TRANSLATION

CONSTITUTIONAL COURT
Courtroom two

Appeal nr. 3382-2005 CG

SUBJECT MATTER: Defense filed by Zhizhen Dai and others.

(There is a rectangular Stamp of the School of State Attorneys of Madrid – date of reception: 8 November 2007 – date of notification: 12 November 2007.)

I take pleasure in attaching for your information a copy of the resolution issued by this Constitutional Court under the complaint for the violation of constitutional rights referred to above.

Sincerely,

THE ATTORNEY GENERAL

Attachment: Copy of resolution.

Pilar Cendrero Mijarra
STATE ATTORNEY

Courtroom two of the Constitutional Court, comprising Mr. Guillermo Jiménez Sánchez, President, Mr. Vicente Conde Martín de Hijas, Mrs. Elisa Pérez Vera, Mr. Eugeni Gay Montalvo, Mr. Ramón Rodriguez Arribas and Mr. Pascual Sala Sánchez, Magistrates, has issued the following DECISION in the name of the KING:

Under the complaint for violation of constitutional rights nr. 3382-2005, filed by Mrs. Zhi Zhen Dai, Mr. Ming Zhao, Mrs. Yuzhi Wang, Mr. Victor Manual Fernández Sánchez, Mr. Cui Ying Zhang, Mrs. Li Yu, Mr. Alan Y. Huang, Mrs. Chen Zhao, Mr. Alejandro Centurión and Mr. Gang Chen, represented by the State Court Attorney Mrs. Pilar Cendrero Mijarra and assisted by Attorney Mr. Carlos Iglesias Jiménez, against decision nr. 345/2005, of 18 March, of the Penal Court of the Supreme Court, which declares inadmissible the extraordinary appeal to the supreme court (requesting the reversal of the lower court decision) filed against the ruling issued by the Penal Court of the National High Court of 11 May 2004, rejecting the appeal against the decision of the Central Court of Preliminary Criminal Procedure nr. 2 of 20 November 2003, through which the lawsuit filed by the appellants under the defense for crimes of genocide and torture was not admitted. The Justice Department has appeared and made allegations. The Magistrate Mr. Vicente Conde Martín de Hijas has acted as Proposer, and has expressed himself in agreement with the Courtroom.

I. Background

1. Through a document presented at the General Registry of this Court on 11 May 2005. Mrs. Pilar Cendrero Mijarra, Court State Attorney, on behalf of Mrs. Zhi Zhen Dai, Mr. Ming Zhao, Mrs. Yuzhi Wang, Mr. Victor Manual Fernández Sánchez, Mr. Cui Ying Zhang, Mrs. Li Yu, Mr. Alan Y. Huang, Mrs. Chen Zhao, Mr. Alejandro Centurión and Mr. Gang Chen, filed a complaint for the violation of constitutional rights against the judicial resolutions referred to in the heading of this Decision.

2. The complaint for violation of constitutional rights is based on the factual background that is presented below:

a) the appellants for violation of constitutional rights filed a complaint against Chinese citizens Mr. Jiang Zemin, Former President of the People´s Republic of China, Former President of the Central Committee of the Chinese Communist Party and Head of the Central Military Committee of the People´s Republic of China, and Mr. Luo Gan, Director of the National Political and Legal Commission, and Vice-Director and direct Coordinator of the Office for the Control of Falun Gong 6/10, for crimes of genocide and torture committed in China as from the year 1990 through the persecution of people belonging to the group Falun Gong or sympathizing with the latter.

b) Having filed prior measure number 318/2003, the Central Court for Preliminary Criminal Proceedings nr. 2, through a decree dated 20 November 2003, agreed to declare the inadmissibility of the complaint filed.

The above Decree was confirmed to be in reformation through Decree of the Central Court for Preliminary Criminal Proceedings nr. 2, of 17 December 2003.

c) The appellants in the complaint for violation of constitutional rights filed an appeal against the decree referred to, which was rejected by a Decree of the Full Meeting of the Penal Courtroom of the National High Court on 11 May 2004.

d) The appellants in the complaint for violation of constitutional rights filed an extraordinary appeal for the reversal of the above Decree and, on grounds of art. 893 bis a) LECrim, requested a hearing.

The Supreme Court Penal Courtroom, through the order dated 17 December 2004, pursuant to what was informed in voce by the Judge writing the opinion of the court of appeals, agreed for the appeal to be admitted and opened for the indication of a decision when this corresponded to the session.

e) The appellants in the complaint for violation of constitutional rights filed a petition for reconsideration against the above order, requesting a hearing in the appeal for reversal.

