Spanish Judicial Decisions in Public International Law, 2005

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

Constitutional Court Decision (CCD) 155/2005 of 9 June
Constitutional Jurisdiction
Appeals alleging unconstitutionality nos. 3247/1999 and 73/1999

Constitutionality appeals brought by over fifty Deputies belonging to the Socialist Parliamentary Group of the Congress of Deputies against Royal Decree Law (RDlaw) 14/1998, of 9 October, on Spain's accession to a number of International Monetary Fund Agreements, especially referring to Arts. 2 and 3 (of the Constitution), and against Law 13/1999, of 21 April, on Spain's accession to a number of International Monetary Fund Agreements, especially referring to Arts. 2 and 3 (of the Constitution): provision of the consent of the Kingdom of Spain to bind itself internationally to a number of International Monetary Fund Agreements: the legal invalidity of the decree-law as an instrument for incorporating international agreements into domestic law: such a law not being lawfully able to provide the constitutionally-required authorization for creating national law under Arts. 94.1 and 74.2 of the Spanish Constitution (SC). The appeal was partially admitted.

Legal Grounds:

"(. . .) 5 Beginning with consideration of the appeal against *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)*, it should be kept in mind that the challenged law is a legal norm with the force of law to which the provisions set forth in Art. 86.1 of the Spanish Constitution (SC) do not apply. This is not, however, the only limitation to which the decree-laws are subject under the

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Constitution, since all the reservations established by the Constitution regarding certain matters and favouring specific forms and procedures are clearly in force here. One of such reservations is the one established by Art. 94.1 of the Constitution (RCL 1978, 2836) on providing the consent of the State in order to enter into binding agreement through treaty or agreement, requiring the provision of consent to be authorised by the Spanish Parliament in certain cases. This therefore excludes the possibility of such consent being provided with no prior parliamentary authorization or under authorization from another body. It is therefore clear that the Decree-Law is a legal format that is not valid for the authorization required by SC Art. 94.1. This is, first, because SC Art. 86.1 only provides for the Decree-Law as a way to make "legislative provisions", a legal category different from authorizations, and therefore it cannot be considered a suitable instrument for granting authorisation.

Second, an authorisation clearly cannot be granted by the entity needing to be authorised. Lastly, the Decree-Law is a source of regulation for use by the Government that only requires passage by the Congress of Deputies, not the two Chambers of the Spanish Parliament, for it to enter into law. Therefore, not even after parliamentary validation is the Decree-Law a legal format able for granting authorization, something only the full Spanish Parliament (Cortes Generales) is able to do, since validation by the Congress of Deputies could never amount to validation by the complex body in which it is a part together with the Senate, making it impossible to view validation as an act equivalent to the authorisation required under SC Art. 94.1.

Another argument must be added to the above, since authorisation under SC Art. 94.1 must be prior to the provision of consent, meaning that if the authorisation contained in the Decree-Law is only complete with congressional validation, the Decree-Law in and of itself cannot authorise the provision of consent and would not be in full effect as from publication, which can hardly be reconciled with being an instrument for urgent legislation. The alternative would be to consider the authorisation contained in the Decree-Law as sufficient before it is validated, in other words, strictly governmental authorisation, which would be manifestly contrary to the requirement for authorisation by the full Spanish Parliament (Cortes Generales) and must be granted in all cases before the State makes international commitments under the premises set forth in SC Art. 94.1. Lastly, to accept that the not-yet-validated Decree-Law would be initially sufficient for authorising the granting of consent but that, nonetheless, the authorisation only becomes perfected after validation of the text by the Government, would lead, ultimately, to allowing a treaty to be entered into before effective parliamentary authorisation (albeit incomplete, owing to the exclusion of one of the Chambers).

6 Therefore, *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)* cannot be used as a legal format for granting the constitutionally required authorisation to bind the State internationally by means of treaty or agreement in accordance with *SC Art. 94.1 (RCL 1978, 2836)*. The question that arises immediately,

therefore, is to determine whether Arts. 2 and 3 of said Royal Decree-Law refer to any agreement or treaty of the type, as the appellants allege, referred to in paragraph d) of SC 94.1, namely, "treaties or agreements which imply financial liabilities for the Public Treasury."

With regard to Art. 2 of Royal Decree-law 14/1998, the appellants maintain that accession to the New Agreements for obtaining loans from the International Monetary Fund establishes a new agreement framework obligating the Spanish public treasury to put financial resources at the disposal of the IMF by granting loans of up to 672 million special drawing rights. The State Lawyer, on the other hand, considers this to be a situation for standard implementation of the International Monetary Fund's Articles of Agreement, signed by Spain in 1958, whose Art. VII, Section 1, establishes a special system for obtaining resources for which the New Arrangements, to which Art. 2 of Royal Decree-Law 14/1998 refers, only provide specific implementation. Furthermore, the State Lawyer alleges that no financial obligation is assumed by the Public Treasury, since providing amounts as a loan only requires a management operation of the reserves account by the Bank of Spain.

The appellants are correct in maintaining that Art. 2 of the Royal Decree-Law refers to international commitments involving financial liabilities for the Public Treasury. Under the New Arrangements approved by the IMF Board of Governors Decision of 27 January 1997, signatory countries acquire an unequivocal commitment to provide the Fund with the loans it needs in order to provide third parties with needed financial recourses. It is evident that the amounts made available to the Fund will be recorded in the Bank of Spain's assets account, as the State Lawyer pointed out, but this is a logical result of the prior commitment to make this available which, if implemented requires the appropriate monetary provision, that the State is obligated to make.

It is important to point out that the immediate party to which Art. 2.1 of the Royal Decree-Law refers is the Kingdom of Spain, which therefore holds the commitment established by the second sub-paragraph of Art. 2.1. Sub-paragraph 2 of said article attributes the decision-making for the implementation of the New Arrangements to the Ministry of Economy and Finance. The public treasury's involvement is therefore undeniable, whether or not further instrumentation of the commitment is performed by the Bank of Spain in the terms set forth in the First Final Provision.

The New Arrangements referred to in Art. 2 of the Royal Decree-Law are not, on the other hand, a mere result of routine implementation of the International Monetary Fund Articles of Agreement as the Government representative alleges. Art. 3 of the so-called New Arrangements makes it clear that accession to same is not obligatory for the Member States of the International Monetary Fund, but rather that accession thereto can be by depositing "an instrument setting forth that it has adhered in accordance with its law and has taken all steps necessary to enable it to carry out the terms and conditions of this decision" [paragraph c)]. This is in strict application of Art. VII, Section 1,

of the Articles of Agreement, in accordance with which the New Arrangements were adopted, whereby the measures that can be taken to replenish Fund holdings in the general resources account include the granting of loans by Member States, with the understanding that said Member States are not under obligation to grant them. The Member States of the Fun do not therefore assume an obligation under Art. VII Section 1, of said Articles solely by entering into the Articles of Agreement. Obligations of this type require specific acceptance on a case-by-case basis. This is set forth in Art. 3 c) of the New Arrangements, and the financial dimension of the obligation assumed by the Spanish public treasury by acceptance of these New Arrangements, is what makes prior authorization by the full Spanish Parliament (Cortes Generales) a requirement.

This is not a case, therefore, of an obligation assumed immediately upon acceding to the Articles of Agreement, nor in response to the need to unfailingly comply with a commitment acquired through adopting the ordinary International Monetary Fund decision-making process through the Articles of Agreement. This is a new commitment in the framework of a prior commitment, of sufficient magnitude from the perspective of the Articles of Agreement themselves to require an express statement of acceptance. Aside from the use in Title III, Chapter Three of the Constitution of the terms treaty or agreement, the decisive factor is the existence of an agreement ["whatever its particular designation", as provided in Art. 2.1 a) of the Vienna Convention on the Law of Treaties, of 23 May 1969, to which Spain acceded by Instrument of 2 May 1972], which binds the (Spanish) State as concerns other States in the framework of International Law, and amounts to an assumption of liability which, to the extent that the free exercise of the faculties of any sovereign State can be committed, is only in accordance with the Constitution when dealing with the matters set forth in Arts. 93 and 94.1 SC with the intervention of the full Spanish Parliament (Cortes Generales), as the representative of the Spanish people (SC Art. 66.1). It is constitutionally irrelevant whether this commitment is set forth expressly in a treaty or in the accession to an obligation arising from a treaty making it possible but not necessary; the determining factor is that the State commits to something which it was not required to do at all up to that point; and such is the case with the obligations referred to in Art. 2 of the Royal Decree-Law under review.

Therefore, Art. 2 of *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)* is unconstitutional because it violates Art. 94.1 d) of the *Constitution (RCL 1978, 2836)*.

7 Art. 3 of the Royal Decree-Law is also found to be unconstitutional because it authorises ratification of an amendment (Fourth) of the International Monetary Articles of Agreement themselves. This is not, as in Art. 2, a question of committing the State to specific obligations in the framework of a general obligation, but rather of modifying the legal text of that which precisely gave rise to the latter, namely, the Agreement that Spain acceded to in 1958. However difficult it may be at times to determine whether it is a matter of inter-

national commitments that are a mere specification of prior or more general commitments, the assumption of which is involved in having assumed the former, or rather obligations which, because they involve essentially what has already been committed, requiring specific, express consent, it must be pointed out that modification by means of amendment of an agreement already in force in the Spanish legal system under SC Art. 96 *(RCL 1978, 2836)*, is something that can only be done under the conditions required for assuming a new commitment; namely, under the same terms under which the Agreement being modified was accepted or those demanded by the Constitution in force for the enactment of an agreement of the same characteristics, an agreement such as provided under SC Art. 94.1.

The characteristics of this agreement make the Decree-Law an improper formula for authorising the provision of the consent of the State for a revision of the kind undertaken by the Fourth amendment, an impropriety that must not have gone unnoticed by the government when it initiated the procedure under SC Art. 94.1 before enacting *Royal Decree-Law 14/1998 (RCL 1998, 2489, 2574)* and proceeded with it even after enactment.

The legal difference between the passage of Laws and parliamentary authorisation for international treaties is expressly confirmed by Constitutional Court Decision *CCD 114/1991, of 11 April (RTC 1991, 114 AUTO)*, F. 3 *in fine*, where it says that "the approval of Laws which form the *de facto* premise of such a provision [referring expressly to SC Art. 91], is an essentially different legal rule than parliamentary authorisation for international treaties, as regulated by Art. 94 of our Law of Laws."

Art. 3 of *Royal Decree-law 14/1998 (RCL 1998, 2489, 2574)* is, therefore, also unconstitutional as it violates SC Art. 94.1 d) *(RCL 1978, 2836)*.

(. . .)

The constitutionality issues posed in relation to Law 13/1999 have to do, on the one hand, with its appropriateness for repairing the constitutional defects of Royal Decree-Law 14/1998 and, on the other, with it being a law capable of providing the parliamentary authorisation required by SC Art. 94.1. The solution of both issues is clearly determined by the fact that, as we have just argued, the matter subject to regulation by Arts. 2 and 3 of Royal Decree-law 14/1998, and the same articles of Law 13/1999, must be in the context of "treaties or agreements involving financial liabilities for the Public Treasury" [SC Art. 94.1 d)]. This, as regards the first question posed, means that Law 13/1999 is absolutely unable to repair the fundamental defect of Royal Decree-Law 14/1998, the expression of a will that in no way can be attributed to the full Spanish Parliament (Cortes Generales), but rather solely to the Government or perhaps, subject to appropriate validation, to one of the Chambers that makes up the Spanish Parliament (Cortes Generales). To accept anything else would mean that the full Spanish Parliament (Cortes Generales) would be validating a measure that had already been authorised by the Government, which, once validated, had been in full effect from the start and therefore sufficient to make it

possible to enact an international agreement into law, so that it became part of the legal system prior to the authorisation by Parliament. The full Spanish Parliament (Cortes Generales) would not be authorising enactment in advance, as sought by SC Art. 94.1, but rather validating an enactment already authorised by the Government and accepted by the Congress of Deputies. Therefore, as the appellant Deputies state, in addition to depriving the full Spanish Parliament (Cortes Generales) of its exclusive jurisdiction for authorising the enactment of certain pieces of international law prior to their actually being applied, it would seriously compromise the design for preventive monitoring of the constitutionality of treaties established by SC Art. 95, since the full Spanish Parliament (Cortes Generales) would only be able to seek a decision from the Court regarding the constitutionality of the treaty after it had already been committed to by the Government under International Law, and not before, as would be appropriate for preventive monitoring.

