ADMINISTRACION
DE JUSTICIA

NATIONAL HIGH COURT
CRIMINAL DIVISION
PLENARY SESSION

APPEAL against Ruling
Preliminary Proceedings 157/2008
Central Magistrates' Court No. 4

DISSENTING OPINON REGARDING RULING 1/2009, issued by the Magistrates Manuel Fernandez Prado, Jose Ricardo de Prada Solaesa, Clara Bayarri Garcia and Ramon Saez Valcarcel

1. Background

The Division's Ruling states that the principle of universal jurisdiction is not of an absolute nature and that it is governed by the criteria of subsidiarity, which must be applied as a priority over the criteria of concurrent jurisdictions, so that since the events "have been investigated and are being investigated" in the State of Israel, the Public Prosecutor's appeal is accepted and the preliminary proceedings are definitely shelved.

We do share these arguments because they entail an outright denial of universal jurisdiction to prosecute the most severe crimes under international law, nor do we support the decision, which creates a jurisdiction vacuum and favours impunity of the conduct subject matter of the proceedings.

Before explaining the reasons for our discrepancy some questions regarding the facts and the language used must first be clarified. The conduct under examination did not consist, as stated in the resolution in an acritical manner, in *dropping a one-tonne bomb on the house of Salah Shehadeh, leader of the terrorist organisation Hamas.* The Al Daraj neighbourhood in the city of Gaza, Palestinian territory occupied by Israel, is one of the most densely populated areas in the world. The bomb consisted of one thousand kilos of explosives. Shehadeh should be considered suspicious of terrorist actions, perhaps as commanding officer of Hamas, but never –without prior trial or conviction- as leader of a terrorist organisation. The association *bomb/house/terrorist leader/unforeseen and inevitable collateral damages* presents a biased factual hypothesis, which we refuse to accept in the name of the culture of legality and of the most elementary respect for basic human rights, especially the right to life.

2. International law crimes and universal prosecution

2.1 The most serious international crimes

The provisional classification of the subject matter of the criminal investigation is the crime against protected persons and property in the case of armed conflict, specified in Articles 608.3, 611.1 and 613 of the Criminal Code (the conduct described is to carry out or order indiscriminate or excessive attacks or make civilians the object of attacks, reprisals or acts of violence with the main purpose of terrorising them), together with fifteen offences of assassination provided in Article 139.1 and of one hundred fifty offences of injury provided in Article 147 and subsequent ones. In consequence, we are dealing with offences against the International Community, in other words the most serious crimes under international law.

It is important to highlight the different treatment to be given to the different charges covered under the principle of universal jurisdiction in Article 23.4 of the General Judiciary Act. Drug trafficking or terrorism are not considered in the same manner as war crimes or genocide. This is because the latter form part of serious, or first degree, crimes under international law, and criminal prosecution of these crimes, irrespective of the place where they are committed, is provided and in some cases required in international treaties and under international customary law. Thus, the *Updated set of principles for the protection and promotion of human rights through action to combat impunity* (Human Rights Commission E/CN.4/2005/102/Add.1, 8.2.2005) first establishes, as serious offences, the serious violations of the Geneva Conventions of 1949 and Additional Protocol I thereto of 1977, together with the crime of genocide and crimes against humanity. These are the crimes, and not others, that are assigned to the competency of the International Criminal Court under Article 5 of the Rome Statute, Article 1 of which considers the most serious crimes with international significance. In other words, we are dealing with the core of international criminal law, which deals with the most atrocious international crimes, including, amongst others, excessive attacks against civilian populations that are innocent because they do not intervene in the conflict, for the purpose of terrorising them.

2.2 Obligation to prosecute war crimes

International law obliges all states to prosecute war crimes. Specifically, in reference to crimes against protected civilians in armed conflicts, Article 146 of the Fourth Geneva Convention states that each party State , "*shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, any such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts*" (common wording that appears in the four conventions of 1949, so Articles 49, 50 and 129 of the other three treaties are identical). The obligation to prosecute and if fitting, punish is unanimously

acknowledged under international law in connection with war crimes in armed conflicts of an international nature. These conventions are universally accepted, as they have been signed by the immense majority of States. This is an inevitable fact, which clearly sets the case under consideration apart from other cases. Our criminal code has classified these crimes and provides punishments for them; in accordance with Article 96 of the Constitution, the Clauses of the Convention form part of our legal system and it is difficult to accept that a domestic law can repeal this obligation to investigate the facts and prosecute the persons responsible for having committed them.

