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Palazzo del Ferdinandeo,
MIB School of Management
Largo Caduti di Nasirya n° 1
tel: +39 040 918 8111

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REPORT

INTERNATIONAL LAW AND IRREGULAR IMMIGRATION. THE CASE OF SPAIN AS A PARADIGM OF RECENT IMMIGRATION MODELS

by

Mr Eduardo RUIZ-VIEYTEZ
(Director, Pedro Arupe Institute of Human Rights,
University of Deusto, Bilbao, Spain)

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1.- IMMIGRATION AND INTERNATIONAL LAW: DIFFERENT FIELDS FOR PUBLIC INTERVENTION

1. It is possible to identify different fields for public intervention around the phenomenon of international migrations. Considering migration in its most restrictive meaning, we would refer to those public policies devoted to the regulation of the migration flows. In fact, migrations happen to be a process and the word migrant could only be used to refer to the person who is within such a process, and not to those who have already finished their movement. In fact, it is impossible to determine when a migrant ceases to be such.

2. From the core of migration policies, which refer to the regulation of flows, another three different domains for public intervention can be observed. On the one hand, the whole social, economic or labour field. Normally, migrations respond to the will of promoting a social condition, but even in those cases which do not correspond to that possibility, any state must regulate, ensure and promote an adequate social integration of the newcomers. A second field for public intervention is that related to cultural or identity elements, which are basic components of the human dignity. Finally, a third domain of public intervention (and legal regulation) is that of effective political participation of the new citizens, which connects with naturalisation and nationality law.
In this paper we will deal mainly with the first domain for public intervention, that of the regulation of the migration flows.

1.1.- CATEGORIES AND CONCEPTS

3. It is necessary to start by clarifying that the term migrant happens to be a non-technical word from a legal perspective. Sociologically, the migrant does exist, not only for the receiving society, but for the migrant him/herself. But when the notion is translated to a legal system, we normally find that migrant is not a technical word. Even if at the United Nations level, the concept of migrant has been incorporated to some bodies and documents, in fact the legal meaning of the word is not the one sociologically admitted. Domestic legal orders do not refer to migrants, since there is normally no definition of migration or of a migrant person.

4. The key issue from a Law perspective is whether the migrant person goes through an international border or not. The link between individuals and states is that of nationality (or citizenship). For the legal system, we can speak about aliens, foreigners, or non-nationals, but not about migrants. Obviously, internal migrations occur, and in some cases their implications could be more relevant for the people concerned than an international migration. But from a more strict perspective, we can only make political and legal proposals through the relevant legal concepts, such as that of alien. Therefore, when talking about integration of migrants we will reflect in fact on the rights of those who are not nationals of the state they reside in.

5. Other relevant categories to be included in a more complete analysis from the very beginning are those of Denizen (a long-term non-national legal resident), Stateless person (not enjoying any nationality or citizenship of any country, but still an alien), Refugee (category defined in the Geneva convention of 1951 on the status of refugees), Asylum (a traditional concept referring to the protection of people in certain places) or Stowaway (a particular situation which is rather relevant in the field of migration flows, but not necessarily refer to alien people).

6. Concerning the human rights of foreigners, a preliminary general classification can be stated as follows:

a) Included rights: Any foreign person must enjoy a minimum set of fundamental rights in any place, regardless of the legal condition of his or her stay in the territory of the host country (e.g. right to life, freedom of expression, freedom of thought, right to a fair trail, etc.)
b) Excluded rights: foreigners cannot enjoy political rights in the state they are not nationals (right to vote, to be elected or to participate in political affairs or positions)
c) The remaining fundamental rights can be recognised to foreigners in different ways and subject to different conditions, according to the legislation in force in each country (e.g. freedom of residence, right to work, etc.).

7. Therefore, when talking about human rights of migrants or newcomers, it is necessary to remind that universal rights must be able to be exercised by everybody, with the sole restriction corresponding to the political rights reserved to the effective members of a political community. In general, international human right law requires the equal treatment of citizens and non-citizens. Exceptions to this principle may be made only if they are to serve a legitimate state objective and are proportional to the achievement of that objective[1]. Obviously, the rule of non-discrimination is due also to protect immigrants or new citizens.

