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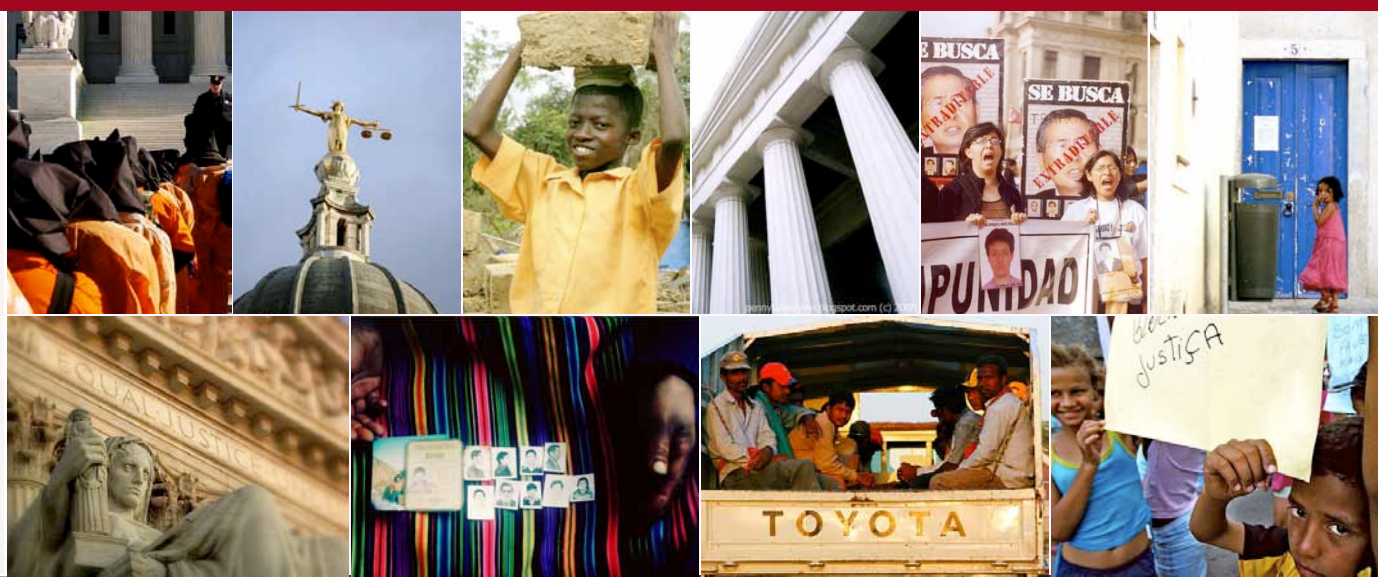

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Prosecuting Genocide in Guatemala: The Case Before the Spanish Courts and the Limits to Extradition

Naomi Roht-Arriaza

University of California, Hastings College of the Law

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This working paper series is based on an international symposium, "Human Rights Tribunals in Latin America: The Fujimori Trial in Comparative Perspective." Select panelists have prepared incisive analyses of new trends in transitional justice in the region. The conference was organized by the Center for Global Studies at George Mason University, the Washington Office on Latin America, and the Instituto de Defensa Legal on October 2, 2008 in Washington, D.C., and funded with the generous support of the Open Society Institute.

The Center for Global Studies at George Mason University was founded to promote multidisciplinary research on globalization. The Center comprises more than 100 associated faculty members whose collective expertise spans the full range of disciplines. The Center sponsors CGS Working Groups, publishes the Global Studies Review, and conducts research on a broad range of themes.

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FOREWORD

Over the course of the past year, former Peruvian president Alberto Fujimori has sat, three days a week, in front of a panel of three Supreme Court justices tasked with determining his responsibility in a series of grave human rights violations committed during his ten-year administration (1990-2000).

Few Peruvians imagined such a trial was ever possible. Fujimori fled Peru in November 2000, amidst explosive corruption scandals. Upon his arrival in Japan, the birthplace of his parents, he was provided protection by top political authorities and was quickly granted Japanese citizenship, effectively shielding him from the risk of extradition to Peru.

But events took a new turn in November 2005, when Fujimori left his safe haven in Japan for Chile. In what international law scholar Naomi Roht-Arriaza has referred to as "the age of human rights," this was a critical miscalculation. Instead of launching a bid for the presidency in Peru's 2006 elections, Fujimori instead found himself under arrest in Chile. The Peruvian state prepared an extradition request, and in September 2007, after a long and complex process, the Chilean Supreme Court approved Fujimori's extradition. Within days the former president was returned to Peru, and on December 10, 2007, his trial for human rights violations began.

Domestic prosecutions of heads of state for human rights crimes are extremely rare in any country. And Peru may seem an especially unlikely place for such a high-profile trial to unfold. Fujimori remains quite popular among certain segments of the Peruvian public. The judiciary historically has been held in low esteem by Peruvian citizens. Key figures in the present-day political establishment, including the current president, vice-president, and key opposition figures, have their own reasons for being wary of possible prosecutions for human rights violations in the future. Yet, in a striking display of impartiality and professionalism, the tribunal overseeing the prosecution of the former president has been a model of fairness, fully protecting the due process rights of the accused. Regardless of the outcome, the trial of Fujimori demonstrates that with sufficient political will, domestic tribunals can prosecute high-level public officials who commit or order the commission of grave human rights violations.

Impunity has long characterized Latin American societies emerging from years of authoritarian rule and/or internal conflict, but today numerous Latin American countries are making great strides in bringing to justice those who committed or ordered the commission of grave violations of human rights. To highlight and analyze this welcome development, the Center for Global Studies at George Mason University, the Washington Office on Latin America (WOLA) and the Instituto de Defensa Legal (IDL) joined forces to draw attention to the Fujimori trial, as well as the other human rights tribunals underway in parts of Latin America today.

Mason, WOLA and IDL organized a conference series to examine human rights trials in Latin America. The first conference, entitled Los culpables por violación de derechos

humanos, took place in Lima, Peru, June 25-26, 2008. It convened key experts in international human rights law, as well as judges, lawyers, scholars and human rights activists from across the region, to analyze the Fujimori trial in comparative perspective. (A rapporteur's report for this conference is available online at: <www.justiciaviva.org.pe/nuevos/2008/agosto/07/seminario_culpables.pdf >.)