9 *Law 13/1999 (RCL 1999, 1013)* is the result of the will of the full Spanish Parliament (Cortes Generales). It is therefore a law that arises out of the same will as required by SC Art. 94.1 *(RCL 1978, 2836)* for prior authorisation for providing the international consent of the State. The exclusive jurisdiction of the Spanish Parliament (Cortes Generales) to grant this consent is not what is impaired by using a Law, in contrast to cases of urgent government legislation. However, in any case, as derived from SC Art. 74.1, it must be pointed out that the prior authorisation by the full Spanish Parliament (Cortes Generales) set forth in SC Art. 94.1 corresponds to the exercise of a power that the Constitution specifies as non-legislative, whereby the use of the constitutional channel to exercise a jurisdiction that is constitutionally set aside for a different channel, is constitutionally relevant. The issue is not, therefore, whether the intervention of an institution has been dispensed with or not, but rather whether the specific jurisdiction of such institution was exercised through the channel specifically provided for such purpose under the Constitution. Clearly, on the authorisation required for assuming international commitments the Constitution imposes not only an institutional but also a procedural reservation owing to the fact that different constitutional jurisdictions are being exercised.

For authorisations as set forth under SC Art. 94.1, Art. 74.2 of the Spanish Constitution establishes a specific parliamentary procedure that is different from that of ordinary or common legislation, and differentiated by the fact that the role of the Senate is defined in terms of greater equality as opposed to what is customarily the case in the Congress of Deputies. Thus, while in legislative procedure the rule is that, in accordance with SC Art. 90.2, discrepancies between the two Chambers may be ultimately resolved by a simple majority of the lower Chamber – also in the case in which the Senate exercises a veto which in reality only delays the sufficiency of a simple majority of the Congress of Deputies by two months – Art. 94.1 provides that discrepancies be overcome by means of a "joint Committee made up by an equal number of Deputies and of Senators", the proposal from which must be must be approved by a majority in

each Chamber, with the decision of the Congress of Deputies ultimately prevailing, but solely by absolute majority, if the discrepancy continues (SC Art. 74.2).

This strengthening of the role of the Senate, in comparison to the lesser importance it is given in legislative procedure, to the point of significantly bringing its position in line with that of the Congress' – whose rejection by simple majority can only be overcome by a qualified majority – determines the process of the parliamentary decision-making in terms which diverge from everything that is otherwise commonplace in the procedures of the full Spanish Parliament (Cortes Generales), and gives the participation of the higher chamber in the process truly special relevance in our parliamentary system in terms that are different than the norm in the Spanish Parliament (Cortes Generales) on the whole, as it is characterised by obvious imperfect bicameralism. Along these same lines of the diversity in the respective constitutional channels in the exercise of different powers, we must refer to the divergent type of intervention by the King in sanctioning and enacting Laws and in manifesting the consent of the State for entering into international obligations by means of treaties, set forth respectively in SC Art. 62 a) and Art. 63.2, along with potential advance monitoring of unconstitutionality as provided in *SC Arts. 95.2 CE and 78 (RCL 1979, 2383)*, regarding treaties but not laws. In sum, the procedure set forth in SC Art. 74.2 offers relevant characteristics allowing it to be able to be considered a reservation for the adoption of the agreement required by SC Art. 94.1, making it mandatory, in principle, to understand that the advance parliamentary authorisation prior to providing the State's international consent must be obtained through this specific procedure.

This is not a question of a potential defect in legislative procedure, regulated by infra-constitutional rules, as in the case salvaged in *STC 97/2002, of 25 April (RTC 2002, 97)*, but rather of inappropriate selection of a procedure established directly by the Constitution itself.

SC Art. 74.2 cannot allow for anything other than the strict authorisation set forth in of SC Art. 94.1, which is totally unaccepting of the formation of other parliamentary decisions, particularly legislative per se. Arts. 2 and 3 of Law 13/1999 authorise Spain to accede to certain International Monetary Fund Agreements and ratify the Fourth amendment to the IMF Articles of Agreement, but Art. 2 and especially the other parts of the Law contain other provisions whose content is not limited to that contained in the simple authorisation to incorporate foreign rules. In particular, these include rules that are purely internal in nature and necessary for the proper inclusion in the legal system of the rules being authorised, but they are substantially different and, above all, set forth in a legal format (Law) that is different from the regulatory formats included (New Arrangements and the Fourth amendment), along with what that involves in terms of regulating the relations of one form and the other within domestic Law, based on respect for the Law as a norm offered as an expression of a parliamentary desire insofar as it exceeds the strict authorization set forth in SC Art. 94.1.

In fact, Art. 4 of Law 13/1999 empowers the Government to assume commitments with respect to the International Monetary Fund for amounts up to $3,000 million, while under Art. 5, and in accordance with Art. 107 of the General Budgetary Law, the State guarantee to the Bank of Spain to back Spain's participation in a multilateral aid operation through the Bank for International Settlements was granted up to a maximum amount of 170,000 million pesetas. These are decisions for which the integration of prior international agreements or provisions is not authorized, but rather that represent an internal desire to make a international commitment, through an internal rule that is valid under the legal system in the form of a law, which is the expression of the general will as represented by the full Spanish Parliament (Cortes Generales) (SC Art. 66 CE). These measures are therefore agreed in the context of an aid operation in the international financial environment under the auspices of the IMF, hence the instrumental connection to the authorisation under SC Art. 94.1 granted in Arts. 2 and 3 of the law in question, including a provision referred to the Minister of Economy and Finance, which also differs from the appropriate framework of such authorisations.

Therefore, no matter how minimal the regulatory content the full Spanish Parliament (Cortes Generales) may consider necessary to accompany the prior authorisation it is required to give under SC Art. 94.1 CE, the appropriate parliamentary procedure would be the common or special legislative procedure imposed, as necessary, by the matter to which such content refers. Such has been the practice up until now of the Spanish Parliament (Cortes Generales) in regard to the various increases in Spain's quota in the International Monetary Fund. *Law 73/1980, of 16 December (RCL 1980, 2827), Law 28/1983, of 12 December (RCL 1983, 2823)*, and *Law 16/1992, of 16 June (RCL 1992, 1401, 1566)*, approved Spain's concurrence with the seventh, eighth and ninth increases in quota, respectively, adding to the authorisation in accordance with SC Art. 94.1 a series of internal organizational provisions that were not fully covered by the special procedure set forth under SC Art. 74.2.

(. . .)

In this case, the economic pledge made by the State must be made a full commitment, and cannot be reversed in order to avoid the harm which would otherwise be caused to the International Monetary Fund and other States.

While the unsuitability of the specific procedure followed by the Spanish Parliament (Cortes Generales), is as serious as any violation of the Constitution, it is sufficiently sanctioned by the declaration of the unconstitutionality of the provision arising from this procedure, without adding nullification which, in addition to not repairing the harm caused in its entirety, would add harm to that which was already caused by the review of an international commitment that is incontestable from a perspective of Treaty Law.

As regards its effect on Art. 3, we must point out a special fact that necessarily warrants our reaching a different judgment conclusion than as regards the previous article. In this regard, it is important to point out that before the Law

was approved, the authorisation contained in Art. 3 had already been granted by the full Spanish Parliament (Cortes Generales) as established under SC Art. 74.2 *(RCL 1978, 2836)*. In fact, such authorisation was provided by the Congress of Deputies and the Senate on 12 November and 9 December 1998, respectively, so the inclusion in Spanish law of the Fourth amendment to the Articles of Agreement of the International Monetary Fund was made effective through the procedure mandated by Art. 94 of the Spanish Constitution.

That said, the fact that *Law 13/1999 (RCL 1999, 1013)* reiterates an authorisation that already existed legally and therefore did not arise *ex novo* in said Law, may be considered unnecessary or even anomalous; but not therefore inevitably unconstitutional. To save the reiterative authorisation in the Law from constitutional censure it is sufficient to state that the legal status of prior authorisation was no longer dependent, which is where, under SC Art. 94.1, the reason for prohibiting it being granted for ordinary legislative procedure lies, and the inclusion of the authorisation in the legal text together with the specific rules to make it effective in the same legal context, however questionable from a technical regulatory standpoint, cannot be qualified as unconstitutional.

Therefore, the appeal for unconstitutionality is dismissed as regards Art. 3 of Law 13/1999.

DECISION

In consideration of all the above, the Constitutional Court, BY THE AUTHORITY BESTOWED UPON IT BY THE *CONSTITUTION (RCL 1978, 2836)* OF THE SPANISH NATION,

Has decided

1° To consider appeal for unconstitutionality no. 73/99, against Articles 2 and 3 of *Royal Decree-law 14/1998, of 9 October (RCL 1998, 2489, 2574)*, on accession by Spain to different International Monetary Fund Agreements, and hereby declare such precepts unconstitutional and null and void.

2° To partially consider appeal for unconstitutionality no. 3247/99, brought against *Law 13/1999, of 21 April (RCL 1999, 1013)*, on accession by Spain to different International Monetary Fund Agreements through Art. 2 of said Law, and to declare said article unconstitutional, with the effect defined in Legal Ground 10 of this Decision, dismissing the appeal on all other matters."

IV. SUBJECTS OF INTERNATIONAL LAW

1. The State

a) Universal Jurisdiction for international crimes

STC 237/2005 of 26 September
Constitutional Jurisdiction

Appeals for reversal nos. 1744/2003, 1755/2003 y 1773/2003
Proponent: Judge Guillermo Jiménez Sánchez

Two central issues are decided in this Decision: First, the issue of the Jurisdiction of Spanish courts under Art. 23.4 of the Law on Judicial Procedure (LOJP) to judge facts classified as genocide, terrorism and torture involving the universalisation of the jurisdiction of States and their entities for judging certain facts; second, that of the protection in this context of the fundamental right to the effective protection by judges and courts. The Decision rules on several appeals for reversal entered against the Decision of 25–02–2003 by the Second Chamber of the Supreme Court, which partially considered the motion to vacate brought against the Ruling of 13–12–2000, by the Plenary Criminal Chamber of the National Court, and against the latter, claiming a violation of the fundamental right to the effective protection of the court, and granting the reversal.

Legal Grounds:

"(. . .) 4 As stated previously, the National Court decision subject to appeal, supported by prior decisions of the same court, is based on the *Convention on Genocide (RCL 1969, 248)*, specifically its Art. VI, and concludes by affirming the effective subsidiarity of Spanish jurisdiction over territorial jurisdiction. Said article provides:

> "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 decision is based on the concept that the above mentioned provision establishing the obligation of the States on whose territory the act takes place to prosecute in no way prohibits other Signatories from establishing extraterritorial jurisdictional criteria in respect of genocide; as it eloquently set forth by citing prior decisions, such a limitation would be contrary to the "spirit of the Convention, which seeks the commitment of the Contracting Parties, by using their respective penal codes, to pursue genocide as a crime under international law and prevent impunity in relation to such a serious crime." Notwithstanding the above, the decision concludes that Article VI of said Convention imposes jurisdictional subsidiarity on jurisdictions other than those contemplated therein.

