

**CENTRAL MAGISTRATES' COURT NO. FOUR
AUDIENCIA NACIONAL (SPANISH NATIONAL COURT OF JUSTICE)
MADRID**

Preliminary Report no.: 157/2.008-G.A.

COURT ORDER

Madrid, on the twenty-ninth of January two thousand and nine.

FACTUAL BACKGROUND.

FIRST.- By the representation of Mr. RAED MOHAMMED IBRAHIM MATTAR, Mr. MOHAMMED IBRAHIM MOHAMMED MATTAR, Mr. RAMI MOHAMMED IBRAHIM MATTAR, Mr. KHALIL KHADER MOHAMMED AL SEADI, Mr. MAHMOUD SOBHI MOHAMMED EL HOUWEIT and Mr. MAHASSEL ALI HASAN AL SAHWWA, an action was filed against

Mr. DAN HALUTZ, Commander of the Israeli Air Forces at the time the facts took place
Mr. BENJAMIN BEN-ELIEZER, Israeli Defence Minister at the time the denounced facts took place,

Mr. DORON ALMOG, Southern Command GOC of the Israel Defence Forces,
Mr. GIORA EILAND, Head of the Israeli National Security Council and National Security Advisor,

Mr. MICHAEL HERZOG, Military Secretary to the Israel Defence Ministry

Mr. MOSHE YA'ALON, Chief of Staff of the Israel Defence Forces,

and **Mr. ABRAHAM DICHTER**, General Director of the General Security Service of Israel, and, that, by virtue of the following facts:

“On 22 July 2002, between 23.30 and 24.00 hours, an Israeli F16 fighter plane dropped a one-ton bomb on the Al Daraj neighbourhood of the City of Gaza. The main objective of such attack was the house of Salah Shehadeh, who was suspected of being one of the Hamas commanders, due to which the objective of the mission was killing him. The house of Salah Shehadeh was directly hit by a bomb of great power, however the house was located in one of the most densely populated residential areas in the whole world. Close to the house occupied by Salah Shehadeh was the house occupied by Mr. Mattar's family. There were less than two meters between the two houses. As a result of the bombing, his house was totally destroyed and seven members of his family were killed.

Thus, as a result of the explosion caused by the bomb, fifteen people were killed –most of them children and babies–, one hundred and fifty were injured –some of them with serious injuries and permanent damage–, eight houses of the surrounding area were totally destroyed, nine houses were partially destroyed and twenty-one suffered moderate damages.

As a consequence of the bombing, the following persons were dead:

Iman Ibrahim Hassan Mattar

Dalia Ra'ed Mohammed Mattar

Ayman Ra'ed Mohammed Mattar

Mohammed Ra'ed Mohammed Mattar

Dina Rami Mohammed Mattar

Alaa' Mohammed Ibrahim Mattar

Miriam Mohammed Ibrahim Mattar

Muna Fahmi Mohammed Al-Howaiti

Subhi Mahmoud Subhi Al-Howaiti

Mohammed Mahmoud Ali Al-Sa'idi

Khader Mohammed Ali Al-Sa'idi

Yousef Subhi Ali al-Shawa

*Iman Salah Mustafa Shihada
Leila Khamis Yousef Shihada*

SECOND.- Under resolution of this Court of 25 August 2008, it was agreed, prior to the ruling on the action's leave to proceed, to send an International Letter Rogatory under the provisions of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, to which both Spain and Israel are parties, requiring information on the existence in such State of any judicial proceedings which had been processed or were in process concerning these facts.
As of the date hereof, the authorities of the State of Israel have not met the request of international legal cooperation.

LEGAL GROUNDS

FIRST.- Title I of Book I of the *Ley Orgánica del Poder Judicial* (Spanish Law on the Judiciary) sets forth the extension and limits of the Spanish jurisdiction, which are ruled concerning the criminal scope under its article 23, with its paragraph 4 providing the following:

"Likewise, Spanish jurisdiction shall be competent to hear the facts committed by Spaniards or foreigners outside of the national territory likely to be categorised under the Spanish criminal law, as any of the following crimes:

- a) Genocide.*
- b) Terrorism.*
- i) And any other which, according to the international treaties or conventions, should be prosecuted in Spain."*

Furthermore, the Rome Statute of the International Criminal Court of 17 July 1998 provides the following in its Preamble:

*"Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
Recognizing that such grave crimes threaten the peace, security and well-being of the world,*

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"

It provides the following under its article 8:

"For the purpose of this Statute, "war crimes" means

a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- i) Wilful killing;*
- b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:*
 - ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;*
 - iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects;*
 - v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;"*

In response to this international commitment, the Spanish internal law was amended in the Chapter of the Criminal Code concerning Crimes against the International Community, and hence articles 608, 611, 612, 613 and 614 were amended to establish a readjustment in

criminal offences as to criminal prosecution of Crimes against the International Community, and, thus, it is provided as follows:

Article 608:

For the purposes of this Chapter, protected persons shall be:

3º Civilian population and civilian individuals protected under the IV Geneva Convention of 12 August 1949 or under Protocol I Additional to the Geneva Convention of 8 June 1977.

