

TO THE CORRESPONDING CENTRAL MAGISTRATES' COURT
OF THE AUDIENCIA NACIONAL (SPANISH NATIONAL COURT
OF JUSTICE) BY ROTATION

I, Mr. **JAVIER FERNÁNDEZ ESTRADA**, Legal Representative 561 of the Courts and of Mr. **Raed Mohamed Ibrahim Mattar, Mr. Mohamed Ibrahim Mohamed Mattar, Mr. Rami Mohamed Ibrahim Mattar, Mr. Khalil Khader Mohamed Al Seadi, Mr. Mahmoud Sobhi Mohamed El Houweit, Mr. Mahassel Ali Hassan Al Sahwwa**, as per credentials to be granted at the relevant procedural time, as provided by the First Additional Claim, appear before this Central Magistrates' Court and as prescribed at law, **I SAY:**

That by means of this bill, under the representation I hold, I bring a **CRIMINAL ACTION**, in accordance with the provisions of section 277 of the *Ley de Enjuiciamiento Criminal* (Spanish Criminal Prosecution Law) and in exercise of the **PRIVATE PROSECUTION**, under the provisions of section 24.1 of the Spanish Constitution and sections 101 and 277 of the Criminal Prosecution Law, for the commission of a **CRIME AGAINST PERSONS AND PROPERTY PROTECTED IN CASE OF ARMED CONFLICT**, under Title XXXIV, Chapter III of the Spanish Criminal Code, as well as any other crime which may appear in the course of investigation of the facts which are denounced, and against those to be found liable during the investigation,

I – COURT BEFORE WHICH IT IS FILED

The corresponding Central Magistrates' Court of the *Audiencia Nacional* (Spanish National Court of Justice) by rotation, is competent based on the following provisions:

1. Section 23. 4 g of the L.O.P.J. (Spanish Organic Law on the Judiciary) of 1985, **which provides that the Spanish jurisdiction shall be competent to hear the facts committed by Spaniards or foreigners outside of the national territory likely to be categorised under the Spanish law, under its paragraph g) which according to the international treaties or conventions should be prosecuted in Spain.**
2. **Section. 65. 1. e) of the Spanish Organic Law on the Judiciary of 1985:** The Criminal Division of the Spanish National Court of Justice shall hear the crimes committed outside of the Spanish territory when, according to laws or treaties, their prosecution corresponds to Spanish courts.
3. **Section 88 of the Spanish Organic Law on the Judiciary of 1985:** In the City of Madrid there may be one or more Central Magistrates' Courts, with jurisdiction in the whole of Spain, which shall investigate the cases the prosecution of which corresponds to the Criminal Division of the Spanish National Court of Justice or, as the

case may be, to the Criminal Central Courts and which shall handle the records of enforcement of the European orders of detention and delivery, as well as the records of passive extradition under the terms provided under the Law.

4. The current Spanish Code sets forth under its title XXIV the so-called “Crimes against the International Community”, those usually called “war crimes”; crimes included under several international treaties, entered into by Spain, and which through the following incorporation to the Spanish internal criminal law, are under Spanish jurisdiction:

- **The Geneva Convention of 1949 and the Protocols Additional of 8 June 1977**, entered into and ratified by Spain on 4 August 1952 and 21 April 1989.
- **The Rome Statute**, approved on 18 July 1998 and ratified on 24-10-00 by Spain, which provides in its **Preamble**: *“it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”*.

Therefore, in this case, the requirements necessary for the Spanish jurisdiction to be competent are met:

- Nature of the crime, affecting the objects held by the international community: war crimes.
- Crime included in the International Treaties entered into by Spain and incorporated to the internal criminal law.

- Connection with national interests.

II – NAME AND ADDRESS OF THE PLAINTIFFS

- **Mr. Raed Mohamed Ibrahim Mattar,**
- **Mr. Mohamed Ibrahim Mohamed Mattar,**
- **Mr. Rami Mohamed Ibrahim Mattar,**
- **Mr. Khalil Khader Mohamed Al Seadi,**
- **Mr. Mahmoud Sobhi Mohamed El Houweit,**
- **Mr. Mahassel Ali Hassan Al Sahwwa**

All of them have their address for service of process purposes at number 29 of the Omar al-Mukhtar street, Postcode 1328, City of Gaza, Gaza Strip – Palestine.

III – NAME OF THE DEFENDANTS

This action is filed against:

- 1) **Dan Halutz**, who at the time of the attack was Commander of the Israeli Air Forces (IAF)
- 2) **Benjamin Ben-Eliezer**, then Israeli Defence Minister.
- 3) **Doron Almog**, Southern Command GOC of the Israel Defence Forces (IDF) between 8 December 2000 and 7 July 2003.

