on the locations and characteristics of all its weapons of mass destruction. Twelve years later that information still has not been provided in a comprehensive manner, as demanded by the Council.

Resolution 687 (1991), therefore, left in abeyance Resolution 678 (1990), which authorized the use of force. It left it in abeyance, but it did not abolish it. The content of Resolution 678 (1990) continues to be perfectly valid, and that is recalled in Resolution 1441 (2002), unanimously adopted by the Council four and a half months ago.

Resolution 1441 (2002) recognizes that Iraq's non-compliance with the Council's resolutions constitutes a threat to international peace and security, it recalls that these have not been restored in the region – I am using the language of the resolution – and it decides that Iraq has failed to comply and continues to fail to comply most seriously with the demands imposed by the international community”.<sup>6</sup>

The fact that actions were being coordinated between Spain and the United States was shown clearly by the fact that the letter sent the following day by the United States Representative to the Chairman of the Security Council informing of the commencement of hostilities justified the action based on the same theory of linked resolutions.<sup>7</sup>

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<sup>6</sup> Security Council, 4721st meeting, 19 March 2003, Doc. S/PV. 4721, pp. 15–16.

<sup>7</sup> “The actions being taken are authorized under existing Council resolutions, including its Resolutions 678 (1990) and 687 (1991) . . . Iraq continues to be in material breach of its disarmament obligations under Resolution 687 (1991), as the Council affirmed in its Resolution 1441 (2002) . . . The Government of Iraq decided not to avail itself of its final opportunity under Resolution 1441 (2002) and has clearly committed additional violations. In view of Iraq's material breaches, the basis for the cease-fire has been removed and use of force is authorized under Resolution 678 (1990)” (*Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, Doc. S/2003/351).

In parallel to the role assumed by the Security Council, the Spanish Government sponsored a letter that was signed by the prime ministers of Spain, Italy, the United Kingdom, Portugal, Denmark, Poland, Hungary and the Czech Republic on 29 January 2003, in defence of the transatlantic link and warning Iraq of the consequences of its attitude and on 16 March of that year then Prime Minister Mr. Aznar participated in the Azores summit which gave the ultimatum to Iraq. As a corollary, on the day military operations began, Prime Minister Mr. Aznar made the following statement:

“Early this morning the last efforts concluded without result to get a decision by Saddam Hussein – to abandon power and leave Iraq – that would avoid the grave consequences of which the International Community has warned.

The Iraqi regime has consummated its challenge to legality, ignoring its obligation to disarm as demanded by the United Nations for twelve years, up to Security Council Resolution 1441 passed nearly five months ago.

Saddam Hussein has rejected his last opportunity.

With a full sense of responsibility, the Government of the Nation supports the reestablishment of international legality and compliance with the obligations determined to guarantee peace and security . . .

We concur with a large group of countries with which we share the principal concern of achieving effective peace and conditions of security in relations among States . . .

We have assumed our responsibilities. There were more comfortable options, but we do not want to leave to the future the dangers we should confront in the present.

In doing so, we act in accordance with the spirit and the letter of international law . . .

At the same time, I want to assure the Spanish people that the military actions undertaken will be consistent with and proportionate to the goal of making the disarmament of Iraq possible under the terms of Security Council Resolution 1441 . . .”<sup>8</sup>

The Spanish government’s decision to support the war against Iraq and to adopt the United States’ reasoning was made clear at the 27 March 2003 session of the Security Council, where the Spanish representative, Mr. Arias, stated:

“Saddam Hussein’s repeated non-compliance over the past 12 years with his obligation to eliminate his weapons of mass destruction – as set forth in many resolutions of the Security Council and most recently in Resolution 1441 (2002), which gave Iraq one last chance to disarm – has compelled an international coalition, which includes my country, to take enforcement action to achieve that disarmament.

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<sup>8</sup> The text of this Declaration was found on 20 March 2003 at <http://www.mpr.es/irak/default.asp>.

Spain and other members of the Security Council used to the maximum all available diplomatic resources to achieve the disarmament of Iraq by peaceful means. Resolution 1441 (2002) and its reference to others adopted by this Council supported the legality of the action undertaken by the coalition. We want military operations to end as soon as possible, with a minimum loss of human life".<sup>9</sup>

After the war ended, Spain once again co-sponsored with the United States and the United Kingdom a draft which would become Resolution 1483 (2003), by which the Security Council accepted the *fait accompli* and endorsed the decisions of the Coalition Provisional Authority in exchange for a discreet role in Iraqi reconstruction. In explaining his support for the Resolution, the Spanish representative stated:

"I believe that this is a very important day for the people of Iraq as well as for the United Nations. The Security Council, as a whole, has understood that the time to be realistic has now come. Some may say that this resolution is not perfect, but no one can deny that it provides an appropriate legal framework for dealing with the special, anomalous and grave situation facing the international community".<sup>10</sup>

Once the United Nations was able to deal once again with Iraq, Spain was one of the States showing the greatest optimism relating to the situation in the country

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<sup>9</sup> Security Council, 4726th meeting, 27 March 2003, Doc. S/PV. 4726, p. 29. The similarity in reasoning between the United States and United Kingdom representatives continued. In fact, at the same session, Sir Jeremy Greenstock (United Kingdom) stated: "The action that the United Kingdom is now taking with its coalition partners to uphold United Nations resolutions is both legitimate and multilateral. The use of force is authorized in the current circumstances under Security Council Resolutions 678 (1990), 687 (1991) and 1441 (2002). A broad coalition of well over 40 States is supporting this action materially or politically" (S/PV. 4726, p. 23); for his part, Mr. Negroponte (United States) said: "It was regrettable that the Government of Iraq decided not to take the final opportunity for compliance provided in Security Council Resolution 1441 (2002). The coalition response is legitimate and not unilateral. Resolution 687 (1991) imposed a series of obligations on Iraq that were the conditions of the cease-fire. It has long been recognized and understood that a material breach of those obligations removes the basis of the cease-fire and revives the authority to use force under resolution 678 (1990). Resolution 1441 (2002) explicitly found Iraq in continuing material breach. In view of Iraq's additional material breaches, the basis for the existing cease-fire has been removed and the use of force is authorized under Resolution 678 (1990)" (S/PV. 4726, p. 25).

