

Romagoza v. Garcia: DRAFT Jury Instructions

LIABILITY FOR CRIMES AGAINST HUMANITY; TORTURE; CRUEL, INHUMAN OR DEGRADING TREATMENT; OR ARBITRARY DETENTION

Military commanders have a legal duty to exercise control over the conduct of their subordinates. By law, a superior who fails to take appropriate measures to prevent his subordinates from committing unlawful acts or who fails to punish subordinates who commit unlawful acts is legally responsible for those acts.

You may find Defendant(s) liable to Plaintiffs if you find, by a preponderance of evidence, that Defendant(s) either:

- (1) directly committed acts constituting crimes against humanity; torture; cruel, inhuman or degrading treatment; and/or arbitrary detention;
- (2) directed, ordered, conspired with or aided the Salvadoran Military Forces, Security Forces, paramilitary and/or police forces to commit acts constituting crimes against humanity; torture; cruel, inhuman or degrading treatment; and/or arbitrary detention;
- (3) had, or should have had, knowledge that Salvadoran Military Forces, Security Forces, paramilitary forces, and/or police were committing acts constituting crimes against humanity; torture; cruel, inhuman or degrading treatment; and/or arbitrary detention, and failed to take effective measures to prevent these unlawful acts; or
- (4) had, or should have had, knowledge that Salvadoran Military Forces, Security Forces, paramilitary forces, and/or police had committed acts constituting crimes against humanity; torture; cruel, inhuman or degrading treatment; and/or arbitrary detention, and failed to take effective measures to investigate and punish the perpetrators of these unlawful acts.

In other words, to hold Defendant(s) liable for unlawful acts perpetrated by their subordinates, you must find that Defendant(s)

- (1) exercised command authority over the perpetrators of unlawful acts;
- (2) knew, or should have known, that their subordinates were going to or had committed unlawful acts; and
- (3) failed to prevent or punish their subordinates who committed unlawful acts.

In considering whether Defendant(s) breached this duty of command responsibility, you can consider—among other things—whether they educated and trained their subordinates on the rules of

land warfare, whether they made public denunciations of unlawful acts, whether they investigated the commission of acts by subordinates, whether they cooperated with efforts by members of the El Salvadoran judicial system to investigate and prosecute perpetrators, and whether they punished subordinates found guilty of unlawful acts.

Sources:

Treaties and Statutes:

- Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. Section 1350 note);
- Senate Report
- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. 30, 101st Cong. 2d Sess. 14 (1990);
- Rome Statute for the Creation of an International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998).
- 22 U.S.C. Section 2340 (d)(1).

Case Law:

- In re Estate of Marcos Litigation, D.C. No. MDL 840 (D. Haw. Feb. 3, 1995), *aff'd on appeal*, 103 F.3d 767 (9th Cir. Dec. 17, 1996);
- In re Yamashita, 327 U.S. 1 (1946);
- Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994);
- Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1998);
- Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987);
- Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995).

Treatises:

- United States Department of Army Field Manual No. 27-10, "Responsibility for Acts of Subordinates in the Law of Land Warfare" (1956);
- Army Subject Schedule, 27-1 at 15-16 (1970).



UNDER COLOR OF LAW

In this case, Plaintiffs claim that Defendant(s), while acting under “color of law,” intentionally deprived Plaintiffs of their rights under international law, United States law, and the laws of El Salvador. Specifically, Plaintiffs claim that Defendant(s) and their subordinates were acting under color of authority of the Government of El Salvador and the Salvadoran Military and Security Forces and intentionally violated Plaintiffs’ legal rights.

Acts constituting crimes against humanity; torture; cruel, inhuman and degrading treatment; and arbitrary detention committed by a person under color of law violate international law, United States law and the laws of El Salvador and renders the perpetrator liable to the victim. A public official acts “under color of law” of the authority of a State not only when the official acts within the limits of lawful authority, but also when the official acts without or beyond the bounds of lawful authority. In order for Defendant(s)’ alleged unlawful acts to have been committed “under color of law,” the unlawful acts must have been committed while Defendant(s) were acting, or were purporting or pretending to act, in the performance of official duty. That is, the unlawful acts must constitute an abuse or misuse of the power that is possessed by Defendant(s) *because of* the positions they held (either as Minister of Defense or Director of the National Guard).

An individual acts under “color of law” as used in these instructions when the individual is an official or subordinate of a *de facto* or recognized government under any law or decree of that country.

Sources:

Case Law:

- In re Estate of Marcos Litigation, D.C. No. MDL 840 (D. Haw. Feb. 3, 1995), *aff’d on appeal*, 103 F.3d 767 (9th Cir. Dec. 17, 1996).
- Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980);
- Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995);

Treatises:

- 11th Cir. Pattern Jury Instructions (1999), pp. 31-33;
- Devitt and Blackmar’s Federal Jury Practice and Instructions, Section 103.04.

