

# The Guatemala Genocide Cases: Universal Jurisdiction and Its Limits

by Paul “Woody” Scott\*

## INTRODUCTION

Systematic murder, genocide, torture, terror and cruelty – all are words used to describe the campaigns of Guatemalan leaders, including President Jose Efraim Rios Montt, directed toward the indigenous Mayans in the Guatemalan *campo*. The United Nations-backed Truth Commission concludes that the state carried out deliberate acts of genocide against the Mayan indigenous populations.<sup>1</sup> Since Julio Cesar Mendez Montenegro took Guatemalan presidential office in 1966, Guatemala was involved in a bloody civil war between the army and guerrilla groups located in the Guatemalan countryside. The bloodshed escalated as Montt, a fundamentalist Christian minister, rose to power in 1982 after taking part in a coup d'état and becoming the de facto president of Guatemala. He was in power for just sixteen months, considered by many to be the bloodiest period of Guatemala's history.<sup>2</sup> Under his sixteen-month rule, more than 200,000 people were victims of homicide or forced kidnappings, 83% of whom were of indigenous Mayan origin. Indigenous Mayans were targeted, killed, tortured, raped, and

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<sup>1</sup> United Nations Office for Project Services [UNOPS], Commission for Historical Clarification [CEH], Conclusions and Recommendations, GUATEMALA, MEMORIA DEL SILENCIO [hereinafter, GUATEMALA, MEMORY OF SILENCE], Volume V, ¶ 26 (1999).

<sup>2</sup> *Id.*

kidnapped in his attempt to cleanse Guatemala of a guerilla movement.<sup>3</sup> An estimated 93% of these heinous acts were carried out by government forces such as the army, civil patrol, or people ordered to commit actions by the heads of government.<sup>4</sup> Montt conscripted indigenous people into his civil patrols at threat of death under the mantra of the “*Frijoles y Fuseliers*,” literally translated as “Beans and Guns.” He is famous for a quote in the July 18, 1982 *New York Times*, in which he told a Mayan audience that if they were with him then he would feed them, but if they were against him, he would kill them, coining the “Beans and Guns” campaign.

Complaints have been lodged in all corners of the world against the Guatemalan leaders, seeking to bring the alleged perpetrators to justice, but none have yet to prevail. Complaints have been filed in Guatemala’s domestic courts, the Inter-American Commission on Human Rights, and the Spanish courts.

The complaint filed in the Guatemalan domestic court has been met with delay, obstruction, and death threats to those pursuing the claim, causing virtually no resolution. The complaint filed in the Inter-American Commission on Human Rights, known as *The Case of the Plan de Sanchez Massacre v. Guatemala*, has been received, and the court has responded in the form of issuances, resolutions, and opinions in order to remedy the victims, but the accused have yet to stand trial for their actions. The closest the Guatemalan leaders have come to being arrested and standing trial is in Spain, where a series of decisions and appeals have gone to the highest constitutional court of Spain. Spain’s highest constitutional court issued a groundbreaking decision building on the *Pinochet* principle by asserting Universal Jurisdiction over members of the Guatemalan government for crimes against humanity, including genocide, torture, and terrorism.

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<sup>3</sup> Lisa Viscidi, Justice for Latin America, 41 ANAMESA: AN INTERDISCIPLINARY JOURNAL, Vol. 4:1 (Spring 2006).

<sup>4</sup> GUATEMALA, MEMORY OF SILENCE, Vol. V, ¶¶ 1, 2, & 15.

In December of 1999, Rigoberta Menchu Tum, victims, witnesses and advocacy groups filed a complaint against Montt and others with the Spanish Public Prosecutor alleging genocide, terrorism, torture, forced disappearances, and other crimes against humanity. The complaint alleged the “targeting of Mayans as an ethnic group and the intended elimination of part of the Guatemalan ‘national’ group due to its perceived ideology.”<sup>5</sup> The complaint ignited a series of court battles exposing the world’s polar views of the concept of Universal Jurisdiction. Despite the efforts of Menchu Tum, a Nobel Peace Prize winner and poet, and other plaintiffs, the indigenous Mayan victims have yet to see justice. The story of this case unfolds a saga of court cases that have accomplished little in bringing offenders of human rights to justice, but has advanced the concept of Universal Jurisdiction to a new level. While it is unlikely that Montt will be brought to justice for the crimes committed, his case has set a powerful precedent such that violators of human rights will be more efficiently brought to justice and will be unable to hide behind jurisdictional protections. Courts will then be able to grant reparations to the victims. Spanish Judge Santiago Pedraz issued an international arrest warrant for Montt, but the Guatemalan government has thwarted, obstructed, or evaded all attempts against Montt. Montt has thus far successfully avoided interviews by investigators, extraditions, and arrest.

*Menchu Tum v. Montt*, known as the *Guatemalan Genocide Case*, is a groundbreaking case of pure Universal Jurisdiction dealing with the difficulty of bringing perpetrators of crimes against humanity to justice. Universal Jurisdiction is “jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State.”<sup>6</sup> Pure Universal

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<sup>5</sup> Naomi Roht-Arriaza, *The Guatemala Genocide Case: Judgment No. STCno. 237/2005*, 100 AM. J. INT’L L. 207 (2006).

<sup>6</sup> ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 44 (Cambridge University Press, 2007).

Jurisdiction is jurisdiction that “arises when a State seeks to assert jurisdiction over an international crime (usually by investigating it and/or requesting extradition of the suspect) even when the suspect is not present in the territory of the investigating state.”<sup>7</sup> The subject of Universal Jurisdiction was previously brought to the world’s attention by the *Pinochet Case*; where Spain asserted Universal Jurisdiction over Latin American dictator Augusto Pinochet for his commission of crimes against humanity against indigenous populations in the Dirty Wars of Argentina and Chile.

Although a Spanish embassy was torched and a few Spaniards were killed in the midst of the bloodshed, the heart of the complaint against Montt in Spain’s court had to do with the alleged genocide of Mayan victims who had no link to Spain. The plaintiffs are seeking to bring the Guatemalan perpetrators to justice through the penal courts of the separate sovereign state of Spain. International groups, international agreement, and increasingly available technology have blurred traditional national legal boundaries, making the concept of Universal Jurisdiction both of extreme importance and relevance. Little judicial precedent exists where a sovereign has instituted prosecution against the former head of another sovereign without any link to the prosecuting state. This case should be handled with great cognizance of the potential ramifications it may have upon Universal Jurisdiction. To make an analogy to American Law, this case rises to the magnitude of *Marbury v. Madison*, a groundbreaking case regarding the United States Supreme Court’s jurisdiction to hear cases.

