[This document is the Spanish Constitutional Court Decision Accepting Jurisdiction of September 26, 2005 in the Guatemala Genocide Case. The English translation is provided by the Center for Justice & Accountability. It is meant for informational purposes only and is not an official translation.]

Spanish Constitutional Court Decision (SCCD) – SCCD 237/September 26, 2005 Guatemala Genocide Case 331/1999-10

The Second Chamber of the Constitutional Court, comprised of Chief Judge Guillermo Jiméne Sánchez, Judge Vicente Conde Martín de Hijas, Judge Elisa Pérez Vera, Judge Ramón Rodriguez Arribas, and Judge Pascual Sala Sanchez, pronounce:

BY DECREE OF THE KING

The following

DECISION[1]

This decision concerns constitutional appeals number 1744/2003, 1755/2003, and 1773/2003. The first of these appeals was filed by Ms. Rigoberta Menchú Tum, 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, Mrs. 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. Human Rights, Mr. Arcadio Alonzo Fernández, CONAVIGUA, FAMDEGUA and Mrs. Ana Lucrecia Molina Theissen, represented by Court Counsel Mrs. Gloria Rincón Mayoral and assisted by Attorney Carlos Vila Calvo, and by the Confederation of Labor Unions, represented by Court Counsel Ms. Isabel Cañedo Vega and assisted by Attorney Antonio García Martín. The second appeal, number 1755/2003, was filed by the Spanish Human Rights Association, represented by Court Counsel Ms. Irene Gutierrez Carrillo and assisted by Attorney Victor Hortal Fernandez. And the third appeal, number 1773/2003, was filed by the Free Association of Lawyers, the Association Against Torture, the Association of Friendship with the Guatemalan Nation, the Central Association for Documentation and Solidarity with Latin America and Africa, the Zaragozan Committee for International Solidarity, represented by Court Counsel Isabel Calvo Villoria, and assisted by Attorney Antonio Segura Hernandez, and by the Argentinean Pro-Human Rights Association of Madrid, represented by Court Counsel Isabel Cañedo Vega, and assisted by Attorney Carlos Slepoy Prada.

[1] Translated into English by Anthony J. Wentzel and Eliana P Kaimowitz on behalf of the Center for Justice & Accountability. Edited by CJA.

These appeals were filed in response to the Supreme Court's decision entered on February 25th (number 327-2003), based on the appeal for annulment number 803-2001, which partially allows an appeal for annulment filed in response to the National Criminal Court's *en banc* decision entered on December 13, 2000 regarding appellate matter number 115-2000. The Attorney General's Office has intervened in this case. The Speaker, Magistrate Guillermo Jiménez Sánchez, writes for the Court.

BACKGROUND

1. a) Court Counsel Ms. Gloria Rincon Mayoral, representing Ms. Rigoberta Menchú Tum and others mentioned above, and Court Counsel Isabel Cañedo Vega, representing the Confederation of Labor Unions, filed an appeal registered by the Court on March 26, 2003 (number 1744/2003) in response to the judicial decrees mentioned above.

b) Court Counsel Irene Gutiérrez Carrillo, representing the Spanish Pro-Human Rights Association, also filed an appeal against the same judicial decrees on March 27, 2003 (number 1755/2003).

c) Court Counsel Isabel Calvo Villoria, representing the Free Association of Lawyers and others mentioned above, and Counsel Isabel Cañedo Vega, representing the Argentinean Pro-Human Rights Association of Madrid, filed an appeal against the same judicial decrees on March 27, 2003 (number 1773/2003).

2. This appeal is based on the following background history which is summarized with regards to the main arguments of the requested relief:

a) On December 2, 1999, Ms. Rigoberta Menchú Tum filed a written complaint with the Spanish National Court describing numerous events which the plaintiff claims constituted crimes of genocide, torture, terrorism, murder and illegal detention. These crimes were presumably carried out between the years 1978-1986 in Guatemala by people who, at the time, were public servants in both the military and civil sectors. The events detailed in the complaint included the attack on the Spanish Embassy in Guatemala in 1980, in which 37 people died, including Spanish priests, priests from other countries and plaintiff's relatives. The plaintiff was of sound mind and body when recounting the details to the Spanish National Court, in accordance with Article 23.4, sections a), b), and g) of the Spanish Organic Law Of the Judicial Power (LOPJ is its Spanish acronym). Numerous other plaintiffs and associations joined the complaint filed at the Central Criminal Chamber Number One [of the Spanish National Court], including the aforementioned plaintiffs.

b) On January 13, 2000, the Public Prosecutor requested the case be closed, arguing that it did not fall under Spanish jurisdiction. In his decision entered on March 27, 2000, Central Judge Number One dismissed this ruling and declared the court did have jurisdiction. He reinstituted the filed lawsuits and ordered judicial formalities procedures to be carried out, among them a request to the Guatemalan Authorities that they prove legal

action was actively being taken against the defendants for the these acts, specifically those committed at the Spanish Embassy, and to provide “information about the suspension or halting of any proceedings along with reasons for these actions and dates” and to provide information regarding any “judicial decisions filed or stay of proceedings".

In summary, among other arguments irrelevant to this constitutional appeal, the Investigative Judge [Central Judge Number One] based his decision on the facts presented to him which gave an "overwhelmingly obvious appearance of genocide," since they dealt with the extermination of the Mayan people "who are claimed to favor or harbor--or even be the source of--the insurgence or revolution," according to section 4 (a) in relation to 2 (c) Article 23 and from Articles 65.1 and 88 (all from the LOPJ). The Judge was competent in recognizing this offence, which also involved other plaintiffs. He added that Guatemala's National Reconciliation Law (GNRL)only provides amnesty for those who participate in the "armed conflict," and whether an “armed conflict” took place (as alleged by the District Attorney) is a "factual element still pending proof." In addition, Article 23 of the LOPJ is a procedural rule, and therefore the non-retroactivity of the unfavorable criminal law doctrine does not apply. And finally, no prior case exists and there is no proof that legal proceedings for these same crimes are taking place in Guatemala. Moreover, States in which these crimes occur cannot claim interference with their sovereignty, since the magistrates of the state that assumes repressive competence ensure this to preserve the common interests of civilized humankind. Therefore, without trying to evade Guatemalan territorial jurisdiction, which “is not exclusive, and in the absence of its honest and effective exercise, can be supplemented by tribunals, like the Spanish one, who uphold the extraterritoriality of their national and international jurisdiction with regards to universal prosecution [...] without forgetting that Article 6 of the Convention of 1948 imposes subsidiary Spanish jurisdiction over the State in which the aforementioned crimes occurred.”

c) The Public Prosecutor filed an appeal, dismissed by court order on April 27, 2000, for reasons substantially similar to those presented in the decision. Then, they filed an appeal against this decision, which the Criminal Court of the National Tribunal heard *en banc* (allowed by court order on December 13, 2002). The court declared that “at this time, Spain will not proceed in exercising its criminal jurisdiction to prosecute the referenced events, until the Investigative Judge files the prior judicial formality procedures.” The Court determined that the Investigative Magistrate's proposal followed the basic reasoning of the court decisions issued in this courtroom on November 4th and 5th, 1998 "in the Chilean and Argentine cases," but “not the factual premise of the Guatemalan justice systems' inactivity."

Specifically, the Court argued that:

> 1) It is necessary to create compatibility between the universal principle of prosecution from Article 23.4 a) LOPJ and the norm in Article 6 of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the Genocide Convention), applicable under Articles 96 of the CE (Spanish Constitution) and Article 1.5 CC (Spanish Civil Code), which obligate

the State where the events took place to establish jurisdiction to try these crime. This does not imply that others are excluded from establishing jurisdiction, since the principle of subsidiary jurisdiction may be invoked;

2) This principle presupposes other States will refrain from exercising their ability to establish jurisdiction when crimes are tried in the place where the events occurred or in an international criminal tribunal;

3) "As opposed to Chile and Argentina cases," the inactivity of the Guatemalan jurisdiction has not been proven. First, no legislation exists that impedes local judges from acting [given that Article 8 of the GNRL explicitly excludes the expiration of criminal responsibility with regards to genocide, among other crimes. Furthermore the Historical Clarification Commission (CEH) created by the Oslo Accords in 1994 specifically recommends compliance "with the goal of prosecuting and trying" these crimes]. And secondly, if the Guatemalan justice system felt threatened in the past, there is no evidence that today it could not try a criminal complaint brought before its courts. Notwithstanding, one could infer its alleged inactivity from the mere passage of time, since the material element validating the original appeal (referring to the CHC report) was published on February 2, 1999, and the complaint was filed on December 2 of the same year "without a Guatemalan judicial decision dismissing it."

d) Faced with this decision, the plaintiffs filed an appeal for annulment that was decided by the Supreme Court who presides over constitutional decision. In its decision, the Second Chamber of the Supreme Court examines and rejects the allegations contained in the appellate brief based on the following analysis that has been succinctly summarized, and once again, limited to the issues on constitutional appeal:

1) The right to effective judicial guidance is not violated by the fact that the Spanish National Court denies jurisdiction based on an argument (subsidiary jurisdiction) that was not made be the District Attorney in his appeal. The decision contains arguments that, while some may not agree with them, should not be disregarded as nonexistent or arbitrary. Thus, the arguments satisfy the inherent demands of the invoked law. Furthermore, the accusatory principle binds the Tribunal to the intentions of the law, but not to the legal arguments applied to defend them.

