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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of)
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VIDES CASANOVA, Carlos Eugenio) A042 241 058
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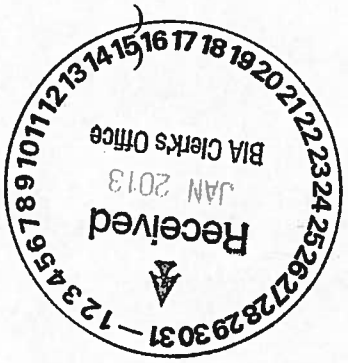
In Removal Proceedings)



THE U.S. DEPARTMENT OF HOMELAND SECURITY'S
RESPONSE BRIEF ON APPEAL

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THE U.S. DEPARTMENT OF HOMELAND SECURITY'S RESPONSE BRIEF ON APPEAL

COMES NOW, the U.S. Department of Homeland Security (DHS), by and through undersigned counsel, and hereby submits its Response Brief on Appeal.

I. INTRODUCTION

On October 2, 2009, DHS issued a Notice to Appear (NTA) against the respondent, Carlos Eugenio Vides Casanova, charging him with removability from the United States under section 237(a)(4)(D) of the Immigration and Nationality Act (INA or Act) as an alien described in INA § 212(a)(3)(E)(iii)(I), in that he "committed, ordered, incited, assisted, or otherwise participated in the commission of any act of torture" while outside the United States. *See* Exh. 1. On October 25, 2010, DHS filed a Form I-261, Additional Charges of Inadmissibility/Deportability, amending the NTA to also charge the respondent with removability under INA § 237(a)(4)(D) as an alien described in INA § 212(a)(3)(E)(iii)(II), in that he assisted or otherwise participated in the commission of any extrajudicial killing. *See* Exh. 1A. On February 22, 2012, the Immigration Judge issued a 151-page written decision sustaining the two charges of removability. On August 16, 2012, the Immigration Judge ordered the respondent removed from the United States. The respondent timely appealed the order of removal, and subsequently filed a brief on appeal. DHS now files this response brief on appeal, and respectfully requests that the Board affirm the Immigration Judge's decision ordering the respondent removed from the United States.

II. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

A. Background[1]

From 1980 to 1992, El Salvador was embroiled in a brutal civil war pitting the government against the guerrilla forces.[2] The war exposed Salvadoran society to shocking crimes and resulted in the death of more than 70,000 civilians.[3] The El Salvador Armed Forces (ESAF) was composed of the security forces—the National Guard, the National Police, and the Treasury Police—and the military—the Army, the Navy, and the Air Force.[4] The main guerrilla organization, the *Frente Farabundo Martí para la Liberación Nacional* (FMLN), was formed when several formerly disparate guerrilla groups united in late 1980.[5] The civil war ended on January 16, 1992, with the signing of peace accords brokered by the United Nations (UN).[6] The peace accords included a mandate to establish a truth commission to investigate and report on human rights atrocities committed by the parties during the civil war. On March 15, 1993, this UN-appointed commission presented a 252-page report discussing specific instances of violence,

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[1] The Immigration Judge's decision dedicates over 100 pages to present a comprehensive synopsis of the testimony presented over multiple days. *See generally* I.J. at 1-102 (Feb. 22, 2012). The Immigration Judge made one minor correction to the factual summary in a subsequent decision. *See* I.J. at 4 (Aug. 16, 2012). DHS agrees with the facts as presented by the Immigration Judge in the two decisions, and presents this factual summary as a shorter summary for the Board's convenience.

[2] *See* Commission on the Truth for El Salvador, *From Madness to Hope: The 12-year War in El Salvador*, U.N. Doc. S/25500 (April 1, 1993), Exh. 2 Tab A at 8, 25 [hereinafter "Truth Commission Report"].

[3] *See* Terry L. Karl, Expert Report of Professor Terry L. Karl for Department of Homeland Security (Dec. 17, 2010), Exh. 5 Tab ZZZ at 1201 [hereinafter "Prof. Karl's Report] (citing estimates ranging from 70,000 to 85,000 civilians killed).

[4] *See id.* at 1195 n.1; *see also* Ambassador Edwin Corr, State Dep't Cable, *Post Reporting Plan: Military's Response to Human Rights Accusations*, (June 29, 1988), Exh. 3 Tab UU at 684-85 [hereinafter "Corr's Post Reporting Plan Cable"]. While the terms "security forces" and "military" are sometimes used in various reports and cables to distinguish between the National Guard, National Police, and Treasury Police versus the Army, Navy, and Air Force, the term "military" is also often used as a generic term to refer to all six branches of the ESAF—the National Guard, National Police, Treasury Police, Army, Navy and Air Force. Throughout this brief, the terms "armed forces," "military," or ESAF will be used interchangeably to refer to all six of the components of the El Salvador Armed Forces. The term "security forces" will be used to refer only to the National Guard, National Police, and Treasury Police. In some instances the phrase "security forces and military" will be used to refer to the entire ESAF.

[5] *See* Truth Commission Report, Exh. 2 Tab A at 25.

[6] *Id.* at 8.

as well as the overall pattern of violence.[7] The Truth Commission found that while all parties to the civil war committed atrocities, the Salvadoran military and security forces were responsible for the vast majority of human rights abuses.[8] In fact, of the 22,000 complaints of serious acts of violence submitted to the Truth Commission, only five percent were attributed to the FMLN.[9]

The respondent was a high-ranking officer in the Salvadoran military during the civil war. From October 1979 until April 1983 he was the Director General of the National Guard, and from April 1983 until June 1989 he was the Minister of Defense.[10] As the Director General of the National Guard, the respondent oversaw the entire National Guard, which is consistently cited as among the worst offenders of human rights, both before and during the civil war.[11] While the respondent was the Minister of Defense, the entire Salvadoran military was subordinate to him.[12] For purposes of this case, there are two main periods of the civil war—1980-1983 and 1983-1989—with each period roughly corresponding to the respondent's tenures as Director General of the National Guard and as Minister of Defense, respectively.[13]

"The main characteristics of [the first period] were that violence became systematic and distrust reigned among the civilian population."[14] In 1981, at the height of the killings, about 9,000 people died, equaling approximately 0.2 percent of the total population of El Salvador.[15] While the number of human rights violations decreased at the beginning of the second period, the decrease was not maintained. For example, reports of torture increased immediately, even while

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[7] *See generally* Truth Commission Report, Exh. 2 Tab A.
[8] Truth Commission Report, Exh. 2 Tab A at 41; Prof. Karl's Report, Exh. 5 Tab ZZZ at 1201.
[9] Truth Commission Report, Exh. 2 Tab A at 41.
[10] *See* NTA, Exh. 1.
[11] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1204, 1215 *ff.*
[12] *See* Corr's Post Reporting Plan Cable, Exh. 3 Tab UU at 685.
[13] *See* Truth Commission Report, Exh. 2 Tab A at 24; Prof. Karl's Report, Exh 5 Tab ZZZ at 1201.
[14] Truth Commission Report, Exh.2 Tab Z at 25.
[15] Prof. Karl's Report, Exh 5 Tab ZZZ at 1201-02.

reports of extrajudicial killings decreased.[16] Moreover, the reduction in the number of killings was short-lived. The number of extrajudicial killings committed in 1985 was double the rate of killings at the end of 1984,[17] with the increase in human rights abuses committed by the ESAF also continuing in 1987.[18] By June 1988, Edwin Corr, the U.S. Ambassador to El Salvador, commented that "for the first time in years, blindfolded bodies are again beginning to appear in San Salvador with their hands tied behind their backs."[19]

The initial decrease at the beginning of the second period can be attributed to the December 1983 visit by then-U.S. Vice President George H. W. Bush,[20] who visited El Salvador to meet with the respondent and other Salvadoran officials.[21] During this visit, Vice President Bush pressed the respondent, who had been appointed Minister of Defense approximately eight months earlier, to put an end to the human rights abuses, the murder of civilians, and the overall repression being carried out by the ESAF. Vice President Bush also warned that failure to take action could result in the loss of U.S. military aid.[22] The significant drop in human rights abuses after this visit demonstrates that the respondent had the authority and ability to significantly reduce the human rights abuses committed by the ESAF.[23] However, as discussed above, this

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[16] *See id.* at 1228.
[17] Lawyer's Committee for Human Rights, *et. al.*, *The Reagan Administration's Record on Human Rights in 1985* (January 1986), Exh. 3 Tab MM at 642.
[18] Ambassador Edwin Corr, State Dep't Cable, *1987 Violence Statistics: A Relook* (July 16, 1988), Exh. 3 Tab VV at 704.
[19] Ambassador Edwin Corr, State Dep't Cable, *Human Rights in El Salvador* (June 29, 1988), Exh. 3 Tab TT at 661-62 [hereinafter "Corr's Human Rights Cable"]; *see also* Ambassador Edwin Corr, State Dep't Cable, *1987 Violence Statistics: A Relook*, Exh. 3 Tab VV at 704 [hereinafter "Corr's 1987 Statistics Cable"]; Truth Commission Report, Annex, Volume II, Section 5, *Statistical Analysis of the Testimonies Received by the Truth Commission*, Exh. 5 Tab PPP at 1099A [hereinafter Truth Commission Annex] (indicating that the number of tortures actually increased from 1984 to 1989).
[20] Truth Commission Report, Exh. 2 Tab A at 31; Prof. Karl's Report, Exh. 5 Tab ZZZ at 1223
[21] Ambassador Thomas Pickering, State Dep't Cable, *Early Assessment: Vice President Bush's Visit* (Dec. 13, 1983), Exh. 3 Tab GG at 622-24.
[22] Ambassador Thomas Pickering, State Dep't Cable, *Vice-President Bush's Meetings with Salvadoran Officials*, (Dec. 14, 1983), Exh. 5 Tab TTT at 1159-60; Prof. Karl's Report, Exh. 5 Tab ZZZ at 1228.
[23] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1227.

drop in human rights abuses was not sustained, and human rights abuses by the ESAF soon increased.

The respondent's integral role in the human rights abuses committed by the ESAF during the civil war can be seen by examining documents from that era, including the hundreds of pages of declassified U.S. Government documents and the Truth Commission Report, as well as through the testimony of U.S. Government officials present in El Salvador at the time, survivors of the torture perpetrated by the ESAF, and experts versed in the complexities and subtleties of the Salvadoran civil war.

B. Prior Proceedings

At a master calendar hearing on February 24, 2010, the respondent admitted allegations 1 through 6 on the NTA, denied allegation 7, and denied the charge of removability contained in the NTA. *See* I.J. at 2-3 (Feb. 22, 2012). At a pre-trial conference held on November 30, 2010, the respondent denied allegation 6, as amended by the I-261, denied allegation 8, and denied the additional charge of removability contained in the I-261. *See id.* at 3. Between the time of the pre-trial conference and the evidentiary hearings, the respondent filed a number of motions, including a motion in limine and a motion to terminate. *See id.* at 5. The Immigration Judge denied the motion in limine and the motion to terminate. *See id.* Over a period of seven days from April 18, 2011, through May 24, 2011, the Immigration Judge heard extensive testimony from several DHS witnesses, the respondent, and several witnesses on behalf of the respondent. *See id.* at 5-6.

The Immigration Judge issued a written decision on February 22, 2012, sustaining the charges of removability. At a master calendar hearing on May 9, 2012, the respondent filed a "Motion for Relief from Removal" and an Application for Cancellation of Removal for Certain

Permanent Residents (Form EOIR 42A). *See* I.J. at 2 (Aug. 16, 2012). DHS orally moved to pretermit the application for cancellation of removal under INA § 240A(c)(4). The Immigration Judge then gave DHS time to respond in writing to the respondent's Motion for Relief from Removal, and gave the respondent time to respond to DHS's oral motion to pretermit. On August 16, 2012, the Immigration Judge issued a written decision pretermitting the respondent's application for cancellation of removal, denying his Motion for Relief from Removal, and ordering that he be removed from the United States. *See* I.J. at 1-5 (Aug. 16, 2012). The respondent timely appealed the order of removal.

C. DHS Witnesses

1. Testimony of Ambassador Robert White

Ambassador Robert White served as the U.S. Ambassador to El Salvador from 1979 to 1981. Tr. at 101:22-23. As Ambassador during some of the critical events that led to the Salvadoran civil war, Ambassador White was able to provide a unique perspective on the history of the civil war, his discussions with members of the ESAF High Command, including the respondent, regarding the human rights atrocities being committed by the ESAF, and the respondent's role in the Salvadoran government at the time.

Ambassador White testified that, as Ambassador, he reported directly to the U.S. Secretary of State or the Assistant Secretary of State via diplomatic cables. Tr. at 108:14-109:4. During Ambassador White's tenure in El Salvador, the respondent was the Director General of the National Guard. Tr. at 112:18-22. Ambassador White testified about some of the key events leading up to the civil war. He explained that in 1972, the Salvadoran military annulled the results of that year's presidential election and expelled the elected president, José Napoleón Duarte, from the country. Tr. at 103:23-104:4. He explained further that as young people and

liberals began to believe that there was no hope for peaceful change, a revolutionary movement began to emerge. Tr. at 104:6-11. On October 15, 1979, younger military officers, who believed in a democratic form of government, staged a *coup d'état*, ousting the corrupted military rulers and forming a military-civilian *junta* to govern the country. Tr. at 105:7-17.

Ambassador White testified to the structure of the ESAF, stating that the Salvadoran armed forces were at the time composed of the Army, Navy, Air Force, National Guard, National Police, and Treasury Police. Tr. at 107:5-18. He stated that the Army, Navy, and Air Force constituted the military, while the remaining branches composed the security forces. Tr. at 107:19-108:3. He testified that the ESAF was subordinate to the "High Command," which included the Minister of Defense, the Director General of the National Guard, the Director of the National Police, and the Director of the Treasury Police. Tr. at 112:7-17.

