

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 02-22046-CIV-LENARD/BANDSTRA

OSCAR REYES, GLORIA REYES, JANE DOE)
I, JANE DOE II, ZENAIDA VELÁSQUEZ,)
HECTOR RICARDO VELÁSQUEZ)
)
Plaintiffs,)
)
v.)
)
JUAN EVANGELISTA LÓPEZ GRIJALBA)
(GRIJALVA))
)
Defendant.)

**STATEMENT OF MATERIAL FACTS AND MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

STATEMENT OF MATERIAL FACTS

I. Background On Military Abuses

From 1981 to 1984, between 100 and 150 people were disappeared by the Armed Forces in Honduras. *Velásquez Rodriguez Case, Inter-American Court of Human Rights, Judgment of July 29, 1988* (“IACHR”), ¶147(a),(b)-(d), attached at Ex. G;¹ *Report of Dr. Leo Valladares Lanza* (“Valladares Report”), 3, attached at Ex. H. Suspected “subversives” were detained and tortured. *IACHR*, ¶147(d); *Valladares Report*, 3; *Testimony of Florencio Caballero before the Senate Select Committee on Intelligence* (“Caballero Senate”), 6, attached at Ex. I.² Their detentions were not publicly announced. *IACHR*, ¶147(d). Most of the prisoners were killed. *Id.*, *Valladares Report*, 6. When their families and the media inquired about their whereabouts, the

¹ Admissible under Federal Rules of Evidence (“FRE”) 803(8), 803(6).

² Admissible under FRE 804(b)(1), 804(b)(3), and 803(8).

Armed Forces denied any knowledge about them. *IACHR*, ¶147(d); *Valladares Report*, 10; *Declaration of Zenaida Velásquez* (“*Z. Velásquez Decl.*”), ¶5, attached at Ex. A.

The Armed Forces were headed by the commander in chief. *Decree No. 180, Armed Forces Act, 2/25/75* (“*Decree 180*”), arts. 17, 18, attached at Ex. JJ. See also demonstrative chart, attached at Ex. II. Directly below the commander in chief in the chain of command was the *Estado Mayor General* (“General Staff”).³ *Id.*, arts. 30, 50-55. Below the General Staff, the Armed Forces were broken into several branches, including the Army, Navy, Air Force and, the most repressive of the institutions, the *Fuerza de Seguridad Pública* (“FUSEP”). *Id.*, arts. 16, 87-88; *State Department Telegram, “Reports of GOH Repression,” 6/17/81*, ¶¶2-3, attached at Ex. J;⁴ *Valladares Report*, 3.

FUSEP was essentially a national police force. *Decree No. 369, Organic Law of the Public Security Force, 9/21/76* (“*Decree 369*”), arts. 1, 2, 8, attached at Ex. K. Within FUSEP, the main body that monitored the activities of Honduran citizens, including people deemed to be “subversive”, was the *Dirección Nacional de Investigaciones* (“DNI”). *Id.*, arts. 1, 31; *Deposition of Juan Evangelista López Grijalba* (“*Grijalba Depo*”), 5/13/03, 17:6–20:8, attached at Ex. L. See also demonstrative chart, attached at Ex. HH. In furtherance of this function, DNI carried out disappearances and torture. *Caballero Senate*, 7; *Valladares Report*, 3-4.

The repression was implemented by not only DNI, but also by two extralegal death squads. One of the death squads, the Honduran Anti-Communist Liberation Army (“ELACH”) was involved in the murders of at least nine people between 1980 and 1984. *Cable, “Honduran Leftists Executed by the Honduran Anti-Communist Liberation Army Between 1980–1984,”*

³ *Estado Mayor* refers both to the institution, the Armed Forces General Staff, and the building in which the General Staff was headquartered.

⁴ Admissible under FRE 803(16), 803(8) and 803(6).

11/26/85 (“ELACH Cable”), ¶1, attached at Ex. N;⁵ *Review and Findings of the Honduras Working Group* (“Working Group”), 000033-34, attached at Ex. P.⁶ These murders were carried out at the order of the director of DNI. *ELACH Cable*, ¶1.