2) In reference to the subsidiary jurisdiction principle, the Supreme Court warns that "the goal of our decision is to determine the existence of extraterritorial jurisdiction of the Spanish Courts […] and not just to evaluate the correction of the norms applied by the Criminal Chamber of the Spanish National Court in their *en banc* decision." This issue "depends solely on the law and, once the question has been formulated, the Court must apply its provisions." This is why "the doctrine prohibiting a *reformatio in peius* does not apply to the issue in question." Based on this premise, and admitting that the Genocide Convention neither recognizes universal jurisdiction nor does it eliminate the possibility, the

Second Chamber of the Supreme Court affirms that "the way the lower court has applied the subsidiary jurisdiction norm […] is not satisfactory," because by basing its opinion on the supposed or actual inactivity of the local jurisdiction it "implies that the jurisdictional agents of one State can judge the capacity of similar agents of another State to administer justice," a job that "does not correspond to the State's Courts" as stated in Article 97 of the Spanish Constitution which leaves matters of foreign policy to the Government, "and the repercussions such a declaration could provoke cannot be ignored."

The Genocide Convention provides guidelines for cases like these, granting the United Nations (Article 8) the power to take appropriate measures to prevent and punish the crimes addressed in its text. In this case, there are reports from the United Nations Mission (MINUGUA) which make reference to the difficulties in the area of human rights. These reports are well-known by entities of the United Nations, who nonetheless have not responded in the same way they did in Rwanda or in the former Yugoslavia.

3) Admitting, for the sake of argument, that the events in the complaint constitute genocide, it is incorrect to interpret, as the plaintiffs do, that in Article 1 of the 1948 Genocide Convention (in which the Contracting Parties […] promise to prevent and punish this crime) provides for universal jurisdiction, since Article 6 provides the rule for establishing jurisdiction over a territory or by an international criminal court. In addition, Article 8 (previously examined) considers a different approach to establishing each State's jurisdiction based on the stated principle of universal prosecution. Spain, in fact, incorporated the crime of genocide into its Penal Code (Law 44/1971) in its implementation of the Genocide Convention, but it did not modify the procedural rules that regulated extraterritorial jurisdiction to extend universal jurisdiction to this crime.

4) In effect, Article 23.4 of the LOPJ includes said principle, but "a provision as broad as the one contained in this rule raises certain questions," since "it cannot be interpreted in such a way that, in practice, opens up legal proceedings for any events that are susceptible to being categorized as one of the crimes it addresses, regardless of where the crime occurred and the nationality of the perpetrator or victim." And, in our law, "the principle of opportunity is not established." Furthermore, one should analyze whether the rule of universal jurisdiction can be applied "without considering other principles of international public law." The High Court states this one point that a "jurisdiction is a manifestation of the sovereignty of a State, so its initial limitations coincide with those of that sovereignty, which in many ways is determined by [the sovereignty of] other States." Therefore, the Court write, "situations in which events occur in a place that is not under the umbrella of a state's sovereignty and those in which jurisdictional intervention affects events that take place in the territory of another sovereign State are not fully comparable."

Thus, with regard to the real principle or protection principle and the principles of active and passive nationality, the extraterritorial expansion of jurisdiction is justified by the existence of each State's particular interests. But when we try to base the extraterritoriality of jurisdiction on the legally protected interests of the international community, the question becomes one of compatibility between the principle of universal jurisdiction and other principles of international public law. There is no objection to universal jurisdiction when it stems from a recognized source of international law, especially a treaty that has been accepted by its signature States. But if it is only recognized by domestic law, it is limited by "other principles" when there is "no direct connection with national interests," since "it is strongly supported by the doctrine that it is not the job of any State in particular to unilaterally go about establishing order using criminal law against everyone and around the world."

The Court accepts that, if the criminal activity was carried out with the consent or even the participation of the State's authorities, "the extraordinary gravity of the events, together with the absence of explicit international rules, or the lack of an international organization of States, could explain the individual acts of any one of them." But this does not mean that there is no governing norm, such as Article 8 of the Genocide Convention and "the principle of not interfering in other State's affairs (Article 2.7 UN Charter)," whose limitations in the human rights matters only are unobjectionable when the intervention is accepted through agreements between States or decided upon by the United Nations, and not in the case in which it is a result decided "unilaterally by a State or by the judges of a State."

5) The international treaties signed by Spain for the prosecution of crimes "that protect legal interests whose protection is of general concern to the International Community," provide rules for establishing jurisdiction for reasons of territorial contact or personal jurisdiction based active or passive nationality. In addition, each State agrees to prosecute these crimes wherever they take place, when the perpetrator is in their territory and does not concede to his or her extradition (*dedere aut punire*). Yet, "none of these treaties expressly states that each signature State can prosecute, without any limitations and following only its national laws, crimes that have taken place in another State's territory, not even in those cases in which the other State did not proceed with the prosecution."

6) The Tribunal can justify an interpretation based on these treaties for two reasons: First, with reference to Article 23.4 g) LOPJ regarding the crimes that Spain should prosecute according to the international treaties or conventions, the common norm in these treaties is that they should be applied in a manner "consistent with their purported purpose." The second reason is that Article 96.2 of the Spanish Constitution incorporates the content of these treaties into domestic law, together with Article 27 of the 1969 Vienna Convention on the Law of Treaties (hereafter Treaty Law Convention) that prohibits changing or failing to implement its content based on the domestic law of each State. It is from this starting point that the decision approaches the aforementioned treaties signed by Spain and arrives at its already anticipated conclusion. It responds to what "an

important part of the doctrine" interprets as "the principle of supplementary justice or criminal representation law, at least in a general sense," and what another doctrinal sector interprets as "a connecting element in the realm of the principle of universal jurisdiction." ????

Since parts of the doctrine and some National Courts recognize "the connection with national interests" as a "legitimizing element in the framework of the principle of universal jurisdiction," these national interests are relevant when the event "reaches a level of importance equal to other events that have been recognized, according to domestic law and the treaties, as giving rise to the application of the other norms relevant to establishing extraterritorial jurisdiction." There should also be a connection to the crime that serves as the basis through which jurisdiction can be established, and not with other related crimes, so that the existence of a connection between national interests and a crime does not allow the expansion of jurisdiction over other crimes where no connection exist.

7) In applying this doctrine, the universal jurisdiction of the Spanish Courts cannot bypass the laws of the Genocide Convention or any other treaty signed by Spain. Moreover, there is no evidence that any of the guilty parties is on Spanish territory, or that Spain had denied their extradition. Also, there is also no evidence of a connection with Spanish national interests. Therefore, although it may be possible to establish a connection through the nationality of the victims, there is no finding of genocide being committed against Spaniards, even when they have been affected by events that can be qualified as different crimes. The same occurs with terrorism "without prejudice to the issues which could be considered to meet the legal category of the facts in accordance with the Spanish laws that existed at the type of their commission." As for torture, Spain and Guatemala form part of the Genocide Convention that incorporates the principle of passive nationality, allowing the victim's government to prosecute those crimes when the government considers it appropriate.

The claims include the events that took place at the Spanish Embassy where Spanish citizens were killed, even after the Guatemalan government recognized in the joint statement of 1984 that these acts violated the Vienna Convention on Diplomatic Relations and accepted the consequences of these violations. The appeal also denounces the killings of four Spanish priests by government employees or other persons holding public office. These claims regarding Spaniards are what authorize the plaintiffs to argue for, in both cases, the Jurisdiction of the Spanish Courts through Article 23.4 g) LOPJ, in conjunction with the Convention against Torture.

