Public Prosecutor's Office

I FILE AN APPEAL

Lord Judge:

Gerardo D. Pollicita, Federal Prosecutor in charge of the Argentine Prosecutor's Office at the Criminal and Correctional Federal Court Nro.11 in **Case No. 777/2015,** entitled ***"Cristina Fernandez de Kirchner and others concerning concealment"*** from the registry of Secretariat. No. 5 of the Argentine Criminal and Correctional Federal Court no. 3 in your worthy charge, I stand respectfully before Your Honor and say:

I.- PURPOSE

That pursuant to the provisions of art. 449 et seq. of the Criminal Procedural Code of the Nation (CPPN, for its acronym in Spanish), I hereby lodge a formal appeal, aware of the irreparable damage caused to this party by Resolution 465 / 499Vta. This ruling **dismissed** the complaint which gave rise to the current case on the grounds of the inexistence of any crime (Article. 180, paragraph 3 of the CPPN, Section I) and **referred the testimonies** from the relevant parties and the wiretap transcripts held at the office of the Secretary of the Argentine Federal Criminal and Correctional Court no. 9, Secretariat. no. 18, to be added to Case no. 11.503 / 2014. It is within the framework of this case that an investigation is being carried out into Allan Hector Ramon Bogado for the alleged commission of offenses against public order (Section II).

II.- PURSUANT TO THE RESOLUTION CRITICIZED

In the resolution which is the object of this appeal, the lower court began its analysis by detailing the essence of the criminal hypothesis contained in the complaint filed by Dr. Alberto Nisman, Attorney General in charge of the Prosecutor's Unit of Investigation into the bombing attack perpetrated on July 18, 1994, against the AMIA headquarters and which, as he stated, was delineated by the Undersigned in the judicial summons added to fs. 316/351.

In this regard, it was noted that prosecution policy was directed towards the investigation of the existence of a maneuver apparently orchestrated and put into operation by the highest authorities of the Argentine government*: Madam President of Argentina, Cristina Fernandez de Kirchner and the Minister of Foreign Affairs of Argentina, Hector Timerman,* with the collaboration of several people including *those identified as Angel Luis D'Elia, Luis Fernando Esteche, Jorge Alejandro "Yussuf "Khalil, Andrés Larroque, Hector Luis Yrimia and Allan Héctor Ramón Bogado.* This maneuver was aimed at providing impunity to the Iranian nationals accused in the proceedings instituted by the complainant, to permit them to evade the investigation and escape the sphere of action of Argentine Justice.

In line with Dr. Nisman's complaint and the subsequent intervention made by this Public Prosecution Office, the two actions deployed by the accused to further this plan have been identified and the arguments developed to show that these actions did not qualify as criminal offenses, prompting the judge to reach the decision hereby questioned.

In short, the lower court argued that the hypothesis that the "Truth Commission", enshrined in the Memorandum of Understanding signed on January 27, 2013 between the Government of Argentina and the Government of the Islamic Republic of Iran on issues related to the terrorist attack on the AMIA in Buenos Aires on July 18, 1994, would *free from responsibility the Iranians identified as responsible for the bombing of the AMIA*, contains an overriding and unavoidable error, which is the absence of the beginning of execution of the crime, given the irrefutable fact that the agreement never came into effect.

In relation to the activity undertaken by the accused to get Interpol to lift the corresponding Red Notices issued for the capture of five of the accused in the AMIA case and *thus enable them to evade the action of justice,* Dr. Rafecas put forth the arguments supporting his view that there was no evidence in the record to sustain this assertion.

On the contrary, said the judge, the intrinsic proof contradicts this, as it makes clear that the position of the Argentine government concerning the ongoing validity of the warrants for the Iranian fugitives has remained unchanged since 2007.

After that, despite estimating these objectives sufficient to support the opinion adopted, the lower court considered it relevant to address a series of circumstances described by Dr. Nisman, given the public repercussions generated. In its opinion, these could, in the worst-case scenario, be interpreted merely as preparatory acts which would not be punishable in the context of this failed cover-up crime.

In this line the judge first explored the reasons why he considered that the only element of any weight should be discarded on the grounds that it was inconsistent, weak and contradictory. This was the argument presented by Dr. Nisman that the "Aleppo Summit" marked the starting point of the plan of impunity he denounced, which referred to the testimony given by journalist Pepe Eliaschev, published in a newspaper article and which was subsequently ratified.

The court also dismissed for lack of proof the existence of a secret agreement between the foreign ministers of Argentina and Iran whose clauses would have reflected the fact that Argentina had agreed to have the Red Notices against the Iranian fugitives lifted.

Meanwhile, notwithstanding the fact that the court considered this to be excessive given the conclusion reached, it analyzed the probative value of the wiretaps supporting this complaint. The court ruled out the the existence of any elements linking Andrés Larroque, Cristina Fernández de Kirchner, Hector Timerman, and Hector Luis D'Elia Yrimia with hatching, instigating or preparing (not punishable) a crime of concealment which, according to Dr. Rafecas, was never committed.

The court also downplayed the content of the wiretaps linked to Jorge Yussuf Khalil, inasmuch as they revealed that he had full knowledge that his phone was tapped, and the same as regards Ramón Allan Bogado for being *"... little more than a rogue, a trickster who in no way can ever be taken seriously"* and Fernando Esteche, considered an *"...already controversial character, in trouble with the law, a hired hand of the Islamic community, a schemer playing off multiple interests, some of which are conflicting..."*

The court also pondered, according to its criteria, two documents signed by Dr. Nisman between December 2014 and January 2015, recently provided by the current authorities of the AMIA Prosecution Investigation Unit (UFI for its acronym in Spanish). In these, according to the lower court, *"... not only is there no allusion to the impending or actual filing of the complaint against the highest authorities of the Executive, but, throughout its pages, it* ***presents a diametrically opposed stand-point*** *in the sense that it takes very positive views of the Argentine government's state policy from 2004 to the present ... "* –the text is highlighted in the original–, all of which led to the conclusion " *... that if there were any doubts about what should be done with the presentation giving rise to these actuations, this last event effectively dispels them.*"

Finally, the Judge in charge of the Argentine Criminal and Correctional Federal Court no. 3 stated that the wiretaps, rather than being the deployment of a criminal plan to cover-up and/or obstruct the investigation into the AMIA bombing, in fact laid bare an alleged illegal maneuver by Allan Ramon Bogado. This included a range of offenses from influence peddling, impersonation and the usurpation of authority. Although he achieved nothing from the public officials in charge of government leadership, his actions did however warrant further criminal investigation in the framework of Case No. 11.503/2014 pending before Registry No 18 of the Court No. 9 of the jurisdiction.