- 4) **Giora Eiland**, Head of the Israeli National Security Council and National Security Advisor from 18 January 2004 until end of May 2006.
- 5) **Michael Herzog**, Military Secretary to the Israel Defence Ministry from 2001 to 2004.
- 6) **Moshe Ya'alon**, IDF Chief of Staff from 9 July 2002 to 1 June 2005.
- 7) **Abraham Dichter**, GSS General Director.

IV – DETAILED ACCOUNT OF FACTS

FIRST.- On 22 July of year 2002, between 23.30 and 24.00 hours, an Israeli F16 fighter plane dropped a one-ton bomb on the Al Daraj neighbourhood of the City of Gaza. The main objective of such attack was the house of Salah Shehadeh, who was suspected of being one of the Hamas commanders, due to which the objective of the mission was killing him.

SECOND.- The house of Salah Shehadeh was directly hit by a bomb of great power, however the house was located in one of the most densely populated residential areas in the whole world, as indicated in the UNICEF press release (**Document No. 1**).

THIRD.- Close to the house occupied by Salah Shehadeh was the house occupied by Mr. Mattar's family. There were less than two meters between the two houses. As a result of the bombing, Mr. Mattar's house was totally destroyed and seven members of his family were killed.

FOURTH.- Thus, as a result of the explosion caused by the bomb, fifteen people were killed –most of them children and babies–, one hundred and fifty were injured –some of them with serious injuries and permanent damage– (**Document No. 2**), eight houses of the surrounding area were totally destroyed, nine houses were partially destroyed and twenty-one suffered moderate damages (**Documents No. 3 and 3 bis (versions in English and Spanish)**).

FIFTH.- As a consequence of the bombing, the following persons were dead (**ANNEX 1**):

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

SIXTH. Furthermore, the bombing wounded about 150 people with injuries of varied seriousness, 78 of which with severe or very severe injuries (**ANNEX 2**).

The list of injured or dead people is included under **Document Number 4** attached to this action, identifying them through the house in which they were at the time of the bombing, with the plan of the damaged houses attached as **Document Number 4 bis** accompanying this action; thus:

The following, among others, were injured: 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.

SEVENTH. Furthermore, their houses suffered the following damages:

Eight houses were totally destroyed, nine houses suffered severe damages and twenty-one suffered moderate damages.

The expert's report prepared after visual inspection and assessment of the damages caused, performed by the Association of Engineers – Gaza Governorates has already been produced as **Documents 3 and 3 bis**.

EIGHTH. The day after the bombing, that is on 23 July 2002, the spokesperson of the IDF (Israel Defence Forces) highlighted that:

“Last night's attack by the IDF was directed against Salah Shehadeh and only against him. The attack was accurate, and was performed with appropriate technology. The objective is frustrating future

terrorist activities through an attack to the source itself, that is, Shehadeh. There was no intention to harm members of his family or other civilians.

The IDF regrets all of the damages caused to innocent people. Unfortunately, this is what may happen when a terrorist uses civilians as human shields and their homes as shelters.” (Document Number 5 and 5 bis).

The Israeli Air Forces’ (IAF) sophisticated technology includes air search and other intelligence means, due to which the weight bomb –one tone– and the characteristics of the attacked neighbourhood –one of the locations with more population density in the world, as we have already pointed out– enabled to predict the scale of deaths, injuries and destruction caused to people who are the intended target, as clearly recognised by the IDF.

NINTH.- Witness Ra’ed Mohamad Ibrahim Mattar (**Document Number 6 and bis**) declared that at the time of the bombing he was living in the house next to Salah Shehadeh’s, in a three-floor and 160 square meter house together with his family.

“It was about 11.40 pm, I was sleeping in my house with my family. I woke up due to the sound of an explosion and there was no electricity. I realised I was walking on an uneven ground in ruins. I did not realise that the house was already demolished. As I was walking, I fell from the first floor where my house was to the floor. I cried for help and knocked on the door. My sister Maha opened the door and told me that the house was demolished over us. I came in

the building to find my father and mother trying to save my brother Ibrahim, who was trapped under a concrete column. I tried to help him taking away some of the rubble over him. Then I stopped, looked for a flashlight and looked around for my wife but did not find her. I went down again. My mother asked me about my family and I told her that I hadn't found anybody. After that I did not feel anything else until I woke up at the hospital. The day after I found out what had happened, my wife and three of my children were dead as a result of the explosion and the building in which my house was had suffered many damages and its three floors had been totally demolished, including property and furniture.” (Document Number 6 ter)

TENTH.- The “Yesh Gvul” movement, in Israel, after several failed attempts of correspondence (the transcriptions of which are included in **Documents Number 7 to 12**), filed a request on 30 September 2003 before the Israel High Court urging it to require to the Attorney-General and Military Attorney General to open a criminal investigation for the purpose of investigating and judging all persons in the chain of command of the bombing.

