

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 99-0528-CIV-LENARD
MAGISTRATE JUDGE SIMONTON

ESTATE OF WINSTON CABELLO,
et al.

Plaintiffs,

vs.

ARMANDO FERNÁNDEZ-LARIOS,

Defendant.

PLAINTIFFS' TRIAL BRIEF

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
FACTUAL STATEMENT	2
A. Background.....	2
B. The Caravan of Death	4
C. Southern Chile	4
D. Northern Chile	5
E. The Cover-Up Concerning Winston Cabello’s Killing	10
F. Defendant Armando Fernández Larios.....	11
(1) The Coup d’Etat.....	11
(2) Fernandez’s Role in the DINA	12
(a) David Silberman	12
(b) Fernández’s Role in the Assassination of Orlando Letelier and Subsequent Conviction.....	12
G. Procedural History and The Court’s Prior Rulings.....	14
ARGUMENT.....	16
II. FERNÁNDEZ IS LIABLE UNDER THE TVPA AND ATCA	16
A. The ATCA and TVPA	16
B. Extrajudicial Killing.....	17
C. Torture.....	18
D. Cruel, Inhuman, or Degrading Punishment or Treatment.....	19
E. Crimes Against Humanity.....	20
III. AT A MINIMUM, FERNANDEZ IS LIABLE UNDER PRINCIPLES OF SECONDARY LIABILITY	22
A. Aiding and Abetting Liability.....	22
B. Fernández is Liable for Aiding and Abetting the Violations Alleged in the Second Amended Complaint	24

C. Co-Conspirator Liability..... 25

D. Fernández is Also Liable as a Member of the Conspiracy that Committed
the Violations Alleged in the Second Amended Complaint 27

CONCLUSION..... 29

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES	
<i>Abebe-Jira v. Negewo</i> , 72 F.3d 844 (11th Cir. 1996).....	16, 19, 23
<i>Alvarez-Machain v. United States</i> , No. 99-56762, D.C. No. CV-93-04072, slip. op. (9th Cir. Sept. 11, 2001), <i>reh’g en banc</i> (June 3, 2003)	17
<i>Baron Tube Co. v. Transport Ins. Co.</i> , 365 F.2d 858 (5th Cir. 1966)	15
<i>Cabello Barrueto v. Fernández-Larios</i> , 205 F. Supp. 2d 1325 (S.D. Fla. 2002) (<i>Cabello II</i>).....	15, 18, 19, 20 22, 23, 26
<i>City of Cleveland v. Cleveland Elec. Illuminating Co.</i> , 538 F. Supp. 1280 (N.D. Ohio 1980).....	15
<i>Cox v. Administrator U.S. Steel & Carnegie</i> , 17 F.3d 1386 (11th Cir. 1994).....	24, 27
<i>Estate of Cabello v. Fernández-Larios</i> , 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (<i>Cabello I</i>).....	15, 17
<i>Filártiga v. Peña-Irala</i> , 630 F.2d 876 (2d Cir. 1980).....	16
<i>Glasser v. United States</i> , 315 U.S. 60 (1942).....	28
<i>Gresham v. United States</i> , 1997 U.S. Dist. LEXIS 5824 (N.D. Ga. Mar. 11, 1997).....	27
<i>Halberstam v. Welch</i> , 705 F.2d 472 (D.C. Cir. 1983)	24, 26, 27
<i>Hilao v. Estate of Ferdinand Marcos</i> , 103 F.3d 767 (9th Cir. 1996)	15
<i>In re Estate of Ferdinand Marcos Human Rights Litig. (Trajano v. Marcos)</i> , 978 F.2d 493 (9th Cir. 1992)	16
<i>Kadic v. Karadzic</i> , 70 F.3d 232 (2d Cir. 1995).....	16
<i>Letelier v. Republic of Chile</i> , 488 F. Supp. 665 (D.D.C. 1980).....	13
<i>Letelier v. Republic of Chile</i> , 502 F. Supp. 259 (D.D.C. 1980).....	12, 13
<i>Letelier v. Republic of Chile</i> , 748 F.2d 790 (2d Cir. 1984)	14
<i>Mehinovic v. Vuckovic</i> , 198 F. Supp. 2d 1322 (N.D. Ga. 2002).....	17, 19, 20, 21, 22, 23
<i>Pinkerton v. United States</i> , 328 U.S. 640 (1946).....	25, 26
<i>Presbyterian Church of Sudan v. Talisman Energy, Inc.</i> , 244 F. Supp. 2d 289 (S.D.N.Y. 2003).....	22, 26

<i>Prosecutor v. Furundzija</i> , Case No. IT-95-17/1-T, ¶ 692, (ICTY Trial Chamber II, Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999).....	18, 22, 23
<i>Prosecutor v. Kayishema</i> , Case No. ICTR-95-1-T, Judgement (Trial Chamber, May 21, 1999) ¶ 133	21
<i>Prosecutor v. Musema</i> , Case No. ICTR-96-13-A, Judgement and Sentence (Trial Chamber Jan. 27, 2000)	22
<i>Prosecutor v. Tadic</i> , Case No. IT-94-1-T, ¶¶230-34 (ICTY Appeals Chamber July 15, 1999).....	26
<i>United States v. Manton</i> , 107 F.2d 834, 839 (2d Cir. 1938).....	28
<i>Tachiona v. Mugabe</i> , 234 F. Supp. 2d 401 (S.D.N.Y. 2002).....	17
<i>United States v. Lyons</i> , 53 F.3d 1198 (11th Cir. 1995).....	27
<i>United States v. Odom</i> , 252 F.3d 1289 (11th Cir. 2001), cert. denied, 535 U.S. 1058 (2002).....	25
<i>United States v. Perez</i> , 645 F. Supp. 887 (S.D. Fla. 1986).....	27
<i>United States v. Sampol</i> , 636 F.2d 621 (D.C. Cir. 1980).....	13
<i>Williams v. Obstfeld</i> , 314 F.3d 1270 (11th Cir. 2002).....	24
<i>Wiwa v. Royal Dutch Petroleum Co.</i> , No. 96 Civ. 8396 (KMW) 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).....	18, 21, 22, 23

STATUTES

22 D.C. Code § 2401.....	13
18 U.S.C. § 3.....	1, 14
18 U.S.C. § 844.....	13
18 U.S.C. § 1111.....	13
18 U.S.C. § 1116.....	1, 13, 14
18 U.S.C. § 1117.....	13
28 U.S.C. § 1350.....	14, 16
28 U.S.C. § 1350 note.....	14
28 U.S.C. § 1350 note § 2 (a)	17
28 U.S.C. § 1350 note § 3 (a)	17
28 U.S.C. § 1350 note § 3 (b)(1).....	18

MISCELLANEOUS

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, pt. II, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288) 20

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34 at 91, art. 1 U.N. Doc. A/10034 (1975)..... 20

H.R. CONF. REP. NO. 102-367, 102ND CONG., 1ST SESS. 84 (1991)..... 16

S. REP. NO. 102-249, 102ND CONG., 1ST SESS. (1991)..... 16, 19, 23

United Nations Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art 16, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985)..... 18

INTRODUCTION

Winston Cabello Bravo was tortured and murdered on October 16-17, 1973. He was one of thirteen civilian prisoners killed in the northern Chilean city of Copiapó five weeks after the military junta headed by General Augusto Pinochet Ugarte (“Pinochet”) overthrew the democratically elected government of President Salvador Allende. Copiapó was one of a number of cities victimized by the “Caravan of Death,” a select group of Pinochet’s operatives responsible for the murder of at least 72 civilian prisoners of the junta. The defendant, Armando Fernández-Larios (“Fernández”), formerly a major in Chile’s Army and a member of its secret police, is the only participant in these atrocities known to be living in the United States. Although he has already been convicted in a United States District Court for his involvement in the assassination of another civilian Pinochet opponent who was living in this country,¹ Fernández has never been held accountable for his role in the murder of Mr. Cabello or the other prisoners in northern Chile. Hence this action by Mr. Cabello’s family: Zita Cabello Barrueto, in her capacity as the personal representative of the Estate of Winston Cabello, and in her individual capacity, and Elsa Cabello, Karin Cabello Moriarty and Aldo Cabello in their individual capacities (hereinafter “plaintiffs”).