By virtue of the principle of universal jurisdiction, any State can exercise jurisdiction against serious offences for the interest of the international community, irrespective of the place where the crime is executed and the nationality of the perpetrator or the victim (this is stated in the Preliminary Recitals of General Act 12/2007, which included clandestine immigration in Article 23.4 of the General Judiciary Act and Article 5.1 of the International Criminal Court). The reason for the existence of universal jurisdiction is to avoid the (tremendous impunity) of these crimes, impunity which to a great extent is due to the position of the perpetrators within the State's power structure; because war crimes, crimes of genocide and against humanity, torture and enforced disappearances share a common element: they are State crimes, in the worst sense. This is why it is difficult, and on occasions impossible, to pursue serious international crimes, whether it be because the perpetrators hold power, in other words as ruling authorities, or because they have the capacity to neutralise legal action. This case under consideration is exemplary: the defendants were, at the time the air attack caused the death of innocent civilians, the leading government authorities and top military commanding officers of the State of Israel.

Universal jurisdiction seeks to provide a minimum protection of basic human rights, in the first place of the right to life, by means of procedural guarantees. We must reiterate the idea that some crimes are so atrocious that they cannot remain unpunished. The Division's decision does not take into account this aspect of the problem, impunity, or the need to put an end to it.

2.3 Characteristics of the subject matter of investigation

In order to place the issue in the proper context, it is essential to know the opinion of the United Nations. In his report of 29.1.2007 (A/HCR/4/17), the Special Rapporteur on the situation of human rights in the occupied Palestinian territories highlighted situations of serious breaches of humanitarian international law regarding which no kind of accountability has been demanded. The report describes the situation as a human drama – more than eighty per cent of the population of Gaza, subject to an illegal blockade, live under the threshold of poverty-, which is considered as a type of collective punishment that violates the Fourth Convention of Geneva of 1949. The Special Rapporteur particularly denounces that "*the*

indiscriminate use of military power against civilians and their property has given rise to serious war crimes." "Since the year 2000, more than 500 persons have been killed in targeted assassinations, in particular a considerable number of innocent victims."

And the report concluded that "*even though individual criminal liability is important, the liability of the State of Israel for the violation of the obligatory rules of international law in its actions against the Palestinian people should not be disregarded."* This report contained information regarding the bombarding of houses that were lived-in, located in densely populated areas, of military actions that had killed dozens of innocent civilians, similar to the events that were subject matter of prosecution in our jurisdiction, such as the bomb dropped over Beit Hanoun on 8.11.2006, and Israel's refusal to authorise an international investigation. The Rapporteur stated that "*the fact that no one was made liable for the atrocity committed is an example of the culture of impunity that prevails in the Israeli Defence Forces."*

The ruling that we disagree with justifies what it calls the "*deactivation*" of the principle of concurrence, on the basis of the "*clear prevalence of trust in the Rule of Law"* (Legal Grounds number 4, first paragraph). This is false; a statement in the void, without any analysis of the context, that does not make sense. In addition, it is possible to remove from rule of law its real content and convert it into a mere slogan. We have already seen how it is possible to legalise extrajudicial executions and the correlative death of innocent civilians as proportionate actions in the struggle against terrorism. However, this situation cannot be endorsed or accepted as legitimate from the perspective of international legality. This is inadmissible under the rule of law, irrespective of how degraded its concept of legality and mandatory commitment to the respect of human rights may be, or of the extent to which its internal situation may have deteriorated.

The Principles regarding the effective prevention and investigation of extra-legal, arbitrary and summary executions approved on 24 May 1989 by the United Nations Economic and Social Council (ECOSOC) through resolution 1989/65 and adopted by the United Nations General Assembly in resolution 44/162 of 15 December 1989, states that " *Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This*

prohibition shall prevail over decrees issued by governmental authority"; in addition, "*There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances;*" "*Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed."*

The State of Israel, with its targeted assassinations carried out by the armed forces and with a permissive jurisprudence, with the pretext of engaging in a legitimate war against terrorism, which habitually results in the death of innocent civilians, has caused these principles of civilisation contained in international law to be in crisis. On the basis of that same logic, it breaches its obligation to investigate, and if fitting, to punish said conducts, which it initially considers admissible and thus does not demand any liability from the perpetrators, in breach of international legality.