Excepting the fact that the appealed decision did not explain the reasons for arriving at its conclusions, and that the subsidiary relationship is inferred from the reference to the criteria of territoriality (reference to an international criminal court), we must start by stating that there undeniably exist important procedural and political-criminal reasons to support priority being given to *locus delicti* and that are part of classical international criminal law. On this basis, and returning to the issue at hand, certainly from the point of view of its theoretical formulation the principle of subsidiarity would not need to be con-

sidered a rule that is in opposition or divergent from what is introduced by the so-called concurrence principle, because in the presence of concurrent jurisdiction, and in order to avoid any potential duplication of proceedings and subsequent violation of the *ne bis in idem* principle, there has to be a priority rule. In the presence of a common commitment of all States (at least in principle) to prosecute such heinous crimes affecting the international community, elementary procedural and political-criminal reasonability would of necessity give priority to the jurisdiction of the State where the crime took place.

That said, it must also be stated that the issue at hand is of some constitutional consequence, since what is ultimately under discussion both by the appellants and the Public Prosecution Service, and the Supreme Court decision in disagreement with the criteria applied by the National Court in confirming the priority of the subsidiarity principle, are the terms in which such a rule or principle is applied; more specifically, the greater or lesser number of requirements relating to the passivity of the State where the facts of the case took place. The appealed National Court decision, reproducing the doctrine established by the Decisions of 4 and 5 November 1998, defines the terms of application of the subsidiarity rule as follows: "the courts of a State should abstain from exercising jurisdiction over acts constituting genocide being tried by the courts of the country in which they took place or by an international court". Abiding by a literal interpretation of said statement, the abstention of the courts of a third State would only be required when proceedings had begun in the territorial jurisdiction or in an international court; or, in any event, reasonable modulation of the rule of subsidiarity would also amount to abstaining from exercising extraterritorial jurisdiction when effective prosecution of the crime is foreseeable within a short period of time. On the other hand, however, to activate universal extraterritorial jurisdiction it would therefore be sufficient for a court or a plaintiff to provide reasonable serious indications of judicial inactivity showing lack of either the will or the capability to effectively prosecute the crime. Notwithstanding the Decision of December 2003, containing a very restrictive interpretation of the rule of subsidiarity established by the National Court, it goes further and requires the accusers to fully accredit the legal impossibility or prolonged inactivity by the court, to the extent of requiring proof of the effective rejection by the Guatemalan Courts.

The restrictive assumption of the international jurisdiction of Spanish Courts as established in Art. 23.4 of the Law on the Judiciary *(RCL 1985, 1578, 2635)* violates the right to access to jurisdiction acknowledged in SC Art. 24.1 *(RCL 1978, 2836)* as a primary expression of the right to effective protection by Judges and the Courts. On the one hand, and as the Public Prosecutor denounces in his statements, the requirement of negative proof makes it necessary for the plaintiff to provide something that is impossible to provide, to offer *probatio diabolica*. Furthermore, it jeopardises the very purpose of the universal jurisdiction enshrined in Art. 23.4 of the Law on Judicial Procedure and in the Convention on Genocide, whereby it is precisely the inactivity of the courts

in the State where the facts took place, by not responding to a complaint entered and thereby preventing the proof required by the National Court, that would block the international justice of a third State from taking place, and lead to the impunity of genocide. In summary, such a narrow limitation of universal jurisdiction is in clear contradiction with the hermeneutic rule of *pro actione*, subject to constitutional reproach owing to the violation of SC Art. 24.1.

5 As expressed in detail in grounds, the Supreme Court bases its denial of Spanish jurisdiction on arguments that are different from those of the National Court, relating specifically to the intrinsic limits of application of the rule on universal jurisdiction set forth in Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)*. First, the appealed Decision makes the applicability of the cited provision dependent on the fact that an international convention to which Spain is a party supports such an extension of jurisdiction. As regards the crime of genocide (on which it focuses its arguments), despite finding initially against the criteria of the plaintiffs, that the Convention, while "it does not expressly establishing universal jurisdiction, neither does it deny it", actually ends by stating the contrary, that Article VIII "does not authorise each State to institute its own jurisdiction under the principle of universal jurisdiction, but rather that it envisions a different way of reacting to the commission of this crime, outside its own territory, by expressly establishing recourse to the competent UN agencies for them to adopt the appropriate measures in each case" (seventh legal ground).

Therefore, the conclusion reached by the Supreme Court would be that, only when Convention law expressly authorises recourse to unilateral universal jurisdiction would this be legitimate and applicable under both SC Art. 96 and Art. 27 of the Convention on the Law of Treaties *(RCL 1980, 1295)*, according to which the agreements reached in international treaties must be complied with by the internal legislation of each State Party.

It would be an extremely strict interpretation, and also lacking in argumentative support to conclude that the reference to only some of the potential mechanisms for prosecuting genocide and the silence of the Convention on international extraterritorial jurisdiction infer prohibition directed at States Parties to the Convention (that paradoxically, would not apply to non-parties) for including other tools for prosecuting crime in their national legislation, in compliance with the mandate in Art. I. From the unilateral standpoint of the States and leaving aside the reference to International Courts, what Art. VI of the Convention *(RCL 1969, 248)* provides is the minimal obligation that commits States to prosecute a crime under International Law within their territory. In these terms, that is, having accepted that this Convention does not contain a prohibition but rather leaves up to the signatory the possibility of establishing further mechanisms to prosecute genocide, Art. 27 of the Convention on the Law of Treaties cannot be considered an obstacle to assumption by Spanish courts of jurisdiction regarding the facts allegedly committed in Guatemala; especially when the objective pursued by the Convention on Genocide is seen more as an obligation than as a prohibition of intervention.

In fact, the absence of authorisation found by the Supreme Court in the Convention on Genocide for a State to unilaterally exercise international jurisdiction is not consistent with the principle of universal enforcement and prevention of the impunity of this crime against International Law which, as affirmed, guides the spirit of the Convention and forms part of International Customary Law (and even of *ius cogens*, as stated by the best doctrine) but rather collides with it head on. In fact, it is counter to the very existence of the Convention on Genocide, and the purpose and goals which inspire it, for signatory parties to agree to renounce a way of prosecuting the crime, especial keeping in mind that the priority criteria of jurisdiction (territorial) would in many instances be diminished in its possibilities of effectivity by circumstances that may enter into play in different cases. Just as it is counter to the spirit of the Convention of which it is part, it also provides a limitation of possibilities to fight crime that non-signatory States would not have, insofar as they would not be bound by this supposed, questionable prohibition.

6 Since in the view of the Supreme Court universal jurisdiction is not recognized by the Convention on Genocide, the Second Chamber of this Court maintains that unilateral assumption of such jurisdiction under domestic law should therefore be limited by other principles, such as is getting to be the rule under international custom. This would lead to a restriction in the scope of application of Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)*, and its entry into play would require certain "linkages," such as the alleged perpetrator being in Spanish territory, the victims being Spanish citizens, or there being another direct point of connection with national interests. The Decision in subject to analysis bases the use of such corrective criteria on international custom and reaches the conclusion that it is not up to each State individually to take it upon itself unilaterally to establish order, and that the exercise of universal jurisdiction would only be legitimate when the above-mentioned point of direct linkage exists, which, as emphasized in the appealed decision, must be of a significance that is equivalent to the criteria recognised in domestic law or Treaty Law, to allow for jurisdiction to be extended extraterritorially.

In support of the original premise, namely, the narrowing of the scope of the principle of universal justice in international custom, the Supreme Court invokes certain third-country judicial and international court decisions; it cites in particular a number of decisions by the German Federal Supreme Court, the decision by the Belgian Court of Cassation in the *Sharon* case, and the resolution of the International Court of Justice of The Hague of 14 February 2002 *(Yerodia case)*, in which Belgium was ruled against for issuing an international arrest warrant against the Minister of Foreign Affairs of the Democratic Republic of the Congo.

Therefore, the first thing we must point out is whether or not this is the rule in international custom is quite questionable, in particular since the selection of the jurisprudential references by the Supreme Court in support of such theory leads not to such a conclusion but rather to the opposite conclusion. In this regard, it should not be necessary to provide extensive argumentation in view

of the fact that the dissenting opinion on the appealed decision, signed by seven Magistrates (the importance of which cannot be overlooked), convincingly refutes the purported validity of the resolutions cited in theoretical support of the position taken by the Second Chamber, by providing other references to the contrary. As stated by the Magistrates in opposition to the majority, the German decisions cited do not represent the *status quaestionis* in that country, insofar as German Constitutional Court decisions issued after the decisions cited by the appealed decision support a principle of universal jurisdiction without requiring linkage to national interest (citing as an example the Decision of 12 December 2000, that ratified the conviction for the crime of genocide issued by the German Court against Serbian citizens for crimes committed in Bosnia-Herzegovina against Bosnian victims). As regards the Decision of the International Court at The Hague in the *Yerodia* case, it must be concluded that this cannot be used as a precedent for the intended restrictions to universal jurisdiction, since it limited its discussion to the issue of whether the international rules on personal immunity had been violated, not passing judgment on universal jurisdiction in regard to genocide, since that was what the Democratic Republic of the Congo has expressly requested in its complaint. The same came be said in regard to the Decision of the Belgian Court of Cassation of 12 February 2003, the content of which is referred to by the Supreme Court only in regard to the aspects relating to the immunity of state representatives in office, but omitting any reference to the express recognition in said decision of universal jurisdiction under Belgian law.

If to the above we add the fact that there are many precedents in International Law that would support a position contrary to that held by the Supreme Court on the matter, the premise on which the Supreme Court decision sustains its restrictive interpretation of Art. 23.4 of the Law on Judicial Procedure (the existence of a general limitation of the principle of universal justice in International Customary Law) is left without a large part of its support, keeping in mind particularly that the selection of references is not exhaustive and does not include some that are significantly in opposition to the position maintained. In this respect it is questionable that the Decision fails to mention that, in contrast to what might be inferred by reading it, Spanish Law is not the only national legislation that includes the principle of universal jurisdiction without linkage to national interests, since references can be made to countries such as Belgium (Art. 7 of the Law of 16 July 1993, amended by the Law of 10 February 1999, that extends universal jurisdiction to include genocide), Denmark (Art. 8.6 of its Penal Code), Sweden (Law relating to the Convention on Genocide of 1964), Italy (Art. 7.5 Penal Code) and Germany, all of which are States that, more or less extensively, provide for prosecution of different crimes against the international community in their scope of jurisdiction, without restrictions based on national linkage. As a significant example, it is sufficient to indicate that the Supreme Court Decision cites the Decision by the German Federal Supreme Court of 13 February 1994 but makes no mention of

Art. 6 of the German Penal Code nor of the Code on Crimes under International Law of 26 June 2002 (enacted for the purpose of adapting the German Penal Code to the Statute of the International Criminal Court) the first article of which provides that its provisions shall apply to the offences contemplated therein (genocide, crimes against humanity and war crimes included in the Statute of the Court) "even when the offence is committed abroad and bears no relation to Germany".

7 *Supreme Court Decision (RJ 2003, 2147)* also includes a list of international treaties signed by Spain on the prosecution of offences relevant to the international community in order to show, on the one hand, that in none of the treaties was universal jurisdiction established expressly and, on the other, that they establish the classic formula *aut dedere aut iudicare* as the form of collaboration, namely, that States have the obligation to try perpetrators of offences covered by such treaties when they are in their territory and have not granted the extradition requested by another State with mandatory jurisdiction under the provisions of the respective treaty. On this area of International Law, the Supreme Court deduces that there is need and legitimacy in restricting the scope of application of Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)* to cases in which the alleged perpetrator is in Spanish territory, under SC Art. 96 *(RCL 1978, 2836)*, subparagraph g) of Art. 23.4 of the Law on Judicial Procedure, and the already cited Art. 27 of the Convention on the Law of Treaties *(RCL 1980, 1295)*, according to which the parties to a treaty cannot invoke their domestic law to justify non-compliance with a treaty.