1.2.- LEGAL GUARANTEES AND LEGAL FRAMEWORK

8. General classification of the existing legal guarantees according to their nature and to the institutional framework they can be exerted:

1.- According to the legal nature
1.1.- Normative: legal/constitutional/international rank
1.2.- Institutional: general or specific bodies
1.2.1.- Domestic institutions
1.2.2.- International institutions
1.3.- Judicial
1.3.1.- Domestic ordinary courts
1.3.1.1.- Ordinary proceeding
1.3.1.2.- Special proceedings
1.3.2.- Domestic extraordinary courts
1.3.3.- International courts
2.- According to the institutional framework
2.1.- International
2.1.1.- Universal
2.1.2.- Regional
2.2.- Domestic

9. The international legal framework corresponding to the rights and conditions of migrants does not present a very systematic picture. In fact, it is necessary to precise a number of dualities when listing all the relevant documents that can be relevant in this respect.

10. Firstly, all general human rights standards are of course to be applied to migrant workers. Besides them, there are also some specific international documents which refer in concrete to the human rights of migrant workers. Secondly, it is necessary to distinguish between the different frameworks of protection existing at the international level. On the one hand, the

[1] United Nations, document E/CN.4/Sub.2/2003/23, p. 1.

universal system of the United Nations; on the other hand, the regional framework, where the role of the Council of Europe would be by far the most important one, although it is also necessary to refer to the OSCE or to the EU. It is also necessary to make a distinction between the so-called hard-law and the soft-law. Many of the existing instruments are clearly legally binding and belong to the hard-law, whereas other document have a more limited legal effect, although they also play a role in the international law on human rights. Finally, apart from generic documents referring to a plurality of situations concerning migrants or aliens, it is also relevant to analyse the case-law of some monitoring or judicial bodies, where important leading decisions can open the way to new interpretations of the existing legal framework.

11. All in all, the list of documents in the universal framework relating to some extent to human rights of migrants or aliens can be classified as follows:

1.- Conventions

1.1.- Generic conventions

- International Convention on the Elimination of All Forms of Racial Discrimination (21 Dec 1965)
- International Covenant on Civil and Political Rights (16 Dec 1966)
- International Covenant on Economic, Social and Cultural Rights (16 Dec 1966)

1.2.- Specific conventions

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 Dec 1990)
- Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (not in force)
- Convention on the Reduction of Statelessness. Adopted on 30 August 1961 by a Conference of Plenipotentiaries which met in 1959 and reconvened in 1961 in pursuance of General Assembly resolution 896 (IX) of 4 December 1954
- Convention relating to the Status of Stateless Persons Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954
- Convention relating to the Status of Refugees Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950
- Protocol relating to the Status of Refugees The Protocol was taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966

2.- Non conventional documents

2.1.- Declarations

- Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live Adopted by General Assembly resolution 40/144 of 13 December 1985
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly resolution 47/135 of 18 December 1992
- Universal Declaration on Cultural Diversity Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001
- General Assembly Resolution 59/194 (18 March 2005), On the protection of migrants

2.2.- General comments of treaty bodies

2.2.1.- Human Rights Committee

- General Comment 15 – Position of aliens under the covenant
- General Comment 18 – Non-discrimination

2.2.2.- Committee on the Elimination of Racial Discrimination

- General Comment 11 – Non-citizens
- General Comment 14 – Definition of discrimination
- General Comment 30 - Discrimination against non-citizens

12. It is also relevant to point out the existence of an Special rapporteur on the human rights of migrants, created in 1999 by the Commission on Human Rights, pursuant to resolution 1999/44. The mandate of the Special Rapporteur covers all countries, irrespective of whether a State has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of 18 December 1990. The Special Rapporteur acts on information submitted to him regarding alleged violations of the human rights of migrants; he also conducts country visits upon the invitation of the respective Government; and reports annually to the Human Rights Council about the global state of protection of migrants' human rights, formulating specific recommendations. The position has been held by Ms. Gabriela Rodríguez Pizarro (Costa Rica) between 1999 and 2005, and by Mr. Jorge. A. Bustamante (Mexico), from August 2005.

13. Another special rapporteur of the UN Human Rights Council relevant in this field is that on trafficking in persons, especially in women and children. This special procedure was established in 2004 by the former Commission on Human Rights. The mandate of this rapporteur also covers all UN countries. The functions are rather similar to those of the special rapporteur on the human rights of migrants: he can take action on violations via individual complaints, develop country visits, formulate recommendations and draft annual reports. The first rapporteur in this domain was Ms. Sigma Huda, from Bangladesh, in the period 2004 to 2008. She was followed by Ms. Joy Ngozi Ezeilo, from Nigeria, who holds the position nowadays.

