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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

	JUAN ROMAGOZA ARCE, et al.,)	Docket No.
)	99-8364-Civ-
HURLEY	Plaintiffs,)	
)	West Palm
Beach, Fl.	v.)	July 19, 2002
)	3:55 p.m.
	JOSE GUILLERMO GARCIA and)	
	CARLOS EUGENIO VIDES CASANOVA,)	
)	
	Defendants.)	
)	
	-----x		

VOLUME 15
TRANSCRIPT OF JURY QUESTIONS
BEFORE THE HONORABLE DANIEL T.K. HURLEY
and a jury

APPEARANCES:

For the Plaintiffs: JAMES GREEN, ESQ.
PETER STERN, ESQ.
BETH VanSCHAACK, ESQ.

For the Defendants: KURT KLAUS, ESQ.

24 Court Reporter: Pauline A. Stipes, CSR, RPR, RMR
United States Courthouse
25 West Palm Beach, FL 33401

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question 1 THE COURT: Ladies and gentlemen, we have a
2 from the jury in the trial matter. I wonder if I could
talk to 3 the lawyers in that case.

Casanova 4 THE COURT: Mr. Klaus, are generals Garcia and
5 here?

6 MR. KLAUS: No.

7 THE COURT: Is it all right to proceed in their
8 absence?

9 MR. KLAUS: Yes.

and 10 THE COURT: The parties are present. Dr. Romagoza
11 Ms. Gonzalez, is it all right to proceed in Professor
12 Mauricio's absence?

13 MR. GREEN: Yes.

jury, 14 THE COURT: We have a five part question from the
15 some of which we can handle right away. There is one I
want to 16 put before you, as well, and get your advice on how to
respond 17 to this.

18 The first question is:

19 " Regarding the Legion of Merit awards, may a
juror
20 who has personal knowledge of similar awards advise the
jury as
21 to his or her knowledge and opinion of the value and
weight to
22 place on the award? "

23 Why don't we talk about that for a moment?

24 We tell jurors that they can use their common
25 experience and judgment, but we also tell the jurors that
they

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1 need to limit themselves to the evidence.

2 It would seem to me we could say to the jury that
they
3 ought to limit themselves to the evidence presented, but
they
4 are free to use their own opinions regarding the weight of
that
5 evidence and the interpretation of that evidence.

6 What do you think about that kind of an approach
to
7 it, and let me tell you what I am thinking about.

8 If somebody says, you know, look, these are
awards,
9 and the language they stick in them is all the same. It
is

10 flowery language. It is in the nature of the award. I
think
11 the jury should be able to say that as opposed to saying
this
12 isn't an effort to write a history, and, for instance, one
of
13 the reasons that I let the awards in, as I said at
sidebar,
14 there is a discrepancy between the parties about the
nature and
15 perhaps the magnitude of the Civil War. One side would
suggest
16 that it was a small armed guerilla group which became much
17 larger because of the role of the military in its
repressive
18 actions. The other side has suggested that this was a
full
19 scale communist insurgency that -- because of which the
20 country, literally, was tittering on the brink and could
have
21 gone one way or the other.
22 You know, there are different views about that.
23 Now, I certainly think that the jury looking at
24 language, and maybe the similarity in the language, and so
on,
25 should be able to express its views in that regard, but I
would

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would

1 be concerned about somebody -- I have no idea what they
2 bring into this from some other source that you don't know
3 about.

the

4 How would you approach this? I think the normal
5 approach that we tell jurors is that we limit ourselves to
6 evidence of what has been presented but they can use their
7 common sense in interpreting the evidence.

own

8 Is that walking kind of an ambiguous line but
9 acceptable line or what?

on

10 MR. KLAUS: I think they can -- they have to rely
11 the evidence and use their own common sense and their own
12 experience and they are free to express any opinions they
13 that they have garnered from their life experience, the
14 has to be decided on the evidence. The way the question
15 worded sounds like someone is holding himself forward as
16 expert on Legion of Merit awards.

life

want

case

is

an

said

and

opposite,

Defense

17 THE COURT: Someone may have been in the Army and
18 I have seen 50 of these. They pass these things out left
19 right, they mean nothing; or, someone may say the
20 this is significant when it comes from the Secretary of

run -- 21 and personally signed, so on, so forth, this is not the

22 I don't know what they are going to say.

have 23 I think the guiding principle should be that they

free to 24 to limit themselves to the evidence, although they are

25 use their common sense in interpreting the evidence.

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just 1 MR. KLAUS: You want to say life experience or

2 common sense?

3 THE COURT: I don't know. What is the plaintiff's
4 view? How would you respond to that?

irrelevant 5 MR. GREEN: First, we contend that they are

6 and not admitted and perhaps they should be stricken now.

7 THE COURT: Right, but that is not helpful now.

jurors 8 MR. GREEN: I think they should be advised that

9 are not witnesses and jurors cannot provide evidence.

10 THE COURT: That is an interesting approach to say
11 that --

12 MR. KLAUS: I think that is a necessary approach.

things 13 THE COURT: How about if we wedded those two

14 together and said the principle that has to be applied
here is
15 that the jury must limit its decision to the evidence,
although
16 the jury is free to use their own common sense in
interpreting
17 the evidence, but we must remind you that jurors are not
18 witnesses.

19 What was the second part you have?

20 (Thereupon, the portion of the hearing referred
to was
21 read by the Reporter as above-recorded.)

22 THE COURT: I think those are accurate
principles.

23 MR. GREEN: However, you can evaluate the evidence
with
24 evidence and personal experience.

25 THE COURT: It is personal experience that we open
the

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1 door here.

2 MR. KLAUS: I would include the first phrase, so
well
3 put.

4 THE COURT: Let me take a look at the jury
instruction
5 of what we said. There is something right in there on
that.

6 This is the phrase from the jury instructions:
"You
7 may make deductions and reach conclusions which reason and
8 common sense lead you to make".

9 What if we said that jurors are not witnesses,
nor may
10 jurors provide evidence. You must limit your decision
making
11 to the evidence presented in the courtroom, however, you
are
12 free to evaluate that evidence and make deductions and
reach
13 conclusions which reason and common sense lead you to
make.

14 Could both sides live with that response?

15 MR. KLAUS: Yes.

16 MR. STERN: Could we have a moment?

17 THE COURT: Surely, yes, of course.

18 MR. GREEN: That is fine, Your Honor.

19 THE COURT: Let me go over this verbiage with you
again
20 before I write it down.

21 " Jurors are not witnesses and may not provide
22 evidence. The jury must limit its decision making to the
23 evidence presented in the courtroom, however, that
evidence may
24 be evaluated -- however, in evaluating that evidence you
may
25 make deductions and reach conclusions which reason and
common

1 sense lead you to make. "

2 That is okay?

3 MR. KLAUS: Yes.

4 MR. GREEN: Yes, Your Honor.

5 THE COURT: Okay. Second question:

6 " Is there a list of exhibits and descriptions
that we
7 may have? "

8 I think the answer is no. I am not aware of any
9 descriptions. We have the exhibit lists, but I don't know
how
10 accurate they are in terms of descriptions. I never send
them
11 back.

