UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION
CASE NO. 99-0528-CIV-LENARD

ESTATE OF WINSTON CABELLO,
et al.

Plaintiffs,

vs.

ARMANDO FERNÁNDEZ-LARIOS,

Defendant.

_____/

PLAINTIFFS' BRIEF CONCERNING PROPOSED JURY INSTRUCTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

MISCELLANEOUS

BACKGROUND

Included in Plaintiffs' proposed jury instructions submitted to the Court in advance of the pretrial conference are instructions concerning the two secondary liability principles applicable here. Defendant can be liable as a principal; or he can be liable because he aided and abetted the acts on which the claims are based; or he can be liable because he was a co-conspirator of the perpetrators. This memorandum responds to the Court's request that the parties address the proposed jury instructions concerning these secondary liability principles, the knowledge element contained in certain of the proposed jury instructions, and specifically, whether the jury should be instructed that Defendant may be found liable if he "knew or should have known" certain facts and circumstances.

"Redlined" copies of the relevant jury instructions are attached hereto as Appendix A: Plaintiffs' Proposed Jury Instruction No. 12 (Aiding & Abetting); Plaintiffs' Proposed Jury Instruction No. 13 (Conspiracy); and Plaintiffs' Proposed Jury Instruction No. 19 (Crimes Against Humanity, modified to reflect the discussion herein that Defendant "knew or should have known" that the killing of Mr. Cabello was part of widespread and systematic conduct). Plaintiffs also substitute Proposed Jury Instruction No. 3 (Impeachment of Witnesses, Inconsistent Statement) for the prior Proposed Jury Instruction No. 3 (Impeachment of Witnesses, Inconsistent Statement and Felony Conviction); and withdraw their Proposed Jury Instruction No. 4 (Expert Witnesses). Plaintiffs submit the following new instruction, Proposed Jury Instruction No. ___ (Deliberate Ignorance).

Plaintiffs also intend to submit separately proposed jury instructions addressing: Admissions in Pleadings / Stipulation, and Consciousness of Guilt; and as well as possibly other proposed instructions warranted by the evidence in the case.

DISCUSSION

A. Aiding and Abetting the Substantive Violations

To prove that Defendant is liable for aiding and abetting the above violations committed against Mr. Cabello, Plaintiffs must prove by a preponderance of the evidence that:

First, one or more of the violations [as defined] was committed by some person or persons;

Second, the defendant substantially assisted some person or persons who personally committed or caused the violations; and

Third, the defendant knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance.[1]

1. Prohibited Acts

It is well established that those who aid and abet torts actionable under the ATCA, or extrajudicial killing or torture under the TVPA, are liable. *See Cabello-Barrueto v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002). Drawing on the jurisprudence of the international criminal tribunals, courts in this country have held that the "*actus reus* of aiding and abetting requires 'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.'" *Mehinovic*, 198 F. Supp. 2d at 1356 (*quoting Prosecutor v. Furundzija*, No. IT-95-17/1-T, Judgement (Trial Chamber II, Dec. 19, 1998), ¶ 235); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 323 (S.D.N.Y. 2003) (citing cases) (denying defendant company's motion to dismiss complaint asserting claims for, among other things, extrajudicial killing, kidnapping, rape, and enslavement in connection with "ethnic cleansing" campaign directed at non-Muslim Sudanese); *see also Prosecutor v.*

[1] Plaintiffs do not intend to argue, and no longer request "should have known" language in this jury instruction.

