



THE GUERNICA CENTRE
FOR INTERNATIONAL JUSTICE

SPANISH NATIONAL CRIMINAL COURT
CRIMINAL CHAMBER
SECOND SECTION

Before: Magistrate José Antonio Mora Alarcón (President)
Magistrate Fernando Andreu Merelles (Reporting Judge)
Magistrate María Fernanda García Pérez

CASE No. 97/2010
COURT RECORD No. 4/2015
THE JESUIT MASSACRE TRIAL

Public Prosecutor: Teresa Sandoval

Private Prosecutor: Manuel Ollé
Almudena Bernabéu
José Antonio Martín Pallín

Defence Counsel: Jorge Agüero Lafora for Inocente Orlando Montano

Hearing: Ninth Session

Date: 15 July 2020



THE GUERNICA CENTRE FOR INTERNATIONAL JUSTICE

Opening Trial Session

On 15 July 2020, at approximately 10.00 (Madrid, Spain), the last trial session for the massacre of the six Jesuit priests and two women perpetrated in El Salvador on 16 November 1989 took place. At this ninth session, the parties presented their final submissions and the defence requested that, in the event of conviction, the defence of state of necessity, irresistible force and insurmountable fear be applied and, alternatively, a highly qualified mitigation of undue delay, all of which are provided for in the Spanish Criminal Code of 1973. Following this, all the parties made their respective closing arguments, in order to explain to the Trial Chamber the reasoning that led to their final conclusions.

The first party to present their arguments was the Public Prosecutor, who stated that the crime committed against the Jesuit priests consisted of a murder as an act of terrorism that was planned, ordered and subsequently covered up by a parallel military structure outside the law -La Tandon- made up of members of the High Command as well as high ranking members of the Armed Forces, who for years devoted themselves to disturbing the public peace and producing a state of terror amongst the population.

The Public Prosecutor argued that the murders were committed with malice aforethought because they sought to nullify or prevent any possibility of defence or reaction and to ensure that the crime was committed. This crime, the Prosecutor explained, was committed in the early hours of the morning, while the victims were asleep, by a Rapid Action Battalion composed of more than 40 personnel, using military weapons; she also indicated that they were executed in a position of absolute defencelessness, forcing them to lie face down on the ground. The Prosecutor stressed that the place where the events were committed was heavily guarded by hundreds of military and security personnel, which ensured the success of the crime; describing the scene as “the High Command of the Salvadoran Army had the mice well locked in the mousetrap with no possibility of escape”.

The Public Prosecutor also identified as the motive for the crime the role of Father Ellacuría in the search for a negotiated solution to the internal armed conflict, as he was the main mediator who communicated with all the parties in order to reach a negotiated solution to the Salvadoran civil conflict. This agreed solution was rejected by the members of La Tandon, as it meant that they would lose all the power they had amassed in previous decades and would see their impunity threatened by the thousands of human rights violations committed under their command.

Finally, with regard to the defendant Inocente Montano, the Public Prosecutor demonstrated that, with her statements during her interrogation in the plenary, it was fully accredited that thirty years after the crimes he still felt animosity towards Father Ellacuría and his colleagues. According to the defendant's own statements, the 1979 coup d'état against the military had been planned and directed from the UCA, the Jesuit priests had FMLN weapons, Ellacuría was an advisor to the FMLN leadership and the Jesuits themselves trained children for the guerrillas.

Regarding the direct participation of Inocente Montano in the events, the Public Prosecutor considered it proven that the defendant, along with four other members of the Tandon, gave the order to carry out the murders, having total and absolute control over the event.

After the Public Prosecutor's final statement, it was the turn of the Private Prosecutor, which began by focusing on proving the responsibility of the defendant, Inocente Orlando Montano, based on the evidence presented during the trial. Based on the fact that none of the parties had denied that the murders were committed by the Atlacatl Battalion command unit, the evidence and reasoning of the prosecution were directed at demonstrating the existence of a premeditated agreement by the High Command of the Armed Forces, by which both its members and other high military officials made the consensual decision and gave precise orders to activate and execute the military operation consisting of “assassinating University Dean Ellacuría without leaving any witnesses”.