The State of Israel answered (**Documents Number 13, 14 and 14 bis**) with two arguments: firstly, that the operation had been proportional to the military objective of killing Shehadeh and, secondly, that the result of such operation had not been intentional.

After the answer to the action, on 3 March 2004, the High Court suspended the case pending a decision concerning another action brought by the Public Committee against Torture in Israel in January 2002, which

questioned legality of the State of Israel's killing policy. With respect to this last action, on 16 February 2005 a hearing was held, but the case was also suspended indefinitely as a result of the commitment of the then Prime Minister at the Sharm-el Sheik Summit in January 2005 to suspend the killing policy or "preventive killings".

The Yesh Gvul movement requested to the High Court to reopen the request of criminal investigation and requested a hearing, which was set for 27 July 2005 and which was finally held on 5 September of that year, and the case was indefinitely suspended.

Subsequently, in November 2005, the office of the Attorney-General accepted to reopen the cases from both actions, and a hearing concerning both cases was held on 11 December 2005, in which the High Court decreed that the action relating to the Al Daraj bombing depended on the result of the action concerning the killing policy, and granted to the Attorney-General a twenty-day term to present legal grounds, which was not done.

Finally on 13 December 2006, the Court awarded a judgment concerning the case of the killing policy ratifying the principles of proportionality and distinction and highlighting that:

"The approach of the international customs law relating to armed conflicts of international concern is that civilians are protected from army attacks. However, such protection does not exist for civilians "for such time as they take a direct part in hostilities" (§51(3) of the First Protocol). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is

determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not”.

However, such principles were not applied to the attack performed in Al Daraj, where 15 people were dead and 150 civilians were injured, by means of a one-ton bomb dropped in the middle of a residential zone. On the other hand, no judgment was awarded on the action concerning this issue. Therefore, on 21 December 2006 the lawyers of Yesh Gvul requested the High Court to designate a new court to hear such action, but until today no hearing is set for the issue. (**Documents Numbers 16 and 16 bis**).

ELEVENTH.- Furthermore, an action was brought before the High Court to prevent Halutz from being promoted to IDF Chief of Staff, which was rejected by the Court. (**Documents Number 17 and 17 bis**). The answer is attached as **Documents Number 18 and 18 bis**.

Furthermore, it was requested to the Israeli Defence Ministry that the victims should be compensated, and the Ministry refused arguing that the State was not responsible for the damages caused (**Documents Number 19, 19 bis and 19 ter**).

Subsequently, on 18 December 2003, an action for damages was brought in the name of the Mattar's family, joined by other plaintiffs, but as a result of the amendment of tort laws in Israel, preventing Palestinians from claiming damages to the Government of Israel, with a retroactive effect, the action is expected to be dismissed (**Document Number 20**).

TWELFTH. The State of Israel declared in its answers to the actions that the murder in itself was legal and that the military operation performed on such ground was proportional to the legitimate objective of killing Shehadeh, since the potential for deaths of civilians and destruction of property was taken into account before authorising and carrying out such bombing.

Thus, the State of Israel highlighted that:

*“It is important to highlight that one of the major considerations which were taken into account during all stages of preparation of the operation against Shehadeh and its approval was the consideration of **proportionality** – the obligation to ensure that attacking Shehadeh would not mean attacking the civilian population nearby, disproportionate to the military objectives intended by the operation. Discussions focused mainly on the issue of attacking civilians as a result of the attack against Shehadeh.”*

“After the discussion, for example, it was decided to perform the attack late at night (around midnight) when it was likely that there would be few bystanders in the street near Shehadeh’s house.”

“Furthermore, taking these factors into consideration, it was decided to use a 1000 kg. bomb (the amount of explosives necessary to achieve the objective of the operation with a reasonable likelihood), instead of two bombs of 500 kg. each one, because using two bombs would highly increase the risk of not hitting the target, therefore

putting at risk a building close to the intended target, since one of the bombs could have hit it directly.”

