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Spanish Judicial Decisions in Public International Law, 2009

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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.

– *Actio Popularis [class action] in Universal Criminal Jurisdiction*-Constitutional Court Order (*auto*) No. 186/2009 of 16 June. Question of unconstitutionality No. 3609/2009.

"II. – POINTS OF LAW

1. As indicated in the findings of fact in this ruling, the Presiding Judge of Criminal Court No. 6 raised the issue of unconstitutionality with respect to the terms "Spanish" ("*española*" and "*españoles*") in Articles 19.1 of the Judiciary Act (*Ley Orgánica del Poder Judicial – LOPJ*) (Statute Book – *Repertorio Cronológico de Legislación/RCL* 1985, 1578, 2635) and 101 and 270 of the Criminal Procedure Act (*Ley de enjuiciamiento criminal – LECrim*) (LEG 1882, 16). In the opinion of the applicant, such expressions referring to nationality unjustifiably restrict the availability of a class action to foreign citizens, thereby constituting a breach of Article 125 of the Spanish Constitution (RCL 1978, 2836). The Attorney-General does not share this opinion and seeks to have the question of unconstitutionality deemed inadmissible, on the twin grounds of its failing to comply with the procedural conditions and being manifestly unfounded (Article 37.1 of the Constitutional Court Act – *Ley Orgánica del Tribunal Constitucional/LOTC* [RCL 1979, 2383]).

(…)

3. (…) Strictly speaking, the point at issue here, rather than being the class action's existence in the context of universal jurisdiction, is instead its specific form. In other words, in the view of the court referring the issue, the international treaties which shape universal jurisdiction would contain a limitation on parliamentary freedom to regulate class actions, and this, moreover, to the extent to which the offences prosecuted by universal jurisdiction amounted to an attack on the international community and its constituent subjects. If the latter are not permitted to collaborate in the repression of such types of conduct, they are being deprived of a right accorded to them by the international treaties cited in the court order referring this matter to this Court (*inter alia*: in respect of the fight against piracy, the Convention on the High Seas of 29 April 1958 [RCL 1971, 2306] and the United Nations Convention on the Law of the Sea of 10 December 1982 [RCL 1997, 345]; in connection with forgery of currency, the Convention of 20 April 1929 [RCL 1931, 127]; in the fight against terrorism, the Tokyo Convention on offences and certain other acts committed on board aircraft of 14 September 1963 [RCL 1969, 2315], the New York Convention for the Suppression of Terrorist Bombings of 15 December 1997 [RCL 2001, 1401], the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 [RCL 2002, 1325, 1501] and the International Convention on the Suppression of Acts of Nuclear Terrorism of 13 April 2005 [RCL 2007, 1177]; in the matter of organised crime, the Convention on Psychotropic Substances of 21 February 1971 [RCL 1976, 1747] and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 [RCL 1989, 45]; and, lastly, with regard to the fight against corruption, the United Nations Convention against Corruption of 31 October 2003 [RCL 2006, 1444]).

In this respect, we should stress, as we did in Constitutional Court Decision 12/2008 of 29 January (Constitutional Court Digest – *Repertorio del Tribunal Constitucional/RTC* 2008, 12) (Ground 2), that «International treaties do not constitute a canon for judging whether parliamentary statutes are in line with the Constitution (Constitutional Court Decisions: 49/1988 of 22 March [RTC 1988, 49], Ground 14; 28/1991 of 14 February [RTC 1991, 28], Ground 5; and 254/1993 of 20 July [RTC 1993, 254], Ground 5)», without prejudice to the need to highlight, as indeed we also did then, «the importance of the Constitution's having reference (Article 10.2 of the Spanish Constitution) to certain instruments of international law for the purposes of interpretation of fundamental rights. As was repeated in Constitutional Court Decision 236/2007 of 7 November (RTC 2007, 236) this decision of the framers of the Constitution expresses the recognition of our [Spain's] agreement with the scope of values and interests that these instruments protect, as well as our desire as a nation to join an international legal order which champions the defence and protection of human rights as the fundamental basis for State organisation" (Ground 3).

On this occasion, as the Attorney-General rightly points out, the imputation of nullity arises, not so much from the contradiction between the legal rules challenged and Article 125 of the Spanish Constitution, a case in which the issue would have to be held manifestly groundless because, whatever the interpretation

to be put on the term «citizens» used in the constitutional provision, this term must, at minimum, be construed as encompassing private Spanish citizens, and Parliament has attended to this minimum. The imputation of nullity on which the issue turns, centres on the impossibility of including the legal rules challenged within the concept of universal jurisdiction propounded in the court order referring the matter to this Court. However, as is likewise pointed out by the Attorney-General, even though said concept might be accepted, the intervention of those who are – albeit indirectly – affected by the offences prosecuted in the criminal trial, should not be conceived in terms of the exercise of the class action, but rather in the sense of legitimating those affected by the breach to take part in private prosecution proceedings, within the sphere of their rights and legitimate interests.

Moreover, and reference to this is also made by Attorney-General in his written submission, the international treaties cited in the court order referring the matter to this Court do not incorporate regulatory content of a nature so intense as to render it mandatory for the class action to be universally extended even to legal systems in which this concept is completely unknown. Such treaties embody an undertaking to prosecute certain types of conduct within the possibilities of national legal systems.

What the contested legal provisions lay down is not, *per se*, in contradiction to Article 125 of the Spanish Constitution, without prejudice to the fact that Parliament, in the exercise of its freedom to shape the judicial system, may open its use to other subjects. Having said this, however, we should make the point, yet again, that it is not for this Constitutional Court to establish what might be termed the «constitutional optimum» (Constitutional Court Decision 47/2005 of 3 March [RTC 2005, 47], Ground 10 *in fine*), «because otherwise the judgement of validity that this Constitutional Court is called upon to make would be transformed into a judgement of perfection, a transformation that would affect the very essence of Constitutional Law, which, rather than a closed programme, is an open text, a framework of agreement which is broad enough to house different options (Constitutional Court Decision 197/1996 of 28 November [RTC 1996, 197], Ground 8)» (in essence, ATC 404/2006 of 8 November [RTC 2007, 404 Court Order], Ground 2). Accordingly, the issue of unconstitutionality now before the Court must be held inadmissible on the grounds of being manifestly unfounded.

4

As it behoves the Court to deny leave to proceed in this issue of unconstitutionality for the reasons set forth under the above point of law, there is no call for any ruling whatsoever on the provisional stay of the action from which it stems and in which, moreover, the Attorney-General is an interested party.

THE COURT HOLDS

that in the issue of unconstitutionality, leave to proceed is denied".

– Immunity of foreign states –
Supreme Court Decision 6059/2009 of 22 June. Labour Division.

The Supreme Court dismisses the plea of legal error (No. 6/2008) filed by the United States of America against the Decision of 08-04-2008 of the Basque Country High Court of Justice, pronounced in Court Orders issued in execution of judgement of dismissal.

"On examination of the Court Orders pending before this Court by reason of the plea for recognition of error of law, filed by legal counsel, José Antonio Sanfulgencio Gutiérrez, for and on behalf of the UNITED STATES OF AMERICA against the judgement delivered by the Basque Country High Court of Justice (Chamber for Social and Labour Matters) on 8 April 2008 (AS 2008, 1685), in appeal for reversal No. 3029/07 brought against the Court Order of the Bilbao Labour Court No. 3 of 4 October 2007, issued in execution of the decision.

(…)

POINTS OF LAW

(…)

Two.

The above-mentioned decision of the Basque Country High Court responded to the appeal for reversal which was filed and claimed on two grounds, coming within Article 191 subsections a) or, alternatively, c) of the Labour Procedure Act (*Ley de Procedimiento Laboral – LPL*) (RCL 1995, 1144, 1563), that the decision appealed was not right in law, since the sums seized were non-attachable, inasmuch as they were covered by immunity by reason of being assets linked to the exercise of the sovereignty of the United States of America in our country [Spain]. Accordingly, this was held to amount to a violation of the appellant's right to effective judicial protection recognised under Article 24.1 of the Spanish Constitution (RCL 1978, 2836) and Articles 605, 606 and 609 of the Civil Procedure Act (*Ley de Enjuiciamiento Civil* – LEC), in conjunction with Article 22.3 of the 1961 Vienna Convention on Diplomatic Relations, Article 31 of the 1963 Vienna Convention on Consular Relations (RCL 1970, 395) and Article 3 of the Royal Decree (*Real Decreto*) 3485/2000 of 29 December (RCL 2000, 3040), governing dispensations and exemptions in the case of bodies enjoying diplomatic, consular or international status.

In its legal reasoning, the Court, in brief, held firstly that there was no violation of the appellant's right to effective judicial protection, echoing the reasons given in this regard in the ATC 112/2002 of 1 July 2002 (RTC 2002, 112 Court Order) issued by the Constitutional Court in appeal 4759/2001, in which leave to proceed was denied in an appeal for legal protection in a very similar case of attachment of VAT refunds, due to the manifest lack of constitutional content of the subject matter of the legal action brought by the party that filed

the appeal for legal protection in that case, i.e., once again the United States of America.