TORTURE

Acts of torture are prohibited by international treaties, customary international law, United States law and El Salvadoran law. Torture under international and domestic law and as used in these instructions, means any act, directed against an individual in the offender's custody or physical control, by which severe pain and suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as:

- (1) obtaining from that individual or a third person information or a confession;
- (2) punishing that individual for an act that the individual or a third person has committed or is suspected of having committed;
- (3) intimidating or coercing that individual or a third person;
- (4) or for any reason based on discrimination of any kind.

Torture includes mental pain and suffering from prolonged mental harm caused by or resulting from:

- (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality;
- (3) the threat of imminent death; or
- (4) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Under international law, the following acts constitute torture (although this list is by no means exhaustive):

- (1) Rape, sexual abuse, and other forms of gender-based violence.
- (2) Sustained, systematic beating. Beating particularly constitutes torture if it is performed with truncheons or other instruments, or if it is performed while the victim is bound or otherwise forced into a position that will increase the pain of the beating. Beating also constitutes torture if it is directed at certain parts of the body, such as the genitals or the soles of the feet. Beating alone is sufficient to constitute torture if it is sustained and systematic.
- (3) Electric shocks, infliction of burns, exposure to extreme heat or cold.
- (4) Binding or otherwise forcing the victim into positions that cause pain.

(5) Denying food, water, or medical attention when that denial will cause the victim to suffer, or will cause the victim to continue to suffer, severe physical or mental pain and suffering.

In other words, to hold Defendant(s) liable for the torture of Plaintiffs, you must find that Defendant(s), or their subordinates,

- (1) Inflicted severe pain or suffering, whether physical or mental, on the Plaintiffs
- (2) while the Plaintiffs were in their custody or under their control
- (3) for one of the purposes listed above
- (4) while acting under color of law.

Sources:

Treaties and Statutes:

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), 23 I.L.M. 1027 and 24 I.L.M. 535 (entered into force for the United States Nov. 20, 1994);
- International Covenant on Civil and Political Rights, art. 7, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (entered into force for the United States Mar. 23, 1976);
- Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. Section 1350 note);
- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. 30, 101st Cong. 2d Sess. 14 (1990);
- 22 U.S.C. Section 2340 (d)(1).

Case Law:

- Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980);
- Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987);
- Alvarez-Machain v. United States, 107 F.3d 696 (9th Cir. 1996);
- Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1998);
- Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1196 (S.D.N.Y. 1996);
- Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995);
- Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994);
- In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994).

CRUEL, INHUMAN OR DEGRADING TREATMENT

Cruel, inhuman and degrading treatment is prohibited by international treaties, customary international law, United States law and El Salvadoran law. Cruel, inhuman or degrading treatment includes acts that fall short of torture, but that inflict mental or physical suffering, anguish, humiliation, fear and debasement when such acts are committed at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Torture is aggravated and deliberate cruel, inhuman, or degrading treatment, causing very serious and cruel suffering.

The unjustified physical and mental suffering caused by cruel, inhuman or degrading treatment includes the creation of a state of anguish and stress by means other than bodily assault. Degrading treatment is that which grossly humiliates a person before others or forces the person to act against his/her will or conscience, or incites fear, anguish, or inferiority capable of humiliating and debasing a person and attempting to break his/her moral resistance. Whether treatment is cruel, inhuman, or degrading depends upon an assessment of all the particularities of a concrete case, including the specific conditions at issue, duration of the measures imposed, the objectives pursued by the perpetrators, and the effects on the person(s) involved.

The following acts constitute cruel, inhuman or degrading treatment (although this list is by no means exhaustive):

- (1) Sexual abuse and other forms of gender-based violence;
- (2) Forcing detainees to stand for long periods of time, subjecting detainees to sights and sounds that have the effect or intent of breaking down their resistance and will, or inflicting severe mental or physical stress on detainees in order to obtain information or confession;
- (3) Deportation or expulsion from, or refusal of admission to, one's own country without due process or under exceptional circumstances such as discriminatory application of law or the intentional infliction of physical or mental suffering;
- (4) Failure or refusal to satisfy certain basic needs of the person, such as the needs for food, water, or sleep, if the pain or suffering inflicted is not severe enough to constitute torture; or
- (5) Deliberate indifference to a detainee's medical needs and deprivation of the basic elements of medical treatment.

In other words, to hold Defendant(s) liable for the cruel, inhuman and degrading treatment of Plaintiffs, you must find that Defendant(s), or their subordinates,

- (1) Inflicted mental or physical suffering, anguish, humiliation, fear and debasement on the

Plaintiffs

- (2) while the Plaintiffs were in their custody or under their control
- (3) while acting under color of law.

