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GUATEMALA

The refusal to grant the extraditions requested by Spain for crimes under international law

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Table of contents

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INTRODUCTION

Amnesty International has for many years been deeply concerned about the prevailing human rights situation in Guatemala. Although the internal armed conflict which took place there for over 30 years ended over a decade ago, its consequences are still to a certain extent being felt.

To gain some idea of the scale of the armed conflict, readers should note that the *Comisión para el Esclarecimiento Histórico de las Violaciones a los Derechos Humanos (CEH)*, Commission to Clarify Past Human Rights Violations[1] - set up under the auspices of the United Nations – estimated that over 200,000 people were killed or "disappeared". Of the cases recorded by the CEH, 83 per cent of the victims were Mayan and 17 per cent of mixed race. State forces and paramilitary groups associated with them were responsible for 93 per cent of the violations documented by the CEH, including 92 per cent of the arbitrary killings and 91 per cent of "disappearances". The Commission also concluded that the counter-insurgency operations carried out between 1981 and 1983 amounted to acts of genocide against groups of the Mayan people in certain areas of the country. The systematic use of torture and rape was also widely documented.

As regards the victims, the CEH concluded that the state deliberately exaggerated the military threat posed by the insurgency, thus explaining why the vast majority of the victims of state action were not combatants from guerrilla groups but civilians. Other victims included opposition politicians, trades unionists, church activists, land and indigenous activists, women activists, and human rights defenders.[2]

1 Established thanks to the Agreement concluded between the Guatemalan Government and the *Unidad Revolucionaria Nacional Guatemalteca*, Guatemalan National Revolutionary Unity, on 23 June 1994 in Oslo.
2 Guatemala: All the truth, justice for all, Amnesty International, AI index: 34/02/98, April 1998.

The Commission also documented 626 massacres, most of which entailed the disappearance of whole hamlets (*aldeas*) and the deaths of many women and children.[3]

Armed opposition forces were also responsible for several massacres, murders, acts of torture, the taking of hostages and other serious human rights abuses.

For its part, the Office of the United Nations High Commissioner for Refugees said that the internal armed conflict led to the displacement of over one million people, 200,000 of whom fled to Mexico.[4]

Nevertheless, very few trials have been held in Guatemala to clarify the circumstances surrounding the commission of such crimes and find those responsible for them. As far as Amnesty International is aware, only around 20 people, clearly a very small number, have been convicted for crimes committed during the armed conflict and none of them held a senior post or were in a position of command at the time the offences took place.

In December 2007, the *Corte de Constitucionalidad de la República de Guatemala*, the Constitutional Court of the Republic of Guatemala ("the Court" or "the Constitutional Court"), handed down a ruling revoking several provisional arrest warrants, issued pending an extradition request from Spain, for people allegedly responsible for crimes under international law was pending.[5] In doing so, the Constitutional Court interpreted the terms of the 1895 Extradition Treaty between the two states and other international obligations incumbent on Guatemala in a manner that is inconsistent with international law.

For reasons that will be explained below, the Court's decision reaffirms the impunity that prevails in Guatemala, masking it behind legal procedures against which there is no right of appeal. It has also ensured that the alleged perpetrators of appalling crimes – particularly those who were in positions of responsibility over those who actually carried out the crimes – will not be extradited to any other state or tried locally.

3 Guatemala: Memorias del Silencio, Chapter II, Vol. 3, *Las Masacres: La Violencia Colectiva Contra la Población Indefensa*, p.252, para. 3.
4 Guatemala: Displacement, Return and the Peace Process, United Nations High Commissioner for Refugees, 1995.
5 The use of "crimes under international law" in this document refers to genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial killings.

I. THE GUATEMALAN CONSTITUTIONAL COURT RULING OF 12 DECEMBER 2007

On 12 December 2007 the Constitutional Court agreed to accept an appeal (*recurso de apelación*) and an application for amparo lodged by Ángel Aníbal Guevara Rodríguez and Pedro García Arredondo against a decision handed down earlier by the *Sala Primera de la Corte de Apelaciones del Ramo Penal, Narcoactividad y Delitos contra el Ambiente*, First Chamber of the Appeals Court for Criminal Matters, Drug Trafficking, and Environmental Crimes. [6] The latter had in turn rejected an appeal against a decision by the *Tribunal Quinto de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente*, Fifth Court of Criminal Judgment, Drug Trafficking, and Environmental Crimes, which, in the context of an extradition request from Spain, had ordered the appellants and other interested parties to be remanded in custody. The ruling by the Constitutional Court meant that the orders authorizing the provisional detention of Guevara Rodríguez, García Arredondo and others were rescinded.

As for the legal proceedings which had led Spain to request the extradition of Guevara Rodríguez and García Arredondo, as well as José Efraín Ríos Montt, Oscar Humberto Mejía Victoria and Germán Chupina Barahona, it had stemmed from an action (*querella*) brought in Madrid in 1999 by relatives of victims of the armed conflict. The action was based on the provisions of the Spanish *Ley Orgánica del Poder Judicial (LOPJ)*, Organic Law on the Judiciary (Law 6/1985), article 23(4) which provides for universal jurisdiction over certain crimes. This means that states have the power and sometimes the obligation to investigate and try those responsible for crimes under international law, regardless of where the crimes were committed, the nationality of the victims or that of the alleged perpetrators.[7] This report will refer to this principle of international law on several occasions.

