Court of Appeals in Federal Criminal and Correctional Matters – Courtroom 1

CFP 777/2015/CA1

"*Nisman, Alberto s/denuncia*" [on accusation]

Courtroom No. 3 – Clerk's Office No. 5

Buenos Aires, 26 March 2015.

Opinion of Judge Jorge L. Ballestero:

I. In the early hours of 14 January, Alberto Nisman, who was then in charge of the Prosecutorial Investigation Unit handling the bombings on the AMIA building, filed an accusation within the framework of another case related to that crime. It was submitted within the framework of the case pending before Federal Court No. 4, involving the inquiry into irregularities that were detected during the investigation of the terrorist attack of July 1994 and which allegedly prevented the authorities from properly and timely solving the case to this date.

In such accusation —containing over 280 pages— Nisman referred to an alleged cover-up of those truly responsible for the bombing of the Israeli mutual association, which the abovementioned court has been examining for some years now.

However, even though the crime reported was the same, Nisman referred to other historical facts and, especially, to other actors. Far from the evidence produced in the so-called AMIA case in the 1990's and the persons then associated therewith, this accusation alluded to much more recent dates and more contemporary names.

On this occasion, Nisman reported "… the existence of a criminal plan designed to give impunity to the indicted Iranian nationals in that case, so that they may escape the investigation and be released from the measures taken by the Argentine courts with jurisdiction over the case" and maintained that this "plan has been orchestrated and set into motion by high authorities of the Argentine federal government, with the cooperation of third parties, which entails a criminal action that constitutes […] the following offences: aggravated cover-up, prevention or hindrance of the performance of official duties, and breach of the duties incumbent upon public officials." The means for carrying out these unlawful acts was purportedly the *Memorandum of Understanding between the Government of the Argentine Republic and the Government of the Islamic*

Republic of Iran on matters related to the terrorist attack on the AMIA building in Buenos Aires on 18 July 1994 signed in the city of Addis Ababa, Kingdom of Ethiopia, on 27 January 2013.

The accusation then identified those responsible for such plan. In this regard, it stated that the "deliberate decision to cover up the Iranian nationals accused of having perpetrated the terrorist attacks of 18 July 1994, as shown by the evidence found, was made by the Head of the Argentine Federal Executive, Cristina Elisabet Fernandez de Kirchner, and implemented, mainly, by the Argentine Minister of Foreign Affairs and Worship, Mr. Hector Marcos Timerman" apart from other individuals "including: Luis Angel D'Elia, Fernando Luis Esteche, Jorge Alejandro 'Yussuf' Khalil, Argentine Congressman Andres Larroque, Mr. Hector Luis Yrimia and an individual identified as 'Allan' […] who reports to the Intelligence Secretariat of the Argentine Presidency, and whose real name according to the evidence appears to be Mr. Ramón Allan Hector Bogado" (p. 1/overleaf).

According to the accusation, these criminal actions allegedly stemmed from Argentina's energy needs in recent years. Through the rapprochement between both States, Argentina was to obtain the oil it craved for, which would allow it to cover deficiencies, whereas Iran was to receive a significant supply of grain. A satisfactory balance of trade that was difficult to achieve. The implications of the AMIA case and the accusations that our country had been making against Iranian nationals as those responsible for the bombings had caused the two economies to grow apart for many years. The Memorandum of Understanding was thus an ideal bridge to reunite them, albeit at a considerable cost. Along the way, Argentina had to waive any attempt to prosecute or sentence those who, to this day, have been identified as being responsible for the most serious terrorist attack on Argentine soil.

In Nisman's opinion, the agreement was going to provide a suitable instrument to remove the only restriction on the freedom of the accused Iranians. Through the "understanding" between Argentina and Iran, the parties would purportedly seek the removal of the red notices issued by Interpol against five of the eight accused Iranians, since there was no longer any reason for those notices to exist. Behind the façade of an agreement on the investigation, there would no longer be any reason for keeping a measure intended to identify the persons sought in that investigation and force them to appear before the courts. What is more, the accusation even suggests that there were one

or more agreements signed with Iran, which were never disclosed to the public and which were even more clearly aimed at the removal of those red notices.

But in the event that those persons still required a guarantee of impunity, the task of deciding the fate of the investigation into the AMIA bombings would purportedly fall on the Truth Commission created under the Memorandum. Its mechanisms concealed —according to the accusation— a way to introduce a different hypothesis that would redirect the responsibility of the crime towards courses that were more favourable to the accused Iranians.

Prosecutor Nisman recognized in his last submission that those questions were duly analyzed by the Argentine courts and that, among other things, they led to the declaration of unconstitutionality of Argentine Law No. 26,843 which approved the terms of that Memorandum. But there was something else here. In the light of other signs given by the Argentine government since the year 2011, the behaviour displayed during the negotiation and approval of that treaty and, above all, the data obtained through certain measures ordered in the context of the AMIA case, the abovementioned Memorandum was not —in the opinion of the Prosecutor— a mere act that was contrary to the Argentine Constitution. It was in fact an expression of serious criminal intent.

Following that timeline, Nisman stated that the plan began in January 2011, when Foreign Minister Hector Timerman visited the Syrian city of Aleppo. That visit was not merely aimed at strengthening Argentina's relations with that country, but allegedly had an ulterior motive. During the visit, a meeting was held between Timerman and his Iranian counterpart, Ali Akbar Salehi, where —according to the statements of journalist Jose "Pepe" Eliaschev cited in the accusation— the Argentine foreign minister allegedly expressed Cristina Fernandez's willingness to "suspend the investigations into the terrorist attacks of 1992 and 1994, in exchange for progress in the area of trade" (p. 34).

This was followed by other circumstances that were then merely suspicious but now provided the basis for the charges filed by the prosecutor of the AMIA case. A change in Iran's attitude as regards its cooperation to shed light on the massacre, the unusual presence of the Argentine ambassador to the United Nations during the address by the President of that Islamic Republic at the opening of the 66th Session of the UN General Assembly and the —also unusual— lack of an invitation to the leaders of the local Jewish institutions to join the Argentine President at the same event the following

year were the remaining signs identified by Prosecutor Nisman as the prelude to the plan implemented through the signing of the Memorandum.

The other issues were allegedly contemporary with that instrument. The signing of the Agreement was purportedly coupled with a smear campaign against the investigation conducted by the prosecutorial unit of which Nisman was in charge. Furthermore, authorities would go on to claim that the proceedings were paralyzed and resort to the vile game of making false statements, such as those relating to the unsuccessful extradition of the person who, as of 1994, was the Persian ambassador to Argentina —Hadi Soleimanpour— with a view to portraying the never-discussed Memorandum as the only solution to those problems.

But there is no doubt that, out of all these suspicious events, the most prominent role was given to the results of the wiretaps that, in the last years, were requested by the prosecutor as the accuser in the AMIA case. In the opinion of Mr. Nisman, the consistency between the data obtained and the events then taking place in reality demonstrated the existence of the circumstances referred to above, as well as how seriously the conversations had to be taken as evidence of the crime reported. In addition, the conversations allegedly showed the existence of a diplomatic channel operating in parallel with the official channel, but with a view to achieving a shared goal: the approval of the agreement with Iran that would bring the seeds of destruction; the loss of all the achievements made in the investigation into the bombing of the AMIA building (see pp 1/145).

II. Even though, in order to channel his accusation, Prosecutor Nisman chose the case concerning the irregularities in the first proceedings initiated due to the bombing of the building of the Jewish mutual association, the Judge presiding over Federal Court No. 4 did not agree with his position. According to the judge, neither the facts nor the persons mentioned in this accusation were related to the facts and persons involved in case No. 3446/12, with which such accusation was sought to be associated. That opinion was shared by the President of this Court and this led to the opening of a new file and the participation of new actors (see pp 273/8 and 297/8).

III. The case (now Case No. 777/15) was referred to Prosecutor Gerardo Pollicita, who filed a request for the investigation stage of the proceedings to begin pursuant to section 180 of the Argentine Code of Criminal Procedure (pp. 316/51). In his request, he relied on every event described in the accusation, as well as on the pieces of evidence gathered, and he agreed with the statements made by his colleague with

respect to those responsible for the plan orchestrated. All of this was coupled with a request for the adoption of an array of measures to collect evidence. However, his position was not shared by the judge.

IV. Thirteen days later, Judge Daniel Rafecas dismissed the accusation made by Prosecutor Nisman (pp. 465/99). In the judge's opinion, the pieces of evidence incorporated into the file "…not only […] fail to provide a basis for classifying the actions described as an alleged scheme to 'cover up' and/or 'hinder the investigation' into the AMIA bombings […], but they are completely contrary to the allegation of the purported 'criminal plan'" (p. 466).

His decision —which this court is tasked with examining— is structured around three core aspect. With regard to the first one —which focuses on the criticism levelled at the Truth Commission whose creation was the main purpose of the Memorandum of Understanding signed with Iran— the judge chose to follow a strictly juridical line of argument. In this case, the Judge considered that no crime warranting investigation could possibly be invoked insofar as there was no commencement of execution of that crime —if any such crime was actually planned— and this is an insuperable obstacle to the application of criminal law. Since the Argentine courts declared the unconstitutionality of the approval of the Memorandum, and in view of the fact that Persian authorities did not even give such approval, the requirement set by the Treaty itself in order to enter into force was not met. As a result, its provisions remained static and, thus, incapable of leading to the materialization of the elements contained in the Memorandum that the prosecutor found to be unlawful.

The remaining part of the judge's decision analyzes the accusations relating to the attempt by the Argentine government to remove the red notices. In this case, the arguments for the decision did refer to actual facts and evidence, as the Judge stated that there was no proof to support the allegation that Argentina requested such removal to Interpol. In this respect, the Judge mentioned the e-mails sent by Ronald Noble after Alberto Nisman's accusation was disclosed. In one of those e-mails, sent directly to our Minister of Foreign Affairs, the former Secretary-General of Interpol, who held office between 2000 and 2014, recalled the occasions on which the Argentine Foreign Minister had asserted that "INTERPOL should keep the Red Notices in force" and further claimed that Timerman's position "and that of the Argentinean government was consistent and unwavering" (p. 473).

Those statements were reiterated in other letters —addressed to journalist Raul Kollman within the context of an interview carried out via e-mail— in which he specified that "Prosecutor Nisman's statement is false. No official of the Argentine Government has ever tried to cancel the Interpol red notices" (p. 475 overleaf).

Apart from those letters, Judge Rafecas placed emphasis on the official messages exchanged between the Argentine Ministry of Foreign Affairs and that international organization after the signing of the Memorandum of Agreement, in which one concern was constantly referred to: nothing in that memorandum affected the full validity of the existing arrest warrants.

Finally, in referring to this aspect, the judge asserted that the communication sent to Interpol regarding the rapprochement between both States did not have the illegitimate goal suggested in the accusation, but was merely intended to notify Interpol of the negotiations conducted, in light of the hard work that such organization had carried out for many years with a view to achieving such cooperation.

The last part of this decision analyzes the pieces of evidence that, in the opinion of the prosecutor, show the intention to cover up those responsible for the AMIA bombings. In this case, once again, an assessment of the evidence collected appears to prove the non-existence of the offense reported in such categorical terms.

"Pepe" Eliaschev's words were used to counter the force of his own statements. His article claimed that, according to official information, Timerman purportedly admitted to his Persian counterpart in Aleppo that Argentina "…is no longer interested in clarifying the two attacks... instead it prefers to improve its trade relations with Iran". Nevertheless, the judge considered that his statements before the court were slightly more cautious. Judge Rafecas stresses that he no longer referred to an official communiqué, but to a paper that was not written in what should have been the original language, i.e. Farsi, but in English, and which did not contain those terms but others used by Iranian diplomacy to express that they considered that they should "go forth with an important agreement with Argentina, since the Iranian Ministry of Foreign Affairs claims that […] the conditions are favourable for the Argentine people to decide to turn the page in regard to Argentine-Iranian relations" (p. 482). The difference between both statements completely sapped the strength of the accusation.

The Judge also ruled on the issues relating to the secret agreements allegedly made along the same lines as the Memorandum of Understanding. In this respect, the existence of those agreements was challenged through another possible interpretation of

the same events and statements used by the prosecutor to back his position. A political decision by the Persian authorities to keep that Memorandum confidential two months before its execution¸ which Nisman construed as a reference to another pact, as well as the journalistic distortion of another Iranian communiqué, that was cited by some of the individuals accused in this case in their conversations, appear to destroy the veracity of the accusation regarding this issue.

The Judge saved his opinion on the wiretaps and on the parties to the conversations for last. With regard to the former, he downplayed the importance of their contents by demonstrating that they were nothing more than a —sometimes mistaken— repetition of the information published on different matters by the media. In respect of the latter, the Judge did not spare any adjectives in referring to those individuals. The boastfulness of Luis D'Elía; the condemnable —but not criminal— behaviour of Khalil in his contacts with fugitives from Argentine justice; the various qualities of Fernando Esteche, described as "an extreme leftist supporter and a businessman at the same time … a rebel and an official supporter at the same time; a politically persecuted person with the intention to be close to 'intelligence' areas; an anarchist and an Islamist at the same time"; and the references to the slippery Ramon Allan Bogado who is allegedly "little more than a rogue, a cheat that cannot be taken seriously in any way" finally minimized the importance of every word recorded in the wiretaps (pp. 490 —overleaf— and 493).

