The Spanish reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide

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I. INTRODUCTION

On 29 April 1999, what was then the Federal Republic of Yugoslavia – today Serbia and Montenegro – filed an application instituting proceedings against the Kingdom of Spain with the Registry of the International Court of Justice for breach of the obligation not to resort to the use of force. The applicant claimed that the Court was competent on the basis of the declarations by the respective parties accepting the compulsory jurisdiction of the Court, made in pursuance of article 36 paragraph 2 of the Court's Statute[2] and article 9 of the Convention on

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[1] The author's opinions are strictly personal and are in no way binding on the institution to which he belongs.
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[2] "The states parties to the present Statute may at any time declare that they recognize as

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the Prevention and Punishment of the Crime of Genocide. The applicant accused the Spanish government of having resorted to force against the Federal Republic of Yugoslavia, along with the governments of other NATO Member States, by taking part in the bombing of certain targets in its territory during the airborne campaign conducted by NATO in 1999. According to the applicant, the bombing caused much loss of human life, including numerous civilians, and heavy material damage to homes, schools, hospitals, radio and television stations, places of worship and major items of infrastructure. Also, the Federal Republic of Yugoslavia accused Spain of having, along with other NATO countries, used weapons containing depleted uranium, at great risk to human health, and of having caused a serious threat to the environment by attacks against oil refineries and chemical plants. In short, the alleged acts were presumably in violation of several international norms of capital importance, including among others the obligation not to resort to the use of force against another State and "the obligation contained in the Convention on the Prevention and Punishment of the Crime of Genocide not to impose deliberately on a national group conditions of life calculated to bring about the physical destruction of the group".[3] On the day that the action was initiated, the Federal Republic of Yugoslavia also submitted a request for the indication of provisional measures constraining the Kingdom of Spain to immediately cease committing illegal acts against the Federal Republic of Yugoslavia and to refrain from repeating them.[4]

In its consideration of whether the bases of jurisdiction as invoked allowed it to declare itself competent, at least *prima facie*, to hear the case and thus be able to determine whether the circumstances warranted ordering the provisional measures requested for protection *in limine litis* of rights that would subsequently be recognised by the verdict, the Court found in respect of the respective declarations of acceptance of its compulsory jurisdiction, that reservation *c*) in the Spanish declaration of 1990 barred it from declaring itself competent in the matter. In effect, by virtue of this reservation Spain removed from the Court's jurisdiction any disputes "in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court", and in the case under advisement, "Yugoslavia deposited its declaration of acceptance of the compulsory jurisdiction of the Court with the Secretary-General on 26 April 1999 and filed its Application instituting proceedings with the Court on 29 April 1999".[5]

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compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation".

[3] *I.C.J. Reports 1999*, p. 763, para. 3.

[4] *Ibid.*, p. 766, para. 7.

[5] *Ibid.*, pp. 770–771, para. 25.

The Court then went on to examine whether it could found its jurisdiction on the basis of article 9 of the Convention on Genocide, which establishes that:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

In light of the fact that Spain's instrument of accession was deposited with the Secretary General of the United Nations on 13 September 1969, including a reservation in respect of the whole of article 9, and given that the Convention does not prohibit reservation and Yugoslavia had not objected to the reservation entered by Spain, the Court declared that article 9 could not constitute a basis of jurisdiction in the matter, even *prima facie*.[6] For all those reasons, then, the High Jurisdiction rejected the request for the indication of provisional measures and further withdrew the case from the General List, convinced of the impossibility of adjudicating on the merits of the case.[7]

It might therefore be thought that the Spanish reservation to article 9 of the Convention was a factor in achieving a procedural "victory", in that an action was avoided in which Spain was accused of one of the most serious crimes against the rights of persons, quite regardless of whether or not the accusations were warranted – an issue that lies without the scope of this paper. Nonetheless, the question remains as to why Spain entered a reservation whose purpose is to evade judicial control over its conduct as it relates to the rules laid down in the Convention on the Prevention and Punishment of the Crime of Genocide, an instrument fundamental to international relations, and why it still retains that reservation now that, since the 1978 Constitution, it is "a social and democratic State, subject to the rule of law".[8]

On a unique occasion, during a luncheon at The Hague with Ambassador Juan Antonio Yáñez-Barnuevo, who as head of the Spanish delegation attending a session there of the Assembly of Parties to the Statute of the International Criminal Court, I had the opportunity to put these questions to him, mindful of his long and brilliant career in the Ministry of Foreign Affairs and his proverbial wisdom. His surprising answers prompted an investigation into the historical circumstances that surrounded Spain's accession to the Convention on the Prevention and Punishment of the Crime of Genocide and the formulation of the reservation in respect of article 9. While reflecting the essence of the results of that study, this paper has also allowed me to pay a tribute, in a modest way, to the man who provided me with

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[6] *Ibid.*, p. 772, para. 33.
[7] *Ibid.*, pp. 773–774, paras. 35 and 40.
[8] Spanish Constitution of 1978, article 1.

many answers, who, in fact, had been involved from the beginning in the process of accession to the Convention and who further deserves a significant measure of credit for the Spanish decision to become a party to the treaty. This article also examines the validity of the reservation and of the treatment it has received from the other signatory States and from the International Court of Justice itself.

II. LEGAL-HISTORICAL CIRCUMSTANCES OF SPAIN'S ACCESSION TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

It is well known that in the immediate post-World War II years, Spain was isolated internationally, and in particular was excluded from the United Nations Organisation. Initially, by virtue of Resolution 39 (I) of 12 December 1946, the General Assembly, recalling that, in the words of a Security Council subcommittee, the Franco regime was "a fascist regime patterned on, and established largely as a result of aid received from, Hitler's Nazi Germany and Mussolini's Fascist Italy", not only recommended that all UN members withdraw their ambassadors and plenipotentiary ministers accredited in Spain but also barred Spain from the UN's institutions, agencies and conferences. By Resolution 386 (V), the General Assembly revoked this prohibition on 4 November 1950, along with the recommendation to withdraw diplomatic representatives from Spain. From that point on, the situation began gradually to ease and Spain was admitted to several United Nations agencies such as the World Health Organization,[9] the World Meteorological Organization,[10] and the United Nations Educational, Scientific and Cultural Organization.[11] Finally, by Resolution 995 (X) of 14 December 1955, the General Assembly admitted Spain to the United Nations Organisation.

One consequence of the situation of international isolation was a deep mistrust on the part of Spain towards judicial means for the peaceful settlement of international disputes.[12]

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[9] 28 May 1951.

[10] 29 March 1951.

[11] 25 February 1953 (date of receipt of the notification). Prior to the cited resolution, on 4 April 1947, Spain had been admitted to membership of the International Civil Aviation Organization.

[12] As Santiago Torres Bernárdez noted, "The original ideology, the personalized and authoritarian manner in which power was exercised and the mentality of those generations still in the inner circle of Government and the high levels of the administration, explain the general circumspection showed by the Franco Governments in the fifties and sixties with respect to 'judicial settlement' as a peaceful means of settling disputes" (see S. Torres Bernárdez, "Spain and the Jurisdiction of the International Court of Justice: From Past to Present", *Archiv des Völkerrechts*, vol. 32, 1994, p. 254).

As regards the bilateral treaties concluded by Spain between 1945 and 1956, arbitration is mentioned in friendship or cooperation agreements, generally with Latin American or Arab States, or with the Philippines;[13] the one exception is the Economic Assistance Agreement concluded with the United States of America in 1953, which provided for recourse to the International Court of Justice, or alternatively arbitration. This tendency persisted, if less preponderantly, up until the constitutional era. In effect, according to Professor Andrés Sáenz de Santa María, from the end of the Second World War until 1978, Spain concluded a total of ninety-nine bilateral treaties which contained compromissory clauses contemplating the competence of arbitrating bodies,[14] although it was normally a proviso that non-jurisdictional means, preferably negotiation, be tried first.[15] In any event, it should not be thought that this inclination for arbitration was exclusive to Spain; as Louis B. Sohn has it, "[t]he second major type of binding procedure, arbitration, is by far the most popular of all settlement methods".[16]

In connection with multilateral treaties, we would stress that governments of the time tended to put off for years the ratification of or accession to any containing clauses for the judicial settlement of disputes, or else in acceding to them they excluded the control of the relevant judicial organs,[17] especially where the subject-matter of the treaty had strong political connotations, as for example in the case of treaties dealing with human rights.[18]

Particularly as regards the International Court of Justice, the aversion referred to above also manifested itself in a refusal to accept its jurisdiction as compulsory, as enshrined in the unilateral declaration contemplated in article 36 paragraph 2 of the Court's Statute,[19] and hence a refusal to resume the commitment accepted at the time of the Permanent Court of International Justice.[20] In this connection, it is

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[13] *Ibid.*, p. 253; see also M.P. Andrés Sáenz de Santa María, *El arbitraje internacional en la práctica convencional española (1794–1978)*, Servicio de publicaciones de la Universidad de Oviedo, Oviedo, 1982, pp. 167–168.

