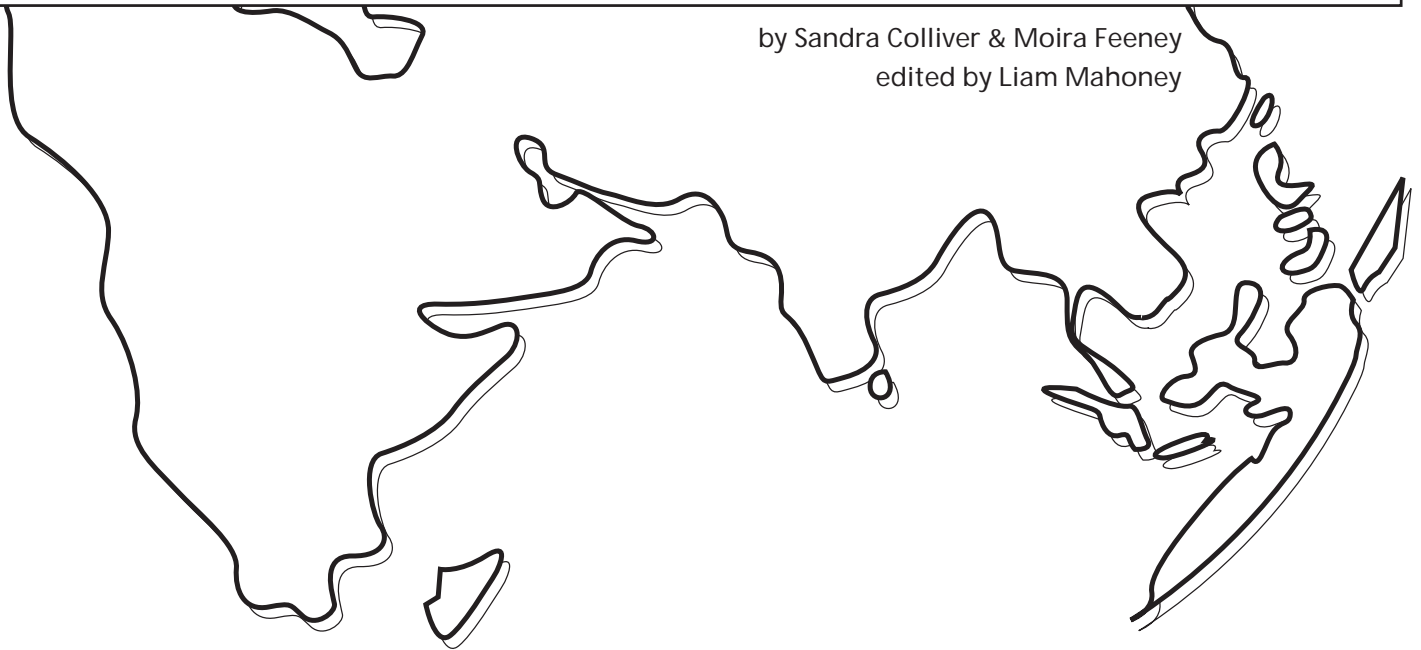


## Reparations

Using civil lawsuits to obtain reparation for survivors of human rights abuses and to challenge the impunity of their abusers

by Sandra Colliver & Moira Feeney  
edited by Liam Mahoney



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## The Center for Justice and Accountability

CJA works to deter torture and other severe human rights abuses around the world by helping survivors hold their persecutors accountable. CJA is the leading U.S. center representing survivors in civil suits against persecutors living in or visiting the United States. Several of the cases discussed in this paper were litigated or initiated by CJA.

CJA has pioneered an integrated approach to the quest for justice that combines legal representation with referrals for medical and psychosocial services, and with outreach to schools, community organizations, and the general public. CJA currently represents more than 40 survivors from countries including Bosnia, Chile, China, East Timor, El Salvador, Haiti, Honduras, Somalia, and one Asian and one Middle-Eastern country (the specific countries must remain confidential until the cases are filed).

CJA was established in San Francisco in January 1998. Its creation was inspired by legal and psychological work with victims of torture and other grave human rights abuses. The need for justice consistently emerges as an integral component of a victim's healing process, and becomes particularly acute when the victim's abuser enjoys impunity in the same country where the victim has sought refuge. CJA was established to respond to the need for justice by combining victim outreach and rehabilitation with legal advocacy and representation.

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## Sandra Coliver

Sandra Coliver is the Executive Director of the Center for Justice and Accountability, based in San Francisco. She has worked in the human rights field since holding a Ford Foundation fellowship with Amnesty International USA in 1979.



Sandra was one of the founding members of AIUSA's Legal Support Network and a member of AIUSA's Board of Directors from 1992 to 1996; a founding board member of Human Rights Advocates; and the Founding Chair of the International Human Rights Committee of the Bar Association of San Francisco (1984–1990, 2002–present). She clerked for the Ninth Circuit Court of Appeals and was in private practice for several years in San Francisco, specializing in criminal, constitutional, and international law.

In 1990 she moved to London to direct the law program of Article 19, the International Center Against Censorship, and opened a U.S. office in 1993. She moved to Sarajevo in 1996 to work for the U.N. High Commissioner for Human Rights, the Organization for Security and Cooperation in Europe, and the International Crisis Group, an advocacy think tank chaired by former Senator George Mitchell. From 1999 to 2001 she served as Senior Rule of Law Advisor to IFES, an NGO dedicated to promoting fair elections and accountable governments.

Sandra has taught human rights, humanitarian law, international law, and women's rights at Boalt Hall, Golden Gate Law School, Santa Clara Law School, and Washington College of Law, and has written extensively on these issues. She has managed or participated in human rights and rule of law programs in Russia, the Balkans, Central and Eastern Europe, Mongolia, Morocco, Southeast Asia, Southern Africa, and Rwanda. She received her law degree from Boalt in 1981.

## Moira Feeney

Moira Feeney is a Staff Attorney at CJA. She is currently the lead attorney in CJA's lawsuit against former Haitian death squad leader Toto Constant, and also works on CJA's case against Colonel Dorélien, a member of the High Command with responsibility for the Raboteau massacre, and a winner of \$3.2 million in the Florida State Lottery in 1996.



She has been involved in human rights work related to Haiti since 1998, and worked under the supervision of Haiti's leading human rights attorneys to prepare criminal and civil litigation against perpetrators of politically motivated rape. Previously, she coordinated election observation delegations to Haiti for Global Exchange, an international human rights organization. Moira serves as the primary media contact for all CJA's current cases. She has also led and organized educational travel, focused on issues of global justice, to Haiti, Cuba, Nicaragua, and Chiapas, Mexico. She has a law degree from UC Hastings College of the Law, and a B. A. in international relations from Brown University. She is fluent in Haitian Creole, French, and Spanish.



March 2004

Dear Friend,

Welcome to the New Tactics in Human Rights Tactical Notebook Series! In each notebook a human rights practitioner describes an innovative tactic used successfully in advancing human rights. The authors are part of the broad and diverse human rights movement, including non-government and government perspectives, educators, law enforcement personnel, truth and reconciliation processes, and women's rights and mental health advocates. They have both adapted and pioneered tactics that have contributed to human rights in their home countries. In addition, they have utilized tactics that, when adapted, can be applied in other countries and situations to address a variety of issues.

Each notebook contains detailed information on *how* the author and his or her organization achieved what they did. We want to inspire other human rights practitioners to think *tactically*—and to broaden the realm of tactics considered to effectively advance human rights.

In this notebook we learn how civil laws can be used to hold torturers and other human rights abusers accountable, and to gain reparations for survivors. The Center for Justice and Accountability (CJA) represents survivors using the Alien Tort Claims Act (ATCA, dating back to 1789) and the Torture Victim Protection Act of 1991, which gives both U.S. citizens and non-citizens alike the right to sue human rights abusers who live in or visit the U.S. CJA has effectively used these acts to help end the possibility of abusers using the U.S. as a safe haven, to assist survivors in gaining reparations, and to break the silence that has enabled abusers to live in impunity. This notebook demonstrates how countries with laws similar to the ATCA can put them to work to end such impunity. Activists around the world can consider ways to use their own civil laws, and to target abusers who travel to the U.S. by building collaborations among diverse groups that include activists in the U.S. and abroad, refugees, lawyers, and people skilled in using the media.

The entire series of Tactical Notebooks is available online at [www.newtactics.org](http://www.newtactics.org). Additional notebooks will continue to be added over time. On our web site you will also find other tools, including a searchable database of tactics, a discussion forum for human rights practitioners, and information about our workshops and symposium. To subscribe to the New Tactics newsletter, please send an e-mail to [newtactics@cvt.org](mailto:newtactics@cvt.org).