Article 611.

A prison term of ten to fifteen years, without prejudice to the sentence arising for the results produced, shall be the sentence for such person who, in an armed conflict:

1º Performs or causes to be performed indiscriminate or excessive attacks or makes the civilian population the object of attacks, reprisals or acts or threats of violence with the purpose of terrifying it.

Under such regulations, it may be concluded that Spain empowers its jurisdiction scope to pursue typical offences such as genocide, terrorism or crimes against the persons protected under the law of armed conflicts, whether occurring in its territory or outside of it (cases of territoriality or extraterritoriality), should the criminal prosecution be appropriate in accordance with the provisions in the Spanish Law on the Judiciary.

SECOND.- In the specific case raised in this action, we are faced with an armed attack the aim of which, as appears to be inferred from the facts described therein, was putting an end to the life of a person allegedly belonging to a terrorist organization known as "HAMAS". If this was the case, and admitting the existence of an armed conflict or war between the State of Israel and such terrorist organization, we could turn to the doctrine established by the Spanish Supreme Court in its Judgment of 11 December 2006 (Couso Case), providing the following:

"It is widely known that, in the field of international law, the State's «ius puniendi» had been traditionally considered as an emanation from its own sovereignty, limited by the frontiers of its territory and the non-intervention principle (see art. 2.7 of the Charter of the United Nations). The criminal intervention of the international community in the decisions of a State which may affect international peace has one of its first recognitions in the Covenant of the League of Nations (art. 14), with the establishment of a Permanent Court of International Justice, until reaching the constitution of the International Criminal Court under the Rome Statute of 1998, with the creation in the meantime of the Courts of Nuremberg and Tokio –after the Second World War–, art. VIII of the Geneva Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and more recently the establishment of the Courts for the former Yugoslavia and Rwanda.

The expansion of the jurisdiction scope beyond the State's territorial scope has made its way through three key principles of the so-called international criminal law: a) the personality principle; b) the real or protection principle; and c) the principle of universal justice. Among them, the latter is undoubtedly the most argued one both in the doctrinal field and in the legislative and jurisprudential fields.

In our legal system, it is the Spanish Organic Law on the Judiciary which rules the scope of the Spanish jurisdiction, setting forth the territoriality principle (art. 23.1), together with the personality principle (art. 23.2), the real or protection principle (art. 23.3) and, finally, the principle of universal justice (art. 23.4), which is the one applicable in the issue under discussion in this case.

Art. 23.4 of the Spanish Organic Law on the Judiciary provides that «the Spanish jurisdiction shall be also competent to hear the facts committed by Spaniards or foreigners outside of the national territory likely to be categorised under the Spanish criminal law, as any of the following offences: (...). h) And any other which, according to the international treaties or conventions, should be prosecuted in Spain». This last generic reference completes the list of offences concerning which the international community has subscribed certain Treaties or Conventions (genocide, terrorism, piracy, currency forgery, prostitution and corruption of minors and drug trafficking).

In the issue with which we are confronted in this case, we have the four Geneva Conventions on the Laws of War, of 12 August 1949, with their corresponding Protocols Additional, one of them (IV Convention) relating to the protection of civilian persons in time of war, wherein art. 146 provides that «the High Contracting Parties undertake to enact any

legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case (...). Furthermore, art. 147 of such Convention sets forth that «grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly».

A consequence of the foregoing Conventions has been the introduction in the 1995 Criminal Code, as an absolute novelty in our legal system, of Chapter III of Title XXIV («Crimes against the International Community»), wherein art. 611.1 sets forth a punishment for any person who «in an armed conflict: 1. Performs or causes to be performed indiscriminate or excessive attacks or makes the civilian population the object of attacks, reprisals or acts or threats of violence with the main purpose of terrifying it»; with the clarification under art. 608 of the Criminal Code that «for the purposes of this Chapter, protected persons shall be: (...) 3. Civilian population and civilian individuals protected under the IV Geneva Convention of 12 August 1949 or under Protocol I Additional to the Geneva Convention of 8 June 1977».

