TO THE SECOND DIVISION OF THE SUPREME COURT
National High Court. Full Criminal Division
Appeal no. 31/09
Section 2 Proceedings no. 118/09
Court of origin: Central Magistrates' Court no. 4
Proceedings of origin: Preliminary Proceedings no157/08

MR. JAVIER FERNÁNDEZ ESTRADA, Procurator of the Courts no. 561, acting on behalf and in representation of Messrs Raed Mohamed Ibrahim Mattar, Mohamed Ibrahim Mohamed Mattar, Rami Mohamed Ibrahim Mattar, Khalil Khader Mohamed Al Seadi, Mahmoud Sobhi Mohamed El Houweit, Mahassel Ali Hassan Al Sahwwa, as substantiated in the proceedings, appears and as best proceeds in Law, HEREBY DECLARES:
That on the 31st of July I was notified that I had been granted a fifteen day deadline to appear before this Division in order to formalise an appeal to the Supreme Court which was announced and filed against Ruling no. 1/09, of July 9th 2009, issued by the Full Criminal Division of the National High Court (with the dissenting vote of four Magistrates) in Section Two Proceedings no. 118/09, derived from Preliminary Proceedings no. 157/08 in the Central Magistrates' Court no. 4.

And within the deadline granted for this purpose, we hereby formalise by means of this writ an APPEAL TO THE SUPREME COURT for the reasons expressed below.
For this purpose, the essential background facts are referred to, as they are deemed necessary for the proper indictment of the case, together with the arguments for admitting the appeal and the legal grounds on which the appeal is based.

I – BACKGROUND FACTS
In order to gain time, we abstain from reproducing the different sections of the Background Facts and Legal Grounds of the resolution that is being appealed, and merely refer at this point to the full contents thereof, taking them as reproduced, without prejudice to the transcriptions or specific references which, in the course of arguments expressed below in favour of the reasons for the appeal, are made to specific extracts of the appealed Ruling, and merely transcribe the Resolution:

"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 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."

Nonetheless, we do want to highlight in these background facts that the order of the two reasons for appeal which have been formalised is based on their contents, the first being of a procedural nature and the second of a material nature.

II – PROCEDURAL GROUNDS

1- The Appeal is appropriate in accordance to the provisions of the Criminal Procedure Act [Ley de Enjuiciamiento Criminal]

2- In addition, as it has been prepared within the established deadline and form for each reason provided by the Criminal Procedure Act, as mentioned below.

3º- And because this writ is filed by the undersigned Attorney and Procurator, with presentation of the copies thereof, other requirements established in the Law having been fulfilled.

4º- Lastly, because it is filed on behalf of the claimants and affected parties, Messrs. Raed Mohamed Ibrahim Mattar, Mohamed Ibrahim Mohamed Mattar, Rami Mohamed Ibrahim Mattar, Khalil Khader Mohamed Al Seadi, Mahmoud Sobhi Mohamed El Houweit, Mahassel Ali Hassan Al Sahwwa.

III - LEGAL-CRIMINAL GROUNDS

FIRST REASON OF THE APPEAL:

PURSUANT TO SECTION 5.4 OF THE GENERAL JUDICIARY ACT [LEY ORGÁNICA DEL PODER JUDICIAL], DUE TO BREACH OF THE RIGHT TO A LEGAL PROCESS WITH ALL THE GUARANTEES PROVIDED IN ARTICLE 24 OF THE SPANISH CONSTITUTION.

BREIEF EXTRACT OF REASON

The appeal submitted by the Public Prosecution, which was finally accepted by the Criminal Division of the National High Court, is tainted with procedural fraud, bearing in mind that appeals against decisions regarding jurisdictional matters, in the terms in which the initial request was submitted, are not possible.

Thus, by means of a writ of challenge submitted by this party against the appeal presented by the Public Prosecution, we requested that it not be admitted *a limine*, bearing in mind the provisions of section 676 of our Criminal Procedure Act and consolidated jurisprudence of this High Court regarding said matter.

Mention should be made that the rule contained in section 676 of the LECrim [Criminal Procedure Act] is applicable to the ruling issued by the Central Magistrates' Court number 4 on 4 May 2009, which provides that appeals against that type of resolution is not possible.

This party believes that the fundamental right to a legal process with due guarantees has been breached, given that non compliance with the provisions of the procedural act as essential part of the guarantees of all persons and of what has been established by this Division, has resulted in allowing the Public Prosecution to make use of an appeal which is not legally established against resolutions like the one decreed by the Central Magistrates' Court no. 4 when it rejected the Public Prosecution's request to refuse accepting jurisdiction.

EXPANDING ON THE REASON

As an introduction, before getting into the merits of the matter in respect to the reasons submitted later on, we must first refer to a procedural matter, which this party believes is essential in order to examine compliance of the guarantees that should prevail in these proceedings.

On 4 May 2009, the Public Prosecution presented an appeal against the resolution issued by the Central Magistrates' Court no. 4, whereby the former's request for stay of proceedings because "the Spanish courts were not competent" was rejected, said Court

upholding that Spanish courts were in fact competent and that the events reported were sufficiently serious to be investigated.

As mentioned above, this party was opposed to said appeal being allowed, pursuant to the application of section 11.2 of the General Judiciary Act, given that the Public Prosecution was not questioning the facts reported nor the liability of the defendants: it was always opposed to the competence of Spanish courts to try the facts of the complaint, but it never argued that the facts did not constitute an offence or that the defendants were not liable for said acts, which makes the resolution appealed herein, if anything, even more unfortunate.

In said appeal the Public Prosecution argued at length that Spain had not jurisdiction to try the events subject matter of the suit, and finally requests that "the competence to try the facts subject matter of the suit must be declared without effect due to the preferential nature of the jurisdiction of the State that is currently trying the facts, and that the ruling be provisionally stayed."
At the time that the Central Magistrates' Court no. 4 requested that the Public Prosecution express its opinion regarding allowing the suit filed to proceed, the latter submitted a report on 2 April 2009 in which it did not question that the facts constituted an offence but expressed opposition to the jurisdiction of Spanish Courts to try the case.
This, in conclusion, entails that:

THE PUBLIC PROSECUTION'S INTENTION, FROM THE BEGINNING, HAS BEEN TO OPPOSE SPANISH JURISDICTION AS BEING COMPETENT TO TRY THE FACTS SUBJECT MATTER OF THE SUIT.

In response to said report (and to the writs submitted by the other parties intervening in the proceedings), this Court issued a ruling on 4 May 2009, in which it rejected the Public Prosecution's petition: there is no appeal possible against said ruling because the appeal is not against the fact that the events constitute an offence, but rather against the jurisdiction positively assumed by the examining court.
Obviously, the intention of the Public Prosecution clearly entails procedural fraud, since it must be aware of the jurisprudence of this Supreme Court and the contents of section 676 of LECrim, which establish the impossibility of appealing against said resolution.
Thus, by virtue of the provisions of section 11.2 of the LOPJ [General Judiciary Act], this party believes that the appeal submitted should not have been accepted, as that was not the channel nor the time to question the jurisdiction; and in addition, the Public Prosecution intention definitely ended with the ruling issued on 4 May 2009.
The jurisprudence of this High Court is peaceable since the famous Judgment of 25 February 2003 (Guatemala Case), regarding the nature of the Public Prosecution's intention. First of all, and insisting a little more on the Public Prosecution's *petitum*, it was not seeking a ruling for the stay of proceedings, whether unencumbered or provisional, since it was not a question of invoking the causes provided in sections 637 and 641 of the Criminal Procedure Act, but rather a result of the statement that the Spanish Courts did not have jurisdiction.
In this sense, the STS [Supreme Court Judgement] of 25 February 2003 (Guatemala Case) established the following:
"Jurisdiction is one of the expressions of state sovereignty. It is seen as the faculty or power of trying, in other words, of exercising over certain persons and in respect to certain acts, one of the powers of the State, subjecting said persons in the case of

criminal law to the "*ius puniendi*" which the laws assign to the State. In this sense it is of a nature that is prior to competence and cannot be mistaken for competence. Determining competence entails assigning to specific jurisdictional bodies the preferential right to try a certain types of cases over other bodies, but all said bodies had been acknowledged jurisdiction before.

The law expressly regulates certain cases of conflict of jurisdiction. This conflict can arise between bodies that correspond to different types of jurisdictions: between bodies of ordinary jurisdiction and military jurisdiction, and between jurisdictional bodies and the Administration. The former, called conflicts of competence in section 42 of the General Judiciary Act, are resolved by a Special Division of the Supreme Court. The latter are resolved by the Division for Conflicts of Jurisdiction chaired by the President of the Supreme Court and comprising Magistrates of this high court (section 39 of the LOPJ). And the third type of conflict are resolved by the Court for Conflicts of Jurisdiction, chaired by the President of the Supreme Court and comprising Magistrates of said Court and Permanent State Councillors (section 38 of the LOPJ and General Act 2/1987, of 18 May on Jurisdictional Conflicts).

