No. 06-6234

In the
United States Court of Appeals
for the Sixth Circuit

JOSE OSCAR CHAVEZ, *et al.*,
Plaintiffs-Appellees,

v.

NICOLAS CARRANZA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis

FINAL BRIEF OF APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Plaintiff-Appellees Cecilia Santos, Francisco Calderon, Erlinda Franco, and Daniel Alvarado make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   No.

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

David R. Esquivel/mae
(Signature of counsel)

June 25, 2008
Date

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because of the nature of the facts and law at issue, Plaintiff-Appellees agree with Appellant that the Court would benefit from hearing oral argument.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in deciding to equitably toll the statute of limitations based on the record evidence proving political violence and reprisals in El Salvador until at least March 1994?

2. Did the district court abuse its discretion in deciding not to grant comity to a Salvadoran amnesty law that does not purport to have extraterritorial effect and, therefore, does not conflict with U.S. law?

3. Did the district court abuse its discretion in several of its evidentiary rulings?

4. Did the district court properly instruct the jury on the elements of the law of command responsibility?

STATEMENT OF THE CASE

Plaintiff-Appellees Cecilia Santos, Francisco Calderon, Erlinda Franco, and Daniel Alvarado ("the plaintiffs") brought claims in the U.S. District Court for the Western District of Tennessee pursuant to the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note. (R. 1 Complaint, R. 31 Second Amended Complaint; Apx. 24-55 and 124-162). Plaintiffs Santos, Calderon, and Franco filed their claims on December 10, 2003. (R. 1 Complaint; Apx. 24-55). Plaintiff Alvarado joined as a plaintiff in an amended complaint filed on June 20, 2005. (R. 31 Second Amended

plaintiff, Ana Patricia Chavez, participated at trial and presented similar claims. (See Trial Tr. 743-772 Chavez Testimony; Apx. 553-562). The jury could not reach a unanimous verdict on Ms. Chavez's claims, and the district court granted the defendant's motion for a mistrial on her claims. (R. 151 Jury Verdict Form #3; Apx. 317-318). Ms. Chavez's claims were later voluntarily dismissed. (R. 165 Judgment entered Jan. 18, 2006; Apx. 329-330). Her claims are not at issue on appeal.

STATEMENT OF FACTS

I. INTRODUCTION

From the 1930s until the mid-1980s, El Salvador was continuously governed by military officers or civilians who were hand-picked by military officers. (Trial Tr. 935-940 Karl Testimony; Apx. 607-608). According to the trial testimony of former U.S. Ambassador to El Salvador, Mr. Robert White, El Salvador had the longest running military dictatorship in Latin America, "which was known far and wide for its brutal and harsh methods." (Trial Tr. 317 White Testimony; Apx. 714). By the 1970s, opposition to the military's dominance began to grow in El Salvador. (Trial Tr. 946-954 Karl Testimony; Apx. 609-611). But hard-line ideologues dominated the leadership of the military, and the military enacted a strategy of maintaining its power through severe repression. (Trial Tr. 331-338

White Testimony, Trial Tr. 962-964, 968-975, 979-980 Karl Testimony, Trial Ex. 28 Truth Comm'n Report; Apx. 718-720, 613-618, and 829-1136).

The Salvadoran military methodically used torture and extrajudicial killings to terrorize the population, with the expectation that this terror would prevent social reform and democratization in El Salvador. (Trial Tr. 974-980, 989-999, 1040-1046 Karl Testimony, Trial Ex. 28 Truth Comm'n Report, Trial Ex. 30 U.S. Gov't Cable dated July 6, 1984; Apx. 616-618, 620-623, 633-634, 829-1136, and 1137-1138). The plaintiffs in this lawsuit were the victims of the widespread and systematic violence unleashed by the military as it sought to protect its stranglehold on power. (Trial Tr. 1046 Karl Testimony; Apx. 634).

Col. Carranza was a member of the High Command of the Salvadoran military during this time of repression, serving as the Subsecretary of Defense and Public Security, also referred to as the Vice-Minister of Defense. (Trial Tr. 322 White Testimony, Trial Tr. 965-966, 1016, 1023-1029 Karl Testimony, Trial Ex. 34 U.S. Gov't Memo. dated Dec. 11, 1980, Trial Ex. 35 U.S. Gov't Cable dated July 22, 1980, Trial Ex. 36 U.S. Gov't Cable dated May 15, 1980; Apx. 716, 614, 627, 629-630, 1141-1143, 1144-1146, and 1147). Later, he served as the Director of the Treasury Police, one of the three branches of the militarily-controlled Salvadoran Security Forces. (Trial Tr. 1451-1452 Carranza Testimony; Apx. 525). Col. Carranza expressly condoned military violence against peaceful opposition

leaders who advocated for democratic reforms. (Trial Tr. 358-359 White Testimony, Trial Tr. 1050-1052 Karl Testimony, Trial Ex. 6 U.S. Gov't Cable dated Dec. 1, 1980; Apx. 725, 635-636, 822, and 824). In both of his positions of authority, Col. Carranza failed to perform his obligation as a commander to prevent his subordinates' human rights abuses or punish those who were responsible for such abuses.

II. THE PLAINTIFFS' CLAIMS

A. Cecilia Santos

On September 25, 1980, Cecilia Santos, a student at the National University and an employee of the Ministry of Education, was in the restroom of a San Salvador shopping mall when she heard a loud noise that sounded like an explosion. (Trial Tr. 518-520 Santos Testimony; Apx. 696-697). A short time later, two private security guards entered the restroom and questioned Ms. Santos about the sound. (Trial Tr. 520 Santos Testimony; Apx. 697). Ms. Santos did not know anything about what had caused the sound. (Trial Tr. 521 Santos Testimony; Apx. 697). The guards took Ms. Santos to the shopping mall's administration office and accused her of planting a bomb. (Trial Tr. 521-522 Santos Testimony; Apx. 697).

Later, two men dressed in civilian clothes came to the office and took Ms. Santos to the headquarters of the National Police, one of the three branches of the

Security Forces. (Trial Tr. 522-524 Santos Testimony; Apx. 697-698). One of the men took her by the arm and led her through the main entrance of the National Police headquarters. (Trial Tr. 525 Santos Testimony; Apx. 698). She was turned over to National Police officials who blindfolded Ms. Santos and led her through a tunnel. (Trial Tr. 525-530, 533-534 Santos Testimony; Apx. 698-700). She reached a room where she was told to sit at a school desk. (Trial Tr. 534 Santos Testimony; Apx. 700). There were several men in this room. (Trial Tr. 535-536 Santos Testimony; Apx. 700-701). The men interrogated Ms. Santos while groping her. (Trial Tr. 535-537 Santos Testimony; Apx. 700-701). Later in the interrogation, one of her interrogators pulled her partially out of the chair and forced an object into her vagina. (Trial Tr. 539-540 Santos Testimony; Apx. 701-702).

Also during the interrogation, an interrogator dipped a Q-Tip into a bottle of acid and inserted it into Ms. Santos' nose. (Trial Tr. 537 Santos Testimony; Apx. 701). He also dripped acid onto Ms. Santos' right hand, causing it to blister. (Id.; Apx. 701). The men also attached wires around the fingers of Ms. Santos' hand and administered electric shocks while interrogating her about pictures of people she did not know. (Trial Tr. 538 Santos Testimony; Apx. 701). She also suffered electric shocks to her gums and breasts. (Trial Tr. 538-539 Santos Testimony; Apx. 701).

Ms. Santos' torture and interrogation lasted the entire night. (Trial Tr. 535-544, 552 Santos Testimony; Apx. 700-703 and 705). She was forced to sign a blank piece of paper. (Trial Tr. 543-544 Santos Testimony; Apx. 702-703). The next morning, one of Ms. Santos' interrogators took her to a man in a green uniform who groped her before locking her in a prison cell. (Trial Tr. 550-552 Santos Testimony; Apx. 704-705). Ms. Santos spent eight nights in a prison cell in the National Police headquarters before she was transferred to the women's prison in Ilopango, where she spent a total of 32 months in confinement. (Trial Tr. 552-554, 558 Santos Testimony; Apx. 704-706).

B. Francisco Calderon

Paco Calderon, the father of Plaintiff Francisco Calderon, was a school teacher in the city of Ahuachapan and a member of the teachers union. (Trial Tr. 691-693 Calderon Testimony; Apx. 491-492). In June 1980, Paco Calderon was arrested at a military roadblock for being in possession of "subversive materials." (Trial Tr. 705-708 Calderon Testimony; Apx. 495). Paco Calderon was never charged with a crime and was eventually released from custody. (Trial Tr. 707-708 Calderon Testimony; Apx. 495). Fearing that he might be a target of further government action, he moved to live with his daughter and Plaintiff Francisco Calderon. (Trial Tr. 708, 710-711 Calderon Testimony; Apx. 495-496).

On September 11, 1980, Paco Calderon was watching television in the living room of his son's home. (Trial Tr. 712 Calderon Testimony; Apx. 496). Around 10:00 p.m., Francisco Calderon heard the loud sound of boots kicking his front door. (Trial Tr. 713 Calderon Testimony; Apx. 497). He went to the front door and saw uniformed members of the National Police. (Trial Tr. 714 Calderon Testimony; Apx. 497). The police demanded that Francisco Calderon open the door, and he complied. (Trial Tr. 714, 717 Calderon Testimony; Apx. 497-498). Several men wearing civilian clothes and masks and carrying military-issued G3 rifles entered the house. (Trial Tr. 715-717 Calderon Testimony; Apx. 497-498). One of these men forced Francisco Calderon to the ground and pointed a rifle at his face. (Trial Tr. 717 Calderon Testimony; Apx. 498).