The New Tactics in Human Rights Project is an international initiative led by a diverse group of organizations and practitioners from around the world. The project is coordinated by the Center for Victims of Torture (CVT) and grew out of our experiences as a creator of new tactics and as a treatment center that also advocates for the protection of human rights from a unique position—one of healing and reclaiming civic leadership.

We hope that you will find these notebooks informational and thought-provoking.

Sincerely,

A handwritten signature in cursive script that reads "Kate Kelsch".

Kate Kelsch

## Introduction

When speaking about his involvement as one of the plaintiffs in *Romagoza, Gonzalez, & Mauricio v. Garcia & Vides Casanova*, a case against two high ranking Salvadoran generals for torture committed in 1979–1983, Carlos Mauricio said, “I am participating in this case in order to help send a message to military leaders around the world that, if they commit atrocities, they will not be able to visit or live in the U.S. with impunity. They will always have to fear that someone someday may recognize them and bring them to justice. I am involved in this case to try to deter people, especially military people in El Salvador and elsewhere, from committing atrocities in the future. Let me tell you, many military officers in Salvador dream of living in the United States after they retire. My case and other cases are sending a powerful message to them. Resolutions passed by the U.N. General Assembly and reports by human rights organizations are effective in publicizing what happened, but they do not send a strong message to military leaders, who think they are above the law. They may be above the law in their home countries, but these lawsuits tell them that they are *not* above the law in this country.”

Since 1980, 18 non-U.S.-born human rights abusers who moved to or were visiting the United States have been successfully sued by their victims in civil proceedings. The victims have been able to use two U.S. laws—one enacted in 1789 as part of the very first Judiciary Act, the other enacted in 1991—that enable victims of certain egregious human rights violations, wherever committed, to bring civil lawsuits in U.S. federal court against those responsible for the violations, so long as the defendants are physically present in the United States.

Of the 18 defendants, two were current high-ranking government officials: the Bosnian Serb leader Radovan Karadzic, and Lui Qi, Mayor of Beijing. Nine were former high-ranking civilian or military officials who continued to exercise considerable influence. Several of the defendants were particularly sadistic, hands-on torturers.

Because these suits are civil in nature, the perpetrators cannot be held in jail. In some cases, however, evidence uncovered during the civil lawsuit has been used by U.S. government authorities to arrest and deport the perpetrator; some plaintiffs have been able to recover substantial assets from the defendants.

And in all of the cases the perpetrators have been exposed as human rights violators, and subjected to the shame and ostracism their actions deserve. Their lives have been disrupted; most fled the U.S. after the lawsuits were filed against them. Of the four remaining,



Carlos Mauricio, plaintiff in CJA's case against the two Salvadoran generals, demands justice outside of the Fresno Federal Court House.

all are subject to deportation investigations. In one case, the lawyers who worked on the civil case are helping others in the defendant's home country to prosecute him following his deportation from the U.S.

These lawsuits have contributed to the worldwide movement against impunity by:

- 1) helping ensure that the U.S. does not remain a safe haven for such perpetrators,
- 2) holding individual perpetrators accountable for human rights abuses,
- 3) providing victims with some sense of official acknowledgment and reparation,
- 4) establishing an historical record of what happened,
- 5) contributing to the development of international human rights law, and
- 6) building a constituency in the U.S. that supports the application of international law in such cases, while creating an awareness about human rights violations in all regions of the world.

These cases, when viewed with other anti-impunity efforts around the world, are also:

- 7) helping to create a climate of deterrence, and
- 8) catalyzing efforts in many countries to prosecute their own human rights abusers.

These eight objectives will be discussed at greater length later in the notebook.

## Strategic context of the tactic HUMAN RIGHTS ABUSERS IN THE U.S.

The Center for Justice and Accountability (CJA) estimates that several hundred human rights abusers—people with substantial responsibility for heinous atrocities—now live in the U.S., and that several dozen high-level perpetrators visit every year. This estimate is supported by the U.S. Immigration and Customs Enforcement Bureau.<sup>1</sup>

These perpetrators come from more than 70 countries, including Bosnia, Cambodia, Chile, El Salvador, Ethiopia, Guatemala, Haiti, Honduras, India, Liberia, Pakistan, Peru, Rwanda, Sierra Leone, Somalia, Sri Lanka, Syria, and Vietnam. Only a few dozen have been deported, nearly all of them since 2000 (approximately 90 people were previously deported or extradited for Nazi-era crimes). Most are low-level abusers; nearly half are Haitian.<sup>2</sup>

The majority of perpetrators are identified during the asylum process, when they declare that their fear of persecution is based on their involvement with a unit that participated in human rights atrocities. Despite the fact that Congress adopted a law in 1994 that gives U.S. courts jurisdiction to prosecute such crimes,<sup>3</sup> no human rights abuser has been criminally prosecuted in the U.S. for torture.

### **THE PRESENCE OF HUMAN RIGHTS ABUSERS CAUSES THEIR VICTIMS EXTREME ANXIETY**

It is important to understand that survivors of atrocities often live in the same communities as their perpetrators. In New York City, for example, the Haitian community is home to a man at the center of a CJA case. Emmanuel “Toto” Constant was the outspoken head of FRAPH (the Armed Revolutionary Front for the Advancement of Haitian People, and also the Creole word for “to hit” or “to beat”), Haiti’s most brutal paramilitary organization. The Haitian people hold Constant responsible for a widespread and systematic campaign of rape, torture, and murder from 1992 to 1994. In 1996, the Haitian community in New York discovered that Constant was openly working in the real estate business in Queens and Brooklyn. An article in the *Atlantic Monthly* of June 2001 describes the traumatic experience of one Haitian family when Constant appeared at their door asking if he could tour their house.<sup>4</sup> The numerous victims of FRAPH who were forced to take refuge in the U.S. must live with the daily fear of meeting the man responsible for their torture.

Another of CJA’s clients, Oscar Reyes, encountered former Honduran military intelligence chief Lt. Col. Juan López Grijalba at a reception for Honduran dignitaries. Unable to speak out at the time, he and his wife had to wait ten years for justice. In 2002, the Reyeses, through CJA, filed a lawsuit against Grijalba for their unlawful arrest and brutal torture in 1983. Based on their testimony and that of other CJA witnesses, Grijalba was deprived of his income and deported to Honduras, where he faces a criminal investigation.

CJA’s founder, a licensed clinical social worker who has counseled torture survivors, has found that two things consistently emerge as integral parts of the healing

process: a need for justice, and an anxiety regarding perpetrators who live in the U.S.

### **THE LEGAL BASIS OF THE CIVIL LAWSUITS**

The Alien Tort Claims Act (ATCA), passed by Congress in 1789, allows “aliens”—non-U.S. citizens—to bring civil lawsuits for “torts...committed in violation of the law of nations or a treaty of the United States.”

The ATCA was largely unused until 1980, when a federal Court of Appeals issued its landmark judgment in the case of *Filartiga v. Pena-Irala*. The case involved a Paraguayan citizen, Dolly Filartiga, who moved to the U.S. after her brother was tortured and killed by Peña, a Paraguayan police chief. When Dolly discovered that Peña was visiting the U.S., she and her father brought an action against him, under the ATCA, for torture and wrongful death. The Court of Appeals ruled that state-sponsored torture violated the law of nations and that the torturer was *hosti humanis*, an enemy of all mankind.

While this was considered a ground-breaking judgment, it did not lead to a flood of cases. The court set a high standard: the violation had to be of a rule that commanded the “general assent of civilized nations.” Subsequent courts elaborated further requirements. The violation must be of a norm of international law that is “specific, universally condemned, and obligatory.” Cases may be pursued against individuals only if they have been personally served while physically present within the territory of the U.S. Cases are barred by the statute of limitations unless filed within 10 years of the violation, unless there are extenuating circumstances—i.e., a threat of retaliation during that period, or a lack of access to necessary evidence.

Concerning most claims, the defendant must be a government official or agent, or have worked together with government agents. A death squad leader, for instance, would be liable only if he received support from government forces. In the absence of any form of

<sup>1</sup> ICE Fact Sheet, <http://www.ice.gov/graphics/news/factsheets/nosafehaven.htm>. See also Amnesty International, USA, quoting an immigration service source: USA: A Safe Haven for Torturers (April 10, 2002). Available at <http://www.amnestyusa.org/stoptorture/safehaven.pdf>.

<sup>2</sup> For information on the number of Haitians placed in deportation proceedings as human rights abusers, see Alfonso Chardy, “2 More Haitian Torture Suspects are Arrested in S. Florida Pending Deportation,” *Miami Herald*, Dec. 20, 2003, available at <http://www.miami.com/mld/miamiherald/news/local/7535658.htm>.