The regulations that establish the competent body to resolve these matters allow us to stress that when the issue is to establish the scope of jurisdiction, whether amongst different jurisdictional orders, or between ordinary and military jurisdictions, the decision is to be made at the highest level.

The problem that is resolved in the Ruling that is challenged is not a problem between the different bodies mentioned above, but rather a matter raised pursuant to section 9.6 of the General Judiciary Act. In this precept, after declaring the non-extendible character of the jurisdiction, previously established in respect to criminal jurisdiction in section 8 of the Criminal Procedures Act, judicial bodies are ordered to examine by the operation of the law the lack of jurisdiction, resolving the issue after hearing the Public Prosecution and the parties involved, issuing a resolution based on arguments and indicating the jurisdictional order that is deemed to be competent.

In addition, we must stress that bearing in mind the characteristics of the specific matter under consideration, no true conflict is possible between jurisdictional bodies regarding the capacity to try the events that have been denounced, because as acknowledged in this Division's Ruling no. 260/1998, of 21 January, at present it is not legally feasible to raise a matter of competence with a foreign court as there is no mechanism or supranational body to resolve the possible positive or negative conflict that could arise. Thus, given the refusal of the appealed Ruling to accept the jurisdiction of the Spanish courts, a negative conflict with another Court cannot be foreseen, and in consequence the resolution adopted should definitely resolve the matter.

The matter under consideration is thus an exceptional case, one that is not expressly regulated by law, which transcends the issue of competence amongst internal jurisdictional bodies and differs from the conflicts mentioned above insofar as it consists in determining the scope of a branch of the Spanish State, the Judiciary, regarding acts committed in territories subject to the sovereignty of another State, the decision being final as it is not possible to engage in a negative conflict of jurisdiction …"

In consequence, the Public Prosecution's claim is resolved, as it involves a matter in connection with national jurisdiction to try a specific case, although it does not involve a jurisdictional conflict, since it is impossible to engage in a negative conflict of jurisdiction, with the State to which an attempt is made to "assign" jurisdiction.

Having clarified the nature of the Public Prosecution's claim, that is, in connection with the jurisdiction of the Spanish Courts, without constituting a conflict of jurisdiction, the

matter raised is what procedural channel will have to be followed in respect to any related matters.
And we find that all matters of jurisdiction of Spanish courts for acts committed abroad, even though they do not technically entail a conflict of jurisdiction, have to be processed in accordance with the provisions of section 676 of the LECr.

In this respect, the aforementioned judgment of the Supreme Court, STS of 25 February 2003, states the following:
"…Section 848 of the Criminal Procedure Act provides that an appeal to the Supreme Court shall only be allowed against final rulings issued by the Provincial high Courts and only due to breach of the law in cases expressly allowed by the law. The second paragraph of the same section states that orders for stay of proceedings shall be deemed final only in the case that the resolution is unencumbered, on the basis of the conclusion that the acts of the preliminary proceedings do not constitute an offence and that someone has been convicted as being guilty for said acts.
Neither the General Judiciary Act not the Criminal Procedures Act specifically establish the appeals that can be filed against the decision adopted within the scope of section 9.6 of the former, nor do they specifically provide whether an appeal to the Supreme Court is possible. It seems reasonable that the final decision in this matter, in view of its exceptionality and special importance insofar as it affects the spatial scope of the jurisdiction of the Courts of the Spanish State, should correspond to the Supreme Court.
Nonetheless, we should add that insofar as we are dealing with the position of a court of instance that issues a final resolution in which it determines the lack of jurisdiction, with no possibility of engaging afterwards in a negative conflict to allow for a final decision by a superior court, the decision adopted is equivalent to the resolution to allow a declinatory plea as provided in section 676 of the Criminal Procedure Act, which this Court has interpreted, since the resolution adopted by the non-jurisdictional Full Court Session of May 8 1998, applied amongst others in STS of July 6 1998, allowing appeals to the Supreme Court except in cases processed in accordance with the General Jury Act [Ley Orgánica del Tribunal del Jurado]."
In other words, this Court, on considering appeals for this type of matter, resolved that on the basis of the application of section 676 of the LECr (as affirmed by this Supreme Court in previous resolutions) in case lack of jurisdiction was declared, appeals shall be allowed, as well as appeals to the Supreme Court.
The matter it resolved was an appeal against the Criminal Division of the National High Court, which rejected jurisdiction, being equivalent to the resolution to all a declinatory plea provided in section 676 of the LECr, so that it is possible to exhaust legal remedies including the Supreme Court.
But what happens if the decision of the judicial body is equivalent to the resolution not to allow the declinatory plea as provided in section 676 of the LECr? According to this precept, no appeal is possible and can only be channelled by means of an appeal of the judgement that may be issued in the future.

Section 676.3 of the LECr establishes that:

"Appeals may be filed against rulings resolving a declinatory plea and rulings allowing exceptions 2, 3 and 4 of section 666. NO APPEAL IS POSSIBLE AGAINST RULINGS THAT REJECT SAID EXCEPTIONS, EXCEPT FOR AN APPEAL AGAINST THE JUDGEMENT, WITHOUT PREJUDICE TO THE PROVISIONS OF SECTION 678."

As mentioned above, STS of 25th February 2003 passed a judgement regarding an appeal against a resolution rejecting jurisdiction, equivalent to a resolution allowing a declinatory plea of jurisdiction, establishing that an appeal was possible, precisely an appeal to the Supreme Court.
In contrast, according to the interpretation of section 676 of the LECr., when a judicial body accepts jurisdiction, the matter is definitely settled, and can only be raised again in an appeal filed against the judgement that is eventually issued.
In its judgement of 24 February 2009, the Supreme Court firmly and categorically expressed itself again in this sense, as follows:
"The issue was deduced as an element of a prior ruling, appealed on the basis of section 676 of the procedural law. We have to analyse whether the ruling that does not allow the declinatory plea submitted as an element requiring prior and special decision.
Section 676 of the procedural act establishes, following the amendment of the General Jury Act, L. O. 5/95 of 22 May, that rulings resolving a declinatory plea and the ones allowing the exceptions 2, 3 and 4 can be appealed. The meaning to be given to the expression "resolution of the declinatory plea " is the one contained in allowing the plea, since that is what is provided in respect to the exceptions 2, 3 and 4 of section 666 and because the following paragraph expressly ESTABLISHES THAT RULINGS THAT DO NOT ALLOW THE DECLINATORY PLEA CANNOT BE APPEALED.
This precept 676 has been the subject matter of a Resolution of the non-jurisdictional Full Division II adopted on 8 May 1998, in which it is deemed that "the current section 676 of LECRim., following its amendment by Act 5/95 of 22 May, must be interpreted in the sense that the appeal considered therein is only acceptable within the scope of competence that the General Act 5/95 assigns to a Jury, and its resolution in this limited field corresponds to the corresponding High Court of Justice. Beyond this procedural sphere the appropriate appeal is an appeal to Division II of the Supreme Court, as established in section 848 LECRim". (STS 60/2004, of 22 January).
The Ruling subject matter of the appeal to the Supreme Court is a Ruling that does not allow the declinatory plea, so it cannot be appealed, without prejudice to the provisions of section 678 of the procedural law, because this is expressly provided in section 676."

In summary: the provisions of section 676 of the LECrim are applicable to the petition filed by the Public Prosecution, and pursuant to what they provide, an appeal cannot be filed against the Magistrates' Court's ruling. In consequence, by virtue of what has been said above, the ruling of May 4 2009, issued by said Court, cannot be appealed in respect to the lack of jurisdiction, so that the appeal filed by the Public Prosecution against said ruling should have been rejected *a limine*, ruling which is the cause of this appeal to the Supreme Court.
Despite our arguments, which we believe are not trivial, the resolution issued by the majority of magistrates of the Criminal Division of the National High Court contains, surprisingly, the following:
"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."

In this way, and clearly forgetting the position of this Court in that respect – the only one capable of issuing jurisprudence (so that we do not now which Court the appealed resolution refers to), the Court whose ruling is appealed deemed that the procedure to question Spanish jurisdiction in respect to the facts depends on the initial proceedings initiated and not the subject matter of the petition.

However, this High Court has already resolved on a similar issue, and as mentioned above in respect to a similar case, though not identical (in that case, the Public Prosecution questioned the feasibility of the appeal to the Supreme Court against the resolution of the National High Court which had accepted the declinatory plea submitted, refusing to investigated the facts contained in the so-called "Guatemala case"), the proceedings provided when the jurisdiction of the Spanish courts is questioned are no other but the ones contained in section 676 of the LECr, irrespective of the specific proceedings involved, in other words, whether Preliminary Proceedings or Ordinary Indictment, the rules of which would in any case be applicable in addition in this case. To state, like the appealed ruling, that this type of resolution "is not in any way exempt from appeals", due to application of section 766.1 of the LECr., only involves ignoring what his Supreme Court had previously clearly and peaceably established.