From this position, Francisco Calderon heard his father walk into the living room. (Trial Tr. 718 Calderon Testimony; Apx. 498). When Paco Calderon saw his son on the floor, he said, "Not my son. I am Francisco Calderon." (Id.; Apx. 498). The armed men then told Paco Calderon to come with them, but he told the men: "I'm not coming with you, kill me right here, sons of bitches." (Id.; Apx. 498). The armed men then broke the lights in the room with the butts of their guns and fired five gunshots into Paco Calderon's body. (Trial Tr. 719-720 Calderon Testimony; Apx. 498). Francisco Calderon – who was lying only a few feet away

from his father – thought he would be shot next, but the armed men left the house while firing shots into the air. (Trial Tr. 720 Calderon Testimony; Apx. 498).

C. Erlinda Franco

In 1980, Erlinda Franco's husband, Manuel Franco, was a professor at the National University and a prominent leader of the Democratic Revolutionary Front ("FDR") – a broad-based coalition of democratic organizations and political parties. (Trial Tr. 350-351 Amb. White Testimony, Trial Tr. 479-480 E. Franco Testimony; Apx. 723 and 565-566). On November 27, 1980, Mr. Franco went to a meeting of the FDR leadership at a Jesuit high school in San Salvador. (Trial Tr. 480 E. Franco Testimony; Apx. 566). Between 9:30 and 11:00 a.m., in a coordinated military operation in which members of the Security Forces surrounded the school, Mr. Franco and five other FDR leaders were abducted from the meeting and forced into pickup trucks. (Trial Tr. 332-333, 353-354, 362-364 Amb. White Testimony, Trial Tr. 1047-1049 Prof. Karl Testimony, Trial Tr. 436-440, 465-469 L. Ramirez Testimony, Trial Ex. 5 U.S. Gov't Cable dated Nov. 29, 1980, Trial Ex. 7 U.S. Gov't Memo. dated Dec. 4, 1980, Trial Ex. 28 Truth Comm'n Report at PL0068-PL0073; Apx. 718, 723-724, 726, 635, 681-682, 689-690, 817-821, 823, 825-827, and 896-901).

Later in the day on November 27, 1980, Manuel Franco's dead body was dumped on the side of the road on the outskirts of Asino, El Salvador. (Trial Tr.

485 E. Franco Testimony; Apx. 567). The bodies of the other five FDR leaders were also found that day. (Id.; Apx. 567). All of the bodies had visible signs of torture. (Trial Tr. 490-491 E. Franco Testimony; Apx. 568). Ms. Franco identified her husband's body at a funeral home the next day, where she saw gunshot wounds to her husband's mouth and thorax, as well as a well-defined burn surrounding his entire neck. (Trial Tr. 485-487, 489-491 E. Franco Testimony; Apx. 567-568). The torture and assassination of the six FDR leaders sparked international outrage and, perhaps more than any other single event, plunged El Salvador into civil war. (Trial Tr. 1047-1048 Prof. Karl Testimony, Trial Ex. 28 Truth Comm'n Report at PL0073; Apx. 635 and 901).

D. Daniel Alvarado

In August 1983, while attending a soccer match, Daniel Alvarado was abducted by men dressed in civilian clothes. (Trial Tr. 786-789 D. Alvarado Testimony; Apx. 473). Mr. Alvarado's abductors blindfolded him, tied him up, and threw him onto the floor of a car. (Trial Tr. 787-788 D. Alvarado Testimony; Apx. 473). After being driven around for about an hour and a half, Mr. Alvarado was taken to the Treasury Police headquarters. (Trial Tr. 788 D. Alvarado Testimony; Apx. 473).

Mr. Alvarado was taken to a clandestine cell where he was interrogated and tortured. (Trial Tr. 790-791 D. Alvarado Testimony; Apx. 474). Mr. Alvarado's

torturers connected wires to the big toes on his feet and ran electrical current through his body. (Id.; Apx. 474). The torturers also placed a hood over his head to keep him from breathing, laid him down on the floor, stood on his body, pulled back on the hood, and kicked and beat him. (Id.; Apx. 474). Mr. Alvarado's torturers called this form of torture "the little airplane with a pilot." (Id.; Apx. 474). Mr. Alvarado was tortured until approximately 1:00 in the morning. (Trial Tr. 792 D. Alvarado Testimony; Apx. 474).

During the torture, the Treasury Police officers accused Mr. Alvarado of being a guerrilla fighter and demanded names of people who participated with the guerrillas. (Trial Tr. 790-791 D. Alvarado Testimony; Apx. 474). They also accused him of killing Lt. Cmdr. Albert Schaufelberger, a United States military advisor in El Salvador. (Trial Tr. 791 D. Alvarado Testimony; Apx. 474). Mr. Alvarado was not a guerilla fighter and had nothing to do with the assassination of Lt. Cmdr. Schaufelberger. (Trial Tr. 783, 785-786 D. Alvarado Testimony; Apx. 472-473).

The man in charge of Mr. Alvarado's torturers was Maj. Ricardo Pozo, chief of the intelligence section of the Treasury Police. (Trial Tr. 797-799 D. Alvarado Testimony; Apx. 475-476). Col. Carranza was the Director of the Treasury Police at this time and was Maj. Pozo's direct superior. (Trial Tr. 799 D. Alvarado Testimony; Apx. 476). Maj. Pozo told Mr. Alvarado to "cooperate" and confess to

killing Lt. Cmdr. Schaufelberger. (Trial Tr. 797-798 D. Alvarado Testimony; Apx. 475-476). Maj. Pozo told Mr. Alvarado the men in the Treasury Police "worked in shifts" and would continue torturing Mr. Alvarado until he confessed. (Trial Tr. 802 D. Alvarado Testimony; Apx. 477). When Mr. Alvarado said he knew nothing of the killing, Maj. Pozo ordered his men to continue torturing Mr. Alvarado. (Trial Tr. 798 D. Alvarado Testimony; Apx. 476).

After his first day of torture, Mr. Alvarado was taken to his parents' home, which his captors searched while Mr. Alvarado was held in a car outside. (Trial Tr. 792-793 D. Alvarado Testimony; Apx. 474). When the Treasury Police officers returned Mr. Alvarado to the clandestine cell, they tortured him again. (Trial Tr. 794-795 D. Alvarado Testimony; Apx. 475). In that session, the torturers applied "the little plane, but without pilot," which consisted of tying Mr. Alvarado's hands behind his back, hanging him from the ceiling, placing the hood over his head, administering electric shocks, and beating him. (Trial Tr. 795-796 D. Alvarado Testimony; Apx. 475). On the fourth day after his capture, Mr. Alvarado was again tortured, this time by being hung upside down by his feet with the hood over his head, while being repeatedly beaten and hit with a brick and having electrical current sent through his body. (Trial Tr. 796-797 D. Alvarado Testimony; Apx. 475).

After four days of torture, Mr. Alvarado signed a statement confessing to the Schaufelberger murder and to give a videotaped statement confessing to the murder. (Trial Tr. 801-803 D. Alvarado Testimony; Apx. 476-477). After making these confessions, Mr. Alvarado was taken before the media at the Treasury Police headquarters for a press conference over which Col. Carranza presided. (Trial Tr. 803-805 D. Alvarado Testimony; Apx. 477). With threats of more torture or harm to his parents, Mr. Alvarado was forced to tell the media he had killed Lt. Cmdr. Schaufelberger. (Trial Tr. 803, 805-806 D. Alvarado Testimony; Apx. 477-478). After the press conference, Mr. Alvarado was returned to the clandestine cell. (Trial Tr. 810-811 D. Alvarado Testimony; Apx. 479). The following day, he was again tortured with electric shocks and the hood until his body began to convulse. (Id.; Apx. 479).

Eventually, Mr. Alvarado was moved into the public cell area of the Treasury Police headquarters. (Trial Tr. 817 D. Alvarado Testimony; Apx. 480). After being held there for several weeks, Mr. Alvarado was taken to a private home where he was questioned by a member of the United States Navy and a member of the FBI. (Trial Tr. 820-822 D. Alvarado Testimony; Apx. 481-482). When Mr. Alvarado was unable to provide accurate information about the Schaufelberger crime scene, they confronted him about whether he actually participated in the crime, and he told them the truth about his torture and coerced

confession. (Trial Tr. 822-823 D. Alvarado Testimony; Apx. 482). The following day, the U.S. officials administered a polygraph examination to confirm that Mr. Alvarado had been tortured and had not participated in the Schaufelberger assassination. (Trial Tr. 832-833 D. Alvarado Testimony; Apx. 484).

Mr. Alvarado remained in a cell at Treasury Police headquarters for four months, until January 31, 1984, when he was transferred to the political prisoner section of the prison in Mariona. (Trial Tr. 835 D. Alvarado Testimony; Apx. 485). He was held in that prison for over two years, until April 14, 1986, when he fled El Salvador to political exile in Sweden. (Trial Tr. 836-838 D. Alvarado Testimony; Apx. 485-486).

III. COL. CARRANZA'S ROLE IN THE MILITARY REPRESSION

Nicolas Carranza spent nearly thirty years as an officer in the Armed Forces of El Salvador. (Trial Tr. 1387 Col. Carranza Testimony, Trial Tr. 1091-1095 Prof. Karl Testimony; Apx. 509 and 646-647). He graduated first in his class from the Military Academy and had the highest grades in his class at the General Staff School. (Trial Tr. 1387, 1399, 1478 Col. Carranza Testimony; Apx. 509, 512, and 531). During his military career, he ascended to the rank of Colonel and was appointed to a number of powerful positions within the military. (Trial Tr. 966-968, 973, 1056-1057 Prof. Karl Testimony; Apx. 614-616 and 637). Throughout

his career, the focus of Col. Carranza's expertise was in tactics and operations. (Trial Tr. 1477-1479 Col. Carranza Testimony; Apx. 531-532).