[14] *Ibid.*, p. 251.

[15] *Ibid.*, pp. 275–276.

[16] L.B. Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties", *RCADI*, vol. 150, 1976 II, p. 266.

[17] In this connection see J. Quel López, *Las reservas a los tratados internacionales. Un examen a la práctica española*, Servicio editorial de la Universidad del País Vasco, Bilbao, 1991, p. 254.

[18] S. Torres Bernárdez, "Spain and the Jurisdiction of the International Court of Justice: From Past to Present", ... *op. cit.*, p. 256.

[19] On this point see E. Orihuela Calatayud, "España y la jurisdicción obligatoria del Tribunal Internacional de Justicia", *REDI*, vol. XLI, 1989, pp. 69–105.

[20] On 21 September 1928, Spain unilaterally declared its acceptance of the compulsory jurisdiction of the Permanent Court of International Justice under article 36 paragraph 2 of its Statute; this provision was similar to that of the same article in the present Statute of the International Court of Justice. The declaration read as follows: "In the name of the Government of His Majesty the King of Spain, I recognise the jurisdiction of the

highly significant that on 1 April 1939, the very day on which General Franco officially announced the end of the Civil War, the national government should have sent a letter declaring its intention to terminate Spain's accession to the General Act of Arbitration adopted in Geneva on 26 September 1928;[21] article 17 of this treaty established the jurisdiction of the Permanent International Court of Justice,[22] and as Andrés Sáenz de Santa María has put it, the treaty constituted "the most important attempt to date to achieve a convention for the peaceful settlement of all international disputes".[23]

Court as mandatory for a period of ten years, *ipso facto* and without the need of any special convention in relation to any other State that accepts the same obligation – that is, in conditions of reciprocity – in respect of any dispute that may arise subsequently to the signature of this declaration, and in respect of situations or events subsequent to that signature, except in cases where the parties have agreed or agree to resort to another means of peaceful settlement" (See French text in: *CPJI*, Série D, No. 6 (Quatrième édition), 1932, p. 43).

[21] The following appears in the note accompanying the entry "Spain" in the list of signatory States and parties to the General Proceedings in the volume published by the United Nations Secretariat on the status of multilateral treaties previously deposited with the Secretary General of the United Nations, or on the relevant page of the UN website:

"Spain acceded on September 16th, 1930.

By a letter dated April 1st, 1939, and received by the Secretariat on April 8th, the Spanish National Government denounced the accession of Spain, pursuant to the terms of Article 45 of the General Act.

Under Article 45, this denunciation should have been effected six months before the expiration of the current five-year period that is to say, in this case, before February 16th, 1939.

In regard to this point, the National Government states in its letter that, as the Secretary-General and almost all the States which are parties to the General Act have "in the past . . . refused to receive any communications from the National Government, this Government could not have acted earlier in pursuance of the right which it now exercises in virtue of Article 45 of the Act".

The Secretary-General brought this communication to the knowledge of the Governments concerned."

Professor Pastor Ridruejo remarks on this fact, noting that: "Underlying this attitude there undoubtedly could be found an exacerbated sense of national sovereignty typical of authoritarian regimes and a more or less conscious mistrust of International Law and the ideology of the United Nations", see J.A. Pastor Ridruejo, "The Spanish Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", *SYIL*, vol. I, 1991, p. 21.

[22] "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.

It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice." With regard to the jurisprudence developed by the International Court of Justice on the General Acts, see *I.C.J. Reports 2000*, pp. 23–25, paras. 26–28.

[23] M.P. Andrés Sáenz de Santa María, *El arbitraje internacional en la práctica convencional española (1794–1978)* . . ., *op. cit.*, p. 97.

Another factor contributing to the aversion to judicial settlement, and particularly to accepting the jurisdiction of the International Court of Justice, was that at the time Spain had a case pending before that court, namely that of *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain).* In effect, in 1958 the Belgian government brought an action against its Spanish counterpart in connection with a dispute arising from the judicial declaration of bankruptcy of Barcelona Traction, a Canadian company with major interests in Catalonia. The object of the action was to seek reparations for damages sustained by Belgian stockholders of the company, arising out of acts, allegedly in breach of international law, carried out to their detriment by organs of the Spanish State. The basis of competence sustained by Belgium in its application was Article 17 of the Treaty of Conciliation, Judicial Settlement and Arbitration between Belgium and Spain, signed on 19 July 1927, and Article 37 of the Statute of the Court.[24] In 1961, the Belgian government gave notice of discontinuance of the proceedings so as to allow a series of negotiations to go forward between the representatives of the various private interests concerned, and consequently the case was removed from the Court's General List. However, when the negotiations foundered, Belgium decided to present another application on 19 June 1962. In 1963, the Spanish government filed four preliminary exceptions, the first two of which were rejected by the Court in a decision dated 24 July 1964. The Court took the view that the other two exceptions were not exclusively preliminary in nature and should be joined to the merits of the case. The third preliminary exception concerned the lack of capacity on the part of Belgium to file an application in defence of a Canadian company despite the fact that some of its stockholders were Belgians. The fourth exception concerned the failure to exhaust all local remedies through the Spanish judicial system before resorting to the International Court of Justice. Finally, on 5 February 1970, the Court admitted Spain's third exception on the ground that Belgium did not possess *jus standi* to extend diplomatic protection to the Belgian stockholders of a Canadian company in connection with certain measures instituted by the Spanish authorities against the company. In conclusion, the Court did not consider the merits of the case and ordered its removal from the General List.[25]

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[24] Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

[25] *I.C.J. Reports 1970*, p. 51. Spain had likewise been a party before the Permanent Court of International Justice in the *Borchgrave* case, which went on during the Civil War. In effect, on 20 February 1937, Belgium and Spain decided to enter into an undertaking whereby they brought before the Court a dispute in connection with the international liability attaching to the Spanish government for the disappearance in Madrid, on 20 December 1936, of Baron Jacques de Borchgrave, a Belgian citizen who was assisting in the work of his country's embassy in the Spanish capital. However, again by mutual

This is the context surrounding the personal experience of Ambassador Yáñez-Barnuevo, whose original story was amplified over a succession of further interviews. Recently recruited to the Diplomatic Corps, Mr. Yáñez-Barnuevo served in the Directorate General of International Organisations from 1967 to 1969. One of his first tasks was to conduct a study on the situation of Spain vis-à-vis human rights treaties; the study was prompted by criticisms levelled at Spain at the time by a Specialist American journal for its scant participation in treaties dealing with this subject. The young diplomat discovered that indeed Spain had not ratified any of the major treaties on human rights:[26] neither the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in New York on 9 December 1948, nor the International Convention on the Elimination of All Forms of Racial Discrimination, adopted in New York on 7 March 1966; nor again the International Pact on Political and Civil Rights adopted in New York on 16 December 1966; nor the optional Protocol to the latter, adopted on the same date and at the same place; nor the International Pact on Economic, Social and Cultural Rights adopted in New York on 16 December 1966; nor the Convention on Imprescriptibility of Crimes of War and Against Humanity adopted in New York on 26 November 1968. In other related matters, the situation differed little. For instance, Spain was not a party to any convention on refugees and stateless persons existing at the time. With regard to traffic in human beings, Spain had only consented to commit to a minority of existing treaties; it was a party only to the International Convention for the Suppression of the Traffic in Women and Children adopted in Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others adopted in New York on 21 March 1950. On matters of the situation of women, Spain had not ratified any of the existing treaties. Of course, not being a member of the Council of Europe, Spain was not a party to any of the conventions on human rights promoted by the Council. As regards the humanitarian law of war, it must be said that at that time Spain had ratified a large number of treaties, including the four 1949 Geneva Conventions.[27]

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agreement, Spain and Belgium dropped the case in January 1938 (see *Permanent Court of International Justice. Series A/B, Judgments, Orders and Advisory Opinions*, no. 73, p. 5).