12 MR. STERN: In the binder, we did include an
index, but
13 that is merely, you know, cable from so and so to so and
so.
14 That does not cover every exhibit. Frankly, I think it is
more
15 than they normally would have.

16 THE COURT: I do, too.

17 Would it be appropriate to say there is an index
in
18 the binder, but we do not have a larger index?

19 MR. KLAUS: That is fine.

20 MR. STERN: The number of exhibits is not -- I am
sure

21 it seems daunting to them, but it is not that extensive.

22 THE COURT: Let me read the next question.

23 It says:

24 " Is it incumbent upon us to read all of the
exhibits

25 in full, or acceptable refer to parts as we may recall as

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1 necessary? "

2 I would suggest that the answer to that should
simply

3 be you may conduct your deliberations as you see fit in
light

4 of the oath you have taken.

5 MR. GREEN: Yes.

6 MR. KLAUS: That is fine.

7 THE COURT: Next question:

8 " Are we permitted to review depositions both
written

9 and video and have testimony reread to us if we ask for
it? "

10 MR. GREEN: I believe the answer to that is, the
video

11 depositions are in evidence and they can review those. As
to

12 the depositions that were used for impeachment purposes, I
13 believe that those are not considered substantive
evidence.

that? 14 THE COURT: Help me out on the video, did we do

15 Did we edit it?

and 16 MR. GREEN: We designated the portions we wanted
17 played those for the jury.

have 18 THE COURT: What we have, if we have a -- do we
need to 19 like a regular video tape that has a whole video and we
20 edit it, or is the video in edited form?

21 MR. GREEN: It is all edited.

22 THE COURT: The video is in and can be seen.

23 MR. GREEN: In its entirety.

that 24 THE COURT: What is in its entirety is everything
25 is shown? Extraneous material is not on the tape?

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1 MR. GREEN: Correct.

2 THE COURT: Good, that is great.

depositions 3 MR. GREEN: To my knowledge, the only other
only 4 that were referred to were used for impeachment purposes
5 and were not introduced as substantive evidence.

6 THE COURT: I am trying to think, did anyone read
7 anyone's deposition?

8 MR. GREEN: No.

9 MR. STERN: Snippets were read.

10 THE COURT: Yes. How about having testimony
reread if

11 we ask for it?

12 MR. GREEN: Yes. Depends on the testimony, but,
yes.

13 THE COURT: Here is the problem. We are being
asked a

14 question in advance of the issue.

15 If somebody came in and said we would like the
16 testimony of so and so reread, and it is two or three days
of

17 testimony, that is one thing. If they come in and say we
are

18 having a problem with this issue in that witness'
testimony,

19 can you get it? We would get the direct, cross, and
redirect

20 on that point.

21 Just trying to think, because I don't want to
22 foreclose anything here.

23 How would it be if we said videos are in evidence
and

24 you can see those?

25 MR. GREEN: And we can provide you with a
television

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1 and VCR.

2 THE COURT: How about if we said the videos are in
3 evidence and you can see those. We would rather wait on
the
4 other matters and if you have specific questions or
requests we
5 would respond to them at that time.

6 Is that an acceptable way?

7 MR. GREEN: That would be acceptable. Another way
of
8 saying the latter part of what you just said is trial
testimony
9 can be read back, however -- I am trying to think of a way
to
10 request that the jury specify which part or portions of
the
11 testimony they would like read back so as to guide the
court in
12 making a determination as to whether we, in fact, allow a
read
13 back.

14 My experience with juries, when they ask for two
days
15 of testimony to be read back you say, no, rely on your
16 recollection, when you ask them to focus on particular
parts of
17 the deposition, that will enable the parties to say, let's
read
18 back pages 28 to 34, and if the other side wants read back
19 pages 60 to 68, we can, hopefully, narrow the scope. If
there
20 is a way to ask them --

21 THE COURT: How about if we say this: The videos
are
22 in evidence and may be viewed, and we would rather wait to
23 respond to the latter part of your question until we have
24 received -- if you find it necessary, and how specific
your
25 request is.

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1 MR. GREEN: Or we ask that you narrow and make
2 specific -- I don't know if Your Honor finds itself
helpful
3 when the jury says we would like to hear the testimony of
agent
4 so and so concerning the lighting, or the --

5 THE COURT: Right, right, that is it. You are on
6 point and I normally allow it if it is specific.

7 I know Judge Ryskamp, I think, has a practice of
not
8 allowing it. I want to do anything we can to help the
jury.
9 If they are telling us they need something and we can get
it to
10 them, I would like to do it.

11 MR. GREEN: Maybe you could say there are times
when
12 the court will permit a read back of testimony -- of
13 specific -- of testimony depending upon length and
specificity

14 of the request.

15 THE COURT: That is a good way to say it, I think.

16 Can you live with that, Mr. Klaus?

17 MR. KLAUS: Yes.

18 THE COURT: Next question:

19 " May we have all display boards and an easel? "

20 I think the display boards are -- I think the

display

21 boards refer to the things that were put up, I think we

need to

22 answer no to that since they were not in evidence.

Anybody

23 feel differently about that?

24 MR. GREEN: With the exception of the goose

stepping, I

25 believe most of them are summaries or are in evidence in

other

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1 exhibits.

2 I think it is discretionary with the court to

allow

3 them. I am not going to request the goose stepping.

4 THE COURT: Now, the map, I wouldn't have a

problem

5 sending the map back, that may be of help to them, but I

6 normally don't allow that. The jury room is a relatively

small

7 room and next thing you know people blow up all kinds of
things
8 that you think are favorable to their side and it becomes
very,
9 very difficult.

10 I am inclined to say that there are demonstrative
11 exhibits, but the boards themselves were not formally
12 introduced into evidence, however, the content may well be
in
13 an exhibit. That is okay?

14 MR. KLAUS: That is fine. I have no objection if
you
15 want to send the map back and the picture of General
Garcia.

16 I am going to hang that in my office.

17 MR. GREEN: We will get them the map and the
picture of
18 General Garcia.

19 THE COURT: I sense negotiations ongoing.

20 MR. GREEN: Your Honor, they may be asking for
21 plaintiff's diagrams, as well, I don't know.

22 THE COURT: They may be. They may be thinking
about
23 some of the slides that were very helpful.

24 MR. KLAUS: They are in evidence.

25 THE COURT: That is what I am saying.

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1 MR. KLAUS: There are smaller copies of them in
2 evidence.

3 MR. GREEN: Your Honor, one thing -- I am sorry.

4 THE COURT: This is the answer I put to this.

5 The boards are not in evidence, but the contents
may
6 well be in evidence in certain exhibits.

7 We need to go back to the sort of the last
question

8 and it's:

9 " Is there a list of exhibits and descriptions
that we
10 may have? "

11 And I suggest we simply say there is an index in
the
12 binder, but we do not have a broader index or more
complete
13 index.

14 MR. GREEN: However, if they have specific
questions as
15 to what number or where a specific exhibit or reference to
an
16 exhibit might be found --

17 THE COURT: Right, if you are having trouble
finding a
18 particular exhibit, let us know, and we will try to help
you.