Tadic, No. IT-94-1-A, Judgement (Appeals Chamber, July 15, 1999), ¶ 229 (Tab 12) (discussing the substantial assistance requirement for aider-abettor liability).[2]

In *Furundzija*, the Appellate Chamber affirmed the defendant's conviction and found him liable as an aider and abettor where he was present while another individual interrogated and raped the victim; defendant's "presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him." *Prosecutor v. Furundzija*, No. IT-95-17/1-A, Judgement (Appeals Chamber, July 21, 2000), ¶ 126 (Tab 9) (citation omitted). The Trial Chamber previously had found that "action which decisively encourages the perpetrator is sufficient to amount to assistance . . . willingness to provide assistance, when made known to the perpetrator, would also suffice, if the offer of help in fact encouraged or facilitated the commission of the crime by the main perpetrator." *Furundzija*, Judgement (Trial Chamber) ¶ 230.[3]

2. Mental State

The Eleventh Circuit has held that "to establish civil liability for aiding and abetting, a plaintiff must show: (1) that the defendant was generally aware of the defendant's role as part of an overall improper activity at the time he provides the assistance; and (2) that the defendant knowingly and substantially assisted the principal violation." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994), *modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994). "The defendant's '[k]nowledge may be shown by circumstantial evidence, or by reckless conduct.'" *Id., quoting Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 96 (5th Cir. 1975); *see also Smith v. First Union Nat'l Bank*, No. 00-4485-Civ., 2002 WL 31056104, at *2 (S.D. Fla. Aug. 23, 2002) (banks could be liable for aiding and abetting breach of fiduciary duty to

[2] The international materials cited herein were supplied to the Court on June 7, 2003; the references herein to "Tab ___" refer to those materials.

[3] A copy of the Trial Chamber's judgement is supplied herewith as Appendix B; it is also available at http://www.un.org/icty/furundzija/trialc2/judgement/index.htm (visited Oct. 5, 2003).

corporation's investors where defendants were generally aware of their role in the overall scheme and knowingly and substantially assisted the violation); *Federal Deposit Ins. Corp. v. First Interstate Bank*, 885 F.2d 423, 430-431 (8th Cir.1989) (approving jury instructions in suit against bank for aiding and abetting depositor's scheme to defraud second bank of funds, FDIC was not required to prove defendant's actual knowledge; instead, it was sufficient to show that bank was "generally aware" of its role in the depositor's scheme); *Boim v. Quranic Literacy Inst. and Holy Land Found.*, 291 F.3d 1000, 1012, 1021, 1028 (7th Cir. 2002) (supplying funds to terrorist organization is sufficient to state a civil claim under 18 U.S.C. § 2333, so long as the donor was generally aware of the donee's intent, and the donor substantially assisted the terrorist act at issue).

The Plaintiffs need not prove that the Defendant had the same intent as the primary violators to commit each of the charged violations. "It is not necessary for the accomplice to share the same wrongful intent as the principal. Rather, it is sufficient that the accomplice knows that his or her actions will assist the perpetrator in the commission of the crime." *Mehinovic*, 198 F. Supp. 2d at 1356 (citing *Furundzija*, Judgement (Trial Chamber), ¶ 232). The *Furundzija* Trial Chamber held that "it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime." *Id*. ¶ 245. "In particular, it is not necessary that he shares and identifies with the principal's criminal will and purpose, provided that his own conduct was with knowledge. That conduct may in itself be perfectly lawful; it becomes criminal only when combined with the principal's unlawful conduct." *Id*. ¶ 243. Moreover, the accused need not have intended the commission of a specific offense; so long as he "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." *Id*. ¶ 246.

Similarly, in domestic civil cases asserting claims for liability based on the defendant's aiding and abetting of a primary violator's acts, courts have focused upon "whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct." *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (finding that companion of burglar was civilly liable for the wrongful death of homeowner killed during a burglary even though she had not accompanied burglar and there was no evidence she knew burglar intended to kill anyone).