It was within this framework that the Secretariat of Intelligence had itself denounced the afore-mentioned party for alleged influence peddling, as he had presented himself to officials from the Customs Administration saying he also worked there.

III.- FUNDAMENTS

In disagreement with the resolution which causes me irreparable damage given the conclusive nature of this ruling, I shall therefore challenge it as follows.

In this scenario, according to the wording of Article 450 of the procedural code, the reasons for the grievance on which the action is based must be indicated, without prejudice to the last substantiation which is given as an explanatory report in the following instance, should the present document be upheld (NAVARRO, Guillermo R., DARAY, Roberto R., *Código Procesal Penal de la Nación. Análisis doctrinal y jurisprudencial*, Tomo III, 5° Ed., Bs. As., Hammurabi, 2010, Pág. 331).

The grievance prompting this deposition arises from the consideration that this resolution, which is the object of criticism, is premature and overhasty in its dismissal of the hypothesis underlying Dr. Alberto Nisman's complaint.

Certainly, the decision to dismiss the investigation, without taking any of the measures proposed in the judicial summons, prevents the collection of information essential for the assertion that the creation of a "Truth Commission" has no relevance in the criminal sphere, or that there was no scheme hatched to get the Red Notices against the Iranians with international arrest warrants for the AMIA bombing lifted.

As regards the considerations used as a basis to reject the possible criminal implications of the creation of the Truth Commission, it must be said that, in my opinion, these are premature for two reasons.

On the one hand, the assertion that this is a merely preparatory act with no criminal relevance requires more information than is currently available concerning the events denounced by Dr. Nisman. It involves examining the scope of the prohibition of the crime of concealment for personal gain in terms of requirements which are not contemplated from the criminal point of view.

Moreover, the closure of the file is itself overhasty, from the point of view that this prevents any further search for evidence concerning the aim pursued by those involved in creating the Truth Commission.

Regarding the issue of the Red Notices, it is the opinion of this party that investigation is still required in order to prove categorically and definitively the alleged inconsistency of the version of this complaint, as regards, inter alia, that the Memorandum of Understanding and any subsequent actions did not jeopardize the validity of the Red Notices issued against the Iranian fugitives, and that this was not one of the aims sought by the agreement.

Ultimately, the resolution in question contains categorical statements which are clearly opposed to the affirmations made by Dr. Nisman in his complaint. It would thus be prudent and reasonable to open the investigation proposed by this Office and subsequently to take a decision concerning the merits of the case on the basis of the information obtained.

So, in answer to the question of why this resolution should be revoked, a criminal hypothesis of such unusual gravity and institutional importance, as that presented by Dr. Nisman, demands that no effort be spared to uncover the real truth of what happened, whether this reflects the incriminating version of the complaint or is diametrically opposed to it as maintained in the dismissal.

Once this takes place, the public should be informed that the courts involved in the case have exhausted all the resources and tools available in order to take their decision as clearly, fairly and transparently as possible.

A) ABOUT THE "TRUTH COMISSION"

The national court dismisses the assumption made in the complaint that the Truth Commission was formed as part of a cover-up operation on the grounds that, in its view, the proven fact that it never took effect implies the absence of the start of the execution of a crime and hence of any legal effect.

Accordingly, the court asks how a legal instrument that was never enacted may constitute a real favor or specific material aid to fugitives from Argentine justice, and accordingly answers negatively given the absence of any legal consequences.

In this sense, the objections to Your Honor's statement about the alleged absence of the principle of execution are made on the grounds that this was a premature assertion lacking all rationale according to the accusation presented.

A) 1. *The difficulties of differentiating between a preparatory act and the start of its implementation; the need for an investigation*

Article 42 of the Criminal Code establishes that any person *"who, with the intent to commit a particular crime, starts to carry it out, but is unable to consummate it due to circumstances beyond their control,"* is punishable.

From a strictly formal point of view, in the field of the constitutional theory of crime, there is some consensus that an attempt is punishable as long as the action leads immediately towards the commission of the crime, depending on the specific plan in mind.

This definition, which justifies the requirement of objective and subjective elements, does not, however, provide criteria of sufficient scientific rigor to determine in a predictable and consistent fashion, in all cases, the difference between a *preparatory act* and the *start of implementation*.

The issue in question has for many years occupied a central place on the agenda of modern penal dogma, to the point that this continues to be one of the most discussed issues in the field of crime theory.

Indeed, as Stratenwerth says (STRATENWERTH, Günter, *Criminal Law. General Part. The offense,* totally rewritten 4th edition, translated by Manuel Cancio Meliá and Marcelo A. Sancinetti, Hammurabi - José Luis Depalma Editor, Buenos Aires, Argentina, 2005), in general, *"the foundation and limits of the punishable nature of an attempt, given that this touches the very core of the theory of criminal offense, have been for decades one of the most discussed and controversial issues of the general part* "(p. 330); and particularly *"the question of how to delimit the attempt to prepare an offense, in an individual case, is certainly one of the traditional difficulties in the field of the discussions concerning the criminal reasons underlying an attempt."* (Ibid, p. 336).

Hence, "*despite all the formulas developed so far, it appears that a truly accurate way to determine the boundary between preparation and attempt cannot be determined once and for all, but only described in approximate form.*" (Ibid, p. 342).

As for the tools which may be used to resolve *"the issue of whether the conduct of the author of the crime, governed by the decision made, has reached the stage of a (punishable) attempt,*" the afore-mentioned criminal lawyer says that it "*should be decided according to the representation of the deed*." (Ibid, p. 340).