Furthermore, the Judge took a measure closely related to the last characterization: he ordered that copies be made and forwarded to Federal Court No. 9 to be added to case file No. 11,503/14, in the context of which Ramón Allan Héctor Bogado is being investigated in connection with the crime of influence peddling as he introduced himself to officials from the National Administration of Customs as an agent of the Intelligence Secretariat. This decision was also challenged by the appeal filed by Prosecutor Pollicita. But this is not the main point here. His challenge against this ruling is only a necessary consequence of his disagreement with the decision he truly dissents from: the premature closing of the proceedings (pp. 515/32).

V. After thoroughly reviewing the decision challenged, the prosecutor expressed his disagreement with such an early closing of the proceedings. In his opinion "… the decision to immediately close the proceedings, without adopting any of the measures suggested in the request for the investigation stage of the proceedings to begin, prevents us from obtaining essential information in order to confidently assert that the creation of

a ‘Truth Commission’ is irrelevant in the context of criminal law or that there were no actions aimed at achieving the removal of the red notices relating to the accused Iranians against whom arrest warrants were issued for the AMIA bombings” (p. 517).

Following this, Mr. Pollicita proceeded to respond to all the arguments that the judge had invoked to reject any criminal nature of the events that constituted the subject matter of the accusation. The lack of commencement of the consummation of the criminal plan revolving around the creation of the “Truth Commission” was met with a detailed description of the crime of cover-up as a manner to show that help was provided by the sole approval of the Memorandum by Argentina. The lack of evidence in respect of an alleged spurious interest in removing the red notices was challenged by resorting to the recourse of requesting that all evidentiary means possible be used, and even by questioning the reasons invoked by the lower court when asserting that the conservation of said notices was never at risk. Finally, the Prosecutor intended to preserve the value of the evidence submitted by Mr. Nisman by pointing out that “….the recorded conversations, instead of being analyzed in an isolated scenario as the one of the present situation, may be, on the contrary, of a circumstantial nature that may be useful to analyze the hypothesis of the accusation with more elements” (p. 529).

VI. The terms of the appeal were maintained by the General Prosecutor, Mr. German Moldes, at the stage governed by Section 454 of the Code of Criminal Procedure. By referring in full to the brief submitted by the lower prosecutor, the appellant before this Court of Appeals insisted on the need to further investigate the facts in order to clear up any doubts or concerns. Furthermore, he stated, as he had already done on another occasion that he expressly recalled, that the essence of justice is to never give up the search for the truth, which is what would happen here should the early closing of the investigation be allowed. Therefore, he requested that the appealed judgment be revoked in order to open the avenue blocked by it (pp. 697/700).

VII. For its part, the defence attorneys for some of the indicted parties appeared in the hearing scheduled in the file. On such occasion, the defence, on the basis of different grounds, requested that the recourse filed by the accusing body be rejected and that the criticized decision be upheld (see defence briefs for Hector Yrimia, Andres Larroque, Hector Timerman and Fernando Esteche, and Jorge Khalil, pp. 712/20, 721/31, 732/51, and 752/6, respectively). As can be seen, there are two antagonistic positions that need to be settled today.

VIII. It is understandable that, in view of the events that are described in the accusation and the historic context in which they took place, there may be an unconscious inclination to connect the facts of this case with those under investigation in other files, but all of which have the tragic event of 18 July 1994 in common.

The proceedings initiated as a result of the bombing of the AMIA building —in which the irregularities that took place during the first stage of those proceedings are being investigated—, as well as the action for the protection of constitutional rights (*amparo)* filed after the signature of the Memorandum of Understanding between Argentina and Iran and, today, the investigation concerned with the reasons that led to the death of the accusing party, Mr. Alberto Nisman, are unified and erroneously regarded by the public as if they were all part of one same thing and, hence, as if deliberating over one of them would imply doing so in respect of the others.

This is why, from now on, any analysis aimed at studying the specific appealed case must necessarily commence by clarifying that, in spite of the undeniable common points that the abovementioned issues share, the analysis here will be strictly focused on the terms of the accusation of 14 January 2015. The accusations made there are the only path to be followed by this judge in his reasoning. The conclusions that may be reached will not have greater force than those reached in the proceedings in which they were required, without further pretensions or effects. The responsibilities for the 1994 bombing, the responsibilities of those who obstructed the timely discovery of the truth, the legal consequences of certain rules that contravene the Argentine Constitution, and the reasons that led to the death of the prosecutor in the AMIA case will be discussed in other fora. Each of these issues will be analyzed in itself.

The issue currently under consideration revolves around revealing what lay behind the negotiation —if anything— that ended up with the signature of the Memorandum of Understanding between Argentina and Iran in January 2013; whether it is true that what the Government announced as the only way to make progress in the AMIA case was nothing more than an attractive Trojan Horse which, as the Hellenic tradition shows, entailed the destruction of all the achievements that had been made up to this day, or whether, as stated by the lower court, none of the elements —apart from the mere assertions made by the accusing party— help to prove that the foregoing is true.

IX. The first step in this last direction led Mr. Rafecas to affirm that at least a part of the criminal plan described did not meet the minimum requirements to be

considered punishable. As the "Truth Commission" created by the agreement was not established because the agreement did not enter into force, there was no commencement of the consummation of the criminal plot that, according to Nisman, had been planned.

Although the dogmatic analysis made on this point is interesting for academic purposes, neither the legislative precedents nor the judicial ones support the presuppositions on which such conclusion is based.

Mr. Pollicita is right in this regard. So long as the Argentine Republic took all the required steps after the signature of the agreement by the Argentine Foreign Minister in order for it to be approved by the Argentine Congress, there were no further steps to be taken by Argentina other than wait for the other party to do the same. From the very same moment in which Law 26843 was enacted, Argentina's share was completed. All the steps that had to be taken in our country were completed. The rest was a decision in respect of which the Argentine authorities had no call.

In fact, that was the reasoning followed by this Court of Appeals —through the concurring vote of its only two members who were summoned to decide upon the matter— in a judgment issued by it less than a year ago when considering the *amparo* action filed against said Law since it approved an international document that allegedly violated the Argentine Constitution. On such occasion, I clearly acknowledged that "…it is true that the actual entry into force of the agreement would only take place upon final enactment by both countries of the laws ratifying the treaty, through the relevant acts of the respective Branches and, lastly, upon exchange of the relevant ratifications. However, our country has already taken all the necessary steps. Only if the Islamic Republic of Iran approves the Memorandum, as our National Congress did, and if the diplomatic letters referred to in the Memorandum are submitted, will the Memorandum enter into force and its provisions be able to be enforced, producing all effects specified therein in relation to the rights and obligations provided for under such agreement" (see my vote in the case CFP 3184/2013/CA1, "AMIA s/ Amparo-Ley 16.986", decided: 15/5/2014).

Therefore, as the Argentine Government no longer had any power of its own in respect of the legal effectiveness of the agreement, the *amparo* action was completely viable, and a decision on the issue was unavoidable. A statement to the contrary would entail censuring the abovementioned decision by alleging that it had made an abstract declaration in the absence of a case that required the participation of the Judiciary. This position, invoked by the attorneys for the Government at the time of appealing the

decision, was recently rejected by the General Prosecutor before the Federal Court of Cassation in Criminal Matters (see opinion 828/2014 issued by Mr. Raul Plee on 30 October 2014 within the framework of the case CFP 3184/2013/CFC1).

On these grounds, it is not possible to support the argument on which the lower court bases its decision to deny the existence of a crime that deserves to be investigated. However, this does not put an end to the issue. Far from a simplistic approach, the fact that, at this point, there is no agreement with the position of the judge does not entail the immediate admission of the accusing party's allegations. These also have some flaws.

The fact that the several articles of the Memorandum of Understanding between Argentina and Iran, which regulate the creation and the powers of a "Truth Commission", may be the subject-matter of criticism is no news. Both the accused parties, public and private, of the AMIA case and two of the members of this Court, who have authority to hear the matter, had the opportunity to highlight all the possible flaws of the agreement. In fact, these flaws were so severe as to make it impossible for the agreement to pass the constitutionality test to which it was subject. But that was all.

Other matters that were extensively discussed were that the "Truth Commission" had only its name in common with the entities that existed before it, that there were no clear rules and specific deadlines for its operation, that there were no provisions to subject all the indictees to interrogatories having the effect of a preliminary investigation, and the risk that all the achievements that had been made in the investigation of the AMIA case would be lost while building "its truth". However, neither this Court of Appeals nor the criminal complainant or the prosecutor of the case —the accusing party herein— detected in the text of the agreement a single hint of the alleged cover-up crime that was recently reported. Not one single suspicion, not one question was even suggested when considering whether the Law was in observance of the Argentine Constitution or not. All criticism revolved around the text of the agreement and the impossibility of accepting its provisions, but nobody talked about a crime, only of inaccuracies (see pp. 231/68, 568/75, and 602/09 of case CFP 3184/2013/CA1, "AMIA s/ Amparo-Ley 16968").

That is why analyzing the provisions of the Memorandum once more in an attempt to find something other than the fact that it contravenes the Constitution is taking the wrong path. Although it is true that its provisions did not observe the law, nothing in its text indicated that such inobservance was in fact the result of a crime. Reviewing every single criticism made to the Memorandum under a different legal

claim would be to review an issue that has already been resolved, at least by this Court of Appeals, by adopting an approach that is completely strange to it.

X. The second issue revolves around another provision of the Agreement: the alleged need of the Argentine Government to remove the red notices that are still currently in force in respect of the Iranian accused in the AMIA case in order to achieve a commercial approach with said Islamic Republic. This intention is allegedly reflected in article 7 of the Memorandum —the only one that did not require the mutual exchange of notes between the parties to come into force—, whereby Interpol was informed of the signature of the agreement.

It should not be overlooked that the abovementioned article was not analyzed within the framework of the file in which the *amparo* action filed by the Jewish institutions, and supported by Mr. Alberto Nisman, was processed. However, this does not mean that such provision was exempted from all analysis. In fact, it was invoked to justify the factualness of the case as the subject-matter of a dispute to be heard by a judicial court.

Both when filing an appeal with this Court and when responding to the forwarding of the pleadings, Mr. Nisman held that "the argument that there is still no actual or imminent damage as the terms of the agreement approved by an unconstitutional law have not yet been put into practice is incorrect since at least two of the articles of the memorandum of understanding have already been applied. Hence, in the first place, the seventh article of the agreement is operative and has been put into practice upon informing Interpol Secretary General of the terms of the agreement. This is public knowledge and has been broadly informed by the media" (pp. 571 and 604 overleaf of case CFP 3184/2013/CA1, "AMIA s/ Amparo-Ley 16986"). This is the only mention to such article made by the prosecutor. Despite the fact that it could be the most criticized of all —as it had already come into force—, that it had the most immediate and feared effects, and that its inclusion was obviously inaccurate within the framework governed by the Memorandum, nothing else was said with regard to this article.

Therefore, discussing the mere text of the agreement makes no sense at all. What would be the point of speculating about the operative nature of the agreement or its provisions, or the reference to Interpol in an agreement between two States, where all these issues —which exist since January 2013 in the text of the agreement— were never criticized, not even when said document was analyzed by the Judiciary at the request of the accusing party himself?

No accusation based on the mere objective provisions of the Agreement can seriously intend to become the basis of a criminal investigation. Nothing new will arise from what has already been written, and consequently analyzed, but the repetition of what has already been said. The Memorandum was, in the opinion of this Court of Appeals, unconstitutional, but it did not constitute the configuration of a criminal act.

In this regard, it is worth making a clarification. The prosecutor stated that the omission to make an accusation together with those legal objections at that time was due to the fact that there were no elements then that do exist today and that allegedly reveal a spurious intention hidden behind the convenient words of the Memorandum. This forces this Court to abandon the literality of the text in order to analyze the alleged new evidence reflected in the brief submitted in January 2014.

XI. This new evidence, which would reveal the truth of the agreement with Iran, consists in fact of two new pieces of evidence, neither of which can be qualified as such. One of them makes reference to a newspaper article in which Jose "Pepe" Eliaschev warned, in the heading itself, that "Argentina negotiates with Iran to halt the investigation on the attacks" [*"Argentina negocia con Iran dejar de lado la investigacion de los atentados"]*, published in Perfil newspaper in March **2011** (!). Hence, simultaneously with the commencement of the negotiations that Nisman described as unlawful, two years before the signature of the Memorandum and four before the formulation of this accusation, one of the proofs of the crime already existed, but it was never noticed. The novelty of this piece of evidence is virtually non-existent.