<sup>3</sup> 18 U.S.C. 2340A.

<sup>4</sup> David Grann, “Giving ‘The Devil’ His Due,” *Atlantic Monthly*, June 2001.



The most important thing is to speak out and not let yourself be dominated by silence. But it's not just speaking and opening wounds. We have to know when it's a good time to share our experiences, and how. We need to find a proper listening space among people who are willing to do something in response to what they hear. We need to find spaces that can generate mechanisms or channels for justice, and not just put these people in jail but prevent this kind of activity from happening again, and isolate torturers who come to the United States in search of a paradise.

*Juan Romagoza, on the significance of Romagoza, Gonzalez, & Mauricio v. Garcia & Vides Casanova, a case against two high ranking Salvadoran generals for torture committed in 1979–1983.*

state action, individuals may be held liable only for genocide, crimes against humanity, war crimes, and slavery and slavery-like practices. While some form of state action is usually necessary, some officials have immunity: if a defendant has head-of-state, diplomatic, or other immunity, a case will be dismissed.

Some judges and academics raised concerns about the ATCA's application to modern-day human rights violations. In 1991, to confirm the act's agreement with the *Filartiga* line of cases, and to extend its jurisdiction to U.S. citizen as well as alien plaintiffs, the U.S. Congress adopted the Torture Victim Protection Act (TVPA). The TVPA provides that "an individual who under actual or apparent authority, or color of law, of any foreign nation" subjects another to torture or extrajudicial killing is liable for damages in a civil action. The legislative history that accompanies the TVPA makes clear that the act was intended to confirm the causes of action for official torture and extrajudicial killing, and did not supercede the ATCA, which continued to have "other important uses."

The TVPA is narrower than the ATCA in that it applies only to torture and extrajudicial killing, and may be used only against individuals who act under "actual or apparent authority...of any foreign nation." The TVPA clearly cannot be applied against individuals acting under the authority of, or in concert with, the U.S. government.

In 2004, the U.S. Supreme Court affirmed the *Filartiga* line of cases in *Sosa v. Alvarez-Machain*,<sup>5</sup> holding that ATCA claims must "rest on a norm of international character accepted by the civilized world and defined with the specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>6</sup> The Court denied the particular arbitrary arrest claim advanced by Dr. Alvarez in the case, but did so in a manner that does not appear to undermine the *Filartiga* line of cases. The Court cited, with approval, cases which permitted ATCA claims for violations of international norms that are "specific, universal and obligatory."<sup>7</sup> These cases

have ruled that claims of genocide, war crimes, crimes against humanity, slavery and slavery-like practices, torture, disappearance, summary execution, and prolonged arbitrary detention are actionable under the ATCA.

In addition to foreign-born human rights abusers, the ATCA has been invoked against corporations that do business in the United States, and against U.S. government officials and agents. While our tactic concerns only foreign-born human rights abusers, these other cases are worthy of notice, and provide important context. To date, some 40 cases have been filed against corporate defendants. In one case, the defendant, Unocal Corporation, agreed to settle for an undisclosed sum to be paid to a fund to benefit the communities of Burmese villagers who had been victimized by Unocal's practices. The settlement has been widely interpreted to signify Unocal's acceptance that it likely would have lost the case. Twenty-three of the other cases have been dismissed for a variety of reasons.<sup>8</sup> Five have survived motions to dismiss, and eight others are awaiting decisions on such motions. All cases against U.S. officials—including Henry Kissinger—have so far been dismissed, though a few decisions are still on appeal. One case was successfully brought against a private company that held, without legal authority, a contract with the U.S. government to operate a detention facility for aliens in the U.S. It appears likely that ATCA will be used successfully against U.S. government contractors, as well as state and local government officials.

## What lawsuits against foreign-born human rights abusers can accomplish

### 1. THEY CAN ENSURE THAT THE U.S. DOES NOT REMAIN A SAFE HAVEN FOR HUMAN RIGHTS ABUSERS

The ATCA cases have resulted in the removal or departure of numerous human rights abusers who were either high-level or directly involved in committing atrocities. Of the 18 individuals successfully sued using the ATCA, one was deported based on information uncovered by the plaintiffs, one was extradited, one died, and ten left the country and have not, as far as we know, returned—including five who had moved here to settle.<sup>9</sup> Only five of the 18 remain in the U.S.<sup>10</sup> Of those, one has been denaturalized and is in detention pending the outcome of deportation proceedings, and one is the subject of a deportation investigation based largely on evidence uncovered during the course of ATCA cases.

These 18 cases have clearly deterred numerous abusers from coming to the U.S. Following the ATCA case against Paraguayan police chief Pena-Irala, for example, the U.S. consulate in Paraguay reported a decrease in U.S. visa requests by Paraguayan officials and

military officers.<sup>11</sup> The Shah of Iran was the last major human rights abuser to openly seek medical treatment in the U.S. Although Baby Doc Duvalier of Haiti came to Miami in 1986 after he was forced into exile, he quickly left for France. Salvadorans watching for the entry of Salvadoran military officers who used to travel regularly to Miami and southern California report that these officers are no longer traveling here. And immigration agents have confirmed that certain human rights abusers from Central America stopped coming to the U.S. after mid-2002. Is it a coincidence that a major ATCA victory against two Salvadoran former defense ministers was obtained in July 2002?

Of course, ridding the U.S. of human rights abusers arguably only exports the problem, unless the receiving country is willing and able to criminally prosecute the abuser. Most countries are not willing or able, and abusers simply return to their home countries where they continue to enjoy immunity. On the other hand, most live less well than they did in the U.S. and most have lost stature, money, and influence as a result of the lawsuits.

The fight against impunity would, in most cases, be better served if the human rights abusers could be criminally prosecuted in the U.S. However, most U.S. prosecutors lack the political will, and in most cases, the legal authority and/or adequate evidence, to pros-

ecute. Given the current administration's willingness to violate international law in the prosecution of its "war on terror," virtually all human rights organizations are reluctant to advocate at this time for laws that would enhance the powers of the U.S. government to prosecute foreign-born human rights abusers.

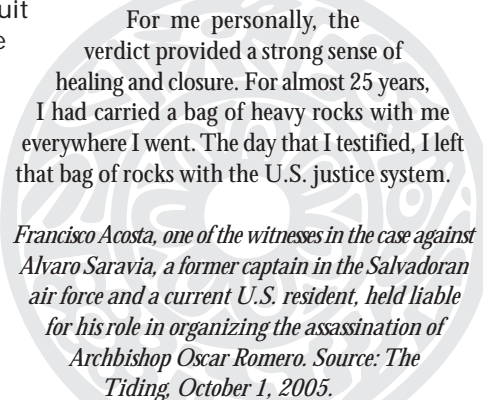
## 2. THEY CAN HOLD HUMAN RIGHTS ABUSERS ACCOUNTABLE

Though their punishment does not fit the severity of the crimes, ATCA cases demand accountability, a component of both justice and deterrence. The cases expose what perpetrators have done. They cause embarrassment. They can limit the careers of foreign officials whose advancement depends on the ability to travel to the U.S. without being greeted with revealing news stories. These cases have conveyed the strong message that people who commit atrocities will *not* be able to visit or live in the U.S. with impunity. This can be a substantial penalty, especially for persons from countries with close relations with the U.S. or whose citizens often travel or retire to the U.S., such as Indonesia and several countries in Latin America.

Hector Gramajo, a Guatemalan ex-general, fled the U.S. after being served with an ATCA complaint in 1991. He had been preparing to run for his country's presidency, and had come to the U.S. to obtain a degree from Harvard University's Kennedy School of Government. After being served with the lawsuit on his graduation day, he immediately returned to Guatemala with his U.S. visa revoked, and his party did not choose him as its presidential candidate. His inability to travel to the U.S. without embarrassment now a liability, Gramajo found his political ambitions thwarted.

Found responsible for acts of torture during the "Red Terror" in Ethiopia, Kelbessa Negewo lost several jobs, and was eventually denaturalized and arrested for deportation because of the judgment in the *Abebe-Jira* case.

Non-monetary consequences have been imposed in other cases as well, including an unreported case in 1987 which caused a Chilean torturer to avoid competing in the Pan-American games in Indiana for fear of having his horse seized as part of an ATCA case.



For me personally, the verdict provided a strong sense of healing and closure. For almost 25 years, I had carried a bag of heavy rocks with me everywhere I went. The day that I testified, I left that bag of rocks with the U.S. justice system.

*Francisco Acosta, one of the witnesses in the case against Alvaro Saravia, a former captain in the Salvadoran air force and a current U.S. resident, held liable for his role in organizing the assassination of Archbishop Oscar Romero. Source: The Tiding, October 1, 2005.*

<sup>5</sup> 124 S.Ct. 2739 (2004).

