UNOFFICIAL TRANSLATION

NATIONAL HIGH COURT
CRIMINAL DIVISION
PLENARY SESSION

APPEAL NO. 31/09
SECTION 2 PROCEEDINGS NO. 118/09
CENTRAL MAGISTRATES' COURT NO. 4
PRELIMINARY PROCEEDINGS NO. 157/08

RULING No. 1/09

Illustrious President:
Mr Javier Gomez Bermudez

Illustrious Magistrates:
Mr Alfonsop Guevara Marcos
Mr Fernando Garcia Nicolas
Ms Angela Maria Murillo Bordallo
Mr Guillermo Ruiz Polanco
Mr Angel Hurtado Adrian
Ms Teresa Palacios Criado
Ms Manuela Fernandez Prado
Ms Carmen Paloma Gonzalez Pastor
Ms Angeles Barreiro Avellaneda
Mr Javier Martinez Lazaro
Mr Julio de Diego Lopez
Mr Juan Francisco Martel Rivero
Mr Jose Ricardo de Prada Solaesa
Mr Nicolas Poveda Peñas
Mr Ramon Saez Valcarcel
Ms Clara Eugenia Bayarri Garcia
Mr Enrique Lopez Lopez

In the City of Madrid, on the ninth of July of two thousand nine.

BACKGROUND FACTS

ONE- On 4-5-2009, the Central Magistrates Court No. 4 issued a ruling in respect to Preliminary Proceedings no. 157/08, initiated on occasion of the suit filed by several Palestinian victims against seven political and military leaders of Israel, in which the Examining Judge stated the following:

"That, rejecting the arguments expressed by the Public Prosecutor, there is no reason to declare Spanish jurisdiction incompetent to hear the subject matter of the suit giving rise to these proceedings, nor is there reason to temporarily stay said proceedings."

The **Public Prosecutor** filed an appeal against said resolution in a writ submitted on 6-5-2009, requesting that the appealed ruling be reversed and that the competence to hear the facts subject matter of the suit be declared without effect, due to the preferential nature of the jurisdiction of the State that is currently investigating the facts, and order that the proceedings be stayed.

TWO - The appeal having been accepted, it was challenged by the private action comprising the complainants **Raed Mohamed Ibrahim Mattar, Mohamed Ibrahim Mohamed Mattar, Rami Mohamed Ibrahim Mattar, Khalil Khader Mohamed Al Seadi, Mahmoud Sobhi Mohamed El Houweit** y **Mahassel Ali Hassan Al Sahwwa,** represented by the Procurator Mr Javier Fernandez Estrada, in a writ submitted on 13-5-2009, in which they requested that the appeal filed be considered outrightly inadmissible and secondarily, in the event this request for inadmisibility was not accepted, that the appeal be dismissed and in consequence that the appealed ruling be ratified. The private prosectuion filed by the **Committee for Solidarity with the Arab Cause** [Comite de Solidaridad con la Causa Arabe], represented by the same Procurator, expressed the same request in a writ of challenge submitted on 13-5-2009. Finally, the private action exercised by **Izquierda Unida**, represented by the said Procurator, submitted a writ challenging the appeal on 18-5-2009, requesting that the appeal be dismissed in order to enable the investigations of the facts that gave rise to the proceedings to continue.

THREE – The testimony of all the proceedings was sent to Section 2 of the Criminal Division, where appeal proceedings no. 118/09 were initiated, and was remanded to the Plenary Session of the Criminal Division of this National High Court, where orders were given to constitute Government Dossier no. 14/2009 on 3-6-2009, in which it was resolved to scan and digitilise the six volumes of the proceedings.

Once case no. 31/09 was established, dates and times were set for the corresponding deliberations. On 29-6-2009 and on 30-6-2009 the plenary session of the Criminal Division met, discussed and adopted a resolution regarding the matter raised, resolving by a majority decision to issue this resolution.

The illustrious Magistrate Mr Juan Francisco Martel Rivero acted as Speaker.

LEGAL GROUNDS

ONE- The Public Prosecutor challenges the resolution of the Central Magistrates' Court No. 4 dismissing its petition regarding incompetence of Spanish jurisdiction to hear the facts of the complaint filed. Said appellant believes that competence to hear said facts must be declared without effect, and in consequence the proceedings must be stayed, because it argues that the jurisdiction of the State of Israel has preference over Spanish jurisdiction, by virtue of the principles of complementarity or subsidiarity in the exercise of universal jurisdiction. The appellant uses the following arguments to support its request that the case filed in Spain be stayed: 1- The existence of proceedings initiated in Israel (Shehadeh case: no. 8794/03), suspended at one point pending resolution of the case regarding targeted assassinations (case no. 769/02) and currently pending preliminary actions in respect to the report to be drafted by the Commission of Investigation created at the initiative of the Supreme Court of the State of Israel; 2- The existence of required points of connection for application of the principle of complementarity or subsiadiarity, pursuant to the rules and the doctrine of jurisprudence it refers to, in accordance with the criterion of reasonability, consisting of the principles of territoriality, of active personality and of litispendence: 3- The Examining Court's alleged confusion in respect to the idea of trial and access to jurisdiction and the idea of the existence and requirement of a criminal investigation underway, given the judicial origin of the Investigation Commission appointed; and 4 –European jurisprudential doctrine that likens the Public Prosecutor's decision that it is not necessary to investigate certain facts which appear to be criminal with judicial pronouncements shelving cases involving crimes.

