Spanish Judicial Decisions in Public International Law, 2004

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

– *DTC* 1/2004, of 13 December.

In response to the request (matter n. 6603/2004) submitted by the State Attorney on behalf of the Government of the Nation, concerning the existence or non-existence of a contradiction between the Spanish Constitution and articles I–6, II–111 and II–112 of the Treaty Establishing a Constitution for Europe, signed in Rome on 29 October 2004.

Reporting judge: Mr. Vicente Conde Martín de Hijas

Facts:

The State Attorney wishes that, his petition having been accepted, a request be considered to have been formulated on behalf of the Government for this Court, pursuant to arts. 95.2 *CE* and 78.1 *LOTC*, following the relevant procedure, to issue a binding Declaration on the following points:

1) The existence or non-existence of a contradiction between the Spanish Constitution and article I-6 of the Treaty Establishing a Constitution for Europe.
2) In view of the provisions laid down in article 10.2 of the Spanish Constitution, the existence or non-existence of a contradiction between the Spanish Constitution and articles II-111 and II-112 of the Treaty Establishing a Constitution for Europe, which are part of the European Union Charter of Fundamental Rights.
3) Whether or not article 93 of the Spanish Constitution is sufficient for the purpose of State authorization of the Treaty Establishing a Constitution for Europe.

4) If necessary, the type of constitutional reform that should be made to adapt the text of the Spanish Constitution to the Treaty Establishing a Constitution for Europe.

"Legal Grounds:

First: This is the second occasion on which this Court has been requested to issue a declaration on whether an international treaty to be integrated into Spanish law, in this case the Treaty Establishing a Constitution for Europe, conforms to the Constitution. This request must be substantiated through the specific procedural channels laid down in art. 95.2 of the Constitution and regulated in art. 78 of the Organic Law of this Court, on whose nature and meaning we made a number of considerations in Declaration 1/1992, of 1 July (hereinafter *DTC* 1/1992), which are appropriate to recall.

On that occasion it was stated that, with the procedure established in art. 95.2 of the Constitution, this Court is entrusted with a twofold mission, for to the general or common function, consisting of the jurisdictional defence of the Constitution, is added that of guaranteeing the security and stability of the international commitments into which Spain may enter. If preferred, to the jurisdictional mission of this Court is added, by dint of its preventive exercise, a precautionary facet of safeguarding the international responsibility of the State. In short, the purpose is to ensure the supremacy of the Constitution without prejudice to those commitments, endeavouring to prevent any possible contradictions between the two from having to be settled once the agreed rules have been incorporated into the legal system; that is, when consequences incompatible with the logic of respect for what is agreed internationally could derive from the logic of the supremacy of the Constitution. Art. 95.2 *CE* allows doubts that a treaty may raise as to constitutionality to be settled before its ratification in order that, should they be confirmed, ratification is not possible unless the constitutional text is revised or the treaty renegotiated in terms that make it compatible with the Constitution. Basically, the aim is to prevent a contradiction found between the supreme Rule, on the one hand, and a rule not yet integrated into the system governed by the latter, on the other hand, from becoming a contradiction between the Constitution and an international rule incorporated into Spanish law.

With this advanced jurisdictional defence the Constitution ensures its supremacy over international rules from the moment they become integrated into national law, attempting to obviate "the disturbance that the possible declaration of unconstitutionality of an agreed rule would imply for foreign policy and international relations of the State" (*DTC* 1/1992, LG. 1) if the judgment of contraction were made only after it had been incorporated into internal law. The contradiction is therefore settled by preventing it at source and not simply when it has already arisen and the only measure that can be taken is to activate two guarantee systems, international and internal [*ex* art. 27.2.c) *LOTC*], which can lead to mutually disturbing consequences.

Therefore, given the strictly jurisdictional nature of the preventive procedure envisaged in art. 95.2 of the Constitution, we stated in the aforementioned Declaration 1/1992 that "what can be requested from us is a declaration, not a ruling; a decision, not merely an opinion based on law, [for] this Court does not cease to be what it is when it is occasionally transformed, by dint of a request, into an advisory body. What the request entails is, as occurs in questions of unconstitutionality, the exposition of a reasonable doubt, but what is requested from us is not a reasoning that settles it but a binding decision" (*DTC* 1/1992, LG. 1). And it is this jurisdictional nature that establishes that our pronouncement can only be based on legal-constitutional arguments – whether or not they are suggested by the requester or by anyone appearing in the proceedings – and "be limited . . . to the contrast between the Constitution, in any of its statements and the treaty stipulation or stipulations that have been previously monitored, since art. 95.1 of the Constitution exclusively grants the Government and either of the Houses the power to formulate this doubt of constitutionality, the raising and clarification of which is therefore not incumbent *ex officio* on the Court, which, as in other proceedings, lacks initiative and is bound to the constitutional principle of congruency. This does not preclude the possibility of this Court requesting further information and clarifications or extensions pursuant to art. 78.3 *LOTC*".

Second: The doubt of constitutionality raised by the Government of the Nation relates to three precepts of the Treaty Establishing a Constitution for Europe, signed at Rome on 29 October 2004, articles I-6, II-111 and II-112. The Government furthermore requires this Court to issue an opinion as to whether art. 93 *CE* is sufficient to enable the Treaty to be incorporated into national law or, if applicable, as to the appropriate constitutional revision procedure to adapt the Constitution to the Treaty before the integration of the latter.

Before giving a detailed reply to the questions raised, it is necessary to comment on the scope and content of art. 93 *CE*. Bringing up this article in itself constitutes application of the Constitution which, in turn, signifies an unequivocal act of exercise of Spanish sovereignty.

As can be inferred from the work of the constituent *Cortes*, art. 93 was conceived as the constitutional means of integrating Spain into the European Communities, an integration phenomenon that extends beyond the simply procedural aspect and entails the consequences of joining a different supranational body capable of creating a law of its own endowed with its own principles governing the efficiency and the requirements and limits of the applicability of its rules. This was a long yearned for and, without a doubt, constitutionally desired integration that was accordingly facilitated by the aforementioned art. 93 *CE*.

The accession of the Kingdom of Spain to what is now the European Union has effectively been implemented through art. 93 of our Constitution, which is therefore a key precept and which this Tribunal has already proceeded to classify in its case-law and in its previous *DTC* 1/1992, and whose complexity, which, as we pointed out in the aforementioned Declaration, "is not slight"

(LG. 4), we must go on to examine the question in greater depth in order to provide a response to the present request.

Of art. 93 *CE*, the "ultimate basis" of our incorporation to the process of European integration and of becoming bound by community law, we have said that it is a precept that is "procedural in nature" (*STC* 28/1991, of 14 February, LG. 4, and *DTC* 1/1992, LG. 4) and allows the exercise of competences deriving from the Constitution to be attributed to international organizations or institutions. This was the only dimension considered in the aforementioned Declaration with the sole purpose of determining, in response to the doubt raised at the time, whether art. 93 *CE* was the appropriate mechanism for making exceptions to the limit which art. 13.2 *CE* established for extending to foreign citizens, by treaty or by law, the right of passive suffrage in municipal elections; it being concluded, given the contradiction pertaining to the text of a substantive constitutional rule, that the aforesaid precept does not incorporate a revisionary procedure equivalent to the constitutional reform procedures regulated in Title X *CE*. But it is the means envisaged by the Constitution for transferring or attributing to international organizations or institutions the exercise of competences deriving therefrom, and therefore, as we recognized in that Declaration, the scope of application and regulation of the exercise of the competences transferred is thus adapted (LG. 4).

However, what we stated in *DTC* 1/1992 was in connection with a set of precise coordinates, the existence of a contradiction between art. 8.B of the Treaty Establishing the European Community and art. 13.2 of the text of the Spanish Constitution, and it is with reference to those coordinates that the scope of some of the contents of that Declaration should be understood when issuing the current one, which relates to a very different framework in which, as we shall argue, such a contradiction with the text does not arise.

Art. 93 *CE* is undoubtedly the basic constitutional backbone for integrating other legal systems with ours, by transferring the exercise of competences derived from the Constitutions; these legal systems are intended to coexist with internal law insofar as they are autonomous systems owing to their origin. In metaphorical terms, it could be said that art. 93 *CE* acts as a hinge whereby the Constitution incorporates into our constitutional system other legal systems by transferring the exercise of competences. Art. 93 *CE* is thus endowed with a substantive or material dimension that should not be ignored.

Once integration has been carried out it should be stressed that the framework for the validity of community rules is no longer the Constitution but the Treaty itself whose conclusion implements the sovereign operation of transfer of the exercise of competences derived from the latter, although the Constitution requires that the legal system accepted as a result of the transfer be compatible with its basic principles and values.

As is inferred from the mechanism contained in the constitutional precept itself, nor can we ignore the need to provide the international organizations to which the exercise of competences has been transferred with the instruments essential for guaranteeing compliance with the law they have created; this func-

tion can only be impaired by an inappropriate understanding of the aforementioned constitutional precept and of its integrating substance. It is therefore essential for an interpretation to embrace the unavoidable dimension of community integration that the constitutional precept entails.

This interpretation should be based on recognition that the operation of transfer of competences to the European Union and the consequent integration of community law into our own law impose unavoidable limits on the sovereign powers of the State, which are acceptable only insofar as European law is compatible with the fundamental principles of the social and democratic State established by the national Constitution. Therefore, the constitutional transfer that art. 93 *CE* allows for has its material limits that are imposed on the transfer. Those material limits, which are not expressly stated in the constitutional precept but implicitly derive from the Constitution and the essential sense of the very precept, translate into respect for State sovereignty, for our basic constitutional structures and for the system of fundamental values and principles enshrined in our Constitution, in which fundamental rights acquire a substantiveness of their own (art. 10.1 *CE*); as we shall see, these limits are scrupulously respected in the Treaty we are analysing.

Having made these considerations, we will now go on to reply directly to the questions raised by the Government.

Third: The first question relates to article I-6 of the Treaty, which literally states:

"The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".

This provision of the Treaty, as formally stated by the Conference of Representatives of the Governments of the Member States in a Declaration appended to the Treaty (Declaration on art. I-6), "reflects existing case-law of the Court of Justice of the European Communities and of the Court of First Instance" and expressly limits the primacy of the law of the Union to the exercise of the competences conferred on the European institutions. This primacy is not affirmed as a hierarchical superiority but as an "existential requirement" of this law, in order to achieve in practice direct effect and uniform application in all states. The coordinates established in this case for defining the scope of validity of this principle are, as we shall see, determining factors in understanding it in the light of the constitutional categories.

The first aspect to stress, in order to interpret correctly the proclaimed primacy and the framework in which it operates, is that the Treaty Establishing a Constitution for Europe is underpinned by respect for the identity of the states that make it up and for their basic constitutional structures and is based on the values that are the backbone of the Constitutions of those states.

Art. I-5.1 is sufficiently explicit in this respect when it states that:

"The Union shall respect the equality of Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.

It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security".

At the same time, as regards the values on which the Union is based, art. I-2 states categorically that:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

This is further developed in the Charter of Fundamental Rights of the Union contained in the second part of the Treaty, the preamble to which states that it "is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity", and that nothing in this Charter "shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized . . . by the Member States' constitutions" (art. II-113 of the Treaty).

These precepts, among others, enshrine the guarantee of the existence of the States and their basic structures, and of their fundamental values, principles and rights, which under no circumstances could become unrecognizable following the phenomenon of transfer of the exercise of competences to the supra-state organization – a guarantee whose absence or lack of explicit proclamation justified, in previous periods, the reservations regarding the primacy of community law over the different constitutions in known decisions of the constitutional jurisdictions of some States in what doctrine has come to call the dialogue between the constitutional courts and the European Court of Justice. Put another way, the limits to which the reservations of those constitutional jurisdictions referred are now proclaimed unequivocally by the very Treaty that is submitted to our consideration, which has adapted its provisions to the requirements of the Member States' constitutions.

The primacy proclaimed in the Treaty Establishing a Constitution for Europe thus operates in respect of a legal system built on the common values of the constitutions of the States that make up the Union and their constitutional traditions.

On the basis of these guarantees, it should furthermore be stressed that the primacy established for the Treaty and its law in the questioned art. I-6 is expressly limited to the exercise of competences conferred on the European Union. It is not, therefore, a primacy that is general in scope; rather, it relates exclusively to the competences of the Union. The limits of these competences are defined by the principle of conferral (art. I-11.1 of the Treaty), pursuant to which "the Union shall act within the limits of the competences conferred upon it by the Member States in the [European] Constitution to attain the objectives set out in the Constitution" (art. I-11.2). This primacy therefore operates in respect of competences that are transferred to the Union by sovereign will of the State and are also recoverable through the "voluntary withdrawal" procedure envisaged in article I-60 of the Treaty.