<sup>6</sup> Alvarez, at 2761-62.

<sup>7</sup> Id. at 2766.

<sup>8</sup> These include that the claim—for instance, arbitrary detention for less than a day—is not actionable under the ATCA; that the case should more properly be brought elsewhere, e.g., in the country where the violation was committed; that the plaintiffs have failed to exhaust remedies in the country where the violation was committed; that the claims are barred by the statute of limitations; and that the court's assertion of jurisdiction to hear the case could interfere with foreign affairs.

<sup>9</sup> Norberto Pena-Irala (Paraguayan police chief) was deported; Suarez Mason (Argentinian general) was extradited; Ferdinand Marcos (Philippines former President) died. Five defendants visiting the U.S. were successfully sued, and each left shortly after the lawsuit was filed: Karadzic (Bosnian Serb leader), Lumintang (Indonesian general), Gramajo (Guatemalan former Defense Minister), Kavlin (Bolivian corporate vice-president); Assasie-Gyimah (Ghanaian security officer). Five defendants who were resident in the U.S. (in the U.S. more than six months or who manifested clear intent to stay) left following the filing of the lawsuit: Imee Marcos-Manotoc (daughter of Philippines President Marcos), Barayagwiza (Rwandan radio station owner), Panjaitan (Indonesian general), Avril (Haitian former President), and Vukovic (Bosnian Serb war criminal).

<sup>10</sup> Garcia and Vides Casanova (Salvadoran generals and former Defense Ministers), Fernandez-Larios (Chilean major and death squad member), and Saravia (Salvadoran death squad henchman).

<sup>11</sup> Information supplied by Prof. William Aceves.

Lawyers also continue to pursue the collection of assets in past judgments, and are increasingly going after defendants who have assets that may be reachable by U.S. courts. Success in collecting these assets will further increase the cases' deterrent impact. In the case of a perpetrator with no assets, a portion of his or her salary or pension may be subject to attachment.

The collection of ATCA monetary judgments, however, has been difficult. It is believed that money has been collected in only two cases: approximately \$1 million from the estate of Philippine President Ferdinand Marcos,<sup>12</sup> and less than \$1,000 from General Suarez-Mason of Argentina.

Plaintiffs and attorneys in cases resulting in default judgments have attempted to enforce some of these past pending judgments. Dolly Filartiga and her family, for example, are still working to enforce the judgment received in their groundbreaking case, and recently filed a new enforcement case in New York federal court. A team of lawyers is also working to enforce the judgment in Paraguay.

Efforts have also been made in other pending cases, to date without success. Given the risks involved, it is difficult to find organizations or law firms who would seek assets on a contingency or *pro bono* basis. Non-profit organizations have not had the resources to successfully enforce judgments against those with assets, especially when the assets are hidden outside the U.S.

In 2003, CJA embarked on a campaign to track and collect assets. Enlisting lawyers in El Salvador to search for hidden assets, for instance, CJA has so far obtained \$270,000 from a Salvadoran general, and is working to acquire more. In another case, CJA's *pro bono* law firm has engaged an international accounting firm to find assets before the complaint is even filed. We are close to obtaining nearly \$1 million from a Haitian perpetrator who won \$3.2 million in the Florida state lottery. CJA is working to build cases against some of the financiers of death squad activity in El Salvador who live in or regularly visit the U.S., along with those who have financed more recent violence in other countries. If and when CJA is able to gain possession of defendants' assets, the majority of the funds will go directly to the plaintiffs; the remainder will cover out-of-pocket ex-

<sup>12</sup> A \$150 million settlement was approved in the Marcos case, but the Philippine courts blocked the transfer of Marcos assets that were also being claimed by the Philippine government, and the settlement has never been funded. All Holocaust assets cases, of course, included ATCA claims, and billions of dollars in settlements have been achieved. Several of the lawyers involved in these cases, including Professor Burt Neuborne, have credited the foundation of ATCA jurisprudence as a crucial element in their efforts to obtain justice for victims of the Holocaust.

penses incurred by CJA and by the law firms that both work with us on a volunteer basis and advance some of the costs.

### **3. THEY CAN PROVIDE OFFICIAL ACKNOWLEDGMENT & REPARATION FOR VICTIMS AND SURVIVORS OF HUMAN RIGHTS ABUSES**

These cases frequently help survivors experience a sense of justice, a sense of meaning in their survival, and a tremendous satisfaction in knowing that they have brought dignity to the memories of those who were killed or tortured.

Plaintiffs, therapists, community leaders, and human rights activists have been eloquent in describing the impact of the cases on their own healing processes and on their efforts to repair their community's sense of loss and injustice. In the words of Juan Romagoza, a Salvadoran torture survivor: "When I testified, a strength came over me. I felt like I was in the prow of a boat and that there were many, many people rowing behind. I felt that if I looked back, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn, bleeding. So, I didn't look back, but I felt their support, their strength, their energy. Being involved in this case, confronting the generals with these terrible facts—that's the best possible therapy a torture survivor could have."

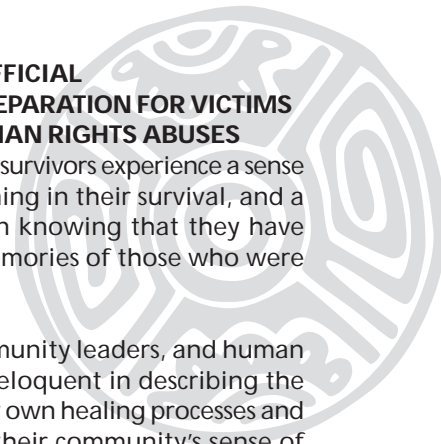
Plaintiffs are generally realistic about the limits of the lawsuits, yet grateful for the opportunity to proactively pursue justice. Zita Cabello, a Chilean woman whose brother was killed and a plaintiff in a CJA case with a positive jury verdict, said "This lawsuit cannot reduce the pain I feel over the death of my brother, Winston. Nothing will ever diminish that pain. But working with CJA has given meaning to my pain. That is a tremendous gift."

The website [www.nosafehaven.org](http://www.nosafehaven.org) contains additional testimony by plaintiffs and a brief submitted to the Supreme Court about the impact of ATCA cases on survivors.

### **4. THEY CAN SET THE HISTORICAL RECORD STRAIGHT**

For the plaintiffs involved, and for their communities as well, these cases are an opportunity to correct the historical record. These suits are not only about what happened, but about who was responsible. As such, they serve as miniature truth commissions.

In many cases the country in which the atrocities took place is still in a period of transition. Perhaps the judiciary is unable or unwilling to pursue litigation of human rights abuses, or there has been no opportunity





CJA Litigation Director Matt Eisenbrandt and Pro Bono counsel Nico Van Alestyn of Heller Ehrman stand with members of the Salvadoran community outside the Fresno federal courthouse.

for a truth commission. In the case of Haiti, for example, the commission was largely under-funded and unable to give all victims an opportunity to come forward, especially those already forced into exile. Participating in an ATCA case is for many plaintiffs their only chance to put on the public record an account of what they suffered. It is also, for many defendants, the only documentation of their role in the atrocities.

### 5. THEY CAN CONTRIBUTE TO THE DEVELOPMENT OF HUMAN RIGHTS LAW

These lawsuits have established important legal precedents which have expanded the kinds of human rights violations which may be subject to suit, and have made it possible to sue corporations and contractors working with the U.S. government. Cases against individual perpetrators have established, in holdings that will likely withstand post-*Alvarez* scrutiny, that several violations constitute torts in violation of the law of nations, including torture, summary execution, prolonged arbitrary detention, war crimes, disappearances, genocide, crimes against humanity, and slavery-like practices. Decisions have also recognized that ATCA applies to commanders, co-conspirators, and aiders and abettors, as well as to the actual perpetrator; to organizations and corporations as well as to individuals; and to private persons as well as to government actors. These decisions may have an impact beyond U.S. borders.

ATCA cases have also given legitimacy to the use of international human rights law in U.S. courts generally. They have demonstrated that customary international law can, and in certain circumstances must, be directly applied by U.S. courts. It seems likely that ATCA decisions will be used by U.S. courts in non-ATCA cases invoking international human rights law in other contexts. With the Supreme Court increasingly, in cases like *Atkins v. Virginia* and *Lawrence v. Texas*, considering interna-

tional law in its decisions, this expanding body of international jurisprudence is likely to be influential in many other areas.

ATCA cases are now a regular part of international human rights curricula at law schools, are taught in international relations courses, and are regularly addressed at judicial education seminars on international law. They have demonstrated the relevance of learning not only about international law but about a host of subsidiary issues crucial to the decisions of human rights cases, including the act of state and political question doctrines, immunities, *forum non conveniens*, exhaustion of domestic remedies, equitable tolling of the statutes of limitations, standing to sue, and theories of liability (command responsibility, aiding and abetting, conspiracy, vicarious liability, direct liability).

