IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CECILIA SANTOS, JOSE FRANCISCO CALDERON, ERLINDA FRANCO, AND DANIEL ALVARADO,	)	
Plaintiffs,	)	**No. 03-2932 M1/P**
v.	)	**JURY TRIAL**
NICOLAS CARRANZA,	)	**JUDGE McCALLA**
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND/OR REMITTITUR

Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur (hereinafter, the "Motion") asserts a variety of arguments for post-judgment relief. For most of these assertions, the defendant simply points to an alleged error made at trial and claims he is entitled to relief. He does not, however, provide any argument or authority as a basis for the relief he seeks. The majority of the defendant's arguments have already been rejected by this Court on several occasions. Because of this, and because the alleged errors do not entitle him to a judgment notwithstanding the verdict, a new trial, or a remittitur, the defendant's Motion should be denied.

ARGUMENT

Although the defendant's Motion asserts more than eighteen different grounds for the relief he seeks, his memorandum in support of the Motion only addresses a few of these issues. In this opposition memorandum, the plaintiffs respond to each of the grounds raised in the defendant's Motion, but on those grounds for which the defendant has failed to present an

argument or any supporting case law, he has failed to carry his burden and, for that reason alone, is not entitled to relief. *Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 891 (6th Cir. 2004) (“‘The burden of showing harmful prejudice rests on the party seeking the new trial.’”).

I. The Defendant’s Motion for Judgment Notwithstanding the Verdict Should be Denied

A defendant cannot receive a judgment notwithstanding the verdict[1] on the basis of any issue he has not previously raised in a motion for a directed verdict. *See Am. & Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 160 (6th Cir. 1997). At trial, the defendant moved for a directed verdict on two grounds: (1) the timeliness of the plaintiffs’ claims and (2) the effect of El Salvador’s amnesty law. *See* Trial Tr. vol. X, 1622 (Nov. 14, 2005); *see also* Def.’s Mot. ¶¶ 1-4.[2] These are the only issues on which the defendant can now seek a judgment notwithstanding the verdict.

A court should not grant a motion for judgment notwithstanding the verdict unless, “viewing the admissible evidence most favorable to the party opposing the motion, a reasonable trier of fact could draw only one conclusion.” *Am. & Foreign Ins. Co.*, 106 F.3d at 157. The arguments made by the defendant fall far short of satisfying this standard.

A. The Defendant’s Argument Based on El Salvador’s Amnesty Law is Without Merit.

The defendant on numerous occasions has asked this Court to dismiss the plaintiffs’ claims due to El Salvador’s amnesty law, and this Court has repeatedly rejected this argument. *See, e.g.*, Mot. of the Def., Nicolas Carranza, for J. on the Pleadings, and or in Addition Thereto or in the Alternative, for Summ. J. (Docket No. 37); Order Denying Def.’s Mot. for J. on the

[1] In 1991, the Federal Rules of Civil Procedure were amended to refer to motions for directed verdict and motions for judgment notwithstanding the verdict both as simply motions for “judgment as a matter of law.” *See Jackson v. City of Cookeville*, 31 F.3d 1354, 1357 (6th Cir. 1994). This amendment was a change in terminology, not a change in substance. *Id.* Because the defendant has used the older terms in his Motion, for consistency, the plaintiffs will also use those terms throughout this opposition memorandum.

[2] Relevant portions of the trial transcript are attached hereto as Exhibit A.

Pleadings, and in Addition Thereto or in the Alternative, for Summ. J., pp. 7-12 ("Summ. J. Order") (Docket No. 97). The defendant has offered no reason, and there is no reason, for the Court to depart from its previous ruling that barring the plaintiffs' claims "in deference to El Salvador's amnesty legislation would run contrary to Congress' clear intent to provide a means for victims of violations of the law of nations to seek redress" in United States courts. *See* Summ. J. Order, p. 12. For the reasons previously argued by the plaintiffs and relied on by the Court in rejecting the defendant's argument on this issue, the defendant's motion for judgment notwithstanding the verdict based on El Salvador's amnesty law should be denied. *See* Pls.' Mem. in Opp'n to Def.'s Mot. for J. on the Pleadings or for Summ. J., 11-17 (Docket No. 48).

