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Méndez and Tinajero-Esquivel: The Cavallo Case: A New Test for Universal Jurisdiction

by Juan E. Méndez and Salvador Tinajero-Esquivel*

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Law 23.492, or Punto Final, passed in December 1986, foreclosed such prosecutions not initiated within 60-days after its promulgation. The result was a race to the courts by victims, and by the end of that period, more than 400 suspects faced indictments. Tensions erupted in April 1987 when many junior officers, fearing prosecution, revolted in what is known as the carapintuda uprising. Following this incident, Congress passed Law 23.521, or Obediencia Debida, which established that any officer not commanding a territorial division or sub-division (essentially colonels or under), would be presumed juris et de jure (by irrebuttable presumption) to have acted in ignorance of the illegality of the orders to kill or torture suspects. Because of his rank, Ricardo Miguel Cavallo was a beneficiary of the Obediencia Debida.

The twin operation of these laws forced prosecutors to drop criminal charges against most officers. Less than 30 generals, and their equivalents in other forces, in addition to those already serving sentences as a result of the two earlier trials, remained unaffected by the amnesty laws. In 1989 and 1990, Alfonsín’s successor, Carlos Saul Menem, compounded the cycle of impunity by issuing pardons to those generals, whether still under prosecution or already serving sentences.

Modifications of Immunity Laws

In 1996, following the revelations of a defector from ESMA about the practice of throwing captives alive into the sea, the Argentine Supreme Court validated an interpretation of treaty obligations regarding crimes against humanity, and allowed lower courts to entertain petitions under the theory of a “right to truth.” As a result, there are now ongoing investigations in several jurisdictions, with broad civil society and bar association participation, attempting to complete the CONADEP report and the trials of the 1980s. Particular attention is being given to the gathering of more proof on the fate and whereabouts of the desaparecidos (disappeared).

More importantly, in March 2001, in a case regarding the appropriation of babies (Case No. 8686/2000), Federal Judge Gabriel Cavallo declared the Obediencia Debida and Punto Final laws unconstitutional as applied to the facts of the case. Judge Cavallo found these laws contrary to Argentina’s treaty obligations regarding crimes against humanity and ordered the prosecution of those who had appropriated the children of two disappeared persons, not just for the appropriation of babies, but also for the kidnapping and presumptive murder of their parents. This judgment may open the door for new prosecutions in Argentina. Unfortunately, this interpretation of the law is rather limited not only because it applies solely to the facts of this particular case, but also because the Supreme Court has appellate review.

Action Taken by the Spanish Courts

The unavailability of justice in Argentina, due primarily to the immunity laws of the 1980s and the presidential pardons of 1988 and 1989, prompted victims and relatives of victims to file a case before the Juzgado Central de Instrucciones No 5 of the Audiencia Nacional, a criminal court in Madrid, Spain, under Judge Baltazar Garzón in 1996. The case is based on Spain’s criminal jurisdiction law, Article 23, Ley Orgánica del Poder Judicial de España (Organic Law of the Judicial Power of Spain), as amended in the 1980s. The law includes one of the most sweeping norms of universal jurisdiction, and opens the doors of Spanish courts to victims of massive and egregious abuse in other lands, provided that in those other lands they have been unable to obtain justice.

During Garzón’s investigation into the human rights abuses in Argentina, Cavallo’s name appeared often. Garzón consolidated Cavallo’s investigation and others with a parallel case against Pinochet when he obtained evidence of illegal coordination between Southern Cone security forces under Operation Condor. Operation Condor consisted of a well-established plan of repression involving the security forces of Argentina, Brazil, Chile, Paraguay, and Uruguay, whose most enthusiasticponent was the Chilean dictator. Judge Garzón indicted several individuals accused of crimes against humanity committed in Argentina during the dictatorship. Although Cavallo’s name figured in the investigations since July 1998, a warrant was not issued until August 2000 when he was spotted by some of his victims while living in Mexico.

The Extradition Process in Mexico

Ricardo Miguel Cavallo arrived in Mexico in early 2000 as a representative of TALSUD, an Argentine firm that had won a bid to manage a new program established by the Mexican government to organize the National Registry of Vehicles (RENAVE). In Mexico, the RENAVE program was controversial, because it required an additional payment for owning a vehicle, in addition to placing information regarding all vehicles in private hands.

Within this discussion about RENAVE, on August 24, 2000, the Mexican newspaper Reforma published an investigation about Cavallo and his military past in Argentina. In the same article, the newspaper reported that many victims of the Argentine repression had recognized Cavallo as the person in charge of the clandestine center where they were detained and, in some cases, as the one who had directed the torture against them. After Reforma disclosed the real identity of the person it called Miguel Angel Cavallo, Cavallo denied being Miguel Angel, and claimed his name was Ricardo Miguel. Cavallo also denounced the article as part of a campaign against RENAVE, arguing that obscure mafias would invent stories just to stop the program. He boarded a flight to Argentina the next day, explaining that he intended to clarify the situation regarding his name. The International Criminal Police Organization (INTERPOL) detained him when the plane stopped at the airport in Cancún, Mexico, just before leaving for Buenos Aires.