This is because a *"conduct which mirrors another may outwardly have a completely different legal meaning, depending on the point of view of the mastermind behind it in carrying out their plans."* (Ibid, p. 340).

Based on these considerations, we cannot define whether a deed may be qualified as an act preparatory to an offense or rather, whether this implies embarking on its full implementation, unless we have information or specific data as to the execution of the planned deed by its authors.

Therefore, although it may seem that this is an entirely legal discussion, this is not so, because ultimately the issue is solved on the basis of fact and evidence that in this case have not been considered as a result of the dismissal which is being challenged here.

A) 2. ***The "help" required in the crime of concealment due to personal favoritism***

Although the necessary elements required to decide the point are lacking, I understand that at this point Dr Nisman's hypothesis contains a *notitia criminis.* This is a notice that a crime has occurred and is the version which holds that the international legal instrument created and ratified may well have been the means sought to achieve the delinking of the accused, to the detriment of the administration of justice.

As held by the judicial summons, in the case of concealment for gain, the law punishes the attempt to unlink someone from an investigation being carried out or planned by the authorities. In other words, that the person doing the concealing is taking action to prevent a third party from being exposed and held accountable for the deed. (BUOMPADRE, Jorge E., DERECHO PENAL, Parte Especial, Mario A, Viera Editor, 2003, Volume III, p. 459).

In light of the assertions in the complaint, in this case a series of actions were performed, in particular the creation of the so-called "Truth Commission", aimed at delinking the Iranians accused from the AMIA case and creating a false theory of accusation plausible enough to ensure that they escaped all liability.

The complaint throws doubt on the creation of a Commission with powers of jurisdiction, which, as it suspects, would delink the Iranians accused. From this point of view, this constitutes the crime of concealment for personal gain.

This is because the "Commission", endowed with wide-ranging powers to determine the liability of the defendants, was to comprise, among others, representatives elected by the Iranian government, which has consistently refused to accept the Argentine indictment in the framework of the AMIA case.

Dr. Nisman said as much in his presentation when he asserted that *"the conclusions of the so-called 'Truth Commission' ... were previously arranged between the signatories ...";* and that this would not allow the case to progress because *"its application contains so many successive stages each without any deadlines that it can be stretched out indefinitely over time without making any real progress";* and that *"its enactment allows for the introduction of the new false, fabricated premise for the attack armed with fake evidence."*

He specifically warned of "*a change in premise and a redirection of the judicial investigation of the AMIA case, towards 'new defendants' founded on false evidence and intended to definitively and fraudulently delink the Iranians accused*", which would take place through "*the recommendations* "of the "*Truth Commission*" which the Argentine government was committed to respecting.

This same interpretation may be made on the basis of the indications given by Courtroom I of the Argentine Criminal and Correctional Court, when it declared the Memorandum of Understanding (CCCF - Room I, 3184/2013, "AMIA s/ Amparo - Law 16.986," Court No. 6 - Secretariat No. 11. 5/15/14) unconstitutional. Also when it seriously questioned the creation of a Commission which did not meet the characteristics of a real "Truth Commission" and whose members were not clearly determined, but which was nonetheless endowed with wide-ranging powers of a judicial nature in violation of the rules of due process, particularly given the fact that neither the victims of the attack nor the representative of the Office of the Public Prosecutor were able to intervene.

According to the reasoning of the Federal Court, the Commission created on the basis of this agreement would have the power to make "recommendations" to be taken into account concerning the situation of the accused, even though the Public Prosecutor and the Judiciary of the Nation were categorical on this issue and were supported by an international organization such as Interpol which accordingly issued Red Notices.

To conclude this point, it may be argued that the "help" which is the object of this complaint would have involved the creation of a Truth Commission and its ratification as a legislative body, because of its direct influence on the jurisdiction of the Argentine judge and the actuation of the representative of the Public Prosecutor's Office.

A) 3. ***The sticking point: the contributions made***

The sticking point as regards the resolution in question refers to the categorization of "help" in criminal terms, and in the lower court's interpretation that this was merely a preparatory act, as their point of view is that the effective entry into operation of the "Truth Commission" would be a condition of criminality.

Running counter to this argument, Dr. Nisman maintained that the operations of the "Truth Commission" and its final decision were the outcome of the "help" given previously, precisely through the signing and ratification of the covenant, which, as stated, would represent a very real and concrete obstacle to the sphere of action of the judge in charge of the AMIA case.

Thus, contrary to the assertions in the resolution, Dr. Nisman's version indicates that the officials accused had actually made the contributions included within the criminal plan designed for its enactment.

As for the reasons why the Commission never began operating, the prosecutor explained, **with which you agreed,** that this was not due to any decision taken by the accused but because Iran did not ratify the Memorandum. This was because the Red Notices were never lifted, an essential preliminary step for the subsequent entry into operation of the Commission.

Hence it may be deduced, from Dr. Nisman's complaint, that the Islamic Republic of Iran did not ratify the agreement precisely because the authorities of that country were unwilling to offer up the accused while the arrest warrants were still in place.

Therefore, said Dr. Nisman, the fact that it never entered into force does not mean that these contributions may not be classified as “help” under the terms of Article 277, paragraph 1 of the Penal Code.

In other words, the fact that the goal of the agreement was not achieved did not prevent Dr. Nisman from stating that this aid was a material contribution provided in the form of the signature and ratification of an international instrument which aimed to withdraw jurisdiction from the judge in charge of the case.

From this point of view, Dr. Nisman concludes that the verb "'to help" was fulfilled with the signature of the agreement and its subsequent enactment into law without the need to verify whether the body created was actually up and running, nor the final dismissal of the accused. His premise is that this was the desired effect, something that is not required for the consummation of concealment.

This is so because the lawmaker, when designing the structure of the offense in question, puts the focus on the negative value of an action taken by a person who deliberately provides help in order to disrupt the administration of justice and links this with its consummation, without necessarily fulfilling the ultimate goal. In this case, the ultimate goal was the operation of a Truth Commission that, according to the premise established, was created to hinder the AMIA case and acquit the accused.