The Penal Courtroom of the Supreme Court, through order dated 14 January 2005, declared the inadmissibility of the petition for reconsideration against the order dated 17 December 2004, since there was no appeal against the said resolution, which is sustained in full.

f) The Penal Courtroom of the Supreme Court issued Sentence nr. 345/2005 dated 18 March, in which it declared the inadmissibility of the petition for reconsideration filed against the Writ of the Full meeting of the Penal Courtroom of the National High Court of 11 May 2004.

3. The legal grounds for the appeal for violation of constitutional rights invokes the violation of the fundamental rights detailed below, in the face of the judicial resolutions disputed.

a) the violation of the right to effective legal protection (art. 24.1. CE) and of the right to a proceeding with all the guarantees (art. 24.2 CE), through the refusal of the request for hearing under the petition for reconsideration.

After reproducing the nature of art. 893 bis a) LECrim., in the complaint it is averred that the petition for reconsideration stems from the prior formalities filed by a criminal complaint for the crimes of genocide and tortures, punished with more than 6 years and which come under Heading VII of Book II of the Penal Code, which should have caused the Court to agree to the hearing since the objective prior assumptions established in the procedural precept referred to are fulfilled. However, the request for hearing was ignored tacitly and unjustifiedly by the order dated 17 December 2004, which declared the appeal admissible and conclusive for designation of a decision, thus damaging the right to effective legal protection (art. 24.1 CE), in its right to obtain a response that is based on the Law and duly justified, through the unfounded refusal of the request for hearing.

Additionally, the decision dated 14 January 2005, which declared the inadmissibility of the appeal filed against the decree of 17 December 2004, has not only failed to redress the violation of the right to effective legal protection, by way of the right to obtain a justified judicial decision based on the Law, but also, by failing to admit the appeal, has damaged the essential right referred to relative to the right to the appeals envisaged by law, through the refusal of the petition for reconsideration based on art. 236 LECrim.

unreasonably and erroneously, and without providing reasonable and legal grounds for the response given.

To the above argument, it is added that in the decrees referred to, the grounds that led the Court to refuse the duly justified petition for hearing are not presented, and this has deprived those appearing in the complaint for violation of constitutional rights, with the ensuing damage of the right to a public proceeding with all the guarantees (art. 24.2 CE), and the possibility of expounding with immediacy, orally and concretely the legal arguments that justify their claim.

b) Secondly, the complaint for the violation of constitutional rights claims that the right to effective legal protection has been violated, in terms of the right to access to jurisdiction (art. 24.1 CE), as a result of the declared inadmissibility of the complaint filed by the appellants. In this regard, it is argued that Central Court for Preliminary Criminal Proceedings nr. 2, the full meeting of the Penal Courtroom of the National Court, and the Penal Courtroom of the Supreme Court, in the judicial decisions appealed, have merely transcribed literally the legal justification of the Decision issued by the Supreme Court on 25 February 2003 (Guatemala case), in relation to which the appellants in the complaint for violation of constitutional rights relate different facts and a different legal justification for the case at hand. In this regard, they indicate that the Court and the National Courtroom have failed to make any analysis of the matters relating to the current situation of China in order to appreciate the impossibility of territorial jurisdiction in this case, or to mention that the International Criminal Court or the United National Safety Council may be aware of the crimes reported. They have restricted themselves to transcribing the legal justification for the Decision of the Supreme Court referred to relative to a case that is unrelated to the one currently dealt with, due to differences in the alleged facts and in the legal justifications presented.

The Proceedings of the Central Court for Preliminary Criminal Proceedings make no reference to the matters posed relating to the specific factual and legal circumstances on which the complaint is based, or to the impossibility of applying the principle of territoriality in China, or to the knowledge of the crimes reported by the International Criminal Court. The decree that declares the inadmissibility of the appeal has incurred the same defect as the Central Court for Preliminary Criminal Proceedings, by also transcribing the legal justification of the Decision of the Supreme Court referred to.

The allegations initially made referred to the impossibility of applying the principle of territorial jurisdiction in China, not only due to the lack of independence of the Chinese jurisdictional organs, but also due to the direct involvement of the highest levels of the Chinese government in the perpetration of the reported crimes of genocide and tortures, with the administrative and legal bodies turning into arbitrary detention centers on numerous occasions, with no type of legal guarantee. It was also claimed that the crime of genocide was not typified in Chinese law, which clearly reveals a violation of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (art. 5). The impossibility of these crimes becoming known and being submitted to trial by the International Criminal Court was also alleged, since China has not ratified the Rome Statute, and therefore does not recognize the competence of the International Criminal Court, and is also a member of the United Nations Safety Council, and is therefore assigned a right to veto any resolution that may be issued for delivery to the Prosecutor of the International Criminal Court. Due to the circumstances set forth above, the

complaint was filed on grounds of the principle of universal jurisdiction as the sole route and proceeding available to the victims and relations of the latter to avoid the impunity of the denounced crimes.