*“Finally, after receiving accurate intelligence information concerning Shehadeh’s hideout, it was decided to perform the operation according to the plan previously described. **This decision was taken at the highest level**, having described the importance of putting an end to Shehadeh’s activity, in spite of the information and the assessments of damages to other people which may have arisen as a result of the attack.”*

THIRTEENTH.- These facts were condemned by the whole international community as illegitimate and disproportionate, due to the advanced and sophisticated military technology held by the State of Israel as well as to the scale of deaths, injuries and destruction caused by such attack.

Thus, the United Kingdom declared that such bombing was neither legal nor proportional. The then British Foreign Secretary declared on 23 July 2002 at the meeting of the House of Commons: *“I will ensure that the views of the honourable gentleman, which I think the whole House shares, about the **unjustified and disproportionate** nature of the attack and its consequences are conveyed to the ambassador and, through him, to the Israeli Government”*.

Subsequently, and pursuant to the murder of Sheikh Yassin by the Israeli Government, on 30 March 2004, he confirmed that the British Government considered the policy of *“so-called assassinations – straightforward killings”* as *“unlawful, unjustified and self-defeating, and they damage the cause that Israel makes in the world. The fact that the killings led to the*

deaths of not only those whom Israel holds responsible for terrorism, but entirely innocent bystanders, including children, simply emphasises the unlawful nature of that approach and its counter-productive effect.”

Similarly, such attack was condemned in the UN Security Council Session, on 24 July 2002, as illegitimate and disproportionate (**Document Number 21**), and in a press release of the International Committee of the Red Cross (**Documents Number 22 and 22 bis**), as well as through various statements of relevant sectors (**Document Number 23**).

FOURTEENTH.- Concerning the defendant **Dan Halutz**, the bombing operation was carried out following his orders.

Halutz has proudly accepted his responsibility in the mission in an interview given to Haaretz in August 2002 (**Document Number 24**):

“The intelligence was very accurate. Sometimes, though, you have no control over all kinds of things that take place in a space that is hidden from view. In retrospect, it turned out that I simply did not have part of the information; it changed in the course of the mission. (...) The decision-making process was right, balanced, proper and cautious.”

In that same interview he declared that, subsequently, he told pilots who performed the attack:

“You can sleep well at night. I also sleep well, by the way. You aren't the ones who choose the targets, and you were not the ones who chose the target in this particular case. You are not responsible for

the contents of the target. Your execution was perfect. Superb. And I repeat again: There is no problem here that concerns you. You did exactly what you were instructed to do. You did not deviate from that by so much as a millimetre to the right or to the left. And anyone who has a problem with that is invited to see me.”, and “It's important for me that you know I stand behind you and in front of you 100 percent. The criticism that is being voiced here and abroad has nothing to do with you. All the critics, all the bleeding hearts - let them criticize me: You have no problem.”

Furthermore, in year 1982, after widespread protests over deaths and injuries of many civilians in Lebanon due to Israeli “military operations”, he pointed out on the television of that country that he did not accept the concept of innocent refugees, but rather that most of them were collaborators.

Also in a television interview after the Al Daraj attack, when asked what it feels to drop a bomb over a residential dwelling, he replied that all he felt was a slight tremor in the wing of the airplane.

In the aforementioned interview published in Haaretz, he refused to admit that civilians were innocent, and previously in an interview to the BBC (**Document Number 25**) he recognised that “*sometimes there are incidents and people who are not involved pay for this ugly war*”, and then went on to describe a killing mission with four helicopters in year 2001 in which he was in command.

When the High Court of Israel required him, during the promotion request, to justify his comments on such bombing, he accepted those comments but tried to play them down (**Documents Number 26, 26 bis and 26 ter**).

FIFTEENTH.- **Ariel Sharon**, then Israeli Prime Minister, also requested such operation to be performed and publicly praised the bombing mission as “*one of our greatest successes*”.

SIXTEENTH.- As for **Benjamin Ben-Eliezer**, at the time of the bombing he held the position of Israeli Defence Minister. In an interview given to BBC2 (**Document Number 27 and 27 bis**) he admitted to being responsible for the decision to perform the murder of Salah Shehadeh and reported his conversation with his military secretary, Mike Herzog, as follows: “*I said “Have you checked with everybody?” I meant the head of intelligence, the military guys. He said, “I have checked with everybody. All is clear, all recommend it.” I said “Good luck”*”

SEVENTEENTH.- At the time of the bombing, **Michael Herzog** was military secretary to Ben-Eliezer. He admitted (**Document Number 27 and 27 bis already mentioned**) that he had acted as liaison between Ben-Eliezer and the other persons who took the decision to obtain authorisation for the operation. This operation was performed with his organization and assistance.