The other element has to do with the outcome of the tapped telephone conversations, which took place throughout 2013 —except for some exceptions— when the Memorandum, which had been approved in February 2013, was being processed in different judicial bodies, none of which even suggested the existence of a crime. It is worth noting that the *amparo* action filed in respect of the AMIA case was processed not only in the courts in federal criminal matters but also in contentious-administrative courts and even in the Supreme Court of Justice of the Argentine Republic. Likewise, it should also be noticed that the accusing party did not learn about the outcome of the conversations only after the decision of this Court of Appeals, in May 2014. On the contrary, the outcome of the tapped telephone conversations —the renewal of which the accusing party himself requested to the judge hearing the AMIA case— were handed to him at the prosecutor's office chaired by him almost simultaneously with the above (see classified documentation in envelope 5).

With regard to the first piece of evidence, the analysis conducted by the lower court seems flawless. When the assertions made by the journalist in his article are analyzed in the light of the statements made by him on deposition, there are few hints left of the commencement of the spurious negotiation that was allegedly planned, and which was asserted with such vehemence. The story changes drastically when considering that a document that was allegedly official was not completely so, but rather an internal paper of the Iranian Ministry of Foreign Affairs; that it was written in English instead of Persian as it should have been considering the source of the document; and that it does not reproduce the words allegedly pronounced by Minister Timerman, but rather an opinion of the Persian interlocutors which, far from revealing a lack of interest by Argentina in solving the question of the attacks, made reference to their impression that Argentina was willing to "turn the page in its relations with Iran". It is evident that this led to the decision to omit any mention to this element when examining the constitutionality of the Memorandum of Understanding. The decision to mention it now is probably based on the idea that, together with other evidentiary elements, it would constitute a more convincing picture. This is where the telephone conversations become relevant.

According to the accusing party, the recorded telephone conversations had allegedly revealed the secret plot behind the agreement with Iran. On the express instructions of the President, Foreign Minister Hector Timerman had allegedly held negotiations with such country to help its nationals avoid the scope of the investigation on the AMIA bombings in consideration for the promise of commencing trade negotiations between both nations. For such purpose, two negotiation channels had been opened: an official one, led by the Foreign Minister, and an underground one, in which Luis D'Elia, Fernando Esteche, Ramon Allan Bogado, Hector Yrimia, and Jorge "Yussuf" Khalil would play their parts on the instructions of the President through the participation of Representative Andres Larroque. The goal of this plot was to obtain oil. Its cost was the collapse of the AMIA case and the impunity of the Iranian accused.

When approaching the study of the accusation that initiated these proceedings, with its almost three hundred pages and dozens of telephone conversations neatly linked to a story which, sparing no adjectives, displays meticulous wording, being seduced by its statements is admissible. Yet, when paying close attention to details, the contour of what is said becomes less clear. As what happens with an illusionist trick, in cases like this one it is important to analyze the situation closer to be able to reveal its real entity.

XII. The first approach leads us to the impossibility to understand what the real background of the Memorandum of Understanding signed between Argentina and Iran in January 2013 would be, because the accusation provides so many elements on this point that they end up confronting each other when trying to find an answer. It should be noted that while in the accusation giving rise to these proceedings it is argued that negotiations began in January 2011, when Timerman visited Siria, in another paragraph it is stated that it was during a trip D'Elía made to Iran, between February and March 2010, that it all started. According to Nisman, at that time D'Elía had been invited by the Persian authorities "…to be informed of the political solution and Iran's disassociation from the AMIA case, thus leaving aside the accusations of the Argentine Judiciary and —esentially— achieving the removal of the red notices, in line with Tehran´s historical claim" (p. 111 overleaf).

The same chronological dispute arises in other excerpts, but with the addition of a new element. Now the struggle is not between 2010 and 2011, but 2006, and it is not so certain that Iran was the author of the plan reflected in the memorandum. Thus, on the day the Agreement was signed, Khalil stated in a conversation: "*…all I know is that the same document we drafted and submitted six years ago, both to the Iranian Embassy and to the Government…," "… we drafted this plan with Fernando Esteche six years ago…,"* He further confessed to Luis D'Elía: "*…Do yo know who wrote that Memorandum for me? Do you? It was Fernando…,"* referring to Esteche (pp. 28 overleaf/9). However, D'Elía recalls other times and other authors, as on the same day, 27 January 2013, he tells Khalil that the signed agreement "*…Is similar to the one they proposed in our first trip to Tehran, remember?...*" (p. 111)

Yet, we should not let these discrepancies prevent us from moving forward in our analysis as, considering the tenor of the accusation, they seem to be merely incidental issues. What is important is that, according to the information provided, the wiretapped conversations apparently show that the main purpose of the Memoransum was the removal of the red notices by Interpol. So, when Timerman apparently could not persuade Interpol Secretary General to remove such notices, the Iranians lost all interest in approving the Agreement internally, a position they even appear to hold nowadays.

In line with the foregoing, Jorge Khalil, who was allegedly the Persian link in our country, when asked about the reasons why as of May 2013 the agreement had not been

approved, apparently told D'Elía the problem is that "*…there is certain disappointment over there, over there, I don't know why, they are disappointed […] I think that some of the words used were not welcome... I think this bloody Jew [referring to Timerman] screwed it up" and he added "…there was something signed… where the precautionary measures are mentioned, I think, but we'll talk about it personally" -sic- (Telephone conversation of 11/5/13, cited on p. 58 overleaf).*

As to Khalil, several comments should be made. Leaving aside the not so convincing expressions he used, such as the repeated "I think", in this wiretapped conversation, as it is acknowledged in another excerpt of the accusation not following the one cited above, the cause of such disappointment is specified. There, Khalil expressly acknowledges that "…some of the words used were not welcome... when someone said: 'I hope you don't think that I like negotiating with people like John Doe… the Iranians'… that made a really bad impression…" (Telephone conversation of 11/5/13, cited on p. 98. See also p. 172 of the Box File with the expression "Transcriptions 1" on it). Now the reasons for the logical omission by the prosecutor are clearly understood. Nothing there made reference to the red notices.

In addition, the implication made as to the existence of other secret agreements "*where the precautionary measures are mentioned"*, conflicts with his own accusation hypothesis. If the Memorandum of Understanding was, as he alleged, the channel chosen by the Argentine Republic to give the necessary assistance that is the essence of the cover-up crime and, more specifically, paragraph 7 as the path towards the removal of the red notices, ¿for what purpose would another agreement be signed where "*the precautionary measures*" were included? ¿Was the prelude of this agreement not hard enough, to the point that it was apparently negotiated for two years, to reproduce its scope in another instrument? Apart from that, the signing of that other agreement without any proof of its execution, may only be achieved by conveniently claiming, as in this case, that it was kept secret. In this way, its absence would be the clearest evidence of its existence. Here, there is no way of accompanying the statement made by the prosecutor but with the idea that the referred instrument has the same defining

features as black holes, whose presence is only demonstrated with the most absolute nothingness.

From another perspective, when the accusation intends to reaffirm that the purpose of the Agreement -the one made publicly known- was the removal of the red notices, Nisman resorts to two wiretapped conversations. In one of them, Ramón Allan Bogado tells Khalil: "*I heard a piece of gossip... I was told there, at "the house*" [a reference to the Intelligence Secretariat]… *Interpol is going to lift the arrest warrants against the friends... it is going to lift them now*" (Telephone conversation of 25/2/13). But, according to the prosecutor, that was not all, there was more to it. The day the Agreement with Iran was signed, Iranian Business Attaché in Argentina apparently had a conversation with Khalil. This is how he expressed it: "*...he was already aware, he told me. This is good news, he told me, and you will receive even better news, he said. Just a little while ago...". Now, if he participated in this secret cover-up plot, ¿how is it possible that he was unaware of such good news that should be derived from the Memorandum that he himself had drawn up and, to make matters worse, that such information was disclosed to him by somebody who, as was stated in the accusation, apparently had no relationship with the Intelligence Secretariat and, even worse, that happened one month after the signing of the Agreement?*

The last conversation in line with the foregoing, was held on 20 May 2013, a day on which several conversations were revealed, whose sequence is priceless. In the first one, Khalil blamed Argentina's attitude for the fact that Iran had not approved the Memorandum yet. He told D'Elía that "... De Vido must be aware that Timerman hasn't done some of the things agreed. That is clear. He hasn't done some of the things agreed...". According to the accusation, those "*things*" could be nothing but the removal of the red notices to which he had committed. Such noncompliance with what had been agreed justified Iran´s failure to approve the Memorandum. However, in that same conversation, before the paragraph transcribed above, Khalil assured his interlocutor, who expressed his concerns, that "*They will approve it, they are going to approve it… They will approve it, Luis, you know what times in Persia are like…"*, so it

cannot be understood why, even if Timerman had not fulfilled his promises, the agreement would be approved anyway.

Some minutes later, another conversation arouses interest. Now, it turns out that on that same 20 May, Iran approved the Memorandum (!). And Khalil told the same interlocutor: *"...I told you it was going to be approved, dude, I told you to stay calm..." Needless to say, between one conversation and the following, the red notices remained unchanged.*

A last stop in this review. This time, the words belong to Luis D'Elía, who warns Khalil "...but there is a detail here that will complicate things... it was approved by Ahmadinejad, but not by the Iranian Congress..." Curiously enough, it was D'Elía who warned Khalil that the situation was not as perfect as he presented it since the latter was the link with the Iranian position. Yet, it is even more weird that all this news was announced when it was the newspapers which that day published the information that they, as we can see, merely reproduced (see the publications referred to in the accusation on pp. 1/145).

Nevertheless, at this point the truthfulness of D'Elía's expressions must be acknowledged. The Iranian Congress, at least up to now, has not approved the Memorandum of Understanding. But perhaps that is not so important. After all, it cannot be understood either what interest Iran had in this issue.

On the one hand, the accusation states that "...Iranian authorities had expressed a long-standing desire to trade. They did not mind whether the Memorandum of Understanding was approved or not" and later on it adds that "...the Islamic Republic of Iran was willing to negotiate without having to ratify the Memorandum of Understanding because, unlike the Argentine government, they did not need to explain themselves to their citizens" (pp. 50 and 51). However, the Iranians apparently did not turn out to be so philanthropic.

*It is then stated in the accusation that Iran did have an interest in the signing of the Agreement, which would serve as the channel for the removal of Interpol's red notices. Thus, it is argued that "a*s there were no red notices to remove, Iran had no interest in signing an agreement with Argentina" and that "...the seventh provision of

the Memorandum of Understanding was the starting point to enable the removal of Interpol's red notices, i.e. it was the first step to guarantee the impunity of the indictees" (see p. 55/overleaf). However, this provision, the only operative one upon the signing of the agreement, apparently did not produce the desired results. This caused Iran's failure to internally approve the Memorandum.

Yet, it is weird that, one part of the plan having been frustrated, they decided to continue on that path since, according to the accusation, the agreement stipulated other beneficial alternatives for the Iranians. In this sense, and several pages later, the prosecutor pointed out that such failure "...did not thwart the impunity plan" and added that "...this setback [did] not imply that Iran's interest in the agreement disappeared completely" (p. 61). This is where the "Truth Commission" would be formed as the body in charge of formulating a different hypothesis about those truly responsible for the attack against the AMIA building, which would not involve Iranians. Thus, it is stated that "the scheme devised in the agreement provides the tools to make progress towards that objective which, as can be appreciated, is much broader and more important than the simple removal of Interpol's red notices" (p. 64 overleaf).

As we can see, assuming a really erratic position, at first Iran had no interest at all in signing the Agreement but it then focused its attention on one single condition and ended up being the authentic and sole beneficiary of each provision of the new rule which, however, it never ratified. So strange.

This argumentative zig-zag, in fact, jeopardizes the accusation itself, showing that once the veil covering the words of the Memorandum is lifted, nothing remains.

Meanwhile, on the other side, there is ample evidence that events happened in a completely different way.

XIII. In this section, it is worth mentioning the exchange of letters between the Argentine Foreign Ministry and the General Secretariat of Interpol following the signing of the Memorandum, and, on the same wavelength, the clarifications recently made by Mr. Ronald Noble, who was Interpol Secretary General during the last 14 years.

By means of a letter dated 15 February 2013, Héctor Timerman addressed the Secretary of such organization informing that: "the execution of the Memorandum of Understanding, the possible approval of it by the competent bodies of both States and its subsequent entry into force do not cause any changes... in the status of the requirements for international arrest" made by the Argentine Republic to Interpol. One month later,

the Legal Counsel of Interpol assured the abovementioned Minister that "…the agreement will imply no changes in the status of the red notices published in connection with the crimes investigated in the AMIA case". Finally, the day after the filing of Prosecutor Alberto Nisman's accusation, Ronald Noble himself addressed Argentine Foreign Minister, by means of an email, in the following terms: "…When I was INTERPOL's Secretary General, on every occasion that you and I talked and met in connection with INTERPOL's red notices, which were issued in relation to the AMIA case, you told me that INTERPOL should keep the red notices in force. Your position and that of the Argentine Government were consistent and firm", and after that he expressly made a revision of those occasions (see Annex 7, 8 and 11 of the documents entered on pages 386/419).