Ambassador White stated that the information he received from various embassy officials, as well as the CIA and witnesses' recorded conversations, invariably implicated the ESAF in the kidnapping, torture, and killing of civilians on a regular basis. Tr. at 115:20-25; 127:22-23; 128:8-20. During his service in El Salvador, Ambassador White received regular and frequent reports that the military and security forces were perpetrating violence against labor unions, leaders of the Catholic Church, and residents of poor neighborhoods. Tr. at 116:1-10; 125:9-16. He stated that the respondent was the second most important military figure in the country, behind only the Minister of Defense, and that the respondent could have prevented the National Guard from committing torture and extrajudicial killings, but that he failed to do so. Tr. at 120:16-121:3.

Ambassador White testified that he met frequently with then-Minister of Defense Colonel José Guillermo Garcia, and that the respondent often attended the meetings. Tr. at 121:4-8.

Ambassador White stated that they discussed human rights violations and Garcia's knowledge that military death squads were operating out of the military establishments and security forces. Tr. at 123:17-124:4. Ambassador White stated that Colonel Garcia admitted that approximately one percent of the military and security forces were in fact involved in death squads. Tr. at 124:3-4. Ambassador White told Garcia that even one percent amounted to 160 members of the military and security forces being involved in death squad activities, and urged Colonel Garcia to dismiss all personnel involved in any human rights violations from the ESAF. Tr. at 124:4-13.

Ambassador White also stated that he and the respondent discussed human rights violations on several occasions, and that the conduct of the security forces was an embarrassment to the United States for having associated with the Salvadoran government. Tr. at 113:6-15; 131:10-16; 149:5-8. Ambassador White testified that despite these many frank conversations with Colonel Garcia and the respondent, no Salvadoran officer was ever punished or dismissed from the military for human rights violations during the Ambassador's tenure. Tr. at 131:5-8.

Ambassador White also discussed the "FDR" murders.[24] He testified that he received overwhelming evidence demonstrating that the security forces murdered six leaders of the Revolutionary Democratic Party (FDR) at *Socorro Juridico's*[25] downtown office in November 1980. Tr. at 133:15-134:15; 134:25-135:2. He stated that the respondent personally told him that the National Guard maintained constant surveillance on the offices of *Socorro Juridico*. Tr. at 135:3-11. Ambassador White testified that this information led him to conclude that nothing could have occurred at the offices of *Socorro Juridico* without the National Guard's knowledge. Tr. at 135:13-18.

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[24] Attached to DHS's Post-Hearing Brief as Appendix 1 is a glossary and brief description of some of the major human rights violations referenced in this brief.

[25] *Socorro Juridico* was a human rights organization, from whose offices the six leaders of the FDR were abducted prior to their murders. *See* Prof. Karl's Report, Exh. 5 Tab ZZZ at 1233.

Ambassador White also testified regarding his knowledge of the rape, torture and murder by the National Guard of four American churchwomen in December 1980. Ambassador White explained that a Canadian church group sought assistance from the United States Embassy after witnessing National Guard members kidnap the American churchwomen from their car, and that the Canadians feared they would also be killed. Tr. at 138:11-20; 139:1-6; 139:12-140:4. Ambassador White testified that he called Colonel Garcia to ask about the disappearance of the churchwomen. Tr. at 152:20-22. Colonel Garcia immediately asked if the churchwomen were wearing habits, which, he explained, led Ambassador White to conclude that Colonel Garcia already had knowledge of this incident. Tr. at 152:20-153:8. After assisting the Canadian church group in leaving the country, Ambassador White testified that he and other U.S. Embassy officials traveled to where the churchwomen's bodies were being exhumed from a makeshift grave. Tr. at 140:4-14; 141:8-20. He testified that National Guard members encircled the U.S. Embassy officials witnessing the exhumation and pointed their machine guns at them. Tr. at 141:20-25. The United States Embassy also received information indicating that the Salvadoran security forces used that area as a body dump. Tr. at 141:25-142:7.

Ambassador White testified that the members of El Salvador's High Command, which included the respondent, never complained that they were unable to control their troops. Tr. at 122:7-10; 123:3-6; 125:17-20; 126:1-16; 204:13-25.

2. Testimony of Pedro Daniel Alvarado, Torture Survivor

Mr. Alvarado testified that members of Section Two (S-2) of the Treasury Police arrested him on Thursday, August 25, 1983, while he and his friends were watching a soccer match. Tr. at 238:17-19; 239:14-16. He stated that his captors blindfolded and bound him, and took him to an unknown location, which he later learned was the headquarters of the Treasury Police. Tr. at

239:16-21; 242:18-24; 244:5-10. There, his captors removed his clothes and untied his hands. Tr. at 244:11-18. They accused him of being a guerrilla, and told him that he had two options: to cooperate or be tortured. Tr. at 246:1-10. Mr. Alvarado later learned through a conversation with Major Ricardo Pozo, that he was expected to accept responsibility for the murder of Lt. Commander Schaufelberger.[26] Tr. at 251:10-252:1; 256:19-25. Mr. Alvarado testified that he was not involved in any guerrilla activities and that he played no role in the murder of Lt. Commander Schaufelberger. Tr. at 247:12-248:8; 252:2-6.

Over the course of approximately six days, members of the Treasury Police tortured Mr. Alvarado with electric shocks, blows, kicks, suspension by wires, and suffocation by covering his head with a plastic hood. Tr. at 249:9-250:17. Major Pozo visited Mr. Alvarado every day, at least once a day. Tr. at 257:25-258:2; 258:9-14. He testified that when he could no longer withstand the torture, he agreed to cooperate with the S-2's demands. Tr. at 263:7-9. Although he was innocent, Mr. Alvarado signed a confession stating that he killed Lt. Commander Schaufelberger and that he was involved in the murder of Vargas Amaya. Tr. at 263:10-12; 267:1-268:1. The next day, August 31, 1983, his captors forced him to attend a press conference at the headquarters of the Treasury Police. Tr. at 268:11-13; 269:19-23; 272:1-6. Colonel Nicolas Carranza, the Director of the Treasury Police, headed this press conference. Tr. at 272:7-10.

Despite Mr. Alvarado's participation in the press conference, the torture resumed the next day and continued until he had a nervous breakdown. Tr. at 274:5-20. A few days later, his captors took him to a military judge for a judicial statement. Tr at 275:10-21. He explained that he could not answer the judge's questions because he feared he would say something

[26] Lt. Commander Schaufelberger was a U.S. military adviser who was murdered on May 25, 1983. *See* Prof. Karl's Report, Exh. 5 Tab ZZZ at 1237-38.

inconsistent with his false confession, so he asked the judge to simply copy his earlier confession so he could sign it. Tr. at 276:6-15.

Mr. Alvarado also testified that on a later date, Colonel Carranza came to his cell and told him to be thankful that he was still alive, because they usually kill guerrillas. Tr. at 285:7-286:4. Colonel Carranza also arranged for him to repeat his confession to a reporter. Tr. at 286:9-17.

Mr. Alvarado testified that around October 1983, a military judge took him to a house where two agents from the U.S. Federal Bureau of Investigation awaited him. Tr. at 278:5-279:7. The FBI agents informed him that they knew he was not involved in the murders. Tr. at 280:11-23. Mr. Alvarado stated that once they guaranteed protection for him and his family, he told them about the torture that he had endured and admitted that he had not killed Lt. Commander Schaufelberger or Mr. Amaya. Tr. at 282:1-11. Agents administered a polygraph test that confirmed that he was telling the truth. Tr. at 283:1-3; 283:24-284:7; 284:18-21.

Mr. Alvarado testified that in November 1983, Colonel Carranza spoke with him, told him that he was a problem, and asked why he did not tell him about the torture. Tr. at 288:12-23. Colonel Carranza indicated he was giving orders to have him transferred. Tr. at 288:25-289:3. Mr. Alvarado further testified that a colonel sent by then-Minister of Defense Vides Casanova offered to have Mr. Alvarado released if he served as an informant against the guerrillas. Tr. at 290:25-291:4; 292:23-293:4. Mr. Alvarado declined because he was not a guerrilla member. Tr. at 294:5-7. On January 31, 1984, the Treasury Police transferred him to a penitentiary, where he stayed until his release on April 14, 1986. Tr. at 293:10-17.

Mr. Alvarado suffers from permanent injuries as a result of his torture, and is in constant pain due to a broken disc caused by the beatings. Tr. at 294:9-18.

3. Testimony of Dr. Juan Romagoza Arce, Torture Survivor

Dr. Romagoza testified that as a medical intern and resident he witnessed two separate instances in which the army and security forces killed a patient in the hospital. Tr. at 340:13-15; 340:24-341:2; 341:12-19; 342:13-14; 346:20-347:3; 347:24-348:15. He testified that he knew that the army and security forces were involved in these killings based on prior similar incidents witnessed by other hospital personnel, as well as the fact that the perpetrators left in military vehicles with uniformed men. Tr. at 342:25-343:12; 345:7-16; 347:4-23.

Dr. Romagoza testified that Army and National Guard soldiers captured him on December 12, 1980, while he and other medical personnel were traveling to visit patients in rural areas. Tr. at 348:22-349:4. His captors shot him, injuring his right ankle and the left side of his head. Tr. at 351:25-352:12; 353:13-25. The soldiers took him to the Chalatenango Army headquarters, where they blindfolded, undressed, interrogated, and tortured him with blows, threats, and electric shocks to his entire body. Tr. at 354:12-25; 355:10-356:5; 358:12-359:7. The next day his captors moved him to the National Guard headquarters by helicopter, where they held him for another 24 days. Tr. at 360:4-21. Dr. Romagoza testified that while in the custody of the National Guard, troops repeatedly questioned and tortured him by striking him, kicking him, hanging him from the ceiling, shoving a wooden stick into his rectum, and, on one occasion, shooting him in the arm. Tr. at 366:8-25; 386:10-18.

Dr. Romagoza testified that on one day during his detention at the National Guard headquarters, his uncle Salvador Mejia, a Lieutenant Colonel in the military, accompanied the other military personnel interrogating him, and kicked him while he lay on the floor. Tr. at 369:1-16; 370:6-15.

Dr. Romagoza testified that while he lay blindfolded on the floor, the interrogators kicked him, telling him that the "Colonel" would come. Tr. at 369:1-16; 370:4-15; 371:17-19; 377:8-

14. When "the Colonel" arrived, some of the soldiers pulled worms from the wound in his foot, threw them on his chest, and told him he was going to have to eat them. Tr. at 372:23-373:12. Those in the room taunted him, telling him that he smelled of death. Tr. at 382:13-21. He testified that the Colonel questioned him for about half an hour, during which time other soldiers continued to kick him. Tr. at 377:1-7; 380:13-14. Because of the repeated kicking during questioning, the blindfold over his eyes moved, enabling him to see the Colonel from the nose down. Tr. at 377:16-21. While all the men in the room wore military uniforms, the Colonel's uniform was different from the soldiers' uniforms because it was of better quality and his boots were shinier. Tr. at 378:3-18; 379:4-380:1. Dr. Romagoza testified that based on the Colonel's uniform, facial features, and voice, he identified the Colonel as the respondent, Carlos Vides Casanova, who was at the time the Director General of the National Guard. Tr. at 380:18-24; 382:5-7. Dr. Romagoza testified that he was very familiar with the respondent's face and voice, having often seen and heard him on television, both before and after his capture. Tr. at 381:1-10.

On January 5, 1981, Dr. Romagoza was released to another uncle, Manuel Rafael Arce. Tr. at 383:1-25. He stated that his uncle carried him from where he was being held because he was weak and could not walk. Tr. at 384:1-5. At the time of his release, Dr. Romagoza weighed approximately 75 pounds. Tr. at 384:5. He testified that the respondent and his other uncle, Salvador Mejia, watched as Manuel Rafael Arce carried Dr. Romagoza from the building. Tr. at 383:23-25; 384:7-11.

Dr. Romagoza left El Salvador in March 1981 because he feared continued persecution. Tr. at 384:17-22. During his horrendous torture, Dr. Romagoza lost part of his outer tibia, sustained a head wound, received a gunshot wound to his left arm causing damage to his radial nerve, suffered rectal bleeding, and lost the use of several fingers. Tr. at 385:19-386:18. He

testified that he cannot perform surgeries or even tie his shoes because of the injuries from the torture. Tr. at 386:19-24.

4. Testimony of Professor Terry Karl, Expert Witness

Dr. Terry Karl, Gildred Professor of Latin American Studies and Professor of Political Science at Stanford University, is a leading expert on the political history of and civil war in El Salvador. Tr. at 479:16-22; 480:8-10; 481:5-14. In the course of her extensive research during the last three decades, Professor Karl traveled to El Salvador numerous times, including multiple trips during the 1980s; interviewed leaders on both sides of the conflict, including Salvadoran military leaders, presidents, and other key political figures of El Salvador; and read most, if not all, of the U.S. Government's declassified cables and other documents from the time period. Tr. at 485:10-13; 486:6-7; 487:5-11; 490:21-491:13; 500:24-501:19. In 1984, she traveled throughout El Salvador with one of the main organizers of the government-affiliated death squads, Roberto D'Aubuisson, as he campaigned for president. Tr. at 487:13-488:2.

Professor Karl testified about the historical precursors to the Salvadoran civil war, stating that El Salvador had been under *de facto* military rule since an uprising in 1932, in which the Salvadoran military killed approximately 30,000 peasants. Tr. at 505:15-506:12. She stated that the 1972 presidential election of Napoleón Duarte, and the subsequent overruling of that election by the military, changed the political landscape of El Salvador. Tr. at 508:17-509:13. She also stated that in 1979 progressive military officers staged a coup and installed what was a short-lived military-civilian governing *junta*. Tr. at 509:14-19; 510:10-21. Professor Karl explained that the civilian members of the *junta* quickly resigned, in part due to threats made by the

respondent.[27] Tr. at 510:21-511:4; 511:4-512:4; 515:6-17. Professor Karl testified that the collapse of this governing *junta* led to the outbreak of full-scale war in 1980 and 1981.[28] Tr. at 515:18-516:5; 517:23-518:16.