Note should be taken of the considerations on which the Central Magistrates' Court No. 4 bases the challenged ruling to continue investigations to determine the events that occurred on 22-7-2002 between 11:30 pm and midnight, when an F-16 of the Israeli Air Force dropped a one-ton bomb on the house of Salah Shehadeh, the leader of the terrorist organisation Hamas, located in the Al Darj neighbourhood of the city of Gaza, explosion which caused the death of 15 persons, including the said Salah Shehadeh, his wife and one of his daughters, caused injuries to 150 persons, of which 78 were very seriously or seriously injured, and which caused considerable damage, not only in the said Shehadeh's house, but also in other houses in the vicinity, of which 8 were totally destroyed, 9 were considerably damaged and 21 had moderate damage. Said considerations made by the Examining Judge can be summarised as follows: 1- Israel does not constitute the forum where the events occurred, since they occurred in the territory of Gaza, which does not form part of the State of Israel; 2- In case there should be reason to shelve the proceedings, shelving would not be provisional but total, in the event Spanish jurisdiction is not competent to hear the facts; 3- There is no reasoned resolution by the Military Advocate General or the Attorney General of the State of Israel that justifies the controversial decision regarding lack of action to investigate the facts; 4 – The non-jurisdictional nature of the Investigation

Commission appointed by the Government of Israel on request of the Supreme Court (acting as Superior High Court of Justice), within the proceedings known as the Shehadeh Case, whose conclusions or recommendation, if any, will not have a punitive or enforceable nature and will only be operational from a military perspective to avoid the mistakes detected in previous intelligence work; 5 – The doctrine of the principle of absolute universal jurisdiction established by the Constitutional Court in connection with judgment no. 237/05, of 26-9 (Guatemala Case) and rules contained in the 1949 Geneva Conventions, which established universal jurisdiction as a concurrent system, in contrast with a subsidiary system, as an alternative to other national or international jurisdictions. In short, the Examining Judge believed that there have not been any criminal investigations in connection with the serious events contained in the facts of the complaint; and that no decision has been issued which would produce the effect of *res judicata* (a matter already judged), expressing doubts regarding the independence, impartiality and organic and functional separation of the Military Advocate, the Attorney General and the Investigation Commission appointed from the Israeli executive branch.

TWO - The action that represents the six complainants and the Committee for Solidarity with the Arab Cause challenges the appeal filed by the Attorney General on the basis of identical arguments. Firstly, they believe that said appeal should be dismissed *in limine*, as they believe the law was contravened pursuant to article 11.2 of the General Judiciary Act [L.O.P.J], given that by application of article 676 of the Criminal Proceedings Act and jurisprudence that expands on said act, the contested decision cannot be appealed; the party challenging the appeal argues that the conflict of jurisdiction cannot be raised again until a final resolution has been issued in the case, by virtue of the provisions of article 678 of the Criminal Proceedings Act; the circumstances would have been different if the Examining Judge had accepted the declinatory plea, because in that case an appeal could have been filed in accordance with article 676 of the Criminal Proceedings Act, and in time an appeal to the Supreme Court. Secondly, and in a subsidiary manner, said action is opposed to the appeal filed by the Attorney General, based by referral on the arguments previously used to challenge the Attorney General's initial request to stay the proceedings, which gave rise to the appealed resolution. Said arguments are the following: 1- By application of Supreme Court Judgment no. 237/05, of 26-9, the principle of alternative does not govern the Spanish model of universal jurisdiction, but rather the principle of concurrent jurisdictions; 2 – The territorially competent authorities have not taken effective action in order to validly void the universal jurisdiction applied; 3 – The Israeli resolutions, in accepting targeted assassinations and death or injuries of collateral victims caused by the former and making it impossible de facto for the victims and their families to access to justice, violate articles 15 (right to life and to physical and moral integrity), 24.1 (effective protection of the courts and proscription of defencelessness, 24.2 (process with excess delays), 10.1 (dignity of the person) and 10.2 (respect for the Declaration of Human Rights and other Treaties regarding fundamental rights and

liberties) of the Constitution; 4- In the case under consideration the principal of proportionality is not applicable; 5- On the other hand, articles 2 and 15 of the European Convention for the Protection of Human Rights and Fundamental Liberties, signed in Rome on 4-11-1950 (on the right to life and its exceptional repeal in case of war), as well as the four General Conventions of 12-8-1949, in particular the Fourth, regarding the protection to be given to civilians in times of warfare, with special attention to article 146 thereof, which deals with pursuit and prosecution by any signatory State of persons accused of having committed or ordered the commission of any of the serious offences specified in the Convention, including intentional homicide, serious attacks against physical integrity or the health of persons and the unjustified destruction of property; 5- The inexistence of matter adjudged or secondarily, of litispendence in Israel, article 14.7 of the International Covenant on Civil and Political Rights, signed in New York on 19-12-1966, which establishes the principle of *non bis in idem*, not being applicable; 6- Absence of impartiality of the Courts, of the Attorney General and of the Investigations Commission appointed by the Israeli government in the case under examination; 7- Competence to investigate and adjudge the events of the complaint cannot be referred to the International Criminal Court, which has not initiated any proceedings in this respect; and 8 – In conclusion, as there are no concurrent jurisdictions, the Spanish jurisdiction has the obligation to continue with the investigation, prosecution and to demand liabilities for the events subject matter of these proceedings.

