



Photo by withonef.

A Guatemalan pointing to the location of his “disappeared” village.

JUSTICE

The Guatemalan Genocide Case in Spain

by Naomi Roht-Arriaza and Almudena Bernabeu

In December 1999, Nobel Peace Prize winner Rigoberta Menchú and others brought a complaint in the Spanish Audiencia Nacional¹ 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.² Among the events underlying the complaint was the massacre of Menchú’s father and 35 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 and rapes as well as cases of torture

and enforced disappearance. The complainants grounded Spanish jurisdiction on Article 23.4 of the Organic Law of the Judicial Branch (Ley Orgánica del Poder Judicial, LOPJ).³ That provision allows for the 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.⁴ 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.⁶ An appeals panel of the Audiencia Nacional and, later, the Spanish Supreme Court, found that

the Spanish courts had no jurisdiction. The Supreme Court held 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.⁷ Thus, only those cases that involved Spanish citizens could proceed.

In September 2005, Spain's highest court, the Constitutional Tribunal, reversed the Supreme Court's decision.⁸ As the Constitutional Tribunal pointed out, Spanish law 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 contemplating the concurrency of jurisdictions. The Tribunal reopened the case for all complainants, including large numbers of Guatemalans who were massacre survivors or family members of victims.⁹ The full case, focusing on genocide, could then go forward.

The next step in the reopened 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 are issued. Following long-established rules for taking statements in another country through a rogatory commission, Judge Pedraz worked with a Guatemalan judge to set up the dates and then traveled to Guatemala with the Spanish prosecutor. 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.¹⁰ It was at this point that the Center for Justice and Accountability (CJA), a U.S.-based NGO with experience litigating transnational cases through its work using the U.S. Alien Tort Statute,¹¹ joined the case, representing several victims' families.

Despite his inability to take formal statements, Judge Pedraz did not leave Guatemala entirely empty-handed. He met informally with several representatives of a victims' group, the Association for Justice and Reconciliation (Asociación para la Justicia y Reconciliación, AJR), who told him about their long struggle for justice in Guatemala. On July 7, 2006, a month after he returned to Spain, Judge Pedraz issued international arrest warrants for the defendants on charges of genocide, state terrorism, torture and related crimes.¹² Up until this time, Rigoberta Menchú

had been represented by labor and criminal lawyers who focused on the validity of Spain's jurisdiction. After the judge's June 2006 visit to Guatemala, a new legal team led by the CJA began facilitating the work of a number of lawyers, including: local counsel in Spain who had experience litigating universal jurisdiction cases; lawyers with knowledge of both national and international criminal law from the Hague and San Francisco; law students at the University of California, Hastings and Harvard University; and lawyers from the Menchú Foundation 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.

In February 2008, witnesses began arriving at the Spanish court. They included experts, journalists and eyewitnesses from some of the Guatemalan regions where, according to the UN-mandated Historical Clarification Commission Report of 1999, acts of genocide were committed. The eyewitnesses described massacres, rape and torture as well as the bombing and persecution of massacre survivors, the destruction of crops and livestock and the targeting of Mayan religious practices and community authorities. They also provided the names of military officials, including the defendants, who are accused of these crimes.¹³ The witnesses spent a full week in February, followed by a second week in May, telling the judge their story.

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 Mayan communities had to be eliminated. These witnesses included Professor Beatriz Manz of the University of California, Berkeley; Professor Charles Hale of the University of Texas at Austin; and Professor Marta Casaus of the Universidad Autónoma de Madrid, as well as the distinguished 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 its exploitation; and a desire by the military to mete out exemplary punishment for what it saw as acts of rebellion, underlay the intention to destroy part of the Mayan group "as such."¹⁴ 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, the experts not only seconded the opinion and analysis of the Historical Clarification



Photo by surizar.

Protestor holding sign accusing former government officials of genocide.

Commission but went further. These testimonies have been crucial for the case and have served a dual purpose. On the one hand, from an evidentiary and technical point of view, they have related and elaborated on the different elements of the crime of genocide. On the other, most importantly in our opinion, from a sociological point of view they have provided the Judge with an objective and wide overview of past and current Guatemalan reality. This contextualization is decisive in transnational human rights litigation, where judges are often forced to make findings and reach conclusions about crimes that have taken place in foreign realities.