A second conference took place in Washington, D.C., on October 2, 2008, at the Carnegie Endowment for International Peace. Several participants from the Lima conference were joined by human rights activists, lawyers, judges and scholars from across the region to examine the Fujimori trial as well as other human rights tribunals underway in Argentina, Chile, Uruguay, and Guatemala. The result is a rich multidisciplinary look at a new moment in Latin America's history, in which impunity and forgetting is giving way to processes of accounting for crimes of the past through domestic tribunals, one piece of a broader process of coping with the difficult legacies of the authoritarian and violent past. (A rapporteur's report for this conference is available online at: <http://cgs.gmu.edu/publications/hjd/OSI2009RappReport.pdf>.)

***T**his working paper series is based on the Washington conference on human rights tribunals in Latin America. Select panelists have prepared incisive analyses of this new trend in transitional justice in the region. Several of the papers analyze the Fujimori trial, offering legal, activist, and scholarly perspectives on the trial of Peru's former head of state. Others examine trends in other countries, including Argentina, Chile, and Guatemala, that have also sought to promote prosecutions for human rights violations. Collectively the papers reveal the strides Latin America has made in its efforts to combat impunity and promote the rule of law and democratic governance. Though obstacles remain, as several conference participants indicated, these efforts represent a key departure from the past, and merit careful scrutiny by policymakers, scholars, and the human rights community.*

We would like to especially thank the Latin American Program at Open Society Institute, in particular Victoria Wigodsky, which made this conference series as well as the publication of this paper series possible. We also thank Arnaud Kurze at CGS/Mason for his capable assistance during all stages of this project and in particular of the preparation of this working paper series.

Jo-Marie Burt
Center for Global Studies, George Mason University
March 2009

Prosecuting Genocide in Guatemala: The Case Before the Spanish Courts and the Limits to Extradition

By
Naomi Roht-Arriaza*

The Fujimori trial, and the prosecutions in the Southern Cone, are wonderful examples of the "justice cascade" in Latin America. Central America, however, has lagged far behind in confronting its repressive past. Nicaragua and El Salvador have blanket amnesties in place that have curtailed any attempt at prosecutions. In Honduras, despite the efforts of the human rights ombudsman and the apparent willingness of the prosecutor's office, there have been few convictions. In Guatemala, despite the efforts of a U.N.-sponsored Commission on Historical Clarification, an ambitious—if flawed—reparations program, and several landmark judgments from the Inter-American Court of Human Rights, prosecutions for past (as well as present) crimes remain few and far between.

Why the stark difference? Many factors are no doubt at play: the transitions in Central America were much more attenuated, with the same or similar political parties still in power for much of the recent era. Most of the victims of repression and internal armed conflict were poor peasants rather than the urban middle and working class. The generational handover symbolized by the election of Bachelet and Kirchner is still largely to come in Central America, where the bulk of the violations happened in the late 1970s and early 1980s. Perhaps most importantly, a number of countries in the region suffer from the transformation of security and intelligence networks into organized crime networks. Drug trafficking, smuggling and other illicit businesses now form a major part of the economy in several (albeit not all) Central American countries, with the resulting

* Professor of Law, University of California, Hastings College of the Law. The author is a member of the Legal Advisory Council of the Center for Justice and Accountability and has been a member of the legal team involved in the Spanish Genocide case litigation since 2006. Many thanks to Almudena Bernabeu, International Attorney at CJA and the heart of the legal team, for comments and inspiration. And thanks to our partners in Guatemala and elsewhere, without whom these cases would not have happened. Portions of this Essay appeared in the Chicago Journal of International Law. See Roht-Arriaza, N., 2008, Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala, *Chicago Journal of International Law,* Vol. 9, no. 1, Summer.

intimidation and corruption of already-weak domestic legal systems. This deliberate dysfunction has made it much more difficult for victims of the crimes of the past to push the domestic legal system into action.

The limits of the domestic legal system have also made efforts to use transnational prosecutions to catalyze domestic action more difficult and complex. Nonetheless, to date these prosecutions, initiated in the national courts of states other than those where the crimes took place, have had a significant impact in combating impunity. I will use the example of efforts in the Spanish *Audiencia Nacional* to investigate charges of genocide in Guatemala during the early 1980s as a case study.

In November 2006, a local trial court in Guatemala's capital ordered the arrest of the country's ex-President, Oscar Mejía Víctores, along with ex-Defense Minister Aníbal Guevara, ex-Police Chief Germán Chupina, and ex-head of the Secret Police Pedro Arredondo on charges of genocide, torture, enforced disappearances, arbitrary detention, and terrorism (Elías, 2006). The defendants, along with two others – former president (and military strongman) Efraín Ríos Montt and former army chief of staff Benedicto Lucas -- whose arrest warrants were not executed, were deeply implicated in the conceptualization and execution of the repressive state strategy that resulted in the deaths of 200,000 Guatemalans and the destruction of over 400 villages detailed in the CEH report. Although the arrest order was carried out through a Guatemalan court, it was issued by a Spanish judge, Santiago Pedraz (Ministerio de Judicia, 2006). Judge Pedraz of Spain's Audiencia Nacional[1] issued the warrants in July 2006, followed by formal extradition requests. He based Spanish jurisdiction over crimes committed by Guatemalans in Guatemala on a Spanish law that allows universal jurisdiction over certain international crimes.

Mejía holed up in his house and the secret police chief fled, while the ex-Defense minister and the ex-Police Chief were held in a military hospital under guard. This case represents the first time members of the military high command were affected by any legal action against them, and one of a handful of cases where any Guatemalan military officer has been subject to judicial proceedings.[2]

[1] The Audiencia Nacional hears cases involving drug smuggling, terrorism, state corruption, and international crimes that cannot adequately be dealt with at the level of provinces and autonomous communities. Although divided into chambers, it is roughly equivalent to a US district court.

