UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

U.S.C.A. NO. 04-10030-D

DISTRICT COURT NO. 99-0528-CV-JAL

ARMANDO FERNÁNDEZ-LARIOS,

Appellant,

v.

ESTATE OF WINSTON CABELLO, *et al*.,

Appellees.

____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

PLAINTIFFS-APPELLEES' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

PURSUANT TO ELEVENTH CIRCUIT RULE 26.1

The undersigned counsel of record certifies that the following persons or entities have an interest in the outcome of this case. These representations are made so that the Judges of this Court may evaluate possible disqualification or recusal.

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19. Honorable Joan A. Lenard, United States District Court Judge, Southern District of Florida (Trial Judge).

20. Honorable Andrea M. Simonton, United States District Court Magistrate Judge, Southern District of Florida (Magistrate Judge).

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STATEMENT REGARDING ORAL ARGUMENT

The District Court's order can be affirmed without oral argument.

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I. STATEMENT OF JURISDICTION

The jury returned its verdict in favor of the Cabello family on October 15, 2003. Judgment was entered on October 31, 2003. The District Court denied Defendant-Appellant's Motion for Judgment as a Matter of Law, Motion for a New Trial and Motion for Remittitur on December 11, 2003. Defendant-Appellant has appealed from that Order. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Whether the evidence supported the jury's verdict that Fernández was liable as an aider and abettor, conspirator, or directly, for his active participation in the undisputed mistreatment and extrajudicial killing of Winston Cabello.

2. Whether the District Court correctly found that the ten-year statute of limitations did not commence while the location of the victims' bodies and the identity of the perpetrators was unknown and Chile remained dominated by the totalitarian government that had instigated and concealed the atrocities for which the jury found Fernández liable.

3. Whether the District Court abused its discretion by admitting into evidence videotaped excerpts of Chilean depositions that were conducted with all the safeguards of American depositions and were taken only after Fernández's counsel waived his objection that the American court reporter administering the oaths lacked Chilean credentials.

4. Whether, in a case that included an element requiring proof of "widespread or systematic" misconduct, the District Court abused its discretion by admitting into evidence that Fernández and his death squad mistreated and killed over 72 civilians including Mr. Cabello.

III. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

1. **Factual Summary.**

Winston Cabello was a 28-year old economist. He was tortured and killed in the northern Chilean city of Copiapó by soldiers of the Copiapó regiment and a traveling death squad of military officers from Chile's capital, Santiago. Santiago had just been the site of a military *coup d'etat* that commenced the seventeen-year dictatorship of General Augusto Pinochet Ugarte ("Pinochet"). The squad saw to the massacre of thirteen men in Copiapó the night Mr. Cabello was killed, and the squad committed or caused the deaths of at least 59 other civilian prisoners of the junta in four other towns the squad terrorized in September-October 1973.

Defendant-Appellant Armando Fernández Larios ("Fernández") participated in those atrocities as a member of the death squad. Eye-witnesses in Copiapó testified that Fernández selected, extracted, interrogated, and tortured men marked for death with Mr. Cabello. Circumstantial evidence further established that Fernández likely knifed Mr. Cabello — although other conspirators claimed credit for the killings, falsely asserting that the slayings were military executions.

The Copiapó victims were buried in a mass grave, the location of which was concealed from their families. The grave was discovered and the bodies exhumed in 1990, following Chile's return to democratic control. Less than ten years later, Mr. Cabello's family brought this action.

Unbeknownst to the jury, after his stint on the death squad, Fernández became a major in the DINA, Chile's notorious secret police. He conducted surveillance of former Chilean ambassador to the United States, Orlando Letelier, in Washington, D.C. in preparation for Ambassador Letelier's 1976 assassination there by a car bomb. Fernández subsequently lied to the Chilean Supreme Court to stymie his own extradition and those of other DINA members involved in Letelier's assassination. In 1987, Fernández entered this country and pleaded guilty to being an accessory after the fact to the assassination. His plea agreement prevented our government from returning Fernández to Chile. Consequently, he has been living in Miami and was the only member of the death squad subject to personal jurisdiction in the United States.

Four years of litigation concluded in a three-week jury trial at which Fernández testified. He was found liable and assessed damages totaling $4 million for extrajudicial killing; torture; cruel, inhuman or degrading punishment or treatment; and crimes against humanity, in violation of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note.

2. Procedural History.

Plaintiffs-Appellees, Zita Cabello-Barrueto as the personal representative of the Estate of Winston Cabello, Elsa Cabello Bravo, Aldo Cabello, Zita Cabello-Barrueto, and Karin Cabello-Moriarty (collectively, "the Cabello family") brought suit on February 19, 1999, and filed an amended complaint on April 7, 1999. Fernández moved to dismiss the

amended complaint for lack of subject matter jurisdiction, and moved for summary judgment or alternatively to dismiss with prejudice, arguing that the statute of limitations had run. On August 10, 2001, the District Court dismissed the non-federal claims as time-barred and dismissed the Estate's claims for lack of standing. The District Court denied the summary judgment motion, finding that the TVPA's ten-year statute of limitations applied to the ATCA and that the limitations period did not commence until 1990.

On September 17, 2001, the Cabello family filed a Second Amended Complaint ("SAC"). Fernández again moved to dismiss, arguing that the case was time-barred. The District Court denied that motion on July 5, 2002, finding that, "the pre-1990 Chilean government's concealment of the decedent's burial location and the accurate cause of death prevented [the Cabello family] from bringing this action until 1990. Accordingly, the ten-year limitation period did not begin to accrue until 1990."

In August 2001 and August 2002, eleven depositions were conducted in Santiago, Chile. In advance of the first depositions, on July 24, 2001, and again on August 24, 2001, the Cabello family gave notice of the depositions beginning on August 27, 2001. Fernández's counsel traveled to Chile and participated in the depositions of six witnesses. The following year, on August 6, 2002, the Cabello family again notified Fernández that they intended to take additional depositions beginning on August 28, 2002. Fernández's counsel attended three depositions by telephone and chose not to participate in two others.

The depositions were conducted according to the procedures traditionally employed in federal civil depositions. A certified and licensed shorthand reporter attended the depositions, administered an oath to each witness prior to his or her testimony, and made a verbatim transcription of the proceedings. The testimony of all but the first witness was also videotaped.

Beginning with the first deposition, Fernández's counsel objected to the depositions, including on the basis that the court reporter was not authorized to administer an oath under Chilean law. However, at the beginning of the fourth deposition, Fernández's counsel refused the Cabello family's offer to obtain a Chilean notary to administer the oath. Thereafter, Fernández made no objection to the manner in which the depositions were conducted.

Beginning in May 2003, the parties submitted motions *in limine* to the trial court. In its pretrial Omnibus Order on Motions *in Limine*, the District Court granted in part, and denied in part, Fernández's Motion *in Limine* to Restrict Evidence to the Treatment of Winston Cabello. The trial court excluded evidence relating to Fernández's role in the Letelier assassination and the DINA. The court declined to exclude evidence of Fernández's role in the killings in cities the squad visited before and after Copiapó, or of his actions the night Mr. Cabello was killed. The court also excluded testimony of two experts proposed by the Cabello family.

The first morning of trial, Fernández moved to exclude the Chilean depositions, contending that they did not comply with Federal Rule of Civil Procedure 28(b) because they were not conducted before a person authorized to administer oaths in Chile. The District Court held that the Cabello family would not be permitted to introduce the first three depositions, but beginning with the fourth deposition, Fernández had waived the oath provision of Rule 28(b) and the depositions taken on or after August 29, 2001 were admissible.

3. Disposition Below.

The trial lasted approximately three weeks. At the close of the evidence, each party moved for Judgment as a Matter of Law pursuant to Federal Rule of Civil Procedure 50(a). The District Court denied Fernández's motion on the grounds that the claims were not time-barred and because there was sufficient evidence to permit a reasonable jury to find that the Cabello family had proven its claims. The District Court also denied the Cabello family's motion.

On October 15, 2003, the jury delivered its verdict in favor of the Cabello family on all claims and awarded them compensatory damages of $3 million and $1 million in punitive damages. Judgment was entered on October 31, 2003.

On December 11, 2003, the District Court denied Fernández's Motion for Judgment as a Matter of Law, Motion for a New Trial and Motion for Remittitur. Fernández argued substantially the same grounds he now raises. This appeal followed.

IV. Statement of Facts

A. The Squad's Mission Was to Suppress Potential Resistance Including by Killing Civilian Prisoners of the Junta.

On September 11, 1973, the democratically elected government of Chile was overthrown by a military junta led by General Pinochet. Soon afterwards, General Sergio Arellano Stark ("Arellano"), a senior Chilean Army general who also played a key role in organizing the *coup*, and a squad of military officers, including Fernández, traveled by helicopter to regimental garrisons outside Santiago. Their mission was to subdue civilian opposition to the regime; they did so by killing civilians imprisoned by the junta after the *coup*. Although the full extent of the killings is not known, at least 72 civilians in five Chilean cities were killed under the squad's direction. Many were killed without having

been convicted of committing any crimes; of those convicted, none had been sentenced to death. Fernández has acknowledged that he was a member of the squad throughout this entire period, and traveled to each city along the helicopter's route. He contends he was Arellano's bodyguard. He has also acknowledged being aware of civilian killings in at least five cities in which the squad was involved. The squad's mission has come to be known as the "Caravan of Death."

One civilian killed was Winston Cabello Bravo. Mr. Cabello was a 28-year-old economist with a wife and two children. He was employed by the Allende government as the chief of a regional planning department and had his office in Copiapó. Mr. Cabello was arrested on September 12, 1973, the day after Allende was overthrown, but was never charged with, nor convicted of, any crime. He was held first at the local jail, but after a few weeks was transferred to the garrison. There, he was joined by his sister's husband, Patricio Barrueto, who was also his deputy in the planning office and who had been arrested a few weeks after Mr. Cabello. Ms. Cabello-Barrueto visited them frequently; until October 16, 1973, Mr. Cabello was not ill-treated.