14. At the European regional level, the most prominent documents protecting human rights of foreign immigrants are:

a) The European Convention on Human Rights, 1950. In particular, protocols 4 and 7 are relevant in the field of aliens
b) The European Convention on the status of migrant workers, open for signature on 24 November 1977. It has been ratified so far by 11 states (ALB, F, I, MOL, NL, N, P, E, S, TUR, UA)
c) The Convention for the participation of foreigners in public life at the local level, open for signature on 5 February 1992. It has been ratified by 8 states (ALB, DK, SF, ICE, I, NL, N, S).

15. Within the framework of the European Union, there is a big set of legislative measures adopted in the last years concerning the combat against irregular migration and border control. The most relevant documents in this respect are the following:

a) Regulation (EC) No. 863/2007. European Parliament and the Cou8ncil 11 July 2007, which establishes a mechanism to create rapid intervention teams on the borders (amends Regulation (EC) No. 2007/2004 of the Council.

b) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
c) Council Regulation (EC) No. 2007/2004, establishing Frontex, the European Agency for the Management of Operational Cooperation at the External Borders, based at Warsaw (Poland) (http://www.frontex.europa.eu)

16. A fundamental right in the field of protection of international migrants is the principle of non-refoulement. This is contained in article 33 of the Geneva Convention relating to the Status of Refugees. It also derives from article 3 of the UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment, and article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.- THE CASE OF SPAIN

2.1.- SOCIAL AND GEOGRAPHICAL CONDITIONS

17. Foreign migration to Spain is a relatively recent phenomenon. In 1985 there were merely 250,000 legal foreign residents in the country. During the last two decades, however, immigration flows have swelled significantly, thus producing a completely new demographic situation. Today the nation hosts more than four and a half million foreign residents, which represents about 10 per cent of the total population. This makes Spain one of the European Union's leading immigration countries. Spain's percentage of immigrants in relation to its total population has reached a level comparable to that of other North-West European countries. This growth has been especially visible in certain regions such as Madrid, Catalonia, Andalusia, Murcia, Valencia, the Balearic Islands and the Canary Islands. This particular background makes the Spanish case an interesting one to contrast with other North-West and Central European countries. A long-standing tradition of emigration that lasted up until just recently and the increasing momentum that immigration has gathered in two decades have geared Spanish policymaking to a starting point distinct from others that came before it.

18. Spain has had a long and complex migration history, primarily as an emigration country and an exporter of labour. It was only in the mid-1980s that the country experienced a visible reversal of migration patterns. For most of the 20th century, internal migration and international emigration were key factors determining the distribution of Spain's population at the time. Both flows were mainly rural-urban ones. Catalonia, the Madrid Metropolitan Area and the Basque Country (the three regions where most industry was concentrated) were the nation's main areas of destination, while Andalusia, Extremadura and Galicia experienced the most emigration. Spain's international emigrants departed for urban areas in European countries like Germany and France, as well as some Latin American countries. This resulted in an unequal distribution of the population never before paralleled. The situation was not unique to Spain, however. Throughout most of the 20th century, Portugal, Italy and Greece were also characterised as emigration countries.

19. The late 1980s and 1990s ushered in a new phase for Spain altogether, as a reduced rate of investment was combined with economic restructuring, recession and high unemployment. Since low wages were the only means for businesses to retain a competitive edge, employers turned to immigrant workers. Labour immigration to Southern Europe was thus not only a matter of supply, but also a particular response to employers' demands for cheap labour. As shown in Table 1, immigration rose to unprecedented levels, notably beginning in 2000. This rapid growth was linked to a booming Spanish economy driven by expansion of the housing market (and subsequent construction industry) as well as Spain's strong foothold in the tourist industry. These economic developments went hand in hand with a rather lenient governmental immigration policy.

20. Annual inflow of foreigners in Spain, 1998 – 2006

Annual inflow of foreigners	Year				
	1998	2000	2002	2004	2006
	57,195	330,881	443,085	645,844	802,971

Source: *Estadística de Variaciones Residenciales*, INE.

