UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-8364 Civ-Hurley/Lynch

JUAN ROMAGOZA ARCE, NERIS GONZALEZ, and CARLOS MAURICIO, Plaintiffs,	)
v.	)
JOSE GUILLERMO GARCIA, an individual, CARLOS EUGENIO VIDES CASANOVA, an individual, and DOES 1 through 50, inclusive, Defendants.	)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PROPOSED JURY INSTRUCTION ON COMMAND RESPONSIBILITY SUBMITTED IN LIGHT OF THE ELEVENTH CIRCUIT'S RULING IN *FORD v. GARCIA*

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INTRODUCTION

In light of the Eleventh Circuit's recent ruling in the matter of *Ford v. Garcia*, No. 01-10357, 2002 U.S. App. LEXIS 7866 (11th Cir. Apr. 30, 2002),[1] Plaintiffs hereby submit a revised proposed jury instruction on command responsibility that is consistent with the Appeals Court's ruling in *Ford*.[2] This proposed instruction is attached hereto as Attachment A (Jury Instruction Nos. 18 and 18.5). Plaintiffs' instruction tracks the language approved by *Ford* and includes explanatory text that ensures that the jury will apply these standards correctly. The highlights of Plaintiffs' proposed command responsibility instruction are as follows:

First, Plaintiffs' proposed instruction provides that Plaintiffs need not establish that the Defendants knew, or should have known, that the Plaintiffs themselves would be targeted for human rights abuse. Rather, as the instruction makes clear, Defendants may be liable where they knew, or should have known, that subordinates were committing abuses like the abuses suffered by Plaintiffs. Plaintiffs' instruction also explains that a defendant commander's constructive knowledge of human rights abuses carried out by his subordinates may be shown through the existence of a pattern, practice, or policy of such abuses.

Second, Plaintiffs' proposed instruction omits reference to proximate cause on the ground that proximate cause is not an element of the doctrine of command responsibility under either domestic or international law, as succinctly explained by Judge Barkett in her concurrence in *Ford*.

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[1] All non-standard authorities are available in Plaintiffs' Appendix of Authorities, filed herewith.

[2] On March 29, 2001, the Court ordered the parties to jointly submit proposed jury instructions. The parties complied on April 19, 2001. At that time, Plaintiffs submitted a memorandum of law in support of their proposed jury instruction on command responsibility. The present brief, drafted in light of the Eleventh Circuit's recent ruling, supersedes Plaintiffs' previous memorandum. Defendants have submitted no memorandum in support of their proposed command responsibility instruction.

Third, Plaintiffs' proposed instruction omits the delegation instruction that was employed by the trial court in *Ford*, because that instruction is inapposite to the present case and, moreover, was incorrectly formulated as a matter of law.

Fourth, Plaintiffs propose the addition of a presumption instruction to the effect that the establishment by Plaintiffs of Defendants' *de jure* command authority over their subordinates gives rise to a rebuttable presumption of effective command, as held in *Ford*.

For the reasons set out below, Plaintiffs respectfully request that the Court adopt Plaintiffs' proposed command responsibility instruction.

ARGUMENT

I. PLAINTIFFS' PROPOSED COMMAND RESPONSIBILITY INSTRUCTION REFLECTS THE PREVAILING LEGAL STANDARD AS SET FORTH BY THE ELEVENTH CIRCUIT IN *FORD v. GARCIA*

Plaintiffs' proposed instruction tracks the language approved by the Eleventh Circuit in *Ford*. Specifically, as set out in Attachment A hereto, Plaintiffs propose the following formulation of the three elements of the doctrine of command responsibility:

(1) That subordinates under the defendant's effective command had committed, were committing, or were about to commit unlawful acts, such as the human rights abuses suffered by the plaintiffs; and

(2) That the defendant knew, or owing to the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts, such as the human rights abuses suffered by the plaintiffs; and

(3) That the defendant failed to take all necessary and reasonable measures to either:
(a) prevent or stop subordinates from committing such abuses; or
(b) punish the subordinates.