B. Fernández Was Involved in Selecting, Interrogating and Extracting the Thirteen Civilians Killed in Copiapó.

The squad landed in Copiapó on October 16, 1973. Fernández was greeted by a military academy classmate, Enrique Vidal Aller ("Vidal"), an aide to the garrison's commander, Colonel Oscar Haag Blaschke ("Haag"). Fernández bragged that he was Arellano's "right hand man" and that Arellano "trusts me totally." He questioned Vidal about the number of prisoners at the garrison and appeared to be searching for them.

Vidal noticed that Fernández was heavily armed with, among other things, a machine gun and an unusual weapon he had never seen before, a spiked ball on a chain attached to a rod. Fernández told Vidal that this weapon would be used to "caress the little pigeons," which Vidal understood to mean "beat the prisoners."

Vidal saw Fernández and other members of the squad enter the office of the military prosecutor ("*fiscal*") where the prisoners' files were kept. Two other witnesses, Dr. Ivan Murua Chevesich ("Murua"), a physician imprisoned at the garrison, and former Chilean Army Corporal Juan Morales Alcota ("Morales") also saw Fernández there.

The *fiscal's* interrogation of Murua was interrupted by Arellano's arrival with two other officers — including one Murua identified as Fernández. Arellano reviewed the prisoners' files, marking them with red circles; he announced that those whose files were so marked were to be "eliminated." Fernández was in the office the entire time.

Morales observed Fernández selecting and reviewing prisoners' files, and checking names off a list given to him by Haag's second-in-command. The list contained the names of the prisoners who were later killed. Haag described the process: Arellano "sent notes [from the office] to the outside through any member of his retinue as they had his confidence. . . . At the end of the meeting, General Arellano delivered the list which he had received from the prosecutor's office . . . and he had marked the names of thirteen prisoners ordering that they be shot as soon as possible."

As a member of the "retinue," Fernández also interrogated at least some of the prisoners. One of those interrogations turned violent. Outside the *fiscal's* office, Morales saw Fernández brutally injure one of the prisoners who was later killed, hitting him in the chest with his rifle butt and stomping his head to the concrete floor, where the impact "sounded like a watermelon." The prisoner, Jaime Sierra, "begged to be killed because he could no longer stand the beatings, the pain."

Accompanied by local soldiers, including a man named Ojeda, Fernández attempted forcibly to remove another prisoner, Angel Ruben Herrera Jofre ("Herrera"), from his hospital bed. A doctor who outranked Fernández interceded and prevented Herrera's removal. Before leaving, however, Fernández slammed his rifle butt into Herrera's chest and announced he would return.

Hours after the helicopter's arrival, Vidal observed Fernández and other squad members coming from an area where the prisoners were held; Fernández was still carrying the spiked weapon. Vidal testified that Fernández seemed to be "on a kind of high" and that "he was upset and very nervous."

Late that night, Patricio Barrueto watched as an officer he had never seen before commanded Mr. Cabello to dress quickly (so quickly that he had to throw his clothes over his pajamas) and leave the barracks. Mr. Barrueto was unable to bring himself to look the officer in the eyes, but he recalled the man's sinister smile.

In the early morning hours of October 17, 1973, the thirteen prisoners were hooded, loaded into a truck, driven into the desert, and killed. Fernández does not dispute that Arellano and Haag directed the selection of the civilians to be killed in Copiapó. Fernández has also admitted that Arellano gave the order to load the civilians into the truck that drove them into the desert. A local Army captain, Patricio Diaz, claimed that Haag had given him a list identifying the thirteen civilians to be killed, and that he and other local officers shot them in a military execution. However, the forensic evidence established that the prisoners were massacred, not merely executed.

The military authorities never told the victims' families the truth about their deaths. Instead, Haag directed the local newspaper to publish a "*bando*" or official statement, falsely claiming that the prisoners had been shot trying to escape. The authorities also concealed the location of the unmarked mass grave in which their bodies were buried. Only in 1990, after a civilian government took office and the families successfully

petitioned the Chilean judiciary for an exhumation order, did the Cabello family learn how the civilians, including Mr. Cabello, were killed.

Notwithstanding the cover story, there was no escape attempt, and the Copiapó prisoners were not merely shot. Instead, their bodies were horribly mutilated. Dr. Elvira Miranda, the forensic pathologist who participated in the exhumation, testified in person and narrated clips of a videotape of the exhumation and forensic analysis of the prisoners' remains. There was no evidence of gunpowder residue on Mr. Cabello's clothes; his clothes bore evidence of knife wounds.

Her testimony echoed the testimony of Victor Bravo, an official of the local civil registry who had been called out to identify the victims shortly after they were killed. Bravo had known many of the victims. He testified that they had not been merely shot; each was horribly wounded. One of Sierra's eyes had been removed. Mr. Cabello had a gash from his ear to his throat. Other victims also had gaping wounds.

Fernández admitted possessing a sharp, curved knife known as a "*corvo*" and acknowledged that he may have had the only *corvo* in Copiapó. He further admitted that he might have been the only officer on the helicopter armed with a *corvo*. Vidal confirmed that none of the officers or soldiers stationed in Copiapó had *corvos*.

Although Fernández had expressed some remorse at his deposition, he showed none at trial. Instead, he asserted, "I don't have a guilty conscience for what happened there. I am not guilty for what happened there," and complained that "[o]nly to be named in this is bad."

C. Fernández Participated in Killing Civilians Before and After Copiapó.

Copiapó was neither the beginning nor the end of the squad's mission. The squad initially left Santiago on September 30, 1973, for regiments south of the capital. Their last stop before returning to Santiago was Cauquenes where, on October 4, 1973, four civilians were killed. Fernández admitted that before he returned to Santiago, he knew that prisoners had been killed and that there was a connection between the squad's visit to Cauquenes and the killings.

While he was back with his regular unit for about ten days, Fernández told no one what had happened in the south. On October 16, 1973, the squad resumed killing, this time visiting northern regiments. Fifteen prisoners were killed in La Serena during the squad's visit. According to letter rogatory testimony provided by Arellano's second-in-command, Sergio Arredondo Gonzalez ("Arredondo"), Fernández participated in those killings. Fernández acknowledged knowing that prisoners were killed in La Serena while the squad was present.

After La Serena, the squad traveled to Copiapó and killed thirteen people including Mr. Cabello on October 16-17, 1973. The squad arrived in Antofagasta on October 18, 1973, and fourteen prisoners were killed that day. Fernández admitted that he knew that prisoners were killed while the squad was in that city. Arredondo stated that Fernández was one of those involved in the killings.

Finally, the squad arrived in Calama on October 19, 1973, where twenty-six people were killed. Fernández was present and admits knowing of the killings. Arredondo identified Fernández as one of those involved. Patricio Lapostol, then a young officer, saw the bodies just after they were killed. They had been shot and stabbed and were "absolutely destroyed."

V. STANDARD OF REVIEW

Review of a ruling on a Rule 50 motion for judgment as a matter of law is *de novo*. *Lambert v. Fulton County, Georgia*, 253 F.3d 588, 594 (11th Cir. 2001). In "applying that standard, [the appellate court reviews] 'the evidence in the light most favorable to, and with all reasonable inferences drawn in favor of, the nonmoving party.'" *Id.* (citations omitted). A Rule 50 motion tests the sufficiency of the evidence supporting a jury verdict and the appellate court will apply the same standard the district court applied in deciding the motion. *See Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 644 (11th Cir. 1990). The appellate court is not to "second-guess the jury" or replace the jury's judgment with its own if the "verdict is supported by sufficient evidence." *Lambert*, 253 F.3d at 594; see also *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000).

"The question of whether or not equitable tolling applies is a legal one and thus is subject to *de novo* review, but we are bound by the trial court's factual findings unless they are clearly erroneous." *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531 (11th Cir. 1992); *see also Cabriolet Porsche Audi v. American Honda Motor Co.*, 773 F.2d 1193, 1201 (11th Cir. 1985).

The district court's rulings on the admissibility of evidence are reviewed for abuse of discretion. *See Palmer v. Board of Regents*, 208 F.3d 969, 973 (11th Cir. 2000); *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997). Likewise, the decision whether to grant or deny a motion *in limine* is reviewed for abuse of discretion. *See Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1503 (11th Cir. 1985).

VI. SUMMARY OF ARGUMENT

The Cabello family presented substantial evidence proving that Fernández was liable for the offenses committed against Mr. Cabello, either directly or as an aider-abettor or

conspirator. The jury was properly instructed on each of these theories and Fernández has not challenged those instructions. The Cabello family never urged an alternate theory of secondary liability known as command responsibility, which is irrelevant to this case.

The District Court correctly held that the Cabello family's claims were not time-barred because the ten-year statute of limitations applicable to the TVPA and ATCA commenced when the victims' bodies were located and exhumed in 1990. Applying the TVPA to acts that were forbidden and occurred before that statute's enactment was not an impermissible retroactive application.

The District Court correctly found that Fernández waived his objection to the administration of the oaths at the Chilean depositions, which were properly admitted. The deposition testimony could also have been admitted under Federal Rules of Evidence 804(b)(1) and 807 because they were conducted with the full safeguards of an American deposition.

The trial court also properly permitted the Cabello family to present evidence concerning Fernández's direct participation in killing civilians in cities other than Copiapó and his actions and threats towards civilians killed with Mr. Cabello in Copiapó. That evidence proved elements of the claim of crimes against humanity and also proved Fernández's liability as an aider-abettor and conspirator.

VII. ARGUMENT

A. Substantial Evidence Demonstrated that Fernández Was Liable for the Offenses Against Mr. Cabello.

Fernández has not contested that Winston Cabello was tortured and died a violent and horrible death at the hands of Chilean military officers. Nor is there any question that his death, and the deaths of twelve other men in Copiapó, was not an isolated event; rather these were part of a series of politically motivated killings of at least 72 civilian prisoners of the junta in at least five Chilean cities in September-October 1973. Fernández's challenge is to the decisions of the judge and jury that he was legally responsible for these wrongs.