The other death squad was made up of active members of the military and known by several different names, including Battalion 316, Special Investigations and FUSEP Special Unit.⁷ *Testimony of Florencio Caballero, Inter-American Court of Human Rights, October 6, 1987* (“Caballero IACHR”), attached at Ex. O;⁸ *Caballero Senate; Working Group, 000033-34*. The death squad operated clandestinely until 1983 or 1984, when it was institutionalized and officially named Battalion 316. “*Plan to Establish an Intelligence Battalion of the Honduran Armed Forces*,” 7/21/83 (“Battalion Plan”), 2, attached at Ex. Q;⁹ *Caballero Senate, 5, 8, 15*. Battalion 316 committed widespread torture and numerous disappearances and murders. *Caballero Senate; Caballero IACHR*. All these forces – FUSEP, DNI, and Battalion 316 – worked together, carried out joint operations and shared information and members. *Department of Defense Cable, “Update on Honduran Public Security Force,” (“DOD Cable”), 3/11/82; attached at Ex. M*¹⁰ *Caballero IACHR, 168; Working Group, 000033; Valladares Report, 3*.

II. Defendant Grijalba’s Command Responsibility Over Repressive Units

A. Defendant Grijalba’s Command Authority

In 1978, Grijalba was named director of DNI. *Biographic Sketch of Juan Lopez Grijalba* (“Grijalba Bio”), 2, attached at Ex. R;¹¹ *Grijalba Depo, 5/13/03, 9:15-22, 14:17-21*. In 1981, as director of DNI, Grijalba held command and control over the operations of DNI in Tegucigalpa.

⁵ Admissible under FRE 803(8) and 803(6).

⁶ Admissible under FRE 803(8) and 803(6).

⁷ Although the group had several different names, for the sake of simplicity, it will herein be referred to as “Battalion 316”.

⁸ Admissible under 804(b)(1), 804(b)(3), and 803(8).

⁹ Admissible under FRE 803(16), 803(8) and 803(6).

¹⁰ Admissible under FRE 803(16), 803(8) and 803(6).

Grijalba Depo, 5/13/03, 50:2-7. He also oversaw the operations of ELACH. *ELACH Cable*, ¶1. From 1982 to 1984, Grijalba was director of military intelligence (“G-2”) for the Armed Forces General Staff. *Grijalba Depo*, 5/13/03, 9:19-22, 14:17-21, 17:4-11; *Ministry of Defense Order*, 1/29/82, p.1, attached at Ex. S.¹²

As G-2 director, Grijalba oversaw the operations of all the security forces, including DNI, FUSEP and Battalion 316. *Valladares Report*, 3-4; *Caballero IACHR*, 164; *Grijalba Depo*, 14:17-21, 20:16-19. Both during its clandestine and “official” incarnations, Battalion 316 operated under the direct command of G-2.¹³ *Caballero IACHR*, 164; *Memorandum*, “Trip to Honduras”, 3/18/86, 7, attached at Ex. T;¹⁴ *Battalion Plan*, 2. Grijalba worked together with commander in chief General Alvarez Martinez and issued orders to the hands-on chief of Battalion 316, Alexander Hernandez. *Caballero Senate*, 9, 17; *Caballero IACHR*, 164, 173.

B. Defendant Grijalba’s Knowledge About Abuses

When Grijalba became chief of DNI, he was aware that DNI had been abusing prisoners. *Grijalba Depo*, 5/13/03, 23:22-23. He was aware that the press was reporting about disappearances and secret detention facilities run by DNI. *Id.*, 32:18 – 33:10. In fact, in 1981, Grijalba publicly responded to charges about the disappearance of two men, and wrote a letter to General Alvarez about one of them. *Article*, “DNI Knows Nothing...”, 6/13/81, attached at Ex. U;¹⁵ *Grijalba Letter to General Alvarez*, 6/20/81, attached at Ex. V.¹⁶ He also made visits to

¹¹ Admissible under FRE 803(8) and 803(6).

¹² Admissible under FRE 803(16), 803(8) and 803(6).

¹³ The position of “G-2” was changed in name, but not in function, to “C-2” in 1983. *Grijalba Depo*, 5/13/03, 16:8-21. This change occurred when the Honduran Armed Forces were reformed and the General Staff was converted into the Joint Chiefs of Staff. *Id.*, 15:16-21. “C-2” was the new term used in Honduras, whereas “J-2” was used in the United States. *Id.*, 16:17-21. For that reason, the Battalion Plan exhibit uses the moniker “J-2”.

¹⁴ Admissible under FRE 803(8) and 803(6).

¹⁵ Admissible as non-hearsay because it is only being used to show Grijalba was aware of abuses, not for the truth of the contents of the document.

¹⁶ Admissible as non-hearsay because it is only being used to show Grijalba was aware of abuses, not for the truth of the contents of the document.

DNI detention facilities. *Grijalba Depo*, 5/14/03, 30:15-17, 43:11 – 44:1. He met with relatives of the disappeared, including Zenaida Velásquez. *Z. Velásquez Decl.*, ¶5.