The Caravan’s mission was to eliminate civilians perceived to be enemies of the junta and thereby to send a message that the junta was in charge and that dissent would not be tolerated. Fernández actively participated in the Caravan’s brutal mission. Not only did he personally kill prisoners in several of the cities visited by the Caravan, in Copiapó; he brutally beat one prisoner (perhaps to death); threatened to harm prisoners with a metal-spiked flail; participated in selecting the prisoners who were condemned; and attempted forcibly to remove an ill prisoner from a hospital. Fernández denies that he personally tortured or killed Mr.

¹ As discussed *infra* at Section I.F(2)(b) and in Plaintiffs’ Motion *in Limine* No. 1, Fernández was involved in the assassination by bombing of Orlando Letelier, the former Chilean Ambassador to the United States. Fernández was convicted of violating 18 U.S.C. §§ 1116 and 3 (accessory after the fact to the murder of an internationally protected person) for part of his role in that killing.

Cabello or anyone else, or that he was otherwise involved with the deaths of any of the Caravan's victims. He acknowledges, however, that the number of participants in the Caravan was small and admits that he was the personal bodyguard of General Sergio Arellano Stark ("Arellano"), who commanded the Caravan. One of Fernández's former military academy classmates, an Army lieutenant serving in Copiapó when the Caravan arrived, testified that Fernández claimed to be Arellano's confidant and delighted in that role and the ostensible license it gave him for sadistic aggression against perceived Pinochet opponents.

Fernández has admitted that as he and his cohorts on the Caravan traveled through northern Chile, he knew they were leaving a wake of murder. Fernández acknowledges that by the time the Caravan reached Copiapó, he knew that nineteen prisoners had already been killed in two of the cities the Caravan had just visited and that the killings were connected to the Caravan's visit. Fernández never sought to disassociate himself from the Caravan; instead, he advanced the mission's goals with acts ranging from the banal to the horrific. Consequently, regardless of whether he fired the shots or wielded the knife that killed Mr. Cabello, Fernández is at a minimum liable under well-established principles of secondary liability — as a co-conspirator or aider-abettor — for the extrajudicial killing; torture; cruel, inhuman, or degrading, treatment or punishment; and crimes against humanity; committed against Winston Cabello, whose death was one of the systematic killings of civilian prisoners throughout Chile.

FACTUAL STATEMENT

A. Background

In 1970, Salvador Allende was elected President of Chile. On September 11, 1973, a military *coup d'état* ousted Dr. Allende. A four-man military junta headed by Pinochet replaced the Allende government. Until that time, Chile had been one of the few countries in South America to have had a strong history of democratic elections and was accustomed to civilian

political administration. The 1973 *coup d'etat* marked the first time in generations that such a violent political transition had occurred in Chile. (Garreton Testimony, Escalante Testimony).²

Following the coup, the junta arrested thousands of civilians. Pinochet's junta cast its net widely in identifying suspected political opponents. (Garreton Testimony). The arrestees included members of the Allende government, professors, students, union leaders, leaders of indigenous peoples' movements and other perceived opponents of the newly installed regime. (Garreton Testimony, Escalante Testimony).

Winston Cabello was one of those arrested. He was the son of plaintiff Elsa Cabello,³ and the brother of the other plaintiffs, Zita Cabello Barrueto, Aldo Cabello and Karin Cabello Moriarty. At the time of the coup in 1973, Mr. Cabello was 28 years old. He was an economist who had been appointed the Director of the Regional Planning Office for the Atacama-Coquimbo regional office in Copiapó by the Allende government. (Z. Cabello Barrueto Testimony).

The day after the coup, September 12, 1973, Mr. Cabello was arrested by Colonel Oscar Haag Blaschke ("Haag"), the commander of the Army garrison in Copiapó. Mr. Cabello surrendered himself peacefully to Haag and his troops. Mr. Cabello was never officially charged with committing any offenses, nor was he ever brought before a tribunal. (Z. Cabello Barrueto Testimony).

Within the first few weeks after his arrest, he was transferred from the local jail to the military garrison in Copiapó. (Z. Cabello Barrueto Testimony). Winston Cabello was humanely treated. Three times a week, Zita Cabello was able to visit her brother and her husband, Patricio Barrueto, who was also a prisoner at the garrison. They spoke often, and Mr. Cabello and his

² The witnesses identified herein are either expected to testify at trial to the facts set forth in this Memorandum, or plaintiffs will offer their testimony through deposition excerpts or responses to the letter rogatory served on the Government of the Republic of Chile.

³ Winston Cabello's father was traumatized by the circumstances of his son's death and died before this suit was filed.

family expected that he would be released in mid-October. (Z. Cabello Barrueto Testimony). Conditions at the Copiapó garrison radically changed, however, upon the arrival of the Caravan.

B. The Caravan of Death

The leaders of the junta questioned whether the regions outside Santiago fully supported the new regime. General Arellano, who had been designated the junta's "official delegate" by Pinochet, lead the select group of operatives who traveled through Chile in what has become known as the "Caravan of Death." The Caravan's mission was to kill prisoners of the junta in order to exert control over regional commanders viewed as "soft" in moving against perceived opponents of the regime, and to instill fear of the junta in the civilian population. (Garreton Testimony, Escalante Testimony, Simalchik Testimony). Over 72 people were killed by the Caravan in less than a month, in cities throughout Chile. (Escalante Testimony). The Caravan intended to make it known to the commanders and soldiers of the local garrisons that the junta was firmly in control and that their actions would have to conform to Pinochet's orders. The Caravan was comprised of army personnel who were strong Pinochet supporters. The elite group of officers included not only the defendant and Arellano, but also: Lieutenant Colonel Sergio Arredondo Gonzalez ("Arredondo"), Major Juan Viterbo Chiminelli Fullerton ("Chiminelli"), Major Pedro Octavio Espinoza Bravo ("Espinoza") and Major Marcelo Luis Manuel Moren Brito ("Moren"). (Escalante Testimony). Only weeks after the Caravan completed its mission, several of its key members became the earliest operatives of the Dirección de Inteligencia Nacional ("DINA"), or National Intelligence Directorate, Pinochet's Gestapo-like secret police.