See Plaintiffs' Revised Proposed Jury Instructions (Attachment A) at

This formulation, coupled with Plaintiffs' proposed explanatory text as discussed below, is consistent with the Eleventh Circuit's ruling in *Ford*.

A. Plaintiffs' Proposed Formulation Of Prong One Has Been Adopted By The Eleventh Circuit

The Eleventh Circuit has approved an instruction directing Plaintiffs to show by a preponderance of the evidence that "persons under defendant's effective command had

committed, were committing, or were about to commit torture and extrajudicial killing." *Id.* at *5 n.3 (setting forth formulation); *13 (finding no plain error). The *Ford* court further held that "the command responsibility theory of liability is premised on the actual ability of a superior to control his troops." *Id.* at *15

The *Ford* ruling is reflected in Plaintiffs' formulation of prong one. Plaintiffs have simply substituted "human rights abuses" for "torture and extrajudicial killing" to better reflect Plaintiffs' claims in this suit. Further, Plaintiffs' proposed definition of "effective command," which appears following the numbered elements of the doctrine, is consistent with that endorsed by the Eleventh Circuit. *Id.* at **14-15 (citing cases).

In addition, like the instructions approved in *Ford*, Plaintiffs propose the inclusion of a sentence indicating that a commander cannot escape liability where his own action or inaction "causes or significantly contributes to" a lack of effective command. Apart from the addition of the words "or inaction," which serve to more fully explain this concept, the relevant language in Plaintiffs' proposed instruction is drawn directly from the corresponding *Ford* instruction. *See id.* at *7 n.5

B Plaintiffs' Proposed Formulation Of Prong Two Accurately States The *Mens Rea* Requirement Of The Command Responsibility Doctrine

Plaintiffs' proposed formulation of prong two accurately reflects the law A defendant commander is liable when he knew, or should have known, that subordinates were going to commit, or had committed, international law violations of the type experienced by the plaintiffs *Ford*, 2002 U.S. App. LEXIS 7866, at *9 ("The essential elements of liability under the command responsibility doctrine are (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war ."). Defendants do not dispute that a defendant commander's knowledge of such violations may be actual or constructive under the command responsibility doctrine. *See* Joint Submission On Jury Instructions at 27-28

(Defendants' proposed instruction stating that Defendant commander is liable where he "knew" or "should have known" of violations).

Plaintiffs' proposed instruction on prong two includes language necessary to explain the following two key features of this accepted legal standard for *mens rea*: (1) Plaintiffs need not prove that they themselves were targeted for human rights abuses; and (2) Plaintiffs may show constructive knowledge, rather than actual knowledge, of abuses in order to trigger liability, and may do so by establishing a pattern, practice, or policy of such abuses by a defendant commander's subordinate forces.

Plaintiffs Need Not Prove Defendants' Actual Or Constructive Knowledge Of Human Rights Abuses Directed At Themselves

Plaintiffs' proposed instruction makes clear that to satisfy prong two of the doctrine of command responsibility, "it is <u>not</u> necessary that a defendant commander knew or should have known that the <u>plaintiffs themselves</u> would be or were the victims of human rights abuses at the hands of specific subordinate forces." *See* Plaintiffs' Revised Proposed Jury Instructions (Attachment A) at 2 (emphasis in original).

Without this proposed clarification, the jury may misinterpret prong two to require Plaintiffs to adduce evidence that the Defendants knew, or should have known, that the Plaintiffs themselves would be, or had been, targeted for abuse. This is not the law. In *Hilao v. Estate of Marcos,* 103 F.3d 767 (9th Cir. 1996), a case brought under the Alien Tort Claims Act ("ATCA"), former President of the Philippines Ferdinand Marcos was found liable to a class of plaintiffs for acts of torture, disappearance, and summary execution committed by troops under his command. The Ninth Circuit approved the district court's jury instruction on command responsibility, which notably did not require a showing that Marcos knew or should have known that subordinates were committing or had committed violations against the specific plaintiffs in the case. 103 F.3d at 776-78 Indeed, since that case was a class action involving approximately 10,000 class members, it would have been virtually impossible for the plaintiffs to demonstrate that Marcos knew, or should have known, of each and every plaintiff and each and every alleged

act of violence. Rather, the Ninth Circuit found Marcos liable where there was evidence that he knew or should have known that his subordinates were engaging in a pattern or practice of human rights violations of the type suffered by the particular plaintiffs. *Id.* at 776 (finding Marcos liable if he "knew of *such* conduct by the military and failed to use his power to prevent it") (emphasis added).