21. The present-day immigrant population with its more than five million people registered in local censuses, therefore also including undocumented immigrants, presents very diverse origins. Total population as of 2009 is 46.6 million people, of which 5.6 million are foreigners. This makes a 12% of the total population. There is a sizeable immigrant population from the EU (a 40% of all foreigners), of which a significant part corresponds to the migration of pensioners of North-Western Europe, but also to the new immigration of economic migrants from Central and Eastern Europe, namely, Romania and Bulgaria. The rest of foreign residents accounts for 3.3 million. Latin Americans are 28% of the total foreign population, this high percentages being a reflection of preferential treatment in legislation as well as the effects of reviving old social networks. Africans comprise 18%, Asians 5% and the rest of countries (including other Europeans and North America) another 9%.

22. The percentages of foreign residents by nationality as of January 1st 2008 are the following:

1 -Romanians	14,0	9 -Bulgarians	2,9
2 -Moroccans	12,3	10 -Argentinians	2,8
3 -Ecuadorians	8,0	11 -Portuguese	2,4
4 -British	6,7	12 -Chinese	2,4
5 -Colombians	5,4	13 -Peruvians	2,3
6 -Bolivians	4,6	14 -Brazilians	2,2
7 -Germans	3,5	15 -French	2,2
8 -Italians	3,0	16 -Poles	1,5

23. The highest levels of immigrant concentrations, both in relative and absolute numbers, are to be found in five main areas:

1) The Mediterranean Coast
This coastal strip accounts primarily for the main Spanish tourist resorts and attracts a diverse flow of well-off sunbelt immigrants from EU countries as well as economic migrants from low-wage countries. Secondly, the area includes some of the most populated and economically dynamic areas in terms of industry and services, such as Barcelona, Valencia, Alicante and Tarragona. Thirdly, some of the most intensive export-oriented agricultural areas (headed by Murcia and Almeria) are also to be found in this area.

2) The Balearic Islands and the Canary Islands
These islands constitute the main point of attraction for foreigners coming from Northern and Western European, including retirees, business people and working students.

3) The Madrid Metropolitan Area
The capital of Spain and its surrounds is the country's most populated territory, where the service sector and the construction industry have generated an increasing demand for immigrant labour.

4) The Ebro River Valley
Foreign labour migrants are attracted to this region because of it wine production and a diversity of fruits crops, together with a growing industrial and service sector.

5) Western and South-Western Spain's agricultural enclaves
Foreign labour migrants are attracted to these spots by their agricultural prospects. Favourite destinations are Huelva, for its strawberries fields, and Cáceres, for its tobacco fields. Leon's mining industry also attracts immigrants, particularly those from Africa and Eastern Europe.

2.2.- ANALYSIS OF THE LEGAL FRAMEWORK

24. The first law dealing with these issues was the *Ley de Extranjería* (Aliens Act or Foreigners Law), which was enacted in 1985, just a year before Spain joined the European Communities.

25. From a legal perspective, the evolution of Spanish immigration and integration policies can be divided into four different phases, each corresponding to major legislative events. Running from the mid-1980s until the early 1990s, the initial period produced a first generation of laws on immigration, including the first Aliens Act (Law on the Rights and Freedoms of Foreigners in Spain, from herein referred to simply as the Foreigners Law). Covering most of the 1990s, the second phase witnessed the birth of the next generation of immigration laws and the simultaneous adoption of the first policies on immigrant social integration. 1999 onwards marks a third phase that has brought about significant changes to the Foreigners Law, as well as ushered in a new turn in integration policies. Finally, we are starting in the present moment the fourth phase including a significant amendment of the main Acts governing the topic of immigration and asylum.

26. It was in 1985 that the first Foreigners Law was passed in Spain. The way these events played out indicates that Spain's full incorporation into the European Communities (in 1986) was a more important factor for the introduction of the law than were any immigration statistics.

27. Although the main aim of this first substantial regulation was to build a framework for legal support and to specify conditions of stay for foreigners in Spain, it also introduced opportunities to restrict entrance. Moreover, granting residence permits on a one-year basis encouraged the notion of temporariness to predominate policies. In view of the earlier absence of a comprehensive immigration and integration policy at Spain's central level, this law was a relative novelty. This marked the birth of the first generation of legislation.