[2] There have been two high-profile trials of military officers in the killings of Bishop Juan Gerardi and anthropologist Myrna Mack. The Mack case, after over a dozen years, resulted in the convictions of three officers, one of whom promptly went into hiding. The sentence is at Recurso de Casación Conexados 109-2003 y 110-2003 (Corte Suprema de Justicia, Jan 14, 2004), available online at <http://www.derechos.org/nizkor/guatemala/myrna/myrnacs.html> (visited Apr 5, 2008). In the Gerardi case, the Supreme Court upheld the convictions of two officers in January 2006. See Conie Reynoso, Confirman Sentencia: Continúa Pena de 20 Años de Cárcel para Sindicados, Prensa Libre (Jan 14, 2006), available

After over a year in detention, the defendants were freed when Guatemala's Constitutional Court ("GCC") decided on December 12, 2007 that it would not honor Spanish arrest warrants or extradition requests (Corte de Constitucionalidad (Guatemala), 2007). The court held that Spanish courts did not constitute a "competent authority" because Spain did not have jurisdiction over events that took place in Guatemala; the effort to exercise universal jurisdiction was unacceptable and an affront to Guatemala's sovereignty. The court added that the charges were related to political crimes and thus not extraditable, and that Spain's participation in the 1980s Central American peace process meant that it was bound by the commitments made by the government and the insurgents that an official truth commission would have no judicial effects. Given that commitment, the GCC concluded, it would be inconsistent for Spain to now seek to prosecute crimes arising out of the region's civil conflicts.

The Guatemala Genocide case in Spain is one of three cases in Guatemala now before the courts that attempt to prove, in a court of law, charges of genocide against individual defendants. The second, filed with the Guatemalan Prosecutor's office in 2000 and 2001 by the Center for Legal Action on Human Rights (CALDH), has been stalled by the refusal of the Prosecutor's office to proceed despite overwhelming evidence of crimes. Nonetheless, the domestic genocide case has also provoked interesting developments, especially in the area of access to information. The third involves an ongoing investigation in Belgium of the killing and disappearance of Belgian priests during the same period. This Essay summarizes the development of the Spanish case and the prospects for holding criminally responsible those who committed the acts detailed in this book.

Victims' groups in Guatemala have pursued a combined inside and outside legal strategy, pushing for domestic prosecutions for genocide while also focusing on transnational prosecution based on universal jurisdiction in other states' national courts. Although not always coordinated, these parallel efforts have the best chance of breaking through the wall of impunity that continues to impede accountability for genocide and its aftermath.[3] In Guatemala, that wall of

online at <http://www.prensalibre.com.gt/ pl/2006/enero/14/132159.html> (visited Apr 5, 2008). For an excellent description of the Gerardi case, see (Goldman 2007). A handful of civil patrollers, members of paramilitary groups created and controlled by the army, have also been convicted of murder in Guatemalan courts. But as detailed in this Article, by and large the prosecutors' office has not pursued cases arising out of the armed conflict, and judges have been intimidated, threatened, or bought off.

[3] An additional strategy involves the use of the Inter-american Commission and Court to push the state to combat impunity. In a series of important cases and in numerous friendly settlements of cases, the Inter-American system has provided money and symbolic reparations for some victims. Although the state has complied with some of the orders of the Court, it has not responded adequately to continuing orders to investigate and prosecute the violations. Other possible accountability strategies are not available for these

impunity has been *de facto* but not *de jure:* the 1996 Law of National Reconciliation, which provides an amnesty for certain crimes committed in the context of the "internal armed conflict," specifically exempts the crime of genocide and other international crimes from its coverage (Ley de Reconciliation, 1996).

THE PROCEEDINGS

In December 1999, Nobel Peace Prize winner Rigoberta Menchú and others brought a complaint in the Spanish Audiencia Nacional (Ministerio de Judicia, 2006) alleging genocide, torture, terrorism, summary execution, and unlawful detention perpetrated against Guatemala's Mayan indigenous people and their supporters during the 1970s and 1980s. The complainants' rationale for the genocide charges included the targeting of Mayans as an ethnic group. It was also based, following a gloss on the definition of genocide that the Audiencia had accepted in earlier cases involving Chilean and Argentine defendants, on the intended elimination of a part of the Guatemalan "national" group due to its perceived ideology (Audiencia Nacional, 1998a and 1998b).[4] Among the events underlying the complaint was the massacre of Menchú's father and thirty-five other people in the 1980 firebombing of the Spanish embassy, the killing or disappearance of four Spanish priests, and a large number of rural massacres, rapes, cases of torture, and enforced disappearance. The complainants grounded Spanish jurisdiction on Article 23.4 of the Organic Law of the Judicial Branch ("LOPJ") (Ley Orgánica, 1985). That provision allows for prosecution of certain crimes committed by non-Spaniards outside Spain, including genocide, terrorism, and other crimes recognized in international treaties ratified by Spain. On March 27, 2000, Investigating Judge Guillermo Ruíz Polanco of the *Audiencia Nacional* accepted the Guatemalan complaint and agreed to open an investigation. In reaching that decision, the judge noted that several of the victims were Spanish and that the Guatemalan courts had failed to investigate the crimes.[5]

The Spanish Public Prosecutors' Office, at the time in the hands of the conservative Popular Party, appealed the judge's jurisdiction (Roht-Arriaza,

crimes. The International Criminal Court only deals with cases occurring after 2002, and in any case Guatemala is not a party to the Rome Statute establishing the court. The International Court of Justice could hear a case against the state of Guatemala involving genocide, as it did in the Bosnia v. Serbia case, but only if brought by another state. So far, no state has been interested in bringing the issue before the Court.

[4] See also the English translation of the decision regarding Chile in (Brody and Ratner 2000).

[5] Juzgado Central de Instrucción No 1, Audiencia Nacional, Madrid, Dil Previas 331/99, Auto de 27 de Marzo de 2000 (on file with author).