In addition, in the writ challenging the appeal filed by Attorney General and after summarising the facts and the proceedings, the popular action exercised by Izquierda Unida refers to the contents of its writ opposing the request previously filed by the Attorney Genearl to have the proceedings shelved. In said writ, said popular action argued that there were no proceedings in Israel to check, or that had checked, the facts of the complaint, and that an ad hoc administrative commission had been created, without any power to exercise jurisdictional actions with complete democratic guarantees.

THREE- The appeal filed by the Attorney General must be accepted, on the basis of the formal and material arguments expressed below.

A) In respect to the formal aspect, no procedural fraud is detected in the arguments of the appeal filed and in consequence, the subsequent procedural action cannot be declared null and void, since it entails the exercise of a legitimate possibility for procedural impulse, permitted by article **766.1 of the Criminal Proceedings Act** and applicable in respect to those interlocutory resolutions of the Magistrates' Courts that are not exempt from appeal and are issued within the context of Preliminary Proceedings. Article 676 and Article 678 of the Criminal Proceedings Act are not applicable to the questioned resolution, because we are not in the procedural phase of indictment, or more specifically in the so-called phase of the Article of Prior Declaration of a Declinatory Plea, established in Article 666.1

of the same legal text, which can be used in a procedural phase which occurs much later than the current one. In all other respects, the reiterated and constant jurisprudence highlighted further on in this resolution has backed without any limitations the use of the means of challenge used by the Attorney General in cases similar to the one under consideration.

B) In respect to the applicability of the principle of universal jurisdiction, established in **Article 23.4 of the General Judiciary Act**, it cannot be interpreted in an absolute manner since it has been qualified by different legal provisions and jurisprudence itself.

a) In a legal context, **Article 23.5 of the General Judiciary Act** established a first limitation, since Spanish jurisdiction is competent to hear acts committed by Spaniards or foreigners outside national territory which are likely to be classified as a crime which, pursuant to international treaties or conventions, must be persecuted in Spain (Article 23.4, letter i); in the case under consideration, crimes against the International Community, specifically crimes against protected persons and property in case of armed conflict provided in articles 608.3, 611.1 and 613.1 letters b) and e) of the Criminal Code, in connection with the Fourth Geneva Convention of 12-8-1949 and the 1st Additional Protocol of 8-6-1977 on the protection owed to civilians in times of warfare. But all of this is applicable provided that the delinquent has not been acquitted, pardoned or sentenced abroad, or in the last case, has not served a prison term or has only partially served it (Article 23.2 letter c) of the General Judiciary Act).

On the other hand, the three sections of **Article 17 of the Statute of the International Criminal Court**, signed in Rome on 17-7-1998, and signed by Spain and Israel although only ratified by Spain, offer specific criteria regarding the admissibility or inadmissibility of hearing matters which reach the Court when certain circumstances occur.

Thus, the Court rejects hearing a matter when: a) the matter is the subject matter of an investigation or prosecution by a State that has jurisdiction over said matter, unless said State is not willing to carry out the investigation or the prosecution or they cannot do so; b) the matter has been investigated by a State that has jurisdiction over said matter and said State decided not to file criminal actions against the person involved, unless the decision responds to the fact that it is not willing to carry out the prosecution or cannot do so. And d) the matter is not sufficiently serious to warrant adopting other measures by the Court.

In order to determine whether or not there exists predisposition to act in a specific matter, the Court shall examine, bearing in mind the principles of proeedings with due guarantees acknowledged by International Law, whether one or more of the following circumstances exist, depending on the case: a) that the trial has been or is underway or that a national decision has been adopted for the

purpose of having the person involved elude his/her criminal liability for crimes for which the Court is competent; b) that there have been unjustified delays in the trial which, in view of the circumstances, are not compatible with the intention of having the person involved appear in court; c) that the proceedings have not been or are not substantiated in an independent or impartial manner or that is has been or is being substantiated in a manner which, given the circumstances, is not compatible with the intention of having the person involved appear in court.

Indeed, in order to determine the incapacity to investigate or prosecute a specific matter, the Court will examine whether the State, due to the total or substantial collapse of its national administration of justice or to the fact that it lacks said administration, cannot make the accused appear in Court, does not have necessary evidence or testimony or is not for other reasons in condition to carry out the trial.

Finally, **Articles 8, 9 and 10 of General Act 18/2003, of 10-12, on Cooperation with the International Criminal Court**, regulate the possibility that the said Court may request that the Spanish authorities relinquish jurisdiction when it notifies the beginning of an investigation of events which the Spanish jurisdiction might be competent to try because said events occurred in Spanish territory or the alleged parties liable for said events are Spanish nationals. In this case, the Ministry of Justice will ask the Attorney General for urgent information regarding the existence of criminal proceedings underway, or that have been followed in connection with the events subject matter of the investigation, and whether Spanish courts are competent. When on the basis of the information provided by the Attorney General it appears that jurisdiction was exercised in Spain, is being exercised or, as a result of the notification received, an investigation has been initiated by the Spanish authorities, the Ministers of Justice and of Foreign Affairs shall make a joint proposal to the Council of Ministers to resolve whether to uphold the competence of the Spanish authorities, and if fitting, request the Court's Public Prosecutor to abstain. Once the resolution of the Council of Ministers has been approved, the Ministry of Justice will submit the petition for abstention.

