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## Romagoza v. García: Proving Command Responsibility under the Alien Tort Claims Act and the Torture Victim Protection Act

by Beth Van Schaack\*

On July 23, 2002, in the courtroom of Judge Daniel T.K. Hurley, a South Florida jury returned a \$54.6 million verdict, encompassing punitive and compensatory damages, in favor of three Salvadoran survivors of torture. The case, *Romagoza v. García*, was brought by three Salvadoran refugees—Dr. Juan Romagoza, Professor Carlos Mauricio, and Neris González—against two former ministers of defense of El Salvador. The plaintiffs were represented by the non-profit Center for Justice & Accountability, a San Francisco-based human rights law firm, with *pro bono* assistance from Bay Area attorneys of Morrison & Foerster LLP, James K. Green of West Palm Beach, and Professor Carolyn Patty Blum and the University of California Boalt Hall School of Law International Human Rights Clinic. The defendants were represented by Kurt Klaus, Jr., a criminal defense and family law solo practitioner based in Florida.

The verdict heralds a major victory in the worldwide fight against impunity for human rights violations. Most significantly, the case is one of the first modern cases in which defendant commanders, fully contesting the allegations and testifying in their own defense, have been held liable for human rights violations exclusively under the doctrine of command responsibility. The case, therefore, served to further cement the doctrine into United States law. The other recent case in which the plaintiffs relied solely on the doctrine of command responsibility, *Ford v. García*, was brought in the same courtroom against the same two generals by families of the four United States churchwomen who were raped and murdered by members of the Salvadoran National Guard in 1980. The two cases were filed concurrently in May 1999 and proceeded in parallel until 2000, when the churchwomen's case went to trial. In November 2000, a jury rendered a verdict in the *Ford* case that the generals could not be held liable for the crimes, apparently because the jury was not satisfied that the two generals had "effective control" over their subordinates. The *Romagoza* case thus provides an important precedent for other human rights cases brought against military commanders for the human rights violations of their subordinates and has also in part rectified what many observers felt was an unfair and flawed result in the *Ford* case due to problems with the jury instructions.

### The Statutory Basis for the Suit: The Alien Tort Claims Act and the Torture Victim Protection Act

The case was brought under two United States statutes that allow victims of human rights violations to sue perpetrators and other responsible parties in United States courts. The Alien Tort Claims Act (ATCA), was enacted in 1789 as part of the First Judiciary Act, which provided that "the district court shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States." The language allowing aliens to sue for torts committed in violation of the laws of nations was later codified as the ATCA, 28 U.S.C. §1350. The plaintiff(s) must be an alien and the defendant(s) may be a U.S. or a foreign citizen or corporation. By most accounts, the ATCA was enacted to respond to certain incidents involving foreign actors that made clear that under

their original grants of jurisdiction, the federal courts were impotent in the face of violations of the law of nations involving non-nationals. The ATCA remedied this jurisdictional gap by allowing the federal courts to adjudicate tort claims under the law of nations, i.e., international law.

The ATCA was little used until 1978, when the family of a Paraguayan youth who had been kidnapped and murdered learned that the policeman who tortured the young man to death was living in the United States. The family enlisted the help of the Center for Constitutional Rights in New York, which brought suit in the United States District Court of the Eastern District of New York under the ancient statute. The district court dismissed the case on jurisdictional grounds, ruling that it felt it was bound by precedent to construe the "law of nations" narrowly so as not to reach the treatment by state agents of citizens of that state. The Second Circuit in *Filártiga v. Peña-Irala*, however, reinstated the case by announcing: "Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights, regardless of the nationality of the parties." The *Filártiga*s were eventually awarded over \$10 million in damages, and the defendant was deported.

The modern-day cause of action under the ATCA was bolstered by a more recent and complementary statute, the Torture Victim Protection Act (TVPA), which is codified as a note to the ATCA. The passage of the TVPA was mandated

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by the United States' signature and eventual ratification of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), which obliges states party to enact implementing legislation allowing victims of torture to "prosecute or extradite" suspected torturers and provide victims with a right to reparation. Accordingly, the United States Congress passed the TVPA in 1991, and President George H.W. Bush signed the law in 1992 in order to implement the Torture Convention's obligations with respect to civil redress.

The TVPA provides that

- (1) An individual who, under actual or apparent authority, or under color of law, of any foreign nation—subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Thus, the TVPA creates a federal cause of action specifically for torture and summary execution committed anywhere in the world. Both the plaintiff(s) and the defendant(s) may be U.S. or foreign citizens, as long as the defendant acted under color of law of a foreign nation. The legislative history makes clear that in passing the TVPA, Congress intended to codify the *Filártiga* result and extend the right of access to federal courts to U.S. citizens with international law claims. This history also stresses the importance of protecting human rights around the world and of granting victims of torture and extrajudicial killing access to U.S. courts.

