

SUPPRESSION OF THE ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ON THE HIGH SEAS: SPANISH CASE LAW

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CONTENTS

1. **General regulatory framework**
 - A) *The United Nations Convention on the Law of the Sea*
 - B) *The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* of 20 December 1988
2. **Spanish practice**
 - A) **Conventional practice:** the Treaty of 2 March 1990 between Spain and Italy
 - B) **Case-law practice:** Judgment 21/1997 of the Constitutional Court (Division 2), 10 February 1997
3. **Final considerations**

1. General regulatory framework

The growing importance of activities relating to the illicit traffic in narcotics and psychotropic substances using ships on the High Seas in recent years indicates that such activities are currently one of the chief manifestations of illicit international traffic in drugs and can be considered an odious practice that violates International Law.¹ The control and suppression of such a practice are therefore of interest to the international society and need to be the object of a common action by States based on the development of effective cooperation aimed at reducing or eliminating it.²

In practice, this cooperation has been designed through conventions in the sphere of International Law, and has materialised in the formulation and adoption of specific rules that regulate the matter with varying scope.

A) *The 1982 United Nations Convention on the Law of the Sea*

The 1982 *Convention on the Law of the Sea* is the first instrument of general scope that acknowledges the importance of the problem raised in practice by the increase in illicit traffic in narcotics on the High Seas.³ Article 108 of its regulations state the following:

- "1. All States *shall cooperate* in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the High Seas contrary to international conventions.
2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances *may*

1. On its consideration as *delicto iuris gentium*, see U. Leanza, "L'evoluzione delle norme internazionali in materia di prevenzione e di repressione del traffico illecito degli stupefacenti in alto mare", in *Le droit international à l'heure de sa codification. Études en l'honneur de Roberto Ago*, 4 vol., vol. II, Milano, 1987, 241-279, pp. 260-262.

2. M. Cherif Bassiouni, "The International Narcotics Control Scheme", in M. Cherif Bassiouni (Ed.), *International Criminal Law*, 3 vol., vol. I. *Crimes*, New York, 1986, 507-524, pp. 507.

3. In this connection, it should be stressed that, on the one hand, the 1958 *Geneva Convention on the High Seas* does not address this issue; and, on the other, the texts drafted under the aegis of the United Nations to suppress this illicit traffic in narcotic drugs and psychotropic substances do not include appropriate and sufficient provisions to suppress this traffic on the seas: see the *Single Convention on Narcotic Drugs* of 30 May 1961, as amended by the *Geneva Protocol* of 25 March 1972 (BOE 22 April 1966, 26 April and 8 November 1967, and 27 February 1975); and the *Convention on Psychotropic Substances* of 21 February 1971 (BOE 10 November 1990). See also C.-H. Vignes, "La Convention sur les substances psychotropes", *AFDI*, vol. XVII (1971), 641-656, pp. 644-656.

*request the cooperation of other States to suppress such traffic".*⁴

This is a very general provision that merely introduces the obligation for States to cooperate in this area and furthermore upholds the application of the traditional principle of exclusive jurisdiction of the flag State over its ships on the High Seas.⁵ Thus, it only envisages the possibility that the aforesaid State may request cooperation, and does not refer to the possibility of intervention by different States, which could request the cooperation of the flag State in order to suppress this traffic.

Similarly, the regulation of the right of visit established in the Convention, insofar as it restricts freedom of navigation on the High Seas and could therefore constitute an effective instrument for combating these activities⁶, does not however refer to cases where there are reasonable grounds for believing that a foreign ship that does not enjoy immunity is engaging in the illicit traffic in narcotic drugs.⁷

Moreover, if we examine the development of international practice with respect to this issue, it does not appear possible either to affirm the existence of a right of visit and seizure, as the case may be, in the sphere of customary law.⁸ Therefore, the possibility of applying it to suppress the illicit traffic in narcotic drugs on the High Seas will require the prior adoption of specific international agreements that provide for the application of this restriction of freedom of navigation.

4. *BOE* 14 February 1997. Cursive by the author.

5. T. Treves, "Intervention en haute mer et navires étrangers", *AFDI*, vol. XLI (1995), 651–675, p. 653; and L. Lucchini, M. Voelckel, *Droit de la mer*, 3 ts., t. II, vol. II, *Navigation et Pêche*, Paris, 1996, pp. 148–150.

6. C. Jiménez Piernas, "Competencia territorial del Estado y problemas de aplicación del Derecho del Mar: práctica española", *Anuario IHLADI*, vol. I2 (1995), 233–278, p. 268.

7. In this connection, see art. 110 of the Convention, which acknowledges the right of warships of any State to board foreign ships when there are reasonable grounds for suspecting that such ships engage in piracy or the slave trade, odious practices repudiated by international society. As for Spanish diplomatic practice with respect to the right to board foreign vessels on the High Seas in peace time, in order to suppress the slave trade, see J. D. González Campos, "El caso del 'Virgen del Refugio' (1864) y el derecho de visita en alta mar", *REDI*, vol. XXI (1968), 4–36, pp. 26–36.