The Guatemala Genocide case has been through multiple layers of trials in Spain, Guatemala, and the Inter-American Court of Human Rights. This essay will examine the

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<sup>7</sup> *Id.* at 45.

procedural history of the case, and examine possible solutions to problems presented and the likelihood of a resolution to this case.

### **I. The Inter-American Court of Human Rights**

Many complaints were filed in the Guatemalan court system but they were met with delays, irregularities, inaction, and the infamous National Reconciliation Law. In order to seek reparations for victims, in October 1996 the plaintiffs lodged a complaint with the Inter-American Commission of Human Rights. In 1978, Guatemala ratified the Inter-American Commission of Human Rights, which is responsible for overseeing the condition of human rights in all American countries. The Commission is also charged with ensuring that there are reparations for victims of human rights. On March 9, 1987, Guatemala accepted the adjudicatory jurisdiction of the Court pursuant to Article 62 of the Convention.<sup>8</sup> In the complaint, the plaintiffs alleged that the State of Guatemala systematically killed women and children in numbers sufficient to constitute a crime against humanity. Guatemala contested the complaint, alleging that these were not systematic killings but rather a quelling of a rebellion, which is well within the power of the government, and that the guerrilla group was committing abuses. Secondly, it contested the complaint because the plaintiffs filed it extemporaneously with the Commission, and lastly contested the Commission's jurisdiction on this issue because not all domestic remedies had been exhausted. The plaintiffs countered this argument by claiming that they had attempted to exhaust all domestic remedies but have only been met with inaction and obstruction. The Commission accepted the complaint in March of 1999 and forwarded it to the Inter-American Court on Human Rights.<sup>9</sup>

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<sup>8</sup> Case of *Plan de Sánchez Massacre*, Case 11.763, Inter-Am. C.H.R., Report No. 31/99, I/A (2004).

<sup>9</sup> *Plan de Sánchez Massacre*, Case No. 11.763, Report No. 31/99, (March 11, 1999).

The Inter-American Court on Human Rights found that it cannot criminally prosecute the Guatemalan officials responsible for the acts committed due to the National Reconciliation Act. This controversial law passed by the Guatemalan government extinguished criminal liability for certain acts committed by Guatemalan officials during the thirty-year civil war. This is a reckless finding by the court, as Article 8 of the same Act precludes the prescription of the crimes as well as the criminal liability for those crimes.<sup>10</sup> The court used a selective reading of the National Reconciliation Act law by, on one hand, reading that it extinguishes responsibility for those guilty of crimes against humanity, and, on the other hand, “forgetting” to read the article in the act that expressly refuses to extinguish criminal responsibility for crimes against humanity such as genocide.

In negotiations between Guatemala, the court, and the plaintiffs, the President of Guatemala admitted that Guatemala was “institutionally responsible for these crimes against humanity.”<sup>11</sup> Reports indicated that victims, witnesses, and families of those who testified or who were scheduled to testify to the court received death threats, which led to a breakdown in negotiations. In response, the court issued its first resolution on July 30, 2004. Since then, more than six resolutions have been issued and more than three opinions by the court released. The resolution ordered that Guatemala should adopt necessary measures and safeguards to protect the life, humane treatment, and personal liberty of the victims who will be testifying as to the genocide, and to investigate the facts that led to the necessity of these measures. It also stated that the Guatemalan government should conduct a serious investigation into the alleged crimes, make reparations to the victims, and take steps to assure that this does not happen again. It also

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<sup>10</sup> Ley de Reconciliación Nacional [National Reconciliation Act], 18 de diciembre de 1996 , Decreto núm. 145-96 del Congreso de la República, Art. 8 (Guat.)

<sup>11</sup> Inter-American Commission on Human Rights [IACHR], Press Release No. 12/-00 (17 August 2000).

ordered that Guatemala report regularly to the Commission in order to ensure that the appropriate steps are being taken.

The court issued a judgment of reparations on November 19, 2004, which ordered Guatemala to pay compensatory damages to victims and families of victims in the amount of almost USD \$8,000,000, provide survivors with medical and psychological treatment, create monuments for the victims, and help restore ruined villages.<sup>12</sup> The court requires that Guatemala regularly report back to it so that it may ensure that the judgment is being carried out.

Compensation for the victims is a step forward, but it seems that the Guatemalan officials bought themselves out of criminal liability for such grave crimes of Genocide and other crimes against humanity. What can be done in order to bring these people to justice if an international tribunal established for the sole purpose of judging crimes against humanity does not bring the accused to justice? Menchu Tum, victims still yearning for justice, and many activist non-governmental organizations are on a quest to bring these people to justice. Following the precedent of *Pinochet*, the plaintiffs filed a new criminal complaint in Spain, where they hope to exercise Universal Jurisdiction over the crimes committed by Guatemalan leaders.

## II. Universal Jurisdiction

### *Spain's Statutory Grant of Universal Jurisdiction*

In order to understand Spain's claim to universal jurisdiction over Guatemalan leaders, one must first look to Spanish law and its reaches. In Book I, Title I of *De la extensión y límites*

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<sup>12</sup> *Case of the Plan de Sánchez Massacre v. Guatemala*, Inter-Am. C.H.R. 7, I/A Court H.R., (19 November 2007).