The jury was instructed that it could find Fernández liable only if he "actively participated" in the offenses. To assess that, the jury was instructed to consider whether he directly participated in the offenses or whether he participated as a conspirator or an aider-abettor. He claims that the jury's verdict should be reversed because it was unsupported by the evidence. *See* App. Br. at 24-26. Fernández ignores that the general verdict — which is amply supported by the evidence as to each theory of liability —

demonstrates that the jury found him liable either directly or secondarily in mistreating and killing Mr. Cabello.

Fernández argues (*see, e.g.*, App. Br. at 9-11, 14) that the Cabello family did not prove that he was liable under yet another theory that they never contended applied: the vicarious liability doctrine of "command responsibility" by which military commanders may be liable for failing to supervise and prevent the wrongdoing of troops under their control. *See Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147, 123 S. Ct. 868 (2003). Whether or not there was evidence to support such a theory is immaterial: the Cabello family never argued that theory; the jury was not instructed on that theory; and that theory is ***not*** the ***only*** theory on which Fernández can be found liable for the offenses he, at least, helped perpetrate.

The jury's verdict demonstrates that the Cabello family proved that Fernández was either directly or secondarily liable, as an aider-abettor or conspirator. Fernández has offered no basis for disturbing the verdict.

1. The Evidence Established that Fernández was Liable as an Aider and Abettor.

The evidence established that, at the least, Fernández aided and abetted the offenses against Mr. Cabello. The trial court added an element to each offense over the objection of the Cabello family; they were required to, and did, prove that Fernández "actively participated" in each of the substantive offenses. The jury was instructed that, in assessing that element, it was permitted to consider whether the Cabello family proved by a preponderance of the evidence that: "[first] one or more of the wrongful acts that comprise the claim were [*sic*] committed; [second] [Fernández] substantially assisted some person or persons who personally committed or caused one or more of the wrongful acts that comprise the claim; [and third] [Fernández] knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance." *See also 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); *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002), citing *Prosecutor v. Furundzija*, No. IT-95-17/1, Judgement, ¶¶ 232, 235 (Trial Chamber II, Dec. 19. 1998).

The evidence established that Fernández substantially assisted in Mr. Cabello's killing, torture and mistreatment. Although he now argues, without evidentiary support, that he was "merely present" in Copiapó when the prisoners were killed (*see* App. Br. at 11 n.2, 15-16, 22), the evidence demonstrates that he was a knowing participant in the events in Copiapó that culminated in the deaths of the thirteen prisoners.

Among other things, Fernández: served as Arellano's bodyguard; told Vidal that "you will soon find out" why the squad was in Copiapó; bragged that he was Arellano's "right

hand man" and claimed that the general "trusts me totally;" asked Vidal how many prisoners were at the Copiapó garrison; was armed with a dangerous weapon consisting of a spiked metal ball on a chain, as well as various firearms; was armed with a *corvo*; threatened to harm the prisoners ("to caress the little pigeons") with the spiked weapon; was present in the *fiscal's* office when Arellano reviewed the prisoners' files and/or reviewed the files himself and was in the room when Arellano announced which prisoners would be "eliminated;" interrogated prisoners; attacked and severely wounded Sierra until he begged for mercy; attempted to extract Herrera from the hospital the night the Copiapó prisoners were killed; and as a member of Arellano's "retinue," likely carried messages regarding the scheme to kill the prisoners. Moreover, all this occurred after he assisted in killing civilians in La Serena.

2. The Evidence Established that Fernández was Liable as a Co-conspirator.

The evidence also showed that Fernández is liable for conspiring to mistreat and kill the civilians. The District Court instructed the jury that, in assessing active participation, it could consider whether the Cabello family proved that: "[first] two or more persons agreed to commit a wrongful act; [second] that [Fernández], knowing the unlawful purpose of the plan, willfully joined in it; [and third] one or more of the violations was committed by some one who was a member of the conspiracy and acted in furtherance of the conspiracy." *See also Halberstam*, 705 F.2d at 481, 487; *Cox*, 17 F.3d at 1410-11; *Pinkerton v. United States*, 328 U.S. 640, 646-648, 66 S. Ct. 1180, 1183-84 (1946).

Substantial evidence proved that a conspiracy to kill civilian prisoners existed and that Fernández was a member of that conspiracy. Knowing that civilians were killed while the squad visited garrisons in the south, Fernández returned to Santiago and later rejoined the squad for the second stage of its operation in the north. By the time the squad reached Copiapó, after his involvement in killing fifteen prisoners in La Serena, and despite his denials, Fernández knew that one of the squad's objectives was to kill civilians held by the local garrisons. In Copiapó, he helped Arellano select the files of those to be killed; was present when Arellano announced that those prisoners whose files were marked with red circles were to be "eliminated;" brutally and viciously injured one prisoner (Sierra); threatened others; and acted in concert with Ojeda when they tried to extract Herrera from the hospital. In addition, Fernández personally killed civilians in La Serena, just before traveling to Copiapó. He then killed civilians again in Antofagasta and Calama, after Copiapó.

Contrary to Fernández's claim that he "could not have understood that Mr. Cabello was to be killed" (App. Br. at 22), given his involvement in killing prisoners at cities before and after Copiapó, as well as his own actions in Copiapó, it was, at least, foreseeable to him that Mr. Cabello and other civilian prisoners would be killed in Copiapó. *See United States v. Alvarez*, 755 F.2d 830, 847-851 (11th Cir. 1985) (members of drug conspiracy were guilty of killing BATF agent and wounding another in shoot-out; gun battle was

reasonably foreseeable consequence of cocaine transaction). Mr. Cabello was one of a group of civilians killed at the same time as part of a plan executed by the squad, possibly with the assistance of local soldiers. Even if he did not personally kill Mr. Cabello, Fernández is liable for the actions of his co-conspirators who were involved in the killing. "[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; *Pinkerton*, 328 U.S. at 646, 66 S. Ct. at 1184 ("so long as the partnership in crime continues, the partners act for each other in carrying it forward.").

Nothing insulates Fernández from liability by virtue of the conspiracy occurring "in a military context." App. Br. at 19. Where the evidence shows that a junior officer was more than "merely present" (*see* App. Br. at 20, 22) and instead acted to further the conspirators' objectives, he may be liable even if his co-conspirators were his military superiors. *See, e.g.*, *United States v. Jaks*, 28 M.J. 908 (1989) (staff sergeant conspired with nine other soldiers including superiors to wrongfully transfer duty-free goods); *United States v. Scott*, 24 M.J. 578 (1987) (reversing dismissal of charges against yeoman who conspired with subordinate to entice women to engage in prostitution with Navy recruits); *United States v. Kinder*, 14 C.M.R. 742 (1954) (airman and others including superior conspired to murder unarmed civilian); *United States v. Schreiber*, 16 C.M.R. 639 (1954) (same facts as *Kinder*; second lieutenant also guilty of conspiracy).

Fernández's contention that "agreement cannot be inferred by a soldier's obedience" (App. Br. at 22) lacks legal and factual support. Fernández offered no evidence that he was following orders when he selected, extracted, interrogated, or tortured civilians. Moreover, any order to injure or kill unarmed civilian prisoners would have been plainly illegal. *See Kinder*, 14 C.M.R. at 781-782 (airman's claim that superior ordered him to kill unarmed civilian was no defense to murder, because such orders are clearly illegal); *United States v. Calley*, 48 C.M.R. 19, 24-25 (1973) (although an officer or soldier must follow all lawful orders, he has no privilege to follow, and must disobey, any illegal order). Fernández admits that the killing of unarmed civilians was illegal: "I think that everybody don't have to be a military to understand that" the military "cannot use force or violence against unarmed civilians and protected prisoners."

Fernández's citation to *United States v. Saglietto*, 41 F. Supp. 21, 32-33 (E.D. Va. 1941) (*see* App. Br. at 23) is inapposite. In *Saglietto*, the court set aside a guilty verdict returned against an Italian sea captain because he had complied with a lawful order given in wartime, holding that his "[p]articipation in a crime actuated solely by the compelling fear of personal harm negatives the very requisites of conspiracy." Here, there was no evidence that Fernández acted under duress or carried out any legal order, other than reporting to the helicopter.

In sum, evidence of Fernández's role in selecting, extracting, threatening and injuring the prisoners in Copiapó was sufficient for the jury to find him secondarily liable for the violations against Mr. Cabello.

3. The Evidence Was Sufficient to Permit the Jury to Find that Fernández Was Directly Liable.

Contrary to Fernández's contention that "Plaintiffs never established anything that directly links Fernández to Mr. Cabello's death" (App. Br. at 19), the Cabello family presented sufficient evidence to permit the jury to conclude that Fernández himself slashed Winston Cabello with a *corvo*.

Victor Bravo saw Mr. Cabello's body shortly after he was killed: "Winston had a cut on his ear, if I remember correctly he had a gash, a wound from his ear down through his throat." Dr. Elvira Miranda testified that she found evidence of knife wounds on Winston Cabello's clothing. Narrating the videotape of the exhumation, she testified that, "[t]his corresponds to Winston Cabello's jacket in which you could see oblique longitudinal tears . . . This is the area of the jacket where you could see linear tears surrounded by traces of blood around it."

Fernández acknowledged that he had the only *corvo* in Copiapó and had not loaned it to anyone. Enrique Vidal confirmed that Fernández had such a knife, and that the members of the local regiment did not. Patricio Lapostol testified, "you can easily slit someone's throat by using the inner curve of this knife." From the evidence of knife wounds on Mr. Cabello's body and of Fernández's possession of a *corvo*, the jury could reasonably have concluded that he caused Mr. Cabello's knife wounds.

Additionally, one of the witnesses may have seen Fernández that night with Mr. Cabello. Patricio Barrueto was awakened by armed military personnel who entered the barracks late at night on October 16, 1973. An unfamiliar officer carrying a rifle entered the room and stood at the foot of the bed. Mr. Barrueto did not say that man was Fernández, but he recalled that man's smile. Other witnesses made similar observations; Herrera said that Fernández seemed to be enjoying what he was doing.