In any case, the resolution issued by the Full Criminal Division of the National High Court opens the door to the Supreme Court in all cases in which Spanish jurisdiction to try any matter is questioned, because when a judicial body issues a ruling to initiate proceedings (in any legal matter) it is implicitly assuming the jurisdiction of the Spanish courts to try a specific case; if an appeal to the Supreme Court were accepted against these resolutions, not only would this give rise to the unacceptable overflowing of the Spanish legal system due to the proliferation of cases before this Supreme Court pending resolution, but would also contradict the spirit of the Law: legislators certainly did not intend such an illogical contradiction.

For this reason we believe that the argument used to reject our challenge against the Public Prosecutor's appeal is not reasonable, since not only does it stray from what has been upheld up to the present by jurisprudence, but also strays from a minimum of procedural logic.

In consequence, the fundamental right to a process with due guarantees has been breached, since the appeal filed by the Public Prosecutor should not have been allowed, bearing in mind that in this case, no appeal is possible.

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SECOND ARGUMENT FOR THE APPEAL

PURSUANT TO SECTION 5.4 OF THE GENERAL JUDICIARY ACT, DUE TO BREACH OF THE RIGHT TO EFFECTIVE COURT PROTECTION, PROVIDED IN ARTICLE 24.1 OF THE SPANISH CONSTITUTION, IN CONNECTION WITH THE NON APPLICATION OF SECTION 23.4 OF THE GENERAL JUDICIARY ACT.

BRIEF EXTRACT OF THE ARGUMENT

This party believes that effective protection of the courts, regulated in article 24.1 of the Spanish Constitution in respect to the right to obtain a resolution based on the Law and on the right to access to jurisdiction has been violated.

The body against which the appeal was filed interpreted in an excessively rigorous and restrictive manner the provisions of section 23.4 LOPJ – *contra legem*- so that it has considered that Universal Jurisdiction is to be exercised through the application of the principle of subsidiarity, given that "it is not a Jurisdiction that is applied in an absolute manner", a criterion of the Full Criminal Division which contradicts or empties the principle of Universal Jurisdiction, established in the said article 23.4 of the LOPJ, of its contents.

Likewise, it has also interpreted, erroneously in this party's opinion, that the jurisdiction of the State of Israel in this case has preference over the one established in article 23.4 LOPJ, which is assigned to Spanish Courts by virtue of the principle of universal jurisdiction, since said State is already investigating the events subject matter of the suit, according to the Public Prosecution and a majority of the Court.

In consequence, we believe that we have entered into a sphere in which Universal Jurisdiction, regulated in our legal system and established by our Constitutional Court, lacks definition, in addition to having make a mistake in stating that there exist criminal proceedings against the events subject matter of our suit and against the persons responsible for said events who appear as defendants.

For this reason, and for the reasons to be given later on, we believe that we have been denied access to the Courts without sufficient reasons, and arbitrarily, with evident lack of reasonableness and obvious error, straying from the requirement of proportionality derived from the principle of *pro actione*, subsequent to and potentially more intense than the principle inherent to generically citing the fundamental right to effective court protection.

EXPANDING ON THE ARGUMENT

The fundamental right to effective court protection, in respect to access to the courts of law, or the so-called principle *pro actione*, imposes, in case it is violated, the duty of obliging judicial bodies to interpret procedural requirements in a proportional manner, "preventing that certain interpretations and applications thereof eliminate or disproportionately hinder the right that a judicial body adjudge and resolve pursuant to the Law regarding the claim which it is submitted" (for all, STC 122/1999, of 28 June, FJ 2).

Furthermore, the Constitutional Court has established that:

"For the purpose of a full understanding of the scope and inclusion of the said principle of *pro actione* within the protective sphere of article 24.1 CE [Spanish Constitution] it seems appropriate to highlight the more incisive nature of the rule of access to a trial, in the sense that judicial interpretations of procedural legality that satisfy the test of reasonableness and even of those that could be considered "correct from a theoretical perspective", may entail a "refusal of access to the jurisdiction on the basis of an excessively rigorous consideration of the applicable rules" (STC 157/1999, of 14 September, FJ 3) and thereby violate the right to the effective protection of the courts in said respect."

In this case, a majority of the Full Criminal Division of the National High Court has unfavourably reinterpreted or rewritten the principle of Universal Jurisdiction and has reached the conclusion that Spanish courts can try, in a subsidiary manner in respect to the courts of the State of Israel, the facts subject matter of our suit.

Furthermore, the Court against which the appeal was filed has resolved that an Israeli military commission, of an administrative nature, is investigating the facts of the suit and the defendants, which in its opinion is sufficient to assign the criminal jurisdiction of the Spanish courts in favour of said Israeli administrative and military investigation. As we will explain later one, this inference is absolutely erroneous and clearly strays

from the provisions of our legal system, from our constitutional doctrine and from what has been established by the international Community, if anyone is still interested in the latter.

The facts contained in our suit date back of 22 July 2002, when between 23.30 and 24.00 hours an Israeli F16 fighter jet dropped a one tonne bomb on the Al Daraj neighbourhood of the City of Gaza.

The main objective of said attack was the house of Salah Shehadeh, who was suspected of being one of the leaders of Hamas, so that said mission's objective was to kill him, action which responds to the so-called "targeted assassinations" against specific persons who had not yet been arrested or tried for their alleged crimes. .

The house of Salah Shehadeh was directly hit by a very powerful bomb (one tonne), even though the house was located in one of the most densely populated residential areas of the world, namely the Al Daraj neighbourhood in the city of Gaza.

Next to the house occupied by Salah Shehadeh there was the house occupied by the family of Mr. Mattar, a victim represented by this party in these proceedings. There were fewer than 2 metres between the two houses. As a result of the bombing, his house was completely destroyed and seven members of his family were killed. As a result of the explosion caused by the bomb, fifteen persons died – most of them children and babies -, 150 persons were injured, some of them very seriously, with permanent after effects; eight houses in the vicinity were completely destroyed, nine houses were partially destroyed and twenty other houses were moderately damaged.

As a result of the bombing, in addition to Salah Shehadeh, the following persons were killed:

1. Iman Ibrahim Hassan Matar
2. Dalia Ra'ed Mohammed Matar
3. Ayman Ra'ed Mohammed Matar
4. Mohammed Ra'ed Mohammed Matar
5. Dina Rami Mohammed Matar
6. Alaa' Mohammed Ibrahim Matar
7. Miriam Mohammed Ibrahim Matar
8. Muna Fahmi Mohammed al-Howaiti
9. Subhi Mahmoud Subhi al-Howaiti
10. Mohammed Mahmoud Subhi al-Howaiti
11. Khader Mohammed Ali al-Sa'idi
12. Yousef Subhi Ali al-Shawa
13. Iman Salah Mustafa Shihada
14. Leila Khamis Yousef Shihada

The persons injured were, amongst others: Ibrahim Mohamad Ibrahim Mattar, Ramez Mohamad Ibrahim Mattar, Amal Mohamad Ibrahim Mattar, Maha Mohamad Ibrahim Mattar, Reem Mohamad Youseph, Rami Mohamad Ibrahim Mattar, Hana'a Hamdi Mattar, this not being a complete list, as is duly reflected in the proceedings.

So first of all we must clarify that the serious offences described in our suit cannot be summarised by "dropping a one tonne bomb on the house of the leader of the terrorist organisation Hamas, called Salah Shehadeh", as stated with certain indifference in the appealed ruling, but rather by the killings of many other persons (the majority babies and children) who died as they slept in their homes, killed by a one-tonne bomb that was dropped over them.

For this reason, the particular vote of the dissenting magistrates, at the beginning of their reasoning when they clarify a "matter of language use", in order not to be offensive to the victims; they thus begin by stating that:

"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." (The bold type is ours, and we fully subscribe these statements, because it would be difficult to state with greater clarity what rule of law means, what presumption of innocence is, and above all, what respect of legality and of life is).

In this way, the criminal facts subject matter of the suit filed by this party constitute offences against protected persons and property in the case of armed conflict, as provided in articles 608.3, 611.1 and 613 of the criminal code (the conduct provided is to perform or order indiscriminate or excessive attacks or have the civil population as an objective of attacks, retaliation or acts of violence aimed at terrorising said population) together with fifteen offences of assassination typified in section 139.1 and one hundred and fifty offences of injuries, typified in section 147 and subsequent ones.

In consequence, we are speaking of offences against the international community, in other words the most serious crimes pursuant to international law.

These crimes, as we have argued in our suit, are the result of evident disproportionate or excessive action committed by Israeli military and/or government leaders, an attack qualified as excessive in relation with the military benefit to be obtained by the army of said country and which violates international customary law. As a result of the attack, 15 innocent civilians lost their lives and more than 150 were injured.

