Constitutional Court Judgment No. 237/2005, of September 26 (Unofficial translation)

The Second Chamber of the Constitutional Court comprising Mr. Guillermo Jiménez Sánchez, President, Mr. Vicente Conde Martín de Hijas, Ms. Elisa Pérez Vera, Mr. Ramón Rodríguez Arribas and Mr. Pascual Sala Sánchez, Judges, has rendered

IN THE NAME OF THE KING

the following

J U D G M E N T

in the appeal for protection proceedings Nos. 1744-2003, 1755-2003 and 1773-2003, the first of which was filed by Ms. Rigoberta Menchú Tumn, Ms. Silvia Solórzano Foppa, Ms. Silvia Julieta Solórzano Foppa, Mr. Santiago Solórzano Ureta, Mr. Julio Alfonso Solórzano Foppa, Mr. Lorenzo Villanueva Villanueva, Ms. Juliana Villanueva Villanueva, Mr. Lorenzo Jesús Villanueva Imizocz, Ms. Ana María Gran Cirera, Ms. Montserrat Gibert Grant, Ms. Ana María Gibert Gran, Ms. Concepción Gran Cirera, Mr. José Narciso Picas Vila, Ms. Aura Elena Farfán, Ms. Rosario Pu Gómez, C. I. Est. Prom. Derechos Humanos, Mr. Arcadio Alonzo Fernández, Conavigua, Famdegua and Ms. Ana Lucrecia Molina Theissen, represented by Court Procurator Ms. Gloria Rincón Mayoral and defended by the attorney Mr. Carlos Vila Calvo, and by the Confederación Sindical de Comisiones Obreras, represented by Court Procurator Ms. Isabel Cañedo Vega and defended by the attorney Mr. Antonio García Martín; No. 1755-2003 by the Asociación de Derechos Humanos de España, represented by Court Procurator Ms. Irene Gutiérrez Carrillo and defended by the attorney Mr. Víctor Hortal Fernández; and No. 1773-2003 by Asociación libre de Abogados, Asociación contra la Tortura, Associació d'Amistat amb el Poble de Guatemala, Asociación Centro de Documentación y Solidaridad con América Latina y África and Comité Solidaridad Internacionalista de Zaragoza represented by Court Procurator Ms. Isabel Calvo Villoria and defended by attorney Mr. Antonio Segura Hernández, and by Asociación Argentina Pro-Derechos Humanos de Madrid represented by Court Procurator Ms. Isabel Cañedo Vega and defended by attorney Mr. Carlos Slepoy Prada, against Supreme Court Judgment No. 327/2003 of February 25, rendered in Cassation Appeal Proceedings No. 803-2001, which partially allows the cassation appeal filed against the En Banc Order of the Criminal Chamber of the National Court of December 13, 2000, rendered in Appeal Proceedings No. 115-2000, with the intervention of the Public Prosecutor. Judge Guillermo Jiménez Sánchez wrote the opinion of the Court.

I. Findings of Fact

1. a) In a brief registered at this Court on March 26, 2003 under No. 1744-2003 Court Procurator Ms. Gloria Rincón Mayoral representing Ms. Rigoberta Menchú Tumn and others as indicated above, and Court Procurator Ms. Isabel Cañedo Vega representing Confederación Sindical de Comisiones Obreras filed an appeal for protection against the decisions cited in the heading.

b) In a brief registered at this Court on March 27, 2003 under No. 1755-2003 Court Procurator Ms. Irene Gutiérrez Carrillo representing Asociación Pro Derechos Humanos de España filed an appeal for protection against those same decisions.

c) In a brief registered at this Court on March 27, 2003 under No. 1773-2003 Court Procurator Ms. Isabel Calvo Villoria represented by Asociación Libre de Abogados and others as indicated above, and Court Procurator Ms. Isabel Cañedo Vega, representing Asociación Argentina Pro-

Derechos Humanos, likewise filed an appeal for protection against the aforementioned decisions.

2. The appeal is based on the following facts summarized below with respect to the object of the petition for protection:

a) On December 2, 1999 Ms. Ribogerta Menchú Tumn filed a crime report at the duty court of the National Court, detailing events which she described as possible crimes of genocide, torture, terrorism, murder and false imprisonment perpetrated in Guatemala between 1978 and 1986 by different persons who during that period held positions of civil and military authority. The events set forth in the report include the assault on the Spanish Embassy in Guatemala in 1980, in which 37 people died, as well as the death of several priests of Spanish and other nationalities, and family members of the complainant. She deemed the Spanish National Court to have jurisdiction to hear these matters pursuant to the provisions of Art. 23.4, paragraphs a), b) and g) of the Organic Law of the Judiciary (hereinafter, "LOPJ"). The filing of the crime report, assigned to Central Criminal Investigation Court No. 1, was followed by numerous individuals and associations entering an appearance in the proceedings including, among others, the present appellants.

b) On January 13, 2000 the Public Prosecutor sought to have the proceedings dismissed, deeming that Spain lacked jurisdiction in the matter. In an Order issued on March 27, 2000 the judge of the Central Criminal Court No. 1 rejected the motion, established the court's jurisdiction, accepted the proceedings against the accused and the criminal complaints as filed, and ordered several investigations, including a petition addressed to the Guatemalan authorities to clarify whether at present there are any criminal proceedings pending against the accused for those same events, particularly those that occurred at the Spanish Embassy, and asking that they "indicate, if applicable, any suspension or continuance of the proceedings, the grounds therefor and the dates" and "any decisions to close or dismiss" the proceedings.

In summary, and among other arguments that are not relevant to the appeal for protection, the investigating judge based his decision on the "clear appearance of genocide", since this concerned the extermination of the Mayan people "on the pretext that they supported, concealed —or even instigated— the insurgency or revolution", and, thus, pursuant to paragraph 4 a) as it relates to paragraph 2 c) of Art. 23 and Arts. 65.1 and 88 of the LOPG, the judge had jurisdiction to hear this offense, which included all others described in the crime report. Moreover, he added that the National Reconciliation Law (hereinafter "LRN") of Guatemala only grants amnesty to participants in the "the armed conflict", the existence of which (as alleged by the prosecutor) is "a factual element pending proof"; that Art. 23 of the LOPJ is a law of procedure and, thus, the principle of the non-retroactivity of unfavorable penal norms is not applicable; that the matter is not res judicata, since there is no evidence that other proceedings based on the same events are being heard in Guatemala, in addition to the fact that the states in which this type of offenses are committed cannot claim interference with their sovereignty, since the judges of the state that assumes repressive jurisdiction exercise their own sovereignty, based on the preservation of the common interests of civilized humanity; therefore not attempting to elude the territorial jurisdiction of Guatemala, which "is not exclusive, since in the absence of any honorable and efficient exercise of that jurisdiction it must be supplemented by courts —such as those in Spain— that base the extraterritoriality of their jurisdiction on the internal and international principal of universal repression... without ignoring that Art. 6 of the 1948 Convention imposes the subsidiarity of Spain's jurisdiction with respect to the state in which those multiple events occurred."

c) The Public Prosecutor filed a reconsideration appeal which was dismissed in an Order issued on April 27, 2000 on grounds substantially the same as those expressed in the decision under appeal, and the Prosecutor likewise appealed that order to the court above, which the Criminal Chamber of the National Court sitting en banc allowed in its Order of December 13, 2002,

declaring that “exercising Spanish jurisdiction with respect to the events in question is not warranted at this time, and the investigating judge should therefore close the investigation”. The Court deemed that the investigating judge’s arguments coincided with the grounds set forth in that Court’s Orders of 4 and 5 November 1998 “with respect to Chile and Argentina”, but “not with the factual premise of failure to act on the part of the Guatemalan courts”.

The Order specifically stated that: 1) it is necessary to balance the principle of universal repression of Art. 23.4 a) of the LOPJ with the criteria of Art. 6 of the Convention on Punishment of the Crime of Genocide of December 9, 1948 (hereinafter, “Convention on Genocide), applicable pursuant to Arts. 96 of the Spanish Constitution (hereinafter “CE”) and 1.5 of the Civil Code, which obliges the state in which the events occurred to establish a jurisdiction to prosecute them, although this does not preclude other jurisdictions, nevertheless applying the principle of subsidiarity of the latter with respect to the former; 2) this principle implies refraining from exercising jurisdiction in another state when the events are being tried in the state in which they occurred or by the International Criminal Court; 3) “in contrast to Chile and Argentina”, the Guatemalan courts’ failure to act has not been demonstrated since, first, there is no legislation that would preclude local judges from acting [given that Art. 8 LRN expressly excludes the extinction of criminal liability with respect to —among others— the crime of genocide and, moreover, the Commission for Historical Clarification (CEH) created by the Oslo Accords of 1994 expressly recommends compliance therewith “in order to pursue and try” such crimes] and, second, if the Guatemalan courts were previously intimidated, there is no indication that they refrain from acting today if criminal proceedings are brought before them, without there likewise being any indication that the time elapsed reflects a failure to act, since the material on which the initial accusation is based [the CEH’s report] was issued on February 2, 1999, and the crime report was filed on December 2 of that year “without being accompanied by any Guatemalan judicial decision rejecting it”.

d) The complainants filed a cassation appeal against that order, which the Supreme Court resolved in a judgment against which the constitutional appeal for protection was filed. In the Supreme Court’s decision, the Criminal Division examined and rejected the grounds for appeal in the following terms, synthetically summarized hereunder and limited to those aspects related to the appeal for protection:

1) The right to effective protection of the courts was not violated by the fact that the National Court declined jurisdiction based on an argument (subsidiarity) not alleged by the Public Prosecutor in his appeal, since the Order contains arguments that may not be shared but neither may they be accused of being inexistent or arbitrary, since they satisfy the inherent demands of the right invoked and, moreover, the accusatory principle binds the Court with respect to the claims, but not with respect to the legal arguments used to defend them.