Pursuant to the Torture Convention, Congress also amended the federal criminal code at 18 U.S.C. §23409(a) to provide that: "Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." In contrast to other nations, the United States has yet to initiate any prosecutions for torture despite the legal ability, and indeed obligation, to do so. As a result of this inaction, victims of human rights violations seeking justice in the United States are limited to civil redress.

Since *Filártiga*, there have been dozens of civil suits brought under the ATCA and the TVPA in the United States arising out of human rights abuses around the world, including claims of genocide, torture, summary execution, disappearance, arbitrary detention, crimes against humanity, and war crimes. The ATCA is also increasingly being invoked against corporate defendants for complicity in human rights violations including forced labor, extrajudicial killing, and environmental harm. So far, the majority of the cases against individual defendants has resulted in default judgments, because personal jurisdiction over the defendant was based on transient jurisdiction, or the defendant simply fled the jurisdiction once suit was filed or after filing unsuccessful motions to dismiss. As a result, enforcing the multi-million dollar judgments obtained in these cases has proven difficult. Thus, the case against the Salvadoran generals marked one of the first instances in which a defendant in a human rights case, under either the ATCA or the TVPA, presented a vig-



Credit: The Center for Justice & Accountability

Plantiffs Carlos Mauricio and Neris González celebrate after the jury delivered the verdict.

orous defense by testifying in his own defense, and in which at least one of the defendants is believed to have substantial assets.

### The Parties to the Action

The case was brought by three plaintiffs, all refugees from El Salvador, against two former ministers of defense of El Salvador for abuses during the period of 1979-1983. That period was marked by widespread atrocities committed by members of the Salvadoran military and security forces against civilians, including clerics and churchworkers, health workers, teachers, members of peasant and labor unions, the poor, and anyone alleged to have leftist sympathies. A Truth Commission established by the United Nations pursuant to the Salvadoran Peace Accords concluded that tens of thousands of civilians were detained, tortured, murdered, or disappeared during the worst 12 years of the civil war, which ended in 1992. The Truth Commission maintained that 85% of the abuses were attributable to members of the military and security forces, as opposed to unaffiliated death squads or the rebel forces. The plaintiffs in this action were three of the civil war's victims who were fortunate to survive, where others perished.

### Dr. Juan Romagoza

The lead plaintiff, Dr. Juan Romagoza, was working in an impromptu health clinic in a church when a detachment of the army and security forces arrived in military vehicles. Because Dr. Romagoza had medical equipment and what appeared to be military boots, he was captured and taken to a local army base. Dr. Romagoza was then transferred by helicopter to the National Guard headquarters in San Salvador where he was brutally tortured for three weeks. As part of his torture, he was hung by his fingertips with wire and shot through his left arm to signify that he was a "leftist," which destroyed his hands and has made it impossible for him to continue to practice surgery. He was also beaten, raped, starved, electro-shocked, and kept in hideous conditions.

At one point during his detention, Dr. Romagoza was visited by an individual whom his torturers called "*mi coronel*," or "the big boss," and to whom they acted deferentially. Dr. Romagoza could see under his blindfold that the individual was wearing a formal uniform and well-polished boots. This new arrival interrogated Dr. Romagoza about two of his uncles who were in the military, asking him if they were passing weapons to the guerrillas. When Dr. Romagoza was

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eventually released into his uncle's custody, he saw General Vides Casanova, one of the defendants in the case, talking to his other uncle and recognized the defendant's voice as belonging to the person who had been in the torture room with him.

After his release, brokered by his uncles in the military, Dr. Romagoza escaped from El Salvador and eventually made his way across the Mexican border into the United States. He later received political asylum and now runs a free health clinic for the Latino population of Washington, D.C.

### Professor Carlos Mauricio

Professor Carlos Mauricio was teaching agronomy at the University of El Salvador when he was lured out of his classroom and taken to the National Police headquarters in San Salvador. Professor Mauricio was detained in a secret cell and tortured for approximately nine days, which included being beaten repeatedly with fists, feet, and metal bars; being hung for hours with his arms behind his back; and being forced to witness the torture of others. As a result of these beatings, two of his ribs were broken, and his vision was permanently damaged in one eye.