In the report on the year 2006, the Special Rapporteur for extra-legal, arbitrary or summary executions (E/CN.4/2006/53, of 8 March 2006) specifically referred to "*transparency in armed conflicts: liability for violations of the right to life in situations of armed conflict and occupation"* and warned of the current danger of going backwards fifty years in respect to the advances made to have the law respected in armed conflicts and specifically in connection with the Geneva Conventions of 12 August 1949, which established for the first time the legal obligation of States to investigate alleged illegal homicides and to prosecute the perpetrators. The report reaffirms the absolute nature of the "*obligation to investigate – as this would eviscerate the non-derogable character of the right to life"; "regardless of the circumstances, investigations must always be conducted as effectively as possible and never be reduced to a mere formality…The State obligation to conduct independent and impartial investigations into possible violations does not lapse in situations of armed conflict and occupation, … while the modalities of this obligation in situations of armed conflict have not been fully settled, some points are clear: States must establish institutions capable of complying with human rights law obligations; there is no double standard for military justice…The legal obligation to effectively punish violations is as vital to the rule of law in armed conflict as in peace. It is thus alarming when States punish crimes committed against civilians and enemy combatants in a lenient manner. The legal duty to punish those individuals responsible for violations of the right to life is not a formality. Punishment is required in order to ensure the right to life by vindicating the rights of the victims and preventing impunity for the perpetrators. Therefore, States must punish those individuals responsible for violations in a*

manner commensurate with the gravity of their crimes."

The Rapporteur went on to state that "*the obligation to investigate is part and parcel of the obligation to ensure the right to life and, thus entails more than the determination of criminal responsibility. States are also responsible for undertaking the systematic supervision and periodic investigation necessary to ensure that their institutions, policies, and practices ensure the right to life as effectively as possible. Canada's experience in Somalia illustrates the complementary roles of criminal and non-criminal investigation. Canada prosecuted and punished several soldiers for their actions in Somalia, but it also established a Commission of Inquiry to determine the institutional defects that allowed those abuses to occur. By identifying pervasive problems in how rules of engagement were drafted, were disseminated through the chain of command, and were taught to soldiers on the ground, Canada improved its institutional capacity to better ensure the right to life in the future. States must constantly monitor and investigate whether they are effectively ensuring human rights law and adopt all necessary measures to prevent the recurrence of a violation."*

2.4 The concurrence of jurisdictions to avoid impunity is a consequence of universal prosecution.

The principle of universal competence and the concurrence of jurisdictions is the result of the obligation to prosecute crimes. All jurisdictions are equals because the idea is to protect property, which transcends the victims themselves to the international community. This is stated in Supreme Court Judgment 87/2000: "*its logical consequence is the concurrence of jurisdictions; in other words, the concurrence of competent States."* The Constitutional Court has established the absolute character of universal jurisdiction in our legal system (Constitutional Court Judgment 237/2005) and in consequence, that subsidiary jurisdictions cannot act as a limit –because it would be contrary to the universal principle- but rather as a regulating element in the case of concurrent jurisdictions. There is no subordination or primacy possible; it simply entails determining which jurisdiction is best prepared to prosecute the events.

Subsidiarity was linked to the old Westphalian paradigm of non-intervention. The obligation to pursue and to avoid impunity has converted said principle into an old-fashioned guarantee of impunity. In current international law the paradigm of universal validity of human rights is what prevails. However, this not entail an obstacle to accepting that certain States are first obliged to engage in the pursuit of crimes due to their proximity with the events, which then triggers the supplementary actions of the other States. Subsidiarity and supplementarity are not synonymous terms, whether on the basis of their meaning or their effect. Supplementary intervention seeks to mitigate the deficiencies in a prosecution and operates in the face of lack of will or effectiveness of the State that is first obliged to act (see as reference the cases mentioned in Articles 17.2 and 17.3 of the Statutes of the International Criminal Court.)

Thus, the duty to pursue crimes under international law has nothing to do with the territory. The *locus delecti* is a criterion to determine jurisdiction, but is not the deciding factor nor is it the only one. This is particularly applicable in the case under consideration: the events took place in Gaza where the Palestinian Authority has legal competence over the territory. The Public Prosecutor of the International Criminal Court even announced a few months ago that the possibility of extending the Court's jurisdiction to the Palestinian Occupied Territories was under study, which would acknowledge de facto the international status of a State with the possibility of ratifying the International Criminal Court's Statute.