2) With regard to the subsidiarity principle, the Supreme Court underscored that “the objective of our ruling is to determine the extraterritorial jurisdiction of the Spanish Courts... and not only to evaluate the appropriateness of the criteria used by the Criminal Chamber of the National Court sitting en banc in its Order now under appeal”, as well as the fact that this matter “depends solely on the law, and once the question has been raised, the Court must apply its provisions” and, thus, “the doctrine of the prohibition of reformatio in peius is not applicable to this matter”. Based on this premise and after admitting that the Convention on Genocide neither establishes nor excludes universal jurisdiction, the Second Division of the Supreme Court affirmed that the “criteria of subsidiarity... is not satisfactory in the form in which it was applied by the trial court”, because to base this on the real or apparent failure to act of the courts of that place “implies that the courts of one state are making a judgment as to the capacity to administer justice of the corresponding courts of another sovereign state”, a declaration which “does not fall to the Courts of the State”, since Art. 97 CE attributes foreign policy decisions to the Government, “and the repercussion that such a declaration may have in that area cannot be ignored”.

Moreover, the Convention on Genocide regulates the proceeding to be followed in such cases, its Art. 8 attributing to the bodies of the United Nations the powers to take the appropriate measures to prevent and punish the crimes included therein, there being in this case reports from the United Nations Mission (MINUGUA) that make reference to difficulties in the area of human rights, which are thus known to those UN bodies, which nevertheless have not responded similarly in the cases of Rwanda or the former Yugoslavia.

3) Admitting "quite provisionally" that the events reported may constitute acts of genocide, Art. 1 of the Convention of 1948 (in which "the Contracting Parties… commit themselves to preventing and punishing" that crime) cannot be interpreted as establishing universal jurisdiction, since Art. 6 provides for the jurisdiction of the territory in question or for an International Criminal Court, and the aforementioned Art. 8 provides for another means of reaction, different from each state's establishing its own jurisdiction in accordance with the principle of universal repression. In fact, in incorporating the Convention Spain included the crime of genocide in its Criminal Code (Law 44/1971), but did not modify the procedural rules regulating extraterritorial matters to extend the principle of universal jurisdiction to that crime.

4) In effect, Art. 23.4 LOPJ includes that principle; but "a provision as general as the one included in that precept raises certain questions", since "it cannot be interpreted as prompting in practice the opening of criminal proceedings upon the report of the commission of acts susceptible to being classified among the crimes to which it refers, no matter where they were committed and the nationality of the perpetrator and the victim", and "the principle of opportunity" is not established in our Law, and it must be determined whether the rule of universal jurisdiction can be applied "without taking into consideration other principles of international public law". In that regard, the High Court affirmed that "jurisdiction is a manifestation of the sovereignty of the State, and thus its initial limitations coincide with those of the State, which in many aspects are likewise determined by that of other States", and, thus, "cases involving places not under the sovereignty of any state and others in which the intervention of the courts affect acts committed in the territory of another sovereign state are not absolutely comparable".

Thus, with regard to the principles of protection of interests and jurisdiction over criminal conduct committed by or against one's citizens, the extraterritorial extension of jurisdiction is justified by the existence of the individual interests of each State, but when basing extraterritorial jurisdiction on the legal rights of the international community a question arises as to the compatibility of the principle of universal justice with other principles of international public law. There is no objection to universal jurisdiction when it is based on a recognized source of international law, especially a treaty accepted by the party states. But if it is only recognized in domestic law, its scope is limited by "other principles" when there is no "direct point of connection with national interests", since "there is significant support in legal scholarship for the idea that no individual state has the power to unilaterally establish order by applying criminal law to all others all over the world".

The Court admitted that if the criminal activities were committed with the consent and even the participation of the state authorities, "the particular seriousness of the events, together with the absence of express international norms or the inexistence of an international organization of states, could explain the individual action of any of them", but this does not imply that there is no governing criterion, such as Art. 8 of the Convention on Genocide and "the principle of non-intervention in the affairs of other states (Art. 2.7 of the United Nations Charter)", whose limitations in matters of human rights are only unobjectionable when intervention is accepted through agreements among states or decided by the United Nations, and not when decided "unilaterally by a state or the judges of a state".

5) International treaties subscribed by Spain to prosecute crimes and "which protect legal rights whose protection is in the interest of the international community" establish criteria for attributing both territorial jurisdiction and personal jurisdiction, committing each state to pursue

these acts, no matter where they were committed, when the perpetrator is present in its territory and extradition is denied (dedere aut punire), “but none of these treaties expressly provides that a state may prosecute acts committed in the territory of another state, without any limitations and based solely on domestic law, even in cases in which the other state does not proceed to prosecute those acts.”

6) The Court justified an interpretation based on those treaties for two reasons: first, based on the general remission of Art. 23.4 g) LOPJ to crimes which according to international treaties or conventions should be pursued by Spain, “the application of the homogenous criteria found in international law for the prosecution of crimes being congruent with the objectives sought therein;” and, second, based on the fact that art. 96.2 CE incorporates into domestic law the content of those treaties, together with Art. 27 of the Vienna Convention on the Law of Treaties of May 23, 1969 (hereinafter “Convention on the Law of Treaties”), which prohibits modifying or failing to comply with their content based on the internal legislation of each state. On that basis the judgment examined the treaties subscribed by Spain, reaching the already implied conclusion that (the Court maintains) reflects what “a significant sector of legal scholars” understand as the “principle of supplementary justice or representative criminal justice, at least in the broad sense”, and another sector of opinion considers “an element of connection within the scope of the principle of universal jurisdiction”.

A sector of legal scholars and several national courts having recognized “the connection to a national interest” as an “element of legitimacy within the framework of the principle of universal justice”, that national interest can be understood as being relevant for these effects when the event to which it is connected “has an equivalent significance to that recognized in other events which, according to internal law and the treaties, give rise to the application of the other criteria for attributing extraterritorial criminal jurisdiction”, while this connection must likewise be present in relation to the crime that serves as a basis for attributing jurisdiction, and not with respect to other related crimes, so that the existence of a connection to one crime does not authorize extending jurisdiction to other different ones in which that connection is not present.

7) In applying this doctrine, the universal jurisdiction of the Spanish courts cannot be inferred either from the provisions of the Convention on Genocide or from any other treaty subscribed by Spain. Moreover, there is no evidence that any of the accused are present in Spanish territory, nor that Spain has refused their extradition, nor is there evidence of a connection to any Spanish national interest, since although it is possible to establish a connection with respect to the nationality of the victims, there is no evidence of genocide against Spaniards, even when they have been affected by events classified as other types of crimes. The same may be said of terrorism “notwithstanding questions that may be raised with regard to the criminal definition of those acts pursuant to Spanish laws in forces when they were committed”. As for torture, Spain and Guatemala are parties to the Convention of 1984, which incorporates the principle of jurisdiction over criminal acts committed against one’s citizens, permitting the state of the victim to prosecute such acts when deemed warranted.

The crime report included events occurred at the Embassy of Spain, in which Spanish citizens died, the Guatemalan government having admitted in a joint communiqué in 1984 that they constituted a violation of the Vienna Convention on Diplomatic Relations and accepted any consequences derived therefrom, likewise regretting the death of four Spanish priests imputed to civil servants or other persons in the exercise of public duties, which would determine the jurisdiction of the Spanish courts with respect to both events, pursuant to Art. 23.4 g) LOPJ, as it relates to the Convention on Torture.