19 I think we can respond almost immediately to that. Is
that
20 okay?

21 MR. KLAUS: That is fine.

22 MR. GREEN: Your Honor, we do have the videos
here.

23 THE COURT: They didn't go back.

24 MS. VAN SCHAACK: We neglected to make a file
folder
25 for them.

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1 THE COURT: Why don't we do that.

2 There is an index in the binder, we do not have a
more
3 complete index. Please let us know if you cannot locate
an
4 exhibit and we will try to give you the number.

5 MR. STERN: Your Honor, it might make sense to
mention
6 that the index is not comprehensive. The index covers
what is
7 in the binder but it is not complete.

8 THE COURT: I think that is implicit. I think we
9 talked before that the binder does not cover everything,
nor
10 does the folder.

11 Okay, anything else we need to handle?

12 All right. Mr. Green, if you would give -- we
have
13 the videos, we will send those back.

14 We will be in recess pending the call of the
jury.

the 15 MR. GREEN: Your Honor, you are going to answer
16 questions in writing to the jury?

handle 17 THE COURT: I thought that would be the way to
18 it.

could 19 Do you want a copy of these? I can see if we
20 get a copy for you.

21 (Thereupon, a recess was taken.)

22 (Thereupon, 3:55 p.m court reconvened.).

from 23 THE COURT: Ladies and gentlemen, we have notes
24 the jury. Let me bring them to your attention and we will
see 25 how attempt to respond to them. These deal with the jury

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1 instructions. Do you have copies of the jury
instructions?

should be 2 MR. GREEN: No, your Honor. Ms. Van Schaack
3 here shortly.

reads as 4 THE COURT: We have two questions. The first
5 follows:

6 " A juror requested the definition of term actual

7 ability as stated on page seven, seven and eight, line
under
8 superior subordinate relationship, element two".
9 We have a second question that just came out, and
it
10 says:
11 " In part one and two of this law, shouldn't it
be
12 absolutely necessary for the accused torturers be
identified or
13 at least prove to be subordinates of the defendant
commanders?
14 It seems a lot is missing".
15 I think the jury is having problems with this
issue.
16 Now, let's take the last question first, because
I
17 think it is the easiest one in one sense.
18 The names of the torturers don't have to be known
in
19 that sense but, clearly, what has to be known is the
torturers
20 must have proved to have been members of the military or
21 members of the security forces, or somebody who is not in
a
22 military uniform but working in concert with the military.
23 MR. KLAUS: They have to be somebody in actual
control
24 of the commander.
25 THE COURT: You don't have to know their actual
names

1 but, in point of fact, they must fit that category.

2 The next question is:

3 " Do they have to be subordinates of the
defendant

4 commanders? " And the answer to that is yes.

5 Let me take a second again.

6 We have two questions from the jury and these are
both

7 very significant questions.

8 I am taking them in reverse order. We need Ms.
Van

9 Schaack, too. Let me give her a minute to come in.

10 I am trying to get copies of the jury
instructions so

11 you will have them. I think it would be helpful to have
them

12 in front of you when we are talking about this.

13 The jury is looking at the command responsibility
14 instruction, and let me read the two questions so you can
have

15 them in mind so we can go back and pull them apart.

16 The first question says:

17 " A juror requested the definition of the term
actual

18 ability as stated on page seven, seven and eight, line
under

19 the superior subordinate relationship".

20 And then the second question that came out after
that

21 says:

22 " On page 7 of the law, in part one and two of
this
23 law, shouldn't it be absolutely necessary for the accused
24 torturers--" and I think it is "-- to be identified or at
least
25 proved to be subordinates of the defendant commanders? It

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1 seems there's a lot missing".

2 Now, let's take the last question first.

3 I think we all agree that it is not necessary
that you
4 know the names of the torturers, but what must absolutely
be
5 established is that the people who did the torturing were
6 either members of the military, members of the security
forces
7 or non-military folks who were acting in concert with
military
8 people, A, and, B, yes, they do have to be subordinates of
the
9 military commanders, of the defendant military commanders.

10 MR. KLAUS: Agreed.

11 THE COURT: Do both sides agree to that?

12 MR. GREEN: Well, Your Honor, depends on how you
answer
13 the question. I hear in terms of absolutely necessary a

of 14 question that relates to the burden of proof and the type
and I 15 evidence that the jury can consider in evaluating this,
16 have a --
be 17 THE COURT: Well, let me go back, because it must
members 18 proven by a preponderance of the evidence that they are
military 19 of the military, members of the security force, or non-
20 people acting in concert with, and it must be proven by a
committing 21 preponderance of the evidence that when they were
defendant 22 that torture they were subordinates to a particular
You 23 military commander who is sought to being held liable.
24 both agree to that?
25 MR. KLAUS: Yes, Your Honor.

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1 THE COURT: Now, as a practical matter, that
means the 2 plaintiffs don't have to prove somebody's name but they
must 3 prove by a preponderance of the evidence that in point in
fact 4 the person doing the torturing was a member of the
military, a

5 member of the security force, or a non-military person
acting
6 in concert with them.

7 MR. STERN: The question to me seems to portray
whether
8 it is possible that someone is a subordinate to the
commander,
9 and that is something that would not be consistent with
our
10 understanding of the instructions.

11 THE COURT: Well, you think about it, you could
prove
12 it lots of ways circumstantially. You could prove it
because
13 they are operating military equipment, they have
helicopters,
14 uniforms, you recognize the insignia.

15 MR. STERN: That is true. The question does not,
16 however, to me, contemplate that type circumstances.

17 THE COURT: I am not quite sure.

18 MR. KLAUS: I don't think it matters if he is a
member
19 of the military, security forces, or the Mickey Mouse
Club, I
20 think what is important that the person is under the
actual
21 control of the commander seeking to be held liable. He
could
22 be a member of a postal service. If he is under the
command of
23 the accused, then the accused could be held liable. It is
24 really an agency theory almost.

25 THE COURT: Let's take a minute and maybe go back
to

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1 the other side. I think that will help us if we come to
grips

2 with what does actual ability mean and not mean.

3 I want to go back, I have Ford versus Garcia in
front

4 of me. Let me read this to you, maybe we could read all
of

5 this to the jury if it further elaborates.

6 Let me just read it to you.

7 " Recent international law cases consistently
have

8 found that effective control of a commander over his
troops is

9 required before liability will be imposed under the
Command

10 Responsibility Doctrine.

11 " The consensus is that the concept of effective
12 control over a subordinate in the sense of a material
ability

13 to prevent or punish criminal conduct, however, however
that

14 control is exercised, is the threshold to be reached in
15 exercising a superior subordinate relationship".

16 Let me go back. That is an interesting thing.
It

17 talks in terms of the material, and remember we talked
about
18 the practical ability to prevent or punish criminal
conduct,
19 however, that control is exercised is the threshold to be
20 reached in establishing a superior or subordinate
21 relationship.

22 " Proof is required that the superior has
effective
23 control over the person's committing the violations of
24 international humanitarian law in question, that is, has
the
25 material ability to prevent the crimes and to punish the

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1 perpetrators thereof". Again, material ability to prevent
or
2 punish.