C. Southern Chile

In early October 1973, Fernández and the Caravan traveled south of Santiago to the cities of Talca, Valdivia and Cauquenes, among others. (Escalante Testimony). On approximately October 3, 1973, eleven prisoners were killed in Valdivia during the Caravan's visit to that city. (Escalante Testimony). Likewise, on approximately October 4, 1973, four prisoners were killed in Cauquenes during the Caravan's visit. Fernández concedes that he knew of the killings in

Cauquenes and the Caravan's connection to them shortly after they happened. (Fernández Testimony). After the trip south, Fernández returned to Santiago with the Caravan, where he remained for one or two weeks. Despite his knowledge of the killings in Cauquenes, Fernández made no effort to apprise anyone in authority of those atrocities during his time in Santiago. (Fernández Testimony). Instead, by mid-October 1973, Fernández accompanied the Caravan on a second trip to Northern Chile. He contends that he went along as Arellano's "bodyguard." (Fernández Testimony).

D. Northern Chile

The Caravan stopped in at least four northern cities: La Serena, Copiapó, Antofagasta and Calama. Civilian prisoners were killed in each of those cities while the Caravan was present. (Escalante Testimony).

On October 16, 1973, Fernández and the Caravan arrived in La Serena. In his response to the Letter Rogatory submitted to the Government of Chile, Arredondo said that the Caravan's "mission was to verify the presence of prisoners [in La Serena] and according to the instructions those people had, they had to eliminate them." (Arredondo Testimony). In response to the question, "[w]hat were your orders concerning the prisoners at the garrison?" Arredondo replied, "[t]hey had to be eliminated." (Arredondo Testimony).

A group of soldiers and officers including Fernández, other military personnel from Arellano's group, and members of the local unit, shot and killed fifteen prisoners in La Serena during the brief period that the Caravan visited that city. Arredondo clearly identified Fernández as one of the killers: "I saw it, I was present at it." (Arredondo Testimony). Fernández denies participating in the La Serena killings, but he concedes that he learned about them shortly after they occurred. (Fernández Testimony). Col. Ariosto Lapostol Orrego ("Lapostol"), then the commander of the regiment at La Serena, was affected by the illegality of the killings there. He testified that the Caravan arrived unexpectedly on October 16, 1973. Arellano explained he was there as Pinochet's official delegate. Arellano asked for and reviewed a detailed list concerning the prisoners, some of whom had already been tried by a *consejo de guerra*, or war council, and

insisted that three of those who had been sentenced, along with twelve others, should face another tribunal. Lapostol disagreed. Less than an hour later, Lapostol was with Arellano when they heard gunshots. Arellano said, “it must be the result of the war council.” Lapostol asked, “[h]ow could there have been a war council if the lawyers who are going to defend the accused haven’t arrived yet?” Arellano responded that the lawyers must have come through another entrance, however, Lapostol had closed all the other entrances. They heard another round of gunshots, and Lapostol’s aide reported that a group of prisoners had been killed. Lapostol then heard Arredondo inform Arellano that “here in La Serena everything has been resolved.” (A. Lapostol Testimony).

Later that day, in the evening of October 16, 1973, Fernández and the rest of the Caravan arrived in Copiapó. Fernández exited the helicopter dressed in combat fatigues and carrying a spiked weapon, or “flail,” in addition to his *corvo* (curved knife), pistol and submachine gun. When asked why the Caravan was in Copiapó, Fernández replied to his former military school classmate, Lt. Enrique Alfonso Vidal Aller (“Vidal”), “you will soon find out.” Fernández went on to brag that he was Arellano’s “right-hand man” and that Arellano “trust[ed] [him] totally.” When asked about the strange weapon he was carrying, Fernández responded that he would use it to “caress the little pigeons” which his former classmate understood to mean that the flail was to be used “to beat up the prisoners.” (Vidal Testimony).

Juan de Dios Morales Alcota (“Morales”), an Army corporal at that time whose duties included maintaining records of each prisoner, testified that Fernández requested a list of the prisoners’ names from the prosecutor (the “fiscal”), Carlos Brito. Morales observed Fernández checking off prisoners’ names. After reviewing the list, which included information such as the prisoners’ political affiliations, Fernández called for certain prisoners to be brought in for interrogation. The interrogations took place in a small room just beyond Morales’s office on the second floor of the regimental headquarters in Copiapó. Morales testified that he saw Fernández hit a prisoner, Jaime Sierra Castillo (“Sierra”), with a rifle. After Sierra fell face down on the ground, Fernández kicked Sierra with his boot, slamming his forehead into the ground. The

impact of Sierra's face smacking the concrete "sounded like a watermelon." After the beating, because the pain was so excruciating, Sierra begged Fernández to kill him. (Morales Testimony).

Dr. Ivan Murua Chevesich, who was then a prisoner in the Copiapó garrison, was being interrogated in the fiscal's office when Arellano and Fernández arrived. They reviewed the prisoners' files. In Fernández's presence, Arellano identified which prisoners were to be killed or "eliminated." (Murua Testimony).

Consistent with Fernández's role in selecting the condemned, another prisoner, Angel Ruben Herrera Jofre ("Herrera"), has testified that Fernández attempted forcibly to remove him from his bed in the Copiapó hospital. Fernández and other military personnel arrived at the hospital in the darkness of October 16-17, 1973. Herrera was ordered to dress and come with them. A doctor interceded, but Fernández hit Herrera with the butt of his rifle and insisted that Herrera get up. The doctor, who outranked Fernández, again resisted and insisted that Herrera remain in the hospital. (Herrera Testimony).

Late on the night of October 16, 1973, or early the following morning, thirteen of the prisoners, including Mr. Cabello, were taken from the garrison and jail, loaded onto a truck and driven into the desert. Before the Caravan left Copiapó for Antofagasta, the thirteen civilian prisoners, including Mr. Cabello, were dead.⁴ Not only was Mr. Cabello never charged with committing any crimes, he was never sentenced to death, not even by a *consejo de guerra*, the sham hearings afforded to some of the condemned. (Z. Cabello Barrueto Testimony, P. Barrueto Testimony).

After the prisoners were killed, Morales guarded the truck carrying the bodies until they were buried early the next morning, in a common, unmarked grave. (Morales Testimony). The families were not notified of their deaths or permitted to bury them. To the contrary, the military

⁴ The other twelve prisoners killed that night were: Agapito Carvajal Gonzales, Fernando Carvajal Gonzalez, Manuel Cortazar Hernandez, Alfonso Gamboa Farias, Raul Guardia Olivares, Raul Leopoldo Larravidi, Edwin Ricardo Mansilla Hess, Adolfo Palleras Norambuena, Pedro Perez Flores, Jaime Sierra Castillo, Atilio Ugarte Gutierrez and Leonelo Vincenti Cartagena.

published an official statement or “*bando*” in the local newspaper proclaiming that the prisoners had been killed while trying to escape as they were being transferred to La Serena. (Garreton Testimony, Z. Cabello Barrueto Testimony). The Caravan issued similar statements in other cities where prisoners had been killed. (Escalante Testimony).