Professor Karl also testified to the rigid hierarchical nature of military and civilian leadership in El Salvador. She distinguished the security forces from the military forces in the combined ESAF, and testified that each force had its own intelligence service, known as the G-2 or S-2, and that these intelligence services operated death squads. Tr. at 523:18-524:8; 526:3-11; 528:22-529:12. She discussed the "*tanda*" system, explaining that a *tanda* is a graduating class from the military academy, and that the intense training received at the academy instilled intense loyalty among the members of each *tanda*. Tr. at 520:3-521:8. She testified that within the ESAF, the chain of command was scrupulously observed, and officers and soldiers did not disobey orders. Tr. at 531:13-19. She stated that this meant, among other things, that lower-ranking members of the ESAF would not commit prominent murders on their own. Tr. at 531:19-532:1.

Professor Karl also testified to the respondent's hands-on method of leadership, which included having his own extensive intelligence network. Tr. at 536:25-537:20. She testified that, as Minister of Defense, the respondent was required by Salvadoran law to manage the ESAF, investigate crimes committed by members of the ESAF, oversee the promotions and removal of officers, and ensure military conduct in compliance with the Geneva Conventions.

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[27] For example, the respondent informed civilian members of the governing *junta* in a December 27, 1979, meeting, that the military would not subject itself to civilian control. He went on to state that "[w]e have put you into the position where you are, and for the things that are needed here, we don't need you. We have been running this country for 50 years, and we are quite prepared to keep on running it." Prof. Karl's Report, Exh. 5 Tab ZZZ at 1219.

[28] Prof. Karl testified that it is difficult to put a precise date on the start of the civil war, and scholars disagree as to the exact date the war started.

Tr. at 539:5-540:11. She testified that the respondent knew of the violence and would have been able to change the levels of violence "if he wanted to." Tr. at 541:5-7; 541:15-24; 543:9-20.

Professor Karl testified further that the respondent ascribed to a "total war" philosophy—a system by which security and military forces, in order to maintain power, would use indiscriminate mass killings to keep the Salvadoran population in terror. Tr. at 544:17-547:2; 548:5-15. She testified that a low estimate of the number of civilians killed during the civil war is 75,000, and that the best estimates are that the ESAF committed 85 to 95 percent of these killings. Tr. at 547:3-22; 561:18-20; 562:5-10. She stated that the National Guard was among the most violent offenders against civilians, particularly from 1980 to 1983, when the respondent was the Director General of the National Guard. Tr. at 563:5-13. Professor Karl stated that she personally witnessed some of the results of this "total war" philosophy, in the form of body dumps and other incidents. Tr. at 553:22-554:13.

Professor Karl next testified about the December 1983 visit by then-Vice President George H. W. Bush to El Salvador. On this visit, he met with the respondent in the respondent's capacity as Minister of Defense. Tr. at 570:1-12. Professor Karl stated that Vice President Bush threatened to withhold U.S. military aid unless the respondent took steps to address the human rights violations in El Salvador, including stopping the death squads, removing known human rights abusers from positions of power, and disciplining those officers involved in human rights abuses. Tr. at 576:14-577:19. Professor Karl testified that following this visit, the incidence of human rights violations dropped dramatically, demonstrating that "this violence was very clearly directed [and] that it c[ould] be turned on and off like a spigot." Tr. at 578:11-24. She also stated that the change in levels and types of violence, along with evidence that the death squads throughout the country consistently used the same techniques, methods, and mechanisms, were

clear indications of a "logistically extremely sophisticated," organized, and directed effort. Tr. at 579:1-19.

Professor Karl testified that although the respondent had both the responsibility and the ability to discipline his subordinates, no officer was prosecuted for human rights abuses in the 1980s. Tr. at 582:8-583:5; 586:24-587:13. Rather, the respondent obfuscated and impeded any investigation or prosecution of his officers. Tr. at 600:17-601:1; 601:15-18; 604:22-605:3; 605:9-23. Professor Karl explained that in some cases, the respondent appointed well-known leaders of the death squads to head commissions set up to investigate the activities of the death squads. Tr. at 583:6-586:3. In other instances, the respondent and the ESAF denied reports of ESAF involvement in killings and falsely blamed the FMLN. Tr. at 586:5-23. As an example, Professor Karl cited the reaction of the military to the reports about the San Sebastian/La Cebadilla massacre. In this case, the military's attempts to create a fictitious ambush to blame the FMLN were so unconvincing that not even the Salvadoran government officials believed the story. Tr. at 622:11-623:3.

Professor Karl testified that the civilian courts were ineffective to prosecute cases involving human rights violations, due in large part to the fact that the security forces were responsible for the investigations and collection of evidence. Tr. at 589:14-22. She explained that a pattern of judicial intimidation, including the assassination of judges and witnesses, further compromised the integrity of the system. Tr. at 589:23-590:19. In cases where military members (not officers) were prosecuted, such as those where the victims were U.S. citizens and the U.S. Government applied pressure, responsibility for the crimes was pushed to lower echelons to protect the officers. Tr. at 587:25-588:11; 630:6-24. Apart from temporary transfers

of officers or superficial investigations, no serious action was taken and there were no prosecutions of high ranking military officers. Tr. at 621:3-20.

Professor Karl also testified that the respondent, as Minister of Defense, promoted many officers who were known human rights abusers, including officers who previously had been removed from command under pressure from the U.S. Government for their participation in human rights abuses. Tr. at 630:25-631:10; 631:15-632:16; 634:22-635:12; 635:19-637:17; 638:7-639:12; 643:21-645:11. The respondent's promotions of known human rights abusers to prominent positions of power allowed the officers to continue to engage in acts of torture and extrajudicial killings. Tr. at 632:17-633:9; 637:1-6; 642:5-23. Further, these promotions sent a strong signal that killing and torture were acceptable acts that could advance one's career. Tr. at 646:3-21.

In sum, Professor Karl testified that the respondent assisted and participated in acts of torture and extrajudicial killings by promoting and protecting known torturers, killers, and human rights abusers; by denying that the ESAF had committed torture and extrajudicial killings, even when given documentation by U.S. ambassadors; by refusing to visit detention cells as was his legal obligation; by refusing to dismantle military death squads; and by obstructing justice, especially by impeding or failing to open investigations. Tr. at 649:20-650:16; 650:23-651:2. Finally, Professor Karl testified that the respondent played a large role in the increase of human rights abuses throughout the Salvadoran civil war. Tr. at 648:3-649:13.

D. <u>The Respondent's Witnesses</u>

1. <u>Testimony of Ambassador David Passage</u>

The respondent first called Ambassador David Passage to testify on his behalf. Ambassador Passage testified that he was the Deputy Chief of Mission at the U.S. Embassy in El

Salvador from 1984 to 1986. Tr. at 835:20-21; 836:20-22; 838:6-14. He testified that the situation in El Salvador was tragic because of the significant numbers of human right abuses, disappearances, and murders at the hands of the death squads. Tr. at 841:4-12. He stated, however, that from 1983 to 1984, El Salvador's situation improved because the U.S. Embassy established a training program to assist the Salvadoran military. Tr. at 841:12-842:3.

Ambassador Passage testified that, during his service in El Salvador, the respondent was the Minister of Defense, and that the respondent's duties were to eliminate the civil war and change the behavior and comportment of the Salvadoran military forces, especially in terms of human rights. Tr. at 882:6-883:8. Ambassador Passage testified that, during his service in El Salvador, military and security forces perpetrated kidnappings, torture, and extrajudicial killings. Tr. at 922:10-19; 945:19-946:14; 971:19-21. He also testified that he had frequent meetings with the respondent in which they discussed specific instances of human rights violations. Tr. at 850:12-21. Ambassador Passage testified that, during these conversations, the two discussed the actions of a number of high-ranking officials, including Rodolfo López Sibrián.[29] Tr. at 965:13-23; 966:8-12. He testified that the respondent appeared receptive to all information provided and acknowledged that there was a problem. Tr. at 851:10-852:1: 852:14-22; 853:3-854:4.

Ambassador Passage testified that, on several occasions, he saw the respondent providing instructions to his field commanders involving the importance of avoiding and ending human rights abuses. Tr. at 875:12-876:2. He stated that the respondent reassigned personnel on several occasions, including individuals of concern to the United States. Tr. at 893:6-13. He testified that during his service in El Salvador, the number of human rights violations declined.

[29] Lt. Rodolfo López Sibrián, second in command in the Intelligence Unit, was involved in the planning and ordering of the Sheraton murders. *See* Prof. Karl's Report, Exh. 5 Tab ZZZ at 1245.

Tr. at 866:19-25. He stated that the respondent was singularly responsible for the decrease of human rights abuses and the support of the democratic process. Tr. at 873:12-17; 874:10-875:4.

On cross-examination, Ambassador Passage testified that he was aware that the United Nations Truth Commission conducted an extensive study on human rights, but was unaware that the report showed an increase in cases of torture in 1984. Tr. at 946:20-947:5. He testified that he disagreed with the numbers reported by the Truth Commission. Tr. at 949:10-12; 949:16-22. Ambassador Passage also testified on cross-examination regarding a March 5, 1985, cable issued from the U.S. Embassy. He testified that he was the *Charge d' Affairs* at the time the cable was issued, and therefore responsible for the content. Tr. at 951:4-19; 955:15-22. He acknowledged that the cable indicates, according to the cited source, that death squads operated out of the G2 Intelligence Section of the National Guard, that National Guard members held meetings to plan the Sheraton killings,[30] and that members of the death squads frequently visited G2 headquarters carrying briefcases full of money and guns. Tr. at 956:15-957:11; 957:20-25.

2. Testimony of Ambassador Edwin Corr, Expert Witness

Ambassador Corr testified that he was the United States Ambassador to El Salvador from August 1985 to August 1988, and that he reported directly to the U.S. Secretary of State. Tr. at 984:17-18; 1162:1-19. His duties as ambassador were to improve the situation, reduce human rights violations, provide help to establish democracy, and focus on the economic situation. Tr. at 989:15-990:12. He stated that the human rights situation was very critical when he arrived. Tr. at 1020:23-1021:1; 1021:13-18; 1163:16-19.

Ambassador Corr testified that, during his tenure as ambassador, the respondent was the Minister of Defense and the entire ESAF was subordinate to him. Tr. at 1038:17-19; 1163:24-

[30] See section IV(C)(2)(c) of this brief for a discussion of the Sheraton murders.

1164:4. He testified that human rights were one of the top responsibilities of the Minister of Defense, and that the respondent had the duty to investigate allegations of human rights violations and prosecute any personnel found to have committed wrongful acts. Tr. at 1170:5-25; 1171:18-1172:1. He further testified that, as Minister of Defense, the respondent had the authority under the Salvadoran code of military law to bring soldiers that disobeyed his orders before the military court system. Tr. at 1169:25-1170:4. He agreed that one has to take decisive action against people who commit human rights abuses, otherwise people will get the message that their actions are permitted and they will continue to abuse human rights. Tr. at 1174:2-8. He stated that, as of June 1988, no high ranking officer had been convicted for any violation of human rights. Tr. at 1174:21-23.

Ambassador Corr stated that, as of June 1988, credible reports about murders, kidnappings, and torture committed by the ESAF still surfaced regularly. Tr. at 1166:15-24. However, he could only testify to one case (the Las Hojas massacre) in which he was aware of an officer being placed into the court system. Tr. at 1105:13-1106:1; 1174:24-1175:2. Ambassador Corr also agreed that he had previously characterized the ESAF investigative report for the Las Hojas case as "a piece of fiction that did not explain the legally-recognized facts of the case." Tr. at 1175:3-7. He testified that the military and security forces were unwilling to investigate cases that involved their personnel, and that the ESAF's normal reaction to reports of ESAF involvement in human rights abuses was to deny involvement; when evidence of their involvement was stronger, they generated an alternative explanation stating that the FMLN was responsible. Tr. at 1196:15-19; 1201:4-10.

Ambassador Corr testified that the Salvadoran government formed a special investigation unit (SIU) to assist with the investigations of human rights abuses, but he agreed that the SIU

backed off from investigating cases involving the military and police officers. Tr. at 1195:20-1196:5. He further agreed that the SIU staff was denied access to witnesses, firearms, and unit personnel lists, so they could not resolve some of the crimes. Tr. at 1196:6-9. Ambassador Corr agreed that in 1988 the officer corps tolerated abuses, because it did not aggressively pursue prosecution. Tr. at 1189:18-21. He agreed that there was an effort by the ESAF not to push cases forward once they were discovered. Tr. at 1189:22-25.

Ambassador Corr testified that, during his time in El Salvador, he and the respondent met at least once a week, both alone and with other military and political leaders, including then-President Duarte. Tr. at 1015:7-25. He stated that they discussed issues related to security, human rights, and the establishment of a constitutional democracy. Tr. at 1014:8-1015:6. Ambassador Corr testified that he and the respondent talked about particular human rights violators that the United States felt needed to be removed from the military, including Colonel Roberto Staben.[31] Tr. at 1130:12-1131:7. He further testified that he asked the respondent to reassign certain officers throughout his tenure as Ambassador to El Salvador. Tr. at 1111:18-1112:8.

Ambassador Corr testified that he recalls observing a significant decrease in the use of torture and degrading treatment or punishment in 1987, and testified that those improvements were reported to Washington. Tr. at 1105:7-12. He stated that, according to the State Department Country Reports on Human Rights Practices, there were no reports of politically motivated killings or disappearances in 1987. Tr. at 1106:12-16. However, on cross-examination he agreed that the 1987 Country Report indicates that there were politically

[31] Col. Staben had a long history of involvement in human rights abuses, including being a principal figure in a kidnapping-for-profit ring run by military officers. *See* Prof. Karl's Report, Exh. 5 Tab ZZZ at 1249.

motivated killings attributed to the Salvadoran military and that there were credible reports of disappearances at the hands of the military and security forces. Tr. at 1204:12-19.

Ambassador Corr testified that reports showed a great improvement in human rights abuses while he was ambassador, although he stated that everything was not "hunky-dory." Tr. at 1204:23-1205:6; 1030:1-6. Ambassador Corr stated that as a result of an "uptick" in violence toward the end of 1987, he started meeting with American military trainers every Saturday. Tr. at 1032:23-1033:18. He attributed the uptick to the FMLN guerrillas, who had adopted a new strategy in which they moved back into the cities. Tr. at 1034:5-1035:7; 1036:7-22. He testified that even though there was an uptick in violence on the part of the FMLN, it seemed that both the human rights and military situation had improved. Tr. at 1067:1-13. He testified, however, that when he saw the uptick in the violence, he felt that it was important to make the commanders aware that this was not acceptable behavior. Tr. at 1205:7-21.