Therefore, the Supreme Court will allow the appeal and reinstate the jurisdiction of the Spanish Courts with regards to these two crimes.

e) Seven Chamber Magistrates voted together and their reasoning has served, in large part, as a basis for the arguments in the constitutional appeal now before the Court. The dissenting minority accepts the criteria of the decision, including the "implicit" evaluation of the reasons behind the annulment appeal in which the High Court applied the principle of subsidiary jurisdiction. However, they disagree with the application of the principle of universal jurisdiction. According to the dissent, the majority's interpretation does not respect what was established by the Legislature in Article 23.4 LOPJ. They believe:

> 1) The principle of subsidiary jurisdiction does not appear in our positive law, in the LOPJ, or in the Genocide Convention, which does not prohibit universal jurisdiction with regards to this crime. There are many countries that have adopted this through their own legislation. Universal jurisdiction "is not guided by the principle of subsidiary jurisdiction, but rather by the principle of concurrence, since its aim is to avoid impunity" by applying the principle of no-need-for-intervention when the territorial jurisdiction is being exercised. This does not authorize the demand of proof of said territorial jurisdiction's inactivity to allow the lawsuit, but rather to offer reasonable proof that the denounced crimes have not at this time been effectively prosecuted, which in this case is what the documentation shows.
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> Therefore, an evaluation of the annulment appeal before the Court with regards to the application of the principle of subsidiary jurisdiction, should have determined the admission of the lawsuit under the terms dictated in the Central Court's decision. Given that subsidiary jurisdiction was the only basis for the Chamber of the National Court's decision, which the majority considers incorrect, a more consistent holding would have been to overturn the decision.
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> 2) Seeing as the complainants are the only ones with recourse, the decision falls under the prohibition of *reformatio in peius* by adversely effecting their position in the process. Applying its interpretation of the principle of subsidiary jurisdiction in the limited amount of time that had passed from the moment the crimes were known to the time of the lawsuit, the Court deemed itself unqualified "at this time." Nonetheless, the decision of the Supreme Court has a definitive reach, since it establishes that Spanish Jurisdiction is only applicable if the victims of the genocide are Spanish or the guilty parties are found within Spanish territory. There is no need to argue that this decision is "based solely upon the law," since all decisions of this type require judicial guidance are made under the assumption that the law has been applied to the situation. What is relevant here is that the appeal, without allowing the claims of the petitioners, is used to establish a new doctrine that is more restrictive than the one upheld in the decision.
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> 3) The Court majority interprets Article 23.4 (g) LOPJ *contra legem*, so the only limitation that this rule establishes for the exercise of Spanish jurisdiction is that the delinquent has not been absolved, charged, pardoned, or punished in another country. The requirement that the victim be Spanish greatly contradicts

what is laid out in the rule, which is not based on the principle of passive nationality and deems the prosecution of genocide an extraterritorial crime almost without substance. The existence of Spanish victims may underpin the reasons why the Spanish Jurisdiction agreed to review this issue, but said jurisdiction is exercised based on Article 23.4 a) and applying its principle of universal jurisdiction. Applying a national interest is contrary to the idea of genocide as a crime against the international community, since it assumes that it exclusively affects Spaniards outside of Spain (since if the Spanish victims were foreign to the group, the crime would not qualify as a crime of genocide with regards to them).

The other norms that the decision uses, namely the presence of the alleged perpetrator on Spanish territory, are also contrary to the rule. Article 23.4 distinguishes two types of crime: those of extraterritorial nature through the application of the same national law [sections a) and f)], and those that can achieve this status by invoking a treaty [section g)]. Regarding the first type of crime, based on the principle of *jus cogens*, universal jurisdiction in domestic law is out of the question. As a result, section (g) cannot be interpreted as establishing limits to the former with regards to a jurisdiction previously recognized. Moreover, the Treaties that are considered establish certain requirements when exercising jurisdiction that constitute a floor but not a ceiling in their application.

4) Citing comparative law precedents, the Court concludes that for the prosecution of genocide the principle of universal jurisdiction applies as a *jus cogens* of international law. Therefore, there is no contradiction between exercising this jurisdiction under the terms of Article 23.4 LOPJ and other principles of international law.

As a result, requiring a link or a connection between the facts [crimes] and a value or interest of the State that exercises jurisdiction can be construed as a reasonable rule of self-restriction that will avoid the proliferation of proceedings based on foreign or removed crimes. But, it can be a requirement that prevents the excesses or abuses of the law, not as a means of derogating in the practice the principle of universal jurisdiction but by making an exception to the rule through the application of passive nationality which does not exist in our law or principles of defense and is found separately in Article 23.3 LOPJ. The aforementioned reasonableness requirement may allow the abusive exercise of jurisdiction to be denied to avoid an excessive expansion of this type of procedure and the ineffectiveness of the intervention. Although, in practice, its exercise is suppressed by understanding this *nexo comun* in such a restrictive manner as the majority does.

5) In any case, if in any situation there is an agreement of the norms of connection it is in this case, to point that "this type of situation in which so there are so many ties with a crime of ethnic genocide will be difficult to find again in the history of Spanish Jurisdiction." The dissenting minority affirms the existence

of cultural, historical, linguistic, legal, and many other ties with Guatemala, which does not allow it to apply the "reasonable rule of exclusion" that was explained before. And, the dissenting majority supports the maximum effectiveness of jurisdictional intervention, to which a significant number of Spanish victims can be added, not to the genocide (since they are not part of the ethnic group in question), but as victims of acts of retaliation or to the same acts of genocide directed towards the Mayan population. In sum, the attack on the Spanish Embassy "cannot constitute a clearer example of affecting the interests of our country."

By virtue of all of this, we believe that the appeal should have been taken, annulling the decision and reinstating the decision initially entered by the Central Investigative Judge.

3. The respective constitutional appeals are based upon the following motives:

a) The Constitutional appeal (number 1744/2003) first considers the right to effective judicial guidance contained in Article 24.1 CE with regards to its provision of the right to obtain a decision founded in Law and the right to access jurisdiction, which would cover both the Supreme Court's decision entered on February 25, 2003, which employed an unjustifiably restrictive interpretation, and *contra legem* of Article 23.4 LOPJ, determined a real need for a requirement that, while not established in the law, some type of connection be made between the punishable crimes and the Spanish interests in order to repeal the principle of universal jurisdiction established in the cited rule. This was done in the decision entered by the National Court on December 13, 2000, through the introduction of a requirement (the rule of subsidiary jurisdiction), not found in the law, to close off current petitioners' access to the proceedings. Secondly, the law found in Article 24.1 CE is considered equally violated by an infraction of the prohibition of *reformatio in peius*, which leads to a state of defenselessness, since the current plaintiffs are the only petitioners. The Supreme Court's decision adversely affects and worsens their situation, seeing as it definitively impede the Spanish Courts' ability to exercise Spanish Jurisdiction "at this moment in time," a decision that the National Court affirmed. Regarding the rest, the plaintiffs appropriate the arguments set forth by the dissent. Finally, the appeal alleges the violation of the right to an ordinary Judge predetermined by the Law and to a process with all of the guarantees (Article 24.2 CE) they would have been afforded had the decision been refuted based on a *contra legem* interpretation of Article 23.4 LOPJ, closing off the Spanish Courts' ability to exercise jurisdiction.

b) The Constitutional appeal (registered under number 1755/2003) was filed based on violations of the following fundamental rights: First, the right to effective judicial assistance (Article 24.2 CE) with regard to its provision of access to justice; the violation, involving both the Supreme Court's decision as well as the National Court's Decision entered on December 13, 2000, by declining to exercise Spanish Jurisdiction to prosecute the crimes contained in the lawsuit

based on an interpretation that precludes any application of Article 23.4 LOPJ ???. The Courts did this by substituting the first of the cited decisions, universal jurisdiction for passive personal jurisdiction, which does not fall under Spanish Law. And they restricted the Spanish Courts ability to exercise jurisdiction through the principle of subsidiary jurisdiction, by framing it as *contra legem.*. Similarly, there was a second violation of the right based on the failure of due process regarding the right to equality before the law when the Courts determine their ability to criminally prosecute the denounced crimes based on the nationality of the victims or based on "national interests." This violates the rules set forth in Article CEDH or 21 PIDCP. Lastly, they allege that the Supreme Court's Decision violated the prohibition of the *reformatio in peius* when they decided to further restrict the Spanish Courts ability to exercise jurisdiction.

c) The Constitutional appeal (registered under number 1773/2003) requests review based on the following reasons: First, the right to effective judicial guidance (Article 24.1 CE) was violated when the Supreme Courts' reached a decision unfounded in the Law. The decision also clearly contradicted Article 23.4 LOPJ which prohibits limiting access to trial through unnecessary restrictions on the Spanish Courts ability to establish jurisdiction. The same complaint applies to the National Court's Decision on Appeal, where the plaintiffs are also denied access to an ordinary Judge predetermined by law due to the decision, which violates the rules of Article 24.2 CE. The lawsuit also alleges, without any evidence, the violation of the right to a speedy trial, concluding that, aside from the dissent's portion of the Supreme Court's Decision that is being contested, the decision violates the prohibition against *reformatio in peius*.