In consequence, the Supreme Court partially allowed the cassation appeal and affirmed the jurisdiction of the Spanish courts with respect to those two events.

e) Seven judges of the chamber dissented, and a large part of their arguments formed the basis for the appeals for protection that have been filed. The dissenting minority accepted the criteria

of the judgment, including the "implicit" allowance of the grounds for cassation concerning the means in which the National Court applied the principle of subsidiarity, but it distanced itself with regard to the application of the principle of universal justice, considering that the majority interpretation fails to respect the provisions laid down by the legislator in Art. 23.4 g) LOPJ. They thus deemed that:

1) The principle of subsidiarity does not appear in our positive law, either in the LOPJ or in the Convention on Genocide which, in effect, does not prohibit universal jurisdiction with respect to that crime, there in fact being several countries that have reflected it in their laws. Universal jurisdiction "is not governed by the principle of subsidiarity, but rather by concurrence, since its purpose is precisely to prevent impunity", applying the principle of nonintervention when territorial jurisdiction is in place. This does not authorize demanding full proof of failure to act on the part of that territorial jurisdiction in order to entertain a criminal complaint, but rather merely reasonable evidence that the crimes reported have not to-date been effectively prosecuted, which in this case can be deduced from the documents presented.

Thus, allowing the cassation appeal with respect to the application of the principle of subsidiarity should have meant accepting the criminal complaint in the terms set forth in the Order issued by the Central Court, and since subsidiarity was the only ground stated in the Order of the Chamber of the National Court, which was deemed incorrect by the majority, the Order under appeal should have been quashed.

2) Since the criminal complainants are the only appellants, the judgment thus incurs in a reformatio in peius by adversely affecting their position in the proceedings: applying their interpretation of the principle of subsidiarity with regard to the short time elapsed between the time the events were made known and until the crime report was filed, the Court declined jurisdiction "for the moment". However, the Supreme Court's decision is definitive, establishing that Spanish courts only have jurisdiction if the victims of the genocide are Spaniards or the accused are present in Spain. It cannot be alleged that this decision depends "solely on the law", since any decision that incurs in this type of violation of due process does so while deeming that it is in accordance with the law. The relevant fact is that without allowing the claims of the appellants, the appeal takes the opportunity to establish a new precedent that is much more restrictive than the position taken in the Order under appeal.

3) The majority of the Court interpreted Art. 23.4 g) LOPJ contra legem, since the only limitation that this provision sets forth with respect to Spanish jurisdiction is that the criminal cannot have been acquitted, convicted, pardoned or imprisoned abroad. The requirement that the victim be a Spaniard is manifestly contrary to this precept, which is not in any way founded on the principle of jurisdiction over criminal conduct committed against one's citizens and renders the prosecution of genocide an extraterritorial crime practically devoid of all content. The existence of Spanish victims may reinforce the reasons for justifying the Spanish court's hearing the matter, but that jurisdiction would be exercised in accordance with the aforementioned Art. 23.4 a), applying the principle of universal justice. Applying national interest is contrary to the consideration of genocide as a crime against the international community, since it affects only Spanish victims outside of Spain (and if the Spanish victims were not included in the group, the event with respect to them could not be considered a crime of genocide).

The other criterion used in the judgment, the presence of the alleged perpetrator in Spanish territory, is likewise contrary to the precept, since Art. 23.4 distinguishes two types of crimes, those with respect to which there is extraterritorial jurisdiction pursuant to domestic law [paragraphs a) through f)], and those which may be considered as such pursuant to a treaty [paragraph g)], incorporating into domestic law with respect to the former the principle of universal jurisdiction pursuant to a principle of ius cogens, which is beyond debate. Thus, paragraph g) cannot be interpreted as establishing limits to the former with respect to jurisdiction recognized previously and, moreover, the treaties to be taken into consideration set

forth minimum rather than maximum obligations to exercise jurisdiction.
4) Citing precedents from comparative law, it concludes that the principle of universal justice is applicable to the repression of genocide as a principle of ius cogens of international law and, thus, in the exercise of this jurisdiction pursuant to the terms of Art. 23.4 LOPJ, there is no contradiction with the principles of international law.
Therefore, requiring a link or connection between the events and a value or interest of the state that exercises jurisdiction may constitute a reasonable criterion for self-restraint in order to avoid a proliferation of proceedings involving foreign and distant crimes, but always as a criterion for excluding an excess or abuse of law, and not as a means of repealing in practice the principle of universal jurisdiction, making an exception the rule by applying the principle of jurisdiction over crimes against one's citizens, which does not exist in our legal system, or the principle of defense, which is set forth separately in Art. 23.3 LOPJ. The criterion of reasonability thus set forth may allow refusing an abusive exercise of jurisdiction with a view to preventing an excessive expansion of this type of proceedings and ineffective interventions, but in practice the Court's excessively restrictive majority interpretation of this common nexus prevents its exercise.
5) In any event, if the criterion of connection is to be found in any case, it is in this one, to the point that "in the history of Spanish jurisdiction it will be difficult to find a case in which there are so many connections with the crime of ethnic genocide". In that regard, the dissenting minority underscored the existence of cultural, historical, linguistic, legal and other links to Guatemala, which would preclude applying the "reasonable criterion of exclusion" described above and supports a more effective intervention of the courts, in addition to a relevant number of Spanish victims, not of genocide (since they do not belong to the ethnic group), but rather of acts of retaliation or the acts of genocide against the Mayan people, and ultimately the attack on the Spanish embassy "of which there can be no clearer example that this affects the interests of our country".
By virtue of the above, the dissenting vote deemed that the appeal should have been allowed, quashing the Order under appeal and affirming the order initially issued by the Central Criminal Examining Court.
3. In summary, the respective appeals for protection are based on the following grounds:
a) Appeal for protection no. 1744-2003 first deems that the right to due process guaranteed in Art. 24.1 CE has been denied with respect to the right to a judgment based on law and the right to access to justice, having been violated in both the judgment of the Supreme Court of February 25, 2003, which contains an unjustifiably restrictive contra legem interpretation of Art. 23.4 LOPJ, and in which the requirement of a connection between the criminal acts and the interests of the Spanish state (that is not established by law) actually repeals the principle of universal justice set forth in that precept, and in the Order of the National Court of December 13, 2000 that introduced a requisite (the criterion of subsidiarity) that is not present in the law, in order to prevent access of the appellants to this proceeding. Secondly, it likewise deems that the right reflected in Art. 24.1 CE has been violated by contravening the prohibition of reformatio in peius, resulting in a denial of justice, given that since the present plaintiffs are the only appellants, the Supreme Court judgment injures and worsens their previous position, since it absolutely precludes the jurisdiction of the Spanish courts in contrast to the National Court's ruling that the Spanish courts did not have jurisdiction "at this time". In other respects, the plaintiffs assume the arguments contained in the dissenting vote. And, third, they allege that the right to an ordinary judge predetermined by law and to all procedural guarantees (Art. 24.2 CE) were violated in the rulings under appeal, which interpret Art. 23.4 LOPJ contra legem and preclude the jurisdiction of the Spanish Courts.
b) The brief filed in the appeal registered under No. 1755-2003 seeks recourse for violation of the following fundamental rights: first, the right to effective protection of the courts (Art. 24.2

CE) with respect to access to the courts, in which both the judgment of the Supreme Court and the Order of the National Court of December 13, 2000 are deemed to have incurred by denying that Spanish courts have jurisdiction to prosecute the events reported, based on an interpretation that precludes any application of Art. 23.4 LOPJ, the Supreme Court's decision replacing the principle of universal jurisdiction with the principle of jurisdiction over crimes committed against one's citizens, which is not a part of the Spanish legal order, and the National Court's decision restricting contra legem the framework of the jurisdiction of the Spanish courts by virtue of the principle of subsidiarity. Secondly, they likewise incur in a violation of the right to due process with regard to the right of equality under the law when they restrict the jurisdiction of the criminal courts to pursue the reported events based on the nationality of the victims or on "national interest", thus contravening the provisions of Art. 14 of the European Convention on Human Rights or Art. 21 of the International Covenant on Civil and Political Rights. Finally, they alleged that the Supreme Court violated the prohibition of reformatio in peius in its ruling in the cassation proceeding filed by the present appellants, by further restricting the jurisdiction of the Spanish Courts with respect to the ruling of the National Court.

c) The appeal for protection registered under No. 1773-2003 was filed based on the following ground for appeal: First, for violation of the right to the effective protection of the courts (Art. 24.1 CE) of the Supreme Court for having rendered a judgment not based on law and that is clearly and precisely counter to the provision of Art. 23.4 LOPJ, likewise denying access to the courts by unduly restricting the jurisdiction of the Spanish courts. The same grounds were applied to the National Court. The rulings of those courts also deprived the present plaintiffs of the right to an ordinary judge predetermined by law, thus contravening the provisions of Art. 24.2 CE. Without providing argumentative support, the brief likewise alleged violation of the right to a speedy trial to finally conclude, based on the dissenting opinion, that the Supreme Court incurred in reformatio in peius.