In the Constitutional Court ruling, the legal issue was summarized up as follows: "to determine the attribution of jurisdiction to the courts of the Kingdom of

6 The ruling is available on the Court's website: www.cc.gob.gt

7 Article 23(4) of the LOPJ (as quoted in Organic Law 13/2007 of 19 November, on the extraterritorial prosecution of the unlawful trafficking or clandestine immigration of persons (BOE No. 278 of 20 November 2007) reads as follows: "Spanish jurisdiction shall also be competent to try acts committed by Spaniards or foreigners outside of national territory that can be classed under Spanish criminal law as one of the following offences:
a) Genocide.
b) Terrorism.
c) Piracy and the unlawful seizure of aeroplanes.
d) Forgery of foreign currency.
e) Offences related to prostitution and those related to the corruption of minors or those who are incompetent.
f) Unlawful trafficking of psychotropic, toxic or narcotic drugs.
g) Unlawful trafficking or clandestine immigration of persons, whether or not they are workers.
h) Those related to female genital mutilation, as long as those responsible are in Spain.
i) And any other which, according to international treaties or conventions, should be prosecuted in Spain." [Unofficial translation]

Spain with regard to the alleged deeds of a criminal nature of which the applicants and other citizens who are of Guatemalan origin and reside within the territory of the Republic of Guatemala are accused, events which are also said to have occurred within this territorial area [Guatemala]".[8] Such a determination, said the Court, "would also enable it to understand and make a decision with regard to the violation of the right to a fair trial, specifically the right to be heard by the appropriate judge (*juez natural*)".[9]

In short, the granting of extradition would depend on whether or not the jurisdiction of the Spanish courts to investigate and prosecute crimes committed in Guatemala in the context of the armed conflict was recognized.

As explained below, the main arguments regarding jurisdiction in the judgment are fundamentally flawed.

II. THE MAIN ARGUMENTS PUT FORWARD IN THE RULING AND A CRITIQUE OF THEM

a) The interpretation of the Extradition Treaty

The Constitutional Court said that, despite the age of the treaty, which dates from 1895, its obligatory character for the states parties must remain intact. It went on to add that it "[s]hould be subjected to analysis with regard to the institutions in place at the time which, based on the principle of good faith, were the ones which the signatory states ought to bear in mind as far as their obligations were concerned and examined with regard to any guarantees of a fundamental nature that might affect the people [concerned] as well as those of an organic nature that preserve the right of states to equal sovereignty".[10]

The Court's premise with regard to how the treaty should be interpreted is juridically unfounded and is not in keeping with the obligations incumbent on Guatemala under international law.

In fact, the Vienna Convention on the Law of Treaties,[11] to which both Guatemala and Spain are parties, provides a general rule on interpretation.[12] That

8 See p.15, last paragraph of the ruling, on the site mentioned above.
9 Last line of p.15 and first paragraph of p. 16 of the ruling.
10 Pages 17 and 18 of the ruling.
11 Vienna Convention on the Law of Treaties, adopted on 22 May 1969 (1155 U.N.T.S. 331, 8 I.L.M. 679). Entry into force: 27 January 1980. Ratified by Guatemala on 21 July 1997. Spain became a party to it on 16 May 1972.
12 Anthony Aust, Modern Treaty Law and Practice, Cambridge University Press,2004, p.186.

general rule, according to the International Court of Justice, reflects customary international law on the matter.[13] The rule specifies that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[14]

The Inter-American Court of Human Rights, when explaining how the 1948 American Declaration on the Rights and Duties of Man should be interpreted, said that:

> As the International Court of Justice said: "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation…" That is why the Court finds it necessary to point out that to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.[15]

For its part the European Court of Human Rights likewise remarked that the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms was an instrument that should be interpreted in the light of the prevailing conditions and not solely according to the intentions of those who originally signed it.[16]

Several examples of flawed interpretation of the Extradition Treaty and other treaty obligations, leading the Court to reach an erroneous conclusion that is in breach of Guatemala's obligations under international law, are discussed below.

b) Territoriality and the offences covered by the Extradition Treaty

13 International Court of Justice, *Case concerning the: Territorial Dispute (Libyan Arab Jamahiriyaichad)*, Judgment of 3 February 1994, p.41. Available in English and French at: www.icj-cij.org/docket/files/83/6897.pdf
14 Article 31(1), Vienna Convention on the Law of Treaties.
15 Inter-American Court of Human Rights, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Arcticle 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89 of 14 July 1989, para. 37.
16 European Court of Human Rights, *Loizidou v. Turkey* (Preliminary objections), Application No.15318/89, Judgment, Strasbourg, 23 March 1995, para.71 ("That the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law (...) It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago").

In its ruling, the Constitutional Court went on to reproduce several different provisions of the Extradition Treaty of 7 November 1895 between Spain and Guatemala which, according to its interpretation, would only be recognized as applicable in the case of jurisdiction founded on the principle of territoriality and solely for the offences listed in the treaty. According to the Court, the treaty only empowered the contracting parties, Guatemala and Spain, to call for the extradition of nationals of those countries who were responsible for criminal acts defined in the treaty that had taken place solely on territory under their own jurisdiction and who had sought refuge in the other country (for example, a Guatemalan responsible for a criminal act that occurred in Guatemala who later takes refuge in Spain). According to the Constitutional Court, there was "no explicit reference [in the treaty] allowing it to be understood that either of the two states parties can have jurisdiction to try criminal acts that occurred on the sovereign territory of the other party".[17]

Such an interpretation, which the Court claimed was based on a literal reading of the treaty and the supposed wishes of those who signed it in 1895, is contradicted by the terms of the treaty itself, because the treaty includes the crime of piracy, a crime which, by definition, can only be committed outside the territory of any state and has been subject to universal jurisdiction for centuries.[18]

International treaty law imposes a series of obligations on Guatemala which have broadened the scope of the Extradition Treaty as regards the crimes covered in article II as well as its geographical application. None of this is mentioned by the Constitutional Court, perhaps because of the mistaken methodology used to interpret the scope of the treaty.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),[19] to which both Guatemala and Spain are parties, after recalling in the preamble that genocide is a crime under international law, contrary to the spirit and aims of the United Nations, states that:

17 Page 18 of the ruling.

18 The Extradition Treaty itself includes piracy in its list of crimes (art.II, 20). It is well known that this crime, as first established by custom and later codified in treaty instruments, can only be committed on the high seas, in waters that are not under the jurisdiction of any State, and is subject to universal – and not territorial – jurisdiction by all States. See Convention on the Law of the Sea, Montego Bay, 1982, arts.101 and 105 (Guatemala has been a State party since 11 February 1997). See also: L.A. Podestá Costa & José María Ruda, Derecho Internacional Público, TEA, Buenos Aires, pp. 545 and 546; R. Jennings & Arthur Watts, Oppenheim's International Law, Ninth Ed., Vol.I, p.746; and Antonio Cassese, International Criminal Law, Oxford, p.24.