Patricio Ramon Felix Diaz Araneda (“Diaz”) contends that he and three other soldiers shot Mr. Cabello and the twelve other prisoners in Copiapó on orders from Haag, the commander of the regiment. (Diaz Testimony). Evidence regarding the conditions of the victims’ bodies, however, belies that testimony. The deaths were not by firing squad. The prisoners had been brutally killed; their bodies were riddled with bullets, and some apparently were clubbed or slashed with knives. One of Sierra’s eyes was missing and, after the exhumation, pathologists reported that his skull showed “a complete absence of the entire facial structure.” (Doctors’ Testimony). The videotape taken of the exhumation shows that his face was crushed and mutilated.

After the killings, Victor Bravo Monroy (“Bravo”), the head of the Civil Registry and Bureau of Identification for the Atacama Province (the region where Copiapó is located), identified the murdered prisoners and prepared the death certificates. Bravo saw the prisoners the day after they had been killed. He testified that, “they were not shot to death. They were massacred with *corvos*, gunshot wounds . . . [t]hey had gunshot wounds on their hands, on their legs, the whole body.” Bravo knew many of the victims personally but, because of the extremely vicious manner in which they were killed, he was able to identify some of them only by their fingerprints. Bravo knew and identified Mr. Cabello who “had a cut on his ear . . . and he had a gash, a wound, from his ear down through his throat . . . gunshot wounds from the feet all up through the body.” Some of the prisoners “had tried to defend themselves [because] they had gunshot wounds through their hands as well.” (Bravo Testimony).

After Copiapó, Fernández continued to Antofagasta with the Caravan of Death. They arrived there on approximately October 18, 1973. The pattern of killings continued. In his response to the letter rogatory, Arredondo stated that the prisoners were killed by personnel from

the Caravan and the local Army unit. (Arredondo Testimony). They “were executed with short bursts, with their faces covered” (Arredondo Testimony). He further testified that Fernández was one of the shooters. (Arredondo Testimony; *see also* Arellano Testimony). Again, while Fernández denies participating in the Antofagasta killings, he concedes that he learned of these killings shortly after they occurred. (Fernández Testimony).

The Caravan, including Fernández, next traveled to Calama on or about October 19, 1973. Fernández, and other military personnel from the Caravan and members of the local unit, shot and killed twenty-six prisoners in Calama. Arredondo again confirms that Fernández was a member of the group that killed the prisoners. (Arredondo Testimony; *see also* Arellano Testimony). Fernández, however, has denied participating in the Calama killings. (Fernández Testimony). Grimilda Hortencia Sanchez Gomez (“Sanchez”), a prisoner in the Calama garrison witnessed Fernandez’s participation in the selection of prisoners to be removed from the Calama prison. She watched from a window as Fernández supervised the loading of prisoners into the waiting trucks by prison guards. Sanchez later learned that these prisoners, including her son, were killed. (Sanchez Testimony).

Like the other prisoners, the Calama prisoners were killed without any judicial process. Col. Eugenio Rivera Desgroux (“Rivera”), the commander of the garrison at Calama, and the military judge and regional governor at that time, testified that the Caravan arrived on the morning of October 19, 1973. Arellano showed him a document by which Pinochet had designated Arellano his “official delegate.” In that capacity, Arellano assumed superior authority over Rivera. (Rivera Testimony). Arellano asked to review the prisoners’ files and then directed Rivera to convene a war council for the afternoon of October 19, 1973. Rivera and the general spent the afternoon away from Calama, visiting a copper mine. Later, around 11:00 p.m., after the Caravan left, Rivera learned that while he and Arellano were at dinner, enjoying cocktails and making speeches, twenty-six prisoners had been shot and killed. Rivera knew that no legitimate death sentences had been pronounced. Of the twenty-six prisoners killed, some

previously had been sentenced to a period of incarceration by a military tribunal — but none had received the death penalty. (Rivera Testimony).

E. The Cover-Up Concerning Winston Cabello's Killing

On October 17, 1973, plaintiff Zita Cabello heard rumors that her brother had been murdered. She made every effort to determine whether he was still alive. However, neither she nor any other members of Mr. Cabello's family were able to learn conclusively what had happened to him. The next day, an announcement was published in the Copiapó newspaper that thirteen prisoners, including Winston, had been killed "while trying to escape" as they were being transferred to La Serena's prison. (Z. Cabello Barrueto Testimony).

Shortly thereafter, however, the Cabello family was provided with a death certificate that indicated that his death was caused by "*ejecucion militar*" (military execution). Many years later, in 1985, the Cabello family received another death certificate, which identified the cause of death as "*herida de balas*" (gunshot wounds). Finally, in about 1991, the Cabello family received a third death certificate, which omitted any reference to the cause of death.

Not only was the true cause of his death kept from his family from 1973 until 1990, Chilean military authorities deliberately concealed the burial location of Mr. Cabello and the other prisoners. In July 1990, after the transition from Pinochet's military government to the civilian government led by President Patricio Aylwin, and in response to a petition submitted by the families of the deceased prisoners in Copiapó, the mass grave in which they were buried was located and excavated. The thirteen bodies were exhumed and examined by Chilean pathologists. (Doctors' Testimony). Family members and others identified the bodies, which were thereafter given funerals and reburied. (Doctors' Testimony; A. Cabello Testimony). According to Drs. Elvira Miranda Vasquez and America Gonzalez Figueroa, who were present at the exhumation and performed the autopsies on the bodies of the prisoners, several of the victims had suffered extensive cranial trauma prior to burial. Dr. Miranda, who identified and examined Winston Cabello's remains, testified that, although the cause of death was difficult to establish with certainty, her examination of marks on his clothing, and the lack of clear evidence of

projectile wounds, lead her to conclude that he had died as a result of injuries sustained from a bladed instrument. (Doctors' Testimony).

Unfortunately, plaintiffs' experience with the Chilean military authorities was not unique. During this chapter of Chilean history, it was routine for civilian prisoners or opponents of the junta to be summarily executed and/or "disappeared." Such abuses continued throughout the 1970s. The Pinochet regime sponsored widespread violence as an instrument of terror, and the rights of citizens, including the guarantees of due process, were ignored by the regime (including in connection with the Caravan of Death). The efforts of the victims' families to petition the regime for information concerning the fates of their loved ones were fruitless. (Garreton Testimony).

F. Defendant Armando Fernández Larios

(1) *The Coup d'Etat*

Fernández rose to the rank of major in the Chilean Army before he left Chile in late 1986. In the fall of 1973, he was a second lieutenant. He had graduated from the military academy a few years previously and selected the infantry — from which many of the top generals, including Pinochet, were drawn — as his specialty. Prior to the coup, he had been posted to Santiago and assigned to teach infantry skills to soldiers. (Fernández Testimony). On the day of the coup, he was one of the first soldiers to enter President Allende's palace, *La Moneda*, the night the Allende government was overthrown. Upon entering the palace, Fernández purportedly found Dr. Allende dead of gunshot wounds. Thereafter, Fernández became well known for having offered his own handkerchief to Gen. Palacios Rhuman to bind wounds the General had received during the attack on the palace. (Fernández Testimony; Rivera Testimony). Beginning in late September or early October 1973, Fernández served under Arellano's command. (Fernández Testimony). Fernández contends he was assigned to serve as Arellano's personal bodyguard. Fernández did not have any special training as a bodyguard, however, and could not articulate what duties he performed as Arellano's bodyguard. (Fernández Testimony).