From October 1979 until January 1981, Col. Carranza served as the Vice-Minister of Defense. (Trial Tr. 1414 Col. Carranza Testimony, Trial Tr. 933 Prof. Karl Testimony; Apx. 515 and 606). As Vice-Minister, Col. Carranza was a member of the High Command, an institution composed of the top military leaders in the country. (Trial Tr. 322 Amb. White Testimony, Trial Tr. 636 Col. Garcia Testimony; Apx. 716 and 588). The High Command set military policies and ensured the execution of those policies. (Trial Tr. 322 Amb. White Testimony, Trial Tr. 636 Col. Garcia Testimony; Apx. 716 and 588).

In actuality, Col. Carranza's power extended even further. Through the testimony of Ambassador White and Professor Terry Karl (the former Director of the Center for Latin American Studies at Stanford University), as well as the presentation of once-classified reports issued by the United States embassy in El Salvador, the plaintiffs proved that Col. Carranza was the "operational commander of the security forces," the collective name given to the three Salvadoran military branches most notorious for committing human rights abuses. (Trial Ex. 1 U.S. Gov't Cable dated Feb. 17, 1980 at PL1278, Trial Tr. 322-323, 331-334, 339-340 Amb. White Testimony, Trial Tr. 939, 1006, 1022, 1027, 1029 Prof. Karl Testimony; Apx. 814, 716, 718-720, 608, 624, 628, and 630).

As Vice-Minister, the operational commander of the Security Forces, and a member of the High Command, Col. Carranza was in the best position of any member of the armed forces to bring an end to the rampant human rights abuses committed by members of the Security Forces. (Trial Tr. 322-324, 368-369 Amb. White Testimony; Apx. 716 and 727). He did not. (Trial Tr. 1484-1488 Col. Carranza Testimony; Trial Tr. 369 Amb. White Testimony; Apx. 533-534 and 727). On the contrary, the evidence at trial established that Col. Carranza supported the use of torture and murder as a means to halt democratic reform in El Salvador. (Trial Tr. 369 Amb. White Testimony, Trial Tr. 1023-1024 Prof. Karl Testimony; Apx. 727 and 629). Amb. White, based upon first-hand knowledge as the Ambassador to El Salvador, as well as all of the resources available to him from embassy personnel, testified unequivocally that Col. Carranza was one of the senior military officers who supported the use of state terrorism to maintain the power of the military. (Trial Tr. 368-369, 382-384 Amb. White Testimony; Apx. 727 and 731). Declassified U.S. government cables confirm that Col. Carranza was one of "the leaders of the security forces . . . most clearly associated with the repressive right." (Trial Ex. 34 U.S. Gov't Memo. dated Dec. 11, 1980 at PL1314; Apx. 1142). Col. Carranza even went so far as to justify death squad murders as necessary because of the court system's failure to punish so-called "terrorists." (Trial Ex. 32 Article dated May 30, 1984 at PL1964; Apx. 1140).

During his tenure as Director of the Treasury Police from 1983 to 1984, Col. Carranza continued to ignore his duty to prevent human rights abuses and punish those under his command who committed such abuses. (Trial Tr. 1096-1098 Prof. Karl Testimony, Trial Tr. 1527-1528 Col. Carranza Testimony; Apx. 647 and 544). Col. Carranza stipulated before trial that he had the legal authority and practical ability to control subordinate members of the Treasury Police. (R. 101 Joint Pretrial Order at p. 7; Apx. 268). He has also admitted on numerous occasions that members of the Treasury Police committed human rights abuses. (E.g., Trial Ex. 39 U.S. Gov't Cable dated June 9, 1983 at PL 1337, Trial Ex. 32 Article dated May 30, 1984; Apx. 1148 and 1139-1140). Indeed, the torture of Daniel Alvarado was performed in Treasury Police headquarters and supervised by an officer under Col. Carranza's immediate command, Maj. Pozo, who had long been linked to the use of torture. (Trial Tr. 797-799 D. Alvarado Testimony, Trial Tr. 1065-1066 Prof. Karl Testimony; Apx. 475-476 and 639).

IV. EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS

Throughout the 1980s, the Salvadoran Security Forces carried out a calculated program of state repression of the civilian population, which demonstrated a clear pattern and practice of arbitrary detention, torture, and extrajudicial killings. (R. 60 Declaration of Prof. Terry Lynn Karl ("Karl Decl.") ¶ 8; Trial Tr. 974-980, 989-999, 1040-1046 Prof. Karl Testimony, Trial Ex. 28 Truth

Comm'n Report, Trial Ex. 30 U.S. Gov't Cable dated July 6, 1984; Apx. 218, 616-618, 620-623, 633-634, 829-1136, and 1137-1138). During this time in El Salvador, the Catholic Archbishop was murdered while saying mass, one of the alleged authors of the crime openly campaigned for the presidency, the judge investigating the assassination was forced to leave the country, death squads operated out of the office of the President of the legislature, the Attorney General was murdered in his home, and six of the most important political opposition leaders were openly abducted, tortured, and murdered by the Security Forces working in concert with paramilitary death squads. (R. 60 Karl Decl. at ¶ 9; Apx. 218-219). Even Salvadorans living in the United States were the victims of politically motivated violence, including suspected death squad murders. (Id. at ¶ 10; Apx. 219-220). During this time period, an estimated 75,000 civilians were killed in El Salvador. (Id. at ¶ 9; Apx. 218-219). Despite widespread human rights abuses, no high level military officers were ever held accountable for any of these crimes. (Id.).

On January 1, 1992, the government and Salvadoran guerrilla forces signed Peace Accords sponsored by the United Nations. (Id. at ¶ 12; Apx. 220). These Peace Accords, however, did not signal the end of political violence and reprisals because the implementation of the accords did not start until well after that date. (Id.). With impunity still in effect, visible human rights violations continued in El

Salvador throughout the early 1990s. (Id. at ¶ 14; Apx. 221-224). These human rights abuses were condemned by the U.N. Secretary General, the United States, and the United Nations Observer Mission in El Salvador, which concluded that the persistence of summary executions, torture, and illegal detentions threatened the peace agreements. (Id.). Between 1992 and 1994, there were numerous politically motivated tortures and murders of students, unionists, human rights workers, police officers, politicians, and activists. (Id.).

In March 1994, El Salvador conducted its first national elections following the signing of the Peace Accords. (Id. at ¶ 15; Apx. 224). Although these elections represented a turning point in the effort to reconstruct El Salvador, they were marred by ongoing political violence. (Id.). The resurgence of death squad murders and political assassinations injected a high level of fear into the campaign. (Id. at ¶ 16; Apx. 224-225). The pattern of victim selection and style of murder closely resembled military and Security Forces killings. (Id.). Several death squads linked to the military and Security Forces claimed credit for these murders, and the lack of government investigations contributed to the sense that these activities were, at the very least, tolerated by state officials. (Id.). Prior to the elections, the United Nations Mission in El Salvador analyzed 94 cases of severe human rights abuses with political motivations, showing that only one of these had resulted in an arrest. (Id.).

Before March 1994, victims of abuses perpetrated by the Salvadoran Security Forces could not have been expected to pursue a cause of action in the United States against a former commander of the Security Forces because of the reasonable fear of reprisals against themselves or family members still residing in El Salvador. (Id. at ¶ 18; Apx. 225-226). Furthermore, until at least March 1994, it would not have been possible to safely conduct an investigation in El Salvador to support a cause of action in the United States seeking to hold a former commander of the Security Forces responsible for human rights abuses. (Id.).

Each of the plaintiffs in this case either lived in El Salvador or had immediate family (parents, children, or siblings) living in El Salvador up through March of 1994. (R. 48 Opp'n to Def.'s Mot. for Summ. J. Ex. 3 (Santos Decl.) at ¶ 2, Ex. 4 (Calderon Decl.) at ¶ 2, Ex. 5 (Franco Depo.) at pp. 9 and 37, and Ex. 6 (Alvarado Depo.) at p. 69; Apx. 203, 204, 206, 208, and 212). The plaintiffs feared that they or their family members would be subjected to retaliation if claims were brought against Col. Carranza before March 1994. (R. 48 Opp'n to Def.'s Mot. for Summ. J. Ex. 3 (Santos Decl.) at ¶ 3, Ex. 4 (Calderon Decl.) at ¶ 3, Ex. 5 (Franco Depo.) at p. 19, and Ex. 6 (Alvarado Depo.) at pp. 22-23; Apx. 203, 204, 207, and 210-211).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it equitably tolled the statute of limitations. The pervasive violence that consumed El Salvador from 1980 until after the first national elections following the signing of the Peace Accords constitutes extraordinary circumstances that justifies equitable tolling. The district court relied on extensive testimony and documents, submitted at trial and before trial in the form of sworn declarations, to support its decision. This evidence demonstrated that the plaintiffs legitimately and reasonably feared violence against themselves or their family members from the Salvadoran regime until at least 1994, and that it was not reasonably possible for the plaintiffs or their counsel to conduct the investigation in El Salvador necessary to support their claims until at least 1994. The district court's decision to invoke equitable tolling was based on sound law and extensive factual development and was not an abuse of discretion.

The district court properly exercised its discretion in refusing to grant comity to the Salvadoran statute that provides a blanket amnesty under that country's laws for the human rights violations committed by Col. Carranza. Comity only arises when there exists a true conflict between a domestic and foreign law. On its face, the Salvadoran amnesty law does not purport to have extraterritorial jurisdiction. Accordingly, there is no conflict between the application of laws (the ATS and

TVPA) enacted by the U.S. Congress for U.S. courts and the application of the amnesty law enacted by the Salvadoran legislature for Salvadoran courts.