At the same time, it should be stressed that the Union should exercise its non-exclusive competences in accordance with the principles of subsidiarity and proportionality (art. I-11.3 and 4), so that the phenomenon of expanding competences previously fostered by the functional and dynamic nature of community law is rationalized and limited, since henceforth, pursuant to the "flexibility clause" as currently worded in article I-18 of the Treaty, in the absence of specific powers to undertake actions necessary for the achievement of its objectives, the Union may only act through measures adopted by the Council of Ministers acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, and the participation of the national parliaments is envisaged in the framework of the procedure for controlling the principle of subsidiarity mentioned in article I-11.3 of the Treaty.

As for the distribution of competences between the European Union and the Member States, articles I-12 to I-17 of the Treaty define with greater precision the areas of competence of the Union. Therefore, the new Treaty does not substantially alter the situation arising from our accession to the Community; if anything, it simplifies and reorganizes it in terms that make the scope of the conferral of the exercise of competences more precise. But, above all, it should be noted that the competences whose exercise is conferred to the European Union could not, without breach of the Treaty, serve as a basis for the production of community rules contrary in content to fundamental values, principles or rights of our Constitution.

Fourth: Having defined the essential elements of the regulatory framework of the precept to which the Government's doubts are related, it should be stressed that the Government takes up the doubts expressed by the Council of State in its opinion of 21 October 2004 on the compatibility of this article with the Constitution, identifying as a possible contradicted constitutional precept art. 9.1, which would appear to proclaim the principle of supremacy of the Constitution over that which is enshrined in title IX of the basic Rule ("Concerning the Constitutional Court") and whose guarantee is provided in title X ("Concerning Constitutional Reform"). In actual fact, having examined the terms in which the question is posed, the contradiction observed could not fail to extend to art. 1.2. of the Constitution, as the supremacy presumed to be placed at risk by the Treaty stems from a rule that enjoys it as a expression of the exercise of the constituent will of the State by the Spanish people, in whom national sovereignty resides.

However, we will see at once that such a contradiction does not exist.

That the Constitution is the supreme rule of Spanish law is a question that, even if not expressly proclaimed in any of its precepts, undoubtedly derives from the wording of many of them, among others from its arts. 1.2, 9.1, 95, 161, 163, 167, 168 and repeal provision, and is consubstantial to its condition of basic Rule; this supremacy or higher rank of the Constitution vis-à-vis any other rule and, specifically, international treaties, was affirmed in Declaration 1/1992 (LG. 1). Now, the proclamation of the primacy of the law

of the Union by art. I-6 of the Treaty does not contradict the supremacy of the Constitution.

Primacy and supremacy are categories that operate in differentiated areas. The former, in the application of valid rules; the latter in that of rule making procedures. Supremacy is based on the higher hierarchical nature of a rule and, therefore, affords validity to those that rank below it, which are consequently invalid if they contravene something that is laid down imperatively in the higher rule. Primacy, in contrast, is not necessarily based on hierarchy but on the distinction between areas of application of different rules which in principle are valid; however one or several of them have the capacity to displace others by dint of their preferential or prevalent application stemming from different reasons. Any supremacy implies, in principle, primacy (hence their use as equivalent terms on occasions, such as in our Declaration 1/1992, LG. 1), except when the supreme rule has provided for its own displacement or non-application in some area. The supremacy of the Constitution is therefore compatible with systems of application that grant applicational preference to the rules of a legal system other than the national system as long as this is provided for in the Constitution, which is exactly what occurs with the provision contained in art. 93, according to which competences derived from the Constitution may be conferred on an international institution constitutionally empowered to regulate matters hitherto reserved to the internal powers and to apply them to the latter. In short, the Constitution has accepted, pursuant to art. 93, the primacy of the law of the Union in the area pertaining to this law, as art. I-6 of the Treaty now expressly recognizes.

And this has been the case since Spain's accession to the European Communities in 1986. That year an autonomous regulatory system endowed with a specific regime of applicability became integrated into Spanish law based on the principle of prevalence of its own rules over any internal rules which it might contradict. This principle of primacy, of jurisprudential construction, was part of the *acquis communautaire* incorporated pursuant to Organic Law 10/1985, of 2 August, authorizing Spain's accession to the European Community, as it dates back to the doctrine first established by the European Court of Justice with the Judgment of 15 July 1964 (*Costa v. ENEL*).

Otherwise, our case-law has pacifically recognized the primacy of European Community law over national law in the field of "competences derived from the Constitution", whose exercise Spain has conferred upon the community institutions on the basis, as we have stated, of art. 93 *CE*.

We referred expressly to the primacy of community law as a technique or regulatory principle designed to ensure its effectiveness in our *STC* 28/1991, of 14 February, LG. 6, which partially reproduces the *Simmenthal* Judgment passed by the Court of Justice, and in the later *STC* 64/1991, of 22 March, LG. 4 a). In our subsequent *SSTC* 130/1995, of 11 September, LG. 4, 120/1998, of 15 June, LG. 4, and 58/2004, of 19 April, LG. 10, we reiterate the recognition of this primacy of the rules of community law, both primary and secondary,

over internal law, and its direct effect for citizens, adopting the definition of this primacy and effectiveness made by the Court of Justice, among others, in its known, now old, *Vand Gend en Loos* Judgment of 5 February 1963, and *Costa v. ENEL* Judgment of 15 July 1964 which we have previously quoted.

Therefore, in view of the foregoing, it must be concluded that, on the basis of art. 93 *CE*, correctly understood, and given the specific provisions of the Treaty pointed out in the previous legal ground, this Court finds no contradiction between art. I-6 of the Treaty and art. 9.1 *CE*, and the circumstance envisaged in art. 95.1 *CE* does not apply.

In highly unlikely event that, as a result of subsequent development, European Union law should become irreconcilable with the Spanish Constitution, and the hypothetical excesses of European Law with respect to the European Constitution were not remedied using the ordinary channels provided for in the latter, preservation of the sovereignty of the Spanish people and of the supremacy they have vested in the Constitution could ultimately lead this Court to address problems arising from such a circumstance which, from the current perspective, are considered to be non-existent, through the appropriate constitutional procedures, apart from the fact that the safeguard of the aforementioned sovereignty is always ultimately ensured by art. I-60 of the Treaty, which provides a genuine counterpoint to art. I-6, and allows a definition of the real dimension of the primacy proclaimed in the latter, which is incapable of overruling the exercise of renunciation, which is reserved for the supreme, sovereign will of the Member States.

Fifth: The Government also requires a declaration on the possible contradiction with the Constitution of two Treaty stipulations included in title VII of part II and referring to the field of application and scope and interpretation of the rights and principles of the Charter of Fundamental Rights of the Union, proclaimed at Nice on 7 December 2000 and now incorporated into the Treaty. The first of the precepts about which the Government enquires is art. II-111, according to which:

"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.
2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution".

The second of the stipulations pointed out by the Government, article II-112, determines that:

"1. Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.
2. Rights recognized by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.
3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States".

The Government, also adopting the opinion of the Council of State as its own, understands that the stipulations of the Charter do not clash with the constitutional configuration of rights and freedoms, especially bearing in mind the invocation of the European Convention for the protection of human rights and fundamental freedoms made by article II-112.3 of the Treaty, for the reference made by the Treaty and by art. 10.2 of the Constitution to this Convention means that part II of the Treaty is substantially in compliance with the system of values, rights and principles guaranteed by the Spanish Constitution. If any difficulty is detected by the Government, it would stem from the coexistence of three systems of protection of fundamental rights (Constitution, European Convention and Charter), which will necessarily determine a process of mutual influence that is not without difficulties. In particular, the Council of State points out in its opinion that it shall fall to this Constitutional Court "to clarify the sense in which the Spanish authorities are bound by the Charter, the relationship between the latter and our constitutional system of rights and freedoms, and the manner of refining regulations that contradict it".

In the Agreement of the Council of Ministers on the decision to submit this request, the previous consideration of the Council of State appears to be interpreted in the sense that it is precisely within the framework of this procedure of art. 95.2 *CE* that this Court should provide a response to the problems resulting from the coexistence of three systems for guaranteeing fundamental rights and freedoms. However, the specific question raised by the Government is confined to the compatibility of articles II-111 and II-112 of the Treaty with the Constitution "in view of the stipulations of article 10.2 of the Spanish Constitution". On the basis of all this the governmental doubt to which a reply can be given here solely concerns the compatibility with the Constitution of a system of rights which, on account of the reference contained in art. 10.2 of the Constitution, would become, following its integration, a parameter that determines the configuration of rights and freedoms, not only within the field of European law but, owing to its inherent expansiveness, also in purely internal law.

Sixth: The problems of coordinating guarantee systems are characteristic of our system of fundamental rights, and it falls to this Constitutional Court to define the specific content of the rights and freedoms protected by the Spanish public power on the basis of the concurrence, by its definition, of international rules and strictly internal rules, the former endowed with their own protection mechanism and, therefore, with an authorized definition of their content and scope. The specific problems of coordination that may arise with the integration of the Treaty cannot be dealt with in an advance and abstract decision. As occurs with those that the integration of the Convention of Rome has posed from the outset, their solution can only be sought in the framework of the constitutional procedures attributed to the cognizance of this Court, that is, weighing up for each concrete right and in its specific circumstances the most relevant formulas for coordination and definition, in constant dialogue with the authorized jurisdictional bodies, if necessary, for the authentic interpretation of the international conventions containing statements on rights that coincide with those proclaimed by the Spanish Constitution.

Therefore, the doubt that can be examined here relates to the possible contradiction with the Constitution of a Charter of Rights which, according to art. 10.2 *CE*, following its integration into Spanish law, should become a standard for the interpretation of "the principles relating to the fundamental rights and liberties recognized by the Constitution"; this is, of course, without prejudice to its value as Law of the Union integrated into ours *ex* art. 93 *CE*. No other sense can be attributed to the reference to articles II-111 and II-112 of the Treaty, which respectively define the field of application of the rights enshrined in the Charter, on the one hand, and the criteria defining their interpretation and scope, on the other. In the case of the former, the Treaty states that the Charter is addressed to the "institutions, bodies, offices and agencies of the Union", and to Member States "only when they are implementing Union law", and expressly mentions that the Charter does not alter by extension the powers of the European Union. This reduction of the field of application of the Charter – and

accordingly of the criteria for interpretation mentioned in article II-112 – could not prevent, if authorization were granted to become bound by the Treaty (insofar as it is a convention on rights ratified by Spain through the procedure laid down in art. 93 *CE*), its interpretative efficiency in respect of the rights and freedoms proclaimed by the Constitution from having the general scope envisaged in art. 10.2 *CE*.

The doubt is therefore whether or not the inevitable extension of the interpretative criteria of the Charter beyond the boundaries defined by article II-111 is compatible with the system of rights and freedoms guaranteed by the Constitution. In other words, whether or not the criteria established by the Treaty for the bodies of the Union and for the Member States when implementing European law can be reconciled with the fundamental rights of the Constitution and, accordingly, whether or not they can also be imposed upon the Spanish public authorities when they act outside the scope of Union law, that is, also in circumstances that are in no way connected with that law. And finally, we should not forget that it is completely clear that the application by the national judge, as a European judge, of the fundamental rights enshrined in the Charter must entail, almost without exception, the simultaneous application of the correlative national fundamental right; in view of this hypothesis it is worth asking whether the interpretation of constitutional rights in the light of the Charter (art. 10.2 *CE*) can in turn be reconciled with the definition of them that can be inferred from our case-law, which, as we have pointed out, has always taken into consideration the treaties and conventions on this matter.

The doctrine of this Court has repeatedly stressed that the international treaties and agreements referred to in art. 10.2 of the Constitution "constitute valuable hermeneutic criteria on the sense and scope of the rights and freedoms recognized by the Constitution", so that they must be taken into consideration "to corroborate the sense and scope of the specific fundamental right which . . . our Constitution has recognized" [*STC* 292/2000, of 30 November, LG. 8, with reference, precisely, to the Charter of Nice, also *STC* 53/2002, of 27 February, LG. 3 b)]. The interpretative value that the Charter would have in matters of fundamental rights with this scope would not cause greater difficulties in our legal system than those already stemming from the Rome Convention of 1950, basically because both our own constitutional doctrine (on the basis of art. 10.2 *CE*) and article II-112 (as shown by the "explanations" which are incorporated into the Treaty through paragraph 7 of the same article as a way of providing guidance in its interpretation) operate with a set of references to the European convention that end by establishing the case-law of the Strasbourg court as common denominator for establishing the minimum shared content of interpretative elements. Even more so since art. I-9.2 states authoritatively that "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

This reduction in the complexity inherent in the concurrence of criteria for interpretation says nothing new about the value that the case-law of the courts

of the European Union should be attributed in defining each right. In other words, it does not mark a qualitative change in the significance of the doctrine in the ultimate configuration of the fundamental rights by this Constitutional Court. It simply means that the Treaty adopts as its own the case-law of a Court whose doctrine is already integrated into our law by means of art. 10.2 *CE*, so that no new or greater difficulties for the ordered structuring of our system of rights are to be found. And any that emerge, as has been stated, may only be grasped and settled using the constitutional proceedings we may conduct.

