1-1-2002

Romagoza v. Garcia: Proving Command Responsibility Under the Alien Torts Claims Act and the Torture Victim Protection Act

Beth Van Schaack
Santa Clara University School of Law, bvanschaack@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Recommended Citation
59 Guild Prac. 170

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
BETH VAN SCHAACK

ROMAGOZA v. GARCIA: PROVING COMMAND RESPONSIBILITY UNDER THE ALIEN TORT CLAIMS ACT AND THE TORTURE VICTIM PROTECTION ACT

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,1 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, 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 Prof. 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.2

The verdict heralds a major victory in the worldwide fight against impunity for human rights violations. Most significantly, it is one of the first modern cases brought under the doctrine of command responsibility in which the defendant commanders testified in their own defense. This case cements the doctrine into United States law. The other recent case in which this occurred, Ford v. Garcia,3 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 1980.4 In November 2000, a jury rendered a verdict in that 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

Beth Van Schaack, 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.
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.

**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 first statute, 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." This latter language allowing aliens to sue for torts committed in violation of the laws of nations was later codified as the ATCA. Thus,

> [t]he Founding Generation understood that the law of nations was part of American common law and that a tort violating that law would be cognizable at common law just as any other tort would be. The Alien Tort Clause simply provided federal jurisdiction over these common-law torts, giving aliens who could allege not just a tort but a tort in violation of the law of nations the option of bringing suit in federal, rather than state, court.

The ATCA was little used until 1978, when the Filartigas, 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 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 to not reach the treatment by state agents of citizens of that state. However, the Second Circuit 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 Filartigas 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). The passage of the TVPA was mandated by the United States' signature and eventual ratification of the 1984 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 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 Torture Convention's obligations with respect to civil redress.

The TVPA provides that an individual who, under actual or apparent authority, or under color of law, of any foreign nation—

(1) 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 and the defendant 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 Filartiga result and extend the right of access to federal courts to U.S. citizens. 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.

Since Filartiga, 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 being increasingly 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 vigorous defense (which involved testifying in their 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 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 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. The plaintiffs in this action were three of the civil war's victims who were fortunate enough to survive when 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 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 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 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 Wash-
ington D.C.

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 perma-
nently 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 de-
tained 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 Con-
ventions and their two Protocols by, among other things, monitoring the treat-
ment of prisoners or 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 coun-
try 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 San Francisco Bay Area school that serves disad-
vantaged youth.

Neris Gonzalez

Neris Gonzalez was a catechist who taught literacy and simple math-
ematics 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 is now the executive director of an environmental education program there.

**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.

**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. Since then, the doctrine has been employed in several ATCA and TVPA cases 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, the statutes of the two war crimes tribunals, and the statute of the International Criminal Court. The United States military, for its part, has long endorsed the doctrine that commanders are responsible for the actions of their subordinates.

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 purview 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. 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. Rather, the two war crimes tribunals are requiring a showing of de facto control in addition to any de jure command. 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.

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.

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.\textsuperscript{29}

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.

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 presented a cautionary forerunner 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 showed 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, 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, which 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.”

Case Impact

The verdict against Generals Garcia and Vides has energized human rights activists in El Salvador and 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 in light of the amnesty law. At the same time, some human rights lawyers stated 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. However, many commentators 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 U.S., throngs of supporters have greeted plaintiffs at events in their communities to celebrate the victory, and 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.

The Importance Of Civil Redress

Cases such as Romagoza v. Garcia that provide survivors of human rights abuses with civil redress represent a valuable tool in the enforcement of international human rights norms and the rehabilitation of victims. To be sure, in the context of human rights violations, any award of money damages as a result of a civil suit will be incommensurate to the harm the individual suffered and continues to suffer. The impact of torture on the life of a victim can never be quantified, nor can money repair the lasting damage. However, money damages can compensate the victim for pain, emotional distress, bodily and psychological harm, and lost wages and earning potential. Further, such damages will assist survivors in obtaining the therapy they need for as complete a rehabilitation as possible.

Even absent an enforceable judgment, however, civil suits are valuable. Most importantly, civil suits have the potential to revive the dignity of survivors and satisfy a demand for justice. Tort law generally is concerned with the definition and defense of social norms by expressing a consensus about the way in which people should relate to and interact with each other and by communicating that consensus to the general populace. A judgment ordering the payment of money damages necessarily includes an assessment that a legal right of the plaintiff was violated, and each individual expression of liability “adds its voice to others in the international community collectively condemning [such acts] as an illegitimate means of promoting individual and sovereign ends.” In comparison to a criminal suit, a civil suit may better preserve a collective memory and “permit a more thorough airing of victims’ stories... along with an expression of judicial solicitude.” In this regard, although criminal prosecutions are an important component of the fight against impunity, a criminal proceeding may be focused on the culpability of the perpetrator at the expense of the harm suffered by the victim. Further, even where criminal prosecutions occur, civil cases involve the survivor directly in the legal process: the survivor chooses to initiate the proceeding and then plays a central role throughout. Attorneys and advocates working with victims of human rights abuses have observed that this active participation within the legal system can be empowering and can restore a
sense of justice among survivors of grave human rights abuses for whom the courts of their countries provided no recourse.