[26] See *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI.*

[27] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864 (Ratification or accession 05.12.1864); Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (Ratification or accession 04.09.1900); Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864. The Hague, 29 July 1899 (Ratification or accession 04.09.1900); Declaration (IV,1), to Prohibit, for the Term of

III. PROCEDURE FOLLOWED IN SPAIN'S ACCESSION TO THE CONVENTION ON GENOCIDE.

In light of the situation as outlined above, Juan Antonio Yáñez-Barnuevo put forward a proposal to examine the possibility of Spain's acceding to some of the principal conventions on human rights, or to those that had attracted most international consensus. However, aware as he was of the aversion to judicial means for the peaceful settlement of conflicts, as noted, in order to improve the chances of his proposal being accepted, he decided to suggest at the same time that reservations be entered in each case in respect of articles contemplating the jurisdiction of the International Court of Justice. His proposal placed the central emphasis on accession to the Convention on Genocide, the Convention on the Elimination of All Forms of Racial Discrimination, and the Supplementary Convention on the

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Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature. The Hague, 29 July 1899 (Ratification or accession 04.09.1900); Declaration (IV,2) concerning Asphyxiating Gases. The Hague, 29 July 1899 (Ratification or accession 04.11.1900); Declaration (IV,3) concerning Expanding Bullets. The Hague, 29 July 1899 (Ratification or accession 04.11.1900); Convention for the Exemption of Hospital Ships, in Time of War, from The Payment of all Dues and Taxes Imposed for the Benefit of the State. The Hague, 21 December 1904 (Ratification or accession 10.05.1907); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906 (Ratification or accession 11.10.1907); Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (VII) relating to the Conversion of Merchant Ships into War-Ships. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (IX) concerning Bombardment by Naval Forces in Time of War. The Hague, 18 October 1907 (Ratification or accession 24.02.1913); Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War. The Hague, 18 October 1907 (Ratification or accession 18.03.1913); Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925 (Ratification or accession 22.08.1929); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 27 July 1929 (Ratification or accession 06.08.1939); Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929 (Ratification or accession 06.08.1930); Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954 (Ratification or accession 07.07.1960) (see *http://www.icrc.org/ihl.nsf/WebPAYS?OpenView&Start=150&Count=150&Expand=206.1#206.1*). On Spain's accession to the four Geneva Conventions, see J. Quel López, *Las reservas a los tratados internacionales. Un examen a la práctica española, . . . op. cit.*, pp. 235–238.

Abolition of Slavery, adopted at the European headquarters of the United Nations in Geneva, on 7 September 1956.

The Directorate General of International Organisations asked the Foreign Ministry's International Legal Department to report on the desirability of becoming a party to the Convention on Genocide, and also the Convention on the Elimination of All Forms of Racial Discrimination. In its report, dated 25 October 1967, the Legal Department, having first analysed the salient aspects of the treaty, stated that it could see no objections to Spain's accession. Having regard to the clause of submission in article 9, the report stressed that until that time it had been the object of several reservations on the part of the socialist countries and some other States, among them the Philippines, and that furthermore, according to a ruling of the International Court of Justice of 1951, reservations could be made to the convention insofar as these did not run counter to the object and purpose thereof. The Legal Department concluded in this respect:

> "It is therefore legally possible to formulate a reservation in respect of the jurisdiction of the International Court of Justice, which must be decided upon by the higher authority for reasons of general policy of the Department, bearing in mind that in recent years Spain has not been accepting recourse to the Court for the settlement of disputes on the interpretation of Conventions, and there is no special reason to depart from that policy in the present case".[28]

In light of the favourable report from the Legal Department, the Directorate General of International Organisations decided to initiate procedures for Spanish accession to the Convention on Genocide. In the external context, the procedure for the signing and presentation of the consent to be bound was regulated in article 9 of the Convention. In accordance with that article, the possibility of becoming parties to the treaty extended to all Member States of the United Nations and those non-members to which the General Assembly had issued an invitation to do so. By virtue of Resolution 368 (IV) of 3 December 1949, the General Assembly had asked the Secretary General "to dispatch invitations to become parties to the Convention to each non-member State which was or thereafter became an active Member of one or more of the specialized agencies of the United Nations, or which was or thereafter became a party to the Statute of the International Court

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[28] Report of 25 October 1967 by the International Legal Department of the Ministry of Foreign Affairs of Spain. ("Existe, pues, la posibilidad jurídica de formular una reserva a la jurisdicción del Tribunal Internacional de Justicia, sobre lo que debe decidir la Superioridad por motivos de política general del Departamento, teniendo en cuenta que España no viene aceptando, en los últimos tiempos, el recurso al Tribunal para la solución de disputas sobre interpretación de Convenios, y que no existe motivo especial que aconseje en este caso apartarse de tal política."). As regards the Convention on Elimination of All Forms of Racial Discrimination, the conclusion it reached was similar to that regarding the undertaking contained in article 22 thereof.

of Justice". The Secretary General accordingly commenced to issue the requisite invitations to those States meeting the conditions referred to. At the outset, Spain did not meet these requirements, as noted earlier because of General Assembly Resolution 39 (I) of 12 December 1946, which barred Spain from UN institutions, agencies and conferences. Later on, despite having been admitted as a member of several special agencies in the United Nations system[29] following the lifting of the ban by Resolution 386 (V) of 4 November 1950, Spain never received an invitation from the Secretary General of the United Nations to become a party to the Convention on Genocide prior to 1955, the year in which it was admitted to membership of the United Nations Organisation, and thereafter it was entitled to accede to the Convention automatically.

Having regard to the procedure for the presentation of consent in the internal sphere, it should be noted that at the time of the Franco regime, the capacity to consent to be bound by treaties lay *de facto* with the Head of State, although this capacity was not enshrined in any law. Thus, according to Professor Pastor Ridruejo, it was understood that the function of ratifying treaties was one of the general powers vouchsafed to the Head of State by the Decree of 29 September 1936, and also by the laws of 30 January 1938 and 8 August 1939[30] respectively. This faculty aside, it would be fair to say generally that all aspects having to do with the State's exterior activity came within the purview of the Government.

Parliament – the Cortes were obviously not democratically elected – was involved very little in the conclusion of treaties and the formulation of reservations. Summarising their role, Professor Remiro stressed that the Cortes' sole function was to "catalyse the inevitable accord of the people whom they represent[ed] – by law – with the Government's necessarily right decisions in the conduct of the State's international relations".[31] The Cortes' intervention was expressly regulated in article 14 of the Law Constituting the Cortes of 17 July 1942 (as amended by the Organic Law of the State of 10 January 1967) and article 9 of the Organic Law of the State. The intention was firstly that ratification of the treaties listed in article 14.I of the Law Constituting the Cortes[32] and article 9 of the Organic Law of the State[33] should be legally subject to parliamentary approval. These were

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[29] See section 2 of this article.

[30] J.A. Pastor Ridruejo, "La estipulación y la eficacia interna de los tratados en derecho español", *REDI*, vol. 17, 1964, p. 43.

[31] A. Remiro Brotons, *Las Cortes y la Política exterior española (1942–1976)*, Cuadernos de la Cátedra "J.B. Scott", Universidad de Valladolid, 1977, p. 9.

[32] "I. Ratification of international treaties or conventions which affect the full sovereignty or the territorial integrity of Spain shall be dealt with in a Law approved by the Cortes in Full Session."