With regard to the non-attachability of assets, the decision states that, insofar as the disputed sums are concerned, even where Article 609 and like provisions of the Civil Procedure Act contain instances of non-attachable goods, deemed to extend to any declared to be so by some statutory provision or any treaty ratified by Spain, with attachment of any such non-attachable asset being null and void (Article 609 LEC), in the case of execution of goods and assets of foreign States, then in line with the doctrine of the Constitutional Court (Constitutional Court Decisions 107/1992 (RTC 1992, 107), 292/1994 (RTC 1994, 292) and 18/1997 (RTC 1997, 18)) it goes on to make the following points:

1) while the existence of immunity from execution in respect of certain State-owned goods and assets envisaged under laws or treaties is compatible with this fundamental right, this is not so in the case of any undue extension or widening of such rules; 2) the goods and assets of diplomatic and consular missions of States are absolutely immune from execution, since they are protected by the Vienna Conventions cited in the appeal, with this guarantee extending to the premises of the mission, their furnishings and other property thereon and the means of transport of the mission, with current bank accounts assigned to such missions' functioning being deemed, in accordance with international practice, to be included among these assets, even though they might serve for operations not directly linked to acts of sovereignty (in view of the impossibility of demarcating their balances and examining their movements); 3) with respect to the remainder of a State's goods and assets, while those pertaining to a State's right of sovereignty are not attachable, those linked to its management activities are so; 4) execution-related activity aimed at achieving compliance with judgements should, if necessary, involve the collaboration of the Ministries of Inland Revenue and Foreign Affairs, to the extent that the latter attend to the necessary formalities via diplomatic channels.

From the standpoint of this constitutional doctrine, the decision now challenged in the plea of legal error arrives at the conclusion that the sums attached by way of VAT refunds pending payment to the party served with the writ of execution were not immune, in the first place because in no case had it been proved that the VAT to be refunded stemmed exclusively, "from the exemptions envisaged under Article 3 of the Royal Decree 3485/2000, unless the appeal were to seek to incorporate this point, of an unequivocally factual nature, by the proper procedure".

Furthermore, the judgement states, literally, that the attached assets have their origin in "a tax privilege, which is not comparable to that of goods protected by absolute immunity from execution under the Vienna Conventions, the rationale for which arises from the fact that these are assets owned by the diplomatic or consular missions of the foreign State and pertain to the smooth running thereof. This lack of comparability does not merely highlight the different nature of some assets versus others (i.e., in one case, the right of ownership of

assets which the state itself has linked to the exercise of its sovereignty; in the other, the right to a credit enjoyed thanks to recognition of the state in which sovereignty is exercised, and which the latter, moreover, makes conditional on criteria of reciprocity, as shown by Article 3 of the above-mentioned Royal Decree). Entering into play here is the constitutional criterion outlined above, i.e., the non-extendable nature of immunity from execution when it comes to construing or applying the rules relating thereto, precisely so as not to prejudice the right to effective judicial protection of parties that have obtained a favourable judgement which they then find themselves unable to enforce against the party required to comply with it".

As can be clearly seen, the decision embarks upon a detailed, reasoned legal analysis of the nature of the assets attached, and concludes by affirming that there is no immunity in respect thereof and that the judgement handed down by the Lower Court is right and proper in law.

(…)

Five

(…)

The applicant contends that, in the above-mentioned respect, the Basque Country High Court was clearly and manifestly erroneous in its interpretation of the provisions of Royal Decree 3485/2000 of 29 December, governing dispensations and exemptions in the case of bodies enjoying diplomatic, consular or international status, asserting that Article 3 of said Decree, read in conjunction with Article 2 subsections 1 a), b), c) and d), contains the legal support that would act as a bar [to said interpretation], pursuant to Article 609 of the Civil Procedure Act (RCL 2000, 34, 962 and RCL 2001, 1892), and firmly based on Article 22.3 of the 1961 Vienna Convention, which lays down that, "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

Far from this, what the judgement challenged did in fact do was to make a perfectly possible, reasoned and coherent interpretation of the implication of such provisions with respect to some very singular assets, i.e., refunds of value added tax, which are in no way directly covered by either the Vienna Convention on Diplomatic Relations of 18 April 1961 or the Vienna Convention on Consular Relations of 24 April 1963, since the essential matter for the Basque Country High Court, and for the Lower Court, was that such non-attachability did not necessarily flow from these provisions. In addition, the legal reasoning of the judgement extends to the lack of evidence shown by the Appellant State to prove that these refunds were linked to activities which amounted to the exercise of *jus imperii*. Consequently, they have the status of tax refunds or tax benefits linked to [consular affairs] management activities.

(…)

Six

Finally, from a constitutional stance, the decision on the appeal for reversal implemented a carefully considered application of the right of the judgement creditor's employees to effective judicial protection -Article 24.1 of the Spanish Constitution (RCL 1978, 2836) – which was in some degree violated by the now applicant, as can be seen from Constitutional Court Decisions 107/1992 (RTC 1992, 107), 292/1994 (RTC 1994, 292) and 18/1997 (RTC 1997, 18), according to which, "Whatever its nature, a foreign state's status of immunity from execution does not run counter to the right to effective judicial protection enshrined in Article 24.1 of the Spanish Constitution, but…any undue extension or widening by the ordinary courts of the scope to be attributed to foreign states' immunity from execution under the current international legal system would entail a violation of the judgement creditor's right to effective judicial protection, since it amounts to placing a restriction, without reason, on the possibilities of the party subject to the court's jurisdiction of achieving the judgement's effectiveness, unless some legal provision were to lay down an exception to said effectiveness".

Accordingly, the decision of the Basque Country High Court embarks upon a detailed analysis of the nature of the goods attached and, relying upon the items of evidence produced to it during the trial, to which the judgement debtor neither contributed anything nor sought to introduce any proven fact relating thereto, goes on to hold that these assets were not subject to, nor was there any evidence to show that they might be subject to or targeted at activities linked to the *jus imperii*, which would have justified their immunity and would also have justified the exception to the constitutional right to obtain due enforcement of a final judgement, activity or analysis which, as is indicated in the constitutional case-law cited, corresponds to the executing court.

Moreover, ATC 112/2002 (RTC 2002, 112 Court Order), which cites the ruling now on appeal and to which reference was made above, asserted categorically that, for the State claiming legal protection there was no violation of the fundamental right of effective judicial protection under Article 24.1 of the Spanish Constitution, in a practically identical case in which the United States of America lodged an appeal for legal protection against a similar decision on the subject of attachment of VAT.

The Court Order cited argues that, "Article 21.2 of the LOPJ (Organic Act on the Judiciary) (RCL 1985, 1578, 2635) and the tenets of Public International Law to which said provision refers, rather than imposing any rule of absolute immunity from execution in the case of foreign States, instead enables the relative nature of such immunity to be asserted, a conclusion reinforced by the very need for effectiveness of the rights contained in Article 24 of the Spanish Constitution and by the rationale for immunity, which is not that of granting States indiscriminate protection but rather that of safeguarding the quality and independence thereof. Hence, any delimitation of the scope of such immunity should start from the premise that, in general, where a foreign State's sovereignty is not involved in a given activity or the earmarking of certain assets, neither

international nor, by extension, internal legal systems would countenance the non-execution of a judgement; it thus follows that in such cases a decision of non-execution would constitute a violation of Article 24.1 of the Spanish Constitution" (in essence, Constitutional Court Decisions 107/1992, 1 July, Ground 4; 292/1994, 27 October (RTC 1994, 292), Ground 3; 18/1997 of 10 February (RTC 1997, 18), Ground 6; and 176/2001 of 17 September (RTC 2001, 176), Ground 3)".

Seven

Hence, it is clear from the line of reasoning followed thus far that the plea of error of law lodged by the United States of America against the decision handed down by the Basque Country High Court of Justice (Chamber for Social and Labour Matters) on 8 April 2008 must be dismissed, with award of costs and expenses as provided for by Article 293.1.e) of the Judiciary Act, and forfeit of the deposit lodged as a requirement for filing the action."

– *Criminal Jurisdiction: definition of terrorism* –
National High Court Decision 31/2009 of 30 April. Criminal Division.

"POINTS OF LAW:

LEGAL DEFINITION OF THE FACTS.

One. MEMBERSHIP OF OR PARTICIPATION IN A TERRORIST ORGANISATION.