28. The 1985 Foreigners Law, however, was not the first regulation to be born to this generation. In fact, it was preceded by other related pieces of legislation that were developed in unison and had a bearing on Spain's inclusion in the European Community. Thus, the Law on Asylum was passed in 1984 and its implementing or developing regulation in 1985. The Foreigners Law would also be developed through the corresponding developing regulation in 1986. In addition, the Royal Decree of 1986 regulated the situation of European Economic Community state citizens (a 'European' citizenship, *per se*, did not exist at that time). To get a complete view on the legal framework of immigration policies, two important Constitutional Court rules must be cited. The first is judgement number 107/1984. This ruling, issued prior to the approval of the Foreigners Law, had already clarified the basic rights that would or would not be enjoyed by foreigners, according to the new constitutional system. As such, the Constitutional Court established three different groups of rights, with the recognition that foreigners could be entitled to enjoy two of them, under different conditions.

29. According to the court, a first set of fundamental rights had to be equally recognised for everybody, including foreigners regardless of their legal situation in the country. These included basic rights such as the right to life, freedom of expression and judicial guarantees, among others. By contrast, most so-called political rights (the right to vote or to participate directly in

public affairs and responsibilities) were not applicable to foreigners. Article 13.2 of Spain's Constitution prohibits such possibilities (the only exception being the right to vote in local elections if there is a reciprocity agreement with a foreign resident's home country). The remaining rights recognised in Title I of the Spanish Constitution may be extended to foreigners depending on their legal situation in Spain, and according to what has been established in the Foreigners Law. This conditionality also applies to differences in how legislation can regulate the concrete implementation of these rights in the cases of foreign inhabitants. This early Constitutional Court ruling of 1984 would later have an obvious influence on the drafting of the aforementioned legislation. The second important Constitutional Court judgement is classified as number 115/1987. This judgement was provoked by the national ombudsman, finding that some articles of the 1985 Foreigners Law, such as those regarding the right to form associations and the right to demonstrate, did not conform with the 1978 Spanish Constitution. The Constitutional Court ruled partially in favour of the ombudsman's position and, as a result, some specific paragraphs of the law were declared void.

30. As a whole, this bundle of first-generation legislation puts clear-cut emphasis on the control of immigration flows and the regulation of formal requirements for foreigners to enter and stay in Spain. After 1985, most foreigners were obliged to conform to new, concrete legal stipulations, and the illegal presence of immigrants became a reality. Beyond this general rule, both European Community citizens and asylum seekers enjoyed a privileged status provided for in specific pieces of legislation. The privileges of asylum provoked a flow of applications from certain groups of immigrants. However, within a few years, the restrictive interpretation of the asylum regulations followed by national authorities curbed this tendency.

31. A significant shift in migration policies can be identified around the early nineties. On 13 March 1991, almost all parliamentary groups agreed on a resolution urging the government to organise a regularisation process and to adopt more legislative and/or administrative integration measures that would complement the existing framework. The consequence of this resolution was an extraordinary regularisation procedure, which was instated the following summer. With enthusiastic collaboration by most relevant social actors, the government received approximately 120,000 applications of undocumented immigrants. Most of these applications led to residence permits.

32. After the EU treaty entered into force in 1994 the Law on Asylum was substantially modified and, in 1995, its implementing regulation was also adapted. A restrictive view of asylum was thus instated and, since then, foreign immigrants have hardly used asylum to enter Spain. This wave of changes did not alter the 1985 Foreigners Law, though it did significantly change its developing regulation, which was derogated and substituted by a new text in 1996. Following the main concerns expressed in previous years in both Parliament and in the public debate, the new 1996 Royal Decree focused on the social integration of immigrants. This meant it included more specific regulations about family reunification procedures, unaccompanied minor immigrants and some basic social rights. Furthermore, the new developing regulation permitted another regularisation process for undocumented foreigners.

33. All such changes, however, were still part of a legislation that basically aimed at immigration control and management. And the introduction of an annual quota or contingent system from 1993 onwards testifies to this. In practice, however, a very specific relation developed in this period between regularisations, on the one hand, and the annual quota, on the other; the regularisations seemed to fill the largest part of the quota.

34. What did change in this period was the very fact that integration had arisen as an issue in legislation and policy. The introduction of integration policies in this period added to the complexity of relations between the different levels of governance in Spain. Immigration policies remained the exclusive competence of the central institutions. This decision was made in accordance with Article 149.1.2 of the 1978 Spanish Constitution, which stated that all

legislative and executive powers related to immigration, asylum, nationality, passports, borders and aliens are the sole responsibility of the national parliament and government. On the flipside, the system generated by the autonomous communities established a distribution of responsibilities in which the regional governments were responsible for all key policy vis-à-vis the accommodation of immigrants. This came as the result of transferring responsibilities from central to regional administrations. Thus, autonomous communities and municipalities had begun endeavouring to manage immigrant integration through their policies in matters such as social welfare, education, health and housing. Later on, they began to formulate 'immigration plans', referring mainly to certain aspects of integration.

