

Spanish Yearbook of International Law  
Volume XVII (2011–2012)

# Spanish Yearbook of International Law

VOLUME XVII

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# Contents

|                                                                                                                                                                                                                                               |     |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| <b>Abbreviations</b>                                                                                                                                                                                                                          | vii |
| <i>Rafael Casado Raigón</i><br>“In Memoriam Juan Antonio Carrillo Salcedo: Grand Master, Grand<br>Human Being”                                                                                                                                | xv  |
| <b>Articles</b>                                                                                                                                                                                                                               |     |
| <i>Yolanda Gamarra Chopo</i><br>“History of the Historiography of Spanish Textbooks and Treatises on<br>International Law of the 19th Century”                                                                                                | 1   |
| <i>Victor L. Gutiérrez Castillo &amp; Juan J. García Blesa</i><br>“The Environmental Protection Regimes Governing Maritime Renewable<br>Energies in the EU and Their Implementation in the Marine and Coastal<br>Areas of the South of Spain” | 23  |
| <i>Francesco Seatzu</i><br>“Civil Society Participation in the Interamerican Development Bank’s<br>Activities and Operations: Enhancing Democratic Accountability?”                                                                           | 43  |
| <i>Marta Sosa Navarro</i><br>“A Hybrid Strategy to Prosecute the Waging of War”                                                                                                                                                               | 73  |
| <b>Diplomatic and Parliamentary Practice</b><br>Spanish Diplomatic and Parliamentary Practice in Public International Law,<br>2011–June 2012                                                                                                  | 95  |
| <b>Treaties</b><br>Treaties to which Spain is a Party Concerning Matters of Public International<br>Law, January 2011–June 2012                                                                                                               | 171 |
| Treaties to which Spain is a Party Concerning Matters of Private International<br>Law, 2011–June 2012                                                                                                                                         | 205 |
| <b>Judicial Decisions</b><br>Spanish Judicial Decisions in Public International Law, 2011–2012                                                                                                                                                | 217 |
| Spanish Judicial Decisions in Private International Law, 2012                                                                                                                                                                                 | 229 |

**Literature**

Spanish Literature in the Fields of Public and Private International Law,  
European Union Law, International Relations and Related Matters,  
2011–July 2012 235

**General Rules for Publication** 351

## *Abbreviations*

|                           |                                                                                                              |
|---------------------------|--------------------------------------------------------------------------------------------------------------|
| Pol. Ext.                 | Actividades, textos y documentos de la política exterior española (Ministerio de Asuntos Exteriores, Madrid) |
| AC                        | Actualidad Civil                                                                                             |
| ADI                       | Anuario de Derecho Internacional                                                                             |
| ADMI                      | Anuario de Derecho Marítimo Internacional                                                                    |
| AFDI                      | Annuaire Français de Droit International                                                                     |
| AJIL                      | American Journal of International Law                                                                        |
| AIDI                      | Annuaire de l'Institut de Droit International                                                                |
| Anuario IHLADI            | Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional                                        |
| Ap.NDL                    | Apéndice al NDL                                                                                              |
| AöR                       | Archiv des Öffentlichen Rechts                                                                               |
| Ar. C                     | Aranzadi Civil                                                                                               |
| Ar. Rep. J, also RJA      | Aranzadi. Repertorio de Jurisprudencia                                                                       |
| Ar. Rep. J. CA, also RJCA | Aranzadi. Repertorio de Jurisprudencia. Comunidades Autónomas                                                |
| ASDI                      | Annuaire Suisse de Droit International (1994–1990)                                                           |
| ASIL Proc.                | American Society of International Law Proceedings                                                            |
| AusYIL                    | Australian Yearbook of International Law                                                                     |
| AVR                       | Archiv des Völkerrechts                                                                                      |
| BIMJ                      | Boletín Informativo del Ministerio de Justicia                                                               |
| BJC                       | Boletín de Jurisprudencia Constitucional                                                                     |
| BOCG-Congreso             | Boletín Oficial de las Cortes Generales. Congreso de los Diputados                                           |
| BOE                       | Boletín Oficial del Estado                                                                                   |
| BYIL                      | British Yearbook of International Law                                                                        |
| CDE                       | Cahiers de Droit Européen                                                                                    |
| CanYIL                    | Canadian Yearbook of International Law                                                                       |
| CI                        | La Comunità Internazionale                                                                                   |
| CML Rev.                  | Common Market Law Review                                                                                     |
| ColJTransLaw              | Columbia Journal of Transnational Law                                                                        |
| Cornell ILJ               | Cornell International Law Journal                                                                            |
| Cur. DI Vitoria           | Cursos de Derecho Internacional de Vitoria                                                                   |
| CurrLPr.                  | Current Legal Problems                                                                                       |
| Rec. Dalloz               | Recueil Dalloz Sirey                                                                                         |
| DCSI                      | Diritto Comunitario e degli Scambi Internazionali                                                            |
| De Martens NRG            | De Martens Nouveau Recueil Général de Traités                                                                |
| DOCG                      | Diari Oficial de la Generalitat de Catalunya                                                                 |
| DOGV                      | Diari Oficial de la Generalitat Valenciana                                                                   |
| DSS-C                     | Diario de Sesiones del Senado – Comisiones                                                                   |
| EA                        | Europa Archiv                                                                                                |

|               |                                                                                       |
|---------------|---------------------------------------------------------------------------------------|
| ECBull.       | Bulletin of the European Communities                                                  |
| ECR           | European Court Reports                                                                |
| EJIL          | European Journal of International Law                                                 |
| ELD           | European Law Digest                                                                   |
| ETS           | European Treaties Series                                                              |
| Eur.Y         | European Yearbook/Annuaire Européen                                                   |
| GYIL          | German Yearbook of International Law                                                  |
| Harv. ILJ     | Harvard International Law Journal                                                     |
| Harv. LR      | Harvard Law Review                                                                    |
| ICE           | Información Comercial Española                                                        |
| ICJ Pleadings | International Court of Justice. Pleadings, Oral Arguments, Documents                  |
| ICJ Reports   | International Court of Justice. Reports of Judgments, Advisory<br>Opinions and Orders |
| ICLQ          | International and Comparative Law Quarterly                                           |
| IJIL          | Indian Journal of International Law                                                   |
| IJRL          | International Journal of Refugee Law                                                  |
| ILA Rep.      | International Law Association Reports                                                 |
| ILC Yearbook  | Yearbook of the International Law Commission                                          |
| ILM           | International Legal Materials                                                         |
| ILQ           | International Law Quarterly                                                           |
| ILR           | International Law Reports                                                             |
| Int. Conc.    | International Conciliation                                                            |
| Int. Lawyer   | International Lawyer                                                                  |
| Ita.YIL       | Italian Yearbook of International Law                                                 |
| JAIL          | Japanese Annual of International Law                                                  |
| JDI Clunet    | Journal du Droit International                                                        |
| Keesing's     | Keesing's Contemporary Archives/Records of World Events                               |
| LCEur.        | La Ley. Comunidades Europeas                                                          |
| LNTS          | League of Nations Treaty Series                                                       |
| NDL           | Nuevo Diccionario de Legislación                                                      |
| NILR          | Netherlands International Law Review                                                  |
| NYIL          | Netherlands Yearbook of International Law                                             |
| OJEC          | Official Journal of the European Communities                                          |
| ÖZöRVR        | Österreichische Zeitschrift für öffentliches Recht und Völkerrecht                    |
| PCIJ Ser.     | Permanent Court of International Justice, Series                                      |
| PolyIL        | Polish Yearbook of International Law                                                  |
| RabelsZ       | Rabels Zeitschrift für ausländisches und internationales Privatrecht                  |
| RBDI          | Revue Belge de Droit International                                                    |
| RCDIP         | Revue Critique de Droit International Privé                                           |
| RCEA          | Revista de la Corte Española de Arbitraje                                             |
| RCG           | Revista de las Cortes Generales                                                       |
| RCL           | Repertorio Cronológico de Legislación                                                 |
| RDA           | Revista de Derecho Ambiental                                                          |
| RDCE          | Revista de Derecho Comunitario Europeo                                                |
| R. des C.     | Recueil des Cours de l'Académie de Droit International                                |

|              |                                                                                                                                    |
|--------------|------------------------------------------------------------------------------------------------------------------------------------|
| RDEur.       | Rivista di Diritto Europeo                                                                                                         |
| RDIPP        | Rivista di Diritto Internazionale Privato e Processuale                                                                            |
| RDP          | Revista de Derecho Privado                                                                                                         |
| REDI         | Revista Española de Derecho Internacional                                                                                          |
| REgDI        | Revue Egyptienne de Droit International                                                                                            |
| REL          | Revista de Estudios Latinoamericanos (Universidad Simón Bolívar)                                                                   |
| Revista IIDH | Revista del Instituto Interamericano de Derechos Humanos                                                                           |
| RGD          | Revista General del Derecho                                                                                                        |
| RGDIP        | Revue Générale de Droit International Public                                                                                       |
| RHDI         | Revue Hellénique de Droit International                                                                                            |
| RIE          | Revista de Instituciones Europeas                                                                                                  |
| Rivista      | Rivista di Diritto Internazionale                                                                                                  |
| RJC          | Revista Jurídica de Cataluña                                                                                                       |
| RMC          | Revue du Marché Commun                                                                                                             |
| RSDIE        | Revue Suisse de Droit International et de Droit Européen (desde 1991)                                                              |
| RTC          | Repertorio de Jurisprudencia Constitucional (Aranzadi)                                                                             |
| RTDE         | Revue Trimestrielle de Droit Européen                                                                                              |
| San Diego LR | San Diego Law Review                                                                                                               |
| Secomex      | Semanario de Comercio Exterior                                                                                                     |
| SYIL         | Spanish Yearbook of International Law                                                                                              |
| UN Chron.    | United Nations Monthly Chronicle                                                                                                   |
| UNGAOR       | UN General Assembly Official Records                                                                                               |
| UNJur.Y      | United Nations Juridical Yearbook                                                                                                  |
| UNRIAA       | United Nations Reports of International Arbitral Awards                                                                            |
| UNTS         | United Nations Treaty Series                                                                                                       |
| Virg. JIL    | Virginia Journal of International Law                                                                                              |
| YaleLJ       | Yale Law Journal                                                                                                                   |
| Yearbook UN  | Yearbook of the United Nations                                                                                                     |
| ZaöRV        | Zeitschrift für ausländisches öffentliches Recht und Völkerrecht                                                                   |
| AAP          | Auto de la Audiencia Provincial (Provincial Court Writ)                                                                            |
| ADR          | Agreement concerning the International Carriage of Dangerous Goods by Road                                                         |
| AECI         | Agencia Española de Cooperación Internacional (Spanish International Cooperation Agency)                                           |
| AGOSCE       | Chechnya Support Group                                                                                                             |
| AI           | Amnesty International                                                                                                              |
| AIDCP        | Agreement on the International Dolphin Conservation Programme                                                                      |
| AN           | Audiencia Nacional (National Court)                                                                                                |
| ANPAQ        | National Authority for the prohibition of chemical weapons                                                                         |
| AP           | Audiencia Provincial (Provincial Court)                                                                                            |
| ATC          | Auto del Tribunal Constitucional (Constitutional Court Writ)                                                                       |
| ATP          | International Transport of Perishable Foodstuffs                                                                                   |
| ATS          | Auto del Tribunal Supremo (Supreme Court Writ)                                                                                     |
| ATSJ         | Auto del Tribunal Superior de Justicia de las Comunidades Autónomas (Superior Court of Justice of the Autonomous Communities Writ) |

|              |                                                                                                             |
|--------------|-------------------------------------------------------------------------------------------------------------|
| BC           | Brussels Convention                                                                                         |
| BGB          | Bürgerliches Gesetzbuch (German Civil Code)                                                                 |
| BOVESPA      | Bolsa de Valores do Estado de Sao Paulo (Sao Paulo Stock Exchange)                                          |
| BVRJ         | Bolsa de Valores do Rio de Janeiro (Rio de Janeiro Stock Exchange)                                          |
| CAP          | Common Agricultural Policy                                                                                  |
| CARICOM      | Caribbean Community                                                                                         |
| Cc           | Código Civil (Civil Code)                                                                                   |
| CC           | Código de Comercio (Commercial Code)                                                                        |
| CCAA         | Comunidades Autónomas (Autonomous Regions)                                                                  |
| CCAMLR       | Convention on the Conservation of Antarctic Marine Living Resources                                         |
| CE           | Constitución Española (Spanish Constitution)                                                                |
| CECAF        | Fishery Committee for Eastern Central Atlantic                                                              |
| CESCE        | Compañía española de seguros de credito a la exportación (Spanish Export Credit Insurance Company)          |
| CESDP        | Common European Security and Defence Policy                                                                 |
| CIAR         | Inter-ministerial Asylum and Refugee Commission                                                             |
| CIF          | Código de Identificación Fiscal (Company Fiscal Identification Code)                                        |
| CITES        | Convention on International Trade of Endangered Species of Wild Fauna and Flora                             |
| CIOMC        | Inter-ministerial Commission for Negotiation in the WTO                                                     |
| CiU          | Convergència i Unió                                                                                         |
| COARM        | Working Group on Conventional Arms                                                                          |
| CoCom        | Coordinating Committee for Multilateral Export Controls                                                     |
| CODA         | Environmental Defence Coordinator Organization                                                              |
| COTIF        | Convention on International Transport by Rail                                                               |
| CP           | Código Penal (Penal Code)                                                                                   |
| CPCE         | Comisión Permanente del Consejo de Estado (Council of State Permanent Commission)                           |
| CSCE         | Conference for Security and Cooperation in Europe                                                           |
| CSN          | Consejo de Seguridad Nuclear                                                                                |
| DAC          | Development Assistance Committee                                                                            |
| DAF          | Development Assistance Fund                                                                                 |
| DGCN         | Dirección General de Conservación de la Naturaleza                                                          |
| DGRN         | Dirección General de los Registros y del Notariado (General Registry and Notary of the Ministry of Justice) |
| DIP          | Derecho Internacional Público (Public International Law)                                                    |
| DIPr         | Derecho Internacional Privado (Private International Law)                                                   |
| EAGGF        | European Agricultural Guidance and Guarantee Fund                                                           |
| EBIC         | European Business Centre                                                                                    |
| EBRD         | European Bank for Reconstruction and Development                                                            |
| EBU          | European Broadcasting Union                                                                                 |
| EC           | European Communities                                                                                        |
| ECHO         | European Convention on Human Rights                                                                         |
| Eur. Com. HR | European Commission of Human Rights                                                                         |
| ECHR         | European Court of Human Rights                                                                              |

|          |                                                                                   |
|----------|-----------------------------------------------------------------------------------|
| ECJ      | European Communities Court of Justice                                             |
| ECMMY    | European Community Monitoring Mission in the Former Yugoslavia                    |
| ECOFIN   | Economic and Financial Affairs Council                                            |
| ECOSOC   | United Nations Economic and Social Council                                        |
| EDF      | European Development Fund                                                         |
| EEA      | European Economic Area                                                            |
| EEC      | European Economic Community                                                       |
| EECT     | European Economic Community Treaty                                                |
| EEZ      | Exclusive Economic Zone                                                           |
| EFTA     | European Free Trade Association                                                   |
| EIB      | European Investment Bank                                                          |
| EMU      | European Monetary Union                                                           |
| EMWIS    | Euro Mediterranean Water Information System                                       |
| ERDF     | European Regional Development Fund                                                |
| ESDI     | European Security and Defence Identity                                            |
| ESDP     | European Security and Defence Policy                                              |
| ESF      | European Social Fund                                                              |
| ET       | Estatuto de los Trabajadores (Workers' Charter)                                   |
| ETA      | Euskadi Ta Askatasuna                                                             |
| EU       | European Union                                                                    |
| EUMETNET | Conference of National Meteorological Services in Europe                          |
| EUMETSAT | European Organisation for the Exploitation of Meteorological Satellites           |
| EURATOM  | European Atomic Energy Community                                                  |
| EUROFIMA | European Company for the Financing of Railroad Rolling Stock                      |
| EUROSTAT | European Communities Statistic Office                                             |
| EUTELSAT | European Telecommunications Satellite Organisation                                |
| FAO      | UN Food and Agriculture Organisation                                              |
| GOVRA    | Grupo Operativo de Vigilancia Radiológica (Spanish Nuclear Monitoring Task Force) |
| HIPC     | Heavily Indebted Poor Countries                                                   |
| HRC      | Human Rights Commissioner                                                         |
| IAEO     | International Atomic Energy Organisation                                          |
| ICAB     | Inter-Country Adoption Board                                                      |
| ICAO     | International Civil Aviation Organisation                                         |
| ICCAT    | International Commission for the Conservation of Atlantic Tuna                    |
| ICJ      | International Court of Justice                                                    |
| ICRC     | International Committee of the Red Cross                                          |
| ICTR     | International Criminal Tribunal for Rwanda                                        |
| ICTY     | International Criminal Tribunal for the former Yugoslavia                         |
| IFOR     | Dayton Agreement Implementation Force                                             |
| ILC      | International Law Commission                                                      |
| ILO      | International Labour Organisation                                                 |
| IMDG     | International Maritime Code of Dangerous Goods                                    |
| IMF      | International Monetary Fund                                                       |
| IMO      | International Maritime Organisation                                               |

|                |                                                                                                                                                                                       |
|----------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| INSS           | Instituto Nacional de la Seguridad Social (National Institute on Social Security)                                                                                                     |
| INSTRAW        | International Research and Training Institute for the Advancement of Women                                                                                                            |
| INTELSAT       | International Telecommunications Satellite Organisation                                                                                                                               |
| INTERPOL       | International Criminal Police Organisation                                                                                                                                            |
| IOPCF          | International Oil Pollution Compensation Fund                                                                                                                                         |
| IPCC           | Intergovernmental Panel of Climate Change                                                                                                                                             |
| IPTF           | International Police Task Force for Bosnia-Herzegovina                                                                                                                                |
| IRPF           | Personal Income Tax                                                                                                                                                                   |
| ISAF           | International Security Assistance Force (Afghanistan)                                                                                                                                 |
| ISM            | Instituto Social de la Marina                                                                                                                                                         |
| ITU            | International Telecommunication Union                                                                                                                                                 |
| IU             | Izquierda Unida                                                                                                                                                                       |
| IVAC           | Instituto Vasco de Administración Pública                                                                                                                                             |
| JIMDDU         | Interministerial Regulation Board for Foreign Trade in Defence and Dual Use Materiel (Spanish)                                                                                        |
| JUR            | Resoluciones no publicadas en los productos CD/DVD de Aranzadi                                                                                                                        |
| KLA            | Kosovo Liberation Army                                                                                                                                                                |
| LAJG           | Free Legal Aid Act (Ley de Asistencia Jurídica Gratuita)                                                                                                                              |
| LC             | Lugano Convention                                                                                                                                                                     |
| LCAT           | Legislación de Cataluña                                                                                                                                                               |
| LECiv.         | Ley de Enjuiciamiento Civil (Civil Procedure Act)                                                                                                                                     |
| LECrím.        | Ley de Enjuiciamiento Criminal (Criminal Procedure Act)                                                                                                                               |
| LGSS           | General Social Security Law                                                                                                                                                           |
| LH             | Ley Hipotecaria (Mortgage Act)                                                                                                                                                        |
| LJCA, also LPC | Law on Contentious-Administrative Jurisdiction                                                                                                                                        |
| LMV            | Ley del Mercado de Valores (Stock Market Act)                                                                                                                                         |
| LO             | Ley Orgánica (Organic Law)                                                                                                                                                            |
| LOCE           | Ley Orgánica del Consejo de Estado (Organic Law of the Council of State)                                                                                                              |
| LODE           | Ley Orgánica de Educación (Organic Law on Education)                                                                                                                                  |
| LOPJ           | Ley Orgánica del Poder Judicial (Organic Law on the Judiciary)                                                                                                                        |
| LOTC           | Ley Orgánica del Tribunal Constitucional (Organic Law of the Constitutional Court)                                                                                                    |
| LPL            | Ley de Procedimiento Laboral (Labour Procedure Law)                                                                                                                                   |
| LRC            | Ley de Registro Civil (Register Office Law)                                                                                                                                           |
| LRDA           | Ley reguladora del Derecho de Asilo y la condición de Refugiado (Law regulating the right to asylum and refugee status)                                                               |
| LRJPAC         | Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (Law of Legal Regime of Public Administrations and Common Administrative Procedure) |
| LSA            | Ley de Sociedades (Company Law)                                                                                                                                                       |
| LTTM           | Ley de Tribunales Tutelares de Menores (Juvenile Court Law)                                                                                                                           |
| MAE            | Ministerio de Asuntos Exteriores                                                                                                                                                      |
| MARPOL         | International Convention for the Prevention of Pollution from Ships                                                                                                                   |

|           |                                                                                                   |
|-----------|---------------------------------------------------------------------------------------------------|
| MEDWETCOM | Mediterranean Wetlands Committee                                                                  |
| MINUGUA   | UN Human Rights Verification Mission in Guatemala                                                 |
| MINURSO   | UN Mission for the Referendum in Western Sahara                                                   |
| MINUSAL   | UN Observation Mission in El Salvador                                                             |
| MO        | Ministerial Order                                                                                 |
| MTAS      | Ministerio de Trabajo y Asuntos Sociales (Ministry of Labour and Social Affairs)                  |
| NAFO      | Northwestern Atlantic Fisheries Organisation                                                      |
| NAFTA     | North American Free Trade Agreement                                                               |
| NATO      | North Atlantic Treaty Organisation                                                                |
| NCTS      | New Computerised Transit System                                                                   |
| NEAFC     | Northeast Atlantic Fisheries Organisation                                                         |
| NEPAD     | New Partnership for Africa's Development                                                          |
| NGDO      | Non-Governmental Development Organisations                                                        |
| NGOs      | Non-Governmental Organisations                                                                    |
| NMD       | National Missile Defence (US)                                                                     |
| NSG       | Nuclear Supplies Group                                                                            |
| OAMI      | Oficina de Armonización del Mercado Interior (Office for Harmonization in the Internal Market)    |
| OAU       | Organisation of African Unity                                                                     |
| ODA       | Official Development Assistance                                                                   |
| ODIHR     | Office of Democratic Institution and Human Rights                                                 |
| OECD      | Organisation for Economic Cooperation and Development                                             |
| OID       | Oficina de Información Diplomática del Ministerio de Asuntos Exteriores, Madrid                   |
| OSCE      | Organisation for the Security and Cooperation in Europe                                           |
| OSPAR     | Oslo and Paris Convention for the Protection of the Marine Environment of the North-East Atlantic |
| PACI      | Plan Anual de Cooperación Internacional (Annual International Cooperation Plan)                   |
| PCIJ      | Permanent Court of International Justice                                                          |
| PIL       | Private International Law                                                                         |
| PNA       | Palestinian National Authority                                                                    |
| PSOE      | Partido Socialista Obrero Español (Spanish Socialist Party)                                       |
| RD        | Real Decreto (Royal Decree)                                                                       |
| RDGRN     | Resolución de la DGRN (DGRN Resolution)                                                           |
| RH        | Reglamento Hipotecario (Mortgage Rule)                                                            |
| RRC       | Reglamento del Registro Civil (Civil Registry Rule)                                               |
| RRM       | Reglamento del Registro Mercantil (Mercantile Registry Rule)                                      |
| SA        | Sociedad Anónima (Limited Company)                                                                |
| SAD       | Sociedad Anonima Deportiva (Sporting Limited Company)                                             |
| SAD       | Single Administrative Document                                                                    |
| SAN       | Sentencia de la Audencia Nacional (National Court Judgment)                                       |
| SAP       | Sentencia de la Audiencia Provincial (Provincial Court Judgment)                                  |
| SECIB     | Secretariat of Ibero-American Cooperation                                                         |

|          |                                                                                                                                         |
|----------|-----------------------------------------------------------------------------------------------------------------------------------------|
| SJPI     | Sentencia del Juzgado de Primera Instancia (First Instance Court Judgment)                                                              |
| SOLAS    | International Convention for the Safety of Life at Sea                                                                                  |
| Ss.      | Sentencias (Judgments)                                                                                                                  |
| STC      | Sentencia del Tribunal Constitucional (Constitutional Court Judgment)                                                                   |
| STS      | Sentencia del Tribunal Supremo (Supreme Court Judgment)                                                                                 |
| STSJ     | Sentencia del Tribunal Superior de Justicia de las Comunidades Autónomas (Superior Court of Justice of the Autonomous Regions Judgment) |
| TARIC    | Integrated Tariff of the European Communities                                                                                           |
| TC       | Tribunal Constitucional (Constitutional Court)                                                                                          |
| TEAC     | Tribunal Económico-Administrativo Central (Central Economic-Administrative Court)                                                       |
| TEAR     | Madrid Regional Economic Administrative Court                                                                                           |
| TGSS     | Tesorería General de la Seguridad Social (National Treasury of Social Security)                                                         |
| TRLPL    | Texto Refundido de la Ley de Procedimiento Laboral (Employment Procedure Law)                                                           |
| TS       | Tribunal Supremo (Supreme Court)                                                                                                        |
| TSJ      | Tribunal Superior de Justicia de las Comunidades Autónomas (Superior Court of Justice of the Autonomous Regions)                        |
| UMAD     | Deployment Support Medical Unit (Unidad Médica de Apoyo al Despliegue)                                                                  |
| UN       | United Nations                                                                                                                          |
| UNAMIR   | UN Mission for Rwanda                                                                                                                   |
| UNCLOS   | United Nations Convention on the Law of the Sea                                                                                         |
| UNDP     | UN Development Programme                                                                                                                |
| UNED     | Universidad Nacional de Educación a Distancia (Open University)                                                                         |
| UNEP     | UN Environment Programme                                                                                                                |
| UNESCO   | UN Educational, Scientific and Cultural Organisation                                                                                    |
| UNHCR    | UN High Commissioner for Refugees                                                                                                       |
| UNMOVIC  | United Nations Monitoring, Verification and Inspection Commission                                                                       |
| UNPROFOR | UN Protection Force (Yugoslavia)                                                                                                        |
| UNRWA    | UN Relief and Works Agency for Palestine Refugees in the Near East                                                                      |
| UNSCOM   | UN Special Commission (Iraq)                                                                                                            |
| UNTAET   | United Nations Transitional Administration in East Timor                                                                                |
| UPAEP    | Postal Union of Americas, Spain and Portugal                                                                                            |
| VAT      | Value Added Tax                                                                                                                         |
| WEU      | Western European Union                                                                                                                  |
| WFP      | World Food Programme                                                                                                                    |
| WIPO     | World Intellectual Property Organisation                                                                                                |
| WMO      | World Meteorological Organisation                                                                                                       |
| WTO      | World Trade Organisation                                                                                                                |
| ZEC      | Canary Islands Special Zone                                                                                                             |

# *In Memoriam Juan Antonio Carrillo Salcedo: Grand Master, Grand Human Being*

Rafael Casado Raigón

*Professor of International Law*

A wise man and a good man at the same time, Juan Antonio Carrillo Salcedo, professor of international law at the University of Granada, the Autonomous University of Madrid and finally, since 1980, the University of Seville, appointed doctor *honoris causa* by the Carlos III University of Madrid, and the Universities of Córdoba, Huelva and Málaga, distinguished as the Favourite Son (*Hijo Predilecto*) of Andalusia, member of the Royal Academy of Moral and Political Science in Madrid, former judge of the European Court of Human Rights, and much, much more, passed away at Seville on 19 January 2013. In addition to these and many other significant merits, awards and honours, he was reputed for the excellence and relevance of his scientific *oeuvre*, for which he held a well deserved place of distinction among the “most highly qualified publicists of the various nations” defined in Article 38 of the Statute of the International Court of Justice.

It was my *honour* to be his first disciple during his second term in Seville. I met my mentor in 1980, when he returned to his University of origin and I was in my last graduate year of law at the University of Seville. Along with my classmates, I immediately realised in his lectures that something revolutionary was happening to the educational model that we had known up until then: a new approach in which clarity went hand-in-hand with an engaging, dynamic, brilliant, scientifically rigorous and very human delivery. It was, in a nutshell, the finest example of what the European Higher Education Area should be, as I mentioned in the foreword to my book *Derecho internacional. Parte general*, which I dedicated to Professor Carrillo.

In 1980 he introduced himself as a *non-textbook professor* (while acknowledging the need for such books and expressing admiration for their authors). Even after 1991, when he published his *Curso de Derecho internacional público. Introducción a su estructura, dinámica y funciones*, a course that he had been rehearsing in the classroom for many years prior and which he dedicated to his ex-students, Doctor Juan Antonio Carrillo considered himself a *non-textbook professor*. He defined himself as a *course* author, for reasons not of form but of method. In his *Curso*, the institutions involved in contemporary international law are not mechanically listed, but merged and interwoven, a method that he acknowledged to be scantily orthodox and hardly amenable to learning by rote with only a shallow understanding of the matter at hand.

Juan Antonio Carrillo consistently advised his disciples to seek a global view of the subject, scientifically pursuing all, rather than just one or a few, of its matters. His *oeuvre*, however, contains discussions of general (and not-so general) problems as well as detailed analyses of specific issues. These discussions and analyses were

always wedded to his studies of European Community law, private international law, international relations and public international law. Since 1980 he devoted the most of his time to this fourth discipline, when an administrative restructuring of law school curricula required him to opt for public international law to the detriment of private international law, despite having taught both subjects since 1963 when, at the age of 28, he was appointed full professor.

He invariably based his private international law research on the premise that law is intended to serve society and its people. In fact as his first disciple, Elisa Pérez Vera has accurately noted, his entire *oeuvre* is geared to “humanising” international law. Two key studies stand out in this respect: his book *Derecho internacional privado. Introducción a sus problemas fundamentales*, a training grounds for countless Spanish law students (even though the preface warns that “this book is not a *manual on private international law* but an introduction to some of its basic problems”) and his 1978 course at the Hague Academy of International Law, entitled *Le renouveau du particularisme en Droit international privé*. As he contended in that course, private international law is deeply rooted in the international order, outside of which it would be barely conceivable. In light of the inconceivability of abstraction from the prior reality of an international society, private international law constitutes a legal formulation of States’ legal duty to cooperate with one another. That duty to cooperate, then, is what requires States to take foreign legal systems into consideration.

His view of public international law, fruit of his research on the State and the evolution of international subjectivity, the formulation and enforcement of laws, international responsibility, the content and functions of international law, the structure of the international society and, among others, the United Nations Organisation, international protection of human rights, the law of the sea and the development of international law throughout history, led him to craft (as early as 1969 and in a second edition in 1976) one of the major works on the science of international law published in the twentieth century: *Soberanía del Estado y Derecho internacional*.

In the book, Professor Carrillo’s baseline was an elementary but indisputable reality: The State sovereignty, along with the characteristics of subjectivity and discretionary nature of international law, on the one hand, and those of voluntarism and relativism, on the other. At the same time, however, he contended that the international order cannot be understood or explained solely in terms of the sovereign State. No State lives in isolation, but rather all are immersed in a broader and more complex community, the international society, which extends beyond mere inter-State relations. In his opinion, that circumstance generates a dynamic and a tension between individual and community, each with its own and differing demands. Both contribute to explain the state-of-play of international law, one of whose characteristic features is the evolution from bilateralism to multilateralism in an ever-expanding sphere of international relations, i.e., the evolution from a decentralised system to one in which international organisation has undeniable consequences.

That same idea and global view are present as well in the general course he delivered in 1996 at the Hague Academy of International Law, entitled *Droit international et souveraineté des États* and in his monograph *Soberanía de los Estados y Derechos Humanos en Derecho internacional contemporáneo*. The position of the State in international

order was the object of ongoing intellectual interest for Professor Juan Antonio Carrillo, and he subsequently proposed a functional and evaluative re-reading of sovereignty. In his book *Globalización y orden internacional* (2004), he shared his colleague Professor Roberto Mesa's view that the (underestimated) State may be the last stronghold affording protection for the excluded. He believed that globalisation should not by any means be governed by market forces only and that States must indispensably develop national capacities, regulate economic activity, foster equity and justice and provide essential public services. He acknowledged that it might seem contradictory for a professor whose publications had insistently stressed the progressive development of and the changes taking place in international law to assert and defend sovereign States' role in the orderly regulation of international affairs. He contended, however, that sovereignty cannot be limited to refrain only, but also entails *States' duties and obligations*. Hence, far from being an obstacle to the existence and development of international law, sovereignty should be an instrument for its materialisation.

Professor Juan Antonio Carrillo reasoned that international law, traditionally envisioned as a legal order that distributes competences and regulates co-existence and cooperation among sovereign States, is today vested with the mission to transform international society, in the name of peace, the furtherance and protection of human rights, peoples' comprehensive and sustainable development and the conservation of the planet's ecological balance. His approach to international law was, then, clearly axiological. Contrary to the alleged neutrality of classical international law, supposedly devoid of ideology, Professor Carrillo viewed international law as a regulatory system axiologically guided by the values of solidarity and universality. Inspired by the universalist tradition bequeathed by Vitoria and Kant, he believed that international law should be based on principles of equity rather than reciprocity, legitimacy rather than the purported axiological neutrality of traditional international law, and international community rather than the exclusivity of States' territorial sovereignty.

That view of the international legal system, in turn, reflected his personal attitude toward life and toward people. As former Spanish Minister of Foreign Affairs and former European Commissioner Marcelino Oreja Aguirre once wrote, what surprised him most about his good friend, beyond the breadth of his intellect, his good judgement and extraordinary erudition, was his steadfast adherence to ethical and moral values that he defended consistently and under whatsoever circumstances, irrespective of any personal convenience or interest. Professor Juan Antonio Carrillo's deeply humanistic vision (which he claimed was the legacy received from his mentors Manuel Giménez Fernández, with his conception of law rooted in the personalism, and Mariano Aguilar Navarro, with his vision of international order grounded on the supremacy of the human being and the notion of international community) carried over into a very substantial portion of his *oeuvre*, the part devoted to human rights. In this area Professor Carrillo combined quasi-judicial duties in the European Commission of Human Rights with his duties as a judge of the European Court of Human Rights, which he served in Strasbourg from 1979 to 1990. But in addition to these complementary activities, another element explains his focus on human rights. As his disciple Professor Alejandro J. Rodríguez Carrión noted, the subject matter was not only a scientific objective, but became the hub of his personal activity and pursuits.

Those personal pursuits, moreover, turned him into a militant and avant-garde advocate of the protection and furtherance of human rights, which he deemed to be exposed to two major hazards: on the one hand, hollow and pompous claims to the effect that they are universal, indivisible and inalienable; and on the other, their manipulation in favour of the strong over the weak. This latter concern led him to wonder about the status of *the human* in the “crucified peoples”. This expression, proposed by Father Jon Sobrino, for Professor Carrillo was not a metaphor, but a phrase needed to clarify and determine how the human element works in favor of peoples whose circumstances are not the result of an act of nature, but induced.

Those of us who were fortunate enough to have worked with him know that one of his greatest virtues was the respect he professed for personal conclusions, when reached, of course, on sound and well reasoned grounds. His *school* (I find it hard to use the word: he never liked it, nor do I) was independent judgement, unguided by any given philosophy or pre-established method that can only lead to pigeonholed routine. His most important teaching, therefore, was tolerance (up to the limits of tolerance) for others’ reasoning and conclusions. As Elisa Pérez Vera wrote, what his disciples truly have in common is their gratitude toward their mentor for having helped us think for ourselves and assume responsibility for our own decisions.

The axiological bases were quite obviously present in his vision of international law. But in addition, Professor Juan Antonio Carrillo devoted particular attention to the fundamentals of history and sociology. Many of his works come to mind in that regard. Two excellent examples can be found in his monographs *El Derecho internacional en un mundo en cambio*, published in 1984, and *El Derecho internacional en perspectiva histórica*, released in 1991. The former was dedicated to Matilde Donaire, his admirably sensitive, talented and devoted wife. He dedicated the second to his law school classmates (Seville, 1951–1956), for whom he reminisced about the complex theoretical world inhabited by scholars with strange names and intricate ideas to which they were introduced when studying international law. With that book, Juan Antonio Carrillo embarked on an exercise of synthesis and precision, providing a historic interpretation of international law based on facts, rules, values and doctrinal reflection, in which he purposed to “see and observe” that legal system “from a distance, to be able to perceive its full value.”

In that historical interpretation of international law, Professor Carrillo always regarded himself as a disciple of both Mariano Aguilar Navarro and Antonio Truyol y Serra. The recognition of the debt contracted with his elders and mentors (and colleagues, as in the case of Professor Julio D. González Campos), the acknowledgement of others’ mastery, defined Professor Juan Antonio Carrillo’s personality and humility. One of the traits that gratified him most in the people he dealt with was their humility. Quoting the *good pope*, John XXIII, whom he admired for his humility as well as for his utopianism and concern for the weak, Juan Antonio Carrillo once said that “what he knew of his shortcomings sufficed for his own confusion”. Nonetheless, he was of firm and inalienable convictions, such as when he claimed that each human being, each human community, is under the positive obligation to be his brother’s keeper in the unjust, unbridled and unruly world we live in. On the *Day of Andalusia* 2009, when he was named Favourite Son, he wondered aloud, in biblical language: “Am I my brother’s keeper?” to which he answered, “yes, undoubtedly, because the obligation to respect and promote human

rights is not the domain of public authorities only, but rather a task incumbent upon us all, if we truly want to be citizens and not vassals”.

On 19 January 2013, at the age of 78, a grand master, one of the grandest masters of international law since the times of Vitoria and Grotius, departed his life. A wise man he was indeed, but he will also be remembered as a good man, a fine and an extraordinary human being.





# *History of the Historiography of Spanish Textbooks and Treatises on International Law of the 19th Century*

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- I. Prologue: The Time of History
- II. International Law as Historical and Natural Law
- III. Morality and the “Idea of Humanity”
- IV. International Law as the Science of the Legal Form
- V. A Modern Conception of International law
- VI. Epilogue: An Encyclopaedic Conception

## ABSTRACT

The bibliography of Spanish international law textbooks is a good indicator of the evolution of the historiography of international law. Spanish historiography, with its own special features, was a recipient of the great debates concerning naturalism *v.* positivism and universalism *v.* particularism that flourished in European and American historiography in the nineteenth century. This study is articulated on four principal axes. The first states how the writings of the *philosophes* continued to dominate the way in which the subject was conceived in mid-nineteenth century Spain. Secondly, it explores the popularization and democratization of international law through the work of Concepción Arenal and the heterodox thought of Rafael María de Labra. Thirdly, it examines the first textbooks of international law with their distinct natural law bias, but imbued with certain positivist elements. These textbooks trawled sixteenth century

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Spanish history, searching for the origins of international law and thus demonstrating the historical civilizing role of Spain, particularly in America. Fourthly, it considers the vision of *institutionist*, heterodox reformers and bourgeois liberals who proclaimed the universality of international law, not without some degree of ambivalence, and their defence of Spain as the object of civilization and also a civilizing subject. In conclusion, the article argues that the late development of textbooks was a consequence of the late institutionalization of the study of international law during the last decade of the nineteenth century. Nevertheless, the legacy of the nineteenth century survives in the most progressive of contemporary polemics for a new international law.

### Keywords

Historiography, Textbooks, International Relations, International Law, Natural Law, Positivism, Sovereignty, Nation-States, History of Civilization, Empire, Religion

### RÉSUMÉ

La bibliographie de manuels espagnols de droit international est un bon indicateur de l'évolution de l'historiographie de ce droit international. La doctrine espagnole, avec ses spécificités, a accueilli les grands débats autour du naturalisme / positivisme, ainsi que de l'universalisme / particularisme, très présents dans l'historiographie européenne et américaine du XIX<sup>e</sup> siècle. Cette étude s'articule selon quatre axes. En premier lieu, elle montre comment les écrits des philosophes ont continué à informer cette discipline tout au long du XIX<sup>e</sup> siècle en Espagne. Elle s'attache ensuite à la popularisation et la démocratisation du droit international à travers l'œuvre de Concepción Arenal et la pensée hétérodoxe de Rafael María de Labra. En troisième lieu, elle examine l'élaboration des premiers manuels de droit international, fortement marqués par la doctrine du droit naturel, mais imprégnés d'éléments positivistes. Ces premiers manuels explorent l'histoire d'Espagne au XVI<sup>e</sup> siècle afin d'identifier les origines du droit international et de démontrer ainsi le rôle civilisateur de l'Espagne, en particulier en Amérique. Dans une quatrième partie, cette étude porte sur l'apparition des premiers manuels rédigés par des institutionnalistes, des réformateurs hétérodoxes, des bourgeois libéraux qui proclament l'universalité du droit international, non sans ambiguïtés, et l'affirmation de l'Espagne à la fois comme objet et acteur de civilisation. En conclusion, l'article démontre que l'élaboration tardive de manuels est la conséquence de l'institutionnalisation tardive des études de droit international au cours de la dernière décennie du XIX<sup>e</sup> siècle. L'héritage de ce XIX<sup>e</sup> siècle survit néanmoins au cœur des polémiques et des batailles qui tentent de définir un nouveau droit international.

### Mots clés

Historiographie, Manuels, Relations internationales, Droit international, Droit Naturel, Positivism, Souveraineté, Etats, Histoire de la civilisation, Empire, Religion

## RESUMEN

La bibliografía de manuales de derecho internacional españoles es un buen indicador de la evolución de la historiografía del derecho internacional. La historiografía española, con sus propias particularidades, fue receptora de los grandes debates en torno a naturalismo *versus* positivismo, y universalismo *versus* particularismo que florecieron en la historiografía europea y americana del siglo XIX. Este estudio está articulado sobre cuatro ejes. Primero, trata de cómo los escritos de los filósofos continuaron informando la disciplina a mediados del siglo XIX en España. Segundo, explora la popularización y democratización del derecho internacional a través de la obra de Concepción Arenal, y el pensamiento heterodoxo de Rafael María de Labra. Tercero, examina la elaboración de los primeros manuales de derecho internacional de marcado carácter iusnaturalista, pero imbuidos de ciertos elementos positivistas. Estos primeros manuales rastrean en la historia española del siglo XVI para identificar los orígenes del derecho internacional y, así, demostrar el papel civilizador de España, en particular en América. Cuarto, explora la irrupción de los primeros manuales de institucionistas, reformadores heterodoxos, burgueses liberales que proclaman la universalidad del derecho internacional, con no pocas ambivalencias, y la defensa de España como objeto de civilización, así como de sujeto civilizador. En conclusión, el artículo argumenta que hay una tardía elaboración de manuales como consecuencia de la tardía institucionalización de los estudios de derecho internacional en la última década del siglo XIX. Sin embargo, el legado del siglo XIX sobrevive en los debates más vivos que tratan de diseñar un nuevo derecho internacional.

### Palabras clave

Historiografía, Manuales, Relaciones Internacionales, Derecho internacional, Derecho Natural, Positivismo, Soberanía, Estados, Historia de la civilización, Imperio, Religión

## I. PROLOGUE: THE TIME OF HISTORY

This article focuses on the history of the historiographies of Spanish international law textbooks at the turn of the nineteenth century – i.e. circa 1880–1900.<sup>1</sup> After the 1850's, which marked a turning point in the dawn of international studies,<sup>2</sup> the bibliography

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<sup>1</sup> In the framework of studies developed by Peter Macalister-Smith and Joachim Schwietzke, "Bibliography of the Textbooks and Comprehensive Treatises on Positive International Law of the 19th Century", *Journal of the History of International Law*, vol. 3, 2011, pp. 75–142, or Manuel Martínez Neira, *El estudio del Derecho. Libros de texto y planes de estudio en la Universidad contemporánea*, Madrid, Instituto Antonio de Nebrija de estudios sobre la Universidad, Universidad Carlos III-Editorial Dykinson, 2001.

<sup>2</sup> The Law of *Instrucción pública* of 17 July, 1857 (Law of Moyano) included the study of International law. See the article written by Ignacio de la Rasilla, "The Study of International law in the Spanish Short Nineteenth Century", *Chicago Kent Journal of International and Comparative Law*, vol. 2, 2013, pp. 122–150.

of books on international law substantially increased as a prelude to the publication of the first textbooks on international law in the 1880s and 1890s.

In 1883, the Spanish Ministry, Germán Gamazo, passed the law that saw the creation of the first chairs in international law.<sup>3</sup> From that moment there existed independent teaching of the subject, with its own courses and professors specialising exclusively in international law studies.<sup>4</sup> Until then, the study of international law, with its dual public and private dimension, ceased to be limited to doctorate courses and came to be considered separately from history and philosophy. In a parallel process to the creation of the first chairs, the handbooks on international law for educational purposes began to be published. These treatises, published in the 1880s were a continuation of the programmes and outlines drafted in previous decades both in terms of form and content. These first textbooks were characterised by dealing with both public and private international law equally. The aim follows the recovery of how authors in the nineteenth century conceived this branch of law in order to discover what was studied, why and with what purpose, considering the formation of the liberal jurist.

The tumultuous nineteenth century, with its foreign interventions – the hundred thousand sons of Saint Louis –, *coups d'état*, failure after failure of the liberal cause – failed constitutions-, social and economic crises, and the 1898 war widespread illiteracy and the search for Spanish identity, “a nation of nations” as defined by José María Jover Zamora,<sup>5</sup> explains why the country felt marginalized, isolated, and different from Europe, and gazed with varying degrees of enthusiasm towards America, the Mediterranean, Africa and Western Europe.<sup>6</sup> While it wanted to become part of an international society in a process of transformation, it also claimed to occupy the position it deserved thanks to its history, culture, resources and geo-strategic position. The recovery of the history of the historiography of international law is therefore a response to national interests, with a clear aim of contributing to the construction of the Spanish nation and to its incorporation into a Europe of civilized nations.<sup>7</sup>

Spanish authors, like those in the rest of America and Europe, were interested in establishing the genealogy of the concept of international law. In their search for origins and precedents, these Spanish authors looked back to the sixteenth century and identified

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<sup>3</sup> Royal Decree of 2 September 1883 (Law of Gamazo), *Gaceta*, de 6 de septiembre de 1883, pp. 653 et seq. See Manuel Martínez Neira, *El estudio del Derecho. Libros de texto y planes de estudio en la Universidad contemporánea*, cit., pp. 256–267.

<sup>4</sup> Mariano y José Luis Peset, “Las Universidades españolas del siglo XIX y las ciencias”, 7 *Ayer* (1992), pp. 19 et seq., Idem, *La Universidad Española (siglos XVIII y XIX). Despotismo ilustrado y revolución liberal*, Madrid, Taurus, 1974; Antonio Álvarez de Morales, *Génesis de la Universidad española contemporánea*, Madrid, Instituto de Estudios Administrativos, 1972, or Manuel Martínez Neira, *El estudio del derecho: Libros de texto y planes de estudio en la Universidad contemporánea*, cit.

<sup>5</sup> José María Jover Zamora, “Caracteres de la política exterior de España en el siglo XIX”, *Política, diplomacia y humanista popular*, Madrid, Turner, 1976, pp. 83–138, and *España en la política internacional. Siglos XVIII–XX*, Madrid, Marcial Pons, 1999.

<sup>6</sup> See José Álvarez Junco, *Mater dolorosa. La idea de España en el siglo XIX*, Madrid, Taurus, 2001.

<sup>7</sup> See Juan Antono Carrillo Salcedo, *El derecho internacional en perspectiva histórica*, Madrid, Tecnos, 1991, pp. 27 et seq.

Francisco de Vitoria as the founder of international law.<sup>8</sup> This witness was subsequently taken up by the later generation of internationalists to demonstrate the civilized nature of the Spanish people, and the civilizing effect of Spain, particularly in America.<sup>9</sup>

The rediscovery of the work of Francisco de Vitoria, Francisco Suarez and others authors of Salamanca School, together with the advance of the liberal cause, led to the resurgence of international law studies in Europe. Martti Koskenniemi has contextualized the re-emergence of Vitoria in a historical era in which “the early international lawyers were liberals who supported the turn to formal empire in order to protect the natives from the greed of colonial companies and ensure the orderly progress of the civilizing mission”.<sup>10</sup> Liberal international lawyers emerging within the framework of the *Institut de Droit International* pointed to the Second Scholasticism of the University of Salamanca as representative of this.<sup>11</sup>

The nineteenth century is traditionally remembered in two ways: first, for the philosophical controversies between naturalism and positivism which, after the relative triumph of positivism, gave way to the more pragmatic discipline we know in this century, and second, as a classical period in which sovereignty and the State were consolidated as the fundamental doctrinal and philosophical underpinnings for international law, only to be eroded, rejected and replaced by twentieth century literature of international law.<sup>12</sup> In both cases, the nineteenth century legal order is a thing of the past and it has been the discipline’s preoccupation from the early days of the League of Nations to keep it that way. As Johan Huizinga (1872–1945) once wrote, using a simile as accurate as it is evocative, historical transitions are not marked by mountain ranges that separate one landscape from another, rather they gradually merge into each other in the varying and constantly evolving remnants of two landscapes: that which is left behind and that which opens out to the future.<sup>13</sup>

My argument is that the nineteenth century can teach us that the modernism, pragmatism and progressivism of today’s international law is more rhetorical effect than historical achievement, and more part of the internal dynamic of the field’s development than artefact of a distant era. A historical study of the history of the historiography of international law textbooks provides an opportunity for us to approach in some measure

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<sup>8</sup> Peter Haggemacher, “La place de Francisco de Vitoria parmi les fondateurs du droit international”, *Actualité de la pensée juridique de Francisco de Vitoria*, 1988, pp. 29 et seq.

<sup>9</sup> See on this idea Yolanda Gamarra, “Rafael Altamira y Crevea (1866–1951). The International Judge as ‘Gentle Civilizer’”, *Journal of the History of International Law*, vol. 14, 2012, pp. 1–49.

<sup>10</sup> Martti Koskenniemi, “Empire and International law: The Real Spanish Contribution”, 61 *University of Toronto Law Journal*, 2011, p. 3.

<sup>11</sup> In particular, Ernest Nys, “Les publicistes espagnols du XVI siècle et les droits des indiens”, *Révue de droit international et de législation comparée* (1889): 532 and *Introduction in Francisco de Vitoria, De Indis et de Iure Belli Relectiones*, Classics of International Law, 1917.

<sup>12</sup> David Kennedy, “International Law and the Nineteenth Century: History of an Illusion”, *QLReview*, vol. 17, 1999, p. 101, and Martti Koskenniemi, “The Legacy of the Nineteenth Century”, in David Armstrong (ed.), *Routledge Handbook of International Law*, New York, Routledge, 2009, pp. 141–153.

<sup>13</sup> Johan Huizinga, *The Waning of the Middle Ages*, 1919, London, Penguin Books, translated in 1924.

the outstanding features of international law as a modern science and its increasing professionalization and internationalization.<sup>14</sup>

The aims, the methodology and the chosen form of presentation of this article is to continue to foster a line of study – critical approach – that could widen the retrospective gaze of Spanish international legal academia by means of an updated intra-disciplinary historiography of its evolution from the early nineteenth century.<sup>15</sup> The present overview of the modern bibliography of international law in nineteenth century Spain is, moreover, oriented to contribute to the new study of the national traditions of international law in Europe.<sup>16</sup> Indeed, the history of international law is a tool for “a critical and conscious moving of frontiers, not only between the national and the international (...) but also as regards, on a global level, the contents of basic concepts such as authority, power, order, law, and the state”.<sup>17</sup>

A full history of international law historiography of the nineteenth century would require writing a history of international law proper. Of course, this is beyond the scope of this article. So I propose to begin with a sketch of textbooks and treatises on positive – public – international law of the nineteenth century. The study is articulated on four principal axes. The first states how the writings of the *philosophes* continued to dominate the way in which the subject was conceived. The contribution of the authors who published the first general textbooks that contained the foundations and principals of international law is studied. In this context, the precedent of Joaquín Marín y Mendoza is used to bring together a study of the body of international law for its teaching, as well as the influence of Latin America literature as essential for the emergence of international law textbooks. The second is an examination of how international law was approached by non-specialist jurists, including the achievements of Concepción Arenal or Rafael María de Labra. They were authors who wrote about the body of international law as amateurs. The third axis addresses the publication of the first treatises with their natural law bias but which were also imbued with certain positivist elements, trawling Spanish sixteenth century history to justify the civilizing nature of international law. The fourth considers the appearance of the first textbooks by heterodox reformers, in short, bourgeois liberals who proclaimed the universality of international law, though not without a certain ambivalence. In conclusion, the paper argues that the late involvement of Spanish international lawyers in writing textbooks is a consequence of the slow institutionalization of international law as a science during the last decades of

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<sup>14</sup> See Matthew Craven, Malgosia Fitzmaurice & Maria Vogiatzi (eds.) *Time, History and International Law*, Leiden & Boston, Martinus Nijhoff Publishers, 2007.

<sup>15</sup> As was pointed out by Yolanda Gamarra and Ignacio de la Rasilla (eds.), *Historia del pensamiento Iusinternacionalista Español del Siglo XX*, Cizur Menor (Pamplona) Thomson Reuters-Aranzadi, 2012, p. 23.

<sup>16</sup> Hence advancing the development of the field of comparative International law, see Martti Koskenniemi, “The Case for Comparative International Law”, *Finnish Yearbook of International Law*, 2011, and Ignacio de la Rasilla, “The Case for Comparative International Law in Question – A Response to Martti Koskenniemi”, *Finnish Yearbook of International Law*, 2012.

<sup>17</sup> Mislos Vec, “Universalization, Particularization, and Discrimination – European Perspectives on a Cultural History of 19th century International Law”, *InterDisciplines* vol. 2, 2012, p. 81.

nineteenth century.<sup>18</sup> In conclusion, the legacy of the nineteenth century survives in the most progressive of contemporary polemics for a new international law.

## II. INTERNATIONAL LAW AS HISTORICAL AND NATURAL LAW

International legal studies were in a precarious state in late eighteenth century Spain after Charles IV suppressed the teaching of Public Law, Natural Law and the Law of Peoples.<sup>19</sup> International law was mainly inspired and founded on natural law. In fact, the rules of natural law designed by authors like Hugo Grotius or Samuel von Pufendorf were transferred from the individual level to the level of nations.<sup>20</sup>

One of our scholars, Joaquín Marín y Mendoza (1721–1782), the first professor of Natural Law, expressed in his *Historia del Derecho Natural y de Gentes* (1776)<sup>21</sup> that international law derived from a discussion of the origins of human society in the natural state and restated the principles of natural independence, equality, and the balance of power under a utilitarian rhetoric adopted from Montesquieu, Hobbes, Puffendorf, Heineccio or Vattel.<sup>22</sup> Even with its uncertainties and inaccuracies, this work represents the exponent of a situation in which the author uses the diminished scholasticism in Spain in search of the construction of natural law and the law of peoples.<sup>23</sup>

In nineteenth century Spain, as in the rest of Europe, there was very little consciousness of international law as a discipline on its own, separate from philosophy, diplomacy or public and private law. International law was developed through the interventions of administrative and civil lawyers, legal historians, theologians, and philosophers.<sup>24</sup> Roman law, canon law and civil law were a great tradition in Spanish legal scholars and from them were implemented the study of international law.

Hence, until late in the second half of the century, international law received no general academic treatment in Spain separate from a discussion of natural law. Nor had international law enjoyed a separate existence in the law faculties. Indeed, international

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<sup>18</sup> See Ignacio Peiró, “La Historiografía académica en la España del siglo XIX”, *Memoria y Civilización. Anuario de Historia de la Universidad de Navarra*, vol. 1, 1998, pp. 165–196.

<sup>19</sup> By the Royal Decree of 1794. See Manuel Martínez Neira, “¿Una supresión ficticia? Notas sobre la enseñanza del Derecho en el reinado de Carlos IV”, *Anuario de Historia del Derecho español* 1998, pp. 523–544.

<sup>20</sup> Luigi Nuzzo and Milos Vec, “The Birth of International Law as a Legal Discipline in the 19th Century”, in Luigi Nuzzo and Milos Vec, *Constructing International Law. The Birth of a Discipline*, Frankfurt/M., 2012, IX–XVI.

<sup>21</sup> See more specific information in José Antonio Tomás Ortíz de la Torre, “L'établissement de l'enseignement officiel en Espagne du droit international. Note bicentenaire”, 40 *Annuaire de l'association des auditeurs et anciens auditeurs de l'Académie de droit international de La Haye*, 1970, p. 122.

<sup>22</sup> Joaquín Marín y Mendoza, *Historia del Derecho Natural y de Gentes*, Madrid, Instituto de Estudios Políticos, re-printed 1950, pp. 39 et seq.

<sup>23</sup> Id. pp. 41 et seq.

<sup>24</sup> In 1836, the University Reform Decree restored the official studies of natural law and the law of nations that had been excluded from the national curriculum since 1794. See García Arias, L., ‘Historia de la doctrina hispánica de derecho internacional’, *Addenda* to Arthur Nussbaum, *A concise history of the law of nations*, New York, 1947 (addenda undated), p. 497.

law fitted uneasily into the juristic atmosphere of the Spanish mid-century, dominated by the exegetic school that recognized no positive source beyond the Criminal Code (1812) or civil law.

Only a few specialized treatises of diplomatic and consular law or maritime law appeared in Spain before the 1880s. Spanish diplomats and courts were satisfied with general treatises written by foreigners, particularly those of Georg F. von Martens, *Tratado de diplomática, o estado de relaciones de las potencias de Europa entre sí, y con los demás pueblos del globo* (1835) translated by Joaquín R. Campuzano, or Johann G. Heineccio, *Elementa Iuris Natura et Gentium* (1737) translated by Joaquín Marín y Mendoza. These translations are enormously valuable given that they show, on one hand, the growing national and linguistic diversification of international law; German, French, Italian and even Russian. On the other hand they indicate the inclusion of Spanish doctrine in the new systematic focus of international law led by the most important iusinternationalists of Europe.

Of significance in this process of independence of international law – from natural law and history of the law – was the compilation in the 1840s of Spanish agreements and treaties by Alejandro del Cantillo (1802–1845) entitled *Tratados, convenios y declaraciones de paz* (1700–1840) published in 1843.<sup>25</sup> To this should be added the work of Esteban de Ferrater y Janer (1812–1873), professor of civil law at the University of Barcelona, under the title *Código de Derecho internacional, o sea, Colección metódica de los tratados de paz, amistad y comercio entre España y las demás naciones* (1846–7).<sup>26</sup> In this code, Ferrater presented a collection of treaties, divided by nations and split between three main headings: the organization of the relationships and interests of governments between themselves, the civil rights of citizens, and commercial interest; as well as a brief summary of the rules of international law or law of people, which without being written in the treaties was always seen as sanctioned by custom, and Spanish laws and provisions that referred to the diplomatic corps and to foreigners.<sup>27</sup>

Antonio Riquelme y Gómez (1801–1879), Head of Section at the Ministry of State, published *Elementos de Derecho Público Internacional con explicación de todas las reglas que, según los tratados, estipulaciones, leyes vigentes y costumbres constituyen el Derecho internacional español* in 1849,<sup>28</sup> completed with an *Apéndice al Derecho Internacional de España*.<sup>29</sup> This treatise was an exponent of the systematization and organization

<sup>25</sup> Alejandro del Cantillo, *Tratados, convenios y declaraciones de paz* (1700–1840), Madrid, 1843.

<sup>26</sup> Esteban de Ferrater, *Código de derecho internacional, o sea, Colección metódica de los tratados de paz, amistad y comercio entre España y las demás naciones tomo primero*, Barcelona, Ramón Martín Indar, 1846, 558 pp.

<sup>27</sup> See Luis García Arias, 'Historia de la doctrina hispánica de derecho internacional', *Addenda* to Arthur Nussbaum, *A concise history of the law of nations*, New York, 1947 (addenda undated), *cit.*, p. 512.

<sup>28</sup> Antonio Riquelme y Gómez, *Elementos de Derecho Público Internacional con explicación de todas las reglas que, según los tratados, estipulaciones, leyes vigentes y costumbres, constituyen el derecho internacional español*, volume I, Madrid, Santiago Saunaque, 1849.

<sup>29</sup> "Apéndice al derecho internacional de España que contiene los tratados, leyes recopiladas, reales cédulas, pragmáticas, reales órdenes y otros documentos que se citan en el tomo primero de esta obra, por Don Antonio Riquelme, gentil hombre de Cámara de S. M. con ejercicio y Jefe de Sección del Ministerio de Estado", volume II, Madrid, Santiago Saunaque, Madrid, 1849.

characteristic of Spanish practice. Also, it includes a compilation of lectures from foreign textbooks. The first volume was dedicated to the elements of international law. These volume was divided into two books; one dedicated to public international law, what is called “political international law”, and the second to private international law, known as “jurisdictional international law” – because it was derived from the “seigniorial jurisdiction of the states”. The second volume was focused on the compilation of laws and other documents cited in the first volume.

In this work, with a clear positivist approach, Riquelme defines international law as a set of rules determining the relations between civilized nations governed by positive, customary and natural law. He classified these rules as political law – subdivided into general and maritime – and jurisdictional law – subdivided into civil and criminal. Some distinctive aspects could be highlighted: in particular the need to discuss and regulate an increasing range of matters of international concern became much stronger for Spain. The purpose of this book was to enrich Spanish legal literature, not with a great treatise but with a small handbook to alleviate the lack of an adequate text with which to begin the study of international law. It was a book that includes an organised explanation of the subject and includes both public and private international law. In the 1950s, he became recognized as the first Spanish author that systematically explained and completed a system of international law surpassing the *Código de Derecho Internacional* by Ferrater.<sup>30</sup>

The linguistic establishment of the term *derecho internacional* came from the Latin American Republics – undoubtedly because of the problems posed by independence. The first book on international law published in the American continent appeared in 1832 written by Andrés Bello, *Principios de Derecho de Gentes*.<sup>31</sup> An eclecticism regarding the dichotomy between natural law and positive law, although with a marked inclination for the latter, impregnates Bello's work.<sup>32</sup>

Like Bello, other Latin American authors such as Carlos Calvo (1824–1906), Carlos Ferreira (1872–1958), or Rafael Fernando Seijas (1822–1905) gradually aligned themselves with the rise of positivism. However, other authors remained closer to naturalism, as was the case with Gregorio Pérez Gomar (1834–1885), José Silva Santisteban (1825–1889), or José María Pando (1787–1840).<sup>33</sup> The Pando's work *Elementos del Derecho internacional* (1843) was the first book to contain in its title the term *derecho internacional*.<sup>34</sup> However, Pando's work was followed by accusations of plagiarism from Bello, who treated it as

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<sup>30</sup> Miguel Ángel Otal Corvinos, “El sistema de derecho conflictual español en Riquelme”, in VV.AA., *El derecho internacional privado español anterior al Código Civil de 1889*, Zaragoza, El Noticiero, 1958, p. 91.

<sup>31</sup> Andrés Bello, *Principios de Derecho de Gentes*, Santiago de Chile, Opinion, 1832.

<sup>32</sup> For the thought of Andrés Bello, see the study by Liliانا Obregón Tarazona, “Construyendo la región americana: Andrés Bello y el Derecho internacional”, in Yolanda Gamarra (coord.), *La idea de América en el pensamiento iusinternacionalista del siglo XXI*, Zaragoza, Institución Fernando el Católico, 2010, pp. 65 et seq.

<sup>33</sup> According to HB Jacobini, *A Study of the Philosophy of International Law as Seen in Works of Latin American Writers*, Connecticut, Hyperion Press, 1979, pp. 39–50.

<sup>34</sup> Arnulf Becker Lorca, “Universal International Law. Nineteenth-Century Histories of Imposition and Appropriation”, *Harvard International Law Journal*, 2010, p. 475.

little other than a new edition of his own *Principios*. Both authors' works heralded the official academic status of the term "international law".

The gradual increasing of chairs on the Philosophy of law and History of international law led to a change in the approach to international legal studies through a slow transition towards a protracted juridification of the perspectives accompanying the formation of the liberal state. At the Central University of Madrid, Pedro Sabau y Larroya (1807–1879), professor of natural law and international law from 1846 till 1868, wrote a *Programa de derecho internacional, asignatura del año octavo de la Facultad de Jurisprudencia* in 1853.<sup>35</sup> His *Programa* contains a condensation of concepts, sources, principles and rules of public and private international law. As every author of a textbook or treatise on international law he decided on his presentation of the subject matter, both as a whole and in each branch of the law. In fact, his monograph offers a historical approach with a positivist view of international law.

It is of interest to note that international historical studies within the traditional area of Spanish foreign politics were implemented by the work of Facundo Goñi (1820–1882).<sup>36</sup> In 1848, Goñi held the chair of Philosophy and international law at the *Ateneo* in Madrid,<sup>37</sup> and published *Tratado de las Relaciones Exteriores de España: lecciones pronunciadas en el Ateneo de Madrid*,<sup>38</sup> in which he collected his lectures as professor of international law given from 1845 to 1847. This treatise was presented as a reasoned and complete exposition of all the treaties and interests that governed the relations between Spain and each of the civilized nations both inside and outside Europe. Goñi's vision of Spanish foreign policy was euro-centric to the point of containing the seeds of the idea of progress through European unity.<sup>39</sup>

Many of Spanish books appearing under the title of international law confined their narrative to the international juridical framework indicated in their titles with numerous considerations of natural law or history of the law. These authors attempted to find a synthesis between natural law and positive law. An example of this genre is the work by Pedro López Sánchez (1831–1882), professor of natural law and international law at the Central University of Madrid, entitled *Elementos de Derecho internacional público, precedidos de una introducción a su estudio bajo los aspectos de su desarrollo histórico o positivo y de su teoría* (1866–1877), with a clear natural and historical law influence.<sup>40</sup>

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<sup>35</sup> Pedro Sabau y Larroya, *Programa de derecho internacional, asignatura del año octavo de la Facultad de Jurisprudencia*, Madrid, Imprenta de Manuel Medina, 1853.

<sup>36</sup> Goñi was the immediate precursor in the genealogy of international relations. See Celestino del Arenal, "La génesis de las relaciones internacionales como disciplina científica", *Revista de Estudios Internacionales*, 1981, vol. 4, pp. 858–860.

<sup>37</sup> The first private chair in international law was established at the *Ateneo* of Madrid in 1844. Originally, it was intended for José María Ruíz López. However, in early 1845, his diplomatic appointment in Constantinople resulted in the nomination of Goñi.

<sup>38</sup> Facundo Goñi, *Tratado de las Relaciones Exteriores de España: lecciones pronunciadas en el Ateneo de Madrid*, Madrid, Establec. Tip. de Ramón Rodríguez de Rivera, 1848.

<sup>39</sup> On the idea of Europe in the 19th Century, see Juan Francisco Siñériz y Trelles, *Constitución europea con cuya observación se evitarán las guerras civiles, las nacionales y las revoluciones, y con cuya sanción se consolidará una paz permanente en Europa*, Madrid, Imprenta del Colegio Nacional de Sordomudos, 1839.

<sup>40</sup> Pedro López-Sánchez, *Elementos de Derecho internacional público precedidos de una introducción a su estudio bajo los aspectos de su desarrollo histórico o positivo y de su teoría* (1866–1877),

López Sánchez's thought was influenced by Spanish Krausism or the so-called "peripheral krausism" as many other publicists or legal scholars in Spain.<sup>41</sup> As Pedro Sabau y Larroya's pupil, López Sánchez work was characterized by a socio-historical approach with a strong influence of Catholicism.

During the nineteenth century, international law became a legal science that was increasingly independent and professionalized. From the 1830s onwards, the preponderance of legal positivism would eliminate from amongst its defenders, the link that connected it to natural law. However, the iusnaturalist tradition or philosophical consideration of international law did not disappear because of this and continued to exert an influence that cannot be ignored.<sup>42</sup> In fact, parallel with the slow awakening of international natural law studies in Spain, the positivism was gaining ground at home and abroad. Before dealing with this development, it is necessary to study two figures that exerted a strong influence on the iusinternationalists at the turn of the century and on the modernization of the discipline.

### III. MORALITY AND THE "IDEA OF HUMANITY"

Concepción del Arenal (1820–1893), an influential criminologist, sociologist and precursor of modern feminism, published her *Ensayo sobre el derecho de gentes* (1879).<sup>43</sup> The essay of Concepción Arenal was one of the outstanding endeavours in encouraging the awareness of international law among the public in the last years of the nineteenth century.

In this *Ensayo*, she attempted to give free rein to the ideas developed over a long time using the notions of the internationalists of the period closest to her intellectual concerns: August W. Heffter, Johann G. Bluntschli, Frederic von Martens, Johann Ludwig Kluber, Jeremy Bentham, Pasquale Fiore, or James Lorimer, resorting also to classic authors such as Hugo Grotius or Emerich Vattel, provoking reflection, argument and critical debate.<sup>44</sup> The identification and univerzalisation of the fundamentals of international law had attracted the attention of Concepción Arenal, and her reflections are contained in this book.<sup>45</sup>

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Madrid, Imprenta de la Revista de Legislación, 1866–1877.

<sup>41</sup> Roberto Albares Albares, "Aproximación al krausismo", in Ignacio Sotelo et al., *Cuatro Ensayos de historia de España* (Madrid, Editorial Cuadernos para el Diálogo, 1975). See also, Antonio Heredia Soriano, *Política docente y filosofía oficial en la España del siglo XIX. La era isabelina (1833–1868)*, Universidad de Salamanca, 1982.

<sup>42</sup> See Antonio Truyol y Serra, *Historia del derecho internacional público* (spanish edition of Paloma García Picazo), Madrid, Tecnos, 1998, pp. 114 et seq.

<sup>43</sup> In 1879, Concepción Arenal published her work *Ensayo sobre el derecho de gentes* with a preliminary study of Gumersindo de Azcárate and edited by the printer of the Revista de Legislación de Madrid. For this study, we refer to the edition of Concepción Arenal, *Ensayo sobre el derecho de gentes*, with an Introduction by G. de Azcárate, Madrid, Reus, 2002.

<sup>44</sup> For the contribution of nineteenth century internationalists to the "civilization" debate, *vid. Martti Koskenniemi, The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*, Cambridge, University Press, 2001.

<sup>45</sup> See on the international legal thought of Concepción Arenal, the work by Yolanda Gamarra, "Una visión humanista del derecho de gentes: Concepción Arenal", *Criaturas Saturnianas*, vol. 3, 2005, pp. 81–90.

Concepción Arenal thought influenced liberals such as Rafael M<sup>a</sup> Labra y Cadrana (1840–1918), Gumersindo de Azcárate (1840–1917), Francisco Giner de los Ríos (1839–1915), Aniceto Sela y Sampil (1863–1935), Joaquín Fernández Prida (1863–1942) or Rafael Altamira y Crevea (1866–1951), among others, which through their work contributed to the modernization and professionalization of international law. She encouraged the study of international law in Spain and opened up relations with Europe. In particular, she discussed the isolated position of Spain in Europe, which was of such concern to authors in the first decades of the twentieth century. In her *Ensayo*, Arenal encapsulated a sense of morals and law consistent with nature and reason. She believed in humanity building itself, developing an enlightened conscience with a sense of justice. She conceived law as a useful instrument to achieve more *civilized* international relations: freedom, equality, progress and the “idea of humanity” before the law and the means to live with dignity were to be extended to the entire human race without differences in terms of race, religion, language or culture. These after all provide the base for the humanist revolution.

The lectures given by Concepción Arenal over many years provided enough material for her to write not only an erudite work supported by multitudinous notes, but also to make use of the work by distinguished internationalists such as Heffter, Bluntschli or Martens to give substance to her ideas and thoughts. Arenal was sufficiently sharp and skilful to classify this work as an “essay” and explain that she was neither a technical expert nor an expert in political or military strategies, but a legal thinker which sought to explain her theories on reason and nature to the general public. As the author acknowledged, the *Ensayo* was aimed at people with a certain degree of culture and education but without any knowledge of international law. They would be able to grasp the ideas in a condensed form in a short book. The work was not, therefore, intended only for lawyers, but for an educated public, given that she did not seek to argue points of law. She wanted to address the question of humanity in order to involve and cultivate her readership and extricate them from misery and wars. Concepción Arenal first worked to take the social sciences from the Academy and the professorial chairs and disseminate them to the public. The second step was to strive to reach the point where the public became the people. Only thus, “when the people understand certain truths can the truths be turned into facts”.<sup>46</sup>

The idea of persuasion framed the guiding principles of the *Ensayo*. First, it attempted to give a succinct idea of the meaning of *derecho de gentes positivo* – the positive law of peoples –, both in times of peace and of war. A distinction was drawn between the *derecho de gentes* – law of peoples – and the *derecho de gentes positivo* – positive law of peoples-, without omitting the definition of the idea of “nation”.<sup>47</sup>

Secondly, the *derecho de gentes* was defined as “justice in the relations between all persons, to whichever nation they belong” – referring to individuals. The origin of law lay in justice and anything that distanced itself from the idea of civilization could not

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<sup>46</sup> Concepción Arenal, *Ensayo sobre el derecho de gentes*, cit.: 17.

<sup>47</sup> Id., p. 5 et seq.

be considered as law.<sup>48</sup> The author did not believe it possible to consider war as originating laws because the origin of law was justice.

On the other hand, Arenal considered that the *derecho de gentes positivo* was “the set of laws, treaties, agreements, tacitly or expressly agreed principles and customs generally followed by civilized nations in their mutual relations, whether nation to nation, one nation to a citizen of another, or between citizens of different nations”.<sup>49</sup> This law, the existence of which the author was defending, was international law and it was nothing less than this.<sup>50</sup> It should be remembered that there was a strong current of opinion, which refused to recognize the juridical character of this legal discipline. With the help of certain principles she defended its juridical value. Similarly, she explained the mutual relations between peoples and not just the governments of those peoples.<sup>51</sup> This humanist characteristic was present throughout her work.

Thirdly, she also addressed the law of peoples in history to ascertain whether or not it had made progress, and to what degree, and particularly what distinguished it from national law.<sup>52</sup>

Fourthly, she argued that justice should not be independent of what occurred on the other side of borders.<sup>53</sup> She maintained that internal justice and international justice were the product of the same historical medium.

Finally, she considered the similarities and differences between the individual and the collective people – the state – in terms of the means to establish law and, once the nature of the person or people was understood, to see which would endure or what they could offer to international justice.<sup>54</sup>

With Arenal, the great ideas that had dominated world history such as progress, freedom and the “idea of humanity” developed further in its criticism of the means and ends of war and in the idea of not causing unnecessary damage or suffering to the population, including the combatants, as stated in the Martens clause. She hopes that war should be extinct as an instrument of politics.

These principles were followed by Rafael María de Labra, one of the most important liberal authors involved in regenerating – and democratizing – Spain and promoting its integration in the international sphere. He was a great defender of freedom and equality of nations, and an important figure in the study of colonialism and leader of the Spanish anti-slavery movement<sup>55</sup> in the last third of the nineteenth century. In 1877, Labra had no hesitation in writing that, “if the scientific world has works of international law written in Spain, this is exclusively thanks to our Latin-American friends”.<sup>56</sup> The new era of European imperialism certainly contributed to the redoubling of the

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<sup>48</sup> Id., p. 19.

<sup>49</sup> Id., p. 5.

<sup>50</sup> Id., p. 6.

<sup>51</sup> Id., p. 7.

<sup>52</sup> Id., pp. 7 et seq.

<sup>53</sup> Id., p. 7.

<sup>54</sup> Id., p. 19.

<sup>55</sup> Rafael María de Labra, *La abolición de la esclavitud en el orden económico*, Madrid, 1873.

<sup>56</sup> Rafael María de Labra, *El Derecho internacional y los Estados Unidos de América*, Madrid, 1877.

efforts, which were linked with independence, for international integration on the part of semi-peripheral authors, thus to strengthen the workings of their own countries in a distinctly western understanding of civilization and its attributes.

Sometimes the focus of study was on Latin America for the furtherance of a political aim or a confederation ideal, such as that of Rafael Fernando Seijas in his work *El Derecho Internacional hispano-americano (público y privado)* (1884). Like other works from this period, this book aspired to bring together actions with a natural law significance from his country and, if possible, from all Latin America to provide a guide or source of consultation for dealing with European and other nations.