The district court did not abuse its discretion in the myriad evidentiary rulings Col. Carranza challenges on appeal. The factual findings contained in the Report of the United Nations Commission on the Truth for El Salvador, entitled, "From Madness to Hope: The 12-Year War in El Salvador," is admissible under Fed. R. Evid. 803(8)(C) as a report of a "public office or agency." The district court also properly admitted, pursuant to Fed. R. Evid. 803(6) and 803(16), several formerly classified reports, cables, and telegrams sent between the U.S. Embassy in San Salvador and the State Department in Washington. Further, the district court properly allowed the expert testimony of Professor Terry Karl and Ambassador Robert White and excluded the testimony of Col. Carranza's proposed witness, Dr. Escobar (Galindo). None of these decisions was an abuse of discretion. Nor could any one, or several, of these rulings rise above the threshold of harmless error in light of the overwhelming proof supporting Col. Carranza's liability.

Finally, the district court properly instructed the jury on the elements of the law of command responsibility. For these reasons, the judgment entered by the district court and the jury's verdict should be affirmed.

STANDARD OF REVIEW

Where the facts are undisputed, the Sixth Circuit reviews de novo a decision on the application of equitable tolling; otherwise, the Court applies the abuse-of-discretion standard. Cook v. Commissioner of Social Security, 480 F.3d 432, 435 (6th Cir. 2007); see also Arce v. Garcia, 434 F.3d 1254, 1260 (11th Cir. 2006). In this case, Col. Carranza disputes the facts presented by the plaintiffs and contends that the parties' circumstances and the situation in El Salvador did not justify equitable tolling. Accordingly, the plaintiffs agree with Col. Carranza that the Court should review the district court's decision for an abuse of discretion. See Appellant's Br. at 23.

Counsel for the plaintiffs have been unable to find Sixth Circuit authority directly on point that sets forth the standard of review for a district court's decision not to invoke the doctrine of comity. Cf. Taveras v. Taveraz, 477 F.3d 767, 783 (6th Cir. 2007) ("[T]he theory of comity can serve as a *discretionary basis* for a court to determine whether a foreign country court's judgment should be given preclusive effect.") (emphasis added). The plaintiffs agree with Col. Carranza, however, that authority outside the Sixth Circuit holds that the Court should review the district court's decision not to grant comity to the Salvadoran Amnesty Law for an abuse of discretion. See Appellant's Br. at 28; see, e.g., Bigio v. Coca-Cola

Co., 448 F.3d 176, 178 (2d Cir. 2006); Stonington Partners, Inc. v. Lernout & Hauspie Speech Products N.V., 310 F.3d 118, 121-22 (3d Cir. 2002).

The Court reviews evidentiary rulings, including the appellant's arguments regarding hearsay and the propriety of witness testimony, for an abuse of discretion. Citing Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579 (1993), Col. Carranza erroneously contends that the district court's decision whether to allow expert testimony is governed by a de novo standard of review. Appellant's Br. at 51. The proper standard of review is abuse of discretion. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

"[I]t is well established that jury instructions are reviewed as a whole and that an issue as to jury instructions is a question of law that is reviewed de novo." Williams v. Paint Valley Local School Dist., 400 F.3d 360, 365 (6th Cir. 2005).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING EXTRAORDINARY CIRCUMSTANCES JUSTIFIED EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS.

Claims brought under the TVPA are subject to a ten-year statute of limitations. 28 U.S.C. § 1350 note. Given the closely similar goals and remedial mechanisms of the two statutes, the TVPA's limitations period also applies to the ATS. Papa v. United States, 281 F.3d 1004, 1011-12 (9th Cir. 2002) (holding that "the realities of litigating claims brought under the ATS, and the federal interest in

providing a remedy, also point towards adopting a uniform – and a generous – statute of limitations.").

The ATS and TVPA limitations periods are subject to equitable tolling "where extraordinary circumstances outside plaintiff's control make it impossible for plaintiff to timely assert his claim." Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987); see also Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996). "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Arce v. Garcia, 434 F.3d 1254, 1261 (11th Cir. 2006) (quoting Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999)). This case law finds support in the legislative history of the TVPA, which expressly encourages courts to apply equitable tolling to the ten-year limitations period. S. Rep. No. 102-249, at 10-11 (1991).[1]

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[1] The district court recognized that the Sixth Circuit traditionally relies on a five-factor test to determine whether to apply equitable tolling. Chavez v. Carranza, 407 F. Supp. 2d 925, 928 n.1 (W.D. Tenn. 2004); see also Dunlap v. United States, 250 F.3d 1001, 1009 (6th Cir. 2001). The holding in Dunlap, however, has been overruled with respect to habeas cases. See Thomas v. Webb, 2007 U.S. Dist. Lexis 13381 (W.D. Ky. Feb. 23, 2007) (citing Pace v. DiGuglielmo, 544 U.S. 408 (2005) and adopting an "extraordinary circumstance" standard). Further, the Dunlap five-factor test does not apply "when there is congressional authority to the contrary." Dunlap, 250 F.3d at 1009. In the TVPA, Congress has expressly called for liberal invocation of equitable tolling "with a view toward giving justice to plaintiff's rights." S. Rep. No. 102-249 (cited in Appellant's Br. at 23). Finally, as the district court recognized, the five-factor test has been employed almost exclusively in cases involving very precise filing requirements (Title VII and

On this issue, the Court should be guided by the overwhelming weight of authority in other circuit courts, particularly three recent decisions from the Eleventh Circuit. In Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006), the plaintiffs were Salvadorans who brought ATS and TVPA claims against two Salvadoran generals who were contemporaries of and shared power with Col. Carranza. The case was tried to a jury under the law of command responsibility, and the jury returned verdicts against the defendants totaling $54 million. Id. at 1259.

The Eleventh Circuit affirmed the judgment in its entirety, including the district court's decision to equitably toll the plaintiffs' claims. The court agreed with the district court that, at least until the signing of the 1992 Peace Agreement, "the fear of reprisals against the plaintiffs' relatives orchestrated by people aligned with the defendants excused the plaintiffs' delay." Id. at 1259. In a passage that directly refutes Col. Carranza's arguments on appeal, the court went on to decide:

> Justice may also require tolling where *both the plaintiff and the defendant reside in the United States* but where the situation in the home state nonetheless remains such that the fair administration of justice would be impossible, even in United States courts. *Absent regime change*, those in power may wish to protect their former leaders against charges of human rights abuses. The quest for domestic and international legitimacy and power may provide regimes with the incentive to intimidate witnesses, to suppress evidence, and

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habeas) and that precedent is a poor "fit" for the highly unusual facts at issue in this lawsuit. Chavez, 407 F. Supp. 2d at 928 n.1. Although the district court did not strictly apply the five factors, the court's analysis is nonetheless consistent with both the substance of the five-factor test and congressional intent in enacting the TVPA.

> to commit additional human rights abuses against those who speak out against the regime. Such circumstances exemplify "extraordinary circumstances" and may require equitable tolling *so long as the perpetrating regime remains in power*.

Id. at 1262 (emphasis added). Because regime change (or the potential for regime change) did not occur in El Salvador until at least after the first free elections were held in March 1994, the district court in this case, like the district court in Arce, properly invoked the doctrine of equitable tolling.

In Jean v. Dorelien, 431 F.3d 776 (11th Cir. 2005), the Eleventh Circuit vacated the district court's dismissal of the Haitian plaintiffs' ATS and TVPA claims based upon the statute of limitations. The Eleventh Circuit held that the district court erred when it failed to invoke equitable tolling. Id. at 779-81. "Congress acknowledged that plaintiffs face unique impediments such as reprisals from death squads and immunity of high-ranking government officials in bringing human rights litigation." Id. at 780. The court noted that equitable tolling is proper "until there has been a regime change in the plaintiff's country of origin, after which the plaintiff can investigate and compile evidence without fear of reprisals against him, his family, and witnesses." Id. Canvassing applicable cases in the federal courts, the court in Jean observed that "every court that has considered the question of whether a civil war and a repressive authoritarian regime constitute 'extraordinary circumstances' which toll the statutes of

limitations of the ATCA and TVPA has answered in the affirmative." Id. at 780-81 (citing cases).

In Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005), the plaintiffs, survivors of a Chilean economist murdered by members of the Chilean military's "caravan of death," sued a military officer twenty-six years after the murder occurred. Id. at 1151-53. The Eleventh Circuit upheld the use of equitable tolling in that case, even though there was no direct evidence that the defendant participated in the Chilean military's subsequent cover-up of the decedent's murder. Id. at 1155. The Court held that the misconduct of the Chilean military, as an institution, justified equitable tolling for the claims until 1990, when the fall of Chile's military government finally permitted the plaintiffs to uncover the details of the murder. Id. at 1155-56.

Other cases have likewise held that plaintiffs' reasonable fear of reprisals against themselves or their family members if they complained about or investigated human rights abuses constituted sufficiently extraordinary circumstances to trigger equitable tolling. See Hilao, 103 F.3d at 773 (finding that the ATS statute of limitations should be equitably tolled, in part, because Filipino torture victims did not report the abuses they suffered for fear of reprisals); Doe v. Saravia, 348 F. Supp. 2d 1112, 1147-48 (E.D. Cal. 2004) (finding the ATS and TVPA statutes of limitations were equitably tolled for a Salvadoran plaintiff, in

part, because he reasonably feared reprisal for bringing claims against a former member of the military responsible for the assassination of Archbishop Oscar Romero).