Likewise, in *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994), a court of this district found that the former military leader of Haiti bore "personal responsibility for a systematic pattern of egregious human rights abuses in Haiti during his military rule" and for "the interrogation and torture of each of the [six] plaintiffs in this case." *Paul*, 901 F. Supp. at 335. However, the court did not require the plaintiffs to demonstrate that the defendant knew or should have known that the six individual plaintiffs would be targeted. Rather, it was sufficient that the defendant knew of the existence of a widespread or systematic attack against the civilian population perpetrated by "soldiers and officers in the Haitian military" that "were employees, representatives, or agents of defendant Avril ." *Id.*; *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 171 (D. Mass. 1995) (finding former Minister of Defense of Guatemala "personally responsible for ordering and directing the implementation of the program of persecution and oppression that resulted in the terrors visited upon the [nine] plaintiffs and their families").

2. Plaintiffs' Proposed Instruction Explains How Constructive Knowledge May Arise

In a paragraph following the numbered elements of the doctrine, Plaintiffs' proposed instruction also explains *Ford*'s teaching regarding a defendant commander's constructive knowledge of human rights abuses carried out by his subordinates. International authorities make clear that constructive knowledge is shown when violations are so numerous, widespread, or systematic that a defendant should have known of abuses, or when knowledge on the part of

the defendant can be inferred.[3] Case law under the ATCA and Torture Victim Protection Act ("TVPA") is in accord.

For example, in an unpublished order in *Doe v. Lumintang*, No. 00-674 (GK)(AK) (D.D.C. Sept. 13, 2001), included in Plaintiffs' Appendix of Authorities, the district court noted that

> a policy, pattern or practice of human rights violations committed by subordinates under a defendant's command is relevant to both a defendant's knowledge of such acts and his failure to exercise an affirmative duty to control his subordinates. By failing to intervene to prevent or punish a policy, pattern or practice of abuses, a commander may be found to have essentially ratified the abuses.

Id. at 32 (citing *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1537-78 (N.D. Cal. 1987)); *see also id.* at 33 (finding defendant liable where he knew, or should have known, of "widespread and systematic human rights violations" by subordinates); *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d

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[3] For example, the United Nations Commission of Experts on the Former Yugoslavia has identified a number of factors that are relevant to determining whether a commander knew, or should have known, of unlawful acts committed by his subordinates. These include:

1) The number of illegal acts;
2) The type of illegal acts;
3) The scope of illegal acts;
4) The time during which the illegal acts occurred;
5) The number and type of troops involved;
6) The geographical location of the acts;
7) The widespread occurrence of such acts;
8) The modus operandi of similar acts;
9) The location [and position] of the commander . . .

See Letter Dated 24 May 1994 From the Secretary-General to the President of the Security Council, at 17, U.N. SCOR, U.N Doc. S/1994/674 (1994). Liability will also attach where the circumstances are such that the defendant was willfully blind to such abuses. *See* XI TRIALS OF WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 ("The Hostages Case") 1260 (1950) ("An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command when he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime.").

Cir. 1995) (finding injuries suffered by plaintiffs were part of a "pattern of systematic human rights violations that was directed by [defendant] and carried out by the military forces under his command").

C. Plaintiffs' Proposed Formulation Of Prong Three Is Consistent With The Eleventh Circuit's Ruling

The Eleventh Circuit has ruled that the formulation of prong three in the *Ford* instructions was proper. *Ford*, 2002 U.S. App. LEXIS 7866, at *9 ("The essential elements of liability under the command responsibility doctrine are: . . . (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes."); *see also id.* at **20-21 Accordingly, Plaintiffs adopt it here as well.