19 Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948. Entry into force: 12 January 1951, in accordance with article XIII. Guatemala deposited the ratification instrument on 13 January 1950 and Spain acceded to it on 13 September 1968.

> The Contracting parties pledge themselves [...] to grant extradition in accordance with their laws and treaties in force.[20]

The phrase "in accordance with their laws and treaties in force" can only, in line with the general principles of international law, refer to the obstacles that exist in some national constitutions with regard to the extradition of nationals or the application of the death penalty by the requesting state. A leading expert on the Genocide Convention although being of the view that there were two exceptions to the obligation to extradite, made it clear that neither would apply to an extradition request like the Spanish one in this case.[21]

From this it can be inferred that, thanks to the obligations that derive from this treaty instrument, which is binding on both Guatemala and Spain, the crime of genocide, despite not being listed in article II of the Extradition Treaty, in principle obliges the parties to grant any extraditions requested. This treaty provision, which was not mentioned in the ruling of 12 December, should have been taken into account by the Court when laying out the normative framework applicable to the case, thereby leading it, through having taken an exclusively literal and out of context view of the bilateral treaty and forgotten its object and purpose, to wrongly reject its application.

For its part, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)[22] states in article 8(1) that:

> The offences referred to in article 4 [torture] shall be deemed to be included as extraditable offences in any extradition treaty existing between States parties.

This provision is binding on both Guatemala and Spain as states parties to the Convention. And with regard to the alleged territoriality of the Extradition Treaty, article 8(4) of the Convention against Torture broadens *ipso facto* its geographical scope by unequivocally stating that:

20 Article VII.

21 William A. Schabas, Genocide in International Law, Cambridge University Press, 2000, pp. 402-404, which reads as follows: "Suggesting the phrase 'in accordance with their laws and treaties in force' goes so far as to allow absolute discretion in the extraditing State is inconsistent with the *travaux préparatoires* and has the consequence of depriving article VII of any *effet utile*".

22 Approved and proposed for signature and ratification or accession by the General Assembly in its resolution 39/46 of 10 December 1984. Entry into force: 26 June 1987, in accordance with article 27 (1). Guatemala acceded on 5 January 1990 and Spain on 21 October 1987.

> Such offences shall be treated, for the purpose of extradition between states parties, as if they had been committed not only in the place in which they occurred but also in the territories of the states required to establish their jurisdiction in accordance with article 5, paragraph 1.

From this it follows that the Court, even while wrongly upholding the territoriality of the Extradition Treaty, could not have been unaware of the treaty obligation to broaden its application to cover the cases of extraterritoriality envisaged with regard to torture. Furthermore, the Convention also states that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with internal law", thereby confirming the lawfulness and validity of the exercise of universal jurisdiction on the part of Spain as far as the crime of torture is concerned.[23]

Similarly, article 8(1) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents[24] states that "[t]o the extent that the crimes set forth in article 2 [a murder, kidnapping or other attack upon the person or liberty of an internationally protected person] are not listed as extraditable offences in any extradition treaty existing between states parties, they shall be deemed to be included as such therein".

The Convention also provides that, for the purposes of extradition between states parties, a crime shall be treated as having been committed not only in the place where it occurred, but also in the territories of the states that are obliged to establish their jurisdiction, thereby including Spain. This Convention, to which both Guatemala and Spain are parties, is applicable to the extradition request in question as far as the events relating to the attack on the Spanish Embassy in Guatemala City are concerned and is specifically cited in the extradition request submitted by the Spanish Judge Santiago Pedraz. From the above, it can be clearly inferred that this treaty broadened the material and geographical scope of the 1894 Extradition Treaty.

The Court said nothing in its ruling about the application of this Convention to the extradition request.

Along similar lines to the above, the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity (1973), after establishing that all states have the right to try

23 Convention against Torture, article 5 (3).
24 New York, 13 December 1973. Guatemala deposited the ratification instrument on 18 January 1983 and Spain did so on 8 August 1985.

their own nationals, thereby enshrining the extraterritorial jurisdictional principle of active personality, states in crystal clear terms that:

> War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.[25]

The Principles also add that states shall cooperate bilaterally and multilaterally to halt and prevent war crimes and crimes against humanity and shall take the domestic and international measures necessary for that purpose. Finally, they state that "[i]n that connection, states shall cooperate on questions of extraditing such persons".[26]

United Nations General Assembly Resolution 2840 (XXVI) two years earlier had urged "all states to cooperate in particular in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity".[27]

Likewise, principle 18 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) provides that:

> Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.[28]

Furthermore, both Guatemala and Spain have signed the International Convention for the Protection of All Persons from Enforced Disappearance. Although neither has yet ratified this Convention, both are obliged not to defeat its object and purpose pending a decision on ratification. The Convention states that:

25 General Assembly Res.3074 (XXVIII), 3 December 1973, article 1.
26 Article 5.
27 Resolution of 18 December 1971, Question of the punishment of war criminals and of persons who have committed crimes against humanity. See also Res. 2712 (XXV) and 2583 (XXIV).
28 Recommended by the Economic and Social Council in Resolution 1989/65 of 24 May 1989, Principle 18.

> The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between states parties before the entry into force of this Convention.[29]

Given the above, it follows that the Constitutional Court, when addressing the issue, should have considered, not only the provisions of the 1895 Extradition Treaty, but also those of other treaties that are binding on Guatemala. It should have also borne in mind the content of various declarations adopted by the international community with regard to the prosecution of crimes under international law. By not doing so, it clearly failed to broaden the material and geographical scope of the Treaty to include other crimes under international law and jurisdictions not specifically spelled out within it but which are nevertheless mandatory.

The Guatemalan Constitution itself states in broad terms that "[e]xtradition is governed by the terms of international treaties".[30]

It should also be noted that the Court failed to recognize that other treaties and customary international law empower Spain and all other states to extend their jurisdiction beyond their own territory in the case of crimes under international law. We shall look at this particular point in greater depth later.

In short, a correct application of international law – not confined to a literal reading of the Extradition Treaty – would have required the Court to make a very different ruling, one that was in line with the obligations incumbent on Guatemala in this regard. By so doing, it would have been able to set out the true scale and scope of territoriality from the perspective of international law, as the Permanent Court of International Justice did in 1927 in the *Lotus* case.

