

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 07-21783-CIV-JORDAN**

TEÓFILA OCHOA LIZARBE, in her individual capacity, and in her capacity as the personal representative of the estates of Silvestra Lizarbe Solis, Gerardo Ochoa Lizarbe, Victor Ochoa Lizarbe, Ernestina Ochoa Lizarbe, Celestino Ochoa Lizarbe, and Edwin Ochoa Lizarbe, and

CIRILA PULIDO BALDEÓN, in her individual capacity, and in her capacity as the personal representative of the estates of Fortunata Baldeón Gutiérrez and Edgar Pulido Baldeón,

Plaintiffs,

v.

TELMO RICARDO HURTADO HURTADO,

Defendant.

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**MOTION FOR DEFAULT JUDGMENT AND
TRIAL ON DAMAGES AND MEMORANDUM OF LAW**

Plaintiffs Teófila Ochoa Lizarbe and Cirilia Pulido Baldeón ask the Court for a judgment by default against Defendant Telmo Ricardo Hurtado Hurtado (“Defendant” or “Hurtado”) in the above-captioned civil action and for a trial to determine the amount of damages. In support of their motion, plaintiffs state the following:

MEMORANDUM OF LAW

The Court has ordered the motion for default to be submitted no later than September 28, 2007. Plaintiffs respectfully request that a trial on damages be set for a date to be determined, at which time Plaintiffs intend to present live testimony from Plaintiffs and other witnesses. As described more fully herein, because Plaintiffs and other witnesses are located in Peru, and must obtain temporary visas authorizing their travel to the United States to give live testimony and because another action involving the same plaintiffs and a different defendant, with similar facts, awaits a motion for default judgment in the United States District Court for the District of Maryland, Plaintiffs request that such a trial be set after a status conference with this Court.

INTRODUCTION

Between 1980 and 2000, a brutal civil war raged in Peru. The Peruvian Army committed widespread human rights abuses, including extrajudicial killing, torture, disappearances and rape, against the civilian population of Peru under the guise of combating the Marxist-Leninist guerrilla insurgency known as the Shining Path. In August 1985, Defendant Hurtado, a second lieutenant in the Peruvian army, ordered, oversaw, and participated in the brutal killings of the relatives of Plaintiffs and dozens of other civilians in a village outside of the town of Accomarca, in the Andean region of Peru. This event, known as the Accomarca massacre, was one of the first and most emblematic examples of military repression during the war. Although Defendant Hurtado admitted his involvement in the massacre, he was never fully or adequately punished by the authorities in Peru. In fact, Defendant was consistently promoted within the Peruvian military after admission of the crimes.

Plaintiffs are entitled to a default judgment against Defendant Hurtado on the claims pled in the Complaint, namely: extrajudicial killing; torture of plaintiffs; torture of decedents; war crimes against plaintiffs; war crimes against decedents; crimes against humanity against plaintiffs; and crimes against humanity against decedents. In addition to this direct liability, the Complaint also alleges that Defendant Hurtado exercised command responsibility over, engaged in joint criminal enterprise with, conspired with and aided and abetted subordinates in the Peruvian Army in committing the Accamarca massacre. Accordingly, Plaintiffs seek a judgment that Hurtado is liable under international and domestic law for the injuries, pain and suffering sustained by Plaintiffs. This Court has jurisdiction over this action under the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”), the Torture Victim Protection Act, 28 U.S.C § 1350 note (“TVPA”) and 28 U.S.C. §1331.

STATEMENT OF FACTS

A. Procedural History

On July 11, 2007 Plaintiffs filed a Complaint and Summons in the above-captioned action against Defendant Hurtado for violations of the ATS and the TVPA for his role in the massacre of civilians, including Plaintiffs’ relatives, in August 1985 outside the town of Accamarca, in the Ayacucho Department in Peru. Defendant Hurtado was personally served with the Complaint and Summons at the Federal Detention Center, 33 Northeast 4th Street, Miami, Florida 33132. The return of service was filed with this Court on August 21, 2007. (Docket entry 3.) Defendant Hurtado has failed to file an answer or other responsive pleading. Defendant Hurtado has not communicated with or responded to Plaintiffs since the initiation of this action. Plaintiffs filed a request for entry of default on August 27, 2007, supported by the

declaration of Robert M. Brochin (Docket entry 6.) The Clerk of this Court entered an Order of Default on August 28, 2007. (Docket entry 7.)