3 " Material ability to control the actions of
4 subordinates is the touchstone of individual
responsibility.

5 Under Article 6.3, the command responsibility theory of
6 liability is premised on the actual ability of a superior
to
7 control his troops. A showing of the defendant's actual
8 ability to control the guilty troops is required as part
of the
9 plaintiff's burden under the superior subordinate prong of

10 command responsibility".

what

11 I wonder if it wouldn't be appropriate to address

material

12 actual ability means, and say actual ability means the

conduct

13 or the practical ability to prevent or punish criminal

prove by

14 and then go back and say, that is, the plaintiffs must

defendant

15 a preponderance of the evidence that the specific

guilty

16 military commander had the actual ability to control the

17 troops or persons.

try

18 MR. GREEN: Your Honor, could we have a moment to

19 to sketch something out?

20 THE COURT: Yes.

actual

21 MR. GREEN: If I may sort of think out loud, and I

22 haven't consulted with my clients, we are talking about

23 ability.

24 THE COURT: Actual ability.

a

25 MR. KLAUS: Your Honor, maybe if we could consult

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1 dictionary for actual.

2 MR. GREEN: I have. It says practical, material,

3 significant.

4 THE COURT: My suggestion is, I think we should
stay as
5 close as we can to the 11th Circuit's opinion, looking at
2295
6 of the slip sheet opinion, you may have another copy, but
there
7 are three or four definitions there that are similar.

8 MR. KLAUS: I don't have a problem with reading
that
9 whole section that goes down through the actual control.
Maybe
10 it will help them.

11 THE COURT: Why don't you think about it for a
12 second. Let's do some drafting and see if we could come
up
13 with something.

14 THE COURT: I know the parties are waiting in the
next
15 matter.

16 Mr. Salnick, that is a straight forward
sentencing?

17 MR. SALNICK: Yes, sir.

18 THE COURT: We will get to it in a second.

19 MR. KLAUS: Your Honor, I don't mind them being
given a
20 dictionary.

21 THE COURT: No. No. No. Let's not do that.

22 MR. GREEN: You want us to respond to that or both
of
23 them?

24 THE COURT: No. Let's deal with that first, the

will 25 concept of effective control and actual ability, and we

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1 figure how we will do the second one.

2 MR. STERN: Your Honor, I think part of the
confusion

3 may be caused by the fact, as we have it now, the sentence
4 defines effective control in the sense of actual ability.

You

5 have this double layer before you get to substance, which

we

6 believe to be the notion of ability to prevent the torture

or

7 punished the accused persons.

8 THE COURT: What I think it means is, remember we
had

9 this discussion about material, what does that mean? I

think

10 it means that the commander has the material or the

practical

11 ability to prevent or punish the wrongdoing.

12 MR. STERN: That is the lines we were thinking of.

13 Actual ability means a material ability to prevent or
punish

14 criminal conduct, which tracks the Ford opinion.

15 MR. KLAUS: I don't agree.

16 THE COURT: Let's take a second and do some
thinking.

17 How does this sound? For a commander to have
18 effective control, it must be shown by a preponderance of
the
19 evidence that he had the practical ability to prevent or
punish
20 wrongdoing by his subordinates.

21 MR. KLAUS: I don't agree. It goes to his
relationship
22 with the person not his relationship to the person's acts.
He
23 has to have the ability to punish the wrongdoer, not the
24 actions. It is -- This is the crux of the case.

25 THE COURT: Let me stop you for a minute. Has the

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1 practical ability to prevent or punish the wrongdoers for
their
2 acts.

3 MR. KLAUS: I object to giving any additional
4 explanation. I think it is clear in the instruction. I
think
5 it is laid out in the instruction. I think the only
6 instruction they should be given, you must rely on your
own
7 interpretation of the instructions.

8 THE COURT: Okay. The only thing I would like to
9 suggest to you is this: I think the question suggests
some

10 real confusion here, serious confusion, and I think our
11 obligation is to try to help the jury to make sure that
they
12 understand the law so they can apply it.

13 Now, let me point out to you, the second question
is a
14 very serious question for the defense because it is clear
there
15 that whoever wrote this question does not understand that
you
16 do, in fact, have to be a subordinate. You don't apply
17 liability if somebody is not, indeed, in that superior
18 subordinate relationship and we need to say that.

19 By the same token, I think we need to point out
that
20 the plaintiffs don't have to prove, necessarily, the
identity,
21 you know, John, Joe, or something else, but they have to
prove
22 what is required.

23 So, I do think -- I think it is the backup for
lawyers
24 to say tell the jury to follow the instructions. It is
clear
25 to me the jury is having real problems with this and we
ought

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it 1 to, as best we can, address it, but make sure we are doing
2 in a correct way, that we are giving them something.

the 3 Again, looking at the 11th Circuit's opinion and
4 quotes in that opinion from the international tribunals,
they 5 talk about having the material ability to prevent the
6 crimes or 7 punish the perpetrators.

8 Now, we've talked about substituting the word
9 "practical" for "material" because I am not sure to a
layman 10 the word material connotes -- has meaning, and that is
11 what we 12 are trying to give them.

13 Again, we come back to the facts in our case.

14 What defense has argued is that the command
structure 15 was so fragmented because of what was happening in the
16 country,
17 that while someone may have held title of commander of the
18 their 19 armed forces, they didn't have the ability to insure that
20 doing 21 orders were in fact being carried out or people were not
22 view,
23 and Professor Karl certainly spoke to this, that this was
24 so
25 widespread and pervasive, that there was state terror.

26 Now, I think you have to be able to talk to the
jury

21 about what does this mean, and it seems to me you are
talking
22 about the practical ability. In light of all of the
evidence,
23 I will not get into that, but the practical ability to
either
24 prevent the crime or punish the wrongdoer.
25 Give me just a minute. Let me see if I can't --

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1 understanding your initial position is say nothing else,
give
2 me a minute here.
3 Looking at Judge Barkett's concurrence, she says
the
4 court defined an official with effective command as one
5 possessing both the legal authority and the practical
ability
6 to exert control over his troops. This effective command
7 instruction is accurate in so far as it requires officials
with
8 de jure authority, and then went on and spoke about we all
have
9 to understand that the concept could be broader. You
could
10 have commanders who were not possessing formal authority,
but
11 they were in fact commanders. She uses the term practical
12 ability to exert control.

13 MR. STERN: Your Honor, one point on that. When
we
14 speak of practical ability to exert control, it doesn't
give a
15 lot of substance to work with.

16 THE COURT: No, we have to put that in with
practical
17 ability to prevent or punish.

18 MR. STERN: That is where the international juris
19 prudence is cited explicitly. In all cases we have this
notion
20 preventing and punishing. Those are quotations from
Delalic
21 and Blaskic cases from the ICTY.

22 THE COURT: How does this sound:

23 " As I said earlier in the jury instructions, one
24 essential component of a superior subordinate relationship
is
25 that a commander had effective control over the
subordinate.