*de la jurisdicción* (the limits and extents of jurisdiction) of the 1985 *Ley Orgánica del Poder Judicial* (Organic Law of the Judicial Power, hereinafter referred to as ‘LOPJ’), Article 23.2 gives Spanish courts and tribunals active personality jurisdiction over *all* crimes in *any* territory if: 1) the offense is also punishable in the territorial state, 2) a complaint by a victim or the foreign authority has been received, and 3) the offender has not yet been tried (emphasis added).<sup>13</sup>

Article 376 of the Guatemalan Penal Code makes genocide a crime in Guatemala. It states, “[o]ne commits the crime of genocide when, with the purpose of totally or partially destroying a national, ethnic, or religious group, one commits one of the following acts: 1) the death of group members, 2) grave harm to the physical or mental integrity of the group, 3) subjecting the group or members of the group to conditions that can produce their total or partial destruction, 4) compulsive displacing of children or adults of the group or other groups, 5) attempts to sterilize members of the group or any other way to impede their reproductions. He who is responsible for genocide shall be sentenced to prison from 30 to 50 years.”<sup>14</sup> Article 377 states that “He who publicly instigates the commission of the crime of genocide shall be sentenced to prison from 5 to 15 years.”<sup>15</sup> Articles 391-393 make terrorism illegal in Guatemala.<sup>16</sup> Because Montt’s actions are crimes in Guatemala according to Articles 376, 377, and 391-393, the first element of LOPJ Article 23.2 is satisfied. Furthermore, The United Nations Commission Report clearly stated that genocide and torture had been committed, and the facts clearly fit within the Guatemalan Penal Code’s definitions of genocide and torture.

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<sup>13</sup> Ley Orgánica del Poder Judicial [LOPJ] [Judicial Branch Law], Art.art. 23.2, 1985 (Guat.).

<sup>14</sup> Código Penal de Guatemala [C.P.] [Guatemalan Criminal Code], Decreto No. 17-73, Capítulo IV, Artículo 376.

<sup>15</sup> *Id.* at Art. 377.

<sup>16</sup> *Id.* at Arts. 391-393.



With regard to the second element of LOPJ 23.2, Rigoberta Menchu Tum filed the complaint against Montt in the Spanish court. She is an indigenous Mayan woman from Guatemala who experienced first-hand the brutality of Montt's attacks on the indigenous people of the Guatemalan countryside. Both her parents and a brother were tortured and killed. She is a survivor, but a victim and witness nonetheless. She along with many other victims filed the complaint. These facts put them within the purview LOPJ 23.2, satisfying the second requirement.

Montt and his government have yet to stand trial for their actions. The first complaint lodged against them was in Guatemala, next in the Inter-American Commission on Human Rights, and lastly in Spain. The third part of LOPJ 23.2 provides the only limitation on the article: that the offender has not yet been tried in any jurisdiction. In this case, the accused have never been tried in any venue or jurisdiction, thus satisfying the third element of Article 23.2. The plain text interpretation of the article provides a clear extension of Spain's jurisdiction. The *Audiencia Nacional* and *Tribunal Superior* do not make a plain reading of the statute and do not find that Spain has universal jurisdiction.<sup>17</sup>

Another statute lending Spanish Universal Jurisdiction over Montt is the LOPJ 23.4, which reads: "Spanish courts have jurisdiction over acts committed abroad by Spaniards *and* foreigners, if these acts constitute any of the following offences under Spanish Law: (a) genocide; (b) terrorism...(g) any other offences which Spain is obliged to prosecute under an international treaty or convention" (emphasis added).<sup>18</sup> Article 607 of the Spanish Penal Code defines the agents in the commission of genocide as those who, with the purpose of destroying totally or partially a national, ethnic, or racial group, or religion, will have perpetrated the crime

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<sup>17</sup> *Infra*.

<sup>18</sup> LOPJ, Art. 23.4.

of genocide.<sup>19</sup> Once again, the UN-backed report found that Montt was purposely killing the Mayan populations, thus he was committing genocide according to Spanish Law.

The Spanish Penal Code defines terrorism, as acts by those who, belonging to groups, actually in service or in collaboration with armed gangs, whose aim is to subvert the constitutional order or gravely alter the public peace, through violence, are guilty of terrorism.<sup>20</sup> Montt used his civil patrols to kill, torture, and impose fear and terror on thousands of Mayans in order to quell any type of opposition. These actions clearly fall within the meaning of terrorism according to the Spanish Penal Code. Because “terrorism” and “genocide” as defined by the Penal Code, were committed by Montt, Spain has jurisdiction to prosecute according to LOPJ 23.4. Reading these two statutes together clearly evidences the drafter’s intention to provide a venue to try genocide, terrorism, torture, and crimes against nature, notwithstanding by whom or where such acts occurred.

### *Judicial Decisions of Universal Jurisdiction*

Although there is *almost* no judicial precedent to apply to *The Guatemala Genocide Case*, one previous case is strikingly similar factually, legally, and temporally. In *Unión Progresista de Fiscales de España v. Pinochet*, or *The Pinochet Case*, the Progressive Union of Prosecutors of Spain lodged a complaint against Argentine and Chilean leaders, most notably Augusto Pinochet, the brutal former dictator of Chile, for the deaths of more than 3,000 indigenous people.<sup>21</sup> In the original complaint, only Spanish citizens were named as victims, but

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<sup>19</sup> Art. 607 del Código Penal de España (C.P. 10/1995).

<sup>20</sup> Arts. 571 y 574 del Código Penal de España (C.P. 10/1995).

<sup>21</sup> LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 184 (2003).

subsequent amended filings added non-Spanish citizens as the crux of the complaint, which thrust the case into the realm of universal jurisdiction.<sup>22</sup> The Spanish magistrate claimed that he was competent to investigate charges of genocide, terrorism, and torture regardless of the nationality of the victims or the perpetrator, and issued an arrest warrant and extradition request for Pinochet.<sup>23</sup> Chile fervently contested Spain's jurisdiction over its former head of State. The Spanish prosecutors brought the case in front of the *Audiencia Nacional*, which upheld Spain's jurisdiction to prosecute Pinochet for genocide and terrorism. (LOPJ 23.4 specifically gives Spain jurisdiction for genocide and terrorism). They also found they had jurisdiction to prosecute for torture through LOPJ 23.4(g) and Article 5(2) of the UN Torture Convention.<sup>24</sup> Finally, the *Audiencia Nacional* stated that the application of LOPJ 23.4 was not an interference with another sovereign, but rather an exercise of their own sovereign powers to prosecute an *international* crime derived from the power of universal jurisdiction.<sup>25</sup>

Notably in the *Pinochet Case* the Spanish court relied on Article VI of the Genocide Convention, which granted the extraterritorial jurisdiction to prosecute terrorism and torture. In the *Pinochet Case*, the court found that local courts failed to act; therefore Spain had the jurisdiction to prosecute. In the *Guatemalan Genocide Case*, the *Tribunal Superior* finds almost the exact opposite and finds that Article VI does not grant extraterritorial jurisdiction to prosecute genocide and torture in Guatemala. It is also noteworthy that the facts are similar, except that there are a greater number of deaths in *The Guatemala Case*.