In 1982, as G-2 director, Grijalba was also aware of allegations about human rights abuses committed by troops under his command. *Grijalba Depo*, 5/13/03, 35:23–36:3. He read the many allegations of torture and disappearances contained in major Honduran newspapers. *Grijalba Depo*, 5/14/03, 49:18–50:7. He publicly discussed the discovery of clandestine graves. *Article, The Associated Press*, 2/19/82, attached at Ex. W.¹⁷ Grijalba met with officials from the U.S. embassy and human rights groups about abuses. *Id.*, 50:8-17, 52:3-9; *Valladares Report*, 10. He also met with family members of the disappeared. *Grijalba Depo*, 5/14/03, 50:20-25. Grijalba even inspected detention facilities used by Battalion 316. *Caballero IACHR*, 167.

C. Defendant Grijalba’s Failure to Prevent or Punish Abuses

Grijalba, as head of both DNI and G-2, had the authority and ability to prevent abuses by his subordinates and to punish those who were responsible. *Valladares Report*, 10. However, Grijalba does not recall whether he ever took disciplinary action against a subordinate for abuse of detainees. *Grijalba Depo*, 5/14/03, 30:2-4, 10-14; 38:15-19; 47:8-12. While head of DNI, he never carried out an investigation to determine whether DNI was using secret detention facilities. *Id.*, 32:15-17, 34:2-5. Similarly, he did not investigate allegations of abuses as director of G-2. *Id.*, 35:13 – 37:4.

Grijalba did not take reasonable and necessary steps to prevent human rights abuses. *Valladares Report*, 1-2. No one was punished for committing them either. *Valladares Report*, 9-10; *IACHR*, ¶147(d). The court system in Honduras was not responsive to habeas corpus petitions or attempts to try responsible military officers. *Z. Velásquez Decl.*, ¶¶3, 6, 7.

¹⁷ Admissible as non-hearsay because it is only being used to show Grijalba was aware of abuses, not for the truth of the contents of the document.

III. Human Rights Abuses At Issue In This Case

A. Torture and Disappearance of Manfredo Velásquez

Manfredo Velásquez was abducted on September 12, 1981 in the parking lot of the Palace y Lido theater in Tegucigalpa, Honduras, and taken to INDUMIL, a notorious torture facility, where he was then tortured. *IACHR*, ¶147(e); *Caballero IACHR*, 166, 180-81. Sergeant José Isaias Vilorio participated in the abduction. *Caballero IACHR*, 180. Vilorio worked at DNI in the personnel department and was a direct subordinate of Grijalba in 1981. *Grijalba Depo*, 5/14/03, 58:5-16; *Caballero IACHR*, 180.

Leopoldo Aguilar was the last known person to speak to Manfredo in DNI custody. Aguilar was detained in September 1981 and taken to DNI headquarters in Tegucigalpa, over which Grijalba exercised command and control. *Deposition of Leopoldo Aguilar* (“*Aguilar Depo*”), 17:16-18:16, attached at Ex. Y; *Grijalba Depo*, 5/13/03, 50:2-7. Aguilar was then taken by at least one man he knew to be a DNI agent to a house some distance away. *Aguilar Depo*, 21:1-18. Aguilar was tortured at the house. *Id.*, 26:2-14. One day, from a room next to the one in which Aguilar was being held, Manfredo Velásquez called to Aguilar. *Id.*, 30:2–31:21. Although Aguilar could not see him, he heard Manfredo say in a painful voice, “Help me, fellow. My name is Manfredo Velásquez.” *Id.*

Manfredo was then handed over to executioners. *Caballero IACHR*, 181. Defendant ordered members of ELACH to murder Manfredo. *ELACH Cable*, ¶¶1-2; *Grijalba Depo*, 5/13/03, 14:9-21; *Grijalba Bio*, 2. When family members inquired about Manfredo’s whereabouts, the Armed Forces denied knowing what happened and failed to properly investigate. *IACHR*, ¶147(g); *Grijalba Depo*, 5/14/03, 118:9-18. Zenaida Velásquez met with Defendant who denied knowing anything about Manfredo’s disappearance. *Z. Velásquez Decl.*, ¶5.