In other respects, we cannot fail to stress that article II-113 of the Treaty establishes that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions", meaning that in addition to the fact that the Charter of Fundamental Rights is based on values in common with the constitutions of the Member States, it is clearly conceived as a guarantee of a minimum from which the content of each right and freedom can be developed until it attains the density that is protected in each case by internal law.

It must therefore be concluded, in reply to the second of the Government's questions, that there is no contradiction between the European Constitution and arts. II-111 and II-112 of the Treaty Establishing a Constitution for Europe.

Seventh: As for the third of the points on which the Government has requested a declaration from this Tribunal, that is, whether art. 93 of the Constitution is sufficient to integrate the Treaty into Spanish law, its sufficiency has practically been confirmed in the previous legal grounds, and it is therefore senseless to repeat what has already been stated. It is sufficient merely to refer to what has been expressed.

Other issues which, following the indications of the Council of State, the Government has raised on the possible advisability of modifying the current wording of art. 93 *CE* in order to refer expressly to the process of European integration and even to make allowances for subsequent developments in this process, are questions of appropriateness on which we obviously cannot give an opinion, since our jurisdiction – and its exercise is also dealt with in this proceedings, as mentioned at the beginning – only authorizes us to issue decisions on that which is constitutionally necessary. From this perspective art. 93 *CE* as currently worded is sufficient for the integration of a Treaty such as the one being analyzed.

Eighth: Finally, as for the fourth of the questions posed by the Government, the presupposition is not mentioned, which is the need for a reform of the Constitution – which is not the case, as no contradiction is found between the precepts of the Treaty in question and the Spanish Constitution, and it is therefore irrelevant to give an opinion.

In view of the foregoing, the Constitutional Court, by the authority vested in it by the Constitution of the Spanish nation,

Declares

1. That there is no contradiction between the Spanish Constitution and article I-6 of the Treaty Establishing a Constitution for Europe, signed at Rome on 29 October 2004.
2. That there is no contradiction between the Spanish Constitution and arts. II–111 and II–112 of the said Treaty.
3. That art. 93 of the Spanish Constitution is sufficient for the purpose of State authorization of the Treaty in question.
4. That it is not appropriate to issue any declaration on the fourth of the Government's questions".

– *STSJ* Catalonia, 1 June 2004. Contentious-Administrative Division. Jurisdiction for suits under administrative law. Appeal n. 741/2004.

The Division of Contentious Administrative Proceedings of the Superior Court of Justice (TSJ) of Catalonia (Fifth Section) issued the following Decision in the aforementioned appeal lodged by the Government Office in Catalonia, represented by the counsel for the state, against the Town Council of La Jonquera, on 22 February 2001. The appeal lodged by the Government Office in Catalonia against the Agreement of the Plenary of La Jonquera Council refusing to take part in the annual inspection of the boundary marks at the French-Spanish border, considered that this act infringed the Treaty of Bayonne and the Additional Act to that treaty, in addition to impinging on the field of competence of the State as it concerns foreign policy.

"Legal Grounds:

(. . .)

Fourth: Having defined the dispute in the aforementioned terms, we should now examine the first of the Government Office's claims that the contested Agreement infringes articles 1 to 3 of the Additional Act to the Treaty of Bayonne of 1866, which is part of Spanish national law.

Article 96.1 of the Constitution (*RCL* 1978/2836) and, in consonance therewith, article 1.5 of the Civil Code (*LEG* 1889/27), states that validly concluded international treaties, once officially published in Spain, shall form part of the internal legal system and their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law.

According to article 94.c) of the Constitution, the amendment of the questioned Treaty of Bayonne shall be carried out by the *Cortes Generales*, which, according to article 66 of the Constitution, represent the Spanish people, in whom, as stated in article 1.2 of the Constitution, national sovereignty is vested and from whom emanate the powers of the State.

In short, the 1866 Treaty of Bayonne is part of the Spanish legal system provided that the *Cortes Generales* do not deem it to be obsolete, a question that does not fall within the area of responsibility of the authority against which the appeal has been filed, despite its claims based on the spirit of later treaties.

Article 17 of the Treaty states that "As a precaution against any doubts and pleadings, whether between individuals or between the public utilities of both countries concerning the international border, which is summarily indicated in the previous articles, it shall be demarcated at the earliest possible date with lasting, conveniently placed boundary marks.

This operation will be performed by Spanish and French officials, in the presence of delegates from the municipalities concerned who are able to provide local advice, and with no other mission than that of remaining informed of the placing of boundary marks between their respective territories and bearing witness thereto.

A general record shall be drawn up of the marking of the boundaries, the provisions of which shall all have the same force and value as if an essential part of this Treaty".

For their part, articles 1 to 3 of the Additional Act to the Treaty, concerning "Preservation of the international boundary marks", state that:

"Article 1. Every year, in the month of August, the highest administrative authorities of the bordering provinces and departments shall reach an agreement to prepare the Councils concerned to appoint delegates who, in each municipal district and in conjunction with those of the adjoining territory of the other States, must conduct without delay a scrupulous visit to the boundary marks at their border, and each shall file a record of this visit with the said highest Authorities for the appropriate purposes.

Article 2. Without prejudice to the previous article, and in order to ensure the preservation of the boundary marks throughout the international border in a more effective manner than has hitherto been established, the civil Governors and Prefects shall reach an agreement, each with respect to their province or department, with the heads of the various branches of public Administration in order for the latter to issue instructions to their personnel at the border to carry out surveillance, in full understanding with the municipal officers, who will be particularly and directly entrusted with this care, in order that no harm is inflicted on the said boundary marks, to report deterioration, to attempt to discover those responsible and to inform the relevant Authorities of all related matters.

Article 3. The civil Governors and Prefects shall work in conjunction to replace any damaged or missing boundary marks and the two Governments shall equally share all the expenses arising therefrom, except the allowances of the Engineers, which will be paid respectively by each State, unless it is agreed to appoint only one Engineer, whose allowances shall then be borne by both countries. If the persons who caused the damage were discovered, they shall be held personally responsible".

In conclusion, it can be inferred from the foregoing that point one of the contested Agreement, whereby the Council against which the action is brought agreed not to take part in the inspection of the boundary marks, is contrary to the Treaty of Bayonne in the terms laid down, and this is not invalidated by the claim that the members of the Council of La Jonquera were unaware, when adopting the contested Agreement, that the preservation of the boundary marks was part of the Treaty of Bayonne, for according to article 6.1 of the Civil Code lack of knowledge of laws is not a valid justification for not abiding by them; this leads us to partially allow the claim set out in the suit and, accordingly, the petition.

Fifth: As for the rest of the claims made by the Authority against which the action is brought, it is appropriate to dismiss the claim relating to the non-impingement on the area of responsibility of the State, since although the challenged Decision neither establishes nor modifies an international treaty as is claimed, it does fail to abide by the legal obligations incumbent upon it emanating from the Treaty of Bayonne, responsibility of the State pursuant to article 149.1.3 and in accordance with the Constitution (*RCL* 1978/2836).

The claim relating to failure by the State to comply with the Treaty on account of the month in which the boundary marks are usually inspected cannot be taken into consideration as it is not the subject of the case in hand; if necessary, the Authority against which the action is brought can act in accordance with the law provided it considers that a violation of the legal system has been committed, including the one alleged.

Finally, the claim that the challenged Agreement is merely a declaration of intent based on the autonomy of the municipal authority can be stated of the second point, but does not apply to the first, for the limit of the right to freedom of expression does not encompass an agreement to breach the legal system, under the terms previously mentioned.

In conclusion, it is appropriate to allow partially the petition and annul, as it does not comply with the law, point one of the Agreement of the Plenary of La Jonquera Council, dated 22 February 2001".

IV. SUBJECTS OF INTERNATIONAL LAW

1. Diplomatic Immunity

– *STSJ* Madrid, 29 June 2004. Social Affairs Division. Appeal n. 661/2004.

The TSJ allows an appeal lodged against a Decision of Madrid Social Affairs Court n. 7 on 3–11–2003 enforcing a judgment on dismissal against the Embassy of Greece, which is overturned as indicated in the legal grounds.

"Legal Grounds

Sole Ground ". . . what is decided in the contested decision is precisely not to enforce the judgment, contradicting the enforcement action, by agreeing to

return the sum which, in compliance with the judgment, was made available to the employee; this decision is linked to article 189.2 of the Employment Law . . .".

Now, the contested decision states in the second legal ground that "the crux of the matter is to determine whether or not the current accounts of foreign embassies are exempt from attachment pursuant to art. 22.3 of the Vienna Convention on diplomatic relations" and concludes, in the third legal ground, that "this Court, in compliance with the constitutional mandate, previously attempted to ascertain whether there was property liable to attachment; it resulted that there were current accounts which, according to a judgment of the *TC*, cannot be liable to attachment and it cannot be forgotten that if at the time the attachment was not lifted it was owing more to reasons of form than of substance, and proof of this is that the *TSJ* agreed to ratify the attachment without studying the proceedings in detail, as the Court intended, since the procedural means of contesting it was not properly considered and the agreement of the Court was thus ratified by a defect of form, not of substance". And having stated this it concludes in the fourth legal ground that ". . . it is clear that the proposed award whose return is requested must be returned given that, since there is an attachment on unattachable property, it is impossible for enforcement to be carried out against unenforceable property, and therefore the appeal is allowed . . . likewise declaring the nullity not of the decision of 26–2–2002, because it is one thing to issue an attachment and enforcement order that the *TC* does not proscribe in the aforementioned judgments and a very different matter for an attachment to be made of property that is unattachable, and subsequently or over time for a warrant for payment to be issued in respect of unattachable property. Enforcement must be carried out completely, but provided that the property in question can be attached; what cannot be done is not declare that it is not possible to go ahead with the enforcement because before proceeding to do so it is not possible to know whether or not there is attachable propert". That is, the Court argues that it does not declare null and void the decision of 26–2–2002 on the attachment of property, including the Embassy's account with the *BBVA*, but rather the attachment, which is, at the least, extravagant, for the following reasons . . .

Moreover, given that, even at an inappropriate point in the proceedings, the Court examines *a quo* the legitimacy of attaching the Embassy's account, we must abide by the doctrine of the Constitutional Court, Division 2, *S.* 17–9–2001, n. 176/2001 (*RTC* 2001/176), *BOE* 251/2001, of 19 October 2001, which sums up the doctrine concerning the attachability of embassy accounts, as follows:

"We have indeed stated that, even if the immunity from enforcement of foreign States does not contradict in principle the aforementioned fundamental right, an undue extension of its scope by the ordinary Courts would lead to a violation of that right. As this Court has stated in the past, art. 21.2 *LOPJ* (*RCL* 1985/1578 and 2635) and the rules of public international law to which this precept refers do not impose a rule of absolute immunity from enforcement for

foreign States; rather, they allow us to affirm the relativity of that immunity, a conclusion that is reinforced by the very requirement of effectiveness of the rights contained in art. 24 *CE* (*RCL* 1978/2836) and by the reason of immunity, which is not to grant States indiscriminate protection but to safeguard their equality and independence. Therefore, a delimitation of the scope of this immunity must be based on the premise that, generally, when the sovereignty of the foreign State is not involved in a specific activity or in the attachment of certain property, both international law, and by extension, national law disavow the non-enforcement of a Judgment; consequently, a decision of non-enforcement would in such cases amount to a breach of art. 24.1 *CE* (*SSTC* 107/1992, of 1 July [*RTC* 1992/107], LG. 4; 292/1994, of 27 October [*RTC* 1994/292], LG. 3; and 18/1997, of 10 February [*RTC* 1997/18], LG. 6). Therefore, the relativity of the immunity from enforcement of foreign States is based on the distinction between property used for activities performed "iure imperii" (that is, those involving the sovereignty of the State) and property used for activities performed "iure gestionis" (in other words, activities in which the State does not make use of its adjudicative powers and acts in the same way as an individual).

Notwithstanding the foregoing, as this Court stated in *STC* 107/1992, of 1 July, LG. 5 (and, subsequently, in *SSTC* 292/1994, of 27 October, LG. 3; and 18/1997, of 10 February, LG. 6), irrespective of the aforementioned "relative" immunity from enforcement of the property of foreign States on the basis of whether they are used for activities performed "iure imperii" or "iure gestionis", the property of Diplomatic and Consular Missions is absolutely immune from enforcement, pursuant to art. 22.3 of the Vienna Convention of 18 April 1961 (*RCL* 1968/155, 641) on diplomatic relations (which provides that "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution") and art. 31–4 of the Vienna Convention of 24 April 1963 (*RCL* 1970/395) on consular relations (which establishes that "The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility").