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<sup>22</sup> *Id.* at 185

<sup>23</sup> *Id.*

<sup>24</sup> BRODY, REED AND MICHAEL RATNER, EDS., *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 95 (The Hague and Boston: Kluwer Law International, 2000).

<sup>25</sup> *Id.* at 107.

### III. Guatemalan Genocide Case I – *Audiencia Nacional*

The actions of the accused are well documented by UN special reporters and independent experts, the Human Rights Office of the Archbishop of Guatemala, the Guatemalan Commission for Historical Clarification, and *Guatemala: Memory of Silence*. Shortly after the publication of *Guatemala: Memory of Silence*, Menchu Tum filed a complaint against Montt in Spain. (Interestingly, this complaint was filed as the *Pinochet Case* was ongoing; certainly a strategic decision to try to take advantage of Spain's intolerance of Latin American genocides and its perceived willingness to extend jurisdiction across borders in order to prosecute them.) As in the *Pinochet Case*, the Public Prosecutor immediately appealed the jurisdiction to investigate and prosecute the accused, claiming lack of jurisdiction because all actions took place in Guatemala, by Guatemalan officials, and affecting Guatemalan people.

The *Audiencia Nacional* based its holding largely on its interpretation of Article VI of the Genocide Convention, which reads: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Article III reads, "The following acts shall be punishable:(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide."

As in the *Pinochet Case*, the *Audiencia Nacional* ruled that Spain had subsidiary jurisdiction to prosecute Montt according to Article VI of the Genocide Convention, but it was not convinced that the local courts had failed to act. Its rule against the complainants was based

in most part on the fact that the United Nations Truth Commission, which created the factual basis for the complaint, had only recently been made public, and since genocide cannot prescribe, it was not evident that Guatemala had not acted. The case was dropped “for the moment,” indicating a willingness to prosecute in the future.<sup>26</sup>

Spain would only prosecute if the territorial state in which the offenses took place will not or cannot prosecute. The court explains in the opinion that the inactivity of the judicial authorities of the State on whose territory the alleged genocide took place “can result either from the adoption of a law . . . which prevents them from initiating prosecution . . . or, although the legal possibility does exist, from pressures on the judiciary by governmental or de facto forces as a result . . . that there exists a climate of intimidation of fear which does not allow justice to be administered in serenity and independence.”<sup>27</sup>

After its finding of subsidiary jurisdiction, the court went on to explore whether there were any legal obstacles to Spain’s prosecution of Montt. The court cited the Guatemalan Law, which precluded the prescription and extinction of criminal liability for genocide, torture, and forced disappearance, therefore there was no legal obstacles to prosecuting these crimes.<sup>28</sup> This was also a reaffirmation that there was no evidence that Guatemala would not prosecute the case sometime in the future.

Although the court found no legal obstacles to Spain’s prosecution of Montt, it said that it was too soon to prosecute because it was still unsure as to what was to develop in the Guatemala court system.<sup>29</sup> The court pointed out that “the description of the situation of the Guatemalan justice system with respect to the acts committed refers to a time when the Guatemalan justice

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<sup>26</sup> *The Guatemala Genocide Case*, Audiencia Nacional, Sala de lo Penal [A.N.] [Criminal Law Division] Judgment No. 115/2000 (2000).

<sup>27</sup> *Id.*

<sup>28</sup> Art. 8, National Reconciliation Act.

<sup>29</sup> *Id.*

system was unable to accomplish its tasks and was hiding out of fear of one of the parties,” but it was not established whether “Guatemala’s judges of *today* would refuse to act if” a complaint, like the one before the Spanish court, was filed with the Guatemalan judicial authorities competent to prosecute this crime (emphasis added).<sup>30</sup>

The court also found it relevant that the report which created the basis of the charges against the accused became public on February 15, 1999, and Tum’s complaint was filed with the Spanish court December 2, 1999. In the complaint, there was no decision of the Guatemalan courts indicating that they would not act and that not enough time had passed since the information became public for them to act.<sup>31</sup>

For the foregoing reasons, the court held that the subsidiary jurisdiction had not yet come into effect. The “territorial principle” embedded in Article VI of the Genocide Convention on the Prevention and the Punishment of Genocide had not been fully exhausted.<sup>32</sup> The court ordered the examining magistrate to stay the proceedings, indicating that the court might be willing to go through with the investigation and prosecution in the future when there would be sufficient evidence of Guatemala’s inactivity of prosecution for these crimes.

This finding goes against the powers provided to Spain in the LOPJ. From a plain text interpretation of the LOPJ 23.4, the writers of the article intended to give extraterritorial jurisdiction in the cases of genocide and terrorism. There is no mention of subsidiary jurisdiction.

The facts surrounding the *Audiencia Nacional* cases on the *Pinochet-* and *Guatemalan Genocide Cases* are remarkably similar factually, yet have an opposite outcome. In both cases, Spain is trying to prosecute alleged genocides committed by Latin American dictators against

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

indigenous peoples. The different interpretations of Article VI by the same court are astounding. In the *Pinochet Case*, the *Audiencia Nacional* found that Article VI of the Genocide Convention and Article LOPJ 23.4 granted Spain jurisdiction to prosecute the crimes of genocide for non-Spanish victims, by non-Spanish defendants, on foreign territory. In the *Guatemalan Genocide Case*, the court took a much narrower interpretation of Article VI and found that it did not yet have jurisdiction to prosecute the accused. The court wanted to wait and see whether Guatemala would prosecute on its own. Is this a sign of Spain getting cold feet in its quest for universal jurisdiction? Interestingly, despite the narrower interpretation, the Guatemalan genocide had approximately sixty-six times more deaths than that in the alleged genocide of Pinochet in the Argentine and Chilean dirty wars under which Pinochet was prosecuted. Also, it is quite unlikely that Guatemala will ever prosecute its former leaders for prosecution, and Spain knew this. Guatemalan history tends to demonstrate that the likelihood of it prosecuting crimes against humanity is unlikely at best. The most damaging effect of this outcome is the reduced credibility of the *Audiencia Nacional*. By claiming to have jurisdiction over Pinochet because the local courts refused to act, and then within one year coming to an opposite conclusion may lessen the legitimacy of Universal Jurisdiction. Opponents of Universal Jurisdiction can easily point to these different outcomes as a sign of instability and an example of why Universal Jurisdiction should not be used.