> Though it is true that in all systems of law the principle of the territorial character of international law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the state which adopts them, and they do so in ways that vary from state to state. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.[31]

29 Article 13 (2). The Convention was adopted by the UN General Assembly on 20 December 2006, A/RES/61/177. Guatemala became a signatory on 6 February 2007 and Spain on 27 September of the same year. The Convention has still not entered into force.
30 Article 27. [AI translation.]
31 S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No.10.

c) The non political nature of crimes involved

i. The outdated concept of crimes of a political nature

The Constitutional Court said that "[a]s regards the nature of the offences attributed to Guatemalans which took place in the Spanish Embassy and of those affecting Spanish citizens (,) they are undoubtedly related to offences of a political nature". It based this assertion on a statement by the Spanish trial judge who, when describing the events that were the subject of the judicial investigation being carried out, said that "[t]he acts that are the subject of the complaint are chronologically confined to the period of war which ravaged Guatemala for thirty-six years".

The conclusion of the Court is not correct under international law.

If, as the Spanish judge said and the Constitutional Court repeatedly maintained, the conflict that took place in Guatemala was a non-international armed conflict, then a substantial portion of the crimes committed during it necessarily amounted to war crimes. Similarly, these and other crimes were part of a widespread as well as systematic attack on the civilian population and, therefore, may amount to crimes against humanity. In many instances such crimes were acts intended to destroy in whole or in part the Maya community and, therefore, may amount to genocide. However, these were not political offences or offences related to them. The category of offence to which the Court refers, of which it neither gives a definition or spells out the legally enforceable consequences, is not a category of offence covered by international law and cannot be legitimately used to interpret a bilateral treaty.

The Constitutional Court also stated that, given that the crimes for which the Spain was seeking extradition were political offences or offences related to them, particularly those that took place during the attack on the Spanish Embassy in Guatemala, they were governed by the provisions of Article 27 of the Guatemalan Constitution,[32] thus exempting Guatemala from the obligation to extradite. And it was on these grounds that it refused to grant the extradition request in that case as well as others.

32 Article 27 reads: "Right of asylum. Guatemala recognizes the right of asylum and grants it in accordance with international practice. Extradition is governed by the provisions of international treaties. Extradition for political offences shall not be sought in the case of Guatemalans who, under no circumstances, shall be handed over to a foreign government, other than as provided in treaties and conventions concerning crimes against humanity or those against international law. The expulsion from national territory of political refugees to the country pursuing them shall not be granted." [Amnesty International translation]

Some of the international treaties to which Guatemala is a party and the obligations it has assumed as a result are discussed below.

For example, article VII of the Genocide Convention, which, as has already been pointed out, is binding on both Guatemala and Spain, states that:

> Genocide and the other acts enumerated in article III [acts that constitute genocide] shall not be considered as political crimes for the purpose of extradition.

Article 1 of the Convention also states that the contracting parties confirm that genocide, "whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". Other international instruments that are binding on Guatemala also prohibit it from considering crimes under international law to be political offences.[33]

Similarly, the Inter-American Convention on the Forced Disappearance of Persons states that:

> The forced disappearance of persons shall not be considered a political offense for purposes of extradition.[34]

The International Convention for the Protection of All Persons from Enforced Disappearance, of which both Guatemala and Spain are signatories, is similarly clear in stating that:

> For the purposes of extradition between states parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone. [35]

33 For example, although the crime it defines does not apply in this case, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* establishes the following: "Acts enumerated in article II of the present Convention [inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them] shall not be considered political crimes for the purpose of extradition". Article XI. Guatemala has been a party since 15 June 2005.
34 Inter-American Convention on the Forced Disappearance of Persons, adopted in Belem do Pará, Brazil, on 9 June 1994. It entered into force on 28 March 1996, in accordance with Article XX of the Convention. Guatemala deposited the ratification instrument on 25 February 2000.
35 Article 13(1).

From the above it can be concluded that international law expressly refuses to allow crimes under international law to be considered as political offences or offences related to them.[36]

ii. The prohibition on extradition under the Constitution

Given the obligations established under international law and accepted by Guatemala, the prohibition laid down in Article 27 of the Guatemalan Constitution – which, incidentally, excludes the provisions of treaties and conventions concerning crimes against humanity and crimes under international law – does not apply. This should have been stated by the Constitutional Court in its ruling.

As a state party to the Vienna Convention on the Law of Treaties, Guatemala has recognized that international law has primacy over all local legislation, including its Constitution. As has been rightly said, a state's domestic law should not be a means of evading implementation of a treaty and thus any responsibility that may derive from it.[37]

Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary law,[38] specifies that:

36 For example, Article 517 (2) (e) of the new Peruvian Code of Criminal Procedure specifies that: "Extradition shall not take place, similarly (,) If the offence is exclusively military, against religion, political or related to such, press-related or one of conscience. The fact that the victim of the punishable act in question may exercise public duties is not in itself sufficient justification for the offence to be called political. Nor does the act become political if the person to be extradited exercises political duties. Also outside of the consideration of political offences are acts of terrorism, crimes against humanity and offences with regard to which Peru has assumed an international treaty obligation to extradite or bring to trial". [Amnesty International translation.] A similar provision is contained in the Netherlands' International Crimes Act, which states that the crimes punishable under it - genocide, crimes against humanity and war crimes – shall not be considered political offences for the purposes of extradition (Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), section 12). The Irish law giving effect to the Rome Statute of the International Criminal Court makes similar provision (*Section 3: Amendment to the Extradition Act 1965.* This section amends section 11 of the Extradition Act 1965 by providing that offences under the Geneva Conventions Act 1962 as amended and offences under the current Act are not to be regarded as political offences for the purposes of extradition), as does Art. III(3) of the resolution passed by the Institut de Droit International at its 1983 session, New Problems of Extradition ("Acts of particularly heinous character, such as acts of terrorism, should not be considered political crimes").

37 Annemie Schaus, in *Les Conventions de Vienne sur le droit des traités: commentaire article par article*, Olivier Corten & Pierre Klein (dir.), Brussels, Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006, article 27, p.1121. Francisco Villagrán Kramer also said that "[w]hat is important is that, when complying with the *pacta sunt servanda* rule, the domestic legal order should allow international commitments to be discharged and neither obstruct nor impede the application of the relevant rules of international law". *Derecho de los Tratados*, 2002, p.76. [Amnesty International translation.]