1. Firstly, the facts declared to have been proved should, as indicated by the Department of Public Prosecutions, be deemed to constitute an offence of membership of or participation in a terrorist organisation under Article 515 subsection 2 of the Penal Code, according to the wording given to this provision by Organic Law 11/2003, which came into force on 1.10.2003 and refers expressly to armed gangs and terrorist organisations or groups, read in conjunction with Article 516 subsections 1 and 2 of said Penal Code, referring, respectively, to those fostering or leading terrorist organisations, and to any person who leads any group thereof and, secondly, to the mere participants in any such organisation.

For a proper understanding of the concept of an armed gang or terrorist organisation established by this criminal offence, it should be seen against what is laid down by Title XXII, Chapter V, Section Two, Articles 571 and successive provisions with respect to crimes of terrorism, and specifically when it comes to attempting to define the concept of terrorism, a terrorist act or, in general, a terrorist. Clearly, the definition established by the above-mentioned articles of the Penal Code is strongly influenced by Spanish terrorist phenomenology in the latter part of the last century, and particularly caters to a concept of purely local or internal terrorism, of a merely political nature or nationalist hue, singularly affecting the peaceful co-existence of Spanish citizens and the

distinguishing marks of our State, crystallised in the constitutional text in force, the definer of a domestic constitutional system. Yet this is without genuinely contemplating the phenomenon of international terrorism, which, despite having existed in the past, has nevertheless assumed its entire importance and need for general attention in the present century. Case-law has endeavoured to formulate a constructive interpretation on the basis of the definition or description contained in those provisions within which these types of conduct would come, frequently referring, for the purpose thereof, to the definition of terrorism or terrorist association contained in certain international treaties, specifically Article 2 of the New York Convention for the Suppression of Terrorist Bombings, adopted by the United Nations General Assembly on 17-12-1997, Article 2 of the Framework Decision of 13-6-02, or also Article 2.1.b) of the International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, and the Common Position 2001/931 (Common Foreign and Security Policy (CFSP) of the Council of the European Union of 27-12-01), linking the jihadist position, in the case of, say, terrorism of a radical Islamic bent (as one of the most common manifestations of international terrorism), to the concept of subversion of the constitutional order or serious breach of the peace, on considering, in essence, that such movements are ultimately seeking to bring about the universal spread of Islam world-wide and, in the process, a change in the world order.

(…)

strictly speaking, no manner of appeal to the content matter of international treaties and Spain's international commitments can serve to fill the gaps in our Penal Code's incomplete regulation of the concept of terrorism. The definitions contained in such conventions have not been immediately incorporated into our legal system. On the contrary, most of the statutory provisions contained in these international instruments are not self-executing. Instead, they generally place a duty on States to punish certain types of conduct by means of reasonable prison sentences, though without this in reality enabling or serving as a justification or ground for a broad interpretation being directly made of the concept or definition of terrorism, unless this might prove seriously detrimental to due respect for the principle of legality in criminal law, which is to be especially urged in the case of so-called international terrorism. In this direction, it is a matter of urgency that our Parliament make provision as soon as possible for the offences defined in Council Framework Decision 2008/919/JHA of 28 November 2008, specifically, those of provocation to commit terrorist offences, recruitment for terrorism and training for terrorism.

It is, without the shadow of a doubt, Parliament to which updating the concept of terrorism truly corresponds, thus complying, moreover, with international commitments in this sphere and with its own domestic needs to have an updated, all-embracing, and yet also strict and accurate, definition of terrorism, thereby avoiding the dangers of the concept being manipulated, or case-law being forced to assume the defining role, something that is clearly not within its remit. It is

only logical that the internationalisation of the judicial fight against terrorism requires that the definition contained in current penal codes come closer to that which enjoys greatest international consensus, and does not deviate significantly therefrom in any respect, whether by too little or too much, so as to ensure that the same or similar types of conduct are clearly punished in all countries.

2. At all events, and aside from this *obiter dicta*, the facts which the Court has deemed to be proved in respect of the applicant parties, Juan Manuel, Ignacio and Gervasio, (person found guilty on these counts in Decision 503/2008 of 17.07.2008 of the Chamber II of the Court), place them clearly at the epicentre of a more or less stable group, with extraordinarily radical positions vis-à-vis the Islamic religion that they profess, an aspect which, unless accompanied by some type of act or external expression, would in itself -as was recently laid down by Chamber Two of the Supreme Court in Decision No. 618/2008 of 07.10.2008, with Mr. Martín Pallín presiding – give rise to no criminal liability of any type whatsoever.

(…)

2. (…) In brief, proof has been duly furnished of the existence of a terrorist organisation, the main goal of which was to lend support, not merely of a moral nature but of all manner and type, to armed actions undertaken by participants in radical Islamic insurgency, both inside and outside Iraq. In addition, they sought to convince other persons to join the insurgency, as jihadist soldiers or mujahidin willing to fight to the death in defence of Islam and Moslems, though the activity of which concrete evidence was furnished in this trial was that of harbouring and giving succour and aid of all manner to those participating in the Madrid terrorist attacks, in order to help them escape. In this organisation, we find the features required by case-law (Supreme Court Decision 1127/2002 of 17 June), as well as those of an objective nature, namely, a series of persons banded together to undertake a given activity, a more or less complex organisation in keeping with the envisaged activity (in this case, that of harbouring, facilitating departure from the country, offering financial aid, forged passports, etc.), and a consistency and permanence of said organisation over time. We are thus confronted by a permanent partnership agreement (let it just be recalled here that, not only were the fugitives of 11 March harboured, but attempts were also made to indoctrinate, i.e., radicalise, Moslems, with the aim of recruiting them to join the ranks of other terrorist organisations). Insofar as the features of a subjective nature were concerned: the criminal activity was intended and sought by both the association and its members, and specifically by the two found guilty on this count, namely, Juan Manuel and Ignacio, plus Gervasio already found guilty on another count, as well as the collaborator, Eloy; and, in addition, there is a strong presumption that said criminal activity was likewise shared by the fugitives. Lastly, the offences which constituted their criminal activity, at least those proven in this trial, i.e., the harbouring of the fugitives of 11 March, were actually committed. In this respect, it might be as well to recall the position outlined by Supreme Court Decision of 17 July 2008 (The

Madrid Terrorist Attacks – *Atentados de Madrid*), "Consequently, in order to claim that an armed gang, terrorist group or organisation exists, it will not suffice to establish that the suspects or applicant parties maintain and, as amongst themselves, share certain ideas about religion, a political system or a way of understanding life.

It is essential to prove that those who advocate these ideas, making them their goals, have resolved to impose them upon the rest by violent means, aimed, as mentioned above, at intimidating the public authorities and intimidating and terrorising the population. In other words, it is essential to show that, from the mere expression and defence of certain ideas, they have in some form, even with the effective decision to carry them out, begun their transition to action, with the aim of imposing their radical ideas other than by peaceful means, individually and as a group.

This may be evinced in many ways, though for criminal purposes there will always be a need for some verifiable and significant fact which at least goes to show: the commencement of actions targeted at procuring the ideal means for the effective achievement of said goal, whether by themselves or by third parties; or alternatively that they have proceeded in some way, through actions of enrolment, indoctrination or support, provision of effects, ideological support or in any other of the wide variety of ways in which such type of co-operation may be manifested, to collaborate with those who are already effectively engaging in such activities, are preparing to do so or have already done so."

In much the same vein, Supreme Court Decision of 16 February 2007 establishes that, "Article 516 of the Penal Code punishes members of terrorist organisations and Article 576 of the same enactment does likewise with regard to the conduct of collaboration with the activities or goals of an armed gang, terrorist organisation or group. The difference, therefore, between the two provisions can be no other than the degree of integration in the terrorist organisation, i.e., permanence, relatively shorter or longer in time, must determine integration, and occasional or possible collaboration, the offence punishable under Article 576 of the Penal Code, which specifically refers to a "any act of collaboration". Hence, it is of no importance that the acts defined in Article 576 subsection two as collaboration with an armed gang or terrorist organisation (information on or surveillance of persons, concealment or transport of persons, construction, refurbishing, conveyance or use of lodgings or deposits, and in general, any other form equivalent to collaboration, aid or mediation) be performed (properly speaking, executed) by organisation activists who are members thereof in order to vary the type of offence to be applied in the specific case on trial. Instead, legal-criminal stress should be laid on membership of such an organisation – structured, hierarchised and motivated by criminal ends – rather than on the acts of collaboration *per se*, since in the latter, any act is constitutive of an offence, but the non-existence of a link with that organisation is required as a negative facet because, were such a tie of membership to exist, then Article 516 of the Penal Code would have to be applied by virtue of the so-called *principio de alternatividad* [Translator's note: akin to the principle of bringing alternative charges] (Article 8.4 of the Penal Code).

It can be said that the status of participating in or belonging to an armed gang amounts to a stronger and deeper-rooted "communion" with the ends and activity sought by the gang than does mere collaboration, which puts aiding it at a lower and peripheral level, with the need for the dividing line between membership and collaboration to be pinpointed in each case, with regard being had to the specific circumstances."