Furthermore, due to the perpetrators' position within the State structure, frequently the territorial jurisdiction does not investigate or prosecute the perpetrators of major crimes against humanity. This is why, in order to avoid impunity, international law has made possible- in the case of war crimes in which intervention is obligatory- the intervention of other national jurisdictions.

The investigation initiated by the Central Magistrates' Court No. 4 on the basis of the principle of universal competence does not entail interference in the internal matters of the State of Israel or in its sovereignty. Because international crimes, plus serious violations of human rights, are not an internal affair of States, and in their respect the principle of non-interference has no effect. The international legal system obliges States to respect legality, and in order to avoid impunity and jurisdiction gaps it obliges national jurisdictions to pursue aberrant crimes under international law, in particular war crimes. The only legal limit is *res judicata*, and even there the limits are not absolute (for example, jurisprudence of the European Court of Human Rights permits a double trial in different States with certain reservations and with respect to the principle of proportionality).

International criminal law is thus applied indirectly by national courts; in theory, its direct application would correspond to an international court, in particular by the International Criminal Court.

3- Universal Jurisdiction in Spain. Regulation criterion in case of conflict of jurisdictions

In its judgment 237/2005, the Constitutional Court expressed the need to establish some rule of priority in the case of conflicts of jurisdictions. For these cases, it argued that there are significant reasons, both procedural and political and criminal, to endorse the priority of the *locus delicti*, which is part of the classical heritage of International Criminal Law.

The criteria of priority only expresses the State of Israel's particularly intense relationship with the facts, which more than a right should entail, *prima facie,* an obligation to investigate in an effective manner and also to criminally

prosecute the perpetrators, if required. Nonetheless, Israel's institutional position of questioning international human rights and international humanitarian law standards in its particular strategy to combat terrorism puts this priority in crisis. It is Israel that wishes to establish, unilaterally and irrespective of international consensus, different rules at the service of its own interests, arguing that classic rules cannot be applied to new situations. The response to said attitude, pursuant to international law, is to reaffirm the need of supplementary intervention of other national jurisdictions in order to avoid impunity.

4. There no matter adjudged, or pending suit. Effective and sufficient investigation

Furthermore, there is no matter adjudged or pending suit, pursuant to international standards. For this purpose we must resort to the abundant jurisprudence of the European Court of Human Rights. Because the legal and administrative actions taken in Israel are far from complying with the criteria of effective investigation established by the jurisprudence of the European Court of Human Rights.

The European Court of Human Rights has unequivocally expressed itself: the obligation to protect the right to life imposed by Article 2 of the European Convention on Human Rights requires that an effective investigation be carried out when use of force has caused the death of a person (judgments *McAnn et al versus United Kingdom*, of 27.9.1995, *Kaya versus Turkey* of 19.2.1998, amongst others).

In the judgments *Hugh Jordan, Kelly et al, Shanaghan and Mckerr versus United Kingdom*, all four of 04.05.2001, the European Court of Human Rights examined the situations of possible extra-legal executions and concluded that, notwithstanding the initiation of criminal investigation procedures, the latter had not satisfied the requirement of sufficient quality, due to the inactivity or the excessive duration of the investigation, as a result of which it considered that Article 2 of the Convention had been breached.

In the matter *Finucane versus United Kingdom*, 1.7.2003, in reference to the assassination of a well-known Northern Irish lawyer by a paramilitary "loyalist" group, the Court established general principles regarding what should be considered an effective investigation for the purpose of complying with the obligation States have to protect human life. In this sense it established the following: "*The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The type of investigation that will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They*

cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures… For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events… This means not only a lack of hierarchical or institutional connection but also a practical independence… The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard… A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts… For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

These principles comprise the basis standards used by the European Court to define the concept of effective investigation. In the case *Fatma Kaçar versus Turkey*, of 15.7.2005, the Court declared that here had been breach of Article 2 of the Convention due to insufficient investigation even though there existed pending criminal proceedings before the domestic courts against the person indicted for the assassination, on the basis of irregularities detected in handling the process due to lack of effective pursuit, whether for not having followed certain lines of investigation, of the existence of periods of inactivity and unjustified delays, of the absence of information to the victims, of inconsistencies in evaluating the evidence or of not having focused the investigation more on certain persons.

