

THE DUTY TO PROSECUTE HUMAN RIGHTS VIOLATIONS
BEFORE THE SUPREME COURT OF MEXICO*
*LA OBLIGACIÓN DE PROCESAR VIOLACIONES DE DERECHOS
HUMANOS ANTE LA SUPREMA CORTE DE JUSTICIA
DE LA NACIÓN*

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RESUMEN: En el presente artículo el autor explora los casos en que la Suprema Corte de Justicia de la Nación de México ha resuelto casos derivados de la obligación internacional de los Estados de procesar violaciones a los derechos humanos y crímenes internacionales. En particular se analizan los casos González y Cavallo en los que se fijó postura en torno a la jurisdicción universal; la interpretación de la Convención Interamericana sobre Desaparición Forzada de Personas, en particular en lo que corresponde a la declaración interpretativa formulada por México en la que se le pretendía dar efectos prospectivos al tratado y el caso Echeverría, por el que se pretendió procesar a este ex presidente por genocidio, en ampliación de la Convención sobre Imprescriptibilidad de Crímenes de Lesa Humanidad y Crímenes de Guerra. Con base en estos casos, se llega a la conclusión de que la postura de la judicatura es ambivalente y poco clara.

Palabras clave: obligación de procesar, derechos humanos, Suprema Corte.

ABSTRACT: *In this article the author explores different cases taken before the Supreme Court of Mexico, in which the duty to prosecute human rights violations and international crimes are at its core. In particular, the González and Cavallo cases are analyzed, in these the High Court established its position regarding the universal jurisdiction principle. The Court also interpreted the Interamerican Convention on Forced Disappearance, in particular Mexico's ex post facto declaration. In the Echeverría Appeal the Court had to deal with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity with regard to the trial of this former president for genocide charges. Based on these cases, the conclusion is that the position of the Supreme Court is ambivalent.*

Descriptors: *duty to prosecute, human rights, Supreme Court.*

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SUMARIO: I. *Introduction*. II. *Duty to prosecute human rights violations*. III. *Tlatelolco Case: the obligation to prosecute (international) crimes*. IV. *The González Case: a first approach to universal jurisdiction*. V. *Cavallo Case: the current approach to universal jurisdiction*. VI. *The Inter-American Convention of Forced Disappearance of Persons*. VII. *The Echeverría Appeal*. VIII. *Conclusion*.

I. INTRODUCTION

Several cases regarding International Criminal Law have reached the Supreme Court of Mexico (SCM) in recent years. The object of this paper is to evaluate the approach taken by the country's High Court in comparison to modern understandings on this field and to expose those not familiar with these holdings to their reasoning.

The chosen approach will look at cases that have been heard by the SCM, regarding distinct and still controversial issues in International Criminal Law, which have a common theme: the duty to prosecute human rights violations. This obligation can be very controversial, especially regarding its exact scope. Therefore, in order to establish an objective basis for comparison, the SCM holdings will be measured against the American Convention on Human Rights (ACHR) and its interpretation by the Inter-American Court of Human Rights (Inter-American Court). Thus the first part of this article will establish the Inter-American understanding of this obligation.

The second part of this paper will consider the cases in turn. The first case to be examined by the SCM will be the Tlatelolco Case in which the First Chamber ordered the Prosecutor's Office to investigate the alleged massacre that took place in Tlatelolco Plaza in 1968. Secondly, two cases involving universal jurisdiction will be analysed. The González Case which is an early decision of the First Chamber of the SCM in which universal jurisdiction principle was recognised (although not in the Mexican legal system) as early as 1932. This is a precedent of a more notorious, and certainly more recent decision of the SCM, the Cavallo Case, where Miguel Cavallo (an Argentine army officer) was extradited to Spain on charges of genocide, torture and terrorism; where Spain based its jurisdiction on its national law which implements universal jurisdiction. Thirdly, the Forced Disap-

pearance Case where the SCM was called to interpret the Inter-American Convention on Forced Disappearance of Persons (ICFDP) regarding issues of retroactivity and statute of limitations. Fourthly, the Echeverría Appeal which dealt on a concrete application of these issues will be analysed.

II. DUTY TO PROSECUTE HUMAN RIGHTS VIOLATIONS

In the case of those states party to the ACHR the obligation to prosecute human rights violations derives from Article 1(1), as interpreted by the Inter-American Court. While the text of this precept does not have any obvious criminal connotations, in Velásquez Rodríguez the Inter-American Court stated that “States must prevent, investigate and punish any violation of the rights recognized by the Convention”.¹

Any doubts as to the prosecutorial nature of this *dictum* have been superseded by more recent cases where it has been clarified that ‘punish’ means criminal sanctions.² The leading case which dealt with this issue is *Barrios Altos*, where the Inter-American Court looked at the self-amnesty laws in Peru and determined that they were meant “to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.³ Consequently, legal obstacles of this nature are violations of the duty to prosecute human rights violations.

In Trujillo Oroza, which dealt with the inability of Bolivia to prosecute for the forced disappearance of the victim, the Inter-American Court reaffirmed the need to combat impunity for human rights vio-

¹ Case Velásquez Rodríguez *vs.* Honduras. Judgment of July 29, 1988. Series C. No. 4, para.166.