The disproportion also results from the objective in connection with the result; for an allegedly single person objective, the result is 15 innocent civilians dead and 150 injured with multiple wounds.

The rule regarding the concept of disproportionate or excessive attacks on military objectives with civilian victims or the destruction of civilian property is relatively recent in international laws, and appears specifically and separately included in the Rome Statute of 1998 and in a more generic manner in Sections 51.5 and 52 of the Additional Protocol I of 1977.

The concept of excessive attack [disproportionate] is also included in our Criminal Code of 1995, in sections 611 and 613. The new concept in recent international law means that the concept of intentional attack has been superseded and expanded for situations in which there are collateral civilian victims, with positive international law acknowledging at present the separate concept of disproportionate attack of a military objective with civilian victims or destruction of civilian property. This recently created rule does not mean that the illicit nature of this type of military action was not denounced before in international courts, as well as the importance of forbidding said disproportionate attacks. We must bear in mind that prior to the approval in 1977 of Additional Protocol I of the Geneva Convention, the separate treatment of the serious infractions of the concept of proportionality was the general rule.

In international casuistry, the first resolution regarding disproportionate attacks dates back to 1948, on occasion of the Einsatzgruppen matter, in which a judgement issued by US courts in its area of administration in occupied Germany analyses for the first time the concept of disproportionate attacks on civilians.

Our interpretation of the analysis of proportionality is based on the fact that the assessment of "*proportionalita*" must be performed in connection with the specific or tactical factors of the attacks, as this enables judging the event with impartiality and that the full line of command that ordered, planned and executed the attack be held accountable by the courts. This interpretation is the one contained in the judgement of 1st Instance of the ICTY in the Galic case of 2003.

Furthermore, we must highlight that in the Galic judgement, the ICTY notes, after studying other attacks against vague military objectives, that the use of a continuous system of excessive attacks against civilians was part of an offensive strategy aimed at terrorizing those civilians, causing them to feel unsafe at all times and in all parts of the city of Sarajevo. In the opinion of this party, that was one of the non-declared objectives of the attack against the Al Daraj neighbourhood by the Israeli army, because with its disproportionate attack it aimed, amongst other things, at terrorising civilians, causing them to feel unsafe at all times and in all parts of Gaza.

As mentioned earlier, irrespective of the interpretation given to the rule of proportionality, we believe that a serious, rational and balanced analysis of the proportionality equation resulting from comparing the two core elements that constitute the lawsuit of the case under consideration (and subject matter of this suit) would always lead us to conclude that we are dealing with unlawful and reprehensible criminal actions of persons who ordered, designed and executed the criminal attack.

When the two core elements mentioned above are confronted, on one hand the military benefit that the Israeli army intended to obtain with its attack, whether it is interpreted as specific and direct, namely killing the person suspected of being the leader of Hamas, Salah Shehadeh, or interpreted as an anticipated benefit linked to a plan of joint operations, in other words limiting the actions of the Hamas group, and on the other the loss of 15 human lives and more than 150 persons with injuries of different seriousness, all due to the criminal attack, the result is an evident disproportion between the military benefit obtained by the Israeli army in its bloody battle against Hamas or one of its members and the macabre result produced by the ONE TONNE BOMB DROPPED OVER THE AL DARAJ NEIGHBOURHOOD IN THE CITY OF GAZA.

In consequence, we believe that this analysis of proportionality reveals the evident disdain for the life of Palestinian civilians shown by those who ordered, designed and executed the Israeli attack, who did not decide to carry out a much less damaging attack. In this respect, we must not forget the capacity, which we consider deplorable, that the Tahal had at that time to carry out a targeted assassination against a specific human objective, limiting damages to the person attacked, or by extension to his bodyguards, targeted capacity that is well-known by the international community.

All of this leads us to conclude that the attack launched on the Al Daraj neighbourhood of the City of Gaza, on the night of July 22 2002, can be criminally prosecuted by the Spanish authorities, due to the violation of the rules, treaties and laws of international humanitarian law on war crimes, as the events that are being tried infringe the provisions of Art. 51.5 of Additional Protocol I of 1977, in addition to the provisions of Art. 8.2 of the Rome Statute, violation which is sanctionable as a crime against the International Community pursuant to Art. 611 of our current Criminal Code.

Thus, in the words of the magistrates who dissented from the majority of the full division (dissenting vote) that issued the resolution against which we are appealing, we

find ourselves dealing with the hard core of international criminal law, which considers the most atrocious international crimes, including excessive attacks against civilian populations – who are innocent, because they do not intervene in the conflict – for the purpose of terrorising them.

In any case, it is always appropriate to recall that neither the Public Prosecutor, in its appeal, nor the majority of the Full Division in its ruling, have questioned the criminal nature of the facts charged nor the participation of the defendants, which must directly lead us to conclude that they all share the criteria that we face very serious crimes, the alleged authors of said crimes and that the only purpose of the appeal, achieved in the ruling, is undesirable impunity.

In respect to the obligation to pursue these very serious crimes in all states of the international community, once again we refer to the dissenting vote –a legal document which must be read by anyone interested in Law – impeccably expressed by the four magistrates who dissented from the majority opinion:

"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."

This same idea was also expressed in the well-known judgement 237/05 of the Constitutional Court on the Guatemala Case:

"International and cross-border prosecution sought by the principle of universal jurisdiction is exclusively based on the special characteristics of the crimes subject to said prosecution, the harmfulness of which (paradigmatically in the case of genocide) transcends the harm caused the specific victims to affect the international community as a whole.

Consequently, prosecution and sanction of said crimes not only constitute a commitment but also an interest shared by all states (as we had occasion to state in STC 87/200 of 27 March, FJ 4), whose legitimacy, thus, does not depend on subsequent specific interests of each individual country. Likewise, the concept of the universal jurisdiction currently in force in International Law does not rely on links based on specific national interests, as revealed in art. 23.4 LOPJ, the said German law of 2002 or to provide another example, the Resolution adopted by the International Law Institute in Krakovia on August 26, 2005, in which, after highlighting the aforementioned

commitment of all nations, defines universal jurisdiction in criminal matters as "the competence of a State to prosecute, and if declared guilty, condemn alleged delinquents, irrespective of the place where the crime is committed and without any consideration to active or passive bonds of nationality or other jurisdiction criteria acknowledged by international law."

Thus, the predominant idea of the principle of Universal Jurisdiction is no other than avoiding impunity and that for this purpose it must not be hampered in any way, as a result of which it is conceived as an absolute principle.

Let us recall that the crimes committed in the Al Daraj neighbourhood of the City of Gaza date back to 2002: as of today they have not yet been investigated nor have the authors thereof being prosecuted – which means that MORE THAN 7 YEARS OF INDECENT INACTIVITY have passed.

There is no more efficient tool to prosecute these serious crimes than that of Universal Jurisdiction, which enables third party states to become involved in a criminal investigation to clarify responsibilities regarding events that affect the entire international community.

In the context of this reflection it seems to us that the Full Criminal Division of the National High Court adopts a vague posture regarding the scope and significance of universal jurisdiction: it does not consider examining the principle in the light of the atrocious crimes reported in our suit, but simply reinterprets said absolute principle, giving prevalence to an alleged administrative investigation in the State of Israel (BY A MILITARY COMMISSION) over the jurisdiction of Spanish courts. In addition, it also defends its arguments with the action of the Israeli Attorney General in connection with the latter's decision to not investigate the crimes because, in its opinion, they do not constitute a crime.

The appealed ruling claims, contradicting itself, *res adjudicata* as an impediment to allow Spanish courts to try the events contained in our suit and at the same time speaks of an alleged *lis pendens* in reference to an investigation commission of an administrative nature recently created (seven years after the crimes were committed), suspiciously after filing the suit which is the cause of this appeal.

Thus, as a consequence of the principle of universal jurisdiction, as conceived in our legal system, it does not admit subsidiarity but rather the concurrence of jurisdictions, meaning that all states investigating events that affect the international community are considered equal.

Our Constitutional Court has expressed itself extensively in this sense, and we refer to the brilliantly expressed opinion of the four dissenting magistrates of the Full Criminal Division of the National High Court.

Concurrence of jurisdictions and subsidiarity are not in any way comparable terms. As has been established by the Constitutional Court, when two jurisdictions are investigating the same events, a correction principle shall be taken into consideration, namely that of *locus delicti*.

And even in this case, the jurisdiction of third party states is not automatically rejected but instead is considered complementary, since precisely because of the proximity with the events reported, the state where the atrocious crimes were committed may possibly have great difficulties in investigating the events that affect their citizens.

However, in the case under consideration, we face a resolution that gives priority to the State of Israel in the obligation (not the right) to investigate these crimes, not even by applying the traditional tool of *locus delicti* (since Gaza, place of commission of the crimes, is not Israeli territory), but rather the so-called "doctrine of ubiquity" upheld in a

surprising manner (and one that is cause for concern) by the majority of the Full Division.