8. It is worth recalling that the boarding of the Honduran flagship *Fidelio*, loaded with several tonnes of hashish, by the Italian authorities on the High Seas in 1986, was declared illicit under International Law by the Court of Appeal of Palermo in a judgment of 30 June 1992 affirmed by the supreme appellate tribunal. The Court dismissed the intention to form a general common practice to legitimise State intervention on the High Seas in order to suppress drug trafficking carried out by vessels belonging to other States.

The Court considered that international practice in this field was scanty and insufficient, consisting only of precedents relating to the actions of US authorities: See text of the Judgment of the Court of Appeal of Palermo in *Rivista*, vol. LXXV (1992), pp. 1081–1093, particularly pp. 1090–1001; and T. Scovazzi, "La cattura della nave *Fidelio*", *Id.*, 1015–1022, pp. 1018–1020.

Notwithstanding this exclusion, the provisions laid down in article 108 of the Convention provide a minimum regulatory framework that is designed to be developed progressively through cooperation between States, in the form of conventions.

B) The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988

This text is the result of the work undertaken in the sphere of the United Nations to strengthen and improve the efficacy of the measures provided for in the *Single Convention on Narcotic Drugs* of 1961, as amended by the 1972 Protocol, and in the 1971 *Convention on Psychotropic Substances* in order to combat the illicit international traffic in drugs and reinforce cooperation between States in this area.

The regulation of illicit trafficking activities at sea is expressly provided for in article 17. The first two paragraphs confirm the content of article 108 of the *Convention on the Law of the Sea* but furthermore – and it is in this that the main innovation lies – paragraph 3 provides a positive development as it also includes the possibility that any State party to the Convention may intervene by adopting measures with respect to vessels suspected of being used for this traffic when they are flying the flag of other States parties.¹¹

However, this intervention depends on the consent of the flag State, since article 17.3 requires the State intending to intervene on the basis of reasonably grounded suspicions that a foreign ship is engaging in these activities to notify the flag State and request confirmation of registry. If this is obtained, it can ask for authorisation to adopt appropriate measures with respect to the vessel.¹²

9. T. Treves, "Codification du droit international et pratique des Etats dans le droit de la mer", *R. des C.*, t. 223 (1990–IV), 9–302, pp. 221–222.

10. See Preamble to the Convention and art. 2.1 in *BOE* 10 November 1990; and F. Rouchereau, "La Convention des Nations Unies sur le trafic illicite de stupéfiants et de substances psychotropes", *AFDI*, vol. XXXIV (1988), 601–617, pp. 601–602.

11. T. Treves, "Intervention en haute mer et navires étrangers", *loc. cit.*, pp. 655–656; and J.-P. Quéneudec, "Chronique du droit de la mer", *AFDI*, vol. XXXIV (1988), 726–734, p. 731.

12. This is therefore a cooperation mechanism built on the basis of respect for the principle of exclusive jurisdiction of the flag State, which remains free to authorise the intervention or not, depending on the information it receives. It can furthermore subject its authorisation to conditions agreed with the requesting party; however, article 17.7 obliges it to respond *expeditiously* to the requests to determine whether the vessel is entitled to fly the flag and to authorise intervention: see M. I. Lirola Delgado, "La represión del tráfico ilícito de drogas en alta mar. Cooperación internacional y práctica estatal", *ADI*, vol. XII (1996), 523–576, pp. 533–534.

Regarding the measures that can be authorised by the flag State, the Convention refers expressly to the boarding and search of the vessel, though, in the event that evidence of involvement in illicit traffic is found, it establishes the possibility of adopting "appropriate measures" with respect to the vessel, persons and cargo found on board it.¹³ In this connection, it is worth noting the deliberate imprecision of the terms used ("appropriate measures"), which avoid any reference to the possibility of seizing the vessel if evidence of infringement is found. Such a reference, which was actually included in the initial draft of the Convention, was eliminated in view of the lack of agreement between the States, which clung to the principle of exclusive jurisdiction of the flag State on the High Seas, even if a seizure were carried out with their consent.¹⁴

The Convention furthermore fails to determine the sea area in which intervention on foreign vessels may take place. A compromise solution is adopted in article 17.3, which refers to vessels "exercising freedom of navigation in accordance with International Law". It is thus possible to interpret that both the High Seas and the Exclusive Economic Zone are included as areas governed by the principle of freedom of navigation.¹⁵

As an indispensable complement to ensure that the cooperation procedure provided for in art. 17 is able to function effectively in practice, the Convention also refers to the powers of the States Parties to act on vessels.