4. The Second Chamber ruled on May 13, 2004, (lawsuit registered under number 1744/2003) in response to the appeal over the content of Article 50.3 LOTC, granting the petitioner and the Public Prosecutor ten days to formulate arguments, with supporting documentation, about the possible unconstitutionality of the content of Article 50.1 c) LOTC. The Prosecutor and the complainant filed a request for the lawsuit to proceed, which was allowed by the Second Chamber on October 14, 2004. The Court also subpoenaed those who formed part of the proceedings from which claims arose. The Argentine Pro-Human Rights Association, represented by Counsel Ms. Isabel Canedo Vega, took part in this appeal through written notification registered by this Court on November 22, 2004.

Said Association appeared before the court by judicial order on January 20, 2005. The Court also agreed to hold a hearing on the parties' participation within a period of twenty days, based on Article 52.1 LOTC, as well as granting them a period of ten days, as established in Article 83 LOTC., to argue their rights regarding the consolidation of the present appeal the Second Chamber (number 1755/2003) and the following appeal in the First Chamber (number 1773/2003)

5. The Second Chamber ruled on May 13, 2004 (lawsuit registered with number 1755/2003) in response to the appeal over the content of Article 50.3 LOTC, agreeing to

grant the petitioner and the Public Prosecutor ten days to formulate arguments, with supporting documentation, about the possible unconstitutionality of the content Article 50.1 c) LOTC. The Prosecutor and the plaintiff filed a request for the lawsuit to proceed, which was allowed by the Second Chamber on October 28, 2004. The Court also subpoenaed those who formed part of the proceedings from which the claims arose. The Free Association of Lawyers, represented by Counsel Ms. Isabel Canedo Vega, took part in this appeal through written notification that was registered by this Court on December, 2004.

By judicial order, on January 20, 2005, said Association appeared before the Court. They also agreed to hold a hearing on the parties participation within a period of twenty days, based on Article 52.1 LOTC, as well as to grant them a period of ten days, as established in Article 83 LOTC, to argue their rights regarding consolidation of the present appeal in the Second Chamber (number 1744/2003).

6. The First Chamber ruled on May 18, 2004 (regarding lawsuit number 1774/2003) to allow the lawsuit to proceed and required, based on Article 51 LOTC, the subpoena of those who participated in the proceedings. Through written documents registered by this Court on June 1, 2004, the following parties have participated in the appeal: The Confederation of Labor Unions represented by Counsel Ms. Isabel Canedo Vega, and Ms. Rigoberta Menchú Tum, 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. Human Rights, Mr. Arcadio Alonzo Fernández, CONAVIGUA, FAMDEGUA and Ms. Ana Lucrecia Molina Theissen, represented by Counsel Mrs. Gloria Rincón Mayoral.

By judicial order of October 8, 2004, the parties cited above appeared before the Court. The Court agreed to hold a hearing on the parties' participation within a period of twenty days, based on Article 52.1 LOTC. Through further legal proceedings on January 20, 2005, the Court granted them a period of ten days, as established in Article 83 LOTC, to present argue their rights regarding the consolidation of the present appeals in the Second Chamber (number 1744/2003).

7. The Public Prosecutor and the participating parties from the various appeals filed an assertion of their interests or they did not oppose it. The Second Chamber of this Court reached a decision on the Appeal on March 14, 2005, agreeing to the consolidation of the most recent appeals (1755/2003 and 1773/2003) and the earlier ones (1744/2003), due to the fact that they contained similar judicial decisions and contained similar allegations of fundamental rights violations.

8. With regards to Appeal 1744/2003, the Prosecutor filed a review of the appeal, submitted in writing to this Court on February 10, 2005, dismissing the procedure set forth in Article 52.1 LOTC, based on the following consideration. Regarding the claim of

a violation of Article 24.1 CE due to the prohibition of *reformatio in peius*, the Prosecutor considers that this falls under the claim of inadmissibility of Article 50.1 a) as related to Article 44.1 (a) LOTC. Since this pejorative reform is an *extra petita* incongruence, it must resort to the path laid out in Article 240.3 LOPJ, of interposing the obstacle of an action for annulment before turning to constitutional jurisdiction. In any case, even if the Court did not see it in these terms the argument for the appeal, one cannot qualify a decision about the Spanish Court's jurisdiction as incongruent. The deadline cannot be extended, and, therefore, the decision can be seen as official at any point in the process, based on Article 9.1 LOPJ. It also cannot be stated that the Supreme Court's Decision has definitively closed a possible trial in Spain for the crimes alleged in the lawsuit, which might be possible if the necessary connections are made.

There has been no violation with regards to the right to an ordinary Judge as predetermined by law. The judicial bodies believe this, since even after the appeals, they made a judicial determination. It would have been an infringement on this right, if a court, initially called upon to consider a given processes, decided they did not have the ability or the jurisdiction to do so.

Regarding the alleged violation of effective judicial guidance, the Public Prosecutor considers that, given that the principle of *pro actione* especially applies to the access to trial, it is inadmissible to condition this type of access on a requirement that is not legally foreseen or so rigorously required that it makes it impossible or extremely difficult to begin and deal with the process. (Cite, among others, SSTC 34/1999, 84/1996 71/2001 or 231/2001). Neither the National Court or the Supreme Court have limited themselves to merely requiring consistency between the conditions listed in Article 23.4 LOPJ. They also add requirements that are not expressly established in the text of the Law to the content of the cited rule. This is how the National Court's appellate decision is able to demand the plaintiffs produce evidence not legally foreseen by the statute and that prove facts in the negative, a *probatio diabolica*, requirement that harm the right to effective judicial guidance. With regards to the Supreme Court's decision, the reference to the requirement of having "a connection with national interests," even though it appears to be formally based on a systematic interpretation of diverse rules, constitutes an unforeseen legal obstacle contrary to Article 24.1 of the Spanish Consitution. Said requirement cannot even be justified from a systematic perspective, given the following arguments:

First, a) The requirement that, as a way of creating a connection, at least one victim be Spanish would make of the specific requirement that the Spanish Court have the ability to undertake a review of a crime of genocide unnecessary, since the principle of personal jurisdiction from 23.2 LOPJ would be applied, being otherwise a crime in need of evidence that will be, at times, extremely difficult to provide. b) Secondly, the alternative requirement that the guilty parties be found in Spain is not founded on any legal provision. c) Lastly, the requirement that, in absence of the previous requirements, Spanish interests must be affected is redundant with regards to Article 23.3 LOPJ. Moreover, it can also be said that when the Spanish Legislature established, along with the classification of genocide, a category of crimes that Spanish Courts can prosecute

under any condition, they did so because they believed it to be in the interest of the State to establish such a rule. In summary, said requirement (stated, otherwise, in a generic fashion) lacks legal support, it is not justified, and its ambiguity makes it an insurmountable obstacle.

The representatives of the Argentinean Pro-Human Rights Association filed on their behalf written accounts that were registered by this Court on February 22, 2005, , to carry out the cited motion, joined the allegations made in the constitutional appeal filed by Ms. Rigoberta Menchú Tum and others.

9. In appeal number 1755/2003, following the procedure required by Article 52.1 LOTC, the Prosecutor filed a review of the appeal stating that the appellate decision violates the plaintiffs right to effective judicial guidance with regards to the right of access to trial in a written account registered by this Court on February 10, 2005. The conclusion is founded upon arguments very similar to those presented in the written account accompanying the constitutional appeal number 1744/2003.

The procedural representation of the Argentinean Pro-Human Rights Association filed written accounts, to carry out the cited motion, registered by this Court on February 23, 2005, joined the allegations made in the appeal filed by the Free Association of Lawyers.

10. In appeal number 1773/2003, following the procedure required by Article 52.1 LOTC, the Prosecutor, in a written account registered by this Court on November 16, 2004, filed a review of the appeal stating that the appellate decision violates the plaintiffs right to effective judicial guidance with regards to the right of access to trial. The conclusion is founded upon arguments very similar to those presented in the written account accompanying the constitutional appeal registered with number 1744/2003. Regarding the rest of the arguments in the appeal, the right to an ordinary Judge predetermined by law consecrated in Article 24.2 of the Spanish Constitution is understood not to have been violated based on the arguments set forth in the cited written account. Granting the appeal based on the alleged violation of the right to a speedy trial is also not possible, since the allegation is made without further development of the arguments, thus lacking a constitutional basis.

The procedural representation of Ms. Rigoberta Menchú Tum and others, following procedure, filed written accounts registered by this Court on November 12, 2004, which followed in its entirety the constitutional appeal filed by The Free Association of Lawyers, registered number 1744/2003.