4. With respect to the complaint filed under no. 1744-2003, pursuant to Art. 50.3 LOTC the Second Chamber issued an order on May 13, 2004 agreeing to grant the appellants and the public prosecutor a common term of ten days in which to submit allegations and the pertinent documents with regard to lack of constitutional content, in accordance with Art. 50.1 c) LOTC. The public prosecutor and the plaintiff sought leave to appeal, which was granted in an order issued by the Second Chamber on October 14, 2004, which likewise notified all those who were parties to the proceeding. In a brief registered at the Court on November 22, 2004, the Asociación Argentina Pro-Derechos Humanos entered an appearance in the proceedings, represented by Court Procurator Ms. Isabel Cañedo Vega.

In an order issued by the clerk of court on January 20, 2005 that Association was deemed as having entered an appearance, and all parties were likewise granted access to the record for a term of twenty days, pursuant to Art. 52.1 LOTC, in addition to granting them ten days, pursuant to Art. 83 LOTC in which to allege whatever they deemed pertinent with regard to the consolidation of this appeal with Appeal No. 1755-2003 assigned to the Second Chamber and Appeal No. 1773-2003 assigned to the First Chamber.

5. With respect to the complaint filed under no. 1755-2003, pursuant to Art. 50.3 LOTC the Second Chamber issued an order on May 19, 2004 agreeing to grant the appellants and the public prosecutor a common term of ten days in which to submit allegations and the pertinent documents with regard to lack of constitutional content, in accordance with Art. 50.1 c) LOTC. The public prosecutor and the plaintiff sought leave to appeal, which was granted in an order issued by the Second Chamber on October 28, 2004, which likewise notified all those who were parties to the proceeding. In a brief registered at the Court on December 23, 2004, the Asociación Libre de Abogados entered an appearance in the proceedings, represented by Court Procurator Ms. Isabel Cañedo Vega.

In an order issued by the clerk of court on January 20, 2005 that Association was deemed as

having entered an appearance, and all parties were granted access to the record for a term of twenty days pursuant to Art. 52.1 LOTC, in addition to being granted ten days pursuant to Art. 83 LOTC in which to allege whatever they deemed pertinent with regard to the consolidation of this appeal with Appeal No. 1744-2003 assigned to the Second Chamber.

6. With regard to Appeal No. 1774-2003, the First Chamber issued an order on May 18, 2004 granting leave to appeal and, pursuant to Art. 51 LOTC notified all parties to the proceeding. In briefs registered at the Court on June 1, 2004, the following entered an appearance in the proceedings: Confederación Sindical de Comisiones Obreras, represented by Court Procurator Ms. Isabel Cañedo Vega, and Ms. Rigoberta Menchú Tumn, Ms. Silvia Solórzano Foppa, Ms. Silvia Julieta Solórzano Foppa, Mr. Santiago Solórzano Ureta, Mr. Julio Alfonso Solórzano Foppa, Mr. Lorenzo Villanueva Villanueva, Ms. Juliana Villanueva Villanueva, Mr. Lorenzo Jesús Villanueva Imizocz, Ms. Ana María Gran Cirera, Ms. Montserrat Gibert Grant, Ms. Ana María Gibert Gran, Ms. Concepción Gran Cirera, Mr. José Narciso Picas Vila, Ms. Aura Elena Farfán, Ms. Rosario Pu Gómez, C. I. Est. Prom. Derechos Humanos, Mr. Arcadio Alonzo Fernández, Conavigua, Famdegua and Ms. Ana Lucrecia Molina Theissen, represented by Court Procurator Ms. Gloria Rincón Mayoral.

In an order issued by the clerk of court on October 8, the aforementioned were deemed as having entered an appearance, granting access to the record to all parties for a term of twenty days, pursuant to Art. 52.1 LOTC. In a subsequent order of the clerk of January 20, 2005, pursuant to Art. 83 LOTC the parties were granted ten days in which to allege whatever they deemed pertinent with regard to the consolidation of this appeal with Appeal No. 1744-2003 assigned to the Second Chamber.

7. The public prosecutor and the various parties to the proceedings either agreed to consolidation or did not oppose it. The Second Chamber of the Court issued an order on March 14, 2005 consolidating the most recent appeals (nos. 1755-2003 and 1773-2003) with the oldest (no. 1744-2003), given that they all appeal against the same judicial decisions and allege the violation of practically the same fundamental rights.

8. In Appeal No. 1744-2003, in compliance with the procedure set forth in Art. 52.1 LOTC, in a brief filed at this Court on February 10, 2005 the public prosecutor requested that the appeal be allowed based on the following considerations. With regard to the alleged violation of Art. 24.1 CE based on reformatio in peius, he considered that it constitutes a ground for refusing leave as set forth in Art. 50.1 a) as it relates to Art. 44.1 a) LOTC, given the fact that, since it is incongruent extra petita, the ground offered in Art. 240.3 LOPJ should have been applied, filing a motion for annulment before seeking recourse in the constitutional jurisdiction. In any case, if the Court does not accept these terms, the aforementioned ground for appeal should be dismissed since, on the one hand, a decision referred to the jurisdiction of the Spanish courts, which cannot be deferred, cannot be deemed incongruent and, in consequence, may be examined ex officio at any stage in the proceedings, as indicated in A. 9.1 LOPJ and, on the other hand, it cannot be affirmed that the decision of the Supreme Court definitively precludes any possible proceeding in Spain with respect to the criminal acts reported, since proceedings could be commenced if any of the required points of connection were present.

With respect to the right to an ordinary judge predetermined by law, he considered that there has been no violation of that right, considering as such the judges on the courts which, after the appeals were filed, issued their decisions, and that this right does not include the obligation of the courts initially called upon to hear a given proceeding to examine ex officio their own jurisdiction.

With regard to the alleged violation of the right to the effective protection of the courts, the public prosecutor considered that, given the significant weight of the pro actione principle in relation to access to the courts, it would not be admissible to subordinate the possibility of commencing proceedings to requisites not legally provided for, applied so strictly so as to

prevent or excessively hinder the commencement of proceedings (he cited, among others, Constitutional Court Judgments 34/1999, 84/1996, 71/2001 or 231/2001). In that regard, the National Court and the Supreme Court did not limit themselves to requiring the concurrence of the circumstances provided in Art. 23.4 LOPJ, but rather they added to the content of that precept requisites not expressly set forth in the text of the law. Thus, the Order of the National Court requires evidence that is not legally required and that concerns negative events, a probatio diabolica whose requirement, in consequence, violates the right to the effective protection of the courts. With respect to the decision of the Supreme Court, although the requirement of a "connection to a national interest" formally appears grounded in a systematic interpretation of several laws, it constitutes an obstacle that is not legally envisaged, thus being contrary to Art. 24.1 CE. Moreover, that requirement is not even justified from a systematic perspective, based on the following arguments: a) First, as one of the points of connection, requiring that at least one of the victims be a Spaniard would render unnecessary the specific provision providing for the jurisdiction of Spanish courts to hear cases of genocide, since the applicable principle in that case would be the personality principle of Art. 23.2 LOPJ, moreover requiring proof that would be extremely difficult to provide on many occasions. b) Secondly, the alternative requirement that the perpetrators be present in Spain is legally unfounded. c) And, lastly, the requirement that, in the absence of the previous requisites, Spanish interests must have been affected is, on the one hand, redundant with respect to Art. 23.3 LOPJ and, on the other, it can be affirmed that when the Spanish legislators set forth, together with genocide, a catalogue of crimes that should be tried in any event in the Spanish courts, they did so in the understanding that this was in the interest of the State. In summary, that requirement (merely set forth generically) lacks legal support, is not justified, and its lack of definition renders it an insurmountable obstacle.

In other respects and in compliance with the aforementioned requisite, the representative of the Asociación Argentina Pro-Derechos Humanos filed a brief at this Court on February 22, 2005, joining and incorporating by reference the allegations made in the appeal for protection filed on behalf of Ms. Rigoberta Menchú Tumn and others.

9. In the appeal entered under No. 1755-2003 and in compliance with the requisite provided in Art. 52.1 LOTC, in a brief filed at this Court on February 10, 2005 the public prosecutor requested that the appeal be allowed, considering that the decision under appeal violates the appellants' right to the effective protection of the courts with regard to access to the courts, basing his conclusion on arguments similar to those put forth in the brief filed in relation to the appeal for protection entered under No. 1744-2003.

In other respects and in compliance with the aforementioned requisite, the representative of the Asociación Argentina Pro-Derechos Humanos filed a brief at this Court on February 23, 2005, joining and incorporating by reference the allegations made in the appeal for protection filed on behalf of the Asociación Libre de Abogados.

10. In the appeal entered under No. 1773-2003 and in compliance with the requisite provided in Art. 52.1 LOTC, in a brief filed at the Court on November 16, 2004 the public prosecutor requested that the appeal be allowed, considering that the decision under appeal violates the appellants' right to the effective protection of the courts with regard to access to the courts, basing his conclusion on arguments similar to those put forth in the brief filed in relation to the appeal for protection entered under No. 1744-2003. With respect to the remaining grounds for appeal, he did not consider that the right to the ordinary judge predetermined by law pursuant to Art. 24.2 CE had been violated, based on the arguments alleged in the aforementioned brief. Nor did he deem violated the right to a speedy trial, lacking in constitutional content, since no arguments were alleged in support of that simple allegation.