All of the plaintiffs in this case have either lived in El Salvador themselves or have had immediate family living in El Salvador from 1980 to the present. (R. 48 Opp'n to Def.'s Mot. for Summ. J. Ex. 3 (Santos Decl.) at ¶ 2, Ex. 4 (Calderon Decl.) at ¶ 2, Ex. 5 (Franco Depo.) at pp. 9 and 37, and Ex. 6 (Alvarado Depo.) at p. 69; Apx. 203, 204, 206, 208, and 212). As long as state-sanctioned political violence was prevalent in El Salvador, no reasonable person who had suffered human rights violations would have confronted those responsible, even in the courts of the United States, because of the risk of reprisals against themselves or their family members. (R. 60 Karl Dec. at ¶ 18; Apx. 225-226). Likewise, it would have been unreasonable to expect the plaintiffs or their counsel to perform investigations in El Salvador to support an action filed in the United States until political violence in El Salvador subsided. (Id.; Apx. 225-226).

The great weight of evidence before the district court demonstrated that the plaintiffs could not have pursued a cause of action in the United States against former Security Forces commanders or safely conducted investigation and discovery in El Salvador any earlier than March 1994. Accordingly, the district court held that the commencement of the statute of limitations should be tolled

until that date. Because the plaintiffs' original complaint was filed on December 10, 2003, the district court properly exercised its discretion in finding that the statute of limitations does not bar the plaintiffs' claims.

A. Proof at trial on the issue of equitable tolling

Col. Carranza suggests in his appellate brief that the district court's decision should be reversed because the plaintiffs allegedly did not present evidence at trial to support the Court's invocation of equitable tolling. See Appellant's Br. at 25. This argument is wrong for two reasons. First, the plaintiffs did provide such evidence at trial. Prof. Karl testified to the violence and instability in El Salvador throughout the 1980s and to the fact that no valid election took place in El Salvador until 1994. (Trial Tr. 909-915 Prof. Karl Testimony; Apx. 600-602). In addition, when ruling against Col. Carranza's motion for directed verdict, the district court pointed to specific aspects of the plaintiffs' trial evidence that supported equitable tolling. (Trial Tr. 1212-1221; Apx. 676-678). The district court discussed how Plaintiff Daniel Alvarado's trial testimony revealed "issues as to whether he felt safe to return to this hemisphere as opposed to staying in Sweden where he does feel safe." (Id. at 1217; Apx. 677). The district court also relied on the demeanor of the trial witnesses as evidence of the "extraordinary circumstances" justifying equitable tolling.

> The impact [of the violence] on [the plaintiffs'] lives has been visibly apparent to the court. . . . I believe they were on one course, but to see

> that kind of impact on someone is rather remarkable. I didn't expect that it would be so severe. It has been severe on these individuals. That strongly supports the determination of tolling in this case . . . . I did not see them or hear them before, I did not see the degree to which they were impaired as a result of the events.

(Id. at 1220; Apx. 678).

Second, equitable tolling is a question of law that the Court, not the jury, must decide. Cabello, 402 F.3d at 1153; Hilao, 103 F.3d at 779; Gumbus v. United Food & Commercial Workers Int'l Union, 1995 WL 5935, at *3 (6th Cir. Jan. 6, 1995). Recognizing this, the district court explicitly addressed and decided the tolling issue on two separate occasions prior to trial – denying the defendant's motion to dismiss and denying the defendant's motion for summary judgment. (R. 28 Order dated Sept. 30, 2004, R. 97 Order dated Oct. 18, 2005; Apx. 111-122 and 246-259). By trial, the issue of equitable tolling had been resolved, and no further proof or rulings were needed. Furthermore, Col. Carranza submitted no proposed jury instructions regarding the issue of equitable tolling. Col. Carranza cannot now assert that the plaintiffs were required to present proof at trial on an issue that the jury (correctly) was never asked to decide.

B. The plaintiffs' knowledge about their claims

Col. Carranza also argues that the district court abused its discretion on the issue of equitable tolling because "none of the Plaintiffs were aware of their right to bring a legal action" during the period in which they feared reprisals by the

Salvadoran military. See Appellant's Br. at 24. However, the plaintiffs' awareness of their specific claims under U.S. law has no bearing on the equitable tolling analysis. The appropriate test for equitable tolling in this case is whether there were extraordinary circumstances outside the plaintiffs' control that made it impossible for the plaintiffs to timely assert their claims. See Forti, 672 F. Supp. at 1549. Applying this test, whether the plaintiffs knew they had an actionable claim under United States law does not change the fact that, until at least March of 1994, the circumstances in El Salvador were such that they would have risked their lives and the lives of their families and loved ones if they had attempted to seek justice in any court for the wrongs they suffered. Similarly, the plaintiffs' lack of knowledge of their claims had no bearing on the fact that, prior to March of 1994, it would have been too dangerous for an attorney to conduct investigation in El Salvador in support of the plaintiffs' claims. As a result, the plaintiffs' awareness of their rights under the specific provisions of the ATS and TVPA does not change the equitable tolling analysis, and the defendant's argument otherwise cannot provide a basis for reversal.

II. THE SALVADORAN AMNESTY LAW DOES NOT PRECLUDE COL. CARRANZA'S LIABILITY UNDER U.S. LAW.

"Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants." Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) (quoting Laker Airways Ltd. v.

Sabena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984)). This duty includes the responsibility of U.S. courts to decide cases properly presented to them. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990); see also Turner Entm't Co. v. Degeto Film, 25 F.3d 1512, 1518 (11th Cir. 1994) ("Federal Courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them." (citation omitted)).

In this case, the district court recognized this duty and properly held that the Salvadoran Amnesty Law should not be applied extraterritorially to preclude the plaintiffs' federal statutory claims. Despite having the burden of proving that decision was an abuse of discretion, Col. Carranza has not even provided the Court with the text of the Salvadoran amnesty law he contends precludes this lawsuit, much less any evidence or judicial authority to meet his burden.

A. Dismissal on grounds of comity would be improper because there is no conflict between U.S. and Salvadoran law.

The issue of comity only arises when "there is in fact a true conflict between domestic and foreign law." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993) (quotation omitted). There is no conflict for comity purposes "where a person subject to regulation by two states can comply with the laws of both." Id. at 799 (citation omitted).

In this case, there is no conflict between laws. The plaintiffs' assertion of their rights in this country under the ATS and TVPA does not render the amnesty

law inapplicable in El Salvador. According to the amicus brief filed by the Republic of El Salvador, if the plaintiffs attempted to bring the same case today in El Salvador, it would be rejected. This demonstrates that Salvadoran courts can apply their amnesty law domestically without undermining the jurisdiction of the United States courts under the ATS and TVPA.

Principles of comity arise only when the law of a foreign jurisdiction purports to have extraterritorial effect. For example, in Sarei v. Rio Tinto PLC, the government of Papua New Guinea ("PNG") passed the Compensation Act, which prohibits the pursuit of legal proceedings in foreign courts when they involve mining and petroleum projects in PNG. 221 F. Supp. 2d 1116, 1201 (C.D. Cal. 2002), rev'd on other grounds, 487 F.3d 1993 (9th Cir. 2007), vacated & reh'g en banc granted, 2007 U.S. App. Lexis 19751 (9th Cir. Aug. 20, 2007). The district court in Sarei, based upon comity principles, declined to exercise jurisdiction over environmental tort and race discrimination claims that grew directly from the defendant's mining and petroleum projects. Id. at 1201-08. As to the plaintiffs' claims for war crimes and crimes against humanity, however, the court found that those claims did not concern mining or petroleum projects, did not conflict with the Compensation Act, and, therefore, were not entitled to comity. Id. at 1207.

Unlike the Compensation Act at issue in Sarei, the Salvadoran amnesty law does not claim to have extraterritorial application. It grants a "broad, absolute and

unconditional amnesty . . . in favor of all those who . . . participated in political crimes, crimes with political ramifications, or common crimes . . . before January 1, 1992." See Decreto Legislativo 486 de 3/22/93 Aprueba la Ley Sobre la Amnistía General para la Consolidación de la Paz [Legislative Decree 486 of 3/22/93 Approving the General Amnesty Law for Consolidation of the Peace], Diario Oficial, 23 de Marzo de 1993 (E.S.), cited in Doe v. Saravia, 348 F. Supp. 2d 1112, 1133 (E.D. Cal. 2004). A statute must not be interpreted as having extraterritorial effect without a clear indication that the statute was intended to apply outside of the country enacting it. BMW Stores, Inc. v. Peugeot Motors of Am., Inc., 860 F.2d 212, 215 n.1 (6th Cir. 1988). Because the Salvadoran amnesty law does not contain a clear indication of extraterritorial effect, the adjudication of this case in no way conflicts with that law, and principles of comity are irrelevant.

In support of their arguments, both Col. Carranza and the amicus Republic of El Salvador rely to a great extent on the Supreme Court's decision in an antitrust case, F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155 (2004). That case is wholly inapplicable to the law at issue here. The Court's decision in Empagran did not directly address the doctrine of comity, but rather, a federal antitrust statute that expressly "excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury." Id. at 158. The statute, the Foreign Trade Antitrust Improvements Act of 1982, sets forth a general rule

that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." Id. (quoting 15 U.S.C. § 6a). In Empagran, the Supreme Court engaged in statutory construction to ascertain the meaning of this law that expressly places extraterritorial limits on the reach of the Sherman Act. There is no correlation between that decision and the propriety of the district court's comity analysis in this case.

B. Dismissal of this case on comity grounds would be contrary to the intent of the U.S. Congress to provide a forum for victims of human rights abuses.

The principle of comity "does not limit the legislature's power" and, therefore, "has no application where Congress has indicated otherwise." Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.), 93 F.3d 1036, 1047 (2d Cir. 1996). The TVPA provides a "clear mandate" that "'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing." Sosa v. Alvarez-Machain, 542 U.S. 692, 728, 124 S. Ct. 2739, 2763 (2004) (quoting H. R. Rep. No. 102-367 at pt. 1, p. 3 (1991)). Congress passed the statute to carry out the obligation that state parties adopt measures to hold torturers legally accountable for their acts as required by both the United Nations Charter and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. H. R. Rep. No. 102-367, at 1-3 (1991); see also S. Rep. No. 102-249, at 3 (1991).

