Spain, Israel and War Crimes

April 8, 2009

By Soeren Kern

Gatestone Institute

<http://www.gatestoneinstitute.org/455/spain-israel-and-war-crimes>

Spanish National Court Judge Fernando Andreu says he will [redouble his probe of seven top Israeli military and government officials](http://www.elpais.com/articulo/espana/juez/Andreu/sigue/investigacion/Israel/bombardeo/Gaza/2002/elpepuesp/20090227elpepunac_9/Tes) for suspected “crimes against humanity.” He made the decision after determining that documents forwarded by the Israeli Embassy in Madrid show that Israel has decided not to prosecute anyone for the targeted assassination of Salah Shehadeh, the commander of the military wing of Hamas, in Gaza City in 2002. Spanish law allows the prosecution of foreigners for such crimes as genocide, crimes against humanity and torture committed anywhere in the world if the suspects will not be tried in their home country.

The case was brought to the Spanish court by the Palestinian Center for Human Rights, which is represented in Spain by [Gonzalo BoyÃ©](http://www.libertaddigital.com/mundo/gonzalo-boye-esta-detras-de-la-querella-contra-el-ex-ministro-de-defensa-israeli-1276349588/), a Marxist revolutionary who was sentenced to 14 years in prison for collaborating with the Basque terrorist group ETA. A seven-page court document says the initial evidence suggests that the attack in the densely-populated Gaza City, which killed 14 civilians, “should be considered a crime against humanity.” Supporters of the lawsuit say Spain should pursue the suit because it has “universal jurisdiction” in such cases.

Andreu will now probe former Israeli Defense Minister Binyamin Ben-Eliezer, former Air Force Commander Dan Halutz, former head of the National Security Council Giora Eiland, and four other senior officials. Andreu will also seek testimony from Palestinian witnesses. The court will ask Israel to formally notify those named in the complaint so that they can be called by the judge to testify. Should Andreu decide to issue an international arrest warrant for any of the seven Israelis, they could be detained upon arrival in any EU member state.

The lawsuit has sparked outrage in Israel, which is trying to fend off foreign censure over the civilian death toll during Operation Cast Lead in January 2009. Israeli Defense Minister [Ehud Barak](http://www.israelnationalnews.com/News/News.aspx/129681) has rejected the complaint as “delirious” and pointed out that Shehadeh was a terrorist mastermind responsible for the deaths of many dozens of innocent people. “Whoever calls taking out a terrorist ‘a crime against humanity’ lives in an upside-down world,” he said. Barak vowed to do “everything possible to get the investigation dismissed.”

Incoming Prime Minister [Binyamin Netanyahu](http://www.haaretz.com/hasen/spages/1059964.html) called the Spanish probe outrageous. “It’s absurd: Israel is fighting against war criminals and they are charging us with crimes?” said Netanyahu. “There is nothing more ridiculous and absurd than them accusing us, a democracy legitimately protecting itself against terrorists and war criminals, of these crimes; it is absurd and makes a mockery out of international law,” he said.

Knesset Member [Aryeh Eldad](http://www.israelnationalnews.com/News/Flash.aspx/160206), pointing to what many see as rank hypocrisy by Spain, has called for Israel to put former Spanish officials on trial for their role in the NATO bombing of Serbia in 1999. His official petition, which was sent to Israeli Attorney General Menachem Mazuz, says: “In those bombings, hundreds, perhaps thousands, of innocent civilians were killed because NATO pilots dropped their bombs from extremely high altitudes in order not to endanger themselves. They thus caused mass civilian casualties. It is fitting that the State of Israel try the Spanish political and military leaders for war crimes if Spain does not immediately revoke the charges against the Israeli Defense Minister and Chief of Staff.”

Sensing that the case has the potential to further cement Spain’s image as one of the most anti-Israel countries in Europe, Spanish Foreign Minister Miguel Ãngel Moratinos said his government would consider a proposal to amend the controversial war crimes law that now allows the court to investigate the Israelis. But he was immediately contradicted by Deputy Prime Minister [MarÃ­a Teresa FernÃ¡ndez de la Vega](http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1233304639276), who stated defiantly that “Spain is a country ruled by law and the justice system [here] enjoys absolute independence. This was made clear to Israel and we are sure they understand this.”