2005).[6] An appeals panel of the *Audiencia Nacional*, and then the Spanish Supreme Court, found that the Spanish courts had no jurisdiction. The Supreme Court held, by a vote of 8-7, that customary international law required a link to the forum state when universal jurisdiction was not grounded in specific treaty provisions or authorized by the United Nations (Tribunal Supremo, 2003). Thus, only those cases that involved Spanish citizens could proceed. In September 2005, Spain's highest tribunal, the Constitutional Tribunal, reversed (Naomi Roht-Arriaza 2006). The Tribunal began with the plain language and legislative intent of Article 23.4 of the LOPJ. As the Constitutional Tribunal pointed out, the law itself establishes only a single limitation: the suspect cannot have been convicted, found innocent, or pardoned abroad. It contains no implicit or explicit hierarchy of potential jurisdictions and focuses only on the nature of the crime, not on any ties to the forum; it establishes concurrent jurisdiction. Given the absence of textual support for a restrictive interpretation of the law, such a construction would be overly strict and unwarranted given the grave nature of the crimes. The Tribunal re-opened the case for all complainants, including large numbers of Guatemalans who were survivors or family members of massacre victims (Ibid. 211) The full case, focusing on genocide, could then go forward.

The next step in the re-opened case, which was assigned to Judge Santiago Pedraz, was to take the statements of the suspects, a procedure designed to allow defendants to tell their side of the story before any arrest warrants issued. Judge Pedraz, following long-established rules for taking statements in another state through a rogatory commission, worked through a Guatemalan judge to set up the dates, and the Spanish judge, along with the Spanish prosecutor, traveled to Guatemala. The defendants apparently did not see much advantage to telling their side of the story; they filed extraordinary writs of *amparo* before the local courts claiming their appearance would violate their constitutional rights. In most Latin American countries, the ability to challenge government action in violation of constitutional rights, known as *amparo*, is a cornerstone of individual rights, and the defendants made constant use of the procedure from this point on (Brewer-Carías, 2007). At this time as well, the Center for Justice and Accountability ("CJA"), a US-based NGO that had experience litigating transnational cases through its work using the US Alien Tort Statute,[7] came into the case representing several families of victims.

Meanwhile, in Guatemala victims' groups had been preparing a case for the domestic courts. An association of survivors from over twenty villages covering the worst-hit areas of the country (including those listed in the CEH Report),

[6] The Public Prosecutors' Office dropped its opposition to this and other universal jurisdiction cases when the Socialist Party assumed office. See (Amnistia Internacional 2005).
[7] 28 USC § 1350 (2006). The statute allows for civil suits in US federal court by aliens for torts in violation of the law of nations or a treaty of the US.

known as the Association for Justice and Reconciliation ("AJR"), worked with the Center for Legal Action on Human Rights to file complaints in 2000 against the highest officials in the Lucas García (1978-82) regime, followed a year later by complaints against high officials in the Ríos Montt (1982-83) period.[8] The named defendants overlapped substantially, but not completely, with those named in the case in Spain. Guatemala, like most countries in Latin America, changed its criminal procedure during the 1990s to make it more prosecutor-driven; only the prosecutor's office (*Ministerio Público*) rather than victims or judges could press forward with an investigation. And despite millions in international aid, training, and support (UNPD; World Bank), the prosecutors' office remained ineffective, disrespectful to victims, and vulnerable to threats and corruption, and was reportedly infiltrated by military intelligence and criminal networks of various sorts (Peacock and Beltrán, 2003).[9] Early on, the prosecutor called on those named in the complaint to testify, and a number of former generals did so voluntarily, denying any participation in crimes. Since then, however, the prosecutor's office refused to take any action to move the cases forward, and they have languished for several years.

Fortunately, despite the inability to take formal statements, Judge Pedraz did not leave Guatemala entirely empty-handed. He met informally with several representatives of the AJR, who told him about their long struggle for justice in Guatemala. Judge Pedraz returned to Spain, and a month later, on July 7, 2006 issued charges and international arrest warrants for the defendants on charges of genocide, state terrorism, torture, and related crimes (Ministerio de Judicia, 2006). In early November, Guatemala's Fifth Tribunal for Crime, Drug Trafficking and Environmental Offenses (the local trial court) executed four of the six arrest warrants. Two others were rejected for technical reasons.[10] Although the technical problems were cleared up soon after, those warrants have never been executed.[11] One of them was for General Ríos Montt, the former head

[8] Case No. 3920-2000, Ministerio Público, Guatemala (on file with author). Although the complaints are unpublished, information (in Spanish) on them is available online at <http://www.caldh.org> (visited Apr 5, 2008).

[9] According to the US State Department Country Report for 2006, "[w]hile the constitution and the law provide for an independent judiciary, the judicial system often failed to provide fair or timely trials due to inefficiency, corruption, insufficient personnel and funds, and intimidation of judges, prosecutors, and witnesses. The majority of serious crimes were not investigated or punished. Many high-profile criminal cases remained pending in the courts for long periods as defense attorneys employed successive appeals and motions" (US Department of State, 2007).

[10] Guatemala does not typically publish lower court pretrial decisions; hence no published record of these rejections is available (reference documents on file with author).

[11] The warrants were initially rejected because of a clerical error; the ones that reached Guatemala included only the allegations surrounding the 1980 Spanish Embassy massacre, not the genocide charges stemming from the entire 1979–85 period. New, corrected arrest orders were sent immediately, but by that time the case was suspended due to the first of many *amparos.* The lower court judges then left them pending until the legal issues around the executed warrants could be settled, which is why they were never executed.

of state from 1982–83, who by that time was running for Congress, and the other for General Benedicto Lucas, former army chief of staff from 1978–80. On November 22, Judge Pedraz followed up with formal extradition requests. He cited an 1895 Extradition Treaty between Guatemala and Spain and explained in detail why each article of the Treaty applied in this case. He also discussed the crime of genocide and attached a copy of the 2005 Spanish Constitutional Court decision to show that he had jurisdiction under Spanish law. [12]

Rigoberta Menchú had been initially represented in Spain by labor and criminal lawyers who focused on the validity of Spain's jurisdiction. Once the genocide case was re-opened, and after the judge's visit to Guatemala in June 2006, a new legal team led by the CJA began working with lawyers in Menchú's local foundation offices in Guatemala to develop the evidence for the Spanish case. At the same time, the team began dealing with the extradition and rogatory commission cases in the Guatemalan courts. Eventually the legal team grew to include local counsel in Spain with experience litigating universal jurisdiction cases, lawyers in the Hague and San Francisco with knowledge of both international and national criminal law, law students at the University of California-Hastings and Harvard human rights legal clinics, and the Menchú Foundation lawyers in Guatemala (who were coordinating with other legal human rights groups there).