None of the considerations set forth have been taken into account by the legal resolutions appealed. The Criminal Courtroom of the Supreme Court has even termed them as irrelevant, because it considers that only the existence of connections or elements of association of the denounced events with our jurisdictional sphere would be relevant, among them the nationality of the victims, forgetting that this element is based on an interpretation by the Supreme Court and which is not reflected in national rules or in International Law.

In the opinion of the appellants for defense, the data that evidences the material impossibility of submitting these crimes to trial cannot be considered irrelevant. This is evident through the principle of universal jurisdiction set forth in art. 23.4 LOPJ, otherwise, the outcome is the total impunity of the crimes denounced, and the interpretation of the referred legal precept made by the Supreme Court in this case is termed as *contra legem*.

The complaint concludes by requesting the Constitutional Court to issue a Decision granting the requested defense, declaring the nullity of Judgment nr. 345/2005, of 18 March, of the Penal Courtroom of the Supreme Court, granting the proceedings retroactive effects to the time at which the petition for a hearing should have been resolved with due justification, and to take into consideration the express analysis and resolution of the matters presented in the motion to vacate by issuing a new judgment, all following the pertinent proceedings, together with the rest of the pronouncements that correspond by Law.

4. Courtroom Two of the Constitutional Court, through resolution dated 23 January 2007, admitted the complaint for proceeding and, enforcing the provisions of art. 51 LOTC, agreed to notify the Penal Courtroom of the Supreme Court, the Penal Courtroom of the National High Court and the Central Court for Preliminary Criminal Proceedings nr. 2, for these to deliver within a term of 10 days certification or certified photocopy of the proceedings corresponding to the motion to vacate nr. 1351/2004, to the remedy of appeal nr. 16/2004 and to the prior formalities nr. 318/2003, respectively, and the Courtroom must previously notify the parties in the proceeding, with the exception of the appellants for protection, for these to appear if they wish to do so within a period of ten days under this appeal for protection.

5. Through a service of summons of the Secretariat of Courtroom Two of the Constitutional Court, dated 8 March 2007, it was agreed to grant a hearing of the proceedings received for the appellant and the Justice Department, for a common period of twenty days, within which they were able to make the allegations they deemed convenient.

6. The Justice Department complied with the allegations proceeding through a writ recorded on 19 April 2007, whose main points are summarized below.

After indicating its legal justification, it indicated that in this case, despite the petition made in the complaint for protection, it should be understood that all of the

legal resolutions issued have been resorted to. It also considers that, although it can be deduced that the appellants report an inconsistency by omission, which should determine the inadmissibility of the complaint due to failure to exhaust the prior legal process (art. 241.1 LOPJ), in actual fact, a careful reading of their allegations reveals that they recognize that there has been no such failure to respond, but rather that the different legal bodies have understood that the particulars adduced by them were irrelevant for resolving the issue in controversy, in other words, the competence of the Spanish jurisdictional organs to bring to trial the facts reported in the complaint, therefore, the failure to respond referred to has not taken place, as is revealed by a reading of the judicial resolutions objected to.

The plaintiffs disagree with the judicial resolutions that they object to because they understand that the data that are considered relevant for the controversial judicial decision are based on an interpretation of the Supreme Court that is not reflected in the national or international rules and which additionally constitutes a *contra legem* interpretation of art. 23.4 LOPJ. In this context, the Justice Department brings to notice the doctrine of STC 237/2005, dated 25 September, issued subsequently to the appeal for protection and in which it was declared that the Decision of the Penal Courtroom of the Supreme Court dated 25 February 2003 is damaging to the right to effective legal protection, relative to the right to access to jurisdiction, the Central Court for Preliminary Criminal Proceedings having based its decision precisely on the Decision of the Supreme Court referred to, which was confirmed by the Full Meeting of the Penal Courtroom of the National High Court and by the Penal Courtroom of the Supreme Court, which decision was to declare the inadmissibility of the complaint filed by the appellants for defense.

Having reproduced legal justifications 7, 8 and 9 of the STC 237/2005, dated 26 September, referred to, the Justice Department considers that its enforcement must lead, in this case, to the granting of the protection requested, since the judicial resolutions objected to have agreed on the inadmissibility of the complaint or the confirmation of said decision by enforcing the doctrine categorically unauthorized by the constitutional Decision referred to.

Specifically, the element of connection of the denounced events with our jurisdictional sphere has been rejected by those resolutions because the victims of the specific crime of genocide – or of other crimes related to it - were not Spanish, or because the parties presumed responsible for the crimes denounced are not of Spanish nationality, and because they were not in the national territory. Both criteria have been rejected by the Constitutional Court in the Decision referred to due to their excessive restrictiveness.