B. Raid on Florencia Sur: Torture of Oscar and Gloria Reyes, and Disappearance of Hans Madisson

On July 7, 1982, Julio Vásquez, an employee of the *Centro Cristiano de Desarrollo* (“CODE”), and a friend were stopped by men in military uniforms while driving away from the CODE offices in the Florencia Sur neighborhood of Tegucigalpa (“Florencia Sur”). *Deposition of Julio Vásquez* (“*Vásquez Depo*”), 13:19 - 29:8, attached at Ex. Z. They were forced to follow the men to the General Staff. *Vásquez Depo*, 29:10–31:15. Inside the General Staff, an officer interrogated Vásquez about, among other things, plaintiffs Oscar and Gloria Reyes, who lived across the street from CODE. *Id.*, 36:20–38:3. During the interrogation the military officer spoke with Grijalba. *Id.*, 41:4-25. When the officer finished speaking to Grijalba, he told Vásquez that he and his friend could not leave Tegucigalpa until further notice. *Id.*, 41:7-13, 42:2-8.

The next day, July 8, 1982, at approximately 9:00 p.m., armed men wearing ski masks raided the Florencia Sur home of Oscar and Gloria Reyes. *Oscar Reyes Declaration* (“*O. Reyes Decl.*”), ¶¶2-3, attached at Ex. C; *Gloria Reyes Declaration* (“*G. Reyes Decl.*”), ¶¶2-3, attached at Ex. D. The armed men handcuffed and blindfolded the Reyeses, their daughter, their housekeeper and an employee. *O. Reyes Decl.*, ¶¶2-3; *G. Reyes Decl.*, ¶¶2-3. They forced Oscar and Gloria to climb a wall in the back yard and get into a vehicle parked on the other side of the wall. *O. Reyes Decl.*, ¶2; *G. Reyes Decl.*, ¶4.

Hans Madisson lived in Florencia Sur at his sister Vicki’s house. *Declaration of Martha Madisson* (“*M. Madisson Decl.*”), ¶3 attached at Ex. E. Earlier on July 8, 1982, Hans had called another sister, Vaike, and told her he was going that night to see his brother Gerardo to pick up a jacket. *Vaike Madisson Declaration* (“*V. Madisson Decl.*”), ¶3, attached at Ex. AA. Gerardo was a member of the military and worked at the General Staff. *Gerardo Madisson Declaration* (“*G. Madisson Decl.*”), ¶3 attached at Ex. BB. Hans left Vicki’s Florencia Sur home around

6:30 p.m., before the military operation began. *V. Madisson Decl.*, ¶3. Hans never arrived at the General Staff or returned to Vicki's house. *V. Madisson Decl.*, ¶3; *G. Madisson Decl.*, ¶4.

At the same time the armed men were entering the Reyes' house, Julio Vásquez was inside the CODE office. *Vásquez Depo*, 37:5-10, 49:12-17, 53:8-54:6. He heard shooting and the sound of military radios outside. *Id.*, 54:8-55:23. Vásquez looked out the window and saw military personnel and a tank in the street. *Id.*, 57:6-12. Using a megaphone, a man ordered Vásquez and his friend to come outside. *Id.*, 61:24-62:12. When they went outside, several armed soldiers surrounded Vásquez and his friend. *Id.*, 65:14-18. The man with the megaphone threw them against the tank and threatened them with a pistol. *Id.*, 66:1-13. Vásquez saw many soldiers and vehicles, including plainclothes members of DNI. *Id.*, 74:13-76:2.

Meanwhile, Oscar and Gloria Reyes were detained inside the vehicle behind their house. *O. Reyes Decl.*, ¶4; *G. Reyes Decl.*, ¶¶4-5. They heard the soldiers call someone a "son of a bitch" and ordered him to stop. *O. Reyes Decl.*, ¶5; *G. Reyes Decl.*, ¶5. Outside the CODE office, Julio Vásquez saw the soldiers stop and throw a young man to the ground. *Vásquez Depo*, 82:5-9. The soldiers hit the man and took him away. *Id.*, 83:17-19, 89:11-13. After hearing the person be called "son of a bitch," Oscar and Gloria heard gunshots. *O. Reyes Decl.*, ¶5.

While Julio Vásquez was outside, a jeep approached and stopped nearby. Vásquez saw defendant Grijalba in the passenger seat dressed in fatigues. *Vásquez Depo*, 92:13-93:22, 98:3-15. Grijalba got out of the jeep and spoke with a group of soldiers. *Id.*, 93:23-96:12. Grijalba was giving orders. *Id.*, 97:11-13. At that point the soldiers blindfolded Vásquez and bound his hands with wire. *Id.*, 99:4-9. They threw Vásquez and his friend into a van. *Id.*, 103:2-4. There was another person in the van who did not move but smelled of blood. *Id.*, 103:4-10.