This team had to contend with the intense judicial activity surrounding Judge Pedraz's 2006 arrest orders and extradition requests. These orders and requests set off a furious battle in the Guatemalan courts. The local courts had to decide whether to execute the arrest warrants, whether to grant extradition,[13] and how to deal with requests for judicial cooperation involving witnesses, defendants, documents, and assets. Along the way, the local courts had to grapple with complex arguments about the propriety of universal jurisdiction, the nature of international crimes, and the role of international law in Guatemala's constitutional order. Each of these involved a combination of local and international law.

In general, the rules on extradition are designed to deal with common crimes, not international crimes like genocide. Most extradition treaties, including the Spain-Guatemala Treaty,[14] have a similar set of rules. The alleged acts must be

[12] Juzgado Central de Instrucción No. 1, Dil Previas 331/99, Auto de 22 Noviembre 2006 (on file with author).

[13] Even if the courts allowed the extraditions to proceed, the Executive Branch would still have a chance to stop them at a later point. Ministerio de Relaciones Exteriores de Guatemala, El Procedimiento de Extradición en Guatemala 6–7, available online at <http://www.oas.org/juridico/MLA/sp/gtm/sp_gtm-ext-gen-procedure.pdf> (visited Apr 5, 2008).

[14] See Tratado de Extradición entre España y Guatemala, (Nov 7, 1895) and Protocolo Adicional aclarando su articulo VII (Feb 23, 1897).

criminalized in both legal systems, and the requested state must only satisfy itself that the requesting state has jurisdiction under its own laws and has made out the rough equivalent of probable cause; a full evidentiary showing is not required. Political crimes, and common crimes connected to them, are not subject to extradition; however, the treaty does not define what constitutes a political crime. Also like many extradition treaties, the Spain-Guatemalan Treaty does not require (but does allow) the extradition of nationals.[15] Guatemala's Constitution also contains a prohibition on the extradition of nationals, but its Article 27 has an exception that seems tailor-made for this case: it excludes alleged crimes contained in "treaties and conventions with respect to crimes against humanity or against international law."[16]

Even though the arrest orders came from a Spanish court, they would have to be enforced through Guatemalan courts ordering the police to execute the warrants. Extradition proceedings had the immense advantage of bypassing the public prosecutors' office, which had long held up domestic proceedings and was not considered particularly eager to move any of the armed conflict or genocide cases along given their political sensitivity and complexity. If the courts moved towards extradition, at the very least, that might embarrass the prosecutors' office into action. Indeed, in July 2007 the prosecutors' office began threatening to call witnesses in the Spanish Embassy massacre case of 1980, in what seemed to be a feeble attempt to preempt the Spanish proceedings by showing they were prosecuting the case at home. This response vindicated the complainants' legal strategy: by pushing for prosecution abroad, they could prod the courts into acting at home, even if the prosecutor's actual motivation was to undermine the foreign proceedings.[17]

The defendants immediately filed writs of *amparo* complaining that their constitutional rights had been violated by the local court's execution of the arrest warrants (Brewer-Carías, 2007). Throughout the process they filed challenge after challenge, some of them almost exact repetitions of earlier ones. The defendants' repeated challenges suspended the proceedings over and over again, to the immense frustration of the complainants. No one begrudged the defendants a legitimate right to defense, but as their lawyers refiled arguments that had already been rejected over and over, it became clear that here, as in other

[15] Ibid. art IV.
[16] See Guatemala Const, art 27 (1985, amend 1993), available online at <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html> (visited Apr 5, 2008) (author translation).
[17] For a fuller explanation of how this insider/outsider theory has worked in the case of Spanish investigations into military dictatorships in the Southern Cone, see (Roht-Arriaza, 2005, chapter 7 and 8).

criminal cases involving powerful defendants,[18] the writ of *amparo* had become a mechanism for delay and abuse.

As soon as the arrest warrants were announced, three complainants in the Spanish case—Rigoberta Menchú, Jesús Tecú, and Juan Manuel Gerónimo—asked for and were admitted to the case as intervenors (*terceros interesados*). Yet despite their intervenor status, they were continually denied access to the file, notification of hearings, and copies of relevant documents. By August 2007, they were frustrated and decided to file their own *amparo* alleging violations of their rights as victims of human rights violations. Advised by the international legal team, they cited the jurisprudence of the Inter-American Commission and Court on the right to the truth, the right to information, the right to prompt and effective justice without excessive delay, and the right to an independent tribunal.[19] Shortly thereafter, the trial court agreed with them and ordered the case file released. The release was suspended when the defendants filed—yet another—writ of *amparo*. Nonetheless, the offensive (rather than defensive) use of the *amparo* proceeding to claim rights as victims under international law to limit the abusive use of dilatory motions is an innovation in Guatemala. While the use of dilatory writs will, in the end, be curbed only by either legislation or a change in attitude of the higher courts, at least it established a precedent that victims do indeed have internationally recognized rights that must be given effect in local courts.

Through this complicated set of domestic proceedings, triggered by an international warrant, trial-level Guatemalan courts had to grapple with international law and to compare their procedures and ways of thinking with the jurisprudence generated by international courts as well as other Latin American courts facing similar issues. Through the offensive use of the *amparo* writ, international law—in this instance concerning the rights of victims—was brought into an area of domestic law where international law had not previously been applied. In this way, transnational prosecutions allow local courts to become familiar with international law and to modernize and innovate, while remaining grounded in local legal culture and practice.

[18] The use of abusive *amparos* was documented, for example, in the Myrna Mack case, one of the few cases in which the Guatemalan courts convicted military officers of killing. See (Fundación Myrna Mack, 2002). Guatemala does not typically publish lower court pretrial decisions, hence there is no public record of these *amparos.* A bill has been pending in the Guatemalan Congress to reform the *amparo* procedure, but it has apparently not progressed very far.