#### **IV. Guatemalan Genocide Case II – Tribunal Superior**

After the disappointing outcome of the *Audiencia Nacional's* decision, the plaintiffs made a prompt appeal to the higher court, and on February 25, 2003 the *Tribunal Superior* ruled

on the appeal. The decision was another big step backwards for the plaintiffs, as the court, in a sharply divided 8-7 decision, decided to throw out all claims that had to do with the Mayan victims but to reopen the case in regard to the crimes of torture committed against Spanish citizens relating to the 1980 Spanish embassy massacre and the torture of four Spanish priests who were later killed.<sup>33</sup> All torture, genocide, and terrorist charges against non-Spaniards were dismissed.<sup>34</sup> This was essentially a categorical rejection of Universal Jurisdiction.

The majority had an even narrower interpretation of Article 23.4 of the J.P.O.A. than the *Audiencia Nacional*, and held that Article 23.4 of the J.P.O.A. only extends extraterritorial jurisdiction according to principles of international law and treaties and that no State shall unilaterally use its own penal laws to maintain international order.<sup>35</sup> It went on to overrule the lower court's finding that the Genocide convention extends even a subsidiary universal jurisdiction.<sup>36</sup> Article VI of the Convention establishes that prosecution for genocide should be done by the tribunals in the territory where it occurred or by an *international* court.<sup>37</sup> That is to say that once the local court fails to prosecute, it should then be prosecuted by an international tribunal such as the United Nations, the International Criminal Court, etc. Furthermore, any State may, according to Article VIII of the same Convention, call upon the United Nations to take any necessary action for the prevention and suppression of genocide.<sup>38</sup> The court interpreted Article VIII to mean that any state wishing to see justice done to a perpetrator of genocide must either allow the victim state to prosecute or direct complaints to the United Nations, but in no case should try to exert Universal Jurisdiction unless there is a specific grant in a treaty, which in this

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<sup>33</sup> *The Guatemala Genocide Case*, Jurisprudencia del Tribunal Superior [J.T.S.] [Superior Tribunal], Judgment Number STC 237/2005, Constitutional Tribunal (Second Chamber) (26 September, 2005).

<sup>34</sup> *Id.* at 21.

<sup>35</sup> *Id.* at 21.

<sup>36</sup> *Id.* at 21.

<sup>37</sup> Convention on the Prevention and Punishment of Genocide, art. VI, Dec. 9, 1948, 34 I.L.M. 1592, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>38</sup> *Id.* at art. VIII.



case they found did not exist.<sup>39</sup> The court mentioned that the United Nations knew of the conditions in Guatemala, as it was the state that published the report and had not taken any action, implying there was possibly a conscious decision not to prosecute.<sup>40</sup>

The Tribunal reasoned that basing subsidiary jurisdiction on the inactivity of another sovereign's courts is an implied value judgment of that state's ability to administer justice of the similarly situated organs of another sovereign state.<sup>41</sup> The Tribunal noted that such an action shall be appropriate only for an international organization or tribunal, but national courts of a sovereign should never make judgments such as this. It even cited a separation of powers argument by claiming that these judgments could affect foreign relations, thus a judiciary should not make the judgments, but a political or executive power of the state.<sup>42</sup> The fear is that these kinds of judicial actions could result in "tit for tat" arrests. That is to say that one state would retaliate for their leader being arrested by arresting another state's leader for no reason at all. This kind of retaliatory behavior could lead to ineffective communication between states and would only serve to exacerbate international relations rather than ameliorate them.

The majority's main argument, however, was that it interpreted Article 23.4 of the J.P.O.A. so as to not allow criminal investigations based on crimes being committed on foreign territory without a link to Spain, hence the reason for dismissing all complaints except those that had to do with Spanish victims or possibly those of Spanish ancestry.<sup>43</sup> It cited international laws respecting sovereignty and honoring the principle of non-intervention in the internal affairs of other States along with the International Court of Justice *Arrest Warrant Case*.<sup>44</sup> In the absence

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<sup>39</sup> STS, Feb. 25, 2003 (J.T.S. No. 327/2003, 13).

<sup>40</sup> *Id.* at 14.

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.* at 32.

<sup>43</sup> *Id.* at 20.

<sup>44</sup> *Id.* at 29 (*Democratic Republic of the Congo v. Belgium*, 2002 ICJ 3).

of a specific treaty granting jurisdiction, a specific link to a Spanish interest is necessary. “A connection to a state interest, the majority opined, creates legitimacy and rationality in international relations and also expresses respect for the non-intervention principle.”<sup>45</sup>

In short, the court categorically denied the legitimacy of Universal Jurisdiction by dismissing all complaints that did not involve a Spanish victim. It upheld a passive personality jurisdiction theory of international prosecution. The court required that there be a link between the crime and a national interest. This was another dramatically different interpretation from *The Pinochet Case*.

The dissent argued that the majority’s interpretation of Spain’s jurisdiction to investigate and prosecute incidents of genocide that take place in Guatemala was overly narrow and inconsistent with the grave effects of the crime.<sup>46</sup> The dissent also found more than enough links between the crimes and Spain, including historical and linguistic links, but maintained that this link was not necessary.<sup>47</sup> The grave crime of genocide does not just affect a single state, but the international community as a whole; Spain would be acting as a representative of the world in investigating and prosecuting it, reasoned the minority.<sup>48</sup> The majority’s position would give impunity to those who commit genocide in the future. Subsequent genocide cases in the *Tribunal Superior* followed the precedent set in the instant case highlighting the importance of the outcome of this case.<sup>49</sup>

This decision in itself creates a drastic reduction of the scope or even of the existence of Universal Jurisdiction. The decision of the *Audiencia Nacional*, the *Tribunal Superior*, and their

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<sup>45</sup> Naomi Roht-Ariazza, *Guatemala Genocide Case. Judgment no. STC 237/2005*, 100 AM. J. INT’L L. 207-213, 209 (2006).

<sup>46</sup> STS, Feb. 25, 2003 (J.T.S. No. 327/2003, 46).

<sup>47</sup> *Id.* at 26.

<sup>48</sup> *Id.* at 32.