II. PLAINTIFFS' PROPOSED INSTRUCTION CORRECTLY EXCLUDES REFERENCE TO PROXIMATE CAUSE IN THE COMMAND RESPONSIBILITY DOCTRINE

Defendants have not requested an instruction on proximate cause. *See* Joint Submission on Jury Instructions at 27-28 (setting forth Defendants' proposed instruction, to which Plaintiffs otherwise object). Accordingly, Defendants have waived the right to seek such an instruction. However, because this Court did employ a proximate cause instruction in *Ford v. Garcia*, which was addressed by the Eleventh Circuit on appeal, Plaintiffs hereby state their opposition to the inclusion of proximate cause as an element of the doctrine of command responsibility.

Although the court's opinion in *Ford v. Garcia* did not reach the issue because it was "invited error," 2002 U.S. App. LEXIS 7866, at*24, Judge Barkett in concurrence correctly found that proximate cause is not an element of the doctrine of command responsibility. *Id.* at **37-38 (Barkett, J., concurring). Specifically, she noted that the

> doctrine [of command responsibility] does not require a direct causal link between a plaintiff victim's injuries and the acts or omissions of a commander. Once a plaintiff establishes a prima facie case by proving the doctrine's three prongs, the command responsibility doctrine requires no further showing to assign liability unless the commander presents a defense.

Id. at *38. Indeed, Judge Barkett pointedly observed that requiring a showing of proximate cause "eviscerates the command responsibility doctrine's theory of liability." *Id.* at *40.

This position is fully supported by both domestic and international precedent. For example, in *Hilao*, the Ninth Circuit expressly ruled that proximate cause is not an element of command responsibility. *Hilao,* 103 F.3d at 774. Likewise, in *Prosecutor v. Delalic*, a case cited with approval by the majority opinion in *Ford*, the defense had argued that the doctrine of command responsibility included a fourth element of causation. *Prosecutor v. Delalic*, Case No IT-96-21-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Nov. 16, 1998), ¶

The Trial Chamber rejected that position, ruling that

> causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Accordingly, the Trial Chamber has found no support for the existence of a requirement of proof of causation as a separate element of superior responsibility. . .

Id. at ¶ 398. Rather, as that tribunal noted, the notion of causation is "inherent" to the doctrine of command responsibility. *Id.* at ¶ 399; *see also Ford,* 2002 U.S. App. LEXIS 7866, at *40 ("causation is presumed to be the result of [the commander's] failure to prevent those individual crimes") (Barkett, J., concurring). Accordingly, the jury instructions should not include a proximate cause instruction

DEFENDANTS' PROPOSED COMMAND RESPONSIBILITY INSTRUCTION ON DELEGATION IS INAPPLICABLE AND SIGNIFICANTLY MISSTATES THE LAW

A. Defendants' Proposed Delegation Instruction Is Not Appropriate For The Case At Bar

The Eleventh Circuit did not address the delegation instruction that was included in the jury instructions in *Ford v. Garcia*. However, in their proposed instructions in this case, Defendants have requested a broad delegation instruction — that a "commander may fulfill his duty to investigate and punish wrongdoers if he delegates this duty to a responsible subordinate" which is cut and pasted from the instructions utilized at the trial of *Ford v. Garcia*, without

considering the unique aspects of that case. *See* Joint Submission on Jury Instructions at 28) (Defendants' proposed instruction, to which Plaintiffs object).

That case presented a factual situation wholly different from the one at bar. Specifically, whether the defendants had fulfilled their command responsibility for the Churchwomen's murders by delegating the investigation of the crimes to subordinates and to the Salvadoran courts was an intrinsic and fundamental aspect of *Ford* from its inception. In their Complaint in that case, plaintiffs alleged that the defendants had ordered an investigation of the murders of the four American Churchwomen. *See Ford v. Garcia*, Compl. ¶¶ 72-73, 75. Accordingly, one issue confronting the jury was whether the defendants sincerely intended that their subordinates pursue the investigation or whether the investigation was thwarted or a sham. Further, it was alleged that five members of the Salvadoran National Guard were eventually convicted and sentenced to thirty years in prison in a Salvadoran criminal proceeding. *Id.* ¶¶ 76-77. Again, the *Ford* jury had to evaluate evidence concerning the reasonableness of the defendants' reliance on the Salvadoran courts to conduct a fair and impartial investigation and to address fully the involvement of superior officers in the crimes.

