

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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TERESA XUNCAX, et al.,
Plaintiffs,

Civil Action
No. 91-11564 WD

v.

HECTOR GRAMAJO,
Defendant.

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DIANNA ORTIZ,
Plaintiff,

Civil Action
No. 91-11612 WD

v.

HECTOR GRAMAJO,
Defendant.

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DECLARATION OF ALEJANDRO M. GARRO

1. I submit this declaration at the request of counsel for plaintiffs, as a supplement to my prior declaration submitted in the above-captioned cases and in response to several questions concerning Guatemalan law raised by the Court at the November 17, 1992, oral argument. More specifically, I have been asked to provide additional information which would assist the court in determining (a) the amount of damages under Guatemalan law (including examples of Guatemalan judgments in analogous tort cases), (b) the categorization of torts under Guatemala law, (c) the relationship between "moral" damages and punitive damages, and (d) attorneys fees under Guatemalan law.

Determining the amount of damages under Guatemalan law

2. Based on my research and study of the Guatemalan legal system, as well as repeated consultations with several prominent

Guatemalan attorneys, I am unable to provide this court with a representative written judgment or opinion rendered by a Guatemalan court determining the criteria followed by Guatemalan courts to assess damages in tort actions. Although I understand the reasonableness of the Court's request for more specific guidelines, I am unable to provide them, despite repeated requests to my colleagues in Guatemala. A brief review of the way in which damages are determined in Guatemala and of the general practice regarding written opinions may help explain why this is so.

3. Judicial decisions are not regularly published in Guatemala, and those that are published do not offer any guidance as to how damages are to be calculated. Unpublished opinions generally contain a minimum of analytic reasoning. I have been unable to obtain a single written opinion which addresses the issues of concern to the Court.

4. Under Guatemalan law, the determination of the amount of damages is left to experts appointed by each side. If the two partisan experts cannot agree on the amount of damages, the court appoints an independent expert to resolve the issue. The decisions of the experts are not published, and I have been unable to find or obtain a written discussion of the criteria applied by these experts while measuring the extent of the recovery. If a decision of a trial court is appealed to an intermediate court of appeals or to the Supreme Court of Guatemala, some of the appellate decisions are published in an official court report. However, appellate decisions do not deal with the measurement of damages, an issue

left to the trial court and the decisions of experts. Further, none of the Guatemalan attorneys I have consulted has yet been able to provide me with a single example of a such an expert's decision on damages.

5. Even if we were able to obtain a written opinion discussing the applicable criteria or actually awarding damages, such a decision would not reflect the "law," but rather a rule with no binding authority except for the parties to the case. See discussion of the inapplicability of the doctrine of stare decisis in paragraphs 11 and 12 of my first affidavit in these cases.

6. My study of the Guatemalan legal system, my experience with similar legal systems in other countries, and my repeated consultations with leading legal scholars in Guatemala all lead me to conclude that the Guatemalan legal system functions without referral to the kind of specific standards this Court seeks.

The categorization of torts under Guatemala law

7. I have also been asked whether, under Guatemalan Civil Code § 1645, Guatemalan courts distinguish between separate torts when awarding damages. The answer is no. There are no "separate specific torts" under Guatemalan law, but only a recognition of liability for tortious conduct in general. The essential elements of this cause of action, set forth in greater detail in my prior affidavit at paragraphs 18-20, are damage to the plaintiff, defendant's fault (i.e., breach of a generalized duty not to harm others) and a causal relation between the two. Thus, in awarding damages under Civil Code § 1645, a court would not specify the

separate torts, but would award damages for the whole pattern of tortious conduct. In this regard, the Guatemalan system follows the pattern of all civil law jurisdictions, which do not define specific torts separately.

The relationship between "moral" and punitive damages

8. As the Court noted during oral argument, "moral" damages under Guatemalan law do partake of a "punitive dimension," as that concept is applied in the United States. "Moral" damages take into consideration the heinousness of the crime and whether it was intentional or accidental. The more heinous the tort, the larger the damage award. Further, "moral" damage awards also consider the relative economic strength of the parties: it may be considered equitable to increase the tortfeasor's liability in order to have a substantial economic impact, if he is a person with extensive resources. See ¶ 3 of Guatemalan Civil Code article 1655, discussed in paragraph 36 of my prior affidavit in these cases. Thus, in practice, the determination of the amount of "moral" damages, under Article 82 of the Code of Criminal Procedure and Article 1655 of the Guatemalan Civil Code, does go beyond strict compensation to the victim.

9. It is also significant that the alleged torts in these cases are not ordinary torts, but rather conduct proscribed by international treaties binding on Guatemalan courts. See paragraphs 38-39 of my previous affidavit. Under the Guatemalan constitution, international treaties prevail over domestic law. The Guatemalan judiciary, to my knowledge, has not yet issued a

judgment in a tort case alleging violations of international human rights law, in large part because human rights cases are not seriously investigated or prosecuted in Guatemala (see id., ¶ 43). However, given the status of international treaties under the Guatemalan constitution, it is my opinion that Guatemalan law directs a court considering a damage award in a case alleging a violation of internationally protected human rights to take into consideration the guidelines provided by the international treaties agreed to and ratified by Guatemala.

Court costs and attorneys fees

10. As noted in my prior affidavit, under Guatemalan law, the party whose claims are rejected by the court bears the expense of both parties' judicial costs, including attorneys fees. (Id., ¶ 42.) Guatemala Civil Code § 578 clearly provides that the "costs" recoverable from the losing party include attorneys fees.

11. Attorneys fees are determined first according to contract. In the absence of an agreement, a fee schedule (arancel) sets the fee according to flexible standards, including the nature, importance and complexity of the case and the time spent by the attorney.

12. I have consulted as a reference an estimate of court costs in Guatemala, in U.S. dollars, prepared by a New York law firm and reprinted in How to Get Your Money in Foreign Countries: A Survey of Court Costs and Lawyer's Fees in 151 Countries, I. Greiter, ed. (1988), at 104. According to the information provided, the fee on the most complex case discussed, execution

proceedings, would be at least 15 percent (\$75,000) of a claim for \$500,000.

13. In the absence of a contractual agreement, the Guatemalan fee schedule, set out in Decree No. 20-75, provides for a fee of approximately 10 percent of the total amount involved for work performed at the trial level, up to a maximum of 30,000 Quetzales, and 5 percent of any additional amount.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 2, 1993

Signed: 
ALEJANDRO M. GARRO