EIGHTEENTH.- **Giora Eiland** was Head of the Planning and Policy Directorate of IDF. In an interview given to BBC in February 2002, he set four conditions for scheduled killings to be performed by the Israeli army, in which he does not rule out the possibility of having civilian victims

highlighting that “*we do it when we believe we can guarantee very few civilian victims*” (**Document Number 28**).

In the interview already attached as Documents 27 and 27 bis he admitted to being responsible as major planner of the operation, and having joint responsibility for the decision to use a one-ton bomb: “*A bomb under a ton might not do the job... which was to kill him... We decided to use the large bomb. In retrospect, this was a mistake.*”

NINETEENTH.- Concerning **Moshe Ya’alon**, in the date of the bombing he was IDF Chief of Staff and he reported directly to the Prime Minister.

In an interview published in Haaretz on 29 August 2002 (The Enemy Within, **Document Number 29**) he admitted to having participated in the decision to carry out Salah Shehadeh’s murder with the purpose of demolishing the building with one ton of explosives and having taken the steps to carry this out.

“We went to attack a person who was unprecedented in that he was the commander of the terrorist arm of Hamas both in Gaza and in Judea-Samaria. This is a person who is responsible for the killing of hundreds of people. He systematically clung to the civilian population because he understood our sensitivities. In quite a few cases, we avoided attacking him because his wife was with him, or his daughters. Shehadeh had six daughters. More recently, we made things easier for ourselves and said that even if his wife is with him, we will attack him. Moreover, a discussion began about whether it would not be right to attack him even if his daughters were with him.”

But we made a decision against that. We decided that we would not harm his daughters.”

“On the Saturday evening before the attack, we held a discussion. It was clear to us that in order to knock down the building, we would need a ton [of explosives], and the question was whether we would use one bomb of a ton or two of half a ton. Our experience was of dropping 160 bombs in the Palestinian area without a single innocent civilian being killed, but the concern was that two bombs raised the statistical risk of a miss.”

“So I sent the air force to do its homework and they came back to me with the answer that a one-ton bomb was more certain. The assessment was that the result would be the destruction of Shehadeh's house and damage to the empty neighbouring building, and shattered windows in the area and tin siding that would be sent flying from the tin shacks. People wounded, not killed. In retrospect, though, it turned out that the neighbouring house was not empty. The execution of the air force was perfect, but the intelligence gap in regard to the neighbouring house caused a hitch. Six children were killed in that house.”

TWENTIETH.- Avraham Dichter was the General Director of the General Security Service (GSS) and reported directly to the Prime Minister, Ariel Sharon. The GSS worked closely with the Israeli Air Forces (IAF) and provided the necessary intelligence to perform “targeted killings”, including proposing objectives and providing information on the whereabouts of the objectives. The final approval to shoot the objective

from the air comes from the GSS, while the IAF decide whether an order may be executed due to weather conditions at the time of the attack.

Joint participation of the GSS (also called Israeli Security Agency or ISA) and the IDF at the highest levels is confirmed in the report of the Israeli Ministry of Foreign Affairs of 2 August 2002. Such report admits that the bombing was a joint operation of the IDF and the ISA and concludes by saying:

“ISD and ISA shall continue to fight against terrorism and to avoid terrorist attacks against Israeli citizens, while continuing to take all the possible measures to avoid harming innocent civilians nearby.”

Pursuant to a civil action filed against Avraham Dichter in USA concerning this bombing, Israel’s ambassador in such country pointed out, in a letter sent to the Court, that the actions *“challenged legal actions of the State of Israel approved by the Government of Israel in defence of its citizens from terrorist attacks.”*

Avraham Dichter took part in the decision to authorise the “targeted killing” of Shehadeh and was involved in planning the operation and deciding to use a one-ton bomb to perform it. As head of the GSS, he did not take the appropriate and necessary measures to prevent his subordinates under his command to perform the bombing, and/or did not denounce, took disciplinary measures against or punished his subordinates for having performed the bombing.

TWENTY-FIRST.- Doron Almog, lastly, as Southern Command GOC of the IDF (responsible for the whole Gaza Strip) and only one level under the

Chief of Staff, took part in the planning of the operation and approved it personally.

Similarly, and as in all those kind of operations by the IDF, the commander of the troops in the area designated to be destroyed must have ensured that all troops under his command were outside of the area of the bombing target at such time, due to which the operation must not have taken place until such commander had ensured that there were no IDF troops inside the target zone.