Likewise, the Government is exclusively competent, by means of a resolution of the Council of Ministers, on joint proposal by the Ministries of Justice and Foreign Affairs, to decide to challenge the competence of the Court or admissibility of the case when Spanish Courts have tried the matter or a judgement has been ordered, or stay of proceedings has been ordered, or they are currently hearing the matter. Said decision shall enable the Ministry of Justice, if fitting, to file the challenge.

Notwithstanding what has been said above, if despite the request for abstention presented to the Court's Public Prosecutor or of challenge of competence or of the admissibility of the case, the competent Section of the Court authorises the Public Prosecutor to continue the investigation or upholds its competence, the

Spanish jurisdictional body shall abstain in favour of the Court and on its request shall submit the proceedings carried out.

b) In jurisprudential doctrine, said principle of universal jurisdiction has also been subject to substantial qualifications.

a') Supreme Court Judgment no. 237/05, of 26-9-2005 (Guatemala Case) and subsequent **Supreme Court Judgement no. 227/07, of 22.10-2007** (Falun Gong Case) established, in respect to the issue under consideration, the following criteria:

1 – In respect to the scope of the principle of universal justice, it states that Article 23.4 of the General Judiciary Act grants the principle of universal justice, in principle, a very ample scope, since the only express limitation it contains is that of *res judicata;* that is, that the delinquent has not been acquitted, pardoned or sentenced abroad. In other words, on the basis of an interpretation based on the literal wording of the precept, and on the basis of *voluntas legislatoris*, it must be concluded that the General Judiciary Act establishes a principle of **absolute** universal jurisdiction, that is, one that is not subject to restrictive criteria of correctness or procedural capacity, and without any hierarchical order with respect to the other rules attributing competence, given that in comparison with the other criteria, the criterion of universal justice is established on the basis of the special nature of the crimes subject to pursuit. But we must add that what has just been stated certainly does not imply that this is the sole interpretation standard of the precept, and that its exegesis cannot be governed by subsequent regulatory criteria which could even **restrict** its scope of application. However, in said exegesis, in particular when that restriction also entails restriction of the margins of access to the jurisdiction, it is necessary to bear in mind the boundaries that limit a strict or restrictive interpretation of what, as a figure contrary to that of the analogy, would have to be conceived as a teleological reduction of the law, characterised by excluding from the precept's framework of application, cases which can unquestionably be included within its semantic nucleus. From the point of view of the right of access to the jurisdiction, such teleological reduction would distance itself from the hermeneutic principle of *pro actione* and would lead to a rigorous and disproportionate application of Law contrary to the principle established in Article 24.1 of the Spanish Constitution.

2- Regarding the tension between the principle of concurrence and principle of alternative jurisdiction, note is made that it is unquestionable that there are substantial reasons, both procedural and political-criminal, to endorse the **priority of *locus delicti***, and that this constitutes part of the classical heritage of International Criminal Law. On the basis of this fact, (…) the truth is that, given its theoretical formulation, the principle of alternative jurisdiction should not be interpreted as a rule that is opposite to or divergent from the one that introduces the so-called principle of concurrence, because in the face of concurrent jurisdictions,

and for the purpose of avoiding the possible duplication of procedures and violation of the prohibition of the principle *ne bis in idem*, it is essential to introduce some **rule of priority**. As all States have the common commitment (at least in respect to principles) to pursue such abominable crimes as they affect the international community, elementary procedural and political-criminal reasonableness must give priority to the jurisdiction of the State where the crime was committed.

b') Supreme Court Judgement no. 645/06, of 20-6-2006 (Tibet case) openly critical of the interpretative arguments of Supreme Court Judgement no. 237/05, after inviting the Constitutional Court to perform a new analysis and to reconsider the issues involved in the application of the principle of universal jurisdiction, establishes the following:

1. The seven Magistrates who dissented with Supreme Court Judgement no. 327/03, dated 25-2-2003, cancelled by the said Constitutional Court Judgement no. 237/05, did not uphold in their dissenting opinion an interpretation of article 23.4 of the General Judiciary Act different from that of the majority Magistrates, but rather considered that, in the case of Guatemala, the existence of a connection with Spanish interests should be accepted. In this sense, the dissenting Magistrates stated that the requirement of some link or connection between the criminal events and some interest or value of the citizens exercising universal jurisdiction could constitute **a reasonable criterion of self-restriction** (…) if it is strictly applied as a **criterion for exclusion of excess law or abuse of law** (…). The dissenting Magistrates went on to state that this is a restriction that does not appear strictly established in the law, but that can be assumed as having emanated from the principles of International Law, and applied as a **criterion of reasonableness** in the interpretation of rules of competence. Furthermore, the dissenting opinion upheld that said restriction may be adopted insofar as it is geared at a reasonable objective, such as **avoiding an excessively expansive effect** of this type of proceedings and **guaranteeing the effectiveness of jurisdictional intervention**, since in cases of total absence of links of connection with the country and the events denounced, the practical effectiveness of the proceedings can be non-existent. It is thus clear that the judgement and the dissenting opinion did not differ in respect to the interpretative technique of the text of article 23.4 of the General Judiciary Act. In respect to the requirement deduced from the context formed by national law and the principles of International Law, agreement was unanimous. The dissenting opinion basically interpreted Article 23.4 of the General Judiciary Act in the same sense in which the majority of the magistrates of the Criminal Division did, only disagreeing in respect to the existence of the point of connection which should have conditioned Spanish extraterritorial jurisdiction.

