"Extraterritorial Jurisdiction as a source of justice for Latin America.[1]"

Almudena Bernabeu[2],

My goal is to try to find a balance between optimism and pessimism in the field of human rights litigation by discussing specific human rights cases that we are now trying at CJA. I would like to explain and show how human rights litigation could have a double effect, on one hand providing justice for the victims while on the other, contributing to important and necessary reforms in the countries where the violations took place. Generally, I believe Latin America countries are well suited for seeking justice through courts. However, the results of tried and pending cases or even among the successes have not been very uniform. I will briefly talk about a positive example taking place right now in Guatemala. I will then explain how, contrarily, in El Salvador very little has happened internally as a consequence of important cases tried internationally.

In 1999 Nobel Prize Laureate Rigoberta Menchu filed a criminal complaint before Spanish courts against Guatemalan members of the High Command under the universal jurisdiction provisions of the country.[3] This case provide later the opportunity to Guatemalan people of Mayan origin, including my two Mayan *Achi* clients, to seek justice for genocide. After it was filed, Spanish prosecutors – as provided by Spanish Law- filed a motion to dismiss on two grounds: (1) exhaustion of remedies and (2) venue or jurisdiction of the Spanish Courts to hear the case.

The case, on appeal made it all the way to the Constitutional Court, court of last resort. The Constitutional Court decision was pivotal in the role of litigation of international crimes in national courts. Previously, the Spanish Supreme Court had ruled restricting the jurisdiction of Spanish Courts under universal jurisdiction to cases that showed a "national interest". Accordingly, only victims of Spanish nationality were able to sue under such provisions. This was really a covered passive personality jurisdiction approach never contemplated under Spanish laws that attempted to destroy the essence of the universal jurisdiction principles and most importantly, violated to rights of the victims. The Constitutional Court ruled later that such consideration violated the essence, the

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[3] Organic Law 6/1985, art. 23.4 (1985, amend. 1999)(Spain).

universal part of universal jurisdiction principle. Thus, jurisdiction of the Spanish Courts and access to such courts could not be limited to Spanish victims.

With the case reopened in Spain, a *Letter Rogatory* pending since 2004, needed to be executed in Guatemala. This irremediably transferred the proceedings to Guatemala. I should add here that all the defendants except Donaldo Alvarez Ruiz (a total of eight members of the Guatemalan Government and High Command, including former presidents Efrain Rios Montt and Romeo Lucas Garcia) were at the time residing in Guatemala. The immediacy and real threat of the rogatory going forward forced the defendants to seek for counsel who challenged the ability of the Spanish Judge to exercise his jurisdiction in Guatemala. They filed a constitutional appeal that by its nature in Guatemala carried the suspension of all proceedings. The situation was very tense. We had an important judge from Spain sitting at a hotel waiting for the government and a bunch of judges in Guatemala to make a decision on whether to recognize the exercise of Spanish jurisdiction and therefore his competence on Guatemalan soil or not. Behind these maneuvers was a group of defendants who for the first time realized that the lawyers of the victims had effectively worked to get them depose. Things were, this time, moving for real. After the Spanish Constitutional Court decision endorsed the genocide claim, we had filed an amended complaint on behalf of Mayan survivors that precipitated all these steps. There was - in the land of the defendants this time - a judge with the intention of really pursuing justice.

We also try to take advantage of the fact that Guatemala, despite of the constant impunity in the country, had applied to be a permanent member of the Security Council of the United Nations. At the time, and with a foreign judge appealing to principles of international cooperation and reciprocity, we realized that Guatemala has never signed a bilateral agreement with any country on international criminal cooperation. This is only the beginning of a much larger discussion on how little Guatemala has done to pass, ratify, or implement international treaties or international laws. The situation became almost a diplomatic issue when the defendants' counsel -and some judges echoed- questioned the judge's competence to the point of forcing his premature departure from Guatemala.

Judge Pedraz was unable to depose the defendants and take the testimony of the proposed witnesses. He and his team left Guatemala when he realized that a dilatory and questionable appeal system provided for a term of as much as a year to resolve the issue. Upon his arrival in Madrid, Spain, with our support as private prosecutors, Judge Pedraz issued international arrest warrants against the defendants and orders to freeze their assets.

Later and in an attempt to attack the arrest warrants, Guatemala asserted that because they do not have any cooperation or bilateral agreements that provide otherwise, the only documents acceptable would be those filed in observance of the

'diplomatic requirements'. We did some research to discover that this is basically a seventeenth century system, with seven different government agencies involved, defective and burocratic by nature. In my opinion, another way of stalling the proceedings and perpetuating impunity.