The Justice department concludes its writ of allegations requesting the issue of a verdict in favor of the petitioner in the protection requested, declaring that the right of the plaintiffs to effective legal protection has been violated (art. 24.1 CE), annulling the legal resolutions objected to, making the proceedings retroactive to the moment immediately prior to that of the Decree of the Central Court of Preliminary Criminal Proceedings nr. 2 dated 20 November 2003, so that a new resolution is issued that respects the essential right that was violated.

7. The plaintiffs requesting protection exhausted the allegation proceedings granted through a writ recorded on 19 April 2007, whose essential points are reproduced below.

a) To begin with, based on art. 83 LOTC, they request the joinder of legal actions of this appeal for protection to the one filed by them, recorded under number 6240/2006, against the decision of the Penal Courtroom of the National High Court, dated 8 May 2006, whereby it was agreed to join to the prior formalities nr. 318/2003, under which the judicial decision now objected to was issued, the complaint which was brought against Mr. Bo Xilai, a Chinese national, based on substantially identical facts, for presumed crimes of genocide and tortures.

They also express that the Decision of the Penal Court of the Supreme Court nr. 645/2006, dated 20 June, in acceptance of the decision of the STC 237/2005, dated 26 September, has appraised the motion to vacate nr. 1395/2005 filed by the now appellants for protection against the judicial decisions that refused the competence of the Spanish jurisdiction to take cognizance of the complaint filed for presumed crimes of genocide and tortures against Mr. Jia Quinglin, of Chinese nationality, based on facts that are substantially identical to those denounced in the judicial proceeding in which the judicial decisions here appealed were issued.

b) The appellants for protection, after having presented a brief factual description on which they base their complaint of genocide and torture by Chinese authorities against the members or practitioners of the so-called religious teaching Falun Gong, reiterate the violations of essential rights alleged in the writ of the appeal for protection, both in terms of the failure to grant a hearing in the motion to vacate, and of the judicial decision not to admit the complaint filed by them for proceeding.

With regard to the last complaint, it is alleged - under the denounced violation of the right to effective judicial protection, in terms of the right to a resolution based on the Law and the right to access to jurisdiction (art. 24.1 CE) - that nothing is said in the judicial resolutions objected to regarding the material impossibility of applying the principle of territoriality in China, in view not only of the absolute inactivity and ineffectiveness of actions in Chinese Courts, but also of the almost nonexistent independence of the Chinese Judicial power, which is controlled by the Chinese Communist Party, which is in turn involved in the persecution of Falun Gong. Nor is anything said of the additional impossibility of enforcing the principle of territoriality, which stems from the lack of typification of the crime of genocide in Chinese domestic law, thus violating the Convention against Genocide. Similarly, nothing is said of the impossibility of bringing to trial the crimes denounced by the International Penal Court, not only due to the fact that China has not subscribed the Statute of Rome, but also to the fact that many of the denounced crimes precede the approval of the Statute of Rome. Finally, it says nothing of the de facto and material impossibility of the involvement in this matter of the agencies coming under the United Nations, since China has a right to veto in the Security Council.

Invoking the right to effective legal protection, in terms of its two-fold right to obtain a resolution based on the Law and to access to jurisdiction (art. 24.1 CE), it is alleged that the argument used in the judicial resolutions objected to, based on the doctrine of the Decision of the Supreme Court dated 25 February 2003, has been

considered damaging to the essential right referred to by the STC 237/2005 referred to, dated 25 September, because it is based on a restrictive interpretation of art. 23.4 LOPJ, a precept that grants the competence of the Spanish Courts for taking cognizance of the crimes of genocide and tortures committed in China against millions of practitioners of the religious teaching Falun Gong, on which grounds the competence referred to should have been recognized by the Spanish judicial bodies, with special consideration of the circumstances prevailing in China previously described.

They conclude their writ by requesting the Constitutional Court to issue a Decision granting the protection requested.

8. Courtroom Two of the Constitutional Court, through a formality dated 18 July 2007, agreed that, "in view of the current status of the proceeding of the appeal for protection nr. 6240/2006, which is still pending a decision regarding its admissibility, it was not lawful to open the hearing proceeding requested by the appellants for protection for its possible joinder to the appeal for protection nr. 3382/2005".

9. Through a formality dated 18 October 2007, a proceeding was opened to deliberate and issue a vote on the present Decision on the 22nd. Day of the same month and year.