### 6. THEY CAN BUILD A HUMAN RIGHTS CONSTITUENCY IN THE U.S.

ATCA cases against individual perpetrators, on behalf of often very sympathetic plaintiffs, put a human face on human rights violations, and have attracted considerable media coverage that itself highlights the need for the ATCA. These cases, along with survivor testimony, compellingly illustrate that the ATCA provides survivors of human rights violations with not only an important means but, indeed, the *only* means for redress in the United States. As U.S. citizens become comfortable with the notion that the ATCA should be applied against foreign human rights abusers, it should be possible to convince courts and the public, at least in the long run, that the same standards should be applied to U.S. agents when they aid and abet such violators, and to U.S. corporations doing business abroad in collaboration with repressive regimes.

### 7. THEY CAN DETER HUMAN RIGHTS ABUSES

When linked with other anti-impunity efforts around the world, ATCA cases contribute to a climate of deterrence. The fact that ATCA cases have caused some human rights violators to leave the U.S. and have dissuaded others from entering is only a modest form of success. When viewed together with developments in other countries, however, ATCA has helped to substantially close off parts of the world habitually enjoyed by criminals—for retirement, health care, and education of their children, and simply as an escape from crime and poverty in their home countries. The effects of the U.S. government's rejection of the International Criminal Court and of other international justice mechanisms would certainly be all the more egregious were the ATCA not available to address some of the most culpable human rights abusers on U.S. soil.



## 8. THEY CAN CONTRIBUTE TO TRANSITIONAL JUSTICE

ATCA cases can serve as a catalyst for the process of transitional justice in the home country. They can bring hope to activists who have labored without significant success, and to survivors who feel solidarity with the plaintiffs. By demonstrating that impunity can be challenged, ATCA cases can stimulate discussion about the crimes of the past, and build support for bringing perpetrators to justice in their own domestic courts.

For instance, a \$54 million jury verdict in July 2002 against two former Ministers of Defense fueled debate in El Salvador regarding repeal of the country's amnesty law. The legal team's success in securing an initial \$270,000, and the fact that Salvadoran lawyers are now helping the U.S. legal team track down further assets, are causing consternation among Salvador's top military officers. The case also has encouraged more torture survivors to come forward with their stories. Other ATCA cases have had similar effects.<sup>13</sup>

Maria Julia Hernandez, director of the Human Rights Office of the Archdiocese of El Salvador, clearly states the impact of these civil cases on transitional justice in the defendant's home country: "The process and the verdict in this case are accomplishments in a long and most difficult fight against impunity. It is a case in which all the victims of El Salvador emerged and were represented by these brothers and this sister. Now each of us has been touched in a way that inspires us to continue on this road." Fr. José Tojeira, President of UCA, the Jesuit university in San Salvador commented: "It is important to pursue international alternatives as a means to pressure the Salvadoran justice system. These Salvadorans brought their case in the U.S. not to hurt El Salvador, not for propaganda, but to help construct an El Salvador that is based on the truth. To fail to pursue the commanders endangers the rule of law and the foundation of our society."

The case also encouraged witnesses to come forward with evidence against two Salvadoran perpetrators who have lived in the U.S. for more than 15 years: Alvaro Saravia, an organizer of the 1980 assassination of Archbishop Oscar Romero, and Col. Nicolas Carranza, head of the Hacienda (Treasury) Police, who was forced out of the military in 1985 because the high level of atrocities for which he bore responsibility made it uncomfortable for the U.S. to continue sending military aid. The verdict in the Romero case, rendered on September 3, 2004, has already had a substantial impact in El Salvador. For the first time, key representatives of the Catholic Church have called for revisions to the amnesty law and a reopening of the criminal investigation into the assassination. Other churches and leaders joined

the call, and President Saca has had to defend his opposition several times in the media.

The U.S. judge's finding that Roberto D'Aubuisson, founder of the ARENA party (which remains in power), was the "mastermind" of the assassination has created further pressure to reopen the investigation. The impact of these cases is due, in part, to the tremendous respect that U.S. federal courts command in El Salvador, reportedly even more, for instance, than such international bodies as the Inter-American Commission on Human Rights. This respect is, apparently, also shared by the Catholic Church. The Archbishop of San Salvador stated that the verdict should help establish Archbishop Romero's martyrdom, proving who was involved in the assassination plot.

## HOW THE TACTIC MAY BE USED IN COUNTRIES OUTSIDE THE U.S.

There are two main ways in which the tactic is transferable. First, lawyers and activists may explore the viability in their own countries of bringing similar lawsuits or of developing the capacity to do so. The best prospects for success exist within countries that are host to high-ranking or numerous foreign-born human rights abusers and have civil or criminal laws that could be used for bringing cases against the perpetrators. For instance, civil suits against human rights abusers for atrocities committed abroad have been filed in the UK using English tort law as the basis for the exercise of civil jurisdiction. Although none of the cases has yet been successful,<sup>14</sup> one is currently on appeal and there are good prospects that the case against an individual hands-on torturer will be upheld. In France and Belgium, a number of criminal complaints have led to civil reparation proceedings through adhesion processes.

Second, activists in the U.S. and around the world can track human rights abusers who live in or are likely to visit the U.S. and compile cases against them, finding plaintiffs (who can live anywhere), witnesses, and other evidence. A person with information that a non-U.S.-born human rights abuser lives in the U.S. or plans to visit can contact the Center for Justice and Accountability. CJA will evaluate the lawsuit's viability, along with its likelihood of promoting human rights and benefit-

<sup>13</sup> The Abebe-Jira case had a large effect on public opinion in Ethiopia and on the commitment of the Ethiopian government to move forward with trials of former officials of the Dergue. Plaintiff's counsel gave a nationally televised address about the case in Addis Ababa in March 1994.

<sup>14</sup> They have been dismissed on grounds of immunity, insufficient nexus with the U.K. (a *forum non conveniens* test), failure to come within the limitation period, and inability to serve the defendant. See Al-Adsani v. UK, ECHR 35763/97 (Eur. Ct. Hum. Rts. 2001) (affirming dismissal of case on immunity grounds).

SAN FRANCISCO — San Francisco's Center for Justice and Accountability (CJA) announced Friday, Oct. 5 a \$66 million federal court judgment against former Indonesian Army Chief of Staff Johnny Lumintang for his role in widespread human rights abuses in East Timor. General Lumintang received notice Friday of the ruling by United States Magistrate Judge Alan Kay of the federal district court in Washington, D.C.

Plaintiffs in the suit included six civilian victims of the violence that followed East Timor's overwhelming vote for independence from Indonesia in a 1999 U.N.-sponsored referendum. They filed suit against General Lumintang in March 2000 under federal laws permitting victims of grave human rights violations abroad to sue perpetrators of such violations who enter the United States. Lumintang was served with court papers during a visit to Washington, D.C.

In March of this year, Judge Kay heard three days of testimony from the four surviving plaintiffs and several expert witnesses in a Washington, D.C. federal courtroom. Two of the victims were killed during the post-referendum violence. The plaintiffs were represented by CJA, a San Francisco human rights law organization, New York's Center for Constitutional Rights (CCR), and the Washington, D.C. law firm Patton Boggs, LLP.

The plaintiffs' suit focused on Lumintang's role in what the court called a "coordinated program of massive destruction" unleashed by the Indonesian military following the overwhelming popular vote for independence from Indonesia in a 1999 U.N.-sponsored referendum.

The court found that Lumintang, as Army Vice Chief of Staff at the time, was responsible for scrutinizing army operations, strategic planning, and military discipline. The court also noted that Lumintang issued a telegram to Army troops viewed as signaling the campaign of violence, and that he signed a training manual distributed to troops in East Timor that included instructions in abduction, killing, kidnapping, and terror.

"It has been established . . . that Lumintang has responsibility for the actions against plaintiffs and a larger pattern of gross human rights violations," wrote Judge Kay. "[H]e—along with other high-ranking members of the Indonesian military—planned, ordered, and instigated acts carried out by subordinates to terrorize and displace the East Timorese population...and to destroy East Timor" infrastructure following the vote for independence."

*Excerpt from a press release, October 5, 2001: U.S. Court Holds Indonesian General Liable for \$66 Million for East Timor Abuses*

ing a broad population of survivors. If CJA has the available time and resources, and determines that a case is both legally viable and likely to have broad beneficial impact, it will take the case, or will seek a law school clinic or experienced private lawyer to do so.