In turn, all that is corroborated, as the lower-court Judge correctly highlights, by the information that Nisman himself provided, by email too, to two journalists who asked him about the issue, on which occasions he confirmed and emphasized his statements about the fact that the Argentine Government never intended to remove those red notices (see news articles published in "*Página 12*" on 18 January and in "The Wall Street Journal" the following day, as well as the copies of the emails sent by Noble and submitted by the writer of the first news article cited, Raúl Kollmann, all of which was entered on pp. 437/56 and 458/61).

Implications versus assertions, suspicions versus documents, speculations versus events. Undoubtedly, the scales are not tipped in favour of the admission of the accusation.

Even Prosecutor Pollicita himself did not succeed, in his appeal, in giving some support to further balance the obvious disparity between the accusations made and the evidence presented. The appeal is focused on claiming that the statements made by Noble be channelled through a formal legal action –a witness' testimony- and not just by means of an email or a journalist's statements. However, he provides not even one reason that raises doubts as to the truth of the email attached to the proceedings or the information in the newspaper articles that would lead to the admission of his claim. Especially when, as he acknowledges, Nisman himself based a significant part of his accusation on journalistic reports, thus making more than an accusation: it was a submission by the representative of the Public Prosecutor's Office in the AMIA case within the framework of the file aimed at investigating the irregularities taking place in it (pp. 524 overleaf/5).

In a last attempt to invoke more than mere suspicions, the appellant resorts to an interpretation of Interpol's internal regulations in order to prove that it is not true that only the judge hearing the AMIA case has the power to cancel the red notices, as stated by Mr. Rafecas in his decision. A correct interpretation of Article 81 of Interpol's Rules on the Processing of Data, not a biased one, as the lower-court Judge would have made, could prove that, according to Pollicita, "even though the red notices may be "removed" from the case at the Judge's request, then they may also be 'suspended and/or cancelled'", which would be an exclusive power of Interpol General Secretariat "...in those cases where 'the notice no longer meets the minimum requirements for its publication" (p. 527).

It is tempting to conduct an exegetical analysis of the rule, in order to extract the appropriate scope of each of its provisions. But it is better to leave that exercise to other matters that do require it. In principle, the analysis made by one of the defences is sufficient (see the submission of Hector Timerman's defence at p. 732/751).

The real interest of this matter lies in other dimensions since although the possibility to suspend or remove the red notices exists and is real, according to the text of the regulation and the prosecutor's interpretation, the appellant fails to provide a fundamental reference. In its appeal, the prosecutor does not provide a single datum from which it can be deduced that someone from the Argentine government, or even the Iranian government, performed an act intended to "force" the activation of such power of the Secretary General of Interpol. No element is added to the mere allusion made to that power, existing whether with or without the Memorandum of Understanding, beyond the mere reference to the signing of the aforementioned agreement. Again, there is nothing that prevails over the very wording of the rule that has already been examined in light of our legal system.

XIV. That same lack of evidence to which Mr. Rafecas referred in his decision, which evidence the appellant failed to submit, is present again when inquiring about the other issue that would provide immunity to the accused Iranian nationals. The idea of the creation of the "Truth Commission" to promote the generation of a new hypothesis to release all indictees is reiterated. To this effect, emphasis is put again on the names of those who have allegedly operated to make progress on the construction of the new enemy responsible for the attack (Khalil, Bogado, Esteche, Yrimia), on the purpose of this plot (*"... they want to build a new AMIA enemy, the new responsible party for the AMIA issue..."*; *"...the essence, the core … is Iran's innocence"; "we're going to clear*

things up we're going to clear things up"; "…someone's going to come out of this with egg on their face …" and Khalil clarified that it would not be the Iranians and concluded: *"…How could it possibly go our way, man? If we're sitting at the table…");* the multiple options that would have allegedly been mentioned (*"...they are reporting that they themselves were the ones of the self-attack. So, straight out and we start weaving another variable "...If the Traffic falls down, forget it, everything falls down, not only did it fall down, but it also turned over…*"); and the roles that each of them would allegedly play in this cover-up plan (Bogado said *"... Yrimia... That one is one of my employees…"* and Esteche mentioned the source of information that the attorney could provide, which *"... could be something specific for any of the different positions of... a third country, or whatever, any of the things to be decided will useful, as it's information"*) (see. pp. 66/70). Those are the most prominent excerpts of the evidence on which the accusation is based. However, what really matters is not specified in the accusation, i.e., what was ultimately the fictitious hypothesis or the specific contribution made by the people cited therein to develop it.

In this regard, the appellant elaborates on the theoretical analysis of the crime of cover-up and delves into the examination of its typical elements, especially the intentional aspect of the act, but fails to provide a single concrete datum on which to base that "help" covered by the aforementioned criminal offense beyond the text of the agreement itself, since even though it is true that, as the prosecutor himself suggests, the wiretaps would allegedly provide these additional elements, it is neither the lower court nor the undersigned who are prevented from admitting them seriously; not even the appellant provides them with probative value. It should be noted that the prosecutor himself admits that the recorded conversations "*... may have... probative value* that is useful to assess the hypothesis of the accusation with *more elements*".

Ergo, today these conversations, far from being purported evidence of a crime, can only aspire to *possibly* serve as *evidence* if *other* elements are added to the case. It is certainly little the strength with which the prosecutor himself has provided them (p. 529, emphasis added).

And it is to be expected when it can be observed that the accusation explores different excerpts from a conversation to link its contents as conveniently as possible, using ellipsis, without consideration of time or date, as if one could go developing the chronic choosing which wiretap to put just like in certain popular soap operas of a few years ago,.

Additionally, telephone communications are combined with others made in different months, but which are displayed as part of one and the same context, so that everything refers to the same allusion: they are talking about the cover up (see pp. 51 et seq., 120 et seq. as well as the ones cited above).

And what value can telephone conversations have in which the speakers, as pointed out by the lower court, make reference to forming part of a restricted-access, decision-making environment, a "small table", without projecting more than the echo of news reports or a made-up idea of being operators without conviction? Only thus can it be understood that on 27 September 2013, hours before the meeting of foreign ministers that was to be held in the United Nations, a rushing D'Elia needed to talk to Khalil as he had *"...an urgent message from the Argentine government to be transmitted urgently over there, before tomorrow... I'm at Government House now... Let's go to the Embassy ... there is no matter of greater importance than this, trust me"* (p. 89). That such message, according to another wiretap involving Khalil, was that the Government "*needs the Iranian Government to announce, together with the Government of Argentina, the creation of the "Truth Commission" tomorrow at the meeting… and to set a date, in January, for the Argentine Judge to travel to Teheran...*" (p. 89). But that, however, Nisman himself admitted that "on Saturday 28 September, the foreign ministers held two meetings, with intermediate consultations to their respective presidents. The diplomatic notes were never exchanged. The agreement did not become effective. No schedule was established for the 'Truth Commission' or the Teheran's meetings. There was no joint announcement at all. The Iranian authorities did not declare anything officially" (p. 90). D'Elia involvement was a real success!

XV. Maybe that is the logical consequence when, as claimed in the decision on appeal, the protagonists of the "sophisticated" plan lack the qualities attributed to them and, therefore, the necessary powers to achieve what they say they will. That is the answer to why none of his predictions or representations had more impact on the facts than the reality behind them, disclosed in unison, with all its hits and misses, by the media. So it is understood that the prosecutor stated that "... there is a correlation between reality and the circumstances mentioned in those [telephone] conversations", though not in the proposed way, i.e., it "strengthens the probative value of this material and provides it with the necessary force", but that does not prove anything other than the reproduction of a source to which any inhabitant of the world could access (p. 14). As it can be seen, the order of factors does alter the product.

In this context, it is understood why D'Elia is referred to as the "valid" operator of this cover-up plan, who the prosecutor himself regarded as unbelievable when listening to his testimony under the AMIA case since, as Nisman said, his version of the facts of the attack "... lacked all grounds, boils down to crazy, on-the-spur-of-the-moment theory; and was self-evident, hence, it is not worthy of any further analysis" (p. 110 citing p. 379/80 of Case File No. 416 made under the AMIA proceedings). Or that his partners denigrate him and refute his statements. Khalil said the following about D'Elia "*... you're a cheat, I told him; he told me that when there is new business with Iran we're back to do business bla bla bla; no, you don't do business with me, I told him, and I'll tell you something else, do not get your hopes up doing business with Iran...I dealt him a low blow, everywhere..."* But we also have Esteche telling Khalil, again referring to D'Elia *"... he cannot go pretending he's a know-it-all; if there is someone who cannot enter the Government House, it's him"* (Communications of 23/7/13 and 20/11/12, pp. 17 and 398 of the file box identified as "Transcriptions 1").

It is also understood that the local connection with Iranian authorities was Jorge Khalil, who not only was seen somewhat disoriented the day that Iran supposedly approved the Memorandum – "*it is a shame that I have to hear it from the Argentinians rather than you*", he would have allegedly questioned a few – but also they had to tell him what his behaviour had to be to avoid compromising the rapprochement between both countries (pp. 98/99). And not to mention when, referring to himself, in front of a third party, Khalil recalls a conversation with D'Elia "*... he wanted to know what was going on with the memorandum (laughs); he thinks I'm Steven Spielberg, 007... and how should I know what is happening with the memorandum, I know as much as you do about the memorandum, I told him"*. When there is a confession, no evidence is needed. (Communications of 20/5/13 and 23/7/13, pp. 156 and 17 of the file box identified as "Transcriptions 1").

Similarly, it is believable that the secret intelligence agent electronically contacted a yahoo email account using his name and surname, and that he can be found in "Sonic", the exclusive social network, and that his contacts in the Argentine Customs Administration have resulted in an accusation by the Intelligence Secretariat for having falsely claimed to be a member of that agency (see pp. 122, 123 and 125 and case No. 11,503/2014 of the registry of Federal Court No. 9).

In addition, little can be said about the contributions made by Esteche and Yrimia, whose involvement is based on the "creation of the false hypothesis intended to

replace the one involving the Iranians being covered up" and on the fact that it "collaborated with and provided information to Iranians agents in Argentina, and created a new hypothesis and promoted the cover-up plan". Such hypothesis was so fictitious that its existence could not be proven even in the accusation itself (see pp. 128/129).

Finally, nothing remains to be noted regarding the other three indictees when they are not involved in any of the wiretaps, and when the evidence and allegations cannot prove the slightest connection with the facts of the accusation that, as stated, do not result from official acts relating to the negotiation, execution and approval of the unconstitutional, but not criminal, Memorandum of Understanding.

XVI. In fact, after all, and having analyzed the evidence that was said to be new, there is nothing but the document that was analyzed, from all its implications, with all its flaws and virtues. At that time it was concluded that its effects could not be admitted as they defied basic precepts of our Fundamental Law, but nothing in its text demonstrated the commission of a crime.

It is true that prosecutor Pollicita explains that it was not possible to present an accusation at that time, such as the one giving rise to this case, because there was no evidence of such spurious conduct. But it is true that the situation remains the same today (pp. 522/523).

It could be claimed that the Memorandum of Understanding was a failure for Argentine diplomacy, an error for legislative records, a disappointment for those who thought that its text showed progress in the investigation into the attack, but it is farfetched to consider that it gave rise to a Machiavellian plan to cover up those responsible for the hundreds of victims of the AMIA bombing.

In a disaster or an accident, not every wound treated at a hospital or every automobile collision involves the commission of the crime of assault or attempted murder. Something else must be added to the mere external causation of harm or danger; something to show the intention to achieve an illicit gain.

Similarly, it is also necessary to claim much more than just the inappropriate nature of such agreement evidencing that its purpose was indeed unrelated to the clarification of the AMIA case. However, no evidence submitted in this case, the statements found, the partial wiretaps or the contradictory statements meet such requirement.

This lack of evidence, which the appellant himself admits, cannot be circumvented by the way proposed, i.e., opening an investigation to obtain evidence that is not available. It is the presence of evidence what should encourage a criminal investigation, and not vice versa, leading to the most coercive state activity to get something to justify its actions.

And there is no reason to depart from this guideline, not even that invoked by the appellant and repeated by Mr. Moldes before this court, because even though it is true that the message that the courts have exhausted all resources and tools to make their decision as clear, transparent and equitable as possible must be conveyed to society (p. 518), it is also true that "... the express disassociation of officials leaves little room to the ideals of justice in social expectations and popular imagination" (p. 698). However, it must also be admitted that criminal courtrooms are not theatre stages and their records are not the part of a movie, or that a person should not be subject to the effects of criminal prosecution with no other reason than being a public figure.