In other respects and in compliance with the aforementioned requisite, the representative of Ms. Rigoberta Menchú and others filed a brief at this Court on November 12, 2004, concurring in all aspects of the appeal for protection filed by the Asociación Libre de Abogados and entered

under No. 1744-2003.
11. In an order dated September 22, 2005 this judgment was docketed for deliberations and voting on September 26, 2005.

II. Conclusions of Law

1. Several appeals for protection were filed at this Constitutional Court against the judgment rendered by the Second Chamber of the Supreme Court on February 25, 2003, partially allowing the cassation appeal filed against the en banc order of the Criminal Chamber of the National Court on December 13, 2000, and against that ruling. The nucleus of the controversy resides in both courts' restrictive interpretation, based on different arguments, of Art. 23.4 of the Organic Law of the Judiciary (LOPJ) and the criteria for determining criminal jurisdiction established therein, with regard to the principle known as universal jurisdiction, the consequence of which was to deny, either totally or partially, the jurisdiction of the Spanish courts to prosecute and hear the events reported and which gave rise to the present proceeding, events defined in the aforementioned reports as genocide, terrorism and torture, committed in Guatemala during the 1970s and 1980s. The three appeals for protection coincide in alleging that the decisions under appeal provide an unfoundedly restrictive and contra legem interpretation of the aforementioned precept based on a series of requisites that are not required in our legal system, thus resulting in a violation of their fundamental rights.
They specifically deem that the right to the effective protection of the courts guaranteed in Art. 24.1 CE has been violated both with respect to the right to a judgment based on law and the right of access to the courts. They likewise coincide in denouncing the violation of the Supreme Court's judgment of Art. 24.1 CE for having incurred in a reformatio in peius, since while the National Court, based on the principle of subsidiarity excluded the jurisdiction of the Spanish courts "for the time being", leaving the possibility open for the future, the judgment of the High Court, rejecting that principle and underscoring the need for a connection with Spanish interests, completely rejected the jurisdiction of our state, thus placing the appellants in cassation in a worse position.
Together with the aforementioned grounds for appeal, both the appeal registered under no. 1744-2003 and the appeal entered as no. 1773-2003 alleged that the right to an ordinary judge predetermined by law (Art. 24.2 CE) had been violated, likewise based on that unwarranted restrictive interpretation, and (in the latter appeal) the violation of the right to a speedy trial. Finally, the appeal registered under no. 1755-2003 alleges the violation of due process guaranteed in Art. 24.2 CE, linked to the equal application of the law, since determining the jurisdiction of the Spanish courts reflects a discrimination of the victims based on their nationality.
In other respects, the public prosecutor sought to have the appeal allowed based on a violation of the right to the effective protection of the courts (Art. 24.1 CE) incurred in both the Order of the National Court and the Supreme Court judgment, which restrict access to the courts with an excessive and unfoundedly rigorous interpretation of Art. 23.4 LOPJ, based on criteria or elements that would restrict the jurisdiction of the Spanish courts and which are not included in nor can they be reasonably deduced from our legislation.
Since several allegations have been made, based on our reiterated case law we shall commence with those which may result with a remand of the proceeding, with a view to guaranteeing he subsidiary nature of the appeal for protection (among others, Constitutional Court Judgments 229/2003, of December 18, Conclusion of Law No. 2; 100/2004, of June 2, Conclusion of Law No. 4; and 53/2005, of March 14, Conclusion of Law No. 2). More specifically, and given that it is the main ground for appeal in all of the complaints, we will commence with the allegation with respect to the violation of the right to the effective protection of the courts guaranteed in Art.

24.1 CE with respect to the right to a judgment based on law and the right of access to the courts.

Although each of the aforementioned aspects of the right guaranteed in Art. 24.1 CE has its own scope of application, they will be considered together in the present case because the main complaint resides in the fact that as a result of a ruling that was not based on law, the appellants have been deprived of their right of access to the courts. This joint consideration of these complaints requires a double legal canon or test. And this is the case because the right of access to the courts constitutes, as we have affirmed, "the medullar substance" (Constitutional Court Judgment 37/1995, of February 5, Conclusion of Law No. 5)and the "proper and primary content" (Constitutional Court Judgment 133/2005, of May 23, Conclusion of Law No. 2) of the right to the effective protection of the courts which, together with the canons common to the effective protection of the courts as regards the right to a ruling founded on law, such as the requirement that it be sufficiently grounded and not be arbitrary, manifestly irrational or contain patent errors, which implies an ultimately and potentially more intense demand for proportionality, derived from the pro actione principle. Thus, we have maintained since Constitutional Court Judgment 35/1995, of February 7, Conclusion of Law No. 5, that the constitutional review of decisions denying leave to appeal or those without a ruling on the merits must be especially intense, given the validity in those cases of the pro actione principle (as well as denial of access to the courts, when access to proceedings is foreclosed) (Constitutional Court Judgments Nos. 203/2004, of November 16, Conclusion of Law No. 2; 44/2005, of February 28, Conclusion of Law No. 3; 133/2005, of May 23, Conclusion of Law No. 2, among many others). This principle "which must be observed by judges and courts, precludes certain interpretations and applications of legally-established requisites for bringing proceedings from unjustifiably hindering the exercise of the right to have a court hear and adjudicate a claim brought before it" (Constitutional Court Judgment 133/2005, of May 23, Conclusion of Law No. 2; Constitutional Court Judgment 168/2003, of September 29, Conclusion of Law No. 2).

As we have confirmed on several occasions, access to the courts is a legally-configured social right, its exercise and the dispensation therewith being subject to the concurrence of premises and requisites established by law, and thus, the right to the effective protection of the courts is not violated by a reasoned decision denying leave or one that is merely procedural in nature that finds an impediment based on an express precept of the law which, in turn, respects the essential content of the fundamental right (Constitutional Court Judgments 172/2002, of September 30, Conclusion of Law No. 3; 79/2005, of April 4, Conclusion of Law No. 2). We have likewise underscored that the pro actione principle cannot be understood as an obligation to adopt the most favorable interpretation when granting leave or issuing a decision on the merits, among all of the possible applicable provisions, since this would prompt the Constitutional Court to resolve matters of procedural legality, which should be decided by the ordinary courts (Constitutional Court Judgment 133/2005, of May 23, Conclusion of Law No. 2). To the contrary, the duty imposed by this principle merely obliges the courts to interpret procedural requisites proportionally, "preventing certain interpretations and applications from disproportionately preventing or hindering the exercise of the right to have a court hear and adjudicate a claim brought before it" (among others, Constitutional Court Judgment 122/1999, of June 28, Conclusion of Law No. 2).

As affirmed in Constitutional Court Judgment 73/2004, of April 23, Conclusion of Law No. 3, "the assessment of legal grounds that would preclude a decision on the merits with respect to the claims alleged is generally the task of judges and courts in the exercise of their functions ex Art. 117.3 CE, and therefore review of the laws applied is in principle not a task of the Constitutional Court. However, as ultimate guarantor of the fundamental right to the effective protection of the courts, it is this Court's task to examine the grounds and arguments that form the basis for a judicial decision denying leave or which otherwise avoids a decision on the merits

in the matter in question. And, as is obvious, this is not to supplant the judges and courts in their function of interpreting legal provisions in specific controversial cases, but rather to verify that the grounds assessed are justified constitutionally and are proportional with respect to the purpose intended by the legal provision on which the decision was based. When warranted, through an appeal for protection this assessment will enable this Court not only to take into consideration a ground that may not be legally covered, but also when such coverage exists, to correct an application or interpretation that may be arbitrary, unfounded, or the result of a patent error that is constitutionally relevant or which does not satisfy the requirement of proportionality inherent in any restriction of fundamental rights." (Constitutional Court Judgments 321/1993, of November 8, Conclusion of Law No. 3; 48/1998, of March 2, Conclusion of Law No. 3; 35/1999, of March 22, Conclusion of Law No. 4, among many others).

This means that, although verification of the presence of procedural requisites is in principle strictly a task of the ordinary courts, it is the task of this Court to review those decisions in which those procedural requisites have been interpreted arbitrarily, are manifestly unreasonable or incur in a patent error. Moreover, in matters involving access to the courts, such review is warranted in the cases in which procedural provisions have been strictly interpreted with excessive rigor, formalism or disproportionately with respect to the purposes served and the interests sacrificed (Constitutional Court Judgments 122/1999, of June 28, Conclusion of Law No. 2; 179/2003, of October 13, Conclusion of Law No. 2; 3/2004, of January 14, Conclusion of Law No. 3; 79/2005, of April 2, Conclusion of Law No. 2). As expressed in the recent Constitutional Court Judgment 133/2005, of May 23, Conclusion of Law No. 2, "what this principle actually implies is prohibiting decisions refusing leave (or which do not include a decision on the merits) in which by virtue of excessive rigor or formalism or any other reason there is clearly a disproportion between the purposes which those grounds for refusing leave (or not issuing a decision on the merits) seek to serve and the interests that they may sacrifice".