Around 10:00 p.m., Oscar's sister drove to Florencia Sur. *Declaration of Gloria Reyes Baca* (“*G. Reyes Baca Decl.*”), ¶2, attached at Ex. X. A man in a FUSEP uniform denied her entrance. *Id.* But, she saw many soldiers, including some wearing baseball hats that said “G-2”. *Id.* DNI, FUSEP, G-2, Battalion 316 participated in the above raid. *Caballero IACHR*, 168.

Oscar and Gloria Reyes were driven to a house outside of the city. *O. Reyes Decl.*, ¶6. When they arrived, the driver said, “This is where we bring subversives.” *G. Reyes Decl.*, ¶6. They were taken out of the car and separated. *O. Reyes Decl.*, ¶6. His captors left Oscar in a corner. *Id.*, ¶7. Whenever people passed by they kicked or hit him. *Id.* His arms were tied behind him and he was hoisted up in the air like a piñata; they hit him while he was in the air. *Id.* This caused intense pain and injuries to his arms. *Id.* While he was hoisted in the air, a man hit him with the butt of a rifle in the sternum. *Id.* They used electrical shock on his genitals. *Id.* They threatened to shoot him by putting him against a wall and holding a gun to him, but then they did not shoot and instead said, “We’ll kill him tomorrow.” *Id.* Eventually they threw him into a room covered with excrement, urine and blood. *Id.*

In the same house, Gloria Reyes was subjected to horrible insults; her captors called her an old woman and a “daughter of a bitch.” *Gloria Reyes Decl.*, ¶6. They took her shirt off and hit her with the butt of a rifle. *Id.* They applied electric shock to her breasts. *Id.* She eventually lost consciousness. *Id.*, ¶7. When she awoke, they continued hitting and shocking her, including in the vagina. *Id.* They said they were going to rape her. *Id.* She passed out again. *Id.*

She woke up in a bathroom with her clothes on. *Id.* They continued interrogating her. *Id.* She passed out again. *Id.* At some point coming in and out of consciousness, she heard Oscar say, “Don’t be barbarians. Don’t hang me up like a piñata. Can’t you see I’m too big?” *Id.*, ¶8. She realized the floor was covered with excrement, urine and blood. *Id.*, ¶9. She heard the

screams of a young man with light hair and skin being tortured. *Id.*, ¶9. She lost consciousness again. *Id.*, ¶10. A man walked in and hit her in the stomach, knocking the wind out of her. *Id.*, ¶11. Blood and water were coming out of her vagina. *Id.*, ¶12.

Julio Vásquez was also driven out of the city and taken into the basement of a house. *Id.*, 107:1-21. Vásquez realized they were torturing a woman he believed to be plaintiff Gloria Reyes. *Id.*, 107:23-24, 113:17-114:2. They were referring to her as an old woman and threatening to rape her. *Id.*, 108:6-15. Vásquez was also tortured by electrical shock to his lips, nipples and genitals. *Id.*, 109:16-111:3. His torturers asked him questions about Oscar and Gloria Reyes. *Id.*, 109:7-8, 110:21-22.

About three days after Hans disappeared, Gerardo Madisson was ordered to appear at the General Staff before a man who identified himself as a G-2 officer. *Gerardo Madisson Decl.*, ¶5. The officer said that commander in chief General Alvarez and defendant Grijalba had ordered him to investigate the Hans Madisson case. *Id.* The man interrogated Gerardo, implying that Hans belonged to left wing organizations and used drugs. *Id.* The next day the same man threatened Gerardo and told him to stop searching for Hans. *Id.*, ¶6.

On Wednesday, July 14, 1982, two DNI detectives arrived at Vaikke Madisson's office. *V. Madisson Decl.*, ¶5. The agents told her that they had gotten rid of Hans Madisson along the *Carretera del Norte* (Northern Highway). *Id.* One of the DNI agents was Florencio Caballero. *Id.*

Several days after their torture, Oscar and Gloria Reyes were taken to DNI headquarters. *Gloria Reyes Decl.*, ¶13; *O. Reyes Decl.*, ¶8. Oscar was again interrogated and told to admit he was a subversive. *O. Reyes Decl.*, ¶8. He was put in a cell. *Id.* Oscar's sister visited both of them at DNI and saw visible signs of torture. *G. Reyes Baca Decl.*, ¶3.

Oscar's sister met several times with General Alvarez to convince him to release the Reyeses from prison. *Id.*, ¶¶3-4, 7-10. She threatened to go to the press if they were not released. *Id.*, ¶¶8-10. After several months, Alvarez agreed to free the Reyeses, but only under three conditions: that they not tell anyone about their torture, that they forget about the items they lost, and that they leave the country. *Id.*, ¶8. They accepted the deal. *O. Reyes Decl.*, ¶12.