II. Legal basis

1. The present appeal for protection, although formally directed against Decision nr. 345/2005, dated 18 March, of the Penal Courtroom of the Supreme Court, is aimed at objecting to the Decree of the Central Court for Preliminary Criminal Proceedings nr. 2 dated 20 November 2003, confirmed in amendment by Decree of 17 December 2003, appealed through Decree of the full meeting of the Penal Courtroom of the National High Court on 11 May 2004, and repealed by the Decision referred to of the Penal Courtroom of the Supreme Court, which declared the inadmissibility of the complaint filed by the appellants for protection against Chinese citizens Messrs. Jiang Zenin and Luo Gan for alleged crimes of genocide and tortures committed in China as from the year 1999 relating to people belonging to and followers of the group Falun Gong, on the one hand, and on the other, objecting to the formality of the Penal Court of the Supreme Court dated 17 December 2004, through which it was agreed that the motion to vacate filed by the appellants for protection should be admitted and opened for the issue of a decision.

In the appeal for protection, the decision referred to is charged with violating the rights to effective legal protection (art. 24.1 CE) and to a proceeding with all the due guarantees (art. 24.2 CE), due to the failure to hold a hearing in the motion to vacate, and the Writ of the Central Court for Preliminary Criminal Proceedings nr. 2 is charged with violating the right to effective legal protection, in terms of the right to access to jurisdiction (art. 24.1 CE), by declaring the inadmissibility of the complaint filed by the appellants for protection.

The Justice Department issued an opinion in favor of the analysis of the appeal for protection due to the denounced violation of the right to effective legal protection, in terms of the right to access to jurisdiction (art. 24.1 CE), applying the doctrine set forth in STC 237/2005, of 26 September.

2. The appellants for protection consider, firstly, that their rights to effective legal protection (art. 24.1 CE) and to a proceeding with all the due guarantees (art. 24.2 CE) have been violated, since the Penal Courtroom of the Supreme Court, despite the concurrence of the presumptions set forth in art. 893 bis a) LECrim, has tacitly and unjustifiedly ignored their express request to hold a hearing in the motion to vacate, agreeing through the decision dated 17 December 2004 to admit the appeal and issue a decision. To the preceding argument they add that the decision dated 14 January 2005, which declared the inadmissibility of the petition for reconsideration filed by them on grounds of art. 236 LECrim. against the prior decision dated 17 December 2004, has not only failed to redress the violation denounced but has additionally incurred a new violation of the right to effective legal protection, this time in terms of the right to access to an appeal (art. 24.1 CE), by failing to admit the said appeal.

According to the consolidated constitutional doctrine on the right to appeal, whose reiteration makes its reproduction unnecessary (STC 122/2007, dated 21 May, FJ 4, for all), any sign of violation of the right to effective legal protection, in terms of the right to appeal (art. 24.1 CE) must be discarded since, due to the decision dated 14 January 2005, it has been declared that the petition for reconsideration filed by the plaintiffs against the decision dated 17 December 2004 is inadmissible, because, according to art. 236 LECrim, the petition for reconsideration is only admissible against case records and not against decisions of Criminal Courts. Therefore, in this case the inadmissibility of the petition for reconsideration has been justified through the enforcement of the prevailing procedural law which in no way …. (últimas palabras p 11 ilegibles).

The same inadmissibility applies to the complaint filed by the appellants for protection because the Penal Courtroom of the Supreme Court did not agree to hold a hearing in the petition for reconsideration, since it is the doctrine of this Court that failure to hold a hearing in a petition for reconsideration is only constitutionally relevant if it generated an actual and effective lack of constitutional protection for the appellant for protection (STC 136/2003, dated 30 June, FJ 2; October, FJ 2; 68/1996, dated 25 March, FJ 7; 153/2001, dated 15 June, FJ 4). In the case at hand, the appellants for protection in no way prove that the failure to hold the hearing placed them in a position of material defenselessness, in such a way that due to the failure to hold the hearing they were deprived of the possibility of making allegations and justifying what they deemed appropriate in defense of their claims, as they actually did in the writ that formalizes the petition for reconsideration, nor do they at any point relate or offer any argument regarding what possible allegations they have not been able to make as a result of the failure to hold a hearing in the petition for reconsideration that could have altered the direction of the judicial resolution they would have obtained if the hearing had been held. Therefore, the complaint for violation of the rights to effective legal protection (art. 24.1 CE) and of the right to a proceeding with all the due guarantees as a result of the failure to hold a hearing in the petition for reconsideration must be rejected (art. 24.2 CE).