² See Werle, Gerhard, *Principles of International Criminal Law*, Netherlands, TMC Asser Press, 2005, pp. 62 y 63. This has been affirmed by the European Court and the UN Human Rights Committee.

³ Case Barrios-Altos *vs.* Perú. Judgment of March 14, 2001. Series C, No. 75, para. 41.

lations as a way to comply with the ACHR.⁴ It is also important to note that the decision emphasised that the application of statute of limitations was one of the reasons why the criminal proceedings had been ineffective.⁵

This proposition would seem to be at odds with the Inter-American Convention on Forced Disappearance of Persons, which was applied in this case, since this treaty does not contain an absolute bar on statutes of limitations for this crime. Article VII does mention that statutes of limitation do not apply to this crime. However, in a second paragraph it mentions that “if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party”.

This paragraph was not considered in the Inter-American Court’s decision, but should be taken into account in the overall scheme regarding the duty to prosecute.

The matter of statute of limitations was also considered in the Bulacio Case, which dealt with the extrajudicial execution of the victim. The Inter-American Court’s *dictum* mentioned that these national provisions could be an obstacle for the implementation of obligations under international law and, consequently, a violation of the *pacta sunt servanda* principle. If statute of limitations constitutes an obstacle for the compliance of the ACHR or the judgments thereof, then the human rights would be devoid of effective protection.⁶

This overall duty to prosecute was reaffirmed in Almonacid Arellano where it was found that the victim had been subjected to an extrajudicial execution during the first months of the Pinochet regime, in the context of a widespread persecution of political oppo-

⁴ See Case Trujillo-Oroza *vs.* Bolivia. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C, No. 92, para. 101.

⁵ *Ibidem*, para. 104.

⁶ See Case Bulacio *vs.* Argentina. Judgment of September 18, 2003. Series C, No. 100, para.117.

nents, in what was considered a crime against humanity.⁷ While the Inter-American Court limited its holding to the question of amnesties, it based its decision on the General Assembly's proposition that crimes against humanity must be prosecuted regardless of the place and time of commission;⁸ a proposition that could be interpreted as allowing for universal jurisdiction in these cases.⁹ However, the applicability of universal jurisdiction in these cases is still unclear since no pronouncement on universal jurisdiction has officially been made by the Inter-American Court.¹⁰

In light of the above, the Inter-American Court has held that there is a general duty to prosecute human rights violations, such as forced disappearance, extrajudicial executions and torture, regardless of the procedural obstacles such as statute of limitations. This obligation seems to be limited to human rights violations which take place within the territory of the State concerned, despite *de dictum* in *Almonacid Arellano*.¹¹

⁷ See Case *Almonacid-Arellano et al. vs. Chile*. Preliminary objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C, No. 154, para.104.

⁸ *Ibidem*, para. 106.

⁹ Compare Case *Jorvic vs. Germany*, Application, 17 July 2007, paras. 68 y 69. Where the European Court of Human Rights upheld the State's law providing for universal jurisdiction.

¹⁰ While no majority opinion of the Inter-American Court has expressly upheld the use of universal jurisdiction, it is a recurring theme in the individual votes of Judge A. A. Cançado Trindade; see Case *Myrna Mack-Chang vs. Guatemala*. Judgment of November 25, 2003. Series C, No. 101, para. 10 (Judge Cançado-Trindade Opinion). "Said initiative has provided new impetus to the struggle of the international community against impunity, as a per se violation of human rights, by affirming and crystalizing the international criminal responsibility of the individual for said violations, thus seeking to prevent future crimes. Criminalization of grave violations of human rights and of international humanitarian law has, in our time, been expressed in the enshrinement of the principle of universal jurisdiction" (Citations omitted).

¹¹ See Case *Fairén Garbí y Solís Corrales vs. Honduras*. Judgment of March 15, 1989, Series C, No. 6, par. 161; see also Werle, Gerhard, *op. cit.*, nota 2, p. 65. The duty to prosecute within the triad human rights-duty of protection-duty to prosecute extends to human rights within the borders of the State of commission, since its sovereignty ends there.

III. TLATELOLCO CASE: THE OBLIGATION TO PROSECUTE (INTERNACIONAL) CRIMES

The case dealt with the complaint filed by a group of people who participated in the 2 October 1968 events in Tlatelolco Plaza, where a group of soldiers fired upon students who were protesting against a series of human rights violations by the government. The complainants considered that the actions of the military allegedly committed constituted genocide, kidnapping and abuse of power.¹² Since, the complaint was filed on 2 October 1998, the prosecutors considered that the charges had to be dismissed because the statute of limitations on genocide, which is the more serious of the crimes alleged, had expired. Thus the SCM was called to decide whether the Prosecutor's Office had a duty to investigate the alleged crimes.