Here, Defendant's actions substantially assisted the squad and the local officers in Mr. Cabello's killing, torture and mistreatment, all of which was part of widespread and systematic conduct intended to eliminate perceived opponents of the Pinochet regime and to terrorize the population. The evidence shows that, among other things, Defendant: asked Enrique Vidal Aller how many prisoners were present at the Copiapó garrison (Trial Tr., Vol. 6 at 407:20-24); was armed with a dangerous weapon comprised of a spiked metal ball on a chain (*id.*, at 409:14-24); was armed with a *corvo* (*id.* at 432:6-13); threatened to harm the prisoners (*i.e.*, "to caress the pigeons") with the spiked weapon (*id.* at 425:9-426:8; 429:7-14); was present in the fiscal's office when Sergio Arellano Stark reviewed the prisoners' files and/or reviewed the files himself (Trial Tr., Vol. 5 at 352:6-24; 353: 12-14; 365:2-367:17; 368:7-13); interrogated prisoners (*id.*, Vol. 5 at 350:15-20; 351:14-16; Trial Tr., Vol. 6 at 410:7-12; 423:21-424:2); attacked Jaime Sierra Castillo, causing severe injuries (Trial Tr., Vol. 5 at 346:12-347:15; 349:21-350:5); and attempted to extract Ruben Herrera Jofre from the hospital the same night that the Copiapó prisoners were killed (Trial Tr., Vol. 2 at 139:20-140:25; 141:24-142:25; 145:7-18). Each of these actions substantially assisted in the squad's efforts to eliminate the prisoners. Moreover, that Defendant knew that his actions would assist the squad's objectives is clear: Defendant was in the room when Arellano stated that he was identifying the prisoners to be eliminated (Trial Tr., Vol. 5 at 361:24-367:17) and

Defendant's own actions, as described above furthered the squad's mission to identify and kill prisoners.

Defendant's effort to explain away his involvement in the squad's actions by contending that he was Arellano's bodyguard (*see* rough Trial Tr., Vol. 8 at 88:22-24) is, if true, tantamount to a confession that he aided and abetted violations committed by others. By protecting Arellano, Defendant furthered the squad's objectives, and facilitated its activities. *See e.g., Halberstam*, 705 F.2d at 478; *Furundzija*, Judgement (Trial Chamber), ¶ 230. In reality, however, the contention is false and the fact that Defendant has manufactured such a story is further evidence of his liability. "Ordinarily it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence." *United States v. Barresi*, 601 F.2d 193, 195 (5th Cir. 1979) (defendant attempted to explain away possession of counterfeit bills by fabricating story that family members at a birthday party in his home may have replaced Treasury bills with counterfeit). Consequently, the jury should be instructed as to consciousness of guilt and Plaintiffs will submit separately a proposed instruction.

B. Co-Conspirator Liability

A conspiracy is an agreement of two or more persons to commit one or more wrongful acts. To prove the Defendant's liability for a co-conspirator's commission of the acts on which the claims are based:

First, two or more persons agreed to commit a wrongful act;

Second, the defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it;

Third, one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy; and

Fourth, the violation could reasonably have been foreseen to be a necessary or natural consequence of the conspiracy.[4]

1. Prohibited Acts

The existence of a conspiracy, and Defendant's membership in it, may be proven by circumstantial evidence, including that he acted in furtherance of its goals. *Cox*, 17 F.3d at 1410-11 (the existence of the conspiracy "does not have to be proven by direct evidence. Instead, it can be inferred from 'the conduct of the alleged participants or from circumstantial evidence of the scheme.'") (citations omitted); *United States v. Perez*, 645 F. Supp. 887, 889 (S.D. Fla. 1986) ("Participation in a conspiracy need not be proven by direct evidence that co-conspirators expressly agreed to undertake an illegal venture. Instead, the jury may infer a common purpose and plan from defendant's actions"); *Gresham v. United States*, No. 1:96-CV-0982, 1997 U.S. Dist. LEXIS 5824, at *6-7 (N.D. Ga. Mar. 11, 1997) ("[p]articipation in a conspiracy need not be proven by direct evidence; a common purpose and plan with other conspirators 'may be inferred from a 'development and collocation of circumstances.'" (quoting *United States v. Lyons*, 53 F.3d 1198, 1201 (11th Cir. 1995) (quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942)).