38 Annemie Schaus, supra, p.1124 ("*Le principe de l'impuissance du droit interne à justifier la non-exécution d'un traité, telle que contenue à l'article 27, reflète en tout état de cause le droit international coutumier"*).

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Strikingly, the Constitutional Court also failed to point out in its ruling, which contains numerous references to the Vienna Convention on the Law of Treaties, that, when becoming a party to it, Guatemala made several reservations to it, including one concerning Article 27. In that reservation Guatemala said it recognized that international law had primacy solely with regard to secondary and ordinary Guatemalan legislation, specifically excluding its Constitution, which would therefore retain primacy over the former.

It should be said that several states have commented on that reservation, objecting to it and declaring that it had no legal validity whatsoever, but nevertheless not seeing it as an obstacle to the entry into force of the Convention between them and Guatemala, though without Guatemala benefiting from the reservation.[39]

Furthermore, Guatemala's failure to comply with Article 27 of the Vienna Convention has caused it to be the subject of an observation by the Human Rights Committee which, with regard to the supposed primacy of the Constitution, warned that:

> The Committee is concerned about the State party's claim that the principles of the Constitution prevent it from giving effect to the provisions of the Covenant and, for example, about the fact that personal jurisdiction has been maintained

39 See, for example, the objections made by Austria ("Austria is of the view that the Guatemalan reservations refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention]. Austria therefore objects to these reservations. This objection does not preclude the entry into force of the [said Convention] between Austria and Guatemala"); Belgium ("The reservations entered by Guatemala essentially concern general rules laid down in the [said Convention], many of which form part of customary international law. These reservations could call into question firmly established and universally accepted norms. The Kingdom of Belgium therefore raises an objection to the reservations"; Denmark ("It is in the common interest of States that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. The Government of Denmark therefore objects to the aforesaid reservations made by the Government of Guatemala to [the said Convention]"); Finland ("In addition, the Government of Finland considers the reservation to article 27 of the Convention particularly problematic as it is a well-established rule of customary international law. The Government of Finland would like to recall that according to article 19 c of the [said] Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted"); Sweden ("The Government of Sweden therefore objects to the aforesaid reservations made by the Government of Guatemala to the [said] Convention. This objection does not preclude the entry into force of the Convention between Guatemala and Sweden. The Convention will thus become operative between the two States without Guatemala benefiting from this reservation") and the United Kingdom ("The Government of the United Kingdom object to the reservation entered by Costa Rica in respect of article 27 and reiterate their observation in respect of the similar reservation entered by the Republic of Guatemala.")."

> for members of the military and some rights of members of indigenous communities are not being recognized.

In summary, the Constitutional Court should have recognized in its ruling that the crimes for which Spain was seeking extradition constituted, according to both custom and treaties, crimes under international law which always entail the obligation to extradite or prosecute. The Court should have also recognized that, from the viewpoint of international law, the provision contained in Article 27 of the Constitution cannot excuse Guatemala from fulfilling its treaty obligations.

In short, the decision of the Constitutional Court also fails to comply with Guatemala's obligations under the Vienna Convention on the Law of Treaties.

d) The irrelevance of Spain's role as a sponsor of the Peace Accord and thus its duty to refrain from exercising jurisdiction in the matter

In chapter VI of its ruling, the Constitutional Court set out its views on the three decades of armed conflict that Guatemala suffered and stated that the route chosen to end it was the establishment of various peace accords between the opposing forces. These accords were sponsored and also encouraged, as the Court said, by several different foreign states, including Spain. Of particular significance was the Agreement on a Firm and Lasting Peace of 29 December 1996, which was the culmination of all earlier ones and put an end to over three decades of armed conflict.

In its ruling, the Court maintained that the support provided by the Spanish Government throughout the entire negotiating process resulting in the Peace Accord and at the time of its signing implied recognition of the overall validity of the accords. It added that:

> Thus, believing that the Spain, as a body, bore witness to the coming of peace and reconciliation to this part of Central America and applying to the case the provisions of article 7 of the Vienna Convention on the Law of Treaties, which indicates the undeniable international representativeness of its Government, it is evident that the Judiciary of that Kingdom has, with regard to Guatemala, failed to comply with fundamental aspects of the Agreements on a Firm and Lasting Peace (...)

This statement by the Constitutional Court has absolutely no basis in law.

First, the Agreement on a Firm and Lasting Peace, concluded between the Guatemalan Government and the *Unidad Revolucionaria Nacional Guatemalteca*

(URNG), Guatemalan National Revolutionary Unity, is not a treaty under international law and thus does not establish obligations under it. Article 2(1) of the Vienna Convention on the Law of Treaties clearly states that "'treaty' means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Clearly the *Unidad Revolucionaria Nacional Guatemalteca* is not a state and does not have the capacity to enter into treaties. For similar reasons, under the Vienna Convention on the Law of Treaties between states and International Organizations, [40] the URNG cannot assume the status of an "international organization" and thereby have the power to enter into treaties.

Second, given that Spain is not a party to the Peace Agreement, which clearly states that only the Government of the Republic of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* are the ones making the agreement,[41] it has not assumed any obligations of a legal nature. In this respect, the Vienna Convention on the Law of Treaties states that "[a] treaty does not create either obligations or rights for a third state without its consent".[42]

It thus becomes clear that the Court was wrong to assert that the "Judiciary of that Kingdom has, with regard to Guatemala, failed to comply with fundamental aspects of the [Peace] Agreements", none of which, furthermore, were specified by the Court. The situation is quite the contrary since the Peace Agreement seems to be imbued with a spirit that is diametrically opposed to the one indicated by the Court. For example, paragraph 4 of the Agreement establishes that: "[t]he Guatemalan people are entitled to know the full truth about the human rights violations and acts of violence that occurred in the context of the internal armed conflict".