11. Based on a court order dated September 22, 2005, the present Decision was presented for deliberation and voted on the 26th of the same month and year.

LEGAL PRECENDENTS

1. Several constitutional appeals have been brought before this constitutional jurisdiction to the Second Chamber of the Supreme Court's Decision entered on February 25, 2003 that partially allowed annulment appeal filed against the *en banc* Criminal Chamber of the National Court decision of December 13, 2000, as well as an appeal to this last decision. The core of the controversy lies in the restrictive interpretation that, while based on different arguments, both judicial bodies gave to Article 23.4 LOPJ and the rule about applying criminal jurisdictional it sets forth. This refers to the so-called principle of universal jurisdiction, with the consequence of denying, entirely or in part, the ability of the Spanish Courts to prosecute and try the crimes that are the center of the lawsuit and gave rise to the current proceedings. These crimes have been called genocide, torture, and terrorism in the lawsuit, which alleges that they were committed in Guatemala during the 1970s and 1980s. The three constitutional appeals concur in denouncing that the contested decisions have led to an unfounded, restrictive interpretation and *contra legem* of the cited rule, due to a series of requirements that are not found in Law, which would involve the violation of their fundamental rights.

Specifically, they state that the right to effective judicial guidance has been violated, both the provision that grants the right of obtaining a decision founded in law and the provision that relates to the right to access jurisdiction. The appeals also concur on the violation of Article 24.1 CE, which the Supreme Court decision would fall under by reaching a decision that would lead to *reformatio in peius*. While the National Court, appealing to the principle of subsidiary jurisdiction, rejected the idea of the Spanish Court's ability to exercise jurisdiction "for the time being," it left open the possibility for a future High Court's decision. By rejecting the principle and raising the need for a connection with Spanish interests, it definitively denies the jurisdiction of our State and, therefore, leaving the current petitioners in a worse off position.

Together, the aforementioned arguments of the appeals, both appeal number 1744/2003 and number 1773/2003, also allege a violation of the right to an ordinary Judge as set forth in the law (Article 24.2 CE), based on an equally unfounded and restrictive interpretation, as well as (the last appeal cited) a violation of the right to a speedy trial. Lastly, appeal number 1755/2003 also includes the violation of the right to a trial with all the guaranties contained in Article 24.2 CE, which is related to the right to a just application of the law. Therefore, the Spanish Court's ability to exercise jurisdiction is established based on the discrimination of victims due to their nationality.

The Public Prosecutor filed the authorization of the constitutional appeal with regards to the violation of the right to effective judicial guidance (Article 24.1 CE), which would have come under both the National Court's appellate decision, as well as the Supreme Court's decision, by restricting the access to a trial with an excessively rigorous and unfounded interpretation of Article 23.4 LOPJ, based on rules or restrictive elements regarding the of the Spanish Courts ability to take up a matter that are not included in the law or reasonably derived from them.

2. Since various complaints have been presented, we must begin, based on our doctrine, by examining those from which retroactive action can follow, with the objective

of safeguarding the subsidiary character of the trial (SSTC 229/2003, December 18, JJ2; 100/2004, June 2, FJ 4; and 52/2005, March 14, FJ 2). More specifically, we will begin with the allegation relating to the violation of the right to effective judicial guidance, regulated by Article 24.1 CE, its provision granting the right to obtain a decision founded in Law and the right to the access to jurisdiction, since it is the central argument for appeal in all the lawsuits.

Both provisions cited in Article 24.1 CE, while they both have their area of application, should be examined jointly in the present case, since the main substance of the complaint is grounded on the argument that due to a decision that is unfounded in Law, the petitioners are being denied their right to access to trial. Therefore, this duplication or concurrence of the arguments in the complaints leads to a double jeopardy. This is because the right to access of jurisdiction constitutes, as we have shown, "the marrow" (STC 37/1995, from February 5, FJ 5) and "the primary content" (STC 133/2005, from May 23, FJ 2) of the right to an effective judicial guidance. It requires, in addition to the common cannons of the right to an effective judicial guidance in its provision granting the right to obtain a decision founded in Law, a showing of sufficient motivation, absence of arbitrariness, obvious unreasonableness, and patent error. A subsequent requirement, potentially more intense proportion, is derived from the principle of *pro actione*. We have maintained, since STC 35/1995, from February 7, FJ 5, that the constitutional control check over decisions not to admit or not to pronounce judgment on a question of law should be rigorously substantiated, given the applicability (as with the denial of jurisdiction when it closes of the access to trial) of the principle *pro actione* previously cited (SSTC 203/2004, from November 16, FJ 2; 44/2005, from February 28, FJ 3, 133/2005, from May 23, FJ 2, among many others). The principle requires "its mandatory observance by Judges and Courts and bars certain interpretations and applications of the legally established requirements to access trial that unjustifiably obstruct the right for a judicial body review and resolve through the Law the a claim brought before it" (all SSTC 133/2005, from May 23, FJ 2; 168/2003, from September 29, FJ2)

As we have stated on many occasions, access to jurisdiction constitutes a legally configured right, since the ability to exercise it and its dispensation is subject to the approval of the budget and other requirements a legislator sets. Therefore, the decision “not to admit” or a merely procedural decision would not violate the right to effective judicial assistance if it is reasonably prevented by an express rule of law that is also respectful of the essential substance of fundamental law (SSTC 172/2002, from September 30, FJ 3; 79/2005, from April 4, FJ 2) We have also shown that the principle of *pro actione* cannot be understood as a forcing the selection of the most favorable interpretation of the admission or the most favorable decision of the basic problem, from all the possible interpretations the rule allows. This requirement would lead the Constitutional Court to entertain questions of procedural legality which are normally resolved by the common Courts (STC 133/2005, from May 23, FJ 2). Otherwise the obligation supposes that this principle consists solely of obligating the judicial bodies to interpret the procedural requirements in a certain way, "preventing certain interpretations and their application from disproportionately eliminating or obstructing the right of a

judicial body to review and legally resolve the claims brought before it" (all, STC 122/1999, from June, FJ 2).

As STC 73/2004, from April 23, FJ 2 affirms, "the consideration of the legal causes of action that bar judgment on the questions of law of the claims generally corresponds to the Judges and Courts in exercising their functions as laid out in *ex* Article 117.3 CE." It is not, in principle, the functions of this Constitutional Court to review the law that was applied. However, this Court, as a the ultimate guarantor of the fundamental right to obtain effective judicial guidance from the Judges and Courts, can examine the motives and arguments that support a judicial decision dismissing a lawsuit or that, similarly, fails to pass judgment on the questions of law brought to them. This is obviously not meant to replace the function of interpreting the judicial laws for specific controversies that correspond to Judges or Courts, but to ensure that the discerned motive is constitutionally justified and proportional to objective of the law on which it is founded. Said examination allows the Court, in certain instances, to ensure through this channel of appeal, not just whether a cause of action is legally covered, but also when it is covered, that it not be arbitrary, unfounded, or result in a patent error in its application or interpretation, and that it be constitutionally relevant and satisfy the requirements of proportionality inherent in the restrictions of fundamental law. (SSTC 321/1993, from November 8, FJ 3; 48/1998, from March 2, FJ 3; 35/199, from March 22, FJ 4, among many others).

In other words, even when the verification of an agreement between the assumptions and the procedural requirements is a strictly ordinary legal question, it is this Court responsibility to review those judicial decisions in which those procedural assumptions have been interpreted in a manner that is not arbitrary, clearly unreasonable or leads to a patent error. Moreover, when it is dealing with the access to jurisdiction, said revision must also come from the cases in which the procedural rules have been interpreted in a rigorous, excessively formalist manner, or disproportionate in the objectives it preserves and the interests it sacrifice (SSTC 122/1999, from June 28, FJ 2; 179/2003, from October 13, FJ 2; 3/2004, January 14, FJ 3; 79/2005, from April 2, FJ 2). As expressed in the recent STC 133/2005, FJ 2, "what this principle really implies is the prohibition of those decisions not to admit (or to pass judgment) that, by their rigorousness, excessive formalism, or any other reason, clearly reveal a discrepancy between the ends that those causes not to admit-or not to pass judgment on questions of law - preserve and the interests that are sacrificed."

To have a fuller understanding of the reach or grounding of the principle of *pro actione* under the protective sphere of Article 24.1 CE, it is not improper to highlight the insightfulness of the cannon of the access to trial, given that the judicial interpretations of the procedural legality which satisfy the test of reasonability and even those whose "correction from a theoretical perspective" is predictable, may entail "a denial of access of jurisdiction based on an excessively rigorous consideration of the applicable rules" (STC 157/1999, from September 14, FJ 3) and, thus, violates the right to effective judicial guidance in previously cited provisions.