<sup>10</sup> Security Council, 4761st meeting, 22 May 2003, Doc. S/PV. 4761, p. 6. It is appropriate to recall that Resolution 1483 marks the meeting point of the States that supported the war and those that were against it. The positive stances of France, Germany and Russia regarding the Resolution are dealt with in my article "El Consejo de Seguridad en la guerra contra Irak: ¿ONG privilegiada, convalidador complaciente u órgano primordial?" ("The Security Council on the war on Iraq: privileged NGO, complacent validator or principal body"), *REDI*, vol. LV, 2003, p. 218.

after the military action. There is a statement in this regard by Foreign Minister Ms. Palacio, who, at the 22 July 2003 Security Council session after stressing the importance of the impending constitutional process in Iraq, stated:

“Members may feel that some of these features are familiar to some of us who are members of the European Union, because, as some members have undoubtedly noted, these points faithfully describe the method whereby we Europeans came together to endow ourselves with a constitution. These are the distinctive features of the recently concluded Convention for the Future of Europe, which just presented the preliminary draft of a European constitution”.<sup>11</sup>

This same optimism was shown by Mr. Arias when Resolutions 1500 (2003)<sup>12</sup> and 1511 (2003), also co-sponsored by Spain, were approved:

“I wish to convey the Spanish delegation’s unreserved satisfaction that this resolution, so important for the future of Iraq, was unanimously adopted. Spain was a resolute sponsor of the draft resolution, convinced that it constituted an important step towards improving the lives of the Iraqis and restoring to them control of their own destiny. We believe that the resolution is good news for the Iraqi people, for the region and for the United Nations. Iraq deserved – and deserves – the sincere consensus of the Security Council and its undivided support and unity. It is a people who have suffered three decades of dictatorship and who must see a better future before it. The resolution should help to achieve that.

(. . .) Lastly, it is good news for this Council and the United Nations, because differences of the past are being reduced. From the unity, which we trust will be unrestricted, we will be able to make efforts that will be beneficial to those who most need them – in other words, the people of Iraq”.<sup>13</sup>

When the government changed hands in Spain, the position of the Security Council on Iraq was already consolidated in the abovementioned Resolutions 1483, 1500 and 1511. Surely for that reason Spain voted in favour of Resolution 1546 (2004), but significant nuances in our country’s position were visible. First, this time it did not co-sponsor the draft resolution, although it did ensure that the text included certain features; second, the new Spanish representative, Mr. Yáñez-Barnuevo<sup>14</sup> stated his government’s desire for the United Nations to have a more leading role in Iraq and for the multinational force to withdraw as soon as possible. He stated:

<sup>11</sup> Security Council, 4791st meeting, 22 July 2003, Doc. S/PV. 4791, p. 33.

<sup>12</sup> See Security Council, 4808th meeting, 14 August 2003, Doc. S/PV. 4808, p. 4.

<sup>13</sup> Security Council, 4844th meeting, 16 October 2003, Doc. S/PV. 4844, p. 8.

<sup>14</sup> Who, in October 2000, drafted the Foreign Ministry’s International Legal Advisory Report referred to above.



“Spain has voted in favour of Security Council Resolution 1546 (2004), thus joining the consensus expressed by the members of the Council. The Spanish delegation has cooperated actively in the formation of that consensus, offering ideas and contributions to the process of drafting the text of the resolution together with other delegations, particularly those of Brazil and Chile.

For us, this is certainly not about the ideal resolution. Actually, Spain would have wanted the United Nations to have assumed guidance of the political and military process in Iraq and that it would have been possible to accelerate even more the political transition in Iraq to a fully normalized situation.

(. . .) Spain has been promoting a more ambitious role for the United Nations in Iraq. The United Nations will continue its performance, essentially in complementing the political process, supporting preparations to hold a national conference and assisting the Independent Electoral Commission, as well as the interim and transitional Governments, in the preparation of the electoral processes. My Government believes that United Nations activities in Iraq must effectively help in the political transition process, which should include recognition of a clear and defined temporary time period to conclude its activities.

A fundamental aspect of the resolution that we have just adopted is related to the security architecture, referred to also in the letters addressed to the President of the Security Council by the Prime Minister of Iraq, Mr. Allawi, and by the Secretary of State of the United States, Mr. Powell. I would like to make a few brief comments in that regard.

My Government hopes that the agreements concluded from now on in the area of security between the interim Government and the multinational force will fully respect Iraqi sovereignty and will faithfully reflect the principle of authority that should govern the relationship between that Government and its armed forces and security forces. It also hopes that agreements will be reached soon on an operation policy that will enable the interim Government to affirm its authority in sensitive cases, so that its due control over the political process is maintained at all times. We also hope that in that context of authority and the exercise of sovereignty, the interim Government – with the assistance that each instance might require, including from the United Nations – will promote a national reconciliation process in which today’s dissident elements will be gradually integrated and will be able to contribute to Iraq’s stability and thus to that of the region.

(. . .) With regard to humanitarian issues, Spain is pleased that the preamble to the resolution notes the commitment of all forces to act in accordance with international law, including humanitarian law, and to cooperate with relevant international organizations. Spain would have liked this provision, which appeals to all parties to observe and ensure respect for such humanitarian principles, to have been included in the operative part of the resolution as well.

As members know, Spain has attached particular importance to the Security Council receiving periodic reports – quarterly if possible – from the multinational

force as well as the reports submitted to the Council by the Secretary General. We welcome the fact that the resolution has reflected that proposal.

We also deem it to be of great importance that the resolution, as requested by Spain and other members of the Council, sets 31 December 2005 as the deadline for the completion of the transitional political process and, therefore, the end of the presence of the multinational force. Spain considers that that force's presence in Iraq should be for as limited a time as possible".<sup>15</sup>

## II. PARLIAMENTARY MONITORING OF SPAIN'S INVOLVEMENT IN THE WAR ON IRAQ: A STORY IN TWO OPPOSING PHASES

Analysis of this subject in the Spanish parliament reveals two features: one is the deep rift occurring between the governing party and the other political groups; the other is the broad discussion of the issue, giving rise to a large number of intense, bitter debates and initiatives.<sup>16</sup> In any case, the change in Government and in the make-up of Parliament after the March 14, 2004 elections led to two opposing phases in Parliament as regards the war in Iraq.

### 1. Support for the war by the Popular Party Government and unsuccessful efforts of the opposition to prevent it.

Throughout its many different appearances, the Government defended its position by using the same arguments as it used in the Security Council. In essence, from a position of alignment with the United States, it sought to maintain that its position was based on respect for international law, the need to implement Security Council Resolutions, and that such Resolutions provided the legal basis for intervention. In September 2002, in an appearance by the Minister of Foreign Affairs before the lower house's Foreign Affairs Committee to explain her Ministry's overall policy, Ms. Palacio stated:

"The Government of Spain's position is crystal clear . . . From 12 August there are statements by this Government setting forth two principles: first, Iraq is a real danger for all of us; second, the natural place to resolve this is the United

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<sup>15</sup> Security Council, 4987th meeting, 8 June 2004, Doc. S/PV. 4987, pp. 11–12.

<sup>16</sup> The principal debates and actions took place in the Congress of Deputies, owing to its scope of responsibility under the Spanish bicameral parliamentary system; nonetheless, the subject of Iraq was also discussed in the Senate. On this item, see *BOCG, Diario de Sesiones del Senado, Comisiones, Comisión de Asuntos Exteriores*, VII Legislature, 2002, no. 342; *BOCG, Diario de Sesiones del Senado, Pleno*, VII Legislature, 2003, no. 127; *BOCG, Diario de Sesiones del Senado, Pleno*, VII Legislature, 2003, no. 124; *BOCG, Diario de Sesiones del Senado, Pleno*, VII Legislature, 2003, no. 128.