2. As regards the alleged absolute character of the principal of universal jurisdiction, the Supreme Court upholds that this has merely been deduced from the fact that the text does not make mention of any express limitation. Nonetheless, the Constitutional Court declares, in direct contradiction

with what is stated above, that this is not the only applicable rule of the precept (nor does it mean) that in its exegesis subsequent regulatory criteria cannot prevail that could even restrain its scope of application. In other words, what is involved is an "absolute universal principle" which nonetheless could be **relativised to "restrict its scope of application**".

3. The principle of universal jurisdiction cannot be interpreted as an absolute principle that cannot be limited by other principles of International Law. It is necessary to bear in mind that in general, the doctrine of Public International Law conditions the jurisdiction of a State over extraterritorial events to a specific **connection** of these events with the State involved. In this sense specific mention has been made that there must exist a "real" or "substantial" or "legitimate link" or a "legitimate contact" or "such a close contact with the events to make it compatible with the **principles of non intervention and proportionality**." Attention must be paid to these principles, in particular when the events that are pursued were executed within the scope of another State's sovereignty. The said Supreme Court Judgement ends by pointing out that the principle of proportionality must inevitably be applied whenever it can be established that there exists a conflict of claims in which preference must be given to some in detriment of others.

c') Supreme Court Judgement no. 1362/04, of 15-11-2004 (procedural aspects of the Schilingo case), aside from dealing with other matters that were later subject matter of analysis in the oft-mentioned Constitutional Court Judgement no. 237/05 regarding the preference or concurrence of jurisdictions in crimes that affect the International Community, establishes, referring to another Supreme Court Judgement of 20-5-2003, that it must be admitted that the need for jurisdictional intervention in accordance with the principle of universal justice is excluded when territorial jurisdiction is **effectively pursuing** the crime of a universal nature committed in its own country. In this sense, we could speak of a **principle of need for jurisdictional intervention**, arising from the nature and purpose of universal jurisdiction. The application of this principle determines the priority of competence of the territorial jurisdiction, when there exists concurrence between the latter and the one exercised on the basis of the principle of universal justice. This criterion does not imply the right to exclude application of the provisions of Article 23.4 of the General Judiciary Act, which establishes the requirement to fully substantiate the inactivity or ineffectiveness of criminal pursuit by the territorial jurisdiction in order to accept a complaint pursuant to universal jurisdiction. This requirement would in fact leave the principle of universal pursuit void of effective content, since such substantiation is practically impossible, and would determine the requirement of an extremely delicate assessment at this premature procedural stage. In order to admit the complaint, the same requirement exists in this matter as in connection with the events that allegedly constitute the universal crime, namely providing serious and reasonable indications that the serious crimes denounced have not to date been pursued effectively by the

territorial jurisdiction, for whatever reasons, without this implying a pejorative judgement regarding the political, social or material conditions that have determined said “de facto” impunity. (…) Finally, as a supplement to the previous principles, the jurisprudence of this Criminal Division acknowledges the relevance that the existence of a **connection with a national interest** could have for said purposes as a legitimating element within the framework of the principle of universal justice, modulating its extension in accordance with **criteria of rationality** and with respect to the **principle of non intervention**.

d’) Lastly, the different Sections that comprise this Criminal Division of the National High Court have also had occasion to give their opinion recently regarding this controversial matter, ruling in respect to the preference of the territorial criterion in different proceedings in which Spanish intervention was requested by virtue of the principal of legally established universal justice, applying criteria of rationality, effectiveness and deliberation. Thus, in a **ruling dated 19-10-2006**, issued in appeal proceedings no. 292/06 of the 4th Section, arising from indictment 19/07 of the Central Magistrates’ Court no. 5 (Fotea Dimieri Case), in which avoiding division of the unitary nature of the case was upheld in respect to other proceedings for murder which the authorities of Argentina where hearing; the **ruling dated 4-4-2008**, issued in Proceedings no. 139/97 of the 3rd Section, arising from indictment no. 19/97 of Magistrates’ Central Court no. 5 (Cavallo Case), in which the situation of litispendence of proceedings existing in Argentina and Spain is resolved in favour of the authorities of the South American country, having given priority to the jurisdiction of the place where the events were committed, the Spanish proceedings having served to guarantee the rights of the victims as long as prosecution was legally impossible in the place where the facts occurred, situation which has presently been overcome; and in **ruling dated 14-1-2009,** issued in appeal proceedings no. 172/08 of Section 2, arising from Preliminary Proceedings no. 27/08 of the Central Magistrates’ Court no. 3 (cases of the local police agents of San Salvador de Atenco, State of Texcoco, Mexico) which points out that it seems logical and appropriate to establish priority rules among jurisdictions, so that in order to resolve duplicity of jurisdictions, preference of the place where the events were committed must be established (as provided in Article 14 of the Criminal Proceedings Act) over the principle of passive personality (Spanish victim’s domicile), unless lack of will or impossibility of pursuing the allegedly criminal acts committed is substantiated, which does not occur in the case under consideration, which are being effectively investigated by the Mexican authorities.