If this is the case, then it follows that, if evidence is uncovered as a result of the measures proposed which proves what the complaint says about the aim of the authorities to use the Commission to end the accusations against Iran, i.e., if the cover-up operation can be verified, this would be sufficient to uphold the charges, as both the objective (the help) and subjective aspects (aim of concealment) would be fulfilled.

This would effectively be the beginning of the execution of a crime whose very structure implies its instantaneous consummation. So, if this were a crime of result, this would be an attempt; but as the offense concerns activity of an instantaneous nature, the beginning of its execution would have involved its consummation *per se*.

This is the dominant interpretation held by virtually all Argentine doctrine in the sense that it is irrelevant whether the end sought by the person providing aid is achieved or not. Concealment is a crime of pure activity, concrete danger, instant and permanent effects, so its consummation coincides with the completion of the criminal action without the need to achieve the result sought:

that the person favored by it be able to escape investigation by the authorities or may remove themselves from the sphere of action of the same (D´Alessio, Andrés, CÓDIGO PENAL DE LA NACIÓN . COMENTADO Y ANOTADO, Parte Especial, La Ley, 2009, Pág. 1390; BUOMPADRE, Jorge E., DERECHO PENAL, Parte Especial, Mario A, Viera Editor, 2003, Tomo III, Pág. 460; BAIGÚN, David, ZAFFARONI, Eugenio R., "Código Penal y normas complementarias. Análisis doctrinal y jurisprudencial – Tomo 11, Pág. 156; CREUS, Carlos, "Derecho penal, parte especial, T. II, 6° Ed., Ed. Astrea, Bs. As., 1999, Pág. 353).

Hence, the "help" which, according to the complainant, would have been provided through the creation of the "Commission" to acquit the defendants, appears *a priori* as sufficient to consume the criminal offense and it is not necessary to achieve the final purpose, which in this case was frustrated when the Red Notices were upheld.

It is thus clear that in this context there are two positions so extreme that this emphatically requires the opening of an investigation to take the measures requested --diplomatic cables, testimonies, and so on-- and shed light on what really happened in relation to the facts and deeds attributed to those accused either as the masterminds or perpetrators of the serious complaint under treatment.

A) 4. ***Legal principles compromised***

Here it is appropriate to contest another point made by the ruling, which maintains that the situation was far from bringing the administration of justice into any "formal danger".

Given that the implementation of such actions qualified as "help" instantly consummates the offense, it is sufficient for the lawmaker to deduce that there is a risk of impairment to the legal principle of the "administration of justice" arising from the conduct of those capable of obstructing the task of investigating crimes and punishing those responsible.

In this case, it must be said that according to Dr. Nisman's premise, if the Red Notices had been lifted, as Iran was trying to bring about (a point I shall discuss later), they would have ratified the pact and thereby put into operation the Commission, compromising Argentina's jurisdiction.

This appears to be sufficient to sustain that there was a real risk of compromising the course of justice, as the means employed would have been ideal to obstruct the administration of Argentine justice, despite the fact that this was subsequently thwarted by external factors.

Dr. Nisman held that, as from the signature of the agreement with the Islamic Republic of Iran (which meant that this nation had access to all the information on file) some countries and international organizations which had been providing information on the whereabouts of the fugitives, ceased to do so on the basis that this would be brought to the attention of Iran, with all the international implications involved.

A) 5. *The reasons why there was no previous complaint*

In another passage of the ruling, the judge states that if the mere signature of the Agreement any criminal connotation, however minimal, it would have been denounced by the AMIA Unit and the court officials who intervened in the appeal to declare the Memorandum unconstitutional.

As is well known, the configuration of a criminal offense is based not only on the externalization of certain actions defined in the crime, but also on the aims sought by its mastermind.

In the crime of concealment, actions which objectively may, after careful analysis, represent a form of help to circumvent or evade the authorities may only entail a *notitia criminis* if accompanied by a subjective element, i.e., the suspected aim of favoring the person involved in a prior offense.

In this case, the externalized fact was presented as an attempt to improve the situation of the AMIA, something which explains the absence of any complaint about it, beyond the criticism regarding the appropriateness of the agreement itself and the danger it could entail for the process of investigation.

This was the case until the complainant took note of what in his view were clues prompting the suspicion that the creation of the Truth Commission was guided by the purpose of concealment.

Dr. Nisman thus repeatedly pointed out that his decision to file the complaint was taken after observing certain indications that the agreement was founded on dropping the charges against the Iranians accused.

The complaint holds that *"an important part of the evidence ... which allowed this criminal maneuver to be uncovered and denounced, involves the telephone communications maintained by Jorge Yussuf 'Khalil which were tapped on the orders of the court in the AMIA case."* (p. 242).

So, although Dr. Nisman constructed the hypothesis of a cover-up for personal gain on the basis of what the Memorandum represents in objective terms, his abundant and systematic use of quotes from the tapped telephone conversations between the parties involved explains why this was the element which motivated him to draw up his complaint.

In short, the parties to these judicial proceedings could not have denounced the deed as they never had access to the wiretaps discussing the supposed point of the concealment, while Dr. Nisman only made his allegations once he had heard the conversations, exposing their content and drawing up the presentation that concerns us here.

A) 6. *Partial conclusions*

At this point it is clear that the main issue is not the fact that the agreement did not take effect but, rather, what purpose lay behind the creation of the Commission.

In this sense, if, as the lower court judge maintains, this was about making progress in the case investigating the AMIA bombing; or if, as argued emphatically by Dr. Nisman, this was about providing help to delink the Iranians accused.

Given the existence of **conflicting versions, one of which represents the possible commission of a public offense, it is the duty of the prosecutors to press for investigation in this regard, in order to clarify the issue.**

The judicial summons and the measures proposed are based on the principle of procedural law which establishes that it is the prosecutor's duty to take action to prove or dismiss the facts, in this case, to confirm the official version regarding the intention of making progress in the AMIA case, or to subscribe to the theory of a cover-up plan to abet the Iranians accused.

This is why, in my opinion, the current resolution is premature because it belongs to a more advanced procedural status, in the sense that it takes certain issues as established which in fact should be demonstrated with greater certainty.