For a complete comprehension of the scope and insertion of the aforementioned pro actione principle within the protection provided under Art. 24.1 CE it is not unwarranted to underscore the more incisive nature of the canon of access to the courts, in the sense that judicial interpretations of procedural provisions that pass the reasonability test, and those that may even require "correction from a theoretical perspective", may result in a "denial of access to the courts by an excessively rigorous interpretation of the applicable provision" (Constitutional Court Judgment 157/1999, of September 14, Conclusion of Law No. 3), thus violating that aspect of the right to the effective protection of the courts.

3. Having outlined the framework for adjudication to be applied to the present case, it is time to examine it in more depth. As underscored in the Findings of Fact, the nucleus of the controversy resides in the openly restrictive interpretation of both the National Court and the Supreme Court of the rule for attributing jurisdiction found in Art. 23.4 LOPJ, the consequence of which was to deny that Spanish courts have jurisdiction to hear cases based on events defined as genocide, terrorism and torture. Since the appeal was filed against both decisions (the National Court's Order of December 13, 2000 and the Supreme Court's judgment of February 25, 2003), and since their respective decisions were based on different arguments, they should be analyzed separately.

Nevertheless, before commencing an analysis of those arguments it is important to underscore that, although referring to other crimes included among those set forth in Art. 23.4 LOPJ, the legal precept at the heart of this controversy has been the object of previous judgments on the part of this Court, which are applicable for the adjudication of the decisions under appeal. Specifically Constitutional Court Judgment 21/1997, of February 10, Conclusion of Law No. 3, states that "when establishing the extension and limits of the jurisdiction of Spanish courts, Art. 23.4 of Organic Law 6/1985, of July 1, on the Judiciary, attributes to our courts the task of hearing matters involving acts committed by Spaniards and non-nationals when those acts are

susceptible to being defined as crimes under Spanish criminal law, in certain cases... This implies that the legislator has attributed universal scope to Spanish courts to hear cases involving specific crimes, based on their seriousness as well as their international impact". We likewise manifested in Constitutional Court Judgment 87/2000, of March 27, Conclusion of Law No. 4 that "the ultimate basis for this provision attributing jurisdiction resides in the universalization of the jurisdiction of the states and their courts to hear cases involving certain acts whose prosecution and adjudication are in the interest of all of those states, the logical consequence being concurrent jurisdiction or, in other words, a concurrence of states having jurisdiction".

This consideration of the basis for universal jurisdiction enables us to directly examine the constitutional scope of the decision contained in the Order of the National Court from the perspective of the right to the effective protection of the courts, since the theoretical premise on which it bases the lack of jurisdiction, the subsidiarity principle, appears prima facie not to coincide with the principle of concurrent jurisdiction that this Court deems should take preference. With a view to underscoring the relevance that this difference in theoretical perspectives may have with respect to constitutional analysis, it is first necessary to examine the grounds on which the National Courts based its arguments, to later analyze the specific criteria used in applying that principle to deny the jurisdiction of the Spanish courts, thus leading to the alleged violation of the right of access to the courts.

In any case, it should be underscored a priori with respect to both the National Court's order and the Supreme Court's judgment that in principle Art. 23.4 LOPJ gives a broad scope to the principle of universal justice, since the only express limitation that it introduces in that regard is res judicata, that is, that the accused may not have been acquitted, pardoned or convicted in a foreign country. In other words, from the perspective of a literal interpretation of the precept, as well as from the perspective of the voluntas legislatoris, it must be concluded that the Organic Law of the Judiciary provides absolute universal jurisdiction, that is, without being subject to restrictive criteria of correction or procedural requisites, and without any hierarchical order with respect to the rest of rules for attributing jurisdiction, since in contrast to other criteria, the criteria for determining universal justice is based on the particular nature of the crimes being prosecuted. The foregoing does not imply, however, that this is the only canon for construing the precept, and that its interpretation cannot be presided by other criteria that may even restrict its scope of application. Nevertheless, especially when this restriction likewise implies limiting access to the courts, any interpretation must carefully take into account the limits on strict or restrictive interpretation of what, as an inverse concept of the analogy, must be conceived as a teleological reduction of the law, characterized by excluding from the framework for applying the precept events that may undoubtedly be included in its semantic nucleus. From the perspective of the right of access to the courts that teleological reduction departs from the hermeneutical pro actione principle and leads to a rigorous and disproportionate application of law contrary to the precept set forth in Art. 24.1 CE. This is the analytical path that we must follow.

4. As indicated earlier, the order of the National Court under appeal, based on previous decisions of that same court, invokes the Convention on Genocide, and particularly its Art. VI, and concludes by affirming the subsidiarity of Spanish jurisdiction with respect to territorial jurisdiction. The precept in question provides that:

"Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

The National Court commenced with the idea that the quoted precept, which sets forth the obligation of states to prosecute criminal acts committed in their territories, certainly does not

prohibit the remaining signatory parties from establishing extraterritorial criteria of jurisdiction for genocide. As it eloquently underscored, citing prior decisions, that limitation would be contrary "to the spirit of the Convention, which seeks a commitment on the part of the signatory parties, using their respective criminal laws, to prosecute genocide as an international crime and to prevent impunity with respect to such a serious offense". Nevertheless, the Court immediately concluded that Article VI of the Convention imposes the principle of subsidiarity with regard the acts of jurisdictions other than those set forth therein.

Disregarding the fact that the decision under appeal does not state the reasons that led to this conclusion, but rather the relation of subsidiarity is inferred from the mere mention of the criterion of territoriality (or an international criminal court), we must commence by affirming that there are undoubtedly both procedural as well as political and criminal grounds for supporting the priority of the locus delicti, which is part of the classic heritage of international criminal law. Based on that fact, and to address the question that we left pending, it is true that from a theoretical perspective the subsidiarity principle should not be understood as an opposite or divergent rule that introduces the so-called concurrency principle, because when there are concurrent jurisdictions in order to avoid duplicating proceedings and violating the rule against double jeopardy, it is imperative to introduce a priority rule. Since (at least at the level of principles) all states are jointly committed to prosecuting these atrocious crimes that affect the international community, elementary procedural and political-criminal considerations must give priority to the jurisdiction in which the crime was committed.

That said, it must immediately be underscored that the matter is certainly relevant from a constitutional perspective, since what is ultimately being debated by both the appellants and the public prosecutor as well as in the judgment of the Supreme Court, which disagrees with the criterion applied by the National Court affirming the priority of the subsidiarity principle, are the terms in which that rule or principle has been applied, or more specifically, the number of requisites required in relation to the jurisdiction of the member state in which the acts were committed. The National Court's order under appeal, reproducing the precedents established in Orders 4 and 5 in November, 1998, defined the terms for applying the rule of subsidiarity: "the courts of one state should refrain from exercising jurisdiction over acts constituting genocide that are being tried in the courts of the country in which those acts occurred or in an international court". Interpreting that affirmation literally, the courts of a third country should only refrain from acting when proceedings have been commenced in the territorial jurisdiction or in an international court. Or, in any case, a reasonable modification of the subsidiarity rule would cause the extraterritorial jurisdiction to refrain from acting if the crimes will foreseeably be tried in the near future. But sensu contrario, to activate universal extraterritorial jurisdiction it should suffice for the complainant to provide serious and reasonable evidence of the failure to act of the courts, which would reflect either a lack of will or a lack of capacity to effectively repress those crimes. Nevertheless, the Order of December, 2003, making use of an extremely restrictive interpretation of the rule of subsidiarity, which the National Court itself had defined, takes this one step further and requires the complainants to fully prove the legal impossibility or the prolonged inactivity of the courts, to the point of demanding proof that the Guatemalan courts have effectively rejected the complaint.

This restrictive interpretation of the international jurisdiction of the Spanish courts set forth in Art. 23.4 LOPJ represents a violation of the right to access to the courts recognized in Art. 24.1 CE as the initial expression of the right to the effective protection of the courts. On the one hand, as the public prosecutor indicated in his brief of allegations, by demanding proof of failure to act the complainant is being asked to carry out an impossible task, a probatio diabolica. In other respects, this defeats the purpose of universal jurisdiction set forth in Art. 23.4 LOPJ and in the Convention on Genocide, since it would precisely be the failure to act of the courts of the state in which the acts were committed, failing to respond to the complaint and thus, preventing

the presentation of evidence demanded by the National Court, which would block the international jurisdiction of a third state, thus resulting in impunity for the genocide committed. In summary, this strict restriction of universal jurisdiction, in open contradiction of the hermeneutical pro actione rule, deserves the reproach of the Constitutional Court as a violation of Art. 24.1 CE.