Nations, because everything stems from its non-compliance with United Nations resolutions".<sup>17</sup>

Several months later, with the conflict looming, the Minister outlined the theory of linked resolutions to the same Committee; disagreeing with the opposition she stated:

"They want to make a differentiation with respect to Resolutions 678 and 687, the so-called Gulf War resolutions. There is no difference, there is a link. If we are where we are it is because Resolution 687 established a cease-fire and conditions for maintaining it, none of which have been complied with, so we are precisely in that same framework".<sup>18</sup>

Days later, Ms. Palacio was back before the Committee reporting on the Security Council sessions at which the H. Blix and ElBaradei reports were presented. She stressed the non-compliance by Iraq and the gravity of the situation, stating:

"The Government will work for a new resolution from the reiterated position that, while it is not legally essential – as we have consistently maintained –, it is politically desirable".<sup>19</sup>

The intention to achieve another Resolution was reiterated by Prime Minister Mr. Aznar in his appearance before a plenary session of Congress in the crucial moments prior to intervention. The Prime Minister stated:

"... the Government has shown its choice and its desire for the matter to continue in the United Nations. Furthermore, although Resolution 1441 states literally that it is a last chance, the Government is working and will work to get another Security Council resolution...".<sup>20</sup>

<sup>17</sup> Appearance on 24 September 2002, *BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Asuntos Exteriores*, VII Legislature, 2002, no. 554, p. 17751.

<sup>18</sup> Appearance on 23 January 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Asuntos Exteriores*, VII Legislature, 2003, no. 676, p. 21921. In a later appearance before a joint meeting of the Foreign Affairs and Defence Committees, the Minister repeated the same reasoning (See *BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Conjunta de Asuntos Exteriores y Defensa*, VII Legislature, 2003, no. 716, p. 22973; also p. 23002).

<sup>19</sup> Appearance on 31 January 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Asuntos Exteriores*, VII Legislature, 2003, no. 678, pp. 21969–21970. In his appearance on 25 February 2003, the Minister stated again that "the Government has always maintained... that a second resolution was not legally essential, but that it was politically desirable" (*BOCG, Diario de Sesiones del Congreso de los Diputados, Comisiones, Asuntos Exteriores*, VII Legislature, 2003, no. 700, p. 22605).

<sup>20</sup> Appearance on 5 February 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados, Pleno y Diputación Permanente*, VII Legislature, 2003, no. 222, p. 11253. On 5 March, the Prime Minister said "we are considering a draft of a new resolution

After participating in the meeting in the Azores, Aznar went before the congressional Plenary to justify his action and inform of his decision to send a military contingent to Iraq in the event of war. After stating that the international fight against terrorism benefits Spain, "standing alongside the nations seeking to actively promote the defence of the principles that enable us to live in freedom and democracy" and "that the international community does not remain paralysed when the time comes to take difficult but unavoidable decisions," he added:

"The statements we approved at the recent meeting in the Azores mean just that. Spain is in this position because it is the best for our national interests and we are in this position because we need security and legality".<sup>21</sup>

He went on to report:

"In view of the international situation, as well as precedents of Spain's participation in previous crises, the Government today, by virtue of its power to direct foreign and defence policy under the Constitution, has taken some decisions . . . in the event there is an intervention, Spain will not participate in attack or offensive missions. Therefore, there will be no Spanish combat troops in the theatre of operations . . .

. . . the Government understands that it must contribute to the international effort in a mission of joint humanitarian support . . .".<sup>22</sup>

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*cont.*

which is under discussion at this time, and which is being discussed and negotiated at this time. This new resolution seeks . . . to reaffirm the Security Council's position in the United Nations" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 231, p. 11774).

<sup>21</sup> Appearance on 18 March 2003 (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 236, p. 12057).

<sup>22</sup> *Ibid.*, p. 236. The Prime Minister then set forth the features of Spain's involvement in the action: "For such purpose, Spain will send the *Galicia* to the area, equipped with medical capabilities to carry out surgery, provide intensive care and hospital beds . . . It will also carry vehicles and vessels for the same purpose and have the capability to act as an emergency coordination centre. It will carry a 120-troop Naval Protection Unit. The ship will include Army engineer and nuclear, bacteriological and chemical defense units . . . In escort, security and support duties the *Galicia* will be accompanied by a Navy Frigate and the *Marqués de la Ensenada* oil tanker. This amounts to an approximately 900-strong contingent. Likewise, Spain and its Government promise to participate actively in humanitarian aid work with the local population . . . The Government will also have commitments in the stabilization and normalization process on Iraqi territory, as appropriate. Apart from this . . . we have made available to the Atlantic Alliance for use in the defense of Turkey – in the event the country is attacked – six F-18 fighter aircraft, supported by a Hercules C-130 tanker aircraft, with their respective crews, along with a salvage and rescue helicopter" (*Ibid.*, pp. 12058–12059). These decisions were set forth in a Council of Ministers Agreement of 21 March 2003 authorizing the participation of Spanish military units in Iraq, subject to later amendment on 25 April and 11 July.

Furthermore, when in the course of the debate several members challenged the legality of intervention, Mr. Aznar once again referred to the theory of linked resolutions, as follows:

"Intervention . . . has a very broad legal basis established in Resolution 678, in Resolution 687 of April 3, 1991 and, of course, in Resolution 1441. Resolution 687 established a ceasefire, conditional on compliance with certain terms . . ."<sup>23</sup>

Resolution 687 suspended, but did not cancel authorization for the use of force. Resolutions 678 and 687 are fully in force and what is occurring there is a flagrant violation of the ceasefire conditions; therefore, authorization under Chapter VII of the United Nations Charter has been in force fully since 1990".<sup>24</sup>

Conversely to the Government's position, all the other political groups stated their opposition to the war. The statements made and actions taken show two different lines of argument: on the one hand, the illegality of military intervention and Spain's participation in it; on the other, concern over the use of the Agreement on Defence Cooperation between Spain and the United States in support of military actions against Iraq. To defend these arguments, all means of parliamentary control provided for under the Spanish Constitution were used,<sup>25</sup>

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<sup>23</sup> *Ibid.*, p. 12066.

<sup>24</sup> *Ibid.*, p. 12075.

<sup>25</sup> Mainly questions, urgent requests for explanation (many of which gave rise to motions) and motions. The questions asked included: a question from Deputy Gaspar Llamazares Trigo, Federal United Left Parliamentary Group "What will Spain's involvement in the United States-Iraq attack be?" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 187, pp. 9315–9316); the question asked by Deputy José Luis Rodríguez Zapatero, Socialist Parliamentary Group "What is the Government's position regarding possibly military action by the United States against Iraq?" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 184, pp. 9198–9199); the one asked by Deputy Gaspar Llamazares Trigo, Federal United Left Parliamentary Group "What position will Spain defend at the next United Nations Security Council meeting on the war on Iraq?" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 225, pp. 11458–11460); another by Deputy Gaspar Llamazares Trigo, Federal United Left Parliamentary Group "Why has your Government sponsored an illegal, illegitimate war against the Iraqi people?", the one from Deputy José Luis Rodríguez Zapatero, Socialist Parliamentary Group "What are the reasons for Spain's participation in the war on Iraq", the one by Deputy Jesús Caldera Sánchez-Capitán, "Why has the Government supported a breach of international law?" (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, núm. 238).