Independently from what we may state later, the interpretation used by the Supreme Court to justify such restrictive criteria regarding the law must be rejected for methodological reasons. To begin with, the so-called systematic reference to subparagraph g) of Art. 23.4 of the Law on Judicial Procedure cannot serve to extend the conclusions of the Supreme Court to the other offences contained in the preceding paragraphs of the text. This is because the closing clause inserted in subparagraph g) extends universal jurisdiction to other offences not included in the previous paragraphs of Art. 23.4 of the Law on Judicial Procedure which, should be prosecuted in Spain under international treaties or conventions. In other words, while subparagraphs a) to f) of Art. 23.4 of the Law on Judicial Procedure establish a catalogue of offences declared prosecutable *ex lege* in Spain despite having been committed abroad by foreigners, subparagraph g) specifically grants the possibility, if agreed to in an international treaty, of prosecuting offences other than those expressly included in the provision in Spain. Therefore, it is not at all clear that the application of the limitations or conditions that are predicated on the interpretation of the different international treaties referred to in the Decision, is analogous to same. This analogous application, in addition to being contrary to the principle of *pro actione* by ostensibly reducing plaintiff access to jurisdiction, is not supported by sufficiently identical reasoning, as just stated.

Referring to Art. 27 of the Convention on the Law of Treaties to support this line of argument is also very debatable, owing to the fact that neither in the Convention on Genocide, as stated previously, nor in the Treaties referred to in the appealed Decision, is there any prohibition of exercising unilateral universal jurisdiction that could be considered as not complied with under the provision of Spanish Law.

Certainly, the presence of the alleged perpetrator in Spanish territory is an essential requirement for bringing same to trial and ultimately convicting, given the non-existence of trials *in absentia* under Spanish legislation (except in cases not relevant to the issue at hand). Therefore, legal measures such as extradition are fundamental to effectively achieve the purposes of universal jurisdiction: the prosecution and punishment of crimes that, because of their nature, affect the entire international community. But this conclusion must not lead to this circumstance becoming a *sine qua non* requisite for the exercise of jurisdiction and the commencement of proceedings, especially when proceeding in this manner would subject severely restrict access to universal jurisdiction in a manner not provided under the Law; such restriction would furthermore be contradictory to the inherent fundament and aims of the institution.

8 Together with the alleged perpetrator's presence in Spanish territory, the appealed Decision introduces two other linkages: personal subjection, making universal jurisdiction dependant upon the Spanish citizenship of the victims, and the linkage of the offences committed to other relevant Spanish interests, which is merely a generic reformulation of the principle of protection or defence. Such restrictions seem to be obtained once again from international custom, referring with no further specificity, to the fact that "a major part of the doctrine and some national Courts" have decided to recognise the relevance of certain linkages.

In this regard, we must state, however, that such a radically restrictive interpretation of the principle of universal jurisdiction found in Art. 23.4 of the Law on Judicial Procedure *(RCL 1985, 1578, 2635)*, which would have to be described as a teleological reduction (as it goes beyond the grammatical sense of the provision), goes beyond the limits of what is constitutionally admissible from the framework establishing the right to effective judicial protection set forth in SC Art. 24.1 *(RCL 1978, 2836)*, to the extent that it is a reduction *contra legem* based on corrective criteria that cannot even implicitly be considered as present in the Law and that, furthermore, is shown to be openly contrary to the objective inspiring the institution, and alters the principle of universal jurisdiction as understood in International Law to the point of making it become unrecognisable, and having the effect of reducing the scope of application of the provision to an extent virtually amounting to a *de facto* abolition of Art. 23.4 of the Law on Judicial Procedure.

In fact, the right to effective judicial protection, in regard to access to jurisdiction, was diminished in this case because an interpretation in accordance with the *telos* of the precept would involve satisfying the fundamental right of access to procedure and would therefore be fully in accordance with the *pro*

actione principle, and because the literal sense of the text analysed leads without any type of interpretational manipulation to compliance with such purpose and, therefore, safeguards the right enshrined in SC Art. 24.1. Therefore the forced and unfounded interpretation to which the Supreme Court subjects the principle amounts to an illegitimate restriction of the fundamental right, as it violates the requirement that "judicial bodies, when interpreting legal procedure requirements, must take into consideration the relationship between the rule and the objective of keeping formalities or unreasonable understandings of procedural rules from preventing the judgment of the substance of the matter, violating the requirements of the principle of proportionality" (*Constitutional Court Decision STC 220/2003, of 15 December [RTC 2003, 220]*, F. 3), by constituting a "denial of access to jurisdiction as a result of an excessively strict consideration of the applicable rule." (*STC 157/1999, of 14 September [RTC 1999, 157]*, F. 3).

9 The restriction based on victim nationality therefore adds another requirement not set forth in the Law, and is also not based on teleological grounds, especially as regards genocide, as it contradicts the very nature of the offence and the shared aim of universal pursuit, leaving same virtually disarmed. According to Art. 607 of the Penal Code *(RCL 1995, 3170 y RCL 1996, 777)* (PC) the crime of genocide is legally characterised by the victim or victims belonging to a national, ethnic, racial or religious group and the acts carried out being for the specific purpose of destroying said group, focussing especially on linkages to such group. The interpretation used by the Supreme Court Decision would therefore imply, that the crime of genocide would only be relevant to Spanish courts when the victim has Spanish citizenship and, furthermore, when the act is motivated for the purpose of destroying the Spanish national group. The unlikelihood of such a possibility is evidence enough that this was not what the Legislator sought in including universal jurisdiction in Art. 23.4 *LOPJ (RCL 1985, 1578, 2635)*, and it is not an interpretation that is in line with the fundamental goal of the institution.

The same must be concluded with regard to the criteria of national interest. Overlooking the fact, referred to by the Public Prosecution Service in its report, that the reference to national interest in the appealed decision is only nominal, and lacks the minimal development permitting specification of its content, the fact is that its inclusion practically voids Art. 23.4 of the Law on Judicial Procedure of content, since it reorients it towards the rule on jurisdiction set forth in the previous paragraph. As was already stated, the key issue is whether subjecting jurisdiction for trying international crimes such as genocide or terrorism to the concurrence of national interests as set forth by the Decision, is not appropriately reconcilable with the principle of universal jurisdiction. International and cross-border enforcement seeking to impose the principle of universal jurisdiction is based exclusively on the special features of the crimes subject thereto, the injuriousness of which (paradigmatically in the case of genocide) transcends its specific victims and extends to the international

community as a whole. Consequently, prosecution and sanction of such crimes is not only a commitment but also in the mutual interest of all States (as stated in *STC 87/2000, of 27 March [RTC 2000, 87]*, F. 4), and its legitimacy therefore does not depend on any of their private interests. Likewise, the concept of universal jurisdiction in current International Law does not derive from linkages based on a specific interest of the State, as shown in Art. 23.4 of the Law on Judicial Procedure, the aforementioned German Law of 2002 and, another example, the Decision issued by the Institute of International Law in Krakow on 26 August 2005 in which, after setting forth the previously mentioned commitment of all States, defines universal criminal jurisdiction as "the ability of a State to prosecute alleged criminals, and, if finding them guilty, to punish them, independent of the place where the crime was committed and without considering any linkage of active or passive citizenship or other criteria for jurisdiction recognised by International Law".

In this regard, the Supreme Court's concept of universal jurisdiction, to the extent it aspires to join "the common interest of preventing impunity for crimes against Humanity to the specific interest of the State to protect certain assets" (tenth legal ground) is built on purposes that are hard to reconcile with the fundamental principle of the same institution, that would, as stated, lead to a virtual *de facto* abolition of Art. 23.4 of the Law on Judicial Procedure. Furthermore, the excessive rigor with which such criteria are applied by the Supreme Court would lead to its decision being incompatible with the right to effective judicial protection as regards access to jurisdiction, since it requires that the linkage with national interests be directly related to the crime taken as a basis for attributing the jurisdiction, expressly excluding the possibility of less strict interpretations (and, therefore, more in line with the *pro actione* principle) of such criteria, such as that of connecting linkage with national interests with other crimes linked thereto, or, more generically, with the context surrounding same.

10 From all the above it can be concluded that both the Decision of the National Court of 13 December 2000 and the *Supreme Court Decision of 25 February 2003 (RJ 2003, 2147)* violated the plaintiff's right to effective judicial protection (SC Art. 24.1 *[RCL 1978, 2836]*) in regard to access to jurisdiction, and it is therefore in order to grant the reversal, nullify the decisions and turn the proceedings back to the time immediately before the nullified National Court Decision was written, but not consider the complaints of violation of other fundamental rights made in the action, in order to preserve the subsidiary nature of the appeal for reversal.

DECISION

On the basis of the above, BY THE AUTHORITY VESTED IN IT BY THE CONSTITUTION OF THE SPANISH NATION, the Constitutional Court,

Hereby decides

To grant the appeal entered by Ms. Rigoberta M.T. and others, the Association for Human Rights of Spain and by the Free Association of Lawyers and others, and therefore to:

1° Declare that it violates the right of the appellants to effective judicial protection in respect of access to jurisdiction (SC Art. 24.1 *[RCL 1978, 2836]*).
2° Re-establish such rights in full and, for such purpose, nullify the Decision of the National Court Plenary of 13 December 2000 and the *Supreme Court Decision of 25 February 2003 (RJ 2003, 2147)* reverting back to the time immediately prior to the publication of the National Court Decision for the purpose of issuing a new decision in respect of the fundamental right that was violated."

NATIONAL COURT DECISION 16/2006 of 19 April
Jurisdiction: Criminal

In Madrid, on nineteenth April two thousand five, the case against Adolfo Schilingo for the crimes of genocide, terrorism and torture was tried in open public court. The central issue is the defendant's criminal liability for crimes against Humanity.

Legal Grounds:

"(. . .) 5 ON THE GENERAL APPLICABILITY OF CRIMES AGAINST HUMANITY

1 The competence of Spanish jurisdiction in the case can be examined from the dual perspective under which it is being considered, a perspective of international law, and a perspective of domestic law. While national rules provide for extraterritorial jurisdiction to criminally prosecute a crime committed in the territory of another State (Art. 23.4 and 5 *Law on Judicial Procedure [RCL 1985, 1578 y 2635]*), for there to be international legitimacy we feel it needs to be recognized therein. This case, as we have been stating all along, is a matter of individual responsibility for crimes against Humanity and the possibility of any other State exercising criminal prosecution is recognised.

2 In this regard, the arguments of Argentine Judge Cavallo in the decision of 6 March 2001, which declared null and void the Full Stop and Due Obedience Law, have been innovative. This decision contains important considerations to which we subscribe fully:

"(. . .) The *ius cogens* and *erga omnes* consideration given to some behaviour considered crimes against the Law of Nations. A first consequence that arises in the face of conduct of this nature is that Mankind as a whole confirms its criminal nature even when the domestic law of the State or States where the acts took place does not consider them as crimes (. . .). Conduct such as that described affects all Mankind alike and therefore its criminal nature is not subject to the will of a particular State or States, but is defined in a context in which individual states have joined with others in

affirming the principles and rules that must prevail in a State, on certain occasions even against its own will. The interest in bringing such crimes to judgment and applying criminal sanctions against the perpetrators (individual responsibility) does not remain with the State on whose territory the facts occurred. To the contrary, all Mankind and the States into which Mankind is divided have an equal interest in trying and criminally sanctioning the perpetrators or participants. To ensure that such interest is effectively satisfied, the Law of Nations assigns jurisdiction to all States to judge crimes committed against such interest (universal jurisdiction) (. . .) When the State tries and sanctions (even the State where the facts took place) it is acting in the interest of the international community as a whole, a higher interest than its own."

3 When analysing the elements involved in the definition of crimes against Humanity, we see that one of the requirements in the crime is that there has been an attack against civilian population, which requires at that time action in conformance with State policies or the policies of a non-State organization exercising "de facto" political power. There is also the requirement of massive or systematic attack or attacks in a political framework or under a state-wide plan.

This circumstance or characteristic of the active perpetrator of the crime, namely, a group in power or acting from a position of power, or which has the capacity to neutralise legitimate power, is one of the elements that internationalises this type of offences, making them crimes against Humanity. The reason crimes against Humanity exist is precisely to ensure that they are prosecuted, especially owing to the extreme difficulty or impossibility of domestic prosecution of this type of crime and the interest of the international community in prosecution and punishment, and so its specific definition being covered under national law is not as important as establishing an effectively persuasive international system.