It should not be forgotten that "the investigation stage jeopardizes the honour, reputation and tranquillity of a legally innocent person, which may restrict their freedom or affect their assets, or distance them from their ordinary business or family, leaving such person in distress; who, in short, can be subjected to the forms and severity of a penalty, causing irreparable dishonour and ruin" (Vélez Mariconde, Alfredo, *Derecho Procesal Penal*, Lerner ediciones, 2nd edition, Buenos Aires, 1969, Volume I, page 386, cited in *Fallos* 327:5863).

That is why a much more recent precedent than that invoked by the General Prosecutor, and signed not by two but by three judges of this Division I, expressly established what has been said herein. It was recalled that all investigations should be conducted rationally and prudently, so as to avoid any risk of violating the guarantees that all litigants enjoy and that the facts and evidence of an alleged crime, regardless of the logical progress of the case, must be incorporated when establishing the procedural object of the proceedings so as to prevent it from becoming what is called a fishing trip. Additionally, it has been said that "we would face the paradox that, instead of investigating further to confirm or rule out a suspicious circumstance that may be relevant in criminal and legal terms, we would do it 'just in case', in order to find any suspicious element". The destruction of the logical order of surveys is what happened in this case. The lower court judge's decision is not regarded as premature because he has unexpectedly dismissed an existing burdensome context, nor is it intended to delve into

the collection of evidence because the existing evidence warns about a crime that must be punished. A thorough and detailed examination is requested… with the hope that, at any time, it provides the basis for suspecting the commission of a crime. And there the cycle begins again. Devising new procedures that, in due course, will generate others, with the consequence of violating constitutional guarantees" (Division I, CFP 12438/2008, decided on 7/17/14).

And this is what the Public Prosecutor's Office proposes.

In this regard, the prosecutor himself admits that "… if evidence of what was said in the accusation regarding the fact that the authorities intended to disassociate Iran for good through the Commission *arose from the proposed measures*, i.e. if the intent of covering up the Iranian nationals were proved, it would be sufficient to support an accusation" (p. 521, emphasis added). As it can be seen, there is no such evidence. It is expected to arise from the proposed measures in the request for the commencement of the investigative stage of the proceedings.

In this way, without any basis other than the haste in its dismissal, but without considering its present lack of evidence, the appellants insist in keeping a criminal action open and ongoing, with the hope that, at some time, something may show that the Memorandum was inspired by a criminal intent. Strictly speaking, in the light of the background information reviewed above, the term for such an endeavor can only be one: a perpetual case. Because if nothing existed in 2013, if nothing was alleged in 2014, and today, in 2015, nothing could be brought, what hope is there that the lapse of time will reverse this situation? On the contrary, the farther one is from the time in which the alleged criminal plan might have occurred, the lesser can be the expectation of obtaining something the accusers can hold on to, in order to keep their case open.

Thus, the decision by the lower court is the only valid answer to the terms of the accusation made in January this year, and therefore it deserves to be confirmed here.

As regards the rest, the remaining item of the decision, which is also questioned by the appellant, seems suitable. Although the collected items have not been suitable to support the accusation in these proceedings, they are indeed suitable as evidence of the other events investigated by Federal Court No. 9. We cannot disregard that the only evidence collected here, having any appearance of seriousness, was the evidence that defied the wording of the accusation, by showing that the actual events were precisely the opposite of those alleged. This evidence is, precisely, inconsistent

with the evidence of the alleged status of Ramón Allan Bogado as an intelligence agent, which is the fact at issue in those proceedings.

For all the foregoing, upon considering the strict wording of prosecutor Pollicita's appeal, and upon the petition by Mr. Germán Moldes (under section 454 of the National Code of Criminal Procedure – especially the prayer for relief on folio 700), my opinion is to confirm the lower court decision, insofar as it dismissed the accusation, and the rest of its grounds, because I am absolutely persuaded that this is the proper way of stating the law.

And this because the closing of this proceeding does not mean in any manner the closing of the investigation in the AMIA case, in the same way as the declaration of constitutional invalidity of the Memorandum of Understanding between Argentina and Iran, requested by the Jewish community institutions themselves, was far from implying such a thing. Quite the opposite, either decision is only one step more to seek the truth of the event of July 18, 1994. Separating one thing from the other contributes to ensure that nothing will lie in the way of a suitable attention of the victims' legitimate claims, punishment of those responsible for the largest terrorist attack our country can remember, and achieving the ideal of justice.

Opinion by Judge Eduardo R. Freiler:

I agree with the solution proposed for the case by my colleague, in his above opinion, because the dismissal of these proceedings, under section 195 of the National Code of Criminal Procedure, appears to be consistent with the law and evidence in the record.

According to the request for investigation prepared by the representative of the Prosecutor's Office, Mr. Pollicita, the subject of these proceedings consists in determining if there was *"... a criminal plan intended to give impunity to the Iranian nationals accused in those proceedings* (the AMIA bombing), *so that they can avoid investigation and escape action by the Argentine judiciary ..."*, as reported by the then prosecutor responsible for the UFI AMIA office, Mr. Alberto Nisman. In that submittal, he alleged that the intent was, specifically, on one hand, to cancel the red notices – issued by Interpol – upon such persons, and on the other, the creation of a Truth Commission that would eventually add a *"false clue"* in order to mislead the investigation. The plan was allegedly carried out by the subscription of a Memorandum of Understanding between both countries, on January 27, 2013.

For a more clear discussion, I will follow the same reasoning sequence followed by the lower court.

1.

As to the matter associated to the creation of a **Truth Commission,** the lower court held that, even if the assumption in the accusation were to be true, it would be the case of preparatory and non-punishable actions, because there would not have existed any actions commencing the reported offence. The decision is disputed by the appellant, who understood the opposite.

Now, in order to resolve the issue herein, and determine if the reported actions went beyond the threshold of merely preparatory acts, so as to become relevant to criminal law, we must carefully examine the type of offense selected by the accusers, and review the investigated events *vis à vis* the elements of such offence.

The legal provision in section 277 first item of the substantive code prescribes a punishment for *"whoever assists a person to avoid investigation, or escape action, by the relevant authority"*. The core of the offense is then such *"assistance"*, i.e. help or cooperation provided to a person, with the purpose of hindering legal action, and thus improving his/her procedural situation. It should be recalled that this is an offence against the public administration, which affects the proper administration of justice.

According to the appellant, *"... the reported 'assistance' allegedly consisted in organizing a Truth Commission and its confirmation by the legislative branch..."*.

This theory cannot be accepted. In the words of the accusation filed by Mr. Nisman, the purpose of creating such Commission was allegedly to add a new clue, based upon false evidence, in order to redirect the investigation of the bombing of the AMIA, and mislead the investigators away from the premise indicating that the perpetrators of the attack were Iranian citizens identified in such proceedings.

It is obvious that achieving such purpose requires multiple factors to occur. First, the International Agreement must be approved by the Parliaments of both countries, because it would only take effect upon the last verbal note being exchanged between both countries, with the consequent compliance with such formalities. After this, the Commission would have to be assembled and their members would have to make their own rules of procedure, which must be approved by the parties. Subsequently, after reviewing the evidence presented by both countries, under the procedure organized by themselves, they were to prepare a recommendation *"on the*

manner how to proceed in the case". According to the accusers' view, that is where the so-called *"false clue"* was going to be presented.

Needless to say that nothing of the sort occurred. The Agreement has not even passed the first of the phases indicated in the above paragraph: it has not been approved by the Legislative Authority of the Islamic Republic of Iran, so it never took effect.

So the lower court is then right to say: there have been no actions commencing the offence.

It cannot be said, as the appellant does, that merely creating the Commission constitutes *"assistance"* for purposes of the offence *encubrimiento* (cover-up), because no improvement to the procedural status of the accused would result from this. As opposed to this, the first action that could have any relevance to criminal law would be the addition of the new –and false – assumption in relation to the terrorist attack upon the AMIA.

As it appears from the Memorandum, the purpose of the Commission is *"to carry on a detailed review of the evidence"* and *"to give a report with recommendations on the manner how to proceed in the case"*. The event reported here would imply distorting the lawful purpose for which the body was created; its members – whose identity is unknown, since it never came to exist – instead of fulfilling the duty entrusted to them, would prepare the related recommendation by not telling the truth, by giving a false version – which is also still unknown - of the investigated events, constructed with the specific intent to mislead the investigation of the attack.

The offence *encubrimiento* (cover-up), by the method of providing a personal benefit – the essence of which, as I have said, consists in providing cooperation so as to improve the procedural situation of a person who is being investigated for a crime – begins once the doer incurs in specific behavior intended to hinder legal action.

By virtue of what has been said in the above paragraphs, I disagree in this regard with the opinion of my colleague Judge Ballestero, and agree with the grounds stated by the lower court.

Apart from this, it should also be noted that the Memorandum of Understanding, in the domestic environment, has gone through several phases: it was subscribed by the National Executive, later approved by the National Congress, and subsequently examined by the Judiciary, pursuant to a claim alleging its constitutional

invalidity. Along this path, it has been the subject of various objections by the then prosecutor responsible for the UFI AMIA office, and those who served in the role as private accusers in that investigation. However, neither the public prosecutor nor the private accusers have made, at any time whatsoever – until the accusation that gave rise to these proceedings, two years later than the subscription thereof – any allegation suspecting its possible relevance from a criminal viewpoint.

This leads me to ask, for what reason did prosecutor Nisman file his accusation at this moment? None of the elements referred to in his submittal is new: neither the text of the Memorandum, nor the journalist article published by the deceased José 'Pepe' Eliaschev – which dates back to several years ago –, not even the telephone wiretappings he relies upon in his version of the events – which were sent to his prosecutor's office almost at the same time they were recorded –.

2.

The second question we must now deal with is the alleged purpose of causing the cancellation of the **red notices** – issued by INTERPOL – which weighed – and still do – upon the accused Iranian nationals.

On this matter, I agree with the discussion presented both by the lower court and by my colleague in his above opinion, in that the elements included in the defense are insufficient to justify even the beginning of a criminal investigation. None of the circumstances referred to by Mr. Nisman – and later accepted by Mr. Pollicita in his request for investigation prepared under section 180 of the National Code of Criminal Procedure – is reasonably sufficient to support the assumption made by both representatives of the Public Prosecutor's Office.

The thorough review performed both by the lower court and Judge Ballestero make any further comments unnecessary in this respect.

Neither do the harm allegations made by Mr. Pollicita and his colleague before this Appellate Court, Mr. Moldes, bring any argument that could enable us to reverse such conclusion, as they essentially indicate the need to conduct further investigation, in order to obtain evidence that could demonstrate the assumption made in the accusation.

Now, the accuser has not mentioned any element whatsoever that could cause the assumption made by such party to be sufficiently believable, which could justify a more thorough investigation as he requests.

As noted by my colleague in his above opinion, if a thorough and detailed review of the case record leads –as it does here – to dismiss the report, it is inadmissible to conclude that, because of serious nature of the events that are the subject of the proceedings, he may seek to open a criminal investigation anyhow, with all the consequences this implies – *per se* – for those who are being prosecuted. This would be a sort of 'fishing expedition'. In his opinion, Judge Ballestero referred to a precedent by this Panel, which precisely noted that *"... we would find ourselves in the paradox that, instead of investigating further in order to confirm or discard a suspicious circumstance that could have criminal legal relevance, we do so 'just in case', in order to find some suspicious item"* (CFP 12438/08, rta. July 17, 2014). Those comments now apply to the case we are reviewing.

3.

Also, we should recall that section 176 of the National Code of Criminal Procedure provides that *"An accusation must include, as far as practicable, a description of the event, with the circumstances of place, time and manner of the offence, and indicate the participants, harmed parties, witnesses and other items that could lead to ascertain that the event matches the legal definition thereof"*.

In this respect, our Supreme Court has held that an accusation must not be general and vague, and must be restricted to the specified and special events, indicating the circumstances that could guide the court in its investigation (*see* Fallos 1:40).

In the same way, Jorge A. Clariá Olmedo cites this decision, and explains that the Supreme Court has held the inadmissibility of a so-called general accusation that does not refer to specific and certain events (*see* "Derecho Procesal Penal", Vol II, published by Rubinzal – Culzoni Editores, Buenos Aires, 2004, page 429).

The reading of the extremely long accusation that gave rise to these proceedings shows that the accusation does not comply with the requirements in applicable law.

First, we should note that Mr. Nisman's submittal evidences a capricious enchainment of various elements that, by themselves, have no relevance, but they are connected so as to simulate that they demonstrate the alleged criminal assumption.

This was clearly explained by my colleague in his preceding opinion. There he questioned the discussion line followed by the accuser, by arbitrarily connecting fragments of different telephone conversations – calls made on different dates between different persons – and connecting such conversations with certain political events that

took place, in order to arrive at a certain conclusion that, in fact, constitutes the starting point of the accuser. This is the so-called fallacy of affirming the consequent.

It is so that certain dogmatic statements are constructed, on the basis of premises that do not enable us, in any manner whatsoever, to infer the conclusions reached therein.