B. The Defendant's Argument Based on the Timeliness of the Plaintiffs' Claims is Without Merit.

The timeliness of the plaintiffs' claims is another issue that has been repeatedly raised by the defendant and exhaustively addressed by the plaintiffs. *See, e.g.*, Docket Nos. 9, 10, 13, 20, 37, 38, 48, and 62. On each occasion, this Court has applied the doctrine of equitable tolling to reject the defendant's argument. *See, e.g.*, Docket Nos. 28 and 97. Rather than rehash these arguments, the plaintiffs simply rely on them and incorporate them by reference into this memorandum. The defendant's Motion provides no reason for the Court to alter its determination that equitable tolling applies in this case because, at least until March of 1994, "extraordinary circumstances" made it impossible for the plaintiffs to timely assert their claims. *See* Order Denying Def.'s Mot. to Dismiss the Compl., pp. 4-10 (Docket No. 28). In fact, very recent precedent from the U.S. Court of Appeals for the Eleventh Circuit confirms this Court's analysis. The decision upon which the defendant's motion for summary judgment was premised, *Arce v. Garcia*, was vacated, and the panel's new decision affirms the district court's finding of

extraordinary circumstances sufficient to toll the statute of limitations. *See Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006).

In an attempt to get past the Court's pretrial rulings on this issue, the defendant's Motion asserts two arguments he raised for the first time at trial. *See* Trial Tr. vol. VII, 1211-1221 (Nov. 8, 2005). Neither of these arguments provides a basis for a judgment notwithstanding the verdict.

1. Lack of proof at trial on the issue of equitable tolling

The defendant argues that, because the plaintiffs allegedly did not put forth any evidence at trial to support their right to equitable tolling, this Court erred in denying the defendant's motion for a directed verdict. *See* Def.'s Mot., ¶ 4. 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. *See, e.g.*, Trial Tr. vol. VI, 909-915 (Nov. 7, 2005). Furthermore, when the defendant made this same argument in his motion for a directed verdict at the close of the plaintiffs' proof, the Court specifically discussed the aspects of the plaintiffs' trial evidence that supported equitable tolling. Trial Tr. vol. VII, 1212-1221 (Nov. 8, 2005).

Second, equitable tolling is a question of law that the Court, not the jury, must decide. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005); *Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996); *Gumbus v. United Food & Commercial Workers Int'l Union*, 1995 WL 5935, at *3 (6th Cir. Jan. 6, 1995) (attached as Exhibit B). Recognizing this, the 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. *See* Docket Nos. 28 and 97. By trial, the issue of equitable tolling had been resolved, and no further proof or rulings were needed. Furthermore, the defendant submitted no proposed

jury instructions regarding the issue of equitable tolling. The defendant cannot now assert that the plaintiffs were required to present proof during their case in chief on an issue that the jury was not being asked to decide.

If the defendant believed that the Court should have considered further proof on the issue of equitable tolling, he could have asked for an evidentiary hearing outside the presence of the jury, which he failed to do. Instead, the defendant waited until his post-trial Motion to complain that he was not given the opportunity to cross-examine the plaintiffs' witnesses on this issue. This complaint seems especially disingenuous because the very witnesses he claims he was unable to cross-examine were at the trial and, in fact, were cross-examined by the defendant. Because the tolling of the statute of limitations is within the Court's equitable, discretionary powers, and because the Court was presented with evidence before and during trial to support equitable tolling, there is no reason for this Court to grant judgment notwithstanding the verdict.

2. The plaintiffs' lack of knowledge about their claims

The defendant argues the Court erred in allowing equitable tolling because "none of the Plaintiffs knew they had a cause of action to file in the United States until solicited as Plaintiffs by the Center for Justice and Accountability." Def.'s Mot., ¶ 15(f). Aside from the inaccuracy of the defendant's reference to the "solicitation" of the plaintiffs, the plaintiffs' awareness of their specific claims under U.S. law has no bearing on the equitable tolling analysis. As the Court has already stated, the appropriate test for equitable tolling is whether there were "extraordinary circumstances" *outside the plaintiffs' control* that made it impossible for the plaintiffs to timely assert their claims. *See* Order Denying Def.'s Mot. to Dismiss the Compl., pp. 4-10 (Docket No. 28); Trial Tr. vol. VII, 1212-1221 (Nov. 8, 2005). S*ee also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987). The plaintiffs' awareness of their legal claims is not a relevant consideration under this standard. For instance, 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 – in the United States or elsewhere – 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 specific claims under U.S. law is irrelevant to the equitable tolling analysis, and the defendant's argument cannot provide a basis for a judgment notwithstanding the verdict.