In view of this curious manner of refusing access to Spanish courts to this party in order to seek prosecution of these very serious crimes, we have no choice but to argue against this refusal in the following terms.

First of all, as assumed in the resolution itself, we have to clarify that the events did not take place in the State of Israel, but rather in Palestinian territory. In our opinion, it is clear that no discussion of this fact is possible, since Gaza, which is Palestinian territory, clearly does not belong to the State of Israel.

This is occupied or autonomous territory, or whatever you want to call it, but there is not doubt that it does not form part of the map of Israel. In consequence the crimes that have been reported were committed outside the territorial jurisdiction of the State of Israel.

Bearing in mind that Gaza does not form part of the State of Israel and whether or not it is considered occupied territory (which we together with the international community consider it as such) what is important is that said area, that of the *locus delicti commissi*, is outside the jurisdictional scope of Israel; that Gaza lacks jurisdictional capacity to hear, investiage and adjudge the events; that unfortunately there is no supranational jurisdictional alternative applicable and there is no concurrent jurisdiction; that it is the obligation of the Spanish jurisdiction to investigate, prosecute and demand accountability for the acts subject matter of these proceedings. Nonetheless, for reasons which we ignore but suspect, the Full Criminal Division of the National High Court (with the exception of the four dissenting magistrates in their dissenting vote) referred to the so-called "doctrine of ubiquitiy" to conclude, in application of said doctrine, that the jurisdiction of the State of Israel prevails over the Spanish jurisdiction to investigate these terrible acts; and accepts as inquestionable that in the State of Israel these crimes are already being investigated in criminal proceedings, which will also be discussed in these arguments for appeal, although at this point we simply affirm that that is false.

In respect to the use of the theory of ubiquity, as a rule governing competence, and in the absence of the criterion of *locus delicti*, the Full Criminal Division states the following:

"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 Full 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."

In other words, inducement or being a necessary accomplice, a form of perpetrating a crime and which is present in the majority of the defendants, is considered to be an "element of the offence"; which our Criminal Code, with excess zeal, clarifies so that no

one will remain unpunished for committing such serious crimes, not even the person who gave the order to kill, without distinguishing between military objectives and the civilian population, including babies and children.

Such a state of confusion, identifying the element of the offence with the manner in which it is perpetrated, leads to the absurd situation of forgetting the theory that has always been applied in the case of offences against the lives of persons: the theory of the result, which is referred to when the criterion of *forum commissi delicti* or, as in this case, *locus commissi delicti*.

In effect, at this stage we should recall that traditionally the jurisprudence of the Supreme Court has accepted the legal solution offered by the so-called theory of the result, although given the fact that there are cases in which said theory cannot be used, the High Court has had to introduce specific solutions, such as the theory of ubiquity.

The theory of the result or *locus delicti* cannot be applied when we are speaking of offences of mere activity (or of risks or of inchoate crimes) such as in the case of offences against public health; nor can the theory of result be applied when dealing with an offence of fraud, the effects of which are felt in different places as the swindle is completed or as assets are moved from one place or another; nor can the *forum delicti* be applied in offences whose performance is continuous, such as a kidnapping in which the person kidnapped is constantly being moved from one place to another …

In other words, when the criterion of the place in which an offense is committed or of its result cannot be used, other rules established to assign competence in offenses without a result or of mere activity, or with results in different places, must be used.

Obviously, in cases of assassination the legal body that is competent to investigate will be the one from the place where the death occurred, because that is where the traces and relevant objective and scientific evidence will be found for any criminal investigation, irrespective of the place of residence of the perpetrator or even of his/her place of hiding or escape.

For this reason, the use of the theory of ubiquity in this case is not only inappropriate to assign competence, in this case jurisdiction, but in addition would entail an intolerable perversion of the rules regulating competence with the consequences this could imply if this High Court accepted such reasoning in the resolution of this appeal – and we are not referring to consequences in specific issues of these proceedings or of other proceedings of universal jurisdiction, but rather in general terms as a jurisprudential concept appealable in a wide variety of proceedings. In any case, as we stated above, one must not mistake responsibility due to inducement, as necessary accomplice, with the result of death, since this result always entails territorial competence, which is how it has always been peaceably resolved up until now.

However, in the improbable case that the theory of territoriality should be deemed to be applicable to the assassinations in the Al Daraj neighbourhood, rejecting the jurisdiction of the Spanish courts, on the grounds that there exist criminal proceedings regarding the same events in the State of Isreal, would be a cause for alarm, because said proceedings do not exist in that country.

As the Public Prosecution proposed, when in its appeal it expressed opposition to having the Central Magistrate's Court no. 4 investigate the crimes reported, the body against which the appeal is filed resolved that there exists *res judicata* with the decision of the Israeli Attorney General to not investigate the facts; and in addition, *lis pendens*, since it is argued that an administrative commission, appointed by the Israeli Government, is carrying out a criminal judicial investigation regarding the facts.

A) THERE IS NO RES JUDICATA: DECISION OF THE ISRAELI ATTORNEY GENERAL TO NOT INVESTIGATE THE FACTS

Even though this party is aware that in Israel the Attorney General has jurisdictional powers, and no further clarification seems necessary in this respect, what this party has always argued in response to the Public Prosecution's claim – and in view of the impunity said party uses as protection – is that the resolution of said Israeli body was never an investigation nor *res judicata*, which is why it rejected that a criminal investigation of the massacre be opened.

And said refusal, as highlighted in the documents provided by the State of Israel, was based on the argument that the action of dropping the bomb on the Al Daraj neighbourhood and its lethal consequences (15 dead) did not constitute an offence, since it was based on the principle of proportionality and distinction, a criterion of proportionality and distinction which is only acceptable from the perspective of the State of Israel and its special understanding of international legality.

The fact is that without any further rhetoric our position is upheld: the opening of a criminal investigation was rejected, which means that it never even started.

Thus the appealed resolution seriously disregards that Spanish judicial authorities, when accepting a foreign judgement or resolution, must not only ensure the constitutionality of the formal guarantees adopted during the proceedings, but also the respect, as regards the merits of the case, for the principles that inspire our legal system and which cannot be waived.

The Israeli resolutions, in accepting targeted assassinations and the death or injuries of the victims the former cause and make impossible that the victims and their families have access to justice, violate Articles 15 CE [Spanish Constitution] (right to life of the victims of the bombing), Art. 24. 1 (effective protection of the courts and defencelessness of the victims and their families), Art 24. 2 (trial without undue delays), as well as the provisions of Art. 10.1 CE (dignity of persons) and 10.2 CE (respect for the universal declaration of Human Rights and other treaties), which makes them incompatible with our legal system, or at least this is what we believe, although the Public Prosecution does not, along with the Full Criminal Division of the National High Court.

In line with what has been said above, mention should be made of constitutional jurisprudence regarding this issue, beginning with STC 21/1997 of 10 February, which stated that:

"it is appropriate to recall at this point, on one hand, that 'the Spanish public authorities are as subject to the Constitution when acting in the field of international relations…as they are when exercising their faculties ad intra', as stated in the Declaration made by this Court on 1st July 1992, legal ground 4, and this is applicable to the authorities and civil servants who depend on said public authorities…

. ..if the mandate of Art. 10.2 CE demands that constitutional precepts be interpreted in accordance with international rules for the protection of human rights, we must also recall that the European Court of Human Rights has declared, in connection with Article 1 of the Rome Convention of 1950, that the scope of state jurisdiction, for the purpose of the protection guaranteed by said instrument, is not limited to national territory. "

STC 91/2000, a faithful rendering of the values contained in the previous resolution, states in Legal Ground no. 6 that:

"On examining in the first place the assumption that Spanish public authorities can "indirectly" violate fundamental rights when they acknowledge, ratify and accept as valid resolutions adopted by foreign authorities, we must unequivocally state that said assumption is based on jurisprudence that has been reiterated by the Court. Our pronouncements in this sense refer to cases of extradition as well as judicial decisions ratifying judgements issued by foreign courts, by means of the exequatur mechanism,

and in both cases Spanish judicial bodies must pronounce themselves regarding the constitutional validity of resolutions issued by non-national courts, despite the fact that the Spanish Constitution only governs in Spanish territory. And these, of course, include the extraterritorial actions of our national authorities."

Legal Ground no. 7 of the same judgement argues the following:

"Having thus established the possibility of "indirect" violations of fundamental rights, and going on to analyse its legal basis, note is made that the previous argument entails, at least *prima facie*, a paradoxical result. The fact that the action that is being examined from a constitutional perspective is that of Spanish courts does not completely eliminate it; because the analysis of whether national courts have violated or not the Constitution is based on a prior assessment regarding whether a past or future action of the bodies of a foreign state (obviously not subject to the Spanish Constitution) violates or may violate the fundamental rights enshrined in the Constitution, to the extent that this may invalidate the general principle of excluding all investigation in that respect.