Following this phase of his detention, Professor Mauricio was inexplicably transferred to a public cell where he remained for about nine days. It was at this time that Professor Mauricio realized he would be released. Professor Mauricio was finally released due to the intervention of his then father-in-law, who was in the military. Professor Mauricio believes he was targeted for capture because he had traveled out of the country for schooling and worked with *campesinos* (peasants) to help them increase their yields.

Professor Mauricio fled from El Salvador soon after his release and made his way to San Francisco where he got a job washing dishes. He eventually learned English, was granted legal permanent resident status, and was awarded a Masters degree and his teaching credentials. He now teaches science at a Bay Area school that serves disadvantaged youth.

### Neris González

Neris González was a catechist who taught literacy and simple mathematics to *campesinos* in the province of San Vicente. She was captured one day in the market by members of the National Guard and taken to a local garrison. There, she was tortured for three weeks, raped repeatedly, and was forced to watch others be tortured, mutilated, and killed. At the time, she was eight months pregnant. The guardsmen wounded her belly repeatedly, at one point balancing a bed frame on her and riding the frame like a seesaw.

Because of the trauma she suffered, Ms. González has no firm memory of how she escaped captivity. She has been able to piece together that she was taken in the back of a truck full of dead bodies to a local dump. At some point, her baby was born, and local villagers heard the sound of her baby crying and rescued her. Her baby died two months later of injuries

he had received in utero, but Ms. González's only memories of this are what her mother and daughter have told her.

Ms. González eventually moved to the United States at the suggestion of a therapist in El Salvador who told her that her flashbacks, anxiety attacks, and the gaps in her memory were due to the torture she suffered and that he was ill-equipped to treat her. Ms. González's therapist told her about the Marjorie Kovler Center in Chicago, which specializes in working with victims of torture. Ms. González eventually moved to Chicago to get the help she needed and obtained political asylum. She now is the executive director of an environmental education program there.

### The Defendants

The defendants in this action were two former ministers of defense of El Salvador. One defendant, General José Guillermo García, was minister of defense from 1979–1983. At that time, the other defendant, General Carlos Eugenio Vides Casanova, was the director-general of the National Guard, one of three internal security forces under the jurisdiction of the ministry of defense

along with the army and other military forces. When General García retired in 1983, General Vides Casanova was appointed minister of defense. The defendants both arrived in the United States in 1989, and General García later obtained political asylum based on allegations that he was being threatened by "leftist forces" within El Salvador. Both defendants lived comfortably in south Florida until they were discovered in 1999 by the Lawyers Committee for Human Rights, which had been representing the families of the four churchwomen in their quest for justice.



Trial counsel Peter Stern, Beth Van Schaack, and James Green.

Credit: The Center for Justice & Accountability

### The Legal Theory: The Doctrine of Command Responsibility

Both Salvadoran cases were brought under the international legal doctrine of command responsibility. This doctrine has existed as long as there have been military institutions, but it was utilized most prominently during the Nuremberg and Tokyo proceedings following World War II to convict top Nazi and Japanese defendants. Since then, the doctrine has been employed in several ATCA and TVPA cases (including the cases against ex-President Ferdinand Marcos of the Philippines; the self-proclaimed president of Republika Srpska, Radovan Karadžić; and Héctor Gramajo, a former Minister of Defense of Guatemala) and also serves as the basis for prosecutions before the International Criminal Tribunals for Yugoslavia (ICTY) and for Rwanda (ICTR). Long a doctrine of customary international law, command responsibility has in modern times been codified at Articles 86 and 87 in Protocol I to the four 1949 Geneva Conventions, Articles 7(3) and 6(3) of the statutes of the two war crimes tribunals, and Article 28 of the statute of the International Criminal Court. The United States military has long endorsed the doctrine that commanders are responsible for the actions of their subordinates, as is expressed in the Department of the Army's Field Manual, for example.

According to this longstanding doctrine, a military commander can be held legally responsible—either criminally or

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civily—for unlawful acts committed by his subordinates. A commander is found liable if he or she knew—or should have known given the circumstances—that his or her subordinates were committing abuses, and he or she did not take the necessary and reasonable measures to prevent these abuses or punish the perpetrators. The doctrine involves, in essence, three main elements:

1. The direct perpetrators of the unlawful acts were subordinates of the defendant commander;
2. The defendant commander knew (actual knowledge) or should have known (constructive knowledge) that his troops were committing, had committed, or were about to commit abuses; and
3. The defendant commander failed to take steps to prevent or punish criminal conduct by subordinates.