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1 This requires a showing that the commander had the
practical
2 ability to prevent his subordinate from committing torture
or
3 had the practical ability to punish the subordinate who
4 committed the torture.

essential 5 " As I have said in the instructions, one
6 component of a superior subordinate relationship is that a
7 commander had effective control over the subordinate.
This 8 requires a showing that the commander had the practical
ability 9 to prevent his subordinates from committing torture or had
10 the practical ability to punish a subordinate who committed
11 torture".

12 MR. KLAUS: It has to be prove by a preponderance.

13 THE COURT: I am going to say all of that. I
promise I 14 will go through all the magic words. Let's deal with the
15 concept.

16 MR. KLAUS: It is not preventing subordinates. It
is 17 preventing these subordinates.

18 THE COURT: It has to be shown that he had the
19 practical ability to prevent or punish the people who
tortured 20 the plaintiffs.

21 MR. KLAUS: Exactly.

22 THE COURT: Because we talked about the necessity
for a 23 superior subordinate relationship between the defendant
and the 24 people who tortured the plaintiff.

25 MR. STERN: Your Honor, our position is it should
be

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1 framed in terms of criminal conduct as in the ICTY juris
2 prudence or punish perpetrators. I think the problem with
3 focusing on the torturer, the subordinate, it suggests
there
4 has to be an identification of that individual.

5 THE COURT: Can you hold on to that and let me go
to
6 the second thing. We have to respond to them together.

7 MR. STERN: This is precisely the context in which
the
8 presumption identified by the Ford court has meaning and
ought
9 to be applied. We are entitled to that.

10 THE COURT: I have ruled on that and I will adhere
to
11 my ruling. I think it would be reversible error. I want
you
12 to think about that. The last thing you want me to do and
I

13 think the Ford opinion absolutely tells me I am not to
tell the
14 jury about a presumption. I know it doesn't say that but
it
15 comes as close to saying that as I think the 11th Circuit
16 could, and maybe they have actually said it.

17 Jury instructions are to address the ultimate
burden
18 of persuasion only and should not needlessly confuse the
jurors

19 with which party had the burden of production at trial.
20 And you are talking about a burden of production
that
21 is caused by a presumption, a presumption shifting a
burden of
22 production.
23 I am going to overrule that. I think the 11th
Circuit
24 has spoken explicitly to that, and I think I would be
25 jeopardizing the result.

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1 Let's go back and try to focus on what the jury
has
2 asked us.
3 They are asking us, first, to help them out in
terms
4 of understanding what do we mean when we say actual
authority?
5 Okay. As I read actual authority in the Ford
opinion,
6 it's talking about the material ability to prevent or
punish.
7 That is the phrase that is repeated three times
in
8 that section.
9 Now--
10 MR. KLAUS: I don't mind if we use perpetrator
there.

11 THE COURT: Hold on a second.

actual
12 So my suggestion is, in responding to what is
13 authority, I think we ought to stick as close to the 11th
ability
14 Circuit's recapitulation of that in terms of material
15 to prevent or punish.

16 The other thing is more distressing. The other
17 question is somebody is really having problems with some
of the
18 things we talked about, and frankly, I had some problems
with,
19 too. And we ultimately conceptually resolved them about
20 elements one and two being specific, whereas elements
three and
21 four are general, see.

22 Let me read the second question again.

23 In part one and two of this law, shouldn't it be
24 absolutely necessary for the accused torturers to be
25 identified?

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by
1 Now, clearly, you don't have to identify somebody
2 name but they do have to be identified in the sense that
the
3 plaintiffs must prove by a preponderance of the evidence
that

4 they are members of the military, security force or
5 non-military working in tandem with the security force.

6 The second thing says or at least prove to be
7 subordinates of the defendant commanders.

8 The answer to that is simple. Of course they
have to
9 be subordinates, see.

10 MR. STERN: I think I would draw a distinction
between
11 identifying and establishing. We don't have to identify
12 anybody in particular. We have to establish that they
were
13 subordinates and there are a variety of ways we can do
that.

14 MR. GREEN: Your Honor, may I make a suggestion?

15 THE COURT: Yes.

16 MR. GREEN: To answer the second question, we
propose
17 that it be answered in two parts or maybe three parts.

Part A
18 would be the names or identities of the actual torturers
need
19 not be shown. Something to that effect.

20 Number two, however, the plaintiffs must show by
21 direct or circumstantial evidence that it is more likely
than
22 not that the plaintiffs were tortured by members of the
23 military, security forces, etc..

24 Part C, among the factors that you may consider
are
25 the existence of a chain of command, whether the torturers
were

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1 wearing uniforms, military, security forces, etc., and the
2 location of the alleged torturers.

3 THE COURT: I can't get into C. That is a comment
on
4 the evidence and you are asking me to lay out factors that
the
5 jury should look at.

6 One and two sound. Good, would you change it and
use
7 preponderance of the evidence and could you pass that up
to
8 me?

9 MR. GREEN: Okay. With respect to actual, I have
been
10 thinking long and hard, a lot of burden shifting, summary
11 judgment stuff, and I have been thinking long and hard
about
12 the 11th Circuit's admonition about instructing on
presumption;
13 however, it does seem, though, jury instruction on what
factors
14 could be considered would be especially appropriate here
when
15 you do have effective command. I have language which I do
not
16 think would run afoul of the Ford instruction.

17 If I could find it, something like this. And
this is

18 very rough. I think it will convey the idea.

19 In evaluating whether the superior had effective
20 control over his subordinates, you can consider the
commander's
21 official position.

22 MS. VAN SCHAACK: More in the nature of an
inference.

23 THE COURT: I am not going to give that kind of
24 instruction. I think we are going too far.

25 Let me get the last two things that you said that
is

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1 right on point.

2 MR. KLAUS: The only problem I have, it needs to
3 include that he was a subordinate. Not just a member of
the
4 military or member of the National Guard.

5 THE COURT: What I think we have to say is, we
have to
6 prove -- the plaintiffs have to prove by a preponderance
of the
7 evidence that a superior subordinate relationship existed
8 between the defendant who sought to be held liable and the
9 person committing the acts or the people committing the
acts.

10 MR. KLAUS: Exactly.

11 MS. VAN SCHAACK: Your Honor, this may be part of
the
12 problem. What I am hearing in the questions from the jury
is a
13 confusion about what level, where the specificity of the
second
14 prong has to lay and we have to be clear to them that the
15 specificity is that the actual perpetrator was a
subordinate in
16 the way in which we defined it, which is to say, the
commander
17 could do these two things, prevent that person or punish
that
18 person.

19 The second point of specificity which is sort of
20 lurking in one of your explanations is that the defendant
21 commander could punish or prevent that particular act of
22 torture.

23 That is not where the specificity lays. What
matters
24 is the perpetrator is a member of the class of
individuals.
25 Not that that commander could punish or prevent the exact

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1 torture. That runs afoul of the third prong which the
2 commander doesn't need to know that these three
individuals

3 were being tortured. What matters is that the commander
can
4 control that member in a general sense.