In this context, it does not seem logical, bearing in mind the purpose and aims of this Convention, that it should oblige the Parties to adopt such measures as may be necessary to establish their jurisdiction over the offences related to the traffic in narcotic drugs established in their domestic law,¹⁶ only when the offence is committed on board a ship flying their flag¹⁷, since when it is committed on board a foreign ship,

13. Art. 17.4 c) of the Convention.

14. F. Rouchereau, "La Convention des Nations Unies contre le trafic illicite de stupéfiants...", *loc. cit.*, p. 614; W. C. Gilmore, "Drug trafficking by sea. The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", *Marine Policy*, vol. 15 (1991), 183-192, p. 190.

15. See art. 58.1 of the *Convention on the Law of the Sea* and T. Treves, "La navigation", in R.-J. Dupuy, D. Vignes (Eds.), *Traité du nouveau droit de la mer*, Paris, 1985, 687-808, pp. 690-692. This claim is corroborated by para. 11 of art. 17, according to which the action taken shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the International Law of the sea: see W. C. Gilmore, "Drug trafficking by sea...", *loc. cit.*, pp. 187-188, and T. Treves, "Intervention en haute mer...", *loc. cit.*, pp. 656-657.

16. See art. 3 of the Convention, which establishes that the obligation of the States Parties is to establish as criminal offences a series of activities related to the production and trafficking of narcotic drugs, referring specifically in para. a) i) to the "brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention".

17. Art. 4.1 a) ii).

for the seizure of which authorisation has been obtained previously in accordance with art. 17, the adoption of these measures is entrusted to the will of the State that has intervened. *Optional jurisdiction* is thus established, which must furthermore be exercised on the basis of the agreements between the Parties as referred to in paras.4 and 9 of art. 17.¹⁸

All in all, despite the foregoing, the legal system provided for in the 1988 Convention can be regarded positively in that it marks a step forward from the provisions of art. 108 of the *Convention on the Law of the Sea*, since it includes the possibility that States other than the flag State may intervene, even though the latter maintains its traditional preferential jurisdiction over its vessels on the High Seas. It furthermore provides a suitable point of departure for developing cooperation between States, particularly at the regional and bilateral levels, in order to formulate and adopt more effective rules to suppress this odious practice at sea.

In the European regional sphere, the results of this cooperation were recently reflected in a specific instrument, the 31 January 1995 *Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.¹⁹

This new Agreement, which will come into force soon²⁰, is closely related to the 1988 Convention, adopting as its frame of reference the provisions established in art. 17 of the latter, which the Agreement aims to supplement, in order to maximise law enforcement measures or enhance their effectiveness.²¹

It furthermore expressly provides for the development of its provisions through the formalisation of multilateral and bilateral agreements by the States Parties, including more complete and detailed specific provisions.²²

Bearing in mind this aim, particular mention should be made of the fact that the rules of the Agreement are along the lines of the Convention, in that they subordinate the Parties' intervention with respect to vessels of other States to prior and express

18. Art. 4.1 b) ii).

19. See text in *RGDIP*, vol. 99 (1995), pp. 212–228; and W. C. Gilmore, "Narcotics interdiction at sea. The 1995 Council of Europe Agreement", *Marine Policy*, vol. 20 (1996), 3–14, pp. 3–4.

20. Pursuant to art. 27.3, this Agreement requires three ratifications in order to enter into force, and by 28 March 2000 it had been ratified by Germany, Norway and Cyprus, and will come into force on 1 May 2000.

21. See Preamble, para. 6, and art. 2.2. As an expression of this link between the two texts of the conventions, it should be stressed that participation in the 1995 Agreement is, in principle, restricted to the member States of the Council of Europe which are Parties to the 1988 Convention (art. 27.1 and W. C. Gilmore, "Narcotics interdiction...", *loc. cit.*, p. 4).

22. Art. 30.2.

authorisation from the flag State.²³ Indeed, a time limit is established of 4 hours from the request for intervention, within which the State must notify of its decision²⁴, in order to allow the requesting State to carry out action more swiftly and thereby increase its efficacy.

Once authorisation is granted, the intervening State may adopt, first, "authorised actions" laid down by the Agreement, including the stopping and boarding of the vessel and the detention of the persons on board, in order to allow this State to take effective control of the vessel and begin to investigate its involvement in illicit traffic.²⁵ Following the adoption of these measures, the possibility is provided for, in second place, of adopting "enforcement measures" when the State has evidence that a relevant offence has been committed which would be sufficient under its laws to justify its either arresting the persons concerned or detaining the vessel.²⁶

Lastly, where it refers to the jurisdiction of the States Parties over offences committed on board vessels flying the flags of other States Parties, it should be pointed out that the text of the Agreement differs, and wisely so, from the 1988 Convention, establishing its *mandatory* nature.²⁷ Nonetheless, it does safeguard one preferential right of the flag State, which must be informed of the evidence collected by the intervening State, in order to decide whether or not to exercise its jurisdiction. It has a period of 14 days in which to notify of its decision. If it fails to do so, it is deemed to have waived the exercise of this jurisdiction,²⁸ since the idea is to favour the exercise of jurisdiction by the intervening state as the most suitable means of achieving the aim pursued by the Agreement, to the detriment of the strict application of the principle of exclusive jurisdiction of the flag State.