Before solving this issue it is relevant to note that the SCM did not have original jurisdiction to consider this review since it did not involve the direct interpretation of the Political Constitution of the Mexican United States (Constitution). However, because of its 'interest and transcendence' its extraordinary jurisdiction to hear appeals directly from federal trial courts was evoked based on the believe that the case "dealt with facts that have historical transcendence in the conscience of the Mexican people, this alone is reason enough for the First Chamber of the Supreme Court to exercise its extraordinary jurisdiction to resolve this case".¹³

The SCM did not consider any aspects of International Law or International Criminal Law in its decision, but the outcome is relevant to these issues. It was noted that the statute of limitations varies depending on the crime. Therefore, although the charges were filed alleging specific crimes, it is the Prosecutor's duty to investigate the facts and to make a determination as to which crime (if any) will be prosecuted before considering whether the statute of limitations bars

¹² Amparo en Revisión 968/98, 30 January 2002, First Chamber, Resultando Segundo (On file with author).

¹³ *Ibidem*, considerando primero. "Hechos notorios respecto de los cuales han tenido tal trascendencia histórica en la conciencia del pueblo mexicano, que constituye razón suficiente, para que esta Primera Sala de la Suprema Corte de Justicia de la Nación discrecionalmente ejerza la facultad de atracción y conozca del asunto" (Author's translation).

prosecution. Consequently, the case should be fully investigated before a decision is made.¹⁴

While the legal aspects of the case did not involve the determination of certain issues such as the applicability of the statute of limitations on crimes against humanity or genocide, it was held that every criminal complaint has to be fully investigated by the authorities, especially where international crimes, such as genocide, are alleged.

The SCM held that following every complaint there must be an investigation, which may lead to prosecution. It is important to stress that this case was heard because of the possibility that international crimes were committed as evidenced by the historical significance that was highlighted in the decision. It is doubtful that the SCM would have heard the case if genocide was not charged.

Consequently, this case stands for the proposition that historical events which may lead to the prosecution of international crimes, like genocide, have to be investigated (although not necessarily prosecuted), regardless of procedural obstacles such as a statute of limitations. Thus, this decision is compatible with human right standards and international treaties which provide for prosecution of certain offences. Conversely, this case could also be cited for the argument that criminal prosecutions are acceptable mechanisms to deal with past events, thus undermining fact-finding procedures, such as truth commissions, which do not provide for criminal prosecutions.¹⁵

IV. THE GONZÁLEZ CASE: A FIRST APPROACH TO UNIVERSAL JURISDICTION

The recognition of universal jurisdiction by the SCM is truly remote. In 1932, the SCM considered a case in which embezzlement (*abuso de confianza*) charges were confirmed against a Mexican citizen, José Ramón González, allegedly committed against foreigners and

¹⁴ *Ibidem*, considerando décimo primero. "Es cierto que la prescripción de la acción penal se extingue por el simple transcurso del tiempo, pero para que opere, debe en primer lugar determinarse qué delito o delitos constituyen los hechos denunciados, para lo cual, necesariamente debe iniciarse un procedimiento penal, mismo que comienza con la apertura de la correspondiente averiguación previa".

¹⁵ See Werle, Gerhard, *op. cit.*, nota 2, pp. 65-70.

based on acts committed abroad.¹⁶ Among the issues the SCM had to consider whether the crime fell within the jurisdiction of the State of Campeche or whether it was a federal crime, based on article 6 of the Federal Penal Code which states that all crimes committed with a foreign element fall with the jurisdiction of the federal courts.

While the case did not revolve around any aspects linked to universal jurisdiction, the SCM felt it was necessary to give an overview of the principles which regulate the jurisdiction of States vis-à-vis other States. Thus it gave brief definitions of the territorial, active personality, passive personality and protective principles.¹⁷ However it also gave a definition of the universal jurisdiction principle:

Lastly, a principle inspired on a cosmopolitan criminal law, which has a tendency of been a system of absolute justice, considers punishable those acts that are committed in any place or against any person, regardless of who is the person affected, so long as the delinquent has not been sentenced elsewhere or is found within the territory of the State which can punish; this theory has already been limited by legislatures, by the recognition of impunity outside the relevant State, by only making criminal those acts which are considered so in the place where they were committed.¹⁸

While the SCM clearly stated the universal jurisdiction principle is not part of Mexican law.¹⁹ it did recognize its existence in academic circles and in some foreign laws. However, it also mentioned that this principle is severely limited by the *non bis in idem* principle, the presence of the accused in the territory of the State where the crime was committed and by a variant of the specificity principle, since the

¹⁶ Amparo penal en revisión 3647/31, First Chamber, 21 de julio de 1932 (On file with author).

¹⁷ *Ibidem*, considerando segundo.

¹⁸ *Idem*. “Por último, un sistema inspirado en el derecho penal cosmopolita, que tiende a ser instrumento de justicia absoluta, considera punibles aquellos actos que han sido cometidos en cualquier lugar o por cualquier persona, sea cual fuere el propietario del bien jurídico atacado, con tal de que el delincuente no haya sido castigado en el extranjero o se encuentre dentro del territorio del Estado que ejerza la represión; dicha teoría ha sido limitada, en la mayor parte de las legislaciones por el reconocimiento de la impunidad fuera de determinado Estado, de aquellos hechos que no son delitos sino en el lugar donde fueron cometidos”.

¹⁹ *Ibidem*, considerando tercero.

principle does not apply when the conduct is considered a crime only in the territory of its commission.