The cases *Isayeva (I and II) against Russia*, of 24.2.2005, are particularly relevant, since the Court reaffirmed these principles on analysing conducts performed in a war context. The first case involved bombings by the Russian army over Katyr-Yurt in Chechenia, which had caused civilian victims, and examined the validity and effectiveness of the investigation carried out, initially of a military nature and later judicialised. The Court concluded that there had not been an

effective investigation, in view of the defects of the investigation, including lack of diligence on the basis of the amount of time that transpired, closing the investigation on the basis of the report presented by the military experts, who endorsed the legality and proportionality of the military operation, in contradiction with the existing evidence, and the impossibility for the victims to respond to the results of the report. In *Scavuzzo-Hager et al versus Switzerland*, of 7.2.2006, the Court added that civilian proceedings "*are open to the initiative of the complainants, and not of the competent authorities, in addition to not involving identification or punishment of the perpetrators of the punishable acts. As such, they cannot be taken into account within the framework of an inquiry devoted to clarifying respect for the obligations of State procedure in connection with Article 2 of the Convention.*"

Spanish constitutional doctrine offers similar guidelines to analyse the sufficiency of a criminal investigation, on the basis of a premise: in some cases the right to the effective protection of the courts is the sole (and ultimate) guarantee in the face of arbitrariness of those in power. When the activity of the courts entails the safeguard of life or of the integrity of persons, as in cases in which the suspects are agents of the State for crimes of torture, inhuman or degrading treatment, "*it involves a protection of the courts that is reinforced and that cannot be compared to any other petitions for court assistance, because protection is requested against the breach of a fundamental right that constitutes an absolute right, indemnity of which depends essentially on said protection.*" (Judgment of the Constitutional Court 107/2008, for all). In these cases the right to effective protection is only satisfied if the investigation carried out is sufficient and effective, as the requested protection initially consists in having the events investigated. So that the right established in Article 24.1 of the Constitution is considered to be breached if an investigation is not initiated or if it is closed prematurely when there exist reasonable suspicions that a crime may have been committed and it appears that said speculations can be clarified.

On the basis of these criteria, it does not seem acceptable to accept as sufficient investigation what a governmental control commission has been charged to do to analyse the military intelligence errors that caused the death of innocent civilians. In fact, simply raising the problem of the assassination of protected persons in terms of *incident, collateral effect, error in intelligence reports, controlled or directed liquidation and preventive executions*, clashes directly with the concept of the dignity of persons deprived of life in this manner.

Nor can we forget that acknowledgement by our courts of the effectiveness of an investigation, merely because it appears to be effective, could constitute an indirect breach of the Constitution. This is what the Constitutional Court has said in this respect: "*Spanish public authorities may indirectly breach fundamental rights when they acknowledge, endorse or accept as valid resolutions adopted by foreign authorities…The control of the Spanish judiciary to ensure that the actions of a*

foreign public authority comply with fundamental rights…does not disappear… There exists an absolute core of fundamental rights pursuant to which Spanish courts can and must assess the repercussion of the acts of the public authorities of foreign States" (Constitutional Court Judgment 123/2009).

5. Special analysis of the investigations and prosecution carried out by the Israeli authorities

The fourth legal ground, sections B, C and D, of the resolution with which we disagree analyses the information provided by the State of Israel and concludes that there have been and currently are criminal and civil proceedings underway to investigate the events that occurred at midnight on 22.7.02 in the Al Daraj neighbourhood of the city of Gaza, stating that real actions have been taken, first administrative ones and then judicial, to verify whether crimes were committed.

This conclusion, however, does not coincide with the contents of the information received, and this is even reflected in the information referred to by the majority resolution.

Thus, in section B), in referring to the initial "military field investigation" sent to the Military Advocate General, the conclusion is that "*this could not serve as the basis of a criminal investigation*."

In section C), which the majority resolution describes as criminal proceedings, mention is made of a complaint presented by the NGO Yest Gvul to the Supreme Court, *requesting that the decisions regarding not initiating criminal proceedings* in connection with planning and implementing the "preventive attack" against Salah Shehadeh *be declared null and void*. The Attorney General asked that the petition to initiate criminal proceedings be rejected, and the Supreme Court, following the suspension until resolution of the proceedings regarding "targeted assassinations of terrorists", resolved to ask the State whether it was willing to constitute an "Objective Committee" to examine the events. This Commission was created by the governmental authority, which appointed its members and which continues to carry out its work. The conclusions of this commission will, in due course, be subject to judicial review.