Indeed, such participation has, as mentioned above, been proved, along with Eloy's collaboration, only in respect of Juan Manuel and Ignacio, and not in respect of the others whose conviction is sought, in view of the fact that no proof has been furnished of this intense, deep-rooted communion with the ends and activity of the terrorist group, or of any type of peripheral collaboration.

(…)

The Court delivers the following

JUDGEMENT

IT FINDS both Ignacio (Segismundo) and Juan Manuel guilty on the count of criminal membership of a terrorist organisation in the capacity of MEMBERS, AND HEREBY SENTENCES THEM to respective prison terms of 9 years and specifically bars them from holding public employment or office for a period of 10 years.

IT FINDS Eloy guilty on the count of criminal collaboration with a terrorist organisation, AND HEREBY SENTENCES HIM to a prison term of 5 years, specifically bars him from holding public employment or office for the period of his sentence and orders him to pay a fine of €5 per day for eighteen months. (…)"

V. THE INDIVIDUAL IN INTERNATIONAL LAW

– *The right to freedom of peaceful assembly* –
Constitutional Court Decision 37/2009 of 9 February.

Appeal for legal protection against the Decision of the Catalonian High Court of Justice (Chamber for Administrative Proceedings, Section Two) of 25-10-2006, dismissing the special appeal for protection of the right of assembly brought against the Ruling of the Directorate-General for Citizen Security of the Catalonian Regional Authority dated 19-10-2006, due to the prohibition of a recreational event in favour of immigrants' right to vote. Violation of the fundamental right of assembly. Protection granted.

"POINTS OF LAW

(…)

2. (…) Secondly, the violation of the right of assembly and demonstration is attributed to the Decision. It is only proper therefore that the consolidated doctrine of this Court with respect to said right should be restated (Article 21 Spanish Constitution).

3

Recently, Constitutional Court Decision 170/2008 of 15 December (RTC 2008, 170), Ground 3, summarised the doctrine as to the content and limits of the right of assembly (Article 21 Spanish Constitution [RCL 1978, 2836]), which is now transcribed below:

«As this Court has repeatedly stated, the right of assembly, "is a collective manifestation of freedom of expression exercised by means of a transitory association, with said right being conceived by scientific doctrine as an individual right in terms of its holders and a collective right in terms of its exercise, which operates as an instrumental technique placed at the service of the exchange or expounding of ideas, defence of interests or airing of problems or claims, thus constituting a conduit for the democratic participatory principle, the configuring elements of which, according to prevailing opinion, are: subjective, i.e., a grouping of persons; temporal, i.e., the transitory duration thereof; goal-oriented, i.e., the lawfulness of the ultimate aim; and real or objective, i.e., the place where it is held" (Constitutional Court Decision 85/1988 of 28 April [RTC 1988, 85], Ground 2; doctrine reiterated in Constitutional Court Decisions: 66/1995 of 8 May [RTC 1995, 66], Ground 3; 196/2002 of 28 October [RTC 2002, 196], Ground 4; and 301/2006, 23 October [RTC 2006, 301], Ground 2).

Stress has also been laid on, "the fundamental importance that this right – the conduit for the democratic participatory principle – possesses, both in its subjective and in its objective aspects, in [the context of] a social, democratic rule of law such as that proclaimed in the Constitution" (Constitutional Court Decision 301/2006 of 23 October, Ground 2; in much the same vein, Constitutional Court Decision 236/2007 of 7 November [RTC 2007, 236], Ground 6). Indeed, to many social groups, "this right is, in practice, one of the few available means whereby they can express their ideas and claims publicly" (in essence, Constitutional Court Decision 301/2006 of 23 October, Ground 2). In this respect, we have said, reproducing the case-law of the European Court of Human Rights (ECHR), that, "Protection of opinions and the freedom to express them is one of the objectives of the freedom of assembly" (ECHR Decision in the Stankov case of 2 October 2001 [ECHR 2001, 562], § 85), and also that, "Freedom of expression constitutes one of the principal means that enables effective enjoyment of the right to freedom of assembly and association to be ensured" (ECHR Decision in the Rekvényi case of 20 May 1999 [ECHR 1999, 23], § 58) (Constitutional Court Decision 195/2003 of 27 October [RTC 2003, 195], Ground 3).

Insofar as curtailment of freedom of assembly is concerned, this Constitutional Court has sounded a reminder that said right, "is neither an absolute nor an unlimited right, but instead, like the remaining fundamental rights, has limits (Constitutional Court Decisions: 2/1982 of 29 January [RTC 1982, 2], Ground 5; 36/1982 of 16 June [RTC 1982, 36]; 59/1990 of 29 March [RTC 1990, 59], Grounds 5 and 7; 66/1995 of 8 May [RTC 1995, 66], Ground 3; and ATC 103/1982 of 3 March [RTC 1982, 103 Court Order], Ground 1), among which are, not only those specifically envisaged under Article 21.2 of the Spanish Constitution – breach of the peace with danger to persons and chattels – but also those imposed by the need to prevent any abusive or excessive exercise of this right from clashing with other constitutional values" (Ground 2), which is also to be inferred from Article 10.1 of the Spanish Constitution (Constitutional Court Decision 195/2003 of 27 October [RTC 2003, 195], Ground 4). At Article 11.2, the European Convention on Human Rights (the Convention) does itself envisage "the possibility of adopting restrictive measures 'such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'…" and, interpreting this provision, "the European Court of Human Rights held that the governmental order to evacuate a church in the case of a peaceful gathering was proportionate and did not in itself entail any disturbance of public order or prevent churchgoers from attending services, in which, nevertheless, the hunger-strikers' health had deteriorated and sanitary conditions become wholly inadequate (ECHR Decision in the Cisse case of 9 April 2002 [JUR 2002, 132779], § 51)" (Constitutional Court Decision 195/2003 of 27 October [RTC 2003, 195], Ground 4).

It thus follows that, "in cases in which there are 'well-founded reasons' that might lead one to think that the above-mentioned limits are not going to be respected, the competent authority may require the meeting to be held with due respect for such constitutional limits, or, if there is no way whatsoever of ensuring that the exercise of this right will respect said limits, even prohibit it. However, in order for the public authorities to be able to bring any weight to bear on the constitutionally guaranteed right of assembly, whether by restricting it, changing the circumstances of its exercise, or even prohibiting it, it is essential that, as has just been pointed out, there be well-founded reasons. This in turn implies the requirement that the relevant ruling or order be well-founded (Constitutional Court Decision 36/1982 of 16 June [RTC 1982, 36]) and outline the reasons which have led the governing authority to conclude that the exercise of the fundamental right of assembly, as envisaged by its organiser or organisers, will result in a breach of the peace prohibited under Article 21.2 Spanish Constitution, or alternatively, disproportionate disturbance to other goods or rights protected by our Constitution" (Constitutional Court Decision 195/2003 of 27 October, Ground 4).

Moreover, it does not suffice for there to be doubts as to whether the right of assembly might give rise to negative effects, and the principle or criterion

of favouring the right of assembly should be uppermost in the event of any action seeking to limit same (*favor libertatis*: Constitutional Court Decisions: 66/1995 of 8 April [RTC 1995, 66], Ground 3; 42/2000 of 14 February [RTC 2000, 42], Ground 2; 195/2003 of 27 October [RTC 2003, 195], Ground 7; 90/2006 of 27 March [RTC 2006, 90], Ground 2; 163/2006 of 22 May [RTC 2006, 163], Ground 2; and 301/2006 of 23 October [RTC 2006, 301], Ground 2). This is also how the European Court of Human Rights has construed the point, "which has defended a strict interpretation of the limits to the right of assembly set under Article 11.2 (RCL 1999, 1190, 1572), so that only convincing and compelling reasons can justify restrictions on freedom of association (ECHR Decision in the Sidiropoulos case of 10 July 1998 [ECHR 1998, 82], § 40)" (Constitutional Court Decision 236/2007 of 7 November [RTC 2007, 236], Ground 6)».

4

Accordingly, «The application of said doctrine and, specifically, the principle or criterion of favouring the right of assembly, as well as the circumstance that, as this Court has repeatedly held, the mere suspicion or simple possibility that the disturbance of other constitutionally protected goods or rights may arise cannot suffice to justify the modulation or prohibition of said right (in essence, Constitutional Court Decision 163/2006 of 22 May [RTC 2006, 163], Ground 2)» (Constitutional Court Decision 170/2008 [RTC 2008, 170], Ground 4), together lead to protection being accorded to the appellant trade union by reason of breach of Article 21.1 of the Spanish Constitution (RCL 1978, 2836).

