

8. ***Romagoza v. Garcia: Proving Command Responsibility Under The Alien Tort Claims Act And The Torture Victim Protection Act***

By: Beth Van Schaack*

I. **Introduction**

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. Garcia*, No. 99-8364 CIV-HURLEY, was brought by three Salvadoran refugees—Dr. Juan Romagoza, Carlos Mauricio, and Neris Gonzalez—against two former Ministers of Defense of El Salvador. Plaintiffs were represented by the non-profit Center for Justice & Accountability, with *pro bono* assistance from Bay Area attorneys of Morrison & Foerster LLP, James K. Green of West Palm Beach, and Prof. Carolyn Patty Blum and the University of California Boalt Hall School of Law International Human Rights Clinic.

The verdict heralds a major victory in the worldwide fight against impunity for human rights violations. Most significantly, the case represents one of the first modern cases brought under the doctrine of command responsibility in which the defendant commanders testified in their own defense and cements the doctrine into United States law. The one other recent case in which this occurred, *Ford v. Garcia*, Case No. 99-08359-CV-DTKH, was brought in the same courtroom and 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. 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 also has in part rectified what many observers felt was an unfair result in the *Ford* case. It also represents one of the first instances in which a defendant in a human rights case under either the ATCA or the TVPA presented a vigorous defense (which involved testifying in their own defense) and in which at least one of the defendants (*Vides Casanova*) is believed to have substantial assets.

II. **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 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 worse 12 years of the civil war ending in 1992 and 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.¹ The plaintiffs were three of the civil war’s victims who were fortunate to survive where others perished.

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

A. Dr. Juan Romagoza

Dr. Juan Romagoza, was working in an impromptu health clinic in a church when a detachment of the Salvadoran Army and Security Forces arrived in military vehicles. Because he had medical equipment and what appeared to be military boots, he was captured and taken to a local army base. From there, he was transferred by helicopter to the National Guard Headquarters in San Salvador where he was brutally tortured for 3 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 colonel*” 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 guerillas. When Dr. Romagoza was eventually released into his uncle’s custody, he saw defendant General Vides Casanova 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, which as it turned out was brokered by his uncles in the military, Dr. Romagoza escaped from El Salvador and eventually made his way across the Mexico/United States border. He later received political asylum and now runs a free health clinic for the Latino population of Washington D.C.

B. Prof. Carlos Mauricio

Prof. 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. Prof. 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 ribs were broken and his vision was permanently damaged in one eye.

Following this phase of his detention, Prof. Mauricio was inexplicably transferred to a public cell where he remained for another nine days or so. It was at this time that he realized that he would be released. While still detained in this public cell, Prof. Mauricio was visited by a representative of the International Committee of the Red Cross (ICRC), a non-governmental organization based in Geneva that implements the four 1949 Geneva Conventions and their two Protocols by, among other things, monitoring the treatment of prisoners of war. Prof. Mauricio informed the ICRC representative that detainees were being tortured in clandestine cells, but he was informed that the government of El Salvador was not allowing the ICRC to visit any other areas of the building. Prof. Mauricio was finally released due to the intervention of his then father-in-law, who was in the military. Prof. Mauricio believes he was targeted for capture because he had traveled out of the country for schooling (he received a Masters Degree in Mexico) and worked with *campesinos* (poor farmers) to help them increase their yields.

Prof. 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 in Genetic Engineering and his teaching credentials. He now teaches science at a Bay Area school that serves disadvantaged youth.

C. Neris Gonzalez

Neris Gonzalez 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. Gonzalez 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. Gonzalez's only memories of this are what her mother and daughter have told her.

Ms. Gonzalez 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. He told her about the Marjorie Kovler Center in Chicago, which specializes in working with victims of torture. Ms. Gonzalez 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.

D. The Defendants

The defendants in this action are two former Ministers of Defense of El Salvador. One defendant—General Jose Guillermo Garcia—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 Garcia retired in 1983, General Vides Casanova was appointed Minister of Defense. The defendants both arrived in the United States in 1989, and General Garcia later obtained political asylum based on allegations that he was being threatened by leftist forces within El Salvador. They both lived comfortably in South Florida until their presence there was 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 and for information about the deaths of the churchwomen.

