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Salvadoran General Deemed Deportable In the Absence of Criminal Charges

Beth Van Schaak, Tuesday, March 17th 2015

UPDATE: Former Defense Minister of El Salvador, Vides Casanova, has been detained pending extradition.

The Board of Immigration Appeals (BIA) ruled last week that General Carlos Eugenio Vides-Casanova could be removed to El Salvador on account of his participation in human rights abuses in the 1980s when he was head of the National Guard (1979–1983) and then Minister of Defense (1983–1989). (The judgment is here.) In so ruling, the BIA affirmed a February 2012 opinion by an Immigration Judge, which — apparently for privacy reasons — was not released by the Justice Department until April 2013 after The *New York Times* filed a request under the Freedom of Information Act. Vides-Casanova has been found deportable under the Intelligence Reform and Terrorism Prevention Act, 8 U.S.C. § 1127(a)(4)(D) (passed in 2004 but rendered retroactive), which is intended to bar individuals who participated in genocide, Nazi persecution, torture, or summary execution from enjoying safe haven in the United States. The suit was originally brought in 2009 by the Department of Homeland Security's Immigration & Customs Enforcement's (DHS ICE) Human Rights Violators and War Crimes Unit with input from NGOs, such as the Center for Justice & Accountability, who have contacts in refugee and immigrant communities. Vides-Casanova will not be immediately removed from the United States since he has 30 days to appeal the BIA's ruling to the 11th Circuit. More on background is available here.

Theory of Liability: Superior Responsibility

The proceedings against Vides-Casanova are based on the theory that he exercised superior responsibility over subordinates who committed acts of torture, summary execution, and other human rights violations during El Salvador's "dirty war." He is reportedly the highest ranking individual to be deemed deportable on these grounds. A 2011 decision involving a Bosnian

respondent charged with participating in the summary execution of 200 Bosnian Muslims, *Matter of D-R-*, confirmed that the statute reaches persons who exercised superior responsibility over the individuals who committed the covered acts. The *Vides-Casanova* decision reiterated *D-R-*'s determination that:

> inadmissibility under … the Act is established where it is shown that an alien with command responsibility knew or should have known that his subordinates committed unlawful acts covered by the statute and failed to prove that he took reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.

The BIA's opinion constitutes precedent and is binding upon all Immigration Judges.

In reaching these results, both sets of adjudicators rejected Vides-Casanova's claims that:

1. the human rights violations were the result of "rogue units" acting autonomously and
2. his conduct was "consistent with the 'official policy' of the United States" such that it would be unfair under principles of equitable estoppel to remove him.

Prior Civil Suits & Other Related Immigration Proceedings

Vides-Casanova was twice sued in the United States under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) alongside his predecessor,General José Guillermo García, who also served as Minister of Defense. The first trial, held in a federal courtroom in West Palm Beach (where the defendants had settled in 1989), involved the defendants' alleged participation in a cover-up of the 1980 rape and killing of four US churchwomen: Ita Ford, Maura Clarke, Dorothy Kazell, and Jean Donovan. A jury found the defendants not liable, presumably under a "chaos of war" theory. Plaintiffs appealed the formulation of superior responsibility in the jury instructions, which largely tracked the jurisprudence of the International Criminal Tribunal for the former Yugoslavia in the *Čelebići* case, but the 11th Circuit affirmed (*Ford v. Garcia*).

A different jury reached the opposite conclusion in the second civil trial — which involved Salvadoran victims who were granted asylum in the United States and also proceeded in Florida — and ordered the defendants to pay $54 million in compensatory and punitive damages. The 11th Circuit upheld this verdict on appeal, ruling that the statute of limitations had equitably tolled until the defendants arrived in the United States (*Romagoza v. Garcia*). The judgment was partially executed through the garnishment of a Merrill Lynch account, although plaintiffs were forced to file a complaint for fraudulent transfer with respect to other assets and implead several family members who had received significant and unexplained cash gifts during the pendency of the litigation. I tell the stories of the origins and outcomes of these two cases here and compare the two sets of plaintiffs' approaches to proving superior responsibility here. (I served as trial

counsel in the *Romagoza* case while an associate at Morrison & Foerster LLP and was at the Center for Justice & Accountability when the case was first filed).