On cross-examination, however, Ambassador Corr agreed that the uptick in violence was a result of increased human rights abuses by the ESAF. Tr. at 1205:22-1206:5; 1206:17-20. He further agreed that his cables indicate that in the second half of 1987 there were twice as many violent deaths involving civilians as there were in the first half of 1987, and that his cables concluded that there had been an increase in human rights violations committed by the ESAF. Tr. at 1207:2-8; 1207:25-1208:8. He confirmed that in June 1988, for the first time in years, blindfolded bodies with their hands tied behind their backs were appearing in the streets and that, according to a 1988 cable, the U.S. Embassy spent months speaking to military leaders about the lack of progress in human rights.[32] Tr. at 1208:10-13; 1211:13-16. Ambassador Corr also agreed that in May and June of 1988 he believed that the human rights situation had deteriorated.

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[32] Corr's Human Rights Cable, Exh. 3 Tab TT at 668; Ambassador Edwin Corr, State Dep't Cable, *Heads Up on Human Rights* (Feb. 15, 1988), Exh. 3 Tab QQ at 655.

Tr. at 1208:22-24. He further stated that the government security forces were the largest offenders in terms of torture against civilians in the 1980s, and that the respondent was aware that human rights abuses were committed by the security forces from 1979 to 1983. Tr. at 1165:19-1166:9.

Ambassador Corr testified that he did not regard the respondent as an obstructionist in dealing with accusations of human rights abuses. Tr. at 1046:12-15. However, on cross-examination, he agreed that the respondent had in effect stopped the investigation into the Melendez murders[33] by his response to a judge's investigative request. Tr. at 1194:7-17. He also agreed that commanders of military units obstructed justice in human rights cases and could count on silence from anyone of equivalent or higher rank. Tr. at 1196:10-14.

Ambassador Corr testified that he did not believe that the respondent protected officers who had been accused of murder, but rather believed that the respondent may have been "occupied by something else." Tr. at 1058:6-17. However, when asked about his references in cables to "command repression" and "institutional repression," he agreed that an example of command repression would be where an officer creates a list of suspected terrorists and orders his men to kill them, while an example of institutional repression would be an officer feeling that he could kill someone with impunity in order to steal his property. Tr. at 1199:23-1200:6. He agreed that both command repression and institutional repression were present in the El Salvador military and security forces. Tr. at 1200:7-13. He also agreed that mid-level army and security officers used extra-legal means for resolving their problems based on a "wink and a nod from above." Tr. at 1200:14-17; 1201:1-3.

Ambassador Corr testified that judges were intimidated by the military. Tr. at 1180:2-4. He explained that civilians in the government did not want to be involved and thus did not press

[33] See section IV(C)(2)(e) for a discussion of the Melendez/Puerto del Diablo murders.

for the prosecution of military officials. Tr. at 1181:19-1182:2; 1184:19-22. He also testified that President Duarte made a secret agreement with the respondent that allowed all decisions affecting the military institution to be made by the military alone. Tr. at 1185:25-1186:21.

At the conclusion of his cross-examination, Ambassador Corr agreed that in early 1988, the Inspector General of the Department of State, Sherman Funk, wrote a memorandum finding that the United States Embassy in El Salvador had not fully and accurately reported on the Duarte administration. Tr. at 1213:7-13. In addition, he agreed that the United States General Accounting Office issued a report that concluded that the 1987 and 1988 Human Rights Reports for El Salvador, the content of which was largely Ambassador Corr's responsibility, had excused the Salvadoran government from responsibility for human rights abuses. Tr. at 1221:24-1222:1.

3. The Respondent's Testimony

The respondent testified on his own behalf, and confirmed that he was the Director General of the National Guard of El Salvador from 1979 to 1983. Tr. at 1272:21-1273:5. As Director of the National Guard, all departments and divisions of the National Guard were under his supervision. Tr. at 1323:18-21. He further stated that although various command posts were autonomous within the region, in that they had authorization to issue licenses, assign positions, and supervise their facilities and staff, command posts nonetheless were required to report to High Command officers. Tr. at 1279:25-1280:10. When questioned about the conditions of the civil war in El Salvador, the respondent testified that approximately 70,000 civilians were killed, and that the Armed Forces had approximately 55,000 members at its peak. Tr. at 1337:19-1338:6.

The respondent testified that he was only aware of press reports about people being tortured, and that he was not aware of any specific cases of torture until he was sued in a United

States court about 20 years later. Tr. at 1325:1-1326:18. When questioned about the investigation and findings of the United Nations Truth Commission, which revealed that death squads operated out of the National Guard Intelligence Division, the respondent disagreed, testifying that at the time he was the Director of the National Guard, he was not aware that death squads were operating under the National Guard. Tr. at 1331:25-1332:9; 1332:23-25. The respondent conceded that he was aware that the National Guard committed acts of extrajudicial killings during 1979 to 1983. Tr. at 1339:1-4.

The respondent testified that the media published articles indicating that the National Guard was involved in the Sheraton killings, but he stated that he had no prior knowledge that National Guard members were going to participate in those killings. Tr. at 1314:22-1315:10. He stated that Major Denis Moran (Chief of Intelligence in charge of the Interrogation Unit, Section 2) and Lieutenant López Sibrián (second in command in the Intelligence Unit) confessed to the Sheraton killings. Tr. at 1315:11-1316:6. He explained that Major Moran was ultimately not charged due to lack of evidence, and that although Lieutenant López Sibrián was charged, he was later acquitted because witnesses did not identify him. Tr. at 1316:7-24. He explained further that López Sibrián was allowed to color his hair a darker shade, which prevented the witnesses from being able to identify him. Tr. at 1316:22-24.

The respondent testified that he was the Minister of Defense from 1983 to 1989. Tr. at 1323:25-1324:6. He stated that his main duties as Minister of Defense were to ensure the safety of the country and to supervise the ESAF. Tr. 1283:14-17; 1324:21-25. He testified that during his time as Minister of Defense, ESAF personnel received a 14-page booklet that described the norms and rules to follow with respect to human rights. Tr. at 1297:20-1298:13.

The respondent testified that he met with Ambassador Passage, Ambassador Corr, and U.S. Secretary of State George Schultz on several occasions to discuss issues related to human rights abuses, professionalism of the armed forces, subordination of the armed forces to civil authority, and military abuse of power, but they did not discuss any specific act of torture or extrajudicial killing by members of the armed forces. Tr. at 1289:14-22; 1290:7-12; 1303:14-1304:5. He stated, however, that he agreed with Ambassador Corr's testimony in that the security forces were responsible for the vast majority of human rights abuses against civilians. Tr. at 1338:17-22. He stated that almost every meeting he had with officials from the U.S Embassy included discussions about the human rights situation. Tr. at 1327:23-1328:5.

The respondent testified that he met with then-U.S. Vice President George H. W. Bush in 1983, and that they discussed the American churchwomen case, the Sheraton killings, and the reorganization of the armed forces. Tr. at 1301:14-1302:7. He testified that Vice President Bush expressed concerns about the human rights violations committed by the ESAF and that the United States believed that High Command officers were involved in death squads. Tr. at 1302:19-25.

The respondent claimed that he did not interrogate Juan Romagoza or any other detainee, because his duties as Director General of the National Guard and as Minister of Defense did not include the questioning of detainees. Tr. at 1275:1-11. He stated that he did not send anyone to interrogate Daniel Alvarado and had no prior knowledge that either Romagoza or Alvarado were going to be captured. Tr. at 1291:10-13; 1291:22-1292:13. He testified that he first learned of Romagoza's allegations of torture about 20 years later when he was sued in a United States court. Tr. at 1290:21-1291:9.

The respondent testified that in 1983, when he became the Minister of Defense, the Armed Forces had approximately 22,000 to 25,000 members. Tr. at 1292:14-20. By 1989, at the time of his retirement as Minister of Defense, the ESAF had grown to approximately 55,000 members. Tr. at 1292:21-23. According to the respondent, as Minister of Defense, he gave a permanent order to the entire ESAF commanding them to respect the human rights of the citizens of El Salvador. Tr. at 1336:16-19. The respondent further testified that if a subordinate did not obey an order, the subordinate had to be punished, which could have included dismissal from the ESAF. Tr. at 1335:2-7. He stated that any act of torture or extrajudicial killing committed by a member of the ESAF constituted a violation of his order to protect human rights. Tr. at 1336:20-1337:9. He further stated that, as the Minister of Defense, he gave a speech about human rights every year on May 7, during the celebration of Soldier's Day. Tr. at 1299:15-1300:1.

When questioned whether the ESAF committed acts of torture and extrajudicial killings from 1983 to 1989, the respondent testified that he does not know of any specific act of torture, but stated that it was possible that the armed forces committed acts of extrajudicial killing during that time period. Tr. at 1339:1-12.

III. STATEMENT OF THE ISSUES

1. Did the Immigration Judge correctly admit and consider the expert testimony and report of Professor Terry Karl and the United Nations Truth Commission Report?
2. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(II), for assisting or otherwise participating in the extrajudicial killings of Manuel Toledo and Vincio Bazzaglia?

3. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(II), for assisting or otherwise participating in the extrajudicial killings of four American churchwomen?
4. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(II), for assisting or otherwise participating in the Sheraton Hotel extrajudicial killings?
5. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(II), for assisting or otherwise participating in the extrajudicial killings in the Las Hojas massacre?
6. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(II), for assisting or otherwise participating in the Puerto del Diablo extrajudicial killings?
7. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(II), for assisting or otherwise participating in extrajudicial killings in the San Sebastian/La Cebadilla massacre?
8. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(II), for assisting or otherwise participating in countless other extrajudicial killings committed by the El Salvador Armed Forces from 1979 to 1989?
9. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(I), for assisting or otherwise participating in the torture of Dr. Juan Romagoza Arce?

10. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(I), for assisting or otherwise participating in the torture of Daniel Alvarado?
11. Was the Immigration Judge correct in determining that the respondent is removable under INA § 237(a)(4)(D), as it relates to INA § 212(a)(3)(E)(iii)(I), for assisting or otherwise participating in countless other acts of torture committed by the El Salvador Armed Forces from 1979 to 1989?
12. Was the Immigration Judge correct in determining that the political question doctrine does not apply in administrative removal proceedings before the Immigration Courts?
13. Was the Immigration Judge correct in determining that the Immigration Judge lacks authority to apply the doctrine of equitable estoppel to prevent the respondent's removal from the United States?
14. Was the Immigration Judge correct in determining that the 2004 amendments adding the torture and extrajudicial killings provisions to the Immigration and Nationality Act apply retroactively?

IV. ARGUMENT

A. Standard of Review

In reviewing an Immigration Judge's decision, findings of fact, including credibility determinations, are reviewed under the clearly erroneous standard. *See Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003). A finding of fact "may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." *Id.* (internal quotations omitted). Rather, a finding is clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that

a mistake has been committed." *Id.* (internal citations omitted). The Board exercises *de novo* review over questions of law and discretion. *See id.*

B. Summary of the Argument

To prove that the respondent is removable as charged in the NTA and I-261, DHS must prove by clear and convincing evidence that: 1) an act of torture or extrajudicial killing was committed in El Salvador; 2) the act of torture or extrajudicial killing was committed under the color of law; and 3) the respondent assisted or otherwise participated in the act of torture or extrajudicial killing. The clear and convincing evidence standard requires that the fact-finder have "an abiding conviction that the truth of [the] factual contentions are highly probable." *See Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). The Board has held that the "ordered, incited, assisted or otherwise participated" in terms "'are to be given broad application' and 'do not require direct personal involvement in the acts of persecution.'" *Matter of D-R-*, 25 I&N Dec. 445, 452 (BIA 2011) (quoting *Matter of A-H-*, 23 I&N Dec. 774, 784 (A.G. 2005)).

First, the Immigration Judge correctly admitted into evidence the U.N. Truth Commission Report and Professor Karl's testimony and written report. The Immigration Judge properly determined that this evidence is relevant and probative, and therefore admissible in immigration court. Further, the evidence would be admissible even if the more restrictive Federal Rules of Evidence applied.

Further, as discussed in more detail below, the Immigration Judge correctly determined that the respondent assisted or otherwise participated in acts of torture and extrajudicial killings by obstructing investigations into extrajudicial killings; by failing to investigate allegations of ESAF involvement in acts of torture and extrajudicial killings; by failing to discipline ESAF officers who committed acts of torture and extrajudicial killings; by protecting from prosecution

officers who committed acts of torture and extrajudicial killings; by intimidating those who accused the ESAF of being involved in human rights abuses; and by promoting known human rights abusers into positions of power and authority. All of these actions by the respondent sent a clear message to members of the Salvadoran Armed Forces that they could commit torture and extrajudicial killings with impunity, and that this could in fact enhance their military careers. In advancing the efforts of the ESAF through such means, the respondent assisted or otherwise participated in the extrajudicial killings and torture committed by the ESAF. *See A-H-*, 23 I&N Dec. at 784; *D-R-*, 25 I&N Dec. at 452. Further, the Immigration Judge correctly determined that the respondent assisted and participated in the torture of Dr. Juan Romagoza by interrogating Dr. Romagoza while he was being tortured by others, and by failing to order Dr. Romagoza's release from custody.

Finally, the Immigration Judge properly determined that the political question doctrine and the doctrine of equitable estoppel do not apply in administrative immigration proceedings, and that the torture and extrajudicial killing provisions of the INA apply retroactively.

Therefore, based on all of the above, and the detailed discussion below, DHS respectfully requests that the Board affirm the Immigration Judge's decision ordering that the respondent be removed from the United States.

C. Analysis

1. The Immigration Judge Properly Admitted Dr. Karl's Expert Witness Report and Testimony and the U.N. Truth Commission Report.