In another section of the ruling, the Court specifically states the following with regard to the Agreement on a Firm and Lasting Peace: "Upon completion of the historic negotiating process in the search for peace by political means, the Government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca* wish to place on record their gratitude for the national and international efforts that have contributed to the conclusion of the Agreement on a Firm and Lasting Peace... They also express appreciation for the support provided by the Group of Friends of the Guatemalan Peace Process, consisting of the Republic of Colombia, the United Mexican States, the Kingdom of Norway, the Kingdom of Spain, the United States of America and the Republic of Venezuela".[43]

40 Doc. A/CONF.129/15. Vienna, 21 March 1986. Not yet in force.
41 Preamble, para. 7.
42 Article 34.
43 Paragraph 17.

It is illogical to conclude from this that Spain – which is not even a signatory of the Agreement – had assumed the duty to refrain from its obligation, under international law, to investigate and prosecute those responsible for crimes under international law, such as genocide, crimes against humanity, war crimes, torture, the forced disappearance of persons and extrajudicial killings. To conclude that Spain's "support" for the peace process, as mentioned in the Agreement, gives rise to an obligation not to exercise its criminal jurisdiction when international law expressly empowers it to do so is just wishful thinking that has no basis whatsoever in law.

Simply as an example, it should be recalled that the Special Court for Sierra Leone settled a case very similar to this one. An appeal by the defence of the accused, *Morris Kallon* and *Brima Bazzy Kamara*, claimed that the *Lomé* Agreement which brought the hostilities between the opposing forces in that country to an end constituted an international treaty – given that it had also been signed by the representative of the UN Secretary General and several heads of state as guarantors – indicated its true nature in law. The Special Court, after recognizing that peace agreements between opposing forces in the same state are always backed or encouraged by other states or by international organizations as moral guarantors or mediators, held that the *Lomé* Agreement, signed between the Government of Sierra Leone and representatives of the *Revolutionary Armed Front* (RUF), was governed by the local law of Sierra Leone and that it could not give rise to obligations pertaining to international law. It pointed out that the insurgent group which entered into the Agreement - the *RUF* – was not the representative of a state and the agreement in question could not therefore be equated to an international treaty. It noted that there were no legal obligations whatsoever arising from the role of guarantor.[44]

From the above it can be concluded that the Agreement on a Firm and Lasting Peace does not give rise to any legal obligations whatsoever for Spain. Furthermore, nothing can exempt Spain from its duty to bring those responsible for crimes under international law to justice.

e) "Unilateral" exercise of universal jurisdiction by Spain

On several occasions the Constitutional Court stated that Guatemala had not delegated to Spain its jurisdictional powers with regard to the investigation and prosecution of crimes committed on its territory against Guatemalan and, in some cases, Spanish

44 SCSL, Case No.SCSL-2004-15-AR72(E) and Case No.SCSL-2004-16-AR72(E), para. 40 ("Almost every conflict resolution will involve the parties to the conflict and the mediator or facilitator of the settlement, or person or bodies under whose auspices the settlement took place but who are not at all parties to the conflict, are not contracting parties and who do not claim any obligation from the contracting parties or incur any obligation from the settlement").

nationals.[45] It also several times described the exercise of jurisdiction by Spain as "unilateral". Finally, on several occasions it stated that, even if Spain could exercise universal jurisdiction as a general rule, it could not do so in this case because Guatemala had not consented to that exercise and Guatemala retained the power whether or not to comply with decisions adopted by Spain's Judiciary since both were sovereign states on an equal footing.

In particular, the Constitutional Court sought to justify the supposed exclusive jurisdiction of the Guatemalan courts in circumstances in which the Convention on the Prevention and Punishment of the Crime of Genocide only allows genocide to be punished by the courts in the state on whose territory it was committed, or by an international criminal court whose jurisdiction has been recognized by the contracting parties, which does not apply in the case of Guatemala. It then went on to discuss the supposed territoriality of other offences, that is, that the other offences could only be tried by the state in whose territory they had been committed.

It is noteworthy that the Court failed to cite either the jurisprudence of numerous national and international courts or scholarship that overwhelmingly indicate that all states can exercise universal jurisdiction in the case of crimes under international law.

In this regard, the International Court of Justice said, in the *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide*, that the rights and obligations enshrined in the Convention are rights and obligations *erga omnes* and that states' obligation to prevent and punish the crime of genocide is not territorially limited by it.[46]

Back in 1961, the Jerusalem District Court said the following in the *Eichmann* case:

> It is the consensus of opinion that the absence from this Convention of a provision establishing the principle of universality (together with the failure to constitute an international criminal tribunal) is a grave defect in the Convention, which is likely to weaken the joint effort for the

45 For example, on page 23 the Court said that: "It is clear that the Kingdom of Spain, through its judicial organs, is not competent to use the Extradition Treaty to request the handing over of citizens of Guatemalan origin, living in the country, for alleged offences committed on Guatemalan territory in breach of the Guatemalan criminal justice system". See also pp. 32 and 55 of the ruling.

46 *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, para. 1 ("It follows that the rights and obligations enshrined by the Convention are rights and obligations erga omnes. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention").

> prevention of the commission of this abhorrent crime and punishment therefore, but there is nothing in this defect to lead us to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question. It is clear that the reference in Article VI to territorial jurisdiction, apart from the jurisdiction of the non-existent international tribunal, is not exhaustive[47]

A quarter century later a Federal court in the United States concluded, with regard to Israel's jurisdiction to try *John Demjanjuk*, that "some crimes are so universally condemned that the perpetrators are enemies of all people. Therefore any nation which has custody of the perpetrators may punish them according to its law".[48]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) pointed out in the *Furundzija* case that torture may not be covered by a statute of limitations and that if committed, every state is entitled to investigate and prosecute those responsible before its own courts if it does not choose to extradite them.[49]

The International Criminal Tribunal for Rwanda (ICTR) said in similar terms: "[T]he Tribunal wishes to emphasize, in line with the General Assembly and the Security Council of the United Nations, that it encourages all states, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law…".[50]

The UN International Law Commission, when adopting the Draft Code of Crimes against the Peace and Security of Mankind in 1996, provided the following: "Without prejudice to the jurisdiction of an international criminal court, each state party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17 [genocide], 18 [crimes against humanity], 19 [crimes against United Nations and associated personnel] and 20 [war crimes], irrespective of where or by whom those crimes were committed…".[51]

The Appeals Chamber of the Special Court for Sierra Leone, established pursuant to the Agreement between the United Nations and the Government of Sierra Leone, found that "[t]he crimes mentioned in Articles 2-4 of Statute of the Special

47 *Attorney General of Israel v. Eichmann*, 1968, 36 ILR 5 (District Court, Jerusalem), para.25.
48 *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir.1985), cert. denied, 475 U.S. 1016 (1986).
49 ICTY, Trial Chamber, *Prosecutor v. Anto Furundzija*, 10 December 1998, paras. 156 and 157.
50 *Prosecutor v.Ntuyahaga*, Decision on the Prosecutor's Motion to withdraw the Indictment, Case No.ICTR-98-40-T, Trial Chamber I, 18 March 1999.
51 International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, 1996, Article 8.