Proof of this is that, while the *ICC Statute (RCL 2002, 1367 y 1906)* established the principle of complementarity of action, the circumstance of prosecution at the domestic level does not enter automatically, but rather procedurally, as an exception in Arts. 17 and 18 requiring in all cases proof that effective prosecution that does not involve fraud.

Finally, from our point of view one of the essential characteristics of crimes against Humanity which truly makes them unique is their international prosecutability beyond the principle of territoriality. It is true that the most neutral and less complex from a standpoint of international relations among States is for a general International, or "ad hoc" Court to be the one to prosecute. However, we would reiterate that the essential thing is that such international prosecution take place, be it complementary or subsidiary to ineffective or non-existent pursuit, so that when it does not take place, either through non-existence or for another reason owing to the action of an international court, the principle of necessary prosecution and the possibility of international prosecution of such crimes is safeguarded, whereby it would be appropriate that in such

cases a national instead of an international jurisdiction would act with the functions of the latter. In essence, there are few basic or substantial differences between one situation and the other, since what is absolute is the international nature of the crime and the need understood by the international community for it to be prosecuted, and if the international community does not make this possible directly, and does not abolish these basic principles of peaceful co-existence, it can be said that it accepts such action by national jurisdictions on an international level not only *de facto*, but also *de iure*, at least in this specific area relating to the mission of defending and protecting human rights against the most barbarous attacks to which they are subject. It is necessary to acknowledge that, while "the international sphere" certainly has some aspects that are more pragmatic and less principled in nature, referring to the requirements for good international relations among States, there are inadmissible situations which cannot be considered as interference by a State in the affairs of another, but rather involvement of the International Community itself, which furthermore is concerned with establishing the pure and simple individual liabilities of the subjects.

We find, therefore that cases in which a State assumes the defence of the interests of the International Community and criminally prosecutes individuals under the principle of individual responsibility are legitimate.

In addition to all this is an important contributing factor of extraordinary importance in this case, the defence of one's own interests through the defence of one's nationals who were victims of the crime. In our view there is no justification for impunity in the international sphere. (. . .)

DECISION

1° CONVICTION OF Emilio as a perpetrator responsible for the commission of a crime against Humanity: 1. For causing 30 deaths with malice aforethought, to 30 sentences of 21 years of imprisonment each; 2. Also for false arrest, to a sentence of 5 years' imprisonment; 3. For causing grave torture, to a sentence of 5 years' imprisonment.

As an accessory to the above sentences, to full disqualification during the duration of the sentences.

2° The above sentences shall be subject to the service limits set forth in Art. 70.2 of the *Penal Code, Consolidated Text of 1973 (RCL 1973, 2255)*, in force at the time the facts took place."

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. Human rights and fundamental freedoms

a) Right to the presumption of innocence

NATIONAL COURT DECISION 39/2005 OF 30 NOVEMBER
Jurisdiction: Criminal

Madrid, on 30 November of two thousand five. The case of reference, emanating from Central Examining Court no. 2 through ordinary proceedings no. 12/2003 Chamber Roll 30/2003, on two counts of attempted terrorist murder and a count of terrorist destruction, in which the public plaintiff was the Public Prosecution Service, represented by Mr. Juan del Moral de la Rosa. The Court confirmed the pertinence of the DNA evidence for weakening the presumption of innocence.

Legal Grounds:

"FIRST. (. . .) To summarize, the right to the presumption of innocence rests on two fundamental pillars:

First, the principle of free consideration of evidence by the judicial body in the exercise of its jurisdictional authority as attributed exclusively to it under SC Art. 117.3 and, second, the need for a guilty verdict to have its factual grounds based on authentic pieces of evidence, consistent with sufficient evidentiary activity and in accordance with law, that invalidates such presumption regarding the existence of a punishable act and the defendant's participation in same.

In conclusion, as shown repeatedly in case law (see., *TS 2ª SS 2085/2001, of 30 Oct. (LA LEY JURIS. 1835/2002)* and *17 Jan. 2003 (LA LEY JURIS. 11570/2003)*) in order to weaken the constitutional principle of presumption of innocence, the prosecution must provide evidence which the sentencing Court (SC *31/1981, of 28 Jul. [LA LEY JURIS. 819750/1981]*, expressed as "minimally probatory", and then as "sufficient"), in conditions of procedural and constitutional regularity, that is incriminatory in nature and wherein the guilt of the defendant can be concluded, leading the judge to conviction of the defendant. This must be done through externalized, legal, logical and coherent reasoning, which is the only possible control in an appeal to a higher court, since the assessment of the evidence is consubstantial with immediacy, as it is composed of elements as subjective as those of credibility and conviction (Art. 741 LECrim.).

Evaluation of evidence is not, however, exempt of subjectivity, but the important thing is that the historical facts be assembled in an adequately logical and rational way, extracted from the results of elements of proof that are expressed in the form of rational, understandable discourse, with the assurance that the judicial assessment of the evidence is understood and shared fundamentally by the social community to which it belongs, aided by science, experience and reason, abstaining from arbitrariness, supposition and conjecture. Evidence for the prosecution shall be such evidence as reasonably leads to accepting the facts that incriminate the defendant as truth, including the very existence of the criminal act and the guilt of the defendant, in the sense of having participated in the criminal act and not in the regulatory sense of criminal-legal reproach.

In this case, in respect of defendants Miguel, José Carlos, Luis Pablo, Juan Alberto – as later will be shown in regard to each – prosecution evidence,

direct evidence, does exist, such as DNA evidence, in addition to which – in the terms to be analysed below – there are their own statements, witness statements, expert evidence and the various visual inspections carried out. The pieces of evidence are of sufficient importance to weaken the presumption of innocence of said defendants, just as – in the understanding of the Court – there also exists sufficient incriminating evidence with regard to defendant Oscar in terms that will be considered. However, the Court does not consider there to be sufficient incriminating evidence against Gustavo to do overcome his basic right to the presumption of innocence.

Regarding the gathering of samples containing alleged biological samples for obtaining DNA, we must distinguish between two points in time:

1. First, samples gathered ("evidence", according to the police report) at the scene of the crime; and
2. Second, quite a while after the first instance, "evidence" was gathered from the defendants when they were being held for other charges (as in the cases of Miguel, José Carlos, Juan Alberto and Oscar) and surveillance was carried out by police agents in order to obtain the sample (as in the case of Luis Pablo).

1 As regards the first of the points in time of reference, the defence lawyers consider that the gathering of the evidence at the scene of the crime – Portugalete – should have been ordered by the appropriate judicial authority. Such a premise cannot be successful as it must be recalled that the Judicial Police, – in the case at hand, the Ertzaintza (Police Force of the Basque Country) –, under Arts. 282 Law on Criminal Procedure, 11 LOFCSE, 443 and successive, the Law on the Judiciary and Articles 1 and 28 of Royal Decree 769/1987, of 19 June, regulating the Judicial Police, has the power to perform all procedures necessary in order to gather all effects, instruments or evidence of a crime (see *Constitutional Court S 303/1993 (LA LEY JURIS. 2390–TC/1993)* and *Supreme Court 2ª SS 112 (LA LEY JURIS. 43057/2000)* and *996/2000 (LA LEY JURIS. 9639/2000)*, of 26 Jan. and 30 May, respectively, and 30 Jun. 2005). In this case, the conduct of the law enforcement agents was correct in gathering suspected traces of the commission of a crime without acting under court order and, as we will discuss, reporting it later when it was found that they had found biological material in the samples taken, as it was a matter of an investigation in which there was a real danger of evidence disappearing. The dismissal of the complaint means that the right to effective judicial protection invoked over lack of judicial control at the time the samples were gathered at the scene of the crime was found not to have been violated.

Such police work is also valid after the reform of Art. 326 of the Law on Criminal Procedure implemented by Organic Law 15/2003. After said reform, the third paragraph of said provision states: "When prints or traces are found whose biological analysis could contribute to clarifying the fact being investigated, the Examining Judge shall take or order the Judicial Police or the

Forensic Surgeon to take the necessary steps to verify that such samples are gathered, stored and examined in conditions guaranteeing their authenticity, without detriment to the provisions of Art. 282". Clearly, this does not prevent – in the terms already discussed in subparagraph II.1 – police agents from acting on their own authority.

In addition to the above – counter to what was alleged by the defence lawyers – the biological samples gathered in this way from sleeves, hoods and other elements used by the aggressors to hide their faces – in a cowardly fashion – to keep from being identified – by either the Ertzaintza (Police Force of the Basque Country) or by private citizens – can be dubitative samples (when it is not known to whom they belonged) and not dubitative (origin fully identified) as they state. An important fact is discussed below.

As regards the rest and with all the more reason, there was no discussion in the plenary of the existence of the garments found at the scene of the crime, basically the genetic traces found on such garments (t-shirts, sweaters, etc.) used as a balaclava, we repeat, in a cowardly way, in order to cover the face of the assailants while they took part in the acts subject to judgment in this proceeding.

2 The second instance of samples being gathered (the so-called "evidence") came much later. Regarding this instance, the defence lawyers of defendants Miguel and José Carlos alleged, – and were joined later by two other defence lawyers – the violation of the right to defence in terms of the right not to testify, the right not to enter a guilty plea and the right not to testify against oneself inasmuch as the defendants refused to submit to DNA testing (José Carlos – f. 2.433 – refused to provide a sample of saliva and Miguel – f. 3.756 – refused "to have a DNA sample taken").

The Court also denies this allegation. In order to analyse the issue posed by the defence lawyers we must distinguish between two premises, one, in which the use of physical force or any other type of coercion is necessary and one where the use of such force is not necessary:

2.1 Only in the first premise, in which physical force is needed to obtain DNA (drawing a blood sample, pulling out a hair or using a swab to obtain saliva, for example), does the Court find judicial authorisation necessary and would therefore invalidate any such sample obtained without such authorisation. Therefore, submitting to a procedure involving an invasion of the suspect's bodily integrity, such as drawing a blood sample or taking a sample of any other bodily tissue or substance to be scientifically analysed, collides with respect of bodily integrity and with the right of any defendant not to collaborate with investigative authorities and not to facilitate evidence that might incriminate him/her, in the terms as stated by the defence lawyers.

This issue has given rise to an interesting debate from the standpoint of safeguarding the rights of any person involved in criminal proceedings, and has been resolved in differing ways by the different legal systems pertaining to our legal and cultural environment. In any case, it must be specified that in the case

at hand no force was used to obtain the DNA samples.

Clearly, Articles 15 and 18.1 of the Constitution do not expressly provide for the possibility of legitimately sacrificing the right to physical integrity and privacy (in contrast, for example, to what is the case with the rights to the inviolability of the home or communication secrecy – Art. 18.2 and 3 CE) –, but this does not mean they are absolute rights, since they may be diminished through well-grounded reasons of general interest as set forth by Law, undoubtedly including *ius puniendi* actions by the State (*SC 37/1989 (LA LEY JURIS. 116723–NS/0000)*, FD 7th and 8th).

Thus, the public interest in the investigation of a crime and, more specifically, the determination of the facts relevant for criminal proceedings, is certainly legitimate cause to justify carrying out a bodily intervention, provided such measure is provided for under the law, which refers us to the next constitutional requirement indicated above. In this regard it is advisable to keep in mind the requirements of constitutional doctrine [see, for all *CT SS 29 Nov. 1984 (LA LEY JURIS. 9401–JF/0000)*, 7/1989, 19 Feb. 1992 and *7/1994 (LA LEY JURIS. 2274–TC/1994)* and TS 2nd *SS 4 Feb. 2003 (LA LEY JURIS. 1547/2003)* and *19 Apr. 2005 (LA LEY JURIS. 1491/2005)*] on proportionality, which can be summarized as follows:

> the measure limiting the fundamental right must be established by law;
> it must have been adopted by specially justified court order; and
> be suited, necessary and proportionate in relation to a constitutionally illegitimate purpose.