Indeed, as was underscored in Constitutional Court Decision 170/2008, Ground 4:

«we have stated that "strictly speaking, in the sphere of electoral processes, only in very extreme cases would it be proper to allow for the possibility that a message might have sufficient ability to coerce or swing the will of the electorate, in view of the private nature of the decision about voting and the legal means available to guarantee freedom to vote" (Constitutional Court Decision 136/1999, 20 July [RTC 1999, 136], Ground 16). If this could be said of demonstrations held by the very political formations taking part in the electoral contest, the more truly said it could then be said of a group of persons who have come together for the purpose of exchanging or expounding ideas, defending interests or airing problems or claims, rather than with the intention of winning votes, an aim which, along with the identification of subjects who can carry out the electoral campaign, defines same (Article 50.2 of the General Electoral Act/*Ley Orgánica del régimen electoral general*: *LOREG* [RCL 1985, 1463 and RCL 1986, 192]).

There can be no doubt that opinions arising from any such exchange, exposition, defence or claim may come to influence the citizen, yet this situation can only be seen as, "a mere suspicion or a simple possibility". Hence, only where well-founded reasons are furnished, an expression used by Article 21.2

of the Spanish Constitution, as to the electoral nature of the demonstration, i.e., where the aim is vote-winning (Article 50.2 LOREG) and it has not been called by the parties, federations, coalitions or groupings, i.e., the only legal persons that may conduct an electoral campaign together with their candidates (Article 50.3 LOREG), could such a demonstration be disallowed on these grounds. Otherwise, as the Public Prosecutor points out, one could arrive at the absurd situation where all demonstrations were absolutely prohibited during electoral campaigns.

It should be borne in mind here that the principle of political pluralism is strongly interconnected with the right to freedom of expression, of which, as has been noted above, the right of assembly is a collective manifestation, with the latter, like said freedom, being a right that contributes to the formation and existence "of a political institution, namely, public opinion, indissolubly linked to political pluralism" (Constitutional Court Decision 12/1982, 31 March [RTC 1982, 12], Ground 3), so that it becomes a necessary pre-requisite for the exercise of other rights inherent in the functioning of a democratic system, an example of which is precisely citizens' right of political participation. As stated by Constitutional Court Decision 101/2003 of 2 June (RTC 2003, 101), "without free public communication, other rights enshrined in the Constitution would be vacated of any real content and the representative institutions reduced to vacuous forms, completely distorting the principle of democratic legitimacy enunciated in Article 1.2 of the Constitution, which is the basis of our whole legal-political system (in essence Constitutional Court Decision 6/1981, 16 March [RTC 1981, 6]; and in much the same vein Constitutional Court Decisions 20/1990 of 15 February [RTC 1990, 20], and 336/1993 of 15 November [RTC 1993, 336])" (Constitutional Court Decision 9/2007 of 15 January [RTC 2007, 9], Ground 4)».

Said Decision thus goes on to say, «the exercise of the right of assembly must be favoured, albeit to the detriment of other rights, particularly those of political participation, not only because it is distinguished by being an essential right in the forming of public opinion, but also because its prior exercise is essential to shape said free and sound opinion, the indispensable basis for the exercise of said rights. Accordingly, the exercise of the right of assembly, of which the right of demonstration is one facet, must prevail, save where sufficient evidence is furnished by the Government Authorities and, as the case may be, by the courts, to show that the main aim of the gathering is the winning of votes» (Constitutional Court Decision 170/2008 [RTC 2008, 170], Ground 4).

5

In view of the above, it cannot be countenanced that the demonstration convoked by *SOS Racisme de Catalonia* under the slogan, «For immigrants' right to vote», be prohibited on the grounds that same may have electoral content («*per considerar que la mateixa pot tenir contigut electoral*»).

(…)

6

Accordingly, the appeal for legal protection on the grounds of violation of the appellant's right of assembly (Article 21 Spanish Constitution [RCL 1978, 2836]) must be upheld and the Ruling of the Directorate-General for Citizen Security of the Catalonian Regional Authority, which was issued on the basis of the Resolution of the Barcelona Provincial Electoral Board, as well as the Decision of the Catalonian High Court of Justice (Chamber for Administrative Proceedings, Section Two) must be declared null and void: in the case of the governmental ruling, for directly violating the above-mentioned fundamental right; and in the case of the court decision, for failing to remedy the harm done on the administrative side (…)".

– The right to a two-tier system [double degree of jurisdiction] in criminal procedures –

Constitutional Court Decision 120/2009 21 May.

"II. POINTS OF LAW.

1. On more than one occasion, this Constitutional Court has pronounced on the guarantees that must be in place for any person found not guilty at first instance to be then found guilty by a court of appeal. In the case now before the Court the capital question submitted to the judgement of this Court consists of clarifying whether a court of appeal may – by virtue of an appraisal of evidence of a personal nature, following the screening of a videotape of the oral proceedings, which is at variance with that performed by the Lower Court – uphold an ordinary appeal filed on the grounds of error in weighing the evidence, and thereby establish a new recital of proven facts that leads to the conviction of someone who was initially found not guilty.

Whereas Section One of the Madrid Provincial High Court holds this to be so in the Decision now brought on appeal for legal protection, the applicant, in contrast, states that his acquittal has been transformed into a conviction without respecting the principles of immediacy and adversarial trial because, according to Constitutional Court Decision 167/2002 of 18 September (RTC 2002, 167) and those of the European Court of Human Rights (ECHR) cited by him, the court of appeal, should, prior to deciding the appeal, have, as requested, held an oral hearing in order to hear him and examine such evidence as, by virtue of its personal nature, required immediacy and adversarial argument. On failing to do so, he contends, his rights to effective judicial protection (Article 24.1 of the Spanish Constitution [RCL 1978, 2836]), to a fair trial (Article 24.2 of the Spanish Constitution) and, due to the lack of supporting evidence, to the presumption of innocence (Article 24.2 of the Spanish Constitution) have all been violated.

(…)

2. (…) we have specified that, «in view of the literal tenor of the above-mentioned Article 14.5 of the International Covenant on Civil and Political Rights (ICCPR), and even in accordance with the case-law of the European Court of Human Rights with respect to Articles 6.1 of the Convention (RCL 1999, 1190, 1572) and 2 of Protocol No. 7 of said Convention (Decisions of the ECHR of 13 February 2001 [ECHR 2001, 88], Krombach v. France, and of 25 July 2002 [ECHR 2002, 46], Papon v. France), said provision must be construed, not as the right to a second instance with repetition of the trial in its entirety but rather as the right to a higher court monitoring the rigour of the trial held at first instance, and reviewing the correct application of the rules which have enabled a verdict of guilty and the imposition of the sentence in the specific case» (Constitutional Court Decisions 70/2002 of 3 April [RTC 2002, 70], Ground 7; 105/2003 of 2 June [RTC 2003, 105], Ground 2; and 136/2006 of 8 May [RTC 2006, 136], Ground 3). Parliament's freedom to define which this higher court should be and the way in which the guilty verdict and sentence should be submitted to it, is expressly recognised by Article 14.5 of the ICCPR, which has made provision for the fact that, within our legal system, parties found guilty may be afforded access to a higher tribunal not only by ordinary but also by supreme court appeals (Constitutional Court Decisions 37/1988 of 3 March [RTC 1988, 37], Ground 5; and 123/2005 of 12 May [RTC 2005, 123], Ground 6).

c) in contrast, there is no right as such under the Constitution to have recourse to an appeal against a verdict of acquittal, so that the creation and regulation thereof come within the ambit of parliamentary freedom (in this regard see, in essence, Constitutional Court Decisions: 251/2000 of 30 October [RTC 2000, 251], Ground 3; 71/2002 of 8 April [RTC 2002, 71], Ground 3; and 270/2005 of 24 October [RTC 2005, 270], Ground 3). This is without prejudice to what this Court has also repeatedly stated, namely, that once Parliament has envisaged a specific appeal against certain judicial decisions, the right of recourse to said appeal becomes part of the fundamental right to effective judicial protection (Article 24.1 Spanish Constitution), becoming incorporated into or merging with it, something that is coherent with this fundamental right's nature as a right definable by statute (Constitutional Court Decisions: 115/2002 of 20 May [RTC 2002, 115], Ground 5; and 270/2005 of 24 October [RTC 2005, 270], Ground 3). Strictly speaking, this aspect of Article 24.1 of the Spanish Constitution, rather than constituting a right on the part of citizens to be provided with an appeal against any judicial decision that may affect them, instead constitutes a right not to be deprived of the appeals envisaged under the legal system (Constitutional Court Decision 69/2005 of 4 April [RTC 2005, 69], Ground 2).

Hence, under our procedural rules verdicts of acquittal are susceptible to challenge by means of ordinary and supreme court appeals, depending on the case; and, concentrating on ordinary appeals against sentences passed by criminal courts, it should be stressed that Article 790.2 of the LECrim currently in force defines the following three grounds of challenge, which are common to verdicts of guilty and not guilty: breach of procedural rules and guarantees; error in weighing the evidence; and infringement of statutory requirements.

d) It should be pointed out that the ground on which this appeal for legal protection is predicated is the challenge of a verdict of not guilty by means of an ordinary appeal pleading error in the weighing of evidence, and in particular the weighing of evidence of a personal nature examined in the oral proceedings.