FOUR – Having noted the absence of the absolute nature of the principle of universal jurisdiction in Spain, in which the criterion of alternative jurisdiction is generally given priority over the criterion of concurrence, and having also noted that the former principle must be modulated in each case by logical rules of rationality, proportionality and self-restriction that facilitate its effective implementation in those cases in which the impunity of the possible abominable crimes committed is at risk, it is now appropriate to examine the documents

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submitted in these proceedings to see how the State of Israel has investigated and is investigating the events described in the complaint filed. Proceedings which definitely deactivate the principle of concurrence of jurisdictions in the case under consideration, with clear prevalence of trust in the rule of law that this entails.

Regarding the existence and subsistence of criminal proceedings in Israel in connection with the military action carried out at midnight on 22-7-2002 against the house of Salah Shehadeh, leader of the Hamas terrorist organisation, located in the Al Daraj neighbourhood of the city of Gaza, with the lethal, detrimental and damaging results mentioned earlier, it can be deduced from the ample and exhaustive documentation sent that a series of criminal and civil proceedings were initiated much before the complaint was presented in Spain, as explained below.

A) Initially, in view of the practical consequences it involves, mention should be made of the **Targeted Assassinations Case** (**High Court of Justice Judgement 769/02**), initiated by virtue of the complaint filed on 24-1-2002 by the Public Commission against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment against the State of Israel and other parties, in which the legality of the Government's policy of targeted assassinations was subjected to judicial review. In said proceedings, the Supreme Court, acting as High Court of Justice, stipulated, amongst others, the following points:

1- The State of Israel is fighting against severe terrorism which carries out its attacks in the area. The resources that are available to Israel are limited. The State has determined that preventive attacks against the terrorists in the area, that cause the death of said terrorists, are necessary from a military point of view. On occasion these attacks cause damages and even the death of innocent civilians. These preventive attacks, with all the military significance they entail, must be carried out within the framework of the law. The State's struggle against terrorism is not implemented outside the law, but rather within the limits of the law, with the tools that the law provides to democratic states. The State's struggle against terrorism is a struggle against the State's enemies and it is also the law's struggle against those who have risen against the State.

2. The issue is not whether we can defend ourselves against terrorism. Obviously it is possible to do so, and sometimes it is even an obligation to do so. The issue is how we respond. In this matter we have to find a balance between security needs and individual rights. This balance allocates a heavy burden to those whose job it is to provide security. Not all effective means are legal. The end does not justify the means. The army must be committed to act in accordance with the rules of law. This balance allocates a heavy burden on judges, who must determine, in accordance with current legislation, what is permitted and what is forbidden.

3. The legality of the policy of targeted assassinations is subject to judicial review. The armed conflict in Israel does not take place within a legislative void, but is subject to the legislative systems connected to what is permitted and what is forbidden. In its struggle against international terrorism the State must act in accordance with the rules of International Law. The International Law that is applicable to the armed conflict between Israel and terrorist organisations stems from several sources: the primary sources are the Fourth Geneva Convention regarding the laws and customs of land warfare, and the Fourth Geneva Convention regarding the protection of civilians in times of war.

4- It is not possible to declare that said policy of preventive attacks, which can cause the death of terrorists and on occasions of innocent civilians, is always permitted or is always forbidden. The phenomenon of the "revolving door", by virtue of which each terrorist has safe havens or cities in which to find refuge and where they go to rest and prepare themselves as long as they are granted immunity against an attack, must be avoided.

5. The legality of each incident must be examined, in accordance with the parameters that are established, drafted pursuant to generally accepted international rules and laws of armed conflict. The burden of proof of the attacking army is heavy, and in case of doubt, before carrying out an attack it is necessary to carry out careful verifications.

6- Prosecution is preferable to the use of force. A State governed by the rule of law uses, to the extent that is possible, legal procedures and not procedures of force. However, arresting, investigating and prosecuting are measures that cannot always be used. Sometimes this possibility does not exist; sometimes it involves such a large risk for the lives of soldiers that it is not deemed obligatory. The State's duty to protect the lives of its soldiers and civilians must be balanced with its duty to protect the lives of innocent civilians who have been caused injuries and damages during the attacks against terrorists.

7- The Supreme Court, acting as the High Court of Justice, subjects the use of discretion by the commanding officers of the armed forces to judicial review; this has been done since the Six Day War. This review preserves the legality of the use of discretion by the commanding military officers.

8- When a preventive attack causes the death of innocent passers-by, said attack should be subject to an objective ex post review by an objective revision committee, whose decisions should be subject to judicial review.

9- The investigation must be independent and damages caused must be compensated in certain cases of innocent civilians who are in the vicinity.