Another Immigration Judge has ruled that General García should be removed as well for his participation in the torture and extrajudicial killing of civilians, includingArchbishop Oscar Romero, who was assassinated in 1980 while delivering a homily. Pope Francis lifted the beatification ban on Archbishop Romero in 2014, in place because of the priest's association with the Liberation Theology movement, and a Vatican panel recently confirmed he is a martyr killed for his faith (rather than on account of political reasons), paving the way for his beatification and canonization.

Sources of Proof

Three former Ambassadors to El Salvador testified in these various proceedings but on opposite sides: Robert White, appointed by President Carter appeared for the plaintiffs/government; Edwin Corr and David Passage, Reagan appointees, appeared for the defendants/respondents. Unfortunately, the BIA's ruling comes just weeks after Ambassador White — who was critical of US policy in El Salvador and was forced out of the Foreign Service as a result — passed away. The testimony of these witnesses, and their cables to Washington during their tenure (compiled by the National Security Archive and others), confirmed that the US government considered Vides-Casanova and García to have exercised superior responsibility over the units under their command and control. Expert reports and testimony by my colleague Terry Karl of Stanford University, who has participated in a number of lawsuits involving Salvadoran perpetrators, were also instrumental in reaching these results. A recent expert's report was prepared in conjunction with the Human Rights Data Analysis Group, which generates statistical analyses of human rights violations and has provided expert testimony in a range of accountability processes.

Juan Romagoza — the lead plaintiff in the successful ATS suit — testified in the immigration proceedings along with Daniel Alvarado, who was also tortured by Vides-Casanova's subordinates. Alvarado was the plaintiff in another successful superior responsibility ATS/TVPA case in the 6th Circuit, *Chavez v. Carranza*, brought against the former Director of the Treasury Police and, reportedly, a CIA informant, who also made his way to the United States. The immigration judges presiding over the *Vides-Casanova* matter also considered the report prepared by the Salvadoran Truth Commission ("From Madness to Hope: The 12-Year War in El Salvador"), which was the product of the 1992 Peace Accord between the Government of El Salvador and the Farabundo Martí para la Liberación Nacional (FMLN) forces. The report was

significant in that it “named names” of individuals responsible for abuses, including Vides-Casanova and Garcia, who were accused of covering up the murders of the churchwomen and failing to investigate other known abuses by their subordinates. Days after the report was published, El Salvador passed a blanket amnesty law, extinguishing all civil and criminal liability; as such, the only real accountability for events during the civil war has been in foreign jurisdictions, including these (and other) civil/immigration cases in the United States and several criminal matterspending in Spain.

The Doctrine of Superior Responsibility in US Law

These cases also reveal that the doctrine of superior responsibility is well established in US law everywhere except Title 18, the federal penal code. Indeed, enemy combatants can even be prosecuted on this theory of responsible before US military commissions pursuant to the Military Commissions Act of 2006, 10 U.S.C. 950q(2006). That provision enables the trial and punishment of any person who:

> is a superior commander who, with regard to acts punishable by this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal.

No Criminal Prosecution Available; Immigration Remedies a Second-Best Option

García and Vides-Casanova cannot be criminally prosecuted for their underlying crimes for a range of reasons:

- The US war crimes statute only reaches war crimes committed by or against US citizens, as outlined here;
- The United States lacks a crimes against humanity statute, as discussed here;
- The United States lacks a superior responsibility statute applicable to federal crimes, as lamented here;
- The criminal torture statute, 18 U.S.C. § 2340 (1994) was enacted after the events in question; and
- The facts are not prosecutable under other universal jurisdiction statutes that are available to federal prosecutors, including: human trafficking, slavery & forced labor, the use of child soldiers, terrorism, etc.