As a result, in order to assist the *Ford* jury in analyzing evidence concerning the Defendants' allegations that they fulfilled their obligation to investigate the murders of the Churchwomen through the means described above, the Court appropriately included a specific instruction on the issue of delegation. In the case at bar, however, the issue of specific delegation to subordinates or civilian authorities is irrelevant. Consequently, the inclusion of Defendants' proposed delegation language in the jury instructions is unnecessary, and would only confuse the jury and confound the issues at trial.

B. The Defendants' Proposed Jury Instruction On Delegation Is Incorrect As A Matter of Law

Defendants' proposed jury instruction on delegation should be rejected on the further ground that it misstates the law. A commander can never entirely absolve himself of his ultimate responsibility for the actions of his subordinates. This is the essence of the jurisprudence of the

International Military Tribunals at Nuremberg and Tokyo and subsequent World War II proceedings, which confirmed that commanders, both civilian and military, must hold sacred their duty to prevent and punish war crimes and crimes against humanity.

An essential component of this norm is the requirement that commanders punish perpetrators so that it is clear to subordinate troops that wrongdoing will not be tolerated. To allow commanders to delegate their responsibilities to subordinates without retaining any continuing duty in order to insulate themselves or their subordinates from liability would be directly contrary to the long-standing doctrine of these cases and would radically undermine the doctrine. *See* THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 49,656 (John Pritchard ed., 1998) ("IMTFE") (noting that the "court-martial of one company commander was so insignificant and inadequate as corrective measure in view of the general disregard of the laws of war by those in charge of prisoners of war . . as to amount to condonation [sic] of their conduct").

In the International Military Tribunal for the Far East's ("Tokyo Tribunal") prosecution of Japanese Foreign Minister Koki Hirota, the defendant was found guilty for having disregarded his legal duty to take adequate steps to secure the observance and prevent breaches of the law of war. *Id.* at 49,788–92. After receiving reports of atrocities in Nanking, China, Hirota contacted the War Ministry, which assured him the atrocities would cease. But because reports of atrocities continued for at least a month subsequent to this, the tribunal found that Hirota

> was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.

Id. at 49,791

Likewise, in the *Felmy* decision in the "Hostages Case," the Nuremberg Tribunal emphasized the inadequacy of measures undertaken by the defendant commander. XI TRIALS OF

WAR CRIMINALS BEFORE THE NÜRNBERG MILITARY TRIBUNALS at 1309. While the defendant recommended that an officer in charge of a regiment accused of massacres be subject to "disciplinary action," the Tribunal found this form of punishment—a method of trying minor offenses—to be inadequate, and further, that the commander failed to follow up to see what action was actually taken. *Id.* ("[H]e [Felmy] seems to have had no interest in bringing the guilty officer to justice."). In the *Lanz* decision, also part of the "Hostages Case," Lt. General Lanz was convicted for failing to prevent the killing of hostage and reprisal prisoners. The Tribunal held that "the unlawful killing of innocent people is a matter that [always] demands prompt and efficient handling by the highest officer of any army." *Id.* at 1311

United States military law affirms that even if a commander directs a subordinate to investigate atrocities, he cannot completely delegate, and thus cannot be absolved of, his responsibility to investigate unlawful acts committed by subordinates. According to the U.S. Army Field Manual, "[t]he commander is responsible for all that his staff does or fails to do. He cannot delegate this responsibility. The final decision, as well as the final responsibility, remains with the commander." U.S. DEP'T. OF ARMY, FIELD MANUAL NO. 101-5, *Staff Responsibilities and Duties*, at 4-1 (1997). Similarly, the Field Manual states that "ultimate authority, responsibility and accountability rest wholly with the commander," although a commander may delegate specific authority to staff officers within their spheres of competence. U.S. DEP'T. OF ARMY, FIELD MANUAL NO. 101-5, *Command and Staff Relationships*, at 1-1 – 1-2 (1997); *see also* Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 165 (2000) ("Although commanders can delegate authority to subordinate leaders to accomplish a mission or a task, the commander can never delegate the responsibility that comes with command.").