35. The third phase in the development of legislative initiatives dealing with immigration started in 1999. The beginning of this period was marked by political turmoil and changes in government. What emerged was a long social debate and resounding consensus among political parties that the 1985 Foreigners Law needed be adapted in view of Spain's increasing rate of immigration. A second Foreigners Law, passed by Spanish Parliament at the end of 1999, was seen by many as a positive turning point. Although it did not contain very substantial modifications, it intended to change how the quota functioned in order to effect its instrumentation for labour market policy and new entry, rather than regularisations. From the social perspective, the new law recognised a significant number of immigrant rights, including clear provisions favouring individuals in an illegal situation. Thus, basic social aspects such as access to education, public health, social benefits and assistance were guaranteed to all those foreigners residing *de facto* in any municipality. Furthermore, legal residents enjoyed a substantial number of additional rights. This second Foreigners Law entered into force in 2000.

36. Nevertheless, after the conservative party had won the national 2000 elections in an absolute majority, its recently elected conservative government showed no intention of drafting the developing regulation of the new 1999 law. In fact, it came with a significantly modified law that was accepted with the help of the PP's overwhelming majority in December 2000. This new law took three divergent directions. Firstly, legal provisions became more restrictive, and many fundamental rights were denied for immigrants without a residence permit. Granting resident permits to undocumented immigrants already residing in Spain was strongly restricted. Secondly, the whole regime of issuing sanctions against undocumented foreigners, or people collaborating with them, became much harsher both on paper and in procedure. Finally, the discretionary competence given to the government to develop the law's actual content was enormously expanded. On this basis, the government proceeded to pass an extensive reform of the developing regulation in 2001.

37. In 2000, the government approved a plan for integrating foreign immigrants called the Global Programme of Regulation and Coordination of Immigration in Spain (GRECO). This plan was primarily aligned with the restrictive policy reflected in the Law of 2000. Having been based largely on the conception of temporary migration, it thus strongly emphasised return. Legislative reforms on immigration under the conservative government continued with November 2003's approval of a new set of modifications to the Foreigners Law. The new set contained concrete rules on sanctions, extended the scope of visa requirements and regulated – and widened – the opportunity to detain undocumented foreigners in specific centres. Both the legal reform of December 2000 and the November 2003 Foreigners Law were challenged before the Constitutional Court for possible violations of fundamental immigrant rights. Several judgements of the Constitutional Court in 2007 put and end to these disputes and call for a new amendment of the Foreigners Law to be passed in 2009.

38. The general elections of 2004 ushered in a leftwing parliamentary majority, a PSOE government and, in general, a new climate and a different configuration of actors in the field. A new developing regulation of the Foreigners Law was adopted in December 2004.

39. In parallel to all this, Spain has signed different migration agreements with many countries, either to regulate migration flows or to implement border control. The first international agreement on readmission of foreigners was signed with Morocco in 1992. Since then, Spain has concluded agreements with the following countries:

a) In Africa: Algeria, Guinea Bissau, Mauritania, Gambia, Mali, Guinea, Niger and Cabo Verde
b) In America: with Peru, Colombia, Ecuador and República Dominicana
c) In Europe: with Bulgaria, Slovakia, Italy, France, Portugal, Latvia, Lithuania, Macedonia, Poland, Romania and Switzerland.

40. In year 2006, the so-called "Plan Africa" was issued with the aim of controlling the south border of the national territory. The agreements signed in 2006 and 2007 with Gambia, Guinea, Mali, Niger and Cabo Verde are a result of this new policy. All these agreements follow the same pattern in terms of contents, including: Acceptance of migrant workers, Voluntary return of people, Integration of residents, Migration and development, Co-operation in combating irregular migration and human trafficking, Readmission of people.

41. Finally, in year 2009, both the Asylum Act and the Aliens Act are being modified. The new Asylum Act has already been passed by the Parliament on 30 October 2009. The new Aliens Act, is to be adopted very soon (currently the bill is at the high chamber, in the second reading). The idea is to adapt the legislation to a number of EU Directives, and also to some judgements of the Constitutional Court. The goals of the new Aliens Act are to ensure the Border control (externalization of the legal border), to promote a more selective control of entry, and to develop the devolution of powers to Autonomous Communities on migration matters.