Thus, the plaintiffs (with the exception of Dr. Romagoza who identified General Vides Casanova in the torture chamber and then again upon his release from detention) did not argue that the generals personally participated in—or even knew about—their detention and torture. Rather, they argued that because the defendants were on notice that their troops were committing abuses, but nonetheless failed to supervise them properly or punish perpetrators, the commanders should be held liable for the abuses the plaintiffs suffered.

In the early stages of both cases against the generals, it was clear that a key challenge would be to establish the legal standard governing when an individual could be considered the legal subordinate of a defendant commander within the understanding of the first prong of the doctrine. With respect to this burden, the ICTY and ICTR have required the prosecution to demonstrate that the defendant commander exercised “effective control” over the individual perpetrators. This approach is most clearly set out in the ICTY judgment in *The Prosecutor v. Delalić et al.* According to this approach, a showing of *de jure* command over an individual within a military hierarchy is a relevant, but not sufficient, showing to satisfy the first prong of the doctrine. Rather, satisfaction of the first prong of the doctrine requires a showing that a commander exercised *de facto* control over subordinates. This burden requires the presentation of evidence that, among other things, the commander was actually able to issue orders to his subordinates and to ensure that those orders were carried out. Although this approach was developed in the context of the Yugoslav conflict, in which individuals operating without a grant of *de jure* command from any formal state were exercising *de facto* control over individuals committing abuses, the tribunals have applied the effective control requirement to prosecutions against *de jure* commanders as well, for example, in *The Prosecutor v. Blaškić*.

Given the strength of this international precedent, Judge Hurley ruled in the *Ford* case that prong one of the doctrine of command responsibility would be satisfied with proof that the defendants exercised effective control over the individuals committing the abuses. After long deliberations with the parties, this standard was eventually concretized in instructions on the law for the jury. The *Ford* plaintiffs appealed this ruling and the resulting jury instructions, urging that it was uncontested that the generals exercised *de jure* command over their subordinates in the National Guard and that the *Ford* instructions improperly placed the burden on



Trial counsel Joshua Sondheimer and Carlos Mauricio.

Credit: The Center for Justice and Accountability

the plaintiffs to prove effective command as well, which they argued was an affirmative defense of the defendants. The Eleventh Circuit Court of Appeals recently upheld the district court’s jury instructions, requiring the plaintiff to prove that the defendant commander—either *de jure* or *de facto*—exercised effective control over his troops. The plaintiffs in *Ford* have petitioned for *certiorari*.

The Eleventh Circuit opinion, in effect, gave the *Romagoza* plaintiffs their marching orders in terms of the command responsibility jury instructions. Accordingly, the instructions in the *Romagoza* case set forth the elements of the doctrine as follows:

- 1) The plaintiff was tortured by a member of the military, the security forces, or by someone acting in concert with the military or security forces;
- 2) No independent superior-subordinate relationship existed between the defendant/military commander and the person(s) who tortured the plaintiff;
- 3) The defendant/military commander knew, or should have known, owing to the circumstances of the time, that his subordinates had committed, were committing, or were about to commit torture and/or extrajudicial killing; and
- 4) The defendant/military commander failed to take all necessary and reasonable measures to prevent torture and/or extrajudicial killing, or failed to punish subordinates after they had committed torture and/or extrajudicial killing.

The instructions then explained that “effective control” means that

the defendant/military commander had the actual ability to prevent the torture or to punish the persons accused of committing the torture. In other words, to establish effective control, a plaintiff must prove, by a preponderance of the evidence, that the defendant/military commander had the actual ability to control the person(s) accused of torturing the plaintiff.

Thus, in contrast to the *Ford* case, the term and definition of “effective control” was not contained in the formulation of the doctrinal elements themselves. Rather, it appeared in a subsidiary explanatory paragraph, which likely served to de-emphasize the concept for the jury. The instructions also clarified that it was not necessary to prove that the defendant commander knew that the plaintiffs themselves would be targeted for abuse; rather, it was sufficient that the defendants

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knew that subordinates were committing human rights abuses like those suffered by the plaintiffs.

The plaintiffs in *Romagoza* drew from the *Delalić* case, in which the ICTY ruled that a showing of *de jure* command gives rise to a legal presumption that the defendant commander exercised effective control. Specifically, the plaintiffs argued that the jury should be instructed on the existence and operation of this presumption. Judge Hurley nonetheless made an initial determination that the defendants had presented sufficient evidence to rebut the presumption and thus declined to instruct the jury on the presumption.