Three: Even though, in principle, the attachable property of the Consulate enjoys the privilege of immunity, as certified by the Ministry of Foreign Affairs to the Judge of Social Affairs Court n. 2 of Vizcaya on 15 November 1995, as it is linked to the activity of the Consulate, the petitioner merely wishes this Court to reclassify the legal nature of the attached property as property used for acts performed "ius gestionis" and not "ius imperii", in order to remove this privilege and achieve their attachment and execution.

We are therefore dealing with a mere question of legality that can only be settled by Judges and Courts in the exercise of their judicial authority, by passing and enforcing judgments, as conferred on them exclusively by art. 117.3 *CE* (*RCL* 1978/2836), and can only be examined in this Court in the event of insufficient

grounds or of manifest arbitrariness, unreasonableness or patent error (S*STC* 111/2000, of 5 May [*RTC* 2000/111], LG. 8; and 161/2000, of 12 June [*RTC* 2000/161], LG. 4). We are dealing with, all things considered, a mere disagreement with a court decision, and right to effective protection of the court in the enforcement phase of judgments has in no way been harmed, since the challenged Decision has not prevented the enforcement of the Decision but has simply declared in a reasonable and reasoned manner that it has been passed on certain property not liable to attachment as, according to current legislation, it enjoys the privilege of immunity, which certainly does not prevent, as we stated in *STC* 107/1992, of 1 July (*RTC* 1992/107), delivered subsequently, the attachment from being carried out on other property or rights not protected by international law".

Property or rights including the funds deposited in current accounts, for the running of the Embassy, which in this case are correctly attached.

From the foregoing it follows that the appeal must be allowed.

In view of the foregoing,

Ruling:

We allow the appeal lodged by Julieta, against the decision of Madrid Social Affairs Court n. 7 on 3 November 2003, in proceedings n. 303/00, enforcement n. 20/02, in a dismissal proceedings against the Embassy of Greece and, consequently, we reverse the decision and confirm the award given by the Court on 1 September 2003, and order that the deposited amount of 23,401.68 euros must be made available to the petitioner in compliance with the final judgment passed in this proceedings".

2. Universal criminal jurisdiction of the state

– *STS* 8 March 2004. Criminal Division. Appeal n. 319/2004.

The decision of the National Court (Section 3) of 31–5–2002, rendered ineffective a decision of the Central Magistrates' Court n. 5 of 30–5–2002 allowing a suit against the Chilean general Cornelio, former Defence Minister of that country, on the charges of genocide, terrorism and torture. Angelina, the political party Izquierda Unida and others lodged an appeal for annulment against the National Court decision on the basis of the claims examined in the legal grounds. The TS gives leave to the appeal and renders ineffective the contested decision, and the suit against the Chilean general, Cornelio, is allowed.

Reporting Judge: Mr. Ignacio Moreno González

"Legal Grounds:

(. . .)

Third: The decision delivered by the Plenary of the Second Chamber of the Supreme Court in the so-called "Guatemala case" (*RJ* 2003/2147) examined the issues relating to the principles of universal jurisdiction and subsidiarity, particularly from the perspective of the crimes of genocide and torture, with specific reference to the related international treaties: the Geneva Convention on

the Prevention and Punishment of the Crime of Genocide, of 9 December 1948 (*BOE* of 8 February 1969 [*RCL* 1969/248]) and the Convention against Torture, of 10 December 1984 (*BOE* of 9 November 1987 [*RCL* 1987/2405]).

The basic argument of the aforementioned decision as to whether Spanish courts have jurisdiction to prosecute acts committed outside national territory that allegedly constitute certain types of crimes under international treaties or conventions (art. 23.4 *LOPJ* [*RCL* 1985/1578 and 2635]) may be summed up as follows:

1) That "nowadays doctrine significantly backs the idea that it befalls no State in particular to engage unilaterally in stabilizing order by resorting to criminal law against all and worldwide, but rather that a link is necessary to legitimate the extraterritorial extension of its jurisdiction" (LG. 9).
2) That article VIII of the Convention against Genocide establishes that any contracting party may "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide", as has occurred with the setting up of the International Tribunals for the former Yugoslavia and for Rwanda (LG. 9).
3) That "the principle of non-interference in the affairs of other States (article 27 of the Charter of the United Nations [*RCL* 1990/2336 and 2473]) allows limitations as to facts that affect human rights, but these limitations are only non-objectable when the possibility of intervention is accepted by means of agreements between States or decided by the international community"; and, in this connection, the provisions of the Statute of Rome of the International Criminal Court are expressly cited (LG. 9). And,
4) That International Treaties on these matters lay down "the criteria for the attribution of jurisdiction based generally on territory or on active or passive personality, and to these is added the commitment of each State to prosecute the crimes, wherever they may have been committed, when the alleged perpetrator is located on his own territory and extradition is not granted, thus providing for an ordered reaction against impunity and avoiding the possibility of certain States being used as havens. But none of these treaties has expressly established that each State party may prosecute, without limitation and on the sole basis of its internal law, acts committed in the territory of another State" (LG. 9).

Similarly, the aforementioned judgment stressed that, as established in art. 23.4. g) of the *LOPJ*, Spanish jurisdiction shall be competent to try acts committed outside Spanish territory that may be classified under Spanish criminal law, when "according to the international treaties or conventions, they should be prosecuted in Spain" (LG. 10). And, in this connection, express mention is made of article 27 of the Vienna Convention on the Law of Treaties (*RCL* 1980/1295), which states that a "party may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (LG. 10).

Corroborating these principles, the judgment passed by the Plenary of this court makes particular reference – without intending to be exhaustive – to the related provisions of the following treaties and conventions: a) The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, of 14 December 1973 (*BOE* of 7 February 1986 [*RCL* 1986/381]); b) the Convention for the Suppression of Unlawful Seizure of Aircraft, of 16 December 1970 (*BOE* of 15 January 1973 [*RCL* 1973/48]); c) the Convention for the Suppression of Unlawful Acts against the Safety of International Civil Aviation, of 23 September 1971 (*BOE* of 10 January 1974 [*RCL* 1974/71]); d) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984 (*BOE* of 9 November 1987 [*RCL* 1987/2405]): e) the Convention against the Taking of Hostages, of 17 December 1979 (*BOE* of 7 July 1984 [*RCL* 1984/1792]); f) the European Convention on the Suppression of Terrorism, of 21 January 1977 (*BOE* of 28 October 1980); g) the International Convention for the Suppression of the Financing of Terrorism, of 9 December 1999 (*BOE* of 23 May 2002 [*RCL* 2002/1325 and 1501]); and, h) the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, of 20 December 1988 (*BOE* of 10 November 1990 [*RCL* 1990/2309]) (LG. 10).

In view of the foregoing, the judgment underlines that "although the attribution criteria used (in the aforementioned international treaties and conventions) display certain variations depending on the characteristics and nature of the crime, in none of these Treaties is universal jurisdiction expressly established" (LG. 10).

"Going beyond the effects of the principles of territoriality, defence and active or passive personality", the judgment states, "the established means of cooperation between each State for the prosecution of the crimes specified in each Treaty is the obligation to prosecute persons who have allegedly committed a crime when they are in a State's territory and it has not agreed to the extradition requested by one of the other States with jurisdiction under the respective Convention" (LG. 10).

Finally, as a complement to the previous principles, the aforementioned judgment recognizes that "part of doctrine and some national courts have been inclined to recognize the significance for these purposes of the existence of a connection with a national interest as a legitimizing element in the framework of the principle of universal justice, modifying its scope pursuant to criteria of rationality and with respect to the principle of non-intervention" (LG. 10). In this connection, the Plenary of this Court considered, in the decision in question, that "in the cases of the . . . Spanish priests, and in the case of the attack on the Spanish Embassy in Guatemala, in respect of the victims of Spanish nationality, having duly verified the points required by article 5 of the Convention against torture, the Spanish courts have jurisdiction to investigate and try the suspected offenders" (LG. 11).

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human Rights and Fundamental Freedoms

a) Non discrimination by reason of gender

– *STC* 253/2004, of 22 December 2004.
On question of unconstitutionality n. 2045/98, filed by Pontevedra Social Affairs Court n. 1 regarding the second paragraph of art. 12.4 of the Law on the Status of Workers, as amended on 24 March 1995. The public prosecutor and counsel for the state appeared, the latter by virtue of his office.
Reporting Judge: Mr. Jorge Rodríguez-Zapata Pérez

"I. Background

1. On 8 May 1998 the General Register of this Court received an application from Pontevedra Social Affairs Court n. 1 accompanied, together with a record of the proceedings n. 809/97, by a Decision of the aforementioned Court of 27 April 1998 raising the question of unconstitutionality of the second paragraph of art. 12.4 of the Law on the Status of Workers (hereinafter *ET*) as amended by Legislative Royal Decree 1/1995, of 24 March, denouncing its possible contradiction with the principle of equality and prohibition of indirect discrimination on the grounds of gender contained in art. 14 *CE*.
2. The question arises in the proceedings of the suit brought by Mrs. Rosalía Falcón Roma against the National Institute of Social Security concerning recognition of entitlement to an allowance for permanent total disability on account of ailments that make her unfit to render her services as a cleaner. The application had been refused by a Resolution of the provincial authorities of the National Institute of Social Security on 8 September 1997; this was confirmed by a Resolution of the following 6 October dismissing the previous claim as the worker had not been paying Social Security contributions for the minimum qualifying period at the date of the occurrence of the event according to art. 138.2.b) of the General Law on Social Security (*LGSS*), as a minimum qualifying period of 4,045 days was required for entitlement to the allowance, whereas she proved to have contributed for a total of 4,024 days.

After the proceedings, the Social Affairs Court, in a decision of 7 April 1998, agreed to hear the parties and the public prosecutor (*ex* article 35.2 *LOTC*) on the appropriateness of filing a question of unconstitutionality concerning the second paragraph of art. 12.4 *ET* owing to its possible contradiction with art. 14 *CE*.

3. The application for a referral of a question of unconstitutionality is based on the following considerations:

a) Mrs. Rosalía Falcón Roma was denied an allowance for permanent disability by the National Institute of Social Security for the sole reason that she had not paid contributions for the legally established qualifying period at the date of the occurrence of the event giving rise to the application for the allowance, which was 4,045 days, whereas the claimant had only paid contributions for 4,024 days (including bonuses and the period of temporary incapacity from which the disability derives).

The second paragraph of art. 12.4 *ET* furthermore contains indirect discrimination on the grounds of gender, according to the application for referral. Indeed, statistical evidence, as provided, showing that part-time workers are mainly women, allows us to affirm the existence of an adverse impact which, as it is not justified by objective circumstances not related to gender, leads us to conclude that the law contains indirect discrimination on the grounds of sex, a concept defined by *STC* 145/1991, of 1 July and *STC* 22/1994, of 27 January. To this should be added, as the application states, that it has been recognized that the rules of community law integrate internal constitutional rules on fundamental rights (art. 10.2 *CE*), and it is therefore appropriate to recall the definition of indirect discrimination on the grounds of gender contained in art. 2.2 of Council Directive 97/80/EC, of 15 December 1997, which is based on an established doctrine of the European Court of Justice. The Court also considers that it is appropriate to examine the prohibition on discriminating against part-time workers inspired by Directive 97/81/CE, of 15 December, although this Directive does not contemplate Social Security aspects.

Legal Grounds:

(. . .)

Seventh: The previous conclusions call for a declaration of unconstitutionality of the questioned law as it breaches the principle of equality before the law (art. 14 *CE*), from the perspective of proportionality between the measure adopted, the result and the intended aim. They are decisively reinforced when we address the other doubt of constitutionality raised by the Court concerning paragraph 2 of art. 12.4 *ET*, that is, the breach of art. 14 *CE* from the perspective of a possible indirect discrimination on the grounds of gender.

The concept of indirect discrimination on the grounds of gender has been formulated by the case-law of the European Court of Justice, precisely on the occasion of the judgment of certain cases of part-time work in the light of the prohibition of discrimination on the grounds of gender laid down in art. 119 of the Treaty Establishing the European Economic Community (now art. 141 of the EC Treaty) and the daughter directives. It can be summed up in a formula that has been reiterated by the European Court of Justice in many of its rulings (among many others, ECJ Judgments of 27 June 1990, *Kowalska* case; of 7 February 1991, *Nimz* case; of 4 June 1992, *Bötel* case; and 9 February 1999, *Seymour-Smith and Laura Pérez* case), namely "As the Court has consistently held, community law precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more

women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex".