This case did not deal with human rights violations and it proposes a very restrictive view of that universal jurisdiction entails. In fact, the SCM went on to criticize this principle as too broad.²⁰ However, these statements in 1932 can be viewed as progressive. This case also deals with another issue which did not come to the forefront until the Cavallo Case.

V. CAVALLO CASE: THE CURRENT APPROACH TO UNIVERSAL JURISDICTION

This case dealt with the extradition of Miguel Cavallo, an Argentine navy officer accused of genocide, torture and terrorism in Spain, regarding events that took place during the military dictatorship in Argentina,²¹ in a clear example of an extradition request in order to exercise universal jurisdiction.²² For the purposes of International Criminal Law, the SCM made important decisions regarding the scope of the exercise of universal jurisdiction; which turned on two diverse issues: the principles of self-determination and non-intervention and the jurisdiction of the Spanish courts. Additionally, the SCM also considered the statute of limitations of all the crimes. These issues will be considered in turn.

Cavallo's defence argued that the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) contravened the principles of self-determination and non-intervention,

²⁰ *Ibidem*, considerando segundo.

²¹ Amparo en revisión 140/2002, 10 de junio de 2003, Tribunal pleno, resultando primero. Available at: [www.scjn.gob.mx/asuntos/2003/CAVALLOENGROSE\(X\).doc](http://www.scjn.gob.mx/asuntos/2003/CAVALLOENGROSE(X).doc).

²² Universal jurisdiction may be defined as the possibility of every state to prosecute crimes of international concern. See Benavides, Luis, "The Universal Jurisdiction Principle: Nature and Scope", *Anuario Mexicano de Derecho Internacional*, vol. 1, 2001, p. 26; Relva, Hugo, "La jurisdicción estatal y los crímenes de derecho internacional", *Revista Relaciones Internacionales*, núm. 20, 2001, p. 3; Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* 28 (2001), principle 1.

which are included in the Constitution,²³ which incorporated them from the United Nations Charter. Firstly, the SCM gave definitions of these principles. It considered that self-determination “is the right of the people to decide for themselves which political, economic and social organization they wish to adopt”.²⁴ On the other hand, non-intervention means “that no State shall intervene in the political, economic and social decisions of another State, so that the right to national sovereignty of each State can be exercised”.²⁵

Based on these definitions, the Genocide Convention does not contravene any of these principles, since its only goal is to reach cooperation among states party in the prosecution of this crime. This is evidenced by Articles V, VI and VII of the convention which refer to national law for the application of the convention, the establishment of territorial jurisdiction and extradition. Therefore, since the function of the Genocide Convention depends on national law, there can be no violation of the cited principles. Moreover, this international treaty establishes a system by which its implementation has to be balanced with the (constitutional) requirements of each State, according to Article V of the Genocide Convention.²⁶

²³ See Political Constitution of the Mexican United States (Constitution), art. 89, fracción X. Available at <http://200.38.86.53/PortalSCJN/MediosPub/PublicacionesSCJN/ConstitucionPolitica/ConstitucionPolitica.htm> (For an English version).

²⁴ Amparo en revisión 140/2002, *op. cit.*, nota 21, considerando décimo segundo. “Dicho principio consiste en el derecho de los pueblos a disponer de sí mismos, de manera interna para escoger la forma de gobierno que consideren conveniente y de manera externa o internacional como el derecho de los pueblos para pertenecer al Estado que elijan, presentándose también de manera negativa, como el derecho de libre determinación que tiene la población a la independencia, entendida como la imposibilidad de ser canjeada o cedida en contra de su voluntad, o de manera positiva, como la facultad que tiene la población a separarse del Estado a que pertenece, ya sea para incorporarse a otro o para formar un nuevo Estado”.

²⁵ *Idem.* “El principio... de no intervención estriba en la no intervención de un Estado sobre otros en las indicadas decisiones internas a fin de que pueda libremente y de manera pacífica ejercer su derecho como nación soberana”.

²⁶ *Idem.* “A virtud de dicha Convención se buscó la cooperación internacional para la prevención y sanción del delito de genocidio sin limitarse la autodeterminación de los pueblos, porque no se interfiere en las decisiones que éstos asuman sobre su organización política interna, puesto que en el artículo V de la propia Convención, se pactó que las partes contratantes se comprometían a adoptar con arreglo a sus respectivas Constituciones, las medidas legislativas necesarias para asegurar la aplicación de dicha Convención, mientras que en el VI se estableció que las personas

It was particularly important to the SCM that the Genocide Convention was an instrument designed to “prevent and sanction what is considered the heinous activity that has caused great losses to humanity”. Consequently, these foreign policy principles cannot be obstacles for the fight against genocide or any other international crime, especially those that involve human rights violations.²⁷

This argument is extremely important because there are a great number of international treaties that seek the collaboration of states in the prosecution of crimes such as torture and forced disappearance of persons. Therefore, these foreign policy principles, despite the fact that they have international recognition, cannot be an obstacle for the implementation of these treaties. In other words, some flexibility has to be afforded when international treaties designed to prosecute crimes which concern the international community are at odds with these principles.