B. Background

Between 1980 and 2000, Peru was in a state of civil war. Complaint ¶14. During this time, the Peruvian Army and other government forces were responsible for widespread and systematic human rights abuses against the civilian population of Peru under the guise of suppression of the Shining Path. *Id.* In the mid-1980's, the Peruvian Army engaged in one such bloody campaign in the Department of Ayacucho, in the Andean region primarily populated by individuals who speak Quechua, a language indigenous to the region, rather than Spanish. *Id.* ¶¶ 16-26. As part of this campaign, the Peruvian Army committed a number of massacres, disappearances and torture against the civilian population. *Id.* In 1985, the Peruvian Army targeted the Accomarca District, within Ayacucho, ostensibly as part of a counter-insurgency effort. *Id.* ¶¶22-27. On August 13, 1985, four patrol units were ordered to a rural village area approximately two miles from the town of Accomarca. *Id.* ¶¶ 27-29. Among these four patrol units were two from Lince Company, a special mobile countersubversive intelligence unit. *Id.* ¶30. Defendant Hurtado led Lince 7, one of these patrols units. *Id.* ¶31. Lince 7 arrived in Accomarca on or about August 13, 1985. *Id.* ¶ 33. On the morning of August 14, 1985, Hurtado led Lince 7 to the rural area of Quebrada de Huancayoc, two miles from the town of Accomarca. *Id.* ¶ 34. As described herein, on August 14, 1985, the soldiers of Lince 7, including Hurtado himself, terrorized the villagers in Quebrada de Huancayoc, committing rape, torture and extrajudicial killing. Ultimately, more than 65 civilians, including children and pregnant women, were killed.

C. Plaintiffs

Plaintiffs Teófila Ochoa Lizarbe and Cirilia Pulido Baldeón are both citizens and residents of Peru. *Id.* ¶¶8, 10. Both Plaintiffs are indigenous to the Andean region of Peru and speak Quechua as their first language and Spanish as their second language. *Id.* Plaintiffs were both 12 years old in August of 1985. *Id.*

D. The Accomarca Massacre

On August 14, 1985, Lince 7, led by Defendant Hurtado, descended to Quebrada de Huancayoc, approximately two miles below the town of Accomarca. *Id.* ¶34. The Lince 7 soldiers were dressed in fatigues and black boots and carried machine guns. *Id.* Most of them wore ski masks. They also brought dogs with them. *Id.* The soldiers went house to house removing villagers and forcibly bringing them out into the open. *Id.* Although the soldiers searched the houses, they did not find any weapons or Shining Path materials. *Id.* Among those who came out of their houses were Silvestra Lizarbe Solis, mother of Plaintiff Teófila Ochoa; Victor Ochoa Lizarbe, Ernestina Ochoa Lizarbe, Celestino Ochoa Lizarbe and Edwin Ochoa Lizarbe, siblings of Plaintiff Teófila Ochoa; and Fortunata Baldeón Gutiérrez and Edgar Pulido Baldeón, the mother and brother of Plaintiff Cirila Pulido. *Id.* ¶35. All of these individuals were civilians and none was a member of the Shining Path or the Peruvian Army. *Id.* ¶15.

Along with her brother, Gerardo Ochoa Lizarbe, Plaintiff Teófila Ochoa initially remained in her house. *Id.* ¶36. However, soldiers eventually found them, so the siblings fled in opposite directions. *Id.* Plaintiff Teófila Ochoa was spotted by soldiers who began shooting at her. *Id.* She managed to escape and hide. *Id.* Her brother Gerardo was shot and killed by soldiers. *Id.* From her hiding place, Plaintiff Teófila Ochoa observed soldiers abduct young girls and take them into houses. *Id.* ¶37. She heard desperate screams from the girls, and then heard gunshots. *Id.* When the soldiers came out of the houses, they set the houses on fire. *Id.*

In order to avoid the soldiers, Plaintiff Cirila Pulido, along with two of her siblings, left their house and hid. *Id.* ¶38. Once most of the villagers were forced out of their own houses and into an open field, Defendant Hurtado ordered the soldiers to separate the men and women. *Id.* ¶39. Some of the women were taken away to a field where soldiers raped them. *Id.*

Later in the morning of August 14, 1985, a group of approximately 50 villagers was being held in front of the home of Cesareo Gamboa de la Cruz, also located in Quebrada de Huancayoc. *Id.* ¶40. In this group were Decedents Silvestra Lizarbe Solis, Victor Ochoa Lizarbe, Ernestina Ochoa Lizarbe, Celestino Ochoa Lizarbe, Edwin Ochoa Lizarbe, Fortunata Baldeón Gutiérrez and Edgar Pulido Baldeón. *Id.* Soldiers forced part of the group into the kitchen, which was a separate structure apart from the house. *Id.* Then soldiers forced the rest of the group into the house. *Id.* From her hiding place, Plaintiff Cirila Pulido saw her relatives, including Decedents Fortunata Baldeón Gutiérrez and Edgar Pulido Baldeón, forced into the house. *Id.* Once all the villagers were in the house, Defendant Hurtado ordered his troops to open fire on the two buildings. *Id.* Defendant Hurtado also threw a grenade toward one of the buildings, causing an explosion and a fire that burned the building with the villagers inside. *Id.* Among those killed were several pregnant women and elderly citizens. *Id.*

The soldiers killed other villagers, including children, in the surrounding areas. *Id.* ¶41. Soldiers found an elderly woman trying to put out the fire at the home of Cesareo Gamboa, so they shot her. *Id.*

E. The Peruvian Senate Commission

After information began to surface in late August 1985 about the killings in Accomarca and Pucayacu, the Peruvian Senate created a human rights commission (“Peruvian