[19] See, for example, Consultative Opinion OC 9-87 of Oct. 6, 1987 on Judicial Guarantees in States of Emergency, art 27(2), 25 and 8, ¶ 24, available online at http://www1.umn.edu/humanrts/iachr/b_11_4i.htm (visited Apr 5, 2008). See also Blake case, Reparations Judgment (Jan. 22, 1999) Ser C; Resolutions and Sentences, ¶¶ 61, 63, available online at <http://www1.umn.edu/humanrts/iachr/C/48-ing.html> (visited Apr 5, 2008). The complainants also cited, as persuasive authority, cases of the Colombian Supreme Court that balanced defendants' due process rights against victims' rights to truth and access to justice. Corte Constitucional de Colombia, Sentencia C-004/03, Demanda de Inconstitucionalidad (Jan 20, 2003), available online at <http://www.cajpe.org.pe/rij/bases/juris-nac/c-004.PDF> (visited Apr 5, 2008).

On December 12, 2007, the GCC ruled that the Spanish arrest warrants were invalid and that defendants could not be extradited (Corte de Constitucionalidad (Guatemala), 2007). The sixty-plus page ruling responded to yet another *amparo,* lodged by Guevara and Arredondo, against the constitutionality of the arrest warrants issued in November 2006. The *amparo* questions only the validity of the arrest warrants, yet the GCC looked beyond that question to consider the validity of the entire extradition proceeding. The ruling began by accepting that the 1895 extradition treaty between Spain and Guatemala is still valid, but found that it must be interpreted in light of the drafters' intentions. Nothing in the treaty explicitly refers to extraterritorial jurisdiction, they noted, and the fact that the treaty speaks of those seeking asylum or refuge in another state indicates that the drafters were thinking about nationals of another state hiding in the requested state (Corte de Constitucionalidad (Guatemala), 2007, at 15-17).[20] The treaty, they argued, must be read in light of the territorial principle of the criminal law. Therefore, they concluded, the treaty does not apply to crimes committed within Guatemala.

The GCC added that it could look into Spanish law because it needed to convince itself that the courts of the requesting country are a "competent authority" under the Extradition Treaty.[21] Although from 2005 on Spain clearly had jurisdiction under Spanish law, the GCC asks whether the 2005 Spanish Constitutional Court decision that allowed re-opening of the full investigation, comports with international law.

It concludes that universal jurisdiction cannot be maintained because it affronts Guatemalan sovereignty. While Guatemala might recognize an international tribunal, the GCC stated, it will not recognize the extraterritorial jurisdiction of another national court. Otherwise, it argued, one state would be judging another state's ability or willingness to prosecute without either Security Council or General Assembly approval. In effect, the Guatemalan court disagrees with the Spanish court's interpretation of Spanish law. In addition, the GCC finds that extradition is improper for other reasons: both Spain and Guatemala prohibit the extradition of nationals. However, this is not strictly speaking true: Article 27 of Guatemala's constitution allows the extradition of nationals where the crimes are based on treaties and conventions with respect to crimes against humanity or against international law.[22] The GCC reads this reference, though, as limited to

[20] This method of interpreting the treaty is at odds with the method of treaty interpretation set out in the Vienna Convention on the Law of Treaties (1980), 1155 UNTS 331, art 31, available online at <http://www.oas.org/DIL/Vienna_Convention_ on_the_ Law_of_Treaties.pdf> (visited Apr 5, 2008).
[21] See Tratado de Extradición and Protocolo Adicional aclarando su articulo VII (cited in note 15).
[22] Guatemala Const, art 27 (cited in note 17). The Court adds that extradition of nationals is also improper because there is no reciprocity, but this is also not strictly speaking true: where a treaty requires it, Spain will

surrender to international courts like the ICC, the ad-hoc international criminal tribunals, or even the Inter-American Court of Human Rights (which has no criminal jurisdiction).

Although not necessary to its decision, the GCC finds that the crimes alleged are common crimes connected to political crimes because they are connected to the armed conflict, and that the Constitution holds that citizens cannot be extradited for political crimes (Corte de Constitucionalidad (Guatemala), 2007, 22–23, 54). This is legally incorrect: the Genocide Convention's Article VII specifically states that "genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition."[23] The Court ignored Guatemala's treaty obligations under the Genocide, Torture and Forced Disappearance Conventions altogether, even though they had been raised. The GCC may have been signaling that it would consider these crimes in any domestic prosecution as subject to the Guatemalan Law of National Reconciliation, which grants limited amnesty to persons who have committed political crimes and common crimes connected to them (Ley de Reconciliación Nacional, 1996). But as mentioned, Articles 4 and 8 of that law specifically exclude the type of crime alleged in the Spanish request.[24] Along the same lines, the Court characterizes the context of the case as a region-wide civil conflict over political and economic models, with external support on both sides and which pitted ethnic and indigenous people against each other. By so labeling the conflict, the Court implicitly rejects the charge of genocide (Corte de Constitucionalidad (Guatemala), 2007).

Finally, the Court recognizes the obligation of the Guatemalan courts to investigate and prosecute under the principle of *aut dedere aut judicare* (extradite or prosecute) if extradition is denied and invites the complainants to submit their evidence to the Public Prosecutor. This is a bit disingenuous, since the judges know perfectly well that charges on these crimes have long been filed with the prosecutor and have gone nowhere. However, the GCC's recognition that the domestic system needs to prosecute is important. As a result, the Court finds that the suspects' constitutional rights have been violated and orders the arrest warrants quashed. While technically the judgment should only apply to the two

extradite its nationals. Art 1, Ley 4/1985, de 21 de Marzo, de Extradición Pasiva, available online at <http://noticias.juridicas.com/base_datos/Penal/l4-1985.html> (visited Apr 5, 2008).

[23] Convention on the Prevention and Punishment of the Crime of Genocide, art VII See also Inter-American Convention on Forced Disappearance of Persons (1994), art V, 33 ILM 1529 ("The forced disappearance of persons shall not be considered a political offense for purposes of extradition"). The UN and Inter-American Torture Conventions also require that torture be considered an extraditable offense. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), General Assembly Res No 39/46, UN Doc A/39/51, art 8(1) (1987) (torture must be extraditable offense). See also Inter-American Convention to Prevent and Punish Torture (1985), OAS Treaty Ser No 67, art 13 (1987).