The respondent argues that the Immigration Judge improperly admitted and relied upon the testimony and report of DHS's expert witness, Dr. Terry Karl, and the U.N. Truth Commission report. *See* Respondent's Initial Brief at 13. The respondent argues that this

evidence is "incompetent, inadmissible hearsay and its consideration would be improper," and that the admission of the evidence violates the respondent's due process rights because he "has no way of effectively cross-examining the hearsay declarants." *See id.* at 13-14. The Immigration Judge found that "the U.N. Truth Commission Report and Dr. Karl's Report are relevant and probative to these proceedings," and admitted them over the respondent's objections. *See* I.J. at 101 (Feb. 22, 2012).

In immigration proceedings, "the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair." *D-R-*, 25 I&N Dec. at 458 (internal quotations and citations omitted). "It is well settled that the Federal Rules of Evidence are not binding in immigration proceedings and that the Immigration Judges have broad discretion to admit and consider relevant and probative evidence." *Id.* Further, the "immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7(a). Thus, "[h]earsay is admissible in immigration proceedings if it is reliable and probative." *D-R-*, 25 I&N Dec. at 461.

The Immigration Judge found that both reports are relevant and probative, and this factual finding is not clearly erroneous. *See* I.J. at 101-02 (Feb. 22, 2012). Further, this evidence is reliable. The 1993 Truth Commission Report summarizes the findings of the extensive investigation the Truth Commission conducted after the peace accords ended the Salvadoran civil war in 1992. Professor Karl's testimony and report were based upon her decades of research, which has included extensive travel in El Salvador and interviews with individuals on all sides of the conflict.

Further, both the Truth Commission Report and Professor Karl's testimony would be admissible in court even under the more restrictive Federal Rules of Evidence. The United States Court of Appeals for the Sixth Circuit has specifically addressed the admissibility of the Truth Commission Report under the Federal Rules of Evidence, holding that the report was properly admitted into evidence under Rule 803(8)(C), the Public Records and Reports exception to the hearsay rule. *See Chavez v. Carranza*, 559 F.3d 486, 496 (6th Cir. 2009). The same court also determined that testimony from Professor Karl, as an expert witness, was admissible under the rules of evidence since "[e]xperts may base their testimony on inadmissible facts 'of a type reasonably relied upon by experts in the particular field.'" *Id.* at 497 (quoting Fed. R. Evid. 703). Further, an expert witness is "permitted to base his [or her] opinion on hearsay evidence and need not have personal knowledge of the facts underlying his [or her] opinion." *D-R-*, 25 I&N Dec. at 460 (quoting *Aguilar-Ramos v. Holder*, 594 F.3d 701, 706 n.7 (9th Cir. 2010)). "[A]n expert opinion may include reasonable inferences that the expert draws from the available facts and data." *Id.* Thus, the admission of the Truth Commission Report and of Professor Karl's testimony and report is not fundamentally unfair, and it was proper for the Immigration Judge to admit them into evidence and rely on them in deciding the case.

The respondent also argues, as mentioned above, that the admission of Professor Karl's testimony and report and the Truth Commission Report violates his due process rights because "there is no way that Respondent can effectively cross-examine the declarants whose out-of-court statements have been referenced or relied upon." Respondent's Initial Brief at 15. The respondent does not cite to any relevant statute, regulation, or case stating that hearsay is inadmissible in immigration proceedings because of a respondent's inability to cross-examine the declarant. The only case he cites, *Alford v. United States*, 282 U.S. 687, 689-90 (1931), is a

criminal case in which the criminal defendant's cross-examination of a fact witness who testified on direct was limited by the trial court. In the instant case, the respondent's right to cross-examine the witnesses who testified before the court was never limited, and, in fact, the respondent conducted extensive cross-examination of Professor Karl.[34] Tr. at 654-821. Further, as discussed above, Professor Karl testified as an expert witness, and was therefore entitled to more latitude than a fact witness.

Additionally, by definition, hearsay is an out-of-court statement made by a declarant. Fed. R. Evid. 801(c). Thus, most hearsay involves situations in which the declarant is unavailable for cross-examination. Importantly, case law consistently holds that hearsay evidence is admissible in immigration proceedings, and that any rule prohibiting hearsay evidence would be detrimental to respondents trying to prove their eligibility for relief. *See, e.g., D-R-*, 25 I&N Dec. at 461 (citing *Duad v. United States*, 556 F.3d 592, 596 (7th Cir. 2009)). Thus, the respondent's argument that the Truth Commission Report and Professor Karl's testimony and report are not admissible because they contained hearsay evidence is without merit under applicable case law, and the Immigration Judge properly admitted them into evidence.

2. <u>The Respondent Assisted or Otherwise Participated in Extrajudicial Killings and Acts of Torture During the 1980s in El Salvador.</u>

Because the respondent was admitted to the United States, DHS bears the burden of proving by clear and convincing evidence that the respondent is removable. *See* INA § 240(c)(3)(A). The clear and convincing evidence standard requires that the fact-finder have "an

[34] DHS also notes that many of the Department of State cables Professor Karl relied on for her report and testimony were authored by Ambassadors White and Corr, both of whom testified in court and were questioned by the respondent. *See* Prof. Karl's Report, Exh. 5 Tab ZZZ at 1206 n.13, 1210 n.33, 1229 n.98; Tr. at 149, 978. Indeed, Ambassador Corr was the respondent's witness. Tr. at 978.

abiding conviction that the truth of [the] factual contentions are highly probable." *See Colorado v. New Mexico*, 467 U.S. at 316. Thus, the clear and convincing evidence standard does not require that DHS prove the factual allegations beyond all doubt. Rather, DHS must only prove that the allegations are "highly probable." *See id.*

The NTA and I-261 allege that the respondent is removable from the United States under INA § 237(a)(4)(D) as an alien who has assisted or otherwise participated in acts of torture or extrajudicial killings. *See* Exh. 1; Exh. 1A. Section 237(a)(4)(D) of the INA states that any alien described in clause (i), (ii), or (iii) of INA § 212(a)(3)(E) is deportable. Section 212(a)(3)(E)(iii)(I) of the INA applies to an alien who "outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission" of "any act of torture, as defined in section 2340 of title 18, United States Code." Section 212(a)(3)(E)(iii)(II) of the INA applies to an alien who "outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission" of "any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991," under the color of law of any foreign nation.

Hence, to establish the respondent's removability, DHS must prove that it is highly probable that: 1) an act of torture or extrajudicial killing was committed in El Salvador; 2) the act of torture or extrajudicial killing was committed under the color of law; and 3) the respondent assisted or otherwise participated in the act of torture or extrajudicial killing. *See* I.J. at 103 (Feb. 22, 2012) (setting forth the same three elements in a different order).

The respondent does not dispute in his brief that there were extrajudicial killings and acts of torture committed in El Salvador during the relevant time period. Further, the respondent does not argue anywhere in his brief that the torture and killings were not committed under color of law, or that the respondent's relevant actions were not under the color of law. Rather, the

respondent only disputes that the evidence of record proves that he assisted or otherwise participated in acts of torture or extrajudicial killings. *See generally* Respondent's Initial Brief at 15-25.

While there is relatively little case law interpreting the phrase "assisted or otherwise participated in," as used in the torture and extrajudicial killings provisions of the INA, the Board of Immigration Appeals ("Board") recently addressed the issue in *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011). Given the dearth of case law interpreting this phrase in the context of extrajudicial killing and torture, the Board looked to case law interpreting the identical phrase in the context of the INA's persecutor bar,[35] as well as to cases interpreting similar language from the World War II era Displaced Persons Act of 1948 (DPA) and the 1978 Holtzman Amendment.[36] *See id.* at 452-53 (citing, *inter alia, Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005) (persecutor bar), and *Kalejs v. INS*, 10 F.3d 441, 444 (7th Cir. 1993) (Holtzman amendment)). Citing *A-H-*, the Board stated that the "ordered, incited, assisted, or otherwise participated in" terms "'are to be given broad application' and 'do not require direct personal involvement in the acts of persecution.'" *D-R-*, 25 I&N Dec. at 452 (quoting *Matter of A-H-*, 23 I&N Dec. at 784).

The United States Court of Appeals for the Eleventh Circuit has also interpreted the "assisted or otherwise participated in" language in the context of the persecutor bar for asylum,

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[35] The persecutor bar prevents an alien from obtaining asylum and withholding of removal, as well as other benefits, if the alien "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* INA §§ 208(b)(2)(A)(i) and 241(b)(3)(B)(i).

[36] The Displaced Persons Act of 1948 (DPA), which provided for the resettlement of certain people displaced by WWII, made a person ineligible for a visa under the DPA if the alien "assisted the enemy in persecuting civil populations," and the Holtzman amendment denies admission to the United States of, and provides for the deportation of, Nazi persecutors if such person "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." *See Chen v. Holder*, 513 F.3d 1255, 1258 (11th Cir. 2008).

likewise looking to cases interpreting the DPA and the Holtzman amendment.[37] In *Chen v. Holder*, 513 F.3d 1255, 1259 (11th Cir. 2008), the Eleventh Circuit held that the test to determine whether an asylum applicant is barred from receiving asylum or withholding of removal "due to assistance or participation in persecution is a particularized, fact-specific inquiry into whether the applicant's personal conduct was merely indirect, peripheral and inconsequential association or was active, direct and integral to the underlying persecution." The court held that Chen, who guarded women detained in a facility until their scheduled forced abortions, assisted in persecution. *Id.* at 1260. The court concluded that "Chen's conduct—voluntarily overseeing the confinement of women scheduled for forced abortions—clearly was direct and integral to the ultimate acts of persecution performed." *Id.* at 1260.

Additionally, contrary to the respondent's argument that to be removable an alien must have personally participated in the torture or extrajudicial killings (*see* Respondent's Initial Brief at 22), the case law is clear that an alien need not have personally participated in the act and does not even need to be physically present in order to assist or otherwise participate in acts of torture or extrajudicial killings. In *Matter of A-H-*, the Attorney General considered whether a "self-proclaimed leader-in-exile" of a terrorist group was barred from withholding of removal for inciting, assisting, or otherwise participating in persecution where the individual "made widely published statements that could be read as encouraging or condoning violent actions." 23 I&N

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[37] The Supreme Court has held that case law interpreting the DPA is not controlling when considering claims of duress or coercion raised in asylum and withholding of removal cases under INA §§ 101(a)(42), 208(b)(2)(A)(i), and 241(b)(3)(B)(i). Prior to the Supreme Court's decision in *Negusie v. Holder*, 555 U.S. 511 (2009), *Fedorenko v. United States*, 449 U.S. 490 (1981), was often relied on when affirming a denial of asylum or withholding in cases where the petitioner claimed to have persecuted others under coercion or duress. *Negusie's* discussion of the persecutor bar was limited to whether there is a duress exception and did not address the question of what conduct constitutes "assistance" in persecution. *Fedorenko* and its progeny are therefore instructive when considering whether particular actions constitute assistance in persecution. Particularly useful is footnote 34 in *Fedorenko*, which provides an analysis on the spectrum of activities that could constitute "assistance in persecution." Additionally, *Fedorenko* discussed the DPA, and not the Holtzman amendment. Thus, although not binding on the question of duress, the Nazi persecutor cases interpreting the Holtzman amendment are likewise still persuasive authority on what constitutes assistance in persecution.

Dec. at 785. Interpreting the "incited, assisted, or otherwise participated in" language of the persecutor bar, the Attorney General held that the "plain meaning of the relevant words in the statute is broad enough to encompass aid and support provided by a political leader to those who carry out the goals of the group, including statements of incitement or encouragement and actions that result in advancing the violent activities of the group." *Id.* at 784. The Attorney General further stated that "(1) these terms are to be given broad application; (2) they do not require direct personal involvement in the acts of persecution; (3) it is highly relevant whether the alien served in a leadership role in the particular organization; and (4) in certain circumstances statements of encouragement alone can suffice." *Id.* at 784-85 (citations omitted). Thus,

> a person ... who is a leader-in-exile of a political movement may be found to have 'incited,' 'assisted,' or 'participated in' acts of persecution in the home country by an armed group connected to that political movement. Examples of evidence that could support such a finding would include evidence ... that he used his profile and position of influence to make public statements that encouraged those atrocities, or evidence that he made statements that appear to have condoned the persecution without publicly and specifically disassociating himself and his movement from the acts of persecution, particularly if his statements appear to have resulted in an increase in the persecution.

Id. at 785.

Other circuits have also addressed the issue. In *United States v. Koreh*, 59 F.3d 431, 440 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit held that "assisting in" persecution included the acts of a Hungarian newspaper editor during World War II who allowed the publication of numerous anti-Semitic articles, stating that the articles "foster[ed] a climate of anti-Semitism ... which conditioned the Hungarian public to acquiesce, to encourage, and to carry out the abominable anti-Semitic policies of the Hungarian government in the early 1940s." Further, the court concluded that "[t]here need be no personal participation ... in the commission of physical atrocities" for a person's actions to constitute assistance in persecution. *Id.* at 442.

The Immigration Judge in the instant case primarily relied on the Board's formulation in *D-R-* that an alien will be considered to have assisted or otherwise participated in extrajudicial killings where the alien "'knew or should have known that his subordinates committed [extrajudicial killings],' and did not take 'reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.'" I.J. at 106 (quoting *D-R-*, 25 I&N Dec. at 453) (alteration in original). However, the case law addressing assistance or other participation in acts of persecution, torture, and extrajudicial killings, as discussed above, suggests that an even broader interpretation of this ground of removability would be appropriate.

Thus, as outlined above, for an alien to be found to have assisted or otherwise participated in an act of torture or extrajudicial killing, the alien's actions must be active, direct, and integral to the torture or extrajudicial killing, although the alien need not have been personally involved in the torture or extrajudicial killing. Further, where the act of torture or extrajudicial killing was committed by an organization of which the alien was a member, the alien's assistance in the torture or extrajudicial killing may be inferred from the circumstances and the alien's role in the organization, especially where the alien was a high-level officer in the organization. Additionally, the "assisted or otherwise participated in" language is to be construed broadly and liberally.