5 THE COURT: I agree. Remember, it is in the
6 disjunctive.

7 MS. VAN SCHAACK: That is fine.

8 THE COURT: How do you propose to deal with that?

9 MS. VAN SCHAACK: I don't have the monitor in
front of
10 me. The way you formulated the ones, the way you read
back,
11 sounded like the commander had the actual ability to
prevent
12 the torture or punish the torture.

13 MR. KLAUS: That is what it says in the jury
14 instructions, prevent the torture or punish the persons
accused
15 of committing them. In other words, to establish
effective
16 control, the plaintiff must prove that the defendant
military
17 commander had the actual ability to control persons
accused of
18 torturing the plaintiff.

19 That is the essential element that the 11th
Circuit
20 talks about. Has to be. That is the corner stone of any
21 liability under command responsibility. Has to be. A
22 practical common sense matter, if you can't control the
person,
23 how can you be liable for what the person is doing?

24 THE COURT: There is a difference between ability
to
25 control and knowing a particular soldier is going to do
it.

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1 MR. KLAUS: No one can know what a person --
particular
2 person is going to do. That is the problem with the whole
3 doctrine.

4 THE COURT: Let me stop for a second. Think of it
this
5 way. We are looking at whether a power existed.

6 In other words, at the time this happened to any
one
7 of the plaintiffs, when you look at the military commander
8 defendant, did he have the practical ability to control
the
9 acts of the people who either -- who committed the
torture?

10 It is not whether he knew they were committing
11 torture; but when you look at the requisite power he had,
did
12 he have that degree of control over them so he had the
13 practical ability to prevent his troops from engaging in
14 torture or for punishing them if he found out they did?

15 MR. KLAUS: Exactly, that is what is so difficult
about
16 it. If you look in a practical application look --

17 THE COURT: Okay, okay.

18 MR. KLAUS: That is what I mean.

19 THE COURT: Okay, okay, everybody, all right.

20 Should we answer the question now or do you want
to
21 wait until Monday morning 9:30?

22 MR. KLAUS: No, let's do it now.

23 MR. GREEN: Would you like to see the written
24 response?

25 THE COURT: Yes.

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1 MR. GREEN: Should I show it to Mr. Klaus first?

2 THE COURT: Would you, please.

3 MR. STERN: I may not be the best person to
address

4 this, but I think the root of our concern is by focusing
on

5 preventing the torture or punishing the persons accused of
6 committing the torture, you merge with this notion of
7 identifying the individual who actually committed the act.

8 That is not the conclusion that you are meant to be left
with.

9 And our concern is that the language that refers to that -
- the

10 torture --

put 11 THE COURT: Let me do this one more time now and

12 this forth as a proposal.

what 13 First, I would tell the jury that they must take

14 I am saying in relation and in part of all of the jury

15 instructions that have been given.

propose the 16 I would read to them the question and then

17 answer.

18 The first business being actual -- definition of

earlier, 19 actual ability, and I would read that as I indicated

20 one of the essential components of a superior subordinate

21 relationship is a commander had effective control over the

had 22 subordinate. This requires a showing that the commander

23 the practical ability to prevent his subordinates from

24 committing torture or had the practical ability to punish

25 subordinates who committed torture.

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deals 1 Now, in response to the second question that

previously 2 with -- and I read the question, the answer is as I

plaintiffs 3 instructed, the second element requires that the

of
between the
held
of

4 prove by a preponderance of the evidence that as a point
5 fact, a superior subordinate relationship did exist
6 specific defendant military commander who sought to be
7 liable and the person or persons who committed the torture
8 the plaintiff.

of the
the
the
that

9 Now, in saying this, this does not mean that the
10 plaintiffs must prove the names or the actual identities
11 torturers, but what must be shown by a preponderance of
12 evidence is that the torturers, A, were in fact members of
13 military, security or acting in concert with them, and
14 those torturers had a subordinate relationship, superior
15 subordinate relationship with the defendant military
16 commanders, and leave it at that.

17 MR. KLAUS: Agreed.

18 MR. GREEN: Almost.

19 THE COURT: Okay. We are getting there.

subordinate.

20 MR. GREEN: I don't think we need to say superior
21 subordinates. The theory is the torturers were

pull

22 THE COURT: I want to relate it to the concept to
23 it in.

did

24 MR. GREEN: Number two, I think it is very -- we

they 25 request and we have factors that juries can consider when

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1 consider, say, the voluntariness of confessions which
survive 2 the suppression gauntlet, and you say you can consider
this 3 factor, this factor, this factor. And I think factors --
4 instructing the jury on factors especially in an area as
5 complex --

6 THE COURT: How about if you do some drafting
over the 7 weekend, let me take a look at it, and we can talk about
it on 8 Monday?

9 MR. STERN: I think the root problem is that you
have 10 to make clear to the jury that they can find the commander
commander 11 liable for failing to punish someone even when the
12 doesn't know the identity of the person to be punished. I
13 sense a confusion, how can you fail to punish someone --

14 THE COURT: Can I ask you to draft over the
weekend?

15 MR. STERN: Sure, fine.

16 THE COURT: Now, one other thing here. What do
you

17 think about going back again and using the concept that we
have
18 been using about how one and two are specific to the
event,
19 whereas, three and four are general? I have found that
20 helpful. And I don't know that we really talked about it,
but
21 talking about one and two deal with the plaintiffs in this
22 case, whereas, three and four are more generic.

23 MS. VAN SCHAACK: As long as it is clear that
prong two
24 relates to just the relationship to the defendant
commander and
25 subordinate. The actual fact here is not relevant.

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1 THE COURT: Let me make sure I am understanding
you.

2 Element two refers to the relationship that
existed
3 between the specific military commander and the people who
4 actually committed the torture.

5 MS. VAN SCHAACK: Right, but the specificity is
not in
6 the actual act that that subordinate engaged in.
Specificity
7 is based on the relationship.

8 THE COURT: Okay.

that 9 MS. VAN SCHAACK: That is where I am sensing where
10 confusion is. There is a merging of the two concepts. I
agree 11 it is helpful to bifurcate.

12 THE COURT: I felt that it was, I really do.

13 MS. VAN SCHAACK: As long as we make it clear that
it 14 is this distinction that I am raising, and we can look at
15 over the weekend.

16 MR. GREEN: Your Honor, are you going to give a
17 preliminary instruction?

18 THE COURT: And indicate that I may have
additional 19 thoughts for them later.

20 There is a third question.

21 What is the origin of Plaintiffs' Ex. 565?

22 I don't know what 565 is.

23 Obviously, we can't provide information outside
the 24 record.

25 What is 565?

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1 It is a cable.

2 Mr. Caldwell and Mr. Marshal, would you bring in
the

3 jury.

4 (Thereupon, the jury returned to the courtroom.)

5 THE COURT: Ladies and gentlemen, please be
seated.

6 You sent us some questions that we were going to
try

7 to respond.

8 Do you have your copies of the jury instructions?

9 A JUROR: Inside.

10 THE COURT: Would it be helpful for you to have
them?

11 Let me let you step into the jury room. Step in
and

12 come back, and we will talk about this.

13 Take a second.

14 Ladies and gentlemen, what I am about to say to
you

15 should be understood and considered in conjunction with
all of

16 the jury instructions that I have given you. Okay?