4. The Doctrine of "Command Responsibility" is Irrelevant to this Case.

Despite Fernández's contention (*see* App. Br. at 8-14), nothing in the ATCA or TVPA limits liability only to defendants who directly perpetrated or exercised command authority over the direct perpetrators of the atrocities. The well-established secondary liability principles of conspiracy and aiding-abetting, about which the jury was properly instructed, apply to claims for human rights abuses brought under the ATCA and TVPA. *See Mehinovic*, 198 F. Supp. 2d at 1355 ("United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law. Similarly, the Senate Report on the TVPA notes that that statute is intended to apply to those who 'ordered,

abetted or assisted' in the violation."); *Presbyterian Church v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003) ("the concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law, especially in the specific context of genocide, war crimes, and the like."); *see also Cabello II*, 205 F. Supp. 2d at 1332-33.

Nothing in either statute limits a plaintiff's claims to actions against military commanders, or even against military personnel. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8396, 2002 WL 319887, at *12-16 (S.D.N.Y. Feb. 28, 2002) (corporation and executive could be liable for acting in concert with and aiding and abetting Nigerian authorities' violations against civil rights activists and villagers); *Presbyterian Church*, 244 F. Supp. 2d at 323 (citing cases) (denying 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).

The cases Fernández cites discuss command responsibility (*see* App. Br. at 9-10, 17) because that doctrine was the theory on which the plaintiffs in those cases were relying. *See, e.g.*, *Ford*, 289 F.3d at 1286; *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995); *In re Estate of Ferdinand Marcos*, 978 F.2d 493, 495 (9th Cir. 1992). The Cabello family, however, did not allege, seek to prove, or argue a command responsibility theory.

Likewise, in the international cases cited (*see* App. Br. at 10), the doctrine was relevant under the facts of each case; the international tribunals did not hold that it was the only means by which a defendant might be found liable. *See, e.g.*, *Prosecutor v. Delalic*, No. IT-96-21-A, ¶¶ 248-268 (ICTY Appeals Chamber, Feb. 20, 2001) (an individual is liable under command responsibility doctrine if he has effective control over direct perpetrators; he need not be their superior in a formal hierarchy); *Prosecutor v. Blaskic*, No. IT-95-14-T, Judgement ¶¶ 300-302 (ICTY Trial Chamber, Mar. 3, 2000) (where a superior has effective control, he may be liable even though direct perpetrators are not formally his subordinates); *Prosecutor v. Kayishema*, No. ICTR-95-1-T, Judgement § 1.2 ¶¶ 2, 23, 25-31, 39-44, 45-50), § 4.4.2 ¶¶ 208-231 (Trial Chamber, May 21, 1999) (civilian prefect of political subdivision of Rwanda convicted of genocide, including for failure to control, prevent or punish the actions of troops, because any superior may be liable for the acts of subordinates).

Fernández has presented no authority holding that the theories of liability on which the Cabello family relied (direct participation, conspiracy, and aiding-abetting) are unavailable under the ATCA or TVPA. He commits the fallacy of the undivided middle in contending without support that liability under these statutes can be predicated only on direct participation or on command responsibility — but on nothing else. His arguments regarding a failure of proof on a theory that was inapplicable to this case is no basis for reversal.

B. The District Court Correctly Held that the Cabello Family's Claims Were Not Time-Barred.

1. The Claims Were Equitably Tolled Until 1990.

Fernández argues that the Cabello family's claims are time-barred because the prisoners were killed in 1973, he arrived in Miami in 1988, and the first complaint was filed in 1999. *See* App. Br. at 27-33. The District Court repeatedly recognized that the statute of limitations did not begin running until 1990, when the bodies of the thirteen prisoners killed at Copiapó were located and exhumed, which only occurred after General Pinochet left office. Therefore, the date of Fernández's arrival in Miami is irrelevant.

The initial complaint was filed in 1999 — within the TVPA's ten-year limitations period which also applies to ATCA claims. The trial court rejected motions to dismiss and for summary judgment based on the limitations argument again urged in the Rule 50 motion. *See Cabello II*, 205 F. Supp. 2d at 1330-31; *Cabello I*, 157 F. Supp. 2d at 1367-68 (citations omitted). The trial court likewise rejected Fernández's limitations argument when he repeated it in his Rule 50(a) motion made at the close of the evidence. Although this Court reviews these decisions *de novo* (*see Brown v. Georgia Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003)), the record amply supports the trial court's ruling and it should not be disturbed on appeal.

The trial court properly applied equitable tolling principles to the Cabello family's claims. *See Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 452 (7th Cir. 1990) ("for equitable tolling all [the plaintiff] need show is that he could not by the exercise of reasonable diligence have discovered essential information bearing on his claim."). The family knew that Mr. Cabello was killed in October 1973, and that unknown military officers were involved, yet until 1990 they did not know how Mr. Cabello actually died, nor did they know of the harm done to him before his death. As Dr. Miranda testified, before the bodies could be exhumed, the forensic team first had to locate their unmarked grave.

The family also knew that the local military authorities had published a "*bando*" falsely claiming that the thirteen prisoners had been shot while trying to escape. Colonel Haag even told the same story to Ms. Cabello-Barrueto. Only in the past few years, however, did Haag finally admit to her that General Arellano had given the order to kill the civilians.

Until the grave was located, the Cabello family did not know that Mr. Cabello and the other prisoners had been tortured before being massacred. Although Victor Bravo had seen the prisoners' bodies shortly after they were killed, he was so traumatized that he never spoke about their condition to their families.

Finally, as the trial court noted, until the first post-junta civilian president was elected in 1990, the repressive political climate in Chile during the Pinochet regime prevented the

Cabello family from pursuing any efforts to learn what actually happened to Winston Cabello.

Thus, until the Cabello family had sufficient information to bring a claim, the statute of limitations was tolled. A court may toll a statute of limitations "only upon finding an inequitable event that prevented plaintiff's timely action." *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993). Here, the inequity was the perpetrators' concealment of, and deceptions regarding, the circumstances of Mr. Cabello's mistreatment and death, and the identity of those responsible. Thus, while the Cabello family knew that they had been injured, they lacked sufficient information to know "whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Cada*, 920 F.2d at 451. Moreover, they were not aware of significant elements of their injury — including that Mr. Cabello had been tortured.

In deciding whether a statute of limitations should be tolled, "[t]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances. To determine whether equitable tolling applies, courts 'examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the . . . Act.'" *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998) (internal citation omitted). The language and the legislative history of the TVPA indicate that Congress intended it to be a broadly remedial statute. The Senate Report accompanying the bill noted that the "legislation provides for a 10-year statute of limitations, but explicitly calls for consideration of all equitable tolling principles in calculating this period with a view toward giving justice to plaintiff's rights." S. REP. NO. 249, 102D CONG., 1ST SESS. 10-11 (1991), *available at* 1991 WL 258662 (hereinafter S. REP. NO. 102-249).

The cases cited by Fernández (*see* App. Br. at 30-33) do not lead to a contrary result. Where courts have refused to toll the limitations period, they have often found that the plaintiff was not diligent in pursuing a known claim. *See, e.g.*, *Justice*, 6 F.3d 1474 (equitable tolling was not available to plaintiff who filed new suit rather than appealing dismissal of incorrectly venued claim; court held that first suit did not toll limitations period for second suit); *Chapple v. National Starch & Chem. Co.*, 178 F.3d 501, 505-506 (7th Cir. 1999) (claim accrued once plaintiffs received letter advising them that union would not pursue grievances against their employer; court would not extend limitations period); *Cada*, 920 F.2d at 451-52 (affirming rejection of equitable tolling where plaintiff's claim accrued once he had been fired but he waited overlong to file suit). Here, the District Court correctly found that, until Mr. Cabello's body was exhumed, the Cabello family could not have pursued any claims because necessary information was outside their reach. Thus, equitable tolling is proper in this case; because the claims only accrued in 1990, they were not time-barred when this suit was filed.

2. Applying the TVPA's Statute of Limitations Does Not Retroactively Create New Rights or Remedies.

Contrary to Fernández's assertion (*see* App. Br. at 28-29), application of the TVPA in this case would not have an impermissible retroactive effect.

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, ***whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.*** If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Products, 511 U.S. 244, 280, 114 S. Ct. 1483, 1505 (1994) (emphasis added).

The TVPA does not "impair rights [Fernández] possessed when he acted" (*id.*), because he never had the right to torture or kill Winston Cabello. *See Cabiri*, 921 F. Supp. at 1196 ("Even prior to the promulgation of the [TVPA], the defendant had fair notice that torture was not a lawful act."). Nor did the TVPA "impose new duties with respect to transactions already completed" or "increase [Fernández's] liability for past conduct" (*Landgraf*, 511 U.S. at 280, 114 S. Ct. at 1505) — because the duty to refrain from torture and summary execution was clearly established as a matter of international law well before 1973. *See, e.g.*, *Filártiga v. Peña-Irala*, 630 F.2d 876, 881-85 (2d Cir. 1980) (holding that international law has long prohibited torture); *Xuncax*, 886 F. Supp. at 177 ("The universal condemnation of the use of torture was fully established prior to the events on which the instant claims turn."); *Princz v. Federal Republic*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (Nuremberg Tribunal memorialized the recognition of "crimes against humanity" as embodying customary international law) (citations omitted).

Thus, those courts that have considered this issue have held that applying the TVPA to events occurring before its enactment in 1992 is not impermissibly retroactive. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1195-97 (S.D.N.Y. 1996); *Xuncax*, 886 F. Supp. at 176-78. Likewise, because the ATCA grants aliens a right to sue for violations of customary international law in the federal courts, there is nothing improperly "retroactive" about extending the TVPA's limitations period to ATCA claims.

C. The District Court Correctly Admitted the Chilean Depositions.

The Cabello family and Fernández presented to the jury videotaped excerpts of the sworn and transcribed deposition testimony of six Chilean witnesses. These witnesses were Chilean nationals residing in Chile. They were deposed in Chile. Each gave his personal account of the atrocities in which Fernández participated.