…In order to establish said decision, the Spanish Constitution of 1978, on stating that the foundation of "of political order and social peace" resides, in the first place, in "the dignity of persons" and in "the inviolable rights inherent thereto" (Art. 10.1) expresses a claim to legitimacy and at the same time a criterion of validity which, because of their nature, are of universal application. As we have declared on several occasions, "when projected over individual rights, the rule of Art. 10.1 CE implies that, as a 'spiritual and moral value inherent to persons' (STC 53/1985, of 11 April, FJ 8) dignity must remain unaltered irrespective of the situation in which persons find themselves ... constituting, in consequence, an inviolable minimum which all legal rules must ensure" [STC 120/1990, of 27 June, FJ 4; also STC 57/1994, of 28 February, FJ 3 A)]. So the Spanish Constitution totally safeguards the rights and the contents of the rights "that belong to persons as such and not as citizens, or in other words … those rights that are essential to guarantee human dignity." (STC 242/1994, of 20 July, FJ 4; in the same sense, SSTC 107/1984, of 23 November, FJ 2 and 99/1985, of 30 September, FJ 2)."

…Only the core that cannot be waived of the fundamental right inherent to the dignity of persons can entail universal implications; however, under no circumstance is this applicable to the specific configurations with which our Constitution acknowledges said right and makes it effective. Thus, in analysing this matter in connection with the guarantees contained in Art. 24 CE, the judgements SSTC 43/1986, FJ 2 and 54/1989, FJ 4, have pointed out that even though foreign courts are not bound by the Spanish Constitution or by its list of rights protected by an appeal for protection of legal rights, the resolutions of Spanish judicial bodies that ratify "a foreign judicial resolution in a case in which it should have been repulsed by the forum's public order for being contrary to the essential principles contained in Art. 24 of the Constitution" do infringe on fundamental rights.

This last concept "has thus acquired in Spain a different content, particularly pervaded by the requirements of Article 24 of the Constitution", since "even though the fundamental rights and public liberties guaranteed by the Constitution are only fully effective where Spanish sovereignty can be exercised, our public authorities, including Judges and Courts, cannot acknowledge nor receive resolutions issued by foreign authorities that entail the violation of fundamental rights and public liberties guaranteed to Spaniards by the Constitution, or if fitting, to Spaniards and foreigners." (STC 43/1986, FJ 4).

Thus, what a majority of the Full Criminal Division of the National High Court establishes is that our Legal System should assume a resolution issued by a foreign

authority that seriously violates the fundamental rights and public liberties enshrined in our Constitution.
The principle of proportionality applied by the Israeli Attorney General, endorsed by the Public Prosecution of the National High Court and the aforementioned majority of the Full Division, is contrary to our legal system, which fully rejects indiscriminate attacks against human beings even if utilitarian principles are used to justify said attacks, since the life of human beings and their dignity is widely protected by our Constitution, above any other rights.
The underlying values of the principle of proportionality cited by the Israeli Attorney General (and endorsed by the appealed resolution) are totally rejected by our Legal System and fully rejectable by socially accepted ethics, because obviously the death of an alleged terrorist, not adjudged, is in no manner proportionate with the results obtained, consisting in the death of totally innocent human beings (the majority children and babies) thanks to dropping a one tonne bomb on the a very densely populated neighbourhood, on a building comprising several dwellings which in turn was close to other houses.
In consequence there was no proportionality in the attack, but rather absolute disdain for the life and integrity of persons, since the Israeli army and its advanced technological resources could have easily detected that this was a densely populated neighbourhood; in consequence, it was easy to predict the terrible consequences caused by said attack.
Thus, in the light of our constitution doctrine, our judicial bodies cannot accept the resolutions of the Israeli Military Advocate General and Attorney General rejecting any kind of judicial investigation in order to clarify the acts committed and their perpetrators.

B) THERE IS NO LIS PENDENS: APPOINTING AN ADMINISTRATIVE INVESTIGATION COMMISSION DOES NOT CONSTITUTE CRIMINAL INVESTIGATION OF THE FACTS
The ruling issued by the body against which the appeal is filed states that it is “now appropriate to examine the documents 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.” Next, the said resolution explains the “procedural landmarks” of what has come to be called “criminal investigation by the judicial bodies of the State of Israel”, which is nothing but the administrative verification, by an administrative body or examination committee of a military nature, regarding the events that occurred more than seven years ago.
Thus, in the resolution that is challenged, an examination committee formed by and for the Israeli armed forces, comprising military members with senior posts in the GSS [General Security Services of Israel], is considered to be a judicial body.
However, logic impedes classifying it as a jurisdictional body, when it obviously is of an administrative nature. Said interpretation is made because said examination commission is considered as the first obligatory instance prior to a judicial investigation: it seems that the Supreme Court of Israel does not resolve the legitimate expectations of the victims-complainants, in their appeal, pending the conclusion of the investigation initiated by said commission. And this in itself can lead to confusion. In other words, and for the sake of greater clarity, we must recall that the competent investigating body with authority to carry out a judicial investigation is the Military Advocate General, whose resolution was appealed to the General Attorney General: the

latter confirmed the former's resolution, stating that the events reported did not constitute a crime, since they complied with the principle of proportionality (but only to Israel's view of said principle, not ours).
The Attorney General's decision was appealed before the Supreme Court; this high jurisdictional body recommended that a military examination committee be formed in order to clarify the events before it made a pronouncement.
In respect to the main issue, the decision regarding the resolution of the Israeli Attorney General to not investigate the events, the Supreme Court has decided not to resolve the appeal until said examination committee finishes its work.
Thus we face a *lis pendens sine die*: the Supreme Court does not resolve pending the resolution of the examination committee, but the latter has not concluded nor resolved anything after more than seven years. The victims face a dead-end street, situation which is equivalent to the violation of the fundamental right to the effective protection of the courts, since access to the jurisdiction is prohibited as a result of this incomprehensible suspension of resolution of the appeal, with the subsequent impunity for the persons responsible of the crimes committed.
In respect to another issue, the said examination commission is considered to be a "judicial authority", and in consequence *lis pendens* is upheld in connection with the fact that said commission's investigation work has not finalised.
This body was created within the Israeli armed forces for the purpose of investigating specific actions in order to avoid faults and errors, not to impose criminal responsibilities.
Article 539.a) paragraph 6 of the Military Justice Law and Article 17 of the General Security Services Law, which the State of Israel must have included with the documents submitted to this Court, establishes that all the material from a military investigation cannot be used by a court of justice or whoever carries out a criminal investigation pursuant to any provision, and that it shall be considered confidential.
The material referred to is no other but the content of the subject matter of the investigation commission's work, or verification carried out within the sphere of the armed forces regarding events that occurred during military manoeuvres or operations.
The Committee of Examination appointed on 23 January 2008 in the
Shehadeh case is not a statutory investigation commission, but instead was established "on the basis of the inherent powers of the government to appoint a committee to examine matters that fall within the scope of its responsibilities." [The ruling in the Shehadeh case, para. 11.]
In contrast with statutory investigation bodies, "such a committee does not have a status determined by law, and is usually used as a tool to assist in examinations into the internal matters of the appointing authority." [HCJ 6001/97, Amitai v. The Prime Minister (decision delivered on 22 October 1997)].
A committee of examination is the weakest kind of the three kinds of investigatory committees that can be established under Israeli law. In this sense, and as indicated by Israeli Supreme Court Justice Procaccia:
The legislation refers to three possible mechanisms for carrying out an investigation that is ordered by the executive authority, and the choice between them is taken by the appointing body: on one end stands 'the committee of examination' […] Such a committee is established on the basis of the inherent powers of the minister or of the inherent powers of the government. Such a committee does not have a statutory status, and therefore its status, modus operandi, and authorities are not determined by law […] The committee of examination lacks the statutory power to compel witnesses and bring evidence, and its conclusions and recommendations have no recognized statutory status. [HCJ 6728/06,

Ometz Association v. The Prime Minister (decision delivered on 30 November 2006), para. 28-29 of Justice Procaccia's ruling]