Sources:

Treaties and Statutes:

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 16, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), 23 I.L.M. 1027 and 24 I.L.M. 535 (entered into force for the United States Nov. 20, 1994);
- International Covenant on Civil and Political Rights, art. 7, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (entered into force for the United States Mar. 23, 1976);
- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. 30, 101st Cong. 2d Sess. 14 (1990);

Case Law:

- Tel Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985);
- Kyle v. Allen, 732 F. Supp. 1157, 1158 (S.D. Fla. 1990);
- Estelle v. Gamble, 429 U.S. 97, 103-04 (1976);
- Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994);
- Abebe-Jiri v. Negewo, 72 F.3d 844 (11th Cir. 1996); and
- Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

CRIMES AGAINST HUMANITY

Crimes against humanity are prohibited by international treaties, customary international law, U.S. and El Salvadoran law. Crimes against humanity are unlawful acts committed within the context of a widespread or systematic attack against a civilian population with knowledge of that attack. The following acts can constitute crimes against humanity when committed in this context and with this mental state:

- (1) murder;
- (2) extermination;
- (3) enslavement;
- (4) deportation;
- (5) imprisonment;
- (6) torture;
- (7) rape;
- (8) persecution on political, racial and religious grounds; and
- (9) other inhumane acts.

Individuals who knowingly commit such acts, regardless of their motives, are liable.

In other words, to hold Defendant(s) liable for the crimes against humanity suffered by Plaintiffs, you must find that Defendant(s), or their subordinates,

- (1) committed one of the above acts against the Plaintiffs
- (2) in the context of a widespread or systematic attack against a civilian population
- (3) with knowledge of that attack.

Sources:

Treaties and Statutes:

- Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6 (c), 59 Stat. 1544, 82 U.N.T.S. 279;
- Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan 19, 1946, art. 5(c), T.I.A.S. No. 1589, 4 Bevens 20, 21, as amended Apr. 26, 1946, 4 Bevens 20, 27;
- Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, art. II(c), (1945); and
- Rome Statute for the Creation of an International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 17, 1998).

Case Law:

- Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995);
- Doe v. Unocal, 963 F.Supp. 880 (C.D. Cal. 1997);
- Doe v. Islamic Salvation Front, 993 F.Supp. 3 (D.D.C. 1998).

ARBITRARY DETENTION

Detention is “arbitrary” when it is illegal and unjust. It may also be arbitrary if it is incompatible with the principles of justice or with the dignity of the human person. “Arbitrary detention” as used in these instructions and under of international law means detention of a person in an official detention facility or in any other place, without notice of charges and failure to bring to trial that person within a reasonable time. In considering what constitutes a “reasonable time,” you may consider all the circumstances existing in El Salvador at the time of the detention.

In other words, to hold Defendant(s) liable for the arbitrary detention of Plaintiffs, you must find that Defendant(s), or their subordinates,

- (1) detained Plaintiffs
- (2) arbitrarily
- (3) without notice of charges and/or without bringing Plaintiffs to trial within a reasonable time.

Sources:

Treaties and Statutes:

- International Covenant on Civil and Political Rights, art. 4, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976);

Case Law:

- Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981);
- Forti v. Suarez Mason, 672 F.Supp. 1531, 1541 (N.D. Cal. 1987);
- Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994);
- Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1998);
- De Sanchez v. Banco Central de Nicaragua, 770 F. 2d 1385, 1397 (5th Cir. 1985);
- Eastman Kodak Co. v. Kavlin, 978 F.Supp. 1078 (S.D. Fla. 1997);
- Soroa-Gonzales v. Civiletti, 515 F. Supp. 1049, 1061 n. 18 (N.D. Ga. 1981).

Treatises:

- Restatement (Third) of Foreign Relations Law, Section 702 comment h (1987);

POLITICAL VIEWS ARE IRRELEVANT

In your deliberations, you should not give any regard to whether the Plaintiffs in this case may have opposed the Salvadoran government or what their political views may have been. Every person—even if they are in custody because they have been accused of violating the law—has the right to be free from being tortured or subjected to crimes against humanity; arbitrary detention; or cruel, inhuman or degrading treatment by government or military officials. And every person—no matter what their political persuasion or ethnicity—has the right to be free from being subjected to acts constituting crimes against humanity; torture; cruel, inhuman or degrading treatment and/or arbitrary detention.

Sources:

Case Law:

- In re Estate of Marcos Litigation, D.C. No. MDL 840 (D. Haw. Feb. 3, 1995), *aff'd on appeal*, 103 F.3d 767 (9th Cir. Dec. 17, 1996).