The urgent requests from the Congress for explanation, include, inter alia: from the Mixed Parliamentary Group, on the support by the Spanish State of a potential attack of Iraq by the United States (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 187, pp. 9341–9347) gave rise to a motion (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 188, pp. 9388–9392); from the Socialist

although the Government's absolute majority enabled it to maintain its position unaltered.<sup>26</sup>

Throughout the military intervention, accusations that the Spanish participation was illegal under international law were refuted by the Government before the

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*cont.*

Parliamentary Group on the Government's decision in the Iraq crisis; from the Federal United Left Parliamentary Group asking the Government to explain its position on a potential war in Iraq; from the Catalanian Parliamentary Group (*Convergència i Unió*) on the measures the Government intended to take relating to the Iraq conflict (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 222) that also gave rise to motions (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 24; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 230; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 233); from the Federal United Left Parliamentary Group for the Government to explain its final decision on Spain's sponsorship of and participation in the announced war against Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, VII Legislature, 2003, no. 234); from the Socialist Parliamentary Group on the purpose and results of the meeting held at the Lajes (Azores) military base, from the Mixed Parliamentary group on the Spanish Government's participation in the war of aggression against Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 238) with subsequent motions (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, nos. 237, 240 and 243); from the Socialist Parliamentary Group on returning to the guidelines of Spanish foreign policy; from the Federal United Left Parliamentary Group on the repercussions on Spain of the new phase of the war against Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 247; subsequent motion *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 248).

Regarding the proposed motions, in addition to those cited above: from the Mixed Parliamentary Group relating to the Spanish Government's position in the event of a U.S. military attack on Iraq (*BOCG, Congreso de los Diputados*, VII Legislature, Serie D, no. 403, pp. 11–12); from the Federal United Left Parliamentary Group on Spain's role in a potential U. S. military attack on Iraq, from the Mixed Parliamentary Group relating to the Government's position in the event of a war against Iraq, from the Socialist Parliamentary Group on Spain's position in the Iraq crisis, from the Mixed Parliamentary Group for Spain to oppose armed intervention in Iraq (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 224); from the Mixed Parliamentary Group relating to the prosecution of crimes committed by those who promote, aid or unleash aggression against Iraq entered in the early morning of 20 March 2003 (*BOCG, Congreso de los Diputados*, Serie D, VII Legislature, 2003, no. 514, pp. 5–6); from the Catalanian Parliamentary Group (*Convergència i Unió*) rejecting the war in Iraq and with measures to be adopted by the Government in relation to this serious conflict (*ibid.*, p. 7–8).

<sup>26</sup> It is noteworthy here that along with the three major issues indicated, the deaths of two Spanish journalists in Iraq caused a great impact in Spain and the presentation in Congress of four motions (*BOCG, Diario de Sesiones del Congreso de los Diputados*,

Parliament by invoking Security Council Resolutions 678, 687 and 1441, as previously indicated. Later, the adoption of Resolution 1483 provided a new element justifying Spain's presence in Iraq. In an appearance before the Defence Committee of the Congress of Deputies, the Minister of Defence maintained the legality of the decisions taken by the Council of Ministers (cabinet) to send troops without distinguishing between the war phase and the later phase, saying that:

"This is derived . . . from Resolution 1483 passed by United Nations Security Council on 22 May. It is very important . . . that we analyse this resolution . . . It is said at times, hastily I think, that this mission lacks United Nations support, which is totally false. It took a great deal of effort, certainly, to draft, amend and finally approve Resolution 1483. After countless negotiations, a text was finally accepted that is, without doubt, the key to understanding the missions that our armed forces will perform in Iraq and to fully legitimizing such missions in accordance with international law".<sup>27</sup>

The debate that ensued during that session is particularly interesting, because, among other things, the Minister called the Spanish military presence a peace-keeping operation, contrary to the criteria of the other political groups that considered that it made it an occupying power, despite the position being then backed by Resolution 1483. In this context, the Defence Minister stated:

"We . . . are not an occupying power . . . The occupying powers are the United States of America and the United Kingdom, to whom occupying power status and later on, authority, pertains. Other, non-occupying States . . . are currently working there or perhaps will in the future. What will Spain's work be? A peacekeeping mission".<sup>28</sup>

The Minister of Foreign Affairs also made similar statements before the Foreign Affairs Committee of the Congress of Deputies:

"Allow me to remind you . . . that Resolution 1483 fully legitimizes the actions of the Spanish Armed Forces in Iraq and makes clear that they are not . . . an occupying power".<sup>29</sup>

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Plenary and Standing Committee, VII Legislature, no. 246; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 528, pp. 8 and 12; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 529, p. 7; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 535, pp. 8–11).

<sup>27</sup> Appearance on 17 July 2003. *BOCG, Diario de Sesiones del Congreso de los Diputados*, Commissions, Defence, VII Legislature, 2003, no. 799, p. 25221.

<sup>28</sup> *Ibid.*, p. 25242. See opposition statements by deputies Marín González (p. 25230), Campuzano i Canadès (p. 25232) and Llamazares Trigo (p. 25234).

<sup>29</sup> Appearance 28 August 2003, *BOCG, Diario de Sesiones del Congreso de los Diputados*, Commissions, Foreign Affairs, VII Legislature, 2003, no. 801, p. 25278.

As regards use by the United States of possibilities under the bilateral defence agreement as logistical support for its actions in Iraq, both during the war and in the period immediately following it, on numerous occasions political opposition groups asked that use of the military bases not be granted, criticising the Spanish Government's permissiveness.<sup>30</sup> Of the many initiatives, of particular interest was the motion to the Plenary by all the political opposition groups asking the Government to deny the use of Spanish bases, territory and airspace for purposes relating to the military intervention in Iraq,<sup>31</sup> and the motion proposed by five political groups, urging the Government "not to allow the Government of the United States of America, in application of the Agreement on Defence Cooperation, to use Spanish bases, territory, territorial sea or airspace for objectives relating to military intervention in Iraq, because pre-emptive war was contrary to international law."<sup>32</sup>

None of this led the Government to alter its decision. The Minister of Defence stated before the Senate that:

"there is a defence cooperation agreement between Spain and the United States referring to the use of facilities and authorizations, that is being implemented currently . . .

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<sup>30</sup> As early as September 2002 the Federal United Left Parliamentary Group presented a motion on the role of the Spanish military bases used by the United States of America in a potential U.S. military attack on Iraq, urging the Government not to authorize its use (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2002, no. 399, pp. 9–10 and no. 408, pp. 4–5; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2002, no. 186, pp. 9288–9295); reiterating this in March 2003 (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 501, pp. 3–4; *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 505, pp. 9–10). The Mixed Group presented other similar motions (*BOCG, Congreso*, Series D, VII Legislature, 2002, no. 403, pp. 11–12; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 477, p. 5; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 478, p. 6; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 481, pp. 7–8; *BOCG, Congreso*, Series D, VII Legislature, 2003, no. 509, pp. 9–10) and the Socialist Parliamentary Group also including the issue in some of its motions (*BOCG, Congreso*, Series D, VII Legislature, 2003, no. 477, pp. 30–31). Motions were also presented on the basis of urgent requests for explanations seeking denial of the use of the bases (see *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, pp. 6–9 for motions presented by the Socialist and the Federal United Left Parliamentary Groups).