Although it has not yet addressed these loopholes in US penal law, Congress has enacted a range of immigration statutes aimed at the perpetrators of atrocity crimes in our midst. US immigration

authorities thus allow the US government to denaturalize,deport, remove, or pursue related remedies against individuals who committed fraud during an immigration proceeding or process, including while completing visa forms to come to the United States. *See, e.g.*, 18 U.S.C. § 1546 (Fraud and Misuse of Visas, Permits, and Other Documents), 18 U.S.C. § 1001 (false statements), and 18 U.S.C. § 1621 (perjury). For example, the United States had to prosecute two Rwandan sisters, Prudence Kantengwa and Beatrice Munyenyezi (the latter of whom was accused of manning a roadblock that identified Tutsi individuals to be killed), for immigration fraud, perjury, and obstruction of justice because the genocide in Rwanda pre-dated 2007 amendments to the genocide statute extending universal jurisdiction over the crime. Likewise, the United States extradited Bosnian national Sulejman Mujagic to stand trial for war crimes committed against Bosnian prisoners of war during the war in Bosnia-Herzegovina. US immigration officials recently announced that they would move to deport another 150 Bosnians who stand accused of participating in war crimes and other human rights violations during the wars in the former Yugoslavia.

Preventing the United States from Serving as a Safe Haven

Although there are legal barriers to entry into the United States for such individuals, these filters are imperfect and, in the past, contained some unfortunate loopholes. As such, a number of perpetrators have been able to make their way to the United States over the years. Indeed, in October 2011, the Deputy Assistant Director of DHS ICE's National Security Investigation Committee testified before the Tom Lantos Human Rights Commission (of the House Committee on Foreign Affairs) that based on DHS's investigations, there were already almost 2000 perpetrators in the United States, hailing from 95 different states, many of whom are beyond the criminal law and so must be dealt with administratively through immigration proceedings.

In August 2011, President Obama sought to address this problem by issuingPresidential Proclamation 8697 entitled Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses. The Proclamation states:

> The entry into the United States, as immigrants or nonimmigrants, of the following persons is hereby suspended:
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> (a) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, widespread or systematic violence against any civilian population based in whole or in part on race; color; descent; sex; disability; membership in an indigenous group; language; religion; political opinion; national origin;

ethnicity; membership in a particular social group; birth; or sexual orientation or gender identity, or who attempted or conspired to do so.

(b) Any alien who planned, ordered, assisted, aided and abetted, committed or otherwise participated in, including through command responsibility, war crimes, crimes against humanity or other serious violations of human rights, or who attempted or conspired to do so.

The Continuing Importance of the Criminal Law & Legal Reform

Immigration remedies offer an expedient solution to the presence of perpetrators in our midst by preventing the United States from becoming a safe haven for human rights abusers. However, such remedies are unsatisfying when the underlying criminal conduct rises to the level of war crimes, crimes against humanity, torture, or genocide. Administrative proceedings, and even criminal convictions for fraud, do not carry the stigma of the substantive penal law or allow for the imposition of penalties commensurate with the underlying criminal conduct. These statutes also have short statutes of limitation, which may hinder their utility in the atrocity crimes context given that perpetrators may live undercover for years before being recognized and brought to the attention of law enforcement authorities. Moreover, the resort to such remedies will result in merely returning a perpetrator to a national system that may lack the legal framework, juridical capacity, or political will to prosecute for the substantive crime and where the suspect's reintroduction may exert a destabilizing effect or lead to the intimidation or retraumatization of victims. Enacting a crimes against humanity and superior responsibility statute, and strengthening our war crimes statute, will help reduce these instances of impunity (or imperfect accountability) for the next wave of perpetrators who manage to make their way to the United States.

http://justsecurity.org/21146/salvadoran-general-deemed-deportable/