We must point out that the Supreme Court's resolution of 18.12.2008, sitting as High Court of Justice, which is mentioned in section C) 10, simply rejected the appellant's petition to go back to the initial petition to have the decision of the Government's Legal Adviser to not initiate a criminal investigation cancelled. And it specifically states: "*the early stage in which it is at present, when the Commission has not yet completed its tasks and has not yet issued its conclusions, which will be examined by the competent authorities, amongst other matters in connection with the scope of the need to take supplementary judicial measures in the case which is the subject matter of the appeal* (legal ground 13 of

the resolution of the Supreme Court of Israel).

Given this situation, the conclusion cannot be that a criminal judicial investigation of the events is underway in Israel, as stated in the majority's decision, because the information provided indicates the contrary. There is only a governmental commission which is preparing a report on whether it is appropriate to initiate a judicial investigation, and as long as there is no decision to initiate criminal judicial proceedings the lispendence established in the majority's resolution lacks any kind of basis. Civil procedures to claim damages mentioned in the Division's ruling cannot be an obstacle to impede criminal action before the Spanish courts.

Moreover, the actions followed in the State of Israel cannot be considered criminal judicial proceedings since the appellant Attorney General itself, in support of its arguments, refers to the criteria established by the jurisprudence of the European Court in the cases agasint Huseyin Gozutok and Klaus Brugge regarding the effectiveness of *res judicata* of shelving proceedings initiated against an accused person, ordered by the Attorney General and not by a judicial resolution.

The European Union Court of Justice, judgment of 11 February 2003 issued in the criminal proceedings agaisnt Huseyin Gozutok and Klaus Brugge for petitions for a prejudicial resolution by Germany and Belgium, establishes that shelving proceedings initiated against an accused person, ordered by the Public Prosecution without the intervention of a judicial body, can produce effects of *res judicata* to impede carrying out other proceedings for the same events in another country of the Union. Said judgement states that the expression "adjudged with a final judgement" must not be interpreted as meaning that it cannot be applied to public action abatement proceedings without the intervention of a court. But in comparison with the case under consideration, the ones examined by the European Court involved the abatement of criminal action as a result of having recurred to simplified solutions provided for minor offenses in which the accused person had accepted and had already served the penalty proposed by the Public Prosecution, whereas this case does not involve the abatement of criminal proceedings and there is no analogy with simplified proceedings accepted by the accused persons.

The Public Prosecutor's appeal attributes to the Examining Magistrate an erroneous interpretation regarding the judicial nature of the bodies that have intervened in the case, which it believes is due to mistaking a criminal investigation with an investigation carried out by an Examining Magistrate, forgetting those countries in which criminal investigations correspond to the Public Prosecution. However, according to the opinion of the dissenting magistrates, this is not correct, because in this case the Attorney General's decision in Israel was to not initiate a criminal investigation, which has only one meaning, namely that up to this moment and as long as said decision is not repealed, no criminal action has been taken, so that there is no matter adjudged or suit pending.

6- Definitely shelving the proceedings generates a situation of jurisdictional vacuum

Lastly, we must point out that in its appeal the Public Prosecutor requested that *competence to try the events subject matter thereof be considered without effect due to the preferential nature of the jurisdiction of the State that is trying the events, and resolve to shelve the proceedings,* without stating whether they should be shelved temporarily or definitely, and the majority's resolution, in deciding that they be shelved definitely, on the basis of a situation it describes as lispendence and not matter adjudged, is contrary to the nature of the situation of lispendence, which should never be the basis for definitely shelving proceedings, which is proper of a matter adjudged, but rather provisional shelving because there are, precisely, ways in which to end the proceedings other than a decision on the merits and which are not of the same nature as a definite trial. This is acknowledged in this manner in the bill that is currently being processed.

7. Conclusion

The conduct that was being investigated in the Preliminary Proceedings of the Central Magistrates' Court no. 4 is not being investigated in Israel, nor are the perpetrators thereof being criminally prosecuted, which said country was obliged to do pursuant to international law. In consequence, there is no obstacle to the exercise of jurisdiction in Spain by virtue of the principle of universal competence, as the conduct involves the most serious international crimes, committed in this case against protected persons and property in an armed conflict.

The appeal filed by the Public Prosecutor must be rejected.

The definite stay of proceedings adopted by the Division is going to generate a jurisdiction vacuum which international law bans by means of universal jurisdiction and is going to favour the impunity of said crimes.

In Madrid, on the 17 of July 2009.