CJA offers all services free of charge. We enter into written contracts with our clients whereby we undertake to represent them fully and rigorously through trial. In turn, if we win a case and are able to secure the defendant's assets, we are entitled to be reimbursed for costs expended on the case. CJA has won six cases since April 2002, with judgments totaling \$254 million, but has yet to collect any assets. Assets are discussed at greater length above.

Three other non-profit organizations are involved in using the Alien Tort Claims Act to bring lawsuits against human rights abusers: the Center for Constitutional Rights (CCR, at [www.ccr-ny.org](http://www.ccr-ny.org)), Earth Rights International (ERI, at [www.earthrights.org](http://www.earthrights.org)), and the International Labor Rights Fund (ILRF, at [www.laborrights.org](http://www.laborrights.org)). CCR brought the Filartiga case, mentioned above, which was the first ATCA human rights case, and since then has been involved in nearly a dozen ATCA lawsuits.

In 1996 CCR, together with ERI and ILRF, brought the case against Unocal, the first case ever filed in a U.S. court against a corporation for abuses of international human rights (this case is described above). CCR is now pioneering cases against U.S. government officials and contractors who work with the U.S. government. It recently filed a lawsuit against CACI and Titan, two large companies that provided interrogators to work for the Department of Defense in the Abu Ghraib prison. CCR continues to work on a few cases, started many years ago, against top foreign officials who visited the U.S., including Li Peng, the Chinese Premier, and an Indonesian general. CCR is, however, no longer taking new cases against individual foreign-born human rights abusers.

ERI has been involved in several lawsuits against corporations—Unocal, ChevronTexaco, Union Carbide and Shell—whose exploitation of natural resources has led to human rights abuses against populations living near their installations. ILRF has focused on lawsuits against corporations—ExxonMobil, Coca-Cola, DelMonte, Drummond, and Occidental Petroleum—involving attacks against labor unionists.

CJA works closely with these sister organizations—partnering, for instance, in the defense of the ATCA from U.S. government and corporate attacks and in the development of beneficial case-law by filing friend-of-the-court briefs. None of these three organizations,



however, is currently accepting cases against individual foreign-born human rights abusers. When asked about the possibility of a lawsuit against such an abuser, they refer people to CJA. Similarly, when people contact us about lawsuits in which the other groups might be interested, we make referrals to those organizations. On occasion we also refer cases to law school human rights law clinics.

### HOW THE TACTIC WORKS IN THE U.S.

To work effectively, the tactic requires four essential steps:

- 1) tracking down perpetrators in the U.S.,
- 2) finding appropriate plaintiffs and witnesses,
- 3) bringing civil lawsuits against the perpetrators, and
- 4) working with the authorities to have the perpetrators arrested, prosecuted, and deported.

### TRACKING DOWN PERPETRATORS

CJA finds perpetrators living in the U.S. by using a variety of methods, the most important being outreach to refugees, community leaders, human rights activists, and others who may have knowledge of these people. If we obtain information that a perpetrator is living in a certain city, we collaborate with private investigators and sometimes the immigration service to establish the person's whereabouts.

Refugees in the U.S. are often the best sources of information about perpetrators who have settled here, while activists in the home country are often knowledgeable about perpetrators who will be traveling to the U.S.—as part, for instance, of official delegations, for fundraising purposes, for medical care, or to attend police or other training programs.

Human rights activists in a country where atrocities have been committed can initiate this tactic by tracking the travel plans of, and collecting evidence against, top perpetrators. They can contact CJA to find out which perpetrators are subject to legal action in the U.S. and which are protected by diplomatic, head-of-state, or some other form of immunity. Assuming adequate information, CJA can file a lawsuit against a traveling perpetrator with only a few days notice.

### FINDING APPROPRIATE PLAINTIFFS

To file a civil lawsuit, CJA must find plaintiffs who were victims of the perpetrator. We do this by spreading information quietly through various networks. We are careful to use only trusted networks so as not to tip off the defendant before we file the case. If a defendant learns of a case before he is formally served with a complaint, he may flee, destroy evidence, intimidate witnesses, or hide his assets.

First, I am participating in order to seek justice, and to help put an end to the culture of impunity that exists in El Salvador. Second, I want to be the voice for people who were never able to speak out, for those who do not want, or are unable, to take their cases to court. Not only those who have been tortured and never want to talk about it, but also those who were killed during torture. Third, I am looking for a psychological healing of the wounds that torture left on me. I need an explanation and that is why I need a day in court....Whatever the outcome of my case, just bringing the lawsuit has been a victory.

*Carlos Mauricio, one of the lead plaintiffs in CJA's first El Salvador case*

*case*

Generally, we disseminate information through solidarity groups, torture treatment centers, refugee communities, and asylum lawyers who have handled cases from the country at issue. We ask these intermediaries if they know of potential plaintiffs, and ask them to request that any such plaintiffs contact us. We never initiate this direct contact ourselves because we want people to be recommended to us by someone they trust. We do not want to appear to be soliciting clients, and we do not want to appear to be applying pressure on them to join the lawsuit. Survivors must want to contact us, and must be interested in learning about their options.

When a potential plaintiff contacts us, we discuss very carefully with him or her what is involved in being a plaintiff, and what can be expected. We prefer to do this in person and with a trusted third person present, and we also provide the information in writing in the potential plaintiff's native language (see the sample memo on page 19).

It is important that the interested persons understand several basic aspects of the case. We discuss the following points in detail with potential clients:

- 1) The defendant cannot be sent to jail merely as a result of the case, although there is a possibility that evidence produced at trial could be used to arrest and deport the defendant.
- 2) It is unlikely that we will be able to obtain the defendant's assets; in any event, the desire to do so should *not* be a reason for a person to join one of these lawsuits.
- 3) We can keep the person's identity fully confidential during the initial stages of the lawsuit but, if the defendant decides to defend himself, and is willing to participate in a trial, then he has a right to know the identities of the plaintiffs and witnesses. At this point, a plaintiff may drop out of a lawsuit if he or she wants to maintain a confidential identity. Accordingly, we always discuss security

concerns at length, and encourage interested people to consider the risks to themselves and their families, especially if any live in a defendant's home country. Interested persons sometimes think that we can protect them, or that the U.S. courts will do so. We make very clear that neither we nor the courts can provide protection, although we will do all we can to obtain appropriate police protection if they should be threatened. In some of our cases, clients and witnesses have received threats of physical harm.

- 4) These cases take a long time—generally two to four years from the filing of the complaint until a final judgment.
- 5) There always exists the possibility that a case will be lost. Cases can be dismissed based on technicalities that have little or nothing to do with the claim's merits. Potential plaintiffs have to be aware of all possible outcomes.

## BRINGING A CIVIL LAW SUIT

Once CJA has located an appropriate defendant, and has confirmed that victims of the defendant or surviving relatives of victims want to be involved in a suit, we evaluate whether there are any insurmountable obstacles to bringing the suit (see the section on challenges, below) and whether the case will advance an important human rights objective and benefit a broad group of survivors.

If we decide that the case is legally viable and advances important human rights objectives, we prepare a complaint for filing. At this stage we may need to conduct additional fact-finding to ensure that we are likely to prove the case at trial. We do not need, at this stage, to have assembled all of the necessary evidence, but we like to have at least one expert witness and a good sense of how we will find necessary witnesses and other evidence.

### EXAMPLE: EL SALVADOR

In 2002, CJA won a \$54.6 million judgment against two Salvadoran generals, both former Ministers of Defense, who had retired to Florida in 1989. Two years later, CJA won a \$10 million default judgment against Alvaro Saravia, a key organizer of the assassination of Monsenor Oscar Romero. In 2005, CJA will go to trial against former Salvadoran military commander Nicolas Carranza.

#### *Tracking down the perpetrators*

Although the two generals were part of the ruling junta of El Salvador, and thus high-profile, they were able to live in obscurity in the U.S. by settling in prosperous communities in Florida that did not include Salvadorans from outside the elite class. Their whereabouts were discovered when a TV station broadcast a show on immigrants who had done well in Florida, and featured one of the generals. A viewer reported this sighting to a human rights organization, the Lawyers Committee for Human Rights, which investigated and found both the televised general and the other general living in South Florida.

During the trial against these men, journalists began discussing the presence of other Salvadoran human rights abusers living in the U.S. These reports, along with the help of the Salvadoran community, led to the discovery that Saravia was selling used cars in Modesto, California, and that Carranza was retired and living in Memphis, Tennessee.

#### *Finding plaintiffs and witnesses*

Through the strong leadership of grassroots groups within El Salvador and within the U.S. Salvadoran community, that community rose to the challenge of gathering plaintiffs and evidence against the perpetrators. CJA attorneys have worked

hard to cultivate relationships with these groups in order to maintain communication at every stage of the case's development. Our clients and supporters helped to spread the word about our cases, and clients spoke publicly as well as in small meetings about the benefits and challenges of these cases.