II. The Defendant's Motion for a New Trial Should be Denied

A motion for a new trial should not be granted unless the moving party suffered prejudice. *Barnes v. City of Cincinnati*, 401 F.3d 729, 743 (6th Cir. 2005); Fed. R. Civ. P. 61 (harmless error standard to be applied to a motion for new trial). In his Motion, the defendant points to evidentiary determinations, jury instructions, and pre-trial rulings on matters of law that he claims were in error. Because the decisions referenced by the defendant were not erroneous, much less prejudicially erroneous, the defendant's motion for a new trial should be denied.

A. The Court's Evidentiary Determinations Were Correct and Do Not Provide a Basis for a New Trial

1. The Truth Commission Report and embassy cables were properly admitted

The admissibility of the Report of the United Nations Truth Commission on El Salvador ("Truth Commission Report") has been fully briefed and argued and was correctly decided by this Court. *See* Pls.' Reply Mem. in Support of Their Mot. for Partial Summ. J., pp. 4-9 (Docket No. 79); Order Denying in Part and Granting in Part Pls.' Mot. for Summ. J., pp. 24-28 (Docket No. 108). The defendant offers no new basis for upsetting the Court's proper determination that

the Truth Commission Report is admissible under Federal Rule of Evidence 803(8)(c), and he is not entitled to a new trial based on this issue.

The admission of embassy cables under applicable exceptions to the hearsay rule, including Federal Rule of Evidence 803(6), was also proper. Through the testimony of Amb. White, the plaintiffs laid a foundation that certain cables transmitted from United States governmental agents, including members of the Embassy in El Salvador, 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. *See, e.g.*, Trial Tr. vol. II, 313-314, 319-321 (Nov. 1, 2005). 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 these records. *See id.* at 320-321. Consequently, the cables were admissible under Rule 803(6). *See U.S. v. Stavroff*, 149 F.3d 478, 484 (6th Cir. 1998).

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

Relying on an affidavit submitted by Col. Brian Bosch, the defendant 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." Def.'s Mot., ¶5(c).[3] Trial Exhibit 6 is a United States government document describing a conversation 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. Col. Bosch avers that he was

[3] Prof. Karl was not asked to identify the author of the document nor to authenticate it. The portion of the transcript attached to the defendant's motion indicates that Prof. Karl merely made reference to Amb. White's testimony about the document.

not the author of this cable 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, and he did not dispute the authenticity of the document when he met with counsel for the plaintiff in July 2005. *See* Declaration of David R. Esquivel, filed contemporaneously with this Opposition ("Esquivel Decl."), ¶ 11. 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/or 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, including the Report of the U.N. Truth Commission. *See* Trial Exs. 5, 7, 28, 50. In addition, the importance of the document was its content, not its author. As a result, 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, if the defendant thought Col. Bosch's testimony regarding Trial Exhibit 6 was important to his case, he had the opportunity to present that evidence at 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. *See* Esquivel Decl. ¶ 4 & Exh. B. Amb. White had previously identified Col. Bosch as the author of Trial Exhibit 6 during the June 2002 trial of Generals Garcia and Vides Casanova. *See* Exh. A to Esquivel Decl. Aside

from three months in 2005, Amb. White's testimony in that trial has been publicly available on the Center for Justice and Accountability website since the date this case was filed. 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 portions of Col. Bosch's book to Col. Carranza. *See* Esquivel Decl. ¶ 6. 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. *See* Esquivel Decl. ¶ 7. The defendant 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. *See* Esquivel Decl. ¶ 8. 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 discover those views before trial and then present those views for the jury's consideration.