Congress recognized that the acts alleged in this case – torture and extrajudicial killing – are prohibited by international treaty and customary international law such that they are no longer the exclusive concern of the nation in which they occurred. H. R. Rep. No. 102-367, at 2-3 (1991). International law now reflects "procedural agreement that universal jurisdiction exists to prosecute . . . torture, genocide, crimes against humanity, and war crimes." Sosa, 542 U.S. at 762 (Breyer, J., concurring); see also Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) ("International law recognizes a 'universal jurisdiction' over certain offenses . . . based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses."). The exercise of jurisdiction over these internationally condemned crimes "is consistent with principles of international comity." Sosa, 542 U.S. at 762 (Breyer, J., concurring).

Further, this case has substantial connections with the United States. Two of the four plaintiff-appellees are U.S. citizens. (R. 31 Second Amended Complaint at ¶¶ 9-10; Apx. 126). Col. Carranza has lived in Tennessee since 1985 and became a United States citizen in 1991. (R. 40 Aff. of Nicolas Carranza; Apx. 181-183). This is a case brought in a United States court, alleging the violation of two statutes enacted by the United States Congress, between United States citizens,

in a jurisdiction that has been the defendant's home for 20 years. Given these contacts, there is no reason to look to the laws of other nations to determine whether this Court should exercise jurisdiction over the plaintiffs' claims.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS EVIDENTIARY RULINGS.

A. The Factual Findings of the Truth Commission Report are Admissible.

Under the Public Records and Reports exception to the hearsay rule, reports of "public offices or agencies" setting forth "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible in civil actions "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8)(C). This Rule creates a presumption that factual findings in reports prepared by "public offices or agencies" in connection with an investigation conducted pursuant to legal authority are admissible, and the party opposing admission has the burden of proving that the report is not sufficiently trustworthy. See Bank of Lexington & Trust Co. v. Vining-Sparks Sec., Inc., 959 F.2d 606, 616 (6th Cir. 1992). If an opposing party does not satisfy its burden, the report is admissible as an exception to the hearsay rule. Baker v. Elcona Homes Corp., 588 F.2d 551, 557-559 (6th Cir. 1978).

The Truth Commission Report falls within the Public Records and Reports exception to the hearsay rule. The Truth Commission Report was prepared by The

Commission on the Truth for El Salvador, an entity established under the 1992 United Nations-sponsored peace agreements between the Government of El Salvador and the Frente Farabundo Marti para la Liberacion Nacional ("FMLN"). (Trial Ex. 28 Truth Comm'n Report, at PL0007-PL0011, PL0017-PL0018; Apx. 835-839, and 845-846). As a result, there is no question that the Truth Commission Report is a report of a "public office or agency" as required by Rule 803(8)(C). See U.S. v. M'Bive, 655 F.2d 1240, 1242 (D.C. Cir. 1981) (finding that the United Nations is a "public office or agency" for purposes of Rule 803(10)). Furthermore, because the Truth Commission Report sets forth the factual findings that the Truth Commission discovered through its investigation of El Salvador – an investigation mandated by the U.N.-sponsored peace agreements – the Truth Commission Report satisfies the other requirements necessary to give rise to a presumption of admissibility under Rule 803(8)(C).

Col. Carranza has not done anything to rebut this presumption. Indeed, the facts surrounding the creation of the Truth Commission Report show that it is, in fact, trustworthy.

1. The Truth Commission Report is trustworthy.

To determine whether a report is trustworthy, courts consider the following factors: (1) the timeliness of the investigation upon which the report is based, (2) the special skill or experience of the investigators, (3) whether the agency held a

hearing, and (4) possible motivational problems. Bank of Lexington, 959 F.2d at 616-617.

The timeliness of the Truth Commission's investigation suggests the report is trustworthy. The timeliness factor focuses on how much time passed between the events being investigated and the beginning of the investigation. See id. at 617. The Truth Commission's investigation began on July 13, 1992, almost immediately after the peace agreement between the El Salvador Government and the FMLN had been reached. (Trial Ex. 28 Truth Comm'n Report at PL0009; Apx. 837).

Under the second factor, the special skills and expertise of the members of the Truth Commission and their staff also demonstrate that the Truth Commission Report is trustworthy. The Truth Commission was headed by "three scholars from other countries" to ensure impartial findings. (Id. at PL0010; Apx. 838). The commissioners were Belisario Betancur, a former president of Colombia, Reinaldo Figueredo Planchart, a congressman and former Minister of Foreign Affairs of Venezuela, and Thomas Buergenthal, an international law professor in the United States who had served as the president of the Inter-American Court of Human Rights. (Id. at PL0236-PL0237; Apx. 1064-1065). The commissioners were assisted by a staff of experienced advisors, researchers, and experts. (Id. at PL0237-PL0243; Apx. 1065-1071). Consequently, the members and staff of the

Truth Commission possessed the "special skill or expertise" necessary to satisfy the requirements of Rule 803(8)(C).

Under the third factor, courts have repeatedly recognized that a formal hearing is not necessary for admissibility under Rule 803(8)(C) when other indicia of trustworthiness are present. See Baker, 588 F.2d at 558; see also Bank of Lexington, 959 F.2d at 617. Furthermore, although the Truth Commission did not conduct a formal hearing, it did interview numerous participants, witnesses, victims, and relatives associated with the events described in its report. (Trial Ex. 28 Truth Comm'n Report at PL0260; Apx. 1088). In arriving at its findings, the Truth Commission analyzed over 13,000 complaints of serious acts of violence, examined documents, interviewed members of the military, requested and reviewed information from government bodies, reviewed court dossiers, and examined various locations where acts of violence occurred. (Id. at PL0260-PL0261; Apx. 1088-1089).

Finally, under the fourth factor, there is no evidence of bias or other "motivational problems" in the composition of the Truth Commission or the manner in which it performed its investigations. The Truth Commission was specifically tasked with discovering the unbiased truth about human rights violations committed by all sides during the civil war. The Truth Commission's "very purpose and function" was to "seek, find and publicize the truth about the

acts of violence committed by both sides" during the civil war in El Salvador. (Id. at PL0008; Apx. 836). In furtherance of this goal, the Truth Commission applied a stringent test of reliability for its findings and refused to include any factual findings in its report that were not supported by sufficient corroborating evidence. (Id. at PL0025-PL0026, Apx. 853-854). As a result, the Truth Commission was able to "confirm beyond the shadow of a doubt that the incidents denounced, recorded and substantiated in [its] report actually took place." (Id. at PL0011; Apx. 839).

Under the four-factor trustworthiness test, therefore, the factual findings in the Truth Commission Report are trustworthy "beyond the shadow of a doubt." Accordingly, the Truth Commission Report is admissible under Rule 803(8)(C), and there is no basis upon which to find the district court abused its discretion in admitting the report into evidence.

2. The Commissioners' lack of firsthand knowledge does not render the Truth Commission Report's factual findings inadmissible.

The fact that the findings in the Truth Commission Report are based on interviews with numerous witnesses and on an analysis of over 16,000 complaints, rather than on the Truth Commission's firsthand knowledge, does not prevent the Truth Commission Report from being admissible under Rule 803(8)(C). This Court's precedent makes it clear that a report is admissible under Rule 803(8)(C)

even if the factual findings contained in the report are not based on the reporter's firsthand knowledge. See Combs v. Wilkinson, 315 F.3d 548, 555-556 (6th Cir. 2002).

In Combs, the Court found that a report based on 123 witness interviews and a review of numerous documents was admissible under Rule 803(8)(C), even though the committee members who wrote the report did not have firsthand knowledge of the events described in the report. The Court noted that, if firsthand knowledge were required under Rule 803(8)(C), "an investigative report would never be admissible as such reports typically are not prepared by persons directly involved in the matter under investigation." Id. at 555. The Sixth Circuit has consistently followed its precedent in Combs and admitted public reports into evidence under Rule 803(8)(C) in circumstances where the factual findings in the reports were based largely on interviews with witnesses and where the authors of the reports did not have firsthand knowledge of the basis for their findings. See Hill v. Marshall, 962 F.2d 1209, 1215 n.2 (6th Cir. 1992); Baker, 588 F.2d at 557-559; Amerisure Ins. Co. v. Ex-Cell-O Corp., 1998 WL 30817, at *5 (6th Cir. 1998); Mullins v. Fast Motor Serv., Inc., 1994 WL 475799, at *4 (6th Cir. 1994).

There has been some confusion in the Sixth Circuit regarding this issue, with a few decisions broadly stating that, to be admissible, factual findings in a public report must be based on the firsthand knowledge of the report's author. See, e.g.,

Miller v. Field, 35 F.3d 1088, 1093 (6th Cir. 1994); Nowell v. City of Cincinnati, 2006 WL 2619846, at *4 n.2 (S.D. Ohio 2006). The holding in Miller and similar cases, however, actually stands for the much narrower proposition that witness hearsay statements, as opposed to factual findings, that appear in a report are not admissible under Rule 803(8)(C), unless the hearsay statements themselves qualify for a hearsay exception. See Miller, 35 F.3d at 1092; Chicago Ins. Co. v. Chimnee Cricket, Inc., 17 Fed. Appx. 374, 378 (6th Cir. 2001). This does not mean that public reports that include factual findings based on witness interviews and other evidence are not admissible under Rule 803(8)(C). Indeed, as the Combs court made clear, factual findings contained in public records and reports are admissible, as long as the report itself is trustworthy. Combs, 315 F.3d at 555-556.