### The Defense and the Plaintiffs' Rebuttal

Given the centrality of the concept of "effective control" to the application of the doctrine of command responsibility, the defendants not surprisingly argued in both cases that the civil war in their country had created a state of chaos that rendered it impossible for them to know what their subordinates were doing, or to be able to intervene to prevent abuses or punish perpetrators. This defense proved successful in the *Ford* case, as statements by jurors to the press indicate that they determined that the plaintiffs had not met their burden of proving that the generals had "effective control" over the subordinates who committed the churchwomen's murders.

The defense verdict in *Ford* presented a cautionary fore-runner to the *Romagoza* plaintiffs. Accordingly, the *Romagoza* plaintiffs presented an array of expert testimony and documents identifying widespread patterns of torture by members of the Salvadoran military and security forces during the period in question. This evidence included reports of torture published in the press and presented to the generals at the time by non-governmental organizations and U.S. officials, among others. The plaintiffs also demonstrated through expert and percipient testimony that the civilian abuses being committed by the subordinates of the generals were systematic rather than random. In this regard, the plaintiffs demonstrated that particular demographic segments were specifically targeted, especially doctors, teachers, and church workers who were working with the poor. The plaintiffs themselves were able to testify that even if they were detained by plainclothed persons, each of them was eventually taken to an official government detention center where he or she was tortured by individuals in uniform.

The plaintiffs also demonstrated that the top military echelons were able to control their troops when they wanted to implement the banking reform or fight the civil war. In this regard, Terry Karl, professor of Latin American studies at Stanford University, gave expert testimony describing the violence in El Salvador during the relevant period as a spigot, which could be turned on and off by the military as needed. A retired Argentine colonel—Colonel José Luis García, whose extensive knowledge of El Salvador stemmed from expert testimony he provided in the trial of the murderers of the six Jesuits who were killed in El Salvador in 1989—discussed the structure and operation of a military chain of command in general and of Latin American militaries in particular. He also presented expert testimony that the Salvadoran military's communications and transportation infrastructure were sufficiently developed to enable the defendants to exercise control over their troops. Finally, the plaintiffs presented significant evidence of the generals' failure to denounce abuses, let alone investigate or prosecute perpe-

trators, despite their ability to do so. The plaintiffs' military expert provided examples of what the defendants could have done to curb abuses by their subordinates had they had the will to do so.

The verdict demonstrated that the plaintiffs' evidence persuaded the jury, which found incredible the defendants' denials that their subordinates were committing abuses or claims that in the chaos of the civil war there was nothing more they could have done. The jury foreperson told journalists afterward that "The generals were in charge of the National Guard and the country. . . . It was a military dictatorship. They had the ability to do whatever they chose to do or not do."

The defendants have indicated their intention to appeal. In the meantime, Kurt Klaus, the defense counsel, has recently indicated that he will defend Juan López Grijalba, a former Honduran military chief accused of the murder and torture of Honduran civilians in the 1980s. This case is also being brought by The Center for Justice & Accountability, which filed and served the complaint on July 15, 2002.

### Case Impact

The verdict against Generals García and Vides has energized human rights activists in El Salvador and has provided hope to the Salvadoran refugee community and others. The verdict was headline news in El Salvador, and was widely reported in the United States. Over 150 lawyers, students, and others encouraged by the verdict attended a recent conference about the case at the Human Rights Institute of the University of Central America in San Salvador. Activists gave their overwhelming support to efforts in the United States to fight against the impunity of military and death squad leaders for abuses during that country's civil war. While many expressed a desire for such cases to be brought in El Salvador, commentators noted that this is currently impossible due to the existence of the the amnesty law, which forgave military leaders of crimes and human rights abuses they or their subordinates committed. At the same time, some human rights lawyers stated that the case provided new impetus to seek to limit or rescind the broad amnesty law adopted by the Salvadoran Congress in 1993 in the wake of publication of the United Nation's Truth Commission Report.

At the same time, editorials in some Salvadoran papers criticized the case as "reopening old wounds" and as a threat to stability achieved following the Peace Accords in El Salvador. Many commentators nonetheless dismissed these arguments as disproved by the measured debate accompanying the verdicts, and pointed to the importance of the public dialogue about the issues of justice and accountability brought about by the case. In the United States, throngs of supporters have greeted the plaintiffs at events in their communities to celebrate the victory, and the plaintiffs have received messages from well-wishers around the world praising their courage and thanking them for providing hope that some measure of justice could be achieved. 🌐

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*\*Beth Van Schaack, as a consulting attorney with The Center for Justice & Accountability and a former associate with Morrison & Foerster LLP, was a member of the trial team for Romagoza v. García. Ms. Van Schaack teaches international law at Santa Clara University School of Law.*