2. Spanish practice

A) *Conventional practice: the Treaty between Spain and Italy of 2 March 1990*

The control and suppression of the illicit traffic in narcotic drugs and psychotropic

23. Arts. 6 to 8 of the Agreement, and M. I. Lirola Delgado, "La represión del tráfico de drogas en alta mar...", *loc. cit.*, pp. 539–541.

24. See art. 7 and art. 21, which lays down the content of the request for authorisation, including, *inter alia*, the request for confirmation of the vessel's registration, notification of the measures the State intends to adopt and guarantees that these measures could likewise be adopted if the ship were flying its flag.

25. See art. 9, according to which the adoption of these measures may be made subject to conditions that can be established by the flag State in its authorisation (art. 8).

26. Art. 10.

27. Art. 3.2.

28. Arts. 13.1, 14.1 and 2 and W. C. Gilmore, "Narcotics interdiction...", *loc. cit.*, pp. 13–14.

substances at sea is an issue of particular interest to Spain, owing mainly to its special geographical location. Its position between the Mediterranean Sea and the Atlantic Ocean, and its proximity to the north African States, make it the principal gateway to the European markets for drugs coming from North Africa and Latin America, as well as an essential route for traffic from the Mediterranean to the US markets.

This situation has led our country to participate actively in international cooperation actions carried out at a general level and reflected in the conventions examined earlier on. It has furthermore begun to develop a specific cooperation, focused on the bilateral sphere, in order to facilitate the suppression of these activities, thereby supplementing the provisions of the 1988 *United Nations Convention*, which is the main frame of reference for this cooperation.

This bilateral cooperation has materialised in practice through different agreements concluded in the general framework of prevention and reduction of the consumption and illicit traffic in narcotic drugs and psychotropic substances. These agreements basically provide for the exchange of information and documents, and scientific and technical assistance between the Parties to carry out joint programmes and projects in this field.²⁹ Indeed, as regards the suppression of illicit trafficking activities carried out at sea, the *Treaty between Spain and Italy on the suppression of the illicit traffic in drugs at sea* of 23 March 1990³⁰ positively reflects the new trend stemming from the 1988 Convention.³¹ It is particularly interesting to point out some significant aspects of the content of this Treaty that clearly reflect the headway that has been made in international cooperation with respect to the rules laid down in the 1988 Convention.

In particular, the Treaty includes mutual recognition of a right of intervention that is exercisable outside territorial waters by each of the Parties with respect to ships flying the other Party's flag. There is no need for prior authorisation from the flag State³² and the actions that can be carried out in exercising this right are specified in

29. In this connection, in recent years (since 1990), Spain has signed cooperation agreements with the former USSR (*BOE* 23 November 1990), Turkey (*BOE* 2 December 1991), the United States (*BOE* 8 April 1993), Venezuela (*BOE* 27 March 1998), Bolivia (*BOE* 3 April 1998), Chile (*BOE* 21 May 1998), Mexico (*BOE* 26 June 1998), Malta (*BOE* 30 July 1998), Cuba (*BOE* 30 December 1998), and Panama (*BOE* 20 July 1999).

30. The text of the Treaty, in force since 7 May 1994, can be found in *BOE* 6 May 1994.

31. See M. I. Lirola Delgado, "La represión del tráfico ilícito...", *loc. cit.*, pp. 556–560.

32. On this point, art. 5. 1 states that the intervention is carried out on behalf of the flag State. This indication has been criticised by some authors, who question its conformity with International Law, since the Treaty does not refer to third States with respect to which the actions of the intervening State should be regarded as being carried out by the flag State: see R. Adam, "La repressione del traffico di droga via mare in un recente trattato italo-spagnolo", *La Comunità Internazionale*, vol. XLVIII (1992), 348–382, p. 357.

detail.³³

Furthermore, concerning the Parties' jurisdiction in actions relating to the illicit traffic of drugs on board vessels, as laid down in article 2³⁴, the Treaty, as the 1995 *Council of Europe Agreement* does subsequently, establishes the obligation of the States Parties to make such facts statutory offences punishable according to their internal rules, exercising exclusive jurisdiction when they are committed in their territorial waters, bonded areas or free ports; although when they are committed outside territorial waters the flag State enjoys preferential jurisdiction.³⁵ This solution has also been adopted in the European regional sphere through the 1995 Agreement.³⁶

Nevertheless, the possibility of waiving the exercise of these powers, even tacitly, through a prior request from the intervening State³⁷, favours the exercise of jurisdiction by this State, which will generally have a greater interest as it has carried out the detention and seizure of the vessel and the arrest of the persons on board, as well as the investigation, inspection, collection of evidence and custody of persons implicated.³⁸

33. Such actions, of which the flag State should be informed before they are adopted, if possible, or immediately after being performed, include the possibility of pursuit and boarding of the vessel, verification of documents and questioning of persons found on board; and, if there are still grounded suspicions that the vessel and/or the persons found on board are involved in illicit activities, the ship may be inspected and any drugs found seized, and the persons implicated arrested and the vessel escorted to the nearest suitable port (art. 5.2).