(2) *Fernández's Role in the DINA*

In October or November 1973, Fernández joined the secret agency that, in June 1974, was publicly identified as the DINA. (Fernández Testimony). Caravan members Espinoza and Chiminelli also became DINA officers. DINA was a “military organism” under the control of the junta, *i.e.*, Pinochet. *See Letelier v. Republic of Chile*, 502 F. Supp. 259, 264-265 (D.D.C. 1980). Fernández described its purpose to be “to control the left wing that was fighting against Pinochet.” (Fernández Testimony). The DINA was formed as part of a plan to solidify Pinochet’s power and to continue the work of eliminating opponents of the regime and terrorizing the civilian population through the targeted use of torture and other abusive tactics. (Escalante Testimony).

(a) *David Silberman*

In DINA, Fernández’s role as an operative against civilian opponents of the Pinochet regime continued the work Caravan had begun. In October 1974, Fernández entered the Santiago Penitentiary and, using a false identity, directed the warden of the penitentiary to release a civilian prisoner — David Silberman — to him. Before his arrest, Silberman had been the general manager of the Cobre-Chuqui Company copper mine. The warden, Jorge Ortiz Aedo, released Silberman to Fernández’s custody; Silberman has not been seen since, and is presumed to be dead. (Ortiz Testimony).

(b) *Fernández's Role in the Assassination of Orlando Letelier and Subsequent Conviction*

Fernández’s role as an operative against civilian opponents of the Pinochet regime even extended beyond Chile’s borders. In 1976, fellow Caravan member, Espinoza, and Colonel Manuel Contreras Sepulveda (“Contreras”), the DINA’s director, sent Fernández and another DINA operative, an American civilian named Michael Townley (“Townley”), to Paraguay to pick up false Paraguayan passports. *See Letelier*, 502 F. Supp. at 262. They were to use the passports to travel to the United States to conduct surveillance on former Chilean Ambassador to the United States, Orlando Letelier del Solar (“Letelier”). (Fernández Rule 11 Plea Hearing).

Once Fernández learned that U.S. Embassy officials knew that two Chileans were planning to enter the U.S. on false passports, he and Townley returned to Chile. (*Id.*)

Approximately a month later, acting at the direction of Espinoza and Contreras, along with a woman posing as his wife, Fernández traveled to the United States using a Chilean passport issued in the name of “Armando Faúndez Lyon.” (*Id.*) Townley traveled separately. Fernández went to Letelier’s home where he saw a car that had a distinctive Chilean insignia. (*Id.*) Fernández made notes of his activities (*id.*) and reported to Espinoza that Letelier was not in the United States. (*Id.*) Espinoza directed Fernández to meet with Townley at New York’s Kennedy Airport, before returning to Chile. (*Id.*) They met in an airport bathroom, and Fernández gave Townley the information he had collected, including Letelier’s home and business addresses, a description of his car, and a city map. (*Id.*) *See also Letelier*, 502 F. Supp. at 262.

On September 21, 1976, Letelier and his assistant, Ronni Karpen Moffitt, were killed, and her husband was wounded, when a remotely detonated bomb blew up Letelier’s car as they drove through Washington, D.C., on their way to work. Assisted by some men he had recruited, Townley had made the bomb and planted it under Letelier’s car. *United States v. Sampol*, 636 F.2d 621, 629-631 (D.C. Cir. 1980); *Letelier*, 502 F. Supp. at 262-263.

On August 1, 1978, in the District of Columbia, Fernández was indicted — along with others including Espinoza, Contreras and Townley — on charges including: conspiracy to murder a foreign official, in violation of 18 U.S.C. § 1117; murder of a foreign official, in violation of 18 U.S.C. §§ 1111, 1116; two counts of first-degree murder in violation of 22 D.C. Code § 2401; and murder by use of explosives to blow up a vehicle engaged in interstate commerce, in violation of 18 U.S.C. § 844. *See Sampol*, 636 F.2d at 629; *see also Letelier v. Republic of Chile*, 488 F. Supp. 665, 666 n.1 (D.D.C. 1980). The U.S. government requested that the Chilean government extradite Fernández, Contreras and Espinoza to the United States to stand trial. *See Sampol*, 636 F.2d at 629 n.1. Fernández gave false testimony to the Chilean

Supreme Court in connection with that extradition request, and the request was denied. *Letelier v. Republic of Chile*, 748 F.2d 790, 791 (2d Cir. 1984).

In late 1986, Fernández left Chile and entered into a plea agreement with the U.S. government. On February 4, 1987, in the United States District Court for the District of Columbia, Fernández pleaded guilty to violating 18 U.S.C. §§ 1116 and 3, that is, accessory after the fact to the murder of an internationally protected person. Fernández admitted at his Rule 11 hearing that that he had been a DINA officer at the time of the Letelier assassination. (Rule 11 Hearing; Fernández Testimony). When asked if he knew the ultimate objective of his surveillance against Letelier, he admitted that “after I met Townley in Paraguay, and all of that, I must be honest to say to you that [it] can be not for a good thing here [*sic*].” (Rule 11 Hearing). Fernández also acknowledged that he realized he had been involved in Letelier’s assassination the day that it occurred. (*Id.*).

Fernández admitted at his plea hearing that when he testified before the Chilean Supreme Court he told the justices a false “cover story” that he had agreed upon with Contreras, Espinoza, and another officer. He falsely claimed that he had traveled to the U.S. on business for the Chilean national copper company. (*Id.*).

G. Procedural History and The Court’s Prior Rulings

Plaintiffs filed this action in February 1999 and first amended the complaint on April 7, 1999. They stated claims for extrajudicial killing, torture, cruel, inhuman, or degrading punishment or treatment and crimes against humanity under the Alien Tort Claims Act, 28 U.S.C. § 1350 (the “ATCA”) and the Torture Victim Protection Act of 1991, codified at 28 U.S.C. § 1350 note (the “TVPA”).

Fernández twice unsuccessfully moved to dismiss the action, including by an early summary judgment motion. He challenged the plaintiffs’ standing to bring the torture claims — contending that such claims do not survive the death of the victim — and the extrajudicial killing claims — contending that none of the plaintiffs except Elsa Cabello could state a claim for wrongful death under Chilean law. The Court found that the plaintiffs had standing to assert

these claims. *See Estate of Cabello v. Fernández-Larios*, 157 F. Supp. 2d 1345, 1357-1359 (S.D. Fla. 2001) (“*Cabello I*”). Fernández also unsuccessfully argued that, under the ATCA and TVPA, plaintiffs’ claims were barred by the statute of limitations. Rejecting that contention, the Court held that the TVPA’s ten-year statute of limitations could be applied retroactively and that the limitations period had been equitably tolled until 1990, when the bodies were located and exhumed, and a civilian government replaced the military junta. *Id.* at 1368.

Plaintiffs filed a second amended complaint on September 17, 2001 and the defendant filed a second motion to dismiss. The Court again rejected Fernández’s attempt to dismiss the case by contending that the limitations period barred plaintiffs’ claims⁵ and that the legal representative of Mr. Cabello’s estate lacked standing. The Court also rejected Fernández’s attempt to dismiss the action on the theory that the statutes did not allow for secondary liability. *See Cabello Barrueto v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1331-1333 (S.D. Fla. 2002) (“*Cabello II*”) (“[T]he Court determines as a matter of law that Defendant may be held liable under the ATCA for conspiring in or aiding and abetting the actions taken by other Chilean military officials, contrary to international law, with respect to Plaintiffs’ decedent.”).