17 What I want to do is look at the Doctrine of
Command

18 Responsibility, and in particular, I am looking at page
seven.

19 Okay, page seven.

20 Now, I think everybody understands that the
burden of

21 establishing the elements of this doctrine, the burden is
upon

22 the plaintiff, and all four elements have to be
established,

23 and the burden is what we call preponderance of the
evidence.

try to 24 Okay. Let me read the question to you and then
25 respond to the question.

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1 The first question is:
2 " A juror requested the definition of the term
actual 3 ability as stated on page seven, seven and eight, line
under 4 superior subordinate relationship in element two".

5 Okay.
6 In answering that, let me go back for a minute
and 7 give you the concept that is helpful to us that we have
been 8 discussing in understanding this law.

9 The first two elements, if you will, are what we
have 10 been referring to as the specific elements because they
deal 11 specifically with the plaintiff and they deal specifically
with 12 each defendant military commander and also with each
person who 13 is alleged to have actually tortured the plaintiff.

14 In other words, in talking about these things, we
are 15 talking about the people here in the case and the alleged

16 torturers. Okay.

17 Let's go to the second element which deals with
it

18 must be shown by a preponderance of the evidence by the
19 plaintiffs that what is called a superior subordinate
20 relationship existed between -- and when we said the
defendant

21 military commander, we meant the specific general who was
being

22 sued. Okay? So there has to be a showing by a
preponderance

23 of the evidence that there was what is called a superior
24 subordinate relationship between one or both of the
defendants

25 and the people who actually committed the torture.

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1 Now, one of the components of that is what is
2 called -- when I say one of the components, one of the
3 essential components of a superior subordinate
relationship is

4 that a commander had effective control over the
subordinates.

5 Now, this requires a showing that the commander
who is

6 being sued had the practical ability to prevent his
7 subordinates from committing torture or had the practical
8 ability to punish subordinates who had committed torture.

9 In other words, it must be shown that the
specific
10 defendant had the practical ability to prevent those
people who
11 committed torture from committing it or had the ability to
12 punish people who had engaged in the torture of the
13 plaintiffs.

14 What we are looking at there, you see, is, what
was
15 the relationship that existed between the defendant
military
16 commander and the people who actually committed the
torture if
17 the torture was committed.

18 You think about this for a minute. We are
talking
19 about holding someone else liable for the acts of another
20 person so this concept of proving effective control is one
of
21 the important elements. It is a component of this
superior
22 subordinate relationship.

23 Now, let me go on and read the next question
because
24 it is related to what I just said.

25 It says:

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1 " On page seven of the law in part one and two of
this
2 law, shouldn't it be absolutely necessary for the accused
3 torturers --" it says be identified, but I think it means
to be
4 identified or at least prove--" to be subordinates of the
5 defendant commanders? It seems there is a lot missing".

That
6 is the question.

7 Now, the answer to the question is this: In
8 establishing the existence of a superior subordinate
9 relationship between a defendant military commander and
the
10 people who committed the torture, the plaintiffs don't
have to
11 prove the names of the people who committed the torture.

They
12 don't have to identify them in the sense it was John Smith
or
13 somebody else, but what the plaintiffs must do by a
14 preponderance of the evidence is prove that they were in
fact

15 tortured by someone who was a member of the military, who
was a
16 member of the security forces, or maybe was a non-military
17 person who is acting in concert with them, who was in fact
a

18 subordinate, who did in fact have this subordinate
relationship
19 with the particular military commander.

20 So, the answer to the question is, yes, you must
-- in
21 order to prevail, the plaintiff must establish that the
people

of a 22 who were committing the torture were in fact subordinates
23 particular military commander; and as I said in the
that 24 instructions, when I use the word "subordinate", I mean
the 25 they were in this superior subordinate relationship, that

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is, 1 military commander had effective control over them, that
or 2 had the practical ability to prevent torture by his troops
3 to punish them if torture had been committed.

may 4 Now, we know we are at the end of the day and we
5 have more instructions for you on this on Monday.

the 6 But, obviously, your questions are dealing with
terms of 7 theory, if you will, the central theory of the case in
sure 8 what is command responsibility, and we simply want to make
name who 9 you understand that it is not necessary to identify by
by a 10 the torturers were, but the plaintiff needs to establish
members 11 preponderance of the evidence that, indeed, they were

12 of the military or members of the security forces, or
maybe
13 non-military people acting in concert with military people
but
14 who were subordinate to a particular -- the particular
15 defendant who is being sued.

16 Okay.

17 Now, when I said that we have been viewing
elements
18 one and two as specific, number one deals with the fact
that
19 the plaintiff does in fact have to establish that he or
she was
20 tortured and who did the torturing. Who in the sense of
what
21 was their status? Were they a member of the military, the
22 security forces, or non-military acting in concert.

23 The second element looks at what was the
relationship,
24 if any, between the defendant military commander and the
25 subordinate.

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1 The third element, obviously, looks at what the
2 military commander actually knew or should have known; and
the
3 four element looks at what the military commander did or
failed
4 to do.

5 Does that respond to your question?

6 Okay. We will try to have, and may have, some
7 additional instructions for you on Monday.

8 I think it is important if there are any
questions you
9 write them out so I could talk to the lawyers first. We
want
10 to thank you for the diligence, for the effort that you
are
11 bringing to the case. Let me make a suggestion to you, if
I
12 can, you need to go home now and relax and try to put the
case
13 out of your mind so you could be fresh on Monday, and I
don't
14 mean that you will cavalierly do that, because I suspect
these
15 matters are on your mind and you have been thinking about
16 them. What I am saying is, it is my experience when
people are
17 working very hard and focusing on something, thinking
about it,
18 and talking with their colleagues, sometimes a rest and a
break
19 gives you the distance as you are reflecting on these
things.

20 If you have additional questions on Monday, don't
21 hesitate to send them and I will try to respond as quickly
and
22 directly as I can.

23 Now, I want to come back to this again.
Everything
24 that I have just said must be understood in conjunction
with

25 all of the instructions that I have given to you earlier.

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1 Okay.

2 What time did the jury intend to reconvene on
Monday?

3 A JUROR: 9:15.

4 THE COURT: Let me remind you, again, be very
careful,

5 please don't begin your deliberations until everybody is
6 present.

7 If you take a break, make sure that the
discussions in

8 the jury room stop and you want to wait until all the
members

9 of the jury have reassembled.

10 Please be so careful, don't let anybody talk to
you,

11 be sure you don't talk to anybody about the case. If by
chance

12 you should be approached by anybody, you must let them
know you

13 are a juror, you are under court instruction to talk to no
one

14 and ask them to step away.

15 If there is any problem in that regard, I want
you to

16 call Mr. Caldwell, and he will give you a number so he can

17 reach you. I don't anticipate there are any problems, but
18 preserving the integrity of the jury process is very, very
19 important and we must all work together to make sure we
are
20 diligent in this regard. I want you to avoid the
newspapers
21 over the weekend and follow the general instructions I
have
22 given you before.