<sup>49</sup> *Id.*

contrasts with the *Pinochet Case*, reflects the world's polar views of Universal Jurisdiction. On one hand, the community "seems to be moving towards a major consolidation of the international system where the rule of law, not politics, determines the outcome of the situations," recognizing the need for universal jurisdiction to bring international perpetrators to justice.<sup>50</sup> On the other hand, there are those who, like the majority, seem to be more for the status quo where considerations of Realpolitik shape many situations.<sup>51</sup>

This majority maintains that they *need* a link in order to exercise jurisdiction, thus completely disregarding the existence of Universal Jurisdiction.<sup>52</sup> In the *Pinochet Case*, the Spanish courts seemed to expand the definition of genocide in order to create a jurisdiction. "The willingness of the judicial authorities in [*The Pinochet Case*] to stretch the international definition of genocide in order to arrest a suspect who has no link with Spain is clearly wrong."<sup>53</sup> This case "was a paradigmatic example of those in which Spain *should* exercise its jurisdiction: there would never be a more compelling case."<sup>54</sup> The saga of Spain's divergent decisions regarding the Guatemala Genocide Cases does not stop at the *Tribunal Superior*, as the plaintiffs once again appealed the decision.

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<sup>50</sup> Luis Benavides, *Introductory Note to the Supreme Court of Spain: Judgment on the Guatemalan Genocide Case*, 42 I.L.M. 683 (2003).

<sup>51</sup> *Id.*

<sup>52</sup> STS, Feb. 25, 2003 (J.T.S. No. 327/2003, 51).

<sup>53</sup> LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 192 (Oxford University Press, 2004).

<sup>54</sup> *Id.* at 192.

## V. Guatemalan Genocide Case III – The Spanish Constitutional Court

In March 2003, the plaintiffs once again appealed the decision to the highest appellate court in Spain, the Spanish Constitutional Court.<sup>55</sup> The Spanish Constitutional Court stunned the world, as it made its opposite interpretation of Article 23.4 of the J.P.O.A. and The Genocide Convention to those of the lower courts, reversed their holdings accordingly, and categorically endorsed Universal Jurisdiction.<sup>56</sup>

The Court began by taking a plain language approach to Article 23.4 of the J.P.O.A. The statute gives Spain the jurisdiction to investigate and prosecute Spaniards *and* foreigners for the crimes of genocide, terrorism, and any other crime that Spain is obligated to prosecute under an international treaty.<sup>57</sup> The “and” is conjunctive, thus lending Universal Jurisdiction equally, not as subsidiary.<sup>58</sup> Opposite the *Audiencia Nacional*’s finding, a hierarchy was not created that requires the local courts prosecute first, and only if that court will not or cannot prosecute then Spain will proceed.<sup>59</sup> The Court held instead that there is only one limitation to Universal Jurisdiction that can be found in Article 23.2 of the J.P.O.A.: the defendant cannot have been previously tried, convicted, or acquitted of the alleged crime in any jurisdiction.<sup>60</sup> Following this plain interpretation of the Article’s language, there is no “subsidiary” jurisdiction or limitation on extraterritorial investigation and prosecution of the crimes enumerated in the Article.<sup>61</sup> The Court said that to hold otherwise would be an overly restrictive interpretation of the Article and that it would put plaintiffs in an “untenable position, requiring that they prove that no case could be

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<sup>55</sup> S.T.C., Sept. 26, 2005 (J.T.S., No. 237/2005).

<sup>56</sup> *Id.* at 21-22.

<sup>57</sup> *Id.* at 11 (citing Article 23.4 of the J.P.O.A.).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 26.

<sup>60</sup> *Id.* at 11.

<sup>61</sup> *Id.*

brought at home.”<sup>62</sup> It can be virtually impossible to prove that another sovereign does not have the ability to prosecute, or that the other sovereign will not prosecute, which would essentially put victims in a quandary where they cannot seek justice against the perpetrators. They would have to wait on their own court to act; in the meanwhile, if they filed a complaint in another venue, that court would require evidence as to why the local court would act, creating a circular problem. All the while the perpetrators of human rights would continue evading justice, or worse continuing in their commission of crimes against humanity. The Supreme Constitutional Court categorically rejected the lower court’s interpretation of the Genocide Convention, by noting the absence of any mention of alternative and international tribunals in the convention.<sup>63</sup> The Court also rejected the notion that a connecting link was needed between the crime committed and the prosecuting state.<sup>64</sup> The drafters of the Article could not have intended that it be a requirement that the victims of genocide be Spanish, and that the perpetrators have the intent to carry out genocide against Spaniards, opined the Court.<sup>65</sup>

The Court gave a full endorsement to Universal Jurisdiction by stating that genocide, torture, crimes against humanity, and the crimes listed in Article 23.4 of the J.P.O.A. “transcend the harm to the specific victims and affect the international community as a whole . . . therefore prosecution and punishment are not only a shared commitment, but a shared interest of all states.”<sup>66</sup> Following the decision of the Constitutional Supreme Court, Spanish Judge Santiago

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Naomi Roht-Arriaza, *Guatemala Genocide Case, Judgment No. STC 237/2005*, at 100 AM. J. INT’L L. 207, 211 (2006).

Pedraz ordered the issuance of international arrest warrants for those alleged in the complaint, including Montt, and traveled to Guatemala on a fact-finding investigation.<sup>67</sup>

## VI. Guatemala's Case – Extradition Hearing

“Crimes against humanity continue without punishment in Guatemala,” the court boldly proclaimed in the first sentence of their decision setting the theme for the rest of the opinion.<sup>68</sup> On May 6, 2001, indigenous communities represented by the Association for Justice and the Center for Legal Action in Human Rights filed a complaint in the Guatemalan courts against Montt and others for war crimes, genocide, and crimes against humanity which were committed during Montt's tenure.<sup>69</sup> The court alleged numerous delays and obstructions during the investigations of these claims that span over the appointment of three separate special prosecutors to the case, clearly indicating the corruption extended to the highest levels of government.<sup>70</sup> The court noted the lack of witness testimony due to threats against witnesses, victims, and anyone willing to testify.<sup>71</sup> The court was skeptical of the Minister of Defense's refusal to turn over documents to the prosecutors for “national security” reasons.<sup>72</sup> The prosecutors have not even attempted to get a judicial order forcing the Minister of Defense to