Added to these are two more requirements, derived from physical integrity being involved: that the procedure must be performed by medical or health care personnel, and that in no may it case endanger health or cause inhumane or degrading treatment.

Specifically, the DNA test cannot be accepted as valid when the subject on which the test is to be performed does not give his/her consent and it is not backed by court order that is duly justified and strictly proportional to the nature of the crime subject to prosecution and the means available for investigation, as explained above.

Currently, since the reform of the Law on Criminal Procedure by Organic Law 5/2003, by addition of a second paragraph to Art. 363, this doctrine has acquired legal coverage from case law establishing that if the Examining Judge finds the specific concurring circumstances to so warrant he/she may, in a justified resolution, order biological samples considered indispensable for determining the suspect's DNA profile to be obtained from same.

In any case, it must be recalled that the European Court of Human Rights (Dec. 8 Feb. 1996, Murray case) maintains that, when refusal to submit to DNA testing is lacking in sufficient justification or explanation, keeping in mind that the test does not cause any physical harm and has an ambivalent effect, meaning that it can be incriminating or totally exculpatory, nothing impedes a

rational, logical assessment of such an attitude as an element which, although it has no probatory value, can be taken into consideration with the rest of the evidence to reinforce conclusions obtained by the court.

2.2 In the second case, since there is no need to use physical force or coercion to obtain DNA – which is the premise in the proceedings –, the Court considers a court order not to be necessary. The samples were acquired from cigarette butts thrown to the floor by José Carlos, Juan Alberto and Miguel and from the glass used by Luis Pablo on dates quite a long time after the acts subject to judgment. This is under the terms set forth in Decision 1311/2005 of *14 Oct. (LA LEY JURIS. 1935/2005)* of the Second Chamber of the Supreme Court on the issue of surreptitious evidence gathering derived from a voluntary act of disposal – or, in this case, leaving behind – of organic matter by the subject of investigation, with no use of invasive methods or practices as regards bodily integrity.

Just as in the case analysed previously – biological samples left at the crime scene on hoods, sweaters and other garments – we feel it was not necessary to have a court order to gather the DNA samples, we consider that it also did not require a court order to take of objects (cigarette butts) from the above mentioned José Carlos, Juan Alberto and Miguel when they were under arrest, and from Luis Pablo (glass) when he left the bar where he had drunk from the glass, for the following reasons:

1° It was not necessary to use force, coercion or any other type of physical bodily handling to obtain the objects containing the biological samples. The objects – specifically the cigarette butts – were thrown down, left – by their owners, converting them into *res nufflus*; lacking ownership, to be picked up and taken away by anyone (in this case, by police officers). The glass used by Luis Pablo was left in the bar when he left, and picked up by police officer no. NUMO07, after identifying himself to the owner of the establishment. In summary, and as stated in Decision *1311/2005 of 14 Oct. (LA LEY JURIS. 1935/2005)* of the Second Chamber of the Supreme Court, "the consolidated doctrine of requiring court intervention in certain cases, to authorize potentially banal, non-aggressive intervention is not required."

2° Both the cigarette butts and the glass were left behind by their respective owners or user, and the defendants were in no way compelled either to use them or to throw them to the floor or, as the case may be, to leave them. The defendants' biological material was obtained totally unexpectedly. Whether the material belonged or not to the defendant is a matter of admission of evidence – not the issue at hand – to be dealt with later on.

3° It would make no sense to seek a court order regarding something already abandoned by its owner (cigarette butts) or user (glass): What would be authorized in gathering such objects? Who would attest to the fact that

the objects belonged to the persons who threw them down (cigarette butts) or left them (glass) since the Court Clerk can only attest to the fact that such objects were in a specific place, not as to who left them there or used them, as the Court Clerk did not see them?

4° In any case, and in summary, what Judge should be one authorising any gathering of such objects? Should it be the first to oversee the proceedings regarding the facts that took place in Portugalete two years before and were provisionally dismissed, while the persons taken into custody were not going to be made available to him because until the DNA test was performed there was nothing linking them to the case? Or, should it be the Judge in whose custody the subjects were when under arrest and not yet made available to the court? Furthermore, with regard to the individuals who were allowed to stay free without being subject to the custody of the court, who should be the one to authorise taking samples under the terms as considered (without violence or any type of coercion)?

5° They were not sent to the laboratory as certain evidence (that is to say, with the identification of owner) as stated in the plenary record by the police officers who testified and by the laboratory technicians themselves, who went on to state that if they had been submitted with identification they would have been rejected for breaching the rules of the laboratory. They stated that they only had a reference number.

6° The samples were not reconstituted evidence, with status as prior case evidence, as both the police officers who gathered them and the persons who compared the two – dubitative – samples appeared as witnesses before the full court.

7° In this case – and in contrast to the premise alleged by the defence and dealt with in the Decision of the Second Chamber of the Supreme Court of 19 Apr. 2005 *(LA LEY JURIS. 1491/2005)* – the actual gathering of the objects from which DNA samples were obtained was documented and not in violation of Art. 292 of the Law on Criminal Procedure as in the other case. It is true that there was poor police work, almost surely for simple reason of convenience and economy, in not documenting the gathering of the samples – cigarette butts and glass – until a number of months later when the laboratory reports were received showing a positive match with the samples gathered at the scene of the crime subject to judgment. However, poor police work should not be reason for nullification, as moved by the defence, especially since the officers who collected the objects (cigarette butts and glass) took the witness stand in plenary court and documented it – albeit late –, in compliance with the constitutional principles of public, oral trial, the right of parties to contest, and right to have direct access to the Court. It is a matter, therefore, of the Court's assessment of credibility but, again, not a cause for nullification.

8° Also, we must remind ourselves that taking fingerprints from a detainee, something that requires physically compelling the individual and is a

procedure with reliability equal to or greater than the DNA test, does not require a court order. When fingerprints are taken they are sent to the police laboratory to be checked against the data base and to see if the individual in question has participated in other investigated crimes; only if there is a positive match with other fingerprints taken where other investigated acts took place is the fact made known to the Judicial Authority for appropriate action, with a copy inserted in the pertinent police and judicial reports. Just as the case with police ballistics services, to which all firearms, bullets and casings found at the crime scene are sent for analysis against their data base and to determine whether the weapon was used in any other criminal act, if the finding is positive, the competent Judicial authority is informed thereof.

9° While it is true that Art. 363 of the Law on Criminal Procedure, even before the reform instituted under Organic Law 15/2003, provided that chemical analysis must be ordered by the Court "... solely in cases in which it is considered absolutely necessary for the investigation and the proper administration of justice", we should not overlook the date this Law came into effect, 1882, a time when the scarcity of means needs to be taken into account, and the fact that the articles immediately preceding same, (Arts. 356 to 362) determine the procedure for appointing experts and how "chemical analysis" is to be performed (Art. 356), and fact that it was absolutely unthinkable that police officers would have access to such experts – Art. 356 refers to "Doctors of Medicine, Pharmacy, or Physical-Chemical Science or Engineers who specialise in Chemistry." Furthermore, the fact that chemical analysis may be ordered by the Judicial authority under the terms stated does not rule out such testing being able to be ordered by the competent police authority, provided persons are not compelled as set forth above and prior to the above-mentioned reform of the Law on Criminal Procedure."

b) Right to not be discriminated against on the basis of gender

Constitutional Court Decision 182/2005 of 4 July
Jurisdiction: Constitutional
Appeal for reversal no. 2447/2002
Rapporteur: Ms. María Emilia Casas Baamonde

The Decision sets forth circumstances that constitute proof of discrimination on the basis of gender and grants the appeal for reversal.

"(...)

5 The specific prohibition in the Spanish Constitution of discrimination on the basis of gender means that there is direct violation of SC Art. 14 *(RCL 1978, 2836)* when the prohibited factor is accredited to have been the basis for undervaluation or injury in employment, and the concurrence of other grounds that might justify the measure aside from the discriminatory result has no legitimating value in such cases.

To resolve the issue set forth in this appeal for reversal we must begin with the proven facts, since a simple reading of the allegations of the different parties in the case reveals strong discrepancies as to what took place. It is therefore necessary to clarify the situation by specifying the facts that have actually been proven, the invariability of which is imposed by Art. 44.1 b) of the Law on the Constitutional Court *(RCL 1979, 2383)*, since any review of judged fact is prohibited in our jurisdiction, as we have repeatedly said since the beginning in Constitutional Court Decisions *2/1982, of 29 January (RTC 1982, 2)*, and *11/1982, of 29 March (RTC 1982, 11)*.

Leaving aside the assessments by the parties and the judicial bodies regarding the facts, the incidents that took place over the course of the complainant's employment by Red Eléctrica de España, SA, as taken from the factual account in the Labour Court Decision maintained by the appeal decision challenged herein, that are important in resolving this case are the following:

a) The complainant's children were born in October 1995, October 1996 and January 2000.
b) The complainant's last promotion was granted by the company in July 1994. In 1997, 1998 and 1999 the complainant's two work colleagues were promoted.
c) In the 1995 evaluation the complainant received the same rating as her colleague who was working for the company, and Ms. Z's boss' comments in the evaluation showed clear satisfaction with Ms. Z's work despite her recent maternity.
d) In subsequent evaluations – 1996 to 1999 – the complainant received lower ratings than her colleagues, except in 1998.
e) In 1996 Ms. Z acknowledged in her report that, because of her personal situation of having had two children in a short period of time and finishing a Master's program on the Environment, she had had a more limited area of responsibility. The complainant stated her disagreement with the criteria used to distribute duties for the first time, stating that in 1995 she was studying the same Master's program and on maternity leave for more days and nonetheless given greater responsibility in her work, that she performed to the great satisfaction of the employer, as gathered from the evaluation from the previous period. In the 1997 evaluation, the employee once again stated her discontent with the distribution of work, focusing on the economic repercussions arising from the circumstances. She reiterated this complaint in the 1998 evaluation.
f) On 28 September 1999, the employee sent a letter to the President of the company describing her situation, which she characterised as discriminatory on the basis of gender and derived from her pregnancies, announcing her desire to claim her rights, even in court if necessary. The President called for an investigation, of which there is no reported result.
g) On 26 October 1999 the claimant entered a complaint with the Labour Inspection Service alleging discrimination on the basis of gender. The complaint resulted in a finding of infraction and a proposed sanction, finding that the

employee had been subject to discriminatory decisions regarding her professional promotion and remuneration, and also related to her transfer to another department of the company. In its allegations, Red Eléctrica de España, SA, provided a certificate from the Chief of the Labour Relations Service of the Directorate General for Labour of the Community of Madrid, under which the administrative sanction was dismissed.

h) The employee's evaluation in 1999 – completed in May 2000 following her return to work after having her third child – showed a much lower rating than her two colleagues in the Legal Department. Her boss stated that her performance had dropped owing to her lack of job satisfaction.

i) On 5 May 2000 the employer sent the claimant a letter notifying her of a change in her employment. This letter stated that the complaints contained in her letter to the President had turned out to be unfounded and further announced that a meeting was scheduled to be held two months hence to assess the level of satisfaction in her new position. It also stated that the measure taken to move her had arisen out of conversations with the Labour Inspection Service, although the proven fact – based on page 82 of the case filed – is that the fifth legal ground in the Decision states that this information is not true, since the change was not promoted by the Inspection, contrary to what was alleged by the employer.

j) There is a psychiatric report of August 2000 that diagnoses the employee as suffering a personality disorder, anxiety and anguish, along with lack of appetite related to the injurious employment situation, stating that after returning to her job the condition showed a worsening in anxiety and depression.

k) The hours not worked by the employee for reason of illness, holidays and maternity leave were set forth for the record, as was the difference in pay between the 12-B and the 17-C level accorded to her colleagues.

l) Staring in 1995 the company was involved in a period of change and adaptation to the market, but did not give the complainant any work relating to the new strategic challenges.

m) Also proven was:

   1) That the employer fundamentally opposed the complaint, alleging that the different professional treatment was due to the fact that the male colleagues in the legal department were taking on more responsibility in their work than the complainant could objectively take on, and more than the complainant was willing to take on, and that her transfer to another job was based on the suggestion made by the Labour Inspection.
   2) That, based on the functions set forth by the company organizational chart, little or no legal work was being in the new department to which the employee was transferred [Legal Grounds 3 c) and 7]. The appealed Decision states that the premise of the original Decision cannot be accepted, but that is not an evaluation of the judge from which the case was removed, but rather a statement with real value based on the

employer's organizational structure, which was not reviewed under Art. 191 b) of the *Law on Labour Procedure (RCL 1995, 1144, 1563)* in the appeal process.