Fernández did not renew any of these arguments by filing a motion for summary judgment after obtaining discovery in this case.

⁵ The Court reaffirmed its prior ruling and held that the limitations period was equitably tolled due to the pre-1990 Chilean government’s deliberate concealment of the decedent’s burial location and true cause of death from plaintiffs, and the shift to a civilian government. This issue need not be revisited because there is no dispute about the facts on which the Court’s ruling is based, *i.e.*, that inconsistent death certificates were supplied to the Cabello family, that the location of the bodies and cause of death was unknown, and that a civilian government took power in 1990. The application of equitable tolling to the statute of limitations has already been decided by this Court. Moreover, the applicability of equitable tolling principles is not a question for the jury. *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 779 (9th Cir. 1996) (“The application of a statute of limitations, however, is a question of law for the court, not for the jury.”); *see also Baron Tube Co. v. Transport Ins. Co.*, 365 F.2d 858, 861 (5th Cir. 1966) (Where only question concerned the impact of undisputed facts under Texas law, the court was correct in not submitting the issue of statute of limitations to jury); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1280 (N.D. Ohio 1980) (city was properly restricted from presenting evidence to jury in support of its claim that Clayton Act limitations period had been equitably tolled for purposes of its antitrust suit against electric utility).

ARGUMENT

II. FERNÁNDEZ IS LIABLE UNDER THE TVPA AND ATCA

A. The ATCA and TVPA

The ATCA provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The ATCA confers federal subject-matter jurisdiction when the following three conditions are satisfied: “(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).” *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (*quoting Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)); *see also In re Estate of Ferdinand Marcos Human Rights Litig. (Trajano v. Marcos)*, 978 F.2d 493, 499 (9th Cir. 1992). Aliens may also bring suit in federal court for tortious violations of treaty obligations. 28 U.S.C. § 1350. Thus, the ATCA “establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.” *Abebe-Jira*, 72 F.3d at 848.

Since the early 1980s, federal courts have recognized a private cause of action for official torture and extrajudicial killing under the ATCA. *See Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). However, the ATCA only supplies a forum for aliens, and not citizens, to bring such claims. In 1991, Congress enacted the Torture Victim Protection Act (“TVPA”) to “codify the cause of action recognized by [the Second Circuit] in *Filártiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens.”⁶ *Kadic*, 70 F.3d at 241. The TVPA provides, in pertinent part, that:

An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

⁶ *See* H.R. CONF. REP. NO. 102-367, 102ND CONG., 1ST SESS. 84 (1991), 2-4 *reprinted in* U.S.C.C.A.N. 84 (*available on Westlaw as* 1991 WL 255964); S. REP. NO. 102-249, 102ND CONG., 1ST SESS. (1991), 3-5 (*available on Westlaw as* 1991 WL 25866) (*hereinafter* S. REP. NO. 102-249). *Abebe-Jira*, 72 F.3d at 848 (“In enacting the TVPA, Congress endorsed the *Filártiga* line of cases”); *Kadic*, 70 F.3d at 241, 243.

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note § 2 (a) (1991).

Here, plaintiffs have asserted claims against the defendant under the ATCA and the TVPA for: extrajudicial killing; torture; cruel, inhuman, or degrading punishment or treatment; and crimes against humanity; in connection with the death of Winston Cabello.⁷ (Attached as Appendix A is a chart outlining the claims brought by each plaintiff under these statutes).

B. Extrajudicial Killing⁸

Section 2 of the TVPA defines two elements of an “extrajudicial killing” in addition to the element (common to both the definitions of extrajudicial killing and torture) that the defendant must have committed these acts under actual or apparent authority or color of law of a foreign state:

[1] a deliberated killing [2] not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 note § (3)(a) (1991).

This Court has recognized that extrajudicial killing is a violation of customary international law actionable under the ATCA. *Cabello I*, 157 F. Supp. 2d at 1359-1360. Other courts have as well. “It is well established that torture, summary execution, and arbitrary detention ‘constitute fully recognized violations of international law,’ [citation omitted] because

⁷ Plaintiffs may recover both compensatory and punitive damages for claims asserted under the ATCA and TVPA. *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1358 (N.D. Ga. 2002) (“It is well-established that victims of human rights abuses actionable under the ATCA and the TVPA may recover both compensatory and punitive damages.”); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 423 (S.D.N.Y. 2002). See also *Alvarez-Machain v. United States*, No. 99-56762, D.C. No. CV-93-04072, slip. Op. at 7270 (9th Cir. Sept. 11, 2001), *reh’g en banc* (June 3, 2003) (damages for ATCA violations are to be assessed under federal law, to provide uniform application of the law).

⁸ Fernández’s liability for these substantive violations is discussed *infra* at Sections III.B and III.D.

they are inconsistent with the ‘inherent dignity and [] the equal and inalienable rights of all members of the human family.’” *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8396 (KMW) 2002 WL 319887, at *6 (S.D.N.Y. Feb. 28, 2002) (citation omitted) (plaintiffs stated claims for, *inter alia*, extrajudicial killing, against corporate defendants Royal Dutch / Shell and an executive, where the defendants engaged in concerted action with the Nigerian authorities and aided and abetted the killings, rapes and beatings of members of the Ogoni tribe by Nigerian military police).

As explained below, it is not necessary for the defendant to have personally killed the victim. A defendant may be liable for extrajudicial killing if he aids and abets or conspires with others. *See, e.g., Cabello II*, 205 F. Supp. 2d at 1331-1333; *Wiwa*, 2002 WL 319887, at *13-14, 16; *see also Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶ 692 (International Tribunal for the Former Yugoslavia (“ICTY”), Trial Chamber II, Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999) (Tab 9).⁹

The elements of the extrajudicial killing pleaded in the present case are established by the facts that: (1) one or more army officers killed the thirteen prisoners in Copiapó; and (2) there had been no trial or other proceeding by which the victims had been sentenced to death.

C. Torture

The elements of a claim for torture under the TVPA are defined as:

[1] any act, directed against an individual in the offender’s custody or physical control, [2] by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual [3] for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that the individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

28 U.S.C. § 1350 note § (3)(b)(1) (1991).¹⁰

⁹ The international materials cited as “Tab ___” are contained in the binder provided to the Court pursuant to the Court’s June 6, 2003 Order.

¹⁰ This definition is modeled on that used in the United Nations Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art 16,

To be liable for torture, the defendant need not have personally subjected the victim to severe physical or mental harm for the prohibited purposes. “[T]hose who assist in the commission of acts prohibited by international law may be held individually responsible.” *Mehinovic v. Vukovic*, 198 F. Supp. 2d 1322, 1355-1356 (N.D. Ga. 2002); *see also Cabello II*, 205 F. Supp. 2d at 1331-1333; S. REP. NO. 102-249, at 8 (persons who “ordered, abetted, or assisted in the torture” are liable under the TVPA).

Here, the elements of torture are met by the facts that: (1) the thirteen victims had been prisoners of the Army until their deaths; (2) the victims, including Mr. Cabello, were subjected to the terror of being transported to a remote location, and were sliced with corvos and shot, leaving them horribly wounded and mutilated before dying; and (2) the victims were singled out because they were perceived to be opponents of the junta.