THE GUERNICA CENTRE FOR INTERNATIONAL JUSTICE

The lawyers of the private prosecution made use of the strong circumstantial evidence, which, as Spanish precedent case law recognizes, allow the presumption of innocence to be rebutted if it is analyzed as a whole, and the only possible inference is that the defendant is criminally responsible. On the other hand, the conclusions derived from all the evidence have been complemented and reinforced by Professor Terry Karl's expert intelligence evidence, which was prepared on the basis of multiple interviews, analysis of hundreds of reports and review of up to 14,000 declassified documents. The accusation pointed out that the intelligence expert's work has been essential since it has made it possible to deal with, group together and analyse all the existing documents on the events being tried in order to reach logical, independent and impartial conclusions about the participation of Inocente Montano as a indirect co-perpetrator.

The private prosecution continued to provide an account of the facts that have been proven. First, it has been proven that the army's high command was under the control of the Tandona, a group of officers graduated in 1966 with a long history of human rights violations and systematic cover-ups, who by 1989 had succeeded in co-opting virtually all command positions. The leaders of the Tandona were Colonels Zepeda, Montano and Ponce, who were part of the military High Command holding the respective positions of Vice-Minister of Defence, Vice-Minister of Public Security and Head of the Joint Chiefs of Military Staff. They were also at the top of the chain of command, in charge of making the main strategic and operational decisions -such as the assassination of Ellacuría. In this sense, the private prosecution affirms that the reason for the assassination of the Jesuit priests of the UCA by the leaders of the Tandona lay in their leadership of the peace negotiations, which involved purging the army and removing the "mafia family" known as La Tandona from positions of power.

Secondly, he maintained that the premeditation of the murders is considered proven by the psychological operation that began on 11 November 1989, consisting of a campaign of verbal attacks against Father Ellacuría and the Jesuits of the UCA. The campaign identified them as subversive and terrorist enemies of the FMLN and called for their violent execution with popular appeals to "cut off their heads". The operation, whose purpose was to legitimize the subsequent assassination of the Jesuits, was carried out through Radio Cuscatlán, the official radio station of the Armed Forces and the only one on the air during the week of the FMLN offensive and could only be ordered by the High Command. Thirdly, after the declaration of the state of siege and the division of San Salvador into five security commands, on 13 November 1989 the High Command transferred a unit of commands from the Atlacatl Battalion to the military complex next to the UCA. Despite being the best elite unit of the Salvadoran armed force, during the three days they remained there, the lawyer emphasizes that there is no evidence that they were assigned any military operation other than searching the Jesuits' residence and assassinating them two days later, in the early morning of 16 November 1989.

The private prosecution emphasized that the facts concerning the meetings on the 15th and the transfer of the order to assassinate Ellacuría were confirmed by Benavides' notebook and by the invariable testimony of the direct witness, Yushy René Mendoza, who stated in his statement that Col. Benavides had told him that that afternoon there had been two consecutive meetings at the Joint Operations Center (COFCA) and, in the second of these, Colonels Montano, Zepeda, Larios, Ponce and Elena had decided, deliberated and agreed that Father Ellacuría should be assassinated without leaving any witnesses.

Later, counsel also referred to the cover-up process carried out by Inocente Montano and the rest of the High Command. All the witnesses and evidence showed that from the beginning of the investigation they sought to put up a firewall and prevent the discovery of the actions of Col. Benavides' superiors, hindering the investigation through the Commission of Inquiry into Criminal Acts (CIHD) and the Commission of Honour, intimidating direct witnesses by the FBI, altering the statements of witnesses before the Commission of Honour, impeding the work of the prosecutors in the case, murdering key witnesses, burning the record books and modifying the weapons of the crime, systematically lying, preparing the statements by lawyer Rodolfo Parker as well as threatening all the participants continuously, as Inocente Montano did with the wife of then Lieutenant Yushy René Mendoza, whom he threatened to kill. He also pointed out that the cover-up has continued to the present day, as it has become clear that the defense expert Oscar Alfredo Santamaría traveled to Spain in 2008 with the aim of obstructing the lawsuit from which this procedure derives and pressuring so that the National Court's investigation was closed.