[24] Ibid., arts 4, 8.

defendants who appealed, they make it extensive to all the other suspects as third-party intervenors. There can be no appeal from the decision.

AFTERMATH AND CURRENT PROSPECTS

Reaction to the GCC decision was not long in coming. International human rights groups uniformly criticized the holding and the reasoning. Above all, human rights and humanitarian lawyers pointed out that if Guatemala was not going to extradite the suspects, it had an international legal obligation to try them at home. That obligation was explicit under the UN and Inter-American Conventions Against Torture and Enforced Disappearances as well as the Genocide Convention (Ley de Reconciliación Nacional, 1996, art. 4,8). It was also, quite obviously, not being fulfilled.

Most spectacularly, Spanish Judge Pedraz also responded to the GCC decision. On January 9, 2008, he issued his own ruling condemning Guatemala's lack of cooperation and abandonment of its responsibilities under international law (Audiencia Nacional, 2008). In strong language, the judge complained about the complete lack of collaboration on his requests for rogatory commissions and lambasted the GCC decision as ignoring Guatemala's conventional and customary law obligations to extradite or to prosecute, which the judge traced back as far as Grotius, as well as the extradition treaty.[25]

Judge Pedraz also recalled that genocide is a crime in international law that cannot be labeled a political offense and found that Guatemala was also violating an international treaty and customary law obligation to prevent and to punish the crime of genocide against the Mayan people. He concluded:

> This resolution of the Constitutional Court, issued by the maximal judicial authority, in light of the above-referenced facts and of the advanced age of the accused, together with the well-known fact that the level of impunity for lesser crimes in Guatemala is among the world's highest, confirms the State's intention not to investigate these crimes and bring those responsible before the courts. This gives clear backing to impunity, ignoring the above-referenced international law and, therefore, placing Guatemala in the sphere of countries that violate their international obligations and disdain the defense of human rights.[26]

Nonetheless, the judge wrote, the GCC decision showed the continued need for Spanish judicial authorities to investigate the alleged crimes. However, he would

[25] Ibid.
[26] Ibid. at sec 6 (translation by author).

no longer rely on the Guatemalan courts but would bring witnesses to Spain to testify.[27] In addition, he called on anyone—victims, witnesses, or others—having information about the case to bring it directly to him through the proper channels.[28] He thus opened up new possibilities for evidence gathering by victims' groups, complainants' lawyers and others around the world.

In February 2008, witnesses began arriving at the Spanish court. They included experts, journalists, and eyewitnesses from some of the areas of the country where, according to the CEH Report, acts of genocide were committed. The eyewitnesses detailed massacres, rape, torture, bombings and persecution of massacre survivors, destruction of crops and livestock, and targeting of Mayan religious practices and community authorities. They also named specific military officials, including the defendants, and specified their role in these crimes (Ortíz, 2008). The witnesses spent a full week in February, followed by a second week in May, telling the judge their story. This in itself can have reparatory effects.[29]

The May witnesses included a number of academic experts who testified about the history of racism and discrimination in Guatemala that set the stage for military authorities to decide that entire communities of Mayans had to be eliminated. These witnesses included University of California Professor Beatriz Manz, University of Texas Professor Charles Hale, and Autonomous University of Madrid Professor Marta Casaús, as well as well-known Guatemalan anthropologist Father Ricardo Falla. They posited that a combination of seeing Mayans as an undifferentiated, traditional, unthinking and inferior mass, a deep-seated fear of this mass rising up and taking revenge for their exploitation, and a desire by the military to mete out exemplary punishment for what it saw as acts of rebellion, underlie the intention to destroy part of the Mayan group "as such."[30] This process included not only the massacres, but also the continuing attacks on survivors, internally displaced persons and even refugees who had crossed the Mexican border. Thus, they not only seconded the opinion and analysis of the CEH but went further.

[27] In another innovation, the Spanish Public Prosecutor designated some of the eyewitnesses as witnesses for the Spanish Crown, which allows Spain to pay their travel expenses. Given the modest economic status of almost all the witnesses, this made it possible for them to testify. Unpublished decision of Public Prosecutor, Audiencia Nacional.

[28] Ibid. The proper channels for submitting additional information or evidence presumably would include Spanish consulates throughout the world.

[29] There is extensive literature on truth-telling and its potential salutary effects for some victims. See, for example, (Hayner, 2001). On the other hand, there is a risk that victims will end up frustrated by the continued inability to acquire custody over the defendants and thus to proceed to full trial and sentencing. The witnesses were well aware of that possibility and chose to testify nonetheless.

[30] Summaries of the testimony are posted on the websites of the National Security Archive, http://www.nsa.org, and of CJA, http://www.cja.org.

Another piece of the evidence involves showing that the highest levels of the military had to have been involved in planning and executing a military strategy; this was not a case of a "few bad apples" or of the individual excesses of rogue officers. Part of this evidence comes from declassified U.S. State Department and CIA documents, made available during the Clinton administration, and analyzed by the National Security Archive. Another part comes from analysis of the military's own rules, orders, and communications protocols, showing that this was a tightly-run and tightly-controlled chain of command. A third piece of evidence is the simple comparison of the massacre and post-massacre patterns. Everywhere in the highlands, the pattern was the same, involving gathering as many people as possible, closing off the village, separating men and women and killing them sequentially, and then attacking any survivors using helicopters and aviation. It is difficult to explain this degree of similarity as simply the result of training; rather it seems to correspond to a carefully conceived strategy. The judge will have to consider this evidence as well.

The continuing political pressure and what is expected to be an ongoing parade of witnesses will no doubt keep the issue in the public eye in Guatemala. Whether this translates into effective change in the attitude of Guatemala's prosecutors and judges is, at this point, unknown. It is of course more difficult for such change to happen without at least a modicum of physical security for all those involved.[31] However, the pressure has already apparently had some result: on February 25, 2008, Guatemalan President Álvaro Colom announced that he would order the military to open up its archives from the armed conflict period and turn them over to the Human Rights Ombudsman (Ordonez, 2008). Shortly thereafter, the Constitutional Court ruled that specific military plans had to be turned over to the complainants in the domestic genocide case. The courts had initially ordered the documents turned over to CALDH in 2007, and the Defense Ministry had agreed, but lawyers for Ríos Montt alleged that handing over the documents would violate his constitutional rights. In March 2008 the Constitutional Court dismissed that appeal. It remains to be seen however how many documents the military will actually turn over to either the complainants or the government.