The other aspect that was challenged dealt with the jurisdiction of the Spanish courts. Considering that universal jurisdiction was to be exercised, the SCM had to make a holding on this issue. In other words, granting the extradition request would mean consenting to Spain’s use of universal jurisdiction.

The SCM’s analysis started with the Constitution, which states that, the legal framework for extradition is made up of the Constitution, applicable international treaties and the Statute on International

acusadas de genocidio o de uno cualquiera de los actos enumerados en el artículo III serían juzgados por un tribunal competente del Estado en cuyo territorio el acto fue cometido, o ante el Tribunal Internacional que fuese competente respecto a aquellas de las partes contratantes que hayan reconocido su jurisdicción, y en el artículo VII se estableció que para los efectos de la extradición el genocidio y los otros actos enumerados en el artículo III no serían considerados como delitos políticos, comprometiéndose las partes contratantes a conceder la extradición conforme a su legislación y los tratados vigentes; normas con las cuales no se advierte que se afecte en algún aspecto los principios internacionales de no intervención y autodeterminación de los pueblos”.

²⁷ *Idem*. “La Convención para la Prevención y la Sanción del Delito de Genocidio, era un instrumento que buscaba la cooperación internacional para la prevención y sanción de lo que se consideraba un flagelo odioso que ha inflingido grandes pérdidas a la humanidad, como lo era el delito internacional de genocidio cometido tanto en tiempos de guerra como de paz, la misma no podía constituir un mecanismo que limitara la autodeterminación de los pueblos ni tampoco interfiriere en las decisiones que éstos asumieran sobre su organización política interna”.

Extradition. Therefore, it was deemed essential to look into these legal norms to determine if the Mexican authorities are obliged to evoke the jurisdiction of the State that seeks extradition before granting it.

The SCM decided that none of these legal instruments provided for such requirement. Moreover, in light of the principles of reciprocity and good faith among states, the extraditing State may trust that the person involved will be tried before a competent court. Additionally, it was argued that determining the jurisdiction of foreign courts, is an undue infringement on the sovereignty of the state that seeks prosecution, because Mexican courts would be applying foreign law, which they are not permitted to do. Moreover, it is for the Spanish courts to determine if they have jurisdiction over the crimes alleged once the trial starts, not within the context of the extradition proceedings.²⁸

The SCM added that only Article 10 of the Statute on International Extradition mentions something regarding the jurisdiction of foreign courts. It basically requires Mexico to ask for assurances that the person to be extradited will be judged before a competent and permanent tribunal and according to due process standards. Therefore, it is not required to question the jurisdiction of the extraditing court, only an assurance that this tribunal will have jurisdiction. Consequently, the jurisdiction of the Spanish courts was not considered in the decision.²⁹

This reasoning *de facto* allows for the use of universal jurisdiction, since the jurisdictional analysis (*compétence de la compétence*) is beyond the scope of the extradition process. Only if an emerging norm of international law forbids the exercise of universal jurisdiction, the states agree in extradition treaties (or protocols thereof) not to exercise it,

²⁸ *Idem*. “En el procedimiento de extradición a requerimiento de Estado extranjero, no es factible que las autoridades de México analicen la competencia del tribunal del país requirente, ya que de lo contrario sería necesario realizar un análisis o estudio de la legislación interna del país requirente, a fin de determinar la legalidad o ilegalidad de la determinación de competencia efectuada por el tribunal que emitió la resolución judicial con base en la cual se pide la extradición, vulnerándose con ello la soberanía del Estado requirente, porque se conculcaría la facultad de dicho tribunal para analizar esa cuestión cuando fuese oportuno en el proceso penal correspondiente”.

²⁹ *Idem*.

or the Statute on International Extradition is modified in the same way, will there be an obstacle in granting extradition to a state that wishes to exercise universal jurisdiction.

In conclusion, the importance of this line of reasoning is that states will have to look into their individual legal frameworks on extradition. If the jurisdiction of the requesting state need not be analysed or if no prohibition on the use of universal jurisdiction is found, then the extradition cannot be denied on this ground. This extends to crimes such as genocide where the duty to prosecute outside the borders is under dispute.³⁰ Conversely, if a state objects on the use of universal jurisdiction this should be stated in its legal framework, including its extradition treaties.³¹

This decision has another important consequence. The lack of objections presented by Mexico (not only based on this ruling but also on the grant of extradition by the Ministry of Foreign Affairs) can be interpreted as important *indicia* that an evolving rule of international customary law allowing for the exercise of universal jurisdiction is starting to form.³²

On this point the positions of the Inter-American Court and the SCM diverge. On one hand, the human rights tribunal has no clear position on the exercise of universal jurisdiction as a tool to prosecute human rights violations. On the other hand, the SCM has created a mechanism which allows for its use on foreign soil and arguably has contributed in ascertaining that it forms part of customary international law.

VI. THE INTER-AMERICAN CONVENTION OF FORCED DISAPPEARANCE OF PERSONS

On this case, the government of Mexico City challenged the constitutionality of the reserve and declaration that were added to the

³⁰ See Werle, Gerhard, *op. cit.*, nota 2, p. 64.

³¹ But see Cassel, Douglas, "Jurisdicción universal penal", *Iter Criminis*, México, núm. 1, 2005, pp. 39 y 40. Arguing that the importance of the decision is only one of result not jurisprudence.