#### *Bringing the civil lawsuits*

CJA has partnered with outstanding *pro bono* law firms on each of the Salvadoran cases. Each firm donates on average more than 2,000 hours of attorney time to the cases, as well as \$100,000 or more in out-of-pocket costs.

Both generals decided to defend and appear personally at trial, making it clear that they did not want to give up their South Florida lifestyles. In the case filed against Saravia for the assassination of Archbishop Romero, the defendant got wind of the suit and went underground. Nonetheless, the attorneys successfully argued for a default judgment against him. Carranza has also decided to defend and the pending case will go to a jury trial.

#### *Working with authorities*

The evidence presented against the generals, and the publicity attracted by the trial, motivated the U.S. immigration service to investigate grounds for deporting the two men. Officials have been eager to locate defendant Saravia since his presence in California became publicized by CJA's case. Publicity during the trial in Fresno, California, encouraged more witnesses to come forward with helpful information, and authorities are closing in on him. Finally, defendant Carranza became a U.S. citizen in 1992. CJA is providing information to the proper authorities to help them exercise their authority to de-naturalize and deport him.

At this stage we also seek to enlist the participation of a private law firm to work on the case *pro bono*. A case requires hundreds, even thousands, of hours of attorney time, and the costs—if the defendant decides to defend the suit—are likely to exceed \$100,000.

Once the complaint is filed and personally served on the defendant, the future of the suit depends on whether the defendant chooses to defend. As these suits are only civil actions, a defendant can choose to simply ignore the complaint and face a default judgment. Defendants who are only visiting the U.S. when served with the suit are more likely to do this, particularly if their contacts with the U.S. are minimal. It is CJA's experience, however, that individuals who want to maintain a certain lifestyle in the U.S. will hire a lawyer and respond to the lawsuit. Such cases almost always go to jury trial.

Pre-trial work includes several tasks:

- drafting responses to motions to dismiss filed by the defendant's lawyer,
- pursuing civil discovery (locating witnesses and evidence),
- drafting interrogatories (questions for opposing counsel to answer about the evidence that will be introduced) and responding to interrogatories,
- taking depositions of the defendant and the defendant's witnesses, and preparing plaintiffs and plaintiffs' witnesses for their depositions by opposing counsel;
- preparing plaintiffs and witnesses psychologically for what they can expect at trial.



The legal team behind the successful judgment against Alvaro Saravia stands outside the federal courthouse in Fresno, CA: (from left to right starting with the back row): Matt Eisenbrandt of CJA, Russel Cohen of Heller Ehrman, Nico Van Alestyn of Heller Ehrman, Clare T.O'Hoynes of Heller Ehrman, Patty Blum of CJA, and Almudena Bernabeu of CJA.

The actual trial can last from a few days to several weeks, depending on the number of witnesses and plaintiffs involved. If the defendant hires a lawyer, it usually takes two to three years from the date that the complaint is filed to the actual trial. If the defendant does not defend himself, it can still take as long as one to two years to complete the process of obtaining a default judgment.

After a successful jury verdict is entered, the final stage in the litigation is the collection of assets. This process can be expensive and complicated. CJA has found it useful at this stage to involve attorneys with special expertise in the area of asset collection.

### SEEKING TO HAVE THE DEFENDANT CRIMINALLY PROSECUTED OR DEPORTED

Despite the usefulness of bringing civil claims against these perpetrators, the suits still do not amount to criminal prosecutions. Although depriving individuals of their wealth can be an effective form of justice, the ultimate exercise of justice is their incarceration for the crimes they have committed against the people of their own communities. To this end, CJA recognizes the importance of working with immigration authorities, especially in cases where deportation may lead to criminal prosecution in the home country. There are also other benefits to working with these officials, including but not limited to the sharing of information.

In the U.S., immigration authorities can arrest a non-citizen for a material misrepresentation on his or her immigration forms. Many forms ask if applicants ever participated in the persecution of others. People who answer no, and who are shown by CJA to be misrepresenting themselves, can be arrested by the immigration service and placed in deportation proceedings. If a deportation is contested, which it usually is, the person receives a trial which is similar to a criminal trial in many ways. And if the misrepresentation is clear cut, the person can be criminally prosecuted for perjury.

In December 2004, Congress passed a law giving the immigration service new authority to deport non-U.S. citizens who have participated in torture or extrajudicial killing outside of the U.S. One Ethiopian man—who in a 1994 ATCA case brought by the Center for Constitutional Rights was proven to be a torturer—has been arrested and placed in deportation proceedings, and more than 200 suspected abusers are being investigated. Recently, using this new law, a coalition of groups and individuals was able to persuade U.S. authorities to deny a visitor's visa to Narendra Modi, Governor of Gujarat, India, because of his close involvement in the anti-Muslim riot in 2002. Regrettably, these immigration laws leave open the possibility of abuse. CJA works



Gloria and Oscar Reyes brought a lawsuit against Honduran former military commander Grijalba.

with immigration lawyers and agents to encourage them to investigate defendants in our cases, and on occasion is able to provide exculpatory information that persuades them to close an investigation when appropriate.

In addition, the Department of Justice can initiate a criminal prosecution for torture pursuant to a 1994 law that makes torture committed outside the U.S. after 1994 a crime that can be prosecuted in the U.S. Although the DOJ has yet to exercise its authority in this area, with proper guidance from human rights groups such as CJA this law could be used productively to achieve a higher level of accountability.

### CHALLENGES IN BRINGING THESE LAWSUITS

The number of ATCA/TVPA cases brought against individual perpetrators pales in comparison to the number of human rights abusers who now live in or visit the U.S. There are several reasons why such a limited number of cases have succeeded. Many relate to a lack of available resources, but others are intrinsic to any judicial process.

The first difficulty is that of finding the human rights abusers. This can be easy if the defendant has been outspoken or if the particular refugee community is sufficiently tight-knit. But some defendants are experienced in keeping a low profile. Some have changed their names, some are even believed to have undergone plastic surgery. Such cases require additional resources, including private investigators. Often it is simply not possible to locate perpetrators believed to be in the U.S.

Second, it is often difficult to find victims or witnesses willing to participate in a lawsuit. This is especially the case if security remains a genuine concern. People in the U.S. often have family members still living at home who are vulnerable to reprisal, and there are criminal networks that operate even in the U.S. CJA has been advised, for example, to be extremely careful about bringing cases against defendants from Guatemala and Colombia. The more recent the crimes, the more dangerous the defendants and their criminal networks.

Evidence gathering is also a challenge, especially concerning abuses that happened many years ago. However, expert testimony—including that of human rights reporters—is admissible to establish patterns of abuse.

Next, plaintiffs and witnesses are likely to be retraumatized by the process of telling their stories, although most say that the experience is worthwhile. There are more than 30 torture treatment centers throughout the United States, and professionals at these centers have expressed their willingness to provide services to plaintiffs and witnesses free of charge. More than half of CJA's clients have received services from these centers.

Asset collection presents uncharted and challenging territory for many of these cases. This can be an extremely expensive endeavor, without guaranteed results. And depending on the defendant's sophistication, assets are easily moved off shore or put under another name.

Before the trial started, I couldn't sleep. I felt fear knowing that the generals would confront me. I wasn't frightened of them so much as of how my body might react. I was afraid of how I would feel being face to face with them again, so close....I had a lot of problems with insomnia; I had more frequent bouts of depression than I normally do. I was afraid for my family in El Salvador, and I still am afraid. But my mother and my family have accepted that, and they've told me that. They used to wonder why was I getting myself into these problems again, and causing problems for them, too. It was a tremendous internal challenge. But little by little, talking with them and others has helped me to clarify my thoughts, and strengthen my conviction in carrying through with this case, and to see the long-term historical impact of this case.

*Juan Romagoza, regarding the psychological preparation for and significance of Romagoza, Gonzalez, & Mauricio v. Garcia & Vides Casanova: a case against two high ranking Salvadoran generals for torture.*



Although CJA has generally had a positive relationship with immigration officials, this area also presents challenges. Government agencies are bureaucratic and political. Other agencies, including the CIA and State Department, occasionally become involved in these cases.

Finally, one of the greatest difficulties in bringing a successful ATCA case is the ongoing challenge to this area of law. The recent 2004 Supreme Court ruling on *Sosa v. Alvarez-Machain* did NOT resolve several potential legal challenges to ATCA claims.<sup>15</sup> Cases can be dismissed if they are found to violate the statute of limitations (claims must be filed within ten years of the crime, but courts have extended this period for equitable reasons—i.e. when the defendant was absent from the U.S., or victims and witnesses were deterred from bringing a suit due to a well-founded fear of reprisal). They can be dismissed if the defendant is found to have immunity by virtue of status as a current head of state or foreign minister, or by virtue of diplomatic functions in the U.S. Courts may determine that the plaintiffs could have, and therefore should have, brought the suit in their home country. There are several other legal grounds upon which suits may, and have been, dismissed.