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<sup>67</sup> Guatemala: Appeal Case: Crimes Against Humanity Remain Unpunished in Guatemala, Nov. 17, 2006 (AMR 34/035/2006), available at <http://www.amnesty.org/en/library/asset/AMR34/035/2006/en/dom-AMR340352006en.html>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

hand over the documents.<sup>73</sup> This is due to the fact that they were reported to have been receiving death threats if they pressed on with the prosecution.<sup>74</sup>

After exploring the current status of the complaint in Guatemala, the court moves on to discuss the investigation and extradition request by Spain.<sup>75</sup> In June of 2006, Judge Pedraz went to Guatemala on a fact finding investigative trip but was sent back with “empty hands” because of various obstructions to his investigation and lack of cooperation by the judicial and political system of Guatemala.<sup>76</sup> This is a reference to the theme and first line of the case which notes the unpunished crimes against humanity; even by another jurisdiction. In concurrence with international law, no state has more right than another to initiate an investigation, and if there exists sufficient admissible proof that the defendant committed these atrocious crimes, they shall have the jurisdiction to prosecute them, reasoned the court.<sup>77</sup>

Crimes that are in violation of human rights are imprescriptable; therefore, there is no legal obstacle for Spain, or anyone else, to prosecute.<sup>78</sup> In conclusion, the court mirrored the final decision of the Spanish Constitutional Court and held that there is no obstacle for Spain to prosecute.<sup>79</sup> Since there is no progress in the investigation and prosecution of the alleged atrocities in Guatemala, the court feared that the accused would never be brought to justice in the Guatemalan Court system: “if an investigation according to the norms of international law is not going to be brought [in Guatemala], then the accused should be extradited without delay to Spain.”<sup>80</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

Although this was undoubtedly a great victory for the plaintiffs and proponents of Universal Jurisdiction, the Guatemalan Constitutional Court would soon essentially negate the effect of this decision, sending the plaintiffs back to square one.

## VII. Guatemala's Constitutional Court – Extradition Hearing II

Jose Rios Montt and others named in the complaint in the Guatemalan court lodged an appeal of the lower court's decision to extradite them to Spain so that they could stand trial.<sup>81</sup> On December 12, 2007, the Court read its opinion and once again shocked the world and furthered Montt's impunity, overturning the lower court's decisions to extradite and holding that Spain did not have jurisdiction to prosecute Montt and others, and that the previous extradition treaty between Spain and Guatemala was no longer in effect.<sup>82</sup> The Court asserted that this rejection of Spanish jurisdiction obligated Guatemala, under international law, to prosecute those suspected of committing crimes against humanity.<sup>83</sup> Although the Court admits that they have the responsibility to prosecute, there has yet to be any forward progress in the Guatemalan court system.<sup>84</sup> Even if the crimes are found to be political crimes, Guatemala has the responsibility to seek justice, but has yet to do so and most likely never will.<sup>85</sup> It is worthy to keep that thought in mind as one reads the Court's rationale for not honoring the extradition request.

The Genocide Convention, which has been law in Guatemala since the 1950s, in Article VII says that crimes of genocide and other acts enumerated in Article III of the Convention shall

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<sup>81</sup> Guatemala: Inconsistent Ruling by the Constitutional Court Rejects Extraditions Sought by Spain, Dec. 21, 2007 (AMR 34/026/2007), available at <http://www.amnesty.org/en/library/asset/AMR34/026/2007/en/AMR340262007en.html>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*



not be considered political crimes.<sup>86</sup> Despite this being law in Guatemala, the Constitutional Court said that the reported crimes were crimes in connection with political crimes, and that thus the accused shall not be subject to extradition.<sup>87</sup> Clearly, this blatant act of ignoring its own domestic law and a well-accepted international treaty shows the existence of corruption in the Guatemalan judicial system and how the corruption extends to the highest levels of the system.

The Court then held that the extradition treaty between Guatemala and Spain is not applicable to the accused because: 1) it had been disregarded when ordering the arrest of Guevara Rodriguez and Garcia Arredondo [former Guatemalan soldiers] and 2) in particular and most importantly, the *Audiencia Nacional* of Spain does not have jurisdiction to prosecute crimes with no link to Spain.<sup>88</sup> This is because the *Audiencia Nacional* is not an *international* criminal tribunal.<sup>89</sup> By not recognizing the *Audiencia Nacional*'s jurisdiction to prosecute, the Court rejected the existence of Universal Jurisdiction. This once again presents a common problem with Universal Jurisdiction: in order for it to be effective, all must recognize it. Is this possible? Or will the desire to 'protect one's own' always interfere with the effectiveness of Universal Jurisdiction?

The Court affirmed that the judicial system of Guatemala functions, thus the Guatemalan courts should prosecute any wrongdoings, including "political offenses."<sup>90</sup> Cases arising out of armed conflict still have the possibility of being tried by the Guatemalan courts since the crimes alleged are political offenses and have not yet been exhausted by the Guatemalan court system.<sup>91</sup>

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<sup>86</sup> Genocide Convention, *supra* note 36, art. VII.

<sup>87</sup> Guatemala: Inconsistent Ruling by the Constitutional Court Rejects Extraditions Sought by Spain, Dec. 21, 2007 (AMR 34/026/2007).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

This reinforced their decision that the reported crimes were not crimes against humanity, but political crimes.

This decision was an assault to the international obligations of the State of Guatemala to protect human rights and the international system of protection of human rights set by the United Nations, the Genocide Convention, and their membership in the Inter-American Court of Human Rights.<sup>92</sup>

In a public statement published by Amnesty International criticizing the decision, the author states that it is important to note that Spain is following its own laws and the treaties it is bound by; obviously a contrast to Guatemala's refusal to follow even its own domestic laws.<sup>93</sup>

### VIII. The Case Today

The effect, with regard to precedent, of *The Guatemala Genocide Cases* remains unclear. Although the Spanish courts have on two occasions, in *The Pinochet Case* and the instant case, claimed to have Criminal Universal Jurisdiction over those accused of genocide, torture, terrorism, and other crimes against humanity, it has yet to prosecute a crime under this principle. In *The Pinochet Case*, Pinochet was sent back to his home of Chile from England despite the arrest warrant and extradition request against him in England.<sup>94</sup> England used their discretion to send him to Chile, stating he was not healthy enough to stand trial.<sup>95</sup> In *The Guatemala Genocide Cases*, all attempts at prosecution were met with resistance at all levels.<sup>96</sup> It is probably

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<sup>92</sup> Fundacion Rigoberta Menchu Tum, CONAVIGUA, Jesus Tecu Osorio, [http://www.nisgua.org/themes\\_campaigns/index.asp?id=3040](http://www.nisgua.org/themes_campaigns/index.asp?id=3040) (last visited Dec. 17, 2007).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

impossible to completely rid the world of commissions of crimes against humanity, but it is certainly possible to deter them and bring those to justice who committed them. With that said, it will take much more than the issuance of international arrest warrants and extradition requests, which eventually get blocked, in order to achieve this goal.