Cavallo was detained in Cancún without an arrest warrant issued by any court, pursuant to Article 16 of the Mexican Constitution. Article 16 empowers the public prosecutor to detain a person for up to 48 hours without a warrant when there is suspicion of commission of a grave crime and well-founded expectation of a risk of escape. After the publication of the Reforma
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The judge also held that *Obediencia Debida* and *Punto Final* are contrary to the spirit of the legal rules recognized by the international community and therefore grants of amnesty for such crimes are prohibited.

for the crimes of genocide and terrorism, but not for torture because the statute of limitations created by the Mexican legislature had expired with regard to the alleged torture. The decision is a very important precedent in the application of universal jurisdiction and represents the first time that a Mexican tribunal has accepted the validity of this concept. The judge decided that the Spanish court had jurisdiction based on Article 23 of the Organic Law of Judicial Power of Spain, enacted to prosecute certain crimes regardless of the territory in which they were committed.

The decision relies on Spanish and Mexican constitutional law as well as international law. The judge applied international law using the same rationale as the British House of Lords in the *Pinochet* case, relying on treaties signed and ratified by Spain, Mexico, and Argentina, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), and the International Covenant on Civil and Political Rights (ICCPR). The judge determined that the Spanish prosecution had met the requirement of international law of jurisdiction and represents the first time that a Mexican tribunal had jurisdiction based on Article 23 of the Spanish law, enacted after the alleged commission of the crimes.

The Extradition Hearing

On January 11, 2001, the Sixth District Judge in Criminal Matters of the First Circuit, a Mexican federal court, issued his opinion regarding Cavallo’s extradition to Spain. In an over 700-page judgment (Resolution 5/2000), Judge Jesus Guadalupe Luna Altamirano decided that the extradition should proceed.

Analysis of the Argentine Amnesty Laws

One of the most important issues decided by Judge Luna was the validity of the Argentine amnesty laws, *Obediencia Debida* and *Punto Final*. The judge determined that these laws have no legal effect internationally because they are contrary to international conventions binding State Parties. In particular, the amnesty laws are contrary to the principles enshrined in such international treaties as the Convention on the Prevention and Punishment of the Crime of Genocide, the Inter-American Convention to Prevent and Punish Torture, the Convention against Torture, and the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance. These treaties oblige States Parties to punish the perpetrators of the crimes forbidden by the treaty. For example, the Convention Against Torture requires a State Party to prosecute an individual who has committed or participated in torture (Article 6). Under the rationale of this decision, laws granting amnesty to perpetrators of torture or other crimes included in the above-mentioned treaties violate international law because they prevent authorities from prosecuting these criminals.

Judge Luna also held that *Obediencia Debida* and *Punto Final* are contrary to the spirit of the legal rules recognized by the international community; therefore, grants of amnesty for such crimes are prohibited. He concluded that the norms of international law that impose an affirmative obligation to investigate, prosecute, and punish these alleged crimes are *jus cogens* (peremptory norms that do not recognize any opposing normative limitation). Therefore, international law does not protect persons accused of these crimes from the jurisdiction of the international community.

Retroactivity Analysis

In his defense, Cavallo argued that the Spanish universal jurisdiction law was enacted after the alleged commission of the crimes and that consequently, Mexico could not extradite him for crimes that pre-date the Spanish law. In addressing the allegation of illegal retroactivity—the prohibition of *ex post facto* criminal legislation—the Mexican judge ruled that Spanish Courts are competent to hear the case and that the non-*ex post facto* rule does not apply because already existing international treaties prohibited the crimes before the defendant allegedly committed them. Furthermore, the judge held that jurisdictional laws are procedural, not substantive, and that the rule of non-retroactivity does not apply to rules of procedure. Citing past Mexican jurisprudence, the judge ruled that it was not a valid argument to deny the extradition of Cavallo on the grounds that the Spanish jurisdictional law was enacted after the alleged commission of the crimes.

The decision of the District Judge was essential in recognizing the principle of universal jurisdiction in Mexico. Unfortunately the decision did not go far enough because it decided against extradition for the crime of torture on the grounds that the statute of limitations regarding this charge had expired. The decision is in error insofar as the indictment categorized torture as a crime against humanity and therefore no statute of limitations should apply.

The Decision of the Foreign Affairs Ministry and the Inclusion of Torture Charges

In Mexico, the decision of a judge to grant or deny extradition is not binding on the executive branch. According to Articles 29 and 30 of the *Ley de Extradición Internacional* (International Extradition Law), the Ministry of Foreign Affairs ultimately decides whether the extradition should take place, taking into account existing treaties, the judicial record, the legal opinion of the judge, and prudential considerations in the conduct of foreign policy. On February 2, 2001, Mexican Foreign Secretary Jorge Castañeda decided that in the present case, the extradition of Ricardo Miguel Cavallo should proceed for the crimes of genocide and terrorism as well 

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as torture, despite the previous decision of the judge that the latter crime was subject to statutory limitations.