B. Embassy cables were properly admitted into evidence.

The admission of embassy cables under applicable exceptions to the hearsay rule, including Federal Rule of Evidence 803(6), was proper. Through the testimony of Amb. White, the plaintiffs laid a foundation that certain cables transmitted from United States governmental agents addressing the situation in El Salvador were memorandums, reports, or records recording acts, events, conditions, or opinions made at or near the time the acts or events took place by or from information transmitted by a person with personal knowledge of the act or event. (Trial Tr. 313-314, 319-321 Amb. White Testimony; Apx. 713-715). The

testimony of Amb. White also established that the documents were kept in the course of the regularly conducted business of the applicable United States governmental agencies, and it was the regular practice of the agencies to make those records. (Trial Tr. 320-321 Amb. White Testimony; Apx. 715). Consequently, the cables were admissible under Rule 803(6). See U.S. v. Stavroff, 149 F.3d 478, 484 (6th Cir. 1998).

Because these documents were, on their face, more than 20 years old, and because the parties stipulated to their authenticity, the cables were also admissible under the Ancient Document exception to hearsay, Federal Rule of Evidence 803(16).

C. Trial Exhibit 6 was Admissible and Not Improperly Prejudicial to the Defendant.

Relying on a post-trial affidavit submitted by Col. Brian Bosch, who was a U.S. military attaché at the U.S. Embassy in San Salvador in 1980, Col. Carranza contends that Amb. White and Prof. Karl used Trial Exhibit 6 "to falsely represent to the jury that the Defendant . . . allegedly approved and condoned the killing of six (6) FDR leaders." Appellant's Br. at 47. Trial Exhibit 6 is a United States government document describing a conversation in 1980 between a U.S. official and Salvadoran military officers in which Col. Carranza "supported [a] line of thinking" that assassinations of political opponents, such as the leaders of the FDR, should be accomplished whenever possible. (See Trial Ex. 6 U.S. Gov't Cable

dated Dec. 1, 1980; Apx. 822 and 824). Col. Bosch avers that he was not the author of this cable – although he was identified as such by Amb. White at trial – and that he has no personal knowledge of the statements attributed to Col. Carranza in that document. These claims, however, do not present any basis for a new trial.

First, Col. Bosch's statements do not suggest that Trial Exhibit 6 was improperly admitted. Even taking Col. Bosch's statements as true, Trial Exhibit 6 was still admissible under the hearsay exception in Rule 803(6). Furthermore, Col. Bosch's affidavit does not dispute the authenticity of Trial Exhibit 6. Trial Exhibit 6, therefore, was properly admitted at trial.

Even if Trial Exhibit 6 had been improperly admitted, its admission did not unfairly prejudice the defendant. The subject matter of Trial Exhibit 6 – the knowledge and approval of the abduction and assassination of the FDR leaders by members of the Salvadoran officer corps, including Col. Carranza – was corroborated by the testimony of several witnesses and multiple exhibits at trial. (See Trial Tr. 358-359 Amb. White Testimony, Trial Tr. 1050-1052 Prof. Karl Testimony, Trial Ex. 5 U.S. Gov't Cable dated Nov. 29, 1980, Trial Ex. 7 U.S. Gov't Memo. dated Dec. 4, 1980, Trial Ex. 28 Truth Comm'n Report at PL0068-PL0073, Trial Ex. 50 U.S. Gov't Cable dated Dec. 1980; Apx. 725, 635-636, 817-821, 823, 825-827, 901, and 1150-1158). In addition, the importance of the

document was its content, not its author. Even if Amb. White was mistaken in his identification of the author of Exhibit 6, that fact alone was not prejudicial to the defendant considering all the evidence presented at trial.

Second, the defendant had every opportunity to conduct discovery, and prepare appropriate cross-examination of Amb. White and Prof. Karl, on this issue prior to trial. In their initial disclosures, the plaintiffs identified Amb. White as the only person, aside from the parties, on whose testimony the plaintiffs might rely in support of their claims. (R. 169 Esquivel Decl. ¶ 4 & Exh. B; Apx. 332 and 339-343). Amb. White had previously identified Col. Bosch as the author of Trial Exhibit 6 during the June 2002 trial against two former Salvadoran generals in the case of Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006). (R. 169 Esquivel Decl. ¶ 2-3 & Exh. A; Apx. 331 and 334-338). Amb. White's testimony in that trial has been publicly available, including on the Center for Justice and Accountability website, since the date this case was filed. (Id. ¶ 3; Apx. 331). Had the defendant chosen to do so, therefore, he had ample opportunity to prepare to rebut this portion of the plaintiffs' case.

Col. Carranza also had ample opportunity to make personal contact with Col. Bosch prior to trial. During Col. Carranza's deposition in December 2004, counsel for the plaintiffs read to Col. Carranza portions of a book Col. Bosch had written about the Salvadoran military, which included significant details about Col.

Carranza himself. (R. 169 Esquivel Decl. ¶ 6; Apx. 332). Not only did Col. Carranza remember Col. Bosch at that time, he showed counsel for the plaintiffs that he was carrying Col. Bosch's business card in his wallet. (Id. at ¶ 7; Apx. 332). Col. Carranza could have easily located Col. Bosch prior to trial. Counsel for the plaintiffs obtained Col. Bosch's phone number and address through publicly available records using an internet search. (Id. at ¶ 8; Apx. 332-333). If Col. Bosch's views were so important to the proceedings that they now require a new trial, the defendant should have taken the easy steps necessary to present those views for the jury's consideration. It was the defendant's own negligence in failing to contact a known potential witness that prevented the jury from considering the views contained in Col. Bosch's affidavit.

Further, Col. Carranza's brief erroneously and unfairly characterizes the nature of Trial Exhibit 6. No less than ten times, Col. Carranza mentions that Trial Exhibit 6 was "highly redacted" and that the "author was not indicated." E.g. Appellant's Br. at 44, 47. Col. Carranza fails to mention that the redactions, including the identity of the author, were not the work of the plaintiffs. The document was redacted by the United States government. Trial Exhibit 6 was (in 1980) a highly classified document, portions of which have since been declassified. The identity of the author and others significant parts of the document remain classified information through no fault of the plaintiffs. Trial Exhibit 6 is no

different than a number of other declassified documents the plaintiffs introduced as exhibits at trial, which contained redacted classified information. It is particularly disingenuous for Col. Carranza to make issue of redactions given that, as a CIA informant providing information to the U.S. Embassy throughout this time period (Trial Tr. 364-365 Amb. White Testimony, Trial Tr. 1470-1472 Col. Carranza Testimony; Apx. 726 and 529-530), he is in a better position than the plaintiffs or their counsel to know what lies beneath the redactions.

Col. Carranza's brief also unfairly suggests that Trial Exhibit 6 was a surprise exhibit because the plaintiffs' counsel substituted a clearer copy at trial than the copy of the document that had been produced in discovery. See Appellant's Br. at 47 (describing Trial Exhibit 6 as "previously undisclosed"). The document produced in discovery was legible, and Col. Carranza could not have been surprised at trial by plaintiffs' use of the document or its contents. At his deposition before trial, counsel for the plaintiffs showed Col. Carranza Trial Exhibit 6 and asked a number of questions about it, including the language about Col. Carranza's remark, according to the author of the document, that he was "highly pleased" with the murder of the leaders of the FDR.

D. The photographs admitted into evidence were relevant and their probative value was not substantially outweighed by the danger of prejudice.

Col. Carranza contends that the admission of photographs depicting "dead bodies" and "victims of alleged military atrocities" was erroneous. Appellant's Br. at 48. This claim is without merit. To be admissible, photographs, as with all other evidence, must meet the requirements of Federal Rules of Evidence 401 and 403. Shahid v. City of Detroit, 889 F.2d 1543, 1546-47 (6th Cir. 1989). Under Rule 401, relevant evidence is admissible, subject to the other rules of evidence, and under Rule 403, otherwise admissible evidence is not inadmissible unless its "probative value is substantially outweighed by the danger of unfair prejudice."

The photographs identified in Appellant's Brief are clearly admissible under these two rules. The photographs are highly relevant proof that the Salvadoran military was engaged in a widespread or systematic attack against a civilian population, elements the plaintiffs were required to prove as part of their claims for crimes against humanity. The photographs also show Col. Carranza had notice of his subordinates' human rights abuses, as required for liability under the law of command responsibility. In light of the direct relevance of the photographs, especially in conjunction with Prof. Karl's testimony, the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. (See Trial Tr. 900-901; Apx. 598).

E. Expert witnesses are entitled to rely upon inadmissible evidence.

The defendant argues that the court erred in permitting two of the plaintiffs' expert witnesses, Amb. White and Prof. Karl, to "testify and give subjective opinions about hearsay documents rather than testify from personal knowledge." Appellant's Br. at 35. As an initial matter, Amb. White was listed, without objection from Col. Carranza, in the Joint Pretrial Order as an expert witness. (R. 101 at 12-14; Apx. 273-275). Furthermore, and even more fundamentally, the short answer to Col. Carranza's argument is that expert witnesses, by definition, are entitled to offer "subjective opinions" that may be based on something other than "personal knowledge."

Under Federal Rule of Evidence 703, experts may base their testimony on inadmissible facts or data "of a type reasonably relied upon by experts in the particular field." Fed. R. Evid. 703. It was certainly reasonable for Amb. White to rely upon intelligence gathered by himself, his staff, and other government agents in forming his opinions and for Prof. Karl, as a political scientist, to rely upon interviews, documentary research, and field research to form her opinions. See Katt v. City of New York, 151 F. Supp. 2d 313, 356-57 (S.D.N.Y. 2001) (interviews, commission reports, research articles, scholarly journals, books, and newspaper articles are types of data reasonably relied upon by social science

experts). The testimony offered by Amb. White and Prof. Karl, therefore, satisfies the requirements of Rule 703 and was properly admitted.