The awareness of the problems in Latin America and of colonialism generally developed to some extent in restoration Spain. The *Institución Libre de Enseñanza* – Free Institution of Education (ILE) – was founded in 1876 where the teaching of civil law, history of politics and international law was assigned to Rafael María de Labra. At the same time, Labra was the President (1876–1888) of the Spanish Abolitionist Society – founded in 1865. The activism of Labra in the parliament was decisive for the passing of the Abolition of Slavery Law of 22 March 1873, which included a financial provision to compensate the “legitimate rights” of the owners of slaves freed under the law. However, Labra continued fighting against the institution of tutelage, a new form of servitude suffered by the former slaves in Cuba that was abolished in 1887.<sup>57</sup>

It was the Spanish-American relationship that was the subject of the first conference on international law given by Labra at the ILE on 1 April 1877 under the title “Representation and influence of the United States of America in international law”.<sup>58</sup> In his lecture, Labra lamented the ignoring of international legal studies in Spain, criticizing the peripherality of Spain and its continuing attachment to things, institutions, meanings and ideas that are completely out of step in relation to the world.<sup>59</sup>

He wrote as an idealistic scholar, emphasizing how one of the most important characteristics of the nineteenth century was the contribution of international law towards civilization, which he identified with equality, pluralism, liberty at the domestic level and religious freedom.<sup>60</sup> Labra also presented an idealistic anglophile representation of the British colonial model,<sup>61</sup> and even defended the Monroe doctrine<sup>62</sup> against those who criticized it as a veiled form of colonialism providing an excuse for American interventions and calming fears about the expansionist aims of the US in Cuba.<sup>63</sup>

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<sup>57</sup> Roberto Mesa Garrido, Julio D. González Campos and Enrique Pecourt García, “Notas para la historia del pensamiento internacinalista español: algunos problemas coloniales del siglo XIX”, *Revista española de derecho internacional*, 1965, vol. 18, pp. 380 et seq.

<sup>58</sup> Rafael María de Labra, *De la representación e influencia de los Estados Unidos en el Derecho internacional, Conferencia dada en la Institución libre de Enseñanza el día 1 de abril de 1877*, Madrid, Imprenta de Aurelio J. Alaria, 1877.

<sup>59</sup> Id., p. 6.

<sup>60</sup> Id., p. 9.

<sup>61</sup> Id., p. 13.

<sup>62</sup> Id., p. 28.

<sup>63</sup> Id., p. 38.

#### IV. INTERNATIONAL LAW AS THE SCIENCE OF THE LEGAL FORM

The great industrial revolution of the nineteenth century provided the means to accelerate the spread of western culture to the rest of the world,<sup>64</sup> culminating in the expansion of the original European system to the so-called “society of civilized states”, governed by a Eurocentric conception of the history.<sup>65</sup> This was conditioned by the incorporation of the principles of western law to other non-European powers. Invoking these principles, the European states imposed colonization on continents such as Africa, including occupation and submission of the local populations, by virtue of a perceived insufficiency in the level of civilization of these populations in terms of western culture.

The international jurists were liberals who supported the shift to formal empire in order to protect the native peoples from the greed of colonial companies and to ensure order and success in the civilizing mission process. The implementation of these principles of international law resulted in the establishment of relations of hegemony and dependence between western culture – mainly European – and other cultures. James Lorimer described that situation in 1883 setting out his well-known triple division between civilized states, barbarous – or semi-civilized – states and savages – uncivilized – thus presenting a highly colonialist vision of international law.

The first specialized international law chairs were evidence of the incipient social role of international legal studies.<sup>66</sup> The definitive institutional initiative for the creation of several chairs of international law was the Royal Order of 2 September 1883, establishing public and private international law courses that had hitherto been confined to the Central University of Madrid. New chairs were created at the universities of Barcelona, Granada, Oviedo, Santiago de Compostela, Seville, Valencia, Valladolid and Zaragoza.<sup>67</sup> This led to the rise of a body of academicians which contributed to the professionalization of the discipline.<sup>68</sup>

International law studies were influenced by European initiatives such as the founding of the *Revue de droit international et de la législation comparée* (1869) by Gustave Rolin-Jaquemyns, Tobias Asser and John Westlake, and the establishment of the *Institut de Droit International* (1873).<sup>69</sup> In Spain, one ephemeral publication was the *Revista de*

<sup>64</sup> Antono Truyol y Serra, “L’expansion de la société internationale aux XIX<sup>e</sup> et XX<sup>e</sup> siècles”, *Recueil des Cours*, 1965, vol. 116.

<sup>65</sup> Martti Koskenniemi, “Histories of International law: Dealing with Eurocentrism”, in Thomas Duke (ed.), *Rechts Geschichte*, Heidelberg, Max-Planck-Institut für europäische Rechtsgeschichte, 2011.

<sup>66</sup> See Antonio Quintano Ripollés, ‘Cien Años de Derecho internacional’, *Revista General de Legislación y Jurisprudencia*, 1953, pp. 134–172.

<sup>67</sup> See García Arias, L., ‘Historia de la doctrina hispánica de derecho internacional’, *addenda to Nussbaum, cit.*, 497.

<sup>68</sup> See *Escalafón General de lo catedráticos de las Universidades del Reino en 1<sup>o</sup> de enero de 1887*, Madrid, Imprenta del Colegio Nacional de Sordomudos y ciegos, 1887.

<sup>69</sup> See Stefano Mannoni, *Potenza e ragione. La scienza del diritto internazionale nella crisi dell’equilibrio internazionale (1870–1914)*, Milano, Giuffrè, 1999; Luigi Nuzzio, *Origini di una scienza. Diritto internazionale e colonialismo nel XIX secolo*, Frankfurt, Klostermann, 2012, and Ingo J. Hueck, “The Discipline of the History of International Law. New Trends and Methods on the History of International Law”, *Journal of the History of International Law*, 2001 (vol. 3), pp. 194–217.

*Derecho internacional, Legislación y Jurisprudencias comparadas*, with only one year of life, 1887/88, under the direction of Alejo García Moreno (1842–1913).<sup>70</sup> The contents of the first issue of the *Revista de Derecho Internacional: Legislación y Jurisprudencia comparadas* were divided into several sections providing an overall picture of the state of contemporary natural law studies in Spain.<sup>71</sup>

However, the *Revista General de Legislación y Jurisprudencia (RGLJ)* – which started in 1853 – carried articles on the law of the sea, the law of war, the right to freedom, American institutions, emancipation of colonies or international justice. Publicity was given to translations and editions of works on international law by foreign authors. Alejo García Moreno, like many other Spanish *krausist* younger scholars, such as Joaquín Fernández Prida,<sup>72</sup> distinguished himself with an extensive output of translations of foreign works as in previous decades. Among others, the translations of Pasquale Fiore,<sup>73</sup> or Johann G. Bluntschli,<sup>74</sup> all of them translated with extensive annotations and appendices for the Spanish audience, were publicized in the *RGLJ*. These translations accompanied the parallel development of a national production of articles, textbooks and treatises on international law in the 80's and 90's.

Once again, Spanish doctrine shows its connections to European and American doctrine in the search for the modernization of the discipline, that is, towards international law inspired by socio-historical and political values. The new expression, “international law”, coined by Jeremy Bentham in 1780 was becoming increasingly common, and after the French Revolution it better expressed the reality regulated by this legal system than the old “law of people”. The new expression was accepted gradually and was used by Wheaton in the United States of America in *Elements of International law* (1836), Pando's work *Elementos del Derecho internacional* (1843), and later by Louis Renault in France, *Introduction à l'étude du Droit International* (1879).<sup>75</sup> In Spain, the new expression was popularized by Manuel Torres Campos, or Ramón Dalmau amongst others.<sup>76</sup>

<sup>70</sup> The journal presented itself as being created for “the convenience and necessity (that) are evident for all that pertains to the prodigious development in the relations between nations in recent times, increasing in equal measure the interest and importance of International law and all that provides knowledge of the progress and legal advances that are occurring in all states”.

<sup>71</sup> See on the contents of the publication Ignacio de la Rasilla, “The Study of International law in the Spanish Short Nineteenth Century”, *cit.*, pp. 139 and 140.

<sup>72</sup> Frederic von Martens, *Derecho internacional contemporáneo de las naciones civilizadas*, 2 vols., Saint-Petersburg, 1882–83; Spanish edition, *Tratado de Derecho internacional*, prologue and notes by J. Fernández Prida, 4 vols., Madrid (undated), vol. I, pp. 225–227.

<sup>73</sup> Pasquale Fiore, *Tratado de Derecho Internacional Público, aumentado con notas y un apéndice con los tratados entre España y las demás naciones*, by A. García Moreno, 2.a ed., 4 vols., Madrid, 1894–95, volumen I, Pasquale Fiore, *El Derecho internacional codificado*, Madrid, 1901, pp. 30–38.

<sup>74</sup> Johan G. Bluntschli, “Derecho público universal. Primera parte. Teoría General del Estado”, *Rec., RGLJ*, 1880, vol. 28, p. 56.

<sup>75</sup> See in general the interesting work of Bando Fassender, Anne Peters, Simone Peter and Daniel Högger (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, 2012.

<sup>76</sup> See Juan Antonio Carrillo Salcedo, *El derecho internacional en perspectiva histórica...*, *cit.*, p. 28.

International law textbooks of a marked natural law character with positivist elements included the work of Manuel Torres Campos (1850–1918),<sup>77</sup> *Elementos de Derecho Internacional Público* (1890) and its subsequent editions. Torres Campos, professor of international law at the University of Granada in 1886,<sup>78</sup> considered in his book *Elementos* that international law was the least studied area of the law because of its imperfect character: only force without laws or tribunals put an end to conflicts.<sup>79</sup> In his view, the basis of international law was layed in international community, and each state was bound to the others through common rights and interests with which the state formed an organic body -organicist theory- while preserving its independence.<sup>80</sup> This concept led him to consider international law as that applicable to civilized nations, distancing him from the universalist conception of international law.<sup>81</sup> He felt that international law was the law applicable to civilized nations, pursuant to Lorimer's theory. The effect of the criterion of *civilization* led to a vision of international law with a discriminative purpose.

Also, Luis Gestoso Acosta (1855–1931), professor of international law at the University of Valencia, reflected his stance on natural law in *Resumen de Derecho Internacional público* (1894) and *Curso elemental de Derecho internacional público e Historia de los Tratados*, (1897).<sup>82</sup> In his *Curso elemental* considered natural law to be a source of international law in so far as it determines the nature and aims of states, the conditions enabling these to be brought together among the members of the society in question, and the fundamental or absolute laws that constitute their legal capacity.<sup>83</sup>

One of the academics who most contributed to the bibliographic development of international law in the Spanish language was Ramón de Dalmau y Olivart, Marquis of Olivart (1861–1928), professor of international law at the Central University of Madrid, as well as politician, and lawyer.<sup>84</sup> Dalmau initially concentrated his research in the area of civil law and roman law – the subject of his doctoral thesis in 1884 – both of them of great tradition in Spain. Then, he intervened into international law through several fields of research such as sources, succession of States, treaties, Statehood, League of Nations and the publication of several textbooks.

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<sup>77</sup> Manuel Torres Campos, *Elementos de Derecho internacional público*, Madrid, Librería Fernando Fé, 1890, 2<sup>a</sup> ed. 1904.

<sup>78</sup> Antonio Álvarez de Morales, *Génesis de la Universidad española contemporánea*, Madrid, Instituto de Estudios Administrativos, 1972.

<sup>79</sup> Manuel Torres Campos, *Elementos de Derecho internacional público*, *cit.* 32–33.

<sup>80</sup> *Id.* at 66.

<sup>81</sup> *Id.* at 53.

<sup>82</sup> Luis Gestoso Acosta, *Resumen de Derecho internacional público*, Valencia, Federico Domenech, 1893, and *Curso elemental de Derecho internacional público e Historia de los Tratados*, Valencia, Federico Domenech, 1897.

<sup>83</sup> Luis Gestoso Acosta, *Curso elemental de Derecho internacional público e Historia de los Tratados*, *cit.*

<sup>84</sup> See Blanc Altemir, A., *El Marqués de Olivart y el derecho internacional (1861–1928): sociedad internacional y aportación científica*, Lérida, Universidad de Lérida, 1999.

Dalmau was one of the first Spanish Natural Law scholars to offer a general account of international law in his *Tratado de Derecho Internacional Público y Privado* (1886).<sup>85</sup> Among his many treatises are the four volumes of the *Tratado y Notas sobre Derecho Internacional Público* (1887),<sup>86</sup> which appeared in several editions until 1903–4.<sup>87</sup> He refused the Grocius classical division between the law of peace and the law of war and followed the Martens methodology. In fact, Dalmau was a supporter of adapting the system to the social/legal reality at any given historic time. The systematic ordering of this work influenced a generation of Spanish textbooks and filled a gap in the discipline.

Dalmau's conception of "international legal community" is part of a specific, singular ideological current defined by idealism and its strong nationalist character.<sup>88</sup> This conception brought him close to authors such as Wheaton, Dana, Kent, Pillet, Zitelmann, Bustamante or Donati. Thus, in the first editions of his treatises Dalmau expressly limited the domain of application of international law to European and Christian subjects. However, Dalmau left aside the absolute Christian-Eurocentricity of his conception of international law in the Appendix covering the period 1887–1899 in the third edition of his treatise. He replaced it with Lorimer's tripartite scheme of civilized, barbarous and savage, with the former being in Dalmau's words, the equivalent to "plain humanity". In the 1899 edition, Dalmau began to integrate certain states, such as Turkey and Japan, into the "international legal community" of "civilized humanity" that required "complete legal recognition". Alongside those who had raised themselves up the scale of civilization, there remained others, such as China, Siam and Morocco, which represented "barbarous humanity".<sup>89</sup>

His enduring contribution to the bibliographical development of international law found its first expression in his *Bibliographie du Droit International* (1905),<sup>90</sup> and his *Catalogue de ma Bibliothèque de Droit International et sciences auxiliares* (1908).<sup>91</sup> Dalmau's contribution also extended to the development of the field of Spanish foreign affairs through his compilation, between 1890 and 1902, of thirteen volumes of the *Spanish Collection of Treaties, Agreements and Documents* from 1814 to 1902.<sup>92</sup>

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<sup>85</sup> Ramón Dalmau, Marquis of Olivart, *Manual de Derecho internacional público y privado*, Madrid, Librería de Fernando Fé, 1886.

<sup>86</sup> Ramón Dalmau, Marquis of Olivart, *Tratado y Notas de Derecho internacional público*, Madrid, Imprenta de Manuel Murillo, 1887.

<sup>87</sup> Ramón Dalmau, Marquis of Olivart, *Tratado de Derecho internacional público*, Madrid, Librería General de Victoriano Suárez 1903–4, 4 vols.

<sup>88</sup> See Mariano Aguilar Navarro, *Lecciones de Derecho internacional privado*, Madrid, Artes Gráficas Clavileño, 1966, vol. I, p. 169.

<sup>89</sup> Ramón Dalmau, Marquis of Olivart, *Tratado y notas de Derecho internacional público*, Madrid, Manuel Murillo, 1887–1890, p. 349.

<sup>90</sup> Ramón Dalmau, Marquis of Olivart, *Bibliographie du Droit International* (Paris, 1905–10). *Bibliothèque du Droit International*, 3 fasc. Paris, A. Pedone, 1905.

<sup>91</sup> Ramón Dalmau, Marquis of Olivart, *Catalogue de ma Bibliothèque de Droit International et sciences auxiliares*, Paris-Leipzig, 1908.

<sup>92</sup> Ramón Dalmau, Marquis of Olivart, *Colección de tratados, convenios y documentos internacionales concluidos o ratificados por nuestros gobiernos con los Estados extranjeros desde el reinado de doña isabel II hasta nuestros días*, Madrid, El Progreso, 1902.

His last book was *El Derecho Internacional Público en los últimos veinticinco años* (1903–1927).<sup>93</sup> In this book, he included a chapter dedicated to the history of international law, and another to preliminary explanations where he analysed the concept and its sources, among other points.

Another of the theorists who contributed to a global overview of international law was Remigio Sánchez Covisa (...) who published *Derecho internacional público* in 1896.<sup>94</sup> The material in this book was adapted to the official syllabus of public international law at the Central University of Madrid and it was inspired by the lectures of Rafael Conde y Luque (1835–1921). Conde was professor of international law at the Central University of Madrid and author of a treatise on the *Concepto de Derecho Internacional* (1886). In *Derecho internacional público*, Sánchez-Covisa wrote that international law was not “true law” since it did not share the same origins as the other branches of the law, justifying this on the grounds that “the state is not apt to form society and be subject to law and because it contains no sanction.”<sup>95</sup> However, the author considered that “the co-existence of states determines certain rules and maxims that are moral, pertain to an ethical order and are written in the conscience of man.”<sup>96</sup> The tension between a naturalist approach and a positivist approach was in this book.

In the 1890s, Juan de Dios Trías y Giró (1861–1914), professor of international law at the University of Barcelona, published *Programa de las lecciones de Derecho internacional privado* (1895) and *Programa de las lecciones de derecho internacional público* (1897). In the years that followed, other textbooks appeared including those by Ángel Romanos, a military who wrote *Elementos de Derecho internacional Público* (1904) with the popularization intention of international law, in particular the law of war; Manuel Conrotte, *Manual de derecho Internacional para uso de Jefes y Oficiales del Ejército y Armada* (1910), and Manuel García Álvarez & A. García Pérez, *Derecho internacional público* (1909), the latter two books written for training in the armed forces.

The doctrine of international law in the nineteenth century, having developed in line with the development of positive international law and at a time when the Industrial Revolution guaranteed it technological, economic and military dominance and ultimately global domination, was less universalist than international law from the age of its founders in the sixteenth century. However, the internationalists of the nineteenth century and early twentieth century faced the challenge of the expansion of international society and demonstrated an adaptable perspective ranging from the restrictive positions of Wheaton, Heffter, Westlake, Lorimer and von Listz, to the more nuanced ones of Despagnet, and the more universalist positions of Phillimore, Fiore, Bluntschli and Bonfils.<sup>97</sup> We will deal with these universalist positions in the following section.

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<sup>93</sup> Ramón Dalmau, Marquis of Olivart, *El Derecho internacional público, 1903–1927*, Madrid, 1927.

<sup>94</sup> Remigio and Pedro Sánchez-Covisa y Azofra, *Derecho internacional público*, Madrid, Librería de Sánchez Covisa, 1896.

<sup>95</sup> Id., p. 138.

<sup>96</sup> Id., p. 240.

<sup>97</sup> Antonio Truyol y Serra, *Historia de derecho internacional público... cit.*, p. 124.

## V. A MODERN CONCEPTION OF INTERNATIONAL LAW

The influence of heterodox thought on international law can be seen in the work of Aniceto Sela Sampil.<sup>98</sup> He defended the universality of international law, with the one proviso that they considered that *civilized* nations those which shared a set of ideas about the law were the valid model for applying their principles.

Sela as professor of international law at the University of Oviedo wrote a *Manual de Derecho internacional* (1900),<sup>99</sup> which is almost like a pocketbook. He studied the relations of coexistence between states, including the problems deriving from territorial limits, the attribution of nationality to individuals and the defence of the rights of man, as well as pacifism and cases of resorting to war. He also addressed the definition, classification and declaration of laws of war, prohibited and permitted means, the rights of the invader and the country invaded, martial law, military tribunals, allies, neutral states, maritime blockades, contraband, visiting rights, treaties, armistices, surrender and peace.<sup>100</sup> This represented an extensive repertoire of problems with a common thread: condemning war and its consequences to build a more rational, harmonious and civilized world. This thought helped to reshape a modern international legal system.<sup>101</sup>

Sela organised his *Manual* around three central topics. First, he stated his *methodological* concern within the “positivist” viewpoint considering, in relation to the construction of the international system and in its teaching, the weight in practical terms of states in their reciprocal relations. He addressed both “realities” and “theory”. This developed into an analysis of international relations marked by “the politics of force”, and by the first manifestations of cooperation between states with common interests and subsequently integration within more advanced mechanisms of organization. The League of Nations was the leading example and model of the organization of society at an international level.

The second theme was the idea of international *cooperation* given the growing requirements of the State to cooperate and act with other states in its pursuits of its legal aims and as a result of its own inherent rights. The state could strive for perfection by associating itself with other “superior” states. This involved creating a current of collective solidarity – equivalent to interdependence between states – following the discourse developed by George Scelle. Influenced by the theory of Léon Duguit, the French international jurist Scelle designed a “new” international system in which the state ceased to occupy a central position. Individuals were the subjects of international

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<sup>98</sup> On the life and work of Aniceto Sela Sampil see José Carlos Fernández Rozas y Paz Andrés Sáenz de Santa María, “La aportación de la Facultad de Derecho de la Universidad de Oviedo al progreso del derecho internacional”, en J. M. Coronas González (coord.), *Historia de la Facultad de Derecho (1608–2008)*, Oviedo, Servicio de Publicaciones de la Universidad de Oviedo, 2010, pp. 496 et seq.

<sup>99</sup> Aniceto Sela Sampil, *Manual de Derecho internacional*, Barcelona, Sucesores de Manuel Soler, 1900. We have used an edition of 1911.

<sup>100</sup> See Julio González Campos, Roberto Mesa, and Enrique Pecourt., “Notas para la historia del pensamiento internacionalista español: Aniceto Sela Sampil (1863–1935)”, *Revista Española de Derecho Internacional*, XVII, vol. 4, 1964, pp. 561–583.

<sup>101</sup> Following the study of Martti Koskenniemi, ‘History of the Law of Nations World War I to World War II’, *Encyclopedia of Public International Law*, vol. II, 1999, pp. 839 et seq.

law and a quasi-federal world order was constructed in which the League of Nations played the leading role in the international society. This theory of social harmony, anchored in a conception of the world based on the idea of progress, was shared by a wide-ranging group of Spanish authors of the period such as Fernández Prida, Salvador de Madariaga (1866–1978), Rafael Altamira or Antonio de Luna (1901–1967).<sup>102</sup> The period from 1907–1921 was characterised by an excessive optimism about the ability of states to overcome their difficulties under the aegis of the League of Nations. In the words of Antonio de Luna, it was a “soteriological” period of international law.<sup>103</sup>

The final theme was *pacifism* as an idea for guiding the interpretation of the conduct of states and being at the same time an element in the assessment of all the deficiencies involved in the international order. This was pacifism operating on two levels. First, there was the action of the state which accepted a system of *resolution of conflicts* to regulate the use of power, and aspired to limit its unlimited defence capacity and to humanize the rules governing its war operations – the Hague Conventions of 1899 and 1907. Second, this pacifism rested on the action of the individual who intervened in the foreign affairs of the state through a democratization of these affairs by means of parliamentary control as opposed to “secret diplomacy”. During the interwar period, under the influence of pacifism, there was a change of attitude in international relations involving the substitution of *secret diplomacy* by open public diplomacy, illustrated by the meetings held at the League of Nations, and the obligation to publicize all the international treaties gathered within the League of Nations Covenant. This change materialized in practice in a new conception of the model of diplomacy and the adaptation of diplomats and politicians to this new conception.

In the view of Sela and the other authors around him, international law was essentially universal, not “European” and not “Christian” given that both adjectives tended to arbitrarily limit the field of international law. This perspective of the universality of international law meant that Sela held a broad conception of its subjects, and he rejected James Lorimer’s division of international society into “civilized, barbarous and savage”. This implied that any political institution should possess the capacity to achieve certain ends and should be able to be a subject of an international legal relationship – the case of the League of Nations. To be obligated subjects, groups of human beings should have the necessary means to comply with the objectives of the international order and to enjoy the freedom recognized all of them – catholic and non-catholic.<sup>104</sup>

Sela defended the legal equality of states, barely accepted at the time given the *imperialist* policy of the end of the nineteenth century and the first decades of the twentieth. This approach, however, had two somewhat perverse effects. First, it was not possible to demand from states that they comply with more obligations than

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<sup>102</sup> See Yolanda Gamarra, “Rafael Altamira y Crevea (1866–1951). The International Judge as ‘Gentle Civilizer’”, *cit.*, pp. 18 et seq. See also Juan Antonio Carrillo Salcedo, “Don Rafael Altamira, Magisterio español en la Corte Permanente de Justicia Internacional”, in E.M. Vázquez Gómez, et al., *El arreglo pacífico de controversias internacionales*, Valencia, tirant lo blanch, 2013, pp. 30 et seq.

<sup>103</sup> Antonio Truyol y Serra, “Don Antonio de Luna y García (1901–1967)”, *Revista Española de Derecho Internacional*, vol. XXI, 1968, p. 175.

<sup>104</sup> Aniceto Sela Sampil, *Manual de Derecho internacional*, *cit.*, p. 282.

were compatible with their organization or culture, and this implied rejecting the rule of an international standard of conduct, a factor in the intervention of economically developed states in the internal affairs of countries receiving capital. This was one of the characteristics of the bourgeois notion of international law in the nineteenth century. Secondly, the idea of “development” led to the idea of an international tutelage over less developed entities.

The refusal to recognize the “constitutive” character of the state was another feature. He, and other authors around him such as Altamira or Fernández Prida, also showed themselves to be against the phenomena of domination and colonial dependence, and adopted a position opposed to conquest as a legitimate way of acquiring territory, without excluding the possibility of intervention provided that it is collective, preferably within institutionalized frameworks.<sup>105</sup>

## VI. EPILOGUE: AN ENCYCLOPAEDIC CONCEPTION

It is not difficult to see why international law could not be put on a professional footing during the first half of the nineteenth century. In Europe, the ascendant liberalism was radically activist and internationally organized within peace societies and federalist and pacifist movements. In Spain, the situation was marked by confusion resulting from the loss of the American colonies and the decadence of the monarchy. Turn to history is a response to national interests with a clear aim of contributing to construction of the Spanish nation.

International law textbooks were influenced by an encyclopaedic conception of international law, which attempted to combine, in parallel with the natural law slant of positivist analysis, the philosophy, the history and the politics of international law under the label of one discipline. No doubt, the legal unification marked the boom of the textbooks of international law in Spain in the late nineteenth century and the decades that followed. The legacy of the historiographical tradition of the nineteenth century was not only a *corpus* of heuristics and methodology, but also an appetite for new content: new content and new subjects. The internationalists of the early twentieth century devoted themselves to this.

It was in the late nineteenth century when international lawyers first became advocates of what they saw as the natural evolution of civilization, an advocacy which came to seem more urgent after 1918. If the nineteenth century’s main disciplinary contribution was turning itself into a past related to its own theoretical and doctrinal practices, then the study of the historiography of the nineteenth century is the study of our own century’s originalism – and the origins of that exceptionalism in the memory and the practice of progress narration. At the end of the day, the growing European historiography on the role of Vitoria in the genesis of the law of peoples found an echo in Spanish intellectual thought.

Reflecting on the history of historiography of international law textbooks may well serve us to reassess the functions of international law. The past, though partly expunged, is still at hand to be retrieved in the name of new professional initiatives.

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<sup>105</sup> Yolanda Gamarra, “Rafael Altamira y Crevea (1866–1951). The International Judge as ‘Gentle Civilizer’”, *cit.*, p. 20.

## *The Environmental Protection Regimes Governing Maritime Renewable Energies in the EU and Their Implementation in the Marine and Coastal Areas of the South of Spain*

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- I. Introduction: Marine Renewable Energies in the Maritime and Coastal Areas of the EU
- II. The Marine Environment Protection Regimes Applicable to the Maritime and Coastal Areas of the EU: the Mediterranean Sea
- III. The Case of Sea Wind Energy in the South Spanish Maritime and Coastal Areas
- IV. Final Remarks

### **ABSTRACT**

The purpose of this paper is to review the configuration and point out the weaknesses of the main legal regimes of environmental protection of the Mediterranean Sea applicable to the implementation of marine renewable energies in the maritime and coastal areas of the EU, focusing on some parts of the south coast of Spain. Renewable energy sources have become a strategic industry for Europe over the last years due, among other things, to the need for finding cheap and clean energy sources. Within this context, marine renewable energies attract a lot of attention from the EU and several Member States. However, the development of this industry without a sound environmental protection and preservation policy and regulation, might well result in a rather negative impact on the affected marine ecosystems. On the other hand, the legal framework established by the EU and other international legal regimes for the protection of the marine environment seems to give much room for Member States putting economic objectives before environmental considerations.

**Keywords**

Environmental protection; renewable energy sources; marine ecosystems; Mediterranean Sea; coastal areas south Spain.

**RÉSUMÉ**

Le but de cet article est de revoir la configuration et de souligner les faiblesses des principaux régimes juridiques de protection de l'environnement de la mer Méditerranée applicables à la mise en œuvre des énergies renouvelables marines dans les zones maritimes et côtières de l'UE, en se concentrant sur certaines parties de la côte sud de l'Espagne. Sources d'énergie renouvelables sont devenues une industrie stratégique pour l'Europe au cours des dernières années en raison, entre autres, à la nécessité de trouver des sources d'énergie bon marché et propre. Dans ce contexte, les énergies marines renouvelables attirent beaucoup d'attention de la part de l'Union européenne et plusieurs États membres. Cependant, le développement de cette industrie sans une bonne protection de l'environnement et de la politique de préservation et de régulation, pourrait bien se traduire par un impact plutôt négatif sur les écosystèmes marins concernés. D'autre part, le cadre juridique mis en place par l'UE et d'autres régimes juridiques internationaux pour la protection de l'environnement marin semble donner beaucoup de place pour les États membres de mettre des objectifs économiques avant les considérations environnementales.

**Mots clés**

Protection de l'environnement; énergies renouvelables; écosystèmes marins; mer Méditerranée; côte sud de l'Espagne.

**RESUMEN**

El propósito de este trabajo es revisar la configuración y señalar las principales debilidades de los regímenes jurídicos de protección del medio ambiente del mar Mediterráneo aplicables a la ejecución de las energías renovables marinas en las zonas marítimas y costeras de la UE, centrándose en la costa sur de España. Las fuentes renovables de energía se han convertido en una industria estratégica para Europa en los últimos años debido, entre otras razones, a la necesidad de encontrar fuentes de energía barata y limpia. Dentro de este contexto, las energías renovables marinas atraen la atención de la Unión Europea y varios Estados miembros. Sin embargo, el desarrollo de esta industria, sin una buena protección del medio ambiente y la política de conservación y regulación, podría tener un impacto negativo sobre los ecosistemas marinos del lugar. Por otro lado, el marco legal, establecido por la UE y otros regímenes jurídicos internacionales para la protección del medio marino parece dar margen de maniobra a los Estados miembros para anteponer los objetivos económicos a las consideraciones ambientales.

**Palabras clave**

Protección de medio ambiente; energías renovables; ecosistemas marinos; mar Mediterráneo; costa sur de España.

**I. INTRODUCTION: MARINE RENEWABLE ENERGIES IN THE MARITIME AND COASTAL AREAS OF THE EU**

Climate change due to the additional global warming of the atmosphere caused by human activities that generate high concentrations of greenhouse gases (GHG) has become a “common concern of humankind”<sup>1</sup> over the last 20 years, and thus a critical point in the global governance agenda. The signing of the United Nations Framework Convention on Climate Change (UNFCCC) in May 1992 sets the overall objective of stabilizing GHG emissions as a goal of the international community in order to protect the global climate system.<sup>2</sup>

As the UNFCCC states, the stabilization of GHG emissions directly affects the energy production sector, such that the Parties agree to “Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases [...]”<sup>3</sup> This general agreement, together with the global aspiration to achieve a sustainable economic and production system and the subsequent agreements concluded within this framework,<sup>4</sup> imply among other measures the replacement of energy sources which release large amounts of GHG by other less polluting sources.<sup>5</sup> As a consequence,

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<sup>1</sup> See Preamble of United Nations Framework Convention on Climate Change (UNFCCC), done at New York on 9 May 1992 (A/AC.237/18 (Part II)/Add.1 and Corr.1), and entered into force on 21 March 1994, retrieved from <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>2</sup> See Article 3 of the UNFCCC; see also the Kyoto Protocol, signed on 11 December 1997 and entered into force on 16 February 2005, retrieved from [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php); and the Copenhagen Accord of 18 December 2009, retrieved from [http://unfccc.int/meetings/copenhagen\\_dec\\_2009/items/5262.php](http://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php).

<sup>3</sup> See article 4.1.c) of the UNFCCC.

<sup>4</sup> Article 3.3 y 4 *Ibid.*; see also SABOGAL AGUILAR, J., HURTADO AGUIRRE, E., MORENO CASTILLO, E., “Evaluación de los proyectos de mecanismo de desarrollo limpio presentados a la UNFCCC. Los criterios de sostenibilidad entre 2004 y 2008”, *Revista Facultad de Ciencias Económicas: Investigación y Reflexión*, Vol. 18 (1), 2010, pp. 225–246; ARVIND JASROTIA, “Justice at Cancun: Twilight or Dawn?”, *Dilemata*, 6, 2011, pp. 31–37; TABAU, A.-S., MALJEAN-DUBOIS, S., Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union, *European Journal of International Law*, Vol. 21 (3), 2010, pp. 749–763; LÁNCOS, P.L., Flexibility and Legitimacy – The Emissions Trading System under the Kyoto Protocol, *German Law Journal*, Vol. 9 (11), 2008, pp. 1625–1651; FREESTONE, D. and STRECK, Ch., *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work*, Oxford University Press, London, 2005; HILEMAN, B., “Meeting Kyoto Protocol Goals”, *Chemical and engineering news*, Vol. 83 (2), 2005, p. 11; SASSNICK, Y., HAMMONS, T., SCHWARZ, J., “Recent Developments of Transmission System Interconnections and the Implementation of Power Generation with Respect to the Kyoto Protocol”, *Electric power components and systems*, Vol. 34 (8), 2006, pp. 841–856.

<sup>5</sup> Article 4.2.10 of the UNFCCC.

renewable energy sources (RES) currently deserve more attention from some key international actors, especially from the European Union (EU) and some of its Member States.<sup>6</sup>

The EU, following its Sixth Environment Action Programme<sup>7</sup> and according to its commitment to take international leadership and initiative under the UNFCCC<sup>8</sup> has decided to focus on fostering and developing renewable energies as a common core action within both its energy and environmental policies.<sup>9</sup> Although the EU has shown interest in RES for decades, its support has only gathered momentum after 2007.<sup>10</sup> Following the strategic proposals of the European Commission (EC) for the establishment of a European energy policy and a long term strategy on renewable energies,<sup>11</sup> the Council of the European Union adopted an ambitious Action Plan that included the general target of increasing the share of renewable energies in its overall energy mix to 20% by 2020 and the resulting need for substantially strengthening research and investment in that area.<sup>12</sup>

These objectives and their subsequent development by concrete actions gave a boost to the development, investment and access to the energy market of renewable

- <sup>6</sup> See generally OBERTHÜR, S., “The European Union’s Performance in the International Climate Change Regime”, *Journal of European Integration*, Vol. 33(6), 2011, pp. 667–682; and UNFCCC background information about the EU as a decisive actor in this field on [http://unfccc.int/essential\\_background/feeling\\_the\\_heat/items/2908.php](http://unfccc.int/essential_background/feeling_the_heat/items/2908.php).
- <sup>7</sup> See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Sixth Environment Action Programme of the European Community, “Environment 2010: Our future, Our choice”, COM(2001)31 final – Not published in the Official Journal.
- <sup>8</sup> Article 3.1 UNFCCC. The EC ratified the UNFCCC by Council Decision 94/69/CE, 15 December 1993. About the international role of the EU in the fight against climate change, see FERNÁNDEZ EGEA, R.M., SINDICO, F., “El papel de la UE en la lucha contra el cambio climático: ¿líder en la política climática global?”, *Revista Electrónica de Estudios Internacionales*, nº. 14, 2007, p. 1 et seq.
- <sup>9</sup> See articles 191 and 194 of the Treaty on the Functioning of the European Union.
- <sup>10</sup> See Council Recommendation 88/349/EEC of 9 June 1988 on developing the exploitation of renewable energy sources in the Community (*Official Journal* L 160, 28/06/1988 P. 0046–0048); Communication from the Commission – Energy for the future: renewable sources of energy – White Paper for a Community strategy and action plan, COM (1997) 0599 final; or the Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.
- <sup>11</sup> These proposals deem the development and implementation of RES to be an opportunity to successfully and simultaneously face the challenges of economic growth, security of supply and climate change. See Green Paper – A European Strategy for Sustainable, Competitive and Secure Energy, COM (2006) 105 final; Communication from the Commission to the Council and the European Parliament – Renewable energy road map – Renewable energies in the 21st century: building a more sustainable future, COM (2006) 0848 final; and Communication from the Commission to the European Council and the European Parliament – an energy policy for Europe, COM (2007) 0001 final.
- <sup>12</sup> Brussels European Council, 8/9 March 2007, annex to the Presidency Conclusions; this target responds to the objective of reducing EU greenhouse gas emissions by at least 20% from 1990 levels by 2020 (*ibid.*, par. 32).

energies, including those technologies meant to be installed in maritime areas. For instance, the first version of a European Strategic Energy Technology Plan (SET-PLAN), put forward by the European Commission (EC), already stated the need for doubling the power generation capacity of the largest wind turbines, with off-shore wind as the lead application, as a key EU technology challenge that should attract European investment and research.<sup>13</sup>

The support of the EU for RES did considerably increase during 2008–2009. Indeed, the EC calls for establishing legally binding national targets and intensifying efforts towards development and implementation of RES were echoed by the Council of the EU, who adopted, *inter alia*, the Directive of 23 April 2009 on the promotion of the use of energy from renewable sources,<sup>14</sup> as well as a set of other legal and political measures aimed at implementing renewable energy, especially including marine renewable energy sources (MRES).<sup>15</sup>

Yet, apart from the EU legal and political measures for the promotion of RES, the international legal context relevant to the development and implementation of marine renewable energies remains complex,<sup>16</sup> even more so in certain areas such as the

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<sup>13</sup> For that purpose, the European Commission proposes to launch a European Wind Industrial Initiative, including on and off-shore applications, see Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – A European strategic energy technology plan (SET-PLAN) – ‘Towards a low carbon future’, COM (2007)0723 final, pp. 5 and 10; endorsed by the Brussels European Council, 13/14 March 2008, Conclusions of the Presidency, par. 20–28; see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Offshore Wind Energy: Action needed to deliver on the Energy Policy Objectives for 2020 and beyond, COM (2008) 0768 final/2.

<sup>14</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, *OJ L* 140, 5.6.2009, pp. 16–62; after the implementation of the emissions allowances market in compliance with the requirements of the Kyoto Protocol, the EU passes the directive 2009/28, which sets renewable energy consumption objectives for each member state, grants European legal effect to national green certificates (a tradable commodity certifying that electricity has been generated from RES), establishes a European renewable energy market, and standardizes the guarantees of origin, in order to allow the future creation of a European market of guarantees of origin. For further information, see SANZ RUBIALES, I., “Mercados de cuotas y protección del medio ambiente: el fomento de las energías renovables en la Directiva 2009/28”, *Revista General de Derecho Administrativo*, n.º. 25, 2010.

<sup>15</sup> See, e.g., Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), *OJ L* 164, 25.6.2008, pp. 19–40.

<sup>16</sup> See *Conclusions to the Symposium on Marine Renewable Energies*, Santander, 16 April 2010, p. 4, available at [www.crpm.org/pub/agenda/1398\\_actas\\_santander\\_2010.pdf](http://www.crpm.org/pub/agenda/1398_actas_santander_2010.pdf); there are still important legal barriers to the implementation of marine renewable energy sources. This is the case of problems relating to the delimitation of areas of implementation, due to the fact that these areas are directly regulated by the international law of the sea and the international regimes for marine and coastal environment protection. This problem increases the complexity of the national regulations and legal procedures that slow down and cripple the implementation of MRES, see also the communication of the European Commission of 13 November 2008, COM

Mediterranean Sea. The applicable international legal framework encompasses from issues related to the law of the sea to different international marine and coastal environment protection regimes, including the EU regulation in this field. Notwithstanding the above mentioned legal barriers, it seems that MRES are meant to experience a considerable development in the next future in the EU.

Generally, marine renewable energy sources mostly consist of capturing the kinetic energy of sea wind, waves, marine currents and tides by means of different versions of turbine based mechanical devices. However, as of today, the most successful developments in this area, in terms of technological viability and profitability, belong to the sea wind sector and to a much more limited extent to tidal energy. In fact, today sea wind farms are based on an adaptation of on-shore windmills to shallow waters (5–18 meters depth) to be deployed not further than 14 km. off-shore. On the other hand, only few tidal power plants are currently functioning and their output is still considerably low compared to sea wind farms.<sup>17</sup>

Nevertheless, given that sea water density is 850 times higher than air, there is much more energy available in the ocean current, wave and tidal energy sectors and, therefore, further developments are foreseeable.<sup>18</sup> In fact, new models of wave, current and tidal energy devices have been successfully tested over the last few years and some of them are in an industrial deployment stage. The improvement of floating foundations and anchor systems make possible an ever deeper and further offshore installation (about 900 meters depth and 130 km. offshore). Similarly, the same developments favor the sea wind energy sector and grant sea windmills access to areas further offshore, where sea wind energy potential rises considerably.<sup>19</sup>

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(2008) 768 final; and ANKER, H.T., OLSEN, B.E. and RØNNE, A. (eds.), *Legal systems and wind energy: a comparative perspective, Energy and environmental law & policy series*, vol. 2, Alphen aan den Rijn: Kluwer Law International, 2009.

<sup>17</sup> See *Energy and environment report 2008*, Report n.º 6/2008, European Environment Agency, Copenhagen, 2008; “Renewable U.K. Wave and Tidal 2010 Conference”, *Renewable Energy Focus*, March/April 2010, pp. 6 and 8; “Renewable Energy in Scotland”, *Renewable Energy Focus*, May/June 2010, pp. 28–33; MUSIAL, W., BUTTERFIELD, S. and RAM, B., *Energy from Offshore Wind*, National Renewable Energy Laboratory, U.S. Department of Energy, Conference Paper, February 2006; Strangford Lough Tidal Turbine, Northern Ireland, United Kingdom, en [www.power-technology.com](http://www.power-technology.com); “L’énergie marémotrice” en [www.planete-energies.com](http://www.planete-energies.com).

<sup>18</sup> The highest wave energy potential available (50–100 kW per meter of wave thrust) seems to be concentrated in the Atlantic and Pacific oceans, between latitudes 40° and 60°. In tropical areas the potential is about 10–20 kW/m. For further information, see PERERA MARRERO, J., ARANCIBIA MORENO, G., MELÓN RODRÍGUEZ, E., GARCÍA GARCÍA, F., “Uso de la energía proveniente del oleaje atlántico”, *Revista del Instituto de Navegación de España: publicación técnica cuatrimestral de navegación marítima, aérea, espacial y terrestre*, n.º. 35, 2009, pp. 4–15.

<sup>19</sup> See *Conclusions to the Symposium on Marine Renewable Energies*, Santander, 16 April 2010, p. 4; Santoña Wave Energy Project (SWEP), [www.iberdrola.es](http://www.iberdrola.es); Wave Hub, Hayle, U.K., [www.southwestrda.org.uk/working\\_for\\_the\\_region/key\\_sw\\_projects/cornwall\\_the\\_isles\\_of\\_scilly/wave\\_hub.aspx](http://www.southwestrda.org.uk/working_for_the_region/key_sw_projects/cornwall_the_isles_of_scilly/wave_hub.aspx); “PELAMIS, World’s First Commercial Wave Energy Project, Agucadoura, Portugal”, en [www.power-technology.com/projects/pelamis](http://www.power-technology.com/projects/pelamis); Whale Tale Turbine Project, [www.whaletailturbine.com/?gclid=CMbWpcWe7a1CFYiX2Aod727h9Q](http://www.whaletailturbine.com/?gclid=CMbWpcWe7a1CFYiX2Aod727h9Q); *Transverse Horizontal Axis*

Finally, the most interesting aspect of MRES with regard to this paper and one of the main reasons why its promotion has been labeled as preferential is its apparent lack of environmental impact, since they seem not to create any type of pollution. However, the fact is that this industrial activity generally implies some sort of negative effect in the form of electromagnetic fields, vibrations, acoustic pollution, water turbidity and higher risk of eutrophication, and alteration of the seabed, benthic life, and routes of migratory animals.<sup>20</sup> Thus, the main danger posed by MRES appears to be the alteration and disturbance of marine ecosystems and migratory species that generate MRES, especially ocean current turbines and sea windmills. In fact, many potential negative effects of MRES on the environment will not be conclusively established until enough time has passed in order to measure its long-term impact. However, it can already be said that insofar as the exploitation of sea wind and water currents demands the construction of physical barriers in the form of turbines, wires, etc., the animals that live and travel through these currents will be in danger.<sup>21</sup>

To sum up the preceding observations, the fast development of this strategic industry, together with the current political and economic context described above, make a quantitative and qualitative increase of MRES' impact in European marine areas very likely. Therefore, it is the main purpose of this article to review the configuration and point out the weaknesses of the main legal regimes applicable to the environmental protection of the Mediterranean Sea, focusing on some parts of the south coast of Spain. The concern about this region is well justified by the latest interest of the Spanish Administration at all levels in giving a significant boost to the development and implementation of RES, also in marine and coastal areas, for the sake of complex political and economic interests.<sup>22</sup>

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*Water Turbine (THAWT)*, en [www-civil.eng.ox.ac.uk/research/tidal/index.html](http://www-civil.eng.ox.ac.uk/research/tidal/index.html); "Offshore Wind – Do We Have What It Takes?", *Renewable Energy Focus*, January/February 2010, pp. 24–29; "Maximising the Power of Waves", *Renewable Energy Focus*, November/December 2009, pp. 80–84; "Wave Energy Device Oyster Launched", *Renewable Energy Focus*, November/December 2009, p. 14; "Are We Ready to Transform UK Waters?", *Renewable Energy Focus*, May/June 2010, pp. 12–17; "Seven Offshore Foundation Design Shortlisted", *Renewable Energy Focus*, November/December 2009, p. 13; "Seven Estuary Tidal Power Projects Shortlisted", *Renewable Energy Focus*, March/April 2009, p. 18.

<sup>20</sup> For an analysis of potential negative effects on marine and coastal ecosystems in Spanish maritime and coastal areas, see Strategic Environmental Assessment of the Spanish Coast for the Installation of *Estudio Estratégico Ambiental del Litoral Español para la instalación de renovables marinas*, pp. 47 et seq., retrieved from: [www.mityc.es/energia/electricidad/Regimen Especial/eolicas\\_marinas/Paginas/estudioEstrategico.aspx](http://www.mityc.es/energia/electricidad/Regimen Especial/eolicas_marinas/Paginas/estudioEstrategico.aspx); an abundant bibliography on the topic might be found at the website of the Marine Bioacoustics Lab, University of Aarhus, Denmark, [www.marinebioacoustics.com/pub.html](http://www.marinebioacoustics.com/pub.html).

<sup>21</sup> EXO, K.-M., HUEPPO, O. and GARTHE, S., *Birds and offshore wind farms: a hot topic in marine ecology*. Wader Study Group Bull, 2003.

<sup>22</sup> FERNÁNDEZ GARCÍA, Ricardo, *La dimensión económica del desarrollo sostenible*, Ed. Club Universitario, San Vicente (Alicante), 2011, p. 108; MOLINAS, C., "Una teoría de la clase política española", *El País*, 09/09/2012; CALZADA ALVAREZ, G. et al., "Study of the effects on employment of public aid to renewable energy sources", *Procesos de Mercado*, Vol. 7(1), 2010; "La 'burbuja fotovoltaica' supera los 15.000 millones", *Capital Madrid*, 04/07/2012; "Galán augura una burbuja

## II. THE MARINE ENVIRONMENT PROTECTION REGIMES APPLICABLE TO THE MARITIME AND COASTAL AREAS OF THE EU: THE MEDITERRANEAN SEA

In order to guarantee that the development of the industry is carried out having consideration for ecosystems and migratory species, it is necessary to make sure that not only the industry complies with the relevant national and international legal framework, but also that this framework implies an adequate level of protection.

The main question, therefore, is: *what is the international legal framework governing marine and coastal environment protection in the maritime areas of the EU, especially the Mediterranean Sea?* In the first place, a distinction needs to be made between international treaties which apply to maritime and coastal areas of the EU on the one hand and on the other hand EU law. At the international level, the most relevant regimes that affect the EU are the Helsinki,<sup>23</sup> OSPAR<sup>24</sup> and Barcelona<sup>25</sup> Conventions, being the Barcelona Convention the international regime applicable to the Mediterranean Sea. With regard to these conventions, it should be noted from the outset that they seem to be concerned about a type of pollution that at first sight appears to have little to do with the above mentioned negative effects of MRES. However, insofar as MRES may generate several types of pollution which could even imply a modification of habitats and ecosystems, including risks for the life of some species, it is necessary to explore the most important regulatory elements of those Conventions which constitute the general normative framework in this field before analyzing the relevant EU legal regime. In any case, it must be stressed that none of the regimes examined seems to reflect a specific concern about the potential hazardous effects of MRES on marine ecosystems.<sup>26</sup>

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temosolar si no se gestionan bien las renovables”, *Cinco Días*, 22/07/2010; “El Gobierno decide poner coto a la burbuja energética”, *La Vanguardia*, 21/03/2010.

<sup>23</sup> Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention and its governing body – the Helsinki Commission, HELCOM), for further information about the Convention and the activities of the Commission, see [www.helcom.fi](http://www.helcom.fi).

<sup>24</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention and its governing body – the OSPAR Commission), for further information about the Convention and the activities of the Commission, see [www.ospar.org](http://www.ospar.org).

<sup>25</sup> Convention for the protection of the Mediterranean Sea against pollution, adopted in Barcelona on 16 February 1976 and amended and renamed the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean on 10 June 1995, see the Barcelona Convention and all its Protocols, available at the website of the Mediterranean Action Plan for the Barcelona Convention of the United Nations Environment Programme, <http://www.unepmap.org>.

<sup>26</sup> See *Peer Review of the Draft Quality Status Report 2010*, at [www.ospar.org](http://www.ospar.org); It should be taken into account that there are other international legal regimes the scope of which goes beyond European waters that apply to the implementation of MRES in EU marine areas. For instance, the Convention on Migratory Species (the Bonn Convention), which regulates the conservation of wild life and its habitats at the global level, see the Convention and activities of the Secretariat at [www.cms.int](http://www.cms.int); the Convention on Biological Diversity, which pursues the conservation of the biological diversity, including ecosystems and their sustainable, see the Convention and activities of the Secretariat at [www.cbd.int](http://www.cbd.int); or the UNESCO Convention Concerning the

The ability of the Conventions to regulate the development of MRES depends on their particular scope and the human activities they attempt to regulate. The OSPAR and Helsinki Conventions define in a very similar way their concept of marine pollution as “the introduction by man, directly or indirectly, of substances or energy into the maritime area which results, or is likely to result, in hazards to human health, harm to living resources and *marine ecosystems*, damage to amenities or interference with other legitimate uses of the sea”.<sup>27</sup> Thus, the OSPAR and Helsinki Conventions are based on the ‘ecosystem-based approach’.<sup>28</sup> This approach was first defined by the Convention on Biological Biodiversity in 2000<sup>29</sup> and adopted at the Joint Ministerial Meeting of 25–26 June 2003 held in Bremen by the Contracting Parties to the OSPAR and Helsinki Conventions. The ecosystem-based approach is a holistic concept based on an understanding of the ecosystem as a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit at different geographic levels. This approach acknowledges that current knowledge about the effects of human interactions with marine ecosystems is still limited and, therefore, calls for an integrated management of human activities based on the best available scientific knowledge in order to identify and prevent the negative impact of such activities on the good environmental status of the ecosystem and its sustainable use.<sup>30</sup>

Therefore, the OSPAR and Helsinki Convention regimes will apply to MRES as far as such *activities* interfere with the ecosystem approach or other legitimate uses of the affected areas.<sup>31</sup> With regard to the obligations binding the Contracting Parties, there is a core of general obligations in the OSPAR and Helsinki Conventions that relate to the adoption of “all necessary measures” as to *prevent and remove* any marine pollution. Finally, the OSPAR and Helsinki Conventions provide for stringent obligations concerning conservation and restoration of damaged ecosystems, as well as the application of the precautionary principle, the polluter-pays principle and the use of best

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Protection of the World Cultural and Natural Heritage (the World Heritage Convention), which defines the concept of “natural heritage” that affects specific ecosystems and habitats such as monuments and natural sites protected for their esthetic value, see the Convention and activities of the Secretariat at [www.whc.unesco.org](http://www.whc.unesco.org). These and other similar regimes are also an integral part of the legal framework that should limit and control the development of the MRES industry protecting the marine and coastal environment.

<sup>27</sup> Article 2.1 of the Helsinki Convention; and Article 1(d) of the OSPAR Convention (emphasis added).

<sup>28</sup> Articles 1. 2), 3) and 3.5).

<sup>29</sup> See RODRIGUEZ, J. and RUIZ, J., “Conservación y protección de ecosistemas marinos: conceptos, herramientas y ejemplos de actuaciones”, *Ecosistemas: Revista científica y técnica de ecología y medioambiente*, Vol. 19(2), 2010; and SMITH, R.D. and MALTBY, E., *Using the Ecosystem Approach to Implement the Convention on Biological Diversity: Key Issues and Case Studies*, International Union for Conservation of Nature and Natural Resources, Gland, Switzerland and Cambridge, United Kingdom, 2003, available on: [www.iucn.org/bookstore](http://www.iucn.org/bookstore).

<sup>30</sup> See Statement on the Ecosystem Approach to the Management of Human Activities, “Towards an Ecosystem Approach to the Management of Human Activities”.

<sup>31</sup> See also Annex V to OSPAR Convention on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area, available at [www.ospar.org/html\\_documents/ospar/html/ospar\\_convention\\_e\\_updated\\_text\\_2007\\_annex\\_v.pdf](http://www.ospar.org/html_documents/ospar/html/ospar_convention_e_updated_text_2007_annex_v.pdf).

available techniques and best environmental practice, including, where appropriate, clean technology.<sup>32</sup>

As for the Barcelona Convention, in spite of establishing a similar definition, it results in a rather anthropocentric regime less protective towards the environment as it does not refer to hazards to ecosystems as an element to its definition of “pollution”. Instead, it only includes those substances or energy which results or is likely to result “in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of seawater and reduction of amenities”.<sup>33</sup> Neither shall its Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil be applicable to MRES, since it only envisages the exploration and exploitation of mineral resources (ore, gas, oil, etc.).<sup>34</sup> Only the Protocols concerning Integrated Coastal Zone Management (ICZM) and Specially Protected Areas and Biological Diversity in the Mediterranean provide for a strong regulatory basis insofar as the deployment of MRES takes place within one of the Specially Protected Areas or affects protected species or is managed in an integrated coastal zone.<sup>35</sup>

With regard to the Mediterranean Sea, the Contracting Parties to the Barcelona Convention will individually or jointly take all appropriate measures to protect and improve the Mediterranean marine environment in order to contribute to sustainable development. In order to meet this objective, the Parties undertake to reduce, combat and, as far as possible, eliminate pollution in this area. The main goals of the Convention are: the assessment and control of pollution; the sustainable management of natural marine and coastal resources; the integration of the environment into economic and social development; the protection of the marine environment and coastal regions through action aimed at preventing and reducing pollution and, as far as possible, eliminating it, whether it is due to activities on land or at sea; and the protection of natural and cultural heritage. In addition, the Barcelona Convention includes the application of the precautionary principle and the polluter-pays principle; the promotion of impact assessments; the protection and preservation of biological diversity; and access to information and public participation.<sup>36</sup>

The lack of an ecosystem-based approach in the regional legal regime governing the Mediterranean Sea appeared to be a significant weakness which may have substantially hindered the ability of this regime to effectively prevent and remove the potential negative effects of the development of MRES in this area. This problem was solved by the Contracting Parties to the Barcelona Convention in January 2008 at their

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<sup>32</sup> Article 2 of the OSPAR Convention and Article 3 of the Helsinki Convention.

<sup>33</sup> Article 2 (a).

<sup>34</sup> Article 1 (c) y (d).

<sup>35</sup> See all Protocols to the Barcelona Convention, available at <http://www.unepmap.org/index.php?module=content2&catid=001001001>; for the Alboran Sea and the Bay of Cadiz, see RODRIGUEZ, J. and RUIZ, J., “Conservación y protección de ecosistemas marinos: conceptos, herramientas y ejemplos de actuaciones”, *Ecosistemas: Revista científica y técnica de ecología y medioambiente*, Vol. 19(2), 2010, pp. 11–20.

<sup>36</sup> Articles 3 and 4.

Almeria meeting, where they decided to “progressively apply the ecosystem approach to the management of human activities that may affect the Mediterranean marine and coastal environment”.<sup>37</sup> However, the introduction of this approach requires a very close cooperation between the Contracting Parties that does not seem to be taking place in a sufficient degree yet. As a result, only three out of the seven strategic goals identified in the road map for the application of the ecosystem approach in the Mediterranean Sea, which should have been implemented until July 2012, have been completed.<sup>38</sup>

Nevertheless, as mentioned above, two of the Protocols to the Barcelona Convention, the Protocol on ICZM and the Protocol on Specially Protected Areas and Biological Diversity in the Mediterranean, could offer a sound basis for a comprehensive Mediterranean framework that could guarantee a sufficient environmental protection. However, the Protocol on Specially Protected Areas and Biodiversity, which is specially well-suited for the achievement of a well-balanced regional use of marine and coastal areas governed and guaranteed by international law, subsequently depends on the establishment by the coastal states of multilateral Specially Protected Areas of Mediterranean Importance (SPAMIs).<sup>39</sup> No SPAMI has been established yet in the Mediterranean area between Spain and Morocco, i.e. the Alboran Sea.<sup>40</sup>

On the other hand, the Protocol on ICZM,<sup>41</sup> which explicitly includes the ecosystem approach among its regulatory principles,<sup>42</sup> does not affect the deployment of MRES far beyond the seashore as its maximum geographical scope of application is the territorial sea (max. 12 nautical miles).<sup>43</sup> Still, it can serve as a sound framework for

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<sup>37</sup> Decision IG 17/6: Implementation of the ecosystem approach to the management of human activities that may affect the Mediterranean marine and coastal environment, UNEP(DEPI)/MED IG.17/10 Annex V, pp. 179–180.

<sup>38</sup> *Ibid.*, pp. 205–206; about the application of the ecosystem approach and the Barcelona Convention, see the Regional Activity Center for Specially Protected Areas, <http://www.rac-spa.org/ecap>.

<sup>39</sup> See Articles 4–10 of the Specially Protected Areas and Biodiversity Protocol.

<sup>40</sup> Note that as mentioned below various national Specially Protected Areas (SPAs) have been established under domestic law by Spain and Morocco. See RODRIGUEZ, J. and RUIZ, J., *op. cit.*, pp. 11–20.

<sup>41</sup> JUSTE-RUIZ, J., BOU, V., “Towards integrated management of the coasts and of the coastal waters in Spain”, in: Nicola Greco (ed.), *Le risorse del mare e delle coste: ordinamento, amministrazione e gestione integrata*, Roma (Italia), Ed. Edistudio, 2010, pp. 119–154.

<sup>42</sup> See Article 3(2) (b) of the ICZM Protocol.

<sup>43</sup> See *ibid.*, article 2 (e) “‘Coastal zone’ means the geomorphologic area either side of the seashore in which the interaction between the marine and land parts occurs in the form of complex ecological and resource systems made up of biotic and abiotic components coexisting and interacting with human communities and relevant socio-economic activities”. (f) “‘Integrated coastal zone management’ means a dynamic process for the sustainable management and use of coastal zones, taking into account at the same time the fragility of coastal ecosystems and landscapes, the diversity of activities and uses, their interactions, the maritime orientation of certain activities and uses and their impact on both the marine and land parts”; and article 3 (1). “The area to which the Protocol applies shall be the Mediterranean Sea area as defined in Article 1 of the Convention. The area is also defined by: (a) the seaward limit of the coastal zone, which shall be the external limit of the territorial sea of Parties; and (b) the landward limit of the coastal zone, which shall be the limit of the competent coastal units as defined by the Parties”.

safeguarding at least the south Spanish coastal environment against irrational developments of MRES. The ICZM seeks a sustainable development of coastal zones by rational planning of activities, the preservation of coastal zones, the sustainable use of natural resources, the preservation of ecosystems and coastlines, the prevention and reduction of natural disasters and climate change, and the achievement of coherence between public and private initiatives and between all decisions by the public authorities, at the national, regional and local levels, which affect the use of the coastal zone.<sup>44</sup> With special regard to energy facilities and maritime works and structures, it establishes that such facilities, structures and works will have to be subject to authorization “so that their negative impact on coastal ecosystems, landscapes and geomorphology is minimized or, where appropriate, compensated by non-financial measures.”<sup>45</sup> The ICZM Protocol also recognizes “the specific aesthetic, natural and cultural value of coastal landscapes, *irrespective of their classification as protected areas*” and binds the Contracting Parties to adopt “measures to ensure the protection of coastal landscapes through legislation, planning and management” and to “promote regional and international cooperation in the field of landscape protection, and in particular, the implementation, where appropriate, of joint actions for transboundary coastal landscapes.”<sup>46</sup>

Specially since the EU Council decision of 4 December 2008 on the signing, on behalf of the European Union, of the ICZM Protocol to the Barcelona Convention<sup>47</sup> and the resulting applicability of the infringement procedures of the EC to the Member States and the jurisdiction of the European Court of Justice, the ICZM Protocol has become a significant protection regime to be taken into account in the development of MRES in the Mediterranean Sea areas of the EU. Notwithstanding this regulatory improvement, the fact that the ICZM Protocol, entered into force on 24 March 2011, is still in an early stage of implementation,<sup>48</sup> together with its limited geographical scope of application (the maximum width of the territorial sea) and merely advisory non-adversarial compliance mechanisms,<sup>49</sup> imply that ICZM will only be applicable to the present state of development of MRES (usually not to be deployed beyond 14 km offshore) but not for the future developments examined above. Therefore, it becomes necessary to explore the strengthened EU legal regime.

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<sup>44</sup> See article 5 of the ICZM Protocol. For principles and procedures for the implementation of ICZM, see articles 6 and 7.

<sup>45</sup> Article 9.2 (f).

<sup>46</sup> Article 11, emphasis added.

<sup>47</sup> Decision 2009/89/EC, Official Journal of the EU, L 34/17, 04.02.2009.

<sup>48</sup> See the Action Plan for the Implementation of the ICZM Protocol, for the period 2012–2019, adopted at the 17th Ordinary Meeting of the Contracting Parties, Decision IG 20/2, UNEP(DEPI)/MED IG 20/8, Annex II; and the Paris Declaration, UNEP(DEPI)/MED IG.20/CRP.XX, Annex I; see also the follow-up of the ICZM implementation process on the web site of the EU funded Pegaso Project, retrieved 15.08.2012 from <http://www.pegasoproject.eu>.

<sup>49</sup> See Decision IG.17/2 on Compliance Procedures and Mechanisms adopted by the 15th Meeting of the Contracting Parties, after which a Compliance Committee was created in July 2008; and Decision IG.19/1 containing the Rules of Procedure adopted by the 16th Meeting of the Contracting Parties in November 2009.

The EU has passed a set of legal measures aimed at the protection and conservation of the marine and coastal environment of the EU, which directly affects the industrial development of MRES.<sup>50</sup> One of the most relevant of such EU measures is the Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).<sup>51</sup> This Directive establishes common binding objectives for the protection and conservation of the marine environment, which are implemented by specific marine strategies and programmes of measures devised and put into practice by each Member State. The main objective pursued by the Directive is to lay down a common framework within which the particular strategies and measures from Member States will aim to achieve until 2020 a 'good environmental status';<sup>52</sup> defined as:

the environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations, i.e.:

(a) the structure, functions and processes of the constituent marine ecosystems, together with the associated physiographic, geographic, geological and climatic factors, allow those ecosystems to function fully and to maintain their resilience to human-induced environmental change. Marine species and habitats are protected, human-induced decline of biodiversity is prevented and diverse biological components function in balance;

(b) hydro-morphological, physical and chemical properties of the ecosystems, including those properties which result from human activities in the area concerned,

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<sup>50</sup> See specially Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7); and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.04.1979, p. 1); both amended by Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania; and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, pp. 1–73); and Directive 2008/32/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2000/60/EC establishing a framework for Community action in the field of water policy, as regards the implementing powers conferred on the Commission.

<sup>51</sup> OJ L 164, 25.6.2008, pp. 19–40. See BOU FRANCH, V., "La política marítima de la Unión Europea y su contribución a la prevención de la contaminación marina", in: Jorge Pueyo Losa; Julio Jorge Urbina (coords.), *La cooperación internacional en la ordenación de los mares y océanos*, Madrid, Iustel, 2009, pp. 89–134. See also COM(2008) 791 final, Brussels, 25.11.2008, Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU – Communication from the Commission; COM(2007)575 final, Brussels, 10.10.2007 – An Integrated Maritime Policy for the European Union – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; and Decision 1600/2002/EC of the European Parliament and the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme.

<sup>52</sup> Article 1.1.

support the ecosystems as described above. Anthropogenic inputs of substances and energy, including noise, into the marine environment do not cause pollution effects;<sup>53</sup>

For this purpose, the Marine Strategy Framework Directive sets down the obligation for Member States to devise and implement their own marine strategies in order to protect the marine and coastal areas under their jurisdiction, preserve them from any damage caused by human activities and ensure the sustainable use of these areas by applying an ‘ecosystem-based approach’,<sup>54</sup> which has become a key concept in EU legislation on the subject.<sup>55</sup>

The application of this approach, thus, includes both conservation and management through, e.g., the establishment of specially protected areas or the special protection of some species and habitats. Furthermore, the acknowledgement of the limitations of scientific knowledge on the subject, leads to the acceptance of the precautionary principle, according to which:

(...) preventive measures are to be taken when there are reasonable grounds for concern that human activities may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship. A lack of full scientific evidence must not postpone action to protect the marine environment. The principle anticipates that delaying action would in the longer term prove more costly to society and nature and would compromise the needs of future generations.<sup>56</sup>

The Marine Strategy Framework Directive builds on this conceptual basis a well defined procedure to be followed by Member States while developing their own marine strategies. The procedure begins with some preparatory measures to be completed by 15 July 2012, including (i) an initial assessment of the current environmental status of the waters concerned and the environmental impact of human activities thereon, (ii) a determination of good environmental status; (iii) establishment of a series of environmental targets and associated indicators; and (iv) establishment and implementation of a monitoring programme for ongoing assessment and regular updating of targets. These preparatory measures should end in the development, by 2015 at the latest, of a

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<sup>53</sup> Article 3,5, see Annex I of the Directive.

<sup>54</sup> Article 1. 2), 3) and 3.5).

<sup>55</sup> Defined as: “the comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity”, see §5. Statement on the Ecosystem Approach to the Management of Human Activities, “Towards an Ecosystem Approach to the Management of Human Activities”, Joint Meeting of the Helsinki & OSPAR Commissions 2003, *Record of the meeting – Annex 5* (available at [www.ospar.org](http://www.ospar.org) and [www.helcom.fi](http://www.helcom.fi)).

<sup>56</sup> The OSPAR Commission definition of the precautionary principle, retrieved from [www.ospar.org/content/content.asp?menu=0012000000065\\_000000\\_000000](http://www.ospar.org/content/content.asp?menu=0012000000065_000000_000000).

programme of measures designed to achieve or maintain good environmental status, which should enter into operation by 2016 at the latest.<sup>57</sup>

The above described requirements and obligations for Member States seem to put in place a sufficiently demanding regulatory framework so as to guarantee the protection of the marine environment against potential negative impact of MRES. It implies that the industrial deployment of MRES shall comply with the same standards as any other human activity by referring it to a broad definition of “pollution” which has to be prevented and tackled by states. To this effect, “pollution” is defined as:

(...) the direct or indirect introduction into the marine environment, as a result of human activity, of substances or energy, including human-induced marine underwater noise, which results or is likely to result in deleterious effects such as harm to living resources and marine ecosystems, including loss of biodiversity, hazards to human health, the hindering of marine activities, including fishing, tourism and recreation and other legitimate uses of the sea, impairment of the quality for use of sea water and reduction of amenities or, in general, impairment of the sustainable use of marine goods and services.<sup>58</sup>

Nonetheless, although it requires to ensure the sustainable use of the marine environment as one of the objectives to be achieved when designing the programmes of measures, the Marine Strategy Framework Directive requires Member States to take into consideration, in particular, “the social and economic impacts of the measures” including cost-benefit analysis when carrying out impact assessments.<sup>59</sup> In addition, the Directive envisages a number of exceptions according to which Member States shall not be required to take any steps in the event of significant negative impact on the environment where “modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which outweigh the negative impact on the environment, including any transboundary impact” or the costs would be disproportionate.<sup>60</sup>

In other words, even though compliance with the precautionary principle is mandatory,<sup>61</sup> the analyzed EU framework gives much room for the protection of socio-economic interests within the ecosystem-based approach. This broad margin of appreciation seems to allow possible disruptions or deteriorations of an ecosystem while implementing MRES. Consequently, due attention must be paid to the transposition by Member States<sup>62</sup> and the case law that the European Court of Justice might develop in interpreting the Directive.

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<sup>57</sup> Articles 5 and 8–14.

<sup>58</sup> Article 3.8.

<sup>59</sup> Article 13.

<sup>60</sup> Article 14.1, d) and Article 4.

<sup>61</sup> See BIRNIE, P. and BOYLE, A., *International Law and the Environment*, 2nd ed., Oxford University Press, 2002.

<sup>62</sup> The time limit for transposition of the Directive was 15 July 2010 (Article 26).

On the other hand, the Marine Strategy Framework Directive also establishes the objective of contributing to a better and more coherent implementation of other international systems of marine environment protection applicable in EU waters. To that end, it divides EU maritime spaces into four regions and several sub-regions,<sup>63</sup> which correspond to the geographical scope of the main four international conventions for the protection of marine environment in Europe. The analyzed EU legal framework is, thus, connected to the above mentioned OSPAR<sup>64</sup> and Helsinki<sup>65</sup> Conventions, as well as the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) and its additional Protocols<sup>66</sup> and the Convention on the Protection of the Black Sea against Pollution.<sup>67</sup>

The ecosystem-based approach adopted by the Framework Directive implies a high level of regional cooperation, not only between Member States of the EU, but also with non-EU countries. For this reason, the already existent regional and sub-regional institutions and their already existent programmes and activities are envisaged as a means to coordinate and develop new marine strategies and programmes.<sup>68</sup> These legal regimes

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<sup>63</sup> *Article 4.* "Marine regions or subregions. 1. Member States shall, when implementing their obligations under this Directive, take due account of the fact that marine waters covered by their sovereignty or jurisdiction form an integral part of the following marine regions: (a) the Baltic Sea; (b) the North-east Atlantic Ocean; (c) the Mediterranean Sea; (d) the Black Sea. 2. Member States may, in order to take into account the specificities of a particular area, implement this Directive by reference to subdivisions at the appropriate level of the marine waters referred to in paragraph 1, provided that such subdivisions are delimited in a manner compatible with the following marine subregions: (a) in the North-east Atlantic Ocean: (i) the Greater North Sea, including the Kattegat, and the English Channel; (ii) the Celtic Seas; (iii) the Bay of Biscay and the Iberian Coast; (iv) in the Atlantic Ocean, the Macaronesian biogeographic region, being the waters surrounding the Azores, Madeira and the Canary Islands; (b) in the Mediterranean Sea: (i) the Western Mediterranean Sea; (ii) the Adriatic Sea; (iii) the Ionian Sea and the Central Mediterranean Sea; (iv) the Aegean-Levantine Sea. Member States shall inform the Commission of any subdivisions by the date specified in the first subparagraph of Article 26(1) but may revise these upon completion of the initial assessment referred in Article 5(2), point (a)(i)."

<sup>64</sup> To which the EU is a Contracting Party, see Decision 98/249/EC of the Council (OJ L 104, 3 April 1998, p. 1) and Decision 2000/340/EC of the Council (OJ L 118, 19 May 2000, p. 44).

<sup>65</sup> To which the EU is a Contracting Party, see Decision 94/157/EC of the Council (OJ L 73, 16 March 1994, p. 19).

<sup>66</sup> To which the EU is a Contracting Party, see Decision 77/585/EEC of the Council (OJ L 240, 19 September 1977, p. 1) and its amendments of 1995, approved by Decision 1999/802/EC of the Council (OJ L 322, 14 December 1999, p. 32). For further information about the Convention, its Protocols and the Action Plan, see [www.unepmap.org](http://www.unepmap.org).

<sup>67</sup> Find the Convention and more information about the activities of the Secretariat at [www.blacksea-commission.org](http://www.blacksea-commission.org).

<sup>68</sup> *Article 6.* "Regional cooperation. 1. In order to achieve the coordination referred to in Article 5(2), Member States shall, where practical and appropriate, use existing regional institutional cooperation structures, including those under Regional Sea Conventions, covering that marine region or subregion. 2. For the purpose of establishing and implementing marine strategies, Member States shall, within each marine region or subregion, make every effort, using relevant international forums, including mechanisms and structures of Regional Sea Conventions, to coordinate their actions with third countries having sovereignty or jurisdiction over waters in the same marine region or subregion. In that context, Member States shall, as far as possible, build

contain an independent regulatory core which also affects MRES and could complete the EU basic legislation on marine environment protection.

### III. THE CASE OF SEA WIND ENERGY IN THE SOUTH SPANISH MARITIME AND COASTAL AREAS

In Spanish law, sea wind energy production is considered a special sort of electricity production regulated by a special regime that applies to sea wind farms.<sup>69</sup> This legal regime is made up of the national statute 22/1988 of 28 July 1988,<sup>70</sup> governing the Spanish coastal areas; the Regulation of 1 December 1989, developing the national statute 22/1988 (Real Decreto 1471/1989);<sup>71</sup> the national statute 9/2006 of 28 April 2006, on the Strategic Environmental Assessment (SEA);<sup>72</sup> the national statute (RD Legislativo 1/2008) on Environmental Impact Assessments (EIA);<sup>73</sup> the Rules governing the administrative procedure (RD 1028/2007) for the authorization of installation of electricity producing devices in the territorial sea;<sup>74</sup> and the Regulation (RD 1955/2000) governing the transport, distribution and supply of electric energy and the procedure for authorization.<sup>75</sup>

As far as the environmental requirements are concerned, the procedure of authorization, which involves up to six different ministries of the central government and may last for several years, is carried out within the framework of the Strategic Environmental Assessment (SEA) of marine areas at national level, and the relevant EIA. The main product of the SEA is the "Sea Wind Map",<sup>76</sup> which serves the preventive protection of the marine environment by determining suitable and non-suitable areas for the installation of any type of MRES.<sup>77</sup>

The SEA of the Spanish marine areas actually establishes three types of zones: non-suitable, suitable subject to conditions and suitable zones. This delimitation takes into consideration specially protected areas, in particular the ecological network Natura 2000, and other areas of exceptional importance for marine biodiversity, such as the Strait of

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*cont.*

upon relevant existing programmes and activities developed in the framework of structures stemming from international agreements such as Regional Sea Conventions. Coordination and cooperation shall be extended, where appropriate, to all Member States in the catchment area of a marine region or subregion, including land-locked countries, in order to allow Member States within that marine region or subregion to meet their obligations under this Directive, using established cooperation structures prescribed in this Directive or in Directive 2000/60/EC".

<sup>69</sup> [http://www.mityc.es/energia/electricidad/RegimenEspecial/eolicas\\_marinas](http://www.mityc.es/energia/electricidad/RegimenEspecial/eolicas_marinas).

<sup>70</sup> Boletín Oficial del Estado (BOE) no. 181, 29 July 1988.

<sup>71</sup> BOE no. 297, 12 December 1989.

<sup>72</sup> BOE no. 102, 29 April 2006.

<sup>73</sup> BOE no. 23, 26 January 2008.

<sup>74</sup> The additional provision no. 5 extends the application of the procedure to the contiguous zone and the economic exclusive zone. See BOE no. 183, 1 August 2007.

<sup>75</sup> BOE no. 310, 27 December 2000.

<sup>76</sup> See 'Spanish Sea Wind Map', Instituto para la Diversificación y Ahorro de la Energía, Ministerio de Industria, <http://atlaseolico.idae.es/>.

<sup>77</sup> See the Strategic Environmental Assessment of the Spanish Coast, pp. 66–69, [http://www.mityc.es/energia/electricidad/RegimenEspecial/eolicas\\_marinas/Paginas/estudioEstrategico.aspx](http://www.mityc.es/energia/electricidad/RegimenEspecial/eolicas_marinas/Paginas/estudioEstrategico.aspx).