The defendant also had ample opportunity to contact Col. Bosch during the trial. Trial Exhibit 6 was entered into evidence on the second day of trial, November 1, 2005. The defendant did not finish presenting his evidence until almost two weeks later on November 14, 2005. In the interim, Col. Carranza could have contacted Col. Bosch and asked the Court for permission to present Col. Bosch's testimony to the jury. Had the Court allowed the testimony, the jury then would have had the opportunity to weigh Col. Bosch's testimony against not only Trial Exhibit 6 and the testimony of Amb. White and Prof. Karl, but the entirety of the plaintiffs' evidence. Instead, the defendant waited until November 17, 2005, to contact Col. Bosch - three days after the jury began its deliberations. *See* Letter from Mr. Brooke to Col. Bosch (dated

Nov. 17, 2005), attached as Ex. C to Esquivel Decl. It was the defendant's own negligence in failing to contact a known potential witness that deprived the jury of the opportunity to consider the views contained in Col. Bosch's affidavit. The defendant should not be allowed to undo a three-week trial and jury verdict because he chose to wait until after the close of evidence to contact Col. Bosch.

As he did at trial, Col. Carranza has resorted to impugning the character of the plaintiffs' witnesses and counsel in an attempt to avoid accountability for his complicity in a shameful campaign of state terror. Though not stated explicitly in the motion, the defendant implies that counsel for the plaintiffs knowingly put a false document into evidence and elicited false testimony. This is simply not correct. Counsel for the plaintiffs was confronted with conflicting accounts of the authorship of Trial Exhibit 6 and had no reason to credit Col. Bosch's unsworn statements over the prior, sworn testimony of Amb. White. This was particularly so because, during the July 2005 meeting between Col. Bosch and counsel for the plaintiffs, Col. Bosch contradicted statements from his own book about Col. Carranza's role and authority within the Salvadoran military. *See* Esquivel Decl. ¶ 10. For these reasons, the plaintiffs' counsel acted reasonably and in good faith by crediting the sworn testimony of Amb. White, on two occasions, regarding the authorship of Trial Exhibit 6.

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

In his motion, the defendant claims the admission of photographs depicting "dead bodies" and "victims of alleged military atrocities" was erroneous. Def.'s Mot. ¶ 7. 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. *See 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 the defendant's Motion are clearly admissible under these two rules. The photographs are highly relevant proof that the Salvadoran military was engaged in a widespread and systematic attack against a civilian population, as 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. vol. VI, 900-901 (Nov. 7, 2005).

4. Expert witnesses are entitled to rely upon inadmissible evidence

The defendant argues that the court erred in permitting the plaintiffs' expert witnesses, Amb. White and Prof. Karl, to testify in reliance upon allegedly inadmissible hearsay and irrelevant information that was not applicable to the defendant's liability, including evidence regarding "unknown and unidentified third parties and outrageous conduct committed after the Defendant was no longer associated with the military." Def.'s Mot. ¶ 8. To the extent Paragraph 8 suggests the Court erred in permitting the plaintiffs' expert witnesses to rely upon inadmissible hearsay evidence in forming their opinions, the defendant is incorrect. 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 is 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.[4]

To the extent Paragraph 8 contends the Court erred in permitting evidence of any atrocities inflicted upon persons other than the plaintiffs in El Salvador in 1980 and 1983, this issue has been fully briefed and does not provide a basis for upsetting the jury verdict. *See* Def.'s Mot. *in limine* to Limit the Evid. of Pls.' Witnesses and Exclude Evid. (Docket No. 92); Pls.' Mem. in Opp'n to Def.'s Mot. *in limine* to Limit the Evid. of Pls.' Witnesses and Exclude Evid. (Docket No. 106). Before trial, the Court correctly ruled that the plaintiffs could put on evidence of other human rights abuses, as required to meet the elements of crimes against humanity and command responsibility.

The defendant also claims the Court erred in allowing evidence of conduct that occurred after the defendant was no longer associated with the military, but he fails to identify any such evidence. Further, the defendant has made no argument as to how such evidence prejudiced the jury's verdict as required to succeed on a motion for a new trial. Consequently, this cannot be the basis for granting a new trial.