[33] The Head of State requires an act, or a resolution or authorisation as appropriate, for the following purposes: a) to ratify international treaties or conventions which affect the full sovereignty or the territorial integrity of Spain; b) to declare war and agree to peace; c) to undertake the actions referred to in article 12 of the Law of Succession and any others established in other provisions of the fundamental Laws of the Kingdom.

treaties affecting the full sovereignty or the territorial integrity of the State and conventions entailing peace agreements or the declaration of war. Secondly, article 14.II of the Law Constituting the Cortes provided that the full Cortes, or a Commission thereof as appropriate, should simply be required to give voice for the ratification of all other treaties affecting matters for whose regulation they were competent under articles 10 and 12.[34]

The Law Constituting the Cortes and the Organic Law of the State referred solely to the "ratification" of treaties and not to "accession". This last was regulated in article 10 paragraph 5 of the State Legal Regime of the Administration Act, which required the Government's authorisation for the negotiation and signing of international treaties and conventions and for [accession] to existing ones.[35] In 1970 Professor García Arias noted in this respect that despite the strict distinction, "Spanish practice in recent decades has been chaotically varied, as regards

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[34] Article 10 of the Law Constituting the Cortes provided thus: The Cortes, in Full Session, shall deliberate on any actions or laws having any of the following purposes: a) The ordinary and extraordinary State budgets; b) Major economic and financial transactions; c) The establishment or reform of the tax system; d) Banking and monetary organisation; e) Economic control of the Trade Unions and any legislative measures that may decisively affect the economy of the nation; f) Basic laws regulating the acquisition and loss of Spanish nationality and the duties and rights of Spaniards; g) The political and legal organisation of State institutions; h) The bases of local government; i) The bases of Civil, Mercantile, Social, Criminal and Procedural Law; j) The bases of the Judiciary and the Public Administration; k) The bases for the organisation of agriculture, trade and industry; l) National education plans; m) Any other Laws that the Government may, of its own accord or at the behest of the appropriate Commission, decide to submit to the Cortes in Full Session.

The Government may likewise submit to the Full Cortes items of business or resolutions not of the nature of Laws.

Article 12 of the Law Constituting the Cortes in turn provided:

I. The Commissions of the Cortes shall have competence in respect of all provisions which are not included in article ten and which must have the form of laws, either because such is established in a law subsequent to the present one or because such is ordered by a Commission comprising the President of the Cortes, a Minister designated by the Government, a Member of the Permanent Commission of the National Council, a Member of the Cortes who is a qualified Attorney, the President of the Council of State and the President of the Supreme Court of Justice. This Commission shall issue an opinion at the behest of the Government or of the Permanent Commission of the Cortes.

II. Should any Commission of the Cortes, for purposes of examination of a bill, a draft act or an independent motion, raise an issue for which the Cortes are not competent, the President of the Cortes may, on his own initiative or at the Government's request, require the opinion of the Commission referred to in the foregoing paragraph. Should the Commission conclude that it is not within the purview of the Cortes, the matter shall be removed from the Commission's agenda.

[35] On the role of the Cortes in accession to treaties, see L. García Arias, "Sobre el papel del órgano legislativo en lo referente a la adhesión de España a los convenios internacionales", *REDI*, vol. XXIII, 1970, no. 4, pp. 773–774.

both the Executive and the Legislative authorities; recently, the Government has evinced a tendency to allow the Cortes a greater role, not only for purposes of ratification but even for purposes of [accession]".[36] Likewise, in the light of actual practice, in 1977 Professor Remiro proposed a broad interpretation of the term "ratification", wherein the relevance of the Cortes' intervention was determined solely by the subject matter of the treaty.[37]

The doctrine highlights another series of treaties that required parliamentary approval although this was not expressly provided in the Law Constituting the Cortes and the Organic Law of the State. According to Professor Remiro Brotóns, these were first and foremost treaties whose terms entailed the reform or repeal of Fundamental Laws, by analogy with the terms of article 10 of the Head of State (Succession) Act.[38] Secondly, parliamentary approval was also required for conventions entailing taxpaying obligations for individuals, again by analogy, in this case to article 9 of the Customary Law [*Fuero*] of the Spanish people of 17 July 1945, which provided that "Spaniards shall contribute to the upkeep of public burdens according to their financial capacity. No-one shall be obliged to pay taxes that have not been established under a law approved by the Cortes".[39]

In cases requiring the intervention of the Cortes, this should naturally take place prior to the expression of the State's consent to be bound by a treaty; however, as Professor Remiro Brotóns noted, the Government occasionally put the question to the Cortes *ex post*.[40]

Despite this general recognition, on paper, that the Cortes had a binding say by way of resolution or law, the actual tendency in practice was the opposite, for a number of reasons: first of all, the power to determine whether a matter came within the purview of the Cortes lay with the Government; and in the second place, the Cortes themselves took no pains "to uphold the House's constitutional right to intervene in the process of concluding treaties".[41] Thus, as Professor Remiro Brotóns put it in 1977, in the preceding thirty-five years Spain had not concluded a single treaty that met any of the conditions in which a resolution or act of parliament was required.[42]

Returning specifically to the formalities of the Convention on Genocide, the Legal Department's report mentioned earlier indicated the steps required:

> "In view of the nature of this Convention and its inevitable legislative consequences, this International Legal Department takes the view that once decided

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[36] *Ibid.*, p. 773. In this connection, see also: A. Remiro Brotóns, *Las Cortes y la Política exterior española (1942–1976), . . . op. cit.*, p. 22.
[37] *Ibid.*, pp. 28–29.
[38] *Ibid.*, p. 35.
[39] *Ibid.*
[40] *Ibid.*, p. 31.
[41] *Ibid.*, p. 26.
[42] *Ibid.*, p. 36.

> by the Government, Spain's [accession] ought to be remitted to the Cortes for consideration by a Commission in a process analogous to that of the ratification of Treaties. Once the Cortes have pronounced thereon, the instrument of accession, signed by the Head of State, must be deposited with the United Nations Secretariat."

As we can see, although this is a case of accession rather than ratification, the procedure proposed is the one required for the latter. Therefore, as this is not one of the matters listed in article 14 paragraph I of the Law Constituting the Cortes, the Cortes should simply give their opinion. At the same time, as it does not concern any of the matters coming within the purview of the Cortes in Plenary Session by virtue of article 10 of the same Law but is a treaty whose application would entail legislation, it had to be examined by a Commission as provided in article 12 of the Law Constituting the Cortes.

And these were in fact the steps followed in practice: on 23 April 1968, the President of the Cortes ordered its publication in the Official Gazette of the Spanish Cortes (*BOCG*) and remitted the text of the convention to the Foreign Affairs Commission for examination, but reserving the right of the other Members, irrespective of the Commission on which they sat, to submit comments on the text during the fifteen days following its publication.[43] It is worth noting in this connection that the text published in the *BOCG* made no reference to the reservation to article 9 of the Convention proposed by the Executive. At the end of the statutory period, on 31 May 1968, the Foreign Affairs Commission of the Spanish Cortes issued an opinion in favour of [accession];[44] this was read out at the Plenary Session held on 18 June 1968.[45] Finally, on 13 September 1968 Spain formally acceded to the Convention on the Prevention and Punishment of the Crime of Genocide, at the same time entering the reservation to article 9.[46] That same day, Spain also acceded to the Convention on Elimination of All Forms of Racial Discrimination,[47] with a reservation in respect of article 22, which recognises the International Court of Justice as competent to settle disputes arising in connection with the interpretation and application of the convention.[48] Earlier, on 21 November

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[43] *BOCG* no. 1,003 of 26 April 1968, p. 21443 *et seq.*

[44] *BOCG* no. 1,009 of 12 June 1968, p. 21575. The document notes, possibly because this was a blanket formula, that the opinion thus issued was favourable to "ratification".

[45] *BOCG* no. 1,011 of 18 June 1968, p. 21666.

[46] Published in the *BOE* no. 34, of 8 February 1969, p. 1944 *et seq.* The convention came into force for Spain on 13 December 1968.

[47] Published in the *BOE* no. 118, of 17 May 1969, p. 7462 *et seq.* The convention came into force for Spain on 4 January 1969.

[48] "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".

1967, Spain had acceded to another convention at the suggestion of Ambassador Yánez-Barnuevo, namely the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, in this case without reservations, which are expressly prohibited by article 9.

IV. VALIDITY OF THE SPANISH RESERVATION IN RESPECT OF ARTICLE 9 OF THE CONVENTION ON GENOCIDE AND REACTIONS THERETO OF OTHER SIGNATORY STATES.