Gibraltar due to its relevance for migratory animals and other biological groups. There are in total two geographic areas in southern Spain which have been classified by the SEA as non-suitable in the whole width of the marine area regulated by the Strategy (up to 24 nautical miles from the baseline): the Strait of Gibraltar and the Cape of Gata.<sup>78</sup>

In the case of the Strait of Gibraltar, this area presents the particular feature of being as well one of the most important zones for migratory animals in the Mediterranean Sea and the North-East Atlantic Ocean. In spite of this, the Draft of the ministerial regulation establishing the Special Protection Areas (SPA) for Sea Birds in Spain under the Birds Directive<sup>79</sup> does not include the Strait of Gibraltar. The explanation for this omission is the pending diplomatic conflict between Spain and the United Kingdom on the jurisdiction over certain parts of this area. Nevertheless, due to the fact that the parts of the Strait area actually affected by the dispute are rather limited, the Spanish government would find no obstacle to constitute a protection area over those parts of the Spanish territorial sea not subject to controversy either with the United Kingdom or with Morocco.<sup>80</sup>

This problem has seemingly been solved by the SEA which, despite the Strait of Gibraltar being one of the most productive areas of the EU in terms of wind power density and average wind speed<sup>81</sup>, has declared the whole area as non-suitable for deployment of MRES. The qualification as non-suitable by the SEA should rule out from the outset the possibility of applying for a government authorization to exploit the area. However, a careful revision of the additional provision no. 3 of the Regulation 1028/2007,<sup>82</sup> reveals that the qualification of an area by the SEA as non-suitable is only relevant for environmental considerations. Moreover, the additional provision no. 2, which prohibits any authorization with regard to some specific areas, does not consider the qualification of an area as non-suitable to exclude such area from the procedure of authorization. In fact, a reference to marine animals is made solely in connection to marine reserves, regulated in Article 13 of the national statute 3/2001, of 26 March 2001, regarding state fisheries.<sup>83</sup> In other words, an area qualified as non-suitable for environmental reasons is not necessarily excluded from an application and authorization to exploit that area.

<sup>78</sup> The Cape of Gata is a natural park covering more than 12.000 hectares of marine and coastal area and protected under Regulations 314/1987, 418/1994 and 37/2008.

<sup>79</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

<sup>80</sup> See 'España descarta tres parques para evitar conflictos diplomáticos', EL PAIS – Madrid, 19 October 2011. For an analysis of the international status of marine areas subject to Spanish jurisdiction in the Strait of Gibraltar and the disputes with Morocco and the United Kingdom, see GUTIÉRREZ CASTILLO, V.L., "Estudio del régimen jurídico del Estrecho de Gibraltar: conflictos de soberanía, espacios marinos y navegación", in DEL VALLE GÁLVEZ, J.A., El Houdaïgui, R./ ACOSTA SÁNCHEZ, M.A. (coord..) *Las dimensiones internacionales del Estrecho de Gibraltar*, Dykinson, 2006, pp 292 et seq.; and GUTIÉRREZ CASTILLO, V.L., *España y sus fronteras en el mar. Estudio de la delimitación de sus espacios marinos*, Dykinson, Madrid, 2004.

<sup>81</sup> See 'Spanish Sea Wind Map', Instituto para la Diversificación y Ahorro de la Energía, Ministerio de Industria, <http://atlasaeolico.idae.es/>.

<sup>82</sup> BOE no. 183, 1 August 2007, see Article 16 on the decision criteria applicable to the authorization process.

<sup>83</sup> BOE no. 75, 28 March 2001.

This qualification only means that during the evaluation of the application the environmental criterion will definitely speak against granting the authorization.

This procedural weakness does not seem to be coherent with the purported preference given to environmental protection and conservation. Yet, serious concerns arise when examining these provisions together with the evaluation criteria for granting the exploitation of an area established in article 16 of the Regulation 1028/2007. The environmental impact is considered as just another criterion together with socio-economic factors in paragraph f), on a long list of criteria related to economic profitability and technological aspects.

#### IV. FINAL REMARKS

The previous analysis shows how the international regime that shall govern the industrial implementation of MRES in the Mediterranean Sea establishes a rather sound conceptual framework in order to protect marine ecosystems against potential hazardous effects derived from this industry. This international framework, consisting of several international treaties and EU legislation, creates a regulatory system that seeks a holistic protection of the marine environment and fosters sustainable use policies in the area by the relevant states including coordination with other geographical areas and non-EU states.

On the other hand, this international regime reveals some serious weaknesses in the Mediterranean area. Even though the introduction of EU legislation in the subject has represented a very significant increase in the level of environmental concern and protection in the Mediterranean spaces of the EU, with the design of SEAs and EIAs and the adoption of an ecosystem-based approach, the European regulation is still a developing body of rules which mainly aims at laying the foundations for a future stronger regime, if necessary. The analyzed EU regulation seems to be excessively worried about the economic considerations, unwilling to set too stringent limits and controls over Member States in a political area where many Member States experience a serious economic and energetic crisis. Therefore, EU law does not seem to represent a sufficiently strong barrier against state policies which could negatively affect the Mediterranean Sea.

This international legal landscape is unfortunately not improved by the system of the Barcelona Convention. Even though the Protocols concerning ICZM and Specially Protected Areas and Biological Diversity in the Mediterranean provide for a seemingly strong protection regime, no such Specially Protected Areas have been established by the coastal states of the Strait of Gibraltar (Spain, U.K. and Morocco), making the whole regime ineffective.<sup>84</sup> And the ICZM Protocol, not ratified by Morocco, introduces a geographically very limited regime with relatively weak compliance mechanisms, which is still in a rather early stage of development.

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<sup>84</sup> The International Union for Conservation of Nature and Natural Resources (IUCN), a global environmental organization created by States and NGOs, is working as an international technical forum for the creation of a Special Protected Area from the Strait of Gibraltar to the Sea of Alboran, even though so far no positive results are in sight, see 'Towards a better Governance of the Mediterranean', Report of the IUCN's Group of Experts 2007–2008, April 2009.

The practical result of the above described regulatory picture is a broad margin for the states to develop and apply their own protection policies and give priority to either socio-economic or rather environmental interest in the industrial development of MRES. From that point of view, it can be claimed that the international legal regimes governing MRES in the Mediterranean Sea are still weak and that strong further developments are necessary in order to guarantee an optimal environmental protection when deploying MRES.

Ultimately, the fact that the effective scope of the international protection regime strongly depends on each coastal state, makes the specific development of this regime be determined by local political conditions, which can be observed in the case of the some parts of the south coast of Spain. For the moment, aside from the decisive financial shortages which hold Spanish Administrations and industry within the borders of respect for marine and coastal environment, it is the refusal from the civil society to host the largest sea wind farm in Europe near the Cape of Trafalgar, on the Western margin of the area of the Strait of Gibraltar, that has paralyzed so far the authorization in a procedure that has already lasted several years,<sup>85</sup> a politically sensitive situation that might change just as local financial and political perceptions and needs do so.

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<sup>85</sup> See 'Trafalgar no quiere molinos. Chipiona se postula para heredar los planes eólicos rechazados por sus vecinos', Pedro Espinosa – EL PAIS – *Cádiz* – 2 May 2009.

## *Civil Society Participation in the Interamerican Development Bank's Activities and Operations: Enhancing Democratic Accountability?*

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- I. Introduction
  - A. Evolution of Current Bank-Civil Society Policy
  - B. Current Bank-Civil Society Relations
- II. CSO and NGO Collaborative Roles in Bank-Supported Activities and Operations
  - A. Consultations for Projects with Environmental and Social Impacts
  - B. Project Design
  - C. Project Financing
  - D. Project Enforcement
  - E. Monitoring and Assessment
- III. CSO and NGO Role in Carrying Out Action Demanded under Bank Activities
  - A. Involuntary Resettlement Policy
  - B. Indigenous Peoples Policy and the Strategy for Indigenous Development
  - C. Environmental Assessment Policy
  - D. Disaster Risk Management Policy
  - E. Gender Equality
- IV. Consultation with CSO and NGOs on Bank Policies and Strategies
- V. Special Issue: Disclosure of Information
- VI. IDB Financing for CSOs and NGOs.
- VII. Final Remarks: Prospects for the Future

**ABSTRACT**

Non-governmental organizations ('NGOs') and civil society organizations ('CSOs') are increasingly influential players both in Spain and the Latin American and Caribbean countries. Since 1998 NGOs and CSOs have progressively enjoyed easy access to, and better possibilities to affect decision-making processes taking place within the Inter-American Development Bank ('the Bank' or the 'IDB'), including also the most recent decisions of the IDB affecting the relationship between Spain and the Latin American and Caribbean (LAC) countries. Indeed, in particular the increasing intensity of NGO and CSO activities and their involvement in the performances and activities of the Bank and of its governing bodies at different levels and stages show that NGOs and CSOs over the last decade have become essential, though often under-recognized components of the operational structures of the internal governance of the IDB. CSOs may be, and often are, eligible to directly receive financings from the Bank. Starting from a brief introduction of the Bank followed by a set of normative arguments on the key accountability challenges facing the IDB Group, the paper will deal with the issue of NGO and CSO participation in relation to the decision-making process on the IDB Group's financed operations, investment and programmatic lending operations. It will also consider the social and environmental accountability initiatives that derive from the Bank's core aims of achieving poverty eradication and effective and sustainable development. In doing so, approaching the topic from an international legal perspective, the paper will first explore the broad and inclusive definition of what constitutes a 'civil society organization' for the IDB and its affiliated organizations. Secondly, and in more detail, it will consider the "Strategy for Promoting Citizen Participation in Bank Activities" as approved by the IDB Board of Directors in 2004 in order to expand, strengthen and systematize citizen and civil society participation in the Bank's activities. Thirdly, the paper will focus on the Guidelines for the functioning of the Civil Society Advisory Councils (the 'Guidelines'). Fourthly, it will describe how NGO and CSO participation is taken into account by the internal instruments of the Bank envisaging citizen and civil society participation in the IDB's financial activities (including the most recent activities to enhance the trade and investment relationship between Spain and LAC countries). Therefore, the key features and characteristics of the Guidelines that are of special significance to NGO and CSO participation in the decision-making process on the IDB's financed operations and in furthering the accountability of the Bank to its constituents – such as the criteria for the establishment and participation of CSOs and NGOs, the notification procedure, the meaning of 'Civil Society Consulting Groups', the methods for consultations at operational level, the possibilities for civil society groups and movements, including Spanish civil society groups and movements, to increase human rights and democratic accountability – will all be, in turn, the subject of specific analyses. Finally, the paper will conclude with some observations on the social and democratic accountability of the IDB to civil society and non-state actors, referring in particular to the experience of the internal accountability mechanism established by the IDB's Board of Governors (the Bank's highest authority) in 1994 – the Independent Investigation Mechanism of the Inter-American Development Bank (the 'Independent Mechanism') – that was established with the aim of "increasing the transparency, accountability, and effectiveness" of the

Bank and recently replaced by the created Independent Consultation and Investigation Mechanism (ICIM) effective on June 30, 2010.

### **Keywords**

Multilateral Development Institutions; Social and Democratic Accountability; Institutions of Global Governance; Spanish General Cooperation Fund (FGE); Civil Society Organizations (CSOs); Non-governmental organizations ('NGOs'); Design and Monitoring of Development Projects; Inter-American Development Bank Group; Public and Development Organizations; Poverty Reduction Strategy Paper (PRSP); NGO-Bank Committee.

### **RÉSUMÉ**

Les organisations non gouvernementales (« ONG ») et les organisations de la société civile (« OSC ») sont des acteurs de plus en plus influents en Espagne et Amérique latine et des Caraïbes (ALC). Depuis 1998, les ONG et OSC ont progressivement bénéficié de meilleures possibilités de facilement accéder et d'influer les processus décisionnels qui ont lieu au sein de la Banque interaméricaine de développement (« la Banque » ou « BID »), y-compris les décisions les plus récentes de l'BID relatives à la relation entre l'Espagne et l'ALC. En particulier, l'intensité croissante des activités des ONG et des OSC et leur participation aux activités de la Banque et de ses organes directeurs, à différents niveaux et stades, montrent comment au cours de la dernière décennie les ONG et les OSC sont devenues indispensables, bien souvent sous-composantes des structures opérationnelles de la gouvernance interne de la BID. Les OSC peuvent recevoir directement, et souvent reçoivent, des financements de la Banque.

Après une brève introduction de la Banque, suivie d'arguments normatifs sur la reddition des comptes clés du Groupe de la BID, le document traitera de la question de la participation des ONG et des OSC au processus de prise de décision du Groupe de la BID en ce qui concerne le financement d'investissements et de prêts programmatiques. Seront également examinées les initiatives de responsabilisation sociale et environnementale dont découlent les objectifs de la Banque relatifs à l'éradication de la pauvreté et le développement efficace et durable. Ce faisant, et du point de vue du droit international, le document explore d'abord la large et inclusive définition d'« organisation de la société civile » adoptée par la BID et ses organisations affiliées. Deuxièmement, et plus en détail, il étudiera la « Stratégie pour la promotion de la participation des citoyens aux activités de la Banque », telle qu'approuvée par le Conseil d'administration de la BID en 2004 afin de développer, de renforcer et de systématiser la participation citoyenne et de la société civile dans les activités de la Banque. Troisièmement, le document met l'accent sur les lignes directrices pour le fonctionnement des conseils consultatifs de la société civile (les « lignes directrices »). Quatrièmement, il décrira comment la participation des ONG et OSC est prise en compte par les instruments internes de la BID. Par conséquent, les fonctionnalités et les caractéristiques des lignes directrices qui sont d'une importance particulière à la participation des ONG et des OSC dans le processus de prise de décision sur les activités financées par la BID et dans la poursuite de la

responsabilité de la Banque envers ses commettants clés seront tous, à leur tour, l'objet d'analyses spécifiques.

Le document se termine par quelques observations sur la responsabilité sociale et démocratique de la BID vers la société civile et les acteurs non étatiques, en se référant en particulier à l'expérience du mécanisme de responsabilisation interne mis en place par le Conseil des gouverneurs de la BID (la plus haute autorité de la Banque) en 1994 – le Mécanisme d'enquête indépendant de la Banque interaméricaine de développement (le « Mécanisme indépendant ») – qui a été créé dans le but « d'accroître la transparence, la responsabilisation et l'efficacité » de la Banque et le Mécanisme d'investigation (MICI) en vigueur le 30 Juin 2010.

### Mots clés

Banque interaméricaine de développement; Espagne; organisations non gouvernementales; responsabilité sociale et démocratique.

### RESUMEN

Las organizaciones no gubernamentales (« ONGs ») y las organizaciones de la sociedad civil (« OSC ») son actores cada vez más influyentes en España y en los países de América Latina y el Caribe. Desde 1998, las « ONGs » y las « OSC » han disfrutado progresivamente de un fácil acceso y mayores posibilidades de influencia en los procesos de toma de decisiones que tienen lugar en el Banco Interamericano de Desarrollo (« el Banco » o el « BID »), incluyendo también las más recientes decisiones del BID que afectan la relación entre España y América Latina y el Caribe (ALC). En efecto, el aumento de la intensidad de las actividades de las ONGs y las OSC y su participación en las actuaciones y actividades del Banco y de sus órganos de gobierno -en los diferentes niveles y etapas- demuestran que se han convertido en actores esenciales en la última década, aunque a menudo no se las ha reconocido como tales en las estructuras operativas de la gestión de gobierno interno del BID. Las OSC pueden ser, y a menudo lo son, elegibles para recibir directamente los financiamientos del Banco. Partiendo de una breve introducción acerca del Banco, seguido por una serie de argumentos normativos vinculados a los principales retos de « accountability » que enfrenta el Grupo del BID, el documento se ocupará de las ONGs y OSC y su participación en el proceso de toma de decisiones vinculadas a las operaciones de financiamiento, inversiones y los préstamos programáticos del Grupo BID. También se tendrán en cuenta las iniciativas de responsabilidad social y ambiental que se derivan de los objetivos fundamentales del Banco para lograr la erradicación de la pobreza y el desarrollo efectivo y sostenible. De este modo, abordando el tema desde una perspectiva jurídica internacional, el documento explorará en primer lugar la definición amplia e inclusiva de lo que constituye una « organización de la sociedad civil » para el BID y sus organizaciones afiliadas. En segundo lugar, y con más detalle, se tendrá en cuenta la « Estrategia para Promover la Participación Ciudadana en Actividades del Banco », tal como fue aprobada por el Directorio del BID en el año 2004, con el fin de ampliar, fortalecer y sistematizar la participación ciudadana y de la sociedad civil. En tercer lugar, el trabajo se centrará en

las Directrices para el funcionamiento de los Consejos Asesores de la Sociedad Civil (las « Directrices »). En cuarto lugar, se describe como está contemplada la participación de las ONGs y OSC en los instrumentos internos del Banco, y la participación de la sociedad civil y los ciudadanos en las actividades financieras del BID (incluidas las actividades más recientes destinadas a mejorar la relación comercial y de inversión entre España y los países de ALC). Consecuentemente, los aspectos principales y características de las directrices que son de especial relevancia para las ONGs y OSC en el proceso de toma de decisiones sobre las operaciones financiadas por el BID y en la promoción de la rendición de cuentas del Banco a sus componentes claves – tales como los criterios para el establecimiento y la participación de las OSC y las ONG, el procedimiento de notificación, el significado de « Grupos Consultivos de la Sociedad Civil », los métodos de consulta a nivel operativo, las posibilidades de los grupos de la sociedad civil y movimientos (entre los que se incluyen la sociedad civil española y sus movimientos) para aumentar los derechos humanos y la responsabilidad democrática – serán a su vez objeto de análisis específico. Finalmente, el documento concluye con algunas observaciones sobre la responsabilidad social y democrática del BID para con la sociedad civil y los actores no estatales, refiriéndose en particular a la experiencia del mecanismo de rendición de cuentas interna, establecida por la Junta de Gobernadores del BID (máxima autoridad del Banco) en 1994 – el Mecanismo de Investigación Independiente del Banco Interamericano de Desarrollo (el “Mecanismo Independiente”) – con el objetivo de “aumentar la transparencia, rendición de cuentas y la eficacia” del Banco que fue recientemente sustituido por el Mecanismo Independiente de Consulta e Investigación (MICI) a partir del día 30 de junio de 2010.

### **Palabras clave**

Instituciones Multilaterales de Desarrollo, Responsabilidad Social y Democrática; Instituciones de Gobernanza Global; Fondo General de Cooperación de España (FGE); Organizaciones de la Sociedad Civil (OSC), Organizaciones No Gubernamentales (ONGs); Diseño y Seguimiento de Proyectos de Desarrollo, Grupo del Banco Interamericano de Desarrollo; Organizaciones Públicas y de Desarrollo; Documentos Estratégicos de Reducción de Pobreza (DERPs), Comité de ONGs del Banco.

## **I. INTRODUCTION**

The Inter-American Development Bank,<sup>1</sup> an international financial institution that is headquartered in Washington but that has recently opened its representation office for Europe in the city of Madrid,<sup>2</sup> was established in 1959 to accelerate economic and

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<sup>1</sup> The Inter-American Development Bank (IDB) was set up by the ‘Agreement Establishing the Inter-American Development Bank’, available at: <[www.iadb.org/leg/Documents/Pdf/Convenio-Eng.Pdf](http://www.iadb.org/leg/Documents/Pdf/Convenio-Eng.Pdf)> (hereinafter ‘IDB Charter’).

<sup>2</sup> See ‘IDB opens its office for Europe in Madrid’, available at: <http://www.iadb.org/en/news/announcements/2012-07-06/idb-opens-its-office-for-europe-in-madrid,10052.html>.

social development in Latin America and the Caribbean.<sup>3</sup> It has only recently sought to involve civil society movements and NGOs in the elaboration and implementation of bank-supported projects and operations.<sup>4</sup> In the last few years, due to NGOs growing relevance and influence in development-related issues in Latin American and Caribbean (LAC) countries, the Bank's interaction with NGOs including Spanish NGOs has gradually started to extend beyond project financing.<sup>5</sup> In particular since 1998, this interaction has grown significantly in the IDB's policy and operational areas, often in projects concerning the environment and social issues. This paper discusses the Bank's interaction with civil society movements and NGOs, especially the legal issues arising from the Bank-NGO cooperation.

The foundation for the Bank's interaction with international governmental institutions is set forth in article XIV, section 2 of the Inter-American Development Bank's Articles of Agreement (Articles of Agreement) which provides that: "The Bank may enter into arrangements with other organizations with respect to the exchange of information or other purposes consistent with this Agreement". Therefore the Bank may cooperate with general international institutions as well as public international organizations and national public entities such as the Spanish Agency for International Development Cooperation<sup>6</sup> which hold specific responsibilities in fields relevant to the Bank's activities

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<sup>3</sup> For information on the history and work of this organization, see F. Adam, *Le financement extérieur pour le développement: le rôle de la Banque interaméricaine de développement*, in *Etudes internationales*, 2005, p. 301 ff; G. Briggs, *El financiamiento multilateral en América Latina – su marco legal: el caso del Banco Interamericano de Desarrollo*, in *Cursos de derecho internacional / Comité Jurídico Interamericano*; prep. por la Subsecretaría de Asuntos Jurídicos, Departamento de Derecho Internacional de la Secretaría general de la Organización de los Estados Americanos, 2003, t. 2, pp. 163–193; J. Broide, *Banco Interamericano de Desarrollo: Sus Antecedentes y Creación*, Washington DC, 1968; E. Carranza, M. Ángel, *El Banco Interamericano de Desarrollo, in Derecho internacional económico y de las inversiones internacionales*, in *Biblioteca de arbitraje del Estudio Mario Castillo Freyre*, Lima: Palestra, 2009, pp. 225–259; D. Cordovez Zeger, *El Banco Interamericano de Desarrollo*, Santiago de Chile: Editorial Universitaria, 1962; G. Monroy, *Inter-American Development Bank*, in *American University International Law Review*, 1998, p. 838 ff; S.S. Dell, *The Inter-American Development Bank: A Study in Development Financing*, New York, 1972, p. 9 ff; D. Tussie, *The Inter-American Development Bank*, London, 1995. See also E.V. Iglesias, *The new Latin America and the Inter-American Development Bank*, in P.F. Diehl (ed.), *The politics of global governance*, Boulder, Colo., [etc.]: Rienner, 1997, pp. 233–242.

<sup>4</sup> See J. Howell, J. Pearce, *Civil Society and Development: A Critical Exploration*, Boulder, Colorado: Lynne Rienner Publishers, 2001, p. 217 ff. See also S. Ahmed, *The Impact of NGOs on International Organizations: Complexities and Considerations*, in *Brooklyn Journal of International Law*, 2011, p. 817 ff.

<sup>5</sup> References in A.L. Domike, *Civil society and social movements: building sustainable democracies in Latin America*, Washington D.C.: Inter American Development Bank, 2008, p. 200 ff.

<sup>6</sup> The Spanish Agency for International Development Cooperation, (AECID) is a public entity within the Ministry of Foreign Affairs and Cooperation, responsible to the Secretary of State for International Cooperation and for Latin America (SECIPI). Under the International Development Cooperation Act 23/1998, of 7 July 1998, AECID is the governing body for Spanish policy on international development cooperation, and its fundamental aim, according to the AECID statutes, is to promote, manage and implement public policies for international development cooperation, with particular emphasis on reducing poverty and achieving sustainable

and call on the Multilateral Investment Fund (MIF)<sup>7</sup> and the Inter-American Investment Corporation (IIC),<sup>8</sup> IDB's sister organizations, to cooperate with public international institutions which supply technical and financial assistance to less-developed areas of the globe, as clearly suggested by its text. The IDB has entered into formal cooperation agreements with the Organization of American States (OAS);<sup>9</sup> however, the Bank has collaborated informally with international NGOs from countries such as Spain and the United States and, more recently, local NGOs and civil society movements.

The Bank's recognition of NGOs' importance to IDB projects, programmes and activities heightened in the early 2000s and resulted in the "Strategy for Promoting Citizen Participation in Bank Activities" (the Strategy), approved by the IDB Board of Directors in 2004.<sup>10</sup> The Strategy's aims – to expand, strengthen and systematize citizen and civil society participation in the Bank's activities and operations – focused on developing new approaches to cooperation between the Bank and NGOs, reviewing the instances in which Bank/NGO cooperation had been successful, and suggesting activities which could prove beneficial to both NGOs and the borrowing member countries of the Bank.<sup>11</sup>

#### A. Evolution of Current Bank-Civil Society Policy

Prior to 2000, Bank staff only occasionally invited NGOs to perform different roles in Bank-supported activities in several of the IDB's borrowing member countries.<sup>12</sup> In 2000 the Bank moved from this ad hoc approach in dealing with NGOs to the organization of specific annual meetings with the civil society organizations of the region to hold a regular dialogue with representatives from civil society organizations and exchange

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*cont.*

human development in developing countries, as defined in each four-yearly AECID Master Plan. Among other activities, the AECID with the Inter-American Development Bank administer the Cooperation Fund for Water and Sanitation (FCAS) that finances projects in drinking water, sewage treatment, storm water drainage, and climate change adaptation. Further information on the activities of the AECID are available at: <http://www.terravivagrants.org/Home/view-grant-makers/government-organizations/spanish-agency-for-international-development-cooperation>.

<sup>7</sup> For the text of the MIF see: [http://wetten.overheid.nl/BWBO001828/geldigheidsdatum\\_30-01-2013](http://wetten.overheid.nl/BWBO001828/geldigheidsdatum_30-01-2013).

<sup>8</sup> Agreement establishing the Inter-American Investment Corporation (IIC), with annex. Drawn up/Signed in Washington November 19, 1984 and entered into force March 23, 1986. TIAS 12087.

<sup>9</sup> The OAS and the IDB signed several other agreements in specific areas which have supplemented cooperation agreements between the OAS, the IDB and the Economic Commission for Latin America and the Caribbean (ECLAS). More information is available at [http://www.oas.org/en/ser/dia/institutional\\_relations/Documents/Cooperation\\_Profile-IADB.doc-06/22/2011](http://www.oas.org/en/ser/dia/institutional_relations/Documents/Cooperation_Profile-IADB.doc-06/22/2011).

<sup>10</sup> See 'Promoting Citizen Participation in Bank Activities: Corporate Strategy (2004)', available at: <http://www.iadb.org/en/publications/publication-detail,7101.html?id=16746%20&dcLanguage=en&dcType=All>.

<sup>11</sup> *Ibidem*.

<sup>12</sup> See Strategic Planning and Operational Policy Department, *Modernization of the State and Strengthening of Civil Society*, Washington D.C: Inter-American Development Bank, 1996, p. 3.

ideas about issues related to the socio-economic development of the LAC region.<sup>13</sup> In so doing the Bank adopted a broad and inclusive definition of what constitutes a civil society organization, so as to encompass inter alia community organizations, community groups, groups of residents directly affected by Bank-financed projects, non-profit organizations and business organizations.<sup>14</sup> No less important than this is that since 2000 the Bank has identified specific roles that NGOs could play in Bank-financed projects and outlined potential benefits and problems.<sup>15</sup>

The benefits arising from the new IDB's approach to NGOs included increased access to the intended beneficiaries of Bank-financed projects.<sup>16</sup> For example, without a regular dialogue with NGOs' representatives on community development projects in Latin America and the Caribbean, the implementation of several community-driven projects sponsored by the Bank in that region probably would have been often confronted by hostile, un-cooperative target groups. Another noted benefit involved access to comments and suggestions from NGOs regarding the Bank's initiatives, in order to improve the Bank's effectiveness in the social and economic development of borrowing countries.<sup>17</sup> But according to the IDB, participation does not mean replacing or reducing the role of the governments of IDB member countries as the primary stakeholders in the Bank and as members of its highest management and decision-making bodies.

Even more importantly than these benefits, the organization of specific annual meetings with the civil society organizations and movements of the region has led to the adoption of the "Strategy for Promoting Citizen Participation in Bank Activities". This presents a corporate strategy for the first time and refers to the procedures by which the Bank incorporates citizen participation into its operational activities by means of: a) the definition of agendas, plans and policies for country development; b) the formulation of sectoral strategies and country strategies; c) project preparation and implementation; d) evaluation of the Bank's activities.<sup>18</sup>

Another significant step in the IDB's policy on collaboration with NGOs occurred after the adoption of the Guidelines for the functioning of the Civil Society Advisory Councils (the 'Guidelines') in 2010.<sup>19</sup> In fact, in the intention of its drafters, the Guidelines

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<sup>13</sup> IDB, *Citizen Participation in the Activities of the Inter-American Development Bank*, Washington D.C.: Inter-American Development Bank, 2000.

<sup>14</sup> See supra n. 10. See also C.H. Waisman, *Civil Society and the Bifurcated State: Mexico in the Latin American Mirror*, in D. Drache (ed.), *Big Picture Realities: Canada and Mexico at the Crossroads*, Waterloo, Ont.: Wilfred Laurier University Press, 2008, p. 270; D.M. Trubek, D.R. Coutinho, M. Schapiro Sr., *Towards a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions*, in Univ. of Wisconsin Legal Studies Research Paper No. 1207, 2012.

<sup>15</sup> *Ibidem*.

<sup>16</sup> See J. Howell, J. Pearce, supra n. 4, p. 217 ff.

<sup>17</sup> See supra n. 12.

<sup>18</sup> See supra n. 10.

<sup>19</sup> IDB Civil Society Advisory Councils, *Guidelines for the functioning of the Civil Society Advisory Councils*, available at: <http://www.iadb.org/en/civil-society/public-consultations/civil-society-consulting-group/civil-society-advisory-councils,5683.html>

shall operate as a reference point to each Bank's Country Office ('COF') with the aim of supplying guidance and support to the institutional relationship that the COFs are currently establishing, or will establish, with various CSOs in their respective countries.<sup>20</sup>

Recent political and historical events have provided additional justification for such Bank-NGO (and CSO) cooperation: NGOs even in the LAC region are often filling gaps left by state and market failures, and increasing pluralism is naturally leading to wider public, and thus NGO, participation.<sup>21</sup> The IDB and its borrowers are gradually learning how NGOs, especially local NGOs in borrowing countries, can give contributions to national development. However, as James Petras pointed out, it is true that: 'NGOs in Latin America emphasize projects, not movements; they "mobilize" people to produce at the margins but not to struggle to control the basic means of production and wealth; they focus on technical financial assistance of projects, not on structural conditions that shape the everyday lives of people.'<sup>22</sup>

## **B. Current Bank-Civil Society Relations**

The IDB's enlarged interest in civil society participation led to the Bank's approval of the Guidelines for the functioning of the Civil Society Advisory Councils (the 'Guidelines'), as noted earlier, which are intended to provide Bank staff with clear guidance on cooperation with local civil society movements and groups.<sup>23</sup> Drawing from the experience gathered from civil society's participation at different stages of the project cycle in a number of Bank-supported projects, the Guidelines sets forth the procedures to be followed in the Bank's cooperation with Civil Society Consulting Groups (CSOs).

Any interaction with CSOs regarding Bank-supported projects is strongly influenced by the circumstance that the Bank, an international institution, which lends only to, or with the guarantee of, a member government, unavoidably works with governments in its lending operations. Therefore, regardless of the prospective benefits of such involvement, the Bank may work directly with NGOs in a borrowing country only in a way consistent with that government's policies toward the NGOs and with the full awareness of the government concerned. On the other hand, despite this primary relationship with governments, the IDB has established mechanisms to guarantee maximum possible involvement of local and international civil society movements in Bank-supported projects and activities.<sup>24</sup>

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<sup>20</sup> *Ibidem*.

<sup>21</sup> See G. Casaburi, D. Tussie, *La Sociedad Civil y los Bancos Multilaterales de Desarrollo*, in D. Tussie (ed), *Luces y Sombras de una Nueva Relación*, Buenos Aires: FLACSO, Temas Grupo Editorial, 2000, p. 17.

<sup>22</sup> See J. Petras, *Imperialism and NGOs in Latin America*, available at: <http://www.rebellion.org/hemeroteca/petras/english/ngolai70102.htm>.

<sup>23</sup> See *supra* n. 19.

<sup>24</sup> See *infra* paras. II–III.

## II. CSO AND NGO COLLABORATIVE ROLES IN BANK-SUPPORTED ACTIVITIES AND OPERATIONS

The stage at which an NGO becomes involved in a Bank-supported operation or activity depends upon a multiplicity of issues, such as the type of project involved and the relationship between the borrower government and the NGO, and the type of NGO. Under the “Strategy for Promoting Citizen Participation in Bank Activities” NGOs may become involved at all stages of a Bank project, both before and after the project has been approved.<sup>25</sup> These stages, indicated in the Strategy in the same order in which a project proceeds, include such functions as:

- a) consultation processes for projects with environmental and social impacts and those entailing population resettlements;
- b) sector-strategy consultations with key civil society stakeholders (unions, non-governmental organizations, business associations, community organizations, political parties, academic institutions, indigenous communities, interest groups, other civil society organizations);
- c) project design;
- d) project financing;
- e) project implementation (including community auditing, which helps ensure that a project will achieve its goals), and
- f) project supervision and evaluation in particular through the elaboration of indicators to be used as guideposts for an eventual ex post evaluation with citizen participation.

The degree of civil society organizations and NGO involvement in those functions has varied. Notwithstanding the fact that NGO involvement in project implementation remains the most common practice, in recent times there has been a shift towards a greater involvement in co-financing, elaboration and supervision.<sup>26</sup> In fiscal year 2011, NGOs and CSOs were consulted and provided advice on important issues such as the Ninth General Capital Increase (GCI-9), the Climate Change Strategy, the Strategy for Institutions for Growth and Social Welfare, the Operating Policy on Gender Equality in Development, the trade and investment relationship between Spain and LAC countries<sup>27</sup> including the Memorandum of Understanding on cooperation over the next three years between Spain, the EU-LAC Foundation and the IADB<sup>28</sup> and the flow of workers from LAC countries to Spain.<sup>29</sup> NGOs and CSOs also carried out and provided advice on

<sup>25</sup> See *supra* n. 10.

<sup>26</sup> See *infra*. para. II, lett. C), D), E).

<sup>27</sup> See O. Méndez, ‘IDB spurs business bridge Spain – Latin America and Caribbean’, available at: <http://www.microdinero.com/index.php/english/nota/5439/idb-spurs-business-bridge-spain-latin-america-and-caribbean>.

<sup>28</sup> See ‘EU-LAC Foundation signs Agreement with Inter-American Development Bank’, available at: <http://www.eulacfoundation.org/news/eu-lac-foundation-signs-agreement-inter-american-development-bank>.

<sup>29</sup> See ‘Labor Migration’, available at: <http://www.iadb.org/en/topics/labor-and-pensions/idb-and-labor-migration-in-latin-america-and-the-caribbean,2954.html>.

the Private Sector Development Strategy<sup>30</sup> and the Camisea Gas Pipeline project.<sup>31</sup> In addition, the Strategy sets out the main weaknesses and strengths associated with the involvement of civil society representatives in IDB-financed activities and operations.

### A. Consultations for Projects with Environmental and Social Impacts

Several CSOs and NGOs have been involved in the development of projects proposed for Bank-financing. In particular, they have played a major role assisting governments in the development of country-wide strategies (the frameworks for Bank action in each country) and sector-wide strategies, culminating in the identification of Bank-financed projects. Recent good examples of such country-wide strategies are the Country Strategy with Argentina covering the period 2004–2008,<sup>32</sup> the country strategy with Costa Rica for the period 2006–2010<sup>33</sup> and the country strategy with Nicaragua for the period 2008–2012.<sup>34</sup> This role has been especially notable in the fields of gender equality, culture and the environment.<sup>35</sup> CSOs and NGOs are also particularly well-placed to advise on the preparation of programs aimed at alleviating the adverse effects of structural adjustment programs on the poor and have been instrumental in assisting the IDB group in this area.<sup>36</sup>

### B. Project Design

As “specific projects may require ad hoc participation approaches, which should be addressed at the early stages of project identification” the IDB has consulted CSO and NGO representatives under normal Bank guidelines and since January 2010 under the new operational guide for the Civil Society Consulting Groups (ConSOC) on pre-investment

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<sup>30</sup> See ‘IDB begins public consultation on new Private Sector Development Strategy’, available at: <http://www.iadb.org/en/news/news-releases/2011-01-21/latin-america-private-sector,9024.html>.

<sup>31</sup> References in R. Montgomery, ‘The IDB and the Camisea Project’, available at: <http://www.iadb.org/idbamerica/index.cfm?thisid=3765>.

<sup>32</sup> See IDB, IDB country strategy for Argentina focuses support on Norte Grande region and greater Buenos Aires area, available at: <http://www.iadb.org/en/news/news-releases/2012-12-12/country-strategy-with-argentina-2012-2015,10261.html>.

<sup>33</sup> See IDB, IDB: country strategy with Costa Rica 2011–2014, available at: <http://www.iadb.org/en/countries/costa-rica/costa-rica-and-the-idb,1068.html>.

<sup>34</sup> See IDB, IDB: country strategy with Nicaragua 2008–2012, available at: <http://www.prevention-web.net/english/professional/publications/v.php?id=8792>.

<sup>35</sup> Gender Action, the World Conservation Union, the World Wildlife Fund, the Civil Society Consulting Groups in Guyana and Jamaica on various occasions have assisted governments in adopting country strategies in tandem with the IDB’s work with governments on preparing national action plans, in the fields of respective competences. NGOs and CSOs have played significant roles in the preparation of national environmental and gender equality plans.

<sup>36</sup> More generally, for a good resume of the disadvantages of preventing participation of civil society movements and NGOs in the activities of international organizations see recently S. Charnovitz, *The Illegitimacy of Preventing NGO Participation*, in *Brooklyn Journal of International Law*, 2011, p. 891 ff. See also K. Tsutsui, C. Whitlinger, A. Lim, *International Human Rights Law and Social Movements: States’ Resistance and Civil Society’s Insistence*, in *Annual Review of Law and Social Science*, 2012, pp. 367–396.

projects, programmes and studies.<sup>37</sup> The Bank benefits in those circumstances from the NGOs' most valuable understanding of local institutional, socio-cultural and technological environments. When the IDB does consult an NGO, the Bank enters into an appropriate formal or informal Bank–civil society liaison arrangement such as the Civil Society Advisory Councils ('CSACs') that operate in some of the Bank's Country Offices, and the NGO works directly to support the Bank's staff and assist the government concerned in the development of the proposed project. When an NGO-affiliated individual works alone on a project, the Bank may employ the individual as a consultant, for instance through an exchange of letters.<sup>38</sup>

One example of NGO collaboration in project design involves a recommendation on pre-investment projects in Guatemala under the Inter-American Development Bank (IDB)-CELADE agreement.<sup>39</sup> The Bank's involvement in the preparation of these projects helped lay the grounds for future investment planning in Guatemala.<sup>40</sup> The Centro Latinoamericano y Caribeño de Demografía (CELADE/CEPAL), a major NGO in Guatemala, participated in this effort.<sup>41</sup>

### C. Project Financing

International NGOs and civil society organizations, such as Conservation International, the Nature Conservancy and the World Wildlife Fund, have co-financed some components of IDB financed projects and activities.<sup>42</sup> The Bank has found, nevertheless, that NGOs, civil society organizations and CSOs more often finance activities complementary to a Bank-financed project. One significant and precedent-setting example of "complementary" financing involving an NGO concerned a debt-for nature swap transaction in Bolivia.<sup>43</sup> In this case, Conservation International arranged a debt-for nature swap transaction with the Government of Bolivia to conserve important biological resources

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<sup>37</sup> According to the IDB's official webpage (<http://www.iadb.org/en/civil-society/civil-society-consulting-groups-consocs,7238.html>), the new operational guide for the Civil Society Consulting Groups (ConSOC) approved on January 29, 2010 will promote civil society participation and interaction with the IDB. See also A. Calderón Hoffmann, Foreign direct investment in Latin America and the Caribbean: an assessment at the start of the new millennium, in Z. Vodusek (ed.), Foreign direct investment in Latin America: the role of European investors, Washington, DC: Inter-American Development Bank, pp. 17–41.

<sup>38</sup> See the operational guide for the Civil Society Consulting Groups (ConSOC), *supra* n. 36, which states that: "Civil Society Advisory Councils (CSACs) in the Bank's Country Offices do not preclude other liaison and coordination arrangements between Country Offices and civil society organizations" (emphasis added).

<sup>39</sup> See GUATEMALA: Redatam and GIS training for IDB pre-investment projects, available at: <http://www.cepal.org/cgi->

<sup>40</sup> *Ibidem*.

<sup>41</sup> Further information on the activities of the CELADE/CEPAL is available at: <http://www.eclac.cl/celade/>.

<sup>42</sup> Information on these activities can be found at the official webpages of these organizations respectively at: <http://www.eclac.cl/celade/default.asp?idioma=IN>.

<sup>43</sup> References are found in C. Kilbane Gockel, L. C. Gray, Debt-for-Nature Swaps in Action: Two Case Studies in Peru, *Ecology & Society*, available at: <http://www.ecologyandsociety.org/vol16/iss3/art13/>.

in exchange for the reduction of foreign debt owed by Bolivia.<sup>44</sup> Part of the transaction involved the establishment of an operational fund for the management of the Beni Biosphere Reserve.<sup>45</sup>

In another breakthrough operation, a debt-for-nature swap signed between the Inter American Development Bank and Mexico granted funds from the IDB-supported conservation trust funds established by the Government of Mexico, the IDB and the World Wildlife Fund to finance activities designed to protect threatened tropical forests in Mexico.<sup>46</sup>

NGOs also provided some financing in the Bank's major health sector effort in Brazil, the Maués Integrated Sanitation Program, which involved funding sanitation and water improvements in the municipality of Maués in the Amazon with a loan of \$24.5 million.<sup>47</sup> This program includes financing for drainage and urbanization works for the Maresia, Prata, and Donga lagoons that consist of 33,000 meters of sanitary lines and drainage networks, 14 hectares of green areas, 3.4 km of bicycle lanes, and 900 square meters of multiuse area for fairs and expositions.<sup>48</sup> Unlike earlier programmes, the local government in this case readily agreed to interact with civil society movements and mechanisms for wider civil society support are evolving.

#### **D. Project Enforcement**

Most likely since participation processes have a cost, in terms of time and resource requirements, only a small percentage of IDB-NGO involvement occurs when NGOs act as project implementation entities for borrowing governments. Unsurprisingly, therefore, this has led to some unsatisfactory results, as also demonstrated by some recent activities of the Bank. In Mexico, for example, the IDB has spent more than 100 million dollars on private projects for wind energy, especially in the southern state of Oaxaca, but the energy and financial benefits did not extend to the local communities. This is also due to the lack of involvement of civil society movements and organizations during the implementation stage of the project.<sup>49</sup> According to ten NGOs from Brazil, Chile, Colombia, Ecuador, Mexico, Peru and the United States, priority was not given in that case either to initiatives for local and decentralised development, or to policies and

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<sup>44</sup> Conservation International paid US dollars 100,000 to purchase US dollars 650,000 face value in debt owed by Bolivia to commercial creditors.

<sup>45</sup> See *supra* n. 42.

<sup>46</sup> References are in I. Tomaselli, Brief Study on Funding and Finance for Forestry and Forest-Based Sector, available at: [http://www.un.org/esa/forests/pdf/publications/brief\\_funding\\_tomaselli.pdf](http://www.un.org/esa/forests/pdf/publications/brief_funding_tomaselli.pdf).

<sup>47</sup> The IDB loan has a 25 years term, a grace period of five-and-a-half years, and an interest rate based on the Libor.

<sup>48</sup> Brazil gets \$24.5 million IDB loan for sanitation and water improvements in the municipality of Maués in the Amazon, available at: <http://www.iadb.org/en/news/news-releases/2012-11-22/water-and-sanitation-in-brazil,10227.html>.

<sup>49</sup> See E. Godoy, We Need Sustainable Development Banks, Say NGOs, available at: [http://www.insidecostarica.com/special\\_reports/2010/2010-07/banks\\_development.htm](http://www.insidecostarica.com/special_reports/2010/2010-07/banks_development.htm).

directorates that are participatory and transparent, ‘in order to strengthen governance and prevent an increase in social conflicts’.<sup>50</sup>

Another noticeable example of the non-involvement of NGOs in project implementation is the Camisea natural gas pipeline project in the Peruvian Amazon, “arguably the most damaging project in the Amazon Basin”.<sup>51</sup> Consequently this has been bitterly criticised by several NGOs on these and other grounds, especially after five ruptures along the pipeline route caused contaminant spills onto the ancestral lands of indigenous peoples and into the pristine rivers and streams through the region.<sup>52</sup>

Furthermore, and significantly, NGOs’ representatives were not involved in project implementation even at the end of the IDB’s annual meeting in the southeast Mexican resort of Cancún in 2010, where the delegates from the institution’s 48 member countries agreed to a general capital increase of 70 billion dollars, greater transparency in the allocation of funds, and a stronger focus on climate change.<sup>53</sup> Consequently, 110 non-governmental organisations from 22 countries of Latin America and the Caribbean firmly objected to that sum, maintaining that the IDB had not justified that amount, had refused to share a draft of its replenishment proposal, and had failed to give responses to recommendations for reforms.<sup>54</sup>

### E. Monitoring and Assessment

With their ability to operate at the ‘grass roots’ level, civil society organizations and movements may supply ongoing monitoring and evaluation of the Bank-financed activities and projects.<sup>55</sup> Depending upon the specific circumstances, NGOs can do this work alone, together with the government or a government agency, with a project entity, or with the Bank.<sup>56</sup>

There are only a few examples of such NGO monitoring and evaluation, but the IDB expects greater activity in the near future. For instance, NGO consultants have supplied periodic evaluations on behalf of a borrower during technical and management assistance contracts and service delivery. In the Camisea gas project in Peru, 23 major Peruvian civil society movements monitored the implementation (or more precisely, the non-implementation) of the social and environmental protection measures in the

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<sup>50</sup> Ibidem.

<sup>51</sup> See S. Walden, B. Edwards, Whistleblowers Reveal Inter-American Development Bank (IDB) Covered up Deficiencies in Camisea Gas Project, available at: <http://www.whistleblower.org/blog/31-2010/832-whistleblowers-reveal-inter-american-development-bank-idb-covered-up-deficiencies-in-camisea-gas-project>.

<sup>52</sup> Ibidem.

<sup>53</sup> See E. Godoy, LATIN AMERICA: IDB Agrees to Reforms, But NGOs Will Keep Up Pressure, available at: <http://www.ipsnews.net/2010/03/latin-america-idb-agrees-to-reforms-but-ngos-will-keep-up-pressure/>.

<sup>54</sup> Ibidem.

<sup>55</sup> See G. Casaburi, M.P. Riggiozzi, M.F. Tuozzo, D. Tussie, MDBs, Governments and Civil Society: Chiaroscuros in a Triangular Relationship, in *Global Governance*, 2000, pp. 493–517. See also T. Kelley, Wait! That’s Not What We Meant by Civil Society!: Questioning the NGO Orthodoxy in West Africa, in *Brooklyn Journal of International Law*, 2011, p. 993 ff.

<sup>56</sup> See J.L. Cohen, A. Arato, *Civil Society and Political Theory*, Cambridge, MA: MIT Press, 1992.

Amazon Basin.<sup>57</sup> Other international NGOs involved in this project, such as *Médécins-sans-Frontières* and *Friends of Earth*, share responsibility for managing the well being of local indigenous people affected by the *Camisea Gas Project* in Peru.<sup>58</sup>

Local NGOs are also helping monitor and evaluate the anti-corruption, anti-poverty and rural development programs in Bolivia.<sup>59</sup> However, and significantly, in the recently approved IDB credit for renewable energy projects and modernization of the *Rio Macho* hydropower plant to improve performance and its life span, neither local nor international NGOs played a constructive and effective role in the reform process of the energy sector and to diversify the energy matrix.<sup>60</sup>

In the recently enhanced policy to establish the Independent Consultation and Investigation Mechanism, NGOs serve on a steering committee established to determine the general operation and functioning of the mechanism, namely to help to increase the access for local communities to express their concerns on Bank supported-projects in their countries and monitor their execution, including compliance with the Bank's operational policies during the design and implementation of projects financed by the organization.<sup>61</sup>

### III. CSOS AND NGOS' ROLE IN CARRYING OUT ACTIONS DEMANDED UNDER BANK ACTIVITIES

#### A. Involuntary Resettlement Policy

When Bank-financed operations, in the public or private sector, contemplate involuntary physical displacement of people living in the Latin America and the Caribbean region, Operational Policy OP-710, entitled 'Resettlement', delineates the procedures and policies a prospective borrower should follow.<sup>62</sup> OP-710 states as its core guiding principle that involuntary resettlement must be avoided or minimized where feasible and that all viable alternative projects designs must be reviewed.<sup>63</sup> This implies, for instance, that: 'when displacement is unavoidable, a resettlement plan must be prepared to ensure

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<sup>57</sup> See S. Walden, B. Edwards, *supra* n. 50.

<sup>58</sup> *Ibidem*.

<sup>59</sup> See A. Bebbington, *New States, New NGOs? Crises and Transitions among Rural Development NGOs in the Andean Region*, in *World Development*, 1997, pp. 1755–65.

<sup>60</sup> See IDB, IDB approves \$500 million conditional credit line for Costa Rica's power company, available at: <http://www.iadb.org/en/news/news-releases/2007-10-24/idb-approves-500-million-conditional-credit-line-for-costa-ricas-power-company,4103.html>.

<sup>61</sup> The Inter-American Development Bank (IDB) recently adopted a new accountability mechanism under which local communities impacted by an IDB-financed project may request investigation of possible violations for the IDB's safeguard policies including its environmental policy. The newly created Independent Consultation and Investigation Mechanism (ICIM) replaces the IDB's old mechanism and became effective on June 30, 2010.

<sup>62</sup> This Operational Policy (OP-710) was approved by the Board of Executive Directors of the Inter-American Development Bank on July 22, 1998. The full text of OP-710 is available at: <http://www.iadb.org/intal/intalcdi/PE/2010/07171.pdf>.

<sup>63</sup> Art. II.

that the affected people receive fair and adequate compensation and rehabilitation.<sup>64</sup> The Policy also notes that the experience of NGOs can often be used to guarantee that the interests and needs of local communities to be affected by possible resettlement are expressed and taken into adequate consideration.<sup>65</sup>

Bank consultations with NGOs on resettlement issues proved essential in the Mexico Hydroelectric Project (MHP), which took place in the early 1990s and included two separate dam projects, displacing a total of 3,500 people.<sup>66</sup> With respect to this project, Accountability Counsel, an international NGO based in the US, in cooperation with Mexican and international organizations such as Habitat International Coalition América Latina ('HIC-AL') and Servicios para una Educación Alternativa A.C. ('EDUCA') supplied, amongst other things, fundamental knowledge of local conditions and greatly contributed to the design of a more socio-culturally sensitive resettlement scheme.<sup>67</sup> Accountability Counsel performed a social survey of the communities in Oaxaca, Mexico, assessed relocation potential, and prepared a Final Problem-Solving Report summarizing its perception of the problem-solving process.<sup>68</sup>

## B. Indigenous Peoples Policy and the Strategy for Indigenous Development

In February 2006 the IDB issued the long awaited Operational Policy OP-765, entitled 'Indigenous Peoples', and its complementary Strategy (GN-2387-5) for indigenous development or in other words for a 'development with identity', to provide guidance to the Bank's personnel and to prospective borrowers on issues arising out of bank-financed projects and investments which affect such peoples.<sup>69</sup>

The Bank's stated aims in this Operational Policy are in particular: "a) to give wider visibility for indigenous peoples including ethnic groups and their specificity through for instance systematic and relevant mainstreaming of indigenous issues in national development programs and agendas and in its own operations portfolio; b) to support national governments in elaborating public policies which reflect the recognition of indigenous peoples in accordance with most countries' legal frameworks, that incorporate multi-ethnicity and multiculturalism; c) to promote, in order to fulfil countries'

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<sup>64</sup> Art. III, par. 2.

<sup>65</sup> See e.g. Art V, par. 2.

<sup>66</sup> For a good account of these issues see Jason Stanley, *Financing Matters: Where funding arrangements meet resettlement in three Mexican dam projects*, RSC Working Paper No. 14, October 2003, available at: [http://www.rsc.ox.ac.uk/publications/working-papers-folder\\_contents/RSC-workingpaper14.pdf](http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSC-workingpaper14.pdf).

<sup>67</sup> Information is in the Accountability Counsel's official webpage at: <http://www.accountability-counsel.org/>.

<sup>68</sup> *Ibidem*.

<sup>69</sup> For their texts and a commentary see IDB, *A brief independent guide to the Inter-American Development Bank's New Operational Policy on Indigenous Peoples (OP-765)*. See also J.W. Head, *Protecting and Supporting Indigenous Peoples in Latin America: Evaluating the Recent World Bank and IDB Policy Initiatives*, in *Journal of International Law and Practice*, 2006, p. 383 ff.

development aims including the ‘Millennium Development Goals’;<sup>70</sup> a breakdown of the most common indicators and the enactment of socio-culturally appropriate and specific indicators for ethnic groups and indigenous peoples. Moreover, as it appears from the reference to poverty reduction strategies and assessments, OP-765 aims to ensure that indigenous peoples and ethnic groups receive culturally compatible economic and social benefits.<sup>71</sup> This Operation Policy also explicitly recognizes that the issue of how to approach indigenous peoples and ethnic groups is highly controversial and states that the strategy for addressing the issues concerning indigenous peoples should be based on the informed participation of the indigenous peoples themselves.<sup>72</sup>

With the view of building indigenous issues into IDB programs and projects as well as of guaranteeing such informed participation, OP-765 demands that, before proceeding with a project that may adversely affect indigenous peoples or ethnic groups, a development assessment should be planned in a manner thoroughly consistent with IDB policy.<sup>73</sup> This implies in particular that such an ‘indigenous peoples’ development assessment should be structured around the pivotal concept of ‘development with identity’ and must be based on a systematic and complete evaluation of the options selected by the indigenous peoples to be affected by the implementation of the Bank’s project, program or investment.<sup>74</sup> Recognizing the fundamental role of local and international civil society (but also of public foundations, private enterprises, other indigenous groups, etc.) in ‘materialising’ the options of indigenous peoples, OP-765 provides that the institutions responsible for government engagement with ethnic groups and indigenous peoples must normally involve NGOs any time that this is not only ‘necessary’ but also when this is ‘socio-culturally relevant’.<sup>75</sup> Therefore, each development assessment should have the characteristics that are typical of ‘integrated local development projects’ that: ‘acknowledge the leadership role played by indigenous organizations and communities in project conceptualization, participatory planning, decentralized execution, and local capacity-building’;<sup>76</sup> and local and international civil society must be involved in devising mechanisms which enable local peoples to participate in decision-making. This approach has also been recently endorsed by the Inter-American Court of Human Rights (‘ICTHR’) in the *Sarayaku* case<sup>77</sup> where it was declared that Ecuador had failed to meet its international responsibility in failing to consult the Sarayaku indigenous

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<sup>70</sup> The United Nations Millennium Development Goals are eight goals that all 191 UN member states have agreed to try to achieve by the year 2015. The United Nations Millennium Declaration, signed in September 2000, commits world leaders to combat poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women. The MDGs are derived from this Declaration, and all have specific targets and indicators.

<sup>71</sup> Articles IV.B.4.4.a.i and V.5.3.b).

<sup>72</sup> Art. IV.B.4.4.a.ii and iii)

<sup>73</sup> Art. IV.A.4.2.b).

<sup>74</sup> Art. IV.B.4.4.b).

<sup>75</sup> Art. V.5.3 (a).

<sup>76</sup> Art. IV.B.4.4.a.ii and iii).

<sup>77</sup> *Kichwa Indigenous Community of Sarayaku v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 245, para. 176 (June 27, 2012).

community when it granted oil concessions in the community's ancestral lands.<sup>78</sup> Moreover, once such mechanisms are in place, CSOs and NGOs must be solicited to assist with the supervision and evaluation of the development assessment. As a proper way for the project's management to absorb the preferences of indigenous and ethnic groups beneficiaries, OP-765 encourages supervision by representatives of indigenous peoples and ethnic groups' own organizations.<sup>79</sup>

In some countries of the LAC region, nevertheless, it is not clear whether indigenous peoples or representative CSOs and NGOs may efficiently organize and express their options. For this reason, OP-765 provides for the benefit of these categories of vulnerable individuals: a) a brief assessment of the status of indigenous peoples and ethnic groups (more than 400, with their high ethnic and linguistic diversity) in the Latin American and the Caribbean region; b) a summary of the Bank's experience – the long-term objectives, principles, requirements, conditions, and rules for Bank activities *vis-à-vis* indigenous peoples in general.<sup>80</sup>

To sum up, OP-765 and its complementary Strategy for the very first time explicitly provides local and international civil society with a concrete role in dealing with the prospective borrower on projects of relevance to ethnic groups and indigenous peoples.

### C. Environmental Assessment Policy

In the early 1990s, during the latter part of Mr. Iglesias's presidency, the IDB started a substantial revision of its outdated, 452-word Environment policy, which had served as the standing policy on this fundamental issue since its adoption in 1979.<sup>81</sup> In so doing the Bank made a significant step toward the incorporation of environmental considerations into Bank-financed development projects, but it addressed the issue mainly on an informal basis until the early 2000s.<sup>82</sup> In March 2004, however, the IDB Executive Directors approved and disclosed an advanced profile of a revised environment and safeguards compliance policy for comment, and one month later the IDB announced a plan for consultation with civil society movements on the advanced profile of the policy.<sup>83</sup> After successful consultation periods on the environment policy, the IDB decided to withhold the draft version of the Environment and Safeguards Compliance Policy (ESCP) that was submitted to the IDB's Policy and Evaluation Committee, despite promises from the IDB Board and Management that this would be shared with NGOs.<sup>84</sup> This absence of transparency ultimately negatively affected the whole consultation process, since it was impossible for civil society organizations (CSOs) to know if their observations and

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<sup>78</sup> For a commentary see L. Brunner, K. Quintana, *The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku*, in *ASIL Insights*, vol. 16 (35), available at: <http://www.asil.org/insights121128.cfm>.

<sup>79</sup> Art. IV.B.4.4.a.ii and iii).

<sup>80</sup> Art. IV.B.4.4.a. ii, iii) and g).

<sup>81</sup> Information on this policy is available at: <http://www.bicusa.org/en/Article.2448.aspx>.

<sup>82</sup> *Ibidem*.

<sup>83</sup> See IDB GROUP NEWS, *IDB approves new environmental policy*, available at: <http://www.iadb.org/idbamerica/index.cfm?thisid=3873>.

<sup>84</sup> *Ibidem*.

suggestions had been included in the new draft.<sup>85</sup> Eventually, in late October 2005, the IDB Executive Director for Argentina supplied CSOs with a copy of the draft Environment policy.<sup>86</sup> In compliance with the Bank's Environment Strategy (GN-2208-4),<sup>87</sup> approved by the Board in July of 2003, which identifies key principles and priority actions to improve the effectiveness of internal Bank activities and procedures, a new Environment and Safeguards Compliance Policy strengthening the Bank's commitment with environmental sustainability in the region was finally adopted in 2006.<sup>88</sup> This policy applies both to the IDB and the MIF, and includes financial and non-financial products; public sector and private sector operations; environmental aspects of the Bank's project procurement practices and management of its own facilities.<sup>89</sup>

The Policy expressly recognizes the role of local NGOs and CSOs, providing for consultation with affected groups and local NGOs and CSOs to have their views fully taken into account in project design and implementation, especially during the preparation of an Environmental Assessment (EA).<sup>90</sup> The Policy encourages that such consultations take place once a draft environmental assessment report (alias a country-level environmental analysis) has been elaborated.<sup>91</sup> However, the Policy does not provide a checklist on community involvement to guide IDB staff in identifying and interviewing community representatives, NGOs and experts.

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<sup>85</sup> See *supra* n. 80.

<sup>86</sup> *Ibidem*.

<sup>87</sup> The Bank's Environment Strategy (GN-2208-4) is a guiding instrument whose fundamental objective is to attain greater effectiveness in the support that the Bank offers each of the borrower countries of Latin America and the Caribbean to achieve their sustainable development goals. The strategy sets forth guiding principles and general priority areas of action that the Bank would promote, on a cross cutting basis, in the context of the pipeline of operations agreed with each borrowing country. More information is available at: <http://www.iadb.org/en/publications/publications,4126.html?doctype=&docTypeID=AllPublic&searchLang=&keyword=Integration%20%26%20Trade%20%3A%3A%20Globalization%20%26%20Regionalization&selectList=All&topicDetail=1&tagDetail=0&jelcodeDetail=0&publicationCover=0&topic=Integration%20%26%20Trade%20%3A%3A%20Globalization%20%26%20Regionalization%3BCOSO&page=7>.

<sup>88</sup> See IDB, IDB approves new environment and safeguards compliance policy, available at: <http://www.iadb.org/en/news/news-releases/2006-01-9/idb-approves-new-environment-and-safeguards-compliance-policy,2643.html>. See also R. Bowen, Walking the Talk: the Effectiveness of Environmental Commitments Made by Multilateral Development Banks, in *The Georgetown International Environmental Law Review*, 2010, p. 731 ff.

<sup>89</sup> *Ibidem*.

<sup>90</sup> *Ibidem*.

<sup>91</sup> In particular this Policy provides that:

'Country-level environmental analysis should be strategic in nature and focused on targeted sectors or areas that are likely to be highly relevant in the overall Bank's engagement with the country. In this context, this analytical work will consider relevant aspects such as: (i) the identification and analysis of environmental priority issues and opportunities across sectors, including their links to social and economic drivers, and poverty reduction objectives, as well as their regional and global implications; (ii) the state of environmental governance (e.g., level of institutional development, civil society participation, etc'. ("Supporting Environmental and Natural Resources Management Operations", para. A. 2, p. 6).

#### D. Disaster Risk Management Policy

NGOs can make a difference in disaster risk management ('DRM') efforts through participation and empowerment in the planning, decision-making and implementation processes.<sup>92</sup> Fully aware of this, the Bank envisions similar collaboration between NGOs and other project participants in the management of disaster risks.<sup>93</sup> As a result, the operational policy for disaster risk management adopted on February 2007<sup>94</sup> to replace OP-704 on 'Natural and Unexpected Disasters' provides that Bank staff must consult with NGOs as appropriate, bearing in mind the capacity of NGOs of managing "risks related to natural hazards at the regional, national and local levels and for the successful achievement of this policy's objectives".<sup>95</sup>

#### E. Gender Equality

In November 2010 the Bank issued a new operational policy, to provide guidance to the IDB's staff and to prospective borrowers on gender issues across development sectors and throughout the elaboration, enforcement, supervision and assessment of IDB-financed activities and operations.<sup>96</sup> More specifically, the new policy expressly seeks to enhance projects that define gender equality or women's empowerment as their main goal.<sup>97</sup> A noteworthy example of such an operation currently in execution is a project with MiBanco in Peru where the IDB is lending \$10,000,000 to widen access to financial services for women and micro entrepreneurs.<sup>98</sup> Even more significantly here: "the Bank will seek the equitable participation of women and men, as well as the participation of civil society organizations" as requested by this policy in para. 16. Furthermore, the policy also provides that: "In project-related consultations, the Bank will seek the inclusion of the women and men affected in a gender-sensitive and socio-culturally appropriate manner".<sup>99</sup>

In order to ensure such informed participation, the policy demands that, before proceeding with a project which can affect the right to equality between women and men, as well as the specific rights of women, as established in the national legislation of the regional member countries and in applicable international treaties, a development plan

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<sup>92</sup> See K. Chandra Samal, *State, NGOs and disaster management*, Bangalore: Rawat Publications, 2005; D.P. Coppola, *Introduction to International Disaster Management*, Amsterdam: Elsevier, p. 488 ff. See also R. Lester, *The World Bank and natural catastrophe funding. The Changing Risk Landscape: Implications for Insurance Risk Management*, Proceedings of a Conference sponsored by Aon Group Australia Ltd, Sydney, Australia, 1999.

<sup>93</sup> See P.K. Freeman, L.K. Martin, R. Mechler, K. Warner, P. Hausmann, *Catastrophes and Development. Integrating Natural Catastrophes into Development Planning*, Washington DC, 2002.

<sup>94</sup> Information is available at: <http://www.iadb.org/en/topics/natural-disasters/disaster-risk-indicators/disaster-risk-indicators,1456.html>.

<sup>95</sup> *Ibidem*.

<sup>96</sup> IDB, *Operational Policy On Gender Equality In Development*, 3 November 2010.

<sup>97</sup> Art. IV, para. 1.

<sup>98</sup> Information is available at: <http://www.iadb.org/en/news/news-releases/2010-08-06/peru-mibanco-to-boost-credit-for-women-microentrepreneurs-idb,7613.html>.

<sup>99</sup> Art. IV.

should be elaborated in a manner consistent with Bank policy.<sup>100</sup> This gender equality development plan should be based on: “affirmative actions specifically targeted to women or men with the goal of closing existing gender gaps, meeting specific gender-based needs of either group, or ensuring the participation of either group in consultations will not constitute discrimination or exclusion”.<sup>101</sup> Recognizing the key – though by no means exclusive – role of civil society movements and organizations in assessing operations’ potential adverse impacts on gender equality, the policy provides that the institutions responsible for boosting the analysis and mainstreaming of gender in policies and programs should normally involve civil society organizations and movements with expertise in gender issues.<sup>102</sup> Therefore, NGOs and civil society movements must be involved in devising mechanisms which enable the equitable participation of women and men in decision-making. Moreover, once such mechanisms are in place, civil society movements must be invited to assist with the monitoring and evaluation of the development plan. As an efficient way for the project’s management to absorb gender perspectives into development plans and poverty reduction plans, the IDB encourages monitoring by representatives of NGOs and civil society movements involved in gender issues.

In conclusion, the new operational policy for the first time expressly provides civil society organizations and NGOs with a concrete role in dealing with the prospective borrower on projects involving gender issues.

#### **IV. CONSULTATION WITH CSOS AND NGOS ON BANK POLICIES AND STRATEGIES**

In a critical development, CSOs and NGOs have only very recently started to become directly involved in the drafting of the IDB policies, directives and strategies of special interest.<sup>103</sup> Indeed prior to 2004 the IDB issued policies and directives to be used almost exclusively by IDB staff and other specifically authorized persons and not to be disclosed, quoted, or cited at least in principle outside of the Bank.<sup>104</sup> In 2004 the Bank’s Board of Executive Directors adopted the Strategy for Promoting Citizen Participation in Bank Activities, including the drafting of operational policies and Bank’s strategies, with the view of turning the IDB from a relatively closed institution into an institution accountable and open to civil society.<sup>105</sup> At the same time, Bank management under the strong pressure of the representatives of several NGOs and CSOs such as Amazon Watch, the Centro de Derechos Humanos y Medio Ambiente and Oxfam America decided that although the IDB intended the operational policies and directives primarily for use within the Bank, these policies and directives could be shared with member countries, specialized OAS agencies, and other multilateral public development institutions and

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<sup>100</sup> Art. V.

<sup>101</sup> Art. IV, para. 18.

<sup>102</sup> Art. IV, para. 13.

<sup>103</sup> See also A. Vianna Jr., *Civil Society Participation in World Bank and Inter-American Development Bank Programs: The Case of Brazil*, in *Global Governance*, 2000, pp. 457–72.

<sup>104</sup> See *supra* n. 10.

<sup>105</sup> *Ibidem*.

interested parties and groups, including the Spanish Agency for International Development Cooperation, (AECID), NGOs and CSOs.<sup>106</sup>

This new transparency has led to Bank debates with local and international NGOs on certain IDB operational policies and strategy issues. Therefore, after the November 2004 issuance of the Operational Policy on Gender Equality in Development, Bank staff held special meetings with CSOs and NGOs to inform those CSOs and NGOs of the IDB's new policies and procedures with respect to gender equality in the Latin American and Caribbean region.<sup>107</sup>

In addition, in March 2011 the Bank departed from its traditional practice and invited CSOs and NGOs to attend a meeting to discuss the IDB's new Climate Change Strategy before its adoption by the Board of Executive Directors.<sup>108</sup> The IDB then incorporated CSOs and NGOs' views into its policy paper. In March 2001, the IDB undertook similar exercises with CSOs and NGOs on draft Bank strategy on Social Policy for Equity and Productivity.<sup>109</sup>

Currently, the IDB invites CSOs and NGOs to several international conferences and meetings the IDB organizes (for instance, the Social Innovation in Human Capital Development Seminar convened in Washington in November 2012 by the Bank);<sup>110</sup> indeed, the IDB and several CSOs and NGOs have jointly sponsored several international meetings.<sup>111</sup>

At the annual meetings of the IDB's Board of Governors, generally held in March or April of each year to review the Bank's operations and make major policy decisions, Governors representing IDB member countries have stressed the role of NGOs in IDB activities and strategies.<sup>112</sup> In addition, the Board of Executive Directors that is responsible for the conduct of the operations of the Bank has specially recognized the fundamental role that NGOs can play, especially in activities relating to the indigenous peoples, involuntary physical displacement of people and disaster risk management.<sup>113</sup>

NGO representatives have gained access to another forum of the IDB Group through their participation in an informal meeting with the Multilateral Investment Fund's management in March 2011, in the context of the discussions on the second MIF replenishment.<sup>114</sup> Although this type of Bank-NGO interaction is not likely to be regular (mainly

<sup>106</sup> Ibidem.

<sup>107</sup> Information is available at: <http://www.iadb.org/en/civil-society/the-idb-and-civil-society,6160.html>.

<sup>108</sup> Ibidem.

<sup>109</sup> Information is available at: <http://www.iadb.org/en/civil-society/public-consultations/public-consultation-strategy-on-social-policy-for-equity-and-productivity/strategy-on-social-policy-for-equity-and-productivity,1886.html>.

<sup>110</sup> Ibidem.

<sup>111</sup> Some noteworthy examples are the Annual IDB – Civil Society Meetings in Latin American and Caribbean countries, devoted exclusively to dialogue with civil society organizations in the region and in other countries such as the United States and Europe.

<sup>112</sup> Information on this issue is available at the IDB's official webpage at: <http://www.iadb.org/>.

<sup>113</sup> See *supra* para. 3, B.

<sup>114</sup> See F. Seatzu, *The Role of the Multilateral Investment Fund (MIF) in the Promotion of Foreign Private Investments in the Latin American and Caribbean Region*, in A. Tanzi, A. Asteriti (eds.), *International Investment Law in Latin America*, Naples, 2013 (on file with the author).

since these meetings are not scheduled on a regular basis), this initial encounter was an important step in the IDB Group's increasing awareness of the significant contribution that civil society organizations, grass-root movements and CSOs may provide in enhancing the effectiveness of the strategies and projects of the IDB Group.<sup>115</sup> Discussion at this informal meeting focused on issues of appropriate criteria for the evaluation of poverty, governance and social costs of structural adjustments.<sup>116</sup>

## V. SPECIAL ISSUE: DISCLOSURE OF INFORMATION

CSOs and NGOs have an effective interest in access to IDB information regarding specific programmes and projects similar to the CSOs' and NGOs' interest in the IDB's policy-making process. Environmental NGOs in particular have strongly criticized the IDB for limiting the access to information that they contend is of relevance to the public opinion.<sup>117</sup> The NGOs base their criticism on the assertion that the IDB and other public multilateral development organizations which use public funds to lend for public purposes must be transparent and always open to public scrutiny.<sup>118</sup> While this criticism was formulated initially by NGOs in developed countries, analogous complaints have also been expressed by NGOs and CSOs in developing countries. For instance, 110 non-governmental organisations from 22 countries of Latin America and the Caribbean have recently criticised the IDB for not sharing a draft of its replenishment proposal, as well as for failing to provide adequate responses to recommendations for reforms formulated by the representatives of these and other NGOs and CSOs.<sup>119</sup>

As mentioned above, in recent times the IDB has been willing not merely to discuss its policies but to make its internal operational procedures and directives available to interested groups, as well as to NGOs and CSOs.<sup>120</sup> The IDB should guarantee, nevertheless, that it keeps its relationships with borrowing countries at an appropriate level of reciprocal confidence.<sup>121</sup> Moreover, the IDB should continue to receive from borrowing countries the information indispensable to the efficient performance of the IDB's work. IDB policy therefore seeks an appropriate balance concerning disclosure.<sup>122</sup> IDB's

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<sup>115</sup> See more generally on the interaction between civil society movements and multilateral banks' managements during replenishment processes of these institutions S. Babb, *Behind the Development Banks: Washington Politics, World Poverty, and the Wealth of Nations*, Chicago: University Press, 2009.

<sup>116</sup> See F. Seatzu, *supra* n. 113.

<sup>117</sup> See *inter alia*, H.J. Johnson, *Multilateral Development Banks: Public Consultation on Environmental Assessments*, Washington DC, 1998, p. 49 ff.

<sup>118</sup> References are found in K. Menemencioglu, *A Critique of Inter-American Development Bank's Neoliberal Discourse of Exclusion*. Msc Thesis, Reading University (2008).

<sup>119</sup> See E. Godoy, *LATIN AMERICA: NGOs Demand Transparency, Reforms in IDB*, available at: <http://www.globalissues.org/news/2010/03/17/4883>.

<sup>120</sup> But the international financial institutions including also the IDB fared poorly in the "freedom of information" category of the recently issued ratings by Publish What You Fund (<http://www.freedominfo.org/2012/10/ifis-rate-low-on-access-by-publish-what-your-fund/>).

<sup>121</sup> *Ibidem*.

<sup>122</sup> See W. Carrington and H. Jin Lee, *Governance and Accountability at the Regional Development Banks*, in *The University of Iowa Center for International Finance and Development Research Papers*, May 2008.

General Operational Policies encourage governments and the IDB staff to be responsive to CSO and NGO demands for information while keeping these demands of information subject to the limitations in the IDB's new Policy on Access to Information Disclosure for the institution (the 'Access Policy'), which since January 1, 2011 has replaced the Bank's Disclosure of Information policy of 2003.<sup>123</sup>

Re-affirming the Bank's commitment to transparency (or more precisely the Bank's efforts and commitment to adopt the highest standards of transparency in all aspects of its operations and activities), the Access Policy reflects the best practices that IDB clients, principally the countries of the Region that IDB serves, have adopted in recent years, including 'information disclosure', 'borrower disclosure practice' and the 'use and dissemination of information' indicators in assessing results-based budgets, projects and programs.<sup>124</sup> The language of this Policy, in particular the reference to 'a compelling reason not to disclose information, shows the existence of a clear presumption in favour of disclosure, both outside and within the Bank. The same conclusion arises from Principle 3 of the Policy which, after having asserted at the beginning that IDB: 'will employ all practical means to facilitate access to information', declares that the: 'guidelines for maximizing access to information will include clear and cost-effective procedures and timelines for processing requests and will be based on use of a system for classifying information according to its accessibility over time'. Analogous conclusions are suggested by Principle 4 which declares that: 'When denying access to information the Bank will provide an explanation for its decision'. Moreover, a further confirmation is also that at any exceptions to disclosure should be predicated upon the possibility, narrowly and clearly defined, that the potential harm to interests, entities or parties arising from disclosure of information outweigh the benefits according to the Policy. The Policy nonetheless restricts the circulation of some documents such as: a) the documents related to the Bank's decision-making process; b) the documents containing confidential information provided to the IDB on the condition of no external disclosure; c) the documents that the Bank is legally obligated to non-disclosure; d) the documents that the Bank has received with the understanding that information contained therein will not be disclosed; e) the documents containing information which may affect the Bank's activities in capital and financial markets or to which such markets may be sensitive.<sup>125</sup>

However, the Policy introduces a two-stage review mechanism for requesters who are denied access to information in the form of: a) an interdepartmental 'Access to Information Committee' and b) in the event that the interdepartmental Committee were to deny the request, a three-member external panel.<sup>126</sup> The Bank bases its new policy

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<sup>123</sup> Full text of the new "Access to Information Policy" is available at: <http://www.iadb.org/en/news/news-releases/2010-05-12/new-inter-american-development-bank-access-to-information-policy-idb,7133.html>. This policy will supersede the version of OP-102 (GN-1831-18) dated August 17, 2006 (<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=784916>) with respect to documents and information produced on or after January 1, 2011.