To the extent Paragraph 8 refers to some other evidence the defendant finds objectionable, the plaintiffs cannot respond due to the failure of this paragraph to set forth the grounds for a new trial with sufficient particularity as required by Federal Rule of Civil

[4] Paragraph 15(a) of the defendant's Motion appears to raise a similar objection: that a new trial is warranted because the Court erred in failing to grant the defendant's pretrial motion regarding "[p]ermitting Plaintiffs' experts to testify and give subjective opinions about hearsay documents rather than testify from personal knowledge." Def.'s Mot. ¶ 15(a). The plaintiffs are unaware of any such pretrial motion. Nevertheless, the Court did not err in permitting the plaintiffs' expert witnesses to testify about matters for which they did not have personal knowledge. Under Federal Rules of Evidence 702 and 703, expert witnesses may offer expert opinions, and these opinions need not be based upon admissible evidence.

Procedure 7(b)(1). In sum, the fact that expert witnesses relied upon hearsay evidence and testified about abuses committed against non-plaintiffs does not call for granting a new trial.

5. Terry 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 or had military training and that she was not identified before trial as a military expert is incorrect (Def. Mot. ¶ 9, ¶ 15(b)).[5] 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 mailed to the defendant's counsel on January 13, 2005, contains a lengthy discussion of her expert opinions about Salvadoran military structure and Col. Carranza's responsibilities as a commander. *See* Expert Report of Prof. Terry Lynn Karl at 8-11, 17-22 (attached as Exhibit C). Further, 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.

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

[5] The defendant also asserts that the Court erred in failing to grant the defendant's pretrial motion to not allow the plaintiffs' experts to offer opinions outside of their expertise. Def.'s Mot. ¶ 15(b). The plaintiffs are unaware of any such pretrial motion. To the extent Paragraph 15(b) refers to experts other than Prof. Karl, the plaintiffs cannot respond because Paragraph 15(b) fails to set forth the grounds for a new trial with sufficient particularity as required by Federal Rule of Civil Procedure 7(b)(1).

for the jury to determine. Accordingly, the admission of Prof. Karl's expert testimony on the Salvadoran military does not call for a new trial.

6. There was no error in admitting testimony regarding "other cases"

The defendant's Motion for a new trial based upon the plaintiffs' counsel's statement to the jury regarding "other cases" and expert witness testimony about other cases does not sufficiently identify the evidence the defendant claims to be objectionable with the particularity required by Federal Rule of Civil Procedure 7(b)(1). To the extent this argument, contained in Paragraph 13 of the defendant's Motion, refers to comments in Mr. Esquivel's closing argument, it does not provide the basis for granting a new trial. In his closing argument, plaintiffs' counsel argued that the jury should disregard any effect that "other cases" might have on their deliberations. *See* Trial Tr. vol. X, 1757 (Nov. 14, 2005). This statement is completely in accord with the Court's instruction to the jury entitled, "Do Not Consider Others." *See* Trial Tr. vol. X, 1761-1765, 1785 (Nov. 14, 2005). Furthermore, to the extent Paragraph 13 refers to witness testimony regarding "other cases," it was counsel for the defendant who repeatedly asked the plaintiffs' expert witnesses about the "other cases" in which they had testified. *See* Trial Tr. vol. II, 369-370, 408 (Nov. 1, 2005); Trial Tr. vol. IV, 651, 661-663, 665 (Nov. 3, 2005); Trial Tr. vol. VII, 1183-1186 (Nov. 8, 2005).

7. There was no prejudicial error in refusing to declare a mistrial regarding counsel's mention of post-World War II tribunals.

The Court properly refused to grant a mistrial based on the plaintiffs' counsel's brief mention of the crimes committed during World War II. 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. *See* Trial Tr. vol. XIII, 1891 (Nov. 18, 2005). 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 Court correctly refused to grant a mistrial.

The defendant 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' witness Col. Jose Luis Garcia by pursuing inquiry that Argentina was a haven for German Nazi war criminals. Def.'s Mot. ¶ 14. It is unclear, and the defendant 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 Court did not err in preventing the defendant's counsel from asking them.