Despite the agreement with Alvarez the judge overseeing the case refused to release them. *Id.*, ¶12. Oscar called his sister and told her to contact the media to publicize what had happened. *Id.*, ¶13. The next day defendant Grijalba called Oscar's sister and told her that Alvarez wanted to see her immediately. *G. Reyes Baca Decl.*, ¶9. When Oscar's sister confronted Alvarez about breaking the deal, Alvarez called Grijalba and ordered Grijalba to personally fix the situation and have Oscar and Gloria released. *Id.*, ¶10. On December 22, the judge signed their release and Oscar and Gloria flew to the United States. *O. Reyes Decl.*, ¶13.

On October 25, 1995, the body of Hans Madisson was exhumed from a spot along the *Carretera del Norte*. *Certificate of Exhumation, 10/25/96, attached at Ex. CC; Letter to Dr. Hector Ghahin, 11/2/95, attached at Ex. DD*. The body showed signs of decapitation; multiple fractures of the skull; fractures in the 2nd, 3rd and 4th vertebra; and trauma on both femurs. *Forensic Report, attached at Ex. EE*. The cause of death was determined to be a bullet wound in the neck. *Id.* The report concludes that the laboratory results are consistent with the physical information provided about Hans Madisson. *Id.* In 1998, the remains were finally delivered to the Madisson family. *Letter to Director of Forensic Medicine, 10/1/98, attached at Ex. FF*.

MEMORANDUM OF LAW

I. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The moving party has the initial burden of establish the basis for its motion and identifying the materials that show an absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Once the movant meets its burden, the burden then shifts to the non-moving party to demonstrate “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986). Specifically, the non-moving party cannot simply rest on mere allegations or denials of the adverse party’s pleadings or a mere scintilla of evidence supporting its position. *See Fed. R. Civ. P. 56(e); Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). The non-movant must establish, through the record presented to the court, that it is capable of providing evidence sufficient for a reasonable jury to return a verdict in its favor. *See Cohen v. United Am. Bank*, 83 F.3d 1347, 1349 (11th Cir. 1996).

II. Plaintiffs Are Entitled To Summary Judgment For Their Claims

A. Grijalba is Liable as a Commander, Aider and Abettor, and Conspirator

Grijalba is legally responsible for the abuses alleged by Plaintiffs under the doctrine of command responsibility and under theories of aiding and abetting and conspiracy.

1. Command Responsibility

A defendant is liable as a military commander for the acts of others if:

- (1) A superior-subordinate relationship existed between the defendant and the unit or persons who committed the violations at issue;
- (2) The defendant knew, or should have known, in light of the circumstances at the time, that his subordinates had committed, were committing, or were about to commit human rights abuses, such as torture, disappearances and extrajudicial killings; and
- (3) The defendant failed to take all necessary and reasonable measures to either (a) prevent subordinates from committing human rights abuses, or (b) punish the subordinates after they had committed human rights abuses.

Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002). See also *In re Yamashita*, 327 U.S. 1, 66 S.Ct. 340 (1946); S. Rep. No. 102-249, at 9 (1991) (“[A] higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts — anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.”); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (quoting Senate Report and recognizing that “[t]he principle of ‘command responsibility’ that holds a superior responsible for the actions of subordinates appears to be well accepted in U.S. and international law”); *Xuncax v. Gramajo*, 886 F. Supp. 162, 171-172 (D. Mass. 1995).

Under the first prong of the test, the defendant must have “effective control” over the unit or persons accused of committing the violations. *Ford*, 289 F.3d at 1290-92. “Effective control” means that the defendant had the legal authority and practical ability to exert control over his subordinates. *Id.* at 1297. The fact that a defendant exercised formal command over his subordinates gives rise to a presumption under law that the defendant exercises “effective control” over those subordinates. *Id.* at 1291.

Grijalba exercised effective control over the soldiers and agents responsible for the abuses against Oscar Reyes, Gloria Reyes, Hans Madisson and Manfredo Velásquez. He held formal command over these troops and had the actual ability to control them. See sections II (A) and II (B) *supra*. In 1981 as chief of DNI, Grijalba ordered the murder of Manfredo Velásquez. See *supra*. In 1982, as director of G-2, he actually visited Florencia Sur during the raid (in which Oscar Reyes, Gloria Reyes and Hans Madisson were abducted) to issue orders, and he later had a

major role in releasing Oscar and Gloria Reyes from prison. *See supra*. The direct involvement shows that Grijalba had effective control over his subordinates that committed these abuses.