The Convention on Genocide makes no stipulation regarding the possibility of entering reservations. An examination of the preliminary work reveals that this was no oversight, but that the reason for the silence was that it was not deemed necessary to make any particular provision in that respect. In effect, in the draft convention remitted to governments for examination, the Secretary General of the United Nations included an article heading (17) entitled "Reservations", but without any text. The reason for this was that he believed that blanket reservations had no place in a convention of the kind proposed, "which does not deal with the private interests of a State, but with the preservation of an element of international order".[49] The only government that made any comment in this connection was the United States, which observed that the convention ought not to include any provision in respect of reservations. None of the successive bodies entrusted with the drafting of the convention subsequently deemed it necessary to include any provision regarding reservations, and thus the Convention in its final form was approved by the General Assembly in full session on 9 December 1948 without any reference to this point.[50] Furthermore, the preliminary work in connection with the drafting of article 9 proper shows that there was no serious proposal in the sense of permitting reservations thereto.[51] Nonetheless, the minutes recording the discussions of the Sixth Committee of the General Assembly demonstrate that following the approval of the whole text of the Convention at its 132nd meeting, there was an argument among the various delegations in the course of which the possibility was mooted of entering reservations in respect of certain articles of the Convention, among them article 9.[52]

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[49] See the written report submitted by the United Nations Secretary General in the proceedings relating to the advisory opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*I.C.J. Pleadings, Oral Arguments, Documents*, p. 88).

[50] *Ibid.*

[51] *Ibid.*, pp. 90–92.

[52] *Ibid.*, pp. 92–95.

In view of the Convention on Genocide's silence on the subject, when some of the States which began ratification included some reservations, essentially in connection with article 9, and other States objected to them, the Secretary General of the United Nations, as depositary of the Convention, was forced to go to the General Assembly and ask for guidelines on how he should act in connection with reservations to it.[53] The General Assembly in turn resolved to seek an advisory opinion from the International Court of Justice; this was made public on 28 May 1951, responding to the three concrete questions that the consulting body had put to it. The advisory opinion provides some interesting considerations regarding the validity of reservations in general, and also – although it did not address the subject directly – regarding the validity of reservations in respect of the article discussed in this paper.

Firstly, in its advisory opinion of 28 May 1951, the Court took the view that a degree of consensus had been reached in the General Assembly regarding the possibility of entering reservations to the Convention, as witness the very fact that the resolution requesting the ruling had raised the question of whether the State entering a reservation could be considered a party to the Convention in the face of objection to that reservation by one or more States.[54] Secondly, in a *dictum* that would profoundly affect subsequent treaty law, the Court stated that, absent any specific provision in a treaty with regard to the admissibility of reservations, the question must be addressed in the light of the object and purpose of the treaty.[55] In the specific case of the Convention on Genocide, the Court stated that it had been adopted for reasons of humanity and civilisation; and more specifically:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946)."[56]

In this way, according to the Court, the object and purpose of the Convention showed that the General Assembly and the countries adopting it intended that the largest possible number of States be parties to it.[57] Moreover, "the complete exclu-

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[53] The Secretary General faced a problem with article 13. To set a date for deposit of the twentieth instrument of ratification or accession, he needed to know whether and under what conditions he could accept instruments of ratification or accession that were accompanied by reservations.

[54] *I.C.J. Reports 1951*, pp. 22–23.

[55] *Ibid.*, p. 24.

[56] *Ibid.*, p. 23.

[57] *Ibid.*, p. 24.

sion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are at its basis".[58] These words, clearly favourable to the acceptance of reservations to the Convention, which were uttered at a time when several States had already drawn up reservations to it and particularly to article 9,[59] surely suggest that the Court had seen no obstacle to the possibility of States entering reservations to the Convention in general, or indeed to reservations specifically addressed to the compromissory clause it contained.

The repercussions of the Court's advisory opinion were, as we know, immense. As a first step, in resolution 598 (VI) of 12 January 1952 the General Assembly recommended that States "be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951"; then secondly, in the same resolution the General Assembly recommended that the Secretary General, as depositary, adapt his practice to the Court's ruling. Finally, the rule proposed by the Court whereby it was up to the parties to the Convention on Genocide to examine the compatibility of reservations with the object and purpose of the Convention, was enshrined by the legislating States in article 19, c) of the 1969 Vienna Convention on the law of treaties as a universal criterion for application in determining the admissibility of a reservation in the event that the terms of a treaty make no provision.

Since the adoption of the 1969 Vienna Convention on the law of treaties, much has been written and debated as to whether these general rules apply equally to human rights treaties, and in particular stress has been placed on the risk entailed in leaving analysis of the compatibility of reservations with the object and purpose of the treaty up to the contracting States.[60] However, universal practice shows that

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[58] *Ibid.*

[59] See the written report submitted by the United Nations Secretary General in the proceedings relating to the advisory opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*I.C.J. Pleadings, Oral Arguments, Documents*, pp. 97–103). See in this connection the collective dissenting opinion of judges Guerrero, McNair, Read and Hsu Mo attached to the International Court of Justice's advisory opinion (*I.C.J. Reports 1951*, p. 45); see also the argument of the United States of America in the stage relating to the appropriateness of provisional measures in the case concerning *Legality of Use of Force (Yugoslavia* v. *United States of America)* (see CR 99/24, para. 2.14).

[60] Among the recent bibliography on the question, see G. Cohen-Jonathan,"Les reserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux", *RGDIP*, 1996–4, pp. 915–949; R. Goodman,"Human Rights Treaties, Invalid Reservations, and State Consent", *AJIL*, vol. 96, 2002, pp. 531–560; M. Rama-Montaldo, "Human Rights Conventions and Reservations to Treaties", *Héctor Gros Espiell. Amicorum Liber,* vol. 2, Bruylant, Bruxelles, 1997, pp. 1261–1277; D. Shelton, "State Practice on Reservations to Human Rights Treaties", *Canadian Human Rights Yearbook. Annuaire canadien des droits de la personne*, 1983, pp. 205–234;

this is still the rule, in spite of some attempts to assign the role of checking the validity of reservations to institutional organs. This was confirmed by the International Law Commission – the body which since 1993 the United Nations General Assembly has entrusted with the task of examining reservations – in its preliminary conclusions of 1997 on reservations to normative multilateral treaties, including treaties on human rights. In effect, this document affirms that the content of articles 19 to 23 of the Vienna conventions on the laws of treaties of 1969 and 1986 govern the rules on reservations to treaties; and it particularly stresses that the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations to treaties of all kinds, including those relating to human rights.[61]

For all the above reasons, we believe that in analysing the validity of the Spanish reservation to article 9 of the Convention on Genocide, we are bound to consider the reactions of the other signatory States to the Spanish reservation and to others of [ ] similar nature. We would note in this connection that another sixteen States besides Spain entered reservations in respect of article 9.[62] The import of the reservations varies widely, but most seek to bar the Court's jurisdiction, or at least to render it subject to the express consent of the reserver in the event that a dispute is placed before the High Jurisdiction. Some, on the other hand, required

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Simma, B., "Reservations to Human Rights Treaties- Some Recent Developments", *Liber amicorum Professor Seidhl-Hohenveldern – in honour of his 80th birthday*, Kluwer Law International, 1998, pp. 659–682; M.M. Sychold, "Ratification of the Genocide Convention: the Legal Effects in Light of Reservations and Objections", *RSDIE*, vol. 8, 1998, no. 4, pp. 533–552. On the question of whether reservations to clauses for peaceful settlement of disputes included in treaties are generally compatible with the object and purpose thereof, see M.P. Andrés Sáenz de Santa María, *El arbitraje internacional en la práctica convencional española (1794–1978)...*, *op. cit.*, p. 216.

[61] "1. The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;

2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;"[...].

[62] Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Morocco, Philippines, Rwanda, Serbia and Montenegro, Singapore, United States of America, Venezuela, Viet-Nam and Yemen. For the text of the reservations see *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp#N20.*

the express consent of all or almost all of the parties to the dispute; take for example the following reservation:

> "1. The Socialist Republic of Viet Nam does not consider itself bound by article IX of the Convention which provides the jurisdiction of the International Court of Justice in solving disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention at the request of any of the parties to disputes. The Socialist Republic of Viet Nam is of the view that, regarding the jurisdiction of the International Court of Justice in solving disputes referred to in article IX of the Convention, the consent of the parties to the disputes except the criminals is diametrically necessary for the submission of a given dispute to the International Court of Justice for decision."