*Justice or Just Propaganda?*

Spain’s investigation of Israel for war crimes is being motivated by at least three closely interrelated factors: judicial vanity; anti-Western globalism that uses international law to eat away at national sovereignty; and anti-Semitism disguised as concern for human rights.

Some Spanish commentators say Judge Andreu is pursuing the case against Israel because he is [hungry for international publicity](http://asturieslliberal.nireblog.com/post/2009/01/31/quien-yel-que-denuncia-a-israel-la-audiencia-nacional-en-defensa-de-un-terrorista-o-el-mundo-al-reves). They say he is following the “fame formula” used by his colleague and political soul mate, Baltasar GarzÃ³n, who in 1998 became an instant hero of the global Left when he issued an arrest warrant for former Chilean dictator Augusto Pinochet. Since then, Spanish prosecuting magistrates have used the principle of universal jurisdiction to go after current or former government officials such as former US Secretary of State Henry Kissinger, Italian Prime Minister Silvio Berlusconi, and around 100 leaders of the 1976-1983 military junta in Argentina. Critics say Andreu now wants to capture some of GarzÃ³n’s stardust and the perks that go with it.

Others say that activist judges like Andreu and GarzÃ³n (as well as many of their European ‘universal justice’ counterparts [here](http://news.bbc.co.uk/2/hi/uk_news/7251954.stm), [here](http://news.bbc.co.uk/2/hi/europe/1664443.stm) and [here](http://www.alertnet.org/thenews/newsdesk/L11763029.htm)) are in the grips of a post-modern and post-nationalist viral fever, which drives them to formulate international legal concepts like “universal jurisdiction” in order to undermine the national sovereignty of others. These self-appointed apostles of global government want to end nationhood, especially as it is defined by Israel and the United States, in order to usher in a new era of world harmony. Of course, a sustainable world peace requires world law that is supervised by global elites who know better than Israel what is right for Israel.

And last, but certainly not least, many observers believe Andreu’s pursuit of Israel is [politically motivated](http://www.libertaddigital.com/opinion/editorial/andreu-y-el-odio-a-israel-47534/). It is a legal ambush, they say, that has little to do with his concern over human rights and much to do with his personal rage over Israel’s ground invasion of the Gaza Strip in January 2009. They point to the fact that judges like Andreu and GarzÃ³n are highly selective about the cases they take. For example, they have never sought to prosecute any Hamas or Fatah terrorists for war crimes. Nor have they shown much zeal for investigating crimes against humanity in Chechnya or Darfur. Nor have they prosecuted any of the suspected Nazi war criminals who sought refuge in Spain after the end of World War II.

So far none of the lawsuits filed against Israel in Europe have ever reached the stage of a court trial where Israeli leaders have appeared before a foreign judge. But Spain’s case against Israel could open a Pandora’s Box as sundry political organizations try to use the Spanish legal system to charge Israelis and others who are fighting terror. Indeed, Israel is now bracing for a wave of lawsuits which accuse it of human rights violations during Operation Cast Lead.

At the moment, Israel’s best option for avoiding a messy and precedent-setting trial may be to exert diplomatic pressure to persuade Spanish authorities that Spain has a vested interest in protecting its justice system from malicious abuse. Britain reached that conclusion in wake of the [Almog affair](http://www.jpost.com/servlet/Satellite?pagename=JPost%2FJPArticle%2FShowFull&cid=1139395494861) in 2006. And Belgium rolled back its universal jurisdiction law in 2003 after former US Secretary of Defense [Donald Rumsfeld](http://www.telegraph.co.uk/news/worldnews/europe/belgium/1432913/US-threatens-to-pull-Nato-HQ-out-of-Belgium.html) threatened to pull NATO headquarters out of Brussels.

Over the long term, however, countries fighting the war on terror will have to find a permanent solution to the challenge posed by universal jurisdiction. As the Obama administration warms to the idea of joining the International Criminal Court (ICC), Americans should demand that international law clearly differentiates between those who are war criminals and those who combat terrorism. Otherwise, in the words of [Henry Kissinger](http://www.foreignaffairs.com/articles/57056/henry-a-kissinger/the-pitfalls-of-universal-jurisdiction): “Universal jurisdiction risks creating universal tyranny — that of judges.”