The second prong of the command responsibility test requires that a defendant knew, or should have known, in light of the circumstances at the time, that his subordinates had committed, were committing, or were about to commit human rights abuses, such as torture, disappearances and extrajudicial killings. *Ford*, 289 F.3d at 1288. The facts just cited to show that Grijalba had effective control over his troops also demonstrate that not only should he have known that his subordinates were committing abuses, he actually did know.

The third prong of command responsibility requires a showing that the defendant failed to take all necessary and reasonable measures to either (a) prevent subordinates from committing human rights abuses, or (b) punish the subordinates after they had committed human rights abuses. *Ford*, 289 F.3d at 1288. Grijalba neither prevented the abuses nor punished those responsible. *See supra*. In fact, he ordered and supported the continuation of the abuses. *Id*.

2. Aiding and Abetting

Grijalba is also liable for aiding and abetting in the abuses in this case. Both the Alien Tort Claims Act (“ATCA”), 28 U.S.C. §1350, and Torture Victim Protection Act, (“TVPA”), 28 U.S.C. §1350 note, encompass the liability of accomplices. *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1355-56 (N.D. Ga. 2002); *Cabello v. Fernandez-Larios*, 205 F. Supp. 2d 1325, 1331-1333 (S.D. Fla. 2002).

A defendant is liable for aiding and abetting if:

- (1) One or more of the abuses at issue in the case were committed by some unit or person;
- (2) The defendant provided practical assistance, encouragement or moral support which had a substantial effect on the perpetration of the crime; and
- (3) The defendant knew that his or her actions would assist the perpetrator in the commission of the crime.

Mehinovic, 198 F.Supp.2d at 1355; *Talisman*, 244 F.Supp.2d at 323.

By ordering his subordinates in DNI, ELACH, FUSEP, Battalion 316 and G-2 to commit human rights abuses, Grijalba substantially assisted them in these crimes. Furthermore, plaintiffs have extensively documented that Grijalba should have known, and in fact knew, that his actions would assist in the abuses.

3. Conspiracy

The TVPA and ATCA also encompass theories of conspiracy. *Cabello*, 205 F. Supp. 2d at 1331-33; *Talisman*, 244 F.Supp.2d at 320-24. Grijalba is liable for conspiracy to commit human rights abuses with his subordinates. Liability for conspiracy requires:

- (1) An agreement between two or more persons;
- (2) An unlawful purpose; and
- (3) An overt act committed by one of the coconspirators in furtherance of the conspiracy.

United States v. Perkins, 748 F.2d 1519, 1527 (11th Cir. 1984).

Plaintiffs have demonstrated above that Grijalba agreed with numerous people to carry out human rights abuses. He knew that the goal was to detain, torture and/or disappear suspected “subversives.” Numerous abuses in fact occurred, an outcome which was clearly foreseeable to Grijalba.

B. Defendant Is Liable for Torture and Extrajudicial Killing Under The TVPA.

The TVPA “‘establish[es] an unambiguous and modern basis for’ federal claims of torture and extrajudicial killing.” *Sosa v. Alvarez-Machain*, __ U.S. __, 124 S. Ct. 2739, 2763 (2004) (citing H.R. Rep. No. 102-367, pt. 1, p.3 (1991) (modification in original)). Under the TVPA,

- 2.(a) An individual who, under actual or apparent authority, or color of law, of any foreign nation –
 - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
 - (2) subjects an individual to an extrajudicial killing shall, in a civil action, be

liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 (note).

Torture is defined, in relevant part, as:

- (1) any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering ... whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
- (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering; ...
 - (C) the threat of imminent death; or
 - (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering....

Id. at §3(b).

Extrajudicial killing is defined as “a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* at § 3(a).

1. Plaintiffs Oscar and Gloria Reyes and Decedent Manfredo Velásquez Suffered Torture

Plaintiff Oscar Reyes was held in the custody of the Armed Forces of Honduras, as he was detained in a raid conducted by FUSEP, DNI, G-2 and Battalion 316. He suffered severe physical pain and suffering. *See supra.* He also suffered mental pain and suffering through the severe physical suffering he endured and through the threat of imminent death. *Id.*

Plaintiff Gloria Reyes was held in the custody of the Armed Forces of Honduras, as she was detained in a raid conducted by FUSEP, DNI, G-2 and Battalion 316. She suffered severe physical pain and suffering. *See supra.* She also suffered mental pain and suffering through the severe physical suffering she endured and through the threat that another individual would

imminently be subjected to severe physical pain or suffering, namely that she heard her husband and another man being tortured. *Id.*

Manfredo Velásquez was detained by DNI. He suffered severe physical pain and suffering. *See supra.*

2. Decedents Manfredo Velásquez and Hans Madisson Were Subjected to Extrajudicial Killing

Manfredo Velásquez and Hans Madisson were both subjected to “deliberate killing[s] not authorized by a previous judgment pronounced by a regularly constituted court....” Velásquez was abducted by DNI, detained, tortured, and executed by ELACH at the order of Grijalba. Hans Madisson was abducted during the raid on Florencia Sur, which was conducted by DNI and Battalion 316. His corpse was dumped along the Northern Highway by DNI agents.