Victor Bravo explained that he was summoned to the cemetery to fingerprint the corpses and complete death certificates. Noting that he had never told the families what he was then describing, Mr. Bravo expressed his shock at the brutal abuse that had been inflicted on the victims. He had known Winston Cabello and described seeing a gash from his ear to his throat.

Enrique Vidal was stationed at the Copiapó garrison and had been Fernández's military academy classmate. Mr. Vidal described seeing Fernández debark from the helicopter heavily armed. Fernández asked Mr. Vidal about the number and location of the prisoners held at the garrison, appeared to search for them, and threatened to beat them with a weapon he carried — a spiked metal ball hanging from a chain attached to a rod. Mr. Vidal also observed Fernández enter the *fiscal's* office with other squad members and later saw him return from the area where the civilians were held.

Juan Morales was a corporal in the Copiapó regiment. He saw Fernández enter the *fiscal's* office in Copiapó, select and review files, and interrogate prisoners. One of those prisoners was Jaime Sierra who was killed with Mr. Cabello. Mr. Morales described seeing Fernández stomping Mr. Sierra's head to the ground so that it sounded like a "watermelon."

Dr. Ivan Murua was himself a prisoner in Copiapó and was in the *fiscal's* office under interrogation when Fernández arrived with General Arellano. Dr. Murua observed them review the prisoners' files and heard General Arellano loudly declaim that the prisoners whose names were circled were to be "eliminated."

Patricio Lapostol saw the bodies of the Calama prisoners just after they were killed. They were not executed; they were "absolutely destroyed." He also testified that the inner blade of a *corvo* can be used to cut someone's throat.

Jorge Ortiz testified that, approximately a year after the coup, Fernández used an official password and a false name to extract from the Santiago jail a well-known prisoner named David Silberman who was never seen again.

The depositions were conducted with all the safeguards routine to federal practice:

- Counsel for the Cabello family provided Fernández's counsel advance notice of the depositions.

- Fernández's counsel traveled to Chile and attended the first set of depositions in person.

- Fernández's counsel attended most of the second set of depositions by telephone and chose not to appear at certain depositions.

- Fernández's counsel cross-examined each of the witnesses whose depositions he attended.

- Each deposition admitted at trial was videotaped.

- A certified American court reporter attended all of the depositions, administered an oath to each witness, and prepared a verbatim transcript of each witness's testimony.

- A Spanish language interpreter was present at each deposition and translated the questions and each witness's testimony for counsel and the court reporter.

Notwithstanding these safeguards, Fernández claims that the District Court erred by admitting the excerpts because the depositions were not conducted before "a person authorized to administer oaths in the place where the examination is held, either by the law thereof, or by the law of the United States." App. Br. at 34, quoting FED. R. CIV. P. 28(b). Fernández has not challenged the witnesses' truthfulness. Nor does he contend that they did not understand the significance of the oath they each had sworn. *See* App. Br. at 34-37; *see also United States v. Osidach*, 513 F. Supp. 51, 90 n.22 (E.D. Pa. 1981) (foreign depositions were admissible, including because it appeared that the witnesses understood and appreciated the substance of the oath).

Instead of filing a pre-trial motion *in limine* to exclude the depositions, Fernández objected to their admission on the first trial day. After receiving briefing, the District Court excluded the deposition testimony of the first three witnesses but found that Fernández had waived his objection to the remaining eight depositions. The District Court held that:

on August 29 at 9 o'clock [at] the deposition of Ivan Murua Chevesich and thereafter, I find there was constructive waiver by defense counsel as the citations to the deposition indicate that at that time inquiry was made of [Fernández's counsel] if they provided a notary — if the Cabello family provided a notary from Chile who could give an oath under Chilean law [that] would be sufficient. He indicated it would not. I do find that would have cured the problem, therefore there was constructive waiver at that time. Those depositions thereafter would be admissible.

The District Court's findings were correct, and the remaining depositions were properly admitted. This Court also may affirm the admission of the testimony on grounds in addition to those cited by the trial court. *E.g.*, *Powers v. United States*, 996 F.2d 1121, 1123-24 (11th Cir. 1993).

1. The Trial Court Did Not Abuse its Discretion in Finding that Fernández Waived his Objection to the Oath.

Any errors or irregularities in the taking of a deposition may be waived. *See* FED. R. CIV. P. 32(d)(3)(B) ("Errors and irregularities occurring at the oral examination . . . in the oath or affirmation, . . . are waived unless seasonable objection thereto is made at the taking of the deposition."). Contemporaneous objection is required so that the other party may rectify any purported error. *See, e.g.*, *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374, 383 (6th Cir. 1997) (although defendant objected generally to ex-wife's testimony, he waived objection by failing to object to specific testimony at deposition, which prevented plaintiff from inquiring into assertion of spousal communications privilege); *Kirschner v. Broadhead*, 671 F.2d 1034, 1037-38 (7th Cir. 1982) (it was error for trial court to exclude deposition testimony "on grounds which could have been remedied at deposition but cannot be at trial.").

Here, the Cabello family offered to remedy the defect that Fernández now asserts required exclusion of the depositions. At the first three depositions he attended, Fernández's counsel objected to the court reporter's administration of the oath. When he made the same objection at the start of Dr. Murua's testimony (the fourth deposition) on August 29, 2001, counsel for the Cabello family offered to procure a Chilean notary to administer the oath. Fernández's counsel declined the offer, thereby waiving any technical deficiency in the oath and agreeing to the procedure by which the following depositions were conducted. *See* FED. R. CIV. P. 32(d)(3)(B). Fernández effectively stipulated to the certified court reporter's continued administration of the oath for each subsequent deposition. The trial court correctly refused to exclude those depositions based on an objection Fernández had waived, premised on a practice to which he had stipulated. *See* FED. R. CIV. P. 29; *see also Popular Imports Inc. v. Wong's Int'l., Inc.*, 166 F.R.D. 276, 277-280 (E.D.N.Y. 1996) (rejecting contention that depositions conducted in China pursuant to stipulation and order were inadmissible where plaintiff argued that Chinese law does not permit voluntary depositions and the "depositions were not taken before a person authorized by the law of China to administer oaths as required by FED. R. CIV. P. 28(b)").

District courts have wide latitude in deciding whether to admit a particular item of evidence, including foreign evidence. *See, e.g.*, *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 531-38, 107 S. Ct. 2542, 2549-53 (1987) (rejecting petitioners' contention that Hague Evidence Convention provided sole means of obtaining foreign evidence and holding that trial courts have the discretion to decide the manner in which foreign evidence should be collected and which forms of foreign evidence are admissible). The trial court was well within its discretion in admitting depositions that were conducted like all American depositions and to which Fernández had dropped his technical objection to the administration of the oath by the court reporter.

2. Fernández's Technical Objection to the Oath Goes to the Weight and Not the Admissibility of the Evidence.

Even if Fernández's technical objection to the oath had not been waived, at most, it would have been relevant only to the weight of the testimony, not its admissibility. *See, e.g*., Advisory Committee Note to 1963 amendment to FED. R. CIV. P. 28 ("Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case."); *see also Bernstein v. Brenner*, 51 F.R.D. 9, 13 (D.D.C. 1970) (court would not suppress unsigned and uncorrected deposition of deceased witness because witness had been cross-examined and evidence was material to claim; defects went only to weight and not admissibility of the evidence).

3. Even if the Deposition Testimony Were Hearsay, it Was Admissible Under Recognized Exceptions to the Hearsay Rule.

The Chilean deposition testimony was admissible pursuant to at least two recognized hearsay exceptions even if the technical objection to the Rule 28(b) oath provision was not deemed waived. The District Court could have admitted the deposition testimony pursuant to Federal Rules of Evidence 804(b)(1) and 807 because it was reliable.

Both rules permit the court to admit reliable evidence that would otherwise be excluded by the hearsay rule. Under Rule 804(b)(1), the "former testimony" of witnesses unavailable to testify at trial is admissible. The Chilean witnesses whose videotaped testimony was admitted were unavailable: all six were Chilean residents and nationals and thus outside the trial court's subpoena power and one (Morales) died before trial. *See* FED. R. EVID. 804(a)(5) (witness is unavailable if he/she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1249 (E.D. Pa. 1980) (Japanese citizens were unavailable; "In civil cases, it has long been the rule that inability to procure attendance by 'process or other reasonable means' is satisfied by demonstration of inability to serve a subpoena. We have found nothing to indicate that the adoption of the Federal Rules of Evidence altered this longstanding rule.") (internal citations omitted), *rev'd. on other grounds sub nom. In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983).

Rule 807, the "residual" hearsay exception, allows the admission of reliable hearsay where the proponent gives notice of intent to rely on the evidence, thereby avoiding unfair surprise. The Cabello family notified Fernández of their intent to introduce the deposition testimony on August 27, 2003, well in advance of trial. *See United States v. Munoz*, 16 F.3d 1116, 1122 (11th Cir. 1994) (notice of intent to offer evidence one month before trial was sufficient).

Both rules provide that courts may admit any relevant evidence that is otherwise hearsay — so long as the evidence bears sufficient indicia of reliability. *See* FED. R. EVID. 804(b)(1), 807. The Advisory Committee Notes to Rule 804 identify three "'ideal conditions for the giving of testimony,'" that is, an oath, cross examination, and an opportunity for the factfinder to observe the witness's demeanor." Advisory Committee Notes to Rule 804(b)(1), 1972 Proposed Rule (West. ed. at 439) ("Advisory Committee Notes"). Here, all three conditions were present.