2. Mental State

To be civilly liable for a co-conspirator's commission of a tortious act, a defendant must have had "knowledge of and voluntary participation in an agreement to do an illegal act." *Cox*, 17 F.3d at 1410. *See also Tadic*, Judgement (Appeals Chamber), ¶ 220 (Tab 12):

> it is appropriate to apply the notion of 'common purpose' only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further — individually and jointly — the

[4] "Civil conspiracy depends on the performance of some underlying tortious act. It is thus not an independent action; it is, rather, a means for establishing vicarious liability for the underlying tort." *Baker v. Danek Medical*, 35 F. Supp. 2d 865, 872 (N.D. Fla.1998).

> criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.

To be liable as a co-conspirator, Defendant need not have specifically contemplated the commission of each of the violations. It is a well-established principle of federal law that a conspirator may be liable for an offense even though he personally did not commit or even specifically agree to commit the particular crime or overt act with which he is charged, so long as the crime or act was foreseeable and was within the scope of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 646 (1946) ("so long as the partnership in crime continues, the partners act for each other in carrying it forward"); *see also United States v. Odom*, 252 F.3d 1289, 1298 (11th Cir. 2001) (defendant was liable for full restitution to church destroyed by arson, although fire was set by others after she left because she did not take affirmative acts inconsistent with the conspiracy such as putting out earlier fire, or notifying law enforcement), *cert. denied*, 535 U.S. 1058 (2002). Even if the offense actually committed was not one of the original objects of the conspiracy, so long as it was reasonably foreseeable, a defendant may be liable for that offense. *See United States v. Alvarez*, 755 F.2d 830, 847-851 (11th Cir. 1985) (members of conspiracy to sell drugs were guilty of killing BATF agent and wounding another in shoot-out; gun battle was reasonably foreseeable consequence of cocaine transaction). In *Alvarez*, the Eleventh Circuit held that a lesser member of the conspiracy — a defendant who served as the drug dealers' apparently armed lookout at the motel where the drug deal and gun battle occurred — was as culpable of the unanticipated, but foreseeable, consequences of the drug conspiracy, *i.e.*, the murder and attempted murder of federal agents, as those defendants who actually shot the agents. *Id*. at 850-851. Defendant's self-serving characterization of his role as Arellano's bodyguard throughout the squad's mission is no different from the participation of a "lookout" in a drug conspiracy. Thus, under *Alvarez*, even if Defendant had a lesser role in the scheme than some of his co-conspirators, he is equally liable.

That co-conspirators are criminally liable for one another's actions if committed within the course of the conspiracy is also true under the developing international standards. *See Tadic*, Judgement (Appeals Chamber), ¶¶ 178-184, 230-34 (Tab 12) (defendant was legally responsible for the killing of five civilians in connection with his participation in "common plan" to rid area of non-Serb population regardless of whether he was directly involved in the killings.). *See Presbyterian Church of Sudan*, 244 F. Supp. 2d at 322 ("the concept of complicit liability for conspiracy . . . is well-developed in international law;" citing the Statutes of the ICTR and the ICTY, the Torture Convention, the Statute of the International Criminal Court, among other legal instruments finding that co-conspirators may be liable for one another's acts); *Wiwa v. Royal Dutch Petroleum Co*., No. 96 Civ 8386, 2002 WL 319887, at *14-16 (S.D.N.Y. Feb. 28, 2002) (plaintiffs had sufficiently pleaded "state action" by corporate defendants who were alleged to have acted in concert with Nigerian police).

Parties to a conspiracy are civilly liable for one another's tortious acts. "[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy." *Halberstam*, 705 F.2d at 481. A "conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action . . . so long as the purpose of the tortious action was to advance the overall object of the conspiracy." *Id*. While agreement is an element in civil conspiracies, it "does not assume the same importance it does in a criminal action." *Id.* at 477. Indeed, "[p]roof of a tacit . . . understanding" is sufficient to show agreement. *Id.* The *Halberstam* court conducted an extensive review of case law on civil conspiracy, finding that where two or more persons jointly commit an unlawful act, courts have inferred that they were parties to a prior agreement, and that they are each liable for any illegal acts committed within the scope of such an agreement. *Id.* at 479-81. In *Halberstam*, the defendant was held liable as a co-conspirator (and aider-abettor) for a murder that occurred during a burglary

at which she was neither present nor about which she had advance knowledge. The court found that "a conspirator can be liable even if he neither planned nor knew about the particular overt act that caused injury, so long as the purpose of the act was to advance the overall object of the conspiracy." *Id.* at 487.