In his decision, the Immigration Judge outlined specific instances in which the respondent had assisted or otherwise participated in acts of torture or extrajudicial killing. Each of these is addressed in the subsections that follow.

a) The Immigration Judge correctly found that the respondent assisted or otherwise participated in the extrajudicial killings of Manuel Toledo and Vincio Bazzaglia.

On October 3, 1980, members of the National Guard captured Vincio Bazzaglia and Manuel Toledo and handed the two young men over to "armed men out of uniform."[38] Observers were able to film and photograph the incident.[39] Both men were killed, and the mother of Manuel Toledo was able to recognize her son's body. Mrs. Toledo showed the pictures to the respondent, who identified the captors as guardsmen and the vehicle as one the National Guard used.[40] The respondent "attempted to impede Mrs. Toledo's investigation by requesting the original photos." I.J. at 109 (Feb. 22, 2012). The Immigration Judge found that the respondent assisted or otherwise participated in these acts of extrajudicial killings in that the respondent "knew that his subordinates … committed the extrajudicial killings of Manuel Toledo and Vincio Bazzagalia, and did not take 'reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators.'" I.J. at 109-10 (Feb. 22, 2012) (quoting *D-R-*, 25 I&N Dec. at 453).

The respondent does not directly dispute the Immigration Judge's findings regarding the Bazzaglia/Toledo killings. Rather, the respondent generally argues that the Immigration Judge should not have admitted or relied on the expert testimony and report of Dr. Karl or the UN Truth Commission Report. As argued above, the Immigration Judge properly relied on these pieces of evidence, and therefore the Immigration Judge's factual findings based on that evidence are not clearly erroneous and should be affirmed by the Board.

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[38] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1232.
[39] Richard Alan White, Rule Without Law: El Salvador, 4 Human Rights Quarterly 149 (Spring 1982), Exh. 5 Tab UUU at 1176-80
[40] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1232

The respondent also generally argues that DHS failed to prove that he "personally engaged in any conduct that could be deemed 'assistance of' or 'participation in' acts of torture or extrajudicial killing." Respondent's Initial Brief at 24. He further argues that there is no evidence that he "directly committed or participated in" any extrajudicial killing, and that there is "no evidence of any 'personal conduct' by Respondent that could be deemed to constitute 'participation' in" any extrajudicial killing. Respondent's Initial Brief at 22. As discussed above, case law provides that the statute has broad applicability and does not apply only to those who personally commit an unlawful extrajudicial killing. Rather, an alien can "assist or otherwise participate" in extrajudicial killings when, like the respondent, he fostered a climate in which extrajudicial killings could flourish. Moreover, the respondent's actions advanced the violent activities of the ESAF by failing to punish those responsible for extrajudicial killings and failing to investigate the extrajudicial killings, despite having the authority and power to do so. *See Koreh*, 59 F.3d at 440; *A-H-*, 23 I&N Dec. at 784. Thus, the Immigration Judge correctly found that the respondent is removable for having assisted or otherwise participated in the Bazzaglia/Toledo extrajudicial killings.

b) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in the extrajudicial killings of four American churchwomen.

On December 2, 1980, members of the National Guard kidnapped, raped, tortured, and murdered four American churchwomen as they left the San Salvador international airport.[41] Four low-level National Guardsmen were convicted in the killings and in 1998 admitted that they acted after receiving orders from above.[42] The UN Truth Commission found that then-Colonel

[41] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1241-42.
[42] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1243.

Carlos Eugenio Vides Casanova, Director General of the National Guard, "facilitated the cover-up of the facts which obstructed the corresponding judicial investigation."[43]

The Immigration Judge found that the respondent "1) had knowledge that National Guardsmen had confessed to involvement in the murders; 2) failed to competently investigate Guardsmen under his command; 3) obstructed U.S. efforts to investigate the murders; and 4) excessively delayed bringing the Guardsmen to justice, fostering an expectation of impunity for extrajudicial killings." I.J. at 113 (Feb. 22, 2012); *see also* I.J. at 4 (Aug. 16, 2012). Thus, the Immigration Judge concluded that the respondent assisted or otherwise participated in the extrajudicial killings of the four American churchwomen. *See* I.J. at 115 (Feb. 22, 2012).

The respondent does not specifically dispute the Immigration Judge's findings regarding the Churchwomen murders. Instead, he asserts that DHS improperly argues that "even if Respondent's actions do not constitute 'assistance' or 'participation' within the terms of the statute, he should still be deemed subject to removal because Congress specifically enacted the statute with him in mind," apparently referencing DHS's argument in its post-hearing brief regarding the legislative history of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458. Respondent's Initial Brief at 24; DHS's Post-Hearing Brief at 41-43. While the statutory provisions providing for the removal of aliens who have assisted or otherwise participated in acts of torture or extrajudicial killings were clearly written for the purpose of divesting this respondent and other human rights violators like him of the opportunity to enjoy safe haven in the United States, DHS has not argued, and is not now arguing, that the respondent is removable irrespective of the evidence of record. Rather, DHS argues that the respondent, by obstructing and impeding the investigation into the torture and murder of the four churchwomen, as found by the Truth Commission and the Immigration Judge, assisted or

[43] Truth Commission Report, Exh. 2 Tab A at 64.

otherwise participated in torture and extrajudicial killings. This argument is supported by the legislative history to the law adding the torture and extrajudicial killing provisions to the INA, which makes it clear that Congress intended for actions that cover up and conceal torture and extrajudicial killings be considered assistance and participation in those acts of torture and extrajudicial killing. *See* Anti-Atrocity Alien Deportation Act of 2003, S.710, S. Rep. No. 108-209 (2003), Exh. 2 Tab C at 373-74.

c) The Immigration Judge correctly found that the respondent assisted or otherwise participated in the Sheraton Hotel extrajudicial killings.

On January 3, 1981, two National Guard members killed Jose Rodolfo Viera Lizama, President of El Salvador's land reform organization, and Michael P. Hammer and Mark David Pearlman, United States citizen advisers, while they were at the restaurant at the Sheraton Hotel in San Salvador.[44] The actual triggermen, lower-level National Guardsmen, were eventually convicted for their involvement.[45] The Immigration Judge found that officers of the National Guard ordered the extrajudicial killings and other officers within the National Guard participated in the planning of the killings. *See* I.J. at 117 (Feb. 22, 2012). Specifically relating to the respondent, the Immigration Judge found that the respondent "knew that the National Guard officers were suspected in the murders no later than September 1982"; that as the "Director General of the National Guard, he had the duty and resources to investigate the extrajudicial killings, but failed to do so in a competent manner"; that the respondent "obstructed the U.S. investigation and displayed a lack of commitment to ensuring the perpetrators of the crime were brought to justice"; that by his actions the respondent "sent a message to troops under his command that extrajudicial killings … could be committed with impunity"; and that by

[44] Truth Commission Report, Exh. 2 Tab A at 144.
[45] Exh. 5 Tab ZZZ at 1245.

promoting one of the officers directly associated with the murders, the respondent "sent a message to troops under his command that a career in the Salvadoran Armed Forces would not be affected by extrajudicial killings." I.J. at 120 (Feb. 22, 2012). The Immigration Judge therefore concluded that the respondent assisted or otherwise participated in the extrajudicial killings at the Sheraton Hotel.

The respondent does not specifically address the Immigration Judge's findings in this case, but generally argues that there is no evidence that the respondent "took personal action to promote or facilitate" extrajudicial killings. Respondent's Initial Brief at 25. However, as discussed above, the INA does not require that the alien be personally involved in the killing for the alien to have assisted or otherwise participated in the killing. Rather, as the Attorney General held in *Matter of A-H-*, "actions that result in advancing the violent activities of the group" constitute assistance or other participation in those violent activities. 23 I&N Dec. at 784. As the Immigration Judge found in this case, the respondent's actions created a climate of impunity and sent a message to troops that they could commit extrajudicial killings without it affecting their military career. I.J. at 120 (Feb. 22, 2012). Further, as discussed above with the Churchwomen murders, obstructing and impeding an investigation in the killings, and protecting those responsible, also constitutes assistance or participation in extrajudicial killings. Thus, the Immigration Judge properly found that the respondent assisted or otherwise participated in the Sheraton Hotel extrajudicial killings.

d) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in extrajudicial killings in the Las Hojas massacre.

On February 22, 1983, members of the Salvadoran Army, on a military operation in Las Hojas, detained approximately 74 of the area's residents, took them to the nearby river, and shot

them at point-blank range.[46] Relating to the respondent, the Immigration Judge found that the respondent "did not properly investigate or hold accountable the officers he believed to be responsible" for the massacre. I.J. at 122 (Feb. 22, 2012). By protecting the officers involved in the massacre, the respondent "sent a message that extrajudicial killings—even large scale massacres—could be committed by military personnel with impunity." *Id.* Thus, the Immigration Judge concluded that the respondent assisted or otherwise participated in the Las Hojas extrajudicial killings. *See id.*

Again, the respondent does not specifically address the Immigration Judge's findings regarding the Los Hojas massacre, instead arguing generally that there is no evidence that he was personally involved in any extrajudicial killing. Respondent's Initial Brief at 24-25. However, as with the previous cases discussed above, the respondent's actions in this case "advanc[ed] the violent activities," namely the torture and the extrajudicial killings, of the ESAF by creating a climate in which extrajudicial killings could be committed with impunity and by obstructing the investigation and protecting the officers. *A-H-*, 23 I&N Dec. at 784. Thus, the Immigration Judge's finding that the respondent assisted or otherwise participated in the Los Hojas massacre is correct and should be affirmed.

e) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in the Puerto del Diablo extrajudicial killings.

On January 31, 1988, in Canton Melendez, three individuals were killed and their bodies were dumped at Puerto Del Diablo.[47] An eyewitness identified one of the abductors as a member

[46] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1235-36
[47] Exh. 3 Tab TT at 665.

of the National Guard whom they knew as "Tony."[48] Upon the order of a civilian judge to provide the names of the soldiers patrolling that area on the night of the incident, the respondent offered a list of 450 names, including 50 "Antonios."[49] At one point, when a bishop had accused the ESAF of being involved in the murders, the respondent "'reacted angrily' to the accusation 'with an expression of outrage obviously intended to intimidate the Bishop from further declarations of this sort.'" I.J. at 123-24 (Feb. 22, 2012) (quoting Corr's Post Reporting Plan Cable, Exh. 3, Tab UU at 686 and 694). The Immigration Judge found that the respondent "effectively obstructed the judicial investigation" of the murders by his response to the judicial request for names of soldiers, and that the respondent's statement to the Bishop, designed to intimidate the Bishop from accusing members of the ESAF of the extrajudicial killings, "effectively sent a message to the military that he was willing to protect their violent activities, including extrajudicial killings." I.J. at 125-26 (Feb. 22, 2012). Thus, the Immigration Judge found that the respondent assisted or otherwise participated in the Puerto del Diablo extrajudicial killings. *See id.* at 126.

As with the other cases, the respondent does not specifically address the Immigration Judge's findings in this case, making only general arguments regarding the evidence of record. However, as with the earlier cases discussed above, the respondent's actions in obstructing the judicial investigation into the Puerto del Diablo murders and in intimidating the Bishop advanced the violent activities of the ESAF, and thus constitute assistance or participation in those extrajudicial killings. The Immigration Judge's finding that the respondent assisted or otherwise participated in the Puerto del Diablo extrajudicial killings is correct, and should be affirmed.

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[48] Corr's Post Reporting Plan Cable, Exh. 3 Tab UU at 694-95; Prof. Karl's Report, Exh. 5 Tab ZZZ at 1230.
[49] Corr's Post Reporting Plan Cable, Exh. 3 Tab UU at 695.

f) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in extrajudicial killings in the San Sebastian/La Cebadilla massacre.

On September 21, 1988, members of the Jiboa Battalion of the Army executed ten peasants on the order of the Chief of Intelligence for the Fifth Brigade.[50] A fictitious ambush was staged in order to blame these murders on the FMLN.[51] The Immigration Judge found that the respondent had "publicized the false version as fact before undertaking a competent investigation of the incident"; that he "protected Col. Chaves Caceres from prosecution for his role in the murders"; and that by "showing no initiative to investigate the murders or hold anyone accountable, and by protecting officers involved in the incident, Respondent sent a message that extrajudicial killings could be committed by military troops unless the U.S. intervened." I.J. at 129-30 (Feb. 22, 2012). Thus, the Immigration Judge found that the respondent assisted or otherwise participated in the San Sebastian extrajudicial killings. I.J. at 130 (Feb. 22, 2012).

The respondent did not specifically address in his brief the Immigration Judge's findings as they relate to this incident, offering instead only a general argument regarding the lack of evidence that he personally was involved in any extrajudicial killing. *See* Respondent's Initial Brief at 16-25. The Immigration Judge's factual findings are well supported by the record and are not clearly erroneous. Further, the case law cited above supports the finding that the respondent's actions in protecting the officers involved in the killings and in covering up the true facts of the crime constitute assistance or participation in the San Sebastian extrajudicial killings. *See A-H-*, 23 I&N Dec. at 784; *D-R-*, 25 I&N Dec. at 452.

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[50] Prof. Karl's Report, Exh. 5, Tab ZZZ at 1239
[51] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1240-41.

g) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in countless other extrajudicial killings committed by the El Salvador Armed Forces from 1979 to 1989.

There can be no doubt that members of the Salvadoran National Guard and the ESAF committed countless extrajudicial killings, in addition to those specifically discussed above, during the respondent's tenure as Director General of the National Guard and as Minister of Defense. The United Nations Truth Commission Report,[52] dozens of U.S. Department of State cables,[53] U.S. Government reports,[54] reports by non-profit and nongovernmental organizations,[55] and Professor Karl's expert witness report[56] clearly establish that members of the Salvadoran National Guard and ESAF committed thousands of extrajudicial killings. Witnesses for both

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[52] *See* Truth Commission Report, Exh. 2 Tab A at 41. The Truth Commission report states that between January 1990 and July 1991, the Truth Commission received more than "22,000 complaints of serious acts of violence that occurred in El Salvador" during the civil war. *Id.* Of these complaints, 60 percent concerned extrajudicial killings, and 20 percent were complaints of torture. *See id.* Further, 60 percent of the complaints implicated members of the ESAF, and 25 percent of the complaints implicated members of the security forces. *See id.* Over the next 100 pages, the report details the evidence against the ESAF in 22 emblematic cases. *See id.* at 43-147. Additionally, one of the annexes to the Truth Commission report states that state actors (the military, security forces, or paramilitary forces) were responsible for 6,182 cases, or 84 percent of the total cases they received. *See* Truth Commission Annex, Exh. 5 Tab PPP at 1070A. Of the reports of torture received by the Truth Commission, 94 percent are attributable to the Salvadoran Armed Forces and Security Forces. *See id.* at 1072A.