B) ***CONCERNING THE "RED NOTICES"***

The judge dismisses Dr. Nisman's hypothesis that the "help" supposedly provided to get the Red Notices lifted comprised a cover-up operation, because in his view, there is a total lack of evidence in this regard. Furthermore, he claims that the testimony and documents in the case, together with the official position of the Argentine authorities in this area, are conclusive –in his view– for a refutation of the criticism formulated.

Given these conditions, I shall hereinafter focus on developing the arguments to show that the judge's statement is at the very least less premature and lacks the due foundations which should underlie any ruling, especially in those cases where a conclusive view is adopted in relation to an allegation of such vast public and institutional significance.

In fact, a reading of the actuations so far reveals the need to undertake certain diligence in order to prove categorically and definitively the probity of the accusation so far. This means proving that the Memorandum of Understanding and any subsequent actions did not jeopardize the validity of the

Red Notices issued against the Iranian fugitives, and that this was not one of the aims sought by the agreement.

Certainly, the discrepancy rests on three pillars, the first being the probative value of the statements allegedly attributed to Ronald Noble, Secretary General of Interpol at the time of the events; the second concerning the purpose of the communication of the signature of the Memorandum to Interpol, and lastly, the interpretation of the regulations governing Red Notices.

B) 1. ***Concerning the alleged statements made by Ronald Noble***

A reading of the resolution in question shows that the main argument challenging and even disqualifying the construction made by the complainant is based on an alleged letter from Mr. Ronald Noble –sent via email– to one of the people charged in the case and accompanied at the deposition by the Attorney for the Argentine Treasury.

In this alleged letter, the former Secretary General of Interpol informs Timerman that:

"I write to make your position and that of the Argentine government clear regarding the INTERPOL Red Notices issued in relation to the 1994 terrorist attack on the Asociación Mutual Israelita Argentina (AMIA) that killed 85 people and injured hundreds more."

"While I was Secretary General of INTERPOL, each time you and I talked or saw each other in the context of INTERPOL's Red Notices issued in connection with the AMIA case, you indicated that these INTERPOL Red Notices should remain valid. Your position and that of the Argentine government were consistent and firm."

"I specifically recall when we talked on the phone, after the reports published in Argentine and Iranian media which falsely suggested that the MoU signed between Argentina and Iran in January 2013 would affect the validity of INTERPOL Red Notices. I made clear to you orally and subsequently in writing that INTERPOL welcomed all efforts made by Argentina and Iran to cooperate on the AMIA case. You [Héctor Timerman] requested INTERPOL to express in writing that the Red Notices were to remain unchanged, valid and enforceable. On March 13, 2013, INTERPOL's General Counsel stated unequivocally in writing that the validity and status of red notices had not been not affected."

"In May 2013, you visited the headquarters of INTERPOL to identify ways in which INTERPOL and Argentina could strengthen cooperation in police matters. Once again, you brought up the subject of the AMIA and INTERPOL's Red Notices. You asked INTERPOL to make it clear that any effort by Argentina and Iran

to cooperate in the AMIA case in specific ways should not affect the validity of INTERPOL's Red Notices. You have expressly stated that the president of Argentina, Cristina Fernández de Kirchner, you yourself as Minister of Foreign Affairs and the entire Argentine government were 100% committed to ensuring that the INTERPOL Red Notices remain without effect."

"On November 26, 2013, you visited INTERPOL headquarters and informed me and INTERPOL of recent developments related to the implementation of the Memorandum of Understanding signed between Iran and Argentina in January 2013. You reiterated that the position of the Argentine Government remained unchanged as regards the INTERPOL Red Notices which should remain in effect, and that these should remain valid. "

"Finally, last November 2014 during the INTERPOL General Assembly in Monaco, you reaffirmed that your personal commitment and that of the Argentine government remained unchanged in the sense that INTERPOL's Red Notice were to remain in effect while at the same time trying to do everything possible to ensure that there was real progress in the ongoing investigation. I remember how passionately [you] again spoke of the victims and their loved ones who have suffered so deeply and who deserve to see the investigation complete its course and the perpetrators of this deadly terrorist attack brought to justice."

I do not underestimate the relevance of what Noble supposedly said, but the truth is that it was not adequately corroborated by the intervening judge, who should have without fail heard the presumed author of the missive give a witness statement, thus confirming the statements attributed to him.

Another controversial issue is the means used by the national judge to obtain and confirm the letter allegedly received by email by the Foreign Minister and which he understands invalidates the aid provided to the Iranians accused.

Indeed, the ruling reflects the fact that Noble's statements are understood to be corroborated by two media interviews he gave, one to the newspaper "Pagina 12" and the other to "The Wall Street Journal", in which he categorically gives the lie to Dr. Nisman's accusation.

However, in this situation, I believe that a complaint of such weight and importance should not be undermined by a supposed mail attributed to a person or by the method used to confirm this as being no more than two newspaper articles.

This is because the aforementioned letter was provided by one of the persons accused and that one of the supposed interviews attributed to Noble and subsequently published by "Page 12" was presumably held via email (cfr. fs. 458/461) by the journalist Raúl Kollmann, whose testimonial was also not heard.

These are extreme decisions which support the position of this party concerning the need to corroborate the statements attributed to a subject who is central to the scenario constructed by the complaint, given his position at the time of the incident.

I am not unaware of the fact that the complaint which affirms the existence of a criminal plan prompting the formation of the present case, is also supported by news reports. However, the truth is that Dr. Nisman's procedural act is no more than a denunciation, and thus does not require anything more than the simple introduction of a *notitia criminis* within the formalities of the procedural code.

But the situation of the examining judge is quite different as, he must, I repeat, given the gravity of the case □prior to issuing a definitive statement□ exhaust all avenues of evidence to reach the degree of certainty needed to support his opinion, as required by the legal system.

B) 2. ***The purpose of the communication to Interpol***

The second issue motivating the need to proceed as intended by this party is that new evidence may resolve the dispute over how to interpret the letter sent by the Argentine Foreign Ministry on February 15, 2013, to Interpol. This missive informed the organism of the signature of the Memorandum of Understanding in compliance with the requirements given in the agreement's clause 7.

According to Dr. Nisman, the purpose of the letter was to have the international body lift the Red Notices. However, for the judge, the letter merely obeyed a need to inform a given entity on the basis of its active involvement in clarifying the attack on the AMIA.