Council Directive 76/207/EEC of 9 February 1976, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and career advancement, and working conditions, does not define the concepts of direct or indirect discrimination. On the basis of article 13 of the EC Treaty, the Council adopted Directive 2000/43/EC, of 29 June 2000 on the implementation of the principle of equal treatment of persons irrespective of racial or ethnic origin, and Directive 2000/78/EC, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, which define direct and indirect discrimination. The incorporation of Directives 2000/43/EC and 2000/78/EC into Spanish law was confirmed by Laws 51/2003, of 2 December, on equal opportunities, non discrimination and universal access for persons with disabilities, and 62/2003, of 30 December, on fiscal, administrative and social measures. Subsequently, in the framework of art. 141.3 of the Treaty establishing the European Community, European Parliament and Council Directive 2002/73/EC, of 23 September 2002 was adopted, which amends Directive 76/207/EEC, including the definitions of direct and indirect discrimination on grounds of sex, in line with the definitions contained in the quoted Directives of 2000.

Therefore, pursuant to art. 2.1 of Directive 76/207/EEC, amended by Directive 2002/73/EC, "the principle *of equal treatment* shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status". "Direct discrimination" is defined as "where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation", while "indirect discrimination" is "where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary" (art. 2.2). The prohibition of direct or indirect discrimination on grounds of sex in access to work or during employment is currently expressly laid down in arts. 4.2.c) and 17.1 *ET*, worded according to art. 37 of the aforementioned Law 62/2003, of 30 December, on fiscal, administrative and social measures.

This concept of indirect discrimination on grounds of sex was already enshrined in art. 2 of Council Directive 97/80/EC, of 15 December 1997, which the State Attorney invoked in his allegations, on the burden of proof in cases of discrimination based on sex. It defines indirect discrimination as follows: "where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". The European Court of Justice considered there to be no indirect discrimination on grounds of sex, as the differences in treat-

ment were justified for social-policy reasons, in measures such as not including part-time workers in any of the Social Security schemes (ECJ Judgment of 14 December 1995, *Megner and Scheffel* case) or lack of cover of certain Social Security allowances (ECJ Judgment of 14 December 1995, *Nolte* case).

This case-law of the European Court of Justice on indirect discrimination on grounds of sex has been adopted by the doctrine of the Constitutional Court and, as pointed out in *STC* 22/1994, of 27 January (LG. 4), "an abundant case-law of this Court has dismissed as inadequate differences based solely and exclusively on a smaller number of hours worked because, on the sole basis of this differential factor, the lesser contractual power of these atypical workers is not known and the statistic, proven by experience, that these female workers account for a high percentage of these groups, and the unreasonability of the differential factor is therefore accentuated when the prohibition of discriminations comes into the picture (Judgments of the European Court of Justice, *Bilka Kaufhaus* case, 13 May 1986, and *Kowalska* case, 27 June 1990, among others), and a more careful justification of inequalities is therefore required in this field by providing other concomitant factors that explain them apart from only less time worked".

Similarly, *STC* 240/1999, of 20 December (LG. 6), recalls and sums up this doctrine, pointing out that "this Court has reiterated in several decisions that the specific prohibition of discrimination on grounds of sex enshrined in art. 14 *CE*, which contains a right and an anti-discriminatory mandate (*STC* 41/1999), not only encompasses direct discrimination, that is, a different legal and unfavourable treatment of a person on grounds of their sex, but also indirect discrimination, that is, a formally neutral or non-discriminatory treatment from which stems, owing to diverse conditions arising between workers of both sexes, an adverse impact on the members of a particular sex (*STC* 198/1996, LG. 2; equally, *SSTC* 145/1991, 286/1994 and 147/1995)". This has also been stated by the European Court of Justice in many Judgments, when interpreting the content of the right to non-discrimination on grounds of sex in relation to workers' wages (in particular, the previously quoted ECJ Judgments of 27 June 1990, *Kowalska* case; of 7 February 1991, *Nimz* case; of 4 June 1992, *Bötel* case; and of 9 February 1999, *Seymour-Smith and Laura Pérez* case).

It should be noted that, as scientific doctrine and this Court have stressed, just as the European Court of Justice has declared in many Judgments, when the right claimed to have been breached is not the right to equality *in genere* but rather its materialization in the right not to suffer discrimination on any of the grounds expressively prohibited in art. 14 *CE*, it is not necessary to provide in each case a *tertium comparationis* to justify the existence of discriminatory and adverse treatment, particularly in cases where an indirect discrimination is claimed. Indeed, in these cases what is compared "is not the individuals" but social groups in which their diverse individual components are considered statistically; that is, groups of which some are formed mainly by persons belonging to one of the categories especially protected by art. 14 *CE*, in this case women.

As is logical, in these cases, when a complaint is brought against indirect discrimination, it is not required to provide as a comparison the existence of a more beneficial treatment attributed solely and exclusively to men; it is sufficient, as both this Court and the European Court of Justice have stated, for there to exist, first, a rule or interpretation or application thereof that works to the disadvantage of a group formed mainly, though not necessarily exclusively, by female workers (part-time workers – ECJ Judgment of 27 June 1990-workers who have held their post for less than two years – ECJ Judgment of 9 February 1999-workers with less physical strength – *STC* 149/1991, etc.). In these cases it is evident that when, for example, a specific treatment of part-time workers discriminates against women, it is not being stated that men are receiving better treatment than men in the same situation. And second, it is required that the authorities be unable to prove that the rule according different treatment stems from a measure of social policy, justified by objective reasons and unrelated to any discrimination on grounds of sex (above all, ECJ Judgment of 14 December 1995, *The Queen v. Secretary of State for Health* case; of 20 March 2003, *Jorgensen* case, and of 11 September 2003, *Steinicke* case).

In short, in these cases, in order for the anti-discriminatory right and mandate enshrined in art. 14 *CE* to be considered breached, there must be a distinct and adverse treatment of a social group that is clearly formed mainly by women, in respect of significant assets, and there must be insufficient constitutional justification of a possible limit to the right in question.

Finally, it should be noted that the incorporation of indirect discrimination as a content prohibited by art. 14 *CE* has repercussions on the form in which the interpreter and enforcer of law must approach the analysis of this type of discrimination, as it implies that "when difference in treatment is invoked before a court . . . and this invocation is made precisely by a person belonging to the group traditionally affected by this discrimination – in this case, women – the court cannot merely judge whether the different treatment has, in an abstract manner, an objective and reasonable justification; rather, it must analyze specifically whether what appears to be a formally reasonable differentiation conceals or allows the concealment of a discrimination that is contrary to art. 14 *CE*" (*STC* 145/1991, of 1 July, LG. 2). For this purpose it should necessarily take into account the data provided by statistics (*STC* 128/1987, of 14 July, LG. 6). A similar opinion has been reiterated by the European Court of Justice (above all, Judgment of 9 February 1999, previously quoted).

Ninth: The foregoing leads us to allow the claim of unconstitutionality with respect to the second paragraph of art. 12.4 *ET*, as worded according to Legislative Royal Decree 1/1995, of 24 March, which establishes that qualifying periods for Social Security allowances, including unemployment benefit, shall be calculated exclusively on the basis of hours worked. It merely remains for us to point out that it is not to this Constitutional Court but to the judicial bodies to which it falls to fill, by the means provided by law, the possible gap that annulling the questioned precept could cause in the calculation of qualifying

periods for entitlement to Social Security benefits in the case of part-time workers.

Ruling

To allow the present claim of unconstitutionality and, accordingly, declare unconstitutional and null and void the second paragraph of art. 12.4 of the Law on the Status of Workers, as amended by Legislative Royal Decree 1/1995, of 24 March, which establishes that the qualifying periods for Social Security benefits, including unemployment benefit, shall be calculated solely on the basis of hours worked".

b) Principle of non refoulement

– *STC* 181/2004, of 2 November. Application for a declaration of fundamental rights n. 3134/99.

In appeal for legal protection n. 3134/99, lodged by Mr. José Bouza Izquierdo, represented by the procurador Mr. Tomás Alonso Ballesteros and assisted by the counsel Mr. Luis Martí Mingarro, against Decision 37/1999 of the Plenary of the Criminal Division of the National Court, of 17 June 1999, dismissing the request for review filed against Decision n. 2/1999 of the Second Section of the Criminal Division of the National Court, on 1 February 1999, which declared admissible the extradition of the claimant to Venezuela as per extradition file 7/98. The public prosecutor intervened. The Republic of Venezuela was represented by the procurador Mr. Fernando Bermúdez de Castro Rosillo, under the guidance of the counsels Mr. Joaquín Ruiz Giménez Cortés and Mr. Joaquín Ruiz Giménez Aguilar.

Reporting Judge: Ms. María Emilia Casas Baamonde

Facts:

a) The appellant was born in Madrid on 25 May 1944, to a Spanish father and Venezuelan mother, studied in Venezuela, married and recognized his children in that country, and held positions in companies in that country.

b) During 1993 and the first half of 1994, Mr. Bouza Izquierdo came to be appointed president of the *Banco de Venezuela SACA*, and of other companies belonging to that financial group. During that period the Banco de Venezuela granted loans to one of these companies (*Banco de Venezuela N.V. Curazao*, based in the Dutch Antilles), amounting to the loan of 95 percent of the funds of the *Banco de Venezuela SACA*; these operations were not recorded in the relevant accounts, even though Mr. Bouza was aware of the financial situation of the latter bank. Various public companies signed contracts as trustees with the *Banco de Venezuela SACA*, whereby the latter received sizeable funds (over 23 billion bolivars), which were administered by Mr. Bouza; part of these funds was used in risk operations, as loans that were granted to companies that turned out to be insolvent and had to be declared unrecoverable. As a result, the *Banco de Venezuela SACA* had to be "statized" on 8 August 1994, and a "Financial Emergency Board" undertook to transfer 48,391,389 bolivars worth of investments. In December 1994 the *Banco de*

Venezuela SACA recorded losses of 778,935,647 bolivars, at which point it was taken over by the Guarantee Fund for the Protection of Depositors (*FOGADE*), basically causing the Venezuelan state a loss of wealth as it was forced to make contributions of public funds that were eventually also absorbed by the debts.

c) In mid-1994, the appellant moved to Spain, where he took up residence. In October that year he was issued with a Spanish national identity document and the following December a Spanish passport.

d) By means of note verbale n. 227, of 7 March 1997, the Embassy of Venezuela in Spain formally requested the extradition of Mr. Bouza Izquierdo, in order that he be tried in the Republic of Venezuela. By means of note verbale n. 1019, of 22 October 1997, that same Embassy based its request on a warrant issued on 24 May 1996 by the Caracas Fifth Court of First Instance for criminal and banking matters and protection of public heritage, and on three writs of arrest issued by the same court against Mr. Bouza on 26 April, 15 May and 5 June 1996. The application for extradition requests that Mr. Bouza be handed over to the authorities to be tried for the following charges: preparation of balance sheets that failed to reflect the true situation of the *Banco de Venezuela SACA* and appropriation of bank funds for the benefit of third parties; illegal financial intermediation and unlawful association; and, finally, failure to meet the obligations arising from the trust.

(. . .)

On the right not to be subjected to torture or to inhuman or degrading punishment or treatment (art. 15 *CE*). The situation in Venezuelan prisons is appalling, so much so that this has even been recognized by that country's justice ministers, who state that they are the worst in the world. The decision of the plenary, on the one hand, recognizes that the Venezuelan government is not in control of the situation in prisons; but, on the other, it makes extradition subject to the condition that the Venezuelan state provide sufficient guarantees that, in the event that Mr. Bouza is imprisoned on the charges he faces, the human-rights requirements be met during his imprisonment. There is therefore a contradiction between these two statements, for if it is generally affirmed that the State does not control penitentiary establishments, how then can it be guaranteed in the specific case of Mr. Bouza that he will receive proper treatment in accordance with human-rights requirements if sentenced to imprisonment?

(. . .)

"Legal grounds:

First: The appellant, Mr. José Bouza Izquierdo, seeks the annulment of the decisions of the Criminal Division of the National Court declaring he be extradited to Venezuela on the grounds that they violate, in the first place, his right to equality before the law enshrined in art. 14 *CE* because they allegedly draw a discriminatory distinction between Spanish nationals and Spanish nationals also possessing another nationality, as extradition is only granted in respect of

the latter. Secondly, his right to personal freedom (art. 17.1 and 4 *CE*) insofar as pre-trial custody is automatically established in Venezuela for any offence and cannot be avoided by paying bail, which is contrary to the exceptional circumstances and proportional nature of this precautionary measure according to Spanish law. Thirdly, his right of access to an ordinary judge predetermined by law and to an impartial judge, laid down in art. 24.1 and 2 *CE*, as the judicial body designated to hear his case in the requesting State is special, established after the cause of action, and is assigned the tasks of investigation and passing judgment. Fourthly, the appellant complains that these decisions violate art. 15 *CE*, which recognizes the rights not to be subjected to torture or inhuman or degrading punishments or treatment, because they allow extradition even though Venezuela has not provided guarantees that the aforementioned rights of Mr. Bouza Izquierdo will not be affected in the event he is imprisoned, when it is known that Venezuelan prisons do not respect such rights. Finally, the appellant complains that his rights to the effective protection of the court and not to go undefended (art. 24.1 *CE*) and to a trial with full guarantees (art. 24.2 *CE*) have been breached, since various irregularities have occurred in the extradition process.