Along with the seventeen States which currently maintain reservations in respect of article 9, there is a group of ten States – consisting essentially of countries from the former socialist group[63] – which initially entered reservations then withdrew them.

Only two States, the Netherlands and the United Kingdom, have raised express objections to the Spanish reservation to article 9. The first went so far as to declare that it did not consider Spain to be a party to the Convention. Let us look at these two objections:

> Netherlands: 27 December 1989. " [. . .] the Government of the Kingdom of the Netherlands recalls its declaration, made on 20 June 1966 on the occasion of the accession of the Kingdom of the Netherlands to the Convention [. . .] stating that in its opinion the reservations in respect of article IX of the Convention, made at that time by a number of states, were incompatible with the object and purpose of the Convention, and that the Government of the Kingdom of the Netherlands did not consider states making such reservations parties to the Convention. Accordingly, the Government of the Kingdom of the Netherlands does not consider the United States of America a party to the Convention. Similarly, the Government of the Kingdom of the Netherlands does not consider parties to the Convention other states which have made such reservations, i.e., in addition to the states mentioned in the aforementioned declaration, the People's Republic of China, Democratic Yemen, the German Democratic Republic, the Mongolian People's Republic, the Philippines, Rwanda, Spain, Venezuela, and Viet Nam, on the other hand, the Government of the Kingdom of the Netherlands does consider parties to the Convention those states that have since withdrawn their reservations, i.e., the Union of Soviet Socialist Republics,

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[63] Albania, Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Mongolia, Poland, Romania, Ukrainian Soviet Socialist Republic and Union of Soviet Socialist Republics. See *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp#N20.*

> the Byelorussian Soviet Socialist Republic, and the Ukrainian Soviet Socialist Republic."[64]

The United Kingdom, for its part, warned that:

> "The Government of the United Kingdom do not accept the reservations to articles 4, 7, 8, 9 or 12 of the Convention made by Albania, Algeria, Argentina, Bulgaria, Burma, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Mongolia, Morocco, the Philippines, Poland, Romania, Spain, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics or Venezuela." [. . .] On 21 November 1975, "The Government of the United Kingdom of Great Britain and Northern Ireland have consistently stated that they are unable to accept reservations in respect of article 9 of the said Convention; in their view this is not the kind of reservation which intending parties to the Convention have the right to make."[65]

Aside from these two cases in which Spain is specifically mentioned, a good number of States have raised objections of one kind or another to reservations in respect of article 9: some objected to reservations to the provision in general and others objected to the reservations entered by certain States.[66] Thus, one might take the view that this group of States implicitly objected to the Spanish reservation as well; some other States might have objected expressly had Spain entered its reservation prior to accession and ratification by these States. Most of the objecting States had nothing to say on the matter of whether the author of a reservation should be considered a party to the treaty.[67]

Finally, one further point about States which have objected in one way or another to reservations made to article 9 of the Convention is that some, in addition to the Netherlands and the United Kingdom, have affirmed that such a reservation is incompatible with the object and purpose of the Convention on Genocide.[68]

Having reviewed the reactions of the parties to the Convention on Genocide, it behoves us also to look at how the jurisprudence deals with the reservation to article 9 subsequently to the advisory opinion of 1951. We would note in this connection that the International Court of Justice has had to deal with reservations to

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[64] *Ibid.*

[65] *Ibid.*

[66] Australia, Belgium, Brazil, China, Ecuador, Greece, Mexico, Norway and Sri Lanka. See *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty1.asp.*

[67] China stated that it did not consider States that entered the reservation parties, and Mexico, referring to the United States reservation to article 9, noted that it did consider it a party to the Convention. See *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty1.asp.*

[68] Brazil, China, Greece and Mexico. See *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/treaty1.asp.*

article 9 on several occasions since that date and has never declared one invalid or even raised any doubts as to their validity.

To the contrary, as it did in the cases concerning *Legality of use of force (Yugoslavia v. Spain)* and *Legality of use of force (Yugoslavia v. United States of America)*, it has accepted their validity and on that ground has denied its jurisdiction. In the case in which Spain was involved, as we noted in the introduction, it analyses the reservation of 13 September 1968 and its effects in paragraphs 29 to 33 of its Order of 2 June 1999 regarding the request for provisional measures. Its reasoning there is essentially that since the Convention does not prohibit reservations and Yugoslavia had not objected to Spain's reservation to article 9, then that reservation must stand and the Court must declare itself incompetent.[69]

In its Order of 10 July 2002, in which it pronounced on a request for provisional measures in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court went a step further in admitting the validity of the reservation and virtually dispelled all doubt, on this occasion stating that the reservation "does not bear on the substance of the law, but only on the Court's jurisdiction" and that it therefore "does not appear contrary to the object and purpose of the Convention".[70]

In the case concerning the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), the Court dealt with the reservation to article 9 entered by Serbia and Montenegro upon presenting its instrument of accession to the Convention on Genocide on 6 March 2001 and did not reject it in any way.[71] This is not entirely conclusive, however, in that

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[69] *I.C.J. Reports 1999*, p. 772. In the case of Yugoslavia versus the United States, its analysis was the same as in paragraphs 21 to 25 (*I.C.J. Reports 1999*, pp. 923–924). In this line see Pellet, A., "La CIJ et les reserves aux traités. Remarques cursives sur une révolution jurisprudentielle", *Liber Amicorum Judge Shigeru Oda*, Kluwer Law International, 2002, p. 500.

[70] *I.C.J. Reports 2002*, pp. 245–246, para. 72. The full text of this crucial paragraph reads as follows: "72. Whereas the Genocide Convention does not prohibit reservations; whereas the Congo did not object to Rwanda's reservation when it was made; whereas that reservation does not bear on the substance of the law, but only on the Court's jurisdiction; whereas it therefore does not appear contrary to the object and purpose of the Convention; whereas it is immaterial that different solutions have been adopted for courts of a different character; whereas, specifically, it is immaterial that the International Criminal Tribunal for crimes committed in Rwanda was established at Rwanda's request by a mandatory decision of the Security Council or that Article 120 of the Statute of the International Criminal Court signed at Rome on 17 July 1998 prohibits all reservations to that Statute".

[71] "53. The Government of Croatia, on 18 May 2001, and the Presidency of Bosnia and Herzegovina, on 27 December 2001, objected to the deposit of the instrument of accession by the FRY, on the basis that as one of the successor States to the former SFRY,

the situation of the Federal Republic of Yugoslavia as regards the Convention on Genocide was a marginal issue in the case in point. This was the review of a decision, and therefore the Court's concern was to ascertain whether the admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000 constituted a new fact, not known to the Federal Republic of Yugoslavia or to the Court before the latter issued its ruling on competence in the original case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*) on 11 July 1996, knowledge of which might have altered the original decision. As we know, that decision rested upon the view that the situation *sui generis* of the Federal Republic of Yugoslavia vis-à-vis the United Nations Organisation as from General Assembly resolution 47/1 of 22 September 1992, which indicated that the Federal Republic of Yugoslavia could not take part in the work of the General Assembly, did not prevent it from appearing before the Court.

In its rulings of 15 December 2004 on competence in the case concerning *Legality of Use of Force*, the Court made no attempt to analyse this issue. Taking the view that in 1999 Serbia and Montenegro lacked the capacity to appear before it under article 35 paragraph 1, since it was not a party to the Court's Statute, and concluding that it likewise had no right of access by virtue of article 35 paragraph 2 – access to the Court for States not parties to the Statute – the Court decided that there was no need to determine whether or not it could found its jurisdiction under the Convention on Genocide in the cases at issue,[72] as the applicant had stated at the outset.