Thus, Defendants' jury instruction regarding delegation misstates the law. The instruction states that a commander "may be relieved of the duty to investigate and punish" through the use of a civilian investigative authority or "may fulfill his duty to investigate and punish" through delegation to a subordinate. As demonstrated above, a commander can never

fully absolve himself of his command duty, which includes the prevention and punishment of abuses by subordinates. A commander is under an ongoing and continuous obligation to investigate and punish all perpetrators of each and every instance of wrongdoing, and to ensure that subordinates who committed abuses are genuinely punished. To ignore certain instances of wrongdoing, to selectively punish only certain perpetrators, or to delegate the responsibility of punishment without follow-up does not fulfill a commander's legal obligation. Defendants' misconstruction of the law in this regard is fatal to a fair assessment by the jury of the relevant evidence regarding Defendants' fulfillment of their duty to prevent, stop and punish wrongdoing by their subordinates.

IV. PLAINTIFFS' INCLUSION OF AN INSTRUCTION ON THE PRESUMPTION OF EFFECTIVE COMMAND IS APPROPRIATE UNDER *FORD*

The Eleventh Circuit has ruled that a showing that a defendant commander exercised *de jure* command authority over subordinates results in a rebuttable presumption of effective command. *Ford*, 2002 U.S. App. LEXIS 7866, at **16-18. Specifically, the court invoked *Prosecutor v. Delalic*, a case before the International Criminal Tribunal for the Former Yugoslavia, for the proposition that *de jure* authority of a commander over subordinates is "*prima facie* evidence of effective control, which accordingly can be rebutted only by the defense putting forth evidence to the finder of fact that the defendant lacked this effective control." *Id.* at *17.[4] *See Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgement of the Int'l Crim. Trib. Former Yugo., App. Chamber (Feb. 20, 2001), ¶ 197 ("a court may presume that possession of [*de jure*] power *prima facie* results in effective control unless proof to the contrary is produced"); *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgement of the Int'l Crim. Trib. Former Yugo., Tr. Chamber (Aug. 2, 2001), ¶ 648 n.1418 (noting that there was no evidence "to

[4] The Court noted specifically that cases of the two *ad hoc* international criminal tribunals "provide insight into how the doctrine [of command responsibility] should be applied in TVPA cases." *Ford*, 2002 U.S. App. LEXIS 7866, at *14.

rebut the presumption that as Commander of the Drina Corps, General Krstic's *de jure* powers amounted to his effective control over subordinate troops").

Accordingly, Plaintiffs' proposed instruction includes a separate instruction indicating that if Plaintiffs establish that Defendants exercised *de jure* command authority over their subordinates, Plaintiffs are entitled to a presumption that Defendants exercised "effective command." In particular, after defining the term "presumption" in keeping with Eleventh Circuit authority (*see Walker v. Mortham*, 158 F.3d 1177, 1183 n.10 (11th Cir. 1998)), the proposed instruction indicates:

> The fact that a defendant commander exercises formal command over his subordinates gives rise to a presumption under law that the defendant commander exercises "effective command" over those subordinates.

See Plaintiffs' Revised Proposed Jury Instructions (Attachment A) at 3. This formulation is necessary to reflect the Eleventh Circuit's ruling that the *de jure* command authority of a commander over his troops results in a presumption of effective command. *Ford,* 2002 U.S App. LEXIS 7866, at *17.

Plaintiffs have also included language to the effect that here, as a matter of law on undisputed facts, Defendants exercised *de jure* command authority over their subordinates, and on this basis Plaintiffs are entitled to assert a presumption of "effective command."