First, the witnesses were placed under oath by a certified court reporter. Although Fernández objects to the administration of the oath, he has offered no evidence that the witnesses did not understand or appreciate the seriousness of the oath they swore. *See Osidach*, 513 F. Supp. 51, 90 n.22. Courts have admitted foreign testimony even in the absence of an oath, including in criminal cases in which the confrontation clause applies. *See United States v. Sturman*, 951 F.2d 1466, 1481 (6th Cir. 1991) (affirming conviction for fraud and tax evasion, and finding no error in admission of foreign deposition testimony despite lack of an oath); *United States v. Casamento*, 887 F.2d 1141, 1174-75 (2d Cir. 1989) (upholding admissibility of depositions taken without an oath in Switzerland); *United States v. Salim*, 855 F.2d 944, 953 (2d Cir. 1988) (approving use of French deposition where defense counsel was not permitted to be present during testimony, and witnesses were not placed under oath).

Second, the testimony presented to the jury was not only transcribed by a certified court reporter, it was videotaped. The "opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination." Advisory Committee Notes. A videotaped deposition overcomes the Advisory Committee's concern by offering the jury an opportunity to view the witness's demeanor while testifying. *See United States v. King*, 713 F.2d 627, 631-32 (11th Cir. 1983) (reversing and remanding because district court excluded testimony from prior trial; court noted Advisory Committee's comments but held that testimony was admissible although only transcript was available and jurors would not be able to observe witness's demeanor).

Third, the testimony is reliable because Fernández's counsel had an adequate opportunity to develop the witnesses' testimony through cross-examination. *See Crawford v. Washington*, -- U.S. --, 124 S. Ct. 1354, 1367-68 (2004) (noting that even in criminal cases, prior testimony is admissible where the defendant had an adequate opportunity to cross-examine witnesses). Here, Fernández actively cross-examined those witnesses whose depositions he attended, and he offered excerpts of the depositions at trial. *See United States v. Miles*, 290 F.3d 1341, 1352 (11th Cir. 2002) (admitting testimony of witness from prior trial), *cert. denied*, 537 U.S. 1089, 123 S. Ct. 707 (2002); *United States v. Deeb*, 13 F.3d 1532, 1536-38 (11th Cir. 1994) (co-conspirator's testimony from prior trial was admissible under residual hearsay exception even though defendant was neither present nor represented at prior trial, but co-defendants' counsel cross-examined witness); *United States v. Curry*, 471 F.2d 419, 420-21 (5th Cir. 1973) (admitting testimony from prior suppression hearing).

Finally, the manner in which the Chilean deposition testimony was obtained establishes its reliability and made it properly admissible. *See United States v. Siddiqui*, 235 F.3d 1318, 1325 (11th Cir. 2000) (foreign depositions were reliable, including because witnesses were placed under oath and cross-examined, objections were preserved for trial, and testimony was transcribed); *United States v. Mueller*, 74 F.3d 1152, 1157 (11th Cir. 1996) (district court properly admitted depositions taken in the United Kingdom which were conducted with the same procedural guarantees as U.S. depositions). Because Fernández has not shown that the District Court abused its discretion in finding that he waived his objection to the oath and admitting the depositions taken on or after August 29, 2001, this Court should affirm the lower court's ruling. This Court also may affirm the admission of the Chilean deposition testimony under Rules 804(b)(1) and 807.

D. The District Court Properly Admitted Evidence Establishing the Claim for Crimes Against Humanity and Proving Fernández's Secondary Liability.

Before trial, Fernández moved to exclude all evidence except the "proof . . . about what interaction he had with Winston Cabello in Copiapo" contending that "[n]one of the evidence about events outside of Copiapo is relevant . . . ." The District Court found that evidence concerning the other twelve victims in Copiapó and the killings at the cities visited before and after Copiapó was relevant to whether Fernández knowingly participated in crimes against humanity and to whether he conspired to commit or aided and abetted the commission of other offenses. Nothing in Fernández's argument undermines the trial court's decision.

The evidence established that the squad participated in killing at least 72 civilians including those in Copiapó. The evidence further showed that Fernández personally killed prisoners in La Serena, just before Copiapó, and then again in Antofagasta and Calama. Further, Mr. Cabello was one of thirteen men killed and buried together in Copiapó, thus the evidence relating to the deaths of the other twelve is relevant to his death.

To prove their claim for crimes against humanity, the Cabello family was required to prove that the squad committed offenses including murder, torture, or unlawful imprisonment "'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'" *Wiwa*, 2002 WL 319887, at *9 (citation omitted); *Mehinovic*, 198 F. Supp. 2d at 1352 and n.44. Evidence concerning the squad's killings in other cities was essential to establishing the "widespread and systematic" element of this claim. Evidence that Fernández personally killed civilians in other cities also was relevant to proving that he was aware of the scope of the offenses committed by the squad of which Mr. Cabello's killing was one part.

The Cabello family's claims were premised on the theory that Fernández was secondarily, as well as directly, liable for the offenses. Proving his secondary liability necessitated offering evidence of his substantial assistance to, or concerted actions with, other direct perpetrators — actions that might have fallen short of direct liability. Fernández claims that "Plaintiffs cannot establish the required elements of aiding and abetting or conspiracy through which Fernández could be held civilly liable for the extrajudicial killing because they cannot prove that Fernández personally killed Mr. Cabello." App. Br. at 25. Fernández misunderstands that he properly could be held secondarily liable as a conspirator or an aider and abettor even if he did not personally kill Mr. Cabello.

The evidence that Fernández attempted to exclude was directly relevant to proving elements of aiding-abetting and conspiracy. Evidence concerning the cities visited before Copiapó was relevant to establishing that Fernández knew before arriving in Copiapó that the purpose of the conspiracy was to identify and kill civilians held by the military. That evidence also was relevant to establishing that it was foreseeable to him that the squad would kill in Copiapó — another element of co-conspirator liability. Further, evidence concerning his actions in selecting, interrogating and threatening prisoners in Copiapó was relevant to proving he substantially assisted his squad members and the local military in identifying the prisoners to be killed. Because the evidence concerning other cities visited by the squad and the mistreatment and killing of prisoners other than Mr. Cabello was relevant to proving Fernández's secondary liability, it was properly admitted.

Evidence concerning Fernández's and the squad's actions in cities other than Copiapó, and with prisoners other than Mr. Cabello, also would have been admissible under Federal Rule of Evidence 404(b) to demonstrate the existence of a plan or scheme to kill civilian prisoners of the junta, as well as Fernández's knowledge, intent and lack of mistake concerning the squad's activities on the night that Mr. Cabello was killed. *See* FED. R. EVID. 404(b); *see also United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir. 1992) ("First, the evidence must be relevant to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act. Third, the evidence must possess probative value that is not substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.") (internal citations omitted). Here, the evidence concerning Fernández's actions in cities before and after Copiapó, and his acts and statements the night Mr. Cabello and the other prisoners were killed meets the *Miller* criteria.

Fernández incorrectly claims that, "Plaintiffs argue simply that Fernández is liable for the extrajudicial killing of Mr. Cabello largely because Fernández was at Copiapó when the events took place." App. Br. at 25. Evidence concerning his actions in cities before and after Copiapó would be admissible to refute the claim that he was "merely present" in Copiapó because such evidence demonstrated his knowledge and intent to assist in identifying, locating, and extracting the prisoners to be killed in Copiapó, as well as his membership in the conspiracy to kill. *See, e.g.*, *United States v. Bennett*, 848 F.2d 1134, 1137-39 (11th Cir. 1988) (evidence of defendant's prior drug smuggling was properly

admitted under Rule 404(b) to rebut claim that he and his son were fishing and merely present near abandoned, cocaine-laden boat).

The District Court did not abuse its discretion when it denied Fernández's motion to restrict the evidence that proved an element of one of the substantive claims and multiple elements of the secondary liability theories.

VIII. CONCLUSION

For the foregoing reasons, and based on the entire record in this case, the District Court's order from which Fernández appeals should be affirmed.

Dated: May 19, 2004 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C), I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 13,856 words, as calculated by the word processing program employed to prepare this brief.

Dated: May 19, 2004 Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Jo Stinson declare:

I am employed in Santa Clara County, State of California. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050.

On this 19th day of May, 2004, I filed one (1) original and six (6) true and correct copies of Plaintiffs-Appellees' Brief at the Office of the Clerk, United States Court of Appeals for the Eleventh Circuit, at the address indicated and in the manner identified below:

☐ By placing the document(s) in a sealed envelope and consigning them to an express mail service for guaranteed next day delivery to the following person(s):

Thomas K. Kahn, Clerk

United States Court of Appeals for the Eleventh Circuit

56 Forsythe Street, N.W.

Atlanta, GA 30303

On this 19th day of May, 2004, I served true and correct copies of Plaintiffs-Appellees' Brief on each person listed below, at the address indicated and in the manner identified below:

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I am readily familiar with Wilson Sonsini Goodrich & Rosati's practice for collection and processing of documents for delivery according to the instructions indicated above. In the ordinary course of business, documents would be handled accordingly.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Palo Alto, California on May 19, 2004

____

Mary Jo Stinson

See Record Excerpts Cited in Initial Brief of Appellant ("R.E.") Tab 1 at 6.

Estate of Cabello v. Fernández-Larios, 157 F. Supp. 2d 1345, 1354, 1369 (S.D. Fla. 2001) (*Cabello I*).

Cabello I, 157 F. Supp. 2d at 1364-68.

See R.E. Tab 1 at 18; R.E. Tab 2. The claims for cruel, inhuman or degrading punishment or treatment and crimes against humanity were pleaded under the ATCA (SAC, Claims 5-8, ¶¶ 90-119); the claims for extrajudicial killing and torture were pleaded under both the ATCA (*id*. Claim 1, ¶¶ 57-62 and Claim 4, ¶¶ 79-89) and the TVPA (*id*. Claims 1-3, ¶¶ 57-78).

See Cabello Barrueto v. Fernández-Larios, 205 F. Supp. 2d 1325, 1329 (S.D. Fla. 2002) (*Cabello II*).

Cabello II, 205 F. Supp. 2d at 1331.

See Record Volume ("R.Vol.") 7, Docket Entry ("D.E.") 277, Declaration of Nicole M. Healy in Support of Plaintiffs' Opposition to Defendant's Motion to Exclude Chilean Depositions ("Healy Dec."), Exs. 1-2.