(…)

From the conjunction of these two facets, ECHR case-law has derived the requirement – which it has linked to Article 6.1 of the European Convention on Human Rights – that where an appellate court is called upon to try an issue in its aspects of fact and law, and examine the matter of the applicant's guilt or innocence as a whole, it may not, for reasons of a fair trial, decide such matters without assessing the testimony given in person by the applicant, maintaining that he has not committed the act deemed to constitute a criminal offence, a doctrine which has been accepted by this Court, pursuant to Article 10.2 of the Spanish Constitution, based on Constitutional Court Decision 167/2002 of 18 September, linking it to the right to a fair trial (Article 24.2 Spanish Constitution).

3

It is therefore necessary to recall the doctrine that stems from the above-mentioned Constitutional Court Decision 167/2002 of 18 September (RTC 2002, 167) (Grounds 10 and 11), based, as stated, on ECHR case-law, which, in connection with actions brought for infringement of Article 6.1 of the Convention (RCL 1999, 1190, 1572) as a consequence of an appeal in a criminal case having been decided without a public hearing or trial having been held at this stage, lays down that, as a general rule, criminal proceedings are a whole, and that the protection afforded by the above-mentioned provision does not end with the decision at first instance. The State holding a court of appeal is thus under a duty to ensure that the party being tried is, in this regard, assured of the fundamental guarantees of Article 6.1 of the Convention. More specifically, with respect to the matter now before us, the ECHR has held that the notion of a "fair trial" implies that a person charged with a criminal offence should, as a general principle, be entitled to be present at the first instance trial. The manner of application of Article 6 to proceedings before courts of appeal depends on the special features of the proceedings involved, so that account must be taken of the entirety of the proceedings in the domestic legal order, the role of the appellate court therein and the way in which the applicant's interests were actually presented and protected before the Court, in the light of the nature of the issues to be decided by it (Decisions of the ECHR of: 26 May 1988 [ECHR 1988, 10], Ekbatani v. Sweden, §§ 24 and 27; 29 October 1991 [ECHR 1991, 44], Helmers v. Sweden, §§ 31 and 32; and 27 June 2000 [ECHR 2000, 145], Constantinescu v. Romania, § 53).

Hence, it cannot be concluded that, as a consequence of a court of appeal's being vested with full jurisdiction, this circumstance must, in application of Article 6 of the Convention, invariably imply the right to a public hearing at second instance, regardless of the nature of the issues to be decided. In this connection, the European Court of Human Rights has held that the requirement

of publicity is certainly one of the means whereby confidence in the courts is maintained. However, there are other considerations, including the right to trial within a reasonable time and the related need for expeditious handling of the courts' case-load, which must be taken into account in determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance. Thus, the absence or lack of such a public hearing or debate before a second or third instance may be justified by the special features of the proceedings at issue, provided that there has been a public hearing at first instance. Accordingly, the European Court of Human Rights has held that leave-to-appeal proceedings and proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6.1 of the Convention, even though the appellant was not given an opportunity of being heard in person by the appeal or supreme court (ECHR Decisions of: 26 May 1988 [ECHR 1988, 10], Ekbatani v. Sweden, § 32; 29 October 1991 [ECHR 1991, 44], Helmers v. Sweden, § 36; 29 October 1991 [ECHR 1991, 46], Jan-Äke Anderson v. Sweden, § 27; 29 October 1991 [ECHR 1991, 45], Fejde v. Sweden, § 31; 22 February 1996 [ECHR 1996, 16], Bulut v. Austria, §§ 40 and 41; 8 February 2000 [ECHR 2000, 68], Cooke v. Austria, § 35; 27 June 2000 [ECHR 2000, 145], Constantinescu v. Romania, §§ 54 and 55; and 25 July 2000 [ECHR 2000, 404], Tierce and others v. San Marino, §§ 94 and 95).

Nevertheless, where a court of appeal has to try questions of both fact and law, and in particular when the applicant's guilt or innocence has to be examined as a whole, the European Court of Human Rights has held that the appeal cannot be decided in a fair trial without direct assessment of the evidence given in person by the accused applicant who claims that he has not committed the act alleged to constitute a criminal offence. In such cases, therefore, the court of appeal's review of the verdict as to the applicant's guilt calls for a new and full hearing in the presence of said applicant and the remaining interested or opposing parties (ECHR Decisions of: 26 May 1988, Ekbatani v. Sweden, § 32; 29 October 1991, Helmers v. Sweden, §§ 36, 37 and 39; 29 October 1991, Jan-Äke Andersson v. Sweden, § 28; and 29 October 1991, Fejde v. Sweden, § 32). In this respect, the Court, in its Decision of 27 June 2000 – Constantinescu v. Romania, §§ 54 and 55, 58 and 59 – has also stated that, where an appellate court is called upon to examine both the facts and law of a case and make a full assessment of the question of the applicant's guilt or innocence, it cannot, for the sake of a fair trial, properly determine these issues without direct assessment of the evidence given in person by the accused who claims that he has not committed the act alleged to constitute a criminal offence, specifying, in such a case, that, following the acquittal at first instance, the applicant had to be heard by the court of appeal, particularly bearing in mind that it was the first to find him guilty in the framework of a trial aimed at deciding on the matter of a criminal charge. This doctrine was reiterated in the Decision of 25 June 2000 – Tierce and others v. San Marino, §§ 94, 95 and 96 – noting that the absence of new facts is not sufficient to warrant departing from

the principle that appeal hearings should be held in public in the presence of the accused, and that the most significant factor is the nature of the questions which the appellate court is to address. More recently, ECHR Decisions of 27 November 2007 (JUR 2007, 345228), Popovic v. Moldavia, § 71, 16 December 2008, Bazo González v. Spain (§ 31), and 10 March 2009 (ECHR 2009, 33), Igual Coll v. Spain (§ 37) reiterate the point that a guilty verdict passed on appeal with respect to someone who had initially been acquitted by the court of first instance at which personal evidence was examined, without said party's having been personally heard by the appellate court before which questions of fact were debated affecting the verdict as to said appellant's guilt or innocence, is not in accord with the requirements of a fair trial as guaranteed by Article 6.1 of the Convention.

4

From a standpoint of negative delimitation, it should be recalled that the criterion set out above will not, in contrast, be applicable, and thus, «there can be no place for any constitutional rebuke whatsoever: where the verdict of guilty passed on appeal (regardless of whether the appellant had been acquitted by the lower court or the decision on appeal had worsened his situation) does not alter the factual substrate on which the lower court's decision is based; or where, despite such an alteration being brought about, it does not stem from analysis of items of evidence which require their examination to be witnessed for their appraisal; or finally, where the appellate court divorces itself from the lower court's findings of fact for not sharing the deductive process applied to basic facts accepted as proven in the lower court's decision and unchanged in that of the appeal court, and yet on the basis of which the higher court draws conclusions other than those reached by the lower court, since this deductive process, insofar as it is based on rules of experience not dependent on immediacy, is fully reviewable by the courts hearing the matter on appeal, with no erosion of constitutional guarantees» (Constitutional Court Decision 272/2005 of 24 October [RTC 2005, 272], Ground 2).

Indeed, early on we highlighted the fact that in Constitutional Court Decision 170/2002 of 30 September (RTC 2002, 170) (Ground 15), the doctrine laid down by Constitutional Court Decision 167/2002 of 18 September (RTC 2002, 167) is not applicable where, on the basis of facts declared to have been proved at first instance, the nub of the discrepancy between the verdicts of acquittal and guilt is a strictly legal point, the resolution of which, rather than requiring the applicant to be heard in a public trial, can be adequately achieved by the court on the basis of the record of the proceedings. Along these same lines, the European Court of Human Rights in its Decision of 29 October 1991 (ECHR 1991, 46), Jan-Äke Andersson v. Sweden, holds that there is no violation of the right to a fair trial when public debate is not reproduced with immediacy on appeal in cases in which «no question of fact or law is raised which could not adequately be resolved on the basis of the official court record of proceedings», so that there is no violation of Article 6.1 of the Convention (RCL 1999, 1190)

(in much the same vein, ECHR Decisions: of 29 October 1991 [ECHR 1991, 45], Fejde v. Sweden; 5 December 2002 [ECHR 2002, 72], Hoppe v. Germany; and 16 December 2008, Bazo González v. Spain, § 36).

(…)

6

It being noted that in this case the revocation of the verdict of acquittal was accompanied by a verdict of guilt based on direct assessment of the evidence of a personal nature which led to amendment of the recital of proven facts, we must examine the issue that confers singularity on this appeal for legal protection, namely, the question of whether the guarantees of immediacy and adversarial argument have been fulfilled by means of the court of appeal's screening of the videotape of the oral trial held at the first instance.