Here, the evidence shows that a conspiracy to kill civilian prisoners existed, and that Defendant was a member of that conspiracy. *See* Trial Tr., Vol. 7 at 546:18-547:5. The evidence also demonstrates that Defendant was aware of the squad's purpose and acted to accomplish its objectives — at least as to the killings in the North. Knowing of the killings in the south, Defendant flew back to Santiago (*see* rough Trial Tr., Vol. 8 at 63:8-10) and later rejoined the squad for the second stage of its operation in the north (*id.* at 110:11-18). By the time he rejoined the squad, and certainly by the time he reached Copiapó after the killings of prisoners in La Serena (*see id.* at 112:19-24, 114:16-19, 121:21-22), despite his denials (*see id.* at 114:1-6), Defendant knew that one of the squad's objectives was to kill prisoners held by the local garrisons. In Copiapó, he helped Arellano select the files of the prisoners who were to be killed (Trial Tr., Vol. 5 at 352:6-24; 353: 12-14; 365:2-367:17; 368:7-13), brutally and viciously injured one prisoner (Sierra) (Trial Tr., Vol. 5 at 346:12-347:15; 349:21-350:5), and threatened others (*id.* at 425:9-426:8; 429:7-14). Further, in at least two other northern cities visited by the squad after Copiapó (Antofagasta and Calama), Fernández personally participated in killing the prisoners. *See* rough Trial Tr., Vol. 8 at 33:21-25, 35:7-13 (Antofagasta), and 35:24-36:1, 37:10-16 (Calama).

Thus, it was a natural and foreseeable consequence of the conspiracy that, once in Copiapó, the squad would continue its mission — to "eliminate" the prisoners. Whether Fernández knew Winston Cabello's name or not, or held any animosity toward him, or personally intended to kill him, is of no significance. Mr. Cabello was one of a group of 13 prisoners killed at the same time as part of a plan executed by the squad, possibly with the assistance of local officers. It is a well-established precept of federal and

international law that a defendant is culpable or liable for a crime or tort that occurs during and within the scope of a conspiracy of which he is a part, even if another conspirator directly performed the unlawful act.

C. Knowledge Element — Secondary Liability and Crimes Against Humanity

The secondary liability principles of aiding/abetting and conspiracy, and the claim for crimes against humanity each contain a "knowledge" element. With respect to the secondary liability principles, the proof must show that the Defendant was aware of the squad's true mission was to kill civilian prisoners and that his actions substantially assisted the primary violators, or that he knowingly joined a conspiracy to kill prisoners and committed acts in furtherance of its objectives. Alternatively, the proof may show that Defendant consciously avoided learning facts concerning the mission in order to avoid liability and that knowledge of these facts therefore can be imputed to him.

With respect to the claim for crimes against humanity, the proof needed to establish that Defendant knew or should have known that the violations committed against Mr. Cabello were part of widespread and systematic conduct committed against a civilian population.

1. A Deliberate Ignorance Instruction is Appropriate Based on Defendant's Admissions

As discussed above, the evidence shows that Defendant is liable for aiding and abetting the squad's wrongful conduct, and conspiring to accomplish its objectives, including because he possessed the mental states required under each of these means of establishing secondary liability. Additionally, Defendant's testimony leads, at minimum, to the conclusion that he consciously avoided learning the truth concerning the mission. Defendant's own testimony would lead to an inference that, although faced with substantial evidence of the squad's true mission, he consciously avoided learning or remained deliberately ignorant of the facts concerning its objectives. "Under the doctrine of willful blindness or deliberate ignorance, which is used more often in the criminal

context than in civil cases, knowledge can be imputed to a party who knows of a high probability of illegal conduct and purposely contrives to avoid learning of it." *Williams v. Obstfeld*, 314 F.3d 1270, 1278 (11th Cir. 2002). "The means of knowledge are ordinarily the equivalent in law to knowledge." KEVIN F. O'MALLEY, JAY E. GRENING, AND HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL, §101.24.