³² See Ratner, Steven and Abrams, Jason S., *Accountability for Human Rights Atrocities in International Law. Beyond the Nuremberg Legacy*, 2a. ed., Great Britain, Oxford University Press, 2001, p. 168.

Inter-American Convention of Forced Disappearance of Persons (ICFDP) by the President and the Senate upon ratification. The reserve states that the jurisdiction of the military courts to try cases of forced disappearance should not be excluded, since this jurisdiction is expressly allowed by the Constitution.³³ The SCM did not reach this point because it found that Mexico City did not have standing to make this challenge.³⁴

However, it did analyse the declaration, which states that the ICFDP may not be applied retroactively, since this would be a violation of Article 14 of the Constitution, which recognises the principle of legality which contains an *ex post facto* clause. Mexico City argued that this was an obstacle on its criminal jurisdiction and ability to try this crime. This argument is based on the constitutional distribution of powers between the federal and state courts, which give the states primary jurisdiction over criminal matters.

The SCM admitted that Mexico's declaration was designed to give the ICFDP only prospective effects. However, it decided it was necessary to analyse the nature of the crime involved in relation to the time of commission; in other words, whether forced disappearance is a continuous crime or not. The relevance of this, rested on the fact that if a case of forced disappearance was committed prior to the convention's entry into force, but continued to be committed after the bar on the jurisdiction imposed on Mexico City, the city's courts would still be able to prosecute these cases.³⁵

To ascertain the nature of the crime the SCM looked at Article III of the ICFDP which expressly mentions that forced disappearance is

³³ Art. 13 of the Constitution of Mexico indicates that "military jurisdiction prevails for crimes and faults against military discipline; but under no cause and for no circumstance may military courts extend their jurisdiction over persons which are not members of the [a]rmed forces". See Constitution, *op. cit.*, nota 23.

³⁴ See Controversia Constitucional 33/2004, 29 June 2004, Tribunal Pleno, considerando séptimo (On file with the author). The SCM considered that the scope of the reserve, which only mentions that in certain cases forced disappearance of persons may be tried before military courts, does not exclude the criminal jurisdiction of the courts of Mexico City; therefore the reserve does not affect its interests.

³⁵ *Ibidem*, considerando octavo.

a continuous crime and the legal definitions provided by the Federal Penal Code to confirm this conclusion.³⁶

The Federal Penal Code defines permanent crimes as those which its “consummation takes place over a period of time”.³⁷

Thus it concluded that the authorities of Mexico City could prosecute cases of forced disappearance that take place after the ICDFP entered into force; those that were committed before this date, but continued to be committed afterwards; but cases that took place before were entirely barred.³⁸ The SCM added that a case of forced disappearance ceases to take place when the person is found (albeit death or alive).³⁹

It should be noted that this decision, taken by the SCM as ‘a whole’ was based on a previous resolution of the First Chamber, in an extraordinary appeal where the defendants, who at the time were members of several law enforcement agencies, were charged with the kidnapping of a civil rights activist in 1975. At the time, forced disappearance was not a crime, so the complaint was filed for kidnapping.⁴⁰ In that case, the Chamber reached a similar conclusion: kid-

³⁶ *Idem.*

³⁷ Federal Penal Code, art. 7, fracc. II. “El delito es... [p]ermanente o continuo, cuando la consumación se prolonga en el tiempo” (Author’s translation).

³⁸ Controversia constitucional 33/2004, *op. cit.*, nota 34. “Ahora bien, tomando en consideración que conforme al principio de irretroactividad de la ley que se ha explicado con anterioridad, las disposiciones contenidas en las leyes no se deben aplicar hacia el pasado, afectando hechos realizados o consumados antes de que aquellas entren en vigor, es inconcuso que tratándose de delitos de consumación instantánea la nueva ley no puede regir conductas o hechos de consumación anterior, pues resultaría retroactiva, lo cual se encuentra prohibido constitucionalmente. En cambio, sí debe aplicarse la nueva normatividad sin incurrir en el vicio apuntado, a aquellos hechos constitutivos de delito continuo o permanente cuando aunque hayan empezado a realizarse antes de que aquella entrara en vigor, se continúen cometiendo, esto es, se prolonguen después de su vigencia, en cuyo caso ésta resultará aplicable; tal es el caso del delito de desaparición forzada de personas que prevé la Convención mencionada, cuya naturaleza es permanente o continua, porque se consume momento a momento durante todo el tiempo que el sujeto pasivo se encuentra desaparecido”.