## LESSONS LEARNED

CJA has learned that publicity is key if a lawsuit is to have impact. We have had to develop a strategic approach to involving the media in the process. This has meant that every occasion and every development during the course of litigation must be used as an opportunity to draw attention to the bigger issues at hand—namely, the existence of impunity in the target country and the U.S., the existence of perpetrators “among us,” the value of the testimonial aspect of the trial, and the significance of the final judgment, both legally and practically.

Another significant lesson is the value for survivors of the process as much as the outcome. To individual plaintiffs, the process of being involved in the lawsuit, testifying, and confronting their former persecutors is at least as important as winning the case.

Finally, it is crucial that survivors have realistic expectations about what can and cannot be accomplished with these cases. The reality concerning the difficulty of asset collection, for instance, is one area in which attorneys must be candid with survivors, but participants in these suits must be realistic in recognizing the limitations of civil lawsuits.

When pursued correctly and cautiously, this tactic can prove a valuable asset to the greater global movement for justice and the respect for rule of law.

<sup>15</sup> U.S. Supreme Court clearly stated in *Rasul v. Bush* (124 S. Ct. 2686 (2004)) that Guantanamo detainees could bring ATCA claims. This will likely include claims of international human rights violations, including torture and war crimes.

## **BEING A PLAINTIFF IN A LAWSUIT**

### ***Do I qualify to be a plaintiff in the case?***

If you were tortured or are the parent, child, spouse, brother or sister of someone who was killed, you may be able to join the lawsuit as a “plaintiff.” Being a plaintiff would mean that you are personally accusing the person or organization that we sue (the “defendant”) of being responsible for what happened to you or your relative, and asking the court to require the defendant to pay a money penalty. As a plaintiff, ordinarily your name would be identified on all papers filed with the court, and thus the defendant and the public would be able to know that you are involved. However, as explained below, you may be able to keep your identity secret, if you are concerned for your safety.

### ***Will I get any money if I become a plaintiff?***

There is a chance you will be able to recover money as compensation for what happened to you or your relative, although this is unlikely. There have been many cases brought in the United States by people who have been tortured or who lost family members in violence that occurred in other countries. In almost all of these cases, the plaintiffs have not received any money. There are two reasons. First, some cases have been rejected by the courts on legal grounds. Second, we are only entitled to get money from the defendants themselves and the defendants generally do not have any money or property in the United States. If their money is in another country it is very difficult for us to get it.

### ***What are the reasons why I might want to be a plaintiff?***

Participating in a case allows you the chance to seek justice and to have a U.S. court hold accountable people who were responsible for the abuse you or your relative suffered. The case can help establish an historical record of responsibility for terrible human rights atrocities. After we file a case, we make efforts to publicize the case to send a message that perpetrators can be held accountable, and to provide hope to those who have suffered. A victory will establish important legal precedent for future cases against human rights violators.

### ***If we sue a person, will that person be arrested?***

No, at least not directly as a result of the civil lawsuit. We do not have the ability to put the perpetrator in jail; only government prosecutors can bring criminal charges against the perpetrator. Moreover, for most crimes committed abroad to be subject to criminal prosecution in the United States, the defendant or the victim must be a U.S. citizen. However, if we win the lawsuit, it is possible that the U.S. government will revoke the defendant's visa and will not allow him to return to the United States.

### ***If we sue a person, will he/she be required to attend the trial?***

The person we sue is not required to participate in the case. We can only bring a lawsuit against persons visiting or residing in the United States, or against an organization that has offices or agents here. If the defendant is from another country he will likely return to that country and not defend the case in the United States. In this situation, we would ask the court to rule in our favor. The court would likely do this, and then hold a hearing to determine the penalty to be assessed against the defendant. This penalty will be a certain amount of money. However, recovering the money from the defendant in this circumstance will be extremely difficult to do.

### ***If I decide to become a plaintiff, what will I have to do?***

If you decide to become a plaintiff, lawyers working on the case will ask for your help in obtaining information and documents that can be used in court to show what happened to you or your relative. You may be asked to help lawyers locate and talk to witnesses. The lawyers will need to discuss important decisions in the case with you.

If the defendant does not participate in the case, the court will hold a hearing to assess a money penalty against the defendant. All plaintiffs should be present at this hearing, although on occasion we have arranged for plaintiffs to be available by telephone. If you want to attend the hearing in person, we (or one of the other organizations involved) will pay for your travel, housing, and all related costs. Before the hearing, lawyers will talk with you to ensure that you are prepared to answer questions.

If the defendant does participate in the case and hires a lawyer you may have to respond to written questions from the defendant. You may also have to provide testimony at a deposition. A deposition is a proceeding in which the defendant's lawyer and our lawyers have the chance to ask you questions about the case. The deposition can take place in your country near where you live. You will also need to attend the trial in the United States. We will pay for you to travel to the U.S. and for housing accommodations while here. It is likely that you will have to give testimony in court at the trial. This means that you will have to answer questions from one of our lawyers and from the defendant's lawyer in front of the judge and jury. The defendant may be present at the trial. We will work with you before the trial to prepare you for everything that might happen.

### ***How long will the case take?***

It is important to realize that this case will take a long time to reach a conclusion. We probably will not be able to file the case for several more months. Once we file the lawsuit, the length of the process will depend on whether the defendant participates in the case. If he does not, it will likely take one or two years before the case is finished. If the defendant defends himself in the case and it goes to a trial, the process could take three years or longer.

### ***If I become a plaintiff, will everyone know that I am involved in the case?***

You will need to consider whether being a plaintiff might jeopardize your security, or that of your family or other persons. If necessary, you can file the case under a pseudonym (John or Jane Doe). However, if the defendant responds to the case, he may request information about the identity of the plaintiffs. We can provide you with another document that explains this process in more detail.

There will likely be significant attention paid to this case in the press and media. As a plaintiff, you would not be required to speak with the press and public.

### ***What other problems might I face if I become a plaintiff?***

You should also consider the emotional implications of being a plaintiff. You will have to talk to the lawyers and in court about the terrible things that happened. This is not easy. Our clients generally have felt that it is worthwhile to talk about the things that happened to them, and to speak out for their families and all those who suffered. However, this is often very difficult to do.



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**ORGANIZATIONS WORKING ON ATCA LITIGATION**

Center for Constitutional Rights  
New York  
[www.ccr-ny.org](http://www.ccr-ny.org)

Center for Justice and Democracy  
New York  
[www.centerjd.org](http://www.centerjd.org)

Earth Rights  
Washington, DC  
[www.earthrights.org](http://www.earthrights.org)  
[www.notortureforprofit.org/petition/](http://www.notortureforprofit.org/petition/)

International Labor Rights Fund  
Washington, DC  
[www.laborrights.org](http://www.laborrights.org)

Human Rights First  
(Lawyers Committee for Human Rights)  
New York, Washington DC, Oakland  
[www.humanrightsfirst.org](http://www.humanrightsfirst.org)

[www.globalpolicy.org](http://www.globalpolicy.org)  
website of articles & information  
regarding the ATCA  
[www.globalpolicy.org/intljustice/atca/  
atcaindx.htm](http://www.globalpolicy.org/intljustice/atca/atcaindx.htm)

**ORGANIZATIONS THAT WORK TO BRING HUMAN RIGHTS ABUSERS TO JUSTICE**

Amnesty International  
[www.amnesty.org](http://www.amnesty.org)

Center for Human Rights & Constitutional Law  
[www.centerforhumanrights.org](http://www.centerforhumanrights.org)

Center for Justice and International Law  
[www.cejil.org](http://www.cejil.org)

May I Speak Freely?  
[www.mayspeakfreely.org](http://www.mayspeakfreely.org)

Redress Trust  
Universal Jurisdiction Information Network  
London  
[www.redress.org](http://www.redress.org)  
[www.u-j.info](http://www.u-j.info)

Derechos  
[www.derechos.org](http://www.derechos.org)

Human Rights Watch  
[www.hrw.org](http://www.hrw.org)

Transnational Institute - Bring Pinochet to Justice!  
[www.tni.org/pinochet/index.htm](http://www.tni.org/pinochet/index.htm)

International Criminal Tribunal  
for the former Yugoslavia  
[www.un.org/icty/](http://www.un.org/icty/)

International Criminal Tribunal for Rwanda  
[www.icttr.org](http://www.icttr.org)