34. Specifically, "possession with a view to the distribution, transport, transfer, deposit, sale, manufacture or processing of narcotic drugs or psychotropic substances as defined in the international instruments that bind the Parties"; attempts, aiding and abetting and concealment are likewise punishable.

35. Art. 4.2.

36. See *supra* 1.B).

37. For this purpose, art. 6.2 of the Treaty establishes the obligation of the flag State to examine the request in good faith, bearing in mind different criteria when adopting its decision, such as the site of seizure, ease of access to evidence and the nationality and residence of those implicated, as these criteria may be conducive to waiver of jurisdiction in favour of the intervening State. In this connection, it is interesting to point out that the flag State has a period of 60 days from receipt of the request to notify of its decision, on the understanding that failure to answer within this period indicates waiver of jurisdiction (art. 6.4).

The possibility of waiver is also included in the 1995 *Council of Europe Agreement*, though the latter establishes a period of 14 days.

38. In this connection, it is interesting to underline the important results of the bilateral cooperation recently carried out by the United States, a major naval power, with the Caribbean States, which are a key transit zone for drugs from South America on their way to the United States – a third of the drugs that are smuggled into the US cross the Caribbean area – and Europe. These results translate specifically into the adoption of treaties that develop and improve on the provisions of art. 17 of the 1988 *United Nations Convention*.

One such instrument that is worthy of mention owing to its importance is the 9 November 1991

B) Case-law practice: Judgment 21/1997 of the Constitutional Court (Division 2), 10 February 1997

In recent years, the practical application of the general rules laid down by the conventions we have examined has led our courts to become increasingly active in hearing and ruling on cases of seizure on the High Seas of vessels flying foreign flags or displaying no flag, involved in the illicit traffic in narcotic drugs.

As for the seizure of vessels flying no flag, it is worth commenting on the *Audiencia Nacional* (National Court) Judgment of 15 September 1995, affirmed by the Supreme Court in its Judgment of 10 February 1997.³⁹ Pursuant to the international regulations in force for Spain⁴⁰, the court considered that the Spanish authorities acted legitimately in boarding and detaining the vessel *Rand*, which was carrying cocaine, on the High Seas, without requesting authorisation from any State, since the vessel in question was not flying any flag and, as such, was not subject to the jurisdiction of any State.⁴¹

Agreement with Venezuela and its Protocol of 23 July 1997 regulating the action of one Party with respect to the other's flagships, after obtaining authorisation from the flag State, which should be given within just 2 hours (arts. 2 and 4: text provided by the US Department of State).

The US has likewise concluded cooperation agreements with Jamaica, on 2 May 1997, and Barbados, on 25 June 1997, which furthermore include the establishment and implementation of assistance programmes and joint operations by the Parties in order to suppress illicit maritime traffic in drugs (arts. 5–12 and arts. 3–4, respectively: text provided by the US Department of State).

Both texts, in force since 1998, were negotiated shortly before the Bridgetown (Barbados) Summit which brought together the US and fifteen Caribbean States on 10 May 1997 and ended in the adoption of a Declaration of "Partnership for Prosperity and Security in the Caribbean" and an Action Plan that expressly addresses the need to enhance cooperation to combat illicit traffic in drugs in the Caribbean area: *ILM*, vol. XXXVI (1997), pp. 792–806.

39. See *Ar. Rep. J.* 1987, n. 1550, pp. 2390–2402.

40. See art. 6.1 of the 1958 *Geneva Convention on the High Seas* and art. 92.1 of the 1982 *Convention on the Law of the Sea*, which establish the subjection of vessels on the High Seas to the exclusive jurisdiction of the *flag State*; and arts. 4 and 5.1.b) of the 1988 *United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances*, which refer to the adoption of measures by the States Parties to establish their jurisdiction with respect to the offences envisaged in the Convention, and to authorise the seizure of substances of this kind. The competence of Spanish jurisdiction in these cases is based on art. 23.4.f) of the *Ley Orgánica del Poder Judicial* (Organic Law on Judicial Power, *LOPJ*) which adopts the principle of universality in connection with the suppression of the offences established by Spanish criminal law of illicit traffic in narcotic drugs and psychotropic substances.