THE GUERNICA CENTRE FOR INTERNATIONAL JUSTICE

After having listed and justified the proven facts, the private prosecution proceeded to analyze the intervention of Inocente Montano in the crime, indicating that among the elements that pointed to his direct responsibility in the preparation, decision and cover-up of the facts, they highlighted that the security forces under his command were the ones that verified the arrival of Ellacuría and participated in military operations, that all the military leaders met daily at the COFCA to make decisions regarding the halting of the offensive, and that on the 15 November 1989 the entire High Command was in session, it being implausible that Montano was not present, without having offered any alibi. Likewise, all the evidence clearly pointed to the fact that it was the leadership of “La Tandongá” that took the decision to end Ellacuría by consensus and that the defendant, Inocente Montano, not only participated in the decision making process, but also did not prevent the execution of these events from his position of power, subsequently covering them up and systematically obstructing the investigation.

In the second part of its intervention, the accusation proceeded to legally qualify the intervention of the defendant in the criminal acts as an indirect co-perpetrator, acting through an organized apparatus of power. This theory has been developed by German criminal jurist Claus Roxin and Spanish professor Enrique Gimbernat and has been applied by international precedent case law in the Eichmann case (1961), in the proceedings against the Argentinean Military Juntas (1986) or the case of the Berlin Wall shooters (1990-1997). In the present case, which, if it were to be considered, would be a landmark judgment in Spanish and international law, the prosecution clearly stated that all the requirements for indirect perpetration by organized apparatuses of power had been met, namely (i) the prior existence of a structured organization - in this case, La Tandongá and the High Command occupied by them; (ii) the power of command - all the defendants were at the top of a vertical hierarchical structure with absolute capacity to take criminal decisions and to transmit them to their subordinates; (iii) acting from an apparent framework of formal legitimacy; (iv) departing from the existing framework of legality - the Jesuit priests and two women were in a non-international armed conflict and were executed, i.e., civilian victims and (v) the fungibility of the direct perpetrator - the perpetrators chose the Atlacatl battalion itself to execute him, being able to select any perpetrator and knowing that his order would always be carried out; and (vi) the predisposition to the realization of the act by the direct perpetrators - for several days the soldiers were subjected to messages contrary to the Jesuits that predisposed them psychologically, in addition to being part of the military structure and being obliged to carry out the orders of their superiors in the extraordinary context of the offensive.

In the present case, the private prosecution argued that there were multiple indirect perpetrators who led this organized apparatus of power - Colonels Montano, Ponce, Larios, Zepeda and Elena- in a regime of co-authorship or co-perpetration, and that acting in common agreement, they ordered the assassination of Ellacuría. The indirect co-perpetration, which is unprecedented in Spanish precedent case law, has been recognized by the International Criminal Court in several cases, such as the Gaddafi case and the Al Bashir case. The prosecution argued that there was a common agreement by consensus of the members of the High Command appointed to order the assassination; their action was an essential contribution to the commission of the crime, since they decided it, made it possible and facilitated it; and that they controlled the criminal structure and the subordinates, guaranteeing according to this organization and hierarchy that the crime would be committed, all of which confirms the indirect co-perpetration.

Indirect co-perpetration, as indicated by the prosecution, does not violate the principle of individual responsibility because it is intimately related to the control of the criminal act, without the identity of the direct executor being important, since control of the crime and the criminal organization depends on the indirect perpetrator, in this case, the defendant and the other four members of “La Tandongá”. The direct executor, as the charge exemplifies, is interchangeable and dispensable, since he is integrated into the organized apparatus of power itself and carries out an action on which he has decided nothing.

Furthermore, the private prosecution stressed that Inocente Montano, derived from his position as Deputy Minister of Public Security and member of the High Command, had two responsibilities as a superior: to respect the laws of war and to make his subordinates respect these rules. Therefore, he also had the obligation to (1) prevent his subordinate troops from committing crimes; and (2) if they did commit crimes, to proceed to sanction them by opening a criminal investigation. Therefore, the prosecution pointed out that Inocente Montano would also be guilty as a perpetrator by omission in accordance with the superior’s responsibility for



THE GUERNICA CENTRE FOR INTERNATIONAL JUSTICE

the crimes of his subordinates, which was already provided for in international, Spanish and Salvadoran law in force at the time of the events.

In the alternative, and in any case, the prosecution concluded, the theory of deliberate ignorance should be applied to the actions of the defendant since, in the hypothesis that he had not actively participated, he voluntarily disregarded the risk that had been created against Father Ellacuría, and preferred to ignore it, placing himself in a position of deliberate blindness so as not to become involved in or to prevent the murders.