3. Secondly, the appellants for protection claim – which claim constitutes the core of their complaint – that the failure to admit the complaint filed by them violates the right to effective legal protection, in terms of the right to access to jurisdiction (art. 24.1 CE), since the judicial resolutions rejected base that decision on the doctrine set

forth by the Penal Courtroom of the Supreme Court in its Decision dated 25 February 2003, pursuant to which the enforcement of the principle of universal justice of the Spanish jurisdiction in the penal sphere indicated in art. 23.4 LOPJ requires the existence of connections or elements of association of the denounced facts with the sphere of our jurisdiction, among these that the presumed author of the crimes should be present in Spain, or that the victims be of Spanish nationality, and therefore this jurisdictional interpretation – which they term *contra legem* – lacks any association with national rules or the rules of international Law. In the allegation proceeding of art. 52.1 LOTC, the appellants for protection express that this Constitutional Court, in STC 237/2005, dated 26 September, has declared the doctrine of the Decision of Penal Courtroom of the Supreme Court of 25 February 2003 contrary to effective legal protection, in terms of the right to access to jurisdiction, and that, by enforcing the constitutional Decision referred to, the very Penal Court of the Supreme Court, in Decision nr. 645/2006, dated 20 June, has considered the petition for reconsideration filed by them against the jurisdictional decisions that had refused the competence of Spanish jurisdiction for taking cognizance of the complaint filed by them against eight Chinese citizens for presumed crimes of genocide and tortures based on facts substantially identical to those denounced in the complaint, and in which connection the judicial resolutions now objected to under the defense were issued.

At the same time, they point out that Antecedent 4 b) presents the impossibility of the crimes denounced being prosecuted by the International Penal Court, since China has not ratified the Statute of Rome, and therefore it does not recognize the competence of the International Penal Court. Additionally, as a member of the United Nations Security Council, it has vetoing power in any resolution that may be issued for delivery to the prosecutor of the International Penal Court. Consequently, the sole procedural route available to the victims of the crimes is the enforcement of the principle of universal jurisdiction.

The Justice Department pronounced itself in favor of the appeal for protection through the enforcement of the doctrine of STC 237/2005, dated 26 September, since the judicial resolutions appealed have agreed on the inadmissibility of the complaint or the confirmation of the said decision enforcing a case law doctrine of the Supreme Court which was flatly unauthorized by STC 237/2005. Specifically, the judicial resolutions appealed have been based on the inexistence of a connection of the events denounced in the complaint with our jurisdictional sphere, because the victims of the crimes of genocide are not of Spanish nationality, but rather of others connected with the latter, or because the parties allegedly responsible for the denounced crimes are not of Spanish nationality, nor are they situated in national territory, and the requirement of these connection criteria has been rejected by the Constitutional Court in the Decision referred to.

4. The matter that has arisen now, i.e. the possible violation – by the judicial resolutions rejected – of the right to effective legal protection, in terms of the right to access to jurisdiction (art. 24.1 CE), as a result of the interpretation made in these of the rule for the extension of Spanish penal jurisdiction envisaged in art. 23.4 LOPJ, relating to the principle of universal jurisdiction, on which they have based the decision not to admit the complaint filed by the appellants for protection, is substantially identical to that put forward in STC 237/2005, dated 26 September.

In this case, the Central Court for Preliminary Criminal Proceedings - whose decision regarding the inadmissibility and the reasoning on which it is based have been confirmed by the Full Meeting of the Penal Court of the National Courtroom and by the Penal Court of the Supreme Court - has based its decision on the case law reflected in Decision of the Penal Court of the Supreme Court dated 25 February 2003. By enforcing this case law doctrine, according to which, in brief, in order for the rule of art. 23.4 LOPJ to be applicable, certain connections or elements of association must exist between the denounced facts and our jurisdictional sphere, among them that the alleged author of the crime should be situated in Spanish territory, that the victims be of Spanish nationality, or for there to be another point of direct connection with Spanish interests, Central Court for Preliminary Criminal Proceedings nr. 2 declared the inadmissibility of the complaint filed by the appellants for protection by concluding that the Spanish jurisdiction was not competent for taking cognizance of the facts denounced "considering that none of the parties presumed guilty is of Spanish nationality, nor is in the national territory of Spain nor has Spain denied their extradition and, furthermore, there is no evident connection with a national Spanish interest that directly relates to those crimes, because, since it is possible to find such connection with the nationality of the victims, no crimes of genocide and torture have been denounced or evidenced to have been committed on Spaniards. Neither is it directly connected with relevant Spanish interests (Seventh Legal Reasoning).

5. Evidence was provided - prior to the allegation made by the appellants - of the impossibility of resorting to the International Penal Court, and this element is unique in this case as compared with the decision in STC 237/2005, the enforcement of whose doctrine to the present case constitutes the essence of the appeal.

The first thing is to aver the correction of the proposition made by the appellants regarding the impossibility of access to the International Penal Court due to the reasons indicated by them, which as a result leaves no other way out -as they sustain- for the possible prosecution of the denounced crimes than that which they have chosen, thus placing the key of the decision within the scope of art. 23.4 of the LOPJ regarding access to jurisdiction, which is precisely the matter decided in our STC 237/2005.