<sup>31</sup> *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, pp. 15–16; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, pp. 12140–12153.

<sup>32</sup> Motion presented by the Socialist, Federal United Left, Basque (*EAJ-PNV*), Canaries Coalition and Mixed Parliamentary Groups (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 514, pp. 6–7).



... we have applied authorisations for use of facilities – Article 18 – of authorisations for use for flights and overflights – Article 25 – and authorizations for use for ships, although on a lesser scale – Article 31 –”.<sup>33</sup>

The Minister also spelled out before the Congress of Deputies the authorizations granted for support facilities and the authorizations for use,<sup>34</sup> referring in both the Congress and the Senate to Spain's obligation to comply with the agreement. During the ensuing debate, representatives of political opposition groups countered by questioning implementation of the agreement in an illegal war, alleging that more authorizations were being granted than the Minister was admitting and denouncing the permits granted by the Spanish Government for in-flight refuelling of U.S. aircraft while flying over Spanish territory.<sup>35</sup>

## 2. The Change of Government and the Withdrawal of Spanish Troops from Iraq

In fulfilment of his promise during his election campaign, Mr. Rodriguez Zapatero, in his investiture speech, said:

“I want to state clearly that Spain will assume its international obligations as appropriate in defence of peace and security. It will do so with one single prerequisite: the prior decision of the United Nations or any other multinational organisation that binds us. In any case, the participation of Spanish troops abroad will be determined with the participation of the Parliament”.<sup>36</sup>

Consistent with his promise, on April 18, 2004, Prime Minister Rodriguez Zapatero made public a Declaration in which, after referring to his previous statements to the effect that he would order the return of the troops from Iraq if the United Nations did not take charge of the political and military situation there and

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<sup>33</sup> Response in the session on 12 March 2003 to the question posed by Deputies José Cabrero Palomares and Manuel Cámara Fernández, of the Mixed Parliamentary Group, on the Government's position regarding potential military attack by the United States of America against Iraq and the use of the military bases (*BOCG, Diario de Sesiones del Senado*, Plenary, VII Legislature, 2003, no. 127, p. 7839).

<sup>34</sup> Appearance before the joint session of the Foreign Affairs and Defence Committees on 24 March 2003 (*BOCG, Diario de Sesiones del Congreso de los Diputados*, Commissions, VII Legislature, 2003, no. 716, pp. 22977–22979).

<sup>35</sup> Speeches are found in the *BOCG, Diario de Sesiones del Congreso de los Diputados*, Commissions, VII Legislature, 2003, no. 716. The issue of in-flight refuelling of B-52 bombers especially troubled political opposition groups, who were particularly annoyed when the minister said “in-flight refuelling may or may not have taken place” (*ibid.*, p. 23006).

<sup>36</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 2, pp. 20–21.

stating that according to his information it was not foreseeable that such a Resolution would be approved, he announced that he had decided to order the return of the troops in the shortest time possible.<sup>37</sup>

This decision was subject to discussion in the Congress of Deputies. On 27 April, Mr. Rodríguez Zapatero went before Congress to inform of his reasons and the scope of his decision to take the necessary measures for the return of the Spanish troops serving in Iraq. In his speech, the Prime Minister stated:

“During the previous legislative term, all the groups in this Chamber, except for the one that backed the Government, stated their opposition to the Government’s decision to send the Spanish Armed Forces to Iraq. They did so because they felt the intervention in Iraq was illegitimate and illegal; because they did not share the Government’s opinion of the scope of the United Nations resolutions nor the rationale leading to its decision; because they felt that military operations would not contribute effectively to international peace or security, or to the eradication of terrorism; ultimately because they represented the feelings of a majority of Spaniards”.<sup>38</sup>

After recalling his political promise and explaining the international contacts he had had in order to evaluate the political-military situation regarding Iraq, Mr. Rodríguez Zapatero concluded:

“In all of them, and I feel this important to refer to specifically, we were met with the certainty that it was virtually impossible to expect the United Nations to adopt a resolution before 30 June in terms that would warrant my Government reconsidering its presence in Iraq. This conviction, this certainty, has made us not delay the implementation of our promise to the citizens and the Spanish soldiers stationed in Iraq”.<sup>39</sup>

The new Spanish Government’s decision was very well received by all the groups in the entire Spanish political spectrum, with the exception of the Popular Group. A few days after the session referred to above, all groups, with the exception of the Popular Group, passed a motion of support by the Congress of Deputies for the Prime Minister’s decision, stating in its preamble:

“In December 2003, the then Prime Minister of Spain decided, without submitting his decision to the Parliament, to send a contingent of soldiers to Iraq.

It was a decision taken after the so-called Azores Declaration . . . done without authorization by the Security Council and contrary to the United Nations

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<sup>37</sup> The text of the Declaration can be seen at <http://www.la-moncloa.es/web/asp/muestraDoc.asp?Codigo=p1804040>.

<sup>38</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 4, p. 134.

<sup>39</sup> *Ibid.*, p. 135.

Charter. The former Government knew that a majority of the Spanish people was against participating in the war. It also knew that the war on Iraq was going to take place without legitimate justification, despite which it involved our country in the conflict . . .

Since then it has not been possible to have the United Nations take political and military control of the occupation, nor is it reasonably foreseeable for this to take place before 30 June. This was a requisite in the electoral platform of the governing party, the *PSOE*, for keeping the troops in Iraq. It was also a demand by the other political organizations that also sponsor this Motion. If this were not the case, the above mentioned electoral promise was to bring the troops back to Spain".<sup>40</sup>

It is therefore proposed to agree:

"To support the Prime Minister's decision to bring the troops deployed in Iraq back to Spain in the shortest time and with the highest security possible".<sup>41</sup>

The motion was debated in Congress on 13 May 13, 2004 and approved with the votes of all members except for the Popular Group.<sup>42</sup> Along with this initiative, a number of questions were posed by different political groups, most of which were in line with the Government's position.<sup>43</sup> This gave the Government the opportunity to offer its assessment of Resolution 1546 (2004), done for the first time by the Minister of Foreign Affairs and Cooperation in response to a parliamentary question, as follows:

"the Government's assessment of the approval of Security Council Resolution 1546 is positive. As has been stated on other occasions, it is not ideal, it is not

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<sup>40</sup> *BOCG, Congreso*, Series D, VIII Legislature, 2004, no. 6, p. 48.

<sup>41</sup> *Ibid.*

<sup>42</sup> See *BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 7 and *BOCG, Congreso*, Series D, VIII Legislature, 2004, no. 18.