B. The Court's Legal Rulings Were Correct and Do Not Do Not Provide a Basis for a New Trial

1. The Court did not err in denying the defendant's pretrial and trial motions regarding timeliness or the effect of El Salvador's amnesty law.

As discussed above in Section I, the Court correctly determined before and during trial that the plaintiffs' claims were timely brought and that El Salvador's amnesty law did not prevent the plaintiffs from bringing their claims. Because these decisions were correct, there is no basis for granting a new trial on any of the timeliness grounds asserted by the defendant or on any of the arguments the defendant makes related to El Salvador's amnesty law.

2. The Court's refusal to seat a twelve person jury was within its discretion.

The defendant's Motion and supporting memorandum acknowledge that the decision to impanel a jury of less than twelve people is completely within the discretion of the Court under Federal Rule of Civil Procedure 48. Def.'s Mem. in Support of His Mot. for J. Notwithstanding the Verdict, New Trial and/or Remittitur, p. 7. In fact, Local Rule 47.1 provides for an eight-

person jury in civil cases. Because there was no error in the Court's decision to exercise its discretion to impanel a jury of ten jurors, a new trial should not be granted on this ground.

3. The Court properly permitted the plaintiffs to rely upon the doctrine of command responsibility.

The defendant is simply wrong in his argument that the Court erred in allowing the plaintiffs to rely upon the doctrine of command responsibility because "there has not been any specific body of civil law on the subject."[6] *See* Def.'s Mot. ¶ 11. A number of federal courts have accepted the doctrine of command responsibility in civil cases brought under the Alien Tort Claims Act or the Torture Victim Protection Act. *See, e.g., Ford v. Garcia*, 289 F.3d 1283, 1288-89 (11th Cir. 2002); *Hilao v. Estate of Marcos*, 103 F.3d 767, 774, 779 (9th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 171-172 (D. Mass. 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994). In addition, in a petition for writ of habeas corpus arising from a military tribunal, the United States Supreme Court has upheld the validity of command responsibility as a theory of liability. *See In re Yamashita*, 327 U.S. 1, 14-15 (1946). Allowing the plaintiffs to rely on this doctrine, therefore, was not error.

4. The jury instructions accurately and effectively conveyed the law governing the plaintiffs' claims.

The defendant assigns as error the jury instructions on command responsibility, proximate cause, and the defendant's scienter, but he makes no argument as to why these instructions were faulty.[7] *See* Def.'s Mot. ¶¶ 12(b)-(d), ¶15(c). The Court and counsel for both parties discussed the appropriate jury instructions at length before and during the trial. The jury

[6] The defendant is also wrong that the cases developing command responsibility are all cases "advanced by Plaintiffs' counsel." Plaintiffs' counsel participated in none of the cases cited in this section of their memorandum.

[7] In Paragraph 12(a), Defendant asserts that the court erred in its jury instructions on "admitting the Truth Commission Report into evidence and other hearsay documents into evidence over Defendant's objection." Def. Mot. ¶ 12(a). Because there was no jury instruction relating to the admission of the Truth Commission Report or "other hearsay documents," the plaintiffs do not address this ground for a new trial.

instructions regarding command responsibility, including the "knowledge" element, accurately reflect the law. The exclusion of an instruction on proximate cause was proper because proximate causation is not an element of command responsibility. *See* Pls.' Mem. in Support of Mot. *in limine* to Exclude References to Proximate Cause (Docket No. 88). Further, the Court properly rejected the defendant's requests for special jury instructions because these instructions contradict the law of command responsibility by premising liability upon a finding that Col. Carranza directly participated in or had prior knowledge and failed to prevent the specific abuses suffered by the plaintiffs. *See* Docket Nos. 115-119.

5. The defendant's proposed expert witness, Dr. Galindo, was properly prevented from testifying about the Salvadoran Amnesty Law.