In it this Court, due to the reasons transcribed below, has declared that the requirement of connections or elements of association in order for the applicability of the jurisdictional rule of art. 23.4 LOPJ, expressed in the Decision of the Penal Court of the Supreme Court of 25 February 2003, is contrary to the right to effective legal protection, in terms of access to a legal proceeding (art. 24.1 CE).

a) In general terms, we said in our cited Decision, prior to proceeding with the analysis of those connections or elements of association, that "art. 23.4 LOPJ grants, in principle, a very broad scope to the principle of universal jurisdiction, since the sole express limitation that it introduces in this regard is that of *res judicata*; in other words, that the criminal has not been acquitted, pardoned or punished abroad. In other words, from a literal interpretation of the precept, as well as from the *voluntas legislatoris*, it has to be concluded that the Organic Law of the Judiciary establishes an absolute principle of universal jurisdiction, in other words, without it being submitted to corrective or justifiability criteria, and without any hierarchic classification with regard to the other rules of attribution of competence, since, unlike the other criteria, the one of universal justice is configured on the basis of the specific nature of the crimes

prosecuted. What has just been affirmed does not imply that this must be the sole rule for interpreting the precept, and that its interpretation of law cannot be presided by ulterior governing criteria that may even restrict its sphere of enforcement. However, in this work of interpretation of law, and even more so when this restriction brings with it the restriction of the margins of access to jurisdiction, it is necessary to take into account the limits that outline a strict or restrictive interpretation of what – as an inverse figure to the analogy - should be seen as a teleological reduction of the law, characterized for excluding from the framework of enforcement of the precept certain undoubtedly incardinate assumptions in its systematic center. From the viewpoint of the right to access to jurisdiction, this teleological reduction would be far from the hermeneutical principle of *pro actione* and would lead to an enforcement of the strict and disproportionate enforcement of the principle set forth in art. 24.1 CE" (FJ 3).

b) More specifically, with regard to each of the connections or elements of association upon which the enforcement of the rule of extension of Spanish jurisdiction in the penal sphere of art. 23.4 LOPJ is dependent in the judicial resolutions appealed, this Court rejected - in the cited STC 237/2005, dated 26 September – the requirement that the party presumed responsible for the denounced crimes should be situated in Spanish territory. According to the reasoning in the decision, "there is no doubt that the presence of the presumed author in Spanish territory is an undeniable requirement for the prosecution and eventual punishment, due to the absence of *in absentia* judgments in our legislation (with the exception of assumptions that are not relevant to this case). Consequently, legal rules, such as extradition, constitute essential elements for the effective attainment of the finality of universal jurisdiction: the prosecution and punishment of crimes that affect the entire international community due to their characteristics. However, this conclusion cannot lead to the constitution of this circumstance as a *sine qua non* requirement for the enforcement of judicial competence and the opening of the proceeding, even more so considering that this procedure would submit access to universal jurisdiction to a deep restriction not envisaged in the law, which be contrary to the essence and purpose of the institution" (FJ 7).

c) The Court also rejected passive personality as an element of association, constituting the Spanish nationality of the victims and the association of the crimes committed with other relevant Spanish interests as the requirement for the enforcement of universal competence.

In relation to the two elements it was then said, and we reiterate here, that:

"this radically restrictive interpretation of the principle of universal jurisdiction presented in art. 23.4 LOPJ, which should preferably be classified as a teleological reduction (since it goes beyond the grammatical sense of the precept), exceeds the scope of what it admissible in constitutional terms from the framework established by the right to effective legal protection presented in art. 24.1 CE, insofar as it involves a *contra legem* reduction based on corrective criteria that cannot be considered contained in the law, even implicitly, and which, additionally, are contrary to the finality sought by the institution, which is altered to the point of non recognition of the principle of universal jurisdiction, as it is conceived in International Law, and which has the effect of reducing the sphere of enforcement of the precept to the point of almost assuming a *de facto* derogation of art. 23.4 LOPJ.