In the same way, the submittal has certain inconsistencies, since it concurrently alleges several alternative assumptions. Although my colleague, in his preceding opinion, has dealt with such contradictions accurately, we should note those that link possible precedents of the Memorandum of Understanding – there are at least three alternatives mentioned – with the interest of the Islamic Republic of Iran in the Agreement – which is claimed in certain paragraphs and denied on others – and with the statements made by some participants in the telephone wiretappings, who are claimed to be the makers of the alleged spurious agreement, but appear surprised when the news arise about the subscription or the Treaty.

We cannot fail to notice that the accusation we examine here has not been made by a private person, by the power granted under section 174 of the National Code of Criminal Procedure. On the contrary, it was made by an officer of the Public Prosecutor's Office, so it constitutes an act of government, and as such it must comply with the relevant formal requirements.

In the same way as section 123 of the code orders a court to state the grounds of its decisions, section 69 specifically provides that *"a representative of the public prosecutor's office shall make its requests for investigation and conclusions,* ***with supporting grounds and specifically*** *..."*.

Those requirements were not fulfilled in the document subscribed by Mr. Nisman.

On prior occasions, this Panel, with its previous membership, has warned about the risk of accepting accusations that are not reasonable or believable: *"Simply supposing that a criminal offense occurred does not authorize the filing of an accusation, because the law requires that the reporting party must have seen or otherwise become aware of the offence, so as to offer the necessary guarantees of security and seriousness, so as to institute the proceedings by supposing that the events in the accusation are believable. It would be very dangerous if a proceeding could be instituted based on accusations of purely imaginary or simply supposed events, because this, apart from the unfair harm caused to the relevant persons, could cause an*

accusation to become an effective means of persecution in order to satisfy base purposes of revenge or profit, as a consequence of the intolerance that obfuscates and disturbs spirits so much" (*see* this Panel I, C.Nº 30,041, reg. nº 701, rta. August 27, 1998 and its citations: Ábalos, R.W. "Derecho Procesal Penal", Vol. III, published by Ed. Jurídicas Cuyo, Mendoza, 1993, pages 201/202).

For the rest, we should take into account that the signature of a Treaty with a foreign power is one of the powers granted by our National Constitution to the National Executive, and that such behavior, *per se,* cannot be considered as a criminal offence, as in this case, unless there are serious indications that reasonably enable us to suspect otherwise.

It is not up to a Court to review the merit, desirability or timeliness of an act of another branch of government, but to determine the existence of events having legal relevance and, as the case may be, to determine any criminal responsibility that may correspond to the offender.

In this scenario, we cannot but confirm the dismissal of these proceedings, under section 195 of the National Code of Criminal Procedure, so my opinion is cast accordingly.

4.

On another matter, I do not agree with the preceding opinion in relation to order item II of the reviewed decision, since it is the policy of this Appellate Court that the extraction of official copies by the lower court is final and not subject to appeal, since it is associated to the actions or one or another court having identical venue and jurisdiction (in this respect, see the records No. 36,496, rta. September 6, 2004, reg. No. 842, among many other precedents).

The exceptions to this rule correspond to allegations based on constitutional safeguards, such as the following: hindering the exercise of due process rights (article 18 of the National Constitution); or failing to recognize the right to be heard in the proper court, - as a consequence of the dispersion o over-accumulation of events, before several courts or one court; or the risk of double jeopardy (articles 33 of the National Constitution or section 2 of the National Code of Criminal Procedure), which are all situations not found in these proceedings.

That is my opinion.

Opinion of Judge Eduardo G. Farah:

I- The Prosecutor Mr. Gerardo Pollicita entered an appeal against the decision appearing on folios 465/99, which (I) dismissed the proceedings by reason of lack of a criminal offence, and (II) remitted official copies of the relevant parts to the Federal Court No. 9 – where the case No. 11,503/14 – is being conducted, with the possible commission of the offences including 'influence traffic' and 'usurped authority', by Ramón Allan Héctor Bogado.

II- *On criminal investigation, its purposes and cases in which its commencement is dismissed.*

(1) Where the prosecutor's office requests a criminal investigation, the court has three options: to order the investigation, to declare that it has no competent jurisdiction to hear the case, and to dismiss the case. Such are the alternatives prescribed by section 180, last paragraph, of the Code of Criminal Procedure.

(2) As to the first option, we should take into account that the only requirement for the commencement of an investigation is a believable assumption of a criminal offence (see Panel II, case No. 33,175 *"N.N. s/ desestimación"*, reg. No. 36,107, of May 31, 2013).

In this we must not confuse the meanings: believable is something that has the appearance of being true, because it is at the same time possible and consistent, because it observes a number of rules resulting from logic and experience, and because it has an acceptable level of consistency among its different elements it is comprised of. This does not imply that the situation is real or true, the believability is always a mere indication, never final, when it comes to explain something.

The logical sequence of a criminal proceeding could be simply explained thus: what is 'possible' determines the commencement of an investigation, what is 'probable' leads to the prosecution of an individual or his/her trial, and 'certainty' is the only circumstance whereby a person may be sentenced; at the same time, it is certainty or doubt (after all means of evidence have been exhausted) that leads to dismissal of the proceedings or acquittal.

For this reason we say that believability, as a legal requirement to open an investigation, *"does not express knowledge or degrees of knowledge, as these are provided by the evidence of the fact. Believability does without any means of evidence and – in the case – is relevant at times prior to the acquisition of evidence"* (Taruffo, Michele, "La prueba de los hechos", published by Ed. Trotta, 3rd Edition, 2009, 188).

It is precisely for these reasons that a core purpose of the investigation is to ascertain if a criminal offence has been committed, by taking action that leads to discover the truth. The law specifically says so (section 193 of the National Code of Criminal Procedure) and the Supreme Court of Justice of Argentina has understood it likewise, by holding that *"In a criminal proceeding, what has exceptional relevance and must always be protected is the public interest, which requires finding the truth in court, since the proceeding is only the means to achieve higher values: truth and justice"* (Fallos 313:1305, and many other precedents).

In this pursuit, the preparatory phase, by definition, not only serves to confirm the criminal assumption, but also to discard it (see, in this regard, Maier, Julio B.J. *"Derecho Procesal Penal"*, Vol. II, *"Parte General. Sujetos Procesales"*, published by Ed. del Puerto SRL, 1st edition, 1st reprint, Buenos Aires, 2004, page 159), with the important addition that, if there have been any accused, the dismissal of the proceedings must be granted with a specific statement indicating that the fact that the proceedings were instituted does not affect the good name and honor the person may have had (section 336, last part, of the National Code of Criminal Procedure).

(3) As the other side of the above, if an accusation of an event appears to be believable, the dismissal of the case, without instituting the related investigation, can only be done if –and only if – the description of the event is sufficient to conclude that it is not prescribed by law as a criminal offence; that is, it does not coincide with any of the offences defined in Book II of the Penal Code or in a special law (Francisco J. D'Albora *"Código Procesal Penal de la Nación"*, Second Edition, revised, expanded and updated, published by Ed. Abeledo Perrot, Buenos Aires, 1996, pages 234/5).

However, this "lack of definition", which enables a court to validly dismiss the commencement of the investigation, i.e. the lack of correspondence between the description of the event in the prosecutor's accusation and the definition of an offence, must clearly result from the description itself, without need for any debate on subjective matters or disputed facts. The lack of evidence of the reported event is not a valid reason to decide in this manner (see Navarro, Guillermo R. and Daray, Roberto R. *"Código Procesal Penal de la Nación. Análisis doctrinal y jurisprudencial"*, Vol I, published by Ed. Hammurabi, 5th edition, Updated and Expanded, Buenos Aires, 2013, page 80).

As we can see, these are restricted cases.

Note, for instance, that most courts accept an anonymous notice as the trigger of a criminal proceeding, without this being an obstacle to its commencement (see Panel II of this Appellate Court, in the case No. 21,855 "Granillo Ocampo", reg. No. 23,737 of May 27, 2005, case No. 20,890 "Perematteu", reg. No. 22,208 of March 23, 2004; and Panel I, see the case No. 36,663 "Cabezas", reg. No. 132 of September 16, 2004; likewise, see De Luca, Javier *"Denuncia Anónima"*, published by La Ley, 1991-D, Secc. Doctrina, p. 895 and subsequent pages).

For all this, there is a constant trend in the decisions of the Federal Court of Appeals to reverse any dismissal of accusations by lower courts, where in the proceedings there is a plausible assumption to be investigated, and take steps to confirm or discard the accusation. For brevity purposes, I will only mention some of the many examples of this, in cases of high, medium or low institutional significance (see Panel I, case No. 44,260, *"Espinoza, Fernando s/ desestimación"*, reg. No. 769 of August 13, 2010, case No. 48,337 *"Gonella, Carlos s/ desestimación de denuncia"*, reg No. 568 of May 28, 2013, case No. 48,321 *"Gils Carbó, Alejandra M. s/ desestimación de denuncia"*. reg. No. 567 of May 28, 2013, case No. 48,020 *"NN s/ desestimación de denuncia"*, reg. No. 808 of July 11, 2013; and Panel II, case No. 28,088, *"NN s/ desestimación"*, reg. No. 30,193 of August 4, 2009, case No. 28,611 *"Chionetti, Fabián s/ desestimación de denuncia"*, reg. No. 30,928 of December 29, 2009, case No. 30,202 *"Dieguez Herrera, Esteban s/ desestimación de denuncia"*, reg. No. 32,865 of May 11, 2011, case No. 32,853 *"Moreno, Guillermo s/ desestimación"*, reg. No. 35,808 of March 14, 2013, case No. 32,874 *"Banco Central de la República Argentina s/ desestimación de querellante"*, reg. No. 35,812 of March 18, 2013, case No. 32,987 *"De Blas, Gustavo s/ desestimación de denuncia"*, reg. No. 36,039 of May 13, 2013, CFP No. 139/2014/CA1 *"Manes, Silvia y otros s/ desestimación"*, reg. No. 38,023 of August 22, 2014).

III- *Assumptions by the prosecutor's office and grounds stated by the court to dismiss the possibility of its investigation*

The dismissal under review has not been decided under the policies described in the above Recital. Accordingly, it is a case of an arbitrary judgment, because it departs from the regulatory solution that –based upon the record – applied to the case (see Supreme Court holdings on the matter, in Palacio, Lino E. *"El recurso extraordinario federal. Teoría y técnica"*, published by Ed. Abeledo Perrot, 4th Edition, updated by Alberto F. Garay, Province of Buenos Aires, 2020, page 179).

I will explain:

(1) The grounds of the lower court to dismiss the opening of an investigation rely on two main ideas:

a) the first, that even if the assumption of the public prosecutor were to be true, the reported events did not constitute the commencement of an offence and, for this reason, are irrelevant to criminal law, regardless of the offence selected;

b) the second, that already in this phase, prior to the commencement of an investigation, there is alleged information that would belie the truth of the case made in the accusation.

Both averments are refuted in the appeal by the prosecutor's office, which described them as premature.

(2) The first matter to be reviewed has to do with a matter that, from the beginning, seemed to be only a dogmatic matter, but actually is not.

It is difficult to distinguish the difference between an action preparing an event (which is not punishable), from the commencement of the offence (which is punishable). It is so that this is one of the most disputed issues in the field of criminal literature, and that repeating all the positions existing in this respect would warrant a thorough discussion, without any benefit for the solution that must be given here (see Zaffaroni, Eugenio *"Derecho Penal, Parte General"*, published by Ed. Aguiar, 2005, page 806 and subsequent pages).

Without prejudice to this, I will touch upon certain matters that should be reviewed here due to their impact upon this case.

To begin with, we should acknowledge that in spite of all the formulae developed so far, it seems that the exact limit between one thing and another (phases of the *iter criminis*) can never be determined dogmatically, so it can only be described approximately. For this reason, it has been proposed that the simplest way to remedy the above consists in making groups of cases showing expressively how to do (Stratenwerth, Günther *"Derecho Penal. Parte General I. El hecho punible"*, 4th edition, fully remade, 1st reprint, published by Ed. Hammurabi, Buenos Aires, 2008, page 342).

However, there is a certain coincidence or acceptance among the majority, in providing certain basic guidelines, with a certain degree of consistency, to determine when *the offence has begun to be committed.*

In this way, to determine this, we must take into account both (1) the *offender's plan* – individual or subjective aspect – and (2) *the degree of nearby danger for the juridical value, affected by the doer's action* – objective aspect – (see Righi, Esteban, *"Derecho Penal. Parte General"*, 1st edition, 2nd reprint, published by Ed. Abeledo Perrot, Buenos Aires, 2010, page 418).

That is, in these proceedings concerning the time when a certain behavior has crossed or not crossed the fine line between what is not punishable (because it remained within the realm of mere thought or preparation) and what is punishable (because it became a deed, even if the offence was not consummated), we cannot disregard the subjective guideline that concentrates upon discovering the purpose or intent of the doer, nor the objective guidelines, which consider the actual fact of the danger caused by the behavior of the person, since both guidelines or criteria will have to provide a suitable approximation in order to resolve the case.