3) That there are contradictions in the statements by the claimant's superiors on the reasons for not assigning certain responsibilities to her and that, in particular, the employer's legal representative expressly acknowledged that the claimant's absences were the reason she was not assigned such responsibilities.

6 The remaining elements entered into evidence at different times in the prior and Constitutional proceedings were either not proven facts but rather legal opinions, or represented mere discrepancies by the parties regarding the unchanged narration of the facts.

Specifically, to the contrary of what is alleged, it is of particular importance to underline:

1) It is not proven that the employer assessed job knowledge and professional willingness of its employees to assume new responsibilities.
2) It has not been declared proven that the assignment to a new job was due to the employer's organizational needs. In fact, the respondent employer alleged that there were other reasons for this (suggestion by the Labour Inspection Service, which was stated to be false).
3) It is not proven that the claimant did not show a willingness to participate in the most recent needs of the legal department, or that her willingness was less than that of her department colleagues. Neither was it proven that the promotion of said colleagues was based on facts, such as greater dedication or effort, that proved that the distribution of the work by the superiors was inconsequential regarding functional and remunerative outcomes.
4) Also, there is no proven fact whatsoever, nor statement with value as fact from which it can be concluded that maternity leave made it objectively impossible for the claimant to undertake the more responsible or more substantial duties. In fact, in 1995, despite her pregnancy, Mrs. Z's work and effort received high ratings.
5) There is no element at all from which to conclude that the claimant's job dissatisfaction might have led her to prefer the change of job that was effected, nor any basis on which to conclude that the indication contained in the notification of 5 May 2000, in which the employer announced that a meeting was scheduled to be held two months after the change in employment went into effect, that it amounted to agreement by the employer to conciliate with the employee definitive measures to be adopted in order to resolve the conflict.

Finally, it must be stressed that we cannot take into consideration any other elements that ensued and were alleged in the proceedings under Art. 52 Law on *Organic Law on the Constitutional Court (RCL 1979, 2383)*, not because they

do not necessarily prove what they claim to prove, but rather because, as stated, under Art. 44.1 b) Organic Law on the Constitutional Court we must limit ourselves to the proven facts in the decisions handed down in the proceedings giving rise to this appeal for reversal.

7 All the above leads unequivocally to the conclusion, as maintained by the Public Prosecution Service, that the claimant's successive pregnancies and periods of maternity leave caused her not to be assigned the more important legal duties, detriment in her financial improvement, and her final transfer to a different job in a different department from the department she was in originally, characterised by little or no legal content.

In effect, the connection in time of the maternity leave and the disputed measures; the low consideration of the claimant's effort, acknowledged by her superiors in different evaluations; the contradictions of these same superiors; the fact that the employer's alleged reasons for the change in job are not the real ones (at the alleged suggestion or mediation of the Labour Inspection Service) and the fact that the decision to move her was taken right after the claimant made a formal complaint regarding the situation she regarded as discriminatory, can all be considered indications of discrimination as denounced by the claimant. Beyond that, however, the confession by the employer's legal representative, – referred to by the ruling Judge – clearly reveals the motivation behind the employer's decision to relegate the employee.

It is not a matter, therefore, of the appellant having shown a scenario indicating the alleged damage, but rather of full accreditation of a causal connection between the facts denounced and the legally relevant motivation on which they were based (three pregnancies). This is seen from the facts provided that we have just reiterated to clarify any doubt, just as with the statements of fact contained in the *ratio decidendi* by the original decision, not revised at the next level of jurisdiction. It is relevant, indeed, that aside from the criteria and the reasoning contained in the decision subject to appeal for reversal, the Labour Section of the High Court of Justice maintained unchanged the narration of the proven facts, therefore leaving as definitively established the causal connection between the challenged employer's decisions and their motivation, as seen in the above legal grounds.

By acting in this way, the appeals Court maintained the analysis of constitutional violations denounced by the employee in the context of Art. 20 of the *Law on Workers' Statute (RCL 1995, 997)*, overlooking thereby that to exclude discrimination it is required that when difference in treatment is alleged before a judicial body based on the circumstances set forth in Art. 14 *SC (RCL 1978, 2836)* that are considered discriminatory – in this case, gender – and such allegation is by a person belonging to the group traditionally affected by such discrimination – in this case a female employee-, the court cannot limit itself to determining whether the different in treatment denounced is objectively and reasonable justified in the abstract, as if dealing with a problem relating to the

general equality clause, but rather it should analyse more specifically, whether what seems to be a formally reasonable differentiation does not hide, or allow to be hidden, discrimination in violation of SC Art. 14 (in this regard, *SSTC 145/1991, of 1 July [RTC 1991, 145]*, F. 2, and *286/1994, of 27 October [RTC 1994, 286]*, F. 3).

In other words, it cannot be maintained, as in the appealed resolution, that there is no discrimination owing to the fact that the employer is acting as permitted under labour law. We have said that, even when the legal cause is present, business freedom does not allow for unconstitutional results (for all, *SSC 87/2004, of 10 May [RTC 2004, 87]*, F. 2), and it is not admissible for there to be an underrating or harm in working conditions immediately associated to maternity, since this would constitute direct discrimination by reason of gender (Art. 14 SC). Therefore, any employer behaviour based on factors expressly prohibited, such as gender, cannot be assessed as an act of freedom or the exercise of lawful powers, just as the underlying business interest in this type of decision, whatever it may be, cannot be legitimised through measures contrary to the constitutional mandate prohibiting discrimination against women.

In reality, no evidence was presented that reasonably or rationally breaks the causal nexus set forth between the employee being undervalued at the workplace and her three pregnancies, that would place the business decisions above any discriminatory motivation. On the contrary, in the case judged there is evidence of application of a criteria of professional and economic relegation and a unfavourable order of functional mobility by reason of the employee's successive pregnancies and maternity leaves. Therefore, an argument such as the one maintained by the Labour Court in the appealed decision brings about, in substance, the effect of denying the judicial protection sought on the basis of principles of ordinary legality, that must not in any way neutralise proven reality – and the effects – of employer violation of the complainant's fundamental right (in this regard, *CCD 173/1994, of 7 June [CCA 1994, 173]*, F. 4). If the contrary is accepted, some of the most notorious effects of discrimination, a social ill to be eradicated by constitutional mandate, would be left without protection, (in this case, continuity and the normal progress of a professional career in conciliation with the free decision to be a mother) and, furthermore, Spain's aforementioned international commitments in this area would be left virtually void of any content.

In summary, the employer's decision was discriminatory on the basis of gender, in violation of SC Art. 14, and as it was not corrected by the Labour Court Decision appealed herein, the pronouncement provided under Art. 53a) of the Law on the Constitutional Court *(RCL 1979, 2383)* is in order, together with the statement declaring the Decision by Labour Court No. 33 of Madrid as firm, setting forth the violation of SC Art. 14 and the related consequences.

(. . .)

DECISION

On the basis of the above, the Constitutional Court, BY THE AUTHORITY VESTED IN IT BY THE CONSTITUTION OF THE NATION OF SPAIN,

Has decided

To partially accept the appeal for reversal submitted by Ms. Enriqueta G.S. and therefore:

1° Acknowledge her right not to be discriminated against by reason of gender (Art. 14 *SC [RCL 1978, 2836]*).
2° Repeal the Decision of the Fifth Section of the Labour Court of the High Court of Justice of Madrid, dated *23 April 2001 (AS 2001, 737)*, in Appeal No. 688–2001 for protection of fundamental rights, declaring Labour Court No. 33 of Madrid's Decision of 31 October 2000 as firm."

2. Right of foreign nationals

a) Right to enter Spain

CCD 72/2005 of 4 April
Jurisdiction: Constitutional
Appeal for Reversal No. 5291/2001
Rapporteur: Francisco José Delgado Barrio

Appeal for reversal against the Decision by the Chief of the Almeria Border Station of 26 August 2000, that denied the appellant entry into national territory and ordered the appellant to be returned to place of origin; against the Decision by Administrative Court No. 1 of Almeria of 26–03–2001, that dismissed the administrative appeal entered against said Decision; and against the Decision by the Administrative Court of the High Court of Justice of Andalusia (Granada) (First Section), of 30–07–2001, that dismissed the appeal against said court order. The Court denied the appeal.

"(. . .)

4 And, lastly, we must consider the alleged violation of Art. 19 SC *(RCL 1978, 2836)*. There are two rights recognized in this constitutional provision which, *prima facie*, might have been violated in the case of a foreign subject who was denied entrance into national territory and was ordered to be returned to where he had come from: the right to enter Spain and freedom of residence.

It must be pointed out, however, that the two rights, recognised in SC Art. 19 are – evidently – two different rights with different content, notwithstanding their potential interrelationship. For persons outside Spain – without needing here to refer to those who have this right, an issue to be dealt with later on- the right to enter national territory protects the specific act of going from being outside our borders to being inside national territory. Freedom of residence, on the other hand, protects the right of individuals to "choose their place of resi-

dence freely within Spanish territory": it is "the subjective, personal right to freely choose the place or places one wishes to reside temporarily or permanently" in Spain (CCD *28/1999, of 8 March [RTC 1999, 28]*, F. 7, quoting CC Order *227/1983, of 25 May [RTC 1983, 227 AUTO]*, F. 2).

The specific, detailed text of SC Art. 19 requires precise interpretation in order to determine the scope that is constitutionally protected by such rights, despite the potential area of overlap between the two, in order to determine protected behaviours and avoid such overlap.

A foreigner who – such as the appellant – has never been in Spain, cannot invoke freedom of residence – the right to choose the place or places one desires to live temporarily or permanently in Spanish territory – to protect an act that falls in the area defined by a different right: that of entry into national territory. For the foreigner, the circumstance of *already being* in Spain is a logical prerequisite – and, in this case, also a chronological one – upon which residence in national territory may be considered. Until such time as one has entered Spain it is not possible to exercise the right to choose a place of residence therein, nor is it possible to accept that the potential impediments or obstacles placed by the public powers in the way of a foreigner's intentions as violations of the right to residence guaranteed by SC Art. 19. In such cases, other rights would be violated. A different matter would arise hypothetically if the foreigner had obtained a residence permit prior to entering Spain, owing in this case, to the fact that it is not necessary to already be in Spanish territory to get one. This hypothesis cannot be ruled out altogether but, it is not the circumstance in the case at hand and this would be not a matter of a right to freedom of residence under SC Art. 19, but rather a simple administrative authorisation, or at most, the exercise of a legal and not a constitutional right: ultimately, when the subject tried to return to Spain he would not be exercising his right to choose residence, but rather the right to enter, albeit in such a case it may serve as support to the latter. In any case, as said before, the case at hand in this appeal for reversal is very different: it deals with a foreigner who, having acknowledged never having been in Spain, cannot allege freedom of residence in Spain, in support of a supposed right to enter Spain, when, as clearly seen in the grounds of the case, he can only aspire to residence if he is in Spanish territory.