In fact, the right to effective legal protection, in terms of access to jurisdiction, has been diminished in this case because an interpretation in line with the *telos* of the precept would bring with it the fulfillment of the exercise of a fundamental right to access to a proceeding and would therefore be in full agreement with the *pro actione* principle, and because the literal sense of the precept analyzed seeks the fulfillment of this finality, without any forced interpretation of any kind, and with it, the safeguard of the right presented in art. 24.1 CE. Therefore, the forced and unfounded interpretation of law to which the Supreme Court submits the precept involves an illegitimate restriction of the essential right referred to, because it violates the requirement that "two judicial bodies, in interpreting the procedural requirements envisaged by law, should consider the ratio of the rule in order to avoid mere formalities or unreasonable understandings of procedural rules from preventing the in-depth prosecution of a matter, violating the requirements of the principle of proportionality" (STC 220/2003, 15 December, FJ 3), by constituting a "denial of access to jurisdiction based on an excessively strict consideration of the applicable regulation" (STC 157/1999, 14 September, FJ 4)" (FJ 8).

d) To the preceding considerations which are common to both elements, the following was added:

"the restriction based on the nationality of the victims incorporates an added requirement not envisaged in the law, which, additionally, cannot be given a teleological basis because, particularly with regard to genocide, it contradicts the very nature of the crime and the shared object of its universal persecution, which is practically cut off at the base […]. The interpretation of law maintained by the Supreme Court would imply, as a consequence, that such crime of genocide would only be relevant for the Spanish courts when the victim was of Spanish nationality and, furthermore, when the behavior was motivated by the finality of destroying a group of Spanish nationals. The improbability of this possibility should constitute sufficient evidence that this was not the finality sought by the Legislator through the introduction of universal jurisdiction in art. 23.4 LOPJ, and that this interpretation cannot be in line with the objective fundamentals of the institution.

The same must be concluded with regard to the criterion of international interest […] with its inclusion, nr. 4 of art. 23 LOPJ remains practically devoid of content, through its redirection to the rule relating to jurisdictional competence envisaged in the preceding number. As has been affirmed already, the determining issue is the fact that submitting the competence for prosecuting international crimes such as genocide or terrorism to the concurrence of international interests, under the terms set forth by the Decision, is not exactly reconcilable with the fundamentals of universal jurisdiction. International and across-border persecution with the intention of imposing the principle of universal justice is based exclusively on the specific characteristics of the crimes that are submitted to it, whose harmfulness (paradigmatically in the case of genocide) transcends the specific victims and reaches the international community as a whole. Consequently, the persecution and punishment (of these crimes) constitute not only a commitment, but also a shared interest of all the States (as we have affirmed in STC 87/2000, dated 27 March, FJ 4), and whose legitimacy, consequently, does not rely on ulterior particular interests of each (State)".

Additionally, we concluded that:

"the exaggerated strictness with which those criteria are applied (…) leads to the incompatibility of its pronouncements with the right to effective legal protection, in terms of access to jurisdiction, since this requires a visible connection with national interests directly related with the crime taken as a basis for averring the attribution of jurisdiction, with the express exclusion of the possibility of more lax interpretations (including interpretations more in line with the *pro actione* principle) of that criterion, such as associating the connection with national interests with other crimes connected with the first, more generically, with the context surrounding them" (FJ 9).

6. In this case, the enforcement of the preceding constitutional doctrine leads to the consideration that the decision not to admit the complaint filed by the appellants for protection has violated their right to effective legal protection, relative to the right to access to jurisdiction (art. 24.1 CE), and consequently, **it is in order to grant the protection of constitutional rights requested, annul the judicial resolutions rejected and make these proceedings retroactive to the time immediately prior to the Decree of the Central Courtroom for Preliminary Criminal Proceedings nr. 2, dated 20 November 2003, so that it issues a new judicial resolution that is in line with the essential right that has been violate**d.

DECISION

In view of all of the above, the Constitutional Court, WITH THE AUTHORITY VESTED IN IT BY THE CONSTITUTION of the NATION OF SPAIN,

Has decided

To consider the appeal for protection filed by Ms. Zhi Zhen Dai, Mr. Ming Zhao, Mrs. Yuzhi Wang, Mr. Victor Manual Fernández Sánchez, Mr. Cui Ying Zhang, Mrs. Li Yu, Mr. Alan Y. Huang, Mrs. Chen Zhao, Mr. Alejandro Centurión and Mr. Gang Chen, and, by virtue of this:

1. To declare that the right of the appellants for protection of effective legal protection, in terms of access to jurisdiction (art. 24.1 CE) has been violated,

2. To restore their right, and to this end, declare the nullity of the Decrees of the Central Courtroom for Preliminary Criminal Proceedings nr. 2, dated 20 November and 17 December 2003, contained in prior formalities of abbreviated proceeding nr. 318/2003, as well as that of the Decision of the Full Meeting of the Penal Courtroom of the National High Court dated 11 May 2004 and that of Decision nr. 345/2005, dated 18 March, of the Penal Court of the Supreme Court, contained in … (renglón ilegible en p. 19) legal proceedings cited, in order for a new resolution to be issued that is in line with the essential right that has been violated.

Publish this Decision in the "Official State Gazette".

Given in Madrid, on October 22 2007.

(Signed)
(Round stamp of the CONSTITUTIONAL COURT – SECRETARIAT - COURTROOM TWO).