(…)

To the extent that it implies direct contact with the source of evidence, immediacy acquires genuine transcendence vis-à-vis evidence characterised by orality, i.e., statements, in whatever guise made. Accordingly, its dimension as a constitutional guarantee (Article 24.2 Spanish Constitution [RCL 1978, 2836]) is linked to the constitutional requirement that proceedings be predominantly oral, above all in criminal matters (Article 120.2 Spanish Constitution).

This is a guarantee of rigour which circumvents the risks of inadequate appraisal stemming from intermediation between the evidence and the body appraising it, and which, in the case of personal evidence, as opposed to the testimony of statements made at the trial, enables: assessment, not merely of the essence of a verbal sequence transcribed in a written submission by a third party, but instead of the totality of the words spoken and the context and manner in which they were so spoken: access to the totality of verbal communicative aspects; access to non-verbal communicative aspects, in respect of both deponent and third parties; and intervention by the court, at least to the limited extent allowed by its impartiality, to ascertain the truth of elements of fact (Constitutional Court Decision 16/2009 of 26 January, Ground 5).

In this regard, the review of the ECHR case-law outlined above highlights the fact that, should the assumptions to which said precedent refers be present, it is essential that the court of appeal conduct a «direct and personal» appraisal of the applicant and the evidence given in person by the applicant, in the context of a «rehearing», in the presence of the other interested or opposing parties (Decisions of the ECHR of: 26 May 1988 [ECHR 1988, 10], Ekbatani v. Sweden, § 32; 29 October 1991 [ECHR 1991, 44], Helmers v. Sweden, §§ 36, 37 and 39; 29 October 1991 [ECHR 1991, 46], Jan-Äke Andersson v. Sweden, § 28; de 29 October 1991 [ECHR 1991, 45], Fejde v. Sweden, § 32; 9 July 2002, P.K. v. Finland; 9 March 2004 [ECHR 2004, 21], Pitkänen v. Finland, § 58; 6 July 2004 [JUR 2004, 206482], Dondarini v. San Marino, § 27; 5 October 2006 [ECHR 2006, 55], Viola v. Italy, § 50; and 18 October 2006 [ECHR 2006, 59], Hermi v. Italy, § 64).

Thus, the allusion here is to a procedural activity that must be inserted at the second instance and is aligned with a public, adversarial trial or hearing, at which the «direct and personal» examination is made – i.e., with immediacy – of those persons whose statements are to be the subject of a new appraisal. This «personal and direct» examination implies the simultaneous presence in space and time of the party making the statement and the party before whom the statement is made, since the constitutional guarantee resides both in the fact that the party judging the issue has the party making the statement before him, and in the fact that the deponent can address the party tasked with appraising his assertions.

The above conclusion must, however, be completed by two further considerations, both relating to the possibility of the content matter of the videotape being incorporated into the second instance, within the framework of a public, adversarial hearing or trial.

The first of these arises where the statement made at the oral trial is reproduced, in the presence of the party that made it, and the latter is questioned as to the content of said statement. This power of the court is based on the fact that our current model of appeal is of a limited nature or *revisio prioris instantiae*, i.e., a review of what has been decided at the first instance, and not a *novum judicium*, with the oral proceedings repeated in their entirety. Hence, the absence of immediacy with respect to the personal evidence examined at first instance is no bar to its assessment, provided -as was stated in the recent Constitutional Court Decision 16/2009 of 26 January [RTC 2009, 16] (Ground 5.b) – that such lack of immediacy is offset by the essential reproduction thereof before the new court disposed to appraise it, through the content of appropriate examination of witness evidence on appeal, the reading of the pertinent record of proceedings, or any other suitable means [such as, doubtless, the videotape] that enables such evidence to be introduced into the new hearing before said court, which will be in a position to assess it within the framework of the new evidentiary activity and the arguments with respect thereto, intervene in connection therewith, and perceive the deponent's reaction to his prior statement, whether by means of a new statement or his refusal to make same.

A second consideration relates to the fact that the extent and thrust of the guarantees of immediacy, orality, adversarial argument and publicity at a second instance are susceptible to being modulated on the same terms as those on which they may be modulated at the first. In this respect, we have accepted the possibility that statements made at the trial of first instance may be appraised by the corresponding appellate court – even though [the guarantees of] immediacy and adversarial argument may be lacking at this second instance, as a consequence of the impossibility of the deponent coming before the appeal hearing – in any case where the content of said statements may be orally introduced at the second instance through the reading of the pertinent record of proceedings, appropriate examination, or any other suitable means that enables such content to be aired in public debate in court and be submitted to challenge in the oral

proceedings before the deciding judge or court (Constitutional Court Decision 16/2009 of 26 January, Ground 6.b).

Along these same lines, the judgement of the ECHR of 2 July 2002 (ECHR 2002, 43), S.N. v. Sweden, §§ 46, 47, 52 and 53, accepts the absence of immediacy with respect to criminal proceedings involving sexual abuse in which minors may be affected; and ECHR Decisions of 5 October 2006, Viola v. Italy, §§ 67, 70, 72 to 76, and 27 November 2007 (ECHR 2007, 84), Zagaría v. Italy, § 29, which accept the use of videotape on the condition that legitimate ends are pursued – such as the «defence of public policy, prevention of crime, protection of the rights to life, freedom and safety of witnesses and the victims of crimes, as well as respect for the requirement of a reasonable time» – and that the implementation thereof respects the accused's right of defence.

Under our body of statutory law there is no shortage of instances where immediacy, though lacking or deficient, has no effect on the validity of the relevant judicial proceedings (to wit, Articles 306 *in fine*, 325, 448, 707, 710, 714, 730, 731 (b) and 777 of the Criminal Procedure Act [LEG 1882, 16]), on the understanding that any form of examining personal evidence which does not entail the material coexistence, in space and time, of the party testifying and the party judging, rather than being an alternative form of conducting same, the choice of which is freely decidable by the court, is instead a subsidiary manner of examining evidence, the origin of which is subordinated to the presence of a legally envisaged, justified ground.

7

In this case, as explained above, the ordinary appeal filed by the Department of Public Prosecutions against the Criminal Court's verdict of acquittal contended that the lower court had erred on appraising the statements made in the oral proceedings, thereby giving rise to issues of both fact and law affecting the guilt or innocence of the applicant parties, who at the trial denied having committed the acts of which they were accused.

After having watched the videotape of the oral proceedings held in the Criminal Court, the Provincial High Court held that it was entitled to conduct an appraisal of the evidence of a personal nature examined at said trial, deeming that the lower court had erred in weighing such evidence. Consequently, it proceeded to draw up a new recital of proven facts, which led to the conviction of those who had initially been found not guilty.

The truth of the matter, however, is that the High Court was deprived of the power to appraise the evidence of a personal nature in any way other than that used by the Criminal Court – from the standpoint of the credibility of the deponents – on having failed to hold a public, adversarial trial or hearing at which the parties who had testified at the oral proceedings at first instance could be heard personally and directly, and on there being no legally envisaged ground

barring the appearance of such persons before the Court. Accordingly, inasmuch as the appellate court failed to respect said limit, it violated the appellant's right to a fair trial under Article 24.2 Spanish Constitution (RCL 1978, 2836).

8

The finding of a violation of the right to a fair trial (Article 24.2 Spanish Constitution [RCL 1978, 2836]) must, in this case, be accompanied by the finding of a violation of the right to the presumption of innocence (Article 24.2 Spanish Constitution), as has been the practice on similar occasions (Constitutional Court Decisions: 167/2002 of 18 September [RTC 2002, 167], Ground 12; 197/2002, 28 October [RTC 2002, 197], Ground 5; 198/2002 of 28 October [RTC 2002, 198], Ground 5; 212/2002, 11 November [RTC 2002, 212], Ground 4; 68/2003, 9 April [RTC 2003, 68], Ground 4; 118/2003, 16 June [RTC 2003, 118], Ground 6; 50/2004, 30 March [RTC 2004, 50], Ground 4; and 168/2005, 20 June [RTC 2005, 168], Ground 4), given that the proceedings highlight the point that, as explained in greater detail in the findings of fact, the only evidentiary activity to address the facts on the basis of which the appellant was found guilty, was of a personal nature, consisting of statements by witnesses and the applicants. This being so, the weighing of such means of evidence was not accompanied by the necessary guarantees of immediacy, orality, publicity and adversarial argument, with the result that the verdict of guilty lacks support of sufficient constitutional authority to undermine the presumption of innocence.

JUDGEMENT

In light of the foregoing, the Constitutional Court, BY THE AUTHORITY CONFERRED UPON IT BY THE CONSTITUTION OF THE SPANISH NATION,

has decided

to grant the protection sought by Mr. A. A. and, thereby:

1

Recognise his rights to a fair trial and the presumption of innocence (Article 24.2 Spanish Constitution [RCL 1978, 2836]).