This is not to say that civil redress in domestic courts is necessarily superior to other forms of redress or other accountability mechanisms available to survivors of human rights violations. Rather, civil redress in domestic courts constitutes an important component within a comprehensive and worldwide regime for the enforcement of human rights. This regime operates at all levels—international, regional, and municipal—and includes a variety of accountability mechanisms, including judicial (civil and criminal), administrative, geo-political, retributive, restorative, and symbolic ones. Each of these various mechanisms has certain strengths and weaknesses, but if international norms are to have any meaning, all should be available to survivors in search of redress. In the case of the plaintiffs in the cases against the generals, civil redress, regrettably, was their only option, given the amnesty law passed in El Salvador in 1993 and the fact that the U.S. law criminalizing torture wherever committed was just passed in 1994 and is considered by the Department of Justice to have prospective effect only.

NOTES


2. Mr. Klaus has recently indicated that he will defend Juan Lopez Grijalba, a former Honduran military chief accused of the murder and torture of Honduran civilians in the 1980s. That case is also being brought by the Center for Justice & Accountability (CJA), which filed and served the complaint on July 15, 2002. A highly interesting twist is that the INS arrested Grijalba and is seeking to deport him on grounds that he lied on his visa applications. The CJA has supplied crucial evidence of Grijalba's past crimes.


4. The two cases were filed concurrently in May 1999 and proceeded in parallel until 2000 when the churchwomen's case went to trial.

5. Judiciary Act, ch. 20, s 9, 1 Stat. 73, 76-77 (1789), 78-79. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV. L. REV. 49, 73 (1923) (noting that the Judiciary Act was drafted to grant jurisdiction to the federal courts over both common law crimes and violations of the law of nations). The First Judiciary Act also granted federal jurisdiction over common law crimes, which included violations of the law of nations. The federal courts soon lost jurisdiction over common law crimes on the theory that only Congress and the state courts could pronounce on new crimes. U.S. v. Hudson, 11 U.S. (7 Cranch) 32 (1812) (holding that no federal court was "vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.").
6. The ATCA, 28 U.S.C. §1350, provides that federal courts may entertain "any civil suit by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 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.


11. See generally Rachael E. Schwartz, "And Tomorrow" The Torture Victim Protection Act, 11 ARIZ. J. INT'L & COMP. L. 271, 284 (1994) (noting that the TVPA "serves to fulfill internationally agreed-upon obligations with respect to torture and extrajudicial killing."). Similarly, Congress amended the federal criminal code at 18 U.S.C. §2340 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." 18 U.S.C. § 2340a (1994). In contrast to some other states, the United States has yet to initiate any prosecutions for torture despite the legal ability, and indeed obligation, to do so.

12. In particular, the House Report noted that the Torture Convention is "enforcement-oriented" in that it "obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts" and that "[o]ne such obligation is to provide means of civil redress to victims of torture." House Report, No. 367, 102d Cong., 1st Sess., pt. 1, at 3 (1991) ("House Rep."). See also Senate Rep. No. 249, 102d Cong., 1st Sess. (1992) at 3 ("Senate Rep.").

13. House Rep. at 4 ("At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350 [the ATCA]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."). Because the four churchwomen and their families are all U.S. citizens, that case proceeded under the TVPA only.

14. Senate Rep. at 3 (predicting that "torturers and death squads will no longer have a safe haven in the United States.").


20. 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 (“The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be if they knew, or had information which would have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach”).

21. 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) (“The fact that the [crime] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”); 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).


23. See, e.g., Department of the Army Field Manual (“AFM”), The Law of Land Warfare, 27-10, Art. 501, Jul. 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.”); AFM, 22-100, Army Leadership, Be, Know, Do, Art. 1-60, Aug. 31, 1999 (“Command is a specific and legal position unique to the military. It's where the buck stops.”); id., Art. 1-61 (“Command is a sacred trust. The legal and moral responsibilities of commanders exceed those of any other leader of similar position or authority.”).
24. 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.”).

25. 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, Judgement of the Int’l Crim. Trib. Former Yugo., Tr. Chamber (November 16, 1988). In the Romagosa 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 an initial determination that defendants had presented sufficient evidence to rebut the presumption and thus declined to instruct the jury on the presumption.

26. 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.”).


29. 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.


31. See, e.g., Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409, at *6 (S.D.N.Y. Apr. 8, 1996) (noting that the judge had seen “no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant” and arguing that “one can not place a dollar value on the lives lost as the result of the defendant’s actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs.”).

In this way, a civil judgment “awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law” condemning the international crime. Id.


34. Given that the effectiveness of criminal remedies depends upon state discretion, civil cases can be commenced when the government with criminal jurisdiction over the offender is unwilling to prosecute for evidentiary or political reasons, as is the case in the United States.