³⁹ *Idem.*

⁴⁰ See Recurso de apelación extraordinaria 1/2003, 5 de noviembre de 2003, Primera sala, resolutive segundo (On file with author).

napping is a continuous crime; therefore the statute of limitations starts to run after the victim is freed.⁴¹

While the reasoning behind the affirmation that forced disappearance of persons is a continuous crime has been upheld by the Inter-American Court,⁴² the decision is consistent with the rule on statute of limitations as expressed by the ICFDP, since this regional treaty only calls for lengthy timeframe.⁴³ It is also interesting to note that this is also the case with regard to the International Convention for the Protection of All Persons from Enforced Disappearance which has been recently ratified by Mexico.⁴⁴

VII. THE ECHEVERRÍA APPEAL

The First Chamber of the SCM had the opportunity to apply its criteria on statute of limitations in the follow up to the Tlatelolco Case where former President Echeverría and members of his regime, including the then ‘Minister of the Interior’ Mario Augusto José Moya y Palencia, were indicted on charges of genocide and other human rights violations, not only for this massacre but also for crimes that were committed as a consequence.⁴⁵

This extraordinary appeal before the SCM resulted from a Federal Judge’s declaration that the statute of limitations had run out on genocide. The Prosecutor’s Office appealed this decision, which reached the SCM, which elected to use its extraordinary jurisdiction again.⁴⁶ Despite the fact that the SCM allowed for the trial to move on, it dismissed several arguments from the Prosecutor’s Office that are worth mentioning.

Firstly, the First Chamber refused to apply the Convention on the Non-Applicability of Statutory Limitations to War Crimes and

⁴¹ *Ibidem*, considerando octavo.

⁴² See Case Blake *vs.* Guatemala. Judgment of July 2, 1996. Series C, No. 27, para. 39.

⁴³ International Convention for the Protection of All Persons from Enforced Disappearance, E/CN.4/2005/WG.22/WP.1/Rev.4 (2005), (ICPPED), Art. VII.

⁴⁴ ICPPED, Art. 8. This treaty was ratified on 18 March 2008.

⁴⁵ See Recurso de apelación 1/2004-PS, 15 de junio de 2005, Primera sala, resultando primero (On file with author).

⁴⁶ *Ibidem*, resultando cuarto.

Crimes against Humanity retroactively. The main argument of the SCM was that there is a balance of interests at stake. On one hand, there is the interest of the international community to prosecute without any legal obstacles war crimes and crimes against humanity. On the other hand, the need to respect individual freedoms, such as those ensured by the Constitution and in particular the security of the person through the enforcement of the non-retroactivity of the statute of limitations.⁴⁷ In this context the SCM argued that sacrificing individual freedoms in favour of a defuse protection on race, nation or any other ‘personalised entity’ is dangerous and can lead to totalitarian rule, which is exactly what these international norms are trying to avoid.⁴⁸

Secondly, the SCM also refused to determine that the Prosecutor’s Office under the Echeverría regime was not an independent and impartial institution to try the President and the Minister of the Interior, since the Prosecutor was subordinate to the President, thus no feasible prosecution could take place at that time.⁴⁹ The SCM arguing solely on a constitutional basis sustained that the Prosecutor’s Office is the only institution that may initiate criminal trials; therefore it could have done this without interference from the executive, since at

⁴⁷ But see Corcuera, Santiago, “Los efectos de la ratificación por México de la Convención sobre la Imprescriptibilidad de los Crímenes de Guerra y de los Crímenes de Lesa Humanidad”, in García Ramírez, Sergio *et al.* (eds.), *La reforma a la justicia penal. Quintas Jornadas sobre Justicia Penal*, México, UNAM, 2003, p. 75. Refusing to apply the convention retroactively would be contrary to its object and purpose.

⁴⁸ Recurso de apelación 1/2004-PS, *op. cit.*, nota 45, considerando séptimo. “El gran peligro que implica el sacrificar los derechos individuales frente a una pretendida existencia de derechos de la humanidad, la raza, la nación u otra entidad personificada, difusa y totalizadora de este tipo, es el reproducir la mecánica de argumentación totalitaria frente a la cual estos derechos sirven como defensa; y hacer a un lado la legalidad positiva por una pretendida ‘legalidad superior’ que encarna a la justicia o algún otro valor que un juzgador considere relevante en un momento determinado. Los argumentos totalitarios han seguido esta mecánica de argumentación y los resultados han sido siempre nefastos para la humanidad que pretenden proteger y que utilizan como fundamento”. But see “Corte Suprema de la Nación Argentina. Recurso de hecho en la causa Arancibia Clavel, Enrique Lautaro s/Homicidio calificado y asociación ilícita y otros”, Judgment of August 24, 2004, in *Diálogo Jurisprudencial*, México, núm. 1, 2006, p. 23. The Argentinian Supreme Court has considered that the interests of the international community override individual rights such as those derived from the implementation of statute of limitations.

⁴⁹ See Ratner, Gerhard, *op. cit.*, nota 2, pp. 144 y 145.

the time the alleged crime took place the decisions to indict were not reviewable by constitutional mandate.⁵⁰

The SCM sidestepped the issue, since challenge implied a *de facto* assessment of the executive's powers not a *de iure* analysis which evidently prevailed. The SCM acknowledged this and defended its position by stating further that the statute of limitations as set out in the Federal Penal Code depends of a legal analysis of the crime and the time transpired since its commission; thus no study of the particular circumstances is necessary. Anything else, it argued, would be 'dogmatic affirmations'.⁵¹