Senate commission”) to investigate the massacres. *Id.* ¶49. The Peruvian Senate commission interviewed eyewitnesses to the Accomarca massacre as well as most of the Peruvian army officers involved. *Id.* ¶51. Defendant Hurtado admitted to the Peruvian Senate commission his involvement in the killings in Accomarca. *Id.*

F. Failure of the Peruvian Government or Military to Punish Defendant Hurtado

In or about October 1985, the Peruvian Senate commission published its report concluding that 69 people were killed in the Accomarca massacre and that the murders were common crimes, not military crimes, and should therefore be investigated and prosecuted in a civilian court. *Id.* ¶76. Around the same time, both government prosecutors and military authorities opened their own investigations. *Id.* Despite the Peruvian Senate commission’s conclusions, the Peruvian Supreme Court eventually ruled that the case was solely within the jurisdiction of the military justice system because the killings occurred inside an emergency zone and were perpetrated by members of the Peruvian Army. *Id.*

In or about 1987, two years after the Accomarca massacre, a military court absolved Defendant Hurtado of the charge of homicide because the court found that the killing of civilians by members of the military could not be charged as homicide in the military justice system. *Id.* ¶78. Defendant Hurtado was convicted only of “abuse of authority” and sentenced to four years in prison. *Id.* The military court’s 1987 ruling was thrown out by the Supreme Council for Military Justice. *Id.* ¶79. In or about 1989, a lower military court upheld the charges against Defendant Hurtado, but in or about 1992, that court convicted Defendant

Hurtado only of the lesser charge of abuse of authority and sentenced him to only six years in prison. *Id.* ¶¶79, 80.

In or about 1995, Defendant Hurtado's short six-year sentence was annulled under the amnesty law passed by the Peruvian government. *Id.* ¶81. Despite these lengthy proceedings and two different sentences of imprisonment for multiple years, Defendant Hurtado only served a fraction of his sentence in prison. *Id.* ¶82. Hurtado remained on active duty in the Peruvian army while the investigation into the Accamarca massacre was underway, and he was promoted three times — eventually to the rank of major. *Id.*

DISCUSSION

Plaintiff's Complaint sets forth specific allegations of Defendant Hurtado's liability under international and domestic law for extrajudicial killing; torture of plaintiffs; torture of decedents; war crimes against plaintiffs; war crimes against decedents; crimes against humanity against plaintiffs; and crimes against humanity against decedents. Accordingly, this Court has jurisdiction over this action under the ATS, 28 U.S.C. §1350 and the TVPA, 28 U.S.C. §1350 note, and 28 U.S.C. §1331. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 732 (2004); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Jean v. Dorelien*, 431 F.3d 776, (11th Cir. 2005); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002).

Plaintiffs request compensatory and punitive damages in this matter. An order of default has already been entered by the clerk in accordance with Federal Rule of Civil Procedure 55(a). As Plaintiffs' damages are not for a sum certain or an amount that can be made certain by computation, Federal Rule of Civil Procedure 55(b)(2) requires a default judgment be entered by the Court, with damages to be determined at trial. Default judgment is proper where: (1) a defendant properly served with the Summons and Complaint fails to appear or otherwise defend

within the time permitted by law; (2) the moving party has established the fact of such failure by affidavit or declaration; (3) the defendant is not an infant or incompetent person; and (4) a default has been entered against the defendant. *Id.*

Defendant Hurtado was properly served with the Summons and Complaint and proof of service of Defendant Hurtado was filed with this Court on August 21, 2007. (Docket entry 3.) Defendant Hurtado has failed to appear or otherwise defend in this action within the time permitted for his answer or other responsive pleading. Defendant Hurtado is neither a minor nor incompetent. The Clerk filed an entry of default on August 28, 2007. (Docket entry 7.)

As Plaintiffs' claims for compensatory and punitive damages are not for a sum certain, Plaintiffs hereby request a trial pursuant to Federal Rule of Civil Procedure 55(b)(2) to establish their entitlement and to quantify damages. Given the extraordinary importance of this case, Plaintiffs plan to give live testimony and to present other live witnesses to the events of August 14, 1985, as well as to present documentary evidence regarding their injuries and the Defendant's crimes.

As Plaintiffs and these other witnesses are located in Peru, preparation for such a damages trial will take a substantial amount of time. Further, Plaintiffs will need to obtain temporary visitor visas from the U.S. Consulate in Lima, Peru, a process that entails lengthy screening. In addition, a federal suit parallel to this one, with identical plaintiffs and nearly identical facts, is proceeding in the United States District Court for the District of Maryland against the commander of another Lince Company.¹ Plaintiffs have requested and received an

¹ *Teófila Ochoa Lizarbe, et al. v. Juan Manuel Rivera Rondon*, Case 8:07-cv-01809-PJM (D. Md.).

entry of default in that action because the defendant, another officer in Lince Company who was involved in carrying out the massacre, has also failed to answer the complaint against him. In order to fully inform the Court of these circumstances and to give the Court sufficient information to make a decision as to the timing of the requested damages trial, Plaintiffs propose that they appear at a status conference ordered by this Court.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court enter a judgment by default against Defendant Hurtado and schedule a trial to determine damages.

Dated: September 28, 2007

s/Robert M. Brochin

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