<sup>43</sup> This is the case with the question posed by Gaspar Llamazares Trigo (Federal United Left Group) on the financial cost of participating in the occupation of Iraq (*BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 12, pp. 406–407; question by Jesús Cuadrado Bausela (Socialist Parliamentary Group): "What is the Government's assessment of the withdrawal operation of the troops from Iraq?" (*ibid.*, no. 14, pp. 542–543); by Rafael Estrella Pedrola (Socialist Parliamentary Group): "Does the Government reaffirm that its decision to withdraw the troops from Iraq was the right one?" (*ibid.*, no. 17, pp. 660–661); written question by Francisco Rodríguez Sánchez (Mixed Group): "Government position regarding the occupation of Iraq and its consequences" (*BOCG, Congreso*, Series D, VIII Legislature, 2004, no. 111, p. 301). Against the Government position, the question posed by Gustavo de Arístegui y San Román: "What contacts did the Prime Minister have to reach the unequivocal decision that a new United Nations resolution on Iraq was not possible before June 30th?" (*BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 17, pp. 659–660).

the resolution the Spanish Government would have desired, since it does not give the United Nations political and military leadership of the process of the stabilization and liberation of Iraq. Nonetheless, we feel it takes the first steps towards resolving the problem from a better perspective . . . The resolution has positive features in that it deals for the first time with the transfer of sovereignty . . . Owing to Spanish input, the resolution also included an element on respect for international humanitarian law . . .”<sup>44</sup>

This opinion, in line with the statements by the Spanish representative on the Security Council when the resolution was approved, was reiterated several days later by the Secretary of State for Foreign Affairs and Latin America in an appearance before Congress.<sup>45</sup>

### III. THE SHORTCOMINGS OF THE SPANISH CONSTITUTIONAL SYSTEM AS REVEALED BY THE WAR IN IRAQ: THE PROBLEM RELATING TO ART. 63.3 OF THE SPANISH CONSTITUTION

The analysis in the previous section of this paper shows that in accordance with Spanish law the decision by the former Spanish Government to involve the country in the War in Iraq was able to be taken by the Executive without having to consult the Parliament, which only had recourse to classic monitoring procedures. This was due to the fact that the only provision that relates in any way with this type of matter is Article 63.3 of the Constitution, according to which:

“It is incumbent upon the King, following authorization by the *Cortes Generales*, to declare war and to make peace.”

During the Congress of Deputy sessions on Iraq, the Government was accused of non-compliance with Article 63.3. This argument was used particularly by the Federal United Left Parliamentary Group; its spokesperson, Mr. Llamazares Trigo stated:

“Mr Aznar, you too have broken constitutional rules. You have involved Spain in a war without the authorisation of the Congress of Deputies, without the authorisation provided under Article 63.3 of the Spanish Constitution and without the signature of the Head of State. You have illegally usurped powers of the Congress of Deputies and the Head of State, the King.”<sup>46</sup>

<sup>44</sup> *BOGC, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 17, pp. 661–662.

<sup>45</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Committees, Foreign Affairs, VIII Legislature, 2004, no. 46, pp. 23–24.

<sup>46</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 236, p. 12080.

Although the Prime Minister did not respond at that time, at a later session the Minister of Defence did, saying:

“a formal declaration of war is for when Spain is at war . . . regarding certain conflicts that is something that Charles Rousseau . . . even then considered an anachronism because the formal declaration of war, just like the signing of peace treaties, armistices, etc., are formalities applicable to the law of war of centuries past, but scarcely common, actually quite unusual, in the present.”<sup>47</sup>

In defence of its line of argument, the Federal United Left Parliamentary Group submitted a motion to the Plenary demanding “the Spanish Executive to respect the procedures required under Article 63.3 of the Constitution. Consistent with the above, it urges the Government to make the required request for authorization to the *Cortes Generales* to involve Spain in a war”<sup>48</sup> and later proposed dealing with a conflict of jurisdiction between the Congress of Deputies and the Government “based on the reason of invasion of the jurisdiction of the Parliament in deciding to participate in the war on Iraq without the consent of the Parliament and without a formal declaration of war by the King.”<sup>49</sup>

Article 63.3 was also invoked by the Deputy belonging to the Basque Parliamentary Group, Mr. Anasagasti Olabeaga:

“We would like to know whether hapless Constitution Article 63, which states loudly and clearly that it is up to the King, with the prior authorisation of the *Cortes Generales*, to declare war and make peace, is still in force. We would like to know whether we are at war or not because we feel that to be the crux of the matter. Are we at war or not, is Iraq a humanitarian operation or not? . . . Why is Article 63 not being applied, with the King, as stated in the Constitution, with our prior approval, the Parliament, declaring war and making peace?”<sup>50</sup>

<sup>47</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 247, p. 12734.

<sup>48</sup> *BOCG, Congreso de los Diputados*, Series D, VII Legislature, 2003, no. 501, pp. 5–7.

<sup>49</sup> *BOG, Congreso de los Diputados*, Series D, VII Legislature, 2004, no. 662, p. 481.

<sup>50</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 301, p. 15955. More generally, a motion presented to the Plenary by the Socialist, Catalan (*Convergència i Unió*), Federal United Left, Basque (EAJ-PNV), Canaries Coalition and Mixed Parliamentary Groups, on the Parliament’s involvement in decisions regarding Spain’s participation in the Iraqi crisis urging the Government “Prior to adopting any commitment relating to Spain’s participation in military operations against Iraq or in support thereof, to send a report to the Parliament containing the reasons and objectives of the mission, the extent of Spanish participation and the projected credits necessary fund it to the Parliament for debate” (*BOCG, Congreso de los Diputados*, Series D, VII Legislature, no. 509, pp. 15–16; *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VII Legislature, 2003, no. 237, pp. 12140–12153).

Was, however, Art. 63.3 of the Spanish Constitution applicable to Spain's participation in the War on Iraq?

### 1. Interpreting Art. 63.3

Art. 63.3 is, of course, an anachronistic, outmoded provision, harking back to times in which States had the right to make war. Now it is prohibited by the UN Charter, which contemplates only two exceptions: coercive measures determined by the Security Council under Art. 42 of the Charter, and the right to self-defence under Art. 51. Furthermore, in practice neither legal nor much less illegal wars are declared anymore, so the disappearance of the concept of war has taken along with it the requisite declaration formalities which used to allow for going from the law of peace to the law of war without any legal reproach. Even under current international law, the concept of war must be considered to have been replaced by the concept of international armed conflict, in line with the Geneva Conventions and Protocols on international humanitarian law, as an expression contemplating any use of force.<sup>51</sup> Therefore, the prior Spanish Constitution of 1931, which on one hand proclaimed the renunciation of war as an instrument of national policy and, on the other, provided for a declaration of war only in cases authorized by the League of Nations Pact was more correct in this regard.