2

Hold, insofar as Mr. A. A. is concerned, that the Decision of Section One of the Madrid Provincial High Court of 6 July 2005 (*sic*) (JUR 2007, 16929) entered on appeal rolls No. 207/2006 is hereby set aside and rendered null and void (…)."

– *Right of Asylum* –
National High Court Decision of 28 October 2009. Chamber for Administrative Proceedings.

"JUDGEMENT ON APPEAL

In Madrid, on the twenty-eighth day of October in the year two thousand and nine.

The High Court, composed of the Justices listed in the margin hereto, has heard ordinary appeal number 304/09, filed by Mr. Abelardo, represented by the Court Procurator, Carmen Olmos Gilsanz, against the decision of 27 February 2009, handed down in the appeal conducted by abbreviated procedure 35/08, heard in Central Court for Administrative Proceedings No. 2; with the respondent being the Government Authorities, represented by State Counsel.

FINDINGS OF FACT

(…)

TWO. In his written submission lodged at the Lower Court on 25 March 2009, Mr. Abelardo's counsel, contesting the decision, filed an ordinary appeal in which, after pleading such points as he deemed fit and proper, sought judgement to the effect: that the application for asylum was improperly denied for lack of grounds; that the case be retried; and, should the decision not be annulled, that Mr. Abelardo be permitted to stay in Spain for humanitarian reasons.

(…)

POINTS OF LAW

(…)

FOUR.

With respect to the second ground, violation of Article 9.1 of Royal Decree 203/1995, the applicant argues that the Government Authorities are in breach of their statutory duty to investigate the circumstances pleaded and appraise the importance thereof for the purposes of asylum, as required by the statutory provision cited.

This ground cannot be upheld since the Government Authorities, rather than ruling on the credibility of the account of the facts furnished by the asylum seeker, have instead held that, on the basis of the situation reflected in said account, this would not constitute persecution covered by the Asylum Act and, secondly, that the present situation in the country does not currently justify the need for protection. The fact that the account of the facts may refer to events occurring when the asylum seeker was under legal age does not justify the need for the investigation advocated by the appellant.

This High Court's Decision of 29 December 2004 cited by the appellant is thus not relevant for the purposes hereof.

FIVE

We shall go on to address the last of the grounds pleaded, the application's alleged lack of untimeliness, resulting from the discrepancy as to the situation currently prevailing in Sierra Leone.

Accordingly, in contrast to what has been contended in the pleadings, it is common knowledge that the situation in Sierra Leone has undergone a profound transformation in recent years, going from a situation of chaos to one of more than reasonable stability.

As to said country's situation, the following comment was made in our decision of 2 January 2007, issued in ordinary appeal 262/2006: moreover, the situation in Sierra Leone was referred to by this Court in its decision of 6 April 2005 (Ordinary appeal No. 332/04), where it made the point that: "(…) "although attached to the case file, (…), there were various international reports which indicated that, despite disarmament and the holding of elections in May 2002, deep-rooted issues that had given rise to the war remained largely unaddressed (Human Rights Watch), or that in practical terms the civil war continued, with the peace process being upset in May 2000 by the Revolutionary United Front (Afrol News), this information appeared to be discredited by that produced in court. Hence, the National College of Doctors of and Graduates in Political Sciences and Sociology reported that, on 7 June 1999, the government of Sierra Leone and the Revolutionary United Front signed a Peace Accord at Lome, Togo, to put an end to the armed conflict that had begun in 1991. Article 9 of this Accord required the government to grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, a measure which was rejected in the report of the Secretary General of the United Nations insofar as crimes against humanity or serious violations of international humanitarian law were concerned. Indeed, it was in this latter respect that a special court was created by Security Council Resolution of 14 August 2000 to try those persons bearing the greatest responsibility for crimes against humanity, war crimes and other serious violations of international humanitarian law. The United Nations High Commissioner for Refugees (UNHCR) report on the situation of human rights in Sierra Leone of 26 February 2003, concluded that, since the last report of the High Commissioner, tremendous progress had been made in the implementation of the peace process in Sierra Leone. The war had formally ended, disarmament had concluded and national elections had been held. Sierra Leone was certainly on the way to recovery. The human rights priorities in the country continued to focus on addressing past abuses and tackling present-day violations, while developing national capacities to promote and protect human rights. This same report explained that children were gravely affected by the conflict in Sierra Leone, and that 2,097 separated children were registered by child protection agencies involved in family tracing and reunification programmes. Mention was also made of the fact that, since the beginning of the current repatriation operation in September 2000, over 197,000 Sierra Leonean refugees had returned to Sierra Leone. Another UNHCR report on the human rights situation in Sierra Leone of 19 February 2004, noted the

return of 245,732 refugees since repatriation operations had begun, stipulating in its conclusions that, since the previous report, considerable progress has been made in the field of human rights in Sierra Leone. Sustained progress in the transition from relief to recovery and from peacekeeping to peace-building had led to the gradual withdrawal of United Nations Mission in Sierra Leone (UNAMSIL), which was scheduled to be completed by December 2004. In brief, the Amnesty International Annual Report on Sierra Leone (highlights from January to December 2003), apart from referring to the Special Court for Sierra Leone, underscored, among other things, that the peace consolidation process achieved in 2001 was continuing, government authority had been re-established throughout the country, deployment of security forces, supported by UNAMSIL, along the border with Liberia had been increased, and refugees were continuing to return from Guinea and Liberia.".

SIX

The appellant seeks alternatively, without furnishing any arguments that would support his petition, that he be permitted to remain as a resident in Spain for humanitarian reasons,

With respect to the humanitarian reasons cited, it should be recalled that Article 17.2 of the Asylum Act provides that, "Notwithstanding the provisions laid down in subsection one hereof (in which the effects, not only of denial of leave to proceed, but also of denial of applications for asylum are specified) any applicant that has been denied leave to proceed with his/her application or had his/her application denied may, within the framework of the general legislation governing aliens, be permitted to remain in Spain for humanitarian reasons or reasons of public interest, particularly where he/she is a person who, as a consequence of serious conflicts or disturbances of a political, ethnic or religious nature, may have been forced to leave his/her country and fails to fulfil the requirements referred to in Article 3 subsection 1 hereinabove". The statutory provision cited is implemented by Articles 23.2, 31.3 and the 1st Additional Provision of the Regulations passed by Royal Decree 203/1995 of 10 February.

The Supreme Court has often made the point, as highlighted by its Decision of 3 November 2004, that "this Court has tirelessly repeated that the term "may be" (*podrá*), used in some legal texts, must be construed as meaning "must be" (*deberá*), provided that the legally envisaged conditions or circumstances are present to enable a decision to be made in the sense intended by the law (…)".

Proceeding to analyse the case now before the Court, the claim cannot be upheld, because, in order for an asylum seeker to be able to remain in Spain for humanitarian reasons, it is essential that said reasons be "connected to the very aim and purpose of the right of asylum, which seeks the protection of persons who suffer persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (Supreme Court Decisions of 20 December 2000, 3 October and 18 December 1997)", and in the case before the court, the application submitted as an alternative plea is couched in terms

of those very cases which have been deemed not to constitute grounds for the processing of asylum, so that no reason can be discerned for construing that the asylum seeker finds himself in a situation which calls for protection outside his country of origin due to any of the circumstances envisaged under Article 17.2 of the Asylum Act.

With reference to the decision of the lower court, we see that the latter refrains from embarking upon an analysis of the matter, on holding that it may not do so in view of the jurisdiction attributed to Central Courts under Article 9 of the 1998 Jurisdiction Act (*Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-Administrativa*).

As it has repeatedly stated, the High Court does not share the argument espoused by the Court of First Instance. The fact that under said Article 9 of the Jurisdiction Act, Central Courts are attributed jurisdiction to hear administrative appeals filed against rulings which deny leave to proceed with asylum applications cannot imply that such courts are not entitled to rule on the presence or absence of humanitarian reasons, which are linked by the above-mentioned Article 17.2, not only to denial of asylum, but also to denial of leave to proceed with applications for asylum. In this respect, we rectify the doctrine underlying the lower court's decision.

SEVEN

In view of the above, it now behoves the Court to confirm the lower court's decision; with no order to the appellant to pay costs and expenses on application of Article 139.2 of the Jurisdiction Act, having regard to the difference with the lower court's decision as to the application of said Article 17.2 of the Asylum Act.

HAVING EXAMINED the statutory provisions cited and other duly applicable enactments.

THIS COURT HOLDS

that it must and does dismiss this ordinary appeal number 304/09, filed by Mr. Abelardo, represented by Court Procurator, Carmen Olmos Gilsanz, against the decision of 27 February 2009, handed down in the appeal conducted by abbreviated procedure 35/08, heard in Central Court for Administrative Proceedings No 2, which decision this Court holds to be good in law; with no order as to costs and expenses. (…)".