F. Prof. Karl's expert testimony regarding military procedures and command responsibility was properly admitted.

The defendant's assertion that a new trial is warranted on the grounds that Prof. Karl was permitted to testify about command responsibility and military procedure even though she never served in a military organization and that she was not identified before trial as a military expert is incorrect. First, the assertion that Prof. Karl was not identified as an expert in Salvadoran military organization and command responsibility is simply wrong. Prof. Karl's expert report, which was timely served on counsel for Col. Carranza more than nine months before trial, contains a lengthy discussion of her expert opinions about Salvadoran military structure and Col. Carranza's responsibilities as a commander. (R. 171 Opp'n to Def.'s Mot. for J. Notwithstanding the Verdict at Ex. C pp. 8-11, 17-22; Apx. 378-381 and 387-392). Prof. Karl's Expert Report discusses her credentials as a specialist in Latin American politics based, in part, upon her familiarity with "the military strategies of both the Salvadoran military and security forces and the armed opposition, the command structure of the Salvadoran military, the corruption of the Salvadoran military and security forces, and the practice of death squads." (Id. at 3-5; Apx. 373-375).

Second, the fact that Prof. Karl never served in a military organization or had military training does not require her exclusion as an expert on Salvadoran military structure and the responsibilities of Col. Carranza as a Salvadoran commander. The Court properly determined that the weight to be given Prof. Karl's testimony on these topics based on her credentials was for the jury to determine. (See Trial Tr. 901-904; Apx. 598-599).

Third, any testimony by Prof. Karl regarding the command structure of the Salvadoran military was also presented to the jury by another of the plaintiffs' trial experts, Col. Jose Luis Garcia. (See Trial Tr. 580-672 Col. Garcia Testimony; Apx. 574-597). Col. Garcia, a retired officer from the Argentine army who has served as an expert witness in several proceedings concerning the Salvadoran military structure, was disclosed without objection in the Joint Pretrial Order as an expert in "the Salvadoran military structure and the obligations of a military commander." (R. 101 at p. 13; Apx. 274). Col. Carranza has not raised any aspect of Col. Garcia's testimony as a basis for his appeal. Accordingly, any prejudice that arguably occurred as a result of Prof. Karl's testimony about the Salvadoran military is harmless in light of the overlapping testimony of Col. Garcia.

G. Plaintiff counsel's isolated reference to the Nuremberg trials was permissible and did not materially prejudice the defendant.

Although not included within the Statement of Issues or any subject heading in the Argument, Col. Carranza's brief contends that the district court should have

granted a mistrial based on the plaintiffs' reference to the Nuremberg trials during closing argument at the punitive damages phase. See Appellant's Br. at 52. During the punitive damages argument, counsel for the plaintiffs mentioned that the term "crimes against humanity" was coined to express the outrage of the world at the crimes of World War II. (Trial Tr. 1891; Apx. 808). No further mention of World War II was made, and counsel for the plaintiffs in no way attempted to connect Col. Carranza to the crimes committed during World War II. As a result, the defendant was not improperly prejudiced by these comments, and the district court correctly refused to grant a mistrial.

Col. Carranza does not present any argument regarding how the statement made by counsel for the plaintiffs was prejudicial. Rather, he complains that he was not permitted to impeach the credibility of the plaintiffs' expert witness, Col. Jose Luis Garcia, by pursuing inquiry that Argentina, his home country, was a haven for German Nazi war criminals. See Appellant's Br. at 52. It is unclear, and Col. Carranza has not explained, how this line of questioning would have provided any proper basis for impeaching Col. Garcia's credibility. Because these questions were irrelevant to Col. Garcia's credibility, the district court did not err in preventing the defendant's counsel from asking them.

H. Dr. Escobar, Col. Carranza's proposed expert witness on the Salvadoran amnesty law, was properly excluded.

According to his expert designation, Dr. Escobar (Galindo) would have testified that "one of the principle [sic] purposes of the Peace Accord was to grant amnesty to participants in the civil war and discord." (R. 75 Pls.' Mem. in Supp. of Mot. to Exclude Galindo Testimony Ex. 1 (Designation of Expert Witness) at p. 1; Apx. 237). Dr. Escobar intended to testify on behalf of Col. Carranza that "the Peace Accord and Amnesty Agreement was the sovereign law of the land of El Salvador, which should be recognized and honored by all other countries of the world." (Id. at p. 2; Apx. 238). According to Dr. Escobar, "cases such as the one being brought against Nicolas Carranza violate the sovereign law of El Salvador and circumvent the purposes and intentions of the Peace Accord and Amnesty Agreement." (Id.; Apx. 238).

"Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Daubert, 509 U.S. at 591 (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02], p. 702-18 (1988)). Dr. Escobar's proposed expert testimony would not have related to any fact in issue. Instead, it would have addressed a question of law – whether the Salvadoran Amnesty Law, as a matter of comity or otherwise, prohibits U.S. courts from exercising jurisdiction over the plaintiffs' federal law claims. Irrespective of what the answer to that question may be, the question itself is a legal one that was not for the jury to

consider at trial. Accordingly, Dr. Escobar's proposed expert testimony would have been of no assistance to the trier of fact and, therefore, was properly excluded.

The long-standing law of the Sixth Circuit is that expert opinion on a question of law is inadmissible. Berry v. City of Detroit, 25 F.3d 1342, 1353-54 (6th Cir. 1994); Shahid v. City of Detroit, 889 F.2d 1543, 1547-48 (6th Cir. 1989); United States v. Zipkin, 729 F.2d 384, 386-87 (6th Cir. 1984). Further confirmation of this principle is found in Rule 44.1 of the Federal Rules of Civil Procedure, which makes clear that courts, not juries, are to determine matters of foreign law as questions of law. Inarguably, then, "the determination of an issue of foreign law is regarded as a question of law for the court to decide." General Elec. Co. v. G. Siempelkamp GmbH & Co., 809 F. Supp. 1306, 1314 (S.D. Ohio 1993). Accordingly, it would have been error to submit Dr. Escobar's proposed testimony to the jury at trial.

Col. Carranza also objects that Dr. Escobar was not allowed to offer "personal and factual information, and first-hand knowledge of circumstances in El Salvador." Appellant's Br. at 54-55. However, Dr. Escobar was never disclosed before trial as a fact witness; he was only disclosed as a proposed expert on the Amnesty Law. Counsel for the defendant first proposed Dr. Escobar's potential testimony as a fact witness in a status conference before the district court just four

days before trial. (Tr. of Status Conf. at p. 23-24, Oct. 27, 2005; Apx. 764-765). At that conference, the plaintiffs agreed to stipulate to those facts that were disclosed in Dr. Escobar's expert report. (Id. at pp. 24-29; Apx. 765-770). Col. Carranza did not attempt to introduce those facts by stipulation and, regardless, was not precluded from offering the testimony about which he now complains on appeal.

IV. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE LAW OF COMMAND RESPONSIBILITY.

Col. Carranza argues that the district court erred in its instructions to the jury by failing to issue proper jury instructions on the law of command responsibility, including Col. Carranza's request for an instruction on proximate cause. Appellant's Br. at 52-54. Col. Carranza's argument has no merit.

Three elements must be established for the command responsibility doctrine to apply: (1) a superior-subordinate relationship between the defendant/military commander and the person or persons who committed human rights abuses; (2) the defendant/military commander knew, or should have known, in light of the circumstances at the time, that subordinates had committed, were committing, or were about to commit human rights abuses; and (3) the defendant/military commander failed to take all necessary and reasonable measures to prevent human rights abuses and punish human rights abusers. See Ford v. Garcia, 289 F.3d 1283,

1288 (11th Cir. 2002). The district court's instructions to the jury were completely in accord with this law. (Trial Tr. 1782-1785; Apx. 802).

The law of command responsibility does not require proof that a commander's behavior proximately caused the victims' injuries. Prosecutor v. Delalic, 1998 WL 34310017, Case No. IT-96-21-T, Judgment of the Int'l Crim. Trib. Former Yugo., ¶¶ 398 (Tr. Chamber, Nov. 16, 1998); Sean Arthurs, Comment and Casenote, A Foolish Consistency: How Refusing to Review Ford v. Garcia's Invited Error Demonstrates the Eleventh Circuit's Prioritization of Procedure Over Justice, 72 U. Cin. L. Rev. 1707, 1729 (2004). Under this doctrine, causation is presumed from the commander's failure to satisfy his duties as a military commander. Delalic, 1998 WL 34310017, at ¶¶ 396-400. "No federal court considering a case brought under the Torture Victim Protection Act has required plaintiffs to show proximate cause between their injuries and the acts or omissions of an executive commander." Ford, 289 F.3d at 1299 (Barkett, J., concurring). Because the very purpose of the command responsibility doctrine is to impute liability upon a commander for abuses by subordinates the commander failed to prevent or punish, "a proximate cause requirement practically eviscerates the command responsibility doctrine's theory of liability." Id.

The United States Court of Appeals for the Ninth Circuit has expressly held that proximate cause is not an element of command responsibility. See Hilao, 103

F.3d at 774. As that court recognized, any question about whether an injury was caused by a commander's act or omission is resolved by a finding of liability under the elements of command responsibility, and liability extends to any "higher authority who authorized, tolerated or knowingly ignored" the wrongful acts of subordinates, even though the defendant did not personally perform or order the abuses. See Hilao, 103 F.3d at 774, 779.

CONCLUSION

For the foregoing reasons, the judgment of the district court and the jury's verdict should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the 6th Cir.R.32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of 6th Cir.R.32(a)(7)(B).

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