The Court correctly ruled before trial that the defendant's proposed expert witness, Dr. David Galindo, could not testify about the Salvadoran Amnesty Law because such testimony would have been irrelevant, confusing, and prejudicial to the plaintiffs. The plaintiffs have fully briefed this issue and rely upon the arguments made in their Memorandum in Support of Motion *in limine* to Exclude Any and All References to Salvadoran Amnesty Law (Docket No. 77) and their Memorandum in Support of Motion *in limine* to Exclude Testimony of Dr. David Escobar Galindo (Docket No. 75). Because Dr. Galindo was properly prevented from testifying about the Salvadoran Amnesty Law, the defendant is not entitled to a new trial on this ground.

III. The Defendant's Request for a New Trial or Remittitur on the Issue of Punitive Damages Should Be Denied.

The defendant moves for a new trial or remittitur on the grounds that the punitive damages[8] awarded by the jury were excessive, beyond the scope of the Court's charge, and

[8] The plaintiffs do not address the compensatory damages awards because the defendant's motion appears to refer only to the punitive damages awards. *See* Def.'s Mot. ¶¶ 16, 17. To the extent these paragraphs object to the compensatory damages awards, those awards do not call for a new trial or remittitur because they are supported by ample evidence of the physical and emotional damage suffered by the plaintiffs and because the awards are not so excessive as to shock the judicial conscience.

unsupported by the evidence. This argument is without merit. A motion for a new trial based on an argument that a verdict is against the weight of the evidence should be denied as long as "the verdict is one which could reasonably have been reached." *J.C. Wyckoff & Assoc., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991). Similarly, remittitur is not appropriate unless the trial court believes, after reviewing all evidence in the light most favorable to the awardee, that a jury award, is (1) beyond the range supportable by proof, (2) so excessive as to shock the conscience, or (3) the result of a mistake. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 905-06 (6th Cir. 2004).

When viewed in light of all the factors the jurors were instructed to consider, the punitive damages awards are not excessive and are supported by the evidence. Amb. White and Prof. Karl both testified that Col. Carranza was one of the most powerful members of the Salvadoran military during the time the military committed massive atrocities against civilians, including the plaintiffs. The plaintiffs testified to the impact their torture or the murder of their family members had on their lives. Amb. White and Prof. Karl testified that Col. Carranza was motivated in failing to prevent these atrocities and failing to punish the perpetrators by his desire to ensure the military remained in power. These experts also testified that Col. Carranza supported and encouraged the torture and murder of innocent civilians and that it was inconceivable that Col. Carranza had not known that his troops were committing atrocities. Evidence was also presented that Col. Carranza's failure to prevent or punish human rights abuses occurred for more than two years and while he was in two different command positions. This evidence goes directly to the factors the jury was instructed to consider in making their punitive damages award, and this evidence, along with the overarching purpose of punitive damages – punishment and deterrence – supports the jury's punitive damages awards. *See* Trial

Tr. vol. XIII, 1908-10 (Nov. 18, 2005). Consequently, the jury acted reasonably in levying its one million dollar punitive judgment for each of the four plaintiffs.

Further, the punitive judgment is not so excessive as to shock the judicial conscience in light of awards in factually similar cases. *See Doe v. Saravia*, 348 F. Supp. 2d 1112, 1158-59 (E.D. Cal. 2004) (citing punitive damages awards between $1 million and $35 million in similar cases); *see also Gregory v. Shelby County*, 220 F.3d 433, 444-45 (6th Cir. 2000) (reversing magistrate judge's remittitur of $2.2 million punitive damage award where jury found that corrections officer had permitted a jail inmate to fatally beat another inmate). In the case most analogous to this lawsuit, a jury awarded three Salvadoran torture survivors punitive damages in the amount of $5 million, $10 million and $5 million, respectively, against General Vides Casanova and two of the survivors $10 million each against General Garcia. *See Arce v. Garcia*, No. 99-8364-CIV-HURLEY, Final Judgment (S.D. Fla. July 31, 2002) (attached as Exhibit D). Because the amount of the jury's punitive judgment was fully supported by the evidence and not so excessive as to shock the judicial conscience, the defendant's motion for a new trial or remittitur should be denied.

CONCLUSION

For the foregoing reasons, the defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, and/or Remittitur should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has this day been served upon the following counsel for the Defendant by electronic means via the court's electronic filing system this 17th day of February, 2006.

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