5. As indicated in detail in the Findings of Fact, the Supreme Court based its denial of Spanish jurisdiction on arguments distinct from those used by the National Court, particularly underscoring the intrinsic limits to the application of the universal jurisdiction rule set forth in Art. 23.4 LOPJ. First, the judgment under appeal makes the application of that precept dependent on the fact that an international convention to which Spain is a party must first endorse that extension of jurisdiction. With respect to the crime of genocide (on which it practically centers its arguments, despite having initially indicated, in opposition to the criteria of the appellants, that although "it does not expressly establish universal jurisdiction, neither does (the Convention) prohibit it", the truth is that the Court ultimately affirms the contrary, considering that Article 8 of the Convention "does not authorize each state to exercise its jurisdiction under the principle of universal jurisdiction, but rather it provides a different form of reacting to the commission of this crime outside of one's territory, expressly establishing a recourse to the competent bodies of the United Nations, so that they can adopt the pertinent measures in each case (Conclusion of Law No. 7).

Thus, the Supreme Court arrived at the conclusion that only when it is expressly authorized in treaty law can recourse to unilateral universal jurisdiction be considered legitimate and applicable by virtue of both Art. 96 CE and Art. 27 of the Convention on the Law of Treaties, according to which international treaties cannot be contravened in the internal law of each state.

It is an extremely strict interpretation that, moreover, is devoid of argumentative support to conclude that mentioning only some of the possible mechanisms for repressing genocide, and the Convention's subsequent silence with regard to international territorial jurisdiction is tantamount to prohibiting the signatory states to the Convention (which, paradoxically would exclude those which are not) from adopting in their laws other methods for repressing the crime and, thus, in fact from following the mandate in Art. I of the Convention. From the unilateral perspective of the states, and excepting the reference to international courts, what Art. VI of the Convention sets forth is the minimum obligation that commits the states to prosecute international law crimes within their territories. In such terms, that is, assuming that the Convention does not prohibit, but rather leaves the signatory states free to establish subsequent methods for prosecuting genocide, Art. 27 of the Convention on the Law of Treaties does not establish any obstacle for Spanish courts to assume jurisdiction over acts presumably committed in Guatemala, especially when the purpose on which the Convention on Genocide is inspired implies an obligation, rather than a prohibition to intervene.

In effect, this lack of authorization that the Supreme Court perceives in the Convention on Genocide for a state to unilaterally assume international jurisdiction cannot be reconciled with the principle of universal repression and the obligation to prevent impunity with regard to that crime in international law which, as had been affirmed, presides the spirit of the Convention and is a part of international customary law (and even ius cogens¸ as the best legal scholars have underscored). In that regard it is directly opposed and contradicts the very existence of a Convention on Genocide and its objectives and goals, that the signatory parties should agree to relinquish a mechanism for prosecuting that crime, especially when taking into account that the possibility of effectively exercising the priority criterion of jurisdiction (territory) is often limited by the circumstances of a specific case. It is likewise a contradiction of the Convention that being a party thereto implies limiting the possibilities for combating that crime, which other states that have not signed it would have at their disposal, since they would not be limited by this alleged and questionable prohibition.

6. Since the Supreme Court deems that the Convention on Genocide does not recognize universal jurisdiction, the Second Chamber of that High Court maintained that assuming unilateral jurisdiction in our internal law should therefore be limited by other principles, based on the practices of international customary law. This culminated in a restriction of the scope of application of Art. 23.4 LOPJ, requiring in order for it to be deemed applicable certain "points of connection", such as, the alleged perpetrator must be present in Spanish territory, the victims must be Spanish nationals, or there must be another direct connection to national interests. The judgment under analysis bases the use of such corrective criteria on international custom, concluding that since each individual state should not occupy itself with the task of unilaterally establishing order, the exercise of universal jurisdiction is only legitimate when one of the aforementioned points of connection is present, which the decision under appeal underscores must be of equivalent significance to the criteria recognized in national law or in treaties that permit the extraterritorial extension of jurisdiction.

To support this argument that international custom restricts the scope of the principle of universal jurisdiction, the Supreme Court cited international case law or decisions from the courts of other states. These include several decisions of the German Federal Supreme Court, the decision of the Belgian Cassation Court in the Sharon case, as well as the decision of the Hague International Court of Justice of February 14, 2002 (Yerodia Case), in which the court ruled against Belgium for issuing a warrant for the arrest of the Minister of Foreign Affairs of the Democratic Republic of the Congo.

In that regard, we must first underscore that it is quite debatable that this is indeed the rule in international customary law, particularly in view of the fact that the selection of case law presented by the Supreme Court in support of its thesis does not lead to that conclusion, but rather to the contrary. This does not require extensive comment, since the dissenting opinion in the judgment under appeal, signed by seven judges (whose significance cannot be ignored) convincingly refutes the alleged validity of the case law cited as theoretical support for the Second Chamber's arguments, while presenting other case law indicating just the opposite. As the dissenting judges indicated, the German case law cited in the majority opinion do not represent the status quaestionis in that country, since decisions of the German Constitutional Court rendered subsequent to the case law cited in the judgment under appeal support the principle of universal jurisdiction without requiring connections to national interests (citing, as an example, the Judgment of December 12, 2000, which ratified a conviction for genocide issued by German courts against Serbian citizens for crimes committed in Bosnia-Herzegovina against Bosnian victims). Concerning the judgment of the International Court of Justice in The Hague in the Yerodia Case, it cannot be used as a precedent to support the claimed restrictions on universal jurisdiction, since it contains no pronouncement as to universal jurisdiction with regard to genocide, but rather was limited to reviewing the question of whether international laws of personal immunity had been violated, as expressly requested by the Democratic Republic of the Congo in its complaint. The same may likewise be said of the judgment of the Belgian Court of Cassation of February12, 2003: the Supreme Court limited its comments to aspects related to the immunity of practicing state representatives, while it failed to mention the express recognition in that decision of universal jurisdiction set forth in Belgian legislation.

If we add to the foregoing the multitude of precedents in international law that support a position contrary to the one maintained by the Supreme Court in this matter, the basis for its restrictive interpretation of Art. 23.4 LOPJ (the existence of a generally-accepted limitation of the principle of universal jurisdiction in international customary law) loses much of its support, particularly in view of the fact that its selection of supporting case law is not exhaustive and does not contain any of those that are significantly contrary to the Court's thesis. In that regard it is questionable that the judgment fails to mention that, contrary to what it implies, Spanish law is not the only national law that includes the principle of universal jurisdiction without

limiting it to national interests, including the law of Belgium (Art. 7 of the Law of July, 16, 1993, amended by the Law of February 10, 1999, which extends universal jurisdiction to genocide), Denmark (Art. 8.6 of its Criminal Code), Sweden (Law on the Convention on Genocide of 1964), Italy (Art. 7.5 Criminal Code) or Germany, states which all include to a greater or lesser degree the repression of different crimes against the international community within the scope of their jurisdictions, without restrictions based on national connections. As a significant example, it suffices to underscore that the Supreme Court judgment cites a decision of the German Federal Supreme Court of February 13, 1994, but fails to mention Art. 6 of the German Criminal Code or its Code of Crimes against International Law of June 26, 2002 (a law enacted to adapt German criminal law to the Statute of the International Criminal Court) whose Art. 1 states that this law shall apply to the criminal offenses designated therein (genocide, crimes against humanity and war crimes included in the ICC Statute) "even when the offense was committed abroad and bears no relation to Germany".

7. The Supreme Court judgment likewise included a list of international treaties on the prosecution of crimes affecting the international community subscribed by Spain with a view to demonstrating, on the one hand, that none of those treaties expressly establishes universal jurisdiction and that, on the other hand, as a form of collaboration they provide for the classic formula of aut dedere aut iudicare, that is, a state will be obliged to try the perpetrators of crimes set forth in the treaties when they are present in its territory and when that state denies extradition requested by another state whose jurisdiction is compulsory under the provisions of that treaty. From an analysis of this sector of international treaty law the Supreme Court infers the necessity and legitimacy of restricting the scope of application of Art. 23.4 LOPJ to those cases in which the alleged perpetrator is present in Spanish territory, based on Art. 96 CE, paragraph g) of Art. 23.4 LOPJ, and the aforementioned Art. 27 of the Convention on the Law of Treaties, according to which the parties to a treaty cannot invoke internal law to justify noncompliance with a treaty.