Where a defendant consciously avoids learning the true facts regarding the events with which has become involved, knowledge of those facts can be imputed to him. "'[I]f a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.'" *United States v. Rivera*, 944 F.2d 1563, 1571 (11th Cir. 1991), *quoting United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (*en banc*) (citations omitted). *See also United States v. Knight*, 705 F.2d 432 (11th Cir. 1983) (deliberate ignorance instruction was appropriate where evidence showed that defendant had "closed his eyes" to the presence of marijuana in ship's hold); *United States v. Stone*, 9 F.3d 934, 937 (11th Cir. 1993) (defendant's receipt of IRS refund created high probability that he was aware that false return was filed).

Defendant contends that he was a mere bodyguard (*see* rough Trial Tr., Vol. 8 at 88:22-24) with no knowledge of the real purpose of the squad's helicopter flight (*id*. at 87:24-88:2), who could not hear what was said by his fellow squad members on the helicopter (*id*. at 60:3-10, 121:15-18), who was given no orders other than to accompany the squad (*id*. at 88:22-89:4), who had no duties or obligations (*id*. at 90:5-8), who never saw any prisoners (*id*. at 122:2-3), and who did not interrogate any prisoners (*id*. at 99:21-24), nor was present during any acts of violence committed against any prisoner (*id*. at 122:2-3). At the same time, he admits that he was aware of the connection between the squad's presence in the various cities the helicopter visited and the deaths of the prisoners in those cities (*id*. at 58:15-59:2). Moreover, he claims that he never asked any of his fellow squad members — some of whom he had known before the trip — for

the truth concerning their mission (*id*. at 69:4-12). Nor, he admits, did he contact anyone outside the squad during the approximately two-week stay in Santiago between trips (*id*. at 69:17-70:2). Thus, even under Defendant's theory of the case, there is sufficient evidence to demonstrate that he was at least deliberately ignorant of the facts concerning the squad's mission, and that knowledge of the true facts concerning the mission may be imputed to him. Based on this evidence, the facts support a deliberate ignorance instruction. "To justify a conscious avoidance instruction, the facts must 'point in the direction of deliberate ignorance.'" *United States v. Hooshmand*, 931 F.2d 725, 734 (11th Cir. 1991) *quoting United States v. Aleman*, 728 F.2d 492, 494 (11th Cir. 1984) (citation omitted).

2. The Jury Should Be Instructed that Plaintiffs Must Prove That Defendant "Knew or Should Have Known" that His Conduct was Part of Widespread and Systematic Activity Directed at Civilians

With respect to the claim for crimes against humanity, the jury should be instructed that Plaintiffs are required to prove that Defendant either "knew" or "should have known" that the killing of Winston Cabello was part of widespread and systematic conduct directed against a civilian population. *See Mehinovic*, 198 F. Supp. at 1354, n.50 (a defendant "is liable for the commission of [the charged acts] even if he was not aware that his conduct might rise to the level of crime against humanity. International law provides that an actor is responsible if he knew or should have known that his conduct would contribute to a widespread or systematic attack against civilians.") citing *Prosecutor v. Kayeshima*, No. ICTR-95-1-T, Judgement (Trial Chamber, May 21, 1999) ¶ 133 (defendant must have had "actual or constructive knowledge" of a widespread or systematic attack) (Tab 10).