3. These Acts Were Carried Out Under Color of Law

The torture of Oscar Reyes, Gloria Reyes and Manfredo Velásquez, and the extrajudicial killings of Velásquez and Hans Madisson were carried out under the actual and apparent authority and color of law of the government of Honduras. All the acts were performed by members of the Armed Forces of Honduras over whom Grijalba had command responsibility.

C. Defendant Is Liable for Torture, Extrajudicial Killing and Disappearance Under The ATCA

1. Sosa v. Alvarez-Machain

On June 29, 2004, the U.S. Supreme Court unanimously upheld the validity of the ATCA and recognized that specific, universal, and obligatory international norms shall be recognized under federal common law and are actionable by the ATCA. *Sosa*, 124 S. Ct. at 2766. As evidenced by the cases the *Sosa* court cited with approval, torture, extrajudicial killing and disappearance meet that standard.

2. Torture

United States courts have consistently recognized that torture is a violation of customary international law, and therefore actionable as a tort in violation of the “law of nations” under the ATCA. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). As the Ninth Circuit has stated, “[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law.” *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992). Moreover, the prohibition against torture is a specific, universal and obligatory norm. *In re Estate of Marcos (Human Rights Litigation)*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Forti v. Suarez-Mason*, 672 F.2d 1531, 1542 (N.D. Cal. 1987).

As discussed above, Plaintiffs have established that Grijalba is liable for the torture of Oscar Reyes, Gloria Reyes and Manfredo Velásquez.

3. Extrajudicial Killing

Extrajudicial killing is actionable under the ATCA. *Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1359 (S.D. Fla. 2001). There can be little doubt that under international law, extrajudicial killing is a norm that is “specific, universal, and obligatory.” The Ninth Circuit has held that “[t]he prohibition against summary execution . . . is . . . universal, definable, and obligatory.” *Marcos*, 25 F.3d at 1475 (citing *Forti*, 672 F.Supp.2d at 1542). Another court concluded that, “[a]s with official torture, the practices of summary execution, ‘disappearance’ and arbitrary detention have been met with universal condemnation and opprobrium.” *Xuncax v. Gramajo*, 886 F. Supp. 162, 185 (D. Mass. 1995) (citing *Forti v. Suarez-Mason*, 694 F.Supp.2d 707, 711 (N.D. Cal. 1988) (“*Forti II*”).

As discussed above, Plaintiffs have established that Grijalba is liable for the extrajudicial killing of Manfredo Velásquez and Hans Madisson.

4. Disappearance

Disappearance is actionable under the ATCA. *Forti II*, 694 F.Supp.2d at 711; *Xuncax*, 886 F. Supp. at 185. *See also Declaration of Professor Naomi Roht-Arriaza* (“*Roht-Arriaza Decl.*”), attached at Ex. GG. Courts that have analyzed the crime of disappearance under international law have found that it is a norm that is “specific, universal, and obligatory.” *Forti II*, 694 F.Supp.2d at 711; *Xuncax*, 886 F. Supp. at 185; *Roht-Arriaza Decl.*. In particular, the *Forti II* court examined numerous international materials and found that the norm was sufficiently definable. In order to make out a claim for disappearance, plaintiffs must show “(1) abduction by state officials or their agents; followed by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate.” *Forti II*, 694 F.Supp.2d at 711. Disappearance therefore meets the requirements of *Sosa* to be recognized under the ATCA. *See Roht-Arriaza Decl.*

Here, plaintiffs have amply demonstrated above that Manfredo Velásquez and Hans Madisson were abducted by the Armed Forces. In both cases, the Armed Forces refused to announce that either man had been detained and actively denied that they were in government custody.

Dated this ____ day of September, 2004.

Respectfully submitted,

Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via fax and U.S. Mail on this _____ day of September, 2004, to: Juan Evangelista López Grijalba, Alien No: A 94 265 485, Krome Service Processing Center, 18201 Southwest 12th Street, Miami, FL 33194.

By: _____
BENJAMINE REID