<sup>124</sup> Para. 2 (Principles).

<sup>125</sup> Principle 2 (Narrow and clear exceptions).

<sup>126</sup> Principle 4 (Explanations of decisions and right to review).

on documents dealing with Bank decision-making on the assumption that documents are not final while under deliberation by the Bank and decision-makers in borrowing countries. Thus, the documents must not be made available to third parties before the parties involved have taken definite positions as premature disclosure might compromise the decision-making process. Moreover, if the documents belong to the IDB, the IDB must be able to guarantee the authors their freedom to write their drafts with simplicity, unhindered by the concern that whatever they write can automatically become public knowledge and adversely harm the Bank's relationship with a borrower.<sup>127</sup> If the documents involved belong to a borrower, the Bank cannot disclose those materials without its approval.

Despite these and a few other restrictions on disclosure explicitly recalled in the Policy,<sup>128</sup> the Bank has recently adopted a much more pro-disclosure approach concerning environmental assessment reports.<sup>129</sup> For instance, when an environmental assessment ('EIA') is performed, the IDB expects a prospective borrower to engage local NGOs, affected groups and communities in meaningful consultations. Indeed EIAs are made available to affected populations and local nongovernmental organizations by the borrower before the Bank proceeds to the formal analysis of a project. Several other environment related directives encompass provisions on the sharing of information. The 2006 Environment and Safeguard Compliance Policy that prompted environmental issues to be identified and addressed during the project design, for instance, provides that systematic information sharing and regular consultation among host populations and local NGOs lead to increasing access for people to voice their concerns and monitor closely what the Bank is doing about their requests.<sup>130</sup>

Open disclosure policies are also being pursued by the 'Strategy for Indigenous Development' and its companion 'Operational Policy on Indigenous Peoples' with respect to projects that may affect indigenous peoples.<sup>131</sup> As a corollary to the formal consultations with local NGOs and grassroots organizations prior to the design of Bank operations and the enactment of activities that may potentially and significantly impact indigenous peoples through, for instance, the formation of councils and spaces for dialogue with indigenous peoples' representatives when appropriate, all documents including a summary of the consultation plan and the technical studies for preparation of the strategy and operational policy are made available to any interested parties, including NGOs, through the Bank's official website ([www.iadb.org/sds/ind](http://www.iadb.org/sds/ind)). Moreover, measures such as assessments, expert screenings, and whenever possible, early and socio-culturally appropriate consultation and good faith negotiation processes, aimed at identifying the indigenous peoples affected and their genuine representatives, will be adopted to guarantee that

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<sup>127</sup> Para. 8.

<sup>128</sup> See *supra* n. 125.

<sup>129</sup> Para. 5.2.

<sup>130</sup> IDB, Environment and Safeguards Compliance Policy, *supra* n. 88, paras. 1.3, 4.5, 4.11, 5.3.

<sup>131</sup> IDB, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development, available at: <http://www.iadb.org/en/topics/gender-indigenous-peoples-and-african-descendants/indigenous-peoples,2605.html>.

those peoples are not intentionally or involuntarily excluded from projects or activities which could potentially benefit them significantly.<sup>132</sup>

## VI. IDB FINANCING FOR CSOS AND NGOS

Like the majority of international development institutions (including the public multi-lateral institutions belonging to the ‘World Bank Family’)<sup>133</sup> the IDB, in conformity with its general operational policies, is forbidden to make loans to CSOs and NGOs without the previous and formal guarantee of the local government of the country in whose territories the project should be carried out.<sup>134</sup> Therefore, unsurprisingly, financial support to NGOs and CSOs is most likely to be realised in the form of grants to formally incorporated organizations.

However, unlike in the cases of other international development banks such as the World Bank, the prohibition to make loans to non-governmental organizations without a previous guarantee of a governmental entity applies to the IDB only in principle or, to use the same words of Art. III, section 8 of its establishing Agreement, exclusively: ‘when the Bank deems it advisable’. Always according to Art. III, section 8 of the establishing Agreement, the: ‘guarantor could be alternatively a public institution or a similar agency of the member acceptable to the Bank’.

That said, long-term practice dating back to the late 1980s has recognised the Bank’s power to provide financial aid through grants (non-reimbursable funds), including policy-based grants.<sup>135</sup> In fact, although the IDB agreement does not explicitly indicate this power, a well established common practice has considered grant-making as an implied power of the IDB to the extent that grant-making allows this Organization to fulfil the purposes and functions set forth in Article 1 of its Establishing Agreement – the acceleration of the process of economic and social development of the regional developing member countries, individually and collectively, provided the Bank makes such grants out of the Bank’s profit or surplus and also that the applications for financial aid are channelled via the IDB office in the corresponding country.<sup>136</sup> While, like the IDB’s partial credit guarantees, most of the IDB’s technical assistance in the form of grants have been made to its affiliate MIF – which supports, mostly through technical assistance grants, the enhancement of programmes and initiatives aiming to ameliorate access to finance, markets and capabilities and fundamental services for small businesses and

<sup>132</sup> See *supra*, n. 130, p. 8.

<sup>133</sup> Five institutions, taken together, constitute the so called World Bank Group: The International Bank for Reconstruction and Development (IBRD), The International Development Association (IDA).

<sup>134</sup> Civil society organizations having a national government guarantee are eligible for IDB lending (<http://www.iadb.org/en/about-us/idb-financing/eligibility-for-public-sector-financing,6059.html>).

<sup>135</sup> Information can be found at: <http://www.iadb.org/en/civil-society/the-idb-and-civil-society,6160.html> and also at: <http://www.iadb.org/en/topics/culture/cultural-center/cultural-development-grants,1671.html> (with specific reference to the cultural development grants programs).

<sup>136</sup> See M.E.S. Capek, M. Mead, *Effective Philanthropy: Organizational Success through Deep Diversity and Gender Equality*, Boston: The MIT Press, 1997, p. 192 ff.

micro entrepreneurs in the Latin America and Caribbean region<sup>137</sup> – the IDB has made other grants to various recipients, including CSOs and NGOs as well as academic institutions.<sup>138</sup> The IDB has made these grants through the Sustainable Energy and Climate Change Initiative ('SECCI') Trust Funds,<sup>139</sup> the Anti-corruption Fund<sup>140</sup> and the Social Entrepreneurship Program ('SEP')<sup>141</sup> which provides financing through local partner organizations to individuals and groups that generally do not have access to commercial or development loans on regular market terms.<sup>142</sup> The grants have financially supported such organizations as the CSAG/C in Guyana to help reduce poverty,<sup>143</sup> CSOs in Brazil to support programs concerning the inappropriate presence of destitute children in urban streets ('street-children'),<sup>144</sup> and various OAS agencies' special programs like, in 2007, the 'memorandum of understanding between the IDB and OAS to cooperate in the implementation of the Inter-American Convention against Corruption ('CICC')'.<sup>145</sup>

In addition, the Bank established its Better Conditions for Productivity ('MAP') program to support innovative activities and leading research on financial and private sector development through calls for proposals.<sup>146</sup> Research financed by MAP contributes to areas like development, credit and training tools for banks and entrepreneurs, agricultural finance, and regulatory simplification, among others. The work focuses on rigorous impact assessments and activities that improve the effectiveness of IDB activities and operations. Last but not least, the IDB established a Structured and Corporate Finance Department ('SCF') through which it provides grants to non-profit organizations and others to develop and enhance specific technologies and business models which may benefit projects supported by the IDB, and those that may promote discussion and dissemination of information on a wide and heterogeneous range of development issues of special relevance to the IDB Group. SCF also operates as a knowledge broker gathering together NGOs and academic organizations with its clients.<sup>147</sup> In selecting beneficiary

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<sup>137</sup> References in Seatzu, *supra* n. 114.

<sup>138</sup> *Ibidem*.

<sup>139</sup> More information is at: <http://www.iadb.org/en/topics/climate-change/secci,1449.html>.

<sup>140</sup> Information is at: <http://www.iadb.org/en/topics/transparency/support-for-countries/anticorruption-activities-trust-fund-aaf,1194.html>.

<sup>141</sup> See G.D. Westley, *Guidelines for monitoring and evaluating projects of the social entrepreneurship program*, Washington DC.: Inter American Development Bank, 2002.

<sup>142</sup> Under this program, the Bank provides loans and grants to private, non-profit and local or regional government organizations that provide financial, business, social and community development services to disadvantaged populations. The SEP provides approximately \$10 million in financing each year to projects in 26 Latin American and Caribbean countries. More information on the SEP and its activities are available at: <http://www.iadb.org/en/about-us/idb-financing/grants-,6039.html>.

<sup>143</sup> See IDB, GY-T1064: Strengthening Civil Society Participation in Poverty Reduction and Development, available at: <http://www.iadb.org/en/projects/project-description-title,1303.html?id=GY-T1064>.

<sup>144</sup> See R. Moran, C. de Moura Castro, *Street-children and the Inter-American Development Bank: Lessons from Brazil*, Discussion Paper, March 13, 1997.

<sup>145</sup> Information is at: [http://www.oas.org/juridico/spanish/dna\\_res17.pdf](http://www.oas.org/juridico/spanish/dna_res17.pdf).

<sup>146</sup> Information can be found at: [http://www.iadb.org/en/about-us/departments/about,1342.html?dept\\_id=SCF](http://www.iadb.org/en/about-us/departments/about,1342.html?dept_id=SCF).

<sup>147</sup> *Ibidem*.

institutions, the IDB takes into consideration, amongst other things, whether the activity to be financed furthers the Bank's development aims, whether the activity involves a separate contribution reflecting the Bank's comparative advantage, and whether such financial aid by the Bank might marshal financial contributions from other donors. The IDB has made small grants under this program to a wide range of NGOs in both developed and developing countries.

## VII. FINAL REMARKS: PROSPECTS FOR THE FUTURE

So what is the answer to the initial question in the title: have the Bank's connections and engagements with CSOs and NGOs made this public multilateral institution and its affiliated organizations socially and democratically accountable to national and local communities affected by IDB activities and operations?<sup>148</sup> The answer is negative, at least if one considers the numerous and often specific criticisms of the activities and operations of the IDB Group raised by several international, national and local NGOs and CSOs in their official reports and blogs.<sup>149</sup> But the answer does not radically change if one bears in mind what has been indicated above, namely that the successes of civil society organizations and movements in enhancing democratic and social accountability in the IDB have largely been at the policy level.<sup>150</sup>

Going even further than that, some writers and opinion leaders are also critical about the Bank's operational policies and procedures and they have observed that appeals by the IDB and its affiliated institutions for wider and deeper CSO and NGO involvement were merely 'window-dressing' so the results would not be consistent with the pursued aims.<sup>151</sup> According to Jude A. Howell and Jenny Pearce,<sup>152</sup> CSOs and NGOs have encountered increasing Bank-financed ecological and social debacles and they are disillusioned with the IDB's environmental and social reform programmes. In this critic's opinion, it is ironic that the limits of the IDB's reforms are becoming evident just as the CSOs and NGOs are succeeding in enhancing similar institutional changes in other international development banks like the World Bank, the Asian Development Bank ('ADB') and the European Bank for Reconstruction and Development ('EBDR').<sup>153</sup>

Nevertheless, it is also true that the IDB's review process over the past twenty years or so has gradually become more accessible. More often than not, it turns out to be the outcome of a dialogue and interactions of civil society representatives and the governing bodies of the Bank and thus the subject of a broad and sustainable consensus. The process has also become more participatory, in the sense that it has slowly but

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<sup>148</sup> For a thorough exposition of the meaning of NGO accountability see Kenneth Anderson, *What NGO Accountability Means – And Does Not Mean*, in *Am. J. Intl. L.* 1, 2009, p. 107 ff.

<sup>149</sup> For a good resume of these criticisms see *supra* n. 188.

<sup>150</sup> See *supra*, especially paras. I, II and IV.

<sup>151</sup> See e.g. J. Pereira, *Democratic Ownership beyond Busan: Building Inclusive Partnerships for Development*, Alliance 2015, p. 5 ff; J. Griffin, and R. Judge, *Civil Society Policy and Practice in Donor Agencies*, overview report commissioned by DFID, INTRAC, 2010.

<sup>152</sup> See J.A. Howell, J. Pearce, *supra* n. 4, p. 216 ff.

<sup>153</sup> For an account of these successes see H.J. Johnson, *Multilateral Development Banks: Public Consultation on Environmental Assessments*, Washington DC, 1988, p. 23 ff.

gradually become more incorporative of representatives of civil society groups and movements, as a result of the improvement in the IDB's engagements and connections with CSOs and NGOs.<sup>154</sup>

The discussions over the role of CSOs and NGOs in the IDB's operations and activities show in particular that future success requires continued and increased interactions between the Bank and its affiliated institutions on one hand, and social society groups and movements on the other. As part of this process, action by the IDB and its affiliated organizations in this direction encompasses certain measures that are being pursued at present. In this context, the following steps can be pointed out:

- 1) Bank staff review selected bank initiatives and projects which involve CSOs and NGOs to establish how the IDB-CSOs and NGOs relationship can be further improved and strengthened; and
- 2) the IDB, as well as its affiliate organizations, is increasing its efforts to disclose information on its operations and policies to CSOs and NGOs and to the public at large in pursuit of the goals of openness and transparency which are now emphasized in its dialogue not only with the primary stakeholders in the Bank, the member countries, but also in its dialogue with the representatives of NGOs and CSOs. A good example of such efforts toward openness and transparency is the opening of on-line media pre-registration for the Annual Meeting of its Board of Governors, the main forum for discussion of political, economic and social development in Latin America and the Caribbean. Another noteworthy example is provided by the new whistleblower protection policy – “Staff Rule No. PE-328 Whistleblowers and Witnesses”<sup>155</sup> – that is a substantial improvement on its previous protections (though some fatal flaws persist, at least according to some observers);<sup>156</sup>
- 3) the IDB management and staff actively seek CSO and NGO involvement in IDB-financed projects and investments to the extent that there are benefits to be drawn from such involvement. Partnership operations and/or advocacy at the national, regional, and transnational levels in areas such as education, environment, micro-enterprise, health and rural development are good examples of this practice;
- 4) the IDB now pays special attention to the practice of involving the beneficiaries and potentially adversely affected residents and local communities by a Bank-financed project or programme at the earliest possible stage in design of Bank-supported investments and projects and allows properly constituted local and international CSOs and NGOs to play a key role in this process, especially where this interaction is expressly provided for, e.g., Operational Policy

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<sup>154</sup> See *supra*, especially paras. I to IV.

<sup>155</sup> See Staff Rule No. PE-328 “Whistleblowers and Witnesses”, available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35179900>.

<sup>156</sup> See e.g. Inter American Investment Corporation Observer Blog, *Inter-American Development Bank Passes Improved Whistleblower Protections; Fatal Flaws Remain*, available at: <http://iicobserver.wordpress.com/2010/06/19/inter-american-development-bank-passes-improved-whistleblower-protections-fatal-flaws-remain/>.

No. 102 – Disclosure of Information<sup>157</sup> and the Operational Policy on Indigenous Peoples and Strategy for Indigenous Development;<sup>158</sup>

- 5) the IDB invites a dialogue with CSOs and NGOs on issues and topics of shared concern not only through the ‘IDB Civil Society Consulting Group (ConSOC)’ – which is a forum for exchanging information, strengthening dialogue, and for ongoing consultations between the IDB and the CSOs that are pertinent to its work in the countries where it functions – but also through other and more informal and flexible forms of consultative relations with CSOs and NGOs in the ordinary course of Bank activities and operations, and through other venues such as the examination of a dossier containing a summary of proposals to the Bank for policy reforms;<sup>159</sup>
- 6) the IDB management and staff is reinforcing the practice of setting up Civil Society Advisory Councils (‘CSACs’), which are often broad-based and diverse with members periodically renewed, in the Bank’s Country Offices;
- 7) IDB management and staff are increasing their efforts, in open consultation with the ConSOC, to issue specific operational guidelines for the Bank’s investments, operations and activities in the countries where ConSOC functions.

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<sup>157</sup> See *supra* n. 123.

<sup>158</sup> See *supra* n. 69.

<sup>159</sup> A dossier containing a summary of proposals was submitted by a group of civil society organizations to the Inter-American Development Bank in 2010. These recommendations focus on two core areas of the IDB’s comparative advantage as a development bank in Latin America, Sustainability and Management for Development Results (<http://www.bicusa.org/en/Article.12221.aspx>).

# *A Hybrid Strategy to Prosecute the Waging of War*<sup>1</sup>

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1. Introduction
2. Background: The Origin of the Crime of Aggression
  - 2.1. The Nuremberg Trials
    - 2.1.a. *The Legal Arm: The Kellogg-Briand Pact (KBP)*
    - 2.1.b. *The Intellectual Arm: William Chanler and His “Kellogg-Briand Implies Murder Liability” Theory*
  - 2.2. Subsequent Attempts to Define the Crime of Aggression
    - 2.2.a. *General Assembly (GA) Resolution 3314, 14 December 1974*
    - 2.2.b. *The International Court of Justice’s (ICJ) Decision in the Nicaragua Case*
    - 2.2.c. *Security Council Resolutions*
    - 2.2.d. *The International Law Commission (ILC) and the Urgency to Conclude the Draft Code of Offences against the Peace and Security of Mankind in the Light of the Creation of the ICC*
3. The Two-Head Strategy: Combining International and National Jurisdiction to Prosecute the Crime of Aggression
  - 3.a. *The Kampala Conference and Its Limited Success*
  - 3.b. *Head 1. The International Via: Crimes against Humanity and the ICC*
  - 3.c. *Head 2. The National Via: The Crime of Aggression and the aut dedere aut judicare Clause*
4. Conclusion

## ABSTRACT

The Kampala Conference held in 2010 to review the Rome Statute portrays a discouraging image regarding the fight against impunity for those responsible for the waging of war. Its outcome reflects the international community’s lack of willingness to take the necessary steps to hold accountable those responsible for the crime of aggression.

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<sup>1</sup> This paper was selected finalist in the Inaugural Benjamin B. Ferencz Essay Competition, launched by the Whitney R. Harris World Law Institute at the Washington University Law, October, 2012.

Regardless of the existing agreement on its definition, the International Criminal Court's jurisdiction has been postponed again, fostering the need to resort to alternative formulas to prosecute this crime. This paper aims to study the possibility of prosecuting aggression as a crime against humanity in so far as the illegal use of force amounts to "other inhuman acts of similar character (...)", articulated in article 7.1.k of the Statute. It also searches for alternative procedures to prosecute these crimes, focusing on the emerging role of domestic jurisdiction through the consolidation of the *aut dedere aut judicare* clause.

### Keywords

Crime of aggression, use of force, crimes against humanity, International Criminal Court, national jurisdiction, *aut dedere aut judicare*.

### RÉSUMÉ

La Conférence de Kampala tenue en 2010 a fin de examiner le Statut de Rome dépeint une image décourageante en ce qui concerne la lutte contre l'impunité pour les responsables du déclenchement de la guerre. Son résultat reflète l'absence d'une volonté politique dans le communauté internationale de prendre les mesures nécessaires pour demander des comptes aux responsables du crime d'agression. Indépendamment de l'accord existant sur sa définition, la compétence de la Cour Pénale Internationale a été reportée à nouveau, en favorisant la nécessité de recourir à des formules alternatives pour poursuivre ce crime. Cet article vise à étudier la possibilité de poursuivre l'agression en tant que crime contre l'humanité dans la mesure où l'utilisation illégale de la force peut être inclus dans la catégorie « autres actes inhumains de caractère analogue (...) », articulé en 7.1.k article du Statut. On explore également des procédures alternatives sur la base du rôle émergent de la compétence des tribunaux nationales à travers la consolidation du principe *aut dedere aut judicare*.

### Mots clés

Crime d'agression, l'utilisation illégale de la force, crime contre l'humanité, Cour Pénale Internationale, compétence nationale, *aut dedere aut judicare*.

### RESUMEN

La Conferencia de Kampala, celebrada en 2010 con el objetivo de revisar el Estatuto de Roma, nos ha dejado un legado desesperanzador en cuanto a los logros alcanzados en el ámbito de la exigencia de responsabilidades por el acto de iniciar y provocar la guerra. El resultado de la misma refleja la ausencia de una voluntad política en el seno de la comunidad internacional dirigida al enjuiciamiento a aquellos presuntos autores del crimen de agresión. A pesar de la existencia de un acuerdo en torno a su definición, el ejercicio de la competencia de la Corte Penal Internacional para conocer de este crimen ha tenido que ser retrasado una vez más, lo cual ha provocado la necesidad de recurrir

a fórmulas alternativas para lograr el enjuiciamiento de este crimen internacional. Este trabajo tiene como finalidad estudiar la posibilidad de enjuiciar el crimen de agresión como crimen de lesa humanidad encuadrando el uso ilegítimo de la fuerza dentro del subtipo “otros actos inhumanos de carácter similar (...)”, recogido en el artículo 7.1.k del Estatuto. Asimismo, se exploran también procedimientos alternativos para enjuiciar estos crímenes basados en el papel emergente de las jurisdicciones nacionales a través de la consolidación de la cláusula *aut dedere aut judicare*.

### **Palabras clave**

Crimen de agresión, uso ilegítimo de la fuerza, crimen de lesa humanidad, Corte Penal Internacional, jurisdicción nacional, *aut dedere aut judicare*.

## **1. INTRODUCTION**

Despite the grave violations for human rights starting a war entails, the crime of aggression, has had a very irregular legal history of condemnation. The first signs of a common will within the international community to prosecute the initiation of war during the Nuremberg trials has slowly faded away with time and the international criminal justice system finds itself in a situation which starts to seem kaffian: the ICC, after taking 12 years to agree upon a definition of the crime of aggression, has recently seen the possibility of exercising its jurisdiction postponed at least until 2017, when another meeting to discuss this issue will be held.

The present article aims to tackle this problem by proposing two alternative and complementary techniques of legal engineering, which, in application of international law, could contribute to fulfil the impunity gap created by this new delay of the ICC's jurisdiction.

In order to do so, this paper is divided into two parts: the first part addresses the crime of aggression from an historical perspective in order to understand what the foundations and first manifestations of this crime were.

The second part concentrates on presenting conveying legal arguments that may be used both by the International Criminal Court (ICC) and by national courts to guarantee accountability for those responsible for waging war.

A two-head approach is taken to try and offer two different legal constructions that will allow the prosecution of the waging of war both by the International Criminal Court, through the consideration of aggression as an act of illegal use of force that can amount to a crime against humanity and by national courts, through the implementation of the recently defined crime of aggression into their legislations and subsequent prosecution of the alleged responsible in application of an emerging consuetudinary principle of international law: the obligation to extradite or prosecute.

## **2. BACKGROUND: THE ORIGIN OF THE CRIME OF AGGRESSION**

Context is crucial when presenting any argument aimed at persuading the reader. In a matter as politically charged as the one studied in this essay, understanding and referring

to the history and evolution of the “crime of aggression” becomes essential, both to infer the scope and elements of such a crime, and to establish the legitimacy of national and international courts to investigate and prosecute its alleged perpetrators.

### 2.1. The Nuremberg Trials

The prosecution of Nazi leaders for conspiracy to wage aggressive war can be deemed the origin of aggression as an international crime. The London Agreement consolidated this crime as a specific one among the more general category of crimes against peace (Art 6.a. IMT Charter).

In his exhaustive analysis on the origin of the notion of aggressive war through the detailed consideration of correspondence between some of the most influential men in the construction of the Nuremberg trials,<sup>2</sup> professor Jonathan Bush highlights the magnitude of the challenges faced by these “legal architects”, who, given the circumstances, had to rely, in a big proportion, on their imagination and legal skills to articulate convincing arguments which had little or no precedent support.<sup>3</sup>

The absence of a precedent and the little academic debate on the notion of aggression can be explained through a realistic analysis of the recent European history. As Chanler bluntly puts it in one of his letters, the rising of imperialism in Europe conditioned international lawyers who had been struggling to draw a distinction between “just” and “unjust” war, forcing them to advance theories that justified, in law, military conquests:

*“Obediently, the international lawyers of that day dropped their attempts to draw distinction between “just” and “unjust” war, and, in order to support the desires of their rulers, advanced the theory that the use of the nation’s military power in support of its national policy was an inherent attribute of sovereignty-or to put it in layman’s language, that all wars are lawful, whatever their origin.”<sup>4</sup>*

Nevertheless, after World War II, the international community had two powerful arms for fighting the crystallization of this crime: a legal one and an intellectual one.

#### 2.1.a. The Legal Arm: The Kellogg-Briand Pact (KBP)

The KBP from 1928 was undoubtedly the strongest legal tool to be used by defenders of this position. Through this Pact, over 60 nations declared war to be illegal. This instrument was considered to be hard treaty law and binding for all ratifying States.

<sup>2</sup> William C. Chanler (Wall Street lawyer serving in the War Department in Washington), Sheldon Glueck (leading Harvard criminologist whose intellectual contribution to Nuremberg has long been known) and General Telford Taylor (chief Prosecutor at the later Nuremberg trials).

<sup>3</sup> J.A. Bush, “The Supreme Crime and its origins: the lost legislative history of the crime of aggressive war”, 102 *Columbia Law Review*, (2002), 2324–2424, p. 2329: “(…) allied lawyers and planners around 1940 found little precedent for the notion that aggressive war itself might be a crime that, when they started to contemplate war crimes trials”.

<sup>4</sup> Letter from William Chanler to Sheldon Glueck, 9 May 1945 in J.A. Bush, “The Supreme Crime and its origins... loc. cit., p. 2410. Bush himself supports this view, *Ibid.*, p. 2230.

Moreover, its influence in the construction of aggressive war was manifest when it was raised, in the context of the negotiation of the Nuremberg trials' framework, to counterbalance the argument that asserted that the charges relating to aggressive war were violations of the legality principle or the rule against retroactivity of criminal law. This Pact, as well as the subsequent bilateral friendship, neutrality and collective security treaties, evidenced that the concept of crimes against peace was already clear law by the 1930s.<sup>5</sup> However, in 1944, in the context of the Nuremberg Trials negotiations, two of the most influential figures in this process (Belgian Judge de Baer and criminology scholar Glueck) had concluded that Nazi leaders could not be tried for a crime called aggression. According to de Baer, the reason was that the KBP lacked specific punishments, which meant that countries would have had to incorporate its provisions into their domestic law to make the violations of this Pact punishable.<sup>6</sup> In Glueck's view, the Versailles Commission's precedent, which had declined to impose personal criminal liability on Kaiser Wilhem for starting World War I, together with the Kellogg-Briand failure to "make violations of its terms an international crime punishable either by national courts or some international tribunal",<sup>7</sup> resulted in the impossibility to recognize the existence of the crime of aggression and hence impeded the prosecution of Nazi leaders on this count.

*2.1.b. The Intellectual Arm: William Chanler and His "Kellogg-Briand Implies Murder Liability" Theory*<sup>8</sup>

If this was the leading opinion in 1944, how did 14 defendants get to be charged for committing crimes against peace? According to Bush, the key to this answer should be searched "behind the scene". This author asserts that William Chanler, a Wall Street lawyer that had previously worked in the War Department, was the first person to propose the framing of crimes against peace as an international crime and to succeed in placing it on the American agenda. The United Nations War Crimes Commission (UNWCC) requested its member Nations for their views on the criminality of aggression. In the US, the State Department referred it also to the War Department for advice. Chanler, who at this point in time was a member of the War Department, still had in mind the Mussolini failure (he, with his colleague Robert O. Gorman, drafted an indictment against Mussolini, where he was accused of initiating an aggressive war against Ethiopia and the then Allies, but the Italian king declined to turn over the Italian dictator to Anglo-American forces and Mussolini was rescued by Nazi commandos),<sup>9</sup> and consequently wrote that the solution was to recognize that the illegality of aggressive wars had been established by the Kellogg-Briand Pact and related instruments. If this was to

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<sup>5</sup> *Ibid.*, p. 2335.

<sup>6</sup> Marcel de Baer, "Considerations of Present Interest on the Pact of Paris. 27 Message", *Belgium Review*, (1944) at 31.

<sup>7</sup> Sheldon Glueck, *War Criminals: Their Prosecution and Punishment*, New York: Alfred A. Knopf, 1944), p. 38.

<sup>8</sup> For its use at Nuremberg see Report of Robert Jackson, *The Nuremberg Case* at 84 (London Conference Report).

<sup>9</sup> T. Taylor, "The Nuremberg Trials", 55 *Columbia Law Review*, (1955), 488–525, pp. 488–493.

be accepted, authors of killings in Poland or Czechoslovakia would not enjoy the status of privileged combatants that they would have had in a lawful war under the traditional laws and customs of war, but that of underprivileged fighters consequently breaching Polish or Czech domestic criminal law.

Initially, Chanler found a great deal of resistance from American academics, policy makers and members of the War Department when trying to defend this theory. Nevertheless, after debating the whole idea, some of them, such as Glueck, were persuaded.<sup>10</sup> Finally, Chanler's arguments managed to convince President Roosevelt of the importance of including it in the indictment.<sup>11</sup> But the fact that a key person in Nuremberg shared his position must not be underestimated. Justice Robert Jackson, who was, appointed by the President to lead the American team in the negotiations, managed to incorporate his view on the definition of the crime of aggression and the individual criminal responsibility it entailed, which went a step further than Chanler's and was more compromising: "Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".<sup>12</sup> Consequently, the Nuremberg Tribunal would later conclude that international law already applied, allowing criminal punishment of individuals for aggression or crimes against peace, without requiring domestic incorporation of this prohibition by victim States.

## 2.2. Subsequent Attempts to Define the Crime of Aggression

### 2.2.a. General Assembly (GA) Resolution 3314, 14 December 1974

This Resolution was the result of the materialization of Resolution 95 (I), adopted unanimously by the UN GA on the 11th September 1946. It affirmed the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgement of the Tribunal". It was however agreed that the definition would be a non-binding guide to the Security Council.

Resolution 3314 was non-exhaustive, consequently representing an important but incomplete step towards the crystallization of this crime in international criminal law. It left the Security Council a broad area of discretion by stating that it was free to characterize other acts of aggression under the Charter.<sup>13</sup>

<sup>10</sup> See letter exchange in J.A. Bush, "The Supreme Crime and its origins...loc. cit., pp. 2402–2417.

<sup>11</sup> To see the tensions Chanler had to deal with see *ibid.*, p. 2359. President's Roosevelt's memorandum specifically stated that "(t)he charges should include an indictment for waging aggressive warfare, in violation of the Kellogg Pact. Perhaps this and other charges might be joined in a conspiracy indictment". *Ibid.*, p. 2363. Justice Robert Jackson, Supreme Court Judge at the time also defended the inclusion of the crime of aggression in the American draft proposal for the international court. *Ibid.*, p. 2367.

<sup>12</sup> Charter of the International Military Tribunal, art. 6(a).

<sup>13</sup> A. Cassese, "On Some Problematical Aspects of the Crime of Aggression", *Leiden Journal of International Law*, 20 (Dec. 2007), 841–849, p. 842.

2.2.b. *The International Court of Justice's (ICJ) decision in the Nicaragua Case*<sup>14</sup>

In this case, the ICJ interpreted the prohibition of using force against another State to reflect customary international law. It addressed the legality of American government actions and policy, rather than individual liability, but it was rightly deemed a groundbreaking decision, both for the judges' precedent-setting reasoning which shed some light on the specific acts that could be considered to amount to aggression and for the fact that the ICJ as an institution tackled the case at all.

2.2.c. *Security Council Resolutions*

The role assigned to the Security Council by the Rome Statute in respect of the crime of aggression is undoubtedly a very significant one.<sup>15</sup> Nevertheless, this body has very rarely asserted the perpetration of an act of aggression by a State. Among the exceptions, Resolution 573 from the 4th of October 1985 (Israeli attacks on PLO targets in Tunisia) and Resolution 577 from the 6th of December 1985 (South African attacks on Angola) may be cited. The excessively prudent approach taken by the Security Council on this issue was evidenced by its failure to label the Iraqi attack on Kuwait as an aggression, despite the fact it declared the annexation void (SC RES 660, 2 Aug. 1990 and 662).

2.2.d. *The International Law Commission (ILC) and the urgency to conclude the Draft Code of Offences against the Peace and Security of Mankind in the light of the creation of the ICC*

The ILC started working in the Draft Code of Offences against the Peace and Security of Mankind back in 1949, in the context of the formulation of the Nuremberg principles. It was not until 1953 that the General Assembly received a draft statute for a Court and a 1954 draft code that included aggression, but it put them on hold, pending a better definition of aggression.

The explosion of the crisis in the Balkans and Rwanda and the subsequent establishment of international tribunals determined the emergence of what Bush described as "an institutional "customer" interested in the legal product the ILC was producing", being that customer the proposed permanent International Criminal Court. This fostered the completion of the Draft Code of Offences against the Peace and Security of Mankind,

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<sup>14</sup> Military and paramilitary activities in and Against Nicaragua (ICJ Reports 1986, 14 at 195), Judgement.

<sup>15</sup> See article 5(2), 13(b) and 16 of the Rome Statute. Precisely in the light of this, some authors have stressed the importance of finding a balance between this important role and the necessity of counterbalancing the resulting political taint affecting an ICC in need of objectivity to consolidate its legitimacy. See Escobar Hernández, C., Corte Penal Internacional, Consejo de Seguridad y Crimen de Agresión: el equilibrio difícil e inestable en *El derecho internacional en los albores del siglo XXI: homenaje al profesor Juan Manuel Castro-Rial Canosa*, coord. por Fernando M. Mariño Menéndez, 2002, pp. 243–264.

which included a definition of aggression strongly criticized by international experts, despite the almost 50 years it took to crystallize.<sup>16</sup>

### 3. THE TWO-HEAD STRATEGY: COMBINING INTERNATIONAL AND NATIONAL JURISDICTION TO PROSECUTE THE CRIME OF AGGRESSION

#### 3.a. The Kampala Conference and its limited success

Aggression requires individual conduct (on the part of the accused) and State conduct (on the part of the State on behalf of which the aggressive war was planned or initiated). This has raised questions as to whether aggression is to be found by criminal courts prosecuting individuals or political institutions such as the Security Council categorizing the actions of States.

However, giving content to this crime has been a long pending issue.<sup>17</sup> Finally, in May–June 2010, at the Conference held in Kampala to review the Rome Statute, a definition of this crime was adopted by consensus.<sup>18</sup>

Shortly after this Conference, ICC Judge Hans-Peter Kaul<sup>19</sup> openly expressed his views on the proscription of the crime of aggression and celebrated the final agreement on the definition of aggression as a great achievement: “The waging of war will become triable after all”.<sup>20</sup>

The magnitude of the step taken towards ending impunity for aggression is unquestionable. However, some problems resulting from the way in which this crime has been articulated in the Rome Statute remain unsolved.

<sup>16</sup> A. Cassese, “On Some Problematical Aspects...loc. cit., p. 842, referring to the definition in the Draft Code: “(...) although it specifically dealt with criminal liability for aggression, was rather circular and in fact did not provide any definition (...)”.

<sup>17</sup> The extensive academic production on the content of this crime confirms this assertion. See, among others, Remiro Brotons, A., “Agresión, crimen de agresión, crimen sin castigo”, Documento de Trabajo, n° 10, *Fundación para las Relaciones Internacionales y el Diálogo Exterior*, Junio, (2005); Orozco Torres, L.E., “La criminalización de las guerras de agresión”, *Revista Española de Relaciones Internacionales*, n° 3, (2011), pp. 223–249 and Meron, T., “Defining Aggression for the International Criminal Court”, *Suffolk Transnational Law Review*, Vol. 25, Issue 1 (2001–2002), pp. 1–16.

<sup>18</sup> Resolution RC/Res. 6, adopted at the 13th plenary meeting, on the 11th June 2010, RC/11; See articles 8 *bis*, 15 *bis* and 25(3) *bis* of the Rome Statute. The working dynamics and method applied in this Conference have already provoked reactions among scholars. See, among others, Kress, C.; Von Holtzendorf, L., “El compromiso de Kampala sobre el crimen de agresión”, *Revista General de Derecho Penal*, n° 15, (2011).

<sup>19</sup> The author was elected as one of the first 18 judges at the International Criminal Court in 2003 for a term of three years and re-elected in 2006 for a further term of nine years. Since 2009, he is serving as Second Vice-President of the ICC. Judge Kaul is assigned to the Pre-Trial Division.

<sup>20</sup> Kaul, H.P., “Kampala June 2012 – A First Review of the ICC Review Conference”, 2 *Göttingen Journal of International Law*, N° 2, (2010), 649–667, p. 658.

Firstly, the Court will not be able to exercise its jurisdiction for almost five years, at the earliest. The effective exercise of jurisdiction is subject to a decision to be taken after 1 January 2017, with the same majority that would be needed for any other amendment of the Statute. It must be accepted or ratified by at least 30 State Parties. Kaul estimates that the delay should be considered in long term perspectives and asserts that “There is now an increasing likelihood that in the years to come the ICC will be able to prosecute perpetrators for the crime of aggression, not like in Nuremberg by means of law created ex post fact, but on a strong legal basis created by the common will of States before the commission of the crime.”<sup>21</sup>

Ferencz, on the other hand, does not assess the Conference’s outcome in very positive terms and points out its limited progress towards the actual materialization in the prosecution of those alleged to be responsible for the crime of aggression by the ICC as it has just “postponed the issue again.”<sup>22</sup>

Secondly, the preeminent role assigned to the Security Council in this matter raises legitimacy and fairness issues. There are three ways of referring a situation of aggression to the ICC. The first one refers to the Security Council’s right to refer the situation to the Court after determining, in application of Chapter VII of the Charter, the existence of an unlawful use of force.<sup>23</sup> The second one consists of the Prosecutor *motu proprio* initiating investigations, and the third one implies the Prosecutor initiating investigations upon request of the State Party. In the last two cases, however, the Prosecutor may only initiate an investigation after having consulted the Security Council.

The two-head strategy hereby proposed tackles these two problems by offering short-term and long-term solutions to the impunity gap which those allegedly responsible of committing the crime of aggression might be benefitting from. Through head 1, the ICC, temporarily finding itself in a handcuffed situation, is offered a way out to prosecute this crime as a crime against humanity through the subcategory “other inhumane acts...”. Head 2, as will be exposed, proposes a long-term and State-centred alternative that grants national jurisdictions with the key role to hold those responsible for the waging of war accountable.

### 3.b. Head 1. The international via: Crimes against Humanity and the ICC

*“The illegal use of force, which is the soil from which all Human Rights violations grow, must be condemned as a Crime against Humanity”.*

It was impossible for Spencer Tracy to foresee that 40 years after he played the role of Judge Haywood in the film “Trial at Nuremberg”, one of his lines would actually summarize one of the main arguments for the prosecution of the waging of war, in the context of a complex legal debate.

<sup>21</sup> Ibid., pp. 666–667.

<sup>22</sup> B. Ferencz, A New Approach to deterring illegal wars, August 2011, B. Ferencz. Law. Not War.

<sup>23</sup> Article 39 of the Charter of the United Nations: “The Security Council shall determine the existence of any threat to the peace, breach to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security”.

Under the present circumstances, the limitations faced by the ICC when trying to prosecute the crime of aggression have been officially extended until 2017 at Kampala, inviting international lawyers and academics to find alternative ways of bringing the alleged responsible for aggression to trial.<sup>24</sup> Part 1 of the two proposed arguments will concentrate on articulating the way in which the notion “crimes against humanity” (CAH) can serve as an instrument to achieve this goal at the international level.

The concept “crimes against humanity” is regulated in article 7 of the Rome Statute and it includes an exhaustive list of acts “when committed as part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack”. The definition that was finally agreed upon during the Diplomatic Conferences to draft the Rome Statute basically includes the core elements of the formula adopted by the ICTY in the Tadic case, which will be further analysed, with an exception: the exclusion of the two-tiered approach which required proof of both the intent to commit the act (murder, extermination, enslavement, deportation, . . .) and the knowledge of the context in which his/her act took place. There was also a no-war nexus requirement included. It is notable that, according to the Rome Statute, the ICC does not require this “widespread and systematic attack” to rise to the level of an armed conflict.

The origin of this crime and its international criminalization goes back to Nuremberg, although its roots can be found far earlier.<sup>25</sup>

This paper’s initial hypothesis is that the illegal use of force can amount to a CAH in so far these acts can amount to “Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”, articulated Article 7.1.k of the Rome Statute, which regulates CAH.

In order to support this hypothesis, key concepts such as “the illegal use of force” and “other inhumane acts” will be analysed and compared, together with a thorough analysis of the definitional features of the notion CAH, in order to construct a strong legal argument to support this alternative shortcut to end impunity.

### I. *Definitional features of the notion CAH*

The *ad hoc* tribunals have played an essential role in the development of the content of the CAH. The fact that the general element of “widespread and systematic attack”

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<sup>24</sup> On the Kampala Conference outcome see Rodríguez-Villasante y Prieto, J.L., “La Corte Penal Internacional, de Roma a Kampala pasando por la Haya: “Consenso” sobre el crimen de agresión en la Conferencia de Revisión del Estatuto”, *Revista general de la marina*, Vol. 260, Mes 5 (Junio, 2011), pp. 769–779; Milanovic M., “Aggression and Legality: Custom in Kampala”, *Journal of International Criminal Justice*, Vol. 10, Issue 1 (March 2012), pp. 165–188; Scheffer, D., El significado y la activación del crimen de agresión bajo el Estatuto de Roma de la Corte Penal Internacional”, *Política Criminal*, Vol. 7, N° 13 (Julio 2012), pp. 209–229; and more recently, Quesada Alcalá, C., El crimen de agresión como amenaza a la seguridad global, Cuadernos de estrategia, N° 160, (2013), pp. 77–116. This paper also presents a complete timeline on the evolution of the content of the crime of aggression.

<sup>25</sup> Van Schaak highlights the links between humanitarian intervention, as a pre-existing principle from the 19th century that was later developed in the Charter and CAH, E. Van Schack, “The Definiton of Crimes Against Humanity: Resolving the Incoherence”, 37 *Columbia Journal of Transnational Law*, 787–850, (1998–1999), p. 849.

was not explicitly included in the ICTY Statute but interpreted into the definition from the words “directed against any civilian population”, can serve as an example of it.<sup>26</sup>

Also at the ICTY, the Trial Chamber defined CAH based on the *mens rea* of the defendant and the existence of a widespread or systematic attack against a civilian population,<sup>27</sup> increasing with this the Prosecutor’s burden of proof by adding additional elements to the definition of the offense that do not appear in the Statute.<sup>28</sup>

The war nexus requirement appears in the ICTY Statute despite the opposition to include it, expressed by the Commission of Experts Established Pursuant to Security Council Resolution 780.<sup>29</sup> Nevertheless, this limitation in the Statute has been generally considered to be jurisdictional rather than definitional.<sup>30</sup> Moreover, the ICTY Appeals Chamber in the Tadic case confirmed that conviction for CAH under customary international law no longer requires proof of link to a state of war or war crimes.

Following this precedent, the war-link nexus has also been omitted in the Statutes of later international or mixed tribunals and courts such as the ICTR, Special Court of Sierra Leone, East Timor Special Panels and the Extraordinary Chambers in the Courts of Cambodia. Special reference should be made to the ICC’s articulation of the crime which reformulates its definition on a consensual basis and removes the requirement of a policy as one of its definitional elements.<sup>31</sup>

It can be concluded from a combined analysis of the conventional statements and case-developments that the general and definitional elements of this crime enable it to be defined as a “widespread and systematic attack against a civilian population”.

<sup>26</sup> See Judgement Kunarac (IT-96-23) AC 12 June 2002, para. 85. Some differences between Statutes should be pointed out. While according to the ICTY, this attack it must be carried out in the context of an armed conflict, the ICTR Statute established that acts against civilians must be carried out on national, political, ethnic, racial or religious grounds. The regulation of CAH in the Rome Statute also presents some particularities: it requires the perpetrator to commit the crime pursuing or furthering a “State or organizational policy to commit” an attack against a civilian population.

<sup>27</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment (Int’l Crim. Trib. former Yugo., Trial Chamber II, May 7, 1997), at 252, para. 656. Two mental state requirements can be found in this definition: first, intent to carry out the enumerated offense must be proved (i.e. inhumane treatment, murder) and second, the prosecutor must prove that the perpetrator knew “of the broader context in which his acts occurs” (para. 656). This knowledge however “can be factually implied from the circumstances” (para. 657).

<sup>28</sup> E. Van Schack, “The Definition of Crimes Against Humanity...loc. cit., p. 828.

<sup>29</sup> See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR 49th Sess., Annex VI, at 21, U.N. Doc. S/1994/674 (1994) (“Crimes against humanity are also no longer dependent on their linkage to crimes against the peace or war crimes.”).

<sup>30</sup> Van Schaak, *supra* note 22, p. 827. This author supports this position on the commentators’ interpretation on the Secretary General’s comments emphasizing the prohibition of CAH “regardless of whether they are committed in an armed conflict, international or internal in character”.

<sup>31</sup> On the legal arguments supporting the consolidation of this version within international law, see Mettraux, G., “The Definition of Crimes Against Humanity and the Question of a ‘Policy’ element” in *Forging a Convention for Crimes Against Humanity*, edited by Leila Nadya Sadat, Cambridge University Press (2011), pp. 142–176.

It is precisely the concurrence of these elements that allow ordinary crimes to become crimes of much greater consequences: crimes against humanity.<sup>32</sup> In this line, professor Tieger asserts that although CAH emerged from the field of IHL as an extension of war crimes, this category of crimes has become the criminal law response to gross violations of human rights.<sup>33</sup>

II. *The category of “other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health” as a vehicle to prosecute illegal use of force as CAH*

In the Tadic case, at the Trial Chamber, the Prosecution seemed to confuse persecution with “inhumane treatment” and considered that when integrating “racial, political, (...) motives into the main elements of the crime, persecution and inhumane acts are made redundant”. This position has been strongly criticized by authors such as Van Schaak, who argues that “the discriminatory motive requirement adds nothing to the international nature of the offense and threatens to exclude from the rubric of crimes against humanity inhumane acts involving non-enumerated motives”.<sup>34</sup> It can be inferred from her words that she had a wide concept of “inhumane acts” and clearly rejected the idea of establishing an exhaustive list of conducts, based on the underlying motives that could amount to this crime, opinion with which the present author fully subscribes.

Some authors have pointed out the challenges this category would have to face for being too “vague”, potentially colliding with the principle of *nullum crime sine lege*.<sup>35</sup> Nevertheless, international case law has given some steps towards its concretion.

Among the international case law that has contributed to define “other inhumane acts”, the Krnojejac case may be highlighted.<sup>36</sup> In this case, the accused is charged with inhumane acts as a CAH as a result of his participation in the implementation of brutal living conditions to victims while he was warden. As a result of these living conditions, many detainees, according to the Prosecutor, suffered serious physical and psychological consequences.

“The elements to be proved are:

1. The occurrence of an act or omission of similar seriousness to the other enumerated crimes under the Article concerned;
2. The act or omission causes serious mental or physical suffering or injury or constitutes a resinous attack on human dignity; and
3. The act or omission is performed deliberately by the accused or a person or persons for whose acts or omissions he bears criminal responsibility”.<sup>37</sup>

<sup>32</sup> A. Tieger, Crimes Against Humanity in *The Oxford Companion to International Criminal Justice*, Editor in Chief: Antonio Cassese, Oxford University Press, New York, (2009), p. 286.

<sup>33</sup> *Ibid.*, p. 287.

<sup>34</sup> E. Van Schaak, “The Definiton of Crimes Against Humanity...loc. cit., p. 840.

<sup>35</sup> A. Tieger, Crimes Against Humanity in *The Oxford...* op. cit. p. 287.

<sup>36</sup> *Prosecutor v. Krnojejac* (IT-97-25), TC, 15 March 2002, para. 130.

<sup>37</sup> *Kayishema and Ruzindana*, ICTR, Judgement, (ICTR-95-1-T), TC, 21 May 1999, para. 151–154; *Prosecutor v. Vasiljevic*, ICTY, Judgement, (IT-98-32-T), TC, 29 November 2002, para. 234. In this

As for the subjective element, Ferencz considers that “the Prosecutor would have to prove beyond doubt that the accused held a position of high authority, played a key role and intended the foreseeable consequences”.<sup>38</sup> The required *mens rea* for an act to amount to a CAH has been established by the international case law. In the Krnojelac case, the TC specifically referred to the inclusion to the civil law notion of *dolus eventualis* by asserting that:

*“The required mens rea is met where the principal offender, at the time of the act or mission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or mission.”*<sup>39</sup>

In short, it can be asserted that the content of the notion CAH has been significantly shaped by the *ad hoc* tribunals jurisprudence, preceding the Rome Statutes’ articulation of the crime, which includes a definition based on the existence of a widespread or systematic attack against a civilian population and the perpetrator’s knowing contribution to that attack.<sup>40</sup>

At this point, and once the subjective and objective elements of the crime which will serve us as an instrument to prosecute aggression have been established, the direction in which this argumentation is taking us becomes clear. Having clarified the definitional elements of CAH through an international conventional and case-law analysis and taking into account the existence of an open clause in which we can embody the “illegal use of force”, the foundations of this proposal have been built. Once the perpetration of an act of illegal use of force has been verified, a box-ticking exercise on the aforementioned definitional elements of CAH would be sufficient to justify the ICC’s prosecution of an act of illegal use of force as an inhumane act amounting to a CAH.

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*cont.*

case, the TC highlights that this notion “functions as a residual category for serious charges which are not otherwise enumerated under Article 5”.

<sup>38</sup> B. Ferencz, A New Approach to deterring illegal wars, August 2011, B. Ferencz. Law. Not War.

<sup>39</sup> Krnojelac (IT-97-25), TC, 15 March 2002, para. 132 referring to Kayishema and Ruzindana Trial Judgement, para. 153; Aleksovski, Trial Judgement, para. 56.

<sup>40</sup> Much more critical with the *ad hoc* tribunals’ contribution to the shaping of the CAH’s legal framework is Professor Sluiter. Sluiter, G., “Chapeau Elements” of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals” in Forging a Convention for Crimes Against Humanity, edited by Leila Nadya Sadat, Cambridge University Press (2011), p. 140: “As with many aspects of the law of the ad hoc tribunals, the important decisions and choices were made in the early case law. Even if they fundamentally disagreed with these choices, subsequent Trial Chambers could not significantly deviate from these initial findings without risking the invalidation of earlier judgements. (...) There is a lot of uncritical repetition going on, and what matters is the origin and quality of the initial solution proposed”.

### III. *Illegal use of force*

Among international scholars, with some exceptional opinions,<sup>41</sup> there is a common agreement on the absolute illegality of the use of force by States lacking authorization from the Security Council.<sup>42</sup>

According to current international law, in the absence of a Security Council Resolution, the use of armed force by States can only be justified as collective self-defence pursuant to Article 51 of the Charter of the United Nations.<sup>43</sup>

With the help of the referred case law, there are three questions the ICC must respond to in order to be able to establish its jurisdiction to investigate the use of force by a State against another State resulting in widespread and systematic attack of civilian population as a potential case of CAH:

1. Is this use of force illegal?
2. Are the definitional features of CAH present?
3. Do these acts amount to other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health?

Despite the fact that, as stated above, scholars' positions range from considering the use of force illegal in all situations to estimating that in some occasions, though remaining illegal it may be justified, the present research paper takes a legalistic approach to

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<sup>41</sup> In this article Professor Simma, though accepting that the use of force by NATO in the Kosovo crisis is contrary to the United Nations Charter, he diminishes the importance of this illegality in so far it was aimed at avoiding the perpetration of big-scale atrocities: B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", *European Journal of International Law*, 10, (1999), p. 22.

<sup>42</sup> Professor Phillip Allot, in an article on the invasion of Iraq, positions himself against the possibility of armed force being legal in any case: "The use of armed force by States can never be unlawful because it can never be lawful". P. Allot, "The invasion of Iraq and the nature of international law", 5 *Inter Alia* 91, (2006); Cassese A., "*Ex iniuria ius oritur*: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?", *European Journal of International Law*, 10 (1999), pp. 25–29. In the light of the Kosovo crisis, Professor Cassese suggests that the nascent trends in the world community may lead to justifying, under strict conditions, resort to armed force, even absent any authorization by the Security Council as an exception similar to that laid in Article 51. However, he clearly states that, in the present moment, the use of force by NATO countries in the Kosovo crisis was fully unlawful, justified from an ethical point of view but contrary to current international law; also in this sense, see O. Schachter, *International Law in Theory and Practice* (1991), Martinus Nijhoff Publishers, p. 128; On the question of the Security Council's capacity to legalise *ex post facto* the unilateral use of force see Österdahl, I., "Preach what you practice. The Security Council and the Legislation *ex post facto* of the Unilateral Use of Force", 74 *Nordic Journal of International Law*, 231–260 (2005).

<sup>43</sup> Cassese, *supra* note 13, p. 25: "Under the UN Charter system, as complemented by the international standards which have emerged in the last 50 years, respect for human rights and self-determination of peoples, however important or crucial it may be, is never allowed to put peace in jeopardy. One may like or dislike this state of affairs, but so it is under *lex lata*".

respond to this question, consequently considering illegal the use of force perpetrated by a State without Security Council authorisation.<sup>44</sup> Thus, the first question can straightforwardly be answered in positivistic terms by finding out this body's position on the exercise of the use of force by a given State. The second question requires further analysis, as it is necessary to verify that the "illegal use of force" is committed through an act in which the aforementioned definitional elements of CAH are present, that is, through an act amounting to a widespread and systematic attack against a civilian population. Finally, despite the existence of guiding standards set up by international case law in order to answer the third question, the vagueness inherent to the concepts that conforms it makes it, undoubtedly, the most complex question to answer. Interesting developments made by the international criminal tribunals, serve as examples of the inclusion of "attacks against human dignity" in the definition of "other inhumane acts".<sup>45</sup> Nevertheless, establishing the borders of such a concept remains one of the big unsolved issues in the context of international criminal law. A proper attempt to present a content proposal would require an in depth transversal approach from disciplines ranging from philosophical tradition to ethics and anthropology. Though extremely interesting, it is beyond the scope of this paper.<sup>46</sup>

It can be inferred from the previous arguments that despite the recent postponement of the ICC's jurisdiction to investigate the crime of aggression, this body has the legal tools to prosecute those alleged responsible for the waging of war by resorting to the CAH's subcategory "other inhumane acts...". Dependence of the Security Council's decision to authorize a State's use of force partially diminishes the legitimacy of this option, regardless of the very rare occasions in which this body has done so. In any case, this flaw will serve to introduce us to the second proposal, consisting of a State-centred approach to the prosecution of those alleged authors of the crime of aggression through the consolidation of a territorial jurisdictional principle: the *aut dedere aut judicare* clause.

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<sup>44</sup> Position which has also been defended by academics. See, among others, Sarooshi, D., *The United Nations and the Development of Collective Security. The Delegation by the UN Security Council of its Chapter VII Powers* (Clarendon Press, Oxford, 1999).

<sup>45</sup> *Kayishema y Ruzindana*, ICTR, Judgement, Case No. ICTR-95-1-T, 21 May 1999, para. 151; *Bagilishema*, ICTR, Judgement, Case No. ICTR-95-1A-T, 7 June 2001, para. 91; *Blaskic*, TPIY, Judgement, Case No. IT-95-14-T, 3 March 2000, para. 240.

<sup>46</sup> A couple of interesting attempts to answer this question can be found in D. Luban, *A Theory of Crimes Against Humanity*, 29 *Yale Journal of International Law*, (2004) 1, 85 and Kuschnik, B., *Humaness, Humankind and Crimes Against Humanity*, 2 *Göttingen Journal of International Law*, 501, 2010.

### 3.c. Head 2. The national via: the crime of aggression and the *aut dedere aut judicare* clause

Despite the discouraging precedents in the scope of domestic initiative to prosecute the crime of aggression,<sup>47</sup> after Kampala, those States that have not yet done so,<sup>48</sup> have no more excuses not to incorporate the crime of aggression into their domestic legislations.

It is in this context that the emerging obligation to extradite or prosecute as a part of customary international law becomes relevant. Having achieved a full definition of this crime at an international level, there are no more obstacles to extend the applicability of this clause to this crime.

The “extradite or prosecute” clause is an emerging international obligation whereby a State’s obligation to extradite in the absence of prosecution cannot be subject to executive discretion. It can be defined as “the alternative obligation of a State holding an alleged perpetrator of certain crimes to extradite him or to set in motion the procedure to prosecute him”.<sup>49</sup> This alternative formula deals with one of globalisation’s main challenges: the need for a universal and consistent approach towards impunity in respect of the most serious violations of Human Rights.

The “extradite or prosecute” principle presents itself in this context as a tool that can potentially fill in the existing impunity gaps and consolidate consistent procedure regulations that would result in the respect of international Human Right standards in this scope. The novelty resides in that to meet these objectives, the duties and responsibilities of domestic jurisdictions are enforced in application of international law. Nevertheless, the binding nature of this clause, and hence the enforceability of the referred duties and responsibilities, is dependant on its consideration as part of customary international law.

The International Law Commission (ILC) is addressing the analysis of this principle since 2004. Various reports have been published after the appointment of a Special

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<sup>47</sup> See *R. v. Jones et al.*, decided by the House of Lords on 29 March 2006. The appellants, who in 2003 had unlawfully entered British or NATO military bases in the United Kingdom to prevent what they considered to be preparations for a war of aggression against Iraq, had been charged with or convicted of causing criminal damage or aggravated trespass in British military bases. The House of Lords held that aggression is criminalized in international law; however, absent any statutory enactment in the United Kingdom incorporating the international customary law criminalizing aggression, the appellants were not entitled to rely upon that criminalization as a defence for the illegality of their action.

<sup>48</sup> For instance, see the following provisions of criminal codes: Art. 80 of the German Criminal Code (“Whoever prepares a war of aggression ([envisaged in] Art. 26 para. 1 of the Basic Law) in which the Federal Republic of Germany is supposed to participate and thereby creates a danger of war for the Federal Republic of Germany, shall be punished with imprisonment for life or for no less than ten years”); of Bulgaria (Art. 409), the Russian Federation (Art. 353); Ukraine (Art. 437); Armenia (Art. 384); Uzbekistan (Art. 151); Tajikistan (Art. 395); Latvia (Para. 72), Moldova (Art. 139), Macedonia (Art. 415). See also Art. 1 of the Iraqi Law no. 7 of 17 August 1958.

<sup>49</sup> G. Acquaviva, “*Aut dedere aut judicare*” in *The Oxford Companion to International Criminal Justice*, Editor in Chief: Antonio Cassese, Oxford University Press, New York, (2009), pp. 253–254.

Rapporteur for this topic,<sup>50</sup> which has preceded the constitution of a Working Group in 2008. However, until recently, this matter has received very little attention from academics.<sup>51</sup>

Up until now, progress in this scope has been limited to the establishment of the sources to be considered and to the methodological aspect dealing with the way in which this topic should be approached.<sup>52</sup>

<sup>50</sup> Reports issued by the Special Rapporteur, Mr. Zdzislaw Galicki: A/CN.4/571, Preliminary report on the obligation to extradite or prosecute (“*aut dedere aut judicare*”), June 2006, ILC 58th Session; A/CN.4/585, Second report on the obligation to extradite or prosecute (*aut dedere aut judicare*), June 2007, ILC 59th Session; A/CN.4/603, Third report on the obligation to extradite or prosecute (*aut dedere aut judicare*), August 2008, ILC 60th Session; A/CN.4/648, Fourth report on the obligation to extradite or prosecute (*aut dedere aut judicare*), May 2011, ILC 63rd Session.

<sup>51</sup> This issue has been indirectly referred to in in-depth extradition monographs (i.e. BASSIOUNI, M.C., *International Extradition: United States Law and Practice*, Oxford University Press, New York, 2007). The list of specific research papers included in the bibliography suggests that only recently has this topic gained the attention of scholars. See also Remiro Brotóns, A. y otros, *Derecho Internacional*, Ed. Tirant lo Blanch, Valencia (2007), p. 1254; Abad Castelos, M., “La persecución restringida de los delitos que lesionan valores esenciales de la comunidad internacional: ¿sigue existiendo la jurisdicción universal en España?”, *Universitas. Revista de Filosofía, Derecho y Política*, n° 15, enero 2012, pp. 65–90. See pp. 72–73. Available at [http://e-archivo.uc3m.es/bitstream/10016/13385/1/abad\\_RU\\_2012.pdf](http://e-archivo.uc3m.es/bitstream/10016/13385/1/abad_RU_2012.pdf); Gómez-Benítez, J.M., “Complementariedad de la Corte Penal Internacional y Jurisdicción Universal de los Tribunales Nacionales”, *Revista de Derecho Penal y Criminología*, Vol. 27, N° 82 (2006), p. 41; Pérez González, C., “Jurisdicción universal y enjuiciamiento de crímenes de Guerra: ¿qué obligaciones impone el Derecho internacional público?”, *La responsabilidad penal por la comisión de Crímenes de Guerra: El Caso de Palestina*, C. Pérez González y R. Escudero Alday (editores), Thomson Reuters, Aranzadi, Navarra (2009), pp. 131–163 and Bassiouni, M.C.; Wise, E.M., *Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff publishers, (1995), considered to be the first monographic work exclusively addressing the scope and nature on this principle written in the context of the new world order created after the Second World War. Historically, the origins of the *aut dedere aut judicare* clause can be traced back to the 16th century with Spanish jurist and theologian Diego de Covarrubias and Dutch jurist Hugo Grotius considered to be at the foundations, see Garcés, J., “Epílogo”, *La Responsabilidad Penal por la Comisión de Crímenes de Guerra: El Caso de Palestina*, C. Pérez González y R. Escudero Alday (editores), Thomson Reuters, Aranzadi, Navarra, 2009, pp. 231–238; p. 233 and Grocio, H., *De Iure Belli ac Pacis*, 1625; traducción española: *Del derecho de la guerra y de la paz* (Clásicos jurídicos, Editorial Reus, traducción de Jaime Torrubiano Ripoll), 1925. In chapter XXI, book II, paragraph IV, this principle is studied in depth. Its initial construction (*aut dedere aut punire*) would be later on modified in application of legal security rights and respect to the presumption of innocence to become “*aut dedere aut judicare*”.

<sup>52</sup> One of the most recent research works on this issue (C. Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law* (« eCahiers », n° 2), 2009, Online, Online since May 2011, connection on 31 March 2013, URL: <http://iheid.revues.org/299>; DOI: 10.4000/iheid.299) concentrates on the preliminary phase of a research project that is still pending: organising and systematizing the sources to be examined while proposing a methodology to approach this challenge. Among other ideas, this author suggests that undertaking this task appropriately requires analysing the legal nature of this clause regarding each international crime separately.

Consequently, although this second proposal, until its legal nature is defined, is still under construction, recent developments of both *opinion iuris* and State practice seem to consider the crystallization of this mechanism to end impunity in respect of the most serious crimes, more than plausible. At a case-law level, a very recent ICJ decision on the obligation to extradite or prosecute that binds Senegal in the conflict that arose between this country and Belgium in respect of former Chad dictator Hissène Habré<sup>53</sup> seems to confirm it. This ground-breaking decision estimates that in this particular case, the obligation to extradite or prosecute is a conventional one, which binds both States, as they are both signatories of the Convention against Torture that articulates this clause as a mechanism to fight impunity in respect of the crimes of torture.<sup>54</sup>

From all of the above, and in attempt to sum up the flaws and strong points of the alternatives proposed to tackle the temporary problem of the ICC's lack of jurisdiction, two considerations should be made: firstly, it should be pointed out that fostering national courts to take the lead in the investigation of the crime of aggression finds, after Kampala, no legal, definitional or procedural obstacles; secondly, by using this stalemate period in which the ICC is impeded to exercise its jurisdiction to consolidate the role of domestic courts in holding these criminals accountable, an unprecedented step towards the effective application of the principle of complementarity is taken. This principle, which should regulate the relationship between the ICC and national courts' jurisdictions, is very far from being fully applied. Moreover, the ICC, created to intervene on a subsidiary basis is currently being the object of criticism for not being able to deal with all the cases that are being presented before it.<sup>55</sup> It is in this scenario that the obligation to extradite or prosecute stands out as a tool to reduce the ICC's case burden. By applying this alternative obligation, the impunity gap which the alleged authors of international crime may benefit from is closed by national jurisdictions on the basis of the presence of the accused in the territory of a given State. In so far the

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<sup>53</sup> Questions relating to the obligation to prosecute or extradite, *Belgium v. Senegal*, 12th July 2012, Judgement.

<sup>54</sup> The nature of *ius cogens* of the prohibition of torture and the developing State Practice and *Opinio Iuris* on the legal nature of the *aut dedere aut iudicare* clause invite to further debate on the emerging customary nature of this obligation in respect of core international crimes. Nevertheless, this discussion exceeds the scope of this paper and should be addressed monographically.

<sup>55</sup> On the complementarity principle see, among others, Kleffner, J., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, New York, 2008, p. 100: "In the light of the general meaning of the term employed, the ICC is thus envisaged to supply the deficiencies of national criminal jurisdictions, and together they form a unit in the enforcement of the prohibition of ICC crimes"; Olásolo, H., *Reflexiones sobre el principio de complementariedad en el Estatuto de Roma*, *Revista española de derecho militar*, N° 82 (2003). On the de facto capacity of the ICC, see Burke-White, W.W., *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 *HARV. INT'L L.J.* (2008), p. 49. The author refers to the ICC's budget for 2005, which has been progressively increased up to 11 million euros per year in 2012. Available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/Resolutions/ICC-ASP-10-Res.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/Resolutions/ICC-ASP-10-Res.4-ENG.pdf) and 118 million euros per year in 2013, available at [http://icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-10-ENG.pdf](http://icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf): "No institution with a 66.8 million (euros) annual Budget can possibly provide global accountability".

legal nature of this obligation has not yet been defined in international law, it would be desirable to have an international convention on the crime of aggression that recognises the application of this alternative principle. This way, the temporary lack of definition of its legal nature would be resolved by a conventional legitimisation which, at the same time, would contribute to crystallize the emerging consuetudinary nature of the *aut dedere aut judicare* principle in respect of core international crimes.

#### 4. CONCLUSION

There is no doubt on the diplomatic tensions that will result from any attempt to exercise jurisdiction to prosecute the crime of aggression. When investigating the commission of this crime, an international or national court will have to question a decision made by a State, which will argue to be doing so in application of the discretion that the principle of sovereignty entitles it with. This disadvantage, although it should not be underestimated, has been a common place in the strive to prosecute all international core crimes, committed, most of the time, with a State's direct or indirect participation.

It follows from the present paper that although there is a latent intention in the international community to end impunity in respect of those responsible for the waging of war, State actors seem to lack the strength to materialize this will. The modest outcome of the Kampala Conference in the scope of the ICC's capacity to exercise its jurisdiction is the latest proof of it. Until the ICC can effectively assume its rightful role in respect of the crime of aggression, the two proposals presented in this paper offer alternative ways of filling temporarily the impunity gap left by the inability of State representatives to reach an agreement at Kampala.

The first proposal, consisting of prosecuting the crime of aggression through the classification of the act of starting a war as "illegal use of force", which can potentially qualify as a crime against humanity if it fulfils the definitional requisites of the aforementioned crime, opens automatically a door through which international criminal jurisdiction can step in. In this case, the proposed legal engineering would allow the ICC to prosecute those alleged responsible for the act of starting a war by concentrating on the concurrence of the elements of the crime against humanity.

From a practical point of view, the international option seems to be more viable as the existence of a whole working structure with a consolidated international judicial body which applies well-settled definitions and substantial case-law. It also enjoys a very important advantage: the limited or null role of the SC in deciding to investigate and prosecute these crimes as CAH. This assertion, which at first may seem to contradict the SC's power of referral, requires further explanation. The idea behind this statement is that regardless of this body's capacity to block an investigation through the exercise of the power of deferral, it cannot stop States from referring the illegal use of force as a CAH to the ICC for further investigation when this crime appears to have been committed, or the Prosecutor to initiate investigations on this basis *proprio motu*. In so far this mechanism allows the crime of aggression to be redirected to the crime against humanity, the Security Council's role, in any of these two cases, is reduced to evaluating whether it wants to exercise its power of referral to block the investigation on an apparently committed crime against humanity. If the referral is presented in a

way that evidences that there has been an illegal use of force with consequences that can apparently amount to crimes against humanity, the ICC is obliged to consider this covert crime of aggression, unless the SC exercises the cited power. This is to say that through this shortcut, we can avoid the SC's influence on the initial classification of this act as a CAH.<sup>56</sup> Judicial independence is guaranteed through this mechanism with the advantage of carrying out the whole process in full respect of international standards of human rights.

On the other hand, the State-centred alternative based on the promotion of the application of the obligation to extradite or prosecute might seem riskier at first sight but, if studied in depth, it will soon be perceived that contributing to the emergence of this clause as customary international law might be the hardest and longest way to end impunity, but it is definitively the most enduring alternative, in a long term perspective. After 10 years functioning, the need to enforce a solid system that enables the just application of the principle of complementarity on which the ICC's role is based on, has become more than obvious. The ICC does not have the capacity to investigate and prosecute all genocides, crimes against humanity, war crimes and crimes of aggression occurring in the world. A more committed step towards the consolidation of an "integrated system" which places the national courts at the centre of the prosecution of core international crimes has become a world priority.<sup>57</sup> It is in this context that the potentiality of the *aut dedere aut judicare* clause to enforce accountability of those responsible for the commission of the crime of aggression, having been defined in Kampala 2010, stands out. The proposed option has obviously a long road ahead of it before it crystallizes, specially given the fact that the legal nature of this alternative clause has not yet been completely defined, as can be inferred from the analysis of the ICL's work on this topic. However, the consensus on the definition of the crime of aggression represents an important step forward and sets the basis for the development of a domestic-centred approach to the prosecution of this crime. Among the unavoidable measures, an international convention which prohibits it and incorporates the obligation to extradite or prosecute, is strongly recommended.

All in all, it can be concluded that investing in the promotion of this second proposal, will produce, in the long term, bigger and more solid results as it counts with the means to effectively achieve the main goal of international criminal justice: end

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<sup>56</sup> Despite the aforementioned power that it indirectly exercises on the first proposal in so far it decides whether to classify a use of force by a State as legal or illegal.

<sup>57</sup> Oriolo, A., Revisiting the interactions between the ICC and national jurisdictions as a new Gateway to strengthening the effectiveness of international criminal justice, *Revue Internationale de Droit Pénal*, Vol. 83, (1er et 2ème trimestres 2012), pp. 195–220, p. 198, citando a Ziccardi Capaldo, G., *The Pillars of Global Law* (2008), p. 46: "According to the "integrated system", "the right of States to sanction uti universi breaches of fundamental rules must be "integrated" with the general functions conferred on international institutions to "determine" the breaches themselves and "control" the activity carried out by States, Thus, "the control exercised by international bodies gives the action undertaken 'unilaterally' by States or groups os States the objectivity needed to endow it with a 'public' nature and avoid abuses, providing an institutional control of legitimacy".

impunity through the eradication of safe havens for those responsible for the commission of core international crimes.

The acceptance and combined application of these two propositions by the international community is the closest we can come, for the time being, to materializing Professor Ferencz's assertion: "Deterring war should not depend on nomenclature".<sup>58</sup>

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<sup>58</sup> B. Ferencz, *A New Approach to deterring . . . op. cit.*



## *Spanish Diplomatic and Parliamentary Practice in Public International Law, 2011–June 2012*

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The following is a list of abbreviations related to the documentation of the Spanish Parliament used in the preparation of this Section (<http://www.congreso.es>, and <http://www.senado.es>).

*BOCG-Cortes Generales* – Boletín Oficial de las Cortes Generales. Cortes Generales. Serie A, Actividades Parlamentarias (Official Journal of the Spanish Parliament. Spanish Parliament. Series A, Parliamentary Activities).

*BOCG-Congreso.D* – Boletín Oficial de las Cortes Generales. Sección Congreso de los Diputados. Serie D, Actos de control (Official Journal of the Spanish Parliament. Congress of Deputies. Series D, Acts of control).

*BOCG-Senado.I* – Boletín Oficial de las Cortes Generales. Sección Senado. Serie I, Boletín General (Official Journal of the Spanish Parliament. Senate. Series I, General Journal).

*DSCG-Comisiones Mixtas* – Diario de Sesiones de las Cortes Generales, Comisiones Mixtas (Official Record of the Spanish Parliament. Joint Committee Meetings).

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- I. International Law In General**
- II. Sources of International Law**
  - 1. Treaties
  - 2. Codification and Progressive Development
- III. Relations Between International Law and Municipal Law**
- IV. Subjects of International Law**
  - 1. Self-Determination
    - a) *Western Sahara*
    - b) *Palestine*
    - c) *South Sudan*
  - 2. Recognition of Governments
    - a) *Honduras*
- V. The Individual in International Law**
  - 1. Diplomatic and Consular Protection
  - 2. Aliens
  - 3. Human Rights
- VI. State Organs**
- VII. Territory**
  - 1. Territory Division. Frontier
  - 2. Colonies
    - a) *Gibraltar*
- VIII. Seas, Waterways, Ships**
  - 1. Delimitation of Maritime Areas
  - 2. Fisheries
  - 3. Ships
  - 4. Underwater Cultural Heritage
- IX. International Spaces**
  - 1. Indian Ocean
- X. Environment**
  - 1. Climate Change
- XI. Legal Aspects of International Cooperation**
  - 1. Development Cooperation
    - a) *General Lines*
    - b) *Alliance of Civilizations*

2. Assistance to Developing Countries

- a) *Latin America*
- b) *The Mediterranean*
- c) *Africa*

3. Terrorism

4. Humanitarian Assistance

- a) *Haiti*
- b) *Sahel Region*
- c) *Occupied Palestinian Territory*

**XII. International Organizations**

1. United Nations

- a) *Security Council*
- b) *Somalia*

2. North Atlantic Treaty Organization

- a) *Military Structure*
- b) *NATO Operations: Kosovo*

**XIII. European Union**

1. Common Agricultural and Fisheries Policy

- a) *EU-Morocco Agreement*

2. Common Fisheries Policy

- a) *Fisheries Agreement with Morocco*
- b) *EU-Gabon Fisheries Agreement*

3. Area of Freedom, Security and Justice

4. EU Economic Strategy

5. External Relations

- a) *Common Foreign Policy*

6. Foreign Investment Protection

**XIV. Responsibility**

1. In General

**XV. Pacific Settlement of Disputes**

**XVI. Coercion and the Use of Force Short of War**

1. Collective Measures

- a) *Libya*

**XVII. War and Neutrality**

1. Arms Exports

## I. INTERNATIONAL LAW IN GENERAL

## II. SOURCES OF INTERNATIONAL LAW

### 1. Treaties

On 26 January 2011, the Spanish Minister of Defence, Mrs. Chacón Piqueras, referred to the necessity that the Agreement on Defence Cooperation between the United States of America and the Kingdom of Spain be revised:

“(..)

On 12 January this year, we came to terms with the United States as to the enhancement of the aforementioned Agreement on Defence concerning three fundamental aspects: first, the permission for stopovers and overflights by military aircraft; second, the storage of ammunition and explosives in American support facilities; third, the adoption of joint measures for environmental conservation. All these measures shall enter into force on 1 February.

(..)

With regard to the operating procedures related to authorizations for use, (...) there have been completed those improvements introduced in year 2007 (...). Specifically, there have been reinforced the measures for the protection of our airspace through an express prohibition against air-to-air refuelling and visual flights over the national territory. Likewise, a specific procedure has been provided for those flights to which general authorizations shall not apply. In the case of the said flights, an application for a permit to fly shall be submitted in greater advance (seven days) and shall be attached to an explanatory memorandum on the detailed circumstances justifying the flight, its cargo (type and quantity) and its itinerary. These improvements are aimed at a stronger security of our airspace and at a more thorough information and follow-up of the activities carried out by these aircraft while in transit through the Spanish territory.

Secondly, concerning explosives and ammunitions at United States support facilities, there has been provided a procedure adapted to current Spanish regulations on the storage of ammunitions and explosives and on the kind of weapons authorized. (...) Eventually, improvements may be found in the field of environmental control and conservation. Through them, we intend to ensure an environmental management which complies with current Spanish regulations, but especially European Union ones. As a way of example, in the event of a new activity to be developed by American authorities at a joint facility, they shall specify those consequences likely to affect our environment and explicitly state the corresponding corrective measures and contingency plans before the activity can be carried out.