The appellant, who came to hold, among other positions, the post of President of the *Banco de Venezuela* in 1993 and 1994, has witnessed how the Republic of Venezuela requested his extradition from Spain to try him for financial offences which he allegedly committed when holding that post. The National Court declared the extradition to be legitimate, except for certain charges that do not constitute offences according to Spanish legislation and conditioned his surrender to the provision by the State of Venezuela of sufficient guarantees that Mr. Bouza's rights would be effectively respected during his internment were he imprisoned (. . .).

Twelfth: The appellant's last complaint that remains to be examined claims that the decisions of the National Court have violated art. 15 *CE*, which states that nobody must be subjected to torture or to inhuman or degrading punishment or treatments, insofar as they allow him to be turned over in the knowledge that the situation in Venezuelan prisons is appalling, so that if the appellant were placed in pre-trial custody or sentenced to imprisonment that fundamental right would run a serious risk of being violated. In the appellant's opinion, both the decision of the Second Section and that of the Plenary of the Criminal Division of the National Court recognize this risk and admit that the Venezuelan prison system is largely beyond the control of the Administration of Justice. The appellant argues that despite this, and in a contradictory manner, these decisions require the Venezuelan State to provide sufficient guarantees that should the appellant be imprisoned on these charges the human rights requirements will be effectively met during his imprisonment. According to the appellant, the contradiction lies in the fact that if the Venezuelan State does not control its own prisons it is not possible for it to guarantee that Mr. Bouza's right not to be subjected to torture or inhuman o degrading punishments or

treatment will be respected. The appellant ends his claims by explaining that Venezuela has neither provided the required guarantees, as a statement to that effect by the counsel or *procurador* of the Republic of Venezuela contained in the plea challenging the appeal for reversal submitted as part of the extradition proceedings cannot be regarded as such, nor is it able to offer such guarantees, since, as has been proven, the Venezuelan authorities do not exercise control over penitentiary centres.

For his part, the prosecutor agrees with the appellant that protection should be granted in this case, because despite the sincere intentions of the Venezuelan penitentiary authorities to ensure the guarantees are fulfilled, it is still possible they are unable to do so. On the contrary, Venezuela opposes this claim for protection.

As has already been stated in the precedents, the judicial decisions of the National Court have required Venezuela to provide guarantees that the appellant's rights not to suffer inhuman or degrading treatment will be respected, on the basis of art. 11 of the extradition treaty between Spain and Venezuela, which reads as follows:

"1. Extradition shall not be granted when the offence for which it is requested is punishable with the death penalty, with life imprisonment, or with punishments or security measures that would be damaging to the physical integrity of the person sought or would subject the person sought to inhuman or degrading treatment.
2. However, extradition may be granted if the requesting Party were to provide sufficient assurance that the person sought will not be executed and that the maximum punishment served will be that which is immediately lower than life imprisonment or that he will not be subjected to punishment damaging to his physical integrity or to inhuman or degrading treatment".

In this appeal for constitutional protection, this Court required the Second Section of the Criminal Division of the National Court to prove whether the Republic of Venezuela had provided the guarantees required in the decisions that found the extradition of Mr. Bouza Izquierdo to be admissible and, if so, to send a copy of the document. The full reply from the Second Section was as follows:

"In connection with your request dated 5–10–2000, appeal for legal protection n. 3134/1999, lodged by José Bouza Izquierdo against a decision of the Plenary of the Criminal Division of the National Court, the records show that in the plea challenging the appeal for reversal of the decision declaring the extradition to be admissible, the Venezuelan State affirmed that Mr. Bouza will be given a fair trial with full procedural guarantees and without undue delay and that, if he has to be placed in pre-trial custody, he will be sent to *El Junquito* in Caracas, which displays the best conditions of establishments of this kind and where other prominent persons have been imprisoned such as Mr. Carlos Andrés Pérez, twice president of the Republic of Venezuela and Mr. Claudio Fermín, twice candidate for president of the State.

There is no record of a formal commitment to ensuring the guarantees are met, though it should be noted that the government has not yet issued a decision on the surrender of Mr. Bouza, nor that the express guarantees imposed on the Venezuelan State have been requested".

Focusing on the most significant details of the complaint and the parties' positions thereon, we should consider whether we are dealing with a case which falls within the scope of application of art. 15 of the Constitution.

Thirteenth: The first paragraph of art. 15 of the Constitution states that "everyone has the right to life and to physical and moral integrity, and under no circumstances may be subjected to torture or to inhuman or degrading punishment or treatment". The constitutional prohibition of torture and of inhuman or degrading punishment or treatment must be interpreted, as laid down by art. 10.2 *CE*, in accordance with the Universal Declaration of Human Rights and with other international treaties or agreements on the same matters and that is what this Court has done since its first decision on this point (*STC* 65/1986, of 22 May). The prohibition, under the same or similar terms, is also contained in art. 5 of the aforementioned Universal Declaration and in other conventions Spain has ratified, such as art. 7 of the International Covenant on Civil and Political Rights; art. 3 of the European Convention for the protection of human rights and fundamental freedoms), a precept which, as was recognized by *ATC* 333/1997, of 13 October, clearly influenced the wording of art. 15 *CE*; the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, of 1984; and the European Convention for the prevention of torture and inhuman or degrading punishment or treatment, of 1987, among other international instruments.

Of all these texts the International Covenant on Civil and Political Rights of 1966 and the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment of 1984 are particularly relevant to this appeal for constitutional protection since both have been ratified by both Spain and Venezuela. Art. 3 of the aforementioned Convention states the following:

"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".

Similarly, art. 16.1 of the same Convention provides that each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.

The constitutional prohibition of art. 15 *CE* holds a double meaning. On the one hand, it constitutes a fundamental value of democratic societies (*STC* 91/2000, of 30 March, LG. 8, and *SSTEDH* of 7 July 1989, *Soering v. United Kingdom*, § 88; of 30 October 1991, *Vilvarajah et al v. United Kingdom*, § 108; of 15 November 1996, *Chahal v. United Kingdom*, § 79; of 17 December 1996, *Ahmed v. Austria*, § 40; of 29 April 1997, *H.L.R. v. France*, § 35; of 28 July 1999, *Selmouni v. France*, § 95) which is connected with respect for the most basic fundamental rights of the individual in his relations with the State. On the other, it is closely linked to human dignity which, according to art. 10.1 *CE*, is one of the foundations of political order and social peace (*SSTC* 53/1985, of 11 April, LG. 8; 120/1990, of 27 June, LG. 4; 57/1994, of 28 February, LG. 4; 337/1994, of 23 December, LG. 12; 91/2000, of 30 March, LG. 7; *ATC* 238/1985, of 10 April). Indeed, human dignity is an intrinsic quality thereof to which all humans irrespective of their specific characteristics are therefore entitled, and with which the conducts prohibited in art. 15 *CE* clash head-on and radically, either because they demean the individual, reducing him to material or animal level, or because they constrain or instrumentalize him, forgetting that all people are an end in themselves. Our aforementioned *STC* 120/1990, of 27 June, LG. 4, has established the criterion – subsequently repeated in later decisions – that dignity must remain unaltered whatever situation the person is in and thus constitutes an invulnerable minimum that any legal status must ensure, so that any limitations imposed on the enjoyment of fundamental rights do not amount to contempt for the esteem which the person deserves as a human being.

Fourteenth: In consonance with the foregoing, only recently (*STC* 32/2003, of 13 February, LG. 2), on the basis of our doctrine on extradition matters, we reiterated that "the special nature of the extradition procedure determines that if the Spanish judicial bodies, being aware of the possible violation of the appellant's fundamental rights in the country of destination, do not prevent it using the means at their disposal, then these bodies must be held responsible for the possible violation of the appellant's fundamental rights. Indeed, insofar as the extradition proceedings weave a close-knit web of actions in the requesting and requested States, the future of the person extradited in the former not only cannot be of no concern to the authorities of the latter, but they are obliged to prevent the expected violation of fundamental rights by the foreign authorities".

Furthermore, this judicial obligation becomes more marked the more significant the rights and interests of the appellant which are at stake, "so that the requirement is great when fundamental rights enshrined in the Constitution are concerned, which bind them as objective bases of our law (above all, *SSTC* 13/1994, LG. 4, and 91/2000, LG. 7), and which enjoy a particular significance and position in our system (above all, *STC* 5/2002, of 14 January, LG. 4) and, even, such a high requirement must be graded in accordance with the fundamental right or rights that can be affected, so that it would necessarily reach particular intensity when the situation applies to those recognized in art. 15 *CE*

or, from another perspective, when what is affected is what we refer to in *STC* 91/2000 as the absolute content of fundamental rights".

Furthermore, we maintain in the said decision (on the basis of the doctrine of the European Court of Human Rights, Judgment of 28 March 2000, *Mahmut Kaya v. Turkey*, §§ 85 and 115) that all States must take appropriate measures to safeguard the lives of persons under their jurisdiction, and to ensure they are not subjected to torture or inhuman or degrading treatment, and must adopt reasonable measures to avert the risk of ill-treatment they know or should know of; the related positive obligation of the State arises from the circumstance that the authorities knew or should have known of the existence of a real and immediate risk to the life of the individual, as we have stated, with reference to the doctrine established by that same Court in the *Soering* case (we have applied this doctrine since *STC* 13/1994, of 17 January, mentioned earlier and quoted subsequently in *STC* 91/2000, of 30 March).

The foregoing does not entail the requirement, as both this Constitutional Court and the European Court of Human Rights have established, that the "person prove fully and absolutely the violation of his rights abroad, which will have adverse consequences for that person, or that this violation is going to take place in the future, as this . . . would normally be an excessive burden for the person in question" (*STC* 32/2003, of 13 February, LG. 3). We reiterated in the said *STC* 32/2003 (LG. 3), so often quoted, that protection of the right claimed by the appellant would have to be granted if there were a rational and grounded fear that it would be violated (*STC* 13/1994, of 17 January, LG. 5), and in *STC* 91/2000, of 30 March (LG. 6), we referred to the significant risk of violation of the rights by the courts of a foreign State and to the foreseeable consequences entailed by an extradition outside the jurisdiction of the State, stressing in *ATC* 23/1997, of 27 January (LG. 1), the need to exclude the surrender of subjects who, presumably, with some degree of certainty may suffer significant violations owing to the existence of a reasonable and grounded fear. For its part, the European Court of Human Rights, in relation to the rights to life and not to be subjected to torture or inhuman or degrading treatment, taking into consideration the specific circumstances that can lead to a difficulty of evidence, has referred to the existence of serious and proven motives for believing that if the person in question is surrendered to the requesting state he runs a real risk of being subjected to torture or to inhuman or degrading treatment (*Soering, Ahmed v. Austria*, § 39; Judgment of 11 July 2000, *G.H.H. et al. v. Turkey*, § 35).

Therefore, we should take into account the specific characteristics of the case when dealing with proceedings that may end with the compulsory expulsion from the territory of one of the contracting States, by requiring not proof that the breach has occurred or is going to occur, as it is necessary to weigh up the specific circumstances that could entail difficulty of furnishing proof, but rather the existence of a reasonable and grounded fear that the courts of the requesting State may subject the extradited person to such breaches of his fundamental

rights, as otherwise the remedy would have a precautionary focus that is not appropriate.

Applying these guidelines required by the doctrine of the European Court of Human Rights, we stated in the so often quoted judgment that the courts, when conducting extradition proceedings, must weigh up the specific circumstances of the case in question, taking into account the significance of the rights and interests considered to be breached or at risk of being breached, the consequences that may stem from surrendering the person to the requesting State in relation to the impossibility of repairing the damage, the argument of the person subject to the procedure and the elements of proof on which he attempts to base it and, in connection with the latter, the difficulty of furnishing such proof precisely because he is in a different State from the one in which the violations were allegedly committed or could be committed. And once the alleged circumstances have been clarified and proven or even, given the existence of elements, fears or reasonable risks that they have indeed occurred, exist, or may occur, and have not been distorted by the information and documentation held by the court, the surrender of the person involved in the extradition proceedings should be declared inadmissible, thereby preventing the damaging consequences that could stem from the opposite decision.