3. Having presented the judgment framework that will be applied to this case, it is time to delve further. As shown in the background, the heart of the controversy lies in the openly restrictive interpretation that both the National Court and the Supreme Court have given to the rule regarding the establishment of jurisdiction in Article 23.4 LOPJ, which resulted in the denial of the Spanish courts ability to exercise jurisdiction over the alleged crimes of genocide, terrorism, or torture. It is in the interest of the Court to treat them as separate cases, as the lawsuit touches upon both decisions (the National Court's Decision on Appeal from December 13, 2000 and the Supreme Court's Decision from February 25, 2003), and their respective decisions are founded on diverse arguments.

Thus, before entering into an analysis of said arguments, it is important to remember that, even when referring to other crimes included in the catalog of Article 23.4 LOPJ, the legal rule that is the focus of the controversy has been the object of this Court's previous decisions. One can extract some implications for the judgment of the contested decision from these previous decisions. Specifically, the STC 21/1997, from February 10, FJ 3, states that; "in establishing the extension and limits of the Spanish Court's jurisdiction, Article 23.4 from Organic Law 6/1985, from July 1, of Judicial Power, confers knowledge on our judicial bodies of the crimes committed by Spaniards and foreigners outside of Spanish territory when theses are susceptible to being categorized as crimes according to Spanish Criminal Law, in certain situations [...]. This means that the legislator has ascribed a universal reach to Spanish jurisdiction to gain knowledge of these specific crimes, with regards to their gravity as well as their international reach." Furthermore, in the STC 87/2000, from March 27, FJ 4, we state that "the essential basis of this rule of establishing the exercise of jurisdiction lies in the universalization of States' and their agents' ability to exercise jurisdiction and learn of certain crimes whose persecution and prosecution are of interest to all Governments, in such a way that its logical consequence is the coming together of this ability to exercise jurisdiction of competence, or in other words, the concurrence of governmental jurisdiction".

This understanding with regards to the basis of universal jurisdiction allows one to directly consider its constitutional reach from the perspective of the right to effective judicial guidance, and the resolution of the National Court's Decision on Appeal. The theoretical assumption from which it bases the absence of jurisdiction, the principle of subsidiary jurisdiction, does not appear to be *prima facie* in coinciding with the principle of concurrence which this Court has determined to be preferable. In order to emphasize the relevance that this different theoretical perspective could have for the constitutional analysis, it is important to first delve into the arguments which the National Court Supports uses to support their position in order to study which specific norm in the application of the principle led to the denial of Spanish jurisdiction, and with it, to the alleged violation of the right to access to trial.

In any case, one cannot but first emphasize that both with regard to the National Court's decision and to the Supreme Court's decision Article 23.4 LOPJ theoretically grants broad reach to the principle of universal jurisdiction, since the only limitation it expressly introduces is that of an already adjudicated matter, namely that the delinquent person should not have already been absolved, pardoned, or punished in another country.

In other words, both from a literal interpretation of the rule, as well as from the *voluntas legislatoris*, it is necessary to conclude that the LOPJ establishes a principle of absolute universal jurisdiction. That is to say, since it may not be placed under restrictive norm of correction or procedure, and without hierarchical rules ranking to the rules of granting judicial competence, contrary to the other norms, the principle of universal jurisdiction originates from the particular nature of the crimes being prosecuted. This does not mean that this is sole cannon of interpretation of the rule, or that its explanation cannot be controlled by other regulating norms that may even restrict its realm of application. In this task of interpretation, especially when the restriction includes the boundaries of access to jurisdiction, one should keep in mind the limits that outline a strict interpretation or one that is restrictive, inverse to the analogy, of what should be conceived as a teleological interpretation of the law, characterized by the exclusion of these incorporated assumptions from the framework of the application of the rule. From the perspective of the right of access to jurisdiction, such a teleological interpretation would distance itself from the hermeneutic rule of *pro actione* and would lead to an application of rigorous and disproportionate law contrary to the to the principle established in Article 24.1 CE. This is the analytical path we must follow.

4. As anticipated, the National Court's Decision was appealed, resting on prior decisions of the Court, part of the Genocide Convention, and more concretely on Article VI in order to conclude by affirming the validity of a relationship of subsidiary jurisdiction of Spanish Jurisdiction and territorial jurisdiction. The rule that was cited states:

> "Persons accused of genocide or of any of enumerated acts in Article III will be tried by a competent court of the State in whose territory the act was committed, or before the international criminal court that is competent with regards to the Contracting Parties that have recognized its jurisdiction."

The National Court bases itself on the idea that the rule cited, which establishes the obligation of the States in whose territory the crimes were committed to prosecute, in no way prohibits the rest of the Signatories to establish extraterritorial rules of jurisdiction for genocide. As it eloquently states, citing prior decisions, such a limitation would be contrary "to the spirit of the Convention which seeks a commitment from the Contracting Parties through the use of their respective penal systems to persecute genocide as a crime of international law and to avoid impunity of such a grave crime." Nonetheless, immediately afterwards, it concludes that Article VI of the Convention imposes a subsidiary nature to jurisdictions not contemplated in the article.

The contested decision does not delve into the reasons it arrived at such a conclusion, it infers a subsidiary relationship from the sole mention of the rule territorial jurisdiction (or that relating to the international criminal court). Therefore, we must begin by accepting there are undoubtedly important reasons, procedural, as well as political and criminal, that support giving priority to *locus delicti*, and that forms part of traditional international criminal law. Using this as a starting point, and picking up the questions we left pending, the truth is that, from the perspective of its theoretical formulation, the

principle of subsidiary jurisdiction should not be understood as an opposing or divergent rule from what the principle of concurrence introduces. Faced with concurrent jurisdictions, and to avoid the eventual duplication of processes and the violation of the *ne bis in idem* principle (double jeopardy), it is essential to introduce a rule of priority. Since the prosecution of such atrocious crimes is a common interest (at least on the level of principles) of all States because of their effect on the International Community, a reasonable and basic political-criminal process must grant priority to the jurisdiction of the State where the crime took place.

This being affirmed, it follows to warn that the topic proposed still has constitutional relevance, since what is ultimately discussed, both by those seeking relief and the Public Ministry, as well as by Supreme Court's decision that diverges from the norm applied by the National Court of affirming the priority of the principle of subsidiary jurisdiction, are the terms under which the rule or principle is applied. More concretely, the greater or lesser number of requirements demands with regards to the passivity of the State where the acts took place. The National Court's Decision on Appeal which is the object of the appeal, repeats the doctrine established in the Appeals from November 4th and 5th, 1998, defining the terms for applying the rule of subsidiary jurisdiction in the following way: "A State should abstain from exercising jurisdiction over crimes which constitute genocide, that are being tried by the courts of the country where they took place or by an international tribunal." Taking this statement literally, a third party State should only abstain when a legal process has already been initiated in the territorial jurisdiction or an international tribunal. Or, in any case, a reasonable change to the rule of subsidiary jurisdiction would also lead to the abstention of extraterritorial jurisdiction when the effective prosecution of the crimes can be foreseen to occur in a short period of time. *A sensu contrario*, for the universal extraterritorial jurisdiction to be enacted, it should be enough that there be, either official communication or by the acting party, serious and reasonable indications of judicial inactivity that would prove a lack of willingness or capacity to effectively prosecute the crimes. However, the Decision on Appeal from December 2003, taking an enormously restrictive interpretation of the rule of subsidiary jurisdiction that the same National Court had outlined, goes even further and requires the plaintiffs to prove the legal impossibility or the prolonged judicial inactivity to the point of requiring evidence of the lawsuit's rejection by the Guatemalan Courts.

Such a restrictive assumption of the Spanish Courts international jurisdictional competence established in Article 23.4 LOPJ entails a violation of the right to access of jurisdiction recognized in Article 24.1 CE as a first expression of the right to effective guidance from the Judges and Courts. On one hand, and as the Prosecutor charges in his written account of the allegations, the requirement of proving negative events places the actors in a situation where they are faced with undertaking an impossible task, namely to carry out an impossible proof. On the other, with it they frustrate the finality of universal jurisdiction established in Article 23.4 LOPJ and in the Genocide Convention, since it would be precisely the judicial inactivity of the State where the crimes where committed by not responding to the a claim brought and thus impeding the proof sought by the National Court, which would block the international jurisdiction of a third State and

would result in the impunity of genocide. In sum, such a rigorous restriction of universal jurisdiction, in stark contradiction to hermeneutic rule of *pro actione*, becomes deserving of constitutional challenge for violating Article 24.1 CE.