III. The Legal Theory: The Doctrine of Command Responsibility

The case was 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.² Since then, the doctrine has been employed in several ATCA and TVPA cases³ and also serves as the basis for prosecutions before the two *ad hoc* war crimes tribunals for Yugoslavia and Rwanda that have been established by the United Nations Security Council. Long a doctrine of customary international law, command responsibility has in modern times been codified in Protocol I to the

four 1949 Geneva Conventions,⁴ the statutes of the two war crimes tribunals,⁵ and the statute of the International Criminal Court.⁶ The United States military, for its part, has long endorsed the doctrine that commanders are responsible for the actions of their subordinates.⁷

According to this longstanding doctrine, a military commander can be held legally responsible—either criminally or civilly—for unlawful acts committed by his subordinates if the commander knew—or should have known given the circumstances—that his subordinates were committing abuses and he did not take the necessary and reasonable measures to prevent these abuses or to punish the perpetrators. Thus, 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 such abuses.

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

Early on in the life 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 two *ad hoc* criminal tribunals have required the prosecution to demonstrate that the defendant commander exercised “effective control” over the individual perpetrators.⁸ In

other words, 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.⁹ Rather, the two war crimes tribunals are requiring a showing of *de facto* control in addition to any *de jure* command.¹⁰ 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 doctrine 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 within the context of *de jure* commanders as well.¹¹

Accordingly, Judge Hurley ruled in the *Ford* case that prong one of the doctrine would be satisfied with proof that defendants exercised effective control over the individuals committing the abuses. The *Ford* plaintiffs appealed this ruling, urging that the *Ford* jury instructions improperly placed the burden on them to prove that the generals had *de facto* control over their subordinates in the National Guard, in addition to *de jure* command, which was uncontested. On April 30, 2002, the Eleventh Circuit Court of Appeals upheld the district court’s jury instructions, requiring the plaintiff to prove that the defendant commander exercised effective control over his troops.¹² The Eleventh Circuit opinion in effect gave the *Romagoza* plaintiffs their marching orders. Accordingly, the jury 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) A 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 went on to explain 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.”

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

IV. The Defense And Plaintiffs’ Rebuttal

Given the centrality of the concept of “effective control” to the application of the doctrine of command responsibility, 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* was a

caution 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. 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, 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 they were tortured by individuals in uniform.

Plaintiffs also demonstrated that the top military echelons were able to control their troops when they wanted to, for example to implement the banking reform or fight the civil war. In this regard, Professor Terry Karl of 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—Col. Jose Luis Garcia, 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, plaintiffs presented

significant evidence of the generals' failure to denounce abuses, let alone investigate or prosecute perpetrators, despite their ability to do so. In this regard, 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 plaintiffs' evidence persuaded the jury, who found incredible 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."

Endnotes

¹ See *From Madness to Hope: the 12-Year war in El Salvador: Report of the Commission on the Truth for El Salvador*, U.N. Doc. No. S/25500 (March 15, 1993).

² See Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence, *reprinted in* 41 Am. J. Int'l L. 172, 186 (1947) (Nuremberg Judgment). See also *Yamashita v. Styer*, 327 U.S. 1 (1946).

³ See e.g., *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D.Ca. 1987); *Paul v. Avril*, 901 F.Supp. 330 (S.D.Fla. 1994).

⁴ Article 86(2), Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (Protocol I), *reprinted at* 16 I.L.M. at 1429.

⁵ Article 7(3), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law

Committed in the Territory of the Former Yugoslavia Since 1991, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/25704 (1993); Article 6(3), International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994).

⁶ Article 28, Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

⁷ See, e.g., Department of the Army Field Manual ("AFM"), THE LAW OF LAND WARFARE, 27-10, Art. 501, July 18, 1956 ("[i]n some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control.")

⁸ These two cases were unique in their consideration of international legal precedent. See *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002) (noting "The recently constituted international tribunals of Rwanda and the former Yugoslavia have applied the doctrine of command responsibility since *In re Yamashita*, and therefore their cases provide insight into how the doctrine should be applied in TVPA cases.").

⁹ The Yugoslav tribunal has also ruled that a showing of *de jure* command gives rise to a legal presumption that the defendant commander exercised effective control. *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgment of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (November 16, 1988). In the *Romagoza* case, plaintiffs argued that the jury should be instructed on the existence and operation of this presumption, otherwise it would be meaningless. However, Judge Hurley made a judicial determination that defendants had presented sufficient evidence to rebut the presumption and thus declined to instruct the jury on the presumption.

¹⁰ See, e.g., *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (November 16, 1988), at ¶378 (ruling that “in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having material ability to prevent and punish the commission of these offenses.”).

¹¹ See *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (March 3, 2000) (requiring evidence of effective control in case against *de jure* commander).

¹² *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002). Plaintiffs in *Ford* have petitioned for *certiorari*.