Dr Nisman's approach is supported by certain operational aspects assigned to the afore-mentioned clause 7, unlike the other clauses in the agreement which required ratification by Congress. Furthermore, there is the fact that the agreement only provided for the declaration of the defendants with valid Interpol arrest warrants against them.

The position of Dr. Rafecas is based on documents accompanied by the Attorney of the Treasury which are dated much earlier than the signing of the Memorandum and attest to the cooperation of Interpol in investigating the attack.

In light of this, it would be productive to broaden the investigation in order to obtain a thorough knowledge of the motivation prompting the parties to add clause 7. It would thus be of interest to take measures aimed at obtaining proof such as diplomatic cables, non-transcribed wiretapping records, the background to parliamentary debate, and testimonials from the official delegations involved in the negotiations -such as Dr. Angelica Abbona, Dr. Eduardo Zuain or Dr. Susana Ruiz Cerruti- as well as from Interpol staff, among others. All of this, if analyzed as a whole, would permit an understanding of the intentions underlying the conduct of those accused.

On the other hand, one cannot ignore how the resolution in question refers to the contents of the letter in which the Argentine Foreign Ministry, on 15 February 2013, informed Interpol of the signature of the Memorandum, in the understanding that, beyond complying with the need for a report enshrined in clause 7, this reflected the commitment undertaken by the Argentine government in reference to the Red Notices.

Dr. Rafecas emphasized that the position of the Argentine government, represented by Foreign Minister Timerman, was made clear in the aforementioned letter when he argued that: *"Any change in INTERPOL's international arrest requirements which were formulated in a timely fashion by Argentina in relation to the serious crimes being investigated in the AMIA case, can only be made by the Argentine judge with jurisdiction in this case, Dr. Rodolfo Canicoba Corral* [...] *This means that the signature of the Memorandum of Understanding, its approval by the relevant bodies of both States and its future entry into force will not bring about any change in the criminal procedures applicable or the status of the international arrest requirements referenced above*."

Nevertheless, this party understands that the probative value assigned to that instrument, in the light of the rules governing Interpol Red Notices, is not sufficient in and of itself to refute the criminal hypothesis introduced by the complainant.

Indeed, the first part of this paragraph says that any change in the international arrest requirements can only be made by the judge in charge of the investigation of the AMIA bombing, a circumstance which, as pointed out by Dr. Nisman, conforms to reality and is obvious. Interpol has no power to amend an arrest warrant but only to assign it a Red Notice status and distribute this among its delegations in other countries for the suspects to be detained.

Nevertheless, the national court understood that the second paragraph, in referring to *"the future entry into force"* of the Agreement *"produces no change (...) in the status of international arrest requirements…",* which is a clear reference to the fact that the Argentine officials intended that the effectiveness of the Red Notices should not be modified.

Despite the scope of the letter, it should be pointed out that the provisions established by the regulation governing the purpose of Interpol's Red Notices and also their suspension, withdrawal and/or lifting, necessarily imply that further research is required to determine whether the actual signature of the Memorandum and its subsequent communication had the power to have the notices lifted, notwithstanding the subsequent attitude of the people involved.

B) 3. **The rules governing the "Red Notices"**

In order to support the assertion that the view taken was premature, the regulations governing Interpol's Red Notices should be analyzed as well as the disagreement over the interpretation made by the judge.

In order to challenge the substance of the complaint, Dr. Rafecas refers to Article 81 paragraph 2 on the "Rules of Interpol on Data Processing" to state categorically that the only authority with the power to have a Notice lifted before the headquarters of Interpol is:

"The National Central Bureau (...) which requested the initial publication of a notice", i.e., as inferred by the judge, Interpol Argentina. According to internal regulations the Bureau can only do so at the request of the trial judge.

The judge thus argues that the only way to achieve the lifting of the Red Notices was purely and exclusively via an express request by the judge in charge of investigating the attack, which allows him to discard the possibility of any irregularity in the conduct of the accused.

However, the article to which the Judge referred when he noted that the Red Notices may be "withdrawn" by order of the trial judge, also says that these may be "suspended and / or lifted."

Specifically, when the Regulation addresses the possibility of lifting a Red Notice, it determines that this is the exclusive authority of the General Secretariat of Interpol, regardless of external confirmations, when *"the notification no longer fulfills the minimum conditions for publication." (cfr.* Art. 81 -3rd paragraph c) - of the Interpol Regulations on Data Processing).

A reading of the article quoted shows that there is at least one option where lifting a Red Notice would not be subject to the discretion of the trial judge but depend solely and exclusively on the General Secretariat of Interpol.

Now, in order to see whether this option applies in this particular case, we must look at a key issue involving the *purpose of an Interpol Red Notice.* This is an issue which, despite its relevance, was not covered either in the complaint or in the resolution which aims to put an end to these proceedings.

In this regard, Article 82 of the Rules of Interpol on Data Processing states that *"Red Notices will be published (...) to request the location of a wanted person and their detention or limitation of movement with a view to extradition, delivery or implementation of other legal measures "(*the emphasis is mine).

Accordingly, given that the Notice in question was intended to establish the whereabouts of a person or persons to be made available to justice, it is clear that the Memorandum of Understanding, in revealing the location of subjects sought by the police authorities because they would thus be made available to justice, could pave the way for anyone interested to question the validity of the Red Notices.

The importance of this point explains the concern shown by the families of the victims about the issue on the one hand, and on the other, the disappointment of the Iranian authorities when Interpol reported that the agreement did not change the status of notifications. Neither of these circumstances would have come about if everything had been simply subject to the will of the judge in charge of investigating the attack.

Furthermore, this party is not unaware of the existence of the letter dated March 15, 2013, sent by Interpol's Legal Adviser, Joël Sollier, to Minister Timerman saying that *"... the agreement does not imply any change in the status of the Red Notices issued in relation to the crimes investigated as part of the AMIA case ... "*

Nevertheless, the content of that communication does not rule out the fact that the signature of the Memorandum would have made it possible, within the limits of its scope, for the Iranian regime to handle the lifting of the Red Notices itself.