(..)

As to CIA flights (...), the aforementioned Agreement on Defence shall not apply. As you may know, improvements were made in 2007 (...). Henceforth, all flights by American military aircraft making stopovers in Spanish bases and with Guantanamo as origin or destination shall be granted authorization, one by one, in advance. Since

then, the United States is obliged to inform us on the nature of the flights' personnel and cargo, which shall not be controversial to our country, as it is provided for in Article 25.2 of the Agreement. Regarding the incident to which you are referring, the US Government confirmed to the Spanish Government that all military flights (...) operated before that date had complied with the said Article 25.2. Likewise, in 2007, there was entered the agreement on the regulations governing the activities carried out by the US Naval Criminal Investigative Service (NCIS) and US Air Force Office of Special Investigations (AFOSI) within Spanish territory. Under this agreement, prior official approval is necessary for these bodies to operate in Spain and they are forced to give prior notice on any activity carried out within our territory, an authorization which may be denied at any time.

(*DSC-P*, IX Leg., No. 219, pp. 38–41).

On 14 March 2011, the Secretary of State for Constitutional and Parliamentary Affairs referred to the Government's predictions concerning the signature of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 in the following terms:

"The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 was adopted in 1990, under circumstances other than those faced today (...). So far, only 42 States have ratified the said Convention.

None of EU Member States have ratified the Convention of 1990. This Convention was drafted by the countries of origin, without taking into account contributions from those countries which are a destination for migratory flows. This Convention does not make a clear distinction between legal and illegal immigrants.

It must be pointed out, however, that those rights set forth in the Convention of 1990 are also envisaged, although in general terms, in numerous treaties with a universal scope for the protection and promotion of human rights to which Spain is already a party, and in other treaties at the European regional level (...).

Furthermore, Spanish internal law actually provides a broad protection to the rights of immigrants (...). In Spain, many of the so-called economic, social and cultural rights are granted to all persons, irrespective of their legal or illegal situation, namely, emergency medical care or access to education, the rights of migrant workers and their families being thereby fully guaranteed in Spain.

Finally, it must be noted that after the entry into force of the Treaty on the Functioning of the European Union, on 1 December 2009, matters in the Convention are either exclusive competence of the European Union, or joint competence, or competence of EU Member States. Indeed, the Commission has competences in legal migration, although the rights of legal migrant workers are a national competence. As to the rights of illegal migrants, competences here are of national or joint character.

To sum up, for the eventual ratification of the Convention, the European Union Commission should agree on it. On April 2010, both the Commission and the remaining 26 EU Member States declared they were against any study of the eventual ratification of the Convention, given the aforementioned reasons, and stated so through a letter addressed to the President of the Convention Committee (...).

(*BOCG-Congreso.D*, IX Leg., No. 557, p. 399).

On 6 May 2011, the Secretary of State for Constitutional and Parliamentary Affairs put forward those agreements concluded between Spain and the Palestinian Authority:

“The Spanish Government has not signed any agreement with the Palestinian Authority (PA) since the only agreements which may be signed are those concluded with the Palestine Liberation Organization (PLO), which possess *jus contrahendi* under International Law. Anyhow, Spain is working with the PA according to its competences pursuant to the Israel-PLO Agreements and, since year 2004, it has signed the following Memoranda of Understanding:

1. Memorandum of Understanding between the Ministry of Foreign Affairs and Cooperation of the Kingdom of Spain and the Ministry of the Interior of the Palestinian Authority.
2. Memorandum of Understanding for the establishment of political consultations between the Government of the Kingdom of Spain and the Government of the Palestinian Authority.
3. Memorandum of Understanding concerning tourism between the Ministry of Tourism and Antiquities of the Palestinian Authority and the Spanish Secretariat-General for Tourism and Domestic Trade”.

(*BOCG-Congreso.D*, IX Leg., No. 579, p. 105).

In response to a parliamentary question concerning the Spanish conventional investment policy, on 24 February 2012, the Government pointed out that:

“The Government has not considered reviewing Spain’s role in those Bilateral Investment Agreements to which it is a party, except for the role pursuant to the Treaty of Lisbon and EU Investment Rules.

The Treaty of Lisbon establishes EU’s exclusive competence in the field of foreign direct investments, as part of the common commercial policy (Article 207.1.). At present, there is a proposal by the EU Parliament and Council under discussion for the development of a temporary solution for those existing bilateral investment treaties between EU Member States and third countries, and for the establishment of EU Members’ authorization to modify or enter bilateral investment treaties in the future.

In addition, the Government intends to remain a party to the International Convention for the Settlement of Investment Disputes (ICSID Convention), which is key in dispute settlement arbitration in a majority of the Bilateral Investment Treaties (BITs) concluded by Spain and other countries in the Organization for Economic Cooperation and Development (OECD). Likewise, the said Convention underpins these BITs at the worldwide level”.

(*BOCG-Congreso.D*, X Leg., No. 67, pp. 165–166).

On 20 March 2012, the Government stated the following as to the agreements entered into by Spain and the Holy See:

“So far, none of these Agreements have been deemed contrary to the Constitution by the Spanish Constitutional Court, which under the Spanish Constitution has issued a binding interpretation on the matter. The said interpretation has been applied extensively, as in the case concerning Spanish Catholic Religion teachers.

With regard to administrative agreements, our legal system provides sufficient legal channels and guarantees to ensure their legality. Therefore, there is no need for the Government to amend them in order to adapt them to the legal system. Should it be necessary, Courts shall examine their adequacy where the parties involved would consider they contravene the law.

As it could not be otherwise, the Government is committed to the principles of equality, religious freedom, and cooperation and neutrality of public authorities. Likewise, the Government considers that the current legal framework of relations with the Catholic Church is adequate, without prejudice to those improvements which may be introduced in the present model by the enforcement of the aforementioned principles”.

*(BOCG-Congreso.D, X Leg., No. 94, p. 229).*

On 4 May 2012, the Government reported the following as to the ratification process of the European Social Charter (revised):

“The reasons why Spain has not ratified the Charter so far have their origin in year 1999, when a joint study was carried out by certain units of the former Ministry of Labour and other departments. The said study concluded that, although differences between the text of the Revised Charter and the domestic law and practices of the time were far from being insurmountable, there were particular aspects which did pose problems.

As a consequence thereof its ratification remained pending. Subsequently, given the time elapsed since that date and the progress undergone by our social law, in 2007 a new assessment was carried out with a view to analyzing its potential ratification. With that aim, as of 18 October 2007, consultation was made to the various Units and Directorates of the former Ministry of Labour and Social Affairs competent in the matter in order to obtain their opinion on a potential eventual ratification.

In view of the data provided by the various Units and Directorates of the former Ministry of Labour and Social Affairs, there was concluded that there were not significant difficulties at that moment which might hinder Spain’s ratification of the Revised European Social Charter. However, particular difficulties were found concerning specific articles and aspects of the Revised Charter (Article 2.3, Article 2.6, Article 8.2, Article 8.5, Article 19). In addition, there are further difficulties arising out of the interpretation given by the European Committee of Social Rights (ECSR) to the Charter’s articles, since provisions are not interpreted literally but pursuant to the Committee’s particular interpretation (the so-called “Committee case-law”). Thus, the Charter makes use of vague and imprecise expressions to refer to the States’ commitments (such as the establishment of “reasonable” daily and weekly working hours; the workers’ rights to a remuneration “sufficient” for a “decent standard of living” for themselves and their families, etc.). This leads to the Committee’s (sometimes excessive) interpretations on the scope which should be granted to these commitments. At present, some of the difficulties have been overcome as a result of the updating of rules governing this issue; however, other difficulties still remain, which explains the fact that the Revised European Social Charter has not been ratified [by Spain] so far.

As set out above, in principle, the Spanish Government is willing to continue the study and consultations for a potential eventual ratification of the Revised Charter of 1996”.

(*BOCG-Congreso.D*, X Leg., No. 104, p. 147).

## 2. Codification and Progressive Development

On the occasion of the [GA 6th Committee meeting concerning the] Report of the International Law Commission on the work of its sixty-third session, on 25 October 2011, Spain’s representative, Ms. Escobar Hernández, remarked the following:

“(T)he Commission’s sixty-third session, the last of this five-year period, had been remarkable for the completion of work on three long-standing topics: reservations to treaties, responsibility of international organizations, and effects of armed conflicts on treaties. Completion of work on those three topics enabled the Commission to turn its attention to topics already on its agenda and to take up new ones while the Commission had an impressive array of topics on its agenda that were of great interest to States and for international practice, it should focus on a limited number of topics in order to be more effective and efficient and to deliver valuable and useful results for States and the international community as a whole. In that connection, it hoped that the Commission would prioritize its work accordingly and submit its plan to the Sixth Committee for consideration at its sixty-seventh session. In setting its priorities, the Commission should take into account the opinions of States, especially as expressed during the debates in the Sixth Committee.

36. Completion of work on the Guide to Practice on Reservations to Treaties was one of the Commission’s main achievements of its last session. Spain welcomed the Commission’s recommendation that the General Assembly should take note of the Guide to Practice and ensure its widest possible dissemination. While her delegation reserved the right to make specific comments on some of the guidelines during the fuller debate during the sixty-seventh session, it considered the Guide to Practice – which addressed in a comprehensive manner the various elements related to reservations and objections to reservations that might be of interest to States – to be a useful reference tool for States in the difficult task of deciding whether they could or should formulate reservations to treaties or objections to reservations.

37. The Commission’s two recommendations relating to the reservations dialogue drew attention to the reality that reservations and objections created major practical problems that, in many cases, could not be resolved by merely applying the standards of the Vienna Conventions on the Law of Treaties or the guidelines themselves. Indeed, reservations and objections often gave rise to openly conflicting positions. The issue should therefore be addressed in a transparent manner, with the aim of safeguarding the integrity of treaties, but also enhancing their flexibility and securing the widest possible participation of States and international organizations in treaty-based legal regimes. Her delegation therefore welcomed the Commission’s recommendation regarding the reservations dialogue. It viewed the mechanism of assistance and settlement of disputes in relation to reservations to treaties as an

element of support for the reservations dialogue and was open to participating in a debate on the establishment of such a mechanism.

38. The topic of the responsibility of international organizations had great practical implications and called for international regulation. The text of the draft articles on the topic maintained the basic balance between the various issues at stake, without overlooking the important dimension of the responsibility of States in connection with the conduct of an international organization. The draft articles were largely similar in overall structure and content to the articles on State responsibility. Nonetheless, each form of responsibility had its own unique set of features, so that it was not always possible to transpose the rules *mutatis mutandis*. The general commentary to the draft articles, in any case, acknowledged the diversity of international organizations and the specificity of the international responsibility that they might incur.

39. Her delegation could support the recommendation that the General Assembly should take note of the draft articles. With regard to the possible elaboration of a convention, while a topic of such importance should be governed by a treaty, the wide variety of positions showed that the matter required further reflection and debate and should therefore be considered at a later stage”.

(*A/C.6/66/SR.19*, of 22 November 2011, p. 7).

### III. RELATIONS BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

### IV. SUBJECTS OF INTERNATIONAL LAW

#### 1. Self-Determination

##### *a) Western Sahara*

On 27 January 2011, the Secretary of State for Constitutional and Parliamentary Affairs appeared before the Spanish Congress in relation to the dismantling by Morocco of the Sahrawi camp Gdeim Izik:

“The Government maintains a fluid dialogue with Moroccan authorities regarding human rights issues (...), both at a bilateral level and through those mechanisms under the EU-Morocco Association Agreement. On 11 October, the EU-Morocco Subcommittee on Human Rights met Moroccan authorities to analyse the Moroccan policy on human rights and fundamental freedoms.

The Government, aware of the historical bonds between Spain and the Sahrawi population, is working so that the parties reach an agreement to settle the dispute within the United Nations framework, as provided for in the Security Council’s resolutions, which are fully supported by Spain. Likewise, our country collaborates through its membership in the Group of Friends of the Western Sahara, which annually drafts the resolution extending MINURSO’s mandate. Spain also supports the

task of the UN Secretary-General's Personal Envoy, Ambassador Christopher Ross, both politically and logistically”.

(*BOCG-Congreso.D*, IX Leg., No. 544, pp. 375–376).

On 21 March 2011, on the occasion of the expulsion of Spanish journalists from the Western Sahara and of the prohibition on their entrance to El-Aaiun in their exercise of freedom of information, the Government reported the following:

“The Government appraises the task of the Spanish media positively, since it is convinced that freedoms of the press, information and speech are a fundamental guarantee for the rule of law and the democratic system.

The Government regretted those constraints imposed by Moroccan authorities on the work of the Spanish and other media in the Western Sahara, for it deems objective and detailed information on the issue to be necessary.

The Government repeatedly requested Morocco to allow Spanish reporters in the area. As a result, two Spanish correspondents were granted an authorization to enter the territory and exercise their right to inform. Through its representative in El-Aaiun, the Government has provided consular protection, as far as possible, to those journalists undergoing difficulties.

With regard to the Spanish citizen killed in the incidents posterior to the dismantling of the camp, the Government addressed Moroccan authorities through our embassy in Rabat to require information on the event.

(...)

The Government maintains a fluid dialogue with Moroccan authorities regarding issues related to Human Rights and freedom of the press, both at the bilateral level and within the European Union framework. Mechanisms of dialogue with Morocco have been thereby established through the Subcommittee on Human Rights, created by virtue of the Association Agreement between the Maghreb country and the European Union, which studies these issues from a positive and collaborative perspective aimed at the enhancement of the situation of human rights and at the promotion of the freedom of the press in Morocco.

Pursuant to this approach, on the occasion of the latest visit to Madrid of the Moroccan Minister of Foreign Affairs, the Spanish Government, from a friendly and cooperative perspective, advocated for the free flow of information and the entrance of Spanish journalists in Morocco and the Western Sahara, being convinced that a better awareness of the situation and the parties' stances should contribute to the enhancement of the bilateral relation and to the reinforcement of Morocco's international image.

The Moroccan Government has been sensitive to the Spanish request and has lessened some of the constraints on the Spanish professionals, among whom a few have been authorized to travel to the Western Sahara. Likewise, the Spanish Government has provided consular protection to defend those Spanish correspondents who might have faced difficulties to perform their duties”.

(*BOCG-Congreso.D*, IX Leg., No. 544, p. 392 y 438).

“The Spanish journalists travelled from Casablanca to El-Aaiun without problems (mainly, thanks to the action taken by the Spanish Ambassador in Rabat) the day after the events mentioned in your question had occurred. In this respect, the Government will not utter any complaints.

The EU Permanent Representative and EU-States Heads of Mission have advised Moroccan authorities to facilitate the task of European media. The latter share this stance and have expressed their wish to guarantee the free exercise of the right to information of all European media with Morocco’s authorization.

The Government is against the request for a suspension of the Preferential Agreement with Morocco, the filing of a claim against Royal Air Maroc Airline, and the imposition of sanctions”.

(*BOCG-Congreso.D*, IX Leg., No. 547, p. 156).

On 4 April 2012, the Government reported that Spain:

“[S]upports the introduction of mechanisms for the monitoring of human rights in MINURSO’s mandate.

The Government’s wish is to maintain the best possible relations with the Polisario Front. The latter has always been well treated by both the Spanish Government and society. (...) The Government has made representations to Moroccan authorities so that independent observers and reporters are allowed to visit the Western Sahara territory in order to get close to the present reality of Sahrawi citizens”.

(*BOCG-Congreso.D*, X Leg., No. 94, p. 129).

*b) Palestine*

On 27 January 2011, the Secretary of State for Constitutional and Parliamentary Affairs declared the following as to the Government’s policy on the Occupied Palestinian Territories:

“The Spanish Ministry of Foreign Affairs and Cooperation, Spain’s Embassy and the Consulate General in Jerusalem take pertinent consular support action together with Israel’s Ambassador in Spain and Israeli authorities in the field in those cases of detentions of Spanish citizens in the Occupied Territories. These measures express the concern of the Spanish Government in relation to detentions of Spaniards, the respect for their individual rights, the compliance with legality and the need for an urgent solution which should be satisfactory for every case.

Apart from this specific action, the Spanish Government is working so that Spanish volunteers can carry out their work without obstacles, specifically regarding the terms for their entrance, stay and residence, both in Israel and the Occupied Territories.

[T]he Spanish Government understands that dialogue, especially with the Middle East, is the only means for the achievement of a comprehensive, just and lasting peace, which would end the occupation initiated in 1967, through an agreement on the subject matters of the Israeli-Palestinian final status. In this sense, Spain’s Government does not deem sanctions on the bilateral or multilateral agreements to be positive”.

(*BOCG-Congreso.D*, IX Leg., No. 544, pp. 191–192).

On 27 January 2011, the Secretary of State for Constitutional and Parliamentary Affairs referred in the following terms to the stance of the Spanish Government regarding Israel's blockade of the Gaza Strip:

"The Spanish Government shares the concern on the humanitarian effects of the blockade imposed on the Gaza Strip and has repeatedly urged the lifting of the said blockade. The Spanish Government has put all its efforts in the lifting of the blockade of the Gaza Strip and it is therefore working to support the full implementation of Resolution 1861 of the UN Security Council concerning the reconstruction and economic recovery of the Gaza Strip.

Israeli Government's decision to alleviate the blockade, announced on 20 June, was a positive step towards the right direction. At the moment, the European Union, backed up by a strong commitment on the part of Spain, keeps on working to lift those restrictions imposed on the Gaza Strip.

(...)

With regard to the Gaza Airport, after the crisis in January 2009, the Spanish Government carried out an analysis of damages caused during the conflict, which was completed by a joint study on the damages caused to cooperation projects of EU Member States and the European Commission during the conflict, developed under the coordination of the European Commission. Spain and the European Union do not rule out the possibility to claim damages in the future. Anyhow, the priority is to make progress in the Israel-Palestine peace process and the improvement of humanitarian conditions in the Gaza Strip.

As to the flotilla of activists and members of various NGOs heading to Gaza, the Spanish Government condemned, from the very beginning, the military action taken against it and required the determination of responsibilities. Furthermore, the Spanish Government made sure that Spanish members of the aforesaid flotilla received appropriate consular assistance while successfully requiring Israeli authorities to release them immediately.

(*BOCG-Congreso.D*, IX Leg., No. 544, pp. 239–240).

In response to a question on the new mission of the "Gaza Freedom Flotilla" to assist the Palestinian people, the Spanish Government replied that:

"The corresponding Director-General of the Spanish Government has met the organizers of the 'Heading to Gaza Initiative' (*Iniciativa Rumbo a Gaza*), whose main objective is to send a new flotilla to the Gaza Strip. The Spanish Government has conveyed to the Spanish activists organizing it the risks to security posed by the maritime access to Gaza and in the Gaza Strip proper, as proved by the murder of the Italian activist, Vittorio Arrigoni, in the hands of a violent Salafi group. As a token of the Government's concern about the protection and integrity of Spanish citizens, there have been modified those travel recommendations on the website of the Spanish Ministry of Foreign Affairs and Cooperation, which now advise against any trip to the Gaza Strip. In particular, it is earnestly advised not to board any of the vessels of the 'Heading to Gaza Initiative' given the serious danger to which the flotilla participants are likely to be exposed. Likewise, it is advised that humanitarian aid to Gaza be sent by land through authorized means.

Regarding Government's action in the multilateral field, it must be highlighted that the High Representative of the European Union, Catherine Ashton, has warned that the flotilla is not the adequate response for a lifting of the blockade. The UN Secretary-General, Ban Ki Moon, has addressed Mediterranean countries in writing so that these advise against new flotillas.

As to the Spanish Government's action in relation to the events resulting from the flotilla of May 2010, it must be pointed out that, first of all, the Government immediately condemned the disproportionate use of force on the part of Israel in the military action taken against the flotilla, which caused the death of 9 activists and injured tens of them. In addition, the Spanish Government described the said action as unacceptable in its communiqué. Secondly, as holder of the EU rotating Presidency, the Government took prompt measures so that the EU also condemned both the event and the disproportionate military action. The third point is that the very same day the Government summoned Israel's Ambassador in Madrid to ask him for an explanation. Later that morning our Ambassador in Tel Aviv took action on behalf of the Spanish Government and the European Union in order to facilitate consular assistance to all activists detained and have them immediately released without any condition, as it was finally achieved. At present, the Spanish Government still requests that a thorough investigation of the events be carried out in order to determine responsibility for them.

In conclusion, the Spanish Government will at all times maintain this coherent and firm stance for the defence of international legality. Spain supports the full implementation of UN Security Council Resolution 1860 and it is working for the economic reconstruction and recovery of the Gaza Strip. Thus, for instance, Spain is taking action within the EU framework and under the Agreement on Movement and Access of 2005 in order to achieve that traffic of goods be allowed into the Gaza Strip with the due guarantees for security so as to prevent the destabilization of Gaza, which would not be beneficial at all".

*(BOCG-Congreso.D, IX Leg., No. 638, p. 97).*

On 7 February 2011, the Secretary of State for Constitutional and Parliamentary Affairs appeared in Congress in order to convey the Government's stance concerning the Occupied Palestinian Territories:

"OECD's Conference on Tourism was held in (...) West Jerusalem, a territory within Israel since 1948 and therefore not a part of the Palestinian Territories occupied in 1967. None of the conference-related events took place in East Jerusalem, thus the Spanish participation cannot be regarded as supporting occupation at all.

The Spanish Government is clearly and firmly for a Peace Agreement between Israel and Palestine which would put an end to the occupation started in 1967. In this sense, Spain will not take any step which may imply the recognition of Israel's sovereignty over the said territories, including East Jerusalem. The Spanish participation in the OECD's Conference on Tourism was absolutely coherent with the aforementioned stance".

*(BOCG-Congreso.D, IX Leg., No. 544, p. 359).*

c) *South Sudan*

On 18 January 2011, the Minister of Foreign Affairs and Cooperation, Ms. Jiménez García-Herrera, expressed the Spanish position regarding the recognition of South Sudan as a sovereign State:

“Indeed, the referendum in South Sudan will form new expectations such as the likely creation of a new State. (...) Should the referendum and the declaration of independence take place, these are far from the unilateral declaration of independence by the Province of Kosovo. The independence of Sudan is legal as it is envisaged in a peace agreement promoted by the international community, apart from having been agreed by the parties, which is the most important point.

(...)

Our commitment to South Sudan is firm and will result in the opening of a representation office in Juba, the capital, within the EU's premises where our partners work, to facilitate thereby the task of Spanish cooperation in the country”.

(*DSS-P, IX Leg.*, No. 106, pp. 5710–5712).

## 2. Recognition of Governments

a) *Honduras*

On 2 February 2011, the Secretary of State for Constitutional and Parliamentary Affairs appeared in Congress to inform on the Spanish position concerning the Honduran participation in the Ibero-American Summit in Mar del Plata:

“Spain's stance has been, first of all, one attempting to settle this situation through dialogue with the Honduran Government and the other members of the Ibero-American Community and, secondly, one of non-exclusion. This has been the position maintained by the Spanish Government at all times, which was actually reflected in the EU-Latin American and the Caribbean Summit (EU-LAC Summit) held in Madrid during the semester of Spanish EU Presidency”.

(*BOCG-Congreso.D, IX Leg.*, No. 544, p. 423).

That very same day, the Secretary of State for Constitutional and Parliamentary Affairs answered other parliamentary questions concerning the relations with the Honduran Government in the following terms:

“Spain supports President Lobo's efforts to reach institutional normalization and the reconciliation with the country, and it is in favour of the full reinstatement of Honduras in regional multilateral bodies in order to re-establish normality in its international relations. In fact, after the inauguration of President Porfirio Lobo, Spain decided, together with the other EU Member States, that the Spanish Ambassador should return to Tegucigalpa and dialogue with Honduran authorities should be resumed.

In this sense, the Spanish Government considers that the most favourable option, not only for Honduras but also for the other States in the Ibero-American Community of Nations, would be the full participation of all members in the said organization.

(...)

Spain considers that the isolation of the Honduran Government is absolutely not beneficial, neither for the region's stability nor for the Honduran people. The Government considers it fundamental that Honduras' relations be resumed, not only with States but also with the international bodies to which it is a member, so as to recover institutional normality and democratic stability in the country".

(*BOCG-Congreso.D*, IX Leg., No. 544, p. 424).

## V. THE INDIVIDUAL IN INTERNATIONAL LAW

### 1. Diplomatic and Consular Protection

On 19 May 2011, the Spanish Government informed on the detentions of two Spanish journalists for their participation in a demonstration for the indigenous peoples in Panama:

"Spain's Embassy in Panama has devoted particular attention to the detentions and subsequent repatriations of the two Spanish journalists, Francisco Gómez Nadal and María Pilar Chato. The Spanish Government has at all times provided Consular Assistance to Mr. Gómez Nadal and Mrs. Chato through its Consul in Panama under the terms set forth in international law and the domestic law applicable.

Spain's Consul in Panama was in contact with both journalists from the moment of their arrests – as a result of their participation in the altercation – to their repatriations due to their illegal statuses in terms of migration and taxes. Furthermore, the Consul contacted the police station to which the journalists had been transferred, the NGO of which they were members and the Panamanian Ombudsman. Later on, he paid the journalists a visit while at the Judicial Investigation Directorate in Ancón, where he could confirm that both Spanish citizens were in good health and that the treatment they had received on the part of the police had been gentle at all times. Likewise, Spain's Ambassador telephoned the detainees and their families in Spain. Subsequently, Spain's Embassy suggested to Panamanian authorities that the detainees be brought to justice as swiftly as possible and contacted a Panamanian lawyer so that she could provide legal assistance to the detainees. After the hearing before the competent judicial authority, the Spanish Consul paid the detainees a second visit. Mr. Gómez Nadal and Mrs. Chato left Panama under the voluntary repatriation legal mechanism set forth in Panamanian migratory law.

The Spanish Government will provide the aforementioned consular protection if the case so requires pursuant to the international law applicable. Likewise, the Government reminds us that they cannot interfere with a foreign State's sovereign legislative activity – which has been passed democratically. Therefore, under international law, a foreign citizen shall comply with the legal order in the country in which they are staying".

(*BOCG-Congreso*, Serie D, IX Leg., n. 575, p. 158).

## 2. Aliens

On 20 June 2011, the Spanish Secretary of State for Security, Mr. Camacho Vizcaíno, referred to the situation at alien detention centres in Spain as follows:

“(...) the amendments to legislation on aliens by virtue of Organic Law 2/2009 have provided a more thorough regulation – unlike year 2000 – of the admission of foreigners to detention centres and of their rights and duties, including their right to contact an NGO. Therefore, this is actually governed by legislation, it is not a possibility but a right of NGOs to access these centres and contact the inmates.

(...)

As to substantive data, at present there are nine centres, six in the Peninsula – in Madrid, Barcelona, Valencia, Malaga, Algeciras and Murcia – and three in the Canary Islands. All of them are in good condition for the fulfillment of their duties under the law. The average occupation during 2011 has been of 906 inmates so far, that is to say, 28% of their total capacity. It is thereby demonstrated that the system is not overcharged. Furthermore, these facilities undergo frequent refurbishment works so as to have imperfections or damages repaired as swiftly as possible.

(...)

On another matter, we have taken measures concerning the judicial control over inmates at detention centres. A judicial committee was created long ago for the examination of the conditions at the centres. It delivers periodical decisions which we implement in order to make our service more efficient and to ensure what is essential for us: inmates’ rights”.

(*DSS-Comisión de Interior*, IX Leg., n. 541, p. 21).

On 29 June 2011, the Spanish Government assessed the Voluntary Return Scheme, aimed at a wider protection of those migrant workers returning to their countries of origin:

“The Voluntary Return Scheme was set in motion at the turn of 2008. It introduced in our legal order a mechanism which enables the advanced payment of the total unemployment benefits to those non-Community foreign workers returning to their countries of origin voluntarily.

This mechanism presents the following characteristic features: a general character, the implication of mobility, and a voluntary and permanent nature. First of all, the Scheme is general since it shall apply to all foreign workers who meet the requirements set forth in it. Secondly, mobility is determined by the fact that the Scheme enables the return of migrants to their countries of origin and back to ours while protecting the rights accrued. Third, it is permanent for it has been added to the alien policy and regulations with a view to being long lasting and useful. Finally, we must highlight its voluntary character, as this is an instrument at their disposal which helps them decide whether to return to their countries or stay in Spain. Furthermore, we cannot disregard its effectiveness, since it does not only assist the return to their countries, but it also assists their returning to Spain.

Apart from the advanced payment of total unemployment benefits, which is to be acknowledged and paid off by the Spanish National Public Employment Service (SEPE), there are regulations which provide for the grant of complementary aids to

cover the costs of immigrants' transferring to their countries of origin. These aids, framed within the Ministry of Labour and Immigration budget, are managed by the Secretariat of State for Migration through the Directorate-General for the Integration of Immigrants.

Apart from the complementary aids linked to the advanced payment of total contributory unemployment benefits pursuant to the Voluntary Return Scheme, the Directorate-General for the Integration of Immigrants runs two more schemes for voluntary return: one for social assistance and the other for business entrepreneurship.

This mobility option – which is not intended to be massive but to enable the dignified return of immigrants –, together with the schemes for social assistance and business entrepreneurship, should facilitate a successful resettlement in their societies of origin and should ensure the protection of the rights accrued in the event of return to our country.

The Scheme has received a very positive appraisal so far:

1. It increases the rights and opportunities of those foreign workers who wish to return to their countries of origin.

2. It organizes the migratory phenomenon and its flows while promoting migrants' reintegration into employment in their countries of origin, strengthening development in these countries through their better qualification and experience, and reinforcing relations between Spain and the said countries.

3. The immigrants return policy has not only been boosted by the Spanish Government, but also by the European Union. In this sense, the promotion of an integrated return policy at the national level is the major aim of Decision No. 575/2007/EC of the European Parliament and of the Council, of 23 May 2007, establishing the European Return Fund for the period 2008–2013, which is part of the General programme 'Solidarity and Management of Migration Flows'. This management is focused on effective and sustainable returns through various means and it encourages Member States to give preference to voluntary returns as opposed to forced returns, since the former contribute to the dignified return of individuals and meet the interests of host countries' authorities.

4. Applications for the Scheme may be submitted at any time throughout the year, since the Plan is to be in force for an unlimited period of time, and it is expected to be widely implemented once the interested groups have learnt of the positive experiences of former beneficiaries, who have actually been paid off, both in Spain and in their countries of origin.

5. Not all beneficiaries are willing to return voluntarily. It has been noticed that those having worked in sectors such as construction – with a higher unemployment rate – or those less integrated in Spain – such as males whose families remained overseas – are more willing to do so. Likewise, immigrants whose countries of origin undergo much worse socioeconomic situations show greater reluctance.

6. Coordination measures have been required so that the Scheme could be jointly managed by the Spanish Employment Public Service, the Secretariat of State for Migration and other collaborating bodies. At present, management is being carried out in a highly effective manner".

(*BOCG-Congreso*, Serie D, IX Leg., n. 596, p. 210).

### 3. Human Rights

On 14 January 2011, the Government stated their position concerning the Human Rights Plan passed by the Council of Ministers on 12 December 2008:

“Through the Human Rights Plan, passed by the Council of Ministers on 12 December 2008, the Government adopted the proposal of the 1993 Vienna World Conference on Human Rights for the drawing up of a National Action Plan which set forth the necessary measures to promote respect for human rights and to enhance their protection.

In the case of Spain, the Human Rights Plan is an instrument systematizing and organizing the actions taken by public authorities concerning human rights in general. Such a Plan constitutes an instrument to boost, coordinate and jointly assess the actions of very diverse nature taken by the various actors in the Government and the Administration. Likewise, it may serve as a base for upcoming policies and measures.

The Plan envisages 172 measures distributed into two blocks: external action and internal action. Its major aims are to promote equality, non-discrimination and integration and to guarantee human rights.

The Plan is intended to direct governmental action in the human rights field, to teach human rights so as to raise awareness among the society, and to facilitate the control over governmental action in this matter. This is a public document as to its drawing up, follow-up and assessment, since the civil society (NGOs, universities and other social actors) has been present at the diagnosis and formulation of particular measures and at the document's follow-up.

The Plan has been positively appraised regarding its content and methodology, as proved by the recommendations made by the various Committees which have assessed Spain under international law pursuant to Spain's full membership of the United Nations. For instance, such were the cases of Spain's First Universal Periodic Review before the UN Human Rights Council, last 5th May; of the submission of its Sixth Report to the Committee for the Elimination of All Forms of Discrimination against Women, in July 2009; or of the submission of its Fifth Report to the Committee against Torture, in November 2009.

(...)

The 172 measures of the Plan are divided into two blocks, namely, external action and internal action. With regard to measures on external action, action of diverse nature has been taken. There have been signed and ratified various treaties on human rights, and there have been started the procedures to have some more ratified. By way of example, we should like to highlight the following:

The ratification of the Convention on Cluster Munitions, June 2009;

The International Convention for the Protection of All Persons from Enforced Disappearance, September 2009;

The signature and ratification of Protocols 4, 7 and 13 to the European Convention on Human Rights;

The ratification of the Council of Europe Convention on Actions against Trafficking in Human Beings, April 2009;

The ratification of the Agreement on Privileges and Immunities, September 2009.

Spain's participation and presence in international bodies related to the promotion on human rights have been boosted. The Spanish Presidency of the Committee of Ministers of the Council of Europe (from November 2008 to May 2009) aimed to promote human rights, the rule of law and democracy. Likewise, a significant sum has been earmarked for the funding of the Office of the UN High Commissioner for Human Rights.

We must highlight that the Spanish Presidency of the EU Council during the first semester of 2010 proved the Government's interest in the promotion and protection of human rights. Spain has taken part in several rounds of dialogue on human rights with countries being a priority for our external action. Likewise, within the Presidency framework, on 29 June, the EU-China Summit on "Consultations on Human Rights" took place in Madrid. Eventually, we must point out the creation of the European Observatory on Violence against Women, on 8 March.

(...)

On another matter, the development of particular subjects has entailed the passage of Plans and Programmes to direct governmental action concerning the promotion and guarantee of human rights. Among the numerous plans adopted, we should like to highlight the following:

The setting in motion of the Comprehensive Plan of Action against Trafficking in Human Beings, especially women and children, passed in December 2008;

The 2007–2010 Strategic Plan for Citizenship and Integration, still in force;

The Plan for the Attention and Prevention of Violence against Immigrant Women, passed by the Council of Ministers on 9 January 2009;

The creation of the Resource Centre Against Discrimination (CREADI), within the framework of the implementation of the National Comprehensive Strategy to Fight Racism and Xenophobia;

The Strategic Plan for the Modernization of Justice, passed by the Council of Ministers on 18 September 2009, which is the base for the action to be taken by the Ministry of Justice. We should like to highlight the increase of the number of judges by 19%;

The 3rd Action Plan for People with Disabilities, passed on 10 July 2009, establishing Government's global strategy in the field for their present term in office.

Likewise, teaching initiatives have been carried out, such as conferences, seminars, training courses or awareness-raising measures, in order to disseminate human rights culture among society. Furthermore, training activities for civil servants have been held to provide this group with techniques to respond, in the best way possible, to the problems of diverse nature which may contravene citizens' rights. Finally, measures have been implemented for the economic support of those activities by social bodies devised for the promotion of respect for human rights.

Last, but not least, we should like to highlight the following instances of the Human Rights Plan: first of all, the National Mechanism for the Prevention of Torture; secondly, the allowances for victims of terrorism, mainly granted by the Directorate-General for the Support of Victims of Terrorism, which have enabled to provide

institutional, medical and material support to the victims in 2009. Furthermore, new Units for Incarcerated Mothers have been opened at prisons; and the network of aliens detention centres is being changed and enlarged in order to enhance the conditions and quality of life of illegal immigrants pending repatriation.

To conclude, we should like to remind that the Human Rights Plan is to be in force for the entire period 2008–2012, as foreseen”.

(*BOCG-Congreso*, Serie D, IX Leg., n. 508, p. 53).

On 21 March 2011, the Government stated their position concerning the human rights of prisoners of conscience in Cuba. On 26 April 2011, on behalf of the Government, the Minister of Foreign Affairs and Cooperation, Mrs. Trinidad Jiménez, assessed the release of prisoners of conscience, started in July 2010:

“From a humanitarian perspective, the Spanish Government has played a facilitator role concerning the release of prisoners of conscience, with the aim to have them all released in the end. The Government has implemented a mechanism for their reception and integration in the Spanish society, which consists in the validation of academic diplomas.

Therefore, the Spanish Government, through its Embassy in Havana, in response to those applications submitted by the interested persons themselves, made a demarche to Cuban Authorities for the transfer of academic documents of those persons having travelled to Spain under the present release process. By the end of January, 43 files had already been processed, the attendant academic documents having been validated upon reception from the Cuban Ministry of Foreign Affairs.

(...)

Dialogue between the Cuban Church and Government has resulted in the Cuban authorities’ decision that prisoners of conscience in Cuba be released. The purpose of the Spanish Government is to accompany Cuban actors and – should this be requested – to collaborate with them throughout this dialogue in order for it to yield results as swiftly as possible. Therefore, the decision of which persons are to be released corresponds to Cuban authorities, a decision which is based on their previous dialogue with the Cuban church. The Spanish Government’s role is to help and assist this process so that it comes to fruition, their wish being that all prisoners of conscience be released.

Within the release framework, Spain, through the reception mechanisms for humanitarian reasons provided for in Spanish law – including residence and work permits –, is taking charge of those released prisoners who, having decided to travel to Spain together with their relatives, convey their true wish to do so. Those persons admitted to Spain will be able to carry out any sort of working activity. Whether they should be entitled to carry out the same activities in Cuba falls within the competence and sovereignty of Cuban authorities.

Within the mechanism of the bilateral dialogue on human rights, the Spanish Government has reiterated to Cuban authorities that they deem it appropriate that a delegation of the International Committee of the Red Cross (ICRC) and the UN Rapporteur on Human Rights be allowed to visit Cuba. However, Cuban authorities have communicated that this issue falls within their internal competence. Within

this framework of political dialogue with Cuban authorities, these are urged to fully comply with human rights”.

(*BOCG-Congreso*, Serie D, IX Leg., n. 544, p. 392).

“(..)[T]he Spanish Government is content with their support to negotiations between Cuban authorities and Cuba’s Catholic Church, as well as with their contribution to the release of prisoners of conscience started in June. This process has released a total of 127 prisoners of conscience in the Island, 115 out of which – and I reiterate, my Honourable Members, 115 – have been admitted to our country. In fact, my Honourable Member, I consider it essential to highlight that there have been released 52 prisoners out of the total incarcerated as a result of the so-called “Black Spring” of 2003 – also known as ‘the Group of the 75’ –. Forty out of these have been admitted to Spain, and the remaining 12, who had conveyed their wish to stay in Cuba, have been released and allowed to stay. Likewise, I should like to point out the release of other prisoners of conscience who were not among the aforesaid ‘Group of the 75’, but who were on the lists submitted by the Cuban Committee for Human Rights and National Reconciliation, the Ladies in White and other organizations.

Therefore, the Spanish Government’s appraisal of the liberation process is positive, not only due to its political significance – which is outstanding –, but also because it entails a great advance in the human rights field and proves the effectiveness of the political dialogue on human rights between our Government and Cuban authorities. This is an open, sincere and demanding dialogue which offers actual and particular results, such as the aforementioned one.

I should like to highlight as well that the Spanish Government’s support to the process has been of clear humanitarian nature, consisting in the reception, as I stated before, of a total of 115 political prisoners and their 647 relatives. As you may well know, the Government, with the backup of several NGOs, has implemented a wide reception mechanism which encompasses their transfer to Spain; assistance upon reception; maintenance aid; accommodation; legal, psychological and medical assistance; as well as means of transport; that is to say, a comprehensive and global reception. All this is aimed at the dignified treatment of all former prisoners and their families so as to achieve their progressive integration into the Spanish society”.

(*DSS-P*, IX Leg., n. 118, p. 6752).

## VI. STATE ORGANS

## VII. TERRITORY

### 1. Territory Division. Frontier

In response to a question raised in Congress concerning the governmental security task force in Ceuta and Melilla at their borders with Morocco, the former Spanish Government replied that:

“In the Autonomous City of Ceuta the only checkpoint at the border with the Kingdom of Morocco is the one at El Tarajal, located in the South Bay, where the *Guardia Civil* (the Spanish Gendarmerie) carries out fiscal-related tasks and conducts random inspections on vehicles and persons.

Likewise, surveillance at the Spanish-Moroccan terrestrial border in the Autonomous City of Ceuta is carried out jointly, through both mobile police units and permanent surveillance points along the entire border, which is 8,200 meters long, approximately (...).

At Melilla’s border there are four crossings, namely, Beni-Enzar, Farhana, Gurugú and Mari-Guari. These four checkpoints are devised for the passage of persons; however, only two, Beni-Enzar’s and Farhana’s, are for the passage of vehicles. At the aforementioned crossings, the *Guardia Civil* carries out fiscal-related tasks and conducts random inspections on vehicles and persons whereas the National Police Corps controls the entry and exit of persons (...).

The inspections carried out at these border checkpoints do not pose serious problems and are aimed at ensuring the security and control of the passage of persons. The illegal entry of immigrants into the city is thereby prevented, as well as the clandestine entry or exit of goods coming from illegal trade or of those which, despite being legal, lack the mandatory customs documentation”.

(*BOCG-Congreso.D*, IX Leg., n. 590, pp. 181–183).

## 2. Colonies

### a) Gibraltar

In response to a question posed in Congress on the enlargement of Gibraltar’s maritime domains, the Government explicitly set out Spain’s position concerning waters in the Bay of Algeciras in the following terms:

“First of all, Spain’s stance as to waters in the Bay of Algeciras is that of non-recognition of UK’s sovereignty over maritime spaces other than those expressly ceded by the Treaty of Utrecht of 1713. This means that despite accepting that port waters were ceded by the said Treaty, the airport was, however, not ceded, since it was not even envisaged in the 18th-century Treaty. In addition, there should be pointed out that the Spanish policy on the Gibraltar dispute has always been aimed at the recovery of the Spanish sovereignty over the said territory, an objective which has been shared by all Spanish Governments so far without any exception, including, of course, the present one.

Secondly, neither the British nor the Spanish nautical charts elaborated by the Hydro-graphic Institute of the Spanish Navy actually delimit spaces of sovereignty, their only aim being to provide data which may facilitate navigation. The fact that Spanish and British nautical charts do not overlap is not a fundamental matter, since cartographic services adapt the charts they publish to their own particular needs. Needless to say that the only necessary coincidence is that of physical geographic points, which have to be the same in all nautical charts. Furthermore, the new

edition of British Admiralty Nautical Chart 1448 does not include significant changes in relation to former versions.

In any case, the Spanish position concerning waters in the Bay of Algeciras has been conveyed to the United Kingdom through suitable diplomatic channels on countless occasions. Likewise, there have not been altered neither the passage of ships nor the location of fishing ships operating in these waters as a result of the publication of the new edition of the aforementioned nautical chart by the British Navy.

Moreover, the *Guardia Civil* has not been given any orders not to cross those limits set by Gibraltar on the territorial sea. Likewise, the Spanish Maritime Safety Agency (*Sociedad de Salvamento y Seguridad Marítima*) still operates in the Spanish SAR area officially recognized by the International Maritime Association after Spain's accession, on 29 January 1993, to the International Convention on Maritime Search and Rescue done in Hamburg on 27 April 1979".

(*BOCG-Congreso.D*, IX Leg., No. 562, p. 267).

In this sense, on 3 May 2011, upon being questioned on the results obtained by the Spanish Government concerning the demarche made to the UK after the last events occurred in the Bay of Algeciras (Cadiz) on Sunday 24 April 2011, the Spanish Minister of Foreign Affairs explained it as follows:

"(...) [A]s you may well know, there is nothing new in the problems arising out of the different interpretations made by Spain and the UK concerning Gibraltar's maritime spaces. These have reappeared at different intensities throughout, virtually, the past 200 years since the Treaty of Utrecht of 1713. In this sense, it must be reiterated that the position of the current Spanish Government, like the ones of former Governments, is that defending Spanish sovereignty over the waters around Gibraltar.

Therefore, the reaction of the Spanish Government towards the last incidents in the Bay of Algeciras has been prompt and strong. As you may well know, we made representations to British authorities clearly stating our support to the action taken by the *Guardia Civil del Mar* (Spanish Maritime Gendarmerie). We also conveyed our concern not only about this particular incident, but also about the repetition of incidents of such a nature which contravene not only the Treaty of Utrecht, but also the policy on the fight against drug trafficking and organized crime to which both Spain and the UK subscribe. Eventually, we reiterated the Spanish position concerning waters around Gibraltar.

(...) [B]ritish authorities are aware of our willingness to address matters of such a nature on a permanent and continuous basis without prejudice to Spain's and UK's respective positions concerning the bilateral dispute on sovereignty.

(...) [A]s the responsible Government we are, we have expressed our firmest rejection to the events occurred and we have supported at all times the work of State Security Forces and Corps.

Therefore, (...) the fact that we have never backed down or resigned is a proof of firmness and responsibility. The position of the Spanish Government is very clear: on the one hand, we defend that Gibraltar is not entitled to more rights concerning the waters around it other than those envisaged in the Treaty of Utrecht; on the other hand, under the former premise and giving full support to Security Forces and

Corps, we aim to increase cooperation between the authorities in charge of crime fight, especially those responsible for the fight against illegal trafficking. (DSS-P, IX Leg., No. 120, pp. 6905–6907).

As to the Forum of Dialogue, upon being questioned on the achievement of the objective to collaborate for the start of negotiations in order to conclude an agreement on the exchange of tax information between Spain and Gibraltar (an issue addressed at the Forum of Dialogue on Gibraltar held in October 2009, in London), the Government clearly stated that:

“The Directorate-General for Taxation of the Spanish Ministry of Economy and Finance participates in the Group of Experts on “Financial Services and Taxation” of the Forum of Dialogue on Gibraltar.

One of the aims of the said work group is to carry out negotiations with Gibraltar in order to conclude an Agreement on the Exchange of Tax Information which should be based at least on the OECD’s Model Agreement on Exchange of Information on Tax Matters.

Regarding the major objective, to collaborate for the start of negotiations which would lead to the aforementioned agreement, there must be highlighted the progress of negotiations and the achievement of the said objective within the Framework Document agreed by the Governments of Gibraltar, the United Kingdom and Spain, adopted at the 3rd Ministerial Meeting held on 21 July 2009.

As to customs cooperation between Spain and Gibraltar, as a result of one of the agreements reached at the tripartite meeting held in February 2010, the Spanish Customs had appointed a contact person to write a report containing some new proposals aimed at the enhancement of existing cooperation structures. The proposals were focused on the following aspects:

- The reinforcement of contact between the respective Customs bodies.
- The exchange of information on dates and schedules.
- The communication of the existence of circumstances affecting traffic of vehicles or persons in both directions.

Furthermore, the assigned contact points have been officialized, the corresponding telephone numbers and e-mail addresses having been exchanged.

Likewise, there have been sporadic cases of collaboration with the Customs Surveillance unit of the Gibraltarian Police; however, there have not been any joint interventions yet.

On 21 October 2010, there was signed a joint communiqué by Spain, the UK and Gibraltar, and it was thereby agreed that technical meetings be resumed.

Moreover, it is expected that a meeting of the corresponding Directors-General be held in order to address particular aspects of future cooperation in the police, judicial and customs fields.”

(BOCG-Congreso.D, IX Leg., n. 532, pp. 229–230).

During his appearance before the UN Special Committee on Decolonization concerning Gibraltar (C-24), Spain’s Permanent Representative to the United Nations explained to the Committee’s President that:

“Only a few days ago there was held a new edition of the Regional Seminar on Decolonization in order to discuss on the best way to steer the works by the upcoming Third International Decade for the Eradication of Colonialism. I take the opportunity to thank the Government of Saint Vincent and the Grenadines once more for their hospitality and the excellent organization of the event.

A majority of speakers mentioned the need to make progress in the decolonization process. There were many voices, among which the one of the representative of the Secretary-General, who asked the Committee to increase the level of dialogue with the concerned parties.

It was confirmed that progress may occur relatively rapidly in some of the cases under examination, whereas decolonization is much more complex in those cases where disputes over sovereignty exist. Anyhow, it was conveyed that new proposals for the implementation of the UN Mandate are necessary, as well as a practical approach to the works.

Spain substantially agrees with these statements, which envisage the main elements to be taken into account during the Third Decade:

- This Committee hears cases of diverse nature, a case-by-case review of these being therefore compulsory. In addition, should it be necessary, it would seek pragmatic solutions for each of the cases.
- Although it may seem obvious, the UN’s Mandate shall remain the reference to carry out our works.

I will dwell on these two aspects briefly.

1. A case-by-case review.

The Committee shall examine, case by case, whether the degree of autonomy reached by some of the colonized territories proves their capacity to be run by themselves responsibly and independently. Should the answer be in the affirmative, there should be questioned their political submission to the administering power.

Spain agrees, therefore, with the Committee’s presidency that where there is no dispute over sovereignty, it is the people’s opinion which shall be a key factor in the path to decolonization. The time has come for those territories undergoing decolonization and their administering powers to start dialogue in order to transform their colonial bonds within the shortest period of time possible, pursuant to the United Nations criteria.

The said individualized examinations, however, allow us to confirm that, in some cases, the inhabitants of the territory themselves waive political independence, as long as their economic stability is ensured. These are cases of ‘colonialism by consent’ which intends to perpetuate in spite of the Committee’s criteria.

This case becomes particularly troublesome where there is intent to perpetuate the situation at the expense of the legitimate rights of a third party, such being the case of Gibraltar, which is the one concerning my country the most.

In the case of Gibraltar, this Organization has acknowledged the colonial situation as undermining the unity and territorial integrity of Spain, the administering power itself accepting that the independence of its colony is not possible against Spain’s will. These two factors are sufficient reasons to conclude that a realistic solution is necessary. But, certainly, what is not realistic at all is to think that the Spanish

Government may accept the perpetuation of the present situation, where the administering power and the colony intend to disregard Spain's legitimate rights under the auspices of the Treaty of Utrecht and the United Nations doctrine.

2. United Nations Mandate.

Secondly, it is fundamental for my country that all of us who gather here today will develop our work with supreme respect for the task and criteria of this Committee, the Organization's Mandate being our permanent reference point as to our field of concern.

In the case of Gibraltar, for more than three decades, the General Assembly has called for a settlement through dialogue between the United Kingdom and Spain. Every year, the Assembly issues a Decision adopted by consensus, which sets out this mandate on bilateral dialogue, pointing out the means to reach it, that is, the so-called Brussels Process.

Spain claims the bilateral dialogue with the United Kingdom be resumed, since it has not taken place in the last few years, contrary to Spain's will. Spain is certain, as experience has proved, that both countries will be able to find imaginative formula to settle their differences without prejudice to the interests of the present inhabitants of the colony. This sincere offer has been repeatedly conveyed to UK's authorities at the highest levels.

Furthermore, my country's goodwill, in spite of the standstill of the aforementioned Brussels Process, allows the development of regional cooperation with both the United Kingdom and the Gibraltarian Government, within the separate framework of the Forum of Dialogue on Gibraltar, with the aim to create a constructive atmosphere of mutual trust and cooperation for the benefit and prosperity of Gibraltar and the region around it, particularly Campo de Gibraltar.

Nevertheless, potential progress within this cooperation forum is being hindered by the colony's local government, which insists on addressing sovereignty issues falling within the exclusive competence of the United Kingdom and Spain. Those differences between my country and the colony's administering power concerning sovereignty issues and jurisdiction should be settled through bilateral negotiations, as provided for in the mandate reiterated by the UN, inspired by the task of the Special Committee on Decolonization.

Therefore, Spain reiterates how important this Committee's task is, together with the respect for the procedure established by this Organization for decolonization matters. Therefore, Spain urges the Committee not to allow the removal from the UN's list of those territories which have not been decolonized according to this Committee's criteria, in spite of those arguments in favour, which are external to our Organization. In addition, Spain trusts that progress required in the decolonization of Gibraltar will be achieved under the competent direction of this Committee".

(Official Website of the Permanent Mission of Spain to the United Nations. Press Office > <http://www.spainun.org/pages/viewfull.cfm?ElementID=3320&print=1>).

On 7 March 2012, the Spanish Minister of Foreign Affairs, Mr. García-Margallo y Marfil, appeared for the first time before the Foreign Affairs Committee in order to present the broad lines of his department's policy and clearly stated that:

“The Gibraltar question encompasses two issues: sovereignty and cooperation in aspects other than sovereignty. The first thing to be done is to make the distinction between the two. With regard to sovereignty, I received three letters, the last of which was from Mr. Straw. The penultimate paragraph of his letter read that the United Kingdom would never initiate, I repeat, it would never initiate talks with Gibraltar without the consent of the authorities of the Rock. What Brussels and the UN say is that the conflict should be settled through dialogue between the two parties, without the possibility that someone’s right to veto may hinder that process of dialogue. That is contrary to Brussels and contrary to the United Nations. I had to intervene and give a prompt reply for otherwise – according to a doctrine in International Law called Estoppel theory – things might have taken shape and it might have been said that I had accepted their thesis and that, therefore, I could not oppose to it anymore. I had to make a sign to tell them that things had changed.

I am deeply interested in cooperation. I am concerned about the welfare of the inhabitants at both sides of the fence – naturally, I am more concerned about those at my side of the fence –, but I will not admit that the United Kingdom, Spain and Gibraltar participate in a cooperation forum with the same legal position, the same status and the same legitimacy. To discuss on cooperation, it is Spain and the United Kingdom that should be present. The authorities of the Rock should appear only where there are minor issues to be addressed, in which case authorities of Campo de Gibraltar should be present too so as to respect equality and prevent errors. That was said by the spokesman. When the Ambassador asked me about the meaning, I answered: either two or four flags, but not three.

I assure you that I have received many phone calls from your party so far, from very important people in your party who have told me that it was time to do this, that they completely disliked a tripartite forum. They did not like the forum’s meeting in Cordoba much, but what they truly disliked was that a Spanish Minister of Foreign Affairs had accepted to hold a forum’s discussion in. I will never do so. Apart from that, coincidence [between Spanish Governments] remains significant.

(*DSS-C*, X Leg., n. 31, p. 26).

In this sense, on 27 June 2012, the Government’s Secretary of State for Foreign Affairs, Mr. de Benito Secades, appeared before the Committee of Foreign Affairs to inform on the plans and global objectives of the Secretariat for this 10th parliamentary term:

“My Honourable Members, I should like to refer to the Gibraltar issue briefly. The Government, according to its plan since last January, has decided, on the one hand, that the bilateral negotiations on sovereignty interrupted for years be resumed, pursuant to UN General Assembly Resolutions on the matter and under the commitment assumed by the Spanish and British Governments, which is clearly stated in the Brussels Declaration of November 1984. On the other hand, the Government has come up with a new model of regional cooperation, more efficient and focused on matters which directly concern the inhabitants at both sides of the fence. The model does not envisage a tripartite forum anymore, unlike the existing one, but a quadripartite framework for the participation of Spain and the United Kingdom, together with local authorities and Spanish regional authorities (...).

As to Gibraltar, there should be pointed out that tensions have not been provoked. Tensions with Gibraltar arose in middle May, when Gibraltarian authorities prohibited fishing in the waters where Spanish fishermen had traditionally operated – 300 families from Algeciras and La Linea –. They alleged that it was for the conservation of the Bay of Algeciras, in spite of the fact that there are other more usual events which are much more harmful to the environment and the waters in the Bay of Algeciras than these 300 families which operate in full compliance with community fishing regulations.

We have reasonably proposed that negotiations on sovereignty be resumed. However, discussions on sovereignty should only concern Spain and the United Kingdom, and conversations on cooperation should continue – in line with the previous work –, since we must make the greatest effort to facilitate the coexistence and harmony of the inhabitants at both sides of the fence, the Gibraltarian population and the population of Campo de Gibraltar. This prohibition against fishing imposed on the fishermen from Algeciras and La Linea occurred amid the process of talks concerning the need that conversations entail four parties, instead of just three, so that autonomous representatives of Campo de Gibraltar could be present, as it happened with representatives of the colony itself. As the Government, our duty is to work for the protection of these fishermen, so that they can operate as they have done so far. Therefore, in coherence with the proposal above, the Ministry and the Government have called for the negotiation on an amendment of the agreement of 1999, within the cooperation field between the two municipalities; and they have requested that the issue be settled at the local level”.

(DSC-C, X Leg., No. 139, pp. 7 y 27).

## VIII. SEAS, WATERWAYS, SHIPS

*Note:* See VII.2.a) *Gibraltar* and IX. International Spaces

### 1. Delimitation of Maritime Areas

In response to two questions raised in Congress – the first on whether it was foreseen to address together with the Kingdom of Morocco the issue of the establishment of a median line between Spain and the said country; the second on the existence of negotiations with the latter concerning the distribution of grids for future oil prospecting in waters near the Canary Islands –, the Government replied as follows:

“My Honourable Member, concerning the information you have requested, it must be highlighted that Spain has held nine meetings with Morocco so far in relation to this issue, which contributed to a better understanding of the respective positions and of the existing technical problems. In this new period, the Spanish Government is deeply interested in improving its relations with Morocco through the promotion of bilateral cooperation in all fields. But negotiations will not be resumed unless both parties meet the necessary objective conditions (...).

In response to the question of reference, the Government informs that Spain has held nine meetings with Morocco so far in relation to the delimitation of the

maritime spaces in the Atlantic coast, which contributed to a better understanding of the respective positions and of the existing technical problems. In this new period, the Spanish Government is deeply interested in improving its relations with Morocco through the promotion of bilateral cooperation in all fields. But negotiations will not be resumed unless both parties meet the necessary objective conditions”.

(*BOCG-Congreso.D*, X Leg., n. 94, pp. 150–151).

## 2. Fisheries

Upon being questioned before Congress on its stance concerning the proposals and priorities of the new European Maritime and Fisheries Fund (EMFF), the Government clearly stated that:

“The Regulation on the new EMFF proposes a series of elements of key importance which are supported by the Government, as reflected in the Regulation proposal. These elements are:

The promotion of sustainable and competitive fishing and aquaculture.

The boost of development and the implementation of EU’s Integrated Maritime Policy, together with the Cohesion Policy and the Common Fisheries Policy (CFP).

An impetus for a balanced and conciliatory territorial development of fisheries areas (both aquaculture and inland fisheries).

The contribution to the implementation of the CFP.

At the moment, the Spanish Ministry of Agriculture, Food and Environment is receiving the opinions of the Autonomous Communities, the fisheries sector and other interested parties. Once all the information requested has been received, the Government will make their final decision. The participation of the various social actors will be ensured mainly through the Committee of the European Fisheries Fund, at which the autonomous communities, the fisheries sector, social actors, environmental NGOs and other interested parties participate. The proposal has also been conveyed in writing to the major associations in the sector so that they communicate their remarks.

Furthermore, it must be highlighted that the Government supports the proposal submitted by the Commission concerning the keys for the distribution of funds among the Member States, as well as the repartition of EMFF’s allocations among the different priorities suggested and the Commission’s proposal that a fixed amount out of the EMFF total be put aside for control, observance and data compilation measures. Likewise, the Government considers that the management of CFP’s structural and support measures – through a single financial instrument – will guarantee a more efficient management of the said funds.

Eventually, as to fish farming, the Government deems that EMFF’s proposals for the support of fish farming are mainly based on environmental sustainability. None of the measures proposed show social or environmental disrespect. More in particular, offshore aquaculture entails a better environmental protection, since it enables to transfer fattening cages far from the shore, where the effects on the environment are more significant.

The farming of aquatic animal and plant species for a purpose other than food will enable the development of new projects in those areas which are especially

dependent on fishing, which will contribute to the creation of economic activities and employment in the said areas”.

(*BOCG-Congreso.D*, X Leg., n. 98, p. 204).

In response to two questions raised in Congress concerning the Government’s provisions as to the renewal of the Fisheries Agreement with Portugal and the joint delimitation of the fishing zone, the new Government replied as follows:

“The Agreement on the conditions for the activities by the Spanish and Portuguese fleets in shared waters, signed in October 2003, has a 10-year duration, thereby expiring on 31 December 2013. The Agreement sets forth the conditions for the access of fleets from both countries to the waters under Spanish and Portuguese sovereignty or jurisdiction in the Atlantic Ocean surrounding the Iberian Peninsula, as well as the conditions for border fishing at the mouths of the Miño and Guadiana rivers.

Contact has already been established with the Portuguese delegation so as to resume the meetings of the Joint Committee under the Agreement, which has not met since 2007. The said Committee will make a joint interpretation of the agreements on reciprocal access to our waters and of those on border fishing concerning the Miño and Guadiana rivers. Likewise, negotiations on the renewal of the Agreement will be initiated on the basis of its actual implementation and the defence of the interests of both countries (...).

In 2003, there was created the Delimitations Subcommittee, within the Inter-Ministerial Committee of International Maritime Policy (*Comisión Interministerial de Política Marítima Internacional*, CIPMI) under the auspices of the former Ministry of Foreign Affairs.

At the time of its constitution, the situation was summarized through the study of the recommendations which should be made to the CIPMI concerning relations with neighboring countries as to negotiations and modifications of the agreements in force. They deemed urgent the relations with Portugal, Algeria, Morocco, France, Italy, Ireland and the United Kingdom.

In 1976, there were concluded the ‘Guarda Agreements’, on the Delimitation of the Territorial Sea and Contiguous Zone, which were ratified by Spain but not by Portugal. At the border in the Gulf of Cadiz, the zone for bottom trawling remains undetermined, having caused several controversial situations so far.

Therefore, it is foreseen to work in close collaboration with the Ministry of Foreign Affairs and Cooperation in order to delimit in a clear manner, if possible, the border between both countries”.

(*BOCG-Congreso.D*, X Leg., n 101, pp. 178–179).

### 3. Ships

*Note:* See IX. International Spaces

In response to two questions raised in Congress concerning the collision between oil tanker *Torm Marina* and container vessel *MSC Camille*, occurred on 20 June 2010 at 42 nautical miles off the east coast of Gibraltar, the former Government stated the following:

“The collision between oil tanker *Torm Marina*, IMO No. 9319698, flying the Norwegian flag, and container vessel *MSC Camille*, IMO No. 9404651, flying the Panamanian flag, occurred beyond Spanish jurisdictional waters, at 33 nautical miles off the South of Malaga, at the Mediterranean Sea.

Given the fact that both vessels were flying foreign flags and there were not any Spanish citizens involved or injured in the incident, and since the marine environment was not damaged, the Standing Commission for Maritime Accident and Incident Investigations should not investigate the accident, none of the cases being envisaged under Article 2 of Royal Decree 862/2008, which regulates the investigation of maritime accidents in Spain.

Pursuant to international regulations, flag States are the ones responsible for the investigation of the technical causes of the said accident”.

(*BOCG-Congreso.D*, IX Leg., n. 547, p. 102).

#### 4. Underwater Cultural Heritage

In response to a question posed in Congress concerning Government’s awareness of the American firm Odyssey Marine Exploration having proposed the creation of a joint enterprise for the conservation of underwater archaeological sites, the former Government claimed the following:

“The Spanish Ministry of Culture is not aware of any proposals on the part of the American firm Odyssey Marine Exploration concerning the creation of a joint enterprise for the protection of underwater archaeological sites. Anyhow, it is neither among the field objectives of the Ministry of Culture nor pursuant to the Spanish National Plan for the Protection of Underwater Cultural Heritage to collaborate with private firms with commercial purposes. Therefore, it is not foreseen to establish any sort of contact with the firm in this respect”.

(*BOCG-Congreso.D*, IX Leg., n. 547, p. 108).

## IX. INTERNATIONAL SPACES

### 1. Indian Ocean

In response to a Congressional query concerning the Government’s appraisal of the performance of those private security guards aboard fishing vessels operating in the Indian Ocean, apart from condemning piracy attacks, the Government stated as follows:

“First of all, I should like to highlight that it is ship-owners who hire the private security guards aboard the vessels with Spanish flag operating in the Indian Ocean. Therefore, being aboard private property, guards do not fall within the competence of the Ministry of Defence.

However, pursuant to the operating procedures in force, the Spanish Navy Maritime Operation and Surveillance Centre, located in Cartagena, permanently monitors the movements and activities of national tuna seiners operating in the Indian Ocean. Upon detecting any hazardous situation, the centre reports it to the Spanish

Naval Operations Command and to EU's Naval Operations Command in Northwood. Likewise, warnings are sent to other vessels operating in the area in order to alert that pirates may approach.

On another matter, as reported on 16 December 2010 by the Spanish Minister of Defence before the Committee on Defence of the Congress of Deputies, we should like to remind that, over the past year, the Ministry of Defence maintained a fluent dialogue with Spanish ship-owners' associations to strengthen security measures. The said measures have materialized into amendments to the regulations on private security services and on arms, respectively, so as to allow the presence of private security guards aboard tuna seiners with Spanish flag and to supply these with weapons appropriate for a tough response to pirates' attacks.

In addition, during her appearance, the Minister pointed out that the Ministry of Defence will offer a new series of military training courses to private security guards aboard the tuna fleet in the Indian Ocean".

*(BOCG-Congreso.D, IX Leg., n. 544, p. 261).*

## X. ENVIRONMENT

### 1. Climate Change

On 7 March 2011, with regard to Carbon Funds – in which Spain participates – for the purchase of greenhouse gas emissions allowances – acquired by the Spanish Administration to meet Kyoto Protocol commitments – the Government reported that:

“For the purchase of carbon credits, Spain has entered into agreements with several International Financial Institutions. Hence, Spain is participating in six Carbon Funds at the moment: on the one hand, tranches 1 and 2 of the Spanish Carbon Fund (FEC); tranches 1 and 2 of the BioCarbon Fund (BioCF); and the Community Development Carbon Fund (CDCF), all three belonging to the World Bank; on the other hand, the Multilateral Carbon Credit Fund (MCCF) and its EBRD-EIB Green Carbon Fund; the Ibero-American Carbon Initiative of the Andean Development Corporation (CAF); and the Asia-Pacific Carbon Fund (APCF) of the Asian Development Bank (ADB).

(...)

As to the acquisition of credits, Carbon Funds with Spanish Government's participation are devoted to the development of projects in third countries which reduce or set CO<sub>2</sub>-equivalent (CO<sub>2</sub>e) emissions allowances.

The Spanish Government has signed more than 100 purchase agreements so far for the development of activities under the Kyoto Protocol flexibility mechanisms, which amounts to a total of 28.8 MtCO<sub>2</sub>.

(...)

The Spanish Government is firmly committed to comply with the obligations under the Kyoto Protocol. Therefore, the Government has adopted a strategy with significant policies and measures for the reduction of domestic greenhouse gas emissions, complemented by Protocol's flexibility instruments.

Pursuant to Royal Decree 1370/2006, of 24 November, through which there was passed the 2008–2012 National Plan for the Allocation of Greenhouse Gas Emissions Allowances, Spain shall purchase 289.39 million tonnes (Mt) of emission reductions [measured in tonnes of CO<sub>2</sub>-equivalent (tCO<sub>2</sub>e)] to meet its commitments. Given the fact that the emission percentage corresponding to diffuse sectors was established at 55 percent, the Spanish Administration shall acquire a total of 159.15 million of emission reductions in order to meet the commitments assumed within the Protocol framework”.

(*BOCG-Congreso*, Serie D, IX Leg., n. 537, p. 149).

On 4 April 2011, the Government informed on the level of compliance with the commitments they had assumed in Copenhagen concerning the financing of developing countries’ adaptation to climate change:

“Through the Copenhagen Accord, the Heads of State of developed countries committed to contribute \$30,000 million for period 2010–2012 by means of new and additional resources (the so-called ‘fast start’ finance), to be distributed between adaptation and mitigation in a balanced manner, including the Reduction of Emissions from Deforestation and Forest Degradation (REDD+) policy. In this context, in 2009, the EU had already committed to finance €7,200 million for period 2010–2012. As a EU Member State, Spain is committed to contribute €375 million for period 2010–2012. By December 2010, Spain had mobilised financial resources through contributions to bodies and multilateral funds in the three major areas: adaptation, mitigation and REDD+. The chart below shows Spain’s contributions relating the ‘fast start’ finance for climate change.

| Fund                                                                | 2010 (€ million) | Sector                                 |
|---------------------------------------------------------------------|------------------|----------------------------------------|
| Kyoto Protocol Adaptation Fund                                      | 45               | Adaptation                             |
| Inter-American Development Bank                                     | 28               | Adaptation and Mitigation              |
| Africa Sustainable Forestry Fund                                    | 16.6             | (REDD+ and others)                     |
| UN REDD                                                             | 1                | REDD+                                  |
| Climate Investment Funds (CIF) – Forest Investment Program          | 10               | REDD+                                  |
| Strategic Climate Fund (SCF) – Pilot Program for Climate Resilience | 10               | Adaptation                             |
|                                                                     | 3                | Mitigation                             |
|                                                                     |                  | Energy Program in Low Income Countries |
| Global Environment Fund (GEF) – Special Climate Change Fund         | 4                | Adaptation                             |
|                                                                     | 13               | Adaptation, Mitigation and REDD+       |
|                                                                     |                  | GEF 5th Replenishment Period           |
| <b>Total</b>                                                        | <b>130.6</b>     |                                        |

It must be highlighted that at least 45 percent out of 2010's total contributions were earmarked for programmes, projects and activities related to the adaptation of developing countries to climate change, the commitment to distribute funds in a balanced manner between adaptation and mitigation being thus met".

(*BOCG-Congreso*, Serie D, IX Leg., n. 553, p. 132).

## XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION

### 1. Development Cooperation

#### a) *General Lines*

On 9 March 2011, at her appearance before the congressional Committee on International Development Cooperation, the Spanish Minister of Foreign Affairs and Cooperation, Mrs. Jiménez García-Herrera, informed on the new policies and lines of action concerning international cooperation for development as follows:

"(...)

As to 2011's Annual Plan for International Cooperation (PACI), passed by the Council of Ministers last Friday, I should like to highlight two of its major aspects, which were included recently pursuant to a Parliament's opinion. First, there is the review of cooperation with the Arab world given the new context. One of the most characteristic features of present times are the budding institutional changes in the Arab world, changes creating expectations which must be supported (...).

Therefore, PACI's proposal is that action be taken in the following areas. First of all, [it is proposed to take action] together with European institutions. In this sense, we will follow up the joint proposals by the Commission and the European External Action Service. This process will start by identifying support actions along with the European agencies on the ground. Spain – in an advantageous position in relation to new-coming countries – could substantially contribute to this process, since our presence in these countries is strong thanks to the Technical Cooperation Offices (...). In particular, we are going to work with the European Investment Bank on a €300-million repayable investment.

Secondly, as to bilateral cooperation, we are going to reorient our programme processes. We were awaiting progress in 2011 concerning the association frameworks with Tunisia, Egypt, the Palestinian Territories, Mauritania, and Jordan; and on the framework agreement for cooperation with Morocco. Given the current situation in Tunisia and Egypt, we have decided to wait for dialogue with the new authorities to be established and then address the priorities on their agendas (...).

(...) [T]he second major aspect envisaged in 2011's PACI, pursuant to a Parliament's opinion, has been the reduction of official development assistance and the new deadlines for the achievement of our objectives. We are all well aware of the twofold challenge posed to the fight against poverty by the serious global economic and financial crisis we are undergoing (...).

In the case of Spain, as you may well know, during the biennial period 2010–2011, the Government has reduced official development assistance by €800 million. This measure has forced us to cut down some estimates, especially in the multilateral assistance field, and to rearrange others, such as the Fund for Water and Sanitation in Latin America (...). We know that the 0.7 percent goal will not be attained in 2012, as it had been initially foreseen and stated on the Master Plan. But we will maintain the goal of achieving it in 2015, an objective shared by the majority of our EU partners. Likewise, our commitment to the Millennium Goals is strong (...).

Eventually, (...) with regard to the major lines of work of 2011's PACI, those presented by the Secretary of State for Cooperation are maintained – firstly, the fight against hunger, with special emphasis on food safety and rural development; secondly, the promotion of human and sustainable development, specifically through the fight against climate change, which will be enhanced through the organization of Rio+20 in 2012. Third, we will focus our efforts on mobilizing other development resources. I am referring to both developing countries' domestic resources and the implementation of a global taxation mechanism on international financial transactions. This mechanism has been adopted by many countries and included in the G-20's agenda, run by France at the moment. Finally, in 2011, we will duplicate our efforts concerning the engagement of the private sector in the fight against poverty (...).

(...) Just in 2011, humanitarian action will be a major line of work within the Government's cooperation policy (...). In fact, as you may well know, a specific chapter on humanitarian assistance has been included in the PACI. The PACI establishes clear priorities as to the provision of humanitarian response – similar to those set by other donors under the Good Humanitarian Donorship initiative such as the European Commission Humanitarian Office (ECHO) and Canada –, this year's global budget allocated to the Spanish Humanitarian Assistance Office [sic] adding up to €117,263,630. On the one hand, it is intended that humanitarian action goes beyond mere emergency aid, that it encompasses other dimensions of assistance, protection of rights, and political impact. On the other hand, it is intended to boost an efficient and transparent humanitarian response, one which is based on the recipients' needs and accountable to them. Especially in the case of Spain, due to the decentralized character of its cooperation system, it is essential to disseminate and promote such principles in an effective manner, so as to attain coherent and coordinated action and to improve the quality of the assistance. Over the last few years we have been concerned with this: quality assistance and transparent management.

(...)

(...) Apart from strengthening our efforts to improve the effectiveness and quality of the assistance, concerning the coherence and transparency of official development assistance, the Government's prevision for 2011 is to pass the regulations for the Spanish Development Promotion Fund (FONPRODE). As you may well know, the recent reform of the former Spanish Fund for Development Assistance (FAD) – which has been the NGOs' claim for decades – has led to the creation of the FONPRODE and the Fund for the Internationalization of Companies (FIEM), the latter being managed by the Ministry of Industry, Tourism and Trade. In this sense, FONPRODE regulations are the last stage of a process of essential reform for Spanish cooperation, since

it entails the complete disappearance of the FAD, leading to a more efficient and transparent fund which is fully devoted to official development assistance.

(...)

(...) Over the past seven years, there has been certainly a dramatic advance as to the achievement of budgetary goals. In 2004, official development assistance amounted to €1,985 million, which increased up to €4,728 million in 2009. Moreover, in spite of the cuts to assistance, the total official development assistance duplicates 2004's. That is, we had to reduce the budget since public expenditure had to be reduced as well. However, the increase of Spain's official development assistance over the last few years is highly noticeable, being the member of the Organization for Economic Cooperation and Development (OECD) whose official development assistance has increased the most since 2004, when compared to any other country. At present, Spain is among the major European and world donors.

(...) First of all, we have attained the consolidation of consultation and consensus-building bodies in the cooperation policy field (...). Secondly, we have promoted the reform process of the Spanish Agency for International Development Cooperation (AECID) (...). Third, we have made significant progress as for the social and institutional recognition of the task performed overseas by the Spanish aid workers, through the approval of the Statute of the Aid Worker and the attendant regulations in April 2006. In addition, at this same stage, we have reformed AECID's regulation governing the allocation of subventions for NGOs by creating the 'qualified NGO' status and by offering the opportunity to enter into multiannual agreements with the Agency. Fourth, we have worked on the strategic aspects of the Spanish Development Cooperation Policy multilateral dimension by signing cooperation framework agreements with key multilateral partners such as the UN Development Programme (UNDP) or the former UNIFEM (now UN Women). Fifth, we have initiated reforms clarifying the role and outcome of the Development Cooperation Policy. I am referring to the advances concerning the coherence and transparency of official development assistance achieved by the FAD reform and the creation of the FONPRODE (...). Sixth, we have enlarged the knowledge and social basis of development cooperation. Finally, I should like to remind that an act governing the external debt management was passed in 2006, with the support of a large majority. This provided Spain with an unprecedented legal framework linking external debt and development, which made us the second European country, behind Italy, with an act of such a kind".

(...)

(DSC-C, IX Leg., no. 724, pp. 3–7).