An in this respect, the issue here is that, slowly but surely, in these years we have learned, by court experience, that in order to achieve a valid and useful distinction, between what did not commence and what did, which constitutes a punishable attempt, or else between this last phase and its consummation, ***these guidelines must necessarily be applied consistently with suitable evidence criteria, such as those that tend to specify the equivocal or univocal meaning of a behavior, or the specific and non-abstract danger resulting from it in the peculiar circumstances of each case*** (see, in this respect, Creus, Carlos, *"Derecho Penal, Parte General"*, 5th edition, updated and expanded, 3rd reprint, published by Ed. Astrea, Buenos Aires, 2011, page 422).

Finally, we cannot arrive at any suitable conclusion on these matters if we do not know all the peculiar circumstances of the specific case under review.

(3) The preceding premise has a direct and logical consequence for the solution that is now reviewed.

By disregarding the possibility of opening an investigation without producing the evidence requested by the prosecutor, it cannot be established if, as that party alleged, there is an intent – for reasons of political or ideological alignment, or for reasons of commercial convenience, or for other interests not known yet, but that can be found out by the investigation – to cover up the persons presumptively responsible for the AMIA bombing, by providing them with a procedure that delays their trial *sine die* and enables such persons to request rapid cancellation of the red notices for their capture via Interpol, or, on the contrary, if the only purpose of the government officers

was what they interpreted as a progress made in the criminal proceeding followed in this venue, due to the possibility of interrogating the suspects by the procedure prescribed in the Memorandum of Understanding.

Consequently, neither do we know if the behavior of the parties accused in these proceedings are shown to be equivocal or else unequivocal with regard to one of those two purposes, according to the alleged risk arising from the agreement subscribed to create a special Commission, parallel to the judicial proceeding, and the communication of the former to Interpol, prior to its effect, a matter I will revisit below.

In view of this scenario, the conclusion that the events would not have been but mere preparatory actions is not supported by the evidence; it is therefore groundless.

(4) In order to be clearer:

The assumption of the public prosecutor – in summary – consists in that there was a fraud intended to help Iranian citizens with the capture ordered in the AMIA case, in order to avoid action by the Argentine judiciary, and give them impunity (folios 317/51).

This version of the events had premises that, in their opinion, deserved the commencement of an investigation.

In this way, according to his allegations, the signature of the Memorandum of Understanding on January 27, 2013 between representatives of the Executive Branches of Iran and Argentina – subsequently confirmed by the Legislature of Argentina – would be a part of the reported cover-up, in spite of the official version in this respect. This would arise from items previously collected; especially, telephone wiretappings obtained in the environment of the AMIA case and the wording of the agreement itself, the peculiar nature of which, under the criminal plan, would enable the deletion of the Red Notices issued by Interpol in relation to certain of the accused in such investigation.

In order to determine the scope of this –alleged – operation (for which purpose it was indispensable to know who their participants could eventually be), the prosecutor's office requested the production of various and multiple means of evidence. These included: obtaining witness statements from Argentine and foreign public officers, journalists and private persons; obtaining lists of incoming and outgoing calls of the persons involved in the accusation (with details of the locations where the cells were activated); cross-tracking phone calls; obtaining reports on the owners of fixed and mobile telephones used by members in the area of the Presidency of Argentina, the

Ministry of Foreign Affairs and Worship, the Ministry of Federal Planning and the Secretariat of Intelligence; ascertaining the migratory movements of the accused persons, to Iran, Syria, Switzerland, Ethiopia, United States and Venezuela, and seeking details of the means used to pay such trips; adding documentation on the memorandum of understanding, its prior formal and informal negotiations, other background information of all sorts, and the records of congress debates on their confirmation; obtaining records of visits to the Government House, the Ministry of Planning and the Secretariat of Intelligence; seeking information on public or secret – or similar – diplomatic cables associated to the evens, among representatives of Argentina, Iran, Israel, Syria, Ethiopia, Venezuela, United States, Switzerland and France; seeking reports on the committee that accompanied the Minister of Foreign Affairs of Argentina in trips associated to the memorandum, and later hear the witness evidence given by their members; the same with regard to Argentine representatives at the United Nations Organization; requesting Interpol regulations on red notices; monitoring certain e-mail accounts; searching domiciles; and adding records relating to the extradition proceeding corresponding to Hadi Soleimanpour with the United Kingdom.

None of these evidences was produced, because the judge underestimated their relevance when he dismissed the case. However, such omission is not irrelevant to its solution; it is of core importance. First, because nobody is in a position to guess what their result will be. Secondly, because this same circumstance will finally determine the decision to be made in this case.

This is because, if the matter is determining if assistance was given to persons accused of the AMIA bombing, so they could avoid being brought to justice, it is not the same thing to see if a group of persons, without decision-making powers in the government, mention their intent to benefit the accused, nor their opinion regarding circumstances that would lead to achieve such purpose, than the fact that parallel negotiations could actually have existed, involving high Argentine and Iranian authorities, resulting from an informal agreement, but underlying the formal agreement between both countries, which, according to the plan, could serve as an instrument to achieve the result sought.

In this we must resort to common sense. It is obvious that the level of danger to the legal value (administration of justice, in the case of section 277 of the Penal Code asserted by the court) would not be equal in both cases, nor the degree of progress made by the plan of the parties eventually responsible; all this regardless of the

fact that the result might not have been achieved for reasons beyond their wishes: either because the terms of the Memorandum of Understanding were not carried out because, as far as Iran was concerned, it was not approved by all their relevant authorities, or, as to Argentina, it was declared unconstitutional, and also an injunction was entered so the agreement could not be put into practice during the time of the remedies that might have been filed against the decision; or because Interpol decided to maintain the red notice for the capture of the persons primarily responsible, in spite of the communication prescribed in the Memorandum, and eventually any dealings that Iran could have done according to this, about which nothing has been found out so far.

In this respect, it should be noted that the prosecutor's assumption has to be reviewed globally and not by parts, either by examining the significance of the telephone wiretappings by themselves, the memorandum only by its wording and legal status, or the public statements made by the accused on the maintenance of the Interpol red notices, with disregard of what could have –allegedly – been unofficially looked for.

And in this task we must consider that, by nature, the investigation tends to specify the accusation, that its development is fluid, and that it may experience changes and be narrowed down; for this reason, its subject is constructed during the procedure and is modifiable, until it becomes fixed in the accusation – or, as the case may be, when it is discarded – (see Panel II CCCF, case No. 33,070, reg. No. 36,246 of June 27, 2013 and case No. 28,836, reg. No. 31,410 of May 13, 2010; Panel IV of the CFCP, case No. 3771 of December 4, 2003, reg. 5390; likewise, Maier, Julio B.J. *"Derecho Procesal Penal. Tomo II. Parte General. Sujetos Procesales"*, published by Ed. del Puerto SRL, 1st edition, 1st reprint, Buenos Aires, 2004, page 36), provided, however, that the review cannot be limited – least of all when the investigation has not even commenced – to one type of offence that may be found by the assumption – even if it is the offence suggested by the accuser – or even discard other explanations having criminal relevance on the way the events took place, by narrowing down or expanding the number of persons possibly involved.

The problem, as can be seen, is not only academic; first of all it is a matter of evidence. This because, as said before now, *"An accusation made on such terms was far from promoting a merely legal debate, such as the debate that took place. Had it been fully understood and made the subject of an assumption, it could be seen that those allegations were not sufficient to explain, by themselves and in a satisfactory manner, the concerns conveyed by the accuser ..."* (this Panel, case No. 48,321, cited above).

By disregarding this simple question, the lower judge failed to order the investigation as he should have done, by a simple decree, as prescribed by law. Instead, he did a substantive review of the facts, which is not only untimely, but also lacked the minimum elements required to state its supporting grounds.

IV- *Certain individual questions*.

Everything said so far is sufficient to reverse the dismissal. However, in view of certain comments made therein, we should stress certain questions posed by the case.

(1) The appealed decision indicates that only the court in the AMIA case had the power to remove the red notices issued by Interpol. In this he relies upon section 81, item 2 of the *"Interpol Rules on the Processing of Data"*.

However, in its appeal the prosecutor's office indicates a part of the same section (item 3, paragraph 'c'), which went unnoticed by the lower court. It provides that the General Secretariat has the power to cancel a red notice where *"the notice no longer meets the conditions for publishing a notice"*.

The prosecutor also indicated that section 82 of the Rules reads thus: *"Red notices are published (...) in order to seek the location of a wanted person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender or similar lawful action"*, and subsequently concluded that *"... the signature of the Memorandum of Understanding, by evidencing the location of the parties being sought by the police authorities, and that such persons would be brought to justice, could open the way so that any interested party could question the effect of the red notices"*.

Such allegations, according to the appellant, should be considered together with item 7 of the Memorandum of Understanding, reading thus: *"7. Interpol. This agreement, once signed, shall be delivered jointly by both foreign ministers to the General Secretariat of Interpol in compliance with Interpol requirements in relation to this case"*. That is, prior to, and not after, its confirmation by the Parliaments of both countries.

Whether this variation of the facts is confirmed or not, it is clear that disregarding it as unbelievable, without producing any evidence in this respect, is arbitrary for the following reasons:

a) first, as the appellant proposed, it should be reviewed globally with the rest of the alleged circumstances – on the content of the parallel negotiations – and we

should note the direct relation they have with the action requested by the accuser and not ordered as a consequence of the lower court decision.

b) secondly, because this way fails to consider:

b.1. that there has not yet been any explanation of the purpose of including in the Memorandum a specific notice to Interpol, the agency that issues such red notices for captures requested by the court in the proceedings – *which, in fact, were the real reason that prevented the free movement outside their country of certain of the accused in the AMIA case* – nor the need to do so before the agreement took effect upon its treatment and approval by the parliament in both countries, nor – especially – which were those "Interpol requirements in relation to this case".

b.2. that, as noted by the prosecutor, the background of this case shows a situation that is different from the situation described by the lower court in the appealed decision: towards 2004 the Interpol Executive Committee cancelled the red notice for the capture of several accused – upon request by Iran, and although Argentina defended the opposite – when it became aware of the nullities entered due to the involvement in the case of *"a judge removed because of corruption"* (source: http://www.interpol.int/es/Centro-de-prensa/Noticias/2005/PR041).

Meanwhile, in 2007, when the Argentine court insisted with the red notices, Interpol dismissed three of such notices and approved the rest *"Upon examining the written documents and attending to verbal explanations by the NCBs of both countries ..."* (source: http://www.interpol.int/es/Internet/Centro-deprensa/Noticias/2007/PR005).

2) In line with the foregoing, the appellant focuses on other aspects of the text of the Memorandum of Understanding which, analyzed under the light of all the other situations referred to in the request for the commencement of the investigative stage of the proceedings, certainly raise several questions.

For example, the appellant points at the fact that the agreement only included the accused Iranians who had been issued Interpol red notices and not other accused individuals whose prosecution was equally important and had been similarly postponed, when its alleged goal was to serve as a tool to obtain the declarations of all the accused against whom arrest warrants had been issued.

More specifically, he states the following in his accusation: *"It should be noted that, out of the eight Iranian indictees whose testimonies have been ordered in the case, paragraph 5 of the agreement governing "Tehran hearings" only includes those with an Interpol red notice, the removal of which —as demonstrated by the evidence gathered—*

was essential for Iran, as had been agreed. There is no reasonable explanation for the Argentine authorities to accept the hearings of only those whose red notices could be removed, while excluding the Iranian indictees with effective arrest warrants issued against them by Federal Judge Rodolfo Canicoba Corral."

Doubts about this issue warranted, as requested by the prosecution, an investigation into the background and previous negotiations (whether formal or not) of the agreement, in order to discover if any reasons had been given to justify the adoption of this course of action.

Lacking an investigation into the above, only uncertainties remain. This undermines the very aim of the investigative stage of the proceedings (Article 193 of the Argentine Code of Criminal Procedure).

3) This course of action is also unavoidable for another reason.

Both in his request for the commencement of the investigative stage of the proceedings and in his subsequent appeal, the Public Prosecutor highlighted the "fallacious statements" made during the parliamentary discussion of the Memorandum. In the opinion of the prosecutor, this issue is another piece of evidence which, analyzed jointly with the rest of the evidence in the case, calls for the commencement of the abovementioned investigative proceedings.

I will not expand on this matter. Suffice it to recall that I addressed the inconsistencies identified by the prosecution when I rendered my opinion on the unconstitutional nature of the agreement, and particularly when I analyzed the arguments offered to justify the creation of a "Truth Commission" (cf. my vote in CFP 3184/2013/CA1 "AMIA s/amparo ley 16986, 15/5/14).

In the sixth recital of that decision I stated, after analyzing the existing international precedents on the subject matter of the Memorandum, the differences between a Truth Commission and the commission briefly described in such instrument. I further observed that it was important to note that "*based on the above paragraphs and on the existing works on the subject matter that were cited above – to which I refer for the sake of brevity –, the body established by the Memorandum of Understanding is not a Truth Commission of the kind known to international legal tradition.*."