Under these circumstances, there is agreement to indicate that Art. 63.3 should be interpreted in the light of the international rules in force. This leads to the conclusion that declarable wars would only be those that are authorized by international law, leaving us only the two exceptions established by the Charter in relation to the prohibition of the use of force: as a means of coercion as determined by the Security Council under Article 42 and the inherent right to individual or collective self-defence. Other constitutions, such as Portugal's, despite continuing to contemplate the anachronism of a declaration of war, are nuanced by specifying that it would take place "in the event of actual or imminent aggression". An amendment presented by the Communist parliamentary group proposed reducing the possibility of a declaration of war to cases of "external aggression or serious threat to the independence of the State;" but the proposal was dismissed, thereby

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<sup>51</sup> See E. Pérez Vera, "Artículo 63", *Comentarios a las Leyes Políticas* (O. Alzaga Villaamil dir.), T. V, EDERSA, Madrid, 1983, pp. 310–313; J. García Fernández, "Guerra y Derecho Constitucional", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, no. 32, Valencia, 2000, pp. 6–46; J. García Fernández, "Guerra y Derecho constitucional. La formalización del inicio de la guerra mediante la declaración en Derecho internacional y en Derecho interno", *Estudios de Teoría del Estado y Derecho Constitucional en honor de Pablo Lucas Verdú*, (R. Morodo and P. de Vega dirs.), T. II, Madrid, 2000, pp. 1037–1086; G. de Vergottini, "Nuevos aspectos de la guerra y relaciones entre el Parlamento y el Gobierno", *Anuario Iberoamericano de Justicia Constitucional*, vol. 6, 2002, pp. 549–565.

losing the opportunity to follow the example of the Republican Constitution (of Spain) by renouncing war as an instrument of national policy or, at least, ensuring that any use of force is exercised under the terms set forth in the Charter.

Having established the physical scope of application of Article 63.3 under international law, we must nonetheless make several specific comments. First, it is possible that an international military operation expressly authorized by the Security Council on the basis of Chapter VII of the Charter might not be legally an act of war but rather an international policing measure within the scope of peacekeeping, in which case a declaration of war would not be applicable. This does not mean that it would not subject to control, however, as we will see later on. During the Gulf War of 1991, this was the position in Congress of Mr. Herrero y Rodríguez de Miñón, as Foreign Minister Fernández Ordóñez was quite relieved to hear.<sup>52</sup> Second, in the case of self-defence, the reaction has to be immediate, it being up to the Government to initiate actions without delay, despite having to push the declaration through Parliament in the shortest time possible. Thirdly, in connection with the consideration that while under international law only authorized wars can be declared, it must not be overlooked that prohibition does not always prevent illicit acts from being committed and therefore one cannot rule out the hypothesis that Spain sought to embark upon a type of military action that was not among those permitted.

In my opinion, in these cases Article 63.3 would also be applicable. If not, the situation would be one of the absurd, in which there would only be parliamentary monitoring of licit acts, and precisely the cases in which intervention by the Parliament would be most useful would be exclusively in the hands of the Government. This may be precisely the greatest virtue of obsolete Art. 63.3, that of mandating that this type of action be submitted to the Parliament.

This brings us to the need to determine what should be understood as constituting war, not an easy task as international law does not set a level of violence that armed operations have to reach in order for the rules on international armed conflicts to apply. Based on references made in 1986 by the International Court of Justice on the matter of Nicaragua to "the most serious forms of the use of force," which it equates to armed aggression, the definition of the concept of war must be based on the fact that open hostilities exist or are going to exist.<sup>53</sup> Accordingly, if

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<sup>52</sup> *Cortes Generales, Diario de Sesiones del Congreso de los Diputados, Comisiones*, IV Legislature, 1991, no. 198, p. 5961. For this reason I feel it unnecessary for doctrinal proposals for modification of Art. 63.3 to continue to attribute to the King the declaration of Spain's participation in collective measures, because it is a formality which is not used in practice (J.G. Ibáñez, "La regulación de las intervenciones bélicas y Europa, reformas anheladas", *El País Extra*, December 6, 2003, pp. 18–19, with reference to a proposal by Professor Carrillo Salcedo).

<sup>53</sup> See C. Izquierdo y L. Pérez-Prat, "La guerra constitucional", *Política Exterior*, vol. V, 1991/92, pp. 149–156.

Spain is to be involved in such a situation, even if it falls outside international law, the Government must comply with the requirements of Article 63.3 of the Constitution.

In this regard it can be said that Spain was not at war, owing to the small, auxiliary nature of its involvement, but the intervention against Iraq in 2003 showed that together with the interpretation of Art. 63.3, the important thing was Parliamentary control, not only in relation to actions determined or authorized by the Security Council but also – and above all – in relation to participation in unilateral actions. In this regard Spanish law did not have the answer at that time.

## **2. Improving Parliamentary Control of Spain's Participation in Overseas Military Actions**

Indeed, the Spanish Constitution does not provide any mechanisms along these lines. Reference can only be made to a political agreement adopted by the congressional Plenary in November 1995 on the occasion of the 50th anniversary of the United Nations, affirming that Spain's participation in peacekeeping operations would always be under UN authority and setting forth the goal of having greater involvement by the Parliament in such matters.<sup>54</sup> However, taking into account that the debate was regarding the United Nations Charter, this agreement clearly only refers to actions that are legal from a standpoint of international law.

The conclusion is that this is an area clearly requiring reform to ensure parliamentary control of military actions abroad, and requiring prior authorisation in the most extreme cases. An author has stated that “the spirit of the Constitution requires parliamentary authorisation, in some cases, and parliamentary control and debate, in others,” maintaining that armed actions not involving peacekeeping are actions of a military nature or at least potential uses of force and must be authorized by the Parliament, while for peacekeeping operations it would be sufficient for the government to inform the Congress; ultimately, unarmed actions should be debated *a posteriori*.<sup>55</sup>

So this is where things stand, the absence of constitutional provision makes it advisable to adopt legislative measures to provide for parliamentary participation. This was the stance taken by the Prime Minister, Mr. Rodríguez Zapatero, who committed himself to modifying Organic Law 6/1980, of July 1, on basic National Defence criteria, in the parliamentary debate held on April 27, 2004 on the withdrawal of the Spanish troops from Iraq stating:

“the Government will submit to the Congress of Deputies a draft organic law modifying the Law on basic national defence criteria, to provide for real par-

<sup>54</sup> *BOCG, Congreso*, V Legislature, Series E, no. 178, November 22, 1995, pp. 30–31.