Court [crimes against humanity, violations of Article 3 common to the Geneva Conventions and Additional Protocol II, and other serious violations of international humanitarian law] are international crimes entailing universal jurisdiction".[52]

The 2005 Basic Principles and Guidelines on the Right to a Remedy (van Boven/Bassiouni Principles) state that:

> [W]here so provided in an applicable treaty or under other international law obligations, states shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction...[53]

Similarly, scholarship has recognized that, although the Genocide Convention does not expressly envisage universal jurisdiction, it can nevertheless clearly be inferred from its text, context, drafting history, purpose and aim that all states have the right to exercise it.[54] Along similar lines, for example, M. Cherif Bassiouni maintains that "recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statute of limitations for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war)".[55]

Likewise, the study carried out by the International Committee of the Red Cross of customary international humanitarian law concluded that "[s]tates have the right to vest universal jurisdiction in their national courts over war crimes".[56] The study further points out that that rule is also supported in practice by treaties. It also notes that, as

52 Special Court for Sierra Leone, Case No.SCSL-04-15-PT-141, 25 May 2004, p.7.
53 Resolution 60/147 approved by the General Assembly on 16 December 2005.
54 For example, Eric David in *Principes de Droit des Conflits Armés*, deuxième edition, Bruylant, Brussels, 1999, p.666 ("*La Convention se limiterait-elle donc à ne prévoir qu´une compétence territoriale? Ce serait priver la Convention d´une grande partie de sa portée et de son utilité. En réalité, cette restriction ne signifie pas que d´autres Etats ne peuvent connaître de l´infraction: elle confère simplement une compétence prioritaire au tribunal de l´Etat où le crime a été comis, mais elle n´exclut pas la compétence d´autres Etats*"); William A. Schabas, in Genocide in International Law, Cambridge University Press, 2000, p.367 ("State practice, opinio juris, international and domestic judicial decisions and academic writing all suggest an increasing willingness to accept universal jurisdiction and to go beyond the terms of Article VI of the Convention"); Bruce Broomhall in International Justice and the International Criminal Court, Oxford, 2003, p.112 ("The best that can be said with certainty is that customary law allows a permissive exercise of universal jurisdiction over genocide, crimes against humanity, and some war crimes, and may be evolving towards mandatory one").
55 M. Cherif Bassiouni, en "Represión Nacional de las Violaciones del Derecho Internacional Humanitario", Comité Internacional de la Cruz Roja, 1998, p.30.
56 Customary International Humanitarian Law, Jean-Marie Henckaerts and Louise Doswald-Beck, Cambridge, Vol.I, p.604, Rule 157. For its part, the Institut de Droit International concluded in 2005 that the exercise of universal jurisdiction is primarily based on custom and, secondly, on multilateral treaties (Krakow session, 2005, Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, art.2).

far as war crimes known as "grave breaches" are concerned, the most serious category of war crime, the exercise of universal jurisdiction is not a power but an obligation.[57]

In conclusion, it can be confirmed that international law authorizes – and in some cases obliges – Spain to exercise universal jurisdiction over crimes under international law committed in Guatemala and the Constitutional Court's refusal to grant the extraditions that were sought under the pretext that the wrongs that gave rise to them were political offences or offences related to them is, given what has been said above, unjustified.

f) Flawed claim that sovereignty and honour preclude the exercise of jurisdiction by Spain

On page 32 of its ruling, the Constitutional Court said that it is unacceptable that "[a] state should unilaterally issue a judgment against another state concerning elements of such enormous significance as national sovereignty (and even honour)". This was a reference to a ruling handed down on the Guatemalan case in 2005 by the Spanish Constitutional Court, in which it concluded that there was already at that time serious and reliable evidence of a failure on the part of the Guatemalan courts to take action to investigate and prosecute the crimes under international law that had been committed there, thus justifying the supplementary exercise of jurisdiction by Spain.[58]

Once again, the Constitutional Court has completely ignored international law. In fact, international treaty law often forces states to make a value judgment about the effective exercise of, and respect for, human rights in another state and, in doing so, inevitably includes an assessment of how the courts in that state exercise their jurisdiction. Guatemala, for example, is obliged, under the provisions of the Convention against Torture not to expel, return or extradite a person to another state when there are substantial grounds for believing that he or she would be in danger of being subjected to torture.[59] The UN Declaration on the Protection of All Persons from Enforced Disappearance contains a similar prohibition when a person might be a victim of that crime in another state.[60] It goes on to add that "[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into

57 Customary International Humanitarian Law , p.606 ("The right of States to vest universal jurisdiction in their national courts over war crimes in no way diminished the obligation of States party to the Geneva Conventions and States party to Additional Protocol I to provide for universal jurisdiction in their national legislation over those war crimes known as 'grave breaches'.")

58 For a detailed critique of Spanish jurisprudence on the principle of universal jurisdiction prior to May 2005, see: Amnistía Internacional, España: El deber de respetar las obligaciones de derecho internacional no puede ser eludido, AI Index: EUR 41/003/2005. Available at: http://www.amnesty.org/es/library/asset/EUR41/003/2005/es/UoQR-aTV-3IJ

59 Article 3.

60 Article 8 (1), UN GA Res. 47/133, 12 February 1993.

account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights".[61] Guatemala is also obliged, under the provisions of the Convention relating to the Status of Refugees, not to expel or return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[62]

Making such determinations in all cases will inevitably oblige the state to make value judgments with regard to respect for human rights in another state which will sometimes include doing so with regard to the way in which fundamental human rights are protected by the courts in the state making the request. As we have said, it is a treaty-based obligation.