As we have recently reiterated, in order to activate this specific protective duty that is incumbent on the judicial bodies competent in extradition matters, it is not sufficient to claim the existence of a risk; rather, it is necessary for the "alleged fear or risks to be grounded, in the sense that they be minimally proven by the person sought". Furthermore, it is not sufficient to make "generic" references or claims regarding the situation of the country; rather, the person sought must make specific claims regarding himself and his rights (*STC* 148/2004, of 13 September, LG. 8).

Fifteenth: Applying the previous doctrine to the case in hand, we must dismiss the claim for protection. For this purpose, we must bear in mind that the person sought refers to a generic risk and, furthermore, that the Decision of Section Two of the Criminal Division of the National Court of 1 February 1999 establishes that in order for extradition to be admissible the Venezuelan State must provide guarantees of respect for the person's human rights.

Indeed, the risk of being subjected to inhuman or degrading treatment deriving from the appellant's internment in Venezuelan prisons is generic in nature. The appellant provided the courts with various data relating to the general situation of prisons in Venezuela, without making any reference whatsoever to any concrete and specific circumstances of his case constituting reasonable proof that, were he surrendered to Venezuela, his right not to be subjected to inhuman or degrading treatment could be specifically breached.

Furthermore, the court has required a guarantee from the Venezuelan authorities deriving from that generic situation invoked, that, in the event that the appellant is imprisoned, the requirements of "respect for human rights" be effectively met during his imprisonment, expressly stating that, when the time

comes, it will have to examine the guarantees, if appropriate, and decide on his surrender, though, it adds, this does not preclude the possibility of the Executive examining these reasons and refusing the surrender if it doubted that the Venezuelan State would comply with the treaties on the protection of human rights.

Consequently we are not dealing with a case comparable to those ruled on in *SSTC* 32/2003, of 13 February and 148/2004, of 13 September, as unlike the judicial decisions contested in the aforementioned cases, those challenged in this appeal for protection consider that the alleged generic risk is possible, as they recognize that "people serving sentences in the prisons of that country may experience harsh situations and conditions that are incompatible with the international rules on the protection of human rights" and that "there is indeed a risk, which we are not going to question, that the person sought may be subjected to inhuman and degrading treatment". However, both decisions maintain that it is precisely the acceptance of this as a possible hypothesis which leads them to require the Venezuelan state to provide "sufficient guarantees that if José Bouza Izquierdo were imprisoned on the charges the requirements of respect for human rights would be effectively met during his imprisonment".

In view of the foregoing, we are not dealing with the hypothesis of a lack of court protection due to failure to consider proven a risk of breach of the appellant's fundamental rights without taking any or sufficient action to clarify whether or not the alleged risk is grounded (*SSTC* 32/2003 and 148/2004). On the contrary, we are examining whether, the hypothesis of the existence of a generic risk of breach of the right not to be subjected to inhuman or degrading treatment having been considered possible, the guarantee required by the National Court, laid down in art. 11 of the Spanish-Venezuelan Treaty, constitutes sufficient court protection of this right in extradition proceedings. The appellant maintains that it is not, as it neither implies a formal commitment on the part of the Venezuelan state nor can it be effectively provided as it is recognized that the prisons are beyond the control of the State.

Sixteenth: However, in the light of the characteristics of the extradition proceedings, of this Court's decisions in similar cases, and of the provision made for this guarantee in the Spanish-Venezuelan extradition Treaty, we cannot consider that making the admissibility of the extradition proceedings conditional upon the guarantees mentioned in this case constitutes a lack of court protection or indirect breach of the appellant's right not to be subjected to inhuman or degrading treatment.

Firstly, Spanish extradition proceedings are of a combined nature, with a judicial phase of limited competences and a government one; art. 6, paragraph three, of the Law on passive extradition states that "there shall be no remedy against the Government decision". The object of this appeal for protection is delimited exclusively by the judicial decisions, and their examination must therefore be limited to the constitutional appropriateness of the exercise of their competence in the framework of their jurisdictional powers.

Therefore, in relation to appeals for protection lodged against judicial decisions declaring admissible extradition proceedings that enforce sentences passed in trials from which the defendant is absent, subjecting them to the guarantee of a new trial, we declare that "it having been found that the National Court expressly requires a new trial to be held with the presence of the defendant and allowing him a defence, it cannot be claimed that the appellant's right to a fair trial has been indirectly breached, as, on the one hand, it is recognizing that his right to defence was breached in the original proceedings since otherwise it would not be necessary to make the extradition conditional – art. 2.3 *LEP* – and, on the other, it is attempting, to the best of its abilities, to repair this breach. On the basis of this it falls to the Spanish government to require the fulfilment of this guarantee, and the consultation made by the National Court to the prosecuting authorities of Milan in connection with the extradition proceedings on the possibilities of providing that guarantee is not relevant, as it is not an official notification to guarantee the new trial which can only be held once the extradition has been authorized by the court" (*ATC* 177/2000, of 12 July, LG. 3).

To this we should add that, despite recognizing that the imposition of a life sentence may breach the prohibition on inhuman or degrading punishments laid down in art. 15 *CE*, for the purposes of determining whether judicial decisions allowing a person to be extradited in order to serve life imprisonment or be tried for a crime for which he will foreseeably be sentenced to this punishnent, this Court has declared that it is sufficient guarantee if the judicial decisions make the admissibility of the extradition conditional upon the fact that if such punishment were imposed, its enforcement would not be indefectibly for life (*STC* 148/2004, of 13 September, LG. 9, quoting ECHR judgment of 7 July 1989, *Soering v. United Kingdom*; of 16 November 1999, *T. and V. v. United Kingdom*).

Secondly, it cannot be forgotten that the furnishing of this specific guarantee is provided for in art. 11.2 of the Spanish-Venezuelan extradition Treaty, and therefore the National Court is not acting without legal cover. Indeed, we should remember that art. 11 of the aforementioned Treaty establishes that:

"1. Extradition shall not be granted when the offence for which it is requested is punishable with the death penalty, with life imprisonment, or with punishments or security measures that would be damaging to the physical integrity of the person sought or would subject the person sought to inhuman or degrading treatment.
2. However, extradition may be granted if the requesting Party were to provide sufficient assurance that the person sought will not be executed and that the maximum punishment served will be that which is immediately lower than life imprisonment or that he will not be subjected to punishments damaging to his physical integrity or to inhuman or degrading treatments".

Furthermore, we are not dealing with a case of specific risk of being subjected to torture, in which case we could consider whether the rights of the person sought would be safeguarded by the mere requirement of guarantees such as those provided or whether it would necessarily require extradition to be refused; rather, as we have reiterated, we are dealing with a generic risk of being subjected to inhuman or degrading treatment owing to the situation of the prisons of the requesting State.

Consequently, we must dismiss the appeal for protection since, within the scope of its powers, the National Court has subjected the extradition proceedings to the condition provided for in art. 11.2 of the Treaty, which does not preclude the Government, should extradition be definitively agreed, from formally requesting the Venezuelan State to furnish the guarantees provided for in the Decision of the Second Section of the Criminal Division of the National Court of 1 February 1999 and their effective enforcement.

Ruling

To dismiss the appeal for protection lodged by Mr. José Bouza Izquierdo".

c) Freedom of association

– *STSJ* Murcia, 12 July 2004. Social Affairs Division. Appeal n. 839/2004.

The TSJ partially allows the repeal for reversal lodged by the appellant against a Judgment of Murcia Social Affairs Court n. 2 dated 7–4–2004, which is overturned in the sense indicated in the legal grounds, in dismissal proceedings. Raquel was first employed by the Council of Las Torres de Cotillas with the professional status of lawyer. Trade union elections were held, the electoral process beginning on 7 July 2003. On 25 November 2003 the trade union UGT presented its list of candidates, which included the appellant, to the Council, and the final candidates were confirmed on 1 November 2003. On 5 December 2003, the Council informed the appellant of the discharge of her contract. On 11 December 2003 the appellant was elected a representative of the trade union UGT. Other remedies had been exhausted and the court ruled as follows: "Partially allowing the claim lodged by Raquel against the Council of Las Torres de Cotillas, I hereby declare the petitioner's dismissal of 5–12–2003 to be unfair, sentencing the aforesaid Council, within five days of notification (. . .) to pay the worker the sum of 2,571.75 euros compensation or to reinstate her to her post (. . .) whichever option is chosen, the Council shall pay the wages corresponding to the period from the date of dismissal to service of the judgment". An appeal for reversal was lodged by the counsel for the claimant, Mrs Dorleta Cutillas, and contested by the counsel for the Council Mrs María del Carmen Marqués.

"Legal Grounds:

Having examined the claims of both parties, the Court finds clear evidence that the complainant was dismissed on account of her trade union activity, as immediately beforehand she had stood for elections, as reflected in the facts declared to be proven, and was even elected by the trade union *UGT*.

In the face of such evidence the Council has failed to prove that the measure adopted is justified (article 178 of the *LPL*). Under such circumstances we should follow the reasoning of our judgment n. 1079/03, of 22 September (*JUR* 2003/251071), which states that: "It is clear from the foregoing that, more than indications, there is evidence that the action of the employer is incompatible with article 28 of the Spanish Constitution (*RCL* 1978/2836), with national regulations, and with various related international treaties signed by Spain, such as the International Covenant on Economic, Social and Cultural Rights, of 16–12–1966 (*BOE* n. 103, of 30–4–1977 [*RCL* 1977/894]; particularly article 8); ILO Convention n. 87 (*RCL* 1977/997) concerning Freedom of Association and Protection of the Right to Organize, of 9–7–1948 (*BOE* n. 112, of 11–5–1977), ILO Convention n. 98, concerning the Application of the Principles of the Right to Organize and Collective Bargaining, of 1–7–1949 (*BOE* n. 111, of 10–5–1977 [*RCL* 1977/989]), particularly articles 1 and 2 which state literally: article 1. 1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment . . ."; "2. Such protection shall apply more particularly in respect of acts calculated to: (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours"; "art. 2. 1. Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration"; "2. In particular, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations, shall be deemed to constitute acts of interference within the meaning of this Article".

It specifically grants an imperative mandate and metaphorically imposes an obligation for Spanish Jurisdiction, deriving from the previously transcribed article 1.2.b), in that it must provide special protection against any acts intended to "cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours". In this case, the same protection should be guaranteed, *in extenso*, when we are dealing with the enjoyment of trade union or representative hours, by fiction or compensatory, bearing in mind the criterion of protection according to a canon of constitutionality of fundamental rights (*STC* 422/2002) which implies the interpretation that is most favourable to its effectiveness.

Therefore, since there are indications of a breach of freedom of association (article 179 of the Law on Employment Procedure [*RCL* 1995/1144 and 1563]) and charges of misconducts not sufficiently serious as to justify dismissal, it

should be considered, in this context, as a cover concealing this anti-trade union attitude that it implicitly entails insofar as a member of *CC OO* is affected by a violation of article 14 of the Spanish Constitution, this determines that the ground for appeal should be dismissed, since given the anti-trade-union tendency or purpose detected, that is the legal consequence. In view of this evident fact, the conciliation act of 3 July 2003 concerning other facts in no way affects the foregoing".

Now, having found evident indications of anti-trade union action, as there is no proof that justifies the conduct of the employer, this confirms the existence of a violation of articles 12 of the *LOLS* (*RCL* 1985/1980), 28 of the Spanish Constitution and implicitly article 14 thereof, since the aforementioned judgments of Social Affairs Court n. 1 and those of this Court, should act as such. Furthermore, article 1.2.b) of ILO Convention n. 98 concerning the application of the Principles of the Right to Organize and Collective Bargaining, imposes "a special protection" and concealing a dismissal that involves an absence of misconduct or lack of sufficient misconduct cannot operate to prevent this classification, as this cannot obviate the effectiveness of the fundamental rights, given the radicality with which they operate, according to the canon of constitutionality.

Therefore, the dismissal must be declared null and void (art. 55.5 of the Workers' Statute [*RCL* 1995/997]). It is not appropriate to grant the compensation requested since, as we stated in our judgment n. 1079/03 (*JUR* 2003/251071): "Having examined the claims, in relation to the aforementioned judgments, the Court, pursuant to the Law, must point out that article 180.1 of the Employment Law (*RCL* 1995/1144 and 1563), among the consequences of violation of the fundamental facts, refers to "appropriate compensation" and this assumes that such compensation is linked to damage and prejudicial consequences that are assessable and would justify an additional compensation and must therefore be proved".

In the previous conditions, the Court has not found proof of any specific damage or prejudicial consequences for which compensation should be provided other than that of the dismissal itself, and therefore, this ground for appeal is allowed.