B) In specific reference to the case under consideration, an **initial military**

field investigation was carried out by the Israeli Defence Forces, as it involved armed action in which civilians died and were injured. The results of said internal investigation were forwarded to the **Military Attorney General,** the **Attorney General** having also received some complaints directly. Said authorities determined that, despite the tragic loss of civilian lives, this could not be used as the basis of a criminal investigation of the actions of Israeli soldiers, basing their argument on the fact that the attack was against a lawful objective, bearing in mind the principles of the laws of armed conflicts, and specifically the principles of distinction and proportionality.

C) In addition to the internal investigation mentioned above, which was finally stayed by the Israeli Public Prosecution, at present criminal proceedings in the so-called **Shehadeh Case (High Court of Justice 8794/03)** are pending, the outstanding procedural landmarks of which are the following:

1. Said proceedings were initiated as a result of a complaint filed with the Supreme Court on 30-9-2003 by the NGO Yesh Gvul against the Military Attorney General, the Attorney General, the Air Force Commander Dan Halutz, the Minister of Defence Benjamin Ben Eliezer, the Head of the Cabinet Moshe Ya'along and the Prime Minister Ariel Sharon. The complaint requested that the decisions made by the first two defendants to not initiate criminal proceedings in respect to planning and implementing the preventive attack against Salah Shehadeh be declared null and void, with the argument that the alleged procedural passivity reflects a selective application of the law, moral corruption and unjustified disregard for human lives.

2. Once the complaint was allowed and the proceedings initiated, the Attorney General replied to the petition contained therein, in a writ dated 1-1-2004, upholding that the tragic result of the preventive attack of 22-7-2002 took place under the difficult circumstances of the fight against terrorism in hostile territory. In addition, the writ states that the officers who planned the attack carried out an analysis regarding the proportionality of the operation and its military need, considering the possibility that human lives would be lost, with the tragic results being due to erroneous intelligence information. The Attorney General asked that the request to initiate criminal proceedings be rejected due to lack of grounds on which to suspect that a criminal act had been committed, as there was no significant deviation.

3. On 22-3-2004, the Supreme Court, acting as High Court of Justice (highest judicial body), ordered that proceedings 8794/03 be suspended until the final resolution of the High Court of Justice in Case 769/02 on Targeted Assassinations was issued, in view of the close connection with the matters considered in the 2003 proceedings. The argument was that in order to issue a judgement in the appeal of the 2003 case, it was essential to know the legal considerations regarding the legality of the preventive execution, subject matter of

the 2002 case. The latter resolution was issued, as mentioned earlier, on 14-12-2006 in the sense previously explained.

4- After said judgement was issued, on 2-1-2007 the Supreme Court lifted the suspension and ordered that the so-called Shehadeh Case be resumed.

5- On 17-6-2007 the highest Israeli judicial body ordered the State to inform said Tribunal within 45 days whether it would be willing to constitute an Objective Committee to examine the circumstances by virtue of which detriment was caused to innocent civilians during the attack on 22-7-2002, in accordance with the spirit of the directives and principles established in the preceding judgement regarding targeted assassinations.

6- On 17-9-2007 the Attorney General accepted the constitution of said independent Commission and that its members be designated by the governmental authority.

7- The complainant also accepted that said Investigation Commission be created to determine the factors that caused the tragic results arising from the attack on Salah Shehadeh's house.

8- On 23-1-2008 the Prime Minister of Israel named a Special Investigation Commission, appointed its members and gave them powers of verification, of which the Supreme Court was informed by the General Attorney on 4-2-2008.

9- On 18-2-2008 the complainant party presented arguments in which it expressed, after having accepted as satisfactory the creation of the Investigation Commission, opposition regarding its composition because it was not sufficiently objective. It also requested that there should be a direct criminal investigation, as initially demanded, by means of an express order from the Supreme Court urging the State to open said criminal investigation. The argument was that three members of the Commission had previously been commanding officers of the State Security Services and that none of the members were judges or public representatives, so that the verification actions to be carried out would simply entail a military investigation.

10 – On 23-12-2008 the Supreme Court rejected the petition filed by the complainant, considering that said petition had lapsed for not having complied with burden of proof imposed on it, since it did not provide evidence of any defect in the exercise of the Military Attorney General's and Attorney General's discretional power of deciding not to open any criminal investigation. The Supreme Court highlighted that it found no defect to justify its intervention in connection with the Government's ample discretional power in the targeted assassinations; and that it found no defect in the composition of the Commission named nor any need

to go back to the initial petition contained in the complaint.

11- At present, said Investigation Commission of the Shehadeh Case is performing its mission, and its decisions are subject to judicial review. The Commission was asked to draft a report including the findings and conclusions regarding the issues it dealt with and, if fitting, to issue a report regarding whether it was appropriate to draw operational conclusions based on the investigation's findings. It may recommend to the Chief of Staff or to the Head of the General Security Services to consider the possibility of taking necessary measures against some of the persons accused in the case. If in the course of the investigation underway there should appear any suspicion that an offence or disciplinary misdemeanour may have been committed, the Commission will inform whomever corresponds, depending on the case.

D) Lastly, there have been and currently are several civil proceedings in different Israeli Courts in connection with the Shehadeh Case (such as in the Courts of Kfar Saba and Hadera) aimed at obtaining economic compensation for the deaths, injuries and material damages caused by the attack with the bomb. Some of said civil matters were filed by several complainants in the criminal proceedings initiated in Spain.