The SCM did reach the conclusion that proceedings could continue based on the fact that the Constitution expressly mentions that, absent an impeachment, "[t]he terms of the statute of limitations shall be interrupted while the public officer holds any of the offices referred under Article 111".⁵² which includes the President and the Minister of the Interior. However, this provision was added in 1982, thus the SCM had to argue why this norm could be applied retroactively. The argument is based on two premises: firstly, the Constitution must be interpreted as a whole and, secondly, unless otherwise provided all constitutional amendments must be applied retroactively. Therefore, the prohibition against *ex post facto* application of criminal norms finds an exception in the Constitution itself, which is confirmed by the implicit desire of the participants in the reform to have that provision apply to past events.⁵³

Consequently, the former President and the Minister of the Interior, had to be impeached for a prosecution to take place, but since this did not happen, the statute of limitations was suspended for the time that they remained in office, so it started to run in 1976 when they both left office. As a result, the 30 year statute of limitations for genocide had not run out.⁵⁴

⁵⁰ Recurso de apelación 1/2004-PS, *op. cit.*, nota 45, considerando séptimo.

⁵¹ *Idem.*

⁵² See Constitution, *op. cit.*, nota 23, art. 114, par. 2. For its part, art. 111 establishes among others things, the public officers who can be prosecuted.

⁵³ Recurso de apelación 1/2004-PS, *op. cit.*, nota 45.

⁵⁴ *Ibidem*, considerando octavo.

This holding is based on an interesting proposition, which is that individual rights should supersede the interests of the international community to prosecute international crimes or human rights violations. Thus the principle of non-retroactivity was favoured over the non-applicability of the statute of limitations.⁵⁵ However, this line of reasoning contravenes current understandings of the duty to prosecute, which have few if any limits recognised in International Criminal Law.⁵⁶

Moreover, the SCM did not tackle the issue whether the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity could be applied as part of international customary law. In a previous case (not involving human rights issues) the SCM stated that every government agency is bound by international customary law,⁵⁷ despite the fact that the Mexican Constitution does not expressly mention this as a source of law.⁵⁸

If the SCM had followed its own precedent it would have had to look into whether this international treaty had become part of international customary law and whether this took place before the alleged acts were committed (it would not be necessary to establish a precise date). Thus it left this question was left unresolved.

On this matter there are also wide and diverging views between the Inter-American Court and the SCM. The regional tribunal seems to favour prosecutions free from legal obstacles such as amnesties and statutes of limitation. Trujillo Oroza and Almonacid Arellano stand for this proposition. Conversely, the SCM would uphold individual rights over the interests of the international community, especially regarding criminal prosecutions.

⁵⁵ See Cassese, Antonio, *International Criminal Law*, New York, Oxford University Press, 2003, p. 319. The appropriate interpretation seems to be that the non-application of Statute of Limitations is only mandatory for genocide, crimes against humanity and torture.

⁵⁶ *Ibidem*, pp. 312-321. Other possible obstacles are amnesties, the *ne bis in idem* principle and immunities.

⁵⁷ See Controversia constitucional 5/2001.

⁵⁸ Article 133 of the Mexican Constitution only mentions international treaties as part of the "Supreme Law of the Union", excluding all other sources of international law, such as customary law.

VIII. CONCLUSION

The scope of jurisprudential developments in the SCM on human rights violations is ambivalent. On one hand, it has pushed the limits of universal jurisdiction. First by actually recognising its existence even before World War II, then by implementing a “don’t ask don’t tell” with regard to toward the jurisdiction of a requesting State, it opened the door for a broad application of extraterritorial principles, such as universality.

This in turn is also an ironic position because in both cases involving universal jurisdiction analysed, the SCM seems comfortable with other countries exercising the jurisdictional policy, but from the discussion it is clear that they would not allow it if Mexico were to use it, absent clear congressional intent.

In any event the Tlatelolco Case would seem to suggest that crimes, especially international crimes which constitute human rights violations, such as genocide when committed *in Mexico* have to be investigated and if charges are confirmed, they must be prosecuted. This position may be at odds with the Almonacid Arellano reasoning, although it is not entirely clear whether crimes involving human rights violations are subject to universal jurisdiction. Therefore, it cannot be convincingly argued that there is a discrepancy between both Courts on this issue.

However, the SCM has also been very rigid in its application of criminal law principles such as non-retroactivity and statute of limitations. Several cases deal with statutes of limitations, which is a thorny issue even at the international level. While the Inter-American Court has cited this as an obstacle for the prosecution of human rights violations, since it is a way to avoid the duty to prosecute, this proposition is not affirmed in individual treaties: the ICFDP does not create an obligation to withdraw all statutes of limitations for the crime of forced disappearance, merely stating that the timeframe must be lengthy. Thus it would seem that only those crimes considered in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity are subject to this obligation.

The SCM would seem to concur with this proposition as evidenced by the Echeverría Appeal, in which a reading of the impeach-

ment clause of the Constitution was a way to suspend the statute of limitations, which would amount to a lengthy timeframe.

In every case, the position of the SCM is firmly fixed on the letter of the Constitution, from which the SCM will rarely divert, even in extraordinary appeals when it does not act as a constitutional court.

At a minimum, the propositions that there is a duty to prosecute international crimes and human rights abuses and that foreign courts may use of universal jurisdiction, even for genocide, absent a legal prohibition, are important contributions to the development of these principles, or at a minimum add to the notion that these are rules under international customary law.