The third section of the private prosecutor's intervention was aimed at justifying the indictment of the crimes as terrorist assassinations. On the one hand, reiterating what the Public Prosecutor had stated, the murders were committed with malice aforethought because of the time, place and manner in which they were executed, with more than 40 military personnel entering secretly and brutally massacring the eight victims without the possibility of defending themselves. On the other hand, the murders constituted State Terrorism, as the Tandon and the defendant used the material, economic and personal means of the State to commit their crimes, within a hierarchical, organized criminal structure with command capacity on the part of leaders –including Colonel Montano– who made tactical and strategic decisions. Furthermore, they had a clear purpose of subverting public and constitutional order through widespread violence, creating alarm and insecurity, disturbing the peace and provoking a state of terror in the population. “It was state terrorism because at no time was the state's neutrality respected”, the lawyer concluded.

In the last part of his speech, the attorney for the private prosecution defended the need to condemn the defendant for the eight terrorist murders –and not for just five of them– on the grounds that Spanish law allows for the prosecution of crimes related to a criminal act, provided that the court has jurisdiction to hear that main act. In this case, despite the reform of the principle of universal jurisdiction, since it is possible to investigate the facts related to the deaths of the five victims of Spanish nationality –Fathers Ignacio Ellacuría, Ignacio Martín Baró, Segundo Montes, Amando López and Juan Ramón Moreno– the court is legally obliged to prosecute and convict for the murders of the Salvadoran victims –Father Joaquín López y López, housekeeper Julia Elba Ramos and her daughter Celina Mariceth Ramos–.

The attorney for the private prosecution concluded by referring to the international context in which these crimes took place in El Salvador, a non-international armed conflict, where war crimes were committed by killing civilians, which constitutes the perpetration of first-degree international crimes that offend humanity as a whole. The prosecution stressed that the prohibition of committing war crimes, in addition to being contained in the Geneva Conventions of 1949 –ratified by Spain in 1952 and by El Salvador in 1953– has been recognized as a rule of *jus cogens*, a peremptory law and a norm crystallized in international custom, which has obliged all States to prosecute these crimes for more than 70 years.

In this final plea, he claimed the need to refer to universal justice and the international context of the crimes in order to provide the victims with a comprehensive and reparative response, affirming the true nature of the international crimes that the murders of the Jesuit priests in El Salvador entailed. All this, despite the inability to prosecute Inocente Montano for such international crimes due to the almost total suppression of the principle of universal jurisdiction in Spanish procedural law that was operated in 2014.

After the intervention of the prosecution, the defence counsel proceeded to inform the court presenting its concluding statements and trying to exempt Inocente Orlando Montano from any criminal responsibility, questioning the jurisdiction of the court to carry out the prosecution and questioning the evidence presented by the prosecution, without offering any explanation beyond the fact that the defendant had only administrative functions and was completely unaware of the decision to kill Father Ellacuría without leaving any witnesses.

The trial ended with the final intervention of Inocente Montano, who chose to make use of his right to the last word. Despite the opportunity to acknowledge his participation in the criminal acts, he denied all the facts for which he was accused and remained faithful to the version that the army's High Command had nothing to do with the murders and that they were due to a unilateral decision by Colonel Benavides, who was in charge of the Atlacatl Battalion. He did acknowledge that he belonged and still belongs to the Tandon, confirming that it is an organization that has not disappeared and that still meets frequently.



THE GUERNICA CENTRE FOR INTERNATIONAL JUSTICE

After this intervention, the President of the Criminal Chamber of the Audiencia Nacional concluded the trial, leaving the case remitted for judgment, which is expected in the coming months.

For everyone at Guernica and as we rightly pointed out from the private prosecution, “without justice there is no peace, no reconciliation and no forgiveness”. The judiciary is an essential mechanism that accompanies transitional processes and cannot ignore serious human rights violations and international crimes. Despite the fact that today it is deeply undermined, it was thanks to the principle of universal jurisdiction that we have been able to reach this moment and hold this trial before a Spanish Court that has effectively ensured the protection and guardianship of international legal assets, acting on behalf of the international community and above all, returning some justice to the Salvadoran people who have fought so hard to achieve it, without results. Universal justice is not only justice, it is solidarity and hope for the victims.

As soon as we have news of the judgment, we will continue to report.



*

*

*

*

*