Our view, then, is that there are elements in the preparatory work for the Convention which could suggest that the compatibility of the reservations to article 9 of the Convention on Genocide with the object and purpose of the treaty is at best doubtful. The proposal drawn up by the Special Committee on Genocide set up by the Economic and Social Council by resolution dated 3 March 1948 contained an

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it was already bound by the Genocide Convention. The two States also objected to the FRY's reservation. In this regard Croatia stated that it was "incompatible with the object and purpose of the Convention" whereas Bosnia and Herzegovina stated that it was made several years after 27 April 1992, "the day on which the FRY became bound to the Genocide Convention in its entirety". On 2 April 2002, the Government of Sweden informed the Secretary-General that it considered the FRY to be one of the successor States to the SFRY "and, as such, a Party to the Convention from the date of entering into force of the Convention for the Socialist Federal Republic of Yugoslavia". Therefore, the Government of Sweden considered the FRY's reservation "as having been made too late and thus null and void" (Multilateral Treaties deposited with the Secretary-General at *http://untreaty.un.org*). To date there has been no further reaction from States parties to the Genocide Convention." (*I.C.J. Reports 2003*, para. 53).

[72] See paragraph 127 of the decision in the case concerning *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* at *http://www.icj-cij.org/cijwww/cdocket/cybe/cybe-frame.htm.*

article 10 declaring the International Court of Justice competent to hear disputes arising from the interpretation and application of the Convention.[73] In the Sixth Commission of the UN General Assembly – Legal Affairs – Belgium and the United Kingdom presented a joint amendment regarding article 10 of the Special Committee's proposal.[74] This joint amendment invested the International Court of Justice with competence to hear not only disputes relating to the interpretation and application of the Convention, but also disputes concerning its "fulfilment", "including disputes relating to the responsibility of a State for any of the acts enumerated in articles 2 and 4".[75] In explaining the amendment, the British delegate, Mr. Fitzmaurice, said that "[t]he delegations of Belgium and the United Kingdom had always maintained that the convention would be incomplete if no mention were made of the responsibility of States for the acts enumerated in articles 2 and 4".[76] Later on, the British delegate insisted that:

> "At the 102nd meeting, during the discussion of the competence of national courts and the reference of disputes to the Security Council, the representative of the United Kingdom had been impressed by the fact that all speakers had recognized that the responsibility of the State was almost always involved in all acts of genocide; the Committee, therefore, could not reject a text mentioning the responsibility of the State".[77]

Thus, in my opinion, this resolved to render the convention effective by making the Court competent to hear disputes arising from failure to fulfil the obligations contained therein highlights the fundamental importance of article 9 in the treaty as a whole for the drafters of the amendment.[78] For his part, the Belgian representative on the Sixth Commission had already declared during the discussion on another

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[73] Doc. E/794, "Report of the *ad hoc* Committee on Genocide", *Economic and Social Council Official Records: Third Year, Seventh Session, Supplement No. 6*, Lake Success, New York, pp. 13–14.

[74] Doc. A/C.6/258, *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Annexes to the Summary Records of Meetings*, 1948, Geneva, p. 28.

[75] *Ibid.* The full text of the joint amendment reads: "Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles II and IV, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties".

[76] "Hundred and Third Meeting, 52. Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]", *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Summary Records of Meetings*, 1948, Palais de Chaillot, Paris, p. 430.

[77] *Ibid.*

[78] Another debatable issue is whether or not the joint amendment was necessary; normally, the terms "interpretation" and "application" appearing in most compromissory clauses allow the Court to examine the international liability attaching to States for violation of international obligations acquired through accession to the treaty.

prior provision, that "It [is] in connexion with prevention that the International Court of Justice could be useful, for it alone [is] competent to decide whether or not a State [is] guilty of violating the terms of the convention and to determine the necessary legal redress".[79] In the view of Belgium, then, the International Court of Justice could be of decisive assistance in the prevention of genocide.[80] For all these reasons, we are forced to conclude that for the authors of the joint amendment to what was then article 10, if recourse to the Court was associated with the attainment of one of the Convention's purposes – the prevention and punishment of the crime of genocide – then a reservation to the compromissory clause would be contrary to the object and purpose of the treaty, and hence invalid.[81] Be it remembered, on the other hand, that the cited joint amendment, with a modification proposed by India, was eventually approved by the Sixth Commission by 23 votes in favour to 13 against with 8 abstentions[82] and came to be included in essence in the definitive version of article 9 of the Convention.

At the same time, it is curious to note that one of the States that have described reservations to article 9 as contrary to the object and purpose of the treaty should be the United Kingdom, one of the co-authors of the cited amendment, and that Belgium, the other co-author, although not going so far as to make an outright statement, did – in ratifying the Convention on 5 September 1951 – in fact oppose the reservations entered by the then Soviet Republics, among them reservations to article 9.[83]

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[79] "Ninety-Eighth Meeting, 47. Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]", *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Summary Records of Meetings*, 1948, Palais de Chaillot, Paris, p. 375.

[80] *Ibid.* On the characterisation of compromissory clauses as a means for the protection of human rights, see Ochoa Ruiz, N., "Las cláusulas compromisorias de las Convenciones de Derechos Humanos de las Naciones Unidas a la Jurisdicción de la Corte Internacional de Justicia: ¿Un mecanismo jurisdiccional de protección de los Derechos Humanos?", *ADI*, vol. XIX, 2003, pp. 267–275.

[81] According to the United States of America, on the other hand, "The possibility of recourse to this Court for settlement of disputes is not central to the overall system of the Convention, which has as its essential elements the definition of the crime of genocide and the creation of obligations to try and punish those responsible for genocide." (See the argument of the United States of America in the stage relating to the suitability of provisional measures in the case, brought before the International Court of Justice, concerning *Legality of Use of Force (Yugoslavia* v. *United States of America)* (CR 99/24, para. 2.17).

[82] "Hundred and Third Meeting, 53. Continuation of the consideration of the draft convention on genocide [E/794]: report of the Economic and Social Council [A/633]", *Official Records of the Third Session of the General Assembly, Part. I, Sixth Committee, Summary Records of Meetings,* 1948, Palais de Chaillot, Paris, p. 447.

[83] "The Government of Belgium does not accept the reservations made by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics."

The fact that the jurisprudence of the International Court of Justice considers compromissory clauses containing the terms "interpretation" and "application" to acceptably vouchsafe it the competence necessary to examine the liability of States parties to whatever treaty is concerned has probably precluded a truly clear appreciation of the scope that the authors of the cited joint amendment intended the compromissory clause in the Convention on Genocide to have.

To close this section on the validity of the Spanish reservation, in the final analysis we must consider its effects, albeit in a general way. It should be noted in this respect that, under the rule laid down in article 21 paragraph 1 of the 1969 Vienna Convention on the Law of Treaties, article 9 must stand in relations between States which explicitly or implicitly accept it, to the extent determined by the reservation. Similarly, having regard to States that have objected to the reservation in respect of article 9 of the Convention on Genocide without actually opposing the Convention's entering into force between them and the State making the reservation, under the rule laid down by article 21 paragraph 3 of the Vienna Convention on the Law of Treaties, it follows that article 9 will not be applicable to mutual relations between those States.

V. CONCLUSION

Given the silence of the Convention on Genocide regarding the possibility of entering reservations, we must perforce examine the compatibility of such reservations with the object and purpose of the treaty. In the section dealing with the validity of reservations to article 9, we saw that, to judge by the preparatory work leading up to the drafting of the article, such compatibility is doubtful. What the drafters of article 9 had in mind was not simply to give the Court competence to hear disputes arising from the interpretation and application of the Convention, but by substantiating the liability of States for violation of the obligations contained therein, actually to associate it with one of the ends pursued – namely, the prevention of genocide. The conclusion to be garnered from a study of the reactions of the States parties is equally doubtful: on the one hand 27 States have entered reservations to the article (17 currently in force), while on the other hand 11 have objected to them, in some cases stressing their incompatibility with the object and purpose of the treaty. Nevertheless, the International Court of Justice has never cast doubt on their validity, and recently it has even gone so far as to state that they are not contrary to the object and purpose of the Convention.

In fact, our analysis of the historical circumstances in which Spain acceded to the Convention shows that the reason why it entered a reservation to article 9 was the Franco regime's reluctance, especially in its early years, to recognise the jurisdiction of international judicial bodies for the peaceful settlement of disputes. As the International Legal Department of the Ministry of Foreign Affairs asserted in its report of 25 October 1967 – to which we have referred several times and which is of key importance in clarifying the position of the Spanish administration – "Spain [had not been] accepting, in recent years, recourse to the [International] Court [of

Justice] for the settlement of disputes over the interpretation of Conventions". Hence, we are forced to rule out any suspicion as to the possibility of intent to conceal practices contrary to the Convention. Indeed, the Legal Department seemed fully to concur with the objectives pursued by the treaty, noting that "it is through Conventions such as the one here in point, despite their imperfections, that the juridical conscience of the international community in criminal matters is given form in Positive International Law", and that "the provision of a conventional juridical basis for the condemnation of genocide reinforces the moral postulates in which it is rooted".