I further added that "[*i*]*n order to conclude this sixth recital, it is necessary to include two considerations about the two precedents quoted both in the Request for the passing of the law to approve the Memorandum of Understanding, and in the debate held within the framework of the plenary session of the Committees for Foreign Affairs*

and Worship, Constitutional and Justice Affairs, and Criminal Affairs of the Argentine Senate, dated 13 February 2013 (Verbatim record available at http://eventos.senado.gov.ar.88/12227.pdf).

As will be explained below, one of these precedents bears no relationship with the content of the Memorandum of Understanding, and the other one is at least inaccurate, based on the records on file (…).”

With respect to the repeated references to the Lockerbie case, I explained that “*… its differences with the agreement between the Iranian and Argentine Foreign Ministers are, therefore, substantial and so evident that they require no further analysis.”*

In connection with the equally reiterated references to the alleged decision of the British courts on the request for the extradition of the Iranian Ambassador of Argentina at the time of the AMIA bombing, I also explained why I thought it was “*necessary to note that the references to the proceedings for the extradition of Hadi Soleimanpour made in the case are something quite different from the statements made during the debates in Congress…”*

It is my opinion that the prosecution is right with respect to the fact that, in order to determine the actual intentions behind the signature of the Memorandum or Understanding and, particularly, the extent of the contribution made by each of those accused of participating in the alleged criminal plan, an adequate analysis of the grounds on which such justifications were offered and accepted as valid must be conducted.

4) In the appealed decision, the court categorically dismissed the accusatory validity of the tapped telephone conversations between some of the accused, discarding the possibility that Ramon Allan Hector Bogado (frequent party to the conversations with Yussuf Khalil) could actually have the links or influence at the government level that he claimed to have in the conversations in which he was involved. Moreover, the court suppressed some of those declarations lest any of such “lies” could constitute further crimes (paragraph No. 2).

This measure was challenged by the Prosecutor’s Office as premature until an investigation into the actual truth of the statements made by the accused is not conducted, as requested by said office.

I will not make a thorough analysis of the validity of the tapped telephone conversations as evidence. I will only note that, in my opinion, the prosecution is right to consider that the final conclusion reached by the inferior court is premature.

Indeed, such decision is premature firstly because it has been revealed that there exist recordings of tapped telephone conversations that still have not been submitted to the court. Moreover, it is also premature because a fundamental principle was not applied in the assessment of the elements that were actually submitted: tapped telephone conversations are an ancillary measure adopted in the course of an investigation, and they are not valid as autonomous evidence for the purpose of affirming the existence of the conduct attributed to the person accused of a crime. Therefore, this kind of evidence has to be related to other evidence that justifies or strengthens the clues which are based on them.

The fact that this principle has been supported by consistent precedents, in which it has been applied at more advanced stages of the proceedings – during, for example, the review of indictments – (see Division II of the Court, case No. 13230 "Cabrera," Register No. 14280, dated 20-May-1997; Case No. 12647 "Requena," Register No. 13753, dated 26-Nov-1996, case No. 11916 "Salvatierras Limpias," Register No. 12963, dated 21-March 1996, and case No. 11732 "Rentaria," Register No. 12649, date 15-Dec-1995, among many others) makes it even more necessary to consider such principle when it comes to rendering a decision in a case like the one at hand, in which the investigative stage of the proceedings has not commenced and evidence of this sort is absent.

Considering these tapped telephone conversations to be sufficient incriminating evidence or, on the contrary, dismissing them altogether would be an arbitrary measure at this stage.

Out of the many intercepted telephone conversations, there is one clear example obtained by comparing the theory proposed by the accusation to the following conversation, held on 20 May 2013 between Yussuf Khalil and Luis D'Elia:

"*(Yussuf) Hello, Luis. (Luis) Hey, Yussuf, how are you? (Yussuf) I'm all right, thanks. (Luis) Look, I've just been talking to the guy. (Yussuf) OK. (Luis) They are willing to send people from YPF with us two. (Yussuf) Yes (Luis) To do business there. (Yussuf) Good. (Luis) He is very interested in exchanging what is theirs for grain and meat over there. (Yussuf) OK. (Luis) So … what's the deal? He has a political problem;*

the memorandum needs to be approved, right? (Yussuf) Yes, that is quite clear, Luis, I told you the other day. Did you say what I told you? (Luis) Yes, I told them 10 days ago, and they said that it would be approved in 30 days. (Yussuf) No, no, I told you that the memorandum would be approved…. I told you, but that it was being delayed because of that matter… (Luis) No… no, there was something …I shared what you'd told me, that incident that happened. (Yussuf) Yes. (Luis) And the meeting was because it was requested by HER, OK? (Yussuf) Right. (Luis) We are at the highest level. (Yussuf) It means that we are fine. (Luis) Yes, yes, more than fine… Now, if that memorandum is not approved, we'll look as morons there, see? (Yussuf) If they don't approve it? They will approve it, they are going to approve it. (Luis) OK, but they have to approve it ASAP, see.(Yussuf) They will approve it, Luis, you know what times in PERSIA are like and, besides, some logical things did not take place, OK?… you know. De Vido has to know that Timerman hasn't fulfilled some of the promises made. It's as clear as that. He hasn't delivered, but it doesn't matter. I'll call there right now and tell them that we are… Did they tell you where they want to go? (Luis) No. I already proposed two places but, well… We'll see then , OK? (Yussuf) All right…Let's go to another place… Let's go to Lebanon (Luis) I believe our team will be more comfortable in CARACAS… (Yussuf) Ok, I was just saying that so that we killed two birds with one stone, but all right… (LUIS) Yes, I know, but first this needs to get approved and then we can continue moving forward, OK? (Yussuf) You mean that the memorandum has to be approved first? (Luis) Well, right… Otherwise he said it would be very complicated (Yussuf) OK, sure. That's fine. Talk to you later. (Luis) Ok, see you later. (Yussuf) I'll call you.." (See pp. 197/198 of the dossier attached to the case at p. 269 by the AMIA Prosecutorial Investigation Unit).

Whether the content of the above conversation is a lie invented by the parties speaking, an irrelevant matter or, on the contrary, a piece of evidence that has a reasonable connection with the accusation against the Minister of Foreign Affairs for having allegedly entered into a criminal and unlawful agreement with the Iranian representatives in connection with the orders issued in the AMIA case regarding the

Interpol red notices is a factual issue that cannot be dismissed without implementing the investigation measures expressly requested by the Office of the Prosecutor at the time it requested the commencement of the investigative stage of the proceedings, such as the request, among others, of information from Iran about their reasons to enter the negotiations and about any other demarches undertaken by said State before Interpol, the frustration of which – as hypothesized by the prosecution – could have led to the postponement of the discussion of the Memorandum by the Iranian Parliament.

In addition, the importance of the content of other intercepted telephone conversations cannot be minimized or dismissed. I will quote only two cases:

- In the ruling handed down on 9 November 2006 by Federal Judge Rodolfo Canicoba Corral ordering the issue of international and national arrest warrants against Mohsen Rabbani, among others, the judge stated that the accused: "… *has been the principal author of the preparation and execution of the terrorist attack. The evidence submitted by the investigative unit demonstrates that he had a leading role in the local logistics of the terrorist attack of 18 July 1994 against the AMIA building"* (File No. 8566/96 "Coppe, Juan C. y otros s/asociacion ilicita," taken from the records of Criminal and Correctional Court No. 6).

Both before and after the signature of the Memorandum of Understanding, accused Yussuf Khalil proved to be in close contact with Mohsen Rabbani and to have provided detailed information about the passing of the Memorandum in Argentina (See, for example, telephone conversation of 14 May 2012, cited at p. 28 of the dossier attached to page 269 of the case file by the AMIA Prosecutorial Investigation Unit; telephone conversation of 27 February 2013, recorded on File B-1009-2013-02-27-125331-24; Calling line: 1133156908; Receiving line: Unknown; CD 297; and telephone conversation of 20 May 2013, transcribed at pp. 198/9 of the abovementioned dossier).

In this context, the link between accused Khalil and one of the main accused of the AMIA bombing is a lead that should not be disregarded - particularly when considered in connection with the persons with whom he frequently spoke and the links with and

interests in the highest levels of the Argentine government that these persons claimed to have.

- In this specific context, other references are worthy of attention too. For example, the following excerpt of the intercepted conversation held by party to the call No. 3315-6908: *"(HD) Today I drove them crazy. We have a video, you know? A video of the bombing… (Y) OK. (HD) And… (Y) Hey, let's not talk on the phone so much…"* (CD Date 25-Feb-213. Date of transaction: 27-Feb-2013, CD No. 295. Speakers: Yussuf and "HD").

Neither the identity of the party speaking with Khalil nor the truthfulness of the assertion made by said party have been determined so far. Nevertheless, this is a piece of information that should not be disregarded.

V – Conclusions:

In conclusion, all of the abovementioned can be summarized as follows:

1) Neither the accusation nor the request for the commencement of investigative proceedings submitted by the prosecutor have the aim of demonstrating the allegedly criminal acts. It is the investigative stage of the proceedings that is aimed at demonstrating the existence – or absence – of a crime. Although said proceedings should have been authorized (without making the legal or evidentiary analysis that is specific to other stages of the proceedings), that was not the case. The decision rendered did not resort to the solution set forth by the law for this sort of cases.

2) Suffice it to establish at this stage that an integral and not partial analysis of the hypothesis of the Prosecutor's Office –which may be subsequently upheld or discarded– renders it sufficiently reasonable to warrant an investigation. The lack of investigation has an impact on both a possible theoretical analysis and an assessment of the evidence gathered before the filing of the accusation.

Moreover, during the investigative stage, and without exceeding the main aim of such stage, consideration could be given to alternatives to the theories submitted by the prosecutor and lower court about the way in which events unfolded, the identity of the actual protagonists and the criminal nature of their actions.

The appealed decision has invalidly prevented the commencement of this investigative process.

3) In this context, and until the search for truth shows further progress, there remain unsolved questions in this case. I have identified some of them in order to gauge their depth and determine which are the wise – and compulsory – measures to be taken to solve them (see Article 193 of the Argentine Code of Criminal Procedure).

The highly relevant institutional implications of this case make it necessary to gather evidence as quickly as possible, in order for it to be submitted and discussed at a public level – that is, through a court decision that is timely and duly issued in procedural terms.

Enough time has already been lost, and the investigative stage of the proceedings can no longer be properly commenced. Indeed, it would not be unreasonable to assume that this delay has already had a negative impact on the effectiveness of the implementation of any measures for the search and collection of evidence, as requested by the Prosecutor's Office (for example, the search of premises). The commencement of these proceedings is compulsory and should not be further postponed, in order to prevent the damage already caused from being irreversible.

4) A final issue should be addressed.

The other documents that Prosecutor Nisman had signed and kept inside a strongbox at his office (which were mentioned in the appealed decision) should also be analyzed, since, *prima facie*, their content seems to be inconsistent with the arguments presented in the accusation at issue.

At this point, I can only state that the conditions are not ripe yet to venture a final explanation for this situation. Indeed, there is no certain and detailed knowledge

about the drafting of these documents and the reasons for the Prosecutor to keep them inside a safe. Moreover, the measures required to properly assess them have not been implemented.

I reiterate: only the commencement of the investigative stage of the proceedings and the adoption of the measures required to obtain the relevant evidence will contribute to answering all the questions that remain unanswered. Refusing the commencement of such proceedings is not only incorrect but also against the law (Articles 123, 180 and 193 of the Argentine Code of Criminal Procedure).

Based on all of the foregoing, I hereby cast a vote in favour of overruling of the decision of the lower court (Article 166 and other related articles of the Argentine Code of Criminal Procedure) and, in view of the position adopted by the inferior court with respect to the merits of the case, of ordering the case to be removed from said court, as set forth in Article 173 of the abovementioned Code, and forwarded to the Office of the Clerk of this Court of Appeals in order for the case to be reassigned to another inferior Court for the commencement of the investigative stage of the proceedings, with the celerity and determination required by the circumstances.

By virtue of the above agreement, the COURT HEREBY RESOLVES:

- TO CONFIRM provisions I and II of Resolution at pp. 465/99, **dismissing the accusation** for which these proceedings were initiated, since the existence of a crime has not been demonstrated (Article 180 of the Argentine Code of Criminal Procedure), and TO ORDER the statements made by the relevant parties involved in the investigative proceedings and all related classified documents to be forwarded to Federal Court No. 9, Clerk's Office No. 18, for them to be attached to case file No. 11503/14 of the records of such court.

Be it notified, recorded as per Court Resolutions No. 31/11 and 38/13, informed to the Directorate for Public Communications of the Supreme Court of Justice of the Argentine Republic (cf. Court Resolutions No. 15/2013 and 54/2013), and returned to the lower court.

Be it notified.

JORGE . BALLESTERO

[Majority vote]

EDUARDO R. FREILER

[Majority vote]

EDUARDO G. FARAH

[Dissident vote]

Before me: IVANA S. QUINTEROS

[Court Clerk]