One problem in the *Guatemala Genocide Cases* is the question of whether the accused actually committed genocide.<sup>97</sup> The United Nations' report claimed that genocide occurred. The United Nations, in its Genocide Convention, Article II, defines Genocide as acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, including acts such as: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting upon the group conditions of life calculated to bring about physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.<sup>98</sup> Admittedly over 200,000 people died, of whom 80% were of a single race, the indigenous Mayan.<sup>99</sup> This certainly satisfies the requirement that a racial or ethnic group was victimized, but the key question is, did Rios Montt *intend* to destroy that group, or was he trying to destroy a rebellious guerilla group intending to overthrow the government? The case can be made convincingly either way, especially considering that the guerilla group, composed mostly of Mayans, was located in the countryside where the indigenous Mayans reside.<sup>100</sup> The key question is whether Montt was performing these killings to destroy the Mayans, or instead the group which many Mayans belonged to, which focused on overthrowing the Guatemalan government. The distinction is that according to the United Nations definition of genocide, if it

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<sup>97</sup> GUATEMALA, MEMORY OF SILENCE, Art. II, ¶ 111.

<sup>98</sup> Genocide Convention, *supra* note 36, art. II.

<sup>99</sup> GUATEMALA, MEMORY OF SILENCE, Art. II.

<sup>100</sup> *Id.*

were the former, then Rios Montt is clearly guilty of genocide, if the latter, he may be guilty of a multitude of political crimes, but none of which would justify Universal Jurisdiction. The United Nations' report said that the Guatemalan Army "identified groups of the Mayan population as the internal enemy, considering them to be an actual or potential support base for the guerrillas, with respect to material sustenance, a source of recruits and a place to hide their members . . . and defined a concept of internal enemy that went beyond guerrilla sympathizers, combatants or militants to include civilians from specific ethnic groups."<sup>101</sup> The report went on to conclude that for the "purpose of determining whether they constituted the crime of genocide, . . . the reiteration of destructive acts, directed systematically against groups of the Mayan population, within which can be mentioned the elimination of leaders and criminal acts against minors who could not possibly have been military targets, demonstrates that the only common denominator for all the victims was the fact that they belonged to a specific ethnic group and makes it evident that these acts were committed 'with intent to destroy, in whole or in part' these groups," which fit within the definition of genocide according to the Genocide Convention.<sup>102</sup>

The other problem lies in the fact that it is very unlikely that Rios Montt will ever be brought to trial in order to decipher what really happened and take appropriate action. Perhaps it would have been better, and in the future will be better, if there were a hearing to decide first whether genocide, crime against humanity, or political crime occurred, and then try to get jurisdiction over the accused. This may prevent a circus-like chain of events and trials that could lead to the reduction in the appearance of legitimacy for international tribunals, international organizations, those states claiming Universal Jurisdiction, and the concept of Universal Jurisdiction itself. Although the United Nations reported that genocide did in fact occur, that

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<sup>101</sup> GUATEMALA, MEMORY OF SILENCE, Art. II, ¶ 110.

<sup>102</sup> *Id.*

report cannot suffice to definitively decide if it did or not, as it is not an independent tribunal. The United Nations report can be analogized to the police investigating someone. The report needs to be followed up with some type of hearing of probable cause or a determination by an independent and unbiased tribunal similar to that of a Grand Jury indictment in United States' law, to decide if there is enough evidence to try the defendant. This would legitimize the process and possibly create a rally effect amongst other nations. Once it is determined that there is probable cause that the crime committed was that of genocide, or any crime against humanity, the world would be more likely to work together to exact justice, pressuring Guatemala or the perpetrating state to cooperate.

A United Nations committee created the report which said that genocide and other crimes against humanity took place, yet they have not brought it to the next level. Guatemala's courts obviously cannot or will not try this case; the commission, in its own report, "has also come to the conclusion that the weakness and dysfunction of the judicial system has contributed decisively to impunity and the misapplication of criminal law."<sup>103</sup> Why has the organization that reported on the conditions of Guatemala and conclusively decided that crimes against humanity took place not taken steps to bring the perpetrators to justice?

How should the world balance the desire and need to bring to justice one who commits crimes against humanity versus the need to respect jurisdictions and sovereigns? In order for pure Universal Jurisdiction to work, it must be recognized by all states. When one state, such as Guatemala, harbors and protects perpetrators of crimes against humanity, the rest of the world must unite and apply a collective pressure to cooperate with proceedings against the defendants. Pressure can be applied through trade embargos, boycotts, etc. It is human nature to protect one's

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<sup>103</sup> GUATEMALA, MEMORY OF SILENCE, Art. V, V.1.5.

own. That is to say, although all states may agree to Universal Jurisdiction, when it is their own citizen being prosecuted, it is natural for that state to fight Universal Jurisdiction in protection of its own citizen. We have seen this reaction in both *The Pinochet Case* and *The Guatemala Genocide Case*. The only way to solve this is to have an international organization, such as the United Nations or the International Criminal Court, coordinate the proceedings. In other words, have the UN or ICC have the states of the world agree to Universal Jurisdiction over certain crimes against humanity, genocide, torture, etc. The next step would be for that organization to have a probable cause hearing, held by a neutral and independent tribunal, to determine if prosecution can commence, and then a complaint should be lodged in a court, whether it be a state's court or the international tribunal's court. The venue should not matter, as it is a crime against the world, so any venue in the world should suffice.

As humans, we must find a way to efficiently and effectively bring crimes committed against humanity to justice. We must no longer stand for such offenses to go unpunished as the perpetrators hide behind national boundaries and jurisdictions. The crime is against all humans in this world, thus, the jurisdiction should be any penal court with the statutory grant of Universal Jurisdiction.