5. As has been spelled out in detail in the precedents, the Supreme Court bases its denial of Spanish jurisdictional competence on arguments different from those of the National Court, pertaining in particular to the intrinsic limits of the application of the rule of universal jurisdiction captured in Article 23.4 LOPJ. In the first place, the disputed Decision makes the applicability of the rule cited depend upon an international treaty of which Spain is a part to guarantee such an extension of jurisdictional competence. Regarding the crime of genocide (around which the argument is practically based), in spite of initially manifesting that the Convention, while faced with the view of the plaintiffs, it "does not expressly establish universal jurisdiction, it also does not forbid it," that the truth is that it ends up stating the contrary. Consider that Article VIII "does not authorize each State to exercise its Jurisdiction under that principle of universal jurisdiction, but rather that it contemplates a different reaction to the commission of this crime outside of its territory, expressly establishing an appeal to the competent bodies of the UN with the goal that they will adopt the pertinent measures in each case." (seventh jurisdictional basis).

Thus, the conclusion the Supreme Court reached would be that, only when the appeal to unilateral universal jurisdiction is expressly authorized by conventional Law, is it legitimate and applicable by virtue of Article 96, as well as Article 27 of the Treaty Law Convention, according to which what was agreed on in international Treaties must be carried out through the internal legislation of each State.

To conclude from the mentioning of only a few possible mechanisms to prosecute genocide and the subsequent silence of the Convention with regards to extraterritorial international jurisdiction that there is an inferred prohibition directed towards States party to the Convention (which paradoxically would not reach those who are not party) against introducing domestic legislation, following the mandate captured in Article I, to allow other tools to prosecute the crime into their national legislations, seems to be an extremely rigorous interpretation as well as one that lacks support. From the unilateral standpoint of the States, and except for the mention of the international tribunals, what Article VI of the Accord establishes is at least a minimal obligation that commits them to persecute international law crimes in their territories. Under these terms, once it is assumed that the oft cited Convention does not contain a prohibition, but rather leaves open to the signatory States the possibility of establishing subsequent mechanisms for prosecuting genocide, Article 27 of the Treaty Law Convention cannot be used as an obstacle for allowing the Spanish Courts to exercise jurisdiction over the crimes allegedly committed in Guatemala. Especially when the desired result the Convention Genocide seeks is an obligation to intervene, not the contrary prohibition to intervene.

In effect, said lack of authorization that the Supreme Court finds in the Convention on Genocide for the activation of unilateral international jurisdiction by a

State cannot be reconciled with the principle of universal prosecution or the principle of avoiding the impunity of crimes of international law. This prevails in the spirit of the Convention and forms part of customary international law (and even that of *jus cogens* as the best doctrine has shown). Instead, the idea of a lack of authorization directly collides with this notion. In effect, it is contradictory to the very existence of the Convention on Genocide and its object and purpose, inspiring signing parties to agree to renounce a mechanism of prosecution of the crime, especially when we consider that the priority rule of competence (territorial) would in numerous situations diminish the possibility its effective exercise by the circumstances that can arise in the different cases. In the same way that it is contrary to the spirit of the Convention to say that abiding by it includes a limitation in the possible forms of combating the crime that States who have not become signatories would not have, thus they would not be constrained by this alleged and questionable prohibition.

6. Since, in the Supreme Court's opinion, universal jurisdiction is not recognized by the Convention on Genocide, the Second Chamber of the High Court upholds that its unilateral assertion by internal law must accordingly be limited by other principles, by virtue of what has become rule in international custom. From this one derives a restriction on sphere of application of Article 23.4 LOPJ, requiring for it to come into play certain "links of connection," such as the requirement that the accused party must be found within Spanish territory, that the victims have Spanish nationality, or that there be some other direct link with national interests. The use of such corrective norms is based in the decision on an analysis of international custom, which concludes that, since it is not each individual State's responsibility to occupy itself unilaterally with establishing order, the exercise of universal competence will only be legitimate when the cited links exists. The contested decision emphasizes that these links ought to have an equivalent meaning to the norms recognized in national law or in treaties which permit the expansion of extraterritorial competence.

The Supreme Court invokes certain jurisprudential decisions from third State or international tribunals to support the premise that the reach of the principle of universal justice has continually been restricted in international custom. It cites, in particular, several decisions from the German Federal Supreme Court, the Belgian Court of Appeals on the *Sharon Case*, as well as the decision from the Hague International Criminal Court on February 14, 2002 in the Yerodia Case, in which Belgium was punished for issuing an international order of arrest for the Minister of Foreign Affairs of the Democratic republic of Congo.

The first thing that we must point out is that this customary law rule is extremely debatable, and that, the particular jurisprudential references the Supreme Court has chosen to support this thesis do not support this conclusion, but rather a contrary one. It is unnecessary to develop a broad argument, since the particular votes in the contested decision, signed by seven Magistrates (whose significance cannot be overlooked), has come to convincingly refute the presumed validity of the cited decisions as a theoretical basis for the Second Chambers approach by offering other contradictory references.

As the dissenting Magistrates have stated, the cited German decisions do not represent the *status quaestionis* in this country, since the German Constitutional Court's decisions following the cited decision have come to support a principle of universal jurisdiction that does not require a link to national interests (citing, as an example, the Decision on December 12, 2000, where the German courts affirmed a conviction for genocide of Bosnian nationals for crimes committed Bosnia-Herzegovina against Bosnian nationals.) With respect to the Hague International Court Decision in the Yerodia Case, one must concluded that it cannot serve as precedent for the intended restrictions on universal competence, since it narrowly focused on the issue of whether the international norms of personal immunity had been violated. It did not rule on the question of universal jurisdiction with regards to genocide, since this is what the Democratic Republic of the Congo expressly requested in its claim. And the same can be said about the Belgian Appeals Court's Decision on February 12, 2003, which the Supreme Court, from all its content, only alludes to the aspects related to the immunity of state officials carrying out their functions, and omits any mention to the express acknowledgment and formulation in the decision of the universal jurisdiction established in Belgian legislation.

If we add to that a number of precedents in international law which support the contrary approach to what the Supreme Court has followed, the assumption on which the High Court's decision bases its restrictive interpretation of Article 23.4 LOPJ (the existence of a general limitation to the principle of universal justice in customary international Law) loses a great part of its support, in particular when one considers that the selection of references is not exhaustive nor does it include some which are significantly contrary to the orientation being presented. In this respect, it is objectionable that the decision fails to mention that Spanish law, contrary to what could be derived from its reading, is not the only national legislation that incorporates a principle of universal jurisdiction with a link to national interests. One can cite to countries like Belgium (Article 7 of the Law on July 16, 1993, amended by the Law on February 10, 1999, extends universal jurisdiction to genocide), Denmark (Article 8.6 CP), Sweden (the Law relative to the 1964 Accord on Genocide), Italy (Article 7.5 CP), or Germany, States that incorporate, to a greater or lesser degree, certain crimes against the International Community in its realm of jurisdiction without restrictions motivated by national ties. As an important example, it is enough to point out that the Supreme Court's decision cites the German Supreme Court's decision on February 13, 1994, but does not make any mention of Article 6 of the German CP. Nor does it mention the Code of Crimes against International Law on June 26, 2002 (a law enacted to adapt German Criminal Law to the statutes of the International Criminal Court), whose first Article sets forth that these rules will be applied to crimes contemplated in it (genocide, crimes against humanity, and war crimes included in the Court’s statutes) "even when the crime is committed abroad and has no relationship at all with Germany."

7. The Supreme Court's decision also includes a list of International Treaties related to the prosecution of crimes relevant to the International Community and signed by Spain, to demonstrate that, on the one hand, universal jurisdiction is not expressly established in any of these Treaties, and that, on the other hand, they do establish as a

means of collaboration the classic formula *aut dedere aut judicare (obligation to extradite or prosecute)*. In other words, the States are obligated to try those responsible for the crimes spelled out in the Treaties when they are found in their territory and no other State with mandatory competence will seek extradition according to the provisions of the Treaty. From the analysis of this realm of conventional international law, the Supreme Court infers the need to and the legitimacy of restricting the sphere of application of Article 23.4 LOPJ to the cases in which the alleged guilty party is found in Spanish territory, under Article 96 CE, from section g) of Article 23.4 LOPJ, and Article 27 of the Treaty Law Convention, according to which the parties to a Treaty cannot invoke their domestic law to justify their failure to execute a Treaty.