23 Is there anything we need to discuss before we
excuse
24 the jury in the evening?

25 MR. GREEN: One -- two additional matters. May we
come

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1 sidebar?

2 (Sidebar discussion on the record.)

3 MR. GREEN: Just in terms of contextualizing
4 preponderance of the evidence which is a fine instruction,
and
5 also seems that it might be appropriate this can be
established
6 by direct or circumstantial evidence; and second point was
the
7 action, remind them about the action or inaction.

8 MR. STERN: This paragraph is as much a part of
the
9 clause on the third prong. We think these two lines are

10 extremely important in light of our theory of the case.

11 THE COURT: Okay. Do you have any objection?

12 MR. KLAUS: I don't think you need to get into
13 circumstantial, whatever, circumstantial or direct
evidence,
14 but I don't care if you want to read from the third part.
That
15 line is fine.

16 THE COURT: I will do that. Okay.

17 MR. GREEN: If you can remind them they can
consider
18 direct or circumstantial. You didn't read the whole
19 instruction on preponderance.

20 MR. STERN: We think this is part and parcel of
the way
21 they are struggling with this notion how do they identify
the
22 torture.

23 THE COURT: I will stop there and tell them to go
back
24 and have them reread the whole instruction. If I start
pulling
25 one piece out of the other, there is no end of this.

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1 MR. GREEN: Could we have this one right now, one
2 sentence?

3 THE COURT: I don't think I should do that. I
don't
4 want to do that. I think I am going to be emphasizing one
5 thing over the other. I am going to tell them to go back
and
6 reread the whole instruction.

7 (After sidebar.)

8 THE COURT: I want to come back to what I said to
you,
9 and let me tell you something, I said to you at the very
10 beginning that we are so concerned that we be of
assistance to
11 you to make sure that you really understand the law so you
can
12 apply that law faithfully to whatever facts you find from
the
13 evidence. The difficulty, the thing that makes me
somewhat
14 hesitant, when I begin talking about one aspect of the
law, you
15 always run the risk that maybe something else gets
16 overshadowed, and I want to come back and say this to you
17 again. I have given each one of you the full charge to
the
18 jury instructions.

19 I think everybody understand that the Doctrine of
20 Command Responsibility is the central issue in this case
21 because both sides have talked to you long and hard about
it,
22 and that is the exclusive theory under which the
Plaintiffs are
23 bringing their claims before you. I want you to know we
spent

24 almost every night in the trial working on these jury
25 instructions so that, number one, they would be correct,
and

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1 comprehensive and state the law.
2 Now, I have tried to respond specifically to the
3 questions you've given me, but I want to ask you if you
would
4 to go back and read the entire Doctrine of Command
5 Responsibility instruction yourself when you start on
Monday,
6 okay, so that, so that you will understand and take what I
have
7 just said to you now in conjunction with the written jury
8 instruction on that, because there are three or four
paragraphs
9 there, and I want to tell you, we really carefully tried
to
10 work over all of them, so, number one, they would be
11 understandable, but they really would state the law to
you.
12 If you have any problem on it as you are going
along,
13 please don't -- I don't feel I have to say this to you,
because
14 we have been getting lots of notes -- but please don't
15 hesitate, because, seriously, we want to assist you in

16 clarifying the law so you really understand it so you can
apply

17 it to whatever you find the facts. Okay.

18 Now, again, leave everything about the case in
the

19 jury room, just take your time and have a peaceful weekend
and

20 put this behind you.

21 It is going to be there. It is going to be in
the

22 back of your mind and you are going to think about these
23 things.

24 Come back on Monday and begin anew and fresh.

25 I can't begin to thank you on behalf of all of
the

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1 parties for what you are doing. We are so indebted to
you. We

2 appreciate the diligence and effort you bring to the case.

3 Ladies and gentlemen, I will allow you to retire
and

4 terminate your deliberations for today, and we will see
you all

5 Monday at 9:15 when you intend reconvene. We won't
reconvene

6 court. We will just let you start your jury
deliberations.

7 (Thereupon, the jury retired from the courtroom.)

gentlemen. 8 THE COURT: Please be seated, ladies and
9 had an 9 Now that the jury has retired, but before they
10 opportunity to recommence their deliberations, I want to
ask 10
11 counsel for the plaintiff if you have any additional
objections 11
12 to the instructions of law given by the court other than
13 whatever you may have placed in the record already?
14 MR. GREEN: Judge, if we could reserve until we
have 14
15 actually read the actual transcript?
16 THE COURT: Yes, but you have to give it to me so
I can 16
17 cure it if there is a problem.
18 MR. GREEN: We will do it Monday morning.
19 THE COURT: May I ask the same of the defense?
20 MR. KLAUS: No objections.
21 THE COURT: Okay. We will be in recess pending
call of 21
22 the jury.
23 I will be more than happy if you are going to do
24 drafting over the weekend maybe we ought to get together
Monday 24
25 morning at some point to take a look at any suggestions
you 25

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1 have.

2 I am going to begin selection of another jury on
3 Monday morning, but I will take a break to see if you have
4 something and we can look at that. Okay?

5 MR. GREEN: Your Honor, I need to schedule things.
6 Judge Winnett has called me to trial Monday morning, and I
have
7 advised him I am on 10 minute call.

8 I am confident that the prosecutor has agreed to
drop
9 the felony charges --

10 THE COURT: I need to leave this up to you, but I
11 think given the involvement that you have had in the case
and
12 understanding how critical it is when we are responding to
13 something like this, we don't know, I think it is fair to
say
14 when the jury asks questions like this, they are telling
us
15 what is central to their thinking right now, and I think
it is
16 terribly important that the lawyers who have the input be
17 there.

18 The last thing any of us want is to misstate or
19 incorrectly state the law that they would have. I would
ask if
20 you can't prevail on Judge Winnett, I know he is a
reasonable
21 fellow, to see if he could postpone that matter if you
could
22 respond if need be.

do 23 MR. GREEN: Judge, there are two ways that we can
24 that. If we could get here early, and I have no problem
25 getting here any time anyone requests, and I am fairly

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of 1 confident once I get over to Judge Winnett I could be out
2 there in 30 minutes.

be 3 THE COURT: I will leave this up to you. I will
4 here Monday early.

5 MR. GREEN: If we could get together 7:45 or eight
6 o'clock.

Why 7 THE COURT: The jury is not getting until 9:15.

be 8 don't we plan to meet sometime in the morning. It would
9 helpful if we could meet before 9:30, only because the
jury

10 panel is coming in 9:30. Could we come in at 9?

11 MR. GREEN: Yes, Your Honor.

would 12 MR. STERN: I don't know what response, if any,
13 be appropriate on Ex. 565 --

second. 14 THE COURT: Wait a minute, everybody, wait a

origin 15 I am not sure what the question is. It says what is the

16 of it? If you you agree it is a State Department cable --
17 MR. STERN: I think CIA. I would like to double
check
18 that.
19 THE COURT: Could you write out a one sentence
20 response?
21 MR. STERN: Yes, certainly.
22 THE COURT: Great, thank you all. Thank you.
23 (Thereupon, a recess was taken 5:15 p.m.)
24
25

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