Defendant has admitted actually knowing of the deaths of the prisoners in Cauquenes, La Serena, Copiapó, Antofagasta, and Calama — but claims that he only knew of those deaths after they occurred. *See, e.g.*, rough Trial Tr., Vol. 8 at 114:16-21,

116:21-117:6 (La Serena). However, another squad member, Sergio Arredondo Gonzalez, testified in his letter rogatory response that Defendant was one of those who actually shot the prisoners in La Serena, Antofagasta, and Calama. *See* rough Trial Tr., Vol. 8 at 31:7-16, 33:17 (La Serena); *id*. at 33:21-25, 35:7-13 (Antofagasta); *id*. at 35:24-36:1, 37:10-16 (Calama). Likewise, Patricio Lapostol Amo testified in his videotaped deposition that while the squad was in Calama, prisoners were killed in a particularly brutal fashion. *See* Trial Tr., Vol. 6 at 439:9-17.

Evidence of Defendant's involvement in the killings of prisoners in cities other than Copiapó establishes that Defendant knew, or should have known, that the squad's activities were widespread and systematic. Similarly, evidence of the killings of prisoners other than Mr. Cabello in Copiapó, and Defendant's involvement in the events leading up to those killings, also demonstrates that the widespread and systematic nature of the squad's activities was known, or should have been known, to the Defendant.

CONCLUSION

Based on the foregoing Plaintiffs ask that the Court give the following instructions to the jury, along with Plaintiffs' other proposed instructions, as modified.

Dated: October 6, 2003

WILSON SONSINI GOODRICH & ROSATI
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Appendix A

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 3

IMPEACHMENT OF WITNESSES
INCONSISTENT STATEMENT

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Authorities:

Eleventh Circuit Civil Pattern Jury Instruction No. 4.1.

Appendix A

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 12

AIDING AND ABETTING

One way the defendant may be found liable for any of the four violations, even if he personally did not do them, is if you find that he aided and abetted others who did them or caused them to be done. To prove the defendant liable for aiding and abetting any of the violations against Winston Cabello, the plaintiffs must prove by a preponderance of the evidence:

First, one or more of the violations (as I will define them for you in a moment) was committed by some person or persons;

Second, the defendant substantially assisted some person or persons who personally committed or caused the violations; and

Third, the defendant knew ~~or should have known,~~ that his actions would assist in the illegal or wrongful activity at the time he provided the assistance.

The defendant need not have known the specific violations that those persons intended to commit. It is sufficient if the defendant was aware that one of a number of violations would probably be committed, and one of those violations was in fact committed.

Authorities:

Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note; S. Rep. No. 249, 102nd Cong., 1st Sess. (1991); *Halberstam v. Welch*, 705 F.2d 472, 477, 481-484 (D.C. Cir. 1983); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994), *modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994); *Barrueto v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1331-1333 (S.D. Fla. 2002); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1355-1356 (N.D. Ga. 2002); *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 24 F. Supp. 2d 289, 321-324 (S.D.N.Y. 2003).

Appendix A

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 13

CONSPIRACY

A defendant also may be found liable for any of the four violations, even if he personally did not do them, if you find that he conspired with someone who did them or caused them to be done. A conspiracy is an agreement of two or more persons to commit one or more wrongful acts. To prove the defendant liable for conspiring to commit any of the violations, the plaintiffs must prove by a preponderance of the evidence:

First, two or more persons agreed to commit a wrongful act;

Second, the defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it;

Third, one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy; and

Fourth, the violation could reasonably have been foreseen to be a necessary or natural consequence of the conspiracy.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. Further, the agreement, common plan, design, or purpose does not have to have been arranged or formulated in advance. The existence of such agreement, plan or purpose may be inferred from the fact that two or more persons acted together to put into effect a joint enterprise with a wrongful or criminal aim.

Each member of the conspiracy is liable for the actions of the other conspirators performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a violation in furtherance of a conspiracy, the other members have also, under the law, committed the violation.