CONCLUSION

Plaintiffs' case rests on the doctrine of command responsibility. Although this doctrine may be alien to the experience of United States jurors, it is of paramount importance in the world's efforts to bring the rule of law to bear on commanders who fail to adequately prevent or punish human rights abuses committed by subordinates. Accordingly, it is crucial that the jury instructions in the instant case be legally accurate and comprehensible. Plaintiffs respectfully request this Court to adopt Plaintiffs' revised proposed instruction on command responsibility as

discussed above in order to ensure that the instruction is in line with United States law and other relevant legal precedent.

Dated: May , 2002

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to KURT R. KLAUS, JR., ESQ., 3191 Coral Way, Suite 502, Miami, Florida 33145, by Facsimile and U.S. Mail, this day of May, 2002.

Attorney

ATTACHMENT A

PLAINTIFFS' REVISED PROPOSED INSTRUCTIONS

JURY INSTRUCTION NO. 18

COMMAND RESPONSIBILITY

A defendant commander may be held legally responsible for unlawful acts committed by subordinate forces. This is the law of command responsibility. The doctrine of command responsibility is founded on the principle that a military commander is obligated, under international law and United States law, to take appropriate measures within his power to control the troops under his command and prevent them from committing torture and extrajudicial killing.

The plaintiffs contend that the defendant commanders in this case knew or should have known that their subordinates were committing unlawful acts, such as torture and other human rights abuses, and did not take all necessary and reasonable measures to prevent or stop such abuses, or to punish the perpetrators.

To hold a defendant commander liable under the law of command responsibility, the plaintiffs must prove the following requirements by a preponderance of the evidence:

(1) That subordinates under the defendant's effective command had committed, were committing, or were about to commit unlawful acts, such as the human rights abuses suffered by the plaintiffs; and

That the defendant knew, or owing to the circumstances at the time, should have known, that subordinates had committed, were committing, or were about to commit unlawful acts, such as the human rights abuses suffered by the plaintiffs; and

That the defendant failed to take all necessary and reasonable measures to either:

(a) prevent or stop subordinates from committing such abuses; or

(b) punish the subordinates.

"Effective command" means the defendant commander had the legal authority and practical ability to exert control over his subordinates. A defendant commander cannot, however, escape liability where his own action or inaction causes or significantly contributes to a lack of effective command over subordinates.

To satisfy these requirements, it is not necessary that a defendant commander knew or should have known that the plaintiffs themselves would be or were the victims of human rights abuses at the hands of specific subordinate forces. Rather, it is sufficient that the commander knew or should have known that subordinate forces had, were, or were about to commit unlawful acts, such as the human rights abuses suffered by plaintiffs.

Further, under the law of command responsibility, even if a defendant commander did not actually know that human rights abuses were being committed by subordinates, the commander may still be held responsible if the commander should have known that such abuses were being committed. Under the law, a defendant commander "should have known" that abuses were being committed if subordinate forces were engaged in a pattern, practice, or policy of committing unlawful acts, such as the human rights abuses alleged by plaintiffs.

A defendant commander may be liable where he failed to either (1) prevent abuses being committed by subordinates, or (2) punish subordinates who committed abuses after the fact.

PLAINTIFFS' AUTHORITY: *Ford v. Garcia*, No. 01-10357, 2002 U.S. App. LEXIS 7866 (11th Cir. Apr. 30, 2002); Torture Victim Protection Act, S. REP. NO. 249, 102d Cong., 1st Sess. (1991).

JURY INSTRUCTION NO. 18.5

PRESUMPTION OF EFFECTIVE COMMAND BASED UPON SHOWING OF FORMAL COMMAND

A presumption is an assumption that you may draw from a set of facts that has been established. Therefore, before you may find the presumed fact to exist, you must determine whether the underlying or basic fact has been proved.

The fact that a defendant commander exercises formal command over his subordinates gives rise to a presumption under law that the defendant commander exercises "effective command" over those subordinates.

In this case, I instruct you that as a matter of law, it has been established that these defendants were commanders who exercised formal command over their subordinates, giving rise to a presumption under law that they exercised effective command over their subordinates.

PLAINTIFFS' AUTHORITY: *Ford v. Garcia*, No. 01-10357, 2002 U.S. App. LEXIS 7866, at **16-17 (11th Cir. Apr. 30, 2002).