41. In this connection, the Judgment of the Supreme Court states: "Nor can the search of the vessel on which the cocaine was found be considered null and void. The evidentiary facts establish that the vessel 'Rand' was not flying any flag... In this case it was not necessary to request any authorisation to board the vessel from the flag State ... because it was not sailing with any flag or with any documents relating to any State whatsoever and, furthermore, the persons on board the ship were Spanish nationals...". (*Ar. Rep. J.*

We may also cite in this connection the *Audiencia Nacional* Judgment of 9 July 1993 relating to the seizure on the High Seas of the vessel *Bongo*, which was carrying over 1,100 kg of cocaine, and was not flying any flag or carrying any documents that accredited its nationality.⁴²

Moreover, cases of seizure of ships flying foreign flags are also found in the basis some recent decisions taken by Spanish courts. In this respect, on 2 October 1995 the Supreme Court, ruling on an appeal in cassation, upheld the legitimacy of the seizure, inspection and escorting to a port of the *Grisú*, which was flying the flag of Belize, following the detection of drugs on board. Relevant authorisation was obtained from the flag State.⁴³ Similarly, Spain's Supreme Court recently confirmed the legality of the seizure and search of the vessel *Martere*, formally flying the Panamanian flag⁴⁴, affirming the decision by the *Audiencia Nacional*⁴⁵, in a recent Judgment of 28 February 1998.⁴⁶ In this case the flag State authorised the intervention verbally over the telephone.

In addition to the *Audiencia Nacional* and the Supreme Court, the Constitutional Court also had to deal with similar cases for the first time in its Judgment of 10 February 1997 regarding an application for the defence of basic constitutional rights. This application had been lodged against the Criminal Division of the *Audiencia Nacional* on the grounds of infringement of the right to personal freedom enshrined in art. 17 of the Spanish Constitution (CE).⁴⁷

We pointed out earlier on that this decision, in our view, is particularly interesting, not so much because of its novelty as for the Court's interpretation of the

1997, n. 1550, Fifth Legal Ground, p. 2394).

42. The *Audiencia Nacional* specifically states: "... pursuant to art. 5 of the Geneva Convention (and in accordance with art.91 of the UN Convention) the nationality of the vessel should be determined by that of the State whose flag it is flying. And that nationality could not be ascertained externally because ... it lowered the Colombian flag as soon as it left Colombian jurisdictional waters; and because it did not display any other signs of identity other than the name 'Bongo', which did not figure in the international registers...."

On the basis of lack of knowledge of the nationality, inspection of the vessel ... is provided for in art. 17 of the 1988 Convention (and in arts. 108 and 110 of the 1982 Convention)": Judgment 9 July 1993 (Criminal Division, Section 1), n. 27/93, Sixth Legal Ground, pp. 15-16.

43. See *Ar. Rep. J.* 1995, n. 6959, pp. 9316-9317, particularly the First Legal Ground, and the commentary by C.F. Fernández Beistegui, in *REDI*, vol. XLVIII (1996), pp. 179-183.

44. Nonetheless, the vessel previously possessed a Danish flag and, when officials of the Customs Surveillance Service made the seizure, it was loaded with over 1,300 kg of very pure cocaine, was not flying a flag, displayed a different name (*Wanguard*), and lacked the minimum documents required on board.

45. Judgment of the *Audencia Nacional*, 28 July 1995, n. 33/95 (Criminal Division, Section 1).

46. *Ar. Rep. J.* 1998, n. 1746, pp. 2709-2712, particularly the Second Legal Ground, pp. 2711-2712.

47. See *BOE* 14 March 1997, Sup. (Judge: Julio D. González Campos).

constitutional right that was allegedly violated. This will clearly be beneficial to achieving the aim pursued by the international regulations by which Spain is bound in the fight against offences of illicit traffic in narcotic drugs and psychotropic substances on the High Seas.

The circumstances from which the decision derives are the seizure on the High Seas, in the South Atlantic, of the Panamanian merchant vessel *Archangelos* and the arrest of its crew by a Customs Surveillance Service vessel acting on the orders the Central Court of Preliminary Investigation no. 1 of the *Audiencia Nacional*. 2,000 kg of cocaine were found on board the vessel which, after being arrested, was escorted to the port of Las Palmas de Gran Canaria.

As a result of this action taken by the Spanish authorities, the master of the ship that was seized filed an application for the defence of fundamental rights with the Constitutional Court, claiming that his right to personal freedom, one of the fundamental rights enshrined in the *CE* (art. 17.1), had been violated. He alleged that his arrest failed to comply with constitutional rules since he was unlawfully imprisoned before being made to appear before a judge, for a period that exceeds the legal period established in art. 17.2 of the *CE* (72 hours); and because he was not fully informed of his rights, with the services of an interpreter and lawyer (art. 17.3 *CE*).