The committee of examination lacks the elementary powers needed to conduct a criminal investigation, powers that are granted under Israeli law to bodies authorized to conduct criminal investigations, i.e., the Israeli Police [According to Article 3 of the Police Ordinance (new version, 1971), which defines the role of the police, and Article 59 of the Criminal Procedure Law (integrated version, 1982), which determines the power of the police to open an investigation where there is suspicion that a felony has been committed], the Military Police [Articles 251 and 252 of the Military Justice Law – 1955] and the Ministry of Justice's Police Investigations Unit. [The powers of the police to investigate felonies committed by police officers or employees of the General Security Services were transferred to the Ministry of Justice's Police Investigations Unit by article 49J of the Police Ordinance (new version, 1971).] In contrast to these investigatory bodies, which are granted, by law, the power to compel witnesses to attend investigations [Article 68 of the Criminal Procedure (Powers of Enforcement – Detentions) Law – 1996] and to seize evidence[Article 32(a) of the Criminal Procedure (Detention and Search) [new version, 1969] Ordinance, and article 256(b) of the Military Justice Law – 1955], the committee of examination lacks these powers. Furthermore, the criminal sanctions that apply for obstructing a criminal investigation, for example, providing false information [Article 2 of the Criminal Procedure (Testimony) Ordinance and Article 243 of the Penal Code – 1977], carrying out a deliberate act in order to cause a criminal investigation to fail or to prevent it from taking place, including preventing a witness from being brought to give evidence and concealing evidence [Article 244 of the Penal Code – 1977], and persuading potential witnesses to withhold information or to lie in a criminal investigation, [Article 245 of the Penal Code – 1977] do not apply to witnesses who appear before a committee of examination. Some of the powers granted to bodies authorized to conduct criminal investigations are also granted to official commissions of inquiry [Established in accordance with Article 1 of the Commissions of Inquiry Law – 1968], such as the powers to compel witnesses to testify under oath [Article 9(a)(2) of the Commissions of Inquiry Law – 1968], to compel witnesses to appear before the commission [Article 9(a)(3) and Article 11 of the Commissions of Inquiry Law – 1968], and to issue search warrants [Article 12 of the Commissions of Inquiry Law – 1968]; however, they are not granted to the so-called "committees of examination".

In its ruling in the Shehadeh case, the Israeli Supreme Court explicitly stated that, "Article 539A of the Military Justice Law – 1955 or Article 17 of the General Security Services Law – 2002 shall apply as appropriate" to the committee of examination [The ruling in the Shehadeh case, para. 10]. Therefore, the application of these articles to the committee of examination in the Shehadeh case results not only in a committee that is powerless, but also one whose findings will be confidential and will be impossible to use in the future to promote accountability.

The distinction between a criminal investigation and a military probe conducted according to Article 539A of the Military Justice Law – 1955 was elaborated on by the Israeli Supreme Court in its ruling in the *Al-Nebari* case: [HCJ 2366/05, Al-Nebari v. The Chief of Staff of the Israelí Army (decision delivered on 29 June 2008), para. 6-10 of Justice Arbel's ruling]

> "The factual examination is the main role of the investigatory bodies – the Military Police, the Inspecting Officer, and the Investigatory Judge – and its purpose is to reveal the truth in order to do justice and bring those responsible to justice. Conversely, the factual examination that is

> undertaken within the framework of an operational probe, while it is an essential and extremely important step in conducting the probe, is not its purpose; rather it comes to serve the main purpose of the operational probe, which is to draw conclusions and lessons in order to prevent future failures and errors […] There is, therefore, a substantial difference between an operational probe and a criminal investigation, both at the level of purpose and at the operational level."

In consequence, the purpose of the military examination committee is simply to detect faults and errors, which is incompatible with the search for criminal accountability.

It is obvious that the committee of examination for GSS issues is basically of an administrative nature; its sole objective is to assess operational mistakes of a specific military action and its conclusions cannot be transferred to any judicial body that is carrying out a criminal investigation.

According to the said article 539.a) of the Military Justice Law, the only possible consequences will have disciplinary effects, if fitting, but will not be the subject matter of a criminal trial.

In consequence, when 7 years after the terrible events in the Al Daraj neighbourhood of the City of Gaza, the Israeli Supreme Court, prior to issuing the resolution against the General Attorney's decision to stay the complaints presented by some of the victims, establishes that the committee of examination must finish its work, it is avoiding a relevant judicial pronouncement for the victims by using a commission that has no effect in a judicial and criminal suit.

This is simply a trick to try to confuse the victims of the terrible crimes committed, who have no other alternative but to wait *sine die* until the committee of examination concludes its investigation (of an internal nature) so that, in turn, the Supreme Court can conclude its work.

And in the best of cases, if the committee of examination should finish its work within another 7 years time and the Supreme Court should finally issue its resolution, this high jurisdictional body would not be able to use the investigation material used in said committee of examination because that is forbidden by the law and by the Supreme Court's own jurisprudence. In this sense, in respect to the impartiality of jurisdictional bodies, the European Court of Human Rights has pointed out, in its Judgement of 1 October 1982, that the existence of impartiality "can be assessed in different manners in accordance with Article 6.1 of the Convention. It is thus possible to distinguish a subjective aspect, that seeks to determine the personal convictions of a specific judge in a specific case, from an objective aspect, which refers to whether the former offers sufficient guarantees to exclude all reasonable doubts in that respect".[Judgement of the European Court of Human Rights, Piersack case, of 1 October 1982).

Likewise, in numerous judgements the European Court of Human Rights has established the grounds or requirements with which to consider whether an investigation is effective: Hugh Jordan, Kelly and other, Shanaghan and Mckerr versus the United Kingdom, the four of 04.05.2001; Finucane versus the United Kingdom, 1.7.2003; Fatma Kaçar versus Turkey, of 15.7.2005; the cases of Isayeva (I and II) versus Russia, of 24.2.2005.

In this last case, Isayeva versus Russia, the European Court of Human Rights firmly declared that the judicial investigation carried out, subject to a report by a committee of military experts, was not effective nor could it be deemed to satisfy minimum guarantees to determine the facts, identify the perpetrators and in fitting punish them: "As regards criminal law remedies, the Court observes that a criminal investigation was instituted into the attack on the village, albeit only after a considerable delay, namely in

September 2000, despite the fact that the authorities were likely to have been aware of the consequences of the attack immediately after it happened. Information about civilian casualties on such a scale should have alerted the relevant authorities to the need to proceed with an investigation at an earlier stage. Despite this, according to a letter of 24 August 2002 addressed to Memorial, the military prosecutors conducted a check in March 2000 and refused to start an investigation. The Court futher notes that the applicant was not properly informed of progress in the investigation and that no charges were brought against any individuals."

Thus, we see, in the first place, that a verification by military prosecutors concluded that it was not necessary to start an investigation; in addition to the fact that said preliminary check was carried out with a great deal of dealy in respect to the date on which the acts were committed.

In this case, almost identical, not only was there no report on initiative of the military prosecutor, but rather at the request of the victims, with considerable delays in respect to the date of the bombing and its consequences, and said report concluded with the decision to not investigate.

Continuing with the case of Isayeva versus Russia, the ECHR established that: "The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within its jurisdiction the rights and freedoms defined in the Convention" requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.

For an investigation into an 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 (see, for example, Güleç v. Turquía, of 27 July 1998, Reports 1998-IV, §§ 81-82; Ogur v. Turquía [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, Ergi v. Turquía, 28 July 1998, Reports 1998-IV, pp. 1778-79, §§ 83-84, and the recent Northern Irish cases, for example, McKerr v. the United Kingdom, no. 28883/95, § 128, Hugh Jordan v. Reino Unido, no. 24746/94, § 120, and Kelly and others v. the United Kingdom, no. 30054/96, § 114, ECHR 2001- III)."

In this case, the Israeli committee of examination was appointed by the Israeli government, some of its members are responsible of having ordered the bombing against specially protected civilian objectives, and the composition of said commission includes military officers, some of whom were involved in the chain of command of said criminal action.

Obviously, this committee of examination, to which the majority of the Full Criminal Division grants due procedural garantees, fulfilled in a fair trial, does not satisfy the requirements of an impartial investigation, from the point of view of objective parameters and international standards (this is stated strictly in terms of defence and in view of the unanimous criticism of the resolution we have appealed on the part of the most eminent international jurists, who disagree with it.)

Furthermore, in the said Isayeva case versus Russia, the ECHR continues saying:

"The investigatin must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (for example, Kaya v. Turkey, cited above, p. 324, § 87) and to the identification and punishment of those responsible. (Ogur v. Turkey, cited above, § 88). This is not an obligation of result, but of means. The authorities must habe taken the reasonable steps available to them to secure the evidence concerning the incident,

including inter alia eye-witness 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. (See for example, Salman v. Turkey [GC], no. 21986/93, ECHR 2000-VII, § 106; Tanrikulu v. Turkey [GC], no. 23763/94, ECHR 1999-IV, § 109; Gül v. Turkey, no. 22676/93, § 89, 14 December 2000). 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 (see the recent North Irish cases concerning the inability of inquests to require the attendance of security force witnesses directly involved in the use of lethal force, for example McKerr v. the United Kingdom, cited above, § 144, and Hugh Jordan v. the United Kingdom, cited above, § 127)."

In other words, an investigation of means in nothing more than the guarantee that if the persons responsible are found and identified, they will not enjoy impunity.