42. Despite many changes in the law (in1985 and made twice in 2000) and the development of subsequent regulations (in 1991, 1996, 2001, 2003, 2004), Spain has never resolved the mismatch between its very restrictive entry policies and simultaneous labour demands. This has resulted in the emergence of an irregular immigration model and the implementation of frequent regularisation measures endeavouring to surface the ever-growing stocks of irregular migrants. Moreover, very short-term residence permits and the fact that their prolongation is contingent on a formal work contract have led many regularised immigrants to fall back into irregularity.

Entry
43. The Foreigners Law of 1985 (in force until 2000) maintained the previous policy's practice of submitting each labour migrant entry to administrative control. Employment of non-EU workers was only permitted if employers could demonstrate that they were unable to hire any otherwise suitable citizen or resident of the country. In terms of policymaking, this implied that the evaluation of labour needs was administrative rather than political. Since this evaluation was undertaken by local public employment offices, permission for the employment of foreign workers depended on discretionary interpretations and practices of labour market tests. The absence of a political decision further implied that there was no judicial control on the implementation of entry policies. In terms of policy implementation and effects, this work permit policy (referred to as the general regime) obstructed legal entry in the following ways:

1) labour market tests were often conducted in a very restrictive manner;
2) there were no clear, objective criteria for admission, which meant employers were faced with excessive uncertainty when it came time to hire;
3) there were insufficient mechanisms to match labour demand with supply;
4) and even when work permit applications were approved, it took months before securing the actual document.

44. In order to create new avenues for legal entry, in 1993, the Spanish government launched a quota system. The idea behind this second work permit system was to create a direct way to enter regularly into Spain without submitting individual applications to a test of the labour market. This was only possible in particular economic sectors that were determined annually by the government, and for a maximum number of applications. In contrast to the general regime, the quota system thus introduced a political evaluation of labour needs. However, in practice, this system functioned as a regularisation programme, as most applications were filed by irregular migrants already in the country. Once applications were approved, foreign workers went back to their country of origin, applied for a visa and then re-entered into Spain as regular migrants. In contrast to a regularisation programme proper, prior residence was not needed, economic sectors were determined by the state and there was a limited number of annual applications.

45. From 2000 to 2004, the rightwing government closed off the possibility of entry through the general regime. Although several court judgements deemed this illegal, therefore letting entry remain formally open, in practice, the general regime was no longer an option, as labour market tests were done in a very restrictive manner. In these four years, the government endeavoured to channel regular migration exclusively through the quota system. For this purpose, the quota system was modified in two different ways. First, in order to avoid the regularisation of irregular migrants through the quota system, job offers could only be made through anonymous recruitment. By signing bilateral agreements with countries such as Colombia, Morocco, Poland, Ecuador, the Dominican Republic and Romania, the selection process became the responsibility of the individual countries' governments. Second, to adapt the annual quota to the requirements of the labour market, included in the process were regional governments, employer organisations and trade unions who could help determine the number and characteristics of workers included under this system. In this system, employer organisations' and trade unions' estimations were evaluated at the provincial level by regional governments and then proposed for acceptance to the Ministry of Labour. In turn, the Ministry was responsible for the final decision after consultation with the Higher Council on Immigration Policy.

46. Although proffered by subsequent governments as Spain's main channel for legal entry, the quota system has offered no more than 20,000 to 40,000 jobs per year. While the annual quota had always been rather limited, the number of employer applications registered through this system has further decreased. The outcomes may be explained by the rigidities imposed by the annual quota (as established by economic sector, job speciality and province), the limitations of the recruitment process (managed by the governments of countries of origin), and once again, excessively long administrative procedures.

47. Given the limitations of the quota system, in 2004, with the PSOE again in power, the general regime was restored. The idea behind this decision was that those employers who wanted to hire a foreign worker in particular or who had not anticipated their labour needs in time to be accounted for in the quota system, would still have the opportunity to undertake nominative employment of foreign workers. From this point onwards, in order to facilitate procedures in those sectors with huge staff shortages, the Spanish government has issued a quarterly list of occupations in which nominative employment of foreign workers is permitted without first having to conduct a labour market test. The national employment office disseminates this list to the regional governments, where it is discussed at the regional level with employer organisations and trade unions. Ultimately, the list is approved in the Tripartite Labour Commission, which features representation by the Ministry of Labour, Spain's largest employer organisation (CEOE) and the two largest trade unions (CCOO, UGT). While employer organisations have commonly claimed less restrictive policies, their position has varied according to region and depending on whether medium and small companies were represented. On the other side, trade unions have often been reluctant to an open-labour migration policy. While they have pushed for the legalisation of irregular migrants who are

already present in the country, trade unions have had a much more restrictive position regarding the entrance of new migrants.