Independently of what we will later affirm, the interpretation followed by the Supreme Court to justify this rule of restriction of the law should be rejected for methodological reasons. First, the intended systematic reference to section (g) of Article 23.4 LOPJ cannot serve to extend the conclusions of the High Court to the rest of the crimes set forth in the preceding sections to the cited rule. The closing clause introduced in section (g) extends universal jurisdiction to other crimes, not included in the prior sections of Article 23.4 LOPJ, which according to international treaties or Conventions, must be prosecuted in Spain. In other words, while sections (a) and (f) of Article 23.4 LOPJ establishes a catalog of crimes that are prosecutable *ex lege* in Spain in spite of their commission in another country and by foreigners. Section (g) sets forth precisely the possibility that, if agreed to in an international treaty, other crimes which are not expressly included in the rule will be prosecuted in Spain. Consequently, it does not mean, nor is it obvious, that the limitations or conditions that, by way of the interpretations of the diverse international treaties mentioned in the Decision, one could conclude that the latter have an analogous application to the former. This analogy, as we have just argue, is not protected by sufficient reasoning, as well as being contrary to the principle of *pro actione* by limiting the manner in which the claimants can ostensibly access the jurisdiction.

Similarly, it becomes questionable to appeal to Article 27 of the Treaty Law Convention to support this line of argument, since neither the Convention on Genocide, as we have just argued, nor the treaties that the contested decision mentions contemplate any prohibition against exercising universal jurisdiction unilaterally that could be considered to breach what is stipulated in Spanish Law.

Undoubtedly, the presence of the alleged perpetrator in Spanish territory is an unavoidable requirement for trying and eventually convicting, given lack of trials *in absentia* in our legislation (except for assumptions that are not relevant to the case). Therefore, juridical institutions such as extradition constitute fundamental elements to effectively achieve the purpose of universal jurisdiction: the prosecution and punishment of crimes that due to their characteristics, affect the entire international community. However, this condition cannot lead to the elevation of this circumstance to a *sine qua non* requirement for the exercise of judicial competence and the opening of the process. Especially when this would lead to subjecting access to universal jurisdiction to a

profound restriction not contemplated in the law, a restriction that would be contradictory to the foundation and the objective inherent to the institution.

8. In addition to the presence of the alleged perpetrator on national territory, the contested decision introduces two other connecting links: passive nationality, which makes universal jurisdiction dependent on the Spanish nationality of the victims, and a connection between the crimes committed with other relevant Spanish interests, resulting in nothing more than a generic reformulation of the so-called real principle of protection or of defense. Such restrictions, again, seem to come from international custom, appealing to the notion, without further precision, that "an important part of the doctrine and some national courts" have been inclined to recognize the relevance of certain points of connection.

In this regard, we must state that this interpretation, radically restricting the principle of universal jurisdiction captured in Article 23.4 LOPJ, should be qualified as a teleological reduction (insofar as it goes beyond the grammatical sense of the rule), going beyond the constitutionally admissible path established in the framework laid out by the right to effective judicial guidance in Article 24.1 CE, to the extent that it supposes cutting back *contra legem* and starting from a corrective norm that cannot even implicitly be considered to exist in the law, and that furthermore, is clearly contrary to the ends the institution inspires. It has the effect in unrecognizably altering the principle of universal jurisdiction as it was conceived by international law, and reduces the realm of application of the rule to the point that it supposes a *de facto* derogation of Article 23.4 LOPJ.

In effect, the right to effective judicial guidance, in its consideration of the access to the jurisdiction has been undermined in the present case because an interpretation that follows the *telos* (purpose) of the rule entail satisfying the right to exercise a fundamental right to access to the legal process and would be, therefore, plainly in accordance with the principle of *pro actione*. Also, because the literal meaning of the analyzed rule, without any forced interpretation, leads toward the fulfillment of such an end, and with it, to the safeguarding of the right established in Article 24.1 CE. Therefore, the forced and unfounded interpretation of the Supreme Court gives to the rule presupposes an illegitimate restriction of the cited fundamental right, because it violated the requirement that the “judicial organs, in interpreting the legally anticipated procedural requirements, will consider the *ratio* of the norm in order to avoid the mere formalities or unreasonable interpretations of the procedural norms to impede an in depth investigation of the matter, violating the requirements of the rule of proportionality,” (STC 220/2003, on December 15, FJ 3), by constituting a "denial of access to jurisdiction based on an excessively rigorous considerations of the applicable rule" (STC 157/1999, on September 14, FJ 3).

9. This is how the restriction based on the nationality of the victims incorporates an added requirement that is not contemplated in the law. It also cannot have a teleological foundation because, particularly in the case of genocide, it contradicts the very nature of the crime and the shared aspiration of universal prosecution, which is practically

encroached on at its base. According to Article 607 CP, the legal classification of genocide is characterized by the victim or victims belonging to a national, ethnic, racial, or religious group as well as by the requirement that the acts be committed with the specific intent of destroying said group precisely through focusing on the ties to this group. The interpretation of the Supreme Court's decision, consequently, would imply that the crime of genocide would only be relevant to the Spanish Courts when the victim is Spanish and, moreover, when the conduct was motivated by the desired end to destroy the Spanish nationals as a group. The improbability of such a possibility should be sufficient proof that this was not the intent of the Legislator with the introduction of universal jurisdiction in Article 23.4 LOPJ, and that this is not an interpretation that is compatible with the ultimate objective of the institution.

The same conclusion should be reached with regards to the criteria of national interest. Disregarding the fact that the reference to the same in the contested decision is practically nominal (as was pointed out by the Public Prosecutor in his report), without at a least a minimal explanation that would allow one to be more specific about its content, the truth is that with its inclusion number 4 of Article 23 LOPJ ends up deficient of content, since it brings one back to the rule of jurisdictional competence contemplated in the former number. As already has been stated, the pivotal issue is that to subject the competence to try international crimes of genocide or terrorism to the concurrence of national interests under the terms set out in the decision would not be exactly reconcilable with the foundations of universal jurisdiction. The international and trans-border prosecution that the principle of universal jurisdiction intends to compel is based exclusively on the particular characteristics of the crimes yielded to its authority. The injurious nature of these crimes (exemplified in the case of genocide) transcends the particular victims and reaches the international community as a whole. Consequently, its prosecution and punishment constitute, not only a commitment, but also a shared interest of all of the Sates (as we affirmed in STC 87/2000, on March 27, FJ 4), whose legitimacy does not depend upon the specific subsequent interests of each one of them. Similarly, the conception of universal jurisdiction in current active international law is not formulated around the points of connection based on particular State interests. This is illustrated in Article 23.4 LOPJ, the cited German law of 2002, or, to provide more detailed examples, the decision adopted by the Institute of International Law in Krakow on August 26, 2005, where, after expressing the aforementioned commitment of all the States, universal jurisdiction is legally defined as "the competence of a State to prosecute and, in cases where they are found guilty, punish the alleged delinquents, regardless of where the crime was committed and without considering active or passive nationality or other rules of jurisdiction recognized by international law."

Faced with the Supreme Court’s notion of universal jurisdiction, to the extent it aspires to unite "common interests to avoid the impunity of crimes against humanity with a States' concrete interest in the protection of certain assets" (tenth juridical basis), it is supported by purposes that are difficult to reconcile with the foundations of this institution. Thus, giving rise in practice to a *de facto* abrogation of Article 23.4 LOPJ. Moreover, the excessive rigorousness with which the High Court applies these rules bears on the incompatibility of its pronouncements with the right of effective judicial guidance

in its consideration of access to jurisdiction, given that it requires that the connection to national interests be seen as directly related to the crime that serves as the basis for assigning jurisdiction. It expressly excludes the possibility of a more lax interpretations of said rule (and thus, more in accordance with the principle *pro actione*), such as tying the link to national interests with other related crimes or more generally with their surrounding context.

10. From arguments made above, we conclude that the National Court's decision entered on December 13, 2000, as well as the Supreme Court's Decision on February 25, 2003, violates the claimant's right to effective judicial guidance (Article 24.1 CE) in its consideration of access to jurisdiction. Therefore, an appeal is granted and the cited decisions are overturned and bringing us back to the proceedings immediately prior to the annulled National Court Decision without examining the claims for violations of other fundamental rights that are made in the lawsuit, so as to preserve the subsidiary character of the constitutional appeal.

HOLDING

Based on the all these arguments, the Constitutional Court, BY THE AUTHORITY VESTED IN IT BY THE SPANISH CONSTITUTION,

has decided

To grant the appeal requested by Ms. Rigoberta Menchú Tum and others, by the Spanish Association for Human Rights, and by the Free Association of Lawyers and others, and consequently:

First - To state that the claimant's right to effective judicial guidance in consideration of the access to jurisdiction (Article 24.1 CE) has been violated.

Second - To restore to the aforementioned the integrity of their rights, and, to this end, repeal the National Court's *en banc* decision entered on December 13, 2000 and the Supreme Court's Decision entered on February 25, 2003, and bringing us back to the proceedings immediately prior to the pronouncement of the National Court's Decision in order for a new decision to be made that is respectful of the fundamental right violated.

Publish this decision in the "Official State Bulletin"

Declared in Madrid on September 26th, 2005