In response to a parliamentary query before Congress, concerning the approval of the Annual Plan for International Cooperation (PACI), the Government replied as follows:

"2011's PACI is the third operational plan which develops and applies the strategic lines under the 3rd Spanish Cooperation Master Plan (2009–2012), having been elaborated under the consensus of Spanish cooperation main actors. The Government submitted 2011's PACI to the two Chambers of Parliament – the Congress and the Senate – before its passage by the Council of Ministers, the provisions on the

reform of the International Development Cooperation Act set forth in the first of the final provisions of Act 36/2010, of 22nd October, concerning the Development Promotion Fund (FONPRODE), having thus been met.

The PACI was appraised positively after the analysis by the International Development Cooperation Committee, which issued a series of recommendations to reinforce 2011's PACI guidelines. The said recommendations were finally included in 2011's PACI final drafting.

(...)

Budgetary limitations have been translated into the decrease of the total Official Development Assistance with respect to the previous year as well as into an impact on the gross national income (GNI) affecting all levels in the Public Administration (State, Autonomous Communities and municipalities). The prevision for 2011 is that 0.4 percent of the GNI be reached. The 0.7 goal for 2015 is reaffirmed – pursuant to EU's goal –, as so is the message that development and its desired effect – poverty eradication – remain a fundamental political commitment.

The objective set by the State Agreement against Poverty [*Pacto de Estado contra la Pobreza*], to earmark at least 20 percent of bilateral official development assistance to basic social services, was attained for the first time in 2008, when the sum allocated to these added up to 24.67 percent of bilateral official development assistance. In 2009, the sum amounted to 27.85 percent. The unavoidable adjustments on the part of the Government have had an impact on all sectors. The decrease [of investment] in healthcare results from the general cuts to the budget, not from a change in the Government's priorities concerning health".

(BOCG-Congreso.D, IX Leg., no. 618, p. 126).

At his appearance before the International Development Cooperation Committee of 14 June 2012, the Spanish Secretary-General for International Development Cooperation, Mr. Robles Orozco, presented 2012's Annual Plan for International Cooperation (PACI) and made the following remarks:

("...)

This PACI will be the last annual development plan under the Master Plan in force at the moment.

(...)

The PACI (...) is based on three [sic] pillars of major importance. The first one is the report drafted by the parliamentary subcommittee on international cooperation during the last parliamentary term (...). Thus, the present PACI is underpinned by and based on the agreements and decisions of the said subcommittee. All the criteria they used concerning assistance concentration, assistance quality, policies, assessment, instruments, have been poured, literally, into the PACI.

The second key pillar in the drafting of the PACI is the Peer Review Report by OECD's Development Assistance Committee (DAC), that is, the report with DAC's recommendations to Spain. As you may well know, the DAC is the body which controls, governs and sets cooperation policies; thus, it is the body which monitors and directs our cooperation. Spain has undergone several reviews, the last one in 2011 (...). Here, great emphasis is made once more on the quality of assistance; assessment;

transparency; impact; geographical, sector and multilateral concentration; issues on which progress and consensus had already been attained. Therefore, DAC's report is another pillar under the present PACI.

However, as it could not be otherwise, there is a series of reviews – incomplete though – carried out in the past by Spanish cooperation bodies. There is this Secretariat-General's review on the Paris Declaration and its implementation, which has also been reflected in the PACI.

Furthermore, there is a forthcoming document – the review on the current Master Plan. As the Master Plan is still in force, the assessment process – a long one – is not over yet. However, the lessons already learnt throughout the process have been considered and poured into the PACI.

(...)

As my Honorable Members may well know, the EU has just adopted the so-called Agenda for Change, which would be our master plan virtually. The Agenda for Change resulted from a communication made by the Commissioner to the Commission at the turn of last year. Henceforth, the development group has been working on it in order to build European cooperation new foundations (...).

(...) EU's Agenda for Change will provide us with new chances and particular instruments, such as joint programming at field level. We have already started joint programming with the EU in Guatemala, where our technical cooperation offices are strong and delegated cooperation projects are already in motion.

(...)

Likewise, another pillar underpinning the PACI is the outcome from the Busan Forum, at which there were reviewed all those issues which might boost the achievement of the Millennium Goals by 2015 in this final period. At a moment when habitual and major donors are precisely those countries with more financial difficulties – which affects the official development assistance of many countries and agencies –, it is important to readdress issues such as task sharing, complementarity, alternative development funding mechanisms, financial charges, public-private partnerships, official development assistance flows – which do not refer to the actual official development assistance but to private flows – that is, all issues which are important as new instruments to mobilize resources for cooperation, not to replace cooperation but to complement it.

(...)

I should like to linger on another pillar under PACI's identity, key for the new master plan programming cycle, which is the one concerning the monitoring, transparency and assessment policies, respectively. This consensus is reflected in both the Parliament's and DAC's reports. I believe we must enhance our transparency and monitoring mechanisms and draw up an assessment model. Although progress has been made and plans have been set in motion, I consider we lack a global project enabling us to assess procedures and the impact of our cooperation, as well as one enabling accountability. Hence, we are amid a process we expect to be reflected in the master plan (...). I expect that the master plan may envisage Spain's assessment model and our commitment for the next four years, the development of the assessment process being thereby determined in that cycle.

I think that decentralized cooperation deserves attention as well. In fact, Spanish assistance is characterized by an architecture of historical actors at both the local and autonomous communities levels (...). Just like there is a EU agreement on the sharing of tasks and duties and on delegated cooperation, these same international criteria should apply to the Spanish State as well so that we are able to coordinate our actions properly, plan suitably, programme jointly with autonomous communities, prevent duplicity, specialize work; that is, to culminate the process amid which we are at the moment, which I think will be useful for the entire Spanish cooperation system.

NGOs are another pillar of our traditional structure. In spite of budgetary difficulties, both the PACI and the budget framework clearly opt for giving support to the civil society. In this sense, 34 percent of AECID's budget – if chapters 1 and 2 were discarded, 48 percent would be reached – is earmarked for the support of NGOs. Certainly, these are still a major pillar of our development cooperation.

(...)

Pursuant to the report by the parliamentary subcommittee and to Busan's recommendations, an issue on which greater emphasis is to be placed is the search of action options in the business private sector. Now we must seek resources, we must seek public-private alliances, we must seek public-private partnerships, and we must seek aid flows other than official assistance. Therefore, we will do our best in the fields of social responsibility, business ethics and sustainability – that is, cooperation ethical foundations – and on that basis we will examine the aforementioned questions. Likewise, universities and trade unions are foreseen as traditional actors.

I should also like to linger on the effort we intend to make to complete the project Info@OD, which will provide us with a better and more complex platform to manage the flows of official development assistance and of all development cooperation-related data. We have invited all actors comprising the system: universities, the Spanish Federation of Provinces and Municipalities (FEMP), the autonomous communities and the Agency – which has another system – so that these are integrated in a more adequate manner and we can become an instrument for the dissemination of data and gain transparency. Therefore, we will make the effort to raise resources in this field in order to complete the project as foreseen.

I should like to address humanitarian action as well, which is also part of our cooperation. The Agency will maintain its Humanitarian Action office and we will make an effort concerning specialization so that our actions are more efficient. As you may well know, there is this important project with the World Food Programme in the port of Las Palmas about to be approved. This will enable us to play an important part in the provision of humanitarian assistance in the Sahel region and in Western Africa. Therefore, our aim is to be actors in the field and to work on the humanitarian crises forecast for the immediate future in Africa and other areas where famines occur.

(...)"

(DSS-C, X Leg., no. 64, pp. 2–9).

b) *Alliance of Civilizations*

In response to a parliamentary question concerning the membership of Morocco, Algeria, Libya, Egypt, Jordan, Syria, Saudi Arabia, Yemen or Bahrain to the Alliance of Civilizations, and on the latter's position towards the claims of freedom, democracy and equality raised lately in the South Mediterranean countries, the Government informed as follows:

“Morocco, Algeria, Bahrain, Tunisia, Egypt, Jordan, Saudi Arabia, Syria and Yemen are members of the UN Alliance of Civilizations (UNAOC). Libya, however, is not.

UN Alliance of Civilizations shares International Community's interest concerning the claims of freedom, democracy and equality raised in the South Mediterranean states. In this context, last November, the Alliance, the EU and its Member States, other Mediterranean countries, and international organizations adopted the UN Alliance of Civilizations Regional Strategy for the Mediterranean. The said strategy identifies the priorities in the region, such as the respect for and promotion of human rights and fundamental freedoms. Likewise, the strategy encourages the development of efforts in the field of intercultural and interreligious dialogues as an instrument for the promotion of tolerance, pluralism and respect for diversity.

Furthermore, the Alliance of Civilizations is an international initiative for dialogue and cooperation whose objectives are to overcome divisions motivated by culture or religion and to counteract forces leading to radicalization and extremism. For this purpose, the Alliance of Civilizations attempts to build a culture of peace through the promotion of respect and understanding and through the fight of intolerance. These actions are divided into four major blocks: Education, Youth, Media and Migrations.

As a result of the recent events occurred in Libya, and concerning the media field to which the parliamentary question refers, the Rapid Response Media Mechanism, a project promoted by the UN Alliance of Civilizations Secretariat, has addressed the cultural situation and dimensions of the conflict. Within the situation framework, various alerts have been issued and the Global Experts finder has been activated.

Through this early warning system, experts react within 24 hours and share their knowledge with the media in order to prevent the use of stereotypes or incorrect or groundless information. The system's website is <http://www.theglobalexerts.org/>.

(*BOCG-Congreso.D*, IX Leg., no. 568, p. 242).

In response to a parliamentary question concerning those actions foreseen by the Alliance of Civilizations for year 2011, the Government replied as follows:

“The Alliance of Civilizations is an international initiative for dialogue and cooperation whose objectives are to overcome divisions motivated by culture or religion and to counteract forces leading to radicalization and extremism.

In order to attain its goals, the Alliance of Civilizations promotes the development of actions in four major areas: Education, Youth, Media and Migrations. The said actions encompass dialogue projects and initiatives boosted by the Alliance of Civilizations Secretariat, those countries members of its Group of Friends and a wide network of associates.

Among the most outstanding activities in 2011, we must highlight the following:

- The continuation of the promotion of National Plans and Regional Strategies for Intercultural Dialogue between member countries, as well as the development of those Regional Strategies already in force.
- The arrangement and organization of the 4th UNAOC Global Forum, to be held in December 2011, in Doha, Qatar.
- The continuation of the commitments adopted at the fora of Rio de Janeiro, Istanbul and Madrid.
- The setting in motion and development of the UN University International Institute for the Alliance of Civilizations, based in Barcelona.
- The seminar on Christian minorities, to be held at the Florence European University Institute in May/June 2011.
- The meeting between the Alliance of Civilizations and the civil society, to be held in March 2011 in Doha.
- The exchange of experiences between the 26 countries with a National Plan for Intercultural Dialogue, which will take place in March 2011, in Doha.
- The continuation of the development of ongoing projects and initiatives by the Alliance of Civilizations, and the initiation of new ones”.

(BOCG-Congreso.D, IX Leg., no. 532, p. 325).

## 2. Assistance to Developing Countries

### a) *Latin America*

At his appearance before the Senate's Committee on Ibero-American Affairs of 9 June 2011, the Secretary of State for External and Ibero-American Affairs, Mr. Yáñez-Barnuevo García, informed on the state of democracy and security in Ibero-America:

“(…)

I have just arrived from San Salvador, where there has been held the Annual Assembly of the Organization of American States (OAS), which this year has been focused on the topic 'Citizen Security in the Americas'. The title itself conveys the programme and the concern shared by the countries in the continent as for the challenges posed by security, especially, for persons and societies. In the OAS field, this is the so-called multidimensional security, a concept coined in its 2003 declaration on security in America. This concept does not only include traditional threats, but also new ones added by each State according to their particular situations, which will contribute to the consolidation of peace, comprehensive development and social justice in the region.

I should like to highlight that the multidimensional security concept – whose value has been increased and enriched by the participants in the OAS Assembly in San Salvador – is based on democratic values, respect, the promotion and defence of human rights, solidarity, cooperation and respect for national sovereignty. In other words, security should be understood as public security at the service of citizens within the framework of a democratic society.

(…)

I should like to point out as well that this Assembly has determined Honduras' return to the Organization. The two-year distance episode due to 2009's coup d'état in that country came thus to an end.

(...)

The consolidation of the democratic model allows a flow of permanent collaboration and experience exchange between the administrations of our respective countries. The enhancement of bidirectional exchanges lies in our mutual interest, which has boosted the enlargement of the network of commercial and cooperation agreements between the EU and several countries or groups of countries in Latin America.

(...)

Spanish development cooperation flows to the countries most in need in the region – especially in Central America, the Caribbean and the Andean countries – have been maintained pursuant to the philosophy of cooperation with middle-income countries defended by Spain at multilateral fora. Likewise, triangulation schemes and South-South cooperation formulas have been set in motion with Spanish support.

In the case of those countries with a higher level of relative development, cooperation, which is increasingly mutual, cooperation is focused on state-of-the-art sectors, such as science and technology, innovation, universities, environment and so on.

(...)

The last EU-LAC Summit, held in Madrid in May 2010, as the pinnacle of the Spanish Presidency, was certainly a landmark in that relationship. Our aspiration can be divided into three paths: the maintenance of the EU-Latin American dialogue – especially concerning global agenda issues –; the approach and interrelation of both regions; and, more in particular, the approval and implementation of new instruments and policies.

Apart from the summits and the high level fora held on that occasion, there was the signature of the EU-Central America Association Agreement, the first region-to-region agreement in the field, which symbolizes the European efforts to contribute to the peace process and governance in the region. [Other measures] to bring our respective civil societies closer, as well as the centres for debate and analysis in both regions, were the signature of trade agreements with Peru and Colombia – to be completed by an upcoming agreement with Ecuador –; the relaunch of negotiations for association with Mercosur; the approval of an investment facility for the promotion of infrastructure; and the launch of the EUROLAC Foundation encompassing countries and societies in Europe, Latin America and the Caribbean, (...).

As we all may know, neither organized crime nor terrorism respect borders (...). Latin America and the Caribbean are regions where these problems are severe and result in serious consequences. In 1980s–1990s great effort was made on the part of the International Community – where Spain played an important part – to help overcome civil conflicts in Central America and to contribute to the establishment of stable and inclusive democracies in the region (...).

Spain's political support to Latin America's democratization process, based on the so-called influential instance of the Spanish transition to democracy, was also assisted by Spanish cooperation, which was initiated for the first time in Central America in 1980s, with its current format (...).

Henceforth, Spanish cooperation has supported projects in Central America concerning peace building, democratic governance and civil society, thereby enhancing democratic institutions, municipal development, the associative fabric, the civil society presence and engagement in the peace process, the participation of women, and gender equality.

At present, the AECID is working on a sector plan on democratic governance and peace building which will give coherence to Spanish cooperation actions in the field. It is required that conflict prevention and democratic governance be transversal issues within these actions. These issues became a priority for the first time under Spanish Cooperation 2nd Master Plan (2005–2008); and they continue to be so under the 3rd Master Plan, in force from 2009 to 2012.

Central America is located in a region of special concern in this respect. In the region, integration has not been able to advance at the desired pace concerning security matters. Thus, a process of greater integration becomes essential at present to fight crime successfully (...).

Within this framework, the creation of the International Commission against Impunity in Guatemala (CICIG) was an audacious initiative on the part of the International Community for the support of the rule of law in that country. The CICIG's task, under the auspices of the UN and with the co-funding of countries and bodies of their group of friends, such as Spain, has assisted the Guatemalan Prosecution in the fight against organized crime – present even at the country's institutional level –. Likewise, the CICIG conveyed a message of hope to the Central American public opinion: the establishment of an efficient justice system would not be easy; however, far from fatalism, there were means to overcome these problems, with the necessary political determination, technical expertise and resources.

Spanish cooperation has also intervened in Central American security matters at a bilateral level, through AECID's actions in these countries; and at a regional scale as well, through the Spain-SICA Fund and the UNDP. The cross-border dimension of the issue has called for regional formulas, in order to attain the highest efficiency concerning the prevention and control of violence.

The Security Strategy for Central America and Mexico, adopted by the said countries in 2007, led to the drawing up of a Spanish support plan directed by the principle of alignment and the priorities set by the governments in the region. The plan's budget will be \$8 million for a four-year duration (2010–2013) and will support lines of work in key fields to democratic security; that is, minors' prevention and their social reintegration or rehabilitation; the enhancement of local governments' security management capacities; the promotion of democratic security knowledge; the enhancement of the Central American Programme on Small Arms Control (CASAC); the enhancement of judicial cooperation in Central America; the modernization of police bodies; and the contribution to the drawing up, creation and setting in motion of a security unit in Central America. Apart from multilateral support, the AECID provides support at the bilateral level, either directly or through NGOs, having contributed €24 million to security programmes since 2008 in support of human rights activists, the reduction of impunity, women victims of violence, women's access to justice, the strengthening of the police corps, the enhancement of procedural rules,

the fight against juvenile violence, etc. Security has also been strengthened within the framework of the Ibero-American Programme for Specialized Technical Training (PIFTE), with the collaboration of Spanish institutions such as the Ministry of the Interior, the Ministry of Justice and the General Council of the Judiciary.

Regarding general assistance, all instruments considered, between 2008 and 2010, Spanish cooperation earmarked more than €30 million to Central America for the support of security-related actions. It is foreseen that by the end of period 2008–2014 the sum will have amounted to €150 million. Such a significant sum will be allocated to the funding of the estimates of the Central American Integration System (SICA) for the implementation of its security strategy, totalling approximately \$1,000 million in the upcoming years.

(...)

Given the situation, Spain, with the aim of raising funds from the International Community, is actively supporting SICA's organization of the Central American Security Conference, which will be held this year in Guatemala, on 22 and 23 June. To prepare the conference, a meeting of the Group of Friends – comprising various countries and international organizations – was held in Madrid, on 16 May. At it, SICA presented the four-pillared conceptual framework of the Strategy for Security: crime fight; violence prevention; rehabilitation, reintegration and prison security; and institutional strengthening. SICA also presented a more detailed plan of action and a set of regional projects for which international cooperation funding would be necessary.

(...)

The Ibero-American Summit in Asuncion, focused on the transformation of the State and on development, will be the occasion to agree on formulas and guidelines for the enhancement of administrations' effectiveness, the increase of their tax-paying capacity and a more solid professionalization of civil servants in a State which may be trusted by its citizens.

In 2012, we will celebrate the bicentennial of the Constitution of Cadiz, a pioneering text reflecting the desires of the Spanish people, their desires of freedom and democracy. Its creation and drafting are a landmark of Ibero-American liberalism, which promoted the first constitutions in independent States emerging out of the former colonies.

(...)"

(DSS-C, IX Leg., no. 531, pp. 2–7).

## b) *The Mediterranean*

*Note:* See XI.4.c) *Occupied Palestinian Territory*, and XVI.1.a) *Libya*

At her appearance before the Congressional Committee on International Development Cooperation of 14 June, the Spanish Secretary of State for International Cooperation, Ms. Rodríguez Ramos, informed on the proposals made and the measures taken in the countries of the Mediterranean Basin, the Maghreb and the Near East, respectively:

"(...)

As you may well know, with the exception of Libya, all Arab countries in the Mediterranean are a priority for Spanish cooperation. The current master plan

establishes four countries with broad partnerships in the region, bilateral cooperation with them being thus significant, not only from the Spanish governmental level, but also from its autonomous communities and municipalities. These four countries are Morocco, the Palestinian Territories, and, at a lower scale, Mauritania and Algeria. Over the past three years, both Morocco and the Palestinian Territories have been among the ten major recipients of Spanish official development assistance, which has contributed more than 60 million [sic] of net bilateral official development assistance per year.

The remaining countries are among the so-called categories B and C under the Master Plan. Our presence there is more limited, as so is the corresponding total official bilateral development assistance. However, the AECID boasts offices in the said countries and we have action programmes in Tunisia, Egypt, Sudan, Lebanon, Jordan and Syria. New opportunities arise for collaboration with all these countries. It may be said that we do not only have the opportunity, but also the responsibility, to contribute to the underpinning of democratic processes in some of these countries through development cooperation. This is a responsibility shared by the entire International Community, not only a Spanish one. However, Spain is a country on which the Arab Spring, the Mediterranean revolution, has had a greater impact, since we are present in the region, since we are tightly linked to them and since Spanish cooperation has been working in many of these countries for forty years now.

This is somehow a two-dimensional challenge. On the one hand, we find the humanitarian response to the consecutive crises. I am referring especially to the war in Libya and the situation in Yemen, where the Arab Spring turned into a sad and bloody Arab Winter. On the other hand, we find Spanish development cooperation new approach, which, from now on, will be based on new foundations, on new programmes, and will accompany democratic processes while escaping meddling or paternalistic attitudes (...).

As for the humanitarian crisis in this field, AECID's Humanitarian Assistance Office [sic] took the first measure on 25 February, when an aircraft carrying 30.5 tonnes of emergency equipment for the UNHCR took off from Torrejón, with the aim of assisting 10,000 refugees at the Libyan border with Tunisia. That very same day, the Agency allowed the World Food Programme to make use of the port of Las Palmas, since the Libyan crisis prevented the said World Programme from using its habitual base in the region, that is, the port of Benghazi. The delivery of 25 February made Spain EU's first country to react before Libya's crisis from the humanitarian perspective. Henceforth, we have been shipping emergency equipment every ten days either by air or sea transport.

On 3 March, we carried out the airlift transportation of Egyptian refugees at the Libyan border with Tunisia. The operation, in which other EU States participated as well, consisted in three daily flights between Djerba and Cairo, which enabled the evacuation of 3,000 Egyptian citizens in a week. As evacuation operations by UN agencies and other donors developed, the Spanish operation was extended to other three countries in Sub-Saharan Africa; and to Mali, Ghana, Sudan and Bangladesh as well. A total of 33 flights have transferred refugees: 17 to Egypt, 11 to Sudan, 2 to Ghana, 2 to Bangladesh and 1 to Mali (...).

(...)

On 10 March, at the AECID, there was held the first of a series of coordination meetings with the Spanish NGOs and autonomous communities present in the North of Africa. On 27 March, as the humanitarian emergency had worsened, a new mission of AECID's Humanitarian Action Office (OAH) was deployed in Egypt. The mission's major outcome was the establishment of a humanitarian corridor for the delivery of assistance through the World Food Programme (WFP) in the area controlled by rebels. This is a land corridor; however, it has enabled two shipments of medicine, food and equipment from various UN agencies, namely, the WFP, UNICEF and the WHO. Likewise, the International Red Cross is currently making use of the said corridor (...).

My Honorable Members, so far, Spain has allocated approximately €6 million (€5,817,000) to this emergency situation; we have mobilized more than 27,200 tonnes of food and we have entered into agreements with five international organizations and NGOs, some of which I have already mentioned, particularly, with the WFP, the Red Cross, the UNHCR, the Arab Medical Union (Arabmed) and Action Against Hunger (ACF). My Honorable Members, by way of reference, we are fifth in the rank of humanitarian action and commitment, behind the EU, UK, Sweden and Germany; and ahead Member States such as France or Italy (...).

Finally, I should like to mention our response to Yemen's crisis, since it is an important part of our work and cooperation, the response having been, however, much more limited, given our capacity to act and the emergency dimensions in this case. Already in 2010, we had earmarked €1 million for humanitarian assistance through the International Committee of the Red Cross (ICRC) and the UNHCR. Over the last few weeks, we have contributed €2 more million to these bodies, in response to UN's call for assistance to the situation. This sum, which will adapt to the evolution of the crisis, will be allocated to food and to the assistance of internally displaced persons in Yemen.

(...) Now I will address the second approach to which I have previously referred at the beginning of my speech, that is, the new vision of development cooperation with the countries in this situation. We must take into account that this is not a uniform situation, that the situation of each of the countries in the Southern rim of the Mediterranean differs widely from the others'. There are at least three different scenarios. First of all, we have the peaceful revolutions in Tunisia and Egypt, where peaceful democratic transition processes have been set in motion. Secondly, we find the social claims for institutional reforms in Jordan, Morocco or Algeria. Eventually, we encounter open conflicts in Libya, Yemen and Syria, where violence is being exercised against the civil society in response to the people's claim for greater freedom and openness in the regimes. In any of the three cases, it must be taken into account that these processes are not over – we ignore what their duration and outcome will be, but these will clearly bring about social and political changes in these countries. Therefore, our response will be adapted to each of the situations, which can be classified into the aforesaid three dimensions (...).

As disclosed by this addendum to 2011's PACI, the calendar for association agreements has been modified. My Honorable Members, when the Tunisian revolution exploded, we had already foreseen the negotiation of strategic association frameworks

with Mauritania, Algeria, Tunisia, Egypt, Jordan and the Palestinian Territories, respectively. Likewise, we were amid negotiations for a strategic association framework between the Spanish cooperation and Morocco. Thus, one of the first measures adopted has been the stay of these negotiations for association agreements (...).

In this context, (...) the trip to Tunisia on the part of the Spanish Head of Government, on 2 March, set the guidelines for what will be the Spanish cooperation general response in the future. The Prime Minister announced our prevision to create a €300 million financing facility devised mainly for three sectors: first, works and infrastructure on water and sanitation; second, energy, energy efficiency and climate change; and, third, support to small and medium enterprises in these countries to create employment opportunities. My Honorable Members, the main goal is to revitalize the socioeconomic fabric of these countries, clearly affected, above all, by the revolution's strong impact on a sector such as tourism, which highly contributes to the growth of the GDP. Clearly, tourism remains indirectly damaged by the Libyan war (...). Hence, the Spanish Prime Minister has proposed that the Spanish cooperation create a repayable financing facility, which is being negotiated with the European Investment Bank (EIB).

This Spanish facility, financed by the EIB, is expected to be clearly outlined by 6 July, at which hopefully will be the last working session in Luxembourg (...). We expect that this important Spanish initiative, together with those being studied by the EIB for the funding of new projects in the Mediterranean, may alleviate this economic standstill situation, which is vital for the democratic transition process, so that the objectives set by these countries can be achieved within the foreseen timelines.

(...) Apart from this financing facility, other measures have been set in motion. My Honourable Members, the first one has been the support to the holding of democratic elections (...). In this sense, the support to democratic transition processes has been embodied in the financial support to Tunisia's and Egypt's first democratic elections, contributed by the Spanish fund within the UNDP allocated to election processes (...).

Finally, (...) I should like to highlight that we have set in motion all public diplomacy institutions of the Ministry of Foreign Affairs and Cooperation in order to strengthen this cooperation task we are carrying out. Bodies such as *Instituto Cervantes*, *Casa Árabe*, *Casa Mediterráneo* and *Fundación Carolina*, with links to the civil societies and cultural institutions in the Southern rim of the Mediterranean, have set in motion training and experience exchange programmes by Spanish personalities who may convey similar experiences concerning the recent process of democratic transition undergone by Spain. Likewise, the *Fundación Carolina* runs a programme of visits to these countries to address our work in the field.

(...)"

(DSC-C, IX Leg., n. 787, pp. 2-7).

c) *Africa*

In response to a Congressional query concerning the measures taken by the Government to respond to the humanitarian crisis in the Horn of Africa, the Government informed as follows:

“(...) the Government has set in motion several measures to respond to this severe humanitarian crisis. On the one hand, we have responded through the international organizations present in the region, namely, the UNHCR, UNICEF, the WFP or the WHO. On the other hand, we have adopted six emergency agreements with NGOs for the funding of particular projects focused on a serious problem such as malnutrition, healthcare, or water and sanitation works. We have also implemented innovative cooperation mechanisms, such as the so-called triangular cooperation for the joint distribution of approximately 7,500 tonnes of food together with the US, Brazil and the WFP. All this, in permanent coordination with the actors in the area, on the ground, through periodical meetings and the visits of the Spanish Secretary of State for Cooperation to the camps of displaced persons and refugees, and to Mogadishu in August.

(...) [G]iven the dimension of this severe humanitarian crisis, the Government has invested more than €25 million, which exceeds the amount initially foreseen. We have become the fifth European donor for the Horn of Africa crisis, and we are proud of it, my Honorable Member. Therefore, we will support this region as long as it is necessary. As pointed out, this has been the worst drought undergone by the region in the last sixty years. It already affects 13 million people in a region where there was a previous situation of political conflict, displacement and malnutrition.

(...)”.

(*DSC-P*, IX Leg., no. 272, p. 14).

### 3. Terrorism

At his intervention in the open debate concerning UN's three counter-terrorism committees, held on 16 May before the UN Security Council, the Spanish permanent representative to the UN, Mr. De Laiglesia y González de Peredo, pointed out the following:

“I appreciate the opportunity offered to my delegation to participate in this open debate on the activities carried out by the three Security Council Committees specialized in the fight against terrorism. At the outset, I wish to note that Spain fully aligns itself with the statement to be delivered by the representative of the European Union.

Terrorism, in all its forms and manifestations, constitutes one of the most serious threats to international peace and security. Acts of terrorism are unjustifiable wherever, whenever and by whomsoever committed.

The United Nations system has carried out important work in the fight against terrorism and should continue to play an important role as the guarantor of international law. The implementation of the United Nations Global Counter-Terrorism Strategy, adopted by consensus by the General Assembly in 2006 (resolution 60/288), is a valuable tool against the global threat of terrorism. The Security Council should carry out its work in a way that is complementary to the efforts of the General Assembly, which should in general be the pre-eminent forum for the international community to formulate its responses to the global problems of our time.

I reiterate Spain's firm commitment to fighting all forms of terrorism, regardless of its motivation or manifestation, and my Government's wish to see this objective be a permanent priority on the agenda of the United Nations.

It is essential to work at the national and international levels to prevent and combat this scourge. In doing so, we must not neglect to address the underlying causes of terrorism, such as radicalization. The Alliance of Civilizations initiative, noted in resolution 1963 (2010), which Spain promoted as a tool for enhancing understanding among countries, societies and individuals, can be useful in this regard.

Moral and political reasons compel us to provide assistance and support to the victims of terrorism. The convening by the Secretary-General of a new symposium in support of victims of terrorism, as a continuation of the one convened in 2008, would be much appreciated by Spain. On this matter, we also hope the Security Council will provide the necessary continuity to its intention expressed in resolution 1566 (2004) regarding assistance to victims of terrorism through establishing an assistance fund or a practical assistance mechanism, as set out in the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly (General Assembly Resolution 60/288).

I would like to thank the Chairmen of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, the Counter-Terrorism Committee and the Security Council Committee established pursuant to resolution 1540 (2004) for the information provided and the work they have carried out together with their respective groups of experts.

First, Spain would like to highlight the work of the 1267 Committee. We value the efforts to increase the transparency of the review and updating of the names of persons and entities on the sanction regime's Consolidated List. The adoption of Security Council resolution 1904 (2009) led to an improvement in the application of the sanctions regime in response to concerns expressed by national and regional courts.

(...)

Spain wants to highlight as well the work of the Counter-Terrorism Committee (CTC) and the Counter-Terrorism Committee Executive Directorate (CTED) to monitor compliance with resolutions 1373 (2001), 1624 (2005) and 1963 (2010) and to facilitate technical assistance to countries that request it. We welcome the dialogue, in the context of fighting terrorism, between the CTC and relevant bodies promoting and protecting human rights, such as the Council of Europe.

Similarly, we want to highlight the new strategy devised by the Executive Directorate to enhance its role as facilitator of technical assistance and to undertake a permanent dialogue between donor and recipient States, in the interest of greater efficiency. The adoption of resolution 1963 (2010), which extended the mandate of the Executive Directorate, will enable the Directorate to increase its participation in the work of the Counter-Terrorism Implementation Task Force and make it the pre-eminent facilitator of technical assistance, strengthening States' capacities and thereby reinforcing the desired integral nature of the fight against terrorism.

(...) We express our support for the efforts of the 1540 Committee to design mechanisms for monitoring the implementation of that resolution and its work to extend its universal application. Spain welcomes the unanimous adoption of resolution 1977 (2011), which extends and strengthens the mandate of the Committee in the essential framework of full and strict compliance with the obligations and commitments incumbent upon Member States in matters of arms control, disarmament

and non-proliferation in all its aspects of all weapons of mass destruction and their delivery systems. In this context, Spain wants to highlight the work of the Global Initiative to Combat Nuclear Terrorism and calls for increased cooperation among all stakeholders with expertise in combating nuclear terrorism.

I conclude by expressing Spain's appreciation for the efforts of these three Committees to improve the effectiveness of their work. It is also encouraging to see the growing awareness that all measures taken must respect the rights of individuals. With this essential respect for human rights, the whole international community must demonstrate its firm determination to face down the barbarity of terrorism".

(S/PV.6536, pp. 30–31).

#### 4. Humanitarian Assistance

*Note:* See XI.2.b) *The Mediterranean*, and c) *Africa*

##### a) *Haiti*

In response to a parliamentary question concerning the International Donors' Conference towards a New Future for Haiti, aimed at the creation of a special fund for the reconstruction of the said country, the Government made the following remarks:

"At the Donors' Conference for the reconstruction of Haiti, held in New York, on 31 March, Spain, as the third bilateral donor and EU's first one, reiterated its decision to reach an agreement to support the Haitian Government.

The Action Plan for the National Recovery and Development of Haiti, announced in New York, engages the entire society. It is divided into two phases: one in the immediate future (with an 18-month length), and other of "genuine renewal" (with a 4-to-10-year length). Likewise, it comprises three programming cycles of the National Strategy for Growth and Poverty Reduction (emergency, implementation and materialization).

Spain announced a contribution of €346 million for the 2010–2013 period, which would be allocated to the fields of water and sanitation, education and basic habitability (food security and agriculture being also funded).

This is the breakdown of Spain's €346-million contribution: in 2010, Spain will contribute €131.1 million (€90.3 million out of which will be exclusively allocated to water and sanitation; the remaining sum being earmarked to sectors such as basic habitability, education and agriculture).

The remaining of the total amount will be distributed as follows:

- €65.39 million
- €75 million
- €74.5 million

On 17 June, the Interim Haiti Recovery Commission was constituted in Port-au-Prince. Spain participates in the said Commission through a government representative.

The Commission, presided by UN Secretary-General's Special Envoy, Mr. Bill Clinton, and by Haitian Prime Minister, Mr. Jean Max Bellerive, was established for an 18-month period".

(BOCG-Congreso.D, IX Leg., no. 537, p. 97).

b) *Sahel Region*

In response to a parliamentary question concerning the provisions on the amount of humanitarian assistance allocated to emergency assistance programmes in the Sahel region, as well as the recipient countries and the agreements with humanitarian NGOs to be adopted, the Government informed as follows:

“The Government announces that, in order to alleviate the emergency situation in the Sahel region, the AECID has adopted measures at the multilateral level and in the field of humanitarian NGOs, respectively.

At the multilateral level, we must highlight the intervention in Chad and Niger through UNICEF, focused on nutrition (€500,000 per country), and the support to the International Committee of the Red Cross in Mali and Niger (a total of €500,000), focused on protection. These interventions will be shortly completed by the support provided through the UNHCR to Malian refugees in Mauritania, as part of the regional response to the food crisis in the area, through a carryover from 2011 to the WFP and healthcare interventions thanks to the AECID/WHO Fund [sic].

As for the support to humanitarian NGOs, we must point out the reactivation in Mauritania of the emergency agreement with Intermón Oxfam (€550,000 to employment and water). Likewise, we must highlight the support to the Spanish Red Cross in Mali (€206,000 to food assistance) and Burkina Faso (€150,000 to food assistance); to Action Against Hunger in northern Mali (€98,000 to displaced persons) and Mauritania (€400,000 to children’s healthcare); and to Save the Children in Niger (€200,000 to children’s nutrition).

A total of €3.15 million has been contributed so far. AECID’s response will be adapted to the needs”.

(*BOCG-Congreso.D*, X Leg., no. 104, pp. 213–214).

c) *Occupied Palestinian Territory*

In response to a parliamentary query on the difficulties faced by those aid workers of Spanish and other nationalities in the Israeli State, the Government reported that:

“The Spanish Government’s appraisal of the laudable task performed by Spanish aid workers in Palestinian Territories is highly positive. Spain has become one of the major donors to the Palestinian people, EU’s second donor, and tenth in the rank of major donors to Palestinian refugees. Aid workers’ efforts and work on the region play an important part in this cooperation field.

Both the Spanish Minister of Foreign Affairs and Cooperation and the Secretary of State for International Cooperation have met the Spanish aid workers in the Occupied Territories in order to get to know the real and daily difficulties and problems they face at work. The Spanish Government has reiterated its commitment to the Palestinian people and has highlighted that cooperation in the Palestinian Territories ‘remains a priority’, as proved by the fact that assistance has been maintained, in spite of the cuts to the cooperation budget.

Furthermore, we must remark that development NGOs play a significant part in Spanish Cooperation in the Palestinian Territories. At present, the number of development NGOs carrying out development cooperation activities in the region

amounts to 40, approximately. There are 62 ongoing interventions with AECID's funding – e.g. 12 agreements from different calls for proposals and 8 projects totalling €2.3 million, financed in 2011 – the budget for these interventions exceeding the €50 million sum. Apart from these actions, we must mention the significant number of projects funded through decentralized cooperation, which has added up to an average of €12 million in the last years.

Likewise, we must highlight that upon notice that Mr. García Pedraza had been prevented from entering Israel, the Consular unit of the Spanish Embassy in Tel Aviv contacted him and Israeli authorities to ensure that both the treatment given to Mr. García Pedraza and the procedure were under the law. On their part, Israeli authorities gave notice of their decision prohibiting Mr. García Pedraza's entrance to Israeli territory. Mr. García Pedraza thanked the Embassy anyway.

Apart from the Government's action in this case, the Spanish Government has conveyed to Israeli authorities its concern about the conditions of entrance, stay and residence imposed on the Spanish aid workers in Israel and the Occupied Territories. The Government has worked jointly with the other EU partners, since this is a concern shared by other Member States and Community institutions".

(*BOCG-Congreso.D*, IX Leg., no. 638, p. 104).

## XII. INTERNATIONAL ORGANIZATIONS

### 1. United Nations

#### a) Security Council

On 9 November 2011, Spain's Deputy Permanent Representative to the United Nations, Mr. Oyarzun Marchesi, participated in the debate on the question of equitable representation on and increase in the membership of the Security Council and related matters:

"First of all, we should admit that the third revision of the negotiating text (Rev.3.) has not been fully accepted as the basis on which to continue negotiations. Therefore, please pardon the redundancy, this revision must be revised once more. Without a third revision, we consider that the only alternative would be to adopt the second revision (Rev.2), the only with the full support of groups and countries.

Secondly, we should admit that the rules of the game established in Decision 62/557 cannot be changed unilaterally in the middle of the game.

Mr. President, to that end, you may count on the full support of the Spanish delegation. I believe that we have proved to have a flexible and constructive spirit.

(...)

I should like to remind that the 'Uniting for Consensus' group remains the only one having submitted a model alternative to the original one.

(...)

The said model presents elements from the so-called 'intermediate' model, such as the creation of a new category – or intermediate category between the current ones – for non-permanent members of long duration (longer-term seats).

It must be clarified that this model was submitted under a condition of reciprocity on the part of the remaining groups, which, unfortunately, has not been met. Therefore, the model of the 'Uniting for Consensus' group, that is, Spain's, remains the same as in 2005.

This is a comprehensive model, with realistic proposals for each of the five points in the Council reform: categories and veto; size; regional representation; work methods; and Council-Assembly relations.

As you may well know, one of its major features is that it only envisages the enlargement of Council's non-permanent members. We are firmly convinced that only the enlargement of electable seats may guarantee the protection of the democratic principle, necessary to confer full legitimacy upon the Council reform".

(Official Website of the Permanent Mission of Spain to the United Nations. Press Office > <http://www.spainun.org/pages/viewfull.cfm?ElementID=3368>).

On 27 June 2012, the Secretary of State for Foreign Affairs made the following statements:

"Our support to the UN system as the legitimate core of multilateral policies remains one of our foreign policy guidelines. However, ours is a critical and responsible support. Spain will continue in the front row of UN reform processes to claim effectiveness and budgetary rigour on their part. We will continue our work within the 'Uniting for Consensus' group, to request an ambitious reform of the Security Council entailing the enhancement of its work methods and the enlargement of its non-permanent members.

As my Honorable Members may know, our aspiration is to be part of the Security Council in 2015–2016, for the fourth time in our democratic history. We are competing for one of the two seats reserved for the Western group together with New Zealand and Turkey, two highly respected countries in the UN field. In this competitive context, the Government has come up with a strategy with various stages, which will intensify as the voting date approaches, and has foreseen a campaign based on values and respect for our rivals".

(DSC-C, X Leg., No. 139, p. 3).

*b) Somalia*

On 10 March 2011, Spain's Representative to the United Nations, Mr. De Laiglesia y González de Peredo, participated in the Security Council's open debate on Somalia:

"(...)

In this context, and in view of the end of the transitional period in August, we believe it to be a matter of urgency that the authorities of the Transitional Federal Government make progress in the drafting of a new constitution that obtains broad consensus. They must promote an inclusive political dialogue that makes it possible to address the root causes of conflict. They need to focus on security sector reform with the support of the international community, and they must work actively to improve the living conditions of the population.

Spain shares the international community's concern about the escalation of piracy in the Indian Ocean waters. Spain's commitment to the fight against piracy is unequivocal.

(...)

However, the commendable work of the naval forces in the prevention and prosecution of acts of piracy contrasts with a degree of impunity enjoyed by those arrested for acts of piracy that seriously undermines the effectiveness of the international efforts.

(...)

We agree with the assessment that it is essential to develop and strengthen the institutional capacities of the countries of the region in the legal, jurisdictional and correctional spheres if we wish to reverse the trend that favours the spread and continuation of acts of piracy. Legal initiatives should be aimed against not only the actual perpetrators, but also those who plan, lead and make a profit from those activities. This will require improving the collection and production of evidence, as well as the further involvement of all the countries taking part in this endeavour.

The aforementioned measures – in particular, those of a jurisdictional nature – would be better implemented through the adoption of a new Security Council resolution as soon as possible. Notwithstanding the fact that such a resolution could address a wide range of the many necessary elements of an approach to piracy, in Spain's opinion it should focus on the legal aspects and contain at least the following three main elements:

- An encouragement of the strengthened collection and production of evidence;
- a guarantee of treatment in accordance with international humanitarian law for those detained, prosecuted and found guilty for crimes of piracy;
- and a decision to urgently establish Somali courts to hear piracy cases in Somaliland, Puntland and in any of the neighboring countries. Such courts could be also open to staff from third countries.

With regard to the drafting and adoption of such a resolution, the Security Council can count on the full support and cooperation of Spain, since we are convinced that it would contribute to addressing the current significant legal loopholes. That is an essential element in the international effort coordinated by the Contact Group on Piracy off the Coast of Somalia and requires maximum effectiveness with respect to prevention and deterrence".

(S/PV.6494 (*Resumption 1*), of 10 March 2011, p. 14).

## 2. North Atlantic Treaty Organization

### a) *Military Structure*

On 27 June 2012, the Spanish Secretary of State for Foreign Affairs made the following statements concerning Spain's participation in NATO's European Ballistic Missile Defence System:

“The development of this system significantly contributes to the security of Spanish and European populations. This is also a proof of Spain’s firm commitment to the Atlantic Alliance and the enhancement of its defence capacities. At the moment, we are negotiating the Protocol of Amendment to the Agreement of Defence Cooperation of 1988, pursuant to which the aforementioned deployment will take place. We expect that the final text will be adopted soon, so that this new phase in our defence relation, beneficial for both countries, can be initiated”.

(*DSC-C*, X Leg., No. 139, p. 5).

*b) NATO Operations: Kosovo*

On 9 February, the Spanish Secretary of State for Constitutional and Parliamentary Affairs appeared to reply to a parliamentary question concerning organ trafficking in Kosovo and Albania:

“The Spanish soldiers and civilians working for KFOR and UNMIK, respectively, performed protection and surveillance tasks. Thus, they never had the competence to investigate neither war crimes nor organ trafficking crimes in Kosovo and Albania.

(...)

In October 2002, investigators of the Tribunal and the UNMIK travelled to Central Albania, where they found evidence of human organ removal, predictably for trafficking, on Serbian and other prisoners of UCK guerrillas. However, the Prosecution could not continue with this inquiry due to a lack of evidence and witnesses.

After Kosovo’s Unilateral Declaration of Independence, on 17 February 2008, the European Union decided to deploy a CSDP mission in Kosovo, the ‘European Union Rule of Law Mission in Kosovo’ (EULEX), for the strengthening of police forces, justice and customs. At present, EULEX is responsible for the inquiries initiated by Prosecutor Carla del Ponte, as requested in the Council of Europe Parliamentary Assembly Resolution, of 25 January 2011. Spain supports EULEX’s work, as it supports the remaining Missions as for the exercise of their competences”.

(*BOCG-Congreso.D*, IX Leg., No. 544, p. 475).

### **XIII. EUROPEAN UNION**

#### **1. Common Agricultural and Fisheries Policy**

*a) EU-Morocco Agreement*

In response to two congressional questions – posed in April and June 2012, respectively – concerning the provisions on the consequences of the agriculture agreement adopted by EU and Morocco, the Government made the following remarks:

“The ratification of the new EU-Morocco agricultural protocol constitutes the final stage of the agreement adopted between Morocco and the EU for the creation of

a free trade area for agricultural, livestock and fisheries products between the two geographical regions. Liberalization, however, is not complete, since an important group of products will be under protection mechanisms such as tariff quotas and entry prices.

The impact of the agreement ratification on the Spanish agricultural sector will be limited, given the fact that protection mechanisms are kept and that the liberalization process has occurred between 1996 and 2012.

Thus, as for certain sensitive products (...), there is an increase, subjected to the community market demand, of those quotas exempt from ad valorem tariffs. Likewise, some of these products are subjected to an entry price, which guarantees their minimum price in the community market.

As for the removal of the tariff quotas on some products, this is not expected to have any impact on the said products, since these do not even cover current tariff quotas, or Morocco's production and exports of these are minimal; or even because some of them are protected by entry prices.

Other products become fully liberalized (...). There were already no quantitative restrictions on these at particular periods, which mainly overlapped Spain's production and exports schedules. Therefore, the relative conditions on the markets of products from the two regions do not undergo important changes.

(...)

Eventually, (...) [other] products had been liberalized before the ratification of the agreement on the part of the European Parliament".

(*BOCG-Congreso.D*, X Leg., n. 98, p. 164).

"The revision of the Agricultural Protocol to the EU-Morocco Association Agreement is framed within the decisions of 1995 Barcelona Process, which established the creation of a free trade area between the EU and Mediterranean Non-Member Countries.

This Agreement culminates the creation of the said free trade area, although there are some limitations on free trade in the case of EU's and Morocco's most sensitive products.

Spain's most sensitive products are fruit and vegetables (...). The liberalization of these sensitive products is limited, since their entry price – if existent – is maintained, as so are their tariff quotas, although some of these products receive a duty-free treatment.

With regard to Morocco's opening to EU exports, all customs duties on vegetables and citrus fruit are abolished from the first year. Other fruit products shall be liberalized in five years' time. Likewise, tariffs on processed agricultural produce with high added value are reduced.

As a consequence thereof, the terms of the agreement actually protect Spanish most sensitive products (...), as well as the opening of Moroccan markets, which may become a clear recipient of Spanish agricultural products in the future".

(*BOCG-Congreso.D*, X Leg., n. 109, p. 215).

## 2. Common Fisheries Policy

### a) *Fisheries Agreement with Morocco*

On 8 March, in response to a question posed by a MP on the Government's provisions concerning the renewal of the EU-Morocco Fisheries Agreement, they replied as follows:

"On 3 February, the Permanent Representatives Committee (COREPER) passed by qualified majority the Council's Decision authorizing the start of negotiations for a new Protocol to the Fisheries Association Agreement between the EU and the Kingdom of Morocco.

According to a compromise proposal of the Presidency of the Council, the draft mandate was submitted for approval before the COREPER on 9 February, as point 1/A [on the agenda]. This would be subsequently approved, as point A, at the meeting of the Council of Transport, Telecommunications and Energy of 14 February.

This Decision authorizes the start of negotiations for a new Protocol, the renewal of the former protocol, suspended on 14 February 2011 through a Resolution of the European Parliament, being thereby dismissed.

In this context, it must be mentioned that, on 22 February, Commissioner Damanaki addressed a letter to the Moroccan Minister of Agriculture and Fisheries, on which she proposed that a meeting 'at the appropriate level' be arranged as swiftly as possible, in order to agree on the date of the start of the process and to determine its modalities.

Since the suspension of the Protocol on the part of the European Parliament, the Spanish Administration has taken measures at all levels so that the approval of the negotiation mandate be attained as swiftly as possible.

All opportunities have been taken to insist before Community authorities on the importance of reaching a good Agreement in order to fill the current vacuum.

The mandate guidelines, that is, the criteria defining the negotiation, are as follows:

- That the best scientific data available be studied, in order to guarantee the sustainable exploitation of resources.
- That a good balance between EU's payments to Morocco and the economic benefits be achieved.
- That dialogue on sector policy be enhanced.
- That a clause on the consequences of the violation of human rights and democratic principles be included.
- That conflicts with international law be prevented, especially those related to the Western Sahara territory.

With the European Commission's consent, the Ministry of Agriculture, Food and Environment has set in motion a mechanism of allowances to alleviate the situation of fishermen and shipowners until the new Agreement enters into force. The beneficiaries will be 661 crewmembers from 69 different vessels, and the allowance amounts to 45 euro/day for each crewmember and to a minimum sum of 100 euro/day, depending on the vessel's size, for each shipowner. The mechanism shall apply

since last 14 December, when the European Parliament Resolution forced the withdrawal of vessels from Moroccan waters, and for the next six months, the period the Government considers necessary for the adoption of a new Agreement.

The Government has met both, the representatives of the affected persons, the majority from Andalusia and the Canary Islands, and local and autonomous authorities from the said regions.

The Spanish Head of Government chose Morocco as the destination for his first official visit overseas, on 18 January 2012, in order to boost bilateral relations and support the last political reforms in Morocco, where he took his agenda with the suspension of the fisheries Protocol.

Morocco's stance was known to be for the achievement of an Agreement which reflected Morocco's unity, ensured the protection of its underwater resources, and responded to common interest, that is, Spain's and Morocco's.

Action is being taken at all levels in order to adopt, as swiftly as possible, a good Association Agreement between the EU and the Kingdom of Morocco".

(*BOCG-Congreso.D*, X Leg., n. 78, pp. 294–295).

#### *b) EU-Gabon Fisheries Agreement*

At his appearance of 21 June 2012 before the Congressional Committee on Agriculture, Food and Environment, the Secretary-General for Fisheries made the following statements concerning the negotiations on the EU-Gabon Fisheries Agreement:

"The Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community, provided for in Council Regulation (EC) 450/2007, has not been able to be renewed so far. The Agreement allowed the European fleet to operate in the waters of the African country from 3 March 2006 to its expiry date, on 2 December 2011, fishing activities within the Gabonese fishing zone having been suspended as of the said date. All the attempts to adopt a new protocol which might avoid the period of mandatory inactivity imposed from last December on the Community fleet operating in this fishing zone have failed, since Gabon has been reluctant to include a human rights clause under the European Parliament's mandate.

The first round of negotiations for protocol renewal was held in Brussels, on 14 and 15 July 2011, before the agreement expiry date. However, in spite of the revision of and progress on certain technical aspects, negotiations had to be suspended due to the Gabonese delegation's reluctance to accept the said clause. In the event of failure to comply with the clause, EU's allocation should be cancelled, a relation which Gabonese authorities deemed inadmissible.

The second round was held in Libreville, from 12 to 14 October. As the first one, this one was hindered by the Gabonese party's objection that the commercial character of the agreement did not justify the inclusion of a suspensive clause such as the one invoked by the EU. Eventually, an informal meeting was recently held in the Gabonese capital, on 25 and 26 April, at which European Commission representatives made once more the attempt to overcome that obstacle through the flexibilization of the requirement of human rights protection (...). Gabon's rejection was maintained. Therefore, the European Commission has requested the Gabonese Republic

to convey their own proposal on the issue. The vessels operating in these waters at seasonal intervals (15 tuna seiners and 13 longliners), which were operative in 2011, have been forced to stop their activities in such an important fishing zone for our fleet (...). The Government took every opportunity at hand in the past months to point out before the European Commission the importance of the said Agreement, having even requested a protocol renewal while negotiations for a new agreement took place. This would have allowed exploitation during the 2012 fishing season; but, unfortunately, the season will be over soon.

Our only expectation at this point of year 2012, as conveyed at the talks with the sector in the last few months, is that the Commission's discretion facilitates the return of vessels to the fishing zone for the 2013 fishing season. Over the next months, we will keep urging the Commission to provide a solution as swiftly as possible, or, should this not be possible, to provide our fleet with alternatives in other fishing zones of coastal States in Africa's Atlantic rim. We will keep doing our best, and will take every opportunity, as we have done so far, to urge the Commission to do this. In the meantime, we will carry out consultations with the interested sector and the most affected autonomous communities, whose opinions have determined our position.

(...).

(DSC-C, X Leg., n. 133, pp. 2-3).

### 3. Area of Freedom, Security and Justice

On 28 June 2012, at his appearance before the Congressional Committee on Home Affairs to inform on the agreements reached at the meeting of the EU Justice and Home Affairs Council (JHA) concerning progress in political governance and the strengthening of cooperation in the Schengen Area, the Secretary of State for Security made the following statements:

"(...)

(...) The following measures were agreed at the European Council, on 23 and 24 June 2011: (...) the enhancement of Schengen's assessment system and (...) the establishment of a mechanism which, under extraordinary circumstances, should allow the re-establishment of checkpoints at internal borders. Pursuant to this mandate, the Commission submitted both legislative initiatives in September 2011. The last chapter of this legislative procedure occurred at the JHA Council of 7 June 2012 (...).

As for the initiative concerning the enhancement of the assessment mechanism, the Danish Presidency's proposal was supported. As defended by Spain in the European Council's conclusions of 7 June 2011, not only did this proposal enhance or strengthen the assessment mechanism, but it also strengthened its European character with the role it assigned to the Commission. With regard to the legal basis, in line with its position throughout negotiations, Spain supported the proposal (...) that the legal basis chosen by the Commission – Article 77 of the Treaty on the Functioning of the EU – be replaced by Article 70 of the said Treaty. Finally, Spain also endorsed the Presidency's proposal that the European Parliament be involved in the assessment

mechanism reform. Therefore, this body will be consulted, although its opinion will not be binding.

Regarding the initiative on the re-establishment of checkpoints at internal borders under extraordinary circumstances, Spain supported once more the Presidency's proposal, since it considers that the said proposal strengthens the Schengen Area without altering it substantially. In line with the position we have maintained throughout negotiations, the temporary re-establishment is restrained to those cases of extreme seriousness which may put the functioning of the Schengen Area at risk. In addition, this re-establishment shall only be considered as a last resort, after failure to apply gradual and coordinated measures to assist the Member State in a predicament. Eventually, the Presidency's commitment does not envisage the Commission's initial claim concerning the unilateral re-establishment of borders, but it establishes a mechanism consisting in a collegial recommendation on the re-establishment of the borders of a particular Member State.

(...)

(...) Previous agreements on the assessment of migration policies and the re-establishment of borders had been adopted in October 2011. We attended the JHA Council meeting of 7 June to vote – fully aware and supportive of the criteria of the Danish Presidency, run by the Danish Minister of Justice – that this issue falls within the competence of States, neither within the Commission nor within the Parliament, which does not imply that the Commission takes over to the detriment of the Parliament.

As for the assessment mechanism, we requested that procedure in Article 70 – establishing that the election of the said mechanism falls within the competence of States – be maintained. However, [we also claimed that] we should listen to the Commission, as it could not be otherwise; and that we should engage the Parliament as far as possible, since they are the representatives of the European peoples, and they should be kept informed through a consultation process.

With regard to the mechanism for the re-establishment of borders, given its extraordinary character, the only alternative was to maintain the criterion applied so far in the Schengen Area, that is, in the event of occurrence of an extraordinary situation. Migratory crises have been included into this group of extraordinary situations. This is not as related to our neighboring countries as we may think – e.g. Spain's or France's relations with Latin American countries –, but it responds to the significant migratory crisis experienced in the Eastern Mediterranean, about which the EU is highly concerned.

What I did at the JHA Council was to highlight that neither the Eastern Mediterranean nor the Western Mediterranean regions should be disregarded, and that we could not disregard either the fact that some countries have complied with their duties. In fact, Spain has reduced its migratory flows due to the good migratory policy implemented in the last term, the good agreements reached with particular countries and the strong control deployed at the Strait through a comprehensive surveillance system co-financed by EU funds.

However, an attempt has been made to enhance some old problems in the migration field. The agreements with some countries were unsustainable, especially due

to the increase of the assistance sums. This increase, which had been foreseen, was not a minimal percentage, since it grew exponentially (...). Therefore, we had to tell our partners, which are the ones experiencing the migratory flows, that Spain's situation prevented us from increasing the said sums exponentially (...), that we could only afford limited sums, and that we should come up with smart formulas to limit such an increase. Thus, in some cases we have realized that the assistance should be focused on a particular region of a country, not on the entire country. In this sense, we have reached several agreements which have enabled us to save, to reach a certain stability (...).

(DSC-C, X Leg., n. 143, pp. 9–10 y 24–25).

#### 4. EU Economic Strategy

On 14 March 2012, at his appearance before the Congress in order to inform on the European Council of 1 and 2 March, the Spanish Prime Minister made the following remarks:

“(...)

Council's priorities for 2012 refer to five areas: the drawing up of a fiscal consolidation strategy, adapted to and compatible with growth; the re-establishment of the credit channel towards economic activity; the boost of growth and competitiveness; the creation of jobs; and the modernization of public administrations. These five areas have shaped Spanish Government's action.

With regard to the tax policy, EU's Heads of State and Government agree that fiscal consolidation is a requirement – not the only one though – for economic recovery. The significant fiscal imbalances accumulated over the last years are a major risk factor to be overcome. The reduction of the said fiscal imbalances will entail that those resources now earmarked to deficit financing will be allocated to the financing of productive investments, and therefore, it will entail the creation of wealth and employment. Likewise, this will dispel the doubt about the sustainability of public finances (...).

As for this field, I must refer to the new Treaty on Stability, Coordination and Governance, or the so-called Fiscal Compact, whose elements are essential, according to Spain, in order to strengthen our economy's foundations and guarantee its healthy growth (...). Spain's sense of responsibility and its European spirit put us ahead, since we had already included a fiscal rule in Article 135 of the Spanish Constitution before the signature of the present agreement. This has been positively regarded by the European Commission.

Likewise, we will soon have an Organic Law on Budgetary Stability. The attendant Bill (...) complies with the commitments assumed by Europe in the fiscal field and scrupulously respects the constitutional pact with the Socialist Party. In particular, concerning budgetary stability, we decided to abide by EU's decision – pursuant to Article 135.2 of the Spanish Constitution –, as it has been the case; or, failing that, to establish through an organic law this criterion: there is a balanced budget provided that structural deficit is below 0.4 percent of GDP. The Fiscal Compact forces States to attain and maintain the so-called medium-term objective – a 0-percent balance,

according to European law –, unless a Member State implements a structural reform entailing an increase of deficit in the short-term, but its reduction in the medium-term. This precisely has been reflected in Article 11.2 of the Draft Bill on Budgetary Stability, which in the event of an extraordinary measure should impose on deficit a limit of 0.4 percent of GDP, the constitutional pact being thereby scrupulously respected (...).

(...)

(...) Our obligations under the Stability and Growth Pact materialized into the European Council recommendation to the Kingdom of Spain, of November 2009, concerning excessive deficit procedures (...). [The said recommendation] established that deficit should be at 3 percent in 2013, and that a fiscal adjustment of more than an average 1.5 percent of annual GDP should be carried out in period 2010–2013, economic cycles having been taken into account. Spain will follow the recommendation scrupulously, in spite of the unexpected recession experienced by Spain and Europe, as recently recognized by the Commission (...). At the end of year 2011, public deficit was at 8.5, way beyond the 6-percent figure set in the said stability programme. This means that in 2011 they failed to meet the recommendation concerning excessive deficit procedures. From the very beginning, the current Government deemed it indispensable to get back on the track of meeting recommendations. Therefore, on 30 December 2011, we adopted immediate corrective measures valued at €15,000 million.

(...) The Council of Ministers of 2 [March] made a step forward towards this policy of commitment through the establishment of the budgetary stability objective and the spending limit for 2012 (...). [T]he Government's stability objective for 2012 was initially at [a deficit of] 5.8 percent of GDP; and maintained administrations' deficit at 3 percent at the turn of 2013. At the last Eurogroup meeting, our partners requested us to rebalance deficit reduction throughout the present year and the next one in such a way as to have it reduced by 3.2 percentage points (from 8.5 to 5.3) of GDP in 2012, and by 2.3 percentage points (from 5.3 to 3) next year. The commitment to the 3-percent deficit set forth in the Stability and Growth Pact would thereby be met. The most important point (...) is that the 4.4 figure established in 2009 and ratified in 2011 could be replaced by a more sensible and affordable figure: 5.3 percent (...). However, we have been required to make a stronger effort this year and a smaller one the next. As we are aware that we should always keep the highest level of coordination and consensus with our European partners, we have decided to meet this recommendation (...). Given the current recession period, the stability objective will force us to make an effort for joint structural adjustment in 2011 and 2012, which will exceed 4 percent of GDP. Apart from meeting the fiscal adjustment commitment to an average 1.5 percent of annual GDP set in the recommendation, this would also compensate what we failed to meet in 2011. The entire administration shall make an effort in this direction; however, it has been decided that the additional adjustment of 0.5 percentage points for 2012 will be fully assumed by the Central Administration. Consequently, a greater effort shall be made by territorial administrations in 2013.

(...)

(...) European Council's final declaration also refers to the restoration of credit, and, consequently, to the completion of the financial sector regulatory reform (...). We must do our best to boost credit flows towards productive activities. In the present context, it is essential to implement measures dispelling any doubts about the solvency and liquidity of our financial institutions. The Spanish Government is actually working on this. With regard to this point, I should like to refer, above all, to the necessary restructuring of the financial system. Through the Royal Decree-Law on the Reorganization of the Financial Sector, this Government is promoting a reform whose objective is to achieve a sounder and better structured financial system. The reforms carried out are aimed at dispelling doubts about the valuation of the real estate assets on the balance sheets of our financial institutions. Likewise, the sale of real estate at lower prices is thereby promoted. Uncertainty on the valuation of real estate assets is one of the factors which hinders the financial institutions' recourse to the capital market and the attendant drawdown for the funding of the private sector.

This is why the Government is intending to attack the root of the problem by bringing the valuation of real estate assets closer to the markets. Financial institutions will need further reorganization, valued at approximately €50,000 million. After the reform, the specific allowances plus the capital cushion will cover 80 percent of the land value, 65 percent of the real estate under construction, and 35 percent of the real estate already built. In the same direction, the Government is promoting the sector's consolidation. The said process must be carried out in an agile, rapid and organized manner, in order to avoid old hesitations. Therefore, time limits to solve concentration problems are deliberately brief. Financial institutions shall submit their merger projects before 30 May, and the attendant decision shall be issued within a month. These integration projects should ensure more solid and efficient financial institutions, able to assume expansion commitments concerning their credit investments. This process will result in a sounder banking sector, a capitalized one, with fewer financial institutions undoubtedly, but more efficient ones, and able to access financing in international markets.

All this must enable the restoration of the financial sector's main duty: to grant families and enterprises loans so that economic growth and the creation of jobs are set in motion.

(...) The necessity to fight unemployment is, in the case of Spain, (...) particularly urgent (...). [Therefore], our labour reform is in line with the Council's commitments.

(...)"

(*DSC-P*, X Leg., n. 19, pp. 4–7).

On 13 June 2012, in response to a MP's question before Congress on the role of European and International authorities in the supervision of Spain's bailout, the Minister of Economy and Competitiveness replied as follows:

"(...) The Government will request European funding for the recapitalization of the financial sector exclusively. The Spanish Fund for Orderly Bank Restructuring (FROB) will be the recipient of the funding, as well as the one channeling it

to those financial institutions in need. Given the fact that the funding has been requested in order to meet the financial sector's needs, the conditions imposed on the sector will be specific. That is, there will be conditions, whose observance will be supervised; however, the assistance will not be attached to any macroeconomic adjustment programme (...). There will not be any additional fiscal policy conditions or structural reform ones.

(...) Economic surveillance and coordination procedures within the framework of European economic governance will run their course. There will not be further recommendations apart from the one conveyed by the Commission through the excessive deficit procedure of 30 May, to be assessed by the ECOFIN Council and the European Council soon. However, there will be conditions to facilitate the restructuring of the banking sector, conditions to be met by those financial institutions receiving funds. These specific conditions for the financial sector will be agreed when appropriate, once the assistance has been requested, and will be reflected in a memorandum of understanding adopted by the Government and European authorities. We will do it (...) with the clearest transparency. Furthermore, this will be long-term financial assistance, with advantageous conditions, much more favorable than those periods and interest rates recently offered to the FROB in the market.

The International Monetary Fund (IMF) will not participate in the funding (...). However, the IMF will assist its implementation technically and will follow up the financial assistance (...), since it has just carried out a deep assessment of our financial sector and already takes part in the Advisory Committee concerning the evolution of the banking sector".

(DSC-P, X Leg., n. 39, p. 11).

## 5. External Relations

### a) *Common Foreign Policy*

On 27 June 2012, at his appearance before the Congressional Committee on Foreign Affairs in order to present the general lines concerning matters of his competence, the Secretary of State for Foreign Affairs made the following statements:

"(...)

I should like to start my presentation (...) by highlighting, first of all, Spain's commitment to EU's Common Foreign and Security Policy (CFSP). The growing importance of European diplomacy makes it essential to defend Spanish interests in regions such as the Mediterranean, the Middle East or Latin America, not only through the Ministry and our embassies, but also from Brussels. Therefore, our purpose is that the support of political forces makes us have a proactive attitude in the European Union which is reflected in its decision-making and which contributes solutions and leadership so that Spain's interests are present on the European agenda.

(...)

(...) Human rights will inspire and guide the Government's policy on each of the areas, which will be previously agreed with our EU partners.

Security is other of the major pillars of the Government's foreign policy. Limits between domestic and foreign security are blurry and challenges and threats are more and more complex, hence the necessity to address this from a comprehensive approach, both at the European and International levels. Next year we will celebrate the 10th anniversary of EU's first civil mission and military operation. Since then, 22 more EU operations have been carried out, both military and civil, in three different continents. Spain has significantly contributed to many of these and so expects in the future. Eunavfor-Atalanta operations or the training mission in Somalia are examples of our country's leadership in the CFSP field.

(...)

Spain is one of the greater supporters of locating the transatlantic bond in the European Union. This is why the EU is promoting the agenda of a strategic partnership between the US and the EU and is actively negotiating the Special Partnership Agreement with Canada (...)

(...)

As for Iran (...), we share the concerns of the EU, the International Atomic Energy Agency and the UN Security Council about the potential military dimensions of the Iranian nuclear programme. As we understand the deep concern of its neighbouring countries, we are committed to the non-proliferation of nuclear weapons in the region. Spain has made an important sacrifice upon endorsing the tightening of sanctions on the part of the EU, especially the ones concerning the oil embargo. This pressure has proved to be fruitful, conversations between the EU and Iran having been resumed. We defend (and will continue to do so) that pressure must be maintained until Iran makes a move which allow us to trust the peaceful character of its nuclear programme.

Likewise, I should like to refer to the countries in the Gulf Cooperation Council. The Government intends to enhance relations with these countries. As for the priority that the Government gives to economic diplomacy (...), I should like to point out that great opportunities open up for Spanish enterprises in the region. Many of them have already entered into important contracts, among which there must be highlighted the emblematic project of the construction, exploitation and maintenance of the high-speed train between Mecca and Medina, together with other less visible but very transcendent for our economy, such as those in the sectors of infrastructure and renewable energy. The priority given to the Gulf region is translated into two tracks: on the one hand, dialogue between the EU and the Gulf Cooperation Council (...); and, on the other hand, a bilateral effort to enhance political dialogue and to improve economic, commercial and cultural relations through the enlargement of political contacts and the signature of agreements on the aforementioned questions (...).

(...) As for Cuba, the Ministry's position is widely known (...). We endorse the common stance, but the Government makes a flexible interpretation of this stance, in such a way that, should advance be made concerning the respect for human rights in Cuba, we would be willing to study the possibility to enter into a partnership agreement with Cuba within the EU framework, which may enhance the relation between the said country and the EU (...). Given the current situation in Cuba,

we subscribe to the common position, but (...) we will continue our follow-up of the evolution of events in Cuba. Because, in the end, (...) we want for Cuba what we have always wanted for Spain; that is, the rule of law, respect for human rights, tolerance, freedom and all which this entails (...). Should this channel open, we will be willing to revise our position and foster the enhancement of Cuba's relation with the EU.

(...)

(...) Within the EU framework, we also promote the interests of Latin American countries. (...) At the Council of Foreign Affairs, where EU's development cooperation policy was examined, the Minister energetically proposed, in line with our cooperation policy in Latin America, that Peru and Colombia remained recipients of EU development cooperation funds. In order to make clear the position of the Spanish Government, a declaration by the Minister of Foreign Affairs was attached to the conclusions of the Council of Foreign Affairs, where it was explained the reason why we deemed it necessary that the EU keeps allocating development cooperation funds to Peru and Colombia, as we will do with Spanish development cooperation funds.

(...)

What measures do we take? Are we adapting our strategies and work methods to the CFSP when it comes to decision-making on conflicts and situations we are facing, such as Syria, Egypt, Iran, and so on? Let me tell you that, in this respect, decisions mainly rely on the EU. The sanctions regime falls within EU's competence. In the case of Iran, we have been on the front row of EU countries imposing sanctions, in a case where we have given preference to principles over interests. Sanctions on Iran have damaged us, since these entailed the prohibition on the imports of Iranian oil, which amounted to 14 percent of our imports. Over the last months, we had to look for alternative resources. Our SMEs (many of which are located in the Basque Country) cannot work with Tejarat Bank, whose activity with enterprises in the EU countries has been prohibited. Here, once more, principles have been given preference over economic interests: the reach of an agreement within the EU framework and the imposition of sanctions, where necessary, on those countries whose behavior fails to comply with International community rules.

(...)"

## 6. Foreign Investment Protection

On 24 April 2012, the Minister of Foreign Affairs, at a Senate's plenary session, replied to a question concerning the measures the Government had requested to the European Commission as a result of the decision made by the Argentinean Government in relation to YPF. He made the following statements:

"(...) Article 207 establishes that the protection of European investments falls within the competence of European institutions; however, (...) the Article's development being pending, the legal instruments applicable are the bilateral investment treaty (BIT) in force (...) and the Cooperation Agreement between Argentina and the EU, signed in 1990.

In spite of this constraint (...), the Spanish Government has been fully supported by European institutions, undoubtedly, and I should like to take the opportunity to thank them. A resolution has been passed by a large Parliament's majority condemning the expropriation suffered by Repsol, as owner of YPF shares. Both the Commission and the Council have fully supported the Spanish Government's stance. The former did it through the statements of which you are aware, those made by Commissioner Tajani, President Barroso, and the High Representative of the Union for Foreign Affairs, Ashton, who reiterated it at the Commission; the latter did it yesterday.

The Commission's work groups are studying measures concerning the following options: the bringing forward of action against Argentina under the auspices of the WTO (therefore, through commercial means); the bringing forward of the Scheme of Preferences, which is applicable until 2014 and beneficial for Argentina; and even the changing of the approach of a region-to-region preferential agreement (EU-Latin America), in order to provide a bilateral instrument for those countries abiding by the commercial rules respected by civilized nations".

*(DSS-P, X Leg., n. 14, p. 754).*

## **XIV. RESPONSIBILITY**

### **1. In general**

On 23 February 2011, the Minister of Foreign Affairs and Cooperation, Ms. Jiménez García-Herrera, informed on the measures to be adopted by the Spanish Government concerning the detention of the Spanish Consul in Teheran:

"(...) Indeed, the detention of the Spanish Consul in Teheran is an unacceptable event, extremely serious, as my Honorable Member has pointed out, and which seriously violates the Vienna Convention. Therefore, from the very beginning, we required a clear and immediate response on the part of Iranian authorities. The first decision taken by the Government was to contact Iran's Ambassador in Madrid in order to protest energetically against this event, and to require an explanation and the immediate release of our diplomatic counselor. Meanwhile, our Ambassador in Teheran sent, at my request, a note verbal of protest to the Iranian Ministry of Foreign Affairs. Furthermore, we informed the EU, which made many of its members (France, UK or Holland) summon the Iranian Ambassador in their countries in order to convey their firm rejection against the detention of the Spanish diplomat.

My Honorable Member, the Government's attitude, as you have pointed out, has been firm, and the measures we adopted in that moment received an official response duly and timely.

As you may well know, last Thursday I received a call from the Iranian Minister of Foreign Affairs through which he solemnly apologized and assured that events of that nature would not occur again. It was a long talk, through which he explained to me how the events had took place and informed me that his Ministry had ordered a thorough inquiry in order to get to know all details on the event and to ensure that events of such a nature would not happen again. Therefore, the Government will

remain watchful and we have established an internal cooperation formula within the EU to do so”.

(*DS-Congreso, Pleno y Diputación Permanente*, IX Leg., n. 225, p. 14).

## XV. PACIFIC SETTLEMENT OF DISPUTES

Spain and EU's mediation in the dispute between the United Kingdom and Argentina on the sovereignty over the Falkland Islands, the Government provided the following information:

“The Government deems that, given the existence of a dispute on sovereignty over the Falkland Islands, South Georgia Island and South Sandwich Island, unless the decisions taken contribute to the improvement of relations between the United Kingdom and Argentina, there will not be seen any positive outcome.

As declared by the UN through resolutions issued by its various bodies, there is a recognized dispute between the United Kingdom and the Republic of Argentina concerning sovereignty over the Falkland Islands, South Georgia Island and South Sandwich Island. In this sense, Spain endorses UN doctrine and states that Argentina claims to hold them, whereas the United Kingdom holds them in practice. Spain states this at every international fora where its opinion is requested.

Spain has supported all calls by the International Community aimed at the negotiation of the parties. Spain endorses and will endorse those measures contributing to the settlement of the dispute within the UN.

The High Representative of the Union for Foreign Affairs and Security Policy has declared she has been paying special attention to the issue and has requested the Heads of EU delegations to inform on the evolution of the dispute without interfering in it. Anyhow, she respects the fact the United Kingdom wants to settle the issue through bilaterally. By now, both the EU and Spain understand that this is a bilateral dispute which shall be settled bilaterally”.

(*BOCG-Congreso.D*, X Leg., no. 104, p. 171).

At his appearance of 17 April before the Senate's Committee on Ibero-American Affairs, the Minister of Foreign Affairs and Cooperation, Mr. García-Margallo y Marfil, made the following remarks concerning the general lines of his Department's policy:

“(...)

The Government, both yesterday and at a conference I attended today, has summarized in a very simple manner its stance concerning the events occurred in the Argentinean YPF. First of all, they have expressed their condemnation of Argentina's decision to expropriate the YPF shares owned by the Spanish Firm Repsol, which, apart from being arbitrary, is also discretionary, since it does not affect all shareholders of the company.

Secondly, I should like to highlight, to my great sorrow, that Argentina's decision has put an end to the fraternity that has always governed relations between the Republic of Argentina and Spain. I should like to remind that in 2001–2002, when Argentina was facing trouble, it was the Spanish Government that rescued it through

a \$1,000 million loan (through the Paris Club), of which there are some outstanding installments.

Third, I should like to point out that President Kirchner's decision means the breach of the oral agreement reached on 28 February by Minister Soria and Ministers Lorenzini and De Vido, respectively, on behalf of the Spanish and Argentinean Governments. This agreement mainly established that all potential disputes between YPF-Repsol and the Argentinean Government should be settled through dialogue. There was agreed the constitution of two working groups, a Government-to-Government one, and another between the Argentinean Government and YPF. The said agreements never materialized and we never received a response to our repeated claims on the application of the aforementioned agreements.