The Court ruled on these alleged violations, dismissing the application requested by the petitioner. It is interesting to highlight several aspects of the legal grounds on which this decision is based, which will be examined in the following paragraphs.

1. The specific characteristics that distinguish the circumstances from which the judgment is derived – for the action was carried out by the Spanish authorities in international waters, the High Seas, outside Spanish territorial waters – play a major role in developing the position of the Constitutional Court regarding its interpretation of the right to personal freedom. These circumstances explain why the Court is careful to specify, appropriately, that the subjection of our public powers to the legal order (arts. 9.1 and 10.2 *CE*) also operates in relation to its actions *ad extra*, as a prerequisite for acknowledging the possible existence of damage to the rights and fundamental freedoms laid down by the Spanish Constitution through such actions.

Through art. 10.2 *CE*, which establishes that the constitutional provisions relating to fundamental rights and freedoms must be interpreted in accordance with international regulations on the protection of human rights, and on the basis of the case-law of the European Court of Human Rights, Spain's Constitutional Court thus broadens the spatial scope of protection of these fundamental rights and freedoms, by considering, in this case, the possibility of charging the Spanish State with encroaching on those rights as a result of an action carried out outside Spanish territory.

2. Second, the question is raised of the international legitimacy of the boarding and seizure of the vessel *Archangelos* by the Spanish authorities, insofar that this is a foreign ship – Panamanian – which exercises freedom of navigation on the High Seas, and such actions are an exception to the principle of exclusive jurisdiction of the flag

State over its vessels, laid down in the 1958 *Geneva Convention on the High Seas* and in the 1982 *Convention on the Law of the Sea*.⁴⁸ In this regard, it is appropriate to recall that the lack of a basis in customary International Law providing legal grounds for this exception in cases of illicit international traffic of narcotic drugs makes it necessary to examine the content of the conventional rules currently in force regarding this matter.

In the aforementioned case, the Court finds no international legal obstacle to the implementation of the measures referred to. It considers them legitimate since they constitute a specific application of the 1988 *United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances*, an instrument by which both Spain, the intervening State, and Panama, the flag State, are bound.

Art. 17 of the Convention, which expressly provides for the taking of measures with respect to foreign ships on the High Seas (paras. 3 and 4), with the prior authorisation from the flag State⁵⁰ provides a legal basis for the action carried out with respect to the *Archangelos*. This action can be considered irreproachable from the viewpoint of International Law, bearing in mind that the boarding and seizure of this vessel and the arrest of its crew were expressly authorised in writing, through diplomatic channels, by Panama.⁵¹ Furthermore, this State, by granting "flags of convenience", lacks the possibility of exercising a minimally effective control over its vessels and, consequently, its action would scarcely be effective in suppressing the illicit traffic in narcotic drugs by sea.

3. Having established that the action complies with International Law, the supplementary issue arises of the jurisdiction of Spanish courts over cases of offences committed outside national territory. In this context, it should be underlined that the 1988 Convention only envisages the powers of the States Parties to establish their jurisdiction over offences established in the penal codes of their domestic laws, when such offences are committed on board foreign vessels and prior authorisation has been obtained from the flag State.

The *LOPJ*, of 1 July 1985, does however establish Spain's jurisdiction over cases

48. Art. 6 of the *Geneva Convention* and art. 92 of the *Convention on the Law of the Sea*.

49. See *supra* 1.A).

50. See *supra* 1.B).

51. See Third Legal Ground, para. B.

In this case, the *written* record of diplomatic confirmation from the Embassy of Panama in Madrid is a particularly significant data bearing in mind that in the aforementioned judgments of the Supreme Court, permission from the flag State to board, search and arrest a foreign vessel on the High Seas had always been granted verbally, or else the only record of such permission was through references from the Spanish authorities (Cases involving the vessel *Martere*, Judgment of 28 February 1998, and the *Grisú*, Judgment of 2 October 1995).

that, among others, can be classified according to penal legislation as offences of "illicit traffic in psychotropic, toxic and narcotic drugs" (art. 23.4 f).⁵² Domestic legislation thus reflects the main trend in international practice and doctrine regarding the legal nature of territory, recognising the extraterritorial application, of a universal scope, of Spanish criminal jurisdiction. This is based on the international nature and particular importance of these offences, which can be included among the so-called odious practices abhorred by international society and which generate individual criminal liability.⁵³

On the basis of this acknowledgement of jurisdiction by our domestic law, it is therefore obvious, as the Constitutional Court rightly points out, that the detention and imprisonment by the Spanish authorities of the master of the vessel *Archangelos*, in addition to being in compliance with the conventions to which Spain is a party, also relates to one of the cases provided for in our legal system and, as a result, the alleged violation of the right guaranteed by art. 17.1 of the *CE* through the aforementioned action should be ruled out.