See R.Vol. 7, D.E. 277, Ex. 4.

See id. ¶¶ 9-13.

See id. ¶ 4.

See id., Ex. 5 at 6-7.

See R.Vol. 8, D.E. 318 at 54:16-59:18.

See R.E. Tab 7 at 21.

See R.E Tab 7 at 11-12, 18-21; *see also* R.Vol. 4 D.E. 191-92, R.Vol. 5, D.E. 205.

See id. at 6-12.

See R.Vol. 7, D.E. 274 at 6-7.

See R.Vol. 8, D.E. 318 at 49:7-50:20, 54:16-59:25.

See R.Vol. 9, D.E. 319 at 107:23-108:17.

See R.Vol. 18, D.E. 328 at 909:6-912:3.

See id. at 912:5-916:11.

See R. Vol. 7, D.E. 307.

See R.E. Tab 9.

See R.E. Tab 10.

Fernández has abandoned his request for a new trial and remittitur. *See Granite State Outdoor Adver., Inc. v. City of Clearwater, Florida*, 351 F.3d 1112, 1115 n.2 (11th Cir. 2003); *Lind v. United Parcel Serv., Inc*., 254 F.3d 1281, 1283 n.2 (11th Cir. 2001).

See R.Vol. 9, D.E. 319 at 112:2-5; R.Vol. 14, D.E. 324 at 483:15-484:1; R. Vol. 15, D.E. 325 at 648:19-23.

See R.Vol. 15, D.E. 325 at 664:12-21.

See R.Vol. 14, D.E. 324 at 522:14-523:3.

See R.Vol. 15, D.E. 325 at 648:19-23; R. Vol. 5, D.E. 230 at Exhibit B, 4-5 (Plaintiffs' Offer of Testimony from Jorge Escalante).

See R.Vol. 15, D.E. 325 at 600:1-3, 601:23-602:7, 604:4-9, 625:16-626:3, 649:25-650:3.

See e.g. R.Vol. 9, D.E. 319 at 113:23-25, 114:25-115:1, 124:20-25.

See R.Vol. 16, D.E. 326 at 784:13-785:11.

See R.Vol. 15, D.E. 325 at 655:22-24, 656:5-9.

See id. at 625:16-20, 626:4-628:24.

See R.Vol. 14, D.E. 324 at 495:18-21; R.Vol. 15, D.E. 325 at 649:25-650:3; R.Vol. 16, D.E. 326 at 726:4-6, 726:24-727:1, 727:12-16, 729:7-9.

See R.Vol. 9, D.E. 319 at 120:18-22; R.Vol. 14, D.E. 324 at 487:15-24.

See R.Vol. 9, D.E. 319 at 102:22-103:9; R.Vol. 14, D.E. 324 at 455:11-456:2.

See R.Vol. 9, D.E. 319 at 104:9-105:4, 105:25-106:1.

See R.Vol. 14, D.E. 324 at 484:25-485:4.

See id. at 487:3-5.

See R.Vol. 9, D.E. 319 at 106:11-15, 114:1-115:25.

See R.Vol. 14, D.E. 324 at 485:5-486:14.

See R.Vol. 13, D.E. 323 at 406:20-407:8. At his deposition, Vidal immediately identified Fernández in a photograph originally shown to another witness, Dr. Ivan Murua, by Fernández's counsel. *See id.* at 429:15-431:3; R.Vol. 12, D.E. 322 at 379:9-381:16.

R.Vol. 13, D.E. 323 at 422:8-11.

See id. at 407:19-24.

See id. at 409:15-410:2, 425:9-11, 426:15-427:8.

See id. at 426:7-8, 429:7-14.

See id. at 429:7-14.

See R.Vol. 12, D.E. 322 at 344:21-345:3, 345:4-18; R.Vol. 13, D.E. 323 at 427:9-428:8.

See R.Vol. 12, D.E. 322 at 345:4-18, 346:5-11; 363: 3-367:17.

See id. at 361:24-367:17.

See id. at 364:10-366:11, 367:12-17.

See id. at 352:6-19, 352:20-24, 353:3-14, 355:25-356:5.

See id. at 355:14-24.

See R.Vol. 17, D.E. 327 at 846:4-6, 848:18-849:1.

See R.Vol. 12, D.E. 322 at 351:14-16.

See id. at 346:12-347:15, 328:1-4.

See id. at 346:24-347:7.

See id. at 346:12-347:15, 349:21-350:11.

See R.Vol. 9, D.E. 319 at 138:21-146:25.

See R.Vol. 13, D.E. 323 at 409:8-410:2, 423:14-424:2, 424:25-425:11.

See id. at 411:10, 19.

See R.Vol. 9, D.E. 319 at 116:10-13, 119:13-120:20; Pl. Ex. 23 at C018465.

See id. at 116:19-117:9.

See R.Vol. 12, D.E. 322 at 326:4-13, 329:9-330:1, 354:17-23, 356:6-357:19; R.Vol. 15, D.E. 325 at 620:15-19.

See R.Vol. 15, D.E. 325 at 695:24-25.

See id. at 620:15-19.

See R.Vol. 16, D.E. 326 at 795:15-797:16; R.Vol. 11, D.E. 321 at 241:17-242:1, 260:19-261:7; R.Vol. 12, D.E. 322 at 329:12-19, 326:12-22, 326:23-328:11.

See R.Vol. 14, D.E. 324 at 459:10-460:2, 490:15-493:17.

See R.Vol. 13, D.E. 323 at 416:20-417:5; R.Vol. 14, D.E. 324 at 459:10-15, 459:20-460:2, 490:15-18; and Pltfs. Ex. 4.1.

See R.Vol. 10, D.E. 320 at 184:21-25; R.Vol. 14, D.E. 324 at 494:20-24, 516: 25-517:12.

See R.Vol. 10, D.E. 320 at 181:1-10, 182:14-24; R.Vol. 11, D.E. 321 at 241:17-242:1, 242:10-11, 244:13-17; R.Vol. 14, D.E. 324 at 494:20-24, 457:10-21.

See R.Vol. 13, D.E. 323 at 416:20-417:5; R.Vol. 14, D.E. 324 at 459:10-15, 459:20-460:2, 490:15-18.

See R.Vol. 11, D.E. 321 at 262:3-5.

See id. at 241:17-242:1, 260:19-261:7.

See R.Vol. 12, D.E. 322 at 326:12-328:3.

See id. at 329:12-19.

See id. at 328:1-6.

See R.Vol. 15, D.E. 325 at 647:16-20.

See R.Vol. 13, D.E. 323 at 432:6-433:6.

R.Vol. 16, D.E. 326 at 743:21-22, 744:17-18.

See id. at 627:24-629:8.

See id. at 636:17-20.

See id. at 630:10-12; R.Vol. 16, D.E. 326 at 765:7-9.

See R.Vol. 15, D.E. 325 at 636:21-638:2; R.Vol. 16, D.E. 326 at 723:11-724:2.

See R.Vol. 17, D.E. 327 at 834:25-835:3.

See R.Vol. 15, D.E. 325 at 601:3-9.

See id. at 684:9-23.

See R.Vol. 9, D.E. 319 at 124:14-16; R.Vol. 16, D.E. 326 at 792:12-13, 794:22-24, 796:1-5.

See R.Vol. 15, D.E. 325 at 595:8-10, 601:23-602:2; R.Vol. 16, D.E. 326 at 785:6-8.

See R.Vol. 16, D.E. 326 at 741:8-742:2.

See R.Vol. 15, D.E. 325 at 601:23-603:15.

See id. at 596:19-21, 604:4-15; R.Vol. 16, D.E. 326 at 750:23-24.

See R.Vol. 13, D.E. 323 at 436:18-19; R.Vol. 15, D.E. 325 at 596:19-21, 604:4-7; R.Vol. 16, D.E. 326 at 750:23-24.

See R.Vol. 16, D.E. 326 at 741:8-12, 785:9-11.

See R.Vol. 15, D.E. 325 at 605:12-18.

See R.Vol. 13, D.E. 323 at 434:7-17, 439:9-14.

See R.Vol. 9, D.E. 319 at 120:8-14; R.Vol. 15, D.E. 325 at 625:16-626:3.

See R.Vol. 7, D.E. 308, Instructions 11-14, 17-18.

Where multiple theories of liability are presented and the evidence supports each theory, a general verdict is "immune from attack." *Jones v. Miles*, 656 F.2d 103, 106 n.4 (5th Cir. 1981); *see also Cronin v. Washington Nat'l Ins. Co.*, 980 F.2d 663, 669 n.7 (11th Cir. 1993) ("where a jury returns a general verdict, a party seeking a judgment notwithstanding the verdict must demonstrate the failure of *each* alternative theory of liability supporting the judgment.").

See R.Vol. 7, D.E. 308, Jury Instructions 11-14; *see also* R.Vol. 20, D.E. 330 at 1019:21-1022:17. Fernández has not appealed any of the instructions.

See R.Vol. 7, D.E. 308, Jury Instruction 17; R.Vol. 20, D.E. 330 at 1022:18-1023:5.

While someone who was merely present at the scene of a crime is not culpable, because the evidence shows that Fernández engaged in affirmative acts that contributed to the deaths of Mr. Cabello and others in Copiapó, and killed prisoners elsewhere, his "mere presence" argument is not entitled to any consideration. *See Jacobs v. Singletary*, 952 F.2d 1282, 1290 (11th Cir. 1992) (where defendant was indicted for being one of three people involved in shooting of two police officers but the evidence was unclear as to whether she fired any shots, she was not entitled to mere presence instruction; instead the judge properly instructed the jury on aiding and abetting).

See R.Vol. 15, D.E. 325 at 655:22-24, 656:5-9.

See R.Vol. 13, D.E. 323 at 431:24-432:5.

Id. at 422:8-11.

See id. at 407:20-24.

See id. at 409:14-24.

See id. at 432:6-13.

See id. at 425:9-426:8, 429:7-14.