Fourth, I should like to emphasize that I will not take any action, since this falls within the competence of the Council of Ministers, which will do so when appropriate (...). Therefore, the Government will take all measures deemed necessary to defend the lawful interests of Spanish companies overseas, as well as to ensure that the rights of the millions of shareholders (Spaniards, above all) having invested in a company confiscated or expropriated through an arbitrary decision are respected.

Fifth, I should like to highlight that the Government has been carrying out a diplomatic task since it learnt of the events, on 10 December of the previous year, to be precise. It sought solidarity and collaboration from its partners at those international fora directed and managed by the Government. Right today there has been cancelled the EU-Argentina meeting which was to be held on Thursday, since it has been decided to alter the agenda of the European Parliament Plenary Session, in Strasbourg, in order to discuss a decision and adopt a resolution on this matter through voting. At the moment, the Spanish Prime Minister is in Mexico, which holds the Presidency of the G-20 Summit which will take place in Los Cabos. Likewise, at the meeting held with the Ministers of Foreign Affairs of the G-20 I already reported the events; and I will do it again in this case, undoubtedly, as I will address the matter at the Council of Foreign Affairs to be held on Monday.

Therefore, I should ask my Honorable Members not to worry: We consider that the measure adopted by the Argentinean Government is arbitrary and discriminatory. We consider that it alters the solidarity and friendship traditionally characteristic of the relations between the two Governments. We deem that it violates the oral agreements reached, through which it was intended to settle potential conflicts by means of dialogue and negotiation (as friendly countries do). I reiterate that the Government will adopt as many measures as deemed necessary to ensure respect for the lawful interests of companies, especially, of shareholders. Likewise, we are seeking dialogue and consensus together with our partners and allies in the matter.

(...)

As for the BIT, I have already mentioned the situation of the claims brought pursuant to it. Therefore, I will not insist on the issue any further. As you said, it is EU's competence to defend us; and, if I remember right, it is Article 207 of the Treaty on the Functioning of the EU that sets forth that the EU shall protect the investments of its Member States. However, as the development of the Article is

pending, the capacity to bring action in a jurisdictional dispute still falls within the competence of Member States.

(...)"

(DSS-C, X Leg., no. 43, pp. 4-5, 24).

## XVI. COERCION AND THE USE OF FORCE SHORT OF WAR

### 1. Collective measures

#### a) *Libya*

*Note:* See XI.2.b) *The Mediterranean*

At his appearance of 22 March before Congress in order to inform on the Spanish participation in the Libyan crisis and to seek ratification of the said participation under Article 17.3 of the Organic Law on National Defence, the Spanish Prime Minister, Mr. Rodríguez Zapatero made the following remarks:

"(...)

As you may all know, last Thursday, the UN Security Council passed Resolution 1973 authorizing Member States to take those measures necessary to protect civilians and the areas inhabited by civilians in Libya. To that end, a no-fly zone was established. Through this Resolution, the Security Council has exercised one of its competences under the UN Charter concerning international peacekeeping and security. Through it, the UN applies the principle of the responsibility to protect, supported by the UN General Assembly in the final document of 2005 World Summit, which had already been applied by the Security Council to some extent in its Resolution 1706 of 2006, authorizing the UN Mission in Sudan to make use of force to protect civilians in Darfur.

Through Resolution 1973, which is complementary to Resolution 1970 of last 26 February, the International Community, by means of its major body, has measured up to its responsibilities of fighting such a serious situation as the use of force against the civil population on the part of Libyan authorities through generalized and systematic attacks (...). The International Community has been strengthened by its position, since it was fully supported as for the two Security Council Resolutions: Resolution 1970; and Resolution 1973, which has allowed the use of force and has been expressly supported by the major regional organizations, such as the Arab League, the Organization of the Islamic Conference, the African Union, and the Security Council itself. It has also been strengthened by the decision's factual basis: the principle of responsibility to protect, the protection of civilians. Resolution 1970 of the Security Council established this. The responsibility to protect means that in the event a State fails to protect its citizenship, the International Community shall intervene in order to assume this responsibility. The reason why we have intervened in Libya meets a humanitarian principle: to protect Libyan civilians from Libyan forces.

(...)

In Libya, the violent reaction of authorities to the democratization claims of its people was immediate, and an exception to these processes. The EU Council of Foreign Affairs already stated, on 21 February, its stance as to the first riots reported: its condemnation of repression and its strong rejection against violence and the killing of Libyan civilians.

As the utmost seriousness of the situation increased, there was summoned an Extraordinary European Council for 11 March. At the said meeting, the EU conveyed its firm solidarity with the Libyan people and the victims of repression, and agreed to condemn the violent repression the regime was exercising against its citizens, as well as the serious and systematic violation of human rights. It also required that the violation ceased and that there was guaranteed the population's security through all necessary means. Furthermore, the European Council endorsed UN Security Council Resolution 1970 and the action brought before the International Criminal Court concerning the present situation in Libya.

The clear aim was that Libya made a rapid and orderly transition towards democracy through plural dialogue (...). The EU set in motion a mechanism for the evacuation of its citizens and citizens from neighboring countries fleeing from the attacks and the dangers posed by the regime's military retaliation. Spain contributed to this task through the provision of aerial means for the evacuation of nationals from third countries stranded at the borders between Libya and Tunisia or Egypt, as well as through the supply of equipment for humanitarian support by means of the AECID in a manner defined as exemplary by our partners and affected countries due to its effectiveness.

(...)

The passage of Resolution 1973 last Thursday provided the legal basis necessary to intervene, pursuant to the conditions set by the Council of Europe on 11 March, endorsed by the Spanish Government.

Given the situation, the International Community should decide how to apply the Resolution, and so did it at the meeting of 26 March in Paris, summoned by French Prime Minister Nicolas Sarkozy. There was approved a declaration regretting that the claims of the International Community through the UN Security Council Resolution 1970, the Arab League, the Islamic Conference and the EU had been disregarded by the Libyan regime, which maintained the arms build up against its own population.

Given the circumstances, we the countries gathered in Paris conveyed our satisfaction concerning the adoption of UN Security Council Resolution 1973, and we decided to abide by it. My Honorable Members, we decided to adopt under Resolution 1973 all necessary measures, including military ones, to guarantee its observance (...) The setting in motion of several coordinated operations was the start of the so-called *Odyssey Dawn* Operation, which shall not entail the occupation of Libyan territories under no circumstances, pursuant to Resolution 1973 (...).

(...) UN Security Council Resolutions, together with the complementary decisions of 12 March adopted by the Organization of the Islamic Conference and the African Union's Security and Peace Council, made the Spanish Government consider, within

the framework of the decisions adopted by our European partners at the Extraordinary Council of 11 March, that the necessary legal and political conditions are met so that Spain assumes its duties as a member of the International Community and the UN.

Indeed, before taking the step, I put forward, on behalf of the Government, four conditions to be imposed on our participation:

- First, a UN Security Council Resolution authorizing the use of force, because international law so requires. Likewise, this is required pursuant to the newly passed NATO's strategic concept, since it reaffirms Security Council's primary responsibility as to the prevention of peace and international security.

- Second, a European agreement.

- Third, regional cooperation through the Arab League and the African Union.

- And, of course, the authorization of this Parliament (...).

Pursuant to all this, the Government has adopted, under the provisions of the Organic Law on National Defence, certain urgent decisions in order to determine the degree of participation of our country in the international coalition constituted to face the situation, His Majesty the King having been duly informed on the issue. The Spanish participation aims at ensuring the respect of the no-fly zone. Five aircraft have been supplied to that end: four fighter aircraft F-18, heading to the Italian military base Decimomannu, and one Boeing 707 for air-to-air refueling (...). Likewise, it has been decided to deploy aerial and maritime forces to apply the embargo. While we await the North Atlantic Council's decision on the start of the mission, instructions have been given and arrangements have been made for the preparation of frigate *Méndez Núñez*, located in Ferrol; of submarine *Tramontana*, whose base is in Cartagena; and of a C-235 aircraft for maritime surveillance (...).

I should like to highlight that we are facing an important deployment of military forces, both aerial and maritime. Its importance lies in the assistance they provide and the number of deployed forces and of military personnel engaged: approximately 500 members of the Armed Forces (...).

(...) Under the Law we adopted in order to govern situations of this nature, I request the authorization of this Chamber concerning the participation of our country in this operation, which consists in what I have already described, ensuring the observance of UN Security Council resolutions.

(...)

Therefore, today the Government's request is a cautious one. Indeed, the Government has agreed to establish an initial period for our participation which corresponds to the nature of the missions we have assumed: a month to monitor and ensure the guarantee of the no-fly zone, and three months for the operation to ensure the embargo. If the international operation will so require, the Government will request the Chamber's authorization for renewal (...).

(DSC-P, IX Leg., no. 232, pp. 2-5).

At their appearances of 20 June before the Congressional Committee on Foreign Affairs and Defence, both the Minister of Foreign Affairs and Cooperation, Ms. Jiménez García-Herrera; and the Minister for Defence, Ms. Chacón Piqueras, informed on the consensus

reached by the Council of Ministers concerning the request for authorization to renew the participation of Spanish Military Units within the Libyan crisis framework:

“(...)

(...) As I have already stated, diplomatic, economic and military pressure is rendering Gaddafi's regime weak and isolated (...). On the one hand, we should maintain our support of the mediation task carried out by UN Secretary-General's Special Envoy (...). On the other hand, we should start to prepare the country's governance so that it is ready at Gaddafi's departure from power. As I have already pointed out, at the meeting in Rome, the National Libyan Council provided the Contact Group with a plan for political change including the drawing up of a constitution and the call for elections. Therefore, Spain proposed in Abu Dhabi that the necessary support and implication of the International Community be reflected in a pact between the National Transitional Council and the Contact Group.

(...)

(...) I will now address the core point of this appearance, that is, to request your authorization, especially the authorization of the Committee of Defence, in order to renew our presence in NATO's operation in Libya until the objectives set are attained (...). As you may well know, it was under UN Security Council Resolutions 1970 and 1973 that two different operations were set in motion: on the one hand, one to protect civilians and inhabited areas under the threat of attacks, through the adoption of all necessary measures and a no-fly zone; on the other hand, another to guarantee the observance of the maritime arms embargo and the measures against mercenaries imposed on Libya. On 31 March, NATO took over these operations, also known as *Operation Unified Protector*. At the moment, a total of 19 countries are participating in it: 14 NATO Members, together with Sweden, Ukraine and 3 Arab countries (Jordan, Qatar and United Arab Emirates). Spanish Armed Forces have contributed to both missions since last 19 March, only two days after the Security Council had issued the resolution authorizing their deployment. In order to attain the first objective, there has been established a no-fly zone, which ensures that Libyan military aircraft will not attack the population anymore. My Honorable Members, 195 aircraft from 15 different countries participate in this effort. Our military personnel provide an equipment made up of 4 fighter aircraft F-18, 2 tankers for air-to-air refueling, 1 Boeing 707 and 1 aircraft TK-10 Hercules. The Spanish military personnel deployed at the Italian Base Decimomannu, in Sardinia, amounts to a total of 108. As to the maritime embargo, the Libyan coast is under maritime and aerial surveillance in order to block all aircraft and ships under suspicion of having violated the prohibition. For this task, NATO boasts 18 surface ships, 2 submarines and 5 aircraft for maritime surveillance from 12 different countries. Spain contributes frigate *Méndez Núñez*, submarine *Mistral* and 1 aircraft N-235 for maritime surveillance, whose military personnel amounts to 305. It is important to reiterate that Spanish military forces are participating exclusively in the tasks assigned to them; that is, the control of the maritime embargo and the establishment of the no-fly zone (...).

As to the establishment and protection of the no-fly zone, over the three first months, the group of aircraft under NATO's command have made 11,600 sorties,

184 out of which correspond to the 4 Spanish F-18, which, since 19 March, have accumulated a total of 805 hours of air patrolling. So far, they have not been given any orders to block any non-authorized aircraft (...).

Likewise, tankers are in charge of the air-to-air refueling of all aircraft of the Alliance. Since the operation started, the Boeing 707 has carried out 68 missions, which amount to a total of 384 flight hours, and it has supplied 1.5 million litres of fuel. As I announced at my previous appearance, Spain has contributed a new aircraft for air-to-air refueling, which was essential to correct the shortage of this sort of equipment in the operation. Thus, on 20 April, TK-10 Hercules was added, without exceeding the number of military personnel authorized for the mission by the Defence Committee. From that moment, this aircraft has carried out 39 missions. Having flown a total of 200 hours, it has supplied approximately 275,000 litres of fuel.

On another matter, as to the maritime embargo, the Alliance has so far questioned the crew of more than 1,400 vessels, 102 out of which have been inspected. As a consequence, 8 vessels were not authorized to continue their journey to or from Libyan ports. Throughout its three first months in the mission, Frigate *Méndez Núñez* has questioned the crew of 117 vessels under suspicion and has inspected 19 (...). Aircraft CN-235 for maritime surveillance joined the operation on 23 March and, as you may well know, its mission is to identify and monitor any vessel under suspicion. The aircraft has carried out 36 missions so far and has accumulated 216 flight hours which have allowed it to identify 525 ships. Submarine *Mistral* joined the operation on 1 May, when it replaced the *Tramontana*, which had operated there since 26 March. Both submarines have carried out patrols undercover on the Libyan coast, across the areas they had been respectively assigned for the identification and follow-up of ships under suspicion. So far, they have identified more than 800 ships. Therefore, (...) Spanish participation is being significant as for the advance of operations, both for the protection of the no-fly zone (and its previous establishment) and the imposition of the maritime embargo. NATO's Secretary-General confirmed this on Thursday, during his visit to Spain.

(...)

We allies agree that the operation should continue as long as necessary, until the three objectives set by Ministers of Foreign Affairs at the meeting in Berlin are fully attained (...). Therefore, at the North Atlantic Council of 1 June, NATO decided to extend *Operation Unified Protector* by 90 days from 27 June. A week later, the decision was ratified in Brussels at the meeting of NATO's Ministers of Defence (...).

As a consequence, (...) the Spanish Government has decided to renew its participation in the *Operation Unified Protector* until its end. Therefore, my Honorable Members, under UN Security Council Resolutions 1970 and 1973, I request you, as members of the Defence Committee, the authorization of the Congress of Deputies for the renewal of the participation of the Spanish aerial and maritime forces in the operations until the objectives set are attained: a permanent ceasefire, the withdrawal of military forces from the occupied and besieged towns and the guarantee of human assistance for the entire Libyan territory. This will not entail neither action on the ground nor the enlargement of our troops. A military personnel of 500 is still sufficient to perform the tasks we have assigned (...). Over these three

months of operation, the costs foreseen have been met, as I already informed at my previous appearance. It has cost a total of €43 million. Should the renewal of our participation be approved, the extension of the mission will have a monthly cost of approximately €14.4 million”.

(*DSC-C*, IX Leg., no. 800, pp. 3–7).

## XVII. WAR AND NEUTRALITY

### 1. Arms Exports

On 9 March 2011, the Spanish Head of Government, Mr. Rodríguez Zapatero, informed on the Government’s criteria for the authorization or refusal to sell arms in North of Africa:

“(…) The Government’s criteria are the ones set forth in Act 53/2007, to which we gave impetus, and which, as you may know, was devised for the establishment of the guarantees of control and transparency in the foreign trade field, especially concerning defence and dual-use items. Pursuant to this Act, the Government carries out a case-by-case review of those exports operations heading to sensitive countries, irrespective of the region to which these belong. This applies to the many cases to which you referred, under the internationally recognized criteria set forth in the aforesaid act, among which you may find EU criteria for the exports of military technologies and equipment.

In the event of changes, (...) appropriate measures are taken, as it occurred in the case of Libya. Precisely yesterday, the two licenses for the export of defence equipment to the said country were revoked, having been previously suspended on 22 February for precautionary reasons, four days before the UN Council passed measures concerning Libya, and six days before the EU did so. Furthermore, Ms. Buenaventura, arms trade with Libya did not even amount to 0.5 percent of the total authorized for 2010’s first term, and trade with countries in the Middle East and North Africa only totals 1.2 percent of this trade. Please, do not convey the idea, since it is untrue, that our relations with countries in North Africa, the Maghreb and Arab countries are based on arms trade. Our bonds are much deeper, and Spain’s outstanding task in these countries is one of development cooperation”.

(*DS-Congreso, Pleno y Diputación Permanente*, IX Leg., n. 228, p. 6).



## *Treaties to which Spain is a Party Concerning Matters of Public International Law, January 2011–June 2012*

This section has been co-ordinated by Dr. María Isabel Torres Cazorla. The materials have been selected, compiled and commented on by a team from the Department of Public International Law of the University of Malaga, which includes David Márquez Botella, Andrés Bautista Hernáez, Pedro Expósito González and Carolina Jiménez Sánchez (Research Fellows of Public International Law), Dr. Elena del Mar García Rico, Dr. Magdalena M<sup>a</sup>. Martín Martínez, Dr. Eloy Ruiloba García, Dr. Ana M. Salinas de Frías and Dr. María Isabel Torres Cazorla, Lecturers of Public International Law.

This survey includes the treaties covered by Art. 2.1 a) of the Vienna Convention on the Law of Treaties, published in the *Boletín Oficial del Estado* (Official Journal of the State). Its purpose is to record the legal effects of these instruments, such as ratification or accession, municipal entry into force, provisional application, reservations or declarations, territorial application, termination and abrogation. In a few instances some relevant articles or references are reproduced in an unofficial translation.

### I. INTERNATIONAL LAW IN GENERAL

### II. SOURCES OF INTERNATIONAL LAW

– Resolution of 10 June 2011 passed by the Spanish Technical Secretariat-General on implementation of article 32 of Decree 801/1972, regulating the activity of the State Administration regarding international treaties (*BOE* 147, 21.06.11).

*Note:* This Resolution provides for publication, in the public interest, of communications of third States actions regarding multilateral treaties to which Spain is party and received by the Spanish Ministry of Foreign Affairs and Cooperation from 1 September 2010 to 30 April 2011.

– Resolution of 5 October 2011 passed by the Spanish Technical Secretariat-General on implementation of article 32 of Decree 801/1972, regulating the activity of the State Administration regarding international treaties (*BOE* 247, 13.10.11).

*Note:* This Resolution provides for publication, in the public interest, of communications of third States actions regarding multilateral treaties to which Spain is party and received by the Spanish Ministry of Foreign Affairs and Cooperation from 1 May 2011 to 31 August 2011.

– Resolution of 24 April 2012 passed by the Spanish Technical Secretariat-General on implementation of article 32 of Decree 801/1972, regulating the activity of the State

Administration regarding international treaties (*BOE* 105, 02.05.12 and *corr. of errors* *BOE* 138, 09.06.12).

*Note:* This Resolution provides for publication, in the public interest, of communications of third States actions regarding multilateral treaties to which Spain is party and received by the Spanish Ministry of Foreign Affairs and Cooperation from 1 September 2011 to 31 March 2012.

### III. RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW

### IV. SUBJECTS OF INTERNATIONAL LAW

### V. THE INDIVIDUAL AND INTERNATIONAL LAW

#### 1. Human rights

– International Convention for the Protection of All Persons from Enforced Disappearance, done in New York on 20 December 2006.

*Instrument of ratification:* 14.07.09

*Entry into force:* 23.12.10 (*BOE* 42, 18.02.11).

*Note:* With the following declaration by Spain:

“1. In accordance with article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance, the Kingdom of Spain declares that it recognizes the competence of the Committee to receive and consider Communications from or on behalf of individuals subject to its jurisdiction, claiming to be victims of violations by Spain of provision of this Convention.

2. In accordance with article 32 of the International Convention for the Protection of All Persons from Enforced Disappearance, the Kingdom of Spain declares that it recognizes the competence of the Committee to receive and consider Communications in which a State party claims that another State party is not fulfilling its obligations under this Convention”.

– Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, done in Lanzarote on 25 October 2007.

*Corr. of errors:* *BOE* 56, 07.03.11.

– Resolution dated 14 July 2011, of the Technical Secretariat-General of the Ministry of Foreign Affairs, on the objection by Spain to the reservations made by the Islamic Republic of Pakistan to the Convention against torture and other cruel inhuman or degrading treatment (published in *Boletín Oficial del Estado*, n. 268, 9 November 1987), done at New York on 10 of December 1984 (*BOE* 179, 27.07.11).

*Note:*

“The Government of the Kingdom of Spain has examined the reservations made by Pakistan at the time of its ratification of Convention against Torture and Other Cruel Inhuman or Degrading Treatment under Articles 3, 4, 6, 12, 13 and 16 of that international instrument.

The Government of the Kingdom of Spain considers that these articles contain rights and guarantees essential for the realization of the object and purpose of the Convention. The reservations made by Pakistan, subordinating the application of those articles of the Convention in accordance with either domestic law on extradition, along with its Constitution and laws of Sharia, all categories to which it makes a reference without specifying its contents does not allow to know the commitment of Pakistan to achieve its object and purpose of the Convention. Moreover, contrary to the principle of international law, well established in practice, under which a State may not condition the fulfillment of international obligations voluntarily assumed by the mere application of rules of law, whatever its nature. These reserves, in the terms in which they are made, in no case for excluding the legal effect of the obligations under the relevant provisions of the Convention.

Consequently, the Government of the Kingdom of Spain objects to the reservations made to Articles 3, 4, 6, 12, 13 and 16 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment.

This objection does not preclude the entry into force of this Convention between the Kingdom of Spain and Pakistan”.

- Resolution dated 28 June 2011, of the Technical Secretariat-General of the Ministry of Foreign Affairs on Spain's objection to the reservations made by the Islamic Republic of Pakistan upon ratification of the International Covenant on Civil and Political Rights (published in *Boletín Oficial del Estado*, n. 103, of 30 April 1977), done at New York on 16 of December 1966 (*BOE* 180, 28.07.11).

*Note:*

“The Government of the Kingdom of Spain has examined the reservations made by Pakistan at the moment of its ratification of the International Covenant on Civil and Political Rights, under Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of that international instrument.

The Government of the Kingdom of Spain considers that such reserves are incompatible with the object and purpose of the Covenant, since its purpose is to exclude or limit an indefinite commitment of Pakistan to respect and guarantee certain rights essential to the realization of the object and purpose of the Covenant, such as equality between men and women, the right to life and the limitations on the imposition of the death penalty, the prohibition of torture and cruel, inhuman and degrading treatment, freedom of thought, conscience and religion, freedom of expression, freedom of movement and choice of place of residence, restrictions on the expulsion of aliens lawfully in the territory of a State Party, and the right to participate in public affairs, the right to vote and stand, and the right of access to public service on equal terms.

The Government of the Kingdom of Spain also considers that the reservation of not recognizing the competence of the Human Rights Committee to perform its functions under article 40 is incompatible with the object and purpose of this international treaty. The Government of the Kingdom of Spain considers that the reservations made by Pakistan, subordinating the application of certain articles of the Covenant, either on its conformity with the laws of Sharia, or its conformity with the Constitution or to both, which makes a general reference, without specifying its content, in any case would not exclude the legal effect of the obligations under the relevant provisions of the Covenant. Consequently, the Government of the Kingdom of Spain objects to the reservations made by Pakistan to Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of the International Covenant on Civil and Political Rights.

This objection does not preclude the entry into force of this Covenant between the Kingdom of Spain and Pakistan”.

## 2. Aliens

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Cape Verde concerning the participation in municipal elections of nationals of each country residing on the territory of the other country, done in Praia on 8 April 2009.

*Entry into force:* 1.01.11 (*BOE* 11, 13.01.11).

– Agreement between the Kingdom of Spain and the Plurinational State of Bolivia on Mutual Suppression of visa requirement for holders of diplomatic and official or service passports, done in Madrid on 15 September 2009.

*Entry into force:* 31.12.10 (*BOE* 17, 20.01.11).

– Agreement between the Kingdom of Spain and the Kingdom of Thailand on reciprocal suppression of diplomatic passport visa, done at Madrid on the 7 October 2010.

*Entry into force:* 31.05.11 (*BOE* 131, 2.06.11 and *corr. of errors BOE* 142, 15.06.11).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Korea concerning the participation in municipal elections of nationals of each country residing on the territory of the other country, done at Madrid and Seoul on 16 November 2010 and 26 January 2011.

*Entry into force:* 01.07.11 (*BOE* 160, 06.07.11).

– Agreement between the Kingdom of Spain and the State of Kuwait on the waiver of visa requirements for holders of diplomatic passports, done at Seville on 3 October 2011.

*Provisional application:* 03.10.11 (*BOE* 266, 4.11.11 and *corr. of errors BOE* 279, 19.11.11).

– Agreement between the Kingdom of Spain and the Islamic Republic of Mauritania on the abolition of visa requirements for the holders of diplomatic passports, done at Nouakchott, on 6 October 2011.

*Provisional application:* 6.10.11 (*BOE* 270, 9.11.11 and *corr. of errors BOE* 291, 3.12.11).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Trinidad and Tobago on participation in municipal elections by nationals of one country resident in the territory of the other, done at Port of Spain, on 17 February 2009.

*Entry into force:* 1.11.11 (BOE 290, 2.12.11).

– Exchange of Notes, constitutive of an Agreement between the Kingdom of Spain and the United States of Mexico, modifying the Exchange of Notes on mutual abolition of visas on diplomatic passports, of 17 April 1989, done in Madrid on 7 and 14 December 2011.

*Provisional application:* 14.12.11 (BOE 313, 29.12.11 and *corr. of errors* BOE 9, 11.01.12).

*Entry into force:* 27.03.12 (BOE 90, 14.04.12 and 313, 29.12.11).

## VI. ORGANS OF THE STATE

### 1. Diplomatic Relations

– European Convention on Consular Functions, done in Paris on 1 December 1967.

*Instrument of ratification:* 4.05.87

*Entry into force:* 9.06.11 (BOE 84, 08.04.11 and *corr. of errors* BOE 133, 04.06.11).

*Note:* With the following reservations by Spain:

“Spain reserves the right not to recognize the obligation, laid down in paragraph 1 of Article 6, of informing the consular officers if the person concerned, after having been informed without delay of his or her rights, does not request it; Spain also reserves the right not to allow the visiting rights provided for in paragraphs 2 and 3 of Article 6, if the person concerned is opposed to them.

Spain reserves the right not to give effect, on its territory, to draw up documents of civil status by consular officers, in accordance with paragraph 1 of Article 13.”

– Agreement between the Kingdom of Spain and the Republic of Serbia concerning the free exercise of remunerated activities by dependent relatives of diplomatic, consular, administrative and technical staff of diplomatic missions and consular offices, done in Madrid on the 23 February 2010.

*Entry into force:* 27.05.11 (BOE 129, 31.05.11 and *corr. of errors* BOE 143, 16.06.11).

– Agreement between the Kingdom of Spain and the Government of the Republic of Turkey on reciprocity concerning the free exercise of remunerated activities by dependent relatives of diplomatic, consular, administrative and technical staff of diplomatic missions and consular offices, done at Istanbul on the 5 April 2009.

*Entry into force:* 06.06.11 (BOE 155, 30.06.11).

– Agreement between the Kingdom of Spain and the Republic of Panama on reciprocity concerning the free exercise of remunerated activities by dependent relatives of diplomatic, consular, administrative and technical staff of diplomatic missions and consular offices, done at Madrid on the 25 November 2008.

*Entry into force:* 12.10.10 (BOE 165, 12.07.11).

– Agreement between the Kingdom of Spain and the Republic of Guatemala on reciprocity concerning the free exercise of remunerated activities by dependent relatives of diplomatic, consular, administrative and technical staff of diplomatic missions and consular offices, done at Madrid, on 15 October 2007.

*Entry into force:* 9.12.08 (*BOE* 168, 14.07.11).

– Agreement between Spain and Jamaica, concerning the free exercise of remunerated activities by dependent relatives of diplomatic, consular, administrative and technical staff of diplomatic missions and consular offices, done in Kingston on 17 February 2009.

*Entry into force:* 07.07.11 (*BOE* 192, 11.08.11 and *corr. of errors BOE* 221, 14.09.11).

– Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, done at Vienna, on 24 April 1963.

*Instrument of accession by Spain:* 01.03.11

*Entry into force:* 21.10.11 (for Spain) (*BOE* 262, 31.10.11 and *corr. of errors BOE* 303, 17.12.11).

– Agreement between the Kingdom of Spain and the Republic of Ghana concerning the free exercise of remunerated activities by dependent relatives of diplomatic, consular, administrative and technical staff of diplomatic missions and consular offices, done in Accra, on 31 March 2011.

*Entry into force:* 07.12.11 (*BOE* 305, 20.12.11).

## 2. Relations with International Organizations

## VII. TERRITORY

## VIII. SEAS, WATERWAYS AND SHIPS

– Amendments 2009 to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Addition of a new chapter 8 to MARPOL Annex I and consequential amendments to the Supplement to the IOPP Certificate, Form B) (published in *Boletines Oficiales del Estado* n. 249 and 250 of 17 and 18 October 1984, respectively) adopted on 17 July 2009 by Resolution MEPC.186(59).

*Entry into force:* 01.01.11 (*BOE* 35, 10.02.11).

– Amendments 2009 to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Amendments to Regulations 1, 12, 13, 17 and 38 of MARPOL Annex I, Supplement to the IOPP Certificate and Oil Record Book Parts I and II) (published in *Boletines Oficiales del Estado* n. 249 and 250 of 17 and 18 October 1984, respectively) adopted on 17 July 2009 by Resolution MEPC.187 (59).

*Entry into force:* 01.01.11 (*BOE* 35, 10.02.11).

- Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Amendments to regulations 1, 12, 13, 17 and 38 of MARPOL Annex I, Supplement to the IOPP Certificate and Oil Record Book Parts I and II), adopted on 17 July 2009 by Resolution MEPC 187 (59) (*BOE* 63, 15.03.11).
  
- Amendments 2008 to the International Convention for the Safety of Life at Sea, 1974, as amended (published in the *Boletín Oficial del Estado* of 30 September 1999 and 9 December 1999), adopted on 4 December 2008 by Resolution MSC 269 (85).  
*Entry into force:* 01.07.11 (*BOE* 65, 17.03.11).
  
- International Code on Intact Stability, 2008 (2008 IS Code), adopted on 4 December 2008 by Resolution MSC 267 (85).  
*Entry into force:* 01.07.10 (*BOE* 70, 23.03.11).
  
- Amendments of 2009 to the 1988 Protocol concerning the 1974 International Convention for the Safety of Life at the Sea (published in the *Boletín Oficial del Estado* of 30 September 1999, n. 234), adopted on the 5 June 2009 by means of Resolution MSC.283(86).  
*Entry into force:* 01.01.11 (*BOE* 143, 16.06.11).
  
- Correction of errors concerning the 2008 Amendments to the amended 1974 International Convention for the Safety of Life at Sea (published in *Boletín Oficial del Estado* of 30 September 1999, n. 234 and n. 294, of 9 December 1999), adopted on the 9 December 2008 by means of Resolution MSC.269 (86) (*BOE* 143, 16.06.11).
  
- Amendments 2009 to the International Convention for the Safety of Life at Sea, 1974, (published in *Boletín Oficial del Estado* of 16–18 of June 1980), adopted the 5 of June 2009 by Resolution MSC.282 (86).  
*Entry into force:* 01.01.11 (*BOE* 144, 17.06.11).
  
- Amendments to the Annex of the Protocol of 1997, amending the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (published in *Boletín Oficial del Estado*, n. 249 and 250, on 17 and 18 October 1984), adopted on 26 March 2010 by Resolution MEPC.190 (60).  
*Entry into force:* 1.09.11 (*BOE* 291, 3.12.11).
  
- Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended, (published in *Boletín Oficial del Estado* on 16 - 18 June 1980), adopted on 21 May 2010 by Resolution MSC.290 (87).  
*Entry into force:* 01.01.12 (*BOE* 308, 23.12.11).
  
- Amendments to the International Convention for the Safety of Life at Sea, 1974, as amended, (published in *Boletín Oficial del Estado* on 16 - 18 June 1980), adopted on 21 May 2010 by Resolution MSC.291 (87).  
*Entry into force:* 01.01.12 (*BOE* 308, 23.12.11).

– Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution From Ships, 1973 (Addition of a new chapter 9 to MARPOL Annex I) (published in *Boletín Oficial del Estado* n. 249 and 258, on 17–18 October 1984) adopted on 26 March 2010 by Resolution MEPC.189 (60).

*Entry into force:* 01.09.11 (*BOE* 312, 28.12.11).

– International Convention on Standards of Training, Certification and Watch-keeping for Fishing Vessel, 1995, done at London on 7 July, 1995.

*Instrument of accession:* 28.11.08.

*Entry into force:* 29.09.12 (*BOE* 65, 16.03.12).

– Manila Amendments 2010 to the Annex to the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers (STCW) 1978, (done at London on July 7, 1978 and published in *Boletín Oficial del Estado* 7 November, 1984). Resolution 1 of the Conference of the Parties to the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers, adopted in Manila on June 25, 2010.

*Entry into force:* 1.01.12 (except for Finland, Slovenia, Lithuania, Denmark, New Zealand, United Kingdom, Ireland and Portugal) (*BOE* 67, 19.03.12).

– Amendments of 2010 to the Annex to the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (published in *Boletín Oficial del Estado* n. 249 and 250 of 17 and 18 October 1984, respectively), (Revised Model IAPP Certificate Supplement) adopted on 1 October 2010, by Resolution MEPC.194 (61).

*Entry into force:* 01.02.12 (*BOE* 81, 04.04.12).

– Amendments of 2010 to the Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974, as amended, (published in *Boletín Oficial del Estado* n. 234 of 30 September, 1999) adopted on 3 December 2010, by Resolution MSC.309 (88).

*Entry into force:* 01.07.12 (*BOE* 83, 06.04.12).

– Amendments 2010 to the International Convention for Safe Containers (CSC) 1972 (published in *Boletín Oficial del Estado* n. 219 of 13 September 1977), adopted on 3 December 2010 by Resolution MSC.310 (88).

*Entry into force:* 01.01.12 (*BOE* 85, 09.04.12 and *corr. of errors BOE* 138, 09.06.12).

– Amendments 2010 to the International Convention for the Safety of Life at Sea, 1974, (published in *Boletín Oficial del Estado* of 16, 17 and 18 June 1980), adopted on 3 December 2010 by Resolution MSC.308 (88).

*Entry into force:* 01.07.12 (*BOE* 98, 24.04.12).

– Amendments 2010 to the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers (STCW Convention), adopted in Manila on 25 June 2010.

*Entry into force:* 01.01.12, except with Finland, Slovenia, Lithuania, Denmark, New Zealand, United Kingdom, Ireland and Portugal, due to article XII 1) a) ix) of the Convention (BOE 133, 04.06.12).

## IX. INTERNATIONAL SPACES

## X. ENVIRONMENT

– Cooperation Agreement between the Kingdom of Spain and the United Nations Human Settlements Programme (UN-Habitat), done in Rio de Janeiro on 23 March 2010.

*Entry into force:* 10.01.11 (BOE 32, 07.02.11).

– Amendments to the Convention Establishing the European Centre for Medium-Range Weather Forecast and to the Protocol on the Privileges and Immunities of the European Centre for Medium-Range Weather Forecast, done in Brussels on 22 May 2005.

*Instrument of ratification:* 19.06.07

*Entry into force:* 06.06.10 (BOE 38, 14.02.11).

– Amendments to the Annex II and III of the Protocol on Integrated Coastal Zone Management in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (*Boletín Oficial del Estado* n. 302, 18 December 1999), adopted in Marrakech on 5 November 2009 by Decision IG.19/12.

*Entry into force:* 13.02.11 (BOE 47, 24.02.11).

– Protocol on Integrated Coastal Zone Management in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, done in Madrid on 21 January 2008.

*Instrument of ratification:* 20.05.10

*Entry into force:* 24.03.11 (for Spain) (BOE 70, 23.03.11).

– Protocol on Heavy Metals to the 1979 Convention on Long-range Transboundary Air Pollution, done in Aarhus (Denmark) on 24 June 1998.

*Instrument of ratification:* 23.11.10.

*Entry into force:* 23.10.03 (in general) and 16.05.11 (for Spain) (BOE 80, 04.04.11 and *corr. of errors* BOE 156, 01.07.11).

– Amendments to the Technical Code on Control of Emission of Nitrogen Oxides From Marine Diesel Engines (NOx Technical Code 2008), adopted on 10 October 2008 by Resolution MEPC 177 (58), published in the *Boletín Oficial del Estado* n. 131 on 10 October 2008.

*Entry into force:* 1.07.10 (BOE 83, 07.04.11 and *corr. of errors* BOE 158, 04.07.11).

– Correction of errors concerning the entry into force of the amendments to the lists of Annex II and III of the Protocol Concerning Specially Protected Areas and Biodiversity

in the Mediterranean (*Boletín Oficial del Estado* n. 302, of 18 December 1999), adopted at Marrakech on the 5 November 2009 by means of Decision IG.19/12 (*BOE* 95, 21.04.11).

– Denounced by Spain of the Convention for the establishment of an Inter-American Tropical Tuna Commission (IATTC), done at Washington on 31 May 1949.  
*Entry into force:* 1.02.12 (*BOE* 171, 18.07.11).

– Amendment to paragraph 3 of the Annex 2 of the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (published in the *Boletín Oficial del Estado* n. 150, 23 June 2001), adopted at the IV Meeting of the Parties held in Monaco on 12 November 2010.  
*Entry into force:* 28.09.11 (*BOE* 246, 12.10.11).

– Amendments to Annexes A, B and C of the Stockholm Convention on Persistent Organic Pollutants (published in *Boletín Oficial del Estado*, 23 June 2004), done at Geneva on 8 May 2009.  
*Entry into force:* 26.09.10 (in general) and 14.11.11 (for Spain) (*BOE* 250, 17.10.11).

*Note: With the following declaration by Spain:*

“Complied the requirements of Spanish law, extend this Instrument of Acceptance of Spain Amendments to Annexes A, B and C of the Stockholm Convention on Persistent Organic Pollutants, adopted in Geneva on 8 of May 2009, so that through the deposit and in accordance with Article 22.4 the Convention, Spain becomes a party of such amendments, with the following statement:

In the case of the Convention on Persistent Organic Pollutants may in some aspect lead to actions relating to Gibraltar, Spain wishes to make the following statement:

1. Gibraltar is a dependent territory for whose external relations the United Kingdom is responsible and which is subject to a process of decolonization of Agreement with the decisions and resolutions of the General Assembly of the United Nations.

2. The authorities of Gibraltar have a local character and exercise exclusively internal competences which have their origin and foundation in the distribution and allocation of powers made by the United Kingdom, in accordance with the provisions of domestic law, as a sovereign State which depends on the territory is not autonomous.

3. Consequently, the possible participation of the Gibraltarian authorities in the implementation of this Convention shall be performed exclusively within the framework of the internal competences of Gibraltar and not be deemed to produce any change compared to the provisions of the preceding two paragraphs.

4. The procedure in the “Rules relating to Gibraltar authorities in the context of certain international treaties (2007) ‘agreed by Spain and the United Kingdom on 19 of December 2007, next to the Agreed Arrangements relating to Gibraltar authorities in the context Instruments of the EU and EC Treaties and related” 19 of April 2000, applies to this Stockholm Convention on Persistent Organic Pollutants, done on 22 of May 2001.

Done in Madrid on 11 of July 2011”.

– Amendments to Annexes II and III of the Convention for the Protection of the Marine Environment of the Northeast Atlantic, concerning the storage of carbon dioxide streams in geological structures (OSPAR) (published in *Boletín Oficial del Estado*, 24 June 1998), adopted in Ostend (Belgium) on 29 June 2007.

*Entry into force:* 23.07.11 (*BOE* 251, 18.10.11).

– Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, done at Aarhus (Denmark), on 24 June 1998.

*Instrument of ratification:* 20.07.11.

*Entry into force:* 24.12.03 (in general) and 20.12.11 (for Spain) (*BOE* 268, 7.11.11).

*Note:* With the following declaration of Spain:

“In the event that the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, should be applicable to Gibraltar, Spain wishes to make the following declaration:

1. Gibraltar is a Non-Self-Governing Territory for whose international relations the United Kingdom is responsible and which is subject to a process of decolonization in accordance with the relevant decisions and resolutions of the United Nations General Assembly.

2. The Gibraltar authorities are local in character and exercise an exclusively domestic jurisdiction that originates in and is based on the powers allocated to and conferred on them by the United Kingdom, in accordance with its domestic law and in its capacity as the sovereign State upon which depends the said Non-Self-Governing Territory.

3. Consequently, any involvement by the Gibraltar authorities in the implementation of this Convention shall be understood to take place exclusively within the framework of the domestic jurisdiction of Gibraltar and shall not be considered to affect in any way the content of the two preceding paragraphs.

4. The procedure envisaged in the “Agreed Arrangements relating to Gibraltar Authorities in the Context of the Mixed Agreements (2007)”, concluded by Spain and the United Kingdom on 19 December 2007, and communicated to the Secretary-General of the Council of the European Union, shall be applicable to the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, done in Aarhus on 24 June 1998”.

## **XI. LEGAL ASPECTS OF INTERNATIONAL COOPERATION**

### **1. General Treaties**

– Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence signed in Brussels on 17 March 1948 (the Brussels Treaty), as amended by the Protocol signed in Paris on 23 October 1954.

*Denouncement by Spain:* 18.10.11 (*BOE* 39, 15.02.11).

## 2. Military and Defence Cooperation

– Exchange of Notes dated 7 of December 2009 and 8 of September 2010, constituting the Amendment Agreement on security measures for the protection of classified information between the Kingdom of Spain and the Republic of Estonia, done in Madrid on 11 of November 2005.

*Entry into force:* 10.06.11 (for Spain) (BOE 40, 16.02.11).

– General Agreement between the Kingdom of Spain and United Kingdom of Great Britain and Northern Ireland concerning the protection of classified information mutual exchange, done in Madrid on 26 February 2009.

*Entry into force:* 01.03.11 (BOE 64, 16.03.11).

– Resolution on 1 March 2011, by the Spanish Technical Secretariat-General, publishing the operational procedure to develop article 25.8 of the Convention on Defence Cooperation between the Kingdom of Spain and the United States of America, 1 December 1988, as amended by Protocol done in Madrid on 10 April 2002.

*Entry into force:* 01.02.11 (BOE 74, 28.03.11).

– Agreement between the Kingdom of Spain and the Czech Republic concerning security measures for the reciprocal protection of classified information, done at Madrid on the 8 October 2009.

*Entry into force:* 01.07.11 (BOE 155, 30.06.11).

– Agreement between the Kingdom of Spain and Romania concerning security measures for the reciprocal protection of classified information, done at Madrid on the 14 May 2010.

*Entry into force:* 01.03.11 (BOE 156, 01.07.11).

– Security Agreement between the Kingdom of Spain and the Grand Duchy of Luxembourg concerning the exchange and mutual protection of classified information, done at Luxembourg on 12 November 2009.

*Entry into force:* 01.10.11 (BOE 220, 13.09.11).

– Agreement between the Kingdom of Spain and the Republic of Lithuania on the mutual protection of classified information, done at Madrid, on 7 May 2010.

*Entry into force:* 14.12.11 (BOE 312, 28.12.11).

– Exchange of Letters constituting an Agreement between the Kingdom of Spain and the Portuguese Republic to the creation of two police and customs cooperation centres, under Article 4.2 of the Agreement on border cooperation in police and customs matters between the two countries of 19 November 2005, done at Lisbon on 28 and 31 July 2009.

*Entry into force:* 06.09.09 (BOE 33, 8.02.12).

– Memorandum of Understanding among the Department of Defence of Australia and the Ministry of Defence of Finland, the Minister of Defence of the French Republic,

the Federal Ministry of Defence of the Federal Republic of Germany, the Ministry of Defence of the Italian Republic, the Ministry of Defence of the Kingdom of Spain, the Swedish Armed Forces, the Secretary of State for Defence of the United Kingdom of Great Britain and Northern Ireland and the Department of Defence of the United States of America concerning the Coalition Wideband Networking Waveform (COALWNW), done in Canberra (Australia) on 25 June 2009, in Helsinki (Finland) on 29 June 2009, in Bagueux (France) on 25 June 2009, in Koblenz (Germany) on 6 July 2009, in Rome (Italy) on 30 June 2009, in Madrid (Spain) on 9 April 2010, in Stockholm (Sweden) on 24 June 2009, in London (United Kingdom) on 30 June 2009 and in Washington DC (United States of America) on 26 June 2009.

*Entry into force:* 08.03.12 (BOE 101, 27.04.12).

– Agreement between the Government of the Kingdom of Spain and the Government of the Kingdom of Morocco on Cross Border Police Cooperation, done “ad referendum” in Madrid on 16 November 2010.

*Entry into force:* 20.05.12 (BOE 116, 15.05.12).

– Treaty between the Kingdom of Spain, the French Republic, the Italian Republic, the Kingdom of The Netherlands and the Portuguese Republic, establishing the European Gendarmerie Force (EUROGENDFOR), done in Velsen (The Netherlands) on 18 October 2007.

*Instrument of ratification:* 13.02.09

*Entry into force:* 01.06.12 (BOE 131, 01.06.12).

### 3. Cultural Cooperation

– Denounce by Spain of the European Convention for the Protection of Archaeological Heritage, done at London on 6 May 1969.

*Entry into force:* 1.10.11 (BOE 172, 19.07.11 and *corr. of errors* BOE 181, 29.07.11).

– European Convention for the Protection of Archaeological Heritage (Revised), done in La Valletta on 16 January 1992.

*Instrument of ratification:* 1.03.11

*Entry into force:* 25.05.95 (general) and 1.10.11 (for Spain) (BOE 173, 20.07.11).

– Convention between the Kingdom of Spain and the Republic of Costa Rica on cultural and educational cooperation, done in San Jose de Costa Rica on 20 November 2000.

*Entry into force:* 12.01.11 (BOE 194, 13.08.11).

– Agreement between the Government of the Kingdom of Spain and the Government of the Republic of Singapore on cultural, educational and scientific cooperation, made in Singapore on 13 April 2011.

*Entry into force:* 24.08.11 (BOE 258, 26.10.11 and *corr. of errors* BOE 279, 19.11.11).

– Agreement between the Kingdom of Spain and Romania on the performance of the centre of the Spanish Cervantes Institute in Bucharest and the Romanian Cultural Institute in Madrid, done in Madrid on 19 October 2010.

*Entry into force:* 19.01.12 (*BOE* 35, 10.02.12).

#### 4. Scientific and Technical Cooperation

– Framework Agreement between the Kingdom of Spain and the Hashemite Kingdom of Jordan for cooperation in the peaceful uses of nuclear energy, done in Amman on 20 January 2010.

*Entry into force:* 4.02.11 (*BOE* 30, 04.02.11).

– Agreement on Scientific and Technological Cooperation between the Government of Spain and the Government of Japan, done in Tokyo on 1 September 2010.

*Entry into force:* 24.01.11 (*BOE* 36, 11.02.11).

– Agreement between the Kingdom of Spain and the United States of America on scientific and technological cooperation in the field of national security, done in Madrid on 30 June 2011.

*Provisional application:* 30.06.11 (*BOE* 235, 29.09.11).

– Addendum to the Agreement on Scientific and Technical Cooperation between the Kingdom of Spain and the Caribbean Community (CARICOM) for establishing the Joint Fund, done at Port of Spain on November 28, 2011.

*Provisional application:* 28.11.11 (*BOE* 22, 26.01.12).

– Agreement on the promotion, provision and use of Galileo and GPS satellite navigation and related applications, done at Dromoland Castle, Co. Clare on 26 June 2004.

*Entry into force:* 12.12.11 (*BOE* 29, 3.02.12).

*Note:* It was provisionally applied between the United States of America and the European Union since 1.11.08.

– International Tropical Timber Agreement, 2006, done at Geneva on 27 January 2006.

*Instrument of ratification:* 24.06.09

*Entry into force:* 07.12.11 (*BOE* 51, 29.02.12).

#### 5. Financial and Tax Cooperation

– Convention and Protocol between the Kingdom of Spain and the Republic of Costa Rica for the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income and capital, and Protocol, done in Madrid on 4 March 2004.

*Entry into force:* 15.12.10 (*BOE* 1, 01.01.11).

– Convention between the Kingdom of Spain and the Republic of Albania for the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income, done in Tirana on 2 July 2010.

*Entry into force:* 04.05.11 (BOE 63, 15.03.11 and *corr. of errors* BOE 125, 26.05.11).

– Convention between the Kingdom of Spain and the Eastern Republic of Uruguay for the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income and Protocol, done in Madrid on 9 October 2009.

*Entry into force:* 24.04.11 (BOE 87, 12.04.11).

– Convention between the Kingdom of Spain and the Islamic Republic of Pakistan in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Madrid on the 2 of June 2010.

*Entry into force:* 18.05.11 (BOE 116, 16.05.11).

– Convention between the Kingdom of Spain and the Republic of Georgia in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Madrid on the 7 June 2010.

*Entry into force:* 01.07.11 (BOE 130, 1.06.11).

– Convention between the Government of the Kingdom of Spain and the Government of the Republic of Kazakhstan in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Astana on the 2 July 2009.

*Entry into force:* 18.08.11 (BOE 132, 3.06.11).

– Agreement concerning the Exchange of Information on Tax Matters between the Kingdom of Spain and the Republic of San Marino, done at Rome on the 6 September 2010.

*Entry into force:* 02.08.11 (BOE 134, 06.06.11).

– Convention between the Kingdom of Spain and the Republic of Panama in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Madrid on 7 October 2010.

*Entry into force:* 25.07.11 (BOE 158, 04.07.11).

– Agreement on exchange of information on tax matters between the Kingdom of Spain and the Commonwealth of the Bahamas and Memorandum of understanding between the competent authorities of the Kingdom of Spain and the Commonwealth of the Bahamas concerning the interpretation and implementing the Agreement between the Kingdom of Spain and the Commonwealth of the Bahamas on the exchange of information on tax matters and the recognition of other accepted commitments between the competent authorities, done at Nassau on 11 of March 2010.

*Entry into force:* 17.08.11 (BOE 169, 15.07.11 and *corr. of errors* BOE 194, 13.08.11).

– Agreement between the Kingdom of Spain and Barbados in order to avoid double taxation and prevent tax evasion on income taxes, signed at Bridgetown, 1 December 2010.  
*Entry into force:* 14.10.11 (BOE 221, 14.09.11).

– Agreement between the Kingdom of Spain and the Socialist Republic of Vietnam on the promotion and protection of investments, done at Hanoi, on 20 February 2006.  
*Entry into force:* 29.07.11 (BOE 303, 17.12.11).

– Agreement between the Kingdom of Spain and the Republic of Singapore for the avoidance of double taxation and preventing fiscal evasion with respect to taxes on income and its Protocol, signed in Singapore on April 13, 2011.  
*Entry into force:* 02.02.12 (BOE 9, 11.01.12).

– Convention among the Kingdom of Spain and the People's Republic of China Special Administrative Region of Hong Kong for the avoidance of double taxation with respect to taxes on income and on capital, and Protocol, done in Hong Kong on 1 April 2011.  
*Entry into force:* 13.04.12 (BOE 90, 14.04.12).

– Convention between the Kingdom of Spain and the Republic of Armenia for the avoidance of double taxation with respect to taxes on income and on capital, done in Madrid on 16 December 2010  
*Entry into force:* 21.03.12 (BOE 92, 17.04.12 and *corr. of errors* BOE 98, 24.04.12).

## 6. Road Traffic and Transport

– Agreement on the mutual recognition and exchange of national driving licenses between the Kingdom of Spain and the Republic of Turkey, done *ad referendum* in Istanbul on 5 April 2009.  
*Entry into force:* 25.04.11 (BOE 75, 29.03.11).

– Instrument of Accession of Spain to the Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), concerning the electronic transport document, done at Geneva on the 20 February 2008.  
*Instrument of accession:* 29.04.11  
*Entry into force:* 05.06.11 and for Spain 09.08.11 (BOE 141, 14.06.11).

– Agreement on the mutual recognition and exchange of national driving licenses between the Kingdom of Spain and the Republic of Tunisia, done at Madrid on 22 June 2010.  
*Entry into force:* 22.06.10 (BOE 159, 05.07.11).

– Declaration of acceptance by Spain concerning the accession of the Kingdom of Morocco to the Hague Convention on the Law Applicable to Traffic Accidents, done at The Hague on 4 May 1971  
*Entry into force:* 11.07.11 (BOE 164, 11.07.11).

*Note:* “According to Article 18, para. 4 of the Hague Convention on the Law Applicable to Traffic Accidents, done at The Hague on 4 May 1971, Spain declares to accept the accession of the Kingdom of Morocco to the aforementioned Convention”.

– Amendment proposed by Portugal to Annex A and B to the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) (published in the *Boletín Oficial del Estado* on the 9 to 17 July 1973, n. 163 to 170), done at Geneva on the 30 September 1957.

*Entry into force:* 01.01.11 (*BOE* 164, 11.07.11).

– Multilateral Agreement M-218, under Section 1.5.1 of Appendix A of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) (published in *Boletín Oficial del Estado* n. 182 of 29.07.2009), concerning the placarding of containers used exclusively in a road transport operation, done at Madrid, 19 October 2010 (*BOE* 179, 27.07.11).

– Exchange of Notes dated 22 and 29 of July 2011, establishing the Agreement on the Exchange of Letters amending the Agreement on mutual recognition and the exchange of driving licenses between the Kingdom of Spain and the Federative Republic of Brazil, 17 of September 2007.

*Entry into force:* 05.08.11 (*BOE* 220, 13.09.11).

– Agreement between the Government of Spain and the Macedonian Government on the reciprocal recognition and the exchange of driving licenses, done at Skopje, on 6 October 2011.

*Provisional application:* 05.11.11 (*BOE* 266, 4.11.11 and *corr. of errors BOE* 291, 3.12.11).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of de Nicaragua on the mutual recognition of driving licenses, done at Madrid, on 19 February 2010.

*Entry into force:* 2.01.12 (*BOE* 274, 14.11.11).

– Denouncement of the Agreement between Spain and Romania on the reciprocal recognition and the exchange of driving licenses for Spaniards and Romanians, done at Bucharest, on 1 September 2004.

*Note:* the Agreement is not in force since 12 February 2011, 30 days after the notification of the denouncement, as provided in article 10 (*BOE* 304, 19.12.11).

– Multilateral Agreement according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) (published in the *Boletín Oficial del Estado* n. 182, on 29 July 2009), on the carriage of chemicals under pressure, done at Madrid, on 21 July 2011 (*BOE* 308, 23.12.11).

*Note:* This agreement shall be valid until 31 December 2012 for the carriage on the territories of those ADR Contracting Parties signatory to this agreement. If it is revoked before then by one of the signatories, it shall remain valid until the above mentioned

date but only for the carriage on the territories of those ADR Contracting Parties signatories to this agreement which have not revoked it.

– Agreement between the Kingdom of Spain and the Principality of Andorra on waste transport, done at Madrid, on 29 November 2011.

*Provisional application:* 29.11.11 (*BOE* 311, 27.12.11).

– Multilateral Agreement M-236, in accordance with Section 1.5.1 of ADR, on Transport Document on Delivery Sales Operations, done in Madrid on 1 August 2011 (*BOE* 99, 25.04.12 and *corr. of errors* *BOE* 109, 07.05.12).

*Note:* Concerning M-218:

This agreement should be valid until 31 December 2012 inside the territory of signatories. Concerning M-236:

This agreement should be valid until 12 May 2016 between the signatories.

– Multilateral Agreement M-226 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) (published in the *Boletín Oficial del Estado* n. 164, of 11 July 2011), on Carriage of desulfurization agents containing UN 1402 calcium carbide of Class 4.3, packing group I, done in Madrid on 3 April 2012.

*Note:* Valid until 30.06.15 (*BOE* 148, 21.06.12).

– Multilateral Agreement M-245 according to Section 1.5.1 of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) (published in the *Boletín Oficial del Estado* n. 164, of 11 July 2011), on Environmentally hazardous substance requirements related to Class 7, done in Madrid on 3 April 2012 (*BOE* 151, 25.06.12).

## 7. Rail Traffic and Transport

– Multilateral Agreement RID 4/2009 under Section 1.5.1. of the Regulation concerning the International Transport of Dangerous Goods by Rail (RID), (published in the *Boletín Oficial del Estado* n. 59, 9 of March 2007) concerning the orange-coloured plates to affix to carrying wagons used for piggyback transport (ferroustage), done in Madrid on 14 June 2010 (*BOE* 82, 06.04.11).

– Amendments to the Ruling concerning the International Carriage of Dangerous Goods by Rail (published in the *Boletín Oficial del Estado* on 20 to 26 of August 1986), (RID 2011). Annex to the Convention concerning International Carriage by Rail (COTIF), done at Bern on 9 May 1980 (published in the *Boletín Oficial del Estado* on 18 of January 1986) adopted by the Commission of Experts on the RID in Bern on the 20 of May 2010.

*Entry into force:* 01.01.11 (*BOE* 162, 08.07.11).

– Multilateral Agreement RID-3/2011 under Section 1.5.1 of the Rules for International Carriage of Dangerous Goods by Rail (RID) (published in *Boletín Oficial del Estado*

n. 59 of March 9, 2007) on transport of chemicals under pressure, done at Madrid on August 31, 2011 (*BOE* 19, 23.01.12).

*Note:* (6) This agreement is valid until December 31, 2012 for transport in the territories of those States RID adhered to this agreement. If it is revoked earlier by one of the signatories, it will remain valid until the above date only for carriage on the territories of those States that have not RID revoked.

– Multilateral Agreement RID-9/2011 under Section 1.5.1. of the Regulation of the International Carriage of Dangerous Goods by Rail (RID), (published in the *Boletín Oficial del Estado* n. 162, 12 July 2011), on the transport of Carbide UN Number 1402 Class 4.3, Group packing I in tanks, done in Madrid on December 29, 2011.

*Entry into force:* Valid until December 31, 2012 for transportation in the territory of the Member States co-signatories of this agreement RID (Germany, Belgium, France, Spain and Luxembourg) (*BOE* 79, 02.04.12).

– Multilateral Agreement RID 5/2010 according to section 1.5.1 of RID concerning the carriage of UN 1057 Lighters and UN 1057 Lighters Refills, done in Madrid on 14 November 2011 (*BOE* 133, 04.06.12).

*Note:* This agreement will be applied until 30 June 2015 to the transport inside the territory of signatory States (Austria, Spain, France and Luxembourg).

## 8. Sea Traffic and Transport

– International Maritime Solid Bulk Cargoes Code (IMSBC Code) adopted on 4 December 2008 by means of Resolution MSC.268 (85).

*Entry into force:* 1.01.11 (*BOE* 98, 25.04.11 and *corr. of errors BOE* 268, 7.11.11).

– Instrument of Accession by Spain to the International Convention on Arrest of Ships, 1999, done at Geneva on the 12 March 1999.

*Instrument of accession:* 31.05.02

*Entry into force:* 14.09.11 (*BOE* 104, 02.05.11 and *corr. of errors BOE* 160, 06.07.11).

– Correction of errors of the Instrument of Ratification of the 2005 Protocol concerning the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation done at London on the 14 October 2005 (*BOE* 112, 11.05.11 and *BOE* 173, 20.07.11).

– Performance Standard for Protective Coatings for Cargo Oil Tankers, adopted on 14 May 2010 by Resolution MSC.288 (87).

*Entry into force:* 01.01.12 (*BOE* 308, 23.12.11 and *corr. of errors BOE* 115, 14.05.12).

– Adoption of the International Goal-Based Ship Construction Standards for Bulk Carriers and Oil Tankers, adopted on 20 May 2010 by Resolution MSC.287 (87).

*Entry into force:* 01.01.12 (*BOE* 308, 23.12.11).

– Amendments to the International Life-Saving Appliance (LSA) Code, published in the *Boletín Oficial del Estado* n. 275, on 17 November 1998, adopted on 21 May 2010 by Resolution MSC.293 (87).

*Entry into force:* 01.01.12 (*BOE* 308, 23.12.11).

– Amendments to the International Code for Fire Safety Systems (FSS Code), adopted on 21 May 2010 by Resolution MSC.292 (87).

*Entry into force:* 01.01.12 (*BOE* 308, 23.12.11).

– Performance Standard for Alternative Means of Corrosion Protection for Cargo Oil Tanks of Crude Oil Tankers, adopted on 10 May 2010 by Resolution MSC.289 (87).

*Entry into force:* 01.01.12 (*BOE* 309, 24.12.11 and *corr. of errors BOE* 51, 29.02.12).

– Amendments to the International Life-Saving Appliance (LSA) Code, published in the *Boletín Oficial del Estado* n. 275 of November 17, 1998, adopted on December 4, 2008 by Resolution MSC.272 (85) (*BOE* 9, 11.01.12).

*Entry into force:* 01.07.10 (*BOE* 12, 14.01.12).

– Amendments 2010 to the International Code for Fire Safety Systems, published in the *Boletín Oficial del Estado* n. 299 of 14 December 2002, adopted on 3 December, 2010 by Resolution MSC.311 (88).

*Entry into force:* 01.07.12 (*BOE* 76, 29.03.12).

– International Code for Application of Fire Test Procedures, 2010 (2010 FTP Code) adopted on 3 December 2010 by Resolution MSC.307 (88).

*Entry into force:* 01.07.12 (*BOE* 134, 05.06.12).

## 9. Air Traffic and Transport

– Agreement between the Kingdom of Spain and the Plurinational State of Bolivia on Air Transport, done in La Paz on 8 November 2010.

*Provisional application:* 8.11.10 (*BOE* 2, 03.01.11 and *corr. of errors BOE* 32, 07.02.11).

*Entry into force:* 25.02.12 (*BOE* 54, 03.03.12).

– Amendments 2008 to the International Code of Safety For High-Speed Craft, 2000 (2000 HSC Code) (published in the *Boletín Oficial del Estado* n. 301, of 17 December 2002), adopted on 4 December 2008 by Resolution MSC.271 (85).

*Entry into force:* 01.01.11 (*BOE* 45, 22.02.11 and *corr. of errors BOE* 39, 15.02.11. and 129, 31.05.11).

– Agreement on Aerial services between the Kingdom of Spain and Australia, done at Canberra on the 24 June 2009.

*Entry into force:* 5.04.11 (*BOE* 101, 29.04.11).

– Agreement between the Kingdom of Spain and the State of Qatar on Air Transport, done in Madrid the 26 April 2011.

*Entry into force:* 28.09.11 (*BOE* 244, 10.10.11).

– Accession instrument of Spain to the European Air Group between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic, done in London on 8 July 1998, and Amendment Protocol, done in London on 16 June 1999 (*corr. of errors BOE* 135, 06.06.12).

## 10. Labour, Social Security and Emigration

– Agreement on the Application of the Ibero-American Multilateral Social Security Convention, done in Lisbon on 11 September 2009.

*Provisional application:* 13.10.10 (*BOE* 7, 08.01.11).

– Convention on Social Security between the Kingdom of Spain and the Republic of Ecuador, done in Madrid on 4 December 2009.

*Entry into force:* 1.01.11 (*BOE* 32, 07.02.11).

– Latin American Multilateral Agreement on Social Security, done at Santiago de Chili on the 10 November 2007.

*Instrument of ratification:* 5.02.10

*Provisional application:* 13.10.10

*Entry into force:* 1.05.11 (*BOE* 103, 30.04.11).

– Resolution of April 2011, by the Technical Secretariat-General of the Ministry of Foreign Affairs and Cooperation, concerning the signature by the Plurinational State of Bolivia of the Latin American Multilateral Agreement on Social Security, done at Lisbon on the 11 September 2009 (*BOE* 103, 30.04.11).

– Agreement concerning the implementation of the Latin American Multilateral Convention on Social Security, done at Lisbon on 11 September 2009.

*Entry into force:* 19.05.11 (between Brazil, Bolivia and Spain) (*BOE* 163, 09.07.11).

*Entry into force:* 20.06.11 (between Brazil, Bolivia, Spain and Ecuador) (*BOE* 177, 25.07.11).

*Entry into force:* 26.07.11 (between Brazil, Bolivia, Spain, Ecuador and the Eastern Republic of Uruguay) (*BOE* 241, 06.10.11).

*Entry into force:* 01.09.11 (between Brazil, Bolivia, Spain, Ecuador, the Eastern Republic of Uruguay and Chile) (*BOE* 241, 06.10.11).

*Entry into force* (with Uruguay): 28.10.11 (*BOE* 304, 19.12.11 and *corr. of errors BOE* 312, 28.12.11).

*Provisional application:* 13.10.10

*Entry into force:* 27.12.11 (*BOE* 39, 15.02.12).

– Agreement between Spain and Ukraine concerning the regulation and management of mutual labor migration flows, signed in Madrid on 12 May 2009.

*Entry into force:* 28.07.11 (BOE 191, 10.08.11).

– Administrative Agreement for the implementation of the Social Security Convention between the Kingdom of Spain and the Republic of Ecuador, done in Madrid the 18 July 2011.

*Entry into force:* 01.01.11 (BOE 243, 08.10.11).

– International Labour Organization (ILO) Convention number 185 on Seafarers' Identity Documents (Revised), 2003.

*Instrument of ratification:* 03.05.11 (BOE 274, 14.11.11).

*Entry into force:* 9.02.05 (in general) and 26.11.11 for Spain.

– International Labour Organization Convention number 108 concerning Seafarers' National Identity Documents, done at Geneva, on 13 May 1958.

*Denouncement by Spain:* 26.11.11 (BOE 312, 28.12.11).

## 11. Civil and Criminal Cooperation

– Convention on the Recognition of the decisions for which there has been a sex change, done in Vienna on 12 September 2000.

*Instrument of ratification:* 16.07.10

*Entry into force:* 01.03.11 (BOE 36, 11.02.11).

*Note: With the following declaration of Spain:*

“If the Convention were to be applied to Gibraltar, Spain would like to make the following declaration:

1. Gibraltar is a non-autonomous territory whose international relations come under the responsibility of the United Kingdom and which is subject to a decolonisation process in accordance with the relevant decisions and resolutions of the General Assembly of the United Nations.

2. The authorities of Gibraltar have a local character and exercise exclusively internal competences which have their origin and their foundation in a distribution and attribution of competences performed by the United Kingdom in compliance with its internal legislation, in its capacity as sovereign State on which the mentioned non-autonomous territory depends.

3. As a result, the eventual participation of the Gibraltarian authorities in the application of this Convention will be understood as carried out exclusively as part of the internal competences of Gibraltar and cannot be considered to modify in any way what was established in the two previous paragraph.

4. The process provided for by the Arrangements relating to Gibraltar authorities in the context of certain international treaties (2007) which have been agreed by Spain and the United Kingdom on 19 December 2007 (jointly with the “Agreed Arrangements relating to Gibraltar authorities in the context of EU and EC instruments and related treaties”, dated 19 April 2000) apply to the n. 29 Convention of

the International Commission on Civil Status on the Recognition of the decisions for which there has been a sex change, done in Vienna on 12 September 2000”.

- Objection of Spain to the reservation made by Republic of Yemen to the International Convention for the Suppression of the Financing of Terrorism, done at New York on 9 December 1999 (*Boletín Oficial del Estado* n. 123 of 23 May 2002) (*BOE* 39, 15.02.11).

*Note:* The Spanish objection has the following content:

“The Government of the Kingdom of Spain has examined the reservation made by the Republic of Yemen to article 2, paragraph 1 (b), of the International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999) upon ratifying the Convention.

The Government of the Kingdom of Spain considers that the reservation is contrary to the object and purpose of the Convention and contravenes article 6 of the Convention, whereby States parties undertake to adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

The Government of the Kingdom of Spain recalls that, according to customary law enshrined in the 1969 Vienna Convention on the Law of Treaties (article 19 (c)), reservations that are contrary to the object and purpose of international treaties shall not be permitted.

The Government of the Kingdom of Spain therefore objects to the reservation made by the Republic of Yemen to article 2, paragraph 1 (b), of the Convention. This objection shall not preclude the entry into force of the Convention between the Government of the Kingdom of Spain and the Republic of Yemen”.

- Agreement between the Portuguese Republic and the Kingdom of Spain on the access to the information of Civil and Companies Registries, done “ad referendum” in Zamora on 22 January 2009.

*Entry into force:* 17.02.11 (*BOE* 48, 25.02.11).

- Declaration of acceptance by Spain of the accession of the Republic of Korea to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, (published in the *Boletín Oficial del Estado* n. 203, of 25 August 1987), done at The Hague on 18 March 1970.

*Entry into force:* 15.03.11 (*BOE* 57, 08.03.11).

- Declaration of acceptance by Spain of the accession by the Kingdom of Morocco to the Convention on civil aspects of international child abduction, done at The Hague on 25 October 1980.

*Entry into force:* 1.05.11 (*BOE* 76, 30.03.11).

*Note:* “In accordance with paragraph 4 of Article 38 of the Convention on civil aspects of international child abduction, done in The Hague on 25 October 1980, Spain declares the acceptance of accession by the Kingdom of Morocco to this Convention”.

- Instrument of Ratification of the Additional Protocol to the Criminal Law Convention on Corruption, done in Strasbourg on 15 May 2003.

*Instrument of ratification:* 16.12.10

*Entry into force:* 01.05.11 (for Spain) (*BOE* 56, 07.03.11 and *corr. of errors BOE* 84, 08.04.11).

*Note:* With the following declaration of Spain:

“If the Additional Protocol to the Criminal Law Convention on Corruption, dated 15 May 2003, were to be applied to Gibraltar, Spain would like to make the following declaration:

1. Gibraltar is a non-autonomous territory whose international relations come under the responsibility of the United Kingdom and which is subject to a decolonisation process in accordance with the relevant decisions and resolutions of the General Assembly of the United Nations.

2. The authorities of Gibraltar have a local character and exercise exclusively internal competences which have their origin and their foundation in a distribution and attribution of competences performed by the United Kingdom in compliance with its internal legislation, in its capacity as sovereign State on which the mentioned non-autonomous territory depends.

3. As a result, the eventual participation of the Gibraltarian authorities in the application of this Protocol will be understood as carried out exclusively as part of the internal competences of Gibraltar and cannot be considered to modify in any way what was established in the two previous paragraphs.

4. The process provided for by the Arrangements relating to Gibraltar authorities in the context of certain international treaties (2007) which have been agreed by Spain and the United Kingdom on 19 December 2007 (jointly with the ‘Agreed Arrangements relating to Gibraltar authorities in the context of EU and EC instruments and related treaties’, dated 19 April 2000) apply to this Additional Protocol to the Criminal Law Convention on Corruption”.

- Convention between the Kingdom of Spain and the Republic of Serbia on cooperation concerning the fight against crime, done at Madrid on the 31 January 2011.

*Provisional application:* 2.03.11 (*BOE* 88, 13.04.11).

*Entry into force:* 31.10.11 (*BOE* 39, 15.02.12).

- Convention between the Kingdom of Spain and the Republic of Cameroun concerning the fight against crime, done at Madrid on the 26 January 2011.

*Provisional application:* 18.03.11 (*BOE* 142, 15.06.11 and *corr. of errors BOE* 155, 30.06.11).

- Declaration of acceptance by Spain concerning the accession of the Republic of Albania to the Convention on the taking of evidence abroad in civil or commercial matters (published in *Boletín Oficial del Estado* n. 203, on 25 August 1987), done at The Hague on 18 March 1970.

*Entry into force:* 11.07.11 (*BOE* 161, 07.07.11 and *corr. of errors BOE* 168, 14.07.11).

*Note:* “According to Article 39, para. 4 of the Convention on the taking of evidence abroad in civil or commercial matters, done at The Hague on 18 March 1970, Spain declares to accept the accession of the Republic of Albania to the aforementioned Convention”.

– Declaration of acceptance by Spain concerning the accession of the Republic of Serbia to the Convention on the taking of evidence abroad in civil or commercial matters (published in *Boletín Oficial del Estado* n. 203, on 25 August 1987), done at The Hague on 18 March 1970.

*Entry into force:* 11.07.11 (*BOE* 162, 08.07.11 and *corr. of errors* *BOE* 169, 15.07.11).

*Note:* “According to Article 39, para. 4 of the Convention on the taking of evidence abroad in civil or commercial matters, done at The Hague on 18 March 1970, Spain declares to accept the accession of the Republic of Serbia to the aforementioned Convention”.

– European Convention on the Adoption of Children (revised), done at Strasbourg on the 27th November 2008.

*Instrument of ratification:* 16.07.10

*Entry into force:* 1.09.11 (*BOE* 167, 13.07.11).

*Note:* Spanish Declaration contained in the instrument of ratification deposited on 5 August 2010:

“If the European Convention on the Adoption of Children (Revised) were to be extended by the United Kingdom to Gibraltar, Spain would like to make the following declaration:

1. Gibraltar is a non-autonomous territory whose international relations come under the responsibility of the United Kingdom and which is subject to a decolonization process in accordance with the relevant decisions and resolutions of the General Assembly of the United Nations.

2. The authorities of Gibraltar have a local character and exercise exclusively internal competences which have their origin and their foundation in a distribution and attribution of competences performed by the United Kingdom in compliance with its internal legislation, in its capacity as sovereign State on which the mentioned non-autonomous territory depends.

3. As a result, the eventual participation of the Gibraltarian authorities in the application of this Convention will be understood as carried out exclusively as part of the internal competences of Gibraltar and cannot be considered to modify in any way what was established in the two previous paragraphs”.

– Exchange of Notes establishing the Amendment to the Extradition Treaty between the Kingdom of Spain and the Republic of Peru of 28 of June 1989, done in Madrid on 4 August 2008 and 9 March 2009.

*Entry into force:* 09.07.11 (*BOE* 193, 12.08.11).

– Convention between the Kingdom of Spain and the Federative Republic of Brazil on cooperation to fight against crime, done in Madrid on 25 June 2007.

*Entry into force:* 31.08.11 (*BOE* 222, 15.09.11).

– Resolution dated 19 September 2011, given by the Technical Secretariat-General of the Ministry of Foreign Affairs, publishing the Rules of Procedure and Evidence of the International Criminal Court (*BOE* 231, 26.09.11).

– International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, done at Brussels on 10 May 1952.

*Denounce by Spain*: effective from 28.03.12 (*BOE* 242, 07.10.11).

– Resolution dated 7 of October 2011, of the Technical Secretariat-General of the Ministry of Foreign Affairs, on Singapore's accession to the International Convention against the taking of hostages, done at New York on 17 December 1979 (published in *Boletín Oficial del Estado* of 7 July 1984) (*BOE* 250, 17.10.11).

– Convention between the Kingdom of Spain and the Hashemite Kingdom of Jordan on cooperation in the fight against crime, signed in Amman on 15 March 2011.

*Entry into force*: 27.10.11 (*BOE* 256, 24.10.11).

– Agreement between the Kingdom of Spain and the Republic of Albania on cooperation in the fight against crime, done at Tirana, on 20 May 2009.

*Entry into force*: 30.04.10 (*BOE* 258, 26.10.11).

– Convention between the Kingdom of Spain and the Republic of Croatia on the fight against delinquency and security matters, done at Madrid, on 24 October 2011.

*Provisional application*: 24.10.11 (*BOE* 270, 9.11.11).

– Declaration of acceptance by Spain of the accession of Singapore to the Convention on the Civil Aspects of International Child Abduction, done at The Hague, on 25 October 1980 (*BOE* 274, 14.11.11).

*Note*: "In accordance with the provisions of Article 38, paragraph 4th of the Convention on the Civil Aspects of International Child Abduction, done at The Hague, on 25 October, Spain declares that accepts the accession of the Republic of Singapore to the abovementioned Convention".

– Declaration made by Spain amending its declaration related to Article 24 of the Convention European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg, on 20 April 1959 (ETS n. 30).

*Entry into force*: 10.06.11 (*BOE* 298, 12.12.11 and *corr. of errors BOE* 303, 17.12.11).

*Note*: This modification applies also to the Additional Protocol to the Convention, and reads as follows:

"In accordance with Article 24 of the Convention, Spain declares that for the purposes of the Convention, the following shall be deemed judicial authorities:

- a) ordinary judges and courts;
- b) registrars;
- c) public prosecutors;
- d) military judges and courts;
- e) reporting registrars of the military courts.

This declaration applies also to the Additional Protocol to the Convention, done in Strasbourg on 17 March 1978.”