<sup>55</sup> J. García Fernández, “El control político de las misiones militares en el exterior: derecho internacional y derecho interno”, *European Security and Defence Observatory, Newsletter*, October 2003, no. 10.



ticipation by the Parliament in the decisions taken by the Government in the exercise of its constitutional functions and responsibilities.”<sup>56</sup>

Both the Ministers of Foreign Affairs and of Defence reiterated their commitment to ensuring the involvement of the Parliament in relation to military actions abroad. When the former appeared before the Foreign Affairs Committee of the Congress of Deputies to outline his ministry’s policy, he said that:

“it is the will of this Government not to commit Spain to international military operations against the will of Parliament . . . The Minister of Defence and I, both within our respective responsibilities and jointly, will make sure that Parliament is consulted on any decision of this nature.”<sup>57</sup>

And, subsequently, in another appearance before a joint session of the Foreign Affairs and Defence Committees, the Minister for Foreign Affairs stated once again that:

“the Prime Minister announced in his investiture speech to the Congress of Deputies the Government’s commitment to having any Spanish Armed Forces participation in missions abroad being agreed to – I repeat, agreed to – with the participation of Parliament . . . The Government cannot fail to assume its responsibilities under Article 97 of the Constitution, in the sense of directing domestic and foreign policy, but the constitutional mandate does not exclude the possibility that prior to the Government taking a decision it may consult Parliament, informing of the reasons and circumstances that make it think it should send troops beyond national soil, and taking note of the criteria and positions of each of the political groups represented in Parliament.”<sup>58</sup>

At that same session, the Minister of Defence, who also spoke, announced:

“a legal modification along these lines, as well as the appearance of the Prime Minister to inform of the agreement adopted by the Council of Ministers on this matter, submitting it to debate in the Congress of Deputies and not only informing them but also requesting its ratification of the Council of Ministers’ decision.”<sup>59</sup>

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<sup>56</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Plenary and Standing Committee, VIII Legislature, 2004, no. 4, p. 136. See also *El País*, April 28, 2004, pp. 1 and 15. This is the formula defended by J. García Fernández, together with modification of the Chamber Regulations (*op. cit.*).

<sup>57</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Committees, Foreign Affairs, VIII Legislature, 2004, no. 24, p. 3.

<sup>58</sup> *BOCG, Diario de Sesiones del Congreso de los Diputados*, Committees, Joint Foreign Affairs and Defense, VIII Legislature, 2004, no. 61, p. 3.

<sup>59</sup> *Ibid.*, pp. 5–6.

If the Defence Minister's statement is to be taken literally, certain differences are noted with respect to the statement by the Foreign Minister, since while the latter talks about "consultations," the former seems to be accepting binding congressional control through "ratification." Nonetheless, the Minister of Defence continued, saying:

"We give the Parliament its due respect, and before making any formal Government commitment we want to inform the members of Congress and hear their views – be it *sotto voce* or into a microphone,"<sup>60</sup>

making it seem that the minister in question had said more than he really intended to.

Months later, the Government approved National Defence Directive 1/2004, a program document that stated that:

"actions by our Armed Forces abroad shall be carried out in the framework of effective multilateralism, requiring two conditions: first, that there be a prior decision by the United Nations or, when appropriate, another multinational organization to which Spain belongs, and, secondly, that they be approved with the active participation of Parliament."<sup>61</sup>

All of the above was set forth recently in the draft Organic Law on National Defence.<sup>62</sup> Its Article 16 deals with consulting the Congress of Deputies regarding operations abroad, providing:

- "1. To order operations abroad not directly related to the defence of Spain, the Government shall hold prior consultations to receive the views of the Congress of Deputies.
2. In missions abroad in accordance with international commitments requiring rapid or immediate response to specific situations, prior consultation shall be carried out on an urgent basis enabling such commitments to be complied with.
3. In cases such as those set forth in the previous paragraph, when for reasons of maximum urgency it is not possible to carry out prior consultation, the Government shall, as soon as possible, submit its decision to the Congress of Deputies."

The Law also provides for congressional monitoring of operations through regular information to be sent by the Government (Article 17). Article 18 sets forth the

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<sup>60</sup> *Ibid.*, p. 6.

<sup>61</sup> This Directive was signed by Prime Minister Mr. Rodríguez Zapatero on December 30, 2004. On the document, see F. Arteaga, "La Directiva de Defensa Nacional 1/2004", *Real Instituto Elcano de Estudios Internacionales y Estratégicos*, ARI, no. 29/2005.

<sup>62</sup> *BOCG, Congreso de los Diputados*, VIII Legislature, Series A, 31 March 2005, no. 31/1.

conditions under which the Spanish Armed Forces may carry out missions abroad when not directly related to the defence of Spain as follows:

- “a) Missions carried out at the express request of the Government of the State in whose territory they are to be carried out or authorized by United Nations Security Council Resolutions, or, where appropriate, agreed by international organizations to which Spain belongs, particularly the European Union or the North Atlantic Treaty Organization (NATO), in the framework of their respective areas of competence.
- b) Missions fulfilling the defensive, humanitarian, stabilization or peacekeeping and preservation goals set forth and ordered by said organizations.
- c) Missions consistent with the United Nations Charter that do not contradict or violate the international law of treaties that Spain has incorporated into its legal system, pursuant to Article 96.1 of the Constitution.”

The Law, therefore, covers the aspects not contemplated in outmoded Article 63.3 of the Constitution, setting forth a consultation mechanism, and establishes criteria for participation in military operations outside Spain. In regard to the first item, provision is made for non-binding involvement by the Congress of Deputies, which in cases of maximum urgency will be *a posteriori*.<sup>63</sup> In regard to the latter two items, there is a requirement for authorization by the Security Council, undoubtedly a result of the war in Iraq,<sup>64</sup> while Art. 18 set forth above shows faith in proper action being taken by international organizations, something which, in view of NATO's intervention in Kosovo in 1999, one cannot completely share;<sup>65</sup> on the other hand, the rules of international customary law are completely overlooked, despite their importance in regard to the use of force, as stated by the

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<sup>63</sup> Nonetheless, in 2001 the Federal United Left Parliamentary Group presented a draft bill to amend Organic Law 6/1980, of July 1, regulating basic national defense criteria, according to which “The Parliament shall expressly approve any sending of Spanish troops to missions taking place outside national territory” (*BOCG, Congreso de los Diputados*, Series B, VII Legislature, 2001, no. 167–1, p. 2). The Proposal was rejected (see *BOCG, Congreso de los Diputados*, Series B, VII Legislature, 2003, no. 167–2).

<sup>64</sup> Nonetheless, the Popular Group submitted an amendment seeking to change the word “authorized” to “covered” (amendment no. 214, see. *BOCG, Congreso de los Diputados*, VIII Legislature, Series A, 18 May 2005, No. 31–5, p. 92) which, according to press reports, seems to have been accepted by the Minister of Defense. The intent of the amendment is clear: to open the door to the ambiguities experienced in the case of Iraq regarding invocation of Security Council resolutions, the acceptance of which would not be wise. At the time this report was written, the result of the debate on amendments was not known.

<sup>65</sup> The Report of High-level Panel on Threats, Challenges and Change (2 December 2004) seems to share the same reservations when it states “In recent years, such alliance organizations as NATO . . . have undertaken peacekeeping operations beyond their mandated areas. We welcome this so long as these operations are authorized by and accountable to the Security Council” (Doc. A/59/565, p. 71).

International Court of Justice in the Case concerning Military and Paramilitary Activities in and against Nicaragua.

#### **IV. EPILOGUE**

The 2003 War against Iraq had an impact on Spanish policy and elicited a major public response, showing the existence of an ample majority of people that was against the military conflict and Spain's participation therein.

Beyond what actually took place, the case has contributed to reorienting Spain's position internationally and to improving democratic control of the government's decisions regarding military actions abroad, along with the establishment of clear limits on this type of action. Fortunately, this will be the positive legacy of the errors made in the past.