4. Other issues worth underlining concern the application in this case of the constitutional guarantees established regarding the time limit for preventive arrest and for the right of arrested persons to defence, which are considered by the applicant as being violated.

With regard to the failure to observe the maximum period of preventive arrest (72 hours; art. 17.2 *CE*), aimed at preventing a person from being held in custody for prolonged periods without prior decision and supervision by a competent court or tribunal, the Court construes that the existence of an order for preventive arrest, issued when the legally established period ended, ensures judicial control of arrest and, as a result, guarantees the proper fulfilment of constitutional prescriptions even though the particular circumstances of the case, – namely the site of the arrest – meant

52. See Judgments of the Supreme Court, 21 July 1987, First Legal Ground (*Ar. Rep. J.* 1987, n. 5603, p. 5318) and 10 February 1997, Fifth Legal Ground (*Ar. Rep. J.* 1997, n. 1550, p. 2394).

53. C. Jiménez Piernas, "Competencia territorial del Estado y problemas de aplicación del Derecho del Mar...", *loc. cit.*, pp. 245–248.

With regard to the criminal liability of the individuals implicated in these activities, it should be pointed out that the illicit traffic in narcotic drugs was established in art. 25 of the *Draft Code of Crimes against the Peace and Security of Mankind* provisionally approved in 1991 by the International Law Commission at first reading (*ILC Yearbook* 1991-II (Part 2), para. 176). Nonetheless, the final text approved by the Commission in 1996 (UN Doc. A/51/10, pp. 15–129), contains no references to the consideration of these activities among the offences regulated by the new Code.

In addition, of the cases of offences over which the International Criminal Court recently set up by the Statute of Rome is to exercise its jurisdiction, offences relating to the illicit traffic in narcotic drugs and psychotropic substances are not included, though they are referred to in the scope of the Draft Statute drawn up by the ILC in 1994 (art. 20.4.e) and Annex): see *ILC Yearbook* 1994-II (Part 2), para. 91, and *ILM*, vol. XXXVII (1998), pp. 999–1069.

that it was not materially possible for the arrested person to appear before a judge.

Furthermore, the application of the institution of *habeas corpus* (art. 17.4 CE), as a guarantee of control over the legality of arrest, is also ruled out by the Constitutional Court in the case under examination, since the arrest was carried out in strict compliance with a prior order and subsequently increased to remand in custody on the basis of a further order.

Lastly, having acknowledged the special characteristics of the arrest in the case examined, since it was carried out on the High Seas, the Court considers that neither the petitioner's right to defence nor his right to legal assistance and an interpreter were violated (art. 17.3 CE and 520.1 LECrim.), since until the vessel *Archangelos* arrived at a Spanish port, the Spanish authorities who carried out the seizure did not initiate any investigative proceedings to clarify the facts; rather, they limited their action to custody of the vessel until it reached the port; and as a result, there are no grounds for establishing the existence of a situation of defencelessness.

All in all, the construction made by the Constitutional Court in this decision reflects the – logical – compatibility between compliance with the constitutional provisions acknowledging and guaranteeing rights and fundamental freedoms, such as the right to personal freedom, and the achievement of the aim pursued by the international regulations integrated into our legal system, directed at suppressing particular criminal cases of international nature relating to the illicit traffic in narcotic drugs on the High Seas using vessels flying foreign flags.

3. Final considerations

Conventional practice as examined in the field of suppression of illicit traffic in narcotic drugs on the High Seas shows that international cooperation in this field, both general and regional, has been developed by upholding the application of the principle of exclusive jurisdiction of the flag State over its vessels, which exercise freedom of navigation on the High Seas, since prior consent is a necessary requisite for legitimating the intervention of third States with regard to vessels in this sea area. This requirement has, nonetheless, been superseded in the framework of bilateral practice developed by Spain through the Treaty signed with Italy in 1990, which marks a major step forward in international cooperation in this field.

In order to achieve greater efficiency in the suppression of this illicit traffic, the application of the principle of exclusive jurisdiction of the flag State is qualified, particularly in the conventions drawn up in the regional and bilateral spheres, through the introduction of the obligation of the States Parties to establish the offences committed by ships flying other Parties' as offences punishable by their domestic laws, and the *obligation* of the flag State to notify the intervening State, within a set time limit, of its decision to exercise preferential jurisdiction over the case, with the possibility of tacit waiver of this exercise.

As for Spanish case-law practice in this field, it should be pointed out that it deserves to be regarded positively and satisfactorily from the perspective of application of international law domestically, in that decisions emanating from Spanish courts (*Audiencia Nacional*, Supreme Court and Constitutional Court) in recent years respect and uphold the full application, in our legislation, of international rules deriving from the conventions by which Spain is bound, as a result of the cooperation carried out to suppress and eliminate the illicit traffic in narcotic drugs on the High Seas.