V.- LEGAL GROUNDS

A) SPECIFICATION OF THE CHARGES ENTAILED BY THE FACTS

On an evidence basis, and without prejudice to the fact that the specification may be extended to any other offence which may derive from the investigation, this party considers that the facts described above may be subsumed and categorized as follows:

The reported facts constitute, from the perspective of international law, a “war crime”. According to the **Rome Statute**, resulting in the creation of the International Criminal Court, entered into by Spain on 18 July 1998 and ratified on 24 October 2000, the following are considered to be war crimes:

- **Article 8.2**

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

b.- ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives.

iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly **excessive** in relation to the **concrete and direct overall military advantage anticipated**.

The Protocol I Additional to the Geneva Convention adopted on 8 June 1977 provides:

. **Art. 51.1:** *“The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”*.

. **Art. 51.4, 5:** To give effect to this protection to civil population, indiscriminate attacks are prohibited. Indiscriminate attacks are: **Art. 51.4 a)** *“Those which are not directed at a specific military objective”*. **Art. 51.5 b)** *“An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof”*.

Furthermore, concerning exclusively civilian objects, **Art. 52 of Protocol Additional I** to the Geneva Conventions sets forth the following:

“1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.”

The applicable provisions of the Spanish Criminal Code provide the following:

Within internal criminal law, the prohibitions of article 51 of the Geneva Convention are incorporated under Chapter III of Title XXIV of the Criminal Code. Thus, the facts constitute:

A crime against the International Community as provided under section **611 of the Criminal Code:**

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

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

Likewise, the following, expressed under **Art. 613 of the Criminal Code** is considered a crime against the international community:

“A prison term of four to six years shall be the sentence for such person who, in an armed conflict performs or causes to be performed any of the following:

a) Attacking or making civilian objects of the adverse part the object of reprisals or acts of hostility, causing their destruction, provided that this, within the circumstances of the case, does not offer a definite military advantage”

Article 608 of the Criminal Code defines protected individuals:

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

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

As for the **result produced**, the facts constitute a crime of:

Article 139.1 of the Criminal Code

“A prison term of fifteen to twenty years, as prisoner for a murder crime, shall be the sentence for such person who murders someone, meeting any of the following circumstances:

1.- With treachery.

Articles 147 and following of the Criminal Code concerning the various injuries suffered.

Article 116 of the Criminal Code

“Anyone criminally responsible for a crime or offence is also responsible from a civil point of view if damages result from the fact”.

The relevant amount for civil liability shall be determined during the proceedings.

B) LEGAL GROUNDS:

DISPROPORTIONATE ATTACK

Against civilians: The factual event we raise before the Spanish courts is the outcome of an evidently disproportionate or excessive action committed by Israeli military and/or governmental officers, an attack categorised as excessive in relation to the military advantage which the army of that country intended to obtain and which infringes law and international customs law. As a result of the attack, 15 innocent civilians were dead and more than 150 were injured.

Disproportion arises also from the objective in relation to the result; for an objective of allegedly only one person a damage result of 15 innocent civilians dead and another 150 injured, as well as multiple damages, has been obtained.

The regulation, embodied under international humanitarian law, of the concept of disproportionate or excessive attack to a military objective with

civilian victims or destruction of civilian objects is quite *young* in international law, and it is independently and specifically expressed since the Rome Statute was drafted in year 1998 and more generically under Art. 51.5 and 52 of Protocol I Additional of 1977.

The concept of excessive [disproportionate] attack is also included similarly in our 1995 Criminal Code under Art. 611 and 613. The new conceptualisation under the most recent international law entails that the concept of wilful attack has been expanded for factual events in which there are collateral civilian victims, and, nowadays, international positive law recognises the autonomous concept of disproportionate attack to a military objective with civilian victims or destruction of civilian objects. The recentness of this regulatory creation has not been an obstacle for the illicit nature of this kind of excessive military actions, as well as the importance of the forbiddance of such disproportionate attacks, to be raised previously before the international courts. What is more, prior to the approval in 1977 of the Protocol I Additional to the Geneva Conventions, the separate treatment of grave breaches as to the concept of proportionality was the general rule.

In international case records we find the first judgment on disproportionate attacks in year 1948, concerning the case *Einsatzgruppen*, a judgment pronounced by USA courts in their administration zone in occupied Germany, analysing for the first time the concept of disproportionate attack to civilians.

Our interpretation of the analysis of proportionality is based on the fact that the “proporcionalita” weighting judgment must be carried out based on the attack’s specific or tactical factors since this ensures that the fact may be

judged with fairness and that the whole of the scale of command which ordered, planned and executed the attack is brought before the courts. This interpretation is the one used by the first instance judgment of the ICTY in the *Galic* case in 2003.