In the light of the above, the investigation should focus on determining whether Interpol's General Secretariat was entitled, without requiring external agreement, to lift the afore-mentioned Notices and if so, whether the Persian authorities made any moves in this direction based on the "help" enshrined in the instrument signed with the Argentine government.

It would thus be conducive not only to have the testimony of Mr. Ronald Noble, given his position, but also that of Interpol's Legal Adviser, in

addition to that of any other person responsible for the area which intervened, on behalf of the international police body, in the subject at hand in order to corroborate the purposes referred to above.

B) 4. ***Of the criminal relevance pertaining to the complaint***

As for the offense of concealment, as is clear from the rule governing this crime (Art. 277 of the Procedural Code) all that is required is to simply *assist* someone in the sense of providing an ideal collaboration to facilitate or *enable* the individual to elude the action of the authorities (D'Alessio, Andrés, CÓDIGO PENAL DE LA NACIÓN.. COMENTADO Y ANOTADO, Parte Especial, La Ley, 2009, Pág. 1390).

In other words, the offense contemplates a single mode of conduct, which is to provide the help in question. This entails all positive acts consisting of assisting, aiding, helping, facilitating, providing resources and performing tasks designed to confuse the authorities, etc., as-and-when these actions are aimed at ensuring the subject is able to avoid the actions taken by the authorities (BUOMPADRE, Jorge E., DERECHO PENAL, Parte Especial, Mario A, Viera Editor, 2003, Tomo III, Pág.. 457).

In turn, it should be noted that the offense in question, as it is purely one of activity, concrete danger, instant and permanent effects, does not require that its purpose be consummated by the person providing aid.

The result of the deepening of the investigation on this basis will determine, as argued Dr. Nisman, whether the Memorandum of Understanding and its subsequent notification sought to make possible, deliberately, the lifting of the Red Notices which would substantiate the "help" in the terms outlined and, as such, would mean that those responsible would be criminally reprehensible.

B) 5. ***Partial conclusions***

From the foregoing, it is clear that the thrust of the deeper investigation based on the hypothesis discussed above should be to determine conclusively the purpose underlying the Memorandum of Understanding signed between Argentina and Iran.

Whether, as the lower court judge maintains, this was about making progress in the case investigating the AMIA bombing, or as emphatically argued by Dr. Nisman, this was about providing help to delink the Iranians accused.

Given the existence of conflicting versions, one of which represents the possible commission of a public offense, it is the duty of the prosecutors to press for investigation in this regard, in order to clarify the issue.

This is why, in my opinion, the current resolution is premature because it belongs to a more advanced procedural status, in the sense that it takes certain issues as already established which in fact should be proven with greater certainty.

C) ***OF THE OTHER CIRCUMSTANCES TARGETED IN THE RESOLUTION***

So far we have developed the grounds on which the Public Prosecutor considers that the resolution adopted by Dr. Rafecas is premature and, as such, should be revoked.

However, although these guidelines are judged to be sufficient motive for the actions described, since they rebut the central arguments of the lower court's decision, I consider it necessary to refer to other circumstances addressed in the ruling inasmuch as it must be determined whether these are *"not punishable preparatory acts (of the failed crime of concealment)"* as stated, or links in the criminal plan denounced by Dr. Nisman which prompted this process.

C).1. ***Concerning the admissibility of the wiretaps***

Given the overall discursive context sustained in the appeal, the conclusion that this ruling was premature applies with regard to the statement that the wiretaps provided in the complaint are not conclusive.

The conversations recorded, instead of being analyzed in an isolated setting as is currently the case, may in fact be useful as they provide yet more elements which can be used to assess the premise of the complaint.

For example, they could be analyzed and interpreted in conjunction with information obtained from the search for evidence proposed in the judicial summons, such as records of incoming and outgoing calls, cross-referencing, records of visits, diplomatic cables, etc.

It should be added that the transcripts of the latest wiretaps obtained before the complaint was filed have not yet been received yet. Neither has all the information contained in the huge number of recordings provided by Dr. Nisman at that time been processed yet. .

C).2. ***Concerning the Aleppo Summit***

At this point, the resolution states that the contents of the "Aleppo Summit," which Dr. Nisman believed was the point of departure of the "plan" aimed at consummating the cover-up, should be dismissed on the grounds that the only evidence provided (namely the statement of journalist José Eliaschev) was inconsistent, weak and contradictory.

Although Dr. Rafecas is of the opinion that there is no proof to support the statement made in the complaint concerning the discussion between the foreign ministers at this meeting, one cannot dismiss the fact that the result of the significant number of investigations I have proposed would allow Eliaschev's statements to be corroborated.

Further research is thus necessary in order to corroborate definitively the content of the meeting. It would be conducive to search for diplomatic cables, non-transcribed wiretaps and particularly to depose the members of the official delegation which traveled to Syria and intelligence personnel involved in the investigation of the AMIA bombing.

D) ***A DIFFERENT VERSION OF THE FACTS ACCORDING TO THE UFI AMIA ITSELF***

Another issue that Dr. Rafecas considered favorable, in his view, was the existence of two documents signed by Dr. Nisman, one in December 2014 and the other January 2015. Copies of these were provided for these proceedings on February 20, 2015, by the new authorities in charge of the Prosecutor's Investigation Unit into the AMIA case, Drs. Sabrina Namer and Roberto Salum, who, as stated by the Judge, took *"a diametrically opposed view"* to the content of Nisman's complaint.

The undersigned understands that is not necessary to analyze the content of such instruments in the current context, because they were added on 28 January to case No. 8566 linked to the AMIA bombing by Dr. Alberto Gentili, who was then in charge of the Unit. However, the emphasis placed on this point by the lower court and the subsequent repercussions generated meant that it acquired a degree of importance to the point where it was exhibited it as a major argument in favor of dismissal. This prompts the Undersigned to address the issue in order to demonstrate a very different interpretation from that made by the lower court.

I must thus refer to some of the paragraphs in the same note as referenced by the lower court when it arrived at this conclusion. This is the note penned by Dr. Soledad Castro where she revealed the existence of these documents in the sphere of influence of the Unit where she holds the post of Secretary of Attorney General.