[53] *See, e.g.*, Exh. 3 Tabs D, F, H, I, J, K, L, P, Q, V, Z, BB, CC, DD, EE, II, JJ, LL, OO, RR, SS, TT, UU, VV, YY, ZZ, CCC; Exh. 5 Tab RRR.

[54] *See* Harold R. Tyler, Jr., *The Churchwomen Murders: A Report to the Secretary of State* (Dec., 1983), Exh. 2 Tab B; U.S. Dep't of State, *Country Reports on Human Rights Practices* for the years 1981-1989, Exh. 4 Tabs FFF, GGG, HHH, III, JJJ, KKK, LLL, MMM, NNN, OOO.

[55] *See* William Bollinger and Deirdre A. Hill, *The Index to Accountability: An Overview of Perpetrators Implicated in Human Rights Violations in El Salvador, 1980-1990* (July 22, 1992), Exh. 5 Tab QQQ. The El Rescate database, which includes instances of human rights violations in El Salvador from 1980 to 1990 that were reported to Tutela Legal, reflects that over 20,000 civilians were killed by Salvadoran government forces, that over 11,000 of those were extrajudicial killings, that there were approximately 1,400 victims of torture at the hands of government agents, and that the National Guard was responsible for killing over 100 civilians. *See id.* at 1118, 1122-23, 1127-28. The report states that the pattern of violence "indicates beyond a reasonable doubt that the violations were systematic and part of a government policy which was applied throughout the agencies of the Salvadoran armed forces." *Id.* at 1129. Printouts of the El Rescate database for human rights violations committed by the National Guard from 1980 through 1989 can be found at Exhibit 4 Tab DDD at 754-843, and printouts of the El Rescate database for human rights violations committed by the military between 1983 and 1989 can be found at Exhibit 4 Tab EEE at 844-952.

[56] *See* Prof. Karl's Report, Exh. 5 Tab ZZZ. Professor Karl's report summarizes and evaluates the findings of several key reports regarding the security forces' and ESAF's commission of torture and extrajudicial killings. On page 1205 of her report, Exh. 5 Tab ZZZ, she writes that "[a]ll reliable sources, including U.S. government reports, scholarly writings, and non-governmental human rights reports, attribute the overwhelming majority of abuses against civilians to the El Salvadoran Armed Forces." She goes on to summarize the findings of the UN Truth Commission Report and the Department of Defense Rand Corporation Study, and also discusses the opinions of U.S. Ambassadors on the issue. *Id.* at 1205.

DHS (Professor Karl and Ambassador White) and the respondent (Ambassador Corr and Ambassador Passage) confirmed that the ESAF committed extrajudicial killings during the 1980s.

The scale of atrocities committed by the National Guard while the respondent held the position of Director General, and committed by the ESAF as a whole while the respondent was Minister of Defense, is staggering. "By the time [the respondent] stepped down from his position as Minister of Defense in 1989 … 70,000 civilians had been killed in the civil war, the overwhelming majority by the government security forces and paramilitary units."[57] Further, during the respondent's tenure as Director General, the National Guard had a reputation as one of the worst offenders in terms of human rights abuses.[58]

The Immigration Judge found that the "overwhelming" evidence in the record compelled the finding that "hundreds, if not thousands, of extrajudicial killings were committed by the Salvadoran National Guard … while Respondent was Director General and by the Salvadoran Armed Forces … while Respondent was Minister of Defense." I.J. at 132 (Feb. 22, 2012). Further, the Immigration Judge found that the respondent "engaged in a pattern of behavior ranging from complicity (by turning a blind eye to extrajudicial killings) to outright support (by promoting individuals known to be involved in extrajudicial killings)," and that his "lack of willingness to bring members of the Armed Forces who committed extrajudicial killings to justice fostered an environment of impunity where extrajudicial killings continued." *Id.* at 133. Thus, the Immigration Judge found that the respondent's actions were "'active, direct and integral' to the commission of the extrajudicial killings," and that he therefore assisted or

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[57] Prof. Karl's Report, Exh. 5 Tab ZZZ at 1201.

[58] *See* Ambassador Robert White, State Dep't Cable, *Conversation with UCS Leaders* (May 2, 1980), Exh. 3 Tab E at 418 (U.S. Embassy's Labor Attaché noted that "local national guard commanders bore much of the responsibility for the repression" in the countryside). Ambassador White and Ambassador Corr both testified before the Immigration Court that the National Guard was among the worst offenders in terms of human rights abuses.

otherwise participated in the thousands of extrajudicial killings committed by the National Guard and the ESAF. *Id.* (quoting *Chen*, 513 F.3d at 1259).

Once again, the respondent does not specifically challenge the Immigration Judge's factual findings regarding the thousands of additional unspecified extrajudicial killings committed by the ESAF and the respondent's role in assisting or otherwise participating in those extrajudicial killings. Instead, the respondent simply makes general arguments that he was not personally involved in any of the extrajudicial killings. *See* Respondent's Initial Brief at 16-25. The Immigration Judge previously considered and correctly rejected this argument, finding that the respondent's actions in obstructing judicial investigations into extrajudicial killings, protecting officers who committed extrajudicial killings from prosecution, and promoting officers who committed extrajudicial killings fostered a climate of impunity in which extrajudicial killings could continue, and that this conduct was active, direct, and integral to the extrajudicial killings. *See* I.J. at 133. The Immigration Judge's factual findings regarding the respondent's actions are supported by the record, and are not clearly erroneous. Further, the Immigration Judge correctly applied the pertinent case law, as discussed at length above, to find that the respondent assisted or otherwise participated in extrajudicial killings. Therefore, the Immigration Judge's finding that the respondent assisted or otherwise participated in thousands of additional, unspecified extrajudicial killings in El Salvador in the 1980s should be affirmed.

h) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in the torture of Dr. Juan Romagoza Arce.

Dr. Romagoza's testimony about the torture he suffered provides the clearest example of the respondent's assistance and participation in torture. Dr. Romagoza was a medical student during the civil war in El Salvador. Tr. at 335:1-6. He was captured by members of the National

Guard and Army in 1980 while he was in a rural area providing medical care to local peasants. Tr. at 348:22-349:4. Over a period of more than three weeks, he was brutally and repeatedly tortured by members of the National Guard at the National Guard Headquarters. Tr. at 366:8-25. During this three-week period, the respondent visited Dr. Romagoza in the torture chamber and interrogated him while National Guard members kicked him. Tr. at 377:1-7; 380:13-14; 380:18-24. At the end of Dr. Romagoza's captivity, the respondent watched as Dr. Romagoza was carried out of the National Guard headquarters. Tr. at 383:23-25; 384:7-11.

The Immigration Judge found that the respondent's "physical presence in the room and interrogation of Dr. Romagoza while another person kicked Dr. Romagoza and pulled worms from his wounds constitutes participation in torture." I.J. at 141 (Feb. 22, 2012). The Immigration Judge further found that the respondent's actions in visiting Dr. Romagoza in the torture chamber and not ordering his release constitutes assistance in torture under *Chen*, 513 F.3d at 1260. *See* I.J. at 141-42 (Feb. 22, 2012).

The respondent does not argue that the conduct described by Dr. Romagoza falls short of assistance or participation in torture. Rather, the respondent argues that Dr. Romagoza's identification of the respondent is not credible, pointing to certain inconsistencies in Dr. Romagoza's account of his torture. *See* Respondent's Initial Brief at 7. The Immigration Judge previously rejected the respondent's argument regarding credibility, and instead found that Dr. Romagoza's testimony was credible, despite the inconsistencies identified by the respondent. *See* I.J. at 137 (Feb. 22, 2012). The Immigration Judge's credibility determination is not clearly erroneous.

The Immigration Judge set forth specific reasons as to why he found Dr. Romagoza credible, including the internal consistency of the testimony, Dr. Romagoza's demeanor, his

emotions, and the fact he "took pains to answer the questions presented to him specifically and without exaggeration." *Id.* The respondent, however, argues that the Immigration Judge should have rejected Dr. Romagoza's testimony based on a study that discusses the ability of people to identify their interrogators. Respondent's Post-Hearing Brief at 9-10.

However, Dr. Romagoza testified that his identification of the respondent was not based solely on physical identification, as appears to be the case in the study relied on by the respondent. *See* Charles A. Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 International Journal of Law and Psychiatry 265, 269-70 (2004) (attached to the respondent's Motion in Limine). Dr. Romagoza testified that his identification of the respondent was based on a combination of having seen a portion of the respondent's face, the respondent's distinctive clothing, and having heard the respondent's voice. Dr. Romagoza also testified that he saw the respondent again as Dr. Romagoza was being carried from the National Guard headquarters. Further, Dr. Romagoza testified that he was very familiar with the respondent's face and voice, having often seen and heard the respondent on television, both before and after his capture. In contrast, in the study cited by the respondent, the study's participants did not know their interrogators prior to the interrogation. *See id.* at 268. Thus, the study cited by the respondent has little, if any, applicability to the testimony of Dr. Romagoza.

Thus, the Immigration Judge's finding that Dr. Romagoza's testimony was credible and that the respondent participated in the torture of Dr. Romagoza, is not clearly erroneous and should be affirmed.

i) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in the torture of Daniel Alvarado.

In August 1983, Pedro Daniel Alvarado was kidnapped by members of the Treasury Police Intelligence Section (also known as Section 2 or S-2). Tr. at 220:9-17; 238:17-19; 239:14-16. Under the direction of Major Ricardo Pozo, head of the Treasury Police Intelligence Section, he was brutally tortured into falsely confessing to the murders of Lieutenant Commander Albert Schaufelberger, a U.S. military advisor, and Vargas Amaya, a member of the Salvadoran parliament. Tr. at 249:9-250:17; 257:25-258:2; 258:9-14. After Mr. Alvarado gave the false confession, the Treasury Police took him to a press conference, headed by the Director of the Treasury Police, Colonel Nicolas Carranza. Tr. at 267:1-268:1; 268:11-13; 269:19-23; 272: 1-10. Eventually, U.S. FBI agents were able to interview Mr. Alvarado, determining that he had nothing to do with the murders. Tr. at 278:5-279:7; 280:11-23; 282-1-11. However, Mr. Alvarado was not released from Salvadoran government custody until April 1986, two and a half years after he was interviewed by the FBI. (Tr. at 293:10-17). In November 1983, Ambassador Pickering notified the respondent that Mr. Alvarado was tortured into falsely confessing to the murders. [59]

The Immigration Judge found that the respondent "was aware of the details of Mr. Alvarado's torture by the Treasury Police, but took no action to investigate or discipline the perpetrators until the United States demanded action"; that the only action the respondent eventually did take was to "transfer individuals to prestigious positions outside the country"; and that he "later promoted Maj. Pozo, the officer who supervised the torture, to lieutenant colonel." I.J. at 146 (Feb. 22, 2012). The Immigration Judge found that the respondent's actions "sent a

[59] *See* State Dep't Memorandum from James E. Thyden to Assistant Secretary of State Elliott Abrams, *Arrest and Torture of Pedro Daniel Alvarado Rivera in Connection with the Murder of Lt. Commander Albert Schaufelberger* (Nov. 15, 1983), Exh. 3 Tab EE at 617-19; Ambassador Thomas Pickering, State Dep't Cable, *Schaufelberger Case: Rivera Confession* (Nov. 11, 1983), Exh. 5 Tab SSS at 1142-44.

message to his subordinates that torture would be tolerated," and that the promotion of Major Pozo "sent a message to his subordinates that torture of civilians could enhance one's military career." *Id.* Thus, the Immigration Judge found that the respondent assisted or otherwise participated in the torture of Daniel Alvarado. *Id.*

The respondent argues that Mr. Alvarado has been proven to be a pro-guerrilla combatant, and therefore was not credible because he has a strong bias to fabricate evidence. *See* Respondent's Initial Brief at 6. However, Mr. Alvarado's testimony on both direct and cross was that he was not a pro-guerrilla combatant, and there is no evidence to the contrary. Tr. at 234-35; 309-14. In addition, the torture of Mr. Alvarado is corroborated by agents of the United States in several State Department documents.[60] The Immigration Judge's finding that Mr. Alvarado's testimony was credible is not clearly erroneous.

The respondent also argues that Mr. Alvarado's testimony does not show that the respondent personally participated in his torture because the only part of his testimony that relates to the respondent "is his claim that in November 1983, long after commission of the acts of torture he claims he was subjected to, he was visited in his jail cell by a colonel who claims to have been sent by Respondent." Respondent's Initial Brief at 5. However, this argument ignores the Immigration Judge's findings that the respondent failed to investigate the torture, failed to discipline or take any effective action against the torturers, and later promoted Major Pozo. *See* I.J. at 146 (Feb. 22, 2012). As discussed above in relation to the cases involving extrajudicial killings, the respondent's actions in this case advanced the illegal violent activities of the ESAF and created an environment in which members of the ESAF could torture people with impunity.

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[60] *See* State Dep't Memorandum from James E. Thyden to Assistant Secretary of State Elliott Abrams, *Arrest and Torture of Pedro Daniel Alvarado Rivera in Connection with the Murder of Lt. Commander Albert Schaufelberger* (Nov. 15, 1983), Exh. 3 Tab EE at 617-19; Ambassador Thomas Pickering, State Dep't Cable, *Schaufelberger Case: Rivera Confession* (Nov. 11, 1983), Exh. 5 Tab SSS at 1142-44.