The Guatemalan genocide case before the Spanish National Court is now stronger than ever, thanks to the testimony of both victims and experts. Last October, six survivors from the Ixil region traveled to Madrid to give testimony. Four more experts are scheduled to testify in the next few months. New evidence will require us to file an amended complaint and keep working to conclude the pre-trial investigation phase, which will allow the judge to decree the opening of the trial phase.

Conclusion

Human rights litigation confronts challenges very much intrinsic and peculiar to this kind of prosecution. In most cases, many years must pass before prosecution is possible. Evidence is frequently unavailable or, if it exists, is difficult to corroborate. In this context, expert analysis and testimony are crucial. The substantiated statements of those researchers who investigated and deeply knew a reality at times remote from the courtroom are a decisive source of evidence. Experts of this kind are often first person survivors of the terrible events they document; they carry some of the same pain as the victims but have the expertise and experience to communicate it.

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1 See explanation in note 3.

2 See *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para Conocer de los Crímenes de Genocidio*

y *Terrorismo Cometido Durante la Dictadura Argentina (Decision (Auto) of the Full Penal Chamber Confirming Spanish Jurisdiction Over the Crimes of Genocide and Terrorism Committed During the Argentine Dictatorship)*, Appeal No 84-98, 3rd Section, File 19/97 from Judicial Chamber 5, Autos (Audiencia Nacional, Nov 4, 1998) (Spain), available online at <<http://www.derechos.org/nizkor/arg/espana/audi.html>> (visited Apr 5, 2008) (author translation); *Auto de la Sala de lo Penal de la Audiencia Nacional Confirmando la Jurisdicción de España para Conocer de los Crímenes de Genocidio y Terrorismo Cometido Durante la Dictadura Chilena (Decision (Auto) of the Full Penal Chamber Confirming Spanish Jurisdiction To Investigate Genocide in Chile)*, Appeal No 173/98, 1st Section, File 1/98 from Judicial Chamber 6 (Audiencia Nacional, Nov 5, 1998) (Spain), available online at <<http://www.derechos.org/nizkor/chile/juicio/audi.html>> (visited Apr 5, 2008) (author translation). See also the English translation of the decision regarding Chile in Reed Brody and Michael Ratner, eds, *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain* (Kluwer 2000).

3 Ley Orgánica 6/1985, BOE 1985, 157, available online at <http://noticias.juridicas.com/base_datos/Admin/lo6-1985.11t1.html> (visited Apr 5, 2008).

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

5 Id.

6 See Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005) at ch 1. The Public Prosecutors' Office dropped its opposition to this and other universal jurisdiction cases when the Socialist Party assumed office. See Amnistía Internacional, *La Audiencia Nacional condena a el ex militar argentino Adolfo Scilingo por Crímenes de Lesa Humanidad* (Apr 19, 2005), available online

at <<http://ania.urcm.net/noticia.php3?id=13324&idcat=1&idamb=3>> (visited Apr 5, 2008).

7 *Sentencia del Tribunal Supremo sobre el caso Guatemala por Genocidio*, Sentencia No 327/2003, Appeal Roll 115/2000, Case 331/99, File 162/2000 (Tribunal Supremo, Second Penal Chamber Feb 25, 2003) (Spain), available online at <<http://www.derechos.org/nizkor/guatemala/doc/gtmsent.html>> (visited Apr 5, 2008).

8 Naomi Roht-Arriaza, *Guatemala Genocide Case*, 100 Am J Intl L 207, 207 (2006).

9 Id at 211.

10 See Allan R. Brewer-Carías, *Some Aspects of the "Amparo" Proceeding in Latin America as a Constitutional Judicial Mean Specifically Established for the Protection of Human Rights*, Colloquium in International and Comparative Law, U Maryland School of Law (Oct 2007), available online at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1001&context=iclc_papers> (visited Apr 5, 2008).

11 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.

12 See Juzgado Central de Instrucción No 1, Audiencia Nacional, Madrid, Dil Previas 331/99, Auto del 7 de Julio de 2006.

13 Gerson Ortiz, *Declaran en Espana por Genocidio*, La Hora (Feb 5, 2008), available online at <<http://www.lahora.com.gt/notas.php?key=25579&fch=2008-02-05>> (visited Apr 5, 2008).

14 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>.

Guatemalan witnesses who traveled to Spain to testify.



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