Regularisation

48. In view of how entrance has actually been regulated, it is no wonder that regularisations have constituted the primary avenue for conferring legal status in Spain. Concretely speaking, the easiest and most common way to obtain a legal status had been to enter with a tourist visa, work illegally for a while and then get regularised in one of the frequent regularisation programmes. Between 1985 and 2005, six exceptional regularisation processes were implemented in Spain (1986, 1991, 1996, 2000, 2001 and 2005).[2] Moreover, the general regime and, in particular, the quota system have actually functioned as regularisation programmes. Since 2004, individual regularisation, referred to as '*arraigo*' ('rooting') has been possible once the migrant has lived in Spain for two years and has established a work relationship of at least one year (or three years and the prospect of entering into a work contract).

49. The Spanish government has given different reasons for implementing extraordinary regularisation programmes. For one, the government launched different regularisation programmes to reduce the stocks of irregular migrants that had been generated through previous procedures before introducing a new immigration law or regulation (1986, 1996, 2000, 2005). In 1991 a regularisation programme was implemented in exchange for the introduction of a visa requirement for Moroccans. Finally, the government has also argued, most remarkably in 2005, that regularisation programmes were necessary in order to reduce the underground economy and therefore benefit both the migrant (by improving their working and living conditions) and Spanish society (through more taxes and social security contributions).

50. Most regularisations required conditions of residency and work to be fulfilled. While residence was normally demonstrated through registration in the municipality, in 2000 and 2001, passport entry stamps, boarding tickets, utility bills and other similar documents could also be used for this purpose. In 2005, following a number of demonstrations in Barcelona and Madrid, seven other documents (e.g. official health cards, expulsion orders, rejected registration applications, asylum applications) were also deemed applicable for registration 'by omission'. Labour requirements had also been instated through some regularisation programmes (1986, 2000, 2005), which, in practice, meant that only workers in the formal economy got regularised. Particularly in the regularisation of 2005, eligibility was dependent on the prospect of a *bona fide* work contract of at least six months. Finally, in 1996 a special programme was launched to regularise those migrants who had fallen back into irregularity. In this case, potential regularised migrants had to prove that they had been in possession of an earlier residence or work permit.

51. Employers have generally taken a favourable position vis-à-vis regularisation processes. Among smaller companies, especially, employers were grateful for the opportunity to regularise the situation of many of their already employed irregular immigrants. Following the trend throughout Europe, Spanish trade unions have expressed worry about the possible negative impact immigrant workers might have on wages and employment opportunities for native workers, but they have demonstrated a positive attitude towards immigration and immigrants. Trade unions have extended their services to immigrant workers, basically regarding them as potential new members through which they can reinforce their social presence. This stance may have something to do with the fact that Spain's dominant trade unions have traditionally had a left-wing political orientation. At the same time, it is also plausible that the remarkable

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2 The 1990s also saw specific regularisation programmes implemented to solve confrontational situations in the border cities of Ceuta and Melilla. These programmes permitted irregular migrants to get a one-year residence permit without having to undergo the standard process. In exchange, the government required active collaboration from NGOs who would see to it that immigrants could move to the peninsula. There they were to be granted some basic reception provisions, a gesture meant to counterbalance the negative impact of their irregular arrival.

expansion of the Spanish economy during the last decade and the importance of the country's black economy have encouraged the positive attitude among trade unions.

52. In any case, the systematic use of regularisation processes remains an important issue in the Spanish policy on immigration flows and border control. It is possible that the current economic crisis helps in consolidating the flows and the number of foreign residents. In this respect, regularisation processes may be rarer in the future. An important alternative way of incorporating irregular immigrants within the legal conditions required by the regulations in force is that of "arraigo" (rooting). This can be seen as a permanent open door for incorporating a significant group of immigrants who stay or fall in an irregular situation, without opening a costly process of regularisation, undesired in both political and administrative terms.