See A-H-, 23 I&N Dec. at 784; *D-R-*, 25 I&N Dec. at 452. Thus, the Immigration Judge correctly determined that the respondent assisted or otherwise participated in the torture of Mr. Alvarado.

j) The Immigration Judge correctly determined that the respondent assisted or otherwise participated in countless other acts of torture committed by the El Salvador Armed Forces from 1979 to 1989

As with the countless acts of extrajudicial killings committed by the ESAF, as discussed above, the Immigration Judge found that there were substantial additional instances of torture committed by the National Guard from 1979 to 1983, and by the ESAF from 1983 to 1989, and that the respondent was aware of the torture being committed by those under his command. *See* I.J. at 147-48 (Feb. 22, 2012). The Immigration Judge found that the "vast number of reports of torture by the Salvadoran Armed forces between 1979 and 1989, Respondent's knowledge that torture was occurring, Respondent's clear authority and capacity to investigate such reports and discipline offenders," and the fact that the first time the Salvadoran Armed Forces investigated human rights allegations and found guilt on the part of active duty military officers was in 1989, "compel this Court to find that Respondent assisted or otherwise participated in torture." I.J. at 148. Further, the Immigration Judge found that the respondent's "failure to investigate reports of torture and bring perpetrators to justice … created an environment of impunity" for those who committed torture. *Id.* at 149.

The respondent does not dispute the factual findings of the Immigration Judge relating to the additional instances of torture, and the factual findings are not clearly erroneous based on the substantial evidence in the record regarding acts of torture committed by the ESAF. Further, the respondent's actions clearly advanced the violent activities of the ESAF, and therefore constitute assistance and participation in torture. *See A-H-*, 23 I&N Dec. at 784; *D-R-*, 25 I&N Dec. at 452.

Therefore, the Immigration Judge correctly determined that the respondent assisted or otherwise participated in countless other acts of torture, and the Immigration Judge's decision should be affirmed.

3. The Immigration Judge Correctly Determined that the Political Question Doctrine Does Not Apply to Administrative Removal Proceedings Before Immigration Courts.

The respondent argues that "removal should nevertheless be denied because ordering Respondent subject to deportation from the United States on the basis of the allegations made against him in this case would adversely implicate the policy considerations that underlay the so-called 'political question' abstention doctrine." Respondent's Initial Brief at 25. In advancing this argument, however, the respondent ignores the most important aspect of the political question doctrine—that it is grounded in separation of powers concerns, a concern not applicable in this case.

The Eleventh Circuit has held that the "political question doctrine emerges out of Article III's case or controversy requirement and has its roots in separation of powers concerns." *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1312 (11th Cir. 2001) (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)). "Political questions have been held to be nonjusticiable and therefore not a 'case or controversy' as defined by Article III." *Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009) (internal quotations omitted).[61] In short, the political question doctrine precludes Article III federal courts from reviewing "those

[61] The respondent cites a recent Eleventh Circuit case, *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011), and quotes from it at some length regarding the political question doctrine. Respondent's Initial Brief at 30-32. However, the *Mamani* Court's discussion of the political question doctrine is limited to one footnote, where the court holds that "[t]his case presents no political question: plaintiffs' tort claims require us to evaluate the lawfulness of the conduct of specific persons towards plaintiffs' decedents, not to decide the legitimacy of our country's executive branch's foreign policy decisions." *Mamani*, 654 F.3d at 1151 n.4. The rest of the decision discusses the issue of whether the plaintiff failed to state a claim under the Alien Tort Statute. *See id.* at 1151-52.

controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Id.* (internal quotations omitted).

As the Board is well aware, the Immigration Courts and the Board are not Article III courts, but rather are part of the Executive Office of Immigration Review of the U.S. Department of Justice, which is part of the Executive Branch. Similarly, the Department of Homeland Security is an Executive Branch agency. The Article III federal courts are, at this point, not involved in this case, and the respondent's separation of powers political question doctrine argument must therefore be rejected.

In his brief on appeal, the respondent fails to acknowledge that the Immigration Court and the Board are part of the Executive Branch. Instead, he suggests policy arguments as to why the political question doctrine should apply. *See* Respondent's Initial Brief at 39. Yet, even the respondent's policy arguments do not support his political question argument. The respondent argues that the "Respondent's actions in response to reports of torture and extrajudicial killings in El Salvador was supported completely and enthusiastically by United States officials," and that "it is indisputable that while there may have been some disagreement among U.S. diplomatic personnel themselves, Respondent was consistently and uniformly led to believe that his conduct was consistent with the 'official policy' of the United States." Respondent's Initial Brief at 39, 41. This argument ignores the testimony and evidence, cited in detail in DHS's Post-Hearing Brief at pages 38-41, that United States officials frequently confronted him about human rights abuses committed by the ESAF and made demands that specific steps be taken to curtail those abuses.

The respondent further argues that the political question doctrine applies because it would be improper for this "Court to now second-guess actions of Respondent which were consistent with official U.S. policy," and that it would constitute "an unwarranted and excessive intrusion into the foreign policy authority of the executive branch, and pose an unacceptable threat of potential disruption or embarrassment to the United States' exercise of foreign policy in Latin America." Respondent's Initial Brief at 39. However, the Immigration Judge's role in deciding the case was limited to determining whether the respondent's actions during the Salvadoran civil war constitute assistance or participation in any act of torture or extrajudicial killing, and the Board's role is to determine whether the Immigration Judge's factual findings are clearly erroneous and whether the Immigration Judge correctly applied the law. Congress has already determined that assistance or participation in torture or extrajudicial killings warrants removal from the United States, and the Immigration Judge's and the Board's respective roles are to apply the law as written by Congress. The Immigration Judge properly recognized that the political question doctrine does not apply to administrative immigration proceedings. *See* I.J. at 102 (Feb. 22, 2012). The Board should therefore affirm the Immigration Judge's refusal to apply the political question doctrine.

4. The Immigration Judge Correctly Determined that the Immigration Court Lacks Authority to Apply the Doctrine of Equitable Estoppel to Prevent the Respondent's Removal from the United States

The respondent also argues that DHS is estopped from removing the respondent from the United States under the doctrine of equitable estoppel because the United States government has "unclean hands." Respondent's Initial Brief at 41-42. The Immigration Judge rejected this argument, finding that the Immigration Courts do not have authority to apply the doctrine of equitable estoppel. *See* I.J. at 3 (Aug. 16, 2012).

The Board has held that the Board can only exercise "such discretion and authority conferred upon the Attorney General by law." *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 339 (BIA 1991). Equitable estoppel, however, is a "judicially devised doctrine" (*id.* at 338-39) and, because it is an equitable form of action, lies only in courts of equity. The Immigration Court and the Board are not courts of equity. Therefore, "the Board itself and the immigration judges are without authority to apply the doctrine of equitable estoppel against the Service [DHS] so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation." *Id.* at 338.

Further, as observed by the Eleventh Circuit, "it is far from clear that the doctrine of equitable estoppel may even be applied against a government agency." *Savoury v. U.S. Att'y Gen.*, 449 F.3d 1307, 1318 (11th Cir. 2006). The United States Supreme Court has never held that the doctrine may be applied against the government, and has "specifically declined to apply estoppel against the government in several cases in the immigration context." *Id.* (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422-23 (1990)). While the respondent cites cases from other jurisdictions, he cites to no case from the Eleventh Circuit to show that the doctrine of equitable estoppel can be applied to prevent DHS from lawfully removing an alien in accordance with the INA. Further, as noted by the *Savoury* court, the "Supreme Court has specifically declined to apply estoppel against the government in several cases in the immigration context." *Id.* (citing *INS v. Miranda*, 459 U.S. 14, 17-18 (1982); *INS v. Hibi*, 414 U.S. 5, 7-8 (1973); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961)). Thus, the respondent has not shown that the doctrine can be applied to prevent the Immigration Court from ordering the respondent's removal nor that it can be applied to prevent DHS from removing the respondent should an order of removal be issued.

Finally, even if the Board were to hold that the doctrine of equitable estoppel could be applied, the respondent has failed to show that all of the elements have been met. The traditional elements of the doctrine of equitable estoppel include "(1) words, conduct, or acquiescence that induces reliance; (2) willfulness or negligence with regard to the acts, conduct, or acquiescence; [and] (3) detrimental reliance." *Id.* (quoting *United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003) (brackets in original). In addition to the traditional elements of equitable estoppel, the respondent must prove that the government "engaged in affirmative misconduct," which "requires more than governmental negligence or inaction." *Id.* at 1319.

In the instant case, the respondent has not alleged affirmative misconduct, and instead simply states that the U.S. government has "unclean hands" because it knew how the Salvadoran government conducted the war, advised the Salvadoran government, and continued to provide funds and supplies for the war. *See* Respondent's Initial Brief at 42. However, the respondent is charged with removal for assisting or otherwise participating in acts of torture and extrajudicial killings. While the U.S. government indeed provided funds and equipment to the Salvadoran government during the civil war, the respondent fails to acknowledge that the U.S. government consistently and repeatedly told the respondent, in no uncertain terms, to stop the human rights abuses. *See generally* Department of Homeland Security's Post-Hearing Brief at 38-41 (providing discussion and citations to the record regarding meetings between U.S. government officials and the respondent wherein the respondent was told to stop the human rights abuses). It is clear that U.S. policy regarding the war in El Salvador was that human rights abuses had to stop, and in fact Congress specifically tied financial support for El Salvador to assurances that the Salvadoran government was improving its human rights record. *See id.* Thus, the respondent

has failed to prove that he was induced by any affirmative misconduct on the part of the U.S. government to commit acts of torture and extrajudicial killings.[62]

Thus, for all of the above reasons, the Board should affirm the Immigration Judge's decision refusing to apply the doctrine of equitable estoppel.

5. The Immigration Judge Correctly Determined that the 2004 Amendments Adding Torture and Extrajudicial Killing Provisions to the Immigration and Nationality Act Apply Retroactively.

Finally, the respondent argues that the "Government is barred from removing Vides since it is in violation of international law," arguing that "the provision used by the Government to deport Vides is an ex post facto law seeking application of a new law to events that happened nearly 30 years ago." Respondent's Initial Brief at 42. However, the law adding the torture and extrajudicial killing provisions to the INA specifically states that the provisions "shall apply to offenses committed before, on, or after the date of enactment of this Act." Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108-458, § 5501(c); *see also Matter of D-R-*, 25 I&N Dec. 445, 456 (BIA 2011) (holding that the extrajudicial killing provisions of the INA apply to killings that took place prior to the date of enactment of the IRTPA).

As to the respondent's argument that enforcement of the law would violate international law, it is well settled that the Immigration Court and the Board lack the authority "to pass on the validity of the statutes and regulations [they] administer." *Hernandez-Puente*, 20 I&N Dec. at 339; *see also D-R-*, 25 I&N Dec. at 456 ("neither the Immigration Judge nor this Board may rule

[62] Given the Immigration Judge's finding that the respondent assisted or otherwise participated in acts of torture and extrajudicial killings, the respondent's invocation of the doctrine of equitable estoppel in an attempt to prevent his removal also ignores the fact that the respondent himself lacks clean hands. One "of the most elementary and fundamental concepts of equity jurisprudence and a universal rule which affects the entire system of equity jurisprudence is the maxim that 'He who comes into equity must come with clean hands.' This principle is founded upon conscience and good faith." *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1341 (11th Cir. 2004) (quoting *Ryan v. Ryan*, 277 So.2d 266, 276 (Fla. 1973) (Roberts, J., dissenting)).

on the constitutionality of the statutes that we administer") (quoting *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1035 (BIA 1999)).

The Immigration Judge also found that the law applies retroactively, and that the Court "has no jurisdiction to assess whether the retroactivity of the statute indeed violates international law." I.J. at 3 (Aug. 16, 2012). The Immigration Judge's decision was correct, and the Board should likewise find that the statute is retroactive and that the Board lacks jurisdiction to determine whether the retroactivity of the statute violates international law.

V. CONCLUSION

The Immigration Judge properly found that the U.N. Truth Commission report and the testimony and report of Professor Karl were relevant and probative, and therefore admissible in immigration court. The Immigration Judge also properly determined that the respondent assisted or otherwise participated in the enumerated acts of torture and extrajudicial killings by obstructing investigations into extrajudicial killings; by failing to investigate allegations of ESAF involvement in acts of torture and extrajudicial killings; by failing to discipline ESAF officers who committed acts of torture and extrajudicial killings; by protecting from prosecution officers who committed acts of torture and extrajudicial killings; by intimidating those who accused the ESAF of being involved in human rights abuses; and by promoting known human rights abusers into positions of power and authority. All of these actions by the respondent sent a message to members of the Salvadoran Armed Forces that they could commit torture and extrajudicial killings with impunity and that this could in fact enhance their military careers. Thus, the respondent through his actions advanced the illegal violent activities of the ESAF, and thereby assisted or otherwise participated in acts of torture and extrajudicial killings. Further, the Immigration Judge correctly determined that the respondent assisted and participated in the

torture of Dr. Juan Romagoza by interrogating Dr. Romagoza while he was being tortured by others, and by failing to order Dr. Romagoza's release from custody. Finally, the Immigration Judge properly found that the political question doctrine and the doctrine of equitable estoppel do not apply in administrative immigration proceedings, and that the torture and extrajudicial killings provisions of the INA apply retroactively.

Therefore, for all of the above reasons, DHS respectfully requests that the Board affirm the Immigration Judge's decision ordering that the respondent be removed from the United States.

Respectfully submitted this 30 day of January, 2013.

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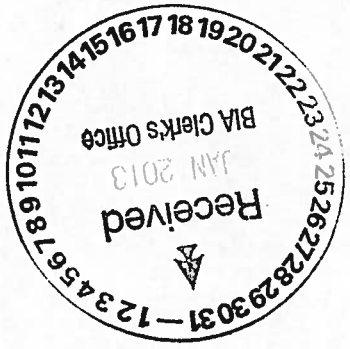

CERTIFICATE OF SERVICE

On January 30, 2013, I sent via first class mail a complete copy of this document to the respondent's attorney at the following address:

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