FIVE - From the previous summary of the proceedings that existed and currently exist in Israel for the criminal and civil investigation of the events that occurred at midnight on 22-7-2002 in the neighbourhood of Al Daraj in the city of Gaza, it is concluded that there have been real actions, first administrative and then judicial, to check whether an offence may have been committed. To describe the work carried out by the Investigation Commission named by the Government of Israel as a simple internal investigation in the administrative-military sphere does not correspond to the judicial decisions adopted in proceedings in which the intervening parties have appeared, including many of the signatories of the complaint filed in Spain, who have been able to exercise their legal rights of allegation, substantiation and challenge. It should be recalled that the oft-mentioned Investigation Commission was conceived as part of a previous judicial resolution (judgment of 14-12-2006, issued in the Case 769/02, called the Targeted Assassinations Case), was created by the Government on 23-1-2008 at the initiative of the Supreme Court as part of another criminal trial (Case 8794/03, called Shehadeh Case), carried out its mission in accordance with the judicially established directives and that its decisions are subject to review by the Supreme Court itself.

It cannot be argued, with the documents submitted by the authorities of Israel, that no effective criminal investigation has taken place in the State of Israel, as there exists at present a situation of litispendence, given that the criminal liabilities arising from the events of the complaint have not been completely ruled out. Furthermore, malicious or unjustified procedural delays intended to spoil the

legitimate expectations of the parties to a just and reasoned judicial resolution of the matters submitted to judicial decisions have not been detected.

Apart from that, to question the impartiality and the organic and functional separation of the Executive branch from the Military Attorney General, the Attorney General and the Investigation Commission named by the Government of Israel implies ignoring the evidence of the existence of a social and democratic rule of law, under which the members of the executive and judicial branches are subject to the law. On the basis of these premises, there can be no doubt regarding the exercise of the corresponding criminal actions if the existence of criminally relevant conduct by the persons who ordered, designed and executed the attack with the bomb is detected in the course of the investigations underway.

In connection with this matter, it is inadmissible to question the competence of the judicial authorities of the State of Israel to investigate, and if fitting, to try the events subject to verification, on the basis of the theory of **ubiquity,** applicable to the possible offences committed, in which the barrier of protection of the legally protected right (civil persons immersed in military actions) transcends mere execution to the previous phase of organising and planning the attack. Let us recall that articles 611.1 and 613.1 of the Spanish Criminal Code uses the expressions "carry out or give orders to carry out" in describing the types of offences attributable to the perpetrators (in an ample sense: material, instigators and necessary accomplice) that commit acts listed therein. By virtue of the doctrine of ubiquity, the offence, should it exist, is committed both where the action originates and progresses (in Israel) and where the result takes place (Gaza). In this respect, mention must be made that in the Resolution adopted by the Plenary Session of Division 2 of the Supreme Court on 3-2-2005, it stated that: "The offence is committed in all the jurisdictions in which any element of the offence was committed; in consequence, the Judge in any of them that initiates proceedings first will be, in principle, competent to investigate the case." Transferring said Resolution to these proceedings, it is well known that the Israeli judicial authorities have been investigation the facts of the complaint. Furthermore, the absence of any problems in respect to the territorial competence of the State of Israel is even evidenced by the fact that the complainants themselves initially filed their criminal and civil complaints with bodies of the Israeli judicial branch.

Indeed, this last statement must be extended to recall that criminal proceedings in Israel are not governed by the so-called continental system, like in Spain, but instead by the so-called Anglo Saxon system, with ample powers and prevalence of the Attorney General in the investigation of the allegedly criminal acts. This legislative and doctrinal assignment of tasks is not taken into consideration in the appealed resolution.

SIX - As a result of the arguments expressed above, it is proper to accept the appeal filed by the Public Prosecutor and in consequence, order that the

proceedings be definitely stayed, declaring that payment of legal costs accrued is not imposed as there are no grounds on which to award them.

In respect to what has been stated,

RULING

THE DIVISION RESOLVES: To **ACCEPT** the appeal filed by the Public Prosecutor against the ruling issued on 4 May 2009 by the Central Magistrates' Court No. 4 in Preliminary Proceedings no. 157/08, rejecting the Public Prosecutor's petition presented on 2 April 2009 regarding incompetence of the Spanish jurisdiction to hear the facts contained in the complaint filed on 24 June 2008 by the common representation of the victims **Raed Mohamed Ibrahim Mattar, Mohamed Ibrahim Mohamed Mattar, Rami Mohamed Ibrahim Mattar, Khalil Khader Mohamed Al Seadi, Mahmoud Sobhi Mohamed El Houweit** y **Mahassel Ali Hassan Al Sahwwa** against **Dan Halutz, Benjamin Ben Eliezer, Doron Almog, Giora Eiland, Michael Herzog, Moshe Ya'alon** and **Abraham Dichter.**

So that we reverse the said resolution and in its place we resolve that the proceedings **BE DEFINITELY STAYED,** declaring that the legal costs of this appeal are not awarded.

This resolution is to be notified to the parties involved, informing them that an appeal can be filed against it with Division 2 of the Supreme Court.

This is our ruling, which we the members of the Tribunal pronounce, order and sign.