See R.Vol. 12, D.E. 322 at 350:6-14, 351:22-353:2, 352:6-24, 353:12-14, 365:1-367:17, 368:7-13; R.Vol. 17, D.E. 327 at 846:25-847:19, 846:4-6, 848:18-849:1.

See R.Vol. 12, D.E. 322 at 350:15-20, 351:14-16; R.Vol. 13, D.E. 323 at 410:7-14, 423:21-424:2.

See R.Vol. 12, D.E. 322 at 346:12-347:15, 349:21-350:5.

See R.Vol. 9, D.E. 319 at 139:20-140:25, 141:24-142:25, 145:7-18.

See R.Vol. 12, D.E. 322 at 345:4-18, 346:5-11, 350:14-16, 352:6-19, 352:20-24, 353:3-14, 355:14-356:4, 361:24-367:17, 364:10-366:11, 367:12-368:10; R.Vol. 16, D.E. 326 at 794:22-797:10; R.Vol. 17, D.E. 327 at 846:25-847:19, 846:4-6, 848:18-849:1.

See R.Vol. 15, D.E. 325 at 601:3-9.

See R.Vol. 7, D.E. 308, Jury Instruction 18; R.Vol. 20, D.E. 330 at 1023:6-25.

See R.Vol. 15, D.E. 325 at 636:17-20.

Id.

See R.Vol. 15, D.E. 325 at 630:10-12.

See id. at 599:10-601:9.

See id. at 681:18-25.

See R.Vol. 12, D.E. 322 at 352:6-24, 353:12-14, 365:2-367:17, 368:7-13.

See id. at 361:24-367:17.

See id. at 346:12-347:15, 349:21-350:5.

See R.Vol. 13, D.E. 323 at 425:9-426:8, 429:7-14.

See R.Vol. 9, D.E. 319 at 139:22-15, 145:7-146:11.

See R.Vol. 15, D.E. 325 at 599:1-601:9.

See id. at 601:23-603:15 (Antofagasta), 603:16-605:18 (Calama).

See R.Vol. 7, D.E. 308, Jury Instruction 18.

His citation to *Chappell v. Wallace*, 462 U.S. 296, 300, 103 S. Ct. 2362, 2265-66 (1983) and *Bois v. Marsh*, 801 F.2d 462, 467 (D.C. Cir. 1986) is inapposite; both cases hold that discrimination claims by one military officer against another must be handled through military channels and not the courts under the *Feres* doctrine. *See Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153 (1950) (barring intramilitary tort suits).

See R.Vol. 15, D.E. 325 at 625:9-13, 637:9-14. The *Calley* court rejected the defendant's arguments that he had obeyed what he understood were his commander's orders when he killed a large number of unarmed Vietnamese villagers. The court noted the "acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him *unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful*, or if the order in question is actually known to the accused to be unlawful." *Calley*, 48 C.M.R. at 27 (emphasis added); *see also United States v. Yunis*, 924 F.2d 1086, 1097 (D.C. Cir. 1991).

See R.Vol. 12, D.E. 322 at 329:13-15.

See R.Vol. 11, D.E. 321 at 260:23-261:7.

See id. at 241:17-25.

See R.Vol. 15, D.E. 325 at 647:16-20; R.Vol. 13, D.E. 323 at 433:8-11.

See R.Vol. 13, D.E. 323 at 406:20-407:8, 409:14-24, 432:6-433:6.

See id. at 436:2-15.

See R.Vol. 9, D.E. 319 at 116:19-117:9.

See id. at 145:7-18.

Fernández contends that the ATCA is jurisdictional and does not supply a cause of action. *See* App. Br. at 11-13 (citing *Sinaltrainal v. Coca Cola Co.*, 256 F. Supp. 2d 1351, 1352 (S.D. Fla. 2003)). *Sinaltrainal* does not support his contention; the court dismissed the ATCA claims for lack of subject matter jurisdiction because the plaintiffs

failed to allege that private persons acted under color of law by acting in concert with paramilitaries. *See id.* at 1353. Fernández ignores Circuit precedent that plaintiffs may pursue claims under the ATCA for violations of customary international law, including crimes against humanity. *See Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996); *see also Paul v. Avril*, 812 F. Supp. 207, 211-12 (S.D. Fla. 1993). Other courts have also held that the ATCA provides a cause of action as well as jurisdiction. *See In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467, 1474-76 (9th Cir. 1994); *Filártiga v. Peña-Irala*, 630 F.2d 876, 880-90 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179-84 (D. Mass. 1995). However, on December 1, 2003, the Supreme Court granted certiorari, and on March 30, 2004, heard argument on this issue in *Sosa v. Alvarez-Machain*, No. 03-339 (Sup. Ct. argued Mar. 30, 2004). *See* http://www.supremecourtus.gov/qp/03-00339qp.pdf (accessed March 30, 2004).

See R.Vol. 10, D.E. 320 at 181:1-15, 182:22-24.

Because the TVPA is the most analogous federal statute, its ten-year statute of limitations applies to ATCA claims. *See, e.g.*, *Papa v. United States*, 281 F.3d 1004, 1011-13 (9th Cir. 2002); *Cabiri v. Assassie-Gyimah*, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996); *Xuncax*, 886 F. Supp. at 192.

The District Court held that, "the pre-1990 Chilean government's concealment of the decedent's burial location and the accurate cause of death prevented [the Cabello family] from bringing this action until 1990. Accordingly, the ten-year limitation period did not begin to accrue until 1990."

In *Cabello I*, the trial court found that:

> Equitable tolling of the TVPA is appropriate in this case because Chilean military authorities deliberately concealed the decedent's burial location from Plaintiffs, who were unable to view the decedent's body until 1990. The Court finds that such concealment precluded [them] from knowing the exact nature of the decedent's death, particularly in light of the confusion created by the three death certificates sent to the decedent's family between 1973 and 1991. The Court further finds that once the civilian government under the leadership of President Patricio Aylwin replaced General Pinochet's military regime in 1990, the tolling ceased, and the limitations period commenced.

Cabello I, 157 F. Supp. 2d at 1368.

The District Court held:

> In my prior order of [*Cabello II*], I found that the ten-year limitation period did not begin to accrue until 1990. This action was filed in I believe February of 1999. So it was within the ten-year period. As far as the evidence that was adduced at trial regarding the limitation period beginning in 1990, there was testimony by Dr. Miranda that the excavation of the remains began in July of 1990, and in fact, the autopsy report that has been introduced into evidence of Winston Cabello was actually dated January 1991 . . . the Court finds there is sufficient evidence in the record upon the excavation of the remains and the findings of the autopsy report that this action was filed within the ten year period that began to accrue, did not begin to accrue until 1990. Therefore, on that basis the Rule 50 motion is denied.

R.Vol. 18, D.E. 328 at 909:9-910:4.

See R.Vol. 9, D.E. 319 at 116:10-13, 119:13-120:20.

R.Vol. 10, D.E. 320 at 184:21-25.

See R.Vol. 14, D.E. 324 at 510:18-511:6.

See, e.g., R.Vol. 11, D.E. 321 at 241:17-242:1, 260:19-261:7, 262:3-5; R.Vol. 12, D.E. 322 at 329:12-19.

See R.Vol. 12, D.E. 322 at 334:21-335:9.

See R.Vol. 5, D.E. 230 at Exhibit A, 8-9 (Plaintiff's Offer of Testimony from Ambassador Roberto Garretón).

There is virtually no legislative history for the ATCA. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 20-21 n.11 (2d Cir. 2003) ("The Senate debates on the Judiciary Act of 1789 were not recorded and the House debates did not mention the ATCA provision.") (citation omitted).

One court has suggested that it would even be permissible for the TVPA to have a retroactive effect. Noting that the Senate Report "observes that the statute would extend to U.S. citizens as well as aliens 'an unambiguous basis for a cause of action that has been successfully maintained under an existing law [*i.e.*, 28 U.S.C. §1350],'" the *Xuncax* court stated that "to the extent, then, that the TVPA may be viewed as closing a perceived 'jurisdictional gap,' retroactive application is also appropriate." *Xuncax*, 886 F. Supp. at 177 n.14; *see also* S. REP. NO. 102-249 at 4.

See R.Vol. 9, D.E. 319 at 107:23-108:17. Mr. Herrera, the only other witness who testified by videotaped deposition is a resident of California where he was deposed, and

his testimony is not at issue. Although Dr. Miranda was deposed, she testified in person and her deposition was not presented to the jury.

R.Vol. 12, D.E. 322 at 329:12-15.

R.Vol. 13, D.E. 323 at 407:4-8, 13-24; 409:4-5, 14-24; 410:3-14; 414:24-415:2; 419:22-25; 420:11-13; 423:21-424: 2; 429:7-14.

R.Vol. 12, D.E. 322 at 346:12-347:15.

Id. at 367:8-17.

R.Vol. 13, D.E. 323 at 436:4-9.

R. Vol. 13, D.E. 323 at 465:24; 468:15-16; 469:20-25; 470:1-8; 470:20-471:1; 471:2-10; 473:24-474:2.

See R.Vol. 7, D.E. 277, Exs. 2-4.

See id. ¶¶ 3-13.

See R. Vol. 8, D.E. 318 at 49:7-50:20, 54:16-59:25.

R.Vol. 9, D.E. 319 at 108:5-14.

The Cabello family maintains that the three excluded depositions were properly admissible notwithstanding the technical noncompliance with Rule 28(b).

See R. Vol. 7, D.E. 277, Ex. 10.

See, e.g., R.Vol. 12, D.E. 322 at 367:18-22, 371:16-24; R.Vol. 14, D.E. 324 at 477:23-478:1.

See R.E. Tab 6 at 1.

See R.E. Tab 7 at 4-20.

See nn.**Error! Bookmark not defined.**-96, *supra*.

See R.Vol. 15, D.E. 325 at 599:1-601:9.

See id. at 601:23-603:15 (Antofagasta), 603:16-605:18 (Calama).

See nn.35-**Error! Bookmark not defined.**, *supra*.

See R.Vol. 7, D.E. 308, Jury Instruction 14.