An effective investigation of means is also one that goes on site and collects remains, performs autopsies, interrogates eye-witnesses, the victims…The Courts of Israel have not, 7 years after the killings were committed, employed a minimum of investigation diligence for the purpose of clarifying the facts and identifying the persons responsible (if one is consistent Spain will be perceived as being in much better conditions than Israel to try these facts because here not only is there more and better documentation on the facts and their results, but in addition there exists no legal impediment to have the victims testify, there exists no risk for the integrity of the witnesses, there exists no doubt regarding the impartiality of the Courts in respect to these events and their perpetrators, and above all, there should be no will to hide and to protect impunity, as there is in Israel. This is not a gratuitous statement, but instead is based on what has happened in the course of these 7 years and more of absolute impunity).

The commission of examination which is allegedly carrying out a type of inquiry into the facts since it was created a year ago – after having filed the suit which has resulted in this appeal, has not yet even initiated a verification of the cause of the deaths; it has not gone out to collect remains and traces; there is not even evidence that it has heard the declaration of any witness of the events, all of whom have been and are waiting for an investigation worthy of being called that.

Another requirement that the ECHR establishes is that an investigation be started promptly:

"A requirement of promptness and reasonable expedition is implicit in this context (see Yasa v. Turkey, cited above, §§ 102-104; Çakici v. Turkey [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV; Tanrikulu v. Turkey, cited above, § 109; Mahmut Kaya v. Turkey, no. 22535/93, ECHR 2000-III, §§ 106-107). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigation 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 (see, for example, Hugh Jordan v. the United Kingdom, cited above, §§ 108, 136-140)."

In this case, not only is there evidence of the inexistence of an effective criminal investigation, but in addition lack of interest on the part of the State of Israel, though its highest authorities, given that more than seven years after these serious offenses were committed, a commission of examination is claimed to have been created, whose members are directly appointed by the Israeli government; but it turns out that at present there is no evidence of a criminal investigation geared at clarifying the events and identifying the persons responsible.

On the other hand, as the vote of the four dissenting magistrates argues so well, the fact that not even civil proceedings have been initiated in connection with the facts shows nothing in respect to what is being requested and has been denied: an effective criminal investigation.

In this case, and on the basis of what has been said, it is obvious that the Israeli jurisdictional and administrative authorities do not offer guarantees of an impartial investigation, and in addition of the existence of any judicial investigation whatsoever.

Seven years after the criminal acts reported were committed, the persons responsible for said acts enjoy the most ample impunity thanks to the work of all the Israeli authorities, impunity which is made easier by the appealed resolution; it should be highlighted that even the support of the accused by all the political authorities of the State of Israel has been reflected in these current proceedings, against which they have spared no efforts or contacts to try to paralyse what has finally happened by virtue of the resolution presently appealed. For this purpose it suffices to have short-term memory or to consult recent publications to understand that the impunity was made easier and protected by the entire administration of the State of Israel.

In respect to the need for Universal Jurisdiction to try to curb the excesses of the Israeli military forces in Palestinian territory and thus avoid impunity – in direct relation with the lack of will to investigate on the part of the State of Israel – the so-called Gladstone Report was recently published (14 September 2009), drafted by the Commission headed by the South African judge Goldstone and created by mandate of the United Nation Human Rights Council, which states, as measures to avoid impunity, that:

"1646. In their search for justice, victims of serious violations of human rights have often looked for accountability mechanisms in other countries when there were none at home or the existing ones did not offer an effective remedy. The principal of universality, which says that international crimes that violate fundamental human values are a concern for the entire international community, underpins the exercise of criminal jurisdicition in many States. The exercise of criminal jurisdiction on the basis of the universality principle concerns especially seriuos crimes regardless of the place of commission, the nationality of the perpetrator or the nationality of the victim. This form of jurisdiction in concurrent with others based on more traditional principles of territoriality, active and passive nationality and it is not subsidiary to them.

1647. It is unconstroversial today that States may confer upon their courts the right ot exercise universal jurisdiction over international crimes, including war crimes, crimes against humanity and genocide. However, there is lingering controversy about the conditions or requirements for the exercise of that jurisdiction, and in particular about whether the alleged perpetrator should be physically present in the territory of the prosecuting State or not.

1648. Iniversal jurisdiction is also established under certain conventions as an obligation for their State parties. Such is the case of the Fourth Geneva Convention, whose article 146 requires each high contracting party "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches" and to bring such persons, regardless of their nationality, before its own courts.

1649. Article 5 of the Convention against Torture requires States parties to take measures to establsih jurisdiction over the offence of torture and of complicity or participation in torture when the alleged offender is in a territory under its jurisdiction.

1650. Many countries around the world incorporate the principle of universal jurisdiction into their national legislation, including Australia, Bangladesh, Belgium, Costa Rica and Spain.

1651. In connection with past events in the Occupied Palestinian Territory, the Mission is aware of one case pending before Spanish courts. It concerns the killing of Hamas leader Salah Shehadeh on 22 July 2002 by a one-ton bomb fired from a Israeli F-16 aircraft. The strike also killed a number of other people in the same hounse and in the house next door. The investigatin judge admitted the case of investigation on the basis of the universality principle and after determining that the Israeli internal investigation system did not satisfy the requirements of the right to an effective remedy. This decision was overturned by the Appeals Chamber, whose decision is, in turn, being appealed now to the Supreme Court..

1652. There are other cases pending before national courts of several European States, such as the Netherlands and Norway. In South Africa, a request for prosecution is being considered by the National Prosecuting Authority.

1653. Criminal investigations and prosecutions by countries other than Israel are possible on the basis of the principle of nationality of the offender. Several countries provide their courts with jurisdiction over their own nationals regardless of the place where the offence has been committed. For example, article 5 of the Convention against Torture requires States parties to establish jurisdiction over offences defined in it when the offender is a national.

1654. It is the view of the Mission that universal jurisdiction is a potentially efficient tool for enforcing international humanitarian law and international human rights law, preventing impunityj and promoting international accountability. In the context of increasing unwillingness on the part of Israel to open criminal investigations that comply wioth international standards and estalbish judicial accountability over its military actions in the Occupied Palestinian Territory, and until such a time as clarity is achieved as to whether the International Criminal Corut will exercise jurisdiction over alleged crimes committed in the occupied Palestinian Territory, including in Gaza, the Mission supports the reliance on universal jurisdiction as an avenue for States to investigate violations of grave breach provisions of the Geneva Convention of 1949, prevent impunity and promote international accountability."

Basically, what is being considered is simply the existence of ample international conscensus regarding the impunity that exists in Israel for the perpetrators of such serious crimes and the need to try them wherever international rules are applicable, such as in Spain. Amongst other vices, the appealed judgement suffers from that of protecting or generating a sphere of undesirable impunity on the basis of which events such as the initial subject matter of the proceedings which gave rise to this appeal will tend to repeat themselves indefinitely on the sole basis considered certain: if there are not real requirements for accountability, the offense settles down and inevitably tends to be repeated, or to say it differently, by impeding special prevention you are impeding general prevention.

We cannot forget that the victims, and this may be a nuisance for some, have come to the Spanish jurisdiction searching for the effective protection of our courts in view of the following:

a- the legal system existing in the Gaza Strip lacks jurusdictional capacity to investigate and try these events for well-known reasons,

b.- the systematic refusal of court protection by the Courts of Israel for those who in addition, due to legal impediment, cannot even enter Israel (do not forget that access and entrace to Israel is forbidden for the citizens and residents of Gaza), and

c.- because they thought that in Spain, country with special historical, cultural and geopolitical bonds with the Palestinian people, was a democratic state governed by the

rule of law, where they would be granted, pursuant to the rules of universal jurisdiction, the effective court protection they wanted and expected.

The resolution of the majority of the Full Criminal Division of the National High Court and the position of the defender of legality momentaneously thwarts the victims' aspirations for effective court protection from such terrible crimes and generates prospects of greater impunity for the perpetrators of said crimes. However, we hope that this High Court will be the point for beginning to recover our cultural values and the basic principles that govern our legal system.

I thus REQUEST THE DIVISION to acknowledge submission of this writ, with testimony of the final resolution and literal copies of this writ and said testimony authorised by this court representative for each one of the other parties cited to appear, and of the writ of summons, to accept it and the appeal filed against Ruling no. 1/09, of 9 July 2009, issued by the Full Criminal Division of the National High Court (with the exception of the dissenting vote of four Magistrates) in Second Section Court Record no. 118/09, coming from Preliminary Proceedings no. 157/08, of the Central Magistrates' Court no. 4; and subject to appropriate legal steps, the said appeal be allowed and SUBJECT TO A HEARING – which is requested in view of the relevance of the subject matter of this appeal – that the appealed ruling be overturned and repealed and that a resolution be adopted separately in accordance with the law.

FUTHERMORE I STATE: That for the purpose of this appeal and for appropriate notice thereof I request that this High Court obtain from the body that issued the ruling a full copy of the proceedings of this case on the basis of which we have founded the grounds of our appeal.

This is Justice which I request in Madrid on 21 September 2009.

Javier Fernández Estrada

Procurator