It should also be noted that the judgment by the Spanish Constitutional Court was not an isolated event and that international courts and various bodies within the UN system have taken a similar view.

The Inter-American Court of Human Rights said in the case of *Carpio Nicolle v. Guatemala* that:

> [t]he Court considers that, during the domestic proceedings in this case, there was continual obstruction of the investigations by state agents and the so-called "parallel groups" in power, and also a lack of diligence in conducting the investigations, all of which has signified that, to date, there is total impunity with regard to the facts that occurred on July 3, 1993... All this has been accompanied by constant threats and intimidation of the next of kin, witnesses and members of the judiciary.[63]

The Committee against Torture has expressed its concern regarding:

> "[t]he continuing existence of impunity for offences in general and for human rights violations in particular, as a result of repeated dereliction of duty by the government bodies responsible for preventing, investigating and punishing such offences. Impunity exists for most of the violations

61 Article 8 (2).
62 Convention relating to the Status of Refugees, Article 33 (1). Adopted on 28 July 1951. Entry into force: 22 April 1954. Guatemala acceded to it on 22 September 1983.
63 Inter-American Court of Human Rights, Case of Carpio-Nicolle *et al.* v. Guatemala, Judgment of November 22, 2004 (Merits, Reparations and Costs), para. 78.

committed during the internal armed conflict and those committed after the Peace Agreements were signed".[64]

In 2001, the Human Rights Committee said the following:

> "The Committee is disturbed that the absence of a state policy intended to combat impunity has prevented the identification, trial and punishment of those responsible for violations of article 6 and the payment of compensation to the victims. The Committee is concerned that delays in and the shortcomings of legal procedure and the failure of the authorities to comply with the decisions and orders of the courts have strengthened the perception by the public that justice is not being done".[65]

The UN Special Rapporteur on Racism said in 2005 that:

> "[t]here are numerous cases of violations of the human rights of indigenous peoples during the armed conflict which have not received sufficient attention from the justice system, with the result that the guilty parties remain unpunished".[66]

In 2006, the Committee against Torture again said that:

> "[t]he Committee is concerned with the impunity that persists regarding most of the human rights violations committed during the internal armed conflict, with over 600 massacres documented by the Historical Clarification Commission still to be investigated".[67]

In 2007 the UN Working Group on Disappearances said:

> "The Working Group wishes to reiterate and emphasize again the existing gap between the advanced legal framework and good political will to bring to justice cases of disappearances, versus the actual results. The Working Group took note with great concern that, to date, there has not been one

64 Concluding observations of the Committee against Torture: Guatemala, A/56/44, 6 December 2000, para. 73(b).
65 Concluding observations of the Human Rights Committee, Guatemala, CCPR/CO/72/GTM, 27 August 2001, para. 12.
66 Report by Mr. Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mission to Guatemala, E/CN.4/2005/18/Add.2, 11 March 2005, para. 32.
67 Conclusions and recommendations of the Committee against Torture, Guatemala, CAT/C/GTM/CO/4, 25 July 2006, para. 15.

person convicted for the commission of the crime of enforced disappearance".[68]

Amnesty International has also called attention on numerous occasions to the absolute impunity enjoyed by those allegedly responsible for serious violations of human rights and international humanitarian law.[69]

All these statements concur in pointing out the impunity enjoyed in Guatemala by those responsible for crimes under international law.

III. CONCLUSIONS

As a result of the Guatemalan Constitutional Court ruling, people suspected of having committed the most appalling crimes will not be extradited to Spain as requested by the latter or, given the practice – so far – as pointed out by various bodies within the UN system and the Organization of American States, subjected to an independent and impartial trial in Guatemala.

Amnesty International believes that the judgment handed down by the Constitutional Court fails to comply with Guatemala's obligations under international law. If the Court had been taken those obligations into account in its ruling, another – very different – decision would have been reached.

Amnesty International believes that, furthermore, the ruling significantly reinforces the impunity that has prevailed in that country for many years.

IV. RECOMMENDATIONS

With the purpose of ensuring that both past and future human rights violations are investigated and the perpetrators punished, whatever post or official position they may hold, Amnesty International makes the following recommendations, namely:

68 Report of the Working Group on Enforced or Involuntary Disappearances, Mission to Guatemala, A/HRC/4/41/Add.1, 20 February 2007, para. 93.

69 See Guatemala: Guatemala's Lethal Legacy: Past Impunity and Renewed Human Rights Violations, AMR 34/001/2002, 28 February 2002; Guatemala: Memorandum to the Government of Guatemala: Amnesty International's concerns regarding the current human rights situation, AMR 34/014/2005, 20 April 2005; Guatemala: No protection, no justice: killings of women in Guatemala, AMR 34/017/2005, 9 June 2005; Guatemala: Open Letter from Amnesty International to Guatemalan Presidential Candidates for the September 2007 Elections, AMR 34/020/2007, 29 August 2007; Guatemala: Submission to the UN Universal Periodic Review: Second session of the UPR Working Group, 5-16 May 2008, AMR 34/001/2008, 25 January 2008.

- The Guatemalan judiciary must be able to exercise its jurisdiction in an impartial and independent manner, without granting privileges or immunity to any individual or group of individuals.

- The Guatemalan Constitutional Court should reconsider its ruling of 12 December 2007 and grant the extraditions sought by Spain for crimes under international law.

- If the Constitutional Court does not reverse its judgment of 12 December 2007, Guatemala should amend the current extradition law or enact new extradition law removing all obstacles to extradition of persons suspected of crimes under international law, except safeguards necessary to guarantee the human rights of suspect.

- The Guatemalan judiciary should – as standard practice – grant any extraditions requested of it by other states for crimes under international law, unless there is a well-founded risk that those facing extradition may be subjected to torture or other forms of cruel, inhuman or degrading treatment or punishment, or to the death penalty.

- Guatemalan should recognize the jurisdiction of the International Criminal Court by accepting the Rome Statute of the International Criminal Court of 17 July 1998.

- Guatemala should urgently ratify the International Convention for the Protection of All Persons from Enforced Disappearance, enact effective implementing legislation and recognize the competence of the Committee on Enforced Disappearances.