Castañeda’s decision is a correct interpretation of the rationale of Judge Luna. In addressing the Argentine impunity laws, Judge Luna held that the international community must not recognize internal provisions, such as amnesties or other laws designed to impede international justice, because the interests of the international community in general, and of the victims of the crimes in particular, transcend any particular or national interest of a State. The same reasoning applies to laws that impose statutes of limitations based on the passage of time, like the Mexican law that allows statute of limitations to run for torture. There might be a conflict if the rules that impose a statute of limitations were set in the constitution. Statutory limitations, however, are not contemplated in the Mexican constitution, but are provided for only in secondary laws such as the criminal code (Articles 100 to 115). Thus, the provision of Article 6 of the Convention Against Torture creating the obligation to prosecute or extradite (aut dedere aut judicare) when an alleged torturer is under the jurisdiction of a State Party preempts the secondary internal rule that Judge Luna applied.

In addition, Mexico signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on July 3, 1969, years before the alleged commission of Cavallo’s crimes. This Convention provides in Article 1 that no statutory limitation shall apply to war crimes or crimes against humanity irrespective of the date of their commission. Under Article 18 of the Vienna Convention on the Law of Treaties, Mexico has an international obligation not to defeat the object and purpose of the treaty. In the present case, the object and purpose of the Convention on the Non-Applicability of Statutory Limitations is to punish such crimes regardless of internal rules on statutory limitations and irrespective of the date of their commission. Here, torture fits under the rubric of crimes against humanity and, as such, no statutory limitations apply. Fortunately, the Ministry of Foreign Affairs amended the mistake of the Judge Luna, avoiding Mexico’s potential breach of its international obligations.

The Amparo or Habeas Corpus Proceedings

After the decision of the Ministry of Foreign Affairs, Ricardo Miguel Cavallo filed a writ of habeas corpus against this decision before another federal judge. In Mexico, habeas corpus is contemplated under the broader writ of amparo, which applies to any decision of an administrative agency that may affect a constitutional right. In the Cavallo case, the amparo proceedings before the federal district court are currently pending, and it will likely go to the Supreme Court if it considers the case of institutional importance.

It is important to note that habeas corpus or amparo proceedings in Mexico are not an appeal against previous decisions; instead they constitute independent trials to review the constitutionality of administrative acts—in this case the extradition decision. The importance of this lies with the fact that the Supreme Court is called upon to decide whether the extradition process was done in accordance with the Mexican constitution. In this case, the issues raised by constitutional standards are intimately related to the manner of incorporation of international treaty obligations into domestic law. Thus, the eventual outcome of the Cavallo case in Mexico will have enormous repercussions as a matter of constitutional, international, and even comparative law. The ultimate fate of Cavallo lies in the federal courts’ decision. All of us should stay tuned.

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21, and 25 of the American Convention. The Commission asked the Inter-American Court to order Nicaragua to pay reparations to the Awas Tingni in accordance with Article 63.1 of the Convention. Under this article, if a State is found responsible for violating the Convention, the Inter-American Court may order the State to take any and all measures to ensure the negative consequences of the violation are redressed. In the Awas Tingni case, the Commission asked that Nicaragua be required to demarcate the territorial boundaries of its indigenous populations and to abstain from granting licenses allowing the use or removal of natural resources from the Awas Tingni land until the precise demarcation has taken place.

As part of Nicaragua’s restitution to the Awas Tingni, the Commission requested that the government provide compensation, both material and moral, for the suffering the community experienced as a result of the State’s actions. The Commission also requested the State pay for the legal expenses incurred by the Awas Tingni to defend themselves in Nicaragua, before the Commission, and before the Inter-American Court.

The Importance of this Case

This is a landmark case in the Inter-American System for the Promotion and Protection of Human Rights. It is the first case brought before the Inter-American Court concerning the rights of an indigenous population. It is appropriate that the first such case should examine the property rights of an Indian group because the very culture and existence of the Indian community depends upon the land on which they reside.

This case is also important because it shows the value of the Inter-American System as an avenue to debate (and hopefully settle) very important and complex legal matters. Nicaragua participated fully in the proceedings, showing the vitality of the Inter-American System’s framework. Also, Nicaragua’s active participation renders illegitimate any later non-compliance with the Inter-American Court’s decision by the government. For the Awas Tingni, this case also opens up the possibility to achieve justice and to establish principles that will help not only their community, but also establish precedent for future cases involving the rights of indigenous peoples.

The Commission expects a ruling from the Inter-American Court on the case of Awas Tingni v. Nicaragua by the end of 2001.

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