In this document, she records that *"... Among the many aspects of the investigation of the AMIA case, for a long while we worked to find some legal way to obtain the effective extradition of suspects of Iranian origin, in order to bring them to trial..."*

"... Eventually, a brief was drawn up documenting the lack of cooperation with the investigation, over the years in the context of the case, evidenced on behalf of the Iranian authorities . A legal recourse was proposed on the basis of these

circumstances to ensure that the defendants of that country could be handed over to Argentine jurisdiction ..."

As stated by the Secretary of the Attorney General, the prosecutor Alberto Nisman sought to achieve through the appropriate channels, that the UN Security Council *"... enjoin the Islamic Republic of Iran to detain, for the purposes of extradition and subsequent prosecution and trial, the eight (8) persons accused of Iranian nationality ... "*

"... The negotiations between the authorities of the Islamic Republic of Iran and Argentina that culminated in the signing of the Memorandum of Understanding of January 27, 2013 gestated, as was understood by Dr. Alberto Nisman, an scenario which was entirely opposed to the path they were apparently trying to pursue. This was because its proposed approach contradicted in some way the understanding reached. He therefore decided to postpone the development of this line of investigation and ordered the preparation of two documents based on this initial idea. The first of these was drawn up based on the supposition that the Islamic Republic of Iran ratified the Memorandum. The second was to be written in the event that this did not happen ... " (the highlighted words are mine).

It follows then, that these two instruments originated in an initial draft that was written before the Agreement between Argentina and Iran was signed, i.e., at least two years before the present complaint was filed. This initial draft was adapted to fit the new international scenario, the details of which provided Dr. Nisman with two alternative courses of action which shared a single purpose: to have the Iranians stand trial.

Dr. Castro says of these two documents that "*... by order of Dr. Alberto Nisman, they were updated on several occasions ..."* without prejudice to which she specified that *"... in his mind these documents were still not up-to-date, as his convictions had undergone substantial modifications on the basis of a set of assumptions and conclusions they contained. He believed that his brief needed to be corrected once again so that it would reflect his full and current conviction. This is what Dr. Nisman told his Lawyer Clerks and the undersigned*."(the highlighted words are mine).

My clarification becomes relevant when one takes into account the vast importance bestowed by Your Honor on the note from Dr. Soledad Castro to explain the alleged inconsistency or incongruity of the complaint filed by Dr. Nisman. Indeed, in my opinion, a comprehensive reading of the report reveals that the complainant had but one single intention, which is specifically reflected in the complaint dismissed.

The above is one more argument in favor of the revocation sought, and it underscores the need to hear the testimony of all the lawyer clerks who received precise instructions from Dr. Nisman, in order to dispel any doubt concerning my true objective in relation to the opinion you have formed concerning the liability of those accused.

E) ***THE REFERRAL OF TESTIMONY REGARDING RAMÓN A LLAN HECTOR BOGADO***

The last of the points raised in the decision at issue, being point II of the operative part, as detailed earlier in this opinion, concerns the referral of testimonies to the Criminal and Correctional Court no. 9, Secretariat. no. 18, so that they may be added to Case no. 11.503 / 2014, concerning the investigation into Allan Hector Ramon Bogado for the alleged commission of offenses against public order.

The rationale for this decision was, in essence, that while the content of wiretapping laid bare the deployment of unlawful activity by Allan Ramon Bogado, this is not linked to the criminal plan denounced in this investigation, which at this point in the resolution, had already been concluded to be lacking the authority to qualify as an offense.

The grievance that this decision has caused me, then arises vehemently, as, if the Higher Court finds in favor of the position proffered in favor of opening the investigation, there is no reason why the actions taken by one of the participants in the maneuver denounced should be investigated independently, in the context of another case whose procedural purpose differs markedly from the present one.

For these reasons, I shall postulate that point II of the decision which is the subject of appeal also be revoked.

IV FINAL THOUGHTS

Before drawing to a close, I think it necessary to note some final thoughts concerning the general context in which this appeal is presented.

I agree with the judge concerning the gravity of the series of events referred to in the complaint and the repercussions these have created given the elevated institutional status of some of those accused by Dr. Nisman. I also agree that it is important to emphasize the political, social and journalistic consequences that his presentation and its consequences have had at both national and international levels.

In this sense, I am convinced that we owe a thorough investigation of the facts and the background for the purposes given, to both those mentioned in the complaint of 14 January 2015 and those who have been struggling to see justice done for the last two decades.

The background information alone which would arise from a correct investigation undertaken as part of criminal proceedings conducted with the due intervention of all the parties concerned would determine whether an accusation is viable or the charges definitively dropped.

The work undertaken by this Prosecution office has never once deviated nor will it, even in the face of the severity of the facts and the institutional status of one of the accused, from the summons ordered by the Argentine Constitution, which demands that the judicial and prosecution authorities *know* and *decide* on the facts brought to their attention (Articles 116 and 120 of the Constitution). Article 193 of the C.P.P.N. provides the basic regulation governing this obligation and, taken together with articles 180 and 188 thereof, set the minimum standards of actuation when faced with a situation of limited knowledge.

This task must be performed in order to overcome the unknowns, beyond the specifics involved in this particular case.

Faced with an event such as the one which should be investigated here, the law requires that for everyone's peace of mind (complainants, judges, defendants, stakeholders etc.), this knowledge be governed by its own standards, not by others.

With his resolution, the judge has precluded the opportunity to comply with these standards, which provide structures on how to prove the facts given in a complaint, or how to prove that these have criminal potential.

The criminal process □being the only one which is constitutionally permissible for the finding and prosecution of the alleged commission of crimes□ has its own rules; in the face of a premature resolution, a new analysis of the case files must be carried out and an extensive review of the decision taken, since otherwise this precludes the objective of reaching the material truth of what happened.

V. REQUEST

Given the issues exposed before Your Honor, I request: 1) that it be declared that the appeal was filed in good time and in due form. 2) that the appeal be granted and that these proceedings be raised to the higher instance to resolve the question posed. Federal Prosecutor's Office no. 11, March 4, 2015. *Fiscalnet No. 10,789 / 15.-*