We must highlight furthermore that the ICTY, in the *Galic* judgment, evidenced, in examining other attacks against vague military objectives, that the use of a continuous system of excessive attacks against civilian population was comprised within an offensive strategy aimed at terrifying the civilian population, causing that they did not feel safe at any time and in any place in the city of Sarajevo. This was, in the opinion of this representation, one of the undeclared objectives of the attack to the Al Daraj neighbourhood by the Israeli army, since the disproportionate attack was aimed, among other things, at terrifying the civilian population, causing that it did not feel safe at any time and in any place in Gaza.

As we have already indicated, whichever is the interpretation to be given to the proportionality rule, we consider that a rational and weighted rigorous analysis of the proportionality equation resulting from the comparison of the two core elements constituting the legal grounds of the case denounced hereby (and the subject of this action) would always produce as a conclusion that this is a criminal and condemnable unlawful act by the persons who ordered, designed and executed the criminal attack.

On confronting these two core elements mentioned before, we may consider on the one hand, the military advantage intended by the Israeli army through this attack, whether construed as specific and direct, that is, the murder of the person suspected to be a Hamas commandant, Salah Shehadeh, or construed as an expected advantage comprised in an overall

operation plan, that is the limitation of action of the Hamas group, and on the other, the loss of 15 human lives and more than 150 injured with varied seriousness, all of them undoubtedly innocent civilians, caused by the criminal attack, which gives as a result the obvious disproportion between the military advantage obtained by the Israeli army in its bloody fight against Hamas or one of its men and the macabre result produced by the **ONE-TON BOMB DROPPED ON THE AL DARAJ NEIGHBOURHOOD IN THE CITY OF GAZA.**

We consider therefore that this proportionality analysis shows us the obvious disdain of those who ordered, designed and executed the Israeli attack for the life of the Palestinian civilians, not deciding to opt for an infinitely less harmful action. Concerning this, we should not forget the capacity, deplorable in any case, which the Israeli army had at that time to perform a targeted attack against a specific human target, limiting thereby the damage to the attacked person, or by extension to his bodyguards, which is a targeting capacity very well known by the international community.

The legal grounds previously put forward leads us to the conclusion that the attack launched on the Al Daraj neighbourhood in the city of Gaza on the night of the 22nd of July 2002 may be criminally prosecuted by the Spanish authorities since it infringes the rules, treaties and regulations of international humanitarian law on war crimes, all of this given that the prosecuted fact infringes the provisions of Art. 51.5 of the Protocol I Additional of 1977, in addition to the provisions of Art. 8.2 of the Rome Statute, an infringement that may be punished as a crime against the International Community under Art. 611 of our current Criminal Code.

b) Against civilian property:

Furthermore, the disproportion we are denouncing in this action is all the more obvious if we confront the attack against the Al Daraj neighbourhood to the civilian objects which were attacked. Thus, when Art. 52.2 of the Protocol I Additional to the Geneva Conventions provides that “*attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.*”, it amounts to forbidding all attacks against civilian objects motivated by a military action whose purpose is merely justified by a superfluous military advantage.

After considering the contents of article 52 of the Genevan Protocol and taking into account that in the attack eight houses were totally destroyed, nine were partially destroyed and others were moderately damaged without any military object in itself being the object of the attack, and with a sole individual being the sole military objective, the futility of the military advantage obtained is obvious, due to which we may conclude, once again, that the attack performed by the Israeli air force was disproportionate or excessive.

This is why, and as we already stated in the section prior to this legal line of argument, the attack on civilian objects located in the Al Daraj neighbourhood in the city of Gaza fits also into the offence provided under Art. 613 1. b) of our Criminal Code, a criminal offence coinciding

materially with the prohibition provided under Art. 52 of the Protocol I Additional.

Likewise, the residual clause of article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, SICTY, also develops the legal treatment of attacks directed against civilian people or objects and disproportionate attacks in the ICTY case law. This is the most recent case law concerning war crimes, in particular the cases Celebici, Kunarac, Tadic, Blaskic and Kordic, all of them highlighting the effective use of criminal offences and punishable behaviours concerning the Geneva Conventions and the Protocols Additional to them, constituting jointly, together with conventional law and the case law itself, the basis which must be taken into account when judging the relevant fact.

Lastly, it should be highlighted that we are not faced at all with issues affecting internal affairs of other states, but, on the contrary, with facts, war crimes, affecting the whole of the international community, to which therefore the latter must respond, avoiding the impunity which would otherwise be granted to criminal states, which have committed war crimes and grave breaches to the Geneva Conventions, if they were to be those in charge of protecting the same human rights they are violating and infringing.