However, while the rationale behind Spain's entry of a reservation to article 9 in 1968 is explicable, the same cannot be said, from a standpoint of juridical consistency, of its maintenance at this time, when Spain, having attained a constitution ensuring the rule of law internally, has progressively sought to respect the same values in the international sphere. In fact, it is fair to say that Spain has already come a long way in this direction, becoming party – in addition to the conventions referred to particularly in this paper – to the major conventions relating to the protection of human rights, within the spheres of both the United Nations[84] and the Council of Europe,[85] and accepting the means of control established by these conventions for purposes of their application.[86]

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[84] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966 (ratified by Spain on 27 April 1977); International Covenant on Civil and Political Rights, New York, 16 December 1966 (ratified by Spain on 27 April 1977); Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979 (ratified by Spain on 5 January 1984); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 6 October 1999 (ratified by Spain on 6 July 2001); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984 (ratified by Spain on 21 October 1987); Amendments to articles 17 (7) and 18 (5) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 8 September 1992 (Spain adhered on 5 May 1999); Convention on the Rights of the Child, New York, 20 November 1989 (ratified by Spain on 6 December 1990); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, New York, 25 May 2000 (ratified by Spain on 8 March 2002; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, 25 May 2000 (ratified by Spain on 18 December 2001); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, New York, 15 December 1989 (ratified by Spain on 11 April 1991); Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean, Madrid, 24 July 1992 (ratified by Spain on 7 December 1994) (see *http://untreaty.un.org/English/sample/EnglishInternetBible/partI/chapterIV/chapterIV.asp*).

[85] Convention for the Protection of Human Rights and Fundamental Freedoms, 4/11/1950 (ratification or accession on 4/10/1979); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20/3/1952 (ratification or accession on 27/11/1990); European Social Charter, 18/10/1961 (ratification or accession on 6/5/1980); Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental

To crown this advance in the acceptance of international legal commitments in the sphere of human rights, since 24 October 2000 Spain has been a party to the Statute of the International Criminal Court of 17 July 1998 and hence accepts the Court's jurisdiction for the judgment of individuals responsible for committing, among others, the crime of genocide, as provided by articles 5 and 6 of the Statute. Indeed, this is yet another reason why it makes little sense for Spain to try and evade scrutiny of its international liability when the individuals responsible could be tried for the same alleged deeds.

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Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions, 6/5/1963 (ratification or accession on 6/4/1982); Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 29, 30 and 34 of the Convention, 6/5/1963, (ratification or accession on 4/10/1979); Protocol No. 5 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending Articles 22 and 40 of the Convention, 20/1/1966, (ratification or accession on 4/10/1979); European Agreement relating to Persons participating in Proceedings of the European Commission and Court of Human Rights, 6/5/1969 (ratification or accession on 23/6/1989); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28/4/1983 (ratification or accession on 14/1/1985); Protocol No. 8 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 19/3/1985 (ratification or accession on 23/6/1989); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26/11/1987 (ratification or accession on 2/5/1989); Additional Protocol to the European Social Charter, 5/5/1988 (ratification or accession on 24/1/2000); Protocol amending the European Social Charter, 21/10/1991 (ratification or accession on 24/1/2000); European Charter for Regional or Minority Languages, 5/11/1992 (ratification or accession on 9/4/2001); Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 4/11/1993 (ratification or accession on 8/6/1995); Protocol No. 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 4/11/1993 (ratification or accession on 8/6/1995); Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11/5/1994 (ratification or accession on 16/12/1996; Framework Convention for the Protection of National Minorities, 1/2/1995 (ratification or accession on 1/9/1995); European Agreement relating to persons participating in proceedings of the European Court of Human Rights, 5/3/1996 (ratification or accession on 19/1/2001); Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, 5/3/1996 (ratification or accession on 21/1/1999) (See *http://conventions.coe.int/Treaty/EN/cadreprincipal.htm*).

[86] As from 11 March 1998, Spain accepts the competence of the Human Rights Committee by virtue of article 41 of the International Covenant on Civil and Political Rights; also, since 25 January 1985 it has agreed to be bound by the system of individual claims established in the Optional Protocol to the Covenant. Within the European sphere, as we saw in note 81, Spain is fully integrated in the system of protection of human rights instituted by the Rome Convention of 4 November 1950 and protocols, including the eleventh protocol, which among other things establishes the jurisdiction of the European Court of Human Rights as mandatory and allows individuals to submit complaints to it directly.

Also, on 29 October 1990 Spain accepted the compulsory jurisdiction of the International Court of Justice in depositing a unilateral declaration under article 36 paragraph 2 of the Court's Statute with the United Nations Secretary General.[87] The Spanish declaration is couched in very general terms and could readily serve to vouchsafe the necessary jurisdiction to the Court in disputes relating to the interpretation or application of the Convention on Genocide, always provided that competence in the case at issue is not barred by the reservations and conditions included therein and also in the declaration of the opposing party under the principle of reciprocity;[88] as we see it, this makes it even less reasonable to maintain the reservation in respect of article 9 of the Convention on Genocide.

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[87] "1. On behalf of the Spanish Government, I have the honour to declare that the Kingdom of Spain accepts as compulsory ipso facto and without special agreement, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the Court, in relation to any other State accepting the same obligation, on condition of reciprocity, in legal disputes not included among the following situations and exceptions:

(a) disputes in regard to which the Kingdom of Spain and the other party or parties have agreed or shall agree to have recourse to some other method of peaceful settlement of the dispute;

(b) disputes in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court only in relation to or for the purposes of the dispute in question;

(c) disputes in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than 12 months prior to the filing of the application bringing the dispute before the Court;

(d) disputes arising prior to the date on which this Declaration was deposited with the Secretary-General of the United Nations or relating to events or situations which occurred prior to that date, even if such events or situations may continue to occur or to have effects thereafter.

2. The Kingdom of Spain may at any time, by means of a notification addressed to the Secretary-General of the United Nations, add to, amend or withdraw, in whole or in part, the foregoing reservations or any that may hereafter be added. These amendments shall become effective on the date of their receipt by the Secretary-General of the United Nations.

3. The present Declaration, which is deposited with the Secretary-General of the United Nations in conformity with Article 36, paragraph 4, of the Statute of the International Court of Justice, shall remain in force until such time as it has been withdrawn by the Spanish Government or superseded by another declaration by the latter. The withdrawal of the Declaration shall become effective after a period of six months has elapsed from the date of receipt by the Secretary-General of the United Nations of the relevant notification by the Spanish Government. However, in respect of States which have established a period of less than six months between notification of the withdrawal of their Declaration and its becoming effective, the withdrawal of the Spanish Declaration shall become effective after such shorter period has elapsed." Madrid, 15 October 1990. (Signed) Francisco Fernandez Ordóñez, Minister for Foreign Affairs.

[88] In addition to the works mentioned so far, on the Spanish declaration and its effects see M.P. Andrés Sáenz de Santamaría, "España y el Tribunal Internacional de Justicia", *Meridiano*

The inconsistency of carrying on with the reservation was made patent on 22 October 1999, when the Spanish government informed the United Nations Secretary General, as depositary, that it had decided to withdraw the reservation to article 22 of the Convention on the Elimination of All Forms of Racial Discrimination entered at the time of acceding[89] – which reservation, as we know, was entered at the same time as the one to article 9 of the Convention on Genocide, and for the same reasons.

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Ceri, 1995, no. 3; J.D. González Campos,"España reconoce como obligatoria la jurisdicción de la C.I.J. de conformidad con el art. 36.2 del Estatuto", *REDI*, vol. XLII, 1990, pp. 360–365 and F. Jiménez García, *La jurisdicción obligatoria unilateral del Tribunal Internacional de Justicia. Sus efectos para España*, Dykinson, Madrid, 1999, pp. 60–66.

[89] See *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp*.