Therefore, although the appeal for reversal in citing SC Art. 19, refers to the right to reside in Spain, it should be underscored that the right the Moroccan citizen entering the appeal sought to exercise and was prevented from doing so by the administrative decision denying him entry into national territory and ordering his return, was specifically the right to enter Spain that is recognised in the same constitutional provision. This brings us face-to-face with the issue of whether foreigners have a fundamental right to enter Spain. It must be noted, however, that the arguments and conclusion reached, written in very general terms, do not affect nor do they extend to concrete cases in which specific circumstances are present that alter the situation, such as: the legal rules

governing the right to asylum (subject to specific regulation contained in SC Art. 13.4); the right of citizens of the European Union to enter Spain as regulated by international treaties or by other rules distancing it substantially from the conditions applicable to other foreigners; the situation of foreigners who already reside legally in Spain and seek to enter national territory after having left temporarily, a situation which is not the one offered by the appeal; and the premise of reuniting families, also alien to the case that was the subject of this judgment of constitutionality.

5 SC Art. 19 *(RCL 1978, 2836)* acknowledges "Spaniards" as having four different basic rights: the right to freely choose their place of residence, the right to move freely within national territory, the right to freely enter and the right to freely leave Spain. Despite the fact that a literal interpretation of this constitutional provision would explicitly allude solely to Spanish citizens as the holder of these fundamental rights, the jurisprudence of this Court establishes that the conclusion that foreigners cannot hold the fundamental rights guaranteed by this constitutional provision cannot be concluded there from: "literal interpretation of SC Art. 19 is insufficient because this provision is not the only one to be considered; others must be considered alongside it that determine the legal status of foreigners in Spain, including SC Art. 13" [SCD *94/1993, of 22 March (RTC 1993, 94)*, F. 2; *116/1993, of 29 March (RTC 1993, 116)*, F. 2; *242/1994, of 20 July (RTC 1994, 242)*, F. 4, and 169/2001, *of 16 July (RTC 2001, 169)*, F. 4 a)], whose paragraph 1 provides that "aliens shall enjoy the public freedoms that are guaranteed by the present Title, under the terms to be laid down by treaties and the law."

Therefore, since under our legal system the only fundamental rights are those recognised as such by the Constitution, "it is appropriate to remember that an interpretation of the Constitution that leads to a result other than its literal interpretation can only be accepted when there is ambiguity therein, or lack of systematic consistency among constitutional provisions (*CCD 72/1984, of 14 July [RTC 1984, 72]*, F. 6)" (*CCD 215/2000, of 18 September [RTC 2000, 215]*, F. 6).

We must start, therefore, from a literal reading of SC Art. 13.1 and then consider the result of systematic interpretation of the provision. SC Art. 13.1 only refers to the public freedoms of foreigners "in Spain", with two specifications: a) it does not refer to all the rights of foreigners in Spain, but rather only to fundamental rights; and b) in the context of such rights it does not include all their fundamental rights, but only those rights of Spanish nationals – Arts. 19, 23, etc., – that are extended by SC Art. 13.1 to foreigners in Spain, since they have most of the other fundamental rights, – right to life, freedom of religion, personal freedom, due process of law, etc. – without requiring the extension set forth in SC Art. 13.1, that is, without any need of treaty or law establishing them.

6 More specifically, we must remember that SC Art. 13.1 *(RCL 1978, 2836)* is the provision "in our Constitution that establishes the subjective limits determining the extension of fundamental rights to non-nationals" [Constitutional Court Statement of de 1 July 1992, F. 3 B)]. The text of paragraph 1 of SC Art. 13, which refers to the terms under which foreigners enjoy the rights under SC Title I "in Spain", shows that the regulation of this constitutional right is not for the purpose of recognizing the general rights of the billions of foreign nationals in other countries, nor, more specifically, of making possible entry into Spain by all the aliens outside our country who reach our borders a fundamental right, but rather, precisely, to regulate the legal position of aliens already in Spain. The right holder to which SC Art. 13.1 refers is not just any alien, but rather any alien *in Spain*, an alien who has *already entered our country*, which is the prerequisite circumstance for the extension of rights set forth in SC Art. 13.1.

Therefore, a literal reading of SC Art. 13.1 does not project over any of the fundamental rights – the right to enter Spain – that are recognised in SC Art. 19, meaning that only Spanish nationals would have this fundamental right, with the exceptions referred to in the last paragraph of Legal Ground 4, which do not affect this premise. The fundamental right of the Spanish national to be accepted by the State, and therefore, to be able to enter his country, is one of the essential aspects of nationality and, therefore, one of the basic legal differences between the personal status of nationals and aliens. This "traditional distinction" is only now being subject to partial alteration in the framework of "incipient European citizenship" [Constitutional Court Declaration of 1 June 1992, F. 3 A)].

It is therefore clear that a literal, unambiguous reading of SC Art. 13.1 does not include the right to enter Spain as a fundamental right of aliens.

7 As regards systematic interpretation, when clarifying to what extent SC Art. 19 applies to aliens, we must keep in mind not only that SC Art. 13.1 refers expressly to treaties in force, but also more importantly that SC Art. 10.2 establishes a very relevant criterion for a systematic interpretation of the Spanish Constitution by referring in this context of fundamental rights to the international treaties and agreements on this subject that have been ratified by Spain: the terms contained therein thus acquire "interpretive transcendence for all intents and purposes" (CCD *242/1994, of 20 July [RTC 1994, 242]*, F. 5).

We begin by examining the International Covenant on Civil and Political Rights *(ICCPR, of 19 December 1966 (RCL 1977, 893)*. Under the terms of Arts. 12 and 13 this Court has declared that aliens lawfully in Spain "have the right to reside in Spain, and enjoy the protection of SC Art. 19, albeit not in terms identical as those of Spanish nationals", and that they hold the fundamental right not to be deported from national territory except for reasonably applied legal cause and with essential due process guarantees – in the terms set forth by Art. 13 ICCPR CCDs *94/1993, of 22 March [RTC 1993, 94]*,

FF. 3 and 4; *242/1994, of 20 July [RTC 1994, 242]*, FF. 4 and 5; and *24/2000, of 31 January [RTC 2000, 24]*, F. 4).

We must now look closely at the rights guaranteed by ICCPR Arts. 12 and 13 and other international treaties on the same subject in order to use such regulation as an adequate path of interpretation for the purpose of answering the question of whether aliens have a fundamental right to enter Spain. ICCPR Art. 12 acknowledges the right of any person who is lawfully within the territory of a State, therefore aliens are also included- to "have the right to liberty of movement and freedom to choose his residence", along with the right of all persons to "to leave any country, including his own." This provision also ensures that no one shall be "arbitrarily deprived of the right to enter his own country." Furthermore, ICCPR Art. 13 acknowledges, in the terms already set forth, the right of aliens lawfully in the territory of a State to be expelled there from "only in pursuance of a decision reached in accordance with law." Careful analysis of the provisions cited show with no shadow of doubt that the right to enter a country is only recognized in the ICCPR for nationals of said country.

The same conclusion is reached through the provision under the *Universal Declaration of Human Rights (LEG 1948, 1)* (to which SC Art. 10.2 expressly refers), that recognises every person's right to leave any country, but only guarantees the right to enter one's own country – "Everyone has the right to leave any country, including his own, and to return to his country" – (Art. 13); and, even the provision of Protocol. 4 to the *European Convention on Human Rights (RCL 1999, 1190, 1572)* (signed but not yet ratified by Spain) also guarantees anyone in a lawful situation in Spain the right to freedom of movement and to choose residence, as well as the freedom to leave any country (Art. 2) and not be expelled "from the territory of the State of which he is a national" (Art. 3.1); but the right to enter is only recognised for "the territory of the State of which he is a national." (Art. 3.2)

Therefore, there is no ambiguity in a literal reading of SC Art. 13.1 nor in any systematic interpretation projecting over SC Art. 19 in relation to international treaties on fundamental rights, and we therefore must conclude that the fundamental right to enter Spain only pertains to Spanish nationals and not to aliens.

8 This issue has no bearing on the categorical statement that, generally speaking, fundamental rights are binding upon Spanish public powers independently of whether they act "in Spain" or not. One thing is to define the subjective scope of the extension of certain fundamental rights for which it is relevant to be a Spanish national or an alien. – such is the issue regulated by SC Art. 13.1 – and quite another is to set forth the territorial scope in which fundamental rights are in force for the Spanish public powers. The obligation of all Spanish public powers to respect fundamental rights, without limitation to any territorial context, is established in SC Art. 53.1; and all persons are entitled as an attribute of their human dignity to a large part of the fundamental rights – where it is irrelevant whether one is a Spanish national or an alien

(CCDs *107/1984, of 23 November [RTC 1984, 107]*, F. 3, and *95/2000, of 10 April [RTC 2000, 95]*, F. 3).

Furthermore, no contradiction exists between the above and the statement contained in our jurisprudence referring to the fact that "paragraph 2 of SC Art. 13 only sets aside for Spanish nationals entitlement to the rights recognised in SC Art. 23" (CCDs *94/1993, of 22 March [RTC 1993, 94]*, F. 2; and *242/1994, of 20 July [RTC 1994, 242]*, F. 4, which cites the Statement by this Court of 1 July 1992). Careful reading of said Declaration of 1 July 1992 shows that the constitutional reservation for Spanish nationals of a certain fundamental right – specifically the right to passive suffrage in municipal elections, which was the right the Court was ruling on in that case and which gave rise to the Constitutional reform of 27 August 1992 – referred to a fundamental right which by constitutional mandate could only be exercised by Spanish nationals, thereby prohibiting that by law or by treaty it could be granted to other subjects. The Declaration of 1 July 1992 dealt with a constitutional rule contained in SC Art. 13.2 "that reserves for Spanish nationals the entitlement and exercise of very specific fundamental rights, such as the passive suffrage in the case at hand, that cannot be granted by law or treaty to anyone not possessing such status; namely, that can only be granted to foreign nationals by reforming the Constitution." (F. 5)

This is not at all the case with entry into Spain. This right is held solely by Spanish nationals as a fundamental right guaranteed by SC Art. 19, but, -in contrast to passive suffrage in municipal elections – the legislator can grant this right to aliens who meet the requirements established by law. The fact that the Constitution does not set forth a fundamental right of aliens to enter Spain does not mean, obviously, that the right of an alien to lawfully enter our country is not protected: it enjoys the protection of rights granted by law and, specifically, that aliens do have – even if they have not entered (in the strict legal sense) Spain, but only are in Spain *de facto*, in a situation, therefore, of "subjection (. . .) to Spanish public power" [CCD *53/2002, of 27 February (RTC 2002, 53)*, F. 4 a)] – the fundamental right to effective due process – SC Art. 24.1 – (CCDs *99/1985, of 30 September [RTC 1985, 99]*, F. 2, and *115/1987, of 7 July [RTC 1987, 115]*, F. 4) in defence of the right to consider themselves protected by Spanish judges and courts.

It is therefore lawful to state that the right to enter Spain – "acknowledged solely for Spanish nationals in the Constitution" (CCD *53/2002, of 27 February [RTC 2002, 53]*, F. 4), as expressed by this Court in an incidental statement – is not a fundamental right to which aliens are entitled under SC Art. 19, although, obviously, whosoever is actually in Spain can seek protection of this right from Spanish Judges and Courts, that must protect it in accordance with the requirements set forth in SC Art. 24, that does provide for rights that aliens are entitled to.

9 In the case set forth by the appeal for reversal, if the appellant's defence was not channelled through the special process for protection of the fundamental

rights of the individual, but rather entered as an Administrative appeal not limited with respect to the subject of judicial cognition, it could have obtained a court response on the issue of whether the border authorities might be unaware of the presumption of validity and effectiveness of an administrative declaration of rights, given the seriousness of the defect of nullity incurred – as alleged by State Lawyer – or if, on the contrary, to eliminate the effect of this administrative measure it was necessary to pursue any specific administrative review or effect extinction procedure. The judicial body of the ordinary jurisdiction would have provided the protection applicable to the rights of aliens, resolving this issue, in principle, outside the jurisdiction of this Court.

The pronouncement provided in Art. 53.b) Law of the Constitutional Court *(RCL 1979, 2383)* is therefore called for.

DECISION

On the basis of the above, the Constitutional Court, by the AUTHORITY VESTED UPON IT UNDER THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To refuse the appeal for reversal entered by Mr. Yahya R".