The solution reached on this point reflects the decisions of the highest European court in the interpretation of the European Convention on Human Rights (*RCL* 1979/2421), the European Court of Human Rights which, in judgments of 28–10–1998 (*ECHR* 1998/52) (*Pérez de Rada Cavanilles v. Spain*) (116/1997/900/1112), has established that the judgment constitutes in itself sufficient just satisfaction as far as the alleged non-pecuniary damage is concerned.

There is a similar judgment by the European Court of Human Rights of 28–10–1998 (*ECHR* 1998/51) (*Castillo Algar v. Spain*) (8/193/403/481).

Ruling

In view of the foregoing, the Social Affairs Chamber of this Court, by the authority vested in it by the Constitution, holds:

We allow the appeal for reversal; and we declare the dismissal of the complainant, Raquel, to be void, and sentence the Council of Las Torres de Cotillas to reinstate the complainant immediately and pay her the wages she has ceased to receive. The Council is absolved from paying the compensation requested".

d) Right of appeal to a higher court

– *STS* 9 July 2004. Criminal Division. Appeal n. 889/2004.

On 26–06–2003 the Criminal Division of the National Court delivered a Judgment convicting various defendants on charges of drug trafficking. Various appeals for annulment were lodged against this decision. The Second Chamber of the Supreme Court dismisses the appeals and confirms the Judgment.

Reporting judge: Mr. Carlos Granados Pérez

"Legal grounds:

First: The first ground for appeal pursuant to article 849.1 of the Code of Criminal Procedure (*LEG* 1882/16) and in accordance with article 5.4 of the Organic Law of the Judiciary (*RCL* 1985/1578, 2635) invokes violation of the right to be presumed innocent enshrined in article 24.2 of the Constitution (*RCL* 1978/2836).

The possible unconstitutionality of the appeal for annulment is affirmed when the violation of the fundamental right to be presumed innocent is invoked and related to a decision of the Human Rights Committee as there is no Higher Court to review the judgment, as required by the International Covenant on Civil and Political Rights (*RCL* 1977/893), as the evidence is not newly assessed in an appeal for annulment.

The ground for appeal cannot be upheld.

This Court has dismissed similar invocations, such as in its Judgments 297/2003, of 8 September (*RJ* 2004/2103), 1860/2000, of 4 December (*RJ* 2000/10177) and of 30 April 2001 (*RJ* 2001/10297), in which it declares that given the diversity of legal systems in the territory in which the Covenant is in force, the possibility of access to a higher court is determined by the characteristics of the procedural laws of each country and although this review should be as broad as possible in scope, we cannot rule out the possibility of there being other channels for contesting judgments of conviction, provided it is done through a higher court empowered to overrule the decisions of the lower one. Therefore our Constitutional Court has declared that although an appeal for annulment of a criminal conviction is of a special nature and limited in scope, it meets sufficiently and appropriately the expectations of the aforementioned International Covenant and "meets the obligation assumed by the Spanish State when incorporating its provisions into national law through article 96 of our Constitution (*RCL* 1978/2836)".

Some international treaties Spain has signed refer expressly to the two-tiered system. Specifically the International Covenant on Civil and Political Rights and Protocol n. 7 of the European Convention on Human Rights (*RCL* 1979/2421)

state that everyone convicted of a criminal offence by a tribunal shall have the right to have conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

The need for the conviction to be reviewed by a higher court may be interpreted differently. A strict reading is possible, in the sense that review by a higher tribunal is not necessarily imposed but simply that the conviction and sentence should be reviewed by another court. Interpreted more broadly, it could be taken to mean that a full review of the trial is necessary.

When examining the texts of the aforementioned international Treaties, we find that the International Covenant on Civil and Political Rights refers to "conviction and sentence". If we take conviction to mean, in addition to the part containing the verdict, the points of the judgment that examine the declaration of guilt, we would be dealing with an interpretation that extends beyond that which is mentioned as being strict, insofar as it exceeds the mere verdict, though it allows at least two readings, that which is identified with a full review, that is, a new trial with repetition of evidence, which would affect the facts on which the declaration of guilt is based; and another which, although not limited to the decision of verdict, nonetheless has as its limit a review of the trial in question carried out by the court of first instance, its rational structure and specifically whether it conforms to the rules of logic, experience and scientific knowledge.

Now, the text of the International Covenant on Civil and Political Rights, the only one out of those mentioned that has been ratified by Spain, does not call for a new trial with repetition of proof; rather, the requirement that the conviction and sentence be reviewed by a higher Tribunal is met by a mere review of the trial conducted by the court of first instance.

It is true that both covenants refer this right of review by a higher Tribunal to the law of each signatory State, and this leads us to examine whether the mandate of the International Covenant on Civil and Political Rights is fulfilled in Spanish procedural legislation with the scope we have just mentioned.

Since judgments 42/1982, of 5 July (*RTC* 1982/42), 76/1982, of 14 December (*RTC* 1982/76) and 60/1985, of 6 May (*RTC* 1985/60), the Constitutional Court has declared that article 14.5 of the International Covenant of Civil and Political Rights is not sufficient to create by itself non-existent remedies and that the Supreme Court, when hearing an appeal for annulment, meets this requirement of the intervention of a higher Tribunal although, when developing the right of remedy, its interpretation has been more favourable to the effectiveness of that right and with a broad interpretation with respect to the scope of examination of the appeal for annulment, as found in Judgments 133/2000, of 16 May (*RTC* 2000/133) and 190/1994, of 20 June (*RTC* 1994/190).

In order to comply better with article 14.5 of the so often cited International Covenant and in accordance with the declarations made by the Constitutional Court on this article, the Supreme Court has shaped a doctrine that has progressively broadened its examination to include a review of how the proof was assessed by the court of first instance.

Accordingly, this Court's Judgment of 25 April 2000 (*RJ* 2000/3720) states that when invoking the right to be presumed innocent this leads the Supreme Court to examine, among other issues, whether the evidence was obtained lawfully and whether the findings of the Court that issued the judgment go against the laws of logic, experience and science.

This Court's compliance with the International Covenant on Civil and Political Rights is maintained, with the scope of the appeal for annulment that has been expressed, following the decision of 20 July 2000 of the United Nations Human Rights Committee, though this decision, which settles a specific case and not whether or not Spanish appeals for annulment generally fall under article 14.5 of the Covenant, in no way requires a change of criterion. A very different question is the appropriateness of establishing access to a higher court in all types of proceedings and the sole function that resides in the Supreme Court is the essential task of unification in the application of the legal system.

This is the opinion expressed by the Plenary of this Court at the non-jurisdictional meeting held on 13 September 2000, in which it was stated that in the current developments in case-law in Spain the appeal for annulment provided for in the laws in force in our country, similar to that of other European Union Member States, already constitutes an effective remedy in the sense of article 14.5 of the International Covenant on Civil and Political Rights. However the appropriateness was also stressed of establishing a remedy of appeal prior preceding the appeal for annulment.

Finally, it is interesting to note that the European Court of Human Rights, in the *Loewenguth* and *Deperrois* cases, which were dismissed, respectively, on 30 May 2000 and 22 June 2000, considers that in article 2 of Protocol n. 7 the Member States retain the power to decide on the manners of exercising right of review and can restrict the scope of the latter; in addition, in many States the aforementioned review is equally limited to questions of law. Therefore, the European Court of Human Rights considers that the possibility of appealing to a higher court for annulment meets the requirements of article 2 of Protocol 7 of the Convention.

In view of the foregoing, the violations reported have not taken place and the ground for appeal must be dismissed".

VI. STATE ORGANS

VII. TERRITORY

VIII. SEAS, WATERWAYS, SHIPS

IX. INTERNATIONAL SPACES

X. ENVIRONMENT

XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

XII. INTERNATIONAL ORGANISATIONS

XIII. EUROPEAN COMMUNITIES

XIV. RESPONSIBILITY

1. Diplomatic Protection

– *STS* 6 October 2004. Contentious-Administrative Division. Jurisdiction for suits under administrative law. Appeal n. 6164/2002.

The Division of Contentious-Administrative Proceedings of the National Court issued a judgment on 12–06–2002 dismissing the appeal brought by Bárbara against a Resolution of the Undersecretary for Foreign Affairs denying her diplomatic protection with respect to the return of real estate property. The claimant lodges an appeal for annulment with the TS, which dismisses the appeal.

Reporting Judge: Ms. Celsa Pico Lorenzo

"Legal Grounds:

First: Bárbara's representative before the court lodged an appeal for the annulment of a judgment delivered on 12 June 2002 (*RJCA* 2003/112) by Section Four of the National Court dismissing the Contentious-Administrative appeal filed against a decision of the Undersecretary for Foreign Affairs of 28 July 2000, by delegation of the Minister, dismissing the appeal for reversal lodged against an earlier decision of 25 April 2000. It was agreed not to allow the application for diplomatic protection filed by the claimant consisting of the return of the real estate property belonging to the conjugal partnership established with the husband of the claimant or, if applicable, compensation for the equivalent of that property plus the portion to which she is entitled of all the wages and remunerations owed to Isidro by the Public Administration of Equatorial Guinea. In her claim, she wished for her right to receive compensation from the Spanish Administration for the damages caused to be recognized as an individualized legal situation and for the damages to be quantified, subject to an appraisal, during the enforcement proceedings.

(. . .)

Sixth: A second ground for appeal under art. 88.1.d) of the *LJCA*/1998 (*RCL* 1998/1741) lies in the breach of art. 24.1 *CE* (*RCL* 1978/2836) inasmuch as the requirement that the claimant exhaust internal remedies would be tantamount to denying effective protection of the courts as it requires more than may be reasonably demanded.

To support her argument she maintains that the Human Rights Committee determined not only that the president of Equatorial Guinea controls the judiciary but that in the aforementioned country there is no independent and impartial court as laid down in art. 14.1 of the International Covenant on Civil and Political Rights.

As with the previous claim, in that it deals with them jointly, the Counsel for the State argues that the claims formulated to the contrary do not prove the reality of violation of legal rules.

The judgment in question settles the question by stating that "There is no evidence that the claimant has exercised any action to claim the rights of the conjugal partnership she understands to be infringed before the authorities of the Republic of Equatorial Guinea.

The fact that her husband has filed claims in this respect and has recorded in them his married status cannot exempt her from having to file such a claim, as it is the claimant who is requesting diplomatic protection and it is she should have exhausted the internal remedies in that country. However, it is not that she failed to exhaust those internal resources; rather, she did not have recourse to any remedy to claim the rights of the conjugal partnership she considers to have been infringed".

The decision of the Court in question cannot be considered contrary to law as regards access to the conditions necessary for being entitled to the so-called diplomatic protection of the Spanish State.

Indeed, the observations issued by the United Nations Human Rights Committee regarding the International Covenant on Civil and Political Rights of 10 November 1993, in connection with the complaint laid by the husband of the claimant in respect of his arrest and subsequent confiscation of the property referred to by the claimant, mention problems of impartiality concerning the complainant – who formerly held a political post – in the courts of Equatorial Guinea. It concludes by urging the State of Equatorial Guinea to return the confiscated property to him or grant him compensation.

However, the existence of the so-called principle or rule of international customary law (*Elsi case* in the judgment of 20 July 1989 of the International Court of Justice) which requires the remedies existing in internal law to have been previously exhausted cannot be ignored. The International Court of Justice (*Elsi case*) has stated that a diplomatic claim is admissible when the essence of the claim has been subjected to the competent courts and the claimant has continued, unsuccessfully, as far as is permissible by local laws and procedures. Doctrine understands that an exception would be if it were proved that internal

legislation does not provide for appropriate remedies, a fact which is not justified in this case.

Our legislation on administrative proceedings, *LJCA*/1998-surprisingly, like the previous *LJCA*/1956 (*RCL* 1956/1890), given the framework of the Civil Code (*LEG* 1889/27) then in force – has attributed unrestricted legal capacity to sue to married women, who do not need, nor did they previously need, the assistance of their husbands. Therefore, the claimant's allegations of her husband's actions with respect to the Republic of Guinea or the report of the Human Rights Committee on their result are not relevant grounds for exempting her from the requirement to exhaust the internal remedies of the State that has committed the internationally unlawful act.

We are dealing with a principle of respect for and sovereignty of states and their jurisdictional power. To exercise diplomatic protection prematurely without granting the respondent states the opportunity to do justice is internationally considered an affront to the aforementioned sovereignty. It is well known that the International Court of Justice of The Hague does not draw distinctions between claims and therefore the claimant cannot adopt the individual claims of her husband. Let us not forget that he, despite having the possibility of filing them jointly, did soon his own behalf as a national of the State from which they were claimed.

We therefore dismiss the claim . . . ."

Seventh: Pursuant to art. 135 *LJCA* (*RCL* 1998/1741), as the claim has been dismissed, the legal costs are to be paid by the claimant up to a limit of 1,800 euros; this does not preclude the possibility of the client claiming the amount she deems appropriate".