The Spanish jurisdiction bodies would not be making anything exceptional, but meeting the undertakings taken by Spain throughout its history concerning international humanitarian law, investigating exclusively a specific and serious case focused on the persons directly affected, who through this action and private prosecution denounce these facts exclusively.

Due to the foregoing, we seek relief by the Spanish jurisdiction concerning the reported war crimes since, as previously put forward, in the preceding facts of this action, it has been impossible to bring the relevant prosecution before the Israeli judicial authorities.

VI.- TAKING OF EVIDENCE.

As first taking of evidence, without prejudice to the fact that throughout the record of process and inquiries others may be proposed and admitted, the following are requested for the inquiry of the facts:

- 1.- Statement of the defendants.
- 2.- Statement of the victims,
- 3.- That the Israeli authorities are required to indicate the defendants' addresses

Without prejudice to the procedural steps deriving from the foregoing.

By virtue of the foregoing,

I BESEECH THE COURT, that considering this action to be filed, together with the accompanying documents and taking of evidence, it shall admit it and agree:

- To consider the action, with the name, representation and nature indicated, as filed, deeming this Legal Representative as a legitimate party in the invoked representation and performing with him the procedures to follow.
- To initiate the relevant proceedings for the clearing up of the facts and the identification of the persons responsible for them, as well as the capacity in which they were responsible for them, to be determined, whether as perpetrator, accomplice, necessary collaborator or any other.

It is Justice I seek in Madrid on 24 June 2008.

AS FIRST ADDITIONAL CLAIM, I SAY that it is required hereby that, having the plaintiffs subscribed personally this action, as provided by section 277 of the Spanish Criminal Prosecution Law, and due to the material impossibility to grant the relevant empowering before a public commissioner for oaths under international acknowledgment:

- a Judicial Commission is established to travel to Gaza, before which the plaintiffs may grant the relevant power of attorney “apud acta”, or
- cooperation and assistance is required through the International Red Cross or International Red Crescent, or diplomatic assistance is required, so that assistance is required to the European Union’s consular authority in Gaza for the purpose of performing before it the relevant power of attorney, or
- Spanish diplomatic assistance is required allowing to authorize the transfer of the plaintiffs under conduction and protection before the

judicial authority which we address, for the purpose of performing the power of attorney before it, and carrying out the relevant statement, in their condition as victims.

I BESEECH AGAIN, that in view of the requests of the previous Additional Claim, the applicable measures be established so that the relevant power of attorney may be granted.

AS SECOND ADDITIONAL CLAIM, I SAY that a judicial commission is established to make a visual inspection and take statements by the plaintiffs and the witnesses of the facts who, due to reasons which are only too well known, are hindered from coming to this court.

AS THIRD ADDITIONAL CLAIM, I SAY that this party represents its will to comply with the requirements at law, concerning the provisions of article 231 of the Law of Civil Prosecution, so that the Court provides for the correction of the defects in which the procedural acts of the parties may incur.

I BESEECH AGAIN, that the representation made in the previous Additional Claim is considered made, for the relevant purposes.

AS FOURTH ADDITIONAL CLAIM, I SAY that as an interim measure we require that a measure of personal control be agreed so that the defendants be at the disposal of the Justice, for the purpose of signing by means of appearances before the Spanish consulate or the diplomatic authority based in Jerusalem and that the obligation be established to communicate any travel entailing the transfer outside of the State of Israel, due to the special seriousness of the facts and the social unrest caused.

I BESEECH AGAIN, that in view of the requests of the previous Additional Claim, the preceding interim measures requested be agreed, since they are appropriate under law.

It is Justice I seek in Madrid on the date and place indicated at the beginning.

No.	Name	Signature
1.	Raed Mohamed Ibrahim Mattar	[signature]
2.	Mohamed Ibrahim Mohamed Mattar	[signature]
3.	Rami Mohamed Ibrahim Mattar	[signature]
4.	Khalil Khader Mohamed Al Saeedi	[signature]
5.	Mahmoud Sobhi Mohamed El Houweity	[signature]
6.	Mahassen Ali Hassan Al Shawwa	[signature]

It is again Justice we seek in Madrid on the date and place indicated at the beginning

Javier Fernández Estrada
Legal Representative

Antonio Segura Hernández
Lawyer

Raúl Maíllo García
Lawyer

Juan Moreno Redondo
Lawyer

Gonzalo Boye Tuset
Lawyer