D. Cruel, Inhuman, or Degrading Punishment or Treatment

Courts in this circuit have held that:

Cruel, inhuman, or degrading treatment is a discrete and well-recognized violation of customary international law and is, therefore a separate ground for liability under the ATCA. In particular, the Eleventh Circuit and other courts have recognized cruel, inhuman, or degrading treatment as a violation of customary international law, at least to the extent that the conduct also would be prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the U.S. Constitution.

Mehinovic, 198 F. Supp. 2d at 1347-1348 (internal citations omitted); *see also Abebe-Jira*, 72 F.3d at 847-848; *Cabello II*, 157 F. Supp. 2d at 1361.

The cruel treatment claim is akin to a lesser-included offense of torture because it does not require proof of two torture elements — that pain and suffering be “severe,” or that the harm be committed for a prohibited purpose. “Generally, cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of ‘torture’ or do not have the same purposes as

23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985) (“Torture Convention”), which codifies the definition of torture under customary international law; *see Mehinovic*, 198 F. Supp. 2d at 1344-1345 and n.25 (noting that the definitions are “substantially similar”); *see also* S. REP. NO. 102-249, at 3.

‘torture.’”¹¹ *Mehinovic*, 198 F. Supp. 2d at 1348 and n.33 (plaintiffs proved claims for both torture and cruel, inhuman, or degrading treatment or punishment where they demonstrated that, in addition to subjecting them to severe physical and mental suffering, the defendant had engaged in acts intended to humiliate or degrade them, including physical mutilation, religious persecution and other forms of humiliation).

The elements of cruel, inhuman, or degrading punishment or treatment are, therefore, proven here by the same facts that establish torture but without regard to the severity of Mr. Cabello’s suffering or the purpose for which it was inflicted.

E. Crimes Against Humanity

The offense of “crimes against humanity” has been recognized as a violation of customary international law since the Nuremberg tribunals. Claims for crimes against humanity are therefore actionable under the ATCA. *See Mehinovic*, 198 F. Supp. 2d at 1352.

As this Court previously recognized, “[t]he London Charter [setting forth the basis for trying Axis war criminals after World War II] defined crimes against humanity as ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds.’” *Cabello II*, 157 F. Supp. 2d at 1366, n.12 (citing Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, pt. II, art. 6(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288) (Tab 1); *Mehinovic*, 198 F. Supp. 2d at 1352 and n.43.

Similarly, in *Wiwa*, the court observed that the perpetration of certain “‘enumerated acts [including murder, torture, or unlawful imprisonment] committed as part of a widespread or

¹¹ “‘Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.’” *Mehinovic*, 198 F. Supp. 2d at 1348, n.33 (quoting *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34 at 91, art. 1 U.N. Doc. A/10034 (1975) (Tab 5). However, “‘the purpose of the act is irrelevant’ in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment.” *Id.* (citations omitted).

systematic attack directed against any civilian population, with knowledge of the attack” constitute crimes against humanity. See *Wiwa*, 2002 WL 319887, at *9 (internal citations omitted). As the *Wiwa* court explained, a crime against humanity is perpetrated not only against an individual victim, but also against an entire group. “[T]he emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population.” *Id.*, at *10 (citations omitted).

The defendant need not have committed all of the offenses that form the “widespread or systematic” attack on the civilian population. Instead, “a single act by a perpetrator, taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.” *Id.* (citation omitted). Thus, it is sufficient if a defendant committed or conspired to commit or aided-abetted the commission of one of the enumerated offenses, while knowing of the widespread or systematic attack. 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. Kayishema*, Case 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).

The elements of crimes against humanity are present in this case: (1) the killings were widespread — at least 72 civilian prisoners of the junta were killed by the Caravan, or at its direction, in at least five cities; (2) the killings were systematic: the Caravan followed a well-orchestrated plan, killing or ordering the deaths of civilian in each of the cities after reviewing prisoner files; many civilians in the different cities were selected for death because they were perceived to be potential opponents of the regime; and (3) Winston Cabello was one of those

murdered in connection with the Caravan's mission of carrying out widespread and systematic attacks against a civilian population.

III. AT A MINIMUM, FERNANDEZ IS LIABLE UNDER PRINCIPLES OF SECONDARY LIABILITY

A. Aiding and Abetting Liability

This Court has already determined that the defendant may be liable “for conspiring in or aiding and abetting the actions taken by Chilean military officials” *Cabello II*, 205 F. Supp. 2d at 1333; *see also Presbyterian Church of Sudan 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.”); *Mehinovic*, 198 F. Supp. 2d at 1355;¹² *Wiwa*, 2002 WL 319887, at *15-16;¹³ *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement and Sentence (Trial Chamber Jan. 27, 2000) (Tab 11); *Furundzija*, Case No. IT-95-17/1-T, Judgement (Tab 9).¹⁴

The “*actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.” *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 323¹⁵ (citing cases) (denying

¹² In *Mehinovic*, the district court held that “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.” *Mehinovic*, 198 F. Supp. 2d at 1355 (internal citations omitted). The *Mehinovic* court went on to find that, “[p]rinciples of accomplice liability are well-established under international law. Relevant international conventions explicitly provide that those who assist in the commission of acts prohibited by international law may be held individually responsible.” *Id.* at 1355-56 (citations omitted).

¹³ “[T]he language and legislative history of the TVPA supports liability for aiders and abettors of torture and extrajudicial killing.” *Wiwa*, 2002 WL 319887, at *16.

¹⁴ Courts in the Eleventh Circuit have recognized that international criminal tribunals play an important role in setting the standards for secondary liability for human rights violations under international law. *See Mehinovic*, 198 F. Supp. 2d at 1344 (“Among various contemporary sources [of international law], the statutes of the ICTY and the International Criminal Tribunal for Rwanda (“ICTR”) and recent opinions of these tribunals are particularly relevant. The United States has explicitly endorsed the approach of the ICTY Statute.”) (internal citations omitted).

¹⁵ That court also noted that these international authorities are becoming more widely consulted “to determine standards of international human rights law under the ATCA.” *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 323, n.30.

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 Mehinovic*, 198 F. Supp. 2d at 1356 (citation omitted) (same standard).

In its report accompanying the bill, the Senate Judiciary Committee noted that the TVPA was enacted to permit suits against "persons who ordered, abetted, or assisted in torture" or extrajudicial killing. S. REP. NO. 102-249, at 8. Based in part on the statute's legislative history, courts have found that defendants may be liable under the TVPA as aiders and abettors of extrajudicial killing or torture. *See Cabello II*, 205 F. Supp. 2d at 1332; *Wiwa*, 2002 WL 319887, at *15-16 (language and legislative history of TVPA, as well as Restatement of Torts (Second), support secondary liability); *Abebe-Jira*, 72 F.3d at 845-48. Thus, a defendant need not have committed the charged violations himself to be found secondarily liable under the ATCA and TVPA. *See Mehinovic*, 198 F. Supp. 2d at 1355-56; *Wiwa*, 2002 WL 319887, at *15.