Appendix A

Authorities:

Pinkerton v. United States, 328 U.S. 640 (1946); *see also Barrueto v. Fernandez Larios,* 205 F. Supp. 2d 1325, 1331-33 (S.D. Fla. 2002); *Halberstam v. Welch*, 705 F.2d 472, 478-479 (D.C. Cir. 1983); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994), *modified on reh'g*, 30 F.3d 1347 (11th Cir. 1994); *United States v. Alvarez*, 755 F.2d 830, 847-851 (11th Cir. 1985); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, (Appeals Chamber, July 15, 1999) ¶¶ 185-201, 227 (available at http://www.un.org/icty/tadic/appeal/judgement/index.htm); *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgement (Appeals Chamber, July 21, 2000) ¶¶ 115-21 (available at http: //www.un.org/icty/furundzija/appeal/judgement/index.htm);); *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 24 F. Supp. 2d 289, 321-324 (S.D.N.Y. 2003).

Appendix A

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 19

CRIMES AGAINST HUMANITY

On the plaintiffs' crimes against humanity claim, the plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

First, one or more individuals committed any of the following acts: murder, extermination, enslavement, deportation, imprisonment, mutilation, torture, persecution on political, racial or religious grounds, and other outrages against personal dignity;

Second, Winston Cabello's killing was part of widespread and systematic violations directed against a civilian population;

Third, the defendant knew or should have known that the killing of Winston Cabello was part of widespread and systematic conduct directed against a civilian population; and

Fourth, the defendant either personally killed Winston Cabello, or he aided and abetted or conspired with others who killed Winston Cabello or caused him to be killed.

Authorities:

Alien Tort Claims Act, 28 U.S.C. § 1350 (2003); Article 7, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/2/Add.1 (1998); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Wiwa v. Royal Dutch Petroleum Co*., No. 96 Civ 8386, 2002 WL 319887, *9-10(S.D.N.Y. Feb. 28, 2002); Restatement (Third) of Foreign Relations Law of the United States §§ 701-702.

See also Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (citing R. Jackson, Final Report to the President on the Nuremberg Trials (Oct. 7, 1946) (cited in R. Jackson, *The Nurnberg Case* xiv-xv (1971)); The Charter of the International Military Tribunal, Nuremberg, of August 8, 1945, confirmed by G.A. Res. 3, U.N. Doc. A/50 (1946) and G.A. Res. 95, U.N. Doc. A/236, 59 Stat. 1546 (1946); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Report of the Secretary General, pursuant to para. 2 of U.N.S.C. Res. 808

(1993), U.N. Doc. S/25704 at 36 (1993), adopted by U.N.S.C. Res. 827, U.N. Doc. S/Res/827 (1993), reprinted in 32 I.L.M. 1159, 1170 (1993); Statute for the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453rd mtg., at 1, U.N. Doc. S/Res/955 (1994).

Appendix A

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. _____

DELIBERATE IGNORANCE
(As Proof of Knowledge)

The means of knowledge are ordinarily the equivalent in law to knowledge. If it appears from the evidence in the case that a person had information that would lead a reasonably prudent person to make inquiry through which that person would surely learn the facts, then this person may be found to have had actual knowledge of those facts, the same as if that person had made such inquiry and had actually learned such facts.

That is to say, the law charges a person with notice and knowledge of whatever that person would have learned, on making such inquiry as it would have been reasonable to expect the person to make under the circumstances.

So, with respect to the issue of defendant's knowledge in this case, if you find by a preponderance of the evidence that the defendant deliberately and consciously tried to avoid learning facts in order to be able later to say that he did not know such facts, you may treat such deliberate ignorance of positive knowledge as the equivalent of knowledge.

In other words, you may find that defendant acted "knowingly" if you find by a preponderance of the evidence either: (1) that the defendant actually knew; or (2) that he deliberately closed his eyes to what he had every reason to believe was the fact.

The requisite proof of knowledge on the part of the defendant cannot be established by merely demonstrating that the defendant was negligent, careless, or foolish.

Authorities:

Eleventh Circuit Criminal Pattern Jury Instruction No. 8 (modified); KEVIN F. O'MALLEY, JAY E. GRENING, AND HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL, §101.24 (modified).