Independently of what we shall affirm below, the interpretation followed by the Supreme Court to justify the criterion of restriction of the law must be rejected for two reasons of a methodological nature. First, the supposedly systematic reference to paragraph g) of Art. 23.4 LOPJ cannot be used to extend the conclusions reached by the High Court to the rest of the crimes contained in the preceding paragraphs of that precept. And that is because the closing clause introduced in paragraph g) extends universal jurisdiction to other crimes not included in the previous paragraphs of Art. 23.4 LOPJ, which according to international treaties or conventions must be repressed in Spain. In other words, while paragraphs a) through f) of Art. 23.4 LOPJ establish a catalogue of crimes that must be prosecuted in Spain ex lege despite having been committed abroad by non-nationals, paragraph g) sets forth the possibility, if determined in an international treaty, of prosecuting other crimes not expressly included in the precept. In consequence, it is not at all evident that the limitations or conditions, which the judgment's interpretation of several international treaties places on the latter, are applicable by analogy to the former. A procedure of analogy which, in addition to being contrary to the pro actione principle by sensibly reducing the appellants' access to the courts, is not sufficiently grounded, as has just been affirmed.

It is likewise quite debatable to appeal to Art. 27 of the Convention on the Law of Treaties to support such arguments since, as indicated previously, neither the Convention on Genocide nor the Convention on Treaties cited in the judgment contains any prohibition of unilaterally exercising universal jurisdiction, which might be deemed as being contravened by the provisions of Spanish law.

Undoubtedly, the presence of the alleged perpetrator in Spanish territory is an unavoidable prerequisite for his trial and eventual conviction, given that trials in absentia do not exist in our legislation (with exceptions that are not relevant in this case). For that reason, judicial

procedures such as extradition provide a fundamental means for effectively fulfilling the purpose of universal jurisdiction: the prosecution and punishment of crimes which, due to their specific characteristics, affect the international community as a whole. But this conclusion cannot convert this circumstance into a requisite sine qua non for exercising jurisdiction and commencing proceedings, especially when this would subject the access to universal jurisdiction to a far-reaching restriction that is not contemplated in our legislation and, moreover, contradicts the very foundation and objectives inherent in that institution.

8. In addition to the presence in Spanish territory of the alleged perpetrator, the judgment under appeal introduces two other points of connection: the principle of jurisdiction over criminal conduct committed against one's citizens, rendering universal jurisdiction dependent on the victims being Spanish nationals, and the requirement of the connection of the crimes committed to other relevant Spanish interests, which is simply a generic reformulation of the so-called principle of interest or of defense. These restrictions once again appear to have been based on international custom, the judgment referring without further details to the fact that "a significant part of legal scholarship and some national courts" have tended to recognize the relevance of certain points of connection.

Thus we must affirm that this radically restrictive interpretation of the principle of universal jurisdiction set forth in Art. 23.4 LOPJ, which would be better described as a teleological reduction (since it surpasses the grammatical sense of the precept), exceeds the limits of what is constitutionally admissible from the perspective of the framework of the right to effective protection of the courts guaranteed in Art. 24.1 CE, to the extent that it implies a contra legem reduction based on corrective criteria that cannot even implicitly be considered as being present in the law and which, moreover is clearly contrary to the purpose on which the institution is inspired, altering the principle of universal jurisdiction to the point of its being unrecognizable as it is conceived in international law, and having the effect of reducing the scope of the application of the precept to the point of constituting a de facto repeal of Art. 23.4 LOPJ.

In effect, the right to the effective protection of the courts with respect to access to the courts has been weakened in the present case, because an interpretation in accordance with the telos of the precept would satisfy the exercise of the fundamental right of access to the courts and would thus be fully in compatible with the pro actione principle, and because, without any degree of forced interpretation the literal sense of the precept analyzed fulfills that purpose, therefore safeguarding the right guaranteed in Art. 24.1 CE. Thus, the forced and unfounded interpretation to which the Supreme Court has subjected this precept implies an illegitimate restriction of that fundamental right, since it violates the requirement that "the courts, when interpreting legally-established procedural requisites should consider the ratio of the provision with a view to preventing mere formalisms or an unreasoned interpretation of procedural rules from precluding a decision on the merits, and thus contravening the requirements of the principle of proportionality" (Constitutional Court Judgment 220/2003, of December 15, Conclusion of Law No. 3), by constituting a "denial of access to the courts based on an excessively rigorous interpretation of the applicable provision" (Constitutional Court Judgment 157/1999, of September 14, Conclusion of Law No. 3).

9. Thus, this restriction based on the nationality of the victims adds a limitation that is not provide for by law and which, moreover, cannot be justified teleologically since, especially with respect to genocide, it contradicts the very nature of the crime and the shared objective that it be combated universally, which in this case is practically precluded from the onset. Pursuant to Art. 607 of the Criminal Code, genocide is legally defined by the victims' belonging to a national, ethnic racial or religious group, and because acts of genocide are purposely intended to annihilate those groups, specifically based on membership therein. In consequence, the Supreme Court's interpretation implies that the crime of genocide can only be relevant for Spanish courts when the victims are Spanish nationals and, moreover, when such acts are intended to destroy

Spaniards as a group. The improbability of that scenario should suffice to demonstrate that this was not the objective of the legislator when establishing universal jurisdiction in Art. 23.4 LOPJ, and that this interpretation is incompatible with the objective of that institution.

The same conclusion may be drawn with respect to the criterion of national interest. Ignoring the fact, underscored in the public prosecutor's opinion, that the reference to national interest in the decision under appeal is minimal and is likewise so lacking in substantiation that it is impossible to define its content, the truth is that with its inclusion in paragraph 4 of Art. 23 LOPJ it is practically devoid of content, being redirected toward the rule governing jurisdiction set forth in the preceding paragraph. As has been affirmed earlier, the determining question is that making the jurisdiction to hear cases of international crimes such as genocide and terrorism subject to the concurrence of national interests in the terms set forth in the judgment is in no way compatible with the principle of universal jurisdiction. The international and cross-border repression sought through the principle of universal justice is based exclusively on the particular characteristics of the crimes covered thereby, whose harm (paradigmatically in the case of genocide) transcends the specific victims and affects the international community as a whole. Consequently, their repression and punishment constitute not only a commitment, but also a shared interest among all states (as we had the occasion to affirm in Constitutional Court Judgment 87/2000, of March 27, Conclusion of Law No. 4), whose legitimacy in consequence does not depend on the ulterior individual interests of each of them. In that regard, the concept of universal jurisdiction in current international law is not based on points of connection founded on the individual interests of a state, as demonstrated in Art. 23.4 of our own LOPJ, the aforementioned German law of 2002 or, to provide additional examples, the resolution adopted by the Institute of International Law in Cracow on August 25, 2005 in which, after underscoring the aforementioned commitment of all states, it defines criminal universal jurisdiction as "the jurisdiction of a state to prosecute and, when found guilty, punish alleged criminals, independently of the place in which the crime was committed and without considering any connection with regard to the nationality of perpetrator or victim, or other criteria for determining jurisdiction recognized in international law".

In contrast to the foregoing, the Supreme Court's thesis on universal jurisdiction, to the extent that it seeks to join "a common interest in preventing impunity with respect to crimes against humanity with the specific objective of the State to protect certain interests" (Conclusion of Law No. 19) is difficult to reconcile with the purpose of that institution, and which as we have indicated previously, practically constitutes a de facto repeal of Art. 23.4 LOPJ. Moreover, the extreme rigor with which the High Court applies its criteria reinforces the incompatibility of its pronouncements with the right to the effective protection of the courts with respect to access to the courts, since it requires that the connection to national interests be directly related to the crime that serves as a basis for attributing jurisdiction, expressly excluding interpretations that are less strict (and thus more in keeping with the pro actione principle), such as the connection of national interests linked to other crimes connected to main one, or more generically, the context surrounding those crimes.

10. The foregoing demonstrates that both the Order of the National Court of December 13, 2000 and the Supreme Court Judgment of February 25, 2003 violate the appellants' right to the effective protection of the courts (art. 24.1 CE) as regards access to the courts, and thus their appeal should be allowed and, in consequence the aforementioned decisions annulled and the proceedings remanded to the National Court to be recommenced from the moment immediately prior to rendering the Order of the National Court annulled herein. With a view to preserving the subsidiary nature of the appeal for protection, an analysis of the claims of violation of other fundamental rights made in the complaint will not be made.

R U L I N G

In view of the foregoing, the Constitutional Court, BY VIRTUE OF THE AUTHORITY VESTED THEREIN BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To allow the appeal for protection filed by Ms. Rigoberta Menchú Tumn and others, by the Asociación de Derechos Humanos de España and by the Asociación Libre de Abogados y otros, and in consequence:

1. To declare that the appellants' right to the effective protection of the courts with respect to access to the courts (Art. 24.1 CE) has been violates.

2. To restore that right and, in doing so, to annul the En Banc Order of the National Court of December 13, 2000 and the Judgment of the Supreme Court of February 25, 2003, remanding the proceedings to the National Court to be recommenced from the moment immediately prior to rendering its Order, so that it may render a new decision, respecting the fundamental right that was violated.

It is hereby ordered that this Judgment be published in the Official State Gazette.

Given in Madrid on the Twenty-sixth of September, Two Thousand Five.