We researched the issue and found out a way to assist the proceedings. We made sure the arrest warrants arrived in Guatemala properly formalized. After receiving the warrants, Guatemalan authorities processed them and surprisingly, transferred them to the competent court. This Court, the Tribunal Number 5 of Criminal Sentencing, opened the extradition proceedings. The court ordered the arrest of their own national military leaders, which was by all standards, unthinkable.

This shows how our case in Spain and some of the issues it raised provided for some necessary changes – legal, political and perhaps to some extent sociological – that I believe are taking place in Guatemala. A case started in the Spanish courts, international by definition, is suddenly, back in Guatemala. We have been criticized for being invasive and maybe accelerating the process of reality and history in that small country, perhaps that's true. Nevertheless, a case result of exercising a sort of extraterritorial justice is now the principal vehicle for change and hope in Guatemala. This is perhaps the most important aspect of this work, the most important lesson.

We do not know whether the defendants would all be arrested and extradited to Spain or whether the Guatemalan legislative will advance and protect the rule of law providing for a society that rejects impunity. What we know and witness is that Guatemalan is aware of the challenge. That the public discourse of politicians, intellectuals and others has taken into consideration international law and obligations. International litigation of human rights cases is therefore an important and effective contribution to ongoing national battles and efforts against impunity, not an impediment. There is a national debate and movement towards advancing the rule of law in Guatemala very much reactivated by our work; we all hope in my team that the case keeps playing this role.

My second example is El Salvador, currently representative of the opposite dynamic. First, I would like to acknowledge the Human Rights Institute of the University of Central America (IDHUCA)[4] and the fact that, since for every set rule there is an exception, IDHUCA is the exception in my narrative. This institute was founded by one of the Jesuits priests assassinated in 1989 and was originally created to assist the refugees of the Civil War. It has developed an expertise in filing cases before the Inter-American Commission and Court and has obtained

[4] http://www.uca.edu.sv/publica/idhuca/indice.html

over the year important results. One of the cases, the Serrano Sisters case[5], denounced the lack of effectiveness of Salvadoran Courts and urged the government to take the necessary steps to reopen national investigations. According to legal scholars, professionals and experts in human rights in El Salvador, nothing has been done yet. My organization, the Center for Justice & Accountability, filed three important cases based on the brutal human rights abuses committed in El Salvador. Although our cases are only civil (you can only sue for damages) the successful outcome in all three and their immediate impact provided an opportunity for Salvadoran authorities to undertake some changes. However and despite the popular request, they dismissed our work.

The second case that CJA tried in relation to the assassination of Archbishop Oscar Romero[6] forced the Catholic Church of El Salvador to pronounce themselves about the importance of these investigations and efforts against impunity.

Our third case[7] filed on December 2003 was the first to precipitate an initiative in Salvadoran Congress to repeal the amnesty law. The blanket amnesty law was in part passed in opposition of the Jesuit's case tried nationally in 1990. The 1990 case has been publicly condemned as illegal and mock due to the many irregularities during the trial. Later in 2001, UCA filed a second case that exhausted the national remedies – today pending before the Interamerican Commission - and that forced a slight reform on the application of the Amnesty Law. The Supreme Court decided the amnesty law would only apply to political crimes but not to human rights violations. The court leaves to the prosecutor's discretion to determine, on a case by case basis, whether a crime is or not political. As of today, the assassination, force disappearance and torture of thousands of civilians such as the Archbishop of El Salvador Oscar Romero and of six Jesuits priests, their cook and her daughter at their house, have been considered 'political' crimes or what is to say, don't constitute a human rights violation and therefore they are covered by the Amnesty.

Regardless of how important our work is or could be in Spain and the United States, these cases are important to the extent that they have an effect and an impact in the countries they belong. All we can do, and I believe we should do, is to keep working, to keep bringing cases, to get better at working on them. These cases are valid and effective vehicles for hope and change in those countries in their search for justice. Their national recent history has left these countries are at a delicate stage. There is a lot of work still to do. International human rights litigation in national courts plays an important role to empower civil society and

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[5] *Case 12.132. Ernestina and Erlinda SERRANO CRUZ v. EL SALVADOR. February 23, 2001*
[6] *J. Doe v. Saravia, No. Civ. F-03-6249*

[7] *Chavez v. Carranza No. Civ. 03-2932*

through the search for justice, directly contribute to the strengthening of their democratic institutions and states.

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