Lastly, we wish to recall the doctrine expressed by the Constitutional Court in the “Guatemala Case”, providing that: “«the ultimate basis of this competence-attributing rule lies in universalising of the jurisdictional competence of the States and their bodies to hear certain facts in the prosecution of which all States are interested, ...». And, to this respect, it has declared that «art. 23.4 of the Spanish Organic Law on the Judiciary grants, in principle, a very wide scope to the principle of universal justice, since the sole express limitation it introduces concerning this is that of the *res judicata*»; thus, the Constitutional Court –which has the last word in issues relating to constitutional guarantees (see art. 123 of the Spanish Constitution)– comes to conclude that «the Spanish Organic Law on the Judiciary sets forth an absolute principle of universal jurisdiction» (see. *Judgment of the Constitutional Court 237/2005; F. 3º*).

THIRD.- Pursuant to the rules previously mentioned, as well as the jurisprudential doctrine established in their enforcement by both the Supreme Court and the Constitutional Court, it is appropriate to declare the competence of the Spanish Courts and Tribunals to hear this case, and in view of the account of the facts made in the action, it may be concluded that the denounced facts evidence a “*notitia criminis*” which must be investigated, which is that, with the purpose of committing the murder of an alleged member of the terrorist organization “HAMAS”, Salah Shehadeh, the Armed Forces of the State of Israel, in the knowledge of the consequences which might be entailed by such action, decided to drop an explosive device of great power, which caused, in addition to the death of the aforementioned Salah Shehadeh, the death of another fourteen people, as well as injuries of varied seriousness to another one hundred and fifty Palestinian citizens, including children and babies, since they amount to facts which on an evidence basis must be considered as a Crime against Humanity, and concerning which the international commitments subscribed by Spain impose prosecution. Indeed, we are confronted with the existence of an attack against civilian population, already illegitimate from the start, since it had as its objective the commission of a murder, that of Salah Shehadeh, which turns into a fact that must be prosecuted under the principle of universal jurisdiction since the attack is the outcome of an action which is reckoned as clearly disproportionate or excessive and which, should it be evidenced during the course of these proceedings to follow a pre-conceived or pre-determined strategy, could give rise to a categorization of the facts other and even more serious than that which may be considered initially.

All in all, the facts can and must be investigated by the Spanish jurisdiction, all the more since no response whatsoever has been received to the request made by this Court concerning relevant information to the State of Israel, nor is there any evidence that any proceedings have been brought to investigate the facts.

FOURTH.- In accordance with the provisions of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, it is appropriate to request to the authorities of the State of Israel that the defendants be served with the action brought against them, summoning them to appear before this Court in the dates to be determined, and that the Judicial Commission of this Court be authorized to travel to the Gaza Strip to take the statements of the plaintiffs, as injured parties and witnesses of the facts which are the subject matter of these proceedings.

In virtue of the foregoing.

RULING

I AGREE.- The leave to proceed of the action brought by the representation of Mr. RAED MOHAMMED IBRAHIM MATTAR, Mr. MOHAMMED IBRAHIM MOHAMMED MATTAR, Mr. RAMI MOHAMMED IBRAHIM MATTAR, Mr. KHALIL KHADER MOHAMMED AL SEADI, Mr. MAHMOUD SOBHI MOHAMMED EL HOUWEIT and Mr. MAHASSEL ALI HASAN AL SAHWWA against Mr. DAN HALUTZ, Mr. BENJAMIN BEN-ELIEZER, Mr. DORON ALMOG, Mr. GIORA EILAND, Mr. MICHAEL HERZOG, Mr. MOSHE YA'ALON and Mr. ABRAHAM DICHTER.

An international letter rogatory, addressed to the Authorities of the State of Israel, shall be issued, so that this court order is served to the defendants, together with the action brought against them, and so that they may be summoned, in the dates to be timely determined, in order to take their statement as defendants.

In the same request of international legal assistance an authorization shall be required for the Judicial Commission of this Court to travel to the Gaza territory, to take the statements of the plaintiffs, as witnesses and injured parties.

The same request shall be sent to the Palestine National Authority.

This order shall be served to the parties represented in the action, informing them that an application for amendment and/or a subsidiary appeal may be brought against it within three or five days, respectively.

It is ordered and signed by the Honourable Mr. FERNANDO ANDREU MERELLES, Senior Judge of the Central Magistrates' Court no. four of the Spanish National Court of Justice (*AUDIENCIA NACIONAL*); I witness thereof.

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