With respect to the state of mind requirement, 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*, Case No. IT-95-17/1-T, Judgement, ¶ 232). The aider and abettor need not even know what wrong the principal intends to commit. *Mehinovic*, 198 F. Supp. 2d at 1356 ("it is not necessary for the accomplice to share the same wrongful intent as the principal.") (citing *Furundzija*, Case No. IT-95-17/1, Judgement at ¶ 232). In *Furundzija*, the ICTY 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. If the accused "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.

The standards developed in the international jurisprudence discussed above, which have been incorporated into federal law addressing claims under the ATCA and TVPA, are analogous to well-recognized federal law governing liability for aiding and abetting. In civil cases asserting

claims for liability based on the defendant's aiding and abetting of another 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). The Eleventh Circuit has held that "to establish civil liability for aiding and abetting, the plaintiffs 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 'knowledge may be shown by circumstantial evidence, or by reckless conduct'" (*id.*) (citations omitted), and knowledge includes deliberate ignorance.¹⁶

B. Fernández is Liable for Aiding and Abetting the Violations Alleged in the Second Amended Complaint

The evidence, including the defendant's admissions, will establish that Fernández had the state of mind required to be liable as an aider and abettor because he knew the purpose of the Caravan, and even before he arrived in Copiapó where Mr. Cabello was killed, Fernández knew that the Caravan was connected to multiple slayings of civilian prisoners. His substantial assistance of the violations will be established by proof of some or all of the following facts:

- He was one of only approximately eight men who traveled as the Caravan to each of the cities where the Caravan assured that civilian prisoners were killed;
- He was heavily armed as he disembarked the helicopter in each city thereby providing the show-of-force and muscle needed to keep the regional garrisons in step with the junta;

¹⁶ "Under the doctrine of willful blindness or deliberate ignorance, which is used more often in the criminal context rather 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 it." *Williams v. Obstfeld*, 314 F.3d 1270, 1278 (11th Cir. 2002).

- His self-described role was that of “body guard” for the undisputed leader of the Caravan;
- He brutally injured one prisoner in Copiapó;
- He participated in selecting and extracting the prisoners in Copiapó who were killed;
- He assaulted a hospitalized prisoner in Copiapó while unsuccessfully attempting to extract that prisoner;
- He threatened to kill or inflict injury on prisoners in Copiapó with a barbaric weapon;
- He killed prisoners in La Serena;
- He killed prisoners in Antofagasta; and
- He killed prisoners in Calama.

Consequently, Fernandez had the requisite state of mind and committed acts that, at least, substantially assisted the mistreatment and killing of Winston Cabello. Fernandez is, therefore, liable as an aider and abettor for each of the four torts.¹⁷

C. Co-Conspirator Liability

The United States Supreme Court long ago established 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

¹⁷ Further, as discussed in greater detail in Plaintiffs’ Motions *in Limine* Nos. 1 and 2, the evidence concerning Fernández’s roles in the disappearance of David Silberman and the Letelier assassination, demonstrates that he had the intent to aid and abet the Caravan’s objectives. Like his role in the Caravan, in both of those instances, the defendant provided substantial assistance to the regime’s horrific violations of domestic and international law, which resulted in the deaths or “disappearance” of opponents of the junta. Moreover, members of the Caravan — including Fernández — became the core of the DINA, and Pinochet’s enforcers. Thus, as plaintiffs have discussed at length elsewhere, these three events are linked along a continuum of criminal activity in which the defendant was a knowing participant.

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).

Parties to a conspiracy are also civilly liable for one another's wrongdoing. "[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.*

Co-conspirator liability is well recognized for violations under the ATCA and TVPA. *See Cabello II*, 205 F. Supp. 2d at 1331-1333; *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 322-323 (finding that "the concept of complicit liability for conspiracy . . . is well-developed in international law;" and 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*, 2002 WL 319887, at *14-16 (finding that plaintiffs had pleaded "state action" by corporate defendants where they were alleged to have acted in concert with Nigerian police). *See also Prosecutor v. Tadic*, Case No. IT-94-1-T, ¶¶230-34 (ICTY Appeals Chamber July 15, 1999) (Tab 12) (defendant was responsible for killing of five civilians for participation in "common plan" to rid area of non-Serb population regardless of whether he was directly involved in the killings). Using language that echoes *Pinkerton*, the *Tadic* Appeals Chamber held that "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 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." *Id.*, ¶ 220.

For a co-conspirator like Fernandez to be civilly liable for atrocities perpetrated in furtherance of the conspiracy, the proof must establish: "an agreement to do an unlawful act or a

lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act.” *Halberstam*, 705 F.2d at 487. The defendant must, of course, be party to the agreement or conspiracy to be liable as a co-conspirator.

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. The defendant in *Halberstam* 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.

D. Fernández is Also Liable as a Member of the Conspiracy that Committed the Violations Alleged in the Second Amended Complaint

The existence of a conspiracy, and the 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 “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*, 1997 U.S. Dist. LEXIS 5824, at *6-*7 (N.D. Ga. Mar. 11, 1997) (“participation 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) (quoting *United States v. Manton*, 107 F.2d 834, 839 (2d Cir. 1938))).

Here, the evidence shows that Fernández was aware of the Caravan's purpose and acted to accomplish its objectives. Knowing of the killings in the south, he flew back to Santiago and rejoined the Caravan for the second stage of its operation. In Copiapó, he helped Arellano select the files of the prisoners who were to be killed, brutally and viciously injured one prisoner, and threatened others. In at least three of the other northern cities visited by the Caravan before and after Copiapó (La Serena, Antofagasta and Calama), Fernández personally participated in killing the prisoners.

Thus, it was a natural and foreseeable consequence of the conspiracy that, once in Copiapó, the Caravan would continue its mission of murder. 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. 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.

CONCLUSION

Based on the foregoing principles of law and the proof to be adduced at trial, and the entire record in this case, Plaintiffs respectfully submit that a verdict and judgment in their favor on each of their claims against defendant Armando Fernández-Larios will be required.

Dated: June __, 2003

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____
Nicole M. Healy

Leo P. Cunningham, Esq. (admitted *pro hac vice*)
Nicole M. Healy, Esq. (admitted *pro hac vice*)
Jenny L. Dixon, Esq. (admitted *pro hac vice*)
650 Page Mill Road
Palo Alto, CA 94304
Telephone: (650) 493-9300
Facsimile: (650) 565-5100

Robert Kerrigan, Esq.
KERRIGAN, ESTESS, RANKIN & MCLEOD, LLP
400 East Government Street, P.O. Box 12009
Pensacola, Florida

Julie Ferguson, Esq.
JULIE C. FERGUSON & ASSOCIATES, PA.
1200 Brickell Avenue
Suite 1480
Miami, FL 33133

Joshua Sondheimer, Esq. (admitted *pro hac vice*)
THE CENTER FOR JUSTICE AND
ACCOUNTABILITY
870 Market Street, Suite 684
San Francisco, CA 94102

Attorneys for Plaintiffs

APPENDIX A

Plaintiff	ATCA			
	TVPA			
	Extrajudicial Killing	Torture	Cruel, Inhuman, Degrading, Punishment or Treatment	Crimes Against Humanity
Estate	Count 2	Count 4	Count 5	Count 7
Aldo	Count 3		Count 6	Count 8
Elsa	Count 1			
Zita	Count 1			
Karin	Count 1			