In April 2008 the proceedings took yet another turn. Guatemalan trial court judge José Eduardo Cojulún, whose chambers had received Judge Pedraz' repeated requests for a rogatory commission to interview witnesses, decided that he would honor those requests. He reasoned that the GCC's decision had no bearing on his international judicial cooperation obligations, and that, while he could not allow Judge Pedraz to come to Guatemala, he could conduct the

[31] On March 5, 2008, unknown assailants shot at the house of the director of the Fundación Nueva Esperanza, Guillermo Chen. The Fundación represents some of the witnesses and complainants involved in the Spanish case. Amnesty International, Urgent Action, Public AI Index 34/006/2008 (Mar 7, 2008).

interviews himself and forward the results to the Spanish court. He thus set out a demanding schedule of witness interviews, which lasted for some three weeks (Notimex, 2008). He rejected the predictable *amparos* from the defendants. He also took the packet of completed testimonies and turned them over to the public prosecutor's office, noting that he had obtained evidence of a crime. His courage has been met with death threats.[32] However, the Public Prosecutor has now been replaced, along with a number of senior prosecutors seen as ineffective. And a U.N.-backed International Commission against Impunity in Guatemala has begun work investigating the activities of shadowy crime and intelligence networks responsible for maintaining the current climate of fear and intimidation.

In any case, along with internal pressure, the Spanish case has already changed the national equation, bringing the issue again to the forefront of national consciousness. Unless the GCC changes its mind or one of the named defendants (or other defendants named in the future) leaves the country, the case may never come to trial; Spain does not allow trial *in absentia*. Nonetheless, the judge will continue taking testimony and eventually, if the evidence is sufficient, is expected to issue individualized indictments (*autos de procesamiento)* against these and, perhaps, other defendants. These indictments would set out the evidence that the charged crimes were committed and that the defendants were responsible, and at a minimum, they would serve as a valuable historical record and a validation of the witness testimony. The indictments would also serve as a powerful tool for lawyers, victims groups and even, if it so chose, the Executive Branch in Guatemala to pursue new avenues of investigation and prosecution.

CONCLUSION

The Guatemalan case exemplifies both the promise and the limits of a transnational prosecution strategy under adverse conditions. The GCC's decision is clearly a setback for the complainants and for international law. In a climate of intimidation where judges are routinely bribed or threatened into submission, where the legal system has been repeatedly criticized for its ineffectiveness and for allowing rampant impunity, and where some (but not all) of the defendants still hold power,[33] the defensive tone and negative outcome of the case may have

[32] Ibid.

[33] Efraín Ríos Montt, for example, was elected to Congress in 2007, in part as a stated attempt to gain immunity from prosecution. As a Congressman, he has immunity for criminal acts committed while in office, but that immunity does not preclude investigation by the Spanish courts. See Ex-Dictador Ríos Montt Vuelve al Congreso, *La Prensa* (Sept 11, 2007), available online at <http://laprensa.aplyca.com/ediciones/2007 /09/11/ex_dictador_rios_montt_vuelve_al_congreso> (visited Apr 5 2008) and (Benítez**,** 2007). As to the other defendants, one strategic consideration here is that they may have less current ability to influence

been inevitable. The willingness of the lower courts to go forward, the obvious errors and omissions of the GCC's judgment, and even the length of time it took for the GCC to rule on the arrest warrants despite several earlier opportunities to do so, are reasons for hope that there are some cracks in the façade of impunity. After all, early cases in the Chilean and Argentine courts also featured more open lower courts, followed by conservative decisions rejecting international human rights law obligations at the highest levels.[34] Both the Chilean Supreme Court and the Argentine Supreme Court have now invalidated or limited amnesty laws and approved prosecutions for past crimes based in part on international law obligations.

The Achilles heel of all international justice efforts, whether at the ICC, through hybrid courts, or through transnational prosecutions, is the inability to execute arrest warrants against powerful defendants. The ICC, for example, has been hamstrung by the inability to apprehend indicted Sudanese officials accused of crimes against humanity in Darfur, despite the existence of a Security Council referral and numerous resolutions condemning those crimes (UN News Center 2007). The International Criminal Tribunal for the Former Yugoslavia became effective only when NATO troops began to seek out and arrest suspects.[35] Hybrid tribunals, although theoretically less exposed to this problem because they have the cooperation of the territorial government, have still experienced difficulties: Charles Taylor for many years could not be extradited from Nigeria to the Sierra Leone Special Court.[36] The Special Panels on Serious Crimes in East Timor were similarly unable to prosecute members of Indonesia's high command for atrocities in East Timor because Indonesia refused to extradite them (Cohen, 2002). Transnational prosecutions will suffer from the same weakness when the defendant's presence is sought through extradition: unless he leaves his country and travels to a third state willing to execute the arrest warrants, the defendant will be beyond the reach of the foreign court.

Nonetheless, these transnational prosecutions, together with domestic efforts, can play complementary roles in catalyzing changes in domestic ability and will to investigate and prosecute the powerful. The success of these mechanisms, like that of international prosecutions more generally, should be measured not only (or even principally) by how many convictions they secure, but at how well they succeed in changing the possibilities for justice at home.

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outcomes or to threaten participants than other, lower-ranked former officers who may be more active in current criminal and intelligence networks.

[34] For description and analysis, see (Roht-Arriaza and Gibson, 1998).

[35] The two most wanted suspects at the ICTY are still at large, and NATO has been criticized for its inaction. See, for example, (Human Rights Watch, 2005), available online at <http://hrw.org/english/docs/2005/06/29/bosher11228_ txt.htm> (visited Apr 5, 2008).

[36] Liberia Seeks End to Taylor Exile, BBC News (Mar 17, 2006), available online at <http://news.bbc.co.uk/1/hi/world/africa/4817106.stm> (visited Mar 2, 2008).

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