- Corrigendum to the provisional application of the Convention between the Kingdom of Spain and the Kingdom of Morocco on Mutual Assistance in Criminal Matters, done at Rabat on 24 June 2009 (*BOE* 51, 29.02.12).
- Corrigendum to the provisional application of the Extradition Convention between the Kingdom of Spain and the Kingdom of Morocco, done at Rabat on 24 June 2009 (*BOE* 53, 03.02.12).
- Declaration of acceptance by Spain of the accession of the Gabonese Republic to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 (*BOE* 56, 06.03.12).
- Resolution dated 12 March 2012, of the Technical Secretariat-General on Spain’s objection to the statement made by Singapore upon accession to the International Convention against the Taking of Hostages (published in *BOE* n. 162 of 7 July 1984), done at New York on 17 December 1979) (*BOE* 69, 21.03.12).

*Note* (with the following objection by Spain, deposited with the Secretary General of the United Nations on 21 October, 2011):

“The Government of the Kingdom of Spain has examined the unilateral declaration with respect to article 8, paragraph 1, made by Singapore upon acceding to the International Convention against the Taking of Hostages of 17 December 1979. The Government of the Kingdom of Spain considers that the said declaration constitutes a reservation incompatible with the object and purpose of the 1979 Convention, insofar as it is difficult to determine precisely the extent to which Singapore accepts the obligations set out in article 8, paragraph 1. The said reservation affects fundamental obligations resulting from the Convention, the performance of which is necessary for the realization of the object of the Convention.

The Government of the Kingdom of Spain therefore objects to the reservation formulated by Singapore to article 8, paragraph 1, of the 1979 Convention. This objection shall not prevent the entry into force of the Convention between the Kingdom of Spain and Singapore”.

- Amendments to the Statute of the Hague Conference on Private International Law, concluded at The Hague on October 31, 1951, done at the Hague Conference on Private International Law at its twentieth meeting in The Hague on 30 June 2005 and consolidated text of the Statute.

*Entry into force:* 01.01.07 (*BOE* 77, 30.03.12).

- Resolution of 27 March, 2012, of the Technical Secretariat-General, on the ratification of Vietnam to the Convention on the Protection of Children and Cooperation in Respect of International Adoption, done at The Hague on 29 May 1993.
- Entry into force:* 01.02.12 (*BOE* 80, 03.04.12).

**12. Health and Relief Cooperation****13. Industrial and Intellectual Property**

– Modifications to the Regulations of the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado* of 7 November 1989) adopted in the 34 Meeting of the Assembly of the International Patent Cooperation Union, Geneva, 5 October 2005. (*Corr. of errors*: BOE 81, 05.04.11).

– Modifications to the Regulations of the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado* of 7 November 1989) adopted in the 40 Meeting of the Assembly of the International Patent Cooperation Union, 1 October 2009 (BOE 81, 05.04.11).

– Declaration of withdrawal of incompatibility of national legislation and rule 20.3 ii) and b)ii, 20.5 a)ii and d) and 20.6 of the Ruling of the Patent Cooperation Treaty (PCT), adopted in the 34 session of the Assembly of the International Patent Cooperation Union, in Geneva on the 5 October 2005 (published in the “*Boletín Oficial del Estado*” n. 175, of 21 July 2009 and n. 57, of 8 March 2011).  
*With effects since* 1.10.10 (BOE 143, 16.06.11).

– Common Regulations under the Madrid Agreement concerning the International Registration of Marks and the Protocol relating to this Agreement, done at Geneva, 1 September 2009.  
*Entry into force*: 1.09.09 (BOE 175, 22.07.11).

– Modifications to the Regulations of the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado* of 7 November 1989) adopted in the 41st Meeting (24 Extraordinary) of the Assembly of the International Patent Cooperation Union, 29 September 2010.  
*Entry into force*: 1.07.11 (BOE 181, 29.07.11).

– Common Regulations under the 1999 and 1960 Acts of The Hague Agreement concerning the International Registration of Industrial Designs, signed at Geneva on 2 of July 1999 and at The Hague on 28 of November 1960, respectively.  
*Entry into force*: 01.04.10 (BOE 243, 08.10.11).

**XII. INTERNATIONAL ORGANIZATIONS**

– Statute of the International Renewable Energy Agency (IRENA), done in Bonn on 26 January 2009.

*Instrument of ratification*: 28.03.11

*Entry into force*: 08.07.10 (in general) and 01.04.11 (for Spain) (BOE 75, 29.03.11).

– Framework Cooperation Agreement between the Kingdom of Spain and the United Nations Conference on Trade and Development (UNCTAD), done at Geneva on the 28 September 2006.

*Entry into force:* 02.05.07 (BOE 113, 12.05.11).

– Acts, Resolutions and Recommendations of the Postal Union of the Americas, Spain and Portugal (UPAEP) adopted at the XXI Congress of the Postal Union of the Americas, Spain and Portugal, held in Santiago de Chile on 21 August 2009.

*Instrument of ratification:* 7.06.11.

*Entry into force:* 1.01.10 (BOE 174, 21.07.11).

– Headquarters Agreement between the Kingdom of Spain and the European Forest Institute, setting up an office of the Institute in Spain, done in Madrid on 28 July 2011.

*Provisional application:* 28.07.11 (BOE 240, 05.10.11).

– Agreement for the Establishment of the International Anti-Corruption Academy as an International Organization, done at Vienna, on 2 September 2010.

*Instrument of accession by Spain:* 06.10.11

*Entry into force:* 12.12.11 (for Spain) (BOE 266, 4.11.11).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the United Nations regarding the hosting of a workshop on peacekeeping operations chief personnel, to be held at Madrid, 31 October–11 November 2011, done at New York, on 17 and 18 October 2011

*Provisional application:* 28.10.11 (BOE 291, 3.12.11).

– Headquarters Agreement between the Kingdom of Spain and the International Organization of Securities Commissions (OICV/IOSCO), done at Madrid, on 23 November 2011.

*Provisional application:* 23.11.11 (BOE 303, 17.12.11).

– Establishment Agreement between the Kingdom of Spain and the United Nations Human Settlements Programme, done at Madrid, on 30 November 2011.

*Provisional application:* 30.11.11 (BOE 310, 26.12.11).

– Agreement on the participation of the Republic of Bulgaria and Romania in the European Economic Area, done at Brussels on 25 July 2007.

*Entry into force:* 11.09.11 (BOE 53, 02.03.12).

– Headquarters Agreement between the Kingdom of Spain and the Secretariat of the Union for the Mediterranean, signed in Madrid on 4 May, 2010.

*Entry into force:* 23.03.12 (BOE 83, 06.04.12).

– Headquarters Agreement between Spain and the International Organization for Migration (IOM) establishing a representation office of the OIM in Spain, done in Madrid on 14 July 2008.

*Entry into force:* 23.03.12 (*BOE* 91, 16.04.12 and 244, 09.10.08).

– Framework Agreement between the Kingdom of Spain and the International Organization for Migration, done in Madrid on 17 December 2009.

*Entry into force:* 23.03.12 (*BOE* 93, 18.04.12).

– Headquarters Agreement between the World Tourism Organization and the Kingdom of Spain, regarding the hosting of the 93rd meeting of the Executive Council, done in Madrid on 4 June 2012.

*Provisional application:* 04.06.12 (*BOE* 149, 22.06.12).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the World Tourism Organization concerning the free exercise of remunerated activities by dependent relatives of the civil servants of this international organization.

*Provisional application:* 11.06.11 (*BOE* 152, 26.06.12).

### **XIII. EUROPEAN UNION**

– Agreement between the Minister of Defense of the French Republic, the Minister of Defense of the Italian Republic, the Minister of Defense of the Kingdom of Spain and the High Representative for the Common Foreign and Security Policy (CFSP) for the European Union, regarding the Helios I images being made available to European Union.

*Provisional application:* 10.12.07 (*BOE* 69, 20.03.10).

*Entry into force:* 03.12.10 (*BOE* 36, 11.02.11).

– Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, done in Luxembourg on 25 June 2005.

*Instrument of ratification:* 19.07.07

*Entry into force:* 01.07.08 (*BOE* 39, 15.02.11).

– Convention on centralised customs clearance concerning the allocation of national collection costs retained when traditional own resources are made available to the EU Budget, done in Brussels on 10 March 2009.

*Instrument of ratification:* 19.10.10

*Provisional application:* 10.11.10 (*BOE* 42, 18.02.11)

*Note:* Following art. 7.3, Spain will provisionally apply this Convention in the mutual relations with the member States that have declared to do so, until the entry into force of it.

– Protocol to amend the Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part, signed on the 25 and 30 April 2007, done at Luxembourg on the 24 June 2010.

*Provisional application:* 24.06.10 (BOE 100, 27.04.11).

*Note:* The present Protocol to amend the Air Transport Agreement between the European Community and its Member States, of the one part, and the United States of America, of the other part, signed on the 25 and 30 April 2007, will be provisionally applied from 24 June 2010, the date of its signing, according to Article 9.1.

– Agreement on Free Trade between the European Union and its Member States, on one side, and the Republic of Korea on the other side, done at Brussels on 6 October 2010.

*Provisional application:* 01.07.11 (BOE 163, 09.07.11).

– Framework Agreement on the European Financial Stability Facility between the Kingdom of Belgium, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Republic of Slovakia, the Republic of Finland, the Greek Republic, and the European Facility for Financial Stability, done at Brussels on 05-07-2010, at Berlin on 16-06-2010, at Dublin on 10-06-2010, at Madrid on 10-06-2010, at Paris on 25-06-2010, at Rome on 16-06-2010, at Nicosia on 16-06-2010, at Luxembourg on 11-06-2010, at La Valetta on 05-07-2010, at The Hague on 10-06-2010, at Wien on 09-06-2010, at Lisbon on 15-06-2010, at Ljubiana on 11-06-2010, at Bratislava on 15-07-2010, at Helsinki on 10-06-2010, at Athens on 16-06-2010 and at Luxembourg on 11-06-2010.

*Entry into force:* 04.08.10 (BOE 164, 11.07.11).

– Amendment to the Framework Agreement on the European Financial Stability Facility between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Italy, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the European Facility for Financial Stability, signed in Madrid on 5 September 2011.

*Provisional application:* 08.09.11 (BOE 216, 08.09.11).

*Entry into force:* 18.10.11 (BOE 258, 26.10.11).

– Headquarters Agreement between the Kingdom of Spain and the European Union (Office for Harmonization in the Internal Market, Trade Marks and Designs, OHIM), done in Madrid on 20 September 2011.

*Provisional application:* 20.09.11 (BOE 254, 21.10.11 and *corr. of errors* BOE 274, 14.11.11).

– Protocol amending the Protocol on Transitional Provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to

the Treaty establishing the European Atomic Energy Community, done at Brussels, on 23 June 2010.

*Entry into force:* 01.12.11 (BOE 312, 28.12.11).

*Note:* Dealing with the number of seats per Member State at the European Parliament, in accordance with the provisions of the Lisbon Treaty.

– Loan Facility Agreement between the following Member States whose currency is the euro: the Kingdom of Belgium, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland and KfW acting in the public interest, subject to the instructions of and with the benefit of the guarantee of the Federal Republic of Germany as the Lenders, and the Hellenic Republic as the Borrower and the Bank of Greece acting as agent on behalf of the Borrower, done at Brussels and Athens on 8 May 2010.

*Entry into force:* 22.12.10 (BOE 3, 4.01.12 and *corr. of errors* BOE 313, 29.12.11).

– Inter-creditor Agreement between the Kingdom of Belgium, the Federal Republic of Germany, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, done at Brussels on 8 May 2010.

*Entry into force:* 22.12.10 (BOE 4, 05.01.12 and *corr. of errors* BOE 313, 29.12.11).

– Corrigendum of the Instrument of Ratification of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic on the Accession of those States to the European Union, done at Athens on April 16, 2003 (BOE 30, 4.02.12).

– Economic Partnership Agreement between the CARIFORUM States on the one hand, and the European Community and its Member States, on the other, done at Bridgetown on 15 October 2008.

*Provisional application:* 29.12.08 (BOE 58, 08.03.12).

– Amendment to the Loan Service 80,000,000,000 euros from the following Member States whose currency is the euro: the Kingdom of Belgium, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, Grand Duchy

of Luxembourg, the Republic of Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia and the Republic of Finland and KfW, acting in the public interest, subject to instructions and invoking the guarantee of the Federal Republic of Germany, as Lenders and the Hellenic Republic as Borrower, the Bank of Greece as an agent of the Borrower, done at Brussels on 14 June 2011 and in Athens on 10 June 2011.

*Entry into force:* 30.03.12 (BOE 89, 13.04.12).

– Amendment to the Loan Facility Agreement of 80,000,000,000 euros from the following Member States whose currency is the euro: the Kingdom of Belgium, Ireland, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of The Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia and the Republic of Finland and KfW, acting in the public interest, subject to instructions and benefit of the guarantee of the Federal Republic of Germany, as Lenders and the Hellenic Republic as Borrower, the Bank of Greece as an agent of the Borrower, done at Brussels on 27 February 2012 and in Athens on February 24, 2012.

*Provisional application:* 30.03.12 (BOE 89, 13.04.12).

#### XIV. INTERNATIONAL RESPONSIBILITY

#### XV. PEACEFUL SETTLEMENT OF DISPUTES

#### XVI. COERCION AND USE OF FORCE SHORT OF WAR

– Convention for the Mutual Recognition of Proof Marks and Portable Firearms and Regulations with Annexes I and II adopted in Brussels on 1 July 1969 (published in BOE n. 228 of 22 September 1973). Decisions adopted by the Permanent International Commission for Portable Firearms Testing on its Plenary Session of 20 September 2006 (Decisions XXVIII-34 to XXVIII-66).

*Entry into force:* 22.09.07 (BOE 82, 05.04.12).

– Convention for the Mutual Recognition and Proof Marks on Portable Firearms with Regulations and Annexes I and II adopted in Brussels on 1 July 1969 (published in BOE n. 228 of 22 September 1973). Decisions adopted by the Permanent International Commission for Portable Firearms Testing on its XXIX Plenary Session of 11 July 2007 (Decisions XXIX-1 to XXIX-25).

*Entry into force:* 15.04.08 (BOE 100, 26.04.12).

– Convention for the Mutual Recognition and Proof Marks on Portable Firearms with Regulations and Annexes I and II adopted in Brussels on 1 July 1969. Decisions adopted by the Permanent International Commission for Portable Firearms Testing on its XXIX Plenary Session of 16 April 2008 (Decisions XXIX-26 to XXIX-39).

*Entry into force:* 15.04.09 (BOE 127, 28.05.12 and *corr. of errors* BOE 149, 22.06.12).

- Convention for the Mutual Recognition and Proof Marks on Portable Firearms with Regulations and Annexes I and II adopted in Brussels on 1 July 1969. Decisions adopted by the Permanent International Commission for Portable Firearms Testing on its XXIX Plenary Session of 24 September 2008 (Decisions XXIX-40 to XXIX-59).  
*Entry into force:* 09.08.09 (*BOE* 127, 28.05.12).

## **XVII. WAR AND NEUTRALITY**

- Third Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Adoption of an Additional Distinctive Emblem (Protocol III), done in Geneva on 8 December 2005.

*Instrument of ratification:* 23.11.10

*Entry into force:* 10.06.11 (for Spain) (*BOE* 42, 18.02.11).

- Agreement between the Government of the Kingdom of Spain and the Government of the Republic of Kazakhstan concerning the transit of military equipments and personnel through the territory of the Republic of Kazakhstan due the participation of the Kingdom of Spain in the international efforts for the stabilization and rebuilding of the Islamic Republic of Afghanistan, done in Astana on 2 July 2009.

*Entry into force:* 31.05.12 (*BOE* 150, 23.06.12).

## *Treaties to which Spain is a Party Concerning Matters of Private International Law, 2011–June 2012*

This survey, prepared and compiled by Dr. Pilar Jiménez Blanco (Tenured Associate Professor of Private International Law, University of Oviedo), covers the treaties and other international agreements published in the *Boletín Oficial del Estado* (Official Journal of the State) from January 2011 to June 2012.

### I. SOURCES OF PRIVATE INTERNATIONAL LAW

– Amendments to the Statute of the Hague Conference on Private International Law, concluded at The Hague on October 31, 1951, done at the Hague Conference on Private International Law at its twentieth meeting in The Hague on 30 June 2005 and the consolidated text of the Statute.

*Entry into force:* 01.01.07 (BOE 77, 30.03.12).

### II. INTERNATIONAL JURISDICTION

### III. CIVIL INTERNATIONAL COOPERATION

– Agreement between the Portuguese Republic and the Kingdom of Spain on the access to the information of Civil and Companies Registries, done “ad referendum” in Zamora on 22 January 2009.

*Entry into force:* 17.02.11 (BOE 48, 25.02.11).

– Declaration of acceptance by Spain of the accession of the Republic of Korea to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, (published in the *Boletín Oficial del Estado* n. 203, of 25 August 1987), done at The Hague on 18 March 1970.

*Entry into force:* 15.03.11 (BOE 57, 08.03.11).

– European Convention on Consular Functions, done in Paris on 1 December 1967.

*Instrument of ratification:* 4.05.87

*Entry into force:* 9.06.11 (BOE 84, 08.04.11 and *corr. of errors* BOE 133, 04.06.11).

*Note:* With the following reservations by Spain:

“Spain reserves the right not to recognize the obligation, laid down in paragraph 1 of Article 6, of informing the consular officers if the person concerned, after having been informed without delay of his or her rights, does not request it; Spain also

reserves the right not to allow the visiting rights provided for in paragraphs 2 and 3 of Article 6, if the person concerned is opposed to them.

Spain reserves the right not to give effect, on its territory, to draw up documents of civil status by consular officers, in accordance with paragraph 1 of Article 13.”

– Declaration of acceptance by Spain concerning the accession of the Republic of Albania to the Convention on the taking of evidence abroad in civil or commercial matters (published in *Boletín Oficial del Estado* n. 203, on 25 August 1987), done at The Hague on 18 March 1970.

*Entry into force:* 11.07.11 (*BOE* 161, 07.07.11 and *corr. of errors* *BOE* 168, 14.07.11).

*Note:* “According to Article 39, para. 4 of the Convention on the taking of evidence abroad in civil or commercial matters, done at The Hague on 18 March 1970, Spain declares to accept the accession of the Republic of Albania to the aforementioned Convention”.

– Declaration of acceptance by Spain concerning the accession of the Republic of Serbia to the Convention on the taking of evidence abroad in civil or commercial matters (published in *Boletín Oficial del Estado* n. 203, on 25 August 1987), done at The Hague on 18 March 1970.

*Entry into force:* 11.07.11 (*BOE* 162, 08.07.11 and *corr. of errors* *BOE* 169, 15.07.11).

*Note:* “According to Article 39, para. 4 of the Convention on the taking of evidence abroad in civil or commercial matters, done at The Hague on 18 March 1970, Spain declares to accept the accession of the Republic of Serbia to the aforementioned Convention”.

#### IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND DECISIONS

– Convention on the Recognition of the decisions for which there has been a sex change, done in Vienna on 12 September 2000.

*Instrument of ratification:* 16.07.10

*Entry into force:* 01.03.11 (*BOE* 36, 11.02.11).

#### V. INTERNATIONAL COMMERCIAL ARBITRATION

#### VI. CHOICE OF LAW: SOME GENERAL PROBLEMS

#### VII. ALIENS, REFUGEES AND CITIZENS OF THE EUROPEAN UNION

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Cape Verde concerning the participation in municipal elections of nationals of each country residing on the territory of the other country, done in Praia on 8 April 2009.

*Entry into force:* 1.01.11 (*BOE* 11, 13.01.11).

- Agreement between the Kingdom of Spain and the Plurinational State of Bolivia on Mutual Suppression of visa requirement for holders of diplomatic and official or service passports, done in Madrid on 15 September 2009.  
*Entry into force:* 31.12.10 (*BOE* 17, 20.01.11).
- Agreement between the Kingdom of Spain and the Kingdom of Thailand on reciprocal suppression of diplomatic passport visa, done at Madrid on the 7 October 2010.  
*Entry into force:* 31.05.11 (*BOE* 131, 2.06.11 and *corr. of errors BOE* 142, 15.06.11).
- Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Korea concerning the participation in municipal elections of nationals of each country residing on the territory of the other country, done at Madrid and Seoul on 16 November 2010 and 26 January 2011.  
*Entry into force:* 01.07.11 (*BOE* 160, 06.07.11).
- Agreement between Spain and Ukraine concerning the regulation and management of mutual labor migration flows, signed in Madrid on 12 May 2009.  
*Entry into force:* 28.07.11 (*BOE* 191, 10.08.11).
- Agreement between the Kingdom of Spain and the State of Kuwait on the waiver of visa requirements for holders of diplomatic passports, done at Seville on 3 October 2011.  
*Provisional application:* 03.10.11 (*BOE* 266, 4.11.11 and *corr. of errors BOE* 279, 19.11.11).
- Agreement between the Kingdom of Spain and the Islamic Republic of Mauritania on the abolition of visa requirements for the holders of diplomatic passports, done at Nouakchott, on 6 October 2011.  
*Provisional application:* 6.10.11 (*BOE* 270, 9.11.11 and *corr. of errors BOE* 291, 3.12.11).
- Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of Trinidad and Tobago on participation in municipal elections by nationals of one country resident in the territory of the other, done at Port of Spain, on 17 February 2009.  
*Entry into force:* 1.11.11 (*BOE* 290, 2.12.11).
- Exchange of Notes, constitutive of an Agreement between the Kingdom of Spain and the United States of Mexico, modifying the Exchange of Notes on mutual abolition of visas on diplomatic passports, of 17 April 1989, done in Madrid on 7 and 14 December 2011.  
*Provisional application:* 14.12.11 (*BOE* 313, 29.12.11 and *corr. of errors BOE* 9, 11.01.12).  
*Entry into force:* 27.03.12 (*BOE* 90, 14.04.12 and 313, 29.12.11).
- Headquarters Agreement between Spain and the International Organization for Migration (IOM) establishing a representation office of the OIM in Spain, done in Madrid on 14 July 2008.  
*Entry into force:* 23.03.12 (*BOE* 91, 16.04.12 and 244, 09.10.08).

- Framework Agreement between the Kingdom of Spain and the International Organization for Migration, done in Madrid on 17 December 2009.

*Entry into force:* 23.03.12 (*BOE* 93, 18.04.12).

## VIII. NATURAL PERSONS: LEGAL INDIVIDUALITY, CAPACITY AND NAME

### IX. FAMILY LAW

- European Convention on the Adoption of Children (revised), done at Strasbourg on the 27th November 2008.

*Instrument of ratification:* 16.07.10

*Entry into force:* 1.09.11 (*BOE* 167, 13.07.11).

- Declaration of acceptance by Spain of the accession of Singapore to the Convention on the Civil Aspects of International Child Abduction, done at The Hague, on 25 October 1980 (*BOE* 274, 14.11.11).

*Note:* “In accordance with the provisions of Article 38, paragraph 4th of the Convention on the Civil Aspects of International Child Abduction, done at The Hague, on 25 October, Spain declares that accepts the accession of the Republic of Singapore to the above mentioned Convention”.

- Declaration of acceptance by Spain of the accession of the Gabonese Republic to the Convention on the Civil Aspects of International Child Abduction, done at The Hague on 25 October 1980 (*BOE* 56, 06.03.12).

- Resolution of 27 March, 2012, of the Technical Secretariat-General, on the ratification of Viet-Nam to the Convention on the Protection of Children and Cooperation in Respect of International Adoption done at The Hague on 29 May 1993.

*Entry into force:* 01.02.12 (*BOE* 80, 03.04.12).

### X. SUCCESSION

### XI. CONTRACTS

### XII. TORTS

- Declaration of acceptance by Spain concerning the accession of the Kingdom of Morocco to the Hague Convention on the Law Applicable to Traffic Accidents, done at The Hague on 4 May 1971.

*Entry into force:* 11.07.11 (*BOE* 164, 11.07.11).

*Note:* “According to Article 18, para. 4 of the Hague Convention on the Law Applicable to Traffic Accidents, done at The Hague on 4 May 1971, Spain declares to accept the accession of the Kingdom of Morocco to the aforementioned Convention”.

### **XIII. PROPERTY**

– Modifications to the Regulations of the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado* of 7 November 1989) adopted in the 34 Meeting of the Assembly of the International Patent Cooperation Union, Geneva, 5 October 2005. *Corr. of errors:* BOE 81, 05.04.11.

– Modifications to the Regulations of the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado* of 7 November 1989) adopted in the 40 Meeting of the Assembly of the International Patent Cooperation Union, 1 October 2009 (BOE 81, 05.04.11).

– Declaration of the withdrawal of incompatibility of national legislation and rule 20.3<sup>a</sup> ii), b)ii, 20.5 a)ii and d) and 20.6 of the Ruling of the Patent Cooperation Treaty (PCT), adopted in the 34<sup>a</sup> session of the Assembly of the International Patent Cooperation Union, in Geneva on the 5 October 2005 (published in the “Boletín Oficial del Estado” n. 175, of 21 July 2009 and n. 57, of 8 March 2011).

*With effects since:* 1.10.10 (BOE 143, 16.06.11).

– Common Regulations under the Madrid Agreement concerning the International Registration of Marks and the Protocol relating to this Agreement, done at Geneva, 1 September 2009.

*Entry into force:* 1.09.09 (BOE 175, 22.07.11).

– Modifications to the Regulations of the Patent Cooperation Treaty (PCT) (published in the *Boletín Oficial del Estado* of 7 November 1989) adopted in the 41st Meeting (24 Extraordinary) of the Assembly of the International Patent Cooperation Union, 29 September 2010.

*Entry into force:* 1.07.11 (BOE 181, 29.07.11).

– Common Regulations under the 1999 and 1960 Acts of The Hague Agreement concerning the International Registration of Industrial Designs, signed at Geneva on 2 of July 1999 and at The Hague on 28 of November 1960, respectively.

*Entry into force:* 01.04.10 (BOE 243, 08.10.11).

– Headquarters Agreement between the Kingdom of Spain and the European Union (Office for Harmonization in the Internal Market, Trade Marks and Designs, OHIM), done in Madrid on 20 September 2011.

*Provisional application:* 20.09.11 (BOE 254, 21.10.11 and *corr. of errors* BOE 274, 14.11.11).

#### XIV. COMPETITION LAW

#### XV. INVESTMENTS AND FOREIGN EXCHANGE

– Agreement on the mutual promotion and protection of investment between the Kingdom of Spain and the Socialist Republic of Vietnam, done in Hanoi on 20 February 2006 (*BOE* 303, 17.12.11).

#### XVI. FOREIGN TRADE LAW

#### XVII. BUSINESS ASSOCIATION/CORPORATION

#### XVIII. BANKRUPTCY

#### XIX. TRANSPORT LAW

– Agreement on the mutual recognition and exchange of national driving licenses between the Kingdom of Spain and Republic of Turkey, done *ad referendum* in Istanbul on 5 April 2009.

*Entry into force:* 25.04.11 (*BOE* 75, 29.03.11).

– Agreement on Aerial services between the Kingdom of Spain and Australia, done at Canberra on the 24 June 2009.

*Entry into force:* 5.04.11 (*BOE* 101, 29.04.11).

– Instrument of Accession by Spain to the International Convention on Arrest of Ships, 1999, done at Geneva on the 12 March 1999.

*Instrument of accession:* 31.05.02

*Entry into force:* 14.09.11 (*BOE* 104, 02.05.11 and *corr. of errors BOE* 160, 06.07.11).

– Instrument of Accession of Spain to the Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR), concerning the electronic transport document, done at Geneva on the 20 February 2008.

*Instrument of accession:* 29.04.11

*Entry into force:* 05.06.11 and for Spain 09.08.11 (*BOE* 141, 14.06.11).

– Agreement on the mutual recognition and exchange of national driving licenses between the Kingdom of Spain and the Republic of Tunisia, done at Madrid on 22 June 2010.

*Entry into force:* 22.06.10 (*BOE* 159, 05.07.11).

– Amendments of the Ruling concerning the International Carriage of Dangerous Goods by Rail (published in the *Boletín Oficial del Estado* on 20 to 26 of August 1986), (RID

2011). Annex to the Convention concerning International Carriage by Rail (COTIF), done at Bern on 9 May 1980 (published in the *Boletín Oficial del Estado* on 18 of January 1986) adopted by the Commission of Experts on the RID in Bern on the 20 of May 2010.

*Entry into force:* 01.01.11 (*BOE* 162, 08.07.11).

– Amendment proposed by Portugal to Annex A and B to the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) (published in the *Boletín Oficial del Estado* on the 9 to 17 July 1973, n. 163 to 170), done at Geneva on the 30 September 1957.

*Entry into force:* 01.01.11 (*BOE* 164, 11.07.11).

– Multilateral Agreement M-218, under Section 1.5.1 of Appendix A of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) (published in *Boletín Oficial del Estado* n. 182 of 29.07.2009), concerning the placarding of containers used exclusively in a road transport operation, done at Madrid, 19 October 2010 (*BOE* 179, 27.07.11).

– Exchange of Notes dated 22 and 29 of July 2011, establishing the Agreement on the Exchange of Letters amending the Agreement on mutual recognition and exchange of driving licenses between the Kingdom of Spain and the Federative Republic of Brazil, 17 of September 2007.

*Entry into force:* 05.08.11 (*BOE* 220, 13.09.11).

– Agreement between the Kingdom of Spain and the State of Qatar on Air Transport, done in Madrid the 26 April 2011.

*Entry into force:* 28.09.11 (*BOE* 244, 10.10.11).

– Agreement between the Government of Spain and the Macedonian Government on the reciprocal recognition and the exchange of driving licences, done at Skopje, on 6 October 2011.

*Provisional application:* 05.11.11 (*BOE* 266, 4.11.11 and *corr. of errors* *BOE* 291, 3.12.11).

– Exchange of Notes constituting an Agreement between the Kingdom of Spain and the Republic of de Nicaragua on the mutual recognition of driving licenses, done at Madrid, on 19 February 2010.

*Entry into force:* 2.01.12 (*BOE* 274, 14.11.11).

– Denouncement of the Agreement between Spain and Romania on the reciprocal recognition and the exchange of driving licenses for Spaniards and Romanians, done at Bucharest, on 1 September 2004.

*Note:* the Agreement is not in force since 12 February 2011, 30 days after the notification of the denouncement, as provided in article 10 (*BOE* 304, 19.12.11).

– Agreement between the Kingdom of Spain and the Principality of Andorra on waste transport, done at Madrid, on 29 November 2011.

*Provisional application:* 29.11.11 (*BOE* 311, 27.12.11).

– Multilateral Agreement M-236, in accordance with Section 1.5.1 of ADR, on Transport Document on Delivery Sales Operations, done in Madrid on 1 August 2011 (*BOE* 99, 25.04.12 and *corr. of errors BOE* 109, 07.05.12).

*Note:* Concerning M-218:

This agreement should be valid until 31 December 2012 inside the territory of signatories.

Concerning M-236:

This agreement should be valid until 12 May 2016 between the signatories.

– Accession instrument of Spain to the European Air Group between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic, done in London on 8 July 1998, and Amendment Protocol, done in London on 16 June 1999 (*corr. of errors BOE* 135, 06.06.12).

## XX. LABOUR LAW AND SOCIAL SECURITY

– Agreement on the Application of the Ibero-American Multilateral Social Security Convention, done in Lisbon on 11 September 2009.

*Provisional application:* 13.10.10 (*BOE* 7, 08.01.11).

– Convention on Social Security between the Kingdom of Spain and the Republic of Ecuador, done in Madrid on 4 December 2009.

*Entry into force:* 1.01.11 (*BOE* 32, 07.02.11).

– Latin American Multilateral Agreement on Social Security, done at Santiago de Chili on the 10 November 2007.

*Instrument of ratification:* 5.02.10

*Provisional application:* 13.10.10

*Entry into force:* 1.05.11 (*BOE* 103, 30.04.11).

– Resolution of April 2011, by the Technical Secretariat-General of the Ministry of Foreign Affairs and Cooperation, concerning the signature by the Plurinational State of Bolivia of the Latin American Multilateral Agreement on Social Security, done at Lisbon on the 11 September 2009 (*BOE* 103, 30.04.11).

– Agreement concerning the implementation of the Latin American Multilateral Convention on Social Security, done at Lisbon on 11 September 2009.

*Entry into force:* 19.05.11 (between Brazil, Bolivia and Spain) (*BOE* 163, 09.07.11).

*Entry into force:* 20.06.11 (between Brazil, Bolivia, Spain and Ecuador) (*BOE* 177, 25.07.11).

*Entry into force:* 26.07.11 (between Brazil, Bolivia, Spain, Ecuador and the Eastern Republic of Uruguay) (*BOE* 241, 06.10.11).

*Entry into force:* 01.09.11 (between Brazil, Bolivia, Spain, Ecuador, the Eastern Republic of Uruguay and Chile) (*BOE* 241, 06.10.11).

*Entry into force* (with Uruguay): 28.10.11 (*BOE* 304, 19.12.11 and *corr. of errors BOE* 312, 28.12.11).

*Provisional application*: 13.10.10

*Entry into force*: 27.12.11 (*BOE* 39, 15.02.12).

– Administrative Agreement for the implementation of the Social Security Convention between the Kingdom of Spain and the Republic of Ecuador, done in Madrid the 18 July 2011.

*Entry into force*: 01.01.11 (*BOE* 243, 08.10.11).

– International Labour Organization (ILO) Convention number 185 on Seafarers' Identity Documents (Revised), 2003.

*Instrument of ratification*: 03.05.11 (*BOE* 274, 14.11.11).

*Entry into force*: 9.02.05 (in general) and 26.11.11 for Spain.

– International Labour Organization Convention number 108 concerning Seafarers' National Identity Documents, done at Geneva, on 13 May 1958.

*Denouncement by Spain*: 26.11.11 (*BOE* 312, 28.12.11).

## XXI. CRIMINAL LAW

– Instrument of Ratification of the Additional Protocol to the Criminal Law Convention on Corruption, done in Strasbourg on 15 May 2003.

*Instrument of ratification*: 16.12.10

*Entry into force*: 01.05.11 (for Spain) (*BOE* 56, 07.03.11 and *Corr. of errors BOE* 84, 08.04.11).

– International Convention for the Protection of All Persons from Enforced Disappearance, done in New York on 20 December 2006.

*Instrument of ratification*: 14.07.09

*Entry into force*: 23.12.10 (*BOE* 42, 18.02.11).

– Exchange of Notes establishing the Amendment to the Extradition Treaty between the Kingdom of Spain and the Republic of Peru of 28 of June 1989, done in Madrid on 4 August 2008 and 9 March 2009.

*Entry into force*: 09.07.11 (*BOE* 193, 12.08.11).

– Convention between the Kingdom of Spain and the Federative Republic of Brazil on cooperation to fight against crime, done in Madrid on 25 June 2007.

*Entry into force*: 31.08.11 (*BOE* 222, 15.09.11).

– Convention between the Kingdom of Spain and the Hashemite Kingdom of Jordan on cooperation in the fight against crime, signed in Amman on 15 March 2011.

*Entry into force*: 27.10.11 (*BOE* 256, 24.10.11).

– Agreement between the Kingdom of Spain and the Republic of Albania on cooperation in the fight against crime, done at Tirana, on 20 May 2009.

*Entry into force:* 30.04.10 (*BOE* 258, 26.10.11).

– Convention between the Kingdom of Spain and the Republic of Croatia on the fight against delinquency and security matters, done at Madrid, on 24 October 2011.

*Provisional application:* 24.10.11 (*BOE* 270, 9.11.11).

– Declaration made by Spain amending its declaration related to Article 24 of the Convention European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg, on 20 April 1959 (ETS n. 30).

*Entry into force:* 10.06.11 (*BOE* 298, 12.12.11 and *corr. of errors BOE* 303, 17.12.11).

*Note:* This modification applies also to the Additional Protocol to the Convention, and reads as follows:

“In accordance with Article 24 of the Convention, Spain declares that for the purposes of the Convention, the following shall be deemed judicial authorities:

- a) ordinary judges and courts;
- b) registrars;
- c) public prosecutors;
- d) military judges and courts;
- e) reporting registrars of the military courts.

This declaration applies also to the Additional Protocol to the Convention, done in Strasbourg on 17 March 1978.”

– Corrigendum to the provisional application of the Convention between the Kingdom of Spain and the Kingdom of Morocco on Mutual Assistance in Criminal Matters, done at Rabat on 24 June 2009 (*BOE* 51, 29.02.12).

– Corrigendum to the provisional application of the Extradition Convention between the Kingdom of Spain and the Kingdom of Morocco, done at Rabat on 24 June 2009 (*BOE* 53, 03.02.12).

– Agreement on the cross-border mutual assistance of police between the Kingdom of Spain and the Kingdom of Morocco, done ad referendum on Madrid on 16 November 2010 (*BOE* 116, 15.05.2012).

## **XXII. TAX LAW**

– Agreement on the cross-border mutual assistance of police between the Kingdom of Spain and the Kingdom of Morocco, done ad referendum on Madrid on 16 November 2010 (*BOE* 116, 15.05.2012).

– Convention and Protocol between the Kingdom of Spain and the Republic of Costa Rica for the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income and capital, and Protocol, done in Madrid on 4 March 2004.

*Entry into force:* 15.12.10 (*BOE* 1, 01.01.11).

– Convention between the Kingdom of Spain and the Republic of Albania for the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income, done in Tirana on 2 July 2010.

*Entry into force:* 04.05.11 (*BOE* 63, 15.03.11 and *corr. of errors BOE* 125, 26.05.11).

– Convention between the Kingdom of Spain and the Eastern Republic of Uruguay for the avoidance of double taxation and the prevention of tax evasion in relation to taxes on income and Protocol, done in Madrid on 9 October 2009.

*Entry into force:* 24.04.11 (*BOE* 87, 12.04.11).

– Convention between the Kingdom of Spain and the Islamic Republic of Pakistan in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Madrid on the 2 of June 2010.

*Entry into force:* 18.05.11 (*BOE* 116, 16.05.11).

– Convention between the Kingdom of Spain and the Republic of Georgia in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Madrid on the 7 June 2010.

*Entry into force:* 01.07.11 (*BOE* 130, 1.06.11).

– Convention between the Government of the Kingdom of Spain and the Government of the Republic of Kazakhstan in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Astana on the 2 July 2009.

*Entry into force:* 18.08.11 (*BOE* 132, 3.06.11).

– Agreement concerning the Exchange of Information on Tax Matters between the Kingdom of Spain and the Republic of San Marino, done at Rome on the 6 September 2010.

*Entry into force:* 02.08.11 (*BOE* 134, 06.06.11).

– Convention between the Kingdom of Spain and the Republic of Panama in order to avoid double taxation and prevent tax evasion on income tax and wealth tax, done at Madrid on 7 October 2010.

*Entry into force:* 25.07.11 (*BOE* 158, 04.07.11).

– Agreement on exchange of information on tax matters between the Kingdom of Spain and the Commonwealth of the Bahamas and Memorandum of understanding between the competent authorities of the Kingdom of Spain and the Commonwealth of the Bahamas concerning the interpretation and implementing the Agreement between the Kingdom of Spain and the Commonwealth of the Bahamas on the exchange of information on tax matters and the recognition of other accepted commitments between the competent authorities, done at Nassau on 11 of March 2010.

*Entry into force:* 17.08.11 (*BOE* 169, 15.07.11 and *corr. of errors BOE* 194, 13.08.11).

- Agreement between the Kingdom of Spain and Barbados in order to avoid double taxation and prevent tax evasion on income taxes, signed at Bridgetown, 1 December 2010.  
*Entry into force:* 14.10.11 (BOE 221, 14.09.11).
  
- Agreement between the Kingdom of Spain and the Socialist Republic of Vietnam on the promotion and protection of investments, done at Hanoi, on 20 February 2006.  
*Entry into force:* 29.07.11 (BOE 303, 17.12.11).
  
- Agreement between the Kingdom of Spain and the Republic of Singapore for the avoidance of double taxation and preventing fiscal evasion with respect to taxes on income and its Protocol, signed in Singapore on April 13, 2011.  
*Entry into force:* 02.02.12 (BOE 9, 11.01.12).
  
- Convention among the Kingdom of Spain and the People’s Republic of China Special Administrative Region of Hong Kong for the avoidance of double taxation with respect to taxes on income and on capital, and Protocol, done in Hong Kong on 1 April 2011.  
*Entry into force:* 13.04.12 (BOE 90, 14.04.12).
  
- Convention between the Kingdom of Spain and the Republic of Armenia for the avoidance of double taxation with respect to taxes on income and on capital, done in Madrid on 16 December 2010.  
*Entry into force:* 21.03.12 (BOE 92, 17.04.12 and *corr. of errors* BOE 98, 24.04.12).

## *Spanish Judicial Decisions in Public International Law, 2011–2012*

The team which selected these cases was directed by Professor Fernando M. Mariño (Carlos III University) and co-ordinated by Pablo Zapatero. It includes the following Lecturers at the Carlos III University: M. Abad; A. Alcoceba; A. Díaz; J. Escribano; A. Manero; D. Oliva; C. Pérez; F. Quispe; L. Rodríguez de las Heras and P. Zapatero.

### I. INTERNATIONAL LAW IN GENERAL

### II. SOURCES OF INTERNATIONAL LAW

### III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

### IV. SUBJECTS OF INTERNATIONAL LAW

#### 1. The State

– *Universal Criminal Jurisdiction* –

*National High Court Order, 6 April 2011, Criminal Division, Section 2*

Dismissal of the appeal submitted by the Public Prosecutor against a complaint – from a citizen of Morocco – based on tortures in the Guantanamo Military Base (Cuba), under US administration. The claimant was acquitted by the National High Court before, after he was transferred by the US in order to be judged of terrorism in 2005. Following the opinion of the Public Prosecutor, there is no need to wait the answer from the competent US authorities in the various opened proceedings. Secondly, it is not possible to exercise the universal jurisdiction, according to article 23.4 LOPJ, as amended on 3 November 2009.

The Chamber considered that the “real connection link” of the claimant is based, firstly, on his legal residence in Spain during ten years, secondly, in the fact that he was born in the former Spanish protectorate in the North of Africa, before his trip to Afghanistan in 2000 (where he was imprisoned by the US Army). Seven judges, in their dissenting opinions, questioned the “real connection link” of the aforementioned circumstances.

*Supreme Court Order, 6 October 2011, Criminal Division, Appeal n. 857/2011*

A wide-ranging group of organizations and a particular individual supporting Tibet initiate a proceeding before the National High Court. They appeal before the Supreme Court. The claimants [*el Comité de apoyo al Tíbet y otros*], consider that the Spanish jurisdiction is competent for the judgment of the crimes against humanity committed by Chinese authorities in Tibet (based on article 23.4 of the LOPJ, as amended by LO 1/2009 of 3 November). The Supreme Court considers that the exercise of the Spanish jurisdiction is subject to “the existence of a real connecting link with Spain” – as a *conditio sine qua non* –; this view is correcting “a *vis expansiva* that does not satisfy the requirements of the universal criminal jurisdiction, being those cases susceptible to be judged by international tribunals”. Due to the abovementioned reasons, the appeal against the Order of the National High Court of 27 October 2010 was dismissed.

*National High Court Order, 23 March 2012, Criminal Division, Section 1*

Dismissal of the appeal against a previous order of dismissal of the case concerning the memoranda from the US Department of State on torture methods in Guantanamo; a previous complaint against the authors of these Memoranda was dismissed. Seeing the letter rogatory requested to the United States, the Chamber considers that investigations, judicial procedures and criminal sanctions have been developed in conformity with the conditions determined by the LOPJ (universal jurisdiction).

Three judges maintain, in their individual opinion, the possibility to investigate the alleged facts, in the event of crimes against the international community, as a violation of *ius cogens*. No procedure (investigation, criminal prosecution) against the authors of the Memoranda has been opened at the United States (merely professional ethics procedures). Furthermore, some Guantanamo detainees are Spanish citizens. In their opinion, the dismissal meant granting impunity.

*Supreme Court Order, 20 December 2012, Criminal Chamber, Appeal n. 1133/2012*

The association *Pro dignidad de los presos y presas de España y otros* submitted a complaint against some Spanish citizens, based on the commission of crimes against protected persons and property in the event of armed conflict (Chapter III, Title XXIV of the Spanish Criminal Code); the complaint is based on the establishment of a systematic plan of torture and cruel treatment of detainees at the detention centre in the Guantanamo Bay. The complaint and the appeal were dismissed; this former appeal to the Supreme Court is based upon article 23.4 LOPJ.

The Supreme Court dismissed this appeal; the subsidiarity principle contained in article 23.4 LOPJ is the main argument of the tribunal. Some administrative procedures and criminal investigations on detainees' treatment were opened at the United States at the same time. On the contrary, as the General Prosecutor has pointed out, there does not seem to be criminal prosecutions against the ideologists of the juridical architecture of the detention centre, acting *bona fide*, within the legal framework determined by the Office of the Legal Counsel. On the field of judicial co-operation, it referred to the Mutual Legal Assistance Treaty of 20 November 1990, between Spain and the United States, and the Agreement between the European Union and the United States on Legal Assistance, of 25 June 2003.

The Supreme Court dismissed the appeal against the Order of the National High Court (Criminal Division) of 23 March 2012.

– *Universal jurisdiction for international crimes* –

*Supreme Court Decision, 27 February 2012, Criminal Division, Appeal n. 20048/2009*

Two far-right organizations complain against the judge dealing with the case on the crimes committed by the Franco regime; this one was based on a complaint submitted before the National High Court by a group of private persons and associations of relatives and friends of those persons disappeared or murdered during the Civil War and Post-War period. They claim their “right to know” the circumstances of the death and the location of their relatives, together with all necessary actions to locate and identify the victim’s mortal remains and deliver them to their relatives.

The sitting Judge of the Central Investigative Court (n. 5) of the National High Court held that it had jurisdiction to entertain the matter on “those who stood against the legitimate Government of the country and committed a crime under the Constitution at that time and against the nation’s highest bodies, induced and ordered the previous, simultaneous and resulting mass killing, illegal detentions of political opponents, and led to the forced displacement of thousands of people”. He further notes that it seems to be “a continuous crime of illegal detention, without knowledge of the victim’s whereabouts, in the field of the crimes against humanity, together with crimes against persons and against the nation’s highest bodies”.

The Supreme Court considered that the localization and exhumation of the victim’s bodies of the Franco regime cannot be fulfilled *in toto*; the so-called “truth trials” must be dismissed as a consequence of the existence of circumstances of extinction of criminal responsibility (such as death, prescription and amnesty). This requirement, in the opinion of the Tribunal, contravenes the criminal procedural rules (imposing a penalty); in their opinion, this is a matter for historians, not for judges and courts.

The tribunal observes that there was no prevarication in the conduct of the judge; there was not a knowingly unjust judicial decision, but a misapplication of the law: the legality principle was not respected. International Criminal Law, in order to be applied, needs an “accurate transposition into national law”; customary law cannot tipify certain criminal offences directly applicable by Spanish courts.

Under this reasoning, the Martens clause cannot be understood as a substantive rule of criminal law; on the second hand, the Nüremberg Principles are not applicable in this case, because Spain did not participate in their formation and they were not transposed in our legal system until 1952, when the Vienna Conventions were ratified, a later date to the period analyzed in this case.

The conducts are prescribed. Concerning the permanent character of the crime of illegal detention, the Tribunal decides that the criminal offence was not tipified in the Spanish Criminal Code. The imprescriptibility character cannot be accepted, at least until the ratification of the international instruments that contained this possibility; this measure cannot have a retroactive character. The Supreme Court affirms that the annulment of the amnesty laws declared in international instruments, and reflected by

the international practice is not pertinent (cannot be applied to previous facts and the application of customary rules may provide legal uncertainty).

– *Extraterritorial jurisdiction* –

*Supreme Court Decision, 12 December 2011, Criminal Division, Appeal n. 1164/2011*

The condemned and some crew members of the Spanish fishing vessel *Alakrana* (hijacked by Somali pirates in the Indian Ocean), appeal the Decision of the National High Court (Fourth Section), of 3 May 2011.

This decision is relevant, dealing with international and European legal order, for the following reasons: the jurisdiction of Spanish Courts in this case and, secondly, the possible membership of a terrorist or armed group.

Dealing with the first question, the Supreme Court is in line with the previous instance Decision; the Spanish jurisdiction is based on article 23.1 LOPJ, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the United Nations Convention on the Law of the Sea (UNCLOS), and the Council Joint Action 2008/851/CFSP of 10 November 2008, on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (supporting the UN Security Council Resolutions 1814, 1816 and 1838).

Secondly, some members of the crew qualified this situation as terrorist acts (serious disturbance of public peace, together with terrorist actions). In the opinion of the Court, creating social alarm is not sufficient to qualify a conduct as terrorism: a systematic and repeated action and social alarm for a large sector of population are necessary conditions. The claimants proposed an interpretation based on article 1 of the Council Framework Decision of 13 June 2002 on combatting terrorism (2002/475/JHA); this argument was rejected by the Court. The observance of the principle of legality in criminal proceedings, the parliamentary legitimacy of criminal rules, together with other requirements was not found in the Framework Decision. This argument was applicable to the International Convention against the Taking of Hostages and to the International Convention for the Suppression of the Financing of Terrorism.

The authors have been convicted of the offence of unlawful association, abduction (36) and armed robbery; they have been sentenced to provide compensation to their victims. The Court admitted some aspects of the appeal to the Decision of 3 May 2011 of the National High Court (Fourth Section), as explained above.

## V. THE INDIVIDUAL IN INTERNATIONAL LAW

– *Right to freedom* –

*Constitutional Court, Decision 108/2012, 21 May 2012*

This is an appeal against a previous Order of the Supreme Court (Criminal Chamber); this case concerns the cumulative character of criminal offences punishable by deprivation of liberty (the so-called “Parot doctrine”). The appeal is based on the infringement of the right to equality, the right to freedom and security, the right to effective judicial

protection, the right to defence and the principles of legality and legal certainty. The Court dismissed the appeal.

*Constitutional Court Decision, Second Chamber, Decision 141/2012, 2 July 2012*

Appeal against previous judicial decisions on urgent voluntary confinement because of a psychiatric diagnosis. The request is based on the violation of fundamental rights to freedom (art. 17 of the Spanish Constitution) and the right to effective legal remedy (art. 24.1 of the Spanish Constitution).

The Constitutional Court analyzes the legality or not of the confinement “of a person of unsound mind”; art. 5.1 e) of the European Convention on Human Rights, and the interpretation of this provision done by the ECHR are fundamental aspects to be taken into account (case *Winterwerp v. The Netherlands*; Decision of 24 October 1979). Art. 9.1 of the International Covenant on Civil and Political Rights, and the interpretation of this provision given by the UN Human Rights Committee, are essential aspects considered by the Constitutional Court. This right must be applicable “respect to all the forms of deprivation of liberty (...) such as, for example, mental illness”.

The Court has decided to grant the protection, recognising the right to freedom of the claimant, and holding the previous orders null and void.

– *Right to marriage* –

*Constitutional Court Decision, Plenary, Decision 198/2012, 6 November 2012*

The Constitutional Court solves an exception of unconstitutionality lodged by Spanish parliament members of the “Partido Popular”, against Act 13/2005, amending the Spanish Civil Code (extending marriage to same-sex couples). In their opinion, the most important consequence of this Act (a new paragraph of art. 44 of the Spanish Civil Code) “will change the secular, constitutional and legal conception of the marriage as a union between a man and a woman”. Following this point of view, there is an infringement of article 10.2 of the Spanish Constitution (interpretation in the light of fundamental rights and freedoms contained in international human rights treaties ratified by Spain): the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Rome Convention on the protection of human rights and fundamental freedoms. In their opinion, art. 32 of the Spanish Constitution ought to be understood considering that “the members of a couple must be a man and a woman”. Their interpretation of the decisions of the ECHR (art 12 of the European Convention) follows the same positions.

The Constitutional Court argues that “the interpretation of legal texts must be done taking into account the international activity of States as manifested on international treaties, on judicial decisions of interpretative organs, in the advisory opinions of the United Nations system, and in the opinions of international organisms, universally recognized”. For these reasons, art. 10.2 of the Spanish Constitution require an interpretation of the affected human rights in conformity with the Universal Declaration of 1948, and the international treaties ratified by Spain. This interpretation “cannot be done without the perspective of the monitoring bodies established by international treaties”, because “the hermeneutic rule of art. 10.2 include an evolutive interpretation”.

In the opinion of the Court, international law and international judicial decisions showed “a possibility of opening the traditional notion of marriage”. There is no total consensus in Europe on “same-sex marriage” because on each State this institution has had a particular evolution. For these reasons, the Strasbourg Court has understood that “art. 12 of the European Convention on Human Rights cannot impose, at present, the obligation to open the institution of marriage to same-sex couples to State Parties in the Convention; but, on the contrary, the literal wording of art. 12 do not prohibit the regulation of marriage in these situations”. In the same way, “art. 9 of the Charter of Fundamental Rights of the EU, as interpreted by the Praesidium in the Explanatory Report, neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex”. In the opinion of the ECHR, art. 9 of the Charter suppose an updated version of art. 12 of the European Convention, “to cover cases in which national legislation recognises arrangements other than marriage for founding a family” (cases *Schalk and Kopf v. Austria* – Decision of 24 June 2010, par. 60 –).

Due to the aforementioned reasons, the Constitutional Court dismissed the exception of unconstitutionality; the decision is followed by four dissenting opinions.

– *Right to privacy* –

*Constitutional Court Decision, First Chamber, Decision 241/2012, 17 December 2012*

Application for amparo (right to privacy and secrecy of communications). A software application was installed by the applicant and a colleague in a joint computer of the company where they worked. Using this programme, these workers exchanged private information (thinking that this information was private); but, on the contrary, the texts transmitted, the usernames and the e-mail addresses were filed in the computer system (in a public folder sharing). Later, both workers were called to a meeting by the Director of the enterprise; during this meeting, in the presence of senior managers, the content of some messages was read. The Director admonished them.

The Constitutional Court remembers in its Decision, that the ECHR underlined the notion of secrecy of communications (case *Malone v. United Kingdom* – Decision 2 August 1984, párr. 84 – and case *Copland v. United Kingdom* – Decision of 3 April 2007, párr. 43 –). According to the Court’s case-law, telephone calls from business premises are prima facie covered by the notions of “private life” and “correspondence” for the purposes of Article 8.1 (case *Copland v. United Kingdom* – párr. 41 –; case *Halford v. United Kingdom* – Decision of 25 June 1997, párr. 44 –; and case *Amann v. Switzerland* – Decision of 16 February 2000; párr. 44 –).

The Constitutional Court dismissed the amparo due to the following reasons: firstly the election of a joint computer is not compatible with “a private use”; secondly, “the need conditions to preserve secrecy have no constitutional coverage”; and thirdly, the installation of this software – being a conduct prohibited by the enterprise – proofs that no reasonable expectations of confidentiality exists.

The Decision is followed by one dissenting opinion, signed by two judges.

– *Right of association* –

*Constitutional Court, Decision 138/2012, 20 June 2012*

Dated 18 May 2011, the courts' solicitor, acting on behalf of a group of people and the political party Sortu, brought an appeal against the ruling of 30 March 2011 of Supreme Court Special Chamber (Article 61 of Judiciary Act). The ruling found the constitution of the political party Sortu to be inapplicable because it was the continuation or succession of Batasuna, a political party which was declared as illegal and, consequently, dissolved; it pointed out that its registration in the register of political parties was not appropriate. The interested party submitted the application for dismissal of actions against the aforesaid order, which was dismissed because of the Chamber consideration that it pretends the reopening of the same procedural issue. Legal protection is raised because of the infringement of the right of association, in its aspect of the right to establish political parties, regarding the rights to ideological freedom, to freedom of speech and to political involvement, with regards to joint an expression of political pluralism (Articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Constitutional Court evaluated the legal protection request and it found that the right to association of applicants had been infringed, in its aspect of the freedom to establish political parties, and the court acknowledges the right of the applicants to establish the aforesaid political party. Three dissenting votes are submitted.

– *Right to not be subjected to torture or to cruel, inhuman or degrading treatment* –

*Constitutional Court, Decision TC 131/2012, 18 June 2012*

Dated 6 September 2011, the applicant brought an appeal for legal protection against Vizcaya Provincial High Court, Section One Order, which has dismissed the appeal filed against Bilbao First-instance Criminal Court No. 9 Order, which ratifies the determination of dismissal without prejudice and the discontinuance of the case. It is a report of a torture crime which was dismissed due to pathologist's reports. Constitutional Court, according to the European Court of Human Rights jurisprudence, establishes that the right to effective protection of the court for who reports the suffering of torture or inhumane and degrading treatment requires, in accordance with the reinforced canon of grounding, a well-founded resolution according to the total prohibition of such behaviour. Quoting the Court, the reasons to justify the dismissal fail to satisfy the constitutionally demanding duty of reinforced ground in these cases.

The Court decides to consider the appeal for legal protection and acknowledges that the right to effective protection of the court has been violated, regarding the right to not be subjecting to tortures.

– *Family reunification* –

*Supreme Court Decision 8 June 2012. Chamber for Administrative Proceedings. Rec. 5946/2011*

On this judgment, the Supreme Court find admissible the appeal to this Court filed against the Madrid High Court of Justice 20 July 2011. Mr. Juan Carlos appeals to the Supreme

Court against the Madrid High Court of Justice judgment, Chamber for Administrative Proceedings Section One, which partially estimated the administrative appeal filed against the refusal of a Family Regrouping Visa for European Union of one of the applicant's sons. In order to accept applicant's claim, the court evaluates a key concept for obtaining a Family Regrouping Visa: "to be in charge of". The fact of being a member "in charge" of a family "is the result of a situation in which the community citizen who exercised the right to free movement or his/her spouse guaranteed all necessary resources for the family member sustenance." [...] following the doctrine from the Court of Justice of the European Union, compiled in Decisions of 19 October 2004, case C-200/02, and of 9 January 2007, case C-1/05, since it should not be forgotten the expression "in charge" used by Royal Decree and applicable in this case, comes from the Directive 2004/38 (European Union Law – *Legislación de las Comunidades Europeas/LCEur* 2004, 2226 and European Union Law 2007, 1364) and from previous provisions. With the only purpose of specifying when it could be achieved the quantity that guarantees such resources, it is possible to turn to very different criteria of interpretation, keeping in mind that there is no rule which requires that all incomes of the regrouped person come from who made the regrouping. The most important thing for being "in charge" of somebody else is that such person must cover every necessity."

– *Right of Asylum* –

*Supreme Court Decision of 27 December 2012, Chamber for Administrative Proceedings. Rec. 1630/2012*

The Supreme Court Decision of 27 December 2012 dismisses the appeal to this Court filed by a Sierra Leone citizen against Ministry of the Interior resolution of 30 June 2009, which refused to recognize the refugee condition and the right of asylum to him. The applicant alleges the existence of a risk for his/her personal safety in case of coming back to Sierra Leone and the violation of Article I.A.2 of 1951 Geneva Convention relating to the Status of Refugees and Article I.2 of New York Protocol of 1967 (Statute Book – *Repertorio Cronológico de Legislación/RCL* 1978, 2290, 2464) for the aforesaid status, according to the Article 3 of the Asylum Act. The Chamber decision is unfavourable for applicant's claim for two reasons: on the one hand, "the applicant's arguments have no sense about the required evidentiary harshness to confer asylum and about circumstantial evidence consistent with this court doctrine".

The appeal was dismissed due to the absence of evidence. The circumstances in the applicant country of origin have notably changed (in 2003, year of his departure and in 2006, when he submitted the petition of asylum).

The UNHCR Report of 6 June 2008, mentioned in the contested decision, and the recommendation of the UN High Commissioner for Refugees support this change of the circumstances in Sierra Leone.

The spirit and the aim of the humanitarian protection (art. 17.2 of the Spanish Asylum Act, RCL 1984, 843) is to promote asylum-seekers with a mechanism for protection and safeguarding (in case of general conflict or violations of human rights in their country of origin). This is not the case of Sierra Leone at this moment, on the basis of the evidence, as described above.

*Supreme Court Decision, 26 October 2011. Chamber for Administrative Proceedings. Rec. 2544/2008*

The Supreme Court dismisses the Appeal submitted by the *Administración General del Estado* (the State) against a previous Decision of 16 November 2007 of the National High Court; the former uphold in part the appeal against a resolution of the Spanish Ministry of Internal Affairs of 2 December 2004, refusing to grant to the applicant refugee status and asylum right, but authorizing him to stay in Spain (article 27.2 of the Asylum Act). *Bona fide* principle must be under consideration.

The asylum-seeker was acquitted of charges as a result of the coup d'État in his country of origin; he had no difficulties in exercising his profession. He obtained an official passport and leaved his country without obstacles. These facts may justify the argument of the Court (following the recommendations of UNHCR), refusing the asylum petition, but considering the possibility to stay in Spain.

The Report submitted by UNHCR showed that the applicant had been arrested, tortured and prosecuted in the past; he belongs to a family where there is opposition to the political regime in Equatorial Guinea. There are continuous violations of human rights in this country; for this reason, the prosecution of the applicant in the next future can not be fully excluded.

– *Diplomatic protection* –

*National High Court Decision 1 February 2012, Chamber for Administrative Proceedings. Rec. 157/2010*

The National High Court analyses the eventual pecuniary responsibility of the State as a consequence of the potential harm caused to the Spanish company FLM Internacional SL. Spain denied the exercise of diplomatic protection in favour of this company, concerning its investments in Cuba (Agreement between the Kingdom of Spain and the Republic of Cuba on Mutual Promotion and Protection of Investments, 27 May 1994). The National High Court dismisses the appeal, considering out of time the complaint of diplomatic protection submitted before the Spanish Ministry of Foreign Affairs and Cooperation.

– *Protection of stateless persons* –

*National High Court Decision 10 December 2012, Chamber for Administrative Proceedings. Rec. 598/2008*

This is an appeal against a Resolution of the Spanish Ministry of Interior of 23 April 2008, rejecting the status of stateless person to the claimant. The Chamber allowed the claim pursuant to well-settled caselaw of the Supreme Court concerning the recognition of the status of stateless persons to people of saharawi origin.

## VI. EUROPEAN UNION

### – Environmental protection –

*High Court of Justice of the Autonomous Community of Madrid, Decision of 8 March 2012, Chamber for Administrative Proceedings*

This is an administrative appeal of a private person against the Madrid City Council agreement of 15 February 2011, adopting the Ordinance against thermal and acoustic pollution. The High Court of Justice determines the parties positions: on the one hand, the claimant considered that this Ordinance violates article 15 of the Spanish Constitution (fundamental right to the physical and moral integrity), together with article 1 c) of the Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise: “The aim of this Directive shall be to define a common approach intended to avoid, prevent or reduce on a prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise. To that end the following actions shall be implemented progressively: (c) adoption of action plans by the Member States, based upon noise-mapping results, with a view to preventing and reducing environmental noise where necessary and particularly where exposure levels can induce harmful effects on human health and to preserving environmental noise quality where it is good”. From the point of the defendant, there is no violation of the Directive in this case.

The High Court dismissed the appeal, based upon former decisions of the Supreme and the Constitutional Courts, and the lack of legitimacy. The Aarhus Convention of 25 June 1998, on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters may also be relevant. This convention was ratified by Spain (*BOE*, 16 February 2005, entry into force 19 March 2005); article 9 is referred to the access to justice on these subjects. There is a lack of legitimacy in this case, following articles 22 and 23 of the Act 27/2006, 18 July on Access to Information, Public Participation and Access to Justice in Environmental Matters.

## VII. INTERNATIONAL ORGANIZATIONS

*High Court of Justice of Galicia; Decision of 11 July 2012, Chamber for Administrative Proceedings*

This is a dismissal of the appeal submitted by several dozen people (participants in peacekeeping international operations) against the Spanish Ministry of Defence. They consider that, as members of the frigate “Blas de Lezo”, (participant in the “Allied Protector” NATO operation), under Ministerial Order 7/2008, their mission must have the same character and the same economic conditions than the ships of the “Atalanta” operation of the European Union against piracy (the principle of discrimination and violation of art. 14 of the Spanish Constitution are under discussion).

Initially, the frigate was framed within the NATO operation “Allied Protector”; subsequently, they have to support the Spanish participants of the “Atalanta” operation, for several months. The Court underlines the differences between these operations: the

“Atalanta” operation is conceived as a peacekeeping operation in order to assure the World Food Programme transport and to fight against piracy in Somali waters. The “Allied Protector” is not considered a peacekeeping operation, but a NATO Rapid Reaction Force; the “Atalanta” operation was created by the EU to fight against piracy (in the field of the Common Foreign and Security Policy). In the opinion of the Court, the “Allied Protector” NATO operation fights against piracy in the same way as another warship, following article 105 of the UNCLOS Convention (*Montego Bay Convention, 1982*). The different character of these operations justify the economic conditions of them.

The principle of equality and non-discrimination has not been violated. The appeal was dismissed.



## Spanish Judicial Decisions in Private International Law, 2012

This section has been co-ordinated by Federico F. Garau Sobrino, Professor of Private International Law (PIL), University of Balearic Islands, and Ángel Espiniella Menéndez, Lecturer of PIL, University of Oviedo. The materials have been selected and collated by Mónica Vinaixa Miquel, hired Lecturer (*Profesora Lectora*) of PIL, University *Pompeu Fabra* of Barcelona [Nationality, Immigration Law, Refugees and EU Citizens]; Antonia Durán Ayago, hired Lecturer of PIL, University of Salamanca [Natural Persons]; Gloria Esteban de la Rosa, Lecturer of PIL, University of Jaen, and Esperanza Gómez Valenzuela, Intern, University of Jaen [Family Law]; Maria Álvarez Torné, Research Fellow of PIL, University of Barcelona [Succession Law]; Carmen Otero García-Castrillón, Lecturer of PIL, University *Complutense* of Madrid [Competition Law]; Katia Fach Gómez, Lecturer of PIL, University of Zaragoza, and Néstor Raúl Londoño, hired Lecturer, University *Pontificia Bolivariana*, Colombia [Contract Law]; Silvia Feliu Álvarez de Sotomayor, hired Lecturer of PIL, University of Balearic Islands [Property Law, Intellectual Property, Securities]; Sara Sánchez Fernández, PHD Candidate, University Autònoma of Madrid [Insolvency Law]; Iñigo Iruretagoiena Agirrezabalaga, hired Lecturer (*Profesor Adjunto Doctor*) of Public International Law, University of País Vasco, and Nerea Magallón Elósegui, hired Lecturer (*Profesora Doctora Encargada*) of PIL, University of Deusto (País Vasco) [International Arbitration]; Albert Font Segura, Lecturer of PIL, University *Pompeu Fabra* of Barcelona [Interregional Conflict of Laws]. The English translation and final review have been done by María Teresa Echezarreta Ferrer, Lecturer of PIL, University of Málaga, and Alba Arcas Rodríguez, Research Fellow of PIL, University of Málaga.

### I. NATIONALITY, INMIGRATION LAW, REFUGEES AND EU CITIZENS

- Judgment of the High Court of Justice [Tribunal Superior de Justicia] of Madrid (Chamber for Contentious Administrative Proceedings, Section 1) n° 35/2012 of 20 January 2012. (ROJ 125/2009). Foreign Legal Status. Residence authorized by family reunification. Application for a family reunification visa of minor. The “minor” status must be assessed in the starting date of the file, not the date of visa application.
- Supreme Court [Tribunal Supremo] Decision (Third Chamber, Section 3), of 27 April 2012 (ROJ 6769/2010). Foreign Legal Status. Granting of residence permit authorized by family reunification. Reunification of relatives in the ascending line.
- Supreme Court Decision (Third Chamber, Section 3), of 15 June 2012 (ROJ 6249/2011). Foreign Legal Status. Refusal of the residence permit authorized by family reunification.
- Judgment of the High Court of Justice of Madrid (Chamber for Contentious Administrative Proceedings) n° 672/ 2012 of 15 June 2012. Foreign Legal Status. Residence

- Permit authorized by family reunification. Granting of a visa for family reunification of a parent whose daughter had obtained Spanish nationality.
- Judgment of the High Court of Justice of Castilla y León, n° 20/2012 of 20 January 2012 (ROJ 231/2011). Foreign Legal Status. Expulsion. Stay of the expulsion of the foreigner due to be disabled, to be under the supervision of their Spanish parents and family roots.
  - Supreme Court Decision (Third Chamber, Section 3) of 22 March 2012 (ROJ 299/2010). Foreign Legal Status. Residence authorization without an occupation. Refusal of visa. Improper.
  - Judgment of the High Court of Justice of Islas Baleares (Chamber for Contentious Administrative Proceedings) n° 316/2012 of 24 April 2012 (ROJ 45/2012). Permission or temporary residence and work. Foreign Legal Status. Granting by administrative silence positive.
  - Supreme Court Decision (Third Chamber, Section 3), of 22 June 2012 (ROJ 6085/2011). Permit for temporary residence on the grounds of exceptional circumstances. Foreign Legal Status. Granting by humanitarian reasons.

## II. NATURAL PERSONS

- Decision of Barcelona Provincial High Court [Audiencia Provincial] n° 70/2012 (Section 18) (ROJ 1866/2012). Absence of jurisdiction of the Spanish Courts to adopt provisional measures on resident minors in China.
- Decision of Barcelona Provincial High Court n° 88/2012 of 23 April (Section 18) (ROJ 3766/2012). Resolution of restitution of a minor to the State of his habitual residence before to the removal (UK), until the Courts of this country resolve on the right of custody and the right of access.

## III. FAMILY LAW

- Supreme Court Decision (Third Chamber, Section 3) of 28 February 2012 (ROJ 6769/2010). Foreign special Legal Status. Granting of family reunification of descending lines until 21 years old.
- Judgment of Huesca Provincial High Court n° 20/2012 of 31 January 2012 (Cendoj 2125370012012100036). Divorce of two foreigners (from Ghana) in Spain. Foreign judgment already passed abroad. Not appropriate double jeopardy exception. Proof of foreign law by the contents of the foreign judgment of divorce.

## IV. SUCCESSION LAW

- Supreme Court Decision (Third Chamber, Second Section) of 30 January 2012 (ROJ 591/2012). Inheritance and Donation Tax. Local law of Aragon. *Fideicomiso*. Nullity *ab initio* of Section 8 of Article 54 of the Regulation on Inheritance and Donation Tax, approved by Royal Decree 1629/1991.

- Resolution of the General Directorate of Registries and Notaries [Dirección General de los Registros y del Notariado] of 27 February 2012. Appeal against a refusal to register a deed of inheritance. Notification by a notary to heirs domiciled in the UK.

## V. BUSINESS ASSOCIATION/ CORPORATE LAW AND LEGAL PERSONS

### VI. COMPETITION LAW

#### Unfair Competition

- Order [Auto] of the Commercial Court nº 10, Madrid, 20 January 2012 (proc. 658/2011 ROJ: AJM 18/2012). Provisional measures against companies seated abroad providing on line gambling.
- Order of the Commercial Court nº 4, Barcelona, 16 January 2012 (proc. 758/2011 ROJ: AJM 26/2012). Provisional measures against companies seated abroad providing on line gambling.
- Supreme Court Decision (Civil Chamber, Section 1) of 13 April 2012 (nº 203/2012, ROJ 2012\5256). Protection scope of foreign commercial names and unfair competition.
- Order of the Madrid Provincial High Court (Section 28) of 12 March 2012 (nº 43/2012; ROJ: AAP M 6066/2012). Acceptance of the exception on judged in an unfair competition demand.

#### Restrictive Business Practices

- Supreme Court Decision (Administrative Chamber) of 8 March 2012 (proc. 1589/2009, Iustel: §347266, and proc. 3227/2009, Iustel: §347275). Forbidden practices.
- Supreme Court Decision (Civil Chamber) of 15 February 2012 (proc. 1560/2008, Iustel: §347093). Contracts (exclusive distribution of fuel) annulment on the basis of antitrust infringement. Effects. EU *de minimis* rule. Rejection.

#### Abuse of Dominant Position

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### VII. CONTRACT LAW

- Judgment of Valencia Provincial High Court of 2 May 2012 (ROJ 1911/2012). Dismissal of declinatory plea. Interpretation of Incoterms CIF. Dismissal of the appeal.
- Judgment of Alicante Provincial High Court of 17 April 2012 (ROJ 1434/2012) Inadmissible Incoterm “ex factory” for a carrier who was not involved in the contract of sale.

- Order of Madrid Provincial High Court of 15 February 2012 (ROJ 5650/2012). Declining exercise of jurisdiction. International contract for the supply of goods. Estimation of the appeal.
- Order of Pontevedra Provincial High Court of 6 February 2012 (ROJ 1178/2012). Lack of objective competence of the Court. Application of Incoterm FCA.
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- Supreme Court Decision (Chamber for Civil Matters, Section 1) of 19 June 2012 (ROJ 5354/2012). Registration efficiency of a public deed granted by a German notary.

## VIII. TORT LAW

## IX. PROPERTY LAW, INTELLECTUAL PROPERTY, SECURITIES

- Supreme Court Decision (Chamber for Civil Matters) n° 172/2012 of 3 April 2012, Resource 2037/2008 (ROJ 3942/2012). Google activity without a license or the permission of the copyright. Legality of its activity in connection with Law on Intellectual Property.
- Order of the Commercial Court n° 2, Bilbao, n°15/2012 19 January 2012 (*La Ley* 8924/2012). Public communication of artworks through the Guggenheim Museum website. Infringement of intellectual property rights. Adoption of provisional measures: cease communication.
- Resolution of the General Directorate of Registries and Notaries of 22 February 2012 (BOE [Boletín Oficial del Estado – Spanish Official Journal] n°62, 13-III-2012): Refusal to register in the Property Registry a document formalized in Venezuela.

## X. INSOLVENCY LAW

- Order of Vitoria-Gasteiz Provincial High Court of 14 March 2012 (Section 1) (ROJ 91/2012). Termination of a contract and compensation for damages. Scope of the Regulation on insolvency. Jurisdiction of Spanish Court.

## XI. INTERNATIONAL ARBITRATION

- Order of the High Court of Justice of País Vasco (Civil and Criminal Chamber, Section 1) of 19 April 2012 (ROJ 2/2012). Recognition and enforcement of foreign award. (Court of Arbitration of the International Chamber of Commerce).

- Order of Madrid Provincial High Court (Section 28) of 13 January 2012 (ROJ 1049/2012). Appeal against the order of 30 April 2010 that accepted the application for recognition and enforcement of an award rendered in London. Estimation of the appeal.
- Judgment of the High Court of Justice of Madrid (Civil and Criminal Chamber, Section 1) of 25 June 2012 (ROJ 9715/2012). Action for annulment: Estimation. Effective legal protection.
- Order of Barcelona Provincial High Court (Section 1) n° 133/2012 of 21 May 2012 (ROJ 4830/2012). Appeal against an order that declining the exercise of jurisdiction. Dismissal of the appeal.

## **XII. INTERREGIONAL CONFLICT OF LAWS**

### **Cases in which there is an interregional conflict that is resolved applying a rule of conflict of laws**

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- Judgment of Navarra Provincial High Court (Section 1) of 16 January 2012 (ROJ 7/2012). Successions, application of Navarre civil law, New Autonomous Community Act [Fuero Nuevo de Navarra] 148.
- Judgment of Cuenca Provincial High Court (Section 1) of 31 January 2012 (ROJ 39/2012). Successions, application of Catalan civil law, articles 9.8 & 16 Civil Code.

### **International cases where Spanish civil law must be applied and is necessary to determine which of them is applicable**

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## *Spanish Literature in the Fields of Public and Private International Law, European Union Law, International Relations and Related Matters, 2011–July 2012*

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This bibliographical selection was prepared by Sandra García Cano, Professor of Private International Law, Universidad de Córdoba (Spain).

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#### 4. Texts

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## V. MEDIATION AND ARBITRATION

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## VI. INTERREGIONAL LAW

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## VII. NATIONALITY AND ALIENS

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This bibliographical selection was prepared by Carlos Teijo García, Lecturer of Public International Law, Universidad de Santiago de Compostela (Spain).<sup>1</sup>

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## EUROPEAN UNION LAW AND RELATED MATTERS

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## INTERNATIONAL RELATIONS AND RELATED MATTERS

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Responsibility: Circumstances Precluding Wrongfulness”, *NYIL*, vol. XVI (1985), 249–277, pp. 276–277.

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